UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§	CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§	

LEAD COUNSEL'S REPLY IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES AND REIMBURSEMENT OF PLAINTIFFS' EXPENSES (DOCKET NOS. 5815 & 5816)

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

From its inception, this case has been closely watched by countless investors. As the Court noted in February 2002, "the eyes of the nation are on this Court." February 28, 2002 Scheduling Order (Docket No. 326) at 2. Early on, many public pension funds took a keen interest in the case and moved to be appointed lead plaintiff.[1] As the case progressed, the Attorneys General of 33 states continued to closely follow the proceedings. They filed *amicus* briefs in support of plaintiffs here at the motion-to-dismiss stage and again in the Fifth Circuit and before the Supreme Court. In other mega-cases, public pension funds have objected to the attorney fee requested.[2] Here, not a single public pension fund has objected to the requested fee. Nor has any institutional investor, other than the "independent fiduciary" for the Enron Savings Plan and ESOP, objected. This speaks volumes about The Regents' decision to negotiate a fee percentage at the beginning of the case that was "about one-third of the customary take." Michael Orey, *Cashing In On Shareholder Suits* –

---

[1] They included the Florida State Board of Administration, the Teachers Retirement System of Georgia, the Teachers Retirement System of Ohio and the New York City Employees Retirement System.

[2] *See In re Tyco Int'l Ltd. Multidistrict Litig.*, No. 02-md-1335-PB, slip op. at 41 (D.N.H. Dec. 19, 2007) (*see* Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for an Award of Attorney Fees (Docket No. 5818) ("Hodges Decl."), Ex. 5 at Ex. A) (Pennsylvania State Employees' Retirement System and Pennsylvania Public School Employees' Retirement System); *In re Cendant Corp. Litig.*, 264 F.3d 201, 230 (3d Cir. 2001); *In re Cardinal Health, Inc. Sec. Litig.*, No. C2-04-575, 2007 U.S. Dist. LEXIS 95127, at *12 n.6 (S.D. Ohio Dec. 31, 2007) (Compendium, Ex. Q) (Pennsylvania Public School Employees' Retirement System; New York State Teachers Retirement System; New York State Common Retirement Fund; Colorado Public Employees' Retirement Association); *In re Krispy Kreme Doughnuts, Inc. Sec. Litig.*, 1:04CV00416, Order Awarding Attorneys' Fees and Reimbursement Expenses (M.D.N.C. Feb. 15, 2007) (New York State Teachers Retirement System) (Supplemental Compendium, Ex. 1) ("Supplemental Compendium, Ex. __" refers to Lead Counsel's Supplemental Compendium of Exhibits in Support of Lead Counsel's Reply in Support of Motion for Award of Attorney Fees and Reimbursement of Plaintiffs' Expenses and Lead Plaintiff's Memorandum in Response to Objections to the Plan of Allocation filed herewith); *In re Qwest Commc'ns. Int'l, Inc. Sec. Litig.*, No. 01-CV-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71267, at *3-*4 (D. Colo. Sept. 29, 2006) (New York State Teachers Retirement System and State of New Jersey, Department of Treasury, Director of Investment).

Class Actions Are Mounting And So Are Payouts As Deep Pockets Get Tapped; Should You File?, Wall St. J., April 25, 2002, at D1 (Compendium, Ex. E).[3] This decision was lauded by SEC Commissioner Atkins in February 2006 when he stated: "When talking about the importance and effectiveness of the lead plaintiff provision of the PSLRA, Chairman Cox likes to point to the Enron class action suits. . . . One of the first moves made by the UC Regents was to negotiate a significantly reduced legal fee that resulted in hundreds of millions more dollars for injured investors." Paul S. Atkins, Speech by SEC Commissioner: Remarks Before the U.S. Chamber Institute for Legal Reform (Feb. 16, 2006) at 8 (Compendium Ex. F). In this admittedly extraordinary case, the requested fee is well-deserved.

Lead Counsel requests that the Court award the fee consistent with the agreement The Regents negotiated. Because some objectors were confused about the fee calculation (*i.e.*, calculated on the "net" vs. "gross" recovery), it is set forth here. Total recoveries of $7,227,390,000 are first reduced by estimated expenses of $45,000,000 for a net recovery of $7,182,390,000. Applying 8% to the first $1 billion, 9% to the second billion and 10% of the balance results in a fee of $688,239,000. *See* Hodges Decl., ¶3 & n.7. $688,239,000 divided by the gross recoveries of $7,227,390,000 generates 9.52%. Thus, while for ease of reference, the fee is expressed as a percentage of the total recovery, it is, in reality, calculated on the net. Reimbursement of Lead Counsel's expenses is not part of this motion. The Court has previously approved six expense reimbursement motions and awarded a total of $39 million to plaintiffs' counsel. Counsel estimates that an additional $6 million has been incurred and will be the subject of future reimbursement

[3] "Compendium, Ex. __" refers to exhibits previously attached to Lead Counsel's Compendium of Exhibits in Support of Lead Counsel's Memorandum of Law in Support of Fee Award and Reimbursement of Plaintiffs' Expenses (Docket No. 5817).

requests. In sum, Lead Counsel requests the Court award an attorney fee of $688,239,000 plus interest thereon at the same rate as has been earned on the funds recovered for the Class.[4]

Lead Counsel addresses below first, the issues raised by more than one objector, and then the issues raised by each objector. That is followed by Lead Counsel's discussion regarding fee-sharing and finally, the response regarding reimbursement of expenses for plaintiffs.

II. LEAD PLAINTIFF'S NEGOTIATED FEE AGREEMENT BASED ON A PERCENTAGE OF THE RECOVERY SHOULD BE APPROVED

A. The Percentage-of-Fund Method Should Be Used

The percentage-of-fund method of awarding fees is preferable and has been applied by this Court and numerous others in the Fifth Circuit in common fund cases. *In re Waste Management Inc., Sec. Litig.,* No. 99-2183, slip op. at 54, 56 (S.D. Tex. May 10, 2002) ("*Waste Management I*") (awarding 7.93% fee) ("The majority of the courts of appeals favor or require the use of the percentage-of-recovery method to calculate an award of attorneys' fees in common fund cases. The Supreme Court, moreover, has indicated that the percentage method is proper in such cases.") (Compendium, Ex. B); *Tittle v. Enron Corp.*, No. 4:01-CV-03913, Amended Final Order Approving an Award of Attorneys' Fees, Reimbursement of Expenses and an Incentive Award to the Class Representatives (S.D. Tex. Jul. 24, 2006) at 5 (awarding 20% fee) (Supplemental Compendium, Ex. 2); *Di Giacomo v. Plains All Am. Pipeline*, No. H-99-4137, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Dec. 18, 2001) (awarding 30% fee). As Judge Lake in this district noted "[t]his Court adopts the percentage-of-recovery method of awarding attorneys' fees" as "the Supreme Court has

---

4 At the insistence of Lead Counsel, the settlement funds have earned interest from the time the agreements were reached for each settlement. Interest is therefore part of the recovery that will be distributed to the Class and counsel should receive interest on the fee it earned at the same rate. *See* 15 U.S.C. §78u-4(a)(6) ("Total attorneys' fees and expenses awarded . . . shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

indicated that computing fees as a percentage of the common fund recovered is the proper approach" and awarded the full fee called for by the fee contract in *Dynegy*. *In re Dynegy Inc., Sec. Litig.*, No. H-02-1571, slip op. at 1 (S.D. Tex. Jul. 8, 2005) (awarding 8.72% fee) (Compendium, Ex. C). *See Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 28453, at *13 (N.D. Tex. Nov. 8, 2005) (awarding 22.2% fee) (awarding a fee to class counsel "which represents the percentage fee award negotiated between Court-appointed Lead Plaintiffs and Co-Lead Counsel at this level of recovery"; there was a "presumption that a 22.2% fee award is reasonable," "the percentage of the benefit is the proper method for awarding attorneys' fees" and the negotiated "fee structure . . . which provides a higher percentage fee for increasing levels of recovery, is entitled to deference because it was designed to incentivize counsel to achieve the maximum result possible for the class") (Compendium, Ex. D).[5] Moreover, the PSLRA calls for "a reasonable percentage" of any recovery to be paid to the lawyers. *See* 15 U.S.C. §78u-4(a)(6). The requested percentage is no more than "a reasonable percentage" per the statute. *Id*.

Certain objectors, contrary to the statute and Fifth Circuit case law, assert otherwise. The Bishops (represented by John J. Pentz, hereafter "Bishop/Pentz") assert that "This Circuit prohibits the use of a percentage of the fund methodology of calculating a fee in a common fund case," citing *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992). Notice of Objection to Plaintiffs' Counsel's Application for an Award of Attorney's Fees and Notice of Intent to Appear (Docket No.

---

[5] *See also Faircloth v. Certified Fin., Inc.*, No. 99-3097, 2001 U.S. Dist. LEXIS 6793, at *20-*23 (E.D. La. May 16, 2001) (awarding 35% fee); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000) (awarding 7.02% fee); *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 446 (S.D. Tex. 1999) (awarding 15% and 25% in fees); *In re Harrah's Entm't, Inc.*, No. 95-3925, 1998 U.S. Dist. LEXIS 18774 (E.D. La. Nov. 25, 1998) (awarding 26% fee).

5875 ("Bishop Objection") at 3. [6] This is wrong. Their view of Fifth Circuit precedent in general is incorrect, but more fundamentally they fail to account for the fact that the PSLRA entirely reset the board in securities class actions by empowering the lead plaintiff to "select and retain counsel to represent the class."[7] The power to "retain" is the power to contract with class counsel, which necessarily carries with it the ***discretion*** to determine the financial terms of the retention agreement.[8] Here, a sophisticated institutional investor lead plaintiff exercised that discretion, choosing to retain counsel under a percentage-based fee formula.

The Fifth Circuit has never held that a lead plaintiff is without discretion to retain counsel on a percentage-of-the-fund basis, or that a district court should ignore a retainer agreement made in the proper exercise of a lead plaintiff's discretion. While there may be circumstances under which a court could determine that a lead plaintiff had abused its discretion by entering into what was, viewed in light of the circumstances at the time it was made, a manifestly unreasonable fee contract, this is not that case. The undisputed evidence confirms that The Regents properly exercised its discretion by negotiating the agreement at arm's length and by reaching a fee formula that optimally aligned the interests of the Class and counsel. Nor has any objector suggested a basis in fact for finding that The Regents abused its authority. In the absence of evidence demonstrating such an

---

[6] Peter Carfagna, represented by Edward F. Siegel (hereafter "Carfagna/Siegel"), Larry Fenstad, represented by Darrell Palmer (hereafter "Fenstad/Palmer"), Rinis Travel Service, represented by Stuart Yoes (hereafter "Rinis/Yoes"), and Debra Silverio, represented by Edward W. Cochran (hereafter "Silverio/Cochran") make similar arguments.

[7] 15 U.S.C. §78u-4(a)(3)(B)(v).

[8] As Professor Silver notes in his report entitled Supplemental Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees ("Supplemental Silver Report"), Congress could have constrained the scope of a lead plaintiff's discretion in this regard by, for example, prohibiting percentage-based fee agreements, but it did not do so. Instead, the statute provides for percentage-based awards but prohibits such awards from exceeding "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6).

abuse of discretion, this Court should honor Lead Plaintiff's discretionary choice of a percentage-based fee and make its award accordingly. Other courts are in accord on this issue. *See Cendant*, 243 F. Supp. 2d 166, 171; *Global Crossing*, 225 F.R.D. 436, 461; *TXU*, 2005 Dist. LEXIS 28453, at *13;[9] Supplemental Silver Report at 6-13.

As Professor Silver notes, the PSLRA and its lead plaintiff provisions have a significant impact on the fee methodology to be used here. As he states:

> Although Objectors mostly ignore the PSLRA, they repeatedly invoke the Fifth Circuit, claiming that it requires the Court to use the lodestar method in this case. This is patently wrong. Fifth Circuit precedent cannot require this because the Fifth Circuit has ***never*** set terms for fee awards in securities fraud cases litigated under the PSLRA. All of Objectors' Fifth Circuit precedents either pre-date the PSLRA or involve non-securities cases . . . .
>
> * * *
>
> Objectors indiscriminate use of cases might not matter if the PSLRA contained a generic fee award provision like the one contained in the civil rights statute at issue in *Johnson v. Georgia Hwy. Express, Inc*. 488 F.2d 714 (5th Cir. 1974), the hoary Fifth Circuit case that set out a multi-factor approach. But the PSLRA's fee provisions are unique and revolutionary. They create a fee-setting mechanism unlike that found in any other statute. Consequently, Fifth Circuit cases construing other statutes are irrelevant.
>
> Some objectors think Fifth Circuit cases construing other statutes trump the PSLRA. The Bishop Objectors make this contention. "In light of the fact that this Circuit follows the lodestar method, the fee agreement between the Regents of the University of California appears to be irrelevant at best and collusive at worst." . . . This is exactly backwards. The PSLRA makes fee agreements relevant and plainly

---

[9] Bishop/Pentz cite *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005), as the model this Court should follow, but *Visa Check* was not a PSLRA case, and counsel requested a much higher percentage of the fund and a much higher multiplier than that requested here. In *Visa Check*, the district court rejected, citing it as "excessive" and "fundamentally unreasonable," a request for attorneys' fees by lead counsel in the amount of almost 20% the total settlement, which was calculated using a lodestar multiplier of almost 9.7. *Id*. at 522-23. The common fund settlement in *Visa Check* of almost $3.4 billion is less than half of what Lead Counsel was able to obtain for Enron Class members; yet, unlike its counterpart in *Visa Check*, Lead Counsel here is asking for 9.2%, as opposed to the almost 20% the *Visa Check* plaintiffs' counsel requested, with a lodestar multiplier of 5.4 in contrast to *Visa Check*'s requested multiplier of 9.7.

> allows lead plaintiffs to promise contingent percentages. If old Fifth Circuit cases construing other statues say something else, the Fifth Circuit must not apply those precedents to PSLRA cases. Like any other circuit, it must adhere to Congress' intent when interpreting a statute.

Supplemental Silver Report at 9-10 (emphasis in original).[10]

Thus, to the extent relevant here, in its decision in *Longden*, the Fifth Circuit simply held that "[a]lthough the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method." *Longden*, 979 F.2d at 1099 n.9. What Bishop/Pentz omit from their reference to *Longden* is that the Fifth Circuit ***affirmed*** a district court that exercised its discretion to award one set of lawyers a fee using the percentage-of-fund method, while giving another attorney – whose efforts had contributed less to the case – a lodestar award.[11] Thus, contrary to the Bishop/Pentz assertion, no Fifth Circuit case has ***prohibited*** use of the percentage method in a common fund case. *See, e.g.*, *Shaw*, 91 F. Supp. 2d at 965, 967 n.15 ("Indeed, the Fifth Circuit has ***never*** . . . reversed a district court judge's decision to award a fee as a percentage. Quite the contrary, in *Longden* . . . the Fifth Circuit ***affirmed*** a percentage fee award in a securities class action, noting that the district court had stated its preference for the percentage-of-recovery method 'as a matter of policy.'") (emphasis in original). And in *Waste Management*, this Court noted:

---

[10] Citations and footnotes are omitted and emphasis is added unless otherwise noted.

[11] *See Longden*, 979 F.2d at 1100 n.11 ("That the district court also calculated fees on a percentage of the total recovery basis merely demonstrated its preference for that method as a matter of policy. [Quoting the district court:] 'The question in the circuit is as to whether or not a percentage fee will stand up or is the circuit still controlled by the *Johnson* factors. I'm going to address it both ways.'"); *see also id*. at 1100 ("Massie also argues that the district court erred when it awarded a percentage amount to the Susman Attorneys and then excluded her firm from this award. The record shows, however, that the district court, based on its review of all counsels' records, apportioned an aggregate award amounting to 27.5% of the total amount recovered by all petitioners, including Massie, based on its discretionary application of the *Johnson* factors.").

> "Although the prevailing trend in other circuits and district courts has been toward awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method." *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992). Nevertheless, numerous district courts within the Fifth Circuit continue to use the percentage method for evaluating attorney's fees in common fund cases. *Shaw,* 91 F. Supp. 2d at 966-67.
>
> * * *
>
> ***The percentage [method is] meant for lead or general counsel for plaintiffs in a class action*** . . . .

In re Waste Management, Inc. Sec. Litig., No. 99-2183, slip op. at 22-23 (S.D. Tex. Dec. 29, 2003) ("*Waste Management II*") (order largely denying fees to objector to a $37 million fee award in securities class action) (Compendium, Ex. L).

The next miscite that Bishop/Pentz and certain other objectors attempt is a cite to *Strong* with the same argument that the Fifth Circuit ***only*** allows the lodestar method. Again the opinion itself states otherwise, noting that awarding attorneys' fees based on the percentage method is proper when there exists a common fund settlement with a value that is easily ascertainable. *Strong v. BellSouth Telcoms.*, 137 F.3d 844, 852 n.5 (5th Cir. 1998). The settlement at issue in *Strong* was ***not*** a common fund: "in [that] settlement no money was paid into escrow or any other account – in other words, no fund was established at all in [that] case." *Id.* at 852. The plaintiffs in *Strong* cited the Supreme Court's decision in *Boeing v. Van Gemert*, 444 U.S. 472 (1980), as authority for the proposition that attorneys' fees should have been calculated based on a percentage of the entire settlement fund. *Strong*, 137 F.3d at 851-52. The Fifth Circuit disagreed, stating: "Without deciding the implications, if any, of *Boeing* on the lodestar method, however, ***we find Boeing distinguishable on a more significant ground***: ***unlike Boeing, this case does not involve a traditional common fund***." *Id.* at 852. The court went on to further explain that in *Boeing*:

> Because each member of the class had an 'undisputed and mathematically ascertainable claim to part of [the] lump-sum judgment,' the members could obtain their share of the fund 'simply by proving their individual claims against the judgment fund.' ***The Court held that an attorney who recovers a common fund for***

> ***the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole, including the unclaimed portion***.

Id. Thus, the court's comments regarding the use of the lodestar method – where there was no common fund – are of little relevance here.

Thus Bishop/Pentz, Carfagna/Siegel and Silverio/Cochran's claim that under Fifth Circuit precedent the lodestar method is the ***only*** applicable way of setting attorney fees, is without basis.[12] The best language that these objectors can cling to is that in *Longden*. Nothing in that opinion, or any Fifth Circuit opinion that these objectors cite to, prohibits lower courts from, or even criticizes them for, applying the percentage method to calculate reasonable attorney fees from a common fund settlement. And with the PSLRA statute calling for a percentage, courts in this Circuit have applied the percentage method and also looked to the *Johnson* factors.[13]

---

[12] *See, e.g.*, *Turner*, 472 F. Supp. 2d at 860-61 (E.D. La. 2007); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 629 (E.D. La. 2006); *In re Bayou Sorrel Class Action*, No. 6:04 CV 1101, 2006 U.S. Dist. LEXIS 80924, at *12-*13 (W.D. La. Oct. 31, 2006); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *83 (N.D. Tex. Nov. 8, 2005); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003); *Di Giacomo*, 2001 U.S. Dist. LEXIS 25532, at *17; *Shaw*, 91 F. Supp. at 965-67; *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 500-01 (N.D. Miss. 1996).

