# STATEMENT OF LEONARD BARRACK TO
# THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL


**Barrack, Rodos & Bacine**
**3300 Two Commerce Square**
**2001 Market Street**
**Philadelphia, PA 19103**


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Barrack, Rodos & Bacine ("BRB") is a litigation firm that has been involved extensively, for twenty five years, in major complex litigation, including class and derivative actions, in courts throughout the United States, alleging, *inter alia*, violations of the federal securities and antitrust laws and state consumer laws. The firm, which has its primary office in Philadelphia and attorneys in other offices located in San Diego, New York, New Jersey and Boston, believes it is unique among firms concentrating in such complex litigation in that, in addition to its extensive experience prosecuting these actions on behalf of plaintiffs, it has significant experience in defending such actions as well. A copy of the Firm's resume is attached as Attachment A.

BRB has had significant experience with various methods that courts have utilized to select counsel in class actions.[1] We submit this statement pursuant to the letter dated February 16, 2001 from the Third Circuit Task Force Co-Chairs, Professor Stephen A. Saltzburg and Gregory P. Joseph, Esquire, and in advance of the June 1 appearance before the Task Force of Leonard Barrack, the senior partner of the Firm.

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[1] BRB was co-lead counsel to the class in *In re Cendant Corp. Litigation*, Master File No. 98-1664 (WHW) (D.N.J.), in which the district court selected counsel for the class based on a competitive bidding process described at 182 F.R.D. 144, 149-52 (D.N.J. Sept. 8, 1998). As more fully described herein, the plaintiffs achieved settlements in *Cendant* that included cash payments totaling $3.18 billion ($2.851 billion from Cendant and $335 million from Ernst & Young, LLP), plus a contingent additional cash payment to the class and certain corporate governance changes to which Cendant agreed as part of its settlement.

The settlements were approved by the district court at 109 F. Supp.2d 235 (D.N.J. Aug. 15, 2000), and are presently on appeal to the Third Circuit Court of Appeals at Appeal Nos. 00-2683, 2684, 2708, 2708 & 2734. The district court awarded fees to co-lead counsel in the amount of 8.275% of the cash recovery in accordance with the outcome of the auction process undertaken at the outset of the case, *see* 109 F. Supp.2d 285 (D.N.J. Aug. 16, 2000), from which appeals are pending at Appeal Nos. 00-2520, 2733, 2769 & 3653. Because the issues raised in the appeals from the fee award are related in certain respects to issues being considered by the Task Force, we attach a copy of the Brief of Appellees, filed January 30, 2001, in the *Cendant* fee appeals as Attachment B, and the letter memorandum of Appellees addressing the relevance to the fee appeals of the decision in *In re Cendant Corp. Prides Litigation*, 243 F.3d 722 (3d Cir. March 21, 2001), filed May 9, 2001, as Attachment C.

## I. Introduction

The primary purpose of Rule 23 of the Federal Rules of Civil Procedure is to encourage and facilitate the efficient prosecution of cases involving similarly situated people (classes) and empower courts to take actions necessary to protect absent class members. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (emphasis added):

> Rule 23 imposes on the Court an obligation to proceed with flexibility and imagination in structuring the course of a class action. … At the same time, the Court has responsibilities as the guardian of the rights of absentee class members, and to carry out those responsibilities is vested [with] broad administrative, as well as adjudicative, power.

Rule 23 vests courts with powers and obligations with respect to four important aspects of class actions: (1) determining whether class treatment is appropriate; (2) entering orders imposing conditions on the representative parties, which includes the appointment of class counsel; (3) determining the amounts awarded as fees and expenses to class counsel; and (4) requiring court approval for settlements of class actions.

The subjects of this statement concern the manner by which courts may and should, in the circumstances of different cases, exercise their discretion in carrying out their obligation under Rule 23 to protect absent class members in the selection of, and awarding fees and expenses to, class counsel.

## II. Background

Fifteen years ago, the Third Circuit established a Task Force to investigate and make recommendations with respect to counsel fees in class cases. *See Court-Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 254-259 (1985) ("Task Force Report"). Among the key recommendations in the Report were: (a) in common fund cases, counsel fees should be set according to the percentage-of-the-recovery method, rather than the lodestar method that created numerous burdens on the court and disincentives to counsel to prosecute cases efficiently; (b) the district courts should attempt to establish fees at the outset of cases, in order to provide clear incentives to plaintiffs' counsel; and (c) the courts and counsel should adhere to the fee structures set in advance when awarding fees.

After the Task Force Report was issued, district court judges by and large began to award fees based on the percentage method. In several decisions, the courts expressed the view that a percentage fee structure should have been established at the outset of the case, i.e., before the outcome of the case was known. In *In re First Fidelity Bancorp. Securities Litigation*, 750 F. Supp. 160, 162 (D.N.J. 1990), Judge Sarokin wrote that the percentage of recovery should be negotiated and accepted by the court and counsel while the risks and amount of recovery are still unknown. The court continued: "Absent an agreement initially approved by the court, the award by necessity resurrects many of the

infirmities which prompted adoption of the lodestar formula." *Id.* at 162-63 (emphasis added). Similarly, in *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 886 F. Supp. 445 (E.D. Pa. 1995), Chief Judge Cahn expressed a clear preference that percentage fee arrangements should be established as early as practicable. *Id.* at 460. The court further made clear that a pre-set fee should not be a "floating target" to be changed at whim, quoting from the Task Force Report, 108 F.R.D. at 258, as follows: "The advantage of the negotiated fee procedure will be entirely undermined if, at the end of the litigation, counsel have the right to renegotiate depending upon … factors relating to the case." *Unisys*, 886 F. Supp. at 461 (emphasis added).

Various courts in this Circuit and elsewhere followed the Task Force's recommendation that courts establish a percentage fee structure acceptable to the court and plaintiffs' counsel at the outset of class action cases. *See, e.g., Urbach v. Sayles*, Civil Action No. 91 CV 1291 (D.N.J.) (*Summit Bancorp*); *In re Tiphook Securities Litigation*, Master File No. 93-CV-4449 (D.N.J.); *see also In re United States Surgical Corp. Securities Litigation*, Civil Action No. 3:92 CV 374 (D. Conn.) (copies of decisions and special master reports available upon request). In each case, the court set the fee structure in advance and awarded the fee in accordance with the pre-set structure.

The *Manual for Complex Litigation* (3d ed. 1995) has also recommended that among the alternatives courts may utilize to award fees is to set the fee arrangement at the outset of complex class litigation:

> The court should routinely specify, at the outset of the litigation, the method of compensation that will be used. Innovative methods used in this connection have included competitive bidding procedures for the selection of class counsel, and appointment of an outside attorney to negotiate a fee arrangement for the class. (*Manual*, ¶ 24.231 at 199) (emphasis added).
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> Disputes will be reduced if the court advises the parties at the outset of the litigation what method will be used for calculating fees and, if using the percentage method, the range of likely percentages. This decision will have a substantial effect on incentives in the litigation. (*Id.* ¶ 24.21 at 194-95) (emphasis added).

Indeed, in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000), the Court expressly recommended that district courts consider setting fees in advance in common fund cases:

> We do note that district courts can avoid many of the complications associated with fee awards by setting fee guidelines and ground rules early in the litigation process. Such ground rules may include: developing means of record keeping that facilitate judicial review. ...
> Another approach is for the district court to determine the fee arrangement in advance through competitive bidding. *See, e.g., In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190, 1192-1201 (N.D. Ill. 1996)

> (Shadur, J.) (employing this approach); *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 150-52 (D.N.J. 1998) (Walls, J.) (same); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 468-77 (N.D. Cal. 1994) (Walker, J.) (same); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000) (Lechner, J.) (same). This device appears to have worked well, and we commend it to district judges within this circuit for their consideration.

*Id*. at 201-02 n.6 (emphasis added).

Generally, however, district courts have continued to set fees at the end of class cases, rather than establish fee structures at the outset of the actions.

In 1995, the Court of Appeals for this Circuit held that in common fund cases, counsel fees were more appropriately determined based on the percentage method than the lodestar method. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). The preference for the percentage method was reiterated in 1998 in *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283, 332 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).[2]

The decision to award fees in common fund cases based on the percentage method raises the following question: whether percentage fees should be established at the outset of common fund cases or at the conclusion of such cases. The traditional manner has been for courts to establish counsel's fee at the conclusion of a case. However, as the 1985 Task Force recommended, establishing a percentage-based fee structure at the outset of a case can be an effective way to ensure that the interests of class counsel are more closely aligned throughout the litigation with the interests of the Class and obviate many of the problems associated with determining fees after the fact.

In 1990, Judge Vaughn Walker began the experiment of conducting auctions for the selection of counsel and establishing the fee structure under which counsel for plaintiffs would prosecute class actions. *See In re Oracle Securities Litigation*, 131 F.R.D. 688 and 132 F.R.D. 538 (N.D. Cal. 1990). As Judge Shadur stated in *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190, 1194 (N.D.Ill.1996), the object of an auction "is to give the lawyer what he would have gotten in the way of a fee in an arm's

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[2] While both decisions state that a district court may also want to conduct a lodestar-based "cross-check" of the reasonableness of a percentage-based fee, the Court did not define precisely what a lodestar "cross-check" means (i.e., whether it would serve as a kind of cap on the fee or merely an indicator of the multiple of lodestar to which the percentage-based fee would equate) and the decisions did not mandate such a "cross-check." Moreover, as we show below, the entire notion of a lodestar "cross-check" at the end of a case is antithetical to, and would destroy the advantages of, establishing a fee structure at the outset of a class action. Thus, while there is nothing wrong with establishing fees at the end of a class proceeding – indeed, in many cases, that seems to be the most appropriate time at which to set the fee – once a fee structure is established at the outset, either by auction or negotiation with a special master, based on a percentage of the recovery that might be achieved by counsel, neither the hours devoted to the case nor counsel's lodestar should have any impact on the fee awarded.

length negotiation, had one been feasible. ... [T]o simulate the market where a direct market determination is infeasible." *See also In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992) (Posner, J.) ("The object in awarding a reasonable attorney's fee … is to simulate the market"). Some of the cases in which auctions have been utilized were cited in the decision of the Court of Appeals in *Gunter* (cited above). The use of auctions in these cases raises the following questions:

1. Should auctions be utilized to select class counsel?

2. Should auctions be utilized to establish the fee structure in advance for class counsel?

3. When is the best time to use auctions?

4. Are there examples of when courts should or should not use auctions?

5. What guidelines, if any, should the Task Force recommend to district courts that choose to utilize auctions for the selection of class counsel and/or the establishment of a fee structure at the outset of a class action?

## III. Primary Recommendations

### A. Auctions should be used only in rare circumstances

While district courts have the discretion to select class counsel pursuant to an auction process, and to utilize an auction process to establish the fee structure in advance for class counsel (*see* Brief of Appellees, Attachment B, at 34-38), such auctions should be undertaken only in cases where the court can, at a minimum: (a) reasonably anticipate that numerous, competent law firms will seek appointment as class counsel; (b) reasonably evaluate the likelihood of a recovery for the class; and (c) reasonably foresee a very substantial recovery. In *Auction Houses*, 197 F.R.D. 71 (S.D.N.Y. 2000), the court cited the following reasons why an auction in that case was appropriate: (1) the alleged wrongs came to light absent involvement of any plaintiff's attorney, so that selecting lead counsel through an auction would not deprive an investigating attorney of his or her just reward; (2) an auction could serve as an efficient market because (a) the case had received extensive media attention and consequently attracted large numbers of plaintiffs' attorneys, so there would be a sufficient number of bidders, and (b) the relief sought was monetary, making the case easier to evaluate; and (3) the bidding attorneys had a great deal of information with which to evaluate the case, both as to liability and damages. *Id.* at 82. As the court found, "there was an unusually substantial base of information from which bidders intelligently could evaluate the case." 197 F.R.D. at 83.

These types of circumstances simply do not exist at the outset of most class actions. While the events precipitating a securities law class case may be public, much of the time the relevant information concerning what defendants knew, and when they knew

it, is peculiarly within the defendants' control. Indeed, since passage of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), nearly one-third of securities law class complaints are dismissed at the pleading stage. Clearly, in such cases, neither the court nor counsel can reasonably estimate potential levels of recovery and, where such evaluations at the outset are difficult at best, bids based on fee proposals do not provide a court with a sound basis to select counsel who will best serve the interests of the class. Thus, in the normal case, auctions do not provide a sound basis for either selecting counsel or setting a fee in advance.

In terms of the size of an expected recovery that would warrant an auction, the Court of Appeals for this Circuit differentiated in *Gunter* between very large cases, i.e., those with recoveries over $1 billion, and other "mainstream" cases. *See* 223 F.3d at 195 n.1. Indeed, the Court stated that the seven factors identified in *Gunter* (size of the fund created and number of persons benefited; presence or absence of objections; skill and efficiency of counsel; complexity and duration of the litigation; risk of nonpayment; amount of time devoted by counsel; and awards in similar cases) that are normally employed to determine counsel fees on an *ex post* basis should be given less weight in such "mega-fund' cases and are not to be employed in a "formulaic way." *Id.* While we do not advocate setting the threshold for cases that warrant auctions at an expected billion dollar recovery, if neither the parties nor the court reasonably expects a recovery of more than one or two hundred million dollars, we believe that is a factor that should support not instituting an auction process.

Moreover, there are certain cases in which an auction simply does not make sense. Where the court and counsel cannot make a realistic assessment in advance of the potential liability of defendants, the level of potential damages or any likely recovery, counsel would be bidding "blind" and the court would have no way to gauge whether bids were realistic in terms of providing the proper incentives to class counsel. Even in large recovery cases, auctions would probably have disserved the classes in *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 (S.D.N.Y. 1998), where the theory of the case was somewhat novel, and *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942 (E.D. Tex. Jan. 28, 2000), an action brought on behalf of purchasers of Toshiba laptop computers, in which the counsel who brought the case had developed the facts and theories of liability, and were, in a very real sense, entitled to prosecute the case. In both cases, the courts awarded fees at the conclusion of the cases in amounts equal to 14% of the $1 billion plus recoveries. Indeed, while the court in *NASDAQ* conducted a lodestar "cross-check" of the fee award, the court in *Toshiba* found that no such "cross-check" was required, even though plaintiffs' counsel achieved their settlement in eight months from the filing of the complaint to the agreement to settle the case. *Id.* at 945.

For an entirely different reason, an auction would not have been beneficial to the class in *In re Tiphook Securities Litigation*, Master File No. 93-CV-4449 (D.N.J.), where the district court appointed a special master to negotiate a percentage-based fee structure in advance. There, even though the court sought to establish a percentage fee in advance, it was far more appropriate for counsel to explore with a special master all of the

complexities and potential pitfalls of the case (including the potential liability of a foreign parent of a U.S. operating group that had no assets) and negotiate an appropriate fee. *See* Special Master's Report and Recommendation (available upon request). But, notably, after the court adopted the special master's report and recommendation as the basis for the fee awarded in the case, the fee award was not later made subject to any *post hoc* re-appraisal. The fee was awarded in accordance with the pre-established fee structure.

Thus, in most cases, the class is better served by the court assuring itself that the counsel selected by the lead plaintiffs (in securities cases) or by agreement of plaintiffs and their counsel (in antitrust, product liability and other class cases) or through the court's own selection process (as in the diet drugs litigation) are competent and experienced to lead the prosecution of the cases, and undertaking other methods – i.e., regular reporting of case status (*see Manual of Complex Litigation, Third*) – to ensure that the class is being well served by counsel.

## B. Considerations when an auction is utilized

Even when auctions are utilized for selecting class counsel and establishing a fee structure in advance, courts must be sensitive to the need, first and foremost, to select counsel who is competent and qualified to represent the class, and not simply choose counsel who has submitted the lowest bid. In complex class actions, whether in the fields of securities law, antitrust law or mass tort litigation, courts must ensure that counsel for the class possesses the skills and expertise necessary for the particular case, and the experience and ability to litigate against the high caliber counsel generally retained by defendants in these types of cases.[3] Thus, depending on the manner in which the court views the case, i.e., whether the skill set necessary to prosecute must include tenacious litigation skills or trial experience or negotiating prowess (perhaps in cases in which liability appears clear), counsel may be required to show that they possess the skills and experience to: prosecute the case efficiently; create opportunities to obtain an optimal recovery for the class; negotiate a fair and adequate recovery for the class; and try the case if an adequate recovery is not forthcoming through settlement. Simply choosing the lowest bidder – without regard to the competency of counsel to litigate the case, negotiate an optimal settlement and try the case if necessary – disserves the interests of the class.[4]

[3] The economics of the practice – both on the plaintiffs' side and the defense side – make it unrealistic to believe that firms that normally undertake defense work will now seek to take on plaintiffs' class cases. Similarly, auctions should not be used to provide a "proving ground" for lawyers without a solid track record of achievement.

[4] Some witnesses have testified to this Task Force that an adequate class representative must, consistent with its fiduciary duties, select counsel that will "maximize the class' share of the recovery. This requires the representative plaintiff to select counsel that are both competent and competitively-priced." *See, e.g.,* Statement of Honorable Vaughn Walker at 11. This analysis has three major flaws. First, it places a burden on a lead plaintiff applicant that is not stated in the PSLRA. While a lead plaintiff movant may choose to negotiate a fee agreement with its chosen counsel, there is no requirement in the PSLRA that it do so and, in fact, the Conference Report, at page 34, specifically states that courts should not place any additional fiduciary duties on lead plaintiffs. Moreover, under the PSLRA, it is the province of the Court – not the lead plaintiff – to

Further, as prior testimony to this Task Force has shown, it is difficult for a court to assess in advance the most probable recovery level in a class action case. Yet, in order to judge competing bids, a court must have some idea of the level of probable recovery and stage at which recovery might be had. For instance, if a chosen bid is too low, and counsel must expend very significant efforts to prosecute the action, counsel will have an incentive to "cut its losses" and settle too cheaply. In a similar vein, placing a cap on the fee or expenses to be awarded will serve to create a conflict between the interests of the class, which seeks a maximum recovery, with the interests of counsel, who will not be rewarded in any monetary way by reaching for a recovery in excess of the amount that will yield the maximum fee. Thus, a necessary corollary is that even in an auction setting, the court must be cognizant that a bid that is too low to allow class counsel to commit the type of resources – in terms of lawyer time, investigation and litigation expenses – necessary to prosecute complex class cases will *not* serve the interests of the class, and that such bids should be rejected.

In the end, to select counsel or establish a fee structure on the basis of an auction, a court must: (1) have a realistic way of ascertaining the liability aspects of the case, the likely magnitude of a recovery and the likely stage at which such a recovery might be achieved; and (2) be sensitive to the goal of seeking to align the interests of the class and counsel by selecting an appropriate fee structure.

## C. Use of auctions in PSLRA cases

In cases brought pursuant to the PSLRA, courts should be especially loathe to drive a potential wedge between the statutorily-mandated lead plaintiffs and their chosen counsel by instituting an auction process, and courts that decide to implement auctions should reconcile the counsel selection provisions of the PSLRA with auction procedures by providing the lead plaintiff's chosen counsel with a right to "match" the bid that the court determines is the lowest qualified bid. This will serve to ensure that the lead plaintiff's chosen counsel, if otherwise qualified, will still be able to represent the class under the terms and conditions of the lowest qualified bid. While we understand that this could result in counsel for the class not being chosen by the lead plaintiff, as long as the court is empowered to reject clearly insufficient bids, and exercises that authority for the

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establish a reasonable fee. *See* Section III.C. & note 5, below. Second, placing an emphasis on maximizing the class' share of the recovery – rather than maximizing the net recovery of the class – is faulty. The class has an overriding interest not necessarily in paying the lowest possible counsel fees but, rather, in obtaining the greatest possible net recovery. Requiring a lead plaintiff to negotiate the lowest possible fee would, in most cases, disserve the class' interest by running the risks that less competent counsel, with lower overheads, will be favored and that class counsel will not invest the proper amount of resources into a case to obtain an optimal recovery for the class. Third, the analysis treats plaintiff's lawyers as fungible, failing to recognize that lawyers and law firms have competencies and skills within a wide range above a minimal threshold of "competency." Indeed, when defendants choose their counsel for class cases, price is certainly not the determinative factor. Such defendants seek out lawyers with particular skills or knowledge, and are not content with retaining as their counsel lawyers who are minimally competent but will charge them the least. So, too, courts should not utilize auction procedures to retain only minimally qualified lawyers or firms for a plaintiff class.

benefit of the class, the lead plaintiff's chosen counsel will normally choose to match the lowest qualified bid. As to the theoretical risk that this could "chill" the bids that are submitted to the court, thus far, there has only be one case in which such a right to match was provided to lead plaintiff's chosen counsel (*Cendant*), and in that case, many bids were received, *including* bids that the court rejected as being too low to provide the proper incentives for prosecuting the case, and the lead plaintiffs' chosen counsel was not faced with the prospect of being forced to agree to abide by an unreasonably low bid.

Our comments on the intersection of the PSLRA and the use of auctions are guided by the three tiers that Congress appears to have created with respect to oversight of securities law class actions. The three tiers are: (1) appointment of lead plaintiff; (2) selection and retention of class counsel; and (3) setting attorney's fees.

1. With respect to <u>appointment of lead plaintiff</u>, Congress provided a presumption in favor of appointing as lead plaintiff the entity with the largest financial interest in the relief sought in the case. This is a powerful presumption that can be rebutted only by *proof* that the presumptive lead plaintiff cannot adequately represent the interests of the Class under traditional Rule 23 class action jurisprudence.

2. With respect to <u>selection of class counsel</u>, Congress provided that the lead plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class. In explaining this provision, the Report of the Conference Committee states that the Committee "does not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class." H.R. Cong. Rep. 104-369 at 35. The Senate Report states: "This provision is intended to permit the plaintiff to choose counsel rather than have counsel choose the plaintiff. Although the Committee permits the most adequate plaintiff to choose class counsel, the Committee does not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class." S. Rep. 104-98, at 14 (GPO Access edition).

3. Finally, with respect to <u>setting attorney's fees</u>, Congress provided that the total attorney's fees and expenses "awarded *by the court* to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount … paid to the class." In explaining this provision, the Conference Committee wrote: "By not fixing the percentage of fees and costs counsel may receive, *the Conference Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis*." H.R. Conf. Rep. 104-369, at 36 (emphasis added). Notably, there is not one word in either the Conference Report or the Senate Report about the lead plaintiff having any role in setting the fee for class counsel.

Thus, there is a necessary distinction to be drawn between a lead plaintiff's selection of counsel – which is entitled to a great deal of deference by a court – and how the court should set counsel's compensation. *See, e.g.,* Coffee, *"The PSLRA and Auctions,"* New York Law Journal, May 17, 2001. In view of the PSLRA's legislative history, which "clearly shows that the district court was to retain its traditional supervision over attorney fee awards," *id.*, and because compensation for class counsel comes from the entire class, not merely the lead plaintiff, the court is clearly the arbiter of what constitutes a reasonable fee. On the other hand, as the Conference Report makes clear, lead plaintiff's selection of counsel should be disturbed only "when necessary to protect the interests of the plaintiff class." H.R. Conf. Rep. 104-369, at 35.

A simple example illustrates this point. Imagine that the presumptive lead plaintiff had entered into a fee agreement with its chosen counsel that provided for a 33% fee in a potentially very large recovery case. It is hard to believe that anyone would contend that the court does not have the authority under the PSLRA to reject that proposed fee as too high under the circumstances of the case. While the counsel selected by the presumptive lead plaintiff may be perfectly appropriate and competent to prosecute the action on behalf of the class, it is the court that is charged by Congress with awarding a fee that is a reasonable percentage of any recovery. Thus, the court is left with two alternatives: inform the lead plaintiff and its chosen counsel that the court will not be bound by their fee arrangement and (a) tell the lead plaintiff that it – the court – will fix the fee at the conclusion of the case, i.e., on an *ex post* basis; or (b) tell the lead plaintiff that it will determine what would be a reasonable *ex ante* percentage fee by conducting some type of market-driven analysis. Instituting an auction is certainly one way that the court could gain valuable information in order to determine a reasonable *ex ante* percentage fee. And, as long as the court devises a mechanism that honors the lead plaintiff's selection of class counsel, such as a right to "match" the lowest qualified bid, it has effectively reconciled the court's and the lead plaintiff's rights and responsibilities under the PSLRA, and served the best interests of the class.

## D. Awarding fees in auction cases

Courts that choose to establish fees in advance through an auction mechanism and counsel who participate in such auction procedures must recognize that setting fees through an auction process is totally antithetical to the setting of fees based on any lodestar considerations, and that no lodestar-based analysis of the fee can factor into the court's fee award at the end of the case. The purpose of an auction is to establish a market-driven fee structure at the outset of the action, pursuant to which counsel will prosecute the case with the sole interest of maximizing the recovery of the class. As the 1985 Task Force Report recommended, neither the court nor counsel should deviate from the auction result at the end of the case, except in the rarest of circumstances. Such exceptional instances may involve when the recovery achieved for the class was not the result of counsel's efforts (as the Court surmised in *Prudential*) or the value of the settlement is not readily ascertainable, thereby making the percentage method of determining fees suspect (as in *General Motors*). Absent these type of exceptional circumstances, allowing any consideration at the end of the case of the number of hours

spent by counsel, or its lodestar, would run counter to the fundamental purpose of establishing a percentage-based fee in advance, and should not be tolerated – either by the district court or any reviewing court.

In *In re SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 534 (E.D. Pa. 1990) (citation omitted), the court poignantly noted the pitfalls of utilizing a lodestar analysis:

> Petitioners also brought this action to a close only two years after filing the complaint, despite the problems with which they contended. This is precisely the sort of result that the percentage of recovery fee method is intended to foster and stands as a counterexample to the perennial laments about the slow pace of complex litigation.
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> Moreover, plaintiffs' counsel terminated this controversy by settlement and thereby avoided burdening the federal judicial system with a trial and appeals. Indeed, "it would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation."

