

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 BY INTERVENORS/OBJECTORS GRAHAM, FLOYD, HULL and AUSWR
FOR AWARD OF FEES and COSTS**

INTERVENORS/OBJECTORS ELDON **GRAHAM**, HAZEL **FLOYD**, MARY M. **HULL**, and the **ASSOCIATION OF U S WEST RETIREES** (hereinafter “**Graham Objectors**”), by and through their counsel Curtis L. Kennedy, hereby move for an award of attorney’s fees and reimbursement of expenses. Submitted herewith in support of this motion is the Declaration of Curtis L. Kennedy (Exhibit 1).

1. On September 29, 2006, this Court entered several rulings, giving final approval for partial settlement of this matter, awarding Lead Plaintiffs’ Counsel attorney’s fees and partially sustaining objections made by Graham Objectors and others. On the same day, this Court entered a judgment for the Class and entered an order administratively closing the case, pursuant to Local Rule 42.2 (Docket 1054). The Court stated any party may seek to lift the administrative closure upon a showing of good cause. On October 5, 2006, Graham Objectors filed their motion to have this case reopened (Docket 1060).

2. Statement Pursuant to Local Rule 7.1: On September 29, 2006, the undersigned counsel wrote to lead counsel specifically named in the January 5, 2006 Class

Notice, seeking feedback whether there would be any objection to the following request:

“As you know, today, Judge Blackburn entered Docket 1054 ordering this action “administratively closed” pending resolution of the criminal charges against defendant Nacchio in *USA v. Nacchio*, Case No. 05-cr-00545 (D. Colo.) and that any party may seek to lift the stay and administrative closure on a showing of good cause. Intervenor-Objectors contend that today's ruling (Docket 1051) sustaining their objections to the requested \$96 million fee award and costs and, thereby, reducing the award to \$60 million, much as argued by Intervenor-Objectors during the May 19 “Fairness Hearing,” has resulted in a benefit very favorable to the class of shareholders. Accordingly, Intervenor-Objectors wish to file a motion for reimbursement out of the \$36 million enhance settlement fund the cost of their expert witness fees – \$23,000 charged by Professor Michael Perino – plus a reasonable award of attorney's fees based upon a modest lodestar enhancement. Therefore, pursuant to Local Rule 7.1, this is a request that you advise whether you have any objection to Intervenor-Objectors filing a motion to lift the administrative stay so as to address the issue of an award of attorney's fees and costs for Intervenor-Objectors. While, we are not seeking a bonanza, it would seem best to get this issue resolved before the settlement fund is distributed. Please let me know. Thank you.”

The only response was that given by Attorney Mike Dowd who stated as follows:

“Lead plaintiffs have no objection to the Graham Objectors filing a motion seeking an order lifting the stay for the limited purpose of allowing Objectors to file a motion seeking attorneys' fees and related expenses in connection with their Objections to Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Expenses. Plaintiffs do note, however, that they intend to oppose any such request for attorneys' fees and expenses by Objectors, if this Court lifts the stay to permit the filing of such a motion.”

3. Graham Objectors contend the contribution their counsel made, by providing an adversarial context in which this Court could evaluate the fairness of attorneys' fees, was substantial, and since their objections were partially sustained, in so far as the \$96 million fee request was reduced to \$60 million and there was a reduction in the requested expenses, the Class Settlement Fund and Class of shareholders benefitted and, therefore, the Court should consider an award of attorney's fees and reimbursement of related costs to Graham Objectors' counsel. This issue ought to be timely resolved before final distribution of the Class Settlement

Fund.

I. ARGUMENT

A. The Court Should Grant Graham Objectors an Award of Attorney's Fees and Expenses, Since They Substantially Prevailed With their Objections Saving the Settlement Fund \$36 Million Attorney's Fees and \$200,000 In Costs.

4. As Graham Objectors argued when requesting intervention, the adversarial process is often “diluted” or entirely “suspended” during fee proceedings, and fee requests often go unchallenged. *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 52 (2nd Cir. 2000). Lead Plaintiffs, having previously negotiated a fee arrangement with Lead Counsel, did not oppose the \$96 million fee request. And none of the numerous Defendants in this action had any incentive to oppose the \$96 million fee request, since Defendants are not the least impacted by the way in which the Settlement Fund is carved up and distributed. Thus, it was desirable for this Court to have Class members participate in the fairness hearing and the debate over attorney's fees to be charged to the Settlement Fund. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (allowing attorneys' fees for objector's attorneys because “[i]t is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally”); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (calling it “vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements”); see also *In re Prudential Ins. Co. Am. Sales*, 278 F.3d 175, 202 (3d Cir. 2002) (observing that “a lawyer with objector status plays a highly important role for the class and the court because he or she raises challenges free from the

burden of conflicting baggage that Class Counsel carries”).

5. Objectors’ counsel who contributes materially to the Fairness Hearing proceedings should be provided a fee charged to the Settlement Fund. *Gottlieb v. Barry*, 43 F.3d 474, 490-91 (10th Cir. 1994) (fee awarded to objectors because objectors’ arguments “did in fact result in a reduction of certain fee and expense awards, and thereby benefitted the class”); *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir.1993) (affirming award of fees paid from the common fund to objectors’ counsel based on benefit conferred to class). See also *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 547 (5th Cir. 1980); *White v. Auerbach*, 500 F.2d 822, 828 (2nd Cir. 1974) (objectors entitled to attorney fees for improving settlement).

6. Generally speaking, there is no question that objectors are entitled to compensation for improvements to a settlement resulting from their objections. *See, e.g., In re Cendant PRIDES Corp. Litig.*, 243 F.3d 722, 743-44 (3rd Cir. 2001) (concluding that attorneys’ fees were appropriate for objector, represented by counsel, that successfully appealed attorneys’ fee award for class counsel). While within this case there were about a half dozen objections opposing Class Counsel’s fee application, Graham Objectors offer detailed and substantive grounds, together with an expert opinion report, in support of their opposition. Graham Objectors appeared through counsel at the Fairness Hearing and argued that a fee within the range of \$60 to \$80 million was far more appropriate in this case, for a number of reasons (Docket 1027, Tr. at 36:21-24, 37:15-16, 40:1-3 and 42:10-12). Graham Objectors were the only Class members objecting to expenses. The Court did reduce about \$200,000 of expenses, particularly excessive in-house photocopying charges.

7. Here, after sustaining some of Graham Objectors' material objections, the Court awarded Lead Counsel \$36.2 million less than they requested. Courts have awarded fees where objectors' counsel has fought against an exorbitant fee award. See *In re Elan Securities Litigation*, 385 F. Supp.2d. 363, 376-77 (S.D. N.Y 2005), where the Court awarded objectors' counsel fees after reducing Lead Counsel's requested award from 20% to 12% – Court awarded Objectors' counsel \$121,575 in legal fees (representing an \$81,050 lodestar and a 1.5 multiplier) along with un-reimbursed expenses of \$4,001.41). In *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) Public Citizen, an amicus, was awarded \$105,037.46 out of a \$100 million settlement fund; In *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 359 (N.D.Ga., 1993) the court awarded objectors' counsel fees of \$718,030.20, plus expenses of \$92,327.04.

8. Similarly, in this case, Graham Objectors presented the Court with references to assist the Court in crafting an award that is consistent with a pattern of moderation. Graham Objectors's written and oral presentations were submitted so as to help preserve more of the Settlement Fund for the class members. Graham Objectors contend they should be reimbursed for their expenses, especially their expert witness fees, on the same grounds that those expenses were incurred in order to confer a substantial benefit on the Settlement Fund and class members. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999).

