LEXSEE 1992 U.S. DIST. LEXIS 16326

In Re PUBLIC SERVICE COMPANY OF NEW MEXICO Class and Derivative Actions

CASE NO. 91-0536M

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 16326; Fed. Sec. L. Rep. (CCH) P96,988

July 28, 1992, Decided
July 28, 1992, Filed

DISPOSITION: [*1] Under either of the accepted analyses the result is substantially the same, the pending motions are granted in part and denied in part as discussed herein.

JUDGES: McCUE

OPINIONBY: HARRY R. McCUE

OPINION:

MEMORANDUM DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW AWARD OF ATTORNEYS' FEES AND EXPENSES AND ORDER THEREON

I. INTRODUCTION

This action is a consolidation of nine (9) separate lawsuits filed against the Public Service Company of New Mexico (PNM) and various officers and directors of PNM based upon violations of state and federal laws and common law. The lawsuits were consolidated into the above-captioned action for settlement. The class actions are on behalf of a national class of PNM shareholders from September 24, 1986 through January 31, 1991 and a class of New Mexico residents who purchased PNM Stock, between October 1, 1985 and the beginning of the national class period. The derivative actions are on behalf of all PNM Shareholders as of May 5, 1991.

Counsel to the Class of plaintiffs represented by Jennie Farber, Frank Bowden, Paula Siegel, and Tomasita Garcia and counsel for Derivative Plaintiffs Martin Kaplan, James Swatz, Genie Mayfield, and Anthony Jacobs seek an award of attorney's fees [*2] based upon the expenditure of 25,868.40 chargeable attorney hours and 9,637.04 chargeable support hours and seek reimbursement expenses in the amount of $1,531,159.90. There are three petitioners for attorneys' fees and reimbursement of expenses.

PETITIONERS	LAW FIRMS ASSOCIATED WITH PETITIONERS
DERIVATIVE PETITIONERS:	Much Shelist Freed Denenberg & Ament
	Miller, Faucher, Chertow, Cafferty & Wexler
	The Branch Law Firm
	Zlotnick & Thomas
	Law Offices of Vernon Salvador
	Levin, Fishbein, Sedran & Berman
	Murray & Murray, Co.
	Kennedy & Kennedy
	Law Offices of Gerald Cohen
	Eaton & Hart
SIEGEL/GARCIA PETITIONERS	Aguirre & Meyer
	Law Offices of Alfred M. Sanchez

PETITIONERS	LAW FIRMS ASSOCIATED WITH PETITIONERS
FARBER/BOWDEN PETITIONERS	Berger & Montague
	Kohn, Nast & Graf
	Savett, Frutkin, Podell & Ryan
	Carpenter & Goldberg
	Freedman, Boyd, Daniels, Piefer, Hollander, Guttmann & Goldberg
	Sirota & Sirota/Abbey & Ellis

The Petitioners were counsel to the plaintiffs in the following actions:

CASE NAME	COURT	CASE #	TYPE	PETITIONER
Garcia v PNM	D.N.M.	90-928JC	Class Action	Siegel/Garcia
Siegel v. PNM	S.D.Cal.	91-536M	"	"
Garcia v. PN M	N.M.	91-7246	"	"
Kaplan v. Geist	D.N.M.	89-1033JC	Derivative	Derivative
Kraus V. Geist	N.M.	90-5612	"	"
Mayfld v Geist	N.M.	90-6922	"	"
Jacobs v Geist	N.M.	91-5062	"	"
Farber v. PNM	D.N.M.	89-456JB	Class Action	Farber/Bowden
Bowden v. PNM	D.N.M.	90-340JC	"	Farber/Bowden

[*3]

The three Petitioners worked independently of each other throughout the litigation and pursued separate and distinct theories of liability against the defendants. The following is a brief summary of each Petitioners' description of their actions:

DERIVATIVE PETITIONERS

The Derivative Petitioners represented the plaintiffs in one Federal and three State Derivative actions filed on behalf of PNM seeking to recover for the company certain sums PNM allegedly wasted in connection with its excess capacity and diversification efforts. The PNM Board appointed a Special Litigation Committee (SLC) to conduct a 16 month investigation into the allegations in the derivative actions. The SLC determined that PNM should not seek dismissal of the claims for mismanagement against former PNM officers and directors arising out of PNM's diversification efforts. Thereafter, the Derivative Petitioners amended their action to focus only on the diversification aspects of the litigation. The SLC calculated the damages associated with the derivative allegations in excess of $200 million. These Petitioners seek $4,500,000 as an award of the attorney's fees and $262,608.72 as reimbursement of expenses [*4] incurred.

