

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

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In re	:	Chapter 11
	:	
KAISER GYPSUM COMPANY, INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 16-31602 (JCW)
	:	
Debtors.	:	(Jointly Administered)

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**SETTLEMENT AGREEMENT REGARDING  
THE PORT OF SEATTLE'S GENERAL UNSECURED CLAIMS**

**RECITALS**

A. On September 30, 2016, Kaiser Gypsum Company, Inc. ("Kaiser Gypsum") and Hanson Permanente Cement, Inc. ("HPCI" and together with Kaiser Gypsum, the "Debtors"), commenced reorganization cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of North Carolina (the "Bankruptcy Court").

B. On March 31, 2017, the United States, at the request of the United States Environmental Protection Agency (the "EPA") and the United States Department of Interior, acting through the U.S. Fish and Wildlife Service, and the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration, each filed identical proofs of claim (proof of claim numbers 6, 7, 8, 9, 10 and 11) against each Debtor based on alleged liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in connection with the Lower Duwamish Waterway Superfund Site (the "Site"). These claims are based on Section 107 of CERCLA, 42 U.S.C. §9607, and seek recovery from the Debtors for: (a) a portion of unreimbursed past response costs incurred by the EPA in the amount of \$5,690,299.30; (b) a portion of future response costs based on a Record of Decision released by the EPA in November 2014 that selects the CERCLA remedy for the Site, which the EPA estimates will result in remedial costs of \$342 million; and (c) a portion of Site natural resource damages, including past and future assessment costs. The Debtors are but two of the approximately 120 potentially responsible parties ("PRPs") that the EPA has identified at the Site.

C. On September 1, 2017, The Port of Seattle (the "Claimant" and collectively with the Debtors, the "Parties"), another PRP at the Site, filed proof of claim number 23 in an unliquidated amount against HPCI ("Claim No. 23") and proof of claim number 24 in an unliquidated amount against Kaiser Gypsum ("Claim No. 24" and together with Claim

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<sup>1</sup> The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188) and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

No. 23, the "Claims"). Each of the Claims asserts that the applicable Debtor is responsible for some portion of (i) more than \$18 million in investigation, cleanup, source control, remediation and response costs allegedly incurred by the Claimant at the Site and (ii) undetermined future investigation, cleanup, source control, remediation and response costs relating to the Site that have not yet been incurred by the Claimant. On November 1, 2018, the Debtors filed an objection to the Claims [Docket No. 1278].

D. The City of Seattle and King County, Washington, additional PRPs at the Site, each filed proofs of claim against the Debtors asserting that the applicable Debtor is responsible for some portion of (i) the investigation, cleanup, source control, remediation and response costs allegedly incurred by each of those PRPs at the Site and (ii) undetermined future investigation, cleanup, source control, remediation and response costs relating to the Site that have not yet been incurred by each of those PRPs. On November 1, 2018, the Debtors filed objections to each of the claims asserted by The City of Seattle and King County, Washington [Docket Nos. 1279, 1280].

E. The Claimant, The City of Seattle and King County, Washington and The Boeing Company (collectively, the "LDW Claimants") have completed a remedial investigation and feasibility study ("RI/FS") of the Site pursuant to the requirements of a joint Administrative Order on Consent to Conduct a RI/FS between the aforementioned entities and the EPA and the Washington Department of Ecology. The LDW Claimants have also engaged in cleanup of various "early action areas" identified as locations at the Site that would require cleanup under any remedial scenario and agreed to perform additional studies of the Site. In 2013, the LDW Claimants also agreed to perform additional pre-remedial design investigations and studies of the Site, which remain ongoing.

F. In April 2014, HPCI, for itself and for Kaiser Gypsum, entered into an Alternative Dispute Resolution Memorandum of Agreement (the "MOA") with over thirty participating parties, including the LDW Claimants, pursuant to which the MOA signatories agreed to participate in a non-judicial process for allocating the response costs incurred in connection with investigation and remediation of the Site.

G. The Debtors and the Claimant agree for purposes of this Settlement Agreement, as a reasonable compromise of their respective positions, that the Claimant has incurred \$17,500,582.00 in total costs at the Site (the "Past Costs"). These Past Costs are comprised of (a) \$11,736,549.00 for the Claimant's portion of shared costs incurred by the LDW Claimants at the Site, and (b) \$5,764,033.00 in direct costs incurred by the Claimant at the Site.

H. The Debtors have reached an agreement in principle with the United States, on behalf of the EPA and the United States Department of Interior, acting through the U.S. Fish and Wildlife Service, and the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration, to liquidate and pay in full an allowed general unsecured claim in a certain amount (the "US Settlement").

I. The Parties engaged in extensive good faith negotiations regarding the Claims. As a result of the Parties' arm's-length negotiations, the Parties have agreed to resolve the claims on the following terms.

