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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.

) Civ. Action No.
C99-0562 PJH

) CLASS ACTION

) Hon. Phyllis J. Hamilton

) **DECLARATION OF LIONEL Z.
GLANCY IN SUPPORT OF FINAL
APPROVAL OF SETTLEMENT,
AWARD OF ATTORNEYS' FEES
AND REIMBURSEMENT OF
EXPENSES, AND APPROVAL OF
PLAN OF ALLOCATION OF
SETTLEMENT PROCEEDS**

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

1 I, Lionel Z. Glancy, declare as follows:

2 1. I am sole principal in the Law Offices of Lionel Z. Glancy, Lead Counsel
3 for the plaintiffs herein. I make this declaration in support of plaintiffs' application for
4 (1) approval of class action settlement (the "Settlement"); (2) approval of the Plan of
5 Allocation for the Settlement; and (3) an award of attorneys' fees and reimbursement of
6 expenses incurred. I have personal knowledge of the matters set forth in this
7 declaration and, if called upon to do so, could and would testify competently thereto.

8 **I. PRELIMINARY STATEMENT**

9 2. The purpose of this declaration is to set forth the basis for and
10 background of the captioned action ("the Litigation"), its procedural history, and the
11 negotiations that led to the Settlement. This declaration demonstrates why the
12 Settlement is fair, reasonable and adequate and should be approved by the Court, why
13 the Plan of Allocation is reasonable, and why plaintiffs' counsel's fee and expense
14 request is reasonable and should also be approved by the Court.

15 3. The Settlement creates a cash fund for the benefit of the plaintiff class in
16 the amount of \$3,000,000 (the "Settlement Fund") plus interest on the Settlement Fund
17 that accrues prior to distribution. This cash amount has already been transferred to,
18 and is being maintained by, plaintiffs' Lead Counsel and is earning interest for the
19 benefit of the Class. Plaintiffs' counsel is requesting 30% of the Settlement Fund for
20 attorneys' fees plus reimbursement of expenses in the amount of \$102,015.03.

21 4. This Litigation was commenced on February 5, 1999. Counsel for both
22 sides have sought to litigate the matter as efficiently as possible. This was particularly
23 important to plaintiffs due to concern that the insurance proceeds potentially available
24 to fund a settlement would rapidly be depleted. Initial attempts at settlement failed,
25 however, because the parties differed greatly on the issues of materiality and damages.

26 5. The Settlement confers an immediate and substantial benefit on the
27 Class, and eliminates the risk of continued litigation whose favorable outcome could
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1 not be assured. It is respectfully submitted that the Settlement and Plan of Allocation
2 should be approved as fair, reasonable and adequate, and counsel should be awarded
3 attorneys' fees of 30% of the Settlement Fund and reimbursement of the expenses
4 incurred in the amount of \$102,015.03 for their efforts in creating this benefit for the
5 Class.

6 **II. HISTORY OF THE ACTION**

7 6. The following is a summary of the principal events during the course of
8 this Litigation.

9 **A. Factual Background**

10 7. Founded in 1989, Cholestech has traded publicly since 1992. The
11 Company's flagship product, the L-D-X System, offers a diagnostic testing method
12 which claims to test and measure an individual's various cholesterol levels within five
13 minutes using a single drop of blood. The L-D-X System is comprised of the L-D-X
14 Analyzer Unit and a variety of single-use test cassettes. During all times relevant to
15 this Litigation, the L-D-X System accounted for substantially all of Cholestech's
16 revenues.

17 8. Defendants marketed the L-D-X System to three market segments – the
18 Physician Office Laboratory (the "POL" market targeted doctors' office labs), the Health
19 Promotions market (the "HP" market includes corporate wellness programs, fitness
20 centers, health promotion providers, public health programs, community health centers,
21 the military and other independent screeners) and the Pharmacy market (retail drug
22 stores, especially large national chains).

23 9. Various problems inherent to the L-D-X System prevented Cholestech
24 from achieving widespread acceptance for the L-D-X System, including precision and
25 accuracy problems, the amount of labor involved in using and maintaining the system,
26 the perishable nature of the required cassettes and pervasive quality control problems
27 suffered by the cassettes.
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1 10. Because Cholestech was not achieving market acceptance for the L-D-X
2 System – Cholestech’s sole source of revenue – defendants resorted to stuffing the
3 distribution channels with unwanted product to meet forecasted revenue figures, in
4 order to support the Company’s stock price for a planned secondary stock offering.

