

COURT OF APPEALS, STATE OF
COLORADO

2 East 14th Avenue
Denver, CO 80203

(Appeal from)

DENVER COUNTY DISTRICT COURT
COLORADO

Denver City and County Building
1437 Bannock St.
Denver, CO 80202
Judge John W. Coughlin, Courtroom 1
Case Number **00-CV-4142**

Plaintiffs: ADELE BRODY, et al., On Behalf of
Themselves and All Others Similarly Situated.

v.

Defendants: PETER S. HELLMAN, JERRY
COLANGELO, SOLOMON D. TRUJILLO,
MANUEL A. FERNANDEZ, DR. CRAIG R.
BARRETT, FRANK P. POPOFF, MARILYN
CARLSON NELSON, HANK BROWN, GEORGE J.
HARAD, LINDA G. ALVARADO, QWEST
COMMUNICATIONS INTERNATIONAL, INC. and
JOSEPH P. NACCHIO,

(Attorney for **Objectors-Intervenors-Appellants**)
**ASSOCIATION OF U S WEST RETIREES, MARY
M. HULL, ELDON H. GRAHAM and HAZEL
FLOYD)**

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FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

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Clerk, Court of Appeals

Denver District Court
Case Number: **00-CV-4142**
Courtroom 1

Colorado Court of Appeals
Case Number: **05-CA-2017**

**OBJECTORS-INTERVENORS-APPELLANTS
OPENING BRIEF**

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
II. STATEMENT OF THE CASE	1
III. STATEMENT OF FACTS	3
IV. STANDARD OF REVIEW	11
V. SUMMARY OF ARGUMENT	11
VI. ARGUMENT	12
A. The Award of Attorneys Fees Was Excessive and An Abuse of Discretion	12

B.	The Awards in Similar <i>Megafund</i> Securities Cases Recoveries Weigh in Favor of Awarding Far Less Than \$15 Million or 30% of the Settlement Fund	15
C.	There Was No Disclosure of the Fee Agreement. There is No Compliance With the Colorado Rules Governing Contingent Fees. There is No Evidence Any Lead Plaintiff Fully Supports the \$15 Million or 30% of the Settlement Fund Attorney’s Fee Award. There is No Supporting Expert Opinion Report	18
D.	The Court Erred and Abused Discretion By Charging the Settlement Fund Certain Undocumented Costs and Expenses	22
VII.	CONCLUSION	26

TABLE OF AUTHORITIES

CASES	PAGE
<i>A. Tenebaum & Co, v. Colantuno</i> , 3 P.3d 456 (Colo. App. 1999), <i>aff'd</i> , 23 P.3d 708 (Colo. 2001)	11
<i>Boeing Co. v. Van Gemet</i> , 444 U.S. 472, 481 (1980)	14
<i>Branch v. FDIC</i> , 1998 WL 15249 (March 24 1998)	18
<i>Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42</i> , 8 F.3d 722, 725-26 (10 th Cir. 1993)	25
<i>Brown v. Phillips Petroleum Company</i> , 838 F.2s 451, 456 (10 th Cir. 1988) ..	12, 14
<i>Dierks v. Thompson</i> , 414 F.2d 453, 456 (1 st Cir. 1969)	20
<i>Duhaime v. John Hancock Mut. Life Ins.</i> , 989 F. Supp. 375 (D. Mass. 1997)	17

<i>Fail v. Community Hospital</i> , 946 P.2d 573 (Colo. App. 1997), <i>aff'd</i> , 969 P.2d 667 (Colo. 1998)	11
<i>Guevara v. Foxhoven</i> , 928 P.2d 793 (Colo. App. 1996).	11
<i>Hall v. Cole</i> , 412 U.S. 1, 5 (1973).	14
<i>In re Bristol-Meyers Squibb Securities Litig.</i> , 361 F.Supp.2d 229, 230 (SD NY 2005).	17
<i>In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.</i> , 109 F.3d 602, 608 (9 th Cir. 1997).	12
<i>In re Copley Pharmaceutical, Inc. “Albuterol” Products Liability Litigation</i> , 1 F.Supp.2d 1407, 1409 (D. WY 1998).	12
<i>In re Prudential Ins. Co. of America Sales Practices Litig.</i> , 962 F.supp. 572, 585 (D.N.J. 1997), reversed and remanded, 148 F.3d 283 (3d Cir. 1998).	17

<i>In re Sprint Corp. Sec. Litig.</i> , 01-4080-CM (D. Kan., December 16, 2003).	16
<i>Jane L. v. Bangerter</i> , 61 F.3d 1505, 1510 (10 th Cir. 1983).	15
<i>Johnson v. Georgia Highway Express, Inc.</i> , 488 F.2d 714, 717 (5 th Cir. 1974). ..	14
<i>Mackall v. Jalisco International, Inc.</i> , 28 P.3d 975, 978 (Colo. App. 2001).	23
<i>Ramos v. Lamm</i> , 713 F.2d 546, 553 (10 th Cir. 1983)	15
<i>Roget v. Grand Pontiac, Inc.</i> , 5 P.3d 341, 348-49 (Colo. App. 1999)	22
<i>Smith v. Town of Estes Park</i> , 944 P.2d 571 (Colo. App. 1996)	11
<i>Walton v. State</i> , 968 P.2d 636 (Colo. 1998)	11

