

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re:</i> TOUCH AMERICA HOLDINGS, INC., <i>et al.</i> , Debtors.	Chapter 11 Case No. 03-11915 (KJC) (Substantively Consolidated) Related to Docket No.: 3689
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PETITION FOR ATTORNEYS' FEES AND COSTS

Pursuant to Federal Rules of Civil Procedure 23(h)(1) and 54(d)(2), the Mattson Claimants, by their counsel, submit this Petition for Attorneys' Fees and Costs in accordance with the Court's July 9, 2008 Order Preliminarily Approving Classwide Settlement of Mattson Claim (the "July Order") [D.I. No. 3689] that set a deadline of July 21, 2008 for the Mattson claimants to submit this petition for attorneys' fees and costs. Below, the Mattson Claimants present the standard for awarding attorneys' fees and costs in a classwide settlement and then detail the amounts sought. It should be noted that the Mattson Claimants seek fees and costs only for the work performed in conjunction with their claim in this bankruptcy case. They do not seek to recover fees or costs for work performed in the underlying state court action that is currently pending in the Montana Supreme Court.

I. ATTORNEYS' FEES

Class counsel has contingency fee agreements with the named plaintiffs who represent the Mattson class (Exhibit A). These agreements provide that class counsel will be paid one-third (33 ½ percent) of any recovery. As of the date of this filing, 12 of the 16 named plaintiffs have submitted written agreements to this settlement; class counsel expects to be able to present all the agreements at the Final Approval Hearing. The cash portion of the settlement in this

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matter is \$350,000, so class counsel seeks one-third of that amount in attorneys' fees, or \$116,667.¹

“[A] thorough judicial review of fee applications is required in all class action settlements.” *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 819 (3rd Cir. 1995). Contingent fee awards are generally favored in classwide settlements, especially in those with modest total cash values such as this one. *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 333 (3rd Cir. 1998).

In reviewing the fee petition for fairness and reasonableness, the Court looks to the factors set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3rd Cir. 2000): (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Id.* Here, each of the enumerated factors support the fee petition, as shown.

1. Size of fund created and number of persons benefitted: here, the class of over 3,000 members will be benefitted by the cash awards to two organizations close to their interests: the Flathead Conservation District (<http://www.flatheadcd.org>) and the University of Montana's Flathead Lake Biological Station (<http://www.umt.edu/flbs>). In addition, the class will receive the opportunity to pursue potentially large claims against the insurance companies if the

¹The total value of the settlement could far exceed \$350,000 after factoring in the right to pursue the insurance policies that are part of the settlement, but this possibility is sufficiently uncertain that class counsel does include the value of those policies in the calculation of fees here.

underlying Montana state court case revives. The recovery thus supports a one-third contingency award.

2. Presence or absence of substantial objections by members of the class: the deadline for objections to the settlement and/or fee petition is August 14, 2008. Class counsel will report those numbers to the Court at the Final Approval Hearing on August 21, 2008, at which time this factor can be evaluated.

3. Skill and efficiency of the attorneys: class counsel is highly experienced in class action litigation and has worked tirelessly on behalf of this class since the underlying Montana state court was brought in 1999. In the Touch America bankruptcy, class counsel has worked since filing the Mattson claim in 2003 to secure a recovery for the class. The loss of the class' claims in the Montana state court reduced the value of the Touch America claim significantly, yet class counsel persisted in this venue and secured a settlement of significant value to the class. The fact that class counsel's lodestar – their actual hours spent pursuing this claim multiplied by their hourly rate – *exceeds* the one-third contingency that they seek is further proof that their fee petition is appropriate. Cross-checking a fee petition by comparing it to the lodestar is a common method for courts to justify a fee award. *In re Prudential*, 148 F.3d at 333.

4. Complexity and duration of litigation: this claim has been pending for five years, and the underlying Montana state court case has been pending for nine years. Few cases could boast the level of complexity and duration that this one has grown to encompass.