**NOW, THEREFORE**, in consideration of the mutual promises and terms contained herein, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the Parties hereto, the Parties, intending to be legally bound, agree as follows:

1. **Allowance of Claims.**

a. **Proof of Claim No. 23.** Subject to the satisfaction of the conditions set forth in Section 1.c., Proof of Claim No. 23 is hereby allowed as a general unsecured claim in the amount of \$81,815.22 against HPCI in its bankruptcy case.

b. **Proof of Claim No. 24.** Subject to the satisfaction of the conditions set forth in Section 1.c., Proof of Claim No. 24 is hereby allowed as a general unsecured claim in the amount of \$81,815.22 against Kaiser Gypsum in its bankruptcy case.

c. **Conditions to Allowance of Claims.** The Claims shall not be allowed pursuant to Sections 1.a. and 1.b. until each of the following conditions is satisfied: (i) the entry of a consent decree concerning the Debtors' liabilities at the Site pursuant to the terms of the US Settlement, (ii) Bankruptcy Court approval of an agreement resolving the proofs of claim filed by City of Seattle, (iii) Bankruptcy Court approval of an agreement resolving the proofs of claim filed by King County, Washington, (iv) Bankruptcy Court approval of this Settlement Agreement, and (v) the occurrence of the effective date of a plan of reorganization confirmed in the Debtors' chapter 11 cases that provides for payment in full in cash, without interest, of the allowed amount of the Claims stated in Sections 1.a and 1.b above.

2. **Effectiveness of the Settlement Agreement.** This Settlement Agreement shall be effective (the "Effective Date") upon the later of (a) the date that the Settlement Agreement is signed by all Parties (the "Execution Date") and (b) its approval by (i) the Bankruptcy Court and (ii) an administrative law judge for the Washington State Office of Administrative Hearing.

3. **Court Approval.**

a. On or before seven business days after the Execution Date, the Debtors will file a motion seeking entry of an order pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure approving this Settlement Agreement with the Bankruptcy Court.

b. As soon as reasonably practicable after the Execution Date, the Claimant will seek approval of this Settlement Agreement from an administrative law judge for the Washington State Office of Administrative Hearing.

4. **Most Favored Nation.** If the Debtors enter into an agreement with either The City of Seattle or King County, Washington that provides for the allowance of that claimant's proofs of claim related to the Site in an amount that is more than 0.935% of that claimant's direct costs and portion of shared costs incurred at the Site (a "More Favorable Settlement"), then the allowed amount of the Claims set forth in Section 1 will equal (a) the Past Costs times (b) the percentage share of The City of Seattle's or King County, Washington's costs allowed under the More Favorable Settlement.

5. **Law; Jurisdiction.** This Settlement Agreement shall be governed by and construed according to the laws of the State of North Carolina. The Parties agree that the Bankruptcy Court shall have exclusive jurisdiction, and the parties hereby submit to such jurisdiction, of any dispute arising under or related to this Settlement Agreement.

6. **Representations.** Each of the Parties, in order to induce each other to enter into this Settlement Agreement, hereby covenants, represents and warrants to each other with the intent and understanding that the other Parties are expressly relying thereon as a material inducement to enter into this Settlement Agreement as follows: (a) each Party has full rights, powers and authority to execute this Settlement Agreement; and (b) upon the Effective Date, this Settlement Agreement will be a valid, binding, subsisting and enforceable obligation of such Party.

7. **Miscellaneous Provisions.**

a. **Construction of Terms.** This Settlement Agreement has been drafted jointly by the Parties in full consultation with their respective attorneys, and no ambiguity in this Settlement Agreement shall be interpreted or construed against any of the Parties on the basis that such Party was the drafter.

b. **Entire Agreement.** This Settlement Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and is the final and complete expression of their intent. No prior or contemporaneous negotiations, promises, agreements, covenants or representations of any kind or nature, whether made orally or in writing, have been made by the Parties, or any of them, in negotiations leading to this Settlement Agreement or relating to the subject matter hereof, which are not expressly stated herein, or which have not become merged and finally integrated into this Settlement Agreement.

c. **Modification.** This Settlement Agreement can only be changed, modified or discharged if consented to in writing and executed by the Parties hereto.

d. **Binding Effect.** This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors or assigns.

e. **Counterparts.** This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

[Signature Page Follows]

**IN WITNESS WHEREOF**, the undersigned have duly executed and delivered this Agreement as of the date set forth below.

THE PORT OF SEATTLE

Dated: \_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

Title : \_\_\_\_\_

KAISER GYPSUM COMPANY, INC.

Dated: \_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

HANSON PERMANENTE CEMENT, INC.

Dated: \_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_