2004 to May 16, 2005, in *McKenna Memorial Hospital v. HBE Corp., Hospital Building & Equipment Co., Hospital Designers, Inc., Facility Works, Inc., Lacy Masonry, Inc., Ollie Tope & Sons, Armor Sealants, Inc., Todd–Ford Management Co. Todd–Ford, Inc., and PHI Service Agency, Inc.*, Cause No. C2005–0993C, in the 274th Judicial District Court, Comal County, Texas. In all other respects, Plaintiffs' motions are DENIED.

It is further ORDERED that Defendant Employers Mutual Casualty Company's Motion for Summary Judgment (Document No. 26) is GRANTED IN PART, and Plaintiffs' claims for contribution and breach of contract are DISMISSED on the merits. Defendant's motion is otherwise DENIED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

In re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION.

Mark Newby, et al., Plaintiffs

v.

Enron Corporation, et al., Defendants.

No. MDL–1446.
Civ.A. No. H–01–3624.

United States District Court,
S.D. Texas,
Houston Division.

Sept. 8, 2008.

Background: Lead counsel in Private Securities Litigation Reform Act (PSLRA) class action filed motion for award of attorney fees from total recovery of approximately $7.2 billion, plus interest, achieved in settlements arising out of violations of federal securities laws.

Holding: The District Court, Melinda Harmon, J., held that requested attorney fee award to lead counsel of 9.52% of total recovery, or approximately $688 million, was fair and reasonable.

Motion granted.

1. Federal Courts ⚿71

A forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though the plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.

2. Constitutional Law ⚿3981

If the forum state wishes to bind an absent plaintiff class member concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection; plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel, the notice must be the best practicable, reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections and should describe the action and the plaintiffs' rights in it. U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⚿3981

Due process requires at a minimum that an absent plaintiff class member be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court; due process also requires that the named plaintiff at all times adequately represent the interests of the absent class members. U.S.C.A. Const.Amend. 5.

4. Federal Civil Procedure ⚿2723
Federal Courts ⚿754.1, 878

Standards employed calculating attorney fees awards are legal questions subject to plenary review, but amount of a fee award is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous.

5. Securities Regulation ⚿157.1

Private Securities Litigation Reform Act (PSLRA) does not prohibit the application of the lodestar method to fees as long as the result does not exceed a reasonable percentage of the class recovery. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6).

6. Attorney and Client ⚿151
Federal Civil Procedure ⚿2737.13

As part of its duty to independently review and approve class action settlement agreements for the protection of the absent class and the public, the district court must assess the reasonableness of the attorney fees and ensure that they are divided up fairly among plaintiffs' counsel. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

7. Securities Regulation ⚿157.1

Deference to the empowered plaintiff's choice of counsel in Private Securities Litigation Reform Act (PSLRA) cases should extend to the ex post review of the attorney fee agreement in those cases. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6).

8. Federal Civil Procedure ⚿2737.4

For purposes of calculating award of attorney fees, a reasonable hourly rate should be in accord with rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation; relevant legal community is the one in which the district court sits, no matter how much of the work is done elsewhere, and in addition to the community rate, district court must also consider the attorney's regular rates.

9. Federal Civil Procedure ⚿2737.4, 2742.5

There is a strong presumption that the lodestar is a reasonable attorney fee, and the fee applicant bears the burden of demonstrating that an adjustment by application of the *Johnson* factors is necessary to calculate a reasonable fee.

10. Federal Civil Procedure ⚿2737.4

Johnson factors considered in adjusting lodestar by a multiplier for purposes of calculating award of attorney fees are: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

11. Federal Civil Procedure ⚿2742.5

Counsel must exclude from an attorney fee request hours that are excessive, redundant, or otherwise unnecessary; fee applicant bears the burden of showing that the hours claimed were reasonably expended.

12. Federal Civil Procedure ⚿2742.5

Proper remedy for counsel's omitting evidence of billing judgment, which requires documentation of the hours charged and of the hours written off as unproduc-

tive, excessive, or redundant, does not include a denial of requested attorney fees but, rather, a reduction of the award by a percentage intended to substitute for the exercise of billing judgment; district court may reduce the number of hours awarded if the documentation is vague or incomplete, but failing to provide contemporaneous billing statements does not preclude an award of fees per se as long as the evidence produced is adequate to determine reasonable hours.

13. Federal Civil Procedure ⚿2737.4

Hourly rate for attorneys should not be applied to clerical, secretarial or administrative work, since those are part of office overhead.

14. Federal Civil Procedure ⚿2742.5

Generally, determination of a reasonable hourly rate for attorneys in a particular community is established by affidavits of other attorneys of similar caliber practicing in that community.

15. Federal Civil Procedure ⚿2737.4

District court must not double count a *Johnson* factor already considered in calculating the lodestar when it determines the necessary adjustments.

16. Federal Civil Procedure ⚿2737.4

Increasing attorney fee award based on the eighth *Johnson* factor (the amount involved and the results obtained) is only proper when the applicant shows that it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result.

17. Attorney and Client ⚿155

District courts have discretion to use risk multipliers to enhance the lodestar in common fund cases.

18. Federal Civil Procedure ⚿2737.4

To enhance a lodestar, the court must explain with a reasonable degree of specificity the findings and reasons upon which the award is based, including an indication of how each of the *Johnson* factors was applied; of the *Johnson* factors, the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel.

19. Attorney and Client ⚿155

Percentage method was proper for determining attorney fee award in common fund class action case under Private Securities Litigation Reform Act (PSLRA). Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6).

20. Attorney and Client ⚿155

Requested attorney fee award to lead counsel of 9.52% of the total $7.2 billion recovery, or approximately $688 million, was fair and reasonable in common fund class action case brought under Private Securities Litigation Reform Act (PSLRA); contingent fee agreement was negotiated at arm's length, award was substantially lower than fees awarded in other comparable class actions at the time the agreement was made, and the requested award was reasonable under lodestar cross-check in light of the unmatched size of the recovery, the obstacles and risks faced by lead counsel from the beginning, and the skill and commitment exhibited by counsel, whose lawyers and support staff spent over 247,000 hours prosecuting the case which presented extremely complex and very frequently novel factual and legal issues. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6); Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

21. Attorney and Client ⚿155

For purposes of calculating lodestar in common fund class action case, counsel properly used their current billing rates in

order to compensate for delay in receiving fees.

22. Federal Civil Procedure ⚿2737.4

For purposes of calculating lodestar, prevailing counsel can recover fees for contract attorneys' services at market rates rather that at their cost to the firm.

23. Attorney and Client ⚿155

General acceptance of the requested fee amount by all the pension funds and all but one institutional investor strongly supported the reasonableness of enforcing the fee agreement with lead counsel in common fund class action case brought under Private Securities Litigation Reform Act (PSLRA). Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6); Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

24. Attorney and Client ⚿155

Lead counsel's average hourly rate of $457 per hour for all participants, including paralegals and associates was not unreasonable in common fund class action case brought under Private Securities Litigation Reform Act (PSLRA) in light of the substantial risks, and the unquestioned complexities of the litigation, not to mention the high caliber teams of defense attorneys. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6); Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

25. Attorney and Client ⚿155

Test for payment of legal fees incurred by non-lead counsel before appointment of lead plaintiff and approval of its choice of lead counsel under the common fund doctrine is whether the attorney's services provided an independent benefit to the class beyond that conferred by lead counsel. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

26. Securities Regulation ⚿157.1

Appointment of a guardian, accountant or special master to review attorney fee request in class action brought under Private Securities Litigation Reform Act (PSLRA) was not warranted; court's personal oversight of all aspects of the case provided a strong basis for evaluating counsel's fee request, and such an appointment would not only be redundant, but would further increase costs and delay distribution to the class. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(6); Fed.Rules Civ. Proc.Rule 23(h)(4), 28 U.S.C.A.

27. Federal Civil Procedure ⚿2737.13

Post-settlement legal work performed on behalf of the class's interests, but not for work on a fee application for the attorneys' interests, was compensable in class action; such work included litigating appeals of the settlements, developing a plan of allocation to compensate absent class members for their pro rata share of losses caused by the unlawful actions of all defendants, and addressing claims administration concerns. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

Richard J. Zook, Cunningham Darlow et al., Roger B. Greenberg, Schwartz Junell et al., Lawrence David Finder, Haynes & Boone LLP, Jeffrey C. Kubin, Gibbs & Bruns LLP, Earnest W. Wotring, Connelly Baker et al., R. Paul Yetter, Yetter Warden et al. LLP, Charles R. Parker, Locke Liddell and Sapp, Thomas W. Sankey, Duane Morris, LLP, Thomas E. Bilek, The Bilek Law Firm LLP, Jack Edward McGehee, McGehee and Wachsman, Tom Alan Cunningham, Cunningham Darlow LLP, Ronald Joseph Kormanik, Attorney at Law, Gregory Sean Jez, Fleming & Asoc LLP, Robin L. Harrison, Campbell

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Hicks Thomas et al., Ronald Earl Cook, Cook & Roach LLP, Robert Hayden Burns, Liskow & Lewis, David Michael Bond, Boyar & Miller PC, Hugh R. Whiting, Jones Day, Justin McKenzie Waggoner, Smyser Kaplan et al., Kathy Dawn Patrick, Aundrea Kristine Frieden, Brian Turner Ross, Jennifer H. Greer, Gibbs & Bruns, Amy Catherine Dinn, Thomas Anthony Hagemann, Marla Thompson Poirot, Peter Scaff, Gardere Wynne et al., C. Robert Mace, Tekell Book et al., Odean L. Volker, Haynes and Boone LLP, Jacks C. Nickens, Nickens Keeton et al., Matthew Okin, Okin & Adams LLP, Claude L Stuart, III, Phelps Dunbar LLP, Jessica Lynne Wilson, Nickens Keeton et al., Glen M. Boudreaux, Jackson Walker LLP, Maryellen Shea, Boudreaux Leonard et al., Houston, TX Jeffrey Kilduff, Robert M. Stern, Shannon M. Barrett, O'Melveny & Myers, Reid M. Figel, David L. Schwarz, Kellogg Huber et al., Michael L. Spafford, McKee Nelson LLP, Philip T. Inglima, Crowell & Moring LLP, Barry J. Pollack, Kelley Drye et al., Mark J. Rochon, Miller & Cehvalier Chartered, Robert P. Trout, Trout Cacheris, PLLC, Washington, DC, Robert K. Spotswood, Attorney at Law, Kenneth D. Sansom, Spotswood LLC, Anne Sikes Hornsby, Warren B. Lightfoot, Lightfoot Franklin et al., Lightfoot Franklin White LLC, N. Lee Cooper, Maynard Cooper et al., Matthew Todd Lowther, Spencer M. Taylor, Balch & Bingham LLP, Birmingham, AL, Salvador M. Hernandez, Bowen Riley et al., Nashville, TN, William J. Melley, III, Attorney at Law, Michael Joseph Walsh, Moukawsher & Walsh, Hartford, CT, Jeffrey A. Barker, O'Melveny & Myers LLP, James J. Farrell, Miles N. Ruthberg, Alicia A. Pell, Camille N. Rybar, Charles W. Cox, III, Latham Watkins, Los Angeles, CA, Catherine E. Palmer, Christopher R. Harris, Ethan J. Brown, Seth L. Friedman, Latham & Watkins, Christopher C. Costello, Curtis Mallet et al., Daniel F. Kolb, Sharon Katz, Davis Polk et al., Eliot Lauer, Michael J. Moscato, Curtis Mallet-Prevost et al., Andrew B. Kratenstein, Darin P. McAtee, Julia A. North, Richard W. Clary, Cravath Swaine and Moore, Adam R. Brebner, Caroline M. Flintoft, David H. Braff, Jennifer Parkinson, Julian C. Swearengin, Marc DeLeeuw, Michael T. Tomaino, Jr., Richard H. Klapper, Todd G. Cosenza, Daniel H.R. Laguardia, James V. Masella, III, Jeffrey T. Scott, Matthew A. Parham, Peter Tsapatsaris, Rajwant Mangat, Steven J. Purcell, Sullivan & Cromwell LLP, Lance Croffoot-Suede, Lawrence Byrne, Joseph B. Schmit, Ruth Harlow, Linklaters LLP, Owen Pell, Timothy Pfeifer, Cyrus M. Nezhad, Johanna S. Wilson, Jonathan Beemer, Jonathan Grant White & Case LLP, Adam S. Hakki, Daniel M. Segal, Michael Cordera, Benoit Quarmby, Herbert S. Washer, Shearman & Sterling LLP, Ignatius Grance, James D. Miller, Christopher M. Joralemon, James B. Weidner, James N. Benedict, James F. Moyle, Mark A. Kirsch, Guy C. Quinlan, Jason A. D'Angelo, Sean M. Murphy, Attorney at Law, Clifford Chance et al., New York, NY, Jeffrey S. Bagnell, Ethan A. Levin Epstein, Garrison Levin Epstein et al., New Haven, CT, Matthew D. Harrison, Peter Wald, Gabriel G. Gregg, Latham & Watkins LLP, Stan G. Roman, Krieg Keller et al., John A Reding, Jr., Paul Hastings et al., San Francisco, CA, Andrew Ramzel, Administaff, Inc., Kingwood, TX, George Walton Walker, III, Copeland France et al., Montgomery, AL, William Chester Wilkinson, Thompson Hine LLP, John Wolcott Zeiger, Zeiger & Carpenter, Columbus, OH, Julie Ann North, Cravath Swaine et al., NY, Angelo Russo, Howrey Simon, Curtis D. Ripley, Michele L. Odorizzi, T. Mark McLaughlin, Andrew D. Campbell, Jordan M. Rudnick, Mayer Brown et al., Alan S. Madans, Rothschild Barry et al., Avidan J. Stern, Jenner Block LLC, Chicago, IL, James W. Bow-

en, Hunton & Williams, Dallas, TX, Marc I. Machiz, Cohen Milstein et al., Philadephia, PA, Eric H. Cottrell, Mary K. Mandeville, Mayer Brown Rowe and Maw, Charlotte, NC, Charles E. Geister, III, David A. Elder, Drew Neville, Kurt M. Rupert, Lincoln C. McElroy, Ryan S Wilson, Hartzog Conger et al., Oklahoma City, Ok, Timothy K. Roake, Gibson Dunn et al., Palo Alto, CA, Madeleine F. Grossman, Levett Rockwood PC., Westoport, CT Ronald T. Adams, Black Helterline LLP, Portland, OR, for Defendants.

CONCLUSIONS OF LAW, FINDINGS OF FACT, AND ORDER RE AWARD OF ATTORNEYS' FEES FROM SETTLEMENT FUND

MELINDA HARMON, District Judge.

ROADMAP

Pending before the Court in the above referenced cause is Lead Counsel Coughlin Stoia Rudman & Robbins LLP's [1] motion for an award of attorney's fees (instrument # 5815) from the total recovery of approximately $7.2 billion,[2] plus interest, achieved in settlements in this action.[3] It is supplemented by a Statement, # 5864. Also pending, relating to the fee issue, are (1) a motion for additional information and for appointment of special master or enlargement of time for review (# 5963), filed by Peter Carfagna on behalf of Rita Murphy Carfagna & Peter A. Carfagna Irrevocable Charitable Lead Annuity Trust U/A DTD 5/31/96; (2) a motion for an order directing counsel to file and serve within two weeks a summary by law firm of what software was used by each firm to track and generate the time or billing records submitted, and CDs or DVDs of the data in electronic format with the metadata stripped (# 5967), filed by Rinis Travel Service Inc. Profit Sharing Trust U.A. 06/01/1989 and Michael J. Rinis, IRRA ("the Rinis Objectors"); and (3) Plaintiff Class Member/Objector Brian Dabrowski's unopposed request to file supplemental objection (# 5890). Chitwood Harley Harnes LLP and Cunningham Darlow LLP have withdrawn (# 5990) their partial objection to Lead Counsel's motion for an award of fees and their separate motion for attorneys' fees and reimbursement of expenses (# 5858) after reaching an agreement with Lead Counsel regarding allocation of fees to them for legal services provided for the benefit of the class, to be paid out of

1. Lead Plaintiff originally chose Milberg Weiss Bershad Hynes & Lerach, LLP. In May 2004 the lawyers prosecuting this action withdrew from that firm and formed Lerach Coughlin Stoia Geller Rudman and Robbins LLP (''Lerach Coughlin''). After William Lerach retired from the firm in 2007, it was renamed Coughlin Stoia Rudman & Robins LLP (''Coughlin Stoia''). References to Coughlin Stoia in this opinion include its predecessors.

2. The settlement fund is comprised of the following recoveries:

Andersen Worldwide	$ 33,330,000
Bank of America	$ 69,000,000
Lehman	$ 222,500,000
Outside Directors/Harrison	$ 168,000,000
LJM2	$ 51,900,000
Arthur Andersen	$ 72,500,000
Kirkland & Ellis	$ 10,160,000
Citigroup	$2,000,000,000
JPMorgan Chase	$2,200,000,000
CIBC	$2,400,000,000
Total	**$7,227,000,000**

Declaration of Helen Hodges, # 5818 at 2.

3. It is undisputed that this amount represents the largest recovery ever in a class action.

whatever award granted pursuant to Lead Counsel's fee petition, all with the approval of Lead Plaintiff.

Specifically Lead Counsel seeks a fee of 9.52% of the total recovery, or approximately $688 million, plus interest accrued, in accordance with a fee agreement negotiated with Lead Plaintiff the Regents of the University of California [4] at the outset of this litigation.

Alternatively, if the Court chooses to apply the lodestar method and the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974),[5] Lead Counsel insists their requested fee of approximately $688 million is also fair and reasonable if calculated under that method. Providing an analysis of the *Johnson* factors, Lead Counsel claims that as of September 30, 2007, Coughlin Stoia's lodestar plus that of co-counsel was $127 million. Given the $688 million counsel would receive under the fee agreement, Lead Counsel requests the Court to apply a 5.4 multiplier to the $127 million lodestar to equal that amount. Alternatively, with counsel's subsequent substantial work up to and including December 15, 2007, including the Plan of Allocation, Coughlin Stoia and co-counsel collectively have spent a total of 289,593.35 hours on this litigation at a blended hourly rate of $456, resulting in a lodestar of $131,971,583.20, and they request a multiplier of 5.2 if this time period [6] is used.[7]

In addition to their own documentation, Lead Counsel's fee request is supported by nationally prominent experts on fee awards in class actions: Professor Charles Silver from the University of Texas (# 5822, 5906); Professor John C. Coffee, Jr. from Columbia University Law School (# 5821); former Federal District Judge and Third Circuit Court of Appeals Judge H. Lee Sarokin (# 5819); Lucian Bebchuk, Professor of Law, Economics and Finance and Director of the Program on Corporate Governance at Harvard University (# 5820); and Kenneth M. Moscaret (# 5903, corrected 5911). Also in support

4. The Regents of the University of California was appointed Lead Plaintiff on February 15, 2002. The fee agreement, negotiated in December 2001–January 2002 between Lead Counsel's firm and James Holst (former General Counsel, now General Counsel Emeritus), John Lundberg (Deputy General Counsel), and Lloyd Lee (University Counsel) of The Regents' General Counsel's Office, provided,

> [T]his representation has been undertaken on a contingent fee basis and [the] firm will look only to the proceeds of any recovery for all of our fees. We have agreed upon the following fees as a percentage of the recovery for the class: 0–$1 billion, 8%; $1–2 billion, 9%; $2+ billion, 10%. The higher percentages apply only to the marginal amounts. In addition, we will also advance all costs and disbursements, and will look only to the proceeds of any recovery for repayment of those costs.