5. Risk of nonpayment: class counsel ran a high risk of nonpayment in bringing this claim. That risk increased exponentially after the loss of their underlying state court claims and the Plan Trustee's motion to dismiss the claim based on the argument that, in any case, the

liability for the Mattson claimants' damages stayed with NorthWestern rather than passing to Touch America. Class counsel's risk of nonpayment justifies the one-third contingency.

6. Amount of time devoted by plaintiffs' counsel: as forth in the accompanying Affidavit of Jamie S. Franklin (Exhibit B), class counsel has incurred the following attorneys' fees in pursuing the Mattson claim:

Attorneys' Fees as of July 21, 2008

Total hours:	271.20
Total billing:	\$130,850.00

Billing breakdown:

<u>Name</u>	<u>Hours</u>	<u>Rate/hour</u>	<u>Amount</u>	<u>Position</u>
Jamie S. Franklin	183.20	415.00	76,028.00	Partner
Thomas R. Meites	63.30	755.00	47,791.50	Partner
Michael M. Mulder	5.40	665.00	3,591.00	Partner
Christopher Romer	10.20	190.00	1,938.00	Senior Paralegal
Emily Vanney	4.00	165.00	660.00	Paralegal
<u>Evelina Shpolyansky</u>	<u>5.10</u>	<u>165.00</u>	<u>841.50</u>	<u>Paralegal</u>
Totals	271.20		\$130,850.00	

Class counsel's contemporaneous time records and detailed cost records, including descriptions of the work performed and costs incurred, are appended to the Affidavit of Jamie S. Franklin (Exhibit B). As shown, these fees, which represent class counsel's lodestar, exceeds the one-third award of \$116,667 that they seek. The amount of time devoted to this claim justifies the award sought.

7. Awards in similar cases:

Courts routinely approve fee awards in contingent-fee cases that are several times the amount of the attorneys' lodestar (when used as a cross-check). Here, the contingent fee is less than the lodestar; there is no multiplier at all. Typical awards involving contingent fee cases like this one is between 20 and 35% of the classwide recovery – and that number goes up the smaller

the total settlement. *In re SmithKline Beckman Corp. Securities Litigation*, 751 F.Supp. 525, 533 (E.D.Pa. 1990). The fees sought are thus clearly within the range commonly approved in class settlements in this circuit. *See also* 3 H. Newberg, *Newberg on Class Actions* 186, 190 (2d ed. 1985).

II. COSTS

Class counsel's actual out-of-pocket costs for bringing the Mattson claim total \$36,326.48, as follows:

Out-of Pocket Costs as of July 21, 2008

<u>Category</u>	<u>Total</u>
In house copying costs	\$610.60
Package delivery services	\$417.97
Postage/Samps expenses	\$30.72
Travel expenses, lodging, meals	\$2,005.56
Telephone charges	\$59.21
Payments made to Bifferato Genilotti, LLC	\$24,244.65 ²
Westlaw research	\$4,457.77
Total	\$31,826.48

Costs of administering the settlement are expected to be approximately \$4,500.00, as follows:

Administrative Costs as of July 21, 2008

<u>Category</u>	<u>Total</u>
Printing and mailing class notice	\$4,500.00

The total of class counsel's out-of-pocket costs and administrative costs is thus \$36,326.48.

²Meites, Mulder, Mollica & Glink advanced the attorneys' fees and costs of the law firm of Bifferato Gentilotti, LLC, which served as local counsel to the Mattson class. This sum, \$24,244.65, is thus categorized as a "cost" to be repaid to Meites, Mulder, Mollica & Glink in the table above.

III. CONCLUSION

For all the reasons presented above, the Mattson claimants respectfully request that the Court approve their one-third contingency fee in the amount of \$116,667 and award them their reasonable litigation and administrative costs of \$36,326.48.

DATED: July 21, 2008
Wilmington, Delaware

BIFFERATO GENTILOTTI LLC

/s/ Linda Richenderfer
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Attorneys for Mattson Claimants

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AFFIDAVIT OF JAMIE S. FRANKLIN

I, Jamie S. Franklin, under penalty of perjury, state that the following is true and accurate to the best of my knowledge:

1. I am a partner at the law firm of Meites, Mulder, Mollica and Glink. I have been practicing law for ten years, and the majority of my practice is devoted to class action litigation on behalf of plaintiffs. I am a graduate of the University of Chicago Law School (J.D. 1997) and Duke University (B.A. 1992). I am one of the attorneys of record for the Mattson class that is the subject of this Court's July 9, 2008 Order Preliminarily Approving Classwide Settlement of Mattson Claim (the "July Order") [D.I. No. 3689]. My biography is posted at <http://www.mmmglaw.com/Bio/JamieFranklin.asp>.

