UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ALAN B. MARCUS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. J.C. PENNEY COMPANY, INC., et al., Defendants.	§ § § § § § § § § § §	Civil Action No. 6:13-cv-00736-RWS-KNM (Consolidated) CLASS ACTION

DECLARATION OF CRAIG T. ENOCH, JUSTICE (RET.), IN SUPPORT OF PROPOSED AWARD OF CLASS COUNSEL'S ATTORNEYS' FEES

I, Craig T. Enoch, declare:

INTRODUCTION

I am a Member at the law firm of Enoch Kever PLLC, in Austin, Texas, which I co-founded in 2011. Before that, I was a Shareholder at the Texas-based law firm of Winstead P.C., where I was Chair of the Appellate Practice Group. I joined Winstead in 2003, after retiring as Justice of the Texas Supreme Court where I had served nearly 11 years. Before my tenure on the Supreme Court, I served as Chief Justice of the Fifth District Court of Appeals of Texas and as Presiding Judge of the 101st District Court in Dallas County, Texas. Before assuming the bench, I was a partner at Moseley, Jones, Enoch & Martin and an associate at Burford, Ryburn & Ford, both located in Dallas, Texas. I earned my undergraduate and law degrees from Southern Methodist University in Dallas, Texas, and a Master of Laws degree from University of Virginia School of Law in Charlottesville, Virginia. I am Board Certified in Civil Trial Law by the Texas Board of Legal Specialization.

During the twenty-two years I served in the Texas judiciary, I reviewed, researched, decided, and wrote on cases pending before the Texas Supreme Court and the Fifth District Court of Appeals. My responsibilities on the 101st District Court included reviewing, researching and presiding over trials, primarily civil cases brought in Dallas County. As I moved through all three levels of the Texas judicial system, and after returning to private practice, I have evaluated, ruled on, and opined on class action settlements and on the reasonableness of applications for the award of attorneys' fees.

OPINION

In this case, I have been asked to express an opinion on whether the attorneys' fees requested by Lead Plaintiff's Counsel, Robbins Geller Rudman & Dowd LLP ("Lead Counsel"), are reasonable. Lead Counsel has achieved a settlement for class members of $97,500,000 in cash ("Settlement Amount"), and requests an award of attorneys' fees of 30% of the Settlement Amount. Having considered a number of documents, writings on the subject of attorneys' fees, and case authority, I conclude that an award of attorneys' fees computed on 30% of the Settlement Amount is reasonable in this case.

DOCUMENTS, WRITINGS AND CASES

To assist in forming my opinion, I was provided for review the following documents related to this litigation:

- Plaintiff's Revised Consolidated Complaint for Violation of the Federal Securities Laws
- Defendants' Motion to Dismiss Lead Plaintiff's Consolidated Complaint and Brief in Support
- Lead Plaintiff's Response in Opposition to Defendants' Motion to Dismiss the Consolidated Complaint
- Defendants' Reply in Support of Their Motion to Dismiss Lead Plaintiff's Consolidated Complaint
- Lead Plaintiff's Sur-Reply in Response to Defendants' Reply in Support of Their Motion to Dismiss Lead Plaintiff's Consolidated Complaint
- Report and Recommendation of the United States Magistrate Judge denying Defendants' Motion to Dismiss
- Defendants' Objections to Report and Recommendation of the United States Magistrate Judge denying Defendants' Motion to Dismiss

