

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 01-cv-1451-REB-CBS

(Consolidated with Civil Action Nos. 01-cv-1472-REB-CBS, 01-cv-1527-REB-CBS, 01-cv-1616-REB-CBS, 01-cv-1799-REB-CBS, 01-cv-1930-REB-CBS, 01-cv-2083-REB-CBS, 02-cv-0333-REB-CBS, 02-cv-0374-REB-CBS, 02-cv-0507-REB-CBS, 02-cv-0658-REB-CBS, 02-cv-755-REB-CBS, 02-cv-798-REB-CBS and 04-cv-0238-REB-CBS)

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

**LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

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I. INTRODUCTION

Lead Plaintiffs' counsel in this securities class action (the "Litigation") respectfully submit this motion and memorandum of law in support of their request for an award of attorneys' fees of 24% of the Settlement Fund plus reimbursement of their out-of-pocket litigation expenses of \$2,219,063.84.¹ In addition, the Lead Plaintiffs have requested reimbursement for their time and expense in representing the Class. The substantial recovery obtained for the Class – a cash recovery of \$400,000,000 – was achieved solely through the substantial efforts and effective advocacy of counsel for the Lead Plaintiffs, the active participation by Lead Plaintiffs and is an excellent result by any measure.² The \$400 million represents one of the larger cash settlements of a securities class action and Lead Plaintiffs' counsel believe it to be in the top 10 to 15 settlements achieved after the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The extensive efforts of Lead Plaintiffs' counsel over the past four and one-half years have been undertaken

¹ Submitted herewith in support of approval of the proposed settlement is Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation of Settlement Proceeds (the "Settlement Brief") and the Declaration of Michael J. Dowd in Support of Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and Award of Attorneys' Fees and Reimbursement of Expenses (the "Dowd Declaration"), which more fully describes the history of the Litigation, the claims asserted, the investigation undertaken, the extensive litigation efforts, the negotiation and substance of the settlement, the substantial risks of the Litigation and the reasonableness of the fee request. Also submitted herewith are declarations from each firm which worked together with Lead Counsel setting forth the expenses incurred in prosecuting the Litigation.

² All capitalized terms not defined herein shall have the same meanings as set forth in the Stipulation of Partial Settlement dated as of November 21, 2005 (the "Stipulation").

without compensation of any kind and the fee has been wholly contingent upon the result achieved.

The requested fee was negotiated between the Court-appointed Lead Plaintiffs and counsel and therefore should be afforded a presumption that it is reasonable.³ One of the three Lead Plaintiffs – institutional investor the New England Health Care Employees Pension Fund – was represented by separate counsel in the negotiations. The agreement was intended to incentivize Lead Counsel to obtain the largest recovery possible by increasing the percentage fee as the recovery increased. Moreover, the requested percentage fee is well within the range of percentages (and actually less than) awarded in class actions in this Circuit, and is the appropriate method of compensating counsel for this result. This is especially true in light of the extensive efforts undertaken by Lead Plaintiffs' counsel for nearly five years, the significant risks involved in bringing this Litigation and the outstanding results achieved for the Class.

The Court-appointed Lead Plaintiffs include a pension fund and three individual investors, each with a significant financial stake in the outcome of the Litigation, paradigm fiduciaries for the Class envisioned by Congress when it enacted the PSLRA.⁴ As several

³ The negotiated fee actually provides a slightly larger (24.062%) fee, but counsel seek an award of 24% of the \$400 million Settlement Fund, the amount stated in the settlement notice sent to Class Members.

⁴ Congress enacted the PSLRA in large part to encourage institutional investors to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." See H.R. Conf. Rep. No. 104-369 (1995), 1995 WL 709276,

courts have held, "courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 465 (S.D.N.Y. 2004) ("[I]n class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable."). Not only was the requested fee structure negotiated and agreed to, but the Lead Plaintiffs evaluating counsel's work now, at the time of this partial settlement, support the requested fee based on the result obtained. Lead Plaintiffs were actively involved in all aspects of the Litigation, including the protracted settlement negotiations and were familiar with the strengths and weaknesses of this case, including the risks of continued litigation as well as Qwest's financial condition. Because of this involvement, Lead Plaintiffs are in a unique position to evaluate the work of counsel and the effort required to obtain the \$400 million settlement and to determine, as they have, that the fee request is fair and reasonable and should be awarded. The fact that the requested fee was negotiated and agreed to and later approved after a settlement was reached should be given great weight. *Cendant*, 264 F.3d at 282. This standard was recently reiterated: "In *Cendant*, 264 F.3d 201, we noted, under the Private Securities Litigation Reform Act, the

at *32 (Leg. Hist.); see also *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999). Congress believed that institutions and other investors with a significant financial stake in the outcome of a securities class action would be in the best position to monitor the ongoing prosecution of the litigation, select counsel and to assess the reasonableness of counsel's fee request.

aim of the fee award analysis 'is not to assess whether the fee request is reasonable,' but 'to determine whether the presumption of reasonableness has been rebutted.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 n.10 (3d Cir. 2005) (quoting *Cendant*, 264 F.3d at 284).

The Litigation, which was filed nearly five years ago, is subject to the provisions of the PSLRA and, therefore, was extremely risky and difficult from the outset. 15 U.S.C. §78u-4. The effect of the PSLRA is to make it harder for investors to bring and successfully resolve securities class actions. Lead Plaintiffs and their counsel were mindful of the fact that in this post-PSLRA environment, a greater percentage of cases are being dismissed than ever before amid defendants' constant attempts to push the envelope and contours of the PSLRA. Indeed, an unfortunate byproduct of the PSLRA is that numerous meritorious suits have been dismissed as a result of the heightened pleading standards under the PSLRA.

In the face of this formidable challenge, counsel for the Lead Plaintiffs marshaled considerable resources and expended substantial effort in the researching, investigating and uncovering of detailed facts to attempt to meet the post-PSLRA pleading requirements. Importantly, Lead Plaintiffs and their counsel were at the forefront of uncovering the alleged fraud at Qwest. ***This Litigation was commenced six to nine months prior to any governmental action relating to Lead Plaintiffs' allegations and advanced claims that the Securities and Exchange Commission ("SEC") did not pursue which contributed to Lead Plaintiffs' success in obtaining a superior result for the Class.*** Despite defendants' repeated attempts to dismiss Lead Plaintiffs' claims at the pleading stage, Lead

Counsel successfully defeated (in the main) their attempts to do so. The Settling Defendants, however, continued to deny all claims of wrongdoing or liability against them arising out of the allegations set forth in the Fifth Consolidated Amended Class Action Complaint and vigorously defended the Litigation.

As discussed in greater detail in the Dowd Declaration and Settlement Brief, Lead Plaintiffs faced very real obstacles in establishing the elements necessary to prove liability and damages if litigation were to continue. The gravamen of Lead Plaintiffs' case is that defendants issued allegedly false or misleading statements and falsified Qwest's financial statements by engaging in a series of accounting manipulations in violation of Generally Accepted Accounting Principles ("GAAP"). While Lead Counsel conducted an extraordinarily detailed analysis of Qwest's financial statements as well as the multitude of underlying transactions and concluded that Qwest's financial statements violated GAAP, the accounting transactions and principles at issue are complex and the determination of many of the accounting issues would be subject to expert testimony. Defendants would continue to deny any liability and, assuming that Lead Plaintiffs survived the anticipated motions for summary judgment, presenting these complex issues to a jury posed a real risk to establishing liability at trial. Lead Plaintiffs would also have to prove that each Settling Defendant acted with scienter. Proving each defendants' intent to make material representations and or/omissions, which they adamantly deny, is subject to considerable uncertainty.

