

JUN - 3 2016

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

CASSANDRA SCHMILL,)	
)	WCC NO. 2001-0300
Petitioner,)	
)	
vs.)	STIPULATION RE: FINAL ACCOUNTING
)	AND FOR <i>CY PRES</i> DESIGNATION
)	AND RELEASE OF CERTAIN FUNDS
LIBERTY NW INS. CORP.,)	
)	
Respondent/Insurer,)	
)	
and)	
)	
MONTANA STATE FUND,)	
)	
Intervenor.)	
_____)	

COME NOW the above common fund Petitioner and her attorney and the Respondent Liberty NW Ins. Corp. and the workers' compensation insurers identified below through their attorney and submit the following *Schmill* common fund stipulation for a *CY PRES* designation directing the Respondent to disperse all remaining *Schmill* benefits to the Montana Justice Foundation for the reasons set forth with particularity below.

Whereas the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2003 MT 80 (Schmill I)* held that it was a violation of the equal protection clauses of the Montana and United States Constitution to allow for apportionment deductions for non-occupational factors in the Occupational Disease Act, since repealed; and

Whereas The Montana Supreme court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2005* held *Schmill I* was retroactive to all cases not yet final or settled at the time of its issuance, and was therefore a common fund case that created a global lien; and

Whereas this Court in *Flynn v. Montana State Fund, 2010 MTWCC 20* held that "paid in full" meant:

A claim in which all benefits to which a claimant is entitled pursuant to the statutes applicable to that claim are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of a judicial decision, the claim can no longer be considered "paid in full" and is subject to retroactive application of the judicial decision

And whereas the Montana Supreme Court held in *Flynn-Miller v. Montana State Fund and Liberty Northwest Ins. Corp.*, 2011 MT 30 this Court's definition of "paid in full" properly applies the retroactive principles to be applied in common fund cases; and

Whereas the Liberty affiliated companies as of the time of this pleading affected by the above decisions include the following workers' compensation insurers;

- American Economy Insurance Company (Safeco)
- American States Insurance Company (Safeco)
- Employers Insurance Company of Wausau
- First National Insurance Company of America (Safeco)
- General Insurance Company of America (Safeco)
- LM Insurance Corporation
- Liberty Insurance Corporation
- Liberty Mutual Fire Insurance Company
- Liberty Mutual Insurance Company
- Liberty Northwest Insurance Corporation
- Safeco Insurance Company of America
- The First Liberty Insurance Corporation
- The Ohio Casualty Insurance Company
- Wausau Underwriters Insurance Company

And, whereas by orders dated July 29, 2015, and August 18, 2015, the Court adopted the parties' common fund implementation plans for the *Schmill* common fund; and

Whereas the Liberty affiliated companies identified above followed the approved implementation plans and identified thirteen (13) *Schmill* claims for the requisite time period. Checks for past due *Schmill* benefits were sent to the last known addresses of the 13 identified claims. Nine of the 13 checks were cashed and four were returned. Additional attempts were made by Liberty to locate the four (4) claimants whose checks were returned, but without success.

Whereas the following table is an accounting of the *Schmill* benefits paid and still owing by Liberty:

Claimant Name and Claim Number	Date Claimant paid by Liberty	Total Benefits	25% Fee
Appel, Kimberly 687-032378	8/24/15	\$ 3,147.09	\$ 786.77
Cline, Norma 22W981701088	Check returned	\$ 193.73	\$ 48.43
Flores, Johnny 687-031410	8/24/15	\$ 209.85	\$ 52.46
Goldy, Donna 687-030405	8/26/15	\$ 7,697.06	\$1,924.27
Jones, Cornelia 687-040715	Check returned	\$ 294.84	\$ 73.71
Jones, Pamela 687-037900	Check returned	\$ 1,559.31	\$ 389.83
Kessel, Duane 687-015540	8/27/15	\$ 2,719.63	\$ 679.91
Meyers, Greg 687-024917	8/24/15	\$ 330.05	\$ 82.51
Potter, Darcy 687-035491	2/12/16	\$ 770.64	\$ 192.66
Samples, Sandy 687-037290	8/24/15	\$ 1,223.26	\$ 305.82
Smith, Doug 687-034600	2/12/16	\$ 152.78	\$ 38.20
Sorenson, Janice 687-033184	2/10/16	\$ 629.67	\$ 157.42
Sutich, Linda 687-037351	Check returned	\$ 5,470.51	\$1,367.63

