Calix v. Apple Inc. Doc. 1 Att. 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: EDUCATIONAL TESTING SERVICE PRAXIS PRINCIPLES OF LEARNING AND TEACHING: GRADES 7 - 12 LITIGATION	**MDL NO. 1643** **SECTION: R(5)** **JUDGE VANCE** **MAG. JUDGE CHASEZ**

THIS DOCUMENT RELATES TO ALL CASES

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MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND APPROVAL OF INCENTIVE AWARD TO CLASS REPRESENTATIVES

MAY IT PLEASE THE COURT:

Class Counsel submit this memorandum to discuss the means by which attorneys' fees should be set in this common fund case, the appropriate amount of those fees, how the awarded fees should be divided, and an award of costs.[1] Class Counsel respectfully submit that the attorneys' fees awarded in this case should be calculated based on the "percentage of the fund," rather than the "lodestar," method and that a 40% attorneys' fees award is appropriate. These attorneys' fees would be used to satisfy all attorneys' fees in this case and would be divided equitably between counsel who preformed work that benefitted the class and those attorneys who only represented individual clients but who are nevertheless entitled to fees for the representation of those individual clients. That equitable division can be accomplished by agreement of counsel after Your Honor makes the

[1] Class Counsel will not address in this memorandum the 7% reserve for Settlement Administrative Costs recommended by the Special Master in his Report and Recommendation to the Court as there should be no dispute as to the necessity for that reserve.

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appropriate award of attorneys' fees.[2] Finally, costs incurred to bring this matter to fruition are properly reimbursed from the Settlement Fund.

I. Factual Background.

Educational Testing Service (ETS) is the world's largest private educational testing organization. ETS administers the Praxis Principles of Learning and Teaching Grades 7-12 (Praxis) examination. Nineteen states require a passing score on the Praxis for certification as a teacher.[3] The Praxis is also relevant to colleges and universities, a number of professional associations and organizations, and employers as a measure of teaching credentials. The Praxis is designed to assess a beginning teacher's knowledge of a variety of material relevant to teaching students in grades 7-12. ETS designed, administered, conducted and scored the Praxis.

For nine separate administrations of the Praxis, ETS admits that it improperly scored the examinations and that the scoring errors went undetected for a period of sixteen months. Only after one of ETS's 19 client states questioned ETS's scoring results did ETS even begin an investigation. Although ETS almost immediately noted the lower scores, it incorrectly assumed until its later investigation that the test-takers during that period were simply not as bright as those who had taken the Praxis prior to January 2003. Upon investigation, however, ETS discovered that its assumption was statistically impossible and in July 2004 publicly announced its scoring error.

According to ETS, during the sixteen month period, approximately 27,000 test-takers took

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[2] Such agreements are typical and have specifically been approved by the United States Fifth Circuit Court of Appeals, Longden v. Sunderman, 979 F.2d. 1095, 1101(5th Cir. 1992). Should agreement be impossible, the parties could petition the Special Master and the Court for resolution.

[3] Although 19 states require a passing score on the Praxis for teacher certification, the Praxis was administered to test-takers in all 50 states, the District of Columbia and some Canadian provinces.

the Praxis and all received grades lower than they should have received had it graded the tests correctly. Of these approximate 27,000 test-takers, 4,070 persons who took the test were informed by ETS that they failed the Praxis, despite the fact they would have passed the test had it been graded accurately. In July 2004, ETS notified each of the 4,070 persons who falsely failed the Praxis (the "False Failures") of the scoring error and apologized for the error. ETS further refunded the testing fees paid by all of the False Failures for examinations taken after the falsely failed examinations. Of the remaining 23,000 test-takers who were not False Failures but who received lower scores than actually earned, ETS internally re-scored the examinations but did not notify the examinees of its error.

Based upon data furnished by ETS, approximately 95% of the False Failures reside in ETS's 19 client states. Of these 19 states, approximately 75% of the False Failures reside in 7 states. The breakdown of the 7 states with the highest number of False Failures is, as follows:

1. Ohio-1,231;
2. Pennsylvania-562;
3. Louisiana-486;
4. Tennessee-308;
5. South Carolina-150;
6. Kentucky-150; and
7. Nevada-119.

II. Procedural History.

As a consequence of ETS's actions, Plaintiffs throughout the country filed suit against ETS. Those actions were transferred and consolidated by the Judicial Panel on Multidistrict Litigation for pretrial proceedings to this Court.

This Court appointed Dawn M. Barrios as Plaintiffs' Lead Counsel and Richard J. Arsenault as Plaintiffs' Liaison Counsel. By Order dated February 14, 2005, the Court appointed a Plaintiffs'

Steering Committee of seven attorneys, including Lead and Liaison Counsel, and subsequently set various deadlines for filing by Plaintiffs of an Administrative Master Complaint (AMC) and a Motion to Dismiss by Defendant, Educational Testing Service ("ETS").

On March 10, 2005, Plaintiffs filed their Administrative Master Complaint (AMC), which laid out all of the factual allegations and causes of action common to the consolidated actions.

Plaintiffs' claims against ETS sound in breach of contract, negligence, and negligent misrepresentation. Plaintiffs also asserted a claim under §2 of the Sherman Act alleging abuse of ETS's monopoly power in the market for Praxis testing. Rather than merging all of the cases into a single action, the AMC is strictly an administrative device for the convenience of the Court and parties, designed to aid efficiency and economy in handling pretrial issues within the jurisdiction of the MDL Court.

