ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SCHWARTZ, et al., On Behalf of Themselves and All Others Similarly Situated	§	CAUSE NO. 3:02-CV-2243-K
	§	(Consolidated with Nos. 3:02-CV-2248; 3:02-CV-2255; 3:02-CV-2262; 3:02-CV-2270; 3:02-CV-2279; 3:02-CV-2314; 3:02-CV-2315; 3:02-CV-2322; 3:02-CV-2328; 3:02-CV-2334; 3:02-CV-2337; 3:02-CV-2339; 3:02-CV-2343; 3:02-CV-2346; 3:02-CV-2360; 3:02-CV-2366; 3:02-CV-2416; 3:02-CV-2438; 3:02-CV-2450; 3:02-CV-2458; 3:02-CV-2471; 3:02-CV-2528; 3:02-CV-2586; 3:02-CV-2600; 3:02-CV-2689; 2739; 3:03-CV-0289; 3:03-CV-0290)
Plaintiffs,	§	
v.	§	
TXU CORP., et al.,	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs and Defendants have submitted for approval a proposed settlement of this class action that is memorialized in a Stipulation and Agreement of Settlement ("Stipulation of Settlement"), filed with the Court on March 31, 2005. For the reasons set out below, the Court has determined that the settlement is fair, reasonable and adequate, and should be approved. The Court makes the following findings of fact and conclusions of law. It has issued a Final Judgment and Order of Dismissal with Prejudice, approving the settlement and dismissing the complaint in this action with prejudice.

I. BACKGROUND

A. Materials Considered by the Court

1. In coming to its decision, this Court has considered the written memoranda and supporting documents submitted by the parties and all other Class members, as well as oral arguments made by the parties and other Class members in connection with the settlement. As discussed below, the parties have fully briefed the request for approval, and they have supported the request with numerous declarations or affidavits of fact, including from expert witnesses and the Court appointed Lead Plaintiffs. Also, both Lead Plaintiffs' counsel and counsel for Defendants made oral presentations at the June 23, 2005 Fairness Hearing.

B. History of Litigation

2. On or about November 15, 2002, pursuant to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 77z-1(a)(3)(B)(ii), this Court consolidated 30 putative class actions complaints against TXU Corp. ("TXU") and certain of its present and former officers and directors of TXU alleging federal securities law violations into the above-captioned case, *Schwartz, et al. v. TXU Corp.*, et al, Case No. 3:02-CV-2243-K (the "Litigation").

3. In December 2002, various class members filed motions and

memoranda in support thereof for the appointment of lead plaintiffs and the approval of lead plaintiffs' choice of counsel. During December 2002 and February 2003, opposition and reply memoranda were filed in connection therewith.

4. On May 8, 2003, pursuant to PSLRA, this Court resolved the competing motions for appointment of lead plaintiff appointing the Plumbers & Pipefitters National Pension Fund, Arthur Nielsen, Jr. and Ronald Canada as Lead Plaintiffs in the consolidated class action and approving Lead Plaintiffs' choice of William S. Lerach, Darren J. Robbins, Mark Solomon and Milberg, Weiss, Bershad, Hynes & Lerach, LLP and Joe Kendall of Provost Umphrey Law Firm, LLP as Co-Lead Counsel.[1]

5. On or about July 21, 2003, Lead Plaintiffs filed a Consolidated Complaint (the "Complaint") that named as defendants TXU, Erle Nye, David W. Biegler, Michael J. McNally, Brian N. Dickie, Biggs C. Porter, V.J. Horgan, Derek C. Bonham, J. S. Farrington, William M. Griffin, Kerney Laday, Jack E. Little, Margaret N. Maxey, J. E. Oesterreicher, Charles R. Perry, Herbert H. Richardson (collectively, the "Individual Defendants"), and Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Banc of America Securities LLC, Credit Suisse First Boston Corporation and Salomon

1. Messrs. Lerach, Robbins and Solomon, and the other attorneys from Milberg, Weiss Berchad Hynes & Lerach LLP who were appointed lead counsel, and who have prosecuted this litigation from the onset, formed the firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, effective May 1, 2004.

Smith Barney Inc ("Underwriter Defendants"). The Complaint pled on behalf of all persons who purchased the publicly traded securities of TXU, between 4/26/01 and 10/11/02 (the "Class Period").

6. In September 2003, TXU Defendants' Motion to Dismiss ("TXU's Motion to Dismiss) and the Underwrites' Motion to Dismiss the Consolidated Complaint ("Underwriters' Motion to Dismiss") were filed. Lead Plaintiffs file opposition memoranda in November 2003, and in January 2004, defendants filed their reply memoranda. Defendants' motions to dismiss the Complaint were under submission at the time the parties reached a tentative settlement agreement.

7. In January 2005, the parties reached a tentative settlement agreement and executed a Memorandum of Understanding on January 20, 2005. Between January 20, 2005 and March 31, 2005, the parties negotiated a comprehensive Stipulation of Settlement and supporting exhibits. On March 31, 2005, Lead Plaintiffs and Defendants executed a Stipulation of Settlement pursuant to which they agreed to settle the action. Before beginning settlement negotiations, Lead Counsel (with the assistance of a team of private investigators) conducted dozens of interviews of former employees and management of the Company. [*See* Joint Declaration of Joe Kendall and Mark Solomon in Support of: (1) Final Approval of Settlement and Plan of Allocation of Settlement Proceeds; and (2) Award of Attorneys' Fees and Reimbursement of Expenses ("Joint Declaration of Joe Kendall and Mark Solomon"), at ¶¶ 7, 27, 33.] The

proposed settlement was conditioned on, among other things, Lead Counsel's completion of certain additional discovery, including review of relevant Company documents and interviews of TXU witnesses, and Lead Counsel's and Lead Plaintiffs' conclusion at the completion of that additional discovery that the settlement terms were fair, reasonable and adequate. [*See Id* at ¶ 13.]

8. In connection with the prosecution and the settlement of the litigation, Lead Counsel and their experts have reviewed hundreds of thousands of pages of documents, including TXU's public filings and other public statements and internal TXU documents produced in response to specific requests from Lead Counsel.

9. In addition to the review of documents, Lead Counsel has interviewed more than two dozen witnesses, including nine former or current TXU officers and directors in both the United States and Europe knowledgeable about the issues alleged in the litigation.

C. The Parties and Their Counsel

10. **Lead Plaintiffs** - Lead Plaintiffs are the Plumbers & Pipefitters National Pension Fund, Arthur Nielsen, Jr. and Ronald Canada. Each purchased TXU securities during the class period. [*See* Compl., at ¶ 17.]

11. **Lead Counsel** - Lead Plaintiffs and the Class are represented by several experienced law firms, including Lerach Coughlin Stoia Geller Rudman &

Robbins LLP and Provost & Umphrey LLP. Lead Counsel are knowledgeable about, and experienced in, federal securities fraud class actions.

12. **Defendants** - Defendant TXU provides electric and natural gas services, merchant energy trading, energy marketing, telecommunications and energy related services. TXU's common stock is traded in an efficient market on the New York Stock Exchange. TXU Europe Ltd. was a wholly-owned subsidiary of TXU, and was a holding company for TXU's European Operations. TXU controlled TXU Europe Limited, which issued TOPrS. TOPrS traded on the NASDAQ during the Class Period. The Individual Defendants are: (i) Erle Nye who, at all relevant times, was Chairman of the Board and CEO of TXU; (ii) Michael J. McNally who, at all relevant times, was Executive Vice Chairman and CFO of TXU; (iii) Brian N. Dickie who, at all relevant times, was Executive Vice President of TXU and President of the TXU Energy business segment; (iv) Biggs C. Porter who, at all relevant times, was the Controller and Principal Accounting Officer of TXU; (v) V.J. Horgan who, at all relevant times, was President of Energy Trading at TXU; (vi) Derek C. Bonham, J. S. Farrington, William M. Griffin, Kerney Laday, Jack E. Little, Margaret N. Maxey, J. E. Oesterreicher, Charles R. Perry, Herbert H. Richardson who, at all relevant times, were directors of TXU; and (vii) Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Banc of America Securities LLC, Credit Suisse First Boston Corporation and Salomon Smith Barney Inc. who, during the relevant time period, were underwriters of certain securities offerings for TXU.

13. **Defendants' Counsel** - Defendant TXU and all of the Individual Defendants are represented by Hunton & Williams, Orrick, Herrington & Sutcliffe LLP and the TXU Legal Department and the Underwriter Defendants are represented by Weil, Gotshal & Manges LLP. These firms and the lawyers involved in this case have extensive experience in the defense of complex securities class action litigation.

D. Lead Plaintiffs' Allegations

14. The Complaint is brought on behalf of all persons who purchased the publicly traded securities of TXU between 4/26/01 and 10/11/02 (the "Class Period"), including TXU Europe Capital I, 9-3/4% Trust Originated Preferred Securities ("TOPrS"). Plaintiffs allege violations of the federal securities laws arising out of defendants' issuance of false and misleading statements about the health of the Company's business, its operating performance and prospects. [*See* Compl., at ¶ 1.] The definition of the Class, including certain exceptions, is set out in full in the Court's Order Preliminarily Approving Class Action Settlement and in the Final Judgment.

15. The Complaint alleges that defendants violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§78j(b) and 78t(a), and Rule 10b-5, and under §§11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§77k, 77l(a)(2) and 77o, by, among other things, issuing a series of false and misleading statements during the Class Period. These

allegedly false and misleading statements were in the following forms:

- Statements made by defendants during the Class Period in press releases, analyst meetings, conference calls and elsewhere concerning the Company's business, earnings and historical and projected financial results, including TXU's ability to meet earnings guidance; [*see, e.g.*, Compl., at ¶¶ 24-38.]

- SEC filings during the Class Period that omitted or inadequately disclosed serious and identifiable problems being experienced by TXU that affected TXU's financial performance, liquidity and credit ratings; [*see, e.g.*, Compl., at ¶¶ 40-52.]

- Omissions by the individual defendants during the Class Period regarding TXU's severe billing problems that negatively impacted revenues and receivables; [*see, e.g.*, Compl., at ¶¶ 53-64.]

- Omissions by the individual defendants during the Class Period of TXU's use of round-trip trades to falsely inflate trading volume revenues and manipulate the Texas energy markets; [*see, e.g.*, Compl., at ¶ 65.] and

- Failures by the Underwriter Defendants during the Class Period to conduct adequate due diligence to detect and disclose the severity of TXU's financial problems and accounting irregularities. [*see, e.g.*, Compl., at ¶¶ 191-206.]

The Complaint seeks compensatory damages, pre-judgment and post-judgment interest, as well as reasonable attorney's fees, expert witness fees, and extraordinary, equitable or injunctive relief as well as such other relief as the Court may deem just and proper.

E. Defendants' Response

16. Defendants expressly deny any wrongdoing or liability in connection with any facts or claims that have been or could have been alleged in connection with this litigation. [*See* TXU Defendants' Brief in Support of Motion to Dismiss ("TXU's Motion to Dismiss"), at pgs. 1-2, Underwriters' Memorandum of Law in Support of Its Motion to Dismiss ("Underwriters' Motion to Dismiss"), at pgs. 1-2]. Defendants contend that they have substantial legal and factual defenses to plaintiffs' claims and believe that they ultimately would have prevailed on the claims – either on a motion to dismiss, a motion for summary judgment or at trial. Defendants have identified the following issues they contend would defeat plaintiffs' claims:

- Plaintiffs' allegations failed to meet the heightened pleadings standards as required under the Private Securities Litigation Reform Act of 1995 ("PLSRA");

- Plaintiffs' reliance on opinions of former TXU employees does not satisfy the heightened pleading requirements of the PSLRA in that the former employees can not establish a strong inference of scienter, and that the former employees' opinions are contradicted by the Company's "clean audit" opinions;

- Plaintiffs' reliance on statements about the security of the Company's dividend and European subsidiary fails to satisfy the heightened pleadings standards of the PSLRA;

- Plaintiffs' accounting allegations fail to satisfy the heightened pleadings standards of the PSLRA, nor are the accounting allegations plead with specificity;

- Many of Plaintiffs' challenged statements are forward looking and protected from liability;

- Plaintiffs failed to satisfy the pleading requirements of Section 11 and 12 of the Securities Act of 1933, in that Plaintiffs improperly collapsed allegations about the underwriters into allegations that are not actionable; and

- Plaintiffs lack standing to bring certain claims.

[*See passim,* TXU's Motion to Dismiss and Underwriters' Motion to Dismiss.]

17. Defendants have represented to the Court that they nevertheless consider it desirable for the class action to be settled and dismissed to avoid the substantial burden, expense, management distraction and uncertainties that would be involved in protracted litigation, and to settle the Released Claims against them. [*See* Stipulation of Settlement, at pg. 4.]

F. The Settlement

1. Initial Settlement Discussions

18. In early 2004, counsel for the parties met to initiate settlement

discussions and the progress of the case. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 47.] Subsequent discussions ensued and Counsel for the parties began exploring issues of damages, causation, allegations and defenses. [*See Id.*]

19. In May 2004, Counsel for Lead Plaintiffs and the Defendants engaged in a mediation session before Antonio Piazza. [*See Id.*] Many issues were debated and vigorously contested. [*See Id.*] At that time, Lead Plaintiffs and Defendants could not reach an accord. [*See Id.*] Counsel for Lead Plaintiffs continued to investigate the case, interview fact witnesses and meet with consultants. [*See Id.* at ¶ 27.] Throughout the second and third quarters of 2004, the parties engaged in ongoing discussions. [*See Id.* at ¶ 47.] However, they were unable to reach an amicable agreement, due in part to Lead Plaintiffs' insistence on stringent corporate governance reforms as part of any settlement. [*See Id.*] Ultimately the differences between the parties narrowed, with the assistance of the Honorable Robert M. Parker as Mediator, and a Memorandum of Understanding was signed mid-January 2005. [*See Id.* at ¶ 48.]