9. Assessment of attorney's fees in this class action is discretionary with the district court. There can be no question that Graham Objectors played a useful and constructive role and worked to benefit the Settlement Fund and the Class of shareholders. Should the Court not award attorney's fees and expenses to Graham Objectors' counsel, there will be no incentive for

objectors to make legitimate and substantive legal arguments in opposition to excessive attorney's fees requested to be charged against a class action settlement fund.

B. The Requested \$300 Lodestar Hourly Rate is Very Reasonable; the Detailed Time Expended Was Necessary; the Modest Expenses Were Necessary.

10. This Court has ample experience awarding reasonable attorney hourly fees based upon the prevailing market rates in the Denver community. This Court can determine an applicable hourly rate relying on its superior knowledge of rates for lawyers with comparable skill and experience practicing in the Denver area. *See Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243 (10th Cir. 1998); *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1259 (10th Cir.2005) (approving the district court's determination of the applicable hourly rate by "relying on its knowledge of rates for lawyers with comparable skill and experience practicing" in the relevant market). The undersigned counsel has over 23 years experience with complicated federal court litigation, and a significant amount of work is on behalf of U S WEST/QWEST retirees, many of whom were members of the Class. (See Exhibit 2 - resume filed herewith). In *Bat v. A.G. Edwards & Sons, Inc.*, 2006 WL 446078 (D. Colo. February 21, 2006), Magistrate Judge Boland noted that an hourly rate of **\$350** for an attorney with 24 years experience is within the prevailing market rate for the Denver area. The undersigned counsel has requested payment at his current hourly rate of **\$300**. Earlier this year, Chief Judge Lewis T. Babcock entered an order awarding the undersigned counsel fees based upon an hourly rate of \$300.00 in the case of *Hull v. United States Department of Labor*, Case No. 04-cv-1264 (D. Colo. May 30, 2006) (See Exhibit 3 - slip opinion at p. 10).

11. None of the time spent by Graham Objector's counsel was irrelevant and,

certainly, there is no attempt to gouge the Settlement Fund. There is no evidence of excessiveness or redundancy. Also, Professor Michael Perino's charges (\$23,930.46) for his expert opinion services and photocopying costs (\$140) were all necessarily incurred. The undersigned counsel expended a total of 90 hours on behalf of Graham Objectors at the rate of \$300 for a lodestar of \$27,000. The requested fee award is \$40,500, based upon a modest multiplier of 1.5.

II. CONCLUSION

For the aforesaid reasons and those reasons set forth in the Declaration of Curtis L. Kennedy submitted herewith as Exhibit 1, the Court should award Graham Objectors' counsel attorney's fees in the amount of \$40,500, plus expenses of \$24,070.46.

Dated: October 10, 2006.

s/ Curtis L. Kennedy
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("Graham Objectors")

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 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
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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

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
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(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

**DECLARATION OF CURTIS L. KENNEDY
IN SUPPORT OF GRAHAM OBJECTORS' APPLICATION FOR AWARD OF
ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES**

I, **Curtis L. Kennedy**, declare as follows:

1. I am a sole practitioner with offices in Denver, Colorado. I am counsel of record for Intervenor/Objectors Eldon Graham, Hazel Floyd, Mary M. Hull and the Association of U S WEST Retirees (hereinafter "**Graham Objectors**"). For more than twenty years, a significant part of my law practice has concentrated on assisting, either on a paid basis or pro bono basis, thousands of employees and retirees of the former Bell System, particularly the former U S WEST and the current Qwest Communications International, Inc. I played a very significant role in forming the Association of U S WEST Retirees (**AUSWR**), Qwest Pension Plan participants and Qwest shareholders.

2. I am submitting this declaration and application for an award of attorneys' fees in connection with services rendered in the above-entitled action and the reimbursement of expenses incurred by Graham Objectors in the course of this litigation. I performed professional services in connection with the following tasks and projects during this litigation, as described in the table below, and billed at my current customary hourly rate of **\$300.00**. **Exhibit 1**

STATEMENT OF LEGAL SERVICES RENDERED

3. The following is a true and accurate statement of my hours expended and legal tasks performed during the January 18, 2006, through October 10, 2006, in connection with Graham Objectors' intervention and objections submitted in the case of *In re Qwest Consolidated Federal Securities Cases*, Case No. 01-1451, District of Colorado:

<u>Date:</u>	<u>Description of Task Performed:</u>	<u>Hours:</u>
01.18.06	Review from PACE proposed Class Notice of January 5 to be sent to class members of partial settlement of consolidated Qwest federal shareholder lawsuits; outline issues to address with AUSWR retiree leadership.	0.7
01.21.06	Meetings with AUSWR leadership in Phoenix, Arizona and individual Qwest shareholders to discuss recently announced partial settlement of Qwest shareholder cases and January 5 Class Notice sent out re: expected attorney's fee request and AUSWR plans to object seeking moderation of fee payment.	2.0
01.27.06	Extensive review of massive court files at Denver Federal Court to get updated on developments in the consolidated federal shareholder cases and potential for settlement (9:35-11:50, 1:45-4:10).	5.5
02.15.06	Research and review Internet based reports on recent securities settlements, including <i>Elan</i> , <i>Haliburton</i> , and <i>InfoSpace</i> settlements; review and analyze July 2005 NERA report: Elaine Buckberg, Ph.D, Todd Foster, Ronald I. Miller, Ph.D., <i>Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?</i> at 7 (NERA July 2005); review and analyze St. John's School of Law, legal studies research by Michael A. Perino, <i>Markets and Monitors: The Impact of Competition and Experience on Attorney's Fees in Securities Class Actions</i> ; draft report to AUSWR leadership (9:10-12:05).	2.5
02.21.06	Further review of <i>Elan</i> , <i>Haliburton</i> , and <i>InfoSpace</i> settlements and objections raised; begin draft of AUSWR's notice of objections and email work product to AUSWR leadership for comment. (1:15-4:25).	3.0

03.01.06	Review, via PACER, all papers filed by Lead Counsel on February 27 and 28 in connection with motion for approval of partial settlement and motion for attorney's fees (52 separate filings); draft update report to AUSWR leadership (4:10-6:45).	2.5
03.02.06	Continue drafting and revising proposed objections to attorney's fee and cost reimbursement request; further analysis and review of 52 filings downloaded from PACER website (1:05-3:30, 4:10-9:15)	7.3
03.03.06	Continue drafting and revising proposed objections to attorney's fee and cost reimbursement request; further analysis and review of 52 filings downloaded from PACER website (10:20-12:30)	2.0
03.04.06	Continue drafting and revising proposed objections to attorney's fee and cost reimbursement request; further analysis and review of 52 filings downloaded from PACER website; draft update re: work product to Named Objectors and AUSWR leadership for comment and feedback (9:05-1:15, 2:20-3:00)	3.1
03.06.06	Review comments, corrections and suggestions from Named Objectors and AUSWR leadership; final drafting and revising proposed objections to attorney's fee and cost reimbursement request; file same and draft courtesy note to Lead Counsel, per January 5 Class Notice (9:05-11:40, (1:35-3:45); draft update report for all of AUSWR's Qwest shareholders (8:40-9:10)	4.9
03.07.06	Review numerous email messages from AUSWR's Qwest shareholders and respond to their concerns; tcs with Named Objectors and AUSWR leadership.	0.9
	Draft additional update for AUSWR's Qwest shareholders explaining the claims process and no application to Qwest 401k related claims.	0.5
03.08.06	Review (approximately 100) email messages from AUSWR's Qwest shareholders and respond to their concerns; draft additional explanation report about the claims process and no application to Qwest 401k related claims (12:15-1:45).	1.4
	Review Judge Blackburn's "Order Reassigning Magistrate Judge and "Order of Reference to U.S. Magistrate Judge;" Tcs with AUSWR leadership Nelson Phelps and Mimi Hull re: same.	0.2