Whereas the amount of unclaimed *Schmill* benefits totals \$ 7,518.39.

The parties respectfully request the Court issue an order adopting the foregoing accounting, finding the plans noted above have been implemented, and impose *CYPRES* on the amount of \$7,518.39 remaining in unpaid and unclaimed *Schmill* benefits held by the Respondent, Liberty NW Insurance Company, for the reasons stated below.

CY PRES DESIGNATION

Historically, the equitable *cy pres* doctrine was used by courts to reform a written instrument to distribute a charitable gift when the original purpose of a trust had been frustrated. See Black's Law Dictionary (9th ed. 2009). The doctrine originated "as a way to effectuate [a] testator's intent in making charitable gifts . . ." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012). Montana has statutorily recognized the *cy pres* doctrine in the area of charitable trusts since 1989. §72-33-504, MCA (repealed and replaced with similar language in 2013 Mont. Laws Ch. 264, § 62 (S.B. 251)). In recent years, many state and federal courts have applied the *cy pres* doctrine in the settlement of class action lawsuits, allowing the Court "to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries," *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011), typically a nonprofit charitable organization whose work indirectly benefits the class members and advances the public interest. Black's Law Dictionary (9th ed. 2009), *cy pres*. Under *cy pres*, the court has broad discretion to distribute funds in a manner that is keeping "as near as possible" with the original intent of the trust or class action funds. Fed. Rules Civ. Proc. Rule 23; *Mangone v. First USA Bank*, 206 F.R.D. 222 (S.D. Ill. 2001).

The *cy pres* doctrine was first used in Montana in 2005 for the distribution of unclaimed funds from a settlement. In *Kimberlee Williams, et al., vs. Norwest Corporation, et al.*, the Honorable Judge Dorothy McCarter approved a settlement agreement allowing unclaimed funds to be distributed to the Montana Justice Foundation and the United Way. (Attached Exhibit A) The doctrine was also used for similar purposes in *MT Land & Mineral Owners Association, Inc. v. Devon Energy Corp.*, (¶ M). (Id.)

The extension of the *cy pres* doctrine to unclaimed funds from class action suits follows the original intent of the doctrine. Although extended out of the realm of trusts, the doctrine solved a similar issue of what to do with funds intended for one purpose, but unable to be distributed to the original recipient. This dilemma was remedied by the *cy pres* doctrine that allowed funds to be diverted to a purpose that was as near as possible to the original intent. The unclaimed benefits resulting from this case presents a similar dilemma, and, the parties stipulate, one that can be remedied by employing the equitable doctrine of *cy pres*.

The Montana Justice Foundation is a 501c3 organization sanctioned by the Montana Supreme Court through Rule 1.18 of the Montana Rules of Professional Conduct to be the recipient of Interest on Lawyer Trust Accounts ("IOLTA"). MJF funds over forty legal aid organizations and access to justice initiatives throughout the state, focusing on "preserving housing, protecting subsistence income, obtaining access to health care, providing food and clothing for families and maintaining safety, independence, and dignity." Montana Justice Foundation, *IOLTA for Attorneys*, <http://www.mtjustice.org/iolta/for-attorneys/> (accessed Oct. 8, 2013). The MJF directly benefits residents of Montana through grants to Montana Legal Services Association ("MLSA") which provides free legal civil aid to low income Montana citizens. Over

150,000 low-income Montanans utilized MLSA as their law firm with 13 full time attorneys carrying the case load. A *cy pres* award to MJF will help ensure that all Montanans have dedicated advocates to help them with their most basic legal needs. The residents of Montana, including injured workers, would be greatly served by MJF's efforts to ensure access to justice in their communities. By directing the unclaimed property to the MJF, all the residents of Montana would receive the benefit of these funds.

