UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WACHOVIA PREFERRED SECURITIES AND BOND/NOTES LITIGATION	Master File No. 09 Civ. 6351 (RJS) **ECF Case**

DECLARATION OF JOHN C. COFFEE, JR.

JOHN C. COFFEE, JR., under penalty of perjury, declares as follows:

I. INTRODUCTION

1. I submit this Declaration in support of the motion of Bernstein Litowitz Berger & Grossman LLP, Robbins Geller Rudman & Dowd LLP, and Kessler Topaz Meltzer & Check LLP (collectively, "Lead Counsel") for an award of attorneys' fees and reimbursement of expenses. At the outset, I should acknowledge that my writings over nearly thirty years have frequently been critical of the performance of plaintiff's attorneys in class actions, and especially in securities class actions. In particular, I have suggested that securities class actions often fail to produce a net benefit for the shareholder class because of the essential circularity of the securities class action, with the investor class typically bearing the cost of the corporation's liability, while those most responsible for the fraud escape serious liability. See John C. Coffee Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006). But even a critic must recognize that there are exceptions to any generalization, and this case stands out as a distinctive and exemplary exception. Because it essentially involves primary market transactions (i.e., the sale of securities by the defendant issuer to investors), rather than secondary market transactions among shareholders, there is no issue in this case of circularity or of any wealth transfer among shareholders. Rather, as this declaration will discuss, the net benefit to the class – viewed from a variety of perspectives – is extraordinary by any standard and was the product solely of the efforts of plaintiff's counsel.

2. This settlement is distinguished by two unique features: (1) it is probably the largest securities class action settlement in which the private recovery has not been

preceded by a public enforcement proceeding (either a criminal or an SEC enforcement action); and (2) it appears to have recovered a higher percentage of the maximum estimated damages (from plaintiff's usually optimistic perspective) than any other securities class action with which I am familiar has done – and by a wide margin. That such a high recovery (apparently the 14th largest in the securities class action field) has been negotiated without class counsel riding on the "coattails" of a public enforcement action underscores that the class has done remarkably well in this case. Their level of success deserves considerable weight in the fee award determination.

3. Other factors also merit careful consideration. First, this action was settled in the face of high risk and considerable legal uncertainty regarding several issues (particularly in light of the developing state of the law on the line between statements and "opinions" and the Second Circuit's then pending decision in Fait v. Regions Fin. Corp., 2011 U.S. App. LEXIS 17517 (2d Cir. August 21, 2011)). Second, the case was aggressively and fully litigated by experienced and highly competent counsel on both sides. Third, the class members appear to be more than satisfied (indeed delighted with the recovery), and no serious objection to the settlement or the fee award has been filed. Some of these factors have been discussed at length in the Memoranda submitted by Lead Counsel, and I will try to avoid replowing the same ground that they have already covered (on the premise that this Court does not feel that it has received too little or too abbreviated filings in this matter).

4. Instead, this declaration will focus on (i) the empirical evidence on fee awards in similar class actions, (ii) the level of success in this case, (iii) the unique absence of a prior public enforcement proceeding, and (iv) the factor of risk. To be sure,

knowing what the average or median fee award has been does not necessarily tell the court what the optimal or appropriate fee award should be. Empirical data seldom resolves the normative issue. But such information does provide a starting point and a baseline. Thus, Part III of this declaration will cover the recent studies of class action settlements and fee awards in securities class actions, with particular emphasis on comparably large class actions. Part IV will then turn to the relative success of plaintiff's counsel by examining the contemporary evidence on the ratio between settlement size and investor losses. Part V will next examine the special feature in this case that plaintiffs did not free ride on the coattails of a public enforcement action. Part VI will then turn to the issue of risk and assess the actual risks in this case. Part VII will discuss the role of a lodestar cross check and review the risk multipliers used in other large class actions, and Part VIII will analyze the lone objection that has been filed. Part IX will set forth my conclusions.

II. BACKGROUND AND QUALIFICATIONS

5. I am the Adolf A. Berle Professor of Law at Columbia University Law School, where I have taught since 1980, and am a member of the Bars of the State of New York and the District of Columbia. I am also a Fellow of the American Academy of Arts and Sciences, a Life Fellow of the American Bar Foundation, and a member of, and former Reporter for, the American Law Institute. I have also been a Visiting Professor of Law at Harvard Law School, Stanford Law School, the University of Virginia Law School, and the University of Michigan Law School. I began my academic career teaching at Georgetown University Law School from 1976 to 1980. Prior to that, I

practiced law with the firm of Cravath, Swaine & Moore in New York City from 1970 to 1976. I am a 1969 graduate of Yale Law School.

6. As a law professor, one of my principal academic interests has been class action litigation (with a special focus on the management of the large class action and the incentive structure that the law creates to reward the successful plaintiff's attorney). Although my academic interest in class actions does not make me more able than any other competent attorney to cite relevant precedent to this Court, my research has placed me in a position to call to this Court's attention recent empirical evidence concerning class action litigation and attorney fee awards. This data has relevance because it supplies a frame of reference enabling this Court to compare the requested fee against relevant benchmarks and an appropriate sample of related cases. Thus, rather than duplicating class counsel's legal memorandum, I will focus instead on recent empirical studies regarding the typical recovery and fee award in class action litigation.

7. I have on a number of occasions testified before Congressional committees with regard to the federal securities laws and class actions, have appeared as a witness before the Advisory Committee on the Civil Rules of the United States Judicial Conference, and regularly appear as a panelist at symposia and institutes on the topics of securities law and class actions. For the past fifteen years, I have been the opening lecturer at the annual ABA National Institute on Class Actions, and my annual survey of class action developments for this Institute is regularly published by the Bureau of National Affairs ("BNA"). During 1995, I served as an adviser to the White House's Office of General Counsel with regard to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), which chiefly seeks to regulate securities class actions. More

recently, I advised the staff of the Senate Finance Committee with respect to the drafting of both the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Act in 2010.

8. In addition, I have authored the following articles on class actions (which I cite in part to indicate that I am not contradicting prior positions or inventing a novel argument that I would not endorse apart from the facts of this case): John C. Coffee Jr., Litigation Governance: Taking Accountability Seriously, 110 Colum. L. Rev. 288 (2010); John C. Coffee Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006); John C. Coffee Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983); John C. Coffee Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Probs. 5 (Summer 1985); John C. Coffee Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 (1986); John C. Coffee Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987), John C. Coffee Jr., and Donald E. Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposed Legislative Reform, 81 Colum. L. Rev. 261 (1981); John C. Coffee Jr., Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L. Rev. 625 (1987); John C. Coffee Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995), John C. Coffee Jr., The Future of the Private Securities Litigation Reform Act: or Why the Fat Lady Has Not Yet Sung, 51 Bus. Law. 975 (1996); John C. Coffee Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370 (2000).

