IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

PATRICK JOSEPH TURNER, ET AL **Plaintiffs**	*	**CIVIL ACTION NO. 05-4206**
VERSUS	*	**SECTION "L"**
MURPHY OIL USA, INC. **Defendant**	*	**MAGISTRATE "2"**

DEFENDANT'S MEMORANDUM IN OPPOSITION TO THE PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR COMMON BENEFIT FEES AND EXPENSES

This memorandum is submitted on behalf of the defendant, Murphy Oil USA, Inc. ("Murphy") in Opposition to the Plaintiffs' Steering Committee's Motion for Common Benefit Fees and Expenses. Boldly, the Plaintiffs' Steering Committee ("PSC") requests fees in excess of **$115,000,000** as compensation for litigation lasting one year. There is no legal or factual justification for this award anywhere in the PSC's brief, and the longstanding jurisprudence of this jurisdiction does not justify it. In fact, under Fifth Circuit jurisprudence, prior decisions from this Court, and the writings of learned scholars and academics in the field of class action fee awards, the PSC's request can best be characterized in one word – "absurd." The facts and circumstances of this litigation do not even approach the requisite justification for such an enormous recovery, and in fact warrant a significant reduction in any benchmark percentage or lodestar multiplier this Court could apply. Therefore, for the reasons set forth below, Murphy respectfully requests that this Court deny the PSC's request.

INTRODUCTION

In a striking display of self-interest and audacity, the PSC has asked this Court to award over $115 million in attorneys' fees. This number is an absolute absurdity and finds no support in the law or the facts of this case. In terms of hourly compensation (and assuming as true the hourly accounting set forth in the PSC's Motion), the PSC has valued their services at an astounding **$3,400 per hour**. There is no market in the State of Louisiana, or any other jurisdiction in this country, that would bear an hourly rate of this magnitude. With respect to the established and accepted "lodestar" methodology, which is more fully discussed below, the PSC has asked this Court to apply a multiplier of over **13**. Counsel for Murphy conducted an exhaustive search and found that the highest reported multiplier was 3.25. Even applying a pure percentage fee method, the PSC's fee petition is completely unreasonable. To begin, the facts and circumstances of this mega-fund case do not, as the PSC suggests, justify any increase in the benchmark percentage. Further, while the PSC purports to be seeking a fee percentage of 35%, this is based on all payments (projected at $330 million), including $135 million resulting from Murphy's **voluntary settlement program and pre-class settlement remediation activities**, for which the PSC contributed little or nothing. In reality, then, the PSC seeks a percentage fee equivalent to approximately 60% of the common benefit fund ($115 million in fees based on a fund of $195 million). Therefore, for the reasons set forth below, the PSC's request should be rejected.

UNDISPUTED FACTS

For purposes of the fee application, Murphy and the PSC are in agreement on the following facts, all of which reflect the absurdity of the PSC's request for $115 million.

- The PSC seeks approximately $3,400 per hour, based on an alleged 34,000 hours devoted to this litigation;

- Litigation between the time of filing and the time of settlement was approximately one year, and the PSC seeks compensation to the tune of $8.21 million per month of litigation;
- The PSC included 82 attorneys from 27 different firms, such that average compensation would be $1.4 million per attorney or $4.26 million per firm;
- In addition, the PSC has made it clear that they intend to seek compensation on private fee contracts they have with class members over and above the common benefit fee award.
- Prior to class certification, Murphy was engaged in a voluntary settlement program that conferred upon the citizens of St. Bernard Parish benefits with a value of $135 million;
- The PSC sought to terminate or limit Murphy's voluntary settlement program on multiple occasions;
- The PSC tried to prevent Murphy from comprehensively remediating the class area;
- The PSC's fee application seeks nearly 60% of the $195 million in benefits arising from the class litigation;
- The PSC's fee application is based on a lodestar multiplier of over 13, when the highest multiplier ever reported is 3.25; and
- The PSC's fee application is based on an average billable rate of $3,400 per hour, when Judge Vance of this Court has recently concluded that $250 per hour is reasonable.[1]

LAW AND ARGUMENT

I. FIFTH CIRCUIT JURISPRUDENCE REQUIRES CONSIDERATION OF LODESTAR

Generally, there are two methods for determining the reasonableness of attorneys' fee awards in class action settlements: 1) the percentage fee method and 2) the lodestar method.[2] The percentage fee method requires the court to award the attorneys a percentage of the total

[1] The first 60 or so pages of the PSC's brief are devoted to their spin on the case. While Murphy does not agree with the PSC's lengthy discourse, it is not necessary for Murphy to respond in kind. The essential facts regarding an appropriate fee award are summarized above and are apparent in a court record that is only one year in age.

