UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES AND ERISA LITIGATIONS,	MDL - 1446
This Document Relates to: PAMELA M. TITTLE, *et al.*, Plaintiffs, v. ENRON CORP., *et al.*, Defendants.	CIVIL ACTION NO. H-01-3913 AND CONSOLIDATED CASES

MEMORANDUM IN SUPPORT OF CLASS COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND AN INCENTIVE AWARD TO THE CLASS REPRESENTATIVES

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As the Court is well aware, nothing about this consolidated action has been easy or simple. Reflecting that, Class Counsels' efforts have been intensive. More important, however, they have also been successful.

Over the past four and one half years, recoveries of $264.4 million in cash for the benefit of the Class have been achieved through a series of partial settlements, all but one of which has received the Court's final approval.[1] The only exception – the $37.5 million partial settlement with the Northern Trust Company – is scheduled for final approval at the same hearing set for this fee petition.

The collective *Tittle* recoveries are unprecedented in a litigation of this nature. Two of them are among the largest single amounts recovered in a case of this type. Separately, the recovery from the Northern Trust Company, if approved, will be the largest settlement against a trustee claiming to be a directed trustee on record to date.

The majority of the recovered funds are now being processed for distribution to the Class. The rest remain in Court approved accounts that are earning interest for the Class until they too become final. Certain of the funds are in fee and expense reserve accounts which were established by the Court. The purpose of those accounts was to allow for the efficiencies of a single fee application and to delay consideration of an appropriate fee until the cumulative results of Counsels' efforts and successes could be evaluated. That time has now come.

Thus, this motion addresses Counsels' proper compensation in light of all of the prior settlements in this complex, cutting-edge class action. Specifically, Class Counsel are requesting: (1) an award of 20% of each Settlement Fund, with interest, for attorneys' fees,[2] to

[1] To be more exact, the amount of the recoveries for the *Tittle* class is $264,375,000.

[2] In the Settlement Agreements, the total consideration for each partial settlement was either defined as the Class Settlement Amount or the Settlement Fund, which under the terms of each agreement included interest earned on those amounts beginning when the moneys were required to be deposited into the accounts established for the benefit of each Settlement Class or bonds were posted for those amounts. *E.g.,* AWSC Settlement Agreement at ¶ 1.16 (*Newby* Dkt. No. 1554); $85 Million Settlement Agreement at ¶ 8.2.2 (Dkt. No. 756); Enron Settlement Agreement at ¶ 4.2.(b) (Dkt. No. 1007); Arthur Andersen Settlement Agreement at ¶ 7.2.2 (Dkt. No. 1085); and Northern Trust Settlement Agreement at ¶ 7.2.2 (Dkt. No. 1174).

be disbursed when each of those funds become final and/or available for payment pursuant to the terms of the respective settlement agreements for each such fund;[3] (2) reimbursement of additional costs and expenses of the litigation incurred since the Court's last expense approval; and (3) incentive awards of $7,000 to the each of the Class Representatives and an additional Named Plaintiff.

These requests are fully justified by the record and satisfy the standards for reasonability set by controlling Fifth Circuit authority allowing district courts to employ different approaches to determine appropriate attorney's fees. Regardless of which of the approved methods or attendant factors for evaluating the fee request this Court uses, the fee petition is eminently reasonable. Similarly, the additional expenses requested are consistent with the types and amounts of expenses that the Court has previously approved in this case. Finally, the Class Representatives in the litigation have all devoted an extraordinary amount of time to the case and well deserve the modest incentive awards requested for them.

I. INTRODUCTION

Class Counsel became involved in this litigation in late October 2001 when they were contacted by Enron employees facing waves of troubling news about the company. That news was breaking during a period when they were unable to freely dispose of their Enron stock or otherwise protect their beneficial interests in Enron's retirement plans.

As a result, counsel undertook extensive investigations that led to filing the first complaints in this matter in November 2001, still weeks before Enron's eventual bankruptcy in December 2001. These early complaints were followed by others. All alleged claims for violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.

[3] Class Counsel are seeking an award based on a percentage (20%) of the aggregated common fund settlements. To allow the Court to cross-check the percentage award using Class Counsels' aggregate lodestar, the product of each firms' time and hourly rates, and the multiplier that would result from a 20% award on Class Counsels' aggregate lodestar are also provided. Any such cross-check confirms that an award of 20% of the aggregate Settlement Funds is reasonable.

§ 1001, *et seq*. ("ERISA") with respect to Enron's ERISA Plans. Those cases were consolidated before the Court, along with numerous cases for securities fraud, and numerous derivative claims.

In February 2002, the Court encouraged Class Counsel to enter into a voluntary organization for the prosecution of the consolidated ERISA cases. Class Counsel complied and the Court then appointed Lead Counsel to prosecute the case.[4] Pursuant to that appointment, Keller Rohrback, LLP and Hagens Berman Sobol Shapiro, LLP began to head and oversee the efforts of all of Class Counsel as Co-Lead Counsel. All told, 16 firms were involved in that organization and effort. Consistent with the Court's requirement that Co-Lead Counsel take responsibility for the "orderly and efficient functioning" of that group, work assignments were made to minimize wasted time and duplicative efforts.[5] Even so, however, vigorous attention to the case demanded huge commitments of resources and expenses.

As the Court appreciates all too well, the Enron litigation is at the upper limits of complexity for civil actions handled by the Federal court system. That complexity was created by a variety of factors, including:

- The sprawling nature of Enron's organization and business;
- The fact that Enron was in bankruptcy in another District, and the coordination required by those bankruptcy proceedings;
- The number of cases ultimately consolidated for resolution by the Court, including not only the numerous consolidated *Tittle* ERISA actions, but the many securities and derivative actions that also were placed under the same tent, each of which had interests that complicated the overall effort to voluntarily coordinate discovery and all other pre-trial procedures;
- The novelty of the legal issues presented to the Court under ERISA as reflected in the Court's thorough overview in its rulings and the continuing development of the case law on certain of those issues throughout the case;
- The novelty of certain of the legal issues presented in the bankruptcy proceedings;

[4] Order Appointing Lead Counsel dated February 25, 2002 (Dkt. No. 105).

[5] *Id*., at ¶ 3.

- The interests of a number of *amicus curiae* in how the legal issues in the *Tittle* action were resolved;
- Allegations of spoliation of evidence that resulted in processes well out of the ordinary in scope and timing;
- The massive amount of information that was ultimately produced and processed by the litigants;
- The technical nature of many of the substantive issues underlying the claims;
- The large number of defendants in the consolidated cases, including individuals, law firms, professional trust companies, financial institutions, and accounting firms;
- The number of professional organizations that were not named as defendants but which were nevertheless involved in the events relevant to the claims and defenses;
- The number of counsel involved in the consolidated litigations;
- Government interest in the underlying events, including not only the numerous hearings and investigations in the United States Congress that took place early in the case, but in federal agencies such as the Department of Justice, the Securities and Exchange Commission, the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service;
- The criminal cases against certain of the key witnesses to events, several of which have yet to be completed;
- Press interest in the case and the procedures required to insure the *bona fides* of confidential business information; and
- Issues arising from competing claims to insurance proceeds.

As a result, despite all of the best efforts of the Court and counsel, the case moved more slowly than anyone planned or preferred. In fact, the Court recognized those realities when it revised the pre-trial schedule for the consolidated cases.[6]

Irrespective of the complexities, beginning in 2003, almost two years after the initial cases were filed, the *Tittle* case began to be streamlined by a series of partial settlements that leave only two remaining individual defendants – Kenneth Lay and Jeffrey Skilling. Those

[6] As the Court candidly observed, its original anti-Dickensian schedule proved to be "optimistic" because the consolidated cases raised unique legal issues and involved a large number of parties and cases, all of which taxed the Court's resources. Order dated October 28, 2002 (*Newby* Dkt. No. 1113).

settlements remain in various stages of finality. For the purpose of the current motion, the pertinent background regarding each of them is as follows:

The AWSC Settlement: In November 2003, the Court approved a $40 million partial settlement with Andersen Worldwide Society Cooperative ("AWSC") and its former member firms (the "AWSC Settlement"). The Settlement Fund was divided between the *Tittle* and *Newby* plaintiffs. In doing so, the Court approved the establishment of a $15 million Expense Fund, $2.925 million of which was apportioned as the *Tittle* Expense Fund.[7] The AWSC Settlement is now final, and the Fifth Circuit has confirmed the propriety of the Expense Fund.[8]

Although the AWSC Settlement is final, immediately prior to the final approval hearing the *Tittle* and *Newby* plaintiffs agreed to divide the remaining $25 million of the $40 million Settlement Amount, with $3.75 million being apportioned to the *Tittle* Settlement Class as the *Tittle* Settlement Fund. That division remains to be approved by the Court. Any award of fees is to be paid from the portion of the $25 million awarded to the *Tittle* plaintiffs.[9]

No petition for attorneys' fees has previously been made relative to the AWSC Settlement. The Court has, however, approved multiple disbursements from the *Tittle* Expense Fund, including payments to reimburse Class Counsels' litigation expenses and to pay for notice expenses for certain of the partial settlements that came after the AWSC Settlement.[10] As of the May 31, 2006, $22,287.27 remained in the *Tittle* Expense Fund.

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[7] Memorandum, Findings of Fact and Conclusions of Law dated November 5, 2003 (hereinafter "AWSC Opinion") (Dkt. No. 648).

[8] *Newby v. Enron Corp.*, 394 F.3d 296 (5th Cir. 2004).

[9] AWSC Settlement Agreement (*Newby* Dkt. No. 1554), ¶ 2.5 (division of Gross Settlement Fund between *Tittle* and *Newby* Classes has no effect on finality of the Judgment) & ¶¶ 6.1-6.2 (fee award to be paid from the *Tittle* Settlement Fund upon Court Order).

[10] Order Granting Plaintiffs' Motion For Permission To Use *Tittle* Expense Fund Monies To Pay For Class Notice And Administration Costs And For Expenses Incurred Pursuant To Deposition Protocol Order dated July 12, 2004 (Dkt. No. 783); Order Granting *Tittle* Plaintiffs' Motion For Reimbursement Of Expenses Dated July 28, 2005 (Dkt. No. 1035); Order Granting Plaintiffs' Motion For Permission To Use *Tittle* Expense Fund To Pay For Class Notice and Administration Costs dated October 12, 2005 (Dkt. No. 1104); Order Granting Plaintiffs' Motion For Permission To Use *Tittle* Expense Fund To Pay For Class Notice And Administration Costs Associated With Arthur Andersen LLP and David B. Duncan Settlement dated March 3, 2006 (Dkt. No. 1165).

Pursuant to this petition, Class Counsel are requesting that 20% of any amount that the Court may eventually approve as the *Tittle* plaintiffs' share of the remaining $25 million Settlement Amount, *i.e.*, 20% of the *Tittle* Settlement Fund, with interest, be awarded to them for fees.[11]

The $85 Million Settlement: In June 2005, the Court gave its final approval to a partial settlement with various former officers and employees of Enron who served as fiduciaries for the Plans. Together, those settling parties constituted the majority of the defendants in this litigation.[12] That settlement will, when final, deplete the fiduciary liability coverage that is the sole source of the $85 million Class Settlement Amount established by that compromise (the "$85 Million Settlement").[13]

The Court's approval was appealed by various non-settling parties, as was a separate order of the Court with respect to the interpleader of the $85 million policy proceeds. The Fifth Circuit Court of Appeals recently heard oral argument on the interpleader appeal. The appeal of the approval itself has been stayed pending approval of the settlement, described below, with Northern Trust.

In connection with that partial settlement, the *Tittle* plaintiffs filed a motion to set aside a portion of the Settlement Fund in the form of two reserve accounts, one for an Attorneys' Fee Account in the amount of $17 million (20% of the recovery) and the other for a Litigation Expense Account in the amount of $2.915 million (3.43% of the recovery).[14] That motion is pending.

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[11] More precisely, Class Counsel request 20% of the current amount allocable to the *Tittle* plaintiffs' share, including interest but deducting taxes and any expenses approved by the Court and apportioned to the *Tittle* case.

[12] Amended Order Of Final Judgment And Dismissal dated June 9, 2005 (Dkt. No. 987).

[13] Additional moneys were paid by certain of the settling defendants from ther own funds through consent decrees with the Department of Labor (Dkt. Nos. 747, 748, and 749).

[14] *Tittle* Plaintiffs' Amended Motion To Set Aside A Portion Of Funds Recovered In Partial Settlement To Establish Attorneys' Fee And Litigation Expense Reserve Accounts And Amended Plan Of Allocation dated August 17, 2004 (Dkt. No. 830).

Granting this petition would moot that motion because Class Counsel are now requesting that 20% Class Settlement Amount, with interest, be awarded to them for fees, receipt of which is conditioned on the finality of the settlement.

The Enron Settlement: In September 2005, the Court gave its final approval to a partial settlement with Enron in consideration of a Settlement Fund consisting of a $356.25 million allowed bankruptcy claim (the "Enron Settlement").[15] The Court also approved a motion to set aside Attorneys' Fee and Litigation Expense Accounts for 20% and 2.5% of the Settlement Fund, respectively.[16] The Court then approved the sale of the allowed claim.[17] In February 2006, that sale was consummated for $124.62 million in cash. This amount, together with a $9.33 million cash distribution from the bankruptcy estate, brought the total amount realized on the claim to $133.95 million.[18]

There was no appeal of the Enron Settlement, which is now final. Other than the Attorneys' Fee and Litigation Expense reserves, in the principal amounts of $26.79 million and $3.34 million respectively, the rest of the Enron Settlement Fund has now been transferred for processing and distribution to the Class.[19]

The reserves in the Attorney's Fee and Litigation Expense Accounts are subject to the Court's ruling on this motion. Class Counsel are requesting the full amount in the Attorneys' Fee Reserve Account, with interest earned in that account, be awarded to them, as well as a payment from the Litigation Expense Account required to fund the full reimbursement of their

[15] Order of Final Judgment, Dismissal, And Bar Order dated September 12, 2005 (Dkt. No. 1075).

