IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

MOTION FOR INTERVENTION BY
OBJECTORS GRAHAM, FLOYD, HULL and AUSWR

OBJECTORS ELDON **GRAHAM**, HAZEL **FLOYD**, MARY M. **HULL**, and the **ASSOCIATION OF U S WEST RETIREES**, by and through their counsel Curtis L. Kennedy, hereby move for leave to intervene with respect to the pending request for an award of attorneys' fees and expenses, and as grounds state:

1. On March 6, 2006 OBJECTORS timely submitted their "Notice of Objections" (Docket 942), and they incorporate herein the same arguments and contentions.

Introduction.

2. The Court has given preliminary approval to the proposed Class settlement set forth in a January 6, 2006 Class Notice. Lead Plaintiffs seek to be certified as representatives of a Class of shareholders which would include OBJECTOR Association of U S WEST Retirees (AUSWR).

3. AUSWR is a non-profit organization serving approximately 40,000 U S WEST/Qwest retirees, and their spouses. A majority of AUSWR members are members of the Class. OBJECTOR Mary "Mimi" Hull serves as the elected President of this retiree

organization. The Board of directors of AUSWR consists of retiree leaders, including OBJECTOR Eldon Graham and OBJECTOR Hazel Floyd. See www.uswestretiree.org.

4. OBJECTORS seek to limit the Lead Counsel's fee award to a reasonable amount, far less than the $96 million requested. OBJECTORS also seek to have the amount of expenses charged to the Settlement Fund limited to only those amounts reasonably incurred and documented by Lead Counsel as necessary for the advancement of this case. OBJECTORS have taken a position contrary to the position espoused by Lead Plaintiffs. Moreover, as shown below, there is a conflict of interest between Lead Plaintiff's interests and Lead Counsel's interest on the one hand and the interests of OBJECTORS and many tens of thousands of Class members on the other hand.

The Court Should Grant OBJECTORS Graham, Hull, Floyd and AUSWR Leave to Intervene.

5. The Tenth Circuit says an applicant may intervene as a matter of right pursuant to Rule 24(a) if "(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *Elliott Indus. Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

6. OBJECTORS seek leave to intervene as a matter of right pursuant to Rule 24(a)(2) and permissively pursuant to Rule 24(b)(2). The initial Complaint was filed on July 21, 2001. *Early* in this case, on October 16, 2001 (See Docket 18), Lead Plaintiffs and Lead Counsel were appointed before any other party had filed either a response or other motion

scrutinizing that request. Afterwards, on December 3, 2001, Lead Counsel filed an Amended Complaint (See Docket 27) adding named Plaintiffs, Clifford Mosher, Tejinder Singh and Sat Pal Singh. In support of their pending $96 million fee request, Lead Counsel heavily rely upon Declarations filed by the additional named Plaintiffs, (See Docket 936, 937and 938, Declarations by Singh and Singh and Mosher), who seek special compensation from the Settlement Fund while fully blessing Lead Counsel's exorbitant fee request.

7. Fed.R.Civ.Proc Rules 23(d)(2 & 3) provide that a court may enter "appropriate" orders allowing intervention, and imposing conditions on any intervenors. "Intervention under Rule 23 is intended to ensure that every class member is given an opportunity to be heard. . . The combined effect of Rule 23(d)(2) and Rule 23(d)(3) is to enable the court to mark out any level of activity for the intervening class members that is appropriate in the particular case." 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 3d* § 1799 (2005). *See also Corley v. Entergy Corporation*, 220 F.R.D. 478, 481 (E.D. Tex. 2004) (in certain landowners' proposed class action against defendant companies, court allows other landowners to intervene to file brief opposing class certification); *Montgomery v. Aetna Plywood, Inc.*, 1996 Westlaw 189347 *6 n. 2 (N.D. Ill. 1996) (granting absent class members' motion to intervene to file brief objecting to class certification).