5818, Declaration of Helen J. Hodges, Ex. 3 (Letter to James E. Holst from Milberg Weiss dated January 25, 2002; see also letter to Holst dated Dec. 18, 2001, also part of Ex. 3). As applied to the current recovery, this provision yields an overall percentage of 9.52%. See also Decl. of Christopher M. Patti, # 5796 at 7–8.

5. *Johnson v. Georgia Highway Express, Inc.* was a statutory (Title VII) fee-shifting case under 42 U.S.C. § 2000e–5(k) ("In any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the cost of the litigation."). See *infra* discussion of attorney's fees under the common fund doctrine versus fee-shifting statutes, including footnote 10.

6. The Court finds the longer period appropriate for reasons discussed later.

7. Declaration of Helen Hodges, # 5818, ¶ 18, ¶¶ 296–97, and Exs. 1 and 2. Lead Counsel reports that up to and including December 15, 2007, Coughlin Stoia by itself spent 248,803.91 hours, giving a lodestar of $113,251,049 of this amount.

of the requested fee award are Declarations from James H. Holst (# 5824) and Christopher M. Patti (# 5796) of the Regents, and Helen Hodges of Coughlin Stoia. (# 5818, 5909).

After substantial briefing on Lead Counsel's request for an award of fees, the Fairness Hearing held on February 29, 2008 regarding final approval of the settlement included extensive oral argument on the issue of the fee award. The Court has carefully reviewed those instruments in the record relating to the fee award issue.[8] Accordingly, in approving Lead Counsel's requested award, which the Court finds to be a fair and reasonable fee, the Court enters the following conclusions of law and findings of fact.

I. Conclusions of Law:

A. Jurisdiction

The Court has federal question subject matter jurisdiction under 28 U.S.C. § 1331 over this dispute arising out of violations of the federal securities laws, in particular §§ 10(b), 20(a), and 20A of the Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), and 78t–1, and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5, and §§ 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2), and 77*o*. This Court also has jurisdiction under the Private Securities Litigation Reform Act of 1995 ("PSLRA") pursuant to § 22 of the Securities Act of 1933, 15 U.S.C. 77v, and § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

[1–3] As for personal jurisdiction over the absent plaintiff class members, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court noted the distinction between an out-of-state defendant haled into a foreign court to defend or suffer a default judgement and an absent class-action plaintiff who may lack all minimum contacts with the forum state and cited its earlier opinion in *Hansberry v. Lee*, 311 U.S. 32, 40–41, 61 S.Ct. 115, 85 L.Ed. 22 (1940):

> [A] "class" or "representative" suit was an exception to the rule that one could not be bound by a judgment *in personam* unless one was made fully a party in the traditional sense.... As the Court pointed out in *Hansberry,* the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.

Shutts, 472 U.S. at 808, 105 S.Ct. 2965. Thus "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though the plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Id.* at 811, 105 S.Ct. 2965. Nevertheless,

> [i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated under all circumstances", to apprise interested parties of

8. Instruments # 5796, 5799, 5800, 5815, 5816–36, 5839–40, 5845, 5849, 5852, 5856, 5864, 5866–69, 5872–72, 5875, 5877, 5879–82, 5884, 5886–88, 5890–5911, 5913, 5916–18, 5922, 5927, 5930–31, 5934, 5942–43, 5948–49, 5951, 5957, 5959, 5960, 5962,5963, 5964, 5967, and 5974.

> the pendency of the action and afford them an opportunity to present their objections.... The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 811–12, 105 S.Ct. 2965 [citations omitted]; *see also Silber v. Mabon*, 18 F.3d 1449, 1453–54 & n. 3 (9th Cir.1994) (applying *Shutts* in securities class action). Such reasonable notice and opportunity to opt out has been provided to out-of-state Class Members in this action.

B. Standard of Review for Fee Award

[4] "The standards employed calculating attorneys' fees awards are legal questions subject to plenary review, but '[t]he amount of a fee award ... is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir.2005), *quoting Pub. Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1184 (3d Cir. 1995). Thus the amount of an attorney's fee award by the district court is reviewed by the Fifth Circuit for abuse of discretion, while any fact finding underlying the award is reviewed for clear error. *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 850 (5th Cir.1998).

C. PSLRA and Fee Award

[5] As a threshold matter, some parties have argued the Private Securities Litigation Reform Act of 1995 limits the award of attorney's fees and costs and preempts the traditional approaches to calculating a fee award. The relevant statute provides, "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." *See* 15 U.S.C. § 78u–4(a)(6).[9]

The statute does not define "reasonable percentage." While the term expressly embraces the percentage method, the PSLRA does not prohibit the application of the lodestar method to fees as long as the result does not exceed a reasonable percentage of the class recovery. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 284–85 (3d Cir.2001) (citing H.R. Conf. Rep. 104–369) ("By not fixing the percentage of fees and costs counsel may receive, the Conference Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis. The Conference Committee does not intend to prohibit use of the lodestar approach as a means of calculating attorney's fees. The provision focuses on the final amount of fees awarded, not the means by which such fees are calculated."), *cert. denied sub nom. Mark v. Cal. Pub. Employees' Retirement System*, 535 U.S. 929, 122 S.Ct. 1300, 152 L.Ed.2d 212 (2002); *Rite Aid*, 396 F.3d at 300 ("We do not believe the Private Securities Litigation Reform Act precludes the use of the lodestar method as a check on the percentage-of-recovery calculation."); *Manual for Complex Litig.*

9. Lead Plaintiff's "share of any final judgment or of any settlement ... shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," although Lead Plaintiff may also recover "reasonable costs and expenses (including lost wages) directly relating to the representation of the class...." 15 U.S.C. § 78u–4 (a)(4).

Fourth ("MCL (Fourth)"), § 12.122 (Federal Judicial Center 2004) ("the lodestar is at least useful as a cross-check . . . using affidavits and other information provided by the fee applicant"). *See also* S.Rep. No. 104–98 at *12 (1995), U.S.Code Cong. & Admin.News 1995, p. 679 ("By not fixing the percentage of attorney's fees and costs that may be awarded, the Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis. The provision focuses on the final amount of damages awarded, not the means by which they are calculated.") As long as the resulting fee award is reasonable, it is not in violation of the PSLRA. The Advisory Committee Notes to Fed. R.Civ.P. 23(h), allowing an award of reasonable fees, states that the PSLRA "explicitly makes this factor a cap for a fee award in actions to which it applies."

It should also be noted that the statute empowers the Lead Plaintiff to choose and retain Lead Counsel, 15 U.S.C. § 78u–4 (a)(3)(B)(v), including to select payment by the percentage method, as long as the result is reasonable.

D. Federal Rule of Civil Procedure 23 and Court's Role

[6] Fed.R.Civ.P. 23(e)(2) requires that the district court, when asked to approve a proposed settlement that would bind class members, to hold a hearing and determine whether the settlement "is fair, reasonable and adequate." As part of its duty to independently review and approve class action settlement agreements under Fed. R.Civ.P. 23 for the protection of the absent class and the public, the district court "must assess the reasonableness of the attorneys' fees" and ensure that they are "divided up fairly among plaintiffs' counsel." *Strong v. BellSouth Telecommunications, Inc.,* 137 F.3d 844, 849 (5th Cir. 1998); *In re High Sulfur Content Gasoline Products Liability Litigation,* 517 F.3d 220, 227–28 (5th Cir.2008).

Federal Rule of Civil Procedure 23(e) states, "The claims, issues or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."

Federal Rule of Civil Procedure 23(h) addresses the issues of attorney's fees and nontaxable costs and provides in relevant part:

> In 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.** The following procedures apply:
>
> (1) A claim for an award must be made by motion under Rule 54(d) subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member; or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a) . . . .

Id. (emphasis added by the Court). The Advisory Committee Notes indicate that "an action certified as a class" includes cases where a class is certified for settlement purposes.

In a common fund case,[10] as noted by

10. Two exceptions to the American Rule that parties to a lawsuit generally pay their own expenses no matter which prevails are (1) statutes with fee-shifting provisions and (2) creation of a common fund for the benefit of a plaintiff class from which the court, exercising its equitable powers, can award plaintiffs' attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247–67, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Thus in the statutory fee shifting context, the unsuccessful litigant bears the burden of paying

the Third Circuit Task Force,[11]

> there is a greater need for the judge to act as a fiduciary for the beneficiaries (who are paying the fee), particularly in the class action situation, because few if any of the action's beneficiaries actually are before the court at the time the fees are set. Judicial scrutiny is necessary inasmuch as the fee will be paid out of the fund established by the litigation, in which the defendant no longer has any interest, and the plaintiff's attorney's financial interests conflict with those of the fund beneficiaries. As a result there is no adversary process that can be relied upon in the setting of a reasonable fee.

Report of the Third Circuit Task Force: Court Awarded Attorney Fees, 108 F.R.D. 237, 251 (1986). Furthermore, "the plaintiffs' attorney's role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." *Id.* at 255.

E. Fee Methodology, the PSLRA, and The Fifth Circuit

The two traditional methods employed by courts for determining an attorneys' fees award in common fund class action cases are (1) the percentage of the settlement fund (or contingent fee) method [12]

attorney's fees of the prevailing party, while in the common fund situation, the fee is taken from the common fund, diminishing the amount ultimately to be distributed to the plaintiff class members, i.e., as with a contingent fee, ''the plaintiff class pays its attorneys by sharing its recovery with them.'' *See, e.g., Skelton v. General Motors Corp.*, 860 F.2d 250, 251–53 (7th Cir.1989). The fee-shifting statutes were intended to ''encourag[e] the private prosecution of certain favored actions, by requiring defendants who have violated plaintiffs' rights to compensate plaintiffs for the costs they incurred to enforce those rights.'' *Id.* at 552–53. In contrast, the purpose of the ''common fund doctrine,'' or ''equitable fund doctrine,'' is ''to avoid the unjust enrichment of those who benefit from the fund . . . who otherwise would bear none of the litigation costs.'' *Report of the Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, 250 (1986) (''based on the equitable notion that those who have benefited from the litigation should share its costs.''). *See also Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882) (in accord with traditional practice in courts of equity, a litigant or 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); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478–79, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (same); *Skelton*, 860 F.2d at 252 (the common fund doctrine is based on the idea that not one plaintiff, but all ''those who have benefited from litigation should share its costs'').

11. In 1985, a task force appointed by the Third Circuit Court of Appeals under the direction of Harvard University Professor Arthur Miller issued an influential study that argued for use of the percentage fee method in common fund cases and pointed out deficiencies of the lodestar method. *Report of the Third Circuit Task Force: Court Awarded Attorney Fees* 108 F.R.D. 237, 246–59 (1986). The Honorable H. Lee Sarokin, one of Lead Counsel's expert witnesses, was for seventeen years a United States District Judge and a United States Circuit Judge on the Third Circuit Court of Appeals. *Inter alia*, he also chaired the Task Force and notes that the Report ''has been frequently used by both federal and state courts across the United States. It has also been cited as support for attorney fee awards in a multitude of published opinions.'' # 5819 at 3 (Copy of Report attached as Ex. B).

12. Some courts applying the percentage method have tried to establish a specific ''benchmark'' percentage, either a particular number or a range, subject to adjustments depending on the particular facts of the case, but the suggested benchmark figures have been quite disparate. *See, e.g., In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7–12 Litig.*, 447 F.Supp.2d 612, 629–30 (E.D.La.2006) (using 25% benchmark), *citing inter alia* MCL (4th) § 14.122 (a fee of 25% of the common fund ''represents a typical benchmark''); *Faircloth v. Certified Finance, Inc.*, No. Civ. A. 99–3097, 2001 WL 527489, *8–9 (E.D.La. 2001) (and cases cited therein); ''*MCL*

and/or (2) the lodestar method (multiplying the number of hours reasonably expended by a reasonable hourly rate and then, in its discretion, in the Fifth Circuit the Court can adjust the lodestar up or down by applying the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974)).[13] *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir., 1998); *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir.1990). As will be discussed, there are hybrid versions of the two.

1. Percentage Method

The United States Supreme Court has held that the application of the percentage method is proper for determination of a reasonable fee award in common fund cases. *Blum v. Stenson*, 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

The Third Circuit Task Force concluded that the percentage method has certain significant advantages over the lodestar approach in contingent common-fund cases. Recommending the use of the percentage method when a common settlement fund is created, the influential Third Circuit Task Force's Report determined that a lodestar approach (1) "*increases the workload of an already overtaxed judicial system*"; (2) is "*insufficiently objective and produce[s] results that are far from homogenous*"[14]; (3) "*creates a sense of mathematical precision that is unwar-*

(Fourth)", § 14.121 at 188–90. A typical benchmark in a common fund case is 25% of the fund, but "in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate. One court's survey of fee awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.925%." *MCL (Fourth)* § 14.121 at 188–89, *citing In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 339–40 (3d Cir.1998) (and cases cited therein). *See also Faircloth*, 2001 WL 527489 at *8 ("Recent study has cast doubt on the assumption that fees awarded in percentage of common fund cases generally adhere to a twenty-five to thirty percent 'benchmark.' Particularly in extremely large recovery cases, percentage recoveries have often been well below twenty-five percent."), *citing the following cases: In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 737–38 (3d Cir. 2001) (charting twelve cases in which fees ranging from 2.8% to 36% were a smaller percentage of the settlement because the total recovery was so large) (awarding 5.7%, at the low end of the range, but noting that higher awards in other cases were more justified by their facts than one would be in *Cendant*), *cert. denied*, 534 U.S. 889, 122 S.Ct. 202, 151 L.Ed.2d 143 (2001); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir.2000) (affirming fee award of 4 percent of the class recovery and rejecting counsel's objections to the fee as a substantial departure from the 25 percent "benchmark" in the profession); *In re Dreyfus Aggressive Growth Mutual Fund Litig.*, 2001 WL 709262, *4 (S.D.N.Y. June 22, 2001) (finding 30% of a common fund award "at the far end" of reasonableness for securities class actions, and awarding fees amounting to 15 percent of the fund); *In re Fine Host Corp. Sec. Litig.*, 2000 WL 33116538 (D.Conn. Nov. 8, 2000) (awarding fees amounting to 17.5% of the class recovery). *See also Di Giacomo v. Plains All American Pipeline*, Nos. Civ. A. H–99–4137 and H–99–4213, 2001 WL 34633373, *8 (S.D.Tex.2001) (applying *Johnson* factors to measure the reasonableness of a proposed benchmark).

13. This Court notes that the Advisory Committee Notes to Fed.R.Civ.P. 23(h) commented about the award of "reasonable" attorney fees,

> Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular there is some variation among courts about whether in "common fund" cases the court should use the lodestar or percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question of whether the lodestar or percentage approach should be viewed as preferable.

14. The Task force observed, "Widespread variations in fees awarded lawyers, often in the same community, by different judges and in

ranted in terms of the realities of the practice of law"; (4) *"is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount"*; (5) "encourages lawyers to expend excessive hours, . . . engage in duplicative and unjustified work, inflate their 'normal' billing rate, and include fictitious hours or hours already billed on other matters, perhaps in the hope of offsetting any hours the court may not allow"; (6) "creates a disincentive for early settlement of cases"; (7) *"does not provide the district court with enough flexibility to reward or deter lawyers to that desirable objectives, such as early settlement will be fostered"*; and (8) *"works to the particular disadvantage of the public interest bar"* by undermining the efficacy of many of the fee statutes that Congress has enacted because the lodestars in the "money" cases, such as securities, "are set higher than in cases under statutes promoting nonmonetary social objectives such as the Civil Rights Attorneys Fees Awards Act of 1976." 108 F.R.D. at 247–49 (emphasis in original).[15] The Third Circuit Task Force Report on *Selection of Class Counsel*, 208 F.R.D. 340, 421 (Jan. 15, 2002), asserts that "use of the lodestar may result in undercompensation of talented attorneys. Experienced practitioners know that a highly qualified and dedicated attorney may do more for a class in an hour than another attorney could do in ten. The lodestar can end up prejudicing lawyers who are more effective with a lesser expenditure of time." One treatise writer has observed, "A lodestar figure cannot fully compensate counsel" in a contingency common fund case "because the resulting amount does not reflect the risk of nonpayment and thus is not equal to the fair market value of the counsel's services." 1 Alba Conte, *Attorney Fee Awards* § 2.10 (database updated May 2007). Furthermore, risk must be assessed *ex ante*, from the outset of the case, not in hindsight. *In re Cardinal Health Inc. Sec. Litig.*, 528 F.Supp.2d 752, 758 (S.D.Ohio 2007), *citing In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir.2001).

Here the requested percentage (blended 9.52%) of the settlement fund was that set out in a fee agreement between Lead Plaintiff and Lead Counsel at the beginning of the litigation. The *Restatement (Third) of the Law Governing Lawyers* § 34 (2007) proposes that the court should examine three issues in evaluating the reasonableness of a fee agreement. "First, when the contract was made, did the lawyer afford the client a free and informed choice?" Some of the circumstances the court should consider include the sophistication of the client in entering into the agreement, whether the client had a reasonable opportunity to pursue other legal representation, and whether the lawyer sufficiently informed the client of the probable cost, the benefits and the drawbacks of the agreement. *Id.* "Fees agreed to by clients sophisticated in entering such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable." *Id.* The second issue is "does the contract provide for a fee within the range commonly charged by other lawyers in similar representations?" The court should compare the percentage in the contingent-fee contract before it with "percentages commonly used in similar repre-

different categories of cases, have led to a loss of predictability as to treatment as well as a loss of confidence in the integrity of the fee-setting procedure." 108 F.R.D. at 246–47.

15. The Task Force did recommend use of the lodestar method for determining fees under fee-shifting statutes, which have different purposes and underlying policies than a common fund.

sentations for similar services." *Id.* Third, did a subsequent change in circumstances make the fee contract unreasonable? *Id.* The Restatement observes, "Although reasonableness is usually assessed as of the time the contract was entered into, later events might be relevant." *Id.* "A contingent fee contract ... allocates to the lawyer the risk that the case will require much time and produce no recovery, and to the client the risk that the case will require little time and produce a substantial fee. Events within the range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made." *Id.*

Most federal courts use the percentage of the fund approach in awarding attorneys' fees in common fund classes. " 'Despite the apparent advantages of the percentage fee method over the lodestar method in common fund cases the law in the Fifth Circuit concerning which method should be applied is at best unclear.' " 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 14:10 Hybrid Class Actions (4th ed. Database updated June 2007), *quoting In re Harrah's Entertainment, Inc.*, No. Civ. A. 95–3925, 1998 WL 832574, *3 (E.D.La.1998) (citing *In re Combustion, Inc.*, 968 F.Supp. 1116, 1134 (W.D.La.1997)). Although the clear trend of the majority of courts in common fund cases is to use the percentage method, the Fifth Circuit has not expressly adopted such an approach. 4 *Newberg on Class Actions* § 14:10. Nor, for that matter, has it ever reversed a district court's application of the percentage method. *Shaw v. Toshiba America Information Systems*, 91 F.Supp.2d 942, 967, n. 15 (E.D.Tex.2000) ("Quite the contrary, in *Longden v. Sunderman*, 979 F.2d 1095[, 1100 n. 11] (5th Cir.1992), 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.' ").