20. Throughout this period, Lead Plaintiffs oversaw the progress of the litigation and instructed Lead Counsel with respect to the ongoing investigation. [*See* Declaration of Arthur Nielsen, Jr., in Support of Application of Settlement and Plan of Allocation of Settlement Proceeds ("Nielsen Declaration"), at ¶¶ 7-9; Declaration of Ronald Canada in Support of Application of Settlement and Plan of Allocation of Settlement Proceeds ("Canada Declaration"), at ¶¶ 4-7; Declaration of Plumbers &

Pipefitters National Pension Fund in Support of Application of Settlement and Plan of Allocation of Settlement Proceeds ("Sweeney Declaration"), at ¶¶ 4-5.] Indeed, the Lead Plaintiffs monitored the mediation process and a representative of The Plumbers and Pipefitter National Pension Fund attended the May 2004 mediation before Antonio Piazza. In addition, Lead Plaintiffs reviewed key documents provided by Lead Counsel and reviewed and approved significant pleadings prior to filing. Lead Plaintiffs also participated in numerous meetings with Lead Counsel in which they discussed the merits and settlement value of the various claims, and instructed Lead Counsel with respect to negotiating the terms of settlement. [*See* Nielsen Declaration, at ¶¶ 8-9; Canada Declaration, at ¶ 6; Sweeney Declaration, at ¶¶ 4-5.]

21. Furthermore, Lead Plaintiffs and Defendants each were advised by various consultants and experts, including individuals with expertise in accounting, auditing and/or governance issues, and in estimating potential damages in cases involving allegations of securities fraud. In addition, Lead Counsel (with the assistance of teams of private investigators) held dozens of interviews with the Company's current and former employees and management personnel. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶¶ 7, 27, 33.]

2. The Stipulation and Agreement of Settlement

22. In January, 2005, Lead Plaintiffs and Defendants reached an

agreement on the terms to settle the Litigation. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 48.] The proposed settlement was conditioned on, among other things, Lead Counsel's completion of additional discovery, including interviews of Company witnesses, and Lead Counsel's and Lead Plaintiffs' conclusion at the completion of that additional discovery that the settlement terms were fair, reasonable and adequate. [*See Id.* at ¶ 13.] On January 20, 2005, Lead Plaintiffs and the defendants executed a Memorandum of Understanding.

23. The proposed settlement provides, among other things, that TXU would make a cash settlement payment of $149,750,000.00 and would implement and maintain for seven (7) years certain corporate governance reforms and enhancements. The parties also agreed that the settlement was subject to Lead Plaintiffs' Counsel's review of additional non-privileged documents, deposition transcripts, and non-privileged reports, and completion of witness interviews to enable them to further review the evidence relevant to the claims in this action.

3. Discovery

24. In January 2005, Counsel for Lead Plaintiffs continued their review of relevant documents and had their accounting experts begin reviewing relevant Company documents. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶¶ 13, 27.] The Company has made available hundreds of thousands of pages of

documents. Additional requests were made by Lead Counsel regarding the allegation in the complaint and the Company produced more documents. [*See Id.* at ¶ 13.]

25. Lead Counsel also interviewed a substantial number of former or current Company witnesses knowledgeable about the issues, including two former Chairmen of the Board, former CEO, the former Executive Vice Chairman and Chief Financial Officer, the former Executive Vice President of TXU and President of TXU Energy, the former Chief Operations Officer of TXU Europe, the former Chief Executive Officer of TXU Europe, and the former President of Energy Trading for TXU Europe. [*See Id.*]

26. Throughout this period of discovery, Lead Plaintiffs and Defendants were advised by various consultants and experts, including individuals with expertise in damages and governance issues, and in estimating potential damages in cases involving allegations of securities fraud. [*See Id.* at ¶¶ 13, 47.]

G. The April 11, 2005 Order

27. On April 1, 2005, this Court held a hearing to determine whether to grant preliminary approval of the proposed settlement and to authorize the issuance of notice to Class Members.

28. Based upon this Court's review of the Stipulation of Settlement, the parties' joint application and oral presentations, this Court entered its April 11 Order,

which, among other things: (i) preliminarily certified the Class for settlement purposes; (ii) found the proposed settlement sufficiently fair, reasonable and adequate to warrant sending notice of the proposal to class members and holding a full hearing on the proposed settlement; and (iii) found that the proposed forms and methods of notice met all of the requirements of the Federal Rules of Civil Procedure, the PSLRA and due process. The Court scheduled a final hearing on the fairness of the proposed settlement for June 23, 2005.

29. As discussed in more detail below, consistent with the court's April 11 Order, the parties provided Notice of proposed settlement to Class Members. The Court approved a class action claims administrator, Gilardi & Co, LLC ("Gilardi" or "Settlement Administrator"), which arranged for the mailing of individual notices. [*See* Declaration of Carole Sylvester Re A) Mailing of the Notice of Pendency and Settlement of Class Action and the Proof of Claim and Release Form; and B) Publication of the Summary Notice ("Sylvester Declaration"), at ¶¶ 5-6.] Gilardi, also had the Notice published in the *Investor's Business Daily* and on its website. [*See Id.* at ¶ 8.]

H. The Fairness Hearing

30. The parties filed submissions in support of the settlement on June 13, 2005. These submissions were accompanied by numerous declarations from fact and expert witnesses.

31. Lead Plaintiffs presented declarations from: (1) Authur C. Nielsen, Jr., Ronald Canada and the Plumbers & Pipefitters National Pension, Lead Plaintiffs, supporting the settlement and plan of allocation of settlement proceeds; (2) Robert A. G. Monks, which detailed the benefits conferred upon TXU shareholders due to corporate governance changes as a result of this settlement; (3) Carole K. Sylvester and Robert E. Forrest, concerning the dissemination and publication of Notice to potential class members; (4) Professor Charles Silver, concerning the reasonableness of class counsels' request for attorneys' fees and reimbursement of expenses; (5) The Honorable Craig Enoch, in support of the proposed attorneys' fee award; and (6) Joe Kendall and Mark Solomon, class counsel, in support of final approval of the settlement and plan of allocation, and award of attorneys' fees and reimbursement of expenses.

32. The Court held a hearing regarding the fairness, reasonableness and adequacy of the proposed settlement on June 23, 2005.

33. Both Lead Plaintiffs' counsel and TXU's counsel made presentations in support of the settlement at the June 23, 2005 Fairness Hearing. Parties objecting to the settlement made presentations as well.

II. THE TERMS OF THE SETTLEMENT

34. The proposed settlement provides the Class with a substantial monetary recovery, which will be allocated among Class Members on the basis of their

particular claims, as well as important corporate governance reforms, designed to benefit TXU and its shareholders.

A. The Settlement Fund

35. Pursuant to the terms of the Stipulation of Settlement, the Defendants paid a total of One Hundred Forty-Nine Million Seven Hundred and Fifty Thousand Dollars ($149,750,000) into a settlement fund from which relief will be provided to Class Members (the "Settlement Fund"). From this settlement fund, $200,000 was used to establish a "Class Notice and Administration Fund." The balance, after deducting the amount of Lead Counsel's attorneys' fee and expenses award, is to be allocated among eligible claimants who submit timely proofs of claim.

1. Expenses to be Deducted from the Settlement Fund

36. The Stipulation of Settlement provides that notice and administration expenses, Lead Counsel's fees and expenses, and tax expenses (if any) will be paid from the Settlement Fund. [*See* Stipulation of Settlement, at 3.b., 3.c., and 8.] The balance of the fund after payment of those amounts will be distributed to Class Members.

37. The terms of the Stipulation of Settlement provided that Lead Counsel could apply to the Court for an award of attorneys' fees and expenses. Lead Counsel committed in the Notice mailed to Class Members that they will not seek an

award of fees exceeding 22.2% of the Settlement Fund [*See* Notice, at XI.] Lead Plaintiffs and Lead Counsel have also applied for reimbursement of litigation expenses in an amount equal to $541,203.77. [*See* Declaration of Ellen Gusikoff filed on Behalf of Lerach Coughlin Stoia Geller Rudman & Robbins LLP in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Gusikoff Declaration"); Declaration of Willie C. Briscoe filed on Behalf of Provost Umphrey Law Firm LLP in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Briscoe Declaration"); Declaration of Jack G. Fruchter filed on Behalf of Abraham Fruchter & Twersky LLP in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Fruchter Declaration"); Declaration of Lawrence G. Soicher, Esq. in Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses (Soicher Declaration).]

2. The Plan of Allocation

38. The Stipulation of Settlement provides that eligible Class Members who submit valid and timely proof of claim forms will receive distributions from the balance of the settlement fund in the form of cash. Those distributions are to be calculated pursuant to the Plan of Allocation prepared by Lead Counsel. Neither the defendants nor their counsel have had any role in, or responsibility for, the Plan of Allocation.

39. Pursuant to the Plan of Allocation, the Net Settlement Fund will be distributed to eligible Class Members who submit valid, timely Proof of Claim forms and Release forms ("Authorized Claimants"). The Plan of Allocation clearly identifies the circumstances by which Authorized Claimants may participate in the distribution of the Net Settlement Fund. [*See* Notice, at VII.]

40. Based on the Plan of Allocation, Lead Counsel projects that Class Members will receive an average distribution of: (1) $5.86 per TXU common stock for Authorized Claimants that purchased TXU stock from April 26, 2001 through October 3, 2002, and sold their stock between October 4 through October 11, 2002; (2) $11.67 per TXU common stock for Authorized Claimants that purchased TXU stock from April 26, 2001 through October 3, 2002, and sold their stock on or after October 12, 2002; (3) $5.81 per TXU common stock for Authorized Claimants that purchased TXU stock from October 4, 2002 October 11, 2002, and sold their stock on or after October 12, 2002; and (4) the difference between the purchase price (not to exceed $50.00) less the sales price per TXU FELINE PRIDES for Authorized Claimants that purchased from May 31, 2002 through October 11, 2002. Additional payment provisions are provided for other Authorized Claimants that purchased all other publicly traded TXU securities during the Class Period. If there are sufficient funds in the Net Settlement Fund, each Authorized Claimant will receive an amount equal to the Authorized Claimant's claim, as defined in the Plan of Allocation. If the amount in the Net Settlement Fund is not

sufficient to permit payment of the total claim of each Authorized Claimant, however, then each Authorized Claimant shall be paid the percentage of the Net Settlement Fund that each Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants. [*See* Notice, at VII.]

41. The Plan of Allocation was formulated by Lead Counsel with assistance from its materiality and damages experts. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 70.]

3. Other Relief

42. In addition to the cash payment of $149.75 million, the Stipulation of Settlement provides that TXU's Board of Directors will adopt resolutions or amendments to the Company's By-Laws and/or Articles of Incorporation to implement a series of corporate governance principles designed to improve the Company's corporate governance and internal controls. The proposed settlement provides for enhancements to the board's composition, compensation, committees and functions in the form of the following, among others:

> the formation of a Lead Independent Director position;
>
> the replacement of two directors who served on the TXU board during the Class Period with independent directors;

increases in the minimum stock holdings by members of the Company's Board;

increasing the number of independent directors;

enhanced "independence" standards for board members;

rescission of the Company's "shareholders rights plan," also known as "poison pill"; and

the appointment of a corporate Governance Officer;

B. Release Bar Orders

43. In consideration of the comprehensive relief described above, the Stipulation of Settlement contemplates that this Court will enter an Order approving the settlement that incorporates a release. [*See* Stipulation of Settlement, at pgs. 10-11.]

III. JURISDICTION

A. Subject Matter Jurisdiction

44. This Court has federal question jurisdiction pursuant to § 27 of the Exchange Act, 15 U.S.C. § 78aa, and § 22 of the Securities Act, 15 U.S.C. § 77v, and 28 U.S.C. §§ 1331 and 1337(a).

B. Personal Jurisdiction

45. This Court has in personam jurisdiction over Lead Plaintiffs and Class Members. The Court plainly may exercise personal jurisdiction over Class Members from Texas and over objectors as a result of their filing objections with this Court. And the Court has properly obtained personal jurisdiction over other out-of-state class Members by giving them proper notice and a chance to opt out or to be heard. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Calagaz v. Calhoon*, 309 F.2d 248 (5th Cir 1962); *Robins v. Cli-Claque Co.*, 2003 U.S. Dist. LEXIS 13695, at * 15 (N.D. Tex. Aug. 4, 2003).

46. The Court therefore finds that all Class Members who did not request exclusion from the Class are subject to this Court's personal jurisdiction. *See Shutts*, 472 U.S. at 812-13.

IV. THE CLASS NOTICE SATISFIES ALL APPLICABLE REQUIREMENTS

47. This Court has found "that the publication, mailing, and Internet posting of such notices in the manner and form set forth in the Stipulation ... meet the requirements of the Rule 23 of the Federal Rules of Civil Procedure, due process, and the Rule of this Court, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto." [*See* April 11 Order at ¶ 3.]

