

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

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§ 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.

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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.

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**LEAD COUNSEL'S RESPONSE TO AMICUS CURIAE BRIEF OF THE TEXAS  
ATTORNEY GENERAL REGARDING REQUEST FOR ATTORNEY FEES  
(DOCKET NO. 5930)**

Lead Counsel gratefully acknowledges the Texas Attorney General's prior support of plaintiffs' claims through *amicus curiae* briefs in this case, the Fifth Circuit and the Supreme Court. Lead Counsel must note, however, that while the Texas Attorney General relies on the Class Action Fairness Act ("CAFA") as a basis for his authority to comment on the attorney fee request, CAFA does not appear to apply to this case.<sup>1</sup> Nonetheless, Lead Counsel addresses the issues raised by the Texas Attorney General, which as he notes are nothing other than a reiteration of objections previously raised by others.

The Attorney General states that he has reviewed the presentation filed March 5, 2008 (Docket No. 5927), Lead Counsel's Memorandum of Law in Support of Fee Award and Reimbursement of Plaintiffs' Expenses (Docket No. 5816) ("Fee Brief") and several objections. *See* Amicus Curiae Brief of the Texas Attorney General Regarding Lead Plaintiff's Request for Attorneys' Fees (Docket No. 5930) ("AG Mem.") at 3. Apparently, the Attorney General has not reviewed the Declaration of Christopher M. Patti (Docket No. 5796) ("Patti Declaration"), the Declaration of James Holst in Support of Lead Counsel's Motion for An Award of Attorney Fees (Docket No. 5824) ("Holst Declaration"), the Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for An Award of Attorney Fees (Docket No. 5818) ("Hodges Decl." or "Hodges Declaration"), the Supplemental Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for An Award of Attorney Fees (Docket No. 5909) ("Hodges Supp. Decl." or "Hodges Supplemental Declaration"), the Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for An Award of Attorneys' Fees (Docket No. 5822)

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<sup>1</sup> CAFA applies only to cases filed after February 18, 2005; this case was filed in October 2001. Moreover, even if it were applicable to this case in general, CAFA primarily addresses the subject of attorney fees in the context of "coupon settlements." *See* 28 U.S.C. §§1711-15. Here, the settlements have already been approved and they are totally cash, not coupons.

("Silver Report"), the Supplemental Report of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for An Award of Attorneys' Fees (Docket No. 5906) ("Silver Supp. Report"), the Declaration of John C. Coffee, Jr. (Docket No. 5821) ("Coffee Decl."), the Declaration of H. Lee Sarokin in Support of Lead Counsel's Motion for An Award of Attorney Fees (Docket No. 5819) ("Sarokin Decl."), the Declaration of Professor Lucian A. Bebhuk (Docket No. 5820), Lead Counsel's Reply in Support of Motion for Award of Attorney Fees and Reimbursement of Plaintiffs' Expenses (Docket No. 5807) ("Fee Reply Brief") or the Corrected Declaration of Kenneth M. Moscaret Esq. (Docket No. 5911) ("Moscaret Declaration"). Suffice it to say, the Attorney General has not reviewed, or at least does not acknowledge, the wealth of support before the Court for the requested fee award. In addition, the Attorney General appears not to understand that the multiple settlements achieved in this case have already been approved by the Court. *See* AG Mem. at 3 referring to "the unprecedented amount of the settlement *proposed*."

The Attorney General asserts that the fee agreement negotiated by The Regents of the University of California ("The Regents") results in a "windfall" to attorneys and that the percentage requested, 9.52%, is not reasonable.<sup>2</sup> However, the Attorney General provides no support for that assertion.

Lead Counsel has demonstrated that the requested 9.52% fee is significantly less than awards made in other mega-fund cases. Even the average "mega-fund" fee award, 11.61%, is above the request here. The fee negotiated by the Lead Plaintiff is entitled to deference as this Court recognized in *Waste Management, Inc.* *In re Waste Management, Inc.*, No. H-99-2183, slip op. at 57

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<sup>2</sup> When the Attorney General engages outside counsel, he presumably wants to maximize the recovery and is willing to pay for excellent representation. In *In re Lease Oil Antitrust Litigation*, the State of Texas was represented by Susman Godfrey, who was awarded a 25% fee on a settlement of more than \$185 million. *See In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 408, 448 (S.D. Tex. 1999).