03.10.06	Review Judge Blackburn's "Order Extending Deadline for Mailing" and "Order Staying Production of Documents."	0.1
03.20.06	Review objections filed by New York State Teachers Retirement System; objections filed by Houston based objectors (Cynthia Levin Moulton) and report about same to AUSWR leadership and Named Objectors.	0.4
03.21.06	Tcs with individual Named Objectors re: paperwork verifying Qwest stock ownership.	0.3
03.22.06	Review numerous additional email messages from AUSWR's Qwest shareholders and respond to their concerns; draft comprehensive update and explanation for all of AUSWR's Qwest shareholders. (9:05-10:35).	1.5
	Begin research necessary case law and drafting of a motion to intervene for filing tomorrow. (6:35-9:40).	3.0
03.23.06	Complete research and final drafting of motion to intervene, file same and draft courtesy email notice to Lead Counsel per January 5 Class Notice; tcs with Named Objectors to explain same. (8:20-11:05, 2:10-3:45)	3.5
	Review Named Objectors' records on Qwest stock ownership; draft report to Lead Counsel per January 5 Class Notice re: intention of Objectors/Intervenors to appear through counsel and argue their motion and records of stock ownership.	0.3
03.24.06	Review and analyze Defendants Nacchio and Woodruff brief supporting their opposition to final approval of partial class action settlement; check case law cited in brief; Tc with AUSWR Executive Director Nelson Phelps about this latest development (3:25-5:10).	1.5
04.04.06	Review New York State Teachers' Retirement System (NYSTRS) filed request to be excluded and withdrawing objections; review Charles Reiner and Margaret Flanagan's motion to join in AUSWR's intervention request; draft update report re: same to AUSWR leadership and Named Objectors; tcs with several Named Objectors re: same.	0.5
04.10.06	Pursuant to Local Rule 7.1, draft request to Lead Counsel per January 5 Class Notice to confer about any objections to AUSWR's renewed motion to intervene; Tc with Named Objectors re: same.	0.3

04.11.06	Review Shriners Hospital for Children and Teachers' Retirement System of Louisiana filed request to be excluded and withdrawing objections; draft update report re: same and trend of significant institutional investors dropping out of case to AUSWR leadership and Named Objectors.	0.4
	Review email feedback from Lead Counsel, per Local Rule 7.1, re: AUSWR's plans to re-submit motion to intervene and respond to same; Tc with Named Objectors re: same.	0.2
	Draft and re-submit AUSWR's motion for intervention (same as March 23 motion and draft courtesy report to Lead Counsel re: same.	N/C
04.13.06	Review Judge Blackburn's "Order Concerning Motions to Intervene; draft update report on status of proceedings to AUSWR leadership and Named Objectors; Tc re: same with AUSWR leadership Mimi Hull and Nelson Phelps.	0.8
04.25.06	Tcs (voice messages) exchanged with Lead Counsel Mike Dowd re: his request on motion to file over length brief; draft email message to Mr. Dowd confirming no opposition to his motion; Tc with Named Objectors re: update on matters.	0.2
04.26.06	Draft report to Lead Counsel per January 5 Class Notice on numerous form objections received by AUSWR's Qwest shareholders.	0.1
04.28.06	Draft update report on status of matters and explanation about May 19 "Fairness Hearing" to AUSWR's Qwest shareholders.	0.4
	Begin review Lead Counsel's legal briefs and affidavits submitted by 3 federal judges in support of their requested \$96 million fee award, as e-filed near the end of the day. (5:15-6:45).	1.5
04.29.06	Review and analyze Qwest's reply to objections to final approval of settlement.	0.5
05.01.06	Continue review and analysis of Lead Counsel's legal briefs and affidavits submitted by 3 federal judges in support of their requested \$96 million fee award, as e-filed on Friday, April 28, near the end of the day; Tc with AUSWR leadership re: same; draft detailed explanation about advisability of obtaining expert witness report to counter opinions given by former federal judges Jim Carrigan, Lee Sarokin and Layn Phillips. (9:15-11:40).	2.4

	Tcs (several- lengthy) with Professor Mike Perino of St. Johns's University requesting expert opinion assistance; Tc with Named Objectors and AUSWR leadership on estimated costs.	0.9
	Pursuant to Local Rule 7.1, draft email communication with Lead Counsel per January 5 Class Notice requesting feedback on AUSWR's planned motion to designate Professor Mike Perino as expert witness for May 19 Settlement Hearing.	0.3
05.02.06	Tc with Professor Mike Perino and AUSWR Executive Director Nelson Phelps to discuss cost arrangements and preparation of his expert opinion report.	0.4
	Draft Professor Mike Perino series of emails with attachments and explanation about court proceedings and filings made by Lead Counsel in support of their \$96 million fee request; numerous tcs over the course of the day with Mr. Perino.	1.5
	Review May 2 email notice from Mike Dowd of Lead Plaintiffs' opposition with AUSWR's motion to submit expert opinion or testimony by Professor Mike Perino; Tc with Mr. Perino re: same; draft extensive explanation to AUSWR leadership and Named Objectors.	0.5
	Review notice e-filed today by Houston based objectors (Cynthia Levin Moulton) withdrawing objections and report about same, and comments made in legal brief by Lead Counsel about Ms. Moulton's counsel Attorney Jeffrey Meyer, to AUSWR leadership and Named Objectors.	0.4
	Draft motion by Objectors/Intervenors for leave to submit expert opinion report or allow Professor Mike Perino to testify at May 19 Settlement Hearing.	0.8
05.03.06	Review May 3 email notices from John Freedman and Alfred Levitt, more of Lead Plaintiffs' opposition to AUSWR's motion to submit expert opinion or testimony by Professor Mike Perino; Tc with Mr. Perino re: same; draft update report re: same to AUSWR leadership and Named Objectors.	0.3
	Tc with Professor Mike Perino on his fees to be charged; finalize agreement and draft report to AUSWR leadership and Named Objectors.	0.4

	Final motion by Objectors/Intervenors for leave to submit expert opinion report or allow Professor Mike Perino to testify at May 19 Settlement Hearing, e-file same and draft courtesy note re: same to Lead Counsel per January 5 Class Notice.	0.3
05.04.06	Review protest/objection submitted by R. Stan Soth, individual investor in Spokane, WA; draft report re: same to AUSWR leadership and Named Objectors.	0.2
05.08.06	Review and analyze opposition briefs e-filed on May 5 by Lead Counsel opposing AUSWR's motion to use Professor Perino's expert opinion; draft report re: same to AUSWR leadership and Named Objectors; Tc with AUSWR Executive Director Nelson Phelps (4:05-5:35).	1.0
05.09.06	Tcs (numerous and lengthy throughout the day) with Professor Mike Perino.	2.9
	Review objections filed by Alan Henry.	0.3
05.11.06	Review Judge Blackburn's "Order Concerning Motion for Leave to Designate Expert Witness" re: Professor Mike Perino; Tc with Mr. Perino re: same; draft report re: same to AUSWR leadership and Named Objectors.	0.5
	Draft report to Professor Mike Perino re: Judge Weinshienk's December 8, 1997 order in the <i>Sonnefield</i> ; Magistrate Judge Schlatter's May 29, 1997 order in the <i>Wolf</i> case; and Robert Tessier's Declaration in support of Lead Counsel's fee request;	0.7
05.12.06	Review and critique Professor Mike Perino's draft of his declaration and expert opinion report; review case law cited in his report. (9:05-11:00).	1.4
	Review Defendants Nacchio and Woodruff's supplemental brief opposing final approval of partial class action settlement.	0.7
05.13.06	Tc (lengthy) with Professor Mike Perino to go over his proposed declaration and expert opinion report.	0.8
05.15.06	Review Professor Mike Perino's revised declaration and expert opinion report; Tc with Mr. Perino re: same and affidavits submitted by Lead Plaintiffs' in support of Lead Counsel's fee request.	0.6
	Draft email explanation to Professor Mike Perino on the <i>proposed</i> Final Judgment as submitted by Lead Counsel.	0.2