5 11. When the distribution channel was fully stuffed with unwanted product
6 and defendants could not find another entity to take unwanted product, defendants
7 were forced to warn the investing public of a severe anticipated earnings shortfall and
8 cancel the secondary stock offering. Cholestech’s stock price dropped precipitously by
9 nearly 50% in one day on the news, on extraordinarily high volume. Excess inventory
10 plagued Cholestech for months after this announcement.

11 12. Plaintiffs’ allegations were supported by a complaint filed by Cholestech’s
12 former Chief Financial Officer, alleging “major” accounting improprieties, interviews with
13 co-founder and former Vice President and Chief Scientific Officer, Gary E. Hewett,
14 interviews with distributor Wilbur K. Bullock (owner of HMSC, Cholestech’s largest
15 distributor), review of documents from former Vice President of Sales & Marketing,
16 Mark J. Kussman, and interviews with other former Cholestech employees and
17 distributors.

18 13. Plaintiffs alleged that defendants’ accounting improprieties and other false
19 statements artificially inflated the price of Cholestech’s stock during the Class Period.
20 Defendants’ negative disclosures caused the price of Cholestech’s common stock to
21 drop like a rock.

22 **B. Commencement of the Action**

23 14. On February 5, 1999, the Litigation was filed in this District as a putative
24 securities class action on behalf of persons who purchased the common stock of
25 Cholestech during the period June 28, 1996 through June 25, 1998, inclusive (the
26 “Class Period”).

27 15. The complaint filed on February 5, 1999 alleged violations of §§10(b) and
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1 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

2 **C. Appointment of Lead Plaintiffs and Lead Counsel**

3 16. By Order dated May 17, 1999, the Honorable Maxine Chesney of this
4 Court appointed plaintiffs Robert Ree, Robert Cuva, Donald Fought, Albert Jackson,
5 Carl Kircher, Patricia Malloy and Sharon Quercioli as Lead Plaintiffs, and appointed the
6 Law Offices of Lionel Z. Glancy as Lead Counsel for the Class. The Lead Plaintiffs
7 each purchased Cholestech common stock during the Class Period and are, therefore,
8 members of the Class.

9 **D. The Amended Complaints**

10 17. During the course of this Litigation, Lead Plaintiffs filed multiple amended
11 complaints as extensive research and investigation, including witness interviews,
12 generated additional evidence supporting plaintiffs' claims. Defendants filed three
13 motions to dismiss, and plaintiffs filed a motion for leave to amend their operative
14 complaint. Plaintiffs' counsel also hired a blood testing expert and investigators to
15 flesh out the factual basis of the claims, and researched a variety of legal issues.
16 Forensic accountants, as well as damages experts, were hired to assist in analyzing
17 the accounting records relevant to the issues in the Litigation and the likely provable
18 damages of the Class.

19 18. On September 20, 1999, defendants filed two motions to dismiss the first
20 amended complaint, arguing that the first amended complaint violated Federal Rules of
21 Civil Procedure, Rule 8, for failing to set forth a short and plain statement of plaintiffs'
22 claims. Defendants failed a second simultaneous motion to dismiss, arguing that the
23 first amended complaint also failed to plead the basis of its allegations with
24 particularity, failed to adequately plead scienter, failed to plead actionable
25 misstatements, and otherwise failed to plead fraud. Plaintiffs opposed the motions and,
26 on March 28, 2000, Judge Chesney entered an Order denying defendants' Rule 8
27 motion and granting defendants' Rule 12(b)(6) motion, but permitting plaintiffs leave to
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1 file a second amended complaint.

2 19. Part of the basis for granting defendants' Rule 12(b)(6) motion, as stated
3 in Judge Chesney's March 28, 2000 order, was plaintiffs' failure to identify their
4 witnesses by name in the first amended complaint. Plaintiffs, seeking to protect the
5 identity of their witnesses from public disclosure, lodged their second amended
6 complaint on June 2, 2000, and filed a contemporaneous ex parte application to file the
7 second amended complaint under seal. Defendants opposed plaintiffs' application and
8 the Court ordered the second amended complaint re-filed with the witnesses identified.
9 Plaintiffs re-filed on June 30, 2000, with the second amended complaint identifying
10 witnesses and attaching pertinent documents supporting plaintiffs' claims.

