

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

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

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

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

**REPLY BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF
SETTLEMENT PROCEEDS AND LEAD COUNSEL'S MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

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I. INTRODUCTION

After almost five years of hard-fought litigation, Lead Plaintiffs entered into a partial settlement with certain defendants that guarantees a \$400 million recovery for the Class and further provides for a mechanism that will allow the vast majority of Class Members to share in an additional \$250 million recovered by the Securities and Exchange Commission ("SEC"). The mediator who oversaw the negotiations leading to this partial settlement, the Honorable Layn R. Phillips, a retired federal judge from this Circuit, believes that the "proposed settlement is not only fair and reasonable, but an excellent result for the Class." See paragraph 8 to the Declaration of Layn R. Phillips in Support of Motion for final Approval of Class Action Settlement ("Phillips Decl."), submitted herewith. Despite this outstanding result, a handful of objectors out of 1.3 million potential Class Members, who sat on the sidelines as Lead Counsel battled defendants for 4-1/2 years, has emerged to criticize the settlement. In addition, Non-Settling Defendants Joseph P. Nacchio ("Nacchio") and Robert S. Woodruff ("Woodruff"), unsatisfied with the damage that they have already caused the Class, also ask the Court to reject the settlement. Nacchio and Woodruff's self-interested objection should also be overruled by this Court.

A handful of other objectors apparently welcome the settlement, but argue that Lead Counsel's application for attorneys' fees and expenses should be denied. As the Honorable Jim R. Carrigan, a retired United States District Judge from this District and former Justice of the Colorado Supreme Court, in opining that the attorneys' fee request is reasonable, states:

In my study of the objections, it became apparent that most of them criticized the fee request from the vantage of hindsight. The objectors point to the

request and say it is unreasonable, looking at it for the first time in 2006. Such hindsight analysis is grossly unfair. In fact, courts should look at the risks, disadvantages, and expenses faced by Lead Counsel as of the time when they filed the case in July 2001. At that time, there was no SEC investigation. The United States Attorney's office had not even begun to focus on Qwest. Rather, it was Lead Counsel who identified the fraud at Qwest. It was Lead Counsel who agreed to assume the enormous risk of undertaking this case on a purely contingent basis. There was no guarantee of ever being repaid for their extraordinary investment of time, talent, effort and money. The only certainty was that any payday was uncertain. Accepting those risks, with no guarantee of success, has resulted in the reward, almost five years later, after Lead Counsel has delivered for the Class.

See paragraph 15 to the Declaration of Jim R. Carrigan in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Carrigan Decl."), submitted herewith.

Similarly, the Honorable H. Lee Sarokin, a retired United States Circuit Court Judge for the Third Circuit, and the Chair of the Third Circuit Task Force on Court Awarded Attorney Fees, has also opined that the requested fee is reasonable in light of the tremendous result achieved and the effort expended in achieving it. As Judge Sarokin states:

The financial risk of the litigation rested solely on the shoulders of plaintiff's counsel. From the outset, plaintiff's counsel took this case on a contingency basis and agreed to advance all costs without any guarantee of success. Given the prominence of Qwest and certain of the individual defendants in Colorado, and the excellent legal resources at defendants' command, plaintiffs had to expend substantial resources to pursue the case. By taking this case on a contingency, plaintiff's counsel had no guarantee that the case would settle or result in a judgment in favor of the plaintiff, thereby ensuring payment of their expenses or fees. Plaintiffs' counsel repeatedly faced the risk of having their case dismissed completely or stayed so as to make the costs prohibitive. The case was a gamble by plaintiff's counsel with an inherent risk that was not reduced until the time of the partial settlement.

See paragraph 32 to the Declaration of H. Lee Sarokin in Support of Plaintiff's Motion for Attorneys' Fees and Reimbursement of Expenses ("Sarokin Decl."), submitted herewith.

Lead Counsel respectfully submit that the settlement should be approved and their motion for attorneys' fees and expenses should be granted in its entirety.

II. THE REACTION OF MEMBERS OF THE CLASS CONFIRM THAT THE SETTLEMENT, PLAN OF ALLOCATION AND REQUESTED AWARD OF ATTORNEYS' FEES ARE FAIR AND REASONABLE

The Court should consider the reaction of the Class as a factor in approving the settlement, Plan of Allocation and attorney fee and expense request.¹ An extensive notice program, by mail and by means of publication has been completed. As a result, copies of the Notice of Pendency and Partial Settlement of Class Action ("Notice") describing the settlement terms, the Plan of Allocation and Lead Counsel's request for an award of attorneys' fees and expenses was mailed to over 1,300,000 potential Class Members and posted on the website of Gilardi & Co. LLC ("Gilardi"), the Claims Administrator appointed by the Court. See paragraphs 3-8 to the Declaration of Carole K. Sylvester dated February 24, 2006, which was previously filed with the Court ("Sylvester Decl."). The Notice explained the Litigation, the terms of the settlement, the Plan of Allocation, the fee and expense request, as well as the rights and options of Class Members. The Notice also provided a toll-free telephone number and address to contact Lead Counsel if Class Members had any questions about the settlement or Litigation. The Summary Notice which

¹ See *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 627 (D. Colo. 1976), *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992), *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

was published in the national edition of *Investor's Business Daily*, clearly and concisely provided information concerning the settlement and explained how to obtain a copy of the Notice and other related documents.

Despite the extensive notice program, only eight timely objections have been lodged by Class Members to the settlement, Plan of Allocation or Lead Counsel's request for an award of attorneys' fee and reimbursement of expenses. In addition, Nacchio and Woodruff, the Non-Settling Defendants, also lodged an objection to the settlement and bar order. Given the number of Notices mailed, "such a low level of objection is a 'rare phenomenon.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (citation omitted). As evidenced by the minimal number of objections, the Class's reaction overwhelmingly supports the settlement, Plan of Allocation and Lead Counsel's fee and expense request, and is strong evidence that they are fair and reasonable. *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 435 (D.N.J. 2004). Out of the eight Class Member objections, the objection filed by the New York State Teachers' Retirement System ("NYSTRS") solely to Lead Counsel's fee request and the objection filed by I. Walton Bader (on behalf of the Shriners Hospitals for Children and the Teachers' Retirement System of Louisiana) to the settlement have been withdrawn. Moreover, the objection of Alan Henry ("Henry Objection") appears to be directed at a different case, and the objection of the Commonwealth of Pennsylvania State Employees' Retirement System ("PSERS") is simply

a “me too” to the NYSTRS’ objection.² As discussed below, all of the objections lack merit and should be overruled.

A. The Class Notice Is Adequate and Satisfies All of the Requirements of Due Process.

“The standard for settlement notice under Rule 23(e) is that it must ‘fairly apprise’ the class members of the terms of the proposed settlement and of their options.” *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993). While the Notice mailed to Class Members, the form of which was approved by the Court in its January 5, 2006 Order, clearly meets the requirements of due process, Rule 23 and the Private Securities Litigation Reform Act of 1995 (“PSLRA”), three objections lodge various complaints about the Notice, all of which are unfounded or irrelevant and should be rejected.

The Graham Objection claims that Lead Counsel attempted to “hamper class members” efforts to contact them by not providing “either a telephone number or email address” in the Notice. This contention is just wrong. The Notice provided a toll-free telephone number for both Lead Counsel and the Claims Administrator.³ The Graham and

² The four additional objections are lodged by Cynthia R. Levin Moulton, Cynthia R. Levin Moulton as Custodian of Solomon Smith Barney IRA Rollover Account, and the Cynthia R. Levin Moulton-Solomon Smith Barney IRA Rollover Account (the “Moulton Objection”); Eldon Graham, Hazel Floyd, Mary M. Hull and the Association of U.S. West Retirees (“Graham Objection”); Brian Fitzpatrick (“Fitzpatrick Objection”); and Charles B. Reiner and Margaret M. Flanagan (“Reiner Objection”).

³ See Notice at page 2, “For further information regarding this settlement you may contact: Rick Nelson, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, 655 West Broadway, Suite 1900, San Diego, California 92101, Telephone: 800/449-4900 or the Claims Administrator, Gilardi & Co. LLC at 800/516-6339.”

Moulton Objections⁴ also claim, without any authority, that the notice process is deficient because it did not provide for a dedicated website to provide access to court documents and answer frequently asked questions. However, a dedicated website is not standard, required or necessary. More importantly, the Notice provided numerous means for Class Members to obtain information about the settlement and have their questions answered, including the toll-free telephone numbers of both Lead Counsel and the Claims Administrator as well as the address to contact Lead Counsel. The Notice also provided the Court address where they could review the pleadings and the Stipulation of Partial Settlement dated as of November 21, 2005 (“Stipulation”) filed with the Court and the website address for Gilardi where copies of the Stipulation, its exhibits, and additional copies of the Notice and Proof of Claim and Release form are available. Moreover, all of the settlement documents are available from the Court electronically. If a Class Member wanted additional information about the settlement or copies of documents, the Notice provided multiple means to obtain it. Lead Counsel have been available to answer questions and both shareholder relations employees at Lerach Coughlin Stoia Geller

⁴ Jeffrey D. Meyer, counsel for the Moulton objectors, is a professional objector who repeatedly raises vague boilerplate arguments, just as he has here, in opposition to class action settlements throughout the nation, oftentimes representing his own law partner as an alleged class member. See *In re WorldCom, Inc. Sec. Litig.*, No. 1:02-CV-03288 (S.D.N.Y. 2002) (attorney Meyer representing his law partner, objector Moulton); *In re AOL Time Sec. Litig.*, No. 1:02-CV-05575 (S.D.N.Y. 2002) (same). Mr. Meyer has been discredited for his frivolous objections. See *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005) (approving settlement over attorney Meyer’s objections because, his client/law partner lacks standing to raise objections to the class settlement and, “[i]n any event, [the] objections are frivolous”).

Rudman & Robbins LLP (“Lerach Coughlin”) and the Claims Administrator have each responded to thousands of inquiries regarding the settlement.

The Graham Objection also claims that the Notice provides “misleading” and insufficient information with respect to the amount of attorneys’ fees and expenses requested by Lead Counsel. Contrary to the Graham Objection assertion, the Notice clearly states that “Lead Counsel will request the Court to award attorneys’ fees of up to 24% of the Settlement Fund, plus reimbursement of expenses, not to exceed \$5.2 million, which were incurred in connection with the Litigation, plus interest thereon.” Notice at p. 10. This language is clear and unambiguous; however, if a Class Member was confused or had questions, all he, she or it needed to do was call Lead Counsel at the toll-free telephone number provided in the Notice. Lead Counsel are applying for fees based on a percentage of the recovery, the preferred method of awarding fees from a common fund in the Tenth Circuit. See *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994) (“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.”). Therefore, any concern by the Graham objectors about lodestar information not being included in the Notice is unfounded. Moreover, Lead Counsel filed their Motion for Award of Attorneys’ Fees and Reimbursement of Expenses (“Fee Motion”) on February 27, 2006, over three weeks before the due date for Class Members to object. The Fee Motion contained detailed information on the reasonableness of the requested fee, including the information the Graham Objection claimed should have been put in the Notice. There can

be no question that Class Members had sufficient information to object to the requested fee if they thought it was appropriate to do so.

Mr. Fitzpatrick complains that the Notice did not disclose that the attorneys may be paid before members of the Class.⁵ He claims that this provision is self serving, does not benefit the Class and therefore should be struck or a new round of notices should be sent to Class Members before the settlement is approved. As an initial matter, Mr. Fitzpatrick does not cite a single case or any other authority that requires or even suggests that this provision be disclosed in the Notice despite the fact that he recognizes it is quite common in class action settlements. This provision is common in class action settlements because it allows Lead Counsel, who have litigated a case on a contingency basis for years, investing enormous amounts of time and advancing millions to cover expenses, to recover these monies on award by the Court, subject to repayment if overturned on appeal. Indeed, any other alternative would simply punish Lead Counsel for their efforts. Although Mr. Fitzpatrick may have such a motive, it should not be countenanced by this Court. Lead Counsel have worked for almost five years to obtain a tremendous result for Class Members. There is no justifiable excuse for making them wait longer to be paid their fees or reimbursed for their expenses.

