



**MONTANA STATE FUND
SPECIAL BOARD OF DIRECTORS MEETING
November 29, 2017**

The Montana State Fund (MSF) Board of Directors special meeting was held November 29, 2017 in Montana State Fund's Board Room at 855 Front Street, Helena, Montana 59601.

Directors Attending

Lance Zanto, Chair, Helena
Jan VanRiper, Helena
Jack Owens, Missoula
Cliff Larsen, Missoula

Lynda Moss, Billings
Matt Mohr, Bozeman
Jim Molloy, Helena

State Fund Staff Attending

Laurence Hubbard, President/CEO
Verna Boucher, Special Asst to Pres/CEO
Kevin Braun, General Counsel
Sam Heigh, Ops Support Vice President
Al Parisian, CIO
Peter Strauss, Compliance Officer

Rick Duane, HR Vice President
Julie Jenkinson, Ops Vice President
Mark Barry, Corporate Support VP
Greg Overturf, Asst. General Counsel
Rene Martello, Controller

Others Attending

Matt Rosendale, CSI
Rep. Jenny Eck, Helena
Dexter Theil, Theil Bros. Roofing
Bridger Mahlum, MT Chamber of Commerce
K.C. Barnhardt, Quality Roofing
Roger McGlenn, IIAM
Riley Johnson, NFIB
Jake Magalsky, Ace Roofing
William Gowen, HATCo
William Johns, Summit Roofing
John Harding, S&H Aluminum Products
Mark Cole, Dick Irvin
Bill Pierce, Pierce & Associates
Phil Drake, Great Falls Tribune
Holli Michels, Lee Newspapers

Richard Miltenberger, Interwest Health
Rep. Greg Hertz, Polson
Rep. Jim Keane, Butte
Chris Cavazos, AFL-CIO
Wayne Dykstra, Liquid Engineering
E.J. Redding, MBWDA
Russell Ehman, CSI
Jameson Walker, Leg. Services Division
Shaun Peterson, Payne West Insurance
Brenda Miller, Liberty
Kerri Emmons, IIAM
Kevin McCutcheon, Payne West Insurance
Kyle Echmauch, CSI
Jonathan Amberian, KXLH
Kris Wilkerson, LSD

I. Meeting Preliminaries

A. *Call to Order*

Chair Lance Zanto called the meeting to order at 1:06 pm. He thanked those in attendance for traveling and participating in this special meeting. He reminded attendees that this session would be live streamed and to please make all comments at the podium and spell their name before offering comments or testimony. He said the Board would be taking public comment; however would be limiting comments only to those in attendance at the meeting. He introduced new Board members Jim Molloy and Cliff Larsen and asked them to provide some background on themselves.

Mr. Molloy welcomed the attendees and said he is currently in the private practice of law in Helena. He said he has been back in Helena since the mid-1990s and has raised three kids in Helena who are now all over the world at various occupations. He said this was a baptism of fire for him and he thought it would be an interesting meeting and appreciated the opportunity to participate.

Mr. Larsen said he has been connected to the State Fund since 1983 when he intentionally moved to Montana from Oregon. He said he brought his wife and son here and they have enjoyed living in Montana since. He said he served eight years in the Montana Senate and was on the Judiciary Committee and really enjoyed his time there working with then Senator and now MSF Board member Lynda Moss. He said he recognized a lot of faces in the audience that he worked with over the years early on and also as a legislator. He said his history includes working in the insurance industry over the years. Fifteen years ago, he and his wife bought a ranch and rotated into ranching and farming. He is a policyholder of State Fund and has been off and on over the years through various businesses he has owned. He said he is greatly interested in the operations [of State Fund]. He said he thought the little vignette on the handout that the State Fund has about the history of State Fund and the connection to the state legislature was really interesting. He said he reviewed that as well as some history about the creation of State Fund. He said he is really interested in being an active member of the Board and looks forward to getting to know a lot of those in attendance better.

Chair Zanto thanked Mr. Molloy and Mr. Larsen and then called on President Hubbard to begin discussion on the next agenda item.

II. Litigation Update - Laurence Hubbard, President/CEO

A. *Board of Directors' Consideration of Pending Lawsuit*

President Hubbard thanked the Chair and welcomed Mr. Molloy and Mr. Larsen to the Board. He assured the new Board members that MSF's Board meetings are not typically this well attended. He took a moment to acknowledge outgoing Board members Richard Miltenberger and Bruce Mihelish for their service on the MSF Board and invited them to return for the December 15 Board meeting to properly receive the recognition they deserve. He also acknowledged that Mr. Molloy and Mr. Larsen, appointed by Governor Bullock, have stepped up to serve on the MSF Board and said he was delighted they have both agreed to take on this role.

He said the topic for today is very important and has drawn a lot of media and political attention and was a very important subject of the most recent legislative special session. There is also quite a bit of emotion and some degree of frustration by not only policymakers but policyholders and others surrounding the litigation that was filed by MSF against the State of Montana. He said that should, in no way, detract from the public service provided by the legislature and the Governor and everyone else who sets policy for the state and he and MSF have deep respect and regard for the job that they have to do. He said he needed to make it very clear that he was there as the President/ CEO and ex-officio Board member on behalf of MSF and was attending in that spirit.

President Hubbard clarified that MSF is an independent non-profit corporation managed by a seven member Board of Directors that receives premium from policyholders to provide workers' compensation-related insurance to them. He said MSF must be sole supporting by the premium dollars collected and its investment earnings as well. He distributed to the Board the draft minutes of the November 10, 2017 special meeting and explained that approval of the minutes was not on the agenda for this meeting so that Board members would have enough time to review the proposed minutes to determine that they provided an accurate reflection of the testimony and information provided at that meeting. He said the November 10 meeting was called subsequent to the Governor's proclamation calling for the Special Session to be held on November 13-14 and

to review what was then known as LC008, which was the draft proposed legislation that ultimately became Senate Bill (SB) 4. SB4 was passed during the special session and signed by Governor Bullock. He noted that LC008 and SB4 are substantially the same in so far as the substantive aspect of that requires the transfer of three percent of State Fund assets over \$1 billion to the fire suppression fund. He said on Thursday morning, November 16 at approximately 1:00 am the Legislature finished their work and adjourned which then transferred the bill on the 16th to the Governor's office for his consideration. On Friday November 17, MSF's Counsel filed a complaint for declaratory judgement injunction in the Lewis and Clark County District Court. He noted the complaint is a matter of public record and he had distributed a copy of the complaint to the Board prior to this meeting. He asked Kevin Braun, MSF General Counsel, and retained Counsel Bradley J. Luck from Garlington, Lohn & Robinson to provide a litigation status update to the Board.

Mr. Braun reiterated that SB4 takes \$30 million (approximately \$15 million per year for the next two years) of MSF's assets and moves it to the fire suppression account. At the November 10 Board meeting the Board of Directors authorized MSF to oppose the legislation and to take whatever legal measures necessary to prevent the transfer of those monies or the impairment of those assets. In response, MSF retained Mr. Luck and he has drafted the verified complaint which he will provide the details and current status of the litigation.

Chair Zanto called on Mr. Luck and thanked him for attending.

Mr. Luck thank the Board for the opportunity to provide an update on the litigation as well as an opportunity to answer any questions or concerns the Board may have. He said his firm was retained in anticipation of SB4 to analyze the situation and determine if there was anything that MSF could and should do in relation to the potential loss of approximately \$30 million of its equity. His firm reviewed the situation in great detail and determined there were three actionable constitutional causes of action that were appropriate for MSF to present on its behalf and on behalf of its policyholders. The first was a claim of taking without just compensation which is basically the taking of private funds from MSF. He said MSF's monies and assets are private funds and are not subject to legislative appropriation. The second is a violation of fiduciary duties because the funds to be taken are held in trust by the State of Montana and the Board of Investments and that the utilization of the funds as directed was a violation of those fiduciary duties guaranteed by the constitution and several statutes. The third is a claim of impairment of contract because MSF has made several contractual promises and agreements with the policyholders that the payment of these funds would violate. He said the firm felt bringing these three constitutional claims was most appropriate and there was concern that it was necessary given the trust relationship of MSF regarding the funds it holds for the benefit of its policyholders and their injured workers.

He said a filing package was prepared which included: a long complaint outlining the factual and legal issues, the extensive brief supporting the allegations of the complaint and speaking to the nature of the relief in the short and long run that was being requested, significant affidavits from Mr. Hubbard and Mark Barry, and a request to the court to issue a temporary restraining order and consider an injunction after further hearing. He said a temporary restraining order is a very extraordinary remedy, provided without notice to the opposing side, and explained that there was concern that given the status of the situation it was appropriate to request the court hold the implementation in abeyance. He added there was also concern about the recoupment of the funds if the litigation were successful yet the funds had been taken as a result of SB4's passage. In order to secure a temporary restraining order, the court would have to be convinced that irreparable immediate harm would be the result; the court did not think that was the case. He said their focus was to take whatever steps were possible within the law to delay the implementation so the status quo could be maintained while these issues were determined and if the status quo

could not be maintained to assure the MSF would be in a position to receive a refund should MSF prevail in its litigation. He said SB4 was passed early in the morning on November 16 and the action was filed on the afternoon of Friday, November 17. There were a number of documents for the court to review and in just over an hour the court set the matter for further hearing and indicated that immediate irreparable harm had not been established so the temporary restraining order (TRO) was not honored. The court also indicated that it felt MSF has an adequate remedy at law which effectively says the court believes the State of Montana is able to repay MSF if necessary which was a key concern for the MSF team. The court also stated that at this juncture it was concerned regarding the causes of action that were plead. He noted that much has been made of that statement and the TRO not being granted. He said he did not believe there was much merit in reading anything into those actions due to the late hour of filing not allowing for a more complete review of the filing package and he did not believe it was a comment on the merits of the case. He said that given the verifications received from the court and the State, that was an appropriate determination. He said most importantly, SB4 had not been signed at that time and the team did not know if Governor Bullock intended to sign it or not. He said it was hoped that the filing would hold the process in abeyance; however the court may have determined there was no imminent harm because SB4 had not become law yet. He said there may have been concern that the team was a day early in filing the complaint.

He said in relation to the causes of action and the three constitutional claims that his firm identified, they are the product of much thought and research. He said he believed they present appropriate considerations for the court and some very big picture issues that MSF needs the answers to. He added that whether or not MSF is successful on one or more of the counts, the direction that will emanate from the lawsuit on several key long-term issues is significant and important for future planning for MSF. The court set a hearing for December 4 in which MSF could present the case on the preliminary injunction. In the interim the Governor signed the bill and MSF received an acknowledgement from the court that they had a remedy of law and verification from the Attorney General's office that in the event MSF was successful, the state would abide by any final judgement in this case. He said due to the concerns of remedy and recoupment being alleviated, MSF moved the court to withdraw the request for the hearing. During the lunch hour, the team received notification that the court has granted that request. The state had 40 days from the date of service to file an appearance. At that point, MSF would work with the state to expedite the prompt processing of the legal issues, which the team believes are significant, subject to motions and resolution by the Court. He said ultimately, it may be the Montana Supreme Court that makes the final decisions. He said his final point, in terms of the status of the legal action, was that there are several significant issues that MSF needs direction on and win or lose, this litigation will hopefully secure that.

Chair Zanto called for questions. There were none.

Chair Zanto explained the Board's process of making a motion, then discussing the motion and finally accepting public comment before the Board votes.

