the litigation are presumably already encompassed in the lodestar and therefore should generally not be used to enhance the award; the Fifth Circuit has held that "[e]nhancements based upon these factors are only appropriate in rare case supported by specific evidence in the record and detailed findings by the courts.' " *Walker,* 99 F.3d at 771, *citing Alberti v. Klevenhagen,* 896 F.2d 927, 936 (enhancements based on these four factors are only appropriate in rare cases supported by specific evidence in the record) (*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)). *See also DeHoyos v. Allstate Corp.,* 240 F.R.D. 269, 323–24 (W.D.Tex.2007) ("[I]t is permissible to adjust a lodestar by *Johnson* factors considered within the original lodestar calculation if the case is rare and exceptional and if 'supported by both specific evidence on the record and detailed findings by the lower courts.' ") (*citing Shipes,* 987 F.2d at 320).

2. Application of the Johnson Factors

a. *time and labor required*

Johnson v. Georgia Highway Express, Inc. instructs, "The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities." Before becoming a judge, this Court had twelve and a half years of trial experience involving complex oil and gas and energy litigation at Exxon Corporation. Subsequently the Court served as a state court judge for one and a half years, and has been on the federal bench for eighteen and a half years. While a District Judge, the Court has also sat by designation on the Fifth Circuit Court of Appeals several times. During its tenure as a federal judge, this Court has presided over numerous complicated cases in varied areas of law, including patent, construction contract, criminal RICO, Constitutional issues, and federal securities violations. This Court has personally overseen this entire litigation, and because of its experience as both a lawyer and a judge, for purposes of a reasonable fee award the Court believes it is competent and in a unique position to assess the time, staffing, skill, and commitment that was necessary to bring this complex, highly contentious, securities-fraud lawsuit involving highly qualified lawyers representing very sophisticated individuals and entities, including seven of the largest financial institutions in the world.

Helen Hodges' Declaration, # 5818 at ¶¶ 18, 18. 295, 296 and Exs. 1 & 2, states that up to and including December 15, 2007, Coughlin Stoia expended 248,803.91 hours, which, added to the hours expended by co-class counsel, equaled 289,593.35, multiplied by the requested hourly rate of $456, yields an overall lodestar of $131,971,583.20. The Court finds that Ms. Hodges' Declaration accurately details the progression of this action. *Id.*

Although this litigation has been ongoing for over six years, the substantial record (demonstrated by approximately 6,000 entries on the *Newby* docket sheet as of this time), the sheer number of responses to motions to dismiss and motions for summary judgment, often addressing cutting edge legal issues, the extensive briefing and demanding, heightened standards applied to each, not to mention the multitude of other motions, and the technical and factual complexity of the issues demonstrate that Lead Counsel has vigorously, tenaciously, and efficiently prosecuted this suit. Lead Counsel also expended enormous energy and effort on class certification issues on the district court level, before the Fifth Circuit, and before the United States Supreme Court in both this action and the related *Stoneridge* case. Moreover, it was preparing for imminent trial when the Fifth Circuit decertified the *Newby* class. Those delays that have occurred have been occasioned not by Lead Counsel, but by the numerous related criminal prosecutions of Defendants or by the Court and its small staff's being overwhelmed by the submissions of so many highly competent attorneys on behalf of so many and such varied Defendants regarding such a vast array of complicated issues, many with little or no precedent.

Coughlin Stoia reports that its lawyers and support staff spent over 247,000 hours prosecuting this case. Hodges Decl., # 5818 at ¶ 17. Among their many diligent and skilled efforts in pursuing as large a recovery as possible for the proposed class, the Court notes that they drafted two massive consolidated class action complaints that thoroughly impressed this Court in the detail, breadth and depth, of their allegations, reflecting extraordinary investigatory effort, especially in light of the stay on formal discovery and the complexity of the scheme. They timely responded to numerous, complex motions to dismiss and motions for summary judgment from varied defendants with very different concerns and defenses and prevailed on most. Needless to say, the fact and expert discovery in this action was extensive, but was tightly controlled and was expertly and professionally handled by nearly all participating counsel. Lead Counsel played a significant role in organizing that discovery, coordinating the Deposition Scheduling Committee, establishing the deposition scheduling protocol, and establishing document depositories in Houston and in New York, where the Enron bankruptcy proceedings were also monitored.

Coughlin Stoia represents under oath that it did not "over-staff" the case, with just one attorney attending most of the fact depositions. Hodges Declaration, # 5818 at ¶ 169 (charting all depositions and Coughlin Stoia attorneys attending them).[68] Nor did they duplicate work already done in the government's and Bankruptcy Examiner Neal Batson's investigations, but instead used those results to streamline their depositions and reduce the number of hours they otherwise would have spent. Genovese Decl. at ¶ 25. *See also* Declaration of Kenneth M. Moscaret (# 5903 at 43–44, ¶ 77(e)) (Lead Counsel's expert on reasonableness of attorneys' fees and propriety of billing practices) ("I saw Lead Counsel usually sent only ***one*** attorney, less often two attorneys, to virtually every one of the several hundred fact depositions taken in the case. This kind of lean deposition staffing showed impressive restraint by Lead Counsel. Because fact depositions were such a costly, time-consuming aspect of this case, the lean deposition staffing was one strong indicia to me of generally acceptable litigation management practices and a reasonable attitude toward billing on the part of Lead Counsel."). See also Hodges Decl., # 5818 at ¶¶ 169, 214; Lead Counsel's Reply, # 5907

68. Objectors Larry Fenstad and Dorothy McCoppin assert that "it was apparently not uncommon for three or more attorneys from Lead Counsel to attend each deposition". # 5868 at 10 (all objections made by Fenstad and McCoppin are joined by class member Nasser Pebdani, # 5877). Ms. Hodges lists the hundreds of depositions taken (# 5818 at 92–100 and 119–20), of which only two were attended by three Coughlin Stoia attorneys; most were attended by only one firm attorney. Lead Counsel labels as "simply false" the statement by Objectors Larry Fenstad and Dorothy McCoppin objection. # 5907 at 19, citing Hodges Declaration, # 5818 at ¶¶ 169 (including chart of all depositions), ¶ 214 (chart of expert depositions).

at 19 (of the 472 depositions listed in Helen Hodges' Declaration, "there are only ***two*** where three lawyers appeared" and "no depositions where more than three attorneys from Lead Counsel appeared," while "***only one*** attorney from Lead Counsel appeared at most of them.").

This Court finds that in this six-plus-year, complex litigation, it would have been impossible to prosecute this action without a large number of attorneys, sometimes with multiple attorneys, appearing at the same court hearings or depositions. Indeed the number of counsel appearing for the Defendants was substantially higher, proportionately, at these events. Lead Counsel inevitably used a number of professional staffers, but the evidence reflects it was a well organized group, a "core" team that followed the litigation through, avoiding having to bring newcomers "up to speed," and distributed work appropriate to different levels of experience and expertise. Given the sophisticated and complex nature of this action, the Court finds that Lead Counsel's heavy use of experienced and skilled partner-level attorneys was appropriate.[69] The Court finds that the evidence does not indicate overstaffing, but instead reflects a most efficient use of staff.

Judge Sarokin, who has had significant experience in such matters, commented, "I would have expected the lodestar amount to be significantly higher, which to me, demonstrates Lead Counsel was extremely efficient in handling this case, for which they should be rewarded-not penalized" by a reduction in the requested multiplier. Sarokin Decl., # 5819 at ¶ 33. This Court agrees that Lead Counsel has achieved a top quality result with speed, efficiency, skill, and vigorous advocacy in a litigation of extraordinary complexity and risk, and that the lodestar request is reasonable.

The time-and-labor factor is usually encompassed within the lodestar and therefore not used to enhance the lodestar. Nevertheless, that factor under the facts here certainly does support as reasonable an award in accord with the 9.52% agreement made at the beginning of the litigation.

b. *novelty and difficulty of the issues*

It is undisputed, and the record of this case demonstrates clearly, that the issues here, both factual and legal, were extremely complex and very frequently novel or had minimal precedent, and that what authority existed was frequently in conflict. Such difficulties "generally require more time and effort on the attorney's part..... [H]e should not be penalized for undertaking a case which may 'make new law.' Instead, he should be appropriately compensated for accepting the challenge." *Johnson,* 488 F.2d at 717. Moreover, in the course of this litigation, various binding, higher-court decisions on issues such as causation, pleading, or proof at the class certification stage made Lead Plaintiffs' pursuit of a recovery, and indeed, individual investors' securities actions under the PSLRA generally, increasingly difficult. The most obvious example is the main theory of the case under § 10(b) and Rule 10b–5(a) and (c), scheme liability based on conduct of mostly secondary parties, the only deep pockets available here. That the viability of this theory, which was supported by the SEC and thirty-three State

69. Objector Debra Lee Silverio (# 5849) complains that over 37% of time billed by Coughlin Stoia was incurred by only five senior partners (Box, Hodges, Howes, Lerach and Park) whose rates ranged from $600 to $900 per hour. The Court finds that the complexity of this litigation required substantial involvement of experienced and knowledgeable attorneys. Moreover, as discussed, the use of a core group of attorneys throughout the litigation was cost-efficient.

Attorneys General, was challenged all the way to the Supreme Court in the *Stoneridge* case, where it was resolved by a 5–3 split in favor of defendants, with Justice Breyer not participating and with a strong dissent written by Justice Stephens, reflects the uncertainty and the significance of the issue. The number and nature of *amicus curiae* briefs that were filed in *Stoneridge* by prominent authorities, experts, and public servants, including the thirty-three State Attorneys General, attest to the considerable disagreement regarding the reach of the statute and Rule 10b–5 and demonstrate that Lead Plaintiff's was not a frivolous pursuit. Though only partially successful, Lead Counsel are to be commended for their zealousness, their diligence, their perseverance, their creativity, the enormous breadth and depth of their investigations and analysis, and their expertise in all areas of securities law on behalf of the proposed class. The difficulty and the risk, to be discussed *infra,* warrant a substantial fee award.

c. *skill required to perform legal services properly*

"The trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work become highly important in this consideration." *Johnson,* 488 F.2d at 718.

Leaving aside the complexity of the legal and factual issues, to which the record in this case attests, and the heightened pleading standards imposed on these securities claims, the Court finds that the fraud here was so skillfully concealed by Defendants that it took years for top experts to unravel the complicated transactions and obfuscations. Moreover, the extraordinary number and variety of parties and witnesses involved, spread across the country if not the world, required yeoman efforts to investigate, locate, interview, and depose. Of course the size of the recovery, $7.227 billion, almost entirely from secondary-actor banks because of the bankruptcy of Enron and, in essence, the dissolution of Arthur Andersen LLP, speak to extraordinary litigating and negotiating skill, perseverance, power, and influence of Class Counsel. Furthermore, they had to litigate against a large number of the best firms in the country for multinational financial institutions, which had essentially unlimited resources.

The Court finds that in the face of extraordinary obstacles, the skills, expertise, commitment, and tenacity of Lead Counsel in this litigation cannot be overstated. Not to be overlooked are the unparalleled results, $7.2 billion in settlement funds, which demonstrate counsel's clearly superlative litigating and negotiating skills. These qualities, constantly challenged by highly experienced and skilled defense attorneys from the best firms in the country, are subsumed in the lodestar. Nevertheless, counsel's skill in conjunction with the eighth *Johnson* factor, the amount involved and results obtained, support as highly reasonable the 9.52% percentage fee in the agreement.

d. *preclusion of other employment*

Lead Counsel states that the time spent on this case could have been devoted to other matters. As observed by Judge Sarokin, "[B]ased on the time commitment of plaintiff's counsel, as evidenced by the hours they have provided and the quality of the attorneys involved, it is apparent that Lead Counsel and their co-counsel were committed. With the time commitment involved, it would have been virtually impossible not to forego other work in order to prosecute this case with the vigor that is evidenced in the pleadings and declarations I have read." # 5819 at 16.

This factor supports the requested percentage fee here. Nevertheless, for purposes of the lodestar check, the Court finds that this factor is subsumed in the lodestar, with the exception of one area: the substantial financial burden on Lead Counsel, pursuant to the agreement with the Regents, to advance what became $40 million in expenses [70] without any guarantee of recovery of fees for such an extended period, had to affect the firm's ability to take and subsidize other cases. This substantial risky financial commitment supports use of a multiplier.

e. *customary fee*

A customary fee pursuant to a fee agreement in an action brought under the PSLRA that results in a common fund is a "reasonable" percentage of the recovery. The Court has determined from the evidence that the negotiated 9.52% was a reasonable fee in a securities class action at the time the agreement was made, indeed lower than that awarded in most contingency class actions.

As for a lodestar cross-check, the Fifth Circuit has opined, "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 Court has found the requested hourly rate reasonable under the prevailing rate in the Houston legal community based on evidence provided by Mr. Moscaret and local Co–Counsel. From its own familiarity with the litigation as well as its perusal of the billing records submitted by Lead Plaintiff, it also finds the lodestar reasonable, given evidence in the record of lean staffing and efficient distribution of tasks to appropriate level staff. The Court, like Judge Sarokin, expected a higher lodestar.

This Court considers Coughlin Stoia "a lion" at the securities bar on the national level. Lead Counsel's outstanding reputation, experience, and success in securities litigation nationwide were a major reason why the Regents selected the firm. While that factor may not support increasing the hourly fee beyond prevailing local levels for plaintiffs' lawyers with similar experience and practice, it does serve to justify an upward adjustment if the local customary fees were substantially lower than the fee Coughlin Stoia easily commands in the securities market nationally. This Court finds that there is no comparable Houston firm on par with Coughlin Stoia in securities class action litigation. Because Lead Counsel's fearsome reputation and successful track record undoubtedly were substantial factors in Lead Counsel's obtaining these extraordinary recoveries at a time when the reach of § 10(b) was being challenged by financial institutions and others in courts around the country, the Court finds the customary fee factor warrants application of a multiplier.

f. *whether the fee is fixed or contingent*

Regardless of whether the percentage in the fee agreement is honored or the Court awards a fee under the lodestar method, it is undisputed that Class Counsel have worked on a contingency. If Class Coun-

70. Regarding expenses, between August 2004 and November 2007, years into the litigation, Lead Counsel requested and the Court approved, as reasonable and necessary, partial expense reimbursements of approximately $39.5 million from "Expense Funds" established within the overall settlement fund for Lead Counsel's and co-counsel's ongoing expenses, such as investigators, court reporters, hotels, transportation, document storage, etc. # 2366, 4083, 4741, 5172, 5367, and 5761.

sel were not successful, they risked losing everything. They invested enormous numbers of hours of service and dollars "up front."

As discussed above, the holding in *Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449, 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, does not apply to common fund cases.

As discussed *supra,* the contingent fee agreement placed the financial risk, which was substantial, completely on Lead Counsel and their co-counsel. Declaration of H. Lee Sarokin, # 5819 at 15, Indeed, Professor Coffee states that the approximately 280,000 hours expended by the Regents' attorneys and the advancement of over $45 million in expenses "[i]n all likelihood ... represents the largest investment ever made in a single securities class action. More importantly, this investment of time and money was not made by a broad consortium of plaintiffs' firms all sharing the risk. Rather, of the total lodestar, which I understand to be in excess of $127.5 million, the Coughlin Stoia firm (and its predecessors) accounted for over $112 million of this amount (or nearly 90%) ... entirely at its own risk, without any promise or hope of reimbursement unless it was successful in high stakes and high risk litigation." # 5821 at 5. Given the complexity, the uncertainty of the law, the legal hurdles, the number and variety of defendants, the multifarious types of fraud, the size and caliber of the defense, and the length of this litigation, the Court finds that not only is the 9.52% fee request reasonable, but a "deal."

Moreover the Court finds that the exceptional obstacles to recovery that were present here, discussed *infra,* and the remarkable success obtained by Lead Counsel's skill and experience make this a "rare and exceptional" case warranting the application of the requested 5.2 multiplier under a lodestar cross-check or enhancement under a lodestar analysis.

First, there was no obvious deep pocket source available from which to seek any recovery. Issuer and primary violator Enron Corporation was in bankruptcy. Professor John C. Coffee points out in his Declaration (# 5821 at ¶¶ 2, 30, and 31) that in most of the "mega-fund" class action settlements, the issuer defendants (including Tyco International, Royal Ahold N.V., Nortel, AOL Time Warner, McKesson, HBOC, Lucent, Bank of America, Dynegy, Inc., Raytheon Co., and Waste Management, Inc.) were solvent and able to pay large settlement amounts. He further notes that "securities class actions are seldom filed when the issuer is bankrupt." # 5821 at ¶ 30, citing Cornerstone Research, *2006: A Year in Review* (2006) at 19 (reporting that no securities class actions were filed subsequent to the issuer's bankruptcy in 2006 and only 8 such lawsuits were filed in 2005). Furthermore, Enron's auditor, Arthur Andersen, LLP, was criminally prosecuted and convicted, and despite the Supreme Court's reversal of that conviction based on jury instructions, was ultimately reduced to a small operation unable to pay any significant amount for the recovery. Numerous individual officers and directors of Enron were also criminally prosecuted and their assets seized by the government, eliminating additional potential recovery. Others had limited resources.

Enron's D & O policies were "wasting" insurance policies: they covered directors and officers for defense and litigation costs as they were incurred, as well as for payment of any settlement or judgment against them. Under such policies, as the litigation goes on, payment of defense costs can drain the fund, leaving little or no money for coverage of settlements or judgments against these defendants.[71] Enron's D & O insurance policy coverage was $350 million dollars, amount was significantly depleted by competing demands defense fees for its officer and director defendants, many of whom were also sued by the SEC, by Enron's estate in the Bankruptcy Court, and by the government in criminal actions, not to mention by the *Tittle* ERISA plaintiffs. Indeed these competing actions further threatened to reduce the recovery from any defendant by the *Newby* plaintiffs. Recovery under these insurance policies was additionally hampered by the policies' exclusions from coverage of "deliberate and dishonest acts." As a result of all these factors, third parties were the only remaining sources for a significant recovery.

Moreover, the PSLRA and recent court interpretations of the statute made the risk of dismissal substantial, even from the initial pleading and from pre-discovery motions to dismiss. *See generally* Declaration of H. Lee Sarokin, # 5819 at 12–13.

