IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE KBR, INC. SECURITIES LITIGATION	Case No. 4:14-CV-01287 Judge Lee H. Rosenthal

CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Class Representatives Arkansas Public Employees Retirement System ("APERS") and the IBEW Local No. 58 / SMC NECA Funds ("IBEW Local No. 58") (collectively, "Class Representatives" or "Lead Plaintiffs"), on behalf of themselves and the certified Class, respectfully submit this memorandum in support of final approval of the proposed Settlement of this Action (the "Settlement"), and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

NATURE OF THE ACTION

This is a securities class action wherein Class Representatives allege that KBR and the Individual Defendants violated the federal securities laws by failing to timely disclose approximately $156 million in losses on KBR's Contracts for pipe fabrication and module assembly in Canada and the lack of internal controls related to those Contracts. Class Representatives further allege that the price of KBR's publicly traded common stock was artificially inflated during the Class Period as a result of Defendants' alleged materially false and misleading statements and omissions, and the stock price declined when the truth was revealed.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The proposed Settlement resolves this litigation in its entirety in exchange for a cash payment of $10.5 million. The Settlement is fair, reasonable and adequate, and should be approved by the Court as it satisfies each of the facts that a district court must consider. *See*

[1] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated as of April 5, 2017 (ECF No. 134-2) (the "Stipulation") or in the Joint Declaration of Louis Gottlieb and John Rizio-Hamilton in Support of (I) Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶" in this motion refer to paragraphs in the Joint Declaration.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983). A court's approval of a class action settlement is reviewed for abuse of discretion. *See Union Asset Mgm't Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012).

The Settlement is the product of extensive arm's-length negotiations between the Parties that included an in-person mediation session before two highly respected and experienced mediators, former Judge Daniel Weinstein (Ret.) and Jed Melnick, Esq. of JAMS (the "Mediator"), as well as significant follow-up discussions under the auspices of the Mediator. Indeed, the proposed Settlement is the product of the Mediator's recommendation. The reaction of the Class to date has been favorable. While the deadline to object to or request exclusion from the Settlement has not yet passed, to date, no putative Class Member has objected or requested exclusion confirm. The Settlement has been approved by Class Representatives, both of which are sophisticated institutional investors that have experience acting as class representatives in other securities class actions. Furthermore, counsel for Class Representatives, the law firms of Bernstein Litowitz Berger & Grossmann LLP and Labaton Sucharow LLP (collectively, "Class Counsel"), both experienced in prosecuting securities class actions, have concluded that the Settlement is favorable given the very significant risk, delay, and expense of continued litigation.

At the time the agreement to settle was reached, Class Representatives and Class Counsel understood the strengths and weaknesses of the Action. As more fully described in the Joint Declaration,[2] before the Settlement was agreed to, Class Counsel had, among other things: (i)

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this motion, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action (¶¶ 10-34); the nature of the claims asserted (¶¶ 7-9); the negotiations leading to the Settlement (¶¶ 55-56); the risks and uncertainties of continued litigation (¶¶ 64-85); a description of the services Class Counsel provided for the benefit of the Class (¶¶ 13-14, 24, 29-31, 33, 35-54); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 86-92).

conducted a thorough and wide-ranging investigation of their claims, which included interviews with dozens of former KBR employees and others with relevant knowledge, and a review of SEC filings, press releases, news reports and other public information; (ii) researched and drafted a detailed Consolidated Class Action Complaint (the "Complaint"); (iii) researched and drafted a successful opposition to Defendants' comprehensive motion to dismiss the Complaint; (iv) participated in oral argument on Defendants' motion to dismiss; (v) successfully moved for class certification; (vi) engaged in extensive fact discovery, which included Class Counsel's analysis of approximately 1.3 million pages of documents produced by Defendants and approximately 78,000 pages of documents produced by non-party KPMG; (vii) took seven depositions of KBR representatives; (viii) defended three depositions, including both Class Representatives' depositions and the deposition of their market efficiency expert; (ix) conferred with experts on accounting, damages and loss causation issues, as well as industry experts on issues pertaining to pipe fabrication and modular assembly; and (x) engaged in the intensive mediation process overseen by the Mediator, which included the exchange of written submissions concerning liability and damages, a full-day formal mediation session, and a discussion between the Parties' respective damages experts.