SIEGEL/GARCIA PETITIONERS

The Siegel/Garcia Petitioners represented plaintiffs in three actions consisting of a national class of PNM shareholders, a California class of PNM shareholders, and a New Mexico class of PNM shareholders. The actions were based upon an alleged fraud engaged in by officers and directors of PNM to manipulate the market price of PNM stock by inflating the value of PNM's unregulated subsidiaries. These plaintiffs alleged that the stock manipulation commenced in the early 1980's through a plan of diversification engaged in by PNM and its officers and directors. These Petitioners seek $3,671,043.63 as an award of attorneys' fees and $76,274.18 as reimbursement of expenses incurred.

FARBER/BOWDEN PETITIONERS

The Farber/Bowden Petitioners represented the plaintiffs in two Federal actions wherein they sought recovery for a national class of PNM shareholders. These plaintiffs were the first to file an action against PNM and certain of its officers and directors. These plaintiffs sought recovery of damages caused by misrepresentations and

omissions in PNMs 1986 and 1987 annual reports and public filings concerning PNM's excess electric generating [*5] capacity and certain "write downs" associated with PNM's diversification efforts. Although no trial date had yet been set, these Petitioners had completed discovery in the summer of 1991 and were awaiting trial. These Petitioners seek an award of attorneys' fees in the amount of $7,920,000 and costs in an amount of $1,192,377.

II. DISCUSSION

Through negotiations conducted in this Court, all of the cases have been settled. This settlement has resulted in the establishment of a cash fund of $33 million plus interest accrued since April 10, 1992 and other non–cash benefits, such as the elimination of PNM's uninsured exposure, estimated in excess of $200 million, without PNM having to pay any money out of its own pocket. The settlement achieved is outstanding. Unlike many situations where a company has undergone costly and extensive litigation, PNM has survived and is continuing to provide a valuable service to the people of New Mexico, and it is being prudently and effectively managed. This litigation had the potential to be so destructive from a financial standpoint that the company might have ceased to operate. This would have sorely disappointed the shareholders and [*6] deprived the people of New Mexico of a valuable service. The shareholders are directly benefitted by the preservation of their company. Due to the combined efforts of all persons involved, the litigation has ended in a manner that benefits both the current and past shareholders of PNM.

This Court has approved the settlement and the plan of distribution. Currently, only the following items remain unresolved:

(1) A determination of the amount of attorney's fees to be awarded to the three Petitioners;

(2) A determination of the amount to award the three Petitioners for reimbursement of expenses.

Each of the petitioners has submitted detailed declarations which explain the actions handled. In reaching the findings set forth herein, this Court has considered the few written objections received from members of the class and the responses to the attorneys' fees petitions filed by the defendants. This Court has also considered the numerous records in these actions, including, but not limited to; the pleadings, declarations and other documents filed in support of and in opposition to the pending motions, as well as its own knowledge of the facts and circumstances and its own participation [*7] in intense conferences leading to this settlement. In addition, this Court conducted a hearing on the motion for an award of attorneys' fees on June 29, 1991. The Court heard from the Petitioners and heard objections to the fee petitions and oral argument thereon from an attorney representing a member of the class.

