ANDREW D. HUPPERT, P.C.
Andrew D. Huppert
257 West Front, P.O. Box 7187
Missoula, MT 59807-7187
Telephone: 406/829-6657
Fax: 406/829-6691
andrew@huppertpc.com

HAGENS BERMAN SOBOL SHAPIRO LLP
Steve W. Berman
Andrew M. Volk
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Telephone: 206/623-7292
Fax: 206/623-0594
steve@hbsslaw.com
andrew@hbsslaw.com

BUXBAUM, DAUE & FITZPATRICK
Douglas A. Buxbaum
John M. Fitzpatrick
228 W. Main Street, Suite A
Missoula, MT 59802
Telephone: 406/327-8677
Fax: 406/829-9840
dbuxbaum@bdf-lawfirm.com
jfitzpatrick@bdf-lawfirm.com

BRANSTETTER, STRANCH & JENNINGS, PLLC
James G. Stranch, III
Jane B. Stranch
227 Second Avenue North, Fourth Floor
Nashville, TN 37201
Telephone: 615-254-8801
Fax: 615/255-5419
jims@branstetterlaw.com
janes@branstetterlaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

IN RE TOUCH AMERICA HOLDINGS, INC. ERISA LITIGATION	No. CV-02-106-BU-SEH
	MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT
This Document Relates To: ALL ACTIONS	

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND RELEVANT TO APPROVAL 4

A. History of Litigation and *Settlement* 4

B. The *Settlement* Provisions and the Mechanics of *Settlement* Administration 6

1. Monetary Recovery and Current Status of Approval Process 6

2. Final Approval and Further Administration of *Settlement* 10

III. THE COURT SHOULD APPROVE THE PROPOSED *SETTLEMENT* FOLLOWING THE *FAIRNESS HEARING* 14

A. The Parties' Negotiations Show No Sign of Collusion 16

B. The Proposed *Settlement* is Fair and Reasonable 17

1. Strength of the *Named Plaintiffs*' Case, as Compared with the Risk, Expense, Complexity, and Duration of Further Litigation 19

2. Risk of Maintaining Class Action Status Throughout Trial 21

3. Nature and Amount of *Settlement* Benefits 21

4. Stage of Proceedings and Discovery 22

5. Experience and Views of Counsel 22

6. Reaction of Members of the *Settlement Class* 23

IV. THE *PLAN OF ALLOCATION* IS FAIR AND REASONABLE 23

CONCLUSION 25

I. INTRODUCTION

Plaintiffs Ross Buckingham, Warren Bellcour, Kim Moran, Torlief Pederson, and Charles Porter ("*Named Plaintiffs*"),[1] on behalf of themselves and the *Settlement Class*, hereby submit this memorandum in support of their Unopposed Motion for Final Approval of the proposed *Settlement* of this long and hard-fought case.

The *Settling Parties*[2] to this ERISA action have achieved a global settlement with contributions totaling $4.9 million ("*Class Settlement Amount*") for the benefit of the *Settlement Class*. In addition to automatically receiving their *pro rata* share of the *Net Settlement Amount* in the ERISA action, many *Settlement Class* members will be eligible to participate in the *McGreevey* settlement[3] and/or

[1] Terms in this Memorandum that are italicized and capitalized have the meanings stated in the Agreement of Compromise and Settlement—ERISA Litigation ("*Settlement Agreement*"). The revised, fully executed version is attached as Exhibit A to the Declaration of James G. Stranch, III, in Support of Plaintiffs' Motion for Final Approval of Settlement ("Stranch Decl.").

[2] The "*Settling Parties*" are *Named Plaintiffs;* Defendants Robert P. Gannon, Jerrold P. Pederson, Pamela K. Merrell, Ellen M. Senechal (n/k/a Ellen M. Marbut), R.W. Cope, Tucker Hart Adams, Alan F. Cain, John G. Connors, R.D. Corrette, Kay Foster, John R. Jester, Carl Lehrkind, III, Deborah D. McWhinney and Noble E. Vosburg ("*Montana Power Company Defendants*"); Defendant The Northern Trust Company and affiliated entities ("*The Northern Trust Company*"); and Federal Insurance Company ("*Federal*").

[3] *Margaret A. McGreevey, et al. v. Montana Power Company, et al.,* Case No. CV-03001-BU-SEH (D. Mont.) and *Margaret McGreevey, et al. v. Associated Elec. & Gas Ins. Ltd.,* No. CV-04-16 BU-SHE (D. Mont).

the securities settlement[4]—both of which are also pending before this Court, and all of which are the subject of the *Master Settlement Agreement* designed to resolve all of the pending actions arising from the collapse of the stock of the Montana Power Company and Touch America. Indeed, the *Plan* itself will make claims under both the *McGreevey* and the securities settlements, the proceeds of which will redound to the benefit of the ERISA *Settlement Class* members.