- Order Adopting Report and Recommendation of United States Magistrate Judge denying Defendants' Motion to Dismiss
- Defendants' Answer to Revised Consolidated Complaint for Violation of the Federal Securities Laws
- Lead Plaintiff's Motion for Class Certification and Memorandum of Law in Support Thereof
- Defendants' Response in Opposition to Lead Plaintiff's Motion for Class Certification
- Lead Plaintiff's Reply in Support of Motion for Class Certification
- Defendants' Surreply in Opposition to Class Certification
- Report and Recommendation of United States Magistrate Judge granting Lead Plaintiff's Motion for Class Certification
- Defendants' Objections to Report and Recommendation of the United States Magistrate Judge Regarding Class Certification
- Lead Plaintiff's Memorandum of Law in Opposition to Defendants' Objections to Report and Recommendation of the United States Magistrate Judge Regarding Class Certification
- Order Adopting Report and Recommendation of the United States Magistrate Judge granting Lead Plaintiff's Motion for Class Certification
- Defendants' Petition for Permission to Appeal Order Certifying Class Pursuant to FRCP 23(f)
- Lead Plaintiff's Answer in Opposition to Defendants' Petition for Permission to Appeal Pursuant to FRCP 23(f)
- Defendants' Reply in Support of Petition for Permission to Appeal Pursuant to FRCP 23(f)
- Order granting Motion for Leave to Appeal under FRCP 23(f)
- Settlement Agreement
- Motion and Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Report and Recommendation of the United States Magistrate granting the Motion and Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Joint Notice of No Objections to Report granting Motion for Preliminary Approval of Settlement

- Order Adopting Report and Recommendation of the United States Magistrate Judge granting the Motion and Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Order Preliminarily Approving Settlement and Providing for Notice

Writings I have reviewed:

- Clifford H. Walston, Chapter 8 Attorney Fee Awards and Incentive Payments, *A Practitioner's Guide to Class Actions* (Am. Bar Ass'n 2010)
- Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements – 2016 Review and Analysis* (Cornerstone Research 2017)
- Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865 (1992)
- Charles Silver, *Due Process and the Lodestar Method: You can't get there from here*, 74 TUL. L. REV. 1809 (2000)
- Chares Silver, *Regulation of Fee Awards in the Fifth Circuit*, 67 THE ADVOCATE 36 (2014)
- Lynn A. Baker, Michael A. Perino & Charles Silver, *Setting Attorneys' Fees in Securities Class Actions: An Empirical Assessment*, 66 VAND. L. REV. 1677 (2013)
- Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 27 (2004) (hereinafter *Attorney Fees Study 1*)
- Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 248 (2010) (hereinafter *Attorney Fees Study* 2)
- Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, New York University Law and Economics Research Paper Series, Working Paper No. 17-02 (2016)
- Relevant provision of the Private Securities Litigation Reform Act of 1995, codified at 15 U.S.C. § 78u-4

Cases I have reviewed:

- Decisions on motions to dismiss class action complaints under Federal Rules of Civil Procedure 9(b) or 12(b)(6) from the federal courts in the Eastern District of Texas

- Decisions on motions to dismiss Private Securities Litigation Reform Act (PSLRA) claims from the federal courts in the Eastern District of Texas
- Various decisions discussing appropriate class action attorneys' fees in Texas federal courts, including:
  - *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012), *cert. denied Schuleman v. Union Asset Mgmt. Holding, A.G.*, 568 U.S. 931 (2012) (PSLRA)
  - *Vassallo v. Goodman Networks, Inc.*, No. 4:15CV97-LG-CMC, 2016 WL 6037847 (E.D. Tex. Oct. 14, 2016) (citing *Union Asset Mgmt.*) (FLSA)
  - *Slipchenko v. Brunel Energy, Inc.*, No. H-11-1465, 2015 WL 338358 (S.D. Tex. Jan. 23, 2015) (citing *Union Asset Mgmt.*) (ERISA)
  - *In re Arthrocare Corp. Sec. Litig.*, No. A-08-CA-574-SS, 2012 WL 12951371 (W.D. Tex. June 4, 2012) (citing *Union Asset Mgmt.*) (PSLRA)
  - *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040 (S.D. Tex. Mar. 20, 2012) (citing *Union Asset Mgmt.*) (FCRA)
  - *Billitteri v. Securities Am., Inc.*, No. 3:11-CV-00191-F, 2011 WL 3585983 (N.D. Tex. Aug. 4, 2011) (Texas Securities Act)
  - *In Re Dell Inc., Sec. Litig.*, No. A-06-CA-726-SS, 2010 WL 2371834 (W.D. Tex. June 11, 2010), *aff'd Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012), *cert. denied Schuleman v. Union Asset Mgmt. Holding, A.G.*, 568 U.S. 931 (2012) (PSLRA)
  - *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F.Supp.2d 732 (S.D. Tex. 2008) (PSLRA)
  - *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350 (N.D. Tex. Nov. 8, 2005) (PSLRA)
  - *In re Dynegy, Inc. Sec. Litig*, Case No. H-02-1571, Order (S.D. Tex. July 7, 2005) (PSLRA)
  - *Di Giacomo v. Plains All Am. Pipeline*, No. A.H-99-4137, 2001 WL 34633373 (S.D. Tex. Dec. 19, 2001) (PSLRA)
  - *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F.Supp.2d 942 (E.D. Tex. 2000) (CFAA)
- Various Fifth Circuit decisions on motions for class certification

