

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ALAN B. MARCUS, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

J.C. PENNEY COMPANY, INC., et al.,

Defendants.

§ Civil Action No. 6:13-cv-00736-RWS-KNM
§ (Consolidated)

§ CLASS ACTION

**PLAINTIFFS' STATEMENT OF NON-OPPOSITION IN FURTHER SUPPORT OF
FINAL APPROVAL OF SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION,
AND AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARDS TO
PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4)**

Lead Plaintiff National Shopmen Pension Fund (“Lead Plaintiff”) and Class Representative David O’Connell (collectively, “Plaintiffs”), by and through their counsel Robbins Geller Rudman & Dowd LLP (“Lead Counsel”), respectfully submit this statement of non-opposition in further support of final approval of the Settlement, approval of the proposed Plan of Allocation, and an award of attorneys’ fees and payment of expenses, including awards to Plaintiffs for their time incurred in representing the Class.

I. PRELIMINARY STATEMENT

Pursuant to the Court’s July 24, 2017 Order Preliminarily Approving Settlement and Providing for Notice (Dkt. No. 164) (“Notice Order”), over 107,000 copies of the Notice of Pendency and Proposed Settlement of Class Action (“Notice”) and Proof of Claim and Release (“Proof of Claim”) (together, “Notice Package”) were mailed to potential Class Members and nominees¹ and the Summary Notice was published in *The Wall Street Journal* and transmitted over the *Business Wire*.² Plaintiffs and Lead Counsel are pleased to report that the deadline for objections and exclusions has passed and there are ***no objections*** to the proposed Settlement, Plan of Allocation or the fee and expense application. Additionally, only eight requests for exclusion have been received (from individual investors).³ These results are a testament to the fairness, adequacy, and reasonableness of the proposed Settlement, the proposed Plan of Allocation and Lead Counsel’s fee and expense application.

¹ See Declaration of Nashira McCoy Regarding Notice Dissemination and Requests for Exclusion Received to Date (“McCoy Decl.”), ¶¶5-7, submitted herewith.

² See Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date (Dkt. No. 170) (“Sylvester Decl.”), ¶14.

³ McCoy Decl., ¶¶10-12.

II. THE REACTION OF THE CLASS STRONGLY SUPPORTS APPROVAL OF THE SETTLEMENT AND PLAN OF ALLOCATION

This is a complex securities class action that was heavily litigated for four years, involving countless hours of motion practice, fact and expert discovery, and trial preparation. Due to the complex nature of this case, Lead Counsel was required to expend a significant amount of time and effort to best represent the interests of the Class. Through these extensive efforts, Lead Counsel was able to secure a \$97,500,000 all cash settlement for the Class. This Settlement was achieved after discovery was nearly complete and represents a recovery of between 21% and 100% of the Class' maximum Class Period recoverable damages. As set forth in Plaintiffs' Motion and Memorandum of Law in Support of Final Approval of Settlement and Approval of Plan of Allocation (Dkt. No. 165) at 2, 13, this is more than eight times greater than the median percentage recoveries achieved in similar securities class action settlements in 2016.

The reaction of the Class to the Settlement is a key factor in weighing its adequacy. As the Honorable Jeremy Fogel, now director of the Federal Judicial Center, noted: “[T]he reaction of the class to the proffered settlement . . . is perhaps the most significant factor to be weighed in considering its adequacy.” *In re Rambus Inc. Derivative Litig.*, No. C 06-3513 JF (HRL), 2009 U.S. Dist. LEXIS 131845, at *10 (N.D. Cal. Jan. 20, 2009) (citation omitted). *See, e.g., In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1068 (S.D. Tex. 2012) (quoting *In re Enron Corp. Sec.*, 228 F.R.D. 541, 567 (S.D. Tex. 2005)) (“Receipt of few or no objections ‘can be viewed as indicative of the adequacy of the settlement.’”); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 U.S. Dist. LEXIS 19210, at *51 (E.D. La. Mar. 2, 2009) (“a small number of . . . objections can be viewed as indicative of the adequacy of the settlement”); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 853 (E.D. La. 2007) (same); *DeHoyos v. Allstate Corp.*, 240 F.R.D.