⁵ Of course the Notice stated: "This Notice is a summary and does not describe all of the details of the Stipulation. For full details of the matters discussed in this Notice, you may review the pleadings and Stipulation filed with the Court . . . Further, the Stipulation, its exhibits, and additional copies of this Notice and the Proof of Claim and Release are available on the Internet at www.gilardi.com." Notice at p.12.

The Graham Objection also complains that the Notice did not adequately inform Class Members that their claims pursuant to the Plan of Allocation will be prorated. The Plan of Allocation set forth in the Notice clearly states that “Each Authorized Claimant shall be paid the percentage of the Net Settlement Fund that each Authorized Claimant’s claim bears to the total of the claims of all Authorized Claimants.” Notice at p.7. This is what proration means. Moreover, the Notice also informed Class Members that “[f]or all types of Qwest publicly traded securities, your actual recovery from the Settlement Fund will depend on a number of variables including the number of claimants and the types and amounts of securities they purchased, the type and number of Qwest publicly traded securities you purchased, the expense of administering the claims process and the timing of your purchases and sales, if any.” Notice at p.1. Clearly, the Graham Objection is mistaken.

Finally, Mr. Fitzpatrick asserts that the Notice is deficient because it did not set forth the amount of value of the Class’s claims. There is no such requirement here as the PSLRA only requires such a statement if the parties agree on the amount of damages. See §21D(a)(7)(B)(i) of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(7)(B)(i). The parties certainly did not agree on damages in this case as the Settling Defendants contended that Lead Plaintiffs could not show loss causation or damages at the level Lead Plaintiffs’ claimed. See paragraph 175 to the Declaration of Michael J. Dowd in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, and Award of Attorneys’ Fees and Reimbursement of Expenses filed with the Court on February 27, 2006 (“Dowd Decl.”). Thus, under these circumstances, all that is

required is a statement of the issues on which the parties disagree. See §21D(a)(7)(B)(ii), 15 U.S.C. §78u-4(a)(7)(B)(ii). The Notice sets forth these issues.⁶

B. The Settlement Is Fair, Reasonable and Adequate

Only one Class Member has lodged an objection to the \$400 million recovery for the benefit of the Class. The Moulton Objection, in one sentence, claims without any authority or an analysis of the facts of this Litigation that the settlement is not fair. However, as discussed in Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds ("Settlement Motion"), previously filed with the Court, the Phillips Declaration, the Dowd Declaration and herein, the settlement is an outstanding result for the Class and is clearly fair, reasonable and adequate. The \$400 million settlement is one of the largest settlements achieved after the passage of the PSLRA and likely the largest possible recovery – even if Lead Plaintiffs had overcome the significant risks in proving liability and damages and prevailed at trial – given Qwest's financial condition and the financial impact on Qwest that would accompany a large judgment. In addition to the \$400 million, the SEC has agreed to distribute the \$250 million it received from Qwest to Class Members, who purchased Qwest common stock, bonds or options from July 27, 1999 through and including July 28, 2002, in accordance with the Plan of Allocation in this Litigation. This is an excellent benefit for the Class.⁷

⁶ See Notice at pp.1-2.

⁷ The SEC was authorized by the Sarbanes-Oxley Act of 2002 to return money it collects from wrongdoers to investors. While laudably the SEC has collected more than \$5 billion, it has returned about 1% of eligible funds to investors according to a report issued

Perhaps the best evidence in support of the settlement is put forth by Judge Phillips, who mediated the settlement. As set forth in his Declaration, Judge Phillips engaged in a long series of meetings and telephone conversations with the parties between March 2003 and October 2005 in an attempt to resolve the case. Judge Phillips notes that this “was an extremely complex securities action involving numerous difficult and disputed legal and factual issues.” Phillips Decl., ¶5. He also affirms that “continued litigation posed great risks for all parties.” *Id.* Nevertheless, he confirms that “each party demonstrated a willingness to continue to litigate rather than accept a settlement that was not in their best interests.” Phillips Decl., ¶6. Finally, Judge Phillips states that “if this litigation continued, plaintiffs prevailed at trial and a substantial judgment was ultimately affirmed by the appellate court, a real risk existed that the judgment would be uncollectible.” Phillips Decl., ¶7. Based on this analysis, Judge Phillips concludes his declaration by stating:

There is no question in my mind that the settlement was reached by counsel who are among the most capable and experienced lawyers in the country in securities class action litigation, who made a considered judgment that the proposed settlement is not only fair and reasonable, but an excellent result for the Class. Based on the facts and circumstances presented by the parties and my experience in the mediation of securities class actions, I concur in that assessment. Lead Counsel took on a risky and complicated

by the Government Accountability Office in the summer of 2005. See Judith Burns, Cox Says SEC Lags in Returning ‘Fair Funds,’ *The Wall Street Journal Online*, November 22, 2005, <http://online.wsj.com>, attached as Exhibit 1 to the Declaration of Jeffrey D. Light in Support of Reply Brief in Support of Lead Plaintiffs’ Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and Lead Counsel’s Motion for an Award of Attorneys’ Fees and Reimbursement of Expenses (“Light Decl.”), submitted herewith. Therefore, Lead Plaintiffs’ efforts to work cooperatively with the SEC to provide that agency with an effective means of distributing the \$250 million is a great benefit to the Class.

case, invested a great deal of time and resources, and achieved an outstanding result for the Class. Therefore, I respectfully submit that this partial settlement should be approved by this Court.

Phillips Decl., ¶8.

The Moulton Objection also claims, without authority or analysis, that the release is overly broad because it releases parties and causes of action that were not pursued. The release in this case corresponds to the allegations in the complaint and is specifically tailored to the “the purchase, acquisition, sale, or disposition of Qwest securities by any Lead Plaintiffs or any Class Member during the Class Period and the allegations that were made or could have been made in the Litigation.” See Stipulation, ¶1.26. The fact that the release includes claims that were not asserted and parties that were not named does not render the release overly broad because it is well established that “a court may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.” *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (citation omitted). As the court stated in *WorldCom*, 388 F. Supp. 2d at 344: “Moulton’s argument that the Release applies to claims against persons and entities uninvolved in the class action litigation is inaccurate,” and does not render a release unfair. Moreover, Ms. Moulton or any other Class Member who did not wish to be bound by the release, could have opted out of the Class. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2005 U.S. Dist. LEXIS 23079, at *12 (S.D.N.Y. Oct. 11, 2005).

C. The Plan of Allocation Is Fair and Reasonable

Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). Mr. Fitzpatrick surmises that the Lead Plaintiffs may not have adequately represented the Class because some Class Members are not going to recover under the Plan of Allocation, but does not challenge the proposition that some Class Members should not recover under the Plan of Allocation. The Plan of Allocation was developed by an expert hired by Lead Counsel, Bjorn Steinholt, and reasonably distributes the settlement proceeds to those Class Members based on their provable damages under the federal securities laws. See Declaration of Bjorn I. Steinholt, CFA (“Steinholt Decl.”) which was previously filed with the Court. The Plan of Allocation calculates a Class Member’s claim, primarily based on the statistically significant price declines following disclosure of the alleged fraud as set forth in the complaint. Thus, some Class Members who purchased and then sold their securities prior to a statistically significant price decline related to the revelation of the alleged fraud will not recover under the Plan of Allocation. See *generally* Steinholt Declaration. Not a single Class Member has complained about this or any other aspect of how their claim is calculated. The fact that some Class Members are not entitled to recover under the Plan of Allocation does not render the Plan of Allocation unfair or make Lead Plaintiffs’ representation inadequate.

The Reiner Objection claims that there is not a provision in the Stipulation for undistributed funds that remain in the Settlement Fund after distribution to Class Members.

The Reiner Objection is wrong. The Stipulation clearly contains such provision. The Stipulation provides that:

6.6 The Net Settlement Fund shall be distributed to the Authorized Claimants substantially in accordance with a Plan of Allocation to be described in the Notice and approved by the Court. If any funds remain in the Net Settlement Fund by reason of uncashed checks or otherwise, then, after the Claims Administrator has made reasonable and diligent efforts to have Class Members who are entitled to participate in the distribution of the Net Settlement Fund cash their distribution checks, any balance remaining in the Net Settlement Fund one (1) year after the initial distribution of such funds shall be re-distributed to Class Members who have cashed their checks and who would receive at least \$10.00 from such re-distribution, after payment of any taxes, and unpaid costs or fees incurred in administering the Net Settlement Fund for such redistribution. If after six months after such re-distribution any funds shall remain in the Net Settlement Fund, then such balance shall be returned to Colorado-based non-sectarian, not-for-profit 501(c)(3) organization(s) providing legal services or otherwise in the appropriate public interest designated by Lead Counsel.

D. The Requested Fee Is Fair and Reasonable

The few objections (six, one of which has been withdrawn) to Lead Counsel's request for an award of attorneys' fees generally ignore or misstate the specific facts and circumstances of this particular case, rely on unsupported assertions, inapplicable law or cases that are easily distinguishable to support their position. For all the reasons discussed below, in the Fee Motion, the Dowd Declaration, the Carrigan Declaration and the Sarokin Declaration, the objections are without merit and should be overruled.

NYSTRS filed its typical boilerplate objection to Lead Counsel's fee request and PSERS filed a "me too" objection, asserting without any analysis of the facts and circumstances of this Litigation, that Lead Counsel's fee should be reduced because some

federal courts in the Second and Ninth Circuit have awarded less than a 24% fee of the settlement amount.⁸ In addition to the fact that none of the cases are from courts within the Tenth Circuit, NYSTRS and PSERS rely on a small and cherry-picked selection of easily distinguishable cases that had elements present which either reduced the risk or effort to obtain a successful result, including the fact that most of these cases involved settlement at the early stages of the litigation.⁹ NYSTRS and PSERS also assert that because some

⁸ To Lead Counsel's knowledge, in the last year or two NYSTRS has objected to no fewer than a dozen class action settlements, appearing at the end of a case to object to the fees of counsel who created a result for the class. It appears to be the standard practice of NYSTRS, and the other public pension funds it recruits to file boilerplate "me too" objections that fail to address the facts and circumstances of the particular case. It should be noted that to Lead Counsel's knowledge, NYSTRS has never sought to be appointed a lead plaintiff in a securities fraud class action; instead it is of the view that "[b]eing a lead plaintiff invariably entails years of work toward an uncertain end; being an objector entails only a few hours of research and letter writing." Wayne Schneider, *Objections to Attorneys Fee Requests in Federal Securities Class Actions*, *The NAPPA Report*, Vol. 19 No. 1, February 2005, at 11. Light Decl., Ex. 2.