Some of these articles have been cited and relied upon by other federal courts, including the U.S. Supreme Court, in well-known decisions dealing with class actions and attorney fee awards. See, e.g., Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2317 n.28 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

9. My work in the area of class actions and representative litigation also includes service (for over a dozen years) as a Reporter for the American Law Institute in connection with its effort to codify the common law rules of corporate law and fiduciary duties in a Restatement-like volume. See A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: Analysis and Recommendations (1992). I served as the Reporter for Litigation Remedies, and this project specifically recommended standards for plaintiff's attorney fee awards in direct and derivative shareholder actions. In connection with serving as Reporter for the American Law Institute, I have studied fee award procedures, met with many of the leading attorneys in the class and derivative action field, and have participated in numerous seminars, panels, and informal conferences with judges who have faced similar issues to those involved in this case.

10. I have also served as an expert witness in a number of the largest class actions, including Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); In re Enron Corp. Securities, Derivative & "ERISA" Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008); In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003); In re AOL Time Warner Inc. Sec. & "ERISA" Litig., No. 02 Civ. 5575, 2006 U.S. Dist. LEXIS 78101 (S.D.N.Y. Sept. 28, 2006); In re Royal Ahold Sec. & "ERISA" Litig., 461 F. Supp. 2d 383 (D. Md. 2006); In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D.N.Y. 1998); In re Sumitomo Copper Litig., 74 F.Supp. 2d 393 (S.D.N.Y.

1999); In re Cendant Corp. Sec. Litig., 182 F.R.D. 144 (D.N.J. 1998); In re Cendant Corp. Sec. Litig., 109 F.Supp. 2d 235 (D.N.J. 2000), aff'd 264 F.3d 201 (3d Cir. 2001); In re Lucent Tech. Inc. Sec. Litig., 327 F. Supp. 2d 426 (D.N.J. 2004); In re Waste Management, Inc. Sec. Litig., No. 97C7709 (N.D. Ill. 1999); In re Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403 (S.D. Tex. 1999); Shaw v. Toshiba America Info. Sys., 91 F.Supp. 2d 942 (E.D. Tex. 2000); and In re Diet Drugs Products Liability Litigation, MDL Docket No. 1203 (E.D. Pa. 2000).

III. THE EMPIRICAL DATA

11. Two legitimate perspectives can be taken on any proposed fee award: one views the fee award from an "ex ante" perspective; the other from an "ex post" perspective.

12. First, from the "ex ante" perspective, if there was a fee agreement between the lead plaintiff or plaintiffs and class counsel, one can examine the reasonableness of that agreement at the time the deal was struck. One can ask whether the lead plaintiffs were sophisticated and independent of class counsel and whether the deal, as struck, was consistent with the then prevailing standards for a contingent fee representation in a securities class action. Some Circuits (most notably the Seventh Circuit) prefer this "ex ante" perspective. See In the Matter of Synthroid Marketing Litigation, 264 F.3d 712, 719-720 (7th Cir. 2001) (favoring a "market-based approach" that looks to the prevailing rates and fees in class actions agreed to by sophisticated institutional investors).

13. Second, the alternative perspective views the proposed fee award "ex post": how does the proposed fee award look in comparison to the fee awards in other comparable cases? In this declaration, I will give greater attention to the second or "ex

post" perspective, but I believe that both perspectives deserve judicial consideration. If sophisticated parties have struck an arm's length and well informed bargain, there is generally little reason for a court to substitute its judgment for theirs, absent special factors. Here, as set forth in the Declaration of Nicholas J. Staffieri, General Counsel of SEPTA (one of the lead plaintiffs in this action), SEPTA negotiated a sliding scale fee agreement, which would have provided for a fee of 17.79% of the gross settlement find – or a slightly higher fee than the 17.5% fee being actually sought here.

14. To gain an overall sense of fee awards from an "ex post" perspective, it is useful to start with some historical data. According to the National Economic Research Associates ("NERA"), a well-known and respected economics consulting firm, attorney fee awards in securities class actions for a considerable period averaged around 32% of the settlement. See Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, Recent Trends III: What Explains Settlements in Shareholder Class Actions? (NERA, June 1995) (hereinafter "NERA Study"). Using data from 656 shareholder class actions that were settled, dismissed or resolved by a jury verdict between January 1991 and December 1994, the NERA Study specifically found:

> "Regardless of case size, fees average approximately 32 percent of the settlement." (NERA Study at 7).

15. Given the relevance of this conclusion, a closer look at their data seems warranted, and an abbreviated version of Table 5 from this study is thus set forth below:

Table 1

Plaintiff's Attorney Fees

Settlement Range	Number of Settlements	Average Attorneys Fee as a Percentage	Median Attorney Fee as a Percentage

$0.00-$0.99 Mil	27	30.31%	30.00%
$1.00-$1.99 Mil	45	31.99%	33.33%
$2.00-$9.99 Mil	162	31.99%	33.33%
$10.00-$49.99 Mil	53	31.36%	32.00%
$50 + Million	2	31.67%	31.67%
Total or Average:	**289**	**31.71%**	**33.33%**

16. Although once accurate, the foregoing data has in my judgment become dated. Fee awards as a percentage of the recovery have declined over the last decade for two distinct reasons: (1) the PSLRA gave effective control over the securities class action to those institutional investors willing to serve as lead plaintiffs, and public pension funds in particular have exercised a restraining oversight over fee awards, and (2) fee awards have long been a declining percentage of the recovery, and the magnitude of securities class action settlements has soared over the last decade, with the result that the nine largest securities class action settlements are today all in excess of one billion dollars.[1]

17. Today, attorney fee awards remain in the vicinity of 25% to 30% of the recovery (as they were in earlier decades), until the recovery approaches approximately $500 million. Once into this vicinity, fee awards begin to decline on a percentage basis. This is shown by the 2011 NERA Study, which finds fee awards in securities class actions to amount to 27.3% in cases where the settlement is between $25 million and

[1] See Institutional Shareholder Services, Securities Class Action Services, "The SCAS 100 for Q3 2011" (2011).

$100 million, 22.2% in cases where the settlement is between $100 million and $500 million, and 8.3% in cases where the settlement is above $500 million.[2]

18. The problem with such a statistical overview is that it ignores exactly the context of this case. This is because the class recovery in the instant case ($627 million) falls on the seam between the last two categories discussed above: i.e., the $100 to $500 million category (where the median fee award is 22.2%); and the above $500 million category (where the median fee award is 8.3%). That last category extends from $500 million to the $7.2 billion settlement in the Enron case and the $6.15 billion settlement in WorldCom class action. Any category that extends from $500 million to $7.2 billion inherently overaggregates, and thus the median fee award for such an overbroad category can be misleading.