A. Notice to Class Members

48. Beginning on April 22, 2005, the Settlement Administrator mailed by first-class mail, postage prepaid, more than 289,000 copies of the Court-approved Notice to the last-known address of each reasonably identifiable Class Member and in response to requests from potential Class Members, brokers and/or nominees. [*See* Sylvester Declaration, at ¶ 6.]

49. Consistent with the Court's April 11 Order, the Notice included the text of the proposed Plan of Allocation and a Proof of Claim and Release form, which included instructions and requirements for filing a Proof of Claim. The Notice also included a general description of the dismissal, release and bar order provisions of the Stipulation of Settlement.

50. In addition to mailing individual notices, the Settlement Administrator arranged to have the Court approved Summary Notice run in the national edition of *Investor's Business Daily*, on April 29, 2005. [*See* Sylvester Declaration, at ¶ 8.]

51. The Notice (in its entirety, including the text of the Plan of Allocation and a general description of the release) was published on the Settlement Administrator's Internet website [*See Id.* at ¶ 7.]

B. Applicable Notice Requirements

52. Where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action, the Court must consider Fed. R. Civ. P. 23(c)(2)'s notice requirements for class certification, as well as Rule 23(e)'s notice requirements for settlement and dismissal. *See, e.g., Newby v. Enron Corp.*, 394 F.3d 296, 306 (5th Cir. 2004); *Moore v. Halliburton Co.*, Fed. Sec. L. Rep. (CCH) P92,916, at *36 (N.D. Tex. Sep. 9, 2004). For classes certified under Fed. R. Civ. P. 23(b)(3), such as the class in this action, Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(e) is less specific, requiring only that notice of the proposed settlement be given "in such a manner as the court directs," and is considered less stringent than Rule 23(c)(2). *See, e.g., Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91 (3d Cir. 1985); *In re Cherry's Pet to Intervene*, 164 F.R.D. 630, 636 (E.D. Mich. 1996).

53. The Constitution's Due Process Clause also imposes certain minimum notice requirements which are satisfied if the notice conforms to Rule 23(c)(2). *See Eisen v. Carlisle & Jacquilin*, 417 U.S. 156, 173-74 (1974) ("the mandatory notice pursuant to subdivision (c)(2) ... is designed to fulfill requirements of due process to which the class action procedure is of course subject") (quotations marks omitted); *see also Doleac v. Michalson*, 264 F.3d 470, 489 (5th Cir. 2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001).

54. In addition to the requirements of the Federal Rules and due process, the PSLRA, see 15 U.S.C. § 78u-4(a)(7); 15 U.S.C. § 77z-1(a)(7)(A), imposes certain additional notice requirements:

> [1] the amount of the settlement and proposed distribution to plaintiffs; [2] if the parties to settlement disagree on the average amount of damages per share. . ., "a statement from each settling party concerning the issue or issues on which the parties disagree"; [3] a statement of attorneys' fees or costs sought; [4] the name, address and telephone number of plaintiffs' representatives; and [5] "[a] brief statement explaining why the parties are proposing the settlement."

In re Cendant Corp. Securities Litig., 109 F. Supp. 2d 235, 254-55 (D.N.J. 2000) (quoting the PSLRA), aff'd, 264 F.3d 201 (3d Cir. 2001), *cert. denied sub nom. Mark v. California Pub. Employees' Retirement Sys.*, 122 S. Ct. 1300 (2002).

C. The Notice Provided in the Case Clearly Meets all Applicable Requirements

55. First, the dissemination of the notice package - by first-class mail to all Class Members who could be identified by reasonable effort - supplemented by publication on the Settlement Administrator's Internet website, and broad publication notice of the Summary Notice in a national newspaper – more than satisfies Rule 23(c)(2)'s requirement of individual notice "to all members who can be identified through reasonable effort." *See, e.g., Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429-30 (5th Cir. 1977); *Grace v. City of Detroit*, 145 F.R.D. 413, 416 (E.D. Mich. 1992)

(notice by first-class mail and publication meets Rule 23(c)(2) requirements).

56. Notice was also provided to Class Members in a timely manner. As noted, mailing of the individual Notice began on April 22, 2005 – 62 days before the scheduled Fairness Hearing. The timing of the mailing is thus adequate. *See, e.g., Miller*, 559 F. 2d at 429; (period of four weeks between the mailing and the hearing is sufficient); *see also Tanksley v. Gulf Oil Corp.*, 848 F.2d 515, 518 (5th Cir. 1988); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985).

57. The content of the notice also complies with Rule 23(c)(2). *See Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) ("[t]he notice provided to class members must include enough information to allow the class members to make an informed choice of whether to approve or disapprove the settlement"); *see generally, Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983) (notice must give class members 'a full and fair opportunity to consider the proposed [settlement] and develop a response"); *see also, In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 224 (5th Cir. Apr. 1981); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 183 (5th Cir. 1979).

58. The Court-approved individual Notice, which was mailed to individual Class Members and posted on the Administrator's website, clearly informed Class Members of the relevant aspects of the class action and the settlement, including:

How the settlement fund will be allocated to the Class Members if the

settlement is approved;

The right of Class Members to exclude themselves from the settlement Class, to object to any aspect of the settlement or to appear at the Fairness Hearing and the processes and deadlines for doing so;

The date of the Fairness Hearing; and

The binding effect of any judgment – whether favorable or not – on all persons who do not exclude themselves from the Class, and the impact on Class members if the settlement is approved.

The Notice also provided Class Members with a telephone number that they could call to obtain additional information regarding the settlement. In addition, as described above, a Court-approved Summary Notice – published in a national newspaper – that contained all pertinent information about the class action and settlement required by Rule 23(c)(2), Rule 23(e) and due process. The Summary Notice also provided Class Members with a telephone number and advised them that they could obtain a copy of the individual Notice by calling that number.

59. Consistent with the requirements of the PSLRA, the Notice:

Sets out the amount of the settlement and the proposed distribution under the heading "Plan of Allocation";

- Informs Class Members of the parties' disagreement regarding the average damages per share;

States the amount of attorneys' fees and costs sought and provides Class Members with the names, addresses and telephone numbers of Lead Counsel; and

- Explains why the parties are proposing the settlement.

60. In these circumstances, all applicable notice requirements have been satisfied, including the requirements of Rule 23(c)(2) and 23(e), and the U.S. Constitution. *See, e.g., In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977); *Prieto v. John Hancock Mut. Life Ins. Co*, 132 F. Supp. 2d 506, 517 (N.D. Tex. 2001); *Shaw v. Toshiba Am. Info. Sys.*, 2000 U.S. Dist. LEXIS 3592, at *49 (E.D. Tex Jan. 28, 2000); *In re Corrugated Container Litig.*, 556 F. Supp. 1117, 1123; *Johnson v. Am. Airlines, Inc.*, 531 F. Supp. 957, 961 (N.D. Tex. 1982).

61. The Court thus affirms its findings and conclusions in the April 11 Order that the notice and the notice methodology are the best practicable notice and meet the requirements of the Federal Rules of Civil Procedure (including Fed. R. Civ. P. 23(c)(2) and (e)), the United States Constitution (including the Due Process Clause), the PSLRA, the Rules of this Court and any other applicable law.

V. CLASS CERTIFICATION

62. In its April 11, 2005 Order Preliminarily Approving Settlement and Approving Form and Manner of Service, the Court preliminarily found the requirements of class certification to be satisfied. [*See* April 11 Order, at ¶¶ 1(a)-(b).] Lead Plaintiffs argue that final certification of this action is both appropriate and warranted. [*See* Lead Plaintiffs' Memorandum of Law in Support of Final Approval of Settlement and Plan of Allocation of Settlement Proceeds ("Lead Plaintiffs' Settlement Memorandum"), at pgs. 28-32.] The Court makes the following findings in support of its decision to grant final certification of the Class for settlement purposes, which are intended to supplement and finalize the certification findings made by the Court in its April 11 Order.

63. In order to certify this settlement class, the court must find that the proposed class meets the four threshold requirements of the Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality and adequacy of representation – and, in addition, is maintainable under Rule 23(b)(3). The Rule 23(b)(3) requirements are that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy."

64. In *Amchem Products,* the Supreme Court expressly acknowledged that cases may be certified for settlement purposes only. *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 618-19, 621-22 (1997) ("dominant concern" is "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives"; "settlement is relevant to class certification," and is "a factor in the calculus."); *see also Black v. Chase Bank of Tex. Nat'l Ass'n*, 2001 U.S. Dist. LEXIS 18134, at *5 (N.D. Tex. Nov. 6, 2001); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (it is proper and consistent for the court to certify a class for settlement purposes even while it might be difficult to reach that determination in a different context).

A. Numerosity

65. The numerosity requirement plainly is satisfied in this case. In its April 11 Order, the Court defined the class for settlement purposes as:

> All Persons who purchased the publicly traded securities of TXU Corp. including TXU Europe Limited, ("TXU") between April 26, 2001 to October 11, 2002, inclusive. Excluded from the Settlement Class are Defendants, officers and directors of TXU and its affiliates and subsidiaries and the Underwriter Defendants, as well as their families; members of the immediate family of each of the Individual Defendants; any entity in which any Defendant has or had a controlling interest; the legal representatives, heirs, executor, successors or assigns of any such excluded party; and those members of the Settlement Class that timely and validly exclude themselves from the Settlement Class.

[*See* April 11 Order, at ¶1.] The purchasers covered by this Class or those who

purchased publicly traded TXU securities during the Class Period. "[T]he prerequisite expressed in Rule 23(a)(1) is generally assumed to have been met in class action suits involving nationally traded securities." *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. Jul. 1981).

B. Commonality

66. Rule 23(a)(2) requires that questions of law or fact exist that are common to the class. "The commonality requirement is satisfied where the party opposing the class has engaged in some course of conduct that affects a group of persons. In such instances, the elements of that cause of action will be common to all persons affected." *McNamara v. Bre-X Minerals, Ltd.*, 2003 U.S. Dist. LEXIS 25644, at *24 (E.D. Tex. Dec. 15, 2003); *see also*, 1 CONTE & NEWBERG § 3.10. The Fifth Circuit has observed that "the threshold for commonality is not high." *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 296-97 (5th Cir. 2001). In the instant case, the claims of all Class members rest on the same allegations of false and misleading statements by Defendants. In addition, the claims of all Class Members derive from the same private right of action granted by the federal securities laws, based on the same underlying facts.

67. Allegations of a common course of fraudulent conduct, such as those set forth in the Complaint, generally satisfy the commonality requirement. *See, e.g., In re Fleming Cos. Secs., & Derivative Litig.*, 2004 U.S. Dist. LEXIS 26488, at *151 (E.D. Tex.

Jun. 10, 2004), *citing, In re Saxon Sec. Litig.*, 1984 WL 2399, at *7 (S.D.N.Y. 1984) (holding that "debenture holders have an interest identical to that of the holders of common stock in demonstrating a common course of fraudulent conduct").

68. There is no doubt that questions of law and fact exist that are common to members of the Class in this case.

C. Typicality

69. Rule 23(a)(3) requires that the claims of the class representative not differ significantly from the claims of the class as a whole. Rule 23(a)(3) "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those they purport to represent." *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999).

70. "Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics as that of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Berger v. Compaq Computer Corp.*, 2000 U.S. Dist. LEXIS 21424, at *10 (S.D. Tex. Jul. 17, 2000).

71. Here, Lead Plaintiffs' legal and remedial theories are the same as those of the other Class Members. The same allegedly false and misleading statements

were directed to Lead Plaintiffs and the other Class Members. Defendants are alleged to have violated the federal securities laws in the same manner with respect to Lead Plaintiffs as to all other Class Members. Moreover, the legal theories and evidence that Lead Plaintiffs would advance to prove its claims would apply to the claims of all other members of the Class.

72. Lead Plaintiffs allege that they were damaged because the Defendants' misrepresentations caused the price of TXU Securities to be artificially inflated. Other Class Members were allegedly harmed by the same artificial price inflation arising from Defendants' alleged misconduct. Because Lead Plaintiffs stand in the same position as other Class Members, Lead Plaintiffs' claims are typical of those asserted by Class Members.

73. Lead Plaintiffs' claims are typical of those of the other members of the Class.

D. Adequacy of Representation

74. To meet the adequacy-of-representation requirement of Rule 23(a)(4), Courts consider (1) whether the named representative shares common interest with other class members, and (2) whether the named representative will vigorously prosecute the interests of the class through the class counsel. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482 (5th Cir. 2001).

1. Qualifications of Lead Counsel

75. Lerach Coughlin Stoia Geller Rudman & Robbins LLP and Provost Umphrey Law Firm, LLP (collectively "Lead Counsel") are two of the nations' preeminent plaintiffs' class action law firms. The lawyers from those firms responsible for the prosecution of this case have taken leading roles in numerous important actions on behalf of investors asserting claims of fraud.

76. Lead Counsel have amply demonstrated their competence through their representation of Lead Plaintiffs in this action to date, including their successful negotiation of a $149.75 million settlement of the claims made by Lead Plaintiffs. This is the largest cash settlement in a securities class action ever in this District. It is also one of the largest securities class action recoveries ever obtained in the United States in a case not involving a restart of never reported earnings.

2. Qualifications of Lead Plaintiffs

77. Lead Plaintiffs are The Plumbers & Pipefitters National Pension Fund (a large institutional investor), Arthur Nielsen, Jr. and Ronald Canada. Each purchased TXU securities during the Class Period. [*See* Compl., at ¶ 17.]