Additionally, I have reviewed with Lead Counsel its time and efforts representing Lead Plaintiff, National Shopmen Pension Fund, in this case.

REASONING IN SUPPORT OF OPINION

Class action litigation has a unique due process overlay. That is, because the bulk of the "plaintiffs" are in fact not participants in the case, judges presiding over class actions are cautioned to ensure these unnamed plaintiffs' interests are adequately represented by the representative plaintiffs—the "named" plaintiffs. In addition, class action judges are charged with the duty to see that the plaintiff class is adequately represented by class counsel. With respect to class counsel's attorneys' fees, these concerns overlap.

In the context of class actions involving claims for securities laws violations, the PSLRA applies. In that Act, Congress intended to address, in part, these concerns. Specifically, Congress provided a mechanism under which a lead plaintiff, one with the largest allowed loss and thus the greatest interest in maximizing the litigation's financial outcome for all plaintiffs, may step forward and take over the litigation. *See* 15 U.S.C. § 78u-4(a)(3). And because a lead plaintiff may step in, Congress anticipated an effect on attorneys' fees agreements. A lead plaintiff having the largest allowed loss would generally have the consistent financial wherewithal to negotiate a competitive fee structure between itself and the class counsel it chooses.

A. Adequate Representation

In the class action setting, the trial court plays a fiduciary-like role. Because the bulk of the plaintiffs are unnamed and absent from the proceedings, the court must assure unnamed plaintiffs are adequately represented. A critical element supporting adequacy is ensuring that the named plaintiffs' and unnamed plaintiffs' interests are aligned. Under the PSLRA, Congress created a statutory framework enabling a private litigant who has a dominant investment interest to enter into the litigation and become lead plaintiff. *See id.* But the court is not relieved of its duty to protect the absent class members.

In addition to assuring the unnamed plaintiffs are adequately represented by the named plaintiffs, the court ensures class counsel is adequate. Adequacy of class counsel involves a number of considerations. The court must consider "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action" as well as "counsel's knowledge of the applicable law." FED. R. CIV. P. 23(g)(1)(A). Further, the court must consider "the resources that counsel will commit to representing the class." *Id.* In other words, class counsel must not only be capable and knowledgeable in class actions, but have the resources to commit to the litigation, all of which represent significant costs. These qualifications take time and experience to develop and require access to monetary resources to sufficiently fund a class action.

To obtain qualified class counsel necessarily requires that they be properly compensated. In order to obtain counsel that meets the requirements of Rule 23, counsel must receive compensation that is fair and reasonable under the circumstances. One factor in making this determination is what the named plaintiffs and counsel agree is fair and reasonable. Because of the ostensible financial strength of the lead plaintiff in PSLRA cases, Congress requires it, subject to the court's approval, to "select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v).

To evaluate fees, courts have developed tools like the contingent percentage formula, the lodestar method (time expended multiplied by an hourly rate), or some combination of the two. *Shaw*, 91 F.Supp.2d at 967-68. The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) has noted the "near-universal adoption of the percentage method in securities cases [because] the PSLRA contemplates such a calculation," but has joined the majority of circuits "in allowing … district courts the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach informed by the *Johnson* considerations."[1] *Union Asset Mgmt.*, 669 F.3d at 643-44. Still, several legal scholars have suggested that a straight contingent percentage fee award is the method that provides the best protection of the class and should be used in class actions. *See* Eisenberg & Miller, *Attorney Fees Study 1* and *Attorney Fees Study 2*; Silver, *Due Process and the Lodestar Method* and *Unloading the Lodestar*.

