

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:17-cv-00140-DLR
	)	
CYPRUS AMAX MINERALS COMPANY	)	
AND WESTERN NUCLEAR, INC.,	)	
Defendants.	)	
_____	)	

**UNOPPOSED MOTION TO ENTER THE PROPOSED CONSENT  
DECREE AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("US EPA"), submits this Unopposed Motion to Enter the Proposed Consent Decree and Memorandum in Support, respectfully requesting that this Court sign and enter the proposed Consent Decree lodged on January 17, 2017. On January 17, 2017, the United States filed a Complaint against the Defendants Cyprus Amax Minerals Company and Western Nuclear, Inc. (collectively "Defendants") seeking injunctive relief and response costs pursuant to Sections 106, 107(a) and 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607(a) and 9613(b) for response actions at abandoned uranium mines located on Navajo Nation lands. If entered, the proposed Consent Decree will resolve all of the claims identified in the Complaint.

## **THE COMPLAINT AND CONSENT DECREE**

### **The Complaint**

The Complaint alleges that Defendants are liable for response costs and injunctive relief for releases or threatened releases of hazardous substances into the environment from abandoned uranium mines on Navajo Nation lands. Specifically, Defendant Cyprus Amax, through its corporate predecessors Vanadium Corporation of America and Climax Uranium Company, and Defendant Western Nuclear, Inc. operated at least 77 uranium mines (“Mine Sites”) on Navajo Nation lands. (*See Complaint ¶ 8*). The Complaint further alleges that Defendants’ mining activities resulted in waste piles which contain overburden (dirt, rock, and rubble), waste rock, and low-grade uranium ore and associated radioactive materials (including radium-226), and other heavy metals. These contaminants have been spread throughout and adjacent to the mines by wind and water processes. (*See Complaint ¶ 10*). There are Navajo Nation communities located close to the Mine Sites and residents graze sheep, cattle and horses, and collect herbs in the vicinity of the Mine Sites. (*Complaint ¶ 11*).

There have been “releases” and “threatened releases” of “hazardous substances” in the form of uranium and radium-226 from the Mine Sites formerly operated by the Defendants into the environment at each of the Mine Sites, within the meaning of CERCLA Sections 101(14), 101(22), and 107(a), 42 U.S.C. §§

1 9601(14), 9601(22) and 9607(a). (*Complaint ¶ 14*). While the Defendants  
2 operated a facility at each of the Mine Sites, there was a disposal, within the  
3 meaning of CERCLA Sections 101(29) and 107(a)(2), 42 U.S.C. §§ 9601(29) and  
4 9607(a)(2), of a hazardous substance at each of the Mine Sites. (*Complaint ¶ 15*).  
5 Accordingly, the Defendants are liable for injunctive relief in the form of cleanup  
6 of hazardous waste and past and future response costs incurred by the United States  
7 to address the contamination. (*Complaint ¶¶ 16 – 17; 31*).

### 10 **The Consent Decree**

11 Under the proposed Consent Decree, the Defendants will pay for and  
12 perform response actions to address and abate threats to human health and the  
13 environment from contamination at the Mine Sites. (*Consent Decree ¶¶ 6, 9 – 11;*  
14 *Appendix C*). These Mine Sites include the 77 mines historically operated by  
15 Defendants or their predecessors plus 17 proximate mines which may present  
16 comingled contamination. (*See Attached Exhibit E, Declaration of Ms. Linda*  
17 *Reeves, ¶ 8, dated May 9, 2017; hereinafter “Reeves Declaration”*). Response  
18 actions pursuant to CERCLA will be selected by the US EPA in accordance with  
19 the National Contingency Plan (“NCP”) which sets forth procedures used to  
20 investigate and respond to releases of hazardous substances and selection of the  
21 appropriate response actions to address the contamination. *See 40 C.F.R. Part 300,*  
22 *National Oil and Hazardous Substances Pollution Contingency Plan.* US EPA,  
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1 Navajo Nation and the Defendants will meet periodically to plan the  
2 implementation of the response actions at the Mine Sites. The Defendants are also  
3 required to pay past and future response costs of the United States and Navajo  
4 Nation. (*See Consent Decree ¶¶ 29 - 33*).