269, 293 (W.D. Tex. 2007) (“[a] minimal level of opposition from absent class members weighs in favor of approving the settlement”).

After an extensive Court-approved notice program, the Class’ response to the Settlement and Plan of Allocation appears to be overwhelmingly positive. Pursuant to the Notice Order, a total of 107,154 copies of the Notice Package were mailed to potential Class Members and nominees. McCoy Decl., ¶7. In addition, the Summary Notice was transmitted over the *Business Wire* and published in *The Wall Street Journal* on August 15, 2017. Sylvester Decl., ¶14. The Notice Package, Settlement Agreement, Notice Order, and all papers filed in support of the Settlement were also posted on a dedicated website for the Settlement, www.jcpenneysecuritieslitigation.com. McCoy Decl., ¶8.

The November 8, 2017 deadline for objecting to any aspect of the Settlement and the Plan of Allocation has long passed and to counsel’s knowledge, as of the date of this statement, not a single objection has been received to any aspect of the Settlement or Plan of Allocation. Accordingly, the reaction of the Class is significant evidence that the Class supports the Settlement and Plan of Allocation.

Similarly, only eight requests for exclusion were received. McCoy Decl., ¶12. A small number of requests for exclusion supports the finding that the proposed Settlement is fair, reasonable, and adequate. *See In re Oil Spill*, 295 F.R.D. 112, 150 (E.D. La. 2013) (“relatively few number of . . . opt outs supported fairness and adequacy of the settlement”); *Billitteri v. Sec. Am., Inc.*, No. 3:09-cv-01568-F, 2011 WL 3586217, at *14 (N.D. Tex. Aug. 4, 2011) (finding class members’ opinions favored approval of the settlement where “[t]he extremely small number of opt-outs suggests a favorable opinion by the absent class members”) (citation omitted); *OCA*, 2009 U.S. Dist. LEXIS 19210, at *51 (“a small number of opt-outs . . . can be viewed as indicative of the adequacy of the settlement”).

III. THE REACTION OF THE CLASS STRONGLY SUPPORTS APPROVAL OF LEAD COUNSEL’S REQUEST FOR AN AWARD OF ATTORNEYS’ FEES AND EXPENSES AND AWARDS TO PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4)

For its exhaustive efforts, Lead Counsel requests an award of attorneys’ fees of 30% of the Settlement Amount and expenses of \$868,760.57, which were reasonably incurred in the prosecution of the litigation, plus interest on both amounts at the same rate and for the same periods as earned by the Settlement Fund. *See* Lead Counsel’s Motion and Memorandum of Law in Support of an Award of Attorneys’ Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) (“Fee and Expense Brief”) (Dkt. No. 166) at 1. Lead Counsel’s fee request is well within the normal range of awards made in contingent fee matters of this type in this Circuit and in this Court, as well as in numerous decisions throughout the country, and is the appropriate method of compensating counsel for the exceptional result they have achieved. Moreover, this fee request falls squarely within the mandate of the Private Securities Litigation Reform Act of 1995 (“PSLRA”) that “a reasonable percentage of the amount” of damages and interest paid to the class be awarded to counsel. *See* 15 U.S.C. §78u-4(a)(6). Further, Plaintiffs have each approved the amount of the attorneys’ fees requested, giving further validity to the reasonableness of the request.

