UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PATRICK JOSEPH TURNER, ET AL	CIVIL ACTION NO. 05-4206
VERSUS	CONSOLIDATED CASES
MURPHY OIL USA, INC.	SECTION "L" (2)

* *

MOTION OF PLAINTIFFS' STEERING COMMITTEE (PSC) FOR COMMON BENEFIT FEES AND EXPENSES PURSUANT TO RULE 23(h) OF THE FEDERAL RULES OF CIVIL PROCEDURE

NOW INTO COURT, through undersigned counsel, comes the Plaintiffs' Steering Committee (PSC), which, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and for the reasons more fully set forth in the memorandum attached hereto, respectfully moves the Court to assess and award common benefit fees and expenses in connection with the class settlement herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, this 13th day of November, 2006.

Sidney Torres III

SIDNEY D. TORRES, III

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MAY IT PLEASE THE COURT:

I. INTRODUCTION

This case has been certified as a class action, and potentially settled on a class-wide basis, less than fourteen months after one of the worst environmental catastrophes in recent Louisiana history. It took great dedication and the investment of significant resources and energy by the Court-appointed Plaintiffs' Steering Committee (PSC) to accomplish these benefits for the plaintiff class on such an accelerated basis.

The proposed settlement results in significant monetary compensation for the residents of St. Bernard Parish who were most affected by the massive oil spill at the Murphy Oil Refinery in Meraux, Louisiana following Hurricane Katrina. The settlement will ensure that a comprehensive remediation of the contaminated area now will proceed with appropriate oversight by the Court. An historic purchase of homes by the defendant Murphy Oil is made possible through this settlement. Thousands of citizens in an area devastated both by the storm surge of Hurricane Katrina and the oil spill now can benefit from a resolution of legal claims that affords both past compensation and a measure of future security.

The members of the PSC contributed to, and assisted in, the resolution of this litigation from its inception. Since the oil spill occurred, these attorneys have taken the initiative to explore and develop a plethora of complex factual, scientific and legal issues. Their effort has entailed over 34,000 work hours and approximately 2.6 million dollars in expenses for the benefit of the class. They took early action to preserve and marshal critical evidence on plaintiffs' behalf. Ambitious discovery and trial plans were both confected and implemented.

The culmination of these efforts is a negotiated settlement that facilitates the post-Katrina recovery of an entire community.

Following the Court's formal appointment of the PSC as class counsel, the attorneys on the Committee committed to an intensive discovery effort. Numerous witness subpoenas were issued, and over eighty-seven (87) depositions were taken, with double — and even triple — tracking of the testimony at times. Thousands of pages of documents and hundreds of exhibits were obtained and then meticulously organized. Over fifty legal motions were filed, supported or opposed, and/or argued before the Court. The case, in fact, remained in highly active trial preparation until the parties' settlement agreement was announced. The jury trial of "common issues" was scheduled to commence on Monday, October 2, 2006; the parties' Memorandum of Understanding (MOU) was read into the record on Monday, September 25, 2006.

The instant request for the assessment and award of common benefit fees and expenses, an award to be funded by Murphy Oil under the Settlement Agreement, is therefore both necessary and appropriate under Rule 23(h) of the Federal Rules of Civil Procedure.[1]

II. EVENT HISTORY AND EARLY CASE DEVELOPMENT

On August 29, 2005, Hurricane Katrina struck southeast Louisiana, bringing with it a storm surge that flooded the entire Parish of St. Bernard. The Murphy Oil Refinery in Meraux, Louisiana experienced approximately eleven feet of water in its north tank farm. As a result of not being properly ballasted, Murphy's Tank 250-2 (a crude oil storage tank) dislodged, floated

[1]This motion does not address so-called "private fees," i.e., legal fees earned under contracts by attorneys for individual case, versus class-wide, services. The PSC neither challenges nor questions the basis for such private fees herein, subject, as always, to this Court's authority to oversee fee amounts deducted from the settlement recovery of individual class members.

and ruptured, releasing in the process approximately 25,000 barrels (over one million gallons) of crude oil. It was not until the afternoon of Saturday, September 3, 2005, that Murphy Oil's employees discovered the source of the release, and began sand-bagging a breach in the containment dyke surrounding Tank 250-2. By this time, much of the surrounding property (homes and businesses) had been inundated by oil.

(A) MURPHY OIL'S INITIAL RESPONSE

The first of a number of petitions for damages (including class actions) was filed on September 9, 2005. In separate orders dated October 4 and 5, 2005, this Court granted plaintiffs' Motion to Consolidate these cases, and further provided that all later cases automatically would be consolidated in this Section of the Court. On October 12, 2005, the Court designated Plaintiffs' Liaison Counsel (Sidney D. Torres, III) and Defendant's Liaison Counsel (Kerry Miller), and also appointed the Plaintiffs' Executive and Steering Committees as interim class counsel to manage the litigation on plaintiffs' behalf.

At the request of the Court, the PSC filed an Administrative Master Complaint on November 28, 2005. This pleading presented all claims to be pursued by plaintiffs as a class. It sought class certification under FRCP 23 and the class-wide recovery of damages from Murphy Oil based on various theories of liability. In December 2005, the defendant filed several motions under FRCP 12(b) to dismiss specific causes of action pled in the Master Complaint. The Court granted some of these motions but denied others. The PSC then filed a formal Motion for Class Certification on December 2, 2005.

Meanwhile, as required by law, Murphy had reported the oil spill to both the U.S. Environmental Protection Agency (EPA) and the Louisiana Department of Environmental

Quality (LDEQ); but, critically, the company undertook to keep the incident a state, rather than federal, concern. In an early e-mail from the defendant corporation's President Mike Hulse, it was noted that officials with the EPA "were going to be reasonable with this spill." *See* E-mail of 9/5/06 from Mike Hulse to C. L. Russell [Bates No. TU2003283]. The importance of this early communication was revealed in the later deposition testimony of Mr. Hulse:

> "If they [the EPA] feel like you are not doing enough to prevent the environmental damage and to recover the oil, if they feel that your efforts aren't good enough, then they will federalize the spill and that's always the worst case, that's always the worst thing that can happen."

Hulse deposition of 8/24/06, at p. 104. The "non-federalization" of the event was only the first step in the defendant's strategy to establish a close and cooperative relationship with state regulators, one that ultimately would facilitate the defendant's remediation and settlement programs.

An October 2005 "Work Plan" submitted by the Center for Toxicology and Environmental Health (CTEH), a private concern hired by Murphy Oil, stated that its objective was to "describe the remedial activities proposed to address soil potentially containing crude oil in the areas surrounding the Murphy Oil Refinery." *See* CTEH Work Plan of 10/27/05, at p. 1 [Bates No. TU2000867]. The Plan further declared that, nearly two full months after the disastrous spill, CTEH had "delineated a conservative, broad Area of Concern based on visual evidence...and soil screening samples." *Id.* The scope of this "Area of Concern" perhaps was misleading, since the "area" was hardly large enough to account for or encompass the full extent of a million-gallon spill. Testimony adduced during the deposition of Ben Badon, an official with the defendant's clean-up contractor (the O'Brien's Group), confirmed that the so-called

"Area of Concern" was based solely on a visual observation of oiling on the outside of properties situated along public right-of-ways in the community.

In fact, the defendant had failed to document the true extent of the spill when this opportunity was presented shortly after the hurricane. On Tuesday, August 30, 2005, Mike Hulse and other Murphy Oil executives flew over the refinery in order to survey the effects of Katrina on the refinery in general, and the crude oil storage tanks specifically. Mr. Hulse testified that, during this overflight, he could see — and photographed — a sheen on the surface of the flood waters extending to Judge Perez Drive. Still, although Tank 250-2 obviously had moved from its foundation and had come to rest at least thirty feet in a northeastern direction, the company executives did not "notice" the tank to be out of position; and neither did they report the spill to regulators at that time. It was not until Saturday, September 3, 2005, that the catastrophe was reported to federal, state and parish officials by the defendant; and it was not until September 8, 2005 that Murphy's legal counsel hired CTEH to visit the refinery and develop the aforementioned Work Plan announcing the extent of the area allegedly affected. On September 16, 2005, CTEH began selectively sampling homes and performing a "visual reconnaissance" of that area.

The PSC ultimately challenged these same sampling techniques, as well as the reliability of the labs utilized for analysis of the sampling. It insisted, on the record, that these early investigative efforts by Murphy Oil were simply not adequate to scientifically delineate the true geography affected by this spill. Had the PSC not then undertaken the expense of having Boston Chemical Data Corporation and plaintiff's expert Marco Kaltofen take numerous samples outside the initial "Area of Concern," the public and the Court would not have had reason to question the

extent of contamination reported by Murphy and its retained service (CTEH) pursuant to a limited, visual survey. Particularly absent controlling oversight by the EPA, since the spill event had not become "federalized," the vigilance of plaintiffs' class counsel was critical in this regard.

In November 2005, Murphy Oil distributed a second "Work Plan" to the EPA and LDEQ, setting forth additional remediation strategy. Importantly, the EPA criticized this second Plan, as reflected in that agency's admonition that "Murphy is expected to investigate reports of oil outside of the current estimated area of impact, since the current area was defined only by visual assessments, and remains subject to change. The plan should note that expectation." Comment on Murphy Oil Work Plan, USEPA Region 6, 12/28/05 [emphasis added]. But the plan was not changed; and further testing of the contaminated area did not even occur until the Court considered the evidence presented by the PSC at the class certification hearing, ultimately deciding to certify a class area with boundaries exceeding the defendant's "Area of Concern."

The defendant's early assessment of the impact area also was critical to its voluntary settlement plan. The second Work Plan of CTEH specified that clean-up would "ONLY BE CONDUCTED ON PROPERTIES WHERE ACCESS AGREEMENTS HAVE BEEN EXECUTED." *See* Murphy Oil Work Plan of 11/05, §5.0, p. 26. This approach lacked any scientific analysis of what areas the released oil had contaminated through the identification of likely, preferential pathways. It also invited a transaction whereby putative class members in the impacted area were obligated to initiate contact with Murphy Oil in order to request testing and clean-up. The company thus was free to promote its settlement program, without having to provide information about the scope of the spill and extent of the contamination which could be monitored and verified on behalf of the plaintiff class.

All such early efforts by the defendant in response to the spill and this litigation, obliged class counsel to conduct important forensic investigation confirming the extent and impact of the event. This ultimately proved critical to offset the various arguments by Murphy Oil discounting the damages sustained by plaintiff class members.

(B) THE PSC DETERMINATION OF THE SPILL'S SCOPE AND IMPACT

The toxic crude oil released by Murphy into the community adjacent to the Meraux refinery affected literally thousands of lives, homes, businesses and possessions in this densely-populated area. Environmental regulators investigating the incident reported that drainage canals in the community which were impacted by the spill — namely, the Twenty Arpent, the Forty Arpent, the Meraux, the Corinne, and the Delarond Canals — as well as various other unnamed, interceptor canals, served as preferential pathways for the spread of the oil and contaminants into a larger geographic area. It was the responsibility of the PSC to designate the true scope of this impact even as the defendant waged a campaign to establish that the amount of oil released by Tank 250-2 was largely contained, and that there were no health risks or consequences associated with this event.

To assist plaintiffs in this regard, the PSC relied upon Marco Kaltofen, P.E., of Boston Chemical Data Corporation to perform a series of chromatograms and GC/MS spectra, utilizing technology for identifying the individual petroleum components in the Murphy crude oil that was released from this specific tank. This accepted method of "finger-printing" enabled plaintiffs to identify which properties were affected by this spill, as distinguished from other locations where different petroleum-based products were present in the wake of the storm surge. The results of the Kaltofen analysis were documented on a map depicting the impacted area, an area which was

larger than Murphy Oil's "Area of Concern" and which became known in the litigation as the "Kaltofen zone."

Another expert engaged by the PSC to assist plaintiffs in confirming the nature of the spill was toxicologist Vincent Wilson, Ph.D. He opined that the properties impacted by the defendant's release contained levels of toxicants which potentially posed health risks to individuals living and working on or near these properties. Dr. Wilson's conclusion was entirely consistent with the defendant's own Material Data Safety Sheet (MSDS) for the crude oil in question, which states that the substance does represent a danger to humans and animals based on both inhalation and skin irritation. When inhaled as fumes, the crude oil is known to cause headaches, nasal and respiratory irritation, nausea, drowsiness, breathlessness, fatigue, central nervous system depression, convulsions, and the loss of consciousness. Various other chemicals found in the oil spilled from the tank likewise posed environmental and human health hazards. Some of the substances identified by plaintiffs' experts included benzene, polycyclic aromatic hydrocarbons, toluene, and xylene.

Whether or not exposure to such substances caused actual medical or physical injury in this case, the potential for health problems proved to be valuable information for many in the plaintiff class. Individuals seeking to return to the area were allowed to know it might be still dangerous to do so. Moreover, the information further motivated those in the community to rightfully insist upon a proper and comprehensive clean-up of the impacted area.

The PSC from the outset insisted that the potential health and safety risks from the oil spill could not be alleviated by clean-up efforts conducted by the defendant on an individualized, case-by-case or settlement-by-settlement basis. To avoid cross-contamination from one property

to the next, the entire community had to be uniformly restored, with proper monitoring and appropriate safeguards so that any contaminants absorbed in structures, the ground, or water pathways, did not leach and re-contaminate the area. The PSC also discussed early on with Murphy Oil's counsel and with the Court, the fact that at least the first three or four streets west of the refinery would never be able to be properly remediated for residential usage. This helped lay the groundwork for the negotiated buyout feature of the proposed settlement.

III. CLASS CERTIFICATION

On January 12-13, 2006, the Court conducted a full evidentiary hearing to determine, on motion of the PSC, whether the plaintiff class should be certified under Rule 23. Murphy Oil vigorously opposed class certification. It contended that the oil had not spread throughout the community in a uniform fashion, so that common issues could not predominate in the case. It contended that much of the oil found by plaintiffs in the community was not crude oil spilled from Tank 250-2. It contended that plaintiffs' homes had been under water for several days before any oil possibly reached the homes, so that the true damages suffered were from water, not crude oil. It contended that only about 25,000 barrels of crude oil leaked out of the tank, and that less than 10% of this amount actually escaped through the containment dyke system at the refinery. The defendant continuously alleged that, in any event, the spill posed absolutely no risk to human health.