78. In the Fifth Circuit, two criteria has been articulated for determining adequacy of representation: (1) whether the named representative shares common interest with other class members; and (2) whether the named representative will

vigorously prosecute the interests of the class through the class counsel. *Berger*, 257 F.3d at 482.

79. It is plain that the Lead Plaintiffs are united in asserting the common goal of maximizing the total recovery for the Class. Through Lead Plaintiffs' efforts, Defendants have been compelled to pay $149.75 million in cash and implement groundbreaking corporate governance improvements. This settlement amount clearly evidences that Lead Plaintiffs have "vigorously" prosecuted the interests of the Class.

80. Moreover, the Lead Plaintiffs have no interests that conflict with those of other Class Members, and have a major stake in the outcome of this action, having asserted losses in connection with their lead plaintiff motion in the aggregate of nearly $2.6 million from the Class Period purchase of TXU Securities during the Class Period. As such, Lead Plaintiffs are part of the Class and possesses the same interests and suffered the same injury as other Class Members. *See Amchem*, 521 U.S. at 625.

81. As Congress intended in passing the PSLRA, Lead Plaintiffs, are sophisticated class members that have taken an active and participatory role in the prosecution of this litigation. As noted above, Lead Plaintiffs monitored the progress of the litigation, instructed Lead Counsel with respect to ongoing investigation and participated, through Lead Counsel, in settlement negotiations. [*See* Nielsen Declaration, at ¶¶ 7-9; Canada Declaration, at ¶¶ 4-7; and Sweeney Declaration, at ¶¶

4-5.] Thus, there is no doubt that Lead Plaintiffs are adequate class representatives.

82. Given that Lead Counsel are highly respected, experienced lawyers in this area of practice, and no conflicts exist between the Lead Plaintiffs' interests and those of other Class Members, this Court finds that the adequacy requirement is satisfied.

E. Predominance of Common Questions

83. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "In order to predominate common issues must constitute a significant part of the individual cases." *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986). "The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless. *Id.* (Internal quotation marks and citation omitted). The test is "'readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."' *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 303 (N.D. Ohio 2001) (quoting *Amchem*, 521 U.S. at 625).

84. Lead Plaintiffs have shown above that numerous important questions of law and fact are common to the members of the Class. These questions clearly predominate over any conceivable individual question, because Defendants' alleged misconduct affected the members of the Class in the same manner. The alleged

misrepresentations by Defendants involve a series of statements that were uniformly disseminated to the investing public, as well as material non-public information that the Defendants failed to disclose to the investing public. Inasmuch as the claims against Defendants arise out of the same set of operative facts and are based on common legal theories, the predominance of common questions of law and fact is clear. *See In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 422 (S.D. Iowa 2001) (predominance requirement met where class has a common interest in determining whether "'defendants' course of conduct is in its broad outlines actionable"'; "[d]ifferences between class members - based on when they bought [the] stock, how much they bought, and when they sold it 'cast no doubt on the finding of predominance"') (quoting *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 178 (E.D. Pa. 2000)). Indeed, all liability issues are common to each and every Class Member. The Class thus readily satisfies the predominance requirement.

F. Superiority

85. Class actions are superior when individual actions would be wasteful, duplicative, present managerial difficulty and be adverse to judicial economy. *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 627 (5th Cir. 1999). Here the class members claim the same injury, from the same event, from the same defendant over the same period of time. Individual actions would therefore be duplicative of the same facts and law. *Basic, Inc. v. Levinson*, 485 U.S. 224, 250 (1998).

86. Where a settlement class is presented, the trial court need not consider the manageability of the class at trial. *See Amchem*, 521 U.S. at 620 (*citing* Fed. R. Civ. P. 23(b)(3)(D)). The remaining three superiority factors plainly indicate that a class action is the best vehicle for conducting this litigation.

87. Given the identity of legal and factual issues among Class Members, the notion that Class Members should file thousands of individual actions is completely illogical and would constitute an enormous waste of judicial and private resources. *See Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 958 (E.D. Tex. 2000). Moreover, it would be economically prohibitive for all but a limited number of Class Members (i.e., those who had the largest losses) to adjudicate their claims individually. *Amchem*, 521 U.S. at 617 ("[t]he policy at the very core of the class mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"); *Amchem* at 615 ("the superiority requirement was to achieve economies of time, effort, and expenses and promote uniformity of decisions"); *Sterling v. Velsicol Chem. Corp.*, 855 F. 2d 118, 1196 (6th Cir. 1988) ("[t]he procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense").

88. In addition, this Court is the most desirable forum in which to prosecute this action. TXU's corporate headquarters was located in Dallas, Texas during

the Class Period and remains here today. Many of the acts and practices complained of originated in Texas, and much of the evidence and many of the witnesses relevant to Lead Plaintiffs' claims are found in Texas. Any fragmentation or separation of this litigation into other jurisdictions would increase the costs to the Class and Defendants, and possibly could cause conflicting results, increasing legal costs and delay associated with resolving such conflicts. *See Shaw*, 91 F. Supp. 2d at 958. Clearly, there is a strong interest in resolving the litigation in this forum.

89. Based on these factors, the superiority of resolving this litigation by means of a class action is evident.

90. For all of these reasons, as well as those set out in the Court's April 11 Order, the Court finally certifies for settlement purposes the Class described in the Order Approving the Class Action Settlement and in the Final Judgment.

VI. FAIRNESS OF THE SETTLEMENT

91. Under Federal Rule of Civil Procedure 23(e), a court should approve a proposed class action settlement if it determines that the settlement is "fair, reasonable, and adequate, as well as consistent with the public interest." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). In making this determination, a court should consider the following factors:

- The Plaintiffs' likelihood of success on the merits, weighed against the

amount and form of relief offered in the settlement,

- The complexity, expense and likely duration of the litigation,

- The state of proceedings and the amount of discovery completed,

- The nature of the settlement negotiations,

- The judgment of experienced counsel, and

- Objections raised by members of the class.

Newby, 394 F.3d at 301; *Reed v. Gen. Motors Corp.*, 703 F.2d 170 (5th Cir. 1983); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982).

92. In addition, a court should consider the "public interest in favor of settlement of class action lawsuits," *Cotton,* 559 F.2d at 1331; *see also Vukovich*, 720 F.2d at 922 ("A court may not withhold approval simply because the benefits accrued from the [settlement] are not what a successful plaintiff would have received in a fully litigated case"). Each of these various considerations strongly supports approval of the proposed settlement in this action.

A. Relief Offered in Settlement Compares Favorably to Plaintiffs'

Likelihood of Success

93. "The most important factor is the probability of the plaintiff's success on the merits." *Parker*, 667 F.2d at 1209. "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of settlement [t]hey do not decide the merits of the case or resolve unsettled legal questions." *Carson v. AM Brands, Inc.*, 450 U.S. 79, 88, n.14 (1981).

94. Review of the circumstances here demonstrates that the concrete monetary and corporate governance benefits of the proposed settlement far outweigh plaintiffs' uncertain prospects of success if this case were to be litigated rather than settled.

1. **Relief Offered in Settlement**

95. As set forth in detail above, the proposed settlement provides a $149.75 million settlement fund that will, after Lead Counsel's fees and certain other settlement-related expenses are paid, be distributed to eligible Class Members. The proposed settlement also provides for important enhancements to TXU's corporate governance policies and procedures, designed to strengthen the Company's internal controls and corporate governance.

96. The settlement thus offers significant benefits to the shareholder

Class. Not only does it provide for one of the largest cash recoveries ever obtained in a non-restatement securities class action, it also includes TXU's adoption of sweeping beneficial corporate governance procedures. [*See* Declaration of Robert A.G. Monks, at ¶¶ 3, 15-22.]

97. The relief provided by the proposed settlement thus clearly falls well within the "range of reasonableness" required for settlement approval. *See, e.g. In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993) ("[i]n assessing the settlement, the Court must determine 'whether it falls within the 'range of reasonableness,' not whether it is the most favorable possible result in the litigation'") (internal citations omitted).

2. Plaintiffs' Likelihood of Success Is Uncertain

98. Defendants have demonstrated that Plaintiffs would face substantial factual and legal obstacles if this case were to proceed. Indeed, the allegations of the Complaint are untested by a motion to dismiss for failure to state a claim. Even assuming some parts of the Complaint were found to state a claim, Defendants have identified in their motions to dismiss what they believe are substantial legal and factual defenses that they believe ultimately would prevail - either on a motion for summary judgment or at trial.

99. For example, Defendants contend that notwithstanding allegations

by a former TXU executive that he forecasted the adverse events that precipitated this lawsuit, in fact there is no evidence that the statements made by Defendants were false when made. [*See* TXU's Motion to Dismiss, at pgs. 11-12.] Even if there was such evidence, Defendants maintain on a motion to dismiss, Plaintiffs' Exchange Act and Rule 10b-5 claims would be found to lack the requisite scienter element required by the PSLRA. As the Fifth Circuit recently observed, "Under the PSLRA, a plaintiff must now 'state with particularity facts giving rise to a strong inference that defendant acted with the required state of mind."' *In re El Paso Elec. Co. Sec. Litig.*, 2004 U.S. Dist. LEXIS 2580, at *9 (W.D. Tex. Feb 23, 2004). The Supreme Court has held that scienter, a mental state embracing intent to deceive, manipulate, or defraud, is an essential element of a § 10(b) or Rule 10-5 claim. *Id.*

100. As noted above, the proposed settlement provides that each eligible Class Member who files a valid Proof of Claim will receive, within a relatively short period of time following approval and final disposition of the case, a distribution from the settlement fund consistent with Lead Counsel's Plan of Allocation. That certainty of recovery clearly outweighs plaintiffs' uncertain prospects of success through continued litigation. This factor therefore favors approval of the settlement.

B. Further Litigation Would Be Complex and Lengthy

101. The Complaint's allegations raise many complex legal and factual

issues, including the accuracy and materiality of numerous statements and the scienter of those who made the statements. If litigation were to proceed, the issues would be hotly disputed by the parties. Litigation relating to such fact-intensive and difficult-to-prove claims would thus be extraordinarily complicated and time consuming, and require expert testimony. *In re Elec. Data Sys. Corp. Secs. Litig.*, 226 F.R.D. 559, 571 (E.D. Tex. 2005) (securities fraud class actions are exceptionally complex)(the PSLRA's scienter requirements are complex); *Oscar Private Equity Invs. v. Holland*, 2005 U.S. Dist. LEXIS 6525, at *34 (N.D. Tex. Apr. 15, 2005) (causation analysis in securities fraud cases is complex); *Longman v. Physicians Res. Group, Inc.*, 2003 U.S. Dist. LEXIS 17546, at *8 (N.D. Tex. Sep. 30, 2003) (securities fraud class actions are complex litigation); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (recognizing the complexity of securities fraud class action claims brought under the PSLRA); *Boston v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1278 (5th Cir. 1989) (securities fraud trial was long and complex).

102. Ultimately, if Plaintiffs were to succeed at trial, they still could expect a vigorous appeal by Defendants and an accompanying delay in the receipt of any relief. *See, e.g., In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 667 (D. Va. 2001) ("a jury verdict for either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs").

103. In contrast, the proposed settlement grants Class Members relief without subjecting them to the risk, complexity, duration and expense inherent in continuing this litigation. *See Id.* (recognizing that "additional litigation of plaintiffs' claims ... would likely have been protracted and costly, requiring extensive expert testimony concerning the company's accounting practices and significance of the Individual Defendants' decisions in relation to GAAP" and concluding that "the old adage, 'a bird in hand is worth two in the bush' applies with particular force"); *see also In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 243 (D.N.J. 2000) (finding that the complexity and duration of litigation weighed in favor of settlement).

104. Thus, this factor also supports approval of the settlement.

C. The State of this Proceeding Strongly Supports Approval of the Proposed Settlement

105. Formal discovery is not a prerequisite to settlement. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. Apr. 1981) Although "[t]here is no precise yardstick to measure the amount of litigation that the parties should conduct before settling," *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *13 (E.D. Mich. Dec. 20, 1996), "[t]he Court need not find that the parties have engaged in extensive discovery," *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d

78 (2d Cir. 2001) (citation omitted); *see also Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 556-57 (S.D. Ohio 2000) (approving settlement in which counsel relied primarily on informal discovery); *D'Amato*, 236 F.3d at 87 ("although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information ... thus, the 'stage of the proceedings' factor ... weighed in favor of settlement approval") (internal citation omitted); *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1239 (9th Cir. 1998) (formal discovery is not necessary "where the parties have sufficient information to make an informed decision about settlement."). Unless Lead Counsel settled while "groping in darkness" the lack of formal discovery will not hinder the settlement. *Id. Cotton*, 559 F.2d at 1332.

106. The Settlement Agreement follows several phases of informal discovery (due to the PSLRA- mandates discovery stay) that provided Lead Counsel and their experts a comprehensive understanding of the facts and issues involved in their claims and defenses that potentially could be raised against them were the case to proceed. Before entering settlement negotiations, Lead Plaintiffs conducted an extensive investigation to assess the merits of the Complaint's allegations. Lead Counsel and private investigators conducted dozens of interviews with the Company's former employees and management personnel. Lead Counsel also examined the Company's public filings, press releases, analyst reports and other documents and employed experts in accounting, damages, materiality, loss causation and corporate governance to aid in

Lead Counsel's investigation. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 9.]