There were also significant risks in proving loss causation and the amount, if any, of damages suffered by the Class. Defendants damage expert would likely opine that the

Class did not suffer any damages or that damages were significantly less than those claimed by Lead Plaintiffs because the price drops in Qwest's securities were due to factors unrelated to the alleged fraud. While Lead Plaintiffs disagreed with defendants' contentions regarding loss causation and damages, at trial there would be a substantial risk that the jury would agree with the Settling Defendants' arguments resulting in a finding of no damages or only a fraction of the damages Lead Plaintiffs' claimed.

Aside from the risk, the effort required to achieve this settlement was substantial. This was not a case where a settlement was achieved at an early stage. The Litigation was pending for over four years when an agreement-in-principle was reached. By that time, Lead Plaintiffs' counsel had expended tens of thousands of hours in a massive investigation, motion practice and discovery, defeating (in the main) defendants' motions to dismiss, obtaining and reviewing over 9 million pages of documents from defendants and third parties, successfully litigating numerous motions to compel, expending a substantial amount of time analyzing the fruits of these discovery efforts, interviewing dozens of witnesses, taking or attending over 50 depositions, fully briefing the issue of class certification, litigating a motion for a temporary restraining order and participating in a preliminary injunction hearing, litigating the United States Attorney's Office motion to stay the litigation, consulting with experts and participating in complex settlement negotiations including mediations with retired Judges Layn R. Phillips and Daniel Weinstein.

In sum, in the face of the serious obstacles referred to above and the substantial efforts of counsel – in a case asserting claims predicated on complex legal and factual issues which were vigorously opposed by highly skilled and experienced defense counsel –

Lead Plaintiffs' counsel succeeded in securing an outstanding recovery for the Class. For all of these reasons, Lead Plaintiffs' counsel submit that the 24% fee requested is fair and reasonable when considered under applicable legal standards and should be awarded.

II. THE REQUESTED FEE SHOULD BE AWARDED BASED ON A PERCENTAGE OF THE RECOVERY OBTAINED

A. Lead Plaintiffs' Counsel Are Entitled to a Fee From the Common Fund They Created

Courts have long recognized that attorneys who represent a class and achieve a benefit for class members are entitled to be compensated for their services, and that where a class plaintiff successfully recovers a fund the costs of litigation should be spread among the fund's beneficiaries. Under this "common fund" doctrine, established more than a century ago in *Trustees v. Greenough*, 105 U.S. 527 (1882), attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund as compensation for their work. See *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). Courts have also recognized that in addition to providing just compensation, awards of attorneys' fees from a common fund also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature. See, e.g., *Dolgow v. Anderson*, 43 F.R.D. 472, 481-84 (E.D.N.Y. 1968). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, provide a "most effective weapon in the enforcement' of the securities laws and are 'a necessary

supplement to [SEC] action.” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

B. Fees in Common Fund Cases Should Be Based on a Percentage of the Recovery

1. The Supreme Court Has Repeatedly Held that Fees in Common Fund Cases Are Properly Calculated Based on a Percentage of the Recovery

The Supreme Court has consistently held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fee should be determined on a percentage-of-the-fund basis. See, e.g., *Greenough*, 105 U.S. at 532; *Cent. R. R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague*, 307 U.S. at 166-67; *Boeing*, 444 U.S. at 478-79. Indeed, by 1984 this notion was so well established that the Supreme Court needed no more than a footnote to make this point in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (“[U]nder the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class.”). See also Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (October 8, 1985) (hereinafter the “*Task Force Report*”) (fee awards in common fund cases have historically been computed based upon a percentage of the fund); 1 Alba Conte, *Attorney Fee Awards* §2.02, at 31-32 (2d ed. 1993) (same). The percentage concept is intended to approximate the market by basing the fee award on what private counsel ordinarily would charge in a contingent fee contract. See *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (“The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.”).

Despite Supreme Court precedent approving percentage fees in common fund cases, many years ago some lower federal courts began employing an alternative method for calculating fee awards known as the “lodestar/multiplier” method.⁵ However, the Supreme Court has *never* adopted the lodestar method in a common fund case. See *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 963 (E.D. Tex. 2000) (citing *Manual for Complex Litigation* §24.12, at 189 (3d ed. 1995)); see also *In re Prudential-Bache Energy Income P’ship Sec. Litig.*, MDL No. 888, 1994 WL 150742, at *3 (E.D. La. Apr. 13, 1994) (“*Prudential I*”). See also *Venegas v. Mitchell*, 495 U.S. 82 (1990) (holding that a plaintiff in a civil rights suit may be contractually bound to pay an attorney a percentage of the recovery even though the fee exceeds the statutory fee that the defendant must pay to the plaintiff).

Moreover, in the wake of the Supreme Court’s decisions in *Boeing*, 444 U.S. 472, and *Blum*, 465 U.S. 886, which reaffirmed the appropriateness of the percentage method in common fund cases, in 1984, Judge Aldisert of the Third Circuit (the author of *Lindy II*) convened a task force of prominent judges and practitioners to reconsider *Lindy II* because “a number of difficulties [had] been encountered in applying the [lodestar method].” *Task*

⁵ The lodestar approach entails two steps. First, to determine the lodestar, the court multiplies the number of hours spent on the case by each attorney’s reasonable hourly rate. Second, the court adjusts that figure (by applying a multiplier) to reflect such factors as the risks faced and overcome, the contingent nature of the litigation, the result obtained, and the quality of the attorneys’ work. See, e.g., *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973) (“*Lindy I*”), subsequently refined in *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-18 (3d Cir. 1976) (en banc) (“*Lindy II*”).

Force Report, 108 F.R.D. at 238. The Third Circuit Task Force, headed by Professor Arthur Miller of Harvard Law School, identified at least nine perceived deficiencies of the *Lindy II* "lodestar" approach, and found that there was a "widespread belief" that these deficiencies "either offset or exceed [the] benefits" of the lodestar method. *Task Force Report*, 108 F.R.D. at 246.

Accordingly, the Third Circuit Task Force concluded that although *Lindy II* continued to have merit in **statutory fee-shifting cases**, and should be followed in such cases, fee awards in **common fund cases** should be based on a percentage of recovery. *Task Force Report*, 108 F.R.D. at 254-59.

2. A Reasonable Percentage of the Fund Created Is the Preferred Method of Awarding Attorneys' Fees in Common Fund Cases in the Tenth Circuit

The percentage method is the appropriate method to use to calculate and award fees in common fund cases because, among other things, it laudably aligns the lawyers' interest in being paid a fair fee with the interest of the class in obtaining a maximum recovery in the shortest amount of time.