III. FINDINGS CONCERNING PLAINTIFFS' COUNSEL'S JOINT APPLICATION FOR AN AWARD OF ATTORNEY'S FEES.

It has long been recognized that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorney's fees. " *Vincent v. Hughes Air West, Inc. 557 F.2d 759, 769 (9th Cir. 1977).* The purpose of this doctrine is to avoid unjust enrichment and "to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone . . . ." *Id. at 769.* This rule, known as the common fund doctrine, is firmly rooted in American Case Law. See, e.g., *Trustees v. Greenough, 105 U.S. 526 (1881);* [*8] *Central Railroad & Banking C. v. Pettus, 113 U.S. 116 (1885).*

Attorneys cannot conduct their professional activities and continue to fight the struggles associated with protecting the rights of small investors without fair and adequate compensation. However, in determining attorneys' fees, the Court cannot, without scrutiny, simply honor counsel's requests. Rather, "in exercising its equitable power to award attorneys' fees for the creation of a common fund . . . . the Court acts as the guardian of the rights of the absent class members . . . . since the portion of the fund allocated to attorneys' fees will obviously not be available to remedy the substantive wrongs for which the fund was created." *" In re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. 92, 98 (N.D. Cal. 1981)* (Citations omitted)."

There is no doubt that an award of attorneys' fees is appropriate in an action such as this. A common fund has been created for the benefit of a group of investors who perceive that they were injured by the alleged wrongful conduct engaged in by the defendants. The law provides an incentive for private attorneys [*9] to vindicate the rights of those people who would not otherwise be able to independently pursue a claim on their own behalf.

Since the Securities and Exchange Commission is unable, due to its budget constraints, to pursue all of the violations of its rules and regulations, investors must rely upon the Courts to encourage private attorneys to vindicate the rights of investors who cannot otherwise afford to do it. *In re M.D.C. Holdings Securities Litigation, 1990 U.S. Dist. Lexis 15488,* Fed. Sec. L. Rep. (CCH) Sec 95,474.

The most effective control and deterrent to over-reaching and wrongful conduct in the capital raising area is the presence of private lawyers who are willing to devote their time, their energy and their own personal resources to vindicate the rights of individual investors who have been importuned, misled or who somehow have been fraudulently deprived of their money. Considering the remedial nature of the securities laws, the ultimate effectiveness of these remedies depends largely upon the utilization of the class action device. 3L. Loss, *Securities Regulation* 1819 (2d. ed. 1961).

Fee awards in securities class actions encourage [*10] and support other prosecutions and thereby advance the goal of private securities law enforcement. *Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).*

The petitioners in this case are members of respected law firms which specialize in class action litigation. These attorneys brought considerable legal talents together, and were able to achieve the successful completion of this litigation. They are entitled to fair and reasonable compensation. It is the task of this Court to determine what is "fair and reasonable" for both the Petitioners as a whole and to the Petitioners individually.

In determining what is fair, a proper balance must be achieved which takes into account competing public policy considerations. The award must be adequate to encourage competent counsel to continue to pursue this type of complicated and protracted litigation. This enables the Congressional intent of the federal securities laws to be fully and competently implemented. On the other hand, the Court must ensure that the class recovery is optimized and protected against any possible over-reaching.

See *In re M.D.C. Holdings Securities Litigations, 1990 U.S. Dist Lexis 15488;* [*11] Fed. Sec. L. Rep (CCH) Sec 95, 474; *In re Capital Underwriters, Inc., Securities Litigation, 519 F.Supp 92, 98 (N.D.Cal. 1981).*

The members of the class were informed that the Petitioners would seek approximately one-third of the Gross Settlement Fund as Compensation for attorneys' fees in both the class actions and the derivative actions. n1 In determining what would be a fair and reasonable fee, the Petitioners have requested that this Court adopt the percentage award enunciated by the U.S. Supreme Court in *Blum v. Stenson, 465 U.S. 886 (1984).* However, at least one objector to the fee petition has urged the Court to adopt the lodestar approach in determining what is fair and reasonable compensation for the Petitioners. The first part of the this approach requires the Court to determine the number of hours reasonably expended multiplied by a reasonable hourly rate. *D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th Cir. 1990).* The Court has the discretion to increase or decrease this amount based upon an analysis of the case in light of the 12 factors enunciated by [*12] the Ninth Circuit in *Kerr V. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).*

n1 Petitioners did file a joint fee petition for 1/3 of The Gross Settlement Fund which conformed to the notice to the class, however, the Court has herein considered the aggregate of the three fee petitions. At the direction of this Court, the Petitioners were instructed to request an amount they thought fairly represented their contribution to the settlement fund, and as such did not necessarily realize that the aggregate sum of their petitions would exceed one third of the settlement fund.