*Accord Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("It matters little to the class how much the attorney spends in time or money to reach a successful result.").

Thus, it would defeat the "bargain" that a court (on behalf of absent class members) enters into with class counsel through an auction if lodestar considerations are allowed to sneak back into the equation through the back door of a lodestar "cross-check." As Judge Walker wrote in *Oracle*, rejecting an objection to the fee request based on the argument that the court should "adjust" the fee to counsel, based on lodestar considerations, from the percentage fee set pursuant to the auction undertaken in that case:

> [t]he propriety of using a percentage of the fund contingent fee approach in this case was addressed at the outset of the litigation. At that time, the court weighed the relative advantages and disadvantages of the lodestar and percentage of the fund approaches in the common fund context and found percentage of the fund fee compensation "vastly superior."

*In re Oracle Securities Litigation*, 852 F. Supp. 1437, 1454 (N.D. Cal. 1994).

## IV. Further Observations Concerning Auctions

1. Auctions may dissuade competent counsel from participating in cases. Professor Coffee has cited *In re California Micro Devices Securities Litigation*, 168 F.R.D. 257 (N.D. Cal. 1996), as an example of a case in which the auction procedure established by the court seemed to dissuade plaintiffs' counsel from bidding to

lead the prosecution of the case. As Judge Walker noted in that case, only 2 of 17 firms representing plaintiffs chose to submit bids, and only one of the bids was characterized by him as "serious." This limited response to the court's request for bids and the court's dissatisfaction with the outcome underscores that auctions are not as easily implemented as they may appear in theory.

2. Bids must be kept confidential. If courts decide to utilize auctions to select counsel or establish fee structures at the outset, the bid selected for the case must be kept confidential throughout the prosecution of the case. Otherwise, defendants can devise their litigation strategies with the fee structure of class counsel in mind, and gain an advantage in settlement negotiations. Moreover, all bids should be submitted *in camera*, and not be available in the public record. The failure to do so appears to have created disincentives to bidding among plaintiffs' counsel in various auctions, and it serves no useful purpose for a court to disclose publicly bids made by various firms, when the case will be prosecuted solely on the basis of the bid accepted by the court as best for the class.

3. Disenfranchising most adequate plaintiffs. Auctions should not be undertaken when the result would be to disenfranchise the most adequate plaintiff, as occurred in *In re Network Associates, Inc. Securities Litigation*, 76 F. Supp.2d 1017 (N.D. Cal. 1999). In *Network Associates*, the company announced in early April 1999 that it was restating its financial results for 1997 and 1998 after receiving a letter from the Securities and Exchange Commission concerning its improper accounting for "in-process research and development" expenses, that the company's sales for the first quarter were only $245 to $250 million, far short of the market's expectations for the quarter, and that its earnings for the quarter were similarly far below what the market expected. The market price of Network Associates stock fell precipitously, and over twenty class action lawsuits were filed against the company and its senior officers. The damages of the class in the lawsuit were estimated by plaintiffs' counsel to be approximately $800 million.

The district court initially appointed the City of Philadelphia, through its Board of Retirement and Pensions, as presumptive lead plaintiff, based on its financial interest in the litigation. However, in the appointment order, the court required the City to conduct an auction for selection of counsel (which was to be based on fee proposals from its own counsel and from other firms), to solicit resumes and fee proposals from law firms that the City had not retained, to interview such law firms, and to engage in a new selection process, based upon the firms' fee proposals and other factors.[5] If the City decided to select its own counsel as class

[5] Requiring a lead plaintiff to conduct an auction – or even enter into a fee agreement with its chosen counsel – is contrary to the Report of the Statement of Managers of the Conference Committee, which states: "the most adequate plaintiff provision does not confer any new fiduciary duty on institutional investors – and courts should not impose such a duty." *See* H.R. Conf. Rep. 104-369, at 34 (emphasis added). Indeed, requiring a putative lead plaintiff to undertake the time-consuming process of conducting an auction (obviously pursuant to, and under the supervision of, the court) could serve to discourage the very outcome that the lead

counsel, the court further required the City to make a second, alternative choice, and to explain the reasons why it chose its counsel again in the event that such counsel's fee proposal was not the lowest.

The City objected to these requirements, citing its own regulatory procedures and the PSLRA. *See* Letter from City of Philadelphia, Board of Pensions and Retirement, to the Honorable William A. Alsup, dated November 24, 1999 (copy available upon request). The City offered the court two variations on the court's suggested procedures: (1) the City would negotiate a fee in advance with its chosen counsel, subject to court approval; or (2) the court itself might undertake an auction similar to the *Cendant* auction. When Judge Alsup made clear in a subsequent order that there would be no deviation from the prior ruling, the City withdrew as lead plaintiff rather than agree to a procedure that it believed would risk requiring the City to breach its own regulations concerning selection of counsel and disserve the class. *See* Letter of December 2, 1999 (copy available upon request).

The court thereafter appointed an individual investor with a significantly smaller financial interest in the litigation as the lead plaintiff (indeed, it was the lead plaintiff applicant with the smallest financial interest in the case), and directed that individual to select counsel based on the court's requirements. The lead plaintiff selected a law firm with an extraordinarily low bid. Recently, the court approved a $30 million settlement in the case, and awarded a fee based on the competitive bidding procedure. There is a wide disparity of views concerning whether the class benefited from the court's procedures. The proponents of the settlement claim that this represents a recovery of 25% of the damages in the case and a very reasonable fee; other counsel involved in the case point to the original damage estimates in the range of $800 million, view the settlement as a small percentage of the actual damages of the class, and see the pre-set fee structure as one reason for the relatively small settlement.

Supporting this view is a "most favored nation" clause in the settlement agreement that provides that if the company settles with an institutional investor (a State pension board) that opted out of the class in order to pursue its claim individually, and the pension board is able to negotiate a better settlement for itself than class counsel was able to negotiate for the class, the company is bound to increase the amount of the class settlement to the level achieved by the individual investor. Many view this provision as tantamount to an admission that the recovery achieved by class counsel is not a good one, but that class counsel was simply not going to devote further resources to the case in an effort to improve the class' recovery. Thus, while the case is being characterized by some as a success that led to a significant recovery at a relatively low fee award, others view it as a case in which the court's process served to disqualify the presumptive lead plaintiff – an institutional investor that was willing to negotiate a reasonable

plaintiff provisions were intended to promote: to "encourage institutional investors to take a more active role in securities class action lawsuits." *Id.*

fee agreement with its chosen counsel, subject to court approval – and produced a result that reflected the so-called "winner's curse."

4. Courts should consider selecting bids with straight line and increasing percentage structures. One of the goals of an auction process should be to create the proper incentive for class counsel to optimize the recovery for the class. In *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, MDL-834 (D. Ariz., July 25, 1990), the court set the fee in advance based on 25% of first $150 million recovered, and 29% of recoveries in excess of $150 million. Such an increasing percentage fee structure may provide an appropriate incentive to class counsel, as envisioned in ABA Formal Opinion 94-389, Section J, "The Percentage of A Contingent Fee May Increase with the Amount of the Recovery," which states as follows:

> [M]any would say that this form of contingent fee agreement [one that increases the percentage as the recovery grows] more closely rewards the effort and ability the lawyer brings to the engagement than does a straight percentage fee arrangement, since everyone would agree that it is the last dollars, nor the first dollars, of recovery that require the greatest effort and/or ability on the part of the lawyer.

Such bids should not be disregarded automatically or disfavored, when the circumstances indicate that the class will be better served by the selection of a straight or increasing percentage structure than by a decreasing percentage structure. This is especially the case in those situations where liability appears clear and the real task for counsel is to recover those last, hardest dollars.

Two cases, *Cendant* and *Auction Houses*, provide some evidence that utilizing increasing or straight line percentage schedules, which more closely align the interests of counsel and the class, provide the right types of incentives for achieving extraordinary class recoveries.

In *Cendant*, the court conducted an auction for the selection of class counsel in *Cendant*. It set the ground rules in advance, including that the bids would be held in confidence until resolution of the case (182 F.R.D. 144, 149-52). There was ample interest and publicity about the bidding process, which took place after a significant amount of information was available publicly about the fraud at Cendant and the market losses suffered by Cendant investors. The court established the fee grid and stages of litigation after consultation with counsel and the lead plaintiffs; and considered the bids based on the competency and experience of counsel (including records of trial experience) and whether the bids would create the proper incentives to optimize the recovery for the class. (191 F.R.D. 387).

The court found three bids to be qualified, and selected an increasing percentage structure that began at a 2% fee for the first $100 million recovered, and gradually

increased to 9% for any recovery over $500 million. In order to reconcile the provisions of the PSLRA with the court's auction procedures, the court allowed the firms retained by the lead plaintiffs – which the court found were qualified to lead the case – to agree to abide by the terms of the lowest qualified bid, and appointed those firms as counsel for the class on that basis.

The history of the litigation and settlements achieved in *Cendant* are described in the district court opinion approving the two settlements, which provide a $3.18 billion recovery for the class, plus the possibility of an additional payment and important corporate governance changes to which Cendant agreed as part of its settlement. *See* 109 F. Supp.2d 235, *appeals pending*. As the court found, based on its own analysis and declarations submitted in support of the settlements by co-lead counsel, experts retained by co-lead counsel during the course of the litigation, and three eminent law professors – John C. Coffee, Jr., Samuel Issacharoff and Arthur R. Miller – the settlements achieved for the class were "off-the-charts." *See* Declaration of John C. Coffee, Jr., submitted June 19, 2000, at ¶¶ 10-18; Declaration of Samuel Issacharoff, at ¶¶ 3, 16; Declaration of Arthur R. Miller, at ¶¶ 14-15. [Copies are available upon request]. Indeed, there is record evidence that the amount recovered was $2 billion <u>more</u> than one of the lead plaintiffs had suggested at the time the consolidated complaint was being prepared as its goal in the case.

The court further determined that based on the result achieved for the class and the auction process pursuant to which co-lead counsel prosecuted the case, it was reasonable and appropriate to award a fee in accordance with the benchmark established through the bidding process. *See* 109 F. Supp.2d 285, *appeals pending*. The fee award constituted 8.275% of the cash portion of the settlements achieved for the class – meaning that Class members will be receiving over $2.9 billion of the $3.18 billion recovery, plus the interest (approximately $150 million per year) that has been accruing on the settlement proceeds.[6]

In *Auction Houses*, 197 F.R.D. 71 (S.D.N.Y. 2000) (see above at Section III.A), the court instituted an unique bidding formula: each bidder was required to propose a figure under which the class would receive the entire benefit of any recovery and in excess of which counsel would be entitled to 25% of the amount recovered. This formula effectively provided an increasing fee schedule. As counsel recovered increasing amounts in excess of the threshold figure, its fee would increase both on a monetary basis and on a percentage basis. For instance, with a threshold figure of $100 million, if counsel recovered $100 million, it would get nothing (0%); at $120 million, its fee would be $5 million (4.2%); at $150 million, it would be $12.5 million (8.3%); at $200 million, it would be $25

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[6] Because the approvals of the settlements and plan of allocation, and the fee award in *Cendant* are presently before the Court of Appeals, we will refrain from specific arguments concerning the use of an auction in the case and challenges to the reasonableness of the fee awarded by the district court.

million (12.5%); at $300 million, it would be $50 million (16.6%); and so on, approaching 25%.

While the system created stark potential conflicts in the event that defendants offered a substantial amount in settlement, but at a level that would have resulted in no or very little counsel fees, such conflicts did not eventuate, and the result achieved for the class was extraordinary. *See* 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001). Class counsel achieved a settlement valued at $512 million, consisting of $412 million in cash and $100 million in credits that can be used in future auctions. The court approved the settlements and awarded a fee based on the result of the auction notwithstanding that the case was settled within four months.

5. <u>Courts should allow firms to bid jointly</u>. Class actions are typically large, complex cases. They require an enormous amount of work, and no single firm should be required to accept the entire risk for such contingency cases. In contrast, defendants are typically represented by highly regarded lawyers who defend such cases vigorously (and who do not risk not being paid for their services). Allowing plaintiffs' firms to submit joint bids would allow them to put a structure in place to prosecute the action fully and underwrite the costs for the action. While this might cut down on the number of bids that a court receives in a particular case, in general, the reasons that courts have not received what they consider to be a sufficient number of auction bids have more to do with the view of most plaintiffs' counsel that the auction will simply be a "race to the bottom" and that the bids will be disclosed publicly and analyzed in published opinions.

6. <u>Courts should not allow after-the-fact questioning of the propriety of the selected bid as the benchmark for awarding a fee</u>. A fee structure arrived at in advance represents a "bargain" by the court, on behalf of absent class members, and counsel. As Professor Issacharoff stated in his testimony to this Task Force: "If the auction process is to have any effect, there must be a quasi-contractual expectation that the auction will indeed set the expected terms governing the retention and compensation of class counsel." Statement of Samuel Issacharoff, at 3 n.6; *accord* Statement of Howard A. Specter, at 8 ("Any bidder, lawyer or otherwise, should be entitled to certainty upon successful performance"); Statement of Elizabeth J. Cabraser, at 7-8 (when a fee is established at the outset and has been factored into the court's selection of counsel, "this fee must be afforded definitive, or at least presumptive weight in the court's award of fees at the end of the litigation. A proposed fee cannot be so crucial as to cause a firm to be selected as class counsel, yet so unreliable as to be disregarded when it comes time to award fees. … The perceived benefits of auctions will be lost if the successful bid is not respected."). As noted previously at pages 2-3 and 10-11 above, district courts should not deviate from pre-set fee agreements except in rare circumstances, such as when the recovery achieved is not the result of counsel's efforts or the value of a settlement is not easily discernable.

Similarly, reviewing courts should not allow after-the-fact questioning of the propriety of the selected bid as the benchmark for awarding a fee. The 1985 Task Force Report is emphatic on this point: "If the plaintiffs' lawyers agree to the negotiated fee and the agreement is approved by the district court, then there should be no review of the matter in the court of appeals." *See Task Force Report*, 108 F.R.D. at 258 (emphasis added). In the words of Judge Sarokin, allowing after-the-fact questioning of the bid selected would be "akin to placing a wager after the outcome of the event is known or playing poker with everyone's cards face up." *First Fidelity*, 750 F. Supp. at 163.

Respectfully submitted,

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Leonard Barrack
Jeffrey W. Golan
**Barrack, Rodos & Bacine**
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Tel: 215-963-0600

Attachments:

A: Barrack, Rodos & Bacine firm resume
B: Brief for Appellees in *In re Cendant*, Nos. 00-2520, et al.
C: Letter/brief dated May 9, 2001 in *In re Cendant*, Nos. 00-2520, et al.

# BARRACK, RODOS & BACINE

Barrack, Rodos & Bacine is a litigation firm that for twenty-five years has been extensively involved in major complex litigation in courts throughout the United States, including class and derivative actions and bankruptcy proceedings, alleging, inter alia, violations of the federal securities, antitrust laws, and state consumer laws. The firm, with attorneys in offices located in Philadelphia, San Diego, New York, New Jersey and Boston, believes it is unique among firms concentrating in such complex litigation in that, in addition to its extensive experience prosecuting these actions on behalf of investors, it has significant experience in defending such actions as well.

## 1. Class Action Representation in Securities Law Class Actions

### a. Plaintiffs' Class Actions

The firm has concentrated for many years in representing plaintiffs in securities class actions, litigating hundreds of such cases. Among the more prominent securities fraud cases in which the firm has acted as lead counsel and has been responsible for substantial recoveries for investors are actions against Cendant Corporation, 3Com, Informix, Medaphis Corporation, Micro Warehouse, Inc., ITT, RJR Nabisco, Lockheed, Northrop, American Continental/Lincoln Savings Bank and Charles Keating, Control Data Corporation, Pfizer, Centocor, First Fidelity Bancorporation, U.S. Surgical Corp., Wickes, Oak Industries, Marion Merrell Dow, Pinnacle West, Stauffer Chemical Company, Regal Communications, UJB Financial Corp., Midlantic Corporation and Home-Fed.

The firm has been retained by many institutional investors since the passage of the Private Securities Litigation Reform Act to bring such securities actions, including the California Public Employees' Retirement System, the New York State Common Retirement Fund, the Commonwealth of Pennsylvania pension funds, State Board of Administration of Florida, the City of Philadelphia pension funds, the Public School Teachers' Pension and Retirement Fund of Chicago, and the CWA/ITU Negotiated Pension Plan (representing present and former members of the Communications Workers of America and International Typographical Union).

#### (1) Recoveries obtained through settlements

In re Cendant Corporation Litigation, Civil Action No. 98-1664 (WHW) (D.N.J.). First cases filed in April 1998. Firm was appointed as co-lead counsel for the class in October 1998. On August 15, 2000, the district court approved settlements of more than $3.18 billion for class members, which is by far the largest recovery in the history of American securities class action litigation, consisting of $2.85 billion from Cendant and $335 million from Ernst & Young LLP, plus a one-half interest in any net proceeds obtained by Cendant and certain of the settling individual defendants in their actions against

Ernst & Young, and significant corporate governance changes agreed to by Cendant as part of its settlement.

In re 3Com Securities Litigation, Master File No. C 97-21083-EAI (N.D. Cal.). First cases filed in December 1997; lead plaintiffs and lead counsel appointed in April 1998; motions to dismiss denied in July 1999; case resolved at end of the discovery process by settlement approved in February 2001 for $259 million.

In re Informix Corporation Securities Litigation, Civil Action No. C-97-1289 (N.D. Cal.). First cases filed in April 1997; lead plaintiffs and lead counsel appointed in July 1997; case resolved during the discovery process by settlement valued at $132 million, consisting of $98 million from the Company and its insurance carriers and $34 million from the accounting firm; settlement approved on November 23, 1999.

In re: 1996 Medaphis Corporation Securities Litigation, Civil Action No. 1:96-CV-2088-TWT (N.D. Ga.). First case filed on August 19, 1996; lead plaintiffs and lead counsel appointed on October 23, 1996; motion to dismiss denied on May 27, 1997, at 977 F. Supp. 1463 (N.D. Ga. 1997); case resolved during the discovery process by settlement dated December 15, 1997, for $72.5 million, consisting of $20 million in cash and Medaphis securities valued at $52.5 million; settlement approved on March 24, 1998.

Payne, et al. v. Micro Warehouse, Inc., et al., Case No. 3:96:-CV-1920 (DJS) (D. Conn.). First cases filed on October 1, 1996; lead plaintiffs and lead counsel appointed on February 4, 1997; resolved during the discovery process by settlement dated February 24, 1998, with the Micro Warehouse defendants and KPMG Peat Marwick, its outside accounting firm, for $30 million in cash; settlement approved on June 2, 1998.

In re M.D.C. Holdings Securities Litigation, Master File No. CV-89-0090-E(M) (S.D. Cal.). This case involved claims against M.D.C. Holdings, the accounting firm of Touche Ross, Drexel Burnham Lambert, Inc, Michael Milkin and others. First case filed in 1989; resolved by a series of settlements, after discovery, noticed to class members beginning on October 6, 1992, in the collective amount of $54.3 million for class members; distribution approved on May 2, 1994.

In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation, MDL Docket No. 834 (D. Ariz.). These actions were brought against Charles Keating and other executives of ACC and Lincoln Savings, the companies' outside accounting firms, the companies' outside law firm, certain Drexel Burnham entities, and various other entities associated with Keating. BRB was a member of the Plaintiffs' Executive Committee and served as the primary counsel for the Class with respect to plaintiffs' claims against Arthur Young & Co., ACC's outside accounting firm. The first cases were filed in April 1989. Partial settlements in the amount of $24.3 million were reached as of July 1990 with two defendants in the consolidated cases, and approved on September 26, 1990. Claims against certain other defendants were resolved after exten-

sive discovery by settlements as of July 1992, for $152 million (including $63 million from the Arthur Young defendants), and approved on September 14, 1992. Certain subsequent settlements in the amount of $10.3 million were reached as of December 1993, and approved on February 22, 1994. Trial occurred in 1993 and a total of $280 million was recovered for the class.

In re IDB Communications Group, Inc. Securities Litigation, Master File No. CV-94-3618-RG(JGx) (C.D. Cal.). First case filed June 1, 1994; resolved during the discovery process by settlement as of October 31, 1994, for $75 million; settlement approved on February 13, 1995.

Persky, et al. v. Turley, et al., Nos. CIV 88-1830 PHX-PAR and 88-2089 PHX-PAR (D. Ariz.). These cases involved claims against the Pinnacle West Capital Corporation and various individual defendants. First case filed in November 1988; resolved by settlement after conclusion of discovery, for $34 million; settlement approved on December 29, 1993.

In re Pacific Enterprises Securities Litigation, Master File No. CV-92-0841-JSL (Eex)(C.D. Cal.). First case filed in February 1992; resolved during the discovery process by settlement as of December 15, 1993, for $33 million in cash; settlement approved on March 28, 1994.

In re First Fidelity Bancorporation Securities Litigation, Master File No. 88-5297 (HLS) (D.N.J.). First case filed in 1988; resolved during the discovery process by settlement on June 29, 1990, for $30 million in cash; settlement approved on September 24, 1990.

In re Centocor Securities Litigation, No. 92-CV-1071 (E.D. Pa.). First case filed on February 20, 1992; resolved during the discovery process by settlements as of December 10, 1992, totalling $26 million; settlements approved on June 2, 1993.

In re Lockheed Corp. Securities Litigation, Master File No. CV-89-6745-TJH(Tx) (C.D. Cal.). First case filed in November 1989; case resolved after extensive discovery by settlement dated November 8, 1993, for $16 million in cash; settlement approved on July 25, 1994.

In re: American Adjustable Rate Term Trusts Securities Litigation, Civil Nos. 4-95-666 & 667 (D. Minn.) (involving various Piper Jaffray offerings). First case filed October 20, 1994; case resolved during the discovery process by settlement on June 17, 1996, for $15.8 million in cash; settlement approved on August 23, 1996.

In re The Gitano Group, Inc. Securities Litigation, Master File No. 91 Civ. 1440 (SS)(S.D.N.Y.). The first cases were filed on February 27, 1991; subsequent cases were filed in January to February 1994; on March 1, 1994, The Gitano Group filed for protec-

tion under Chapter 11 in the United States Bankruptcy Court; and the consolidated complaint was filed on April 27, 1994. The action was partially resolved during discovery by cash settlement as of July 1994, for $13.8 million, and approved on October 31, 1994. A related action against Coopers & Lybrand was resolved in February 1995, for $0.2 million, and approved on May 1, 1995.

In re Marion Merrell Dow Securities Litigation, Master File No. 92-0609-CV-W-6 (W.D. Mo.). First case filed July 8, 1992; motion to dismiss denied on October 4, 1993, at [1993] Fed.Sec.L.Rep. (CCH) ¶ 97,776; resolved after conclusion of discovery by settlement on January 24, 1997, for $13.75 million; all cash settlement approved on May 1, 1997.

In re HomeFed Securities Litigation, Master File No. 90-799-T(CGA) (S.D. Cal.). First case filed June 13, 1990; case against HomeFed stayed based on bankruptcy filing by company; case resolved globally after conclusion of discovery by settlement in June, 1996, for $12.4 million in cash ($8.7 million from the directors and officers, $3.7 million from Peat Marwick, and $175,000 from HomeFed's bankruptcy estate); settlement approved on August 26, 1996.

In re Tiphook Securities Litigation, Master File No. 93-CV-4449 (HLS) (D.N.J.). First case filed in October 1993; resolved during discovery by settlement on July 28, 1995, for $12 million in cash; settlement approved on August 4, 1995.

In re Cirrus Logic Securities Litigation, Master File No. C-93-1591-WHO (N.D. Cal.). First case filed April 29, 1993; motion to dismiss denied November 16, 1993; case resolved after discovery and denial of summary judgment motion by settlement as of December 3, 1996, for $10.4 million in cash; settlement approved on June 19, 1997.

In re Acclaim Entertainment, Inc. Shareholder Litigation, Master File No. 95 Civ. 4979-TCP (E.D.N.Y.). First case filed on December 5, 1995; resolved during discovery process by settlement as of February 25, 1998, for $7.175 million in cash and an additional $2.55 million in warrants; settlement approved on May 26, 1998.

In re Jenny Craig Securities Litigation, Master File No. CV-92-845-J(LSP) (S.D. Cal.). First case filed June 5, 1992; resolved after conclusion of discovery and adjudication of summary judgment motions by settlement as of March 29, 1995, for $9.5 million; settlement approved on June 19, 1995.

In re U.S. Surgical Corporation Securities Litigation, Civil Action No. 3:92 CV 374 (AHN) (D. Conn.). First cases filed in August 1992, with additional cases filed in April to May 1993 and in February to March 1994. Final Complaint filed on June 19, 1995; resolved near conclusion of discovery by settlement dated February 14, 1997, for $3.5 million in cash and other securities with maximum value of $22 million.

In re SLM International, Inc. Securities Litigation, Master File No. 94 CIV. 3327 (RLC) (S.D.N.Y.). First group of cases filed in April 1994, and second group of cases filed in November 1994. Case resolved during discovery by settlement dated April 24, 1996, for $8.75 million in cash and 1 million shares of SLM common stock; settlement approved on July 23, 1996.

In re Regal Communications Securities Litigation, Case No. 94-CV-0179 (JTG) (E.D. Pa.). First case filed in April 1994; case stayed against Regal on September 23, 1994, based on bankruptcy filing by Regal; case against remaining defendants resolved after conclusion of discovery, denial of summary judgment motion and at eve of trial by settlement with individual defendants and outside accounting firm on December 31, 1996, for $7.25 million (after adjudication of summary judgment motions), and by settlement with placement agents for debenture offering for $575,000; final settlement approved on March 13, 1997.