In *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988), the Tenth Circuit affirmed the propriety of awarding attorneys' fees on a percentage basis in a common fund case.⁶ Cases following *Brown* confirm a "**preference**" in the Tenth Circuit for the percentage method. In *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) the court stated:

⁶ See *Brown*, 838 F.2d at 454-55.

In our circuit, following *Brown* and *Useton*, either [the percentage or lodestar] method is permissible in common fund cases; however, *Useton* implies a preference for the percentage of the fund method.

Id. at 483.⁷

Supporting authority for the percentage method in other circuits and by commentators is overwhelming. Since the issuance of the *Task Force Report* in 1985, virtually every circuit court has joined the United States Supreme Court in approving use of the percentage-of-the-fund method in common fund cases. See, e.g., *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("After reviewing *Blum*, the [Third Circuit] Task Force Report, and . . . cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (percentage of the fund recovered is the *only* permissible measure of awarding fees in common fund cases).

⁷ See also *Useton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993).

As these and many other courts have noted, the percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for efficient prosecution, thereby benefiting both litigants and the judicial system. For example, in *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986), the Seventh Circuit succinctly summarized some of the benefits of the percentage method:

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

Conversely, numerous courts have criticized the lodestar method for encouraging plaintiffs' attorneys to needlessly drag out complex litigation for years in order to run up "lodestar" hours, even when their clients' and the class's interests would be much better served by an earlier, more efficient, settlement of a case based on arm's-length negotiations conducted by experienced counsel.⁸

The percentage approach is also the most efficient means of rewarding the work of class action attorneys, since it avoids the wasteful and burdensome process of counsel

⁸ See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds*, 818 F.2d 226 (2d Cir. 1987) (criticizing lodestar approach as one that "tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation") (Weinstein, C.J.); *GMC*, 55 F.3d at 821 (noting that lodestar method has been criticized for giving plaintiffs' counsel "the incentive to delay settlement in order to run up fees"); *Thirteen Appeals*, 56 F.3d at 307 (lodestar method creates "a disincentive for the early settlement of cases") (citation omitted); *Shaw*, 91 F. Supp. 2d at 964 ("Again, simply put, the lodestar method rewards plodding mediocrity and penalizes expedient success.") (Heartfield, J.).

preparing and courts evaluating lodestar-based fee petitions, which the Third Circuit Task Force has described as “cumbersome, enervating, and often surrealistic.” *Task Force Report*, 108 F.R.D. at 258; *see also Shaw*, 91 F. Supp. 2d at 964 (“The lodestar method voraciously consumes enormous judicial resources, unnecessarily complicates already complex litigation, and inaccurately reflects the value of services performed.”); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (warning that a “request for attorney’s fees should not result in a second major litigation”).

One of the nation’s foremost scholars in the field of class actions and attorneys’ fees, Professor Charles Silver of the University of Texas School of Law, has also concluded that – among its many other benefits – the percentage method is also far superior to the lodestar method in aligning the interests of class counsel with the interests of absent class members. Indeed, as Professor Silver notes:

The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.

In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions. The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can’t Get There From Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis

added; footnotes omitted). This is particularly true in PSLRA cases such as this one where Congress empowered sophisticated lead plaintiffs with the ability to select counsel and negotiate the type and terms of their fee arrangement with class counsel.

Moreover, the PSLRA has made the percentage method the standard for determining whether attorneys' fees are reasonable. See 15 U.S.C. §78u-4(a)(6). The PSLRA states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount" recovered for the class. 15 U.S.C. §78u-4(a)(6). Courts have concluded that, by drafting the PSLRA in such a manner, Congress expressed a preference for the percentage, as opposed to the lodestar, method of determining attorneys' fees in securities class actions. See *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001).

Indeed, Professor John C. Coffee, a distinguished scholar in the field, argues that a percentage of the recovery is the *only* reasonable method of awarding fees in common fund cases:

If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a "deregulatory" reform because it relies on incentives rather than costly monitoring. Ultimately, this "deregulatory" approach is the only alternative.⁹

⁹ John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (1986).

III. LEAD COUNSEL'S FEE REQUEST ENJOYS A "PRESUMPTION OF REASONABLENESS"

Passage of the PSLRA "shift[ed] the underpinnings of our class action attorneys fees jurisprudence in the securities area." *Cendant*, 264 F.3d at 282. In a PSLRA case, a fee request, which has been approved and endorsed by properly-appointed lead plaintiffs, enjoys a "presumption of reasonableness." *Id.* at 220, 283. In *Cendant*, the court held that the district court abused its discretion by invalidating a fee agreement negotiated between counsel and three institutional investors in favor of a sealed-bid auction for legal services. In so holding, the court explicitly recognized that, in enacting the PSLRA, Congress expressed its strong belief that an institutional lead plaintiff would be in a better position than the court to protect the interests of the class by monitoring lead counsel throughout the litigation and by negotiating a reasonable fee for counsel's representation. *Id.* at 276 (holding that Congress believed that "institutional investors would likely do a better job than courts at selecting, retaining, and monitoring counsel than courts have traditionally done"). Accordingly, the court held that a fee agreement negotiated between properly selected lead plaintiff and its counsel should be accorded a "presumption of reasonableness":

[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel. . . . This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-à-vis its lawyers.

Id. at 282.¹⁰ See also *Global Crossing*, 225 F.R.D. at 466 (“[I]n class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm’s length between lead plaintiff and lead counsel are reasonable.”); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 432 (D.N.J. 2004) (same).

Here, Lead Plaintiffs, including the one institutional investor through its own counsel, negotiated a graduated fee arrangement with counsel for Lead Plaintiffs that results in a fee slightly in excess of 24%. In fulfillment of their duties in accordance with the contemplation of Congress and under the PSLRA, Lead Plaintiffs have worked with counsel throughout the prosecution and partial settlement of the Litigation, are familiar with the work done by counsel, and they not only negotiated the requested fee but also support the fee request presently before the Court based on the results obtained. See Declarations of Robert Tessier on behalf of the New England Health Care Employees Pension Fund, Clifford Mosher, Tejinder Singh, and Sat Pal Singh, submitted herewith. The fee agreement between the Lead Plaintiffs and counsel is “precisely the type of bargaining that the PSLRA anticipated and to which a court reasonably may give substantial deference.” *Global Crossing*, 225 F.R.D. at 468 (citation omitted). Therefore, the negotiated fee is the appropriate fee to be submitted to the Court for it reflects the exercise of the power and responsibility vested in lead plaintiffs by Congress.

¹⁰ The court stated that only if lead plaintiff and lead counsel were unable to agree on a revised fee to account for the changed circumstances could a court be justified in holding that the presumption of reasonableness had been abrogated and to review the fee request using traditional standards. *Cendant*, 264 F.3d at 283.

The fee structure utilized by the Lead Plaintiffs here is entitled to deference for another reason – it was designed to incentivize counsel to achieve the maximum result possible for the Class and in retrospect, it is clear that the fee agreement accomplished its goal. The negotiated fee structure provides as follows: 0-\$25 million – 15%, \$25-\$50 million – 20%, amounts above \$50 million – 25%. Thus, it provides that counsel receive increasing percentages (15, 20 and 25%) of the common fund only on those amounts recovered above the prior tier. It is axiomatic that the “last” dollars of a settlement are the most difficult to obtain. Here, Lead Counsel were given an appropriate incentive to accomplish just that. We submit that that incentive worked with excellent results.