The Settlement is also a favorable result in light of the significant risks of continued litigation. While Class Representatives believe that the claims asserted against Defendants are meritorious, they recognize that the Action presented a number of serious risks to establishing both liability and damages. As detailed in the Joint Declaration at ¶¶ 64-85 and discussed further below, Defendants raised numerous challenges to Class Representatives' claims, including, among other things, the actionability and falsity of Defendants' statements, whether Defendants acted with scienter, and the existence and amount of damages. Absent the Settlement, Class

Representatives faced the risk that Defendants would prevail on any one or all of their arguments, resulting in a judgment against Class Representatives or vastly reducing, if not completely eliminating, recoverable damages. Furthermore, the Parties faced the prospect of protracted and costly litigation, which would likely have included additional contested motions, a trial, post-trial motion practice, and likely ensuing appeals. The Settlement avoids these risks while providing a substantial, certain and immediate benefit to the Class in the form of a $10.5 million cash payment. In light of these considerations, Class Representatives and Class Counsel respectfully submit that the Settlement warrants final approval by the Court.

Additionally, it is respectfully requested that the Court approve the Plan of Allocation, which was set forth in the Notice sent to Class Members. The Plan of Allocation governs how Class Members' claims will be calculated and was developed by Class Representatives' damages expert in consultation with Class Counsel. For these reasons, the Plan of Allocation is fair, reasonable and adequate, and should likewise be approved.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Dell*, 669 F.3d at 639; *see also Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977) ("the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties").

In applying this standard, the Court should consider the strong public policy favoring settlement, particularly in class actions. *See Cotton,* 559 F.2d at 1331 ("Particularly in class action suits, there is an overriding public interest in favor of settlement."); *In re Enron Corp.*

Sec., Derivative & "ERISA" Litig., No. H-01-3624, 2003 WL 22962792, at *4 (S.D. Tex. Nov. 5, 2003) (same); *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 650 (N.D. Tex. 2010) ("the court should keep in mind the strong presumption in favor of finding a settlement fair").

In evaluating the Settlement, the Court should not attempt to try the case or "to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute," and should not make the proponents of the settlement "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained." *See Cotton*, 559 F.2d at 1330. Instead, the Court should bear in mind that "compromise is the essence of a settlement" and that "inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Id*.

A. Application of the *Reed* Factors Supports Approval of the Settlement as Fair, Reasonable and Adequate

The standards governing approval of class action settlements are well established in this Circuit. In *Reed v. General Motors Corp.*, the Fifth Circuit held that the following factors should be considered in evaluating whether a class action settlement is fair, reasonable and adequate:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

703 F.2d 170, 172 (5th Cir. 1983); *see also Dell*, 669 F.3d at 639 n.11; *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004).

Here, the Settlement satisfies the criteria for approval articulated by the Fifth Circuit.

1. The Settlement Was Reached Following Arm's-Length Negotiations with the Assistance of an Experienced Mediator and There Was No Fraud or Collusion

The first *Reed* factor considers whether there is any evidence that the settlement was obtained by fraud or collusion. There is absolutely no evidence of fraud or collusion here. On the contrary, the Settlement was only reached after extensive arm's-length settlement negotiations between experienced counsel, which included a formal mediation session overseen by former Judge Daniel Weinstein and Jed Melnick. The initial full-day mediation session was unsuccessful, and the Parties only reached an agreement-in-principal after they engaged in significant additional arm's-length negotiations that culminated in the Mediator's proposal, which was evaluated and later accepted by all Parties. *See* ¶¶ 55-56.

Given the arm's-length nature of the negotiations, counsel's experience, and the active involvement of an experienced mediator, there can be no question that the Settlement is procedurally fair and is not the product of fraud or collusion. *See Billitteri v. Securities Am., Inc.*, No. 3:09-cv-01568-F, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) (concluding that a settlement was free of fraud or collusion where it was "diligently negotiated after a long and hard-fought process that culminated" in a mediation before a retired judge); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *10 (E.D. La. Mar. 2, 2009) (the Court found no indication of fraud or collusion where "the settlement was the result of arm's length negotiations" including mediation sessions before Judge Weinstein).