In support of these various defenses, Murphy retained a number of experts for purposes of the class certification hearing: Glenn Millner, an expert in toxicology associated with CTEH; Keith Baugher, a chemical engineer; Dr. Scott Stout, an expert in the "fingerprinting" of oil; Dr. Paul Kuhlmeier, an expert in hydrology; Ben Badon of the O'Brien Group, an expert regarding

the extent of oil released into the community; and Chad Morris, an expert in the surveying of the tank, the tank farm and the surrounding community.

In order to respond to the evidence being presented through the testimony of the above experts, the PSC invested considerable resources in retaining and working with the following expert witnesses: Marco Kaltofen, P.E. of Boston Chemical Data; Dr. John Kilpatrick of Greenfield Advisors; Dr. Erno Sajo of the Department of Physics and Nuclear Science, LSU; Dr. Paul Templet of the Department of Environmental Studies, LSU; Dr. Philip Bedient of the Department of Civil and Environmental Engineering, Rice University; and Dr. Vincent Wilson of the Department of Environmental Studies, LSU.

Separate and apart from the question whether a class should be certified, there also was vigorous advocacy required on the issue of the appropriate class boundaries. Murphy contended that the boundaries proposed by the PSC were too broad, challenging Mr. Kaltofen for not having spent enough time in the field to correctly assess where the oil was present and not present, and for using improper sampling and testing methods. In response, the PSC undertook to obtain and plot each and every CTEH, EPA, Murphy and Kaltofen sample result from soil, sediment, surface water and ground water. A sophisticated computer database was employed to summarize this data; and the crude oil in the class area was systematically and scientifically matched to the crude oil which had been present in Tank 250-2.

Ultimately, these efforts by the PSC had an effect on at least certain regulators, even prior to the certification hearing. The EPA revised its initial impact area and the boundaries of same, by announcing on December 5, 2005 an expansion of the northeastern boundary of the so-called "Area of Concern." This added approximately seventy homes to the oil-impacted area, and

included the addition of the northern ends of Jacob to Lena Streets, up to the Forty Arpent Canal.

In preparation for the January 2006 certification hearing, members of the PSC deposed all of the defendant's experts, and defended the depositions of all of the experts retained by plaintiffs. In all, a total of forty-four (44) depositions were taken prior to the hearing. Additionally, numerous motions *in limine* were filed by defendant to challenge all of plaintiffs' experts, and these motions were opposed by proper research and briefing. Evidentiary objections also were filed by Murphy Oil in advance of the hearing, and the PSC responded to each objection. In order to present the necessary evidence at a certification hearing held only four and one- half months after the oil spill, class counsel was called upon to commit considerable effort, energy and resources. The PSC members, their law firms and their staff worked long hours and weekends, sacrificing the handling of numerous other matters and substantial legal business, to comply with the expedited pace of this important case. As a result, the Court was provided with a proper record for deciding the issue of class certification.

After considering the evidence, testimony, legal memoranda and arguments of counsel, the Court on January 30, 2006 entered an order that this action be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. It found that the questions of law and/or fact common to all class members predominated over questions affecting only individual members, and that the class action was a superior device for the resolution of this controversy. The class was defined as follows:

> "All persons and/or entities who/which have sustained injuries, loss, and/or damages as a result of the September 2005 spill of crude oil and any other related substances from a storage tank located on Defendant Murphy Oil USA, Inc.'s property in Meraux, Louisiana, and who/which on August 29, 2005, were residents of,

> or owned properties or business, in the following area: beginning north, from the 40 Arpent Canal with its intersection in the west at Paris Road in Chalmette, Louisiana, and traveling along Paris Road in a southerly direction to its intersection with St. Bernard Highway, then heading east from this intersection along St. Bernard Highway to Jacob Drive, then heading north along Jacob Drive to the intersection with East Judge Perez Drive, then heading east along East Judge Perez Drive to its intersection with Mary Ann Drive, then heading north along Mary Ann Drive to the 40 Arpent Canal."

Various liability theories of the PSC's Master Complaint were certified for class treatment in the January 2006 ruling. The Court also designated as class representatives Phyllis N. Michon, Cherie Scott Perez, James Shoemaker, Fernand Marsolan and Robin Diaz Clark, and appointed the following as class counsel: Sidney Torres, Mickey P. Landry, Hugh P. Lambert, Scott R. Bickford, Joseph M. Bruno, N. Madro Bandaries, William E. Bradley, Ronnie G. Penton, Robert Becnel, Walter John Leger, Jr., Donni Elizabeth Young, Darleen M. Jacobs, E. Carroll Rogers, Salvador E. Gutierrez, Jr., Michael Hingle, Walter C. Dumas, Anthony D. Irpino, Gerald E. Meunier, Richard J. Arsenault, Daniel E. Becnel, Jr., Val P. Exnicios, and Michael G. Stag. Sidney Torres was appointed to serve as Plaintiffs' Liaison Counsel, and an Executive Committee was appointed as well, comprised of Sidney Torres, Richard Arsenault, Daniel Becnel, Val Exnicios, and Michael Stag.

On February 17, 2005, the Court entered an Order approving a Notice Plan and a Legal Notice of Class Certification. These were the product of research and negotiation by PSC members, and resulted in important information being disseminated to class members by direct mailings, newspaper publication, postings on web-sites, and through notices posted at two locations in St. Bernard Parish. Since many class members had left St. Bernard Parish, the PSC

undertook extensive efforts to identify the locations of numerous individuals falling within the class definition.

In response to the Court's ruling on certification, Murphy sought an appeal to the U.S. Fifth Circuit, as well as a stay of all district court proceedings pending review. The PSC filed an opposition brief for plaintiffs. The Fifth Circuit both refused to stay the case and declined to reverse or modify this Court's certification decision, which became final.

IV. COMPREHENSIVE REMEDIATION OF THE CLASS AREA

The gravity of this unprecedented environmental disaster, and its impact upon the public interest and welfare of citizens in the impacted area, made effective remediation of the contamination a justifiable priority for the PSC. For its part, Murphy Oil could not deny its legal responsibility for cleaning up the various unrefined hydrocarbons and compounds that contaminated not only the soil on the affected properties, but also cement slabs, driveways, brickwork, wood framing, siding, and other homebuilding materials. The threshold issue was the sampling conducted by the defendant as a predicate to discharging its clean-up responsibility.

Standards for sampling surface soils following Hurricane Katrina had been promulgated by the EPA in a document entitled "Emergency Response Quality Assurance Sampling Plan for Hurricane Katrina." This protocol called for a sampling of surface deposited materials designed "to give the highest probability of finding contamination." Nonetheless, Murphy Oil utilized sampling plans and techniques designed by its privately-retained company CTEH, techniques which proved to be inadequate in several respects.

First, defendant's sampling techniques utterly failed to identify and address the contamination inside the homes and businesses of St. Bernard Parish. Second, the samples were

collected too deeply, thus causing dilution of whatever contaminants were present. The samples should have been "scrape," or "wipe," samples to increase the likelihood of finding the crude oil deposited and remaining on or near the surface of soils and structures. The EPA protocol, in fact, specifically stated that, "[a]ll samples will be grab samples collected from the surface by ***scraping the surface...***" Emergency Response Quality Assurance Sampling Plan for Hurricane Katrina — Screening Level Sampling for Sediment in Areas Where Flood Water Receded — Southeast, Louisiana — USEPA Region 6 — September 2005 [emphasis added]. It also called for "biased sampling...as the most appropriate method [for] finding contamination." Biased sampling required scraping in an area seen or believed to be impacted with oil. Finally, this same protocol called for collecting "finer grained sediments" rather than "coarse" sediments. Instead, Murphy adopted a CTEH technique which ignored the need for biased sampling, by collecting "a composite sample from no less than 3 points on the property [with] each sample [taken] from the surface up to six inches in depth." CTEH also collected samples which were often hard rock, not finer grained sediment as required by the EPA protocol. CTEH Work Plan — October 27, 2005, Revised November 8, 2005 for Murphy Oil USA. The obvious result of composite samples taken from six inches deep was to dilute the samples, leading to many false negatives and equivocals.

These false negatives ultimately were demonstrated by CTEH's sampling results, which illogically showed negative results in homes closest to the refinery, in areas known to have been contaminated by the spilled oil. The PSC pointed out these serious deficiencies in Murphy's sampling activity, and discovered others as well:

- Soil samples were being placed in plastic bags, as opposed to glass jars, and thus the plastic absorbed, and reduced, the concentration of crude oil in the sample.

- Air samples were collected by Murphy Oil just inside the front door of houses, where outside air either diluted the sample air or replaced it entirely.

- A chain of custody was not properly maintained in Murphy Oil's protocol. Samples were left unattended, unsealed, and unlocked.

- The split samples given to the EPA in this matter were all collected by Murphy Oil's sampling technicians, so that sampling errors were not exposed to government regulators.

The PSC and plaintiffs' expert Marco Kaltofen, met with Murphy Oil's counsel and CTEH's Glenn Millner in an attempt to agree upon a Joint Sampling Protocol and one laboratory to do testing for both parties. During this day-long meeting, the parties seemed to agree that a Joint Sampling Protocol could be reached and a draft of this Joint Sampling Protocol was, in fact, circulated. However, in the following days the defendant refused to compromise, and no agreement could be reached.

Aside from being based on inadequate sampling activity, the defendant's clean-up methodology was susceptible to PSC challenge as well. It primarily consisted of cleaning affected surfaces with a pressure washer, allowing the contaminated water to run off into the street and storm drains. This technique failed to account for the porous nature of wood studs, concrete, and brick surfaces, so that certain plaintiffs who had their property "cleaned" by Murphy Oil began finding crude oil leaching out of their homes from these porous surfaces. The PSC also raised questions as to what types of chemicals were being utilized to clean up these homes.

No remediation issue, however, was more important than the approach to interior spaces. Normally, environmental spills or releases primarily impact soil and groundwater in an industrial setting. It is for these types of releases that the various governmental agencies have promulgated clean-up standards. Thus, while testing the porosity of soils and contaminated groundwater may be viewed as routine and standardized when appropriately conducted, the same cannot be said for testing the materials used in home and commercial construction for the presence of crude oil. There are no recognized test procedures for determining the amount of hazardous materials that have seeped into the wood or brickwork of a home or business property. Nor has any environmental agency, state or federal, determined the potential hazards from a continual seepage of crude oil in a home environment.

The result is that, even after adherence to a government-promulgated protocol for testing and remediation, an event of this magnitude still may leave families and workers potentially exposed to porous building material contamination by hazardous materials which exude to the surface, and potentially release harmful gases over the course of time. This contamination of a living space interior was not evaluated as part of Murphy Oil's remediation process. Properties purportedly "cleaned" by Murphy Oil were not necessarily safe for rehabitation and were being cross-contaminated.

It was — and has been — defendant's position that its clean-up methodology is adequate because it comports with the Louisiana Risk Evaluation Corrective Program (RECAP). But RECAP outlines the minimum technical requirements that must be used to evaluate and/or remediate polluted sites; and the scope of RECAP is limited to three primary media: soil, sediment and groundwater. The standards provide no guidance as to the cleaning of the homes

and business of the residents of St. Bernard Parish. More specifically, there is nothing in RECAP which addresses the question of how to clean the porous building materials impacted by an oil spill.

Under RECAP, it is the responsibility of the party seeking to remediate a polluted area of interest, "to ensure that all exposure conditions and risks to human health and the environment are addressed and that decisions concerning management of the release site are protective of human health and the environment." La. DEQ Risk Evaluation/Corrective Action Program, Section 1.0, Introduction at p. 1. The phrase "release site" in this context refers to the sites of the actual releases, i.e., chemical plants and refineries. The release of massive amounts of crude oil directly into homes and businesses was not the type of "typical" release envisioned by the RECAP program. Accordingly, the chief relevance of RECAP in this instance was that Murphy Oil, as the "responsible party" herein, needed to perform a specialized risk analysis to evaluate the potential threat of this unconventional contamination.

The PSC, at great expense, has undertaken an extensive effort and analysis to design and monitor both a sampling and testing protocol to determine the actual levels of contamination caused by this spill, and a clean-up protocol to adequately and comprehensively approach remediation of this area. The proposed settlement does allow a comprehensive clean-up program designed by regulators to proceed, but, importantly, with appropriate oversight by this Court should individuals experience problems in the remediation of their property.

V. DEFENDANT'S LEGAL FAULT FOR THE SPILL

The principal issues to be addressed and resolved in the jury trial of October 2, 2006, were (1) the fault of Murphy Oil, and (2) whether that fault was a legal cause of the oil spill. At

the time of the negotiated settlement, the PSC had conducted the needed pretrial discovery and investigation to present overwhelming evidence in plaintiffs' favor as to both issues. In fact, the PSC had filed, briefed and argued a motion for summary judgment in plaintiffs' favor on the questions of both negligence and general causation, a motion which the Court had taken under advisement at the time the class settlement was announced.

That this oil spill resulted from the clear, if not egregious, misconduct of the defendant Murphy Oil, would have been demonstrated at trial based on the following:

For years prior to Hurricane Katrina, Murphy Oil had in place an "Emergency Response Plan" for hurricanes at the Meraux refinery. The plan in effect in August 2005 contemplated successive stages of alert and preparedness on the approach of a hurricane. Stage 1 applied once a hurricane entered the Gulf of Mexico, and it called for the filling of crude oil storage tanks to at least 30% of capacity, to ensure that they were properly ballasted and would not float in the event of flooding. Stage 2 was triggered if a hurricane was predicted to make landfall between New Iberia, Louisiana and Pascagoula, Mississippi within the next forty-eight hours. This Stage not only called for confirmation that all above-ground storage tanks were at least 30% full, but also required the gravitating or equalizing of levels in the three "sister" tanks, Tanks 250-1, 250-2 and 250-3.

