

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWELVE**

IN RE KINDER MORGAN, INC.
SHAREHOLDERS LITIGATION

Consol. Case No. 06 C 801

MEMORANDUM DECISION AND ORDER

This class action is before the Court on the request of Lead Plaintiff's Counsel for an award of attorney fees and expenses. A final settlement hearing was on November 12, 2010, at which time the parties were provided with an opportunity to present evidence and oral argument to the Court. At the conclusion of the hearing, the Court took the issues presented under advisement. On November 19, 2010, the Court entered a Journal Entry and Order Approving Settlement and Plan of Allocation, in which it noted that the request for an award of attorney fees and expenses would be addressed in a separate Memorandum Decision and Order. Thus, the Court finds that the amount of attorney fees and expenses to be awarded to Lead Plaintiff's Counsel is now ready for determination.

I. ATTORNEY FEES AND EXPENSES REQUESTED

The settlement approved by the Court on November 19, 2010, created a \$200 million common fund. It has been represented to the Court that this is the largest common fund achieved in a post-merger class action and it is one of the largest settlements in Kansas history. Lead Plaintiff's Counsel have requested that 25% of the common fund, after the deduction of expenses, be awarded to them as attorney fees. In addition, they seek reimbursement of \$1,766,797.39 in expenses. Thus, assuming the Court grants the request for reimbursement of expenses, the amount of attorney fees requested by Lead Plaintiff's Counsel is \$49,555,800.65, plus interest.

In addition to other submissions, Lead Plaintiff's Counsel have presented the Court with the Declaration of Pamela S. Tikellis filed on behalf of Chemicles & Tikellis LLP in Support of Award of Attorney Fees and Expenses; the Declaration of Diane A. Nygaard filed on behalf of the Nygaard Law Firm in Support of Award of Attorneys' Fees and Expenses; the Declaration of Jeffrey D. Light filed on behalf of Robbins, Geller, Rudman & Dowd LLP in Support of Award of Attorneys' Fees and Expenses; the Declaration of John R. Hamilton filed on behalf of Hamilton, Laughlin, Barker, Johnson & Watson in Support of Award of Attorneys' Fees and Expenses; the Declaration of Paul T. Warner filed on behalf of the Warner Law Firm in Support of Award of Attorneys' Fees and Expenses; and, the Declaration of Marc L. Newman filed on behalf of The Miller Law Firm, P.C. in Support of Award of Attorneys' Fees and Expenses.

In addition, Lead Plaintiff's Counsel have retained the Honorable H. Lee Sarokin, a

retired Judge of the United States Court of Appeals for the Third Circuit and the former Chair of the Third Circuit Task Force on Court Awarded Attorney Fees, as an expert witness. Judge Sarokin has opined “that the requested fee of 25% is fair and reasonable in view of the outstanding results achieved for the Class, the substantial risks undertaken, the exhaustive efforts of counsel, the contingent nature of the representation, and attorneys’ fees awarded by courts in other class action settlements.” Nevertheless, Judge Sarokin recognizes that “[c]alculation of attorneys’ fees is not a precise mathematical formula that may be applied uniformly in each case.” Furthermore, he recognizes that “the trial judge is in the best position to make that determination. . . .”

As to be expected in cases such as this, the Defendants have stood silent on the request for an award of attorney fees and expenses by Lead Plaintiff’s Counsel. On October 26, 2010, Mario Lemieux of Pittsburgh, Pennsylvania, filed an objection to the request for attorney fees by Lead Plaintiff’s Counsel. In addition, Ernest Browne, Jr. of Beaumont, Texas, filed a similar objection to the request for attorney fees by Lead Plaintiff’s Counsel on October 29, 2010. However, on November 2, 2010, the Court struck Mr. Browne’s objection from the record because it was filed after the deadline for the filing of objections, and no request for an extension of the deadline had been submitted. Subsequently, on November 9, 2010, Mr. Lemieux voluntarily withdrew his objection. Thus, there are currently no objections to the amount of attorney fees pending before the Court.

II. FINDINGS OF FACT

The facts of this class action are set forth in detail in the Findings of Fact section of

the Journal Entry and Order Approving Settlement and Plan of Allocation. As such, the Court incorporates the Findings of Fact set forth in the Journal Entry and Order Approving Settlement and Plan of Allocation herein by reference. The Court, however, will refer to the material facts as necessary in the Legal Analysis and Conclusions section of this Memorandum Decision and Order.