The Notice reported that Lead Counsel would request a fee award of up to one-third of the Settlement Amount and payment of expenses not to exceed \$950,000, plus interest on both amounts. Lead Counsel also filed their Fee and Expense Brief, which was posted on the Settlement website on October 27, 2017. McCoy Decl., ¶8. The absence of *any objections* to the requested fee or expense award weighs strongly in favor of approval. *See, e.g., Bethea v. Sprint Commc’ns Co. L.P.*, No. 3:12-cv-322-CWR-FKB, 2013 WL 228094, at *5 (S.D. Miss. Jan. 18, 2013) (citing *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03–0085 FSH, 2005 WL 3008808, at *13 (D.N.J. Nov. 9, 2005)) (“finding that lack of objections from the class supported the reasonableness of the fee

request”); *Cook v. Howard Indus., Inc.*, No. 2:11CV41-KS-MTP, 2013 WL 943664, at *4 (S.D. Miss. Mar. 11, 2013) (“The absence of any objection from . . . any Class Member to Class Counsel being awarded [its requested] fee further supports the award.”); *In re Enron Corp. Sec.*, 586 F. Supp. 2d 732, 804 (S.D. Tex. 2008) (finding “that general acceptance of the requested fee amount by all the pension funds and all but one institutional investor strongly supports the reasonableness” of the requested fees); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (absence of objections to counsel’s fee and expense request “attests to the approval of the Class” and supports approval); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (reaction of class members to fee and expense requests “‘is entitled to great weight by the Court’” and absence of any objections “suggests that [a] fee request is fair and reasonable”) (citation omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (same).

Similarly, the lack of any objection to Plaintiffs’ requests pursuant to 15 U.S.C. §78u-4(a)(4), which was also disclosed in the Notice and Lead Counsel’s Fee and Expense Brief, supports approval of those requests. *See, e.g., Flag Telecom*, 2010 WL 4537550, at *31.

IV. CONCLUSION

For the reasons set forth herein and in Plaintiffs’ and Lead Counsel’s previously submitted briefs and declarations, Plaintiffs respectfully submit that the Settlement is a very good result for the Class, and the proposed Plan of Allocation is both fair and reasonable. Therefore, both should be approved as fair, reasonable and adequate. Finally, Lead Counsel’s fee and expense request is reasonable under the circumstances and should be awarded in the amounts requested, as well as Plaintiffs’ requests for reimbursement of their expenses pursuant to 15 U.S.C. §78u-4(a)(4).

Proposed orders, which include the rescheduled hearing date of December 5, 2017, are submitted herewith.

DATED: November 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 28, 2017.

s/ Robert R. Hensler Jr.

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

This matter came before the Court for hearing pursuant to the Order Preliminarily Approving Settlement and Providing for Notice (“Notice Order”) dated July 24, 2017, on the application of the Settling Parties for approval of the Settlement set forth in the Settlement Agreement dated June 14, 2017 (the “Settlement Agreement”). Due and adequate notice having been given to the Class as required in the Notice Order, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Final Judgment incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement, unless otherwise set forth herein.

2. This Court has jurisdiction over the subject matter of the Action and over all Settling Parties to the Action, including all members of the Class.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court entered an order certifying the Class defined as: “All persons who, between August 20, 2013 and September 26, 2013 (the “Class Period”), purchased or otherwise acquired J.C. Penney Company, Inc. securities, and were damaged thereby. Excluded from the Class are current and former defendants, members of the immediate family of any current or former defendants, directors, officers, subsidiaries and affiliates of J.C. Penney Company, Inc., any person, firm, trust, corporation, officer, director or other individual or entity in which any current or former defendant has a controlling interest, and the legal representatives, affiliates, heirs, successors-in-interest or assigns of any such excluded party.” The pleadings and briefing submitted in connection with class certification made clear that this class definition includes persons who, during the same period, sold JCPenney put options and were damaged thereby, and such persons are, thus, deemed to be included as Class Members.

4. Pursuant to Federal Rule of Civil Procedure 23, this Court hereby approves the Settlement set forth in the Settlement Agreement and finds that said Settlement is, in all respects, fair, reasonable, and adequate to the Class.

5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court finds that the Settlement Agreement and Settlement are fair, reasonable, and adequate as to each of the Settling Parties, and that the Settlement Agreement and Settlement are hereby finally approved in all respects, and the Settling Parties are hereby directed to perform its terms.