DATED this 23 day of May, 2016.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

By:


Laurie Wallace
Laurie Wallace

DATED this 1st day of ~~May~~ June, 2016.

ATTORNEY FOR RESPONDENT LIBERTY
NW INSURANCE COMPANY

WILLS LAW FIRM
323 W. Pine St.
Missoula, MT 59802
Telephone: (406) 541-8560

By:


Larry Jones
Larry Jones

NANCY SWEENEY
CLERK DISTRICT COURT

2005 APR 19 A 10:21

FILED
T. DILLMAN

DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

KIMBERLEE WILLIAMS,
DOUGLAS M. and DANELLE
R. PATTERSON and MARJORIE HOOPS
on behalf of themselves
and all other persons
similarly situated.

Plaintiffs,

vs.

NORWEST CORPORATION,
NORWEST BANK MONTANA, N.A.,
NORWEST INSURANCE, INC.,
Et. al.

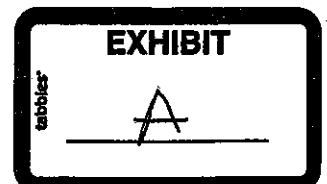
Defendants.

NO. ADV 93-792

**ORDER FOR CY PRES
DESIGNATION AND RELEASE OF
CERTAIN CLASS ACTION FUNDS**

UPON MOTION OF COUNSEL, having considered the accounting submitted by counsel, and for good cause shown the Court hereby ORDERS AND IMPOSES *CY PRES* on the amount of \$325,000 of the funds remaining in the IOLTA account established in this matter under the control of Jonathan Motl, Trustee.

Upon further consideration of the Motion of Counsel, the Court directs that Mr. Motl, as trustee, prepare and send a check for one-half of that *CY PRES* amount (or \$162,500) to the Montana Justice Foundation. The



remaining \$162,500 is to be distributed by Mr. Motl, as trustee, to the United Way, upon direction from Mr. Volling as to the name and address of the particular United Way recipient of those funds.

This Order does not release Mr. Motl from his further duties as trustee as there is still a small amount of remaining IOLTA funds. Mr. Motl is to submit a final accounting with a further request for *CY PRES* distribution of the remaining funds, along with a request for discharge of his duties.

Dated this 19 day of April, 2005.

DOROTHY McCARTER
District Court Judge

C
Jonathan Motl
James Volling

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

MONTANA LAND AND MINERAL
OWNERS ASSOCIATION, INC., ARNOLD
HOKANSON, LOU LUCKE, THE LUCKE
COMPANY, JULIE STRAUSER, CATHY
BESSETTE, HAROLD OLSON, DONALD
BOYCE and MARLA BOYCE,

Plaintiffs,

v.

DEVON ENERGY CORPORATION, DEVON
ENERGY PRODUCTION COMPANY, L.P.,
and DEVON GAS SERVICES, L.P.,

Defendants.

Case No. CV-05-30-H-RKS

**ORDER ON FINAL HEARING, FINAL CERTIFICATION OF THE
SETTLEMENT CLASS, AND FINAL APPROVAL OF SETTLEMENT
AGREEMENT AND RELEASE OF CLAIMS**