He said that when Board members accept the position, they are given an extensive orientation into the State Fund and provided a book that typically identifies what their requirements are as Board members. He said it is referred to in that orientation and throughout their continued work on the Board that they are required to follow the law. SB4 was passed by the legislature with three quarters of the vote and the Governor has signed that bill. It is law now. The law is in effect until 2019 because the bill has a sunset date of December 31, 2018 which is the beginning of the next legislation. He said MSF's financial position is currently very strong and he believes that MSF can absorb the effects of this bill through MSF's investment income without impact to employer rates or dividends. There has been much made about the Board members' fiduciary

responsibility. He said their fiduciary responsibility is to protect the assets of the State Fund, to protect its policyholders and to protect its injured workers. He said, "In essence, it is to protect the long-term financial stability of the State Fund so that we can care for our injured workers. And that long-term stability does not just mean for a year and half, it's the next five, ten, 20, 50 years into the future." He said he believed that the Board has made its point to the legislature that this bill is very concerning to them; however, he added that MSF is "staring at some very serious expenses moving forward with this lawsuit." He said, "Legal fees, large cash outlays and as [Mr. Luck] just pointed out, it is not a short process and there will be a lot of expenses that we will have to incur. More importantly, we run the risk of losing this case and if we lose this case the law has been forever changed." He added that there will not be the ability to come back and revisit this again which has a long-term effect on the financial stability of the State Fund. He said MSF has lost the restraining order and the injunction has now been withdrawn and this is a loss that weakens MSF's case moving forward. As the judge states, he questions whether or not the State Fund has established a legitimate cause of action or that it is likely to succeed on the merits of its claims. He said the question is what is in the long-term best interest of the State Fund, its policyholders and its injured workers. He said "In that context, I feel we are doing our best to protect the State Fund by representing to the legislature that we are interested in working with them to help solve the immediate budget crisis while preserving our position going into the 2019 legislative session and future sessions with the understanding that the assets of the State Fund belong to the State Fund."

Chair Zanto made a motion that the State Fund staff and counsel for the State Fund be directed to withdraw the lawsuit regarding SB4 currently pending in the First Judicial District Court. The motion was seconded by Lynda Moss.

Ms. Moss asked if she could make a statement and said, "Mr. Chair and members of the Board, I was the Board member who was not able to participate during the whole meeting at our last special Board meeting. And as we review our minutes, I just want to remind you that I offered my viewpoint. I have been very concerned about how this development has unfolded. I, like our Chairman, believe that it is important to have a long-term vision for the Montana State Fund and I, in all of my work, always look for ways to work in partnership with the legislature and elected officials and our administration. So I am very concerned and dismayed about this state of affairs that we have right now and I believe that it is imperative for us to look at that long-term perspective and the risks that are involved, Mr. Chairman."

Chair Zanto thanked Ms. Moss and called for additional discussion.

Jim Molloy said "I would like to begin with a comment about the fiduciary duty concept which we've heard about and we have all now received a letter setting forth one view of what the fiduciary duty we the Board members have and what the implications of that are and what the potential consequences are. I need to preface my comments by acknowledging that I am a lawyer but I am not a lawyer here for anyone at this table or for the State Fund. But I inevitably views things from the prism of a being a lawyer with my background, my training, my knowledge and my experience. When I accepted the responsibility to serve on this Board, I knew that doing so came with a fiduciary responsibility. That fiduciary responsibility to me is defined by the statutes duly enacted by the policymaking branches of government. This entity is a public corporation; that is pointed out to us as the Chairman pointed out, in our Board handbook and I can quote from a couple different places. 'The state fund was created by the legislature, it is a public entity, it is a governmental entity.' We are a creature of the legislature subject to the laws duly enacted by the legislature. And I want to acknowledge that that creates a significant challenge for both this Board and the CEO because sometimes, as we all know, the legislative process can be challenging and the results of that can be challenging. But sitting here today, my

obligation is to comply with the laws that the legislature has enacted. I need look no further than the statute that the legislature adopted which says in 39-71-2315 that we, the member of this Board, are to manage and control the State Fund subject to the statutory limitations imposed by this part. Senate Bill 4 specifically amends part of this body's organic laws. If I were in the legislature and I had an argument that it was good or bad, sure. That is not my role as a Board member. My role as a Board member is not to pick and choose among the laws that the legislature passes but to try to abide by, respect and acknowledge those that have been passed. And I am going to make a comment about the legal issues that are implicated by this law, later, but I will come back to that. So in conclusion, on the fiduciary duty issue, I am fully confident that I am complying with my fiduciary duty by respecting and acknowledging the laws passed by the legislature including one that was passed by two thirds of the special session. As far as personal liability or removal from this Board, I want to not use the word warned or admonished or threatened with, though it is hard to read the letter and not consider that to be the implication but I am going to give the benefit of the doubt and say this: If a court were to determine that I as a member of a board am obligated to comply with the statutes that control the entity that I as a member of the board of have somehow breached my fiduciary duties, I accept that. What I have no fear of is any personal liability for doing so. And again, I need to look no further than the laws passed by the legislature that govern this entity including those of us who are on this Board in 39-71-2318, 'The members of this board, the executive director and employees of the State Fund are not liable personally either jointly or severally for any debt or obligation created or incurred by the State Fund.' Here is another statute that I didn't pull but general statute that says when you are working with the government implementing a duly passed governmental law, you by definition are immunized from liability. The law may end up being declared unconstitutional but that doesn't mean you breached some fiduciary duty, in my opinion. Everyone can make their own choices on that issue. So, now I turn to the substance of Senate Bill 4 and I do that because I do take seriously the question of dose this adversely impact either the actuarial soundness of the State Fund or the contractual rights that policyholders throughout the State of Montana have to be protected against liability for injuries to their employees or the rights of those injured workers to receive compensation pursuant to the State Funds laws. And I conclude that on all three counts, SB4 does not threaten any of those things. First by its express terms, the fund transfers can occur, the management fee can be imposed only if it does not threaten the actuarial soundness of the State Fund Board according to an actuarial study to be provided by this entity to the legislature. So that is protected against. Secondly, the legislation specifically provides that premiums and potential dividends cannot be adversely impacted by this bill. Thirdly, it expires as the Chairman pointed out, in two years. So, if this legislation were to do any of the three things that I have asked myself does it do that, I might look at this question differently but given what it does do and what it doesn't do, I don't believe this is the hill worth taking the risk of dying on. I think that is a battle better saved for a later day. The complaint that has been drafted by retained counsel is a well done complaint by a highly respected attorney and a very good law firm; I have a different view of the merits of that case. It is not for me to sit here and get into the legal weeds. I will say only this, that as I examine each of the theories, I believe they are vulnerable and that there is a substantial risk. And I agree with Mr. Luck, you cannot read too much into a judge's order denying a temporary restraining order that is absolutely the case. I also know a bit about this judge, he is very smart, very experienced, highly respected, knows the law, he would not say that lightly in a TRO denial. And I think ultimately, there is an old saying, put one lawyer in a community and he'll starve, put two they'll do okay, put multiple ones in and they will do great. And the only entity that is ultimately going to determine whether those legal theories are viable and actionable or not is first the First Judicial District Court by Judge McMahon if this case proceeds and secondly, probably seven members of the Montana Supreme Court. This would be of significant enough consequence that I think they would take it en Banc as an entire court. So we can debate until the sun goes down the various nuances of these legal theories. My assessment, not to provide legal advice to anyone in this room, my assessment is that given the fact that it

does not threaten either the actuarial soundness of the State Fund, it does not impair any policyholders rights to receive full coverage if they have a claim by an employee nor does it deprive any employee of the rights they have to compensation, I don't believe this legislation creates the kind of emergency situation that warrants the risk that we fight this battle and lose. And I want to say very clearly to you, Lanny, I recognize you have significant challenges when you are charged with responsibility for administering an entity as an insurance company and you have to juggle various kinds of laws that are enacted. Those laws result from a number of different decisions as we all know, over time. And my view is, right now is not the time, I agree with Lynda, that over the long term it will be better to have a more constructive relationship with the State and if in the future that doesn't work out, and some kind of existential threat exists pursuant to laws passed by the legislature, I would look at things through a different view. For now, I support the Chairman's motion and I intend to vote to terminate this lawsuit. Thank you."

Chair Zanto called for further comment from the Board.

Jan VanRiper said, "I have several comments and I wrote some of them down so I wouldn't ramble too much. First I want to respond to a couple of things that in making the motion the Chair referred to. The first thing is, and I think that our new Board member, Mr. Molloy, addressed this and that is the meaning of the TRO being denied. A TRO is for emergency relief, you frequently, well not frequently but occasionally, file that in connection with a lawsuit and if it is denied, it doesn't mean anything unless there is specific language in the court decision about the merits of your case. So, in my judgement, we really have had nothing change at all out there in the world with respect to this action and the situation since we authorized management to take a legal action. Secondly, there was some comments about how we can afford this. Well, we have a fiduciary duty and it's very clear in the statutes and those parts of the statutes have not been changed SB4, to make decisions about the financial actuarial soundness and viability of the State Fund over the long-haul and we did that this year. As a matter of fact we determined there was some substantial amount of money that we could return to the policyholders in dividends. And if we thought we had an extra \$30 million we would have given a larger dividend to the policyholders. So, we have already made that determination and we as a Board are charged with making that determination. So I don't see how now we can say, well, we have plenty of money to fork over \$30 million for other than the policyholders and contrary to what we had decided before. So those are just my reactions and again, we have a disagreement, I respect everybody on this Board, all of the players involved, I just have to express my disagreement when I have them. Now with respect to the rest of it, the motion, I do want to first talk about our duties and I think that it has already been said and acknowledged by other Board members who have spoken that we have a fiduciary duty to the policyholders of the State Fund and that is pretty clear in the statute. And then there are other things in our statutes that kind of lay out what is the nature of that fiduciary duty and SB4 didn't change any of that. We have, the monies are held in trust for the policyholders, there is language in the statute that has not been changed by SB4 that says every policy that goes out to a policyholder shall contain this language that says this is your money and it is not going to go for any other purpose. And that statute remains there. So I think we are constrained to act on behalf of the policyholders and then further constrained about what that means with other parts of the existing statute that hasn't been touched by SB4. So I will just make mention of this, we're here for an historical reason. I was here as Cliff Larsen was here though I am unsure about any other Board members, but I am sure there are people in the audience who were here prior to the creation of this Board. I was at one point what used to be called the Bureau Chief of the State Fund when we had to sit around a table with our actuary and make decisions about what kind of rates we needed to charge for actuarial soundness and then we had to trot up to the governor's office and run those by the governor. And the governor would tell us which class codes or industries he didn't like those rates for and we would have to charge a lower rate. So involving politics in these decisions about actuarial soundness and what we need to assure the

actuarial soundness of the State Fund proves to be a very, very bad idea. As a consequence, between that and some preliminary raids on that money, the legislature in its wisdom, just decided to create this Board and separate us. Certainly the Governor has appointment authority but then separate us from any political considerations about what to do with the policyholder money. It is very important that we respect that. I have two more points. One is, again, I am an attorney, I am not here as an attorney to the Board or anything but it is real hard to be an un-attorney when you are analyzing stuff if you are an attorney. So, I'll just admit that and I am convinced as I was when we first made this decision, that there are several provisions in the act, as I said before, that make clear what our duty is but that doesn't mean the legislature can't come in and change a lot of those. So the legislature can come in and dissolve us, they could change a lot of those statutes and we would have to follow it but the legislature would have to come in and do it in a constitutionally permissible way. And if they don't, then as a Board with our fiduciary duty, which still maintains as a matter of statutory law requires us to act on behalf of the policyholders which is exactly what I think we have done. The other thing is that there are conflicting, you heard from Mr. Luck about some of the constitutional grounds on which this appears to be unconstitutional, those are very compelling arguments. They are arguments, in fact, that the legislative counsel in preparing advice to the legislature about SB4 outlined. And that is certainly, at least I think we can all agree, a neutral body. In the memo to the legislature, counsel outlined these potential constitutional infirmities with this law. The other piece of what the legislature can do is, again as I mentioned, they can change all kinds of statutes, they can't do it in a constitutionally impermissible way but when they act and leave certain statutes that are in conflict of what their latest action is, then you have a question about how to interpret those laws and I think that is what we have here. So, in other words, I think we have absolutely compelling reasons to file the lawsuit and I actually think we have a duty, given what I have said before. And then I want to say one final thing; another reason we are here is to oversee the State Fund and give direction to management and we gave direction to management not a month ago and we knew then what we know now and I just feel like it is wrong with respect to our duty to management to change our minds and withdraw authority for a well-considered decision and well-considered authority for the CEO without any change in circumstances in the real world and I just don't believe there have been."