	Review final declaration by Professor Mike Perino and e-file same with the Court; draft courtesy note to Lead Counsel per January 5 Class Notice; Tc with AUSWR Executive Director Nelson Phelps re: latest events..	0.8
05.16.06	Draft update to AUSWR leadership and AUSWR's Qwest shareholders on status of matters.	0.2
05.17.06	Draft email request to Lead Counsel per January 5, 2006 Class Notice for copy of original objections filed by Pennsylvania State Employees' Retirement System; review 3 page letter setting forth supplemental objections e-filed today; draft letter re: same to Professor Mike Perino.	0.6
05.18.06	Final preparation for tomorrow's "Fairness Hearing" and oral argument for Objectors/Intervenors (1:10-5:45).	4.4
05.19.06	Final preparation for today's "Fairness Hearing."	1.0
	Attend and participate at "Fairness Hearing" and present oral argument on behalf of Objectors/Intervenors (10:00-Noon)	2.0
	After hearing discussion and answer questions by AUSWR's Qwest shareholders in attendance at the "Fairness Hearing."	0.7
	Draft report re: outcome of today's "Fairness Hearing" to Professor Mike Perino.	0.2
05.22.06	Review letter from Objector Alan Henry to Judge Blackburn; Tc re: same with AUSWR President Mimi Hull; review Courtroom Minutes reflecting May 19 "Fairness Hearing."	0.2
06.13.06	Review notice that transcript of May 19 "Fairness Hearing" is available; draft report re: same to AUSWR leadership and Named Objectors; Tc with AUSWR President Mimi Hull re: same.	0.2
06.19.06	Review commentary by Wayne Schneider, General Counsel for NYSTRS and draft email report to Mr. Schneider re: AUSWR's objections and involvement opposing excessive attorney's fee requested.	N/C
06.29.06	Review transcript of May 19 "Fairness Hearing" and draft report re: same to AUSWR leadership and Named Objectors.	0.6
08.23.06	Draft update report on status of proceedings to AUSWR leadership, Named Objectors and Professor Mike Perino.	0.2

09.15.06	Review Objector Donald Keller's letter to Judge Blackburn; review Judge Blackburn's Minute Order seeking information on requests for exclusion; draft update report on status of proceedings to AUSWR leadership, Named Objectors and Professor Mike Perino.	0.2
09.22.06	Review Lead Counsel's report in response to Court's September 15 Minute Order for information regarding timely requests for exclusion; draft update report on status of proceedings to AUSWR leadership and Named Objectors.	0.4
09.29.06	Review and analyze series of rulings and orders entered by Judge Blackburn on approval of partial settlement, award of attorney's fees and costs and administrative closure of case; draft update report on status of proceedings to AUSWR leadership, Named Objectors and Professor Mike Perino.	0.9
	Draft Local Rule 7.1 communication to Lead Counsel per January 5 Class Notice concerning AUSWR's planned motion to re-open the case and pursue a motion for attorney's fees; draft update report on same to AUSWR leadership and Named Objectors.	0.3
10.05.06	Review Local Rule 7.1 response from Mike Dowd for Lead Plaintiffs; draft motion to re-open case/administrative proceedings, e-file with Court.	0.5
10.06.06	Research case law and begin drafting "Graham Objectors" motion for award of attorney fees and expenses in connection with their objections and intervention. (1:20-4:45)	3.3
10.09.06	Continue research case law and drafting "Graham Objectors" motion for award of attorney fees and expenses in connection with their objections and intervention. (9:15-11:45)	2.5
10.10.06	Final "Graham Objectors" motion for award of attorney's fees and expenses; e-file same and draft courtesy notice to Lead Counsel per January 5, 2006 Class Notice. (8:35-11:40)	2.0
	Total Billable Hours:	90
	Total Time Charges: 90.0 hours @ \$300 \$27,000.00 (January 18, 2006 to October 10, 2006)	

4. Graham Objectors incurred costs and expenses during this litigation consisting of:
1) \$23,930.46 for the expert opinion report prepared by Professor Mike Perino submitted to the Court, plus photocopies of numerous documents filed by parties to this litigation - approximately 1,000 pages @ \$.07 per page, or \$140.00. Mr. Perino's invoice is attached hereto.

5. Submitted together with this Declaration is Exhibit 2, my resume, limited to showing various legal cases performed on behalf of U S WEST/Qwest retirees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of October, 2006 at Denver, Colorado.



CURTIS L. KENNEDY #12351

8405 E. Princeton Avenue

Denver, Colorado 80237-1741

Telephone: (303) 770-0440

Fax: (303) 843-0360

CurtisLKennedy@aol.com

Attorney For Objectors/Intervenors

*Eldon Graham, Mary M. Hull, Hazel Floyd and
Association of U S WEST Retirees*

("Graham Objectors")

Invoice

Professor Michael A. Perino
105 Leonia Ave.
Leonia, NJ 07605

Telephone: (201) 410-2983
E-Mail: perinom@stjohns.edu

Taxpayer Identification # 142-58-9926

Date: May 31, 2006

Re: *In re Qwest Communications International, Inc. Sec. Litig.*, Civil Action No. 01-cv-1451-REB-CBS (D. Colo.)

To: Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741

May 2006: Preparation of declaration submitted in support of objection to attorneys' fees request.
See attached for time charge details.

36.75 hours at \$650/hour	\$23,887.50
Expenses (see attached for expense details)	\$ 42.96
Less Retainer	(\$10,000.00)

Total

\$13,930.46

Professor Michael A. Perino
 105 Leonia Avenue
 Leonia, NJ 07605

Taxpayer ID 142-58-9926

**In re QWEST Communications International, Inc. Sec. Litigation
 Time Charges**

3-May-06	0.75	Preliminary analysis of fee data and motion papers in QWEST re fee request. Analyze data on fees in securities class action settlements; investigate recent fee requests in large settlements not included in database; prepare graphs for exhibits; telephone conference with Curtis Kennedy.
9-May-06	3.00	
10-May-06	6.75	Analyze data on fees in securities class action settlements; prepare graphs for exhibits.
11-May-06	11.00	Review motion papers in connection with fee request; draft affidavit in opposition.
12-May-06	8.25	Review motion papers in connection with fee request; draft affidavit in opposition;
13-May-06	0.25	Telephone conference with Curtis Kennedy re draft declaration.
15-May-06	6.75	Revise declaration; prepare exhibits; multiple telephone conferences and emails with Curtis Kennedy re same.

Total Hours	36.75	
Fee (Hours * \$650.00)	\$23,887.50	
Expenses	\$42.96	
Less Retainer	\$10,000.00	
Total	\$13,930.46	

Professor Michael A. Perino
105 Leonia Avenue
Leonia, NJ 07605

Taxpayer ID 142-58-9926

**In re QWEST Communications International, Inc. Sec. Litig.
Expense Breakdown**

15-May-06 \$42.96 Federal Express to Curtis Kennedy from Michael Perino

Total \$42.96

Exhibit 2

CURTIS L. KENNEDY
ATTORNEY AT LAW

8405 E. PRINCETON AVE.
DENVER, CO 80237-1741
CurtisLKennedy@aol.com

TELEPHONE (303) 770-0440

FAX (303) 843-0360

ALSO ADMITTED IN:
UNITED STATES SUPREME COURT
STATE OF ARIZONA
STATE OF OKLAHOMA
STATE OF TEXAS
WASHINGTON, D.C.