The heightened pleading standards of the PSLRA incorporate Rule 9(b)'s fraud pleading standard (the plaintiff must specify the alleged fraudulent statement, the speaker, when and where the statements were made, and why they are fraudulent), require the complaint to identify each misleading statement and explain why it is misleading, and, if the allegation is made on information and belief, to assert with particularity all facts on which that belief was founded. 15 U.S.C. § 78u–4(b)(1); *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 349–50 (5th Cir.2002). In addition to these heightened pleading requirements and increasing the difficulties of bringing suit, the PSLRA, 15 U.S.C. § 78u–4(b)(3)(B), mandates a stay on "all discovery and other proceedings" with narrow exceptions until after resolution of motions to dismiss. The plaintiff must also plead particular facts establishing a strong inference of scienter, i.e., intent to deceive or severe recklessness. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 407, 408 (5th Cir.2001). While these heightened pleading requirements apply to any securities case, they were unusually difficult to meet here in light of the complex accounting and sophisticated transactions that characterized Enron's fraudulent scheme and which took experts years to unravel. Pleading challenges (and ultimately burden of proof) increased during the course of this litigation with the Supreme Court's opinions in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (it is insufficient to allege that the price of the securities was inflated on the day of purchase; plaintiff must allege facts showing loss causation, i.e., that the defendant's material misrepresentation caused the plaintiff's actual economic loss), and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (to plead a strong inference of scienter the plaintiff must not only plead with factual particularity, but also consider competing inferences and show that a strong inference of scienter is more than merely plausible or reasonable, indeed cogent and at least as compelling as any opposing inference).

Lead Plaintiff's ability to demonstrate liability of secondary actors was severely restricted by the Supreme Court's holding

71. *See, e.g., Liles v. Del Campo*, 350 F.3d 742, 745 (8th Cir.2003) (in a wasting policy "the value of the policy diminishes as funds are paid out .... Ongoing defense costs will continue to deplete the policy, and continued litigation threatens to drain the fund completely"); *IPSCO Steel (Alabama), Inc. v. Blaine Const. Corp.*, 371 F.3d 141, 144 (3d Cir.2004) (in a wasting policy, the "costs of defending legal actions could be deducted from the total amount of available coverage").

in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), that there is no aiding and abetting liability under § 10(b).[72] Given this bar, Lead Plaintiff pursued and fought zealously for a novel theory of scheme liability under § 10(b) and Rule 10b–5(a) and (c) against the financial institutions based on acts and conduct of scheme participants, not only on material misrepresentations and omissions where there is a duty to disclose. This scheme liability theory was recognized by a few courts, i.e., the Ninth and Third Circuits and district courts in the Second Circuit and the Fifth Circuit, but not by the Fifth Circuit, itself, which had limited the reach of § 10(b) and Rule 10b–5 to a material misrepresentation or omission where there is a recognized duty to disclose.[73] *See, e.g., Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir.2006), *vacated and remanded for further proceedings sub nom. Avis Budget Group, Inc. v. California State Teachers' Retirement Sys.*, ––– U.S. ––––, 128 S.Ct. 1119, 169 L.Ed.2d 945 (2008), *vacated and remanded for further proceedings pursuant to Stoneridge, Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir.2008); *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 610 (6th Cir.2005); *In re Parmalat Sec. Litig.*, 376 F.Supp.2d 472 (S.D.N.Y.2005); *In re Global Crossing Ltd. Sec. Litig.*, 322 F.Supp.2d 319 (S.D.N.Y.2004); *In re WorldCom, Inc. Sec. Litig.*, 294 F.Supp.2d 392 (S.D.N.Y.); *SEC v. Hopper*, No. Civ. H–04–1054, 2006 WL 778640, *11–12 (S.D.Tex. Mar.24, 2006). It was also supported by the SEC. Moreover, the number of *amicus curiae* briefs in support of this theory submitted by prominent individuals and groups to the Supreme Court in the *Stoneridge* case indicates it was not a frivolous argument. *See, e.g.*, Declaration of Jonathan Cuneo (# 5828) at ¶¶ 56, 57, 59 (stating that *amicus curiae* briefs in support of scheme/conduct liability were filed in the *Stoneridge* litigation by (1) 30 State Attorneys General under joint leadership of the Texas Republican Attorney General and the Ohio Democratic Attorney General; (2) the North American Securities Administrators Association ("NASAA"), a national organization of state SEC's; (3) the Council of Institutional Investors, "the most important, prestigious investors' organization in the world, representing 130 pension funds with $3 trillion in assets"; (4) the American Association of Retired Persons ("AARP"); [74] (5) House Financial Services Chairman Barney Frank and Judiciary Committee Chairman John Conyers, Jr.;

72. *See also* Expert Report of Professor Charles Silver, # 5822 at 55 ("The vast majority of the money comes from secondary defendants, the hardest parties to reach.").

73. *See, e.g., Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 384 (5th Cir.2007) (" '[D]eception' within the meaning of § 10(b) requires that a defendant fail to satisfy a duty to disclose material information to a plaintiff."), *cert. denied*, ––– U.S. ––––, 128 S.Ct. 1120, 169 L.Ed.2d 957 (2008); *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 661 (5th Cir. 2004), at 661 (" 'To state a private securities fraud claim under § 10(b) and Rule 10b–5, a plaintiff must allege, in connection with the purchase or sale of securities, (1) a misstatement or an omission (2) of material fact, (3) made with scienter (4) *on which plaintiff relied* (5) that proximately caused [the plaintiff's] injury.' "), *quoting Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 406–07 (5th Cir.2001) (emphasis in original).

74. Attorney Helen Hodges reports that thirty-three State Attorneys General participated in the *amicus curiae* brief. # 5818 ¶ 14, at 9. She declares that Coughlin Stoia worked hard and successfully to persuade NASAA, the Council of Institutional Investors, and Change to Win (a major labor organization), the AARP, the Consumer Federation of America, and several other large public pension funds and investor organizations to file *amicus* briefs in support of the defrauded investors. # 5818, ¶ 14 at 9.

(6) a bi-partisan group of former SEC officials, including President Bush appointees Chairman William Donaldson and Commissioner Harvey Goldschmid and President Clinton appointee Chairman Arthur Levitt, Jr.; and (6) although rejecting a request from the SEC to file such a brief after White House intervention, when the Solicitor General did file an *amicus* brief, it "adopted our view of fraudulent scheme liability," "said the Courts of Appeals, the Fifth and Eighth Circuit, were wrong on this liability issue," but "urged that 'eyeball' reliance by the victims on the conduct of the behind-the-scenes schemer was necessary for recovery.").

The United States Supreme Court in *Stoneridge Investment Partners, LLC, v. Scientific–Atlanta,* ––– U.S. ––––, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008), examined the issue of "when, if ever, an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)." 128 S.Ct. at 767. The Supreme Court concluded, "Conduct itself can be deceptive"; there need not be "a specific oral or written statement before there could be liability under § 10(b) or Rule 10b–5." *Id.* at 769. It did not totally reject the scheme liability theory based on conduct, but suggested that to satisfy the reliance and causation elements of a § 10(b) claim, the deceptive conduct must have been disclosed to the public, and investors must have relied on it in purchasing or selling their securities. *Id.* at 770 (concluding that in the case before it, "respondents' deceptive acts, . . . which were not disclosed to the investing public, are too remote to satisfy the reliance requirement.") *Id.*

As an additional substantial hurdle for Lead Counsel in deciding to pursue this case, the Fifth Circuit is a difficult venue in which to plead and prosecute securities class actions based on § 10(b) claims. For example, unlike many other courts the Fifth Circuit has rejected the group pleading doctrine. *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.,* 365 F.3d 353, 363–65 (5th Cir.2004) (group pleading doctrine "cannot withstand the PSLRA's specific requirement that the untrue statement or omissions be set forth with particularity as to each defendant" and "conflicts with the scienter requirement"). Many of the Financial Institution Defendants issued analysts' reports. The Fifth Circuit has made pleading § 10(b) liability based on such reports very difficult: to hold a corporation liable for such a report, the plaintiff must allege particular facts demonstrating not only why the statements in the report are false, but facts raising a strong inference of scienter (intent to deceive, manipulate, or defraud, or severe recklessness) in the individual who wrote the report. *Southland,* 365 F.3d at 366. As another example, despite the United States Supreme Court's long established rule that courts cannot "conduct a preliminary inquiry into the merits of a suit" on class certification,[75] in order to invoke a fraud-on-the-market presumption of reliance and to satisfy the loss causation element, the Fifth Circuit has decided that by the class certification stage of the litigation, the plaintiff bears the burden of demonstrating by a preponderance of all admissible evidence that the stock price actually moved because of the defendants' alleged misrepresentation or corrective disclosure. *See, e.g., Oscar Private Equity Investments v. Allegiance Telecom, Inc.,* 487 F.3d 261, 269, 264–66 (5th Cir. 2007) (at class certification for plaintiffs arguing for a presumption of reliance under the fraud on the market theory, "[w]e now require more than proof of a material

75. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

misstatement; we require proof that the misstatement *actually moved* the market."), *citing Greenberg v. Crossroads Systems, Inc.,* 364 F.3d 657, 663, 665, 666 (5th Cir.2004) ("to trigger the presumption [of reliance] plaintiffs must demonstrate that . . . the cause of the decline in price is due to the revelation of the truth and not the release of unrelated negative information," i.e., they must show that the stock price actually moved because of the defendant's alleged misrepresentation or corrective disclosure); *Unger v. Amedisys, Inc.* 401 F.3d 316, 323 (5th Cir.2005) (requiring "a complete analysis of fraud-on-the-market indicators" at class certification stage, including proof of market efficiency relating to the following nonexhaustive list of factors: the average weekly trading volume expressed as a percentage of total outstanding shares; the number of securities analysts following and reporting on the stock; the extent to which market makers and arbitrageurs trade in stock; the company's eligibility to file SEC registration Form S–3; empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in th stock price; the company's market capitalization; the bid-ask spread for stock sales; and float, the stock's trading volume without counting insider-owned stock.); *Nathenson v. Zonagen,* 267 F.3d 400, 414 (5th Cir.2001). Furthermore, in *Greenberg,* the plaintiff must not only show that the stock's price was affected by revelation of the falsity of earlier false statements, but also "(1) that the negative 'truthful' information causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline." 364 F.3d at 666.

Furthermore, certification of a class was an uphill battle from the start in the Fifth Circuit, even though securities fraud actions are frequently viewed as appropriate for class prosecution. The Fifth Circuit is wary of the power of class actions and requires a plaintiff to prove more at pretrial stages of the litigation, as summarized in its recent pronouncements in *Oscar Private Equity,* 487 F.3d at 267 ("We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing of loss causation to sustain certification, at least in the instance of simultaneous disclosure of negative news. . . . [A] district court's certification order often bestows upon the plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it.").[76] In decertifying the class in *Newby,* the Fifth Circuit stated, "The necessity of establishing a classwide pre-

76. As evidenced in the record, the appellate court reversed this Court's certification of the *Newby* class, ruling that there was no *Affiliated Ute* presumption of reliance on the bank defendants' behavior or omissions because the banks had no duty to investors to disclose the allegedly fraudulent nature of their transactions, and there was no fraud-on-the-market presumption of reliance because plaintiffs did not allege that the bank defendants made any public and material misrepresentations. *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). It concluded that plaintiffs had only alleged aiding and abetting in asserting that the banks' transactions allowed Enron to commit fraud by misstating its financial condition. *Id.* at 386. It further rejected as too broad the rule of the SEC adopted by this Court that primary liability attaches to any party that engages in a transaction with the principal purpose and effect of creating a false appearance of revenues. *Id.* at 386–87.

sumption of reliance in securities class actions makes substantial merits review on a Rule 23(f) appeal inevitable," *inter alia* because "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." 482 F.3d at 393. Indeed, the Fifth Circuit's decertification of the *Newby* class and rejection of the scheme liability theory make even more remarkable the exceptional settlement recovery through the litigating and negotiating skills and hard work of Coughlin Stoia. *See* Declaration of Judge Sarokin, # 5819 at 16 ("The adverse class certification ruling by the Fifth Circuit demonstrates the outstanding nature of the $6.6 billion recovery against [Citigroup, JP Morgan Chase, and CIBC] given that [the fraudulent scheme/conduct liability] theory was rejected by the appellate court.").

Another legal risk-related deterrent to taking on this action, especially given the involvement of so many parties in the Enron debacle, is the PSLRA's judgment reduction/proportionate liability provisions for § 10(b) claims. 15 U.S.C. § 78u–4(f). Section 78u–4(f)(2)(B) limit damages against a defendant "solely for the portion of the judgment that corresponds to the percentage of responsibility of that [defendant]" unless he knowingly violated the law, under which circumstance he would be jointly and severally liable for all the damages § 78u–4(f)(2)(A). Moreover, in effect it provides non-settling defendants with a judgment credit through the proportionate share formula. § 15 U.S.C. § 78u–4(f)(7)(B). The evidence required to establish first which parties are primarily liable, to which plaintiffs each defendant is liable, whether the defendant knowingly violated the law, then proportionate liability where plaintiffs do not show a knowing violation, and then judgment reductions would be extensive and make prosecution extremely difficult.[77]

In sum, the risk factor not only supports the reasonableness of the 9.52% fee agreement, but warrants application of a significant multiplier for a lodestar analysis.

g. *time limitations imposed by client or the circumstances*

While the Court is not aware of time limitations imposed by the Regents, given the number, nature, and size of the Defendants in this consolidated-and-coordinated-case litigation the Court itself imposed a very tight and demanding docket control schedule in this case, from the filing of the complaints, two rounds of motions to dismiss and responses in opposition, discovery and the Deposition Protocol. Lead Counsel performed admirably throughout.

h. *amount involved and the results obtained*

It is undisputed that the $7.2 billion recovery for the benefit of the class is the largest in a securities class action, indeed of any class action, in history. *See, e.g.,* Declaration of H. Lee Sarokin, # 5819 at 14.

The United States Supreme Court and the Fifth Circuit have held that " 'the most critical factor' in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), *quoting Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Migis v. Pearle Vision, Inc.,* 135 F.3d 1041, 1047 (5th Cir.1998) (". . . . Where recovery of private damages is the purpose, . . . consideration to the

77. The Court finds a remarkable commitment by Lead Counsel, especially when the view of commentators across the country that the class was unlikely to recover more than a few cents on the dollar. *See, e.g.,* Expert Report of Professor Charles Silver, # 5822 at 42–43.

amount of damages awarded as to the amount sought represents the primary means to evaluate that concern.").

Thus the Court finds that the extraordinary recovery under extremely challenging circumstances not only supports the reasonableness of a 9.52% fee award, but also justifies, for a lodestar calculation, application of a significant multiplier.

i. *The experience, ability, and reputation of the attorney*

The experience, ability, and reputation of the attorneys of Coughlin Stoia is not disputed; it is one of the most successful law firms in securities class actions, if not the preeminent one, in the country. Indeed that factor was the main reason why the Regents hired Class Counsel. Coughlin Stoia's track record of significant victories is unparalleled and justifies the high hourly fees which they charge. After noting the extraordinary amount of time and money invested by Lead Counsel in an action based "on a novel legal theory, with little precedent to support it in a case that initially seemed both financially unpromising and difficult to settle," Professor Coffee proclaimed,

> [E]ven if other counsel could have developed the same original legal theory (and this is uncertain), only a law firm with Lead Counsel's reputation for zealous advocacy could have convinced the defendants that this case would be carried to trial (at whatever cost it took) and represented too great a risk for them not to settle. In addition, Lead Counsel was litigating literally against the cream of the American corporate law bar.... To sum up, in my judgment, few other counsel (and perhaps no other) could have obtained this degree of success.

Coffee Declaration, # 5821 at 5–6, ¶ 5.

Here too, the Court finds that the ninth *Johnson* factor supports the reasonableness of the 9.52% fee agreement.

j. *undesirability of the case*

The quantity of lawsuits relating to Enron filed, the number of highly qualified law firms filing them, the enormous publicity surrounding the Enron debacle, and the support of the suit by the community locally and nationally, other than big business, attest to the desirability of the newsworthy *Newby* litigation. So do the number of class members and attorneys that applied for appointment as Lead Plaintiff and Lead Counsel, respectively.

Nevertheless, the risk of little or no recovery was high in the absence of any deep pocket defendant that had made a material misrepresentation or omission and the Lead Plaintiff's reliance on a novel theory for liability under § 10(b) and Rule 10b–5(a) and (c). Furthermore the cost of pursuing the named Defendants for such a long period was too great to be born by many firms.

The undesirability or financial risk supports the reasonableness of the fee agreement.

k. *nature and length of the professional relationship with the Regents*

Before the Regents retained Coughlin Stoia in December 2001, Lead Plaintiff had never worked with Coughlin Stoia, but their joint efforts on this case were so effective and smooth that the Regents hired Coughlin Stoia to serve as Lead Counsel on the subsequent *Dynegy* litigation, where the fee agreement was structured similarly to the one here, at a slightly lower percentage (7.752%) for a much less complex action, and which Judge Lake enforced. The Regents also hired Coughlin Stoia to represent the Regents in an individual securities suit against AOL Time Warner, in which the Regents negotiated a 14.5% fee and received $200 million net of the fees. This increasing relationship evidences the Regents' satisfaction with Lead Counsel's work and supports the reasonableness of the fee request.

l. awards in similar cases

The result of a comparison of this case with others depends on how comprehensive a view one takes of post-PSLRA securities class actions, in particular of mega-fund class actions.

A review of more than just the five most recent mega-fund cases demonstrates that the requested fee award is below those standardly granted in this area of law. In addition to the evidence previously cited in this opinion, *see, e.g., In re Charter Communications, Inc. Sec. Litig.,* No. MDL 1506, 4:02–CV1186 CAS, 2005 WL 4045741, *13–14 (E.D.Mo. June 30, 2005) (and cases cited therein) (20% fee falls below the average of fee awards and many megafund fee awards have exceeded 20% in securities class actions). Through experts and citations to various cases, Lead Counsel has presented evidence that in the broad or long view, the percentage of the settlement fund requested for fees in this case is not only reasonable, but well below most of those awarded in securities class actions generally.

Professor Coffee submits a chart of the largest class action settlements involving "mega fund" recoveries (over $100 million) since 1990, with their fee awards expressed as a percentage of recovery, to demonstrate that the agreed to 9.52% here is not only within the range, but quite low, and therefore very reasonable. Coffee Declaration, # 5821 at 16–18, Table 2. Professor Coffee also discusses a well known study, Stuart J. Logan, Dr. Jack Moshman, & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions,* 24 Class Action Reports 167–234 (March–April 2003) ("Logan Study"), in which the authors' data on fee awards in all class actions generally suggested that there had been an increase in the average percentage awarded as fees: in 1990 in their first study they found that in 404 cases the average percentage awarded was 14.8%, while in 2003, including those original 404 cases they found the average percentage to be 18.4%. # 5821 at 20. *See also Cardinal Health,* 528 F.Supp.2d at 765 & n. 11.[78]

Professor Coffee also addresses use of a lodestar cross-check to insure that a percentage fee award is reasonable. Observing that if we take the cumulative lodestar asserted here, over $127.5 million, and divide it into the requested fee award of approximately $688 million, the resulting lodestar multiplier would be 5.39%. Professor Coffee concludes that this number is "only marginally higher than the 4.50 average multiplier in settlements over $100 million." # 5821 at ¶ 32. He further reports that in Logan, Moshman & Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," 24 Class Action Re-

78. In *Cardinal Health,* in 2007 Judge Marbley summarized the Logan study:

> The authors undertook a survey of the common benefit fee awards entered by state and federal courts between 1973 and the present, in 1120 cases. The authors also parsed the common benefit fee awards by size of recovery, type of case, and time of award. Among other things the authors found that: (1) when measured as a percentage of the total recovery, common benefit awards (including both fees and expenses) averaged: (a) 18.4% across all 1,120 cases, (b) 15.1% across the 64 cases where the recovery exceeded $100 million, and (c) 16.1% across the 10 mass tort cases.