[13] The Fifth Circuit's recent opinion in *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, No. 07-30384, 2008 U.S. App. LEXIS 2484 (5th Cir. Feb. 4, 2008), is not to the contrary. In *High Sulfur* the court was not addressing setting the amount of the total fee awarded. The issue presented was whether the district court appropriately reviewed the ***allocation*** of fees among plaintiffs' counsel. The fee itself was unobjected to and then the court appointed a fee committee. The objection was to the allocation done at an *ex parte* hearing with sealed orders. While the fee committee left the impression with the district court that the fees had been divided up based on hours, billing rates and a multiplier, this implication by the fee committee lawyer was inaccurate. Under these circumstances, especially in light of the objection of one set of counsel, the district court was required to delve further into the manner and reasons for the allocation. Further, the court cited with approval two district court cases, *Turner*, 472 F. Supp. 2d at 860-61, and *Batchelder*, 246 F. Supp. 2d at 531, where the percentage method was used to calculate the award of attorneys' fees. *High Sulfur*, 2008 U.S. App. LEXIS 2484, at *33-*34 ("That fee allocation procedure [in *Turner*], however, is significantly different from the procedures used here. It is one thing for all attorneys to come to an agreement about dividing up fees, and quite another for five attorneys to declare how an award will cover themselves and seventy-four other attorneys with no meaningful judicial

Objectors[14] commit additional error by citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 484 F.3d 162 (2d Cir. 2007), for the proposition that the fee in a common fund case should be minimized. The case law is uniform that the fee should be reasonable, not minimized. Even *Arbor Hill*, a Voting Rights Act case, and thus, a fee-shifting case, is in accord. In *Arbor Hill*, the losing party, the County of Albany and its Board of Elections, had to pay the prevailing party's "reasonable attorney's fee" set by the court in its discretion. *See* 42 U.S.C. §1973l(e); *Arbor Hill*, 484 F.3d 162. In addition, fee jurisprudence in fee-shifting cases is fundamentally different from common fund cases. *See McLendon v. Continental Group*, 872 F. Supp. 142, 149-51, 156-57 (D.N.J. 1994) ("[D]ifferent considerations inform the determination of a reasonable fee in these two types of cases."); *In re AT&T Corp. Sec. Litig.,* 455 F.3d 160, 164 n.4 (3d Cir. 2006) (noting differences in setting fees in the two types of cases). The "principal purpose [behind subsection (e) of 42 U.S.C. 1973l regarding attorney fees] is to encourage people to seek judicial redress of unlawful discrimination." *Torres v. Sachs*, 538 F.2d 13 (2d Cir. 1976). In such cases the court is trying to estimate a market rate for the attorney services. *See Arbor Hill*, 484 F.3d at 171. Notably, the Second Circuit abandoned the use of the term "lodestar" even in the fee-shifting context. Rather, the court found the "better course . . . is for the district court . . . to bear in mind ***all*** of the case-specific variables that we and other courts have identified as relevant to the

---

supervision or review."). It is also evident that district courts are not required to award attorney fees based on the lodestar method, but rather merely ***assess*** them using a form of the lodestar, as for example, in a rough cross-check. *See Turner*, 472 F. Supp. 2d at 861 ("The lodestar analysis is not undertaken to calculate a specific fee, but only to provide a rough cross check on the reasonableness of the fee arrived at by the percentage method.").

[14] The objectors making this argument are Carfagna/Siegel, Fenstad/Palmer and Silverio/Cochran.

reasonableness of attorney's fees in setting a reasonable hourly rate." *Id*. at 169 (emphasis in original).

B. The Requested Percentage Is Reasonable

The requested 9.52% fee award is significantly less than awards made in other mega-fund cases with many well above the percentage requested here, *i.e.*, *Tyco*, 14.5%; *Lucent*, 17%; *Bankamerica*, 17.83%; *Adelphia*, 21.40%; *Global Crossing*, 16.04%; *Freddie Mac*, 20%; *Cardinal*, 18%; and *Qwest*, 15%. Even the average mega-fund fee, 11.61%, is above the request here and this case was anything but average in risk, complexity, duration, or discovery as the case was litigated for more than six years against the largest banks in the world. *See* Lead Counsel's Memorandum of Law in Support of Fee Award and Reimbursement of Plaintiffs' Expenses (Docket No. 5815) ("Fee Brief") at 53 (Top Securities Settlements chart).

Other evidence supporting the reasonableness of the requested percentage is the reaction of institutional investors, who are well aware of the requested fee. The Florida State Board of Administration, the Teachers Retirement System of Georgia, the Teachers Retirement System of Ohio and the New York City Employees Retirement System moved to be appointed lead plaintiff in this case. They have continued to watch this case and 33 Attorneys General filed *amicus* briefs in support of plaintiffs at least twice during this litigation. Such institutional investors are far from shy about objecting to fees. *See Tyco*, where The Pennsylvania Public School Employees Retirement System objected and *Cardinal* where New York State Teachers Retirement System, New York State Common Retirement Fund and The New Jersey Division of Investments, among others, objected to fees. None have objected here. This is truly remarkable in light of the fact that this is the largest class action settlement, securities or otherwise, ever. The lack of institutional objectors – just one – speaks volumes.

C. The *Ex Ante* Fee Agreement Is Entitled to Deference as Lead Plaintiff Acted Within Its Discretion in Choosing a Percentage Based Fee

Bishop/Pentz do not dispute that courts throughout this country, and most notably this very Court, have given deference to the type of *ex ante*, arm's-length negotiated agreement at issue here. In awarding the percentage fee requested in *Waste Management I*, the Court cited three important factors: (1) "Lead Plaintiff is a sophisticated institutional investor and specifically negotiated the fee agreement to ensure that any fee would be reasonable but not excessive"; (2) "[t]he percentage fee is sought pursuant to the terms of an ex ante representation agreement entered into by Lead Plaintiff and Lead Counsel at the inception of Lead Plaintiff's involvement in this litigation and long before the parties began to discuss settlement"; and (3) "[b]ased on this representation agreement, Lead Plaintiff, which was heavily involved in each facet of this litigation, including the settlement negotiations, fully supports the fee requested." *Waste Management I*, No. H-99-2183, slip op. at 57 (Compendium, Ex. B). All three requirements are satisfied here. *See also TXU*, 2005 U.S. Dist. LEXIS 27077, at *74-*75 ("The objections are without merit since the fee structure agreed between Lead Counsel and Lead Plaintiffs is fair and reasonable. It is in the best interests of the class in that it has appropriately incentivized counsel to obtain the maximum recovery possible, and it represents a percentage of the Settlement Fund that is consistent with, if not less than, awards made in similar cases.").

Other courts have also echoed the sentiment voiced by this Court that when a percentage fee is sought pursuant to an *ex ante* agreement between lead counsel and a sophisticated institutional investor, an inference of reasonableness for the fee should be made. *See, e.g., Cendant*, 264 F.3d at 282 ("We . . . believe that, under the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel. . . . This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers. ***Further, by rendering ex ante fee agreements more reliable, it will assist those agreements in aligning the interests of the class and its lawyers during the pendency of the litigation***."); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2004) (emphasizing that a court must still determine whether an *ex ante* fee arrangement is reasonable, the court stated "when class counsel in a securities lawsuit have negotiated an arm's length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight") (citing *Cendant*, 264 F.3d 201, 282 (3d Cir. 2001)). As one court explained:

> "It is . . . imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks for pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts. Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities like securities fraud."
>
> * * *
>
> Moreover, public policy considerations support the award in this case because the Lead Plaintiff and Class Representative . . . conscientiously supervised the work of lead counsel and has approved the fee request. ***Since passage of the PSLRA, courts – including this Court – have found that in a PSLRA case, a fee request which has been approved and endorsed by a properly-appointed lead plaintiff is "presumptively reasonable," especially where the lead plaintiff is a sophisticated institutional investor. This accords with Congress's belief that institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request***.

In re Veeco Instruments Sec. Litig., No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85554, at *25-*26 (S.D.N.Y. Nov. 7, 2007).

Bishop/Pentz cite the Fifth Circuit's decision in *Strong*, 137 F.3d at 849, as an example of the district court inappropriately "'merely ratif[ing] a pre-arranged compact'" relating to attorneys' fees in a class action settlement. Bishop Objection at 2. However, *Strong* is easily distinguishable from this case. First, the agreed-to fee was not negotiated by a lead plaintiff at the start of the case; it was negotiated with defendants as part of the settlement. *See Strong*, 137 F.3d at 847. Second, there was no easily ascertainable, *i.e.*, a fixed dollar amount, common fund and plaintiffs' claims that the settlement was a "traditional common fund" were viewed as suspect by both the district court and court of appeals. *Strong*, 137 F.3d at 848; *cf. id.* at 852 ("We first question whether *Boeing*, which used the percentage of fund method, has any application to a case such as this one, which uses the lodestar method. Without deciding the implications, if any, of *Boeing* on the lodestar method, however, we find *Boeing* distinguishable on a more significant ground: unlike *Boeing*, this case does not involve a traditional common fund.").[15] In a sternly worded reproach of the *Strong* plaintiffs' contention that the settlement was a common fund settlement with a "value" totaling $64 million, the court countered that: "In contrast to *Boeing*, in this settlement no money was paid into escrow or any other account – in other words, no fund was established at all in this case." *Id.* at 852.

Similarly, *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980), also cited by Bishop/Pentz, addressed a fee agreed to with defendants as part of a settlement and, again, there was ***no common***

---

15 The settlement in *Strong* was comprised of the following:

> In the Agreement, BellSouth agreed to provide settlement class members with information that fully described the IWMS plan and its terms and conditions. The settlement class members then had the option to either (1) continue as a subscriber to the plan under the stated terms and conditions, or (2) cancel the service and, if eligible, obtain a credit on their monthly telephone bill for up to twenty-four months as long as they continued to receive local telephone service from BellSouth. The amount of the available credit varied by state: for Louisiana and Mississippi, the credit amounted to $0.80 per month, for Alabama, $0.60 per month, and for Tennessee, $0.50 per month. To be eligible for the credit, the customer had to have paid for the IWMS plan for six months prior to the date the class was established and not had a repair or service call between January 1, 1987 and the date the class was established. ***Plaintiffs' counsel calculated that if every class member were eligible for and elected to receive the credit, BellSouth's liability would amount to approximately $64 million – a sum which plaintiffs' counsel refers to as a $64 million "common fund***."

Strong, 137 F.3d at 847.

fund. *Id*. at 1328, 1330. The Fifth Circuit vacated the lower court's order awarding attorneys' fees because the district court completely "abdicated its responsibility to assess the reasonableness of attorneys' fees." *Id.* at 1328. Without conducting any inquiry whatsoever, the district court simply stated:

> ***This court is not being asked to set reasonable attorney's fees in conjunction with the instant settlement***; rather the court is being presented with a proposed settlement, agreed to by all parties and unopposed by the class, which incorporates an award of attorney's fees in the amount of $750,000 as a vital part of the settlement. Certainly, different procedures and considerations might obtain were the court being requested to initially fix an attorney's fee. ***Since the award and amount of attorney's fees comes before the court in the posture of an unopposed settlement***, the court finds that the amount is reasonable under the circumstances of this protracted and complicated case.

Id. at 1328.

The next inapposite case cited is *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323 (9th Cir. 1999). *Zucker* like *Strong* and *Piambino*, had ***no common fund***. The dispute "arises because, in the settlement, the attorneys got about $ 3 million in fees (initially), and the class members got no cash at all. . . . If it had, this would probably be a common fund case. Because the class members got no cash, there was no common fund . . . ." *Id.* at 1325-26.[16] The district court, upon remand from the Ninth Circuit, found that the percentage method of allocating attorney fees was inappropriate because:

---

16 The terms of the approved settlement were:

> Oxy guaranteed to pay a minimum $1 per share annual dividend up to 1997. Oxy also promised to make a fifty per cent payout of sustained earnings if that amount exceeded $2 per share. If the sustained earnings from 1993-95 amounted to less than $2 per share, the payout rate would be sixty per cent. All of these terms were subject to the Board's fiduciary obligations, business judgment, and its ability to enter into contrary contractual agreements in any financing.

Zucker v. Occidental Petroleum Corp., 968 F. Supp. 1396, 1399 (C.D. Cal. 1997), *aff'd*, 192 F.3d 1323 (9th Cir. 1999).

> First, no actual award of damages was created by this settlement. Therefore, there is no common fund from which a percentage can be drawn, making use of the Percentage Method impracticable. Second, while the credentials of experts Murray and Sheehan are impressive, their conclusions that the class received a "benefit" in the form of increased stock prices are speculative at best.

Zucker, 968 F. Supp. at 1400-01.[17]

D. The Requested Fee is Reasonable Based on the Lodestar Cross-Check

Several objectors assert the fee requested is too high under the lodestar/multiplier analysis. This is not so. The multiplier is reasonable and more so when the risks and size of the risks are considered. In a less risky case, *Waste Management I*, this Court approved a 5.296 multiplier in a mega-fund case. *Waste Management I*, No. 99-2183, slip op. at 64 (Compendium, Ex. B). In *Cardinal Health*, the court noted that the "outstanding" result supported the fee and awarded a 5.9 multiplier. *Cardinal Health*, 2007 U.S. Dist. LEXIS 95127, at *50 (Compendium, Ex. Q). The 5.4 multiplier that accompanies a fee of 9.52% is well within the range of multipliers awarded by courts within this Circuit and elsewhere, and in both securities and non-securities class action settlements of similar magnitude.[18] *See also* Declaration of John C. Coffee, Jr. (Docket No. 5821) ("Coffee

---

[17] The reasoning behind the Ninth Circuit's initial order vacating the awarding of attorney fees was that "[t]he district court did not articulate its reasons for concluding that the plaintiff class received a substantial benefit and that $2.975 million is an appropriate amount of fees to award. As a result, we cannot adequately review the fee award." *Zucker v. Occidental Petroleum Corp.*, No. 93-56714, 1995 U.S. App. LEXIS 29728, at *6 (9th Cir. Oct. 6, 1995).

In *In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 U.S. Dist. LEXIS 91140 (N.D. Cal. Nov. 30, 2007), which Bishop/Pentz cite, Judge Vaughn Walker, who has been a constant critic of class actions in general and whose opinions on these topics have been rejected throughout the country, rejected a request for a 25% fee award.

[18] *Waste Management I*, No. 99-2183, slip op. at 64 (5.296 multiplier) (Compendium, Ex. B); *Cardinal*, 2007 U.S. Dist. LEXIS 95127 (5.9 multiplier) (Compendium, Ex. Q); *Visa Check*, 297 F. Supp. 2d at 524 (3.5 multiplier); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 470 (S.D.N.Y. 1998) (awarding 14% of $4.027 billion fund, representing 3.97 multiplier); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (awarding 25% of $80 million settlement fund, representing 4.7 multiplier); *In re Charter Commc'ns Inc.*, No. 4:02-CV-1186 CAS, 2005 U.S. Dist. LEXIS 14772, at *56 (E.D. Mo. June 30, 2005) (awarding 20% of $146 million settlement

Decl."), ¶35 ("[T]here has still been general recognition that the lodestar multiplier should be higher in cases involving higher risk. As discussed earlier, this case faced extraordinary risk and, indeed, was ultimately decertified by the Fifth Circuit. Thus, whether or not a multiplier in the 5 to 6 range would be justified in most cases, it is justified in this case . . . .").

The Court should also reject objectors'[19] suggestion that detailed time records should be produced and audited.[20] The fee is to be awarded based on a percentage method not lodestar. As to any lodestar cross-check method, sufficient information has been provided by Lead Counsel. Each attorney's time and rate are broken out and the Hodges Declaration goes into depth of the work undertaken. The Supplemental Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for an Award of Attorney Fees (Docket Nos. 5815 & 5816) ("Hodges Supp. Decl.") (submitted herewith) provides even more information about what the 14 "core" attorneys did in this effort. Hodges Supp. Decl., ¶3. In addition, an expert has opined on the reasonableness of the staffing mix of attorneys and the hourly rates. *See* Declaration of Kenneth M. Moscaret, Esquire ("Moscaret Decl."), ¶¶23-36. Thus, Lead Counsel has provided the Court with more than enough

---

fund, representing 5.6 multiplier); *In re Aetna Inc. Sec. Litig.*, No. 1219, 2001 U.S. Dist. LEXIS 68, at *59 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement fund, representing 3.6 multiplier); *In re Buspirone Antitrust Litig.*, No. 01-CV-7951 (JEK), slip op. at 5 (S.D.N.Y. Apr. 17, 2003) (awarding multiplier of 8.46) (Compendium, Ex. R); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding multiplier of 5.5); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D. Pa. 2003), *vacated, remanded*, 396 F.3d 294 (3d Cir. 2005), *cost/fees granted*, 362 F. Supp. 2d 587 (E.D. Pa. 2005) (on remand awarding fee equal to multiplier of 6.96); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee equal to multiplier of 9.3); *In re RJR Nabisco Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992) (awarding fee equal to multiplier of 6.0).

19 The objectors who raised this issue are Bishop/Pentz, Dabrowski/Schonbrun and Rinis/Yoes.

20 Such a burden on the Court is unnecessary in a lodestar cross-check context. The Third Circuit in *Rite Aid* "reiterate[d] that the percentage of [the] common fund approach is the proper method of awarding attorneys' fees" and that "district courts may rely on summaries submitted by the attorneys and need not review actual billing records" when performing a lodestar cross-check. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005).

information for the Court to properly find the requested fees to be reasonable, without resorting to a "lodestar audit." And this Court is intimately familiar with the work undertaken.

Fenstad/Palmer seemingly cite *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462 (S.D.N.Y. 2004),[21] for the proposition that this Court should painstakingly parse through Lead Counsel's timesheets to prevent alleged "padding." *See* Objection to: (A) Plan of Allocation of Settlement Proceeds; and (B) Plaintiffs' Counsel's Application for Attorney Fees (Docket No. 5868) ("Fenstad Objection") at 10. Even though Lead Counsel has submitted the total number of hours spent working on this case, along with an individual breakdown of how many hours each individual from Coughlin Stoia billed, this is not enough for Fenstad/Palmer. However, not only are they demanding the Court do something that is not required of it, but even the case they cite as support for their position does not mandate as much. In *AMF Bowling*, the court accepted a summary of the hours worked on the case by lead plaintiffs' counsel and did not require a breakdown in the timesheets of specific assignments or projects worked on for a particular day. *See AMF Bowling*, 334 F. Supp. 2d at 467; *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("[W]e encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage. Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)."). The court found deficient the submission of one of seven plaintiffs' firms who worked on the case for 394 hours. Judge Castel reduced the lodestar of that single firm. With that exception, he found the hours and rates submitted by plaintiffs' counsel to

---

[21] Fenstad/Palmer mistakenly attribute this decision to Judge Lynch; it was actually authored by The Honorable P. Kevin Castel.

be reasonable. Lead Counsel has provided an abundance of detail on the work performed. *See* Hodges Decl. and Hodges Supp. Decl. In addition, unlike the one firm whose lodestar Judge Castel reduced, Lead Counsel – one firm alone – performed the vast bulk of the work; it was not simply reviewing the work of other counsel.

Fenstad/Palmer's assertion that "it apparently was not uncommon for three or more attorneys from Lead Counsel to attend each deposition" is simply false. Fenstad Objection at 10. In the 472 depositions listed in the Hodges Declaration, there are only ***two*** where three lawyers appeared. *See* Hodges Decl., ¶¶169, 214. There were no depositions where more than three attorneys from Lead Counsel appeared. In fact, a cursory review of the depositions listed shows that ***only one*** attorney from Lead Counsel appeared at most of them.

While Fenstad/Palmer cannot cite any cases within this Circuit to bolster the argument that the Court must troll through countless pages of Lead Counsel's timesheets, there exists case law directly contradicting this time-consuming, and overly burdensome, demand. In *Di Giacomo v. Plains All Am. Pipeline*, the court explained:

> ***This court requested, and counsel provided, a summary of the hours, work, and hourly rates for the lawyers who will benefit from the fees awarded***. Based on these documents and the entire record, this court will use the percentage of the fund method, accompanied by a "lodestar cross-check." This approach is based on the conclusion that application of the lodestar method by itself is unlikely to result in a more reasonable award of fees; would be unduly burdensome; would require the court to set reasonable rates for the attorneys of a large number of different firms and to review extensive itemized billing records in order to determine whether the 4,709 hours reflected in the summary records submitted were reasonably expended.

2001 U.S. Dist. LEXIS 25532, at *23; *see also Wegner v. Standard Ins. Co.,* 129 F.3d 814, 822-23 & n.19 (5th Cir. 1997) (holding that despite the fact that the prevailing attorneys requesting fees submitted only a summary of total hours expended plus hourly rates, this data was not "so vague or incomplete that the district court was precluded from conducting a meaningful review").