The Plan itself did not comply with accepted industry or safety standards regarding the adequate protection of above-ground storage tanks at refineries which might be subject to flooding. One such standard, set forth in the National Fire Protection Association's "Flammable and Combustible Liquids Code," required "[t]he filling of tanks to be protected by water loading...as soon as floodwaters are predicted to reach a dangerous flood stage, [and], [w]here

independently fueled water pumps are relied upon, sufficient fuel [to] be available at all times to permit continuing operations until all tanks are filled." NFPA 30 Flammable and Combustible Liquids Code 4.6.3 "Tanks in Areas Subject to Flooding." The same industry standard also called for above-ground storage tanks to be filled to capacity if flooding is predicted. This obviously is a much more rigorous standard than the "30% fill" standard set forth in the defendant's Plan. Neither was the defendant's Plan adequate in requiring only a 30% fill for Tank 250-2, since that tank had sunk approximately six feet between the time of its construction and the arrival of Hurricane Katrina. *See* p. 25-26, *infra*.

However, even if the Murphy Oil Plan were deemed adequate, the evidence in this case unequivocally establishes a sequence of events reflecting Murphy's deliberate refusal and failure to adhere to its own hurricane protection requirements.

At 2:19 a.m. on Friday, August 26, 2005, Hurricane Katrina was in the Gulf of Mexico. In accordance with its Plan, the defendant should have been in a Stage 1 alert, and should have been preparing to fill the refinery's oil storage tanks. At this point in time, Tank 250-2 had a liquid fill-height of 12.59 feet, or 84,795 barrels of crude oil. It was filled to 34% of its capacity.

At 8:33 p.m. on the same evening (Friday, August 26, 2005), as Hurricane Katrina continued to approach with a projected landfall at the mouth of the Mississippi River, Tank 250-2 had a liquid fill-height of 9.89 feet, or 66,011 barrels. This means it was filled at that time to only 26% of its capacity. The level of product in the tank, in other words, had been lowered, not raised, as Hurricane Katrina was known to be drawing nearer to the refinery.

At 8:51 a.m. on the next morning, Saturday August 27, 2005, weather forecasts indicated that Hurricane Katrina would make landfall between southeast Louisiana and the Mississippi

coast. At that point in time, in accordance with the defendant's own Plan, Murphy Oil should have been within two hours of going to a full, Stage 2 alert, filling all above-ground crude oil storage tanks at the refinery. Yet, at this specific point in time, Tank 250-2 had a liquid fill-height of 7.92 feet, or 52,303 barrels of crude oil. It was filled to only 21% of its capacity. Again, the tank was being drained, not filled, as the clearly dangerous storm approached.

As the defendant received additional weather advisories concerning the severity of the fast-approaching hurricane, it continued to remove crude oil from Tank 250-2. It even continued to do so as it began evacuating the refinery on Sunday, August 28, 2005, the very day before Hurricane Katrina made landfall in Louisiana. In doing so, Murphy Oil could hardly claim ignorance of the severity or risks associated with this storm. The company's own weather service, Impact Weather, not only issued site-specific advisories to Murphy, but also called the refinery twice on Friday, August 26, 2005 to communicate the serious risk of the approaching storm.

When the Meraux refinery finally was evacuated on the afternoon of Sunday, August 28, 2005, Tank 250-2 was reported to have a liquid fill-height of 6 feet and 3/8 inches. This corresponds to 40,747 barrels of crude oil, and only 16.3% of the tank's capacity.

There is no doubt that following the written procedure for gravitating the three tanks in the 250 series would have resulted in a proper ballasting of Tank 250-2. One of the adjacent tanks, Tank 250-1, had a liquid fill-height of 21 feet, 11 inches, or 157,872 barrels of oil. This represents 63% of that tank's capacity. The other tank in the series, Tank 250-3, had a liquid fill-height of 36 feet, or 250,209 barrels. This tank was filled to 100% of its capacity. If these three "sister" tanks had been gravitated or equalized before the refinery was evacuated, as explicitedy

called for in Murphy Oil's own hurricane emergency procedure, each tank at the time of the flood would have contained 149,609 barrels, i.e., would have been filled to 60% of their respective capacities. Not one of the three tanks would have floated. As it was, of the three tanks only Tank 250-2 floated in the storm surge, because it was filled to only 16.3% of its capacity.

The evidence unveiled by the PSC in trial preparation further established that Murphy Oil intentionally drained product from Tank 250-2 as Hurricane Katrina approached in order to continue with ordinary plant operations, i.e., business as usual. Because Tank 250-2 was the only tank in the gravitation series which contained so-called "sweet crude," the company did not wish to mix this product with the "sour crude" in Tanks 250-1 and Tank 250-3. "Sweet crude" is more expensive than "sour." Murphy Oil's driving concern throughout the approaching weather crisis, therefore, was not safety but the protection of commodity, business, and profit. The neighboring citizens of St. Bernard Parish were the chief victims of this corporate prioritization.

Nor could the defendant's management escape accountability by claiming ignorance of a known risk, given the deposition testimony of Pumper-Gauger Assistant Jerome Donnelly. Both he and Pumper-Gauger Clyde Powers became so concerned about Tank 250-2 being dangerously low, and thus buoyant as the storm approached, that Mr. Powers actually reported the concern to his supervisor. *See* Deposition of Jerome Donnelly, at p. 57, l. 11 - p. 58, l. 9.

The supervisory official charged with overall safety of the plant nonetheless acknowledged failure by the company to follow the very safety plan it had in place for this type of approaching storm. Murphy Oil's Operations Manager at the Meraux refinery, Dennis Bennett, understood that the company's written hurricane preparedness plan called for Tank 250-2 to be filled to at least 30% of its capacity; and he confirmed that there was adequate time to put

this much additional liquid into the tank between the Friday before the storm and the evacuation of the refinery. The plan simply was not followed. According to Mr. Bennett, compliance with the company's hurricane procedures for Tank 250-2 "was something that was overlooked in a busy day" as Katrina approached the area. This was, he agreed, a mistake or "breakdown," as a result of which the tank floated. *See* Bennett depo., at pp. 22-24, 95-98, ll. 117-118.

Dennis Bennett is an experienced and — as it turns out — truthful refinery manager. His acknowledgment of the defendant's error, in fact, was coupled with a further acknowledgment as to causation. Based on his first-hand knowledge of and familiarity with the refinery and this tank, he testified as follows in his deposition:

> Q. ..[I]f it [Tank 250-2] had been properly prepared from a fluid level standpoint, isn't it true that it is likely to not have spilled crude oil into the community regardless of the [MR-GO] levee failure?
>
> A. True.

Bennett depo. at pp. 151-52.

Aside from such fault based on negligence, there were other theories of defendant's liability which the PSC was prepared to establish at trial. The plaintiff class' causes of action to recover damages for trespass, for the impairment of neighboring property rights (under L.C.C. Art. 667), and for the defendant's ownership and custody of Tank 250-2 as a dangerous thing (Art. 2317), all were supported by the record which the PSC developed.

As to Article 2317 in particular, plaintiffs would have demonstrated that Tank 250-2, built in the 1980's, was placed on a soft, prior waste-dump site, but without taking and evaluating soil borings from the site itself. Hence, instead of settling two feet below the existing ground level as was predicted, the tank settled four feet initially, and then another two feet over the

course of time. Being six feet below ground level, and four feet lower than design expectations, meant that this tank not only violated industry standards for oil storage foundation and grading, but, more importantly, would have been susceptible to floating in a storm surge even if filled to 30% capacity. Dennis Bennett acknowledged as much, testifying that merely complying with the "30% fill" requirement of defendant's hurricane Plan would not have been an adequate protection against the floating of Tank 250-2, given the extent to which it had settled below ground-level (and, hence, below the floodwaters). *See* Bennett depo. at p. 38, ll. 12-23.

In any event, the wanton and reckless misconduct of Murphy Oil, both in failing to have an adequate safety plan and in deliberately not adhering to the one in place, becomes relevant in assessing the work product developed by the PSC for trial. By establishing a liability case of this nature, class counsel were poised to offset this defendant's chief trial strategy, i.e., allocation of fault to certain non-defendant entities, in particular the U.S. Army Corps of Engineers [COE]. Under Louisiana law, both the awareness and significance of risk weigh as critical factors in any allocation of fault between entities. *See Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So.2d 967, 974 (La. 1985). Plaintiffs would have demonstrated to the jury through the above evidence that the egregious wrongdoing of Murphy Oil as the storm approached, vastly outweighed any alleged wrongdoing on the part of absent government entities.

VI. PURPORTED ALLOCATION OF FAULT TO THE COE

Citing the provisions of Louisiana Civil Code Article 2324B, Murphy Oil announced its intention at trial to attribute fault for the oil spill to others, principally the COE. It was Murphy Oil's specific contention that the latter's design, construction and maintenance of the so-called "levee" system for the Mississippi River Gulf Outlet [MRGO] was negligent, and that this

negligence caused the flooding of the refinery to be worse than it would have been, and in turn caused Tank 250-2 to float and the containment dyke around the tank to be overcome.

Any such percentage of fault allocated to a non-defendant would operate as a direct reduction in the damages recoverable by the plaintiff class. Moreover, the assertion of this "fault allocation" defense placed unique pressure on the PSC. Due to potential immunity from direct liability, as well as protections afforded to the U.S. Government in response to discovery requests by private litigants, the PSC could neither consider (as a practical matter) adding the COE as a defendant before trial, nor anticipate the position of the COE in response to Murphy Oil's contentions until after formal discovery had commenced. Because of the delays and difficulties inherent in conducting discovery *vis-a-vis* the federal government, this discovery occurred in close proximity to the start of the "common issues" jury trial.

The PSC also was forced to acknowledge that, whatever the merits of the defendant's claims as to the COE, the weight of public sentiment adverse to this federal agency in light of post-Katrina news reports, etc., imposed on plaintiffs an additional burden of persuasion in any attempt to defend the COE at trial.

On plaintiffs' behalf, the PSC thus undertook a two-phased effort to challenge Murphy Oil's strategy of fault allocation: first, legal arguments were mounted against the allocation *per se*; and, subsequently, plaintiffs' case against COE fault allocation was urged in light of the specific facts revealed in discovery as to the roles of the COE and the MRGO.

(A) THE PSC'S INITIAL MOTION IN LIMINE TO EXCLUDE THE ALLOCATION OF FAULT TO THE COE, ETC.

On May 2, 2006, the PSC filed a Motion *in Limine* to Exclude Defendant's Reference to, or Introduction of, Evidence Concerning the Fault of the U.S. Army Corps of Engineers, Lake Borne Levee Engineers, Lake Borne Levee District, and Other Such Entities. The argument that such relief legally was appropriate, proceeded on three separate grounds:

(1) Any legal duties owed by these flood control entities to the members of the plaintiff class, did not properly encompass prevention of the risk of this specific oil spill from Tank 250-2, so that any breach of flood-prevention duties legally could not be deemed causative of the specific oil spill damages sought by plaintiffs herein.

(2) Even if these government entities had a duty to protect plaintiffs against this oil spill, the application of Louisiana's comparative fault principles to the case at hand would, in diminishing the accountability of the defendant refinery for the oil spill, so undermine public policy to protect citizens against this type of spill that the attempted allocation of Article 2323 was unjustified on sound policy grounds.

(3) Since the case against the flood control entities would, as a practical matter, overwhelm the "main" action of plaintiffs against Murphy Oil for the spill, proper judicial management of the class action trial of "common issues" would be jeopardized by the fault allocation urged by Murphy, making it more appropriate to sever the issue of flood control entity fault from the trial of the main action.

The motion was heard on May 16, 2006; and, in a ruling issued on May 22, 2006, the Court took note that it understood and found compelling the arguments of both parties, but considered the motion premature without the development of certain facts through discovery. The PSC expressly was invited by the Court to revisit the issue of fault allocation once discovery was completed.

(B) DISCOVERY AS TO THE COE/MRGO

To support its allegations that the above-mentioned inadequacies of the MRGO caused Tank 250-2 to float, and caused the refinery's containment dyke system to be overcome, the defendant retained an entire team of experts:

Dr. Joseph Suhayda was presented as an expert in coastal hydrology; and he opined that, had the levees for the MRGO not been destroyed, the Murphy refinery would not have flooded. Dr. Suhayda believed that any water that simply would have overtopped these levees would have disbursed over the marsh north of Meraux and would not have overtopped the 40 Arpent Canal levee, much less Murphy's containment dyke.

Dr. Gordon Boutwell, presented by Murphy as an expert on levees and soils, opined that, had the MRGO levees been designed to an appropriate height with proper soil materials, the levee system would not have breached so severely, and, therefore, Tank 250-2 would not have floated.

J. L. Arnold, defendant's purported soils expert, opined that the 250-series tank containment dyke was eroded by storm surge overtopping, and that there was no need for Murphy Oil to have designed a containment system to withstand the type of surge caused or allowed by the problems with the MRGO.

Two other experts presented by Murphy were engineers, Kenneth Smith and Charles Morin, who opined that the defendant's facility suffered extensive flooding due to the failure of flood protection levees designed and maintained by the Corps. This unexpected flood, they concluded, directly led to the failure of Tank 250-2. They stated that Tank 250-2 would not have sustained catastrophic damage and leaked, had it not floated.

Finally, Keith Baugher was presented by Murphy as an expert in operations, safety, and emergency response. He opined that Tank 250-2 did not move until after the surrounding containment dyke was washed away by the storm surge. Therefore, the hurricane procedures in place for Tank 250-2 were adequate for the expected conditions associated with a hurricane, but did not anticipate the complete failure of the MRGO levee system.

Paul Varisco was the representative designated and produced by the COE to testify on its behalf in response to a Rule 30(b)(6) notice of deposition of the COE filed by Murphy Oil. This witness revealed that the MRGO levee system was part of a flood control project authorized by Congress following Hurricane Betsy, pursuant to the Lake Pontchartrain Vicinity Hurricane Protection Act. This legislation directed the COE to design and build a levee to a height consistent with certain "Standard Project Hurricane" criteria. Under these criteria, past or historical hurricanes were analyzed to formulate a "still water height" that could be anticipated in the event of a hurricane-related storm surge. Several feet then were added to this "still water height," to account for additional "wave run-up."

