UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VISA CHECK/ MASTERMONEY ANTITRUST LITIGATION	MASTER FILE NO. CV-96-5238 (Gleeson, J.) (Mann, M.J.)

DECLARATION OF JOHN C. COFFEE, JR.

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

I. INTRODUCTION

1. I submit this Declaration in support of Class Counsel's Petition for Attorneys' Fees and Reimbursement of Costs and Expenses, dated August 18, 2003. In it, I address only one issue: what fee award is appropriate on the facts of this case, given both the uniquely high recovery and uniquely high risk faced by plaintiffs' counsel.

2. To summarize my principal conclusions at the outset, this is probably the largest class action settlement ever presented to a federal court for its approval (the only other arguable contender, *In re Cendant Corp. Sec. Litig.*, 264 F.3d 201 (3d Cir. 2001), is simply not comparable in any meaningful sense because (i) it involved almost no litigation risk; (ii) it was quickly resolved; (iii) it involved no real injunctive or prospective relief, and (iv) the Third Circuit determined the fee award by enforcing a pre-existing retainer agreement between class counsel and the lead plaintiffs). In contrast, this case presents the clearest example that I have ever seen of a "You-bet-your-firm" case in which the principal law firm that carried this case forward for plaintiffs for over six and one half years of uncompensated litigation was forced to

risk its survival as a firm on the outcome of a single, very high-risk case. Although I have testified in several dozen large class actions regarding fee awards, I have encountered no other case in which the principal law firm devoted the majority of its attorneys' hours over several years to the prosecution of a single action on a contingent fee basis. Indeed, I would have doubted that any firm could have accepted such a level of risk. Here, however, one firm did, persisting over six years and finally achieving not simply an exemplary recovery, but a record one.

3. As a result, the question is now: should counsel be rewarded in a manner commensurate with the risk they assumed and the success they achieved? My answer will be that not only would generous compensation be just and reasonable under these circumstances, but it is precisely what rational class members would have wanted to be done, if they could have drafted an enforceable fee contract at the outset of this case to incentivize their counsel. Yet, although I believe that generous compensation would be fully justified, I must also conclude that the fee award requested by class counsel is, on a percentage basis, below that received by class counsel in the most closely analogous category of "mega fund" cases. As discussed below, the best available evidence shows that fee awards averaged 18.5% in class actions generally and 21.34% in antitrust "mega fund" cases; these benchmarks suggest that the requested fee in this case falls easily within the range of reasonableness, even before its special facts are considered.

4. Because this Court has received detailed and voluminous submissions from a variety of experts and from Class Counsel, I will attempt to economize on the aggregate paper that this Court must read by not restating the facts and conclusions that are set forth in more detail in the declarations of the other experts or the memoranda prepared by counsel. In

particular, I will not restate or re-argue the antitrust analysis prepared by Professor First or the valuation of the recovery analysis prepared by Professor Fisher, both of whom are respected experts in these fields, but will simply note their principal conclusions. My focus will instead be on providing additional information, including in particular empirical data, dealing with the level of fee awards in the most comparable recent cases and suggesting how the developing criteria, in both this Circuit and the federal courts generally, should apply to this case.

5. A brief table of contents to this declaration may be useful. Part II of this declaration lists my relevant experience. Part III assesses the level of success achieved by class counsel, both evaluating the relief obtained in this case and comparing it with the largest "all time" recoveries in class actions generally and in antitrust class actions. This section also includes data on the fee recoveries in other "mega fund" antitrust cases. Part IV then surveys the available literature on fee awards in class actions with a special focus on the "mega fund" case. Part V then turns to the issue of risk and the unique level of commitment made by class counsel in this case. Part VI set forth a "lodestar cross-check," and Part VII contains my conclusions and recommendations.

II. BACKGROUND AND QUALIFICATIONS

6. 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.

7. 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 similar cases. Thus, rather than duplicate class counsel's legal memorandum, I will focus instead on recent empirical studies regarding the typical recovery and fee award in class litigation.

8. I have on several occasions testified before Congressional committees with regard to 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 topic of class actions, including serving for the past five years as the principal academic lecturer at the annual ABA National Symposium on Class Actions. 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 (which chiefly seeks to regulate securities class actions), and I have also testified (both in person and by affidavit) on fee awards in a number of class actions.

9. 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): Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983); Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Problems 5 (Summer 1985); Coffee, 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); Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987), Coffee and Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposed Legislative Reform, 81 Colum. L. Rev. 261 (1981); Coffee, Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L. Rev. 625 (1987); Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995), Coffee, The Future of the Private Securities Litigation Reform Act: or Why the Fat Lady Has Not Yet Sung, 51 Bus. Law. 975 (1996); Coffee, 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 Products, Inc. v. Windsor*, 521 U.S. 591, 621(1997); *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998), cert. granted, 117 S. Ct. 2503 (June 27, 1998); *In Re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55

F.3d 768, 801, 821 (3d Cir. 1995); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 618, 636 (3d Cir. 1995).