In re Midlantic Corp. Shareholders Securities Litigation, Master File No. 90-1275 (DRD) (D.N.J.). First cases filed in March 1990; motion to dismiss denied at 758 F. Supp. 226 (D.N.J. 1990); resolved during the discovery process by settlement as of March 2, 1995, for $6.2 million; settlement approved on June 6, 1995.

In re Sierrra Semiconductor Securities Litigation, Master File No. C-93-20286-RPA(PVT) (N.D. Cal.). First cases filed in April 1993; resolved during the discovery process by settlement as of August 23, 1994, for $6 million; settlement approved on November 21, 1994.

Kaplan v. Rose, Civ. No. SACV-89-740-AHS (RWRx) (C.D. Cal.). This case involved claims against Medstone International Corporation and its senior officers. First case filed October 6, 1989; motion to dismiss granted by District Court but reversed on appeal at 49 F.3d 1363 (9th Cir. 1994), cert. denied, 516 U.S. 810 (1995); resolved after conclusion of discovery by settlement as of June 20, 1996, for $6 million in cash; settlement approved on November 15, 1996.

**(2) Class action cases taken to trial**

The firm has extensive experience in trying to a jury nationwide class actions. In the past few years the firm has been trial counsel in the following cases, among others:

Gutierrez v. Charles J. Givens Organization, Inc., Case No. 667169 (San Diego County Superior Court) (consumer case). Case filed in July 1993; discovery concluded in 1996; case tried to a jury in 1996 to a verdict for the plaintiff class for compensatory and punitive damages totalling $14.1 million.

In re ACC/Lincoln Savings Bank, MDL 834 (D. Ariz.). Following settlements with various other defendants (see description at pages 2-3, above), this case was tried

against several defendants in 1993 to a jury verdict for the plaintiff class with total recoveries of over $280 million.

In re Control Data Corporation Securities Litigation, 3-85-1341 (D. Minn.). This case was filed in August 1985. After more than four years of discovery, the case went to trial in January 1990. The District Court entered a directed verdict at the conclusion of the plaintiffs' case, which directed verdict was reversed by the Eighth Circuit Court of Appeals at 933 F.2d 616 (8th Cir. 1991). Upon remand, the case was resolved by settlement in the amount of $7.5 million.

Gould v. Marlon, CV-86-968-LDG (D. Nev.). This case was filed in 1986. Following the conclusion of all discovery, and the denial of defendants' motion for summary judgment, the case was tried in 1990 to a jury verdict for the plaintiff class in the amount of $6 million.

Herskowitz v. Nutri/System, Inc., 86-0711 (E.D. Pa.). This case, which was filed in August 1986, was tried to a jury in 1987. The jury returned a verdict against the class. Plaintiffs appealed various trial rulings of the District Court and the Third Circuit Court of Appeals reversed the decision at 857 F.2d 179 (3d Cir. 1988). Upon remand, the case was resolved by settlement in 1989, in the amount of $1.8 million.

**(3) Cases in which Barrack, Rodos & Bacine has been appointed lead counsel under the Private Securities Litigation Reform Act**

Since the Private Securities Litigation Reform Act of 1995 ("PSLRA") became law on December 22, 1995, the firm, representing public and private institutional clients, money managers, investment advisors and large and small shareholders, has been appointed by federal courts throughout the United States to be lead or co-lead counsel for plaintiffs prosecuting securities class actions, inter alia, in the following cases:

In re Cendant Corporation Securities Litigation, Master File No. 98-1664 (WHW), before the Honorable William H. Walls in the District of New Jersey;

Shafizadah v. Amplidyne, Inc., Civil Action No. 99-4468 (MLC), before the Honorable Mary L. Cooper in the District of New Jersey;

In re McKesson HBOC, Inc. Securities Litigation, No. C-99-20743-RMW, before the Honorable Ronald M. Whyte in the Northern District of California;

In re Sunbeam Securities Litigation, No. 98-8258-CIV-MIDDLEBROOKS, before the Honorable Donald M. Middlebrooks in the Southern District of Florida;

Reiver, et al. v. 3Com Corporation, Case No. C97-21083JW, before the Honorable James W. Ware in the Northern District of California;

In re Informix Corp. Securities Litigation, Civil Action No. C-97-1289-CRB, before the Honorable Charles R. Breyer in the Northern District of California;

In re Green Tree Financial Corp. Stock Litigation, 97-2666 (JRT/RLE), before the Honorable John R. Tunheim in the District of Minnesota;

In re 1996 Medaphis Corporation Securities Litigation, Civil Action No. 1:96-CV-2088-TWT, before the Honorable Thomas W. Thrash in the Northern District of Georgia, Atlanta Division;

Payne, et al. v. Micro Warehouse, Inc., et al., Case No. 3:96-CV-1920 (DJS), before the Honorable Dominic J. Squatrito in the District of Connecticut;

City of Philadelphia, et al. v. Fleming Companies, Inc., et al., Civil Action No. 96-853-M, before the Honorable Vicki N. Miles-LaGrange in the Western District of Oklahoma;

David Malin, et al. v. Ivax Corp., et al., Case No. 96-1843-CIV-MORENO, before the Honorable Federico A. Moreno in the Southern District of Florida;

In re Ford Motor Co. Securities Litigation, No. 00-74233, before the Honorable Avern Cohn in the Eastern District of Michigan, Southern Division;

In re Daimler Chrysler  Securities Litigation, No. 00-0993, before the Honorable Joseph J. Farnan, Jr. in the District of Delaware;

Bell, et al. v. Fore Systems, Inc., et al., Civil Action No. 97-1265, before the Honorable Robert J. Cindrich in the Western District of Pennsylvania;

In re Parametric Technology Corporation Securities Litigation, Civil Action No. 98-11328 GAO, before the Honorable George A. O'Toole, Jr. in the District of Massachusetts;

In re Paradyne Networks, Inc. Securities Litigation, Case No. 8:00-CV-2057-T-17E, before the Honorable Elizabeth A. Kovachevich in the Middle District of Florida, Tampa Division;

In re Citrix Systems, Inc. Securities Litigation, No. 00-6796-CIV, before the Honorable William P. Dimitrouleas in the Southern District of Florida;

In re Theragenics Corp. Securities Litigation, No. 1:99-CV-0141(TWT), before the Honorable Thomas W. Thrash in the Northern District of Georgia, Atlanta Division;

Smith v. Harmonic, Inc., et al. No. C-00-2287 PJH, before the Honorable Phyllis J. Hamilton in the Northern District of California;

In re PeopleSoft, Inc. Securities Litigation, Case No. C-99-0472-MJJ, before the Honorable William H. Alsup in the Northern District of California;

Jack Fishbaum, et al. vs. Silicon Graphics, Inc., et al., No. C CV770534, before the Honorable Conrad L. Rushing in the Superior Court of the State of California, County of Santa Clara;

Smith, et al. v. Electronics For Imaging, Inc., et al., No. C-97-4739-CAL, before the Honorable Charles A. Legge in the Northern District of California;

Wilkes v. Versant Object Technology, Inc., et al., No. C-98-0299, before the Honorable Claudia Wilken in the Northern Division of California, Oakland Division;

Madruga, et al. v. Pacificare Health Systems, Inc., et al., No. SACV97-974, before the Honorable Dickran Tevrizian in the Central District of California;

Robert Schlagel, et al. v. Learning Tree Int'l, et al., Case No. CV 98-6384 GAF (Ex), before the Honorable Gary A. Feess in the Central District of California;

In re Samsonite Corp. Securities Litigation, Master File No. 98-K-1878, before the Honorable John L. Kane, Jr., in the District of Colorado;

Allan Zishka, et al. vs. American Pad & Paper Company, et al., Civil Action No. 3:98-CV-0660-D, before the Honorable Sidney A. Fitzwater in the Northern District of Texas, Dallas Division;

Derric C. Chan, et al. v. Orthologic Corp., et al., Civil Action No. 96-1514-PHX-RCB, before the Honorable Robert C. Broomfield in the District of Arizona;

**(4) Notable decisions in securities cases**

In addition to recovering substantial sums for class members, the firm is also responsible for creating significant legal authority in the field as far back as the early 1970's with the decision in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), which established the standards for class actions in securities cases, and continuing through the years with the decisions in Gladwin v. Medfield, CCH Fed. Sec. L. Rep. ¶95,012 (M.D. Fla. 1975), aff'd, 540 F.2d 1266 (5th Cir. 1976); Herskowitz v. Nutri/System, et al., 857 F.2d 179 (3rd Cir. 1988); In re Control Data Corporation Securities Litigation, 933 F.2d 616 (8th Cir. 1991); In re Craftmatic Securities Litigation, 890 F.2d 628 (3rd Cir. 1989); Shapiro v. UJB Financial Corp., 964 F.2d 272 (3Rd Cir. 1992); Kaplan v. Rose, 49 F.3d 1363 (9th Cir. 1995); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410 (3rd Cir. 1997); Weiner v. The Quaker Oats Company, 129 F.3d 310 (3rd Cir. 1997); and Cooper v. Pickett, 137 F.3d 616 (9th Cir. 1997) (involving Merisel, Inc.).

In addition to the hundreds of district court decisions on motions that BR&B has briefed and argued before enactment of the PSLRA, the firm has also been involved in numerous motions to dismiss complaints in cases brought pursuant to the PSLRA, in which motions to dismiss were denied including In re Cendant Corp. Litigation, 60 F.Supp. 2d 354 (D.N.J. 1999); In re Envoy Corp. Securities Litigation, 2001 WL 224495 (M.D. Tenn., February 1, 2001); In re Sunbeam Securities Litigation, 89 F.Supp. 2d 1326 (S.D. Fla. 1999); Bell v. Fore Systems, Inc., 1998 U.S. Dist. LEXIS 7910 (W.D. Pa. 1998), adopted, 1998 U.S. Dist. LEXIS 9589 (W.D. Pa. 1998); In re Ancor Communications, Inc. Securities Litigation, Master File No. 97-CV-1696 ADM/JGL (D. Minn. July 14, 1998); Gross v. Medaphis Corp., 977 F. Supp. 1463 (N.D. Ga. 1997); and Blaich v. Employee Solutions, Inc., No. Civ-97-545 (D. Ariz. August 11, 1998), In re World Access Securities Litigation, 119 F.Supp. 2d 1348 (N.D. Ga. 2000); In re McKesson-HBOC Securities Litigation, 126 F.Supp. 2d 1248 (N.D. Cal. 2000); In re Hi/fn, Inc. Securities Litigation, 2000 U.S. Dist. LEXIS 11631 (N.D. Cal. 2000); In re PeopleSoft, Inc. Securities Litigation, [2000 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 91,305 (N.D. Cal. 2000) and 2000 WL 1737936 (N.D. Cal. 2000); Stanley v. Safeskin, 2000 WL 33115908 (S.D. Cal. 2000); In re 3Com Securities Litigation, 1999 WL 1039715 (N.D. Cal. 1999); In re Informix Securities Litigation, Master File No. C-97-1289-CRB (N.D. Cal.); Bell v. Fore Systems, Inc., 1998 U.S. Dist. LEXIS 7910 (W.D. Pa. 1998), adopted, 1998 U.S. Dist. LEXIS 9589 (W.D. Pa. 1998); In re Ancor Communications, Inc. Securities Litigation, Master File No. 97-CV-1696 ADM/JGL (D. Minn. July 14, 1998); Gross v. Medaphis Corp., 977 F. Supp. 1463 (N.D. Ga. 1997); and Blaich v. Employee Solutions, Inc., No. Civ-97-545 (D. Ariz. August 11, 1998).

### b. Representation of Defendants in Securities Cases

The firm has represented major public and private corporations throughout the United States defending securities, fraud, tort and contract actions, including the defense of class actions. For many years, the firm represented the brokerage firms of E.F. Hutton & Company, Inc., Prudential-Bache Securities, Inc., and Hibbard Brown & Company, Inc., in the defense of class actions brought under the federal securities laws, as well as in the defense of individual contract and fraud actions. The firm also represented the brokerage firms of First Jersey Securities, Muller & Company, Inc. and Philips, Appel & Walden, in the defense of class and individual actions. In the defense of class actions for brokers, the firm has been responsible for creating significant legal authority including Seiler v. E.F. Hutton & Co., Inc., 102 F.R.D. 880 (D.N.J. 1984), and Glick v. E.F. Hutton & Co., Inc., 106 F.R.D. 446 (E.D. Pa. 1985).

The firm has represented International Thoroughbred Breeders, a public company, in the defense of a class and derivative lawsuit and has defended class actions against directors of Aetna Inc., Cascade International and Bell Savings Bank.

## 2. Class Action Representations in Antitrust Cases

The firm also has extensive experience litigating antitrust class actions and has been instrumental in obtaining large recoveries against the manufacturers or producers of brand name prescription drugs, fine paper, waste management services, chlorine & caustic soda, residential doors, citric acid, plastic tableware, soft drinks, sugar, beer, oil, and copper tubing, among others. The following is a representative sample of these cases:

In re Citric Acid Antitrust Litigation, Master File No. 95-2963 (N.D. Cal.). This case, which involves price-fixing claims against Archer Daniels Midland, Inc. and others, was filed in 1995. The firm is one of three co-lead counsel in the case, in which all but one of the defendants entered into settlements with plaintiffs, for an aggregate amount of $86.25 million, and plaintiffs continued the action against the non-settling defendant. Following the close of the extensive discovery taken in the action, the non-settling defendant was successful in moving for summary judgment. Plaintiffs have taken an appeal of the summary judgment order to the Ninth Circuit Court of Appeals.

In re Residential Doors Antitrust Litigation, MDL Docket No. 1039 (E.D. Pa.). The first four cases were filed in June and July 1994; a fifth case was filed in November 1995; and a sixth case, adding four additional defendants, was filed in March 1996. The parties conducted extensive discovery throughout 1995 and the first nine months of 1996, when plaintiffs reached a settlement with five of the defendants, dated as of September 30, 1996, for a total of $14.55 million. The settlement with the settling defendants was approved on December 18, 1996. The action continued against the remaining defendants, and ultimately was resolved by settlement with them in September 1997, for $3.84 mil-

lion in cash and $2.4 million in other benefits to class members. The final settlements were approved by Judge Broderick on March 6, 1998.

In re Plastic Tableware Antitrust Litigation, Master File No. 94-CV-3564 (E.D. Pa.). This case was commenced in early 1994, and a First Consoldiated Complaint was filed on July 29, 1994. After expedited discovery was undertaken, negotiations with the various defendants resulted in settlements totalling $7.75 million. The settlements, dated as of January 26, 1995, February 21, 1995 and June 9, 1995, were approved by Judge Huyett on October 25, 1995.

Uniondale Beer Co. v. Anheuser-Busch, et al., No. 86-2400 (E.D.N.Y.). This case, brought in 1986, alleged price-fixing and market allocation claims against the major beer manufacturers in the market in and surrounding New York City. Plaintiffs litigated the case for nine years, reaching settlements with all but one of the defendants, including the major defendant which settled on the eve of trial, in the total amount of $14 million. The case went to trial against the remaining defendant, and resulted in a verdict for the non-settling defendant.

Other antitrust matters include:

In re Graphite Electrodes Antitrust Litigation, Master File No. 97-CV-4182(CRW), before the Honorable Charles R. Weiner in the Eastern District of Pennsylvania;

In re Flat Glass Antitrust Litigation, Master Docket Misc. No. 970550, MDL No. 1200, before the Honorable Donald E. Ziegler in the Western District of Pennsylvania ($63 million recovered thus far through settlements);

Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc., et al., No. CV-99-07796-GHK(Ctx), before the Honorable George H. King in the Central District of California, Western Division;

In re Sorbates Antitrust Litigation, Master File No. C 98-4886 CAL, before the Honorable Charles A. Legge in the Northern District of California;

In re Sodium Gluconate Antitrust Litigation, No. C-97-4142CW, before the Honorable Claudia Wilken in the Northern District of California;

In re Carpet Antitrust Litigation, MDL No. 1075, before the Honorable Harold L. Murphy in the Northern District of Georgia, Rome Division;

Capital Sign Company, Inc. v. Alliance Metals, Inc., et al., Civil Action No. 95-CV-6557(LHP), before the Honorable Louis H. Pollak in the Eastern District of Pennsylvania; and

In re: Metal Building Insulation Antitrust Litigation, Master File No. H-96-3490, before the Honorable Nancy F. Atlas in the Southern District of Texas.

## 3. **Bankruptcy - Related Litigation**

The firm has performed significant litigation services in bankruptcy matters, as both a claimant in bankruptcy proceedings, oftentimes representing a class of securities purchasers, and being retained by the trustee in bankruptcy to prosecute claims on behalf of the estate. Some of these cases are as follows:

Glen Ivy Resorts, Inc. In December 1991, class action cases were filed in the Los Angeles Superior Court on behalf of purchasers of timeshare units. The Glen Ivy entities subsequently filed for protection from creditors in the United States Bankruptcy Court, and the class actions were removed to federal court on March 10, 1993. BRB served as co-lead counsel for the Class in the Bankruptcy Court. Settlements were reached as of October 1997, in the total amount of $31.6 million, of which the Settlement Class receives at least 50%. The settlements were approved on January 29, 1998.

Financial Corporation of Santa Barbara. The bankrupt estate retained the firm to prosecute claims against former officers and directors of the Company. This prosecution resulted in an excellent recovery for the estate.

American International Airways, Inc. The trustee of the bankrupt AIA estate retained the firm to prosecute claims against former officers and directors of the company. The firm prosecuted these claims and obtained a significant recovery for the estate.

Mortgage & Realty Trust. While the firm was prosecuting a class action securities fraud case against MRT, MRT filed for bankruptcy. The firm obtained an order and opinion from the bankruptcy judge in the Central District of California certifying a class of securities purchasers and permitting the firm to vote on behalf of this class as to the plan of reorganization. In re Mortgage & Realty Trust, Fed.Sec.L.Rep. (CCH) ¶96,014 (C.D. Cal. 1991).

Data Access Systems, Inc. The firm participated in these bankruptcy proceedings on behalf of a class of securities purchasers of Data Access and participated in the negotiations of the plan of reorganization.

## 4. **Decisions Citing Work of the Firm**

The quality of the firm's work has been recognized by many courts. In In re Cendant Corp. Litigation, 109 F. Supp.2d 285, 306 (D.N.J. 2000), where BRB was co-lead counsel to the class, the Court found that the confidence placed in lead counsel "has been

realized by excellent settlements of uncommon amount engineered by highly skilled counsel with reasonable cost to the class. " In Payne v. Micro Warehouse, Inc., No. 3:96CV1920 (DJS) (D. Conn. Sept. 30, 1999), where BRB was co-lead counsel for the class, the Court noted "the exceptional results achieved by plaintiffs' counsel," who "were required to develop and litigate this complex case solely through their own efforts," and concluded that "the benefit conveyed to the class plaintiffs amply supports the conclusion that the plaintiffs' counsels' work was exceptional."

In Ressler v. Jacobson, Fed.Sec.L.Rep. (CCH) ¶ 97,224 (M.D. Fla. 1992), the Court found that "Barrack, Rodos & Bacine is recognized nationally to be a leading and skillful practitioner in the field of complex class actions." In In re Action Savings Bank Litigation, No. 90-2030 (JBS) (D.N.J), where the firm was lead counsel, the Court publicly commended the firm and stated: "Anybody who would ever say that Class Counsel don't earn their fees ought to be aware of all that you've done here.... I think it should serve as a model to anyone else who should sit in your shoes...." (Tr. Hearing, March 8, 1995). In In re First Fidelity Bancorporation Securities Litigation, Master File No. 88-5297 (HLS) (D.N.J.), where the firm was co-lead counsel for plaintiffs and the class, Judge Sarokin praised "the outstanding competence and performance" of the plaintiffs' counsel and expressed "admiration" for the work in the case. Further, in Bullock v. Kircher, 84 F.R.D. 1 (D.N.J. 1979), where BR&B was lead counsel for a class of shareholders, the Court recognized the "skill and expertise" of the firm which "resulted in a tremendous savings of court time," id. at 18, and stated that the firm "obtained an excellent result notwithstanding serious difficulties regarding liability and damages." Id. at 19.

Arthur R. Miller, Esquire
Areeda Hall 225
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

May 9, 2001

Marcia M. Waldron, Clerk
**United States Court of Appeals**
**for the Third Circuit**
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

**Re: In re: Cendant Corporation Litigation**
**Appeal Nos. 00-2520, 2733, 2769 and 3653**

Dear Ms. Waldron:

As counsel to the law firms of Barrack, Rodos & Bacine and Bernstein Litowitz Berger & Grossmann LLP, Appellees in the above-captioned appeals, I am pleased to submit this letter memorandum addressing the relevance of this Court's recent decision on counsel fees in *In re Cendant Corp. Prides Litigation*, 243 F.3d 722 (filed March 21, 2001) ("*Prides*"), to the issues in this appeal, pursuant to your letter to Counsel dated May 2, 2001.

## I. Summary of Argument

For three principle reasons, the *Prides* decision is completely distinguishable from the district court's fee award in this case and provides no reason to overturn that award. First, the district court in *Prides* did not articulate the basis for its fee award. As a result, this Court could not divine whether the fee was awarded as a percentage of the settlement fund, or based on counsel's lodestar, or as a combination of the two, *id*. at 733-34, and reversed and remanded for the district court to apply the factors specified in this Court's decision in *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190 (3d Cir. 2000). By contrast, Judge Walls' detailed decision in this case, *see* 109 F. Supp.2d 285 (D.N.J. Aug. 16, 2000), specified that the fee was based on the percentage method, evaluated each of the *Gunter* factors, and awarded a fee precisely in accordance with the fee grid established at the outset of the case, which had been disclosed in the Notice to the Class. Second, counsel in *Prides* did not seek a fee in accordance with the auction conducted in that case, and there was no showing that the *Prides* fee adhered to the fee grid that had been established at the outset in that case. By contrast, class counsel in these appeals applied for (and were awarded) a fee precisely in accordance with the fee structure that they were required to agree to abide by as a condition for their appointment. Third, there were unique circumstances surrounding the *Prides* settlement and fee, such as the uncertain value of the

settlement consideration, the reversionary interest Cendant held for unclaimed "rights" which could be used to pay counsel fees, and the immediacy with which the action was settled, that raised questions concerning the propriety of the fee awarded. These circumstances are absent in this case. The settlements are composed entirely of cash and earning interest; there is no reversion of any settlement consideration to Cendant or Ernst & Young; and there were extensive litigation efforts by class counsel.

## II. Summary of the Case

Appellees are lead counsel for the Class in *In re Cendant Corporation Litigation*, No. 98-1664 (WHW) (D.N.J.), who achieved settlements totaling $3.18 billion in cash, which the district court approved. *See* 109 F. Supp.2d 235 and 273 (D.N.J. Aug. 15, 2000) (appeals pending at Nos. 00-2683, 2684, 2708, 2709 & 2734) ("*Cendant*"). At the inception of the action, the district court conducted a competitive bidding process – the auction – in order to select class counsel and set the fee parameters under which counsel would operate. Appellees were required to accept the fee grid that resulted from the auction as a condition for their appointment as lead counsel. *See* 182 F.R.D. 144, 149-52 (D.N.J. Sept. 8, 1998); 191 F.R.D. 387 (D.N.J. Oct. 2, 1998) (released in relevant part on April 7, 2000). The grid accounted for both the amount and timing of any recovery.

The district court clearly articulated its reasons for conducting an auction (summarized in the Brief of Appellees at 8-9, 13-14 and 41-43) and properly reconciled the auction process with the Private Securities Litigation Reform Act of 1995 (the "PSLRA") by providing the Lead Plaintiffs' chosen counsel the right to "match" the lowest qualified bid, recognizing the presumptive right of lead plaintiffs to select counsel under the PSLRA. 182 F.R.D. at 150-51; *see also* Brief of Appellees at 38-40. The district court carefully evaluated the bids submitted by firms seeking the lead counsel position. The court selected a bid that was "realistic in the context of likely results, both for discovery and trial" and represented a fee "calculated to engender and maintain counsel's pursuit of the optimum recovery for the plaintiffs." JA-339.

At the settlement hearing on June 28, 2000, Appellees sought a fee precisely in accordance with the agreed upon fee grid. *See* 109 F. Supp.2d 285, 288-89 (D.N.J. Aug. 16, 2001). One month later, on July 27, 2000, this Court issued its decision in *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190 (3d Cir. 2000), which cited with approval the district court's auction process in *Cendant* that established counsel fees at the outset. *Id.* at 201-02 n.6. Acknowledging *Gunter* and after considering all arguments made by the fee objectors, the district court issued an opinion and order that awarded attorney's fees in accordance with the pre-set grid. *See* 109 F. Supp.2d at 288-306. Counsel did not seek, and the court did not award a fee based on any non-cash component of the settlements. *Id.* at 299 & n.8.

## III. The Decision of the District Court in *Cendant* Fully Comports with the Abuse of Discretion Standard Reiterated in *Prides*

In *Prides*, this Court held that the district court abused its discretion by awarding attorney's fees without making clear the basis of its fee award, or reviewing the factors that this Court in *Gunter* held should be considered. *See Prides*, 243 F.3d at 733-35, *citing Gunter*, 233

F.3d at 195 n.1 & 196. The Court wrote: "As in *Gunter*, the District Court's fee opinion in this case was too cursory for us to 'have a sufficient basis to review for abuse of discretion.' *Gunter*, 233 F.3d at 196. The District Court did not even specify whether it was using the percentage-of-recovery method or the lodestar method to set attorneys' fees." *Prides*, 243 F.3d at 733. The Court further criticized the district court in *Prides* for not explicitly considering any of the seven *Gunter* factors. *Id.* at 734. The result, therefore, was similar to *Gunter*, in which this Court held that the district court's ruling had to be reversed because the factors were not considered and, therefore, this Court did not have the appropriate record upon which to review or uphold the lower court's decision on the fee awarded in that case.

