UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

SUPPLEMENTAL EXPERT REPORT OF PROFESSOR CHARLES SILVER CONCERNING THE REASONABLENESS OF CLASS COUNSELS' REQUEST FOR AN AWARD OF ATTORNEYS' FEES

I, Charles Silver, declare as follows:

1. INTRODUCTION

I previously submitted an expert report on attorneys' fees in this case. It describes my credentials.

Lead Counsel asked me to review all fee-related objections filed in this case and to state my opinions on the issues they raise. I will discuss some objections without identifying the Objectors who make them. Because most objections appear in several filings, this seems appropriate.

2. I STAND BY MY INITIAL REPORT

No objection caused me to reconsider, modify, or retract any opinion expressed in my initial report. Partly, this is because no objector took issue with most of the opinions I previously expressed.[1] The following list identifies points made in my initial report that generated little or no disagreement.

- The terms of Lead Counsel's compensation were disclosed to the Court, along with the compensation terms negotiated by other candidates for lead plaintiff. Because the Court had this information, its finding that The Regents were the most adequate lead plaintiff warrants an inference that Lead Counsel's compensation terms were reasonable when set.
- The Regents, a sophisticated and knowledgeable client with a large stake in the outcome, had a strong incentive to set fees at the level expected to maximize investors' net recoveries.
- The Regents had separate legal and financial representation to provide assistance in fee negotiations.
- When the compensation terms were set, the market for legal services was competitive. The availability of other law firms encouraged The Regents to demand, and Lead Counsel to offer, a market rate.
- The Regents had decades of experience hiring and managing outside counsel.

[1] The *Objection of the Enron Savings Plan and the Enron Stock Ownership Plan* filed by Fiduciary Counselors Inc. comes closest to grappling with my views.

- Under the Private Securities Litigation Reform Act (PSLRA), a trial judge should overrule compensation terms negotiated by a lead plaintiff only when (1) the terms obviously exceeded the market rate when set and (2) the bargaining environment in which fees were set was marred by an identified defect.
- Lead Counsel's compensation terms are reasonable when compared to bonuses paid under federal, state, and local false claim statutes to *qui tam* relators. By itself, the U.S. government paid *qui tam* relators almost $1.8 billion on recoveries of approximately $11 billion, approximately 16.3%.
- Lead Counsel's compensation terms and fee request are proper under the *Restatement (Third) of the Law Governing Lawyers*, which sets out ethical standards for lawyers prevailing nationwide.

These points alone demonstrate the reasonableness of the requested fee award.

3. OBJECTION: THE COURT SHOULD APPOINT AN AUDITOR OR GUARDIAN

Several Objectors ask the Court to appoint a guardian or fee auditor to review Lead Counsel's fee request. This objection is a non-starter. The class already has a guardian: The Regents. Under the PSLRA, the Lead Plaintiff protects the class throughout the litigation by selecting excellent counsel, retaining counsel on appropriate fee terms, participating in and monitoring the progress of the case, and doing whatever else is reasonably needed for adequate representation. The demand for a guardian or fee auditor is a transparent attempt to undermine the Lead Plaintiff by empowering someone else to second-guess its judgments. The demand is therefore at odds with the PSLRA and should be rejected.[2]

Throughout this lawsuit, The Regents' interests and those of other class members were the same: to maximize the expected net recovery. However, unlike Objectors, who sat on the sidelines the past 6 years, The Regents actually ran this litigation. The Regents selected lawyers, retained them on negotiated terms, supervised them, and evaluated their charges and their work. The Board of Regents also had better incentives than Objectors to get these matters right. It had one of the largest financial stakes of any class member and exceptional financial and legal expertise. Every indication suggests that it did its job exceptionally well.

Amazingly, although these Objectors want to replace The Regents' judgments on fee-related matters to with their own, no Objector questions The Regents' incentives or argues that The Regents stood to gain by mismanaging this lawsuit.[3] In other words, Objectors cannot answer this simple question: If hiring a fee auditor was such a great idea, why didn't The Regents use one?