⁹ See, e.g., *In re Veritas Software Corp. Sec. Litig.*, C-03-0283 MMC, 2005 U.S. Dist. LEXIS 30880, at *17-18 (N.D. Cal. Nov. 15, 2005) (settlement reached between parties while motion to dismiss was pending and no discovery had occurred); *In re Riverstone Networks, Inc. Sec. Litig.*, No.: CV-02-3581 PJH, at 4 n.2 (N.D. Cal. May 17, 2005) (reducing fee where "[t]he work actually performed was limited, and consisted principally of conducting the pre-filing investigation; drafting two complaints and an opposition to a motion to dismiss that was never heard by the court; preparing for and participating in the mediation; and preparing the settlement documents"); *In re HPL Technologies, Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 920-21 (N.D. Cal. 2005) (finding counsel had dedicated only 3.8% of total time to discovery while 75% of time was devoted to investigation and settlement); *In re Cylink Sec. Litig.*, 274 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2003) (fee award based on the result of an auction, a practice now discredited); *In re Cendant Corp. Prides Litig.*, 51 F. Supp. 2d 537, 539-42 (D.N.J. 1999) (awarding fee after counsel agreed to fee schedule upon being named class counsel and the court found settlement was reached "very early on in the litigation"); *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648 (LAK), 2001 U.S. Dist. LEXIS 1713, at *11 (S.D.N.Y. Feb. 22, 2001) (in antitrust case, counsel agreed upon being named lead counsel only to seek attorneys' fees representing

class counsel retained by public employee retirement unions have agreed in other cases to a fee below the fee requested in this Litigation, the fee requested here – and the agreement on which it is based – should be set aside. However, what NYSTRS and the other objectors fail to consider or even discuss is that the requested fee was negotiated between the Court-appointed Lead Plaintiffs and Lead Counsel and therefore should be afforded a

25% of any recovery over \$405 million); *In re Critical Path, Inc. Sec. Litig.*, No. C 01-00551 WHA, 2002 U.S. Dist. LEXIS 26399, at *32 (N.D. Cal. June 18, 2002) (Court stating that the settlement was reached after “counsel made a relatively brief investment of time in their cases. To the extent that their work conferred a real benefit to the classes, those efforts primarily occurred in a brief two-month period last fall. The work undertaken by counsel in this period (and throughout the cases) was not particularly complex. Few novel issues were raised.”); *In re Quantum Health Res., Inc. Sec. Litig.*, 962 F. Supp. 1254, 1255 (C.D. Cal. 1997) (Court finding parties settled case only after “[d]uring the fourteen months between filing and settlement, Plaintiffs engaged in written discovery, consisting mainly of requesting the production of documents from Quantum and third parties. Other than a partly successful motion to compel production of certain documents, there was no law and motion practice.”); *In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004) (case “never progressed beyond the pleading stage; counsel’s efforts were limited to drafting complaints and conducting investigations”); *In re Brooktree Sec. Litig.*, 915 F. Supp. 193, 198 (S.D. Cal. 1996) (Court finding a reduced fee warranted where “this case required class counsel neither to engage in numerous motions nor to commit an extensive staff to the case for a period of many years. Indeed, with no analysis of the complexity of this case, and based upon the quick and apparent ease of settlement, this case does not appear to have been of even ‘standard’ difficulty.”) (footnote omitted); *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 367 (S.D.N.Y. 2005) (parties reaching settlement just after motion to dismiss and no formal discovery had occurred); *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 232 (S.D.N.Y. 2005) (court awarding 4% fee to lead counsel after court dismissed plaintiffs’ complaint with prejudice); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 86 (E.D.N.Y. 2002) (parties settled early in discovery process and plaintiffs had not taken one deposition); *In re Horizon/CMS Healthcare Corp. Sec. Litig.*, 3 F. Supp. 2d 1208, 1212, 1214 (D.N.M. 1998) (finding the parties entered into an “early settlement” and little discovery was completed); *In re DPL Inc. Sec. Litig.*, 307 F. Supp. 2d 947, 954 (S.D. Ohio 2004) (Court awarding fee after finding “Plaintiffs’ counsel expended no time conducting discovery in this litigation. Thus, it can be seen that Plaintiffs’ counsel devoted a relatively small amount of time to this litigation.”) (footnote omitted).

presumption that it is reasonable. *Rite Aid*, 396 F.3d at 298, 301 n.10; *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 (3d Cir. 2001); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004); *Lucent*, 327 F. Supp. 2d at 432. See also Sarokin Decl., ¶¶15-25. This presumption preserves the lead plaintiffs' role as "the class's primary agent vis-a-vis its lawyers" and absent unusual and unforeseeable changes, courts should honor that presumption. *Cendant*, 264 F.3d at 282, 283. Not only was the requested fee negotiated and agreed to, but Lead Plaintiffs, who were all actively involved in all aspects of the litigation, evaluating counsel's work after this partial settlement was reached, support the requested fee based on the outstanding result obtained.¹⁰ Importantly, the fee agreement negotiated by Lead Plaintiffs was intended to provide an incentive for Lead Counsel to obtain the largest recovery possible by increasing the percentage fee as the recovery increased. The incentive worked with excellent results in this Litigation. As Judge Sarokin states:

Both the Third Circuit and the Seventh have recognized that higher percentages often can be better for class members than lower ones. The Third Circuit observed that "[t]he goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery

¹⁰ PSERS also without any authority suggests that the fee awarded be applied to the net recovery (after expenses). This unsupported suggestion should be rejected. The fee agreement negotiated with Lead Plaintiffs provided counsel would be entitled to its reimbursement of reasonable expenses incurred in prosecuting the litigation separate from any award of fees. Moreover, the Notice contemplated that the percentage of fees requested is based on the Settlement Fund without a reduction for expenses. This is customary practice, and the vast majority of courts across the country award fees based on the gross amount of the settlement.

for the class than the lawyer who charges a lesser fee.” *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit agreed in *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). It rejected the so-called “megafund rule,” according to which the fee percentage must be capped at a low percentage when the recovery is very large, noting that “[p]rivate parties would never contract for such an arrangement” because it would encourage cheap settlements. *Synthroid*, 264 F.3d at 718.

Sarokin Decl., ¶22.

Here, the fee agreement contained a fee structure that incentivized Lead Counsel to achieve the best possible recovery. As the recovery increased, so did the percentage of the recovery that could be sought by Lead Counsel. This type of fee agreement rewards class counsel for rejecting low settlement offers in the early phases of the litigation. In so doing, Class counsel expose themselves to greater risks than they would face if they settled for fewer dollars at the outset of the litigation.

Sarokin Decl., ¶23.

[T]he system envisioned by the PSLRA demands that courts place considerable weight on the fee structure negotiated by the Lead Plaintiffs at the outset of the litigation, when the outcome of this litigation was in grave doubt. Under the PSLRA, the risk that this case would be dismissed was real. Studies have indicated that 20-30% of all securities cases have been dismissed at the pleading stage since the enactment of the PSLRA. To avoid dismissal, Lead Counsel would have to expend a substantial amount of time and money investigating the case in an effort to satisfy the enhanced pleading requirements of the PSLRA. Assuming that the complaint was upheld, Lead Counsel would also have to expend substantial amounts of time and money in pursuing discovery from the defendants and third parties, overcome substantial hurdles at the class certification and summary judgment stages, and counter the many arguments that defendants would raise on loss causation and damages.

Sarokin Decl., ¶24.

The settlement amount (\$400 million) represents one of the larger cash settlements of a securities class action and is believed to be in the top 15 settlements achieved after

the passage of the PSLRA and given Qwest's financial condition is likely the largest possible recovery that could be obtained for the Class.

Mr. Fitzpatrick, the Reiner Objection and the Graham Objection cite to a few select studies that conclude that the "average" fee awards for settlement amounts in class action cases over \$100 million ranged from 10.1% to 19%. For every study cited by the objectors, there is another study and numerous cases that indicate the average fee award is consistent with or in excess of the requested fee award of 24%.¹¹ For example, the court in *In re Lucent Technologies, Inc. Securities Litig.* 327 F. Supp. 2d 426 (D.N.J. 2004), a case cited by the Graham Objectors, noted in awarding the requested fee of 17% of a \$517 million settlement (a percentage that was negotiated between lead plaintiffs and lead counsel): "the requested 17% fee is considerably less than the percentages awarded in nearly every comparable case" and in cases involving comparable risks to those presented here which have settled for more than \$100 million, courts typically award fees in the range of 25%-30%. *Id.* at 441, 442. Moreover, simply relying on a few select studies, violates the well-established principal that courts are urged not to be "formulaic" in the award of attorneys' fees and the circumstances of each case should be considered in awarding a

¹¹ Lead Counsel in their Fee Motion, cited two studies and numerous cases that indicated the average fee award is consistent with or in excess of the requested award of 24% here. In addition, the Third Circuit recently approved of a district court's reliance on several studies demonstrating that fee awards in class actions ranged from 25%-31% and in settlements of between \$100 million and \$200 million, fee awards in the 25%-30% range were "fairly standard." *Rite Aid*, 396 F.3d at 303 (citation omitted).

fee. Here, there is nothing “average” about the risks involved, the level of skill or effort required or the result obtained by Lead Counsel in this case.

Contrary to the unsupported suggestion by the Graham objectors and PSERS, Lead Counsel did not piggy back on the government’s efforts but instead were at the forefront of uncovering the alleged fraud at Qwest. This Litigation was commenced six to nine months prior to any governmental action. Also, the Lead Plaintiffs advanced claims that the SEC did not pursue which contributed to Lead Plaintiffs’ success in obtaining a superior result for the Class.¹² Indeed, the SEC presented most of its claims against the defendants in the months and years after Lead Plaintiffs had filed their complaints. See Dowd Decl., ¶¶48-52.

In 2005, the Graham objectors, represented by Curtis L. Kennedy (who represents them here as well), filed similar objections to the settlement and fee application in *Brody, et al. v. U.S. West, et al.*, No. 00 CV 4142 (District Court, Denver County), another case litigated by Lead Counsel. In rejecting their objections, Judge John Walker Coughlin pointed out that counsel for the class in that case, including Lerach Coughlin and Dyer & Shuman LLP, filed the case and litigated it for years, while counsel for the Graham objectors took no steps to pursue the claims. Judge Coughlin stated:

¹² See *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (in awarding a 25% of a \$193 million settlement fund, the court noted the skill of plaintiffs’ counsel and the outstanding results “in a 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”).

Now, the issue comes of attorney's fees and costs. And I think one factor I'd like to point out from the start one of the *Johnson* factors is whether this was a desirable case to bring or was it an undesirable case to bring. We have Counsel for the retired – retired U.S. West workers here who represents their association. They didn't bring the claim. They knew all the facts. Everybody knew about the record date and then they changed the record date. They didn't bring the lawsuit. There wasn't any other lawyer in the United States that brought this lawsuit, these people did.

There wasn't any other lawyers in the United States that took the gamble that these people did. Not one other firm anywhere said I'm willing to take that on. I'll go five years. I'll pay out the expenses. I'll put my time and effort on the line. Nobody did.

* * *

But the fact is they're asking for 30 percent after five years of struggling with the risk of getting zero. Do the shareholders want more? Absolutely. But they're fortunate they had some lawyers that had the guts to come forward and do it. It's easy to say that's too much money, but this is cash in the shareholder's pocket. This isn't a coupon you take to Blockbuster to get 50 cents off. This is cash. And that cash would not have been obtained without these people doing what they did for five years.

Brody, et al. v. U.S. West, et al., No. 00 CV 4142, Transcript at 62:13-63:3, 64:24-65:8, (District Court, Denver County Aug. 30, 2005). Light Decl., Ex. 3.

A similar analysis applies here. Mr. Kennedy, if he truly represents U.S. West retirees,¹³ was arguably in a more advantageous position to ferret out the fraud and lead the charge to redress it – but he did not do so. Lead Counsel filed this case in July 2001,

¹³ According to the website for the Association of U.S. West Retirees (“AUSWR”) cited by Mr. Kennedy in the Graham Objection, AUSWR “represents more than 40,000 Qwest Communications retirees and surviving spouses.” See <http://www.uswestretiree.org>. According to recent correspondence from Mr. Kennedy, that was received by counsel for the Settling Parties on April 26, 2006, the Graham objectors have recruited approximately .002% (107) of the 40,000 retirees and surviving spouses to submit late joinders in their objections.

long before the government investigation commenced. As such, the Graham objectors' claim that Lead Counsel "are the mere jackels to the government's lions, feasting after . . . the kill" is preposterous. There may well be jackels at the kill, but Lead Counsel are not they.