By contrast, the district court in this case – *Cendant* – made explicit that its fee award was based on the percentage-of-recovery method, following clearly established Third Circuit law, and adhered precisely to the fee grid established at the outset of the case. 109 F. Supp.2d at 298, 303. There was ample evidence to support the fee award and, again unlike *Prides*, the district court discussed and made explicit findings with respect to each of the *Gunter* factors:

a. Size of fund created and number of persons benefited. The court found the $3.18 billion recovery, representing 37% of the Class' maximum potential damages, represented an excellent recovery; was over three times higher than the next largest securities class action settlement; was significantly higher than any of the parties had anticipated; and the E&Y settlement component ($335 million) was the largest amount ever paid by an accounting firm in a securities class action. 109 F. Supp.2d at 300, 306. In its settlement approval opinion, the court found that at least 50,000 Class members had already filed claims and would benefit from the recoveries. 109 F. Supp.2d 235, 257.

b. Presence or absence of objections. There were only four objections to counsel's fee request, each of which was addressed by the district court. 109 F. Supp.2d at 291-94, 296-305. In the settlement approval opinion, the court found this number of objectors to be "minimal in light of the number of notices sent" (478,000) and the more than 50,000 Class members who had already filed claims. *See* 109 F. Supp.2d 235, 257. The court wrote: "While too much should not be read into low response rates in general, *see General Motors*, 55 F.3d at 813, the lack of objection by those most experienced in securities class actions indicates a favorable class reaction." 109 F. Supp.2d at 257-58.

c. Skill and efficiency of attorneys involved. The court found that the "standing, experience and expertise" of plaintiffs' counsel and the "skill and professionalism with which counsel prosecuted the case" was high. 109 F. Supp.2d at 301. As the court found, the settlements were negotiated "in the face of the government's attempt to stay the entire civil action," and lead counsel were directly responsible for the results achieved. *Id.* at 299-301.

d. Complexity and duration of the litigation. Unlike in *Prides*, the district court in this case discussed the complexity factor and determined that there were considerable risks of establishing liability, particularly with respect to the Section 10(b) claims and

the claims against the non-CUC defendants. *See* 109 F. Supp.2d at 259-61; *see also* 109 F. Supp.2d at 300-01. These included the burden of proving misrepresentations and fraud against defendants who asserted that they, too, were the victims of a few individual officers associated with the former CUC entity. In addition to liability issues, the court properly recognized that the defendants' estimates of the damages were significantly less than the plaintiffs' estimate, and any damages found would have been subject to allocation among defendants, including individual defendants who might have few resources to pay a judgment. *See* 109 F. Supp.2d at 244-45, 250, 259-62. Moreover, damages attributable to Ernst & Young, which could not be found liable to post-April 15, 1998 purchasers of Cendant securities, differed from damages attributable to Cendant. *Id.* at 250, 262. The court further noted the litigation of pre-trial motions and extensive discovery, including retaining and working with experts, conducted by lead counsel in *Cendant*. *Id.* at 258-29 (*see* paragraph f, below).

e. The risk of nonpayment. In the settlement approval opinion, the court noted the distinct possibilities that Cendant might be forced into bankruptcy as a result of the *Cendant* litigation and that plaintiffs might have obtained judgments from various defendants who would not have had the ability to pay the judgments. 109 F. Supp.2d at 263. In *Prides*, the form of the recovery – new securities – and Cendant's smaller exposure posed no such risks. The government's attempt to stay proceedings in the *Cendant* litigation, which would at least have delayed any meaningful recovery for the Class, also raised serious issues of nonpayment. *See* 109 F. Supp.2d at 301.

f. The amount of time devoted by counsel. The district court discussed this factor in two respects:

First, in the settlement approval opinion, the court noted the extensive work that counsel performed: investigating and filing a detailed consolidated complaint; moving successfully for certification of a class for litigation purposes; defeating four sets of motions to dismiss; conducting a 100+ box document inspection during the pendency of the dismissal motions; conducting additional extensive document inspections after denial of the motions to dismiss; obtaining and reviewing documents from numerous non-parties; engaging accounting, damages and investment banking experts and consultants; defeating the government's motion to stay proceedings; and negotiating excellent settlements. *See* 109 F. Supp.2d at 258-59. As the court noted in the fee opinion, lead counsel and certain firms that had assisted them spent over 20,000 hours prosecuting the case as of December 31, 1999, when the agreements in principle were reached. *See* 109 F. Supp.2d at 292. In contrast, in *Prides*, this Court found that counsel had conducted no discovery; the settlement was reached before defendants responded to the complaint or the motions filed concurrently therewith; and the class was certified only as a settlement class. *Prides*, 243 F.3d at 727, 735-36.

Second, the court discussed counsel's time investment in the context of rejecting the proposition that the court was required to conduct a lodestar "cross-check" of the fee. Citing, *inter alia*, the Third Circuit Task Force Report, 108 F.R.D. at 258-29, and

testimony of Professors Coffee and Issacharoff (who cited ABA Formal Opinion 94-389 § J), the district court concluded that reducing the fee award set by the grid upon which counsel had prosecuted the case based on lodestar considerations "would be antithetical to the Task Force's recommendation that a fee agreement be reached early in the litigation and not later readjusted once recovery is known." *See* 109 F. Supp.2d at 302-03. The court further relied on this Court's statement in *Gunter* that district courts may "avoid many of the complications associated with fee awards by setting fee guidelines and ground rules early in the litigation process." *Id.* at 302, *quoting Gunter*, 233 F.3d at n.6 (which specifically referred to the auction conducted in *Cendant* and commended such a process to district courts in this Circuit).

g. Awards in similar cases. Finally, unlike in *Prides*, the district court in this case conducted a detailed analysis of fee awards in large recovery cases, and explicitly found that a 8.275% fee was well within the range of prior fee awards in comparable cases. *See* 109 F. Supp.2d at 290, 301-02. Particular cases that the district court cited included:

> *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942, 972, 989 (E.D. Tex. 2000) (finding 15% award reasonable for $1.1 billion recovery, listing fee awards in large recovery cases between 1993 and 1999, and finding "that awards of fifteen percent (15%) of the recovery or more are frequently awarded in [mega-fund] cases");[1]
>
> *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 (S.D.N.Y. 1998) (14% fee award from a $1.027 billion recovery);
>
> *In re Ikon Office Solutions, Inc. Securities Litigation*, 194 F.R.D. 166 (E.D. Pa. 2000) (awarding 30% of $111 million recovery); and
>
> Awards in the tobacco litigation (25% of $13 billion recovery in Florida; 35% of $4.1 billion recovery in Mississippi; 19% of $17.3 billion recovery in Texas).

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[1] The *Prides* decision misreads *Toshiba* as awarding a 7% fee on a $2.1 billion recovery. *See* 243 F.3d at 737. That is not the case. The *Toshiba* court held as follows: "As to the value of the common fund in this case, this Court has heard opinions ranging from a low net present value of $800 million to a high net present value of $2.1 billion. The median net present value has been set at $1.4 billion. This Court is aware that Toshiba has taken a loss of $1 billion in fiscal year 1999 based on the settlement of this case. Taking all these factors and evidence into consideration, this Court concludes that the value of the common fund in this case is conservatively estimated at $1 billion to $1.1 billion. … Applying the *Boeing* [*v. Van Gemert*, 444 U.S. 472 (1980)] percentage of fund method, this Court concludes that the fair, just, and reasonable amount of attorneys' fees would be calculated by multiplying the applicable percentage – fifteen percent (15%) – times the value of the common fund – $1 billion to $1.1 billion – to yield a range of $150 million to $165 million." *Toshiba*, 91 F. Supp.2d at 972 (emphasis added).

Thus, the fee opinion of the district court in *Cendant,* unlike in *Prides*, analyzed each of the *Gunter* factors and satisfies the requirement that a court must "make its reasoning and application of the fee-awards jurisprudence clear." *See Prides*, 243 F.3d at 733, *quoting Gunter*, 233 F.3d at 196. Having done so, the fee award complies with the holding in *Prides* and this Court's earlier fee decisions.

IV. There Are Significant Other Differences Between the *Prides* Case and the Facts Underlying the Settlements and Fee Award in These Appeals

There are other significant differences that make the *Prides* decision completely distinguishable from the present appeals.

A. The Primacy of the Auction Process and its Result

A key difference is the primacy that the parties and the court placed on the auction process in *Cendant* as opposed to the rather cavalier manner in which counsel in *Prides* sought a fee in contradiction of the auction in that action.

As in this case, counsel in *Prides* was required to agree to abide by a fee grid that the court selected as the lowest qualified bid after conducting an auction. *See* 182 F.R.D. 144, 149-52 (D.N.J. 1998). However, unlike this case, *Prides* counsel did not seek a fee in the amount dictated by the pre-set grid. Indeed, the Notice sent to *Prides* class members did not even disclose the fee grid that the district court put into place after the auction process in that case. *See Prides*, 243 F.3d at 726. *Prides* counsel abandoned the pre-set fee grid, requested a fee higher than the pre-set amount, and sought to justify his fee request on an entirely separate basis, i.e., that his fee would come from unclaimed "Rights" rather than from the common fund. *Id.*

Even on appeal, counsel in *Prides* did not seek to justify the fee award based on the auction. Rather, seeking a fee in excess of the auction amount, counsel in *Prides* argued that the fee award was appropriate based on: (a) the settlement amount; (b) his effectiveness in achieving the result; (c) that the fees were likely to be paid from Rights not claimed; (d) that the fee was in the same form as the class' recovery; and (e) that counsel would have substantial post-settlement responsibilities. *See* Appellee's Brief, Appeal No. 99-5555, filed June 23, 2000, Counter-Statement of Issues at 4.

Moreover, in *Prides*, there was no factual record either in the district court or the Court of Appeals that supported the selected bid or the auction process. The propriety of an auction, the procedures used for conducting the auction, and the reasonableness of the result of the auction simply were not issues on appeal and, not surprisingly, the Court's opinion offers nothing of relevance to this appeal on these subjects.

In contrast, Appellees in *Cendant* sought and were awarded a fee that adhered precisely to the fee structure of the lowest qualified bid. *See* 109 F. Supp.2d at 289. Unlike in *Prides*, the bidding process and fee structure of the lowest qualified bid were described in detail in the Notice of Settlement of Class Action. *See* JA-1327-28. In addition to the fact that Appellees in this case sought a fee in accordance with the auction process that this Court in *Gunter*

commended to district courts in this Circuit (*see* 109 F. Supp.2d at 302, *citing Gunter*, 233 F.3d at n.6), there was a detailed record before the district court concerning the bids and the bidding process, showing that the selection of the lowest qualified bid was reasonable, appropriate and fair to the Class. *See* 109 F. Supp.2d at 290-306; *see also* 191 F.R.D. 387. The record in this case included detailed affidavits and testimony of experts concerning auctions in general and this auction specifically. *See, e.g.,* Affidavit of Professor Samuel Issacharoff, dated June 19, 2000, JA-1259 at 1276-1283 ("To disregard the results of the auction after the fact would defeat the auction experiment altogether by undermining its two claimed virtues: obtaining the best representation for the class at the best price, and providing class counsel with a clear set of incentives to intelligently and aggressively prosecute the action," *id.* at JA-1276); Affidavit of Professor John C. Coffee, Jr., dated August 17, 1998, JA-254 at 263-65 (advocating setting fee grid in advance that utilized increasing percentages as amount of recovery increased); Affidavit of Professor Coffee, dated June 19, 2000, JA-1453 at 1467-87. Thus, unlike in *Prides,* the district court's opinion was well-supported by the record.

B. Other Significant Differences

Other significant differences between *Prides* and the present appeals include the following:

1. The magnitude of the recovery. In *Gunter*, the Court differentiated between very large cases, i.e., those with recoveries over $1 billion, and other "mainstream" cases. *Gunter*, 223 F.3d at 195 n.1. In very large cases, the seven factors identified in *Gunter*, and reiterated in *Prides*, should be given less weight and are not employed in a "formulaic way." *Id.* The $3.18 billion cash recovery in *Cendant* (this case) is clearly very large compared to the purported $341 million recovery in *Prides*. Nevertheless, as shown above, the district court in *Cendant* evaluated and discussed each of the *Gunter* factors.

2. The type of recovery. The settlement in *Prides* provided for the issuance of "rights" to obtain new Cendant Prides (a type of hybrid equity security); the settlements in this case are entirely for cash. The paper in *Prides* was not be distributed right away, making the value of the settlement subject to market conditions affecting the price of those securities and making the class members' recovery very uncertain; the cash recovery in *Cendant* is fixed and is earning interest. [Indeed, by August 20, 2001, one year after the Cendant settlement began accruing interest, the settlement funds will have accrued over $150 million in interest.] Further, the *Prides* settlement was subject to a reversion for claims not submitted; there is no reversion in *Cendant*. The district court in *Cendant* found it significant that the Class was "receiving an immediate all-cash settlement with none of the settlement fund returning to Cendant." 109 F. Supp.2d at 251. Thus, there is no uncertainty as to the benefit bestowed on the Class in *Cendant*.

3. Concerns about the value of the settlement. The *Prides* decision evidences grave concerns about the *Prides* settlement, the economic value of the settlement at the time the paper would be distributed to the class, and the possibility that counsel may have acted in derogation of the class' interests by: (a) negotiating a settlement with a reversionary interest in the settling defendant; (b) agreeing to the outcome of the auction process but

then seeking a fee in excess of the pre-established fee structure; and (c) exposing the class to a significant risk by taking paper, in the form of "rights" to new Prides, the present value of which was uncertain and subject to all kinds of market forces. No such issues can be raised in this case. In this respect, the *Prides* case be viewed as being in a posture similar to *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation* 55 F.3d 768, 782 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995), and to *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999), each of which had non-cash settlement elements and the value of the settlements were highly uncertain.

There are, thus, enormous differences between the recoveries in the two cases and the manner in which the two sets of counsel prosecuted the cases, and sought to be compensated, in *Prides* as opposed to in *Cendant*, which make the *Prides* decision completely distinguishable.

V. The *Prides* Decision Does Not Mandate a Lodestar "Cross-Check" or Require that the Auction Result in this Action Should Be Disregarded

Even though it may have been appropriate in *Prides* for this Court to have focused on the lodestar issue (given counsel's abandonment of the auction fee grid, the uncertainty surrounding the basis of the district court's fee award, and the uncertainty as to the economic value of a non-cash settlement that occurred within four months of lead counsel's appointment, when there had been no motion practice or discovery of any kind), the decision simply cannot be read as curtailing a district court's discretion to: (a) establish a percentage-based fee grid that takes into account both the amount and timing of any recovery at the outset of a case through an auction process, which the Court commended in *Gunter* to district judges in the Circuit (*see Gunter*, 223 F.3d at 201-02 n.6); and (b) award a fee consistent with the pre-set grid after conducting the type of thorough judicial review that the court below conducted in this case.

The primary benefit of setting fees in advance based on the percentage method is that it aligns the interests of the class in obtaining an optimal recovery in a relatively short time period with the interests of counsel. *See, e.g., Prudential*, 148 F.3d at 332 ("The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund in 'a manner that rewards counsel for success and penalizes it for failure.'") (*quoting General Motors*, 55 F.3d at 821). The advantages of a percentage fee are amplified when the fee structure is established at the outset of a case, whether by auction or by other methods, because the fee structure provides the court with a mechanism that ensures the case will be prosecuted efficiently and provides class counsel with a known set of incentives for prosecuting the action:

> By establishing the fee agreement early in the litigation, any and all inducement or inclination to increase the number of *Lindy* [lodestar] hours will be reduced, since the amount of work performed will not be permitted to alter the contingent fee. In addition, another alleged *Lindy* evil will be minimized because there will be a substantial inducement for plaintiff's counsel to settle the matter quickly, since the fee scale will have been established and counsel's compensation will not be enhanced by a delay.

*See* Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 258 (Oct. 8, 1985). As the 1985 Task Force recommended, such pre-set fees should not be disturbed based on lodestar considerations at the conclusion of an action:

> the advantage of the negotiated fee procedure will be entirely undermined if, at the end of the litigation, counsel have the right to renegotiate depending upon the result accomplished, the time devoted, the number of lawyers involved, or other factors relating to the case. In other words, renegotiation should not be permitted and the agreement should be strictly adhered to by the court, unless at the end of the case matter are presented that were not within the reasonable contemplation of the parties at the time the fee arrangement was negotiated. *Id.*

This is precisely what the court did in *In re Auction Houses Antitrust Litigation*, 2001 WL 170792, at *17-18 (S.D.N.Y. Feb. 22, 2001). That was an antitrust case in which one of the two conspirators, prior to the filing of the lawsuit, had admitted its liability and implicated the other in the conspiracy to fix prices. The court conducted an auction for the lead counsel position and awarded a fee precisely in accordance with the selected bid, without any consideration of lodestar whatsoever, notwithstanding that the case settled within 4 months of appointment of lead counsel, without further discovery and after very limited motion practice.

The many advantages of setting fees in advance based on the percentage-of-the-recovery method in common fund cases, which is <u>not</u> precluded by the *Prides* decision, would be lost if lodestar consideration is always required. Especially in cases with the potential for very large recoveries – <u>i.e.</u>, over $1 billion as the Court defined the term in *Gunter* – requiring lodestar "cross-checks" would necessarily create conflicts between the interest of the class in obtaining an optimal recovery in a relatively short period of time, with the interest of counsel whose fee would be limited to some multiple of the lodestar incurred in prosecuting the action.[2] That result directly implicates a number of deficiencies inherent in the lodestar system, including that it disserves classes by creating a disincentive for the early settlement of cases and does not provide district courts with enough flexibility to reward lawyers for prosecuting cases efficiently. *See* Task Force Report, 108 F.R.D. at 248; *Gunter*, 223 F.3d at 198 (procuring a settlement, in and of itself, is never a factor that the district court should rely upon to reduce a fee award because it would "penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases"); *accord In re SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 354 (E.D. Pa. 1990) ("it would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation"); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("[i]t matters little to the class how much the attorney spends in time or money to reach a successful result").

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[2] *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942 (E.D. Tex. 2000), is instructive in this regard. In that action, which was cited with approval in the *Prides* decision, plaintiffs' counsel achieved a settlement valued at $1.1 billion in only eight months after filing the complaint. *Id.* at 945, 988-89. The court in *Toshiba* – based on percentage fees awarded in comparable cases, and without any consideration of counsel's lodestar – concluded that a fee in the range of fifteen percent was reasonable and appropriate. *Id.*

It would further defeat the "bargain" that a court (on behalf of absent class members) enters into with class counsel through an auction process if lodestar considerations are allowed to sneak back into the equation through the back door of a lodestar "cross-check." As Judge Walker wrote in *Oracle*, rejecting an objection to the fee request based on the argument that the court should "adjust" the fee to counsel, based on lodestar considerations, from the percentage fee set pursuant to the auction undertaken in that case:

> [t]he propriety of using a percentage of the fund contingent fee approach in this case was addressed at the outset of the litigation. At that time, the court weighed the relative advantages and disadvantages of the lodestar and percentage of the fund approaches in the common fund context and found percentage of the fund fee compensation "vastly superior."

*In re Oracle Securities Litigation*, 852 F. Supp. 1437, 1454 (N.D. Cal. 1994).[3]

Professor Coffee testified before the court below that courts overseeing class action cases should not adopt policies that encourage lawyers to undertake litigation strategies that ensure years and years of litigation, with more and more motion practice and discovery disputes occupying the court's attention, to build up lodestar and seek increased fee requests. JA-1477-81. To do so returns this Circuit to the situation that existed before the 1985 Task Force, and erects barriers between the interests of the class and the interests of counsel.

If the *Prides* decision were to be viewed as requiring lodestar "cross-checks" in all cases, which Appellees submit it does not, regardless of whether a court had established a percentage-based fee structure at the outset that it believes should be adhered to, counsel would be severely penalized for achieving excellent settlements relatively early in the litigation process, and the class' interests would be harmed. In very large cases like *Cendant*, it would take years and years of interminable litigation to amass the type of lodestar that would "justify" an otherwise

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[3] Testimony and submissions to the newly created Third Circuit Task Force on Selection of Class Counsel confirm that when a court establishes a fee structure at the outset of a case through an auction process, neither the amount of time expended nor the recovery achieved should provide a valid basis for deviating from the pre-set fee. The market process of an auction translates the risks of a case going forward in a much more concrete, anticipatory sense than viewing the case after the outcome is established: counsel's estimates of risk and other factors are reflected in their bids. *See, e.g.,* Transcript of Public Hearing before the Third Circuit Task Force on Selection of Class Counsel, March 16, 2001, at 181 (Statement of Honorable Vaughn R. Walker), at 182-83 (Statement of Honorable Milton Shadur); Written Comments of Professor Samuel Issacharoff, at 3 n.6 ("If the auction process is to have any effect, there must be a quasi-contractual expectation that the auction will indeed set the expected terms governing the retention and compensation of class counsel."); Written Statement of Elizabeth J. Cabraser, at 7-8 ("benefits of auctions will be lost if the successful bid is not respected"); Written Statement of Howard A. Specter, at 7-8 ("Any bidder … should be entitled to certainty upon successful performance.").

eminently reasonable percentage fee award. Creating such a perverse incentive system would not serve the interests of the class or the court system, and was not imposed by the *Prides* decision.[4]

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[4] The value of the settlement in *Cendant* is certain and the district court made clear that it awarded counsel fees based on the percentage method. In contrast, in *Prides*, the Court was not sure of the method by which the fee in that case was established and was further concerned about the true value of the settlement and, therefore, determined that a lodestar "cross-check" was appropriate. Given these disparities between the two cases, the lodestar analysis of the cases cited in *Prides*, in the chart at 243 F.3d at 737, is entirely inapposite to the present appeal. Indeed, the fact that lodestar information was "not available" in *Auction Houses* and *Toshiba* is significant – those courts determined that no lodestar "cross-checks" were necessary given the bases on which the courts established the fees.

Further, many of the cases in the *Prides* chart are inapposite for other reasons. *In re Orthopedic Bone Screw*, 2000 WL 1622741 (E.D. Pa. 2000), and *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987), are inapposite because the percentage awards referred to in the chart related only to payments of fees to plaintiffs' steering committees in multi-district litigation that would be taken from the total amount of attorneys' fees to be paid to the plaintiffs' attorneys collectively, in the amount of 33 1/3% of each plaintiff's ultimate gross recovery. *See MGM Grand*, 660 F. Supp. at 525; *Orthopedic Bone Screw*, 2000 WL 1622741 at *1 & n.5. *Walco Investments v. Thenen*, 975 F. Supp. 1468 (S.D. Fla. 1997), is inapposite because, in that case, the court instituted a hybrid approach to fees and, as the case went along, plaintiffs' counsel applied for and were paid interim fees totaling $7.25 million. Nevertheless, at the end of the case, with total recoveries of $141 million, the court determined that a total fee of 15% was warranted.

*Local 56, Food Workers Union v. Campbell Soup*, 954 F. Supp. 1000 (D.N.J. 1997), the case that the *Prides* decision utilized as its starting point on the percentage scale, is similarly irrelevant to the present appeals. *Local 56* was a class action brought on behalf of retirees who participated in Campbell Soup's retired employee medical plan. In the decision, Judge Brotman: (a) noted that the percentage method "precludes the manipulation of factors affecting the fee award by, for example, cutting short attempts to prolong litigation to enhance the fee (a recognized flaw of the lodestar method)," *id.* at 1003; (b) stated that a district court "may (but need not) calculate the lodestar to double check the fee it awards under the percentage-of-recovery method," *id.* at 1004 (emphasis added); (c) held that the choice of methodology used to calculate attorneys' fees "rest[s] within the district court's sound discretion," id. at 1004; (d) rejected utilizing a lodestar analysis "in light of its widely recognized shortcomings, especially as applied to common fund situations," *id.* at 1005; (e) refused to reduce the attorneys' fee applied for by counsel, notwithstanding objections to the fee; and (f) recognized that the fee being sought by counsel (2.89% of a $114 million recovery) was, in light of the financial situation of the retired employee class member, "at a percentage rate far below the customary amount courts have granted in comparable cases." *Id.* (emphasis added). Thus, by the court's own admission, the 2.89% award was not indicative of a reasonable percentage fee.

Finally, in *Prides*, the Court reiterated that fee awards are reviewed on an abuse of discretion standard, that district courts satisfy this standard by explaining fee awards following the factors enumerated in *Gunter*, and that although lodestar "cross-checks" may be useful in certain situations, the Court did not make them mandatory. Thus, even based on the most restrictive interpretation of the *Prides* decision, the award in this case should not be disturbed as an abuse of discretion. The district court in *Cendant* carefully considered all relevant factors in this Circuit's fee jurisprudence and awarded a fee that is fair to the Class. The *Prides* decision, with its unique factual circumstances, provides no reason to overturn the fee award below.

Respectfully submitted,

Arthur R. Miller
Areeda Hall 225
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

Counsel for Appellees,
Barrack, Rodos & Bacine and
Bernstein Litowitz Berger & Grossmann LLP

cc: Counsel for Appellants

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE THIRD CIRCUIT

Court of Appeals Nos. 00-2520, 00-2733, 00-2769 & 00-3653

District Court No. 98-cv-1664 (WHW)

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IN RE: CENDANT CORPORATION LITIGATION

APPEALS OF JOANNE A. ABOFF FAMILY TRUST,
FAYE SCHONBRUNN and NEW YORK CITY PENSION FUNDS,

Appellants

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ON APPEAL FROM THE ORDER ENTERED AUGUST 16, 2000 IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

**BRIEF OF APPELLEES, BARRACK, RODOS & BACINE and
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

Arthur R. Miller
Areeda Hall 225
1565 Massachusetts Avenue
Cambridge, MA  02138
(617) 495-4111

**COUNSEL FOR APPELLEES**

## CORPORATE DISCLOSURE STATEMENT

This section is inapplicable to Appellees, the law firms of Barrack, Rodos & Bacine and Bernstein Litowitz Berger & Grossmann LLP, which are not corporate entities.