528 F.Supp.2d at 765. Judge Marbley looked to other post-PSLRA cases as a guide to determine a reasonable percentage of the fund for an attorneys' fee award and concluded that an appropriate fee would be between 15% to 20% of a $600 million settlement fund that provided a high percentage recovery for shareholders. *Id.*

ports 169 (March–April 2003), in cases where recovery was over $100 million, 4.5 was the average multiplier. *Id.* Moreover "multipliers above 4 have become relatively common over the last dozen years." *Id.* In support, in ¶ 33 in "Table 5: Recent Multipliers," he lists cases in which multipliers ranged from 3.97 to 9.3. *Id.* at ¶ 34 (and cases cited therein). Furthermore, "there has been a general recognition that multipliers in the range of 3 to 4.5 have become relatively 'common' " in cases with recoveries over $1 billion. *Id., citing In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1999) (awarding a 3.97 multiplier and finding fee awards of 3 to 4.5 to be "common"); *In re Sumitomo Copper Litig.,* 74 F.Supp.2d 393, 399 (S.D.N.Y.1999) (awarding a 27.5% fee on $134.6 million commodities fraud settlement and finding a 3 to 4.5% multiplier to be common); *In re Visa Check/MasterMoney Antitrust Litig.,* 297 F.Supp.2d 503 (E.D.N.Y.2003) (approving a 3.5 multiplier in a multi-billion dollar settlement that remains the largest antitrust class action settlement on record); and *Maley v. Del Global Technologies Corp.,* 186 F.Supp.2d 358, 368–69 (S.D.N.Y.2002) (finding a multiplier of 4.65 to be within the standard range in the Second Circuit.). Given the extraordinary risk in this case, he recommends that a multiplier in the 5–6 range would be justified, especially since "defendants have successfully resisted plaintiffs' attempts to reach trial." *Id.* at ¶ 35.[79]

In Lead Counsel's Memorandum (# 5816 at 60 n. 47), Lead Counsel cites several cases, copies of unpublished opinions included in the Compendium, where multipliers greater than 5 have been approved: *Waste Management, Inc. Sec. Litig. ("Waste Management I"),* H–99–2183, slip op. at 64 (noting the award of 7.9% of the settlement fund as fees was pursuant to parties' agreement and substantially lower than fees regularly awarded in the Fifth Circuit and approving a multiplier of 5.3) (Ex. B); *In re Cardinal Health,* 528 F.Supp.2d 752, 768 (S.D.Ohio 2007) (award of 18% and multiplier of 6) (Ex. Q); *In re Charter Communications, Inc. Sec. Litig.,* No. 4:02–CV–1186 CAS, 2005 U.S. Dist. LEXIS 14772, *56, 2005 WL 4045741 (E.D.Mo. June 30, 2005) (20% of $146,250,000 settlement fund and multiplier of 5.6); *Roberts v. Texaco, Inc.,* 979 F.Supp. 185, 198 (S.D.N.Y.1997) (16.66% of $115 million common fund and multiplier of 5.5); and *In re RJR Nabisco, Inc. Securities Litig.,* No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992) (awarding 30% of $72.5 million with multiplier of 6.0). *See also Di Giacomo,* 2001 WL 34633373, at *10 (30% of $29.5 million fund and multiplier of 5.3).

The Court also notes that the Third Circuit in *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294 (3d Cir.2005), remanded the case for determination of an attorney's fee award after a partial settlement of a securities fraud action. The district court subsequently awarded a fee constituting 25% of the settlement fund, approximately $31.7 million, and found it reasonable even though it resulted in a lodestar multiplier of 6.96, because it involved the largest

79. This Court observes that Judge Marbley in *In re Cardinal Health Inc. Sec. Litig.,* 528 F.Supp.2d at 768, thoughtfully applied a multiplier of six:

> In this case, however, the Court is not uncomfortable with deviating from the normal range of lodestar multiplier, at least to some extent. Given the outstanding settlement in this case and the noticeable skill of counsel, a lodestar multiplier greater than the average would not be unwarranted or unprecedented.... Though [a multiplier of six times] is significantly above average, the Court finds this award reasonable under the circumstances.

recovery on record against an auditor in a securities fraud action ("a historic victory"), because counsel obtained unprecedented results without relying on the product of any official investigation, because the case was extremely complex and "victory at trial would have been, at best, remote and uncertain," and because counsel performed with great skill. *In re Rite Aid Corp. Sec. Litig.,* 362 F.Supp.2d 587, 590 (E.D.Pa.2005). Here, the amount recovered is greater, Lead Counsel has proffered evidence that it provided a roadmap for Bankruptcy Examiner Neal Batson's investigation in the Enron bankruptcy and contributed substantially to it, the case was even more complex, and counsel's representation was of the highest caliber.

Another of Lead Counsel's experts, Professor Silver, provides a chart showing the sliding scales (tying higher percentages to higher levels of recovery) agreed to in other cases prosecuted by Lead Counsel or one of its predecessors; they range from 14% to 27%, considerably higher percentages than that agreed to here. # 5822 at 57–58 (Table 5). He also submits a Table of Fees agreed to by institutional investors in other cases which objectors have cited as having reasonable fees; in all but one, the percentages promised exceed those agreed to by the Regents and Lead Counsel. *Id.* at 58–59 (Table 6). In addition Professor Silver cites two academic studies of post-PSLRA class actions in support of his view that the Regents' promised fee is not only reasonable, but "well below average for cases led by public institutional investors"): (1) Stephen J. Choi, Jill E. Fisch, and A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act,* 83 Washington U.L. Quarterly 869 (2005) (finding that fees averaged 30% of recovery in cases led by investors and private institutions and 25% in cases led by public institutions); and (2) Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience On Attorneys' Fees in Securities Class Actions,* St. John's University School of Law, Legal Studies Research Paper Series, Paper # 05–0034 (Dec.2005) (studying "a random sample of 244 post-PSLRA securities fraud class actions entered into between April 1997 and May 2005, inclusive" and finding a mean fee of 20% in cases with public pension funds as lead plaintiffs. *Id.* at 59–60. Professor Silver also proffers a chart of fee awards in class actions generally, only some of which are securities suits, with settlements exceeding $100 million; the fee award percentages range from 25% to 36%. *Id.* at 62 (Table 7). Finally Professor Silver discusses two empirical studies of class actions generally: (1) Thomas E. Willging, *et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 16 (1996) ("Willging Study"); and (2) Theodore Eisenberg and Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 Journal of Empirical Legal Studies 27. 75 (2004) ("E & M Study"). The Willging Study at 69 reported a remarkably consistent median fee award in class actions ranged from 27–30%. # 5822 at 63. The E & M Study, which included a larger, more diverse, and more recent group of cases, found that as the recoveries increased in size, fee percentages declined. *Id.* at 64. Professor Silver provides diagrams of fee awards, excluding expenses, from that study that demonstrate (1) in cases involving recoveries of $84 million or more, the average fee award equals slightly less than 20% of the recovery, with the rage defined by the first standard deviation extending upward to 27%; and (2) in cases with recoveries over $190 million, the mean is above 10% and a first standard deviation extends above 20%. Lead Counsel's requested 9.52% falls below the mean that the E & M Study reports for the largest class settlements using either of these datasets. *Id.* at 65–66.[80]

Arguing that public policy supports granting the requested fee award in *Enron,* Professor Coffee quotes from Judge Denise Cote, *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y. 2005), and argues that her "comments apply at least as well here, where in my judgment, the risk was substantially higher":

> Public policy also supports the approval of this fee request. The size of the recovery achieved for the class which has been praised even by several objectors-could not have been achieved without the unwavering commitment of Lead Counsel to this litigation. Several of the lead attorneys for the Class essentially devoted years of their lives to this litigation, with the personal sacrifices that accompany such a commitment. If the Lead Plaintiff had been represented by less tenacious and competent counsel, it is by no means clear that it would have achieved the success it did here on behalf of the Class. In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives. After all, this litigation was conducted on an entirely contingent fee basis, and Lead Counsel paid millions of dollars to fund the litigation. While some significant recovery in a case of this magnitude may seem a foregone conclusion now, the recovery achieved here was never certain. It is only the size of the Citigroup and Underwriters' Settlements that make this recovery so historic, and it is likely that less able plaintiffs' counsel would have achieved far less.

Id. at ¶ 48. This Court finds these comments highly applicable to the instant case.

The Honorable H. Lee Sarokin, having independently reviewed Lead Plaintiff's and the attorneys working with the firm demonstrating that they spent approximately 280,000 hours at a time cost of $127 million and incurred expenses of approxi-

80. This Court observes that in *In re Cabletron Systems, Inc., Securities Litig.,* 239 F.R.D. 30 (D.N.H.2006), in a thoughtful discussion of different methods of awarding attorneys' fees, Judge Smith examined the same five statistical analyses of attorneys' fee awards in complex class actions, in particular in securities class actions (the Logan Study, the NERA Study, the Willging Study, the E & M Study, and the O'Brien Study). Although professing that he was "without the technical expertise or time to [fully] parse the available data," Judge Smith determined that the Logan Study found that "on average, attorneys' fees (plus judicially awarded expenses) equaled 18.4 percent of the settlement fund": that the NERA Study "concluded that fee awards averaged approximately 32 percent of the settlement"; that the Willging Study "indicated that the mean and median fee award was between 24 and 30 percent of the net monetary distribution to the class"; that the O'Brien Study concluded that from April 1993 to September 1996 "the average fee award to plaintiffs' counsel in securities cases amounted to 32 percent of the settlement fund"; and that the E & M Study, which "compiled and analyzed data contained in all previous studies of class action awards," "determined that the median fee in securities class actions is 25 percent, while the median fee in non-securities common fund cases is 30 percent." *Cabletron,* 239 F.R.D. at 41–42. Judge Smith decided to follow the Seventh Circuit's "market-oriented approach" and "craft a fee award approximating the result of an arm's length negotiation in real market conditions," and he used these percentages as part of his review to "arrive at a POF fee award that is well grounded in market-based information and it is therefore reasonable." *Id.* at 40–41.

This Court notes that Lead Counsel's requested 9.52%, without expenses included, is far below these percentages.

mately $45 million, found that "the hours spent on the case were necessary and reasonable in light of its complexity, importance, novelty, amount of motion practice, discovery and work involved in prosecuting a case for almost six years.... These figures are entirely appropriate in a complex and protracted case of this magnitude. In fact, I would have expected the lodestar amount to be significantly higher, which, to me, demonstrates Lead Counsel was extremely efficient in the handling of this case, for which they should be rewarded-not penalized." # 5819 at 14.

Moreover, as Professor Charles Silver remarked,

> The possibility that Lead Counsel exceeded The Regents' expectations by recovering $7 billion does not make the fee unreasonable. It just shows that the recovery is outstanding, which presumably delights all investors, and that Lead Counsel's outstanding work, which The Regents repeatedly acknowledge, will generate a superior fee. This is how contingent fee arrangements are supposed to work: lawyers who do better for their clients also do better for themselves.

5822 at 46. He quotes Judge Easterbrook in *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir.2001), in urging against capping fees in megafund cases at 10%: "Private parties would never contract for such an arrangement because it would eliminate counsel's incentive to press" for greater recoveries and would encourage cheap settlements. # 5822 at 67.

This Court notes that while some commentators argue that as the settlement recovery gets larger, the fee award percentage should decrease "because the magnitude of the recovery in many instances is due to the size of the class and 'has no direct relationship to the efforts of counsel,' "[81] Judge Barbadoro in the *Tyco* litigation presented the other side of the public policy coin on such a downward sliding scale with regard to the case before him:

> In this case, countervailing public policy considerations weigh against any reduction of the POF award. This was an extraordinarily complex and hard-fought case. Co–Lead Counsel put massive resources and effort into the case for five long years, accumulating nearly $29 million in yet-to-be reimbursed expenses and expending more than 488,000 billable hours (constituting a lode-star of over $172 million) on a wholly contingent basis. But for Co–Lead Counsel's enormous expenditure of time, money, and effort, they would not have been able to negotiate an end result so favorable for the class. Because Co–Lead Counsel's continued, dogged effort over the past five years is a major reason for the magnitude of the recovery, and because this case could not have reached a similarly satisfactory resolution earlier, public policy favors granting counsel an award reflecting that effort.

Tyco, 535 F.Supp.2d at 249[16].[82] Judge Barbadoro added,

> Without a fee that reflects the risk and effort involved in this litigation, future plaintiffs' attorneys might hesitate to be similarly aggressive and persistent when faced with a similarly complicated,

81. *In re Tyco International Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249 (D.N.H. Dec.2007) (page numbers not yet available for pin citation), *citing In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir.1998), *cert. denied*, 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999), and *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir.2005).

82. Page numbers not yet available for pin citation. Slip opinion is available at Compendium, # 5817 Ex. P.

> risky case and similarly intransigent defendants.[83] ... But for cases like this one, in which a satisfactory settlement only became possible after years of hard-fought motion practice and searching discovery, it would be against public policy for me to set an unreasonably low POF award that would encourage future plaintiffs' attorneys to settle too early and too low. Additionally, approving this fee award is unlikely to open the floodgates to ever-higher levels of attorney compensation. Few cases will involve the combination of incredible legal and factual complexity, high risk, massive lodestar, and multi-billion-dollar recovery that characterized this case. Accordingly, I find it would be inappropriate to artificially reduce the percentage award based on the size of the recovery alone.

Id. This Court finds the same rationale is applicable to Class Counsel's extraordinary commitment here, where the complexity, duration, and risk were even higher than in *Tyco.*

Even from a narrow view of only the five most recent mega-fund cases, the percentage fee award in the *Tyco* litigation (14.5%) was greater than the 9.52% requested here. Moreover, in *Tyco* the company and the accountants were available and able to pay a judgment, so counsel did not have to pursue secondary actors through novel theories, making the risk here much greater. Lead Counsel has also shown that here there were more than 150 depositions over the number taken in *Tyco.* In addition, unlike this litigation in which Coughlin Stoia shouldered most of the economic risk of prosecuting the case, three firms shared such a burden in *Tyco. See, e.g.,* # 5907 at 60. Similarly, the Court has previously compared this case with *WorldCom* and identified the greater difficulties and the greater success here for shareholder class members.

In sum, in its lodestar cross check of the 9.52% fee agreement, the Court finds that while there are no other "similar" cases when one examines all the circumstances of the litigation, the requested lodestar is reasonable for this efficiently prosecuted case and a multiplier of 5.2 is warranted, given the unmatched size of the recovery, the obstacles and risks faced by Coughlin Stoia from the beginning, and the skill and commitment exhibited by counsel.

III. Remaining Objections From Class Members and Attorneys

A. Non–Objector Public Pension Funds

[23] Lead Counsel points out that in other mega-cases, public pension funds have objected to the attorney fees request. Lead Counsel's Reply, # 5907 at 1 and n. 2 (listing examples). Here, however, it is remarkable that not a single pension plan fund has objected to the fee request. Furthermore, only one institutional investor, the Fiduciary Counselors acting on behalf of the Enron Savings Plan and the Enron

83. Lead Plaintiff's expert on economic analysis of litigation and settlement, Professor Bebchuk, opines,

> [A] sliding [decreasing] schedule has it backwards. A sliding schedule provides counsel with a higher percentage of those initial settlement dollars that are relatively easy to obtain—and with a lower percentage of those dollars at high settlement levels that are relatively more difficult to extract. The sliding schedule thus concentrates the "firepower" of incentives in exactly the wrong places. Most importantly, a sliding schedule

5820 at 11. He concludes that "the goal of inducing investments by counsel would best be served by an increasing schedule ... [which] spends more compensation dollar on additional settlement dollars at higher settlement values that are relatively more difficult to achieve and for which stronger incentives can make a significant difference." *Id.* at 11–12.

Stock Option Plan ("ESOP"), has voiced objections (discussed *infra*) to the fee request. *Id.* at 1. This Court finds that general acceptance of the requested fee amount by all the pension funds and all but one institutional investor strongly supports the reasonableness of enforcing the fee agreement.

B. Objections To Issues Not Previously Addressed

1. General Objections Made by Multiple Parties[84]

Several objections to the failure of counsel to provide time records have been cured. Lead Counsel have submitted their billing records (# 5959 and 5960) [85] pursuant to Court order and the objectors have had an opportunity to review them and to file additional objections.

A few letters from class members have complained of the small amount of money they will receive per share compared with the price they paid when they bought their Enron securities. In comparison to that small recovery, they find the amount of Lead Counsel's request for fees and expenses excessive.

Although the estimated losses to the Class exceed $40 billion, the Court finds that the settlement fund ($7.2 billion, and for Plaintiff class members, an average of at least $6.79 per share according to the disclosure in the Notice to the Class,[86] of their Enron investments) is remarkable in the face of the great obstacles to any recovery in this litigation. The typical recovery in most class actions generally is three-to-six cents on the dollar. *See, e.g., Cardinal Health,* 528 F.Supp.2d at 764, *citing* Elaine Buckberg, *et al., Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements,* 8 (NERA, Feb. 2005). Thus despite significant impediments, the individual recovery here is beyond that range. Moreover 90% of the common fund here goes to the class members. Thus the Court overrules the objection.

2. Individual Objections

a. Debra Lee Silverio

[24] Debra Lee Silverio (# 5849) objects to Lead Counsel's average hourly rate of $457 per hour for all participants, including paralegals and associates.

The Court would point out that a blended hourly rate of all the firm's legal staff is commonly used in preparing fee requests. *See, e.g., Rite Aid,* 396 F.3d at 306 and nn. 14 and 15 (the billing rate should be a "blended billing rate that approximates the fee structure of all the attorneys who per-

84. A number of objectors have made conclusory complaints, e.g., that the requested fees are excessive or the multiplier too high, without offering any specific reasons, comparisons or established standards by which to measure the objection. For example, Mr. Fenstad and Ms. McCoppin assert the size of Lead Counsel's fee request "should shock the conscious [*sic*] of this court." # 5868 at 7.

The Court addresses only those objections that are specific, not previously addressed, and supported by evidence or authority.

85. Supplemented by an Addendum (# 5991) with the time records of Chitwood Harley Harnes LLP and Cunningham Darlow LLP. Under these firms' agreement with Lead Counsel, their fees will be awarded from the amount the Court grants Lead Counsel and will not increase the burden on the class.