Moreover, there was nothing "average" about the efforts of Lead Counsel in the prosecution of this Litigation. The Litigation was pending for over four years when an agreement-in-principle to partially settle was reached. By that time, Lead Plaintiffs' counsel had expended an enormous amount of time and money in a massive investigation, motion practice and discovery. Lead Plaintiffs' counsel largely defeated defendants' numerous attempts to dismiss Lead Plaintiffs' claims at the pleading stage, obtained and reviewed over 9 million pages of documents from defendants and third parties, conducted an extraordinarily detailed analysis of Qwest's financial statements and the multitude of underlying accounting transactions and principles at issue, successfully litigated numerous motions to compel, expended a substantial amount of time analyzing the fruits of these discovery efforts, interviewed dozens of witnesses, took or defended over 50 depositions, fully briefed the issue of class certification, litigated a motion for a temporary restraining order and conducted a two-day preliminary injunction hearing, litigated the United States Attorney's Office motion to stay the litigation, consulted with experts and participated in complex settlement negotiations that lasted several years (while Lead Counsel continued to vigorously prosecute the Litigation) including mediations with retired Judges Layn R. Phillips and Daniel Weinstein.

An important issue during the settlement negotiations was the financial ability of Qwest to fund a settlement with the Class or satisfy a significant judgment after trial and appeals. As a result, Lead Counsel spent a considerable amount of time and effort in meeting with Qwest to discuss the financial limitations faced by Qwest in analyzing Qwest's ability to fund a settlement or significant judgment. As discussed in the Fee Motion, courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in awarding attorneys' fees. That risk was increased here because Qwest lacked significant assets to satisfy a substantial judgment. *See Lucent*, 327 F. Supp. 2d at 438 ("the risk of nonpayment is 'acute' where a defendant lacks 'significant . . . hard assets against which plaintiffs could levy had a judgment been obtained.'") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000)).

In addition to the substantial effort required to successfully prosecute this Litigation, the result obtained for the Class is far from "average." In fact, as discussed above, the \$400 million recovery is one of the larger securities class action settlements after the passage of the PSLRA. Moreover, based on Qwest's financial condition, Lead Counsel believe that the \$400 million recovered for the Class is likely the largest possible recovery because the financial impact on Qwest that would accompany a larger judgment would likely force Qwest into bankruptcy. As this Court recognized in its order denying Lead Plaintiffs request for preliminary injunction, "freezing \$400 million of the proceeds of the QwestDex sale would substantially disrupt Qwest's current business plan and would probably prompt Qwest's bankruptcy" which event would cause harm to a lot of constituents including Lead Plaintiffs and Class Members. *See In re Qwest Commc'ns, Int'l, Inc. Sec.*

Litig., 243 F. Supp. 2d 1179, 1188 (D. Col. 2003). See also *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) (“In other words, rather than permitting litigation to destroy a business and shortchange investors, as securities class actions so often do, Plaintiffs’ Counsel created a settlement that promotes a just result and furthers economic activity.”). In short, to say that the level of skill or effort required to prosecute this case and obtain the outstanding result for the Class is “average” simply belies the record.

Mr. Fitzpatrick, the Graham Objection and the Moulton Objection claim, citing to a few select cases, none from the Tenth Circuit, that the percentage of recovery for attorneys’ fees should decrease as the size of the settlement fund increases. While some judges have applied declining percentages, neither market transactions or economic reasoning provide much support for these practices. Indeed, this practice “has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply.” *Rite Aid*, 396 F.3d at 302 n. 12 (citation omitted). The Seventh Circuit rejected the objectors’ argument there that a fee percentage must be capped at a low percentage when the recovery is very large, noting that “[p]rivate parties would never contract for such an arrangement” because it would encourage cheap settlements. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001).

Indeed, Judge Sarokin, the Chair of the Third Circuit Task Force which endorsed the declining sliding scale in 1985, now rejects that type of fee agreement since “it reduces the incentive of counsel to increase the amount of the settlement as their participation in it

diminishes.” Sarokin Decl., ¶23. Further, Judge Carrigan points out that such an approach belies common sense, stating:

Ironically, they [the objectors] seem to imply that if the recovery had been much smaller, the 24% fee would be fine. Thus, they would punish Lead Counsel for having been too successful. Fairness of a contingent fee agreement should be judged at the outset, not through hindsight.

Carrigan Decl., ¶16.

Moreover, most of the cases cited by the objectors are either inapplicable or easily distinguishable. For example, the Graham objectors claim that “[o]ne example where the trial court applied such a sliding scale is the case of *In re Lucent Techs.*” However, the court in *Lucent* did not apply such a sliding scale but instead approved the requested and agreed-to fee of 17% of a \$517 million settlement and noted that the ““requested . . . fee is considerably less than the percentages awarded in nearly every comparable case.” *Lucent*, 327 F. Supp. 2d at 442.¹⁴

¹⁴ The Graham objectors also cite to *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522 (D. Nev. 1987), claiming the court awarded 7% of a \$205 million recovery. What the Graham objectors fail to mention is that *MGM* was a mass tort case and the court awarded 7% to the plaintiffs’ legal committee who oversaw the litigation and 26-1/3% of the \$205 million was awarded to counsel for each individual plaintiff, for a total of 33-1/3% of the \$205 million recovery. In *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375 (D. Mass. 1997), the court approved the parties agreement on fees where no common fund was created. See also *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *9 (S.D.N.Y. Sept. 29, 2003) (court in reducing a fee request award of 25% to 20% found that while the “case was brought under the securities laws, it better resembles a run-of-the-mill commercial litigation”).

E. The Requested Fee When Cross-Checked Against Counsel's Lodestar Is Reasonable

Lead Counsel make this application on a percentage-of-recovery basis pursuant to a fee structure that was negotiated with the Court-appointed Lead Plaintiffs. While the time and labor required by Lead Counsel to successfully prosecute this Litigation and obtain the outstanding settlement for the benefit of the Class fully justifies the requested fee and is one of the *Johnson* factors the Court can consider in determining whether the requested fee is reasonable, the Tenth Circuit has found this *Johnson* factor to be of less importance in a common fund settlement such as this case. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988). In any event, a lodestar analysis as a check on the reasonableness of the requested fee demonstrates that it is fair and should be awarded. As set forth in the Fee Motion and the Declarations of counsel that were previously submitted to the Court, the aggregate lodestar of Lead Plaintiffs' counsel, their para-professionals and in-house experts totals \$18,547,453.65. The requested fee would result in a multiplier of approximately 5.1. As the court noted in *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990): "there should be no arbitrary ceiling on multipliers." This is especially true here where a lodestar multiplier analysis is used merely as a cross-check on the reasonableness of a percentage. 1 Alba Conte, *Attorney Fee Awards* §2.06, at 39 (2d ed. 1993). Without any support the Reiner, Graham and Moulton Objections claim that a 5.1 multiplier is excessive.¹⁵ Notably, none of

¹⁵ The Reiner Objection claims without citing a single case or any other authority that a 5.1 multiplier "is out of line with recent decisions where multiples of more than 2 on the

the objectors cite controlling authority that would require the Court to reduce the requested fee. In fact, as discussed in the Fee Motion, the 5.1 multiplier here falls within the range of multipliers found reasonable for cross-check purposes by courts in common fund cases and is fully justified given the effort required, the risks faced and overcome and the results achieved.¹⁶ Judge Carrigan has also opined that the multiplier is reasonable. Carrigan Decl., ¶17. Moreover, awarding Lead Counsel a fee lower than that negotiated with the Lead Plaintiffs simply because the multiplier is 5.1 undermines the rationale for using the

allowable lodestar amount are deemed suspect and cause for more inquiry.” The Reiner Objection also claims that Lead Counsel did not make any references to the amount of the multiple in the Fee Motion. However, the Fee Motion specifically noted the number of hours worked by Lead Plaintiffs’ counsel and their para-professionals and in-house experts, the total lodestar and the resulting 5.1 multiple. See Fee Motion at p. 25. The Moulton Objection simply states the award is excessive using a lodestar cross-check without any support or analysis. The Graham Objection cites to *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002), where the court noted that in common fund cases between 1996-2001 where the court awarded fees based on the percentage method the multipliers for cross-check purposes ranged from 0.6-19.6. The Graham Objection also criticizes Lead Counsel for failing to cite *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), which the objectors incorrectly assert is the leading decision from the Tenth Circuit. However *Rosenbaum* is inapplicable here because it was not a common fund case and the court found the benefits of the settlement to be questionable.

¹⁶ See, e.g., *Rite Aid*, 146 F. Supp. 2d at 735-36 (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.*, No. 818 (MBM), 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 6); *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 Conte, *supra*, at 39 (“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.”).

percentage method of awarding fees and encouraging lead plaintiffs to negotiate fee agreements with class counsel. It also improperly penalizes counsel for obtaining a very successful resolution of complex claims and provides a disincentive for counsel to take advantage of the opportunity to secure a good settlement without unnecessarily dragging the case on for years. See *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000) (“[t]he court will not reduce the requested award simply for the sake of doing so when every other fact or ordinarily considered weighs in favor of approving class counsel’s request of thirty percent”).

In another effort to cast doubt on counsel’s veracity and intentions, the Graham Objection claims that Lead Counsel have “cleverly hidden” in the information it submitted to the Court time for their in-house accountants, investigators and para-professionals. Nothing could be further from the truth. The Fee Motion specifically states that “[i]n total, Lead Plaintiffs’ counsel and their para-professionals and in-house experts devoted 53,795.87 hours to this Litigation.” Moreover, the previously filed Declaration of Michael J. Dowd Filed on Behalf of Lerach Coughlin Stoia Geller Rudman & Robbins LLP in Support of Application for Award of Attorneys’ Fees and Reimbursement of Expenses clearly sets forth the time spent on this Litigation by Lead Counsel’s in-house accountants, investigators and para-professionals, their respective hourly rates and describes the services they performed.

Still not satisfied, the Graham objectors claim without any authority or citation that the “PSLRA does not consider accountant and investigator time the same as billable attorney time.” The PSLRA, however, does not talk about attorney time but instead has

made the percentage method the standard for determining whether attorneys' fees are reasonable. See 15 U.S.C. §78u-4(a)(6).¹⁷ The Graham objectors further claim without any authority that the accountants should not be charged at "phantom" hourly rates but instead should be charged at the costs Lead Counsel incurred in employing them. Here, like the attorneys,¹⁸ the in-house accountants' time was billed at their usual customary rate; a rate that is less than it would cost to hire an outside accounting expert with similar background and experience. Moreover, in common fund cases where the court conducts a lodestar cross-check, in-house experts and para-professionals are normally billed at their usual hourly rate that would be charged to a client who was being billed by the hour. Additionally, Lead Counsel could have applied for the in-house accountants', investigators' and para-professionals' time as an expense which would have **increased** the overall amount of fees and expenses requested. Thus, the inclusion of in-house accountants, investigators, and para-professionals in lodestar works to save Class Members' money as opposed to costing the Class money.

¹⁷ 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. See 15 U.S.C. §78u-4(a)(6).

¹⁸ Plaintiffs counsel's hourly rates are consistent with those reported in the National Law Journal's 2005 survey of partner and associate billing rates in more than 170 of the largest law firms in the United States. Light Decl., Ex. 4. In addition, David Boies of Boies, Schiller & Flexner, LLP, which represented defendants in this case for the first several years of the Litigation, charges an hourly rate of \$750, as recently reported in an August 2005 *Westchester Magazine* article attached as Exhibit 5 to the Light Declaration. Plaintiffs' counsel's hourly rates are thus not "excessive" as argued by certain objectors, and are in line with rates charged by comparable lawyers and firms who litigate large, complex cases.