[2] *In re Harrah's Entertainment*, 1998 WL 832574, *2 (E.D.La.). Pursuant to Fed.R.Civ.P. Rule 23(e), federal district courts must "independently analyze the reasonableness" of the attorneys' fee quantum in a class action case. *In re Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, 2006 WL 2513005, *16 (E.D.La.)(citing *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 849-50 (5th Cir. 1998)).

fund.[3] The lodestar method requires the court to devise a "lodestar" by "multiplying the number of hours reasonably expended" on the case by a reasonable hourly rate; a multiplier may then be applied that either increases or reduces the lodestar.[4] Most federal circuits use the percentage fee method.[5] This is not the case in the Fifth Circuit, however.[6]

Beginning in 1974 with *Johnson v. Georgia Highway Express*, the Fifth Circuit stated that the following twelve factors, now referred to as the *Johnson* factors, must be "examined" when determining the reasonableness of attorneys' fees:

> 1) time and labor required; 2) novelty and difficulty of the issues; 3) skill required to perform the legal services properly; 4) preclusion of other employment; 5) customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) amount involved and results obtained; 9) experience, reputation, and ability of the attorneys; 10) undesirability of the case; 11) nature and length of professional relationship with the client; and 12) awards in similar cases.[7]

Since *Johnson*, "the Fifth Circuit has [effectively] 'blended' the percentage fee method, the lodestar method, and the *Johnson* factors" when making quantum determinations.[8] A couple of recent decisions by Judges Vance and Lemelle (discussed in detail below) demonstrate the prevailing method for determining fee awards in the Fifth Circuit.

In *In re Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, 2006 WL 2513005 (E.D.La.), plaintiff test-takers brought a class action against the defendant testing service regarding the defendant's failure to correctly grade the plaintiff class' tests. Under the proposed settlement agreement, the defendant agreed to pay $11.1 million

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[3] Id. (citing *In re Prudential-Bach Energy Income Partnerships Securities Litigation*, 1994 WL 150742 (E.D.La.)).
[4] *Id.* (citing *Strong v. Bellsouth Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998)).
[5] *Id.* (citing *In re Catfish Antitrust Litigation*, 939 F.Supp. 493, 499 (N.D.Miss. 1996)).
[6] *Harrah's Entertainement*, 1998 WL at *3 (citing *In re Combustion, Inc.*, 968 F.Supp. 1116, 1135 (W.D.La. 1997)).
[7] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).
[8] *In re Harrah's Entertainment, Inc. Securities Litigation*, 1998 WL 832574 (E.D. La.); *accord Faircloth v. Certified Finance, Inc.*, 2001 WL 527489 (E.D. La.); *In re Bayou Sorrel Class Action*, 2006 WL 3230771 (W.D. La.).

into a common fund for the benefit of the class members.[9] After determining that the proposed settlement agreement was reasonable, Judge Vance addressed class counsel's request for attorneys' fees of 40% of the $11.1 million fund.[10]

The Court began by acknowledging that the Fifth Circuit "has established" the aforementioned *Johnson* factors as the proper considerations in "calculating reasonable fees and costs."[11] In applying the *Johnson* factors, the Court should:

> 1) ascertain the nature and extent of the services supplied by the attorney; 2) determine the value of the service according to the customary fee and the quality of work; and 3) adjust the compensation on the basis of the other *Johnson* factors that may be of significance in that particular case.[12]

However, in citing criticism of courts exclusively employing the lodestar method, Judge Vance agreed that Fifth Circuit law provides the court with "the flexibility to calculate fees based on the percentage method, as long as it combines its determination with some analysis under the lodestar method."[13] As a result, the Court elected to proceed using a three-tiered approach: 1) the selection of a benchmark percentage; 2) the application of the *Johnson* factors to the benchmark percentage; and 3) a lodestar crosscheck. Thus, at a minimum, the lodestar method should be used as a cross-check to determine the reasonableness of fees awarded in class litigation.[14]