2. The Complexity, Expense and Likely Duration of Continued Litigation Support Approval of the Settlement

The complexity of the case and the expense and delay that would be required to achieve a litigated verdict in the Action also weigh in favor of approval of the Settlement. *See Klein*, 705 F. Supp. 2d at 651 ("When the prospect of ongoing litigation threatens to impose high costs of

time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened"); *OCA*, 2009 WL 512081, at *11 (where continued litigation, including through discovery, class certification, trial and appeals, "would consume substantial judicial and attorney time and resources . . . avoiding such costs weighs in favor of settlement"); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005) (the costs and delays of continuing to litigate "fact-intensive and difficult-to-prove claims" supported approval of the settlement).

Continuing to litigate this Action for Class Representatives and the Class would have required substantial additional time and expense, without any guarantee of success. In the absence of the Settlement, continued litigation of the Action would have included the completion of fact and expert discovery, an expected motion for summary judgment, and a trial that would involve substantial expert and factual testimony with respect to liability and damages. Defendants would have vigorously contested numerous key issues such as the falsity of Defendants' statements, scienter, and loss causation and damages.

Class Representatives and Class Counsel recognize that, in order for Class Representatives to prevail on their claims against the Defendants at trial, they would have to marshal substantial factual evidence about the Defendants' state of mind concerning KBR's Contracts for pipe fabrication and module assembly in Canada and be prepared to present expert testimony to establish loss causation and damages. Class Counsel was prepared to do so, but it cannot be disputed that achieving a litigated verdict in this Action would have required an extremely substantial investment of time and resources.

Moreover, if Class Representatives were to succeed at trial, it is virtually certain that Defendants would appeal, further delaying the receipt of any recovery by the class. *See*

Schwartz, 2005 WL 3148350, at *19. All of the foregoing would pose substantial expense for the Class and delay the ability to recover – assuming, of course, that Class Representatives were ultimately successful on their claims.

In contrast, the proposed Settlement provides an immediate, significant and certain recovery of $10.5 million for members of the Class, without subjecting them to the risk, delay and expense of continued litigation. Accordingly, this factor supports approval of the Settlement.

3. The Stage of the Proceedings, the Amount of Discovery Completed, and Class Representatives' and Class Counsel's Information about the Strengths and Weaknesses of the Case Support Approval of the Settlement

The Settlement was reached after nearly three years of hard-fought litigation that included a detailed investigation by Class Counsel, thorough briefing on Defendants' motion to dismiss, thorough briefing on the class certification motion, substantial fact discovery, and preparation of detailed mediation statements and participation in an extensive mediation process. Accordingly, Class Representatives and Class Counsel had a firm grasp of the strengths and weaknesses of the case when negotiating and evaluating the proposed Settlement.

Class Counsel's investigation in connection with the preparation of the Complaint was comprehensive, involving interviews with 45 individuals who were either former KBR employees or other persons with potentially relevant knowledge. Additionally, Class Counsel conducted an extensive review of publicly available information, including SEC filings, and consulted with experts on issues related to accounting, loss causation and damages, and industry experts on issues pertaining to pipe fabrication and modular assembly. ¶¶ 3, 14. Class Counsel obtained and analyzed approximately 1.3 million pages of documents from Defendants and approximately 78,000 pages of documents from KPMG, took seven depositions of

representatives of the Company, and defended the depositions of Class Representatives and Class Representatives' market efficiency expert. ¶¶ 35-54. Class Counsel also understood Defendants' defenses to the claims asserted in the Action through the extensive briefing on their motion to dismiss, the class certification motion, their detailed mediation statement, and the positions taken by Defendants in the course of the mediation. ¶¶ 21-25, 29-34, 55-56.

Accordingly, based on the information developed, Class Representatives and Class Counsel were able to make an informed appraisal of the value of the case, and they believe that the Settlement represents a resolution that is highly favorable to the Class without the substantial uncertainty and delay of continued litigation.