EDUCATION

1982 J.D., University of Colorado College of Law
Boulder, Colorado

1979 B.A., University of Oklahoma
Norman, Oklahoma

LEGAL EXPERIENCE

1983 - Present Solo Practice. Emphasizing federal employee benefits law (Employee Retirement Income Security Act), federal age discrimination (Age Discrimination in Employment Act), and other employment related issues on behalf of plaintiff workers and retirees. Providing pro bono legal representation in federal COBRA law related claims.

1982 - 1983 Associate, Calkins, Kramer, Grimshaw & Haring, Denver, CO. General business litigation and employment litigation.

1981 Law Clerk, Hall & Evans, Denver, CO. Natural Resources litigation.

ADMITTED / LICENSED TO PRACTICE LAW

State of Arizona
State of Colorado
State of Oklahoma
State of Texas
District of Columbia

United States Supreme Court
Tenth Circuit Court of Appeals
Ninth Circuit Court of Appeals
Sixth Circuit Court of Appeals
Fifth Circuit Court of Appeals
District of Columbia Court of Appeals
United States Tax Court
District of Arizona
Northern District of California
District of Colorado
Northern District of Oklahoma
Western District of Oklahoma
Northern District of Texas
Southern District of Texas

ASSOCIATIONS

Arizona Bar Association
Colorado Bar Association
District of Columbia Bar Association
Oklahoma Bar Association
Texas Bar Association
National Employment Lawyers Association
Plaintiff's Employment Lawyers Association - Colorado

REPRESENTATIVE SPEECHES / PAPERS PRESENTED

Various speeches / papers before the National Employment Lawyers Association annual meetings and Colorado Bar Association sponsored continuing legal education seminars on Employee Retirement Income Security Act litigation.

SIGNIFICANT LABOR LAW CIVIL ACTIONS INVOLVING U S WEST/QWEST SUCCESSFULLY CONCLUDED

- (* Denotes either a class certification in part or class-wide settlement)
- (** Denotes consolidation of several cases)
- (*** Denotes where served as special or pro hac vice co-counsel)

- * Walker, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 84-M-790, District of Colorado
ERISA / ADEA / Common Law
- Holder, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 85-M-122, District of Colorado
ERISA / ADEA / Common Law
- Reed v. The Mountain States Tel. & Tel. Co.,
Case No. 85-M-1368, District of Colorado
ERISA / Common Law
- Kendall, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 85-M-2004, District of Colorado
ERISA / Common Law
- Martin, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 85-M-2696, District of Colorado
ERISA / Common Law
- Mulcahy, et al v. The Mountain States Tel. & Co.,
Case No. 86-M-596, District of Colorado
ERISA / Common Law
- Mead, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 86-M-869, District of Colorado
ERISA / Common Law
- Baker, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 86-M-1102, District of Colorado
ERISA / Common Law
- Bryant, v. The Mountain States Tel. & Tel. Co.,
Case No. 86-M-1103
ERISA / ADEA / Common Law
- Davis v. The Mountain States Tel. & Co.,
Case No. 85-M-1857, District of Colorado
ERISA / Common Law
- Counts, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 86-M-2087, District of Colorado
ERISA / Common Law
- Wilson, et al v. The Mountain States Tel. & Tel. Co.,
Case No. 86-399 PHX, CAM, District of Arizona
Common Law / Arizona wage statute
- Crowder v. The Mountain States Tel. & Tel. Co.,
Case No. 86-M-2259, District of Colorado
ERISA / Common Law
- Hancock et al v. The Mountain States Tel. & Tel. Co.,
Case No. 87-M-177, District of Colorado
ERISA / Common Law
- Fillingham v. The Mountain States Tel. & Co.,
Case No. 87-1538 PHX RGS, District of Arizona
ERISA / Common Law
- Savage, et al v. The Mountain States Tel. & Co.,
District of Montana (MDL 798 transfer to)
Case No. 89-M-282, District of Colorado
ERISA / Common Law
- Barker, et al v. U S WEST Communications, Inc.,
District of New Mexico (MDL 798 transfer to)
Case No. 89-M-585, District of Colorado
ERISA / Common Law
- Rivera, et al v. U S WEST Communications, Inc.,
District of New Mexico (MDL 798 transfer to)
Case No. 89-M-621, District of Colorado
ERISA / Common Law
- Vigil, et al v. U S WEST Communications, Inc.,
District of New Mexico (MDL 798 transfer to)
Case No. 89-M-628, District of Colorado
ERISA / Common Law
- Adcock, et al v. U S WEST Communications, Inc.,
District of New Mexico (MDL 798 transfer to)
Case No. 89-M-640, District of Colorado
ERISA / Common Law
- Bush, et al v. U S WEST Communications, Inc.,
District of Utah (MDL 798 transfer to)
Case No. 89-M-622, District of Colorado
ERISA / Common Law
- Cormani, et al v. U S WEST Communications, Inc.,
District of Utah (MDL 798 transfer to)
Case No. 89-M-653, District of Colorado
ERISA / Common Law
- Boyd, et al v. U S WEST Communications, Inc.,
District of Wyoming (MDL 798 transfer to)
Case No. 89-M-654, District of Colorado
ERISA / Common Law
- Johnson, et al v. U S WEST Communications, Inc.,
District of Arizona (MDL 798 transfer to)
Case No. 89-M-661, District of Colorado
ERISA / Common Law
- Blodgett, et al. v. U S WEST Communications, Inc.,
District of Arizona (MDL 798 transfer to)
Case No. 89-M-662, District of Colorado
ERISA / Common Law
- Engstrom, et al v. U S WEST Communications, Inc.,
District of Arizona (MDL 798 transfer to)
Case No. 89-M-663, District of Colorado
ERISA / Common Law
- Koonce, et al. v. U S WEST Communications, Inc.,
District of Arizona (MDL 798 transfer to)
Case No. 89-M-664, District of Colorado
ERISA / Common Law
- Holz, et al. v. U S WEST Communications, Inc.,
District of Arizona (MDL 798 transfer to)
Case No. 89-M-665, District of Colorado
ERISA / Common Law
- Lynch, et al. v. U S WEST Communications, Inc.,
District of Idaho (MDL 798 transfer to)
Case No. 89-M-703, District of Colorado
ERISA / Common Law