The *Settling Parties* have established all necessary prerequisites for approval of the *Settlement*. As set forth below, the proposed *Settlement* is fair, reasonable, and adequate and is the product of arm's-length negotiations between counsel for the *Settlement Class* ("*Class Counsel*") and counsel for *Defendants* and *Federal*.

The only applicable *Insurance Policy* in this case, issued by *Federal* to the Montana Power Company ("*Company*"), has a $10 million policy limit. That policy has been "wasting," as it has been used to cover the *Montana Power Company Defendants*' litigation costs in this case, which was filed in the fall of 2002 and has proceeded through the bankruptcies of former defendants Touch America Holdings, Inc. ("Touch America"), and the NorthWestern Corporation ("NorthWestern"). Subsequently, the case proceeded through Class certification, rigorous discovery and summary judgment briefing in this Court. Accordingly,

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[4] *In re Touch America Holdings, Inc., Securities Litig.*, No. CV-02-0057-BU-SHE (D. Mont).

Federal's contribution of $3,675,000 is nearly all that remains of the available insurance monies in this case, and it is far more than would be left if the parties litigated to a trial verdict.

In addition to the insurance proceeds, the *Class Settlement Amount* includes payments on behalf of individual and institutional *Defendants*. The Plan Trust of Touch America Holdings, Inc. ("*Plan Trust*"), will contribute $1,200,000 to the *Settlement* on behalf of certain *Montana Power Company Defendants* in the case at bar. *The Northern Trust Company* will also contribute $25,000, despite the fact that it has been granted summary judgment. All of the *Settlement* proceeds are now in escrow accounts pending this Court's consideration of the proposed *Settlement.*

The notice program approved by this Court in its *Notice Order* has been implemented. Furthermore, the *Independent Fiduciary* appointed by the Court has approved the *Settlement*.

The *Named Plaintiffs* urge the Court to enter the proposed *Final Order* so that *Settlement Class* members may reap the benefits of this *Settlement* and of any other related shareholder settlements in which they may be entitled to participate.

II. FACTUAL BACKGROUND RELEVANT TO APPROVAL

A. History of Litigation and *Settlement*

The terms of the *Settlement Agreement* were only reached after years of hard-fought litigation, thorough investigation by experienced counsel, and extensive negotiations. *See* Stranch Decl. ¶¶ 11-12. The parties consulted with experts and made a full evaluation of the evidence. They were, therefore, aware of the issues and risks associated with the claims and defenses. The *Settlement Agreement* is the result of arm's-length and often difficult negotiations that spanned several months. Ideally, every class action settlement would have so much due diligence supporting it.

The original complaints in this case were filed in the fall of 2002. On March 10, 2003, this Court entered an Order consolidating the several cases that had been filed, and, on April 10, 2003, the *Named Plaintiffs* filed their Consolidated Amended Complaint, which included all of the current *Defendants* plus Touch America and NorthWestern. On June 20, 2003, this Court entered an Order staying the *Action* as a result of Touch America's bankruptcy filing. NorthWestern subsequently declared bankruptcy, as well.

Once a plan of liquidation was entered in the TouchAmerica bankruptcy, the stay was lifted in the late spring of 2005. On June 7, 2005, Plaintiffs filed the operative complaint in the *Action,* the Second Amended Consolidated Complaint. After discovery commenced in the summer of 2005, the parties engaged in

extensive discovery. The parties have received and reviewed millions of pages of documents, obtained expert reports on liability and damages, deposed experts and numerous other third-party witnesses, and deposed each party's own witnesses, including all five of the *Named Plaintiffs*. Plaintiffs have sought and obtained class certification. This Court granted in part *Defendants*' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) but denied those motions in most respects.

All parties moved for summary judgment. The Court initially denied *The Northern Trust Company*'s motion for summary judgment, then approved a request for reconsideration and granted the motion. The Court did not rule on the other *Defendants*' motions for summary judgment, as they and the *Named Plaintiffs* reached an agreement to settle the claims between them. This proposed partial settlement did not encompass any claims against *The Northern Trust Company*.

Following an appeal, all of the parties to this *Action* participated in renewed settlement negotiations. They held discussions with a new mediator, Honorable Daniel Weinstein (Ret.) ("Judge Weinstein"), as well as counsel in other litigation involving the *Company*. These efforts led to the *Settlement Agreement* presently under consideration, as well as the *Master Settlement Agreement* that encompasses four other matters pending before this Court and two adversary proceedings in the United States Bankruptcy Court for the District of Delaware.