ETS admitted that it breached the contract with its test-takers, which contract consists of the non-negotiable test application form required by ETS to be filled out by each prospective test-taker. Despite this admission, ETS denied that its breach caused any damage and further claimed that, as a matter of law, Plaintiffs had no viable claims for negligence, negligent misrepresentation or for violation of the Sherman Act.

On April 11, 2005, ETS filed a Partial Motion to Dismiss all of Plaintiffs' claims, except those arising under breach of contract, and further sought to limit even Plaintiffs' breach of contract claims to economic damages only. ETS also sought to dismiss all of Plaintiffs' claims for punitive damages. Plaintiffs filed a lengthy opposition to ETS's Motion, citing substantial authority for the recovery of both tort and contract damages under the laws of all states at issue and further allowing for the recovery of non-economic damages even under contract as a consequence of the significant

mental and emotional distress inflicted upon the Plaintiffs.

On June 2, 2005, the Court heard oral argument on ETS's Motion to Dismiss. During the course of the argument, the Court noted that it was unclear as to the law to apply to Motion and requested that choice of law memoranda be filed by the parties. On June 24, 2005, ETS submitted its Choice of Law Memorandum and on July 18, 2005, Plaintiffs submitted their memorandum.

Contemporaneous with this work, the parties engaged in extensive negotiation about the Case Management and Protective Orders. The parties briefed their respective positions on the number of depositions that should be allowed as well as who could be deposed. The parties even battled over the non-disclosure of information to certain persons and entities ETS deemed to be adverse to its interests. In addition, ETS propounded extensive discovery to named plaintiffs and the PSC worked to ensure compliance of those plaintiffs' discovery obligations. Likewise, plaintiffs fashioned and propounded extensive discovery to ETS. Those discovery requests netted over 60,000 pages of documents. All members of the PSC met in New Orleans to review the documents — page by page — and to catalog and organize same. Further, numerous meetings with experts were held throughout this litigation.

III. Mediation and Settlement Discussions.

Although the parties had engaged in informal settlement discussions from the beginning of the litigation up to the hearing on the Motion to Dismiss,[4] comments from the Court at the hearing on the Motion indicated that it might be in the best interests of all parties to explore the possibility

[4] The parties had either in-person or telephonic settlement discussions on October 11, 2004, November 19, 2004, December 10, 2004, and December 17, 2004 and throughout the first 5 months of 2005.

of settlement while the Motion to Dismiss was under submission.[5] Accordingly, the parties continued with their discussions in several face-to-face and telephonic settlement conferences in June and July 2005.

With the Motion to Dismiss still under advisement and settlement negotiations slowly progressing, Hurricane Katrina hit New Orleans on August 29, 2005 and essentially all matters came to a halt through September 2005. In early October 2005, communication was then re-established with ETS and the parties agreed to mediate the dispute with John Perry of Baton Rouge, Louisiana, acting as mediator.

After receiving prior unanimous approval of a settlement threshold from the Plaintiffs' Steering Committee, a mediation was held on October 29, 2005 in Atlanta, Georgia. At the end of a long day, an agreement in principle was reached between Plaintiffs and ETS to settle the matter through the payment by ETS of the sum of $11.1 million and ETS's agreement to provide a correct score report valued at $35 to all 23,000 non-False Failure test-takers who requested such a score report. To Class Counsel's knowledge, this is the largest settlement ever agreed upon in a testing claim.

IV. Settlement Implementation.

Having a defendant agree in principle to a number is only the first step in a class action settlement. Many say that the work really begins at that point.

The settlement was incorporated into a Memorandum of Understanding executed on

[5] Very few courts have been called upon to analyze the laws of multiple states to determine the availability of economic, non-economic and punitive damages in a mixed breach of contract/tort context. At best, the law as to entitlement to non-economic and punitive damages was unclear and Plaintiffs ran the substantial risk of having their non-economic and punitive damages claims dismissed. In addition, Plaintiffs were concerned that with an admission of liability by ETS for breach of contract, the predominance of individual over common issues might defeat class certification and require costly and time-consuming individual trials in both the MDL and transferor courts.

December 20, 2005. Class Counsel began the arduous task of drafting a comprehensive Settlement Agreement which was submitted to the Court via a Motion for Preliminary Approval of Settlement and Class Certification, which Motion was heard by the Court on February 22, 2006. Prior to the lengthy Preliminary Approval hearing, Class Counsel performed the following tasks in connection with the settlement:

1. Contracted with a Notice Administrator, Hilsoft Notifications, for preparation of a notice plan and assisted with the preparation of a Summary Notice and Detailed Notice to the Class Members;

2. Contracted with a Claims Administrator, Poorman-Douglas Corporation, to print and mail the notice and track inquiries, communications and opt-outs, after soliciting two bids;

3. Contacted, communicated with and secured the consent of Patrick Juneau to act as a Special Master;

4. Contacted, communicated with and secured the consent of Bourgeois, Bennett, CPAs, to act as the Court Appointed Disbursing Agent;

5. Contacted, communicated with and secured the consent of Hibernia National Bank, now Capital One, to act as Escrow Agent and assisted in preparation of an Escrow Agreement;

6. Prepared an extensive Memorandum in Support of the Motion for Preliminary Approval of Settlement and Class Certification, as well as all settlement documents;

7. Prepared three different Claim Forms, as well as instruction sheets for Class Members to follow in submitting Claim Forms;

8. Prepared an extensive order preliminarily approving the settlement and certifying the class;

9. Attended a conference with the Court prior to the Preliminary Approval hearing wherein the Court requested changes to various documents and an explanation at the Preliminary Approval hearing as to various aspects of the settlement; and

10. Submitted Affidavits of Class Counsel and Class Representatives and met with the Special Master, CADA and Notice Administrator to prepare them for their testimony

at the Preliminary Approval hearing.