Discovery further disclosed that the MRGO levees were built by the COE starting in 1965, by using dredge material from the channel bottom and placing this on the banks through a method called "hydraulic fill." This design was intended to allow the silt and sands to wash out and leave appropriate levels of clay, and the remaining mound was expected to then settle and compact on its own. All of this COE work in the design and construction of the MRGO levees, however, was completed before 1979, three years before the Murphy Oil tank farm was ever built (1982). Subsequent to the initial levee construction, there were enhancements or "lifts" performed by the COE, one in 1976 and another scheduled in 1983; but these "lifts" merely

raised the level of the levees to heights consistent with the original design criteria.

Based upon this discovery, the PSC filed both a memorandum supplementing the earlier-filed brief in support of plaintiffs' motion *in limine* regarding COE fault, and a second motion *in limine* to exclude evidence of fault on the part of the COE at the common issues jury trial on new grounds.

(C) ADDITIONAL SUPPORT FOR THE INITIAL MOTION TO EXCLUDE COE FAULT ALLOCATION

In its supplemental memorandum in support of the first-filed motion *in limine*, the PSC emphasized the strained analysis by which defendant argued that the risk of this oil spill properly was encompassed within the flood-protection duty owed the plaintiff class by the COE. First, the defendant would have to argue that the COE should have built and designed a levee system higher than that mandated and authorized by Congress, in anticipation of one of the greatest natural disasters ever to hit the United States. In addition, Murphy Oil would have to demonstrate that the COE should foresee that, within ten years of the completion of the MRGO levee system, an oil refinery would build a tank battery several miles from those levees and store crude oil in that location. Additionally, as early as 1965, the COE would have to foresee that a yet-unbuilt crude oil storage tank might float in certain floodwater conditions, releasing crude oil into the neighborhood because a containment dyke system was overcome in the process. Finally, the COE would have to foresee that, forty years after initially designing and building the MRGO levee system as mandated by Congress, Hurricane Katrina would create a storm surge five to seven feet above that original design height.

The PSC re-urged its argument that there were strong socioeconomic policy reasons not to visit fault upon the COE for this oil spill. The safety disincentive for other oil refineries in future hurricane events would be clear in such a fault allocation, particularly given the invitation to allocate fault to a government entity based on pre-existing legislative mandates.

Finally, in a projected common issues trial essentially limited to the issue of fault for the oil spill, the discovery conducted with respect to the COE and the MRGO identified at least a dozen fault-related issues of law and fact which arguably would have to be the subject of a bench and/or jury determination at trial, *to-wit*:

(1) Did the COE design of the MRGO levee constitute legal fault?

(2) Could the COE be negligent based on what it was authorized and directed to do by Congress?

(3) Was there legal fault in the design and building of levees according to "still water height," as opposed to anticipating the phenomenon of a storm surge overtopping the levee system?

(4) Was there fault in the Congressional/COE decision to follow standard, or historic, hurricane data for purposes of designing levee height?

(5) Was there fault in the way the bottom of the MRGO was dredged to construct the levees?

(6) Was there fault in the reliance on as-built borings for the soil content of the levees?

(7) Was there fault in regard to the amount of sand used in the as-built design of the levees?

(8) Was there fault in the use of peat-based soil in the original construction of the levees?

(9) Were the subsequent "lifts" of the levee system adequate?

(10) Were these subsequent "lifts" grounds for fault allocation, notwithstanding the original design criteria for the levees?

(11) How should the COE position be judged in view of collateral studies of the MRGO levee system?

(12) Did a decrease in the surrounding marsh land serve to impose a duty on the COE to enhance the levees?

Murphy Oil's purported fault allocation defense truly would have overwhelmed the main objective of the common issues trial, i.e., to determine whether defendant itself was liable to plaintiffs for the oil spill.

(D) THE SECOND PSC MOTION TO EXCLUDE COE FAULT ALLOCATION

The discovery conducted as to the COE and the MRGO confirmed that the "events" allegedly supporting the allocation of fault to the COE occurred between 1965 and 1979. Accordingly, it was the PSC's position that no allocation of percentage fault to the COE could obtain under the Louisiana Civil Code, inasmuch as the alleged fault clearly predated the 1980 enactment of Louisiana' comparative fault regime. The latter first was introduced through Act 431 of 1979, effective August 1, 1980. Prior to this, a system of contributory negligence applied as a bar to recovery; a percentage dvision of fault and recovery was not employed. The Louisiana Supreme Court has held that Act 431 applies prospectively only. *See Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). The Court also has made it clear that the prospective application of the comparative fault statute is not triggered by claims arising from events that occurred prior to the effective date of the statute (8/1/80). *See id.* at 1064-65.

The operative events giving rise to the defendant's claim of COE fault in this matter occurred in 1965 with the initial design and construction of the MRGO levee system, and

extended no further than 1979, when construction was completed. Defendant's claims of COE fault thus would be governed by the pre-comparative fault law of Louisiana. Under that law, joint wrongdoers are solidarily liable to the person injured. *See, e.g., Diggs v. Hood*, 772 F.2d 190, 193 (5 Cir. 1985). Such a solidarily-liable defendant would have the right to subsequently enforce contribution against other solidarily-liable tortfeasors. However, this right of contribution notwithstanding, Murphy Oil would have been fully accountable to the plaintiff class based upon any percentage of fault allocated to Murphy Oil at the common issues trial.

Neither the re-urged, first-filed motion *in limine* by the PSC nor the second-filed motion *in limine* by the PSC concerning COE fault allocation, was orally argued. Both matters were taken under advisement, and remain under advisement, pending finalization of the proposed class settlement. But it is important to note that the PSC work product did place plaintiffs in a position to make a strong legal and factual argument that defendant should be precluded from discounting the prospective recovery by the plaintiff class members, based upon a percentage fault allocation to the COE.

(E) THE PSC'S POSITION THAT NO ROLE OR FAULT OF THE COE/MRGO ACCOUNTED FOR THE FAILURE OF DEFENDANT'S CONTAINMENT DYKE

In response to Murphy Oil's allegations of COE fault as a primary or sole cause of the destruction of a containment dyke that otherwise would have captured the oil spilled from tank 250-2, the PSC was able to demonstrate that, to the contrary, the failure of the containment dyke around Tank 250-2 was directly linked to prior deficiencies and the movement of the tank itself, and not to the storm surge from the hurricane.

The defendant was required to maintain a containment dyke around the 250-series tanks. This dyke was designed to hold the entire contents of one crude oil storage tank, plus "freeboard" for eleven inches of rainfall. Murphy Oil had contracted with Wink Engineering to analyze the design capacity of the dyke system. A survey also was performed by Gandolfo Kuhn prior to Hurricane Katrina, and, as a result, the level of the containment dyke around the 250-series tank was raised to approximately eight feet.

Murphy contended that, if the containment dyke had not been compromised by the waters of the storm surge, the oil which spilled from Tank 250-2 would have been contained and there would have been no damage to the surrounding community. For this proposition, the defendant relied on its expert, Jesse Arnold, whose report opined that the containment dyke was designed without the expectation that the dyke might be overtopped by a storm surge.

But discovery by the PSC — and the work of the PSC experts — confirmed that the containment dykes surrounding Tank 250-2 had several breaches after this event, some of which clearly pre-existed the flooding and storm surge that occurred as a result of Hurricane Katrina. Moreover, the most significant breach of the dyke occurred where the piping for Tank 250-2 passed through the dyke itself. The decision to run a floatable tank's piping through the dyke was questionable in and of itself; but, additionally, the deposition testimony of Doug Whittington, a temporary shift foreman at the Meraux Refinery, revealed that pre-Katrina the dyke was actually 2-1/2 feet lower where the tank's piping penetrated the dyke, than in the rest of the system.

At trial, the PSC would have demonstrated that the dyke around Tank 250-2 was (1) compromised before Hurricane Katrina ever arrived, and (2) was most significantly breached

because of the placement of a pipe through it which connected to Tank 250-2, a pipe which then moved and destroyed the dyke as the tank itself floated and moved. This proof would have served to negate efforts by Murphy Oil to argue that an otherwise effective containment system was compromised directly by storm surge.

VII. THE TRIAL PREPARATION EFFORT OF CLASS COUNSEL

As already indicated, the expedited pace of this litigation required intense work on the part of the PSC attorneys, law firms and staff members. When the class settlement was announced just a week before trial, over fifty total motions had been filed, briefed, supported or opposed, and/or argued by class counsel.[2] A total of 87 depositions have been taken, most by

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[2]The motions are as follows: (1) Motion to Supervise Ex Parte Communications between Defendant and Putative Class Members and all Plaintiffs; (2) Motion for Entry Upon Land for Inspection and Other Purposes filed by Plaintiffs; (3) 12(b)(6) Motion to Dismiss Plaintiffs' Claims for Punitive Damages by Murphy; (4) 12(b)(6) Motion to Dismiss Plaintiffs' Claims under CERCLA, RCRA, OPA and La R.S. 30:2015.1 for Failure to State a Claim Upon Which Relief Can Be Granted; (5) 12(b)(6) Motion to Dismiss Plaintiffs' Fraud Claims or Alternative Motion for Judgment on the Pleadings on Plaintiffs' Class Allegations; (6) 12(b)(6) Motion to Dismiss Plaintiffs' Claims for Mental Anguish, or Alternatively Motion for Judgment on the Pleadings on Plaintiffs' Request for Class Certification; (7) 12(b)(6) Motion to Dismiss Plaintiffs' Claims for Fear/Risk of Future Disease; (8) 12(b)(6) Motion to Dismiss Plaintiffs' Class Action Administrative Master Complaint for Lack of Standing; (9) Plaintiffs' Notice of Objections to Discovery Propounded by Murphy to Putative Class Members; (10) Motion to Strike Expert Testimony of Dr. Nachman Brautbar by Murphy Oil; (11) Motion to Continue Class Certification Hearing; (12) Motion *In Limine* to Exclude Testimony, Affidavit and/or Opinions of Plaintiffs' Hydrologist/Fate and Transport Expert, Dr. Philip Bedient; (13) Motion *In Limine* to Exclude Testimony, Affidavit and/or Opinions of Plaintiffs' Real Estate Expert, Dr. John Kilpatrick; (14) Motion *In Limine* to Exclude Testimony Affidavit and/or Opinions of Plaintiffs' Air Modeler Dr. Erno Sajo; (15) Motion *In Limine* to Exclude Testimony, Affidavit and/or Opinion of Plaintiffs' Engineering Expert, Marco Kaltofen; (16) Motion to Strike Testimony, Affidavit and Opinion of Dr. Vincent Wilson; (17) Evidentiary Objections by Murphy Oil to Plaintiffs' Examination of Hydrologist/Fate and Transport Expert, Dr. Philip A. Bedient; (18) Evidentiary Objections by Murphy Oil to Plaintiffs' Examination of Real Estate Expert, John A. Kilpatrick; (19) Evidentiary Objections by Murphy Oil to Plaintiffs' Examination of Engineering Expert, Marco Kaltofen; (20) Evidentiary Objections by Murphy Oil to Plaintiffs' Examination of Toxicology Expert, Dr. Vincent L. Wilson; (21) Motion *In Limine*

videotape. Numerous fact witnesses had been interviewed. Voluminous material had been obtained in trial preparation, pursuant to PSC requests under the Freedom of Information Act (FOIA). Of these thousands of documents received and reviewed, a total of 175 had been selected by the PSC for presentation and use at trial.

Not all of these documents had been Bates-stamped on receipt, and each had to be

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to Exclude the Testimony of Plaintiffs' Environmental Science Expert, Dr. Paul Templet; (22) Motion *In Limine* to Exclude Testimony of Defendant's "Fingerprint" Expert, Scott Stout; (23) Motion to Certify Class Filed by Plaintiffs; (24) Motion to Supplement the Record with the Deposition of Marco Kaltofen, P.E. by Plaintiffs; (25) Motion to Stay Proceedings by Murphy Oil; (26) Joint Motion of Approval of Notice Plan by Plaintiffs and Defendant; (27) Joint Motion for Protective Order by Plaintiffs and Defendant; (28) Joint Motion for Approval of Notice Plan; (29) Motion to Rescind Protective Order; (30) Motion for Order to Set Aside 15% of Gross of Any Settlements of Represented Persons within Class Boundary for Class Counsel's Attorneys' Fees and 7% of the Gross for Class Counsels' Costs by PSC; (31) Discovery Plan for Phase One; (32) Motion for Clarification of Pretrial Order by Murphy Oil; (33) Motion to Compel Depositions of Defendant by PSC; (34) Motion to Dissemination of "Informational Video" to all Class Members; (35) Motion *In Limine* to Prevent Murphy Oil from referring to Fault on the Part of the U.S. Army Corp. of Engineers, the Lake Borne Levee District, or Any Other Entity; (36) Motion to Appoint Expert Under RE 706 to Designate and Monitor Testing and Clean Up Protocol; (37) Motion to Enforce or Alternatively Set Aside Settlement Agreement by Plaintiffs; (38) Motion to Exempt Plaintiffs' Expert Dr. Vasilis M. Fthenakis from Murphy Oil's Site-Specific Training; (39) Motion to Extend Opt Out Deadline by Murphy Oil; (40) Motion Pursuant to Rule 23(d)(2) for Order Granting Access to the Court's Certified Class Area to Implement the EPA-LDEQ-ATSDR-LDHH-Approved Remediation Plan; (41) Motion to Compel Deposition of U.S. Army Corps of Engineers; (42) Motion to Quash Subpoena and/or Motion for Protective Order by U.S.; (43) Motion for Approval and Mailing of Notice Under Rule 23(d) by PSC; (44) Motion for Partial Summary Judgment on the Issue of Murphy Oil's Negligence by PSC; (45) Motion to Compel Deposition Testimony and Production of Documents by U.S. Army Corps of Engineers by Murphy Oil; (46) Second Motion *In Limine* to Exclude Evidence of Fault on the Part of U.S. Corps of Engineers and to Exclude Inclusion of the Issue of Corp's Fault on the Verdict Form by Plaintiffs' Class; (47) Motion *In Limine* to Exclude Defendant's Reference to or Introduction of Corps of Engineers, Lake Borne Levee District, and other such Entities by PSC; (48) Motion *In Limine* to Preclude Certain Testimony of Keith Baugher by Plaintiffs; (49) Motion *In Limine* to Exclude Expert Testimony of Charles M. Duhon by Murphy Oil; (50) Motion *In Limine* to Exclude Expert Testimony of Dr. Paul Templet; (51) Motion *In Limine* to Exclude Evidence of Testimony Relating to Murphy Oil's Voluntary Settlement Program; and (52) Motion *In Limine* to Exclude Gordon Boutwell.

individually stamped and imaged into a "Summation" program database by the PSC. Each document then was processed in the database by way of optical character recognition, allowing the image or document to be reviewed in the database search engine. The database was augmented through the objective coding of each document. An Excel program spreadsheet was developed to maintain the consistency of the assignments and electronic "briefcases" containing the documents produced. The documents then could be produced on compact disk and sent to class counsel for coding. The coding sheets were entered into the Summation database, which was maintained so that it could be "saved" on to an external hard drive that was easily disseminated to members of the PSC Trial Team, to allow them to continually and repetitively search the documents. The Summation database allowed the PSC to have ready access to over 67,000 images and documents, to over 23,000 lines of summary, and to the aforementioned 87 deposition transcripts.