B. The *Settlement* Provisions and the Mechanics of *Settlement* Administration

As indicated above, the terms of the *Settlement* are embodied in the revised version of the *Settlement Agreement*. *See* Stranch Decl., Ex. A. The most important features of the *Settlement* and the Court's related Orders are summarized below.

1. Monetary Recovery and Current Status of Approval Process

To initiate the evaluation process, the *Named Plaintiffs* had to move the Court to approve the *Class Notice*. SA ¶ 2.2.1. The *Named Plaintiffs* filed an unopposed motion to this effect on December 4, 2009. Pltfs.' Unopp. Mot. Approv. Class Notice (Doc. 628). They also filed a proposed *Class Notice*, *Plan of Allocation*, and *Notice Order*. Memo. Supp. Pltfs.' Unopp. Mot. Approv. Class Notice, Exs. B-D (Doc. 629-2 to -4); Notice of Correction (Doc. 632-1).

The Court approved the proposed *Class Notice*. Notice Order ¶ 4 (Doc. 643); Notice of Prop. Settle. (Doc. 644). It scheduled a *Fairness Hearing* for May 20, 2010, to consider: (a) whether the proposed *Settlement* is fair, reasonable and adequate and should be approved; (b) whether an *Order of Final Judgment and Dismissal,* substantially in the form of Exhibit J to the *Master Settlement Agreement,* should be entered; (c) whether the proposed *Plan of Allocation* is fair, reasonable, and adequate and should be approved; (d) whether *Class Counsel* should be awarded attorneys' fees and expenses, and, if so, in what amounts; (e)

whether the *Named Plaintiffs* should receive *Service Awards*; and (f) other related matters. Notice Order ¶ 9.

The *Class Settlement Amount* was to be paid no later than twenty (20) business days after the entry of the *Notice Order* into interest-bearing *ERISA Escrow Accounts*. SA ¶¶ 1.14, 6.3. The *Class Settlement Amount* includes the following payments:

- $25,000 paid by *The Northern Trust Company*;
- $1,200,000 paid by the Plan Trustee for the *Plan Trust*;[5] and
- $3,675,000 paid by *Federal*.

SA ¶¶ 6.2.1-.3. All of these payments have now gone into the *ERISA Escrow Accounts*.

Despite a general release, the *Settlement* specifically reserves any claims by the *Named Plaintiffs* or the *Settlement Class* in the *McGreevey* and securities cases. SA ¶ 3.8(ii)-(iii).

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[5] The *Plan Trust's* contribution is in accordance with section I.A.2 of the Agreement of Compromise and Settlement—Plan Trust D&O Action, which is Exhibit E to the *Master Settlement Agreement.* That agreement clarifies that the Plan trust is making the $1,200,000 payment in satisfaction of claims belonging to "ERISA Defendants" who are also *Montana Power Company Defendants* in this *Action. See* Plan Trust SA ¶ I.A.2 and Definition 18 ("ERISA Defendants' Proofs of Claim"). Those *Defendants* gave up valuable claims for the benefit of the *Settlement Class*, which is effectively a contribution by those individuals to the instant *Settlement*.

The *Settling Parties* devised an effective notice program, now approved by the Court, to ensure that members of the *Settlement Class* got adequate information about the *Settlement*. The Court's *Notice Order* provided that, on or before March 22, 2010, the *Administrator* would mail copies of the *Class Notice* to all *Settlement Class* members who can be identified with reasonable effort at their last known addresses. Notice Order ¶ 6(a) (Doc. 643). The *Administrator* would also publish, on or before March 24, 2010, notice of the *Settlement* and other proposed settlements of claims brought on behalf of former shareholders of *Company* stock. *Id*. ¶ 6(b). Finally, on or before March 22, 2010, the *Administrator* would set up a website with information on the *Settlement* and contact information for *Settlement Class* members desiring additional details. *Id*. ¶ 6(c).[6]

The Court appointed Gilardi & Co. LLC ("Gilardi") as the *Administrator* and made it responsible for managing this notice program. Order App. Admin. ¶¶ 1-2 (Doc. 641). Gilardi has executed the program in accordance with the Court's instructions. *See* Washington Decl. ¶¶ 3-4 (extracted participant data from files, processed names and addresses through the National Change of Address Database, and mailed 3,159 copies of *Class Notice* by March 22, 2010), 5 (for 578 copies of *Class Notice* returned undeliverable, is currently obtaining updated addresses

[6] The Court agreed that this notice program "constitutes the best notice practicable under the circumstances" and fully complies with Fed. R. Civ. P. 23 and due process. Notice Order ¶ 5 (Doc. 643).