(S.D. Tex. May 10, 2002) (Compendium, Ex. B)<sup>3</sup> (“*Waste Management I*”). As Professor Coffee stated, “To reverse The Regents’ well-considered position would undermine the role of the lead plaintiff as the party Congress intended to principally monitor class counsel – and would do so in the absence of any evidence that they were delinquent in performing their role.” Coffee Decl., ¶51. Professor Silver added “Under the Private Securities Litigation Reform Act (PSLRA), a trial judge should overrule compensation terms negotiated by a lead plaintiff only when (1) the terms obviously exceeded the market rate *when set* and (2) the bargaining environment in which fees were set was marred by an identified defect.” Silver Supp. Report at 3 (emphasis added). There is no logical reason to reduce the fee percentage agreed to in a mega-settlement.

And when the Attorney General claims the requested fee would result in a “windfall”, he disregards the cases where similar and higher lodestar multipliers have been awarded in mega-fund cases. This Court awarded a lodestar multiplier of 5.296 in *Waste Management*. *Waste Management I*, No. 99-2183, slip op. at 64. In *Cardinal Health*, the court noted that the “outstanding” result supported the fee and awarded a 5.9 multiplier. Other courts concur.<sup>4</sup> Professor

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<sup>3</sup> All references to “Compendium, Ex. \_\_\_” refer to Lead Counsel’s Compendium of Exhibits in Support of Lead Counsel’s Memorandum of Law in Support of Fee Award and Reimbursement of Plaintiffs’ Expenses (Docket No. 5817).

<sup>4</sup> See *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (3.5 multiplier); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 470 (S.D.N.Y. 1998) (awarding 14% of \$4.027 billion fund, representing 3.97 multiplier); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (awarding 25% of \$80 million settlement fund, representing 4.7 multiplier); *In re Charter Commc’ns Inc.*, No. 4:02-CV-1186 CAS, 2005 U.S. Dist. LEXIS 14772, at \*56 (E.D. Mo. June 30, 2005) (awarding 20% of \$146 million settlement fund, representing 5.6 multiplier); *In re Aetna Inc. Sec. Litig.*, No. 1219, 2001 U.S. Dist. LEXIS 68, at \*59 (E.D. Pa. Jan. 4, 2001) (awarding 30% of \$82.5 million settlement fund, representing 3.6 multiplier); *In re Buspirone Antitrust Litig.*, No. 01-CV-7951 (JEK), slip op. at 5 (S.D.N.Y. Apr. 17, 2003) (awarding multiplier of 8.46) (Compendium, Ex. R); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding multiplier of 5.5); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D. Pa. 2003), *vacated, remanded*, 396 F.3d 294 (3d Cir. 2005), *cost/fees granted*, 362 F. Supp. 2d 587 (E.D. Pa. 2005) (on remand awarding fee equal to multiplier of 6.96); *Weiss v.*

Coffee stated “[T]here has still been general recognition that the lodestar multiplier should be higher in cases involving higher risk. As discussed earlier, this case faced extraordinary risk and, indeed, was ultimately decertified by the Fifth Circuit. Thus, whether or not a multiplier in the 5 to 6 range would be justified in most cases it is justified in this case . . . .” Coffee Decl., ¶35.

The Attorney General asserts that the percentage awarded here should be lower because the fee percentage agreed to and awarded in *WorldCom* was lower and that case was of similar magnitude. However, as Lead Counsel has previously pointed out, the similarity of *WorldCom* to *Enron* ends at the size of the recovery. In *WorldCom*, only one bank, Citigroup, faced §10(b) liability. The vast bulk of the claims and the settlement funds were for violation of §11, which does not require plaintiff to prove scienter or reliance and places the burden of rebutting loss causation on the defendant. There was far more risk and necessarily more creative lawyering here, where the potential §10(b) liability far exceeded the §11 liability, as compared to *WorldCom*. Approximately 80% of the funds recovered in *WorldCom* were distributed to debt claimants with Securities Act claims (Coffee Decl., ¶29) and, as Professor Coffee notes:

[I]t is far more difficult to recover funds on behalf of the shareholders of a bankrupt corporation where there has been no recent public offering that triggers the more favorable liability provisions of the Securities Action of 1933.

*Id.* Professor Coffee also notes that “the fraud in *WorldCom* was simple and egregious” (“WorldCom’s management capitalized line costs, which were essentially a rental expense that created no asset that WorldCom retained. From an accounting perspective, this was indefensible, and the accounting irregularities in *WorldCom*, if detected, should have been obvious to a student in Accounting 101. In contrast, the fraud in *Enron* involved the murkiest depths of contemporary

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*Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee equal to multiplier of 9.3); *In re RJR Nabisco Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992) (awarding fee equal to multiplier of 6.0).

accounting theory.”) and much less complex than *Enron* (“Comparing the two cases in terms of their accounting complexity is much like comparing a high school physics experiment with true rocket science.”).<sup>5</sup> Coffee Decl., ¶30.