86. As pointed out by counsel, that number "assumes that everyone who can submits a claim. Given the number of different types of securities covered by the plan of allocation and the number of individuals and entities in the Class (about 1.5 million) it is highly unlikely that 100% of those eligible will make claims. Necessarily, the average distribution per share will go up under these circumstance[s]. But the math aside, the bottom line is that, given the risks and complexities in this case, the recovery is historic." # 5907 at 49.

formed legal work on the case"); *In re Cabletron Systems, Inc., Sec. Litig.,* 239 F.R.D. 30, 37 (D.N.H.2006) ("The lodestar method multiplies the hours reasonably spend by counsel by either a single blended hourly rate or several such representative rates for partners, associates, and paralegals ...."); *Fisher Scientific Inter., Inc. v. Modrovich,* No. Civ. A H–03–0467, 2005 WL 3348901, *10 (S.D.Tex.2005) (using blended rate for core team of senior partners, junior or mid-level partners, experienced associates, associates, and legal assistants).

Furthermore, Lead Counsel has also pointed out that the average hourly rate results from at least two factors: the rates charged and the staffing decisions made based on the complexity of the case. # 5907 at 60. Thus a rate "reflects the level of expertise and staffing mix required to achieve success in the face of the effort required and the complexity of that specific case." *Id.* The Court agrees with Lead Counsel that here the substantial risks, identified earlier, and the unquestioned complexities of this litigation, not to mention the high caliber teams of defense attorneys, required more experienced and specialized staffing and prosecution than the usual case, inevitably reflected in a higher hourly rate than in some other cases. As discussed previously, the Court finds Lead Counsel has adequately justified the rates that were charged for different members of the team.

Silverio, along with others, cites *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Albany,* 484 F.3d 162, 169, 164 (2d Cir.2007),(abandoning the term "lodestar" in favor of "presumptively reasonable fee," determined by considering all relevant factors including the *Johnson* factors and finding a reasonable hourly fee), i.e., "the rate a paying client would be willing to pay", *amended and superseded on denial of rehearing,* 493 F.3d 110 (2d Cir.2007), *amended and superseded,* 522 F.3d 182, 184, 192 (2d Cir.2008) (touchstone inquiry is "what a reasonable, paying client would be willing to pay," noting "the Supreme Court's emphasis on the need to use the approximate market rate for an attorney's service in calculating the presumptively reasonable fee," and opining that "the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable paying client, who wishes to pay the least amount necessary to litigate the case effectively").[87]

The Court responds that *Arbor Hill* was not a contingency-fee case in which risk and choice of a more qualified and expensive attorney that might optimize the likelihood of success must be assessed *ex ante* and not in hindsight; *Arbor Hill* was a "prevailing" party statutory-fee case based on the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and reasonable fees under 42 U.S.C. § 1983, in which an attorney would be granted fees based on only the claims on which he prevailed at the going market rate. This Court has discussed at length the different factors and rationales informing the two types. *See also infra* discussion of Bishop Objectors. Moreover, Silverio has not cited, nor has the Court found, any court in the Fifth Circuit that followed *Arbor Hill.*

b. 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)

Peter Carfagna complains that Coughlin Stoia and all class counsel failed to include information about the identities of those

87. Larry Fenstad and Dorothy McCoppin, joined by class member Nasser Pebdani, # 5877, also argue the fee should be reduced under *Arbor Hill.*

submitting time requests, i.e., whether they were partners, associates, law clerks, paralegals, secretaries, contract attorneys, etc. Billing rates or total charges are not provided for some, while others are listed only by initials. Thus it is impossible to determine whether time claimed should be included in the lodestar calculations.

Lead Counsel finds this criticism "just plain wrong" and points to the relevant submissions: # 5818 (Hodges) at Ex. 1; # 5827 (Bilek) at 6; # 5835 (Federman) at Ex. 1; # 5828 (Cuneo) at Ex. B; # 5826 (Genovese); # 5835 (Greenberg) at A; # 5831 (Gross) at Ex. 1; # 5825 (Shapiro and Finkel) at Ex. 1; and # 5833 (McDermott) at Ex. 1 and # 5834 (Savitt), both for Berger & Montague, PC. *See also* # 5932 (Tartt) at Ex.B. The Court agrees. *See also* # 5909 (Hodges' Supplemental Declaration).

Carfagna challenges a few specific entries.[88] There are two entries on the first time sheet (at $240 per hour) for two hours each on the same day (August 13, 2001) for "printing SEC documents" # 5959 (2001 records) for T. Ron Gosling. Carfagna charges that these entries are an example of duplication, and he questions how often this occurs later in the records if it occurs in the first entry.

The Court finds this charge of duplication is pure speculation and emphasizes that the SEC played a central role in this litigation, in other related securities class actions, and in SEC enforcement cases against Defendants in this class action, and that the Court's test for scheme liability came largely from the SEC. There would necessarily be numerous documents to be examined and a determination of which would be relevant and should be copied. The objection is overruled.

On page 1 of tab 2, of Coughlin Stoia's 2001 records, Carfagna objects to entries by Darren J. Robbins, whom Carfagna presumes is a partner since he billed at $650 per hour,[89] who claims to have spent four hours on September 12, 2001, 6 hours on September 13, 2001, and 6.5 hours on September 14, 2001, 6.75 hours on September 18, 2001, and 5.25 hours on September 19 in reviewing "first call" "media" and "SEC." Carfagna characterizes 29.50 hours on reviewing media "a bit excessive." # 5963 at 3. The Court disagrees. Numerous commentators began questioning Enron as a "secretive black box" early in 2001. After Jeffrey Skilling's abrupt resignation and the return of Kenneth Lay as CEO of Enron in August 2001, a flood of information addressing Enron's financial condition came out through the media. Moreover, as noted, the SEC was central to the development of Lead Counsel's case. Throughout this litigation the parties have frequently cited key articles in various major journals from 2000–2002, raising key questions about concealed financial information regarding Enron and providing unsettling disclosures about Enron's conduct that led to its collapse and bankruptcy.

Carfagna also complains that Robbins then spent 34.75 hours on September 24–27, 2001 drafting the Complaint against Enron. *Id.* at 2. Carfagna asks whether it is reasonable for a person to spend almost 65 hours doing this work at $650 per hour;

88. Lead Plaintiff's cursory dismissal of Carfagna's "criticisms of specific time entries by specific time keepers," as "display[ing] a stunning lack of knowledge about the myriad tasks required (and the amount of time it takes to perform them) to manage and effectively prosecute a case of this magnitude", was not helpful to a lodestar examination. # 5974 at 13.

89. The Court notes that the records reflect that Darren J. Robbins was a partner at Milberg Weiss and participated in the litigation when Mr. Lerach, from the same firm, entered the fray.

with the requested 5.4 lodestar, this amounts to $228,150 for a draft of a complaint that was later reviewed by others who incurred additional charges. The Court disagrees and points out, as reflected in so many of its orders, how extremely difficult it is to plead a viable complaint under § 10(b) without any discovery and with the heightened standards of the PSLRA, not to mention the complexity and secrecy of Enron's fraudulent scheme, and that attorneys highly skilled in securities fraud class actions would be required. It also explains the necessity of Robbins' researching media articles to obtain more facts.

As another example, although Coughlin Stoia states that "time expended by certain Coughlin Stoia shareholder relations personnel who have spent a substantial amount of time responding to Enron Shareholder inquiries over the past six years was not included in the lodestar submitted with the January 4, 2008 filing, the time of those shareholder relations personnel ***is*** in the time records at tab 2 and the summary at tab 1." Compendium at n. 2. In the time record there is an entry on both January 5 and on 6, 2004 for Rick Nelson for exactly one hour ($240 each) of "shareholder calls." Tab 2 at 7. Carfagna questions whether Nelson spent exactly one hour on each of the two days on these calls. Carfagna further suggests that if actually expended, such time should be the cost of doing business at the firm and should not be included in lodestar calculations. The Court believes that most attorneys charge fees for the hours spent in consulting with their clients, and any firm filing a securities class action against Enron would have many of them in this class action, with a number of class representatives that required even more than usual contact. Two hours in consultation with shareholder/class members is hardly excessive on its face. This objection appears frivolous and petty to this Court and it is overruled.

Carfagna also questions the expenditure of even hourly amounts of time and seemingly duplicative hours and work of Michelle Ciccarelli and Patrick W. Daniels during September and October of 2001. # 5963 at 4. He complains the Ms. Ciccarelli repeatedly (7 times) documented hours calling clients to discuss the factual and legal basis of the case and calls to the custodian and attorneys to determine loss and analyze damages. Given the size and complexity of this action, and the fact that counsel were struggling to gather enough information to file a securities fraud class action, the Court overrules this objection. Carfagna further complains the Mr. Daniels made on two days for exactly twelve hours each day an entry for "prepar[ing] a chart on Enron Insider Trading; prepar[ing] and draft[ing] Complaint on Enron; meeting with clients in LA and Burlingame Re: Enron," and two more days for twelve hours each "research[ing] and compil[ing] Insider Trading; review 10Q and 10K's: prepare Insider Trading detail request; meeting with potential clients to discuss and explain case." Again the Court finds these objections meritless. Carfagna suggests in addition that if these two are contract attorneys, their time should be included as an expense and not included in the lodestar calculation and thus not subject to a multiplier. The Court has previously addressed the issue of contract attorneys.

Out of six years of contemporaneous time records submitted by Coughlin Stoia, Carfagna targets five entries that he characterizes as secretarial or ministerial functions that should not be included in the lodestar calculation and that make him question the entire submission. The Court has reviewed records for that year, as well as others, and concludes that Carfagna's few targeted entries, which are vague, are very atypical of the vast number of entries in the time records which nearly always provide very specific identification of the matters being addressed. Carfagna points to an entry on January 6, 2004 when Frantz Michaud billed a quarter of an hour for "processed mail, docketed, diaried case information and dates into the M.A." at $185 per hour, to be included in the lodestar calculation ($999 with multiplier). The Court finds this service to be sufficiently legal in nature to qualify for inclusion in the lodestar. On June 7, 2004, Rory C. Dowd billed four hours at $135 per hour ($2,916 with multiplier) for stapling and chronicling documents. Chronicling documents could well require legal knowledge. On June 12, 2004, Desiree L. Gilbert billed 3 hours at the rate of $240 per hour ($3,888 with multiplier) for "batch printing of PDF files." The Court is unable to find such an entry and therefore overrules the objection. On January 29, 2004 Risa Castro billed 5 hours at $240 per hour ($6480 with multiplier) for organizing and putting away plaintiff's documents. Such a task would require legal knowledge and skill so the Court overrules this objections. Carfagna does highlight that on April 26, 2004, Bradley P. Louis charged one hour at $210 for "mov[ing] boxes" ($1,134 with multiplier). The Court cannot see any justification for including this entry in the lodestar, no less for it to be subject to a multiplier, and Lead Counsel has offered none. Thus the Court concludes that the lodestar should be reduced by one hour and $210 and the requested total fee with multiplier should be reduced by $1,134.00. Because the Court is applying a lodestar check to evaluate the percentage fee under the fee agreement, and not a lodestar analysis, this amount, by itself, is too small to be significant.

Carfagna also argues that Jerrilyn Hardaway's time records suggest that she "has little, if any, need for sleep, nourishment, or bathroom breaks" because her June 2004 report indicates she worked extremely long days for a total of 392 hours, billing the Class, with multiplier, $166,600. # 5963 at 6. A review of Coughlin Stoia's June 2004 time records, # 5959 and 5960, tab 2 at 369–455, reveals that a number of crucial depositions of representatives of the financial institutions, Enron and Arthur Andersen occurred during that month. *See also* Helen Hodges' Decl., # 5818 at ¶ 169. The record further indicates that Jerrilyn Hardaway was a key player in this litigation and in these depositions. Her billing entries (tab 2 at 371, 374 378–79, 380, 384, 387, 390–92, 395–96, 398–99, 403–04, 406, 409–10, 412, 417, 423, 424, 426, 433, 434, 440, 441, 448, 449) are often for "long" days (a number for 16–18 hours), and they are very specific as to what she spent the time on. In addition to extensive and constant work on the website and databases, she was deeply involved in preparation for very large number of depositions and discussions about them with both Coughlin Stoia and outside counsel. None of the entries with the number of hours claimed strike this Court as unreasonable. Thus the Court overrules this objection.

As for redundant attorney time, Carfagna points to the single deposition of Billy Bauch of CIBC on June 9, 2004, regarding which G. Paul Howes billed $17, 915 (with multiplier) for 16.5 hours, Anne L. Box billed $45,360 (with multiplier) for 14 hours, and John Lowther billed $34,047 (with multiplier) for 13 hours, for a total of $137,000. # 5963 at 6.

The Court observes that in this objection Carfagna is trying to turn on its head Lead Counsel's express declaration, as evidence of its lean staffing, that of the 472 depositions taken, "there are only ***two*** where three lawyers appeared" and "no depositions where more than three attorneys from Lead Counsel appeared," while "***only one*** attorney from Lead Counsel appeared at most of them." Lead Counsel's Reply, # 5907 at 19, citing Helen Hodges' Declaration, # 5818 at ¶ 169 (chart of all depositions taken and Coughlin Stoia attorneys attending), 214. A review of Lead Counsel's time records, Tab 2 at 393, 394, 400, 401, demonstrates that Ann Box attended only a portion of the first day of the two-day deposition of Bauch because for part of her billing on that day she also reviewed documents and prepared for the deposition of Jennifer Bishko, an employee of Citigroup, which Ann Box **took alone** during the next two days; indeed she may have needed some part of the Bauch deposition to prepare for Bishko's. *Id.* at 394; Helen Hodges' Declaration, 5818 at ¶ 169. The billing entries of Paul Howes (Tab 2 at 393, 401) and John Lowther (*id.* at 394, 400), reveal that Lowther was assisting Howes, in particular for pulling and providing the numerous documents that Howes would need during the deposition. The claims against the financial institutions, were complex and sophisticated, and Coughlin Stoia might reasonably have decided that the rare combined presence in this litigation of two or more attorneys at a deposition was necessary. The Court overrules the objection.

Finally Carfagna targets the first page of time records (covering November 12–21, 2001) submitted by Schwartz, Junell, Greenberg & Oathout, LLP [90] for over $54,000 (with multiplier) of time spent by "RBG" relating to whether the firms should get involved in this case, attempting to find appropriate plaintiffs, and other pre-engagement activities that should not be compensable. He maintains time-keeping should begin when a firm is retained, not in trying to find a client and determine what role it might play in the litigation. # 5963 at 6–7.

A review of the record makes clear that Roger Greenberg's early billings for his and his firm's (now Schwartz, Junell, Greenberg & Oathout, LLP's) services are related to one of the deluge of suits filed in the wake of disclosures of Enron's financial distress in October–November 2001 and the genesis of what became the *Newby* class action. *Newby* was filed on November 22, 2001 by attorneys from Cunningham, Darlow, LLP and Shapiro, Haber & Urmy, LLP as the first action arising out of the Enron collapse, and thus for purely procedural reasons became the "lead case" for subsequently filed actions that were consolidated into it. The top page of Greenberg's time records (# 5960 at Tab 3) expressly states the hours he claims are related to the Amalgamated Bank matter, i.e., which shortly became a separate Enron-related class action which Greenberg filed on December 4, 2001, *Amalgamated Bank, Individually and on Behalf of All Others Similarly Situated v. Lay, et al.*, H–01–4198, in this district. It, along with numerous other Enron-related actions, was consolidated with *Newby* on December 12, 1001. # 23 in H–01–4198; # 17 in H–01–3624. Bill Lerach and James Jaconnette, both of Milberg Weiss, were admitted by court order to appear as attorneys of record, with Greenberg, for representation of Plaintiff Amalgamated Bank on behalf of the putative class on December 17, 2001. # 40 in H–01–3624. (The contested time records, Tab 3 at 2–3, reference frequent communications between Greenberg and Milberg Weiss attorneys in November and early December 2001.) A number of motions for appointment as Lead Plaintiff were filed as early as December 21, 2001, including one by Amalgamated Bank and the Regents of the University of California with other Movants (# 67). In February, the Regents was appointed as Lead Plain-

90. Tab 3 of the time records for non-Lead counsel, # 5960.

tiff and Milberg Weiss was approved as Lead Counsel, # 294, with Schwartz Junell serving as Co–Liaison Counsel for Milberg Weiss in the putative class action. Thus Roger Greenberg's work went directly into investigating and developing what became the *Newby* class action with the firm that then became Lead Counsel, Milberg Weiss, for Lead Plaintiff and the proposed class. His fees for services that benefitted the class are therefore compensable. Indeed on December, 5, 2001, in H–01–4198, Greenberg, on behalf of Amalgamated Bank, filed an *ex parte* motion for temporary restraining order and to show cause why a preliminary injunction [91] should not be entered (1) freezing and/or imposing a constructive trust over insider trading proceeds of twenty-nine individual Enron defendants from their sales of Enron stock from October 19, 1998 to November 27, 2001 to prevent dissipation or concealment of those profits and to preserve them to satisfy any future equitable award entered by the court, (2) requiring an accounting of these insider trader proceeds, and (3) permitting limited expedited discovery under § 21D(b)(3) of the PSLRA, 15 U.S.C. § 78u–4(b)(3)(B) (# 7 in H–01–4198), that was joined by a number of other plaintiffs and parties. Although the Court ultimately denied the request for an injunction because evidence in the record thus far was not sufficient to support imposing one, it did conclude in the class's favor that the Court has the authority to issue such a prejudgment restraint on Defendants' assets since Plaintiff's complaint had sought both legal damages and equitable restitutionary remedies of constructive trust, accounting, and disgorgement for breach of fiduciary duty and because Amalgamated Bank's complaint had asserted a cognizable claim. # 111 in H–01–3624.

[25] The 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. *Cendant II*, 404 F.3d at 191. Here, however, Greenberg's work, in conjunction with Milberg Weiss, which became Lead Counsel, fed into and was es-

91. Roger Greenberg's original declaration, # 5830 at 2, explains that he

> was intimately involved in this litigation from the initial stages, seeking an injunction on behalf of the putative plaintiffs (Amalgamated Bank, then Regents) as the initial attempt to protect the interests of the putative class, . . . in seeking a freeze on the transfer of bank funds and a prohibition against document destruction, all of which was occurring *instanter*. This required urgent and late night meetings with Lead Counsel, drafting pleadings ''on the fly,'' public document review and research, follow[ed] by numerous emergency depositions and hearings. The breadth of the case was not totally known at this point but would, in short time, become apparent and appalling.