11 20. On September 12, 2000, plaintiffs filed a motion for leave to file a third
12 amended complaint based on newly obtained information from a co-founder and former
13 executive officer of Cholestech. Defendants filed a statement of non-opposition to the
14 motion, and the Court granted the motion on October 19, 2000. Plaintiffs' third
15 amended complaint was filed on October 29, 2000, adding newly obtained information
16 and adding Andrea Tiller as a defendant.

17 21. After extensive meet and confers regarding the allegations contained in
18 the third amended complaint, the parties agreed that certain allegations should be
19 excised. Pursuant to stipulation of the parties, plaintiffs' fourth amended complaint was
20 filed on December 19, 2000. On December 20, 2000, defendants moved to dismiss the
21 fourth amended complaint, arguing primarily that the fourth amended complaint still had
22 all the deficiencies of the first amended complaint, as well as being time-barred as to
23 the new defendant. Plaintiffs opposed the motion on February 16, 2001, and
24 defendants filed a reply on March 8, 2001. In March 2001, the parties agreed to
25 mediate the Litigation.

26 **E. Settlement Negotiations**

27 22. Lead plaintiffs and defendants discussed settlement on several occasions
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1 during the pendency of the Litigation. During these discussions defendants strongly
2 disputed the analysis and conclusions of plaintiffs' damages expert, particularly the
3 amount of potentially recoverable damages.

4 23. In March 2001 the parties agreed to continue settlement negotiations with
5 the assistance of a neutral mediator. Such negotiations were conducted on June 12,
6 2001 before the Honorable Eugene F. Lynch, United States District Court Judge,
7 Retired. The issues on which the parties disagreed included (1) the appropriate
8 economic model for determining the amount by which Cholestech's stock was allegedly
9 artificially inflated (if at all) during the Class Period; (2) the amount by which
10 Cholestech's stock was allegedly artificially inflated (if at all) during the Class Period;
11 (3) the effect of various market forces influencing the trading price of Cholestech's
12 stock at various times during the Class Period; (4) the extent to which external factors,
13 such as general market conditions, influenced the trading price of Cholestech's stock at
14 various times during the Class Period; (5) the extent to which the various matters that
15 plaintiffs alleged were materially false or misleading influenced (if at all) the trading
16 price of Cholestech's stock at various times during the Class Period; (6) the extent to
17 which the various allegedly adverse material facts that plaintiffs alleged were
18 misrepresented influenced (if at all) the trading price of Cholestech's stock at various
19 times during the Class Period; and (7) whether the statements made or facts allegedly
20 omitted were false, material or otherwise actionable under the federal securities laws.

21 24. Notwithstanding the number of issues upon which the parties disagreed,
22 lead plaintiffs and defendants reached an agreement to settle the Litigation during
23 mediation on June 12, 2001 with respect to all claims and signed a Memorandum of
24 Understanding on June 12, 2001, conditioned on confirmatory discovery supporting
25 defendants' defenses. The terms of the parties' formal agreement are described in
26 their Stipulation of Settlement (the "Stipulation"), filed with this Court on July 31, 2001.

27 **F. Additional Discovery**
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1 25. Between the time of the signing of the Memorandum of Understanding
2 and signing the Stipulation, plaintiffs engaged in extensive discovery regarding
3 defendants' alleged wrongdoing and their defenses thereto. Defendants furnished
4 plaintiffs with thousands of pages of internal operating documents and plaintiffs
5 interviewed defendant Warren Pinckert, Cholestech's Chief Executive Officer,
6 regarding plaintiffs' allegations.

7 26. Based on this further discovery, plaintiffs' counsel are satisfied that the
8 Settlement and scope of the proposed releases contained therein are fair and, on this
9 basis, signed the Stipulation.

10 **G. The Contested Liability Issues and Litigation Risks**

11 27. Plaintiffs believe that the claims asserted in the Litigation have merit.
12 However, counsel for plaintiffs recognize and acknowledge the expense and length of
13 continued proceedings necessary to prosecute the Litigation against defendants
14 through trial and appeals. Plaintiffs' counsel also have taken into account the uncertain
15 outcome and the risk of any litigation, especially in complex actions such as this
16 Litigation, as well as the difficulties and delays inherent in such litigation and the risks
17 involved in attempting to collect any judgment in the event the claims were successful.
18 Plaintiffs' counsel are also mindful of the inherent problems of proof under and possible
19 defenses to the claims asserted in the Litigation. Plaintiffs' counsel believe that the
20 Settlement confers substantial benefits upon the Class.