4. The Probability of Success on the Merits in Light of the Substantial Risks of Establishing Liability and Damages Support Approval of the Settlement

The probability of success on the merits is the most important *Reed* factor. *Smith v. Crystian*, 91 F. App'x. 952, 954 n. 3 (5th Cir. 2004) (per curiam) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). "This factor favors approval of the settlement when the class's likelihood of success on the merits is questionable." *Slipchenko, et al. v. Brunel Energy, Inc., et al.*, Civil Action No. H–11–1465, 2015 WL 338358 at *9 (S.D. Tex. Jan. 23, 2015) (citing *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1326–27 (5th Cir. 1981)). However, in evaluating a proposed settlement, a district court "must not try the case in the settlement hearings because the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.* (quoting *Reed*, 703 F.2d at 172).

In this case, Class Representatives faced very significant obstacles that made the likelihood of success on the merits very uncertain. As discussed below and detailed in the Joint Declaration at ¶¶ 64-85, Class Representatives faced a very real risk that (i) they would be unable to establish that Defendants acted with scienter; (ii) they would be unable to establish the

falsity of certain of Defendants' alleged misstatements, and (iii) even if they prevailed on liability, the Defendants would successfully challenge loss causation and the calculation of damages.

(i) Risks to Proving Defendants' Scienter

Defendants' principal defense to liability in the litigation was that they did not act with scienter, which is commonly regarded to be the most difficult element to prove in a securities fraud claim. *See, e.g., In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *12 (E.D. Pa. Jan. 25, 2016) (noting that "proving scienter is an 'uncertain and difficult necessity for plaintiffs'"). If the litigation continued, Defendants would have presented a number of strong scienter arguments that would have made it very difficult for Class Representatives to prove that Defendants acted with an intent to commit securities fraud or with severe recklessness.

For example, Defendants would have argued that KBR's Restatement was simply the result of misjudgments and good faith mistakes, not the product of intentional or severely reckless behavior designed to mislead investors about the true strength of KBR's financial results. ¶ 65. This argument was particularly challenging in this case because the action is based on misstatements related to the estimates of the cost to complete the Contracts at issue, which, by their very nature, required subjective assessments, judgment calls, and forward-looking projections, which were subject to change as circumstances shifted. In addition, Defendants would have continued to argue that the modules KBR was manufacturing and assembling pursuant to the Contracts were significantly more complex than those KBR had completed for prior projects, which exacerbated the difficulty of making accurate forecasts regarding their cost to complete the projects. ¶ *Id.* Accordingly, Defendants would have continued to present very strong arguments that any accounting errors concerning the complex cost forecasting for the Contracts were the result of mistaken judgments of estimates, and not fraud.

Defendants would have also argued that prior to March 2014, when they began the internal investigation that led to the Restatement, there was no indication that any of the Individual Defendants actually knew that KBR's financial statements were incorrect or misleading. ¶ 66. In support of this argument, Defendants would have pointed out that KBR and the Individual Defendants were based in Houston, Texas, while the Contracts at issue were performed and accounted for more than two thousand miles away in Edmonton, Alberta, Canada, at one of the Company's more than 25 worldwide subsidiaries. *Id.* Defendants would have argued that they were not responsible for overseeing the performance of the Contracts, for preparing or verifying the complex cost forecasts at issue, or for accounting for the Contracts. *Id.* All of those functions, Defendants would have contended, were carried out by KBR employees in Canada who worked for the distinct KBR subsidiary.

Defendants also would have pointed out that the Contacts at issue appeared to be performing well prior to the Restatement, accounted for just 3% of KBR's revenues, and were just seven Contracts out of the thousands of contracts that KBR executed through its many subsidiaries worldwide. ¶ 67. Thus, Defendants would have argued that any accounting errors were, at worst, a product of negligent oversight, and not intentional or reckless behavior designed to defraud investors.