IV. THE REQUESTED PERCENTAGE IS FAIR AND REASONABLE AND CONSISTENT WITH FEE AWARDS IN COMPARABLE CASES FROM THIS DISTRICT AND ELSEWHERE

A. The Requested Fee Is at the Low End of the Range of Fees Awarded by District Courts in the Tenth Circuit in Common Fund Cases

The requested fee percentage is also consistent with and in fact less than percentages awarded in other securities class action cases from within this Circuit. Recent decisions (from within this Circuit and District) have consistently awarded attorneys’ fees of 30% or more. See, e.g., *In re Novell, Inc. Sec. Litig.*, No. 2:99-CV-995 TC (D. Utah May 26, 2005) (fee equal to 30% of recovery plus expenses), see Exhibit 1 to the Appendix of Unreported Decisions in Support of Lead Counsel’s Motion for Award of Attorneys’ Fees and Reimbursement of Expenses (“Appx.”), submitted herewith; *Rasner v. First World Commc’ns, Inc.*, No. 00-K-1376 (D. Colo. Jan. 19, 2005) (fee equal to 33% of recovery plus expenses), Appx., Ex. 2; *Angres v. Smallworldwide PLC*, No. 99-K-1254 (D. Colo. June 7,

2003) (awarding fees of 33-1/3% of the recovery fund), Appx., Ex. 3; *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, *4 (D. Colo. Mar. 9, 2000) (awarding 30% fee, noting, “[f]ees for class action settlements generally range from 20% - 50%” and “class action fee awards are typically 30% of the fund created by the settlement”); *Schwartz, et al. v. Celestial Seasonings, Inc., et al.*, No. 95-K-1045 (D. Colo. Apr. 25, 2000) (awarding fees of 33-1/3% of the settlement fund), Appx., Ex. 4; *Intelcom Group, Inc. Sec. Litig.*, No. 95-D-1166 (D. Colo. Mar. 21, 1997) (awarding fees of 33-1/3% of the recovery), Appx., Ex. 5. *In re Sun Healthcare Group, Inc., Sec. Litig.*, No. CIV-99-00269 JC/LCS-ACE (D.N.M. Dec. 13, 2004) (fee equal to 30% of recovery plus expenses), Appx., Ex. 6; *Schaffer, et al. v. Evolving Systems, Inc., et al.*, No. 98-WY-1338-CB (D. Colo. Oct. 4, 1999) (fee equal to 30% of recovery plus expenses), Appx., Ex. 7; *Queen Uno Ltd. P’ship, et al. v. Coeur D’Alene Mines Corp., et al.*, No. 97-WY-1431-CB (D. Colo. Aug. 11, 1999) (fee of 30% plus expenses), Appx., Ex. 8; *In re Einstein Noah Bagel Corp. Sec. Litig.*, No. 97-N-1614 (D. Colo. June 4, 1999) (fee equal to 30% of recovery plus expenses), Appx., Ex. 9; *Sterling, et al. v. Cray Computer Corp.*, No. 91-N-2261 (D. Colo. June 17, 1993) (fee equal to 30% of recovery plus expenses), Appx., Ex. 10; *In re Coram Healthcare Corp. Sec. Litig.*, No. 95-N-2074 (D. Colo. Jan. 24, 1997) (fee equal to 30% of recovery plus expenses), Appx., Ex. 11; *In re Resort Income Investors, Inc. Sec. Litig.*, No. 97-B-2252 (D. Colo. Mar. 13, 1998) (fee equal to 30% of recovery plus expenses), Appx., Ex. 12; *Sonnenfeld v. City and County of Denver, Colorado*, No. 95-Z-468 (D. Colo. Dec. 8, 1997) (fee equal to 33% of recovery plus expenses), Appx., Ex. 13; *In re Storage Technology Sec. Litig.*, No. 92-B-750 (D. Colo. Dec. 1, 1995) (fee award of 30% of \$55 settlement fund

in consolidated class and derivative action recovery plus expenses), Appx., Ex. 14; *Wolf v. E.A. Breitenbach, et al.*, No. 95-D-2572 (D. Colo. May 29, 1997) (fee equal to 30% of recovery plus expenses), Appx., Ex. 15; *In re Sun Healthcare Group, Inc. Litig.*, No. 95-7005 JCMWWD (D.N.M. May 5, 1997) (fee equal to 30% of recovery plus expenses), Appx., Ex. 16; *In re Diagnostek, Inc. Sec. Litig.*, No. 92-1274 JCMWWD (D.N.M. July 19, 1994) (fee equal to 31.25% of recovery plus expenses), Appx., Ex. 17; *Sardi v. Struthers Indus., et al.*, No. 94-C-787-H (N.D. Okla. Oct. 21, 1996) (fee equal to 30% of recovery plus expenses), Appx., Ex. 18; *In re United Telecomms. Sec. Litig.*, No. 90-2251-O, 1994 U.S. Dist. LEXIS 9151 (D. Kan. June 1, 1994) (fee of 33-1/3% of recovery).

B. The Requested Fee Percentage is at the Low End of Fee Awards in Comparable Class Action Litigation

The requested fee percentage also falls below the average of fee awards in a study of security class actions conducted in 1996 by National Economic Research Associates, an economics consulting firm. Using data from 433 shareholder class actions, the study reports on the issue of attorneys' fees: "Regardless of case size, fees average approximately 32 percent of the settlement." Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996), Appx., Ex. 19. These figures are in accord with a Federal Judicial Study that found in federal class actions generally (including non-securities actions) median attorney fee awards were in the range of 27% to 30%. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at 69 (Federal Judicial Center 1996), Appx., Ex. 20. In cases where large recoveries

have been obtained, percentage fees above the amount requested here have been consistently awarded:

Case	Recovery	Percentage Awarded
<i>In re Rite Aid Corp. Sec. Litig.</i> , 269 F. Supp. 2d 603 (E.D. Pa. 2003), <i>vacated on other grounds</i> , 396 F.3d 294 (3d Cir. 2005)	\$126 million	25%
<i>In re Rite Aid Corp. Sec. Litig.</i> , 146 F. Supp. 2d 706 (E.D. Pa. 2001)	\$193 million	25%
<i>In re Oxford Health Plans, Inc. Sec. Litig.</i> , MDL NO. 1222 (S.D.N.Y. June 12, 2003)	\$300 million	28%
<i>In re Informix Corp. Sec. Litig.</i> , No. C 97-1289 CRB (N.D. Cal. Nov. 2, 1999)	\$132 million	30%
<i>In re Ikon Office Solutions, Inc. Sec. Litig.</i> , 194 F.R.D. 166 (E.D. Pa. 2000)	\$111 million	30%
<i>In re Prison Realty Sec. Litig.</i> , No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001)	\$104 million	30%
<i>In re Lease Oil Antitrust Litig.</i> , 186 F.R.D. 403 (S.D. Tex. 1999)	\$190 million	25%
<i>Kurzweil v. Philip Morris Cos., Inc.</i> , No. 94 Civ. 2373(MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	\$123 million	30%
<i>In re Combustion, Inc.</i> , 968 F. Supp. 1116 (W.D. La. 1997)	\$127 million	36%
<i>In re Sumitomo Copper Litig.</i> , 74 F. Supp. 2d 393 (S.D.N.Y. 1999)	\$116 million	27.5%