III. LEGAL ANALYSIS AND CONCLUSIONS

K.S.A. 60-223(h) provides that “[i]n a certified class action, the court may award *reasonable* attorney’s fees. . . .” (Emphasis added.) “Even where there has been no objection to the amount of attorney fees requested, it is the responsibility of the court to determine the award to assure that the amount awarded is reasonable.” *Gigot v. Cities Service Oil Company*, 241 Kan. 304, 315, 737 P.2d 18 (1987), quoting *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 224, 679 P.2d 1159 (1984), *aff’d in part, rev’d in part*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). “Absent objectors . . . the responsibility for looking out for the class’s interest devolves on the court. . . .” Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics 1453, 1468 (2005).

In considering an award of reasonable attorney fees, “[t]he judge should act as a fiduciary for those who are supposed to benefit from the fund obtained, since typically no one else is available to perform that function.” Klement and Neeman, *Incentive Structures for Class Action Lawyers* 6, www.law.harvard.edu/programs/onlin_center/ (June 2001). As

stated in the Report of the Third Circuit Task Force on Court Awarded Attorney Fees, there is a “need for the judge to act as a fiduciary for the beneficiaries (who are paying the fee), particularly in the class action situation, because few, if any, of the action’s beneficiaries actually are before the court at the time the fees are set.” Report of the Third Circuit Task Force, 108 F.R.D. 237, 251 (1986). See also *In re AT&T Corp. Securities Litigation*, 455 F.3d 160, 175 (3d Cir. 2006). “In these situations, the plaintiffs’ attorney’s role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients’ benefit.” Report of the Third Circuit Task Force, 108 F.R.D. at 255.

Once a settlement has been reached in a class action involving a common fund, “[t]he perspective of the judge also changes because the court now must monitor the disbursement of the fund and act as a fiduciary for those who are supposed to benefit from it, since typically no one else is available to perform that function – the defendant has no interest in how the fund is distributed and the plaintiff class members rarely become involved.” *Id.* Although attorneys should be reasonably compensated for their efforts in creating a common fund, judges must keep in mind that the fees and expenses awarded to an attorney representing a class reduces the fund available for distribution to the members of the class. As such, in the present action, it is important to recognize that each percentage point awarded in attorney fees to Lead Plaintiff’s Counsel will reduce the common fund available to the Class Members by more than \$1.98 million. Thus, it is not difficult to see that there is a “natural conflict that arises between lawyers and class members [which] necessarily draws the judge into the role of regulating and awarding attorney fees.” *Manual for Complex*

Litigation (Fourth) 14.0 (2010).

A. Lodestar Method v. Percentage Method

Over the years, legal scholars have debated the best way to determine a reasonable award of attorney fees in a common fund case. Historically, the two (2) primary methods used by courts in determining a reasonable award of attorney fees in common fund cases are the lodestar method and the percentage of the fund method. “The lodestar method involves the consideration of the reasonable hours expended by the attorneys multiplied by a reasonable rate (the ‘lodestar’), but also involves ‘considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the results obtained.’” *Bruner v. Sprint/United Management Co.*, 2009 WL 2058762, at *3, fn. 3 (D. Kan. 2009), quoting *Strebel v. Milton Wagstaff Motor Co.*, 1995 WL 20265, at *3 (10th Cir. 1995). Under the percentage of the fund method, a court sets aside a percentage of the common fund to be used for attorney fees. See *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

It is important to note that legitimate arguments can be made in favor or against both the lodestar method and the percentage of the fund method. For example, it has been argued that “the lodestar method is difficult to apply, time-consuming to administer, inconsistent in results, and capable of manipulation.” *Manual for Complex Litigation (Fourth)* 14.121. On the other hand, the percentage of the fund method “has been criticized as arbitrary, especially ‘when applied by courts in an automatic fashion.’” *Id.* The reality, of course, is that neither method is perfect, and there is no scientific formula that a court can apply in determining the

reasonableness of attorney fees in a common fund case. Thus, as explained below, the Kansas Supreme Court has encouraged trial courts to look to both methods in attempting to determine a reasonable attorney fee award in a common fund case. *Gigot*, 241 Kan. at 320.