6 The proposed Consent Decree also sets forth the agreement between the  
7 United States and the Defendants regarding the allocation of response costs at the  
8 Mine Sites. Most significantly, the United States will place \$335 million into a  
9 trust account ("Trust") from which the Defendants will be able to seek  
10 reimbursement for the United States' share of incurred response costs. The lodged  
11 Consent Decree includes as Appendix F an unexecuted trust agreement to  
12 effectuate this requirement. That version of the trust agreement was unsigned  
13 because no trustee had been selected. Since lodging the Consent Decree, the  
14 United States and the Defendants interviewed several trustee candidates, and the  
15 United States has selected Le Petomane XXX, Inc., of which Jay A. Steinberg is  
16 President, to serve as the Trustee. After making revisions, the United States,  
17 Defendants and Mr. Steinberg executed the Trust Agreement. The executed Trust  
18 Agreement is attached hereto as Exhibit A and should replace Appendix F to the  
19 proposed Consent Decree.  
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1                   **Public Comment Process**

2                   In accordance with 28 C.F.R. § 50.7, Department of Justice policy, and  
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4                   Paragraph 105 of the Consent Decree, the United States published notice of the  
5                   lodging of the proposed Consent Decree in the Federal Register on January 24,  
6                   2017, to provide any interested person with the opportunity to submit comments on  
7                   the proposed settlement during a thirty (30) day public comment period. 82 *Fed.*  
8                   *Reg. 8211 (Jan. 24, 2017)*. The public comment period has now expired, and the  
9                   United States received comments from three parties, Uranium Watch and the Grand  
10                  Canyon Chapter of the Sierra Club jointly (collectively “Uranium Watch”) and Dr.  
11                  Gilbert John. (*See Attached Exhibit B, Letter from Uranium Watch and Grand*  
12                  *Canyon of the Sierra Club dated February 23, 2017 (the “UW Letter” and*  
13                  *collectively “Uranium Watch”) and Attached Exhibit C, Email from Dr. Gilbert*  
14                  *John dated February 24, 2017 (the “Dr. John Email”)*)).  
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19                  None of the commenters objected to the Consent Decree. Uranium Watch in  
20                  fact expressed support for the Consent Decree as an important step, and raised  
21                  concerns only regarding subjects which were not explicitly addressed in the  
22                  Consent Decree: temporary or permanent relocation of residents; criteria for adding  
23                  or deleting mines from the appendices; establishment of remedial action standards;  
24                  methods of transportation of mine waste; public access to information and public  
25                  involvement; the ultimate disposition of waste and lack of maps of the mines at  
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1 issue. Dr. John primarily requested notification and additional information about  
2 EPA's activities, including contamination data from certain livestock wells, and  
3 historical information about the Mine Sites.  
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5 The United States also received an email from Mr. Ivan Webb after the close  
6 of the public comment period. Mr. Weber did not characterize his email as a public  
7 comment. (*See Attached Exhibit D, Email from Mr. Ivan Weber, dated April 5,*  
8 *2017*). Nevertheless, we are providing this email to the Court in an effort to  
9 broadly construe the public comment record. Mr. Weber did not comment on the  
10 proposed Consent Decree, but asked that the United States apprise him of future  
11 actions with respect to the case.  
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14 The United States responds to all the public comments received with respect  
15 to the proposed Consent Decree in Section II, E of the brief, below, and in the  
16 Declaration of EPA Remedial Project Manager, Ms. Linda Reeves, submitted in  
17 support of this motion.  
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20 For the reasons set forth below – which establish that the proposed Consent  
21 Decree is fair, reasonable and consistent with CERCLA – the United States  
22 respectfully requests that this Court approve the Decree.  
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## ARGUMENT

### I. THE COURT SHOULD APPLY A DEFERENTIAL STANDARD OF REVIEW

There is a “clear policy in favor of encouraging settlements...particularly in an area where voluntary compliance by the parties ...will contribute significantly toward ultimate achievement of statutory goals.” *Patterson v. Newspaper & Mail Deliverers’ Union of New York and Vicinity*, 514 F.2d 767, 771 (2nd Cir. 1975).