Case	Recovery	Percentage Awarded
<i>In re Home-Stake Prod. Co. Sec. Litig.</i> , MDL No. 153 (N.D. Okla. Jan. 2, 1990)	\$185 million	30%
<i>In re Prudential Sec. Inc. Ltd. P'ships Litig.</i> , 912 F. Supp. 97 (S.D.N.Y. 1996)	\$110 million	27%
<i>Dusek v. Mattel, Inc.</i> , No. CV 99-10864-MRP (CWx) (C.D. Cal. Sept. 29, 2003)	\$122 million	27%

As the court observed in *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) in awarding a 30% fee and criticizing the use of any declining "sliding scale" fee regimen: "This court respectfully concludes that such an approach tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable." The sliding scale also "fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that "large attorneys' fees serve to motivate capable counsel to undertake these actions." *Id.* (citation omitted). The *Ikon* court would not reduce the attorneys' fee award in a large settlement "simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent." *Id.* at 196.

V. THE REASONABLENESS OF THE PERCENTAGE FEE REQUESTED IS CONFIRMED BY AN ANALYSIS OF THE JOHNSON FACTORS

Lead Plaintiffs' counsel submit that the fee structure negotiated by the Lead Plaintiffs is the appropriate method to determine counsel's fee in this case. The Tenth Circuit has

recognized that in determining the appropriate percentage of attorneys' fees in common fund cases the court should be informed by an analysis of the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *Brown*, 838 F.2d at 454-55, *Useton*, 9 F.3d at 853. These factors are commonly referred to as the *Johnson* factors. As shown below, application of the *Johnson* factors as a cross-check amply supports the fairness and reasonableness of the percentage fee requested.

The twelve *Johnson* factors are:

- (1) The time and labor required. . . .
- (2) The novelty and difficulty of the questions. . . .
- (3) The skill requisite to perform the legal service properly. . . .
- (4) The preclusion of other employment by the attorney due to acceptance of the case. . . .
- (5) The customary fee [for similar work in the community]. . . .
- (6) Whether the fee is fixed or contingent. . . .
- (7) Time limitations imposed by the client or the circumstances. . . .
- (8) The amount involved and the results obtained. . . .
- (9) The experience, reputation, and ability of the attorneys. . . .
- (10) The "undesirability" of the case. . . .
- (11) The nature and length of the professional relationship with the client. . . .
- [and] (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19. The relevance of each of the *Johnson* factors will vary in any particular case, and, rather than requiring a rigid application of each factor, the Tenth Circuit has left it to the lower court's discretion to apply those factors in view of the circumstances of a particular case. *Brown*, 838 F.2d at 456; see also *Useton*, 9 F.3d at 853 ("applicability and weight" of the *Johnson* factors will "undoubtedly be different" in common fund and statutory fee determinations). As discussed below, consideration of the applicable *Johnson* factors confirms the reasonableness of the fee requested here.

1. The Time and Labor Involved

While the time and labor required to successfully prosecute this Litigation and obtain the outstanding settlement for the benefit of the Class fully justifies the requested fee, the Tenth Circuit has found this *Johnson* factor to be of less importance in a common fund case, such as this case.

Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor – time and labor required – is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth *Johnson* factor – the amount involved and the results obtained – may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.¹¹

The prosecution of this Litigation required an immense effort by counsel for Lead Plaintiffs. This case has been vigorously litigated from its commencement in July 2001 through its partial settlement, a period of over four years. The Settling Defendants mounted a vigorous defense and fought Lead Plaintiffs at every step. This outstanding settlement was not achieved until Lead Plaintiffs' counsel: (1) conducted an extensive investigation into the facts alleged, including detailed interviews of dozens of witnesses some of whom were former employees of Qwest; (2) drafted highly fact specific complaints

¹¹ *Brown*, 838 F.2d at 456. See also *In re Harrah's Entm't*, No. 95-3925, 1998 U.S. Dist. LEXIS 18774, at *15 (E.D. La. Nov. 25, 1998) ("Because counsel prosecuted this action on a contingent fee basis, the Court would rather focus on results obtained.")

to comply with all of the applicable pleading requirements of the PSLRA and Tenth Circuit; (3) conducted a detailed analysis of Qwest's financial statements and the scores of underlying transactions at issue; (4) litigated the numerous motions to dismiss filed by defendants and successfully defeated many of defendants' challenges to the sufficiency of Lead Plaintiffs' allegations; (5) litigated a motion for a temporary restraining order to prevent Qwest from selling its QwestDex assets and conducted an evidentiary hearing before Judge Blackburn in an effort to freeze the proceeds of the sale of the QwestDex assets; (6) reviewed and analyzed nearly 9 million pages of documents produced by defendants and over 300,000 pages of documents and 50 CDs and DVDs produced by approximately 80 third parties; (7) took or attended some 60 depositions; (8) responded to discovery requests from defendants; (9) successfully litigated numerous complex discovery motions; (10) fully briefed Lead Plaintiffs' motion for class certification; (11) litigated the motion filed by the United States Attorney's Office for the District of Colorado to stay discovery in this case pending its ongoing criminal investigation; (12) consulted with experts in connection with the preliminary injunction hearing, the alleged accounting manipulations and Qwest's financial ability to respond to a large settlement or judgment; (13) participated in arduous and complex settlement negotiations over an extended period of time including mediation attempts with Judges Layn R. Phillips and Daniel Weinstein; and (13) negotiated the final settlement terms contained in the Stipulation. The legal work on this Litigation, however, will not end with the Court's approval of this partial settlement. Additional hours and resources will necessarily be incurred in the continued prosecution of

the Litigation against the Non-Settling Defendants and in assisting Class Members with their Proof of Claim forms and other related inquiries.

In total, Lead Plaintiffs' counsel and their para-professionals and in-house experts devoted 53,795.87 hours to this Litigation with a resulting lodestar of \$18,547,453.65. The requested fee represents a multiple of approximately 5.1 times lodestar. The multiplier reflected here falls within the range of multipliers found reasonable for cross-check purposes by courts in common fund cases and is fully justified here given the effort required, the risks faced and overcome and the results achieved.¹²

2. The Novelty and Difficulty of Questions Raised by the Litigation

The novelty and difficulty of the issues in a case is a significant factor to be considered in making a fee award. Courts have long recognized that securities class actions present inherently complex and novel issues. Retired Judge Finesilver noted in *Miller v. Woodmoor Corp.*:

¹² See, e.g., *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735-36 (E.D. Pa. 2001) (25% fee representing 10.73 multiplier); *In re Xcel Energy Inc.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (awarded 25% fee of \$80 million settlement representing a 4.7 multiplier); *Maley*, 186 F. Supp. 2d at 371 ("it clearly appears that the modest multiplier of 4.65 is fair and reasonable"). *In re RJR Nabisco Sec. Litig.*, M.D.L. No. 818, 1992 U.S. Dist. LEXIS 12702, at *22, (S.D.N.Y. Aug. 24, 1992) (approving fees of over \$17.7 million, notwithstanding objection that such an award of fees represented a multiplier of six); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee resulting in 9.3 multiplier); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 167 n.1 (S.D.N.Y. 1991) (multiplier of 8.74); see also 1 Alba Conte, *Attorney Fee Awards* §2.06, at 39 (2d ed. 1993) ("When a large common fund has been recovered and the hours are relatively small, some courts reach a reasonable fee determination based on large multiples of 5 or 10 times the lodestar.").

