

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ **(Consolidated)**

§
§ CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD COUNSEL'S RESPONSE TO THE DABROWSKI/SCHONBRUN
SUPPLEMENTAL AMENDED OBJECTION TO MOTION FOR ATTORNEY FEES
AND REIMBURSEMENT (DOCKET NO. 5891)**

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I. INTRODUCTION

Attorney Lawrence Schonbrun, teaming up with class member Brian Dabrowski, has submitted to the Court a Supplemental Amended Objection (Docket No. 5891) (“Supplemental Objection”) to the attorney fees and reimbursement request.

Although Lead Counsel will address this out-of-time submission at the February 29, 2008 Fairness Hearing whatever questions the Court may have regarding Schonbrun’s latest salvo, we file this short response now in order to point out several problems with the submission: (1) much of the Supplemental Objection merely rehashes arguments that Schonbrun has already raised, or merely adds additional quotes from cases already cited in his initial objection; and (2) whatever truly “supplemental” points Schonbrun raises, they – like his original arguments – wither under reasoned scrutiny.

II. ARGUMENT

A. Schonbrun’s “Supplemental” Objection Primarily Rehashes Points Already Raised in His Original Objection – and that Lead Counsel’s Reply Already Rebuts

Schonbrun’s so-called “supplemental” objections – which he distinguishes from his original objections by using **bold** font – mostly rehash points already made in his initial submission.

Because Lead Plaintiff deals with many of them in its reply brief filed February 22, 2008 (Docket No. 5907), it will not take up space (or the Court’s time) re-arguing them here. Lead Plaintiff will list them, however, in order to highlight that they are nothing more than recycled objections from Schonbrun’s original filing:

- the Court itself is a fiduciary of the Class (Supplemental Objection at 1);
- Class needs a “guardian” to preserve its recovery from fee and expense reimbursement (*id.* at 3);
- Court needs deeper inquiry into Lead Counsel’s experts’ qualifications and the “veracity” of their opinions (*id.* at 6);

- Lead Counsel’s fee award results in a high hourly rate (*id.* at 8 n.5, 20, 27, 54);
- the Court should use a “*Laffey* matrix” (*id.* at 21);
- the fee award is higher than in other large securities class actions (*id.* at 26);¹
- the Court’s review of fee awards is critically important (*id.* at 35, 44-45);
- the Court needs to inquire into Lead Plaintiff’s negotiation of the contingent fee (*id.* at 39-40);²
- Lead Counsel’s lodestar needs to be scrutinized, the multiplier is too high, and Lead Counsel actually faced little risk (*id.* at 45-51);
- the fee award should be considered in light of the class’s billions of dollars of damages (*id.* at 49-50);
- Lead Counsel deserves no compensation for time that did not produce a common fund, or for pursuing novel legal theories (*id.* at 51, 57); and
- feared lodestar abuses do not justify using the percentage method (*id.* at 58).

In addition to these repeat objections, Schonbrun uses the Supplemental Objection to pull additional quotations from cases cited in his initial objection. *See, e.g.*, Supplemental Objection at 59 (in the Conclusion, substituting in a different quote from *Johnson v. Georgia Hwy. Express, Inc.* 488 F.2d 714 (5th Cir. 1974)); *see also* Supplemental Objection at 1 (adding yet another quote from a case (*Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277 (7th Cir. 2002)) that already appeared three times in initial objection). Schonbrun offers no explanation for why he overlooked the quotes the first time around.

¹ Schonbrun unfairly cherry-picks just 7 of the 18 large settlements Lead Counsel’s chart compiles – and thus conspicuously avoids mentioning the \$3.2 billion *Tyco* settlement with its 14.5% fee award totaling over \$172 million. He also ignores other “mega” settlements listed, like *Lucent* (17%), *Bankamerica* (17.83%), *Adelphia* (21.40%), *Global Crossing* (16.04%), *Freddie Mac* (20%), *Cardinal Health* (18%) and *Qwest* (15%). He also ignores that the *average* fee award percentage is higher than the 9.52% sought here.

² As explained *infra*, in connection with this rehashed argument Schonbrun engages in scurrilous, unfounded innuendo.