Based upon the submissions to the Court, the argument of counsel and the testimony of the witnesses at the February 22, 2006 hearing, the Court entered an Order on March 13, 2006 preliminarily approving the settlement and an Amended Order and Reasons Certifying Settlement Class and Appointing Class Counsel on that same date.

Shortly after the entry of these Orders, implementation of the Notice Plan began with the mailing of the Notice to all Class Members, the publication of Notice to various educational institutions and organizations, and the establishment of a Court authorized website. Although official notice of the settlement was disseminated to in excess of 27,000 Class Members, by the end of the June 3, 2006 opt-out period, only 8 Class Members had submitted opt-out requests. Three of those Class Members have now rescinded their requests, for a total of 5 opt-outs, a remarkable .12% of the False Failures, and .0185% of all test-takers.

Class Counsel performed extensive work on behalf of the class and obtained a benefit for the class as a result. Class Counsel and all other attorneys representing Plaintiffs are entitled to an award of attorneys' fees and costs from the fund established.

V. Attorneys Fee Analysis

A. *Common Benefit Doctrine*

Under the "common benefit" doctrine, first articulated by the Supreme Court over a century ago, counsel whose efforts obtain, protect, preserve or make available substantial benefits to a class of persons are entitled to attorney's fees based upon the worth of the benefit to the class.[6] Generally,

[6] Newberg on Class Actions, §14.01 (3rd ed. 1992); Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1881). See also: "Common Fund and Substantial Benefit" Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center 1995), pp. 49-85. The history and justification for the practice of awarding fees from common funds are examined in detail in Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell Law Review 401 (1991).

in Louisiana, the right of an attorney to remuneration for services is dependent upon a contact, either express or implied.[7] An exception to this rule is recognized, however, in those instances where an attorney, alone and at his own expense, has successfully maintained an action for the preservation, protection, increase, or creation of a fund in which persons other than his own clients may share or from which they may benefit.[8] In such instances, equity requires that all who benefit must pay the costs and expenses incident thereto, including attorney's fees[9]. The exception allowing for the award of attorneys' fees even in the absence of a contract has been termed the "fund doctrine" or "common fund doctrine." Common fund cases are predominately, though not exclusively, class actions.

A variant on the traditional common fund case occurs frequently in mass tort litigation – both class actions and large consolidations – where a fund to pay attorneys' fees is created as a part of a settlement and the court must distribute it among the various plaintiffs' attorneys, including class counsel, court designated lead and liaison counsel, and individual plaintiffs' counsel.[10]

The equitable nature of a common benefit award is based on the simple notion that when a class representative does battle on behalf of a group, and achieves a fund that benefits the group and that will be divided among them, all members of the group should share in the costs of producing the benefit. Those costs include an attorneys' fees award. The question then becomes how that award is calculated.

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[7] *Louisiana State Mineral Board v. Abadie*, 164 So.2d 159, 166 (La.App.1st Cir.1964).

[8] *Kirkpatrick v. Young*, 456 So 2d 622, 625 (La.1984); *In re Interstate Trust & Banking Company*, 235 La. at 842, 106 So.2d at 282 (on rehearing); *Abadie*, 164 So.2d at 166.

[9] *Abadie*, 164 So.2d at 166.

[10] Manual for Complex Litigation, Fourth Edition, §22.927 (2004).

B. *Lodestar[11] or Percentage[12]?*

How should the amount of compensation for the common benefit work be determined?

A "lodestar" fee award is computed by multiplying the number of hours expended by the attorneys' hourly rates. The Court then can, in its discretion, adjust the lodestar depending on the respective weight of *Johnson* factors.[13] Often these lodestar issues can take on a life of their own and overshadow the underlying litigation. Given the issues likely to arise in computing a lodestar, courts across the country, both federal and state, are retreating from a lodestar analysis in favor of setting common benefit fees at a percentage of the benefit secured.

Over recent years, virtually no one has defended the use of the lodestar formula in common fund cases. Criticism of the lodestar has been persistent and pervasive, and one 1990 decision described its methodology as "now thoroughly discredited."[14] At a minimum, the views of the Third

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[11] The lodestar method of fee award, which gives rise to the fee based on time, has been roundly criticized by scholars and repudiated by most commentators. *See e.g., Macey & Miller, the Plaintiffs' Attorney Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI.L.REV. 1, 4, 59-61 (1991) (identifying problems associated with applying the lodestar and recognizing the percentage of recovery method as superior); Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Though Class and Derivative Actions*, 86 Col.l. Rev. 669, 691, 724-25 (1986); Miller, *Attorneys' Fees in Class Actions*, (Federal Judicial Center 1980); Coffee, *Rescuing the Private attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42Md. L. Rev. 215 (1983); Court Awarded attorney Fees, Report of the Third Circuit Task Force, Oct. 8, 1985 (Arthur R. Miller, Reporter), 108 F.R.D. 237.

[12] Beginning in 1885 with the Supreme Court's decision in *Central R..R. Co. v. Pettus*, 113 U.S. 116, 127-28 (1885), for over 100 years the overwhelming weight of authority has approved the use of a percentage method in computing fees in common fund cases.

[13] The twelve *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (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 the length of the professional relationship with the client; and, (12) award in similar cases *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d. 714, 717-719 (5th Cir.1974).