2. Fee Agreements and the Fifth Circuit

Originally in *Johnson v. Georgia Highway* the Fifth Circuit applied the twelve factors in a statutory "fee-shifting" context. Subsequently, however, in *Hoffert v. General Motors Corp.*, 656 F.2d 161, 165 (5th Cir.1981), even though the parties had previously entered into a contingent fee agreement, the appellate panel applied the *Johnson* analysis to insure that the fee was "reasonable under all circumstances of the case, including the risk and uncertainty of compensation." Thus in *Hoffert* where a fee agreement existed, the Fifth Circuit "blended" the percentage fee award with the *Johnson* factors. *Strong*, 137 F.3d at 849 ("[A] district court is not bound by the agreement of the parties to the amount of attorneys' fees.... The court must scrutinize the agreed-to fees under the standards set forth in *Johnson* ... and not merely ratify a prearranged compact. [citations omitted]"), *citing inter alia Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir.) ("A district court is not bound by the agreement of the parties as to the amount of attorneys' fees.... In fixing the amount of attorneys' fees the court must, of course, take all of the Johnson criteria into account, including the difficulty of the case and the uncertainty of recovery. He is not, however, merely to ratify a pre-arranged compact.") (holding that by summarily approving attorney's fees in an unopposed settlement agreement the district court "abdicated its responsibility to assess the reasonableness of the attorneys' fees proposed under the settlement of a class action, and its approval of the settlement must be reversed on this ground alone."), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980). *See also Longden v. Sunderman*, 979 F.2d 1095, 1110 & n. 11 (5th Cir.1992) (affirming district court's use of percentage method

in evaluating fee petition where it was clear that the district court "had reviewed all of the relevant time and expense records before arriving at its conclusions, and that it had discussed each *Johnson* factor when it had ruled on the fee issue."). Nevertheless, the district court's "*Johnson* analysis 'need not be meticulously detailed to survive appellate review,' . . . [but] must be 'complete enough to assume a review which can determine whether the court has used proper factual criteria in exercising its discretion to fix just compensation.' [citations omitted]" *High Sulfur,* 517 F.3d at 228.

3. PSLRA

[7] At the same time, despite such conclusory remarks about application of the *Johnson* factors for fee awards in non-securities cases, it should be emphasized that the Fifth Circuit has never ruled on a fee award in a post-PSLRA securities class action case nor addressed the fact that the statute clearly permits Lead Plaintiff to choose how to retain Lead Counsel, including under a percentage-of-the-settlement-fund agreement, limited only by a requirement that the result be reasonable. 15 U.S.C. § 78u–4 (a) (3)(B)(v) (The properly selected lead plaintiff,[16] presumably the plaintiff with the greatest losses and usually a sophisticated, institutional investor, "shall, subject to the approval of the court, select and retain counsel to represent the class."); 15 U.S.C. § 78u–4(a)(6) ("Total attorney's fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of any damages and prejudgment interest actually paid to the class."); Declaration of Charles Silver, # 5906 at 6–9. This Court agrees with the Third Circuit Task Force Report on *Selection of Class Counsel,* 208 F.R.D. 340, 425–26 (Jan. 15, 2002), that

> deference to the empowered plaintiff's choice of *counsel* in PSLRA cases should extend to the *ex post* review of the fee agreement in those cases. The PSLRA establishes a model of client control that extends not only to appointment of counsel but also to monitoring of counsel and negotiation of the fee.[17] The Task Force concludes, therefore, that strict scrutiny of the fee agreement is inconsistent with the client-driven litigation model established in the PSLRA. . . . The fee reached by agreement between the "most adequate" plaintiff and counsel should be accepted by the court unless 1) it is clearly excessive; 2) it has been rendered unfair by unforeseen developments; or 3) it is found in an *ex post* review that the fee was not reached by arm's length negotiation between lead plaintiff and counsel.

Indeed, numerous district courts in this Circuit have applied the percentage method alone in awarding attorneys' fees in common fund cases under the PSLRA. *See, e.g., Shaw v. Toshiba America Information Systems,* 91 F.Supp.2d 942, 966–67 (E.D.Tex.2000) (listing twenty district court cases in the Fifth Circuit utilizing the percentage approach). Recently, in *In re Dynegy, Inc. Securities Litig.,* H–02–1571, Order Awarding Attorney's Fees and Reimbursement of Expenses, # 5817 (Compendium of Exhibits), Ex. C at 1, which was brought under the PSLRA,

16. The PSLRA requires the selection of the ''most adequate plaintiff,'' the one ''most capable of adequately representing the interests of class members,'' 15 U.S.C. § 78u–4(a)(3)(B)(I), the one who ''has the largest financial interest in the relief sought by the class'' and ''otherwise satisfies the requirements'' of Fed.R.Civ.P. 23. 15 U.S.C. § 78u–4 (a)(3)(B)(ii) and (iii)(I)(bb) and (cc).

17. The role of lead plaintiff under PSLRA is distinctively different from that in most class actions, wherein the first attorney to file suit is usually named lead counsel and basically controls the litigation.

Judge Lake expressly "adopt[ed] the percentage-of-recovery method of awarding attorneys' fees" under *Boeing,* 444 U.S. at 478, 100 S.Ct. 745, and *Blum v. Stenson,* 465 U.S. at 900 n. 16, 104 S.Ct. 1541, in a common fund securities action. Judge Lake stated that "the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is the proper approach," and awarded fees in the amount of 8.725% of the common fund in accord with the fee percentage [18] negotiated by Lead Plaintiff with Lead Counsel (also Coughlin Stoia) prior to their appointment by the Court. *See also Schwartz v. TXU Corp.,* 3:02CV2243–K, Order Awarding Attorneys' Fees and Reimbursement of Expenses, sl. op. at 2–3 (N.D.Tex. Nov. 8, 2005) ("awarding percentage fee negotiated between Lead Plaintiffs and Co–Lead Counsel," 22.2% of $149,740,000 settlement fund, and recognizing a "presumption that a 22.2% fee is . . . reasonable" and that a "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"), # 5817 (Compendium of Exhibits # 5817, Ex. D at 2–3).

4. Common Fund Cases

In addition to the PSLRA, whether the percentage is appropriate here depends on the existence of a common fund. Although opining in *Strong* (not a PSLRA securities suit, but an antitrust action) that the Fifth Circuit generally uses the lodestar method to assess an attorney's fee award in class actions, the Fifth Circuit distinguished that case by noting that the settlement in *Strong* had not produced "a traditional common fund"; specifically the panel highlighted the fact that the district court had "voiced concern that the $64 million 'common fund' figure was 'illusory' and refused to award anything in fees." 137 F.3d at 852, 848. Recognizing that the United States Supreme Court applied the percentage method to determine fees in a common fund class action in *Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (holding that as an exception to the American Rule that each litigant should bear his own attorney's fees, "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 that fund as a whole,[19] including the unclaimed portion"),

18. Expert Professor Charles Silver's report provides a chart demonstrating the breakdown of the fee in accordance with the graduating percentages agreed to by the parties and approved by Judge Lake. # 5822 at 32. The increasing fee schedule is similar to that in *Newby.* Lead Plaintiff and Lead Counsel in *Dynegy* were also The Regents and Milberg Weiss, respectively.

19. As noted earlier, the rationale for this equitable common fund doctrine or ''common benefit'' doctrine is that the successful class members who benefitted from the lawsuit would be unjustly enriched if their attorneys were not compensated by the fund created for these litigants. *Boeing,* 444 U.S. at 478, 100 S.Ct. 745; 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 13:76 (4th ed.2002). Specifically in a common fund case, charging the fund as a whole for the fees is justifiable since the costs of the litigation can be ''shifted with some exactitude to those benefitting'':

> [E]ach member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of a class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. This benefit devolves with certainty upon the identifiable persons whom the court has certified as members of the class. Although the full value of the benefit to

the Fifth Circuit questioned whether *Boeing* "has any application to a case such as this one, which uses the lodestar method," but declined to resolve that question. 137 F.3d at 852. Since there was no traditional common fund, the panel observed that "several courts have advocated the use of the lodestar method in lieu of the percentage of fund method precisely in the situation where the value of the settlement is difficult to ascertain, reasoning that there is a strong presumption that the lodestar is a reasonable fee." *Id.* at n. 5. It thus implied that the percentage method might be proper or more appropriate where each member of the class had an "undisputed and mathematically ascertainable claim to part of a judgment." *Id.* at 852, *quoting Boeing,* 444 U.S. at 479, 100 S.Ct. 745.

In several post-*Strong* cases, the trial judges have followed the suggestion in *Strong* that the Fifth Circuit may recognize the propriety of applying the percentage method where "each member of the class has an 'undisputed and mathematically ascertainable claim to part of [a] judgment.' " *Shaw,* 91 F.Supp.2d at 967–68, *quoting Harrah's,* No. Civ. A. 95–3925, 1998 WL 832574, *3–4 (*quoting Strong,* 137 F.3d at 852) (*quoting Boeing Co.,* 444 U.S. at 479, 100 S.Ct. 745).

In contrast to the unusual situation in *Strong,* in the *Newby* settlement the requested fees would come from a traditional common fund in which each member of the class has an "undisputed and mathematically ascertainable claim to part of a judgment." *Id.* Thus under *Strong,* using a percentage method in this common fund case would appear to be proper.

> each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of the claim bears to his total recovery. *Boeing,* 444 U.S. at 479, 100 S.Ct. 745.

5. Hybrid Approach

Yet the Fifth Circuit has several times come out with blanket pronouncements that it uses the lodestar method to assess attorneys' fees in class action suits, without mentioning a common fund or applying it to a PSLRA case. *See, e.g., Strong,* 137 F.3d at 850; *High Sulfur,* 517 F.3d at 228. As noted, none of these cases was a securities class action under the PSLRA.

In the wake of this uncertainty, some lower court in this Circuit, as well as the Tenth and Eleventh Circuit Courts of Appeals, have applied a hybrid approach, using some combination of a percentage and a "lodestar check." *See, e.g., In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7–12 Litigation,* 447 F.Supp.2d 612, 629 (E.D.La.2006) ("Under Fifth Circuit law, the Court has the flexibility to calculate fees based on the percentage method as long as it combines its determination with some analysis under the lodestar method."); *In re Bayou Sorrel Class Action,* No. 6:04CV1101, 2006 WL 3230771, *3–4 (W.D.La. Oct.31, 2006) (using percentage fee award within *Johnson* framework); *Shaw v. Toshiba America Information Systems, Inc.,* 91 F.Supp.2d 942, 968 (E.D.Tex.2000); *In re Catfish Antitrust Litig.,* 939 F.Supp. 493, 500 (N.D.Miss. 1996).[20]

The purpose of a lodestar cross-check of the results of a percentage fee award is to avoid windfall fees, i.e., to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *In re Cendant Corp. Sec. Litig.*

20. Here Lead Plaintiff has proposed the fee should be the approximately $688 million plus interest, the same as that set out in the fee agreement, states that the lodestar for work up until December 15, 2007 was $131,971,583.20, and under this formula, seeks a multiplier of 5.2.

("Cendant I"), 264 F.3d 201, 285 (3d Cir. 2001); *In re Cendant Corp. Sec. Litig. ("Cendant II"),* 404 F.3d 173, 188 (3d Cir. 2005). "A cross-check is performed by dividing the proposed fee award by the lodestar calculation, resulting in the lodestar multiplier." *In re AT & T Corp.,* 455 F.3d 160, 164 (3d Cir.2006). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N.Y.). Since the multiplier can then be "adjusted to account for particular circumstances, such as the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risks involved," if the court considers the multiplier too great, it should reduce the award. *Id.* at 164 & n. 4. It can also upwardly adjust the multiplier in rare and exceptional cases where such a modification is justified by specific evidence in the record and detailed findings by the court. *Id.* The "multiplier need not fall within any predefined range, provided that the District Court analysis justifies the award." *Rite Aid,* 396 F.3d at 307. "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. Even when the lodestar method is used only as a cross-check, 'courts must take care to explain how the application of a multiplier is justified by the facts of a particular case.' " *Id.,* at 306, *quoting In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions,* 148 F.3d 283, 333 (3d Cir.1998); *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 742 (3d Cir.2001).

It may be appropriate for the court to consider multipliers used in comparable cases. *Rite Aid,* 396 F.3d at 307 n. 17. The Third Circuit observed that " '[m]ultiples from one to four are frequently awarded in common fund cases when the lodestar method is applied.' " *PRIDES,* 243 F.3d at 742, *quoting Prudential,* 148 F.3d at 341, *quoting in turn* 3 Herbert Newberg & Alba Conte, Newberg on Class Actions, § 14.03 at 14–15 (3d ed.1992). In the Rite–Aid litigation, the district court ultimately awarded a lodestar multiplier of 6.96. *In re Rite Aid Sec. Litig.,* 362 F.Supp.2d 587 (E.D.Pa.2005) (awarding 25% of the settlement fund of $126,800,000 and 6.96 multiplier). In *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 n. 6 (9th Cir.2002), the Ninth Circuit performed a survey of multipliers and found "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0 and 4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range." Nevertheless, insisting that the court must consider all relevant circumstances in determining the amount of a fee award, the Ninth Circuit affirmed the district court' increase of the standard benchmark of 25% to 28% in the fee award because of exceptional results, high risk, the wide-spread benefits of the litigation, and the market rate. *Id.* at 1048–49.

The Third Circuit is lenient in the kind of cross-check required: "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid,* 396 F.3d at 306–07. The Second Circuit has also concluded, "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000), *citing In re Prudential Ins. Co. Am. Sales Litig.,* 148 F.3d 283, 342 (3d Cir.1998). Instead, the court can measure the claimed lodestar by its own familiarity with the case. *Goldberger,* 209 F.3d at

50.[21] The Fifth Circuit has never indicated that it would relax a lodestar calculation, so this Court has performed a detailed examination in spot checks of the records, though not exhaustive examination of each entry, relying also on the affidavits and declarations submitted by Class Counsel, and has used the *Johnson* factors endorsed by the Fifth Circuit.

As a variation on the percentage calculation, some district judges first establish a benchmark and then adjust it down or up based on analysis of the *Johnson* factors. *Shaw,* 91 F.Supp.2d at 968. *See, e.g., Harrah's,* 1998 WL 832574 (setting a benchmark fee of twenty-five percent and adjusting it according to *Johnson* factors, including time expended); *In re Lease Oil Antitrust Litig.,* 186 F.R.D. 403, 447–48 (S.D.Tex.1999) (25% benchmark). A few Circuit Courts of Appeals utilize a percentage of fund method with a lodestar cross-check to evaluate a fee request in a common fund case. *See, e.g., In re AT & T Corp.,* 455 F.3d 160, 164 (3d Cir.2006)[22]; *United States v. 8.0 Acres of Land,* 197 F.3d 24, 33 (1st Cir.1999). *See also Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436 (2d Cir.2007) (affirming district court's percentage of fund method cross-checked by application of the lodestar method to determine reasonable fee award, but also permitting courts to use the lodestar approach alone in common fund cases); *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047, 1050 (9th Cir.2002) (concluding that the district court has the discretion to choose either the percentage or the lodestar method and proving the district court's application of the lodestar method as a cross-check of the percentage method).

6. Megafund Rule

Some courts have recognized a "megafund rule" requiring a fee percentage to be capped at a low figure when the recovery is quite high, but the appellate courts that have examined such an approach have rejected it as a blanket rule. *See, e.g., In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001) (court must award counsel at the market rate for legal services); *Rite Aid Corp.,* 396 F.3d at 303–03 & n. 12 (while Third Circuit has held that "it may be appropriate for percentage fees awarded in large recovery cases to be smaller in percentage terms than those with smaller recoveries . . . [b]ut there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizeable fund"; endorsing instead

21. Accordingly this Court does not think that the Fifth Circuit would go so far as to accord a presumption of reasonableness to a fee request based on a fee or retainer agreement between a properly-selected lead plaintiff and lead counsel, discussed *infra,* but would more likely require some consideration of the fee agreement for reasonableness under the *Johnson* factors. *See, e.g., In re Cendant Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001). The Fifth Circuit does presume that a calculated lodestar is a reasonable fee, yet it, too, must be examined accordingly. *Walker v. Dept. of HUD,* 99 F.3d 761, 771 (5th Cir.1996).

22. Moreover, a number of courts applying the percentage of fund method have used the Third Circuit's seven-factor-test for determining the percentage, set out in *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000):(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) awards in similar cases. *See, e.g., Di Giacomo v. Plains All American Pipeline,* Nos. Civ. A. H–99–4137 and H–99–4213, 2001 WL 34633373, *9 (S.D.Tex.2001) (Rosenthal, J.) (applying *Gunter* factors to determine percentage and then the *Johnson* factors as a lodestar cross-check to ensure the percentage fee award is not unreasonably high).

a fact-intensive analysis). A mechanical, a *per se* application of the "megafund rule" is not necessarily reasonable under the circumstances of a case. The Fifth Circuit does not appear to have addressed the issue of capping attorney's fees in a megafund class action, no less a post-PSLRA megafund securities class action, but the megafund rule is contrary to the Fifth Circuit's approach that the district court scrutinize each case for the particular facts that will determine what constitutes a reasonable fee award. *See also Rite Aid*, 396 F.3d at 302 ("[T]here is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizeable fund. Put simply, the declining percentage concept does not trump the fact-intensive ... analysis. We have generally cautioned against overly formulaic approaches in assessing and determining the amounts and reasonableness of attorney's fees."). A firm charging a higher fee may earn proportionally more for the class than one that charges less. *See, e.g., Third Circuit Task Force Report*, 108 F.R.D. 340, 373 (2002).[23] A number of district courts have also rejected a rule requiring decreasing the fee percentage as the recovery grows larger. *See, e.g., Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1212–13 (S.D.Fla.2006) (and cases cited therein); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ. A. 03–4578, 2005 WL 1213926, *9–10 (E.D.Pa. May 10, 2005) (rejecting formulaic application of declining reduction to award of attorneys' fees).

7. Reasonable Hourly Rate

[8, 9] As noted, the lodestar is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate in the community for such legal services rendered by attorneys of comparable skill, experience, and reputation. *Alberti v. Klevenhagen*, 896 F.2d 927, 936, *vacated in part on other grounds*, 903 F.2d 352 (5th Cir.1990) (vacating its own reversal of district court's enhancement of the hourly rate for case undesirability and affirming as reasonable that enhancement to attract qualified counsel); *Heidtman v. County of El Paso*, 171 F.3d 1038, 1043 (5th Cir.1999) A reasonable hourly rate should be in accord with rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895–96 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). "A reasonable hourly rate is determined with reference to the prevailing market rate in the relevant legal community for similar work.... While the hourly rate must be 'adequate to attract competent counsel,' the 'measure is not the rates which lions at the bar may command.' " *Coleman v. Houston Independent School District*, 202 F.3d 264, 1999 WL 1131554 (5th Cir.1999) (Table) (available on Westlaw), *citing Leroy v. City of Houston*, 906 F.2d 1068, 1079 (5th Cir.1990). The relevant legal community is the one in which the district court sits, no matter how much of the work is done elsewhere. *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 662 (5th Cir.2002), *abrogated on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In addition to the community rate, the district court must also consider the attor-

23. Coughlin Stoia seek a higher percentage fee than most attorneys have been granted in the last few megafund securities cases with the exception of *Tyco* (14.5%), but 9.52% is still a low percentage in comparison with those in security class actions generally and over a longer time period. Moreover, as will be discussed, the Court finds that the firm obtained exceptional results that justify such a fee, and their results demonstrate why the firm is so highly respected and feared in the securities field.

neys' regular rates. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 328 (5th Cir.1995). There is a strong presumption that the lodestar is a reasonable fee, and the fee applicant bears the burden of demonstrating that an adjustment by application of the *Johnson* factors is necessary to calculate a reasonable fee. *Walker v. Dept. of HUD*, 99 F.3d 761, 771 (5th Cir.1996).

