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11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 Robert Ree, Robert Cuva, Donald Fought,
14 Albert Jackson, Carl Kircher, Patricia Malloy,
And Sharon Quercioli, on behalf of
15 themselves and all others similarly situated

16 Plaintiffs,

17 v.

18 Warren E. Pinckert, II, Andrea Tiller and
Cholestech Corporation,

19 Defendants.
20
21
22

Civ. Action No. C99-0562 PJH
CLASS ACTION
Hon. Phyllis J. Hamilton

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION IN
SUPPORT OF LEAD
PLAINTIFFS' COUNSEL'S
APPLICATION FOR AN AWARD
OF ATTORNEYS' FEES AND
REIMBURSEMENT OF
EXPENSES; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: October 31, 2001
Time: 9:00 a.m.
Ctrm: Hon. Phyllis J. Hamilton

1 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD**

2 PLEASE TAKE NOTICE, that, pursuant to an Order of the Court dated August
3 13, 2001, on October 31, 2001, at 9:00 a.m., or as soon thereafter as counsel may be
4 heard, before the Honorable Phyllis J. Hamilton, United States District Judge, Lead
5 Plaintiffs will and hereby do move for an order awarding Lead Plaintiffs' attorneys fees
6 of 30% of the \$3,000,000 cash settlement fund, plus reimbursement of expenses
7 incurred, plus interest on such fees and expenses. Plaintiffs' motion is based
8 upon plaintiffs' Memorandum of Points and Authorities in Support of Lead Plaintiffs'
9 Counsel's Application for an Award of Attorneys' Fees and Reimbursement of
10 Expenses, the declarations of plaintiffs' counsel submitted in support thereof, the
11 Stipulation of Settlement dated as of July 31, 2001, all other pleadings and matters of
12 record, and such additional evidence or argument as may be presented at the hearing.
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1 **I. INTRODUCTION**

2 Petitioners herein are counsel to plaintiffs and the Class in this putative
3 securities class action against Cholestech Corporation (“Cholestech” or the
4 “Company”), Warren E. Pinckert, II (“Pinckert”) and Andrea Tiller (“Tiller”). Through
5 their efforts, petitioners have obtained a significant cash recovery – valued at
6 \$3,000,000 (the “Settlement” or “Settlement Fund”) – for benefit of the Class.¹ For the
7 reasons set forth below, plaintiffs’ Lead Counsel respectfully requests a fee award of
8 30% of the proposed settlement, plus reimbursement of expenses. Plaintiffs’ Lead
9 Counsel not only took extraordinary steps to achieve the \$3,000,000 cash recovery for
10 the Class, the Class was informed that counsel would seek a fee of 30% of the
11 Settlement and ***no objections to such a request were received***. The particular vigor
12 with which defendants opposed the Litigation, and the response required by plaintiffs’
13 Lead Counsel to prevail in negotiating any kind of settlement, warrants a 30% award.

14 The Settlement represents a successful and efficient resolution of a complex
15 class action which was prosecuted under difficult circumstances. Further, plaintiffs’
16 Lead Counsel undertook substantial efforts to achieve this result which included: (i)
17 thoroughly investigating the facts underlying the case before initiating the action; (ii)
18 filing detailed and comprehensive complaints and amended complaints; (iii) opposing
19 defendants’ multiple motions to dismiss the Litigation; (iv) conducting significant
20 informal discovery during the course of the Litigation; (v) reviewing, on a continuous
21 basis, the public filings, annual reports, trade journals and other public statements of
22 defendants; (vi) consulting with experts regarding liability, damages and stock price
23 issues presented by this action; and (vii) successfully negotiating a substantial
24 settlement with defense counsel on behalf of the Class.

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27 ¹ This motion incorporates by reference the definitions in the Stipulation, which
28 was filed with the Court on or about July 31, 2001. All capitalized terms used herein
shall have the same meanings as set forth in the Stipulation.

1 This favorable resolution occurred in the face of multiple, challenging obstacles.
2 While the Litigation was conducted with a high degree of professionalism on both
3 sides, defendants maintained an unusually aggressive posture from the outset and
4 were represented by extremely skilled and capable defense counsel. Had this case
5 proceeded, defendants could be expected to argue that the statements made by them
6 and the Company regarding Cholestech during the Class Period had a reasonable
7 basis in fact and that none of the alleged misstatements were actionable because the
8 risks were adequately disclosed, were statements of historical fact, were statements of
9 mere optimism or the statements were made by other parties, such as analysts, and not
10 defendants.