through third-party locator service for re-mailing), 6 (toll-free number became operational on March 17, 2010, and has received 171 inquiries, allowing *Settlement Class* members to listen to FAQs, request a *Class Notice*, or speak with a live operator), 7 (posted *Class Notice*, *Settlement Agreement*, and related documents online at www.gilardi.com/TouchAmericaERISA on or about March 19, 2010), 8 (published notice in *Investor's Business Daily* on March 18, 2010, in *The Hamilton Ravalli Republic*, *Montana Standard*, *Great Falls Tribune*, *Helena Independent*, *Billings Gazette*, *Missoulian*, *Daily Inter Lake*, and *Bozeman Daily Chronicle* on March 18 and 25, 2010, and over the *Businesswire* for thirty days).

The *Settling Parties* also had to retain an *Independent Fiduciary* to review the *Settlement* and ensure that it complied with the Department of Labor's Prohibited Transaction Class Exemption 2003-39. SA ¶ 2.2.3.[7] The *Settlement* is contingent on approval by the *Independent Fiduciary*. SA ¶ 2.2.3.

The Court appointed Nicholas L. Saakvitne ("Mr. Saakvitne") as the *Independent Fiduciary*. Order App. Indep. Fiduc. ¶ 1 (Doc. 642). Mr. Saakvitne

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[7] More specifically, the *Independent Fiduciary* had to determine whether: (i) the *Settlement* is reasonable in light of the *Plan*'s likelihood of full recovery, the risks and costs of litigation, and the value of the claims foregone; (ii) the terms and conditions of the transaction are no less favorable to the *Plan* than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstance; and (iii) the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest. SA ¶ 2.2.3.

has completed his review of the *Settlement* and determined that it meets all of the requirements of Prohibited Transaction Class Exemption 2003-39. Saakvitne Rpt. at 11 (Doc. 646-1). He found that the following circumstances make the *Settlement* reasonable: (a) the *Company*'s bankruptcy and the limited sources of recovery; (b) *Defendants*' defenses; (c) the limited success of ERISA "stock drop" cases in the past two years; (d) challenges to the *Named Plaintiffs*' assessment of damages; (e) the fact that *Class Counsel* are seeking a fee award that marks an approximately 75% discount from their normal hourly rates; and (f) the Plan may receive additional recoveries through the *McGreevey* and securities settlements.[8] *Id*. at 8-9. "In sum, I believe that the Settlement is a reasonable and attractive settlement for the Plan and the members of the Settlement Class, and I hereby approve it as Independent Fiduciary acting on their behalf." *Id*. at 12 (emphasis omitted).

2. Final Approval and Further Administration of *Settlement*

Any *Settlement Class* member may appear at the *Final Hearing* and support or oppose the matters under consideration, so long as he or she files and serves notice of the intention to appear, along with supporting papers and proof of membership in the *Settlement Class*, by April 30, 2010. Notice Order ¶ 12 (Doc.

[8] Mr. Saakvitne states, "As Independent Fiduciary for the Plan, I will be asserting claims on behalf of the Plan in the Securities Litigation and the McGreevey Litigation . . . ." Saakvitne Rpt. at 2.

643). Unless otherwise ordered, a *Settlement Class* member who does not make an objection in the foregoing manner is deemed to have waived the objection. *Id*.

At the *Fairness Hearing*, *Class Counsel* will urge the Court to enter the *Final Order* approving the *Settlement*, as well as orders approving the proposed *Plan of Allocation*, an award of attorney's fees and expenses, and the *Named Plaintiffs' Service Awards*. SA ¶ 2.2.4. *Defendants* will urge the Court to enter the *Final Order* approving the *Settlement* but will take no position on the other matters under review. SA ¶ 2.2.4.

The *Effective Date* of the *Settlement* occurs when all of the preliminary steps above are taken, the Court enters a *Final Order* approving the *Settlement* and that *Final Order* becomes *Final*, all of the *Released Claims* are dismissed, and the conditions in the *Master Settlement Agreement* are met. SA ¶¶ 2.1-.5, 7.1. Significantly, in order for the ERISA *Settlement* to become *Final*, both the *McGreevey* and the securities settlements must also become final.

Ultimately, the *Net Settlement Amount* will be the balance of the *Settlement Fund* after payment of (a) the costs of distributing the *Class Notice*; (b) any taxes incurred on the *Settlement Fund's* income; (c) the costs of the *Independent Fiduciary*; (d) the costs of administration, including implementation of the *Plan of Allocation*; and (e) any award of fees and expenses to *Class Counsel* and the *Named Plaintiffs' Service Awards.* SA ¶ 1.28.

