

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
1918 Eighth Ave., Suite 3300
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
J. Gerard Stranch, IV
227 Second Avenue North, 4th Floor
Nashville, TN 37201-1632
Telephone: 615/254-8801
Fax: 615/250-3937
jims@branstetterlaw.com
janes@branstetterlaw.com
gerards@branstetterlaw.com

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

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR AN
AWARD OF ATTORNEYS' FEES
AND EXPENSES AND NAMED
PLAINTIFFS' SERVICE AWARDS

This Document Relates To: ALL
ACTIONS

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	4
III. AWARD OF ATTORNEYS’ FEEES AND EXPENSES	4
A. A Reasonable Percentage of the Fund Recovered is the Appropriate Method For Awarding <i>Class Counsel’s</i> Attorneys’ Fees in this Common Fund <i>Settlement</i>	4
B. A Fee of Approximately 20% of the Fund Created is Reasonable in This Case	6
1. <i>Class Counsel</i> Received a Very Good Result for the Class Given the Serious Risk of No Recovery	7
2. The Skill Required and the Quality of the Work	8
3. The Difficulty of the Questions Presented.....	9
4. The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiffs	11
5. A 20% Fee Award is Below the Average Fee Awarded in Similar Complex Class Action Litigation.....	12
6. Counsel’s Fee Request Is Also Supported By The Lodestar Cross-Check.....	14
a. Counsel’s Lodestar Is Reasonable	15
b. A <i>Negative</i> Multiplier of .22 Cannot Reasonably Be Challenged.....	16
C. Counsel’s Expenses Should Be Reimbursed	17
IV. THE REQUESTED <i>NAMED PLAINTIFFS’ SERVICE AWARDS</i> ARE FAIR AND REASONABLE	18
V. CONCLUSION.....	20

I. INTRODUCTION

Plaintiffs Ross Buckingham, Warren Bellcour, Kim Moran, Torlief Pederson, and Charles Porter (“*Named Plaintiffs*”),¹ respectfully submit this memorandum in support of their Motion for an Award of Attorneys’ Fees and Expenses and *Named Plaintiffs’ Service Awards*. More specifically and as set forth below, *Class Counsel* ask that this Court award fees in the amount of \$1 million dollars and expenses in the amount of \$400,000. The fees sought equal just over 20% of the total *Class Settlement Amount* of \$4.9 million and approximately 22%, less than one fourth, of counsel’s lodestar at their customary billing rates. In addition, *Class Counsel* request that the Court approve *Named Plaintiffs’ Service Awards* in the amount of \$3,000 to each of the *Named Plaintiffs*, without whose time and commitment the *Settlement Class* would receive nothing.

If approved by the Court, the global *Settlement* of this hard-fought ERISA action will create a \$4.9 million common fund for the benefit of the *Settlement Class*. The fee award sought is eminently reasonable in light of the benefit achieved for the Class, the risks involved in undertaking this complex matter, and

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*”), which is Exhibit D to the *Master Settlement Agreement* filed with this Court in *McGreevey v. Montana Power Company*, Case No. CY-03-01-BU-SEH. See Not. Filing Settle., Ex. D (Doc. 478). A revised, fully executed *Settlement Agreement* was filed with the Court in *McGeevey* as Exhibit C to the December 1, 2009, Notice of Filing of Additional Signature Pages (Doc. 480). The final version of the *Settlement Agreement* is attached as Exhibit A to the Declaration of James G. Stranch III In Support of Plaintiffs’ Motion for Final Approval of Settlement (Hereinafter “Stranch Approval Dec.” or “Stranch Dec.”).

the immense effort required in litigating the claims nearly through to trial. The risks greatly increased when both Touch America Holdings, Inc. (“Touch America”), and the NorthWestern Corporation (“NorthWestern”) became bankrupt, leaving the Northern Trust Company (“Northern Trust”) as the only solvent corporate defendant. Moreover, this case was intensely litigated from its inception, as the parties fought each other virtually every step of the way through motion practice and discovery. Counsel reviewed several million pages of documents, and took or defended more than 25 fact and expert depositions. After two rounds of summary judgment briefing, this Court granted Northern Trust’s motion, thereby increasing still further the Class’ risk of not recovering anything in this action. Plaintiffs also responded to the *Montana Power Company Defendants’* motions for summary judgment, which would be heard by the Court if the proposed *Settlement* is not approved.