STATUTES, RULES and TREATISES

Rule 5 of Colorado Rules of Civil Procedure 23.3. 19

Rule 6 of Colorado Rules of Civil Procedure 23.3. 19

Rule 1.5(c) of Colorado Rules of Professional Conduct. 20

Elaine Buckberg, Ph.D, Todd Foster, Ronald I. Miller, Ph.D., *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?* at 7 (NERA July 2005). 17

Manual for Complex Litigation, Third, § 24.12 at 189, Federal Judicial Center (1995) 18

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Denver County District Court judge erred and abused discretion when awarding Lead Counsel \$15 million or 30% of the Settlement Fund as attorney's fees. Whether the Denver County District Court judge erred and abused discretion when charging the Settlement Fund some of Lead Counsel's undocumented expenses and costs.

II. STATEMENT OF THE CASE

This appeal is taken from the Denver County District Court's August 30, 2005 "Order Awarding Class Counsel's Attorneys' Fees and Reimbursement of Expenses" entered in Civil Action 00-CV-4142 overruling the objections made by Objectors-Intervenors-Appellants. The appeal is filed by Objectors-Intervenors Association of U S WEST Retirees, Eldon H. Graham, Hazel A. Floyd and Mary M. Hull.

This is a class action on behalf of the public stockholders of the former U S WEST, Inc. against U S WEST's former directors, Qwest Communications International, Inc., and Joseph P. Nacchio, a former director and former CEO of Qwest. In this case, the alleged unlawful conduct concerns the non-payment of

U S WEST's Second Quarter 2000 dividend to shareholders of record. In the Amended Complaint, Plaintiffs brought a class action for breach of contract, breach of third-party beneficiary contract, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and commission of ultra vires acts. The case was class certified for the following: "The last U S WEST common stock shareholders of record before the U S WEST - Qwest merger closed on June 30, 2000. Excluded from the class are defendants and any person affiliated with or related to any defendant." (Courts' Order of February 8, 2005, *nunc pro tunc*, January 31, 2005).

In June 2005, on the eve of trial of this case, the parties agreed to cancel the trial and enter into a settlement agreement. On June 20, 2005, the parties executed a "Stipulation of Settlement." A Settlement Fund was established in the amount of \$50 million. The Settlement Fund will first be used to pay the expenses of sending out the class notice and claim form. Then, the Settlement Fund will be used to pay the attorneys' fees. The attorneys requested and awarded \$15 million in fees, plus approximately \$1.3 million for expenses and costs.

After notice was sent to the class, a fairness hearing occurred on August 30, 2005 before Judge Coughlin. At the hearing, Judge Coughlin granted Appellants'

motion for intervention. Appellants contended the total fee requested - \$15 million - was excessive, not reasonable. In addition, Objectors contended none of the requested expenses - \$1.3 million - were adequately explained or documented and, therefore, it was unreasonable to charge those unknown expenses against the Settlement Fund. At the conclusion of the August 30, 2005 fairness hearing, Judge Coughlin granted the full request for attorneys' fees and expenses and executed an order prepared by Lead Counsel.

On September 21, 2005, this appeal was timely commenced. (Rec Vol XXV, 5760-5766).

III. STATEMENT OF FACTS

The following material undisputed facts are reflected in the papers and pleadings certified by the Clerk of the Denver County District Court as the record on appeal, including the transcript of the August 30, 2000 Fairness Hearing (See Vols 1-XXV, Bates 0001-5282 and Vol XXVI, Transcript).

1. In July 1999, U S WEST, Inc. and Qwest Communications International, Inc. entered into a corporate merger agreement and the two companies began efforts to obtain necessary regulatory approval. (Rec Vol XI, 2521-2598).

2. On June 2, 2000, the U S WEST Board of Directors met and, among other business matters considered, voted to declare the payment of a second quarter earnings dividend of \$0.535 per common share payable to all shareowners of record at the close of business on the declaration date. (Rec Vol VIII, 1859-1864).

3. The June 2, 2000 "Certified Resolutions" for the U S WEST Board meeting confirmed the declaration date to be June 30, 2000:

"RESOLVED, that a dividend of \$.535 per share on the U S WEST Common Stock be and it hereby is, declared on June 2, 2000, payable on August 1, 2000 to pre-merger shareholders of record at the close of business on June 30, 1000."

(Rec Vol XI, 2523).

4. On June 5, 2000, U S WEST issued a press release reporting the dividend declaration date would be June 30, 2000. (Rec Vol I, 34).

5. On June 6, 2000, Qwest CEO Joseph P. Nacchio had his letter delivered to U S WEST CEO Solomon D. Trujillo, in which he made a testy exchange as follows:

"U S WEST materially breached the merger agreement by declaring a \$270 million dividend payable to shareowners of record at the close of business on June 30. The declaration violates section 5.02 of the merger agreement. . . Please let me know whether you will rescind your dividend declaration or set your record date at the close of business on July 10 or later."