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## OTHER AUTHORITIES

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 743

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15 U.S.C. § 77z-1(a)(7)(C)........................................................................... 71

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H.R. Conf. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 679 ..................................................................28, 42

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## STATEMENT OF SUBJECT MATTER JURISDICTION

Appellees, the law firms of Barrack, Rodos & Bacine and Bernstein Litowitz Berger & Grossmann LLP, the Lead Counsel for the Class in the class action below ("Appellees" or "Lead Counsel"), concur with Appellants' statements of subject matter jurisdiction.

## STATEMENT OF APPELLATE JURISDICTION

Appellees concur with Appellants' statements of appellate jurisdiction.

## STATEMENT OF ISSUES

1. Did the district court abuse its discretion in establishing a fee structure at the outset of the litigation based on a competitive bidding process that allowed the Lead Plaintiff's chosen counsel the right to match the lowest qualified bid?

2. Did the district court abuse its discretion by deciding, after considering all relevant factors, to award attorney's fees of 8.275% of the settlement fund based on the benchmark established through the competitive bidding process?

## STATEMENT OF THE CASE

The fee awarded to Lead Counsel was based on two extraordinary settlements approved by the district court on August 15, 2000, in a case in which the court properly utilized its statutory responsibility at the outset of the case to approve the Lead Plaintiff's selection of Lead Counsel and establish the fee

schedule under which Lead Counsel would prosecute the case. The settlements provide for: (a) cash payments totaling $3,186,500,000 plus interest, consisting of $2,851,500,000 from Cendant Corporation ("Cendant" or the "Company") and $335,000,000 from Ernst & Young LLP ("E&Y"); (b) a potential additional cash payment equal to one-half of any net recovery that Cendant or the HFS Individual Defendants may obtain from E&Y; and (c) significant corporate governance changes involving Cendant. JA-795-96.[1] This is by far the largest recovery ever obtained in the history of securities class action litigation. JA-838-39.

The fee – which comprises 8.275% of the settlement fund net of litigation expenses – was precisely in keeping with the fee grid approved by the court at the outset of the litigation, following a competitive bidding process that resulted in 12 separate bids being submitted to the court and the selection of one as the lowest qualified bid. JA-810-13, 852. The three entities comprising the Lead Plaintiff group (the "CalPERS group") and all parties understood that the CalPERS group's chosen counsel – Appellees – were required to abide by the fee structure of the lowest qualified bid as a condition of their appointment as Lead Counsel, and that the result of the competitive bidding process superceded all fee provisions in the

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[1] The court based the fee award solely on the amount of $3,186,500,000 obtained as cash, noting that the one-half interest was difficult to value and that Lead Counsel did not seek fees based on the benefit to the Class conferred by the corporate governance changes. See 109 F. Supp.2d at 298-99 & n.8.

retainer agreement Appellees had entered into with the CalPERS group. JA-1301-02.

The Class of potential beneficiaries of the settlements includes virtually every large institutional investor in the country, numerous other large and sophisticated investors and hundreds of thousands of other investors. JA-863. Out of all these Class members, only 234 elected to exclude themselves from the Class.[2] Moreover, in response to the notice of settlement that was mailed to over four hundred thousand potential Class members, only four objected to Lead Counsel's fee application, the terms of which were set forth in detail in the notice. The four objections are:

1. Joanne A. Aboff Family Trust ("Aboff") (Appeal No. 00-2520), which acquired 2,085 Cendant shares during the Class Period;

2. Tere Throenle (Appeal No. 00-2708), who purchased 100 shares of Cendant stock, and lost approximately $600;

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[2] The opt out deadline was December 27, 1999. The agreements in principle relating to the two settlements were announced, and their terms widely disseminated, on December 7 and December 17, 1999. Thus, if any Class member believed the settlements were insufficient, there was still time to opt out and pursue an individual action. By mid-June 2000, more than 30,000 Class members had filed claims seeking to participate in the distribution. JA-1321 (¶ 13). The deadline for Class members to submit claims has now passed; over 120,000 claim forms have been submitted.

3. Faye Schonbrunn (Appeal No. 00-2733), who purchased 500 shares of Cendant stock, and lost approximately $3,500; and

4. The New York City Pension Funds ("New York City") (Appeal Nos. 00-2769 and 3653), one of the three entities comprising the CalPERS group. New York City knew that the result of the auction process superceded the retainer agreement's fee provisions (JA-1204), but sought nevertheless at the end of the case to reimpose the agreement's fee provisions.

The two other entities in the CalPERS group, the California Public Employees' Retirement System ("CalPERS") and the New York State Common Retirement Fund ("CRF") – the country's two largest public pension funds – were also parties to the retainer agreement. However, acknowledging and accepting the court's rulings on the competitive bidding process, these funds approved Lead Counsel's seeking a fee in accordance with the bid selected as the lowest qualified bid. They did not join in New York City's objection, did not seek to reimpose the retainer agreement's fee provisions and do not join in this appeal.

The district court, in its August 16, 2000 Opinion, considered each objection raised by Appellants and determined that there was no valid reason to deviate from the benchmark for the fee established through the competitive bidding process. See 109 F. Supp.2d 285. There is no basis to conclude that the district court abused its discretion in determining the fee. The fee award should be affirmed.

## STATEMENT OF FACTS

### A. Commencement Of The Action

Cendant is one of the world's largest providers of consumer and business services. In re Cendant Corp. Litigation, 182 F.R.D. 144, 146 (D.N.J. 1998). Among other things, the Company provides access to shopping, automobile and dining services, mortgage services and real estate brokerage services. Id. Cendant was formed on or about December 18, 1997 when its predecessor, CUC International, Inc. ("CUC"), merged with HFS, Inc. Under the terms of the merger, all outstanding shares of HFS common stock were exchanged for CUC shares and the merged entity took the name "Cendant." Id.

On April 15, 1998, after the stock market closed, Cendant announced that it had uncovered substantial accounting irregularities in the former CUC business unit, which was now part of the merged entity. The Company announced it would restate its reported annual and quarterly net income and earnings per share for 1997 and possibly for earlier periods as well. Id.

On April 16, the next day, more than 108 million shares of Cendant common stock were sold as the stock plunged from $35.625 per share to $19.06 per share, losing 46% of its value, and inflicting substantial losses on purchasers of Cendant stock. Over 50 lawsuits were filed in the United States District Court for the District of New Jersey. Notices of the filing of these lawsuits were published,

pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 743, and Cendant's revelations received widespread coverage in the general and business press.

On May 29, 1998, the Magistrate Judge entered an order consolidating the actions involving Cendant (JA-111) and a preliminary case management/ scheduling order which required that all motions for appointment as lead plaintiff be filed by June 15, 1998, and established a briefing schedule. JA-32.

Fifteen (15) persons or groups moved for appointment as lead plaintiff. 182 F.R.D. at 146. The group consisting of CalPERS, the CRF and New York City had demonstrably larger losses than any other lead plaintiff movant. However, many of the other movants questioned the bona fides of the CalPERS group serving as the sole lead plaintiff; a number suggested that there should be multiple lead plaintiffs; and one of the other movants, Appellant Aboff, raised so-called "pay-to-play" allegations, which Aboff asserted tainted the CalPERS group's appointment as lead plaintiff and its selection of Appellees as its counsel. Id. at 148-49. Aboff further asserted that she should be appointed as lead plaintiff on the basis of a 10% fee agreement that she had entered into with her counsel or, in the alternative, that the court should conduct an auction for the purpose of setting attorney's fees. JA-1415, 1426; 182 F.R.D. at 148-49.

### B. The Court Establishes The Competitive Bidding Process

On August 4, 1998, the district court conducted a day-long hearing on the lead plaintiff motions. Appellees advocated the appointment of the CalPERS group as the sole lead plaintiff, specifically referring the court to the retainer agreement, which had been submitted in a Declaration one week earlier. JA-40 (Item 82), 143, 147-48, 251. The court recognized that the CalPERS group had entered into a retainer agreement with Appellees, but declined to utilize it as the yardstick for the fee. JA-147. The court further made very clear that the eventual fee would be determined based on a percentage method, stating "under no circumstance will I permit lodestar to be used in this litigation." JA-161.

The court also heard from counsel for all other lead plaintiff movants, including Aboff, whose counsel suggested that in view of Aboff's "pay-to-play" allegations concerning the relationship between the CalPERS group and its counsel, the court should: (a) undertake a competitive bidding process for the selection of lead counsel; and (b) "set the fee in advance." JA-152.

At the Hearing's conclusion, the court announced that the CalPERS group would be appointed as the Lead Plaintiff for the Class of purchasers of CUC and Cendant publicly traded securities except Cendant Prides.[3] JA-243. The court

[3] "Prides" are a separate security that were first issued by Cendant in February 1998. The court appointed a separate lead plaintiff and lead counsel in the litigation involving Cendant Prides, utilizing the same type of auction. 182 F.R.D.

further announced that it would select Lead Counsel only after a process in which any interested law firm, whether or not then representing a plaintiff in the consolidated actions, could submit a bid. JA-244-49. The firm that submitted the lowest qualified bid would be appointed as Lead Counsel; however, in consideration of a lead plaintiff's statutory right to select lead counsel subject to the court's approval, if the firm that submitted the lowest qualified bid was not the lead plaintiffs' retained counsel, that counsel would be given the opportunity to agree to abide by the lowest qualified bid and, if they did so, they would be appointed as Lead Counsel. JA-248.

The court's primary reason for ordering a competitive bidding process was to protect absent class members. JA-248. In support of that objective, the court noted many other reasons why an auction was appropriate: (1) since lead counsel "is required and is expected to represent the interests not only of the lead plaintiff, but all members of the consolidated group," and because the fee and expenses of lead counsel would be borne by the entire Class, an auction would allow each plaintiff to share in the bargaining process and likely result in reduced costs (JA-245); (2) under the PSLRA and class action jurisprudence, the court is considered the final arbiter of fees, and establishing a fee acceptable to the court in advance

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at 149-50; see also In re Cendant Corp. Prides Litigation, 51 F. Supp.2d 537 (D.N.J. 1999) (approving settlement and awarding fee to lead counsel in the Prides litigation), appeal pending, No. 99-5555 (3d Cir.).

would serve the Class' interests (JA-246); (3) granting the lead plaintiffs' chosen counsel the right to "match" the lowest qualified bid was consistent with the PSLRA provision that a lead plaintiff selects counsel subject to court approval (JA-248); and (4) although the court had found the pay-to-play allegations entirely without support, an auction would have a salutary effect of removing any speculation arising from the allegations (JA-248).

The district court cited Judge Walker's decisions in In re Oracle Securities Litigation, 131 F.R.D. 688 (N.D. Cal. 1990), 132 F.R.D. 538 (1990) and 136 F.R.D. 638 (1991), lead plaintiff decisions in Gluck v. CellStar Corp., 976 F. Supp. 542 (N.D. Tex. 1997) and Greeble v. FTC Software, Inc., 939 F. Supp. 57 (D. Mass. 1996), and this Court's decision in In re Prudential Insurance Co. of America Sales Practices Litigation, 148 F.3d 283 (3d Cir. 1998), cert. denied, 525 U.S. 1114 (1999), as support for its ruling. JA-250-51. The CalPERS group's counsel (Appellees) noted that they had submitted the retainer agreement "with the fee schedule on it" (which placed them at a disadvantage since all other bidders had a copy of it). The court reiterated that Appellees would be required to bid, and found to be qualified, in order to have the opportunity to match the lowest qualified bid. JA-251-52.[4]

[4] The result of the August 4 hearing was reported on the Dow Jones newswire ("Cendant Suit – Fee Bidding – Bidding Deadline is Sept. 17," Aug. 4, 1998), and

### C. The CalPERS Group Accepts The Competitive Bidding Process

Following the August 4 Hearing, the CalPERS group considered withdrawing as lead plaintiff. Pugh Decl. ¶ 15 (JA-1203) (Declaration of New York City house counsel). Rather than withdrawing or appealing, however, the CalPERS group sent a letter, dated August 17, 1998 (JA-1099), to the court in advance of a hearing set for August 19, 1998, in which it did not object to the auction but made various suggestions on how to conduct the auction and evaluate the bids, given that the bids might not be clearly comparable or easily ranked. JA-1099-1100. The CalPERS group cautioned that a "low bid" might minimize lawyers' fees, but fail to maximize the Class' recovery. JA-1100.

> Accordingly, in selecting the "lowest bid," the Court will need to consider the likely size of recoveries to be obtained from various defendants, and the probable timing of those recoveries. To aid the Court in making these comparisons, we believe the bids should include not only numbers or percentages in a grid, but a narrative which explains how these numbers/percentages were determined. (Id.)

The footnote to this text stated:

> In addition, we recommend that any numbers/percentages in the grid be established as fee caps only, with the actual fee subject to approval by Lead Plaintiffs before submission to the Court. (Id. n.1) (emphasis added)

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in The Wall Street Journal ("Judge Orders Bidding For Plaintiff's Work In Cendant Lawsuit," Aug. 5, 1998). Not one party, attorney or Class member objected.

In addition to making recommendations for the auction, the letter demanded that any counsel selected to represent the Class should be required to agree to the following conditions: (1) providing the CalPERS group with draft copies of all significant filings; (2) providing monthly status reports; (3) keeping the group abreast of any settlement discussions; (4) obtaining prior approval for any proposed resolution of the case; (5) keeping expenses reasonable and subject to the group's approval before submission to the court; and (6) confirming that counsel had the ability to finance the litigation. JA-1101. The letter concluded by stating that any counsel selected as Lead Counsel would have to be acceptable to the CalPERS group. JA-1102.

This letter was the CalPERS group's acceptance of the auction process, combined with a demand that any counsel ultimately appointed be acceptable to it. (Appellees' subsequent matching of the lowest qualified bid and their appointment as Lead Counsel clearly satisfied this requirement.)

A Declaration of Professor John C. Coffee, Jr., dated August 17, 1998 (JA-254), was submitted by one of the other counsel for the court's consideration in advance of the August 19 hearing. Among other recommendations, Professor Coffee suggested that the court utilize a sliding-scale approach, under which the plaintiffs' attorneys be awarded a <u>higher</u> percentage as the size of the Class recovery increased, as one that would be particularly appropriate for the Cendant

case. JA-263-65. It would serve to maximize the Class' recovery, and precisely align the Class' interests in achieving an optimal recovery (preferably without waiting years and years for that recovery) with counsel's interest. Id. Although it would not necessarily mean that the attorneys would receive more money, it would "clearly work better to discourage 'cheap' early settlements." JA-264-65, at ¶ 18(C).

### D. Hearing On Procedures For Competitive Bidding Process And Subsequent Directives Of The Court

On August 19, 1998, the court held a hearing at which it invited all plaintiffs and plaintiffs' counsel to submit their ideas concerning the bid grid format that should be used, including the litigation "mileposts" and the breaking points for the fee percentages. JA-288. The court read from the CalPERS group's letter of August 17, and made clear that any attorney appointed as Class counsel would be required to agree to all six of the points relating to the Lead Plaintiff's supervision. JA-318-27. The court reiterated with respect to the fee, however, that the auction process result would take precedence over the retainer agreement's fee provisions, and that the fee grid would serve as a benchmark – not as a cap. JA-329-31.[5]

[5] New York City argued below, and continues to argue in this Court, that the retainer agreement created a "cap" on fees and that counsel could be compelled to seek a lower fee than established in the agreement. This is a faulty interpretation of the agreement, which actually provided that counsel could not seek fees in excess of its fee schedule, absent approval of the CalPERS group. New York

By letters to counsel dated August 27 and 28, 1998, the court required that all bids be made *in camera* and established the grid format and bidding guidelines to be used in the submissions. On September 8, 1998, the court issued an opinion on the appointment of lead plaintiffs for the Prides and non-Prides Class, and the auction that would be utilized for the selection of Lead Counsel. See 182 F.R.D. 144. The court reiterated its reasons for conducting an auction: (1) under the PSLRA, the lead plaintiff's choice of counsel is subject to the court's approval, which means the court must exercise "its discretionary judgment that lead plaintiff's choice of representative best suits the needs of the class"; (2) the ultimate goal for the members of a plaintiff class "is to maximize the benefit to the class members if the litigation proves successful (either by way of settlement or through trial)," leaving no doubt that the class is best served by "obtaining highly qualified class counsel who are prepared to undertake the representation on a basis that will maximize that recovery"; (3) fixing a fee structure acceptable to the court in advance would ensure fulfillment of the PSLRA provision that attorneys' fees and expenses shall not exceed a reasonable percentage of the class' recovery, 15 U.S.C. § 77z-1(a)(6); (4) the judicial trend in conducting auctions in common fund cases allows simulation of a competitive market and serves as an effective way to

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City's various misrepresentations concerning the agreement are discussed in Section II.E, below.

establish reasonable fees to be borne by an entire class in the event of a recovery; (5) the auction mechanism would give the court "a measure of needed foresight" in establishing a reasonable fee: it would not be "compelled to learn by hindsight – to be told at the end of months or years of litigation, 'this is what we seek for services rendered.'"; and (6) notwithstanding the absence of proof supporting Aboff's pay-to-play allegations, the auction would serve the salutary purpose of removing any speculation about that issue. Id. at 150-52.

**E. Selection Of Lead Counsel**

Twelve separate bids (including the joint bid of Appellees) were submitted by nineteen different law firms. The court considered the bids in detail – both in connection with attorney qualifications and the fee proposals. See Opinion of October 2, 1998 (191 F.R.D. 387).[6] The criteria the court utilized to evaluate the bids were:

[6] JA-336. The October 2, 1998 Opinion was maintained under seal throughout the litigation; the portions relating to this action were released concurrently with the mailing of the Notice of Settlement on April 7, 2000. JA-78. As the court stated in the opinion: "It is of utmost concern to the Court that this opinion, the bidders' identities and the contents of their bids be sealed until resolution of this matter. This is done to maintain adversarial integrity, that of strategy and tactics, which is the prerogative of all parties, plaintiffs and defendants." JA-336. Since the matter has now been resolved, the bids and identity of bidders are no longer subject to confidentiality.

1) litigation experience, including the demonstrated abilities to try a case successfully, if trial proved necessary, and to achieve an effective resolution by settlement;

2) fiscal ability to maintain the litigation; and

3) a fee schedule that represents a realistic incentive to pursue a determined resolution of the plaintiffs' cause at reasonable cost (concentrating on the two middle phases of litigation as shown on the chart on page 16, below). JA-337.

A number of bidders (3, 4 & 11) were rejected as not qualified. Counsel for Aboff, bidder 10, was rejected on numerous grounds: (a) he had not demonstrated the ability to take a case to trial; (b) his bid was not realistically designed to serve the Class' interests, and (c) his allegations of wrongdoing on the part of the CalPERS group created an irreconcilable conflict. See JA-339-41 (191 F.R.D. at 391); see also JA-1744-45 (Hearing of June 28, 2000, at which district judge read from October 2, 1998 Opinion and reiterated that Aboff's counsel had been disqualified because professionally he could not serve as counsel for the CalPERS group due to inherent conflicts and that his bid was not made in good faith). Bidder 1 was rejected because its fee proposal was "not a realistic evaluation of the efforts necessary to obtain optimum results for the plaintiffs or to try this case, if required." JA-337.

Three bidders were found to be qualified – bidder 6, bidder 8 (Appellees) and bidder 9 (Lieff, Cabraser, Heimann & Bernstein, LLP). The court selected bid 9 as the lowest qualified bid. It was the only one in which the percentage fee would rise as the recovery increased, but at lower levels of recovery it provided far less in fees than the other two bids. The court found that this fee schedule was superior to the other qualified bids, was "realistic in the context of likely results, both for discovery and trial," and represented a fee "calculated to engender and maintain counsel's pursuit of the optimum recovery for the plaintiffs." JA-339. It provided for a fee based on the following percentages:

**Lowest Qualified Bid Submission (Bid 9)**

| | **PHASE AT WHICH LITIGATION IS RESOLVED** | | | |
|---|---|---|---|---|
| **Recovery Increments in Dollars** | **Before (and including) adjudication of any motions to dismiss** | **During discovery through adjudication of S.J. motions** | **After adjudication of S.J. motions through trial** | **Post-trial** |
| First 100 million | 2 % | 2 % | 3 % | 3 % |
| Next 100 million | 3 | 3 | 4 | 4 |
| Next 100 million | 4 | 4 | 5 | 5 |
| Next 50 million | 5 | 5 | 6 | 6 |
| Next 50 million | 6 | 6 | 7 | 7 |
| Next 50 million | 7 | 7 | 8 | 8 |
| Next 50 million | 8 | 8 | 9 | 9 |
| Over 500 million | 9 | 9 | 10 | 10 |

After determining the lowest qualified bid, the court found Appellees to be qualified and, consequently, provided Appellees the opportunity to match that bid.

JA-812-13.[7] Appellees informed the court they would abide by the selected bid and were appointed as Lead Counsel by Order filed October 13, 1998. Id.

### F. The CalPERS Group Accepts The Result Of The Auction Process

Each member of the CalPERS group understood at the time of the auction that "the Court would select the bid that it deemed to be the 'lowest qualified bid' as the bid that would guide the fee structure to be followed in the case." Treece Decl. ¶ 8 (JA-1301-02) (Declaration of counsel for the CRF). Indeed, New York City admits that it understood that the result of the auction process superseded the retainer agreement's fee provisions. Pugh Decl. ¶ 19 (JA-1204). Each of the three pension funds were promptly provided with the fee grid that Appellees had matched and notified of Appellees' appointment as Lead Counsel. Treece Decl. ¶ 9 (JA-1302).

The CalPERS group members did not object to the auction process or to the bid that Appellees had matched. 109 F.R.D. at 303. Indeed, there was good reason

[7] Appellees' bid, which was not selected, was based on the retainer agreement's fee schedule and, like bid 6, provided for decreasing percentages as the amount of recovery increased. Appellees made certain minor modifications from the agreement because the litigation "milestones" of the court's fee grid did not precisely match the "milestones" of the agreement. Most significantly, the second column (out of four) of the court's grid was for the litigation stage defined as discovery through adjudication of summary judgment motions, while the second column (out of three) of the retainer agreement was only through completion of discovery, but before the filing of summary judgment motions. In keeping with the court's September 8, 1998 Opinion, 182 F.R.D. at 151 (item 5), the CalPERS group chose not to consult with Appellees on their bid.

for New York City to be delighted by the accepted fee structure. An e-mail memo from New York City's counsel, Roger Pugh, to Max W. Berger (a senior partner in one of Appellees' law firms), dated November 23, 1998, set a goal of $1.2 billion for the total recovery in the case. Coffee Decl., dated June 19, 2000, ¶ 53 (JA-1484-85); Statement of Lorna Goodman, counsel for New York City, at Hearing of June 28, 2000 (JA-1725) (conceding $1.2 billion goal). This $1.2 billion goal that New York City hoped to achieve was formulated and suggested to Appellees after all of the relevant public disclosures had been made concerning Cendant's accounting errors and irregularities. Cendant had filed its Audit Committee Report, dated August 27, 1998, and restatements of the Company's annual and quarterly financial statements for 1995, 1996, 1997 and the first two quarters of 1998. Notably, a recovery of $1.2 billion would have produced a smaller fee under the selected bid than under the CalPERS group's retainer agreement. 109 F. Supp.2d at 300; see also Issacharoff Decl. ¶ 40 (JA-1286-87); Coffee Decl. ¶ 67 (JA-1491-92). It was only after Appellees achieved a settlement three times as large as New York City had hoped for that it sought to reimpose the agreement. 109 F. Supp.2d at 300.

### G. Prosecution Of The Case

On December 14, 1998, Appellees, after conducting a detailed investigation, filed a 152-page, fourteen count Amended and Consolidated Complaint that

detailed the fraud and deception that took place at CUC and Cendant during the Class Period and set forth the claims against each defendant. JA-345. Appellees concurrently moved for Class certification and for partial summary judgment against Cendant on behalf of those persons who had acquired Cendant stock by exchanging their HFS stock in the December 1997 merger. JA-816.

The class certification motion was opposed by defendant E&Y. After receipt of Appellees' reply memorandum in further support of class certification, JA-817, and before determination of the motion, E&Y withdrew its opposition and the court certified the Class on January 27, 1999. Id. Further, in exchange for Cendant's agreement to provide immediate discovery, Appellees withdrew the partial summary judgment motion without prejudice and began reviewing, analyzing and coding hundreds of thousands of documents produced by Cendant. Absent this agreement, discovery would have been stayed pending determination of the motions to dismiss, which were not decided until July 27, 1999. Id. at 816-17; see also In re Cendant Corporation Litigation, 60 F. Supp. 2d 354 (D.N.J. 1999).

In response to four sets of motions to dismiss, Appellees argued persuasively for each claim in the Complaint, and the court ruled in favor of plaintiffs on all motions except for E&Y's motion to dismiss the claims of post-April 15, 1998 purchasers against it. Id. Thereafter, Appellees argued successfully against motions by various defendants, who were joined by the United States Attorney's

Office, to stay the action pending the outcome of the Government's criminal investigation. See Order dated July 30, 1999 (JA-57). Appellees further moved successfully for leave to send a Notice to Class members of the action's pendency and defeated Cendant's argument that Class members be required to answer a "questionnaire" concerning their purchases of Cendant securities. JA-825-26.

During the summer and fall of 1999, Appellees continued the massive discovery efforts that included the review and analysis of additional documents produced by Cendant, the Individual Defendants, E&Y and numerous non-parties involved in the Cendant merger. JA-829-30. Appellees retained and worked extensively with an experienced forensic accounting expert to develop the case's accounting aspects. JA-829.