Pursuant to the Court's Order on Preliminary Certification of the Devon Settlement Class and the Notice of Proposed Settlement of Class Action ("Settlement Class Notice") sent to each Potential Settlement Class Member (as defined in the Settlement Agreement and Release of Claims), a final hearing on the reasonableness and fairness of the proposed settlement was held on August 22, 2007, in the U. S. District Court for the District of Montana, Helena Division. As required by the Order on Preliminary Certification, Class Counsel filed with the Court a Report on Status of Class Notice pursuant to Fed. R. Civ. P. 23(c)(2) ("Class Counsel's Report"). Class Counsel's Report confirms that (1) one objection was filed to the Class Settlement; (2) 1,896

potential class members remained as Settlement Class Members; and (3) 12 potential class members elected to opt-out of the Settlement. At the hearing, James H. Goetz and J. Devlan Geddes of Goetz, Gallik & Baldwin, P.C., John J. Mudd of Mudd Nelson P.C., Calvin T. Christian of Christian, Samson, Jones & Chisolm, PLLC, and Jamie S. Franklin of Meites, Mulder, Mollica & Glink represented the Plaintiffs and appeared as Class Counsel. Stanley T. Kaleczyc and Kimberly A. Beatty of Browning, Kaleczyc, Berry & Hoven, P.C., appeared on behalf of Defendants Devon Energy Corporation, Devon Energy Production Company, LP and Devon Gas Services, L.P. (collectively "Devon"). The Court reviewed Class Counsel Report, the materials filed in the matter including the materials comprising Class Counsel's Motion for Final Order, and considered the comments offered at the hearing.

Pursuant to Fed. R. Civ. P. 23 and 54, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. The individual Plaintiffs filed a suit against Devon alleging individual claims and class action claims seeking, among other things, declaratory and compensatory relief. The Individual Plaintiffs sought certification of a class, including themselves, under Fed. R. Civ. P. 23(b)(2) for declaratory relief and a class under Fed.R.Civ.P.23(b)(3) for money damages. The Plaintiff Montana Land and Mineral Owners Association, Inc. (MLMOA) is a mutual benefits members organization incorporated in Montana and established in 1974. The MLMOA's members are oil and gas royalty owners in the state of Montana, but the MLMOA itself does not own any royalties nor is it entitled to any royalty payments or reporting documents from Devon.

As a Plaintiff in this matter, MLMOA sought declaratory relief as a representative organization.

2. Plaintiffs and Devon agreed to settle this action on terms memorialized in the Agreement for Settlement and Release of Claims executed by and between the parties ("Settlement Agreement"). The Settlement Agreement, without its exhibits, is attached to this Order as Exhibit 1 and incorporated fully herein.¹ All capitalized terms used in this Order and not defined herein shall have the meanings set forth in the Settlement Agreement. In the event of any conflict between the descriptions in these paragraphs and the more detailed terms of the Settlement Agreement, the Settlement Agreement shall govern.

3. The Court has jurisdiction and venue over this suit and the Settlement Class. Under Fed. R. Civ. P. 23(e), approval of this Court is required for any settlement and dismissal of this action.

Certification of the Settlement Class

4. The Settled Claims as defined in the Settlement Agreement all arise from the same nucleus of operative facts and form part of the same case or controversy as alleged against Devon in the Amended Complaint or threatened to be alleged against Devon so that all of the claims approved for settlement by this Order were or could have been asserted as class claims in this Action.

5. The Settlement Class Members are so numerous that joinder is impractical.

¹ The Exhibits to the Settlement Agreement were appended to Plaintiffs' *Motion for Preliminary Approval of Classwide Settlement* (Docket No. 108).

6. There are questions of law and fact common to the Settlement Class Members and Plaintiffs.

7. The questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual members, and a settlement of Settlement Class Members' claims by a class action under Fed. R. Civ. P. 23 is superior to other available methods for the fair and effective settlement and adjudication of the controversy.

8. Plaintiffs' claims are typical of the Settlement Class Members' claims.

9. Settlement Class Members have no special interest in individually controlling the prosecution of separate actions.

10. Class Counsel is experienced and fully qualified.

11. Plaintiffs are adequate representatives of the Settlement Class and will fairly and adequately represent the interests of Settlement Class Members.