8. AUSWR, a non-profit association established and operated for the benefit of U S WEST/Qwest retirees who are shareholders, has standing to intervene. See, e.g., *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 225 (4th Cir. 2001) wherein the appellate court

declared and noted:

> "[A]n association may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members who have been harmed." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir.2000) (en banc). Representational standing is established if "(1) at least one of [the organization's] members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit." *Id.; see Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

9. When considering a motion to intervene, the court "must accept as true the non-conclusory allegations of the motion." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). "A motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Id.* at 321 (citing *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir.1983)). Each intervention case is "highly fact specific and tend[s] to resist comparison to prior cases." *Id.* at 321.

10. In deciding whether an OBJECTOR may intervene as "of right," the Court should consider Lead Plaintiff's cavalier approval of Lead Counsel's request for excessive attorneys' fees. Amazingly, not one Lead Plaintiff has bothered either to audit or closely examine Lead Counsel's time records and expenses. This is quite apparent from a review of Lead Plaintiff's "Declarations" filed herein (See Docket Nos. 935-938) which parrot this boilerplate phrase:

> "[A]t various times throughout the course of the litigation or upon the proposed settlement of the action, I (a) engaged in periodic conferences with lead counsel and other lead plaintiffs; (b) participated in the litigation and provided input into the case; (c) made sure I was kept fully informed regarding case status; (d) reviewed pleadings and motions filed in this action; (e) participated in providing

> discovery to defendants, including sitting for a deposition and providing written discovery; (f) independently evaluated plaintiffs' claims and defendants' defenses; (g) provided significant input respecting litigation and settlement strategy; and (h) actively participated in and was kept advised of the settlement negotiations."

Notably, nothing is said about any examination of Lead Counsel's time records and expenses. It didn't happen.

11. Lead Plaintiffs have a special agenda they are pursuing, to recover a reward for time spent on this case. For example, Lead Plaintiff Sat Pal Singh seeks to recover an award of $&,650.00 which is based on 51 hours spent on this case, or $150.00 per hour. (Docket 936, ¶ 7). Lead Plaintiff Tejinder Singh seeks to recover an award of $8,408.40 which is based on 200.2 hours spent on this case, or $42.00 per hour. (Docket 937, ¶ 7). Lead Plaintiff Clifford Mosher seeks to recover an award of $11,280 which is based on 376 hours spent on this case, or $30.00 per hour (Docket 938, ¶ 7).

12. Under the specific facts and circumstances of this case, OBJECTORS have an interest in this litigation - securing the most amount of money for the Settlement Fund for distribution to the Class - which interest Lead Plaintiffs are not adequately protecting and which OBJECTORS will be unable to protect if they are not allowed to intervene and engage in discovery with respect to Lead Counsel's request for fees and reimbursement of expenses. The best way to clear any obstacles to challenging Lead Counsel's proposed award of $96 million in fees is grant OBJECTORS's application to intervene as of right.

A. OBJECTORS' Motion Is Timely

13. As a threshold issue, an intervenor's motion must be timely. Factors to be considered include the "length of time since the applicant knew of his or her interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (internal quotation marks and citation omitted), *cert. denied sub nom., American Special Risk Ins. Co. v. Rohm & Haas Co.*, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed. 2d 860 (1991). The test for timeliness, however, is essentially one of ***reasonableness***. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir.1994). Importantly, "the prejudice prong of the timeliness inquiry measures prejudice caused by the intervenors' delay--not by the intervention itself." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (citation and quotation omitted).

14. OBJECTORS did not learn of the Lead Counsel's outlandish fee request until several weeks ago. They filed timely OBJECTIONS. [1]

15. Under Rule 24(b)(2), anyone may be permitted to intervene in an action if his or her claim or defense and the main action have common questions of law and fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties. Permitting

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[1] Despite Lead Counsel's clear ability to post the pending fees and expenses request at either its law firm's website or the Claims Manager's website where the masses could obtain it at no cost, there is no such posting. Class members must expend *significant* time and effort to download almost 30 MB of information through PACER at a cost of almost $70.00. This failure to post copies of the legal filings where they could easily be obtained for free is a glaring example of Lead Counsel's unwillingness to keep tens of thousands of Class members adequately informed about this legal proceeding.