19. Thus, in my opinion, it is more useful (and certainly more informative) to look at the fee awards in cases that straddle the $627 million recovery in this case. The following table sets forth the settlement and fee award in securities class actions since 2000 in which the settlement ranged from $400 million to $1 billion:[3]

Case Name	Settlement Amount	Fee Award	Fee Award As A Percentage of the Settlement
1. In re United Health Group Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009)	$925.5 million	$64.7 million	7%
2. Carlson v. Xerox Corp., 596 F. Supp. 2d 400 (D. Conn. 2009)	$750 million	$120 million	16%
3. In re Countrywide Fin. Corp. Sec. Litig., No. 07-cv-05295 (C.D. Cal. March 4, 2011)	$601.5 million	$46.50 million	7.7%

[2] See Dr. Jordan Miley, Robert Patton and Syetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review" (NERA 2011) at p. 27 (Figure 29).
[3] This more focused table has been updated from that in Carlson v. Xerox Corp., 596 F. Supp. 2d 400, at 405-06 (D. Conn. 2009).

4. In re Cardinal Health, Inc. Sec. Litig., 528 F. Supp. 2d 752, 2007 U.S. Dist. LEXIS 95127 (S.D. Ohio Dec. 31, 2007)	$600 million	$108 million	18%
5. In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467, 516 (S.D.N.Y. Oct. 5, 2009)	$586 million	$170.1 million	33.30%
6. In re Health South Corp. Shareholder Litig., No. 03-cv-1500, Dkt. No. 1112 (N.D. Ala. Feb. 12, 2008)	$537.5 million	$97.50 million	18.1%
7. In re Lucent Techs. Inc. Sec. Litig., 327 F. Supp. 2d 426, No. 00-cv-621 (D.N.J. Jul. 19, 2004)	$517 million	$87.90 million	17%
8. In re Bank America Corp. Sec. Litig., 228 F. Supp. 2d 1061 (E.D. Mo. 2002)	$490 million	$86.40 million	18%
9. In re Merrill Lynch & Co. Inc. Sec., Derivative & ERISA Litig., No. 07-cv-9633, 2009 WL 2407551 at *1 (S.D.N.Y. Aug. 4, 2009)	$475 million	$37.12 million	7.82%
10. In re Dynegy, Inc. Sec. Litig., Master File No. H-02-1571, Dkt. No. 686, slip. op. at 1 (S.D. Tex. July 7, 2005)	$474 million	$41.3 million	8.73%
11. In re Raytheon Co. Sec. Litig., No. 99-12142 Dkt. No. 645, slip. op. at 9 (Mass. Dec. 6, 2004)	$460 million	$41.4 million	9%
12. In re Waste Management Sec. Litig., No. 99-2183, Dkt. No. 248, slip. op. at 14 (S.D. Tex. April 29, 2002) (Waste Management II)	$457 million	$36.24 million	7.93%
13. In re Adelphia Communs. Corp. Sec. and Derivative Litig., 2006 U.S. Dist. LEXIS 84621 (S.D.N.Y. Nov. 16, 2006	$460 million	$97 million	21.4%
14. In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 469 (S.D.N.Y. 2004) (multiple settlements)	$448 million	$72,470,000	16.04%
15. In re Qwest Communication Int'l Inc. Sec. Litig., No. 01-cv-1451, 2006 U.S. Dist. LEXIS 71267 at *31 (D. Colo. Sept. 29, 2006), 625 F. Supp. 2d 1143, 1154 (D. Colo. May 27, 2009)	$445 million	$60 million	15%
16. Ohio Pub. Employees Ret. Sys. v. Freddie Mac, 2006 U.S. Dist. LEXIS	$410 million	$82 million	20%

98380 at *4 (S.D.N.Y. Oct. 26, 2006)			
17. In re Marsh & McLennan Cos. Inc. Sec. Litig., 2009 WL 5178546 at *19 (S.D.N.Y. Dec. 23, 2009)	$408 million	$55 million	13.5%

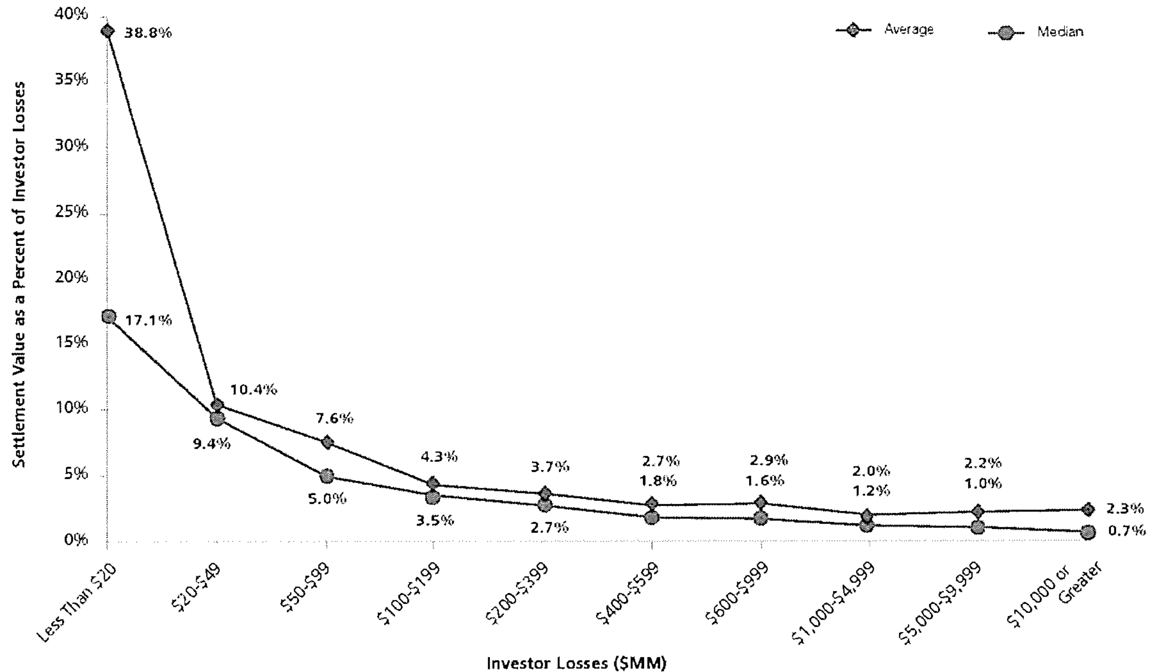
20. In these seventeen cases that straddle the $627 million settlement in this case, a higher or similar fee award than that here requested was awarded in a majority of them. On this basis, I would conclude that the proposed 17.5% fee award is at least consistent with the recent practice in comparable cases. Immediately, I must emphasize that this consistency does not prove that the proposed 17.5% fee is the appropriate or desirable fee award for this case. That is a normative question. Empirically, however, the proposed fee award seems well within the mainstream of fee awards in recent comparable securities class actions.