1. The Hourly Rates Are Reasonable

Bishop/Pentz also argue that plaintiffs' counsel's hourly rates are too high. In determining proper hourly rates, the Court should look to the "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). But what is the "relevant community?" Houston, where the litigation is pending? The San Diego/Los Angeles area, where Coughlin Stoia maintains its main office? Or a "national" rate, that reflects the specialized nature of securities class action litigation and the fact that, for instance, most of the opposition faced by plaintiffs' counsel came from large law firms headquartered in New York? All three approaches have been used. *Citizens Ins. Co. of Am. v. KIC Chems., Inc.*, No. 1:04-CV-385, 2007 U.S. Dist. LEXIS 73201, at *8, *14 (W.D. Mich. Oct. 1, 2007); *Steiner v. Hercules, Inc.*, 835 F. Supp. 771, 787 (D. Del. 1993); *Philips Elec. N. Am. Corp. v. Compo Micro Tech., Inc.*, No. 02-123-KAJ, 2006 U.S. Dist. LEXIS 76775, at *17-*18 (D. Del. Oct. 23, 2006). But, as discussed below, no matter which community is chosen, plaintiffs' counsel's hourly rates are at or below the market rate of lawyers in each geographic area doing similarly complex work.

As the Moscaret Declaration shows, Mr. Moscaret is an attorneys' fee expert who, for the past 18 years, has served as an attorney fee consultant and expert witness for clients, third-party payers, and law firms nationwide offering expert opinions as to the reasonableness of legal fees and the propriety of attorney billing practices in fee disputes, fee litigation, and fee arbitration. He has specialized in this field since 1991, and has acted as an expert or consultant in over 150 large fee disputes. Moscaret Decl., ¶2. As to plaintiffs' counsel's hourly rates, Mr. Moscaret has concluded, *inter alia*, as follows:

> Based upon what I consider to be very objective, reliable hourly rate data . . . Lead Counsel's attorney rates in this case are ***comparable*** to prevailing attorney rates in 2007 for large law firms in the Houston/Dallas "forum" legal marketplace. Hence, Lead Counsel's attorney rates are reasonable under the forum rule.

> Furthermore, Lead Counsel's attorney rates are ***below-market*** as compared to the relevant Los Angeles/San Diego legal marketplace; and even further below-market when compared to the relevant New York City legal marketplace (where many of the major defense law firms that opposed Lead Counsel in this case were headquartered).

Moscaret Decl., ¶¶25, 26 (emphasis in original).

In arriving at his conclusions with respect to hourly rates, Mr. Moscaret has relied on the *National Law Journal*'s ("*NLJ*") December 2007[22] published annual large law firm rate survey regarding hourly rates. As to the reliability and relevance of the *NLJ* survey in assessing the reasonableness of hourly rates, Mr. Moscaret states:

> Conversely, the *NLJ* annual large law firm rate survey is the ***only*** published rate survey in the country, to my knowledge, that identifies specific big law firms by ***name*** in specific cities, and discloses their specific rates for partners and associates . . . . Big law firms generally will not disclose their hourly rates to any survey publisher. However, they do, year after year, to the *NLJ*, perhaps the leading legal newspaper in the U.S., which makes the *NLJ* annual big-firm rate survey the most authoritative survey of its kind in the legal marketplace, in my view. . . . I believe that the *NLJ* hourly rate data which I have used in my expert analysis here is the most objective, credible, reliable data that I can present to this Court to support my opinions.

Moscaret Decl., ¶33.

Courts agree that the *NLJ* survey is a reliable and appropriate source in assessing reasonable hourly rates. *See Entm't Software Ass'n v. Granholm*, No. 05-73634, 2006 U.S. Dist. LEXIS 96429, at *8 (E.D. Mich. Nov. 30, 2006); *Chin v. DaimlerChrysler Corp.*, 520 F. Supp. 2d 589, 608-09 (D.N.J. 2007); *Citizens Ins.*, 2007 U.S. Dist. LEXIS 73201, at *18.

Using the *NLJ* study and his review of the extensive case-related and fee-related materials provided to him, as well as interviews with certain partners at Coughlin Stoia with heavy involvement in this litigation (Moscaret Decl., ¶16), Mr. Moscaret concludes as follows:

---

22 The *NLJ* has done such a study annually for at least the last ten years. Moscaret Decl., ¶33.

- First, for the Houston/Dallas forum legal marketplace . . ., (i) Lead Counsel's partner/of counsel rates fit squarely within prevailing partner rates at big firms in Houston/Dallas; and (ii) Lead Counsel's associate/contract attorney rates are within the range of reasonableness for prevailing associates rates at big firms in Houston/Dallas

Moscaret Decl., ¶35;

- I next wanted to examine in greater detail the fact that the upper end of Lead Counsel's associates/contract attorney rate range . . . was higher than the average upper-end rate . . . for associates at big firms in Houston/Dallas.

- From the above data, it was clear that nearly three-fourths of all Lead Counsel's associates/contract attorneys (*i.e.*, 72%) billed at rates ***below*** the average upper-end rate of $400 per hour for associates at big firms in Houston/Dallas . . . and over half of all Lead Counsel associates/contract attorneys actually billed at the ***lower*** end . . . of the big-firm associate rate range for Houston/Dallas . . . .

Moscaret Decl., ¶¶36, 37;

- Next, should this Court find that the relevant Los Angeles/San Diego legal marketplace . . ., (i) Lead Counsel's partner/of counsel rates were clearly below-market compared to prevailing partner rates at big firms in the Los Angeles/San Diego area; and (ii) Lead Counsel's associate/contract rates area also below-market compared to prevailing associate rates at Los Angeles/San Diego big firms.

Moscaret Decl., ¶38;

- Finally, this Court may wish to consider New York City legal marketplace . . . . (i) Lead Counsel's partner/of counsel rates are considerably below-market compared to prevailing partner rates at big firms in New York City; and (ii) Lead Counsel's associate/contract attorney rates are the same.

Moscaret Decl., ¶39.

Bishop/Pentz claim that the "*Laffey* Matrix" should be applied in this case. This "matrix," which takes its name from the case in which it was first employed, *Laffey v. Northwest Airlines Inc.*, 572 F. Supp. 354 (D.D.C. 1983), is now utilized by some courts outside of the D.C. area (which it was initially tailored for) to provide a template for courts to determine what the prevailing market billing rate within a particular community was for attorneys and support staff persons with varying degrees of experience. However, as the objectors seem to concede, no case in the Fifth Circuit has adopted, or even cited with approval, the *Laffey* Matrix. *Cf. Baruch v. Healthcare Receivable Mgmt.*, No. 05-CV-5392 (CPS) (JMA), 2007 U.S. Dist. LEXIS 80429, at *19 n.12 (E.D.N.Y. Oct. 30, 2007) (refusing to apply the *Laffey* Matrix because, *inter alia*, no court in the Second Circuit adopted or cited it with approval).

As Mr. Moscaret has said with respect to the *Laffey* Matrix:

> First, I am not aware that the Southern District of Texas, nor the Fifth Circuit, has ever adopted the *Laffey* Matrix approach for determining reasonable rates, particularly in large, complex litigation, and securities class actions in particular. However, I am familiar with some other recent federal district court decisions (they happen to be unpublished, but are still persuasive in my view) where the court ***declined*** to apply *Laffey* Matrix rates in the exercise of its broad discretion. . . .
>
> Second, in my opinion, a major flaw in the *Laffey* Matrix approach to determining reasonable rates is that the *Laffey* Matrix is way too simplistic for major, complex litigation such as securities class actions. For example, the *Laffey* Matrix lumps together all attorneys with 20-plus years of experience into the same rate bracket, and assigns the ***same*** uniform rate to each attorney in that bracket. Thus the *Laffey* Matrix treats a 20-year attorney the exact same way as a 40-year attorney with twice the experience. Common sense and the real world of litigation say that is an inequitable result.

Moscaret Decl., ¶¶41, 42.

Using current rates is appropriate. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) (reimbursement may be based on current rates to compensate for delay in payment); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 195 (E.D. Pa. 2000) ("attorney's hourly rates were appropriately calculated by reference to current rather than historic rates").

Enron Savings Plan argues that the average hourly rate here is much higher than the average rate in the *WorldCom* case, where it asserts counsel faced similar hurdles of trying to hold institutions other than the company liable under the securities laws. It overlooks the fact that in *WorldCom*, only one bank, Citigroup, faced §10(b) liability. The vast bulk of the claims and the settlement funds were for §11 violations, which does not require plaintiff to prove scienter or reliance and places the burden of rebutting loss causation on the defendant. Thus, there was more risk and necessarily more creative lawyering by more senior personnel here, where the potential §10(b) liability dwarfed §11 claims, as compared to *WorldCom*.

2. The Hours Are Reasonable

Bishop/Pentz and Dabrowski/Schonbrun argue that time spent pursuing unsuccessful claims should not be included in lodestar. They ignore the fact that pursuit of what they characterized as a "flawed theory" resulted in the vast bulk of the recovery here and that the SEC, 33 Attorneys General and the Ninth Circuit agreed with the "flawed theory." Moreover, it was the diligent and creative prosecution against ***all*** the banks that made the record result possible. In addition, the $6.6 billion in settlements from three banks that were approved by this Court in 2006 were not final until October 25, 2007, when the Davis appeal was resolved. And Silvercreek's appeal from the BofA settlement was briefed in 2007 and will likely be heard in April 2008. Moreover, during 2007 and continuing to today, Lead Counsel has been working on the plan of allocation and other issues related to the prior settlements. The fact-intensive work on plaintiffs' damages analyses which commenced during the fact-discovery phase and continued in 2006 in expert discovery and 2007 in trial preparation, was the foundation for the plan of allocation. As described in the Hodges Declaration, Lead Counsel and its consultants worked long and hard on the plan of allocation, which is based on our economic consultants' evaluation of the claims (and the facts on which they are based) and the resulting inflation in price of Enron securities. Hodges Decl., ¶¶282-289. Furthermore, even in fee-shifting cases, courts compensate the prevailing party for unsuccessful claims that arose from a core set of common facts. *See Robinson v. City of Edmond*, 160 F.3d 1275, 1283-84 (10th Cir. 1998) (Where some of plaintiffs' claims were unsuccessful but were related "because they involved a common core of facts," "it was legally incorrect for the district court to reduce the plaintiffs' fee request on the basis of the plaintiffs' 'only partial success' for their interrelated claims." "*Hensley* made it abundantly clear that failure on some interrelated claims is not nearly as important a factor as the 'overall relief' obtained by the plaintiff.").

Including contract attorney, of counsel, forensic accountant and other professional time in lodestar is also appropriate. All of the professionals identified in Hodges Declaration, Exhibit 1, were essential and integral to the great result obtained. Objectors[23] argue that the hours are "inflated" by contract attorney time. Mr. Moscaret discusses the appropriateness of the use of contract attorneys in his declaration. *See* Moscaret Decl., ¶¶66-84. As he states:

> For the past 15-20 years, since contract attorneys became fixtures at large law firms in major, complex, document-intensive litigation, there are, to my knowledge, still no clear, uniform, "consensus" rules among corporate/institutional clients on how to treat contract attorneys. In my experience. different corporate/institutional clients end up formulating their own individual billing policies for contract attorneys *vis-a-vis* their big-firm outside counsel. Despite that, I do not know of any corporate/institutional clients who will ***not*** pay for contact attorneys in major, complex litigation today, especially in document-intensive lawsuits involving massive amounts of electronic discovery. For those cases, contract attorneys have become part of the litigation landscape, and clients know it.
>
> Notwithstanding the state of the legal marketplace, however, the courts themselves have already taken the lead in not only validating the use of contract attorneys in such cases, but also treating them as "fees" for lodestar purposes, and awarding contract attorneys prevailing market rates instead of internal cost compensation in fee awards. I have actually observed this judicial trend in effect for at least the past 13 years going back to 1995, so it is not just a recent phenomenon.

Moscaret Decl., ¶¶66, 67 (emphasis in original).

In the middle of intensive document review and depositions, but prior to expert depositions, ten of the contract attorneys, each of whom billed 1900 or more hours, were added to the team prosecuting the case. They were hired and directly supervised by Coughlin Stoia partner Paul Howes in the Houston trial office. They performed the same tasks that associates with their level of experience did. They reviewed and analyzed documents to assist in fact depositions. They

---

[23] Bishop/Pentz, Carfagna/Siegel and Silverio/Cochran object to contract attorney time being included in lodestar.

researched issues of law for briefs and trial preparation. They pulled documents requested by our experts. They gathered and reviewed information regarding defendants' experts. They took turns attending the Lay/Skilling criminal trial and researched evidence issues under the supervision of Roger Adelman, who is a very senior trial attorney brought in to assist in trial preparation. They researched and drafted portions of the pre-trial motions, including the *in limine* motions. Throughout their time as contract attorneys, they responded to requests for assistance from Paul Howes and from the rest of the "core" team of attorneys who were in San Diego. In other words, they were not just sitting in a room mindlessly coding documents as some objectors imply. The only difference between them and regular associates with the firm was that they were hired for a limited time – specifically to prepare the *Enron* case for trial. Hodges Supp. Decl., ¶7.

The other contract attorneys with significant time are Jerri Hardaway, Allen Hobbs, Shawn Hays, and Ray Mandlekar. The firm hired Jerri Hardaway in 2002 when Paul Howes opened the Houston trial office. Ms. Hardaway was at that time an experienced lawyer, having worked on, among others, the *In re Leasehold Antitrust* case. Ms. Hardaway worked under the direction of Mr. Howes and made significant contributions to the prosecution of the case. She had the idea for, and the know-how to set up, the web site used for service in this case. She had to convince the other lawyers in the case that it could work and that there was no risk that their firms' computer systems would be harmed by using the ESL3624.com web site. After getting over that hurdle, she convinced the parties to agree to use the web site for service of briefs and other communications among counsel. The Court signed an order approving the web site for service and countless trees were saved. She also spent numerous days drafting and negotiating what became the Document Depository Order. She, like the 10 newer attorneys who came on board in 2005, worked with Mr. Howes and the rest of the attorneys on the team. She played a large role in document review and organization. In addition, she prepared for and took or defended depositions. Hodges Supp. Decl., ¶8.

Shawn Hays and Ray Mandlekar are both senior lawyers and had previously been associates with the firm. Mr. Hays has significant trial experience and was added to the team primarily to take fact depositions. He took 33 fact depositions. *See* Hodges Decl., ¶169. In addition, he prepared some of our experts for their depositions and he took a number of the defendants' experts' depositions. Mr. Mandlekar, an attorney in practice for nine years, had been an associate with the firm from September 2001 until August 2005 and then rejoined the firm on a contract basis to work on the *Enron* case. Prior to joining the firm, he was in solo practice, where he represented plaintiffs in several class action cases. In 2004, while at the firm, he participated in the jury trial of a class action securities fraud case against a Fortune 500 company. Thus, Mr. Mandlekar brought substantial experience in representing plaintiffs in class action cases, and in the trial of securities fraud matters, to the *Enron* team. While working on Enron, Mr. Mandlekar evaluated the claims against certain defendants for purposes of settlement discussions, and performed substantial work in drafting oppositions to defendants' motions for summary judgment. He also interacted with witness Andrew Fastow, gathering information supporting Lead Plaintiff's claims. He moved to Houston and was an integral part of the team preparing the case for trial. He drafted the proposed jury instructions and other pre-trial filings. Hodges Supp. Decl., ¶9.

Allen Hobbs was a contract attorney in the New York office of Milberg Weiss. Mr. Hobbs worked on the case in its early stages. He reviewed SEC filings, media reports, the Powers Report and Congressional hearing transcripts. Working with attorneys in San Diego and New York, he analyzed facts regarding the structure of the investment banks as well as anticipated legal issues. Based on his research, he drafted discovery requests to the investment banks and the Enron board of directors and he prepared witness files for depositions. He assisted in researching and drafting oppositions to the motions to dismiss. He worked with Mr. Howes and Ms. Hardaway on a document database. He reviewed the record from the *JP Morgan Chase v. Liberty Mutual* case, also known as the "sureties" case, then pending before Judge Rakoff in New York. He prepared analyses of the evidence from that case for use in the *Enron* case. Hodges Supp. Decl., ¶10.

In short, each of the attorneys identified as a "contract" attorney was hired by the firm, was supervised by its partners, performed tasks appropriate to his/her level of experience and was treated for most intents and purposes like an associate in the prosecution of the case. What the Court in *Tyco* said with respect to contract attorneys (as well as paralegals) and the appropriate treatment of their time, is instructive:

> [Objector] argues that the work done by contract attorneys should be treated as an expense to be reimbursed, rather than being included in the lodestar. This objection lacks merit. The lodestar calculation is intended not the reflect the costs incurred by the firm, but to approximate how much the firm would bill a paying client. An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar. *See Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609-11 (N.D. Tex. 2000) (holding that under a fee-shifting statute, the fees of contract attorneys and paralegals are compensable at market rates as part of the attorneys' fees, not just as overhead expenses of the firm); *see also Missouri v. Jenkins*, 491 U.S. 274, 286-88 (1989) (using the same reasoning to conclude that market-rate billing of paralegal hours should count toward an attorney fee award).

Tyco, No. 02-md-1335-PB, slip op. at 59 (Compendium, Ex. P).

Other professionals' time is appropriately included in lodestar. Paralegal time is appropriately included in lodestar. *See Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609-11 (N.D. Tex. 2000); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, No. SA-01-CA-1010-FB, 2007 U.S. Dist. LEXIS 12366, at *181-*182 (W.D. Tex. Feb. 21, 2007). Lead Counsel's document clerks and in-house investigators perform tasks similar to paralegals. They gather and organize data for lawyers at hourly rates that are generally lower than lawyers' rates. Hodges Supp. Decl., ¶15.

Our in-house forensic accountants were instrumental in achieving the record recovery. These individuals, all Certified Public Accountants with years of experience in accounting and auditing, applied their knowledge and expertise to assist in drafting the accounting allegations in the Consolidated Complaint and subsequent complaints. They assisted the lawyers in drafting document requests, in reviewing documents, in analyzing the myriad transactions at issue, and in preparing for depositions of fact and expert witnesses. In addition, for purposes of settlement discussions, they analyzed the ability to pay of various defendants. Needless to say, the accounting and auditing issues were central to plaintiffs' case. Consequently, these in-house professionals were vital to our prosecution from start to finish. Hodges Supp. Decl., ¶12.

The in-house accountants also reviewed Enron's SEC filings and financial records and Andersen's audit workpapers. They explained the application of accounting rules to the complex facts in this case. They identified documents to be used in depositions of Andersen auditors. And they attended some of the depositions to further assist our lawyers. In sum, they were extremely involved in, and necessary for, the successful prosecution. Hodges Supp. Decl., ¶13. Their time is appropriately included in lodestar.

Similar to the in-house accountants, our in-house economic analysts applied their knowledge and expertise for the benefit of the Class. They assisted our lawyers in gathering and analyzing information about the numerous securities at issue in the case. Also, from early on, they analyzed the damages suffered by the Class. Hodges Supp. Decl., ¶14. While one objector proclaims that "it doesn't take a $900 lawyer to figure out the damages were $60 billion," the Court knows well that damages and related loss causation issues were far from simple in this case.

When the Court appointed The Regents as Lead Plaintiff, it noted that the firm brought to bear exceptional resources, including "investigators, forensic accountants, and corporate governance experts." *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 454 (S.D. Tex. 2002). The time of all these professionals is appropriately included in lodestar.

The argument made by Bishop/Pentz that Roger Adelman and Jamie Baskin have been "fraudulently characterized" as "of counsel" to Lead Counsel's firm and that their time should be excluded from Coughlin Stoia's lodestar, while colorful (to put it most charitably), misses the mark. The fact of the matter is that they were viewed and treated as "of counsel" to the firm for purposes of the *Enron* case. Among other things, they were provided with personal offices at the firm's Houston trial office; they spent substantial amounts of time working in Houston on the *Enron* case;[24] the firm paid their case-related expenses, including the cost of apartments to live in while in Houston; they directly supervised the work of the firm's associates and contract lawyers; and they functioned as integral members of the firm's *Enron* team. Moreover, both Mr. Adelman and Mr. Baskin have had, and continue to have, substantial and ongoing relationships with the firm.