[16] Order Granting Plaintiffs' Motion To Set Aside A Portion Of Funds Recovered In Partial Settlement To Establish Attorneys' Fee And Litigation Reserve Accounts dated September 12, 2005 (Dkt. No. 1076).

[17] Order Approving Transfer Of Claim And Possible Sale Of Claim dated October 12, 2005 (Dkt. No. 1103).

[18] Lead Counsels' Notice Re Sale Of Claim In Connection With Court-Approved Settlement With Enron Corp. dated February 17, 2006 (Dkt. No. 1161).

[19] The exact amount of principal received from the allowed claim was $133,949,999.97; $26,789,999.98 was apportioned to the Attorneys' Fee Reserve Account and $3,348,749.99 was apportioned to the Litigation Expense Reserve Account.

expenses hereby applied for after depletion of the *Tittle* Expense Fund previously established in connection with the AWSC Settlement and the Arthur Andersen Litigation Expense Account (discussed immediately below). The remainder of the Enron Litigation Expense Account will be retained for any future expense applications as necessary. Any amounts ultimately remaining will be transferred for distribution to the Class.

The Arthur Andersen Settlement: In December 2005, the Court gave its final approval to a partial settlement with Arthur Andersen LLP[20] and David B. Duncan, one of its former partners, in the amount of $1.25 million.[21] Arthur Andersen had served as the auditor for the Savings Plan and ESOP for a limited period, well before Enron collapsed. No appeal of that Order was taken. As a result, that partial settlement has become final.

In connection with that settlement, the Court approved set asides from the Settlement Fund for an Attorneys' Fee Account in the amount of 20% ($250,000) and for a separate Litigation Expense Account in the amount of 2.5% ($31,250).[22]

Pursuant to this motion, Tittle plaintiffs are requesting that the both the Attorneys' Fee Account, with interest earned on that account, be awarded to them, and that all amounts in the Litigation Expense Account be awarded to them in order to partially reimburse any expenses awarded by the Court.

The Northern Trust Settlement: The court recently granted preliminary approval to a settlement with Northern Trust, the alleged trustee for the Savings Plan and ESOP, in consideration of a $37.5 million Class Settlement Amount.[23] That settlement is set for a final

[20] Andersen's United States entity.

[21] Order of Final Judgment and Dismissal dated December 20, 2005 (Dkt. No. 1132).

[22] *Id.*, at ¶ 29.

[23] Order Preliminarily Approving Partial Settlement with Northern Trust, Conditionally Certifying Class for Purposes of Settlement, Approving Form and Manner of Notice, and Scheduling Hearing on Fairness of Settlement Pursuant to Federal Rule of Civil Procedure 23(e) dated April 20, 2006 (Dkt. No. 1179).

approval hearing contemporaneous with the presentation of this motion for fees. Plaintiffs are by this motion seeking 20% of that Class Settlement Amount, with interest earned thereon.

Summary of Partial Settlements and Class Counsels' Request: The settlements to date have garnered $264.4 million in common funds for the benefit of the *Tittle* Class. Over $135 million of those funds are final and distributable.

If Class Counsels' fee petition is granted, those fees will be paid as each of the individual partial settlement funds becomes final. That would result in the immediate disbursement to Class Counsel of the full amount of the Attorneys' Fee Reserve Account established with respect to the Enron Settlement as well their receipt of the full amount of the Arthur Andersen Attorneys' Fee Account. Both accounts include interest earned in them. When and if the remaining settlements become final, Class Counsel would then be paid 20% of each of those Class Settlement Amounts,[24] with interest earned thereon, as well.

The requested expenses, if approved, will first be paid from the small amount of moneys remaining in the *Tittle* Expense Fund that was created in connection with the AWSC Settlement (the balance of which is approximately $22,287.27 as of May 31, 2006), and the $31,200.00 and interest thereon in the Arthur Andersen Litigation Expense Account. The remainder will be paid from the $3.34 million Expense Fund approved in connection with the Enron Settlement.

Class Counsels' Fees and Expenses: To date, Class Counsel have received no compensation of any kind for their efforts to investigate and prosecute this matter, although they have collectively expended over 56,500 hours to do so over a period of more than four years. In addition, Class Counsel have $874,902.74 of outstanding, unreimbursed expenses, including significant outlays for experts hired in the case. Joint Declaration of Co-Lead Counsel In Support of Class Counsels' Joint Petition for an Award of Attorneys' Fees, Reimbursement of Expenses, and an Incentive Award to the Class Representatives, ¶¶ 97-115 ("Joint Declaration"),

[24] As previously stated, with respect to the AWSC Settlement, the fund from which counsel would be paid is the "*Tittle* Settlement Fund."

filed herewith. Despite that substantial commitment of time and resources, Class Counsel undertook the case with no assurance they would be compensated unless they were successful.

Class Counsels' total lodestar is $23,020,068.18. Given this lodestar, the basis of which is discussed in the Joint Declaration, a 20% fee recovery equates to a multiplier of 2.297.[25]

As explained below, although the percentage-of-the-fund method is the proper method for determining Class Counsels' compensation in this common fund settlement, the amount that would be awarded using that approach is often cross-checked using a lodestar approach. In this case, either of those methods shows that the 20% Class Counsel is requesting is fair, reasonable, and fully justified in the context of this complex, intensive litigation, the massive amount of time and resources dedicated to the case by Class Counsel, and the outstanding results achieved as a result of these efforts. In fact, attorneys' fee percentages in similar litigation of 25%, and higher, have been approved by federal courts in this Circuit and across the country under ERISA and other comparable statutory schemes. The request is substantially lower than the fees that Class Counsel could have obtained through negotiations with private parties in the open market, and supported by the relevant factors typically considered by courts in this Circuit when evaluating class action fee requests, including the standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).[26]

The settlements that are the subject of this petition, singly and together, are a laudable result for the Named Plaintiffs and the Class. They were achieved in a case beset with complexities and challenging legal hurdles. Aside from the unprecedented amounts recovered, the settlements were the product of skillful, creative compromises necessary to satisfy the diverse goals of players on the stage, including not only the settling parties but government entities and

[25]Joint Declaration at ¶¶ 97-100 & 114. The multiplier is calculated on the basis of the cash value of the settlements exclusive of interest because the amount of interest to date is unknown.

[26] As revealed in the discussion of the prevailing approaches to fee awards in common fund cases, the standards under the percentage-recovery and lodestar-multiplier approach involve many of the same considerations. Class Counsel are mindful that the Court has stated its intention to scrutinize this fee petition using the *Georgia Highway* factors. AWSC Opinion at page 12, 23.

non-settling parties as well. All had their unique interests in the outcomes due to interests and motives that were often wilding divergent.

The efforts of Class Counsel in achieving this excellent result are described below and are further attested to in the Joint Declaration.

II. HISTORY OF THE LITIGATION

The relevant background of the case and the settlement negotiations that occurred are set forth in the Joint Declaration. As it details, Class Counsel have made large commitments of their resources in the course of the many activities required to litigate this case. They include investigating and drafting the complaint in this matter; successfully opposing the defendants numerous dismissal motions; redrafting the complaint consistent with the Court's dismissal order; drafting the necessary papers for certification of the class; engaging in extensive document discovery and numerous depositions; coordinating the discovery efforts in the context of the consolidated litigations before the Court; initiating and pursuing the many settlement negotiations in locations throughout the country that led to the partial settlements approved by the Court; defending the settlements in appellate proceedings; following and briefing the Court on the developing law applicable to the issues in the case; and working with their experts in preparation for trial. More particularly, as addressed in the Joint Declaration, the substantial work performed by Class Counsel in this case included:

- Drafting numerous initial complaints prior to the Court's appointment of the structure of counsel;
- Preparing a 300-page initial consolidated complaint and a 182-page amended consolidated complaint;
- Opposing 25 dismissal motions filed by the defendants, as well as the several *amicus* briefs filed by various interested parties;
- Participating in the bankruptcy proceedings in New York, including obtaining relief from the automatic stay to permit liquidation of the ERISA claims against Enron in District Court; resisting efforts by the Official Committee for Unsecured Creditors to subordinate the claim under Section 510(b) of the Bankruptcy Code (including filing extensive briefing on cross-motions for summary judgment on the subordination issue); and monitoring the plan of

reorganization confirmation process, including filing of objections and negotiating the resolution thereof;

- Extensively and ultimately successfully litigating class certification issues, including contending with 12 opposition briefs, supplemental pleadings, supplemental submissions of authorities in opposition to certification, and oral argument;

- Serving 16 sets of document requests on the defendants seeking a broad array of documents relevant to the case and resolving the multitude of objections posed by individual defendants and certain affiliations of defendants who were represented separately in the action;

- Serving six subpoenas on third parties seeking relevant information;

- Participating in the depositions of six Arthur Andersen witnesses concerning the spoliation of documents;

- Participating in numerous settlement negotiations and mediations in various locations across the country, leading eventually to the five partial settlements in this litigation, including the successful negotiating of a $356.25 million allowed unsecured claim, which was ultimately sold for $133.95 million in cash;

- Filing several appellate briefs in connection with the partial settlements;

- Reviewing millions of documents (including millions of e-mails), coding the information among them for later use, and establishing an electronic database collecting the coded materials;

- Serving 15 sets of interrogatories and requests for admission;

- Participating in taking and covering 68 depositions of clients, directors, committee members, Northern Trust employees, and third parties, many of which required several days to complete;

- Working extensively with the Independent Fiduciary in amending the Consolidated Complaint and on various settlements;

- Coordinating proceedings with the Department of Labor, both before and after it filed its own action in this matter; and

- Working with the many experts retained by plaintiffs to address liability and damage issues.

III. ARGUMENT

A. Pursuant to the Common Fund Doctrine, Class Counsel Are Entitled to an Award of Fees and Reimbursement of Litigation Expenses from the Funds Recovered in Each Partial Settlement

1. The common fund doctrine controls recovery of fees and expenses associated with this action

In the United States, unlike most jurisdictions, civil litigants must ordinarily pay their own litigation expenses (the "American Rule"), including attorneys fees.[27] The common fund doctrine, however, is an exception to the American Rule that has long been recognized by the Supreme Court of the United States. *Trustees v. Greenough*, 105 U.S. 527 (1882). Pursuant to exception, an attorney who creates a common fund from which members of a class are compensated for a common injury is entitled to a "reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

The doctrine recognizes that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched." *Id*. The underlying rationale for the exception is that beneficiaries of the fund will be unjustly enriched by the attorney's efforts unless the cost of litigation is spread among them. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993) (citing cases); *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

Common fund principles control this case even though ERISA contains a fee shifting provision [*i.e.*, 29 U.S.C. § 1132(g)(1)]. Courts, therefore, often award a percentage-of-recovery fee in class actions under the common fund doctrine where there has been a settlement even though ERISA's statutory fee provision would otherwise apply in individual matters or if a case

[27] Worldwide the rule is the "English Rule," *i.e.*, the loser pays some or all of the prevailing party's fees. *See generally* John Merryman, *The Civil Law Tradition*, 119-20 (2d ed. 1985) (attorney fees in civil law jurisdictions); Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 Law & Contemp. Probs., Winter 1984, at 37. The major exception, indeed perhaps the only exception, is the United States, where, in general, each party pays its own lawyers. *See generally* 1 Dan Dobbs, *Law of Remedies*, § 3.10(1) at 387-88 (1993) (American Rule well in place before 1800).

had gone to judgment. *See Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994) ("common fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund"); *Skelton v. General Motors Corp.*, 860 F.2d 250, 255 (7th Cir. 1988). Common fund principles can control in an ERISA case for at least two reasons. First, "the terms of ERISA's fee-shifting provision do not purport to control fee awards in cases settled with the creation of a common fund." *Florin*, 34 F.3d at 563. Second, the purposes of ERISA's fee provision (*i.e.*, to allow the offending party to bear the costs and ensure claims can be brought by meritorious plaintiffs who could not otherwise afford to bring a lawsuit) will also be fulfilled by the operation of common fund principles. *Id*. at 563-64. *See also Bowen v. Southtrust Bank of Alabama*, 760 F. Supp. 889, 894 (M.D. Ala. 1991) (noting a fee-shifting statute will trump the common law doctrine if application of the latter conflicts with the statute, but that ERISA does not present such a case).