The first page of his billing records, Tab 3 to # 5960, clearly refers to this intense investigation leading up to filing the *Amalgamated Bank* action and then motion for the TRO, involving research, news media disclosures about Enron, discussions with attorneys about types of claims that could be brought and possible plaintiffs for representation, the status of other cases being filed, generally relating to preparation for filing suit and strategy. That investigation, according to Lead Counsel, revealed evidence of fraud massive insider selling by Enron officials before material adverse information about Enron was disclosed to the public in October 2001. Thereafter the filing of the request for a TRO (1) freezing and imposing a constructive trust over insider trading proceeds, (2) requiring an accounting of insider trader proceeds, and (3) permitting limited expedited discovery (because of the stay imposed by the PSLRA) of suspected offshore partnerships and illicit straw entities used to effectuate fraud (# 7 in H–01–4198), subsequently resolved in *Newby,* was of great importance for the class. Helen Hodges discusses it in her Declaration, # 5818 at 26–28.

sential to building the *Newby* action case representation of the class. Thus the common fund doctrine ("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 attorneys' fees") is the applicable law and the hours reported by Greenberg are compensable if reasonable. *Cendant II,* 404 F.3d at 187.

Carfagna asks the Court to sustain his objections, have another hearing on attorneys' fees and expense reimbursement, permit "a full range of discovery, including depositions, as to the propriety of these fees and expenses." The Court, in its discretion, not only does not find that additional procedures necessary, but they would add to the costs and prolong this litigation even more.

c. Brian Dabrowski's Objections (# 5856, duplicated in 5872; 5890; 5891; and 5962)

Mr. Dabrowski, through his attorney Lawrence Schonbrun, wants the Court to appoint (1) a guardian to protect the class's interest by investigating in detail all the circumstances surrounding the fee agreement and the engagement of experts Coffee, Silver, Bebchuk, and Sorkin, (2) expert (auditor/forensic accountant), and (3) a magistrate or special master to oversee the fee proceeding, etc. Carfagna's supplemental objections to Lead Counsel's compendium of records requests that Lead Counsel provide additional information, or that the Court appoint a special master to review the time sheets, or for additional time for Objectors to review the time records. Larry Fenstad and Dorothy Lancaster McCoppin (# 5868) ask the Court to refer the lodestar data to an independent firm for analysis, audit, and review.

Lead Plaintiff's response argues that it is not beyond the objecting class's ability, and certainly not beyond this Court's ability, aided by its familiarity with all phases of this litigation, to examine the records and, using Helen Hodges' Declaration as a guide, to determine whether the fee request is reasonable. Furthermore Lead Plaintiff urges that Carfagna's and all the other objectors' "request for more time to nit pick the time records submitted, unaccompanied by a specific basis or even any description of what efforts they undertook to review the records in the time allotted, should be denied." # 5974 at 13. The Court agrees. Judges standardly review motions for approval of attorneys' fees and time records. The Court further finds that Lead Plaintiff has submitted more than sufficient information for a determination of a reasonable fee.

Moreover, while Federal Rule of Civil Procedure 23(h)(4) permits the Court in class actions to refer issues relating to the amount of a fee award to a special master or magistrate judge in accordance with Rule 54(d)(2)(D), it is discretionary with the Court. The same is true for a guardian.

[26] This Court does not find appointment of a guardian, accountant or special master necessary here, since the Court's personal oversight of all aspects of this case provides a strong basis for evaluating counsel's fee request. More important, the Court points out that under the structure of the PSLRA, the Lead Plaintiff itself serves the role of guardian for the class members' interests, from choosing and "retaining" class counsel, with Court approval, to monitoring Lead Counsel and all action in the litigation. As observed by Professor Silver, appointment of a guardian is "at odds with the PSLRA" and would "undermine the Lead Plaintiff by empowering someone else to second guess its judgments." # 5906 at 10–11. The evidence submitted by Lead Counsel provides sufficient detail about the arm's length fee agreement between sophisticated and competent parties and demonstrates that the Regents amply and vigorously fulfilled their role as protector of the class from the beginning to this point in this litigation. Indeed, in this Court's oversight of this litigation for more than six years it has been continually impressed by the Regents' informed and full involvement in all aspects of the case. Moreover, this Court also serves as a fiduciary of the class in determining attorneys' fees and acts to protect the class. *Rite Aid,* 396 F.3d at 307–08, *citing Cendant,* 264 F.3d at 231 ("[T]he District Court acts as a fiduciary guarding the rights of absent class members[.]"), *Gunter,* 223 F.3d at 201 n. 6, and *In re Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1297 (9th Cir.1994); *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 280–81 (7th Cir.2002) ("We and other courts have gone so far as to term the district court in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."); *Third Circuit Task Force Report,* 108 F.R.D. at 251 (The court "must monitor the disbursement of the fund and act as a fiduciary for those who are supposed to benefit from it, since typically no one else is available to perform that function."); *Cendant,* 264 F.3d at 255 (Because of the conflict between class members who want to maximize their recovery and class counsel who seek to maximize their fees, "an agent must be located to oversee the relationship .... Traditionally that agent has been the court."). Moreover, such an appointment would not only be redundant, but would further increase costs and delay distribution to the class. *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 481 (S.D.N.Y.1998) (denying Schonbrun's request for appointment of a special class guardian), *citing In re Intelligent Electronics Sec. Litig.,* No. 92–CV–1905, 1997 WL 786984, *10 (E.D.Pa. Nov.26, 1997) ("The appointment of a class guardian would only further increase costs, extend indefinitely the time before distribution to the class and further needlessly complicate the procedures."); *In re WorldCom, Inc. Sec. Litig.,* 02 Civ. 3288(DLC), 2004 WL 2591402, *22, 2004 U.S. Dist. LEXIS 22992, *75–76 (S.D.N.Y. Nov. 12, 2004) ("There is certainly no need to retain an independent guardian to undertake a further review of Lead Counsel's time records. Such an appointment would further reduce the amount of money available to distribute to the class, would be redundant of the work already performed by Lead Plaintiff, and is of little value in light of ... the retainer agreement which is the basis for calculating this award.").[92]

As for an auditor, there is no statutory requirement that an auditor be appointed. Professor Silver has declared that he knows of no case in which a violation of due process has been found because an auditor was not appointed (*id.* at 4 n. 2), nor has this Court found one. Moreover, because the Regents and Lead Counsel entered into a contingent percentage fee agreement, which the Court considered when it evaluated and approved Lead Plaintiff's choice of Lead Counsel, it finds that an auditor is not necessary. Furthermore Lead Counsel has hired a recognized fee expert, Mr. Moscaret, to review the fee request in detail. Mr. Moscaret concluded that Lead Counsel's hourly billing rates "are ***comparable*** to prevailing attorney rates in 2007 for large law firms in the

92. In his supplemental amended objection (# 5890 and 5891), Dabrowski goes into greater detail about the investigations he wants the class guardian to perform. Because the Court does not find such an appointment necessary, nor such detailed investigations warranted, it does not discuss these proposals further.

Houston/Dallas 'forum' legal marketplace" and thus reasonable, and that is "staffing, mix of attorneys, and delegation of work by senior attorneys to junior attorneys" were "reasonable, customary, and consistent with generally-acceptable billing practices by law firms in major, complex litigation." Moscaret Declaration, # 5911 at ¶¶ 25, 28. As for expenses, Professor Silver points out sensible reasons why Lead Counsel is incentivized to be especially thrifty: (1) because contingent fee lawyers forfeit their expenses if they lose, they tend to be frugal; (2) the fee agreement discouraged wasteful spending by requiring Lead Counsel to advance all expenses; and (3) the Regents had the experience and capacity to review Lead Counsel's expenses internally and did so. *Id.* at 5.

Indeed, Helen Hodges, in her sworn Supplemental Declaration # 5909 at 1), points out,

> Because we are a plaintiffs' firm paid only on a contingency basis—*i.e.,* only if we win—we have consistently maintained "lean" staffing. We simply can't afford to over-staff cases. Nor can we afford to duplicate work. Unlike most defense firms, our billable hours do not necessarily result in getting paid. We are paid for getting results. And it is in our own self interest to get results with the least outlay of resources in terms of attorney time because we are paying our attorneys as we go.

Ms. Hodges then explains in detail the firm's staffing during the course of the litigation, identifying and explaining when and why additional staff had to be added and their role, but pointing out that a core group of attorneys worked almost exclusively on the case throughout the six years, providing the firm with the advantage of "institutional" knowledge and avoiding having to bring newcomers "up to speed on an ever-burgeoning case" while battling attorneys from large firms with no restrictions on the number of counsel representing defendants. # 5905. See also Moscaret Declaration, # 5911 at ¶¶ 47–50, 61–65. The Court finds the continuity of staffing through this core group of attorneys contributed substantially to the efficient prosecution of this litigation. Moreover, its review of Lead Counsel's time records convinces the Court that hours spent were quite reasonable in light of the size, complexity, and length of this litigation.

Mr. Dabrowski also maintains that special rules apply to billion-dollar recoveries. Where extraordinarily large recoveries of more than $75 million are had, he argues, courts must stringently weigh the economies of scale in fixing an appropriate percentage, and fee awards of 6–10% are common in this large scale context. H. Newberg, *Newberg on Class Actions,* Common Fund Fee Awards (3d.1992) (§ 20.9 "Deviation in Exceptional Cases," at 95). Dabrowski also cites the "increase-decrease" rule in the Third Circuit Task Force Report, 108 F.R.D. at 256 (fee awards that involve a sliding scale dependent on the ultimate recovery for which the percentage of the funds devoted to attorneys' fees will decrease as the size of the funds increases).

As this Court has indicated, while a few courts have adopted the view that the percentage of fee awards should decrease as the recovery increases, especially in megafund cases, this is not the majority view. Nor is there any prohibition of an *ex ante* agreement with an ascending fee schedule to incentivize counsel or an increased award by the court. *See, e.g., Rite Aid,* 396 F.3d at 303 (" 'This position [that the percentage of recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply.' "), *quoting In re Cendant,* 264 F.3d at 284 n. 55; *In re Ikon Office Solutions, Inc., Sec. Litig.,* 194 F.R.D. 166, 196 (E.D.Pa.2000) (court saw "no principled basis for reducing the requested award by some arbitrary amount" simply because of the size of the recovery "when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent"; a sliding scale fee schedule, "by which counsel is awarded ever diminishing percentages of ever increasing common funds . . . tends to penalize attorneys who recover large settlements"). This Court finds, based on evidence submitted by Lead Counsel and its own research, that the 9.52% fee requested here, based either on the fee agreement or on an enhancement of the lodestar, is within the range of reasonableness and is warranted by Class Counsel's reasonable number of hours expended and extraordinary success against extremely difficult odds in a lengthy litigation challenged by top-level defense counsel.

Dabrowski further claims there is no pre-Enron case supporting a fee using an ascending scale of percentages other than dictum in *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166 (E.D.Pa.2000).[93] The Court points out that there are several such cases in the last few years, however. *See, e.g., In re Auction Houses Antitrust Litig.,* 197 F.R.D. 71, 80–81, 84 n. 55 (S.D.N.Y.2000) (a pre-Enron case) (discussing advantages and disadvantages of decreasing and increasing fee schedules and concluding that an increasing schedule was more appropriate in that case); and two post-Enron cases, *Schwartz v. TXU Corp.,* Nos. 3:02–CV–2243–K, 2005 WL 3148350 (N.D.Tex. Nov.5, 2005) (after a lodestar cross-check applying *Johnson* factors, enforcing a graduated fee arrangement resulting in a 22.2% fee for a recovery of $149,750,000 under PSLRA); and *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 has been cited frequently in the briefing.

Dabrowski additionally complains that no mention is made of the allocation of attorneys' fees among the thirteen law firms that are seeking fees from this award and objects to allowing class counsel to receive a lump sum and then to secretly decide how the fee will be divided.[94]

In response to this complaint of nondisclosure of the fee arrangement, Lead Counsel points out that its request for an aggregate fee award, to be divided by lead counsel among co-counsel is the same procedure that the Fifth Circuit approved in

93. Dabrowski cites several cases that support a descending sliding scale as the amount of settlement grows. *See, e.g., VISA U.S.A., Inc. and MasterCard International,* 396 F.3d at 122–23; *In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d at 233, 235.

94. He seeks information about agreements or understandings regarding the sharing of fees among the 13 law firms comprising Class Counsel, some of whom are charging hourly rates as high as $607. # 5890 at 38.

Dabrowski also complains that there is no information on the terms of the separation agreement between William Lerach and Lead Counsel that affect what becomes of the fee award here. Jeannette Dreisbach has also complained about awarding fees to convicted criminal William Lerach. # 5873 at 2–3.

Lead Counsel has responded with what the Court finds is more than adequate briefing demonstrating the propriety of any fee sharing with Mr. Lerach before and after he left the firm and after his indictment, guilty plea, and sentencing. See # 5864 (Statement by Coughlin Stoia), # 5867 (Supplemental Statement of the Regents), 5904 (Declaration of James C. Harrison), 5905 (Declaration of Professor Roy D. Simon), # 5918 (Affidavit of Vincent Johnson), and # 5907 at 68–75. No one has submitted a brief controverting Lead Plaintiff's submissions.

Longden v. Sunderman, 979 F.2d at 1101, which affirmed the district court's granting the petition of class counsel, Susman Godfrey, on behalf of all class counsel, for fees benefitting the class as a whole ("district court acted well within its discretion in awarding an aggregate sum to the Susman Attorneys that was based on their collective efforts, leaving apportionment of that sum to the Susman Attorneys themselves.") [95]; *Forbush v. J.C. Penney Co.,* 98 F.3d 817, 824–25 (5th Cir.1996). Here thirteen firms involved in the representation of Lead Plaintiff have joined together in the fee request. Coughlin Stoia states that Coughlin Stoia is responsible for more than 85% of the time expended and its contribution, alone, generates a multiplier of less than six. # 5974 at 9, citing Declaration of John C. Coffee Jr. (# 5821 at ¶ 35: "Thus, whether or not a multiplier in the 5–6 range would be justified in most cases, it is justified in this case ....").

Nevertheless, even with deference due to Lead Plaintiff and Lead Counsel's decisions under the PSLRA in this class action, this Court ultimately has an obligation not only to ensure that the fees are reasonable, but to see that they are "divided up fairly among plaintiffs' counsel." *High Sulfur Content Gasoline,* 517 F.3d at 227–28 ("The court's duty to review attorneys' fees is no less compelling in common fund cases, like this case, where a separate fund to pay attorneys' fees is created as part of the class action settlement."). This Court observes that when one of the attorneys in *Longden* objected to Susman's calculations and filed her own petition for fees, the district court awarded her a separate sum, although less in amount than she requested, to be taken out of the lump-sum award for all attorneys.[96] *Longden,* 979 F.2d at 1101; *High Sulfur Content Gasoline,* 517 F.3d at 233 ("*Longden* highlights the district court's duty to scrutinize the allocations of a fee award *when an attorney objects to his co-counsel's fee award recommendations.* It does not stand for the proposition that courts can delegate their duty to allocate a fee award to a committee of interested attorneys who have reached no agreement among themselves and then approve the allocation after a perfunctory review. [emphasis added by the Court]").

Lead Plaintiff, in its response to supplemental objections (# 5974 at 9), argues, "Since the 13 firms have joined together in requesting a percentage-of-the fund recovery, the allocation of such award has no relevance to the award itself." The Court would further point out that each of the other Co–Class Counsel firms has provided information about their attorneys, their hourly rates, and their lodestars for this litigation (# 5825–35) and contemporaneous records. Furthermore no objector has submitted any evidence of secretive or *ex parte* conduct here. Co–Class Counsel were permitted to file any objections and to speak freely about the fee allocation at the Fairness Hearing. Thus given the transparency and due process provided here, the Court finds Dabrowski's objection of non-disclosure lacks merit.

95. In *High Sulfur Content Gasoline,* 517 F.3d at 227 the Panel wrote,

> In this circuit, a district court can in its discretion appoint a committee of plaintiffs' counsel to recommend how to divide up an aggregate fee award. *Cf. Longden v. Sunderman,* 979 F.2d 1095 (5th Cir.1992). But the appointment of a committee does not relieve a district court of its responsibility to closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards.

96. In *Longden,* the Fifth Circuit affirmed, holding that the district court acted well within its discretion in both awards. *Longden,* 979 F.2d at 1101; *High Sulfur Content Gasoline,* 517 F.3d at 233.

Dabrowski urges that if the Court uses the percentage approach, Lead Counsel should not be allowed to make any additional fee requests. The Court concludes that if Lead Counsel succeed in obtaining any further settlements, they are entitled to request fees from that additional common fund, too.

Dabrowski presents a laundry list of objections, summarized *infra*, but provides no authority that Lead Counsel is required to provide detailed information relating to each of his demands or ignores the evidence in the record. Dabrowski also objects that there is no description of the extensive arm's length negotiation, despite substantial evidence in the record that this Court has already cited; that prior to *Newby* the Regents had never acted as a representative plaintiff in a securities class action, but ignores the experience the Regents has generally in sophisticated litigation; that there is no mention of any consultants or experts who assisted the Regents in negotiating the fee; that there is no mention of efforts made by Lead Plaintiff in management and oversight of billing practices, staffing practices, and work allocation practices of Lead Counsel and co-counsel [97]; that there is no mention of the background, education or experience of the individuals who negotiated the fee (Holst, Lundberg, and Lee) [98] or of the expectations of the University about the size of the recovery, the duration of the litigation, or how the figures of the sliding scale were determined; that there is no information on how the Regents decided to seek Lead Plaintiff status, how the Regents became involved with Milberg Weiss, and who decided to select Milberg Weiss without competitive proposals from other firms [99]; that there is no explanation of how the agreement, which required Lead Counsel to advance all funds necessary to cover expenses, was changed to allow them to be reimbursed for their expenses and not collect their fees from various settlements that comprise the settlement fund; that there is no mention of how retired Judge Lawrence Irving came initially to be retained to monitor the litigation or the circumstances under which he thereafter joined Coughlin, Stoia; that there is no mention of the twelve co-counsel firms that are seeking fees despite the Regents' claim that one of their criteria for selecting Milberg Weiss was to have a single law firm handling the case; that there no mention of why the Milberg Weiss law firm was retained without any agreement as to the fee it would charge (Hodges Decl., Ex. 3, Letter of 12/18/01); that there is no explanation why Lead Counsel can charge current rates when they chose to delay receiving their fees from settlements obtained as early as 2003 [100]; that there is no discussion of fee agreements between other

97. *See* Supplemental Declaration of Helen Hodges, # 5909 at 7–28, providing substantial background and areas of focus of Lead Counsel's attorneys.

98. This charge is unfounded. *See, e.g.*, Expert Report of Professor Charles Silver, # 5822 at 37–45, for information regarding these and others involved in the negotiations.

99. This allegation is also incorrect. As noted *supra*, James Holst's Declaration states 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.

100. As noted earlier, one established 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).

plaintiffs and law firms who sought to become the representative plaintiff; that there is no explanation for the accuracy of the *Dynegy* fee scale and the inaccuracy of the *Newby;* and that there is no explanation of how the Regents determined the amount of money that would provide necessary incentive to ensure that Lead Counsel would devote sufficient resources to the litigation. The Court finds these "picky" objections are largely to matters for which proof is not required or for which it has been provided and addressed in this order. Moreover, as indicated earlier in this opinion, Lead Counsel has adequately demonstrated that the Regents was a sophisticated Lead Plaintiff with substantial legal expertise who entered into an arm's length agreement with a renowned securities class action firm that incentivized counsel to push through a extremely complicated, long, and risky litigation, with constant and competent oversight by the Regents, to achieve a highly successful result for the benefit of the class.