[14] *In re Oracle Systems Security Litigation*, 131 F.R.D. 688, 689 (N.D. CAL. 1998).

Circuit Task Force resonated with much of the judiciary when it called the lodestar formula a "cumbersome, enervating and often surrealistic process of preparing and evaluating fee Petitions"[15] Judge Ralph Tyson of the Middle District of Louisiana recently stated that the lodestar calculation, while not "completely discredited," was an "increasingly discredited" method of calculating attorneys' fees in a class action settlement and that the percentage method was the proper means to calculate such attorneys' fees.[16]

The principal objections to the use of the lodestar formula in the common fund context are as follows:

(A) The lodestar methodology wastes judicial time and effectively converts the court into "a public utilities commission, regulating the fees of counsel after the services have been performed, thereby combining the difficulties of rate regulation with the inequities of retrospective rate-setting."[17]

(B) The lodestar methodology creates a risk of inflated billing rates and overstated claims of hours worked, which the court simply cannot monitor effectively;

(C) The lodestar formula exacerbates the conflict between attorney and client and can encourage collusive settlements by enabling the attorney to build up time so that the attorney profits even if the client does not; and

(D) The lodestar formula maximizes unpredictability. Because it supplies what the Oracle Systems court called a "rudderless standard," the lodestar asks plaintiffs' attorneys to undertake multi-year litigation without any clear guidance as to how they will be compensated. Ultimately, everything under it is "up for grabs." Enhancements can

[15] See Court Awarded Attorney Fees, Report of the Third Circuit Task Force (Arthur Miller, Reporter), 108 F.R.D. 237, 258 (1985).

[16] *Survey Communications, Inc. v. Corporate Express, Inc.* 05-CV-40 (M.D.La. April 19, 2006).

[17] *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir 1986).

> be added or subtracted; courts can approve or disapprove billing rates; and allow or disallow attorney and paralegal time. Such uncertainty inherently undercuts the expected value of the action to plaintiffs' attorneys and hence reduces their ability and willingness to engage in sustained litigation with better financed defendants.

In a recent judicial conference, the Third Circuit U.S. Court of Appeals observed:

> The percentage method clearly has a number of advantages, including that it is relatively objective, can be easily administered by the courts, will simplify the fee setting process, and will not place a possible premium on running the hourly meter. It better aligns the financial interests of the client with that of the lawyer. It uses economic based *incentives*, rather than court-imposed, after the fact controls to regulate fees.[18]

Obviously, one of the best reasons for supporting a percentage fee award is to encourage early settlement of cases.[19]

> An award of fees based on an hourly ... rate only encourages plaintiffs' attorneys to prolong litigation in order to 'milk' as much of the fee as possible out of a case. Allowing a percentage fee award allows attorneys involved to concentrate their efforts solely on achieving a high rate of return for their clients and the class, which in turn raises counsel's own fee, instead of devoting their efforts to putting enough hours into the case to generate a sizable fee without concern for the best interests of the class members.[20]

Courts have seemingly recognized the utility of the percentage approach in common fund cases. Judge Davidson of the U.S. District Court for the Northern District of Mississippi explains:

> The majority of circuits apply a "percentage fee" approach in common fund cases such as the one at bar, either exclusively or at the

[18] Conte, Attorney Fee Awards § 2.07 (1993), citing M. Malakoff, Third Circuit Judicial Conference, Update on Third Circuit Fee Task Force Report on Court Awarded Attorney's Fees 10 (Sept. 13, 1991).

[19] See H. Newberg, Attorney Fee Awards § 2.07, 48-51 (1986).

[20] Conte, Attorney Fee Awards § 2.07 (1993), citing M. Malakoff, Third Circuit Judicial Conference, Update on Third Circuit Fee Task Force Report on Court Awarded Attorney's Fees 10 (Sept. 13, 1991).

discretion of the district court. E.g., *In re Thirteen Appeals*, 54 F.3d 295, 308 (1st Cir. 1995); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768, 821 (3rd Cir. 1995); *Swedish Hosp. Corp. v. Shalala*, 303 U.S. App. D.C. 94, 1 F.3d 1261, 1268 (D.C. Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974-75 (7th Cir. 1991); *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F. 2d 268, 271 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988). The United States Supreme Court has also noted that in a common fund case, application of a "percentage fee" approach is the proper method in awarding attorneys' fees. *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 79 L. Ed. 2d 891, 903 n.16, 104 S.Ct. 1541 (1984) ("Unlike the calculation of attorneys' fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed upon the class ...."). Indeed, every "common fund" case to come before the Supreme Court utilized a percentage approach, and when given the opportunity, the Court declined to adopt the lodestar method in the common fund context. E.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); see also *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127-28, 5 S. Ct. 387, 393, 28 L. Ed. 915 (1885); *Trustees v. Greenough*, 105 U. S. (15 Otto) 527, 26 L. Ed. 1157 (1881).[21]

Numerous district courts within the Fifth Circuit have also employed a percentage fee approach and the practice in the Fifth Circuit is not significantly different than the national pattern.[22] Actual fees awarded in the Fifth Circuit seem closely comparable in percentage terms to the fees

[21] *In re: Catfish*, 939 F.Supp. 493 (N.D.Miss. 1996).