8. *Johnson* Factors and the Multiplier

[10] The twelve *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

While the lodestar is relevant to determining a fee award, it is not the sole basis for determining that award; the *Johnson* factors are applicable to deciding whether the lodestar is reasonable, as well as to adjusting that award by a multiplier once the lodestar is calculated. *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 536 (5th Cir.1986) ("The time and hours spent on a case are a necessary ingredient in determining a fee award, but they should not be the sole basis for determining a fee. The *Johnson* factors govern the determination of reasonableness itself; they are not merely factors to be considered in adjusting the award once the lodestar is calculated."), *citing Johnson v. Georgia Highway Express*, 488 F.2d at 717.

[11, 12] Compensable hours, reasonably spent, are determined from the attorney's time records. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Usually courts require the applicant to provide contemporaneous time or billing records or other documentation which the district court must examine and discern which hours are compensable and which are not. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.), *cert denied*, 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 113 (1995). Counsel must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary ...." *Id.* The fee applicant bears the burden of showing that the hours claimed were reasonably expended. *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. *See also Saizan v. Delta Concrete Products Company*, 448 F.3d 795, 799 (5th Cir. 2006) ("[P]laintiffs seeking attorney's fees are charged with the burden of showing the reasonableness of the hours billed and, therefore, are also charged with proving they exercised billing judgment. Billing judgment requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant. The proper remedy for omitting evidence of billing judgment does not include a denial of fees but, rather, a reduction of the award by a percentage intended to substitute for the exercise of billing judgment. [footnotes omitted]"). *See also Louisiana Power*, 50 F.3d at 324–25 ("[T]he documentation must be sufficient for the court to verify that the applicant has met its burden.... [A] district court may reduce the number of hours awarded if the documentation is *vague* or *incomplete*.... Failing to provide contemporaneous billing statements does not preclude an award of fees per se as long as the evidence produced is adequate to determine reasonable hours."); *Saizan*, 448 F.3d at 799, 800 (billing judgment requires documentation of the hours

charged and of the hours written off as duplicative, unproductive or excessive; finding the district court did not commit clear error in finding a failure to produce evidence of billing judgment nor abuse its discretion by imposing a ten percent reduction in the lodestar because of that failure).

Furthermore, "[i]f more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do may be obviously discounted." *Abrams*, 805 F.2d at 535. "[H]ours . . . spent in the passive role of an observer while other attorneys perform" are usually not billable. *Flowers v. Wiley*, 675 F.2d 704, 705 (5th Cir.1982), *quoted in Coleman*, 202 F.3d at 264, 1999 WL 1131554 (Table, available on Westlaw). "Litigants take their chances when submitting fee applications" without adequate information for the court to determine the reasonableness of the hours expended or with vaguely described tasks such as "review pleadings," "correspondence," or documents. *Louisiana Power*, 50 F.3d at 327.

[13] The hourly rate for attorneys should not be applied to clerical, secretarial or administrative work, since these are part of office overhead. *Reyes v. Spur Discount Store No. 4*, Civ. A. No. 07–2717, 2007 WL 2571905, *3 & nn. 19–20 (E.D.La. Aug.31, 2007); *Abrams*, 805 F.2d at 536 (court should consider whether the work performed was " 'legal work in the strict sense,' or was merely clerical work that happened to be performed by a lawyer."), *quoting Johnson v. Georgia Highway Express*, 488 F.2d at 717. "[I]nvestigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers, but which a lawyer may do because he has no other help available . . . may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Id.* at 535. Work by paralegals may only be recovered to the extent that it is similar to that typically performed by attorneys; otherwise it is an unrecoverable overhead expense. *Coleman*, 202 F.3d 264, *citing Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982).

[14] Generally in the Fifth Circuit the determination of a reasonable hourly rate for attorneys in a particular community is established by affidavits of other attorneys of similar caliber practicing in that community. *Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir.1993); *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir.2002). "The evidence to support an hourly rate entails more than an affidavit of the attorney performing the work but must also address the rates actually billed and paid in similar lawsuits." *Watkins v. Input/Output, Inc.*, 531 F.Supp.2d 777, 784 (S.D.Tex.2007).

[15] As noted, based on one or more *Johnson* factors, the court may apply a multiplier to adjust the lodestar up or down if that factor or factors are not already taken into account by the lodestar, itself. *Strong*, 137 F.3d at 850. An adjustment may only be made if the *Johnson* factor has not already been accounted for in the lodestar. *In re Fender*, 12 F.3d 480, 487 (5th Cir.), *cert. denied*, 511 U.S. 1143, 114 S.Ct. 2165, 128 L.Ed.2d 888 (1994); *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir.) ("[T]he district court must be careful . . . not to double count a *Johnson* factor already considered in calculating the lodestar when it determines the necessary adjustments."), *cert. denied*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993).

[16] Four of the *Johnson* factors are presumably included in the lodestar calculation: the novelty and complexity of the issues, the special skill and experience of

counsel, quality of representation, and the results obtained from the litigation. *Blum v. Stenson*, 465 U.S. 886, 898–99, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Shipes*, 987 F.2d at 320.[24] "Although upward adjustments of the lodestar figure based on these factors are still permissible, such modifications are proper only in certain rare and exceptional cases supported by specific evidence on the record and detailed findings by the lower courts." *Id.*; see also *Walker*, 99 F.3d at 771, *citing Alberti v. Klevenhagen*, 896 F.2d 927, 936 (*citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley I")*, 478 U.S. 546, 564–65, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)) (*quoting Blum v. Stenson*, 465 U.S. 886, 898–900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 323–24 (W.D.Tex.2007). The Fifth Circuit has also held that two other factors, time limitations imposed by the client or the circumstances and preclusion of other employment, are generally subsumed in the lodestar calculation, too. *Shipes*, 987 F.2d at 321–22; *Heidtman v. City of El Paso*, 171 F.3d 1038, 1043 (5th Cir.1999). Increasing the fee award based on the eighth factor (the amount involved and the results obtained) is only proper when the applicant shows that "it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result . . . ." *Shipes*, 987 F.2d at 322. The *Shipes* panel did state that "enhancement due to the results obtained may be warranted." *Id.* at 321.

9. Enhancement: *City of Burlington v. Dague* and Fee–Shifting–Statute versus Common–Fund Cases

[17] Relating to the sixth *Johnson* factor, whether the fee is fixed or contingent, in *City of Burlington v. Dague*, 505 U.S. 557, 567, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), the Supreme Court has held that enhancement of the lodestar by a multiplier based on the contingent nature of a fee is not allowed when fees are awarded to plaintiffs' counsel under fee-shifting provisions of statutes.

Several Circuit Courts of Appeals and some district courts that have examined the language in *Dague* and the policy behind its holding have concluded that because of key differences between fee-shifting and common-fund cases, *Dague* does not apply to common-fund class action settlement cases. The leading case is *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564–65 (7th Cir.1994). This Court is persuaded by the reasoning in *Florin* and progeny.

In *Dague*, the Supreme Court reiterated its earlier rulings that in typical federal statutory fee-shifting cases there is a "strong presumption" that the lodestar by

24. For example, in *Shipes*, the Fifth Circuit reviewed a district court's enhancement of the "lodestar amount based on the novelty and difficulty of the case because it found that there were over three hundred plaintiffs, an entire spectrum of employment decisions was being challenged, the case was complex and highly technical, and Trinity's obstinate conduct caused additional difficulties." 987 F.2d at 321. The panel opined,

> These factors—not so uncommon in much present-day litigation—simply do not render a case "rare" or "exceptional" for purposes of enhancing the lodestar amount. All counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate, based on fees for counsel of similar experience and ability. Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed-hours for which the attorney is compensated in the lodestar amount. Similarly, obstinate conduct by opposite counsel is compensated by the additional number of hours that are required to prevail over such obstinacy.

Id.

itself represents a "reasonable fee" and that an applicant seeking more money must establish that " 'such an adjustment is *necessary* to the determination of a reasonable fee.' ". 505 U.S. at 562, 112 S.Ct. 2638, *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 733, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), and *Blum v. Stenson,* 465 U.S. at 898, 104 S.Ct. 1541. Opining that "an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar, the high court noted that the risk of losing a case is the product of two factors: the relative legal and factual merits of the claim and the difficulty of demonstrating those merits". *Id.* at 562, 112 S.Ct. 2638. The latter factor is usually subsumed in the lodestar, either in the number of hours expended on the suit or in the hour rate of the attorney adequately skilled and experienced to prove those merits. *Id.* The first factor is not subsumed in the lodestar, but the Supreme Court found good reason it should not be used to enhance the lodestar figure. *Id.* Because relative merits are a factor in every case since no claim has a 100% chance of success, "computation of the lodestar would never end the court's inquiry in contingent-fee cases." *Id.* Furthermore,

> the consequence of awarding contingency enhancement to take account of this 'merits' factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference would disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well.

Id. at 563, 112 S.Ct. 2638.

Previously, in *Delaware Valley,* 483 U.S. at 725, 107 S.Ct. 3078, in a "closely related" argument that the *Dague* Court expressly adopted, 505 U.S. at 567, 112 S.Ct. 2638, Justice White had insisted that because contingency enhancement is based on the weakness of the plaintiff's case, it "penalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases. . . ." The Dague Court's commented that the fee-shifting statutes were not intended to act " 'as a form of economic relief to improve the financial lot of lawyers.' " *Id.* at 563, 112 S.Ct. 2638 [citation omitted].

Instead, discussing reasons why contingency enhancement is incompatible with typical fee-shifting statutes, the Supreme Court in *Dague* observed that the fee-shifting statutory language usually limits fee awards to "prevailing," or substantially prevailing, parties, and thus bars a prevailing plaintiff from recovering fees on claims on which he lost; therefore "it should bar a prevailing plaintiff from recovering for the risk of loss." *Dague,* 505 U.S. at 565, 112 S.Ct. 2638, *citing Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, and *Delaware Valley,* 483 U.S. at 719–20, 107 S.Ct. 3078. An attorney working on a contingency basis usually pools the risks of his various cases and relies on those in which he is successful to pay for the time he risked on those which were not. Therefore, under a fee-shifting statute, enhancing a lodestar for risk

"would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail." *Id.* The Supreme Court, noting that it has "generally turned away from the contingent-fee model . . . to the lodestar model" in determining fee awards under fee-shifting statutes, concluded that engrafting a contingency enhancement onto a lodestar model would result in "a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee." 505 U.S. at 565–66, 112 S.Ct. 2638.

In *Florin*, brought under the Employee Retirement Income Security Act ("ERISA") and relying heavily on *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir.1989), the Seventh Circuit focused on a fee award to be paid, under equitable principles, out of a common fund created by a settlement of a class action suit, and not under ERISA's fee-shifting provision, 29 U.S.C. § 1132(g). 34 F.3d at 563. At issue was whether the district court had abused its discretion by failing to award appellants a multiplier for risk. *Id.* The district court had calculated a lodestar using counsel's usual hourly rate and the hours documented by the attorneys, but found that there was "no compelling reason" to apply a risk multiplier requested by the attorneys. Acknowledging that *Dague* "has been interpreted to preclude generally the use of risk multipliers in fee-shifting cases," the Seventh Circuit concluded that "*Dague*, by its terms, applies only to statutory fee-shifting cases, and its reasoning is largely based on the statutory language of fee-shifting provision"; moreover the policy considerations informing the *Dague* decision "have little force in common fund cases." *Id.* at 564. Earlier, in *Skelton*, the Seventh Circuit opined that in statutory fee-shifting cases, awarding risk multipliers to prevailing plaintiffs may unfairly burden defendants because the risk multipliers have a tendency to penalize those with the strongest defenses, which increase the risk for the attorney bringing the suit. *Skelton*, 860 F.2d at 253. In a common fund case this inequitable burden on defendants will not exist because the plaintiff class is responsible for compensating its attorneys by sharing in its recovery. *Id.* Furthermore, in the fee-shifting context, "assessing risk multipliers against losing defendants in effect requires these defendants to 'subsidize' plaintiffs' lawyers for their unsuccessful lawsuits against other defendants. In statutory fee-shifting cases, this is 'manifestly inconsistent with Congress' intent to award attorney's fees only to prevailing parties.' " *Id.* at 253–54, *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 720, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). In *Florin*, the Seventh Circuit panel pointed out that unlike in fee-shifting cases, in common-fund actions because a fee award with compensation for risk is ultimately charged against the plaintiffs' common fund, because the defendant has been released from liability in return for establishing the fund, and because the defendant's liability is therefore limited to the amount in that fund, there is no direct or immediate danger of unduly burdening the defendant with a multiplier to compensate for risk. 34 F.3d at 565. Nor can the defendants in common-fund cases be seen as subsidizing unsuccessful lawsuits against other defendants. *Id.* Finally, the panel observed that in pre-*Dague* cases, the Seventh Circuit had required that a risk multiplier be used if the court found that counsel " 'had no sure source of compensation for their services' . . . . Moreover . . . 'the need for such an adjustment is particularly acute in class action suits. The lawyers

for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.' " *Id.* at 565, *citing In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir.1992).

In *McLendon v. Continental Group, Inc.*, 872 F.Supp. 142 (D.N.J.1994) (agreeing with *Florin*), Judge H. Lee Sarokin, then United States Judge for the Third Circuit Court of Appeals, sitting by designation in the United States District Court for the District of New Jersey, agreed with the analysis in *Florin:*

> This court is persuaded by this line of reasoning. First, it is unlikely that attorneys will find sufficient incentive to bring even highly meritorious suits that are also complex, innovative, and lengthy if they will at best recover merely their regular hourly rates if they prevail, and nothing if they do not. Second, numerous differences between statutory fee and common fund cases render much of the reasoning in the statutory fees cases inapplicable to the common fund context. Third, as noted in *Florin*, defendants' interests are amply protected in common fund settlements.

McLendon, 872 F.Supp. at 155–56. Judge Sarokin noted that the argument that enhancing an award for contingency would disproportionately penalize the defendants with the best cases is inapplicable when the plaintiffs rather than the defendants pay the fees. *Id.* at 156. He highlighted the different rationales behind the two types of fee awards: "Fee-shifting provisions are designed 'to encourage private enforcement of statutory substantive rights' " by imposing payment of plaintiffs' costs on defendants who violated those rights and allowing those plaintiffs to obtain counsel and not have their awards diminished by the expense of obtaining counsel [25]; "in contrast common-fund awards are 'based on the equitable notion that those who have benefitted from the litigation should share in its costs.' " *Id.*, citing *Task Force Report*, 108 F.R.D. at 250, and *Skelton*, 860 F.2d at 252. Moreover Judge Sarokin further distinguished fee-shifting cases, in which the right to fees belongs to the successful plaintiff, from common-fund cases, in which the attorney has the right to claim a portion of the fund. *Id.*

Progeny of *Florin* include *In re Washington Public Power Supply System Securities Litig.*, 19 F.3d 1291, 1299–1301 (9th Cir.1994) ("[B]ecause we find *Dagues'* reasoning inapposite in the common fund context, we hold that district courts have discretion to use risk multipliers to enhance the lodestar in common fund cases."); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 308 (1st Cir.1995) (permitting court to decide which method, percentage or lodestar, best fits common fund cases and rejecting application of *Dague* to common fund cases; "*Dague*, fairly read, does not require abandonment of the POF [per-

25. Fee-shifting statutes often apply to causes of action that result in nonmonetary relief or very modest monetary recoveries that are inadequate to provide a reasonable percentage fee. Thus to attract lawyers to represent plaintiffs and deter wrongdoing in such causes of action, the United States Supreme Court endorsed the use of the lodestar method, which is based on reasonable hours expended multiplied by prevailing market rates, adjusted for factors like delayed payment, partial success, etc., to be paid by nonprevailing defendants. Alba Conte, 1 Attorney Fee Awards § 2:5 (3d ed. Database updated May 2007). In application of the lodestar method under a fee-shifting statute, fee awards are not limited to the amount of money recovered for the plaintiffs and do not need to be proportional, unlike common-fund fee awards, which are paid proportionally by each class member. *Id.* from common-fund cases, in which the attorney has the right to claim a portion of the fund. *Id.*

centage of fund] method typically used in common fund cases"); *Rawlings v. Prudential–Bache Props., Inc.,* 9 F.3d 513, 516–17 (6th Cir.1993) (in common fund case allowing court to decide whether to use POF method, which "more accurately reflects the results achieved," or the lodestar method, which "better accounts for the amount of work done"); *Cook v. Niedert,* 142 F.3d 1004, 1014–15 (7th Cir.1998); *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1267–70, 1273 (D.C.Cir.1993); *DeHoyos v. Allstate Corp.,* 240 F.R.D. 269, 329–30 (W.D.Tex.2007); *In re Bausch & Lomb, Inc. Sec. Litig.,* 183 F.R.D. 78, 86–87 (W.D.N.Y.1998) (agreeing with *Florin* and *Washington Public Power Supply*); *Dubin v. E.F. Hutton Group, Inc.,* 845 F.Supp. 1004, 1014 (S.D.N.Y.1994) (in the absence of any ruling by the Second Circuit, holding that risk multipliers are appropriate in common fund cases as long as the court examines the action to avoid rewarding attorneys for bringing cases of "dubious merit" and determines "as a matter of public policy, it is the type of case worthy of judicial encouragement"), *citing In re Agent Orange Product Liability Litig.,* 818 F.2d 226, 234 n. 2, 236 (2d Cir. 1987) ("equitable fund cases may afford courts more leeway in enhancing the lodestar, given the absence of any legislative directive"). *See also* 1 Alba Conte, JD, *Attorney Fee Awards* § 2:10, Ch. 2 ("Common Fund–Fee Awards") (3d ed.2007).[26] While the Fifth Circuit has not directly addressed the issue, in a post-*Dague,* but pre-PSLRA, case, *Longden v. Sunderman,* 979 F.2d 1095, 1099 (5th Cir.1992), a common-fund case, it used the lodestar approach with multipliers, including one for risk, to determine a fee award.

This Court notes that under the reasoning of *Florin* and progeny, the *Dague* opinion is not inconsistent with earlier Supreme Court opinions. In *Blum v. Stenson,* a 1984 opinion, in dicta the Supreme Court observed, "Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the fee-shifting statute before the Court] reflects the amount of attorney time reasonably expended in the litigation." 465 U.S. at 900 n. 16, 104 S.Ct. 1541. In *Boeing,* issued in 1980, the Supreme Court had affirmed a fee award decided by the percentage method in a common fund case. 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676. *See Swedish Hospital,* 1 F.3d at 1267–68.