(Rec Vol VII, 1744).

6. The next day, on June 7, 2000, U S WEST issued a *corrected* press release reporting there had been a mistake, that the dividend declaration date was actually July 10, 2000. (Rec Vol I, 38 and Vol VII, 1553).

7. This alleged error, which mistake defendants considered to be *harmless*, is the basis for this lawsuit. The major disputed fact in this case was whether the record date the U S WEST Board of Directors declared at the June 2, 2000 meeting was June 30 or July 10, 2000. ¹

8. On June 21, 2000, a single Named Plaintiff, Adele Brody,² filed suit alleging breach of contract and breach of fiduciary duty. (Rec Vol I, 0001-0011). Plaintiff Brody sought a temporary restraining order (TRO). (Rec Vol I, 0017-0029).

9. On June 23, 2000, a TRO hearing was conducted before the Honorable Larry J. Naves, Judge of the Denver County District Court. (Rec Vol II, 607-638).

¹ Antonio Ozeroff, the Corporate Secretary who took detailed handwritten notes of the June 2, 2000 U S WEST Board meeting, caused her contemporaneous notes to be *shredded* after the meeting, and before the minutes were finalized. (Rec Vol XI, 2724, Qzeroff Depo. at 72:9-17)

² Before this case, Plaintiff Brody was the named plaintiff in other securities cases and her husband and son are attorneys in the class action law firm of Stull, Stull & Brody which has been co-counseling with Weiss & Youman (one of the plaintiff's firms herein seeking a chunk of the \$15 million fees payment) in at least one hundred three (103) of the cases listed on that firm's website. (Rec. Vol IX, 2299 at n. 8 and n.9).

10. During the June 23, 2000 TRO hearing, Judge Naves noted that Plaintiffs' had no evidence to refute the sworn declaration made by U S WEST General Counsel Mark Roellig, which declaration professed the press release announcement of June 30, 2000 as the dividend declaration date was a mistake.³

Judge Naves ruled on the TRO request as follows:

“It appears to me from having had a couple of hours with the documents filed by the plaintiff, including the complaint, that a key element of the plaintiff’s case is what’s in the third paragraph of the complaint, which is, and I quote, “On June 5, 2000, defendants declared a quarterly dividend of .535 dollars per share valued at \$270 million, payable to shareholders of record as of June 30, 2000.” And based upon the offers of proof and submissions made by the defendant, it appears to me that the declaration date was not June 30th, or the declaration that was made by the Board of Directors of U S West was not for shareholders of record for June 30, 2000. It appears that was an error. And the declaration that has been submitted shows that on June 5th the board indicated that the dividend is payable to the shareholder of record as of July 10, 2000. And I think that being the case, the plaintiffs are not likely to prevail on the merits. So the motion [for a TRO] is denied. We’re in recess.”

(Rec Vol II, 637-638, Tr. 31:10-32:2).

³ During the TRO hearing, a declaration by U S WEST General Counsel Mark Roellig was tendered to the Court. (Rec Vol II, 618-620, Tr. 12::19-14:5). Inexplicably, this important declaration and key evidence is nowhere to be found within the public appellate court record, Vols 1-XXVI, Bates 0001-5282)

11. After the TRO hearing, efforts were undertaken to close the merger as quickly as possible in order to avoid paying the shareholder dividend. (Rec Vol XI, 2716, Nacchio Depo at 228:12-229:23).

12. After the decision was made to avoid paying the U S WEST shareholder dividend, an agreement was executed on June 29, 2000 - one day before the merger closed - to provide U S WEST CEO Solomon D. Trujillo a lucrative severance payout valued in excess of \$70 million. (Rec Vol XIX, 4445-4452). The severance agreement included \$5.5 million for use of corporate jet services, which monies were placed into a three year trust fund. (Id. at 4448 and 4430).

13. On June 30, 2000, all conditions for the merger were fulfilled and the Certificate of Merger was properly filed with the Secretary of State of Delaware after normal business hours at 8:40 p.m. EST. (Rec Vol II, 0591-0605 and Rec Vol XXII, 5027 at ¶ 38).

14. Consequently, U S WEST, Inc. ceased to exist and there was no dividend payout because Defendants contended there were no U S WEST shareholders of record as of the declaration date of July 10, 2000.

15. By not paying the dividend, Qwest received about \$273 million that would have been paid to U S WEST shareholders. (Rec Vol XXII, 5028).

16. On January 10, 2001, an Amended Complaint was filed with three new plaintiffs, institutional investors: Employer-Teamsters Local Nos. 175 and 505 Pension Trust Fund, Carpenters Pension & Annuity Fund of Philadelphia & Vicinity, and Fox Asset Management, Inc. (Rec Vol I, 0072-0089).