Litigating this case, therefore, required tremendous time, energy and resources from *Class Counsel*. In fact, as of February 10, 2010 – the date of entry of this Court’s *Notice Order – Class Counsel*, attorneys and their clerks and paralegals had worked over 10,000 hours on this case. At their customary hourly billing rates, then, counsel’s lodestar is over \$4.5 million dollars; in addition, *Class Counsel* incurred over \$417,000 in expenses. See Stranch Approval Dec., ¶¶ 39,

48.² *Class Counsel* continue to spend time and money on this matter in seeking *Final Approval*. If the *Settlement* is approved, *Class Counsel* will also continue to incur additional expense and expend additional hours overseeing the *Plan of Allocation* and fielding inquiries from *Settlement Class Members*—but no additional petition for fees or expenses can or will be made.

Class Counsel faced considerable risk in litigating this case on a contingent-fee basis, and they received no compensation of any kind throughout the nearly 8 year duration of this case. They have foregone other opportunities and devoted their time to this matter instead of others. As explained below, the requested fees and expense award is easily justified by the relevant factors considered by the Ninth Circuit, and is supported by a lodestar cross-check. Equally warranted are the modest *Service Awards* sought for the *Named Plaintiffs*.

Class Counsel respectfully request that this Court grant their motion, and award the requested attorneys' fees of \$1 million, expenses totaling \$400,000, and *Service Awards* of \$3,000 for each *Named Plaintiff*.

² Two Declarations have been filed by James G. Stranch III, Co-Lead Counsel. One Declaration supports this request for fees and expenses for his firm, Branstetter, Stranch & Jennings, PLLC (“BSJ”) and is one of the several Declarations filed by all firms in this litigation in support of the fee request. That Declaration shall be referred to as the “Stranch Fee Dec.” The other declaration also supports this fee request but provides information regarding the entire case and is primarily filed in support of the Motion for Final Approval of the Settlement. That Declaration will be referred to as the “Stranch Approval Dec.” or “Stranch Dec.”

II. FACTUAL BACKGROUND

Plaintiffs incorporate by reference the Factual Background Section of their Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement and the Stranch Decl., both filed contemporaneously herewith.

III. AWARD OF ATTORNEYS' FEES AND EXPENSES

A. A Reasonable Percentage of the Fund Recovered is the Appropriate Method For Awarding *Class Counsel's* Attorneys' Fees in this Common Fund Settlement

For their efforts in creating a common fund for the benefit of the *Settlement Class*, *Class Counsel* seek a reasonable percentage of the fund recovered as attorneys' fees. The percentage method of awarding fees has become an accepted if not the prevailing method for awarding fees in common fund cases in this Circuit and throughout the United States.

Courts have long recognized that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("WPPSS").

In this Circuit, the district court has discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method. *Id.* at 1296. In *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases.

Since *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. 1989) and its progeny, district courts in this Circuit have almost uniformly shifted to the percentage method in awarding fees in representative actions. The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated with a percentage of the recovery. Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time.³ Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas

³ In *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986), the court stated:

"The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains.... The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants."

School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809 (June 2000). Third, use of the percentage method decreases the burden imposed on the court by eliminating a full-blown, detailed and time consuming "lodestar" analysis while assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989).