The Ninth Circuit has recognized that "either approach" may be used in determining what is the reasonable compensation for the creation of a common fund depending upon the circumstances of each case. See *State of Florida v. Dunne, 915 F.2d 542, 545 (9th Dir. 1990).* In light of the magnitude of this settlement fund, created by the multiple lawsuits involved here, the Court [*13] will utilize each approach to absolutely ensure that the amount awarded is fair, just and reasonable. (See *Kirkorian v. Borelli, 695 F. Supp. 446 (N.D. Cal. 1988).*

IV. LODESTAR ANALYSIS OF FEE REQUEST

1. Reasonable Number of Hours Multiplied by a Reasonable Hourly Rate

The Court must first determine the number of hours reasonably expended in the litigation. Next a reasonable hourly rate must be determined to compensate the attorneys for their efforts. The Petitioners' claim their lodestar is $6,996,443.30. This amount is based upon the number of hours billed multiplied by the timekeepers' current hourly rate. All Petitioners provided the Court with their time records. The Petitioners who did not produce their contemporaneously maintained time records provided the Court with a summary sheet classifying their hours into one of eight or more categories which they stated was prepared from contemporaneously recorded time sheets.

The court has reviewed these records and makes the following adjustments:

a. Two law Firms, Berger & Montague and Savett, Frutkin, Podell & Ryan, included hours in their lodestar that they expected to bill for [*14] attending and preparing for the hearing on June 29, 1992 and for other hours they expected to bill in connection with the settlement

administration. All hours not expended will be stricken. Hours in preparing fee petitions are disallowed.

b. Various hourly rates were charged by each of the timekeepers. The court finds that the attorneys involved were of equal caliber and skill. The court also finds that the three Petitioners had a similar ratio of partner-to-associate hours. The court has adopted a uniform hourly rate structure pursuant to which all attorneys will be compensated at the rate of $210.97 per hour (which is the lowest effective hourly rate for the three Petitioners). Since the partner-associate hour ratio is similar in all three petitions, the use of this effective hourly rate approach adequately compensates for the time, skill and caliber of work performed. Basically, since the ratio of partner to associate hours is approximately 63%-37%, this compensates partners at the rate of $265 an hour and associates at the rate of $155 an hour, which under the totality of the circumstances are fair and reasonable rates to charge for attorneys of such skill and experience. [*15] As to non-attorney timekeepers, in calculating the lodestar, they will be compensated at the hourly rate of $61.05 per hour (which is the lowest effective hourly rate for the three Petitioners).

In adopting a uniform hourly rate for all timekeepers, the court has considered the hourly rates charged by all 19 law firms involved in this litigation. These firms, who are headquartered in Chicago, New York, Illinois, Albuquerque, and San Diego and Philadelphia, provide a representative basis upon which the Court could make an evaluation of a reasonable and fair hourly rate to implement in compensating attorneys and other timekeepers. *Blum V. Stenson, 465 U.S. 886,* 895-96 N. 11 (1984). Moreover, a reasonable hourly rate is generally determined by the community wherein the Court is located. *Davis v. Mason County, 927 F.2d 2473, 2488 (9th Cir 1991)* ["Generally, the relevant community is one in which the District Court sits.") The rates adopted here are quite similar to the rates charged by the only firm headquartered in the forum Districts, San Diego and Albuquerque.