Although some courts use 25% of a common fund as a “benchmark” in determining a reasonable attorney fee award (*Manual for Complex Litigation (Fourth)* 14.121, citing *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989)), “in ‘mega-cases’ in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate.” *Manual for Complex Litigation (Fourth)* 14.121, citing *In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 148 F.3d 283, 339-40 (3d Cir. 1998). As noted in the *Manual for Complex Litigation (Fourth)*, the *Prudential* decision included a “survey of fee awards in class actions with recoveries exceeding \$100 million [that] found fee percentages ranging from 4.1% to 17.92%.” *Id.*, citing *In re Prudential Ins. Co.*, 148 F.3d at 339. See also *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 405 (D.Conn. 2009) (a survey of 26 cases that resulted in common funds between \$300 million and \$7.2 billion found fee percentages to range from 1.73% to 28%). Similarly, in reviewing 50 class actions involving common funds between \$100 million and \$300 million, this Court finds fee percentages ranging from a low of 3.96% to a high of 36%. See *Exhibit A*, attached hereto and incorporated herein by reference.

Certainly, the percentage method is an easy way for trial courts to determine attorney fees in common fund cases. However, as recognized in the *Manual for Complex Litigation*

(*Fourth*), “[a]ny single rate . . . is arbitrary and cannot capture variations in class actions’ characteristics.” *Manual for Complex Litigation (Fourth)* 14.121. The problem is that applying a fixed percentage without taking into account such things as the size of the settlement and the hours worked, “*will drastically overcompensate lawyers in some cases and drastically undercompensate them in others.*” (Emphasis in original.) *Matter of Superior Beverage/Glass Container*, 133 F.R.D. 119, 124 (N.D. Ill. 1990). “The point is that ‘percentage’ is a relational concept. Percentage of *what*? Fifty percent is neither a lot nor a little, until one knows what the underlying whole is. Half of one cookie isn’t much. Half of a full cookie jar may well be a lot.” (Emphasis in original.) 133 F.R.D. at 125.

B. Cross-check of Lodestar and Percentage Methods

In an attempt to address this problem, “[a] number of courts favor the lodestar as a backup or cross-check on the percentage method when fees might be excessive.” *Manual for Complex Litigation (Fourth)* 14.121. Although there was “a shift to the percentage method” following the issuance of the Report of the Third Circuit Task Force on Court Awarded Attorney Fees in 1985, there has been “a significant rise in the use of the lodestar cross-check” since 1995. Walker & Horwich, “*Reasonable Percentages*” in *Common Fund Cases*, 18 *Geo. J. Legal Ethics* at 1461. As Professor William B. Rubenstein of Harvard Law School recently wrote: “Without a lodestar cross-check, a straight percentage award has no measuring stick by which to assess whether it might be a ‘windfall’ to counsel. . . .” Rubenstein, *The Puzzling Persistence of the “Mega-Fund” Concept*, *Class Action Attorney Fee Digest* 39, 43 (February 2010). Thus, although the procedure of cross-checking the

lodestar method against the percentage method is more time consuming for trial courts, “committing modest additional judicial resources to the fee-setting problem – something which routinely concerns the allocation of millions of dollars between class counsel and their clients – seems to be time well spent.” Walker & Horwich, “*Reasonable Percentages*” in *Common Fund Cases*, 18 Geo. J. Legal Ethics at 1464.

C. The Kansas Approach

In *Shutts v. Phillips Petroleum Co.*, the Kansas Supreme Court recognized a number of factors that should be considered in determining the size of an attorney fee award in a class action. 235 Kan. at 223, citing 7A Wright & Miller, *Federal Practice and Procedure: Civil* 1803, pp. 289-90. Subsequently, in *Gigot v. Cities Service Oil Company*, which affirmed an award of attorney fees equal to 18% of a \$8 million common fund, the Kansas Supreme Court held:

“In determining the amount of attorney fees to be awarded in a class action, the trial court must hold an evidentiary hearing so that it has before it sufficient information to make a fair and adequate fee award. Factors which should be considered by the trial court in determining the size of attorney fees in a class action include: (1) The number of hours spent on the case by the various attorneys and the manner in which they were spent; (2) the reasonable hourly rate for each attorney; (3) the contingent nature of success; (4) the extent, if any, to which the quality of an attorney’s work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled; (5) the amount involved in the class action; and (6) the benefit produced by the lawsuit. Following *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, Syl ¶ 14, 679 P.2d 1159 (1984).”