Equally as important to the highly successful resolution of the case were a number of innovative steps taken by Appellees to optimize the Class' recovery in negotiating a settlement. Prior to engaging in any settlement negotiations, Appellees hired and worked extensively with Forensic Economics, a well regarded damages expert, and further recommended retaining an investment banking firm to assist in analyzing Cendant's financial condition, its prospects and potential settlement scenarios. JA-830-33, 1303. To the best of Appellees' knowledge, this is the only case in which a plaintiffs' counsel in a securities class action retained a top-tier investment banking firm to analyze a defendant corporation, and insisted

that the defendant corporation open up its books to that firm as a pre-condition to settlement negotiations. JA-830. Appellees contacted sixteen firms, conducted interviews with six of them, and determined that Lazard Freres & Co. should be retained. Appellees thereafter negotiated a fee agreement with Lazard considerably below the norm in the investment banking industry, and recommended retaining them. JA-1303. As the district court found, it was Appellees who "hired, supervised and worked with the investment banking and accounting experts." 109 F. Supp.2d at 299.

Based on their own experience and investigation, the advice of Lead Counsel's experts and input of the CalPERS group, Appellees devised their strategies for settlement negotiations. The negotiations – which extended over six months – involved numerous face-to-face discussions and telephone conferences with defendants' counsel. During negotiations, Appellees rejected a number of settlement offers in excess of $1 billion. JA-865. Finally, by the fall of 1999, Lead Counsel were able to achieve a $2.8 billion settlement offer from Cendant and the HFS Individual Defendants, which Lead Counsel recommended be approved. Lead Counsel thereafter negotiated intensively with E&Y, resulting in a settlement offer of $335 million. The CalPERS group approved both settlements.[8]

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[8] The full extent of Lead Counsel's negotiations with defendants' counsel are set forth at JA-834-35. The $2.85 billion Cendant settlement is over three times higher than the highest recovery ever previously obtained in a securities class

These recoveries were far larger than the members of the CalPERS group had anticipated. Treece Dec. ¶ 13 (JA-1304); 109 F.R.D. at 300 (citing New York City statements that the settlement amount is a "spectacular number" and "substantially more than the parties had anticipated"). The total settlement amount of $3.18 billion, which is earning interest, is $2 billion more that New York City's hoped-for goal. Even after the district court's fee award, over $2.9 billion in cash will be distributed to the Class, plus interest, in addition to amounts that may be recovered based on the one-half interest the Class has in any net recovery that Cendant and the HFS Individual Defendants may obtain from E&Y.

### H. New York City Belatedly Objects To The Outcome Of The Auction

It was only after the Cendant settlement amount was known that New York City objected to utilizing the fee grid of the auction bid and sought to reimpose the retainer agreement's fee provisions. Goodman Decl. ¶ 3 (JA-1215). As the district court found, New York City "did not attempt to enforce the grid set out in the retainer agreement anytime before 'the outcome of the event [was] known.'" 109 F.R.D. at 304, quoting In re First Fidelity Bancorp. Sec. Litig., 750 F. Supp. 160, 163 (D.N.J. 1990). Neither of the other two CalPERS group members sought to

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action, and approximately ten times larger than the recovery in the next largest securities class action case involving fraudulent financial statements. See 109 F Supp.2d at 300. The $335 million E&Y settlement is by far the largest amount ever paid by an accounting firm in a securities class action. Id. at 300.

enforce the agreement. 109 F.R.D. at 304. Rather, CalPERS and the CRF approved Lead Counsel seeking fees in accordance with the result of the bidding process, consistent with the court's earlier rulings. Id.; compare Goodman Decl. ¶ 5 (JA-1216) ("I reiterated the City Pension Funds' position that fees in this case should be governed by the retainer") (emphasis added).

### I. Approval Of The Settlements, Plan Of Allocation and Fee Award

The settlements and proposed plan of allocation were finalized in March 2000, and the district court granted preliminary approval on March 29, 2000. JA-78 (No. 514). Notice of the settlements was mailed to Class members on April 7, 2000, detailing inter alia the fee that Lead Counsel would seek, the competitive bidding process and its outcome. JA-1327-28. Lead Counsel filed their fee petition on May 5, 2000 in accordance with the selected bid. JA-1003-05, 1408.

Over 470,000 Notices were mailed. JA-1320 (¶ 8). Only four Class members objected to the fee petition. None of the hundreds of other institutional investor Class members objected; nor did the 120,000 other Class members who have filed claims.

The district court conducted a full hearing on June 28, 2000, allowing each objector to address the court. JA-1675. In its opinion of August 16, 2000, awarding the fee to Appellees in accordance with the lowest qualified bid's grid, the district court considered and rejected each of the arguments raised by

Appellants. JA-1991 (109 F. Supp.2d 285). The district court opinion also considered each of the potential factors utilized by courts in this Circuit with respect to fees in class cases, and set forth carefully and thoroughly its reasons for the award.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellants in Nos. 00-2520, 00-2733, 00-2769 and 00-3653 appeal only from the August 16, 2000 Order awarding attorney's fees and expenses to Appellees. Appellant Throenle, Appellant in No. 00-2708, appeals from the District Court Judgments and Orders entered August 15, 2000, approving the settlements and plan of allocation, as well as the August 16 Order. There are no other appeals from the August 16 Order.

The appeals from the district court's August 15, 2000 Orders and Judgments approving the settlements and plan of allocation, are:

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| Appeal of Betty Duncan | Docket No. 00-2683 |
| Appeal of Martin Deutch | Docket No. 00-2684 |
| Appeal of Tere Throenle | Docket No. 00-2708 |
| Appeal of Janice G. and Robert M. Davidson | Docket No. 00-2709 |
| Appeal of Ann Mark | Docket No. 00-2734 |

## STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

An appeal from an award of attorney's fees and reimbursement of expenses is subject to an abuse of discretion standard, requiring the reviewing Court to "give [a] great deal of deference to a district court's decision to set fees." Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195-96 (3d Cir. 2000); In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 782 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("General Motors"). A district court's decision will be disturbed only if it "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." General Motors, 55 F.3d at 783. The Court "will not interfere with the district court's exercise of discretion 'unless there is a definite and firm conviction that the court … committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." In re Cendant Corp. Prides Litigation, 223 F.3d 188, 192 (3d Cir. 2000) (citations omitted).

## SUMMARY OF ARGUMENT

The district court carefully and properly exercised its discretion in making the fee award. The court established the auction at the outset of the litigation for clearly articulated, valid reasons. It held two hearings at which it considered the arguments, briefs and comments of all parties and counsel as to the efficacy of conducting an auction and the procedure to be utilized. Responding to the comments of the parties, it then established the auction procedure. It did so in a

manner that protected the rights of the lead plaintiff under the PSLRA while serving the Class' interests. Finally, it selected a bid designed to foster an optimal result for the Class and entered into a contract on that basis with the selected lead counsel. The lead plaintiff accepted the auction process and its outcome, knowing that it superceded the retainer agreement's fee provisions.

At the end of the litigation, the court conducted a thorough judicial review to ensure that the fee established by the auction was reasonable and in line with or below fees awarded in similar cases. It considered each of the potential factors in this Circuit for fee awards, and made numerous findings, based on ample record evidence, that support the award. Indeed, even if there had been no fee structure established at the outset, the fee awarded is proper as a reasonable percentage of the amount recovered. If this Court were to undermine the result of the district court's actions it would open a Pandora's box of evils and subject every case to unbounded ex post contests over fees, making the auction process itself, which this Court has referred to with favor, useless and meaningless.

## ARGUMENT

### I. The District Court, Not Lead Plaintiff, Is The Arbiter Of Fees In A PSLRA Case

Attorneys who represent a class and recover a common fund for class members are entitled to an award of attorney's fees from the fund. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

It has long been clear that it is the district court that has the power and responsibility to make the fee award. "The District Court's judgment assesses attorney's fees against a fund awarded to the prevailing class." Boeing Co. v. Van Gemert, 444 U.S. at 481. See also In re Computron Software, Inc., 6 F. Supp.2d 313, 321 (D.N.J. 1998) (quoting General Motors, 55 F.3d at 821) ("The amount of the award of attorneys' fees and expenses is controlled by the [District] Court and is within its sound discretion."). Pursuant to Federal Rule 23, "the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. This duty exists independent of any objection [from a class member]." Wenderhold v. Cylink Corp., 191 F.R.D. 600, 602 (N.D. Cal. 2000) (emphasis added), quoting Zucker v. Occidental Petroleum, 192 F.3d 1323, 1328 (9th Cir. 1999), cert. denied, 120 S. Ct. 1671 (2000).

Appellant New York City and the proposed "Amici" seek to overturn this established law by contending that it is the lead plaintiff's responsibility in a securities class action to set the fee for class counsel and that a district court should

essentially rubber-stamp the lead plaintiff's decision. This is incorrect. The words of the PSLRA, which serve as the starting point for interpreting the statute, In re Advanta Corp. Securities Litigation, 180 F.3d 525, 533 (3d Cir. 1999), accord Eaves v. County of Cape May, 2001 WL 58107, at *4-5 (3d Cir. Jan. 24, 2001), and the accompanying Conference Report demonstrate that the district courts are granted the ultimate authority to approve the selection of Lead Counsel and to establish a reasonable fee. The statute states:

> The most adequate lead plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class. See 15 U.S.C. § 78u-1(a)(3)(B)(v) (emphasis added); and
>
> Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. See 15 U.S.C. § 78u-4(a)(6) (emphasis added).

The Report of the Conference Committee that formulated the final legislation confirms Congress' intent to have the district courts, rather than lead plaintiffs, be the final arbiter on selecting class counsel and setting attorney's fees. See H.R. Conf. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 679. Indeed, there is not one word in the Conference Report that supports the argument that a court should abdicate to the lead plaintiff in setting lead counsel's fee. Although New York City and the proposed "Amici" cite to pages 34 and 35 of the Conference Report to support their theory, nowhere does the Conference

Committee state an intention that lead plaintiffs, rather than the courts, should set attorney's fees. Rather, the Report states:

> The Conference Committee does not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class. See id. at 35 (emphasis added);
>
> The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly. See id. at 35 (emphasis added) (referring to 15 U.S.C. § 78u-4(a)(4)); and
>
> The Conference Committee limits the award of attorney's fees and costs to counsel for a class in a new section 27(a)(6) of the 1933 Act and new section 21D(a)(6) of the 1934 Act to a reasonable percentage of the amount of recovery awarded to the class. By not fixing the percentage of fees and costs counsel may receive, the Conference Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis. See id. at 36 (emphasis added).

New York City and the proposed "Amici" weave snippets of floor speeches, selected sentences from an earlier Senate Report and a law review article cited in the Conference Report (for a different proposition) in their attempt to fashion a mandate that courts must accept the lead plaintiff's fee determination. However, the PSLRA and the Conference Report can only be read to mean that it is the court's responsibility and prerogative to set fees in post-PSLRA cases.

## II. The District Court's Competitive Bidding Process Was Reasonable And Appropriate, And Carefully Protected The Rights Of Lead Plaintiffs And All Class Members

### A. Establishing A Fee Structure At The Outset Is Consistent With Jurisprudence In This Circuit

The method the district court employed to set the benchmark for Class counsel's fee was based on a strong legal and logical foundation. By establishing a bidding procedure for selecting Lead Counsel, through which the court would determine the "lowest qualified bid," the court sought to protect all Class members. See 182 F.R.D. at 151. Indeed, the very procedure employed in this case was cited with approval in this Court's decision in Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 202 n.6 (3d Cir. 2000) (citing In re Cendant Corp. Litig., 182 F.R.D. 144, 150-52 (D.N.J. 1998) (Walls, J.), among other cases, and stating: "This device [competitive bidding] appears to have worked well, and we commend it to district judges within this circuit for their consideration.").

The decision to establish what was, in effect, a contract between the court, on behalf of absent class members, and counsel finds strong support in the recommendations of the Task Force convened in 1985 by this Court. See Court-Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 254-259 (1985) ("Task Force Report"). The Task Force was created to develop recommendations to provide for fair and reasonable compensation for attorneys who prosecute statutory fee and common fund cases, encourage early settlement or

determination of such cases, provide predictability, reduce the burden on the courts and litigants in class cases and arrive at fee awards that are fair and equitable to the parties. Id. at 238.

The Task Force noted a widespread belief that numerous deficiencies of the lodestar method of determining attorney's fees either offset or exceeded its supposed benefits. Id. at 246-249. As a result, it recommended that attorney's fees in common fund cases be established at the beginning of the case based on a reasonable percentage of the recovery. Id. at 254-59. The procedure for establishing the fee was left to the court's discretion, so that a structure agreeable to the court and counsel could be put into place:

> Accordingly, the Task Force recommends that in the traditional common-fund situation and in those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, the district court, on motion or its own initiative and at the earliest practicable moment, should attempt to establish a percentage fee arrangement agreeable to the Bench and to plaintiff's counsel.

Id. at 256 (emphasis added).

The Task Force further recommended that when a district court determined the percentage fee at the outset of the case, neither the court nor counsel should waver from that structure: "renegotiation should not be permitted and the agreement should be strictly adhered to by the court, unless at the end of the case matters are presented that were not within the reasonable contemplation of the parties at the time the fee arrangement was negotiated." Id. at 258.

> By establishing the fee agreement early in the litigation, any and all inducement or inclination to increase the number of *Lindy* hours will be reduced, since the amount of work performed will not be permitted to alter the contingent fee. In addition, another alleged *Lindy* evil will be minimized because there will be a substantial inducement for plaintiff's counsel to settle the matter quickly, since the fee scale will have been established and counsel's compensation will not be enhanced by a delay. The negotiated percentage scheme also will eliminate the cumbersome, enervating, and often surrealistic process of preparing and evaluating the fee petitions that now plagues the Bench and Bar under *Lindy*. Finally, the proposal offers attorneys a degree of predictability that many believe currently is lacking.

Id. (emphasis added).

The Task Force thus envisioned that the court and counsel would enter into a bargain pursuant to which counsel would seek to obtain an optimal recovery for the class and not request a fee in excess of the agreed upon compensation schedule, and the court would be reciprocally bound to treat the fee schedule as not subject to modification, absent truly unforeseeable circumstances, if a recovery was achieved as a result of counsel's efforts. Inherent in, and critical to, these recommendations is that counsel should not be penalized, through an award of a smaller fee, based on the amount of work performed or the litigation stage at which a resolution was achieved. Id.[9]

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[9] Various courts in this Circuit and elsewhere have followed the Task Force's recommendation that courts establish and fix a percentage fee structure acceptable to the court and plaintiffs' counsel at the outset of class action cases. See, e.g., Urbach v. Sayles, Civil Action No. 91 CV 1291 (D.N.J.) (Summit Bancorp) (JA-2562 & 2580); In re Tiphook Securities Litigation, Master File No. 93-CV-4449 (D.N.J.) (JA-2584 & 2604); see also In re United States Surgical Corp. Securities

The Manual for Complex Litigation (3d ed. 1995) similarly advocates that courts set the fee arrangement at the outset of complex class litigation:

> The court should routinely specify, at the outset of the litigation, the method of compensation that will be used. Innovative methods used in this connection have included competitive bidding procedures for the selection of class counsel, and appointment of an outside attorney to negotiate a fee arrangement for the class. (Manual, ¶ 24.231 at 199) (emphasis added).
>
> Disputes will be reduced if the court advises the parties at the outset of the litigation what method will be used for calculating fees and, if using the percentage method, the range of likely percentages. This decision

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Litigation, Civil Action No. 3:92 CV 374 (D. Conn.) (JA-2606 & 2635). In each case, the court set the fee structure in advance and awarded the fee in accordance with the pre-set structure.

Other courts have lamented that setting fees in advance had not occurred. In In re First Fidelity Bancorp. Sec. Litig., 750 F. Supp. 160, 162 (D.N.J. 1990), the court stated that the percentage of recovery should be negotiated and accepted by the court and counsel while the risks and amount of recovery are still unknown. The court continued: "Absent an agreement initially approved by the court, the award by necessity resurrects many of the infirmities which prompted adoption of the lodestar formula." Id. at 162-63 (emphasis added). Similarly, in In re Unisys Corp. Retiree Medical Benefits ERISA Litigation, 886 F. Supp. 445 (E.D. Pa. 1995), the court expressed its clear preference that percentage fee arrangements be established as early as practicable. Id. at 460. The court noted that the auction conducted by Judge Walker in Oracle served this very purpose. Id. at 461 n.29. The court further made clear that a pre-set fee should not be a "floating target" to be changed at whim, quoting from the Task Force Report, 108 F.R.D. at 258, as follows: "The advantage of the negotiated fee procedure will be entirely undermined if, at the end of the litigation, counsel have the right to renegotiate depending upon … factors relating to the case." Unisys, 886 F. Supp. at 461 (emphasis added).

will have a substantial effect on incentives in the litigation. (Id. ¶ 24.21 at 194-95) (emphasis added).[10]

### B. The District Court Appropriately Exercised Its Discretion By Implementing A Competitive Bidding Process

Given a district court's responsibility for protecting absent class members and awarding a reasonable fee, it is improper to mandate that a court simply accept what a lead plaintiff proposes as a fee structure. Case law under Rule 23 and the PSLRA make that clear. Under the court's inherent powers, even when a class action plaintiff has negotiated a fee with counsel, the court is not divested of its authority and responsibility to establish a reasonable fee. Dunn v. H.K. Porter Co., 602 F.2d 1105, 1110 (3d Cir. 1979). To the contrary: "Even where there is a fee contract, courts have the general power to override it, and set the amount of the fee." Id. at 1110, quoting Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318, 1607 (1976). As this Court stated in Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973) (emphasis added):

> Rule 23 imposes on the Court an obligation to proceed with flexibility and imagination in structuring the course of a class action. … At the same time, the Court has responsibilities as the guardian of the rights of absentee class members, and to carry out those responsibilities is vested [with] broad administrative, as well as adjudicative, power.

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[10] See also Lapointe, "Attorney's Fees In Common Fund Actions," 59 Ford. L. Rev. 843, 875 (1991) ("By making its fee setting standard known before the commencement of the case, the court enables both the class members and their attorney to predict their likely recoveries, thereby facilitating rational decisions regarding whether to pursue the litigation and for how long.").

When a district court determines that a class' interests would be best served by employing an auction process to retain competent counsel on terms that would more likely maximize the recovery, the court is entitled to take steps to secure that result. E.g., Kahree v. Western Electric Co., 82 F.R.D. 196, 199-200 (D.N.J. 1979). Indeed, pursuant to Rule 23, a district court is vested with discretion and authority to determine issues of far greater impact on class members. Thus, for instance, a court may, based on its discretion, approve a class settlement that a lead plaintiff opposes. Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir.), cert. denied, 528 U.S. 874 (1999). Conversely, a district court may – and should – disapprove a proposed class settlement if the court determines that it does not provide adequate compensation for releasing the class' claims. General Motors, 55 F.3d at 805.

The SEC does not question that the district courts have the authority to set fees acceptable to the court in advance under the PSLRA. It cites with approval the Task Force Report finding that establishing a percentage fee arrangement agreeable to the court and counsel at the earliest practicable moment is desirable. See SEC Brief at 10 n.6. The SEC further concedes that in appropriate cases, a court "might itself conduct an auction for lead counsel. This is a remedy that the courts have used under Rule 23." Id. at 21. Indeed, the only question raised in the SEC brief stems from the Commission's uncertainty as to why the district court

instituted its auction process, a question the SEC felt should be answered, to determine whether the court abused its discretion in ordering an auction. But the court did answer that question. See the discussion in Section II.D, below.[11]

Indeed, there are numerous post-PSLRA securities cases in which courts have sought to serve absent class members by conducting auctions for lead counsel. See In re Bank One Shareholders Class Actions, 96 F. Supp.2d 780, 784-85 (N.D. Ill. 2000) (Shadur, J.); Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587-88 (N.D. Cal. 1999) (Walker, J.) (citing Cendant, 182 F.R.D. at 150-52, with approval); In re Lucent Technologies, Inc., Securities Litigation, 94 F.R.D. 137, 155 (D.N.J. 2000) (Lechner, J.) (citing Conference Report as proof of Congress' intent that courts exercise discretion in approving lead counsel).

Even though New York City and the SEC try to distinguish these and other cases on the ground that the lead plaintiffs had not conducted the type of selection process that the CalPERS group undertook in this case, the cases demonstrate that when a district court concludes that the class' interests would be better protected through an auction, it has the authority to implement one. And, even when a lead plaintiff proffers a fee agreement, there is no basis to conclude that the court must act as a rubber-stamp. Certainly, no one would doubt that a court has the power to

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[11] The SEC takes no position on whether the court below abused its discretion in conducting an auction or in awarding attorney's fees. SEC Brief at 3 n.1.

award a fee lower than that suggested or agreed to by a lead plaintiff. It similarly has the power to award a fee higher than that supported by a lead plaintiff.

The decision to order an auction in this case is supported by In re Auction Houses Antitrust Litigation, 197 F.R.D. 71 (S.D.N.Y. 2000). In Auction Houses, Judge Kaplan cited the following reasons why an auction was highly appropriate: (1) the alleged wrongs came to light absent involvement of any plaintiff's attorney, so that selecting lead counsel through an auction would not deprive any investigating attorney of his or her just reward; (2) an auction could serve as an efficient market because (a) the case had received extensive media attention and consequently attracted large numbers of plaintiffs' attorneys, so there would be a sufficient number of bidders, and (b) the relief sought was monetary, making the case easier to evaluate; and (3) the bidding attorneys had a great deal of information with which to evaluate the case, both as to liability and damages. Id. at 82.

The same considerations were present at the time the court below determined that a competitive bidding process would best serve the interests of the Cendant Class, regardless of the existence of a retainer agreement. It was Cendant's announcement of April 15, 1998 – not any counsel's private investigation – that first revealed Cendant's accounting irregularities. Widespread media attention was given to the disclosures of April 15 and thereafter, and over 50

cases were filed within weeks of the announcement. These facts – along with Judge Walls' invitation to any law firm in the country to bid on the lead counsel position, whether they were then representing a plaintiff or not – ensured that there would be a sufficient number of prospective qualified bidders. Moreover, there was a significant amount of public information concerning the fraud and the market losses suffered by purchasers of Cendant and CUC securities. See, e.g., JA-1091-98, 1104-10. Thus, as in Auction Houses, "there was an unusually substantial base of information from which bidders intelligently could evaluate the case." 197 F.R.D. at 83.[12]

### C. Allowing Lead Plaintiff's Chosen Counsel To Match The Lowest Qualified Bid Was An Innovative Way To Implement The Statute's Provision That Lead Plaintiff Selects Counsel Subject To Court Approval

Contrary to New York City's objection, the district court did not run roughshod over the statutory provision that the lead plaintiff selects counsel subject to the court's approval. To the contrary, the district court took concrete steps to

[12] The fee structure utilized in Auction Houses – like that utilized in this case – effectively created an increasing percentage-of-recovery fee. 197 F.R.D. at 84 n.55. However, in contrast to the maximum 9% rate in this case, the court in Auction Houses provided that counsel would be entitled to 25% of the recovery over the "X" factor of the bids. As Judge Kaplan wrote, the fee structure was intended to encourage plaintiffs' attorney to "expend the additional effort, accept the additional risk, and wait out the greater delay" to obtain a truly optimal recovery for the class. Id.

safeguard the rights of the CalPERS group, while at the same time maintaining the court's duty to protect absent class members.

First, the district court precisely followed the presumption created by the PSLRA to appoint the CalPERS group, which had the largest financial interest, as Lead Plaintiff. 182 F.R.D. at 146-50.

Second, the district court made clear that any counsel approved as Lead Counsel would be required to agree to the conditions concerning the CalPERS group's supervision of the litigation, as expressed in their August 17, 1998, including that such counsel be acceptable to the group. JA-1099. Indeed, when counsel for one of the other lead plaintiff applicants questioned the requirements in the August 17 letter, the court made clear that any counsel approved as Lead Counsel would be required to abide by them. JA-319-27.

Third, the court provided that Lead Plaintiff's chosen counsel, if otherwise found qualified, would be approved as Lead Counsel so long as they matched the lowest qualified bid. 182 F.R.D. at 150-52. As Judge Kaplan recognized in Auction Houses, this "undoubtedly reflect[ed] a presumption, ceteris paribus, in favor of counsel for the lead plaintiff." See 197 F.R.D. at 80 n.46.

Thus, the district court carefully and appropriately safeguarded both the rights of the CalPERS group and the Class' interests by ensuring that the attorneys approved as Lead Counsel (a) met all requirements set forth in the CalPERS

group's August 17 letter, (b) were acceptable to the CalPERS group and (c) either submitted the lowest qualified bid or agreed to abide by that bid.

### D. The District Court Had Valid Reasons To Order An Auction

New York City and the SEC attempt to distinguish other decisions in which courts utilized auctions or other means to appoint lead counsel or fix the fee, citing differences in their facts. Those differences, however, miss the mark. Although some of the decisions pointed to the lack of a sophisticated lead plaintiff, or one that had not negotiated a fee with its chosen counsel in advance, each of the cases nevertheless determined that, consistent with Rule 23 and the PSLRA, the court had the responsibility, authority and discretion to conduct an auction, or utilize other independent means, for the purpose of approving class counsel and establishing an acceptable fee structure. As stated in Wenderhold v. Cylink, 191 F.R.D. at 602, quoting Zucker v. Occidental Petroleum, 192 F.3d at 1328: "the district court must exercise its inherent authority to assure that that amount and mode of payment of attorneys' fees are fair and proper." Accord In re Milestone Scientific Securities Litigation, 187 F.R.D. 165, 176 (D.N.J. 1999) (the lead plaintiff's proposed selection of multiple lead counsel "is not dispositive" and requires "an independent evaluation of, among other considerations, the effectiveness of proposed class counsel to ensure the protection of the class").