B. The Remaining “Supplemental” Points Schonbrun Raises Are as Bereft of Substance as His Original Objections

1. The Scheduled Fairness Hearing Provides Ample Opportunity for Schonbrun and His Fellow Objectors to Be Heard

Schonbrun has scared up a Texas Supreme Court case dealing with a class action settlement and fee award in which the appellate court noted that a “plenary hearing” and an opportunity for “vigorous cross examination” by the objectors’ counsel “should be the general rule.” Supplemental Objection at 6 (citing *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 958 (Tex. 1996)).

Schonbrun omits several facts, however, that make the Texas case inapposite here.

First, the Texas appellate court was understandably concerned at the “insufficient” class notice the trial court had approved, for the notice *failed to mention* either the amount of the award, or the method of its calculation. *Id.* at 957-58. “Without this vital information, class members cannot make informed decisions about their right to challenge the fee award at the hearing, including the allocation of the settlement proceeds between the class and its attorneys.” *Id.* at 958. That omission is utterly alien to the situation here, where the informative Class Notice disseminated contained detailed information concerning the fees and expense reimbursement sought.

Moreover, the Texas trial court had approved the sprawling settlement there despite having made “no determination regarding numerosity, commonality, typicality, and adequacy of representation, and the answers to the questions raised by these requirements are not obvious.” *Id.* at 958. This Court has already made these determinations.

Finally, and perhaps most importantly, the need for a “plenary” hearing under the circumstances there was a *requirement under Texas jurisprudence*. *Id.*; see also *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992). There is no such requirement in federal district court before a settlement and/or fee award can be approved. The Class Notice here, complemented by this

Court’s preliminary hearing, extensive briefing, a final approval hearing, and ample opportunity for all parties and their counsel to make their objections known, more than protects the Class’s interests.

2. The PSLRA *Does* State a Preference for the Percentage Method Over the Lodestar Approach

Schonbrun argues that Lead Counsel “incorrectly assert” that the percentage method is “the more appropriate” one under the Private Securities Litigation Reform Act (“PSLRA”), and that the PSLRA’s Committee Report supposedly states the “opposite” view. Supplemental Objection at 32. He implies, then, that the PSLRA actually prefers that the lodestar method be utilized.

Schonbrun’s argument is wrong on at least three levels.

First, the PSLRA *does* express a preference for the percentage method – and says so clearly: “Total attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable *percentage* of the amount of any damages and prejudgment interest actually paid to the class.” *See* 15 U.S.C. §78u-4(a)(6).³ Because this statutory text is clear on its face, it must be faithfully interpreted. *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007).

Moreover, the Committee Report language that Schonbrun relies on was simply stating that it was not *forbidding* use of a lodestar in certain circumstances – which is not the same as giving the lodestar method the affirmative imprimatur that Schonbrun does.

Finally, the PSLRA’s legislative history confirms that Schonbrun is wrong. In January 1995, when the PSLRA was introduced as S.240, a Congressional section-by-section analysis explained that the fee provision was crafted so that class counsel would receive “a reasonable percentage of the amount recovered by the class plus reasonable expenses.” 141 Cong. Rec. S1075, S1085 (daily ed. Jan. 18, 1995). Congress was concerned that under the prevailing lodestar method of fee calculation,

³ Citations and footnotes are omitted and emphasis is added unless otherwise noted.

plaintiffs' counsel were getting paid too much in comparison to the total amount of the settlement awarded to the class. The Senate Report noted that as "a result of [the lodestar] methodology, attorneys fees have exceeded 50% or more of the settlement awarded to the class." S. Rep. No. 104-98, at 12 (1995).

So Congress limited attorneys' fees and expenses to "a reasonable percentage of the amount of recovery awarded to the class." *Id.* Congress was careful to point out that it was not "fixing the percentage of fees and costs counsel may receive" – rather, it was allowing courts the "flexibility in determining what is reasonable on a case-by-case basis." H. R. Conf. Rep. No. 104-369, at 36 (1995).