Defendants would have further argued that their actions after they were made aware of potential problems with the Contracts demonstrate a lack of fraudulent intent. ¶ 68. Defendants would have pointed out that, upon being informed of potential errors in the cost forecasting process, they immediately initiated an investigation into the problem, sending senior executives from Houston to Canada to uncover the facts; hired independent legal counsel and accounting advisors to assist in that investigation; swiftly and publicly disclosed the issue; and then

voluntarily restated the erroneous financial statements—all in a matter of months, between March and May 2014. *Id.* These actions, Defendants would have contended, evidenced their transparency and good faith, and were completely inconsistent with a scheme to defraud.

Another significant scienter defense put forth by Defendants related to the sequence of the planning and design of the modules underlying the Contracts at issue. ¶ 69. KBR would have argued that it had received at least hundreds of initial design drawings for the modules in advance of making its cost estimates, and much later on in the fabrication process received the "issued for construction drawings," which showed, for the first time, that the work needed to complete the modules was more complex and costly than previously understood (and that KBR might not be reimbursed for the extra cost). (All together, KBR produced approximately 40,000 drawings related to the Contracts.) *Id.* This sequence of KBR's receipt of progressively more detailed drawings, Defendants would have argued, conformed to standard industry practice, and Defendants would have contended that their adherence to industry practice further demonstrated that they acted reasonably, and not with fraudulent intent, in making their cost estimates for the Contracts.

In addition to the above arguments, Defendants had several other arguments that they would have advanced in support of their scienter defense. For example, Defendants would have pointed out that KBR's auditor certified and signed-off on its 2013 financial statements (that were later restated) before they were filed, which supports Defendants' position that their cost forecasts for the Contracts were the product of reasonable assessments at that time, and not an intent to deceive, or a reckless disregard for their accuracy. ¶ 70. Defendants would have also argued that the Company's repurchase of more than $90 million dollars' worth of its own stock in the open market during the Class Period, and its Board's authorization to repurchase up to

$350 million of stock, negated any inference of scienter because, if Defendants were truly committing fraud, it would have been irrational for them to authorize the repurchase of stock that they knew was artificially inflated. ¶ 71. Further, Defendants would have argued that none of the traditional hallmarks of fraud was present in this Action because, for example, only one of the Individual Defendants sold KBR stock during the Class Period (Defendant Utt, for whom Defendants offered a plausible and non-fraudulent explanation for him doing so—his retirement from the Company), which confirms there was no "scheme" to inflate the Company's financial results. ¶ 72. Finally, Defendants would have pointed out that, while the SEC launched an investigation of the circumstances surrounding KBR's Restatement approximately 3 years ago, to date it has taken no action against Defendants. ¶ 73.

For all these reasons, there was a very significant risk that the Court on summary judgment, or a jury after trial, could have concluded that Defendants did not act with scienter.

(ii) Risks to Proving Falsity of Defendants' Alleged Misstatements

In addition to defenses regarding scienter, Defendants had several strong arguments with respect to the falsity of certain of their alleged misstatements. For example, the Individual Defendants would have argued that the alleged false statements that they made on conference calls regarding KBR's Canadian operations were not materially false. ¶ 75. These statements included representations that KBR had "a lot of strong bookings" in Canada; was "exercising a lot of discipline in terms of managing KBR's overall business;" and "was doing very well in delivering modules that are built to design." *Id.* Defendants would have contended that these statements were too vague and general to support a claim for fraud. Further, Defendants would have argued that the statements were not false because they did not reference the cost forecasting for any of the Contracts at issue.

In addition, Defendants would have argued that the alleged misleading statements issued by KBR later in the Class Period—namely, the May 5, 2014 statement disclosing the need to restate, and statements made on June 19, 2014—were not misleading and did not fail to omit any known material facts required to be disclosed. ¶ 76. Specifically, Defendants would have contended that the additional Contract-related losses disclosed on June 19 and July 31, 2014 were disclosed on a timely basis, in the periods in which they were incurred, and Defendants had no obligation to pre-announce them ahead of the normal reporting period. *Id.* Thus, Class Representatives faced a significant risk that the Court or a jury could have concluded that these statements were not false.