Matt Mohr said, "I apologize if I ramble or don't make sense but I am going to try to. This is a very difficult decision. I have lost sleep about this and I also don't think there is any winner whichever direction we go. I feel like we are becoming adversarial with the state which I don't want that to happen. I would prefer to form a partnership, that partnership should already exist and I don't feel that that is there. If we file this lawsuit and we win, I am concerned about where will this money come from, it has to come from somewhere. Will it be taxes, will it be other programs, it has to come from somewhere, I worry about that. But we talked about \$30 million, we can afford that but \$30 million is a lot of money and I know a lot of small business owners that have invested a lot of money in their workers comp at the State Fund, that is a lot of money and they work hard for that. My concern is for the policyholders and injured workers. Chairman Zanto, you mentioned that you are looking out ten years, my concern is if we don't fight this, if we don't litigate this, it is going to be worse in ten years. We could be opening a door that could allow the legislature to take money in the future, they could use the same language and change the dates. My concern is for the future of policyholders and the future of injured workers. I don't want rates to go up and I don't want injured workers benefits to go down. I have thought long and hard about this, this is a very tough decision for me but I am always thinking about our policyholders and thinking about our injured workers and thinking about what is best for the State Fund."

Chair Zanto said “I appreciate that and I appreciate the fact that you pointed that out because that is our duty, our policyholders, State Fund and especially our injured workers. So thank you for that.”

Chair Zanto then called for further Board comments.

Cliff Larsen said “Just a couple of brief comments. First of all I want to point out that I have been welcomed to the Board graciously by Lanny and the senior staff and everybody here. I know everybody on the Board now except for Jack, we haven’t had a chance to comment and discuss. And Jan and I go back way too many years. But I appreciate the dilemma that the State Fund has found itself in, I would echo a lot of the comments that Jan made about the duty of the original purpose of the State Fund 102 years ago. It really hasn’t changed that much when you dive in and look at the details. I too am concerned about the policyholders, I am one. I have been a policyholder of the State Fund almost 35 years in one form or another. I owned businesses or I ran businesses and we always used the State Fund. I have had really good relationships, I worked as an expert witness in litigation in every conceivable way you can think of in workers’ compensation and other personal injury cases. I know about insurance, I’ve run insurance organizations and I know how tough it is for Lanny and the staff to find a solution to what the legislature did in creating a little mischief. And if you look back at that timeline about the legislature and the State Fund there has been a little mischief off and on periodically. This is a little more than benign, I think with the vote of the legislature on that bill and now it appears to me as a fairly new observer with nothing to gain or lose, this seems like a shot across the bow to the legislature. We weren’t happy as the State Fund to take this shot and it put a lot of the legislators on notice; in fact, I’ve had a lot of legislators contact me from both sides of the aisle about the kind of view back and history of what has happened before and one person mentioned to me, and this was somebody in my party, that we treated the state fund like our piggy bank. I don’t mean to make light of this because I think it is a tremendously important action that is underway but it was true and we had to remedy some of those problems with some pretty dramatic legislation that followed up. The Old Fund for instance, that is still with us. So I guess I am listening to the folks who want to make public testimony today and I am inclined to vote to withdraw this legal action as well because I don’t want to get into a fight with the legislature. I am a former legislator, I know the power of the legislature and the individual and when the parties get together, they can do most anything and I just realize that we are in a fist fight and we got our hands tied behind us when it comes to taking on an entity like that. Thank you, Mr. Chairman.”

Chair Zanto called for further comments.

President Hubbard said “Thank you members of the Board, Mr. Chairman and thank you for your comments. Thank you, Jim, for acknowledging that as CEO also as an attorney, I also hold my obligations to the State Fund and the policyholders inviolate. And that was the spirit by which we entered the November 10 Special Board Meeting. I want to remind the Board that if you have not reviewed the minutes of that meeting, you should before you take definitive action on this motion today. The reason I mention that is nothing, nothing has changed in terms of circumstances from the November 10 meeting. On November 10 you were facing a special session with the draft legislation which is substantially identical to the bill that was passed as SB4. Substantially identical. The only things that changed were the coal trust reference was removed from the draft and instead of going to the general fund, the three percent management fee went to the fire suppression account. So nothing else has changed and if you review the minutes carefully, you’ll see we discussed the fiduciary responsibility with regard to the law that existed the day before the Governor signed the bill or the legislature passed the bill. The law that existed for which we have been operating since 1990 under section 39-71-2330 that states that the property received by Montana State Fund is the property of the State Fund and it may not be

transferred or used for any other purpose. That is the law by which the assets of the State Fund have been collected and built since that time. Also, the subsequent section 2322 states that these monies are to be held in trust for the purposes for which they were collected. That is unequivocal in my mind as an attorney, as your CEO and as a member of this Board, ex-officio as it may be. So let me just talk a little bit about that. We discussed, during our meeting, the application of a change of the law, anticipating that the bill was going to be passed. The motion that this Board approved unanimously with the members that were present, six of you, voted to allow the State Fund management and myself to take all means necessary, including legal to protect the assets of the State Fund, under the then existing law. So the discussion we had, if I can remind the Board, is the legislature can change the laws prospectively, but it cannot retroactively impair obligations of contract that we have and obligations of trust we already have. Which until the bill was signed by the Governor was the law of our land and the law that this Board must operate under. That doesn't change, it doesn't just go away because of legislative fiat. I would also point out that our own Governor when he was Attorney General issued an opinion and it is 53 AG Opinion No. 6, 2010 that concluded that not all money received by a state entity transforms into public money. It was analysis that involved the Board of Regents versus Judge and that is a very important opinion and principle. We receive premium dollars from private entities and state government too, but only eight percent of our premium is from state government, and the important point there is it is not a gift to State Fund, it is a transfer of risk to an insurance company. We have the absolute obligation to pay claims for those premium dollars that are received and those dollars are discounted by law in ratemaking in anticipation of investment income. What now becomes the subject of the \$30 million legislative action under SB4. So my point here is all of these issues that you now talk about today were discussed on November 10 and I ask you this, what has changed? I assert nothing has changed and I concur with Mr. Zanto, we have worked many, many years to build Montana State Fund's financial health and strength because many of us remember the Old Fund and the liabilities and the legislative actions that resulted in a half-a-billion-dollar unfunded liability. All with the right spirit of intent. This is nothing about good and bad or fighting, this is about public policy and politics versus our legal responsibilities as an insurance company under the laws for which we were created. They can change but they can change only prospectively, not retroactively. So the long-term, let's talk about the long-term, Mr. Zanto referenced that we are here and have to have a long-view, that is very true and unfortunately, I think that was lost in the last legislative session with an immediate need to find \$30 million as quickly as possible. There was no long-term view, in my opinion, discussed. Despite our best efforts to engage the legislators, the policy makers and the administration to meet and talk about solutions, we were rebuffed, we did not have an opportunity, we were not consulted. We were not asked for our opinion. We weren't even asked about our opinion about our legal responsibilities to the policyholders and that is unfortunate, indeed, very unfortunate. And I submit to this Board that this corner was painted for us, we did not paint ourselves into this corner. Every effort was made to reach out and have a dialogue but here we are, now we are left with our legal responsibilities and as a lawyer and as your CEO, I believe that our legal responsibility was appropriately assessed, evaluated and voted on on November 10 because nothing has changed since November 10. The long-term view is this, \$30 million today, and I agree with Mr. Mohr, there is nothing, once you conclude and do not stand up for the prospect that this is policyholder money, it then becomes in the eyes of Montana State Fund, this Board of Directors, public money that can be appropriated at any time at the will of the legislature. So \$30 million today could be \$300 million tomorrow, no it could be into the reserves that are there for injured workers in 2019 and beyond. In my view, we have no choice that we must resolve this issue on the merits; is the money that is currently held by Montana State Fund, prior to the law being changed, held in trust for the policyholders and the injured workers and can the legislature appropriate that money. I believe the answer is no. I believe we have excellent legal scholars, three of them now on this Board of Directors, and General Counsel that opined and I swear if you get five lawyers in a room, you will get 50 different opinions and I think there is proof of that today. But ladies and

gentlemen, I encourage you to withstand the political milieu that surrounds this job that you have as fiduciaries of Montana State Fund and encourage you to let this go to trial on the merits that we represent our policyholders effectively and protect the assets of the company just as you voted for on November 10.”

Chair Zanto thanked President Hubbard and called for further comments from the Board. There were none and he explained that the meeting would now move into public comment. He asked for a show of hands to determine the number of attendees wishing to provide testimony. The majority of the audience raised their hand. He said based on that response, though the Board certainly wanted to hear the comments, he asked that those testifying please limit their comments to five minutes each and to let the Board know if the testimony they would be hearing was the same as that provided during the legislative hearings. He also asked that written comments be provided to Ms. Boucher to assure the comments are entered into the record.

President Hubbard added that there were submitted written comments that have been made available to the Board and the public.

Chair Zanto opened the meeting to public comment and asked those testifying to step to the podium and provide the spelling of their name.

Matt Rosendale, Commissioner of Securities and Insurance (CSI) for the Montana State Auditor’s Office. He said “We’ve gone on record previously at previously held Board meetings and once again would state that we do not feel that the dollars collected from the policyholders of the Montana State Fund as premiums to provide benefits and services to those policyholders should be redirected by another entity or utilized for other purposes. I would like to reference the most recent exam of the State Fund that was conducted by my office which directly addresses many of these issues. That was delivered to the Montana State Fund on November 1, 2017 which was prior to the announcement for the Special Session and any information that was shared in regards to that session.” From page three of the examination, he read, “The examination was a full scope examination of the Montana State Fund covering the period from January 1, 2016 to December 31, 2016. This examination was conducted in accordance with the risk focused financial surveillance framework set forth in the National Association of Insurance Commissioners (NAIC) financial condition examiner’s handbook. To help build a foundation of understanding, I would direct you to page five of the exam which many of you already have. There you will find the origins or summary of the origins of the Old Fund versus the New Fund and I think it is critically important for you guys to think about this as you go forward. I will quote directly from the exam ‘During the 1980s, workers’ compensation insurance premium rates were influenced by the political process rather than by actuarially sound analysis and insurance practices.’ It then goes into much greater detail about how this happened and the disastrous results think it produced. I am not going to recite the entire exam, instead I would simply refer to the comments in the summary that begins on page 22. At the bottom of the summary paragraph it says ‘In the course of this examination, three instances were noted in which additional risk mitigation is recommended to this body: 1. The risk that the Board is not adequately staffed to perform its corporate governance role. Within the insurance community, it is a common best practice that the Audit Committee of the Board of Directors include a financial expert, in that they hold an accounting certification (CPA, CFE, etc.) and have previously been employed in a financial oversight role. In this instance, because the entire Board of the Montana State Fund serves as the audit committee, it is recommended that Board membership include a “financial expert”. You’ve just had two more Board members seated and while I have great respect for both of you, the recommendation of the examiners, and again, this is not me this is the financial examiners, recommends that there is a financial expert included on this board. 2. The risk that the Montana State Fund’s surplus levels or financial solvency could be impacted by actions of the Montana

State Legislature. Currently, Mont. Code Ann. §39-71-2320 provides that money collected by the Montana State Fund for claims for injuries may not be used for any other purpose and may not be transferred by the legislature to other funds or used for other programs. In addition, the Montana State Fund includes a provision in every policy of insurance that incorporates the prohibition against the transfer of assets by the legislature, Mont. Code Ann. § 39-71-2316. This is a contractual limitation that provides additional protection as the Montana Constitution prohibits the legislature from passing a law that impairs contracts, Article II, Section 31. Other statutes authorizing dividends to policyholders when it is safe to do so, Mont Code Ann. §39-71-2323, and the need for surplus, Mont. Code Ann. §39-71-2330, further address the disposition, constraints and requirements of the Montana State Fund's assets. While the existing statutes address the current risk, they do not mitigate the risk that the legislative body could change the law, especially in times of economic stress and when some may consider the unassigned funds (surplus) held by Montana State Fund to be excessive. It is recommended that the Montana State Fund Board of Directors and its legislative liaisons ensure the Montana Legislature is provided with information clearly explaining the following:

- a. The Fund's capital (net worth / surplus/ assets over liabilities) is shown on its balance sheet as "Unassigned funds (surplus);"
 - b. For an insurance company, the terms "unassigned" and "surplus" cannot be interpreted using common definitions, to do so, may lead one to erroneously assume the balance represents excess or unneeded funds;
 - c. Pursuant to Title 33, Chapter 2, Part 19 Montana Code Annotated (MCA), the Montana State Fund's capital must remain at a level satisfactory to the requirements of the risk based capital (RBC) system and any other tools used by the Montana CSI to assess the financial solvency of an insurance company.
3. The risk that conflicts of interest within the board of directors may not be fully disclosed. Conflict of interest statements are signed annually by MSF management and employees. It is recommended that this practice be extended to board members."