Whether to approve the Decree is within the discretion of the Court. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The Court’s discretion should be exercised consistent with the strong policy favoring voluntary settlement of CERCLA litigation. *See generally Cal. Dep’t of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 915 (9th Cir. 2010) (discussing the importance of settlement to CERCLA’s statutory scheme); *see also Lewis v. Russell*, No. 2:03-2646 WBS CKD, 2012 WL 5471824, at \*3 (E.D. Cal. Nov. 9, 2012) (recognizing that “settlement is a favored outcome under CERCLA”). Moreover, as noted by the First Circuit, “[t]he relevant standard, after all, is not “whether the settlement is one which the court itself might have fashioned or considers as ideal, but whether the proposed [consent] decree is fair, reasonable, and faithful to the objectives of the governing statute.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)(“*Cannons II*”). The law encourages voluntary settlements between the parties, “particularly in an area where voluntary

1 compliance by the parties over an extended period will contribute significantly  
 2 toward achievement of the statutory goals.” *Patterson*, 514 F.2d at 771. While the  
 3 reviewing court may make a determination to either approve or deny a consent  
 4 decree submitted for entry, the court does not have the authority to make  
 5 modifications to a proposed decree. *See Officers for Justice v. Civil Serv. Comm’n*,  
 6 688 F.2d 615, 630 (9th Cir. 1982); *United States v. Cannons Eng’g Corp.*, 720  
 7 F.Supp. 1027, 1036 (D. Mass. 1989), *aff’d* by *Cannons*, 899 F.2d 79 (1st Cir.  
 8 1990).

## 11 II. THE CONSENT DECREE IS FAIR, REASONABLE, AND CONSISTENT 12 WITH CERCLA

13 The Consent Decree should be entered if it is fair, reasonable, and in the  
 14 interest of the public. *Conservation Law Foundation of New England, Inc. v.*  
 15 *Franklin*, 989 F.2d 54, 58 (1st Cir. 1993). Whether a decree is fair and reasonable  
 16 is determined by its ability to protect the public interest. *United States v. Akzo*  
 17 *Coatings of America.*, 949 F.2d 1409, 1435 (6th Cir. 1991). To assess the fairness  
 18 of a settlement, the Court must look to both procedural and substantive fairness.  
 19 *United States v. Montrose Chem. Corp. of Calif.*, 50 F.3d 741, 746 (9th Cir. 1995).

### 22 A) The Settlement is Procedurally Fair

23 Courts typically first examine procedural fairness to determine whether the  
 24 negotiation process was “fair and full of adversarial vigor.” *United States v.*  
 25 *Chevron U.S.A., Inc.*, 380 F. Supp.2d 1104, 1111 (N.D. Cal. 2005)(citation  
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1 *omitted*). As the Ninth Circuit concluded in *State of Oregon*, if a settlement is the  
2 product of good faith, arm's length negotiations, it is "presumptively valid and the  
3 objecting party has a 'heavy burden of demonstrating that the decree is  
4 unreasonable.'" *United States v. State of Oregon*, 913 F.2d at 581 (*quoting*  
5 *Williams v. Vukovick*, 720 F.2d 909, 921 (6<sup>th</sup> Cir. 1983)).  
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8 In the instant case, the Consent Decree is procedurally fair because it was  
9 reached after years-long, arms-length negotiations and resolves the civil claims of  
10 the United States for cleanup and response costs alleged in the Complaint. None of  
11 the public comments received questioned the procedural fairness of the Consent  
12 Decree. Each party to the proposed Consent Decree was fully represented by  
13 experienced counsel and the settlement embodied in the Consent Decree was  
14 reached after more than two years of negotiations.  
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17 B) The Settlement is Substantively Fair  
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19 The leading cases regarding the standard for entry of a CERCLA Consent  
20 Decree support entry of this proposed Consent Decree. Although those cases dealt  
21 with the payment of fixed sums to resolve liability, the underlying concepts of  
22 substantive fairness are amply met here, where Defendants have committed to do  
23 the work at the Mine Sites before the full cost of the work has been determined.  
24 (*See Consent Decree ¶ 5 and Section VI*); *Montrose Chem. Corp. of Calif.*, 50 F.3d  
25 at 741. This settlement is primarily for cleanup, rather than a fixed amount of  
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1 money – although the United States is making an initial cash contribution of \$335  
2 million through the Trust to fund work in partial resolution of its alleged liability at  
3 the Mine Sites.  
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5 The Defendants are early volunteers, committing themselves to pay for and  
6 perform response actions under CERCLA estimated to be at least \$600 million of  
7 work in exchange for a limited covenant and the ability to seek reimbursement  
8 from the Trust for up to \$335 million of incurred costs and, should the Trust run  
9 out, 50 percent of such costs from the United States. (*See Consent Decree*, ¶¶ 34,  
10 67, 69, 72, 75 and *Reeves Declaration*, ¶ 8).  
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12 The paramount aspect of fairness is fairness to the public. *Akzo Coatings*,  
13 949 F.2d at 1435. That element is manifestly met here, where a large portion of the  
14 cleanup work is being funded and performed at the Defendants’ expense. Further,  
15 no commenter has objected that this settlement is unfair.  
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18 C) The Settlement is Reasonable  
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20 “Courts have considered several criteria to determine whether a Superfund  
21 settlement is ‘reasonable.’ These include: (1) the nature and extent of the hazards  
22 at the site; (2) the degree to which the remedy provided for a consent decree will  
23 adequately address the hazards present at the site; (3) the possible alternative  
24 approaches for remedying the hazards at the site; (4) the extent to which a consent  
25 decree furthers the goals of the statutes that forms [sic] the basis of the litigation;  
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1 and (5) the extent to which the court's approval of a consent decree is in the public  
2 interest." *Cannons*, 720 F. Supp. at 1038 (citations omitted).

