

1 MR. KENNEDY: Good morning, Your Honor, I'm
2 Curtis Kennedy, I'm appearing on behalf of objectors,
3 Association of U.S. West Retirees, Mimi Hull, Eldon
4 Graham, and Hazel Floyd.

5 THE COURT: Thank you. Are there any other
6 shareholders here who are not represented by counsel and
7 representing themselves? If so, please come forward and
8 state your name.

9 All right. Mr. Kennedy, does it -- you want to
10 intervene; is that right?

11 MR. KENNEDY: Yes, sir.

12 THE COURT: And that request is granted. So
13 you're in the case for whatever purposes you wanna be in
14 the case. Mr. Kennedy, why don't we start with you.
15 I've read your objection and I'm gonna be happy to hear
16 anything else that you might say and any response that
17 counsel has.

18 MR. KENNEDY: Thank you, Your Honor. I
19 appreciate you allowing me to go first. I'm here, of
20 course, I'm here -- it's going to generate some debate,
21 and I understand that I make no friends here today but
22 I'm here to impress upon the Court that what we would
23 like to see is more of the settlement fund go to the
24 shareholders particularly the fact that there are so many
25 shareholders that are retirees and former employees of

1 U.S. West who were dependent on the dividend which was
2 the subject of this lawsuit. And I wanna point out that
3 when the eight pounds of --

4 THE COURT: Excuse me, Counsel. On the side,
5 those things pull out if that helps you.

6 MR. KENNEDY: Oh, okay, I have room here.
7 Thank you. When the eight pounds of paper was dropped on
8 my porch, it caught me by surprise; and I have, indeed,
9 gone through every piece of paper. And what I found is
10 that there are about 31 pages that are really important
11 to this Court for the determination of the attorney's
12 fees application.

13 One of the things that has been revealed to me
14 by this paperwork is there still is some question about
15 the source of the settlement which was an issue for the
16 retirees. They wanted to know who's paying the \$50
17 million. Now, at the time the notice was published,
18 there wasn't any indication clearly about that other than
19 to say 25 million was coming from insurance funds.

20 The paperwork submitted by the two sides, the
21 Plaintiffs and Defendants, are kind of contradictory.
22 The Plaintiffs' paperwork says that 25 million is coming
23 out of U.S. West insurance funds and 25 million is coming
24 from Qwest operating revenues. The next day I received
25 some paper from Defendants' Counsel with an affidavit

1 attached to it that says that the whole amount is coming
2 out of U.S. West insurance proceeds. I think that
3 indicates that -- excuse me, it's just the opposite.

4 MR. THEIS: I just wanna clear it up, Your
5 Honor, so there's not a lot of time spent on that. That
6 footnote in Plaintiffs' -- is actually Plaintiffs' filing
7 there's a Footnote 8 that says there was a communication
8 that all of the funding was coming from insurance
9 proceeds. That is due to a miscommunication between
10 Mr. Dowd and myself, but the affidavit that was filed by
11 Qwest Risk Management, David Hellman, and submitted to
12 the Court last Tuesday has the exact figure and it is
13 approximately 25 million from insurance proceeds and
14 approximately 25 million from Qwest. And that's the
15 amount that Mr. Dowd agrees with, Your Honor.

16 MR. KENNEDY: Okay. With that explanation, I
17 think there's still -- it indicates that the notice that
18 was sent out doesn't adequately inform everyone what the
19 source of the funds are, because we're now only getting
20 an explanation that the information is inaccurate or is
21 not complete. But be as it may, what we are really here
22 focusing on, we understand this is a hard job to get
23 money out of a company with a shareholders lawsuit. We
24 understand that. And these guys have worked hard.
25 There's no doubt about it and they deserve to be paid.

1 But we think that what they've asked for is
2 nothing less than a windfall. And what they're asking
3 for is essentially 2. times or a little over 2. times
4 every hour that they say they spent on this case, every
5 hour including all the paralegals. And when you even
6 look at some of the paperwork that they've submitted,
7 they don't give any detail. They don't explain what
8 projects were done by the partners versus the associates
9 or the paralegals. They just throw in a lump sum, and it
10 just kind of reflects a cavalier attitude that this
11 doesn't really matter. We're just gonna go for the 30
12 percent and it doesn't matter how much we're being
13 enriched whether it's two times or whether it's two and a
14 half times. We're just gonna go for the 30 percent.

15 And what I wanted to point out is that their
16 own paperwork submitted by the Plaintiffs, they provided
17 us an appendix of cases of unreported authorities and
18 there's an interesting case that they rely upon. It's
19 Exhibit 3. It's called the Denny v. Jenkins and Gilcrest
20 case. And Jenkins and Gilcrest as many would know was a
21 law firm that was sued and there was this huge settlement
22 involving some wrongdoing by the law firm and some other
23 issues. And what the New York Judge decided was that the
24 request for attorney's fees of 30 percent was really a
25 windfall and no doubt in that case, the Defendants were,

1 the law firm was objecting to the windfall request and
2 the Court cited a bunch of cases in Exhibit 3. In fact,
3 you can look at page 78 of the Lexis opinion. At the
4 very top it says page 78 and in there is this huge
5 footnote of all these cases where the Courts are saying,
6 You know, when we get a common fund that's 50 million and
7 more, we start to reduce the percentage. We don't just
8 use a benchmark of 30 percent.

9 In fact, most of the Courts, the traditional
10 amount is somewhere between 12 to 20 percent. Their own
11 case law supports that. The biggest case, it's in the
12 appendix, Exhibit 3. That's where we are on this. We
13 think that somewhere between 12 and the upper amount of
14 20 percent, that's a lot of money. That's 1.53 times the
15 hourly rate and that's just assuming that everything's
16 accurate and that there's no mistakes and that every hour
17 ought to be paid at the rate that they're asking for, for
18 everything that they did. One and a half times that
19 equals \$10 million. That's 20 percent of the fund.

20 They have also included in their appendix
21 Exhibit 19. And there's a table in it. And if you look
22 at that table on Exhibit 19 which is Table 9, it says the
23 study by that outfit is that Plaintiffs' attorney's fees
24 and expenses, the total value of fees and expenses
25 declines as a percentage when settlement values exceed

1 \$50 million. And their own table shows that the fees and
2 expenses are generally around 20.05 percent when you get
3 a settlement fund of \$50 million.

4 We don't have any real clue as to the specific
5 tasks done because unlike in other cases, the attorneys
6 haven't provided contemporaneous detailed time reports.
7 But astonishingly, they want the Court to approve of some
8 hundred thousand dollars expenses for photocopying, but
9 they didn't photocopy their time records and submit that
10 to the Court.

11 That wouldn't have been much more expense for
12 them to do that and provide it and let us look at it and
13 double-check it and determine whether all of this is
14 reasonable. Are they billing for time riding taxis to
15 the airport, getting on airplanes? Are they going to a
16 hearing for 15 minutes and then billing out for the whole
17 day? We'd like to know and is that fair to charge to the
18 settlement class?

19 When you look at what they're asking for
20 essentially, most of these partners are seeking more than
21 \$1,000 per hour and that shocks the conscience of my
22 clients, the objectors, and many of the retirees. And I
23 will have to say that I haven't just represented four
24 people here. I have gone and done some due diligence.
25 I've gone to Fargo. I've gone to Bloomington,

1 Minneapolis; I've gone to Helena, for example, and I have
2 met with hundreds of shareholders investors that are
3 affected by this. Many of whom are only gonna get
4 payment representing the 100 to 300 shares that they own.
5 It's not even worth their time to object and to get
6 involved because they're gonna get a check for 10 or 15,
7 maybe \$20.

8 But collectively, they've all expressed this to
9 me that, you know, there really ought to be more of
10 this --

11 THE COURT: Excuse me, sir, you -- you
12 represent four people; is that right?

13 MR. KENNEDY: And the Association of U.S. West
14 Retirees who are also 20,000 strong, 90 percent of them
15 were shareholders and owned U.S. West stock before --

16 THE COURT: But do we --

17 MR. KENNEDY: -- the merger.

18 THE COURT: -- know if all those people in the
19 Association are objecting?

20 MR. KENNEDY: They haven't formally objected
21 with the paperwork, no, Your Honor. I just -- I just
22 throw that in, because I've done some due diligence and
23 I'm not just here --

24 THE COURT: Oh, I'm not denying -- denying that
25 you --

1 MR. KENNEDY: Shoot from --

2 THE COURT: -- you -- I just wanna know -- make
3 it clear who you're representing.

4 MR. KENNEDY: I represent the Association that
5 owns stock and the three individuals as we pointed out.
6 You know, enough's enough, we could've stacked the
7 pleading with a thousand objectors, but you know, the
8 point is the same; is that it shocks the conscience of
9 the folks.

10 And, you know, we want the -- the attorneys to
11 get paid well and they should because it promotes desire
12 to do this again. And we understand the difficulties.
13 I, of all people, understand how difficult it is to fight
14 U.S. West and Qwest. I've been doing it for 23 years.
15 I've 65, 75 cases experience.

16 But I don't understand why you have to have an
17 incentive of 2.3 times every hour that's not even
18 questioned. You've got enough incentive at 1.5 times
19 that. And then there's plenty of money for the people
20 who deserve this which is really what they went for.
21 This is what this lawsuit was all about is to help people
22 out and get 'em some money in their pocket.

