

I. Introduction

1. I submit this Declaration in support of the motion of Coughlin Stoia Geller Rudman & Robbins LLP (“Lead Counsel”) for an award of attorneys’ fees and reimbursement of expenses. At the outset, I should acknowledge that my writings over more than twenty-five years have frequently been critical of the performance of plaintiff’s attorneys in class actions, and particularly in securities class actions. In particular, I have suggested that securities class actions often fail to produce a net benefit for the shareholder class because of the essential circularity of the securities class action, with the investor class typically bearing the cost of the corporation’s liability, while those most responsible for the fraud escape serious liability. See John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006). But even a critic must recognize that this case is a complete and exemplary exception to such a generalization. Its costs and the recovery do not fall on Enron (or on its shareholders indirectly); rather, the recovery has been largely funded by the financial institutions that enabled Enron to inflate its financial statements. To a relatively unique degree in securities litigation, the recovery has been placed on those who are culpable, and the level of the recovery in this case is record-setting and unprecedented.

2. Put simply, this is a litigation that can only be described in superlatives. To begin with, it represents the largest recovery ever in any class action—not just securities class actions, but all class actions. Even more impressively, this record recovery was achieved in the face of exceptional hurdles, both because of (a) the bankruptcy of the corporate issuer (i.e., Enron), and (b) the inability of the proposed class

to achieve certification. Normally, in Rule 10b-5 litigation, the class obtains the bulk of its recovery from the corporate issuer, with most of the balance, if any, coming from the accounting firm that audited the issuer's financial statements. But here, from the outset, Enron was bankrupt and Arthur Andersen was on the brink of insolvency and clearly could not fund more than a small portion of the recovery. Moreover, with a critical issue unresolved—i.e., class certification—it was not surprising that some of the largest defendants with the greatest potential liability declined to settle and held out. That an all-time record was achieved on these facts strongly suggests that Lead Counsel performed with an extraordinary level of skill and negotiating prowess.

3. Although the Enron litigation received great media and public attention, this did not make it an easy case to resolve or settle—indeed, it was just the reverse. Because of its notoriety, Enron could not have been settled as a practical matter for a modest amount, even if such a recovery accurately reflected the high odds facing plaintiffs' counsel in their litigation against basically secondary participants. Thus, this was a legally challenged case from the outset, principally because of the absence of an issuer or other presumptively liable defendant with deep pockets. Although major financial institutions were sued, they had (for the most part) not made any “attributed statements,” and so they could plausibly assert that they had at most aided and abetted the fraud (which conduct cannot result in liability in private litigation under Rule 10b-5). See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). In response, Lead Counsel creatively fashioned a new legal theory—“scheme to defraud” liability—using subparagraph (a) of Rule 10b-5. Armed only with this ingenious, but untested, theory, Lead Counsel was able over time and persistent

negotiation to convince three defendants, who had initially assumed that they were immune from liability under Central Bank, to contribute over \$6.6 billion of this \$7.23 billion settlement. Viewed from an objective distance, this was an extraordinary negotiating success, achieved without any contemporaneous appellate federal court decision endorsing Lead Counsel's "scheme to defraud" theory. Even today, "scheme to defraud" liability is a legal theory that has been rejected by more appellate courts than have accepted it, and its fate currently hangs in the balance before the Supreme Court. See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 443 F.3d 987 (8th Cir. 2006), cert. granted, 127 S. Ct. 1873 (2007). Although the Fifth Circuit rejected the "scheme to defraud" theory (wrongly and prematurely in my personal judgment), this only underscores Lead Counsel's success at negotiation. Lead Counsel was able to induce some of the largest, most sophisticated financial institutions in the world to settle for record amounts, based on a novel theory that other plaintiff's counsel might have overlooked or been unable to articulate convincingly. To be sure, some large institutions held out and did not settle—but that only underlines that the risk was real. Unlike other recent "mega fund" cases—most notably WorldCom—Lead Counsel lacked the overwhelming legal leverage in this case that compelled the defendants in WorldCom to settle.