10. 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 plaintiffs' attorney fee awards in direct and derivative shareholder actions. In connection with serving as Reporter for the American Law Institute, I have interviewed and discussed fee award procedures 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.

11. I have also served as an expert witness in a number of significant recent class action cases, including *Amchem Products, Inc. v. Windsor*, 521 U.S. (1997); *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. Secs. Litig.*, 182 F.R.D. 144 (D.N.J. 1998) and 109 F.Supp.2d 235 (D.N.J. 2000); *In re Waste Management, Inc. Securities Litigation*, No. 97C7709 (N.D. Ill. 1999); *In re Lease Oil Antitrust Litigation*, 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. SETTLEMENT SIZE AND DEGREE OF SUCCESS

12. The benefits from this settlement fall under three headings:

First, there is the combined value of the Net Settlements Funds. Although $3.05 billion is being paid by the two defendants, their payments are staggered over a multi-year period. Professor Fisher has calculated the discounted present value of this component of the settlement as $2,589,000,000. Alone, this would be the second largest settlement ever approved in a federal court.

Second, there is the value of the interim rate reductions, which went into effect on August 1, 2003. These reductions are to remain in force under each of the Visa and MasterCard Settlements Agreements until December 31, 2003 and are capable of accurate calculation. Professor Fisher estimates the value of these fee reductions to be $794.4 million, thus making the sum of the first two components $3,383,400,000 - - or, by itself, the largest settlement ever approved by a federal court, as discussed below.

Third, there is the value of the prospective and injunctive relief. Both Visa and MasterCard will rescind their "Honor All Cards" tying rules, effective January 1, 2004. Each will implement new rules to clearly identify Visa and/or MasterCard POS Debit Devices as "Debit Cards," thereby ending persistent customer confusion regarding the nature and identity of such cards. Visa and MasterCard will also implement rules giving each POS Debit Device a unique Bank Identification Number ("BIN"), with 80% compliance to be achieved by July 1, 2005 and 100% by January 1, 2007. This requirement is further enforced by rules limiting the ability of Visa and MasterCard to charge fees to merchants that decline their debit services. More generally, the Visa and MasterCard Settlement Agreements encourage competition and will likely reduce interchange fees on both off-line debit, on-line debit, credit cards and other POS Debit Devices. The present value of the economic benefits of this relief over simply the next ten years is estimated by Professor Fisher as being not less than $25 billion. Put simply, the projected benefits from this action are an order of magnitude greater than any benefits that have ever been presented to any court in the context of class action litigation.

13. Understandably, a tendency exists for courts to ignore, or give only passing attention to, prospective or non-pecuniary relief in appraising the adequacy of a class action or determining the appropriate fee award. In this case, however, it is the prospective relief that represents the greatest achievement. Impartial observers have made this point over and over in analyzing the settlement. Consider just the following comments:

> "The centerpiece of the settlement is the elimination of the HACRs,[1] which required merchants to accept the association's offline (signature-based) debit cards as a condition of accepting their credit cards... Longer term, eliminating the HACRs creates a more level playing field for future network competition." David A. Balto, "Life After the Wal-Mart Case," Credit Card Management, Vol. 16, No. 5, p.48 (August 2003).

Mr. Balto, a partner at White & Case in New York who formerly headed the policy office of the Federal Trade Commission's Bureau of Competition, also concluded in the above article that:

> "Once in a generation an antitrust case offers a chance to restructure an industry. Twenty years ago the settlement of the Justice Department Suit against AT&T Corp. led to a proliferation of consumer choice, more innovation, dramatically lower prices, and major telecommunications industry restructuring." *Id.*

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[1] "HACRs" is, as this Court of course understands, an acronym for "Honor All Cards Rules."

He then added that the instant settlement offered the same promise of "once in a generation" reforms. James Daly, the Editor of Credit Card Management, has similarly described "the demise of the honor-all-card rules" as the "revolutionary outcome" of this case. *See* James J. Daly "Cards Uncorked," Credit Card Management, Vol. 16 No. 4, at p. 4 (July 2003). Robert Lande, Venable Professor of Law at the University of Baltimore School of Law, made basically the same point in his assessment of the "stunning $3 billion antitrust victory" in this case:

> "As eye-catching as the $3 billion settlements are, the future savings to consumers from this case are likely to be even larger...."