B. A Fee of Approximately 20% of the Fund Created is Reasonable

In *Paul, Johnson*, the Ninth Circuit established 25% of the fund as the "benchmark" award for attorneys' fees. 886 F.2d at 272; *see also Torrissi*, 8 F.3d at 1376 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same). The court may depart from the benchmark if such adjustment is warranted. *Id.* at 1256-57. Here, *Class Counsel* seek a fee award of \$1 million, just over 20% of the common fund of \$4.9 million, and submit that the request is reasonable under the circumstances of this case, taking into account the factors discussed below.

1. *Class Counsel Received a Very Good Result for the Class Given the Serious Risk of No Recovery*

Courts have recognized that the result achieved is an important factor to be considered in making a fee award. *See, e.g., Vizcaino*, 290 F.3d at 1048 (result supported 28% fee). In addition, numerous cases have recognized that risk is an important factor in determining a fair fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *Id.* at 1300; *In re First Fid. Bancorp. Sec. Litig.*, 750 F. Supp. 160, 163 (D.N.J. 1990) (risk is evaluated by considering uncertainties at time the attorneys undertook representation).

Here, the *Class Action Settlement Amount* of \$4.9 million has been obtained without the risks and uncertainties associated with trial. Those risks increased exponentially with the bankruptcies of the TouchAmerica and Northwestern, this Court's grant of Northern Trust's motion for summary judgment, the reasonable possibility of dismissal of some or all of Plaintiffs' remaining claims against the *Montana Power Company Defendants* on their motions for summary judgment or at trial, and serious disputes over the facts and amount of damages even if Plaintiffs prevailed at trial. *See Stranch Dec.*, ¶¶ 23-27. In addition, given that the sole *Insurance Policy* covering Plaintiffs' claims would have been all but eviscerated after trial, collecting on any judgment would have been highly challenging at best. Despite these impediments, *Class Counsel* secured a

Settlement that, if approved, will provide the average *Settlement Class Member* with \$1,340. *See* Report of Independent Fiduciary, (Doc. No. 646-1 at ¶ 1, p. 8). While the \$4.9 million recovery is a small fraction of the highest amount of damages projected by Plaintiffs' expert, those calculations were vigorously contested by Defendants and their own experts, and the actual damage amounts awarded would likely have been far lower. The bankruptcies of both primary corporate Defendants, the impact of such on the individual Defendants and the dismissal of the only solvent corporate Defendant created a substantial risk for collectability of any judgment. Consequently, this *Settlement* is quite likely more than could have been collected if the case had survived the summary judgment motions, and had gone to a successful judgment at trial.

In the face of the substantial risk that the Class would recover nothing, *Class Counsel* achieved a very good result.

2. The Skill Required and the Quality of the Work

The successful prosecution of these claims required the participation of highly skilled and specialized attorneys. *Class Counsel* are experienced in complex ERISA class action litigation and other class litigation, and have represented other plaintiffs in other ERISA breaches of fiduciary duty lawsuits around the nation. *See* Stranch Dec. at ¶ 50-51, and Exhibits B and C thereto (resumes of *Class Counsel*). Given the specialized nature of the case, this

experience and skill was essential. *See In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 2008 U.S. Dist. LEXIS 106327, at *38 (S.D.N.Y. Dec. 29, 2008) (“ERISA fiduciary litigation involving defined contribution plans and their investments is a highly specialized area of the law that requires a mastery of class action litigation and ERISA, as well as regulations promulgated by a myriad of other governmental agencies.”). Although defense counsel presented formidable opposition to Plaintiffs’ claims, *Class Counsel* demonstrated their ability and experience in defeating Defendants’ motions to dismiss in large measure, obtaining certification, and in getting certain of Defendants’ experts dismissed. Absent these efforts, the *Settlement Class* might not have recovered any benefits. *See Fournier v. PFS Invs.*, 997 F. Supp. 828, 833 (E.D. Mich. 1997) (“The professional skill and standing of co-lead counsel and the success achieved is evident. Without counsel’s efforts, the likelihood of settlement in this action would be diminished.”). The skill and quality of counsel’s work easily supports the below-benchmark fee sought here.