(iii) Risks Related to Damages and Loss Causation

Even assuming that Class Representatives overcame each of the above risks and successfully established liability, they faced serious risks in proving damages and loss causation. This case involved four alleged corrective partial disclosure events that occurred on the following trading dates, which together removed the alleged artificial inflation in KBR's common stock: (i) February 27, 2014; (ii) May 5, 2014; (iii) June 19, 2014; and (iv) July 31, 2014.

If the litigation continued, Defendants would have presented very substantial arguments that there were no recoverable damages for all but one of these declines. ¶¶ 77-85. For example, Defendants would have asserted that the vast majority of potential damages in this case was attributable to KBR's stock price decline following the first alleged corrective disclosure on February 27, 2014, when KBR announced poor 2013 results and noted that it had a material weakness in its internal controls. ¶ 78. Defendants would have argued strongly that KBR's stock price decline following this corrective disclosure was not recoverable at all because the announcement was unrelated to the Contracts at issue. *Id.* Specifically, Defendants would have

contended that the material weakness (relating to the valuation of certain long-term construction projects with multiple currencies) occurred in the Company's Gas Monetization segment—which did not include the Contracts—and only had an impact on completely unrelated contracts. *Id*. Thus, Defendants would have maintained, any stock price decline attributable to the disclosure of that material weakness was not recoverable as damages in this case.

In addition, Defendants would have argued that there were no recoverable damages related to the alleged corrective disclosures on June 19, 2014 and July 31, 2014. ¶ 79. On those dates, KBR announced that it had incurred additional losses on the Contracts for the first and second quarters of 2014. Defendants would have pointed out that, on (i) May 5, 2014, prior to the disclosures of these additional losses, KBR had already announced its intent to restate its financial statements based on its failure to properly estimate the costs to complete the Contracts, and informed the market that additional losses were possible; and (ii) on May 30 2014, it issued the Restatement. In light of the information disclosed on May 5 and May 30, Defendants would have asserted that investors who purchased stock after that date were well aware of the fact that KBR's cost estimates on the Contracts were not accurate, as well as the fact that there was a risk of additional losses on the Contracts in the coming quarters. *Id*.

Further, even if some damages were recoverable for the declines following the June 19, 2014 and July 31, 2014 disclosures, Defendants would have contended that those damages were minimal. ¶ 80. Defendants would have argued that the Company's disclosures on those days consisted of press releases and earnings announcements where a variety of information—including many pieces of information unrelated to the alleged fraud—was disclosed to the market and impacted KBR's stock price. Defendants would have further argued that Class Representatives bear the burden of proof in "disaggregating" the impact of this "confounding,"

non-fraud information from the impact of the information at issue in this case. Defendants would have argued that disaggregating cannot be done, and that even if it could, it would substantially reduce damages. *Id*.

In addition to the above arguments regarding damages, Defendants would have argued that Class Representatives should be forced to apportion artificial inflation according to when the losses occurred, or "scale" up the artificial over time—an argument that, if accepted by the jury, would have further reduced damages. ¶ 81. Defendants also would have argued vigorously that the Class Period is overly broad and should be shortened to begin on October 24, 2013, when KBR filed its Third Quarter 2013 10-Q, which in turn would have further reduced potential damages. ¶ 82.

After considering Plaintiffs' claims and analyzing Defendants' defenses, Class Counsel conferred with their damages expert and determined that the damages that the Class could seek at trial were approximately $65 million. ¶ 84. However, had the Court or a jury accepted Defendants' damages arguments, recoverable damages would have been reduced to no more than approximately $21-25 million. *Id.*

Moreover, to determine damages and loss causation, the Parties would have to rely on expert testimony. The experts would be subject to *Daubert* challenges. Even if Class Representatives' expert survived a *Daubert* motion, at trial, these crucial elements of proof would be reduced to an inherently unpredictable and highly contentious "battle of experts." Class Counsel recognizes the possibility that a jury could be swayed by experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Class Representatives contended.