As recognized by several courts and commentators, a lodestar analysis is particularly appropriate when, as here, the case at issue is a "mega fund" case, characterized by a class-wide recovery in excess of $100 million.[15] As noted in the *Manual for Complex Litigation:*

> When the fund is unusually large, the lodestar may be more appropriate than the percentage method. In these unique mega-

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[9] *Educational Testing Service*, 2006 WL at *4.
[10] *Id.* at *16.
[11] *Id.*
[12] *Id.* (citing *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990)).
[13] *Id.* *17.
[14] *Id*; *see also Camp v. The Progressive Corporation*, 2004 WL 2149079 (E.D. La.).
[15] *See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litigation*, 19 F.3d 1291, 1297.

> cases, selection of percentage figures, even on a sliding scale, may be arbitrary because of the absence of comparable cases. As with percentage fees, an award of attorney fees under the lodestar method should fairly compensate the attorney for the reasonable value of services rendered, given the circumstances of the particular case.[16]

Thus, contrary to the PSC's suggestion, this Court may not disregard lodestar in its entirety. In fact, under the particular facts and circumstances of this case, lodestar may be the better tool to determine the fee award.

A. The PSC's Fee Request is Absurd under Lodestar

Irrespective of whether lodestar is used as a cross-check or as the main method for awarding fees, the PSC cannot avoid the complete absurdity of the $115 million fee requested. The PSC's hourly accounting is greatly exaggerated and should, consequently, be reduced. Even giving the PSC full credit for the claimed hours worked, the lodestar analysis demonstrates that the PSC's fee is based on a multiplier far greater than any previously reported multiplier. Moreover, the PSC's average hourly billing rate is far higher than any local or national market would bear.

1. The PSC's Hourly Accounting Is Inflated

To support its request for over $115 million in fees, the PSC has submitted an hourly accounting of approximately 34,000 hours. These hours include paralegal and legal assistant work, which are typically excluded from consideration in evaluating fee awards.[17] More significantly, the stated hours also include attorney time that should not be billed to Murphy. Specifically, as this Court is aware from its own observations, this case was plagued with substantial duplication of efforts on behalf of the PSC. For example, the PSC would often send

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[16] Herr, David F., *Manual for Complex Litigation* (4th Ed. 2004), at §14.122.

[17] *See, e.g., In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993); *see also In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D. La. 1997). In Exhibit A to the PSC's fee application, the PSC denotes that of the 34,000 total hours accumulated, 1,369 are "paralegal hours" and 2,874 are categorized as "other hours." Under prevailing jurisprudence, these paralegal and other hours should not be included in the consideration of a proper fee award to the PSC.

upwards of ten lawyers to attend depositions when only one or two lawyers were responsible for taking or defending the deposition.

Such duplication of effort is a problem attendant with class litigation, and courts resolve duplication by reducing hourly accountings in fee assessments. *See, e.g., In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D. La. 1997); *see also, In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993). In *In re Shell Oil Refinery*, the court reduced an accounting in excess of 262,000 hours to approximately 45,000 hours. The court determined that the 45,000 hours was limited to the primary attorneys working on the case and excluded associate-level attorney billing time, as well as staff and paralegal hours. *Id. accord In re Combustion, Inc., supra.* (court did not consider time of independent attorneys). Although a similar reduction appears to be justified in this case, for purposes demonstrating the absurdity of the PSC's fee request, Murphy will assume the veracity and propriety of this number.[18]

2. *The Lodestar Multiplier is Excessive*

In *In re Cendant Corporation Prides Litigation*, 243 F.3d 722 (3rd Cir. 2001), the Third Circuit Court of Appeals addressed the propriety of a fee award under both a percentage-fee and lodestar method. Critical to this litigation, the court conducted a nation-wide survey of attorney fee awards in class action lawsuits to determine the propriety of the award at issue. Of particular relevance was the court's research into lodestar multipliers, which revealed a range between 1.35 and 2.99. Based on the exhaustive search of undersigned counsel, the highest reported lodestar multiplier in this state is 3.25.[19]

In requesting attorneys' fees in the amount of $115 million, the PSC asks this Court to apply a multiplier far greater than any ever used. The PSC has submitted an hourly accounting of approximately 34,000 hours. Again, notwithstanding Murphy's contention that this number is

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18 The 34,000 hours allegedly worked by the PSC is double the hours worked by Murphy's counsel.