3. The Difficulty of the Questions Presented

Courts have recognized that the novelty and difficulty of the issues in a case are significant factors to be considered in making a fee award. *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001). The prosecution of these claims was difficult from the outset particularly given the unsettled nature

of this area of law. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 382 (S.D. Ohio 2006) (“An ERISA case involves highly-specialized and complex areas of law. The type of claims brought here, breaches of duty by the Plan’s fiduciaries, are based on rapidly evolving legal theories. There are significant conflicts between the approaches adopted by different trial courts and appellate courts and most law in this area was decided after this case was filed.”). As the Court is aware, the parties vigorously disputed the proper showing required to make out an ERISA breach of fiduciary claim under *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004) and *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008). The difficulties in making out a claim against the directed trustee, Northern Trust, increased exponentially when the Department of Labor issued Field Assistance Bulletin 2004-03 (“FAB”) during the pendency of this case. Ultimately, this Court granted Northern Trust’ motion for summary judgment; it is impossible to predict whether Plaintiffs’ claims against the *Montana Power Company Defendants* would have suffered a similar fate. Indeed, complex factual and legal questions were and would have continued to be the subject of fierce debate between *Class Counsel* and the *Montana Power Company Defendants’* counsel. Given the difficulties presented and overcome through this proposed *Settlement*, the fee requested is fair.

4. The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiffs

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement. It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. *WPPSS*, 19 F.3d at 1299.

Class Counsel have received no compensation for their efforts during the course of this litigation and have incurred \$417,673.99 in expenses in litigating for the benefit of the *Settlement Class*. They have expended a substantial amount of attorney and paralegal time, 10,371.36 hours, in obtaining this result and any fee award or expense reimbursement to *Class Counsel* has always been at risk and completely contingent on the result achieved and on this Court's exercise of its discretion in making an award.⁴ In addition, due to the time and expense required

⁴ Professor Conte acknowledged the propriety of adequately compensating counsel in common fund cases:

by this litigation, *Class Counsel* have been precluded from accepting or working on certain on other cases during the eight years of this litigation. The impact on counsel's practices and the financial burden of this litigation weigh in favor of the requested fee award.

5. A 20% Fee Award is Below the Average Fee Awarded in Similar Complex Class Action Litigation

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. If this were a non-class action litigation, the customary contingent fee would likely range between 30 and 40 percent of the recovery. *See, e.g., In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (“in private contingency fee cases, particularly in tort matters, plaintiffs’ counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery”).

A Federal Judiciary Center study released in 1996, which covered all class actions in four selected federal district courts with a high number of class actions, found that as to the size of attorneys’ fees: “Median rates ranged from 27% to 30%.” Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the*

[C]ourts have been careful to award a fully compensable reasonable fee based on the underlying economic inducement for class action lawyers to pursue potentially expensive or complex common fund class litigation. These lawyers assume the risk of no compensation unless they successfully confer common fund benefits on the class

1 Alba Conte, *Attorney Fee Awards* §1.09, at 16 (2d ed. 1993) (footnote omitted, emphasis in original).

Advisory Committee on Civil Rules, at 69 (Federal Judicial Center 1996). This finding is in line with an analysis of fee awards in class actions conducted in 1996 by National Economic Research Associates, an economics consulting firm. Using data from 433 shareholder class actions, the study concludes: “Regardless of case size, fees average approximately 32 percent of the settlement.” Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* (NERA Nov. 1996).