The use of in-house accountants in this case was instrumental in achieving the outstanding recovery for the Class. The gravamen of Lead Plaintiffs' case is that Qwest used a variety of accounting manipulations in violation of Generally Accepted Accounting Principles ("GAAP") that materially misrepresented Qwest's business and financial condition. The multitude of accounting transactions and principles that are at issue are extremely complex and in order to conduct effective discovery and properly prepare this case, Lead Counsel relied extensively on the forensic accounting services provided by their experienced in-house accountants. The vast majority of their time was spent assisting and preparing attorneys' for depositions and to compile the documentary evidence to support Lead Plaintiffs' accounting allegations.

These in-house accountants reviewed Qwest's SEC filings, press releases, financial statements and accounting records as far back as were publicly available and hundreds of boxes of documents of accounting related documents produced by Qwest and audit workpapers produced by Arthur Andersen LLP and KPMG, LLP, Qwest's auditors. The production of accounting documents from Qwest and audit workpapers from the auditors was initially deficient and the in-house accountants assisted counsel in identifying the deficiencies and obtaining the necessary documents from Qwest and its auditors. In addition, the in-house accountants performed extensive research of authoritative GAAP and SEC literature and industry trends relating to revenue recognition, accounting for IRUs, non-monetary exchanges, investment in subsidiaries, QwestDex directory revenue and the related impact on Qwest's financial and public statements. This information was used to demonstrate that Qwest's method of accounting for, and disclosure of, such transactions

were improper and inflated Qwest's financial condition. In sum, Lead Counsel's in-house accounting experts were extensively involved in, and necessary for, the successful prosecution of this Litigation.

F. Lead Plaintiffs' Request for Reimbursement of Costs and Expenses Under the PSLRA Are Reasonable

The Graham objectors and Mr. Fitzpatrick take issue with Lead Plaintiffs' request pursuant to the PSLRA for their "reasonable costs and expenses (including lost wages)" they incurred in representing the Class. 15 U.S.C. §78u-4(a)(4). The Graham objectors claim it is "special compensation" that presents an "obvious conflict of interest" and Mr. Fitzpatrick claims that "absent class members are not adequately represented on this point." Here, the Lead Plaintiffs spent a significant amount of time representing the Class and incurred such costs and expenses and have previously submitted Declarations in support of reimbursement. The amounts requested are reasonable in amount and are allowed under the PSLRA.¹⁹ Accepting the objectors' argument would make every lead

¹⁹ Mr. Fitzpatrick also claims that the amounts requested are excessive, citing to a yet to be published study. He is factually and legally incorrect. First, Mr. Fitzpatrick's claim that each Lead Plaintiff is requesting \$40,000 is not true. That was the outer limit number provided in the Notice. Instead, New England Health Care Employees Pension Fund, Clifford Mosher, Sat Pal Singh and Tejinder Singh are requesting \$13,214.56, \$11,280.00, \$7,650.00 and \$8,431.41, respectively. Second, the amounts requested are based on their actual costs and expenses, as allowed by the PSLRA, are detailed in the Lead Plaintiffs' Declarations previously filed with the Court, and are reasonable in amount. Third, the study that Mr. Fitzpatrick relies upon is inapplicable as it reports on "incentive awards" in all types of class actions and in order to remove post-PSLRA cases ineligible for "incentive awards," the study omitted securities cases terminated after 1997. Finally, the amounts sought are not incentive awards, rather, Lead Plaintiffs seek reimbursement of their time and expenses as specifically authorized by the PSLRA, 15 U.S.C. §78u-4(a)(6).

plaintiff who requested his, her or its reasonable costs and expenses an inadequate class representative.

G. Lead Plaintiffs' Counsel's Request for Reimbursement of Expenses Incurred in the Prosecution of the Litigation Should be Approved

Lead Counsel have incurred \$2,219,063.84 in expenses and costs in prosecuting this Litigation for nearly 5 years on behalf of the Class. These expenses, which are itemized in the individual declarations of Lead Plaintiffs' counsel, are reasonable in amount and were necessary for the successful prosecution of this Litigation. The Graham Objection, which is the sole objection to the requested expenses, claims there is insufficient documentation to justify the requested expenses of Lead Counsel. As the Court recognized in denying the Graham objectors' request to conduct discovery on the issue of attorney fees and costs, there is adequate information in the record to determine the reasonableness of the requested expenses. The claimed expenses are itemized in sworn declarations before the Court that indicate the expenses which counsel are seeking as well as provide detail regarding the specific category of expense. In addition, the Fee Motion provides additional detail on the necessity of some of the expenses to the successful prosecution of this Litigation. See Fee Motion at pp.38-41. Moreover, several attorneys at Lerach Coughlin, including Michael J. Dowd, Spencer A. Burkholz and Keith F. Park, painstakingly reviewed the expenses incurred by Lead Counsel on several occasions to make sure that all the expenses being requested by Lead Counsel are reasonable in amount and properly chargeable to this Litigation. As a result, the Court can be assured

the expenses for which counsel seek reimbursement were necessarily incurred, reasonable in amount and properly chargeable to this Litigation.

III. THE NON-SETTLING DEFENDANTS' OBJECTIONS ARE WITHOUT MERIT AND SHOULD BE OVERRULED

A. The Objections by the Non-Settling Defendants that the Partial Settlement Is Unfair Because They Are Excluded Should Be Overruled

Like the fox guarding the henhouse, the Non-Settling Defendants ask this Court to deny approval of the partial settlement on the novel grounds that Lead Plaintiffs failed to negotiate with them and thus, their exclusion from the partial settlement renders it unfair.²⁰ This self-serving objection is without merit and should be rejected. As an initial matter, Lead Counsel absolutely explored the possibility of settling the case with Nacchio and Woodruff both in discussions with counsel for the Non-Settling Defendants and counsel for Qwest. Nacchio and Woodruff, however, wanted to be folded into the current settlement without making any personal contribution to compromise the claims against them. In light of the evidence developed during discovery against them, Lead Counsel advised defense counsel that any settlement with Nacchio and Woodruff would require them to make personal contributions to the settlement. In particular Lead Counsel believed that Nacchio and Woodruff engaged in massive insider selling, reaping proceeds of over \$265,000,000 from their sale of Qwest stock while Qwest investors were left holding the bag. Also,

²⁰ The Non-Settling Defendants lack standing to assert any objection to the settlement other than the bar order provisions because they cannot demonstrate that they will suffer any legal prejudice other than remaining as defendants in the Litigation. *Zupnick v. Fogel*, 989 F.2d. 93, 98 (2d 1993).

because Nacchio and Woodruff were the Chairman/Chief Executive Officer and Chief Financial Officer, who spoke to investors on behalf of Qwest, Lead Plaintiffs and their counsel believed that they should use their ill-gotten gains to fund any settlement. Nacchio and Woodruff adamantly refused to do so and instead simply wanted to be folded into the current settlement. As a result, settlement negotiations ended with them. The Court should respect this strategic decision of the Lead Plaintiffs. Lead Plaintiffs and their counsel remain willing to negotiate with the Non-Settling Defendants but will not agree to a settlement that is not in the best interest of the Class.

The Non-Settling Defendants further claim that by not including them in the settlement, the Class is exposed to the same risks and delays on which they ask the Court to approve the partial settlement. What they don't mention is that the Class is getting \$400 million for foregoing the risks and delays of continued litigation against the Settling Defendants. Nacchio and Woodruff also question the fairness and honesty of Lead Plaintiffs' decisions to settle with certain defendants and not them. However, the Court's inquiry is not the fairness of the settlement to the Non-Settling Defendants; but instead is directed to whether the settlement is fair, reasonable and adequate to absent Class Members, which it clearly is. More importantly, Lead Plaintiffs and their counsel believe that they have a strong case against Nacchio and Woodruff and were not and are not willing to simply fold them into this settlement or enter into a separate settlement without a significant monetary contribution. Nacchio and Woodruff flatly refuse to acknowledge that, as the CEO and CFO, running the company on a daily basis, they are in a difficult position to avoid responsibility for the allegations of wrongdoing. While this brief is not the correct

place to address the evidence against Nacchio and Woodruff, Lead Counsel believe that the evidence is compelling against these two defendants. Apparently, as to Nacchio, the United State's Attorney's Office and a federal grand jury in Denver agree. On December 20, 2005, after the partial settlement was reached, Mr. Nacchio was indicted for forty-two counts of insider trading. As such, the Woodruff and Nacchio objection that the settlement is unfair because they are not included should be overruled.

B. The Bar Order Provisions of the Stipulation Are Consistent With Applicable Law

The Non-Settling Defendants' objection to the bar order provisions of the Stipulation are similarly unfounded and should be overruled. The importance of a comprehensive bar order in the partial settlement cannot be overstated. As the Court of Appeals for the Eleventh Circuit noted, "Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." See *In re United States Oil & Gas Litig.*, 967 F.2d 489, 494 (11th Cir. 1992). Indeed, the Ninth Circuit stated that "[a]nyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th. Cir. 1989) (citation omitted). As a result, such provisions as provided in paragraphs 11.1-11.4 of the Stipulation are commonly included in partial settlements. As fully discussed in the Reply of Qwest Communications International, Inc. to Objections to Final Approval of Settlement, the bar order provisions of this settlement are appropriate, consistent with applicable law, and

nearly identical to bar order provisions that have been approved in other securities class action settlements.

IV. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs and their counsel respectfully request that the Court approve the settlement, the Plan of Allocation and Lead Counsel's request for an award of attorneys' fees and reimbursement of expenses as fair and reasonable.

DATED: April 28, 2006

Respectfully submitted,

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Lead Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

**In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES
LITIGATION**

**DECLARATION OF JIM R. CARRIGAN IN SUPPORT OF
LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

I, JIM R. CARRIGAN, declare as follows:

BACKGROUND AND QUALIFICATIONS

1. Since December 1995, I have worked nearly full time with the Judicial Arbiter Group in Denver, Colorado as a mediator and arbitrator. I am one of twenty former trial and appellate judges who provide mediation and arbitration services there. In my practice I have worked primarily in Colorado, but also have mediated or arbitrated major complex civil cases in California, Illinois, Minnesota, New Mexico, New York, Ohio and Utah. I am frequently asked to mediate or arbitrate complex civil cases. Thus, I work almost daily with the parties to complex cases and their attorneys. In this work, I have become familiar with both contingent and hourly fees charged by attorneys in complex civil litigation in this district and elsewhere.

2. Prior to joining the Judicial Arbiter Group, I was a trial lawyer, a law professor at four law schools (New York University, Denver University, the University of Washington and the University of Colorado), Justice of the Colorado Supreme Court and, for 16 years, a United States District Judge for the District of Colorado.

3. In Colorado, my practice primarily involved the litigation and trial of civil cases. As a trial lawyer, I was elected a Fellow in both the International Academy of Trial Lawyers and the International Society of Barristers, as well as an Advocate of the American Board of Trial Advocates. I assisted the late Supreme Court Justice Tom C. Clark when he founded and led the National Judicial Colleges and taught for it twice a year for its first 14 years. I was also a co-founder and charter member of the Board of Trustees of the National Institute for Trial Advocacy, which I have served as Chairman of the Board. I have also served on the Board of the American Judicature Society, the Board of Governors of the Association of Trial Lawyers of America, and the Council of the American Bar Association Tort and Insurance Law Section.

4. Also, I served as Colorado State Court Administrator and as a Regent of the University of Colorado. In 1976, I was appointed under the merit selection system as a Justice of the Colorado Supreme Court, and served there from 1976 to 1979.

