

1 STEVE W. BERMAN, WSBA No. 12536
ERIN K. FLORY, WSBA No. 16631
2 HAGENS BERMAN SOBOL SHAPIRO LLP
3 1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
4 (206) 623-7292

The Honorable Fred Van Sickle

5 BRADLEY B. JONES, WSBA No. 17197
6 KENNETH G. KIEFFER, WSBA No. 10850
F. MIKE SHAFFER, WSBA No. 18669
7 GORDON THOMAS HONEYWELL
MALANCA PETERSON & DAHEIM LLP
8 1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
9 (253) 620-6500

10
11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

13 In re METROPOLITAN SECURITIES
14 LITIGATION

No. CV-04-0025-FVS

15 THIS DOCUMENT RELATES TO:
16 ALL ACTIONS

17 ORDER PRELIMINARILY
18 APPROVING SETTLEMENT
BETWEEN THE CLASS AND
DEFENDANT ERNST & YOUNG
LLP

19
20 Having considered the Motion and Memorandum of Plaintiffs, pursuant to
21 Fed. R. Civ. P. 23, for an Order preliminarily approving the proposed settlement
22 (the "Settlement") between the Class and defendant Ernst & Young LLP ("EY") in
23 accordance with the terms and provisions of the Settlement Agreement dated
24 February 22, 2010.
25
26

ORDER PRELIMINARILY
APPROVING SETTLEMENT - 1



1 **IT IS HEREBY ORDERED:**

2 1. This Order incorporates by reference the definitions in the Settlement
3 Agreement and the Judgment. Additionally, the following terms are defined
4 herein: (i) “Non Settling Defendant” and “Non Settling Defendants” refer to those
5 defendants other than Roth Capital Partners which or who were named in the
6 Action as of January 1, 2010 other than EY (specifically, PricewaterhouseCoopers
7 LLP, C. Paul Sandifur, Jr., Thomas Turner, Robert Ness, William Snider and Irv
8 Marcus); and (ii) “Previously Settled Defendant” and “Previously Settled
9 Defendants” refer to those defendants dismissed from the Action pursuant to the
10 Court’s Judgment and Order Finally Approving Partial Settlements filed October 6,
11 2006 (specifically, Robert K. Potter, Clayton E. Rudd, James V. Hawkins,
12 Gregory S. Strate, Philip W. Sandifur, Samuel Smith, Bruce J. Blohowiak,
13 B. Elaine Hoskin, Gary D. Brajcich, the Estate of Harold W. Erfurth, Reuel C.
14 Swanson, William A. Smith, John T. Trimble and Erik E. Skaggs), and that
15 defendant for whom a dismissal was preliminarily approved on February 16, 2010
16 (specifically Roth Capital LLP).

17
18
19 2. The Court has personal jurisdiction over all parties to the Action and
20 the EY Action, including all Class Members and EY, and subject matter
21 jurisdiction over the Action and the EY Action.

22
23 3. Without further order of the Court, the Settling Parties may agree to
24 reasonable extensions of time to carry out any of the provisions of the Settlement
25 Agreement.
26

1 4. In the interest of conserving expenses to the Class, pursuant to the
2 terms of the Settlement Agreement, the Court shall defer approval of the form and
3 manner of providing notice of the Settlement to the Class, and scheduling a hearing
4 for final approval of the Settlement and Settlement Agreement (the “Final
5 Approval Hearing”).
6

7 5. The Court hereby preliminarily approves the Settlement, as embodied
8 in the Settlement Agreement, as being fair, reasonable and adequate as to the Class
9 Members, subject to further consideration at the Final Approval Hearing.