4. Viewed as a negotiation, this was arguably the highest stakes legal poker game ever played. Three sophisticated financial institutions were convinced to settle for an amount in excess of \$2 billion each, based largely on a legal theory that the Fifth Circuit ultimately rejected. See Regents of the Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372 (5th Cir. 2007). Few, if any, other plaintiff's counsel in my judgment could

have pulled off such a tour de force, and some might have been willing to settle for a small fraction of the recovery here obtained. That Lead Counsel succeeded is attributable in almost equal measure to its credibility, creativity and the intensity of its commitment to this case. In my judgment, Lead Counsel is the adversary most feared today by the defense bar in securities litigation, and that reputation played an important role here.

5. In particular, Lead Counsel demonstrated its commitment by essentially risking its own time and money on a novel legal theory, with little precedent to support it, in a case that initially seemed both financially unpromising and difficult to settle. Indeed, this record \$7,227,000,000 settlement would simply not have happened but for Lead Counsel's willingness to accept high risk. Few other plaintiff's law firms could have afforded the costs of litigating and funding this action, which in total has consumed approximately 280,000 hours of time expended by the plaintiffs' attorneys and resulted in an aggregate lodestar of over \$127.5 million. In addition, Lead Counsel advanced over \$45 million in expenses. In all likelihood, this represents the largest investment ever made in a single securities class action. More importantly, this investment of time and money was not made by a broad consortium of plaintiffs' firms, all sharing the risk. Rather, of the total lodestar, which I understand to be in excess of \$127.5 million, the Coughlin Stoia firm (and its predecessors) accounted for over \$112 million of this amount (or nearly 90%). This was an extraordinary investment for one firm to make, but it also permitted this action to be run more efficiently without the duplication and delay that a broad consortium of firms usually entails. As this Court well understands, these expenditures were made by Lead Counsel entirely at its own risk, without any promise or hope of reimbursement unless it were successful in high stakes and high risk litigation.

Without these expenditures and Lead Counsel's commitment to this case, even the most creative legal theory would not have faced defendants with a sufficient prospect of high liability to have induced sophisticated defendants to make serious settlement offers before the issue of class certification had been resolved. My point is that, even if other counsel could have developed the same original legal theory (and this is uncertain), only a law firm with Lead Counsel's reputation for zealous advocacy could have convinced the defendants that this case would be carried to trial (at whatever cost it took) and represented too great a risk at trial for them not to settle. In addition, Lead Counsel was litigating literally against the cream of the American corporate law bar. Virtually every major securities law firm was representing at least one defendant in this case, and defendants had retained many of the leading authorities as their expert witnesses. As a result, the burden of this litigation (at least from the plaintiff's perspective) was also exceptional. As detailed in the Declaration of Helen Hodges, the various defendants constantly made motions that could have been dispositive, and all had to be resisted by a relatively small and vastly outnumbered team of plaintiff's counsel. To sum up, in my judgment, few other counsel (and perhaps no other) could have obtained this degree of success.

6. Much attention has recently focused on abuses in class actions. Precisely for this reason, it is important to note that this case illustrates the best practices in class actions. Indeed, this action has been a model of transparency. Lead Counsel here negotiated a fee agreement at the outset in a careful, deliberative manner with The Regents of the University of California ("The Regents"), as Lead Plaintiff. Such a practice maximized accountability. Although such fee agreements are today not

uncommon, they rarely involve parties as sophisticated as those in this case or a fee formula as carefully thought out as the increasing percentage of the recovery formula adopted in this case. Here, it is clear that The Regents sought to craft a fee formula that would incentivize their counsel to assume the enormous risks in this case over a potentially indefinite period. The outcome—a record settlement—is convincing evidence that The Regents succeeded. The Regents continue to be satisfied with the deal they struck (as well they should be), even though, as a politically accountable body, they would be subject to intense public criticism if it appeared that they had authorized a windfall. Given the reliance placed by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) on lead plaintiffs, I believe The Regents’ judgment should be entitled to considerable weight and some deference. Moreover, as discussed later, The Regents chose a logical and sensible formula that encouraged Lead Counsel to make the extraordinary commitment to this case that produced a record settlement. For all these reasons, I would urge this Court to give presumptive weight to The Regents’ judgment (although I do recognize that it is this Court’s responsibility to determine that any fee award approved by it falls within a range of reasonableness). Most importantly, I further urge this Court to recognize that this case shows what is right about contemporary class action practice, not what is wrong. Everything about its conduct was transparent, open, and accountable.