23 And then the last thing that I did when I went
24 through all this paperwork, is I've noticed what caught
25 me by surprise is that when you look at the reports by

1 the partners and the Associates, for instance, let's look
2 at Lerach's report, Lerach's law firm. And I've listed
3 all the partners. There's 5,055 hours by the partners,
4 there's 2,800 hours by associates. The ratio is 65 to 70
5 percent partner work. These partners are charging 600,
6 \$650 an hour. That represents a supervisory role. They
7 didn't spend all that time doing supervisory work. They
8 must've done a lot of work that could've been delegated
9 to associates.

10 And then the other thing that caught me by
11 surprise and I'm really kind of wondering why they
12 couldn't bother to even name these people. There's three
13 paralegals in the Lerach's law firm statement and it just
14 says, Paralegal 1, Paralegal 2, Paralegal 3.
15 Collectively, they supposedly spent 3,000 hours working
16 on this case. The law firm doesn't even bother to give
17 'em the courtesy of a name. Are they really people? Did
18 they really do the work? Why not disclose their names?

19 In short, addressing just the attorney's fees
20 issue, I think there's plenty of wealth here, plenty of
21 reward if you give them 1.538 I calculated, 1.538, it
22 comes out to almost \$10 million. That's 20 percent of
23 the \$50 million. And then there's the matter of
24 expenses.

25 And I think that we really have to hold off on

1 doing that. We need to bifurcate this issue about the
2 expenses. There's really no detailed documentation of
3 expenses. You know, I did some adding up of the meals
4 and hotels and transportation, \$168,754 for meals,
5 transportation, hotels. Where did they guys eat? At
6 Ruth Chris' all the time? Where they did they stay?
7 What are they charging for all this? And there's no
8 documentation? Are we paying for bar tabs after the
9 meal? We don't know. I don't think very many courts
10 would allow someone to waltz in and say, Hey, I wanna be
11 reimbursed \$168,000 without some detailed documentation.

12 I'm sure if we went into it, we'd find a whole
13 lot of mistakes and things, that, oh, we didn't really
14 mean to charge that, that was just an error. But be as
15 it may, I think it -- it's not worth nitpicking at this
16 point 'cause we don't see the detail. I mean all of it
17 should be held at least in abeyance until there's some
18 more justification.

19 And another example is the photocopies.
20 \$105,000 for photocopies. I was thinking, I don't know
21 how many powerful copy machines can you buy for 105,000?
22 Does the class own those machines now? But there's not
23 any detail other than they're charging 70,000 for in-
24 house copies at the rate of 25 cents each. You would
25 think you would give a discount to your client when you

1 start to run up that many thousands of pages of
2 documents. Not this flat 25 cents per page.

3 Then there's the matter of facsimiles and
4 telephones. \$20,900 for facsimiles and telephone calls.
5 How much of that is really facsimile? And what do we
6 mean facsimile? Do people really pay for a page of fax
7 to go across a telephone line? Isn't that kind of
8 duplication of the photocopying at 25 cents a page?
9 There's just really not a lot of examples of -- I mean
10 information there.

11 And where it really got perplexed was the
12 Lerach's law firm saying they wanna be reimbursed for all
13 this in-house people that we have on our payroll, like
14 forensic accountants, investigators, and then mis, m-i-s,
15 I don't know what that is. What are we talking about?
16 \$4,230. Economic damage analysis, 10,140. Were these
17 people paid on a salary basis and then the company
18 charges them in addition for the work done? Shouldn't
19 the class be paid what it costs Lerach not some
20 additional profit? Or are they figuring that in as well?

21 The same issue spills over with
22 messenger/overnight delivery and support staff. For
23 instance, Milberg's law firm doesn't give any explanation
24 but includes \$28,000 for support staff? What is that?
25 Should the settlement fund pay for 28,000 of settlement

1 monies for support staff with no further explanation?

2 No. Not yet.

3 But you can see in general the \$1.3 million is
4 a lot of expenses and sure it costs a lot. They had to
5 have experts and we understand that. But they shouldn't
6 just throw in a meal tab, a hotel, transportation tab of
7 170,000 almost and say, Here, class, you pay it. Again,
8 we're not here to belittle the results. We think it's
9 great and we understand the difficulties here and we're
10 proud of 'em and we're happy. We really we thank you.

11 But I think in this day and in this community,
12 1.5 times your hourly rate, getting you up to \$10 million
13 for all this is great. It wasn't a home run. It wasn't
14 a grand slam after a trial. It's a great result. And
15 you're really gonna be rewarded and sufficiently
16 compensated at that rate and there's gonna be a lot more
17 money for the little people, the retirees, the very ones
18 who got screwed and were being represented by you.

19 So I hope that you'll consider this, Judge, and
20 I've impressed upon you to reduce the award not at 30
21 percent but get it more in line with what really should
22 happen when we start getting up to these 50-, \$70 million
23 dollar settlements. Let's keep in cap it at 20 percent,
24 Your Honor. Thank you.

25 THE COURT: Thank you, Mr. Kennedy. Be happy

1 to hear response for counsel from the class. And, again,
2 introduce yourself and your firm.

3 MR. DOWD: Rather than just --

4 THE COURT: Again, introduce yourself.

5 MR. DOWD: Oh, Michael Dowd again, Your Honor.
6 I'm sorry. Rather than just starting with Mr. Kennedy
7 and I'll get to him, I think that it's important to first
8 just walk through the issues that were on the table today
9 and discuss those with the Court. And I think the first
10 issue and the most important one is with regard to the
11 settlement itself and whether that settlement should be
12 approved.

13 I think Mr. Kennedy just said he thanked us. I
14 didn't really feel that thanked when he was finished.
15 But that said, it seemed to me that he seems to not have
16 an objection to the settlement itself. At least that's
17 what I took away from what he said. I think, Your Honor,
18 that this settlement -- the standards that the Court is
19 asked to address are, Is it fair, reasonable, and
20 adequate? And I'm prepared to address those standards if
21 the Court would like me to or just answer questions
22 whichever the Court would prefer. But I will walk
23 through the factors.

24 Basically, the factors for judging the
25 fairness, the reasonableness, and the adequacy of the

1 settlement come from two cases. We've cited the Bonfils
2 case in Colorado, and then the Jones v. Nuclear Pharmacy
3 case which is the Tenth Circuit standard. And
4 essentially those standards are very similar. I mean the
5 first question this Court is asked to address is was the
6 settlement fairly and honestly negotiated, and I submit
7 to the Court that there's no question that this
8 settlement was fairly and honestly negotiated by the
9 parties.

10 You know, this is not a case that was settled
11 earlier. This case was litigated vigorously for five
12 years by the parties to this case. I know that the
13 people sitting at that table thought that they had no
14 liability and they fought us. They fought us for five
15 years that these firms work on behalf of this class.

16 And then, Your Honor, on the eve of trial, the
17 case settled. But it settled after two mediation
18 sessions with a retired federal judge. And those two
19 mediation sessions were held in March and April and when
20 we walked away from them, we felt that there was no
21 question in our mind that this case was going to trial.
22 I had no doubt. The parties were just too far apart and
23 I thought that the case was clearly going to trial, and
24 we got ready to go to trial and we did all that work.

25 The long and the short of it is in judging this

1 fact, Your Honor, there can be no question that the
2 settlement was fairly and honestly negotiated. There is
3 no collusion, there's no early settlement, there's no
4 settling with some class members to the detriment of
5 others. This was a fair and honest settlement and so I
6 think we clearly meet that factor in terms of judging the
7 settlement.

8 The second issue the Court is asked to address
9 is the -- whether there were serious questions of law and
10 fact that placed the outcome of the litigation in doubt.
11 And, Your Honor, I think that there's no question that
12 there was serious questions of law and fact. I know this
13 court had the case for a number of years and is very
14 familiar with the issues. I think that this was a case
15 that in some ways was very straightforward. I mean it
16 was a breach of contract claim and in other ways it was
17 unbelievably convoluted because of the lack of
18 controlling authority and then just the unbelievable
19 factual dispute that underlay the entire thing.

20 But just to sum it up in a nutshell, I think
21 there were two main issues. The first was as to
22 liability. We know that U.S. West Board declared a
23 dividend on June 2nd, 2000. The question was what record
24 date did they set for that dividend. I think the first
25 issue was, What if they set a July 10th, record date?

1 And had the evidence established a July 10th record date
2 had been set, the Defendants would have argued that there
3 was no way in the world that this dividend was owed to
4 anyone. And their theory was fairly straightforward.
5 Though there was no controlling case law, they would have
6 said, U.S. West ceased to exist on June 30th, 2000.
7 There were no shareholders of U.S. West on July 10. And
8 therefore there was no dividend that was owed. And that
9 would have been the major legal issue facing us with a
10 July 10th record date.

11 And there was no controlling authority. There
12 were great cases for us that said, When you declare a
13 dividend, it's an obligation. There were no cases that
14 said, And then when you have a merger, after that
15 happens, you still owe the money when the shareholders
16 don't exist any more. And so I think there would have
17 been a serious question as to liability if the July 10th
18 record date was found.