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4 Preliminary investigations of the Mine Sites have found evidence of  
5 releases or threatened releases of uranium and radium-226 – both hazardous  
6 substances within the meaning of CERCLA. (*See Reeves Declaration*, ¶ 8). The  
7 process for the cleanups at the Mine Sites is set forth in the Statement of Work  
8 ("SOW"), which is Appendix C of the proposed Consent Decree. The initial work  
9 to be done by the Defendants pursuant to the SOW and proposed Consent Decree  
10 includes investigation of the Mine Sites through either removal site evaluations  
11 ("RSEs") or a remedial investigation ("RI") to define the scope and full nature of  
12 the contamination. (*See Section 5, SOW*). The SOW sets forth the process and  
13 necessary components of RSEs and/or an RI for the Mine Sites. After RSEs and/or  
14 an RI have been conducted, the Defendants may be required, at US EPA's  
15 discretion, to perform Engineering Evaluation/Cost Analyses ("EE/CAs") or a  
16 Feasibility Study ("FS"). (*See Section 8, SOW*). Defendants must prepare a  
17 detailed analysis of alternatives in accordance with CERCLA, the NCP and US  
18 EPA guidance. (*See Section 8.3, SOW*). As stated above, the NCP sets forth the  
19 procedures that US EPA is required to use in investigating releases of hazardous  
20 substances and selecting the appropriate response to address the contamination.  
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27 *See 40 C.F.R. Part 300, NCP.*

1 After the completion of the EE/CAs or FS, US EPA will determine what  
2 response actions will be required at the Mine Sites. (*See Section 8.5, SOW*). After  
3 a decision by US EPA is made about the appropriate cleanup response, the SOW  
4 sets forth the steps to be taken by the Defendants to perform the selected response  
5 actions. (*See Sections 9 – 16, SOW*).

6  
7 Accordingly, the Consent Decree requires that the nature and extent of the  
8 hazards at the Mine Sites be further investigated and defined. It requires an  
9 analysis of alternatives to address the contamination, and it mandates that the  
10 Defendants will implement selected response actions to remedy the contamination  
11 at the Mine Sites. The Consent Decree promotes the public interest through these  
12 requirements to abate the releases or threatened releases of hazardous substances  
13 that have occurred as a result of historic uranium mine contamination at the Mine  
14 Sites on the Navajo Nation. The specific ways in which the goals of CERCLA are  
15 advanced by this Consent Decree will be discussed more fully below.

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17 D) The Settlement Furthers the Goals of CERCLA

18 CERCLA's overarching principles are "accountability, the desirability of an  
19 unsullied environment, and promptness of response activities." *Cannons II*, 899  
20 *F.2d at 91*.

21 Upon entry of the Consent Decree, the Mine Sites will be thoroughly  
22 investigated and US EPA will have sufficient data to select further response actions  
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1 to address contamination at the Mine Sites. The Defendants are required to pay US  
2 EPA and Navajo Nation EPA's past and future response costs incurred at the Mine  
3 Sites. (*Consent Decree, Section 10*). Further, the Consent Decree promotes the  
4 public interest and meets the goals of CERLCA by requiring the Defendants to  
5 perform cleanup work selected by US EPA while avoiding contested litigation.  
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8 E) The Public Comments Received Do Not Provide a Reason Not to Enter  
9 the Consent Decree