19 *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993)

excessive, if this Court applies Judge Vance's suggested blended rate of $250 per hour, the resulting lodestar is $8,500,000. To get to the PSC's requested fee of $115,000,000, this Court must use a multiplier of 13.5. Even assuming an hourly rate of $400, which Judge Vance specifically rejected as excessive, the resulting multiplier is nearly three times higher than any previously reported multiplier. .

3. The PSC's Average Hourly Billing Rate is Excessive

In *In re Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, 2006 WL 2513005 (E.D.La.), the most recent decision from this Court, Judge Vance evaluated the local market for legal services to arrive at a reasonable blended rate. Based on her knowledge of the local market, Judge Vance indicated that reasonable partner level billing rates were in the range of $350 per hour, and reasonable associate-level rates were $150 per hour. In that case, Judge Vance rejected a proposed $400 per hour rate as excessive, choosing instead to apply a reasonable "blended" rate of $250 per hour.

Here, the PSC has submitted statements indicating its dedication of approximately 34,000 hours to the present litigation during the course of the last year. Even assuming the veracity of this accounting, which is explicitly denied (*See, infra.*), the requested fee amounts to nearly $3,400 per hour, or nearly $3,000 per hour more than what Judge Vance rejected as excessive. Even applying the high-end multiplier of 3.25 employed in *In re Shell Oil Refinery*, *supra.*, to this case, the PSC would be seeking in excess of $1,000 per hour. There is, in short, no way to justify $115 million under a lodestar analysis.

B. Lodestar Requires a Significant Reduction in the PSC's Proposed Fee

As discussed above, *In re Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, 2006 WL 2513005 (E.D.La.), the most recent decision from this Court is informative with respect to the proper calculation of the PSC's fee award. In that case, Judge Vance used lodestar as a cross-check on a fee award of $3.2 million, and

concluded that the award was reasonable. As discussed, *supra*, Judge Vance applied a blended hourly rate of $250 to the PSC's claim of approximately 7,500 hours. Subsequently, Judge Vance examined the particular circumstances of the case and concluded that a multiplier of 1.6 was warranted.

Applying this same formula to the present litigation, the result is dramatically lower than the PSC's request for $115 million. Once more assuming that the PSC's hourly accounting is accurate, the lodestar would be approximately $8.5 million. Applying a 1.6 multiplier results in a fee award of $13.6 million. Judge Vance's formula mandates a significant reduction in the preposterous fee request submitted by the PSC.

Based on the foregoing discussion, the PSC's request is plainly not supported under existing law. The application of lodestar, either as a cross-check or as the basis for a fee award in this matter demonstrates that the PSC is seeking fees based on an inflated estimate of hours worked, an unreasonable hourly compensation, and a lodestar multiplier far higher than any other multiplier reported.

II. THE PERCENTAGE FEE METHOD DOES NOT SUPPORT THE PSC'S REQUEST

Even applying a pure percentage of the fund method, as proffered by the PSC, there is no basis to support a fee award of $115 million. The PSC's request is based on the wrong settlement corpus, assumes (erroneously) that higher settlement funds require higher attorney compensation, and misapplies the *Johnson* factors to raise the benchmark percentage to nearly 60% of the class recovery. The size of recovery in this matter, which is appropriately valued at $195 million, requires the use of a low benchmark percentage as a starting point. Thereafter, the particular facts and circumstances of this case, evaluated under the *Johnson* factor lens, justify additional reduction of the percentage fee award. Pursuant to the law and overwhelming weight of legal and empirical studies, the maximum percentage available in this case should not exceed 7%.

A. Any Fees Should be Assessed on $195 Million

At the outset, the PSC asks this Court to assess fees based on a total settlement value of $330 million. Critically, the PSC does not address how, if at all, its efforts contributed to obtaining this result. In truth, nearly half of these "settlement" proceeds were provided by Murphy before reaching a settlement with the PSC and with little or no PSC involvement. Specifically, Murphy provided $83 million to individual households and businesses as part of its voluntary settlement program. In addition, Murphy paid $53 million for pre-class settlement remediation costs. Murphy should not be taxed with paying PSC attorney fees based on its voluntary settlement and remediation efforts that the PSC sought to terminate on multiple occasions during the litigation. Thus, for purposes of determining a proper fee, the settlement fund should be limited accordingly. The remaining expenses, which amount to $195,000,000, include class member compensation ($120 million), property buy-outs ($40 million), and continued environmental remediation ($35 million). These expenses directly arise from the litigation and are, therefore, the only amounts this Court should consider in assessing attorneys' fees under the percentage approach.