The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case....

Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions. Courts are continually modifying and/or reversing prior decisions in an attempt to interpret the securities law in such a way as to follow the spirit of the law while adapting to new situations which arise. Indeed, many facets of securities law have taken drastically new directions during the pendency of this action.¹³

Judge Finesilver's comments ring even more true today. The adoption of the PSLRA has made the successful prosecution of securities cases even more complex and uncertain. *See Ikon*, 194 F.R.D. at 194 ("securities actions have become more difficult from plaintiff's perspective in the wake of the PSLRA"). This Litigation involved complex issues of law and fact that presented considerable risks to Lead Plaintiffs' case. From the outset, this post-PSLRA action was a difficult and highly uncertain securities case.

The gravamen of Lead Plaintiffs' case is that Qwest issued false or misleading statements and used a variety of accounting manipulations in violation of GAAP that materially misrepresented Qwest's business and financial condition. The accounting transactions at issue were complex and because "GAAP generally tolerates a range of reasonable treatments" would be difficult to plead and prove. *In Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 396 F. Supp. 2d 1178, 1186 (D. Colo. 2004). Thus, when Lead Counsel undertook representation there was no assurance that the Litigation would survive defendants' attacks on the pleadings, motions for summary judgment, trial and appeal.

¹³ *Miller v. Woodmoor Corp.*, Nos. 74-F-988, 76-F-567, 1978 U.S. Dist. Lexis 15234, at *11-12 (D. Colo. Sept. 28, 1978).

Indeed, in *Goldstein v. MCI WorldCom*, 340 F.3d 238 (5th Cir. 2003), the Fifth Circuit affirmed a dismissal with prejudice of a securities fraud class action complaint against Bernard Ebbers and WorldCom arising out of a massive securities fraud which later was revealed and admitted to by the company and for which Ebbers was later convicted.

As further detailed in the Dowd Declaration, the defendants steadfastly maintained that they did nothing wrong and were successful in dismissing some of Lead Plaintiffs' claims at the pleading stage. Lead Plaintiffs' counsel addressed numerous difficult issues in opposing defendants' motions to dismiss and there was no guarantee that Lead Plaintiffs' claims would survive the heightened pleading standards of the PSLRA. As one court has noted: "An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-circuited by the heightened pleading standard." *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1376 (M.D. Ga. 2000).

Even though many of Lead Plaintiffs' claims got past the pleading stage, Lead Plaintiffs would have the substantial burden of proving, *inter alia*, that each of the Settling Defendants was responsible for an omission or a misstatement that was material, that the omissions or misstatements impacted the market price of Qwest securities and caused damage to the Class, and, with respect to Lead Plaintiffs' §10(b) claims, that each Settling Defendant acted with scienter. The complex factual and legal questions at issue would have continued to be the subject of substantial disagreement among the parties.

Even assuming Lead Plaintiffs were able to prove liability, they still would also unquestionably have had to confront expert testimony by Settling Defendants that any damages the Class suffered were not caused by any alleged misleading statements but

instead by market factors unrelated to the fraud and that Lead Plaintiffs' models for calculating damages (even if liability were established) are invalid in the wake of Supreme Court cases such as *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and *Dura Pharms., Inc. v. Broudo*, ___ U.S. ___, 125 S. Ct. 1627 (2005).¹⁴ To the extent that the Settling Defendants could prevail on issues relating to liability or show that any assumptions made by Lead Plaintiffs' experts were incorrect or unreliable or could show that any portion of the market drop was due to factors other than the alleged fraud, Lead Plaintiffs' claimed damages could be significantly reduced. Moreover, the reaction by a jury to such complex testimony is highly unpredictable and there is a risk that a jury could have sided with the Settling Defendants' experts.

Even if Lead Plaintiffs got past summary judgment and were successful against the Settling Defendants at trial, Lead Plaintiffs' efforts to establish liability and damages in the Litigation, in all likelihood would not end with a judgment in the District Court, but would continue through one or more levels of appellate review. In complex and substantial cases such as this, it must be recognized that even a victory at the trial stage does not guarantee ultimate success. Both trial and judicial review are unpredictable and could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. Indeed, as the court observed in *In re Warner Communications Sec. Litig.*:

¹⁴ See also *Kaufman v. Motorola, Inc.*, No. 95 C 1069, 2000 U.S. Dist. LEXIS 14627, at *5-*6 (N.D. Ill. Sept. 19, 2000) (granting defendants' motion in limine to strike testimony of plaintiffs' damages expert).

Even a victory at trial is not a guarantee of ultimate success. If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.¹⁵

Despite the novelty and difficulty of the issues raised, counsel secured an excellent result for the Class. As a result, this factor supports the requested award.

3. The Requisite Skill to Perform the Legal Services Properly

The quality of the representation by Lead Plaintiffs' counsel and the standing of Lead Plaintiffs' counsel are important factors that support the reasonableness of the requested fee. *See Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987), "prosecution and management of a complex national class action requires unique legal skills and abilities." Those unique skills were called upon here. The quality of Lead Plaintiffs' counsel's work on this case was excellent and is ultimately reflected in the result. From the outset, Lead Plaintiffs' counsel marshaled considerable resources and time in the research, investigation and uncovering of facts to file detailed complaints that survived (in the main) defendants' attacks on the pleadings.

The substantial recovery obtained for the Class is the direct result of the significant efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions. Lead Plaintiffs and their counsel led the

¹⁵ *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 747-48 (S.D.N.Y. 1985) (citing numerous examples), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

effort to expose the alleged financial fraud at Qwest. This Litigation was commenced prior to any governmental action relating to Lead Plaintiffs' allegations and it was not until months and years later that the SEC asserted its claims against Qwest. Moreover, Lead Plaintiffs advanced claims that the SEC did not pursue which contributed to Lead Plaintiffs' success in obtaining a superior result for the Class. See *Rite Aid*, 146 F. Supp. 2d at 735 (in awarding 25% of a \$193 million settlement fund, the court noted the skill and efficiency of plaintiffs' counsel and the outstanding results "in litigation that was far ahead of public agencies like the Securities and Exchange Commission and the United States Department of Justice, which long after the institution of this litigation awakened to the concerns that plaintiffs' counsel first identified").¹⁶ This settlement represents an excellent result for the Class, one that is attributable to the diligence, determination, hard work and reputation of Lead Plaintiffs' counsel.