241 Kan. at Syl. 2.

Rather than abandoning the lodestar method in the *Gigot* decision, the Kansas Supreme Court called for “an additional check on the amount of attorney fees awarded by applying the lodestar approach and then determining whether the award represents a reasonable percentage of the common fund recovered.” 241 Kan. at 318-19. Specifically, the Kansas Supreme Court concluded:

The better policy would be for the trial court to perform a lodestar analysis in order that the fee award would bear some relationship to the time expended by the attorneys. The trial court would then have the discretion to modify the lodestar amount based on the other *Shutts* factors. To then view the fee award as a percentage of the common fund is an additional check in determining if it is reasonable.

241 Kan. at 320.

The *Gigot* decision continues to serve as precedential authority in Kansas. See *Robinson v. City of Wichita Employees’ Retirement Board of Trustees*, ___ Kan. ___, 241 P.3d 15, 29 (2010). As such, this Court is required to follow the procedure set forth in *Gigot* for determination of a reasonable attorney fee award in the present action. See *Noone v. Chalet of Wichita, L.L.C.*, 32 Kan. App. 2d. 1230, 1236, 96 P.3d 674 (2004) (“We are duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position.”). Furthermore, this Court has no indication that the Kansas Supreme Court would retreat from *Gigot* because the procedure set forth in the decision is consistent with the ethical and fiduciary obligations that courts owe to the members of a class. See Walker & Horwich, “*Reasonable Fees*” in *Common Fund Cases*, 18 Geo. J. Legal Ethics at 1454.

In addition to the *Shutts* factors, the Court believes it is also appropriate to look to the factors set forth in Rule 1.5(a) of the Kansas Rules of Professional Conduct (“KRPC”) in determining a reasonable fee award in this action. See *Ortiz v. Biscanin*, 34 Kan. App. 2d 445, Syl. 17, 122 P.3d 365 (2004) (“In deciding the reasonableness of attorney fees, the eight factors set forth in Rule 1.5(a) of the Kansas Rules of Professional Conduct should be considered.”) It is important to note that the *Shutts* factors discussed in the *Gigot* decision are very similar to the factors under KRPC 1.5(a). Likewise, the KRPC 1.5(a) factors are very similar to the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which are often used by federal courts in determining a reasonable fee award in class actions.

D. Application of Lodestar Method to Present Action

The calculation of a lodestar “need entail neither mathematical precision nor bean-counting.” *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306 (3d Cir. 2005). Moreover, a court performing a lodestar calculation “need not scrutinize each time entry; reliance on representations by class counsel as to total hours may be sufficient.” Walker & Horwich, “*Reasonable Fees*” in *Common Fund Cases*, 18 Geo. J. Legal Ethics at 1463. Thus, because the Declarations in the present action, which were filed by counsel under penalty of perjury and subject to K.S.A. 60-211, contain itemizations of the timekeepers, the hours worked by each timekeeper, the hourly rate billed by each timekeeper, and the lodestar for each timekeeper, the Court has sufficient information from which to determine a lodestar.

A review of the Declarations submitted by Lead Plaintiff’s Counsel reflect that the

various partners, associates, paralegals, law clerks, investigators and others have billed 22,177.71 hours in this action since May 2006. In addition, the Declarations submitted by Lead Plaintiff's Counsel have set forth the "current rates" for each timekeeper who has worked on this class action. Therefore, applying the hours billed to the hourly rates, the Court concludes that the lodestar in the present action is \$11,164,735.50.

E. Application of *Shutts* Factors

1. Number of Hours and Manner in Which Spent

As indicated above, Lead Plaintiff's Counsel have submitted Declarations stating that various partners, associates, paralegals, law clerks, investigators and others have billed 22,177.71 hours working on this class action. Although it is likely that there has been some duplication of effort over the years this action has been pending, this is understandable due to the fact the parties were litigating in both Kansas and Texas.

2. Reasonable Hourly Rate for Each Attorney

The lodestar of \$11,164,735.50 represents an average rate of \$503.42 per hour for every partner, associate, law clerk, paralegal, investigator and other persons who rendered professional services in this class action. The rates billed for partners at the law firms of Chimicles & Tikellis, LLP, Robin Rudman Geller & Dowd, and The Nygaard Law Firm ranged from \$510 to \$850 an hour. The associates at these law firms billed at rates ranging from \$240 to \$495 an hour. Moreover, the law clerks at these firms billed at rates ranging from \$190 to \$275 an hour, while the paralegals billed at rates ranging from \$175 to \$295 an hour.