11 Accordingly, counsel for defendants repeatedly attacked the adequacy of
12 plaintiffs' original complaint and subsequently filed amendments. Defendants also
13 rigorously denied that the Class has suffered damage, that the price of the Company's
14 securities were artificially inflated by reasons of alleged misrepresentations, non-
15 disclosures or otherwise, or that the Class was harmed by the conduct alleged by
16 plaintiffs.

17 Ultimately, after multiple motions to dismiss and in the face of new evidence
18 obtained by plaintiffs, the parties made realistic and responsible assessments
19 regarding the merits of the Litigation. Settlement negotiations, including mediation with
20 the Honorable Eugene F. Lynch, retired, resulted in what plaintiffs' Lead Counsel
21 believe to be a significant settlement, particularly in light of the risks associated with
22 this case. These risks included, in part: (a) the inherent difficulties in proving damages,
23 including defendants' insistence that the damages in this case were zero; (b) the
24 particularly contentious nature of the Litigation; and (c) the difficult and sensitive
25 settlement negotiations which required extensive time to prepare for on the part of
26 plaintiffs' Lead Counsel. Despite the foregoing, plaintiffs' Lead Counsel never wavered
27 from obtaining the maximum value possible for the Class.
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1 Importantly, plaintiffs' Lead Counsel's efforts to date have been without
2 compensation of any kind and any fee award has been wholly contingent upon the
3 result achieved. As compensation for their efforts, plaintiffs' Lead Counsel respectfully
4 request that this Court award them attorneys' fees of 30% of the Settlement Fund, as
5 well as reimbursement of \$102,015.03 in expenses, which includes expert fees, and
6 interest on these awards at the same rate and for the same period as that earned on
7 the Settlement Fund.

8 The approval of such a request is warranted under these circumstances for the
9 reasons discussed herein. Moreover, in response to a nationally published summary
10 notice and the full notice of settlement mailed to more than 10,000 members of the
11 Class and current record holders of Cholestech securities, which advised members of
12 the Class of their right to object to plaintiffs' Lead Counsel's fee and expense request,
13 there have been ***no objections filed to date***. This fact is significant because the
14 Class includes, in addition to individuals, sophisticated financial institutions such as
15 mutual and pension funds which have counsel available to advise and represent them
16 and assist them in expressing any opposition to the request made here if they so
17 choose.

18 For the reasons discussed in greater detail below and in the Declaration of
19 Lionel Z. Glancy in Support of Final Approval of Settlement and Application for Award
20 of Attorneys' Fees and Reimbursement of Expenses (the "Glancy Declaration"),
21 plaintiffs' Lead Counsel submit that the requested attorneys' fees and expenses are fair
22 and reasonable under the applicable legal standards and -- in light of the risks faced,
23 the result achieved and the effort expended -- should be awarded by the Court.

24 **II. HISTORY OF THE LITIGATION**

25 The history of the Litigation, including the nature of the claims asserted,
26 discovery, the significant risks confronted by plaintiffs and plaintiffs' Lead Counsel, is
27 described in detail in the Glancy Declaration, filed concurrently herewith and, for the
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1 sake of brevity, is not repeated here.

2 **III. THE LEGAL STANDARD GOVERNING THE AWARD OF ATTORNEYS'**
3 **FEES IN COMMON FUND CASES**

4 **A. The Legal Standards Governing The Award of Attorneys' Fees**
5 **In Common Fund Cases Supports The Requested Award**

6 **1. A Reasonable Percentage of the Fund Recovered**
7 **Is an Appropriate Approach to Awarding Attorneys'**
8 **Fees in Common Fund Cases**

9 For their efforts in creating a common fund for the benefit of the Class, plaintiffs'
10 counsel seek as attorneys' fees a reasonable percentage of the fund recovered for the
11 Class. In recent years, the percentage-of-recovery method has become the prevailing
12 method for awarding fees in common fund cases in this Circuit and throughout the
13 United States. A percentage fee is desirable because it most fairly correlates the
14 compensation of counsel to the benefit conferred upon the class.