This Court agrees with the reasoning of *Florin* and concludes that, as a matter of law, the holding in *Dague* does not apply to a common-fund case.

10. Enhancement Requirements

[18] To enhance a lodestar, the court " 'must explain with a reasonable degree of specificity the findings and reasons upon which the award is based, including an indication of how each of the *Johnson* factors was applied.' " *Id., quoting Shipes,* 987 F.2d at 320. "[O]f the Johnson factors, the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." *Migis v. Pearle Vision,* 135 F.3d 1041, 1047 (5th Cir.1998), *citing Von Clark v. Butler,* 916 F.2d 255, 258 (5th Cir.1990); *Saizan v. Delta Concrete Products Co.,* 448 F.3d 795, 799 (5th Cir.2006). "The most critical factor in determining an attorney's fee award is the 'degree of success obtained.' " *Singer v. City of Waco, Texas,* 324 F.3d 813, 829

26. *But see* two cases that have applied Dague to common funds: *In re Bolar Pharmaceutical Co. Inc. Sec. Litig.,* 800 F.Supp. 1091 (E.D.N.Y.1992), and *Nensel v. Peoples Heritage Financial Group,* 815 F.Supp. 26 (D.Me. 1993).

(5th Cir.2003), *quoting Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Saizan,* 448 F.3d at 800 & n. 19. "This factor is particularly crucial when, as in this case, a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims." *Jason D.W. by Douglas W. v. Houston Indep. Sch. Dist.,* 158 F.3d 205, 209 (5th Cir.1998), *citing Hensley,* 461 U.S. at 434, 103 S.Ct. 1933.

In 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure Civ.3d* § 1803.1 (Database current through 2008), in discussing what factors may be taken into account to adjust a lodestar, Charles Alan Wright also identified as the most significant one, the benefit (monetary or otherwise) conferred. Wright further observed,

> In addition to the benefit conferred, the district court should make a qualitative appraisal of the petitioning lawyer's professional services under each of the categories of work reflected in the time records. This might include the following series of inquiries, First, to what extent do the petitioning attorney's credentials and legal experience mark the attorney as someone above the qualitative medium of those of comparable age practicing in the community? Second, what was the quality of the work the attorney actually performed in the case? Third, how efficient was the petitioning attorney in processing the lawsuit? This factor can only be considered by a careful examination of the novelty of the issues presented by the matter and the lawsuit's overall complexity.... Fourth, what responsibility did the petitioning attorney assume in the development and management of the case? .... All of these factors should help the court in evaluating the quality of the representation.

Id. Regarding enhancement of the lodestar because of a contingency element, Wright emphasized that in class action litigation, the plaintiff's attorney does not receive compensation until the lawsuit is concluded, and only then if he successfully obtains a judgment or settlement for the class. *Id.* Thus the court should not merely "guess-timate" *ex post facto* the likelihood of the plaintiff's ultimately succeeding, but "should look at the costs and impact on the lawyers of undertaking the case on a contingency basis, inquiring into the extent to which it required significant resources to be allocated to the case. An important consideration in this regard is the length of time that elapsed between the commencement of the litigation and the fee award, as well as whether it was foreseeable that the litigation would be protracted." *Id.* Moreover in appraising the risk, the court should "evaluat[e] the character of the defense," i.e., focus on the "degree to which the protraction in the case is attributable to the tactical maneuvers of the defendants" and "the professional quality of the defense." *Id.*

11. Burden of Proof

Lead Counsel bears the burden of demonstrating that the requested fee award is reasonable, of adequately documenting the attorney's time records, and producing evidence, such as affidavits, declarations, etc. to demonstrate the rates are in accord with "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Purdie v. Ace Cash Express, Inc.,* No. Civ. A. 301CV1754L, 2003 WL 22976611, *8 (N.D.Tex. Dec.11, 2003) (and cases cited therein). Evidence of the reasonableness of a proposed hourly rate must include an affidavit of the attorney performing the work and information about rates actually billed and paid in similar lawsuits. *Blum,* 465 U.S. at 896, 104 S.Ct. 1541 m.11. Appropriate rates can be determined through direct or opinion evi-

dence about what local attorneys charge under similar circumstances. *Norman v. Housing Authority of City of Montgomery,* 836 F.2d 1292 (11th Cir.1988).

12. Compensating for Delay in Payment

One accepted method of compensating for a long delay in paying for attorneys' services is to use their current billing rates in calculating the lodestar. *Missouri v. Jenkins,* 491 U.S. 274, 283–84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). *See also Islamic Center of Mississippi, Inc. v. City of Starkville, Miss.,* 876 F.2d 465, 473–74 (5th Cir.1989) (alternatively, calculate the lodestar using historical billing rates and compensate by increasing the lodestar by the rate of inflation from the time services were provided to the date of judgment or, if the attorneys' rates have not changed over time, compensate for lost time-value by granting a delay enhancement with an explanation how it recompenses counsel for that lost-time value), *impliedly abrogated on other grounds, City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

13. Non–Class Counsel, The Common Fund Doctrine, and The PSLRA

The Third Circuit, in a very thoughtful and persuasive opinion, has directly addressed the issues of (1) whether the Court in its discretion may award fees from the common fund to non-class counsel who provided legal services to the class action, and (2) as the only appellate court to do so, whether or to what extent the common fund doctrine survives the enactment of the PSLRA. *Cendant II,* 404 F.3d 173 (3d Cir.2005). The equitable and flexible common fund doctrine " 'provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation including attorney's fees.' " *Id.* at 187, *citing In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 820 n. 39 (3d Cir.1995), and *Boeing,* 444 U.S. at 478–79, 100 S.Ct. 745. The panel commented,

> The cases are unanimous that simply *doing* work on behalf of the class does not create a right to compensation; the focus is on whether the work provided a benefit to the class.... No-lead counsel will have to demonstrate that their work conferred a benefit on the class *beyond* that conferred by lead counsel. Work that is duplicative of the efforts of lead counsel—e.g., where non-lead counsel is merely monitoring appointed lead counsel's representation of the class, or where multiple firms, in their efforts to become lead counsel, filed complaints and otherwise prosecuted the early stages of the litigation—will not normally be compensated.

Id. at 191.[27]

Emphasizing the effect of the PSLRA, the Third Circuit panel noted that the statute "creates an exclusive mechanism for appointing and compensating class counsel in securities class actions." *Id.* at 189. "[S]hift[ing] the balance of power away from plaintiffs' attorneys, who tradi-

27. The Third Circuit opined,

> If a hundred lawyers each perform admirable but identical work on behalf of a class before the appointment of the lead plaintiff, the court should not award fees to each of the lawyers, as this would overincentivize duplicative work. Instead, while all of lead counsel's work will likely be compensable, ... other attorneys who merely duplicated that work—however noble their intentions, and however diligent their efforts, and however outstanding their product—will not be entitled to compensation. Only those who confer an independent benefit upon the class will merit compensation.

404 F.3d at 197.

tionally controlled the common fund cases, to the institutional plaintiffs who now supervise securities class actions," the PSLRA authorizes the lead plaintiff, selected by the court under criteria set forth in 15 U.S.C. § 78u–4(a)(3)(B)(I) and (B)(iii)(I), to choose and retain lead counsel, also subject to court approval under 15 U.S.C. § 78u–4(a)(3)(B)(v). *Id.* at 193, 192.

Observing "significant tension" between the common fund doctrine and the PSLRA, the appellate court pointed out that it had previously held that "the PSLRA vests authority over counsel selection and compensation in the lead plaintiff—not in the court, and certainly not in entrepreneurial counsel who attempt to appoint themselves as representatives of the class." *Id.* at 193. The appellate court opined that the common fund doctrine remains intact during the period prior to appointment of lead plaintiff, i.e., "from the accrual of the cause of action to the appointment of lead plaintiff" (which might include legal services involving "discover[ing] possible fraud at the issuer, investigat[ing] that possible fraud, determin[ing] whether it warrants filing of a complaint, mak[ing] strategic decisions about the form and content of the complaint, draft[ing] the complaint, fil[ing] it, issu[ing] notice to class members, and navigat[ing] the PSLRA's lead-plaintiff procedures"). *Id.* at 193–93, 194. "If an attorney creates a substantial benefit for the class in this period—by, for example, discovering wrongdoing through his or her own investigation, or by developing legal theories that are ultimately used by lead counsel in prosecuting the class action—then he or she will be entitled to compensation whether or not chosen as lead counsel," and "[t]he **court,** not the lead plaintiff, must decide for itself what firms deserve compensation for work done on behalf of the class prior to the appointment of the lead plaintiff." *Id.* at 195 [emphasis added by the Court]. During the preappointment period, the court may substantially defer to lead plaintiff's determination of what work created the benefits to the class, but it may also consider any objections of counsel who have not been included. *Id., citing Bank One Shareholders Class Actions,* 96 F.Supp.2d 780, 790 & n. 13 (N.D.Ill.2000). The Third Circuit concluded that the filing of a complaint by attorneys not subsequently appointed lead counsel should best be viewed as "entrpreneurial efforts" and should not be compensable because

> each firms's complaint is the price of admission to a lottery that might result in it being named lead counsel. If the firm wins the lottery, it stands to make significant fees at multiples of its lodestar. Compensating a firm for filing a complaint and not being named lead counsel would offer free tickets to the lead-counsel lottery, and would thus create incentives for redundant filings.

Id. at 196. Nor was the appellate court convinced "that the mere filing of complaints in securities class action ordinarily confers much benefit on the class. Such complaints are as often spurred by news reports or press releases disclosing wrongdoing—or by reports that other firms have filed complaints—as by independent investigation." *Id.* Indeed the PSLRA was enacted in "reaction against a race-to-the-courthouse model of securities litigation in which attorneys appointed themselves class representatives and chose their own figurehead plaintiffs who had no power to select or oversee 'their' lawyers." *Id.* On the other hand, if non-class counsel do their own investigations and discover distinct grounds or new theories for a suit that are later used and not from public reports, they should usually be compensated out of the class's recovery. *Id.* at 196–97. In the unlikely case that the lead counsel do not request fees for these attorneys' work on which lead counsel relied,

"we expect that the court will nonetheless reward earlier attorney's work on behalf of the class." *Id.* at 197.

Once a lead plaintiff is appointed, "the primary responsibility for compensation shifts from the court to that lead plaintiff, subject of course to ultimate court approval. The PSLRA lead plaintiff is the decisionmaker for the class, deciding which lawyers will represent the class and how they will be paid." 404 F.3d at 197.

The Third Circuit concluded that the court should accord a presumption of reasonableness to any fee petition made under a retainer agreement that was entered into at arm's length between properly selected lead plaintiff and lead counsel. 404 F.3d at 199.[28] That presumption can then be rebutted by a showing that the original agreement has been materially altered by unforeseen developments or by the objectors making a *prima facie* case that such an award is "clearly excessive"[29] and should be reviewed under traditional standards. *Id.*

Furthermore, since the goal of the PSLRA is to give the lead plaintiff, and not the court, control over lead counsel, non-lead counsel that seek compensation from the class recovery must submit their request to the lead plaintiff. *Id.* Since the PSLRA "significantly altered the landscape of attorney's fee awards in securities class actions" and because the "lead plaintiff is now the driving force behind the class counsel decisions," the Third Circuit recommended that a presumption of correctness should thereafter be accorded to the lead plaintiff's decision that a non-lead counsel's work, not made pursuant to an agreement between lead counsel and lead plaintiff, is not entitled to fees to be paid out of the common fund. *Id.* at 180, 181, 199.

As this Court previously stated, it does not believe that the Fifth Circuit would go so far as to accord a presumption of correctness, but would certainly give the Lead Plaintiff's determination considerable weight here, given how effectively it fulfilled the statutory intent of the PSLRA in controlling and monitoring the Enron litigation.

The Third Circuit opined that presumption of correctness for the denial of such fees to non-lead counsel by the lead plaintiff, or, in this case, the weight that might be accorded the decision of a properly selected and effective Lead Plaintiff by the Fifth Circuit, not to cover non-counsel's fees, could be countered in two ways if non-lead counsel meets a very high standard to justify why the court's usual deference to lead plaintiff's managerial decisions should not be exercised: non-lead counsel must show (1) that lead plaintiff has failed in its fiduciary representation of the class (mandated by the PSLRA) because the decision was motivated by some factor other than the best interests of the class or the lead plaintiff did not carefully consider and reasonably investigate non-

28. *In accord In re Cardinal Health, Inc. Sec. Litigations,* 528 F.Supp.2d 752, 758–59 (S.D.Ohio 2007); *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* No. 05 Civ 10240, *et al.,* 2007 WL 2230177 (S.D.N.Y.2007); *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 Technologies, Inc. Sec. Litig.,* 327 F.Supp.2d 426, 432 (D.N.J. 2004) ("Under PSLRA a fee[ ] award negotiated between a properly-appointed lead plaintiff and properly-appointed lead counsel as part of a retainer agreement enjoys a presumption of reasonableness.").

29. The *Cendant* court listed the *Gunter* factors (see footnote 22 of this opinion) as guidelines for determination on rebuttal of whether the fee is clearly excessive. 243 F.Supp.2d at 171.

lead counsel's request; or, even if lead plaintiff has fulfilled its fiduciary duties of loyalty and care, (2) that the denial of fees was erroneous by clearly demonstrating that (a) non-lead counsel reasonably performed the work on behalf of the class, (b) they did so with some reasonable expectation of compensation out of the class's common-fund recovery, and (c) they can and do specifically identify the benefits they independently provided to the class that would not have been provided by the services of lead counsel. *Id.* at 199–200. For 2(a), non-lead counsel must show that (i) they spent hours prosecuting the claim, (ii) lead plaintiff or lead counsel requested the assistance of non-lead counsel, and (iii) non-lead counsel had a reasonable expectation of compensation out of the class's recovery, based on lead counsel's or the court's acquiescence in non-lead counsel's services. *Id.* at 200 & n. 15. For 2(c), non-lead counsel must provide specific proof as to what their efforts were, how they created the benefit, and why the benefit would not have been created absent its efforts. *Id.* at 200. Neither mere monitoring by non-lead counsel of the work of lead counsel nor keeping abreast of the case on behalf of and informing their individual clients are compensable. *Id.* at 201–02.

II. Findings of Fact:

A. Fee Agreement and Percentage Method

[19, 20] The percentage method is properly applied here as a matter of law and the fee agreement observed under the PSLRA because the Court finds that the blended 9.52% fee agreed to by Lead Plaintiff and Lead Counsel at the beginning of the *Newby* litigation (1) is fair and reasonable, (2) is substantially lower than fees awarded in other comparable class actions at the time the agreement was made,[30] and (3) should be enforced for the additional reasons indicated below.

1. 9.52% Fee Agreement

The *ex ante* fee agreement here weighs heavily in support of awarding Lead Counsel 9.52% of the net settlement fund. As indicated, the PSLRA authorizes Lead Counsel to select and retain Lead Counsel. As Judge Marbley observed,

> The benefits of an ex-ante agreement between lead plaintiffs and class counsel at the outset of litigation are substantial. In setting fees ex-post, the Court's evaluation of the risk of recovery, the skill of the attorneys, the complexity of the case, and the merit of the settlement or award are infected with hindsight bias. So long as lead plaintiff and lead counsel are of equal bargaining power and they negotiate at arm's length, an ex-ante agreement can more accurately reflect the market value of an attorney's services as applied to the particular facts. Further, agreeing to a fee at the outset will align the interests of the class and the attorneys throughout the litigation. Thus the PSLRA places lead plaintiff, at least ex-ante, in the best position to fix the compensations of lead counsel.

Cardinal Health, 528 F.Supp.2d at 758, *citing Cendant*, 264 F.3d at 282.

As explained by the Honorable H. Lee Sarokin, who independently reviewed the petition for award of attorneys' fees here and has provided a Declaration in support

30. *See* Declaration of H. Lee Sarokin, # 5819 at 13–14 (declaring after reviewing a compilation of fees awarded in the largest securities class action cases that Lead Plaintiff's blended 9.52% request "is not only fair and reasonable when compared to other awards, it is conservative"). *See* also for comparative rates Expert Report of Professor Charles Silver, # 5822 at 56–66 (demonstrating that percentage fee agreement between the Regents and Lead Counsel was low compared with the fee requested or awarded in other class actions).

of Lead Counsel's fee request, contingent percentage fee arrangements are typical in class actions for three reasons: "First contingent percentage fees align the interests of claimants and lawyers by rewarding superior performance. Second they minimize the need to monitor attorneys and to evaluate the reasonableness of their efforts, both of which are time consuming and often difficult to do. Third, they insure that the burden of financing the lawsuit is borne by class counsel rather than the class members. And, as demonstrated in this case, litigation costs can be enormous." # 5819 at 7. He points out that "the contingency arrangement is meant to compensate counsel for the risk undertaken and the result achieved." *Id.*

The Court finds that the fee agreement was negotiated at arm's length between Lead Counsel and General Counsel Office of the Regents of the University of California, a highly sophisticated investor with a substantial stake in the litigation and strong motivation to maximize the recovery for the class (under the fee agreement, over 90% of the settlement fund [31]). The fee agreement served to attract and challenge, by means of an increasing-percentage fee schedule at a lower-than-common contingency fee rate for such cases, one of the top, most experienced, and formidable securities law firms in the country to undertake the largest and most complex securities fraud litigation thus far in the United States. *See also* Supplemental Declaration of the Regents of the University of California in Support of Its Motion for Appointment as Lead Plaintiff and in Response to Surreply of The New York City Pension Funds and The Florida State Board of Administration, Feb, 6, 2002 (Christopher M. Patti), # 252 at 1–2.[32] There is no evidence to the contrary.

As stated, at the time the agreement was negotiated (2000–01), the 9.52 percentage was lower than that awarded in most securities class actions. Helen Hodges' Declaration, # 5818 at ¶ 26, *citing* Michael Orey, *Cashing in On Shareholder Suits–Class Actions are Mounting and So Are Payouts, As Deep Pockets Get Tapped; Should You File?*, Wall St. J., Apr. 25, 2002 (copy in Lead Counsel's Compendium, # 5817, Ex. E) ("[B]ig investors have become increasingly active, using their

31. In contrast, in *WorldCom* approximately 80% of the recovered funds were distributed to debt claimants with Securities Act claims. # 5930 at 4.