IV. **RELATIVE SUCCESS: Measuring Class Counsel's Contribution**

21. A large recovery does not, of itself, prove that class counsel has been particularly successful. Conceivably, class counsel could have settled for a trivial recovery in terms of the potential damages. On the other hand, when very large damages are sought, defendants are subject to inevitable solvency constraints. In addition, defendants might prefer to file for bankruptcy (or at least threaten to do so) than to pay astronomic damages. As a result, the best relative measure of class counsel's success is the percentage of the maximum recoverable damages that the settlement achieved. But here, it must also be recognized that, as the level of damages increases, the percentage that the settlement will bear to those damages will normally decline because of solvency constraints on the defendant. To sum up, settlement value as a percentage of investor losses tends to decline as investor losses increase.

22. This pattern is clearly shown in the diagram set forth below from the NERA 2011 Mid-Year Review of securities class actions:[4]

Settlement Value as a Percentage of Investor Losses, by Level of Investor Losses (January 1996 to June 2011)



As this study shows, when investor losses are between $1 billion and $5 billion, the average settlement is approximately 2.0% of investor losses and the median settlement is 1.2%. If investor losses were even higher and exceeded $5 billion, then the settlement would be even more attractive because the median settlement then descends to under 1% (or to 0.7% in the above chart).

23. Against this backdrop, the actual settlement in this case was extremely favorable to the investor class. Various measures of the total loss to investors are possible, but all reinforce the central theme that the percentage of the maximum damages recovered by Lead Counsel in this case was "off the charts." As Lead Counsel explain in

[4] Id. at p. 29 (Figure 32).

their declaration, their damages experts developed a model that showed a range of recoverable damages between approximately $1.569 and $2.505 billion. In developing such a model, their experts had every incentive to estimate damages as generously as was reasonable under the facts of the case – in effect, to overstate, rather than to understate (overstatement would, of course, make the recovery ratio appear less impressive). Nonetheless, on this initial basis of a $1.569 billion to $2.5 billion range, the $627 million settlement would amount to between 25% and 40% of these maximum damages. Later, following this Court's ruling on standing and the dismissal of certain claims for which no named plaintiff existed, and after making certain additional adjustments based on information exchanged in settlement discussions, Lead Counsel reduced their estimate of the maximum recoverable damages to between $1.2 billion and $2.05 billion. See Joint Declaration at ¶ 163-165. On this basis, the settlement represents between 30.6% and 52.25% of the maximum recovery.[5] In short, the settlement in this case appears to be between 25 and 43 times the median recovery in similar cases, as estimated by NERA.[6]

V. THE ABSENCE OF A PRIOR PUBLIC ENFORCEMENT PROCEEDING

24. One other factor truly stands out about this case and underscores Lead Counsel's achievement. If one examines what I believe to be the fifteen largest securities

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[5] Even if we were to ignore all the statutory defenses and all issues of loss causation, I am advised that class counsel's damages experts estimate that the maximum conceivable loss in terms of market capitalization was on the order of $5.8 billion (a figure which I am advised assumes, inter alia, that all losses experienced by holders of Bond Class Securities during the more than 2 ½ year class period were attributable solely to defendants' alleged misrepresentations and which – unlike the NERA studies noted above (see NERA Report, supra note 2) – include no "market index adjustments" at all in estimating total investor losses). Even on this entirely unrealistic basis (which I am using only for purposes of illustration), the settlement would still amount to nearly 11% of this absolute maximum number.

[6] That is, the above NERA chart shows the median recovery to be 1.2% when the investor losses range between $1 billion and $5 billion.

class action settlements,[7] one finds a predictable common denominator: in each of them, the private settlement was preceded by one or more public enforcement actions (often several and often highly publicized criminal indictments). Such public enforcement actions both signal to the Court that the case has merit and generate unfavorable publicity (and a hostile public reaction) that may make it virtually impossible for defense counsel to mount an effective defense or take the risk of a jury trial. The following table summarizes this pattern of prior enforcement actions preceding major class action settlements.

Top 15 Securities Class Action Settlements

1. In re Enron Corp. Sec., Derivative & "ERISA" Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008)[8]

   The SEC brought charges against the company and certain executives in October 2002; the investigation was ongoing before that, as Andrew Fastow had to be compelled to comply with a subpoena in December 2001. Settlements against various executives began in 2007; Ken Lay and Jeff Skilling were convicted by a jury of fraud and conspiracy in May 2006. The class actions settled at various dates, but primarily in 2006.

2. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 353-59 (S.D.N.Y. 2005)[9]

[7] There are different lists of the fifteen largest securities class action settlements, but nothing of importance follows from the choice of which list is used. Some new settlements have also been recently reached (most notably a $700 million settlement between class plaintiffs and AIG and its auditor (Ernst & Young)). However, in that case, much as in the ones discussed below, the SEC brought a major enforcement action in 2008 that resulted in the largest disgorgement it has ever obtained ($800 million), which action preceded the private class action settlement in 2011 by three years. See I.S.S., "Securities Class Action Services: The SCAS 100 for Q2 2010" at p. 31 (listing "Top 30 SEC Disgorgements" with AIG ranking first).

[8] The information set forth in the text is based upon the following sources:
http://www.sec.gov/spotlight/enron.htm
http://www.justice.gov/enron/
http://www.justice.gov/opa/pr/2003/May/03_crm_268.htm
http://www.sec.gov/news/press/2003-32.htm

[9] The information set forth in the text is based upon the following sources:
http://www.sec.gov/spotlight/worldcom.htm
http://www.sec.gov/litigation/litreleases/lr17588.htm
http://www.sec.gov/litigation/litreleases/lr17594.htm

The SEC charged the company and executives in June 2002. Civil settlements were approved by Judge Rakoff in July 2003. WorldCom's chief executive officer was indicted and convicted, and its chief financial officer plead guilty. WorldCom, itself, entered into a Non-Prosecution Agreement with the United States Attorney for the Southern District of New York in 2005.

3. In re Cendant Corp. Securities Litig., 109 F. Supp. 2d 285 (D.N.J. August 16, 2000) (original decision awarding 8.275%), rev'd by 264 F.3d 201 (3d Cir. 2001), decision on remand, 243 F. Supp. 2d 166 (D.N.J. Feb. 5, 2003).[10]

   The SEC brought an administrative action as well as civil actions in June 2000 against Cendant and its top executives for fraud. Further civil enforcement actions were brought in February 2001. Criminal prosecutions were later filed, but the convictions followed the civil settlement.

4. In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265-74 (D.N.H. 2007)[11]

   The SEC brought action against the chief executive officer (Dennis Kozlowski) and two others in September 2002. Kozlowski was sentenced to up to 25 years in September 2005; also convicted was former chief financial officer Mark Swartz and another financial vice president. The SEC filed a civil injunctive action on April 17, 2006.