[2] Objector Dabrowski, represented by Lawrence W. Schonbrun, a professional fee objector, contends that unless a guardian is appointed, a due process violation will occur because absent class members are inadequately represented. The falsity of this assertion is patent. Thousands of class actions have settled without the appointment of fee auditors, including cases with enormous settlement funds. Yet no due process violation has ever been found or, to my knowledge, alleged. Nor can such a contention sensibly be made. Fed. R. Civ. P. 23 entitles every class member to settlement notice and an opportunity to be heard on the subject of fees. It also requires judicial approval of settlements, including fee awards. Finally, in PSLRA cases, the lead plaintiff's interests are the same as the class'. Although Fed. R. Civ. P. 23(h)(4) allows a court to refer fee issues to a magistrate or master, it does not require this and it does not indicate that the responsibilities of a magistrate or master would differ from those of the presiding judge.

[3] Objector Dabrowski asks questions about the credentials of The Regents' administrative employees, but does not challenge The Regents' incentives. I provided a lot of background information on the key employees in my initial report. Evidently, neither Dabrowski nor his attorney read my report. Dabrowski also accuses Lead Counsel of violating its fiduciary duty to the class, apparently because Lead Counsel asked to be paid and retained experts, including me, to support its application. This is ridiculous.

When one reflects on this question, one sees that hiring an auditor would have been (almost) pointless. The Regents promised Lead Counsel a contingent percentage fee. Only clients who pay lawyers by the hour hire auditors. (It bears mention that I have studied and written about third-party fee audits.) Audits are needless in contingent fees matters because the size of the fee falls out automatically once the result is achieved. No one cares about the number of hours expended or the lawyers' hourly rates. Many commentators and judges have recognized the ability to dispense with "bean counting" as an important advantage of the contingent percentage fee.

Given the fee agreement—which the Court knew about when it put The Board of Regents in charge of this case—the only purpose of an audit would have been to monitor Lead Counsel's expenses, which are estimated at $45 million. There was no reason for The Regents to hire an outside auditor to review these either. First, because contingent fee lawyers forfeit their expenses when they lose, they tend to be frugal. Second, because the fee agreement required Lead Counsel to advance expenses, it discouraged wasteful spending. Third, because The Regents had the experience and capacity to review Lead Counsel's expenses internally (and did), it need not have paid a third-party auditor for this service.

In sum, by demanding the appointment of a guardian or fee auditor, Objectors are being Monday-morning quarterbacks. They assert that the case would have turned out better for the class if The Regents had called "lodestar/fee audit" instead of "contingent percentage." There is no reason to believe this. In both professional sports and securities fraud lawsuits led by "most adequate plaintiff[s]," the players and coaches on the field tend to be much better than the kibitzers who watch from the stands. The Regents recovered $7.2 billion—an unprecedented sum—despite serious challenges to class members' key claims. Their accomplishment rivals that of Vince Young, the amazing quarterback who carried the Texas Longhorns to the national championship in 2006 by defeating the Trojans of U.S.C., one of history's best collegiate teams. Objectors cannot seriously contend they would have outplayed The Regents.

4. OBJECTION: THE COURT MUST APPLY THE LODESTAR METHOD OR PERFORM A LODESTAR CROSS-CHECK

Many Objectors urge the Court to use the lodestar method to set or to evaluate the reasonableness of Lead Counsel's fee. When making this point, Objectors rarely address or grapple with the language of the PSLRA. Yet, the statute is not silent. It contains two important passages:

> Selection of lead counsel
>
> The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

15 U.S.C.A. § 78u-4(a)(3)(B)(v).

> Restrictions on payment of attorneys' fees and expenses
>
> Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

15 U.S.C.A. § 78u-4(a)(6). These passages establish, first, that The Regents were obligated to set fee terms for the representation and, second, that The Regents had the power to use the percentage approach.