17. Defendants filed a motion to dismiss the Amended Complaint which motion was accompanied by sworn affidavits by U S WEST Board members all of which verified the true declaration date as decided during the June 2, 2000 Board meeting was July 10, 2000. (Hellman Affd, Rec Vol I, 139-140); (Colangelo Affd, Rec Vol I, 151-152); (Trujillo Affd, Rec Vol I, 163-164); (Barrett Affd, Rec Vol I, 175-176); (Popoff Affd, Rec Vol I, 187-188); (Harad Affd, Rec Vol I, 199-200); (Brown Affd, Rec Vol I, 211-212); and (Alvarado Affd, Rec Vol I, 223-224).

18. The Honorable Robert L. McGahey, Jr., Judge of the Denver County District Court, denied the motion to dismiss and granted leave to Named Plaintiffs to conduct limited formal discovery. (Rec Vol VI, 1348-1349);

19. After the parties proceeded to conduct formal discovery, in June 2002, two of the three institutional Named Plaintiffs sought and obtained voluntary

dismissal from the case. (Rec Vol VI, 1400-1406 - Order dismissing Named Plaintiffs Carpenters Pension & Annuity Fund of Philadelphia & Vicinity, and Fox Asset Management, Inc).

20. After discovery on the merits of the case, both sides moved for summary judgment and the Honorable Robert L. McGahey, Jr., without elaborating, issued a one paragraph order on July 22, 2003 denying both motions:

“Plaintiffs’ Motion for Summary Judgment is **DENIED**. Likewise, Defendants’ Motion for Summary Judgment is **DENIED**. Summary Judgment is a drastic remedy and is warranted only on a clear showing that there is no genuine as to any material fact. The briefs, authorities and arguments of counsel make it clear that there are substantial issues of material fact which preclude the granting of either the Plaintiffs’ Motion for Summary Judgment or the Defendants’ Motion for Summary Judgment.”

(Rec Vol VI, 1413-1414).

21. By Order dated January 31, 2005, Judge Coughlin granted plaintiffs’ motion for class certification for the following class: “The last U.S. West common stock shareholders of record before the U.S. West-Qwest merger closed on June 30, 2000. Excluded from the class are defendants and any person affiliated with or related to any defendant.” (Rec Vol XV, 3464-3472 and 3477).

22. On June 24, 2005, the parties filed a Stipulation of Settlement reporting the establishment of a \$50 million settlement fund. (Rec Vol XX, 4643-

4672).⁴ The Preliminary Approval Order was executed that date by Judge Coughlin. (Rec Vol XXI, 4729-4735).

23. On August 5, 2000, Appellants filed their Notice of Objections and Motion for Intervention. (Rec Vol XXI, 4836-4351). The motion for intervention was granted. (Id., 4836).

24. On August 30, 2000, there was a fairness hearing conducted by Judge Coughlin at which hearing Appellants appeared through counsel and presented oral argument. (Rec Vol XXVI, Tr. 3:6-13:24 and 57:3-59:14). At the conclusion of the fairness hearing, Judge Coughlin granted Lead Counsel's full request for attorneys' fees and expenses and executed Lead Counsel's prepared written order. (Rec Vol XXV, 5708-5709). He also confirmed that Appellants' motion to intervene was granted, "so there is no question that [Appellants] are in the case and can take whatever action you want." (Rec. Vol. XXVI, Tr. 66:13-17).

⁴ Subsequently, by court filing made on August 23, 2005, the parties explained that \$24,475,000 of the \$50 million settlement fund was created from the proceeds of Directors and Officers insurance policies purchased by U S WEST before its merger with Qwest, and the balance of the settlement fund was paid by Qwest using corporate funds. (Rec. Vol. XXV, 5601, Affidavit of David J. Heller, Qwest's Chief Ethics and Compliance Officer).

IV. STANDARD OF REVIEW

This Court applies a mixed standard of review of awards of attorney fees and costs. Although this Court generally reviews awards of attorney fees for abuse of discretion, this Court will review de novo the legal analysis relied on by the trial court in reaching its decision. *See A. Tenebaum & Co, v. Colantuno*, 3 P.3d 456 (Colo. App. 1999), *aff'd*, 23 P.3d 708 (Colo. 2001); *Fail v. Community Hospital*, 946 P.2d 573 (Colo. App. 1997), *aff'd*, 969 P.2d 667 (Colo. 1998). A trial court's evidentiary findings are reviewed under the clear error standard. *Smith v. Town of Estes Park*, 944 P.2d 571 (Colo. App. 1996). A trial court's legal conclusions are reviewed de novo. *Walton v. State*, 968 P.2d 636 (Colo. 1998). A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable or unfair. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

V. SUMMARY OF ARGUMENT

The Denver County District Court judge erred by not protecting the interests of the Class and Settlement Fund and awarding a lesser amount of attorney's fees. Likewise, the Denver County District Court judge erred and abused discretion by charging the Settlement Fund and awarding all of Lead Counsel's requested but undocumented costs and expenses.