The quality of opposing counsel is also be important in evaluating the quality of Lead Plaintiffs' counsel's work.¹⁷ The Settling Defendants were represented by highly experienced lawyers from prestigious law firms, with well deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. Settling Defendants'

¹⁶ See *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (The court ruled that attorneys' fee request of 33.8% of the settlement fund was reasonable where "class counsel exhibited sustained and admirable tenacity in unearthing facts needed to develop these cases. They brought the first action some two years before the SEC initiated its proceedings.").

¹⁷ See, e.g., *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).

counsel's efforts were aggressive and unrelenting. The ability of Lead Plaintiffs' counsel to obtain a favorable settlement in the face of such formidable legal opposition confirms the quality of Lead Plaintiffs' representation.

4. The Preclusion of Other Employment by Attorneys Due to Acceptance of the Case

When Lead Plaintiffs' counsel undertook to represent the Lead Plaintiffs in this Litigation, it was with the expectation that they would have to devote a significant amount of time and effort, and advance large sums in out-of-pocket expenses, to its prosecution. The dedication of time needed to successfully prosecute this Litigation monopolized the resources of Lead Plaintiffs' counsel on many occasions and precluded them from working on other matters. Few law firms would be willing and able to make such a substantial investment of time and money, and to forego other work knowing that there was a substantial risk of loss. The time spent by Lead Counsel on this case was at the expense of the time that counsel could have devoted to other matters.

5. The Customary Fee for Similar Work

The requested fee is below the range normally awarded in cases of this nature. In local, regional and national markets, complex commercial cases require a contingent fee between 30 and 40 percent of the gross recovery (even more when the attorney must bear the litigation expenses). As Justices Brennan and Marshall observed in their concurring opinion in *Blum*: "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum*, 465 U.S. at 903*. See also *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, 1994 WL 202394, at *2 (E.D. La. May 18, 1994) ("*Prudential II*") ("Were this not a

class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases.") Risky cases generally demand a higher percentage, and the factual and legal uncertainties here made this Litigation riskier than most. Moreover, as discussed, *infra*, the requested fee is consistent with (or less than) awards in this Circuit and courts nationwide.

6. Whether the Fee is Fixed or Contingent

Lead Plaintiffs' counsel undertook this Litigation on a contingent fee basis, assuming a substantial risk that they would have to devote a significant amount of time and incur substantial expenses in prosecuting this Litigation without any assurance of being compensated for their efforts. The contingent nature of Lead Plaintiffs' counsel's fees should be given substantial weight in assessing the requested fee award.¹⁸ Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in awarding attorneys' fees. For example, in awarding counsel's attorneys' fees in *Prudential II*, the court noted the risks that plaintiffs' counsel had taken:

Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

¹⁸ See *Jones v. Central Soya Co.*, 748 F.2d 586, 591 (11th Cir. 1984); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980); *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985); *Ressler*, 149 F.R.D. at 656.

Prudential II, 1994 WL 202394, at *6.

Indeed, the risk of no recovery in complex cases of this type is very real and is heightened when counsel, as they did here, press to achieve the very best result for those that they represent. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. Subsequent to the passage of the PSLRA, many cases have been dismissed at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's pleading standards, including the securities fraud class action arising out of the WorldCom debacle. See, e.g., *Goldstein*, 340 F.3d 238. Lead Plaintiffs' counsel were faced with that possibility in this case. Indeed, as noted above, securities cases have always been complex and difficult and the PSLRA has only increased the risk in successfully prosecuting a securities class action.

The risks of contingent litigation also are highlighted by the fact that a dramatic change in the law can result in the dismissal of a claim after a great deal of time and effort have been expended on the case. For example, the United States Supreme Court eliminated aiding and abetting liability under §10(b) of the Exchange Act. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). As a result, many courts then dismissed long pending cases that otherwise stated a proper cause of action at the time they were brought. Lead Counsel's predecessor firm, Milberg Weiss Bershad Hynes & Lerach LLP, lost a substantial investment of time and money in a large securities fraud class action in *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997), when the Court of Appeals reversed a jury verdict of \$81 million against an accounting firm after 5 years of

litigation and a 19-day trial in Jacksonville, Florida. The Eleventh Circuit Court of Appeals ruled for the first time that plaintiffs could not establish loss causation in a §10(b) case by showing the price of the security was inflated by misrepresentations, although other circuits had held that such proof may establish loss causation grounds and entered judgment for the defendant.

Indeed, because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. Lead Plaintiffs' counsel have received no compensation during the course of this Litigation and have committed enormous resources of both time and money to the vigorous and successful prosecution of their litigation for the benefit of the Class. The contingent nature of Lead Counsel's representation strongly favors the requested percentage.

7. Time Limitation Imposed by the Client or Circumstances

This factor does not pertain to this case.

8. The Amount Involved and the Results Obtained

In a common fund case, "the amount involved and the results obtained" is "decisive" and deserves more weight than "time and labor."¹⁹ Courts consistently recognize that the result achieved is a major factor to be considered in making a fee award. The Tenth Circuit stated, in *Brown*, that "[i]n a common fund case . . . the amount involved and the results obtained – may be given greater weight when, as in this case, the trial judge determines

¹⁹ *Brown*, 838 F.2d at 456.

that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."²⁰ The Supreme Court in *Hensley*, 461 U.S. at 436, recognized that in making a fee award the "most critical factor is the degree of success obtained." Here, the settlement provides a substantial monetary benefit to the Class.

The \$400 million settlement is one of the larger settlements of a securities class action after the passage of the PSLRA and is an outstanding result by any measure. The settlement was achieved as a result of the Lead Plaintiffs' counsel's diligent pursuit of Lead Plaintiffs' claims and counsel's skillful negotiation in the face of the risks of continued litigation, and the vigorous opposition mounted by defendants. Lead Plaintiffs and their counsel believe that the substantial recovery obtained for the benefit of the Class given Qwest's financial condition is an excellent recovery.

9. The Experience, Reputation and Ability of the Attorneys

Lead Plaintiffs' counsel's fee should reflect the degree of experience, competence and effort necessary to prosecute the Litigation. Lead Counsel are nationally known leaders in the fields of securities class actions and complex litigation. Courts have long recognized the importance of providing incentives to experienced counsel who accept complex litigation on a contingent fee basis, so that those cases can be prosecuted effectively. Lead Plaintiffs' counsel's efforts in diligently protecting the Class's interest and

²⁰ *Brown*, 838 F.2d at 456. *Accord King Res.*, 420 F. Supp. at 630 ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

bringing this Litigation to a successful conclusion are the best indicator of the experience and ability of the attorneys involved. The experience of the law firms that represented Lead Plaintiffs in the prosecution of this Litigation is set forth in the accompanying declarations of counsel.²¹

10. The Undesirability of the Case

The issues presented in this case rendered the case inherently risky, if not "undesirable," from the start. This case involved a panoply of difficult issues of fact and law. The risks assumed by Lead Plaintiffs' counsel in prosecuting this case on a contingent fee basis were substantial. When counsel undertook representation of Lead Plaintiffs and the Class in this Litigation, it was with the knowledge that they would have to spend substantial time and money and face significant risks without any assurance of being compensated for their efforts. There is no question that this case was extremely risky when Lead Plaintiffs' counsel accepted this retention, and the risks Lead Plaintiffs' counsel faced must be assessed as they existed at the time counsel undertook the Litigation and not in

²¹ Professor Conte acknowledged the propriety of adequate fees in common fund cases to encourage lawyers to prosecute such cases.