B. The Size of Recovery Requires a Sliding Scale to Determine the Appropriate Benchmark

An appropriate benchmark is the usual starting point in assessing a fee request under the percentage method. This benchmark is established as an average range of attorney fee awards, and under modern analyses should not be applied mechanically, without deference to the particular circumstances of a given case. In fact, as this Court previously noted,

> Of course, the percentage should not be completely arbitrary, devoid of reality, or inconsistent with usual fees for the type of case involved. In short, there is no one percentage that should apply to all cases. Each case should be analyzed on its own basis.[20]

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[20] *Turner v. Murphy Oil USA, Inc.*, 422 F.Supp.2d 676 (E.D. La. 2006).

Therefore, mechanical application of benchmark percentage awards in cases where the common fund is unusually high will yield fee awards that are excessive or disproportionately high and "devoid of reality" considering the merits of the case.[21] Courts are acutely aware of this problem, and reduce percentage awards as the size of recovery increases.[22] Courts have therefore adopted a general principle that the "percentage fee awarded declines as the size of the fund grows," i.e. a sliding-scale approach.[23] Accordingly, in mega fund cases, defined by common benefit funds exceeding $100 million, courts have often found "considerably lower percentages of recovery to be appropriate." [24] In fact, a "so-called megafund baseline" has been set in which awards commonly range from 4% to 16%.[25] There is ample empirical evidence to support this approach.[26] In a 2004 study by Eisenberg and Miller (used by Judge Vance in her case) that "compares two comprehensive class action data sets from 1993-2002," including fee decisions in "more than 600 common fund cases,"[27] it is apparent that the PSC's suggestion of 35% (in truth 60%) is absurdly high for this case. In particular, the Eisenberg and

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[21] *See, e.g., In re Prudential Insurance Company of America Sales Practices Litigation*, 148 F.3d 283; *Manuel for Complex Litigation, Fourth Ed.*, 2004, §14.121.

[22] *See* Herbert P. Newberg, *Attorney Fee Awards* § 209 (1986); William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J.Legal Stud. 185, 201 (1994), *as cited in In re Copley Pharmaceutical, Inc.*, 1 F.Supp.2d 1409 (D. Wyo. 1998).

[23] *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459 (1/11/2006).

[24] *Manual for Complex Litigation*, *supra.* at 14.121.

[25] *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 188 (D.Mass. 1998)(citing *In re Prudential Ins. Co. of American Sales Practices Litig.*, 962 F.Supp. 450, 458 (D.N.J. 1997); *Duhaime v. John Hancock Mut. Life Ins.*, 989 F.Supp. 375 (1997); 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 14.03 (3d ed. 1992 & Cum.Supp. 1997); 1 Alba Conte, *Attorney Fee Awards*, § 2.09, at 7 (2d ed. 1993) (noting that where class recoveries have been in the $75 to $200 million range, "fee awards in the range of 6 to 10 percent are common ....)).

[26] In their application, the PSC sites the Dunbar study for the proposition that the sliding scale approach should not apply. The Dunbar study is not applicable because the premise of the study pertains to fees that are paid out of a common benefit fund. As this Court is aware, fees in this case are being paid over and above compensation paid to the class members. Therefore, the underlying premise of Dunbar that class action lawyers should be incentivized by higher fee awards as the settlement corpus increases does not apply. Moreover, Dunbar is at odds with the prevailing authorities on the fee award topic, the *Manual for Complex Litigation* and *Newberg.*

[27] Eisenberg, T. and Miller, G, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies 27 (2004).