Comments by the PSLRA's drafters indicate that Congress was motivated by grave concerns over the lodestar methodology. During the Senate debate, Senator Domenici inserted a "summary" in the Congressional Record explaining that the PSLRA's fees section "[l]imits attorneys' fees to [a] reasonable amount *instead of confusing calculations.*" 141 Cong. Rec. S17965, S17968 (daily ed. Dec. 5, 1995). And during the PSLRA veto-override debate, the Act's supporters repeated that the attorney fees provision "[l]imits the use of the lodestar method of calculating attorneys' fees." 141 Cong. Rec. S19146, S19152 (daily ed. Dec. 22, 1995). They pointed out that the "lodestar" method was inefficient:

From the judiciary's point of view, *lodestar adds inefficiency* to the process. . . .

This Conference Report limits attorney's fees in a class action to an easy to understand percentage of the amount actually recovered as a result of the attorney's efforts – rather than allowing attorneys to recover their fees without regard to how well the class does. This gives lawyers an incentive to get higher recoveries for investors, not just bill more hours.

Id. The PSLRA's proponents' views are strong evidence of Congress's intent in crafting its attorney fees provision. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

The foregoing demonstrates that Schonbrun is dead wrong to insist that Congress intended attorney fees to be calculated by the lodestar method.

3. A Lodestar Calculation is *Not* the Most Useful Starting Point to Decide the Fee Award in This Matter

Relying upon a 22-year-old district court case from the Northern District of California, Schonbrun insists that Supreme Court “fee jurisprudence supports the lodestar approach.” Supplemental Objection at 33 (citing *Rothfarb v. Hambrecht*, 649 F. Supp. 183 (N.D. Cal. 1986)). Schonbrun points out that *Rothfarb* – which involved a common fund – looked to Supreme Court fee jurisprudence to hold that a lodestar calculation is “[t]he most useful starting point for determining the amount of a reasonable fee.” Supplemental Objection at 34 (quoting *Rothfarb*, 649 F. Supp. at 185 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982))).

Schonbrun’s reliance on *Rothfarb* is misplaced, ignoring the case’s nuances as well as Ninth Circuit precedent.

First, although a common-fund case, *Rothfarb* did not involve a percentage-of-the-fund fee calculation. True, the district court there had been asked by the fee-award applicants to apply a percentage-of-the-recovery method, **but it declined**. *Rothfarb*, 649 F. Supp. at 185 n.1. Thus it was not surprising that in applying a lodestar calculation, the court looked first to the “number of hours reasonably expended on the litigation.” *Id.* at 185.

Second, *Rothfarb*’s recitation of *Hensley*’s “most useful starting point” language fails to explain that *Hensley* dealt not with a common fund, but rather the proper fee award in a civil rights action brought under 42 U. S. C. §1988 – *i.e.*, a **fee-shifting** context. *See Hensley*, 461 U.S. at 426 (“in federal civil rights actions ‘the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs’”). Because *Hensley* addressed the notion of a reasonable fee earned by prevailing parties, naturally it was concerned with reasonable hours, and reasonable hourly rates. *Id.* at 433.

Third, *Rothfarb*'s choice of a lodestar starting point in a common-fund recovery is fairly characterized as an exception to the general rule. Ninth Circuit jurisprudence has long recognized that while courts faced with common-fund fee awards have discretion to use either lodestar or percentage-of-the-fund method, the latter is more likely to be chosen. *See, e.g., Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (noting the “ground swell of support for mandating a percentage-of-the-fund approach in common fund cases”). Other circuits agree. *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 516 (6th Cir. 1993) (“lodestar method better accounts for the amount of work done, while the *percentage of the fund more accurately reflects the results achieved*”); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (“a percentage-of-the-fund method is the *appropriate mechanism* for determining the attorney fees award in common fund cases”); *Camden I Condominium Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (“we believe that the percentage of the fund approach is the *better reasoned* [one] in a common fund case”).

Finally, there is more than a bit of irony in Schonbrun’s slavish reliance upon *Rothfarb* – for had the court there chosen a percentage-of-the-fund calculation, its “starting point” would not have been “number of hours,” but a 25%-of-the-fund “benchmark.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (in common fund cases, 25% benchmark is “starting point for analysis” of fair fee); *Paul, Johnson, Alston & Hunt v. Grawlty*, 886 F.2d 268, 272 (9th Cir. 1989). The requested fee award in this matter is far, far below that particular benchmark.