[22] See, e.g. *In the Matter of the Complaint of Ingram Barge Company*, Civil Action No. 97.226 "A" (M.D.La.) approximately 40% fee of $40.5 million settlement. *In re: Medical Care America Sec. Lit.*, Civil Action No. 3:92CV 1996-J (N.D. Tex. April 24, 1996) (Order and Final Judgment); *In re Prudential Bache*, 1994 U.S. Dist. LEXIS 4786, 1994 WL 150742, at *5 (E.D. La. April 13, 1994); *In re Shell Oil*, 155 F.R.D. at 573; *TransAmerica Refining Corp., et al v. Dravo Corp., et al*, Civil Action No. H-88-789 (S.D. Tex. May 24, 1992) (Order Granting Joint Petition for Attorneys' Fees and Expenses); *In re Middle South Util. Sec. Litig.*, Civ. A. No. 85-3681, 1991 WL 275769, at *1 (E.D. La. Dec. 1991); *Kleinman v. Harris*, Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 21, 1993); *In re Granada Partnerships Sec. Litig.*, MDL No. 837 (S.D. Tex. Oct. 16, 1992); *In re Lomas Fin. Corp. Sec. Litig.*, Civil Action No. CA-3-89-1962-6 (N.D. Tex. Jan. 28, 1992) *Rywell v. Healthvest*, CA3-89-2394-H (N.D. Tex. Dec. 3, 1991); *Teichler v. DSC Communications Corp.*, CA3-85-2005-T (N.D. Tex. Oct. 22, 1990); *Finkel v. Docutel/Olivetta Corp.*, CA3-84- (N.D. Tex. Feb. 23, 1990)." *In re Catfish*, 939 F. Supp. at 500.

awarded in the majority of Circuits that have accepted the percentage approach.[23]

When Judge Richard Haik considered the attorney fee issue in the *In Re Combustion Inc.* litigation, he concluded that a percentage fee award within the *Johnson* framework was appropriate and reasoned as follows:

> Even though it is apparent that the *Johnson* factors must be addressed to ensure that the resulting fee is reasonable, not every factor need be necessarily considered. If a district court has articulated and clearly utilized the *Johnson* framework as the basis of its analysis, "we will not require the trial court's findings to be so excruciatingly explicit in this area of minutiae that decisions on fee awards consume more paper than did the cases from which they arose." *Louisiana Power & Light v. Kellstrom*, 50 F.3d 319, 331 (5th Cir. 1990).
>
> It is the opinion of this Court that in common fund cases such as the instant case, Fifth Circuit precedent requires a district court only to justify its award of attorneys' fees within the framework of the *Johnson* factors regardless of whether the award is determined by the lodestar or percentage of fund method. Further, a district court may exercise its discretion as to whether the fee evaluation more reasonably fits into a percentage of funds or into a lodestar calculation as long as either selection is supported by *Johnson* factor analysis.
>
> The review of district court opinions in this circuit, as was done in *In re Prudential-Bache Energy Income Part. Securities Litigation*, 1994 U. S. Dist. LEXIS 6621, 1994 WL 150742 (E.D.La. 1994), indicates that the district courts within this circuit utilize the percentage of the fund method. See also *In re Catfish Litigation*, 939 F. Supp. 493 (N.D.MS 1996) (citing problems with the application of the lodestar method due to the circumstances of the case, so adopting the percentage of fund validated with the *Johnson* factors).[24]

The following is an illustrative list of class actions in federal courts in Louisiana and throughout the Fifth Circuit where the percentage method (alone, or with a lodestar check) was used:

- *In re Eunice Trail Derailment*, Civil Action Number 00-1267 (W.D.La.);
- *In re New Iberia Train Derailment Litigation*, Civil Action Number 6:00CV1097

[23] 186 F.R.D. 403, 444 (S.D. Tex. May 12, 1999).

[24] 968 F.Supp. 1116, 1135 (W.D.La. 1997).

(W.D.La.);

- *Accounting Outsourcing v. Kappa*, 03-CV-169 (M.D.La.);
- *Survey Communications v. Masterman's*, 04-CV-829 (M.D.La.);
- *Accounting Outsourcing v. Bridge 21*, 03-CV-824 (M.D.La.);
- *Dominion Motorcars v. Satellink*, 03-CV-173 (M.D.La.);
- *Party Paradise v. Minuteman*, 05-CV-120 (M.D.La.);
- *Survey Communications, Inc. v. Corporate Express, Inc.* 05-CV-40 (M.D.La.);
- *Accounting Outsourcing, LLC v. Monroe Systems For Business* , 03-CV-755 (M.D.La.);
- *In the matter of the Complaint of Ingram Barge Company* Civil Action No. 97-226 "A" (M.D.LA.);
- *In re Combustion, Inc.*, 968 F. Supp. 1116, (W.D.LA. 1997);
- *In re Catfish Antitrust Litigation*, 939 F. Supp. 493, 500 (N.D. Miss. 1996);
- *Orzel v Gilliam*, Civil Action No. 3:90 CV-0044-G (N.D. Tex. May 16, 1995) (Judge Fish);
- *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, No. 888, 1994 WL 202394, at *1 (E.D. La. May 18, 1994) (*"Prudential I"*);
- *Steiner v Phillips*, Civil Action No. 3:89-1387-X (N.D. Tex. March 14, 1994) (Judge Kendall);
- *Belman v Warrington*, Civil Action No. H-91-3767 (S.D. Tex. Nov 16, 1993);
- *In re Intellicall Securities Litigation*, Civil Action No. 3:91-CV-0730-P (N.D. Tex. September 22, 1993) (Judge Salis);
- Kleinman v Harris, Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 31, 1993);
- *In re First Republic Bank Securities Litigation*, Civil Action No. 3:88-CV-0641-H (N.D. Tex. Feb. 28, 1992 and March 8, 1993) (Judge Sanders);
- *Transamerica Refining Corp. v. Dravo Corp.*, Civil Action No. H-88-789 (S.D. Tex. November 16, 1992) (Judge Black);
- *In re Granada Partnerships Securities Litigation*, MDL No. 837 (S.D. Tex. Oct. 16, 1992);
- *In re Lomas Fin. Corp. Securities Litigation*, Civil Action No. CA-3-89-1962-G (N.D. Tex. Jan. 28, 1992);
- *In re Middle S. Util. Securities Litigation*, 1991 LEXIS 18062 (E.D. La. Dec. 17, 1991);
- *Rywell v Healthvest*, CA-3-89-2394-H (N.D. Tex. Dec. 3, 1991);
- *Longden v Sunderman*, Civil Action No. 3-87-0612-H (N.D. Tex. May 1, 1991) (Judge Sanders), aff'd, 979 F.2d 1095 (5th Cir. 1992);
- *Teichler v DSC Communications Corp.*, CA-3-85-2005-T (N.D. Tex. Oct 22, 1990); and
- *Finkel v Docutel/Olivetti Corp.*, CA-3-84-0566 (N.D. Tex. Feb. 23, 1990.).