10 6. This Order shall become null and void, with the exception of the
11 Bifurcation Order, and be without prejudice to the rights of the Settling Parties, all
12 of whom shall be deemed to have reverted to their respective status in the Action
13 and the EY Action as of February 7, 2010, if: (i) the Effective Date does not
14 occur; or (ii) the proposed Settlement is terminated or does not become effective
15 for any other reason. In such event, the Settlement Agreement shall become null
16 and void and have no further force and effect, and the Settlement shall be without
17 prejudice and none of its terms shall be effective or enforceable.
18

19 7. The Action is stayed as to EY in all respects until further order of the
20 Court, except as may be necessary to implement and effectuate the Settlement and
21 Settlement Agreement.
22

23 8. Pending final determination by the Court as to whether the Settlement,
24 as set forth in the Settlement Agreement, is fair, reasonable and adequate and
25 should be finally approved and whether the Judgment dismissing the Action and
26

1 the EY Action, with prejudice as to EY and whether an order barring any claims for
2 contribution or indemnification against the EY Released Parties should be entered,
3 no Lead Plaintiff nor any Class Member, either directly, representatively or in any
4 other capacity, shall assert, commence or prosecute against any of the EY Released
5 Parties any of the EY Released Claims in this Action, the EY Action or any other
6 proceeding or forum. This injunction is necessary to protect and effectuate the
7 Settlement, this Order, and the Court's flexibility and authority to effectuate the
8 Settlement and to enter judgment when appropriate, and is ordered in aid of the
9 Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

11 9. Pursuant to the Settlement Agreement and applicable law, any and all
12 claims arising out of any claims under the federal securities laws released by the
13 Class, including, but not limited to, any claims based upon, arising out of or
14 relating to the claims or allegations that were asserted or could have been asserted
15 by the Class in the Action, the Class Action Complaint, Consolidated and
16 Amended Class Action Complaint, Consolidated and Second Amended Class
17 Action Complaint, Consolidated and Third Amended Class Action Complaint,
18 Consolidated and Fourth Amended Class Action Complaint, or the EY Action,
19 (a) by any person against the EY Released Parties, and (b) by the EY Released
20 Parties as to any Non Settling Defendant, are hereby permanently barred, enjoined
21 and restrained. This bar shall apply whether or not the EY Released Parties are
22 "covered persons" as defined in 15 U.S.C. § 78u-4(f)(10). Accordingly, without
23 limiting the above, any person (including any Non Settling Defendant and all
24
25
26

1 persons purporting to act on his, its or their behalf and all persons purporting to
2 claim by or through him, it or them, whether under a subrogation theory or
3 otherwise) is hereby permanently barred, enjoined and restrained from asserting,
4 commencing or prosecuting against the EY Released Parties any such claims, and
5 the EY Released Parties are hereby permanently barred, enjoined and restrained
6 from asserting, commencing or prosecuting against any Non Settling Defendant
7 any such claims.

9 10. If any final verdict or judgment, or portion of any final verdict or
10 judgment, under the federal securities laws is obtained by or on behalf of the Class
11 or a Class Member against any Non Settling Defendant over matters for which EY
12 would have been jointly and severally liable, as determined by the jury through
13 special interrogatories allocating any liability for the expertised and non-expertised
14 portions of the registration statements to EY, any Previously Settled Defendant
15 and/or any Non Settling Defendant, then such final verdict or judgment, or portion
16 of any final verdict or judgment, over matters for which EY would have been
17 jointly and severally liable shall be reduced by the greater of: (a) an amount that
18 corresponds to the percentage of fault or responsibility attributed to EY for the
19 alleged loss to the Class or the Class Member as determined by the jury with
20 regard to the portion of the judgment for which EY would have been jointly and
21
22
23
24
25
26

1 severally liable; or (b) the amounts paid by or on behalf of EY to the Class or the
2 Class Member in connection with the Settlement Agreement.