107. After initial settlement negotiations failed in May 2004, Lead Counsel continued their investigation. Prior to filing the Consolidated Complaint, Counsel for Lead Plaintiffs had conducted many months of investigation and research into the claims alleged. [*See Id.* at ¶ 7.] In January 2005, the parties preliminarily agreed to settle this action. [*See Id.* at ¶ 48.] Lead Counsel continued its investigation during the parties' settlement negotiations and reviewed hundreds of thousands of pages of relevant information to Lead Plaintiffs. A team of more than ten attorneys representing the two Lead Counsel firms reviewed these documents from current and former TXU officers and directors. Co-Lead Counsel also had access to and have reviewed the transcripts of numerous depositions and related exhibits from the Murray Litigation. Similarly, Co-Lead Counsel had access to and have reviewed the transcripts and related materials pertaining to the English Proceedings. Finally, Co-Lead Counsel have had access to and have reviewed over 100,000 pages of additional documents produced to the SEC in connection with a subpoena served on TXU on March 17, 2005 after his proposed settlement had been announced (the "SEC Investigation"). As a result, Co-Lead Counsel were able to assess the claims and defenses in this case through the investigation, through the exchange of information in settlement talks, and through the negotiation and exercise of broad discovery rights that Co-Lead Counsel insisted that

plaintiffs be afforded in the settlement process. [*See Id.* at ¶ 11.]

108. The investigation and discovery that occurred before, during and after settlement negotiations have enabled Lead Counsel and Lead Plaintiffs - as well as Defendants and this Court - to assess the legal and factual merits of the claims set out in the Complaint. *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) (state of the proceedings favored settlement when discovery provided for ample information with which to evaluate the merits of the competing positions). Lead Counsel states that in the discovery process, Co-Lead Counsel became aware of the defendants' defenses which, if accepted, could be sufficient to refute plaintiffs' allegations. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 4.]

109. Under these circumstances, there is no doubt that Lead Plaintiffs had "an excellent idea of the merits of [their] case ... [and were] able to form an 'adequate appreciation of the merits of the case before negotiating." *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235-36 (3d Cir. 2001). The stage of this proceeding thus also weighs heavily in favor of approving the settlement.

D. The Parties Reached the Settlement After Arm's-Length Negotiations and the Settlement Was Not a Product of Fraud or Collusion

110. In addition to evaluating the substance of the proposed settlement, the Court examines "the process by which the settlement was arrived at, to make sure

that the settlement is not the product of fraud, overreaching, or collusion." *Murillo v. Tex. A&M Univ. Sys.*, 921 F.Supp. 443, 445 (S.D. Tex. 1996).

111. The parties have amply demonstrated that the settlement negotiations in this case, which took place over a lengthy period of time and involved two highly regarded mediators, were extensive and undertaken at arm's length by counsel on both sides who have substantial experience and expertise in representing parties in securities class actions. Throughout the negotiation process, the parties employed their own teams of attorneys, consultants and experts to assess the validity of the allegations underlying the Complaint. In addition, Lead Counsel and Lead Plaintiffs diligently prosecuted the action on behalf of the Class. Lead Counsel had already conducted dozens of interviews with former Company employees prior to beginning negotiations. After the parties reached a preliminary settlement agreement, Lead Plaintiffs and Lead Counsel insisted on additional discovery, as described above.

112. The extensive negotiations thus produced a final settlement agreement that is fair to all Class Members and does not unjustly benefit any Class Member. The settlement funds will be distributed on a pro rata basis based on a formula that is tied to liability and damages. The Plan of Allocation developed by experts retained by Lead Counsel, has resulted in a settlement agreement that fairly and rationally allocates the proceeds of the settlement.

113. The gravamen of an approvable proposed settlement is that it be "fair adequate, and reasonable and is not the product of collusion between the parties." *See Cotton,* 559 F.2d at 1330, *citing Young v. Katz,* 447 F.2d 431 (5th Cir. 1971)); *see also Amchem,* 521 U.S. at 633 (settlement approved when it is the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys). Here the "proposed settlement was the result of intense, arms-length negotiations between the parties" and "the final agreement suggests no bias, collusion or coercion in favor of any party or sub-group of class members," this factor weights in favor of approving the settlement. *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. at 372; see also *In re Southern Ohio Corr. Facility*, 173 F.R.D. at 214 (approving settlement negotiated at arms' length, with no evidence of collusion and no indication that any party benefited at class's expense).

E. The Opinion of Lead Counsel Weighs Strongly in Favor of Settlement

114. When evaluating the fairness, adequacy and reasonableness of a settlement, courts consider the opinions of experienced counsel. *See San Antonio Hispanic Police Officers' Org. Inc. v. City of San Antonio*, 188 F.R.D. 433, 461 (W.D. Tex. 1999); *Lelsz v. Kavanagh*, 783 F.Supp. 286, 297 (N.D. Tex. 1991); *Neff v. Via Metro Transit Auth.*, 179 F.R.D. 185, 208 (N.D. Tex. 1998); *see also Dun & Bradstreet*, 130 F.R.D. at

372 ("[c]ounsel in this matter have extensive experience in complex class action litigation. The Court pays particular attention to the opinion of all counsel that the proposed settlement agreement is fair, adequate and reasonable"). In a case like this one, where the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action litigation, courts typically "defer to the judgment of experienced trial counsel who has evaluated the strength of his case." *Thompson v. Midwest Found. Ind. Physicians Ass'n*, 124 F.R.D. 154, 159 (S.D. Ohio 1988) (recognizing that because the parties engaged in "extensive discovery" and Plaintiffs' counsel was "experienced in class action matters ... the opinion of Plaintiffs' counsel that the proposed settlement agreement is fair, adequate and reasonable is an important factor in the Court's consideration").

115. Here, the Court-appointed Lead Counsel have extensive experience in class action securities litigation. In addition, as discussed in detail above, Lead Counsel participated in an intensive investigative and discovery process. Lead Counsel reviewed hundreds of thousands of p ages of documents, including thousands of documents from TXU's files, and conducted numerous interviews to assess the strengths and weaknesses of their positions. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶¶ 7, 13.] As a result of their thorough investigation, Lead Counsel have concluded that the proposed settlement is fair, reasonable and adequate. [*See* Lead Plaintiffs' Settlement Memorandum, at pgs. 5-8.] Under these circumstances, this Court

gives Lead Counsel's support of the settlement substantial weight in considering whether to approve the settlement.

F. Absent Class Members Have Responded Favorably to the Proposed Settlement

116. The Court should consider the reaction of the class to the settlement; however, "a settlement can be fair notwithstanding a large number of class members who oppose it." *Cotton,* 559 F.2d at 1331.

117. As of June 1, 2005, from the over 289,000 notices sent to Class Members, only 122 timely requests for exclusion have been submitted. The shareholders submitting these requests for exclusion indicated that they purchased less than 1.5 million shares of common stock during the class period. Those shares represent a tiny percentage of TXU stock that was traded during that period. The extremely small number of requests for exclusion that have been submitted demonstrates that the vast majority of Class Members support the settlement. Furthermore, a review of the requests for exclusion that were received reveals that the majority do not evidence opposition to the settlement. Many of the shareholders who requested exclusion apparently simply do not wish to participate in the settlement with no apparent reason.

118. Moreover, there have only been eight (8) objections, timely or otherwise, to the proposed settlement filed with the Court. However, only two objectors

have contested the benefits received by the Class as a result of the settlement.

a. The New York State Teachers Retirement System, the State of Wisconsin Investment Board, the Public Employees Retirement System of Idaho, and the Pennsylvania Public School Employees Retirement System, objected to the requested attorneys fees. The objections are without merit since the fee structure agreed between Lead Counsel and Lead Plaintiffs is fair and reasonable. It is in the best interests of the class in that it has appropriately incentivized counsel to obtain the maximum recovery possible, and it represents a percentage of the Settlement Fund that is consistent with, if not less than, awards made in similar cases.

b. Irwin Chase has objected to the plan of allocation and to the requested attorneys fees. The objection is without merit with respect to attorneys fees, as set forth above. Irwin Chase's objection to the plan of allocation – that it does not include option traders – is without merit because lead plaintiffs have confirmed that under the catch-all provisions of the plan of allocation options are included and such claims will be processed.

c. Tom Bouressa objected on multiple grounds. However, Mr. Bouressa is not a member of the plaintiff class and, therefore, has no standing. Accordingly, the court rejects Mr. Bouressa's objections.

d. Bruce Girdauskas has objected on the grounds that TXU is

contributing too much to the Settlement Fund. Mr. Girdauskas' claims, if he has any, are derivative in nature. Because Mr. Girdauskas has not complied with the demand requirements for derivative claims under the Texas Corporation Act, and because he lacks standing, Mr. Girdauskas' objections are rejected.

e. Rinis Travel Service Inc Profit Sharing Trust ("Rinis") has filed an untimely objection and, in an attempt to avoid the consequences of its untimeliness, has also sought to intervene. Because the notice of settlement was sufficient, including the notice of the time within to file objections, Rinis' objection is rejected and its motion to intervene is denied.

119. Accordingly, the overwhelming response of absent Class Members overall also strongly supports approval of the settlement.

G. Approval of the Proposed Settlement Agreement Is in the Public's Interest

120. Courts in the Fifth Circuit have consistently held that public policy favors the settlement of class actions. *Cotton*, 559 F.2d at 1331.

121. The proposed settlement in this case serves the public interest. The settlement requires Defendant TXU to implement a number of corporate governance improvements as well as compensate Class Members for their contested damages now, rather than prolonging a recovery until after a trial and appeal, if at all. In addition, the

proposed settlement would allow the Company to avoid the expense and burden of defending the action and alleviate any further disruption to its operations. A swift resolution of this dispute thus will avoid complex and protracted litigation, provide valuable relief to the Class, and "foster[] the goals of certainty, finality and economy, which lie at the heart of our general preference for settlement of class actions." *Berry*, 184 F.R.D. at 106.

122. In these circumstances, the public interest clearly weighs in favor of approving the settlement.

VII. FAIRNESS OF THE PLAN OF ALLOCATION

123. Approval of a plan of allocation of settlement proceeds among the members of the Class under Federal Rule of Civil Procedure 23 is governed by the same standard of fairness, reasonableness and adequacy applicable to approval of the settlement as a whole. *See In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982) (standard of review "applies with as much force to the review of the allocation agreement as it does to the review of the overall settlement between plaintiffs and defendants").

124. "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable," *In re Oracle Sec. Litig.*, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) 98,355, at 90,446 (N.D. Cal. June 18, 1994).

However, "a class action settlement need not necessarily treat all class members equally." *Cohen v. Resolution Trust Corp.*, 61 F.3d 725, 728 (9th Cir. 1995), *vacated on other grounds*, 72 F.3d 686 (9th Cir. 1996); *see also Petruzzi's, Inc. v. Darling-Del. Co.*, 880 F. Supp. 292, 300-01 (M.D. Pa. 1995) ("disparate treatment of class members may be justified by a demonstration that the favored class members have different claims or greater damages").

125. As noted above, in this case Lead Counsel relied on the damages analyses of its expert, in determining the allocation of the Net Settlement Fund among Class Members. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 70.]

126. The Court finds that the methodology used by Lead Counsel in preparing the Plan of Allocation was appropriate. That methodology ensures that Class Members' recovery will be based on not only their legal damages, but also on their actual losses recognizing the facts and circumstances of this case, based on an objective analysis of the magnitude of loss based on the timing of purchases and sales. *See, e.g., Microstrategy*, 148 F. Supp. 2d at 654 (approving plan of allocation that "sensibly makes interclass distinctions based upon, inter alia, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue"); *In re Aetna Sec. Litig.*, No. CIV.A.MDL 1219, 2001 WL 20928, at *12 (E.D. Pa. Jan. 4, 2001) (approving plan of allocation that "acknowledges the differing losses suffered by Claimants depending on the dates on which they purchased and sold Aetna stock and

the price at which they may have sold the shares").

127. The Court further finds that allocation of the Net Settlement Fund that will be accomplished by the Plan of Allocation is fair, reasonable and adequate. The objective and widely accepted analytical methodology employed by Lead Counsel and its expert in preparing the Plan of Allocation has resulted in a substantively appropriate set of principles for distribution of the settlement fund. Most importantly, there has only been one objection to the Plan of Allocation.

128. For all of the reasons set out above, the Court finds that the Plan of Allocation proposed by Lead Plaintiff in this case is fair, reasonable and adequate.

VIII. ATTORNEYS' FEES AND EXPENSES SOUGHT BY LEAD COUNSEL

A. Attorneys' Fees Sought by Lead Counsel

129. Lead Counsel seek an award of attorneys' fees of 22.2% of the $149.75 million Settlement Fund (plus interest, if any). (*See* Lead Plaintiffs' Counsel's Memorandum of Law In Support of Application for Attorneys' Fees and Reimbursement of Expenses, at pg. 1.]

130. Lead Counsel for the Class is entitled to a fee paid out of the common fund created for the benefit of the Class. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980) (Supreme Court has consistently recognized the common fund

doctrine to permit attorneys who obtain a recovery for a class to be compensated from the benefits achieved as a result of their efforts); *see also Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 73 (S.D. Tex. 1977).

131. The Fifth Circuit recognizes the propriety of the percentage fee method where each member of a class has an "undisputed and mathematically ascertainable claim to part of [a] judgment." *Strong v. Bellsouth Telecomms., Inc.*, 137 F.3d 844, 852 (5th Cir. 1998).