Numerous ERISA and other cases support the range of attorneys’ fees in these studies and thus the fee requested here. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (affirming award of 33.3% of common fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of common fund); *In re HealthSouth Corp. ERISA Litig.*, 2006 U.S. Dist. Lexis 50196, *20 (N.D. Ala. June 28, 2006) (awarding 28.5% of common fund as fee in ERISA class action settlement); *In re CMS Energy ERISA Litig.*, 2006 U.S. Dist. Lexis 55836, *9 (E.D. Mich. June 27, 2006) (awarding 28.5% of common fund as fee in ERISA class action settlement); *Spann v AOL Time Warner, Inc.*, 2005 U.S. Dist. Lexis 10848 (S.D.N.Y. June 7, 2005) (awarding 33% of common fund as fee in ERISA class action settlement); *Beam v. HSBC Bank*, 2003 WL 22087589 (W.D.N.Y. Aug. 19, 2003) (awarding fee of 25% of common fund in

ERISA class action settlement); *Presley v. Carter Hawley Hale Profit Sharing Plan*, 2000 WL 16437 (N.D. Cal. Jan. 7, 2000) (awarding fee of 25% of common fund in ERISA Class action).

6. Counsel's Fee Request Is Also Supported By The Lodestar Cross-Check

Because the requested fee award is reasonable under the percentage of the fund analysis, it is not necessary to determine its reasonableness under the lodestar method. Nonetheless, courts may use the lodestar approach to cross-check a fee award that is determined through the percentage of the fund method. As the *Vizcaino* Court noted, 290 F.3d at 1050:

Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted. Thus, while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.

Here, the lodestar cross-check confirms the reasonableness of Counsel's fee request.

a. Counsel's Lodestar Is Reasonable

To calculate the lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's hourly rates.⁵ *Id.* Counsel and their staff worked 10,371.36 hours in this case.⁶ Of the time spent on this case by Plaintiffs' counsel, approximately 3,036 hours were spent on research and drafting in connection with the initial and amended complaints and in research and briefing in connection with the motions to dismiss, the motion for class certification, the motions for summary judgment, the motions to strike experts, and various other motions; approximately 1,442 additional hours were spent in preparing for and attending hearings before this Court, approximately 1,573 hours were spent in preparing for, taking and defending depositions in this case; additional 2,293 hours, approximately, were spent reviewing and coding documents. The remainder of Plaintiffs' counsel's time, over 1780 hours, was spent on such tasks as drafting

⁵ When used as a cross-check, lodestar calculations can be based on time and expense summaries in lieu of detailed records. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 332 n. 107 (3d Cir. 1998); *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (quoting *Camden I Condo Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)). Nonetheless, *Class Counsel* are providing their contemporaneous and detailed time records to the Court herewith.

⁶ The fee and expense declaration of the attorneys involved in this litigation are filed separately with the Court. In support of this Motion, fee declarations have been filed as follows: Stranch Fee Dec.; Declaration of Andrew M. Volk Concerning Fees and Expenses ("Volk Dec."); Declaration of Doug Buxbaum Concerning Fees and Expenses ("Buxbaum Dec."); Declaration of Andrew D. Huppert Concerning Fees and Expenses ("Huppert Dec."); Declaration of Ellen Kelman Concerning Fees and Expenses ("Kelman Dec."); Declaration of Brian J. Robbins Concerning Fees and Expenses ("Robbins Dec."); and Declaration of George E. Barrett Concerning Fees and Expenses ("Barrett Dec."). References to the entire group of declarations filed by counsel in this litigation in support of the fee petition shall be designated "Fee Declarations."

and responding to discovery, working with our damage and liability experts, working on bankruptcy issues, communicating with clients and other Class members, and attending mediations and negotiating the settlement. *See* Fee Declarations. Given the complexity of the legal and factual issues involved, and the hard-fought and protracted nature of the litigation, the hours incurred are entirely reasonable. Indeed, the *Montana Power Company Defendants* alone incurred more than *six million dollars* in fees and expenses – more than *four times greater* than the total fees and expenses award sought by *Class Counsel* – yet *Class Counsel* were expending their resources against both the *Montana Power Company Defendants*’ attorneys *and* counsel for Northern Trust.