In addition, class counsel engaged in extensive work with plaintiffs' experts in preparation for trial. The PSC had retained and consulted with a total of 18 experts as of the time of the negotiated settlement.[3] Murphy Oil was prepared to produce ten experts to contest liability at the time of trial, each of whom the plaintiffs through the PSC were poised to challenge and cross-examine.[4]

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[3]These experts were: (1) Dr. Vincent Wilson; (2) Marco Kaltofen; (3) Dr. John A. Kilpatrick; (4) Dr. Erno Sajo; (5) Dr. Alan W. A. Jeffrey; (6) Stanley Guidry; (7) Dr. Lee E. Branscome; (8) Dave Barnes; (9) Charles M. Duhon; (10) Florence Cone; (11) Allen Schuele; (12) Robert McGill, P.E.; (13) William Amend, P.E.; (14) Art Deardorff, P.E.; (15) Dr. Vasilis Fthenakis; (16) Dr. Joseph S. Burke, P.E., CSP; (17) Frank Willis, P.E., P.L.S.; and (18) Nachman Brautbar, M.D., F.A.C.P.

[4]These defendant experts were: (1) Jesse Arnold; (2) Keith Baugher; (3) Dr. Gordon Boutwell; (4) Charles Morin; (5) Kenneth Smith; (6) Chad Morris; (7) Dr. Joseph Suhayda; (8)

Through its grasp of technical issues, the PSC Trial Team intended to use computer graphics at trial relative to the issues of tank gravitation, the mechanism of tank floating, the tank's rupturing and spilling of crude oil, and the correlation of weather data to tank fill levels. Certain of the plaintiffs' experts and members of the Trial Team had attended both inspections and dismantling of Tank 250-2, achieving a first-hand knowledge and understanding of the physical evidence critical to this case. This field work preserved crucial trial evidence concerning the location and condition of the tank, its floating roof, and the deformed tank bottom. Class counsel and plaintiffs' experts physically entered Tank 250-2 at a time when it was damaged and slippery, to both photograph and inspect the tank floor.

In preparation for trial, the PSC also conducted appropriate "focus group" sessions. The firm of Zagnolia, McEvoy, Foley, L.L.C. Communication Consulting was hired to organize this activity. This effort enabled members of the PSC Trial Team to develop effective opening statement and closing argument strategies, to identify appropriate themes for trial presentation, and to discern the facts and arguments most helpful for plaintiffs to emphasize with prospective jurors. No less than three "simulated juries" were chosen, with ten persons participating in each group. Each person filled out a detailed questionnaire and a confidentiality agreement. A neutral case overview was presented, followed by case presentations on behalf of both plaintiffs and the defendant. A video presentation of the testimony of crucial witnesses was displayed to the focus groups. Maps, demonstrative exhibits, and computer graphics also were developed and utilized during the focus group sessions. Appropriate legal instructions were given to the groups, and their deliberations as "jurors" were observed in three simultaneous sessions.

Dr. Glenn Millner; (9) Ted Dove; and (10) Brian Carter.

It should be emphasized that all members of the PSC contributed to the trial preparation effort, however, even if not specifically named as members of the designated Trial Team. Members of the Executive Committee met weekly to address important case management and strategy issues. Liaison counsel and other designees met regularly with the Court and opposing counsel. Members of the Legal Committee performed ongoing research and advocated important legal positions on plaintiffs' behalf, both in oral argument and in brief-writing.

Moreover, since the Court had announced its intention to proceed with a second phase jury trial or series of "mini-trials" to address damages once the liability verdict was rendered, members of the PSC Damages Committee met continually and carried out an extensive effort to prepare for presentation of the class claims for damages. Legal and factual research was conducted to outline all potential areas of damages available to class members, identifying more than twenty areas of viable recovery for plaintiffs.[5] An extensive legal memorandum exceeding fifty pages was prepared to analyze and support each area. This memorandum provided legal authority for each claim, the required evidence to support the claim, the types of experts needed to support the claim, and a quantum survey as to each claim. The members of the PSC working in this area constantly coordinated with other members of the PSC (on the Trial Team, the Legal Committee, and the Executive Committee) to discuss issues such as the use and retention of

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[5]These damage areas were: (1) personal injury; (2) mental anguish; (3) mental anguish from witnessing destruction of property; (4) inconvenience; (5) loss of use; (6) evacuation; (7) loss of animals/pets; (8) diminution in property value; (9) stigma damages; (10) groundwater contamination; (11) personal contents property damage; (12) household refurbishing; (13) remediation; (14) testing costs (after remediation); (15) alternative housing costs (including rental and relocation); (16) environmental monitoring program; (17) business interruption; (18) loss of inventory; (19) loss of business income/profits; (20) loss of rental income; and (21) complete destruction of business.

appropriate experts and pertinent themes and approaches to assure the maximum recovery of compensatory damages.

VIII. MEDIATION AND SETTLEMENT

Shortly after the plaintiff class was certified, the PSC commenced settlement discussions with the defendant, convinced that an early resolution of this litigation would be of great benefit to plaintiff class members in the wake of Hurricane Katrina. As early as January 10, 2006, the PSC had discovered in deposition testimony all of the "layers" of excess insurance coverage applicable to this incident. This ultimately was helpful in working toward a reasonable resolution within the limits of the policies in question.

In late March 2006, the parties attended a formal mediation, with John Perry of Perry, Dampf, Watts & Associates serving as mediator. The mediation took place in New Orleans over the course of two workdays. A good faith effort to resolve the case was made at this time, initiated by the PSC presentation of an in-depth, hour-long video detailing plaintiffs' case. The "position video" utilized video clips from the news coverage of the oil spill, expert witness interviews, fact witness interviews, and fact-specific research of both a scientific and legal nature. It detailed how the oil spill had affected the lives of class members.

Dr. Harold Ginzburg, a neuropsychiatrist and former Murphy Oil consultant, discussed in the video the emotional impact of the spill on the community.

An expert real estate economist and appraiser, Dr. John Kilpatrick, described on plaintiffs' behalf how the oil spill devalued property in the community. He explained the significance of home ownership, the premiums paid by individuals to reflect the pride of

ownership, and how many homes in the area no longer were marketable as a result of the catastrophe.

Florence Cone, a metallurgical engineer retained by the PSC explained in the video her tank failure analysis. Another plaintiffs' expert, Allen Scheule, further explained how Tank 250-2 had floated off its foundation early on the morning of August 29, 2005. Buoyancy calculations were presented, as was a discussion of how Murphy Oil had failed to both follow its own storm emergency plan for the ballasting of Tank 250-2, and to maintain a sufficient containment dyke around the tank.

Dr. Paul Templet, a professor of chemical physics at the LSU Department of Environmental Studies, discussed in the position video how biased sampling is critical when taking soil samples in a community such as the one impacted by this spill. He opined that Murphy Oil was diluting its samples by taking random, composite samples, instead of biased, "scrape" samples.

Dr. John Pardue, Ph.D., P.E., spoke in the video about sampling methodology. He explained the need for a comprehensive remediation plan, and the need to address the interior of homes in any such plan. Dr. Pardue in fact reviewed all of the key aspects critical to an effective remediation program.

Plaintiffs' toxicologist, Dr. Vincent Wilson, Ph.D., also discussed remediation in the position video presented at mediation. He explained the volatile components of crude oil, and how the oil saturates porous materials, making remediation difficult in home building materials. Dr. Wilson emphasized how improper remediation might lead to future exposure to the toxic components of the crude oil.

Although the March 2006 mediation attended by the parties did not lead to a class settlement proposal, it was helpful in identifying the various issues which needed to be addressed in any class settlement; and, unquestionably, the PSC's position video and extensive preparation for the mediation served to identify the key considerations to be addressed on plaintiffs' behalf in any prospective settlement of the litigation. This initial mediation event, therefore, was an important predicate to the later discussions which did prove fruitful.

As the trial date approached, renewed settlement discussions intensified. Late-night negotiating sessions became common, as complex and difficult insurance coverage and other issues were addressed and resolved as part of the settlement negotiations. These long hours and intense efforts culminated in the Memorandum of Understanding which was signed and read into the record by the parties on September 25, 2006, a week before trial.

Following this initial settlement development, class counsel have continued to expend long hours in negotiating and confecting a more formal and elaborate Settlement Agreement. This was submitted to the Court and has been preliminarily approved for notice and publication to class members. There continue to be regular work sessions between and among the negotiating representatives of the parties, however, to address and resolve class notice and other matters essential to final approval of the settlement. A number of challenges have arisen in bringing the parties to the present juncture of potential class-wide resolution; and members of the PSC as class counsel have met these challenges unfailingly.

IX. COMMON BENEFIT TIME AND EXPENSES

Submitted as an attachment is the affidavit of Dennis M. McCartney, CPA, of the accounting firm of Bourgeois Bennett, LLC (the firm which has been recognized and appointed

by the Court to work on behalf of the PSC with the Court-Appointed Disbursing Agent, Global Risk Solutions). The affidavit is self-explanatory, and references its own attachments as Exhibits A and B.

The latter (Exhibit B) itemizes both "shared" and "held" common benefit costs, as these terms previously have been defined by the Court. The total costs incurred to date are in the amount of **$2,659,043**. The Court also will note that PSC members have paid cost assessments totaling $2,475,000.

In addition, as shown by Exhibit A to the attached affidavit, members of the PSC and other counsel working with the PSC have reported to date a total of **34,059** hours in "common benefit" legal services. A total of 82 attorneys and 27 different law firms have rendered these services. The contemporaneous records of these hours, as required by the Court's protocol, are being submitted to Bourgeois Bennett on an ongoing basis.[6]

X. LEGAL AUTHORITY FOR, AND MEANS OF CALCULATING, COMMON BENEFIT FEE AWARDS

The Settlement Agreement herein provides that the defendant Murphy Oil shall pay both common benefit fees and costs which may be awarded under FRCP 23(h). This negotiated feature of the proposed settlement is of great importance and benefit to plaintiff class members, since defendant's payment is made as an addition to, and not a deduction from, what class members are entitled to receive in monetary payments and compensation under the proposed settlement program. It is the position of the PSC that this Court's decision on the amounts of

[6]The hours are allocated by attorney and firm, which allocation can be reviewed by the Court at the appropriate time as necessary. For present purposes, it suffices to note the total "common benefit" hours expended by class counsel herein.

common benefit fees and costs to be paid by the defendant, is final and non-appealable, based upon a dispute resolution agreement entered into by the parties and dictated into the record. Since defendant opposes this proposition, the PSC has filed a motion to enforce the dispute resolution agreement, which remains pending at this time.

In any event, it now remains for this Court to tax to the defendant both the above-itemized common benefit costs of this litigation, and a reasonable amount in fee for the legal services performed by counsel which benefitted the class as a whole.

(A) BASIS FOR THE COMMON FUND/COMMON BENEFIT DOCTRINE

The history and purpose of the "common fund" doctrine have been the subject of much analysis and discussion among legal commentators. *See, e.g.*, Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell L. Rev. 401 (1991); Monique Lapointe, *Attorney's Fees and Common Fund Actions*, 59 Fordham L. Rev. 843 (1991); John P. Dawson, *Lawyers and Involuntary Clients: Attorneys' Fees from Funds*, 87 Harvard L. Rev. 1597 (1975). In class action cases such as this one, the rationale for the doctrine is readily discernible:

> When a plaintiff in an individual or representative capacity creates, increases, or preserves a fund by settlement or judgment, which benefits an ascertainable class, the court in exercising its equity jurisdiction, may grant class counsel fees by directing payment from the fund. It is an equitable doctrine based on the rationale that successful litigants would be unjustly enriched if their attorneys were not compensated from the fund created for the litigants.

Conte & Newberg, 4 *Newberg on Class Actions*, §13:76 (4th Ed. 2005).

A concept closely related to the so-called "common fund" doctrine is the "common benefit" doctrine, which applies in cases where a representative plaintiff's successful litigation

confers a substantial benefit on the members of an ascertainable class without the creation of a common, monetary fund *per se*. *See, e.g.*, *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed. 593 (1970). The underlying rationale of the "common benefit" doctrine is identical to that supporting the "common fund" doctrine. The difference between the doctrines is mechanical, not substantive.

In the matter at hand, of course, part of the proposed class settlement is monetary (compensation for property damage and property value diminution, etc.), and part is non-monetary relief (class-wide remediation and a buy-out program). Moreover, the proposed settlement does not contemplate the early establishment of a fund *per se*, but rather secured payments to eligible claimants on an ongoing basis. Hence, both the "common fund" and "common benefit" doctrines have applicability herein, and support the assessment and award of a common benefit fee as contemplated by Rule 23(h).

The proposition that counsel whose efforts obtain a benefit for a class of persons are entitled to legal fees based upon the value of the benefit, first was articulated in Supreme Court jurisprudence dating back more than a century ago. *See Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881). Subsequent Supreme Court decisions have reinforced and expanded the application of the doctrine. *See Boeing Co. v. VanGemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). It is now common for federal district courts in class actions and mass tort cases, therefore, to authorize the award of attorneys' fees pursuant to the common fund/common benefit doctrines. This recognizes the fundamentally equitable notion that when a representative wages legal "battle" on behalf of the class as a whole, and

achieves success for the class as a whole, such services should be compensated through a common benefit fee award. The approach is taken even in cases where (as here) a settlement contemplates the payment of common benefit fees by the defendant, separate and apart from the class' settlement and recovery:

> Although under the terms of each settlement agreement attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.