Commissioner Rosendale continued, "These recommendations were all made prior to the special session being called and I think it clearly outlines the problems that you are facing and the challenges that you will be facing going forward if these funds are not protected. I hope that you will consider all of this as you move forward and I thank you very much for your consideration. Thank you for your time."

Chair Zanto thanked Commissioner Rosendale and called for further public comment.

Representative Jenny Eck from House District 79 in Helena said, "I am the Minority Leader in the House and I just want to weigh in today as a Legislator who worked on this, who heard the testimony and who voted in favor of Senate Bill 4. As legislators, I can tell you we considered the legal arguments made against the bill and we did not find them persuasive. I am confident that this is well within the bounds of the constitution and I think that we can give you assurance that our legal staff at the legislature looked at this and provided us with the same recommendation that we could go forward with this bill. In fact, the bill was passed overwhelmingly in both Houses by a bi-partisan super majority of the legislature as you have noted. Simply put, Senate Bill 4 established a three percent management rate on investment portfolios of greater than \$1 billion managed by the State Board of Investments. The intent of the bill was to create a short-term revenue stream that may also result in lower premium rates for policyholders. This bill explicitly provides that the State Fund may not raise rates or reduce dividends to offset diminishment rate. Any testimony you hear today that rates could be impacted by Senate Bill 4 is contrary to the intent of the legislature and the language of the bill. Again, this bill was considered and passed by a bi-partisan super majority of the legislature. I would urge you to follow the law as enacted by the legislature and not proceed with further costly legal proceedings

which, as we all know, would cost the taxpayers a significantly amount of money and I think it is clear that we have a standing as the legislature to go forward with this. We have considered the legal issues and, I think, the recommendation by the Chair is a wise one to allow this to go forward without further legal proceedings. Thank you.”

Chair Zanto thanked Rep. Eck.

Dexter Theil, President of Theil Brothers Roofing from Sidney Montana began his testimony by thanking the Board for their service and commented that he has served on similar boards and has found the pay and benefits to “just be outstanding.” He said Theil Brothers is a family owned roofing contracting business that has been in business for 62 years. He continued, “I’m sure the minute you heard roofing contractor, you can understand why we are here because workers’ comp is a huge serious thing for us. I would like to say thank you for those refund checks that we’ve received, we use them as incentives for our employees to encourage them to be safe. We also use them as additional funds to train those people further. The interesting thing we hear in the national news, there is a huge debate about taxes now, and in that debate, they talk about how America has not had a raise for a long, long time. Well, I can tell you in Sidney, Montana, when it comes to roofing contractors, the amount of money that we have available for the profits and labor expenses for my business has not changed in the 21 century. Nothing has gone up. Material may change a little bit but the amount of money that we do has not. In my instance, in particular, I live in the Bakken Oil Field and if you haven’t gone out there sometime when that thing is rolling, you really need to do that because it is pretty interesting. I have to compete with oil companies who can pay almost double my starting wage in order to survive so we have one of the highest starting salaries in my industry, anywhere that you go. The minute that goes up, that means my workers’ comp goes up higher, it means my general liability goes higher because that is all based a part of salaries. And so, my brother and I and the other members of my family we sweat bullets to make this thing work. I have to tell you that the minute that I was informed, that this kind of thing was going to happen, it was just like a gut punch. You talk about the economics, our organization has worked for 60 years, we can kind of make it work but the single greatest thing we have to have going for us is the incredible discouragement of trying to manage a business today anymore. We have to do it on less revenues, my company has an award winning quality record so what I have to do is maintain that quality record and I have to do it by paying higher wages and doing more things. And I have to compete with the people that don’t have that ethic. Most of our stuff is public work, we have public wages and that is in there and these kinds of things are really discouraging. The one thing, I can assure you of, is that I have never been a lawyer, in fact I have spent my entire life with my hands being very dirty. I started in 1966 when I was 11 years old and I carried buckets of asphalt; today I am the President of our company. I would like to urge you in the strongest terms to vote against this motion. The number one thing that is going to hurt business in America is discouraging those of us that do that extra effort, that go out and provide jobs. You might look at me and say well you are old, your time is done, get out of here because somebody else will take your place. Well, no they are not. I have employees that come up to me on a fairly regular basis and they say, now I am not going to tell you that I am poor, the Theil kids have no worries that there will be shoes for next year, we’re fine, they look at me and they say, I don’t care how much you make, it’s not worth it to do that. And if you take the people and some of my friends that are going to come up as members of the Montana Roofers Association, and you discourage us too much, we are just going to finally give it up. And there is nobody in my organization that can do what we do, in fact, I have two felons, I have four people that have been in jail, I have a number of them that have to pay child support and on and on. The reason I am bringing this up to you is it is just really discouraging to be out there in this world and the kind of thing that you are doing here now, because we have all heard the things that Matt said about protecting the funds and that kind of stuff, I don’t have a law degree but I know this you can’t take the money out of an organization and use it for the things it wasn’t intended for.

If I do that and I go buy a new boat and take the money away from my operating capital, we're gonna fail. In fact, in business one of the number one things is airplanes, they buy them, the money is gone and the business fails. And we need you guys to take care of this money. If you don't need the money for the purposes of this committee, we really need that rebate check. We need to have that money and if I understand what it says on the policy, the money belongs to the state fund and we the policyholders. I just want to urge you in the strongest terms possible to vote against this motion because it is unhealthy for business and it's really unhealthy for the attitude of the people who are out there trying to make these companies work and go ahead with all the regulations, all those things that are working against us all the time. Thank you."

Bridger Mahlum, Montana Chamber of Commerce, greeted the Board and welcomed new members Mr. Larsen and Mr. Molloy. He said, "Guided by the principles that we set forth in our ten year strategic plan, Envision 2026, the plan for Montana's future, we are here to convey a position that we took in the recent special session. The consequences of Senate Bill 4 is bad public policy, sets poor precedent and undermines the Montana constitution. These funds are policyholder dollars, as you have already heard. It is not state money, it is not tax dollars and rescinding this lawsuit is not in the best interest of the folks you represent, short and long-term. I appreciate the talk about long-term here because this does impact that in a negative way. We believe that your original decision to oppose this legislation was correct and the Montana Chamber urges you to withdraw this motion and proceed with this lawsuit. Because allowing this taking of funds today sets poor precedent for tomorrow and it would become easier, truly, for policymakers to repeat similar asset transfers and expand the scope of those actions. As a lobbyist who works in the legislature, working with legislators all the time and with this recent special session, I absolutely appreciate the intent and hard work that they put into this process especially with the solution that was brought forth in three incredibly fast days. But the composition of the legislature will change in 2019 and I think with that so can the collected intent of what they are trying to accomplish. If there are new people, there are new ideas and there might be different thoughts on the State Fund whether it's a short-term idea or a long-term one in the next session and those to come. Of course, based on the constitutional questions and merits of the case that Mr. Luck has already brought forth to your attention, we believe that there does need to be guidance from the courts on these open questions. We appreciate the opportunity to share our concerns with you today and given the potential ramifications, we have a very keen interest in how this decision will be rolled out. Thank you."

K.C. Barnhardt, Owner and President of Quality Roofing, thanked the Board for being allowed to provide testimony. He said Quality Roofing is a three generation company bought by his father in 1973 with his inclusion in 1976 and his son working for the company for the past ten years. He said, "We struggled through these years with the State Fund. We were here in the 90s with you when the State Fund was in disarray and had a lot of problems. We had to pay that tax that was imposed on businesses to retire that debt. And so here we are again today and all these years, we have been told that as policyholders, that is the money that is put aside to benefit our employees in case of accidents or things that would impair them from being able to work. Now we're here again today, facing another issue where that money wants to go away and we have always believed that that money was there for them. I don't think it is fair to the policyholders in the State of Montana that herein charged with managing that fund, to take that money away from our employees that we pay the premiums for. Once again, thank you for allowing me to speak and I truly urge you to consider this and carry forward with your lawsuit."

Chair Zanto thanked Mr. Barnhardt.

Roger McGlenn, representing the Independent Insurance Agents Association of Montana said "We support this action [the lawsuit] for reasons outlined in the action as you heard earlier. As

representatives of the insureds, our clients and yours, we explain the policy and the protections and coverages in those policies. One of the major ones is the asset amendment which protects these funds from any uses other than that of the policyholders and injured workers. There is a long history of politicization of the Montana State Fund and we have been involved in much of that. It has been in different ways but none the less, politicized. It is time, in our opinion, for the court to decide many of these issues. We urge that the action continues and that you continue it. If the Montana State Fund doesn't, we urge that the action be continued by other parties and would support that. Thank you for the opportunity."

Chair Zanto thanked Mr. McGlenn.

Riley Johnson, spoke on behalf of the National Federation of Independent Businesses (NFIB). He said NFIB has over 5200 members in the State of Montana and "most of them, I would say 90 percent, are really small businesses and the vast majority of those small businesses in Montana, as we call them Mom and Pop shops on Main Street, that vast majority are State Fund holders and payers. I think the testimony before me really hit on some of the issues, I am just asking that you do not politicize this issue on the State Fund. I have been here for decades, I have gone through these fights and I have seen the taxes we had to pay to get us out of the hole and by doing this, I think you are politicizing it. You also thought that you are only going to have this for two years, from my experience in the legislature, it will never happen. It is going to become, as one Board member mentioned, it is going to become a piggy bank for anything that comes up that is not right in the State of Montana. Please do not pass this motion."

Chair Zanto thanked Mr. Johnson.

Jake Magalsky, owner of Ace Roofing for 13 years and Vice President of the Montana Roofing Association, from Wilsall, Montana. He said he drove here today "because this is an issue that got me out of bed when I heard about it. To me, it is relatively cut and dried because I am in the trenches and this can affect me. I am not worried about rates going up, I am worried about the dividend check. I want to first of all, thank you for a \$23,000 check last week, that helps a lot and it is the first year that we have received that kind of a dividend back and I don't want the risk of losing that. This is a lesson that I think I learned at an early age and I've been thinking about this story all morning. It was when I was a child, Halloween and trick or treating and my sister put more effort into trick or treating that I did. She ended up with a suitcase full of candy and I asked her if I could have some because I only had a couple of handfuls. And she said I couldn't so I tried to demand that she give me some and that didn't work. So I told my parents to make her give me some and they taught me a lesson that that the candy was hers. And that is what is going on here, it is a matter of right and wrong. So I see this issue as two issues, one the term hasn't been used but I'm a little rough around the edges and I'm new to this, it really looks like a money grab. That is only issue number one, the real issue is how are we going to pay for this other stuff? And Matthew Mohr, I appreciate you being concerned with that as well. So, I would ask that you move forward with the lawsuit but use your intelligent creative minds and your integrity to help the Governor solve this problem. I respect everybody on this Board, and I don't know you but I respect the position that you hold, and I would ask that you make the right decision for the people of Montana to move forward with this lawsuit, especially the two newest members who I totally trust that your integrity and honor is in favor of the Board that you sit on. And think about the consequences to the hardworking people of the state that you represent. That's all, thank you."