19 If the record date that was set by the Board
20 was June 30th, we felt that legally we were in a much
21 stronger position and had a much better chance of
22 success. The problem with June 30th is that we ran into
23 a real question, a real factual dispute about what date
24 was set. We had and we argued this to the Qwest
25 attorneys, to the mediator when we talked to him, we were

1 gonna say, Hey, the physical evidence doesn't lie. The
2 documentation -- the documentary evidence doesn't lie.
3 It said, June 30th when they issued their press release,
4 we got a certified resolution that says, June 30th, we
5 got an associate General Counsel of the company that
6 said, June 30th. Now, the problem we were gonna face is
7 that the Defendants were gonna parade in 11 officers and
8 directors of this company who are at the June 2nd Board
9 meeting, and they were all gonna testify that it was
10 either July 10th or that it was done in the ordinary
11 course which meant July 10th and that there was only one
12 resolution in the Board book that day, and it said July
13 10th. So that was going to be a very difficult factual
14 issue. And frankly, some of the witnesses that the
15 Defendants were prepared to parade out, were people that
16 are very well respected in this community and they had a
17 former United States Senator, they had other people who
18 were not beholden to U.S. West or Qwest on their Board.
19 And that was going to make that difficult.

20 If we got passed that, Your Honor, there was
21 still the issue of damages. I mean we always came in
22 with our straightforward analysis that, Hey, the damages
23 are the unpaid dividend, you owe us 272- or \$273 million.
24 The Defendants didn't take that sitting down. They went
25 out, they got an economist, he was prepared to come in

1 and say, At best it was \$124 million that's owed because
2 you have to do all these other analysis from the
3 economics of it and then it could be even less than that
4 depending on other factors. So you had real questions as
5 to damages as well. And I think therefore, Your Honor,
6 there could be no question in this case that the outcome
7 of this litigation was in doubt. And I -- I hope and
8 believe that this Court probably shares that view as
9 well.

10 The next factor that the Court's asked to
11 consider in approving the settlement itself is whether
12 the value of the immediate recovery outweighs the mere
13 possibility of some future relief after protracted
14 litigation. You know, I look at this, Your Honor, and
15 what it really is what's better; a bird in a hand or two
16 in the bush? I mean that's the analysis. And I think
17 there was no question that the 50 million is a very good
18 settlement in this case. It was \$50 million guaranteed
19 in hand, no question about it versus the risk at trial
20 that we've just walked through; that this could be a
21 complete shutout. And I think that was a serious risk in
22 this case, that we could've lost.

23 And had we won, because of the questions about
24 the legal authority and whether there was controlling
25 legal authority on some of these issues applied to this

1 fact pattern, we would've looked at another two or three
2 years of appellate litigation where even a verdict in
3 Plaintiffs' favor could have been reversed and in any
4 event, the money wouldn't have been available for years
5 down the road. So I think that factor, again, cuts in
6 favor of the settlement.

7 The fourth factor that the Court is asked to
8 consider is the judgment of the parties that the
9 settlement is fair and reasonable. I think, Your Honor,
10 that, you know, that's a factor that shouldn't be taken
11 lightly in this case. I mean, you had very well
12 qualified defense counsel that, you know, believed the
13 settlement was fair to their side; and I think you have
14 some of the, you know, finest class action lawyers in the
15 country on the other side that thought that this was a
16 fair settlement for their side as well. And I think, you
17 know, everybody involved in this case has experience.
18 We've won 'em and we've lost 'em. And I think that, you
19 know, we're prepared to make that analysis and that
20 judgment should be entitled to some weight.

21 The other considerations that the Bonfils Court
22 said should be taken into account by the Court are the
23 stage of the proceedings in the case. And that's an
24 important one for a number of issues. But it's very
25 important here and it's very relevant here. This isn't

1 an early settlement. This isn't a case where, you know,
2 somebody decided to settle the case for whatever reason
3 within a few months of filing. It went on for five
4 years. I mean we took 23 fact witness depositions. We
5 defended three others. There were 11 expert depositions.
6 We went through all the documents. We went through three
7 rounds of essentially summary judgment briefing in this
8 case. We knew this case. The stage of the proceedings
9 clearly support that this is a good settlement. You
10 know, people can look at this as long as they want,
11 they're not gonna know as much about this case as
12 Ms. Andracchio and Mr. Westerman and Mr. Lurie and
13 Mr. Shuman and myself knew the day we decided to settle.
14 It's that simple.

15 I think the other thing to consider is the
16 reaction of the class. When you had 760,000 notices of
17 settlement that went out, plus, and of those 760,000 plus
18 notices of settlement, you got 11 people objecting
19 basically. And I think that that's something the Court
20 should consider. It's a minuscule amount of objections
21 to this settlement. And I think that for that reason,
22 Your Honor, there's no question that this settlement is a
23 good one.

24 As to the specific objections to the
25 settlement, I think that Mr. Kennedy raised questions

1 about the source of the funds for the settlement, I think
2 we've cleared that up. I apologized. I had a
3 communication with Mr. Theis and asked him where the
4 money was coming from, and he said it was all coming from
5 U.S. West insurers. He meant as opposed to Qwest
6 insurers on that 25 million. The other 25 million is
7 coming from Qwest which we knew 'cause we got the checks.
8 So I had no doubt, I just had some question as to whether
9 something had happened after that time.

10 So I think there's no question that, you know,
11 the money comes half from Qwest half from U.S. West old
12 B&O liability insurance and they provided an affidavit to
13 that effect from one of Qwest's officers. So there's no
14 question about that. And I think, Your Honor, one of the
15 concerns that was raised, is hey you're not getting money
16 from the individual Defendants. Well, Your Honor, I
17 understand that and I understand there's a lot of anger
18 at Qwest in this community particularly by U.S. West
19 retirees who traded their shares for Qwest shares that
20 over the next year or two went drastically down in value.
21 We're sympathetic to that but it's not what this case was
22 about. This case was about the dividend that was
23 declared by U.S. West and not paid. And so though there
24 might be animosity, though there might be anger, though
25 there might be hostility, it doesn't play into the facts

1 of this case, and I think you have to divorce those two
2 things.

3 And so the real issue is what was the case
4 about and it was a breach of contract case. I mean I
5 know that the Defendants used to say when we'd try to,
6 you know, say that there was a breach of fiduciary duty
7 by the director Defendants, they'd say, Hey, you gotta be
8 kidding me. The director Defendants would have got
9 \$600,000 from the dividend 'cause they owned that many
10 shares and they would have put it in their pockets. And
11 so I think that, Your Honor, it's not an issue in this
12 case as it is in securities cases where you have insider
13 trading and things like that.

14 The bottom line is if Qwest had paid the
15 dividend on August 1st, it would have come out of Qwest
16 pockets. And that's where it's coming from. So I think
17 that that is fair and it's not a reason to -- to deny
18 this settlement.

19 As to the other issues, Your Honor, I mean
20 essentially they all boil down to problems with the
21 notice that different people had. And I think, Your
22 Honor, when you -- when you look at the notice that this
23 Court approved back on June 24th, it clearly complies
24 with due process. It complies with the case law. I mean
25 it describes the litigation. It describes the

1 settlement. It describes the plan of allocation. It
2 describes what Plaintiffs' Counsel will seek in fees and
3 expenses. And it contains a list of your rights and
4 options that you have as a shareholder. That's what's
5 required by the law. That's what was in the notice. I
6 mean there can be no serious question about the validity
7 of that notice that this Court already approved.

8 As to one of the other issues, I think it was
9 Mr. Fitzpatrick filed an objection where he complains
10 about the lack of a second opt-out. Now, Your Honor, we
11 sort of crossed that bridge 'cause we sent out the notice
12 of settlement, there wasn't a second opt-out, and there
13 was a simple reason that this Court didn't ask for that.
14 It's because the Colorado rule unlike the federal rule
15 that was amended to allow a discretionary second opt-out,
16 the Colorado rule wasn't amended, it does have a second
17 opt-out. You were in for a penny, you were in for a
18 pound. You know, you got the notice of pendency of the
19 class action, you made a decision to either opt-out or
20 stay in. People opted out. They got that notice.

21 And, you know, there are -- there are practical
22 reasons why that should be respected. I mean first of
23 all, you have due process notice, people got it, they
24 made a decision and they live with that decision, that's
25 what it's about.

1 Second, you know, the Defendants pay based on
2 who's opted out. I mean that was very important to them.
3 I mean they wanted to know if, you know, individuals or
4 institutions were gonna file their own lawsuits 'cause
5 that would have made a difference to these people and I
6 think they counted on the fact that the opt-out period
7 was over, we were ready for the trial, and so I think
8 that it's perfectly appropriate for there to not be a
9 second opt-out.

10 In conclusion, Your Honor, I think as to just
11 the fairness, the reasonableness, and the adequacy of the
12 settlement, I don't think there can be any question about
13 that in this case. And if the Court is prepared to
14 approve the settlement or has -- you know, I'll move on,
15 if the Court has questions I'd be happy to answer them.

16 THE COURT: I don't have any questions at this
17 point.

18 MR. DOWD: Okay. Thank you, Your Honor. The
19 second issue that the Court is asked to address is the
20 plan of allocation itself. And, Your Honor, the plan of
21 allocation in this case is pretty simple. You get a pro
22 rata distribution based on the number of shares you held.
23 And I know that we've gotten some objections from I
24 believe two objectors, there was a Mr. Foster who was a
25 late filed objector who filed a reply again yesterday and

1 I think that, you know, when you walk through his sort of
2 objection and I think it can sort of be an objection to
3 the plan of allocation. I mean he talks about conflict
4 of interest. I struggle with this, Your Honor. 'Cause
5 somebody says, Gee, you're breaching your ethical
6 obligations, you have a conflict of interest. And I look
7 a what we did and I say, Wait a minute. We looked at
8 this thing, we said, Everybody were to get 53 cents from
9 the dividend, everybody will get their pro rata share and
10 they'll all get exactly what they'll get based on the
11 number of shares outstanding. If you had ten shares
12 you'll get, you know, X. If you have 100 shares, you'll
13 get ten times that amount.