Miller study found that settlements in excess of $190 million have a corresponding mean fee percent of 12% with a standard deviation of 8.1%, resulting in a reasonable fee range between 3.9% and 20.1%. Thus, based on the *Manual for Complex Litigation*, the applicable jurisprudence, and the empirical study, the appropriate benchmark percentage for this case (*before* application of the *Johnson* factors) should be 10% - the midpoint of the 4-16% baseline. Applying the *Johnson* factors to this appropriate benchmark of 10% dictates a downward adjustment. *See discussion below.*

C. The *Johnson* Factors Require a Reduction in the Sliding-Scale Benchmark Percentage

As discussed above, this Court must evaluate all twelve factors adopted by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) to arrive at a reasonable fee. According to Judge Vance, the *Johnson* factors must be applied after an appropriate benchmark percentage is set in accordance with the total size of the settlement fund, i.e. the sliding scale approach. The proper application of these factors warrants a reduction in the PSC's claimed fee. To begin with, from the onset of litigation, there was little to no risk involved with the undertaking of this case. In other words, there was little to no risk of no return associated with the litigation to the PSC. This low risk of no return to the PSC permeates throughout the *Johnson* factors.[28]

Even with the difficulties created by the tragedy of Hurricane Katrina, the PSC filed class action lawsuits within a few days of the oil spill. The *Turner* case was filed on September 9, 2005 – 6 days after the leak occurred. The remaining 27 suits were filed shortly thereafter. There was certainly no "undesirability" about filing a class action suit against Murphy. Class settlement discussions began shortly after the filings of the class actions. By early October of 2005, George Frilot, on behalf of Murphy, and Sidney Torres began class action settlement

[28] *Educational Testing Service*, 2006 WL at *18-22.

discussions. Also in October of 2005, Murphy was deemed the "responsible party" by regulators for the oil spill, and Murphy began a voluntary settlement program.

Additionally, beginning with the first Court status conference held in Houston in October of 2005, Murphy made clear its intention of reasonably settling the litigation on a class-wide basis. Frankly, the case could have and should have settled earlier, but did not due to exorbitant demands (a billion dollars) and unrealistic threats made by certain members of the PSC about the extent of the oil spill (from the Orleans Parish line to Violet in lower St. Bernard). A two day class settlement mediation was held in March of 2006 in the hopes of reaching a class settlement well in advance of trial. Murphy increased its previous settlement offer substantially and was prepared to negotiate further. To no avail, however, as the more radical elements of the PSC thwarted settlement by adhering to unrealistic monetary demands and threats about fictional environmental harms.

With respect to the *Johnson* factor dealing with lost opportunities, in post-Katrina New Orleans, there was little opportunity to lose. Clients were displaced, offices were closed, files were lost, and court systems (particularly the state courts) were down for many months. Thus, by working on the oil spill case, PSC members were not losing opportunity or income.

Additionally, the *Johnson* factor pertaining to client relations also dictates a downward adjustment from the benchmark. Despite aggressive advertising by the PSC to "sign-up" class members, relatively few people within the class area joined with the PSC. 75% of the people within the Murphy settlement area settled with Murphy without the aid or assistance of a PSC attorney. Of those in the class area who did not settle with Murphy, still only a handful are linked to the PSC. In fact, most people in the class area who did not or could not settle with Murphy and who wanted an attorney sought the assistance of St. Bernard Parish attorneys not associated with class actions or the PSC.

As a result, class counsel's actions were such as to warrant a reduction of the benchmark percentage based on the following *Johnson* factors: 1) time and labor required; 2) preclusion of other employment; 3) amount involved and results obtained; 4) undesirability of the case; 5) nature and length of professional relationship with the client; and 6) awards in similar cases. Based on these factors, and considering the size of the settlement fund at issue, a percentage fee award should not exceed 7%.

D. The PSC's Percentage Should be Reduced to 7% under *Johnson*

In re Shell Oil Refinery, 155 F.R.D. 552 (E.D. La. 1993) involved a total settlement corpus of $170,000,000. Upon application of Plaintiffs' Liaison Counsel (PLC), the court approved a fee award of approximately $32 million, or around 18% of the total settlement value. The court justified the award based on the extensive litigation that occurred over nearly six years. In particular, the court noted that during the **6 years of active litigation** there had been thousands of court orders, 640 depositions, and a 274 page Pre-Trial Order listing 10,000 exhibits. The 10,000 exhibits were selected from over 2 million pages of documents produced in the course of litigation. In all, the PLC documented 262,874.75 hours of time spent on the case, of which the court only considered approximately 45,000 hours of attorney time. Using these hours, the court estimated a proper lodestar calculation to be $9,796,700, such that the lodestar multiplier was 3.25. Although Shell admitted partial liability, and although it was a virtual certainty that the plaintiffs would recover some amount of money, the court found the uncertainty as to the amount and timing of any recovery sufficient to justify this fee.