Under any method, though, it is important that the court evaluate attorneys' fees from the standpoint of the parties' expectations at the time the attorney-client relationship was formed and suit was filed. Typically, a court evaluates attorneys' fees in connection with a class action settlement after everyone has the benefit of knowing the result ultimately obtained, but the court should be wary of being influenced by this 20/20 hindsight. Recognizing the fiduciary-like responsibility owed by the courts to the absent, unnamed class members to review any fee agreement between the class representatives and class counsel to ensure its fairness to the class, Professor Charles Silver cautions against giving undue weight to this hindsight and re-determining the contract fees because this jeopardizes the parties' "freedom to contract." *See* Silver, *Due*

[1] The *Johnson* factors are intended to ensure "a reasonable fee." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717, 720 (5th Cir. 1974), *overruled on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939 (1989). The twelve factors are (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (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.* at 717-19.

Process and the Lodestar Method and *Unloading the Lodestar*. His concern centers on undervaluing the contingent risk existing before any result is achieved that necessarily occurs through a post-result restructuring of contingent fee arrangements, which in turn increases the risk that attorneys will not be sufficiently compensated for their services. And this will result in plaintiffs being unable to hire good lawyers, because good lawyers will be unwilling to take on high-risk cases. Thus, the reasonableness of attorneys' fees must be determined by the soundness of the fee expectations at the time the attorney-client relationship is formed and suit is filed. *See, e.g.,* 15 U.S.C. § 78u-4(a)(3)(B)(v).

B. Aligned Interests Favor Percentage Fee Awards

Core due process principles dictate that unnamed plaintiffs are bound only when they are adequately represented. To ensure due process, it is widely accepted that judges must encourage fee arrangements that give class counsel an incentive to maximize recovery for the class. Of the articulated methods of determining attorney compensation, the percentage contingent fee comes closest to accomplishing this goal.

First, the percentage contingent fee appears to be the financial arrangement of choice for plaintiffs. One reason given for this preference is that plaintiffs receive the benefit of well-trained lawyers without incurring substantial financial obligations up front. An additional benefit to plaintiffs includes shifting the financial risk of litigation from themselves to the lawyers, who are better skilled at managing these risks. Also, this fee arrangement more closely aligns the interests of the contracting parties because the lawyer's fee is inextricably tied to the client's fortune. Specifically, the contingent percentage fee method allies class counsel and the class members in the pursuit of the largest possible recovery with the least expense. It also satisfies the goal that courts should award counsel fees based upon market prices for legal services. *Shaw,* 91 F.Supp.2d at 965 (citing *In re Continental Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)); *see also In re Enron*, 586 F.Supp.2d at 747-48, 752-55, 766-69 (discussing percentage fee method, lodestar, and attorney fee market rates). As well, this fee arrangement permits relative ease in evaluating the fairness of the arrangement in the context of how the parties would have contracted at the outset of the case, not after the results are known. *Id.*

C. The Circumstances of This Case

This is a securities class action under the PSLRA in which plaintiff-shareholders assert that J.C. Penney, Myron E. Ullman, III, and Kenneth H. Hannah violated federal securities laws by making false and misleading statements regarding the company's financial condition. The plaintiffs allege J.C. Penney officers Ullman and Hannah misrepresented that the Company had adequate inventory and sufficient liquidity to sustain the Company through the end of fiscal year 2013, and, consequently, J.C. Penney stock traded at artificially inflated levels during the class period, reaching a high of $14.65 per share. Then, after the market closed on September 24, 2013, an analyst with Goldman Sachs reported that J.C. Penney could face liquidity problems in the third quarter of 2013. In response J.C. Penney's stock suffered a 15% decline on September 25, 2013, from $11.62 per share to a low of $9.93 per share. Later on that same day, Ullman again represented that J.C. Penney had sufficient liquidity for the remainder of 2013, and the stock began to rebound. And after similar positive representations on September 26, the stock continued to rise, reaching a high of $10.42. But after the market closed on September 26, J.C. Penney announced that it would be raising capital (or, increasing its liquidity) via an $800,000,000 offering of common stock. In response, the stock declined 13%. Thereafter, the Complaint in this case was filed.