Thus, common fund fee awards, ubiquitous in familiar securities and antitrust cases, are also routine in the less familiar arena of ERISA class action litigation. *See, e.g., In re Dynegy, Inc. ERISA Litig.*, No. 02-3076 (S.D. Tex. Dec. 10, 2004); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 n.18 (S.D.N.Y. 2004); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004); *In re Providian Fin. Corp. ERISA Litig.*, No. 02-1001, 2003 U.S. Dist. Lexis 26983 (N.D. Cal. June 30, 2003) (ERISA 401(k) company stock case); *Kolar v. Rite Aid Corp.*, No. 01-1229, 2003 U.S. Dist. Lexis 3646 (E.D. Pa. Mar. 11, 2003) (same); *Great Neck Capital Appreciation v. PricewaterhouseCoopers*, 212 F.R.D. 400 (E.D. Wis. 2002) (ERISA 401(k) objectors paid pursuant to common fund doctrine for carve-out of ERISA claims from securities settlement); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043 (9th Cir.) (ERISA entitlement class action), *cert. denied*, 537 U.S. 1018 (2002); *Millsap v. McDonnell Douglas Corp*., No. 94-633, 2003 U.S. Dist. Lexis 26223 (N.D. Okla. May 28, 2003) (ERISA § 510 class action); *Berger v. Xerox Corp*., No. 00-584, 2004 U.S. Dist. Lexis 1819 (S.D. Ill. Jan. 22, 2004) (ERISA cash balance class action); *Florin*, 34 F.3d 560 at 564 (quoting Mark Berlind, *Attorney's*

Fees under ERISA: When is an Award Appropriate?, 71 CORNELL L. REV. 1037, 1060-61 (1986)).

2. Class Counsel have satisfied all prerequisites for proper application of the common fund doctrine

Here, Class Counsel successfully negotiated a series of five partial settlements totaling over $264 million which, separately and together, qualify as a "common fund." Class Counsel have also satisfied the two prerequisites for making application from the amounts recovered under the common fund doctrine for each and all of those settlements.

First, the settling defendants' total liabilities are fixed by their contribution to the settlement fund. *See Florin*, 34 F.3d at 564-65. Thus, under the terms of each Settlement Agreement, and consistent with the common fund doctrine, defendants have no obligation to pay for attorneys' fees and Class Counsels' fees must be paid from the Settlement Amounts recovered.[28]

Second, the class members have been provided adequate notice that the fees paid to Class Counsel will be provided from the settlement funds. *See* Memorandum, Findings of Fact and Conclusions of Law dated November 5, 2003 (Dkt. No. 648) ("AWSC Opinion") at 14 (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 3042 at 240) (advising that class members should be advised of the impact of a fee determination on the amount of funds that will be available to satisfy the class' claims)). The notice recently provided to the members of all the Settlement Classes clearly stated Class Counsels' intention "to seek an award of attorneys' fees in the

[28] The Enron Settlement Agreement is representative. In it, the Settling Defendants are released from any further claim for damages associated with the Released Claims, including statutory attorneys' fees. Enron Settlement Agreement (Dkt. No. 1007) at ¶ 4.3 (noting the Class Settlement Amount "shall be the full and sole monetary payments made by or on behalf of the Settling Defendants to the Settlement Class in connection with the Settlement"; and "the Class Settlement Amount specifically covers any claims for costs and attorneys fees by named plaintiffs. . . ."). In addition, the Enron Settlement Agreement expressly provides that any fee or expense award "shall be paid solely from the Settlement Fund." *Id.*, ¶ 9.1. The provisions at ¶¶ 8.3 and 11.1 in the $85 Million Settlement Agreement (Dkt. No. 756) are virtually the same, as are the provisions of the AWSC Settlement Agreement (*Newby* Dkt. No. 1554) (¶¶ 2.3 and 6.2), the Arthur Andersen Settlement Agreement (Dkt. No. 1085) (¶¶ 7.3 and 10.1), and the Northern Trust Settlement Agreement (Dkt. No. 1174) (¶¶ 7.3 and 10.1).

amount of up to 20% of the cash value of the amounts recovered" and that such fees would be paid from the "amounts previously recovered in the prior settlements."[29]

As each of the partial settlements becomes final, as has already occurred with respect to the Enron Settlement and the Arthur Andersen Settlement, the common fund will be paid to the Plans and allocated to the Settlement Classes based on the allocation formulae approved by the Court. And unlike in most other class actions, members of the Settlement Classes do not have to submit claims to be entitled to their benefits. As such, Class Counsel are entitled to a share of the fund under the common fund doctrine. *Acosta v. Master Maint.*, 192 F. Supp. 2d 577, 581 (M.D. La. 2001) ("When a common fund is available, attorneys for the successful parties may petition for a portion of the fund as compensation for their efforts."), *aff'd*, 2003 U.S. App. Lexis 12143 (5th Cir. May 29, 2003).

3. This Court has previously held that it is appropriate to evaluate Class Counsels' application for fees pursuant to common fund doctrine

Consistent with the foregoing precedent and Class Counsels' satisfaction of the requirements for seeking their fees from the common fund they created for the Settlement Classes, this Court has on several occasions endorsed the application of the common fund doctrine in this litigation.

Thus, when the Court approved the Enron Settlement it directed that the Settlement Fund is "to be considered a common fund created as a result of the *Tittle* action."[30] Previously the Court observed, in the context of discussing Class Counsels' prior application for expenses, that "[a]pplying the common benefit doctrine reflects the statute's purpose. . . . Nothing in ERISA indicates that Congress intended to preempt the common benefit doctrine." *In re Enron Corp.*

[29] Notice of Partial Class Action Settlement [for Northern Trust Settlement] approved by the Court on April 20, 2006, at pages 1 and 6 (Dkt. No. 1179).

[30] *Tittle* Class Action Settlement Agreement [for Enron Settlement], Section 4.2.(a) and Amended Order of Final Judgment, Dismissal and Bar Order dated September 13, 2005, ¶ 10. The other partial settlements have substantially similar provisions. *See, e.g.*, Amended and Restated Class Action Settlement Agreement [for $85 Million Settlement], Section 8.1.1 and Amended Order of Final Judgment and Dismissal dated June 10, 2005, ¶ 9.

Secs., Derivative & ERISA Litig., No. MDL 1446, Civ. A. H-01-3624, 2004 WL 1900294, at *2-3 (S.D. Tex. Aug. 5, 2004).

The Court has similarly noted the appropriateness of evaluating Class Counsels' petition for fees pursuant to the common fund doctrine on other occasions as well in the context of the Enron civil litigation. *See In re Enron Corp. Secs., Derivative & ERISA Litig.*, No. MDL 1446, Civ. A. 4-01-3624, 2004 U.S. Dist Lexis 7490, at *6 (S.D. Tex. Apr. 6, 2004) ("This case involves a common fund and expenditures are justified by the common fund doctrine. . . ."); *see also* Order Preliminarily Approving Partial Settlement [the Enron Settlement] dated July 27, 2005 at ¶ 14g (Court will review any fee and expense application pursuant to the common fund doctrine) and Order Preliminarily Approving Partial Settlement [the $85 Million Settlement] dated June 3, 2004 at ¶ 14(i) (the Court will evaluate any application for an award of fees and expenses "pursuant to the common fund doctrine"). Accordingly it is appropriate in this instance as well for the Court to apply common fund principles to Class Counsels' request for attorneys' fees and expenses.

4. Application of the common fund doctrine vindicates public policy

Any successful class action vindicates public policies. Private ERISA litigation is a necessary and desirable tool to assure the effective enforcement of the ERISA laws, and the protections afforded by such laws to employees and retirees. As such, the public policy issues apply here with particular force. Fee awards in successful cases, such as the present action, encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the ERISA laws.[31] Moreover, awards of counsel fees help to ensure adequate enforcement of class members' legal rights. "[A] financial incentive is necessary to

[31] Despite some Congressional interest in the immediate aftermath of the Enron scandal, there appears to be no legislative relief in sight for participants in 401(k) plans who have lost significant portions, sometimes all, of their retirement savings through concentration in company stock. Nationwide, according to the most recent available data, 17% of all 401(k) participants' retirement savings is still in company stock despite the fact that "Finance theory screams, Don't do it!" Alicia Munnell & Annika Sunden, *Coming Up Short: The Challenge of 401(k) Plans* at 100-101, 122 (Brookings Inst. 2004) (scholarly treatment of 401(k) issues by two economists).

entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988). "To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Eltman v. Grandma Lee's Inc.*, No. 82 Civ. 1912, 1986 U.S. Dist. Lexis 24902, at *25 (E.D.N.Y. May 28, 1986).

B. This Court Has Authority Over the Manner and Amount of any Award of Fees and Expenses from the Common Fund

Fed. R. Civ. P. 23(e) requires that any compromise of a class action requires court approval. The Court's duty "to protect absent class members and to police class action proceedings," includes "the obligation to explore the manner in which fees of class counsel are to be paid and the dollar amount for such services." *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998) (citing *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 680 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978)). The Court must scrutinize even fees that have been agreed to by the settling parties and not merely ratify a pre-arranged compact. *Id*.

> The purpose of this salutary requirement is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights as well as to minimize conflicts that may arise between the attorney and the class, between the named plaintiffs and the absentees, and between various subclasses. Moreover, the court's examination of attorneys' fees guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class.

Id. (citations omitted). This Court has made it clear that it takes its role in protecting Class Members "very seriously." *In re Enron*, 2004 U.S. Dist. Lexis 7490, at *7.

C. In This Case the Court Should Review the Amount of Fees Based on the Percentage of the Common Fund that Is Requested

1. Most Circuit Courts permit, and some insist, that attorney fee awards in common fund cases be based on the percentage-of-recovery method

Over the years, the courts have used and debated the merits of two methods of determining the amount of fees to award in common fund, class action settlements: the lodestar/multiplier method or the percentage-of-recovery method.

Under the first, the court uses the lawyers' submissions concerning their time expended on the case to compute the "lodestar" that is the product of the number of hours expended and the appropriate hourly rates. This lodestar is then adjusted up or down (the "multiplier") to reflect various factors, especially the risk assumed by the lawyers. Alba Conte & Herbert Newberg, 4 NEWBERG ON CLASS ACTIONS, § 14:5 (4th ed. 2002).

Under the percentage-of-recovery method the fee calculation is much simpler. Much like in a typical contingency fee representation, the fee is a percentage of the recovery. Thus, the court sets an appropriate percentage, usually 20% to 30% of the fund, as the attorney fee. NEWBERG ON CLASS ACTIONS, § 14:6 at 550; *see also*, *e.g., Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (noting that "'[t]he majority of common fund fee awards fall between 20% to 30% of the fund'" and viewing this range as a "benchmark"(quoting *Camden I Condo Ass'n. Inc. v. Dunkle*, 946 F.2d 768, 744-5(11th Cir. 1991)). As a result, the method more accurately simulates the market by providing attorneys with the fee they would have received on a similar contingent fee case, with a similar outcome and a paying client. *Shaw v. Toshiba Am. Info. Sys., Inc*., 91 F. Supp. 2d 942, 965 (E.D. Tex. 2000).

The Supreme Court has consistently calculated attorney fees in common fund cases on a percentage-of-the-fund basis. *See*, *e.g.*, *Greenough*, 105 U.S. at 532; *Central R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Boeing Co. v. Van Gemert*, 444 U.S. at 478-79. This point was so well established by 1984 that the Supreme Court needed no more than a footnote to make it clear that "under the

'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). In fact, the Supreme Court never formally adopted the lodestar/multiplier method in a common fund case, even when the lodestar/multiplier approach was widely used in the 1970s. *See Shaw*, 91 F. Supp. 2d at 963 (thorough review of the competing methods, concluding that the percentage method is far superior and noting Supreme Court's endorsement of the percentage method).[32]

In contrast to the advantages of the percentage-of-the-fund approach, calculating fees under the lodestar/multiplier method has three major drawbacks: (1) it is unrelated to the benefit the class received; (2) it discourages early settlements by encouraging attorneys to run up their hours; and (3) it is administratively unwieldy, and can result in the court sifting through mountains of fee records to make the lodestar calculation. ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH), § 14.121 at 208 (4th ed. 2004) (noting that this approach is "difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation").

Since the United States Supreme Court decided *Blum*, virtually every Circuit has joined in affirmatively endorsing the percentage-of-recovery method as the appropriate one for determining the amount of attorneys' fees to award in common fund cases. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2d Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Florin*, 34 F.3d at 564-65; *Vizcaino v. Microsoft*

[32] As courts have recognized, using the percentage-of-the-fund method to award attorneys' fees in a common fund case "directly aligns the interests of the Class and its counsel for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Vitamins Antitrust Litig.*, No. 99-197, MDL No. 1285, 2001 U.S. Dist. Lexis 25067, at *34 (D.D.C. July 13, 2001) (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 431-32 (S.D.N.Y. 2001)). In addition, "the percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency[-]fee model." *In re Lloyd's Am. Trust Fund Litig.*, No. 96-1262, 2002 U.S. Dist. Lexis 22663, at *74-75 (S.D.N.Y. Nov. 26, 2002); *In re Vitamins*, 2001 U.S. Dist. Lexis 25067, at *68 (noting that the "percentage of recovery method is meant to simulate awards that would otherwise prevail in the market").

Corp., 290 F.3d at 1047-50; *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268-70.

The Ninth, Eleventh, and D.C. Circuits have gone further and effectively prohibited use of the lodestar/multiplier method. *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1047-50; *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d at 774; *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268-70.

2. The Fifth Circuit has not insisted on adherence to any one method of fee analysis

The Fifth Circuit is one of the few that has not addressed the relative merits of the two methods in detail. As discussed below, it has never prohibited the use of the percentage-of-recovery method and that method is commonly used by district courts to award fees in common fund recoveries.

Well over a decade ago, the Fifth Circuit said, "[t]his circuit utilizes the lodestar method to calculate attorneys' fees." *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992).[33] When the *Longden* court so held, however, it cited a statutory fee case, *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1092 (5th Cir 1982), not a common fund case. Further, the circuit court affirmed the bulk of an award that was clearly based on the percentage-of-recovery method. *Id*. at 1099-1100 and n.11. It was only when re-evaluating the award for one complaining attorney that the court used the lodestar method to reduce the attorney's award. *Id*.