	*	<u>Jedlick, et al v. U S WEST Communications, Inc.</u> , District of Idaho (MDL 798 transfer to) Case No. 89-M-704, District of Colorado ERISA / Common Law		<u>U S WEST, Inc. Employees' Benefit Committee v. Alexander, et al</u> , Case No. 93-N-1318, District of Colorado ERISA
**		<u>Andersen, et al v. U S WEST Communications, Inc.</u> , Case No. 86-CV-8735, Denver County District Court (Case No. 88-CA-1798, Colorado Court of Appeals Common Law		<u>Musso v. U S WEST Communications, Inc., et al</u> Case No. CIV 93-0172 PHX RCB, District of Arizona ERISA / ADEA
	*	<u>Payne, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2334, Denver County District Court Common Law		<u>Unger v. U S WEST, Inc., et al</u> Case No. 94-B-2598, District of Colorado ERISA
	*	<u>Aab, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2335, Denver County District Court Common Law		<u>Phelps v. U S WEST, Inc., et al</u> Case No. 95-Z-2759, District of Colorado ERISA
		<u>Brady, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2336, Denver County District Court Common Law		<u>Henry v. U S WEST Communications, Inc.</u> Case No. 96-N-724, District of Colorado ERISA / ADEA / Common Law
		<u>Coppen, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2337, Denver County District Court Common Law		<u>Matthews-Forney v. Qwest Communications International, Inc.</u> Case No. 01-WM-0592, District of Colorado ERISA
		<u>Donahoo, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2338, Denver County District Court Common Law		<u>Tingley v. Qwest Communications International, Inc.</u> Case No. 02-M-0726, District of Colorado ERISA
		<u>Fagerquist, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2339, Denver County District Court Common Law		<u>Helton v. Qwest Communications International, Inc.</u> Case No. 02-M-1578, District of Colorado ERISA
		<u>McComas, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2340, Denver County District Court Common Law		<u>Nearing v. Qwest Disability Plan</u> . Case No. 02-D-828, District of Colorado ERISA
		<u>Millard, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2341, Denver County District Court Common Law		<u>Wolff v. Qwest Communications International, Inc.</u> Case No. 02-WY-777, District of Colorado Title VII, Equal Pay Act
		<u>Sandeman, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-2342, Denver County District Court Common Law		<u>Lauck v. Qwest Disability Plan</u> Case No. 04-WM-0139, District of Colorado ERISA
		<u>Hoffman, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-4447, Denver County District Court Common Law		<u>Strauss v. Anschutz</u> Case No. 02-CV-8188, Denver County District Court Qwest shareholder derivative action
	*	<u>Fisher, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-0813, El Paso County District Court Common Law		<u>Colvin v. Qwest Communications International, Inc.</u> Case No. 04-CV-39, Otero County District Court Common Law / ERISA
		<u>Hawksworth, et al v. U S WEST Communications, Inc.</u> , Case No. 89-CV-97, Mesa County District Court Common Law		<u>Osborn v. Qwest Services Corporation</u> Case No. 04-cv-01987-PSF-PAC, District of Colorado ERISA
*		<u>Walker, et al v. U S WEST Communications, Inc.</u> , Case No. 90-F-108, District of Colorado Common Law		<u>Phelps v. Qwest Employee Benefits Committee</u> Case No. 04-cv-02042-LTB-MEH ERISA
		<u>Shepard v. U S WEST Communications, Inc.</u> , Case No. 92-C-2291, District of Colorado ERISA		

Exhibit 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge**

Civil Action No. 04-cv-01264-LTB-PAC

MARY M. HULL,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

Order

Plaintiff Mary M. Hull (“Hull”) moves for attorney fees and for a judicial decree against defendant United States Department of Labor (“DOL”) in this case under the Freedom of Information Act (“FOIA”), 29 U.S.C. § 552(a)(4)(E) & (F). For the reasons stated below, Hull’s motion is GRANTED, in part and DENIED, in part.

I. BACKGROUND

Hull first filed this FOIA request for records of the DOL investigation of the Qwest Pension Plan (“QPP”) in June of 2004. In the almost two years since, the DOL has provided most of the roughly 6500 pages of documents relevant to her request. My previous Order of December 2, 2005 (Docket # 28) (“December 2005 Order”) describes the history of this action up to that point. That Order addressed about 450 pages of documents in dispute, denying DOL summary judgment on withholding about 125 pages of Service Contracts under FOIA exemption 4, and directing the DOL to submit about 62 pages of documents for *in camera* review. On January 13,

2006, this Court issued an Order requiring the DOL to disclose nine pages of the 62 pages subject to *in camera* review (“January 2006 Order”)(Docket #32).

Since January of 2006, despite some disagreements about the remaining documents, and some motions filed, the parties have resolved their outstanding disputes regarding the documents, and the only remaining issue is attorney fees and costs.

II. Standard of Review

Courts may assess attorney fees against government agencies in FOIA cases where the FOIA requestor “substantially prevails” in its claims against the agency. 5 U.S.C. § 552(a)(4)(E). A party “substantially prevails” in fee-shifting statutes, such as FOIA, when he achieves a “material alteration of the legal relationship of the parties,” such as through an “enforceable judgment on the merits” or a “court-ordered consent decree.” *Buckhannon Bd. and Care Home, Inc., v. West Virginia Dep’t of Health and Human Resources, et al.*, 532 U.S. 598, 604 (2001). In the December 2005 Order I concluded that this definition governs FOIA cases, and determines if a party is eligible for attorney fees.

To recover attorney fees, an eligible party must also be entitled to attorney fees. *Anderson v. Sec’y of Health and Human Services*, 80 F.3d 1500, 1504 (10th Cir. 1996). This requires analyzing four factors: “(1) the benefit to the public, if any, derived from the case, (2) the commercial benefit to the complainant, (3) the nature of the complainant’s interest in the records sought, and (4) whether the government’s withholding of the records had a reasonable basis in the law.” *Id.*

III. Discussion

A. Entitlement to Attorney Fees under FOIA

The DOL acknowledges that Hull is a substantially prevailing party eligible for attorney fees. I therefore must analyze the four factors to determine if Hull is entitled to attorney fees.

1. Public Benefit

The test for determining the public benefit of a FOIA disclosure is “whether the disclosure will assist the citizenry generally in making an informed judgment as to governmental operations.” *Aviation Data Service v. Federal Aviation Administration*, 687 F.2d 1319, 1323 (10th Cir. 1982.)

A public benefit must be more than the benefit derived from “bringing the government into compliance with the FOIA” or “securing for the public at large the benefits assumed to flow from the public disclosure of government information.” *Id.* Rather, a FOIA disclosure must “likely add to the fund of information that citizens may use in making vital political choices.” *Id.* A key factor is “the degree of dissemination and likely public impact that might be expected from a particular disclosure.” *Id.*

The DOL argues that Hull’s request does not serve the public interest because it mainly benefits the Association of U.S. West/Qwest Retirees (“AUSWR”), of which Hull is President. The DOL contends that while the members of the AUSWR have an interest in these documents, the broad public does not. Moreover, the DOL asserts, the documents here do not address government operations, but only the operations of the QPP, a private entity.

I find this argument unpersuasive. The AUSWR is a non-profit organization of over 20,000 current and future retirees. In addition to advocating for its own members, it is part of a broader network of similar entities that advocate for the rights of retirees nationwide. The information disclosed here will be disseminated publicly, free, on the AUSWR website. This contrasts with situations where the information is available only to those who pay for it. *Id.* at

1322, or where the information released was already publicly available. *See Tax Analysts v. United States Dep't of Justice*, 965 F.2d 1092, 1094 (D.C. Cir. 1992). Also, the QPP files reveal information about how the DOL oversees and investigates private pension plans, shedding light both on the QPP, and on the operations of the Department of Labor.

In considering the public benefit of these documents, I am also mindful of the overall situation facing private pensions nationally. Key Congressional leaders report that the pension system is “in crisis,” and is “consistently in the headlines and rightfully on the minds of millions of American families.” Press Release, Committee on Education and the Workforce, U.S. House of Representatives, *Nation's Editorial Pages Highlight Pension Crisis, Cite Growing Urgency for Congress to Act on Reforms*, December 1, 2005. The members of AUSWR have witnessed “unrecoverable disasters across the nation with respect to many defined pension plans.” (Reply Brief Page 8). Numerous large private companies have “terminated their pension plans with severe gaps between the assets these plans held and the pension promises . . . made to their employees and retirees.” *Private Pensions: Revision of Defined Benefit Pension Plan Funding Rules is an Essential Component of Comprehensive Pension Reform, Before the Committee on Finance, United States Senate*, Statement of David M. Walker, Comptroller General of the United States, United States Government Accountability Office, June 7, 2005, page 1, GAO-05-794T. The federal agency that insures these plans, the Pension Benefit Guaranty Corporation faces “serious financial difficulties,” and even “insolvency.” *Id.*

Under these circumstances, millions of Americans, and not just the 20,000 members of the AUSWR have an interest in the status of the QPP and the effectiveness of the DOL in ensuring that private pension plans remain solvent and viable. These documents are of broad interest to

workers and retirees concerned about the future status of their pension, and to taxpayers generally who will be on the hook for any bail-out of the pension system. I conclude that the documents released here “add to the fund of information that citizens may use in making vital political choices” and serve the public interest.