5. In 1979, I was appointed to the United States District Court for the District of Colorado and served there 16 years. During my time as a district court judge, I sat by designation on the United States Courts of Appeals for the Tenth Circuit and for the

Federal Circuit. As a district judge, I was also appointed by the Chief Justice of the United States Supreme Court to serve on the United States Court of Foreign Surveillance and the United States Judicial Conference Committee on Bankruptcy. My fellow judges elected me to the National Board of Directors of the Federal Judges Association, and as Secretary, Vice President and President (1994-1995) of the Tenth Circuit District Judges Association.

6. For 13 years I was a law professor at the University of Colorado, the University of Denver, the University of Washington and New York University (Post-Graduate Tax Program).

DECLARATION

7. I was asked by attorneys at Lerach Coughlin Stoia Geller Rudman & Robbins ("Lerach Coughlin") to review Lead Counsel's Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, and Award of Attorneys' Fees and Reimbursement of Expenses. In particular, I was asked to consider their request for an award of fees in an amount equal to 24% of the \$400 million recovery obtained in this case. After reviewing the materials, including all the objections submitted by some class members, I agreed to submit this declaration in support of the fee request and have been retained for that purpose.

8. As I understand the settlement, it will resolve the bulk of the securities litigation arising out of the fraud which plaintiffs allege was committed by insiders at

Qwest between May 24, 1999 and July 28, 2002. The Settling Defendants, who include all defendants other than Joseph P. Nacchio and Robert S. Woodruff, have agreed to pay \$400 million to the Class for a release of their claims. In addition, the Settlement provides a mechanism whereby the Class members can participate in the proceeds of the \$250 million previously recovered by the SEC in its civil case against Qwest.

9. Lead Counsel for the plaintiffs obtained this outstanding result after litigating this case for over four years on a contingent fee basis. During this four-year period, plaintiffs' counsel were not paid and, in fact, paid \$2,219,063 in expenses from their own resources to fund the litigation. As detailed in their moving papers, Lead Counsel expended tens of thousands of hours in investigating the case, motion practice and discovery. During this time, they survived several motions to dismiss the various complaints, obtained and reviewed over nine million pages of documents from the defendants and third parties, interviewed dozens of witnesses, took over 50 depositions, fully briefed the class certification issue, litigated a motion for a temporary restraining order, participated in a preliminary injunction hearing, consulted with experts and engaged in lengthy, complex settlement negotiations conducted by two experienced mediators, one of whom I knew as an outstanding U. S. District Judge in Oklahoma.

10. Clearly, no one in good conscience can dispute the enormity of the task or question the amount of effort expended by the Plaintiffs' attorneys. The question now is how to reward the extraordinary and risky effort these attorneys undertook on a

contingent fee basis. Fortunately, the courts of this Circuit long ago arrived at the proper method for awarding attorneys' fees in this type of complex litigation.

11. In recent years, federal courts usually have held that attorneys' fees in common fund cases should be awarded as a percentage of the fund created. The rationale for that approach was revisited by the Third Circuit Task Force in 1985 under the chairmanship of Judge Lee Sarokin. Its highly regarded and oft-cited Report entitled *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985), reaffirmed that fee awards in common fund cases should be based on a percentage of the recovery. *Task Force Report*, 108 F.R.D. at 254-59.

12. The United States Court of Appeals for the Tenth Circuit affirmed the propriety of the percentage of the fund approach in *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) and *Useton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993). The reasons federal courts have adopted the percentage of the fund methodology are clear. First and foremost, courts and commentators agree that the percentage method aligns the interest of the Class and its counsel—as the recovery obtained for the Class increases, so do the fees awarded to Class counsel. Second, the percentage of the fund method provides an incentive for attorneys to take on a risky case of this magnitude on a contingent fee basis. Clearly, to attract qualified lawyers to undertake a complex case fraught with risk, and to convince those attorneys to commit enormous amounts of time and money to prosecuting the case, there must be some

reward, if they succeed. The percentage of the fund methodology provides this incentive. Contingent fees have a tremendous advantage to the judicial system because they provide lawyers a strong incentive not to "over lawyer" the case with needless motions, and excessive and overextended depositions, briefs and other papers. Finally, and most importantly, the percentage of the fund methodology rewards superior performance and punishes failure. Therefore, based on both the law and common sense analysis, this Court should award fees based on the percentage of the fund methodology.

13. In this case, the plaintiffs' attorneys have asked for a 24% fee based on their contractual arrangement with the Lead Plaintiffs, which provided for increasing percentages as the amount of recovery increased. This fee arrangement, negotiated by the Lead Plaintiff, which properly provided an incentive for counsel to achieve the best possible recovery for the Class, is entitled to a presumption of reasonableness. *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3rd Cir. 2001); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 536, 466; *In re Lucent Tech Inc. Sec. Litig.*, 327 F. Supp.2d 426, 432 (D.N.J. 2004). Further, the Lead Plaintiffs, who oversaw prosecution of the case, produced documents and sat for depositions as the class representatives, have all submitted declarations supporting both the settlement and the 24% fee request. The fee arrangement and the support of the Lead Plaintiffs should be given deference by this Court in determining the appropriate fee.

14. In addition, an analysis of the *Johnson* Factors,¹ adopted by the Tenth Circuit in *Brown, supra*, 838 F.2d at 454, and *Useton, supra*, 9 F.3d at 853, also weighs in favor of granting Lead Counsel's fee application. 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.

Plaintiffs' counsel diligently prosecuted this case for almost five years, committing tens of thousands of hours to the litigation. The legal and factual questions were numerous, novel and difficult. Indeed, one only needs to consider the vast number of hours worked by Lead Counsel's forensic accountants to understand that the accounting issues alone were complex and required a massive effort to comprehend. Plaintiffs' counsel demonstrated their expertise and skill in litigating this complex case. Their experience, reputation and ability are beyond question. Lerach Coughlin is considered by many to be the preeminent securities class action litigation firm in the country. Once again, in this

¹ The Fifth Circuit originally outlined the factors to be used in considering a fee application in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Since that time, the so-called *Johnson* factors have been widely used by federal courts.

case they demonstrated that their reputation is well deserved. The \$400 million recovery is an outstanding result for the Class.

15. However, certain *Johnson* factors are especially pertinent here. In my study of the objections, it became apparent that most of them criticized the fee request from the vantage of hindsight. The objectors point to the request and say it is unreasonable, looking at it for the first time in 2006. Such hindsight analysis is grossly unfair. In fact, courts should look at the risks, disadvantages, and expenses faced by Lead Counsel as of the time when they filed the case in July 2001. At that time, there was no SEC investigation. The United States Attorney's office had not even begun to focus on Qwest. Rather, it was Lead Counsel who identified the fraud at Qwest. It was Lead Counsel who agreed to assume the enormous risk of undertaking this case on a purely contingent basis. There was no guarantee of ever being repaid for their extraordinary investment of time, talent, effort and money. The only certainty was that any payday was uncertain. Accepting those risks, with no guarantee of success, has resulted in the reward, almost five years later, after Lead Counsel has delivered for the Class.

16. Those who object now did not volunteer at the outset to share the risk and expenses or to pay counsel on a non-contingent basis. If they thought the fee agreement was unfair, they could have "voted with their feet" by opting out of the Class and proceeding separately with their claims. But only after letting Lead Counsel bear the brunt of the battle, pursuant to a contract that they did not claim was unfair when entered,

they now complain. Ironically, they seem to imply that if the recovery had been much smaller, the 24% fee would be fine. Thus, they would punish Lead Counsel for having been too successful. Fairness of a contingent fee agreement should be judged at the outset, not through hindsight.

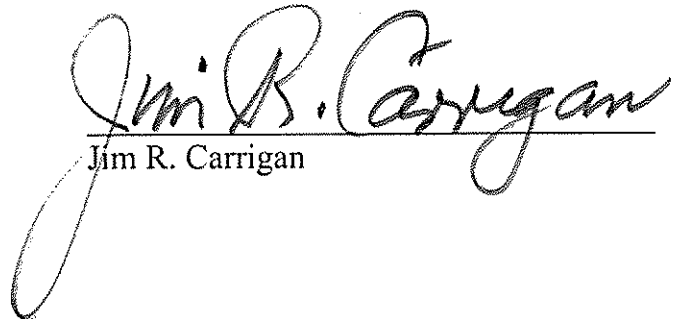
17. The objectors place far too much emphasis on counsel's lodestar as a reason for reducing the fee. Counsel in this case invested an enormous amount of time and money in the prosecution of this litigation, overcame significant risks and obtained an excellent result for the Class. Under these circumstances and based on my experience, a lodestar multiple of 5.1 is reasonable. For all these reasons, the fee request is justifiable.

18. Finally, the fee requested is consistent, and in many cases lower than the fee award in similar cases. In their brief, Lead Counsel have listed the cases from this District and other districts in the Tenth Circuit, where courts have awarded amounts in excess of the 24% requested here. Almost all my trial practice in Colorado was in contingent fee cases, and based on my experience, a 24% fee request for plaintiff's attorneys, working on a pure contingency basis, is substantially lower than that customarily charged in this State. For years, almost all contingent fee agreements in personal injury and similar cases were for 33 1/3%, often with an adder for appeal. Clearly, this case was far more complicated than the typical contingent fee civil case. In more difficult and complex cases, such as medical and hospital malpractice, I usually see 40% charged in cases I mediate.

In conclusion, I believe that the fees requested are reasonable. I respectfully submit that this Court should approve Lead Counsel's application for attorneys' fees in an amount of 24% of the recovery.

I declare under penalty of perjury under the laws of the United States of America that the foregoing states my true and correct opinions.

Executed this 21st day of April, 2006, at Boulder, Colorado.


Jim R. Carrigan

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

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

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

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

**DECLARATION OF LAYN R. PHILLIPS IN SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT**

I, LAYN R. PHILLIPS, declare as follows:

1. I am a litigation partner in the Newport Beach, California office of Irell & Manella. In my practice, I specialize in complex civil litigation, internal investigations and alterative dispute resolution. The vast majority of my time is devoted to alternative dispute resolution, specializing in the mediation of large class action matters.

2. Prior to joining Irell & Manella, I served as a United States District Judge in the Western District of Oklahoma from 1987 to 1991. During my years on the bench, I presided over more than 140 federal trials in Oklahoma, New Mexico and Texas. I have also sat by designation on several occasions for United States Court of Appeals for the Tenth Circuit in Denver, Colorado. I am a Fellow in the American College of Trial Lawyers and a Fellow in the International Academy of Mediators. I also serve on the National Panel of Distinguished Neutrals for the International Center of Dispute Resolution.

3. In light of my experience, I am frequently asked by the parties to complex civil litigation to serve as a mediator, particularly in complex securities fraud cases. In recent years I have successfully mediated dozens of securities fraud cases pending in various courts across the United States.

4. In February 2003, Qwest Communications International, Inc. and counsel for the Plaintiff Class, Patrick J. Coughlin of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, asked me to serve as a mediator in an effort to determine if a settlement could be reached in this litigation. I agreed to assist the parties with their mediation efforts.

5. Between March 2003 and October 2005, I held a series of meetings with Qwest and its attorneys, and plaintiffs' counsel and their consultants. I also engaged in

hundreds of telephone conversations with the parties. During this time period, the parties had extensive discussions regarding the strengths and weaknesses of the case and Qwest's ability to fund a settlement. As a result of these meetings and discussions with the parties, it was apparent that this was an extremely complex securities action involving numerous difficult and disputed legal and factual issues. In my opinion, continued litigation posed great risks for all parties.

6. There is no question that the negotiations between defendants and plaintiffs were conducted at arm's-length. The mediation process was difficult. As the mediator, I worked diligently to temper expectations on both sides and to keep the parties moving toward a resolution that was acceptable to both plaintiffs and defendants. The negotiations continued, off and on, for almost three years. As the length of settlement negotiations underscores, each party demonstrated a willingness to continue to litigate rather than accept a settlement that was not in their best interests. Ultimately, after years of hard-fought negotiations and litigation, the parties reached an agreement that accounted for the risks of litigation, as well as Qwest's limited ability to pay a judgment or settlement. Although Qwest attempted to achieve a settlement that included all the defendants, this ultimately proved impossible, as Lead Counsel determined that they wished to litigate separately their claims against two of the defendants who they believed faced significant exposure and who they believed possessed the ability to pay a judgment against them.