Johnston v. Comerica Mortg. Corp., 83 F.3d 241, 246 (8 Cir. 1996), and cases cited therein [emphasis added].

(B) METHODOLOGY FOR CALCULATING COMMON BENEFIT FEE

District judges have discretion in quantifying a common benefit fee, as well as in selecting which method to apply in the calculation of such a fee. *See e.g., Hanlon v. Chrysler* Corp., 150 F.3d 1011, 1029 (9 Cir. 1998); *Johnston v. Comerica Mortg. Corp., supra*, at p. 246, and cases cited therein.

Historically, the primary method used has been the "percentage of fund" method. Literally from the time the Supreme Court first recognized the common fund doctrine in the above-referenced case law, and until 1973, district judges customarily and invariably calculated common benefit fee awards as a "reasonable percentage" of the fund or valuated benefit of the settlement outcome. *See Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 10/8/85 (Arthur Miller, Reporter), reprinted in 108 FRD 237, 242 (1986) [1985 Task Force Report].

In 1973, two cases in the Third Circuit briefly abandoned this percentage method in favor of a more complicated, so-called "lodestar" method of calculating common benefit fees. *See Lindy Bros. Builders, Inc. of Phila. v. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3 Cir. 1973) [Lindy I]; *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3 Cir. 1976) [Lindy II]. A "lodestar" fee award is computed by multiplying the number of hours expended by common benefit counsel by prevailing hourly rates; and the court, in its discretion, then may adjust this amount upward or downward, depending upon certain factors. These factors were set forth by the Fifth Circuit in the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5 Cir. 1974), *to-wit*: (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill required to perform the services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the amount involved and the results of obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the clients; and (12) awards in similar cases.[7]

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[7]It should be noted that these fee considerations largely overlap with Rule 1.5 of the Louisiana Code of Professional Responsibility, in its identification of the following considerations in determining whether a legal fee is reasonable: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service; (2) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality; (4) the amount involved and results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyers performing the services; and (8) whether the fee is fixed or contingent. *See* Rule 1.5, La. R. Prof. Cond. [LSA R.S. 37:221 *et seq.*].

The use of the "lodestar" methodology as a preferred approach in calculating common benefit fees, however, was short-lived, even in the Third Circuit where the methodology originated. A Task Force appointed by that circuit undertook in 1986 to compare the relative merits of the "lodestar" and "percentage of fund" approaches. It enumerated numerous deficiencies in the "lodestar" process, ultimately recommending that this approach be retained only in fee-shifting-by-statute-cases. The Task Force concluded that the "percentage of the fund" method was the better determinant of the reasonable value of services rendered in common fund cases. *See* 1985 Task Force Report, 108 FRD 237.

A number of objections to the use of the "lodestar" method have been identified, principally including the following:

(1) The method is time-consuming to administer, and not an efficient use of judicial resources. *See Kirchoff v. Flynn*, 786 F.2d 320 (7 Cir. 1986).

(2) The method is capable of manipulation, and creates the risk of inflated billing rates and overstated claims of the hours worked by counsel, none of which the district judge is in a position to effectively monitor.

(3) Reliance on the "lodestar" approach leads to unpredictability and inconsistency in results. *See In re: Oracle Systems Security Litigation*, 131 FRD 688 (N.D. Ca. 1998).

(4) The methodology rewards delay and extends the duration of litigation, to the extent the amount of time reported by counsel has the effect of increasing the amount of the common benefit fee. *See* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Journal of

Empirical Legal Studies 27, 31 (2004).

At present, therefore, virtually every federal circuit court of appeals (including the Third Circuit) has either recommended or required the percentage-of-fund method for calculating common fund/common benefit fees. *See, e.g., In re: Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 307 (1st Cir. 1995); *Gwozdzinnsky v. Sandler Associates*, 159 F.3d 1346 (2nd Cir. 1998); *In re: General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821-22 (3rd Cir. 1995); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994); *In re: Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condominium Ass'n, Inc. V. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

In the Fifth Circuit in particular, where the *Johnson* factors remain viable, there is no prohibition against the use of the percentage method, as informed by those factors. *See Longden v. Sunderman*, 979 F.2d 1095, 1100-1101 (5th Cir. 1992). District judges in this Circuit accordingly have not felt compelled to adhere to the lodestar as a primary means of analysis. For example, the Hon. Ralph Tyson of the Middle District of Louisiana has characterized the lodestar method as a "completely discredited" means of calculating common benefit or common fund fees in class actions, the percentage-of-fund method being the more appropriate means to do so. *See Survey Communications, Inc. v. Corporate Express, Inc.*, No. 05-CV-40 (MDLA 4/19/06). Even more recently, the Hon. Sarah Vance of this Court has stated she

> shares the concerns expressed by the majority of courts that the lodestar method is not only burdensome but also acutely susceptible to manipulation.

See In re: In re: Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation, MDL 1643 (E.D. La.), "Final Approval of Settlement Order," Document 174 (8/31/06), at p. 43.

As stated by the Hon. Richard Haik of the Western District of Louisiana:

> ....Fifth Circuit precedent requires a district court only to justify its award of attorneys' fees within the framework of the *Johnson* factors regardless of whether the award is determined by the lodestar or percentage of fund method....[But] review of district court opinions in this circuit, as was done in *In re: Prudential-Bache Energy Income Part. Securities Litigation*, 1994 U.S. Distr. LEXIS 6621, 1994 WL 150742 (E.D. La 1994), indicates that the district courts within this circuit utilize the percentage of fund method. *See also In re: Catfish Litigation*, 939 F.Supp. 493 (N.D. Miss. 1996) (citing problems with the application of the lodestar method..[and] adopting the percentage of fund validated with the *Johnson* factors).

In re: Combustion, Inc., 968 F.Supp. 1116, 1135 (W.D. La. 1997), and cases cited therein.

As the parties are aware, this Court likewise has embraced the percentage, versus lodestar, approach to common benefit fee calculation, pursuant to its prior ruling in the record of this very litigation. In announcing the decision to impose a common benefit assessment on the settlement recoveries of plaintiffs who proceeded outside of the class action to settle their claims with the defendant, Your Honor reasoned as follows:

> As the Federal Judicial Center has noted, '[i]n practice the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar method creates inherent incentive to prolong the litigation until sufficient hours have been expended.' *Manual for Complex Litigation* (4th ed.) §14.121 (2004). In light of the problems that have emerged with the lodestar method, the majority of Courts of Appeals have adopted the percentage-fee method in common-fund cases, either as a primary or secondary method of calculating fees.

> ...The Fifth Circuit has not explicitly adopted the percentage-fee method, but it has not explicitly rejected it either [citation omitted]. The percentage-fee method seems to allow considerable flexibility for the district court to devise a method for fixing appropriate fees in common benefit cases. Thus, this Court will use the percentage method in computing common benefit fees. Of course, the percentage should not be completely arbitrary, devoid of reality, or inconsistent with the usual fees for the type of case involved. In short, there is no one percentage that should apply to all cases. Each case should be analyzed on its own basis.

Turner v. Murphy Oil USA, Inc., 2006 WL 784872, at pp. 4-5 (EDLA 3/27/06) [emphasis added].

Consistent with the above, the Court now should utilize the percentage-of-fund method to calculate the common benefit fee to be paid by defendant under the proposed class settlement. To assure the needed flexibility and "fit" to the matter at hand, the percentage utilized should be informed by the *Johnson* factors. *See Manual for Complex Litigation* (4th ed.), §14.121, pp. 187-88 & n. 485.

XI. PROPOSED CALCULATION OF COMMON BENEFIT FEE

The two variables in the Court's formulation of the appropriate common benefit fee are (1) the value of the common benefit obtained by class counsel, and (2) the specific percentage to be applied to this value.

(A) VALUATION OF THE BENEFIT OBTAINED

The Memorandum of Understanding which was signed by the parties and read into the record of this case on September 25, 2006, expressly stated that:

> Murphy acknowledges that, from the inception of this incident, the Plaintiff Steering Committee's and Class Counsel's efforts have contributed to and assisted in the resolution of this litigation.

See 9/25/06 MOU, at p. 3 [emphasis added].

It is true that this settlement document was superseded by the later-executed Settlement Agreement, and that the latter is silent with respect to this "acknowledgment" by Murphy. For whatever reason or reasons (not relevant to the instant motion), the defendant company decided to withdraw its express acknowledgment. But this alters neither the truthfulness of what was expressed, nor the fact that was acknowledged. Rather, what Murphy Oil stated on the record on September 25, 2006 is as true today as it was both at that time and prior to that time.

Of course, it now remains for this Court to determine whether there is a basis for the assertion that the PSC contributed to the resolution of this matter from the time of the incident oil spill and the "inception" of the litigation; and, in the foregoing, the factual support for this conclusion has been set forth. The first suit was filed very soon after the incident. Even before the PSC was appointed, class counsel were active both "in the field" and otherwise, tirelessly pursuing and developing the claims of plaintiff class members. It is incontrovertible that Murphy's voluntary settlement program did not commence until after the filing of the first class action, after the investigative efforts of PSC members (and hired experts) had begun, and after the Court's formal appointment of the PSC members as "interim" class counsel.

Rather than view the issue in a factual vacuum, the Court should draw the reasonable and realistic inference that the collective, litigation-related effort of PSC members was, from the outset, a substantial factor motivating the defendant's voluntary settlement program. On the one hand, settling claimants derived clear benefit from the company's risk of exposure, as that exposure increasingly was developed through well-prepared and ongoing class litigation; and, at the same time, Murphy made payments in order to obtain releases from claims which otherwise would be included in the pending litigation.

The prosecution of the class action served as impetus for Murphy Oil's voluntary settlement program, for the same reason that no individual claimant was in a position to seriously threaten this defendant, or provoke its interest in settlement, based upon the prospect of piecemeal litigation. The Supreme Court correctly has observed that

> [t]he use of the class-action procedure for individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.

Deposit Guaranty National Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 338, 100 S.Ct. 1166, 63 L.Ed.2d (1980). Murphy Oil's settlement program recognized this economic reality, and it proceeded precisely because a class action vehicle existed as a practical means for claims to be litigated, unless settled.

It must be the total value of this settlement, then, that serves as the basis for calculating the common benefit fee. That total settlement amount is undisputed; it is specified in the parties' Settlement Agreement to be $330,126,000. *See* Settlement Agreement of 10/9/06, at p. 14.

(B) THE REASONABLE "BENCHMARK" PERCENTAGE FEE IN THIS CASE

As this Court previously has stated, "there is no one percentage that should apply to all cases," each matter being entitled to an analysis of its unique facts and circumstances. *See Turner v. Murphy Oil USA, Inc.*, 2006 WL 784872, at p. 5 (EDLA 3/27/06). To this extent, empirical studies or surveys of common benefit fee awards may have only limited usefulness, *to-wit*: the identification of a general range of percentages, or even a specific "benchmark" percentage, which may be presumed reasonable according to class action jurisprudence.

In this regard, the *Manual for Complex Litigation* reports that common benefit fee awards under the percentage-of-fund method "are often between 25% and 30% of the fund." *Manual for Complex Litigation* (4th ed.), §14.121, at p. 188 & n. 488. A study of class action attorney fees published by Eisenberg and Miller notes a "remarkable uniformity in [fee] awards between roughly 30% to 33% of the settlement amount," based upon a 1996 comprehensive survey by the National Economic Research Associates (NERA). *See Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies 27, 31 (2004), at p. 33. A Federal Judicial Center study in the same year (1996), based upon a more limited case population, discerned a "mean and median" fee award range between 24% and 30% of the settlement fund. *See id.* at 34.

Notable and case-specific surveys also are found in the reported case law. In the securities class action case of *In re: Lucent Technologies, Inc., Securities Lit.*, 327 F.Supp.2d 426 (Dist. N.J. 2004), the district judge identified the range of percentage-of-fund fee assessments in a two-table format. The first table lists twenty-one "recent class action decisions" in the Third Circuit only, where the percentage-of-fund fee awards ranged between 22.5% and 33-1/3%. *See* 327 F.2d at 439-40. The second table lists twelve decisions in various federal districts and circuits, limited to cases where the settlement fund amounts exceeded $100 million. In these matters, the fee percentage ranged from 25% to 30%. *See id.* at 441.

The latter categorization is worth additional comment, in anticipation of the argument by defendant that the current settlement is so large (a so-called "mega-case"), that the percentage-of-fund fee should be reduced in to avoid a "windfall" for class counsel. It is true that common fund fee percentages have been lowered by some district judges because of the substantial

amount of the settlement fund. *See Manual for Complex Litigation* (4th ed.), §14.121, at pp. 188-89, & n. 497. In these cases, some courts also utilize a "sliding scale," whereby the percentage fee decreases as the magnitude of the fund increases. *See id.* at 189 & n. 498.

The above-cited Eisenberg & Miller article includes a survey of fee percentages according to the sizes of settlements, categorized by the authors in "deciles." *See Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies 27, 31 (2004), at Table 7, p. 73; and this same survey highlights the definitional problem in deciding the point at which a settlement fund constitute a "mega-case." The last "decile" specified in the survey is a settlement range between $79 million and $190 million. The authors then list a final, open-ended category of settlements "greater than $190 million." As to these, they report a percentage fee range of 10% to 12% in reported cases, and 16.4% to 17.6% in unreported cases. *See id.*, Table 7, at p. 73. Yet the specified "mean" settlement recovery in this final, catch-all category is an impressive $929 million. Were the instant settlement of approximately $300 million to be placed in any category where a settlement more than three times greater in amount is considered the "mean," the hope for helpful comparison and analysis clearly fades.

Similarly, the *Manual for Complex Litigation* cites the case of *In re: Washington Public Power Supply Sys. Lit.*, 19 F.3d 1291 (9th Cir. 1994) for the proposition that use of a standard or "benchmark" percentage fee for "unusually large funds" may result in a "windfall." *See Manual for Complex Litigation* (4th ed.) at p. 189. The case in question, however, involved "the largest municipal bond default in history," where claims of the class members "totaled almost $1.47 billion," with a settlement ultimately reached in the amount of $687 million (more than twice the amount of the instant settlement). *See In re: Washington Public Power Supply Sys. Lit.*, *supra*, at

p. 1294.