Dabrowski insists that calculating a multiplier based on time expended preparing arguments without legal merit for a trial that never took place, i.e., the time between the last settlement and the Fifth Circuit decision reversing class certification, should not be included in the lodestar. The Court notes that until the Supreme Court issued *Stoneridge,* there was no certainty that Lead Plaintiff's scheme liability would or would not be recognized as viable. Moreover, the fact that it was drastically limited by the high court only demonstrates the risk and highlights the success of Lead Counsel in obtaining the settlements that it did. A multiplier is used to reward exceptional success and skill in the face of high risk and difficulty.

Dabrowski further complains that the fee award should not be paid in its entirety before the class receive their settlement distributions. Larry Fenstad and Dorothy McCoppin object that the fees should be paid in installments, until completion of the administrative process and payment of all claims to the class members and submission of all administrative reports to the court.[101] # 5868 at 11. The Court finds these objections lack merit. *In re AT & T Corp.,* 455 F.3d 160, 175 (3d Cir.2006) (rejecting objection that a portion of the attorneys' fees should be withheld pending payment of claims to all members because there is no evidence that thus far diligent class counsel would stop working on behalf of the class once their fees were paid).

d. Objections by Rinis Travel Service Inc. Profit Sharing Trust U.A. 06/01/1989 and Michael J. Rinis, IRRA ("Rinis Objectors") (# 5866, 5967)

The Rinis Objectors urge the Court to take judicial notice of data collected by the

101. Objectors do not cite to authority that would support installment payments under the circumstances here. Professor Silver, Lead Counsel's expert, calls the argument "odd":

> In my experience, class counsel's fees have been delayed when the value of a settlement could not be known. That would be true, for example, in a "claims made settlement where it was not known how may claims would be allowed or in a coupon settlement where it is not known how may coupons would be cashed". No such uncertainty exists here. The settling defendants paid cash for their releases, and class members will receive all the money that remains in the fund after fees and expenses are paid. Unclaimed funds, should there be any, will not revert to the defendants...... If there is some need to incentivize Lead Counsel to assist with claim filing (unusual in securities fraud causes) or to motivate the Claims Administrator (also unusual), the Court has the power to do this. However, I am not sure what the need is since no Objector has identified a compelling one.

Supplemental Expert Report, # 5906 at 15–16, ¶ 7.

United States Department of Justice, known as the *Laffey* Matrix,[102] as evidence of prevailing market rates for attorneys and paralegals/law clerks of varying experience in the Washington D.C. area from 2003–2008 for determining "reasonable" fee: http://www.usdoj.gov/us ao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html. Under that matrix, the current market billing rates in the District of Columbia and, adjusted for the locality, in the Los Angeles area are as follows:

Experience	2007–08 in D.C.	in L.A.
20+ years	$440	$455
11–19 years	$390	$404
8–10 years	$315	$326
4–7 years	$255	$264
1–3 years	$215	$222
Paralegals and Law Clerks [103]	$125	$129

Applying these data, the Rinis Objectors calculate that William Lerach's hours (8,513.60) times the hourly rate of $455 would result in lodestar of $3,873,688, approximately half of the claimed lodestar. The claimed lodestar was thus already doubled to get the $900/hour rate, and if the Court applies an additional 5.4 multiplier, it would result in an actual multiplier of 10.8. The Rinis objectors concede that any fee should reflect the risk of no recovery, but insist that risk also limits the multiplier to the risk factor, i.e., a 50% chance of recovery implies a multiplier of 2, a 75% chance of recovery implies a multiplier of 1.5, and so on. The multiplier sought here implies that a chance of recovery was less than 20% (a 1 in 5 chance), which they maintain is highly unlikely or Coughlin Lerach would not have taken on the case. They further object that the requested fee does not take into account the economies of scale in mega-fund cases.

102. The *Laffey* Matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C.1983), *rev'd on other grounds*, 241 U.S.App. D.C. 11, 746 F.2d 4 (1984). The matrix is a chart compiled each year (all the way back to 1981) by the Civil Division of the United States Attorney's Office in the District of Columbia and presents a schedule of hourly rates for attorneys of different levels of experience in the Washington D.C. area. It is used by federal courts, particularly in that district, to determine reasonable attorneys' fees awards in cases where there is a statutory entitlement. It provides rates for five different levels of experience, corresponding to "junior associates" (1–3 years after law school graduation), "senior associates" (4–7 years), "experienced federal court litigators" (8–10 and 11–19 years), and "very experienced federal court litigators" (20 years or more). *See generally Lively v. Flexible Packaging Ass'n*, 930 A.2d 984 (D.C. Aug.23, 2007) (accepting *Laffey* Matrix as one of a number of legitimate ways of calculating attorney's fees where a prevailing party is statutorily entitled to attorneys' fees). It is available at http://www.usdoj.gov/usao /dc/Divisions/Civil_Division/Laffey_Matrix_7.html. Under the *Laffey* Matrix, the current market billing rates in the District of Columbia and Los Angeles area are as follows:

Experience	2007–08 in D.C.	in L.A.
20+ years	$440	$455
11–19 years	$390	$404
8–10 years	$315	$326
4–7 years	$255	$264
1–3 years	$215	$222
Paralegals and Law Clerks	$125	$129

See, e.g., In re Chiron Corp. Securities Litigation, No. C–04–4293 VRW, 2007 WL 4249902, *6–7 (N.D.Cal. Nov.30, 2007).

103. The Bishop Objectors argue that the rates charged for paralegals should be in line with rates in their local legal markets as well as with the *Laffey* Matrix. Lead Counsel billed work by paralegals at $160–$270 per hour; noting the requested amounts were out of sync with the *Laffey* Matrix, Bishop Objectors argue that a reasonable rate would be $130 per hour, for a lodestar of $2,891,187, constituting $2,526,527 less than the requested lodestar for paralegals. The Bishop Objectors also contend that Lead Counsel has failed to meet its burden of proof to demonstrate what the prevailing market rate for attorneys is and that their requested hourly rate is reasonable for attorneys of their size, specialty and background in this District. They complain that Coughlin Stoia's requested hourly rates are above those indicated in the *Laffey* Matrix and should at minimum be reduced to the levels of those established in *Chiron.*

Lead Counsel's expert, Mr. Moscaret, insists that the *Laffey* Matrix, supported by some objectors, should not be used to determine reasonable rates here. # 5903 at 20–25. Not only has the Fifth Circuit never adopted the Laffey Matrix to determine reasonable attorney's fee rates, but he cites federal court decisions declining to apply it. *Id.* at 21, *citing Perez v. Cozen & O'Connor Group Long Term Disability Coverage,* No. 05cv0440 DMS (AJB), 2007 WL 2142292, *2, 2007 U.S. Dist. LEXIS 53996, *6 (S.D.Cal. May 27, 2007) (*Laffey* Matrix approach here would be contrary to Ninth Circuit law requiring the court to use the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience and reputation, none of which does the *Laffey* Matrix take into account); *Housing Rights Ctr. v. Sterling,* No. CV 03–859 DSF (Ex), 2005 WL 3320738, **2–3, 2005 U.S. Dist. LEXIS 31872, at *10–11 (D.D.Cal. Nov. 2, 2005) ("The *Laffey* Matrix also does not comport with the reality of Los Angeles firm billing practices" because it sets a single rate for several years' experience while "[t]here is much more variance from year to year in Lost Angeles"). Moscaret makes important points in arguing that the *Laffey* Matrix is too simplistic, with its "one-rate-fits-all approach, for major, complex litigation for several reasons". It "lumps all attorneys with 20–plus years of experience into the same rate bracket, and assigns the ***same*** uniform rate to each attorney in that bracket," despite significant disparities in experience and status. *Id.* at 21–22. He also contends that the *Laffey* Matrix is also contrary to federal case law in lodestar cases, which requires the district court to award to the petitioning attorney fees in accordance with the prevailing rate that other attorneys of comparable skill, experience and reputation would charge for similar work in the relevant market place. *Id.* at 22. Last, Mr. Moscaret asserts that the "one-rate-fits-all" approach is especially inequitable for paralegals, who are all awarded the same rate, regardless of whether a paralegal has one or twenty years of experience, or whether he worked in routine litigation versus major, complex litigations, or whether the paralegal is certificated. He points out that the judge in *Chiron*, on which objectors rely, stated as a key reason why he used the *Laffey* Matrix that counsel did not produce evidence showing that its requested rates were representative of the relevant market or systematically compiled. *In re Chiron Corp. Sec. Litig.,* No. C–04–4293 VRW, 2007 WL 4249902, *6, 2007 U.S. Dist. LEXIS 91140, at *18 (or 2007 WL 4249902) (N.D.Cal. Nov. 30, 2007).

This Court observes that this not a statutory fee-shifting case, the type to which the *Laffey* Matrix applies. Moreover, this Court agrees that not only is there no case in the Fifth Circuit that has applied the *Laffey* Matrix to determine reasonable fees, but the Fifth Circuit has clearly endorsed an alternative approach, the twelve-factor *Johnson* test, for that purpose. It also requires the fee petitioner to produce evidence demonstrating 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 at 936.

Rinis Objectors also challenge Lead Counsel's argument of risk, and point out that the Defendants had settled before the Fifth Circuit dismissed Deutsche Bank. Even earlier a partial settlement had with negotiated with Defendant Arthur Andersen Worldwide Societe Cooperative (AWSC) and some of its member firms, with the stipulation dated August 29, 2002, approved by the Fifth Circuit in *Newby v. Enron Corp., et al.,* 394 F.3d 296 (5th Cir.2004). Part of that settlement provided that $15 million be set aside to pay for future litigation expenses—that fund greatly reduced the risk to class counsel in pursing this litigation, and therefore the multiplier should be adjusted downward. As the Court discussed *supra,* risk is measured at the start of the litigation and not in hindsight.

In their supplemental objections (# 5967), accompanied by a motion for and 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, objectors reiterate their earlier objections and complain that it is unclear whether Coughlin, Stoia used time tracking software [104] and whether time was reconstructed on a spread sheet.

As noted, Coughlin Stoia has made clear that their time records were contemporaneous, not reconstructed. Lead Counsel objects to their request for software, DCs or DVDs because they provide no reason why they need this information, no discussion of their review of the records that were filed, nor any explanation why they need the additional information. Lead Plaintiff states that the time records were entered into the Court's docket and on www.esl3624.com in .pdf format, and the vast bulk of the records are searchable in that format. A number of programs are available to the objectors to convert the .pdf to a different format, such as spreadsheets. The Court agrees that Lead Plaintiff has made the records sufficiently available to render the objectors' complaint meritless.

e. Objections of the Enron Savings Plan and the Enron Stock Ownership Plan (# 5869, duplicated # 5879, supported by Declaration of Marc I. Machiz, # 5881)

Fiduciary Counselors, acting on behalf of the Plans, submits a "Mega Settlements Chart" identifying the settlement amount, the fee award, the % of the settlement that the fee represents, the multiplier, the hours, and the average hourly rates in the recent mega fund cases, listed in order of largest to smallest recovery: *WorldCom, Tyco, Cendant, AOL, Nortel* (2007), *Royal Ahold,* and *Nortel* (2006).[105] # 5869 at 5. The Court refers the parties to the Declaration of Helen Hodges (# 5818, Ex. 5) which has the same and additional mega settlements, gives more information about stage, number of documents reviewed, depositions taken, and a broader view in an attempt to justify the higher fee; it is included in this opinion at pages 84–86 and the Court has discussed it and the variety of factors that create the final lodestar and multiplier, as well as comparisons among the various mega-fund cases.

At the same time Fiduciary Counselors states that it "believes that it is more useful to compare Coughlin Stoia's rates with rates charged by other attorneys spe-

104. Lead Counsel responds that it is not sure what is meant by "time tracking software" but states that it uses a program called "Elite" to record and maintain time records. # 5974 at 14.

105. *In re WorldCom Inc. Sec. Litig.,* 388 F.Supp.2d 319 (S.D.N.Y.2005); *In re Tyco Int'l, Ltd. Multidistrict Litig.,* 535 F.Supp.2d 249 (D.N.H.2007) (Ex. 3 to # 5869); *In re Cendant Corp. Litig.,* 243 F.Supp.2d 166 (D.N.J.2003); *In re AOL Time Warner, Inc. Sec. and ERISA Litig.,* No. 02 Civ. 5575(SWK), 2006 U.S. Dist. LEXIS 78101 (S.D.N.Y. Sept. 28, 2006); *In re Nortel Networks Corp. Sec. Litig. ("Nortel 2006"),* No. 05–mdl–1659 (S.D.N.Y. Dec. 26, 2006) (Ex. 4 to # 5869); *In re Royal Ahold N.V. Securities & Erisa Litig.,* Civ. No. 03–MD–1539, 2006 WL 3313777, 2006 U.S. Dist. LEXIS 85722 (D.Md. Nov.2, 2006); and *In re Nortel Networks Corp. Sec. Litig. ("Nortel 2007"),* No. 01–CV–1855 (RMB), slip op. (S.D.N.Y. Jan 29, 2005) (Ex. 5 and Ex. A to # 5869).

cializing in complex litigation ... given Coughlin Stoia's experience" than to use that in the relevant legal market. # 5869 at 11 n. 14. Nevertheless, this Court notes that the Fifth Circuit uses the relevant local legal market.

f. George S. Bishop, Jill R. Bishop, Lon Wilkens, and Betty Willkens' ("Bishop Objectors' ") Objections (# 5875, 5964)

Dabrowski, the Bishop Objectors, and the Wilkens Objectors argue that it is axiomatic that time spent pursuing unsuccessful claims should be excluded. *Hensley,* 461 U.S. at 439, 103 S.Ct. 1933. Thus counsel's effort to reverse the Fifth Circuit's opinion in *Regents,* 482 F.3d 372, and to influence the outcome in the *Stoneridge* appeal to the United States Supreme Court had nothing to do with the current settlements, came years afterward, produced nothing of value to the settlement class, and should not be reimbursed.

The Court finds Lead Counsel's reply to be on point: "They ignore the fact that pursuit of what they characterized as a 'flawed theory' resulted in the vast bulk of the recovery here and that the SEC, 33 Attorneys General and the Ninth Circuit agreed with the 'flawed theory.' Moreover, it was the diligent and creative prosecution against ***all*** the banks that made the record result possible." # 5907 at 24. Furthermore Lead Counsel provides a reasonable explanation why it did not stop the fee clock from running once the settlements here were negotiated:

> ... [T]he $6.6 billion in settlements from three banks that were approved by this Court in 2006 were not final until October 25, 2007, when the Davis appeal was resolved. And Silvercreek's appeal from the BofA settlement was briefed in 2007 and will likely be heard in April 2008. Moreover, during 2007 and continuing to today, Lead Counsel has been working on the plan of allocation and other issues related to the prior settlements. The fact-intensive work on plaintiff's damages analyses which commenced during the fact-discovery phase and continued in 2006 in expert discovery and 2007 in trial preparation, was the foundation for the plan of allocation.... Furthermore, even in fee-shifting cases, courts compensate the prevailing party for unsuccessful claims that arose from a core set of common facts....

5907 at 24.

This Court first would point out a key distinction between awards based on fee-shifting statutes and awards based on a common fund. In *Hensley,* the Supreme Court addressed a fee award in a civil rights action under 42 U.S.C. § 1988, which, like many fee-shifting statutes, gives the court discretion to award reasonable attorney's fees to a "prevailing party," *Hensley,* 461 U.S. at 438–40, 103 S.Ct. 1933. The Supreme Court wrote,

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 440, 103 S.Ct. 1933.

With regard to a fee award for successful, but not for unsuccessful, claims, this Court believes that the distinction between an award under a fee-shifting statute and one under a common fund is important. 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." *See, e.g., Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 562–63, (7th Cir.1994), *citing Skelton v. General Motors Corp.,* 860 F.2d 250, 251–53 (7th Cir.1989). In contrast, under the common fund doctrine, the fee award is not punitively imposed upon the defendant, but taken from a common fund "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."); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478–79, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (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); *Skelton,* 860 F.2d at 252 (the common fund doctrine is based on the idea that not one plaintiff, but all "those who benefitted from litigations should share its costs"). Logically, therefore, the amount in the fund itself is the evidence of and the result of a successful claim; where the plaintiff's attorney does not prevail, he fails to add to that recovery. Therefore any recovery from it is for success in obtaining the settlements that comprise the common fund; the only issue is whether the amount of the fee award is reasonable.

Even under fee-shifting statutes, however,

> [T]here is ample authority for the proposition that a partially prevailing party may recover all reasonably incurred attorney fees, even though the party did not prevail on all claims, as to all defendants, or as to all issues in a matter.... When the plaintiff has prevailed as to some claims and failed as to others, the key is whether the successful and unsuccessful claims are based upon the same facts and legal theories, i.e., whether the claims are related.... When the successful and unsuccessful claims involve a "common core of facts" or "are based on related legal theories," then attorney fees incurred in the presentation of unsuccessful claims are recoverable on the theory that they contributed to the plaintiff's ultimate success..... Similarly, a prevailing party may not recover for hours devoted solely to claims against defendants as to whom the plaintiff did not prevail.... "But when claims against multiple parties share a common core of facts or related legal theories, a fee applicant may claim all hours reasonably necessary to litigate those claims." [citations omitted]

Coleman v. Houston ISD, 202 F.3d 264, No. 98–20692, 1999 WL 1131554, *5 (5th Cir. Nov.8, 1999), *citing Hensley,* 103 S.Ct. at 1940, and *Kellstrom,* 50 F.3d at 327. This Court finds that such is the case here, where Lead Counsel's central theory of the case was based on scheme liability. Moreover, a common core of facts is shared by all claims in this litigation. *See, e.g., City of Riverside v. Rivera,* 477 U.S. 561, 570–73, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (Brennan, J., writing for plurality) (finding not clearly erroneous the district court's decision to allow total compensation under 42 U.S.C. § 1988 where plaintiffs had not prevailed on all original claims against the thirty-one defendants because the claims were based on a common core of facts and the amount of the damage award did not imply limited success; indeed success was evident in the excellent results achieved in a highly complex case).

The Bishop Objectors also complain that Lead Counsel misrepresented the status of certain attorneys as "of counsel," (specifically James D. Baskin, Roger M. Adelman,[106] Sol Schreiber at Milberg Weiss after Coughlin Stoia parted from that firm, and John Pierce, Exs. H–K) listed on Exhibit F, when they are actually practicing law independently.