6. Accordingly, the Court authorizes and directs implementation of all the terms and provisions of the Settlement Agreement, as well as the terms and provisions hereof. The Court hereby dismisses, as to Defendants, the Action and all Released Claims of the Class with prejudice, without costs as to any of the Released Persons, except as and to the extent provided in the Settlement Agreement and herein.

7. Upon the Effective Date hereof, and as provided in the Settlement Agreement, Plaintiffs shall, and each of the Class Members shall be deemed to have, and by operation of this Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims (including, without limitation, Unknown Claims) against the Released Persons, whether or not such Class Member executes and delivers the Proof of Claim and Release.

8. Upon the Effective Date hereof, and as provided in the Settlement Agreement, each of the Released Persons shall be deemed to have, and by operation of this Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all of the Class Members, and Plaintiffs' Counsel from all claims (including, without limitation, Unknown Claims) arising out of, relating to, or in connection with, the institution, prosecution, assertion, settlement, or resolution of the Action or the Released Claims.

9. Upon the Effective Date hereof, and as provided in the Settlement Agreement, Plaintiffs and each of the Class Members, and their heirs, executors, administrators, successors, and assigns, shall also be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Released Persons and their counsel from all Released Claims (including, without limitation, Unknown Claims) arising out of the defense, conduct, settlement, or resolution of the Action or the Released Claims.

10. Upon the Effective Date, Plaintiffs and each of the Class Members who have not timely opted out of the Class, and their predecessors, successors, agents, representatives, attorneys, and affiliates, and the heirs, executors, administrators, successors, and assigns of each of them, directly or indirectly, individually, representatively, or in any other capacity, shall be permanently barred and enjoined from the assertion, institution, maintenance, prosecution, or enforcement against any Released Person, in any state or federal court or arbitral forum, or in the court of any foreign jurisdiction, of any and all Released Claims (including, without limitation, Unknown Claims), as well as any other claims arising out of, relating to, or in connection with, the defense, settlement, or resolution of the Action or the Released Claims.

11. The Notice of Pendency and Proposed Settlement of Class Action given to the Class in accordance with the Notice Order entered on July 24, 2017, was the best notice practicable under the circumstances, including the individual notice to all members of the Class who could be identified through reasonable effort. Said notice provided the best notice practicable under the circumstances of those proceedings and of the matters set forth therein, including the proposed Settlement set forth in the Settlement Agreement, to all Persons entitled to such notice, and said notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process.

12. Any plan of allocation submitted by Lead Counsel or any order entered regarding any attorneys' fee and expense application shall in no way disturb or affect this Judgment and shall be considered separate from this Judgment.

13. Neither the Settlement Agreement nor the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the Settlement (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Released Persons; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Persons; or (c) is or may be deemed to be or may be used as an admission or evidence that any claims asserted by Plaintiffs were not valid or that the amount recoverable was not greater than the Settlement amount, in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Released Persons may file the Settlement Agreement and/or this Judgment in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

14. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing exclusive jurisdiction over: (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, interest, and expenses in the Action; and (d) all Settling Parties hereto for the purpose of construing, enforcing, and administering the Settlement Agreement.

15. The Court finds that during the course of the Action, the Settling Parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

16. In the event that the Settlement does not become effective in accordance with the terms of the Settlement Agreement, or the Effective Date does not occur, or in the event that the Settlement Fund, or any portion thereof, is returned to the Defendants, then this Judgment shall be rendered null and void to the extent provided by and in accordance with the Settlement Agreement and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement.

17. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

18. The Court directs immediate entry of this Final Judgment by the Clerk of the Court.

IT IS SO ORDERED.

This matter having come before the Court on December 5, 2017, on Plaintiffs' motion for approval of the Plan of Allocation of the Settlement proceeds in the above-captioned action; the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in the Settlement Agreement dated June 14, 2017 (the "Settlement Agreement"), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Settlement Agreement.

