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MARK R. ROSEN****
SAMUEL R. SIMON**

† ADMITTED IN CALIFORNIA
†† ADMITTED IN MASSACHUSETTS
* ALSO ADMITTED IN NEW JERSEY
** ALSO ADMITTED IN NEW YORK AND NEW JERSEY
*** ALSO ADMITTED IN NEW YORK
**** ALSO ADMITTED IN CALIFORNIA AND NEW JERSEY

ATTORNEYS AT LAW
3300 TWO COMMERCE SQUARE
2001 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19103
(215) 963-0600
TELECOPIER (215) 963-0838
www.barrack.com

CALIFORNIA OFFICE
SUITE 850
402 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101

MASSACHUSETTS OFFICE
90 CANAL STREET
FIFTH FLOOR
BOSTON, MASSACHUSETTS 02114

NEW JERSEY OFFICE
14 KINGS HIGHWAY WEST
THIRD FLOOR
HADDONFIELD, NEW JERSEY 08033

NEW YORK OFFICE
18 EAST 50TH STREET
SEVENTH FLOOR
NEW YORK, NEW YORK 10022

June 7, 2001

Ms. Toby D. Slawsky
Chief Executive
Third Circuit Task Force on
Selection of Class Counsel
22409 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Third Circuit Task Force on Appointment of Counsel
In Class Actions

Dear Ms. Slawsky:

Pursuant to the invitation of Chairman Saltzburg to testifying witnesses at the June 1, 2001 hearing, I am enclosing a supplemental statement for consideration by the Task Force.

Sincerely,

Leonard Barrack

Enclosure

SUPPLEMENTAL 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
Tel: 215-963-0600

June 7, 2001

It was a pleasure appearing before the Task Force last Friday, June 1, 2001. I am writing this supplemental statement pursuant to Professor Saltzburg's invitation to the participants to submit any additional thoughts in writing to the Task Force members.

As the Task Force members are aware, my firm served as co-lead counsel to the Class in *Cendant*. In my written statement and oral remarks, I did not feel that this was the appropriate forum in which to present case-specific viewpoints. Thus, the views I expressed on selection of class counsel and setting counsel fees were based on my firm's 25 years of litigating class action cases and a detailed analysis that we conducted concerning the intersection between the PSLRA and auctions.

While the underlying facts of the *Cendant* case may or may not be important to this Task Force, I believe the Task Force members should not be presented with factual inaccuracies about the case. I am therefore compelled to write this supplemental statement in order to correct a number of factual mistakes made by various witnesses about *Cendant* during their testimony.

First, the retainer agreement referred to in testimony of Lorna Goodman, Esquire, was not simply between the New York City Pension Funds and lead counsel but, rather, was between and among the California Public Employees' Retirement System (CalPERS), New York State Common Retirement Fund (the CRF) and the New York City Pension Funds, as clients, and Bernstein Litowitz Berger & Grossmann LLP and my firm, as counsel. (*See* Court of Appeals Joint Appendix, Docket Nos. 00-2520, et al., at A-1088) (hereafter "A-__"). It provided that each of the clients would have an equal voice in supervising the case – not that any one client would have a veto over decisions of the other two. It did not set a cap on fees, as Ms. Goodman testified. To the contrary, it set a grid for percentage-based fees that counsel could request, based on amounts of recovery and stages of litigation at which recoveries might be achieved, but expressly stated that counsel – with approval of the clients – could seek a fee in excess of the percentage-based fee established by the agreement. (A-1089). While it also provided that counsel would not seek a fee without approval of the clients: (a) nowhere was the number of hours or counsel's lodestar mentioned as factors impacting the fee that counsel

would be entitled to seek; (b) New York City's own expert, Professor Weiss, admitted that such approval could not be unreasonably withheld (A-1065 n.5); (c) CalPERS and the CRF approved the fee request, recognizing – as had New York City before the amount of the recovery was known – that the auction undertaken by the district court superceded the fee provisions of the retainer agreement (A-1253, at ¶ 65); and (d) the retainer expressly provided that the fee award would be set by the court. As the district court held, New York City's after-the-fact objection to the fee request reflected just the type of *ex post* questioning that the auction – and setting a fee in advance – was supposed to guard against. *See* 109 F. Supp.2d 285, 304 (D.N.J. 2000).[1]