2. The other attorneys at my firm who worked on this matter are founding partners Thomas R. Meites (<http://www.mmmglaw.com/Bio/ThomasMeites.asp>) and Michael M. Mulder (<http://www.mmmglaw.com/Bio/MichaelMulder.asp>).

3. Thomas R. Meites is a *magna cum laude* graduate of Harvard Law School with over 30 years of complex litigation experience. Mr. Meites has headed the law firm of Meites, Mulder, Mollica & Glink since 1980. He is a member of the Board of the Legal Services Corporation and is a past member of the Board of Directors of Legal Assistance Foundation of

Metropolitan Chicago. Mr. Meites is currently a lecturer at Northwestern University's School of Education and Social Policy and previously served as litigation director for Chicago's Leadership Council for Metropolitan Open Communities, a not-for-profit fair housing organization, and as a member of a negotiated rulemaking committee of the federal Equal Employment Opportunity Commission.

4. Michael Mulder has been a partner or associate with Meites, Mulder, Mollica & Glink since 1982. His practice is focused on complex federal and state court litigation. Over the years, he has conducted jury and bench trials in federal courts nationwide. He has also litigated dozens of appeals and argued before the United States Supreme Court. He is particularly experienced in handling large, complex class actions and multi-plaintiff lawsuits, including employment discrimination, pension, and employee benefits cases. He has also negotiated dozens of severance packages for highly-placed executives at Fortune 500 companies.

5. I submit this affidavit in response to the July 9, 2008 Order in which the Court granted plaintiffs' Motion for Preliminary Approval of Classwide Settlement and set a deadline of July 21, 2008 for the Mattson claimants to submit their petition for attorneys' fees and costs and post that information on their firm website (www.mmmglaw.com).

6. Class counsel undertook to represent the Mattson claimants in this matter on a contingent fee basis after weighing the risk involved and the difficulty of the issues to be litigated. Each of the plaintiffs signed a fee agreement with class counsel in which they agreed to pay class counsel one-third of any recovery they achieved in all matters pertaining to recovery of money damages against Montana Power Company and its successors in interest and other potential defendants.

7. Appendix 1 to this Affidavit is an invoice showing the total amount time spent and costs incurred in connection with the Mattson claim in this venue. I have performed a review of the report of time and costs reflected in Appendix 1 and find that it is accurate and that the time and costs were reasonably and necessarily incurred in the prosecution of this case. As Appendix 1 indicates, as of the date of this submission, class counsel has incurred a total of \$130,850.00 in fees and \$31,826.48 in out-of-pocket litigation costs (the majority of which consists of advance payments of fees and costs to our Delaware co-counsel, Bifferato Gentilloti, LLC). We have also incurred or expect to incur \$4,500.00 in administrative costs related to the settlement for printing and mailing the class notice.

8. The hourly rates reflected in Appendix 1 are the normal hourly rates that attorneys and paralegals at our firm currently bill in all hourly matters. It is my understanding that reasonable fees "are to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). As such, it is reasonable to use our standard billing rates when litigating outside our jurisdiction. *Mathur v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 744 (7th Cir. 2003) (the proper rate to be used in calculating the lodestar amount for award of attorneys' fees for services rendered by out-of-town attorneys was those attorneys' market rate, not the prevailing local rates). Our firm's rates are reasonable for counsel in Chicago of our level of experience and expertise, based on my knowledge of other counsel's billing rates in our jurisdiction.

9. I am also aware of the time spent and costs incurred by the other firms representing the class, and I find them to be reasonable and necessary to adequately prosecute this case.

Signed and sworn before me:

Notary:

Kathy L. Repak

Signed [Signature]

Date 21 July 08