32. Patti's Supplemental Declaration makes clear that the Regents was fully aware of the difficulties and unprecedented challenges facing counsel and that the Regents' goal was to achieve the maximum possible recovery for the class if the Regents and Milberg Weiss were named Lead Plaintiff and Lead Counsel, respectively:

> To achieve that overriding objective, we adhered to several principles. First, we sought to negotiate fee percentages that would be substantially lower than those that are commonly agreed to or awarded so that the portion of the total recovery going to the class members would be maximized. At the same time, we recognized that this suit would likely be the largest, most complex, and most difficult securities class action in history. Accordingly, our second principle recognized that the fee agreement had to provide a sufficient fee to create an adequate incentive for counsel to commit the necessary resources to litigate this difficult case, Finally, we recognized that, given Enron's pending bankruptcy, there is no single source of recovery that is likely to be able to provide an acceptable level of compensation for the class and that achieving recovery above certain levels would become increasingly challenging. Therefore, our third principle held that there should be a modest increase in the marginal fee percentage as the recovery increased to provide counsel an adequate incentive to pursue additional sources of recovery. We believe that the fee agreement we have executed meets these criteria and creates the proper incentives for counsel to maximize the class recovery.

clout to drive down attorneys' fees and increasing the payment available for shareholders large and small. The Regents of the University of California, for example, are the lead plaintiffs for claims against Enron; their law firm, Milberg Weiss Bershad Hynes & Lerach, is seeking 8% to 10% of any recovery—about one-third of the customary take."). *See also* Paul S. Atkins, Speech by SEC Commissioner: Remarks before the U.S. Chamber Institute for Legal Reform (Feb. 16, 2006) (Compendium, # 5817, Ex. F) ("When talking about the importance and effectiveness of the lead plaintiff provision of the PSLRA, Chairman [Christopher] Cox likes to point to the Enron class action suits. . . . In the Enron litigation, the court chose the Regents of the University of California as the lead plaintiff. 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."); 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 14.6 and n. 9 (4th ed., Database updated June 2007) ("In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range."). *See also Schwartz v. TXU Corp. et al.*, Nos. 3:02–CV–2243–K, 2005 WL 3148350, *27 (N.D.Tex. Nov.5, 2005) (finding fee award of 22.2% of the common fund under PSLRA "consistent with and, in fact, significantly less than awards made in similar cases" and providing an extensive list of other cases with higher percentage awards).

Not only were the Regents' negotiators (James Holst, John Lundberg, and Lloyd Lee) experienced lawyers, but the Regents had competent in-house counsel (over 35 at the time the agreement was negotiated, now over 60) [33] with extensive experience in complex litigation, including securities and tobacco actions, as reflected in their submissions in support of the Regents' request to be named Lead Plaintiff. James Holst declared that in December 2001, when the Regents applied for appointment as Lead Plaintiff in this action, "[T] he Office of the General Counsel, on behalf of The Regents, carefully considered the choice of Lead Counsel, and in doing so reviewed the qualifications and resources of a number of class action specialist firms." # 5824 at 2. In the highly competitive arena of securities fraud litigation, in which "firms compete fiercely for opportunities to represent large investment funds," [34] class action expert Professor Charles Silver proclaimed that the Regents is very knowledgeable about prevailing fee rates and not motivated to offer higher fees than the market rate. *See. e.g.*, Expert Report of Professor Charles Silver (# 5822 at 82–83; Declaration of H. Lee Sarokin) (# 5919 at 6–7).[35]

33. Expert Report of Charles Silver, # 5822 at 35.

34. See Expert Report of Professor Charles Silver (# 5822) at 47–54 (the Regents' decision to hire Lead Counsel ''was reasonable because Lead Counsel offered a superior combination of quality and price'' in a deep, competitive market).

35. In agreement with Professor Silver, the Court further points to the Declaration of James E. Holst (# 5824 at 3–4) about the intentions of the Regents in the arm's length negotiations with Lead Counsel over the fee agreement in the Regents' effort ''to maximize the eventual recovery for the ultimate benefit of the Class'':

> First, we concluded that a fee based on a percentage of the class recovery would more effectively align the incentives of counsel with the interests of the class than a so-called lodestar-based fee calculation. Second, we sought to negotiate a fee percentage that was substantially lower than the prevailing awards in such cases so that the portion of the total recover going to the Class would be enhance. Third, we recognized that in light of the complexity and

Furthermore, the structure of the increasing fee schedule here indicates that the Regents and Lead Counsel were aware of the risks and costs of this litigation and that they considered the possibility of a recovery over $2 billion, but also the enormous obstacles that had to be overcome (*see infra*). The graduated formula in the fee agreement has served the best interests of the class in inspiring counsel to continued zealousness, tenacity, and substantial investment of its own funds, resources, and legal services over this lengthy period even up to and after the United States Supreme Court issued its decision in *Stoneridge Investment Partners, LLC, v. Scientific–Atlanta*, —— U.S. ——, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008), indeed ongoing today.[36] See *infra*.

Moreover, under the agreement between Lead Counsel and the Regents, expenses were to be "netted" (deducted from the whole recovery) before applying fee percentages for fee award to Lead counsel. Holst's Declaration, # 5824, ¶ 9. Several objectors, including that of Mr. Brian Dabrowski through his attorney, Lawrence Schonbrun, have questioned whether the fees are based on the gross or net recovery and complained that the fees were based on the gross recovery. In its Reply, Lead Counsel clarifies that the fee percentage is applied to the "net," not the "gross" recovery:

> 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 billion, 9% of the second billion and 10% of the balance results in a fee of $688,239,000. *See* Hodges Decl. ¶ 3 & n. 7. $588,239,000 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 total percentage of the 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.[37] Counsel estimates that an additional $6 million has been incurred and will be the subject of future reimbursement requests. In sum, Lead Counsel requests the Court award an attorney fee of $688,239,000 plus interest thereon at the same rate that has been earned on the funds recovered for the Class.

5907 at 2–3, citing 15 U.S.C. § 78u–4(a)(6) ("Total attorneys' fees and expenses awarded . . . shall not exceed a reasonable

> difficulty of the litigation, the fee percentage would have to be sufficient to create adequate incentives for the firm to dedicate the substantial resources, possibly over a long period of time, needed to maximize the Class recovery. Finally, we recognized that, given Enron's bankruptcy, there was no single source of recovery that was likely to be able to provide an acceptable level of compensation for the Class and that achieving recovery above certain levels would become increasingly challenging. We also want to avoid a fee structure that would create an incentive for quick, cheap settlements. Therefore, we concluded that the agreement should provide for a modest increase in the marginal fee percentage as the recovery increased to provide counsel an adequate incentive to pursue additional sources of recovery.

36. Lead Counsel has submitted the Declaration of Jonathan W. Cuneo (# 5828), Managing Partner of Cuneo Gilbert and LaDuca, LLP (successor to The Cuneo Law Group, PC) and during this litigation designated by Lead Plaintiff as "Washington Counsel," serving as co-counsel with Lead Plaintiff for the proposed class for Washington D.C.-based services, but directed by Lead Counsel, from December 2001–now. # 5828 at ¶¶ 2, 19, 23

37. The six partial reimbursements approved by the Court are instruments # 2366, 4083, 4741, 5172, 5367, and 5761.

percentage of the amount of any damages **and prejudgment interest** actually paid to the class [emphasis added].").

This litigation has been ongoing since the fall of 2001, over six years, and the record attests to a long, difficult fight that justifies honoring the fee agreement's 9.52%.

Helen Hodges' Declaration [38] presents a chart accurately demonstrating significant stages of Coughlin Stoia's prosecution of this litigation.[39] # 5818, ¶ 16 at 10. See also Lead Counsel's proposed findings of fact and conclusions of law (# 5908) at ¶¶ 3–22. Ms. Hodges' Declaration summarizes in great detail most aspects of the firm's work on the Enron litigation. # 5818, ¶¶ 28–210. The record in this action, which is composed of approximately 6,000 entries at this time, also speaks to the vast amount of service performed by all Class Counsel. The Court will not repeat the extensive case history and refers the parties to these sources for a summary.

The two consolidated class action complaints [40] that were filed by Lead Counsel on behalf of the proposed class, charging eighty-two different defendants including multiple Financial Institutions (some of the largest banks in the world), accountants, law firms, and Enron's inside and outside directors, set out, in this Court's view, astonishingly detailed and informed allegations, especially in light of the complicated structured financial transactions,[41] the intricate accounting concealing the fraud, and the inability of Lead Plaintiff to perform formal discovery because of the stay under the PSLRA, 15 U.S.C. § 78u–4. The First Consolidated Complaint (# 441) demonstrates that Lead Counsel had diligently investigated and prepared for this proposed class action before its filing.

38. Helen Hodges, an attorney at Coughlin Stoia, has worked steadily on this litigation since its inception and has shown herself to be a reliable and credible attorney and officer of the court.

39. Indeed the record speaks to the extraordinary efforts made by counsel: as of the end of April 2008, there were 5,961 entries in the *Newby* case alone.

40. The original *Newby* class action complaint was filed on October 22, 2001. The First Consolidated Complaint (# 441) was filed on 4/08/02; the First Amended Consolidated Complaint (# 1388) was filed on 5/14/03.

41. Examples of these complicated off-the-books transactions, detailed in Lead Plaintiff's complaints and other briefing, to conceal Enron's true debt include prepays (loans disguised as commodity transactions), FAS 125/140 (off-balance-sheet sales of unsalable assets to Enron-controlled Special Purpose Entities) (''SPEs''), minority interests (borrowed funds from minority-owned subsidiaries reported as equity investments by minority investors or cash flow from operations), share trust transactions, tax transactions, related-party transactions, forest products transactions, and the Nigerian Barge transaction.

Attorney Jonathan W. Cuneo, whose firm worked with Lead Counsel on Washington, D.C.-based aspects of the Enron litigation and on collecting and forwarding information, monitoring the SEC and Congress, attending a very long list of Congressional Enron hearings, and assisting in the preparation of *amici* briefs submitted in the *Stoneridge* case, as well as convincing numerous significant entities and individuals to file *amicus curiae* briefs supporting scheme liability, described the intricate web of deceit as follows:

> The Enron fraud and the financial transactions were bewilderingly complex, deliberately designed to be difficult to understand, and multifarious in that they involved large numbers of different types of transactions here and offshore with different names, participants, structures, dates and specific purposes and implicating different highly nuanced principles of financial accounting. Although nearly six years later the players and archetypes and patterns seem familiar, they have become accessible in part through repetitive analysis and exposition.

5828 at ¶ 28.

2. Size and Diversity of the Undertaking

The sheer size, the diversity of Enron securities and investors, and the risks posed by a lengthy duration of such a complex litigation were daunting, especially because under the fee agreement Lead Counsel agreed to advance all costs and to look only to an uncertain recovery for reimbursement of expenses and payment of attorneys' fees in what was bound to be a long and difficult litigation.

At the time this Court appointed the Regents as Lead Plaintiff and approved its selection of Lead Counsel, the fee agreement, which was submitted to the Court as part of the application process, appeared very reasonable. In its February 15, 2002 memorandum and order this Court wrote,

> Higher fees can be warranted by superior services, but the fees in this class action must be reasonable in light of the circumstance and in compliance with the PSLRA's policy to preserve the substantial portion of any recovery for the Plaintiffs. Given the magnitude and complexity of this litigation, the geographical and temporal expanse it covers, the number of governmental and private investigations occurring, and the necessary involvement with the bankruptcy proceeding in New York, the selection of competent, experienced and committed Lead Counsel has even greater import than in normal securities class actions. In reviewing the extensive briefing submitted regarding the Lead Plaintiff/Lead Counsel selection, the Court has found the submissions of Milberg Weiss Bershad Hynes and Lerach LLP stand out in the breadth and depth of its research and insight, Furthermore, Mr. Lerach has justifiably "beat his own drum" in demonstrating the role his firm has played thus far in zealously prosecuting this litigation on Plaintiffs' behalf.

In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 458 (S.D.Tex.2002). Lead Counsel has not disappointed the Regents nor this Court, and the fee agreement clearly motivated Lead counsel to obtain a superb result. It should be honored.

Among Lead Counsel's many legal services, not to mention effective leadership and organization in this litigation on behalf of the class, were spearheading the establishment and coordination of a document depository, the creation of the Deposition Scheduling Committee, and developing a deposition scheduling protocol for oral depositions of fact witnesses, creation of a website for economical and swift service of process and communication among the enormous number of attorneys that appeared in this action, interviews of innumerable witnesses (former Enron, bank, and Arthur Andersen employees and third parties), performance of massive discovery, the taking of more than 370 fact depositions and over 50 expert depositions in a concentrated and orderly fashion,[42] the subpoenaing, gathering and review of over seventy million documents, the submission of extensive briefing on countless issues, many without, or with minimal, precedent or regarding which courts were in substantial conflict, responding to approximately 420 complex motions to dismiss, addressing issues of class certification (for which Lead Counsel participated in a two-day hearing), answering motions for summary judgment, retaining and taking depositions of top-level experts (Defendants alone had 40; Coughlin Stoia had 12[43]) and generat-

42. The Declaration of Helen Hodges, # 5818, ¶ 169 at 92–100, states that the parties took 420 fact depositions, lists them, and identifies the Coughlin Stoia attorney(s) in attendance at each.

43. Helen Hodges' Declaration, # 5818, ¶ 7 at 11.

ing expert reports on numerous issues, and, finally, extensive trial preparation. *See, e.g.*, Declaration of Helen Hodges, # 5818, ¶¶ 211–28, at 118–28. At least twelve of Coughlin Stoia's lawyers worked full-time on this litigation at every stage. *Id.* at 6.

Moreover Class Counsel had to cover several venues. For the benefit of the proposed class, Lead Counsel, with the help of bankruptcy experts Genovese, Joblove & Battista, participated in the parallel Enron bankruptcy proceedings in the Southern District of New York, moving for appointment of a trustee, then negotiating for the selection of Neal Batson to serve as the Enron Bankruptcy Examiner, whose resulting reports were of great value to the *Newby* plaintiffs in prosecution of this action, and obtaining a lift of the stay of discovery so documents could be retrieved from Enron. Declaration of John H. Genovese (# 5826) at ¶¶ 8–26; Declaration of Helen Hodges (# 5818) at ¶ 8, ¶¶ 229–37.[44] In still another venue, Genovese, Joblove & Battista also filed a proof of claim and an adversary complaint on behalf of the Regents and the proposed class in the bankruptcy proceedings of LJM2 in Dal-

44. Lead Counsel has provided evidence to show that it did not merely rely on other investigations to prosecute this case. In her sworn Declaration, Helen Hodges maintains that Coughlin Stoia did not merely rely on Batson's evidence to prosecute this action. After negotiations which resulted in Batson's appointment,

> Batson used our Consolidated Complaint as a "road map" for his investigation. After Batson gathered evidence, the banks asked Judge Gonzalez to deny us access to the evidence and Judge Gonzalez granted that motion. In the meantime, we moved Judge Harmon for and were granted access to the evidence which Batson gathered and which the banks and Enron had. While we used Batson's evidence to streamline our depositions, we didn't stop there. We gathered evidence far beyond what Batson had from the banks, from third parties such as rating agencies and stock analysts, and most notably, from Andrew Fastow . . .

5818 at ¶ 8, 6–7. *See also* Lead Counsel's Memorandum (# 5816 at 63).

In John H. Genovese's Declaration (# 5826 at 10–11, ¶¶ 24–25), after describing his firm's work in getting Neal Batson appointed as the Enron Bankruptcy Examiner, Genovese points out,

> While the Examiner Reports in many respects served to validate and confirm the Lead Plaintiff's allegations, the existence of the Reports added further credibility to the Lead Plaintiff's allegations and were of use in a number of ways including, of course, negotiations leading to the Recoveries.
>
> At a minimum, as observed by this Court, the use of deposition transcripts and sworn statements obtained by the Examiner would streamline depositions and provide impeachment tools in this litigation. While it is hard to quantify the savings obtained in coordinating discovery, the amount spent by the Enron bankruptcy estate to investigate the Enron fraud and provide factual support for Lead Plaintiff's allegations reflected in the Examiner's analysis, documents, discovery and sworn statements can be quantified. Batson and his firm received payment of fees and reimbursement of costs totaling approximately $85 million. Stated another way, work product useful to the Lead Law Firm was produced at a cost to Enron's bankruptcy creditors and not the Class, thereby significantly reducing the lodestar in this litigation.

See also Declaration of Professor John Coffee, # 5821 at 24 n. 4 ("Undoubtedly, both Batson and Lead Counsel proved useful to the other, and Lead Counsel's consolidated complaint provided a 'roadmap' for Batson's investigation. But Batson's findings carried no collateral estoppel impact, and defendants also sought to exclude Batson's report from any trial. Moreover, Lead Counsel went far beyond the testimony developed by Batson, for example by deposing witnesses that Batson never interviewed, including Andrew Fastow, credit ratings agencies, and securities analysts. Even if Batson made a contribution to the outcome, he never focused on Lead Counsel's 'scheme to defraud' theory nor had the impact of a prior determination that plaintiffs could rely on for its collateral estoppel impact.").

las, Texas and obtained a recovery of $51.9 million from the debtor's estate (twice as much as the other claimants) even though debtor was bankrupt. Genovese Declaration (# 5826) at ¶¶ 33–50. Lead Plaintiff also participated persistently in settlement negotiations, including mediation a number of times with different mediators. Declaration of Helen Hodges, # 5818, ¶¶ 238–55. After the Fifth Circuit decertified the class on March 19, 2007, Coughlin Stoia pursued the issue of scheme liability under § 10b and Rule 10b–5(a) and (c) to the Supreme Court, both in its petition for certiorari in this action and in the *Stoneridge* case. Lead Counsel also worked for substantial time on a plan of allocation for the settlement fund, a difficult task given the diverse Enron securities involved, some of which lacked pricing data and/or trade volume data. Declaration of Helen Hodges, # 5818, ¶¶ 282–89 at 154–57.

3. Evaluation by Professor Coffee

The Court, from its own experience in presiding over this litigation for more than six years, fully concurs with some of the highly qualified experts' assessments of Lead Counsel's remarkable prosecution of this action. In particular, the opinion of Columbia University Professor John C. Coffee, Jr., a prominent authority in the field of class actions and securities litigation, who has often been negatively critical of the performance of plaintiff's attorneys in class actions, particularly securities class actions, over the past twenty five years,[45] has impressed the Court as very instructive and persuasive.

Professor Coffee identifies as "the two most critical factors in an optimal fee award determination: (1) How successful were plaintiffs' counsel when measured against the best possible outcome? and (2) How high a level of risk did they face?" Decl. of John C. Coffee Jr., # 5821 at ¶ 26. Professor Coffee continues, "Put simply, this is a litigation that can only be described in superlatives. To begin with, it represents the largest recovery ever in any class action—not just securities class actions but all class actions," despite the fact that "from the outset, Enron was in bankruptcy and Arthur Andersen was on the brink of insolvency," certification of the class was unresolved until granted by this Court in 2006, and was then reversed by the Fifth Circuit[46]; and the unparalleled amount of the settlement fund "strongly suggests that Lead Counsel performed with an extraordinary level of skill and negotiating prowess." *Id.* at ¶ 2.

Professor Coffee also observes that the fact that three large financial institution defendants "held out" and did not settle "only underlines that the risk was real." *Id.* at ¶ 3. As for Lead Counsel's negotiations with those that did settle for over $2 billion each in what "was arguably the highest stakes legal poker game ever played," Professor Coffee comments, "Few, if any, other plaintiffs' counsel in my judgment could have pulled off such a tour de force" and the achievement "is attributable in almost equal measure to its credibility, creativity and the intensity of its commitment to this case. In my judgment, Lead Counsel is the adversary most feared today by the defense bar in securities litigation, and that reputation played an important role here." *Id.* at ¶ 4.[47] In an

45. *See, e.g.,* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation,* 106 Colum. L.Rev. 1534 (2006).