b. A Negative Multiplier of .22 Cannot Reasonably Be Challenged

Based on the lodestar of \$4,522,179.00, counsel’s requested fee equates to a substantial negative multiplier. Significantly, in the ERISA class action settlement context, some courts have held that “a risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel ‘had no sure source of compensation for their services.’” *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992)). Here, it is undisputed that *Class Counsel* had no such source. Indeed, “[t]he need for [a positive multiplier] is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement

to fees is inescapably contingent.” *In re Continental Ill. Sec. Litig.*, 962 F.2d at 569. Yet, here, *Class Counsel* seek a ***negative multiplier*** of approximately 22% of their lodestar, less than one fourth of the lodestar value of the services they rendered. Under any analysis, the request is reasonable. *See generally In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 938 n.45 (N.D. Ohio 2003) (relying on a 2003 study of fee awards in 1,120 cases to conclude that “the courts’ effective multipliers averaged ... 3.89 across all 1,120 cases”).

C. Counsel’s Expenses Should Be Reimbursed

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (allowing recovery of “out-of-pocket expenses that would normally be charged to a fee paying client”). Therefore, it is proper to reimburse reasonable expenses even though they are greater than taxable costs. *Id.*⁷ The categories of expenses for which *Class Counsel* seek

⁷ *See also Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (“Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients.”).

reimbursement here are the type of expenses routinely charged to hourly clients and, therefore, should be reimbursed here.

A significant component of *Class Counsel's* expenses is the cost of Plaintiffs' experts. *See* Stranch Dec., ¶ 19. The experts conducted a substantial amount of work on behalf of the Class, both in the area of liability and damages. Without this work, *Class Counsel* would not have been able to either present their proof of damages or rebut the testimony of the plethora of liability and/or damages experts proffered by Defendants.

Another large component of *Class Counsel's* expenses are deposition fees and transcripts, which were each necessary to the prosecution of this action. *See id.* at ¶ 12. And finally, *Class Counsel* were also required to travel in connection with depositions and hearings in this litigation and thus incurred the related costs of meals, lodging and transportation. In all, counsel expended \$417,673.99. Of that amount, counsel seeks reimbursement of \$400,000.

Accordingly, *Class Counsel* respectfully request that the Court Order that they may be reimbursed for their reasonable expenses in the amount of \$400,000.

IV. THE REQUESTED NAMED PLAINTIFFS' SERVICE AWARDS ARE FAIR AND REASONABLE

The recovery for *Settlement Class Members* under the proposed *Settlement* would not have been possible without the efforts of the *Named Plaintiffs*. Under similar circumstances, numerous courts have recognized that the allowance of

service awards to plaintiffs in class actions advances the goals of federal statutes, and have found it appropriate to reward named plaintiffs for the benefits they have conferred.⁸ The \$3,000 *Named Plaintiffs' Service Awards* sought here are fully justified.

From 2002 (when the investigation and filing of the initial complaints in this case occurred) through the present, the *Named Plaintiffs* devoted themselves to the prosecution of this litigation. Each *Named Plaintiff* provided factual information and consulted regularly with counsel, responded to multiple requests for written discovery and documents, and each prepared for and sat for lengthy and contentious depositions. Each *Named Plaintiff* was prepared to testify at trial. *See* Stranch Dec., ¶28. In short, without the efforts of the *Named Plaintiffs*, the remedial provisions of ERISA would not have been fulfilled, and the *Settlement Class Members* would receive nothing. Under these circumstances, the modest \$3,000 incentive awards sought for the *Named Plaintiffs* are eminently fair and reasonable.

⁸ *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming award of \$5,000 to representatives); *In re Immunex Sec. Litig.*, 864 F. Supp. 142, 145 (W.D. Wash. 1994) (awarding \$25,000 to eleven class representatives); *Hughes v. Microsoft Corp.*, 2001 U.S. Dist. Lexis 5976, at *36-38 (W.D. Wash. Mar. 21, 2001) (approving awards of up to \$65,000 per plaintiff); *Van Vracken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving award of \$50,000 to class representative); *Biancur v. Hickey*, 1997 U.S. Dist. Lexis 21516, at *8 (N.D. Cal. Nov. 18, 1997) (award of \$2,000 each to class representatives).