15 It has long been recognized in equity that "a private plaintiff, or his attorney,
16 whose efforts create, discover, increase or preserve a fund to which others also have a
17 claim is entitled to recover from the fund the costs of his litigation, including attorneys'
18 fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The
19 purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from
20 the creation of the fund should share the wealth with the lawyers whose skill and effort
21 helped create it." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d
22 1291, 1300 (9th Cir. 1994). This rule, known as the common fund doctrine, is firmly
23 rooted in American case law. *See, e.g., Internal Imp. Fund Trustees v. Greenough*,
24 105 U.S. 527 (1881); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).²

25 ² In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989), the
26 Ninth Circuit explained the principle underlying fee awards in common fund cases:

27 Since the Supreme Court's 1885 decision in [*Central R. & Banking Co. v.*
28 *Pettus*, 113 U.S. 116 (1885)], it is well settled that the lawyer who creates
a common fund is allowed an extra reward, beyond that which he has
arranged with his client, so that he might share the wealth of those upon

1 In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court
2 recognized that under the "common fund doctrine" a reasonable fee may be based "on
3 a percentage-of-the-fund bestowed on the class." In this Circuit, the district court has
4 discretion to award fees in common fund cases based on either the lodestar/multiplier
5 method or the percentage-of-the-fund method, the end requirement being that the fees
6 be reasonable under the circumstances. *Washington Public Power*, 19 F.3d at 1296.
7 In *Paul, Johnson*, 886 F.2d 268, *Six Mexican Workers v. Arizona Citrus Growers*, 904
8 F.2d 1301 (9th Cir. 1990), and *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370 (9th
9 Cir. 1993), the Ninth Circuit expressly approved the use of the percentage method in
10 common fund cases. Supporting authority for the percentage method in other circuits
11 and by commentators is overwhelming.

12 Since *Paul, Johnson* and its progeny, district courts in this Circuit have almost
13 uniformly shifted to the percentage method in awarding fees in representative actions.
14 Compensating counsel in common fund cases on a percentage basis makes good
15 sense. First, it is consistent with the practice in the private marketplace where
16 contingent fee attorneys are customarily compensated by a percentage of the
17 recovery.³ Second, it more closely aligns the lawyers' interest in being paid a fair fee
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20 whom he has conferred a benefit. The amount of such a reward is that
21 which is deemed "reasonable" under the circumstances.

22 *Id.* at 271 (emphasis in original; citations omitted).

23 ³ Courts are encouraged to look to the private marketplace in setting a percentage
24 fee:

25 The judicial task might be simplified if the judge and the lawyers bent their
26 efforts on finding out what the market in fact pays not for the individual
27 hours but for the ensemble of services rendered in a case of this
28 character. This was a contingent fee suit that yielded a recovery for the
"clients" (the class members) of \$ 45 million. The class counsel are
entitled to the fee they would have received had they handled a similar
suit on a contingent fee basis, with a similar outcome, for a paying client.

1 with the interest of the class in achieving the maximum possible recovery in the
2 shortest amount of time.⁴ Third, use of the percentage method decreases the burden
3 imposed on the Court by eliminating the detailed and time-consuming lodestar analysis
4 while assuring that the beneficiaries do not experience undue delay in receiving their
5 share of the settlement. See *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal.
6 1989).⁵

8 Suppose a large investor had sued Continental for securities fraud, and
9 won \$ 45 million. What would its lawyers have gotten pursuant to their
10 contingent fee contract?

11 *Matter of Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

12 ⁴ As noted by the 7th Circuit:

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

18 At the same time as it automatically aligns interests of lawyer and client,
19 rewards exceptional success, and penalizes failure, the contingent fee
20 automatically handles compensation for the uncertainty of litigation.

21 *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986).

22 ⁵ Professor Coffee argues that a percentage of the recovery is the only
23 reasonable method of awarding fees in common fund cases:

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

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1 **2. A Percentage Fee of 30% of the Fund Created is**
2 **Reasonable in this Case**