As reflected in the *Class Notice*, the *Named Plaintiffs* estimate that the *Net Settlement Amount* will be approximately $3.356 million. Notice of Prop. Settle. at 3 (Doc. 644). The amount for distribution under the *Plan of Allocation* will be greater than this, however, since the *Plan* itself will make claims under the *McGreevey* and the securities settlements. Those amounts will be added to the *Net Settlement Amount* and will be available for distribution to ERISA *Settlement Class* members. The *Administrator* and *Independent Fiduciary*'s work will cost approximately $129,200, altogether. *See* Order App. Admin. ¶ 4 (Doc. 641) (approximately $79,200 to manage notice program and help administer *Settlement*); Order App. Indep. Fiduc. ¶¶ 2-3 (Doc. 642) ($25,000 to review proposed *Settlement* and $25,000 to effectuate distribution). In a separate filing, *Class Counsel* are seeking $1.40 million in attorney's fees and expenses and a total of $15,000 in *Named Plaintiffs*' *Service Awards*.

Upon the *Effective Date* of the *Settlement,* the *Escrow Agent* shall cause the *Net Settlement Amount* to be transferred from the *ERISA Escrow Accounts* to a trust account administered by the *Independent Fiduciary* with the assistance of the *Administrator* and consistent with the *Plan of Allocation.* SA ¶ 7.6.1. The *Independent Fiduciary* is responsible for resuscitating the *Plan* and, as Trustee, ensuring its compliance with ERISA and the federal tax code so that *Settlement*

Class members may receive their proceeds as qualified distributions. Order App. Indep. Fiduc. ¶ 3(i)-(iv) (Doc. 642).

The proposed *Plan of Allocation* describes the method for calculating each *Settlement Class* member's individual recovery. Each member (or his or her successor) will receive a *pro rata* share of the *Net Settlement Amount*, depending upon the average number of shares of the Company Stock Fund held in his/her *Plan* account on the following three dates:

> September 30, 1999, roughly at the beginning of the *Class Period*,
>
> December 31, 2000, roughly in the middle of the *Class Period*, and
>
> September 30, 2001, roughly at the end of the *Class Period.*

Notice of Prop. Settle. at 18 (Doc. 644) (attached *Plan of Allocation*). Dividing the *Net Settlement Amount* by the total of all members' share averages results in a per share value. *Id*. at 18-19. In turn, multiplying this per share value by a given member's average number of shares results in the dollar amount to be received by that member. *Id*. at 19. The minimum distribution under the *Settlement* will be $50, and any *Settlement Class* member who would receive a *de minimis* recovery of less than $50 will receive nothing. *Id*. All such *de minimis* recoveries will return to the *Net Settlement* fund and be distributed *pro rata* to *Settlement Class* members with a recovery of $50 or more. *Id*.

The *Administrator* will calculate each *Settlement Class* member's recovery under the formula above. Order App. Admin. ¶ 3(ii) (Doc. 641). It will then send mailings to the *Settlement Class* members informing them of the amounts they will receive and asking them to choose whether to (i) roll over their *Settlement* proceeds into an IRA or other qualified retirement plan or (ii) receive a check. *Id.* ¶ 3(iv).

For *Settlement Class* members whose current address information cannot be obtained or who fail to make an election within six (6) months, the *Independent Fiduciary* will oversee the transfer of their *Settlement* proceeds to Rollover Systems, Inc., or a comparable organization, which will maintain IRAs in the names of such individuals and continue to attempt to locate them. Order App. Indep. Fiduc. ¶ 3(v) (Doc. 642). The *Independent Fiduciary* will eventually terminate the resuscitated *Plan*. *Id.* ¶ 3(vi).

III. THE COURT SHOULD APPROVE THE PROPOSED *SETTLEMENT* FOLLOWING THE *FAIRNESS HEARING*

The dismissal or compromise of any class action requires the Court's approval. Fed. R. Civ. P. 23(e)(1)(A). Approval of a proposed class action settlement is a three-step process: (1) the court must preliminarily approve the proposed settlement; (2) members of the class must receive notice of the proposed settlement; and (3) a final hearing must be held, after which the court must decide whether the proposed settlement is fair, reasonable and adequate. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41, at 236 (1995). It is at the final

approval hearing that the court ultimately determines, after class members have an opportunity to comment, whether the settlement is "fundamentally fair, adequate and reasonable." *See Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir. 1982).

Courts consistently favor the settlement of disputed claims, *see MWS Wire Indus., Inc. v. California Fine Wire Co., Inc.,* 797 F.2d 799, 802 (9th Cir. 1986), "particularly where complex class action litigation is concerned," *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

"There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 11.41 at 90 (4th ed. 2002); *see also In re Wireless Facilities, Inc*., 253 F.R.D. 630, 634 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-length negotiations are presumed fair.").