2. Commercial Benefit to Complainant and Nature of Complainant’s Interest

These two factors are related, and usually considered together. *Aviation Data*, 687 F.2d at 1322. Attorney fees are generally inappropriate where the plaintiff seeks the information for commercial benefit, or where “self interest was the primary factor in bringing the suit.” *Id.*

The DOL asserts that Hull’s interest here is commercial and private because her principle purpose is to protect her, and the AUSWR members’ financial interests. Hull does not dispute that this FOIA action is, in part, an effort to protect the pension benefits of AUSWR members.

While there is unquestionably a private interest to Hull’s request, it is not a commercial or pecuniary interest. Hull seeks these documents in order to police the QPP on behalf of the 20,000 members of the AUSWR. While in some sense this is a personal interest, it is not personal to Hull, but to the 20,000 individuals whose pensions may be in jeopardy. This is unlike a corporation seeking data for explicitly commercial purposes. *Aviation Data*, 687 F.2d at 1320-1321, or a newspaper using FOIA to obtain already public information in a format that is less “frustrating, cumbersome and time-consuming.” *Tax Analysts v. United States Dep’t of Justice*, 759 F. Supp. 28, 31 (D. D.C. 1991). Neither Hull nor the AUSWR have a commercial stake in this information, and it has not already been made public.

Moreover Hull’s personal interest in these documents is not fatal to her claim. Public and private interests in FOIA documents are not mutually exclusive. *Piper v. U.S. Dep’t of Justice*,

339 F. Supp.2d 13, 21, (D.D.C. 2004). Hull is certainly concerned about the viability of AUSWR's members' pensions. But where the interests of the members of the AUSWR overlap or coincide with the public interest in maintaining a sound pension system, AUSWR's private interests do not undermine its claim to attorney fees. *See Oil, Chemical & Atomic Workers Intern. Union, AFL-CIO v. U.S. Dep't of Energy*, 141 F. Supp. 2d 1, 7-8 (D.D.C. 2001).*rev'd on other grounds*, 288 F.3d 452 (D.C. Cir. 2002).

Finally, the DOL argues that Hull's claim is an effort to identify a possible litigation claim which, like using FOIA for discovery, is an invalid basis for seeking attorney fees. *See Ellis v. U. S.*, 941 F. Supp. 1068, 1079 (D. Utah 1996). The DOL's only evidence for this argument is another, unrelated lawsuit, filed by a different plaintiff, one year after this action was commenced. The DOL's argument here is purely speculative, and not persuasive.

3. Whether Government's Withholding Had a Reasonable Basis in Law

The final factor in this analysis is whether the Government's withholding had a "reasonable or colorable basis in the law." *Aviation Data*, 687 F.2d at 1324. Part of this analysis is whether the Government's delay in providing documents was "obdurate or recalcitrant," or shows bad faith. *Ellis*, 941 F. Supp. at 1080.

The only documents that DOL sought to withhold that were subject to an Order of this Court are the nine pages of the 67 reviewed *in camera*, for which the DOL claimed exemption 5, and the 125 pages of Service Contracts for which the DOL claimed exemption 4. The nine pages consist of a report on a prior investigation of the QPP, initiated in 1995 and closed in 2001. Most of these pages appear to be routine entries in database format in a case file. The DOL, citing *Vaughn v. Rosen*, 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975), contends that language on one of

the nine pages describing the scope of the investigation is “an opinion on a legal matter” and therefore covered by exemption 5.

I do not find this argument to be persuasive. The statement the DOL refers to is a factual statement of the scope of a closed investigation, not an opinion on a legal matter. In *Vaughn*, the D.C. Circuit stated explicitly that pre-decisional materials are only exempt if they are “part of the agency give and take of the deliberative process by which the decision itself is made.” *Id.* at 1144. The DOL does not explain how these documents can be part of the DOL’s “give and take” related to a subsequent investigation. *Vaughn* specifically addressed “summaries of past administrative determinations” and concluded that “it is beyond dispute that such documents would not be exempt from disclosure.” *Id.* In *Casad v. U.S. Dep’t of Health and Human Services*, 301 F. 3d 1247, 1252 (10th Cir. 2002), the court found a document pre-decisional because it was an interim agency recommendation in a longer process. The DOL has offered no evidence that this statement is similarly pre-decisional. I conclude that withholding these 9 pages was unreasonable.

The DOL only released the 125 pages of Service Contracts after this Court ruled that DOL had no valid basis to withhold them, and after Hull filed a motion for summary judgment to obtain their release. In the December 2005 Order, I did not conclude that exemption 4 could not, by law, cover these documents, only that DOL’s affidavit was insufficient. DOL had a colorable legal argument; it merely failed to support its argument with sufficient facts. Additionally, the DOL asserted that Hull had waived her right to receive these documents, an argument I rejected but that has some support in law. I therefore conclude that the DOL’s initial denial of these documents was not unreasonable.

Hull also contends that the DOL’s pattern of providing documents intermittently and only

in order to avoid a Court order constitutes obdurate behavior and bad faith. In the December 2005 Order I summarized Hull's contentions of DOL foot-dragging and obstructionism stretching throughout the two year history of this case. I expressed concern about DOL's behavior, but concluded that, while disturbing, it did not rise to the high standard necessary for finding bad faith. While DOL does not in general, deny Hull's allegations, it offers detailed specific explanations for each instance of delay, attributing them to some combination of internal miscommunication, changing circumstances or honest mistakes, and in one case apologizes to the court and to Hull for the inconvenience its errors have caused.

Despite my misgivings about the DOL's behavior in this case, the evidence presented is more suggestive of ineptitude than of bad faith. The record does not contain evidence that DOL's non-disclosure "was designed to avoid embarrassment or to thwart the requestor." *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978). The DOL eventually disclosed most of the documents Hull requested. The DOL's behavior here is similar to the kind of "foot dragging," *Guam Contractors Ass'n v. U.S. Dep't of Labor*, 570 F. Supp. 163, 170 (D. Cal. 1983), "unprofessional practice," *Frydman v. Dep't of Justice*, 852 F. Supp. 1497, 1512 (D. Kan. 1994), and "sluggish response" and "failure to meet deadlines," *Simon v. U.S.*, 587 F. Supp. 1029, 1032 (D.D.C. 1984), that courts generally find falls short of bad faith or obdurate behavior.

In balancing these four factors, I conclude that disclosure serves the public interest and that this public interest outweighs Hull's non-commercial private interest in these documents. DOL's non-disclosures, mostly, had a colorable basis in law, and while the DOL's "bureaucratic mistakes" do not rise to the level of bad faith, they certainly do not overcome my analysis of the other factors. I conclude that Hull is entitled to attorney fees.

B. Amount of Attorney Fees

Hull seeks attorney fees of \$32,400 plus expenses of \$570, based on an hourly rate of \$300, for her lawyer, Curtis Kennedy. I determine the reasonableness of attorney fees by multiplying the hours an attorney reasonably spends on a case by a reasonable hourly rate. *Case v Unified School Dist. No. 233, Johnson County*, 157 F.3d 1243, 1249 (10th Cir. 1998). This establishes the “lodestar” figure. *Id.* The party seeking fees bears the burden of demonstrating the reasonableness of fees, and “of documenting the appropriate hours expended and hourly rates.” *Id.* The District Court should rely on prevailing local market rates for lawyers of similar experience. *Id.* at 1255. When the Government opposes a plaintiff’s motion for attorney fees, it bears the burden of providing “equally specific countervailing evidence” to rebut plaintiff’s claims. *Piper*, 339 F. Supp.2d at 24.