c. As to the Petitioners who filed without contemporaneous [*16] time records, the Court has no basis to fully scrutinise the data to determine whether or not the burden of demonstrating that the hours claimed were necessary or reasonable. "The reasonableness of the number of hours submitted is a question of fact to be determined by the Court [citations omitted]. The burden is on counsel to file adequately documented applications for fees detailing the time spend for each task. [citations omitted] Those who fail to meet that burden do so at their own risk." *Zeffiro v. First Pennsylvania Bank, 574 F. Supp 443, 445 (E.D. PA 1983).* Moreover, without the time records, the Court is unable to determine how the work performed materially contributed to the results achieved. *Knutson v. Daily Review, Inc., 479 F. Supp. 1263, 1273 (N.D. Cal. 1979); Lindy Brothers Builders, Inc. v. American R & S San. C., 382 F.Supp. 999 (E.D. PA 2974).* The Court's concern was amplified by the fact that the same attorneys who failed to provide contemporaneous time records engaged four law firms to actively pursue the litigation. The Court notes that during several settlement conferences, [*17] that some of the Petitioners had multiple lawyers in attendance. While more than one attorney may need to be present during critical hearings, the Court believes that attendance by four or more attorneys representing the interests of the same plaintiffs is generally duplicative. *See Beniteze v. Collazo, 571 F.Supp 246 (D. Puerto Rico 1983).*

2. Increase/Decreases to the Lodestar

The second part of the lodestar approach would require the Court to make an adjustment upward or downward based upon the results achieved in each litigation. As recognized by the Ninth Circuit, the factors examined to increase or decrease a lodestar include:

(1) The time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services 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 circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, [*18] (11) the nature and length of professional relations with the client, and (12) awards in similar cases.

In this litigation, each Petitioner pursued their own separate and distinct theory of liability against the defendants. This was not a typical case, wherein there has been a consolidation of actions due to similarity of issues. Rather, this was a consolidation of actions to accomplish settlement. While the Court recognizes that there was some limited exchange of information between the actions, this exchange was insignificant to the litigation strategy pursued by each of the Petitioners.

The independent nature of these actions was vigorously contested and the binding law of the case is such that there can be no doubt that the three Petitioners were alleging three independent theories of liability against the defendants. Therefore, the Court has independently analyzed the work of each Petitioner in determining the lodestar.

V. THE PERCENTAGE ANALYSIS OF FEE REQUESTS

In *Blum v. Stenson, 465 U.S. 886 (1984)* the Supreme

Court indicated that the percentage method of computing fees was the proper approach in "common fund" cases where the fees are [*19] paid out of and not in addition to the fund recovered. The Ninth Circuit has recognized that "either the lodestar or the percentage-of-the-fund approach may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund." *State of Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990).* In *Paul, Johnson, Alston & Hung v. Graulty, 886 F.2d 268 (9th Cir. 1989)* the Ninth Circuit determined that where it would be "impractical, if not impossible, for the district court to determine the number of hours expended" by counsel in creating the gross settlement fund, use of the percentage fee award would be appropriate. Id.

The Petitioners have jointly cited to this Court 36 cases wherein an award of one-third or greater was granted to the attorneys. (See Exhibit A to Joint Fee Petition). A Declaration of Terrell W. Oxford, Esq., an expert proposed by the Petitioners, declared that the national market in commercial litigation, supports an attorneys' fee award of one-third of the settlement.

A one-third recovery may be consistent with the percentages generally awarded [*20] in cases such as this. *In re M.D.C. Holdings Securities Litigation, 1990 U.S. Dist. Lexis 15488,* Fed. Sec. L. Rep. (CCH) Sec 95,474 (1990).

In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery. If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *Id; Phemister v. Harcourt Brace Javanovich, Inc.,* 1984-7 Trade Cas. (CCH) Sec 66,734, at 66,995 (N.D. 111. 1984) ("contingent fee arrangement in non-class action damage lawsuits use the simple method of paying the attorney a percentage of what is recovered for the client. The more the recovery, the more the fee. The percentages agreed on vary, with one-third being particularly common."); *Kirchoff v. Flynn, 786 F.2d 320, 323 (7th Cir. 1986)* (40% contractual award of case that went to trial); *Alpine Pharmacy, Inc. v. Chas. Pitzer & Co., 481 F.2d 1045, 1051* (2d Cir.), cert. denied, *414 U.S. 1092 (1973)* (32% fee recovery for settlement before [*21] trial).

In light of the excellent results achieved in this case; the fact that this fee is being used to compensate both derivative and class counsel; and it is based upon the cash value of the settlement; the percentage fee request here is not unreasonable.