The hourly rates charged by Lead Plaintiff's Counsel and their legal team are generally higher than the reasonable hourly fees customarily charged in this locality. However, the Court recognizes that this is a national class action and that most of the legal services rendered in this case were performed outside of Kansas. A review of the record in this case reveals that legal services were performed in California, Colorado, Delaware, New York, Texas and in other localities in which the standard hourly rates are significantly higher than those in Kansas. Thus, under the unique circumstances presented in this class action, the Court concludes that the hourly rates billed under the lodestar approach were reasonable.

3. Contingent Nature of Success

Lead Plaintiff's Counsel have worked diligently on this class action on a contingency fee basis since May 2006. Over the past 4½ years, the legal team assembled by Lead Plaintiff's Counsel has invested a substantial amount of time and money in this litigation without any guarantee of obtaining a settlement, prevailing at trial, receiving a fee or having their expenses reimbursed. Although it is impossible to know with certainty what the outcome of this action would have been had a settlement not been reached by the parties, it is certainly possible that the Defendants may have prevailed at the summary judgment stage or at trial. If this had occurred, there would have been no recovery for the Class Members and no compensation for Lead Plaintiff's Counsel.

4. Quality of Professional Services Rendered

Since June 2006, this Court has had the opportunity to observe and review the legal work performed by Lead Plaintiff's Counsel in the present action as well as the Texas action.

Throughout this litigation, the Court has found that Lead Plaintiff's Counsel have zealously rendered legal services in a professional and skillful manner. Moreover, it is important to recognize that this action was vigorously defended by attorneys with substantial experience and expertise in complex litigation, including class actions. Despite facing significant factual and legal hurdles, Lead Plaintiff's Counsel were ultimately successful in negotiating a large settlement on behalf of the Class Members.

5. Amount Involved in the Class Action

The amount involved in this class action was significant. At the final settlement hearing, it was represented to the Court by defense counsel that had this action went to trial, it is possible that a jury could have returned a verdict for several billion dollars. On the other hand, as indicated above, had the Defendants prevailed on summary judgment or at trial, there would have been no recovery for the Class Members. As such, the stakes in this action were high and the risk for the parties was significant.

6. Benefit Produced by the Litigation

The benefit produced for the Class Members by this litigation was substantial. The settlement resulted in the creation of a \$200 million common fund. As indicated above, it has been represented to the Court that this is the largest common fund achieved in a post-merger class action.

F. Application of KRPC 1.5(a) Factors

1. Time and Labor Required, Novelty and Difficulty of Questions, and Skill Requisite to Perform the Legal Services Properly

This factor was addressed by the Court in its analysis of *Shutts* factors 1 and 4. Clearly, this action required a significant amount of professional time, labor and skill in order to perform the legal services properly.

2. Likelihood that Acceptance of Employment Would Preclude Other Employment

As the Kansas Supreme Court noted in *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 942, 135 P.3d 1127 (2006), “it is common knowledge that the longer a case goes on the more other business it precludes.” As the record reflects, the Texas action was filed in May 2006, and the present action was filed in June 2006. Thus, it is reasonable to assume that the attorneys were precluded from working on other legal matters while working on this action.

3. Fee Customarily Charged in Locality for Similar Services

This factor was addressed by the Court in its analysis of *Shutts* factor 2.

4. Amount Involved and Results Obtained

This factor was addressed by the Court in its analysis of *Shutts* factors 5 and 6.

5. Time Limitations Imposed by Client or Circumstances

The attorneys were required to meet the deadlines set by this Court, the District Court of Harris County, Texas, and the Special Master.

6. Nature and Length of Professional Relationship with Client

Lead Plaintiff’s Counsel have been involved in this action since May 2006.

7. Experience, Reputation, and Ability of Lawyer or Lawyers

This factor was addressed by the Court in its analysis of *Shutts* factor 4. All of the attorneys in this action were experienced and well respected in the legal community.

8. Whether Fee is Fixed or Contingent

This factor was addressed by the Court in its analysis of *Shutts* factor 3.