5. In re AOL Time Warner Inc. Sec. & ERISA Litig., No. 02 Civ. 5575 (SWK), 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006)[12]

   The SEC charged and announced a settlement with Time Warner, Inc. (which came to $308 million) in March 2005. The Department of Justice also settled with AOL Time Warner pursuant to a deferred prosecution agreement in 2008 for $150 million.

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[10] The information set forth in the text is based upon the following sources:
http://www.sec.gov/litigation/litreleases/lr16910.htm
http://www.sec.gov/news/press/2000-80.txt
http://www.sec.gov/litigation/admin/34-42933.htm
[11] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2002-177.htm
http://www.sec.gov/litigation/litreleases/lr17896.htm
http://www.sec.gov/litigation/litreleases/2006/lr19657.htm
http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/
[12] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2005-38.htm
http://www.sec.gov/litigation/litreleases/2011/lr22109.htm
http://sec.gov/litigation/litreleases/2008/lr20586.htm
http://www.washingtonpost.com/wp-dyn/articles/A53801-2005Mar21.html
http://www.theregister.co.uk/2005/03/22/aol_sec/

6. In re Nortel Networks Corp. Sec. Litig., No. 01-CV-1855 (RMB), Dkt. No. 194 (S.D.N.Y. Jan. 29, 2007), aff'd, In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 134 (2d Cir. 2008) (Nortel I)[13]

   The investigation began in April of 2004. In October 2007, Nortel settled with the SEC for $35 million in civil penalties, plus ongoing reporting.

7. In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 387 (D. Md. 2006)[14]

   The SEC charged the company and certain top executives in October 2004; Royal Ahold settled in October 2004. Nine more executives were charged with insider trading in January 2005; seven more executives were charged in November 2005. The United States Attorney for the Southern District of new York also entered into a non-prosecution agreement with Royal Ahold in 2006.

8. In re Nortel Networks Corp. Sec. Litig.,No. 05-MD-1659 (LAP), slip op. at 10 (S.D.N.Y. Dec. 20, 2006) (Nortel II)[15]

   The investigation began in April of 2004. In 2007, Nortel settled with the SEC for $35 million in civil penalties, plus other reforms.

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[13] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2007/2007-39.htm
http://www.sec.gov/litigation/litreleases/2007/lr20333.htm
http://www.sec.gov/litigation/litreleases/2007/lr20275.htm
http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&oid=100229708
http://www.engadget.com/2007/06/08/sec-to-fine-nortel-up-to-100-million-for-shadyaccounting/
http://tech.mit.edu/V124/N17/17_long_4.17w.html

[14] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2004-144.htm
http://www.sec.gov/news/press/2005-157.htm
http://www.sec.gov/litigation/litreleases/lr18929.htm
http://www.washingtonpost.com/wp-dyn/articles/A30807-2004Oct13.html
www.sec.gov/litigation/complaints/comp18929-1.pdf
http://www.sec.gov/news/speech/spch011305lct.htm
http://www.sec.gov/litigation/litreleases/2009/lr21168.htm
http://www.sec.gov/litigation/litreleases/lr19034.htm
http://www.sec.gov/litigation/litreleases/lr19454.htm

[15] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2007/2007-39.htm
http://www.sec.gov/litigation/litreleases/2007/lr20333.htm
http://www.sec.gov/litigation/litreleases/2007/lr20275.htm
http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&oid=100229708
http://www.engadget.com/2007/06/08/sec-to-fine-nortel-up-to-100-million-for-shadyaccounting/
http://tech.mit.edu/V124/N17/17_long_4.17w.html

9. In re McKesson HBOC, Inc. Sec. Litig., 2006 U.S. Dist. LEXIS 97646, No. 99-CV-20743, Dkt. No. 1444, slip op. at 1 (N.D.Cal. Feb. 24, 2006); In re McKesson HBOC, Inc. Sec. Litig., No. 99-CV-20743, Dkt. No. 1560, slip op. at 1 (N.D.Cal. Apr. 13, 2007); In re McKesson HBOC, Inc. Sec. Litig., No. 99-CV-20743, Dkt. No. 1727, slip op. at 1 (N.D.Cal. Jan. 18, 2008)[16]

   The SEC announced the filing of charges against two senior executives in October, 2000; six other executives were charged in another SEC complaint, which was filed in September, 2001. The former general counsel was permanently enjoined from committing future violations of the securities laws, barred from acting as an officer or director of a public company for five years and ordered to pay a civil penalty of $60,000. In separate actions, the U.S. Attorney for the Northern District of California indicted two of the company's officers.

10. In re UnitedHealth Group Inc. PSLRA Litig., 643 F. Supp. 2d 1094 (D. Minn. 2009)[17]

   The SEC filed and settled its actions in December 2007 and 2008. One officer (General Counsel David J. Lubben) paid a $575,000 civil penalty and consented to a five year officer and director bar. The SEC's enforcement action culminated in 2007 with the imposition of a $468 million penalty against William McGuire, the former chief executive officer and Chairman, which amount represents the largest civil penalty imposed against an individual in an options backdating case.

11. In re HealthSouth Corp. Stockholder Litig., No. 03-cv-1500, Dkt. No. 1112 (N.D. Ala. Feb. 12, 2008), Dkt. No. 1617 at 1 (N.D. Ala. June 12, 2009); Dkt. No. 1721 (N.D. Ala. July 26, 2010)[18]

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[16] The information set forth in the text is based upon the following sources:
http://www.sec.gov/litigation/litreleases/lr16743.htm
http://www.sec.gov/litigation/litreleases/2010/lr21444.htm
http://www.sec.gov/litigation/litreleases/lr17189.htm
http://www.sec.gov/litigation/litreleases/lr18170.htm
[17] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2008/2008-302.htm
http://www.sec.gov/news/press/2007/2007-255.htm
http://www.sec.gov/litigation/litreleases/2008/lr20836.htm
http://www.sec.gov/litigation/litreleases/2007/lr20387.htm
[18] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2003-34.htm
http://www.sec.gov/litigation/complaints/comphealths.htm
http://www.sec.gov/news/digest/dig031903.txt
http://www.sec.gov/litigation/litreleases/lr18044.htm
http://www.sec.gov/litigation/litreleases/2007/lr20084.htm
http://www.sec.gov/news/press/2010/2010-132.htm

The SEC charged the company and its chief executive officer in March, 2003. CEO Scrushy settled with the SEC in April, 2007, and was later convicted on unrelated bribery charges in June 2007. The SEC announced its settlement in July, 2010. HealthSouth paid $100 million to settle the SEC charges that it had inflated its earnings.

12. Carlson v. Xerox Corp., No. 00-CV-0910, 596 F. Supp. 2d 400 (D. Conn. Jan. 14, 2009)[19]

    The SEC filed its suit in April 2002. Management settled in June 2003. KPMG settled in April, 2005. Six individual defendants agreed to pay over $22 million in penalties, disgorgement and interest, and in addition to forfeit certain deferred bonuses. Xerox paid a $10 million penalty.