VI. ARGUMENT

A. **The Award of Attorneys Fees Was Excessive and An Abuse of Discretion.**

In this \$50 million common fund recovery case, the trial court had a special duty to protect the interests of the class. On the issue of how much attorney's fees should be paid to the Named Plaintiffs' counsel, the lawyers occupy a position adversarial to the interests of the class. Appellants contended the trial court must assume the role of fiduciary for the Settlement Fund and class of shareholders. See e.g., *Brown v. Phillips Petroleum Company*, 838 F.2d 451, 456 (10th Cir. 1988) ("The trial judge in a common fund case must 'act as a fiduciary for the beneficiaries' of the fund."); *In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litigation*, 1 F.Supp.2d 1407, 1409 (D. WY 1998, Judge Brimmer) ("When an attorney makes a claim for fees from a common fund, his interest is 'adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class.' [citations omitted] this divergence of interests requires a court to assume a fiduciary role when reviewing a fee application, because there is often no one to argue for the interests of the class."); *In re Coordinated Pretrial Proceedings in Petroleum*

Prods. Antitrust Litig., 109 F.3d 602, 608 (9th Cir. 1997) (“In a common fund case, the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid. Their interests are not represented in the fee award proceedings by the lawyers seeking fees from the common fund.”).

In Lead Counsel’s “Memorandum in Support of the Motion For Final Approval of Settlement, Plan of Allocation and Award of Attorneys’ Fees and Reimbursement of Expenses, and Application for Reimbursement of Expenses to Class Representative” (Rec Vol XXII, 4956-5012), Lead Counsel argued for an award of attorney’s fees of \$15 million, plus costs of \$1.3 million. Appellants contended an award of \$15 million was unjustified and would be excessive compensation for Lead Counsel. In this case, there wasn’t a total victory after a trial. While Appellants believe that Lead Counsel should be paid a fair fee for services rendered, Appellants objected to any fees award that is not based upon either a smaller percentage of the fund method or some reasonable loadstar calculation.

The award of attorney’s fees to plaintiffs in shareholder lawsuits is based upon the common benefit doctrine, an exception to the American Rule that

prevailing litigants must pay their own attorney's fees. *Hall v. Cole*, 412 U.S. 1, 5 (1973). It applies where the plaintiff's successful litigation confers a substantial benefit on all of the shareholders of the defendant corporation. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 (1980).

In this case, Lead Counsel contend that “[T]he prosecution of this action required Plaintiffs’ counsel and their para-professionals to perform 15,770.22 hours of work.” (Rec Vol XXII, 5063). The requested \$15 million fee represents a multiple of approximately 2.2 times the lodestar. Simply put, Lead Counsel requested a payment of almost \$1,000 for each hour every person allegedly spent working on this case. That includes \$1,000 for each hour of paralegal time. That figure simply shocks the conscience of every ordinary shareholder.

In determining the amount of attorney's fees to be award, the Court should consider the “*Johnson* factors,” referred to in *Brown v. Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (applying factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d. 714, 717 (5th Cir. 1974).⁵ Factors which militate

⁵ The Johnson factors include: “the time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the 'undesirability' of the case, the nature and length of the professional relationship with the client, and awards in similar cases.” *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

for a reduction in the \$15 million amount requested, include the fact the \$50 million settlement recovered was a fraction of the over \$270 million potential liability. The settlement may have been a reasonable option, but is by no means a home run.

Additionally, apparently, there was no client actively scrutinizing attorney bills on a monthly basis, thus, giving Lead Counsel little incentive to minimize duplication of time spent or increase efficiency. Appellants contend the trial court should have required Lead Counsel to present proof of “meticulous time records that ‘reveal . . . all hours for which compensation is requested and how those hours were allotted to specific tasks.’” *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1996) (quoting *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983)). But, no such detailed records were provided. And, there is no identification of three paralegals whom Lead Counsel reported worked a total of 3,091.4 hours on the litigation. (See Rec. Vol XXIII, 5146).

B. The Awards in Similar *Megafund* Securities Cases Recoveries Weigh in Favor of Awarding Far Less Than \$15 Million or 30% of the Settlement Fund.

In support of the motion for an award of attorney’s fees, Lead Counsel filed numerous unreported case decisions and cited several dozen published case

decisions. Curiously, Lead Counsel did not even mention the outcome of another case in which many of the same attorneys herein litigated and they obtained the same total settlement fund - \$50 million. In the case of *In re Sprint Corp. Sec. Litig.*, 01-4080-CM (D. Kan., December 16, 2003) (slip opinion filed herewith), the court awarded lead counsel in the case, Milberg Weiss, Bershad Hynes & Lerach,⁶ a fee of 17.5% of the \$50 million settlement fund. Lead Counsel will admit that this award was in accordance with a pre-arranged sliding scale fee arrangement specifically set forth in a written fee agreement with the institutional Lead Plaintiffs in the *Sprint* case.⁷

When compared with the award charged to the same size settlement fund obtained in the *Sprint* case, the fees awarded in this case constitute a substantial windfall to the attorneys to the detriment of the class members who stand to recover only pennies on the dollar.