46. *Regents of University of California v. Credit Suisse First Boston (USA), Inc.,* 482 F.3d 372 (5th Cir.2007), *cert. denied,* —— U.S. ——, 128 S.Ct. 1120, 169 L.Ed.2d 957 (2008).

47. *See also* Expert Report of Charles Silver, # 5822 at 49–51.

"extraordinary investment for one firm to make," Lead Counsel "risk[ed] its own time and money on a novel legal theory, with little precedent to support it, in a case that initially seemed both financially unpromising and difficult to settle," in advancing over $45 million in expenses and 280,000 hours of time.[48] *Id.* at ¶ 5. Moreover, "Lead Counsel was literally litigating against the cream of the American corporate law bar" which "vastly outnumbered" Plaintiffs' counsel,[49] and "defendants had retained many of the leading authorities as their expert witnesses," making plaintiffs' burden "also exceptional." *Id.* The Court concurs with all these observations. Professor Coffee concluded, "To sum up, in my judgment, few other counsel (and perhaps no other) could have obtained this degree of success." # 5821 at 6. In addition, Professor Coffee praises the litigation as "illustrat[ing] the best practices in class action," "a model of transparency" in the negotiation of a fee formula, which would "incentivize their counsel to assume the enormous risks in this case over a potentially indefinite period," by a sophisticated, public, and politically accountable body, the Regents of the University of California, which continues to voice its satisfaction with the arrangement. *Id.* at ¶ 6.

4. Comparable Litigation Fee Awards

Professor Coffee's Declaration contains charts and data that demonstrate the dates, settlement funds, and percentage awarded as attorneys' fees in securities and other kinds of class actions reported in various studies to compare the results in the *Newby* litigation. He demonstrates that many more factors must be examined than the amount of the recovery and the percentage of that recovery represented by the fee. He proffers a chart of the largest class action settlements involving "mega-fund" case recoveries of more than $100 million since 1990 and the fee award expressed as a percentage of that recovery. # 5821 at ¶ 22. He concludes that when the settlement funds are below $1 billion, fee awards of 20–25% have been awarded by many courts, although others allow only single digit fees. When the recovery is over the $1 billion line, the percentage of the fee awards decline significantly. *Id.* at ¶ 23. Then he points to the importance of the unexpressed facts underlying the figures.

48. *See also* Declaration of James E. Holst, now General Counsel Emeritus of the Regents (# 5824 at 2), which states about the Regents' selection of Lead Counsel: "The objective of this process was to retain outside counsel possessing the financial resources, skill, experience, and track record to obtain optimum results for the Class. The Regents selected [Lead Counsel] . . . on the basis of the extensive experience of that firm's attorneys in securities litigation, the resources the firm had available to prosecute the case, and the aggressiveness it had already demonstrated in doing so." He further states that the Regents also selected Lead Counsel for the Dynegy litigation before Judge Lake because "we had acquired extensive experience working with Lead Counsel and had observed first-hand the skill and determination of Lead Counsel and their dedication to the best interests of the class. We had developed an extremely effective working relationship with Lead Counsel, and our role in supervision and management of every aspect of the Enron litigation had been welcomed by them." *Id.*

49. The Court notes that among the many excellent firms involved in the *Newby* litigation were Akin Gump; Boies, Schiller; Cadwalader Wickersham & Taft, LLP; Cleary Gottlieb; Clifford Chance US; Cravath, Swaine & Moore, LLP; Davis Polk; Jones Day; King & Spalding; Keker & Van Nest, LLP; Latham & Watkins, LLP; Mayer Brown LLP; O'Melveny & Myers, LLP; Paul Weiss, Rifkind, Wharton & Garrison LLP; Shearman & Sterling, LLP; Sidley Austin; Simpson Thatcher & Bartlett, LLP; Sullivan & Cromwell, LL;, Susman Godfrey, LLP; Weil Gotschal and Manges; White & Case, LLP; and Williams & Connolly.

For instance, in *WorldCom*, the securities class action litigation closest to *Newby* in the amount of recovery, Professor Coffee reports that the plaintiffs recovered $6.133 billion and that the fees ($336.1 million) amounted to 5.5% of the recovery. # 5821 at ¶ 22. But Professor Coffee distinguishes the two cases: in the *WorldCom* litigation, counsel recovered only 2.9% of the decline in market capitalization, for a total of $6.133 billion; Lead Counsel in *Newby* not only recovered $7.23 billion, 1.1 billion more than in *Newby,* but in percentage of market capitalization loss, 8.3% versus 2.9%. # 5821 at ¶¶ 27–28, including Table 4, chart entitled Comparative Settlement Recoveries/Fee Awards. Professor Coffee calculates that only 20.9% of the recovery in *WorldCom* was distributed to shareholders, with the rest (79.1%) going to note purchasers based on Sections 11 and 12(a)(2) claims under the Securities Act of 1933 against the underwriter defendants. *Id.* at ¶ 29 & n. 3. Thus the *WorldCom* claims were largely strict liability claims. In contrast, the *Newby* Lead Counsel recovered almost six times as much for shareholders, with claims largely under § 10(b), in the face of higher risk where the issuer, Enron, was bankrupt. *Id.* He explains that most of the claims in *WorldCom* were under Sections 11 and 12(a)(2), which "essentially shift the burden of proving non-negligence to the defendants and require no allegation of scienter," while *Newby* was "essentially a Rule 10b–5 action" in which the scienter of each defendant had to be pleaded with particularity and plaintiff must prove reliance.[50] *Id.* at ¶ 30. He also found that "the fraud in *WorldCom* was simple," as was the accounting, while *Newby* "involved the murkiest depths of contemporary accounting theory," allowing secondary defendants to "more plausibly assert that they had not known of the fraud and could not be expected to have discovered it." *Id.* Each bank defendant involved different facts and different transactions.[51] Moreover, he points out that in the *Dynegy* litigation (H–02–1571, Order Awarding Attorney's Fees and Reimbursement of Expenses, # 5817 (Compendium of Exhibits), Ex. C at 1), Judge Lake approved essentially the same type of 8% to 9% to 10% increasing percentage-of-the-recovery fee formula to the same firm as that requested in this case. # 5821 at ¶¶ 22, 44.

Professor Coffee comments, "Ultimately, the role of an expert witness in a class action fee determination is modest. The ultimate decision belongs to the Court. But expert testimony can inform the court by pointing out relevant comparisons and empirical data." # 5821 at ¶ 7. He fulfills that role not just in his *WorldCom/Newby* comparison, but with objective evidence to demonstrate why Lead Counsel's fee request is reasonable.

First Professor Coffee relies on the "most complete analysis of fee awards in securities class actions" by National Economic Research Associates ("NERA"), an economics consulting firm, to determine whether the percentage agreed to by Lead Plaintiff and Lead Counsel was reasonable at the time the agreement was made. *Id.* at ¶¶ 14–17, citing Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* (NERA, June 1995) ("Nera Study"). That NERA study concluded, "Regardless of case size, fees average approximately 32 percent of the settlement." *Id.* at ¶¶ 16–17 (and supporting Table).[52] He also reports the results of a study by

50. Lead Counsel points out that only one bank, Citigroup, faced § 10(b) liability in *WorldCom*. *See, e.e.,* # 5931 at 4.

51. Lead Counsel explains that this factor affected staffing, requiring "a separate team complete with senior lawyer leadership for each bank." # 5907 at 59.

52. This study has been updated. *See* Denis M. Martin, et al., *Recent Trends IV: What Explains Filings and Settlements in Sharehold-*

Vincent O'Brien, *A Study of Class Action Securities Fraud Cases, 1988–1996 (1996) ("the O'Brien Study"),* which found the average fee to be 32%, and reported some other studies finding as much as 40%. In paragraph 22 of his Declaration, Professor Coffee presents a table of lodestar multiplier data in recent mega-fund litigation since 1990, with recoveries of over $100 million, expressed as percentages that ranged from 1.7% to 30%. In ¶ 24 he produces a table of the largest antitrust class action recoveries, with fee awards ranging from 6.5% to 35.1% In ¶ 27, he reports comparative settlement recoveries, the percentage of market capitalization recovered, and the percentage that constituted the fee award (for class actions including *WorldCom, AOL Time Warner, Nortel I, Royal Ahold, Dynegy, Raytheon, Waste Management,* and *Global Crossing,*) with fee percentages ranging from 6% to 21.4%.

The following chart can be found in the Declaration of Helen Hodges, # 5818, ¶¶ 292–94 and Exhibit 5.[53] It lists post-PSLRA securities fraud class action cases with settlements at or above $400,000,000, listed in order of the highest settlement to the lowest, before Enron and demonstrates that shows that Lead Counsel's requested 9.52% fee falls below the middle range of other percentage awards, which vary from 1.73% to 21.4%, with the average percentage being 11.61%.

TOP SECURITIES SETTLEMENTS

Case Name	Settlement Amount	Lodestar	Fee Award	Fee Award %	Stage of Case Upon Settlement	Pages of Documents Reviewed	De p- os
WorldCom	$6,133,000,000	$83,183,238.70	$336,100,000.00	5.48%	Various	10,000,00	41
Tyco	$3,200,000,000	$172,069,355.65	$464,000,000.00	14.5%	Class Cert state	83,500,000	220
Cendant	$3,186,000,000	$8,000,000.00	$55,000,000.00	1.73%	Class Cert state	1,000,000	0

er Class Actions,: 5 Stan. J.L. Bus. & Fin. 121, 141 (1999). It also concluded that fee awards averaged approximately 32% of the settlement.

53. A shortened version of this chart, including only the top cases, was submitted by Financial Counselors for Enron Plans with their objections to the fee request, # 5869 at 5. The information and these cases are discussed in *In re Tyco International Ltd. Multidistrict Litigation,* 535 F.Supp.2d 249, (D.N.H.2007) (page numbers not yet available). In four of the five most recent megafund settlement cases there are lower percentage fee awards, but *Tyco* stands out in contrast.

AOL/Time Warner	$2,650,000,000	$39,973,056.76	$147,500,000.00	5.57%	Merits discovery	15,500,000	0
Nortel I	$1,142,000,000	$16,655,971.00	$34,283,259.29	3.00%	Class Cert state	2,000,000	12
Nortel II	$1,039,811,504	$17,429,370.30	$83,184,920.32	8.00%	Class Cert stage	10,000,000	0
Royal Ahold	$1,088,732,241	$50,858,606.25	$130,647,868.95	12.00%	Class Cert stage	15,000,000	0
McKesson	$960,000,000	$31,160,000.00	$74,784,000.00	7.79%	Merits discovery	2,000,000	65
Cardinal Health	$600,000,000	$18,378,123	$107,580,000	18%	Merits discovery	7,200,000	0
Lucent	$517,000,000	$20,244,296.58	$87,890,000.00	17.00%	Class Cert stage	3,000,000	0
Bankamerica	$484,551,469	$28,805,990.75	$86,416,085.14	17.83%	expert disc completed	1,500,000	75
Dynegy	$474,000,000	$10,162,041.75	$41,359,818.00	8.73%	expert disc completed	1,200,000	19
Raytheon	$460,000,000	$13,160,578.00	$41,400,000.00	9.00%	Trial	1,000,000	45
Waste Mgmt. II	$457,000,000	$6,842,457.00	$36,240,100.00	7.93%	Motion to Dismiss	700,000	12
Adelphia	$455,000,000	$33,686,468.00	$97,370,000.00	21.40%	Amended Complaint	1,500,000	0
Global Crossing	$448,000,000	$28,242,915.18	$72,470,000.00	16.04%	Merits Discovery	270,000	0
Freddie Mac	$410,000,000	$35,353,394.50	$82,000,000.00	20.00%	Class Cert stage	6,700,000	78
Qwest	$400,000,000	$18,547,453.65	$60,000,000.00	15.00%	Class Cert stage	9,000,000	60
Totals	**$24,105,095,214**	**$632,753,317**	**$2,038,226,051**			**171,070,000**	**627**
Average	**$1,339,171,956**	**$35,152,962**	**$113,234,781**	**11.61%**		**9,503,888**	**37**

Enron (proposed)	**$7,227,390,000**	**$127,000,000.00**	**$688,000,000.00**	**9.52%**	**Various**	**70,000,000**	**370**

The Court finds that this chart makes clear that a number of quite variable factors are relevant to the issue of reasonableness, not merely the actual amount of the fee or the percentage of the settlement fund it constitutes, but also considerations such as the stage of the litigation, the number of documents reviewed, and the number of depositions taken. These in turn are affected by factors not on the chart, including the number of parties involved, the number of causes of action and

their legal complexity, the length of the class period, and the variety of different kinds of securities covered. The comparison justifies the requested fee award in a number of categories: the unmatched size of the recovery ("the most critical factor"), the late stage of the litigation, and the extensive document and deposition review.

In addition, there are copies of orders of fee awards in these top securities cases attached to the Hodges Declaration as Exs. A–O. She also provides a chart comparing settlements in non-securities class actions, where the percentage ranges from 6.51 to 35%. *Id.* at ¶ 294. Again, Lead Plaintiff's requested 9.52% is not out of the range of reasonableness.

In sum, the Court finds that Lead Plaintiff has met its burden to demonstrate that the 9.52% fee is fair and reasonable in comparison with those awarded in similar litigation.[54]

B. Alternatively, Lodestar Cross–Check

As noted, the Court believes that the percentage method is the proper one for determining a fee award in a common fund case under the PSLRA where a properly chosen Lead Plaintiff at the beginning of the case has negotiated an arm's length fee agreement with Lead Counsel. Furthermore, all the policy reasons for utilizing the percentage method in common fund cases apply with extra force here where the billing records of Class Counsel firms for more than six years are voluminous.

Nevertheless, should this Court's determination be appealed and should the Fifth Circuit decide that the lodestar method should have been used, as either a cross-check or as the only means by which to determine a reasonable fee award, this Court provides the following analysis. The Court's review of the *Johnson* factors not only supports the requested award under the lodestar method, but also the reasonableness of the fee under the agreement.

1. The Lodestar

For purposes of a lodestar determination (*id.*, ¶¶ 295–96), the Declaration of Helen Hodges also presents two charts: (1) one summarizing the time expended by attorneys and paraprofessionals at Coughlin Stoia in this litigation (248,803.91 hours resulting in a firm lodestar of $113,251,049) (*Id.*, Ex. 1); and (2) one summarizing the time spent by Lead Counsel

54. This Court further observes that in *Shaw v. Toshiba America Info. Sys., Inc.*, 91 F.Supp.2d 942, 972 (E.D.Tex.2000), Judge Heartfield wrote,

> Empirical studies show that, regardless whether the percentage method of the lodestar method is used, fee awards in class actions average around one-third of the recovery. The evidence concerning fee awards in mega-fund cases is more limited since there are fewer such cases to study. However, this court is aware that awards of fifteen percent (15%) of the recovery or more are frequently awarded in these cases. Several mega-fund settlements in the Fifth Circuit and Texas have involved fees of fifteen percent (15%) or more. *See In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D.La.1993) (eighteen percent (18%) of $170 million); *In re Combustion*, 968 F.Supp. 1116 (W.D.La.1997) (thirty-six percent (36%) of $127 million); *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403 (S.D.Tex. 1999) (twenty-five percent (25%) of more than $190 million); *Weatherford Roofing Co. v. Employers National Insurance Co.*, No. 91–05637–F, 116th Judicial District (Dallas) (thirty percent (30%) of $140 million); *see also In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y.1998) (awarding fee of fourteen percent (14%) of $1 billion). Given these guiding principles and the size of the class settlement at issue in this case this Court concludes that fifteen percent (15%) is the appropriate percentage for application of the percentage method in this case.

and co-counsel, as well as each firm's total lodestar, collectively 289,593.35 hours for an overall lodestar of $131,971,583.20, over six years (Ex. 2). Moreover, pursuant to a Court order, Lead Counsel has filed, in two parts, a Compendium of Time Records (# 5959 and 5960, with an Addendum, # 5991), which Lead Counsel states are contemporaneous and not reconstructed.[55] To these records several supplemental objections have been filed (# 5962 (Lawrence Schonbrun on behalf of Brian Dabrowski), # 5963 (Peter Carfagna on behalf of Rita Murphy Carfagna & Peter A. Carfagna Irrevocable Charitable Lead Annuity Trust U/A DTD 5/31/96), # 5967 (Rinis Travel Service Inc. Profit Sharing Trust U.A. 06/01/1989 and Michael J. Rinis, IRRA), # 5964 (George S. Bishop, Jill R. Bishop, Lon Wilkens, and Betty Willkens)), and Lead Counsel has filed a response (# 5974) to these additional challenges. Co-counsel[56] have also submitted Declarations in support of their fee and expense requests. *See, e.g.*, # 5799, 5800, 5813, 5825, 5826, 5827, 5828, 5829, 5830, 5831, 5832, 5833, 5834, 5835. This Court does not profess to have scrutinized every entry in the records, but has scanned them, focusing on various specific parts, to get a general idea of counsel's billing practices in this litigation.

[21] The requested average or blended hourly rate for Coughlin Stoia is $456 per hour. # 5818, ¶ 296. To compensate for delay in receiving fees, counsel have properly used their current billing rates. *Missouri v. Jenkins*, 491 U.S. at 283–84, 109 S.Ct. 2463. They seek fees for 289,593.35 hours, for a lodestar of $131,971,583.20, and a multiplier of 5.2.

As evidence demonstrating this hourly rate is in accord with prevailing market rates for big firms in this forum, the Declaration of Lead Counsel's attorneys' fee expert, Kenneth Moscaret, who has served as a fee consultant and expert witness on the reasonableness of legal fees and the propriety of attorney billing practices since 1991 and advised on over 150 large fee disputes,[57] relying on December 2007 survey of the *National Law Journal ("NLJ")*[58] (# 5911 at 14–17 and Ex. F),

55. *See* # 5974 at 1.

56. Lead Counsel's aggregate fee request includes fees submitted by the following: Berger & Montague, P.C.; Joseph A. McDermott, III; Beirne, Maynard & Parsons, LLP; Law Offices of Bernard M. Gross, P.C.; Schwartz, Junell, Greenberg & Oathout, LLP; Scott + Scott LLP; The Bilek Firm; Cuneo Gilbert & LaDuca; Genovese Joblove & Battista; Wolf Popper; and Shapiro Haber & Urmy LLP. See Hodges Declaration, # 5818, Ex. 2 for chart identifying hours and lodestar of each firm. Each of the firms has filed some form of a fee petition with supporting documentation.

57. # 5911 at 1–8.