10 1) Comments from Uranium Watch

11 Uranium Watch and the Grand Canyon Chapter of the Sierra Club submitted  
12 joint comments on the Consent Decree. In comment #1, Uranium Watch supports  
13 entry of this Consent Decree (*See Attached Exhibit B, Comment #1*), as an  
14 important step, then raises specific inquiries about the Decree as follows.  
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16 Comment #2 notes that a map of the mine locations was not included in the  
17 Consent Decree. A map of the Mine Sites is attached to Ms. Reeves Declaration.  
18 (*See Reeves Declaration, ¶ 7*). Comments #2 and #3 note that the proposed  
19 Consent Decree does not address the potential need for permanent and/or  
20 temporary relocation of residents in the vicinity of the Mine Sites. The comment  
21 also questions the impact of response actions on the local communities. As a part  
22 of the EE/CA or RI/FS process, the need for relocation will be evaluated as well as  
23 the impacts on the communities (*See Reeves Declaration, ¶ 8*).  
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1           Comment #4 suggests that the Parties to the Consent Decree should develop  
2 criteria for adding and deleting mines. The provision in the Consent Decree which  
3 permits the Parties to agree to delete or add mines to the agreement allows for some  
4 flexibility in selecting and implementing appropriate response actions should  
5 conditions at a given Mine Site or group of Mine Sites support a modification of  
6 the Mine Site list. (*Consent Decree*, ¶ 15). If that modification is a material  
7 modification, the Consent Decree mandates that the Parties return to this Court and  
8 seek a modification of the Decree. (*Consent Decree*, ¶ 102). Any addition or  
9 deletion of mines from the Mine Site list will be publically available information.  
10 (*See Reeves Declaration*, ¶ 9).

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12           Comment #5 addresses the selection of remedial action standards, current  
13 and future land uses, and the potential restriction of land use. These issues will be  
14 fully addressed at the removal or remedy selection stage and according to the  
15 defined process set forth in the SOW. (*See Reeves Declaration*, ¶10).

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17           Comments # 6, #7, and #8 discuss the potential for centralized disposal  
18 and/or relocation of waste and whether there will be public involvement in these  
19 decisions. Ultimate disposition of contaminated materials will be evaluated  
20 through the EE/CA or FS for each Mine Site or group of Mine Sites in accordance  
21 with the NCP and public comment will be sought. (*See Reeves Declaration*, ¶11).

1 Finally, Uranium Watch Comment #9 suggests that US EPA establish a  
2 website for posting information related to reclamation of the Mine Sites. US EPA  
3 currently maintains a website for information on abandoned uranium mines on the  
4 Navajo Nation. (*See Reeves Declaration, ¶12*).

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6 The comments from Uranium Watch and the Grand Canyon Chapter of the  
7 Sierra Club provide a basis for support of the Decree and the comments do not  
8 challenge that the Consent Decree is fair, reasonable and in the public interest.  
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10 2) Comments from Dr. Gilbert John

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12 Comments #1, #2, and #3 from Dr. John request notification of US EPA  
13 activities and further information about assessments, sampling data of livestock  
14 wells for local residents, and the history of the Mine Sites. US EPA will provide  
15 this information and make it publicly available to the extent allowable by law. (*See*  
16 *Reeves Declaration, ¶¶13-15*).

17  
18 In Comment #4, Dr. John reminds US EPA to work with other federal  
19 agencies to ensure that past and future health effects caused by the mines and  
20 cleanup activities are addressed. The federal agencies will continue to work  
21 together to collectively address the impacts of uranium contamination on the  
22 Navajo Nation. (*See Reeves Declaration, ¶16*). The comments from Dr. John  
23 should not be a basis for disapproval of this Consent Decree because they do not  
24 challenge that the Consent Decree is fair, reasonable and in the public interest.  
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## CONCLUSION

The Defendants have consented to entry of the Decree. (*Consent Decree ¶ 105*). The Navajo Nation supports entry of the Consent Decree and will file a separate statement. The required public comment period is now expired, and the United States only received the comments discussed above. None of the comments even seek, nor do they provide an appropriate basis for, disapproval of this Consent Decree.

For the foregoing reasons, the United States submits that the proposed Consent Decree is fair, reasonable, and consistent with the purposes of the CERCLA. Accordingly, the United States respectfully requests that the Court grant this Unopposed Motion to Enter the Proposed Consent Decree and sign and enter the proposed Consent Decree after substituting the lodged Appendix F (Trust Agreement) for the fully executed Trust Agreement attached hereto as Exhibit A. The proposed Consent Decree is attached hereto for signature in lieu of a proposed order for this Motion. The signature line can be found on page 78 of the proposed Consent Decree.

Respectfully submitted,

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/s/ Katherine M. Kane

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