But more to the point, what difference would it make if they were not treated as "of counsel" and submitted separate fee declarations? The total lodestar would still be the same; their time would not disappear as Bishop/Pentz assume. The real question is, did they do work that benefited the Class and contributed to the recovery obtained? As shown by the discussion above and in the Hodges Declaration and Hodges Supplemental Declaration the answer to that question is yes. The issue is a red herring.[25]

---

[24] Mr. Baskin estimates he spent 90% or more of his working hours during the relevant period on *Enron*; Mr. Adelman likewise spent the major part of his professional time on the case.

[25] Bishop/Pentz's comment that Sol Schreiber is "of counsel" to Milberg Weiss, not Coughlin Stoia, is similarly unpersuasive. The attorneys listed in Exhibit 1 to the Hodges Declaration include those who worked on the case prior to the separation of Milberg Weiss and Coughlin Stoia and remained with Milberg Weiss after that separation in 2004. All references to Coughlin Stoia include its predecessors. *See* Hodges Decl., n.1.

E. The Reasonableness of the Requested Fee Is Well-Supported by Review of the *Johnson* Factors

In Lead Counsel's Fee Brief, Lead Counsel set forth a summary of the evidence supporting the requested fee under each of the *Johnson* factors. Fee Brief at 62-75. The evidence is further detailed in the declarations of counsel and experts filed January 4, 2008. That discussion will not be repeated here.

III. RESPONSE TO EACH OBJECTOR

A. Dabrowski/Schonbrun

Attorney Lawrence Schonbrun has filed a kitchen-sink compendium of objections to Lead Counsel's fee application. Schonbrun, appearing here nominally on behalf of an individual who purchased 75 shares of Enron common stock in late August 2001, is a "professional objector" who regularly files "canned" objections to class action fee applications. Schonbrun asks, as he has done (unsuccessfully) in dozens of cases over the last 20-plus years, for the appointment of a "class guardian," ostensibly to protect the interests of the Class. But, Lead Plaintiff and the Court itself are charged with that duty or, as Professor Silver puts it: "The class already has a guardian: The Regents." Supplemental Silver Report at 3. There is no reason to conclude that either has failed or will fail adequately to protect the Class, or that the significant delay and additional costs that inevitably would flow from appointing another fiduciary are justified. Schonbrun also asserts rote and repetitive objections to, among other things, the structure of the retainer agreement negotiated between Lead Plaintiff and Lead Counsel – basically, Schonbrun disagrees with The Regents' business judgment in this regard – and the multiplier implied by enforcing the retainer agreement which, as representatives of The Regents have noted, worked precisely as they intended. None of the Schonbrun objections is meritorious; they should be denied in their entirety.

1. Schonbrun's Practice of Filing Canned, Boilerplate Objections

Schonbrun, a solo practitioner from Berkeley, California, is well known for appearing at the tail end of class actions and objecting to attorney fees sought by class counsel.[26] Schonbrun devotes essentially his entire law practice to objecting to class action fee applications; over the past 20+ years he has appeared in close to 200 (or more) class action settlement proceedings for this purpose.[27] Courts in Texas and elsewhere have rightly labeled him a "Professional Objector"[28] and a "class action gadfly."[29] Schonbrun has admitted "that he is opposed in principle to class action settlements and has filed many objections over his career."[30]

---

[26] Schonbrun has been characterized as "a darling of the tort reform movement" who "travels the country attacking fee awards in class actions." Charles Silver, "*We're Scared To Death*"*: Class Certification and Blackmail*, 78 N.Y. L. Rev. 1357, 1360 n.8 (2003) (Supplemental Compendium, Ex. 3).

[27] Schonbrun appeared in 80 to 100 class actions during the 1990s, each time purporting to represent absent class members objecting to some aspect of the settlement, almost invariably attorney fees. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, No. 99-20593, Fairness Hearing (E.D. Pa., dated May 10, 2000) (Supplemental Compendium, Ex. 4). He has continued to file objections in numerous class actions since then.

[28] "The Court finds that Mr. Schonbrun is aptly described by the moniker '***Professional Objector'*** and regards him as such." *Scott v. Blockbuster Inc.*, No. D 162-535, 2001 WL 1763966, at *3 (Tex. Dist. Dec. 21, 2001). Judge Shuffield also found that "Mr. Schonbrun has no first-hand experience prosecuting class actions"; that he "makes his living . . . objecting to class action settlements"; that he "has been found by courts across the country to have filed and made ***frivolous, groundless, contrived, or misplaced objections*** to class action settlements"; and that the court had "good cause to believe that Mr. Schonbrun's objections were not filed for the proper purpose of objecting to a specific aspect of the present settlement, but rather for the ***improper purpose of obstructing class action settlements in general***, and the settlement of this case in particular." *Id*. at *3-*4. *See also In re Broadcom Corp. Sec. Litig.*, No. SACV01-275 DT(MLGx), 2005 U.S. Dist. LEXIS 45656, at *15-*17 (C.D. Cal. Dec. 5, 2005), in which Judge Dickran Tevrizian of the Central District of California referred to "***professional objectors***" in the course of imposing a $1.24 million appeal bond in connection with Schonbrun's ***"frivolous" and "canned" objections*** to the fee application in that case.

[29] "Schonbrun has appeared in 'many other cases' involving class action settlements. In fact, Schonbrun can be characterized as something of a ***class action settlement gadfly***. He has appeared in many class action settlement proceedings, invariably in opposition to the amount of fees sought by counsel for the plaintiff class." *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1196 n.2 (9th Cir.

Perhaps unsurprisingly in view of his serial objections and the apparent motives behind them, Schonbrun has been the subject of negative commentary by courts around the country. For example, Chief Judge Heartfield of the Eastern District of Texas admonished Schonbrun "for inappropriate litigation conduct designed to either bolster or manufacture standing through the manipulation of documents submitted to this Court," vacated Schonbrun's admission *pro hac vice* to that Court, and required him to submit a request at least a week in advance "should Mr. Lawrence Schonbrun desire to practice in the Eastern District of Texas again."[31] Chief Judge Korman of the Eastern District of New York told Schonbrun: "I've just about had enough of you and your outrageous behavior here. You are a lawyer and you . . . can't do what you've been doing here."[32] Judge Shuffield of the 136th District Court, Jefferson County, Texas, found "good cause to believe that Mr. Schonbrun's objections were not filed for the proper purpose of objecting to a specific aspect of the present settlement, but rather for the improper purpose of obstructing class action settlements in general, and

---

1999). *See also In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1459 (N.D. Cal. 1994) (referring to Schonbrun as "a class action gadfly").

30 *See Broin v. Philip Morris*, No. 91-49738 CA (22), Memorandum Opinion and Order (Dade Cty. Fl. Feb. 5, 1998) (Supplemental Compendium, Ex. 5). Schonbrun's opposition to class actions in general may involve more than just principle. When Houston attorney Scott Clearman took his deposition several years ago, Schonbrun refused to answer questions about whether unnamed corporate or political interests regularly paid him to go around the country attacking class action attorneys' fees. *Weatherford Roofing Co. v. Employers Nat'l Ins. Co.*, No. 91-5637-F, Deposition Transcript of Lawrence W. Schonbrun (Dallas Cty. 116th Dist., dated Oct. 26, 1996) at 42:10-43:25; 99:2-20; 100:14-101:15; 102:2-10 (Supplemental Compendium, Ex. 6).

31 *Shaw*, 91 F. Supp. 2d at 975.

32 *In re Holocaust Victim Assets*, No. 96-CV-4849 (ERK), Transcript of Civil Cause for Motions before The Honorable Edward R. Korman Chief United States District Judge (E.D.N.Y., dated Jan. 5, 2001) at 6 (Supplemental Compendium, Ex. 7).

the settlement of this case in particular."[33] Other courts have admonished Schonbrun for his practices, including the filing of "frivolous" objections for purposes of "harassment."[34]

Courts have also noted Schonbrun's practice of filing "canned" objections using the same "boilerplate" in case after case.[35] In fact, many of the arguments he makes here have been trotted out repeatedly (and usually unsuccessfully).

None of this is to suggest that the Court ignore the substance of the Schonbrun objections. But we do suggest that they are ill-conceived and deserving of little weight.

---

[33] *Scott*, 2001 WL 1763966, at *3.

[34] *See, e.g., In re Lawrence Schonbrun Attorney Discipline Proceedings*, No. CV-96-134, Amended Order to Show Cause and Order for Assignment Pursuant to Civ. L. R. 11-6(c) (N.D. Cal. Feb. 7, 1997) at 4 (Supplemental Compendium, Ex. 8), in which Judge Marilyn Hall Patel of the Northern District of California found that Schonbrun had "asserted a position in this litigation without probable cause and for the purpose of harassment" and had "been untruthful with the court and . . . sought to mislead [it]." *See also Weissman v. Quail Lodge, Inc.*, No. 96-1131 MHP, Memorandum and Order (N.D. Cal. Oct. 14, 1997) at 4-5, *rev. other grounds* by 179 F.3d 1194 (9th Cir. 1999) (Supplemental Compendium, Ex. 9), in which Judge Patel found that "Schonbrun's intervention . . . reflects a serious lack of professionalism and good judgment" and that his objections were "groundless, contrived and misplaced." In *Vizcaino v. Microsoft Corp.*, No. C93-178C, slip op. at 2 (W.D. Wash. Feb. 15, 2001) (Supplemental Compendium, Ex. 10), the Court found that "Mr. Schonbrun's conduct thus far has been questionable, at the very least" and warned that "Mr. Schonbrun's conduct will be carefully scrutinized for compliance with . . . the relevant rules of ethics."

[35] *In re TCW/DW North American Gov't Income Trust Sec. Litig.*, No. 95 Civ. 0167 (PKL) Transcript (S.D.N.Y., dated Apr. 26, 2000) ("4/26/00 TCW/DW Tr.") at 20 (Supplemental Compendium, Ex. 11). *See, e.g., In re Broadcom Sec. Litig.*, No. SACV 01-275 DT(MLGx), 2005 U.S. Dist. LEXIS 41983, at *24 (C.D. Cal. Sept. 12, 2005) ("The 'canned' nature of [the objections filed by Schonbrun] is further confirmed . . . ."); *Weissman*, No. 96-1131 MHP, slip op. at 5 ("Schonbrun's brief contains nothing but boilerplate arguments previously used indiscriminately by him in dozens of other class action settlements.") (Supplemental Compendium, Ex. 9); 4/26/00 TCW/DW Tr. at 20:24-21:1 ("The court concludes that the objections filed by Mr. Schonbrun . . . appear boilerplate and frivolous.") (Supplemental Compendium, Ex. 11).

2. Schonbrun's Request for a "Class Guardian" Should Be Denied

Schonbrun leads his argument with a request for the appointment of a "class guardian." He asserts that the appointment of a class guardian is necessary and appropriate because the "class lacks adequate representation at this stage of the proceedings to protect its recovery." Objection to Lead Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Plaintiffs' Expenses (Docket No. 5856) ("Schonbrun Objection") at 6. Schonbrun has made this same request for appointment of a class guardian in many cases over the years,[36] but as far as we are aware, after inquiry, he has never been successful in this regard.

There is no good reason, legal or factual, for the appointment of a class guardian; to the contrary, there are compelling reasons not to go down this road.

There is no need here for an additional fiduciary for the Class. The Class and its absent members have been and continue to be well-protected by Lead Plaintiff and by the Court itself.

Under the PSLRA, a lead plaintiff is charged with representing the interests of class members; indeed, the Court is directed by the statute to identify (based on criteria set out therein) and appoint as lead plaintiff the class member(s) "most capable of adequately representing the interests of class members."[37] A lead plaintiff has the right and the obligation, as part of its role as representative of the interests of the class, to retain class counsel and to direct and monitor class

---

[36] *In re Intelligent Elec. Inc. Sec. Litig.*, No. 92-CV-1905, 1997 WL 786984 (E.D. Pa. Nov. 26, 1997); *NASDAQ*, 187 F.R.D. at 465; *Rite-Aid*, 396 F.3d at 302-303; *Powers v. Eichen*, No. 96-1431-B (AJB), Objection and Notice of Intention to Appear at Hearing on Proposed Settlement and Award of Attorneys' Fees and Reimbursement of Expenses; Declaration in Support Thereof (S.D. Cal., dated Sept. 3, 1998) ("Powers Schonbrun Objection") (Supplemental Compendium, Ex. 12); *In re IDB Commc'ns. Group, Inc. Sec. Litig.*, No. CV-94-3618-RG (JGx), Notice of Objection and of Intention to Appear Through Counsel at Fairness Hearing to Object to Proposed Settlement and Award of Attorneys' Fees and Payments to Representative Class Plaintiffs; and Request to Meet and Confer (C.D. Cal., dated Jan. 25, 1995) (Supplemental Compendium, Ex. 13).

[37] 15 U.S.C. §78u-4(a)(3)(B)(i).

counsel in the prosecution of the case. Ample – and essentially unrebutted – evidence confirms that Lead Plaintiff has excelled in its role and more than adequately represented the interests of the Class and will continue to do so. James E. Holst, General Counsel Emeritus of The Regents stated:

> In the Enron case, The Regents developed a very effective working relationship with Lead Counsel which has, in my judgment, been extremely beneficial to the prosecution of the case. Since The Regents' appointment as Lead Plaintiff, attorneys from The Regents' Office of General Counsel have participated in all significant settlement discussions and mediation proceedings, attended hearings, reviewed all major pleadings, and approved all major strategic actions. Substantial oversight procedures were established and maintained, including weekly conference calls, periodic meetings, and circulation of documents.
>
> During my tenure, The Regents, through attorneys in the Office of General Counsel, actively oversaw and supervised every aspect of the Enron litigation. This oversight included monitoring and directing Lead Counsel's investigation; reviewing and approving the Consolidated Complaint for Violation of the Securities Law and the subsequent First Amended Consolidated Complaint for Violation of the Securities Law; reviewing and approving initial paper discovery; overseeing the response by The Regents' current and former personnel to defendants' document requests and interrogatories; reviewing and approving all pleadings; and conducting weekly status conference calls on case development and the litigation strategy The Regents directed Lead Counsel to pursue. In addition, The Regents participated in settlement discussions and made all decisions on behalf of the Class with respect to the settlements. In short, no significant strategic or tactical decision has been made or important action taken by Lead Counsel in this case without the prior review and approval of The Regents.

Declaration of James E. Holst in Support of Lead Counsel's Motion for an Award of Attorney Fees (Docket No. 5824), ¶¶6-7.

Christopher M. Patti, University Counsel responsible for overseeing the *Enron* case day-to-day stated:

> By seeking appointment as a Lead Plaintiff in December 2001, the University responded to the call of Congress for institutional shareholders to actively participate and to ensure that class action securities cases are controlled and supervised by the shareholders for whom they were brought and prosecuted. The University, and this Office in particular, was determined to take an active, controlling role in the management of the litigation.
>
> * * *
>
> The Court appointed the University Lead Plaintiff on February 15, 2002. In fulfillment of its responsibilities as Lead Plaintiff, the University has zealously

supervised and managed this litigation in pursuit of substantial and favorable results for all members of the class. The University developed an effective working relationship with Lead Counsel, and our role in supervision and management of every aspect of the *Enron* litigation has been welcomed by them. The University, through its General Counsel's office, has and will continue to actively oversee and supervise every aspect of the *Enron* litigation.

Attorneys from this Office have reviewed and approved all significant tactical and strategic decisions in the case, including which defendants to name, which legal theories to pursue, whom to dismiss and whom to settle with, etc. Furthermore, this Office has overseen not merely the broad strategic direction of the case but also many of the details of the litigation. That effort that has required an extensive commitment of resources. University attorneys have spent hundreds of hours reviewing, commenting on, and ultimately approving virtually all pleadings filed with the Court on behalf of plaintiffs. University attorneys have spent considerable time monitoring and directing Lead Counsel's initial and on-going investigation. Attorneys from this Office have spent considerable time and effort reviewing and approving First Amended Consolidated Complaint for Violation of the Securities Laws, and complaints filed against parties including Goldman Sachs, The Royal Bank of Scotland, The Royal Bank of Canada and Toronto-Dominion. University attorneys have had a substantial role in planning, review and approval virtually all motions and briefs filed in both this Court and the appellate courts. University attorneys have also reviewed written discovery and overseen the response by The University' current and former personnel to defendants' document requests and interrogatories. This Office was also actively involved in the class certification proceedings, including the two-day hearing before this Court, the appeal of this Court's class certification ruling to the Fifth Circuit and the *Certiorari* Petition to the U.S. Supreme Court. Most recently, University attorneys have spent substantial time in the design of the proposed Plan of Allocation, the review of comments received from the public, and the response to those comments. This Office has reviewed and approved all aspects of the Plan of Allocation.

* * *

Since July 2002, University attorneys have participated in weekly conference calls with Lead Counsel to discuss status, strategy, settlement possibilities and all other important aspects of the case. In addition, University attorneys have frequently traveled to Lead Counsel's Houston trial office and its main San Diego office to speak with staff, to observe discovery activities, trial preparation, and document analysis and to participate in strategy discussions. Through these weekly conference calls and in-person meetings we have provided direction to Lead Counsel on all aspects of the case.

* * *

University attorneys have participated in virtually all formal settlement discussions, including settlement meetings or mediations in Houston, Oakland, San Diego, New York, Chicago, Dallas, and Boston. This Office has submitted all proposed settlements for formal approval by the Board of Regents which has

> approved all settlements on behalf of the class. Our participation in settlement negotiations has at times included direct party-to-party discussions with certain defendants, and I believe those direct negotiations have played an important positive role in achieving some of the settlements we have obtained.
>
> * * *
>
> In short, no significant strategic or tactical decisions have been made or important actions taken by Lead Counsel in this case without the prior review and approval of this Office. The University has devoted a significant, possibly unprecedented, level of its own resources to ensure its effective oversight of this highly complex and important litigation and to obtain the best possible result of the members of the class.

Declaration of Christopher M. Patti (Docket No. 5796) ("Patti Decl."), ¶¶4, 6-7, 10, 12, 14. Schonbrun makes no serious attempt to rebut this evidence or to show why The Regents should now be deemed inadequate in terms of protecting the interests of the Class.

Moreover, as Schonbrun concedes, this Court has a "unique role as a fiduciary and protector of the interests of absent class members." Schonbrun Objection at 1.

Lead Plaintiff and this Court have been closely involved in this litigation for years. They are charged with protecting the interests of the Class. They are in a far better position that a newly appointed class guardian to assess (1) the *ex ante* fee agreement, (2) the risks undertaken by counsel, (3) the performance of counsel, and (4) the value conferred on the Class through the efforts of counsel. The interests of the Class have been and continue to be adequately protected by Lead Plaintiff and by the Court. Schonbrun has brought forth no evidence to support a contrary conclusion. Thus there is no reason to appoint a class guardian in this case.

There are, moreover, compelling reasons *not* to appoint a class guardian. These reasons can be summed up in two words: time and money. The appointment of a class guardian would unavoidably create significant delays – a fact certainly not lost on Schonbrun. Simply getting up to speed on what has transpired in this case over the past six-plus years would require a significant expenditure of time – and, presumably, professional fees and expenses – on the part of a newly appointed class guardian.

The tasks Schonbrun envisions for a class guardian – basically he seeks a roving commission to look for reasons to reduce or deny class counsels' fees – confirm the groundless nature of the request and reinforce the inescapable conclusion that significant time and money would be wasted. For example, Schonbrun asks that the class guardian be empowered to "investigate" a number of aspects of this litigation – among them, whether a presumption of reasonableness should be applied with respect to the fee agreement reached between The Regents and class counsel; the circumstances surrounding the retention of class counsel by the Lead Plaintiff; and the expertise and terms of engagement of the expert witnesses proffered in this proceeding by Lead Counsel. Schonbrun Objection at 3-5. Schonbrun also envisions that the class guardian would retain an "auditor/forensic accountant" to investigate, among other things, the time entries underlying the lodestar report that has been provided to the Court. Schonbrun Objection at 5.