14 I mean you couldn't have done something fairer.
15 There is no question, there's no pitting small
16 shareholders against large shareholders. It just doesn't
17 exist. I mean frankly, I think the accusation is just
18 completely unfounded and I think in this case, I mean I
19 can't even imagine that type of objection. So I think
20 that as to this, you know, there are problems between
21 larger and small. It doesn't exist.

22 As to the other issues that, you know,
23 Mr. Foster raises and I think one other objector, they
24 say, Well, why can't they just send me a check, you know?
25 Why do I have to fill out a form that tells me to list

1 how many shares I have. They have all that information.
2 Well, the simple fact of the matter, Your Honor, is they
3 don't have all this information. I mean the Court was
4 involved in conference calls with the parties when we
5 were trying to get all that information when we were
6 doing the notice of pendency. It's not true that Qwest
7 or its transfer agent have all that information. It's
8 true that they have better information in this case than
9 in most. I mean you probably had, you know, 500,000
10 people or some percentage of the class where they did
11 have information. Information that was five years old,
12 it doesn't account for people's addresses changing, it
13 doesn't account for people passing away. It doesn't
14 account for any of that stuff.

15 And then you still have another, you know, 35,
16 40 percent of the class that held through brokers. And
17 you have to go through the brokers to get that
18 information. There's no other way to do it. So I think,
19 you know, for them to say, Hey, you have the information,
20 just send me a check, practically it just doesn't work.
21 And that's why in every class action case, you submit a
22 proof of claim form. I mean it just has to be done.

23 It also ties into the fact that, you know, when
24 you look at these -- at the cases and, you know, and the
25 analysis that's done, you know, the reality is that, you

1 know, it has to be done that day. I mean the Defendants
2 get, you know, releases from the people, I understand
3 that they'd be released anyway if they hadn't opted out
4 but it's certainly something that they bargained for and
5 I think, Your Honor, there's just -- there are reasons
6 why it's done that way because you need people to decide,
7 do I want to share in the recovery.

8 You know, I found it remarkable that Mr. Foster
9 writes yesterday that I had said something I think he
10 said nonsensical or idiotic or a word like that 'cause I
11 said not every class member's gonna wanna submit a claim
12 form. Not everybody wants to share in the recovery. And
13 he says, Of course, everybody wants to share in the
14 recovery. And the reality is if you look at the
15 objections, there's at least one objector and maybe two
16 who say, I don't want a share in the recovery, I'm not
17 gonna submit a claim. So he says, of course everybody
18 does; the reality is, they don't. And that's why you ask
19 people to submit a proof of claim form. Nothing unusual
20 about it, it's done in every case and in this case, you
21 had to do it that way as a practical matter.

22 So I think, Your Honor, in the realities of the
23 situation are that the settlement is fair; the plan of
24 allocation despite any, you know, sort of arguments to
25 the contrary, the plan of allocation is also fair and

1 reasonable in this case.

2 I guess, Your Honor, that brings us to the, you
3 know, the fee and expense application and, you know,
4 which is I take it the bulk of Mr. Kennedy's objection,
5 there are other people who objected to it as well. And
6 we understand it, Your Honor. I mean, you know, we go
7 through this in, you know, a lot of cases, we represent
8 people in class action cases all the time. And, you
9 know, you hear things like, Well, gee the attorneys got a
10 windfall, you know. And nobody really looks at, you
11 know, what the result was and that there are other cases
12 out there where you don't get it.

13 And the reason is, Your Honor, because this
14 practice, class action law, filing cases like this is
15 about risk and reward. You know, you're not here getting
16 paid on the 1st and the 15th of every month like defense
17 counsel are for five years. I mean you're out there
18 risking your -- your resources, your practice and the
19 reward for that risk for laying out \$6 and a half million
20 dollars and over another million dollars in expenses over
21 a five year period is that when the case comes to a
22 conclusion, you apply or a percentage of the fee award
23 and you should be rewarded for that risk and the case law
24 says it. And I think that's very fair, Your Honor.

25 But to sort of go back to the factors that the

1 Court considers, I mean that's sort of an overview and I
2 understand that people get mad and look at it and say,
3 Plaintiffs' attorneys are getting too much but the
4 reality is, you encourage people to do these lawsuits so
5 that people do get a return in a class action and the
6 reward for that is to be on a contingency fee basis and
7 to get a percentage of the fund.

8 In general terms, Your Honor, you know, you
9 look at the fee and expense application, we asked for a
10 percentage of the common fund, it's been approved by the
11 Supreme Court, it's been followed by Colorado State
12 Courts, it's been followed by the Federal Courts in the
13 Tenth Circuit and across the country. I mean the common
14 fund percentage of the fund recovery for Plaintiffs'
15 counsel is what the law holds, it's what's justified and
16 it's what's right.

17 If you look at the factors that this Court is
18 asked to consider to determine what percentage to apply,
19 they're really in two different places but they're very
20 similar. You have the Colorado Rule of Professional
21 Conduct 1.5 that lays out factors that the Court should
22 consider and that mirrors to a large extent, I mean
23 they're the same issues the Johnson factors that have
24 been used by, you know, in courts throughout the country.

25 And I think, Your Honor, before I get to the

1 response to the objections, I'd like to just walk through
2 those factors 'cause I think it's better to go sort of in
3 order. The first three factors that are laid out in
4 those -- in the rule and the Johnson case are the time
5 and labor involved, the novelty and difficulty of the
6 questions presented, and the skill and experience of
7 counsel.

8 And, Your Honor, you know, I came in to this
9 case later on, I started helping at the class
10 certification stage and then I was the one that was gonna
11 try the case as Your Honor knows. I argued the motion in
12 limine in this court, I was here for preliminary approval
13 of the settlement. But Ms. Andracchio and my partner
14 worked on the case for five years from the time it was
15 initiated as did Mr. Shuman as did Mr. Westerman as did
16 Mr. Lurie.

17 And I'd ask with the Court's indulgence, I'd
18 like Ms. Andracchio to just address those first three
19 factors 'cause I think she's in the best position to
20 explain exactly what we did for the last five years. So
21 I'll let her do that and then I'll come back.

22 THE COURT: That's fine, sir.

23 MR. DOWD: Thank you, Your Honor.

24 MS. ANDRACCHIO: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MS. ANDRACCHIO: Laura Andracchio. All the
2 work that we've done, Your Honor, is set forth in great
3 detail in our papers, so I'm going to try to be
4 relatively brief. It took 30 pages to summarize what we
5 did so I'll try not to go on for that long but to
6 summarize, the case was very aggressively and actively
7 litigated for five years. Plaintiffs' Counsel, all three
8 firms did an inordinate amount of case -- of work on this
9 case. We spent almost 16,000 hours of our professional
10 time on the case. And all that work was necessary
11 because both sides believed adamantly in their positions.

12 We -- Defendants believed that we would never
13 be able to prove that a June 30 record date had been
14 declared. They also believed that if we couldn't prove
15 that, the case was over. And we, on the other hand,
16 believed that we could prove based on minimal but
17 powerful evidence -- what we thought was powerful
18 evidence -- that a June 30 record date had been declared
19 but we also thought and this was pivotal that even if a
20 July 10 record date had been declared which was
21 Defendants' defense all along that we could still win
22 based on substantial legal authority.

23 Now, Mr. Dowd went into more detail about all
24 that but these were the circumstances that drove both
25 sides for five years and drove us all the way to the eve

1 of trial. Now, some objectors have come forward and
2 they've looked at our Complaint and they've looked at the
3 amount of the settlement, they've looked at the amount of
4 the dividend and they've looked at the fact that the
5 settlement was reached on the eve of trial and based on
6 those few facts, they've cried foul. And we'd
7 respectfully submit that those objections are unfair and
8 very uninformed. And part of that may be because a lot
9 of the papers in this case were filed under seal so that
10 anyone who wanted to really look at what the evidence was
11 for us going into trial might not have really been able
12 to assess that or assess the competing legal positions
13 which we both very aggressively argued.

14 That said, I'd like to briefly summarize our
15 efforts and the risks that the Plaintiffs faced going
16 into trial for the benefit of some of those here who
17 maybe are only recently assessing the case. Our work
18 fell generally into several categories. There was fact
19 discovery, there were dispositive motions, there was the
20 class certification phase, there was mediation, there was
21 expert discovery, and then there was trial preparation.

22 We took -- in fact discovery we obtained a
23 substantial amount of documents from the Defendants and
24 third parties, many of which we had to fight for. People
25 don't realize that you go out and subpoena a third party

1 or we asked Defendants for documents, oftentimes they
2 don't just hand them over, you have to meet and confer,
3 maybe file motions and in one case we had to do this in
4 this case. So we fought for a lot of those documents.