G. Application of the *Johnson* Factors

As indicated above, the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are substantially similar to the factors set forth in *Shutts* and in KRPC 1.5(a). Although the Court has already addressed the majority of the *Johnson* factors, there are two (2) additional factors that have not been specifically addressed. The first is “The ‘Undesirability’ of the Case” and the second is “Awards in Similar Cases.”

1. The “Undesirability” of the Case

Although the risks for all parties to this action were significant, the Court does not find it to be an undesirable case from the perspective of Lead Plaintiff’s Counsel. In fact, the competition to be named as Lead Plaintiff’s Counsel in the present action and in the Texas action was intense. This Court interviewed several attorneys from across the United States who requested to be named as Lead Plaintiff’s Counsel. The record reflects that a similar situation occurred in the District Court of Harris County, Texas. Obviously, there were several law firms that saw this case to be very desirable and that were willing to assume the risks associated with this complex litigation.

2. Awards in Similar Actions

The Court has not found any cases in Kansas that it finds to be substantially similar to the present action. In particular, the decisions cited by Lead Plaintiff’s Counsel from state and federal trial courts in Kansas involved significantly smaller common funds.

Furthermore, it is impossible to determine the lodestar and/or multiplier in those cases in which a trial court simply approves a percentage without analysis. However, there are a few state and federal cases from Kansas that contain sufficient analysis from which the Court can find guidance.

In *Premier Pork, Inc. v. Rhone-Poulenc S.A.*, 2006 WL 1388464 (Kan. Dist. Ct. 2006), the Honorable Robert J. Frederick approved a class action settlement that created a common fund of approximately \$1.675 million. Although Judge Frederick awarded attorney fees in the amount of \$535,180.20, which represented one third of the common fund, the lodestar was \$1,057,264.44. In a footnote, Judge Frederick explained that the application of the lodestar approach under such circumstances “would virtually exhaust the settlement amount.” Thus, the attorney fee award was slightly more than half of the lodestar and was equivalent to a multiplier of 0.51.

In the case of *In re Sprint Corp ERISA Litigation*, 443 F. Supp. 2d 1249 (D. Kan 2006), the Honorable John W. Lungstrum approved a class action settlement of approximately \$25 million. Judge Lungstrum awarded attorney fees in the amount of \$3.6 million, which represented 16% of the common fund. However, the lodestar was \$3,046,545. Thus, the award was equivalent to a multiplier of 1.18.

In the case of *In re United Telecommunications, Inc. Securities Litigation*, 1994 WL 326007 (D. Kan. 1994), the Honorable Earl E. O’Connor approved a class action settlement that created a common fund of \$28 million. Although Judge O’Connor awarded attorney fees in the amount of \$9,333,333, which represented one third of the common fund, the

lodestar was \$8,499,239. Thus, the award was equivalent to a multiplier of 1.10.

In addition to the Kansas cases cited above, the Court finds guidance from *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722 (3d Cir. 2001). In the case, the Third Circuit Court of Appeals warned that “district courts setting attorneys’ fees in cases involving large settlements must avoid basing their awards on percentages derived from cases where the settlement amounts were much smaller.” 243 F.3d at 736. Moreover, the Court noted that “\$100 million seems to be the informal marker of a ‘very large’ settlement.” 243 F.3d at 736, fn. 19, quoting *In re Orthopedic Bone Screw Prod. Liab. Litigation*, 2000 WL 1622741, at 7 (E.D. Pa. 2000). In reviewing several cases in which the class settlement exceeded \$100 million and the lodestar method was used as the primary device to calculate the attorney fee awards, the Third Circuit found that the multipliers ranged from 1.2 to 3.25 and that the percentages ranged from 4.1% to 18%. 243 F.3d at 737, fn. 22. Similarly, in reviewing several cases where the class settlement exceeded \$100 million and the percentage method was used as the primary device to calculate the attorney fees awards, the Third Circuit found that the multipliers ranged from 1.35 to 2.99 and the percentages ranged from 2.8% to 36%. 243 F.3d at 738, and 742.

The Third Circuit’s review of class settlements in excess of \$100 million revealed information similar to the information found by this Court in reviewing 50 class actions involving common funds between \$100 million and \$300 million. As indicated above, this Court found fee percentages ranging from a low of 3.96% to a high of 36%. See *Exhibit A*. In addition, this Court found multipliers ranging from a low of 0.72 to a high of 6.96. *Id.*

Certainly, there are common fund cases in which courts have applied a benchmark percentage in a “cookie-cutter” fashion. Nevertheless, in those class actions in which courts have taken the time to cross-check the lodestar method against the percentage method (or vice versa), the parameters for the awarding of attorney fees in “very large” class settlements have been fairly consistent.