As explained, in evaluating whether the attorney's fee request here is reasonable, the fee should be evaluated in the context of the risks faced by plaintiffs when the case was filed and with the parties' view at the time the fee expectations were formed. In this case, that was around 2013. At that time, the PSLRA, under which this case is brought, had been in effect for 18 years. A cursory look at Fifth Circuit cases governed by the PSLRA shows that of the 28 cases heard by the court from 1995 through 2013, 19 (or 68%) were essentially dismissed.[2] Additionally, even if a plaintiff survives a motion to

[2] *See Pipefitters Local No. 636 Defined Benefit Plan v. Zale Corp.*, 499 Fed. Appx. 345 (5th Cir. 2012); *Brown v. Bilek*, 401 Fed. Appx. 889 (5th Cir. 2010); *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185 (5th Cir. 2010); *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200 (5th Cir. 2009); *Catogas v. Cyberonics, Inc.*, 292 Fed. Appx. 311 (5th Cir. 2008); *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333 (5th Cir. 2008); *Newby v. Enron Corp.*, 284 Fed. Appx. 146 (5th Cir. 2008); *Motient Corp. v. Dondero*, 529 F.3d 532 (5th Cir. 2008); *Indiana Elec. Workers' Pension Trust Fund IBEW v. Shaw Group, Inc.*, 537 F.3d 527 (5th Cir. 2008); *Central Laborers' Pension Fund v. Integrated Elec. Servs., Inc.*, 497 F.3d 546 (5th Cir. 2007); *Financial Acquisition Partners LP v. Blackwell*, 44 F.3d 278 (5th Cir. 2006); *R2 Invs. LDC v. Phillips*, 401 F.3d 638 (5th Cir. 2005); *Southland Secs. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353 (5th Cir. 2004); *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563 (5th Cir. 2003); *Goldstein v. MCI Worldcom*, 340 F.3d 238 (5th Cir. 2003); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003); *Abrams v. Baker Hughes Inc.*, 292 F.3d 424 (5th Cir. 2002); *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336 (5th Cir. 2002).

dismiss its class complaint, obtaining class certification presents another challenge.[3] Thus, securities litigation like this case is extremely risky; indeed, the odds did not favor a plaintiff's recovery at the time this case was filed.

Consequently, the expertise of lead counsel also is an important factor in the odds for a plaintiff's recovery. Institutional Shareholder Services has ranked the Lead Counsel firm 1st in its Securities Class Action Services Top 50 Report for 2015. *See* https://www.issgovernance.com/file/publications/2015-scas-top-50-apr-2016.pdf. The National Law Journal selected the firm as the Securities category winner for 2016 out of 35 finalists. Chambers USA awarded the firm a Band 1 ranking, the highest rating available, and noted the firm is "[w]idely respected as a top-notch plaintiff firm with considerable strength in the class action space [that] [s]pecializes in complex securities fraud disputes, with an excellent record of high-value recoveries for clients." *See* https://www.chambersandpartners.com/12059/754/editorial/5/1.

Another consideration is whether the lead plaintiff is sophisticated and capable of negotiating for its own interests. Lead Plaintiff, National Shopmen, is a multi-employer defined benefit plan that manages assets of approximately $400 million and has experience in protecting, through litigation, its financial interests. Information about National Shopmen reveals it has been plaintiff in numerous litigation matters spanning at least three decades, including being named lead plaintiff. As well, Lead Plaintiff states in its Declaration in support of the final approval of the settlement that it has determined that the requested fee is fair and reasonable. Unless clearly unfair, courts should respect the parties' fee expectations. The requested fee here is both fair and reasonable.