Moreover, while the Fifth Circuit has not eliminated the use of the unwieldy lodestar/multiplier method, *In re Combustion, Inc.*, 968 F. Supp. 1116, 1134 (W.D. La. 1997), the percentage-of-recovery method is frequently used in common fund cases. Indeed, district

[33] This Court has relied on that holding when it noted "the Fifth Circuit has embraced the lodestar method of calculating attorneys' fees rather than the percentage method." AWSC Opinion at 13 n.6. As a closer analysis of *Longden* and other cases shows, however, neither the holding in *Longden* nor the actual approach used by Fifth Circuit courts is nearly so clear-cut.

courts clearly have discretion in the fee method to be used, *id.* at 1135, and not one has been overturned by the Fifth Circuit for using the percentage-of-recovery method in a common-fund settlement. *Shaw v. Toshiba*, 91 F. Supp. 2d at 967; *see also Acosta v. Master Maint.*, 192 F. Supp. 2d at 581 ("When a common fund is available, attorneys for the successful parties may petition for a portion of the fund as compensation for their efforts."); *Longden*, 979 F.2d at 1100, n.11 (affirming percentage of fee award in a securities class action).

In *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844 (5th Cir. 1988), a telecommunications antitrust suit, the Fifth Circuit counseled that percentage of fund was appropriate where, like in *Boeing*, "each member of the class had an 'undisputed and mathematically ascertainable claim to part of [the] lump-sum judgment,' [and] the members could obtain their share of the fund 'simply by proving their individual claims against the judgment fund.'" *Id*. at 852 (quoting *Boeing*, 444 U.S. at 479).[34] Thus, where an actual fund is created, such as by the partial settlements in this case, the *Boeing* percentage-of-fund approach is preferable. Lodestar, on the other hand, is more appropriate where, unlike here, the value of a settlement is difficult to ascertain and where no traditional common fund is created. *Id*. at 852 & n.5.[35]

A number of courts have cited *Strong* as standing for the proposition that a percentage fund analysis is appropriate in true common fund cases. *See Purdie v. Ace Cash Express, Inc.*, No. 01-1754, 2003 U.S. Dist. Lexis 22547, at *26 (N.D. Tex. Dec. 11, 2003); *Faircloth v.*

[34] In *Strong*, class members received an option of continuing with their Bell Atlantic service plan or canceling it and obtaining a credit. Plaintiff's counsel calculated the "fund" at $64 million, a liability only attainable if every customer selected the credit. The district court rejected counsels' calculation and characterization of the potential liability as a "fund." *Id.* The court ultimately found the lodestar method to be appropriate due to the significant uncertainty of the value of the settlement – something that is not present here. *Id*.

[35] The *Shaw* court found the percentage of fund far more desirable than the alternative, citing numerous sources and noting that the "lodestar method voraciously consumes enormous judicial resources, unnecessarily complicates already complex litigation, and inaccurately reflects the value of services performed." 91 F. Supp. 2d at 964. Nevertheless, "[o]ut of an abundance of caution" the court examined both lodestar and percentage methods and ultimately awarded a fee of 15% of the estimated $1 billion settlement finding that both methods led to the same result. *Id.* at 968-72.

Certified Fin., Inc., No. 99-3097, 2001 U.S. Dist. Lexis 6793, at *21-22 (E.D. La. May 15, 2001); *Shaw*, 91 F. Supp. 2d at 967; *cf. In re Combustion*, 968 F. Supp. at 1136 (electing to use simpler percentage of the fund approach because the large attorney pool (about 100) and the long duration of the case would result in overwhelming complexity and require outside financial assistance in calculating the lodestar).

As a result, "numerous district courts within the Fifth Circuit continue to use the percentage method for evaluating attorneys' fees in common fund cases." *Shaw*, 91 F. Supp. 2d at 966 (citing *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 500 (N.D. Miss. 1996)). The *Shaw* court cited 19 examples of cases, some from the Southern District of Texas, in which a percentage of the fund was awarded during 1990-1997.[36] That list was far from complete. Many other district courts in this Circuit not cited in either *Catfish* or *Shaw* have used the percentage method as well.[37]

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[36] *Orzel v. Gilliam*, No. 90-0044 (N.D. Tex. May 16, 1995) (Judge Fish); *In re Prudential-Bache Energy Income P'ships Sec. Litig*., No. 888, 1994 U.S. Dist. Lexis 6621 (E.D. La. May 18, 1994) (Judge Livaudais); *Steiner v. Phillips*, No. 3:89-1387-X (N.D. Tex. Mar. 14, 1994) (Judge Kendall); *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993) (Judge Mentz); *Belman v. Warrington*, No. H-91-3767 (S.D. Tex. Nov. 16, 1993) (Judge Hoyt); *In re Intellicall Sec. Litig*., No. 91-0730 (N.D. Tex. Sept. 22, 1993) (Judge Solis); *Kleinman v. Harris*, No. 89-1869 (N.D. Tex. June 21, 1993) (Judge Kendall) (approving fee of approximately one-third of settlement); *In re First Republic Bank Sec. Litig*., No. 88-0641 (N.D. Tex. Feb. 28, 1992 and Mar. 8, 1993) (Judge Sanders); *Transamerica Refining Corp. v. Dravo Corp*., No. 88-789 (S.D. Tex. Nov. 16, 1992) (Judge Black); *In re Granada P'ships Sec. Litig*., MDL No. 837 (S.D. Tex. Oct. 16, 1992) (Judge Harmon) (fees in the amount of 30% awarded under a pure percentage of recovery approach); *In re Lomas Fin. Corp. Sec. Litig*., No. 89-1962 (N.D. Tex. Jan. 28, 1992) (Judge Fish) (approving fee of almost one-third of benefit achieved of over $20 million); *In re Middle S. Util. Sec. Litig*., No. 85-3681, 1991 WL 275769 (E.D. La. Dec. 17, 1991) (Judge Duplantier); *Rywell v. Healthvest*, No. 89-2394 (N.D. Tex. Dec. 3, 1991) (Judge Sanders) (awarding fee of 30% of benefit achieved); *Longden v. Sunderman*, 737 F. Supp. 968 (N.D. Tex. 1990) (Judge Sanders); *Teichler v. DSC Communications Corp*., No. 85-2005 (N.D. Tex. Oct. 22, 1990) (Judge Maloney) (plaintiffs' counsel awarded $10 million on a settlement of $30 million in securities class action); *Finkel v. Docutel/Olivetti Corp*., No. 84-0566 (N.D. Tex. Feb. 23, 1990) (Judge Maloney) (awarding fees amounting to 33% of settlement fund); *Nickle v. Crown Life Ins. Co.*, No. 96-238 (S.D. Tex. 1997) (Judge Black); *Gonzalez v. Crown Life Ins. Co.*, No. 97-156 (S.D. Tex. 1997) (Judge Lake); and *Metzgar v. The Equitable Life Assurance Society of the U.S*., No. 82-413 (N.D. Tex. 1988) (Judge McBryde).

[37] Other district courts in this Circuit not cited in *Catfish or Shaw* used the percentage method as well, including *Kilsilenko v. STB Sys., Inc.*, No. 3:99-CV-2872-M (N.D. Tex. Nov. 3, 2000) (Judge Lynn); *Neibert, et al. v. Monarch Dental Corp.*, No. 3:99-CV-762-X (N.D. Tex. Jun. 19, 2000) (Judge Kendall); *Robertson v. Strassner*, No. H-98-0364 (S.D. Tex. Jan. 5, 2000) (Judge Atlas); *In re Combustion, Inc.*, 968 F. Supp. at 1142-43 (Judge Haik); *In re ProNet, Inc.*, 1933 Act Sec. Litig., Master File No. 3:96-CV-1795-P (N.D. Tex. Nov. 19, 1997) (Judge Solis); *In re Olicom Sec. Litig.*, Master File No. 3:94-CV-0511-D (N.D. Tex. Aug. 30, 1996) (Judge Fitzwater); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 444 (S.D. Tex. 1999) (Judge Jack) (recognizing the "strong trend toward

Commentators have also recognized that the percentage-of-the-fund method is preferable because it aligns the interests of the class and its counsel and benefits the judicial system by encouraging counsel to efficiently prosecute and resolve all claims. *See, e.g.*, Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 241-49 (1985); Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (early, influential scholarly critique of the lodestar/multiplier method); Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEXAS L. REV. 865, 867 (1992) (the lodestar/multiplier method "is a source of many problems and has been widely condemned"); MANUAL FOR COMPLEX LITIGATION, § 14.121 at 208; Third Circuit Task Force, *Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002). In sum, the percentage method has overwhelming judicial and scholarly support, especially with the creation of a true, cash common-fund settlement, and Class Counsel urge the Court to employ it here.[38] Although this Court has yet to address an award of attorneys' fees in the Enron cases, the Court has cited with approval cases using the percentage-of-recovery approach in the contexts of both attorneys' fees and expenses. *See In re Enron*, 2004 U.S. Dist. Lexis 7490, at *6-7 (citing *Boeing*, 444 U.S. 472 (percentage-of-recovery method used to asses

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the use of the percentage method (even in district courts within the Fifth Circuit)" and figuring fees as a percentage, then cross-checking them via the lodestar method); *Sims v. Shearson Lehman Bros., Inc*., No. 90-0252, 1993 WL 646022 (N.D. Tex. Nov. 29, 1993) (Judge Kendall); *Courtney v. American Airlines, Inc*., No. 4:97-CV-668-A (N.D. Tex. Sept. 3, 1999) (Judge McBryde); *In re Harrah's Entm't, Inc.*, No. 95-3925, 1998 U.S. Dist. Lexis 18774 (E.D. La. Nov. 25, 1998); and *In re Tenneco Inc. Sec. Litig*., No. H-91-2010 (S.D. Tex. June 19, 1992) (cited in *Prudential*, 1994 U.S. Dist. Lexis 6621, at *4).

[38] Other district courts in the Fifth Circuit use hybrid approaches in which the court sets a benchmark fee based on the percentage-of-recovery method and then adjusts that fee based on the factors established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19. Or, a court may set a benchmark based on a percentage of recovery and then perform a lodestar check. *Id.* at 968 (citing *In re Harrah's Entm't, Inc. Sec. Litig.*, No. 95-3925, 1998 U.S. Dist. Lexis 18774 (E.D. La. Nov. 25, 1998) (unpublished) and *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999)). Despite the lack of any clear method for fee awards in the Fifth Circuit, any well-considered fee award approach that is reasonable is likely to be approved. *See Shaw*, 91 F. Supp. 2d at 965, 967 (commenting that the "law in the Fifth Circuit concerning which method should be applied is . . . at best unclear" and opining that if the Fifth Circuit "[i]f squarely confronted with the issue . . . might choose to apply a different analysis [than lodestar]." *See also Wolf v. Frank*, 555 F.2d 1213, 1214 (5th Cir. 1977) (the determination of the amount awarded as attorneys' fees is entrusted to the sound discretion of the trial court).

attorneys fees) and *Acosta*, 192 F. Supp. 2d 577 (percentage method used to evaluate expenses)).[39]

D. The Fee Request Is Reasonable Under the Percentage-of-Recovery Analysis

The traditional factors for gauging the reasonableness of any fee also bear on the appropriateness of the 20% requested here. As set out by the MANUAL FOR COMPLEX LITIGATION these factors are:

- The size of the fund created and the number of persons benefited;
- The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
- The skill and efficiency of the attorneys involved;
- The risk of non-payment;
- The amount of time devoted to the case by plaintiff's counsel; and
- The awards in similar cases.

MANUAL FOR COMPLEX LITIGATION, § 14.121 at 211-12. All of these factors militate in favor of the modest fee requested here.[40]

1. Size of the fund and number of persons benefited

The principal amount of the Settlement Fund here is $264,375,000, all cash. This is a significant benefit, especially in view of the relatively modest size of the class (approximately 20,000). In fact, the recovery far exceeds what the defendants claimed the Settlement Classes would have received for damages even had plaintiffs prevailed on the merits. Joint Declaration.

The size of the fund is also relevant to considering whether the recovery is so large or so small that the Court should depart from the typical percentage range of 25% to 33%. Some

[39] Because the Court has stated that it intends to scrutinize any fee petition using the *Georgia Highway* factors, however, Class Counsel also demonstrate that the requested fee is more than supported by those standards and any lodestar analysis.

[40] These factors are also relevant should the Court desire to use the lodestar approach as a cross-check against the percentage-of-fee recovery which Class Counsel is requesting. *See* discussion *infra* at Section III.B.

courts have suggested that smaller percentages should be set for funds that approach a billion or more dollars to avoid a windfall to counsel. *E.g.*, *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 484 (S.D.N.Y. 1998) (14% of $1.2 billion fund). *See generally* MANUAL FOR COMPLEX LITIGATION, § 14.121 at 209. *But see* Coffee, *Class Action Accountability*, 100 COLUM. L. REV. 370, 392 n.51 (2000) (arguing that such a reduction in very large cases is inappropriate and undesirable).