Lead Counsel explains that these attorneys were viewed and treated as "of counsel" for the purpose of this litigation: they had offices in the firm's Houston trial office; they spent significant time in Houston working on the case; the firm paid their expenses including the cost of their apartments in Houston; they directly supervised the work of the associates and contract lawyers; and the were integral members of the *Enron* team. Even if not designated "of counsel," they could have submitted separate fee declarations for the same lodestar request. Lead Counsel also states that Adelman and Baskin have had and continue to have substantial relationships with the firm. This explanation appears reasonable to the Court and the objectors have not provided any evidence that it is not accurate. Lead Counsel agrees that whether they are designated "of counsel" is irrelevant as their time spent on legal services in this litigation is compensable from the common fund. # 5907 at 30.

The Bishop Objectors also contend that Lead Counsel inflates the lodestar by improperly including $6,168,358 which should be categorized as "expenses" generated by forensic accountants, economic analysts, investigators, and document clerks.

In their Supplemental Objections (# 5964), filed after Lead Counsel's Compendium of time records was submitted, the Bishop Objectors comment that although two weeks is not a sufficient time to examine the Compendium of Lead Counsel's records, their "cursory review" (*id.* at 1) found that the records "illustrate the enormous difference that application of the lodestar principles [as opposed to the 'pre-arranged compact'] would have on the amount of a reasonable fee." *Id.* at 3. They re-emphasize that the bulk of the settlements were reached by mid–2005, that the Citibank, JP Morgan and CIBC settlements (totaling $6.6 billion) were announced in June and August of 2005, and thus the risk of non-recovery disappeared at that point. According to the totals submitted by Coughlin Stoia in its time records, from 2001–mid–2005, their total lodestar was $59.4 million, all that should be subject to a multiplier; fees after that time, while compensable, may not be enhanced by a multiplier since there was no longer any risk to Class Counsel.[107] Nevertheless, argue the Bishop Objectors, under Fifth Circuit case law, the lodestar must be limited to the hours spent obtaining the settlements that serve as the predicate for the fee request; post-settlement hours spent on unsuccessful litigation are not "reasonably expended." # 5964 at 5–6. They also complain that much of the post-settlement time was spent on extraneous matters, such as the work on the *Stoneridge* case, perhaps as much as $30 million of the time they are now claiming. They

106. For details on the work of James Baskin and Roger Adelman, see Supplemental Declaration of Helen Hodges, # 5909 at 25–26, 27.

107. The Bishop Objectors state, "For purpose of [lodestar] cross-checking the parties' negotiated fee, it is perhaps reasonable to count every hour that Lead counsel spent pursuing any and every defendant in this case, and even hours spent trying to influence the outcome of other cases. The Regents hired Lead Counsel to pursue each of those defendants, and presumably it would be willing to give Lead Counsel credit for all of the hours worked, even those spent on unsuccessful cases and strategies." # 5964 at 5.

concede that Lead Counsel should be compensated for work after the settlements that was spent on settlement-related tasks such as settlement approval proceedings, the plan of allocation, and claims administration, but no multiplier should be applied because Lead Counsel was guaranteed full compensation for every hour worked once the $6.6 billion of settlement from the three financial institutions was achieved, Thus the Court should review all of the post-summer 2005 time records to cull out what hours were spent litigation against non-settling defendants or on political strategy to influence the outcome of *Stoneridge.*

Lead Counsel responds that multiplier is not only based on risk, but is a multi-factor determination, as this Court has indicated earlier. Furthermore, the risk is assessed at the commencement of the case, not at the time of the fee application. *See* Professor Charles Silver's Expert Report, # 5822 at 32–34, *citing inter alia In re Synthroid Marketing Litig.,* 264 F.3d 712, 718 (7th Cir.2001) ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services in light of the risk of nonpayment and the normal rate of compensations at that time"). This Court agrees. *See also Florin,* 34 F.3d at 565 ("The court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation."); *Taubenfeld v. AON Corp.,* 415 F.3d 597, 599 (7th Cir. 2005) ("Although it is impossible to know *ex post* exactly what terms would have resulted from arm's length bargaining *ex ante,* courts must do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions.").

Lead Counsel, in response to the Bishop Objectors' contention that the risk ended with the settlements in mid–2005, maintains that the risk continued: the settlements were not approved by the Court until May 2006; an appeal relating to those settlements was resolved only in October 2007, just before Lead Counsel filed its motion for preliminary approval of the plan of allocation in November 2007; and Silvercreek's November 15, 2005 (# 4165) appeal from the Bank of America settlement was briefed in 2007 and heard in April 2008, but is still not resolved. In addition, the plan of allocation is based on Plaintiffs' damages analyses, which began during the fact discovery phase, continued in 2006 in the expert discovery, and in 2007 in trial preparation. *See* Helen Hodges' Declaration (# 5818, ¶¶ 282–89).

As for Bishop Objectors' contention that time spent pursuing non-settling defendants should not be counted, Lead Counsel points out that Judge Denise Cotes rejected the same argument under similar circumstances in *In re WorldCom, Inc. Sec. Litig.,* 02 Civ. 3288(DLC), 2004 WL 2591402, **21–22, 2004 U.S. Dist. LEXIS 22992, *74–75 (S.D.N.Y. Nov. 12, 2004) (rejecting as "meritless" an objection that including in the lodestar cross-check time spent on pursuing defendants after the settlement improperly skewed the claimed multiplier and rejecting as "not persuasive" the objection "that no multiplier is appropriate for certain work such as . . . work performed after the settlement with the Citigroup Defendants since no risk of recovery remained.").

[27] Furthermore this Court notes that it is established that post-settlement legal work performed on behalf of the class's interests, but not for work on a fee application [108] for the attorneys' interests, is

108. In response to supplemental objections (# 5974 at 10), Lead Counsel stated about compensable. *Mautner v. Hirsch,* 32 F.3d 37, 39 (2d Cir.1994). The areas of post-settlement services identified and submitted for fees by Lead Counsel full satisfy this criterion. Lead Counsel has made clear it has not requested fees for work relating to its petition for fees. Furthermore, since a reasonable attorney's fee is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" *(Hensley,* 461 U.S. at 433, 103 S.Ct. 1933), the determination is not based on "whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez,* 973 F.2d 96, 99 (2d Cir.1992), *cert. denied sub nom Bethlehem Steel Corp. v. Grant,* 506 U.S. 1053, 113 S.Ct. 978, 122 L.Ed.2d 132 (1993). Surely 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, justifying Lead Counsel's continuing efforts against the others, and addressing claims administration concerns, all on behalf of the class, fit this standard.

In a footnote, Bishop Objectors claim that when the Court performs the mandatory review of the time records, it should exclude the pre-litigation charges of Jonathan Cuneo of Cuneo Gilbert & LaDuca in twelve consecutive entries of precisely six hours each starting on 12/21/01 and ending 1/1/02 for "monitoring Congressional reports and proceedings and media reports." # 5964 at 7 n. 5. They object that Congress was not in session during this period and that it is highly unlikely that Cuneo worked exactly six hours on each of twelve consecutive days. Moreover it suggests there are probably other similar questionable items that this Court should identify and exclude in its more extensive review.

Lead Counsel responds that Cuneo's charges were not "pre-litigation" since they were incurred two months after the *Newby* case was filed, not to mention more than a couple of weeks after *Amalgamated* Bank was filed. Second the Court is not required to perform a detailed review of the time records for a percentage award or for a lodestar cross check. *Di Giacomo,* 2001 WL 34633373, at *10 ("This court will not conduct a detailed analysis of charged hours and hourly rates. To do so would undermine the utility of the percentage fee method."). The Court notes that other courts are in accord when the lodestar method is used as a cross-check. *See Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000) ("[W] here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court."), *citing In re Prudential Ins. Co. Am. Sales Litig.,* 148 F.3d 283, 342 (3d Cir.1998); *see also Rite Aid,* 396 F.3d at 300. Instead, the court can measure the claimed lodestar by its own familiarity

billing judgment in regard to time records and the fee application:

Persons very familiar with the litigation reviewed the time records and where there were issues with the amount of time recorded or the description of the time entry, those persons exercised their informed judgment, sought explanations or clarifications, and reduced or eliminated the time or clarified the entry. It is a little hard to understand the basis for this complaint [that Lead Counsel used "unexplained methodolog[ies]" with respect to the exercise of billing judgment] by Dabrowski/Schonbrun since it only had the effect of ***reducing*** the lodestar. No hours were increased. The same is true of time devoted to matters related to the fee application. Lead Plaintiff's counsel, based on a review of the time records and their knowledge of the application effort, made a conservative (*i.e.,* high) estimate of the time committed and deducted it from the aggregate lodestar reported in the briefing in support of the fee agreement. Again there is no mystery to the "methodology."

with the case. *Goldberger,* 209 F.3d at 50. Because the Fifth Circuit appears to hold a stricter standard of review, this Court has conducted a substantially more specific review of the time records. Finally Lead Counsel points out that if the Bishop Objectors had reviewed the Declaration of Jonathan W. Cuneo (# 5828 at 15) and his firm's time records in early December 2001, they would know that his colleagues attended the Congressional hearings while Cuneo was in trial, and that after his trial concluded, he reviewed media, Congressional testimony and other materials in preparation for coming hearings. The Court finds the objection lacks merit.

Bishop Objectors conclude that if one applies the requested multiplier of 5.4 to all pre-settlement time, the resulting fee would be $320 million. If one assumes half of all post-settlement time was related to settlement approval and claims administration process, and if no multiplier is applied, an additional $30 million would be added to the $320 million, resulting in a fee award of $350 million. The enormous difference between this result and the $695 million fee under the contract that may be awarded under the PSLRA should force this Court to decide whether the PSLRA or Fifth Circuit lodestar jurisprudence should prevail.

Because the Fifth Circuit has not addressed the issue since the enactment of the PSLRA, thus far there is no existing conflict. For reasons explained throughout this opinion, the Court has concluded that the fee agreement deserves deference under the PSLRA, but that a lodestar cross check might also be appropriate to meet Fifth Circuit concerns. Thus it does enforce the fee agreement that it has found reasonable under the circumstances when it was made, but in the event of an appeal and a decision by the Fifth Circuit that a lodestar cross check would be necessary, the Court has provided, to save time, such an analysis.

As for the objections to including contract attorneys' services in the fee award, this Court noted previously, professional staff other than attorneys are included in the lodestar. *See, e.g., Sandoval,* 86 F.Supp.2d at 609 (fees of contract attorneys and paralegals are separately compensable, based upon prevailing market rates for the kind and quality of their services, and included in the lodestar). In a sworn supplemental declaration (# 5909 at 3), Ms. Hodges states that Lead Counsel included in their lodestar paralegals, forensic accountants and investigators, but excluded secretaries, librarians, and clerical personnel. *See, e.g., DeHoyos,* 240 F.R.D. at 325 (fees for legal assistants, paralegals, investigators, and non-secretarial support staff are included in lodestar). There is no dispute that accounting and auditing issues were at the heart of this case.[109] The forensic accountants

109. In response in her sworn Supplemental Declaration, # 5909, Helen Hodges explains that these in-house accountants, who were all Certified Public Accountants with years of experience in accounting and auditing, were essential to successful prosecution of this suit, contributing their knowledge and expertise to assist the lawyers in drafting the allegations in the Consolidated Complaint and subsequent complaints, drafting document requests, reviewing documents, analyzing the myriad transactions at issue, preparing for depositions of fact and expert witnesses, and analyzing for settlement purposes the ability of various defendants to pay. *Id.* at 6. They also reviewed Enron's SEC filings and financial records, Andersen's audit workpapers, explained application of account rules to the complex facts here, identified document to be used in deposition of Andersen auditors, and attended some of these depositions to additionally assist the lawyers. *Id.*

Helen Hodges also states that their in-house economic analysts applied their knowledge and expertise for the benefit of the class by asserting that they helped the lawyers gather and analyze information, especially regarding helped Lead Counsel draft the accounting allegations in the Consolidated Complaint and subsequent pleadings, document requests, document review, analyzing the many transactions at issue, preparing for depositions of fact and expert witnesses, and analysis of various defendants' abilities to pay. # 5909 at 6. They also examined Enron's SEC filings, and financial records and Andersen's audit workpapers, contributed to preparation for depositions of Andersen auditors, as well as applied accounting rules to the complicated issues in this litigation. The economic analysts assisted the attorneys in gathering and analyzing complex information about the numerous securities at issue here, loss causation, and the damages suffered by the Class. Indeed, when the Court appointed the Regents to be Lead Plaintiff, one factor was its employment of Coughlin Stoia because of its "team of two dozen lawyers, investigators, forensic accountants and corporate governance experts" already at work on this litigation. *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 454 (S.D.Tex. 2002). Ms. Hodges further declared that Coughlin Stoia's document clerks and in-house investigators performed tasks like those of paralegals (gathering and organizing data for lawyers), but at rates lower than a lawyer's rates. # 5909 at 6. This Court finds the inclusion of these professionals' fees within the lodestar is appropriate. Moreover, a comment by Judge Cotes in the *WorldCom* litigation is applicable here: "[E]xtensive use of contract attorneys was justified by the need to review [millions of] pages of documents and was a far more efficient way of proceeding than giving the task to more highly compensated counsel. There is little danger of padded hours in this case given the volume of work that has been done and the pace of the litigation." *In re WorldCom*, 2004 WL 2591402, *22, 2004 U.S. Dist. LEXIS 22992, at *76.

g. Amicus Curiae Brief of the Texas Attorney General (# 5930)

Greg Abbott, the Attorney General for the State of Texas, objects to the amount of the fee request as excessive and claims that not only has he previously filed *amicus curiae* briefs in this litigation, but that under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711–15, he is authorized to review the proposed settlement of claims and request for attorneys fees. # 5930 at 2 n. 1 (listing previous *amicus curiae* briefs). He argues that the agreed-to fee is a windfall to the attorneys, that compared with fees in other mega-settlements it is way too high, that Lead Counsel has mechanically applied the *Johnson* factors, that a 5.4 lodestar should not be used to justify otherwise excessive compensation. He notes the objections of others and urges the Court to appoint a special master or some other person to determine the propriety and accuracy of the information used to calculate the lodestar.

The Court agrees with Lead Counsel's response. Lead Counsel notes that CAFA applies only to cases filed after February 18, 2005, and not to this one, filed in October 2001. Moreover, basically the Texas Attorney General reiterates claims made by other objectors. Lead Plaintiff has shown that the 9.52% fee is less than awards made in other mega-fund cases and that the average megafund award is

damages suffered by the class and related causal issues. *Id.* at 6.

Regarding the document clerks and in-house investigators, Ms. Hodges states that they performed services similar to those of paralegals, gathering and organizing data for lawyers at rates lower than those charged by lawyers. Investigators, under the direction of lawyers, coordinated activities with the outside investigation firm to locate and interview witness and review prior case files for relevant information. # 5905 at 6–7.

11.61%. See Top Securities Settlement chart, taken from Ex. 5 to Hodges Declaration (# 5818), this opinion at 84–86. In his "windfall" argument, the Attorney General disregards cases where similar and higher lodestar multipliers have been awarded in mega-fund cases. *See, e.g., In re Waste Management, Inc.,* No. 99–2183, sl. op. at 64 (S.D.Tex. May 10, 2002), in Lead Counsel's Compendium. # 5817, Ex. B) (multiplier of 5.296 awarded); *Cardinal Health* (multiplier of 5.9); *In re Charter Communications* (multiplier of 5.6); # 5930 (Lead Counsel's Response) at 3 n. 4, listing a number of cases with few awarding (multipliers above 5.4). As this Court has explained previously, it finds no "windfall" here, but a reasonable fee earned by an extraordinary group of attorneys who achieved the largest settlement fund ever despite the great odds against them.

IV. Court's Rulings

Accordingly, because this Court has concluded that the blended 9.52% fee in the *ex ante* fee agreement is fair and reasonable and should be enforced here as a matter of law under the PSLRA, the Court

ORDERS that Lead Counsel's motion for an award of attorney's fees (instrument # 5815) of 9.52% of the recovery, or approximately $688 million, plus interest accrued, pursuant to and in accordance with a fee agreement negotiated with Lead Plaintiff the Regents of the University of California at the outset of this litigation, is GRANTED. The Court further

ORDERS that Peter Carfagna's motion for additional information and for appointment of special master or enlargement of time for review (# 5963) and the Rinis Objectors' motion for and 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) are DENIED. The Court further

ORDERS that Plaintiff Class Member/Objector Brian Dabrowski's unopposed request to file supplemental objection (# 5890) is GRANTED. In ruling on the motion for reimbursement, the Court has reviewed Mr. Dabrowski's supplemental objection (# 5891). Finally, Chitwood Harley and Cunningham Darlow LLP's partial objection to Lead Counsel's motion for award of fees and their separate motion for attorney's fees and reimbursement of expenses (# 5858) have been withdrawn (# 5990).

"under-spends" compensation dollars on providing counsel with incentives to obtain extra dollars beyond the easy-to-obtain settlement sums, thereby failing to attain some of the extra dollars that more effective incentives could produce.

Irma J. DURDEN, Plaintiff,

v.

Michael J. ASTRUE, Commissioner, Social Security Administration, Defendant.

Civil Action No. 4:07–cv–865.

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

Sept. 8, 2008.

Background: Claimant sought judicial review of denial by the Commissioner of Social Security of her application for disability insurance benefits (DIB). Claimant

EXHIBIT E

Statistics about Business Size (including Small Business) from the U.S. Census Bureau

The Census Bureau does not define small or large business, but provides statistics that allow users to define business categories in any of several ways:

Employers and nonemployers   Employment size of firms   Employment size of establishments   Receipts size of firms

Independently, the Small Business Administration defines size standards for each NAICS industry [PDF] to determine which businesses are eligible for its programs.

Employers and Nonemployers

About three quarters of all U.S. business firms have no payroll. Most are self-employed persons operating unincorporated businesses, and may or may not be the owner's principal source of income. Because nonemployers account for only about 3.4 percent of business receipts, they are not included in most business statistics, for example, most reports from the Economic Census.

Nonemployer Statistics annually classify nonemployer firms by industry and geographic area (U.S., states, counties, and metropolitan areas.)

Table 1. Employers and Nonemployers, 2007

	Firms	Establishments	Sales or Receipts ($1,000)
All firms	27,757,676	29,413,039	30,738.533,467
Nonemployers (firms with no payroll)	21,708,021	21,708,021	991,791,563
Employers (firms with payroll)	6,049,655	7,705,018	29,746,741,904

Employment Size of Firms

Table 2a. Employment Size of Employer and Nonemployer Firms, 2008 *

Introductory text includes scope and methodology. These data are also available by industry and state. Table includes both establishments with payroll and nonemployers. For descriptions of column headings and rows (industries), click on the appropriate underlined element in the table.