The lodestar approach approximates the percentage of the fund which this Court has in mind for the total amount of attorneys fees. A one-third fraction of the balance in the common fund net of expenses appears reasonable for the efforts expended by counsel in the nine cases that have been consolidated here.

VI. ATTORNEYS FEES

A. DERIVATIVE PETITIONERS

Based upon the entire record, the Court concludes that the Derivative Petitioners' Actions were instrumental in motivating the defendants to participate in global settlement discussions. Prior to the settlement of these actions, the Derivative Petitioners obtained a firm trial date and had demonstrated to the defendants, through discovery conducted and responses to contention interrogatories, that they were ready for trial. The derivative Petitioners had constituted a strong trial team that was devoting most, if not all of its time, to trial preparation. [*22]

It is clear from the declarations and time records submitted that the Derivative Petitioners engaged in meaningful discovery, extensive motion practice and trial preparation. Time was efficiently and effectively used by drawing upon materials reviewed by the Special Litigation Committee and otherwise available to the public record.

These Petitioners had a significant impact in motivating the defendants in the derivative actions to discuss settlement.

The lead Derivative Counsel, as the Court-appointed liaison counsel, did an excellent job of expediting the Settlement Documentation. The leadership exhibited by Derivative's lead counsel was outstanding.

Derivative Petitioners have spent approximately 10,963.53 hours pursuing four derivative actions in the federal and state courts of New Mexico. At the time of this settlement, trial preparation was well underway when the Court stayed further activity pending the settlement negotiations.

The Derivative Petitioners have extensive experience and skill in these types of actions, as well as experience in other complex litigation actions. They worked solely on a contingent fee basis, while vigorously pursuing the claims that the Special [*23] Litigation Committee had not recommended be dismissed. The Derivative Petitioners utilized top litigators' time and effort in pursuing this action, and prepared for trial in a most effective manner.

Therefore, this Court finds that Derivative Petitioners are entitled to a multiplier.

B. SIEGEL/GARCIA PETITIONERS

Based upon the record, it is apparent to this Court, that the Siegel/Garcia Actions motivated the defendants to negotiate a global settlement. Within days of the certification of the class in the Siegel Action the parties requested a settlement conference for the purpose of obtaining a global resolution to PNM's problems. A review of the complaints filed by the Siegel/Garcia Petitioners fully reveals the detail and depth of their investigation and analysis of the problems at PNM.

The *Garcia* Action was reversed and remanded by the 10th Circuit as a result of the Securities Investors Protection Act of 1991, which the Siegel/Garcia Petitioners aggressively pursued through Congress. The activities of the Siegel/Garcia Petitioners in reviving the statute of limitations, so that the Siegel/Garcia Petitioners could prosecute the action on behalf of the Plaintiffs, [*24] was a major factor in increasing the pressure on the defendants.

Because this Court's initial efforts to attempt to negotiate a global settlement in the Summer of 1991 were unsuccessful, the Court is particularly impressed with the achievements made in the Siegel/Garcia Actions in the Fall of 1991 and the early part of 1992. This progress significantly stimulated the desire of the defendants to enter into the settlement arena.

It is clear from the declarations and time records submitted by the Siegel/Garcia Petitioners that they engaged in extensive investigation, analysis, motion practice, class certification, discovery and briefing, appellate issues and legislative efforts. The Siegel/Garcia Petitioners were required to litigate their cases in multiple forums and were compelled to devote their resources to protect the interests of the classes even though at times it appeared likely that they would fail and become unsuccessful in pursuit of their litigation. The Siegel/Garcia Petitioners demonstrated great professional skill while working on this action. Their extensive experience in class action and other complex litigation was effectively utilized for the benefit of the class. [*25] The complexity of the legal and factual issues in the case precluded them from accepting many other cases.

The Siegel/Garcia Petitioners participated enthusiastically in the global settlement conferences and worked with PNM and its counsel, under the guidance of this Court, enabling PNM and the Siegel/Garcia Petitioners to agree on the terms of the settlement. The Siegel/Garcia Petitioners also participated with the Court-appointed liaison counsel in finalizing the Stipulation of Settlement, an achievement of no small dimension.