The first point follows from 15 U.S.C.A. § 78u-4(a)(3)(B)(v), which mandates that a lead plaintiff "select and *retain* counsel to represent the class." One "retains" an attorney by paying or promising a fee. See, e.g., American Heritage Dictionary, definition of "retain" ("4. To hire (an attorney, for example) by the payment of a fee"); Dictionary.com Unabridged (v 1.1), definition of "retain" ("6. to engage, esp. by payment of a preliminary fee: to retain a lawyer."); Merriam-Webster's Dictionary of Law, definition of "retain" ("2: to keep in one's pay or service; *specifically*: to employ (as a lawyer) by paying a retainer."). The connection between the word "retain" and fees is so firmly established that fee contracts between lawyers and clients are commonly called "retainer agreements." See, e.g., State Bar of Michigan, "RETAINER AGREEMENT (Contingent Fee)," http://www.michbar.org/pmrc/articles/0000083.doc (visited February 15, 2008); AllBusiness.com, "Attorney Retainer Agreement," http://www.allbusiness.com/legal/2976193-1.html (visited February 15, 2008). I assume no Objector will dispute this obvious point.

Because the meaning of the phrase "retain counsel" is clear, the obvious import of § 78u-4(a)(3)(B)(v) is that a lead plaintiff must set the terms on which lead counsel will be paid. Equally clear is that this mandate requires the lead plaintiff to set fees to be paid by the entire class, not just the lead plaintiff alone. The statute instructs the lead plaintiff to "retain counsel *to represent the class*." The plain language of the statute makes it clear that a lead plaintiff is to set the term of the financial relationship between a class and a law firm hired to represent it.[4]

The second point—The Regents were entitled to use the contingent percentage method when retaining counsel for the class—follows from two aspects of the statute.

[4] This addresses the complaint of the Fenstad Objectors, who contend that the fee agreement should not bind former Enron employees who "did not participate in the hiring of Lead Counsel." By ordering a lead plaintiff to "retain counsel to represent the class," the PSLRA empowers a lead plaintiff to bind other investors.

One is that § 78u-4(a)(3)(B)(v) does not restrict a lead plaintiff's choice of fee formulas. This is overwhelmingly important. Both contingent percentage fee agreements and percentage-based common fund awards were well known when Congress adopted the PSLRA in 1995. Both were also the subject of much political controversy. Consequently, Congress could have forbidden lead plaintiffs from offering contingent percentage fees had it wanted to. It did not, and its silence implies that it gave lead plaintiffs discretion to choose the fee formulas they think will work best. The other consideration is § 78u-4(a)(6), which states that a court-awarded fee "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." Plainly, this section implies that a court *may* award a fee that is "a reasonable percentage" of the recovery. In combination, then, these two sections of the PSLRA imply that a lead plaintiff may obligate a class to pay a reasonable percentage of its recovery as fees and that a court may honor this promise.

Insofar as the lodestar is concerned, Congress' silence is again deafening. The lodestar method was well known to Congress in 1995. Congress could therefore have instructed federal judges to use the lodestar when evaluating fee awards under the PSLRA.[5] It did not. The PSLRA neither mentions the lodestar nor contains any other indication that fee awards are to be based on hourly rates. To the contrary, in § 78u-4(a)(6) Congress expressly told federal judges to use a reasonable "percentage" as a gauge. By asking the Court to apply the lodestar method or to run a lodestar cross-check, Objectors ignore the plain language of the PSLRA and seek to frustrate Congress' intent.

[5] Some states have adopted statutes requiring the use of the lodestar method in common fund class actions.

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, as the following table shows. The first column lists all Fifth Circuit cases which, according to Objectors, require the application of the lodestar. The second column shows that no case is on all fours with this one.

FIFTH CIRCUIT CASES CITED BY OBJECTORS AS SUPPOSEDLY REQUIRING THE USE OF THE LODESTAR METHOD IN SECURITIES FRAUD CLASS ACTIONS LITIGATED UNDER THE PSLRA	
Forbush v. J.C. Penney Co., 98 F.3d 817 (5th Cir. 1996)	ERISA
In re High Sulfur Content Gasoline Products Liability, --- F.3d ----, 2008 WL 287347 (5th Cir. 2008)	Defective product
Johnson v. Georgia Hwy. Express, Inc., 488 F.2d 714 (5th Cir.1974)	Civil rights
Longden v. Sunderman, 979 F.2d 1095 (5th Cir.1992)	Pre-PSLRA
La. Power & Light Co. v. Kellstrom, 50 F.3d 319 (5th Cir.1995)	Antitrust
Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980)	Pre-PSLRA
Strong v. BellSouth Telecommunications, Inc, 137 F.3d 844 (5th Cir. 1998)	Antitrust