Even more fundamental than the problem of lumping together so broad a range of settlement amounts into one "mega-case" category, is the fact that the *Johnson* factor of settlement outcome/amount commonly is considered the most important criteria for the lodestar multiplier.

> Generally, the factor given the greater emphasis is the size of the fund created, because a "common fund is itself the measure of success...." *Manual for Complex Litigation* (4th ed.), §14.122, at p. 193 & n. 518.

To disincentivize class counsel by diminishing the percentage of the common benefit fee based upon the fact that the settlement was highly successful in dollar amount is counter-intuitive on its face. The risk inherent in working on a percentage fee basis remains a risk, regardless of the outcome of the case; the corresponding, promised benefit to counsel for taking the risk and achieving a high degree of success should remain as well. The risk and benefit are necessary corollaries. They should not be artificially separated for the sake of avoiding a "windfall," any more than risk should be offset in the end by compensating class counsel on the same basis that defendant's counsel are compensated.

Even in its discussion of the "sliding scale" approach by certain courts based on the magnitude of the settlement fund, the *Manual for Complex Litigation* notes the case of *In re: Am. Cont'l Corp. Lincoln Sav. & Loan Sec. Litig.*, MDL 834 (D.Ariz. 7/24/90), where the district judge awarded class counsel 25% of the first $150,000,000 of the settlement, and 29% of any recovery greater than $150 million, plus additional incentives for prompt resolution of the case. *See Manual for Complex Litigation* (4th ed.), §14.121, at pp. 189-90 & n. 498. The Manual then

suggests that, consistent with this decision, perhaps an equally reasonable case can be made for increasing the percentage fee as the fund increases, as can be made for a decrease. In fact,

> [t]he Third Circuit 2001 Task Force identified adherents of both decreasing and increasing percentages and concluded that either approach might reasonably be used.

Id. [citing Task Force Report].

The authors of a definitive and frequently-cited treatise on class actions note that there are scholars who "question the utility of the declining percentage approach" (in large-fund cases) on the following basis:

> [The] Dunbar Study [i.e., Frederick C. Dunbar, et al, National Economic Research Associates, *Recent Trends III: What Explains Setlements in Shareholder Class Actions* (June 1995)] found that fee awards in common fund cases commonly range between 20% and 40% of the gross monetary settlement. The Dunbar Study also found that cases involving class recoveries in excess of $100 million did not vary substantially from the percentage of the fund awarded in much smaller class actions. Therefore, it is reasonable to infer that courts find that substantial attorneys' fee awards are reasonable in cases where class counsel has obtained huge recoveries for their clients....The declining percentage-of-recovery approach...has an adverse impact on the interest of class members. One of the primary benefits of the percentage methodology is the increased alignment of the class members' and class counsel's interests....[The] attorneys face great risk by holding out for a much higher settlement offer; therefore, holding out may be contrary to the attorneys' self-interest if their fee is only raised by [a decreased percentage]....With such high stakes, an economically rational attorney might be reluctant...to try to [increase] the classes' recovery when his own position would be improved only modestly. Therefore, use of a constant percentage for recoveries of all sizes better aligns the rational self-interests of class members and their attorneys.

Conte & Newberg, *Newberg on Class Actions* (4th ed.), §14:6, at pp. 559-60 [citing Goodrich, Frank & Silberg, Reagan, *Common Fund and Common Fund Problems: Fee Objections and*

Class Counsel's Response, 17 Rev. Litig. 525, 546-48 (Summer 1998)] [emphasis added].

The question then becomes which "constant" percentage of the settlement fund should be the starting point or "benchmark" for the Court in its present analysis. The *Manual for Complex Litigation* identifies 25% of the common fund as "a typical benchmark," although it follows with the comment that no single rate can "capture variations" in the characteristics of class actions generally. *See Manual for Complex Litigation* (4th ed.), §14.121, at p. 188 & n. 489. As noted *supra*, this Court previously has echoed the same sentiment in this case.

Considering the above-cited ranges of recovery, including in so-called "large fund" cases as specified in *In re: Lucent Technologies, supra*, the PSC respectfully submits that an appropriate "benchmark" percentage fee herein is 28% (roughly, the mid-point between the range of 25% and 30% noted in *In re: Lucent Technologies* in case settlements exceeding $100 million). That this benchmark is slightly greater than the 25% benchmark reported in the *Manual for Complex Litigation* is justifiable based on several considerations related to the case at hand:

First, the common benefit fee award herein is one in which not only PSC members but other plaintiffs' counsel will participate, assuming a demonstrated contribution to the common benefit achieved through this settlement. The parties' Settlement Agreement obliges the defendant to pay "all common benefit fees...in connection with prosecuting this litigation...." *See* Settlement Agreement of 10/9/06, at p. 25 [emphasis added]. Moreover, the initial settlement document memorializing the settlement, the parties' Memorandum of Understanding, contained defendant's acknowledgment that "the Plaintiff Steering Committee's and Class Counsel's efforts" contributed to and assisted in the resolution of this case from its inception. *See* Memorandum of Understanding of 9/25/06, at p. 3 [emphasis added]. It cannot be denied that in

this case non-PSC members who have contributed to the resolution of this litigation for the good of the class can, and should, be recognized through the assessment of a common benefit fee, which fee in turn should be sufficient compensation for this purpose.

Secondly, and independent of the *Johnson* factor analysis to follow, *infra*, this case cannot be viewed as "typical" for "benchmark" fee reasons, given the context of Hurricane Katrina. The aftermath of that historic storm disrupted the lives of all citizens in this area, including not just the members of the plaintiff class, but also their attorneys and the law firms which served on the PSC. Displaced without exception after Katrina, class counsel established offices far and wide, but still came together and organized themselves under the most adverse conditions, in order to assist in a case that would facilitate the post-Katrina recovery of a community. The stressors and risks associated with counsel's efforts cannot — and need not — be neatly categorized or "graded" under the *Johnson* factors. They better serve as a backdrop for a remarkable achievement, virtually in "record time," on behalf of the plaintiff class. It is submitted, therefore, that some slight increase in the "typical" percentage fee be made as a starting point in this Court's analysis and calculation.

The use of a benchmark fee of 28% cannot be presumed out of the ordinary or unreasonable in a class settlement of this size. *See In re: Oxford Health Plans, Inc. Sec. Litig.*, MDL 1222 (SDNY, June 2003) [28% fee in settlement of $300 million]; *Spartenburg v. Reg'l Health Servs. District, Inc. v. Hillenbrand Indus.*, No. 7:03-2141-HFF (Dis. Ct., So. Carolina) [33% fee in settlement of $337, 500,00 million].

(C) ADJUSTMENT OF PERCENTAGE FEE UNDER THE JOHNSON FACTORS

As noted, it is customary in this jurisdiction for district judges to begin, but not end, their calculation of common benefit fees with a "benchmark" percentage. Reference to the *Johnson* factors is an appropriate method for adjusting the "benchmark." *See, e.g., In re: Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, MDL 1643 (EDLA), "Final Approval of Settlement Order," Document 174 (8/31/06), at p. 43 [adjusting "benchmark" fee of 25% to 29%, based on consideration of two *Johnson* factors]. *See also In re: Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) [adjusting 25% "benchmark" fee to 33-1/3%, "because of the complexity of the issues and the risks"].

Two *Johnson* factors which may be considered collectively are (1) the time and labor required to achieve this settlement and (2) the time limitations imposed by the circumstances of the case. As the attached Affidavit and exhibits document, a substantial amount of time has been reported to date by class counsel and their staff in this matter, i.e., 34,059 hours. But this is a running total; it does not take into account the ongoing work of class counsel in presenting this matter for settlement approval at the fairness hearing, in presenting and arguing this fee application, in negotiating allocation and notice issues, as well as other "mechanical issues" regarding finalization of the settlement, and — perhaps most importantly — in operating and managing the processes both for opt-out individuals to rejoin the class and for all class members to execute the required proof of claim forms. The proof of claim process in particular is a time-consuming and staff-intensive effort.

The time limitations imposed by the circumstances of this case are well-known to the Court. It was important from the outset to expedite the resolution of claims by members of a

community so dramatically impacted by Hurricane Katrina. Class counsel and their staff responded to this challenge. Working late hours routinely, including on weekends and holidays, counsel adhered to the expedited pace of events in regard to class certification, motion practice, trial preparation, factual investigation, and, finally, settlement negotiations themselves.

It is respectfully submitted that the *Johnson* factors related to labor and time limitations warrant an upward adjustment in the "benchmark" percentage fee.

A related *Johnson* factor is the preclusion of other employment due to counsel's acceptance of the case. Given the aforementioned circumstances in which PSC members found themselves personally and professionally following Hurricane Katrina, and given the expedited pace of the litigation, it is unquestionable that class counsel in this case were obliged to forego many activities related to the re-establishment of law practices, in order to carry out their PSC responsibilities. This factor also warrants an upward adjustment in the "benchmark" percentage.

Whether the fee in the case is contingent, and what the "customary" fee in such a matter would be, are *Johnson* factors which readily can be evaluated for present purposes, for it has been suggested frequently that the percentage-of-fund common benefit fee award "should mimic the market," i.e., the percentage should be designed

> to mirror practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.

Conte & Newberg, *Newberg on Class Actions* (4th ed.), §14:6, at p. 560 [citing Goodrich, et al, *Common Fund and Common Fund Problems: Fee Objections and Class Counsel' s Response*, 17 Rev. Litg. 525 (Summer 1998)]. This principle was articulated in the well-reasoned decision of the Seventh Circuit in *In re: Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001):

> We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.

264 F.3d at 718, and cases cited therein.[8]

The Court no doubt is aware that the customary contingency fee charged in personal injury suits in this jurisdiction and legal community is between 33-1/3% and 40%. Both this standard range, and the risk-benefit rationale for the contingency fee system itself, were acknowledged previously by former Judge Henry Mentz of this Court:

> This [contingency fee] system permits a greater recovery for successful cases, thereby rewarding [the attorneys'] investment in successes and offsetting the losses from unsuccessful cases. The customary contingency fee is between 33-1/3% and 40%.

In re: Shell Oil Refinery, 155 FRD 552, 571 (E.D. La. 1993). It also is possible that in some personal injury matters, percentage fees may range higher than 40%. *See Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992) ["[w]e know that in personal-injury suits the usual range for contingent fees is between 33 and 50 percent...."].

The *Johnson* factors of whether the fee is contingent and the customary fee in the community should be evaluated according to the "mirror the marketplace" principle. This would

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[8]What is particularly interesting about the Seventh Circuit's analysis in *Synthroid Marketing* is that the district judge had attempted to limit the common benefit fee on the basis that the settlement fund was a "megafund," so that the percentage fee would be caused to decrease as the size of the fund increased. But the appellate court properly held that it was erroneous to suggest that a so-called "megafund rule" should effectively "trump" market rates. *See* 264 F.3d at 718.

suggest that a "benchmark" fee of 28% fee in this case again might be subject to some upward adjustment on the basis of these factors as well.

Some of the remaining *Johnson* factors, namely, the experience, reputation and ability of counsel, the "undesirability" of the case, and the nature and extent of the professional relationship with the clients might be factors of limited instructiveness for the present analysis (the skill of class counsel, for example, is reflected in the outcome). Moreover, the *Johnson* consideration of "awards in similar cases" already has been addressed by the PSC in the foregoing analysis and survey of percentage fee in cases with similar settlement amounts. In these cases, the fee percentages already have been cited as a basis for establishing the proposed "benchmark" fee of 28%.

The last-remaining *Johnson* factor, however, does warrant discussion: the result obtained for the class, i.e., the amount of the settlement fund. When the amount is limited, it historically has operated as "the most critical factor" in determining the common benefit fee to be awarded. *See McDonnell v. Miller Oil Co., Inc.*, 134 F.3d 638, 641 (4th Cir. 1998), and cases cited therein. Yet, under the previously-discussed "mega-case" or "megafund rule," the defendant in this case no doubt will suggest that a settlement fund amount exceeding $300 million should cause a downward adjustment in whatever benchmark fee the Court deems appropriate.

The PSC will not reiterate its arguments why this "megafund rule" serves as bad policy in class action litigation, not only as a disincentive for those willing to serve as class counsel, but also as a factor which undermines the desired harmony of interests between class counsel and their clients. In the final analysis, perhaps this *Johnson* factor is one the Court will view as neutral for present purposes; the policies of "disincentive" and "windfall" are opposed, and may

be considered offsetting. As the Third Circuit Task Force has noted, using the significance of the settlement fund as a basis for increasing percentage fee awards is no more reasonable or unreasonable than using the same factor to decrease the percentage award.

Judge Sarah Vance increased a "benchmark" fee of 25% to a common benefit fee of 29%, based on her analysis that only two of the twelve *Johnson* factors warranted such an increase. *See In re: Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation, supra.* In that case, not a single deposition was taken. Here, it is submitted that no fewer than five of the *Johnson* factors clearly warrant an increase in the "benchmark" fee percentage.

The PSC accordingly requests that the Court increase the proposed "benchmark" percentage of 28% to a common benefit fee of **35%**, based upon the *Johnson* factors as applied to the facts of this case. This would represent an assessment and award of a total common benefit fee in the amount of **$115,544, 100** [the settlement program value of $330,126,000 multiplied by 35%].

In addition, the PSC moves for an order from the Court that the defendant Murphy Oil pay common benefit expenses at this time in the total amount of **$2,659,043**. *See* attached Affidavit of Dennis McCartney [and Exhibit B]. The order in this regard, however, should provide for supplementary payment and reimbursement by the defendant, since common benefit expenditures will continue to occur until the proposed settlement is approved and final.

XII. CONCLUSION

Counsel engaged in class action cases arising from significant environmental disasters typically are called upon to invest substantial time and money in pursuing litigation on behalf of thousands of individuals. They do so without any payment in the course of litigation, and without any guarantee of payment at the end of the case. Such counsel obviously operate with a far higher level of "loss exposure" than that involved in personal injury litigation pursued on an individual case basis. Attorneys who choose to undertake such cases also must be prepared to marshal resources comparable in quantity and quality to those available to the defendant, which typically (as here) is a large corporate entity with multiple layers of insurance coverage.