21 28. The core of plaintiffs' case was that Cholestech, a one-product company,
22 was unable to gain adequate market acceptance for its flagship product and was thus
23 unable to generate revenue enough to support the Company's forecasted earnings and
24 upcoming secondary stock offering. Defendants instead resorted to stuffing the
25 distribution channels with material amounts of unwanted product and booking these
26 shipments as "sales."

27 29. Defendants' primary arguments regarding plaintiffs' allegations were that
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1 plaintiffs' complaints did not frame the claims with adequate specificity under prevailing
2 law in this Circuit. Defendants assert that the losses suffered by plaintiffs and the
3 Class resulted in substantial part from market and other factors unrelated to the
4 Company's allegedly improper product distribution practices and that, even if plaintiffs
5 were to prevail as to liability, their damages were small.

6 30. Plaintiffs believe that they had valid arguments to respond to these
7 defenses, based upon the analyses of their accounting and damages experts. While
8 plaintiffs believe they would have prevailed on these points, there was a substantial
9 risk that a judge or jury could determine that plaintiffs' losses were caused in
10 substantial part by market forces unrelated to the alleged fraud and that plaintiffs
11 damages were, if anything, less than the amount provided in the Settlement.

12 31. In sum, this was a case where some risks existed with respect to
13 establishing defendants' liability and substantial risks existed to the establishment of
14 damages greater than the amount of the Settlement. There is no doubt that defendants
15 would have employed every argument to avoid an unfavorable liability and damage
16 judgment had the Litigation not been settled. The defenses asserted by defendants had
17 the possibility of success and made the favorable outcome of this litigation problematic,
18 especially when weighed against the substantial and immediate benefits provided by
19 the Settlement.

20 **H. Mailing and Publication of Notice of Settlement**

21 32. The Court's Order Preliminarily Approving Settlement, Certifying the
22 Class and Providing for Notice was entered on August 13, 2001 (the "Notice Order"). It
23 directed plaintiffs' counsel by August 30, 2001, to cause the mailing of the Notice of
24 Proposed Settlement of Class Action (the "Notice") and the Proof of Claim and Release
25 (the "Proof of Claim") to all potential Class Members identifiable with reasonable effort.

26 33. The Notice Order also directed plaintiffs' counsel to cause the Summary
27 Notice for Publication ("Publication Notice"), to be published in *The Wall Street Journal*
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1 on or before September 7, 2001.

2 34. Submitted concurrently herewith is the Declaration of Brian C. Burke of
3 The Garden City Group ("GCG"), the Claims Administrator, stating that 9746 Notices
4 have been disseminated to potential Class Members, and that the Publication Notice
5 was published on September 7, 2001, as directed by the Court. Objections to the
6 Settlement were due on October 17, 2001. None were received.

7 **III. THE PLAN OF ALLOCATION**

8 35. The Net Settlement Fund (as this term is defined in the Stipulation) will be
9 distributed to settlement Class Members who submit valid, timely proof of claim forms
10 ("Authorized Claimants") under the Plan of Allocation described below. The Plan of
11 Allocation provides that a Class Member will be eligible to participate in the distribution
12 of the Settlement Fund only if that Class Member has a net loss on all transactions in
13 Cholestech's stock during the Class Period.

14 36. The Plan of Allocation was prepared in consultation with plaintiffs'
15 damages experts, Triumph Partners, LLC. The purpose of the Plan of Allocation is to
16 estimate the impact of the alleged misrepresentations on the price of Cholestech's
17 common stock during the Class Period. The Plan of Allocation reflects an assessment
18 of the damages that could have been recovered as well as plaintiffs' assessment of the
19 likelihood of establishing liability. The Plan of Allocation was given considerable
20 thought and attention to ensure that the Settlement proceeds would be fairly and
21 equitably distributed and is primarily based upon, among other things, an analysis of
22 the price reaction of Cholestech's common stock to the disclosure of missed revenue
23 forecasts at the end of the Class Period.

24 37. To the extent that there are sufficient funds in the Net Settlement Fund,
25 each Authorized Claimant will receive an amount equal to the Authorized Claimant's
26 claim, as defined below. If, however, the amount in the Net Settlement Fund is not
27 sufficient to permit payment of the total claim of each Authorized Claimant, then each
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1 Authorized Claimant shall be paid the percentage of the Net Settlement Fund that each
2 Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants.