Furthermore, as authority for their August 5, 2005 supporting brief for an award of attorney's fees, Lead Counsel referred to an *outdated* November 1996

⁶ Milberg Weiss is the predecessor firm to Lerach Coughlin.

⁷ As argued in Section C, on pp. 18-21 of this brief, Lead Counsel never disclosed the terms of the contingent fee agreement with Lead Plaintiff, which document is a requirement under the Colorado Rules of Professional Conduct for enforcement of a contingent fee.

report by the National Economic Research Associates (NERA), an economics consulting firm. (See Rec Vol XXIV, 5488-5578). But, there was an *updated* NERA report in July 2005 shows that fee percentages decline to 26% or *less* in settlements above the \$25 million range. See, Elaine Buckberg, Ph.D, Todd Foster, Ronald I. Miller, Ph.D., *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?* at 7 (NERA July 2005), readily available at [http://www.nera.com/image/Recent Trends 07.2005.pdf](http://www.nera.com/image/Recent_Trends_07.2005.pdf) .

Courts typically reduce the percentage of the fee as the size of the recovery increases and utilize the lodestar method to confirm that the percentage amount does not award counsel an exorbitant hourly rate. See *In re Bristol-Myers Squibb Securities Litigation*, 361 F. Supp.2d 229, 230 (SD NY 2005), in which the court awarded a fee of \$12 million representing approximately 4% of a \$300 million settlement; *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F.Supp. 572, 585 (D.N.J.1997), reversed and remanded, 148 F.3d 283 (3d Cir.1998) (noting that percentage awards in megafund cases range from 4.1 percent to 17.92 percent of fund); *Duhaime v. John Hancock Mut. Life Ins.*, 989 F.Supp. 375 (D. Mass.1997) (applying 9.3 percent to a common fund over \$300 million). Where the fund is unusually large, courts have used a "sliding scale, with the

percentage decreasing as the magnitude of the fund increased ..." *Manual for Complex Litigation, Third*, § 24.12 at 189, Federal Judicial Center (1995) (citations omitted). *See e.g., Branch v. FDIC*, 1998 WL 151249 (March 24, 1998) (applying 14 percent up to \$22 million; 12 percent of the next \$10 million, and 5 percent over and above \$32 million).

Succeeding in a shareholder action where the settlement falls in place at a fraction of the alleged damages should not be the equivalent of holding a winning lottery ticket. While the reward for success should justifiably be substantial, that does not necessarily equate to rates that are forty or fifty time higher than the average wage earner. Appellants request an order reversing the award of attorney's fees and reducing it to \$10 million or 20% of the Settlement Fund. (See Rec Vol XXVI, Tr. 6:18-20 and 10:19-22).

C. There Was No Disclosure of the Fee Agreement. There is No Compliance with the Colorado Rules Governing Contingent Fees. There is No Evidence Any Lead Plaintiff Fully Supports the \$15 Million or 30% of the Settlement Fund Attorney's Fee Award. There is No Supporting Expert Opinion Report.

Amazingly, in this class action, there was no disclosure of the fee agreement. That document is no where to be found in the court's file, not even within the mass

of “sealed” records.⁸ Therefore, the trial court’s grant of the mega fee award in this case cannot be tested against the terms of the fee agreement. In Colorado, a contingent fee must meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, “Rules Governing Contingent Fees.” Since there was no showing by Lead Counsel’s that the contingent fee agreement substantially complied with Rule 5, it was an abuse of discretion for the trial court to grant Lead Counsel’s request to impose the requested contingent fee amount upon the Class and Settlement Fund.⁹ The trial court did not rule on Appellant’s request to

⁸ The trial court was not privy to the written fee agreement, as there is no fee agreement to be found within the two boxes of records that the trial court “sealed” from public viewing.

⁹ Rule 5 of Colorado Rules of Civil Procedure 23.3 states: “Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy and other matters with reference to which the services are to be performed; (d) a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney; (e) a statement of the precise percentage to be charged subject to the limitations of Rule 3(d); and (f) a stipulation that the client, except as permitted by the Rules of Professional Conduct, including Rule 1.8(e), is to be liable for expenses, such stipulation including an estimate of such expenses, authority of the attorney to incur the expenses and make disbursements, a maximum limitation not to be exceeded without the client's further written authority. The final disbursement statement shall reflect the amount received, expenses incurred in handling of the case and computation of the contingency fee.”

Rule 6 of Colorado Rules of Civil Procedure 23.3 states: “No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3.”

conduct discovery of the fee agreement, time records and expenses incurred. (See Rec. Vol. XXI, 4849-4850). Likewise, in the final orders, the trial court committed reversible error as there was no determination that the \$15 million fee award was appropriate under the standards of Rule 1.5(c) of the Colorado Rule of Professional Conduct. (See Rec Vol XXV, 5708-5709 – the written order prepared by Lead Counsel – and Rec Vol XXVI, Tr. 59:15-66:19 – the trial court’s ruling from the bench at the conclusion of the August 30, 2005 Fairness Hearing.)