The recovery here is sizeable. While fee awards may vary, district courts in this district have awarded fees of 25% or more in comparable settlements. *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993) (33% of $170 million recovery); *In re Combustion*, 968 F. Supp. 1116 (W.D. La. 1997) (36% of $127 million); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (25% of more than $190 million recovery). In fact, many courts have approved comparable fee awards in recoveries of over $100 million. *See*, *infra*, note 18. Prof. John C. Coffee, Jr. a leading academic expert on class actions, has concluded that as an empirical matter, between 1998-2004, "all antitrust megafund awards [were] over 20%, and sometimes over 30%, even in cases exceeding or comparable to [the Lucent Technologies $610 million global settlement]." *In re Lucent Techs., Inc., Secs. Litig.*, 327 F. Supp. 2d 426, 443-44 (D.N.J. 2004) (discussing Coffee's research and according it "substantial weight"). This factor, therefore, suggests that a percentage fee of 25% would be warranted, and that the requested fee here, 20% of the total fund, is very reasonable.

2. Objections

The Settlement Classes were notified by mail and publication of the Class Counsels' intention to seek a fee of up to 20% of the common fund beginning on April 26, 2006. This fee petition is being filed consistent with the schedule that provides members of those Classes until June 29, 2006 to lodge their objections. Thus, only a preliminary comment on objections is possible.

To date, only three Class members have objected to Class Counsels' application in response to the mailed and published notices, an amount that is insignificant relative to the size of the Class.[41] The substance of those objections is that any fee paid to Class Counsel would be too large. The objections are not specific and are not based on an understanding of the nature and extent of Class Counsels' work or the benefits to the Settlement Classes. Class Counsel will address all correspondence and objections prior to the July 24, 2006 settlement and fee petition hearing.

3. Skill and efficiency of the lawyers

As a preliminary matter, the Court appointed Class Counsel to undertake this effort based, in part, on a review and understanding of "the qualifications of the attorneys and the work they have already performed in investigating and prosecuting this action on the national front as well as here."[42] The Court's understanding was based on the briefs and firm resumes evidencing their experience and commitment. The Court made its appointment with the understanding that this was a complex action that demanded efficiency and coordination, not only with respect to the Class's claims, but with those in the *Newby* litigation, and set the mark for what it expected of Class Counsel leading the case – "persuading other counsel to work together in the most efficient manner."[43] As a result, the Court encouraged all of the counsel in the related ERISA cases to voluntarily enter into an effective leadership structure to prosecute the action and because they readily complied, Class Counsel were appointed by the Court only a few days later.[44]

[41] Although the deadline for objections has not yet passed, the paucity of class member objections received to date militates towards approving it. *See, e.g.*, *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (noting that the lack of objections is "strong evidence of the propriety and acceptability" of fee request); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 530 (E.D. Pa. 1990); *Mashburn*, 684 F. Supp. at 695.

[42] Order dated February 18, 2002 at 6-7 (Dkt. No. 95).

[43] *Id.* at 7.

[44] Order Appointing Lead Counsel dated February 25, 2006 (Dkt. No. 105).

The Court has now had the opportunity to evaluate first-hand whether the level of skill and efficiency it expected in that appointment has been met over the intervening years. Class Counsel submit that one of the best indications it has is how few times the Court has been required to intervene in this action to resolve disputes among the parties in the *Tittle* action. Another positive confirmation is the achievement of the multiple settlements that have created the common fund. To borrow an adage, "the proof is in the pudding."

The achievements in this case and its efficient operations are the result of the substantial experience of counsel in this area of the law. ERISA company stock cases are a recent arrival on the legal stage relative to securities fraud and antitrust actions. Keller Rohrback LLP helped pioneer the development of ERISA breach of fiduciary duty law and is a nationally recognized leader in this specialized area. Keller Rohrback attorneys served as the lead counsel in the first reported 401(k) company stock breach of fiduciary duty case, *In re IKON Office Solutions Secs. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002). Since *IKON*, Keller Rohrback has continued to act as a trailblazer in this specialized area by serving as lead or co-lead counsel in numerous leading ERISA breach of fiduciary duty cases.[45]

Hagens Berman Sobol Shapiro LLP, has also long been involved in company stock cases. The firm is currently lead counsel in *Nelson v. IPALCO*, one of the early company stock cases in which the class has been certified in an adversary setting and one of the few such cases to be tried.[46] In the early 1990's, the firm pioneered the discovery of fraud in discounts to employee health plans in representing Blue Cross health insurance plan participants in class actions in ten

[45] Those cases include not only the *Tittle* litigation, but also *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y.); *In re Providian Fin. Corp. ERISA Litig.*, No. 01-5027 (N.D. Cal.); *In re Xerox ERISA Litig.*, No. 02-1138 (D. Conn.); *In re Dynegy, Inc. ERISA Litig.*, No. 02-3076 (S.D. Tex.); *In re Williams Cos. ERISA Litig.*, No. 02-153 (N.D. Okla.); *In re Global Crossing ERISA Litig.*, No. 02-7453 (S.D.N.Y.); *In re BellSouth Corp. ERISA Litig.*, No. 02-2440 (N.D. Ga.); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill.); *In re CMS Energy ERISA Litig.*, No. 02-72834 (E.D. Mich.); *In re CIGNA Corp. ERISA Litig.*, No. 03-714 (E.D. Pa.); *In re Syncor ERISA Litig.*, No. 03-2446 (C.D. Cal.); *In re HealthSouth ERISA Litig.*, No. 03-1700 (N.D. Ala.); and *In re Polaroid ERISA Litig.*, No. 03-8335 (S.D.N.Y.).

[46] *Nelson, et al. v. IPALCO Enters., et al.*, No. IP 02-0477 C – H/K (S.D. Ind.). The case was tried in March 2006. The Court has yet to render its verdict.

states across the nation[47] and represented employees in a case disputing the valuation of United Airlines ESOP shares involved in the employees' purchase of controlling interest in the airline.[48] It currently is lead or co-lead counsel on behalf of the participants of ERISA plans in not only *IPALCO*, but in plans of General Motors Corporation, Montana Power Company, and United Airlines.[49] The firm has extensive experience in a broad range of complex class actions, ranging from securities fraud and antitrust cases to consumer fraud class litigations and has represented governmental entities in numerous litigations across the United States involving the drug and tobacco industries.

Reflecting this background, Class Counsel have consistently been recognized for their skills. In one of the first of the 401(k) company stock cases to result in an approved settlement, *In re IKON Office Solutions Secs. Litig.*, 209 F.R.D. at 103, Judge Katz praised Keller Rohrback's lawyers' skills:

> [P]laintiffs' counsel clearly possess the expertise to litigate this matter effectively, as evidenced by the quality, timeliness and professional nature of their work before this court. The case has been vigorously litigated, from the filing of the initial complaint and its two subsequent amendments, through numerous discovery battles, a motion to dismiss, the several stages of argument concerning class certification, and the motions for summary judgment, partial summary judgment and decertification pending at the time that the parties reached tentative settlement.[50]

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[47] *Shelley, et al. v. Blue Cross Blue Shield of Washington & Alaska, et al.*, No. C93-843 Z (W.D. Wash.) was the first of those cases.

[48] *Summers, et al. v. UAL Corp., et al.*, No. 95 C 2271 (N.D. Ill.).

[49] *In re General Motors ERISA Litig.*, No. 05-71085 (E.D. Mich.); *In re Touch America Holdings Inc. ERISA Litig.*, No. CV02-106-BU-SEH (D. Mont.); *Summers, et al. v. UAL Corp., et al.*, No. 03 C 1537 (N.D. Ill.).

[50] Keller Rohrback cases that have thus far yielded opinions, other than this case, include: *In re IKON Office Solutions, Inc. Sec. Litig*., 86 F. Supp. 2d 481 (E.D. Pa. 2000) (motion to dismiss denied); *In re IKON Office Solutions, Inc. Sec. Litig*, 191 F.R.D. 457 (E.D. Pa. 2000) (class certified); *In re IKON Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) (securities settlement approval with carve out of ERISA claims); *In re IKON Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002) (ERISA settlement approval); *In re Duke Energy ERISA Litig*., 281 F. Supp. 2d 786 (W.D.N.C. 2003) (motion to dismiss granted); *In re Providian*, 2003 U.S. Dist. Lexis 26983 (ERISA settlement approval); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *In re Williams Cos. ERISA Litig*., 271 F. Supp. 2d 1328 (N.D. Okla. 2003) (motion to dismiss denied); *In re Elec. Data Sys. Corp. ERISA Litig*., 305 F. Supp. 2d 658 (E.D. Tex. 2004) (motion to dismiss denied); *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004) (motion to dismiss denied); *Cokenour v. Household Int'l,*

In another ERISA case, *In re Providian Fin. Corp. ERISA Litig.*, Judge Breyer awarded the ERISA class counsels' fee as follows:

> The attorneys' fees sought by Plaintiffs' Counsel in the amount of 25 percent of the common fund established in this Action are reasonable in light of the successful results achieved by Plaintiffs' Counsel, the substantial monetary and non-monetary benefits obtained in this Action, the substantial risks associated with the Action, Plaintiffs' Counsel's skill and experience in class action litigation of this type, and the fee awards in comparable cases.

2003 U.S. Dist. Lexis 26983, at *6.

More recently, when Judge Cote approved a partial settlement in *In re WorldCom, Inc. ERISA Litig.*, 2004 U.S. Dist. Lexis 20671, at *39-40 (S.D.N.Y. Oct. 18, 2004), she noted:

> Lead Counsel is clearly entitled to a substantial legal fee for the work it has performed up to this point in the ERISA litigation. Lead Counsel has performed an important public service in this action and has done so efficiently and with integrity. It has cooperated completely and in novel ways with Lead Counsel for the Securities Litigation, and in doing so all of them have worked to reduce legal expenses and maximize recovery for class members. Lead Counsel in the ERISA Litigation has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions. It still faces significant challenges in pressing forward with its litigation against Merrill Lynch. Lead Counsel should be appropriately rewarded as an incentive for the further protection of employees and their pension plans not only in this litigation but in all ERISA actions.

Similarly, Hagens Berman Sobol Shapiro has been recognized for its superior skills and results in cases that have, in the aggregate, recovered billions for the firm's clients. The Court in *In re Boeing Secs. Litig.*, Case C97-1715Z (W.D. Wash.), which ultimately approved a 27.5% fee in a $92.5 million settlement, commenting on a case in which Hagens Berman served as Co-Lead Counsel at the final approval hearing, observed:

> There is no question that this has been the most complicated, complex, hotly contested litigation this Court's been involved with

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Inc., No. 02-7924, 2004 WL 725973 (N.D. Ill. 2004) (motion to dismiss denied); *Hill v. Bellsouth Corp.*, 313 F. Supp. 2d 1361 (N.D. Ga. 2004) (motion to dismiss denied); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898 (E.D. Mich. 2004) (motion to dismiss denied); *In re Syncor ERISA Litig.*, No. CV 03-2446 LGB, slip op. (C.D. Cal. Aug. 24, 2004) (denying motion to dismiss).

> in almost 14 years of being a trial judge. [Joint Declaration, Ex. A.]

More important, all of this experience was brought to bear in producing the results here. Class Counsels' expertise, particularly in the arena of ERISA company stock cases, was invaluable in their efficient prosecution of ***this*** case. It was invaluable in successfully negotiating the five settlements that produced the $264 million common fund and insuring that those settlements were fair compromises of the strengths and weaknesses of plaintiffs' claims and in advocating for the Class during the negotiations of those settlements. Their familiarity with the issues specific to company stock cases and knowledge of what was unique to the *Tittle* action assisted them in briefing the extensive defense motions to dismiss. That same familiarity assisted them in discovery in this litigation because they have completed discovery in several similar cases. It enabled them, for instance, to focus discovery of the important factual issues with a ready understanding of the types of documents that are available and the typical relationships and communications that exist among plan committees, services providers, counsel, and other persons involved in the operation of ERISA plans. Class Counsel are thoroughly familiar with the scholarly literature on ERISA plans and company stock, both in the law reviews and the finance journals. They know the major experts in the area, and retained many of them. In short, Class Counsel know this area of the law well, legally and factually, and used that knowledge and experience to efficiently prosecute the case.

Also important was Lead Counsel's bankruptcy expertise. The Enron bankruptcy case was one of the largest and most complex in history. Numerous issues, such as relief from the automatic stay, the rights of the bankruptcy estate with respect to applicable insurance policies, and various technical bankruptcy issues pertaining to Enron's plan of reorganization, had significant implications for the Class and required Lead Counsel's substantial experience in bankruptcy matters. Most significant, of course, was the issue of subordination of the ERISA claims under Section 510(b) of the Bankruptcy Code, an issue which, if decided adversely,

would have meant zero recovery from the estate. Lead Counsel was particularly well versed in this arcane issue, having dealt with it in the *Global Crossing* and *WorldCom* cases (which were also administered in the Southern District of New York). The issue was fully briefed on cross-motions for summary judgment and ultimately was settled shortly before oral argument on those motions, with over $133 million realized from the allowed claim that was issued under that settlement.

They were assisted in doing so by the executive committee that the Court approved in appointing counsel. The efforts of counsel were coordinated throughout the case in order to insure that no important litigation matters and tasks went uncovered, but that none were overcovered. The efficiencies of that coordination extended to not only the motion practice and discovery activities before this Court in the consolidated *Tittle* actions, but also to their involvement in coordination with the *Newby* consolidated actions and to Enron's bankruptcy proceedings as well. In short, Class Counsel are proud of the results they obtained in this litigation and the way they went about it.