13. In re Lucent Tech., Inc., Sec. Litig., No. 00-cv-621 (D.N.J. Jul. 19, 2004)[20]

    The SEC settled its action in May, 2004. Lucent paid a penalty of $25 million; a number of senior officers paid civil penalties, and three officers agreed to be barred from serving as an officer and director of a public company.

14. In re Countrywide Fin. Corp. Sec. Litig., No. 07-cv-05295 (C.D. Cal. March 4, 2011) (slip op.)[21]

    The SEC investigation began in October 2007; the SEC charged three Countrywide executives in June 2009. Ex-CEO Angelo Mozilo settled in October 2010, paying the what has been reported to have been the largest civil penalty ever imposed against a public company's senior executive as of that time, plus disgorgement and a permanent bar from serving as an officer or director of a public company.

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[19] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/headlines/xeroxsettles.htm
http://www.sec.gov/litigation/complaints/complr17465.htm
http://www.sec.gov/news/press/2003-70.htm
http://www.sec.gov/news/press/2003-16.htm
http://www.sec.gov/litigation/litreleases/lr17465.htm
http://www.sec.gov/litigation/litreleases/lr18174.htm
http://www.sec.gov/news/press/2002-52.txt

[20] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2004-67.htm
http://www.sec.gov/litigation/litreleases/lr18715.htm
http://www.sec.gov/litigation/litreleases/lr19437.htm

[21] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2009/2009-129.htm
http://www.sec.gov/news/press/2010/2010-197.htm
www.sec.gov/litigation/complaints/2009/comp21068.pdf
http://www.mortgagenewsdaily.com/10182007_Mozilo_Investigation.asp

15. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S.D. Ohio Dec. 31, 2007; Nov. 14, 2007)[22]

    The SEC filed a civil action against the company in July 2007, and against its executives in May 2009. Cardinal Health paid a $35 million civil penalty and three senior officers paid civil penalties and agreed to bars against their serving as officer or director of any public company for varying periods.

25. In marked contrast, the SEC has brought no enforcement action against Wachovia or its officers; nor has any United States Attorney brought a proceeding. This contrast is striking in my judgment. As a result, little adverse publicity was generated with respect to Wachovia, and the SEC's silence sent at least an implicit signal that it was not aware of fraudulent conduct in the company's financial reporting. Hence, Lead Counsel faced a significantly greater uphill battle in securing a settlement in this case than in cases where it could point to a prior public enforcement action. A number of Southern and Eastern District decisions have recognized that an enhanced fee award is justified when the plaintiff does not in effect "free ride" on the efforts of prior governmental enforcement proceeding, but rather proves the violation on its own. See, e.g., In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 523-24 (E.D.N.Y. 2003); In re Gulf Oil/Cities Service Tender Offer Litig., 142 F.R.D. 588, 597 (S.D.N.Y. 1992). This is precisely such a case.

26. Similarly, in a substantial majority of the fifteen largest class actions listed above, there was a restatement of the defendant issuer's financial statements.[23] Although restatements do not by themselves prove fraud, they greatly simplify plaintiff's counsel's

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[22] The information set forth in the text is based upon the following sources:
http://www.sec.gov/news/press/2007/2007-147.htm
http://www.sec.gov/litigation/litreleases/2007/lr20212.htm
http://www.sec.gov/litigation/litreleases/2009/lr21058.htm

[23] See ISS, Securities Class Action Services: The SCAS 100 for Q2 2010 at p. 27 (listing largest restatements and listing fourteen of the fifteen class actions on this list).

burden by showing that a conceded error was made in the issuer's financial reporting. This is particularly true in a Section 11 case (such as this one) where plaintiffs need only show a material misstatement or omission (and need not prove scienter). Again in contrast to these cases, Wachovia never announced a restatement. Finally, the failure of Wachovia did not attract nearly the same public attention as did the collapse (and formal bankruptcy) of several other, more prominent financial institutions in 2008. Thus, it was in a far superior position in that it could claim (as it did claim) that it was blindsided by a financial "tsunami" which was not of its own making. For these reasons, defendants could better risk a trial than they could in more heavily publicized cases.

VI. RISK LEVEL

27. Although Section 11 cases are generally thought to involve a lesser level of risk for plaintiffs than Rule 10b-5 actions (because plaintiffs need not prove scienter), that difference was overshadowed by a special factor in this case. During the critical period when mediation and settlement negotiations were underway in this case, Lead Counsel had to be aware of (and defense counsel necessarily would have stressed) the decision in Fait v. Regions Fin. Corp., 712 F. Supp. 2d 117 (S.D.N.Y. 2010), which was eventually affirmed in Fait v. Regions Fin. Corp., 2011 U.S. App. LEXIS 17617 (2d Cir. August 23, 2011). Decided in May, 2010, Fait found that, in the context of an essentially similar action based on Sections 11 and 12 of the Securities Act of 1933, certain statements of the defendant in its registration statement were opinions that required the plaintiff to prove that the defendants who made them did not believe them at the time they were made. That is a high standard. Although the facts of this case and Fait can certainly be distinguished, the decision in Fait and the pendency of its appeal before the

Second Circuit (which was ultimately resolved in defendants' favor only weeks after this action settled) was a significant threat to Lead Counsel. That they held out and achieved a $627 million settlement in the face of this threat shows a level of determination (and a level of intestinal fortitude) that is uncommon in this form of litigation (where class counsel loses everything, despite years of work, if the case is reversed on appeal or a motion to dismiss is granted by the district court). In short, Lead Counsel faced and surmounted a level of risk in this case that I believe might have induced other counsel to settle much more cheaply.

VII. THE LODESTAR CROSS-CHECK

28. The Second Circuit today recommends the use of a lodestar cross-check. See, e.g., Goldberger v. Integrated Resources, 209 F.3d 43, 50 (2d Cir. 2000). The purpose of this cross check is to assure that plaintiff's counsel is not receiving a windfall under the percentage of the recovery method. Such a windfall might result, for example, if counsel had piggybacked on the efforts of a public enforcer and achieved a quick settlement in the immediate wake of a public enforcement action. Here, however, I am informed that the cumulative lodestar of the plaintiffs' attorneys in this action, computed at their normal hourly rates, came to approximately $32.7 million. If we divide this lodestar amount into the requested fee award of approximately $109.7 million, the resulting lodestar multiplier is 3.35, which, as next discussed, is below the historic average risk multiplier.