The DOL does not dispute the number of hours Hull claims or the sufficiency of her documentation. The DOL also does not argue specifically that Kennedy’s rates are unreasonable. Rather, the DOL asserts that Hull has failed to show that \$300/hour is reasonable in the Denver area. Hull has provided an affidavit from Kennedy stating that \$300/hour is his “customary hourly rate,” and that Kennedy is a solo practitioner in Denver with more than twenty years of legal experience assisting employees and retirees of the former Bell system. Hull also cites to an unpublished opinion, *Bat v. A.G. Edwards & Sons, Inc.*, No. 04-CV-02225, 2006 WL 446078 (D. Colo. February 21, 2006), stating that \$350 an hour is a reasonable rate for a Denver attorney with 24 years experience. The DOL does not dispute these facts, and offers no facts in rebuttal, but argues that Hull’s claim fails for lack of proof of prevailing market rates.

I disagree. Where, as here, the parties do not provide the court with evidence of market

rates, the court may rely on other evidence, including its own knowledge of the prevailing market rates and a party's statement regarding its usual rates when working on cases in its field of expertise. *Id.* at 1257. Since the Government has provided no specific information to rebut Hull's claim, I may accept her statement of hours and rates. *Piper*, 339 F. Supp.2d at 24. However, I also conclude, based on my own knowledge of the rates of lawyers with twenty plus years of experience in the Denver area, that \$300 an hour is reasonable.

Establishing the hourly rate and the number of hours does not end the inquiry. I also must evaluate the total attorney fees claimed based on the level of success Hull achieved. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Where a plaintiff achieves only partial success, it may be appropriate to reduce the total fee. *Id.* at 436. However, where a plaintiff loses on some claims but still achieves substantial success, reducing the fee may be inappropriate if the successful and unsuccessful claims are closely related. *Id.* at 435. "The most critical factor is the degree of success obtained." *Id.* at 436.

Hull filed this suit to make the DOL disclose its entire QPP investigation case file, consisting of about 6400 pages. During the course of the litigation, during which Hull incurred legal fees filing and responding to numerous motions, the DOL disclosed all but about 454 pages. Of these, the December 2005 Order denied summary judgment to the DOL on 125 pages, granted summary judgment to the DOL on 267 pages, and granted Hull's motion for *in camera* review of 62 pages. Of these 62 pages, the January 2006 Order directed DOL to release 9 pages.

Under these circumstances, I find that Hull "achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434. This entire litigation involves a single FOIA claim on a single set of documents, thus making

every aspect of this case closely intertwined. While Hull only achieved partial success in the specific issues governed by the two Orders, Hull obtained most of the goals she sought in her overall lawsuit, obtaining the QPP investigation file. “[W]hen a plaintiff achieves the principal goal of her lawsuit, lack of success on some of her interrelated claims may not be used as a basis for reducing the plaintiff’s fee award.” *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998). This applies even to time spent on settled claims. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1254 (10th Cir. 1992). Since Hull’s claims were closely intertwined, and she achieved her principal goals, she is entitled to the hours she reasonably devoted to this litigation.

The DOL argues that Hull is entitled to attorney fees only to the degree her success derived from an Order of this court. Relying on *Buckhannon*, the DOL contends that Hull cannot claim legal expenses for the documents that the DOL released that were unrelated to a court-ordered “material alteration of the legal relationship of the parties,” since for these documents Hull did not “substantially prevail.” *Buckhannon*, 532 U.S. at 604.

This argument is inapt. *Buckhannon* addressed the level of success necessary for a litigant to be eligible for attorney fees, not the reasonableness of fees for a partially successful litigant. One District Court rejected this exact argument from another federal agency, stating that “[I]t is incoherent to say that a plaintiff did or did not substantially prevail in part of its litigation. A plaintiff does or does not prevail with respect to the whole litigation.” *Judicial Watch, Inc. v. Dep’t of Commerce*, 384 F. Supp. 2d 163, 168 n.1 (D.D.C. 2005). Whether a party substantially prevails is a “threshold determination” for fee eligibility, while the degree of success must be analyzed considering “all of the circumstances surrounding the litigation.” *Id.*

Additionally, the Tenth Circuit, even since *Buckhannon*, has held that partially successful

plaintiffs can recover attorney fees for unsuccessful claims that are closely related to their principle claims which are successful. *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088, 1103 (10th Cir. 2005). Accepting the DOL's argument would require me to reach the implausible conclusion that plaintiffs may recover attorney fees for closely related failed claims, but not for closely related claims that settle or become moot. I decline to do so.

My conclusion is supported by the overall nature of this litigation. As recounted in the December 2005 Order, this case has been marked by a pattern of DOL denying Hull documents, Hull seeking relief, DOL changing its position about some aspect of its earlier denial, releasing some documents, seeking summary judgment on the remaining documents, Hull opposing these motions and then this pattern repeating. As discussed above, while I am not persuaded that this shows bad faith, it does mean that I measure Hull's success in this case by DOL's overall disgorgement of documents, rather than on Hull's success in those specific issues resolved by an Order. DOL's behavior was not malicious, but it does render Hull's legal success, narrowly construed, inseparable from her overall success in obtaining documents.

However, the DOL is correct that it is inappropriate to award fees for unsuccessful claims where these claims are readily separable. *Anderson*, 80 F.3d at 1506. In this case, Hull expended 14.2 hours on the motion for summary judgment for which she was only partially successful. At issue in this motion were 454 pages of documents, and she obtained judicially ordered relief on about 192 pages (125 pages of service contracts and 67 pages subject to *in camera* review.) Since this motion was only about 40% successful, I reduce the number of hours she may claim on this motion by 60%, or by 8.5 hours.

Also, Hull claims, curiously, "fifteen (18) hours" for time spent replying to DOL's

response to the motion for attorney fees. I assume that this figure is intended to be 15, not 18 hours. I therefore deduct an additional 3 hours. Hull's final count of hours is reduced by 11.5 hours, for a total of 96.5 hours, and total fees of \$28,950. Hull also claims expenses of \$570 for court filing fees and for reproducing about 6000 pages of documents. Because these costs relate to the litigation as a whole, I do not adjust them.

C. Judicial Decree Under FOIA

Hull in her complaint sought not only attorney fees, but also a judicial decree stating that the DOL acted arbitrarily and capriciously. Under 5 U.S.C. § 552(a)(4)(F), a district court may issue a "written finding" that "the circumstances surrounding the withholding (of documents) raise questions whether agency personnel acted arbitrarily and capriciously with respect to the withholding." *Id.* The DOL's conduct does not rise to the level necessary to merit a referral to the Office of Special Counsel. Despite DOL's own admission of bureaucratic mistakes, Hull did eventually get the documents it requested. DOL did not lie to this court, or disobey or ignore any orders of this court. A judicial decree under FOIA is not warranted.

D. Sanctions Under 28 U.S.C. § 1927

Hull also argues that she is entitled to attorney fees in the form of sanctions under 28 U.S.C. § 1927. Section 1927 reads:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Relief under § 1927 is available only against attorneys. *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006). Hull asserts this claim explicitly against the DOL, and not

against United States Attorney Michael Johnson, DOL's attorney of record. Hull therefore cannot get relief under this statute

Therefore, it is so Ordered that Hull's motion for attorney fees and judicial decree (Docket # 41) is granted, in part and denied, in part as follows:

- 1) Hull is awarded attorney fees of \$28,950 and costs of \$570.00; and
- 2) Hull's motion for a judicial decree under 5 U.S.C. § 552(a)(4)(F) is DENIED; and
- 3) Hull's motion for sanctions under 28 U.S.C. § 1927 is DENIED.

It is further Ordered that the clerk shall enter a Judgment in accordance with this Order and the Order of December 2, 2005 (Docket # 28), and the Order of January 13, 2006 (Docket # 32), and

It is further Ordered that this case is closed.

DONE and ORDERED, this 30th day of May, 2006 at Denver, Colorado.

s/Lewis T. Babcock
United States District Chief Judge