3 38. Under the Plan of Allocation, a claim will be calculated as follows:

4 For shares of Cholestech common stock purchased between June 28, 1996
5 through June 25, 1998 and:

6 A. Sold between June 28, 1996 and June 25, 1998, no compensable
7 losses;

8 B. Sold between June 26, 1998 and September 23, 1998, the
9 number of shares purchased and sold multiplied by the lesser of (a) \$5.375; or (b) the
10 actual purchase price(s) less the greater of: (i) the actual sales price(s); or (ii) the
11 average closing price between June 26, 1998 and the date of sale;

12 C. Held through September 23, 1998, the number of shares
13 purchased multiplied by the lesser of: (a) \$5.375; or (b) the actual purchase price(s)
14 less \$6.30.

15 The date of purchase or sale is the "contract" or "trade" date as distinguished
16 from the "settlement" date. The determination of the price paid per share and the price
17 received per share, is exclusive of all commissions, taxes, fees and charges.

18 For Class Members who made multiple purchases or multiple sales during the
19 Class Period, the earliest subsequent sale is matched with the earliest purchase and
20 chronologically thereafter for purposes of the claim calculations.

21 **IV. ATTORNEYS' FEES AND EXPENSES**

22 39. Plaintiffs' counsel seeks an award of attorneys' fees of 30% of the
23 Settlement Fund, a percentage that is well within the range of fees awarded in this
24 Circuit and District and by federal courts in cases of this nature. The award sought is
25 reasonable based on the quality of counsel's work and the substantial benefit obtained
26 for Class Members in light of the risks discussed above.

27 40. As set forth in the memorandum of points and authorities in support of
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1 plaintiffs' counsel's motion for an award of attorneys' fees and reimbursement of
2 expenses submitted concurrently herewith, the Ninth Circuit has held that a fee of 25%
3 of a common fund is the "benchmark" award for attorneys' fees in class action litigation
4 and, in securities class actions, numerous district courts in this Circuit have awarded
5 fees of 25-30%. An award of 30% is warranted where, such as here, special
6 circumstances exist.

7 41. Lead Counsel's experience as counsel in class action and securities
8 cases allowed plaintiffs to identify the complex issues involved in the Litigation and to
9 formulate strategies to effectively prosecute and resolve a litigation of this complexity.
10 Moreover, plaintiffs' counsel submit that their reputation as attorneys able and willing to
11 see a meritorious case through trial and appeals assisted in the settlement
12 negotiations.

13 42. As discussed above, plaintiffs faced significant risks in pursuing this
14 Litigation. Indeed, this was not a case where any recovery was assured and certainly
15 not one at the level ultimately obtained. Compounding the risk, plaintiffs' counsel have
16 received no compensation during the time that this Litigation has been pending, their
17 fees being totally contingent and dependent upon a successful result and an award by
18 this Court. Plaintiffs' Lead Counsel believe that the outstanding Settlement achieved
19 here was primarily the result of their hard work, persistence, and skill.

20 43. Plaintiffs' counsel also request reimbursement of the expenses incurred
21 by them in connection with the prosecution of this Litigation. At Lead Counsel's
22 request, each firm has submitted a separate declaration attesting to the accuracy of,
23 and providing the basis for, their expenses. See Exhibits 1-3 attached to the Appendix
24 of Plaintiffs' Counsel's Declarations in Support of Application for Award of Attorneys'
25 Fees and Reimbursement of Expenses ("Plaintiffs' Fee and Expense Appendix"),
26 submitted concurrently herewith. Each firm requesting reimbursement of expenses has
27 averred that the expenses are reflected in the books and records maintained by the firm
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1 and are an accurate recording of the expenses incurred. In total, plaintiffs' counsel
2 have incurred reimbursable expenses in the amount of \$102,015.03. Included in this
3 amount are the fees payable to plaintiffs' consultants and experts who provided
4 plaintiffs with extensive assistance during this Litigation. Plaintiffs respectfully submit
5 that all of these expenses are reasonable and necessarily incurred in connection with
6 the prosecution of this Litigation.