5 Among the documents that we did receive was a
6 U.S. West -- we received it from Defendants -- was a U.S.
7 West certified resolution signed by a corporate secretary
8 of U.S. West that said -- it certified that the Board had
9 declared a June 30 record date at its June 2, 2000, Board
10 meeting and that's what we had alleged. We were happy
11 about that document. But then we went out and we took
12 the depositions of 23 fact witnesses in varying locations
13 across the country and that was a lot of work and a lot
14 of expense, Your Honor, just preparing for the
15 depositions, taking them, traveling. We took Saul
16 Trujillo in California just to give an overview. We took
17 nine other former U.S. West directors in locations
18 including Florida, Ohio, Minnesota, Idaho, Denver,
19 Northern California, Arizona. We took Qwest's former CEO
20 in New York. We took U.S. West transfer agent in
21 Massachusetts. We took several former U.S. West
22 employees in Denver and Georgia and those included U.S.
23 West's former general counsel and its former CFO.

24 Of the 23 fact witnesses we deposed, 11 of them
25 attended the June 2000 U.S. West Board meeting where the

1 dividend issue was declared. And all 11 denied that a
2 June 30 record date had been declared and that was
3 contrary to our allegations and that was contrary to the
4 certified resolution that we -- that Defendants produced
5 in discovery.

6 Before and after the fact discovery -- and this
7 goes into the dispositive motion part of the case --
8 before and after fact discovery, Defendants mounted
9 strong, aggressive defenses in every critical procedural
10 stage of this case. And we fought equally aggressively
11 in response. They filed a motion to dismiss. They filed
12 two motions for summary judgment. They filed a Rule
13 56(h) motion and they aggressively opposed class
14 certification as Your Honor may recall.

15 After fact discovery was completed, for
16 example, Defendants renewed an earlier motion for summary
17 judgment and we brought our own motion for summary
18 judgment. The Defendants argued that since everyone who
19 attended the U.S. West Board meeting denied that a June
20 30 record date had been declared that our claims had to
21 be dismissed. And we argued on the other hand that the
22 certified resolution and the testimony of one witness
23 indicated that a June 30 record date had been declared
24 and that it raised a triable issue of fact.

25 We also argued that even if the record date was

1 July 10, that we were -- Defendants were still liable as
2 a matter of law on both the contract and the breach of
3 fiduciary duty claims. The Court denied both of the
4 motions for summary judgment and that left this very
5 pivotal legal issue alive for trial whether or not there
6 was liability on the July 10 record date.

7 After both sides summary judgment motions were
8 denied, the final procedural hurdle, Your Honor, was
9 class certification. And as I mentioned before, the
10 Defendants mounted an unusually aggressive defense to
11 class certification. They went to the extreme of hiring
12 two experts, one of whom they paid almost a half a
13 million dollars to give opinions that the class should
14 not be certified. And those experts raised complex
15 financial, economic securities issues and Plaintiffs'
16 Counsel consulted with five experts just to be able to
17 understand those opinions and to depose those experts
18 effectively and then to be able to cross-examine them at
19 the class certification effectively.

20 I mean we didn't just start deposing these
21 people, we had to talk to people who knew as much or more
22 as Defendants' experts did in order to be able to do all
23 of that. And this also goes sort of a lot unspoken but
24 also in the context of class certification, both the
25 named the Plaintiffs and the pension funds money manager

1 produced a substantial number of documents which we also
2 had to review before they were produced and they sat for
3 three depositions that were taken by Defense Counsel.
4 And that's never a pleasant experience for anyone that's
5 representing a class. But after substantial briefing on
6 the class certification, as Your Honor may recall, there
7 was a lot of briefing on that with appendices and
8 everything, Your Honor, held a one and a half day hearing
9 that was akin to a mini-trial. So there was an awful lot
10 of preparation that went into that as well, you know, on
11 top of everything we had already done.

12 We -- the Plaintiffs presented the testimony of
13 three experts, the Defendants presented the testimony of
14 two experts. We had opening and closing arguments on
15 both sides and after the class certification, Plaintiffs'
16 Counsel had to brief additional issues that were raised
17 at the hearing. So just in short, obtaining class
18 certification in this -- in this particular case required
19 an unusual amount of effort and expense on our part. So
20 that said, the Court did certify the class in January of
21 this year and after the class notice was entered, our
22 firm worked very closely with Jilardi, the claims
23 administrator, so that was a lot of time that we put in,
24 too, just to make sure that the class notice procedures
25 were effectively carried out under this Court's order.

1 And the class notice was also very expensive. It was
2 almost \$400,000 just to give notice to the class before
3 there was any settlement notice.

4 After -- after that occurred, we decided that
5 maybe it would be beneficial to mediate the case after
6 the class was certified. So the parties selected a
7 former United States District Court Judge and we mediated
8 for two full days before him. And after two full days of
9 mediation when we put forth our evidence, we submitted
10 mediation briefs with all of the law, we submitted
11 appendices with the exhibits that would be considered at
12 trial. After two full mediation sessions, we were still
13 very far apart. We were unable to resolve the disputes
14 so we, you know, we went forward and we continued to
15 prepare for trial. And we also continued to negotiate
16 with the oversight of this particular mediator and in
17 fact, his oversight and judgment was very important in
18 achieving this settlement.

19 And while we were -- part of our trial
20 preparation efforts included another extensive round of
21 expert discovery and this -- we did the class cert expert
22 discovery, then we had to do expert discovery for trial.
23 And a total of seven experts were designated by both
24 sides. That, again, required a lot of work. Every
25 expert submitted lengthy, complex reports. I mean some

1 of them were 30, 40 pages and these were on issues like
2 contract and fiduciary duty issues, complex economic
3 issues, finance issues, accounting issues. So, again, in
4 the context of preparing for trial and experts who would
5 testify, we worked extensively with our own testifying
6 and consulting experts among our consulting experts were
7 in-house forensic accountants who helped us understand
8 some of the accounting issues involved in declaring a
9 dividend.

10 And in short -- oh, we also deposed before
11 trial occurred, we deposed all three of Defendants
12 experts, they deposed all of ours. Again, lots of
13 preparation for those depositions and to prepare our own
14 experts to testify. So while we were also doing all
15 that, we were doing other things to prepare for trial.
16 We -- that included -- and this was one of the largest
17 expenses, actually, it included moving an entire team of
18 attorneys, paralegals, IT personnel who do the computers
19 and computer graphics and administrative staff to Denver
20 from California and we did that more than two weeks
21 before the trial commenced. And while we were doing all
22 of that and everybody was moving here and we were making
23 our final trial preparations, we also filed several
24 motions in limine, we argued them before this Court and
25 we also filed a very lengthy trial memorandum that put

1 everything together very comprehensively and the TMO
2 which we filed jointly with the Defendants.

3 By the time -- to summarize, by the time that
4 this case settled, Plaintiffs were fully prepared to put
5 on our case in chief. We had prepared cross-examinations
6 and exhibits for almost every case in chief witness. We
7 prepared an opening statement. We prepared demonstrative
8 exhibits. I mean we were ready to go when this case
9 settled.

10 So in summary, Your Honor, this is not like
11 some cases that settle after there's little or no
12 discovery or before the class is certified or before
13 anyone even thinks about trying the case. And I would go
14 through the risks, Your Honor, if you'd like me to, but I
15 think Mr. Dowd handled the risks that we faced going to
16 trial but they were -- they were very high. I mean we
17 really honestly felt assessing this case in full that
18 there was a very large risk that we would walk away after
19 a trial with nothing.

20 Is Your Honor fully --

21 THE COURT: No, I don't need -- you don't need
22 to go through that.

23 MS. ANDRACCHIO: Okay. In summary, Your Honor,
24 we worked very, very hard on this case, almost 16,000
25 hours collectively among all the firms. It presented

1 legal and factual challenges. It required Plaintiffs and
2 their Counsel to be very diligent and very devoted to the
3 case. And in some ways I think it's remarkable that the
4 case actually survived to the point that the Defendants
5 considered it a big enough risk to pay the class what
6 they're paying it.

7 And I -- I -- we do firmly believe that this
8 settlement's a very good result and I thank you.

9 THE COURT: Thank you.

10 MS. ANDRACCHIO: Thank you for your time.

11 MR. DOWD: Your Honor, I apologize for taking
12 up so much time but I just wanted to --

13 THE COURT: It's an important issue and I will
14 give you time and if Mr. Kennedy wants to say more, he'll
15 have an opportunity.

16 MR. DOWD: I appreciate it, Your Honor. I
17 appreciate it. You know, Ms. Andracchio just addressed
18 sort of the first three factors that the Court's asked to
19 consider in determining the reasonableness of the
20 percentage requested. There are other factors. I mean
21 one of the other factors is preclusion of other
22 employment. I think that's, you know, clearly applicable
23 in this case. I mean these firms worked over 15,000
24 hours on this case. That's 15,000 hours that could have
25 been worked on other cases over the last five years

1 making other cases better, doing other cases, and that's
2 a fact that it clearly cuts in our favor in this case.

3 The next factor that the Court is asked to
4 consider is the customary fee or level of award in the
5 case. Your Honor, you know, we've cited a host of cases
6 in our briefs from both Colorado state Courts and Federal
7 Courts where Courts have awarded 30 to 35 percent in
8 complex class action litigation and I think it's very
9 justified here. I mean if it's justified in complex
10 class actions generally and we have all these cases that
11 say it is from Colorado, I think it's clear that it's
12 justified in this case that settled on the eve of trial.