OBJECTORS to intervene in order to conduct discovery with respect to Lead Counsel's request for fees and expense reimbursement will not unduly delay or prejudice the primary settlement of this case.

B. OBJECTORS Have An Interest Relating To The Subject Matter Of The Litigation.

16. There can be no dispute that OBJECTORS have an interest relating to the subject matter of the litigation. The OBJECTORS have furnished all lead counsel with confidential documentation disclosing their ownership of Qwest common stock and their inclusion in the Class. Pursuant to Fed.R.Civ.P., Rule 24(a)(2), the proposed Intervenors need merely show that the disposition of the action "may as a practical matter impair or impede [their] ability to protect [their] interest." FED. R. CIV. P. 24(a)(2). The proposed Intervenors have met this requirement which requirement is to be construed liberally. "If any applicant would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene." FED. R. CIV. P. 24(a)(2), Advisory Committee Note. See, e.g., *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002) ("Whether an applicant's interest would be impaired by disposition of a lawsuit depends on the range of dispositions open to a court about which an applicant is entitled to be concerned, not the specific disposition the original parties are seeking to have a court approve."), quoting *Brennan v. Conn. State UAW Cmty. Action Program Council*, 60 F.R.D. 626, 631 (D. Conn. 1973); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).

17. Indeed, OBJECTORS have an interest to see that the Settlement Fund is maximized, while Lead Counsel receive fair compensation. OBJECTORS assert a significantly

protectable interest in the subject matter at issue, and they are trying to look out for the best interest of all other Class members by maximizing the Settlement Fund. There is ample legal authority for OBJECTORS's legal position which is diametrically opposed to Lead Counsel's legal position. In addition, none of the Named Defendants who participated in the stipulation for the partial settlement are asserting any objections to Lead Counsel's request. Presumably they have silently agreed to simply acquiesce during this stage of the litigation.

C. Disposition Of This Action Will Impair And Impede OBJECTORS' Ability To Protect Their Interests Which Are Not Adequately Represented by Lead Plaintiffs and Their Lead Counsel Who Have a Conflict With the Interests of Other Class Members.

18. OBJECTORS' interest – the interest of the Settlement Fund and tens of thousands Class members – is not adequately represented by either Lead Plaintiffs or Lead Counsel. Inadequacy of representation is shown if when there is proof that Lead Plaintiff's interest is adverse to that of the petitioning intervenor. As the Tenth Circuit observed, "that burden is the 'minimal' one of showing that representation 'may' be inadequate." *Utah Ass'n,* 255 F.3d at 1254 (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)). "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Id.* (quoting *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,* 578 F.2d 1341, 1346 (10th Cir. 1978).

19. Under Fed.R.Civ. Rule 24(a)(2), once an applicant has established an interest in the subject of the action, he must then 'demonstrate that the disposition of that action ***may***, as a practical matter, impair or impede the applicant's ability to protect that interest.' "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its

substantial legal interest is possible if intervention is denied. ***This burden is minimal***." *Utah Association*, 255 F.3d at 1253 (citations and internal quotations omitted) (emphasis added).

20. Lead Plaintiff's 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 their lack of adequacy. They do not share OBJECTORS's concerns. Under Rule 23(a)(4) a proposed class representative must be one who will "adequately protect the interests of the class." This "adequacy" requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). For example, in *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463-64 (10th Cir. 1974), the Tenth Circuit proclaimed: "It is axiomatic that a plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interests of the persons he would seek to represent." Here, Lead Plaintiffs have sold out to Lead Counsel to bless an extremely unreasonable amount of attorneys' fees being requested, an amount that shocks the conscience of tens of thousands of Class members. In so far as the attorneys' fees and reimbursement of expenses issues, it is inequitable to give undue weight to Lead Plaintiffs. 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.").