7. Ultimately, the role of an expert witness in a class action fee determination is modest. The ultimate decision, of course, belongs to the Court. But expert testimony can inform the court by pointing out relevant comparisons and empirical data. In this Declaration, I will principally focus on three critical areas: (1) the degree of success

obtained; (2) the level of risk assumed; and (3) the logic and sensible public policy underlying the fee agreement struck between the Regents and Lead Counsel. Initially, Part II of this Declaration will discuss my background and relevant experience. Part III assembles the data on the fee recoveries in other “mega-fund” cases and compares them to the size of the settlement in this case. Part IV examines the risks in this case and compares the level of success obtained to that in other securities class actions. Next, Part V sets forth a “lodestar cross-check.” Part VI examines the fee agreement with the Regents in more detail. Part VII then considers public policy considerations, and Part VIII contains a summary and recommendations.

II. Background and Qualifications

8. I am the Adolf A. Berle Professor of Law at Columbia University Law School, where I have taught since 1980, and am a member of the Bars of the State of New York and the District of Columbia. I am also a Fellow of the American Academy of Arts and Sciences, a Life Fellow of the American Bar Foundation, and a member of, and former Reporter for, the American Law Institute. I have also been a Visiting Professor of Law at Harvard Law School, Stanford Law School, the University of Virginia Law School, and the University of Michigan Law School. I began my academic career teaching at Georgetown University Law School from 1976 to 1980. Prior to that, I practiced law with the firm of Cravath, Swaine & Moore in New York City from 1970 to 1976. I am a 1969 graduate of Yale Law School.

9. As a law professor, one of my principal academic interests has been class action litigation (with a special focus on the management of the large class action and the incentive structure that the law creates to reward the successful plaintiff’s attorney).

Although my academic interest in class actions does not make me more able than any other competent attorney to cite relevant precedent to this Court, my research has placed me in a position to call to this Court's attention recent empirical evidence concerning class action litigation and attorney fee awards. This data has relevance because it supplies a frame of reference enabling this Court to compare the requested fee against relevant benchmarks and an appropriate sample of related cases. Thus, rather than duplicating class counsel's legal memorandum, I will focus instead on recent empirical studies regarding the typical recovery and fee award in class litigation.

10. I have on a number of occasions testified before Congressional committees with regard to the federal securities laws and class actions, have appeared as a witness before the Advisory Committee on the Civil Rules of the United States Judicial Conference, and regularly appear as a panelist at symposia and institutes on the topics of securities law and class actions, including serving for the past ten years as the principal academic lecturer at the annual ABA National Institute on Class Actions. During 1995, I served as an adviser to the White House's Office of General Counsel with regard to the Private Securities Litigation Reform Act of 1995 (which chiefly seeks to regulate securities class actions), and more recently I advised the staff of the Senate Finance Committee with respect to the drafting of the Sarbanes-Oxley Act in 2002.

11. In addition, I have authored the following articles on class actions (which I cite in part to indicate that I am not contradicting prior positions or inventing a novel argument that I would not endorse apart from the facts of this case): John C. Coffee Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006); John C. Coffee Jr., Rescuing the Private Attorney

General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983); John C. Coffee Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Probs. 5 (Summer 1985); John C. Coffee Jr., 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); John C. Coffee Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987), John C. Coffee Jr., and Donald E. Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposed Legislative Reform, 81 Colum. L. Rev. 261 (1981); John C. Coffee Jr., Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L. Rev. 625 (1987); John C. Coffee Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995), John C. Coffee Jr., The Future of the Private Securities Litigation Reform Act: or Why the Fat Lady Has Not Yet Sung, 51 Bus. Law. 975 (1996); John C. Coffee Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370 (2000). Some of these articles have been cited and relied upon by other federal courts, including the U.S. Supreme Court and the Fifth Circuit, in well-known decisions dealing with class actions and attorney fee awards. See, e.g., Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2317 n.28 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997); In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998); In Re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801, 821 (3d Cir. 1995); Georgine v. Amchem Prods., 83 F.3d 610, 618, 636 (3d Cir. 1995).