Courts have routinely rejected Schonbrun's request for the appointment of a class guardian. For example, in *NASDAQ*, 187 F.R.D. at 481, the court wrote:

> In addition to his numbered objections, Schonbrun also requests appointment of a "class guardian." Plaintiffs submit that no one is better informed about this case, and better situated to serve as the "class guardian" than this Court. Indeed, the Court's familiarity with this litigation is reflected in many opinions and orders cited above.
>
> As observed in *In re Intelligent Electronics Securities Litigation*, 1997 U.S. Dist. LEXIS 19191, 1997 WL 786984 (E.D. Pa. Nov. 26, 1997), "The appointment of a class guardian would only further increase costs, extend indefinitely the time before distribution to the class and further needlessly complicate the procedures." 1997 WL 786984 at *10. Not only would such an appointment be duplicative, but it would derogate the duty of the court which is to illuminate and resolve any meritorious disputes and to insure a fair and just resolution.
>
> Accordingly, Schonbrun's request for the appointment of a special guardian is denied.

Id. at 481. The court also rejected Schonbrun's request for a class guardian in *Intelligent,* 1997 WL 786984 and in *Rite-Aid*, 396 F.3d at 302-03. S*ee also* Powers Schonbrun Objection (Supplemental Compendium, Ex. 12).

Schonbrun's assertion that case law supports the routine appointment of a class guardian in securities class actions is simply wrong. This kind of appointment has been exceedingly rare in post-PSLRA jurisdiction; Lead Counsel is not aware of any case in which a court has appointed a guardian where an active, qualified and vigilant lead plaintiff has been involved.

In an attempt to bolster his argument that "appointment of a class guardian, fee expert, and auditor/forensic accountant [is] mandatory" (Schonbrun Objection at 15), Schonbrun selectively and misleadingly quotes the following language from *Cendant,* 264 F.3d at 255:

> [T]here is often a conflict between the economic interests of clients and their lawyers, and this fact creates reason to fear that class counsel will be highly imperfect agents for the class.
>
> Because of this conflict (and because "the class" cannot counteract its effects via counsel selection, retention, and monitoring), an agent must be located to oversee the relationship between the class and its lawyers.

See Schonbrun Objection at 15-16.[38] Schonbrun infers that the Third Circuit endorses his concept of a class guardian to act as that "agent." Not so. Indeed, the very next sentence of the quoted passage (noticeably left out by Schonbrun) notes that courts had fulfilled that role in pre-PSLRA jurisprudence: "***Traditionally, that agent has been the court***." *Cendant,* 264 F.3d at 255.

The section of the *Cendant* opinion on which Schonbrun relies is in the nature of a review of pre-PSLRA practice. The court turned from historical perspective to a discussion of the new paradigm created by the lead plaintiff provisions of the PSLRA – ***a paradigm conceived precisely so that the class could "counteract" the perceived agency problem "via counsel selection, retention,***

[38] In Schonbrun's brief the quote is broken into two segments with the order reversed. It is set out above as in the opinion.

and monitoring." *Id.* The opinion thus explains that the lead plaintiff provisions were designed to encourage institutional investors to stand as lead plaintiffs because, as the architects of those provisions argued, "institutional investors are well suited to select, retain, and monitor lead counsel in securities class actions." *Id*. at 261. The opinion further observes that, in promulgating the PSLRA, Congress agreed with "Weiss and Beckerman's argument . . . that institutional investors would likely do a better job than courts at selecting, retaining, and monitoring counsel than courts have traditionally done." *Id*. at 276.

The clear thrust of the *Cendant* decision is that a properly selected lead plaintiff is the "agent" Congress has chosen "to oversee the relationship between the class and its lawyers." *Cf. id*. at 255. Schonbrun's suggestion that this Court ignore this congressional choice in favor of an *ad hoc* overseer installed at the end of the game is deserving of little consideration.

3. Schonbrun's Request for Appointment of Another Expert Should Be Denied

Schonbrun asserts that an expert should be retained on behalf of the Class to critically evaluate the submissions made by Lead Counsel's experts. But he offers no particularized reason for this request nor does he justify the additional delay and expense. The Court is entirely capable of evaluating these experts and their submissions. This request should be denied.

4. Schonbrun's Request for Appointment of an Auditor Should Be Denied

Schonbrun urges the Court to appoint an auditor to review the time entries underlying class counsels' lodestar. While we disagree with the necessity for such a review – particularly where the lodestar figure is utilized principally as a cross-check of a percentage-based fee – Lead Counsel has voluntarily undertaken to retain Kenneth M. Moscaret, a highly qualified expert in attorney fee and billing issues, to review the hours and billing rates reported by Lead Counsel. Mr. Moscaret has submitted a lengthy declaration explaining why he has concluded that Lead Counsel's billing rates and staffing practices in this case were reasonable and customary for a complex mega-case. Moscaret Decl., ¶¶25-28. There is no reason to authorize and fund the unguided fishing expedition sought by Schonbrun.

5. Schonbrun's Objection to Payment of Fees Before the Claims Process Has Been Completed Should Be Denied

Trotting out one of his off-the-shelf objections, Schonbrun objects to payment of fees prior to the receipt by the Class of payments from the settlement. Courts have routinely rejected this argument in cases like this one, involving a fixed-sum cash settlement fund in which defendants have no reversionary interest.[39] This is not a case in which the value of the benefit to the Class (from the settlements previously approved by the Court) is in any way dependent upon subsequent events. Nor is there any reason to expect that Lead Counsel will drop the ball in connection with the claims process. There is no reason to delay payment of fees as Schonbrun suggests; this objection should be denied. *See* Supplemental Silver Report at 15-16.

6. Schonbrun's Incorrect Assertion that Fees Have Been Calculated on the Basis of Gross Recovery Should Be Ignored

Schonbrun asserts that the "methodology used by Class Counsel to calculate their fee does not appear to have been 'netted' for expenses" and that "[t]here appears to Objector to be confusion on this issue." Schonbrun Objection at 22.

As discussed above, in fact, the fee request ***is*** based on application of the ascending fee percentages to the net recovery. As noted in the Hodges Declaration, Lead Counsel has used a conservative figure of $45 million of reimbursable litigation expenses in its fee calculation. Hodges Decl., n.7. The fee requested is based upon the gross recovery, less $45 million. If Schonbrun had

39 *AT&T*, 455 F.3d at 174; *NASDAQ*, 187 F.R.D. at 479-80.

done the math, he would have seen that the fee requested is $4.5 million (10% of $45 million) less than it would have been if calculated on the entire gross recovery.[40]

7. There Is No Principled Basis for Creating "Special Rules" for Fees Awarded on Billion Dollar Recoveries

Drawing closer to his true underlying thesis – that the Court should cut the requested award because he thinks it is just too much money to pay a plaintiffs' firm – Schonbrun argues that "special rules" should apply in awarding fees based on billion dollar recoveries. But he does not specify precisely what those "rules" should be or provide any principled justification for the creation or application of "special rules." Nor does he explain why The Regents' business judgment as to fee levels (which were, after all, expressed in relation to billions of dollars of recoveries) should be disregarded. Finally, he does not deal with the thoughtful and detailed discussions contained in the declarations submitted by Lead Counsel's experts. *See also* Supplemental Silver Report at 13-14.

Schonbrun argues that the size of the recovery in a "mega-fund" case – in and of itself – requires the Court to reduce the percentage awarded as fees. In other words, according to Schonbrun, success should not go unpunished.

Courts which have faced this argument head-on have disagreed. For example, in *Ikon*, 194 F.R.D. at 196, the court could "see no principled basis for reducing the requested award by some arbitrary amount" just because the class recovery fell in the "mega-fund" range, and thus concluded that it would "not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent." That court went on to observe that the approach urged by Schonbrun would "cast[] doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules

---

[40] This is not the first time Schonbrun has made this same mistake. *See* 4/26/00 TCW/DW Tr. at 21 (Supplemental Compendium, Ex. 11).

for cases in which the recovery is particularly sizable. It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage." *Ikon*, 194 F.R.D. at 197.

In any event, the 9.52% fee sought here ***is*** lower than the average or mean fee range in these cases. *See, e.g.,* Coffee Decl., ¶¶16-18; Fee Brief at 53 (Top Settlement Chart). Moreover, as Professor Coffee explains, the prosecution of this case was extraordinarily successful, against long odds, thus meriting a fee in the range requested.

Schonbrun asserts that the ascending fee scale preferred by The Regents and as a result incorporated into the fee agreement represents an unacceptable fee structure. But, there is no rule prohibiting such a structure.[41] Moreover, it was entirely rational for The Regents to have concluded that the ascending fee scale best aligned the interests of the Class and class counsel, thereby eliminating or substantially reducing the agency problem about which Schonbrun also complains. Others agree. For example, Keith L. Johnson, Assistant General Counsel of the Wisconsin Investment Board (a large institutional investor), observed that "[a]n ascending scale for contingency fees … as the amount of the recovery or other outcome improves, would align the interests of class counsel with its clients and create an incentive to pursue good cases vigorously." Keith L. Johnson, *Deterrence of Corporate Fraud Through Securities Litigation: The Role of Institutional Investors*, 60 Law & Contemp. Probs. 155 (Fall 1997). The court in *Ikon*, concluded, in the same vein, that a diminishing percentage "approach tends to penalize attorneys who recover large settlements." 194

[41] *Rite-Aid*, 396 F.3d at 302-303. The court also noted that the *Prudential* decision, cited by Schonbrun, "does not mandate application of the declining percentage sliding scale," contrary to Schonbrun's suggestion. *Id.* at 303.

F.R.D. at 197. It simply cannot be said that The Regents made an economically irrational or legally impermissible decision in structuring the *ex ante* fee agreement with the ascending fees scale.

8. Schonbrun's Objection Concerning Allocation of Fees Is Without Merit

Schonbrun objects to the award of a lump-sum fee, which would then be allocated among class counsel by agreement. Yet this very procedure has been explicitly approved in this Circuit. In *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992), the Court affirmed an order awarding a percentage-based fee (27.5% of the recovery) to class counsel, and explained that the "district court acted well within its discretion in awarding an aggregate sum to the Susman Attorneys (class counsel, representing several law firms) that was based on their collective efforts, leaving apportionment of that sum to the Susman Attorneys themselves."[42] The court stepped in only to set the fee allocation for the single attorney who did not join in the allocation agreement. This procedure – with the added overlay of lead plaintiff involvement – is entirely consistent with the PSLRA. The procedure urged by Schonbrun, which would require the Court to act despite agreement among Lead Plaintiff, Lead Counsel, and other attorneys who have worked on behalf of the Class under Lead Plaintiff's direction or with its consent, would not promote the goal of ensuring Lead Plaintiff's control of the case.[43]

---

[42] The recent decision in *High Sulfer*, 2008 U.S. App. LEXIS 2484, does nothing to change this result. *High Sulfer*, which was not a securities case governed by the PSLRA, explicitly recognized the continuing viability of the rule announced in *Longden*. *Id.* at *13.

[43] Fifth Circuit law expressed in the *Longden* and *High Sulfer* opinions ***does*** require this court to step in if and when such an agreement cannot be reached. At this point, as the Court is aware, there is the potential for disagreement with respect to fees, if any, owed to Richardson Stoops. We expect these matters will be brought before the Court in due course if no agreement is reached.

9. Schonbrun's Suggestion that the Fee Agreement Is Not Entitled to a Presumption of Reasonableness Is Groundless

Schonbrun argues unconvincingly that the fee agreement entered into between The Regents and Coughlin Stoia should be accorded no deference. Schonbrun provides no authority or principled basis for this position. Rather, he questions the veracity of the representatives of The Regents and of Coughlin Stoia who testified by declaration to the arm's-length negotiation of that agreement, and suggests that they were somehow required to provide a far more detailed, blow-by-blow description of the retention of counsel and the negotiation of the fee agreement. This objection lacks substance and should be denied.

10. Schonbrun's Objection to the Implied Multiplier Is Without Merit

Schonbrun argues that a multiplier of 5.4 or 5.2 is too high. Here again he shows his true hand, suggesting that "[m]ultipliers in securities class actions are already excessive" and that "[e]ven a multiplier of 2 would be excessive." Schonbrun Objection at 35-36. And here again he fails to offer a principled rationale for the objection.

Assessment of the multiplier is part of the lodestar cross-check and should be viewed in the context of the *ex ante* fee agreement. Here, the multiplier is not so great as to suggest that the agreed fee was or is manifestly unreasonable.

Moreover, contrary to Schonbrun's suggestion, a larger multiplier may be warranted in a case of this size and complexity rather than in a smaller case. The reason is that the firm's case-specific risk was magnified by what bankers and economists call "concentration risk." This case required, from its inception, dedication of truly extraordinary resources, thus requiring the firm to place many eggs in the Enron basket. It is recognized that the "risk premium" necessary to compensate a person for a non-diversified "concentration risk" is greater than it would be absent that risk. Schonbrun fails to discuss or account for concentration risk, or for that matter, for most of the very large risk taken by the firm. His objection to the multiplier should be denied.

11. Schonbrun's Attack on Lead Counsel's Hourly Rates Is Groundless

Along with his attack on the multiplier, Schonbrun mounts a half-hearted assault on the hourly rates reflected in Lead Counsel's lodestar report. He argues that the hourly rates reported by Lead Counsel are too high and urges the Court to revise the rate structure downward to reflect the rates charged by ordinary lawyers.[44] ***But this was not an ordinary case and had it been handled in the ordinary way by ordinary lawyers we would not be here discussing a recovery in excess of $7 billion or the level of legal fees appropriate in view of that result.*** Moreover, in a world in which top defense lawyers bill upwards of $1000 per hour or more, the rates reflected in Lead Counsel's application are entirely reasonable. *See* Moscaret Decl., ¶35 n.15.

12. Public Policy Does Not Support an *Ad Hoc* After-the-Fact Reduction of the Fee Structure Negotiated at the Commencement of the Case

Schonbrun suggests that "public policy" concerns require the Court to slash the fee request. In support of this notion he trots out a laundry list of the "tort reform" movement's talking points, but he does little to relate any real public policy concern to the case or to this fee request.

We suggest that public policy is better served by awarding the fee requested without reduction. Given the world in which we live, it is not beyond imagination that in the not-too-distant future another Gordian knot of a mega-fraud will present itself, complete with multi-billion-dollar investor losses. A law firm will be asked to spend years and millions of dollars in a risky attempt to

---

[44] Schonbrun suggests that the Court recalculate rates based on the so-called *Laffey* Matrix. Schonbrun Objection at 38-39. As discussed at length in the Moscaret Declaration, the *Laffey* Matrix is based on average rates charged for run-of-the-mill legal services, and is of little use as a guide in this massive and complex case, litigated (on both sides) by lawyers at the top of their field.

recover those losses. That firm will no doubt look at the lessons of this case as it assesses risks and rewards. If one of the lessons is that a reasonable *ex ante* fee contract will likely be shredded at the end of the day in favor of a greatly reduced fee based on an unpredictable *ex post* analysis, it will be more difficult to persuade qualified counsel to pour the necessary resources into the fray. Public policy should favor the enforcement of the securities laws, not create perverse disincentives to pursue maximum recoveries in deserving cases. *See* Supplemental Silver Report at 15-16. As Judge Barbadoro stated when awarding 14.5% fees in *Tyco*:

> Without a fee that reflects the risk and effort involved in this litigation, future plaintiffs' attorneys might hesitate to be similarly aggressive and persistent when faced with a similarly complicated, risky case and similarly intransigent defendants. . . . But for cases like this one, in which a satisfactory settlement only became possible after years of hard-fought motion practice and searching discovery, it would be against public policy for me to set an unreasonably low POF award that would encourage future plaintiffs' attorneys to settle too early and too low. Additionally, approving this fee award is unlikely to open the floodgates to ever-higher levels of attorney compensation. Few cases will involve the combination of incredible legal and factual complexity, high risk, massive lodestar, and multi-billion-dollar recovery that characterized this case. Accordingly, I find that it would be inappropriate to artificially reduce the percentage award based on the size of the recovery alone.

Tyco, No. 02-md-1335-PB, slip op. at 52-53 (Compendium, Ex. P).

B. Dreisbach

Dreisbach argues that individual investors should be made whole before public pension funds like The Regents recover anything. She asserts that pension funds lost "other people's" money, not their own. She simply ignores the fact that The Regents pension fund ***is*** for the benefit of thousands of individuals and those individuals collectively suffered a loss of over $144 million on their investment in Enron stock. No individual Regent will receive the benefit of the recovery; it will be returned to the pension fund for the benefit of individual University employees.

Dreisbach overlooks the fact that the estimated losses for all investors exceed $40 billion. Thus while $7.2 billion is a remarkable recovery, it is less than the losses. When the recovery is equitably allocated among investors, and assuming everyone makes a claim, no one will be made whole. The $6.79/share she focuses on is a disclosure in the Notice that is required by the PSLRA; a disclosure of the ***average*** distribution per share. But this number assumes that everyone who can submits a claim. Given the number of different types of securities covered by the plan of allocation and the number of individuals and entities in the Class (about 1.5 million) it is highly unlikely that 100% of those eligible will make claims. Necessarily, the average distribution per share will go up under these circumstance. But the math aside, the bottom line is that, given the risks and complexities in this case, the recovery is historic.

Ms. Dreisbach also argues William Lerach's time should not be included in the fee application. But the record is clear that Mr. Lerach was, for many years, the chief architect of the prosecution of this case. *See* Hodges Supp. Decl., ¶20. His time is appropriately included. *See* §IV *infra* and the Declaration of James Harrison ("Harrison Decl."), dated February 19, 2008.

C. Enron Savings Plan and the Enron Stock Ownership Plan

Enron Savings Plan and the Enron Stock Ownership Plan through the independent fiduciary, Fiduciary Counselors Inc. (Fiduciary Counselors"), represented by Cohen, Milstein, Hausfeld & Toll P.L.L.C.("CMHT") (hereafter "ESOP/CMHT") has objected to the fee application on three grounds. None has merit.

First, ESOP/CMHT takes issue with the fact that the fee agreement with The Regents on which the fee application is based provides for an increasing percentage of recovery formula, observes that the fee agreement does not bind the Court, and urges the Court to not "rubber stamp" the fee request. Taking the last point first, not even a casual observer of the *Enron* litigation could credibly suggest that this Court has "rubber stamped" anything in this case. More to the point, the Court has commented on and emphatically rejected this notion in connection with the approval of several of the settlements in this case and, more recently, in connection with preliminary approval of the plan of allocation.

As the Court stated in June of 2006 in connection with the final approval of the Outside Director settlement:

> THE COURT: Thank you. All right. I want to make sure you-all understand, I've read all these orders that have been submitted to me. So, when I sign them, I'm not signing them blind. I know what they say. I was accused last time of rubber-stamping the settlements and I don't--
>
> MS. PATRICK: Who would even say that?
>
> THE COURT: wish that to be a characterization of what I'm doing today.
>
> MR. PARK: Your Honor, I think you made that clear in the earlier hearing in May, just last month, also, and I appreciate that.

In re Enron Corp. Sec. Litig., No. H-01-3624, Hearing Transcript (S.D. Tex., dated June 22, 2006) at 11:15-12:1 (Supplemental Compendium, Ex. 14).

At the May hearing referred to in the June 22, 2006 Transcript, the Court also stated, in connection with the final approval of the Citigroup, JPMorgan Chase and CIBC settlements:

> THE COURT: I want to point out to everyone in the courtroom that I have read this [the Judgments finally approving the settlements], another copy was presented to me, so I am not just signing this blindly . . . .

In re Enron Corp. Sec. Litig., No. H-01-3624, Hearing Transcript (S.D. Tex., dated May 24, 2006) at 20:2-4 (Supplemental Compendium, Ex. 15). And more recently in connection with preliminary approval of the plan of allocation:

> THE COURT: Thank you. You are going to have to let me think about it. Okay? I'm not going to be able to sign off on it today.