Given the discretion and flexibility the PSLRA grants to district courts, there can be no bright line test for when a court may or may not order that an auction take place. New York City appears to argue that a sophisticated, institutional investor should have virtually unfettered power to select class counsel and set counsel's fee regardless of the judge's view. However, under Rule 23, the PSLRA and existing case law, that determination must rest with the court's sound discretion. When a district court exercises that discretion and implements an auction process to select lead counsel or establish a fee structure acceptable to the court, the fact that a lead plaintiff – even a sophisticated, institutional investor – has entered into a prior fee agreement cannot bar the court from doing what it deems appropriate and reasonable. The court must be able to test whether the marketplace will produce a better deal for the class.

The court below thoughtfully considered and clearly articulated its reasons for ordering the auction. See pages 8-9 (August 4, 1998 Hearing) and 13-14 (September 8, 1998 Opinion), above. These included:

(1) the bidding process allowed the court to consider fee proposals of class members and counsel other than the lead plaintiff and its counsel, in order to establish a structure likely to maximize the Class' recovery;

(2) the bidding process allowed the court to simulate a competitive market and serve as an effective way to establish a reasonable fee to be borne by the Class

in the event of a recovery, and thereby provided the court with "a measure of needed foresight" in establishing a reasonable fee;

(3) there was widespread interest and publicity concerning the Cendant case making a competitive bidding process especially appropriate in view of the large number of cases that were filed, the large class size and the very significant potential damages in the case;

(4) one of the lead plaintiff movants, Appellant Aboff, had raised "pay-to-play" allegations – both in court papers and in comments to the press – casting a shadow over the relationship between the CalPERS group and its chosen counsel, which the court found to be unsupported but which nonetheless could be eliminated by instituting the bidding process;[13] and

(5) the bidding process allowed the court to establish different fee schedules for the Prides and non-Prides cases, which the court determined should be litigated separately, by different groups of plaintiffs and counsel, due to a perceived conflict

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[13] The court properly found that there was no merit to Aboff's "pay-to-play" allegations. 182 F.R.D. at 149. Nonetheless, it can hardly be an abuse of discretion for a court to undertake an auction in order to remove even a potential perception that counsel was chosen improperly. The suggestion that the court should have ordered the CalPERS group to consider the auction bids and select counsel on that basis would not have cured the potential perception. Indeed, it would have undermined this important salutary purpose for ordering the auction. Moreover, imposing a new fiduciary duty on a lead plaintiff would contravene the clear intent of Congress: "the most adequate plaintiff provision does not confer any new fiduciary duty on institutional investors – and the courts should not impose such a duty." Conference Report at 34.

of interest that the CalPERS group had in prosecuting the Prides case. Thus, although the parties to the retainer agreement – the CalPERS group and Appellees – had contemplated prosecuting all claims of purchasers of Cendant securities including Prides in one case, the court determined that the CalPERS group could not represent purchasers of Prides, and that each group would be best served by having separate representation chosen through the auction process.

Based on these considerations the court articulated when it established the auction, the court appropriately determined that it would best serve absent Class members and the public generally if lead counsel were determined following an open competitive bidding process that gave the lead plaintiffs' chosen counsel the right to match the lowest qualified bid. The district court thereafter carefully considered all bids and selected one that was "realistic in the context of likely results, both for discovery and trial, and as such represent[ed] a fee calculated to engender and maintain counsel's pursuit of the optimum recovery for the plaintiffs." 191 F.R.D. at 390. The structure is consistent with ABA Formal Opinion 94-389 (JA-1278), was utilized successfully in a prior action (JA-1277) and followed a key suggestion submitted by Professor Coffee in advance of the August 19, 1998 Hearing (JA-263-65). See 109 F. Supp.2d at 303. Moreover, with a top marginal rate of 9%, the bid provided for reasonable fees at every level of recovery.

The bid selected by the court provided smaller fees for lower recoveries and larger fees as an incentive for maximizing the Class' recovery. If Appellees had achieved a recovery of $800 million – an amount $100 million more than the recovery in the largest class action settlement in history prior to this case (the WPPSS litigation) – they would have been entitled to nearly $20 million less under the selected bid than under the retainer agreement. If they had achieved a $1 billion recovery, they would have been entitled to $10 million less under the selected bid than under the retainer agreement.

### E. New York City's Assertions Regarding The Contents Of The Retainer Agreement And That It Wants The Agreement Enforced Are False

As stated above, the district court ruled on numerous occasions that the outcome of the auction process superceded the retainer agreement's fee provisions and explained its reasons for the decision. See pages 7-9, 12-14, above, citing August 4, 1998 Hearing (JA-147, 244-49), August 19, 1998 Hearing (JA-329-31), and September 8, 1998 Opinion (182 F.R.D. at 149-52). Further, in its October 2, 1998 Opinion, the court found the bid proposal of the lowest qualified bid superior to the bid submitted by Appellees, which was modeled on the retainer agreement. See pages 14-16, above.

In addition to the fact that the court rejected the fee provisions of the retainer agreement, it is clear that (a) New York City's assertions concerning the retainer

agreement are not true and (b) Appellees' fee request would have been appropriate even under the agreement. Moreover, New York City waived any enforcement of the agreement's fee provisions.

**1. The Agreement Does Not Support New York City's Position**

From the beginning of this litigation, and continuing in its brief to this Court, New York City has misrepresented the terms of the retainer agreement. It simply does not say what New York City claims it says.

First, New York City claims that the retainer agreement "made it clear that the amounts in the grid were a cap by specifying that attorneys' fees 'will in no event exceed' the number in the grid." Pugh Decl. ¶ 10 (JA-1201). Wrong. The agreement actually reads: "The fee will be a function of both the timing and size of the recovery but, unless agreed to by The Funds, will, in no event exceed the following." See JA-1089 (emphasis added). Thus, with The Funds' approval, counsel's fee could exceed the amount in the retainer agreement subject, of course, to the court's final approval. JA-1089.

Second, New York City claims the retainer agreement "gave the City Pension Funds the right to veto any fee application that they considered unreasonable." Pugh Decl. ¶ 10 (JA-1201). This too is patently false. The retainer agreement states that The Funds, i.e., CalPERS, the CRF and New York City, "agree to prosecute this litigation together and on an equal basis." See JA-1088

(emphasis added). It further states: "BRB and BLBG [Appellees] each understand that they are separately and jointly responsible in this litigation to CalPERS, CRF and NYCPF on an equal basis." Id. (emphasis added). Thus, no one Fund was entitled to "veto" a decision of the other two. Rather, by entering into this agreement, CalPERS, the CRF and New York City "agreed to join together as a de facto partnership, essentially as a joint venture, in which each of the entities would have an equal say on all matters." Treece Decl. ¶ 5 (JA-1300). The entities "sought to have consensus on decisions that would have to be made in the litigation; however, if unanimity was not possible, the partnership would attempt to operate on the basis of majority rule." Id. (JA-1300-01). Even with regard to the phrase that New York City has now conveniently seized upon, the agreement provides for the Funds collectively to decide whether to permit any specific fee application. It states: "In any event, we [the law firms] will not submit any fee application to the Court without the prior approval of The Funds"; it further provides that "all fee applications would, of course, be subject to final approval of the Court." JA-1089 (emphasis added).

Since two members of the CalPERS group approved Appellees' fee application (although such agreement was not even necessary given the court's rulings), New York City was not entitled, unilaterally, to seek to reimpose the retainer agreement's fee structure. Coffee Decl. ¶¶ 73-77 (JA-1494-96). The

Funds agreed to prosecute the action "together and on an equal basis." JA-1088. Under New Jersey law, the three entities created a joint venture – a partnership for a limited purpose or purposes. See, e.g., Wittner v. Metzger, 72 N.J. Super. 438, 179 A.2d 671, 674-75 (App. Div. 1962); Grober v. Kahn, 47 N.J. 135, 219 A.2d 601 (1966); Inter-City Tire and Auto Center, Inc. v. Uniroyal, Inc., 701 F. Supp. 1120, 1126 (D.N.J. 1988), aff'd mem. sub nom. Uniroyal, Inc. v. Erbesh, 888 F.2d 1382 (3d Cir. 1989); Lo Bosco v. Kure Engineering Ltd., 891 F. Supp. 1020, 1026-27 (D.N.J. 1995). Based on the New Jersey Uniform Partnership Law, N.J.S.A. 42-1:18 ("Rights and duties of partners"), all partners "have equal rights in the management and conduct of the partnership business." Thus, even if the agreement's fee provisions still applied, which they do not, New York City could not "veto" an approval given by the group's majority. See Sullivan v. Jefferson, Jefferson & Valda, 167 N.J. Super. 282, 400 A.2d 836, 839 (App. Div. 1979) (minority partner in a joint venture can be bound by the acts of its coadventurer). New York City was merely a minority partner in the three-party partnership.

Thus, contrary to New York City's contentions, the retainer agreement did not impose fee caps; did not give each client a "veto" over counsel's fee application (which was, in any case, always subject to court approval); and did not give New York City the right to "negotiate" counsel's fee when the case ended. And, of course, even if the agreement's fee provisions had not been nullified, which they

were, Appellees' fee request was entirely appropriate since a majority of the group's members approved it.

Ironically, it is New York City that does not want the terms of the agreement to be applied. It seeks to invalidate the majority decision of the CalPERS group to approve counsel's fee request, and does not want the court to have final approval of the fee application. Indeed, New York City does not even want the fee to be awarded pursuant to the retainer's terms. The agreement provides for a $186 million fee based on the recovery achieved. However, New York City wants that amount to serve only as a starting point for "negotiations" with counsel. Pugh Decl. ¶¶ 21-22, 24 (JA-1204-06). In effect, the only provision New York City wants applied is a term that appears nowhere in the agreement – that it has the unilateral, unfettered right to approve counsel's fee request. Thus, it is clear that New York City has rejected the very agreement it claims to support.[14]

### 2. New York City Waived Enforcement of the Fee Provisions of the Retainer Agreement

It is equally clear that New York City waived its right to seek enforcement of the retainer agreement. The issue of whether the retainer or the auction would control counsel's compensation was firmly resolved by the court in favor of the

[14] As another example, New York City bases much of its objection to the fee on lodestar considerations. However, nowhere in the agreement is lodestar mentioned as a factor. To the contrary, the entire fee structure is based on percentages of recoveries, at different stages of the prospective litigation.

latter. See pages 7-18, above. In a declaration submitted in support of its objection, New York City's house counsel admitted that when he raised the subject at a conference in chambers after Lead Counsel was appointed, the court stated that the retainer agreement "was in full force and effect except as to the grid, for which he would substitute the results of the court auction." See Pugh Decl. ¶ 19 (JA-1204) (emphasis added). New York City could have sought immediate appellate review of the auction process but did not. Issacharoff Decl. ¶ 39 (JA-1285-86). Having failed to do so, New York City is guilty of laches and clearly acquiesced in the auction result. Under these circumstances, it would be highly inequitable to enforce the retainer's fee provisions. As the district court found: "the city did not attempt to enforce the grid set out in the retainer agreement anytime before 'the outcome of the event [was] known.'" 109 F. Supp.2d at 304.

New York City makes three key admissions that establish its waiver and acquiescence. The first is the Pugh Declaration, ¶ 19, quoted above. The second is the admission that it was only after the Cendant settlement amount was known that New York City sought to reimpose the retainer agreement's fee provisions. Goodman Decl. ¶ 3 (JA-1215). This took place, of course, after it was clear that, because of the extraordinary amount that Appellees had obtained for the Class, the fee under the court's grid exceeded the fee allowed under the retainer. See 109 F. Supp.2d at 304. And the third – and most telling – is New York City's admission

that it is "only in hindsight" that it objects to the auction result, because is it only now that it has been shown that the fee amount under the court's grid exceeds the amount under the retainer. See Pugh Decl. ¶ 23 (JA-1205). New York City admits it had "underestimated the possible recovery in this case." Id. ¶ 21 (JA-1204-05). Thus, there is uncontroverted record support for the court's finding that New York City's objection was based only on 20-20 hindsight, and should be rejected. 109 F. Supp.2d at 304.

## III. The District Court Appropriately Awarded A Fee In Accordance With The Lowest Qualified Bid, Which Appellees Agreed To Abide By As A Prerequisite To Their Appointment As Lead Counsel

In addition to New York City's argument that the district court should have renounced the competitive bidding process, each Appellant asks this Court to conduct precisely the type of post hoc fee determination that the court below sought to avoid in setting a percentage-based fee at the outset. Each makes a similar argument: (a) given the recovery, the percentage sought is "excessive"; and (b) the court should have employed a lodestar "cross-check" to determine the fee.

For the reasons set forth below, the court appropriately exercised its discretion in rejecting Appellants' arguments on these grounds. Considering all factors relevant to the fee request, the court awarded a fee that is fair, reasonable and appropriate, and concisely stated its reasons for the fee it awarded.

### A. The Requested Fee Of 8.275 Percent Is Reasonable Compared To Other Cases

The fee structure established by the court was the result of a market process that operated efficiently to set in advance a fair and reasonable fee based on the total recovery. As a result, the Class will receive over 91 percent of the $3,186,500,000 recovered – more than $2.93 billion. Coffee Decl. ¶ 24 (JA-1469) (comparing fee and expense award, which constitutes 8.7% of the settlement funds, with the National Economic Research Associates (NERA) Study in 1995, finding the total of fees and expenses awarded in securities class cases averaged 34.74% of settlement amounts). Expressed from a different perspective, the interest on the settlement funds should exceed $155 million per year; the fee of $262 million represents just 21 months of interest.

The court determined that this percentage was reasonable by taking into account: (1) what the "market" would pay in similar cases, which was established directly through the auction process; (2) the quality of representation, which the court determined was "very high" based on the size of the settlements, the risks of establishing liability and damages on all claims, the fact that Lead Counsel negotiated the settlements in the face of the Government's attempt to stay the action and the expertise and standing that Appellees (as well as their adversaries) exhibited throughout the litigation; and (3) fees awarded in similar cases. See 109 F. Supp.2d at 300-02.

The court based this finding, inter alia, on studies of fees in other common fund cases, dozens of other "mega fund" cases decided within the past ten years and two cases with billion dollar recoveries within the past two years. See Coffee Decl. ¶¶ 20-33 (JA-1467-74); Issacharoff Decl. ¶¶ 24-28 (JA-1273-75); see also 109 F. Supp.2d at 300-02.

A comprehensive study of fee awards conducted by NERA in 1995 concluded that regardless of class size, "fees average approximately 32 percent of the settlement." NERA Study at 7 (JA-1513, at 1520). Similarly, a study conducted by the Law & Economic Consulting Center that examined the period from April 1993 to September 1996, found that average fee awards amounted to 32% of the recovery. Coffee Decl. ¶ 27 (JA-1470). A 1996 NERA Study further concluded that the 32% average for fees holds "even for cases with settlements in excess of $50 million." See Recent Trends IV: What Explains Filings and Settlements in Shareholder and Class Actions? (NERA 1996), at 12-13 (JA-1586, at 1598-99).

The court further considered: (1) a survey of twenty cases, each of which was resolved within the past decade for between $50 million and $200 million, in which courts awarded percentage fees between 18% to 37%, see JA-1472-73 (Coffee Decl. ¶ 31), JA-770-72 (Appellees' opening brief, at 23-24 & n.8, cited with approval in 109 F. Supp.2d at 301); and, more on point, (2) two recent billion

dollar recoveries in class cases in which the courts concluded that fees of 14% to 15% were reasonable. See Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp.2d 942, 945 (E.D. Tex. 2000) (an action brought on behalf of purchasers of Toshiba laptop computers in which plaintiffs' counsel achieved a settlement valued at $1.1 billion in only eight months after filing the complaint); In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D.N.Y. 1998) (an action that resulted in a $1 billion recovery, the largest in antitrust history). The court below concluded, in line with Toshiba and NASDAQ, that fee awards in mega-fund settlements fall in the "neighborhood of fifteen percent." See 109 F. Supp.2d at 301-02, citing Toshiba, 91 F. Supp.2d at 989.[15]

The district court specifically cited In re Ikon Office Solutions, Inc. Securities Litigation, 194 F.R.D. 166 (E.D. Pa. 2000), in which the court approved a 30% fee on a $111 million partial settlement. In response to the argument that the percentage should have been reduced because of the recovery's size, Judge Katz stated:

> [T]he court is well aware that most decisions addressing similar settlement amounts have adopted some variant of a sliding fee scale, by which counsel is awarded ever diminishing percentages of ever

[15] The award was further supported by a comparison with fees awarded in the State Medicaid tobacco litigation, in which fees of 19% to 35% were awarded by arbitrators on settlements of $17.3 billion in Texas, $13 billion in Florida and $4 billion in Mississippi. 109 F. Supp.2d at 290; JA-1474.

> increasing common funds. This court respectfully concludes that such an approach tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable. It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage.

Id. at 196-97 (emphasis added) (citation omitted). The court in Ikon also noted that the large recovery cases cited in Prudential, 148 F.3d at 339 & n.118, that yielded a lower range of fees had largely been based on lodestar rather than percentage calculations and they had all been decided at least thirteen years ago. Id. at 196.[16]

Summarizing its findings on the appropriate percentage, the court below held:

> This Court finds from the factors considered – (1) the fee set by the "market"; (2) the quality of result and representation; and (3) awards in other settlements – 8.275% to be an appropriate and reasonable request.

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[16] Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) and Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998), which New York City cites, are inapposite. They merely stand for the unremarkable proposition that a district court may utilize the lodestar method to compute fees. Moreover, as in General Motors, in Hanlon no cash was to be distributed to the class, making the settlement's valuation highly suspect, and the fee was negotiated with the defendants.

109 F. Supp.2d at 302. Based on the massive evidence presented to the court below, the fee awarded is reasonable and the district court acted well within its discretion in awarding a fee in accordance with the pre-established grid.

### B. There Was No Justification For Reducing The Fee Based On Lodestar

There is no merit to the Appellants' argument that the fee should have been reduced based on an after-the-fact comparison of the requested fee with counsel's lodestar. Although the court below acknowledged that courts may choose to conduct lodestar cross-checks to determine the reasonableness of fees, he concluded there was no need to do so in this case. See 109 F. Supp.2d at 302.

The court based this conclusion on the fact that a more accurate and realistic benchmark existed – the fee set by the competitive bids in the auction. Id. Disregarding the auction result after the fact would defeat completely the purposes of conducting auctions by undermining its two fundamental virtues: obtaining the best representation for the class at the best price; and providing class counsel with a clear set of incentives to prosecute class actions intelligently and aggressively. See Issacharoff Decl. ¶ 30 (JA-1276-77); see also Miller Decl. ¶¶ 45-49 (JA-1244-46) (chronicling the many innovative litigation and negotiation steps that "set the stage for achieving the recovery in this case"). As the court found:

> To reduce the fee award set by auction would be antithetical to the Task Force's recommendation that a fee agreement be reached early in the litigation and not later re-adjusted once recovery is known. 108 F.R.D. at

> 257-58 ("the amount of work performed will not be permitted to alter the [pre- determined] contingent fee"). Such is consistent with this Court's reasoning that attorneys should not be rewarded for taking longer to solve a problem nor penalized for expending shorter time.

109 F. Supp.2d at 302.

The district court appropriately recognized that the court and counsel had entered into a bargain based upon a fee structure that Appellees were required to match, and the recovery achieved was solely the result of Appellees' efforts. Accordingly, counsel should not be penalized simply because they recovered more for the Class than anyone might have thought possible or that they did so in less time than might have been imagined.

The court below stated at the outset that lodestar would not be utilized to set the fee. JA-161, 329-31. As Judge Walker wrote in rejecting a similar attempt to use a lodestar cross-check at the end to "adjust" the percentage fee set pursuant to the auction in <u>In re Oracle Securities Litigation</u>, 852 F. Supp. 1437, 1454 (N.D. Cal. 1994):

> [t]he propriety of using a percentage of the fund contingent fee approach in this case was addressed at the outset of the litigation. At that time, the court weighed the relative advantages and disadvantages of the lodestar and percentage of the fund approaches in the common fund context and found percentage of the fund fee compensation "vastly superior."

The law in this Circuit does not require a lodestar "cross-check." The two cases upon which Appellants rely, <u>General Motors</u> and <u>Prudential</u>, do not mandate that and, in any event, those cases are factually inapposite. Notably, both decisions

affirm that the percentage-of-recovery method is more appropriate to use in common fund cases than the lodestar method. See General Motors, 55 F.3d at 821; Prudential, 148 F.3d at 332. However, a specific fee was not set in advance in either case and competitive bidding was not used. Compare Gunter, 223 F.3d at 202 n.6 (recommending that courts consider auctions). In each case there also were unique circumstances that raised questions as to the customary reliability of the percentage mechanism for awarding fees.

In General Motors, the class recovery was limited to coupons of uncertain value and this Court expressed "skepticism of the settlement's valuation." 55 F.3d at 822. Because of that uncertainty, the Court recommended a cross-check of the fee against the hours expended, noting that the lodestar's strength was that it avoided "subjective evaluation of the monetary worth" of the settlement. Id. at 821. But even in that circumstance, the Court did not mandate a lodestar cross-check even though "the nature of the settlement evades the precise evaluation needed for the percentage of the recovery method." Id. This problem of subjective or inflated valuation obviously did not arise in this case because the district court based the fee award only on the cash portion of the settlements -- $3.18 billion.

A lodestar cross-check also was discussed in Prudential, 148 F.3d at 341, because the Court again was faced with a recovery that was primarily non-cash which could not be easily translated into cash for purposes of a percentage-of-

recovery calculation. In addition, the Court expressed concern that the district court may have over-compensated class counsel by attributing results to them that were obtained by public enforcement authorities. As the Court stated:

> Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of a common fund, and would create an incentive for plaintiffs attorneys to "minimize" the costs of failure … by free riding on the monitoring efforts of others.

Id. at 337.

Neither of these concerns is presented by this case. The settlements provide for straight cash payments by the settling defendants and no enforcement actions contributed to the recoveries. Indeed, the United States Attorney's Office attempted to derail the prosecution of the action, but Appellees were successful in defeating that attempt. 109 F. Supp.2d at 299. There is thus no concern that the settlement, or any portion of it, resulted from the work of government regulators. To the contrary, as the court found, based on its direct supervision over the parties throughout the litigation, there is no reason to attribute any portion of the Cendant settlement to others' efforts. 109 F. Supp.2d at 300.

Moreover, there are important public policy reasons why injecting a lodestar inquiry after fee incentives are established through a wide-open, publicized auction process would undermine the usefulness of the auction device and disserve future classes. The primary benefit of setting a percentage fee in advance is that it aligns

the interests of client and lawyer, giving the lawyer an incentive to press for the best possible recovery for the class. See In re SmithKline Beckman Corp. Securities Litigation, 751 F. Supp. 525, 534 (E.D. Pa. 1990) ("it would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation") (citation omitted). "It matters little to the class how much the attorney spends in time or money to reach a successful result." Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1269 (D.C. Cir. 1993). That benefit would be undercut if counsel were to be penalized for concluding a substantial settlement early in the litigation, even though that result would best serve the class' interest.

Moreover, as the court recognized in establishing a percentage-based fee, there are numerous, very troubling criticisms of the lodestar method. See 109 F. Supp.2d at 295, 302-03; Task Force Report, 108 F.R.D. at 246-49; Coffee Decl. ¶ 42 (JA-1478-79); Issacharoff Decl. ¶ 34 (JA-1279-81). Any fee award formula that utilized lodestar to "cross-check" a pre-set fee formula would simply re-inject into such cases all of the criticisms of the lodestar system, open a Pandora's box of evils, and subject every case to unbounded ex post contests over fees that would be exceedingly counter-productive.[17] As the Supreme Court warned, a request for

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[17] The court below adhered to its determination, forcefully communicated to all parties at the outset, that lodestar would not be used in this litigation. JA-161. Appellees are not relying on lodestar to support the fee award and submit that it

attorney's fees "should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

The district court properly concluded, and certainly did not abuse its discretion in concluding, that there is a vast difference between an auction approach, which works ex ante to set a market-driven fee, and the lodestar approach, which is an ex post mechanism of judicial review. See 109 F. Supp.2d at 295, 302-03; Coffee Decl. ¶ 43 (JA-1479-80). Although it may be appropriate to use the lodestar formula as a cross-check when the value of a settlement is suspect or uncertain, or when a percentage fee is established after the litigation has concluded, use of the lodestar when there already has been a competitive auction confronts the plaintiff's attorneys with an unacceptable level of uncertainty, and

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would be highly inappropriate to import lodestar considerations into the fee determination. In any event, Appellants' statements about the lodestar are factually incorrect. New York City and others compare the fee that resulted from applying the fee grid to the amount recovered for the Class, or $262 million, to an $8 million "lodestar" incurred by Appellees and supporting counsel through March 31, 2000. However, Appellants know that this figure drastically understates the actual "lodestar" that was accumulated. See JA-780 (showing appellants' handwritten notes). That figure relates to only some of the more than 50 law firms involved in the case, and only to services ending months before the settlement hearing. Counsel, of course, have rendered extensive services during the last year, and will continue to do so to protect and safeguard the settlements, and to ensure that the proceeds are distributed equitably to the 120,000 Class members who have filed claims. Thus, counsel's actual lodestar is and will be greatly in excess of the figure trumpeted by Appellants.

conflicts with the critical alignment of the interests of the class and counsel that a pre-set, percentage fee structure provides. See 109 F. Supp.2d at 300-03.

An entirely separate consideration concerns the precedent that would be set if the district court had imposed a lodestar cross-check after counsel had prosecuted the case in contemplation of the incentives provided by the lowest qualified bid. Coffee Decl. ¶ 45 (JA-1480-81). The extraordinary amounts recovered for the Class show that the process employed by the court worked exceptionally well to compensate victims. Certainly, the fee structure established at the outset aided in reaching that objective. Id. Every offer in excess of $1 billion that Appellees rejected, see JA-865, was larger than the highest recovery ever achieved in a securities class action, and every one of those rejections presented the risk that Cendant would not return to the negotiating table.