The lawyers and their firms who are prepared to accept these challenges should be able to do so with the expectation of full compensation consistent with the percentage fee marketplace. Otherwise, there is diminished incentive to accept such enormous responsibility and exposure; and claimants in turn have little prospect of a "level playing field" in class actions against parties with well-paid counsel and large expense reserves.

This important principle was nowhere better articulated than in the testimony of distinguished legal scholar Arthur Miller during the 5/17/2004 Fairness Hearing in *Craig West, et al vs. G & H Seed Company, et al,* 27th Judicial District Court for the Parish of St. Landry:

> I have a philosophical bias that our courts should be open as widely as possible to the people; and, we live in a complex world in which access to the court is very difficult for average Ameircans to secure because of the economics of litigation. The vast, vast, vast majority of Americans cannot pay by the hour. The vast, vast, vast majority of Americans cannot get a lawyer's attention on modest claims, and the only way that access is given to those people is the class action; and, therefore, it is important, I believe, for purposes of social therapeutics to the reality of our legal system that we

> always have the best and the brightest available to take up the legions, the small people. And, therefore, it's very important not to so reduce or so impair the economic rewards to class action lawyers that they decide to go into other fields.

See attached excerpt from 5/17/04 Fairness Hearing Testimony of Arthur Miller, *Craig West, et al v. G & H Seed Company, et al*, 27th Judicial District Court for the Parish of St. Landry, No. 99-C-4984-A.

The common benefit fee payment requested in this motion does not constitute a "windfall," but a reasonable percentage fee under the guidelines established by legal scholars and the reported jurisprudence. Considering the unique circumstances of the effort undertaken and the result achieved in this post-Katrina litigation, it is a fee amount that is fully justified and supported by the record.

Finally, the fee requested in this motion is intended, and must be designed, to recognize the efforts of not just the named members of the PSC, their law firms and their staff, but the efforts of all plaintiffs' counsel who served as *de facto* class counsel in pursuing the "common good" of plaintiffs in this case. Whatever the measure of wholly private legal services performed for individual clients, the "common benefit" legal effort of the many plaintiffs' counsel in this case was nothing less than Herculean.

The defendant has voluntarily agreed in settlement to both compensate that effort and reimburse the associated expenses. The Court therefore is asked to assess and award a reasonable common benefit fee, and tax the common benefit expenses reflected in the attached itemization. Following proper notice to class members and with the entry of appropriate findings of fact and conclusions of law, pursuant to FRCP 23(h)(1)&(3), the instant motion should be

granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, this 13th day of November, 2006.

Sidney Torres III

SIDNEY D. TORRES, III

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PATRICK JOSEPH TURNER, ET AL	CIVIL ACTION NO. 05-4206
VERSUS	CONSOLIDATED CASES
MURPHY OIL USA, INC.	SECTION "L" (2)

* *

AFFIDAVIT OF DENNIS M. McCARTNEY, CPA

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary, personally came and appeared:

DENNIS M. McCARTNEY

who, first being sworn, did attest as follows:

I am a Certified Public Accountant with Bourgeois Bennett, LLC ("BBLLC"), which has accumulated the common benefit time and expenses reported and/or incurred as of November 9, 2006 in the above-captioned class litigation. Requirements for common benefit time and expenses were outlined by the Court Order and Supplement dated January 31, 2006 regarding Plaintiffs' Counsel's Time and Expense Submissions ("the January 31st Order"). The common

benefit hours and expenses presented do not represent all time and expense to be incurred as there are still ongoing activities, outstanding invoices to be paid upon receipt, and submissions for time and expenses incurred that are not due to be reported as of this date under the requirements of the January 31st Order. The common benefit time and expenses presented could also change based on the results of the evaluation of all common benefit items by the Plaintiff's Audit Committee, which has not been finalized at this date.

A summary of the common benefit time is included as Exhibit A. This Exhibit presents a summarization of hours reported by firm and the title categories established in the January 31st Order in rounded whole hours. The time was accumulated based on electronic submissions of hours to BBLLC from each firm performing Plaintiffs' Steering Committee ("PSC") common benefit work. To date 34,059 hours of common benefit work has been reported.

A summary of the common benefit expenses is included as Exhibit B. This Exhibit presents a summarization of expenses, in rounded whole dollars, by the expense categories established in the January 31st Order. The expenses are also segregated between Shared Costs and Held Costs, as defined in the January 31st order. Shared Costs are costs paid from the PSC Expense Fund, which was funded by assessment paid into the PSC Expense Fund by the PSC member firms. Held Costs are the costs incurred by the PSC member firms for common benefit work that are being held for potential future reimbursement. Total common benefit costs to date are $2,659,043, consisting of $2,457,270 in of shared costs and $201,773 in held costs.

Shared costs presented in Exhibit B were accumulated from the accounting records for the PSC Expense Fund. BBLLC performed the accounting and payment functions for the PSC Expense Fund. Expenses are recorded in the accounting records of the PSC Expense Fund by BBLLC at the time a Plaintiff's Executive Committee member submits an approved invoice for

payment. Costs incurred that have not been submitted by vendors for payment are not included in the amounts presented.

Held Costs presented in Exhibit B were accumulated from the electronic submissions of common benefits costs to BBLLC from each firm performing PSC common benefit work.

As discussed above, the common benefit time and expenses presented herein are for amounts incurred and/or reported to date, and do not represent the entire population of time and costs that will be incurred by the PSC.

DENNIS M. McCARTNEY, CPA

WITNESSES:

SWORN TO AND SUBSCRIBED FOR ME, this
13th day of November, 2006.

NOTARY PUBLIC

Gerald E. Meunier
NOTARY PUBLIC
State of Louisiana
LA. Bar No. 9471
My commission is issued for life.

Patrick Joseph Turner, etal Versus Murphy Oil USA, Inc.
Summary of Reported Common Benefit Time
As of November 10, 2006

	Committee Member Hours	Associate Attorney Hours	Paralegal Hours	Other Hours	Total Hours
Firm 1		1,559		3	1,562
Firm 2	189	271	160		619
Firm 3	779	448		307	1,533
Firm 4		168		28	195
Firm 5	1,952	361	156		2,468
Firm 6		222			222
Firm 7		442			442
Firm 8	1,173	200	63		1,435
Firm 9		465			465
Firm 10	330	102			432
Firm 11		36	9	2	47
Firm 12	46	126			172
Firm 13	2,289	8	0	18	2,316
Firm 14	316				316
Firm 15	1,952	2,123	210	1	4,285
Firm 16	1,206	4	24		1,234
Firm 17	1,305	46	1		1,352
Firm 18	477	1,284	37	989	2,787
Firm 19		89	-	197	286
Firm 20	1,517	1,516	16	102	3,152
Firm 21	1,228	195	94	582	2,099
Firm 22	673				673
Firm 23	339	92	150		581
Firm 24	390	92			482
Firm 25		361			361
Firm 26	1,715	1,339	450	646	4,150
Firm 27		395			395
Total of All Firms	17,875	11,941	1,369	2,874	34,059

EXHIBIT A

Patrick Joseph Turner, etal Versus Murphy Oil USA, Inc.
Summary of Reported Common Benefit Expenses
As of November 10, 2006

		Shared Costs	Held Costs	Total Costs
E101	Fax		2,615	2,615
E102	Overnight Mail	6,569	1,202	7,772
E103	Postage	-	3,716	3,716
E104	Copying	1,378	36,180	37,558
E105	Research	768	10,264	11,032
E106	Telephone	-	2,345	2,345
E107.1	Airfare	1,940	10,698	12,639
E107.2	Mileage	-	12,217	12,217
E107.3	Hotels / Lodging	778	15,351	16,129
E107.4	Meals	1,640	4,507	6,147
E107.5	Ground Transportation	80	4,693	4,773
E108	Other	683	20,620	21,303
E201	Court Fees	585	1,811	2,396
E202	Deposition	41,654	616	42,270
E203	Document depository	11,554	-	11,554
E204	PLC admin matters	62,013	37,501	99,514
E205	PSC Mtgs / Conf calls	10,286	3,135	13,421
E206	Legal and accountants fees	204,759	420	205,179
E207	Experts / Consultants	1,919,536	18,136	1,937,672
E208	Outside printing	134,516	1,256	135,772
E209	Research - 3rd parties	7,341	189	7,529
E210	Common Witness Exp	1,625	-	1,625
E211	Bank Charges	57	-	57
E212	Investigative services	-	5,550	5,550
E213	Trial Exhibits	-	6,579	6,579
E214	Claims Office Expenses	40,255	918	41,173
E215	Equipment/space rentals	9,254	1,254	10,508
E216	Taxes - state and federal	-	-	-
E217	Charter Airfare	-	-	-
TOTAL COSTS		**2,457,270**	**201,773**	**2,659,043**

Total Assessments paid to date	2,475,000
Available PSC Expense Fund Balance	17,730

EXHIBIT B

THE TWENTY-SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. LANDRY
STATE OF LOUISIANA

CRAIG WEST ET AL
VERSUS DOCKET NO. 99-C-4984-A
G & H SEED COMPANY ET AL

TRANSCRIPT OF EVIDENCE
RELATING TO FAIRNESS HEARING

PROCEEDINGS had in the above entitled and numbered cause at Opelousas, Louisiana, before His Honor, James T. Genovese, Judge of the Twenty-Seventh Judicial District Court in and for the Parish of St. Landry, State of Louisiana, on the 17th day of May, 2004.

APPEARANCES:

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MRS. JANE FONTENOT, Official Court Reporter, Twenty-Seventh Judicial District Court in and for the Parish of St. Landry, State of Louisiana

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THE COURT: This is the matter of Craig West et al versus G & H Seed Company et al in docket number 99-C-4984-A. The matter before the court is a special fixing Code of Civil Procedure Article 594 fairness hearing that was set subsequent to the March 29th preliminary approval of the proposed settlement in this matter. Are the objectors here?

MR. TOCE: Yes, Your Honor. Andrè Toce for the intervenor/objectors. With me is Mr. Stevens, Mr. McNeely, and Mr. Carl Duhon.

THE COURT: Okay. All right, the court will -- has before it various matters that it will address in this matter. There is, in the order filed, there's a Motion for Final Approval of the Class Action Settlement, a Motion to Set Reserves and Award Attorneys' Fees and Costs. There is also -- there was an objection filed. Mr. Armentor is here this morning. There was an objection that was filed by Mr. Armentor that was subsequently withdrawn.

MR. ARMENTOR: It has been withdrawn, Your Honor.

THE COURT: Has the withdrawn -- been withdrawn, or are you -- you're just here?

MR. ARMENTOR: I'm just observing, Your Honor.

THE COURT: Okay. But you did file on behalf of various people, but I

A. Yes. You're in the fifth year, you could just as easily be in the tenth year in this case given the post-decisional aspects of an appeal, and then conceivably an endless stream of damage suits, of damage proceedings.
Q. The Johnson case also asks us to consider the amounts involved and the results obtained, and I think you've addressed that. The experience, the reputation, and the ability of the attorneys, you've addressed that. The undesirability of the case, and I think you've addressed that in terms of how difficult a case it was.
A. Yes.
Q. And the award in similar cases. And again, I think we see in the Combustion decision and Judge Haik articulating in that decision that not necessarily all of these factors were applicable, not necessarily all of them need to be considered, but this is just a gauge, again, an illustrative list of considerations to allow the court to arrive at what it feels is the appropriate contingency fee.
A. You know, there -- there is a relationship between the result these lawyers achieve for the class members and how they should be compensated. Even though it is extremely difficult to figure out what percentage of loss they have recovered for their client, it has got to be, in the little mathematics I've done with numbers I've seen, the result they have achieved has got to be far higher than what the empiric evidence shows is recovered on average in class actions, which is between seven and 14 percent of loss. And my instinct tells me that 45 million dollars is significantly higher than recoverable loss -- a higher percentage of recoverable loss.
Q. I've heard you testify before that, with regard to this inquiry, that, as an academician, you're not only concerned about this case, but the integrity of the system and the next case and which attorneys will be available to prosecute the next case. How does that fit into this whole decision making process with regard to whether an appropriate reward for attorneys fees should be?
A. Well, part of it is philosophical bias. I have a philosophical bias that our courts should be open as widely as possible to the people; and, we live in a complex world in which access to the court is very difficult for average Americans to secure because of the economics of litigation. The vast, vast, vast majority of Americans cannot pay by the hour. The vast, vast, vast majority of Americans cannot get a lawyer's attention on modest claims, and the only way that access is given to those people is the class action; and, therefore, it is important, I believe, for purposes of social therapeutics to the reality of our legal system that we always have the best and the brightest available to take up the legions, the small people. And, therefore, it's very important not to so reduce or so impair the economic rewards to class action lawyers that they decide to go into other fields.

That's what I think Mr. Arsenault means when he says I worry about the next class, who's going to represent the next class, and the next class, and the next class. Whether it's an economic class, whether it's a class fighting discrimination, or trying to help the environment, it's so critical that our class action lawyers be adequately, effectively, and fully compensated for the risks they take on behalf of by and large small people, little people.
Q. You've seen the Special Master Recommendation that was attached as an exhibit to the motion regarding the attorneys' fees?
A. Yes, I have.
Q. That was authored by Mr. Pat Juneau, who is the Special Master. Do you know who Mr. Pat Juneau is?
A. Yes, I do, he's one of the best.
Q. And you've had an opportunity to work in cases where he was the Special Master?
A. Yes.
Q. And what do you know about his reputation, and training, and experience as a Special Master and how he's regarded?
A. Well, he's as experienced a Special Master in complex cases as anyone in the United States. And I think the world of him, the people I hear speak of him speak of him in the highest terms, so I can't think of anyone better to oversee the distributional phase of this settlement.
Q. And you're comfortable with and concur with his recommendation with regard to attorneys' fees in this case?
A. Yes, yes.

MR. ARSENAULT: Your Honor, that's all we have at this time.
THE COURT: You wish to question, Mr. Bezet?
MR. BEZET: No, Your Honor.
THE COURT: You wish to question, Mr. Toce?
MR. TOCE: Yes, sir, Your Honor