29. There is relatively little comprehensive data regarding the lodestar multiplier in large class action litigation (because most reported decisions simply do not indicate the multiplier, as they do not apply a lodestar cross-check). However, a study by

Logan, Moshman, and Moore found that in cases in which the recovery exceeded $100 million, the average multiplier was 4.50.[24] The following table shows that multipliers above 4 have become relatively common over the last two decades:

Table 5: Recent Multipliers

Case	Multiplier
Weiss v. Mercedes-Benz of North America, Inc., 899 F. Supp. 1297 (D.N.J. 1995), aff'd, 1995 U.S. App. LEXIS (3d Cir. 1995)	**9.3**
Perera v. Chiron Corp., No. 95-20725-SW (N.D. Cal. 1996)	**9.14**
Cosgrove v. Sullivan, 759 F. Supp. 166 (S.D.N.Y. 1991)	**8.84**
In re Buspirone Antitrust Litig., No. 01-CV-7951 (JGK), MDL Docket No. 1413 (S.D.N.Y. Apr. 17, 2003)	**8.46**
Newman v. Carabiner Int'l, Inc., No. 99 Civ. 2271 (S.D.N.Y. Oct 19, 2001)	**7.7**
In re Rite-Aid Corp. Sec. Litig. ("Rite Aid II"), 362 F. Supp. 2d 587 (E.D. Pa. 2005)	**6.96**
In re Cendant Corp. Litig., 243 F. Supp. 2d 166 (D.N.J. 2003)	**6.875**
In re 3COM Corp. Sec. Litig., No. C-97-21083 (N.D. Cal. Mar. 9, 1999)	**6.67**
In re Triangle Industries Sec. Litig., No. 10466, 1991 Del. Ch. LEXIS 203 (Del. Ch. Dec. 19, 1991)	**6.6**
In re RJR Nabisco, Inc. Sec. Litig., MDL No. 818, 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992)	**6.0**
In re Cardinal Health, Inc. Sec. Litig., 528 F. Supp. 2d 752 (S.D. Ohio 2007)	**5.9**
Roberts v. Texaco, 979 F. Supp. 185 (S.D.N.Y. 1997)	**5.5**
Lemmer v. Golden Books, No. 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999)	**5.38**
In re Waste Management Sec. Litig., No. 99-2183, Dkt. No. 248 (S.D. Tex. April 29, 2002)	**5.296**

[24] See Logan, Moshman & Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," 24 Class Action Reports 169 (2003).

In re Enron Corp. Sec., Deriv. & ERISA Litig., 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008)	**5.2**
Feerer v. Amoco Production Co., No. 95-0012, 1998 U.S. Dist. LEXIS 22248 (D.N.M. May 28, 1998)	**4-5**
In re Nortel Networks Corp. Sec. Litig., No. 05-MD-1659 (LAP), Dkt. No. 77 (S.D.N.Y. Dec. 26, 2006)	**4.773**
Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358 (S.D.N.Y. 2002)	**4.65**
Willson v. New York Life. Ins. Co., No. 94-127804, 1995 N.Y. Misc. LEXIS 652 (N.Y. Sup. Ct. Nov. 8, 1995)	**4.6**
In re Rite-Aid Corp. Sec. Litig. ("Rite Aid I"), 146 F. Supp. 2d 706 (E.D. Pa. 2001)	**"4.5 to 8.5"**
Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130 (LBS) 1991 U.S. Dist. LEXIS 18273, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,471 (S.D.N.Y. Dec. 19, 1991)	**4.4**
In re Lucent Techs. Inc. Sec. Litig., 327 F. Supp. 2d 426 (D. N.J. 2004)	**4.343**
In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109 (D.N.J. 2002)	**4.3**
In re Dynegy Inc. Sec. Litig., Master File A-02-1571, Dkt. No. 686 (S.D. Tex. July 7, 2005)	**4.07**
In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319 (S.D.N.Y. 2005)	**4.04**
In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)	**3.97**
In re AOL Time Warner, Inc., SEC & ERISA Litig., No. 02-Civ. 5575 (SWK), 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006)	**3.69**

30. Beyond the above cases, some of which award particularly high multipliers, there has been a particular recognition in the Southern District that multipliers in the range of 3 to 4.5 have become relatively "common." See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 123 (2d Cir. 2005); In re NASDAQ Market-Makers Anti-Trust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding a 3.97

multiplier and finding fee multipliers of 3 to 4.5 to be "common"); In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (awarding a 27.5% fee on a $134.6 million commodities fraud settlement and similarly finding a 3 to 4.5 multiplier to be common); Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 368-69 (S.D.N.Y. 2002) (finding a multiplier of 4.65 to be within the standard range in the Second Circuit); Johnson v. Brennan, 2011 U.S. Dist. LEXIS 105775, at *58-*59 (S.D.N.Y. Sept. 16, 2011) (finding that "courts regularly award lodestar multipliers from two to six times lodestar").

31. At the same time, however, I feel obligated to call to this Court's attention the view, expressed by several Southern District courts, that lodestar multipliers have declined since the time of the Second Circuit's decision in Goldberger v. Integrated Resources, 209 F.3d 43 (2d Cir. 2000). The decision that most clearly articulates this view is Hall v. Children's Place Retail Stores, Inc., 669 F. Supp. 2d 399 (S.D.N.Y. 2009), which states:

> "A review of other, more recent cases reveals a trend toward awarding more modest fees. Courts appear to be finding that an award of one-third of the settlement fund is not always justified where that percentage amounts to a lodestar multiplier of substantially more than 2.0." Id. at 403 (citing cases).

It is possible that the Hall court overstates in its generalization and contrary precedents exist.[25] Indeed, virtually all the Southern District decisions referencing Hall have

[25] See, e.g., In re Adelphia Commc'ns Corp. Sec. & Der. Litig., No. 03-MDL 1529, 2006 U.S. Dist. LEXIS 84621 (S.D.N.Y. Nov. 16, 2006) (21.4% fee award on a $455 million settlement accompanied by a 2.89 multiplier); In re Converse Tech. Inc. Sec. Litig., No. 06-1825 (E.D.N.Y. June 25, 2010) (21% fee award on $255 million settlement accompanied by a 2.78 multiplier); In re Bisys Sec. Litig., 2007 U.S. Dist. LEXIS 51087 (S.D.N.Y. July 4, 2007) (30% fee award accompanied by a 2.99 multiplier).

involved cases settling for less than $100 million (a very different context).[26] Still, it is important not to overread what the Hall court is actually saying. It is most opposed to a higher than average percentage fee award being justified by a high multiplier. I certainly agree: a fee award of 33% of the recovery should not be justified by a high multiplier. But in this case the percentage sought is basically half that: only 17.5%. It would overextend the Hall court's reasoning to insist that the multiplier always remain low, even when the percentage of the recovery is at an average or below average level.

32. Although a number of courts are backing away from accepting 30% fee awards and are reducing the allowable risk multiplier to accomplish this, this does not mean that they would similarly refuse to award a reasonable percentages of the recovery where the multiplier exceeded 3. Not only is there no ceiling on multipliers under the law of the Second Circuit, but to adopt 3 (or some other arbitrary number) as a ceiling would effectively replace the percentage of the recovery approach with a lodestar approach.