D. Reasonableness of the Fee Requested

Lead Counsel is requesting a fee of 30% of the Settlement Amount. Charles Silver and others completed a report on securities class action attorney's fees that demonstrates cases in the Fifth Circuit trend toward the higher end, approving fees at 33.33%. *See* Baker, Perino & Silver, *Setting Attorneys' Fees in Securities Class Actions* at n.45; *see also In re Dell*, 2010 WL 2371834, at *13 (in context of securities suits, "common fee

[3] *See, e.g.*, *The Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010) (affirming trial court's denial of class certification in putative securities fraud class action), *vacated and remanded sub. nom. Erica P. John Fund, Inc. v. Halliburton, Co.*, 563 U.S. 804 (2011) (plaintiff need not prove loss causation to obtain class certification); *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013) (affirming grant of class certification), *vacated and remanded Halliburton v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398 (2014) (defendants entitled to opportunity before class certification to defeat presumption that stock price reflected material misrepresentations); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015) (granting leave to appeal district court's order granting class certification).

awards generally fall within the 20 to 33 percent range"); *In re Enron*, 586 F.Supp.2d at 768 ("In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range."); *Shaw*, 91 F.Supp.2d at 972 ("this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to thirty-three and thirty-four one-hundredths percent (33.34%) have been routinely awarded in class actions"). Additionally, the Eastern District of Texas recently approved a common fee award of 39.78% in a Fair Labor Standards Act case. *See Vassallo*, 2016 WL 6037847, at *4-6.

In *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012), the Fifth Circuit directed trial courts to consider the *Johnson* factors when evaluating the fairness of a contingent, percentage fee or when determining whether to adjust (upward or downward) a lodestar fee.

a. Johnson factors

Johnson, 488 F.2d at 717-720, identified twelve factors courts should consider when determining the reasonableness of attorneys' fees:

(1) the time and labor required –

> According to Lead Counsel's records, over 18,000 hours of legal professionals' time has been devoted to investigation, issue development, and litigation processes. Those hours are reflected in the extensive pleadings, discovery, motions, and correspondence, both affirmative and responsive. The hours also reflect a number of hearings and the preparation associated with those hearings. Finally, the hours reflect extensive negotiations among the parties. For example, more than 20 pleadings and motions were filed (many also attaching various declarations in support), a confidentiality agreement was negotiated, more than 20 depositions were taken, subpoenas were served on over 70 non-parties, Lead Counsel retained and worked with five experts, counsel attended dozens of meetings and conferences over discovery matters, the parties requested and produced voluminous documents, Lead Counsel made Freedom of Information Act requests on the Securities and Exchange Commission, and the parties attended two mediations.

(2) the novelty and difficulty of the issues –

> Issues surrounding securities fraud litigation under the PSLRA are complex and difficult to prosecute—particularly in the Fifth Circuit. *See supra,* pp. 9-10 (discussing dismissal rate in the Fifth Circuit). The fact-intensive and difficult-to-prove causation and scienter requirements in these cases are exceptionally complex. *See Schwartz*, 2005 WL 3148350, at

*9. Moreover, here, the Fifth Circuit granted defendants' motion for Rule 23(f) review of the class certification order after the parties reached a settlement. Fifth Circuit review would have been time consuming and posed high risk to any class recovery.

(3) the skill required to perform the legal service adequately –

Given the complexity of securities fraud litigation under the PSLRA, counsel are required to be highly skilled advocates to successfully present the issues, as Lead Counsel did here. The early stages of this litigation required substantial motion practice, including Lead Plaintiff surviving a Motion to Dismiss and opposition to class certification. *See supra*, pp. 2-4.

(4) the preclusion of other employment by the attorney because of this case –

It is not evident that Lead Counsel was necessarily precluded from taking on other matters as a result of the representation in this case; however, the time Lead Counsel spent on this matter could have been spent on other cases.