Therefore, this Court finds that the Siegel/Garcia Petitioners are entitled to a multiplier.

C. FARBER/BOWDEN PETITIONERS

The Farber/Bowden Petitioners were the first to file their actions and pursued a separate theory of liability from the other Petitioners. They were the first to identify a problem. The Farber/Bowden Petitioners litigated their actions over a time period longer than the other Petitioners. Standing alone, the Court does not believe this to be a controlling factor. *See In re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. 92, 99-102 (N.D. Cal. 1981); In Re Activision Securities Litigation, 723 F. Supp 1373, 1378-1379 (N.D. Cal. 1989).* [*26] The Farber/Bowden Petitioners directed the Court's attention to the fact that they have incurred the largest cost bill; therefore, they are entitled to the largest portion of the fee award. To accept this premise would be to ensure and foster higher cost expenses, which all Courts are desperately trying to reduce. Such an analysis would not be in the best interests of the class.

The record is clear that most of the activity in the Farber/Bowden Actions was completed in the Summer of 1991 prior to the time the Court held the first settlement conference in this Action. Although invited and encouraged to attend, the Farber/Bowden Petitioners declined this Court's offer. They did, however, write a letter to the Court, dated July 26, 1991, wherein they informed the Court that "The Farber case is practically ready for trial . . . . All discovery has been completed in Farber . . . ."

The Farber/Bowden Petitioners billed 15,510.23 hours in their actions, since April 1989 when the *Farber* Action was filed. They were actively involved in – drafting pleadings and briefs, discovery, investigation, preparing experts, court appearances, class action procedures, settlement, meetings [*27] of counsel, strategy and analysis, motions to compel documents and motions to compel third party discovery. In addition, these Petitioners opposed defense motions for summary judgement, successfully obtained documents – beyond the initial scope of discovery imposed by the Court, successfully briefed motions for class certification, and participated in eight expert depositions and 40 lay witness depositions. These Petitioners also retained and prepared several experts to assist them in their litigation and for deposition, and prepared for and deposed defendants' experts. Also, on or about July 16, 1991, the Farber/Bowden Petitioners filed a motion for summary judgment against the defendants in the *Farber* Action which was under submission at the time of settlement, and they vigorously prepared their case to proceed to trial. The Farber/Bowden Petitioners were successful in obtaining documents from the Special Litigation Committee and Max Maerki's "Note to File" which was of major importance to the litigation.

The Farber/Bowden Petitioners also worked solely on a contingent nature and had considerable demands placed upon their time. The Farber/Bowden Petitioners are nationally [*28] recognized counsel and noted for their experience and ability in securities class actions.

Therefore, this court finds that the Farber/Bowden Petitioners are entitled to a multiplier.

VII. ATTORNEYS' FEES FOR THE OBJECTOR

Attorney Lawrence W. Schonbrun appeared at the hearing before this Court and objected to the request for attorneys' fees and reimbursement of expenses as excessive. In light of Mr. Schonbrun's comments and the cases that he cited, I revisited my initial thoughts on the award of attorneys' fees and reimbursement of expenses. His comments guided this Court in making some of the decisions set forth herein and resulted in an increase in the amount of the settlement fund that will ultimately be distributed to the members of the class. As such, Mr. Schonbrun has preserved a portion of the common fund and is entitled to compensation for his time and effort. Mr. Schonbrun did not submit a declaration for his time; however, the Court believes it is reasonable to assume that for a review of the materials, preparation for the hearing, appearances, objections and attendance at the hearing, Mr. Schonbrun would have had to expend ten (10) hours. Mr. Schonbrun will [*29] be compensated for his time at the same hourly rate that I have adopted for the attorneys in this litigation – $210.97. Therefore, the Court will award Mr. Schonbrun the amount of $2109.70 plus expenses in the amount of $250.00 for a total amount of $2359.70.

VIII. EXPENSES

This court is deeply troubled by the magnitude of the request for reimbursement of monies expended in the prosecution of this matter. Reasonable expenditures for items and services that are not considered overhead or ordinary course of business expenses are reimbursable.