In addition, there is no evidence that a Lead Plaintiff bothered either to audit or closely examine Lead Counsel’s time records and expenses. This is quite apparent from a review of Lead Plaintiff Adele Brody’s Declaration. (See Rec Vol XXII, 5110-5112). Notably, since she says nothing about conducting any examination of Lead Counsel’s time records and expenses, it didn’t happen. Moreover, Lead Plaintiff does not specifically state she supports an award of 30% or \$15 million as attorney’s fees. And, it is very telling that no Lead Plaintiff personally appeared at the Fairness Hearing on August 30, 2005 so as to express support for Lead Counsel’s requested fee award. Thus, there can be no undue weight given to Lead Plaintiffs who expressed no opinion, no position on the matter. *See e.g., Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969) (“Unless

the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.”). Lead Plaintiffs’ failure to either audit or carefully examine on an on-going basis the attorney’s time records and expenses to be charged to the Settlement Fund reflects a cavalier attitude.

Remarkably, in a footnote, Lead Counsel acknowledged there was no supporting declaration by anyone representing the lone remaining institutional Lead Plaintiff, Employee-Teamsters Local Nos. 175 and 505 Pension Trust Fund. (Rec. Vol XX, 4997). There is nothing in two boxes of papers filed under “seal” to show that a Lead Plaintiff either expressed support for the specific amount of requested attorney’s fees or that there was an audit or examination of Lead Counsel’s time records and fees and costs. Likewise, despite the numerous expert reports that are “sealed” within those two boxes, none address the very important issue of attorney’s fees and costs to be awarded in this class action.

Therefore, under the circumstances, the trial court erred and abused discretion by awarding a contingent fee amount of \$15 million or 30% of the Settlement Fund.

D. The Court Erred and Abused Discretion By Charging the Settlement Fund Certain Undocumented Costs and Expenses.

The court erred and abused discretion by charging the Settlement Fund hundreds of thousands of dollars for undocumented costs and expenses. Lead Counsel should have been required to provide documentation for the expenses they contend total \$1,335,714.56. (Rec Vol XXII, 5007). No supporting documentation was provided. For instance, Lead Counsel’s records show a request to charge the settlement fund the following as “online library research” costs: ¹⁰

<u>Law Firm:</u>	<u>Description of Expense:</u>	<u>Charges:</u>
LERACH	Lexis, Westlaw, Online Library Research	32,422.97
MILBERG	Lexis, Westlaw, Online Library Research	9,579.54
WEISS & LURIE	Lexis, Westlaw, Online Library Research	59,671.71
DYER & SHUMAN	Lexis, Westlaw, Online Library Research	3,439.82
	TOTAL:	105114.04

Since there was no trial of this matter, the trial court erred in awarding the full amount of requested costs for computer research. In *Roget v. Grand Pontiac*,

¹⁰ This compilation comes from the one line entries appearing in the respective law firm’s alleged expenses reported at Rec Vol XXIII, 5131, 5146, 5227 and 5276).

Inc., 5 P.3d 341, 348-49 (Colo. App. 1999), the appellate court specified that computerized research costs charged by a third party could be recovered as costs provided they were “necessary for trial preparation,” as opposed to generalized litigation. Recovery of computerized research costs have only been permitted after trial and there was a showing that the research was necessary for trial preparation. *Mackall v. Jalisco International, Inc.*, 28 P.3d 975, 978 (Colo. App. 2001). The standard for awarding computerized research costs in a case should be no different when, instead of charging the expenses to an opponent, Lead Counsel’s expenses are being charged to a settlement fund. The trial court should have been more protective of the Class and Settlement Fund. Since Lead Counsel did not provide any statement verifying that all the alleged computerized research was necessary for trial preparation, it was an abuse of discretion for the trial court to simply charge \$105,114.04 to the Settlement Fund. Those expenses should have been treated like ordinary overhead charges for the law firms, an expense factored into attorney hourly rates.

Likewise, at the fairness hearing Appellants argued it would be wrong for the trial court to blindly charge the Settlement Fund with all of Lead Counsel’s

meals, hotel and travel expenses. (Rec Vol XXVI, 11:2-20 and 13:5-7). Those alleged expenses were curtly summarized by Lead Counsel as follows: ¹¹

<u>Law Firm:</u>	<u>Description of Expense:</u>	<u>Charges:</u>
LERACH	Meals, Hotels & Transportation	125,014.67
MILBERG	Meals, Hotels & Transportation	14,231.82
WEISS & LURIE	Meals, Hotels & Transportation	29,214.41
DYER & SHUMAN	Meals, Hotels & Transportation	293.86
	TOTAL:	168754.76

Since there was no supporting documentation, the award of such expenses should be reversed. No reasonable client would write a blank check for undocumented meals, hotel and transportation expenses exceeding \$168,000. It was an abuse of discretion for the trial court to blindly charge the Settlement Fund all those costs.

Similarly, at the fairness hearing Appellants argued it would be wrong for the trial court to charge the Settlement Fund with the full amount of Lead Counsel's requested *in-house* photocopying expenses. (See Rec Vol XXVI, Tr. 11:19-12:2). Those costs were curtly summarized by Lead Counsel as follows: ¹²

¹¹ Again, this compilation comes from the one line entries appearing in the respective law firm's alleged expenses reported at Rec Vol XXIII, 5131, 5146, 5227 and 5275).