[C]ourts have been careful to award a fully compensable reasonable fee based on the underlying economic inducement for class action lawyers to pursue potentially expensive or complex common fund class litigation. These lawyers assume the risk of no compensation unless they successfully confer common fund benefits on the class, based on their reasonable expectation that they will share in the recovery in a fair proportion, in contrast to receiving a fee based initially on time-expended criteria that fail to give the *results obtained* factor primary consideration.

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

light of the recovery ultimately achieved. See, e.g., *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991) (the riskiness of a case must be judged *ex ante* not *ex post*). The “undesirability” of the Litigation supports the requested percentage.

11. The Nature and Length of the Professional Relationship with the Client

As noted above, the Court-appointed Lead Plaintiffs negotiated an attorney fee agreement with Lead Counsel and they also support the current request. This agreement provided for attorneys’ fees on a graduating scale, and the resulting percentage for the recovery obtained here is slightly more than 24%, the percentage requested by this application. With respect to this agreement and support for the requested fee, the Third Circuit Task Force recently concluded:

The Task Force believes, however, that the deference to the empowered plaintiff’s choice of *counsel* in PSLRA cases should extend to the *ex post* review of the fee agreement in those cases. The PSLRA establishes a model of client control that extends not only to appointment of counsel but also to monitoring of counsel and negotiation of the fee. The Task Force concludes, therefore, that strict scrutiny of the fee agreement is inconsistent with the client-driven litigation model established in the PSLRA. This means that a court should presume that the fee is reasonable when it is the result of an agreement between the “most adequate” plaintiff and chosen counsel.

Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340, 425 (Jan. 15, 2002) (emphasis in original).

12. Awards in Similar Cases

As demonstrated by the decisions cited above, the requested fee here is consistent with (and actually less than) percentages customarily awarded in numerous other cases by district courts within the Tenth Circuit and courts nationwide.

If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *Blum*, 465 U.S. at 903* ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery.").²² Thus, the customary contingent fee in the private marketplace is 30% to 40% of the fund recovered.

B. Lead Plaintiffs' Counsel's Expenses Are Reasonable and Were Necessarily Incurred in the prosecution of the Litigation

Lead Plaintiffs' counsel also request reimbursement of expenses incurred in connection with the prosecution of the Litigation. Expenses are compensable in a common fund case if the particular costs are of the type typically billed by attorneys to paying clients in the marketplace.²³ The categories of expenses for which counsel seek reimbursement

²² See also *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39, 1984 U.S. Dist. LEXIS 23595, at *40-41 (N.D. Ill. Sept. 14, 1984) ("Contingent fee arrangements in non-class action damage lawsuits use the simple method of paying the attorney a percentage of what is recovered for the client. The more the recovery, the more the fee. The percentages agreed on vary, with one-third being particularly common."); *Kirchoff*, 786 F.2d at 323 (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial).

²³ *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if such charges would normally be billed to client) (citing *Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990)); *Gottlieb v. Wiles*, 150 F.R.D. 174, 185 (D. Colo. 1993), *rev'd on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994). Decisions in other circuits confirm this practice. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (expenses normally charged to a fee-paying client approved); *Abrams v.*

here are the type routinely charged to paying clients and, therefore, should be reimbursed from the common fund.

Lead Plaintiffs' counsel have incurred costs and expenses in an aggregate amount of \$2,219,063.84 in prosecuting this Litigation on behalf of the Class. These expenses are itemized in the individual declarations of Lead Plaintiffs' counsel submitted herewith.

A significant component of Lead Plaintiffs' counsel's expenses was the cost of experts, consultants and investigators. They were instrumental in assisting counsel to achieve the result obtained for the Class.

In the post-PSLRA era the use of investigators to gather detailed fact-specific information from percipient witnesses in order to plead complaints that will survive motions to dismiss is a necessity. These private investigators conducted a substantial amount of work on behalf of the Class. They were able to identify and locate numerous witnesses who had knowledge of the alleged wrongdoing. Lead Plaintiffs' counsel and/or their investigators interviewed numerous witnesses with specific knowledge of Lead Plaintiffs' allegations. Lead Plaintiffs' counsel used the fruits of this extensive investigation to plead very fact specific complaints, identify additional witnesses with relevant information concerning the alleged wrongdoing, evaluate the strengths and weaknesses of Lead

Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable when customary to bill clients separately for them); *Associated Builders & Contractors, Inc. v. Orleans Parish School Bd.*, 919 F.2d 374, 380 (5th Cir. 1990) (all reasonable out-of-pocket expenses recoverable because the costs are normally charged to fee-paying clients).

Plaintiffs' case and assist in settlement negotiations. The investigators were instrumental in helping Lead Plaintiffs achieve this result for the benefit of the Class.

Other expenses include the costs of computerized research. These are the charges for computerized factual and legal research services including LEXIS, Westlaw, Dow Jones, Disclosure, Inc., CDA Investment Technologies, Pacer Service Center and Choice Point. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These services allowed counsel to access Qwest's SEC filings, perform media searches on Qwest, obtain analysts' reports on Qwest, assist in developing Lead Plaintiffs' damage analyses and allowed the investigators to locate and obtain information on witnesses and defendants.

Lead Plaintiffs' counsel were also required to travel in connection with this Litigation and thus incurred the related costs of meals, lodging and transportation. Counsel in this case traveled to conduct witness interviews, attend document productions, meet with experts, meet with clients and Class Members, attend depositions, to appear before the Court for hearings and to attend mediation sessions.

Counsel are also seeking reimbursement of expenses incurred by reason of Lead Plaintiffs' compliance with the PSLRA, 15 U.S.C. §78u-4(a)(3)(A)(i), which requires that, within 20 days after the date on which a class action is filed under the PSLRA, "the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class – (I) of the pendency of action, the claims asserted therein, and the purported class period; and (II)

that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.”

Other expenses that were necessarily incurred in the prosecution of this Litigation include expenses for photocopying, filing and witness fees, postage and overnight delivery, and telephone and telecopier expenses.

Finally, under the PSLRA, the Court may award “reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” 15 U.S.C. §78u-4(a)(4). The Lead Plaintiffs spent a significant amount of time representing the Class throughout the course of the Litigation and incurred such costs and expenses and have submitted declarations in support of reimbursement. The time, effort and expense they committed is encouraged by Congress in enacting the PSLRA and was of great help in bringing about this highly favorable settlement. See the accompanying declarations of Lead Plaintiffs, which set forth the efforts of the New England Health Care Employees Pension Fund, Clifford Mosher, Tejinder Singh, and Sat Pal Singh spent on such representation and the expenses and costs incurred. The amounts requested are reasonable and should be approved by the Court.

VI. CONCLUSION

For all of the foregoing reasons, Lead Counsel respectfully requests that the Court approve Lead Counsel's application for attorneys' fees and reimbursement of expenses as well as the reimbursement of expenses sought, as allowed by the PSLRA, by Lead Plaintiffs.

DATED: February 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify the foregoing document or paper has been mailed via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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