58. Mr. Moscaret explains that the *NLJ*, "perhaps the leading legal newspaper in the U.S.," issues this survey annually and he considers it "the most authoritative survey of its kind in the legal marketplace." # 5903 at 14. (Mr. Moscaret's qualifications, detailed in his Declaration, demonstrate to the Court that he is highly qualified to testify about attorneys' fees and market rates.) He states that it is "the ***only*** published 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." *Id.*

Among other courts that this Court has found that have relied in part on one of these annual *NLJ* surveys as evidence of prevailing hourly rates in their community for similar services by lawyers of reasonably comparable skill, experience and reputation are the following: (1) *Yurman Designs, Inc. v. PAJ, Inc.*, 125 F.Supp.2d 54, 58 (S.D.N.Y.2000), *aff'd*, 29 Fed.Appx. 46 (2d Cir.2002); (2) *Yamanouchi Pharmaceutical Co., Ltd. v. Danbury Pharmacal, Inc.*, 51 F.Supp.2d 302, 305 (S.D.N.Y. 1999), *dismissed under Fed. R.App. P. 42*, 230 F.3d 1377, 2000 WL 125737 (Fed.Cir.2000) (Table, Text in Westlaw, No. 99–1521, 99–1522); (3) *Howes v. Medical Components, Inc.*, 761 F.Supp. 1193, 1196 (E.D.Pa.1990); (4) *Harb v. Gallagher*, 131 F.R.D. 381, 386 (S.D.N.Y.1990); (5) *Purdy v. Security Savings*

presents a chart (*id.* at 15–16) that Mr. Moscarat created showing the rates charged by the big firms in the Houston/Dallas area that were listed in the annual survey.[59]

NAME OF LISTED LARGE TEXAS LAW FIRM (Houston/Dallas)	PARTNER RATES 2007	ASSOCIATE RATES 2007
Andrews Kurth 396 attorneys/Houston	$400–$795	$210–$460
Gardere Wynne Sewell 284 attorneys/Dallas	$350–$715	$220–$425
Locke Liddell & Sapp 421 attorneys/Dallas (now Locke Lord Bissell Liddell)	$375–$900	$190–$390
Strasburger & Price 178 attorneys/Dallas	$225–$560	$200–$395
Thompson & Knight 414 attorneys/Dallas	$370–$730	$205–$370
Winstead 306 attorneys/Dallas	$345–$620	$180–$360
OVERALL AVERAGE RATE RANGES AMONG LISTED FIRMS	**$344–$720**	**$200–$400**
Coughlin Stoia Rate Ranges	$335–$725 [60] (partners/of counsel)	$195–$505 (associates/ contract attorneys)

Moscaret maintains that this chart [61] shows that (I) Lead Counsel's partner/of

& Loan Ass'n, 727 F.Supp. 1266, 1272 (E.D.Wis.1989); and *Padgett v. Com'rs, Somerset Co.*, No. Civ. HAR–85–3190, 1989 WL 49159, *6 n. 5 (D.Md. May 2, 1989).

In their Reply (# 5907), Lead Counsel cite the following opinions by courts finding that the *NLJ* "is a reliable and appropriate source in assessing reasonable hourly rates": *Entertainment Software Ass'n v. Granholm*, No. 05–73634, 2006 U.S. Dist. LEXIS 96429, at *7–8 (E.D.Mich. Nov. 30, 2006); *Chin v. Daimler-Chrysler Corp.*, 520 F.Supp.2d 589, 608–09 (D.N.J.2007); and *Citizens Ins. Co. of America v. KIC Chemicals, Inc.*, 2007 WL 2902213, **6–7, 2007 U.S. Dist. LEXIS 73201, at *18–19 (D.Mich. Oct. 1, 2007).

59. These law firms are the only large firms in Houston and Dallas that were listed in the 2007 survey.

60. Mr. Moscaret did not include "William Lerach's 'superstar' $900 per hour" (1) because Moscaret "considered it an aberration compared to the rest of Lead Counsel's partner rates in this case" even though that rate might be "Lerach's true market rate in 2007 in the securities class action litigation field" and (2) because Moscaret assumed [but did not know] that "the *NLJ* survey's big firm partner rates were based upon the hourly rates charged by the ***vast majority of partners*** in those listed firms." # 5903 at 16 n. 15.

61. As another source of comparison in addition to Mr. Moscaret's *NLJ*-based chart of the hourly rates of top Texas firms, the Court has examined the submissions of the Houston, Texas Co–Class Counsel in support of their fee requests. The rates of Coughlin Stoia, though acting as Lead Counsel rather than local counsel and although a larger firm, are not very different, indeed generally within the same range. The Bilek Law Firm, L.L.P., reports hourly partner rates ranging from $400 to $600, while an associate charges $200 per hour and a paralegal rate is $125. # 5827 at 6. Federman & Sherman requests attorneys' fees ranging from $375 to $550 per hour, and paralegal fees at $145.00. # 5835, Ex. 1. Schwartz, Junnell, Greenberg & Oathout, LLP, requests partner fees between $495 and $595 per hour, associates between $225 and $275 per hours, and paralegals, $150 per

counsel rates fit squarely within the prevailing 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 at big firms in Houston/Dallas. Mr. Moscaret explains that he included some of Lead Counsel's "of counsel" attorneys in the same category as partners because these attorneys had partner-level skills and law practice experience. *Id.* at 15. Moreover, with few exceptions, the vast majority of its contract attorneys in this case had associate-level skills and experience, so he placed them in the associate rate category.[62] *Id.*

For example, Mr. Moscaret points to the following contract attorneys as very skilled, experienced, partner-level attorneys who had previously worked as associates at Coughlin Stoia and who did not require as much supervision as younger contract attorneys.

First, Shawn Hays, admitted to the California bar in 1988 and had previous trial experience, took more than thirty fact depositions in the underlying case and took some of defendants' experts' depositions. # 5911 at 40; see also # 5909 (Supplemental Declaration of Helen Hodges) at 4, 22–23; see also Lead Counsel's Reply, # 5907 at 27.

Second, Rajesh Mandlekar, admitted to the California bar in 1998, was initially in solo practice, where he represented plaintiffs in several class actions, then became an associate with the firm from September 2001–05, and then rejoined the firm on a contract basis to work on the *Enron* litigation. # 5911 at 40; # 5909 (Supplemental Declaration of Helen Hodges) at 4–5; # 5907 at 27. Mandlekar had jury trial experience in a securities fraud class action against a Fortune 500 company in 2004, moved to Lead Counsel's Houston office for this litigation, prepared opposition briefs to defendants' summary judgment motions in 2006, worked on settlement strategy with some defendants, and was listed in the joint pretrial order as second or third chair on Lead Counsel's trial team. # 5911 at 40; # 5903 at 40; # 5907 at 27; # 5909 at 4–5.

Another contract attorney, Jerrilyn Hardaway, a Texas-licensed, former antitrust litigator in Houston, proficient in computer systems and technology, with Coughlin Stoia partner Paul Howes created Lead Counsel's internal document/deposition management protocols for the dozens of law firms participating in the case around the country, and built and managed the ESL website for service on all participating law firms. # 5903 at 45; # 5909 at 23–25. She also drafted and ne-

hour. # 5830, Ex. A. Beirne, Maynard & Parsons, LLP's attorneys appear to request from $225 to $350 per hour, while the paralegal bills $165–$170 per hour. While these local counsel firms are highly respected, none provides "services by lawyers of reasonably comparable skill, experience and reputation" as Coughlin Stoia. *Blum v. Stenson,* 465 U.S. at 895–96 n. 11, 104 S.Ct. 1541.

62. Lead Counsel represent their average hourly rate for partners is $630; for associates, $437; for of counsel and special counsel, $643; for contract attorneys, $346; with an average rate for lawyers of all levels of experience and paralegals, $456. Exhibit 1 of Helen Hodges's Declaration states that $18,109,738 of the claimed lodestar was generated by contract attorneys. Ex. F to # 5875. The Bishop Objectors speculate, without evidence, that most of these contract attorneys presumably worked in the case-specific Houston litigation center, with no continuing education, mentoring or other investment by the firm in their professional development. Objectors also complain that rates for several associates and contract attorneys are substantially higher than the rates for certain partners. Three partners billed at rates of less than $400 per hour, while fourteen associates and four contract attorneys billed at rates of $400 per hour or higher. The Court finds that Mr. Moscaret's Declaration explains and justifies these rates.

gotiated what became the Document Discovery Order, participated substantially in document review and organization, and prepared for, took and defended depositions. *See also* # 5909 (Supplemental Declaration of Helen Hodges) at 4–5; see also # 5907 at 26–27.

Helen Hodges identifies another contract attorney in the New York Office of Milberg Weiss, Allen Hobbes, who worked on this case at the beginning, reviewing SEC filings, media reports, the Powers Report and Congressional hearing transcripts. # 5909 at 5. He worked with Lead Counsel attorneys in San Diego and New York, analyzing facts regarding the structure of investment banks and researching anticipated legal issues; he then drafted discovery requests to the investment banks and to the Enron board of directors and prepared witness files for depositions. *Id.* He also researched and drafted oppositions to motions to dismiss, worked on the document database with partner Paul Howes and Ms. Hardaway, worked on a parallel case against JP Morgan Chase in Judge Rakoff's court in New York. *Id. See also* # 5907 at 27–28.

Mr. Moscaret also explains that the great majority of Lead Counsel's contract attorneys were recent graduates from the University of Houston Law Center, who all passed the Texas Bar exam and were recruited, interviewed and hired directly by Coughlin Stoia partner Paul Howes, and thus were junior associates who required and were accorded extensive supervision and control, especially by Mr. Howes. # 5903 at 40–44 (describing in detail Mr. Howes' supervision and mentoring of these attorneys in Lead Counsel's Houston office), 45–47.[63]

This Court notes that the hiring of a contract or temporary attorney is a common practice in law firms today.[64] *See, e.g., Takeda Chemical Industries, Ltd.*, Nos. 03 CIV 8253(DKC), 04 CIV 1966(DLC), 2007 WL 840368, *7 (S.D.N.Y. March 21, 2007) (Cotes, J.) ("In complex litigation, contract attorneys are routinely used by well-established law firms who supervise their work."). A contract attorney is one hired "to work on a single matter or a number of different matters, depending upon the firm's staffing needs

63. In their Reply, # 5907 at 25–26, Lead Counsel states,

> 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 researched issues of law for briefs and trial preparation. They pulled documents requested by our 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. . . . 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.

Id., citing Hodges Supp. Decl. ¶ 7.

64. Objectors Debra Lee Silverio (# 5849), Peter Carfagna's Objections on Behalf of the Rita Murphy Carfagna & Peter A. Carfagna Irrevocable Charitable Lead Annuity Trust U/A DTD 5/31/96 (# 5852, 5963), and George S. Bishop, Jill R. Bishop, Lon Wilkens, Betty Willkens (# 5875) complain at length about the use of contract attorneys and support staff and the inclusion of their hours in the lodestar and multiplier calculations.

and whether the temporary attorney has special expertise not otherwise available to the firm..... Economics is the principle reason for emergence of lawyer 'temping' because it permits a firm to service client needs during particularly busy periods by engaging an experienced attorney, without incurring the expense of hiring a permanent employee." George C. Rockas, *Lawyers For Hire and Associations of Lawyers: Arrangements that Are Changing the Way Law is Practiced*, 40 DEC B. B.J. 8 (November/December 1996). One who objects to their use should analyze "the types of tasks they performed in this case and whether their use in fact resulted in efficiencies.... [Bobjector] has failed to show that it was inappropriate for [plaintiff's] counsel either to use contract professionals in this case or to use them to the extent it did.". *Takeda*, 2007 WL 840368, at *7. The Court finds that the objectors here failed to do so.

The Court further finds that Lead Counsel has provided specific factual evidence that demonstrates that a number of its contract attorneys were experienced, skillful counsel, on the level of partner or senior or junior associate, and that the others were carefully supervised and mentored while engaged in legal work. Thus the Court finds that the objections by George S. Bishop, Jill R. Bishop, Lon Wilkens, Betty Willkens (# 5875), Peter Carfagna (# 58520), and Debra Silverio (# 5849) to Lead Counsel's use of contract attorneys and the inclusion of their fees in the lodestar are without merit.

[22] Furthermore, "[t]oday it is not uncommon for an employing law firm to pay the temporary lawyer at one rate and charge that lawyer's services to the client at a higher rate that covers overhead and a contribution to firm profits." Kathryn M. Fenton, *Use of Temporary or Contract Attorneys.* 13–FALL Antitrust 23, 24 (1998). *See also* Moscaret Declaration, # 5903 at ¶¶ 66–68. As for the complaints that Coughlin Stoia charged a higher rate for contract attorneys than it paid them, under ABA Formal Opinion No. 00–420, an attorney may bill the contract attorney's charges to the client as fees rather than costs when " 'the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own.' " *In re Wright*, 290 B.R. 145, 153 (Bkrtcy.C.D.Cal. 2003), citing ABA Formal Opinion No. 00–420. Here Lead Counsel has presented evidence that the "associate-level" contract attorneys, all of whom were licensed to practice by the relevant bar, were very carefully supervised, especially those who were newly licensed in Houston.

While there is not much case law addressing the question whether the charges of contract lawyers and paralegals may be billed separately as attorney's fees at a higher rate than the law firm pays them,[65] the reasoning in the Supreme Court's interpretation of 42 U.S.C. § 1988,[66] a fee-

65. Lead Counsel's average hourly rate for contract attorneys is listed as $346. Exhibit 1 of Helen Hodges's Declaration states that $18,109,738 of the claimed lodestar was generated by contract attorneys. Ex. F to # 5875.

The Bishop Objectors argue that contract attorneys are typically paid between $25–45 by their employers, who in turn bill the client law firms approximately $50 per hour per attorney. According to Exhibit F, the hourly rate requested by Lead Counsel for the listed contract attorneys ranged from $195 to $500, adding up to $18,109,738 of the claimed lodestar. The Bishop Objectors maintain that only the actual cost of these contract attorneys should be billable to the class, that these costs should be "expenses," not included in the lodestar and not subject to a multiplier.

66. Section 1988 provides in relevant part,

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. § 1681, *et seq.*], ... [or] title VI of the Civil Rights Act

shifting statute, in *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463 (1989) (affirming in a desegregation case the district court's compensation of "the work of paralegals, law clerks [67] and recent law graduates at market rates for their services, rather than at their cost to the attorneys"), appears to this Court to support an affirmative answer for any reasonable fee award in a common fund case if the particular facts regarding their services justified such billing. Justice Brennan, writing for the majority, observed that it is "self-evident" that "reasonable attorney's fee" as used in § 1988 "should compensate the work of paralegals, as well as the of attorneys." *Id.* Given the established rule that a reasonable attorney's fee is "one calculated according to prevailing market rates in the relevant community," i.e., " 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,' " Justice Brennan opined that the same principle should apply to the " 'increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks.' " *Id.* at 285–86, 109 S.Ct. 2463. The high court noted that "separate billing appears to be the practice in most communities today." *Id.* at 289 & n. 11, 109 S.Ct. 2463. *See also In re Tyco International, Ltd.,* 535 F.Supp.2d 249, 272 (D.N.H.2007) (Compendium, # 5817 at Ex. P) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completions of a particular document review project, is still an attorney. It is therefor appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); *Sandoval,* 86 F.Supp.2d at 609 (fees of contract attorneys and paralegals are separately compensable based on prevailing market rates for the kind and quality of their services, and included in the lodestar), *citing Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229; *DeHoyos,* 240 F.R.D. at 325 (fees for legal assistants, paralegals, investigators and non-secretarial support staff are included in the lodestar). Regardless of whether the attorney includes the paralegal's charges in his own hourly rate or bills them separately, the court must examine those charges against the prevailing market rate for comparable paralegals' services. 491 U.S. at 286, 109 S.Ct. 2463. *See also Sandoval v. Apfel,* 86 F.Supp.2d 601, 610 (N.D.Tex.2000) (discussing *Missouri v. Jenkins* and stating, "The determining factor for whether law clerk and paralegal fees can be compensated at separately-billed market rates depends on the practice of the relevant market"). Finally, and important here, the Supreme Court "reject[ed] the argument that compensation for paralegals at rates above 'cost' would yield a 'windfall' for the prevailing attorney." *Missouri v. Jenkins,* 491 U.S. at 286, 109 S.Ct. 2463. It noted that it knew of no one who "ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners or is otherwise improper under § 1988 merely because it exceeds the cost of the attorney's services. If the fees are consistent with market rates and practices, the 'windfall' argument has no more force with regard to paralegals than it does for associates."

> on 1964 [42 U.S.C. § 2000d et seq.], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

67. The "law clerks" in *Missouri v. Jenkins* were "generally law students working part time." 491 U.S. at 277, 109 S.Ct. 2463. Moreover, the Supreme Court referred to law clerks and paralegals collectively as "paralegals." *Id.* at 284, 109 S.Ct. 2463.

Id. Moreover, "[b]y encouraging the use of lower cost paralegals rather than attorneys wherever possible", permitting market-rate billing of paralegal hours " 'encourages cost-effective delivery of legal services . . . .' " *Id.* at 288, 109 S.Ct. 2463. The Court finds that the same reasoning applies to contract attorneys and that prevailing counsel can recover fees for their services at market rates rather that at their cost to the firm.

Mr. Moscaret also investigated why the upper end of Lead Counsel's associate/contract attorney rate range ($505) was higher than the average upper-end rate ($400) for associates at big firms in Houston and Dallas, although still, in his opinion, within the range of reasonableness. *Id.* at 16–17. He reports,

> I discovered the following facts:
>
> (a) there were 16 Lead Counsel associates/contract attorneys overall who billed at rates in excess of $400, which was less than one-in-three (*i.e.,* 28%) of the total group of 57;
>
> (b) there were 11 Lead Counsel associates/contract attorneys who billed at rates from $300–$400 per hour, or about one-in-five (*i.e.,* 19%) of that total group of 57;
>
> (c) however, of greatest significance to me, there were 30 Lead Counsel associates/contract attorneys who billed at rates from ***only*** $200–$300 per hour, which was ***more than half*** (*i.e.,* 53%) of that overall group of 57
>
> . . . . From the above data, it was clear that nearly three-fourths of all Lead Counsel associates/contract attorneys (*i.e.,* billed at rates ***below*** the average upper-end rate of $400 per hour for associates) at big firms in Houston/Dallas . . . . More importantly, ***over half*** of all Lead Counsel associates/contract attorneys actually billed at the ***lower*** end (*i.e.,* from $200–$300 per hour) of the big-firm associate rate range for Houston/Dallas . . . . I concluded that, on balance and viewed broadly, Lead Counsel's associate/contract attorneys rates were reasonable in relation to the big-firm Houston/Dallas market . . . . .
>
> *Id.* at 17.

Moscaret also examines the fee request for "efficient" case staffing, i.e., using as few attorneys as necessary doing as much of the legal work on a case as possible. # 5903 at 23. In a large complex case like this one, he looks for "a tight compact litigation team of attorneys doing the majority of the work on the case," i.e., "core" attorneys billing at least 75% of the hours on the case. *Id.* at 24. His investigation found that 67.4% of the total attorney hours (204,687.06) were performed by a "core" Coughlin Stoia litigation team of 14 partners, associates and contract attorneys, "close enough" to the 75% threshold for him to recommend that Lead Counsel be given the benefit of the doubt regarding reasonableness and efficiency of its overall case staffing. *Id.* at 24–25. He also identifies and discusses in detail other indicia demonstrating reasonableness and efficiency of overall staffing in this litigation, including an appropriate mix of attorneys for the demands of a complex litigation, reasonable delegation of work flow, continuity of case staffing, the hiring, use, supervision and control of contract attorneys. *Id.* at 25–47.

As noted, the lodestar is calculated by multiplying number of hours reasonably expended by an appropriate, reasonable hourly rate in the community for such legal services rendered by attorneys of comparable skill, experience, and reputation. The lodestar may then be adjusted by application of the *Johnson* factors. As observed earlier, "novelty and complexity of the issues," "the special skill and experience of counsel", the "quality of the representation," and "the results obtained" from