2. Pursuant to and in full compliance with Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finds and concludes that due and adequate notice was directed to all persons who are Class Members who could be identified with reasonable effort, advising them of the Plan of Allocation and of their right to object thereto, and a full and fair opportunity was accorded to all persons and entities who are Class Members to be heard with respect to the Plan of Allocation.

3. The Court finds and concludes that the formula for the calculation of the claims of Authorized Claimants which is set forth in the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") sent to Class Members provides a fair and reasonable basis upon which to allocate the proceeds of the Net Settlement Fund established by the Settlement Agreement among the Class Members, with due consideration having been given to administrative convenience and necessity.

4. This Court finds and concludes that the Plan of Allocation, as set forth in the Notice, is, in all respects, fair and reasonable and the Court approves the Plan of Allocation.

IT IS SO ORDERED.

This matter having come before the Court on December 5, 2017, on the motion of Lead Counsel for an award of attorneys' fees and expenses (the "Fee Motion"), the Court, having considered all papers filed and proceedings conducted herein, having found the Settlement of this litigation to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in the Settlement Agreement dated June 14, 2017 (the "Settlement Agreement"), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all members of the Class who have not timely and validly requested exclusion.

3. Notice of Lead Counsel's Fee Motion was given to all Class Members who could be located with reasonable effort. The form and method of notifying the Class of the Fee Motion met the requirements of Rule 23 of the Federal Rules of Civil Procedure and 15 U.S.C. §78u-4(a)(7), the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

4. The Court hereby awards Lead Counsel attorneys' fees of 30% of the Settlement Amount (or \$29,250,000), plus expenses in the amount of \$868,760.57, together with the interest earned on both amounts for the same time period and at the same rate as that earned on the Settlement Fund until paid. The Court finds that the amount of fees awarded is appropriate and that the amount of fees awarded is fair and reasonable under the "percentage-of-recovery" method.

5. The awarded attorneys' fees and expenses and interest earned thereon shall be paid to Lead Counsel from the Settlement Fund immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Settlement Agreement, and in particular, ¶6.2 thereof, which terms, conditions, and obligations are incorporated herein.

6. In making this award of fees and expenses to Lead Counsel, the Court has considered and found that:

(a) the Settlement has created a fund of \$97,500,000 in cash that is already on deposit, and numerous Class Members who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlement created by Lead Counsel;

(b) over 107,000 copies of the Notice were disseminated to potential Class Members indicating that Lead Counsel would move for attorneys' fees in an amount not to exceed one-third of the Settlement Amount and for expenses in an amount not to exceed \$950,000, and no objections to the fees or expenses were filed by Class Members;

(c) Lead Counsel has pursued the Action and achieved the Settlement with skill, perseverance and diligent advocacy;

(d) Lead Counsel has expended substantial time and effort pursuing the Action on behalf of the Class;

(e) Lead Counsel pursued the Action on a contingent basis, having received no compensation during the Action, and any fee amount has been contingent on the result achieved;

(f) the Action involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings whose resolution would be uncertain;

(g) had Lead Counsel not achieved the Settlement, there would remain a significant risk that the Class may have recovered less or nothing from Defendants;

(h) Plaintiffs' Counsel have devoted over 18,500 hours, with a lodestar value of \$9,210,496.75, to achieve the Settlement;

(i) public policy concerns favor the award of reasonable attorneys' fees and expenses in securities class action litigation; and

(j) the attorneys' fees and expenses awarded are fair and reasonable and consistent with awards in similar cases within the Fifth Circuit.

7. Any appeal or any challenge affecting this Court's approval regarding the Fee Motion shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

8. Pursuant to 15 U.S.C. §78u-4(a)(4), the Court awards \$10,200.00 to Lead Plaintiff National Shopmen Pension Fund and \$1,500.00 to Plaintiff David O'Connell for the time they spent directly related to their representation of the Class.

9. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Settlement Agreement, this Order shall be rendered null and void to the extent provided in the Settlement Agreement and shall be vacated in accordance with the Settlement Agreement.

IT IS SO ORDERED.