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.[6] But the PSLRA's fee provisions are

[6] The *Johnson* factors are identical to the factors contained in most state bar associations' ethics codes. *Johnson*, 488 F.2d at 719 ("These guidelines are consistent with those recommended by the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106."). Because the standards are so similar, the showing in my initial report that the requested fee award comports with prevailing ethical standards establishes that it comports with *Johnson* as well. It is also a complete fiction that *Johnson* requires the use of the lodestar method in common fund cases, although Fifth Circuit

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.[7]

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. The Lead Plaintiff should have negotiated a fee agreement with their counsel that makes sense in the district where their counsel intended to file suit. The 9.522% fee that [T]he Regents agreed to is impermissible in this Circuit.

Notice of Objection to Plaintiffs' Counsel's Application for an Award of Attorney's Fees and Notice of Intent to Appear, pp. 3-4. This is exactly backwards. The PSLRA makes fee agreements relevant and plainly allows lead plaintiffs to promise contingent percentages. If old Fifth Circuit cases construing other statutes 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.

Fiduciary Counselors concedes that "the PSLRA gave more control over securities class actions to the Lead Plaintiff." However, it continues by observing that "the PSLRA did not do away with the mandate set out in the Federal Rules of Civil Procedure requiring trial courts to protect the interests of the class. Compare Fed. R. Civ.

panels make this assertion frequently. The case did not even involve a fee award from a common fund. It concerned the amount a defendant should pay in fees after losing a civil rights case.

[7] Fiduciary Counselors also errs by contending that Supreme Court cases applying the lodestar method to fee awards paid by losing defendants govern awards of fees from common funds. *Objection of the Enron Savings Plan and the Enron Stock Ownership Plan*, p. 10, n. 13. The Supreme Court has never applied the lodestar method to common fund fee awards.

P. 23(e) with 15 U.S.C. § 78u-4." The reference to paragraph (e) of Fed. R. Civ. P. 23 is singularly odd. Paragraphs (g) and (h) are the portions of the rule governing the appointment of class counsel and the awarding of fees, and these paragraphs solidly support both the method the Court used when appointing Lead Counsel and the requested fee award.

- Fed. R. Civ. P. 23(g)(1)(C) says that, when appointing class counsel, the trial court "may order potential class counsel … to propose terms for attorney's fees and nontaxable costs." Lead Counsel did just this by submitting its fee agreement with The Regents during the lead plaintiff competition.
- Fed. R. Civ. P. 23(g)(1)(D) encourages a court to set fees in advance, providing that a court "may include … provisions about the award of attorney's fees or nontaxable costs" in the order appointing counsel for a class. In this case, the Court implicitly approved the terms of the known fee agreement by finding that The Regents was the most adequate plaintiff.
- Fed. R. Civ. P. 23(g)(2) states that "[when] more than one adequate applicant seeks appointment [as class counsel], the court must appoint the applicant best able to represent the interests of the class." The Court did precisely this. It reviewed the law firms hired by other applicants for the lead plaintiff spot, and it extolled the merits of Lead Counsel when selecting The Regents.

- Fed. R. Civ. P. 23(h) states that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." It could not be plainer that this paragraph supports the fee request, which is authorized by the PSLRA and based on an agreement between Lead Counsel and The Regents.

Fiduciary Counselors' suggestion that Fed. R. Civ. P. 23 undermines Lead Counsel's fee request is mystifying.

In short, no authority requires a court to apply the lodestar method when awarding fees in an action brought under the PSLRA. A judge's only responsibility is to ensure that "[t]otal attorneys' fees and expenses ... not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C.A. § 78u-4(a)(6). When a lead plaintiff promises a contingent percentage fee to counsel for a class, a judge can and should satisfy this responsibility without considering the time a lawyer expended or a lawyer's hourly rate, neither of which would matter in an ordinary contingent fee representation. A judge should simply determine whether the promised percentage was reasonable when set.