In re Enron Corp. Sec. Litig., No. H-01-3624, Hearing Transcript (S.D. Tex., dated Dec. 14, 2007) at 66:23-25 (Supplemental Compendium, Ex. 16). These are but three examples of the Court's commitment to the meticulous, fair resolution of a myriad of issues in this case.

With respect to whether or not the fee agreement with The Regents binds the Court, it does not, and Lead Counsel has never suggested otherwise. But that does not mean that the changes brought about by the PSLRA should or can be ignored. As we noted in our opening brief, passage of the PSLRA "shift[ed] the underpinnings of our class action attorneys['] fees jurisprudence in the securities areas." *Cendant*, 264 F.3d at 282. A fee agreement negotiated between a properly selected lead plaintiff and its counsel should be accorded a "presumption of reasonableness":

> [U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel. . . . This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers.

Id. at 282. *See also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004) ("[I]n class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable."); *In re Lucent Techs. Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 432 (D.N.J. 2004) (same).

While this presumption does not bind the Court, neither should it be ignored as ESOP/CMHT would have the Court do. The presence of such an agreement does have a significant impact on these proceedings since, under these circumstances, "the aim of the fee award analysis 'is not to assess whether the fee request is reasonable,' but 'to determine whether the presumption of reasonableness has been rebutted.'" *Rite Aid*, 396 F.3d at 301 n.10 (quoting *Cendant*, 264 F.3d at 284).

The fee application discusses the growing body of law and the commentators that recognize that the PSLRA changed the dynamics of fee jurisprudence in securities class actions, given the statute's emphasis on the role of a properly appointed lead plaintiff in overseeing the litigation, including matters relating to fees, and there is no question that The Regents has admirably fulfilled that role here in all respects. And, as Professor Silver noted in his report:

> The requested fee award is reasonable because it was set near the start of the case and after arm's-length negotiations by a sophisticated lead plaintiff with a large stake in the outcome, . . . separate legal and financial representation, and access to a competitive market for legal services, and was disclosed to the court prior to, and in connection with, the lead plaintiff's appointment.

Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsels' Request for an Award of Attorneys' Fees (Docket No. 5822) ("Silver Report") at 3. ESOP/CMHT has failed to rebut this presumption of reasonableness or otherwise demonstrate that the agreement is not entitled to "great weight" (*WorldCom*, 388 F. Supp. 2d at 355-56) in the Court's determination of a fair fee.

With respect to the increasing percentage structure of the fee agreement, the Declarations of Professors Coffee and Bebchuk and Retired Judge Sarokin demonstrate that this is a structure that provides the proper incentives to counsel to maximize the recovery to the Class:

> Because an increasing fee schedule is necessary to induce valuable investment by counsel, setting such a schedule, rather than a sliding schedule or constant schedule, will make the class significantly better off even though it will produce higher attorneys' fees.

Declaration of Professor Lucian A. Bebchuk (Docket No. 5820) ("Bebchuk Decl.") at 13-14.

> For over twenty years, I have argued that an increasing percentage of the recovery formula makes greater sense than a decreasing percentage of the recovery formula. . . . The basic premise underlying such a fee formula is that the first dollars in class action settlement negotiations come easily, while the last dollars come dearly. Therefore, a greater incentive is needed to motivate class counsel to pursue the last marginal dollar than the first dollar. But a decreasing percentage formula does exactly the reverse . . . .

Coffee Decl., ¶45.

> This type of fee agreement [increasing percentage of recovery] rewards class counsel for rejecting low settlement offers in the early phases of the litigation. In so doing, class counsel expose themselves to greater risks than they would face if they settled for fewer dollars at the outset of the litigation.

Declaration of H. Lee Sarokin in Support of Lead Counsel's Motion for an Award of Attorney Fees (Docket No. 5819) ("Sarokin Decl."), ¶27.

Support for this proposition also comes from an unexpected quarter, Fiduciary Counselors' own lawyers, CMHT. Several years ago, CMHT served as co-lead counsel in its own "mega-case," *In re Vitamins Antitrust Litig.*, 1:99-MC-00197-TFH, (D.D.C.). Having been awarded 34.06% of early settlements in the case totaling some $359 million (*In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25067, at *57 (D.D.C. Jul. 16, 2001)), plaintiffs counsel submitted an additional fee application for 30% of an additional $172,439,000 in settlements. In this regard, CMHT, with its other co-lead counsel, wrote:

> In its first fee award in this case, this Court recognized that a few courts have indicated that as a settlement grows larger that some arbitrary number, such as $100 million, a lower percentage should be used in awarding attorneys' fee. . . . ***Applying a declining percentage, however, is directly contrary to the Classes' interest in obtaining the maximum recovery possible*** and to what Class Counsel would have received on the open market.

In re Vitamins Antitrust Litig., No. 1:99-mc-00197-TFH, Class Plaintiffs' Consolidated Petition for an Award of Attorneys' Fees and Reimbursement of Expenses in Connection with the Settlements Among Class Plaintiffs and the Merck, Sumitomo, Tanabe, Lonza, Degussa, Nepera, Reilly, Akzo, and UCB Chemical Defendants (D.D.C. June 25, 2004) at 25-26 (Supplemental Compendium, Ex. 17).

Simply put, it is clear that declining percentages on large recoveries create the wrong incentives and the correctness of this principle should not depend on whose fee application is at issue. As the court in *Ikon* said: "This court respectfully concludes that such an approach [declining percentage] tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable." 194 F.R.D. at 197. The *Ikon* court also noted that a declining percentage or sliding scale also "fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that 'large attorneys' fees serve to motivate capable counsel to undertake these actions."' *Id*. at 197. The *Ikon* court refused to reduce the fee award "simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent." *Id*. at 196.

Second, ESOP/CMHT argues that the Court must use the lodestar/multiplier methodology under Fifth Circuit law, that plaintiffs' counsel's billing rates are "inflated" and that the lodestar and multiplier are too high as is the resulting fee.

With respect to the use of the percentage method in the Fifth Circuit, as discussed in more detail above, nothing in Fifth Circuit law prohibits the use of the percentage method. As the court in *Shaw* noted:

> Indeed, the Fifth Circuit has never . . . reversed a district court judge's decision to award a fee as a percentage. Quite the contrary, in *Longden* . . . the Fifth Circuit affirmed a percentage fee award in a securities class action, noting that the district court had stated its preference for the percentage-of-recovery method "as a matter of policy."

Shaw, 91 F. Supp. 2d at 965, 967 n.15. And, as this Court has noted, the percentage method is alive and well in the Fifth Circuit: "Nevertheless, numerous district courts within the Fifth Circuit continue to use the percentage method for evaluating attorney's fees in common fund cases." *Waste Management II*, No. 99-2183, slip op. at 22-23 (Compendium, Ex. L).

In determining proper hourly rates, the Court should look to the "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). But what is the "relevant" community? Houston, where the litigation is pending? The San Diego/Los Angeles area, where Coughlin Stoia maintains its main office? Or a "national" rate that reflects the specialized nature of securities class action litigation and the fact that, for instance, much of the opposition faced by plaintiffs' counsel came from large law firms headquartered in New York? All three approaches have been used. *Citizens Ins.*, 2007 U.S. Dist. LEXIS 73201, at *9, *14; *Steiner*, 835 F. Supp. at 787; *Philips*, 2006 U.S. Dist. LEXIS 76775, at *17-*18. But, as discussed below, no matter which community is chosen, plaintiffs' counsel's hourly rates are at or below the market rate of lawyers in each geographic area doing similarly complex work.

Kenneth M. Moscaret is an attorneys' fee expert who, for the past 18 years has served as an attorney fee consultant and expert witness for clients, third-party payers, and law firms nationwide, offering expert opinions as to the reasonableness of legal fees and the propriety of attorney billing practices in fee disputes, fee litigation, and fee arbitration. He has specialized in this field since 1991, and has acted as an expert or consultant in over 150 large fee disputes. Moscaret Decl., ¶2. As to plaintiffs' counsel's hourly rates and staffing practices, Mr. Moscaret has concluded, *inter alia*, as follows:

> Based upon what I consider to be very objective, reliable hourly rate data . . . Lead Counsel's attorney rates in this case are ***comparable*** to prevailing attorney rates in 2007 for large law firms in the Houston/Dallas "forum" legal marketplace. Hence, Lead Counsel's attorney rates are reasonable under the forum rule.
>
> Furthermore, Lead Counsel's attorney rates are ***below-market*** as compared to the relevant Los Angeles/San Diego legal marketplace; and even further below-market when compared to the relevant New York City legal marketplace (where many of the major defense law firms that opposed Lead Counsel in this case were headquartered).
>
> The case staffing, mix of attorneys, and delegation of work by senior attorneys to junior attorneys by Lead Counsel in this case were reasonable and consistent with generally-acceptable billing practices by law firms in major, complex litigation.

Moscaret Decl., ¶¶25, 26, 28 (emphasis in original).

In arriving at his conclusions with respect to hourly rates, Mr. Moscaret has relied on *NLJ*'s December 2007[45] published annual large law firm rate survey regarding hourly rates. As to the reliability and relevance of the *NLJ* survey in assessing the reasonableness of hourly rates, Mr. Moscaret states:

---

[45] The *NLJ* has done such a study annually for at least the last ten years. Moscaret Decl., ¶33.

> Conversely, the *NLJ* annual large law firm rate survey is the ***only*** published rate survey in the country, to my knowledge, that identifies specific big law firms by ***name*** in specific cities, and discloses their specific rates for partners and associates . . . . Big law firms generally will not disclose their hourly rates to any survey publisher. However, they do, year after year, to the *NLJ*, perhaps the leading legal newspaper in the U.S., which makes the *NLJ* annual big-firm rate survey the most authoritative survey of its kind in the legal marketplace, in my view. . . . I believe that the *NLJ* hourly rate data which I have used in my expert analysis here is the most objective, credible, reliable data that I can present to this Court to support my opinions.

Moscaret Decl., ¶33.

Courts agree that the *NLJ* survey is a reliable and appropriate source in assessing reasonable hourly rates. *See Entm't Software*, 2006 U.S. Dist. LEXIS 96429, at *8; *Chin*, 520 F. Supp. 2d at 608; *Citizens Ins.*, 2007 U.S. Dist. LEXIS 73201, at *18.

Using the *NLJ* study and his review of the extensive case-related and fee related materials provided to him as well as interviews with certain partners at Coughlin Stoia with heavy involvement in this litigation (Moscaret Decl., ¶16), Mr. Moscaret concludes as follows:

- First, for the Houston/Dallas forum legal marketplace . . ., (i) Lead Counsel's partner/of counsel rates fit squarely within prevailing partner rates at big firms in Houston/Dallas; and (ii) Lead Counsel's associate/contract attorney rates are within the range of reasonableness for prevailing associates rates at big firms in Houston/Dallas.

Moscaret Decl., ¶35;

- I next wanted to examine in greater detail the fact that the upper end of Lead Counsel's associates/contract attorney rate range . . . was higher than the average upper-end rate . . . for associates at big firms in Houston/Dallas.

- From the above data, it was clear that nearly three-fourths of all Lead Counsel's associates/contract attorneys (*i.e.*, 72%) billed at rates ***below*** the average upper-end rate of $400 per hour for associates at big firms in Houston/Dallas . . . and over half of all Lead Counsel associates/contract attorneys actually billed at the ***lower*** end . . . of the big-firm associate rate range for Houston/Dallas . . . .

Moscaret Decl., ¶¶36, 37;

- Next, should this Court find that the relevant Los Angeles/San Diego legal marketplace . . . ., (i) Lead Counsel's partner/of counsel rates were clearly below-market compared to prevailing partner rates at big firms in the Los

> Angeles/San Diego area; and (ii) Lead Counsel's associate/contract rates area also below-market compared to prevailing associate rates at Los Angeles/San Diego big firm.

Moscaret Decl., ¶38;

> - Finally, this Court may wish to consider New York City legal marketplace . . . . (i) Lead Counsel's partner/of counsel rates are considerably below-market compared to prevailing partner rates at big firms in New York City; and (ii) Lead Counsel's associate/contract attorney rates are the same.

Moscaret Decl., ¶39.

ESOP/CMHT also briefly comments on the hourly rates of certain Coughlin Stoia associates or partners who billed significant hours to the prosecution of the case. But, as discussed above, Mr. Moscaret has compared the hourly rates of all of the Coughlin Stoia lawyers to the rates of lawyers doing comparable work in the three potentially relevant legal markets and found them to be reasonable and in most instances, below market.

Although not directly raised by ESOP/CMHT, as important to the calculation of an appropriate lodestar as hourly rates is the mix of attorneys assigned to prosecute the case. Mr. Moscaret has opined on this as well. To him, it is an important indicia of efficient case staffing that the bulk of the hours billed to the case were by a "core" team of lawyers. The benefits of having most of the work in a complex, multi-year prosecution done by attorneys with comprehensive, imbedded knowledge about the case are obvious. He concludes that that occurred here. Moscaret Decl., ¶¶47-50.

As important is the mix between partner and associate hours billed. Mr. Moscaret has concluded that, given the unique circumstances of this case, the mix was appropriate and proper delegation and assignment of tasks occurred. *Id.*, ¶¶51-60. Continuity of staffing, which avoided the inefficiencies of attorneys "getting up to speed" or "relearning" the case, is another important staffing issue. Mr. Moscaret found this to be the case here. *Id.*, ¶¶61-65. In his words:

> [O]nce a Coughlin Stoia attorney joined this litigation, they tended to stay on it. Lead Counsel could not afford to devote the time and energy necessary to continually orient new attorneys to keep coming onto the case over and over again. Even the attorneys who did join the case at some point had to be self-starters.

Id., ¶65.

Finally, and though not raised directly at all by ESOP/CMHT, Mr. Moscaret has analyzed the existing case law as well as the work done by contract attorneys and has concluded that the use of contract attorneys in this case was a reasonable, customary, and generally acceptable practice for a case of this complexity and that contract attorney charges should be treated as fees calculated at prevailing market rates. *Id.*, ¶¶66-84.

In addition to the Moscaret Declaration and the Hodges Declaration submitted with the initial application (which describes in detail the history of the case, the complexities and risks involved and the work done by plaintiffs' counsel), a Supplemental Declaration of Helen J. Hodges is submitted now which, among other things, summarizes the background, experience and work performed by any lawyer who billed more than 6,000 hours in the case. These declarations establish that the lodestar here is the result of appropriate hourly rates and proper staffing decisions. What these submissions establish is that the proper "building blocks" of a lodestar – appropriate hourly rates and numbers of hours – are present here. It follows that the resulting lodestar is also proper and any contention that it is "inflated" must be rejected.

ESOP/CMHT next suggests that it is appropriate to compare the ***average*** hourly rate in this case with those in other comparable mega-cases. Given the record-breaking results achieved here and the risks faced and overcome, the difficulty, of course, is in determining which other case or cases is/are truly "comparable." ESOP/CMHT has chosen *WorldCom* where, according to it, "counsel faced a similar hurdle of trying to hold institutions other than the company liable under the securities laws." Objection of the Enron Savings Plan and the Enron StockOwnership Plan (Docket No. 5869) ("ESOP/CMHT Objection") at 13. It concludes from this that the average hourly rate in

WorldCom should be used here. But ESOP/CMHT's simplistic comparison of *Enron* to *WorldCom* massively understates the differences between the two cases. In *WorldCom*, the focus was on claims under the strict liability provisions of the Securities Act of 1933 against investment banking firms and others – not §10(b) liability. Indeed, approximately 80% of the funds recovered in *WorldCom* were distributed to debt claimants with Securities Act claims (Coffee Decl., ¶29) and, as Professor Coffee notes:

> [I]t is far more difficult to recover funds on behalf of the shareholders of a bankrupt corporation where there has been no recent public offering that triggers the more favorable liability provisions of the Securities Action of 1933.

Id. Professor Coffee also notes that "the fraud in *WorldCom* was simple and egregious" ("WorldCom's management capitalized line costs, which were essentially a rental expense that created no asset that WorldCom retained. From an accounting perspective, this was indefensible, and the accounting irregularities in *WorldCom*, if detected, should have been obvious to a student in Accounting 101. In contrast, the fraud in *Enron* involved the murkiest depths of contemporary accounting theory.") and much less complex than *Enron* ("Comparing the two cases in terms of their accounting complexity is much like comparing a high school physics experiment with true rocket science.").[46] Coffee Decl., ¶30. Notably, each bank presented different facts, different transactions, etc. and this fact affected staffing. Consequently, a separate team complete with senior lawyer leadership for each bank was required.

As to *Tyco* as a comparable case, what was said in Lead Counsel's opening brief bears repeating here. The fee award in *Tyco*, 14.5%, was substantially above (by about a third) what is sought here. While that fee was well deserved, lead plaintiffs' counsel in that case faced far fewer

---

[46] In no way should this analysis be read as a denigration of the work done in *WorldCom*. The point is that the two cases were very different and not really comparable.

hurdles than Lead Plaintiff's counsel in *Enron*. In *Tyco*, unlike *Enron*, both the company and the accountants survived the frauds. Thus, the complex theories and questions of liability as to other actors that presented themselves in *Enron* were not a significant factor in *Tyco*. The very number and strength of these other actors in *Enron* and their experienced counsel is simply unprecedented, and yet Lead Counsel was successful in obtaining significant recoveries. In *Enron*, one firm shouldered virtually the entire economic burden of the prosecution of the case as opposed to three firms in *Tyco*. Thus, the economic risks in *Tyco* as to any given co-lead counsel law firm were significantly lower. And while significant discovery occurred in both cases, more that 150 additional depositions were taken in *Enron* vs. *Tyco*. Because of these significant differences, *Tyco* is also not comparable, albeit for different reasons than *WorldCom*.

Moreover, the flaw in concluding that because the ***average*** hourly rate in another case is lower a corresponding reduction is appropriate here is that average hourly rate calculations necessarily reflect at least two components – both the rates charged and the staffing decisions that were made for a particular case. This, in turn, reflects the level of expertise and staffing mix required to achieve success in the face of the effort required and the complexity of that specific case. Thus, for example, the *WorldCom* average hourly rate can reflect many things, including the fact that the claims were primarily strict liability Securities Act claims and the fraud was "egregious" and, hence, a different staffing mix was appropriate and effective, but resulting in a lower average hourly rate. Put another way, do other law firms specializing in securities class action litigation have no partners or associates whose hourly rates are comparable to partners and associates in Coughlin Stoia? Unlikely, at best. Would those firms' staffing and prosecution of a different case of a different magnitude with different risks and complexities result in a different (higher or lower) average hourly rate? Most assuredly. ESOP/CMHT does not contend that plaintiffs' counsel "over-billed" this case; its complaint is with the hourly rates and to a much lesser degree the staffing mix.

But the Moscaret Declaration establishes that, if anything, the rates are below market and the staffing mix was appropriate for a case of this size and complexity. In sum, this was a case of massive complexity, scope and risk and required the talents of the best and the brightest lawyers available to achieve a $7.2 billion-plus result for the Class. There is simply no basis in the record or in reality to conclude that the rates or the lodestar of plaintiffs' counsel here are inflated. Both should be accepted by the Court.

ESOP/CMHT next challenges the multiplier that would result from a 9.52% fee – 5.4. Again, it suggests that the Court should look to other cases to determine what is reasonable in this case. While that exercise may have some validity, the fact remains that this was an extraordinary case, requiring an extraordinary effort, presenting an extraordinary risk and resulting in an extraordinary recovery. As Professor Coffee has said:

> Although the proposed multiplier in this case is above the common 3 to 4.5 range, there has still been general recognition that the lodestar multiplier should be higher in cases involving high risk. As discussed earlier, this case faced extraordinary risk and, indeed, was ultimately decertified by they Fifth Circuit. Thus, whether or not a multiplier in the 5 to 6 range would be justified in most cases, it is justified in this case . . . ."

Coffee Decl., ¶35.