4. Risk of non-payment

At the outset of the case, the risk of non-payment was substantial. First, the case was taken on an entirely contingent basis such that the Court itself recognized that the firms involved needed to have their own resources to do battle.[51] In addition, Enron's fortunes were incinerating so quickly that soon after the case was filed, Enron went into bankruptcy. That December 2001 filing also had a crippling effect on the finances of many of the individual defendants. Arthur Andersen LLP then found itself in similar financial straits. Apart from the specter of non-payment due to a Pyrrhic victory against insolvent defendants, there was also a tangible risk that insurance coverage would be minimal and that any insurance coverage that did

[51] The Court thus noted that in appointing Class Counsel it wanted to assure itself that the applicants had the "capability to handle the expense of such a role." Order dated February 18, 2002 (Dkt. No. 95).

exist could easily be swallowed by litigation efforts on behalf of the many covered individuals who would be involved in the litigation.

That risk of non-payment was also increased because the defenses available to plaintiffs' claims were substantial and unsettled.[52] In fact, counsel face the ultimate risk of non-payment in every case involving company stock. Thus, Class Counsel have had various ERISA company stock claims dismissed, some on the pleadings and some after substantial litigation. In the United Airlines ERISA litigation, for instance, the Court recently granted summary judgment on the eve of trial. *Summers v. UAL Corp. ESOP Comm.*, 2006 U.S. Dist. Lexis 12297 (N.D. Ill. Mar. 23, 2006). Summary judgment was also recently granted in *In re Syncor ERISA Litig.*, 410 F. Supp. 2d 904 (C.D. Cal. 2006). Another of Class Counsels' ERISA 401(k) cases was also dismissed on the pleadings. *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786 (W.D.N.C. 2003). In yet another, the district court also dismissed the case, was reversed by the First Circuit, and then dismissed the case yet again. *LaLonde v. Textron, Inc*., 270 F. Supp. 2d 272 (D.R.I. 2003), *aff'd in part and vacated in part on other grounds*, 369 F.3d 1 (1st Cir. 2004); *LaLonde v. Textron, Inc*., 418 F. Supp. 2d 16 (D.R.I. 2006).

This is not to say that Class Counsel has not been victorious in ERISA litigation or that they believe the decisions in the above cases, many of which are being appealed, were correctly decided or serve as precedents for any other ERISA cases, but they clearly bear on the risk of non-payment. That risk is not vitiated by Class Counsels' victories in this case, *Dynegy*, *Williams* and others. Just last June, Judge Hayden dismissed an ERISA company stock case on purely legal grounds that would arguably apply to any case such as this. *In re Schering-Plough ERISA Litig*., 387 F. Supp. 2d 392 (D.N.J. 2004), *rev'd*, 420 F.3d 231 (3rd Cir. 2005). The Court

[52] In *Goldberger v. Integrated Res., Inc*., the Second Circuit made much of the fact that certain types of cases, especially routine securities fraud cases, do not have "a substantial contingency risk." 209 F.3d 43, 52 (2d Cir. 2000). This case, however, was far from a routine securities fraud case.

is well aware that the defendants submitted many decisions throughout the case to point out that plaintiffs'claims in similar ERISA cases have been dismissed or curtailed.

In addition to these ERISA risks, Class Counsel faced daunting risks in the bankruptcy. Chief of these was the possibility that the claim against Enron, even if successful, would be valueless because of the possibility of subordination of the claim under Section 510(b) of the Bankruptcy Code. The Official Committee of Unsecured Creditors filed a motion seeking subordination (the effect of which would have been zero recovery), and cross-motions for summary judgment were fully briefed. Before oral argument on the summary judgment motions, a resolution was negotiated under which an unsubordinated, allowed claim in the amount of $356.25 million was granted. This claim was ultimately sold for $133.95 million in cash.[53]

As a result, the Court can easily conclude this was a highly risky case, but one that Class Counsel took. This factor strongly supports a fee award in the full amount requested. *See Vizcaino*, 290 F.3d 1043 (ERISA class action; approving 28% fee on $97 million fund in part because of the case's risk).

5. Awards in similar cases

Moreover, the 25% fee sought by Lead Counsel on behalf of Class Counsel is in line with fee awards that have been approved in other similar ERISA breach of fiduciary duty class actions. *See In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844, 851 (N.D. Cal. 2005) (25% fee on $18.2 million award); *In re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 29, 2005) (25% of a $90 million settlement; *In re Xcel Energy, Inc.*,

[53] There is limited case law dealing with the issue of whether claims such as these are subject to subordination under Section 510(b). While Lead Counsel believed that the arguments presented in its summary judgment papers were compelling, it recognized a significant risk of an adverse outcome if the matter was litigated to a conclusion. Indeed, Judge Gonzales recently issued a lengthy opinion subordinating various Enron option claims under Section 510(b). *In re Enron Corp.*, 2006 WL 1148504 (Bankr. S.D.N.Y. May 2, 2006). While the setting for that decision is distinguishable, many of the arguments accepted by Judge Gonzales are similar to those advanced by the Unsecured Creditors' Committee in its summary judgment motion on these claims. If the matter had not been resolved and Judge Gonzales had reached the same conclusion here, there would have been no recovery on the claims against Enron, rather than the $133.95 million that has been realized.

Sec., Derivative & "ERISA" Litig., 364 F. Supp. 2d 980, 1002 (D. Minn. 2005) (25% of the $8 million settlement fund); *In re Dynegy, Inc. ERISA Litig.*, No. 02-3076 (S.D. Tex. Dec. 10, 2004) (attorneys' fee award of 25% of the $30.75 million settlement); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 n.18 (S.D.N.Y. 2004) (fee award of approximately 25% of the net settlement fund less the amount paid "voluntarily" by Gary Winnick); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (fee award of 30% of the $46.5 million settlement amount).

Even in non-company stock ERISA class actions, courts have typically awarded percentage fees of more than 20%, reflecting the very risky nature of ERISA class litigation generally. *E.g.*, *Millsap v. McDonnell Douglas Corp.*, No. 94-633, 2003 U.S. Dist. Lexis 26223 (N.D. Okla. May 28, 2003) (25% of $36 million fund); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (28% of $97 million fund); *Berger v. Xerox Corp.*, No. 00-584-DR4, 2004 U.S. Dist. Lexis 1819 (S.D. Ill. Jan. 22, 2004) (29% of $239 million fund); *Hooven v. Exxon Mobile Corp.*, No. 00-5071, 2005 U.S. Dist. Lexis 2595 (E.D. Pa. Feb. 14, 2005) (33.3% of $6 million fund); *Spann v. AOL Time Warner, Inc.*, No. 02-Civ. 8238 (DLC), 2005 U.S. Dist. Lexis 10968 (S.D.N.Y. June 7, 2005) (33.3% of $2.9 million fund). Thus, the ERISA cases, both company stock and non-company stock, strongly support the 20% set aside requested here.

The historic standard for assessing percentage of fund awards in the Fifth Circuit, however, is reasonableness under the circumstances. While "[n]o general rule can be articulated as to what is a reasonable percentage of a common fund," *In re Combustion*, 968 F. Supp at 1133, certain patterns have materialized and "district courts in the Fifth Circuit have awarded percentages of approximately one-third contingency fee." *Id*. (setting a benchmark of 20%-30% of the common fund and then approving a fee reserve of 36% of $127,396,000 – or approximately $45,952,560 – primarily because of risk factors including lengthy litigation with a

possibility of zero recovery).[54] A study of class action settlements by the National Economics Research Association ("NERA") showed that, regardless of the size of the settlement, attorneys' fees averaged approximately 32% of the settlement in shareholder actions. *See* Frederick C. Dunbar, *et al*., *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* (NERA, June, 1995) (cited in Shaw, 91 F. Supp. 2d at 989). A number of other courts have awarded attorneys' fees of at least 33% of a common settlement fund.[55]

The requested fee award is also consistent with practice in the private marketplace when attorneys negotiate percentage fee arrangements with their clients. *See In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001) ("[W]hen 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 compensation in the market at the time."); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. Lexis 25067, at *68 (the "percentage of recovery method is meant to simulate awards that would otherwise prevail in the market").

[54] In approving an award of 36%, the court in *In re Combustion* relied, in part, upon the following decisions: *Kleinman v. Harris*, No. 3:89-CV-1869-X (N.D. Tex. June 21, 1993) (approving fee of approximately one-third of benefit achieved); *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La.1993) (aggregate of 1/3 of $170 million to Plaintiffs' Committee); *In re Granada P'ships Sec. Litig.*, MDL No. 837 (S.D. Tex. Oct. 16, 1992) (fees in the amount of 30% awarded under a pure percentage of recovery approach); *In re Lomas Fin. Corp. Sec. Litig.*, No. CA-3-89-1962-G (N.D. Tex. Jan. 28, 1992) (approving fee of almost one-third of benefit); *Rywell v. Healthvest*, No. CA3-89-2394-H (N.D. Tex. Dec. 3, 1991) (award fee of 30% of benefit); *Teichler v. DSC Communications Corp.*, No. CA3-85-2005-T (N.D. Tex. Oct. 22, 1990) (plaintiffs' attorneys awarded one-third of benefit); *Finkel v. Docutel/Olivetta Corp*, No. CA3-84-0566-T (N.D. Tex. Feb. 23, 1990) (award of one-third of settlement fund).

[55] *In re Vitamins*, 2001 U.S. Dist. Lexis 25067, at *57 (approving fees of 34.06% of $359 million settlement fund); *Gaskill v. Gordon*, 160 F.3d 361, 363-64 (7th Cir. 1998) (affirming award of 38% of class action settlement fund); *In re Pacific Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (awarding 33% of $12 million common settlement fund); *In re Flat Glass Antitrust Litig*., Misc. No. 97-550, MDL No. 1200 (W.D. Pa. May 28, 2003) (awarding one-third of $61.7 million settlement fund as attorneys' fees); *In re Lithotripsy Antitrust Litig*., No. 98-8394, 2000 U.S. Dist. Lexis 8143, at *7 (N.D. Ill. June 9, 2000) (awarding fees of 33% in class action); *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding fees of 33% of $11.5 million settlement fund); *In re Medical X-Ray Film Antitrust Litig*., No. 93-5904, 1998 U.S. Dist. Lexis 14888, at *20 (E.D.N.Y. Aug. 7, 1998) (awarding 33% of a total settlement fund amounting to $39,360,000); *Maywalt v. Parker & Parsley Petroleum Co*., 963 F. Supp. 310, 313 (S.D.N.Y. 1997) (awarding 33.4% of common fund); *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 326-27 (E.D.N.Y. 1993) (awarding $14.2 million in fees or 33.8% of a $42 million settlement fund). *See also In re Ampicillin Antitrust Litig*., 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that several courts have awarded more than 40% of the settlement fund in class action cases).

As Chief Judge Hogan has noted, a "one-third recovery is a common percentage arrived at in private contingency fee cases." *Id*.

In fact, attorneys regularly contract for contingent fees between 30% and 40% with their client in non-class litigation. *See In re Aetna Inc. Sec. Litig*., MDL No. 1219, 2001 U.S. Dist. Lexis 68, at *44 (E.D. Pa. Jan. 4, 2001) (noting that in private contingency fee cases plaintiffs' counsel often negotiate fees of at least 33.3% of any recovery); *In re IKON Office Solutions, Inc. Sec. Litig*., 194 F.R.D. at 194 ("[I]n private contingency fee cases, particularly in tort matters, plaintiff counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation").[56]

Here, the requested fee award of 20% is fair and reasonable in light of the complexity and duration of this litigation, the substantial risks borne by Class Counsel in litigating this case on a contingency fee basis, the time and resources that Class Counsel devoted to this litigation, and the quality of the representation provided. Comparable cases illustrate the reasonableness of the request.

E. Class Counsels' Fee is Justified Under a Lodestar Approach Using the Johnson Factors as Well

This Court has previously stated that it intended to use the lodestar approach in assessing Class Counsels' fees by satisfying itself that lodestar representing the value of the hours Class Counsel incurred in the litigation is reasonable and then adjusting that lodestar up or down based on the *Johnson* factors.[57]

[56] Some courts have sought to streamline the percentage of recovery method even further by establishing a benchmark percentage. Thus, in the Ninth Circuit, the presumptive fee is 25% of the common fund, and a district court will be reversed if there is no adequate basis for a departure from the benchmark. *See Pincay Inv. Co. v. Covad Comm. Group*, No. 03-1518, 2004 WL 326392 (9th Cir. Feb. 18, 2004) (affirming award of the benchmark fee). *See generally* MANUAL FOR COMPLEX LITIGATION, § 14.121 at 209 (courts using the percentage method generally set the fees at 25%-30% of the fund; noting that "several courts have established benchmarks . . . [with] 25% of a common fund represent[ing] a typical benchmark").

[57] AWSC Opinion at 13, n.6.

One approach to examining the reasonability of the lodestar is to generally examine whether the amount of time expended was merited based on the nature of the litigation. *See Shaw v. Toshiba*, 91 F. Supp. 2d at 968-79. Another is to employ the *Johnson* factors used by Courts within the Fifth Circuit as a hybrid of the percentage-recovery and lodestar methods. The percentage method is first used to determine whether the lodestar is reasonable and the resulting lodestar is cross-checked based on the *Johnson* factors to adjust that amount up or down. *See In re Harrah's Entm't, Inc*., 1998 U.S. Dist. Lexis 18774, at *20 (applying percentage benchmark and then adjusting the percentage upward based on the *Johnson* factors and "the skill of counsel in negotiating a speedy and fair settlement"); *see also Shaw*, 91 F. Supp. 2d at 970. Class Counsels' lodestar clearly stands up to the scrutiny of either approach.