132. In fact, the percentage method is widely used by district courts, including this one, throughout the Fifth Circuit in common fund cases. *See, e.g., Faircloth v. Certified Fin., Inc.*, 2001 U.S. Dist. LEXIS 6793, at *20-*23 (E.D.La. May 16, 2001); *Shaw*, 91 F. Supp. 2d at 942; *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 446 (S.D.Tex. 1999); *In re Harrah's Entm't, Inc.*, 1998 U.S. Dist. LEXIS 18774 (E.D.La. Nov. 25, 1998); *Orzel v. Gillam*, Civil Action No. 3:90-CV-0044-G (N.D. Tex. May 16, 1995); *Steiner v. Phillips*, Civil Action No. 3:89-1387-X (N.D. Tex. Mar.14, 1994); *Belman v. Warrington*, Civil Action No. H-91-3767 (S.D. Tex. Nov. 16, 1993); *In re Intellicall Sec. Litig.*, Civil Action No. 3:91- CV- 0703-P (N.D. Tex. Sep. 22, 1993); *In re First Republic Bank Sec. Litig.*, Civil Action No. 3:88 CV-0641-H (N.D. Tex. Feb. 28, 1992 and Mar. 8, 1993).

133. Moreover, the Supreme Court has indicated that the percentage

method is proper in common fund cases. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984). "[S]ince *Blum* was decided [in 1984], there has been no Fifth Circuit decision that would preclude this Court from employing the percentage of the fund approach endorsed in *Blum* and the circuit and district court decisions that followed and applied *Blum*." *Prudential I*, 1994 WL 150742, at *4; *see also Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003) ("A percentage fee approach, as opposed to a lodestar computation, is the preferred method for determining awards of attorneys' fees in common fund, or class action, cases."); *Shaw*, 91 F. Supp. 2d at 967 n. 15 ("the Fifth Circuit has *never* ... reversed a district court judge's decision to award a fee as a percentage") (emphasis in original); *Longden v. Sunderman,* 979 F.2d 1095, 1100 n.11 (5th Cir. 1992) (affirming district court's percentage fee award in securities class action noting that the district court stated its preference for the percentage of recovery approach "as a matter of policy").

134. Numerous courts and commentators have stated that the percentage method is vastly superior to the lodestar method for a variety of reasons, including an incentive for counsel to "run up the bill" and the heavy burden that calculation under the lodestar method places upon the court. *See, e.g. Di Giacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Sep. 18, 2001), Report of Third Circuit Task Force: Court Awarded Attorney Fees, 108 F.R.D. 237,238 (1985) (The Report identified a number of deficiencies with the lodestar method, including: (1) increasing

the workload of the judicial system; (2) lack of objectivity; (3) a sense of mathematical precision unwarranted in terms of the realities of the practice of law; (4) ease of manipulation by judges who prefer to calculate the fees in terms of percentages of the settlement fund; (5) encouraging duplicative and unjustified work; (6) discouraging early settlement; (7) not providing judges with enough flexibility to award or deter lawyers so that desirable objectives, such as early settlement, will be fostered; (8) providing relatively less monetary reward to the public interest bar; and (9) confusion and unpredictability in administration. Task Force Report, 108 F.R.D. at 246-49).

135. In sum, there is a strong consensus in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery. For all of the reasons previously accepted by this Court as well as other courts in this Circuit, the Court approves the use of the percentage method here.

B. Co-Lead Counsel's Fee Request Made Pursuant to a Fee Schedule Negotiated by the Court-Appointed Lead Plaintiffs is Reasonable

136. The Court appointed Lead Plaintiffs in this case negotiated a fee schedule with counsel prior to their appointment as lead plaintiff. [*See* Lead Plaintiffs' Settlement Memorandum, at pgs. 15-16.] Co-Lead Counsel's fee application is being made pursuant to that fee schedule and is presumptively reasonable and is "precisely the type of bargaining that the PSLRA anticipated and to which a court reasonably may give

substantial deference." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004), *see also In re Cendant Corp., Litig.*, 264 F.3d 201 (3rd Cir. 2001). Lead Plaintiffs negotiated a graduated fee arrangement with Co-Lead Counsel at the beginning of the case that results in a 22.2% fee for a recovery of $149,750,000. In fulfillment of their duties as contemplated under the PSLRA, Lead Plaintiffs have worked with Counsel throughout the prosecution of the Litigation and the settlement negotiations, are familiar with the work done by Counsel, and not only negotiated the fee schedule at the beginning of the case but also support the fee request presently before the Court based on the results obtained. [*See* Nielsen Declaration, at ¶ 11; Canada Declaration, at ¶ 6; and Sweeney Declaration, at ¶ 6.]

137. The fee structure utilized by the Lead Plaintiffs here is entitled to some deference for another reason – it was designed to incentivize counsel to achieve the maximum result possible for the Class. *See, e.g., Cendant II*, 404 F.3d 173 at *42 ("to PSLRA attempts to implement a market approach" by leaving the selection of counsel to sophisticated Lead Plaintiffs who can evaluate counsel" based on both skin and lost and can negotiate fee structures that will keep costs reasonable while providing counsel with initiatives to perform excellent work."). And in retrospect it appears that the Lead Plaintiffs accomplished their goal. It provides that Counsel receive increasing percentages (20, 22 and 24%) of the common fund only on those amounts recovered above the prior tier. It is axiomatic that the "last" dollars of a recovery are more difficult

to obtain [*See* Expert Reports of Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees and Reimbursement of Expenses ("Silver Declaration"), at pg. 30.] Here, it appears that Co-Lead Counsel were given appropriate incentives and those incentives have yielded a $149.75 million recovery and pervasive corporate governance changes. This recovery is one of the largest SEC class action recoveries obtained in a case of this genre, a substantial result for the class which justifies the requested fee.

C. Co-Lead Counsel's Requested Fee is Consistent with Fee Awards In Comparable Cases From the District

138. The requested fee award of 22.2% of the Settlement Fund is consistent with and, in fact, significantly less than awards made in similar cases. *See, e.g.*, *Shaw*, 91 F. Supp. 2d at 972 ("based on the opinions of other courts and the available studies of class action attorneys' fees awards (such as the NERA study), this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to [33-1/3%] have been routinely awarded in class actions"); *Prudential I*, 1994 WL 150742, at *1 (same) (Lead Plaintiffs' Compendium at 83); *Plains*, 2001 U.S. Dist. LEXIS 25532, at *28 (approving 30% fee) (Lead Plaintiffs' Compendium at 31); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (approving 30% fee); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("Traditionally, courts

in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions.") (citing numerous cases), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *see also* Silver Declaration, at pages 31-33. Indeed, courts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the percentage-of-the recovery method. *See Southland Secs. Corp. v. INSpire Ins. Solutions, Inc.*, No. 4:00-CV-355y (N.D. Tex. Mar. 9, 2005) (Judge Means) (approving fee of 30% fee in securities class action); *Scheiner v. i2 Techs., Inc., et al.*, Civil Action No. 3:01-CV-418-H (N.D. Tex. Oct. 1, 2004) (Judge Sanders) (approving fee of 25% of $80 million settlement in securities class action); *Hoeck v. Compusa, Inc. et al.*, Civil Action No. 3:98-CV-0998-M (N.D. Tex. Oct. 14, 2003) (Judge Lynn) (awarding 30% fee); *In re Firstplus Fin. Group, Inc. Sec. Litig.*, Master File No. 3:98-CV-2551-M (N.D. Tex. Oct. 14, 2003) (Judge Lynn) (awarding 30% fee in securities class action); *Warstadt v. Hastings Entm't, Inc., et al.*, Civil Action No. 2:00-CV-089-J (N.D. Tex. Mar. 10, 2003) (Judge Robinson) (awarding 30% fee in securities class action); *Silver v. UICI, et al.*, No. 3:99CV2860-L (N.D. Tex. Mar 3, 2003) (Judge Lindsay) (awarding 30% fee in securities class action); *In re Unistar Fin. Serv. Corp. Sec. Litig.*, No. 3:99-CV-1857-D (N.D. Tex. Aug. 17, 2001) (approving 30% fee in a securities class action) (Compendium at 96); *Kisilenko v. STB Sys., Inc.*, No. 3:99-CV-2872-M (N.D. Tex. Nov. 3, 2000) (approving 30% fee in a securities class action) (Lead Plaintiffs' Compendium at 111); *In re Landry's Seafood Rests., Inc. Sec. Litig.*, No. H-99-1948 (S.D. Tex. Jun. 13, 2002) (Judge Harmon) (approving 30% fee in securities class action) (Compendium at 73); *In re Intellicall Sec. Litig.*, No. 3:91-CV-0730-P (N.D. Tex.

Sept. 22, 1993) (Judge Solis) (approving 30% fee in a securities class action) (Lead Plaintiffs' Compendium at 65); *Robertson, et al. v. Strassner, et al.*, No. H-98-0364 (S.D. Tex. Jan. 5, 2000) (Judge Atlas) (approving 30% fee in a securities class action) (Lead Plaintiffs' Compendium at 158); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1156 (W.D. La. 1997) (Judge Haik) (approving fee of 36% of $127 million settlement); *Neibert, et al. v. Monarch Dental Corp., et al.*, No. 3:99-CV-762-X (N.D. Tex. Jun. 19, 2000) (Judge Kendall) (approving 30% fee of settlement) (Lead Plaintiffs' Compendium at 123). *In re Olicom Sec. Litig.*, No. 3:94-CV-0511-D (N.D. Tex. Aug. 30, 1996) (Judge Fitzwater) (approving 33-1/3% fee) (Compendium at 77); *Belman, et al. v. Warrington, et al.*, No. H-91-3767 (S.D. Tex. Nov. 16, 1993) (Judge Hoyt) (approving fees representing 33% of the settlement fund in securities case) (Compendium at 5); *Sims v. Shearson Lehman Bros., Inc.*, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,134, at 98,976 (N.D. Tex. Nov. 29, 1993) (Judge Kendall) (approving fee of 33-1/3% of $30 million settlement in securities case) (Lead Plaintiffs' Compendium at 16); *In re ProNet, Inc. 1933 Act Sec. Litig.*, No. 3:96-CV-1795-P (N.D. Tex. Nov. 19, 1997) (Judge Solis) (awarding 30% fee in securities class action) (Lead Plaintiffs' Compendium at 80); *In re Granada P'ships Sec. Litig.*, No. H-90-0214 (S.D. Tex. Oct. 19, 1992) (Judge Harmon) (approving 30% fee) (Lead Plaintiffs' Compendium at 55); *Orzel v. Gilliam, et al.*, No. 3:90-CV-0044-G (N.D. Tex. May 16, 1995) (Judge Fish) (awarding 30% fee in securities case) (Lead Plaintiffs' Compendium at 128); *Courtney, et al. v. Am. Airlines, Inc., et al.*, No. 4:97-CV-668-A (N.D. Tex. Sept. 3, 1999) (Judge McBryde) (30% fee award) (Lead

Plaintiffs' Compendium at 25); *Transamerican Ref. Corp. v. Dravo Corp.*, No. H-88-789 (S.D. Tex. Nov. 16, 1992) (Judge Black) (awarding 30% fee) (Compendium at 164); *Plains*, 2001 U.S. Dist. LEXIS 25532 (Judge Rosenthal) (awarding 30% fee in securities class action) (Compendium at 31).

D. The Reasonableness of Co-Lead Counsel's Fee Request is Confirmed Under the Johnson Factors

139. As noted above, the percentage-of-recovery method is generally favored in common fund cases. *Shaw*, 91 F. Supp. 2d at 962. Some district courts within the Fifth Circuit have applied a hybrid approach in analyzing the fairness and reasonableness of requested fees. These courts have used the percentage method to set an initial percentage fee, and then reviewed that fee based on the "*Johnson* factors." *See In re Harrah's Entm't Sec. Litig.*, No. 95-2935 Section "N," 1998 U.S. Dist. LEXIS 18774, at *20-*21 (E.D. La. Nov. 24, 1998); *see also Shaw*, 91 F. Supp. 2d at 967-68. As shown below, application of the *Johnson* factors further supports the fairness and reasonableness of the percentage fee requested.

The twelve *Johnson* factors are:

> (1) The time and labor required.... (2) The novelty and difficulty of the questions.... (3) The skill requisite to perform the legal service properly.... (4) The preclusion of other employment by the attorney due to acceptance of the case.... (5) The customary fee [for similar work in the community].... (6) Whether the fee is fixed or contingent.... (7) Time limitations imposed

> by the client or the circumstances.... (8) The amount involved and the results obtained.... (9) The experience, reputation, and ability of the attorneys.... (10) The "undesirability" of the case.... (11) The nature and length of the professional relationship with the client.... [and] (12) Awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The relevance of each of the *Johnson* factors will vary in any particular case, and, rather than requiring a rigid application of each factor, the Fifth Circuit has left it to the lower court's discretion to apply those factors in view of the circumstances of a particular case. *Brantley v. Surles*, 804 F.2d 321, 325-26 (5th Cir. 1986); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493 (D. Miss. 1996) ("not every [*Johnson*] factor need be necessarily considered"). *See also Cotton*, 559 F.2d at 1331.