7 **A. Extent of the Litigation**

8 44. This case was resolved only after the parties spent substantial time,
9 together with their experts, reviewing each side's positions. Plaintiffs' counsel spent
10 months with their investigators and experts developing the detailed facts pleaded in
11 each of the amended complaints filed and researching the legal basis of claims against
12 additional possible defendants. Plaintiffs retained experts on the subjects of damages
13 and materiality, as well as experts on the issues of blood testing, accounting and
14 auditing. Plaintiffs engaged in an intensive review of documents produced by
15 defendants and interviewed Cholestech's Chief Executive Officer, defendant Warren
16 Pinckert.

17 45. Plaintiffs engaged in discovery sufficient enough to determine in Lead
18 Counsel's experience that the Settlement was warranted and supported.
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20 **B. Risks of Contingent Litigation**

21 46. The Litigation was undertaken by plaintiffs' counsel on a wholly
22 contingent basis. From the outset, plaintiffs' counsel understood that they were
23 embarking on complex, expensive and lengthy litigation (with no guarantee of
24 compensation for the enormous investment of time, money and effort the case would
25 require). In undertaking that responsibility, plaintiffs' counsel were obligated to assure
26 that sufficient resources of attorneys were dedicated to the prosecution of the Litigation
27 and that funds were available to compensate staff and the considerable out-of-pocket
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1 costs a case such as this entails. Furthermore, lawyers that represent hourly, fee-
2 paying clients require their clients to pay fees as the work is done. Such revenues
3 were not available to plaintiffs' counsel in this Litigation.

4 47. In a contingent practice involving predominantly complex cases, such as
5 those practices maintained by plaintiffs' counsel here, contingent litigation firms must
6 not only pay regular overhead, but also must advance the expenses of litigation. Thus,
7 the financial burden on contingent counsel is far greater than on a firm that is paid on
8 an ongoing basis. Indeed, in this case, plaintiffs' counsel's firms incurred a total of
9 \$102,015.03 in litigation expenses, including substantial amounts for experts, travel
10 and other expenses.

11 **C. Standing and Expertise of Plaintiffs' Counsel**

12 48. The expertise and experience of plaintiffs' counsel is described in each of
13 the declarations accompanying Plaintiffs' Fee and Expense Appendix. Plaintiffs'
14 counsel are all long-standing and highly respected practitioners in the securities
15 litigation field.

16 **D. Standing and Expertise of Defendants' Counsel**

17 49. Defendants are represented by outstanding attorneys at Wilson, Sonsini,
18 Goodrich & Rosati, a highly respected firm that practices frequently in this District.
19 Defendants' counsel spared no effort or expense in the defense of their clients. In the
20 face of opposition of this caliber, plaintiffs' counsel developed this case so as to
21 persuade defendants to settle the Litigation on a basis favorable to the Class.

22 50. As set forth above, plaintiffs' counsel are applying for an award of
23 attorneys' fees of 30% of the Settlement Fund, plus interest earned on that sum at the
24 same percentage as earned on the total Settlement Fund. Plaintiffs' counsel are also
25 applying for reimbursement of expenses of \$102,015.03 incurred from the inception of
26 this action. The Notice mailed to Class Members indicated that plaintiffs' counsel
27 would request reimbursement of expenses up to \$125,000.
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E. The Risks Of Litigation And The Need To Ensure The Availability of Competent Counsel in High-Risk, Contingent Securities Cases

51. The above discussion does not take into consideration the possibility of no recovery. It is wrong to assume that a law firm handling complex contingent litigation always wins. Tens of thousands of hours have been expended in losing efforts, through no fault of plaintiffs' counsel. The factor labeled by the courts as "the risks of litigation" is not an empty phrase.

52. There are numerous cases where plaintiffs' counsel in contingent cases such as this, after the expenditure of thousands of hours, receive no compensation. It is unfortunate, but true, that plaintiffs' counsel who litigate cases in good faith and receive no fees are often the most diligent members of the plaintiffs' bar.