Second, Ms. Goodman referred to a letter that the lead plaintiffs wrote to the district court on August 17, 1998 as opposing the auction. In fact, the letter – which the lead plaintiffs sent to the court on their own, not through their chosen counsel – did not object to the auction announced by the district court at the hearing on the competing lead plaintiff motions on August 4, 1998. (A-1099). The letter neither provided the district court with any specifics of how the lead plaintiffs had selected their counsel and negotiated the retainer's fee grid, nor sought to have the retainer's fee provisions enforced. Rather, the letter: (a) offered the district court advice on the how the lead plaintiffs believed the auction should be conducted, including the criteria that the court should utilize in assessing bids; and (b) made clear that the district court should require all bidding counsel to agree to the oversight and supervision provisions of the retainer agreement, in the event the court selected a bidder other than lead plaintiffs' chosen counsel as lead counsel – a point that the district court, in fact, adopted and emphasized at a subsequent hearing on August 19, 1998. (*See* A-1099-1103; A-319-27).

Third, contrary to insinuations by various witnesses before the Task Force, the *Cendant* case was not without significant risks. There were four sets of motions to dismiss that were successfully opposed. Plaintiffs defeated motions to stay prosecution of the action filed by the U.S. Attorney's Office, various defendants and third-party defendants. This was especially important for the Class. It forced defendants to take seriously lead counsel's stated intention (to counsel for defendants) that we would litigate the case fully if we were not able to achieve an optimal recovery for the Class through settlement. Indeed, as events have unfolded, a renewed motion to stay filed by the U.S. Attorney's Office has been granted: the remaining litigation in the district court of large individual claims and various cross-claims has been effectively stayed and it is clear that such claims will not be ripe for determination until the year 2003 at the earliest.

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[1] In response to questions from the Task Force as to whether New York City would have been agreeable to a fee award in the amount set forth in the retainer agreement, Ms. Goodman stated that she was not sure what position New York City would have taken if that were the amount requested. In their final submission to the Third Circuit Court of Appeals, however, New York City was quite sure. New York City opposed the fee set forth in the retainer and, in fact, advocated for a fee that is less than 13% of the fee established by the grid in the retainer. *See* Appellants' letter-brief dated May 9, 2001.

Moreover, there was also always the risk that Cendant might file bankruptcy proceedings. Many of the defendants, including CUC's outside auditor, Ernst & Young, defended their actions on the ground that they were also victims of the fraud at Cendant and CUC and, thus, were not liable to plaintiffs and the Class. As for damages, each of the defendants vigorously contested the plaintiffs' damages estimate and methodology. And, with respect to the protracted settlements negotiations in the case, each settlement offer that lead counsel recommended be rejected by the lead plaintiffs – including offers from Cendant to pay more than $1 billion, and $2 billion, and even $2.5 billion – necessarily raised the significant risk that Cendant would terminate all settlement discussions, and instead litigate the case for years and years.

Finally, it is simply not true that the district court's auction "cost" the Class $76 million in counsel fees. At a $500 million recovery, the court's grid provided for a fee that would have been $30 million less than the retainer. At $800 million – a figure $100 million greater than the amount recovered in the *WPPSS* case (the largest at the time) – the court's grid provided for a fee $18 million less than the retainer. At a $1 billion recovery, the court's grid provided for $10 million less in fees. It was not until a recovery in excess of $1.25 billion was achieved that the fee from the court's grid rose above the fee from the retainer agreement. (A-1492-93). Notably, in this connection, in late November 1998, after all of the public disclosures of the fraud at Cendant and the market losses were known, and after the lead plaintiffs were aware of the fee structure of the selected bid that counsel agreed to abide by as a condition of their appointment as lead counsel, New York City's in-house counsel encouraged lead counsel to seek a total recovery in the $1.2 billion range. (A-1286; 1484; 1725). Before one concludes that the court's selected bid "cost" the Class anything, consider the $2 billion additional recovery between New York City's hoped-for recovery of $1.2 billion with the ultimate $3.2 billion that we were able to achieve for the Class.