12. No significant difficulties are likely to be encountered in the management of the action as a class action for settlement purposes.

13. Exhibit 2 to this Order is a list of all members of the Potential Settlement Class. Those royalty payees who have filed timely notice of their request to be excluded from the Settlement Class are identified in Exhibit 2 to this Order as "Opt Outs" and, consequently, are specifically excluded from the Settlement Class, are not bound by this Order nor entitled to the benefits provided in this Order, and comprise the Opt-Out Claimants. The remaining members of the Potential Settlement Class who have not filed timely notice of their request to be excluded from the Settlement Class are set forth in Exhibit 2 to this Order and are not identified as "Opt Outs." The Court hereby certifies

as members of the Settlement Class those royalty payees set forth in Exhibit 2 to this Order who are not designated as "Opted Out." The Opt-Out Claimants collectively do not exceed 5% of the Cash Settlement Amount.

Notice of Pendency of the Class Action Proposed Settlement and Hearing

14. Pursuant to the Order on Preliminary Certification of the Potential Settlement Class and Fed. R. Civ. P. 23(e), Class Counsel provided the Settlement Class Notice to all Potential Settlement Class Members listed on Exhibit B of the Settlement Agreement.

15. According to the Class Counsel's Report, the Settlement Class Notice was sent via certified mail service to all Potential Settlement Class Members listed on Exhibit B of the Settlement Agreement. Class Counsel's Report confirms that one objection was filed to the Class Settlement.

16. Reasonable and adequate notice of the certification of the Settlement Class and the settlement of claims of Settlement Class Members was given through sending of the Notice as approved in the Court's Order on Preliminary Certification.

Approval of the Settlement Agreement

17. The proposed settlement as set forth in the Settlement Agreement was made in good faith.

18. The proposed settlement as set forth in the Settlement Agreement constitutes a fair, adequate and reasonable settlement of all Settled Claims.

19. This court finds after considering all the circumstances that the Settlement Agreement is fair and equitable and should be approved.

Reasonableness of Attorneys' Fee

20. No member of the Potential Settlement Class appeared at the time of the final hearing to object to the Petition for Fees and Costs. Further, counsel for the Defendants stated that Defendants had no objection to the Petition for Fees and Costs.

21. This court finds that Class Counsel achieved an excellent result for the Settlement Class.

22. This court finds that this case required significant outlays of time and resources for Class Counsel and was vigorously litigated by both sides.

23. This court finds that the legal issues in this case were issues of first impression in Montana and the level of complexity was high.

24. This court finds that the Settlement Class faced a significant risk of no recovery.

25. This court finds that some class member representatives searched for a period of years to secure counsel for this matter.

26. This court finds the one-third contingency fee agreement between class representatives and Class Counsel to be reasonable.

27. This court finds that Class Counsel's performance generated substantial benefits to the Settlement Class beyond the cash settlement fund.

28. This court examined alternative measures for attorneys' fees, including the Lodestar method, and finds the contingency fee to be reasonable.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. The Settlement Class Members are certified as a class under Fed. R. Civ. P. 23 for purposes of settlement only of Settled Claims, and shall proceed with settlement as provided in this Order.

B. As of the Approval Event, all Opt-Out Claimants timely and properly opted out of the Settlement Class and shall not be deemed by that fact to have released Devon or Devon's Additional Released Parties.

C. Following the Approval Event, each Settlement Class Member as defined shall become fully bound by all of the releases and other obligations and conditions as set forth herein and in the Settlement Agreement and shall be deemed to have released Devon and Devon's Additional Released Parties as provided in the Settlement Agreement.

D. Except as necessary to enforce this Order and the Settlement Agreement, Plaintiffs, Settlement Class Members and their heirs, personal representatives, assigns, and successors are barred from bringing claims against Devon and Devon Additional Released Parties, as defined in the Settlement Agreement, for Settled Claims as specifically defined in the Settlement Agreement.