3 In *Paul, Johnson*, the Ninth Circuit established 25% of the fund recovered as the
4 "benchmark" award for attorneys' fees. 886 F.2d at 272. See also *Torrissi*, 8 F.3d at
5 1376. The guiding principle remains that a fee award be "reasonable under the
6 circumstances." *Washington Public Power*, 19 F.3d at 1296 (citation omitted). Courts
7 consistently award percentages of 30% or more in securities and other class actions.
8 See, e.g., *In re Safety Components, Inc. Sec. Litig.*, — F. Supp. 2d —, 2001 WL
9 1159133 (D.N.J. Sept. 27, 2001) (award of 33-1/3% in securities case); *In re Aetna,*
10 *Inc., Sec. Litig.*, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) (award of 30% in securities
11 case); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (award of 33-
12 1/3% in consumer case); *Neuberger v. Shapiro*, 110 F. Supp. 2d 373 (E.D. Pa. 2000)
13 (award of 33-1/3% in securities case); *Kurzweil v. Phillip Morris Co.*, 1999 WL 1076105
14 (S.D.N.Y. Nov. 30, 1999) (award of 30% in consumer case); *In re Medical X-Ray Film*

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

19 As former Chief Judge Brieant, of the Southern District of New York, commenting
20
21 upon the *Paul, Johnson* decision, succinctly stated:

22 Such an award is consistent with the new learning (old wine in a new
23 bottle) announced by the Ninth Circuit in *Paul, Johnson, supra*, which new
24 learning we believe will proceed from West to East and take us back to
25 straight contingent fee awards bereft of largely judgmental and
26 time-wasting computations of lodestars and multipliers. These latter
27 computations, no matter how conscientious, often seem to take on the
28 character of so much Mumbo Jumbo. They do not guarantee a more fair
result or a more expeditious disposition of litigation.

28 *In re Union Carbide Corp. Consumer Products Business Sec. Litig.*, 724 F. Supp. 160,
170 (S.D.N.Y. 1989).

1 *Antitrust Litig.*, 1998 WL 661515 (E.D.N.Y. Aug. 7, 1998) (award of 33-1/3% in price-
2 fixing case); *In re Greenwich Pharm. Sec. Litig.*, 1995 WL 251293 (E.D. Pa. Apr. 26,
3 1995) (award of 33-1/3% in securities case).⁶ An attorneys' fee award of 30% in this
4 case is certainly "reasonable under the circumstances."

5 **B. Relevant Factors Justify An Award Of 30% In This Case**

6 Plaintiffs' counsel seek attorneys' fee of 30% of the fund recovered and submit
7 that such an award is reasonable and appropriate under the circumstances of this
8 particular case, as supported by each of the factors below.

9 **1. The Result Achieved**

10 Courts have consistently recognized that the result achieved is a major factor to
11 be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)
12 ("most critical factor is the degree of success obtained"); *In re King Resources Co. Sec.*
13 *Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end
14 result achieved are of primary importance, for these are the true benefit to the client");
15 *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("[t]he
16 quality of work performed in a case that settles before trial is best measured by the
17 benefit obtained"), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

18 A settlement fund of \$3,000,000 in cash (plus interest) has been obtained solely
19 through the efforts of Lead Plaintiffs' Counsel. In view of the substantial legal, factual
20 and practical obstacles to recovery presented in this Litigation, the settlement is a very
21 good result. Given the defenses to liability and damages raised by defendants and
22 detailed in the Glancy Declaration, the Settlement Fund is possibly more than could
23 have been recovered even had the case continued on and survived defendants'
24 pending motion to dismiss, attacks on class certification, motions for summary judgment
25 and gone to verdict and through appeal.

26 **2. The Risks of the Litigation and the Contingent**

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28 ⁶ See *also*, Appendix A hereto, listing hundreds of other cases.

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Nature of the Fee

Numerous cases have recognized that risk is an important factor in determining the fee award. See, e.g., *Washington Public Power*, 19 F.3d at 1299-1301; *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *Washington Public Power*, 19 F.3d at 1300; *Detroit*, 495 F.2d at 470; *Lindy*, 540 F.2d at 117. As the court aptly observed in *King Resources*:

The litigation also involved unique and substantial issues of law in the technical area of SEC Rule 10b-5, ... difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages.

* * *

In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical.

420 F. Supp. at 632, 636-37.

As detailed in the Glancy Declaration, substantial risks and uncertainties in this type of litigation, and in this Litigation in particular, made it far from certain that a recovery, and certainly not one of this magnitude, would ultimately be obtained. Moreover, while most courts have always recognized that these types of cases carry significant risk, post-PSLRA rulings in this Circuit regarding, *inter alia*, motions to dismiss, make it clear that the risk of no recovery (and hence no fee) has increased exponentially. The risks assumed here by plaintiffs' counsel were substantial, particularly with respect to pleading and proving scienter. There is no question that if not settled, this case would have presented myriad contested, difficult issues of law and fact. Given the Ninth Circuit's decision in *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999), had this Settlement not been achieved, plaintiffs faced very

1 risky litigation against defendants, with ultimate success far from certain.