13 And I note, Your Honor, that in looking back
14 over the case law and writing the briefs, one of the
15 cases I noticed was the Storage Technology case. And in
16 that case, the Court -- the District Court in Colorado
17 awarded a 30 percent fee on a \$55 million settlement and
18 noted that it was one of the largest settlements in
19 Colorado history that was about ten years ago. But I
20 have to think that this 50 million is also one of the
21 larger settlements or awards in Colorado history and I
22 think that also justifies a 30 percent fee.

23 It's simply not extraordinary. I mean you look
24 at, you know, some of the things that Mr. Kennedy just
25 said, he says, Oh, look at that Denny v. Jenkins and

1 Gilcrest. I think if you look at that case, Your Honor,
2 it doesn't look to me like they took depositions before
3 they settled the case. It looks like they did
4 confirmatory discovery after the settlement.

5 And so, you know, I think when that case starts
6 talking about fees of 30 percent not being justified you
7 have to look at the facts of the case, it's very
8 different. I mean in this case all the work was done.
9 We were ready to go. When we settled this case, we were
10 working on the opening statement and getting ready for
11 the witnesses. I mean we were ready to try this case and
12 we were two weeks away from finishing the trial as this
13 Court well knows.

14 So I think that's a different case and if you
15 look at these cases, you have a case like Xcel, Your
16 Honor, that we cited in our papers, the Court awarded 25
17 percent of an 80 million fee and there had been no
18 depositions taken in that case. All there was was, you
19 know, an early settlement for whatever reason. And I'm
20 not criticizing that, but there are 25 percent fee before
21 you even got close to taking the depositions in the case.

22 Also, Your Honor, this isn't a case like some
23 where there's a government investigation, where there's a
24 roadmap laid out for Plaintiffs' Counsel where things are
25 done, where people have provided prior testimony or

1 statements. I mean this case was worked from square one
2 from the time that Ms. Brody filed this lawsuit and
3 sought an injunction trying to prevent U.S. West from not
4 paying the dividend, asked to have the money put aside,
5 you know, basically frozen with a TRO. I mean from that
6 time, this case was litigated purely by Plaintiffs'
7 Counsel by themselves.

8 And I think when Mr. Kennedy cites the cases in
9 the Denny case that say, Well, you know, you have
10 different where you get over a certain dollar amount, you
11 know, there's cases that go both ways on all that stuff,
12 Your Honor. There's a Lupran case that we cited in our
13 papers somewhere that says, Hey, you know, people always
14 say that, that in mega-fund cases, you know, \$100 million
15 in that range, people don't get a 30 percent fee award or
16 a 25 percent fee award. And it says, you know, it's just
17 not true. If you do an empirical analysis like they did
18 in some of the Ninth Circuit cases, it's just not true in
19 the mega-fund cases.

20 So there's case law that goes both ways. But
21 the reality is you have to judge this case. And in this
22 case, the work was done for five years. If any case ever
23 deserved a 30 percent fee award, it's this case and I
24 think that's very true, Your Honor. So that factor again
25 cuts in our favor.

1 The other big issue and I've sort of addressed
2 it a little bit is was it a fixed fee case or was it a
3 contingency case. That's a huge factor supporting a 30
4 percent fee request in this case, you know, I've said it
5 a number of times. The case was litigated for five
6 years. Nobody paid us that entire time. Nobody fronted
7 our expenses, we paid all that money. We were the ones
8 at risk for the class all by ourselves. If this case had
9 been a shutout which it very well might've, you know, I
10 think that we would've been out all that time hand all
11 that money and no one would've been calling us to say,
12 Gee, we're sorry that you spent that money on
13 photocopies. We're sorry you spent, you know, 250-,
14 \$300,000 on experts. We're sorry you spent \$400,000
15 sending out the notice to the class members. Nobody
16 would've done any of that for us.

17 But now after the fact when we laid all that
18 money out, that's when people have questions, and I think
19 that the reality of the situation is the fact that this
20 is a contingent fee case where people worked without
21 compensation for five years is a huge factor that
22 supports this. There was clearly no guarantee of success
23 and it's clear that the Plaintiffs' Counsel in this case
24 stuck to their guns to get a better settlement. I mean
25 if we wanted to dump this case and just get a settlement

1 and get our money back, we could've done it back in March
2 or April with whatever the Defendants were offering at
3 that time and it wasn't enough. 'Cause we knew how
4 important this case was. You know, I talked to people
5 about this case, too.

6 I mean I know that the U.S. West retirees are
7 here today, you know, everybody got the notice of
8 pendency in this case, you know? No one called me to ask
9 how they could help back then. And I was looking for
10 witnesses in April, Your Honor, when that notice went
11 out. I mean we went through documents that Qwest
12 produced to find every letter that was written to Qwest
13 when the dividend was not paid and I called by phone
14 every single one of those people asking them if they
15 would come testify in this courthouse. You know, some of
16 these people had passed away, others were unwilling to
17 get involved, and I had four people who stepped up. They
18 were between the ages of 78 and 81. They lived in New
19 Jersey, North Carolina, Eastern Colorado, and San
20 Francisco. And all four of those men even though they
21 were between 78 and 81 said, Yeah, I'll fly there 'cause
22 I don't like what happened in this case. I don't like
23 that they didn't pay me the dividend and I depended on
24 it.

25 No one else stepped forward. No one called me.

1 I never heard from Mr. Kennedy after the notice of
2 pendency went out telling me I got witnesses that you can
3 use and I was looking for 'em, Your Honor. So I think
4 that the reality is those four people that knew how hard
5 we worked that worked with us that were willing to come
6 testify when I talked to them about this settlement, they
7 were ecstatic about it. And I think they understood what
8 we went through and how much work we did. And I think
9 that's another factor. They understood it was a
10 contingency, that we were laying out all the money, they
11 worked with us, they were willing to come forward, and
12 they had supported the settlement to me at least in my
13 discussions with them.

14 The next issue, Your Honor, is the
15 undesirability of the case. And, Your Honor, this case
16 was filed by Ms. Brody, the Teamsters local pension fund
17 joined in. It was a case that no one else filed, you
18 know? There weren't a lot of people, you've got, you
19 know, objectors here now. None of them filed the case.
20 None of them said, Gee, I wanna be involved in it. It
21 just wasn't a case that plaintiffs' firms were knocking
22 down the door to get to. It's a weird case, Your Honor.
23 I mean it truly is. I mean whether a dividend has to be
24 paid after a merger.

25 I'd note for the Court and it has nothing to do

1 with this settlement, but it's interesting just to show
2 the impact a case like this can have in the future, you
3 know, Unical declared a dividend recently and when they
4 declared the dividend, they knew that there was a merger
5 pending and when they declared that dividend, they
6 specifically noted in the dividend declaration and the
7 press release that went out that if the merger happened,
8 the dividend would not be paid. So it's interesting. I
9 think the Defendants look at the law, too, corporations
10 look at the law, too. They knew what happened here. And
11 they didn't wanna be sued for this going forward. But
12 back then in the year 2000, I don't think anybody was
13 even thinking about cases like this. And so I think it
14 wasn't a case that people were chomping at the bit to do
15 and that's another factor that justifies the request.

16 The next issue, Your Honor, is the amount
17 involved or the result of the case. I think there could
18 be no question that in this case, there was a substantial
19 benefit in this \$50 million cash settlement in the face
20 of great odds and great risks as we've outlined for the
21 Court.

22 You know, the other considerations the Court
23 can take into account in determining the reasonableness
24 of the request or the reaction of the class. Again, you
25 have 11 people that have concerns; you have 760,000 that

1 got the notice and who said nothing. So I think that's
2 an issue.

3 I think there could be no question that when
4 you go through Rule 1.5, and the Johnson factors every
5 single one of those factors cuts directly in our favor in
6 this case.

7 The last check, Your Honor, and I think the one
8 that causes all the problems, the angst for people is
9 what they call the lodestar cross-check. And I just
10 wanna be clear with the Court and with the objectors and
11 everyone else. I mean we're not asking for a lodestar
12 based fee, and I think that might be part of the problem.
13 I mean this isn't a case where somebody's doing a civil
14 rights case and you have statutory fee shifting to the
15 Defendants and then you come in and you lay out all the
16 time you did and they can pick through it and figure out
17 whether you lost some claims and won others and whether
18 those hours should be cut out.

19 This is a percentage of the fund case. The
20 only purpose in a multiplier or the lodestar cross-check
21 is just to see if there's anything when you do that
22 analysis that would lead the Court to conclude that the
23 request is just excessive. That's all it's about. It's
24 like a check and a balance to see if it's excessive. If
25 you look at the time that was submitted and it's clear

1 under the case law, you look at the Rite Aid case from
2 the Third Circuit, they say, Hey, when you're awarding a
3 percentage of the fee or a percentage of the fund
4 recovery, you can rely on time summaries or a summary of
5 just the hours because you're not doing that other type
6 of case, the lodestar multiplier case. So summaries are
7 just fine.

8 And when you add up that time and multiply it
9 out by the hourly rates, it comes out to about six and a
10 half million dollars. That results in a multiplier based
11 on this fee request of 2.3. That's well within the
12 range, Your Honor. I mean the cases that we cited to
13 this Court say that multipliers of two to three are
14 common. They're given in many, many cases. They're the
15 overwhelming majority. We cited cases where people got
16 multipliers of eight or nine on awards of \$100 million
17 recoveries where depositions weren't even taken.