E. Devon has escrowed with the Escrow Agent the sum of \$5,000,000.00 Dollars ("Escrow Account") in accordance with the Settlement Agreement.

F. The portion of the Escrow Account that is attributable to the Opt-Out Claimants share of that amount shall be immediately returned, with accrued interest, to Devon in accordance with the Settlement Agreement.

G. The balance of the Escrow Account, less any approved Attorney's Fees Claims and Administrative Costs, shall be distributed to the Settlement Class in

accordance with the Settlement Agreement. This Court approves the payment schedule for the Settlement Class attached hereto as Exhibit 2.

H. All interest accrued from the Escrow Account through the date of distribution attributable to the Settlement Class Members' portion of the Escrow Account shall be payable to Settlement Class Members. All interest accrued from the Escrow Account through the date of distribution attributable to the Opt-Out Claimants' portion of the Escrow Account shall be returned to Devon. Class Counsel should receive no portion of the interest.

I. The reasonable attorneys' fees of Class Counsel ("Permissible Class Counsel Fees") are and shall be in the amount of \$1,666,666.00. The reasonable litigation costs ("Litigation Costs") are and shall be in the amount of \$114,837.48. The reasonable Administration Costs are estimated to be in the amount of \$30,354.17. These sums shall be paid from the Escrow Account and the remaining amount, less the portions attributable to the Opt-Out Claimants, shall be paid to Settlement Class Members in the amounts as set forth in Exhibit 4 to this Order.

J. Within five (5) days of the entry of satisfaction of the Approval Event, as that term is defined in the Settlement Agreement, Devon and Class Counsel shall instruct the Escrow Agent to release from the Escrow Account all funds to be paid according to the Settlement Agreement ("Distribution Date"). This amount will be released per the Settlement Agreement to pay the amounts to be distributed to Settlement Class Members, the Permissible Class Counsel Fees, Litigation Costs and Administration Fees and to refund to Devon that portion of the Escrow Account attributable to those sums that would have been paid to Potential Class Members listed in Exhibit 2 to this Order who have

requested to be excluded from the Settlement Class. The Permissible Class Counsel Fees shall be released to Meites, Mulder, Mollica & Glink.

K. Class Counsel shall attempt to locate all Settlement Class Members whose Class Notices were undeliverable via Certified Mail. For those Settlement Class Members who are not located by Class Counsel and whose settlement amount is greater than \$100, Class Counsel shall engage a skip tracing service to perform a skip trace. Class Counsel shall complete its attempts to locate Settlement Class Members within sixty (60) days of the Approval Event.

L. All Distribution Checks must be cashed within 180 days of the Distribution Date pursuant to §1.45 of the Settlement Agreement.

M. Pursuant to §2.6.4 of the Settlement Agreement, within 240 days of the Distribution Date, any unclaimed Distribution Checks and all unused Administration Fees shall be paid to the Montana Justice Foundation, a charitable organization that has been approved by the Court as a cy pres recipient, to be earmarked exclusively for the delivery of civil legal aid in Blaine and Hill Counties, Montana.

N. No funds will remain in the Escrow Account after release of the funds as required by the Settlement Agreement and Release of Claims and by this Order.

O. The original Plaintiffs' signature pages to the Settlement Agreement shall be electronically filed with the Court, with the original pages to be retained by Class Counsel.

P. Upon entry of this Order and satisfaction of the Approval Event, as that term is defined in the Settlement Agreement, Class Counsel and counsel for Devon shall file a stipulated satisfaction and order of dismissal with prejudice of all Settled Claims.

The order of dismissal with prejudice of the Settled Claims shall be entered by the Court and shall be considered a final order, subject to appeal under Fed. R. Civ. P. 54.

DATED this 24th day August of 2007.

/s/ Keith Strong
Keith Strong
U.S. Magistrate Judge