In *Longden v Sunderman*,[25] the Fifth Circuit *affirmed* a percentage fee award, noting that the district court had stated its preference for the percentage approach "as a matter of policy."

In *In re Harrah's Entertainment, Inc. Sec. Litig.*,[26] the trial judge noted:

> The Court will apply the percentage fee method in accordance with the request of counsel. The Court does not believe that application of the lodestar method would result in a more reasonable award of fees. Moreover, application of the lodestar method would be unduly burdensome.

If mechanically applied, determining fees based on hours spent invariably leads to an unsatisfactory result in this type litigation. "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance."[27] "A flash of brilliance by a trial lawyer may be worth far more to his clients than hours or days of plodding effort. Few among us would contend that an operation by a gifted surgeon who removes an appendix in fifteen minutes is worth only one sixth of that performed by his marginal colleagues who require an hour and a half for the same operation."[28] As one district judge aptly stated ". . . the lodestar method rewards plodding mediocrity and penalizes expedient success."[29]

An award of the percentage of the fund serves important policy goals in addition to providing access to our legal system for many who would otherwise be unable to finance today's expensive litigation. The nature of the contingency fee system permits greater recovery for successful cases,

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[25] 979 F.2d 1095, 1110, n. 11 (5th Cir. 1992).

[26] 1998 WL 832574 *4 (E.D. La., Nov. 25, 1998).

[27] *Foster v. Boise-Cascade, Inc.*, 577 F.2d 335, at 337, n.1(5th Cir. 1978).

[28] *Id.*

[29] *Shaw v. Toshiba American Information Systems, Inc.*, 91 F.Supp.2d 942, 964 (E.D. TX 2000).

thereby offsetting the losses from unsuccessful ones.

C. *What Is A Reasonable Percentage?*

Lawyers who choose to prosecute complex litigation on behalf of a class must be prepared to marshal resources that are comparable in quality to those that a defendant will bring to bear. Without adequate compensation, the incentive to accept the responsibility and associated risk would be substantially diminished, and the litigation playing field skewed.

The customary contingency fee charged in the type of suits at bar is generally $33^{1/3}$ - 40%, and in some instances, 45%.[30] One Court has opined that contingency fee awards have a usual range between 33 and 50 percent in personal injury litigation.[31]

A 40% fee in this case consistent with fee awards made by other Louisiana Federal District Courts. Judge Polozola awarded a 40% attorney fee in *Pedeaux, et al v. Georgia Gulf Corp., et al*, Civil Action No. 01-0349 (M. D. LA). Judge Parker awarded a 40% fee in *In the Matter of the Complaint of Ingram Barge Company*, Civil Action No. 97.226 "A" (M. D. LA). Judge Haik awarded a 40% fee in *In re Eunice Trail Derailment*, Civil Action Number 00-1267 (W.D.La.). A Louisiana State District Court, likewise, recently awarded 40% in a class action settlement.[32]

Considering the results obtained for the Class Members, as well as the skill and speed with which it was obtained, Class Counsel suggest that a reasonable attorneys' fee is 40% of the Settlement Fund.

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[30] State Bar of Texas, 1995 *Attorney Billing & Compensation Study* (finding average fees ranging from 28% to 45% in the early 1990s).

[31] See *Continental Illinois Securities v. Steinlauf*, 562 F.2d 566 (7th Cir. 1992).

[32] *West, et al v. G & H Seed Co., et al* (27th Judicial District Court, 99-c-4984.A)

D. *The Johnson Factors.*

Class Counsel submit that the fee award herein requested is indeed reasonable and fair in the light of the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which are also tracked in Rule 1.5, Rules of Professional Conduct of the Louisiana State Bar Association.

(a) The time and labor required; the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

Through the end of March 2006, Class Counsel have accumulated in excess of 6,667 hours working on this action on behalf of the class since its inception. Paralegals of Class Counsel have incurred over 900 hours doing work for the class. Class Counsel will submit updated records evidencing the time and labor expended up through the Fairness Hearing. Lead Counsel has regularly submitted the billing records of counsel that evidence work conducted on behalf of the class as a whole, instead of individual clients. These records support the conclusion that plaintiffs' counsel have devoted a large percentage of their available time to the investigation and prosecution of this case on behalf of the more than 27,000 Class Members.