18 And so I think the 2.3 multiplier request is
19 very fair in this case. And I'd note that I don't think
20 Mr. Kennedy even can seriously question that. I mean he
21 did a class action case and he signed a declaration where
22 when he asked for his lodestar multiplier, he said an
23 enhancement of 1.4 is well within the enhancement range
24 typically granted by Courts for class action
25 representation of 1.25 to 2. So back when he was making

1 a request on behalf of the U.S. West Retirees
2 Association, he thought that a multiplier of 2 was well
3 within the range.

4 So I think, Your Honor, that to question that
5 now is just -- it's just not fair. I mean the reality is
6 that this is a case that was litigated for five years.
7 The multiplier is 2.3, if you cut out some hours, maybe
8 it would be 2.5. It's still well within reason when you
9 have cases that say it's 2 to 3. And the other reality
10 is, Your Honor, we know we're asking for a percentage of
11 the fund going into it. This isn't a case where, you
12 know, we're asking for a multiplier or we're defense
13 counsel. We don't have any motivation to overstaff
14 cases. We don't sit there and say, Hey, Let's put 10
15 partners on it to build up the lodestar. That's not how
16 our business works. I mean if you're a plaintiffs' class
17 action counsel, you're trying to get a recovery, you're
18 trying to do the case, you're doing it on a contingent
19 basis. You're not sitting there saying, How can I get as
20 many hours into the case as I possibly can?

21 It just makes no sense. You are doing it on a
22 contingency. If you got a multiplier of eight, you know,
23 like some of these people did, they're happy about that.
24 They're not trying to figure out how to make up hours to
25 get it down to a multiplier of four. It just makes no

1 sense. So I think that's, you know, that's a major
2 underlying issue that people need to address.

3 The other thing, Your Honor, is I think you
4 look at, you know, you look at their expenses and, you
5 know, it sounds like a lot of money. I mean initially we
6 said we wouldn't exceed 1.7 and then when we, you know,
7 figured everything out after all the bills were, you
8 know, squared away and we had to figure out that
9 everything was right, it was about 1.33 I think was the
10 total amount.

11 It sounds like a lot, you know, about 400,000
12 of it is the notice of pendency going out. So that takes
13 you down to about \$900,000. You have I think at least
14 another 200-, 250- for just experts that were paid who
15 did reports that were a tremendous benefit to the class
16 and that takes you down to about 700,000 over five years.
17 I mean you're really looking about 130-, \$140,000 per
18 year in expenses. You know, and the types of expenses
19 we're claiming are all normal things. I mean
20 photocopies, telephone, you know, messenger. I mean it's
21 money that you take out of your pocket.

22 I mean those are the kind of things that Courts
23 routinely award. They're the types of things that, you
24 know, I'm sure Qwest pays every time they hire outside
25 counsel that they're paying on the 1st and 15th. I mean

1 these are just the kind of things that corporations pay
2 and we fronted the money. I mean it's just not fair for
3 someone to say you shouldn't be reimbursed for it five
4 years later when you got \$50 million for the class.

5 As to, you know, some of the in-house time that
6 we used, yeah, you know, we put our in-house accountants
7 in the expenses. I remember years ago we had a case
8 where we put 'em in the lodestar and the Judge said they
9 should be in the expenses, don't put 'em in the lodestar,
10 it makes your lodestar look higher. So it cuts both
11 ways, Your Honor, you can't win for losing. All right?

12 So the reality is that when we use our in-house
13 forensic accountants, they are the best in the business
14 and I say that because they've been working at the firm,
15 I mean we listed their background, these are guys, all
16 three of 'em that worked on this case or did the majority
17 of the work have CPA's, they've been in Big Six
18 accounting firms. They know their business. I mean I
19 like to say about our guys especially our director that,
20 you know, they're the only people in America that have
21 seen the in-house documents on every major fraud in the
22 last 15 years that's been committed by corporations in
23 this country. And they're well worth what we pay 'em.

24 And to be honest you'd pay a lot more because
25 when we went out and got an accounting expert or we were

1 looking at some of their experts' reports and things like
2 that, if you used an outside consultant, you'd pay a heck
3 of a lot more. And I just know that, Your Honor, because
4 they have to do more to get up to speed on the case.
5 They probably have, you know, higher hourly rates
6 oftentimes. And so the reality is, it saves money for
7 the class. And if we didn't use 'em on this case, we
8 could use those people on other cases. So I think that
9 is fair for us to ask for that as an expense as well.

10 I think, Your Honor, that, you know, the
11 reality is here, this isn't some sort of agreed-to fee.
12 There's no collusion. There's no question about what
13 work was done in this case. I hope the Court has no
14 question about the quality of the work and the type of
15 work that we did and the benefit to the class. And that
16 said, Your Honor, unless the Court has any specific
17 questions, I'll sit down.

18 THE COURT: I don't. Thank you very much.

19 MR. DOWD: Thank you.

20 THE COURT: Anything on behalf of Defendants?

21 MR. THEIS: Thank you, Your Honor, Larry Theis
22 on behalf of the Defendants. I have really very little
23 to add. I heard Mr. Kennedy raise two issues. One was
24 some confusion as to the source of the funds. I think
25 that's been cleared up. The other was all relating to --

1 related to the fee and cost application. The only thing
2 that the Court is required to do today is determine the
3 fairness, adequacy, and reasonableness of the settlement.
4 And our filing in response to the -- to all of the
5 objections at page 13 goes through an analysis of
6 numerous cases that hold that the determination of the
7 fee award is a separate determination from the fairness,
8 adequacy, and reasonableness determination.

9 And so the only thing I wanna add on the
10 fairness determination is I've been doing class actions
11 for 30 years, both prosecuting and defending them. I've
12 never been involved in one that after certification went
13 right up to the last day, the last business day before
14 trial. And why that is important here is that as trial
15 approaches there's a refining process. There's a
16 distilling of the essentials. Both sides -- and you had
17 very experienced counsel on both sides here -- have as
18 perfect knowledge as you can as trial approaches as to
19 what the strengths are and what the risks are.

20 And we were prepared as Mr. Dowd and
21 Ms. Andracchio they were prepared to put their best case
22 forward. But face it, both sides are looking down the
23 barrel of a gun right before trial. Mr. Dowd and
24 Ms. Andracchio and their colleagues could have ended up
25 with zero here and we strongly felt that they would. But

1 at the same time, my clients could have faced a very
2 substantial judgment. So the number that's reached in
3 settlement at that time is really defined and distilled
4 as I say by the kiln of the perfect knowledge of the
5 risks of proceeding and the strength. And I think that
6 the number therefore is as close to the right one as you
7 can get under the circumstances.

8 As Mr. Dowd pointed out, this case was based on
9 an unprecedented premise that a company merged out of
10 existence would have been required to pay a dividend
11 after the merger. Every percipient witness who was at
12 the Board of Directors meeting was prepared to support
13 our view of the case yet there were contemporaneous
14 documents that said something different. There were
15 witnesses who could not explain adequately what had
16 occurred and there's no perfect case on either side.
17 This certainly wasn't. So this settlement is a very fair
18 one, adequate to provide some compensation for a heavily
19 disputed claim and imminently reasonable under the
20 circumstances.

21 And unless the Court has any questions of
22 Defendants --

23 THE COURT: No, sir.

24 MR. THEIS: -- that's our position.

25 THE COURT: Thank you very much.

1 MR. THEIS: Thank you.

2 THE COURT: Mr. Kennedy?

3 MR. KENNEDY: Thank you, Your Honor. I just
4 wanna address a couple of remarks that were made by
5 Plaintiffs' Counsel to begin with. They indicated that
6 they had tried to contact shareholders to find out who
7 they might be and get some witnesses. Wouldn't it have
8 been easy for them to establish a website? They are
9 after all asking the Court to charge the settlement fund
10 for \$105,000 in computer and Lexis research, computerized
11 things without detail. But there was no website.

12 When I got involved, I looked around for this
13 Amended Complaint. I couldn't find it. There was
14 nothing. There is no website. There was nothing posted
15 for anyone to find out anything. So I think the
16 responsibility was on their part to provide this
17 information and to show that they were interested in the
18 shareholders and the retirees and make it easy for them
19 to know about this case and how to get involved.

20 And I wanted to point out that yes, there was
21 this decision in the Storage Tech case where Judge
22 Babcock I believe, yes, awarded 30 percent. I was at the
23 hearing. There was no objection. Times are changing.
24 shareholders are beginning to feel that they need to step
25 up and object and express that they think these

1 attorney's fee awards are getting way out of hand. And
2 the Lerach firm, the Wilberg (sic) firm, they're known
3 across the nation. They run a business. They do this as
4 a business. They do it as a calculated risk. They know
5 what they're doing. They take on so many of these case
6 knowing that they're gonna win some of 'em or get
7 settlements and go on to the next. It's not like they
8 chose a particular one and went after with all their
9 heart. And yes, they did a good job and we don't
10 belittle that but we think enough's enough.

11 And when you look at the cavalier way they
12 report their attorney's fees reports, nothing said, no
13 detail, unlike in all these other cases they rely on
14 where the Judges looked at the very detail of the time
15 records, specific detail. Magistrate Judge Pringle
16 looked at the detail in the Storage Tech case and found
17 it justified. We don't have any of that detail, because
18 they take the approach, well, they're just so used to
19 getting 30 percent and maybe they should just do it and
20 not say any more about it.