There can be no doubt about that in this case. The fee was negotiated at arms' length by a sophisticated client with an enormous stake and ready access to other attorneys. The fee arrangement was disclosed to the Court before Lead Counsel was appointed, as were fee arrangements other proposed lead plaintiffs negotiated with other attorneys. The percentage was reasonable by comparison to fees paid in the private market, in other class actions, and in *qui tam* cases. There is no basis for finding the promised percentage unreasonable.[8]

Because I believe the Court should not apply the lodestar method, I will not address Objectors' many contentions regarding the size of Lead Counsel's hourly rates or the multipliers Lead Counsel requests. These matters are irrelevant to my opinion and, I believe, to the Court's decision. That said, I will report the following: The best predictor of a fee award is the result class counsel obtains. This is true whether judges use the lodestar method, the contingent percentage approach, or both. Judges allow the highest hourly rates, apply the biggest multipliers, and award the largest fees in the cases with the largest common funds. They understand the importance of rewarding lawyers for success. This is the biggest settlement in the history of class action litigation. The hourly rates, multipliers, and fee award should reflect this.

5. OBJECTION: TOO MUCH MONEY FOR LAWYERS

Many Objectors complain that $688 million is simply too much money for lawyers. For example, Fenstad and McCoppin and their many supporters contend that the requested award "shock[s] the conscious [sic] of the American Civil Justice System." Others describe the request as astronomical, excessive, or unconscionable, or otherwise ridicule its size.

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

[8] Objector Rinis Travel Service, Inc. (Rinis) contends that the percentage is excessive because of the economies of scale present in this case. Yet, Rinis provides no reason why The Regents, a highly sophisticated investor whose employees surely understand scale economies, would have ignored this factor when setting the fee.

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 that investors' dollars are worth less than taxpayers' dollars. I see no reason to think this.

6. OBJECTION: FEES SHOULD BE SLASHED ONCE THE OUTCOME OF LITIGATION IS KNOWN

Many Objectors invoke the plight of former Enron employees who suffered terribly when the company collapsed. Their retirement funds were decimated and their jobs disappeared. They lost homes, were unable to provide for their families, and went without medical care. They deserve sympathy.

I feel the same way about many tort plaintiffs. Patients incapacitated by medical malpractice and automobile accident victims killed by negligent drivers suffer far worse fates than defrauded investors. These victims and their families also routinely fare badly in the tort system, which cannot cure their injuries and usually gives them far too little money after far too long a wait. If any plaintiffs deserve our sympathy, these do, but the civil justice system does not abrogate their fee agreements when their cases end. It enforces their agreements because it knows that only when agreements are enforced can victims with meritorious claims hire lawyers to maximize their recoveries. The Court should treat former Enron employees the same way it does all tort claimants.

Objectors want the best of both worlds. When this lawsuit commenced, The Regents' promise to pay an increasing scale of fees helped all class members, including Objectors, by motivating Lead Counsel to take the case and invest the time and resources needed to maximize its value. Now that the outcome is known, however, Objectors don't need Lead Counsel anymore, so they want the Court to slash the fee. The bigger the reduction, the more they get to keep. Objectors dress up their demand in fancy clothes, arguing that the Court is their guardian and fiduciary. This is putting lipstick on a pig. They simply want to abrogate the fee agreement now that it no longer helps them.

7. OBJECTION: PAYMENT OF FEES SHOULD BE DELAYED

Some Objectors want to delay the payment of fees to Lead Counsel. They argue that compensation should be withheld until all claims are processed by the Claims Administrator. This assertion seems odd to me. In my experience, class counsel's fees have been delayed when the value of a settlement could not be known. This would be true, for example, in a "claims made" settlement where it was not known how many claims would be allowed or in a coupon settlement where it was not known how many coupons would be cashed. No such uncertainty exists here. The settling defendants paid cash for their releases, and class members will receive all the money that remains in the fund after fees and expenses are paid. Unclaimed funds, should there be any, will not revert to the defendants.

In view of the preceding, the argument for delaying payment to Lead Counsel seems weak. If there is some need to incentivize Lead Counsel to assist with claim filing (unusual in securities fraud cases) or to motivate the Claims Administrator (also unusual), the Court has the power to do this. However, I am not sure what the need is since no Objector has identified a compelling one.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.
Executed on:

2/18/08
Date

Charles Silver

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsels' Request for an Award of Attorneys' Fees document 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.

Mo Maloney

Mo Maloney

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