Nor is this only an academic perspective. This Court awarded a fee representing a 5.296 multiplier in connection with the $457 million result in *Waste Management I*, No. H-99-2183 (Compendium, Ex. B). More recently, Judge Marbley of the Southern District of Ohio, Eastern Division, awarded a fee of approximately 18% of a $600 million recovery representing a multiplier of 5.9. In so doing, Judge Marbley commented:

> In this case, however, the Court is not uncomfortable with deviating from the normal range of lodestar multipliers, at least to some extent. Given the outstanding settlement in this case and the noticeable skill of counsel, a lodestar multiplier greater than the average would not be unwarranted or unprecedented. Indeed, the Court has adopted the percentage approach, and the lodestar cross check is but one of several factors it must consider; it should not unilaterally control the Court's analysis. From the Court's analysis of the previous factors, the Court has found that approximately

> 18% is a reasonable award, which would yield a lodestar multiplier of six. Though significantly above average, the Court finds this award reasonable under the circumstances.

Cardinal Health, No. C2-04-575, 2007 U.S. Dist. LEXIS 95127, at *48 (S.D. Ohio Dec. 31, 2007) (Compendium, Ex. Q). *See also In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approving a fee resulting in a 6.96 multiplier).

Finally on this point, Fiduciary Counselors' lawyer's view of appropriate multipliers when its own fee is at stake is illuminating. As noted above, CMHT was co-lead counsel for plaintiffs in *In re Vitamins Antitrust Litig.*, MDL No. 1285 (D.D.C.). Early on in that litigation, a partial settlement was reached with several defendants resulting in a recovery of some $359 million. *Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *57. Of note, and unlike *Enron*, the partial settlements were prompted by the guilty pleas of several companies and individuals (albeit the result, at least in part, of information regarding defendants' illegal conduct given to the government by one of plaintiffs' co-lead counsel, Boies Schiller). *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 213, 226 (D.D.C. 2005). Plaintiffs' counsel applied for and were awarded fees of 34.06% of $359 million. *Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *57. There were subsequent proceedings involving a dispute over the allocation by CMHT of fees to the law firm of Chitwood & Harley. *Vitamins*, 398 F. Supp. 2d at 213-14, 226. As those proceedings show, at the time of the initial settlements, CMHT had committed 2,898.35 hours to the litigation for a lodestar of $949,096.25. *Id*. at 228. More to the point, from the total amount awarded, CMHT allocated and paid to itself a fee of $24.6 million. *Id*. at 229-30. The resulting multiplier was about 25 times the lodestar. The multiplier that would result here pales by comparison.

Finally, using a similarly flawed analysis as it did with respect to "average hourly rates," ESOP/CMHT argues that the fee should be reduced to a percentage of the fund that is the same as the percentage awarded in *WorldCom*. But all of the reasons the average hourly rate comparison is faulty apply with equal force to ESOP/CMHT arguments regarding the appropriate percentage to be awarded in this case. The requested percentage is reasonable and fair to both the Class and counsel for all the reasons previously discussed.

D. Fenstad and McCoppin

Fenstad/Palmer assert the fee request shocks the conscience and the Court should conduct an in-depth investigation of the basis for the requested fee. But as Professor Silver has stated:

> Objections like these can only provoke pointless shouting matches. To evaluate the reasonableness of Lead Counsel's fee request, one must have standards. The charge that a particular fee is too much money for lawyers does not provide such standards, no matter how loudly, emphatically, or sincerely it is made.
>
> It is because standards are needed that I provided a wealth of information about prevailing fees in my initial report. I will not repeat that information here, but I do want to bring the bonuses paid to *qui tam* relators to the Court's attention momentarily. These bonuses are authorized in federal, state, and local statutes. They therefore reflect a political consensus. They also are large, in both percentage terms and absolute dollars. From 1987 to 2006, the U.S. government paid $1,799,444,848 in bonuses on recoveries of $11,062,851,302 in *qui tam* cases, a contingent fee rate of 16.3%. In the *HCA* case alone, which settled for $631 million, the federal government paid about $152 million, 24% of the recovery.
>
> Given the U.S. government's public announcement that it is reasonable to pay 15%-30%, regardless of case size, to recover taxpayer dollars from fraudfeasors, it cannot "shock the consci[ence] of the American civil justice system" to pay 9.2% to recover money for defrauded investors. To claim otherwise, one would have to believe investors' dollars are worth less than taxpayers' dollars. I see no reason to think this.

Supplemental Silver Report at 13-14.

Fenstad/Palmer cite *Strong* for the proposition that the Court should use the lodestar method for determining the fee. However, *Strong* was neither a PSLRA case nor a common fund case. For the reasons set forth at pp. 3-9 above, *Strong* should be disregarded here.

They assert the multiplier should be reduced and cite Professor Coffee where he said the multiplier here is above the common 3 to 4.5 range, but they ignore his further statement that the requested 5.4 multiplier is appropriate in this case. Coffee Decl., ¶35. They rely upon the *Arbor*

Hill case to argue the fee should be minimized, but *Arbor Hill* was a fee-shifting (Voting Rights Act) case that is not pertinent here.

Fenstad/Palmer assert a lodestar audit is required. In support of that argument, they cite *In re AMF Bowling*, 334 F. Supp. 2d 462. Here, however, unlike the one firm whose lodestar was reduced, Lead Counsel has provided abundant detail of the work that was done in the Hodges Declaration. They state "it apparently was not uncommon for three or more attorneys from Lead Counsel to attend each deposition." Fenstad Objection at 10. However, a quick review of the list of depositions in the Hodges Declaration at pages 92-100 and 118-120 shows that in most instances, we had only one attorney present at each deposition.

They want to have the attorney fees paid in stages. Yet they have provided no compelling reason the Court should do that. For the reasons stated above at pp. 41-42 (re Schonbrun) this argument should be rejected.

In support of their argument that they should be paid for objecting, Fenstad/Palmer cite *In re PNC Financial Services Group, Inc.* and say it was decided "last month on April 12, 2007." Fenstad Objection at 15. But that case provides no analysis or explanation of why the court awarded $17,500 to the objector's counsel except to refer to an unidentified "benefit" to the class. Here, objectors' counsel should not be compensated for making baseless arguments and citing inapposite cases. The objectors have brought no benefit to the Class.

E. O'Toole

O'Toole complains that the Notice of Hearing contains no information regarding the basis for the fee requested. However, the Notice states "For full details of the matters discussed in this Notice you may review additional documents and materials . . . at the office of the Clerk of the Court . . . or at www.gilardi.com or www.enronfraud.com." Notice of Hearing for Final Approval of: (A) Plan of Allocation of Settlement Proceeds; and (B) Plaintiffs' Counsel's Application for an Award of

Attorney Fee and Lead Plaintiff's and Certain Other Persons' Application for Reimbursement of Expenses ("Notice") at 12.

O'Toole divides $688 million by $300/hour and comes up with over 2 million hours, which he says is equal to 24 careers. He requests that the Court appoint an independent evaluator to review the performance of lead counsel. But this has been done on an ongoing basis for years by The Regents. His argument is utter nonsense. He need only look at the result to evaluate the performance of the lawyers.

F. Rinis Travel Service, Inc. Profit Sharing Trust UA and Michael J. Rinis, IRRA ("Rinis")

Rinis is represented by Stuart Yoes. Rinis, represented by Yoes, objected to the Andersen Worldwide settlement and appealed this Court's approval to the Fifth Circuit, which affirmed. "Mr. Rinis has filed objections as a class member in at least 15 class action settlements and can be fairly characterized as a 'serial objector.'" *In re Delphi Corp. Sec. Litig.*, No. 05-md-1725, 2008 U.S. Dist. LEXIS 2207, at *49 (E.D. Mich. Jan. 11, 2008).[47]

Rinis/Yoes complain that the Notice fails to provide minimal information necessary for class members to evaluate the reasonableness of the fee. But the Notice clearly states that the fee requested is 9.52% of the gross settlement fund. Notice at 2. The Notice further states that more

---

[47] With respect to Rinis' status as a repeat player, the court in *In re Broadcom Corp. Sec. Litig.*, No. SACV 01-275 DT(MLGx), 2005 U.S. Dist. LEXIS 41983, at *23-*24 (C.D. Cal. Sept. 12, 2005), stated: "First, this Court notes that as shown by Class Plaintiffs, Objector Rinis Travel Service, Inc. Profit Sharing Trust ('Rinis') is no stranger to filing objections in proposed class action settlements, having filed objections to settlement in several other matters. (*See* Class Plaintiffs' Motion, p. 21 which lists 4 cases to which Rinis has filed objections and at least 19 cases to which Rinis's collective attorneys have filed objections.) The objection filed in this case by Rinis is virtually identical to the one it filed on June 21, 2005 in *Schwartz v. TXU Corp.*, N.D. Tex., 02-CV-2243-K. The 'canned' nature of the Rinis's objection here is further confirmed by the claim that 'the Notice was sent to Objector RINIS only on Friday, August 12, 2005, less than two weeks before the objection deadline of July 22, 2005.' In [*Broadcom*], the objection deadline was August 22, 2005."

detailed information is available at the Clerk's office and at www.gilardi.com and www.enronfraud.com. Notice at 12. Rinis/Yoes also complain that the Notice fails to provide the amount of interest that has been earned on the gross settlement fund. But interest is a moving target that changes every day by over $500,000 per day. The Notice says "plus interest" in numerous places. That is all that is needed.

Rinis/Yoes argue the lodestar and multiplier are excessive because the billing rates are high and investigator, economic analyst and others' time should not be included. *See supra* pp. 20-30. And they claim the risk of recovering nothing was not really that great. On that point, Rinis/Yoes are out of touch with the reality of the Fifth Circuit's reversal of class certification and this Court's dismissal of Deutsche Bank.

Rinis/Yoes claim that the fee fails to take in to account the economies of scale inherent in mega-fund cases – at the same time they would punish counsel for working efficiently and not running up a higher lodestar. They ignore that the defendants here were very diverse. They included seven of the largest financial institutions in the world; while those banks had some similarities, they were by no means all the same structurally or geographically. In an effort to simplify the case for trial, Lead Counsel limited the ***types*** of structured finance transactions designed by the various banks to eight. *See* Lead Plaintiff's Trial Plan Pursuant to Court Order Docket No. 4706 (Docket No. 4729). There were dozens of transactions to be evaluated, understood and proven at trial. Certainly Lead Counsel took advantage of every "economy of scale" available in prosecuting the case by, among other things, limiting the number of core group attorneys assigned to the case, but there is no avoiding the fact that the tremendous result was achieved only because of enormous amounts of painstaking time reviewing documents for each transaction and preparing for each of the 370 depositions.

G. Silverio/Cochran

Silverio/Cochran urges the Court to apply the lodestar method and award fees of $127 million, or the straight time. *See supra* pp. 4-10 re lodestar method. They assert that the multiplier and the lodestar are excessive. *See* above at pp. 16-30. They complain that detailed timesheets were not submitted. *See* pp. 17-19 above.

Silverio/Cochran note that over 37% of Coughlin Stoia's time was incurred by just five senior partners who billed at rates between $600 and $900 per hour. First, the rates are reasonable. *See* Moscaret Decl., ¶¶25, 26. In addition, the fact that a small group of senior attorneys focused on this case was a benefit to the Class because with a larger group, there would be more time spent getting up to speed (or going through a "learning curve") on the case and the Class would have lost the benefit of the knowledge gained by attorneys having worked on multiple briefs and depositions. Further, even assuming the assertion is accurate, the fact that about one-third of the total time was incurred by senior partners indicates that they delegated much of the work. Mr. Moscaret has opined that the staffing mix employed by Lead Counsel was appropriate. Moscaret Decl., ¶¶28, 29.

They point to the *Tyco* case where a former contract attorney criticized the fee request which included time for contract attorneys, but the court there approved the use of contract attorneys (*Tyco* slip op. at 58) and awarded the requested fee of 14.5% of the fund. *Tyco*, No. 02-md-1335-PB, slip op. at 65 (Compendium, Ex. P).

They ask for full discovery, including depositions, as to the propriety of the fees and expenses. The notion that there should be a satellite litigation complete with depositions over the fee request should be rejected. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

H. Chitwood Harley Harnes LLP and Cunningham Darlow LLP

These law firms object to the fee because they want to be paid from it. It appears that their $1.7 million in lodestar was incurred largely during the briefing on the appointment of lead plaintiff.

Thereafter, they kept their client, the Attorney General of Georgia, apprised of the status of the litigation and they state that they participated in drafting the *amicus* brief filed by the Attorneys General at the motion to dismiss stage.

IV. THE FEE SHARING AGREEMENTS BETWEEN MILBERG OR MR. LERACH AND COUGHLIN STOIA ARE CONSISTENT WITH THE RULES OF PROFESSIONAL CONDUCT, CASE LAW AND OTHER APPLICABLE LEGAL AUTHORITIES

There is no ethical concern regarding the sharing of fees with Milberg Weiss LLP ("Milberg Weiss") or former partners of the Coughlin Stoia firm. As set forth in the Declaration of Professor Roy D. Simon, Jr., dated February 18, 2008 ("Simon Decl."), and the Harrison Declaration, independent ethics experts, it is proper for Coughlin Stoia to share fees with Milberg Weiss and its former partner, William Lerach, pursuant to partnership or related contractual agreements. These agreements were entered into prior to any disbarment or suspension and this case does not relate in any way to the alleged activities that gave rise to those indictments or plea.

A. It Is Appropriate for Milberg Weiss to Share in Fees in Cases in Which It Had a Financial Interest Prior to the Withdrawal of Coughlin Stoia

On May 1, 2004, lawyers now with Coughlin Stoia withdrew from Milberg Weiss pursuant to a separation agreement that addresses the division of fees in certain cases pending at the time of the separation of the firms, including this one. Professor Simon, a professor of legal ethics at Hofstra University School of Law, where he teaches Ethics & Economics of Law Practice and serves as the Director of Hofstra's Institute for the Study of Legal Ethics, has concluded that: "***In my professional opinion, Milberg Weiss may ethically share in the legal fees awarded to Coughlin Stoia in this case, as provided by the terms of the Separation Agreement. Moreover, it is my professional opinion that nothing in the statutes, court rules, Disciplinary Rules, or judicial opinions that govern New York lawyers prohibits a lawyer or law firm under indictment from***

receiving the full measure of fees that the lawyer or law firm would otherwise receive." Simon Decl., ¶¶32-33.

New York rules (where Milberg Weiss has its principal offices), and other similar jurisdictions, permit lawyers or law firms to share legal fees pursuant to a separation agreement (or retirement agreement). In New York, fee sharing between lawyers not in the same firm is regulated by Disciplinary Rule ("DR") 2-107. Section DR 2-107 (B) explicitly states that "***This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.***" Simon Decl., ¶16. Simon explains that "in the period leading up to May 1, 2004, I analyzed the fee sharing issues in depth and determined that pursuant to DR 2-107 (B), Milberg Weiss could ethically receive a share of the fees earned by Coughlin Stoia as long as the amount to be shared with Milberg Weiss was not so high that it amounted to an improper restriction on the right of Coughlin Stoia to practice law." Simon Decl., ¶17 (citing to *Silverberg v. Schwartz*, 75 A.D.2d 817 (2d Dep't 1980)). Nothing in the fee sharing arrangement has prevented Coughlin Stoia from practicing law. Simon ultimately concludes as follows: "I understand that the percentage of fees to be shared with Milberg Weiss is relatively modest, well within the range of permitted percentages. I therefore continue to hold the opinion that the fee sharing terms of the Separation Agreement are ethically valid under the New York Code of Professional Responsibility." Simon Decl., ¶17.

The fact that Milberg Weiss was indicted in May 2006, based on allegations that do not relate to this action in any way, does not affect Milberg Weiss's right to share in fees pursuant to the separation agreement. Professor Simon concludes that:

> In my opinion, a lawyer or law firm under indictment may ethically receive legal fees. Nothing in the New York Code of Professional Responsibility, the New York Judiciary Law, the New York court rules, or New York case law (state or federal) prohibits an indicted lawyer from receiving legal fees. On the contrary, even a lawyer that has been convicted of a felony (which has not happened with Milberg Weiss and may never happen), and has consequently been automatically disbarred by

> statute, may ethically receive legal fees for work done before conviction. New York law also contemplates that a lawyer may ethically receive legal fees during the entire period of investigation, indictment, and trial, whether or not the lawyer is ever convicted and disbarred.

Simon Decl., ¶19.

Professor Simon points to the provision in the New York Code of Professional Responsibility that regulates attorney fees, DR 2-106, finding that the factors listed in DR 2-106(B) are the traditional factors that courts have considered when awarding fees in common fund cases such as this one. Whether a lawyer is under indictment is not a factor in determining whether a fee would be illegal or excessive. Nor does any other Disciplinary Rule take into account whether a lawyer is under indictment or prohibit a lawyer from receiving legal fees while the lawyer is under indictment. Even the non-binding ("aspirational") Ethical Considerations in the Code of Professional Responsibility do not consider a mere indictment to be a relevant factor in determining whether a lawyer may receive legal fees. Simon Decl., ¶27-29.

According to Professor Simon, New York case law in the First Department of New York's Appellate Division, where Milberg Weiss has its principal offices, has recognized that a lawyer may be awarded legal fees even ***after*** the lawyer has been convicted, as long as the award represents fees earned before conviction. Simon Decl., ¶30. *See, e.g., Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C.*, 304 A.D.2d 86 (1st Dep't 2003) (the court allowed an award of fees to a lawyer (Lysaght) after the lawyer had been automatically disbarred based on a felony conviction). Simon Decl., ¶30.

Court Rule 22 N.Y.C.R.R. §603.13 (b), from the First Department, is similarly applicable. "Under §603.13 (b), therefore, even after suspension or disbarment, an attorney may receive legal fees for work done by the attorney himself or by other lawyers in his firm before the effective date of disbarment. Significantly, the rule does not restrict the fees that a lawyer may receive while the lawyer or lawyer's firm is under indictment. Nor does any other New York court rule restrict or diminish a lawyer's right to fees solely on the basis that the lawyer has been indicted." Simon Decl., ¶25.

Thus, despite its indictment, courts have continued to award fees to Milberg Weiss for class actions it has prosecuted. Indeed, just weeks ago, in December 2007, in the *Tyco* litigation, in which Milberg Weiss was co-lead counsel and which settled for $3.2 billion (one of the largest recoveries in history), the court awarded a fee of 14.5%, or $464,000,000. *See Tyco*, No. 02-md-1335-PB (Compendium, Ex. P).

B. It Is Appropriate for Mr. Lerach to Share in Fees in Cases in Which He Had a Financial Interest Prior to His Separation from Coughlin Stoia

Mr. Lerach entered into a separation agreement with Coughlin Stoia in August 2007, which sets forth certain fees to be shared arising from various cases, including this one. In December 2007, Mr. Lerach, due to the entry of his plea was suspended from the practice of law. In February 2008, Mr. Lerach's felony plea was accepted by a federal district court in the Central District of California. Mr. Lerach remains suspended as disbarment proceedings are underway. Mr. Lerach's plea does not relate to this case in any way.

Coughlin Stoia has submitted the Declaration of James C. Harrison, an attorney who specializes in advising clients on ethics issues, including conflicts of interest laws, legal ethics and professional responsibility. Mr. Harrison has concluded that: "***I have reviewed the separation agreement between William Lerach and Coughlin Stoia, and believe that the agreement's provisions for the payment of Mr. Lerach's share of fees in cases in which he participated or had a financial interest prior to his separation from the firm is consistent with the rules of professional conduct, case law and other applicable legal authorities***." Harrison Decl., ¶3.