(5) the customary fee for similar work in the community –

Securities litigation, particularly involving publicly-traded securities, has national implications and often involves interests owned across the country. But focusing on courts in the Fifth Circuit, where this litigation is pending, it is evident that fees of between 25 and 34% of the result obtained are generally awarded. *See supra*, pp. 9-11; *Schwartz*, 2005 WL 3148350, at *31 ("The vast majority of Texas federal courts and courts in this District have awarded fees of 25%–33% in securities class actions."); *see also Lasky v. Brown*, No. 99-1035-D-M2, Order and Final Judgment at 9 (M.D. La. Jan. 27, 2003) (awarding 33.33% in PSLRA case); *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 306-10 (S.D. Miss. 2014) (awarding 33.33% in RICO case, relying on such awards in Fifth Circuit securities cases).

(6) whether the fee is fixed or contingent –

The requested fee here is contingent. This appears to be a common arrangement for lead counsels in securities litigation.

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

It is not evident that there existed any time restraints imposed by the client or the circumstances.

(8) the amount involved and the results obtained –

Lead Plaintiff's estimate of the potential amount of recoverable damages in this case was $460 million. On the other hand, defendants maintained that there were no damages. The Settlement reached in this case is a $97,500,000 cash recovery, or approximately 21% of the highest estimated recoverable damages. A 2017 study by Cornerstone Research analyzed the median recovery as a percentage of estimated recoverable damages in shareholder class actions in 2016. *See* Bulan, Ryan & Simmons, *Securities Class Action Settlements: 2016 Review and Analysis* at 7. The median recovery as a percentage of estimated recoverable damages in shareholder class actions was 2.5% in 2016. *Id.* The recovery here of approximately 21% of Lead Plaintiff's highest estimate of recoverable damages is many times the median settlement in similar actions. Hence, the result obtained strongly supports the requested fee.

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

Institutional Shareholder Services has ranked the Lead Counsel firm 1st in its SCAS Top 50 Report, The National Law Journal selected the firm as the Securities category winner for 2016 out of 35 finalists, and Chambers USA awarded the firm a Band 1 ranking, the highest rating available. *See supra*, p. 10. Additionally, Robbins Geller Rudman & Dowd LLP has been lead counsel in hundreds of securities class action lawsuits.

(10) the undesirability of the case –

Due to the risk of dismissal and other risks of securities class actions under the PSLRA, *see supra* pp. 9-12, it appears courts generally view these cases as undesirable, further supporting the requested fee.

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

The relationship between Lead Plaintiff and Lead Counsel has been ongoing for years. In addition to this matter, Lead Counsel has represented Lead Plaintiff in other class action lawsuits.

(12) awards in similar cases –

> The range of awards in similar cases further supports the reasonableness of the fee request here—particularly in light of the result obtained and difficulty of the issues. *See, supra,* pp. 10-12.

The *Johnson* factors support the requested fee recovery by Lead Counsel in this case.

b. Lodestar consideration

Evaluating Lead Counsel's fee request using the lodestar method, which also involves consideration of the *Johnson* factors, serves as a cross check on and further supports the reasonableness of the requested fees. Under that method, one takes the hours of service performed and multiplies it by the reasonable hourly rate of the legal professional. Then using the *Johnson* factors the determination is made whether to upwardly or downwardly adjust the lodestar amount.

In this case, legal professionals provided over 18,000 hours of service, at an average hourly rate of $500 per hour—approximately $9,100,000 in fees. Considering the *Johnson* factors, in particular the contingent risk, the skill required, the amount involved and results obtained, the sophisticated nature of the client and its relationship to Lead Counsel, and results in similar cases, the lodestar sum adjusted upward only by a factor of roughly 3.2 further demonstrates the reasonableness of Lead Counsel's 30% fee request. *See In re Enron*, 586 F.Supp.2d at 752 (in considering multipliers from comparable cases, the court noted that "[m]ultiples from one to four are frequently awarded in common fund cases when the lodestar method is applied" and "a survey of multipliers … found 'a range of 0.6–19.6, with most … from 1.0 and 4.0' ").

CONCLUSION

In my opinion, the 30% fee requested by Lead Counsel in this matter is reasonable, and I believe such a fee would be proper for the court to approve.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, opinion and belief.

Dated: October 25, 2017.

Craig T. Enoch

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 25, 2017.

s/ Robert R. Henssler Jr.

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