33. Indeed, this Court has twice (and correctly) noted in its recent decisions that "the trend in the Second Circuit thus has been to express the attorneys' fees as a percentage of the recovery, rather than to use the lodestar method to arrive at a reasonable fee . . ." See Chin v. RCN Corporation, 2010 U.S. Dist. LEXIS 96302 at *14 (S.D.N.Y. Sept. 8, 2010); Foti v. NCO Financial Systems, Inc., 2008 U.S. Dist. LEXIS 16511 at *19 (S.D.N.Y. Feb. 20, 2008). Thus, although it would generally make sense to reduce a percentage-based fee that is itself high when the lodestar multiplier would also be higher

[26] The only exception that I have found to this generalization that Hall has been followed in cases under $100 million (in settlement size) is In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110, 128 (S.D.N.Y. 2009) (reducing a 25% fee request to a 15% fee and using a 1.62 multiplier to do so).

than the average[27] (and that is the appropriate use of the lodestar cross-check), the multiplier should not alone be controlling, because this would effectively end the use of the percentage of the recovery fee award (which remains the dominant methodology in the Second Circuit).

34. Moreover, in considering whether the requested 3.35 multiplier in this case is reasonable, this Court should also consider whether the blended hourly rate is entirely reasonable. Here, I am advised by counsel that the blended hourly rate for all time expended in this case is only $414 per hour.[28] I note that such a rate is well below the $605 per hour blended hourly rate approved by this Court in the Chin v. RCN Corporation case last year. See 2010 U.S. Dist. LEXIS 96302 at *15. In my judgment, such a blended rate is comparatively modest at a time when many attorneys on the defense side of the aisle are charging rates of $900 to $1,000 per hour. If plaintiff's attorneys cannot charge at roughly the same rates as defense counsel, a fundamental asymmetry results, which would force much work to be pushed down to associates and which would ultimately deny class members the ability to secure counsel as experienced and skilled as those on the defense side. That would preclude a level playing field in securities litigation and would produce only an illusory saving for the class.

VIII. THE LONE OBJECTION

[27] In determining what is the "average" risk multiplier, the leading study remains Logan, Moshman and Moore, supra note 24, which found 4.5 to be the average when the settlement exceeded $100 million.

[28] See Exhibit 6 to Joint Declaration (showing the total hours to be 79,011 and the total lodestar to be $32,736,353). Dividing the lodestar by the total hours yields $414.32. I am further advised by counsel that the hourly associate rate ranged from $305 to $550 per hour and partner hourly rates ranged from $625 to $800 (except for two senior partners who billed at $850 and $975 for a relatively limited amount of time). None of these rates strikes me as unusual or above average for the New York legal market.

35. I am advised that only one objection has been filed with respect to this settlement. That objection was filed by a small retail investor, who allegedly incurred a loss of approximately $155 (which appears to include a brokerage commission of $35) on a single transaction in 2007. No institutional investor has objected, and apparently only some 27 class members (only four of whom appear to be institutional investors) have opted out of this settlement. Although retail investors are, of course, entitled to object and opt out, the behavior of institutional investors better shows an informed and sophisticated reaction to the merits of a proposed class action settlement. In my academic research, I have studied the behavior of institutional investors in class actions and found that, at least over the last eight years, they have opted out from securities class actions in very large numbers when they feel the settlement is inadequate. See Coffee, Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice", 30 Cardozo L. Rev. 407 (2008). Indeed, other plaintiffs law firms now regularly solicit institutions to opt out and represent them in consolidated suits when institutions conclude that the terms of the settlement are unattractive. See Coffee, Litigation Governance: Taking Accountability Seriously, 110 Colum. L. Rev. 288 (2010). Moreover, in the ownership composition of large financial institutions, such as Wachovia, institutional investors typically account for 73% (or more) of such an institution's stock ownership.[29] Thus, given this pattern, the fact that only four institutional investors opted out in this case (two of whom, I am informed, did not even have actual losses) is an overwhelming vote of confidence for the fairness of this settlement.

[29] See The Conference Board, The 2010 Institutional Investor Report: Trends in Asset Allocation and Portfolio Composition (2010) at p. 27 (chart 14) (finding that the 1,000 largest U.S. public corporations had an institutional ownership of 73% in 2009 and 76.4% in 2007).

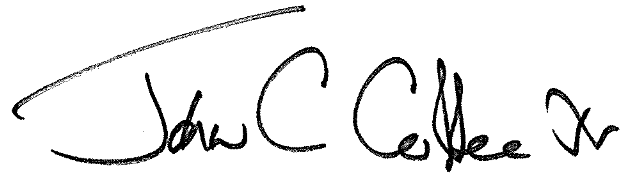
36. Examining the merits of this individual investor's objection (to the extent that it relates to the proposed fee award), I find it to rely more on rhetoric than substantive evidence. He repeatedly points out that class members tend to be passive. This is true enough for retail investors, but not for institutional investors. Although a case can be made that class counsel may sometimes trade off a lower recovery for a higher fee award, he wholly ignores that this settlement is "off the charts" in terms of the potential damages recovered. Although he provides a table of some four cases (at page 20 of his objection) in which the awarded attorneys fees fell between 7% and 13%, each of these cases was more than a decade ago and one case was more than 23 years ago. I believe I have given this court a fuller sense of the relevant comparable cases in my table at pages 11 to 13 of this declaration. Finally, he criticizes the hourly rates requested in this case as excessive, but only one of the cases that he cites was decided in the Southern District of New York. In that one case, Scott v. City of New York, No. 02-civ-9530 (S.D.N.Y. August 25, 2009), the court reduced the hourly rate to $425, but that is still above the blended rate here charged for a later period.

37. Ironically, this objecting investor argues that class counsel settled too early and thus should not be rewarded (even though class members were extraordinarily successful in terms of the recovery). If this Court were to follow his line of reasoning, the impact of such a decision is foreseeable: cases would drag out and settle slowly because plaintiff's counsel would be incentivized to maximize their hours (rather than the recovery). Predictably, the burden on courts would be enhanced.

IX. CONCLUSION

38. I recognize that an expert's role is limited and that the ultimate decision necessarily remains with the Court. Thus, I will conclude simply that, based on all the factors in this case, a 17.5% fee award is well justified, both because it is consistent with the more recent practice in large cases in the $400 to $700 million recovery range and, more importantly, because the extraordinary success obtained in the absence of any prior governmental enforcement proceeding merits judicial recognition. Ultimately, the "proof is in the pudding," and an exemplary recovery justifies a fee that is at least comparable with the normal recovery rate.

I declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge and belief.



John C. Coffee, Jr.

November 4, 2011