2 One of the risks faced by plaintiffs was whether they would be able to show that
3 defendants possessed the requisite scienter to maintain their claims under §10(b).
4 Defendants repeatedly asserted that plaintiffs could not meet the stricter pleading
5 standard set by the PSLRA, which requires pleading a strong inference of scienter.
6 Plaintiffs thus faced a substantial risk that their complaint might not have withstood
7 defendants' pending motion to dismiss. The Ninth Circuit decision in *Silicon Graphics*
8 greatly increased this risk. Even if the Litigation continued and plaintiffs were to
9 succeed at every step, recovery is still not assured because plaintiffs have to consider
10 the extent to which the defendants would be able to withstand a larger judgment.
11 Cholestech's insurance coverage was a wasting asset which would have been
12 substantially depleted by defense costs if this case went to trial. Additionally, had
13 plaintiffs successfully established at trial that defendants had deliberately engaged in
14 the misconduct complained of, Cholestech's insurance carriers would likely have
15 disclaimed coverage for any liability, and Cholestech directly could have been liable for
16 any damage award. Had the Litigation continued and resulted in a significantly greater
17 judgment, the financial impact on Cholestech, particularly if the insurance carriers
18 declined coverage, would have been far more severe and the likelihood that plaintiffs
19 would recover such a verdict would have been severely diminished.

20 Thus, the complexity, magnitude and riskiness of this Litigation plainly support
21 the fee requested. In addition, plaintiffs' counsel have received no compensation
22 during the course of the Litigation and have advanced significant expenses in
23 prosecuting this Litigation on behalf of the Class. Any fee award or expense
24 reimbursement to plaintiffs' counsel has always been at risk and completely contingent
25 on the result achieved and on this Court's exercise of its discretion in making any
26 award. Thus, the contingent fee risk also supports the requested award.

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28 **3. The Skill Required and the Quality and Efficiency of the Work**

1 The successful prosecution of these complex claims required the work of highly
2 skilled and specialized attorneys. The quality of plaintiffs' counsel's work on this case
3 was excellent and is ultimately reflected in the result.

4 From the outset, plaintiffs' counsel engaged in a concerted effort against a
5 vigorous defense. Plaintiffs' counsel painstakingly built and documented a case which
6 brought defendants to the settlement table, evaluated the merits and risks presented,
7 and settled the Litigation on a very favorable basis for the Class. Such quality,
8 efficiency and dedication should be rewarded. *See, e.g., J. N. Futia Co. v. Phelps*
9 *Dodge Indus., Inc.*, 1982-2 Trade Cas. (CCH) ¶64,978 (S.D.N.Y. 1982). The
10 Settlement achieved for the Class is a direct result of effective lawyering and the
11 diligence of plaintiffs' counsel.

12 The quality of opposing counsel is also important in evaluating the quality of the
13 work done by plaintiffs' counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438
14 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Resources*, 420 F. Supp. at 634; *Arenson*
15 *v. Board of Trade of City of Chicago*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).
16 Plaintiffs were opposed in this Litigation by very skilled and highly respected counsel,
17 Wilson Sonsini Goodrich & Rosati, a prominent firm with a well-deserved reputation for
18 vigorous advocacy in the defense of complex civil cases such as this. Given the quality
19 of the advocacy of defendants' counsel, plaintiffs' counsel were necessarily required to
20 produce work of the highest quality.

21 **4. The Novelty and Difficulty of the Questions Presented**

22 Courts have recognized that the novelty and difficulty of the issues in a case is a
23 significant factor to be considered in making a fee award. *See e.g., Johnson v. Georgia*
24 *Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). As that court stated:

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26 Cases of first impression generally require more time and effort on the
27 attorney's part. Although this greater expenditure of time in research and
28 preparation is an investment by counsel in obtaining knowledge which
can be used in similar later cases, he should not be penalized for
undertaking a case which may "make new law." Instead, he should be
appropriately compensated for accepting the challenge.

1 *Id.* at 718.