21 Well, that's -- that's just not the way it
22 should be. We should be looking at the results based on
23 the work put into this and we have no way of verifying
24 this. And they keep talking about 15,000 hours, well,
25 4,000 of it for paralegals. Paralegals that they are

1 saying the community which stands to pay 225 an hour. I
2 don't think this community pays paralegals 225 an hour
3 and they want two times that, 400 an hour for paralegals.
4 I don't even charge that and I've been practicing law for
5 24 years.

6 And yes, on a recent case that I got almost a
7 million dollar cash settlement, I asked for 1.4, my
8 lodestar, \$75,000 is what I got, less than 10 percent. I
9 practice what I preach. I think 1.53 is enough here.
10 And I think the retirees and the shareholders and the
11 silent majority and all the others across the nation are
12 watching these cases now are saying, Judge, give 'em a
13 reasonable amount but it's not the same as holding a
14 lottery ticket. Thank you.

15 THE COURT: The first issue for the Court to
16 determine is whether the settlement was fair, adequate,
17 and reasonable. And it certainly was. This was
18 litigated by extremely talented lawyers on both sides and
19 it went for five years. On the eve of trial, the Friday
20 before the trial was to start on Monday, I was informed
21 of the settlement. So Counsel for both sides were
22 knowing what the risks were and there was risk on both
23 sides. Whether the record date was June 30th as the
24 Plaintiffs claim or July 10th as the Defendants claim, it
25 was a factual issue, it was very much up in the air.

1 There was a press release that said June 30th. There was
2 a certified resolution of the Board that said June 30th.
3 But every witness that was at the meeting said it was
4 July 10th. The ordinary course of business was that the
5 dividend record date was the 10th of the month after the
6 quarter. So that issue was extremely difficult for both
7 sides. Both sides had evidence to support their
8 position. Both sides had evidence to refute the other
9 side's position.

10 Then the legal issue of liability whether you
11 decided it was June 30th or July 10th was another thing
12 that was hotly contested and not clear cut. If it was,
13 we wouldn't have gotten this far. There is case
14 authority that said that once you declare the dividend,
15 it's a contract and you have to pay it, but there was
16 never one case that either side cited to me and I'm sure
17 it didn't exist because they would've found it that said,
18 Yeah, it doesn't matter when you have a merger that it
19 takes effect that eliminates that responsibility to pay
20 the dividend.

21 So the issue of whether the Plaintiffs were
22 gonna get \$245 million plus interest or were gonna get
23 zero was entirely up in the air. And it's easy to say
24 now you should've gotten more, but \$50 million is an
25 awful lot of money no matter how you look at it. And

1 that was a very fair, reasonable settlement under the
2 facts of this case. It was arrived at not early on in
3 the proceeding, not after the -- before the case was
4 certified as a class. Not shortly after it was certified
5 as a class. It went all the way up to the point of
6 trial. And there is no doubt both sides were ready to go
7 to trial. I had their trial brief, I knew what they were
8 prepared to do. We had talked about it. We had rule don
9 the motions in limine, we were ready to go to trial on
10 that Monday morning. There was no doubt about it. And I
11 was surprised when they said they had a settlement 'cause
12 I didn't think -- I thought it was too far gone. So in
13 the Court's mind \$50,000 -- 50 million, excuse me -- 50
14 million is a very adequate settlement.

15 The Defendants had a theory that even if there
16 was gonna be liability that the amount of recovery was
17 greatly reduced from the \$253 million that the dividend
18 would have been and they had a good theory about why that
19 was the case, because the value of the shares of the
20 people would hold afterwards would be diminished by the
21 fact that this great amount of cash had been paid out.
22 So even if Plaintiff were able to prevail on the issue of
23 liability, the issue of damages was very much up in the
24 air.

25 Again, other factors that make this a fair and

1 reasonable settlement. And today we have nobody, nobody
2 coming forward who's saying, this settlement was not
3 reasonable. The objector says, This was a great result.
4 And it was a great result. So there is no doubt. There
5 is no argument that this was a fair, adequate, and
6 reasonable settlement arrived at, after fair
7 negotiations, after mediation -- two days in mediation
8 with an experienced mediator. There was no collusion or
9 anything of that nature and there's nobody that would
10 ever claim such a preposterous thing. So the Court is
11 very confident and very secure in saying that this
12 settlement is fair and reasonable.

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

24 There wasn't any other lawyers in the United
25 States that took the gamble that these people did. Not

1 one other firm anywhere said I'm willing to take that on.
2 I'll go five years. I'll pay out the expenses. I'll put
3 my time and effort on the line. Nobody did. You can say
4 that's a lot of money to get 30 percent of this
5 settlement, but a lot of lawyers had a crack at it and
6 they didn't do it.

7 But I'll go through the Johnson factors. Time,
8 labor involved was astronomical. The novelty and
9 difficulty of the question. I just mentioned that in
10 talking about the reasonableness of the settlement. This
11 was never clear cut by either side. It took a lot of
12 work to get out the facts, it took a lot of discovery.
13 The experts on both sides were excellent. To prepare to
14 cross-examine those experts was difficult, it took a lot
15 of skill and preparation. To prepare your own experts
16 took a lot of difficulty and skill. The skill required
17 to perform the legal services was extreme.

18 The Plaintiffs' Counsel faced Defense Counsel
19 that were equally well-prepared and extremely, extremely
20 talented. There wasn't any issue that wasn't fought. It
21 took a great deal of skill to get to the point of trial.
22 The preclusion of other employment, when you put this
23 much time into an effort for five years, obviously, other
24 employment is precluded.

25 Customary fees, 30 percent has long been

1 considered a reasonable contingent fee. In cases as
2 simple as a personal injury liability case of an
3 automobile accident, 30 percent on a contingency fee is
4 appropriate. But this is far more complicated than any
5 car accident.

6 Any prearranged fee. There was not other than
7 it was going to be a contingency. Time limitation
8 imposed by client or circumstances. That really wasn't a
9 factor. The amount involved and the results obtained.
10 As I indicated, there isn't anybody here today that says
11 the result wasn't anything but great.

12 The experience, reputation, and ability of the
13 attorneys. And I had the opportunity to watch these
14 attorneys throughout this period of time when I had this
15 case and the ability is terrific. The experience and the
16 reputation speaks for itself.

17 And awards in other similar cases. And 30
18 percent is not considered any way extreme in fee. I
19 don't look at the lodestar, but if you did there's fees
20 of three to four percent or three or four times are
21 considered normal. This is 2.3. Fees of lodestar of
22 seven or eight percent -- seven or eight have been
23 accepted.

24 But the fact is they're asking for 30 percent
25 after five years of struggling with the risk of getting

1 zero. Do the shareholders want more? Absolutely. But
2 They're fortunate they had some lawyers that had the guts
3 to come forward and do it. It's easy to say that's too
4 much money, but this is cash in the shareholders' pocket.
5 This isn't a coupon you take to Blockbuster to get 50
6 cents off. This is cash. And that cash would not have
7 been obtained without these people doing what they did
8 for five years.

9 I think the expenses are reasonable. I find
10 Counsel to be honest and if they tell me that's what the
11 expenses, I believe 'em. Most of those expenses were the
12 \$400,000 to give notice. The \$250,000 to pay for the
13 experts that were absolutely essential. So I find that
14 the expenses are reasonable and necessary in this case.

15 I approve the settlement and I approve the
16 attorney's fees and I approve the expenses involved. Do
17 you have an order? I think somebody gave me an order,
18 but I don't know where it is now.

19 MR. DOWD: Your Honor, there's actually three
20 orders. There's an order on the settlement, there's an
21 order approving the plan of allocation that we talked
22 about, and then there is the order awarding attorney's
23 fees.

24 THE COURT: Okay.

25 MR. DOWD: May I approach?

1 THE COURT: Oh, I want to mention that some
2 people weren't here when I mentioned it before early on
3 in the lawsuit when I got it. One of the attorneys on
4 one of the Plaintiffs' side is by the name of Coughlin,
5 the same as my name. I'm absolutely no relation to that
6 person at all.

7 MR. DOWD: May I approach, Your Honor?

8 THE COURT: Yes.

9 (Pause in proceedings.)

10 THE COURT: I've signed it. A copy for both
11 Plaintiffs' side and Defense side. The originals will
12 stay in the court record.

13 Mr. Kennedy, I'm gonna write on your motion
14 that your request to intervene is granted, so there is no
15 question that you -- you're in the case and can take
16 whatever action you want.

17 MR. KENNEDY: Thank you.

18 THE COURT: Thank you. Court will be in
19 recess.

20 MR. DOWD: Thank you, Your Honor.

21 MS. ANDRACCHIO: Thank you, Your Honor.

22 (Whereupon these proceedings were concluded.)

23

24

25

DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

ADELE BRODY, et al.,
Plaintiffs,

v.

U.S. WEST, et al.,
Defendants,

and Concerning,

ELDON GRAHAM, HAZEL FLOYD
and MARY HULL,
Intervenors.

Case No. 00 CV 4142
Division 1

For Plaintiffs:
Michael Dowd, Esq.
Laura Andracchio, Esq.
Jordan Lurie, Esq.
Jeff Westerman, Esq.

For Defendants:
Lawrence Theis, Esq.
Steven Perfremment, Esq.

For the Intervenors:
Curtis Kennedy, Esq.

The matter came on for hearing on August 30, 2005,
before the HONORABLE JOHN WALKER COUGHLIN, Judge of the
District Court, and the following proceedings were had.

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