While the Attorney General urges analysis of the *Johnson* factors, he refers only to the March 5, 2008 filing by Lead Counsel, and ignores the evidence and analysis set forth at pages 62-75 of the Fee Brief and the many declarations filed January 4, 2008. The reasonableness of the requested fee is well supported by analysis of the abundant evidence regarding each of the *Johnson* factors. By claiming that a “mechanical” application of the *Johnson* factors is not appropriate, he seems to suggest that the evidence that is before the Court and supports the award should just be disregarded. He next rejects the lodestar cross-check stating “Lodestars should not be used to justify otherwise excessive compensation,” and thereby concedes that the lodestar multiplier *is* reasonable here. AG Mem. at 5. In sum, he urges that the fee request be reduced for no valid reason. Any way you slice it – the percentage is less than 10%; the *Johnson* factors support the reasonableness of the request; the lodestar multiplier is within the range of reasonableness – and there is no windfall to the lawyers by awarding the fee that the Lead Plaintiff negotiated.

Finally, the Attorney General notes that others have claimed that the lodestar is inflated by including non-attorney hours, contract attorney hours and time spent on “unsuccessful” claims. He suggests that a special master could review the accuracy of the data underlying the lodestar calculation. This suggestion ignores the Hodges Declaration, which the Attorney General has apparently not reviewed, and which describes in detail the work (in over 150 pages) including the tremendous number of briefs written, documents reviewed, depositions taken or defended,

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<sup>5</sup> In no way should this analysis be read as a denigration of the work done in *WorldCom*. The point is that the two cases were very different and not really comparable.

settlements negotiated and documented and the monumental investigation, as well as the time and attention given to preparing the plan of allocation. The Lead Plaintiff oversaw and directed every step. *See* Patti and Holst Declarations. This Court has read all those briefs and conducted every hearing to date; it knows well the work that was done.

Based on his review of the Hodges Declaration, (Ret.) Judge Sarokin stated that he was surprised the lodestar was not higher. Sarokin Decl., ¶33. Indeed, the Hodges Supplemental Declaration explains that Lead Counsel outsourced – that is, paid for and expensed – most of the substantial time spent to code (not review and analyze) millions of pages of documents and prepare the majority of the deposition binders. Hodges Supp. Decl., ¶6. Thus, that time did not add to the lodestar. The Hodges Supplemental Declaration also explains that Lead Counsel directly hired ten young attorneys – the “contract” attorneys – during the intensive document review and fact deposition period and before expert reports and depositions. Hodges Supp. Decl., ¶7. They were supervised by Coughlin Stoia Geller Rudman & Robbins LLP partner Paul Howes and performed the same tasks that firm associates with their level of experience did. *Id.* In addition, they were paid salaries commensurate with their experience. The only difference between them and regular associates with the firm was that they were hired for a limited time specifically to prepare the Enron case for trial. *Id.* The Hodges Supplemental Declaration also explains that the other contract attorneys were senior lawyers who each made a vital contribution to the successful prosecution of the case. Hodges Supp. Decl., ¶¶8-11. The Hodges Supplemental Declaration also describes the work of non-attorney professionals such as in-house forensic accountants and economic analysts and their contribution to the successful result achieved. Hodges Supp. Decl., ¶¶12-15.

Lead Counsel provided additional support for the hours included in the lodestar in the Fee Reply Brief and in the Moscaret Declaration. In sum, contract attorney time is appropriately included in lodestar. *In re Tyco Int’l, Ltd. Multidistrict Litig.*, No. 02-md-1335-PB, slip op. at 59

(D.N.H. Dec. 19, 2007) (Compendium, Ex. P). *See* Fee Reply Brief at 25-30.<sup>6</sup> Paralegal and other professionals' time is also appropriately included. *See Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609-11 (N.D. Tex. 2000).

Lead Counsel has provided more than ample support for the requested fee in the declarations and briefs previously filed. The Attorney General's comments regarding the fee request, like the objectors' he repeats, should be rejected.

DATED: March 10, 2008

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<sup>6</sup> Even if Lead Counsel had paid them hourly – and it did not – it still could have properly billed them at current associate rates under *Tyco* which states: “It is therefore appropriate to bill a contract attorney’s time at market rates and count these time charges toward the lodestar.” No. 02-md-1335-PB, slip op. at 59.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD COUNSEL'S RESPONSE TO AMICUS CURIAE BRIEF OF THE TEXAS ATTORNEY GENERAL REGARDING REQUEST FOR ATTORNEY FEES (DOCKET NO. 5930) document has been served by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com) on March 10, 2008.

I also certify that a copy of the above-mentioned document has been served via U.S. MAIL on the parties listed on the attached "Additional Service List" on this 10th day of March, 2008.

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