2 Due to applicability of the relatively-recent PSLRA, numerous developing issues
3 were presented in this case. There is no doubt that plaintiffs' counsel took on a
4 challenge in pursuing class action litigation under the PSLRA, particularly in the face of
5 *Silicon Graphics*. Had this Settlement not been achieved, the difficult issues would be
6 raised in connection with plaintiffs' efforts to plead and prove defendants liability under
7 the heightened standards set by the PSLRA and *Silicon Graphics*, and that these
8 complex factual and legal questions would have been the subject of substantial
9 research and analysis. Numerous novel and difficult issues would have been raised in
10 plaintiffs' attempt to prove defendants' liability and resulting damages under the
11 heightened standards set by the PSLRA.

12 Given the inherent complexities of a securities class action and the added
13 difficulties faced now in bringing cases under the PSLRA, the fee requested is fair.

14 **5. The Contingent Nature of the Case and the**
15 **Financial Burden Carried by the Plaintiffs**

16 A determination of a fair fee must include consideration of the contingent nature
17 of the fee and the difficulties which were overcome in obtaining the settlement.

18 It is an established practice in the private legal market to reward attorneys
19 for taking the risk of non-payment by paying them a premium over their
20 normal hourly rates for winning contingency cases. See Richard Posner,
21 *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent
22 fees that may far exceed the market value of the services if rendered on a
23 non-contingent basis are accepted in the legal profession as a legitimate
24 way of assuring competent representation for plaintiffs who could not
25 afford to pay on an hourly basis regardless whether they win or lose.

26 *Washington Public Power*, 19 F.3d at 1299.

27 Plaintiffs' counsel have received no compensation during the course of this
28 Litigation and have incurred significant expenses in litigating for the benefit of the
Class. Any fee award or expense reimbursement to plaintiffs' counsel has always
been at risk and completely contingent on the result achieved and on this Court's
exercise of its discretion in making any award.

1 **6. A 30% Fee Award is in the Mid-Range for**
2 **Similar Complex, Contingent Litigation**

3 As demonstrated by the decisions cited above and in Appendix A hereto, a 30%
4 fee is a percentage that has been repeatedly awarded by the courts in this Circuit and
5 District and in numerous other similar cases throughout the country.

6 Further, a Federal Judicial Center Study released in 1996, which covered all
7 class actions in four selected federal district courts with a high number of class actions,
8 found that as to the size of attorneys' fees: "Median rates ranged from 27% to 30%."
9 Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, *Empirical Study of Class*
10 *Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil*
11 *Rules*, at 69 (Federal Judicial Center 1996). This finding is in line with an analysis of
12 fee awards in class actions conducted in 1996 by National Economic Research
13 Associates, an economics consulting firm. Using data from 433 shareholder class
14 actions, the study reports on the central question of attorneys' fees: "Regardless of
15 case size, fees average approximately 32 percent of the settlement." Denise N. Martin,
16 Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What*
17 *Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov.
18 1996).

19 **7. The Customary Fee**

20 If this were a non-representative litigation, the customary fee arrangement would
21 be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.
22 *Blum*, 465 U.S. at 903* ("In tort suits, an attorney might receive one-third of whatever
23 amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional
24 to the recovery."); *In re M.D.C. Holdings Sec. Litig.*, [1990 Transfer Binder] Fed. Sec. L.
25 Rep. (CCH) ¶95,474, at 97,490 (S.D. Cal. 1990) ("[i]n private contingent litigation,
26 fee contracts have traditionally ranged between 30% and 40% of the total recovery");
27 *Kirchoff*, 786 F.2d at 323 (40% contractual award if case went to trial); *Alpine Pharmacy*
28 *v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1051 (2d Cir. 1973) (32% fee recovery for

1 settlement before trial); *McKenzie Const., Inc. v. Maynard*, 823 F.2d 43, 48 n.5 (3d Cir.
2 1987) (33-1/3% contingent fee held reasonable). Thus, the customary contingent fee in
3 the private marketplace is 30% to 40% of the fund recovered.