1. Time and Labor Required

140. As set forth in the Joint Declaration, Counsel for Lead Plaintiffs marshaled considerable resources and time in the research, investigation and prosecution of this Litigation. In considering the time and labor expended, several factors should be considered. First, this Litigation was initiated by Lead Plaintiffs' counsel without the assistance of any governmental investigation or litigation whatsoever. *See e.g.*, *Cendant,* 264 F.3d 201, 219 (case involving clear evidence, including admissions of fraud). In fact, it appears that the SEC took an interest in this case and issued a subpoena to TXU only after it was publicly announced that Defendants would pay almost $150 million to settle this case. [*See* Joint Declaration of Joe Kendall and Mark Solomon, at ¶ 32.] Accordingly, Lead Plaintiffs' counsel had to rely on their own diligent investigation to build a framework for a successful securities fraud case. Second, the legal obstacles to

recovery were significant, and a recovery was obtained due to the skill and tenacity of Lead Plaintiffs' counsel. Counsel for Lead Plaintiffs' dedicated more than eight lawyers to working on this case. In this regard, for Lead Plaintiffs' counsel reviewed hundreds of thousands of pages of relevant documents and the Company's public filings, press releases and other public statements, interviewed witnesses in the United States and Europe, and consulted with experts in accounting, materiality, loss causation, damages and corporate governance to ensure the viability of the claims asserted. [*See Id.* at ¶ 13.] Co-Lead Counsel researched, drafted and filed a 207-paragraph Complaint, which they believe would have been upheld in response to Defendants' motions to dismiss. [*See Id.* at ¶¶ 7, 13.] The parties' settlement negotiations went on for approximately one year. [*See Id.* at ¶ 47, 48.] Counsel for plaintiffs were required to work with experts in the areas of damages, causation, accounting, and corporate governance. [*See Id.* at ¶ 13.] The history of the Litigation, as set forth in the Joint Declaration, makes clear the services provided by Lead Plaintiffs' counsel were highly successful and directly resulted in an outstanding recovery for the Class without the substantial expense, risk and delay of continued litigation. This factor supports the reasonableness of the percentage fee requested.

141. One of the criticisms of the use of attorney time as a key factor in determining an attorney's fee award, which has led to the substantial abandonment of the lodestar method in common fund cases, is that it encourages delay, inefficiency and

recalcitrance towards early settlement.[2] In contrast, the percentage method motivates class counsel to maximize the result because they are paid a straight percentage of what they recover for the class. Thus, where, as here, lead plaintiffs with a substantial financial interest in the relief sought by the Class negotiated a fee structure at the outset of the case, and class counsel obtained an excellent result for the class in less than three years, the fact that the time involved is less than if the cases had unnecessarily dragged on for years should not diminish the percentage to be awarded. To the contrary, such efficiency and effectiveness should be rewarded and the percentage method accomplishes this result. *See In re Harrah's Entm't*, 1998 U.S. Dist. LEXIS 18774, at *15 (E.D.La. Nov. 25, 1998) ("Because counsel prosecuted this action on a contingent fee basis, the Court would rather focus on results obtained. To unduly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services."). *See also In re Xcel Energy, Inc. Sec. Litig.*,364 F.Supp. 980, 983 (D. Minn. 2005) (early settlements are consistent with the purposes of the Federal Rules of Civil Procedures, and modest lodestars are the result of efficient case prosecution); *Rite Aid II*, 396 F.3d 294, 303 (3rd Cir. 2005).

2. Novelty and Difficulty of the Issues

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2. *See* Jerold S. Solovy, Laura A. Kaster and James B. Sowerby, *Attorneys' Fees in Common Fund Cases: The Percentage Method is Back, in Securities Class Actions: Abuses and Remedies*, 145, 147 (National Legal Center for the Public Interest 1994).

142. Federal Securities class action litigation is notably difficult and notoriously uncertain. *Dun & Bradstreet*, 840 F.Supp. 277, 281 (S.D.N.Y. 1993). They involve complex issues of causation and culpability. *Id.* The novelty and difficulty of the issues raised in federal securities class action litigation is a significant factor to be considered in making a fee award. From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, which did not involve restatement of TXU's previously issued financial statements or any other acknowledgments of wrongdoing. There were no criminal convictions or significant insider trading. *See, e.g., Southland Sec. Corp., v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004). Thus, there was no assurance that the Litigation would survive Defendants' challenges to the pleadings, motion for summary judgment, trial and appeal. Indeed, courts have recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also Goldstein v. MCI Worldcom*, 340 F.3d 238 (5th Cir. 2003) (affirming dismissal with prejudice of securities fraud class action complaint against Bernard Ebbers and Worldcom involving a massive securities fraud with a $685 million write-off of accounts receivable, for which Ebbers was later convicted). In addition to being factually complex, the case also involved numerous complex and unsettled questions of law under the PSLRA which the Fifth Circuit has yet to decide, and which have caused numerous splits among the circuit courts that have interpreted the statute.

143. To the extent that Defendants could prevail on issues relating to liability or show that any assumptions made by Plaintiffs' experts were incorrect or unreliable or could show that any portion of the market drop was due to factors other than the alleged fraud, Plaintiffs' claimed damages could be significantly reduced. Moreover, the reaction by a jury to such complex testimony is highly unpredictable and a jury could have very well sided with Defendants' experts. Thus, there was a real risk that even if Plaintiffs were successful in proving liability, that a jury could have awarded damages in an amount less than the proposed settlement or none at all. Despite the novelty and difficulty of the issues raised, Counsel secured an excellent result for the Class. As a result, this factor supports the requested award.

3. The Skill Required to Perform the Legal Services Properly

144. As noted by the Court in *Di Giacomo*, this factor is evidenced where "[C]ounsel performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution." *Di Giacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Sep. 18, 2001). This Litigation required considerable skill and experience to successfully conclude. This case required a determined investigation, the ability to develop facts and creative legal theories, and the skill to respond to a host of legal and factual defenses. But for Co-Lead

Counsel's diligent and tenacious efforts, all of the Class's claims could have been dismissed with prejudice at the pleading stage.

145. Lead Plaintiffs' counsel demonstrated that notwithstanding the barriers erected by the PSLRA, they would develop evidence to support a convincing case. During the settlement negotiations, Lead Plaintiffs' counsel demonstrated a willingness to continue the litigation rather than accept a settlement that they believed was not in the best interests of the Class, refusing to settle this case for about one year after the potential for settlement was first discussed. Based upon Lead Plaintiffs' counsels' diligent efforts on behalf of the Class and their skill and reputations, Lead Plaintiffs' counsels were able to negotiate a very favorable result for the Class under the circumstances.

146. In addition, defendants were represented by highly experienced lawyers from prominent and well-respected law firms: Hunton & Williams, Orrick, Herrington & Sutcliffe LLP, and Weil, Gotshal & Manges LLP. The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976). The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation. Accordingly, this factor also supports the requested percentage. *Shaw*, 91 F. Supp. 2d at 970.

147. The substantial and creative recovery obtained for the Class, short of trial, is just the sort of result the percentage-fee method was designed to reward. The skill and acumen of counsel have produced unprecedented benefits to the Class.

4. Preclusion of Other Employment

148. The time spent by Lead Plaintiffs' counsel on this case was at the expense of time that counsel could have devoted to other matters. In fact, nearly 40% of the attorneys in the Dallas office of Provost Umphrey, including Managing Partner Joe Kendall spent a substantial amount of their time over the last two years working on this case. Lead Counsel had more than eight lawyers assigned to the prosecution of the case. Accordingly, this factor supports the requested percentage.

5. The Customary Fee

149. Co-Lead Counsel's application for a fee award of 22.2% of the Settlement Fund is below the range normally awarded in cases of this nature. In fact, the customary fee awarded in securities cases in this District and across the country is 30% or more. A 2005 NERA statement shows that of the securities class actions settled between 2002-2004, ***the attorneys fees in at least 85% of those cases*** were a greater percentage of the recovery than the 22.2% fee sought here. In local, regional and national markets, complex commercial cases require a contingent fee between 30 and

40 percent of the gross recovery. The vast majority of Texas federal courts and courts in this District have awarded fees of 25%-33% in securities class actions. As Justices Brennan and Marshall observed in their concurring opinion in *Blum*: "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum*, 465 U.S. at 903. *See also In re Prudential-Bache Energy Income P'ships Sec. Litig.*, 1994 WL 202394, at *2 (May 18, 1994) ("Were this not a class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases.").

6. Whether the Fee Is Fixed or Contingent

150. Lead Plaintiffs' counsel undertook this Litigation on a contingent fee basis, assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in awarding counsel's attorneys' fees in *Prudential*, the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Prudential, 1994 WL 202394, at *6 (Compendium at 87).

151. Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. Subsequent to the passage of the PSLRA, many cases in this Circuit have been dismissed at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's pleading standards. For example, 90% of this Circuit's reported PSLRA decisions involving the adequacy of pleadings in securities fraud cases have upheld their dismissal, including the class action arising out of the WorldCom debacle. *See, e.g., Goldstein v. MCI Worldcom*, 340 F.3d 238 (5th Cir. 2003). Lead Plaintiffs' counsel were faced with that possibility in this case. Even plaintiffs who get past summary judgment and succeed at trial may find their judgment overturned on appeal or on judgment notwithstanding the verdict.[3]

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3. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) (class won jury verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict) (Compendium at 51); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for judgment n.o.v. was denied, on appeal the judgment was reversed and the case was dismissed – after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970)

152. Lead Plaintiffs' counsel have received no compensation during the course of this Litigation and have incurred significant expenses in prosecuting this Litigation for the benefit of the Class. Any fee award or expense reimbursement has always been at risk and completely contingent on the result achieved. Thus, the contingent nature of the Litigation supports the requested percentage.

7. Time Limitations Imposed by the Client or Circumstances

153. This factor does not pertain to this case.

8. The Amount Involved and Results Achieved

154. The eighth *Johnson* factor – the amount involved and the results achieved – is entitled to particular weight when, as in this case, the efforts of counsel were instrumental in realizing a substantial recovery on behalf of the class. *See In re Terra-Drill P'ships Sec. Litig.*, 733 F. Supp. 1127, 1129 (S.D. Tex. 1990) ("[t]he factors enumerated by *Johnson*, ... emphasize 'the results obtained'"). The Supreme Court, recognized that in making a fee award the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, the settlement provides substantial monetary and non-monetary benefits provided to the Class.

155. The Settlement provides for $149,750,000 in cash (the largest securities class action recovery ever obtained in this District and one of the five largest securities class action recoveries ever obtained in the United States in a case not

(judgment for $145 million overturned after years of litigation and appeals), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973).

involving a restatement of previously issued earnings) the adoption of groundbreaking corporate governance enhancements, including:

- two new independent directors;
- increasing the number of independent directors
- minimum shareholdings for directors;
- separation of board leadership from management leadership; and
- rescission of TXU's "poison pill";

156. By any measure, the settlement represents an excellent resolution of this Litigation, as it includes significant relief for the vast majority of damaged class members, including cash for those damaged shareholders who suffered out of pocket losses as well as a wide range of corporate governance changes that Lead Plaintiffs' expert has attested have had a favorable impact on the Company's current operations and its existing shareholders.

9. The Experience, Reputations and Ability of the Attorneys

157. Lead Plaintiffs' counsel's efforts in efficiently bringing this litigation to a successful conclusion are the best indicator of the experience and ability of the attorneys involved. That Lead Plaintiffs' counsel have managed the litigation in a disciplined and pragmatic fashion confirms that this litigation was ably prosecuted for the benefit of the Class.

10. The Undesirability of the Case

158. Class Action cases that carry with them elevated risks, such as the present litigation and that also require lengthy investigation through informal discovery, not to mention a possibility of no recovery, certainly speaks to the undesirability of a case. *Di Giacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *35 (S.D. Tex. Sep. 18, 2001). The issues presented in this litigation rendered the case inherently risky, if not "undesirable" from the start. The case involved a panoply of difficult issues of law and fact, and no restatement of financial statements. Furthermore, the Court's review of the case law shows that approximately 90% of Fifth Circuit PSLRA pleading decisions have upheld the dismissal of complaints. This case was risky when Lead Counsel accepted this retention. The risks Lead Plaintiffs' counsel faced must be assessed as they existed at the time counsel undertook the litigation and not in light of the settlement ultimately achieved. *See, e.g., Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991) (the riskiness of a case must be judged *ex ante* not *ex post*). [*See* Silver Declaration, at pgs. 8-18; Declaration of Craig Enoch, Justice (Ret.) in Support of Proposed Award of Attorneys' Fees, at pg. 8.] The "undesirability" of the Litigation supports the requested percentage.

11. Nature and Length of Relationship With the Client

159. As noted above, the Court-appointed Lead Plaintiffs negotiated an attorney fee agreement with Co-Lead Counsel at the beginning of the case. This agreement provided for attorneys' fees on a graduated scale, and the resulting percentage

for the recovery obtained there is 22.2%, the percentage sought by this application. With respect to this agreement and support for the requested fee, the Third Circuit Task Force recently concluded:

> The Task Force believes, however, that the deference to the empowered plaintiff's choice of *counsel* in PSLRA cases should extend to the *ex post* review of the fee agreement in those cases. The PSLRA establishes a model of client control that extends not only to appointment of counsel but also to monitoring of counsel and negotiation of the fee. The Task Force concludes, therefore, that strict scrutiny of the fee agreement is inconsistent with the client-driven litigation model established in the PSLRA. This means that a court should presume that the fee is reasonable when it is the result of an agreement between the "most adequate" plaintiff and chosen counsel.

Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. at 425 (emphasis in original); *see also In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001)(a fee that was negotiated and agreed to at the beginning of the litigation should be given great weight).