Chair Zanto thanked Mr. Magalsky and called for further public comment.

William Gowen, Vice President of Helena Abstract and Title Company said he is a proud [MSF] policyholder. He added, "I was listening a little bit earlier today to some of the discussion about not protecting the assets of this company that you are charged to do under a fiduciary duty, I hope that you all who have mentioned that on this Board will reconsider that. Because I consider you representing me and my charge to you is to protect these assets and keep it away for the legislature as a piggy bank in the future. Thank you."

Chair Zanto thanked Mr. Gowen.

William Johns, President of Summit Roofing and MSF policyholder. He said, "As a roofing contractor in the State of Montana we pay some of the highest work comp rates not only in Montana but in the United States. So this is a big portion of our budget when it comes to what our business does. We have also received very large dividend checks back and I would like to thank my employees for being safe for that because with the contract that we have that is part of it. If we do well we get some of that money back. A couple issues that I see is obviously if we have \$30 million that the legislature can scrape off, we've been overcharged so I would like to encourage you continue with the lawsuit and do right by your policyholders. Thank you."

Chair Zanto thanked Mr. Johns.

John Harding owner of S&H Aluminum Products in Great Falls and policyholder for over 30 years said, "I have spent the last couple of days, after learning about this lawsuit and the situation with legislature, ranting to my wife, so I will rant to you guys for a second. As State Fund has evolved over these 34 years that I have been with it, it has certainly been through thick and thin and Old Fund and New Fund and as a policyholder, I believed if it is naive or not, that the assets of State Fund were the policyholders assets. Simply that. And I believe it is the duty of this Board to protect those assets so I would encourage you, through whatever movement necessary maintain the assets of State Fund. And should you decide not to do that, I would like to have each and every one of you guys start calling the policyholders and tell them why you made this decision with their assets. Thank you."

Chair Zanto thanked Mr. Harding and welcomed former MSF Board Member Cole.

Mark Cole said, "I have been around work comp for 45 years. I've been in the trucking business for 45 years. I remember when we were paying \$26 dollars and we are paying less than half that now. And one of the reasons is this group of skilled management people that we have in this room and in this building, they have done one heck of a job. Also, for the ladies and gentlemen that are sitting here as Board members, I sat here for several years and there are ghosts in this room that are watching you and making sure that we don't let anybody down. Rest assured, that we went through tough times 20 years ago and we laid awake at night and we talked to our wives, anybody that would listen. And, Lance you started out with me and then you have been here for a good spell, done a whale of a job. But I want to just leave this idea with you is that one thing that was ingrained with me from day one is this isn't a democrat building or a republican building, or whatever, this is the State of Montana. It is established to protect our employees, our friends, the vital part of Montana industry. That is what you gentlemen are protecting and we can't mess around with the funds that take care of this. The old adage, I tell you, you let that fox in the hen house, how are you going to get him out. Thank you for your time."

Chair Zanto thanked Mr. Cole.

Bill Pierce, a building contractor with Pierce and Association based out of Helena, Montana for 42 years, said "I guess there is nothing that brings contractors out of the woodwork faster and in

more number than workers' comp issues. So I think there would be some agreement on that. It is hard to stand here and say how you should vote on this issue and why you should without someone taking offense to comments which I don't want to do. This issue runs real deep with us that have lived with workers' compensation insurance for decades. The building industry has enjoyed a very good and strong relationship with the Montana State Fund. To my way of thinking, has been managed very well in the recent past and has been a very successful program for Montana and for private companies within the state that utilize the State Fund for workers' compensation insurance. But I think there would be some pretty wide agreement within this room with all the good minds that are here today that there is something fundamentally wrong that every time the legislature decides to tap these assets of the State Fund for other purposes. In my opinion, this was done out of expediency in the legislature, there were other solutions to this funding shortfall but they were very unpopular. It wouldn't have been popular to raise taxes in another manner or to fund transfers or to cut spending in the state. This is the low-hanging fruit as it often has been in times past and that is why we are looking at this \$30 million now. Before coming here today, I took a look at what the Montana Constitution said on this issue, I took a look at Senate Bill 4 and past statutes and I think it is pretty clear that policy in Montana has been that the funds of the workers' comp organization were clearly intended for the benefit of the policyholders, injured parties and the like. I mean, that is the purpose. I don't think there is a one of us here today that would deny that that isn't what the public policy intent has been for decades in Montana. Now that doesn't mean the legislature hasn't decided to raid that or in special session, as I say, out of expediency change the statute short-term to tap this money. But I think, also when you are placed on a Board such as this, a legal operating Board, and I've been on one before, you have to rise above all politics in a situation like this, use your good judgement, use your good horse sense and do what you know is right for the State of Montana and the citizens. And so, I would strongly urge you to stay the course with this lawsuit; let's find out once and for all what the courts say about whose money this really is. And I think we are going to find out that the courts are going to deem it's the policyholders' and it is not subject to the whims of the legislature. There are a lot of fine people in the legislature, I know that, but I have been up there many times over the years and watched what happens in the heat of the moment and this is going to happen time and time again. They are going to be raiding this fund; we need clarification on this. So I would strongly urge you that you stay with this; let's see what the courts have to say about this. Thank you."

Chair Zanto thanked Mr. Pierce and called for further public comment.

Richard Miltenberger from Clancy Montana, former Board member of MSF, attending as a private citizen, said "I have been in a lot of angst over this whole thing for weeks. Like all of us, you just feel like there has to be some compromise, there has to be some middle ground. In 40 years in business, I picked up from my Dad and I've carried it all my life, nobody wins litigation except the lawyers and try to stay away from litigation whenever you possibly can. What ends up happening, I've watched it personally and I would advise, you get your emotion into it and all of a sudden it is 'them versus us' and we certainly don't want to be in a situation of 'us versus the State of Montana'. Those are the folks that we need to work with in the future, they are not only our largest client but also we are a public entity, as has been mentioned. Having said that, I think everybody could agree that this is not ideal public policy. That what has happened here is not best case. I don't think that the Governor or any legislator who voted for or against SB4 thought that ideally this is the place that public funds ought to be coming from is State Fund assets. But it was, as Mr. Pierce just mentioned, it was expedient and they were in a hurry and it was seemingly available and so it happened. What I would suggest to you is there is a way to separate the emotions so that we don't end up in an 'us versus them' modality, that instead if State Fund could continue with this litigation but with an attitude that we simply want the opinion of the court here. The court ought to weigh in; we have heard lawyers disagree over this, there is a lot

of detail. I don't think it is a particularly difficult moral issue ethical issue or even legal issue but I am not a lawyer; the lawyers disagree. Let's just get a court opinion; I don't think it is that expensive and I think it would do a lot to protect the interest of the policyholders that we've all just heard from.

Chair Zanto thanked Mr. Miltenberger and called for further public comment.

Representative Greg Hertz, from Polson Montana, said "I am here as a business owner and policyholder; I've been at State Fund for a number of years. I am also here to leave a little bit of my insight as a legislator for the past three terms also. I would have to agree with everybody who has been up here testifying with the exception of Minority Leader Eck; we don't always agree on issues. I won't rehash everything that has been said, I sent you all a couple of emails with my concerns. I testified against this in the legislature at hearings. I think everybody was well versed, especially the Governor's office as to the legal concerns with this bill. One of your Board members commented, you have a fiduciary duty to uphold the laws of the State of Montana; you do but you don't have a fiduciary duty to uphold a law that is very likely unconstitutional. That is why we have three branches of government. We have the judicial branch because if there is an issue with a law, that is where we go. Quite frankly, that is what this is about. The comment about how big of a hill do we want to die on; well, good question, is \$30 million big enough hill, is \$50 million, is it \$100 million? How big does it need to get before we tell the legislature enough is enough? And yes, we want to be partners with the legislature. What can you do, you've formed a partnership with the legislature, that partnership has many statutes and those statutes say you do your job, do your duty, protect the assets and the legislature will keep our hands off the money. And that is exactly where we should be. It is the right thing to do to continue with this lawsuit; as many people point out, we need an answer here whether we win or we lose. If we lose, we need to strengthen our laws because this money should not be accessible as a piggy bank to the legislature. And don't worry about ruining your relationship with us up there; tell you what, there are people who won't even be there next session. We have a pretty big turnover just from elections and from term limits. I think Commissioner Rosendale pointed out some great examples from the report that you received and that you did the right thing on the Board meeting on November 10. It was the right thing to do. When you look at the vote in the legislature, when it came to the House Floor, we had a little debate, the bill went down 49 to 51. We reconsidered it late at night, people wanted to go home, things get done up there sometimes on the hill that aren't always the best idea. And that is why we have an executive branch who can veto bills that the legislature might send to him, that is why we have a legislative branch so that we can do things and send them to the executive branch and that is why we have a judicial branch. So they can control what is going on with the other two branches and we really need to find out an answer to this question. Because once that door gets opened, the flood gates open and they will start going after this money. It is not as if it hasn't happened, just in the 2017 session there was a bill to basically privatize State Fund. Take all the reserves, throw them in a trust. The interest would skim off that trust and go to the General Fund and then a trust would be established there to help workers. It was Old Fund all over again. We have not learned from our past mistakes and that is why the legislature pointed out in so many statutes to tell future legislatures 'hands off of this money, we never want to get into that problem again'. I was digging through my old records to find a W-2 that had an OFLT tax that the employee paid in. We never want to get to that again so I would request that you resist this motion or withdraw it. Thank you for your time today."

Chair Zanto thanked Rep. Hertz.

Representative Jim Keane from HD73 out of Butte had handouts that were passed to the Board members. He said, "I have carried bills for the State Fund way back when and I have carried bills to do something with the reserves in the State Fund. And frankly, I think we are so far off the

track on Senate Bill 4 with this testimony that it's hard to understand. If you take a look at the first handout, that is where State Fund was last December and what I want to point out is the blue chart. The State Fund assets in equity, money in excess of reserves has double in the last seven years, over double. It went from \$241 million to \$526 million and guess where that money is coming from? It is coming from these guys who are paying it and do you know why it is coming from them; it is real simple, when they set rates, they take into what it is going to cost to run the business and what the cost of claims is and the million upon millions of dollars they received from the Board of Investments are not set aside to off-set their policies. Instead what they do is wait and throw a bonus out there and all these guys love to see the bonus. I have been trying to carry bills or talk to this Board and I hope you will do it in the future since these people have brought it up. Let's take some of that equity, instead of giving it back in dividends where they have to pay taxes on it, let's reduce the rates. We are 46th in the nation. We're talking about good work here; we are 46th in the nation for work comp. Why don't we get to 23rd, we could do it if the Board would do something instead of give it in a bonus that they have to pay tax on. Lower the rates. Oh, has that been done before, sure other states have actually stopped it for a month like we are doing for the health care in Montana or they just lower the whole rates for a period of time without them owing money, simple. And you still keep the equity up there. House Bill 4 [Senate Bill 4] is constitutional. You've heard that they were taking their money, we are not taking their money. If you take a look at the colored sheet on the back it says all of the assets belong, I agree, it all belongs to them. What House Bill 4 does in the constitution and the other one is this is a state agency, it isn't Gilligan's Island over here that does what it wants, it is required under the constitution to invest its money with who? The Board of Investments; that is where it is required to invest its money. And investing in the Board of Investments, if you go down to number four, which basically that says and I highlighted it, it says to act in a fiduciary responsible manner like a private insurance company as any private insurance company does. So when a private insurance company takes its reserves or takes its equity and reserves and invests it, guess what has to happen, that investment firm gets to charge a rate. That is what we are doing here. For two years, the Board of Investments is charging State Fund a rate and guess what, Senate Bill 4 also does one other thing. It exempts the first billion dollars. Anything above a billion dollars, so there is still going to be \$37 million of interest that you could actually do something with by lowering rates instead of making them pay taxes. Here's how I... you collect \$100, \$50 goes to pay for the operation and the claims that are going to be out there so there is an extra \$50. So the extra \$50 goes into equity and then you throw them another \$20 back but you keep the \$30; that is what is happening here. That is why we are up to \$526 million and if you want to know the truth, let's just get it out there, the reason this equity has grown, in my intention, is to privatize the State Fund. Why do I say that; there was a bill in the last legislative session to do just that. So why do they need so much money to pay off the liabilities? To form a mutual company. That is what is going on here. You don't need it. You have a company, and I have heard these arguments since I've been here, 'oh, the Old Fund is coming back, we're gonna destroy everything, waaaaaa, we're gonna increase rates too bad,' that's the arguments that were used. So finally, in years gone by some of us in the legislature got wise and put it in the bill where you can't do that. Their rates won't go up their dividends won't be harmed and I would like the Board to take a look at, forget about the dividend, cut the rate that they have to pay. Let's move to 23rd instead of 46th. That's what should be happening here. I don't agree with having \$521 billion or whatever it is today in equity in this state company. Let these people keep the money in their pocket to pay higher wages to maybe buy healthcare to do something else instead of sitting it in the Board of Investments and throwing them a little bit back where they think they are doing real good. Mr. Chairman and Board members, I love the discussion you are onto it here, it's a good Board let's stop with the lawsuits and get on with putting State Fund at 23rd instead of 46th. That's the issue here."