4 Plaintiffs' counsel's efforts were performed, and the result achieved, on a wholly
5 contingent basis, despite significant risk and in the face of determined opposition.
6 Under these circumstances, it necessarily follows that plaintiffs' counsel is justly
7 entitled to the award of a reasonable percentage fee based on the benefit conferred
8 and the common fund obtained. Under all of the circumstances present here, a 30%
9 fee plus expenses is fair and reasonable.⁷

10 **C. The Reaction Of The Class Supports The Requested Award**

11 As set forth in the Declaration of Shandarese Garr in Support of Plaintiffs'
12 Motions for Final Approval of Settlement and Approval of Plan of Allocation of
13 Settlement Proceeds (the "Garr Declaration"), over 10,000 individual notices of the
14 Settlement were mailed to members of the Class and a summary notice was published
15 in *The Wall Street Journal*. Class members were informed in the Notice that plaintiffs'
16 counsel would apply for attorneys' fees of 30% of the Settlement Fund, plus expenses
17 not to exceed \$125,000, and were advised of their right to object to plaintiffs' counsel's
18 fee and expense request. ***To date, plaintiffs' counsel have received no objections***

20 ⁷ Professor Conte acknowledged the propriety of good fees in common fund
21 cases:

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

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

1 **to the fee request and the time to object expired on October 17, 2001.** This is
2 significant because the Class includes sophisticated claimants, such as institutional
3 investors, with both large claims against the Settlement and counsel readily available to
4 advise, represent and assist them in expressing any opposition to the Settlement terms
5 and fee request made here if they so chose. These entities have every incentive
6 to object if they believe the fees and expenses are unreasonable. The reaction of the
7 Class thus fully supports the requested fee award.

8 **IV. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND**
9 **WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT**
10 **OBTAINED FOR THE CLASS**

11 Plaintiffs' Lead Counsel have incurred costs and expenses in an aggregate
12 amount of \$102,015.03 in prosecuting the Litigation on behalf of the Settlement Class.
13 These expenses are categorized in the declarations of plaintiffs' counsel submitted to
14 the Court herewith. See Glancy II Declaration.

15 A large component of these expenses are for experts, factual investigation and
16 consultants who assisted plaintiffs' Lead Counsel greatly in, *inter alia*, the areas of
17 blood testing, accounting, materiality and damages. These experts and consultants
18 were indispensable to resolution of the Litigation. Without their involvement, plaintiffs
19 would not have been able to defend the sufficiency of the Litigation or resolved the
20 Litigation in the current manner. Plaintiffs' Lead Counsel believe these expenses are
21 reasonable and know that they were necessarily incurred in obtaining this result for the
22 Settlement Class.

23 The appropriate analysis to apply in deciding which expenses are compensable
24 in a common fund case of this type is whether the particular costs are of the type
25 typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*,
26 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's
27 fees those out-of-pocket expenses that 'would normally be charged to a fee paying
28 client'") (citation omitted). It is proper, therefore, to reimburse reasonable expenses

1 even though they are greater than taxable costs. *Id.* See also *Bratcher v. Bray-Doyle*
2 *Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if
3 they would normally be billed to client); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225
4 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Mittland*
5 *Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("[a]ttorneys may
6 be compensated for reasonable out-of-pocket expenses incurred and customarily
7 charged to their clients, as long as they 'were incidental and necessary to the
8 representation' of those clients.") (citation omitted). The categories of expenses for
9 which counsel seek reimbursement here are the type of expenses routinely charged to
10 hourly clients and, therefore, should be reimbursed out of the common fund.

11 **V. CONCLUSION**

12 Securities class actions are risky. As discussed in the Glancy Declaration, there
13 are numerous examples where plaintiffs' counsel, in cases such as this, after the
14 expenditure of thousands of hours, have received no compensation whatsoever.
15 Onlookers often focus on the overall size of the fees awarded, but fail to take into
16 consideration the instances where huge investments in cases are lost. Here, from the
17 beginning, plaintiffs have been faced with determined adversaries represented by
18 experienced and determined counsel. Without any assurance of success, plaintiffs and
19 their counsel pursued this Litigation to an extremely favorable conclusion. The
20 Settlement represents an excellent recovery on behalf of the Class and stands as a
21 testament to the skill and dedication of plaintiffs' counsel. Counsel respectfully submits
22 that the Court should approve the fee and expense application and enter the order
23 submitted herewith awarding plaintiffs' counsel 30% of the Settlement Fund plus
24 reimbursement of \$102,015.03 in expenses, plus the interest earned thereon at the
25 same rate and for the same period as that earned on the cash portion of the Settlement
26 Fund until paid.

27 Dated: October 23, 2001

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