12. Awards in Similar Cases

160. As demonstrated in Section C. above, a 22.2% fee is consistent with, in fact, 10% less than the percentage that has been repeatedly awarded by courts in this Circuit and District as well as numerous other similar courts throughout the country.

E. Reimbursement of Expenses Sought by Lead Counsel

161. Lead Counsel also requests reimbursement of $541,203.77 in out-of-pocket expenses incurred by all plaintiffs' counsel in connection with prosecuting this case.

162. Counsel were required to lay out substantial funds for consulting expert fees (Co-Lead Counsel Lerach Coughlin Stoia Geller Rudman & Robbins expended $253,836.96 in expert fees [*See* Gusikoff Declaration, at ¶ 4.] and Co-Lead Counsel Provost & Umphrey expended $21,170.20 in expert fees [*See* Briscoe Declaration, at ¶ 4.]), transportation, meals and lodging, in-house and outsourced photocopying, computerized and on-line research, court reporting fees and deposition transcripts; telephone and facsimile; overnight courier service; statutory notice publication; purchase of special materials; postage; messengers; and other services. [*See generally* Gusikoff Declaration; Briscoe Declaration; Fruchter Declaration; and Soicher Declaration.]

163. The Court finds that these expenses were reasonably and necessarily incurred in prosecuting this action and achieving the proposed Settlement. The expenses should therefore be reimbursed.

IX. CONCLUSION

164. This settlement is comprehensive in its scope, is fair and even-handed in its application and is of substantial monetary and non-monetary value to the Class. The Court therefore approves the settlement as fair, reasonable and adequate, and certifies the Class as defined in the Final Judgment and Order of Dismissal with Prejudice. The Court also finds reasonable and awards to Counsel for Lead Plaintiff's Counsel the negotiated attorneys' fee of 22.2% of the settlement fund, and the expense amount requested, plus interest.

SO ORDERED.

Signed November 8th, 2005.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SCHWARTZ, et al., On Behalf of Themselves and All Others Similarly Situated	§	CAUSE NO. 3:02-CV-2243-K
	§	(Consolidated with Nos. 3:02-CV-2248; 3:02-CV-2255; 3:02-CV-2262; 3:02-CV-2270; 3:02-CV-2279; 3:02-CV-2314; 3:02-CV-2315; 3:02-CV-2322; 3:02-CV-2328; 3:02-CV-2334; 3:02-CV-2337; 3:02-CV-2339; 3:02-CV-2343; 3:02-CV-2346; 3:02-CV-2360; 3:02-CV-2366; 3:02-CV-2416; 3:02-CV-2438; 3:02-CV-2450; 3:02-CV-2458; 3:02-CV-2471; 3:02-CV-2528; 3:02-CV-2586; 3:02-CV-2600; 3:02-CV-2689;3:02-CV-2739; 3:03-CV-0289; 3:03-CV-0290)
Plaintiffs,	§	
v.	§	
TXU CORP., et al.,	§	
Defendants	§	

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Honorable Ed Kinkeade, United States District Judge, for hearing pursuant to the Order of the Court, dated April 11, 2005, on the application of the parties for approval of the settlement set forth in the Stipulation and Agreement of Settlement dated as of March 31, 2005 (the "Stipulation"). Due and adequate notice having been given to the Settlement Class as required in said Order, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Stipulation,

and all terms used herein shall have the same meanings as set forth in the Stipulation.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including all Members of the Settlement Class.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby ap proves the Settlement set forth in the Stip ulation and finds that the Settlement is, in all respects, fair, reasonable and adequate to the Settlement Class.

4. Except as to any individual claim of those Persons (identified on Exhibit 1 hereto) who have validly and timely requested exclusion from the Settlement Class, this Court hereby dismisses with prejudice and without costs (except as otherwise provided in the Stipulation) the Litigation against the Defendants.

5. The Court finds that the Stipulation and Settlement are fair, reasonable and adequate. The Stipulation and Settlement are hereby finally approved in all respects, and the Settling Parties are hereby directed to perform its terms.

6. Upon the Effective Date hereof, Lead Plaintiffs and each Member of the Settlement Class shall be deemed to have, and by operation of this Final Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims (including Unknown Claims) against the Released Persons, whether or not such Settlement Class Member executed and delivered a Proof of Claim and Release.

7. Upon the Effective Date hereof, each of the Released Persons shall be deemed to have, and by operation of this Final Judgment shall have, fully, finally and

forever released, relinquished and discharged each and all of the Settlement Class Members and Co-Lead Plaintiffs' Counsel from all claims (including Unknown Claims), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court finally certifies a Class of all Persons who purchased the publicly traded securities of TXU Corp. including TXU Europe Limited, at any time during the period between April 26, 2001 and October 11, 2002, inclusive. Excluded from the Settlement Class are Defendants, officers and directors of the Company and its affiliates and subsidiaries and the Underwriter Defendants, as well as their families; members of the immediate family of each of the Individual Defendants; any entity in which any Defendant has or had a controlling interest; the legal representatives, heirs, executors, successors, or assigns of any such excluded party; and those Members of the Settlement Class that timely and validly excluded themselves from the Settlement Class.

9. With respect to the Settlement Class, this Court finds and concludes that: (a) the Members of the Settlement Class are so numerous that joinder of all Members in the Litigation is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) the claims of Lead Plaintiffs are typical of the claims of the Settlement Class; (d) Lead Plaintiffs and their counsel have fairly and adequately represented and protected the interests of all of

the Members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of the Members of the Settlement Class in individually controlling the prosecution of the separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by Members of the Settlement Class; (iii) the desirability or undesirability of continuing the litigation of these claims in this particular forum; and (iv) the difficulties likely to be encountered in the management of the class action.

10. The Notice of Pendency and Settlement of Class Action ("Notice") provided to the Settlement Class was the best notice practicable under the circumstances, including the individual notice to all Members of the Settlement Class who could be identified through reasonable effort. Said Notice provided the best notice practicable under the circumstances of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Stipulation, to all Persons entitled to such notice, and said Notice fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process.

11. Any court order regarding the Plan of Allocation or the attorneys' fee and expense application shall in no way disturb or affect this Final Judgment and shall be considered separate from this Judgment.

12. Neither the Stipulation nor the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the

Settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity or lack thereof of any Released Claim, or of any wrongdoing or liability of the Defendants; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Defendants in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. Defendants may file the Stipulation and/or this Final Judgment in any other action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

13. The Court finds that during the course of the Litigation, the Settling Parties and their respective counsel at all times complied with the requirements of Rule 11 of the Federal Rules of Civil Procedure.

14. Without affecting the finality of this Final Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, costs, interest and expenses (including fees and costs of experts and/or consultants) in the Litigation; and (d) all parties hereto for the purpose of construing, enforcing and administering the Settlement and Stipulation.

15. In the event that the Settlement does not become effective in accordance with the terms of the Stipulation, then this Final Judgment shall be rendered null and void to the extent provided by and in accordance with the Stipulation and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Stipulation.

16. The Court has considered the timely objections to the Settlement and finds that such objections are without merit. Therefore, the objections of the New York State Teacher's Retirement System, Rinis Travel Service Profit Sharing Trust, Public Employee Retirement System of Idaho, Pennyslvania Public School Employees' Retirement System, State of Wisconsin Investment Board, Tom Bouressa, Irwin M. Chase, Norman Ingram and Bruce Girdauskas are hereby overruled.

SO ORDERED.

Signed November 8th, 2005.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

CLOSED

CASE # 3:02cv2243-K

DATE 11 / 8 / 05

TRIAL **YES** ____ **NO** ✓

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SCHWARTZ, et al., On Behalf of Themselves and All Others Similarly Situated,	§	**Civil Action No. 3:02-CV-2243-K**
	§	**(Consolidated with Nos. 3:02-CV-2248; 3:02-CV-2255; 3:02-CV-2262; 3:02-CV-2270; 3:02-CV-2279; 3:02-CV-2314; 3:02-CV-2315; 3:02-CV-2322; 3:02-CV-2328; 3:02-CV-2334; 3:02-CV-2337; 3:02-CV-2339; 3:02-CV-2343; 3:02-CV-2346; 3:02-CV-2360; 3:02-CV-2366; 3:02-CV-2416; 3:02-CV-2438; 3:02-CV-2450; 3:02-CV-2458; 3:02-CV-2471; 3:02-CV-2528; 3:02-CV-2586; 3:02-CV-2600; 3:02-CV-2689; 3:02-CV-2738; 3:02-CV-2739; 3:03-CV-0289; 3:03-CV-0290)**
Plaintiffs,	§	
Vs.	§	
TXU CORP., et al.,	§	
Defendants.	§	

EXHIBIT ONE TO FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

EXHIBIT 1

CLAIMANTS ELECTING TO OPT OUT OF TXU SETTLEMENT

Ralph G. Nashawaty
Frances M. Nashawaty
Nashawaty Family Trust
Sullivan III Masonic End/Fixed
Joseph D. Stewart
Omer E. Bowlur
Andrew W. Viola
Charles Norman Drew
Mary A. Reid
J L Stuckert Jr.
Jacqueline O .Stuckert
James W. Carey
Faye T. Carey
Jay G. Young
Bettye Young
Felix G. Wilson
Mary Carolyn Ochs
James G. Swayze
Rubie Lange Swayze
Lenora O. Chauvin
Agnes King
Melvin C. London
Carmen M. London
Revocable Living Trust
Karl W. Schemmel
Phyllis B. Miller
Mary E. Weatherly
Jack G. Heintschel
Joy D. Heintschel
Donald J. Cook
Theresa M. Cook
Ruby Jean Neilson
Utahna C. Timothy
Merlin R. Timothy
James A. Thompson
Theodore E. Grabowski
Patricia D. Grabowski
Vernon L. Theisen
Christine A. Theisen
Irene E. Perry
Georgia Cave
Maxine K. Godin
Thelma S. Harding, Executrix for Estate of Lawrence Lawson Harding
Paul E. Poe
Gwenolyn Poe

CLAIMANTS ELECTING TO OPT OUT OF TXU SETTLEMENT

Carl Stanley Eberhard
Charlotte Howard Eberhard
TR Eberhard Family Living Trust
Loyd E. Woodward TTEE
Helen M. Woodward TTEE
Elnora G. Elmore
James H. Elmore
Ronald Moorhouse
Marvin Fritz
Joann Fritz
Frieda O. Elfick
John T. Gregory, Custodian
Amy O. Pudinbaugh, KSUNIF
Tommie Lou Eldridge
Ann Shubsachs
Ethel Da Silva TTEE
William T. Parker
Robert L. Smuts
Mark Lawrence Roth Trust TTEE
Mark L. Roth, Money Purchase Plan & Trust
Jocelyn K. Roth
Jocelyn K. Roth, IRA
Mark L. Roth, IRA
Virginia Stenberg
Catherine Blair Drumtion for Mary Buchanan Taylor
Andrew H. Rutter
Janet C. DeQuick
John Samoluk
Brenda Thibeault
Lilly M. Grier, TR
Byron E. Ruth
Margarete R. Ruth
David B. Sweet
Henry G. Benhardt
Barbara J. Benhardt
William O. DeWitt
Hester C. DeWitt
Frances J. Trulson TR
Trulson Family Living Trust
Joseph L. Folgore
Richard G. Rogers, Jr.
Betty B. Rogers
John Bushong
Louis K. Ned
Barbara A. Crawford
James Day
James & Mary Day Trust

CLAIMANTS ELECTING TO OPT OUT OF TXU SETTLEMENT

Joan H. Kafold, Trustee for Gladys W. Tibbet estate
Jocelyn K. Roth
Karen Garb Tobias
Hurley B. Carlisle
Lydia L. Carlisle
Pauline Hoofe
Charles Robert Dunning, Sr.
Joyce B. Dunning
Ruth Rickard
Jeannette McFarland, Sr.
Harold G. McFarland
Joy S. Hughes
Ivan S. Schwartz
C.R. Mapes
Steve Shintaku
Cheryl J. Mudrick
Cheryl J. Mudrick Living Trust
Michael George Gibbs
Thomas M. Miller
Richard Peter Heinkel
Janet Formanek
Ladislav Formanek
William K. Pullen
Louise Pullen
Leonard V. Fuentes
Aaron Lloyd Lester
Concha Tager Yale
Isabella L. Shaw
Gerald J. Haecker
Robert Soderholm
Carl M. Crouthamel
Elizabeth Crouthamel TEN ENT
Eugene T. Bassi
Elaine B. Silver
Edwin A. Silver
Alice V. Purvis
Isabella L. Shaw
Valoree S. Vargo
David Moeser
Claire G. James
Carolyn A. Bryant
Carolyn A. Bryant Living Trust
William A. Donze, Jr.
Richard V. Hartnett
Hartnett Family Limited Partnership
Betty E. Faist
Linda Sue Olson

CLAIMANTS ELECTING TO OPT OUT OF TXU SETTLEMENT

William Darrell Bushman
Julie Davis
Eleanor P. Western
Frank J. Simonelli
C.B. Collins
Margaret Fox Collins
Arthur Temple
ATSP Partnership, Ltd.
Arthur Temple Indenture Trust
Anna S. Carmody
Sylvia D. Ellis
Frank Sinclair
Marie C. Sinclair
John Lea
Jack C. Wise
Sara K. Tarr
Russell L. Johnson
Mary N. Johnson
Thomas F. McKay
Jennifer A. McKay
Jack S. Krucman
Lora Lee Krucman
Frank Ingels
Mary K. Ingels