Chair Zanto thanked Rep. Keane.

Chris Cavazos the Political Director with the Montana AFL-CIO said, "I appreciate the comments of Rep. Keane. We got back to talking about what actually is at hand with this legislation, not talking about strategic plans, not talking about concerns and feelings. Talking about what's in this bill; it is a bill that assesses a fee for managing \$1.5 billion in assets. During the testimony during the bill, it came out that the State Fund is only paying just over a \$1 million for that cost. This is not a taking, this is paying for a service that they have received that has ostensibly been state subsidized forever, that just [applies] for two years. For the record, Montana AFL-CIO is a policyholder of the State Fund and we thank the legislature for making sure that it is prohibited for our rates going up or our dividend to go down to pay for these costs. Please just stop the lawsuit. Thank you."

Chair Zanto thanked Mr. Cavazos and called for further public comment.

Wayne Dykstra is a former MSF Board member and the owner of a marine engineering company in Billings, Montana. He said walking back into the Board room has been like walking into a tsunami. He commented that 'there are some really smart people sitting around here. In the one sense, I am glad that I am not sitting on the Board because I would feel intellectually challenged. This is a tough team here sitting at the table. I have had some initial involvement with Montana State Fund going back a number of years. I appeared in a hearing with the legislature about seven years ago in which I called President Hubbard a chowder head. I had some pretty strong feelings and I was pretty verbal about them. Got back to my office, received a call from the Governor's office saying, Mr. Dykstra, we would love to have you on the Board of Montana State Fund. Think about, being a nice gentle lamb with soft wool, I was led to the slaughter, and said sure, sounds like a gig, I can get in there and really clean up house. And I will get this right on the railroad tracks where it needs to be. On one side I have heard some very well-reasoned and thoughtful arguments but on the other side of the coin I am disappointed. I think there is something that has been lost in the shuffle. Many of the people who have testified before me, or given their comments before me, have touched on it. I started my company, Liquid Engineering 28 years ago. I did not take a salary for the first four years. I paid my work comp premiums out of credit card cash advances. Had to protect my workers, had to make sure they were covered, lived on my wife's income and used my credit cards to pay that monthly premium. Grew the company, grew the company, now I spend, in recent years, \$250,000 a year on work comp premiums. That is a big slice. That is the single biggest cost behind my payroll. But I did work very closely with Montana State Fund. As I became a Board member, we took advantage of their myriad of safety programs, I invested in my people and invested in our safety programs. Used the resources that Montana State Fund had created to help employers like myself and now my premium this year will be \$100,000. All of that comes from we haven't had a chargeable injury, I think, four years, certainly three years. But I have to tell you, we have thousands and thousands of policyholders who aren't the Wayne Dykstra's who write those \$100,000 or \$200,000 checks. They are Mom and Pop Main Street and I can tell you those people are taking credit card cash advances to make those premium payments. I can tell you those are people that are trying to figure out how they are going to get through year end and still be able to provide the insurance that they are obligated to and in every case I've ever experienced with any small businessman, feel it is important and necessary and due to their employees, the ability to protect them. Someone used the term here a moment ago, scrape off \$30 million. I am not sure how anyone sitting in this room at that Board table can in any way look at any small business man and say, 'You know, we're really sorry that you are having trouble making those premiums and you know it is really tough that you have to take a credit card advance to do that but it's only \$30 million. To those small policyholders, which is 20,000 of the 26,000 policyholders pay less than \$5,000 per year in premium. How can you as a Board look at them and say, well you know it's only \$30 million, you got \$900 in the bank, it's not going to have a material effect on the actuarial analysis and reserve levels and so forth, so we are doing what we think is the right thing. How do you look at

20,000 people and tell them that. I don't know how you do it, I couldn't. George Bernard Shaw has a saying 'A government that robs Peter to pay Paul can always depend on the support of Paul'. Think about that. If you give this legislature a free pass and give them the \$30 million you have simply opened the door and what are they going to do, it worked once, we'll do it again. The next fiscal crisis that the State of Montana experiences, they are going to come back to the well where they got the bucket of water before. I have heard statements from some people who proceeded me that we got this three percent management fee that we are going to charge. I pay management fees and consulting fees and all kinds of fees in my various business interests. When I pay a management fee I expect to get something in return, that is why you pay a management fee. Here we have some people up on the hill who can't balance their own checkbook. The legislature met this spring, they went through all of it, everybody held hands, they kumbaya-ed, they came up with an operating budget. Everything is going to be fine, we made the necessary compromises and here four or five months later, oops, we guessed wrong. So we are going to give \$30 million to guys that can't balance their own checkbook and they are going to now help us balance ours. They are digging around in our checkbook, meaning all these people here and myself. That is our money. We didn't pay that money to Montana State Fund so that the State of Montana who cannot manage their own house now gets to come and take my money. I pay a heck of a lot of taxes, I pay personal taxes, I pay equipment taxes, I pay property taxes, I am taxed to death. It just beats me to death. Oh, we'll just take one more little slice out of your pocket, it's only going to happen for two years, we promise. The point has been made, in two years, the next legislature half these people will be gone, no one has any institutional knowledge, what will happen is exactly what is happening today. They are going to come back and ask for another 30 or another 60 or another \$80 million. Mr. Molloy and I had an opportunity to visit briefly before this session started and as I listened to him, this is a guy a heck of a lot smarter than me. Certainly, he is more polished and articulate but he made a comment to me which he repeated when he spoke and he said I don't think this is the place where we fall on our sword. And I have to parrot a comment made earlier, at what is that number? Is that number \$50 million, is that number \$100 million where do you draw the line in the sand? I don't know about you but I think \$30 million dollars is one hell of a lot of money. It's my money, it's their money, it's their money and we paid that to you people, this Board and this organization with the expectation that you were going to be stewards of our money and it was going to be used exclusively for the injured workers in the State of Montana. I don't know how you can, in any way, justify any other course of action. For the Board, I can't tell you your duties, you all know them, you are intelligent, honorable people, there is not an axe murderer sitting at any those tables, you are thoughtful educated people who have the best interests of the policyholders and the organization here. My service for the four years here with Montana State Fund was one of the true highlights of my life and my professional career. I truly came to appreciate how the sausage is made and the heartfelt effort that everyone here at Montana State Fund invests in this organization. Lance, Lynda we worked together for several years, I have enormous respect for you people but it is disappointing to me. This is where the rubber meets the road, no man can have two masters. And I have heard all this discussion about well we have this political issue and we have that political issue. When I served on the Board I only had one issue and that was the fundamental reason for Montana State Fund which is the protection and care of injured workers. This goes back over 100 years, that is what this is about and in my estimation, trying to serve two masters, you are going to fail both of those. You can't work for the legislature, you can't work for the Governor and you can't work for the policyholders. You can certainly try to find middle ground but giving away \$30 million of my money that isn't finding middle ground. You're wrong and I urge in the strongest possible terms to continue this lawsuit. This needs to see the light of day. We have an obviously very learned and experienced attorney sitting on the Board and he has certainly his opinion which he has expressed very articulately, very polished, very smooth. We heard the attorney with Garlington, Lohn representing Montana State Fund and he has a different position. It is time to kill this once and for all. The eight years that I have had peripheral involvement or Board member involvement

with Montana State Fund, the legislature with every session introduces a bill to come in and figure out a way to transfer that money from the trust, the little treasure chest in the basement where those funds are held in trust on my behalf, for my workers and the workers that work for all these other gentlemen here. It is really time to put a line in the sand and force this issue. If we lose, we being the policyholders, the management people, the Board members here who believe that this \$30 million scrape away is wrong, if we lose, we lose on the merits. We have lots of very bright people here, way smarter than me, really smart, experienced lawyers, that's great. I've been in and out of litigation and lawsuits, I've been an expert witness, the list goes on and on. I added it up, I've spent over \$5 million in my professional career in legal fees and litigation from previous lives and business interests. It is time to spend a little bit of money. [Some said] we don't want the expense of this protracted litigation; I don't know. \$30 million might seem like that might be more money than even six figures in attorney's fees. It is time we stake the ground and get the courts involved so that they can tell each of you what's right, what's wrong, tell the legislature, the Governor, tell Wayne Dykstra, policyholder, tell us how the courts read this. Everybody's got an opinion. Opinions are like noses, everybody's got one, let's get the court to weigh in. Someone suggested this would probably wind up at the Supreme Court, great that is where it needs to be. And if we lose and Montana State Fund becomes the State of Montana's piggy bank, so be it. But this constant pecking along with each new legislature trying to figure out how they can get some of this money or how they can force a change in what Montana State Fund does with its monies, it is time to end that. So I think \$30 million is a big enough hill, I think it is more than big. One last comment and I appreciate you giving me time here to run with this. Before each of you cast your final vote, I would ask you to do one thing, only one thing. Just please, imagine that this room holds the 26,000 policyholders who write those checks every month and I gotta tell you when I was paying \$250,000 a year it was blood money, it was absolutely blood money. At \$100,000 per year, it's pretty painful but I'm not bleeding out of my eyes. I would like you to imagine when you go to cast your vote that there are 26,000 small business owners sitting out here and there are the tens of thousands of injured workers and future injured workers who are sitting out here and when you cast that vote I would like you to figure out how you will look all of these people in the eye and say we are going to give away \$30 million that the 26,000 of you business owners, you paid and for you injured workers, we promise that this will never happen again because it sunsets in two years and we promise that it will not materially affect policies, rates, coverage, you'll get your medicine, you'll get your disability check every month to feed your families and pay your mortgage or your rent. I would ask each of you to look really deep within yourself and if those 26,000 business owners and all of these future and current injured workers were sitting here would you be able to say 'It's only \$30 million, the hill isn't steep enough or high enough for us to fall on our sword'. Please do that before you cast your votes. Thank you very much."

Chair Zanto thanked Mr. Dykstra and then called for further public comment. There was none and he called for a short break.

Chair Zanto called the meeting back to order at 3:28 pm.

Chair Zanto opened the discussion back up for Board members' further discussion and comment. He added, "Given everything that we have heard today, the question in my mind is what's in the best interest long-term for the State Fund. And I am trying to manage the risk of a loss of a lawsuit versus the, I guess for lack of a better way to say it, the ability to live to fight another day. I don't know, in my mind, what the answer to that question is, frankly. I think there is a significant risk either way so, is this a fight that the Board is comfortable in taking today or in 2019 is really the question that I have in my mind. With that, I would open it up to other Board members."