The liability and damages issues presented by this litigation were novel and difficult. This was not "cookie cutter" litigation in which plaintiffs counsel were able to "roll over" a defenseless defendant and "pick up a quick buck." Indeed, just the opposite was the case. Investment of significant time and expenditure of substantial skill were required to navigate a successful conclusion.

Class Counsel engaged the assistance of numerous experts, including psychometricians who are experts in standardized testing. Because of the powerful position that ETS occupies in the area

of standardized testing and the paucity of psychometricians in this country, location and retention of qualified psychometricians who were willing to take positions adverse to ETS was in itself a chore. Because of the hyper-technical issues present in a case dealing with standardized testing, Class Counsel had to spend considerable amounts of time and effort learning the nuances of the standardized testing field and essentially learning a whole new language used by psychometricians.

Despite the admission by ETS that it had incorrectly scored the PRAXIS, Class Counsel had to delve into the specific issues in this case — including how standardized tests are constructed, scored, and reviewed for statistical anomalies to indicate problems with the test — to build and support a negligence claim against ETS for failing to recognize the problem sooner and to ensure that the problem was not more extensive and systemic than ETS was willing to admit. In addition, Class Counsel had to spend extensive time and effort quantifying the economic loss suffered by Class Members. Doing so entailed "boning up" on all aspects of generic and individual causation links and consultation with economic experts. This economic analysis was also done with an eye on class certification and the potential problems these differences in damages may cause at the class certification stage

In addition, ETS made significant arguments, in the form of a Motion to Dismiss, which cut to the heart of many plaintiffs' claims. In particular, ETS argued vociferously that the "economic loss rule" prevented the recovery of any non-economic damages by Class Members. Rebuttal of those arguments required extensive legal research and briefing on each affected state's position on the "economic loss rule" and significant briefing on choice of law issues.

Even ordinarily mundane discovery issues were extensively litigated. The proposed Case Management Order was a product of extended negotiation. Even after extended negotiations, the

parties could not agree on many important issues. The parties had major disagreement about who could be deposed and how many depositions were sufficient. The parties submitted comprehensive legal briefs about ETS' right to depose putative class members and the number of depositions plaintiffs could take of ETS' employees. These procedural and discovery issues required extensive legal research and great skill in communicating plaintiffs' positions on these important issues to the Court.

The novelty and difficulty of the questions involved and the requisite skill to achieve a favorable result in this action are self-evident and supported by the record. Class Counsel have met and performed the duties and responsibilities delegated to it by the Court in a highly capable manner for the best interests of the Class.

(b) Likelihood of preclusion of other employment.

Class Counsel apologize for stating the obvious, but there are only so many hours in a day. Dedication of any time to one case necessarily means that time is not available for dedication to other cases. All counsel are experienced and have substantial opportunities to participate in other litigation throughout the country.

Efforts of Class Counsel in the management of this class action substantially infringed upon, if not altogether curtailed at times, the time and opportunity they would have had available to accept other employment. Class Counsel conduct their practices in firms or associations which do not easily permit the shifting of needed work on other cases. The result is that substantially less time has been available for them to attend to their respective routine practices or participate in other litigation.

(c) The customary fee for similar work in the community.

The customary contingency fee for representation of personal injury plaintiffs in the same area, in much less complex cases than this class action, ranges from 33 1/3% to 50% of the gross award plus costs for cases requiring the institution and prosecution of litigation. Importantly, 40% attorney fees have been recently awarded in class action cases by Louisiana Federal District Courts.[33]

(d) The amount involved and the results obtained.[34]

Class Counsel negotiated an $11.1 million settlement which, on information and belief, represents the largest settlement ever reached in a testing case. Considering the monetary and non-monetary relief obtained and the relatively short time it took to reach an amicable resolution to this complex controversy, the result is spectacular.

(e) Time limitations imposed by the client or the circumstances.

As the Court is well aware, this case has required constant attention by Class Counsel. Often, matters required immediate attention and completion within a very short period of time.

(f) The nature and length of the professional relationship with the client.

While there is no known long-term relationships between Class Counsel and Class Members, the nature of the relationship is a strong one. Class Counsel always looked out for the best interests of the class and all counsel are experienced class action attorneys. The nature of the relationship and the advantages bestowed on class members merits an appropriate award of attorneys' fees.

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[33] *Pedeaux, et al v. Georgia Gulf Corp., et al*, Civil Action No. 01-0349 (M. D. LA); *In the Matter of the Complaint of Ingram Barge Company*, Civil Action No. 97.226 "A" (M. D. LA); *In re Eunice Trail Derailment*, Civil Action Number 00-1267 (W.D.La.).

[34] This *Johnson* factor is generally recognized as "the most critical factor in determining the reasonableness of a fee award." *Shaw*, 91 F.Supp. 2d at 971.

(g) The experience, reputation, and ability of the attorneys.

The Court has been made aware, through its relationship with Class Counsel in the conduct of these proceedings, of their ability, experience and reputation as able litigation counsel, particularly sensitive to the best interests of the Class. For purposes of qualifying for appointment to the PSC, each member of the PSC filed into the record his respective affidavit of qualifications, including references to other class actions in which each has engaged as lead or primary counsel.

(h) Whether the fee is fixed or contingent.