7. It was apparent to me that if this litigation continued, plaintiffs prevailed at trial and a substantial judgment was ultimately affirmed by the appellate court, a real risk

existed that the judgment would be uncollectible. In my opinion, the settlement was fairly and honestly negotiated by the Settling Parties.

8. I have reviewed the final terms of the Stipulation of Settlement. I firmly believe that the settlement is fair, reasonable and adequate. There is no question in my mind that the settlement was reached by counsel who are among the most capable and experienced lawyers in the country in securities class action litigation, who made a considered judgment that the proposed settlement is not only fair and reasonable, but an excellent result for the Class. Based on the facts and circumstances presented by the parties and my experience in the mediation of securities class actions, I concur in that assessment. Lead Counsel took on a risky and complicated case, invested a great deal of time and resources, and achieved an outstanding result for the Class. Therefore, I respectfully submit that this partial settlement should be approved by this Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of April, 2006, at Newport Beach, California.


LAYN R. PHILLIPS

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

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

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

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

**DECLARATION OF H. LEE SAROKIN IN SUPPORT OF PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

I, H. LEE SAROKIN, declare and state:

1. I have been retained as an expert by Lead Plaintiff's counsel in the above captioned case, to opine as to the reasonableness of the attorney's fee sought in Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses (the "Motion") in connection with the partial settlement entered into on November 21, 2005. I have knowledge of the facts set forth below as the result of my review of pertinent documents, and if called and sworn as a witness would and could testify competently to them.

INTRODUCTION AND SUMMARY

2. I firmly believe that the trial Judge who presided over this action, who has seen the conduct and contributions of the lawyers and who has first hand knowledge of the time and effort involved in the litigation, is in the best position to determine the reasonableness of a motion for attorneys' fees. I offer the opinions stated herein simply to provide the Court with an additional perspective and opinion of one who is looking at this litigation and its significance as an outside observer based solely on the record in the Case, having agonized myself over the same issue many times in the past.

3. To summarize my principal observations and conclusions, I understand that this is one of the largest settlements achieved in a securities class action. Plaintiff's counsel undertook to prosecute this case on a contingency basis only. Plaintiff's counsel confronted serious risks and bore significant burdens in undertaking and pursuing this litigation on a purely contingent basis. They faced multiple motions to dismiss the complaints; extensively litigated a motion for a preliminary injunction, presenting evidence

at a two-day hearing in an attempt to prevent Qwest from selling certain assets; litigated complex discovery motions; fully briefed class certification; conducted extensive discovery, including the review and analysis of over 9 million pages of documents produced by defendants and third parties and taking over 50 depositions; interviewed dozens of witnesses; consulted with experts regarding accounting and damages issues, among others; and engaged in numerous settlement meetings and mediations over a 2-1/2 year period before entering into this partial settlement.

BACKGROUND AND QUALIFICATIONS

4. I spent 17 years on the federal bench. From the period 1979 through 1994, I was a United States District Judge presiding in the District of New Jersey. In 1994, I was elevated to the Third Circuit Court of Appeals, where I served as a United States Circuit Judge for the period from 1994 through 1996. During my years on the bench, I heard thousands of cases, including representative and class actions, many of which included fee applications from attorneys, requiring my assessment and approval, and I authored over 2,000 written judicial opinions. I have also authored several published articles and delivered lectures on a variety of legal topics, including that of attorney fees.

5. Since I retired from the bench in 1996, I have worked as a settlement and mediation judge, as an independent, and for the Alternative Disputes Resolution Services, Alternative Resolution Centers, the American Arbitration Association and FEDNET (an organization of former federal judges), in both federal and state cases.

6. In addition, I have participated in numerous programs and panels presented to federal judges and lawyers throughout the country on many different legal issues,

including how to calculate attorney fees. Attached as Exhibit "A" hereto is a true and correct copy of my *curriculum vitae*.

7. While on the bench, I was fortunate to have the opportunity to work on many aspects of the administration of justice in the Federal system. Former Chief Justice Rehnquist appointed me to the Judicial Conference Committees on judicial improvements, automation, judicial administration, and case management. I was appointed Chair of the Case Management Subcommittee charged with the responsibility of implementing the Civil Justice Reform Act. I also was appointed twice to chair the Third Circuit Judicial Conference. I was also selected as chair of the Quadrennial National Conference of Federal Judges in 1993 and 1997 and served as a program chair in 1985 and 1989.

8. In 1985, I was appointed Chair of the Third Circuit Judicial Task Force on Court Awarded Attorney Fees (the "Task Force"), which engaged in a thorough review, analysis and recommendation of how attorney fees should be determined and awarded. The report of the Task Force was published as "Court Awarded Attorney Fees – Report of the Third Circuit Task Force," 108 F.R.D. 237 (1986) (the "Third Circuit Report"), and has been frequently utilized by both federal and state courts across the United States. It has also been cited as support for attorney fee awards in a multitude of published opinions. Attached hereto as Exhibit "B" is a true and correct copy of the Third Circuit Report.

9. The Third Circuit Report sharply criticized the "lodestar method" of awarding attorneys' fees used at that time by certain courts and proposed a more efficient and fair "percentage of the benefit" method, which is the method now primarily used in the Federal

courts. The Third Circuit Report continues to be cited by courts across the country as a guide in awarding attorney fees in class actions.

10. Quite ironically, but to his great credit, I was appointed to chair the Task Force by then Chief Judge Ruggiero Aldisert, who was one of the authors of the "Lindy" lodestar formulation (the opinion is *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (3d Cir. 1973), *appeal following remand*, 540 F. 2d 102 (3d Cir. 1976)). Judge Aldisert had become concerned about the fairness and efficacy of decisions following that formulation and sought an impartial analysis of that methodology. The Task Force consisted of a number of prominent practitioners and judges, and we were particularly fortunate to have the distinguished Professor Arthur Miller of Harvard Law School serve as our Reporter. The committee analyzed every reported opinion on attorney fees in the country and reached several significant conclusions regarding the lodestar approach to fee calculation. In essence, the lodestar method was severely criticized because it discouraged early settlement; encouraged lawyers to run up unnecessary time; required judges to analyze huge and detailed fee submissions and to decide after the fact whether work performed was necessary and reasonable, or performed by the right person (paralegal, associate or senior attorney), and to determine appropriate rates and then apply an arbitrary multiplier, if appropriate. It was also feared and suspected that many judges decided on the appropriate fee and then chose a multiplier to justify it. All of these factors caused us to conclude that the percentage recovery was more appropriate and just than a lodestar method untethered to the benefits conferred.

11. Under my direction, the Task Force commenced its study of how courts should award attorney fees based on the longstanding common fund doctrine. This doctrine simply provides for fair and just allowances for expenses and counsel fees to be paid by those who have benefited from the efforts expended on their behalf. See Third Circuit Report at 241. The Task Force ultimately recommended the percentage recovery method over that of the lodestar method for calculating attorney fees in common fund cases, finding the method to be more efficient and fairer to all participants in the fee-setting process than the more time-consuming lodestar method. *Id.* at 258.

12. Certain federal courts have established a "benchmark" for percentage recovery amounts. For example, the Ninth Circuit has indicated that the "benchmark" award is 25 percent of the recovery obtained, with 20-30 percent as the usual range. *Staton v. Boeing Company*, 327 F. 3d 938, (9th Cir. 2003); *Paul, Johnson, Alnon & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). The Task Force, however, did not recommend that a specific percentage amount for fee recovery be defined as a bright line but left it to the individual court's discretion.

MY ROLE AS EXPERT IN THIS CASE

13. Calculation of attorney fees is not a precise mathematical formula that may be applied uniformly in each case. The determination of a fee award requires judgement based on experience, knowledge and an understanding of the facts and procedural history of a given case, as well as the attorneys' roles in it. In rendering my opinion here, I have based my evaluation of the requested fee award on those factors as I understood them. In connection with my role as an expert assessing the reasonableness of the requested fee

award, I have been provided and have reviewed the following documents: (1) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; (2) Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses; (3) Declaration of Michael J. Dowd in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, and Award of Attorneys' Fees and Reimbursement of Expenses; (4) Declaration of Michael J. Dowd Filed on Behalf of Lerach Coughlin Stoia Geller Rudman & Robbins LLP in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses; (5) Declaration of Klari Neuwelt Filed on Behalf of Law Office of Klari Neuwelt in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses; (6) Declaration of Kip B. Shuman Filed on Behalf of Dyer & Shuman, LLP in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses; (7) Declaration of Bjorn I. Steinholt, CFA; (8) Declaration of Robert Tessier; (9) Declaration of Clifford Mosher; (10) Declaration of Tejinder Singh; (11) Declaration of Satpal Singh; (12) [Proposed] Order Awarding Plaintiffs' Counsel's Attorneys' Fees and Reimbursement of Expenses; (13) [Proposed] Order Approving Plan of Allocation of Settlement Proceeds; and (14) Objections filed by eight objectors: Graham, Floyd, Hull and Association of US West Retirees; Brian Fitzpatrick; Cynthia Moulton; New York State Teachers' Retirement System; Pennsylvania State Employees Retirement System; Anchor Media Ventures; Reiner and Flanagan; and Woodruff and Nacchio.

14. Based on my review of the above described documents, the facts set forth above and my own experience set forth above, in my opinion, the attorney's fee request of

24% of the recovery and approximately \$2.2 million in expenses sought by plaintiff's counsel in their Motion are fair and reasonable, for the reasons set forth below.

THE FEE AGREEMENT IS ENTITLED TO A PRESUMPTION OF REASONABLENESS

15. The Private Securities Litigation Reform Act of 1995 ("PSLRA") created a new structure for the prosecution of securities class action cases. Under the PSLRA, the court selects a sophisticated aggrieved investor with a sizeable financial stake in the litigation to serve as the lead plaintiff. Thereafter, the lead plaintiff is expected to oversee the litigation of the case on behalf of the class. One of the lead plaintiff's duties, subject to court approval, is to select the lawyers who will prosecute the case. In passing the PSLRA, Congress' intent was to ensure that sophisticated investors, preferably with experience in monitoring attorneys, actually monitor and direct Class Counsel's activities during the litigation. In choosing a law firm to represent the Class, the lead plaintiff should seek attorneys who ideally offer the best combination of quality legal work and a fair price.

16. Here, the Lead Plaintiffs were the New England Health Care Employees Pension Fund ("New England") and three individual investors. New England appears to be exactly the type of institutional investor envisioned by Congress as a lead plaintiff in passing the PSLRA. There can be no question that the Lead Plaintiffs made an outstanding choice in selecting counsel for the Class. In selecting Milberg Weiss Bershad Hynes & Lerach, Lead Plaintiffs chose a law firm that was widely viewed as the preeminent securities class action law firm in the country. In 2004, when the attorneys handling this litigation for Milberg Weiss, formed Lerach Coughlin Stoia Geller Rudman & Robbins LLP

("Lerach Coughlin"), the Lead Plaintiffs wisely kept the case in the hands of the attorneys who had been prosecuting it on a daily basis.

17. Being a sophisticated institutional investor with experience in securities class action litigation, New England understood the risks and costs these lawsuits entail. It also was well positioned to bargain for a competitive fee when hiring counsel and had no incentive to offer more than the market rate. Clearly, the market for legal services in securities fraud class actions is very competitive. By offering more than necessary to maximize the value of their own claims, New England and the other Lead Plaintiffs would have harmed themselves by reducing their net recoveries.