The Ninth Circuit is among the many courts that have approved the award of incentive awards to Class Representatives. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). Indeed,

Incentive awards are not uncommon in class action litigation where, as here, a common fund has been created for the benefit of the class. Incentive awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.

Hughes v. Microsoft Corp., 2001 U.S. Dist. Lexis 5976, at *34 (W.D. Wash. Mar. 21, 2001) (approving incentive awards of \$7,500 to \$40,000 per Class Representative) (citing *In re Southern Ohio Corr. Facility*, 175 F.R.D. 270, 272-76 (S.D. Ohio 1997)). *See also, e.g., In re US Bancorp Litig.*, 276 F.3d 1008 (8th Cir. 2002) (affirming \$10,000 incentive awards as appropriate); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (endorsing use of incentive awards); *Spicer v. Chicago Bd. Options Exch.*, 844 F. Supp. 1226, 1266-68 (N.D. Ill. 1993) (approving incentive awards of \$10,000 for each class representative and citing seventeen other courts where incentive awards were approved). Under the great weight of authority, the \$3,000 incentive awards sought here are fair and reasonable, and should be approved by this Court.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order awarding a total of \$1 million in attorneys' fees, \$400,000 in expenses

and *Named Plaintiffs' Service Awards* in the amount of \$3,000 for each *Named Plaintiff*.

Respectfully submitted this 6th day of April, 2010.

/s/ James G. Stranch III
James G. Stranch, III
Jane B. Stranch
J. Gerard Stranch, IV
Branstetter, Stranch & Jennings, PLLC
Attorneys for the Plaintiffs

Andrew M. Volk
Steve W. Berman
Hagens Berman Sobol Shapiro, LLP
Attorneys for the Plaintiffs

Andrew D. Huppert
Andrew D. Huppert, P.C.
Attorney for the Plaintiffs

Douglas A. Buxbaum
John M. Fitzpatrick
Buxbaum Daue & Fitzpatrick
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 6th day 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 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/Jane B. Stranch
Jane B. Stranch
Branstetter, Stranch & Jennings, PLLC
Attorneys for Plaintiffs

Electronic Mail Notice List/ Registered CM/ECF Participants:

Nicole A. Diller
Morgan Lewis & Bockius, LLP
One Market Spear Street Tower
San Francisco, CA 94102
ndiller@morganlewis.com

Andrew M. Volk
Steve W. Berman
Hagens Berman Sobol Shapiro, LLP
1917 Eighth Avenue, Suite 3300
Seattle, WA 98101
andrew@hbsslw.com
steve@hbsslw.com

Christopher C. Scheithauer
McDermott Will & Emery, LLP
18191 Von Karman Ave., Suite 500
Irvine, CA 92612-7108
cscheithauer@mwe.com

John M. Fitzpatrick
Buxbaum, Daue & Fitzpatrick, PLLC
228 West Main, Suite A
P.O. Box 8209
Missoula, MT 59807
jfitzpatrick@bdf-lawfirm.com

Andrew D. Huppert
Andrew D. Huppert, P.C.
257 West Front
P.O. Box 7187
Missoula, MT 59807
andrew@carey-law.com

J. Jackson
F. Matthew Ralph
Kristina W. Carlson
Dorsey & Whitney
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Jackson.j@dorsey.com
Ralph.matthew@dorsey.com
carlson.kristina@dorsey.com

Manual Notice List/

Non-CM/ECF Participants:

D. Ward Kallstrom
Morgan Lewis & Bockius, LLP
One Market
Spear Street Tower
San Francisco, CA 94105

Christopher Weals
Morgan Lewis & Bockius, LLP
1111 Pennsylvania Avenue
Washington, DC 20004

Ellen M. Kelman
Buescher, Goldhammer & Kelman,
P.C.
1563 Gaylord Street
Denver, CO 70206