21. Had Lead Plaintiffs not sought to receive special compensation in this case, there might not have been such an outwardly obvious conflict of interest. Lead Plaintiff's

personal agenda has apparently tainted their ability to press for a more reasoned and much lower attorneys' fee award. This Court should allow OBJECTORS to intervene so as to conduct independent discovery of both the merits of the proposed settlement and the basis for Named Plaintiff's attorney's fee request. See *In re Gen. Motors Corp., Engine Interchange Litig.*, 594 F. 2d 1106, 1126 (7th Cir. 1979) (ruling the trial court should have allowed objectors to conduct discovery on fairness of alleged settlement).

D. The Court Should Order a "Time-Out" and Appoint A Master For Independent Oversight and Recommendation of the Amount of Attorney's Fees and Expenses.

22. There's seems to be a real rush on the part of Lead Counsel and Lead Plaintiffs to get this partial settlement over with and allow Lead Counsel to collect a king's ransom. [2] Instead of rushing to make a ruling on an award of attorneys' fees and expenses at the May 19, 2006 Settlement Hearing, the Court should order a "time out." OBJECTORS have acted in a timely and reasonable manner to file this motion. The timing of this motion could in no way prejudice the parties, as OBJECTORS are not opposed to Lead Counsel being justly compensated. And, Lead Counsel has asked for interest on any award made by the Court. OBJECTOR AUSWR, which organization's primary mission is to engage in efforts to protect the interests of all U S WEST/Qwest retirees including those who are Qwest shareholders, will be extremely prejudiced if this case is allowed to proceed in a hurried fashion to a final determination of an award of fees and expenses. Accordingly, this motion for intervention is timely.

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[2] This is a partial settlement, as the case will proceed against named Defendants Joseph Nacchio and Robert Woodruff.

23. OBJECTORS contend the Court should pause the proceedings and appoint a Special Master who can devote sufficient time to oversee the fairness of an award of attorneys' fees and expenses. Here, there is a proverbial pot of gold at stake and never in the history of this Court has there been a class Settlement Fund of this magnitude. Likewise, this Court has never seen an attorneys' fee request of this magnitude.

WHEREFORE, OBJECTORS, Eldon Graham, Mary M. Hull, Hazel Floyd and the ASSOCIATION OF U S WEST RETIRES, move this Court to enter an order granting them intervention for purposes of conducting discovery in opposition to Lead Counsel's pending motion for an award of $96 million in attorneys' fees, plus expenses to be charged to the Settlement Fund. Moreover, OBJECTORS request a postponement of the May 19, 2006 Settlement Hearing for determination of attorney's fees and expenses to be paid out of the Settlement Fund until after Lead Counsel has provided sufficient documentation and OBJECTORS and class members have sufficient opportunity to further respond to that request. Under the circumstances, the Court should appoint a Special Master.

Dated: March 23, 2006.

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Telephone: (303) 770-0440
Fax: (303) 843-0360
Email: CurtisLKennedy@aol.com
Attorney For OBJECTORS

Name and Address of each OBJECTOR/INTERVENOR:

Association of U S WEST Retirees
c/o Nelson Phelps, Executive Director
1500 S. Macon Street
Aurora, CO 80012- 5141

Eldon H. Graham
13629 SE 20th Street
Bellevue, WA 98005-4047

Hazel A. Floyd
4660 Newton Street
Denver, CO 80211-1161

Mary M. Hull
678 Clarkson Street
Denver, CO 80218

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2006, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to counsel of record in accordance with the January 5, 2006 Class Notice as follows:

Keith F. Park, Esq.
Michael J. Dowd, Esq.
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
mikeD@lerachlaw.com
Lead Counsel for Plaintiffs

Alfred Levitt, Esq.
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W., Suite 800
Washington, DC 20015
alevitt@bsfllp.com
Counsel for Settling Defendant Qwest

John Freedman, Esq.
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1202
john_freedman@aporter.com
Counsel for Defendant Arthur Andersen LLP

and 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.

s/ Curtis L. Kennedy