18. A fee agreement between a lead plaintiff and the lawyer it selects as class counsel should reflect prevailing conditions. The percentage (or range of percentages) will reflect all case characteristics that might enable the lead plaintiff to pay less in fees. This is why a fee agreement negotiated by a sophisticated lead plaintiff merits a presumption of reasonableness, as judges increasingly agree. *See e.g., In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 298, 301 n.10 (3d Cir. 2005) ("In [*In re*] *Cendant [Corp. Litig.]*, 264 F.3d 201, [284 (3d Cir. 2001),] we noted, under the Private Securities Litigation Reform Act, the 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 Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 466 (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 Co-Counsel are reasonable."); *In re Lucent Technologies, Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 432 (D.N.J. 2004) ("Under [the]

PSLRA, a fee[] award negotiated between a properly-appointed lead plaintiff and properly-appointed Co-Counsel as part of a retainer agreement enjoys a presumption of reasonableness. This presumption preserves the lead plaintiff's role as 'the class's primary agent vis-à-vis its lawyers.' Absent unusual and unforeseeable changes, courts should honor that presumption.") (citations omitted). In this case, I know of no evidence that negotiations relating to fees were other than at arm's length. I am informed that the fee arrangement was negotiated by independent counsel representing New England Health Care Employees Pension Benefit Fund within ten months of their appointment as Lead Counsel. I have always been a strong advocate of such prior agreements and favor reliance upon them, because they are negotiated when the risks, but not the outcome, are known, and thus replicate the marketplace.

19. The form of the fee selected – a contingent percentage of the recovery – is typical in class actions. Contingent percentage fee arrangements dominate the market for plaintiff representations, as Judge Easterbrook pointed out in *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986). Three reasons account for this. First, contingent percentage fees align the interests of claimants and lawyers by rewarding superior performance. Second, they minimize the need to monitor attorneys and to evaluate the reasonableness of their efforts, both of which are time consuming and often difficult to do. Third, they ensure that the burden of financing the lawsuit is borne by Class Counsel, rather than the Class Members. And, as demonstrated in this case, litigation costs can be enormous.

20. Moreover, attorney fee awards should replicate the marketplace, and that is why I believe the percentage method is so preferable to a straight lodestar calculation. It is

difficult to envision a competent lawyer undertaking a case on the basis that he or she would be paid on an hourly basis with only the possibility of some slight enhancement if the matter were successful, but receive nothing if unsuccessful – which in essence is the lodestar methodology. The contingency arrangement is meant to compensate counsel for the risk undertaken and the result achieved. Litigants are not interested in how much time counsel devote to a matter, but rather what has been accomplished through their efforts. Indeed, a large settlement procured quickly is preferable to the same result obtained years later. Plaintiff's counsel could have walked away with nothing. Certainly, at the outset of this case, they had no way to predict that they would prevail. Nor could they predict the \$400 million settlement that was achieved through their hard work and tenacity, when this case was filed in July 2001.

21. Because plaintiffs use contingent percentage arrangements far more often than other fee arrangements, it is unsurprising that lead plaintiffs in securities class actions also employ them routinely. In fact, since the enactment of the PSLRA, sophisticated lead plaintiffs have used some version of the contingent percentage approach in every securities class action about which I have knowledge. The decision by Lead Plaintiffs to employ a contingent fee arrangement is laudable. First, it demonstrates that sophisticated lead plaintiffs are using an incentive arrangement that has proven valuable for plaintiffs in every type of case. Second, it demonstrates that Lead Plaintiffs have adopted the Task Force's recommendation of awarding fees as a percentage of a common fund, to incentivize Plaintiffs' Counsel. In short, the contingent fee approach helps class members by encouraging lawyers to maximize their net recoveries.

22. Both the Third Circuit and the Seventh have recognized that higher percentages often can be better for class members than lower ones. The Third Circuit observed that “[t]he goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee.” *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit agreed in *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). It rejected the so-called “megafund rule,” according to which the fee percentage must be capped at a low percentage when the recovery is very large, noting that “[p]rivate parties would never contract for such an arrangement” because it would encourage cheap settlements. *Synthroid*, 264 F.3d at 718.

23. Here, the fee agreement contained a fee structure that incentivized Lead Counsel to achieve the best possible recovery. As the recovery increased, so did the percentage of the recovery that could be sought by Lead Counsel. This type of fee agreement rewards class counsel for rejecting low settlement offers in the early phases of the litigation. In so doing, Class counsel expose themselves to greater risks than they would face if they settled for fewer dollars at the outset of the litigation. (I feel compelled to note that in 1985, the Task Force argued that, in most cases, the percentage amount should be dependent on the ultimate recovery by utilizing a sliding scale so that the percentage awarded would decrease depending on the size of the recovery. However, since that time, some judges have criticized the type of sliding scale considered by the

Task Force on the grounds that it reduces the incentive of counsel to increase the amount of the settlement as their participation in it diminishes. I now agree with that criticism, even though I have utilized the sliding scale in earlier decisions. In fact, some academics now endorse a fee agreement structured so that the percentage increases as the recovery increases, as the fee agreement in this case provides.)

24. I firmly believe that the system envisioned by the PSLRA demands that courts place considerable weight on the fee structure negotiated by the Lead Plaintiffs at the outset of the litigation, when the outcome of this litigation was in grave doubt. Under the PSLRA, the risk that this case would be dismissed was real. Studies have indicated that 20-30% of all securities cases have been dismissed at the pleading stage since the enactment of the PSLRA. To avoid dismissal, Lead Counsel would have to expend a substantial amount of time and money investigating the case in an effort to satisfy the enhanced pleading requirements of the PSLRA. Assuming that the complaint was upheld, Lead Counsel would also have to expend substantial amounts of time and money in pursuing discovery from the defendants and third parties, overcome substantial hurdles at the class certification and summary judgment stages, and counter the many arguments that defendants would raise on loss causation and damages. I sincerely doubt that anyone could have predicted a \$400 million settlement in this matter when it was initiated in July 2001.

25. Under the circumstances, the requested 24% attorneys' fee is fair and reasonable. The blended 24% fee was approved by the Lead Plaintiffs at an early stage of the litigation and reaffirmed after the \$400 million recovery was obtained on behalf of the

Class. Although, a \$96 million fee in the abstract might seem high, it was the product of a competitive marketplace and is entitled to a presumption of reasonableness under the law.

OTHER FACTORS JUSTIFY THE REQUEST

26. In addition to the fee agreement and the support of the Lead Plaintiffs, several other factors are frequently considered by courts in arriving at a proper percentage-of-the-fund fee award. All of these pertinent criteria traditionally considered by the courts support the requested 24% fee award.

27. **Fees in Comparable Cases:** The 24% fee is similar, and in many cases less than, fee awards in similar cases. As more fully discussed below, one Court of Appeals has held that the “benchmark” award is 25 percent of the recovery obtained, and the average range of awards is between 20% and 30%. *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989). The Ninth Circuit Court of Appeals decision in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) provides further support for this analysis. In *Vizcaino*, the Ninth Circuit included as an appendix to its opinion a table, which listed 34 cases between 1996 and 2001 in which attorneys’ fees were awarded as a percentage of the fund. In some of those cases, the attorneys’ fees awarded were as high as 36%, 27% and 40%. In 24 of those cases the district court had conducted a lodestar cross check. A multiplier cross-check in those 24 cases would range from a low of .6 to a high of 19.6, with an average multiplier of 3.31.

28. The Tenth Circuit cases cited by Lead Counsel in their brief also demonstrate that a 24% fee request is well within the reasonable range. As Lead Counsel notes, Tenth Circuit courts have routinely awarded 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."), which was filed on February 27, 2006; *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 JC/WWD (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 JC/WWD (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).

29. Accordingly, the requested fee is reasonable in light of the tremendous result achieved and the effort expended in achieving it.

30. **Time Expended:** In my opinion, the hours spent on the Case were necessary and reasonable in light of its complexity, importance, amount of motion practice and work involved in prosecuting a case for over four years. The documents submitted to me provided information that demonstrates that Plaintiffs' counsel spent 53,795.87 hours at a time cost of \$18,547,453.65, and incurred total expenses of \$2,219,063. These figures

are entirely appropriate in a case of this magnitude. In fact, I would have expected the lodestar amount to be significantly higher, which, to me, demonstrates that plaintiff's counsel were extremely efficient in their handling of this case, for which they should be rewarded – not penalized.

31. **Results Obtained:** As set forth above, the \$400 million recovery is one of the larger securities class action settlements in history. Further, Judge Layn R. Phillips, a retired federal judge and well-respected mediator, has submitted a declaration indicating that the settlement was the product of hard-fought, arm's length negotiations that were ongoing for 2-1/2 years. There is no question that this is an outstanding result for the Class.

32. **Contingent Risk Presented:** The financial risk of the litigation rested solely on the shoulders of plaintiff's counsel. From the outset, plaintiff's counsel took this case on a contingency basis and agreed to advance all costs without any guarantee of success. Given the prominence of Qwest and certain of the individual defendants in Colorado, and the excellent legal resources at defendants' command, plaintiffs had to expend substantial resources to pursue the case. By taking this case on a contingency, plaintiff's counsel had no guarantee that the case would settle or result in a judgment in favor of the plaintiff, thereby ensuring payment of their expenses or fees. Plaintiffs' counsel repeatedly faced the risk of having their case dismissed completely or stayed so as to make the costs prohibitive. The case was a gamble by plaintiff's counsel with an inherent risk that was not reduced until the time of the partial settlement.

33. ***The Novelty and Complexity of Issues:*** Plaintiffs' counsel's exceptional effort procured the \$400 million partial settlement. The procedural history of this case alone demonstrates that plaintiff's counsel have vigorously and tenaciously protected the interests of the Class Members. Since the case was filed in July 2001, plaintiff's counsel addressed the pleading challenges filed by the defendants, made every effort to freeze certain assets by conducting a preliminary injunction hearing and fully briefed class certification. In addition, as set forth in the motion papers, plaintiff's counsel conducted significant discovery, including reviewing and analyzing over 9 million pages of documents produced by the defendants and third parties. Plaintiff's counsel also prepared for and attended (to either examine or defend witnesses) over 50 depositions in cities across the United States. These significant efforts are compelling evidence of counsels' exceptional efforts in making approximately \$400 million available for Class Members. Unquestionably, the issues were both factually and legally novel and complex.

34. ***Preclusion of Other Employment:*** When undertaking a client's case threatens to undermine the ability to take on other work, lawyers often will charge a higher fee. In determining a reasonable fee, this Court should account for this fact. Here, this factor is significant. The law firms representing the Class expended over 50,000 hours in prosecuting this case. All of that time could have been devoted to other cases. Instead, Plaintiffs' Counsel gambled that time on this case, and Plaintiffs' Counsel's decision to accept that burden and risk should be rewarded.

35. ***Quality of Representation:*** I have reviewed each of the declarations of plaintiff's counsel setting forth their qualifications and I am personally familiar with certain of

the materials I read and the success they achieved that they also are highly qualified and very successful attorneys in their own right.

CONCLUSION

36. I firmly believe, as the Third Circuit Task Force found, that the percentage method should be applied in common fund cases, such as this one. In determining the proper percentage, this Court should give great weight to the fee agreement negotiated by the Lead Plaintiff at the outset of this case. At that time, this case was fraught with risk and Plaintiffs' Counsel agreed to take that risk on a contingent basis. After more than four years of shouldering that burden, Lead Counsel recommended, and their clients agreed, that the case be settled for \$400 million. It is one of the larger settlements in a securities class action case. Based on my review of the facts and law, I respectfully submit that the 24% fee requested by plaintiff's counsel in this motion is fair and reasonable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of April, 2006, at Rancho Santa Fe California.



THE HONORABLE H. LEE SAROKIN (RET.)