1. The nature, extent and value of Class Counsels' services supports the reasonability of the lodestar incurred by Class Counsel

Class Counsel expended 56,530.8 hours to investigate and prosecute this litigation. Their resulting lodestar is $23,020,068.18.[58] That total is derived from detailed billings that were prepared by the firms comprising Class Counsel. Those billings were created consistent with the Court's requirement to keep "contemporaneous records of their time devoted to this litigation . . . reflect[ing] the date of legal service rendered, the nature of the service, and the number of hours spent in the performance of such services."[59] Those records were collected and reviewed by Co-Lead Counsel in this litigation to ensure that the substance of the work submitted by counsel reflected the assignments handled by each of the firms.[60]

In evaluating the lodestar information here, several factors should be considered. First, the nature of the work undertaken and the amounts expended are consistent with the demands of this litigation. In fact, the history of the litigation and Class Counsels' discussion of their

[58] Joint Declaration at ¶ 114.

[59] Order Appointing Lead Counsel dated February 25, 2002 at ¶ 7 (Dkt. No. 105).

[60] Joint Declaration at ¶¶ 97-100.

activities discussed in this memorandum and in the accompanying Joint Declaration illustrate that Class Counsel performed high-quality work to efficiently achieve a series of substantial recoveries. Second, counsel in this case who also engage in non-contingent work have charged for their services at the same rates charged in similar litigation. Here, "the 'requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,'" and, therefore, those rates are presumptively reasonable. *Powell v. Commissioner*, 891 F.2d 1167, 1173 (5th Cir. 1990) (quoting *Blum*, 465 U.S. at 895 n.11). *See also Major v. Treen*, 700 F. Supp. 1422, 1434 (E.D. La. 1988) ("As the Supreme Court decisions have also made clear, experienced and expert attorneys who exhibit a high degree of skill have the right to have those factors calculated into the hourly rates."). As stated by the Fifth Circuit:

> When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When that rate is not contested, it is *prima facie* reasonable.

Islamic Ctr. v. Starkville, 876 F.2d 465, 469 (5th Cir. 1989) (citations omitted).

2. Based upon the relevant *Johnson* factors, petitioners should be awarded their requested fees

In *Johnson*, the Fifth Circuit outlined the factors for a court to consider in evaluating lodestar fee awards. *Johnson v. Georgia Highway*, 488 F.2d at 717-19. These factors are:

(1) the time and labor required;

(2) the novelty and difficulty of the issues;

(3) the skill required to perform the legal services properly;

(4) the preclusion of other employment;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the undesirability of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases. *Id.*

The relevance of each of the *Johnson* factors will vary in any particular case, and, rather than requiring a rigid application of each factor, the Fifth Circuit has left it to the lower courts' discretion to apply those factors in view of the circumstances of a particular case. *Brantley v. Surles*, 804 F.2d 321, 325-26 (5th Cir. 1986); *Catfish*, 939 F. Supp. at 502 ("not every [*Johnson*] factor need be necessarily considered").

Because the *Johnson* factors overlap with many of factors for assessing the reasonability of fees requested under the percentage-recovery approach,[61] certain of the considerations have been discussed in detail in previous sections of this petition and will only be highlighted within the *Johnson* framework. Certain of the factors are irrelevant due to the circumstances of this case.[62] Other of the *Johnson* factors deserve additional explanation and are, therefore, addressed more extensively below.

a. The time and labor required

Class Counsel were constrained to expend a great deal of time in this litigation not only due to its legal and factual complexities, but by other circumstances that were inherent in the

[61] For ease of reference, those factors include: the size of the fund created and the number of persons benefited; the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; the skill and efficiency of the attorneys involved; the risk of non-payment; the amount of time devoted to the case by plaintiff's counsel; and the awards in similar cases. MANUAL FOR COMPLEX LITIGATION, § 14.21 at 211-12.

[62] Class Counsel believe that the factors that are not germane to the *Tittle* litigation include: Time limitations imposed by the client or circumstances; the "undesirability" of the case; and the nature and length of professional relationship with the client. With that said however, Class Counsel note that they often worked long hours on short notice to provide services to the Class and that they brought claims that other parties failed to bring that resulted in significant recoveries. Class Counsel believe that those circumstances are otherwise included in the analysis.

sudden collapse of one of the world's largest corporations. Those complexities included the efforts required to contend with: Enron's bankruptcy; the large number of parties and counsel in the numerous ERISA and securities fraud actions consolidated before the Court; the interests and activities of interested non-parties; the novel and technical nature of many of the legal issues raised in the case; the number of investigations and congressional hearings and information disclosed in response to those investigations; spoliation allegations; the large amount of discovery produced by the litigants; the interest of a variety of government agencies in the case; insurance coverage claims; criminal proceedings involving certain of the actors; and press interest in the matter.[63]

Despite those complications, Class Counsel took the Court's charge to efficiently prosecute the action seriously. As a result, events that were not important for representatives of Co-Lead Counsel to handle or attend were typically assigned to local attorneys. Relevant bankruptcy matters were usually handled by one attorney. Discovery efforts were coordinated and assigned such that many depositions were attended by only one attorney. The depositions that were staffed by more than one attorney were either of witnesses that were important enough to the case to merit that concentrated effort or because they were the first in a line of similar witnesses. The "paper chase" aspect of discovery was handled by a core team of counsel so as to avoid unnecessary efforts to educate new attorneys in the systems used to analyze and organize written discovery. Briefing assignments were also controlled. In short, there was a concerted effort to avoid wasted or duplication such that the time invested in the case was, to Class Counsels' best efforts, consistent with the time that was required to get the job done.[64]

[63] Joint Declaration at , *e.g.*, ¶¶ 17-19, 24-25, 30-36, 38-56.

[64] Joint Declaration at, *e.g.*, ¶¶ 16, 19, 52-53, 56.

b. Novelty and difficulty of the questions presented; skill required to perform the legal services properly

An ERISA case is very difficult to handle because "ERISA law is, in general, extremely complex and unsettled...." *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1071 (M.D. Ala. 1988). *See also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) (noting "the complexity of ERISA").

As discussed above, substantial risks and uncertainties are present in ERISA cases as a whole, and the circumstances of this litigation, in particular, made it far from certain that any recovery for the Class would be obtained, let alone the amount recovered here. Indeed, rulings in this and other circuits make it clear that the risk of no recovery (and, hence, no fee) is very real.

The novelty of legal issues was replete in the Court's decision on the defendants' motions to dismiss. *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003), where it noted that:

> "The Fifth Circuit has not expressly addressed the structure of the statute [ERISA] and the verbal 'discretion' distinction between control over plan management and control over plan assets." *Id*. at 545 n.49 [raising a fundamental issue of who would be a fiduciary subject to the litigation];
>
> "The fiduciary's duty to disclose is an area of developing and controversial law." *Id*. at 555 [raising a fundamental issue about the nature of fiduciary obligations that arose in the fall of 2001 as Enron was imploding];
>
> "Courts are divided about if and under what circumstances the officers or employees of a corporation that is the named fiduciary in plan instruments may be personally liable for breach of their fiduciary duty." *Id*. at 567 [raising fundamental issues about the potential liability of many of the Enron officers named as defendants];
>
> "There is little case law regarding § 404 (c) plans." *Id*. at 575 [raising a fundamental issues about the extent of fiduciary duties owed to participants of the Enron Savings Plan]; and
>
> "While case law addressing the duties of a directed trustee is minimal, it is also in conflict with respect to the extent, if any, of

> the duty and potential liability of a directed trustee. The issue necessitates consideration of the relationship of several different provisions under ERISA . . . Difficulties in construing the scope of the directed trustee's fiduciary obligations pursuant to the statute are compounded by: (1) the lack of a statutory definition of 'proper' with respect to the named fiduciary's directions and (2) a lack of guidance about the nature and extent of a directed trustee's duty to determine whether the fiduciary's directions are 'in accordance with the terms of the plan' and 'not contrary to ERISA.'" *Id*. at 582, 583 [raising fundamental issues concerning Northern Trust's obligations in the context of the Enron Plans].

Although the Court denied significant aspects of the defendants' motions to dismiss, Class Counsel were aware that many of the defenses that had been and would be asserted by defendants had some possibility of success on summary judgment and would certainly be presented to the Court had this case proceeded to trial. As the Court is aware, the number of decisions in the field of ERISA company stock cases burgeoned as other district courts began to weigh in on the same sorts of issues, which raised the level of uncertainty and resulted in a host of notices of additional authorities filed with the Court. There is no question that, if not settled, this case would have continued to present the host of sharply contested, difficult and unsettled issues of both fact and law that the Court discussed in its 2003 opinion on the motions to dismiss.

One other point deserves mention. Much of the work of the lawyers was in response to quickly developing situations. In many cases these efforts never came to the attention of the Court, or did so much later and in different settings. For example, early in the case it was a matter of some importance to determine whether an independent fiduciary should be appointed to manage the Enron plans. Class Counsel addressed this issue quickly, investigated the substantive and procedural issues involved in such an unusual request, located and retained an individual willing to serve, and filed the appropriate papers. Eventually, the matter was mooted out in this District as a result of rapidly unfolding events in the bankruptcy, but Class Counsels' efforts, and the experience they gained from them, were invaluable in working with State Street after it was appointed to that role. As another example, early in the case the clients insisted that we attempt to move the bankruptcy to Houston so that they could more easily participate. We

did so, and presented the issue to Judge Gonzalez in January 2002 on, to put it mildly, a very expedited schedule. That effort was not successful, but we could hardly have done otherwise. The massive records of the case are replete with such episodes.

c. Skill required to perform the legal services properly

Apart from the Court's endorsement of the litigation team's skill in its appointment of Class Counsel, the proof of those skills is the results produced in this case. The same counsel who began the case stayed with it throughout. Further, the Court is aware of the complexity of the action and the issues. Effectively dealing with those issues required not only technical abilities, but organizational skills necessary to cope with the large volume of pleadings and evidence, and interpersonal skills that kept the lines of communication between the parties open. The settlements in this action speak highly of the skill of all of the counsel who have participated and are continuing to litigate this case, not just Class Counsel.

The skill of the many defense counsel on the other side of the case and settlement negotiations provides yet another means for the Court to assess Class Counsels' skills. *See In re King Recs. Co. Sec. Litig*., 420 F. Supp. 610, 634 (D. Colo. 1976) (skill of opposition relevant to assessing performance of counsel). Those defense attorneys include not only some of the most prominent attorneys in Texas, but principals from some of the best firms across the country specialized in defending ERISA actions and other complex class actions, including massive bankruptcies.

d. Preclusion of other employment

This factor tests whether Class Counsels' engagement in the *Tittle* litigation precluded their employment in other cases or were prevented from working on other cases due to their work in *Tittle*. *See In re Lease Oil Antitrust Litig.,* 186 F.R.D. at 445; *In re Combustion,* 968 F. Supp. at 1139. That factor is clearly satisfied. The *Tittle* litigation required a substantial commitment of resources. During much of the case, those commitments were exclusive to the action and precluded certain attorneys from working on any other matters. Indeed, some of the

key lawyers have worked on little else over the last five years – and hence have generated no income whatever for their firms.

e. Class Counsels' contingent fee arrangement

By undertaking this action on a contingency basis, Class Counsel assumed a substantial risk that the litigation would yield no recovery and leave them uncompensated. That risk alone supports the application of a positive multiplier to the lodestar. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("Perhaps the foremost of these factors [which justify a multiplier] is the attorney's 'risk of litigation,' *i.e.*, the fact that, despite the most vigorous and competent of efforts, success is never guaranteed."). *See also Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983); *York v. Ala. State Bd. of Educ.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986); *Prudential*, 1994 U.S. Dist. Lexis 6621, at *16 ("contingent fee risk is an important factor in determining the fee award"). For example, in awarding counsel's attorneys' fees in *Prudential*, the court noted the risks that plaintiff's counsel had taken in a case where there has been government intervention:

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Prudential, 1994 U.S. Dist. Lexis 6621, at *16.

Indeed, the risk of no recovery in complex cases of this type is very real and is heightened when Class Counsel press to achieve the very best result for those they represent. There are numerous class actions in which Class Counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise.[65] And as cited above

[65] *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997) (Seventh Circuit affirmed the lower Court's granting of summary judgment in favor of defendants); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW,

in this brief, there are a variety of ERISA actions that Class Counsel have personally handled that have been dismissed on the pleadings or summary judgment and that are now on appeal.[66]

The Court need look no further than this case to find an example of the tangible risks Class Counsel faced resulting from the dismissal of claims against a significant number of the defendants who were collectively in the best position to shoulder financial responsibility for the Classes' losses, the risk of no compensation for the Class was realized.

Other aspects of this litigation also focus the risks Class Counsel faced. For instance, shortly after the AWSC Settlement, the Court dismissed many of the very claims that had resulted in the settlement. As the Fifth Circuit noted when affirming the AWSC Settlement:

> Although at the fairness hearing lead counsel for the *Newby* class was hesitant to state explicitly his belief in the weakness of the claims against the Settling Defendants, counsel for the *Tittle* plaintiffs was more candid: 'Without the settlement agreement, which was reached prior to the Court's ruling on the motions to dismiss, and after very serious and often contentious arm's length negotiations, the *Tittle* plaintiffs could very well have had no recovery at all against AWSC.'

Newby v. Enron Corp., 394 F.3d at 302. In the absence of any recovery for the *Tittle* plaintiffs, of course, the risk of their contingent fee would have been realized as well.