Subjecting the fee award to a lodestar cross-check undercuts the fundamental goal of the auction approach. Coffee Decl. ¶ 44 (JA-1480). Once the lodestar formula is reintroduced through the backdoor, the interests of class counsel and the class again become misaligned. Compare SmithKline, 751 F. Supp. at 534. Thus, although a court is certainly not powerless to reduce a fee set in advance, see Section III.D, below, the timing of a settlement and, by implication, counsel's lodestar, is not a reason for reduction – especially when the

fee determined by auction is well below the national averages, even for like-sized cases. Coffee Decl. ¶ 46 (JA-1481).

### C. Selecting An Increasing Percentage Bid Was Appropriate

The court similarly did not abuse its discretion in selecting as the lowest qualified bid – and using that bid as the benchmark of reasonableness for the actual award – a fee schedule that provided for an increasing percentage as the recovery increased, with a maximum rate of 9%.

Appellants' claim that it confers a "windfall" on plaintiffs' attorneys "reverses the cart and the horse." Id. ¶ 47 (JA-1481). Rather than concluding that the attorneys have received a "windfall" because the recovery is exemplary, "it is more logical to recognize that causation probably runs in the opposite direction: that is, the recovery was exemplary because the attorneys were properly incentivized." Id. Professor Issacharoff opined: "The common expression of 'Monday morning quarterbacking' reflects the common problem of hindsight bias: the belief that the events which emerged were inevitable and could have been anticipated before the fact." Issacharoff Decl. ¶ 33 (JA-1278).

As the district court discussed, the chosen fee schedule "was designed to stimulate counsel to strive for ever-increasing recovery." 109 F. Supp.2d at 303, citing October 2, 1998 Opinion, 191 F.R.D. at 390. The fee "was calculated to engender and maintain counsel's pursuit of the optimum recovery for the

plaintiffs." 191 F.R.D. at 390. Having done so, the very success that the bid was intended to foster for the Class is not a valid ground to conclude that the bid selected was unreasonable.

The court's selection of an increasing percentage fee structure was based on a solid foundation and well served the Class. ABA Formal Opinion 94-389, Section J, which the court cited with approval, 109 F. Supp.2d at 303, bears the heading, "The Percentage of A Contingent Fee May Increase with the Amount of the Recovery." It reads:

> [M]any would say that this form of contingent fee agreement [one that increases the percentage as the recovery grows] more closely rewards the effort and ability the lawyer brings to the engagement than does a straight percentage fee arrangement, since everyone would agree that it is the last dollars, nor the first dollars, of recovery that require the greatest effort and/or ability on the part of the lawyer.

The bid was further consistent with the fee set in advance in In re American Continental Corp./Lincoln Savs. & Loan Securities Litigation, MDL-834 (D. Ariz., July 25, 1990) (setting fee in advance based on 25% of first $150 million recovered, and 29% of recoveries in excess of $150 million), as well as the suggestion that utilizing a sliding-scale approach, under which counsel were awarded a higher percentage as the size of the overall class recovery increased, would encourage them to make the extra efforts necessary to obtain remarkable results for the Class. Coffee Decl. ¶ 18(C) (JA-163-65). As Professor Issacharoff opined:

> In every settlement, it is always the easiest dollars that come first and the hard dollars that are the ones that test counsel's mettle. Under the facts of this case presented to me by plaintiffs' counsel, they actually rejected and walked out of negotiations after offers *in excess* of $1 billion. Of course counsel would never attribute this resolve to anything other than a duty to the best interest of the class. But one may nonetheless conjecture that this resolve was at least not compromised by a compensation scheme that rewarded aggressive prosecution of the class claims. Put another way, one may doubt whether the same fortitude in negotiations would have obtained had class counsel been operating under a compensation system that rewarded them a fee based only on the first $1 billion of class recovery.

Issacharoff Decl. ¶ 32 (JA-1277-78).

In this case, like American Continental, basic liability against certain of the defendants on some of the claims was not the critical element. Rather, the amount of the recovery that counsel would be able to achieve was paramount – meaning that every step had to be undertaken with that goal in mind and if sufficient amounts were not offered through settlement negotiations, counsel had to be ready, willing and able to proceed to trial. As the court found, under the selected bid, counsel had far greater incentives to negotiate higher settlement amounts rather than recommending inferior offers. Appellees rejected offers in excess of $1 billion from Cendant – more than all defendants paid in the WPPSS litigation by a factor of 50 percent. JA-865. By rejecting these offers and holding out for an eventual $3.18 billion settlement – over four times the $700 million recovered in WPPSS, and nearly $2 billion more than New York City's $1.2 billion goal – Appellees undoubtedly were increasing their fee. "But it is myopic to stop at this

point. The critical point is that the class has also more than tripled its recovery."
Coffee Decl. ¶ 50 (JA-1483) (emphasis added).

In these circumstances, it was eminently reasonable for the court to select a fee grid that began at very low levels and increased to (but never exceeded) 9%. The court, although aware of the general precept that it is not 150 times more difficult to try and settle a $150 million case than a $1 million case, see 109 F. Supp.2d at 303, soundly exercised his discretion by selecting a fee schedule that encouraged counsel to reach as high as possible – which they did and achieved a truly optimal and remarkable result. 109 F. Supp.2d at 303, citing Ikon, 194 F.R.D. at 196.

**D. There Is No Basis To Deviate From The Auction Result**

As the district court appropriately noted, even though the outcome of the auction was designed to serve as the benchmark of reasonableness for counsel's fee request, it did not obviate the need for a final review of fees and costs pursuant to Rule 23(e) and 15 U.S.C. § 77z-1(a)(6). See 182 F.R.D. at 151. The court recognized, when the auction process was formulated, a "thorough judicial review of fee applications is required in all class action settlements." 182 F.R.D. at 151, citing General Motors, 55 F.3d at 819. But a benchmark is a standard that should be followed absent very good reasons for deviation. Paul, Johnson Alston & Hunt v. Graulry, 886 F.2d 268, 272 (9th Cir. 1989) (noting 25% benchmark in Ninth

Circuit); see also Powers v. Eichen, 229 F.3d 1249 (9th Cir. 2000) (district courts may deviate from benchmark but must sufficiently explain the grounds for doing so). And, the court's opinion demonstrates that it performed a thorough judicial review and that there are no valid reasons to deviate from the benchmark. 109 F. Supp.2d at 298-305.

There are, of course, several factors that a court might consider at the end of an action to ensure that a fee established through an auction process represents a reasonable percentage of the class' recovery. For instance, if any part of the recovery had resulted from an action brought by state or federal enforcement agencies, that might be considered in deciding whether to deviate from the auction benchmark. However, as the court found, not only did the full recovery result from Appellees' efforts but Appellees successfully fought a motion by the United States Attorneys' Office to stay proceedings. 109 F. Supp.2d at 299-301.

Similarly, if a settlement does not provide a guaranteed cash recovery to the class, or if counsel had engaged in conduct that the court believed disserved the class or was otherwise improper, those might be factors to consider in deciding whether to deviate from an established fee structure. Coffee Decl. ¶ 46 (JA-1481). These factors are not present in this case.

For the reasons discussed above, neither the time that counsel spent litigating the case, the accumulated lodestar, the stage at which the litigation was

resolved nor the amount of the recovery should be a basis for deviating from the benchmark. The benchmark was established when bidding counsel had a significant amount of information concerning the fraud at Cendant and the market losses suffered by Class members, and that information was factored into the bids.[18] When the criteria established at the outset are the level of recovery and the stage at which a resolution might be achieved, neither of those variables should be a ground for deviation. Accord SmithKline, 751 F. Supp. at 354 ("it would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation").

The whole point of setting a percentage fee in advance was to obtain the best result for the Class, while providing counsel with a set of incentives to secure that result. There were significant risks to be weighed in Appellees' decisions to turn down offers in excess of $1 billion. See 109 F. Supp.2d at 300 (citing companion opinion approving settlements). The goal of incentivizing the lawyers to secure an optimal result, which the court's selected bid was designed to foster, should not now be compromised simply because Appellees achieved an extraordinary recovery. To the contrary, the award of a fee in accordance with the bid was fair

[18] The same information, and more, was available to the CalPERS group when each of its members accepted the outcome of the auction process and when New York City communicated its goal of a $1.2 billion recovery to Lead Counsel.

and reasonable, and certainly not an abuse of discretion. As the district court found in rejecting New York City's arguments on this point:

> The purpose of the auction was to obtain the legal market's lowest qualified bid through adversarial competition at the onset of litigation. And it did. The city's fee analysis is precisely the after-the-fact re-evaluation of the fee that the Court sought to prevent by setting the fee scale while the size of recovery was unknown. See, e.g., In re First Fidelity Bancorp. Securities Litig., 750 F. Supp. 160 (D.N.J.1990) ("The percentage of recovery should be negotiated and fixed while the risks and amount of recovery are still unknown"); Task Force Rep. at 255-56 ("the district court, on motion or its own initiative and at the earliest practicable moment, should attempt to establish a percentage fee arrangement"). The post hoc comparison advanced by the city, in the words of Judge Sarokin, is "akin to placing a wager after the outcome of the event is known or playing poker with everyone's cards face up." First Fidelity, 750 F. Supp. at 163.
>
> Here the city did not attempt to enforce the grid set out in the retainer agreement anytime before "the outcome of the event [was] known." This objection based entirely on the benefit of 20-20 hindsight will not be accepted.

109 F. Supp.2d at 304.

### E. The Remaining Objections Were Properly Rejected

#### 1. Aboff's Argument that Her Counsel's Rejected Bid Should Have Been Used to Set the Fee Is Without Merit

Aboff sought to be appointed as lead plaintiff because she had entered into a "highly advantageous" fee agreement with her counsel that provided for a fee based on 15% of the first $100 million recovered and 10% of any amount recovered in excess of $100 million, plus costs. See Sirota Aff. ¶ 3 (JA-1416). Under Aboff's "highly advantageous" agreement, class counsel would have been

entitled to a fee of $323 million -- $60 million <u>more</u> than the fee Aboff now contends is excessive.

In the alternative, Aboff argued for a competitive bidding process to set the fee. <u>See</u> Memorandum of Law ("Aboff Mem."), at 2 (JA-1431). Her own words demonstrate why her after-the-fact objection is meritless. As Aboff stated:

> A court employing competitive bidding will not be presented with the oft-derided, Herculean task of retrospectively setting "fair" compensation for class counsel. Such an approach represents the best opportunity to effectively streamline and expedite the prosecution of this action while still providing ample financial incentives for successful class counsel.

<u>Id</u>. at 2-3 (JA-1431-32) (footnote omitted). She advocated that the court reject "retrospective fee setting approaches because a determination of attorneys' fees after the resolution of the litigation disserves the class." <u>Id</u>. at 9 (JA-1438). She argued <u>against</u> using a "lodestar" approach, stating that a "large and early settlement" is clearly of greater value than a settlement that is "smaller and long in coming." <u>Id</u>. As Aboff's counsel wrote:

> <u>[L]ead counsel selected by competitive bidding has every incentive to</u> conduct itself efficiently and <u>seek the largest recovery for the class</u>. <u>Simply put, lead counsel is stuck with its bid</u>. Thus, it is not concerned about the uncertainties of retrospective fee-setting. <u>It does not have to justify its fee to the court at the close of the case, and, therefore, will not initiate wasteful litigation</u>.

<u>Id</u>. at 10 (JA-1439) (emphasis added). <u>See</u> <u>also</u> JA-150 (counsel for Aboff stating at the August 4, 1998 Hearing: "what the Court should do to protect the members

of this very large class is have a process where the fees are determined in advance by a process of competitive bidding").

When it suited her, Aboff was wholly supportive of a competitive fee process. Now, however, Aboff argues that the outcome of the competitive bidding process should be tossed out, that the fee award – when viewed against counsel's lodestar – is excessive and that this Court should compute the fee based on the bid that Aboff's counsel submitted in the auction. The court, however, rejected that bid because Aboff's counsel did not have a history of actual trial litigation, its proposed fee schedule was "unrealistic and against the interests of the class" and because "the circumstance of [the firm] having accused a lead plaintiff of wrongdoing, if not criminal activity" raised an ethical problem and made Aboff's counsel unacceptable to the CalPERS group. 191 F.R.D. at 391. The court confirmed these reasons for having rejected the bid of Aboff's counsel, and read directly from the October 2, 1998 Opinion at the final settlement hearing on June 28, 2000, when New York City's counsel accused the court of not choosing the low bid. See JA-1743-45.

Appellees prosecuted this action based on the bargain reached by agreeing to match the lowest qualified bid. Having done so, it would be inequitable, unjust and unprincipled to now set their compensation based on a bid that the district court appropriately rejected.

### 2. Aboff's Objection to the Notice Is Without Merit

Aboff also objected to the Settlement Notice on the grounds that it did not include the "lodestar" incurred by plaintiffs' counsel and did not include the bids that the court rejected when it selected the lowest qualified bid. The district court appropriately rejected this objection. The PSLRA establishes the following requirements for statements concerning attorney's fees in class action settlement notices:

> Statement of attorneys' fees or costs sought. If any of the settling parties or their counsel intend to apply to the court for an award of attorney's fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

15 U.S.C. §§ 77z-1(a)(7)(C), § 78u-4(a)(7)(C).

The Notice included all information required by the PSLRA: the average per share amount of the requested fee; the basis of the request; the fee grid upon which the request was based (including the column designating the phase of the litigation at which the case was resolved); and the selection process the court undertook to determine the lowest qualified bid. See Settlement Notice ¶¶ 38-44 (JA-1327-28); see also Summary of Settlement, at page 1 ("per share" information) (JA-1322). The Settlement Notice was clearly sufficient to satisfy the PSLRA. See also Torrisi v. Tucson Electric Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993), cert.

denied, 512 U.S. 1220 (1994) (settlement notice that informs class members that class counsel would request a fee award of 30%, or $9 million, "was adequate notice of class counsel's interest in the settlement").

There is no case that requires counsel to state in a notice of settlement the "lodestar" incurred in prosecuting the action. Not only would this information have been irrelevant, but it is not required by the PSLRA or by Rule 23. The suggestion that the Notice was deficient because other, rejected bids were not included is equally without merit. The PSLRA requires only a "brief explanation supporting the fees and costs sought." Throughout this case the court made clear that the lowest qualified bid would serve as the "benchmark of reasonableness" for counsel's fee application – not rejected bids.

In any event, the rejected bids were disclosed with the issuance and publication of the October 2, 1998 Opinion, which was filed with the Clerk of the Court on April 7, 2000, the same day the Notice was mailed to Class members, and was available on the Westlaw national reporting system as early as April 8, 2000. Any Class member who wished to review the rejected bids could have done so.

### 3. Throenle's Argument Concerning Timing of the Request Is Without Merit

Appellant Throenle argued that the fee application was "premature" because the court has not yet ruled upon the settlements. However, as the Settlement Notice stated: "At the conclusion of the Settlement Hearing described above

[relating to approval of the settlements and plan of allocation], Lead Counsel will apply to the Court for a collective award of attorneys' fees and payment of costs and expenses." Settlement Notice ¶ 38 (JA-1327).

Throenle also argued that because the PLSRA provides for the payment of attorney's fees to a "winning" party by a "losing" party when the court makes a finding that such a "losing" party violated Rule 11 in bringing or defending a claim, Lead Counsel should be seeking payment of fees directly from Cendant and E&Y. However, as part of the settlements, all claims for attorney's fees, costs and expenses were released and dismissed; the judgments provide for each side to bear its own fees, costs and expenses. This too is made clear in the Notice, id. ¶¶ 23-25 (JA-1325-26), and was so found by the court below. 109 F. Supp.2d at 305. In addition, of course, the fee in this common fund case, like all common fund cases, is not awarded on the basis of "winning" and "losing." The fee is awarded out of the fund created by Appellees' efforts. Boeing Co. v. Van Gemert, 444 U.S. at 478.

#### 4. Schonbrunn's Arguments that Detailed Time Records Must Be Filed, that a Special Master Should Be Appointed and that "Special Rules" Apply to Large Settlements Also Are Without Merit

Appellant Faye Schonbrunn was represented by her nephew, attorney Lawrence P. Schonbrun, a habitual objector. 109 F. Supp.2d at 294; see also Toshiba, 91 F. Supp.2d at 274-75 & n.19 (discussing Schonbrun's conduct in that

case); JA-2121-33. Notwithstanding her minimal interest in the action and the fact that neither she nor her counsel reviewed the complaint, the settlement agreements or the papers filed in support of the settlements and fee application before filing her objection (JA-2310-13, 2315-18), Schonbrunn made a number of arguments, each of which the court properly rejected. See 109 F. Supp.2d at 305.

Citing the Ikon decision, among others, the district court rejected the argument that "special rules" apply to fee requests in large settlements. See 109 F. Supp.2d at 303. Schonbrunn's arguments that Appellees were required to file detailed time records and that a special master should have been appointed to review those records were also properly rejected based on the court's determination that a lodestar cross-check was not required, as well as the law in this Circuit that time records are not required to be filed. 109 F. Supp.2d at 305, citing Prudential, 148 F.3d at 342.

## IV. The District Court And Appellees Fulfilled Their Fiduciary Duties To The Class In An Exemplary Manner

Finally, the proposed "Amici" charge that Appellees breached their fiduciary duty to the Class by following the court's rulings that the auction process outcome superceded the retainer agreement's fee provisions and applying for a fee in accordance with the bid that Appellees were required to match. The proposed "Amici" also charge that the district court breached its fiduciary obligations to the

Class. Not only are these accusations entirely without record support, they are reprehensible.

As the court below found, and as other courts have determined, class members are most concerned with receiving a substantial recovery without undue delay. E.g., Swedish Hospital Corp. v. Shalala, 1 F.3d at 1269. Indeed, only four members of the Class objected to the fee request; in sharp contrast, more than 120,000 Class members have responded to the Notice of Settlement by submitting claims for a distribution from the settlement proceeds. In prosecuting this case to obtain an optimal recovery for the Class, and by employing the auction process to establish a percentage-based fee in advance that provided incentives designed to secure an optimal recovery, the court and Appellees served the Class' best interests.

Appellees took creative and innovative steps to move the case toward resolution much faster and more effectively than is done in most securities class actions. Appellees put immediate pressure on defendants by filing their class motion and a motion for partial summary judgment along with the Consolidated Complaint. They were able to obtain documents from Cendant well before they otherwise would have been produced despite the PSLRA's stay of discovery pending determinations of motions to dismiss. They investigated the claims against all defendants with the early assistance of forensic accounting experts and other investigators, and retained an experienced expert to analyze the potential

damages early in the proceedings. And they recommended – for the first time in a securities law class action – the hiring of an investment banking firm to review Cendant's public and internal business records, analyze its lines of business and provide expert guidance on how various potential settlements would impact the Company. All of these actions, which culminated in the unprecedented settlements, show the exemplary service that Appellees provided to the court and the Class.

Clearly, Appellees would have abided by the fee provisions of the retainer agreement had they not been nullified by the court rulings on the bidding process. Indeed, it was Appellees who argued for the agreement in their lead plaintiff reply papers, presented it to the district court in advance of the August 4, 1998 Hearing and urged the court to implement it. After the August 4 Hearing, the members of the CalPERS group informed Appellees that they would not seek appellate review of the court's ruling establishing the auction. And when Appellees were appointed as Lead Counsel pursuant to a fee structure that they were required to match, Appellees undertook the litigation diligently, produced a tremendous result and applied for a fee in accordance with the court's rulings and with approval of the majority of the members of the CalPERS group.

Now, at the twelfth hour, New York City opposes that fee and has evidently recruited the so-called "Amici" to join its crusade. Three of the four so-called

"Amici" received the Notice of Settlement and chose not to object to the fee. The remaining member of the "Amici" group, Franklin Resources, appears never to have sought appointment as a lead plaintiff and, given its emphasis on tax-free funds and foreign emerging markets, its prediction that approval of auctions would curb its interest in seeking lead plaintiff positions in the future is highly suspect. Indeed, since the auction was undertaken in September 1998, New York City has sought lead plaintiff positions in three subsequent cases, showing the fallacy of the "Amici's" hypothesis.[19]

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[19] See Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246 (E.D. Va. 1999); Aronson v. McKesson HBOC, Inc., 79 F. Supp.2d 1146 and 97 F. Supp.2d 993 (N.D. Cal. 1999); and In re MicroStrategy Inc. Securities Litigation, 110 F. Supp.2d 427 (2000). In the latter two cases, New York City is represented by the Lieff Cabraser firm, which represents the proposed "Amici Curiae" in support of New York City's appeal. Clearly, "Amici's" argument – that institutional investors will be discouraged from seeking to serve as lead plaintiffs if courts institute auctions – is belied by New York City's actions in seeking the lead positions in these cases. Even more ironic is that Lieff Cabraser – which advocated that the district court set an increasing percentage fee structure and submitted the bid that the court determined would best serve the Class – now opposes the very fee it proposed.

The other counsel for the proposed "Amici" was also retained by New York City and submitted a Declaration supporting its motion for appointment as lead plaintiff in the McKesson HBOC case. In the Declaration, Professor Grundfest lauded the savings to the class that the very same auction now at issue produced in the Cendant Prides case. See JA-1121 (at ¶ 22), citing In re Cendant Corp. Prides Litigation, 51 F. Supp.2d 537 at 541-42 (D.N.J. 1999); see also Aronson v. McKesson HBOC, Inc., 79 F. Supp.2d at 1158 n.13.

"Amici's" attack on the district court is even more egregious. As Rule 23 requires and the Manual for Complex Litigation recommends, the district court took an active interest in the 50 consolidated cases and exercised firm control over this litigation. "Amici" – who were absent Class members in every sense – simply have no concept of the court's service to the Class. The court ruled on all matters expeditiously and made itself available for conferences with counsel, yet provided counsel with enough latitude to allow them to negotiate two settlements that achieve record recoveries. The court carefully considered each of the factors enunciated in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), before approving the settlements, undertook an equally careful analysis before approving the proposed plan of allocation and further considered each potential factor before rendering the

fee award. The court documented its findings and awarded a fee consistent with prevailing law in this Circuit.[20]

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[20] It is respectfully submitted that the Court should deny the motion of the proposed "Amici" to file their brief. As in Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), the proposed "Amici" are not friends of the Court; they are friends of a party – New York City. The "Amici" do not have a legally cognizable interest in this case, nor are they advancing any relevant legal arguments in addition to those advanced by New York City. As a result, their brief should not be accepted. American College of Obstetricians & Gynecologists, Pennsylvania Section v. Thornburgh, 699 F.2d 644, 645 (3d Cir. 1983).

Courts traditionally have denied motions to appear as *amicus curiae* when a petitioner is perceived to be an interested party or to be an advocate of one of the parties to the litigation. Sciotto v. Marple Newtown School District, 70 F. Supp.2d 553, 555 (E.D. Pa. 1999), citing United States v. Gotti, 755 F. Supp. 1157, 1158-59 (E.D.N.Y. 1991). Moreover, when a court determines that the parties "are already adequately represented and participation of a potential *amicus curiae* is unnecessary because it will not further aid in consideration of the relevant issues, leave to appear has been denied." Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993), citing American College of Obstetricians v. Thornburgh, 699 F.2d at 645; accord Linker v. Custom-Bilt Machinery Inc., 594 F. Supp. 894, 897-98 (E.D. Pa. 1984) (rejecting class member's motion to appear as *amicus curiae*). Based on all these criteria, the motion for leave to file an *amicus* brief should be denied.

## CONCLUSION

For the foregoing reasons, the fee and expense award granted by the Court below should be affirmed in its entirety.

Dated: January 30, 2001

Respectfully submitted,

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Arthur R. Miller
Areeda Hall 225
1565 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

Counsel for Appellees,
Barrack, Rodos & Bacine and Bernstein
Litowitz Berger & Grossmann LLP

## CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

__________________________________

Arthur R. Miller

## CERTIFICATE OF COMPLIANCE WITH FED.R.APP.P. 32(a)(7)(B)(i)

I certify that this brief, which is in 14 point Times New Roman typeface, is in compliance with Fed.R.App.P. 32(a)(7)(B)(i) and the Order entered October 16, 2000, extending the page and word limits for Appellees' consolidated answering brief. Based on the automatic word feature of counsel's computer system, there are 20,045 words contained within the foregoing brief, exclusive of the tables of contents and authorities, which is within the 21,000 word limit allowed by the Order entered October 16, 2000.

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Cristin Cylc

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Appellees were served this date, by first class mail, postage prepaid, upon counsel as follows:

Howard B. Sirota
**Sirota & Sirota**
110 Wall Street, 21st Floor
New York, NY 10005

*Counsel for Appellant Aboff*

Lawrence W. Schonbrun
**Law Offices of Lawrence W. Schonbrun**
86 Eucalyptus Road
Berkeley, CA 94705

*Counsel for Appellant Schonbrunn*

C. Benjamin Nutley
**Kendrick & Nutley**
1010 Second Avenue, Suite 1000
San Diego, CA 92101

Richard Galex
**Galex, Tortoreti & Tomes**
150 Tices Lane
East Brunswick, NJ 08816

*Counsel for Appellant Throenle*

Luis de la Torre
**Securities and Exchange Comm'n**
450 Fifth Street, N.W.
Washington, D.C. 20549-0606

*Counsel for Amicus SEC*

Leonard Koerner, Esquire
**Corporation Counsel of the City of New York**
100 Church Street
New York, NY 10007

*Counsel for Appellant New York City*

Joseph A. Grundfest
**Stanford Law School**
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Melanie M. Piech
**Lieff, Cabraser, Heimann & Bernstein, LLP**
275 Battery Street, 30th Floor
San Francisco, CA 94111

*Counsel for Proposed Amici, Barclays Global Investors, N.A., et al.*

Dated: January 30, 2001

________________________________
Cristin Cylc