Similarly, in *In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D. La. 1997), the court applied a multiplier of 2.9 to approve a 36% fee award to the Plaintiffs' Steering Committee (PSC). The case at issue arose from conduct taking place over the course of more than thirty years, and resulting in widespread contamination and alleged toxic exposures. The first lawsuit was filed in 1986, and the matter was litigated for nine years with no discussion of settlement. Settlement

negotiations spanned the remaining two years of litigation and the case was ultimately resolved for $127,000,000. In approving a 36% settlement, the court noted the extensive and highly risky nature of the litigation. In particular, the court noted that the case involved 80 defendants and hundreds of third-party defendants named in 160 complaints and 1,140 answers. From its inception, there were nearly 1,200 motions filed and approximately 900 hearings, one oral argument per month and three fairness hearings. By the time the case was resolved 285 depositions were taken, and the court had heard two weeks of testimony in a *Daubert* proceeding in which several of the 33 expert witnesses were challenged. In all the PSC in that case submitted a total of 51,121 hours, excluding the work of all non-PSC attorneys. Of critical importance to the court's determination was the high risk involved in the litigation, including the substantial factual and legal obstacles faced by the PSC. Moreover, by the time settlement was reached, the case was prepared for a ten week trial. Therefore, the court found it proper to reward the efforts and risk of the PSC who, in bringing this action, succeeded in having the sight deemed a superfund sight and cleaned in accordance with federal standards.

Conversely, the PSC in this case litigated for less than a year. The case involved only 87 depositions, hundreds (rather than thousands or millions) of exhibits, and fifty motions filed. The case involved a total of 18 experts, none of whom had been subjected to Daubert challenges subsequent to certification. Most significantly, Murphy's settlement program, as opposed to any action of the PSC, was the real catalyst for the class settlement.

Consequently, the instant litigation is most akin to the situation in *In re High Sulfur Content Gasoline Products Liability Litigation*, 04-3386 (E.D. La. 2006). Much like the present case, *In re High Sulfur Content Gasoline* was litigated for slightly over one year, throughout which the defendant, Shell Oil Company, was making repairs to damaged property as part of a voluntary settlement program. The total recovery to the class of over 85,000 claimants in a complex MDL proceeding was approximately $103 million, the bulk of which was due to Shell's

voluntary program. An additional $3.7 million was guaranteed in payments, and Shell was further required to continue its repair program at the conclusion of litigation. The court, in reviewing these facts, approved a fee award of $6.85 million, reflecting approximately 7% of the total fund. A similar percentage is warranted here in light of the striking similarities in these two cases, and Murphy respectfully submits that the proper award in this case would be 7% of the common fund (as reduced by Murphy's voluntary settlement program.).

III. THE PSC SHOULD RECEIVE $13.6 MILLION IN ATTORNEYS' FEES

The existing law and the particular facts of this case do not justify allowing the PSC to recover 60% of the common fund. As established through the existing law, an appropriate percentage to apply in this case would be 7% of the common fund. An award of 7% takes into consideration the sliding scale approach to mega-fund cases, which is the approved method according to the *Manual for Complex Litigation*, *Newberg* and the vast majority of courts. Further, 7% takes into consideration the low risk of this case, as well as the minimal work required to bring this case to settlement in slightly over a year.

Most significantly, an award of 7% is justified under a proper lodestar cross-check, applying the formula most recently endorsed by Judge Vance. Specifically, 7% of the $195 million common fund is equivalent to $13.6 million. Applying Judge Vance's formula, the lodestar is $8.5 million (34,000 hours multiplied by a blended rate of $250/hour). Using the 1.6 multiplier employed by Judge Vance, the resulting fee is $13.6 million. This fee satisfies the legal and factual requirements, and is therefore proper under Fifth Circuit law.

CONCLUSION

For the foregoing reasons, the PSC's request for $115 million should be rejected, and this Court should award the PSC fees not to exceed $13.6 million.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon plaintiff's counsel by United States Mail, properly addressed and postage pre-paid on this 29 day of Nov, 2006.