The size and nature of the Enron Settlement also makes the risk of the Enron ERISA litigation even more poignant due to a fundamental issue arising from Enron's bankruptcy. That settlement was the largest recovery for the Class among the five settlements under consideration in this petition. By itself, it accounts for almost half of what the Settlement Classes will receive.

1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (class won jury verdict against two individual defendants, but district court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (where the class won a substantial jury verdict and a motion for judgment n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed, after 11 years of litigation); *see also State of West Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) (referencing two cases which went to trial: in one case plaintiffs recovered nothing and in the other they recovered less than the amount which had been offered in settlement), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970) (judgment for $145 million overturned after years of litigation and appeals), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973).

[66] *See*, section III.D.4, *supra*.

Yet, the claim was subject to subordination under § 510(b) of the Bankruptcy Code, 11 U.S.C. § 510(b), which would have effectively made the ERISA claims against Enron worthless. Capitalizing on the opportunity to negotiate a settlement by using the litigation risk to the Classes' advantage, the settlement was consummated before any ruling in the bankruptcy proceedings. Recently, however, Judge Gonzalez held that certain claims related to employees' stock options that were not included in the Classes' settled claims were subordinated on grounds that could have very well militated in favor of subordination of the ERISA claims against Enron had they not been settled. *In re Enron Corp.*, 2006 WL 1148504 (Bankr. S.D.N.Y. May 2, 2006). In effect, the Enron Settlement is a good example of wresting victory from the jaws of defeat and demonstrates not only the skill and prudence of Class Counsel, but the size of the risk they faced in this case.

Thus, there would have been other risks to the plaintiffs in continuing to litigate this case against the Settling Defendants. Establishing defendants' liability could have been difficult and either significantly reduced or completely eliminated the recoveries. Or plaintiffs might have proven liability, but at a significant cost to the overall settlement or judgment given the nature of the insurance coverage that was the sole financial asset that existed for the majority of the defendants. In this case, there is no question that the Settling Defendants would have continued to doggedly defended their actions with respect to Enron's ERISA Plans and not hesitated to litigate this matter fully through trial and, most certainly, a lengthy appeal process, if necessary, absent the settlements.

f. The experience, reputations and ability of the attorneys

As noted above, Class Counsels' efforts to bring this case to a successful conclusion, particularly in the instances of two of the settlements that were skillfully engineered to avoid the very risks of extinction that eventuated, speak directly to the experience and ability of the attorneys involved. Class Counsel were pragmatic, efficient, and realistic in achieving the significant recoveries for the Settlement Classes.

The experience of the law firms who participated in the prosecution of this case is set forth above, in the Joint Declaration, and in various pertinent submissions, including firm resumes, that are already on file with the Court.[67]

g. The amount involved and results achieved

This factor is entitled to added weight when, as in this case, the efforts of Class Counsel were instrumental in realizing a recovery on behalf of the class. *See In re Terra-Drill P'ship Sec. Litig.*, 733 F. Supp. 1127, 1129 (S.D. Tex. 1990) ("[t]he factors enumerated by *Johnson*, . . . emphasize 'the results obtained'"). Here, Class Counsel have achieved a substantial benefits consisting of all-cash Settlement Funds of $264.37 million, plus interest. Unlike in many other class actions, this amount will benefit class members, who are required to remain in the class but will not be required to file claims to take part in the settlement.

h. Awards in similar cases and the customary fee

The requested fee here represents a multiplier of 2.297 of the lodestar amount. That premium is reasonable given, among other things, the emerging, highly risky area of law, the contingent nature of the case, the results obtained and Class Counsels' experience in complex ERISA class actions such as the present litigation. There are solid precedents for awards of multipliers in the range of 3 - 10 in analogous cases. *See, e.g., Prudential*, 1994 U.S. Dist. Lexis 6621, at *19 n.3 ("The jurisprudence reflects that the average multiplier is 3."); *Rabin v. Concord Assets Group, Inc.*, No. 89 Civ. 6130(LBS), 1991 U.S. Dist. Lexis 18273, at *4 (S.D.N.Y. Dec. 19, 1991) ("'In recent years multipliers of between 3 and 4.5 have been common.'") (citation omitted). The modest multiplier requested here is certainly justified as illustrated by the *Rite Aid* decision. There, in connection with the ERISA settlement, the court noted that a 25% percentage fee with a multiplier of 4.5, the amount awarded in the securities case, was perfectly reasonable. *Rite Aid*, 2003 U.S. Dist. Lexis 3646, at *16.

[67] *E.g.*, Exhibits A – P to Plaintiffs' Motion and Memorandum for Reimbursement of Expenses dated June 3, 2005 (Dkt. No. 973).

Courts in non-ERISA cases have also approved multipliers well in excess of the multiplier here on many occasions. *E.g.*, *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee that resulted in a multiplier of 9.3 times hourly rate); *Cosgrove v. Sullivan*, 759 F. Supp. 166 (S.D.N.Y. 1991) (multiplier of 8.84); *In re Buspirone Antitrust Litig.*, No. 01-cv-7951, 2003 U.S. Dist. Lexis 26538 (S.D.N.Y. April 17, 2003) (8.46 multiplier); *Newman v. Carabiner Int'l, Inc*., No. 99-2271 (S.D.N.Y. Oct. 19, 2001) (7.7 multiplier); *In re RJR Nabisco, Inc. Sec. Litig*., MDL No. 818 (MBM), 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992) (6.0 multiplier); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir. 1985) (multiplier of 6); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (5.5 multiplier). Thus, a multiplier here of 4.37 is amply justified by the excellent result obtained and the services performed in the face of great risk.

Finally, as further attested to in the Joint Declaration, the fees charged are customary not only from the standpoint of falling within those customarily awarded, but because they are based on the firm's billing rates that are customary in the class action bar and in their locales.

F. Class Counsels' Expenses Should Also Be Reimbursed

Throughout this litigation, Class Counsel continued to expend vast amounts of their own money. The Court previously awarded a partial reimbursement of Class Counsels' expenses in July 2005.[68] That reimbursement was for Class Counsels' expenses incurred through January 31, 2005. The Court has also approved other reimbursements from the AWSC Expense Fund to pay for settlement notice and administration expenses, as well as the costs of the deposition program pursuant to the cost sharing agreement under the Deposition Protocol Order.[69]

[68] Order Granting *Tittle* Plaintiffs' Motion for Reimbursement of Expenses dated July 28, 2005 (Dkt. No. 1035).

[69] Order Granting Plaintiffs' Motion for Permission to Use *Tittle* Expense Fund to Pay for Notice and Administration Costs and Expenses Incurred Pursuant to the Deposition Protocol Order dated July 12, 2004 (Dkt. No. 783); Order Granting Plaintiffs' Motion for Permission to Use *Tittle* Expense Fund to Pay for Class Notice and Administration Costs dated October 12, 2005 (Dkt. No. 1104); Order Granting Plaintiffs' Motion for Permission to Use *Tittle* Expense Fund to Pay for Class Notice and Administrative Costs Associated with Arthur Andersen LLP and David B. Duncan Settlement dated March 3, 2006 (Dkt. No. 1165).

Class Counsel have incurred and paid $874,902.74 in expenses that have not been previously reimbursed. Those unreimbursed expenses are in exactly the same categories of the Court previously approved and reflect the Court's previous restrictions on expenses related to airfare and accommodations. They are evidenced in Class Counsels' record-keeping systems in the required manner. They were reasonable and necessary for the prosecution of this litigation.[70]

Class Counsels' motion with respect to the Court's prior approval of their litigation expenses continues to provide ample authority for reimbursing the additional expenses now requested. To the extent additional authorities are necessary, it is incorporated by reference herein.[71] Suffice it to say, however, that it is well-settled that "an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund. Courts have routinely awarded expenses for which counsel would normally directly bill their clients." *In re Vitamins*, 2001 U.S. Dist. Lexis 25067, at *69 (citations omitted); *Mitland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.").

G. The Class Representatives Should Also Be Given an Incentive Award

Request is also made for a payment out of the ERISA settlement funds of a compensatory award to the sixteen Class Representatives and the Named Plaintiff, Dan Shultz, in the amount of $7,000 each.[72] If approved, together with the $3,000 the Court previously awarded in

[70] Those expenses are discussed in the Joint Declaration at ¶¶ 101-113 and are summarized at ¶ 115.

[71] *Tittle* Plaintiffs' Motion and Memorandum for Reimbursement of Expenses dated June 3, 2005 (Dkt. No. 973).

[72] The seventeen individuals for whom the additional awards are requested for include: Pamela M. Tittle, Thomas O. Padgett, Gary S. Dreadin, Janice Farmer, John L. Moore, Betty J. Clark, Patrick Campbell, Fanette Perry, Charles Prestwood, Roy Rinard, Steve Lacey, Catherine Stevens, Roger W. Boyce, Wayne M. Stevens, Norman L. Young, Michael L. McCown, and Dan Shultz. The Court recently certified sixteen of them as Class Representatives. Opinion and Order Certifying the *Tittle* Classes dated June 7, 2006 (Dkt. No. 1191). As explained in the Joint Declaration at ¶ 5, n. 2 & ¶ 116, Mr. Shultz was a Named Plaintiff in the Second Consolidated and Amended Complaint on claims other than those certified but actively participated in the case along with the Class Representatives.

connection with the $85 million settlement,[73] those persons would each receive a total of $10,000 in incentive payments in this litigation. The Notice to the Class advised that Class Counsel would be applying for such additional incentive awards for each of them. To date, no objections relative to those awards have been received. The payments are clearly merited in the amount requested here.

The Class Representatives and Mr. Shultz have been heavily involved in this case since its inception. They were all deposed as part of the class certification discovery, which required many of them to travel to and from Houston for full day depositions. They have all been involved in monitoring the litigation and in communicating with Class Counsel about the major events in the case. For instance, they followed the negotiations of each of the five settlements as they occurred and spoke with counsel multiple times about each of them. They brought different backgrounds and skills to bear in asking questions about the litigation. Several of them have testified before Congress. Others have been interviewed by the media many times. One of the Class Representatives has been interviewed over 100 times in connection with the litigation. Many of them acted as conduits for groups of Enron employees who communicated with them about the case. It would be hard to assemble a more devoted group of employees to oversee the litigation.[74]

Incentive awards to the named plaintiffs "are not uncommon in class action litigation . . . particularly where . . . a common fund has been created for the benefit of the entire class." *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 369, 400 (D.D.C. 2002) (internal quotation marks and alterations omitted); *see also Collins v. Pension Benefit Guar. Corp*., Nos. CA 88-3406-AER,1996 WL 335346, at *6 (D.D.C. June 7, 1996). "[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Lorazepam*, 205 F.R.D. at

[73] Amended Order of Final Judgment and Dismissal dated June 10, 2005 at ¶ 11 (Dkt. No. 987).

[74] Joint Declaration at ¶¶ 116-121.

400 (quotation omitted). "Numerous courts, recognizing that serving as a class representative involves a substantial time commitment to the litigation, have permitted such awards." *In re Revco Sec. Litig*., Nos. 851, 89-593, 1992 U.S. Dist. Lexis 7852, at *21 (N.D. Ohio May 6, 1992); *see also In re Dun & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 373 (S.D. Ohio 1990). In light of the responsibilities of serving in a representative capacity, and the existence of certain disincentives to taking on such an obligation, "[t]he propriety of allowing modest compensation to class representatives seems obvious." *Bogosian v. Gulf Oil Corp*., 621 F. Supp. 27, 32 (E.D. Pa. 1985).

The amount of the incentive award requested for each of these individuals, even with the previous award, is consistent with other cases in the Fifth Circuit. *See, e.g.*, *In re Catfish Antitrust Litig*., 939 F. Supp. at 504 (approving incentive award of $10,000 to the four named plaintiffs); *Shaw*, 91 F. Supp. 2d at 973 (approving incentive awards of $25,000). In fact, Courts have awarded incentive payments to class representatives that substantially exceed the modest amount requested here. *See, e.g.*, *Revco*, 1992 U.S. Dist. Lexis 7852, at *21 (awarding $200,000 to the named plaintiff); *Roberts v. Texaco, Inc*., 979 F. Supp. at 203-04 (awarding $85,000 to a named plaintiff); *Dun & Bradstreet*, 130 F.R.D. at 374 (awarding $55,000 each to two named plaintiffs); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (awarding $50,000 to the class representative); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (awarding each class representative $50,000); *Van Vraken v. Atlantic Richfield Co*., 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (awarding $50,000 to the named plaintiff).

In sum, the requested incentive awards for each the Class Representatives and Mr. Shultz is appropriate and reasonable.

IV. CONCLUSION

Class Counsel undertook a case that, at its outset, was one that would clearly demand large resources, involving defendants who were certain to spare no expense or effort to defend

the action, and whose risks were such that there was no guarantee of success. Despite those burdens and risks over the past five years, they have applied themselves and succeeded in garnering over $264 million for the Settlement Classes. For the reasons set forth above, Class Counsel respectfully and jointly request that the Court approve the fee and expense petition and enter an order awarding Class Counsel 20% of the Settlement Funds for attorneys' fees such that those awards are released as each settlement becomes certain and final, together with interest on those funds, reimbursement of $874,902.74 in expenses, and a $7,000 incentive award to each of the Named Plaintiffs for their participation in the prosecution of this action.

A proposed order accompanies this memorandum.

Dated: June 9, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of June, 2006, he served a true and correct copy of the foregoing document on all counsel via the http://www.esl3624.com web site, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

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