The Court's review of the proposed *Settlement* for the purpose of final approval should focus on two questions: whether the *Settlement* (A) is tainted by fraud or collusion; and (B) is fair, reasonable and adequate:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,

> reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.

Officers for Justice, 688 F.2d at 625. In this case, both questions weigh strongly in favor of final approval.

A. The Parties' Negotiations Show No Sign of Collusion

In answering the first question, whether a settlement is tainted by collusion, courts examine "the negotiating process by which the settlement was reached"—that is, whether the settlement was achieved through "armslength negotiations" by counsel who have "the experience and ability … necessary [for] effective representation of the class's interests." *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982).

Protracted, difficult settlement negotiations signify the absence of collusion. *See*, *e.g.*, *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 336-37 (S.D.N.Y. 2005) (noting that discussions appeared to break down more than once), *vacated in part on other grounds*, 443 F.3d 253 (2d Cir. 2006); *In re Phenylpropanolamine Prods. Liab. Litig.*, 227 F.R.D. 553, 564 (W.D. Wash. 2004); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000).

The use of an experienced mediator further suggests the absence of collusion. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga.

2001) ("Parties colluding in a settlement would hardly need the services of a neutral third party to broker their deal."); *Toys "R" Us*, 191 F.R.D. at 352.

As the Court is well-aware, virtually every issue in this litigation was hotly contested. The *Settling Parties* are represented by experienced counsel who crafted the proposed *Settlement* and support its approval.

The *Named Plaintiffs* and the *Montana Power Company Defendants* engaged in several months of negotiations in 2006, including a day-long session with mediator Jeff Lewis, an additional day-long meeting without a mediator, and numerous follow-up discussions, offers, and counter-offers. *See* Volk Decl. ¶¶ 12-14 (Doc. 423). Since the Ninth Circuit dismissed the appeal, all of the parties have engaged in negotiations to resolve this *Action*, along with the other actions involving the *Company*. Another highly experienced mediator, Judge Weinstein, presided over the more recent negotiations. Such circumstances prevent any hint of collusion.

B. The Proposed *Settlement* is Fair and Reasonable

Courts use several factors to assess the fairness and reasonableness of a proposed settlement:

> The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in

> settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625; *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Smith v. Mulvaney*, 827 F.2d 558, 562 n.3 (9th Cir. 1987).

Again, courts view proposed settlements with a presumption of fairness that arises as a general matter when the settlement is reached through "arm's-length negotiations between experienced, capable counsel after meaningful discovery." MANUAL FOR COMPLEX LITIGATION (THIRD), § 30.42 at 240; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (upholding approval of settlement where there was "no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims").

If the settlement is not collusive, the evaluation focuses on whether, given the risks of litigation and the range of probable results, "the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625; *Torrisi*, 8 F.3d at 1375. Courts should "'compare the terms of the compromise with the likely rewards of litigation.'" *Weinberger*, 698 F.2d at 73 (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968)). Nevertheless, "[t]he proposed settlement

is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625 (emphasis in original).

1. Strength of the *Named Plaintiffs'* Case, as Compared with the Risk, Expense, Complexity, and Duration of Further Litigation

"'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 4 *Newberg on Class Actions* § 11:50 at 155).

While the *Named Plaintiffs* believe in the merit of their case, they face two major risks in pursuing a judgment. Stranch Decl. ¶ 24. *First,* in order to prevail on their claims against any of the *Defendants,* the *Named Plaintiffs* would have to show that *Defendants*' alleged breaches caused the *Plan* and its participants to suffer losses. *See* 29 U.S.C. § 1109(a). Based on the evidence acquired through discovery, however, the *Montana Power Company Defendants* have a defense based on lack of causation: they will attempt to show that the *Company* intended to terminate the ESOP by selling off the unallocated shares of *Company* stock in order to pay off the acquisition loan, distribute the remainder to *Plan* participants, and terminate the ESOP. This course of action would have prevented much or all of the asserted losses. Under the *Montana Power Company Defendants*' theory of

the case, *The Northern Trust Company* broke the chain of causation by refusing to carry out their termination plan in the summer of 2000.

Second, as the Court is aware, the Ninth Circuit's opinion in *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090 (9th Cir. 2004) limits the scope of fiduciary duty for ESOP fiduciaries. In order to prevail at trial, the *Named Plaintiffs* would have to prove "along with a decline in employer stock, evidence that the company was on the brink of collapse or undergoing serious mismanagement." June 15, 2006 Memorandum and Order at 11 (Doc. 264) (internal citations omitted). While the *Named Plaintiffs* believe they could have prevailed under this standard, they acknowledge that the standard is a difficult one and makes the result in the event of trial (and the inevitable appeals) uncertain. Simply put, the certainty of a $4.9 million *Settlement Fund*, payable now, is preferable to a contingent and uncertain payment sometime in the distant future.