3
4 11. The Court finds that the Settlement represents a reasonable and good
5 faith settlement of all claims arising under state law, federal securities law, federal
6 non-securities law and common law released by the Class under the Settlement
7 Agreement and is sufficient to discharge the EY Released Parties from all such
8 claims. The Court further finds that the EY Released Parties are entitled to
9 protection to the fullest extent permitted by applicable state and federal laws from
10 liability to third parties for contribution or indemnification or any other claim
11 where the claimant's injury is the claimant's liability to the Class. These
12 protections include, without limitation, those provided by WASH. REV. CODE
13 § 4.22.060, CAL. CIV. PROC. §§ 877 and 877.6 and any comparable statute or
14 common law of any other state (the "Additional Contribution Protections"). The
15 Court further finds that, to the extent such Additional Contribution Protections
16 apply, any Non Settling Defendant shall have any final verdict or judgment
17 obtained by or on behalf of the Class or a Class Member against such Non Settling
18 Defendant reduced according to the corresponding judgment reduction provisions
19 applicable under such state law or federal non-securities law, including, but not
20
21
22
23
24
25
26

1 limited to, those provided by WASH. REV. CODE § 4.22.060, CAL. CIV. PROC.
2 §§ 877 and 877.6 and any comparable statute or common law of any other state.
3

4 12. Pursuant to the Settlement Agreement and applicable law, any person
5 (including any Non Settling Defendant, and all persons and entities representing
6 them or otherwise acting on their behalf), is permanently barred, enjoined and
7 restrained from asserting, commencing or prosecuting any claim under state,
8 federal or common law against the EY Released Parties, however styled, whether
9 legal or equitable, whether known or unknown, whether for indemnification or
10 contribution or otherwise denominated (including without limitation claims for
11 breach of contract or misrepresentation), where the claim is based on, arises out of
12 or relates in any way to claims or allegations that were asserted or could have been
13 asserted in the Action or the EY Action (the “Barred Claims”).
14

15 13. Because the Non Settling Defendants, and all persons and entities
16 representing them or otherwise acting on their behalf, are barred from asserting any
17 Barred Claims against the EY Released Parties, any final verdict or judgment
18 obtained by the Class or a Class Member against a Non Settling Defendant shall be
19 reduced in accordance with the judgment reduction provisions under state law or
20 federal non-securities law applicable to such Barred Claims.
21

22 14. In the event the Action proceeds to trial as to a non-settling
23 defendant(s): (i) the Class may not use any finding, ruling, order, trial testimony,
24 verdict or judgment or any attribution of fault or responsibility to EY, for any
25 purpose whatsoever against EY in the Action or in any other proceeding or forum,
26

1 or for any other purpose; (ii) any finding, ruling, order, trial testimony, verdict or
2 judgment or any attribution of fault or responsibility to EY, shall not be admissible
3 for any purpose whatsoever as against EY in the Action or in any other proceeding
4 or forum; (iii) any finding, ruling, order, trial testimony, verdict or judgment or any
5 attribution of fault or responsibility to EY, shall not constitute collateral estoppel or
6 res judicata as to EY in the Action or the EY Action or in any other proceeding or
7 forum; (iv) EY shall not be estopped from challenging liability in the Action or the
8 EY Action or any other proceeding or forum as if no settlement had been
9 negotiated or entered into; (v) EY shall not use any finding, ruling, order, trial
10 testimony, verdict or judgment for any purpose whatsoever against the Class in the
11 Action or the EY Action or against the Class in any other proceeding or forum, or
12 for any other purpose; (vi) any finding, ruling, order, trial testimony, attribution of
13 fault or responsibility to any other defendant, verdict or judgment shall not be
14 admissible for any purpose against the Class in the Action or the EY Action or
15 against the Class in any other proceeding or forum in any litigation between EY
16 and the Class; (vii) any finding, ruling, order, trial testimony, attribution of fault or
17 responsibility to any other defendant, verdict or judgment shall not constitute
18 collateral estoppel or res judicata as to the Class in the Action or the EY Action or
19 against the Class in any other proceeding or forum in any litigation between EY
20 and the Class; and (viii) the Class shall not be estopped from asserting the liability
21 of EY in the Action or the EY Action or any other proceeding or forum as if no
22 settlement had been negotiated or entered into.
23
24
25
26

ORDER PRELIMINARILY
APPROVING SETTLEMENT - 8

001758-11 353041 V1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s Tyler S. Weaver
Tyler S. Weaver
Attorneys for Lead Plaintiffs and the Class