Mr. Molloy said, "I wanted to have this opportunity because a lot of people have made a lot of effort to come here and I want to tell you very sincerely that this isn't an easy seat to be in today. There have been some very valid, legitimate points made as well as questions raised. And Mr. Dykstra, you are underestimating yourself when you do the 'Oh boy, I'm not that intelligent guy', it's a good act. But, I wanted to take the opportunity to answer the rhetorical question that you posted to us because I think it is a very legitimate question. That is, what would I say to the 26,000 small business people in Montana, and by the way, I am a small business person too though I am not in an industry that faces the kind of work comp rates that you all do with the work that you do and the employees you provide work for. I began my comments by saying I asked myself three questions here in terms of believing what my obligation in terms of fulfilling fiduciary obligations would be in considering what this Board is going to do. And those three questions were; will this bill that is temporary substantially and adversely impact the actuarial soundness of the Board. And I have never heard anyone suggest that it does or will. In fact, the bill itself requires that the transfers can only occur if that doesn't happen. The second question is will it adversely impact over the course of the next two years, the policyholders. Again, the bill itself protects against that. Your premiums cannot go up nor can your dividend's be reduced as a result of this bill. The third is, will it adversely impact workers and their rights to be compensated, that kind of circles back to the first question and that is that the State Fund is healthy financially. And we can debate the policy that the legislature implemented through Senate Bill 4, that is not my role here. I would have engaged in that debate in the halls of the legislature and some related issues all of which are outside the realm of what my responsibility is here today. I also have no reason to question and look forward to learning more because I have a lot to learn about how the insurance industry works and I know from the comments I have heard here today that the policyholders have a lot of confidence at least those who are hear speaking today, have a lot of confidence in the management of [President Hubbard] and his team with the guidance of previous Boards on navigating through some rough waters some of which were created by legislative action. So, the rhetorical question that was asked is 'what would I say to the people if they were sitting in this room'. And here is my answer to that question, I am committed to learning more about what the impacts of transfers, management fees, whatever they are called, are in the long-term viability and health of the State Fund and in the meantime will assure the members of this Board and the administration that there is a hill high enough to die on. I don't believe this is that hill and it is not for me. Everyone recognizes that lawyers can come at things from ten different ways and [Mr. Luck] is a very good lawyer and his law firm is highly respected. I want to assure you that there are very, very good lawyers in the Attorney General's office who I am confident are working hard to come up with arguments about why this lawsuit will fail. As I said earlier and as everyone here has apparently acknowledged, whatever Mr. Luck says and the Attorney General's office says, the ultimate determination is going to come from in the first instance, Judge McMahon. I predict that that will not be a favorable decision for the State Fund if we move forward at this time. But his decision would then be reviewed by seven members of the Supreme Court and I am not in a position to predict how that will come out. My commitment to this Board, my commitment to the policyholders that I am here on behalf of as well as the injured worker, is that I am going to learn. I am going to learn more; I don't believe that this is the time to throw down the gauntlet. I believe the state was in a very, very difficult situation and legislators made policy choices, one of which was Senate Bill 4. We can debate the wisdom of that, we can debate whether it is or is not constitutional, I think those are questions better left for a different day at a different time with different facts. For that reason, I will continue to support the motion with the commitment that I give to those small business people. So thank you."

Chair Zanto thanked Mr. Molloy and called for further comments.

President Hubbard asked the Chair for permission to ask a question of Mr. Luck and said, "There has been some discussion that the legislature passed the bill and the law is now different. Can

you address the Board on this distinction between prospective law change and retroactive law change and how that plays into the advice you have given us with regard to the merits of the particular action that is in the court now?"

Mr. Luck responded, "That opens up a lot of doors that I think are appropriate to speak to. I wish I could speak as eloquently as the non-lawyers, everybody is talking about the lawyers saying one thing and the others saying other things. If I could speak as eloquently and cut to the chase and made the appropriate points that turn out to be legal points as the members of the audience have today, I'd be a lot better lawyer than I am, I can tell you that. There are three very good lawyers that I have worked with for years, know and respect that provided their input and it is true you could disagree. One of the things about the discussions that we are having is there is law, there is politics and there is emotion. I can't work on the political side, although I have some ideas, that is not my place. I am trying to keep emotion out of it because I want to speak to all of you about what I believe, as your lawyer, law is. And there are certain aspects of your question and parts of that in relation to the law that are very important. Both Mr. Larsen and Ms. VanRiper mentioned the length in the system. I have to mention, by way of preface, because it gives a little bit of a foundation for some of my legal thoughts and opinions on this. I have also been in the system for 40 years. In 1985 I had the honor of being appointed to the Governor's Council on Workers' Compensation by Judge Schwinden and we worked for two years to revamp the workers' compensation system because it was a total mess. And it was in one of our meetings looking over the State Fund financials that it was mentioned for the very first time that the State Fund was unfunded. I am not aware that the State Fund fully understood that and that Governor's Council asked for an independent accounting. That is what gave rise to the identification of the unfunded liability. That is just the beginning of the story because then after a compromise, total revamp of the workers' compensation act was put together by that council, it was presented to the legislature on a bi-partisan basis, every interest group in the state of Montana was represented there. I represented defense attorneys and Ben Everett from Anaconda represented the claims attorneys. But as soon as the unfunded liability issue came up, it was first denied, and then, my numbers may be off, but then it went to 27, then it went to 50 and then it just kept on growing. The legislature came to town and it became a real political benefit to be unfunded. Because some very harsh, quick actions tried to make the most of that political problem, the workers' compensation act was revamped and it wasn't a very good job. And every two years after that it was revamped again and those of us that practiced, called it the old law and new law, the new new law and the new new new law because every two years, your benefits were determined by if you were injured at that given point in time. Then we went through a whole history of time where the legislature in different ways, messed with the State Fund, messed with the funding, we had the Old Fund liability tax had all kinds of things that you all are very aware of. The point being that bad problems sometimes make bad law. But the bigger point is, the one thing that came out of that experience was that everybody said, the State Fund has to run like a real insurance company. When Ms. VanRiper was a Bureau Chief it was a state agency. Sometimes before that, people thought it was a social program; that is what got it into trouble. So professional management, a Board of Directors, proper operation – it took a decade to pull it off. Now the State Fund is solvent, rates have gone down dramatically, the policyholder's equity is high. It is not as high, always as it should be but revamping and so many statutes mentioned, and I am going to get around to answering the question because it ties into this, so many statutes mentioned; this Board will run the operation like a real insurance company, the State Fund will run like a real insurance company and the operation will succeed. And it has. The Representative was right, there is a lot of money in that account. The Representative was wrong though in relation to the record in our case which by affidavit and documentation, we've established that the rates of the State Fund are not set on the basis of potential underwriting losses because from an underwriting standpoint, from a loss standpoint, the premium doesn't cover our losses. What covers our losses is the premium plus investment income. Without investment income, unencumbered the rates

would be much higher. They have been reduced and reduced and reduced but that is a critical part of running this place like a real insurance company. And there is no such thing as extra money in the policyholder's equity in the State Fund because by law if there is, it goes to the policyholders. By law, it specifically says it doesn't go to the legislature. As a preamble, I think that is important to keep in mind. First of all I mentioned big picture and keep these issues in our mind as we talk about the statutory situation. There are four, in my mind, critical questions that need to be answered in this lawsuit. First, whose money is it, we need to know that. Second, what rights do the executive and the legislative branch have to whoever's money it is. Third, will the State Fund be a piggy bank for the legislature in good but probably in bad times. And fourth, what are the trust obligations of the State Fund in relation to all of this money. I have heard on more than one occasion, and Mr. Molloy eloquently indicated, and I think Ms. Moss did also, that we should be, as a Board, following the law. Of course, every citizen should follow the law. As an aside and as a great trial lawyer, Mr. Molloy would be the first one to tell you that if the law doesn't work with the constitution, we challenge that law. That is what the trial lawyers do and they do it well. The fact of the matter is that we do have a statute, we analyze it and then we decide whether it is appropriate under all the facts and circumstances, both the constitutional law and the statutory law, and what is in the best interest of the State Fund. All of those things went into our consideration in filing this action and should not be ignored. It is right that a statute was passed and it is a law; it is wrong, this is my legal opinion, to indicate that as a result you have to follow that statute blindly. What we do in the law is we look at the constitution and we look at other statutes. Okay, so we have one statute, SB4, it says we are going to charge the State Fund a management rate, a management fee. Does that trump everything else in terms of the constitution and other statutes? Does it trump 2315 that indicates that the Board will run the Fund like an insurance company. Does it trump 2320 that all the property of the State Fund belongs to the State Fund? Does it trump 2323 that if there is excess money over policyholder's equity that it gets paid out in dividends? But most importantly does it trump 2322 that says the assets of the State Fund are held in trust for the purposes for which they were received? SB4 does not speak to that and when we denigrate the obligation of a trustee whether it is by the executive or by the Board, I think we are making a big mistake. And the answer to that is 'certainly not because SB4 changed the law'. 2322 says the assets of the state fund are held in trust so there was a change, does it mean anything in the big picture, no, it means look at the big picture and make a determination of what is right. I understand that there might be an emotional decision there, there might be a political decision there but in my mind, the legal decision is pretty darn clear.

Mr. Luck added, "Now, let's talk about this extra money situation. We can't have any discussion about money unless we consider one given fact, we all know it. The label, management fee is a pretext, this is a transfer of money by the legislature to the firefighting fund. So the question is, is that okay? In terms of the constitution and the statutes? Well, let's not kid anybody and the reason we can't is lets look at the statutes that are in effect. 17-2-102 says that management fee from the Board of Investments shall be based on the actual cost that is reimbursed. 17-6-201 says it is based on the actual cost, no more and no less. So there are statutes that identify what the management fees are for these services provided by the BOI. And I can tell you in fiscal year 17 the actual fees paid to BOI were just under \$350,000 so a three percent management fee would be 45 times that. The total amount paid to BOI in relation to all charges because they have other contractors that pass through their charges, is \$1.1 million so I believe it would be 15 times that. So when we say this is a management fee or we say okay let's just charge for that management fee, we get no services from it. We get nothing from it. All the statutes and all the allocations and all the assessments that are in the law about what the management fees are, are paid. This money goes directly out of the BOI to the firefighting fund and no additional services are provided. And we provided evidence in the case that as the money goes up the fees should be going down, this is many times the fee that was there. Even if it was a management fee, you as a Board would be obligated to say, 'no, we are not going to pay that with this money that we are

holding in trust'. Whose money is it? We talked about the statutes but the unquestioned law of the State of Montana and this is the case that was supported by Attorney General Bullock's opinion several years ago supporting that and basing it on this case. The law is "if money is subject to trust, statute or agreement, it is not general fund money. It is not subject to appropriation. Any of those three things. State Fund money is subject to all three, statute, contract agreement and trust. We can say what we want about the collateral issues, the legal concern here and this is why this is an appropriate lawsuit, that unquestioned law, I would submit to you, it is clear, it is not general fund money or any kind of money that is subject to appropriation. We add that to the pretext. I tell you that this is not an unusual situation, legislatures going to their state funds that have become solvent and asking for money. There is authority in Utah, Arizona, Oregon, Idaho, Oklahoma and Kansas. Certainly different statutes, some different considerations but all standing for different propositions of this argument. It is not your money, you can't take it, it is the policyholder's money. When we talk about impact and consequences in relation to the stability of the State Fund, I don't think that's the question. The question is, is it legal? Even if it is extra its illegal because if it is extra, it goes out in a dividend. The impact to policyholders, boy that is a hard one because it expands here by year. It may be that given the short duration of the present law, the impact would not be dramatic but you are taking \$30 million out of investments that aren't going to have interest. If that money was extra it would already have been gone in a dividend. So not only is it not going to continue to raise money in the short run, it won't be that as we go down the road. I think the fact that you can't raise rates and can't affect the dividend is a negative because the underwriting aspects and the underwriting effects is taking \$30 million out of the Fund aren't going to be there and we can't react to it. So there are short-term and long-term effects, not the least of which on the policyholder is, nobody believes this is only going to happen once. We talk about winning and losing the lawsuit. We can't lose the lawsuit even if they don't rule in our favor. You have the obligation to get the answer to these questions for the betterment of the State Fund going down the road. Whatever the future is, I don't know about those sorts of things, I do know that these are legitimate legal questions right now that can't be quantified by the dollar amount or the political expediency of it all. Legally, this Board and the State Fund management needs to get the answer to these questions. Because what do insurance companies do, they analyze and underwrite. If we don't like the answer, we will take it into account on how we run the State Fund. So, again, unemotionally, legally, I think it is the right thing to do. And we can disagree about things around the periphery but we can't disagree, I don't think, about those core and ultimate issues. The only other thing in relation to prospective and retroactive. The retroactive piece can be very important in relation to the contract situation, we have all these contracts and all the contracts say, since 2003, the State Fund is going to hold your money and it won't let the legislature take it. I believe there are plenty of people in this room and otherwise in the State of Montana who said that is one of the reasons I stayed with you. You said you were going to run like an insurance company, you said you wouldn't let the state take your money and if you got any extra, you are going to give it to me. That pays off that credit card. I think that is important to keep in mind but since we have those policies and if we have to do this, we can't do it retroactively because we can't go back and change those policies. We could do it going forward, we could change our policy and get it approved by the Commissioner's office but the problem we have there is, I would submit, that we have to segregate all those funds separately. account for it and try to figure out what was subject to the other contract what is subject to the new contract and then in a two-year period I guarantee you that new money won't get over a billion dollars. That is one of the difficult legal issues that is critical to be determined in all this if this is going to go forward.