The *Named Plaintiffs* have little recourse against *The Northern Trust Company*, as the Court already granted it summary judgment. The *Named Plaintiffs* would have to obtain a reversal of that decision on appeal and then litigate at the trial level to a successful conclusion. Current legal authority significantly restricts the liability of directed trustees like *The Northern Trust Company*.

Thus, the *Settlement Class* runs the real risk of recovering little or nothing from *Defendants* if they litigate to a final judgment on the merits.

2. Risk of Maintaining Class Action Status Throughout Trial

The Court has already granted class certification, but "[a] district court may decertify a class at any time," *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009), *see* Fed. R. Civ. P. 23(c)(1)(C). This general risk weighs in favor of approving the *Settlement*, without the need of analyzing the exact likelihood of a successful motion to decertify. *See Rodriguez*, 563 F.3d at 966.

3. Nature and Amount of *Settlement* Benefits

"It is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Officers for Justice*, 688 F.2d at 628. A settlement may be fair, even if the cash component only amounts to a fraction of the potential recovery. *Id.*; *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

Based upon their familiarity with the relevant factual and legal issues, the parties were ultimately able to negotiate a fair settlement, taking into account the costs and risks of continued litigation. The *Class Settlement Amount* totals $4.9 million. SA ¶¶ 6.2.1-.3. It includes not just insurance proceeds, as did the partial settlement proposed earlier, but also contributions on behalf of *The Northern Trust Company* and the individual *Montana Power Company Defendants*. *Id.* Also, in

accordance with the *Named Plaintiffs*' position during negotiations, the *Master Settlement Agreement* permits ERISA *Settlement Class* members to recover under both the *McGreevey* and the securities settlements, adding to the value of the ERISA *Settlement*. Stranch Decl. ¶ 15.

4. Stage of Proceedings and Discovery

When parties have conducted significant discovery before reaching a settlement, the court may presume that they arrived at a compromise based on a full understanding of the case. *Nat'l Rural Telcoms.*, 221 F.R.D. at 527.

In this case, the parties did not even commence settlement negotiations until they had completed extensive fact and expert discovery. During discovery, the parties exchanged millions of pages of documents; the *Named Plaintiffs* deposed 19 witnesses, including the individuals in charge of the *Company*'s benefit plans during the class period, as well as eight of the Individual Defendants; the *Defendants* deposed six witnesses, including all five *Named Plaintiffs*; and each side disclosed multiple testifying experts, all of whom were deposed. *See* Stranch Decl. ¶¶ 12-13, 19; Serebin Aff. ¶ 4 (Doc. 424); Volk Aff. ¶¶ 7-9 (Doc. 423). The *Settlement*, therefore, reflects the factual and legal realities of the case.

5. Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in

litigation." *Principe v. Ukropina (In re Pacific Enters. Sec. Litig.)*, 47 F.3d 373, 378 (9th Cir. 1995).

Class Counsel have a depth of experience in ERISA class actions and in complex litigation generally. *See* Stranch Decl. ¶¶ 50-51, Ex. B-C (firm resumes). In evaluating the reasonableness of the *Settlement*, *Class Counsel* analyzed the likelihood of success on the claims asserted. *Class Counsel* believe that the claims against *Defendants* have merit and that the evidence supported the asserted claims. Nevertheless, continuing to litigate against *Defendants* presented substantial risks and substantial costs.

It is the informed opinion of *Class Counsel* that, given the uncertainty of continuing to litigate the claims against *Defendants* through trial and appeals, the *Settlement* is fair, reasonable, and adequate for the *Settlement Class* as a whole. *Id*. ¶¶ 22-27.

6. Reaction of Members of the *Settlement Class*

Since objections from *Settlement Class* members are not due until April 30, 2010, Notice Order ¶ 12 (Doc. 643), the *Named Plaintiffs* cannot specifically evaluate such objections at this time.

IV. THE *PLAN OF ALLOCATION* IS FAIR AND REASONABLE

"Approval of a plan for the allocation of a class settlement fund is governed by the same legal standards that are applicable to approval of the settlement: the

distribution plan must be 'fair, reasonable and adequate.'" *In re Citric Acid Antitrust Litig*., 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001); *see Seattle*, 955 F.2d at 1284-85 (reviewing allocation plan under this standard).

"As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight." *In re American Bank Note Holographics*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id*. at 429-30 (quotations omitted).