¹² Again, this compilation comes from the one line entries appearing in the respective law firm's alleged expenses reported at Rec Vol XXIII, 5131, 5146, 5227 and 5275).

<u>Law Firm:</u>	<u>Description of Expense:</u>	<u>Charges:</u>
LERACH	Photocopies	84,896.65
MILBERG	Photocopies	8,504.03
WEISS & LURIE	Photocopies	5,713.84
DYER & SHUMAN	Photocopies	5,918.00
	TOTAL:	105032.52

Lead Counsel report that they conducted extensive discovery, including reviewing and analyzing over 4,000 pages of documents produced by Defendants and non-party witnesses. . . [and] involving 7 testifying experts, which included the production and analysis of over 67,000 pages of documents, . . .” (Rec. Vol. XXII, 5017, 5031 and 5046). Due to the high volume of photocopying in this case, a constant fixed page rate charge of \$0.25 seems unreasonable. Expenses are compensable in a common fund case if the particular costs are the type typically billed by attorneys to paying clients in the marketplace. *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993). In a case where there is a large volume of photocopying, a fixed charge of \$0.25 per page is not typical. Lead Counsel neither presented evidence that the photocopying charges are typical nor gave any explanation about whether or not any of the Lead Plaintiffs either sought or negotiated a discounted charge for the expected large


volume of photocopying. Any reasonable paying client would have negotiated for a discounted rate. At a minimum, the photocopying charges should be reduced to half the \$105,032.52 the trial court allowed to be charged to the Settlement Fund.

When awarding expenses, the trial court took this simple approach: "I find counsel to be honest and if they tell me that's what the expenses, I believe 'em." (Rec Vol XXVI, Tr. 65:9-11).

VI. CONCLUSION

For all the foregoing reasons, the Colorado Court of Appeals should rule that the order awarding \$15 million in attorney fees was error and an abuse of discretion and reverse. This Court should rule that the order awarding the aforesaid undocumented costs and expenses was error and abuse of discretion. The appellate court should reverse and remand with instructions concerning proper awardable fees and costs. Appellants request an award of fees and costs for this appeal.

Dated: August 3, 2006


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UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

In re SPRINT CORPORATION SECURITIES LITIGATION)	Master File No. 01-4080-CM
)	
)	<u>CLASS ACTION</u>
This Document Relates To:)	REVISED ORDER AWARDING
)	ATTORNEYS' FEES AND
<u>ALL ACTIONS.</u>)	REIMBURSEMENT OF EXPENSES AND
)	AMOUNTS FOR CERTAIN LEAD
)	PLAINTIFFS
)	

This matter having come before the Court on December 16, 2003, on the application of Lead Plaintiffs' counsel for an award of attorneys' fees and reimbursement of expenses incurred in the Action and the reimbursement of time and expenses for certain Lead Plaintiffs, the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of this litigation to be fair, reasonable and adequate and otherwise being fully informed in the premises and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation and Agreement of Settlement dated as of April 7, 2003 (the "Stipulation").

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

3. The Court awards plaintiffs' counsel attorneys' fees of seventeen and one-half percent (17.5%) of the Settlement Fund and expenses in the aggregate amount of \$375,000, together with the interest earned thereon for the same time period and at the same rate as that earned on the Settlement Fund until paid. Said fees and expenses shall be allocated among plaintiffs' counsel in a manner which, in Co-Lead Counsel's good-faith judgment, reflects each such counsel's contribution to the institution, prosecution and resolution of the Litigation.

4. In addition to the awards made in ¶3, Lead Plaintiffs Amalgamated Bank as Trustee for the Longview Collective Investment Fund (\$10,000), New England Health Care Employees Pension Fund (\$4,500), Plumbers and Pipefitters National Pension Fund (\$10,000), and PACE Industry Union-Management Pension Fund (\$2,667) are awarded the amounts set forth by their names as reimbursement for their time and expenses incurred in representing the Class.

5. The Court finds that the amount of fees awarded is fair and reasonable under the “percentage-of-recovery” method.

6. The awarded attorneys’ fees and expenses and interest earned thereon, and the time and expense reimbursement to the plaintiffs listed in ¶4 above, shall be transferred from the Settlement Fund immediately after the date this Order is executed subject to the terms, conditions and obligations of the Stipulation and in particular ¶19 thereof, which terms, conditions and obligations are incorporated herein.

IT IS SO ORDERED.

Dated this 16 day of December 2003, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2006, a true and correct copy of above and foregoing **OBJECTORS-INTERVENORS-APPELLANTS OPENING BRIEF**, together with the slip opinion was delivered via United States mail, postage prepaid, to the following Counsel:

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Also, a copy of the same was sent via email to OBJECTORS - Association of U S WEST Retirees, Eldon H. Graham, Hazel A. Floyd and Mary M. Hull.



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