Chair Zanto called for additional questions;

Mr. Mohr asked Mr. Luck how much the lawsuit would cost the State Fund and how much it would cost the State putting them further into a financial hole.

Mr. Luck said it would not be cheap. He added by a trial lawyer's standard, it would be peanuts. There was a lot of front end time put into this with research and work and figure out the financial information as well as the affidavits and then legal research to pull it all together and complete the pleadings which required review of draft after draft. The total cost of this case from here forward should and could be handled on motions and working with the AG's office through petitions, and he estimated the total cost to be \$50,000 to \$60,000.

Ms. Moss added, "I had a phone call from a woman in Billings, who shared her concern about SB4 and made this statement which I found somewhat fascinating, that well, perhaps some of us as business owners could file our own lawsuit against the state. I was wondering, you talked about other states who had seen similar legislation passed that addressed their state fund assets and how many of those were filed by the State Fund itself or did they come from other entities, businesses, individuals or whatever?"

Mr. Luck responded that he could think of a couple that were brought by associations; however, he was more concerned about the content rather than the parties involved. The constant was that there was always a government agency involved. He said he could not accurately speak to that.

Ms. Moss said it would be good to know that information.

Mr. Luck added that there are others with interests, from regulators to employers who appear to have standing to make claims for challenging the statute and who could also make claims against the State Fund for not.

Ms. VanRiper said, "Thank you for your comments, Mr. Luck. I share your worry about not being able to put a clear sentence together once you get out of law school and you are right the policyholders and other people who have testified here have been very eloquent and clear. I wish I could do the same. I just wanted to respond to a few comments from people who testified. I think that is the stage we are in here. Senator Keane mentioned a couple of provisions in SB4 that we had not talked about. The provisions that say if you take the \$30 million it shouldn't be reflected in dividends or rates for policyholders. And I brought this up at our last meeting, I for the life of me don't know how we implement that because when we consider rates and we consider dividends, we look at the whole package. The reserves and the investment income and so forth and it would not be very easy to just close our eyes and pretend like we still had \$30 million. I just think it is a real difficult provision to comply with. And then, the other response I wanted to give to Senator Keane, and I very much respect him and respect his testimony, but I want to clear the record. As far as I know, there has been no expression of intent by this Board to privatize the State Fund and in fact when there was that bill up during the last session, we gave authority to the State Fund management and the State Fund representatives/lobbyist to oppose that. What I do recall, if I am correct is that we discussed some alternatives and one of the alternatives would be a study commission to have the legislature, once again, take a look at the State Fund and make sure the way it is constituted is in the best interest of the State of Montana and the most affected people, the policyholders and the injured workers. We decided if that happened, we would totally cooperate in providing information and I think we are in the middle of that but nobody on this Board that I know of, wants to privatize the State Fund. So the numbers that we come up with and the ways that we decide rates and so forth have nothing to do with that kind of a goal. I just wanted to clarify that. I just wanted to mention one other thing and I have mentioned it before but I want to go into this a little bit more. So, we're charged with determining rates and dividends; we are charged with that as a Board and how do we do that? I was a Bureau Chief for the State Fund way back when and I have worn a lot of different hats with respect to insurance since then and when I accepted this Board appointment and went to my first meeting, I was pretty shocked

about what I had gotten myself into. I maybe didn't remember or we weren't as sophisticated back in the day, which absolutely was true, when I was here. But it is a very sophisticated and tedious process and what the Board members have to do is they have to look at all this financial information ahead of time and make sure they are familiar with the code and the governing guidelines and study that before you go into the Board meeting where the decisions are made. And at the Board meeting, we have all these experts who provide us information and they provide us more reports and we ask them questions and based on all of that and based on this whole picture, not just what is in reserves, but our total financial picture, our statutory obligations, we make decisions about rates and we make decisions about dividends and that is what we are charged with doing. As I mentioned earlier, if we thought we had an extra \$30 million sitting there, I don't think anybody in this room would have had any hesitation to return it to the policyholders. I for one have been a little bit uncomfortable with the size of the dividends we've approved the last couple of years because I tend to be a little bit more conservative about that. So I think it is a very, very well-considered decision and it's a decision that the Board has made well-considered. And I appreciate the Commissioner of Insurance, did say that in their review of the State Fund, they thought that we ought to have somebody on the Board who has more financial expertise and I think that is good and I am sure we will look for somebody. It is not to say that we don't get a ton of advice from people who are financial experts. This comment really goes to Representative Eck and to some other people, and some Board members as well. I am so disappointed that she is not here to hear this, I think I saw her leave. I have the utmost respect, and I'm sure the members of this Board do, for the legislature, it is a thankless, thankless job. You ruin your health, you ruin all kinds of things when you take on that job and you do that four months and the special sessions. It is very difficult and I have the utmost, utmost respect for Representative Eck, I think she is a fantastic Representative. Having said that, I hope that if this Board were to continue on with the support of the lawsuit that all of the people in the legislature, including Rep. Eck and Rep. Keane, have the respect for us as well. We would have made that decision to continue the lawsuit going through all the considerations with all the advice and that we didn't make it easily and we made the decision based on what we thought was our obligation. I would hope that that would be the case. Finally, this is no fun – Board member Matthew Mohr said at the outset, it is a tough spot to be in – it keeps people up at night. I have to tell you, if I thought there were \$30 million sitting around, I know what I would like to do with it in the public coffers and it has to do with people who are very needy because it is just horrible that we are having to cut those services. But when you wear this hat, you have an obligation and I feel very strongly, that we have an obligation to support this for all of the reasons said here. And what would I say to a policyholder who asks me why I withdrew my support for a lawsuit. I don't have a reason I would be ashamed of it because I am obligated to do this which is not to say I don't think you can come to a different opinion on this which you obviously have. But I think I am obligated to do it and sometimes you have to do what you have to do. I think \$30 million is a big enough hill to die on.”

Chair Zanto called for additional comments.

President Hubbard said, “Rep. Eck is my honorable representative in the legislature and I thank her for her service and I do wish she were here because I would want her to understand that. The legislative opinion that she was referring to, I believe, is one that was issued by Mr. Jameson Walker, a member of the Montana Legislative Services Division, it really is not a legal opinion, it is a legal memo is my understanding and I just want to quote for the Board two things, just so you understand that it is not black and white against continuation of this litigation. “A review of the relevant state and federal cases indicates that the draft is unique in its application of ‘management rate’. Various state courts have addressed the legality of a legislative appropriation or transfer of workers’ compensation funds into the state’s general fund. However, no state court has analyzed the legality of an asset management assessment on workers’ compensation funds.

The difference between a management assessment and an appropriation or transfer is unclear because there is no prior Montana or federal case law from which to base an opinion; it is unclear how the Montana court would determine the legality of the draft.” One last quote from that letter and I believe the Board has had this letter before, it is a matter of public record, it was presented to the Economic Affairs Interim Committee under SJ27. The conclusion, “There is no direct Montana or federal case which triggers a legal review note under Legislative Services Division Legal Office policy. While prior Legislatures have transferred money from the State Fund, there has not been a statutory attempt since the passage of chapter 603 in 2003.” That is the year the restrictive endorsement and the transfer of the Old Fund obligations began as an Old Fund liability. “As indicated throughout, other state cases show that legislative appropriation of State Fund assets may potentially raise constitutional concerns, including implicating contracts clause concerns.” And to your point, Ms. Moss, I know the Utah Compensation Fund was the principle plaintiff in the Utah case which held that the assets were that of the State Fund and not the State of Utah. Finally with regard to rates, Senator Keane and I have, respectfully, debated with one another over time and this is not in any way to mitigate his feelings or his own sense of opinion but this is what the law says about rates and your obligation with regard to rate setting. Section 39-71-2330 states, “The board has the authority to establish the rates to be charged by the state fund and the supplementary rate information to determine the applicable premium as provided in 39-71-2311 and 39-71-2316 and shall file the rates and supplementary rate information with the commissioner as provided in Title 33, chapter 16. The board shall engage the services of an independent actuary who is a member in good standing with the American Academy of Actuaries to develop and recommend actuarially sound rates. Rates must be set at amounts sufficient, when invested, to carry the estimated cost of all claims to maturity, to meet the reasonable expenses of conducting the business of the state fund, and to amass and maintain an excess of surplus over the amount produced by the National Association of Insurance Commissioners' risk-based capital requirements for a casualty insurer.

(2) Because surplus is desirable in the insurance business, the board shall annually determine the level of surplus that must be maintained by the state fund pursuant to this section. The state fund shall use the amount of the surplus above the risk-based capital requirements to secure the state fund against various risks inherent in or affecting the business of insurance and not accounted for or only partially measured by the risk-based capital requirements.

That is the statute that governs this Board with regard to rates and ratemaking; you engage the services of an independent consulting actuary. Not only for rates but also for what level of equity is appropriate for an insurance company in our line of business, workers' compensation which is a long tail line of insurance and inherently volatile over time. And I encourage our newer members to take the time to become students of the statutes that govern the management of this Board. I firmly believe when you tie all of that together and you include all of the obligations in section 2322 that says the money coming into the State Fund must be held in trust for the purposes for which the money was collected is an obligation we cannot avoid. It is not a political decision, it is a fiduciary decision.

Chair Zanto called for further comments or questions from the Board; there were none. He then called for the vote and said the vote would be taken by roll-call. He asked if the Board was clear on what the motion said.

Ms. VanRiper said she was not clear.

Chair Zanto reread the motion, “To move the state Fund staff and counsel for the State Fund be directed to withdraw the lawsuit regarding Senate Bill 4 currently pending in the First Judicial District Court.”

He said those in favor should signify by saying yes and opposed should reply no.

Mr. Larsen – “Yes.”

Mr. Owens – “Yes.”

Ms. VanRiper – “No.”

Mr. Molloy – “Yes.”

Ms. Moss – “Yes.”

Mr. Mohr – “Respectfully, No.”

Chair Zanto – “Yes.” He said the vote passed on a five to two vote.

III. Old Business/New Business

Chair Zanto called for old or new business. He said “What I would offer and it is inclusive of those who were not able to be here personally today, but I would like to thank those who took the time to send us their thoughts and opinions. I know the Board was inundated with lots of phone calls and emails and we genuinely appreciate that. And again we genuinely appreciate you all taking your time to come here today and give us your thoughts and opinions.” He then called for other new or old business. There was none.

IV. Public Comment

Chair Zanto called for public comment; there was none.

The meeting was adjourned at 4:16 pm p.m. The next regularly scheduled Board meeting will be held on Friday, December 15, 2017 at Montana State Fund, 855 Front Street, Helena, Montana.

Respectfully submitted,

Verna Boucher

Special Assistant to the President/CEO