In California (where Coughlin Stoia has its principal offices) Rule 1-320(a) of the California Rules of Professional Conduct, and similar rules in other jurisdictions, governs fee sharing with attorneys who are no longer partners. Fee sharing agreements made between a partner or former partner do not implicate client consent rules. *Anderson, McPharlin & Connors v. Yee,* 135 Cal. App. 4th 129, 133 (2005) (no concern to the client how a fee is allocated among partners or former partners) (quoting *Jewel v. Boxer,* 156 Cal. App. 3d 171, 178 (1984)). If client consent is not required for any arrangement between former partners, then it follows that court consent is not required in class actions as to how an awarded fee allocated to lead counsel is to be divided among members or former members of a firm. Harrison Decl., ¶4. Nothing in the PSLRA interferes with this rule.[48]

Rules like Rule 1-320(a) are also inapplicable to fee sharing agreements signed with lawyers prior to their suspension from the bar or disbarment. *Sympson v. Rogers,* 406 S.W.2d 26 (Sup. Ct. Mo. 1966) (oral contract between attorney about to be disbarred and attorneys who agreed to take over five 50% contingency fee personal injury suits where the disbarred attorney would receive 50% of all fees eventually obtained through the suits was valid because rules prohibiting the division of fees with non-attorneys did not apply where the contract was made while the disbarred attorney was still licensed to practice and it was for legal services already rendered); *see also West v. Jayne*, 484 N.W.2d 186 (Iowa 1992) (attorney entitled to fee for cases he referred to another attorney prior to suspension); *Lee v. Cherry,* 812 S.W.2d 361, 364 (Tex. App. 1991) (disbarred attorney entitled to referral fee where legal services were completed prior to disbarment, prior to amendment of Texas rules prohibiting pure referral fees); *Harris Trust & Sav. Bank v. Chicago College of Osteopathic*

---

[48] Nor does this present the situation the Fifth Circuit opined on in *High Sulfur*, 2008 U.S. App. LEXIS 2484. In *High Sulfur*, the attorney fee award itself was unobjected to and then the court appointed a fee committee. The fee committee, in an *ex parte* hearing, divided the fees among ***other firms***, had it filed under seal, prevented other counsel from communicating with anyone about the awards while requiring releases from counsel who accepted the awards. There are no secret *ex parte* hearings in this matter and it is ethical and proper to share fees with our former partner.

Med., 452 N.E.2d 701 (App. Ct. Ill. 1983) (referral contract upon disbarment for an amount to discharge and release all or any claims disbarred attorney may have had for attorney fees held valid). Harrison Decl., ¶5.

Moreover, former members of the bar who are law partners have also been awarded their partnership share of noncontingent cases and completed contingent cases, as well as some percentage of the total contingent fee in cases determined post-separation based on the value of the partnership interest earned in the case as of the date of disbarment. *Posner v. Messinger*, 197 A.D.2d 508, (2d Dep't 1993); *Greenberg v. Cohn*, 153 Misc.2d 495, (Sup. Ct. N.Y. 1992) (partner entitled to his share of profits resulting from fees earned up until his suspension and an appropriate percentage of contingency fee cases still pending at the time of his suspension, pursuant to New York Appellate Division, Second Department, Rule 691.10 (N.Y.C.R.R. §691.10) which allows suspended or disbarred attorneys to recover their fees on a quantum merit basis); *Tex. Prof. Ethics Op.* 568 (Apr. 2006) ("'a lawyer may share a contingent fee with a suspended or disbarred lawyer if the suspended or disbarred lawyer has fully performed all work in the matter prior to the lawyer's suspension or disbarment' unless the matter forms the basis of the disciplinary action against the lawyer"). Harrison Decl., ¶6.

Coughlin Stoia obtained ethical advice upon Mr. Lerach's retirement and at the time of his plea that his separation agreement was ethical and proper. His work is done and monies to Mr. Lerach relating to this case have nothing to do with matters to which his plea relates. As stated in the Supplemental Declaration of Christopher M. Patti (Docket No. 5865) filed on February 1, 2008 by The Regents there is absolutely no connection between the activity at issue in the plea of Mr. Lerach or the indictment of Milberg Weiss and this case.

Finally, The Regents have extolled the enormous contributions that Mr. Lerach made to the recoveries. For instance, the General Counsel of The Regents at the time the fee agreement was entered into and at the time the record-breaking recoveries were achieved – and who is currently General Counsel Emeritus of The Regents – James Holst, recently stated:

> My experience with Bill Lerach extends over a period of seven years and results from the participation of The Regents of the University of California in the Enron and Dynegy Private Securities Litigation Reform Act class action litigation – *Newby, et al. v. Enron Corp., et al.,* and *Regents v. Dynegy, Inc., et al.* . . . .
>
> *Newby* was unprecedented in terms of the potential for recovery, the complexity of the PSLRA and other issues, and ultimately the $7 billion recovery by way of settlements up to the point of Mr. Lerach's retirement. Although *Dynegy* was less complex, it, too, required the exercise of substantial skill and judgment. Although the result in *Dynegy* and the results in Enron ***to the point of Mr. Lerach's retirement*** involved the participation of several attorneys on behalf of the class, ***Mr. Lerach was central to the process and provided the leadership and resolve necessary to the results achieved. The outcomes in both cases fully justified the confidence placed in Mr. Lerach by the decision to seek the designation of his firm as class counsel***.

Letter from James E. Holst to the Honorable John F. Walker [sic], dated December 27, 2007 (Supplemental Compendium, Ex. 18).

Similarly, Mr. Patti, The Regents' in-house counsel most directly involved in the litigation over the past several years, wrote to the District Court, offering his high praise of Mr. Lerach's work on this case:

> Mr. Lerach's vision, tenacity, legal talent, and leadership has so far resulted in the largest recovery ever obtained in a securities fraud class action – over $7.2 billion. Mr. Lerach and his team obtained this compensation for the victims of the Enron fraud against tremendous odds. The *Enron* defendants included some of the wealthiest and most powerful financial institutions in the world, and they spared no expense in opposing the plaintiffs' claims, hiring many of the largest law firms in the United States. The primary theory on which we pursued these defendants – a theory largely, if not entirely, the product of Mr. Lerach's own thinking – was untested when the case was filed. ***Nevertheless, Mr. Lerach invested over $100 million of his and his firm's time and resources to pursue justice for investors. The results have been historic***.
>
> Given Mr. Lerach's reputation, the formidable legal skill I have observed during the past six years did not come as a surprise. ***What has struck me instead has been the sincerity of his dedication to his clients***. Throughout the litigation, Mr. Lerach has maintained a determined focus on the best interests of the investor victims. ***Mr. Lerach has repeatedly advocated strategies that, while in the best long-term interests of his clients, were not necessarily in his own financial interest***.

> For example, early in the litigation ***he resisted quick settlements with some defendants, settlements that could have relieved the substantial financial burden of the case on his firm but would not have been in the overall best interests of the class***.

Letter from Christopher M. Patti to the Honorable John F. Walter, dated December 29, 2007 (Supplemental Compendium, Ex. 19).

V. THE PLAINTIFFS' AND OTHER INDIVIDUALS' EXPENSES SHOULD BE REIMBURSED

Dabrowski/Schonbrun object to the reimbursement of expenses for plaintiffs. They assert that only named plaintiffs should be reimbursed; they urge the Court to deny the request of others. However, all but two of the individuals were proposed as class representatives and provided discovery, including preparing and sitting for a deposition.[49] Each of those proposed Class representatives signed a certification demonstrating his or her willingness to represent the class. They have submitted declarations explaining the basis for the request for reimbursement for their time and expenses spent while representing the Class.[50] Surely each of those proposed class representatives qualifies as a "representative party" under the PSLRA.

The individuals who were not proposed class representatives are Charles Prestwood and George Maddox. Mr. Prestwood, a 63-year-old retired Enron employee, invested in Enron's employee stock-option program for many years – when Enron collapsed he lost his entire life

---

[49] Concurrent with this filing, two more plaintiffs who were proposed class representatives and provided discovery are filing declarations in support of a request for reimbursement. They are Employer-Teamsfers Local Nos. 175 & 505 Pension Trust Funds and Greenville Plumbers Pension Plan.

[50] *See* Declaration of Michael Bessire (Docket No. 5803), Declaration of John Cassidy (Docket No. 5804), Declaration of Michael B. Henning (Docket No. 5805), Declaration of Richard Kimmerling (Docket No. 5806), Declaration of George Placke (Docket No. 5808), Declaration of Ben Schuette (Docket No. 5809), Declaration of Mervin H. Schwartz, Jr. (Docket No. 5810), Declaration of Joseph C. Speck (Docket No. 5811), Declaration of John Zegarski (Docket No. 5812) and Declaration of Stephen M. Smith (Docket No. 5797).

savings, which had been worth, at one point, $1.3 million. Declaration of Charles Prestwood (Docket No. 5814) ("Prestwood Decl.), ¶2. Mr. Maddox, a retired Enron employee, lost his entire investment of 13,183 shares – which at one time were worth over $1 million. Declaration of George Maddox (Docket No. 5807) ("Maddox Decl."), ¶2. They each worked closely with Lead Counsel since the spring of 2007, exchanging regular letters and calls with Paul Howes and reviewing legal and case-related materials. Prestwood Decl., ¶3; Maddox Decl., ¶3. They both participated in news conferences, attempting to persuade the SEC to support the shareholders' liability theory by filing an *amicus* brief. Prestwood Decl., ¶¶6-7; Maddox Decl., ¶6. In late July 2007, they flew to Washington to participate in a nationwide press conference at the National Press Club. Prestwood Decl., ¶7; Maddox Decl., ¶6. The purpose of that visit was to attempt to dissuade the Justice Department from filing an *amicus* brief on behalf of the banks. Prestwood Decl., ¶7; Maddox Decl., ¶6. After the press conference, they met with several Congressmen and their staffs, along with Senator Cornyn – all of whom subsequently wrote letters to President Bush on the Enron shareholders' behalf. Prestwood Decl., ¶7; Maddox Decl., ¶6. Again, in mid-August, they participated in a nationwide conference call just hours before briefs were due at the Supreme Court; some believe that the shareholders' efforts helped convince the Justice Department to file a more-moderate *amicus* brief – it even acknowledged the existence of "scheme liability." Prestwood Decl., ¶7; Maddox Decl., ¶6. Mr. Prestwood estimates he spent 127 hours performing his duties for the Class. Prestwood Decl., ¶8. Based upon an hourly rate of $40.00 for his time, calculated by reference to his regular annual salary at Enron just before retirement, Mr. Prestwood requests reimbursement of $5,080.00 for his representation efforts. *Id*. Mr. Maddox estimates he spent 75 hours performing his duties for the Class. Maddox Decl., ¶7. Based upon an hourly rate of $43.00 for his time, calculated by reference to his regular annual salary at Enron just before retirement, Mr. Maddox requests reimbursement of $3,225.00 for his representation efforts. *Id*.

Thus, both Mr. Prestwood and Mr. Maddox took time away from their lives to stand up for investors. They certainly did everything in their power to represent the investors well, even though they were not named plaintiffs. They deserve to be reimbursed.

Dabrowski/Schonbrun claim there is insufficient support for The Regents' request for reimbursement. They complain throughout their presentation about the "agency problem," *i.e.*, the conflict of interest they perceive between Lead Counsel and the Class, and they assert (without explanation) that Lead Plaintiff cannot adequately protect the interests of the Class because of its reliance on class counsel. Perversely, Schonbrun objects to payment of expenses incurred by Lead Plaintiff to ameliorate this very concern.

As the Court is aware, The Regents has gone to extraordinary lengths to obtain independent advice, both from retained consultants and from its own experienced in-house lawyers, in order to assist in fulfilling its statutory role as representative of the interests of the Class. The PSLRA permits the award of expenses of this type, and the expenses are adequately documented in the Patti Declaration. Schonbrun states that the request for reimbursement of $814,000 in consultant fees incurred by Lead Plaintiff is "based on nothing more than a date, a fee amount, and a cost amount" and that "[n]othing more is offered than the statement 'My office monitored and reviewed the bills and found them to be reasonable in amount.'" Schonbrun Objection at 20. That statement is incorrect. The Patti Declaration contained a substantial discussion of the nature of the past and on-going work of these consultants and its value to Lead Plaintiff's supervision of the case. *See* Patti Decl., ¶¶16-17. Schonbrun further states that "Lead Plaintiff is asking for $600,000 to reimburse the efforts of attorneys who are not identified by their background, education and experience." Schonbrun Objection at 20. As was made clear in the Patti Declaration, Lead Plaintiff's reimbursement request is based only on time Mr. Patti spent on the case. Patti Decl., ¶26. The request is conservative because it does not calculate costs based on the time of any of the many other in-house University attorneys who also spent considerable time on this matter. Schonbrun's objections to these expenses are without merit.

DATED: February 22, 2008

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
KEITH F. PARK
HELEN J. HODGES
BYRON S. GEORGIOU
G. PAUL HOWES
SPENCER A. BURKHOLZ
JAMES I. JACONETTE
ANNE L. BOX
JAMES R. HAIL
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW I. ALPERT
JENNIFER L. GMITRO

/s/ Roger B. Greenberg *signed by permission
PATRICK J. COUGHLIN

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
REGINA M. AMES
9601 Wilshire Blvd., Suite 510
Los Angeles, CA 90210
Telephone: 310/859-3100
310/278-2148 (fax)

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932

/s/ Roger B. Greenberg
ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2700
Houston, TX 77010
Telephone: 713/752-0017

THE BILEK LAW FIRM
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
808 Travis, Suite 802
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
MATTHEW L. TUCCILLO
53 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for Nathaniel Pulsifer

E. LAWRENCE VINCENT
3020 Legacy Drive, #100-324
Plano, TX 75023
Telephone: 214/680-1668
972/491-2417 (fax)

Attorneys for the Archdiocese of Milwaukee Supporting Fund, Inc.

CUNEO GILBERT & LaDUCA, L.L.P.
JONATHAN W. CUNEO
MICHAEL G. LENETT
507 C Street, N.E.
Washington, DC 20002
Telephone: 202/789-3960
202/789-1813 (fax)

Washington Counsel

CICCARELLO DEL GIUDICE & LAFON
MICHAEL J. DEL GIUDICE
1219 Virginia Street, East, Suite 100
Charleston, WV 25301
Telephone: 304/343-4440
304/343-4464 (fax)

Attorneys for Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund

S:\Settlement\Enron.Set\2007 Fee Application\!Reply to Objections Filing 2-22-08\enron fee reply.doc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD COUNSEL'S REPLY IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES AND REIMBURSEMENT OF PLAINTIFFS' EXPENSES (DOCKET NOS. 5815 & 5816) has been served by sending a copy via electronic mail to serve@ESL3624.com on February 22, 2008.

I also certify that a copy of the above-mentioned document has been served via overnight mail on the parties listed on the attached "Additional Service List" on this 22nd day of February, 2008.

Deborah S. Granger

DEBORAH S. GRANGER

ADDITIONAL SERVICE LIST

Stuart Yoes THE YOES LAW FIRM, LLP 3535 Calder Avenue, Suite 235 Beaumont, TX 77726-7584 409/833-2352 409/838-5577 (fax)	Frank H. Tomlinson PRITCHARD, McCALL & JONES, LLC 505 N. 20th Street, Suite 800 Birmingham, AL 35203 205/328-9190 205/458-0035 (fax)
Edward W. Cochran 20030 Marchmont Rd. Shaker Heights, OH 44122 216/751-5546 216/751-6630 (fax)	N. Albert Bacharach Jr. 115 N.E. Sixth Avenue Gainesville, FL 32601-6592 352/378-9859 352/338-1858 (fax)
Paul S. Rothstein 626 N.E. First Street Gainesville, FL 32601 352/376-7650 352/374-7133 (fax)	Maureen McGuirl FENSTERSTOCK & PARTNERS LLP 30 Wall Street, 9th Floor New York, NY 10005 212/785-4100 212/785-4040 (fax)
Lawrence W. Schonbrun LAW OFFICES OF LAWRENCE W. SCHONBRUN 86 Eucalyptus Road Berkeley, CA 94705 510/547-8070	Richard C. Bauerle 30 Greenbriar Ottumwa, IA 52501
Arnold Gregg 4445 Forest Glen Road Anaheim Hills, CA 92807	Steven F. Helfand HELFAND LAW OFFICES 582 Market Street, Suite 1400A San Francisco, CA 94104 415/397-0007 415/397-0009 (fax)
Mr. Stanley Majors 9332 S. 85th East Avenue Tulsa, OK 74133-5547	Stephen Neuwirth QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP 51 Madison Avenue, 22nd Floor New York, NY 10010

ADDITIONAL SERVICE LIST	
John J. Pentz CLASS ACTION FAIRNESS GROUP 2 Clock Tower Place, Suite 260G Maynard, MA 01754 987/461-1548 707/276-2925 (fax)	J. Scott Kessinger 7304 Michigan Ave. St. Louis, MO 63111 314/369-5115 314/754-8370 (fax)
Jonathan E. Fortman 910 S. Florissant Road St. Louis, MO 63135 314/522-2312 314/524-1519 (fax)	Edward F. Siegel 27600 Chagrin Blvd. #340 Cleveland, OH 44122 216/831-3424 216/831-6584 (fax)
SPRINGFIELD LAW OFFICE OF: JOHN COREY QUA 36 Newmoon Terr, N. Springfield, MI 49015-1328 269/963-4413	Ernst-Georg Baltzer 115 Cherry Tree Lane Campbell River, BC V9W 8E9 Canada E-mail: pacificgeorge@aol.com
Jeannette Dreisbach 1122 Tamarisk Road Palm Springs, CA 92262 760/408-9678	J. Jones SERVICE VIA EXPRESS MAIL P.O. Box 53289 Portland, OR 98264 (zip code on objection partially illegible)
Joseph W. Cotchett Steven N. Williams Aron K. Liang COTCHETT, PITRE & MCCARTHY San Francisco Airport Office Center 840 Malcolm Road, Suite 200 Burlingame, CA 94010 650/697-6000 650/607-0577	Tom Alan Cunningham CUNNINGHAM DARLOW LLP 909 Fannin, Suite 3700 Houston, TX 77010
Martin D. Chitwood CHITWOOD HARLEY HARNES LLP 1230 Peachtree Street, Suite 2300 Atlanta, GA 30309	Roger F. Claxton Robert J. Hill CLAXTON & HILL, PLLC 3131 McKinney Avenue, Suite 700 Dallas, TX 75204-2471 214/969-9029 214/953-0583 (fax)

ADDITIONAL SERVICE LIST	
Mark I. Machiz COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C. One South Broad Street, Suite 1850 Philadelphia, PA 19107 215/825-4010 215/825-4001 (fax)	Avi S. Garbow Whitney R. Case COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C. 1100 New York Avenue, NW, Suite 500, West Tower Washington, DC 20005 202/408-4600 202/408-4699 (fax)
Austin M. O'Toole Attorney & Counselor At Law 509 Nineteenth Street Galveston, TX 77550 409/763-3130 409/763-3111 (fax)	Georgia Matula 9823 Sagedowne Ln. Houston, TX 77089
Nasser Pebdani 5714 Bermuda Dunes Houston, TX 77069	Wiley M. Cauthen SERVICE VIA EXPRESS MAIL P.O. Box 3084 Winter Garden, FL 34778
Jean E. Clark 591 Calibre Crest Parkway #103 Altamonte Springs, FL 32794	Janice K. Farmer 937 Carlson Drive Orlando, FL 32804
Josh G. Mayes 4919 Fern Cove Drive Baytown, TX 77521	Mike L. Smith 1306 Emily Morgan Circle Richmond, TX 77469
Joyce Barrett 11510 Pinole Ln. Ct. Houston, TX 77066	Mary Lynne Dix 5402 Blossom Houston, TX 77007
Frank R. Diemont 10827 Britoak Lane Houston, TX 77079	Rinetia G. Turner 7826 Heron Lakes Drive Houston, TX 77064
Carmen Alliece Morris 4602 Atascocita Trail Humble, TX 77346-4400	Richard C. Barrett 4515 Crichton Lane Orlando, FL 32806

ADDITIONAL SERVICE LIST	
Charles B. Bowman 2422 Deep Lake Drive Kingwood, TX 77345	Christine A. Smith 16611 Shimmering Lake Drive Cypress, TX 77433
Diane L. Watts 25016 Highway 525 Greenbank, WA 98253	Lewis M. May 5715 Will Clayton Pkwy #2513 Humble, TX 77338
Emil B. Thomas Claine C. Thomas 7435 Kobersky Lane La Grange, TX 78945	Cherubim E. Hurdle 151 N. Pleasant Hill Blvd. Pleasant Hill, IA 50327-7137
James Sutton SERVICE VIA EXPRESS MAIL P.O. Box 914 Silver Springs, FL 34489	