H. Modification of Lodestar

As indicated above, Lead Plaintiff’s Counsel requests an award of \$49,555,800.65 in attorney fees. This represents a multiplier of more than four (4) times the lodestar or an implied hourly rate of \$2,234.49 for each attorney, law clerk, paralegal and others working on this class action. Based on the factors set forth in *Shutts, Gigot* and KPRC 1.5(a), the Court finds that such a large fee award is not appropriate in this action.

In balancing the competing interests of the Class Members and Lead Plaintiff’s Counsel, the Court concludes that a multiplier of 2.0 is reasonable under the unique circumstances presented in this class action. The Court finds that a multiplier of 2.0 appropriately recognizes the quality of professional services rendered by Lead Plaintiff’s Counsel, the successful results which they achieved on behalf of the Class Members, the risks they faced in pursuing this action and the contingent nature of their representation. At the same time, the application of a 2.0 multiplier preserves the vast majority of the common fund for distribution to the Class Members who submit valid claims. Thus, the Court modifies the lodestar to \$22,329,471.00.

I. Percentage of Common Fund

As instructed by the Kansas Supreme Court in the *Gigot* decision, the Court will now “view the fee award as a percentage of the common fund [as] an additional check in determining if it is reasonable.” 241 Kan. at 320. In doing so, the Court finds that an attorney fee award in the amount of \$22,329,471.00 equals 11.26 % of the common fund, after deduction of the reasonable expenses claimed by Lead Plaintiff’s Counsel. As seen from a review of the authorities cited in this Memorandum Decision and Order, this percentage falls well within the range of reasonable fee percentages in cases involving class settlements in excess of \$100 million. Thus, the Court concludes that an attorney fee award of \$22,329,471.00 is also reasonable as a percentage of the common fund.

J. Reimbursement of Expenses

In addition to an award of attorney fees, Lead Plaintiff’s Counsel seeks reimbursement from the common fund for expenses incurred in the amount of \$1,766,797.39. From a review of the itemizations set forth in the Declarations submitted to this Court under penalty of perjury, the claimed expenses appear to have been reasonably incurred by Lead Plaintiff’s Counsel in the prosecution of this action on behalf of the Class Members. Furthermore, the Court finds that these are the type of expenses that are usually paid out of the common fund in a class action settlement. Thus, the Court approves the request of Lead Plaintiff’s Counsel for reimbursement of expenses in the amount of \$1,766,797.39.

CONCLUSION

For the reasons set forth in this Memorandum Decision and Order, the Court finds that Lead Plaintiff's Counsel should immediately be reimbursed their reasonable expenses in the amount of \$1,766,797.39 from the settlement fund, without interest. In addition, the Court finds that Lead Plaintiff's Counsel should be awarded reasonable attorney fees in the amount of \$22,329,471.00 from the settlement fund. Of this amount, Lead Plaintiff's Counsel is entitled to receive the sum of \$16,747,103.25 immediately, without interest. Upon final distribution of the settlement fund as approved by this Court, Lead Plaintiff's Counsel will receive the remaining balance of \$5,582,367.75, with interest at the rate earned by the settlement fund. The attorney fees and expenses awarded to Lead Plaintiff's Counsel are approved by the Court in consideration for all of the professional services rendered to date as well as for all of the additional professional services to be performed in the future in connection with the administration of the settlement fund.

This Memorandum Decision and Order shall serve as the final judgment of the Court on the issue of attorney fees and expenses. No further Journal Entry is required.

IT IS SO ORDERED.

Entered on this ___ day of December, 2010.

David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing MEMORANDUM DECISION AND ORDER was faxed and mailed on this ____ day of December, 2010, to the following:

Liaison Counsel for Plaintiffs:

John R. Hamilton
3649 SW Burlingame Road - Ste. 200
Topeka, Kansas 66611-2277
Fax (785) 267-2942

Liaison Counsel for Defendants:

R. Patrick Riordan
3500 SW Fairlawn Rd. - Ste. 210
Topeka, Kansas 66614
Fax (785) 783-8327

Colleen A. Speaker
Administrative Assistant