Employment size of enterprise	Firms	Establishments	Paid employees	Annual payroll ($1,000)	Sales or Receipts ($1,000)
All firms	**27,281,452**	**28,952,489**	**120,903,551**	**5,130,509,178**	**n/a**
Nonemployer firms	21,351,320	21,351,320	n/a	n/a	962,791,527
Employer firms	**5,930,132**	**7,601,169**	**120,903,551**	**5,130,509,178**	**n/a**
Firms with 1 to 4 employees (or with no employees as of Mar 12)	3,617,764	3,624,614	6,086,291	232,062,907	n/a
Firms with 5 to 9 employees	1,044,065	1,056,947	6,878,051	222,504,912	n/a
Firms with 10 to 19 employees	633,141	667,463	8,497,391	293,534,352	n/a
Firms with 20 to 99 employees	526,307	705,430	20,684,691	774,589,335	n/a
Firms with 100 to 499 employees	90,386	359,902	17,547,567	706,476,693	n/a
Firms with 500 employees or more	18,469	1,186,813	61,209,560	2,901,340,979	n/a
Firms with 500 to 749 employees	6,060	72,676	3,681,760	156,491,764	n/a
Firms with 750 to 999 employees	3,038	48,005	2,617,087	114,635,897	n/a
Firms with 1,000 to 1,499 employees	3,044	64,556	3,720,654	167,658,791	n/a
Firms with 1,500 to 1,999 employees	1,533	45,062	2,653,392	121,800,728	n/a
Firms with 2,000 to 2,499 employees	904	36,081	2,011,244	94,406,916	n/a
Firms with 2,500 to 4,999 employees	1,934	120,416	6,726,611	329,188,349	n/a
Firms with 5,000 employees or more	1,956	800,017	39,798,812	1,917,158,534	n/a
Firms with 5,000 to 9,999 employees	975	121,835	6,773,466	337,598,036	n/a
Firms with 10,000 employees or more	981	678,182	33,025,346	1,579,560,498	n/a

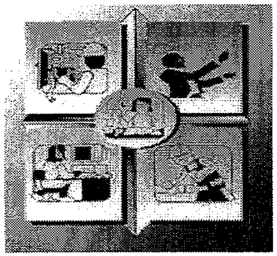
n/a - Receipts data are available for employers only for the years for which an economic census is taken (2007, 2002, 1997).

Source: Statistics of U.S. Businesses (See industry and state detail) and Nonemployer Statistics

Table 2b. Employment Size of Employer and Nonemployer Firms, 2007

Introductory text includes scope and methodology.Table includes both establishments with payroll and nonemployers. For descriptions of column headings and rows (industries), click on the appropriate underlined element in the table.

Employment size of enterprise	Firms	Establishments	Paid employees	Annual payroll ($1,000)	Sales or Receipts ($1,000)
All firms	**27,757,676**	**29,413,039**	**120,604,265**	**5,026,778,232**	**30,738.533,467**
Nonemployer firms	21,708,021	21,708,021	n/a	n/a	991,791,563
Employer firms	**6,049,655**	**7,705,018**	**120,604,265**	**5,026,778,232**	**29,746,741,904**
Firms with 1 to 4 employees (or with no employees as of Mar 12)	3,705,275	3,710,700	6,139,463	234,921,325	1,434,680,823



NONEMPLOYER STATISTICS

Nonemployer Definitions

Nonemployer

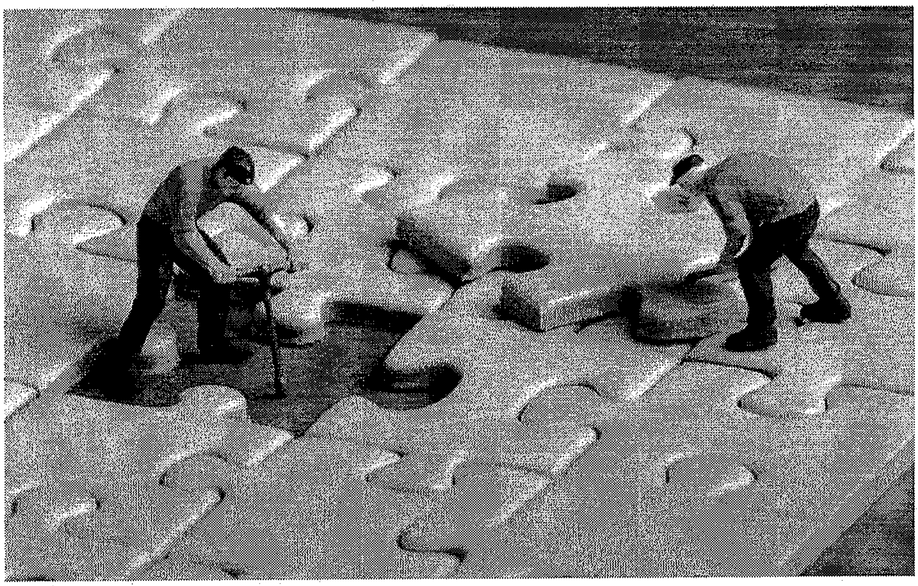
A nonemployer business is one that has no paid employees, has annual business receipts of $1,000 or more ($1 or more in the construction industries), and is subject to federal income taxes. Most nonemployers are self-employed individuals operating very small unincorporated businesses, which may or may not be the owner's principal source of income.

Receipts

Includes gross receipts, sales, commissions, and income from trades and businesses, as reported on annual business income tax returns. Business income consists of all payments received for services rendered by nonemployer businesses, such as payments received as independent agents and contractors.

The composition of nonemployer receipts may differ from receipts data published for employer establishments. For example, for wholesale agents and brokers without payroll (nonemployers), the receipts item contains commissions received or earnings. In contrast, for wholesale agents and brokers with payroll (employers), the sales and receipts item published in the Economic Census represents the value of the goods involved in the transactions.

EXHIBIT F



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Contract Attorneys: How a Small Firm Can Reap Huge Benefits

By Cynthia Feathers and Craig S. Brown

Introduction

The outsourcing of legal work may conjure up images of major law firms and Fortune 500 corporations using outside and even overseas entities to handle administrative tasks and routine legal projects. Yet outsourcing is also a vital tool for small firms, including solo practitioners. This is especially true when it comes to using contract attorneys to provide highly skilled legal work.

Outsourcing can have a direct impact on firm profits and client satisfaction. Contract attorneys offer at least seven potential advantages:

1. allowing small firms to become full-service firms;
2. leveling the playing field vis-à-vis large-firm competition;
3. producing better results, even in the firm's areas of expertise;
4. freeing up time for rainmaking and growing the practice;
5. providing a testing ground for potential permanent staff;
6. serving as a personnel cushion; and
7. providing an alternative to hourly rate billing.

The myth that law firms must overcome is that contract attorneys are by definition inferior to permanent staff; but the contrary is true. These attorneys are often high-caliber legal professionals possessing greater expertise regarding the relevant project than their permanent counterparts. They may be former practicing partners with extensive experience in the subject area, who are now happy to provide the same services for a lower cost. Such contract attorneys may have thrived in their permanent jobs but decided to seek alternative ways to practice that offer more autonomy, control, and flexibility. The types of projects contract attorneys can handle range from document review to trials, from acquiring public companies to writing memoranda of law. Any work a law firm attorney can do, a contract attorney can be hired to do.

The Benefits

1. Become a Full-Service Law Firm

Before the contract attorney industry existed, a small firm generally had two choices when clients or prospective clients requested legal services outside the firm's areas of expertise: turn away the work or refer the client to another firm.

Both options had obvious downsides. Turning away business has financial ramifications in the short and long term. Referring work elsewhere typically yields no financial benefit (with the exception of personal injury matters). Further, while the recipient firm may refer matters back to the small firm, this can be problematic. The cross-referrals may not be at the same level. For example, the small firm could refer out a lucrative antitrust case, but in return receive a simple real estate closing. Also, the recipient firm may decide to enter the small firm's area of practice and keep those clients.

Outsourcing to contract attorneys may offer a superior solution to the problem of representing clients in areas outside the small firm's expertise. If a client comes to the firm with a matter the firm does not normally handle, it can retain an expert contract attorney. By taking this route, the firm keeps the client, makes a profit on the new matter, and avoids the risk of referring to a potential competitor a client who might represent profitable repeat business.

2. Level the Playing Field

Another issue for small firms is how to compete in complex litigation against much larger firms with their seemingly unlimited resources. Similarly, in a non-litigation context, some corporate, real estate, and financing transactions may be too large for a small firm to handle. In both arenas, contract attorneys can provide a potential solution. No matter how large the matter, by adding contract attorneys to the team, small firms can level the playing field. Contract attorneys might be junior attorneys hired to review thousands of documents or seasoned attorneys retained to handle motions, depositions, trials, and appeals. By assembling such teams on a per-project basis, a firm converts labor from a fixed to a variable cost. Once the project ends, the small firm disbands the team and incurs no additional labor costs.

3. Win More Cases

There can be a thin line between maximizing the use of associates and risking malpractice. Contract attorneys can help the small firm avoid crossing that line. Here's an example of a too-typical scenario: A small matrimonial firm had an associate with virtually no experience and yet delegated to him the task of doing all motions and appeals – with only minimal supervision. As a result, many motions and appeals that could have been won were lost, and clients paid for time inefficiently and ineffectually spent.

Consider the path taken by another small firm. An insurance defense firm used a contract attorney to handle opinion letters, motions, memoranda of law, and briefs. The firm's two senior attorneys were freed to do what they did best – depositions and trials. The small firm's motions and briefs were more polished, persuasive, and successful. Their profits were greater, too. The contract attorney did this work in a fraction of the time spent by the associate. She also offered flexible payment options, ranging from a fixed-fee project cost, to a relatively modest hourly fee, to a blended fee that was part hourly, part contingency.

4. Gain Time to Grow Your Practice

One common dilemma faced by small firms, and especially solo practitioners, is being constantly overwhelmed by the demands of handling the substantive, administrative, and business aspects of their practices. These competing demands may leave little time for other vital activities, such as networking in the community to sustain and grow the practice. By judicious use of contract attorneys on an as-needed basis, a firm can free up time and energy to handle important activities like rainmaking. The small firm attorney may also gain more time to relax and regroup – a luxury for chronically overworked attorneys – and may thereby become more productive, creative, and strategic over the long term.

5. Test Potential Permanent Staff

For small firms in particular, a hiring mistake can be deadly. A new hire cannot hide in the back office for months. On day one, that person needs to hit the ground running. To ensure that a candidate has the right skills and temperament for the firm and its clients, the small firm should consider engaging the candidate as a contract attorney. Only when the firm is sure that the candidate is a good fit, and that it has the flow of work to keep the new hire busy full-time, should it seek to convert the contract attorney to a permanent employee.

6. Create a Personnel Cushion

Contract attorneys can provide a personnel cushion. They can allow small firms to ramp up during peak busy periods; they can fill in gaps when key attorneys are on leave; they can help avoid hasty over-hiring and layoffs; they can help free up permanent attorneys to concentrate or more important matters; and they can make it possible for a small firm to accept matters the firm might otherwise decline due to lack of staff.

7. Offer Hourly Rate Alternatives

Decades ago, legal fees were generally based not only on the time spent but also on the nature of the services, the result achieved, the amount at stake, and the attorney's professional judgment.[1] Today, lawyers are typically paid like hourly laborers, but at a higher rate. This approach can breed dissatisfaction among clients, and it is not surprising that firms of every size are facing client pressure to provide greater value in legal services. Indeed, clients are driving the bargain. They are demanding faster, cheaper, and more effective results from their attorneys.[2] After all, using hours spent as a measure of legal service costs fails to address the service's value, worth, and benefit to the client, and the proportionality to the task at issue of time spent and fees charged. Further, the billable hour can create a conflict. What is good for the lawyer is bad for the client. The more time the lawyer spends, the more the lawyer makes – and the more money the client spends. The client may be justifiably concerned that self-interest could impact the lawyer's judgment. What is good for the client – a clear and fair price – may be bad for the firm, if the firm cannot reasonably predict how much time is needed to do a job.

Outsourcing to contract attorneys offers a way to reduce costs and increase value to clients, while maintaining or even increasing firm profits. The concept is simple. The firm should focus on its attorneys' core skills and let them do what they do best. Contract attorneys should be hired to do what they do best, providing services in their areas of expertise more efficiently and effectively than the firm's permanent personnel.[3]

For billing purposes, a contract attorney need not be an out-of-pocket cost that is simply passed on to the client. Firms can bill at a partner's rate, an associate's rate, a standard flat rate, or any rate that is established in the retainer agreement and is acceptable to the client. The results can be a win-win. For the client, contract attorneys can offer better services at lower cost. The cost to the firm can be less than that for associates, since no salary, benefits, taxes, and other carrying charges must be paid. Moreover, the firm can mark up the rate charged to the client in order to cover overhead and yet still provide value to the clients and a profit to the law firm.

Outsourcing to contract attorneys may offer a superior solution to the problem of representing clients in areas outside the small firm's expertise.

The Ethics of Outsourcing: ABA Formal Opinion 08-451

A 2008 ABA Formal Opinion[4] contains an expansive discussion on ethical issues raised by outsourcing. If certain conditions are met, there is nothing unethical about outsourcing legal services. Model Rule 1.1, requiring the provision of competent legal services to the client, does not specify that tasks must be done in a special way. Lawyers may decide to outsource tasks to independent legal service providers, as long as the outsourcing attorney satisfies his or her duty to render legal services competently.

Model Rule 5.1(b) requires a lawyer with direct supervisory control over another lawyer to make reasonable efforts to ensure that the latter attorney conforms to the Rules of Professional Conduct. This duty applies whether or not the lawyer is directly affiliated with the supervising lawyer's firm. Obviously, to meet this duty, the outsourcing lawyer should delegate tasks only to individuals who are competent to perform them and should appropriately oversee execution of the project. The 2008 ABA Formal Opinion on outsourcing reiterated a previous position: Client consent should be obtained if a temporary lawyer is to perform independent work without the close supervision of the hiring lawyer's firm.[5]

Another reaffirmed ABA position is that a law firm that engages a contract lawyer may add a surcharge to the cost paid by the billing lawyers – as long as the total charge to the client is reasonable and otherwise complies with Rule 1.5.[6]

Finally, the 2008 ABA Formal Opinion explains the rationale behind a surcharge on fees paid to contract attorneys – to yield a profit to the law firm:

> This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and overhead costs to support him, and also earns a profit for his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying the contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted.[7]

Three Ways to Hire a Contract Attorney

Perhaps now you are sold on the virtues of contract attorneys, but you wonder how to find the right ones. There are at least three ways to hire contract attorneys.

1. Contract Attorneys as Independent Contractors

Cost is the primary advantage of hiring a contract attorney directly as an independent contractor. The firm avoids the expense and paperwork of paying taxes and providing benefits, as it does for its own employees. Unless the firm knows of qualified contract attorneys in the legal community, however, there is a downside to this approach. The firm may have to spend some time and effort to search for contract attorneys by placing ads online or in legal publications. Then, the firm will need to conduct interviews, verify education and legal credentials, check references, assess writing skills, evaluate analytical skills, and review other relevant skills and expertise. Moreover, if the contract attorney ultimately hired decides to leave, all this work would have to be repeated.

There is also a risk in hiring a contract attorney as an "independent contractor." The firm may consider that attorney to be an independent contractor, but the attorney may properly be considered an "employee" and might successfully seek benefits that are provided to employees.

2. Contract Attorneys as Your Employees

Law firms can hire contract attorneys as their own employees. However, the firm may spend much time and effort to procure the services of such personnel on a purely temporary basis. This option is rarely used for another reason: by hiring temporary workers directly as their own employees, firms face the same liabilities as they do with their permanent employees. These include employee benefits (health care, 401(k) plan, unemployment insurance, Workers' Compensation) and wrongful discharge and discrimination actions.

3. Legal Staffing Agencies

Finally, legal staffing agencies can be utilized to bring on board the right contract attorneys. Such agencies typically treat contract attorneys as their own employees. They pay all employer-related taxes and offer employee benefits. This can make for a content contract staff. It can also absolve the hiring firm of any liability for employment-related disputes. There are several additional benefits of legal staffing agencies:

- The agency can provide access to top legal talent. Most agencies maintain a list of qualified candidates. Many require candidates to meet key criteria, such as years of experience and expertise in a particular area. Since contract placement is the business of the agency, it is constantly meeting and testing new talent, as compared to a firm that sporadically runs ads seeking contract attorneys.
- The agency handles the candidate-screening process. It verifies the attorney's academic degrees and legal credentials, including admission to the bar, current good standing, past employment, and references.
- The agency can help you find the ideal candidate quickly. With a comprehensive candidate database, the agency can assemble a large number of qualified candidates to meet urgent needs.
- The agency has already met the candidate in person. Checking resumes and references can take you only so far. A personal interview is the best way to assess the attorney's strengths, weaknesses, appearance, poise, and personality. This is important to ensure that the candidate fits in well with the hiring law firm's culture. An experienced staffing company will be adept at identifying qualified candidates and weeding out those who are unsuited to a particular assignment at a particular firm.

Be a Contract Attorney

Small firm attorneys may want to consider not only utilizing contract attorneys but also offering their services as contract attorneys. If an attorney is in a fledgling practice or has extra time available, he or she may be able to offer contract services on a temporary or per-project basis. This could afford the attorney the opportunity to make additional money and introduce his or her services to potential new clients and referral sources.

The most effective way to promote availability as a contract attorney is through a legal staffing agency. To do otherwise could limit prospects and confuse clients as to why two sets of rates are offered. As a contract attorney, the attorney's rate would typically be lower than that charged to his or her regular clients.

There is another huge benefit to proceeding through an agency. The agency, not the law firm or client, is the entity that pays the contract attorney, so the attorney avoids having to chase down the client for fees or having to write off any amounts owed. Assuming the attorney works with a reputable agency, he or she will be paid for all hours worked, no questions asked.

Conclusion

The use of contract attorneys to provide legal services is a relatively new phenomenon, but one whose time has come for large firms, as well as small firms, in urban centers and rural communities. By utilizing contract attorneys, small law firms can keep clients; attract new business; become more competitive; save money, time, and space; and make the best use of the firm's own expertise and resources. The recession, downsizings at firms, and other market forces brought a growing acceptance of the use of contract attorneys to handle functions normally done internally. The trend, however, is growing for reasons that transcend any temporary economic condition. Simply put, it makes good business sense for a small law firm to incorporate contract attorneys into its practice. ■

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1. Edward Poll, *Outsourcing: A Multi-Level Solution to the Cost/Value Dilemma*, Law Practice Today, American Bar Association Law Practice Management Services, July 2005.
2. Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else?)*, N.Y. St. B.J. (Oct. 2010), p. 20.
3. *See id.*
4. ABA Committee on Ethics and Professional Responsibility, Formal Op. 08-451 (Aug. 5, 2008) (Outsourcing Legal and Nonlegal Support Services).
5. ABA Committee on Ethics and Professional Responsibility, Formal Op. 88-356 (Dec. 16, 1988).
6. ABA Committee on Ethics and Professional Responsibility, Formal Op. 00-420 (Nov. 29, 2000) (Surcharge for Contract Lawyer).
7. Formal Op. 08-451, *supra* note 4.