4. The 1996 NERA Study Remains Valid for the General Point Concerning Percentage Awards

Schonbrun chides Lead Counsel for supposedly using a 1996 study of fee awards conducted by National Economic Research Associates (“1996 NERA Study”) “for the proposition that fee percentages do not decrease as the settlement amount increases.” Supplemental Objection at 34. That assertion, he says, along with the “plethora of other inaccurate assertions” made by Lead

Counsel, raises questions about “the reliability of Class Counsel’s legal memorandum in its entirety.” *Id.*

Schonbrun is patently mistaken.

Lead Counsel’s brief expressly cited the 1996 NERA Study not for any decreasing/increasing argument, but rather for *this* point concerning fee percentages overall:

The requested fee is also in line with an analysis of fee awards in class actions conducted in 1996 by National Economic Research Associates, an economics consulting firm. Using data from 433 shareholder class actions, the study reports on the issue of attorneys’ fees: “Regardless of case size, fees average approximately 32 percent of the settlement.” Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996) (Compendium, Ex. N).

See Lead Counsel’s Memorandum of Law in Support of Fee Award and Reimbursement of Plaintiffs’ Expenses (Docket No. 5816) at 48.

For the proposition that the negotiated percentage here should not be reduced simply because of the size of the excellent recovery, Lead Counsel relies upon myriad authority – including recent case law, an expert submission by Harvard Law Professor Lucian Bebchuk, and similar post-PSLRA “super-mega-fund” recoveries. See, e.g., *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (in awarding 30% fee, criticizing the use of any declining “sliding scale” fee regimen because, *inter alia*, “it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable” while penalizing success); *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1189 (S.D. Fla. 2006) (“Attorneys’ fees should be structured as an incentive for lawyers to risk achieving the highest possible benefits for the greatest number of Class Members”); see also Declaration of Professor Lucian A. Bebchuk (Docket No. 5820) at 28 (highly reasonable of The Regents of the University of California (“The Regents”) to establish the increasing-fee schedule, for the agreement was in the Class’s interests and *post hoc* downward adjustment will discourage necessary investment of time

and capital). As Lead Counsel's fee submission illustrated, the fee request here is well within the other percentage awards in post-PSLRA cases with "mega" settlements at or above the \$400 million range. *See* Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for An Award of Attorney Fees (Docket No. 5818), Ex. 5 ("Top Securities Settlements" chart).

5. Schonbrun's Scurrilous Suggestions and Innuendo Are Unhelpful

Lead Counsel will not dignify with any extended discussion the several instances of baseless innuendo in Schonbrun's Supplemental Objection. *See* Affidavit of Vincent R. Johnson concerning Texas ethical rules on fee sharing filed herewith.

That said, however, his implications cannot go unacknowledged – and so Lead Counsel points out that Schonbrun offers not one shred of evidence in support of his suggestions that The Regents may have chosen Lead Counsel as a result of political contributions (Supplemental Objection at 5 & 5 n.4), or that there could be undisclosed "nonfinancial agreements" between Lead Plaintiff and Lead Counsel. Supplemental Objection at 40.

Schonbrun's unsavory arguments do a disservice, both to himself as well as this Court.

III. CONCLUSION

Schonbrun's so-called "Supplemental Objections" are ill-conceived and deserving of little weight.

DATED: February 26, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD COUNSEL'S RESPONSE TO THE DABROWSKI/SCHONBRUN SUPPLEMENTAL AMENDED OBJECTION TO MOTION FOR ATTORNEY FEES AND REIMBURSEMENT (DOCKET NO. 5891) has been served by sending a copy via electronic mail to serve@ESL3624.com on February 26, 2008.

I also certify that a copy of the above-mentioned document has been served via overnight mail on the parties listed on the attached "Additional Service List" on this 26th day of February, 2008.

Deborah S. Granger

DEBORAH S. GRANGER

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