53. This Declarant is aware of many hard fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel.

54. For example, prior to the Litigation being filed, plaintiffs had to consider the risk that the case would be dismissed with prejudice at the pleading stage, which has been a recent trend, particularly in this District. Indeed, recent federal appellate reports are filled with opinions affirming dismissals with prejudice in securities cases. *See e.g., Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999); *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542 (6th Cir. 1999); *Levitin v. Painwebber, Inc.*, 159 F.3d 698 (2d Cir 1998), *cert. denied*, 525 U.S. 1144 (1999); *Suna v. Bailey Corp.*, 107 F.3d 64 (1st Cir. 1997); *Chill v. General Electric Corp.*, 101 F.3d 263 (2d Cir. 1996); *In re Syntex Corp. Sec. Litig.*, 95 F.3d 9222 (9th Cir. 1996); *Gross v. Summa Four*, 93 F.3d 987 (1st Cir. 1996); *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996); *In re Stac*

1 *Elecs. Sec. Litig.*, 89 F.3d 1399 (9th Cir. 1996); *Epstein v. Washington Energy Co.*, 83
2 F.3d 1136 (9th Cir. 1996); *Lovelace v. Software Spectrum*, 78 F.3d 1015 (5th Cir.
3 1996); *Acito v. IMCERA Group*, 47 F.3d 47 (2d Cir. 1996); *Hillson Partners Ltd.*
4 *Partnership v. Adage, Inc.*, 42 F.3d 204 (4th Cir. 1994); *Melder v. Morris*, 27 F.3d 1097
5 (5th Cir. 1994); *Shields v. Citytrust Bancorp*, 25 F.3d 1124 (2d Cir. 1994); *Kowal v. MCI*
6 *Communications Corp.*, 16 F.3d 1271 (D.C. Cir. 1994); *Tuchman v. DSC*
7 *Communications Corp.*, 14 F.3d 1061 (5th Cir. 1994); *Mills v. Polar Molecular Corp.*, 12
8 F.3d 1170 (2d Cir. 1993); *In re Verifone Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993); *In re*
9 *Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993); *Neubronner v. Milken*, 6
10 F.3d 666 (9th Cir. 1993); *Raab v. General Physics Corp.*, 4 F.3d 286 (4th Cir. 1993);
11 *Arazie v. Mullane*, 2 F.3d 1456 (7th Cir. 1993).

12 55. The many recent appellate decisions affirming summary judgments and
13 directed verdicts for defendants show that even surviving a motion to dismiss is no
14 guaranty of recovery. *See, e.g., Longman v. Food Lion, Inc.*, 197 F.3d 675 (4th Cir.
15 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1672 (2000); *Silver v. H&R Block*, 105
16 F.3d 394 (8th Cir. 1997); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407b (9th Cir.
17 1994); *Donohoe v. Consolidated Operating & Prod. Corp.*, 30 F.3d 907 (7th Cir. 1994);
18 *Sailor v. Northern States Power Co.*, 4 F.3d 610 (8th Cir. 1993); *McGonigle v. Combs*,
19 968 F.2d 810 (9th Cir. 1992); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
20 949 F.2d 243 (8th cir. 1991); *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507
21 (9th Cir. 1991). Moreover, even plaintiffs who succeed at trial may find their judgment
22 overturned on appeal. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th
23 Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation);
24 *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (en banc) (reversing plaintiffs'
25 verdict for securities fraud and ordering entry of judgment for defendants); *Ward v.*
26 *Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (reversing plaintiffs' jury verdict
27 for securities fraud); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997)
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1 (same).

2 56. Furthermore, plaintiffs had to address the heightened pleading standard
3 of the PSLRA during the pleading stages of the Litigation. Subsequent to the passage
4 of the PSLRA, many cases in this Circuit and throughout the country have been
5 dismissed (with or without prejudice) at the pleading stage in response to defendants'
6 arguments that the complaints do not meet the PSLRA's heightened pleading
7 standards. See, e.g., *Ehlert v. Singer*, 85 F. Supp. 2d 1269 (M.D. Fla. 1999); *In re*
8 *Green Tree Fin. Corp. Stock Litig.*, 61 F. Supp. 2d 860 (D. Minn. 1999); *Lirette v. Shiva*
9 *Corp.*, 27 F. Supp. 2d 268 (D. Mass. 1998); *Hockey v. Medhekar*, [1997 Transfer
10 Binder] Fed. Sec. L. Rep. (CCH) ¶¶99,465 (N.D. Cal. 1997); *In re Silicon Graphics Sec.*
11 *Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997), *aff'd*, 183 F.2d 970 (9th Cir. 1999); *In re Oak*
12 *Tech. Sec. Litig.*, No. 96-20552-SW, 1997 U.S. Dist. LEXIS 18503 (N.D. Cal. Aug. 1,
13 1997); *Genna v. Digital Link Corp.*, 25 F. Supp. 2d 1032 (N.D. Cal. 1997); *Howard*
14 *Gunty Profit Sharing v. Quantum Corp.*, No. 96 20711 SW, 1997 U.S. Dist. LEXIS
15 23532 (N.D. Cal. Aug. 14, 1997); *Head v. Netmanage, Inc.*, No. C 97-4385 CRB, 1998
16 U.S. Dist. LEXIS 20433 (N.D. Cal. Dec. 30, 1998); *Wenger v. Lumisys, Inc.*, 2 F. Supp.
17 2d 1231 (N.D. Cal. 1998); *Ronconi v. Larkin*, [1998 Transfer Binder] Fed. Sec. L. Rep.
18 (CCH) ¶¶90,212 (N.D. Cal. 1998); *In re Yes! Entertainment Corp. Sec. Litig.*, No. C97-
19 01388 CRB, 1998 U.S. Dist. LEXIS 22106 (N.D. Cal. May 14, 1998). Throughout the
20 pleading stage here, plaintiffs faced the significant risk that the Court would find that
21 plaintiffs failed to meet the PSLRA's heightened pleading standards.