When viewed in the context of these significant litigation risks and the uncertainties involved with any litigation, the Settlement is a very favorable result. Accordingly, this factor supports approval of the Settlement. *See, e.g.*, *OCA*, 2009 WL 512081, at *13 (the substantial risks that plaintiffs faced in establishing loss causation and proving *scienter* favored approval of the settlement); *Schwartz*, 2005 WL 3148350, at *18 ("plaintiffs' uncertain prospects of success through continued litigation" – including challenges in proving that "the statements made by Defendants were false when made" and in establishing *scienter* – favored approval of the settlement).

5. The Range of Possible Recovery and the Attendant Risks of Litigation Support Approval of the Settlement

"This factor includes an inquiry into whether the terms of the settlement 'fall within *a reasonable range of recovery*, given the likelihood of the plaintiffs' success on the merits.'" *Billitteri*, 2011 WL 3586217, at *12 (quoting *Klein*, 705 F. Supp. 2d at 656) (emphasis in original). Class Representatives submit that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation.

In light of the litigation risks set forth above and detailed in the Joint Declaration, Class Counsel, in consultation with the damages expert, determined that the damages they could seek at trial—even assuming liability could be established, which was far from certain—were approximately $65 million. ¶ 84. Had Defendants' damages arguments been accepted, damages could have been reduced to approximately $21-25 million. *Id*. And, of course, if a jury or the Court had credited Defendants' arguments with respect to liability—including any one of their significant scienter arguments—the Class would have recovered nothing.

Even if there were a favorable verdict at trial, Defendants almost certainly would have appealed. Recovery was thus highly uncertain and would likely take years, while the Settlement

confers an immediate and substantial benefit. Thus, when weighed against the risks of continued litigation, including the risks that there would be no recovery at all, the proposed Settlement for $10.5 million in cash is a very favorable result.

6. The Opinions of Class Counsel, Class Representatives and Absent Members of the Class Support Approval of the Settlement

The opinions of Class Counsel, Class Representatives and absent members of the Class all support approval of the Settlement. Class Counsel strongly believe that the $10.5 million Settlement is in the best interests of the Class in light of the significant risks of continued litigation. *See* ¶¶ 64-85. Class Counsel have extensive experience in securities class action litigation and were well-informed about the strengths and weaknesses of the claims in the Action when they recommended that the Settlement be approved. ¶¶ 106-08. The judgment of experienced and well-informed class counsel should be accorded great weight by the Court. *See Cotton*, 559 F.2d at 1330 ("the trial court is entitled to rely upon the judgment of experienced counsel for the parties"); *In re Heartland Payment Sys. Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1068 (S.D. Tex. 2012) ("The endorsement of class counsel is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims."); *Klein*, 705 F. Supp. 2d at 649 ("The Fifth Circuit has repeatedly stated that the opinion of class counsel should be accorded great weight.").

Class Representatives, which are both sophisticated institutional investors, have supervised and monitored the work of Class Counsel throughout the Action and were kept apprised of the progress of the mediation with Defendants. *See* Declaration of Gail Stone, Executive Director of the Arkansas Public Employees Retirement System (the "Stone Decl."), attached to the Joint Decl. as Exhibit 1, at ¶¶ 3-5; Declaration of E. Craig Young, on behalf of

IBEW Local No. 58 / SMC NECA Funds (the "Young Decl."), attached to the Joint Decl. as Exhibit 2, at ¶¶ 4-5. Both Class Representatives have strongly endorsed the Settlement as providing an excellent recovery in light of the risks of the litigation, *see* the Stone Decl. ¶ 6 and the Young Decl. ¶ 6, and this recommendation of Class Representatives supports approval of the Settlement. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement").

Finally, the reaction of the Class to date supports approval of the Settlement. Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), began mailing copies of the Notice and Claim Form to potential Class Members and nominees on April 21, 2017. *See* Declaration of Stephanie A. Thurin Regarding: (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion (the "Mailing Decl."), attached as Exhibit 3 to the Joint Decl., at ¶¶ 3-5. As of June 16, 2017, Epiq had mailed a total of 58,349 copies of the Notice Packet (consisting of the Notice and Claim Form) to potential Class Members and their nominees. *See id.* ¶ 8. In addition, a Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on May 5, 2017. *See id.* ¶ 9. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, there have been no objections to the Settlement or the Plan of Allocation and no requests for exclusion from Class. The deadline for submitting objections and requesting exclusion from the Class is July 4,

2017. As provided in the Preliminary Approval Order, Class Representatives will file reply papers on July 18, 2017 addressing all requests for exclusion and any objections that may be received.