What is true, as nearly every witness recognized, is that the recovery in *Cendant* was extraordinary.[2] The settlements with Cendant and Ernst & Young provide a $3.2 billion all-cash recovery, which is earning interest, plus a potential additional recovery stemming from cross-claims being asserted by Cendant and the HFS individual defendants against E&Y, and important corporate governance changes to which Cendant agreed as part of its settlement. E&Y paid $335 million, over four times the next highest payments by accounting firms prior to that time in securities class cases.

A recent PricewaterhouseCoopers study shows that since passage of the PSLRA, about 1,000 securities class cases have been filed, of which 255 have settled. *See*

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[2] While we agree that too much should not be read into this, it may not be coincidental that in the two auction cases in which increasing percentage fee grids were utilized, *Cendant* and *Auction Houses*, the results achieved for the Class were far beyond what anyone had anticipated at the outset of the cases.

PricewaterhouseCoopers LLP 2000 Securities Litigation Study, at 5-6. The total recovery from those 255 cases, including *Cendant*, is $6.6 billion. Without *Cendant*, the total drops to $3.4 billion, meaning that the combined recovery from all of the other 254 settled cases is just $200 million more than the *Cendant* recovery alone. Indeed, the PWC Study excludes *Cendant* when computing average settlements, recognizing that the *Cendant* amount would entirely skew PWC's analysis. The average settlement in the 254 settled cases excluding *Cendant* is $13.8 million. With *Cendant*, that figure would nearly double to $25.5 million.[3]

The settlement amount in *Cendant* was similarly extraordinary as a percentage of the plaintiffs' losses. Based on the claims information in *Cendant* (which lead plaintiffs recently submitted to the Court of Appeals), assuming that the settlements and plan of allocation become final, each Class member claimant will be receiving 64% of his/her claim (67% with the interest accrued on the settlement funds). As practitioners in the field will recognize, this is an enormous percentage of loss recovery. This result compares very favorably to typical class settlements that recover approximately 9% of investor losses. *See* Todd S. Foster, et al., "Trends in Securities Litigation and the Impact of the PSLRA" (June 1999) at 10. Moreover, as this Study of the National Economic Research Associates, Inc. (NERA) shows, as the amount of loss increases, recoveries as a percentage of loss generally decrease. The NERA data thus indicates that as investor losses double, recoveries generally increase by only 38%. *Id.* Yet, the *Cendant* settlement – which is over four times the next largest securities class recovery ($697 million in *WPPSS*) – is many multiples of the 9% norm for class settlements generally. Not surprisingly, at the end of her testimony on June 1, 2001, even Ms. Goodman had to acknowledge: "We [New York City's in-house counsel] never expected to recover $3 billion."

Once again, I would like to thank the Task Force members for presenting me with the opportunity to make my written submissions and testify before the Task Force.

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[3] PWC is not alone in excluding the result in *Cendant* when attempting to analyze recoveries in securities class actions. According to an article, "Securities Reform: What Went Wrong," in the New York Law Journal (Oct. 27, 2000), a study conducted by the National Economic Research Associates, Inc. (NERA) found that settlements in post-PSLRA cases average $12.0 million, compared to $8.5 million in pre-PSLRA cases, but that if the settlement in *Cendant* is factored in, the post-PSLRA figure "jumps to $45.8 million." Similarly, Professor Grundfest was careful to state in his testimony to this Task Force that during the decade of the 1990's, securities class recoveries totaled $6.1 billion – excluding *Cendant*. With *Cendant*, that figure would increase by 50%. With all this, however, Professor Grundfest's data demonstrate that the 8.275% fee awarded in *Cendant*, pursuant to an auction process, fell at the low end of the range of 7% to 21% fees in other auction cases.