22 57. The foregoing refutes the common argument that commencement of a
23 class action is a guarantee of settlement and a large fee. The mere filing of an action
24 does not ensure that there will be any settlement or fee. It takes hard and diligent work
25 by skilled counsel to develop facts and theories which will persuade defendants to
26 enter into serious settlement negotiations, particularly in this Circuit and District. If
27 defendants believe they will prevail, experience shows that they will litigate to the end.
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1 The risk factor is real.

2 58. Losses such as those described above are exceedingly expensive and
3 can often threaten the survival of a law firm. Onlookers often focus on the aggregate
4 fees awarded but fail to take into consideration that those fees are used to cover
5 enormous overhead expenses incurred during the course of litigation, are taxed by
6 federal, state and local authorities and, when reduced to a bottom line, are far less
7 imposing to each individual involved than the aggregate fee awarded appears.
8 Lawyers who specialize in contingent matters live in a world of uncertainty. Changes in
9 the law through legislation or judicial decree can be catastrophic, frequently affecting
10 contingent counsel's entire inventory of pending cases. These are real threats.

11 59. Courts have repeatedly held that it is in the public interest to have
12 experienced and able counsel enforce the securities laws and regulations pertaining to
13 the duties of officers and directors of public companies. Vigorous private enforcement
14 of the federal securities laws and state corporation laws can only occur if the private
15 plaintiffs can obtain parity in representation with that available to large corporate
16 interests. If this important public policy is to be carried out, the courts must award fees
17 which will adequately compensate private plaintiffs' counsel, taking into account the
18 enormous risks undertaken with a clear view of the economics of a securities class
19 action.

20 60. When plaintiffs' counsel undertook to act for the plaintiffs in this matter, it
21 was with the knowledge that counsel would spend many hours of hard work against
22 some of the best defense lawyers in the United States with no assurance of ever
23 obtaining any compensation for such efforts, or even for the overhead of counsel's
24 offices, which is an increasingly substantial consideration. Counsel were aware that
25 the only way they would be compensated was to achieve a successful result. The
26 benefits conferred on plaintiffs and the Class by this Settlement are particularly
27 noteworthy in that an all cash Settlement Fund of \$3,000,000 (plus interest) was
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1 obtained for the Class despite the existence of substantial risks and the vigorous
2 defense mounted by defendants.

3 **V. CONCLUSION**

4 61. For the reasons set forth above and in the accompanying (1)
5 Memorandum of Points and Authorities in Support of Final Approval of Settlement, (2)
6 Memorandum of Points and Authorities in Support of Approval of the Plan of Allocation
7 of Settlement Proceeds, and (3) Memorandum of Points and Authorities in Support of
8 Plaintiffs' Application For Award of Attorneys' Fees and Reimbursement of Expenses,
9 submitted concurrently herewith, the undersigned respectfully submits that: (i) the
10 Settlement is fair, reasonable and adequate and should be approved; (ii) the Plan of
11 Allocation represents a fair method for the distribution of the Net Settlement Fund
12 among Class Members and should also be approved; and (iii) the application for
13 attorneys' fees and reimbursement of expenses should be granted.

14 I declare under penalty of perjury under the laws of the United States of America
15 that the foregoing is true and correct.

16 Executed this 23rd day of October, 2001, at Los Angeles, California.

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19 _____
Lionel Z. Glancy
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