The *Named Plaintiffs* submitted a proposed *Plan of Allocation* that bases a *Settlement Class* member's recovery on his or her stake in the *Plan*. One averages the number of shares of the Company Stock Fund held in a member's *Plan* account at roughly the beginning, middle, and end of the *Class Period*. Notice of Prop. Settle. at 18 (Doc. 644) (attached *Plan of Allocation*). By using averages, the *Plan of Allocation* accounts for fluctuations in members' holdings—both the normal accumulation of shares over time and the sale of shares by some members. Each member ultimately gets a *pro rata* portion of the *Net Settlement Amount,* based on his or her average number of shares, as compared with other members'. *Id*. at 18-19.

"Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach." *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D.

436, 462 (S.D.N.Y. 2004) (approving pro rata allocation plans for securities and ERISA classes); *accord In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1262 (D. Kan. 2006) ("[T]he court is satisfied that the plan of allocation is fair and reasonable because it appears to be rationally based on the participants' proportionate losses in the 401(k) plans.").[9]

CONCLUSION

For the foregoing reasons, the *Named Plaintiffs* respectfully request that the Court grant their Unopposed Motion for Final Approval and enter the Order of Final Judgment and Dismissal.

Respectfully submitted this 6th day of April, 2010.

/s/ James G. Stranch, III
JAMES G. STRANCH, III
JANE B. STRANCH
BRANSTETTER, STRANCH &
JENNINGS PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201
(615) 254-8801

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[9] As noted previously, the minimum distribution under the *Settlement* is $50. Such a provision is entirely appropriate. *See Sprint*, 443 F. Supp. 2d at 1268 ("The court believes this de minimis floor is fair and reasonable in order to preserve the Cash Settlement Fund from excessive and unnecessary expenses in the overall interests of the class as a whole."); *Global Crossing*, 225 F.R.D. at 463 ("Class counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief.").

HAGENS BERMAN SOBOL SHAPIRO, LLP
ANDREW M. VOLK
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
(206) 623-7292

ANDREW D. HUPPERT, P.C.
ANDREW D. HUPPERT
257 West Front
P.O. Box 7187
Missoula, MT 59807-7187
(406) 829-6657

BUXBAUM, DAUE & FITZPATRICK
DOUGLAS A. BUXBAUM
228 W. Main Street, Suite A
Missoula, MT 59802

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Local Rule 7.1(d)(2)(E), the *Named Plaintiffs* hereby certify that the foregoing memorandum contains 6,403 words, excluding the caption and certificates of service and compliance.

/s/ James G. Stranch, III

JAMES G. STRANCH, III
JANE B. STRANCH
BRANSTETTER, STRANCH &
JENNINGS PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201
(615) 254-8801

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 6th of April, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel listed below who have registered for CM/ECF filing. Additionally, a copy of the foregoing document was served by regular mail to the non-registered individuals by depositing a copy of the same in the U.S. Mail, postage pre-paid, addressed as follows:

/s/ James G. Stranch, III
JAMES G. STRANCH, III
JANE B. STRANCH
BRANSTETTER, STRANCH &
JENNINGS PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201
(615) 254-8801

Via CM/ECF Notification to Registered Counsel:

John M. Fitzpatrick, Esq.
Buxbaum, Daue & Fitzpatrick, PLLC
228 West Main, Suite A
P.O. Box 8209
Missoula, MT 59807

Andrew D. Huppert
Andrew D. Huppert, P.C.
257 West Front
P.O. Box 7187
Missoula, MT 59807

Christopher Scheithauer
McDermott Will & Emery 257 West
18191 Von Karman Ave., Suite 400
Irvine, CA 92612

Nicole A. Diller, Esq.
Morgan Lewis & Bockius LLP
One Market Spear Street Tower
San Francisco, CA 94102

J. Jackson, Esq.
F. Matthew Ralph
Dorsey & Whitney
50 S. Sixth Street, Suite 1500
Minneapolis, MN 55402

Andrew M. Volk
Hagens Berman Sobol Shapiro, LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101

Via US Mail to Non-Registered Counsel:

Nancy G. Ross, Esq.
McDermott, Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606-5096

Shane Coleman, Esq.
Dorsey & Whitney, LLP
Millenium Building
125 Bank Street, Suite 600
Missoula, MT 59802

Patrick T. Fleming, Esq.
Fleming & O'Leary, LLP
130 N. Main St.
Butte, MT 59703

Donald C. Robinson, Esq.
Ronald A. Thuesen, Esq.
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
P. O. Box 2000
Butte, MT 59702

Ellen M. Kelman, Esq.
Buescher, Goldhammer &
Kelman P.C.
1563 Gaylord Street
Denver, CO 80206