The members of the PSC were appointed by the Court, although most members had undertaken the representation of individual putative Class members, including the Class Representatives, on the basis of contingent fee contracts. Contingent fees, as opposed to fixed fees, are the norm in personal injury practice. However, Rule 23 requires that in a common fund case as this, the Court has the final assessment and approval of the reasonableness of the fee award to the Class Counsel. Again, Class Counsel respectfully suggest the Court should award fees based on the percentage of fund method.

(i) The undesirability of the case.

In this case, ETS is a large economic entity with access to enormous legal resources and talent. This was not a "slam dunk" and required a great amount of investigation and research to determine not only the cause of the problem, but its extent and appropriate remedies.

This case may be considered "undesirable" based on some of the factors discussed above, not the least of which again is the bleak state of class action law in this state and in the United States Fifth Circuit Court of Appeals. In addition to these pressures, this case has consumed a significant portion of the financial resources and careers Class Counsel. Thus, the risk assumed by Class

Counsel in handling the case on a contingency basis is significant. There were real possibilities that the suit would not be successful. No person knew at its inception what result would be obtained. No one knew the number of Class Members that would be involved, nor the time and cost of working the case and preparing it for trial. Nor did Class Counsel have a basis for a reasonable appraisal as to the possible outcome. Class Counsel could not predict whether this case would ever reach trial or, if so, whether it could be tried in a collective format or whether hundreds of individual trials would be required to bring it to a conclusion. In light of these considerations, the risks assumed by Class Counsel were staggering.

(j) Comparable awards in similar cases.

The risks discussed above are of a far cry from those usually assumed by plaintiffs' counsel in the single plaintiff tort action or in a case where a statutory remedy is clearly merited with provisions for fee shifting to solvent defendants. An action of this complex nature is a "make or break" venture for which their compensation should bear a reasonable relationship to the fruits of the venture when compared to the risks undertaken, particularly in the legal atmosphere for plaintiff lawyers in a class action situation. Thus, this action is peculiarly suitable for the assessment of a substantial contingent fee.

E. ***A Lodestar Check Shows The Requested Percentage Fee Is Appropriate.***

Even if this Court were inclined to consider the requested fees in relation to the increasingly discredited lodestar analysis, Your Honor would still be satisfied that the requested fee is reasonable. Class Counsel have accumulated in excess of 6,667 "common benefit" hours on behalf of the class through March 2006. Through the Fairness Hearing, Class Counsel estimate that there will be approximately 7500 hours incurred on behalf of the Class. It is important to note that these hours

are only for "common benefit" work and specifically do not include the many hours spent by lawyers on behalf of their individual clients taking telephone calls, establishing files, answering clients' questions, filling out Claim Forms, and performing the myriad of other duties lawyers perform on behalf of individual clients. Paralegals of Class Counsel have also spent over 900 hours doing work for the class.

Ignoring for purposes of this analysis the many hours incurred by counsel on behalf of their individual clients as well as time incurred by paralegals on behalf of the class, and multiplying only the 7500 hours incurred by Class Counsel by a reasonable $450 hourly rate with a low 1.333 multiplier,[35] demonstrates that the requested 40% fee is actually less than any lodestar fee.

VI. Reimbursement Of Costs Is Appropriate.

Class Counsel financed this litigation through the payment of periodic assessments and out-of-pocket expenditures. Expenditures were made to pay for expert witness fees and a myriad of other expenses inherent in litigation of this scope. The Special Master recommended that 2.5% of the Settlement Fund be reserved to pay for such costs.[36] Such an award is appropriate. The Special Master will review submitted costs and determine whether they were, in fact, expended for the benefit of the class and Class Members.

Class Counsel respectfully submit that an attorneys' fees award of 40% and a cost award of 2.5% of the Fund is reasonable and justified by the record.

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[35] When utilizing the lodestar method, courts typically apply a multiplier of between 1 and 4 to reflect the possibility of no recovery. *Combustion*, 968 F.Supp. at 1133.

[36] In the event residual funds remain in this reserve after all costs have been paid, the Special Master has recommended that the remainder "shall revert to the benefit of the class at the discretion of the Court."

VII. An Incentive Award To Class Representatives Is Appropriate.

In the instant matter, Raffael M. Billet ("Billet"), Kathleen Jones ("Jones"), Paul Perrea ("Perrea"), and Janet Riehle ("Riehle"), Class Members and authorized representatives of the Class, have been engaged in this litigation for over two years. Billet, Jones, Perrea and Riehle have "rendered a public service by contributing to the vitality" of the class. Through their vigilance, they have "conferred a monetary benefit on a large class..."[37] For those reasons, Billet, Jones, Perrea and Riehle are entitled to incentive compensation for serving as class representatives.[38]

The Settlement Agreement provides that the class representatives shall receive incentive awards not to exceed $2,000 in recognition of and compensation for their services to the Class as class representatives. Class Counsel submit that the amount of $2,000 as incentive compensation to the class representatives is reasonable and consistent with like amounts awarded by the district courts in this Circuit. Accordingly, Class Counsel urge that the Court award the Class Representatives the incentive compensation requested.

Respectfully Submitted,

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[37] *In re SmithKline Beckman Corporation Securities Litigation*, 751 F.Supp. 525, 535 (E.D. Pa. 1990) (awarding class representative $5,000.00 from the common fund).

[38] See e.g. *In re Lease Oil Antitrust Litigation*, 186 F.R.D. 403, 449 and n. 69 (S.D. Tex. 1999) (awarding $10,000.00 to class representative who helped "instigate" the action); *Shaw v. Toshiba Information Systems, Inc.*, 91 F.Supp. 942, 973 (S.D. Tex 2000) (awarding $25,000.00 each to two class representatives).

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