The Court has analyzed the $1,531,160.00 total of expense claims. Approximately one third of the total, or $513,474.00, consists of two major items – meals, hotels and transportation, and photocopying costs. These two items are uniquely within the control of the attorneys involved in the expenditures.

Travel and subsistence expenses must be carefully controlled. The number of trips, the number of travellers, the class and type of travel are all factors that must be carefully managed and planned in order to minimize such costs.

For example, air fares may vary by factors of 2 or 2.5 depending upon advance notice and coach or first [*30] class travel. (This Court is required to travel coach class on government business trips). This Court is not unmindful of the distances and the travel required when counsel "offices" in cities and states far removed from the forum. It is for this very reason that the Court is concerned and cautions that counsel are required to make every effort to utilize local counsel; dispatch only the attorneys absolutely essential to the task at the site of the hearing or event; to arrange for deponents to travel to the "center of the mass" individually rather than having groups of lawyers, court reporters and support staff travel from the center of the mass to the site of the event. Only then will the court be satisfied that every effort is being made to minimize costs.

Photocopying costs of $260,846.22 have been claimed. Clearly photocopying is essential to the prosecution and preparation of lawsuits such as this litigation. Photocopying may mean duplicating by "Xeroxing" or other systems that can vary in cost. Again the court cautions counsel that the costs involved must be carefully scrutinized and controlled. Routine office copying must not become a "profit center" — only actual [*31] costs are recoverable.

The most significant single cost claim is that for experts. In complex cases such as this case, it is essential to utilize the services of professionals in the discipline under scrutiny. In this case $773,260. has been either expended or obligated for such services. These services were provided in the main for the purpose of analyzing the capacity of PNM to meet the energy demands of the market served and for determining the amount of damages sustained by the investors. These services were necessary, without question, in light of the original claims. One wonders, however, if the court should not recognize the realities of the world of litigation and subject all significant charges to the common fund to the same standard of review as attorney fees. The relationship between the bar and the expert is inextricable. The lawyers must justify their fees — so should the experts, when the experts claim and expect payment of funds amounting to approximately 3% of the common fund.

The Court realizes that it is impossible to satisfy each and every concern raised by the bare recital of numbers. To do so would require an unending series of evidentiary hearings [*32] which would undermine and defeat the very purpose of the litigation. Therefore, the Court must rely on its sense of fairness and experience in similar cases. In this regard the court is aided by a review of the results of class action litigation as tabulated in the periodical *"Class Action Reports"* published in Washington, D.C. A review of Volume 13, Nos. 4 and 5 indicates that in the twenty–four securities cases reported settled in the range of 20 to 45 million dollars – only two had

costs awarded in excess of one million dollars. The top awards were 1.3 million dollars each. The ratio of average recovery to average costs is 30 to 1.

It must also be remembered that this single settlement fund is a product of nine individual cases filed in various forums. Duplication and redundancy is inevitable in such circumstances.

In light of the above, the Court finds that reasonable expenses recoverable here are one point one million dollars ($ 1,100,000.00) or approximately seventy-one (71) percent of the total claimed.

Attorneys fees will be awarded from the remainder (after reduction for costs) of $31,900,000.00.

IX. AWARD OF FEES

The total attorneys fees awarded will be [*33] 33% of the fund remaining, after expenses are deducted, which is $10,527,000.00, plus the proportionate share of the interest. The Court further apportions the fee award as follows:

FARBER/BOWDEN CLASS COUNSEL	$ 4,210,800.
SIEGEL/GARCIA CLASS COUNSEL	$ 3,100,200.
DERIVATIVE COUNSEL	$ 3,216,000.

It must be understood that the awards made here are final. All activities with respect to the claims procedures are included, and there will be no further enhancement of the awards.

X. CONCLUSION

Under either of the accepted analyses the result is substantially the same, the pending motions are granted in part and denied in part as discussed herein.

The Escrow Agent shall disburse the funds as described in this order.

IT IS SO ORDERED this 28th day of July 1992.

HARRY R. McCUE

United States Magistrate Judge