* * *

In sum, all of the *Reed* factors support a finding that the Settlement is fair, reasonable and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982); *Schwartz*, 2005 WL 3148350, at *23. A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *In re Dell Inc. Sec. Litig.*, No. A-06-CA-726-SS, 2010 WL 2371834, at *10 (W.D. Tex. June 11, 2010), *aff'd*, *Dell*, 669 F.3d at 632 ("The allocation formula 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012) (same). In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel").

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Class Counsel in consultation with Class Representatives' damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who suffered losses as result of the conduct alleged in the Complaint. In developing the Plan of Allocation, Class Representatives' damages expert calculated the estimated amount of artificial inflation in

the per share closing prices of KBR common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements and omissions. In calculating the estimated artificial inflation allegedly caused by those misrepresentations and omissions, Class Representatives' damages expert considered price changes in KBR common stock in reaction to public disclosures that allegedly corrected the respective alleged misrepresentations and omissions, adjusting those price changes for factors that were attributable to market or industry forces, and for non-fraud related KBR-specific information.

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of the KBR common stock during the Class Period (September 11, 2013 through July 30, 2014, inclusive) that is listed in the Claim Form and for which adequate documentation is provided. ¶ 89. Under the Plan of Allocation, the sum of a claimant's Recognized Loss Amounts is the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶ 90. In general, Recognized Loss Amounts calculated under the Plan of Allocation will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale, or the difference between the actual purchase price and the sale price, whichever is less. ¶ 89. Also, under the Plan of Allocation, those shareholders who bought and then sold shares "before the relevant truth begins to leak out" have no recognized losses because "the misrepresentation will not have led to any loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Thus, claimants who purchased shares during the Class Period but did not hold those shares through at least one partial corrective disclosure will have no Recognized Loss Amount as to those transactions. ¶ 89.

Accordingly, for all of the reasons set forth herein and in the Joint Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Class satisfied 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). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Maher v. Zapata Corp.*, 714 F.2d 436, 451 (5th Cir. 1983); *see In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) ("Under Rule 23(e), a settlement notice need only satisfy the 'broad reasonableness standards imposed by due process.'") (citation omitted).

Both the substance of the Notice and the method of its dissemination to potential members of the Class Members satisfied these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Class; (iii) the amount of the Settlement; (iv) a description of 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 costs that will be sought; (vii) a description of Class Members' right to opt-out of the Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, beginning on April 21, 2017 through June 16, 2017, the Claims Administrator mailed over 58,000 copies of the Notice by first-class mail to potential members of the Class and their nominees. *See* Mailing Decl. ¶¶ 2-8. In addition, Class Representatives caused the Summary Notice to be published in the *Wall Street Journal* and transmitted over the *PR Newswire* on May 5, 2017. Mailing Decl. ¶ 9. Copies of the Notice, Claim Form, Preliminary Approval Order and Stipulation were made available on the Settlement website maintained by Epiq, www.KBRSecuritiesLitigation.com, beginning on April 21, 2017, and copies of the Notice and Claim Form were made available on Class Counsel's websites. *See* Mailing Decl. ¶ 14; Joint Decl. ¶ 62. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Schwartz*, 2005 WL 3148350, at *11; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

For the foregoing reasons, Class Representatives respectfully request that the Court approve the proposed Settlement as fair, reasonable and adequate and approve the Plan of Allocation as fair and reasonable.[3]

[3] Proposed orders will be submitted with Class Representatives' reply papers, after the deadline for objecting has passed.

Dated: June 20, 2017

Respectfully submitted,

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Liaison Counsel

CERTIFICATE OF SERVICE

I certify that on this 20th day of June 2017, I caused the foregoing to be electronically filed with Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

By: */s/ Louis Gottlieb*