See Robert H. Lande, "A New Future for Debit Cards," The Daily Record, July 18, 2003. Echoing this theme, the Economist opined that "[t]he plaintiff's real victory, however, was to force Visa and MasterCard to lower their fees for offline debits." *See* "Plastic Pricing," Economist.com (May 1, 2003). Finally, The New York Times described the prospective relief as likely to be "more significant than the dollar amount of the settlement." *See* Jennifer Bayot, "Settlement Seen As Changing Ways Consumers Use Debit Cards," N.Y. Times, May 2, 2003 at C-1. In short, properly viewed, this is a landmark injunctive action to which is appended over $3 billion in compensatory relief.

14. Another way to understand the magnitude of plaintiffs' success in this case and to place this settlement in its proper context is to compare it against the largest class action settlements ever obtained, either in class actions generally or in antitrust class actions. In making the following lists, I have principally relied upon Logan, Moshman & Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," 24 Class Action Reports 167 (Issue No. 2 March-April 2003). Although there have been a number of studies of class action recoveries and fee awards,

this is the fullest and most recent. Based largely on their sample of 1,120 cases, the dozen largest recoveries or settlements in class actions appear to have been, as follows:

TABLE 1[2]

CASE	RECOVERY	YEAR
1. Price (Miles) v. Philip Morris	$10,100,500,000	2003
2. Cendant Securities Litigation	$3,186,500,000	2000
3. Cox v. Shell Oil Co.	$1,131,803,000	1995
4. NASDAQ Market-Makers	$1,027,000,000	1998
5. Shaw v. Toshiba American Info. Sys.[3]	$2,000,000,00 ($1,000,000,000 in cash)	2000
6. Brand Name Prescription Drugs	$696,667,000	2000
7. WPPSS (Washington Public Power Supply Systems)	$687,000,000	1995
8. Standard Oil/British Petroleum Litig.	$640,000,000	1987
9. Corrugated Container	$550,000,000	1983

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[2] The citations to the cases listed in this table are as follows: *Price (Miles) v. Philip Morris, Inc.*, No. 00-L-112 (Ill. Cir. Ct. Madison Co. March 21, 2003); *In re Cendant Corp. Securities Litig.*, 109 F.Supp. 2d 285 (D.N.J. 2000) vacated and remanded, 264 F.3d 201 (3d Cir. 2001), on remand, 243 F.Supp. 2d 166 (D.N.J. Feb. 5, 2003); *Cox v. Shell Oil Co.*, 1995 WL 77563 (Tenn. Ch. Obion Co. Nov. 17, 1995); *In re NASDAQ Market-Makers Antitrust Litig.* 187 F.R.D. 465 (S.D.N.Y. 1998); *Shaw v. Toshiba American Info. Sys.*, 91 F.Supp. 2d 942 (E.D. Tex. 2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 2000-1 Trade Cas. (CCH), Para. 72, 835, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000); *In re Washington Public Power Supply Sys. Securities Litig.* (WPPSS), 779 F.Supp. 1063 (D. Ariz. 1990), vacated and remanded, 19 F.3d 1291 (9th Cir. 1994); *In re Standard Oil/British Petroleum Litig.*, No. 126760 (Ohio Ct. C.P. Cuyahoga Co., July 2, 1987); *In re Corrugated Container Antitrust Litig.*, 1983-2 Trade Cases (CC) Para. 65, 628 (S.D. Tex.) modified 1985-1 Trade Cases (CCH), Para. 66, 45 (S.D. Tex. 1983); *Naef v. Masonite Corp.*, No. 94-4033 (Ala. Cir. Ct. Mobile Co. Jan. 23, 1998); *Sandpiper Village Condominium Ass'n v. Louisiana-Pacific Corp*, No. 95-879 (D. Ore. Apr. 26, 1996); *In re Bankamerica Securities Litig.*, No. 85-4779 (C.D. Cal. Apr. 26, 1988).

[3] Although the settlement in *Shaw v. Toshiba American Info Systems*, 91 F.Supp. 2d 942 (E.D. Tex. 2000), was on its face for $2,100,000, only $1 billion was in cash, with the remainder being in coupons ("Toshiba dollars") and replacement patches. The court valued the settlement at between $1 and $1.1 billion. *Id.* at 972.

10. Naef v. Masonite Corp.	$528,000,000	1998
11. Sandpiper Village v. La-Pacific	$526,800,000	1996
12. Bankamerica Securities	$490,000,000	2002

Of these decisions, both the first (*Price v. Philip Morris*) and the third (*Cox v. Shell Oil Co.*) were mass tort cases that were settled in rural state courts, the first involving tobacco and the second involving a type of plastic pipe used in home building and plumbing. Neither case furnishes much guidance, and the first is still on appeal. Neither could likely have been certified in federal court today in the wake of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Thus, prior to this case, *Cendant* appears to have been the largest settlement yet approved in federal court, but it is an idiosyncratic case that has few parallels to this settlement. In *Cendant*, the Third Circuit found that "*Cendant* (the main defendant) virtually conceded liability." 264 F.3d 201, 218 (3d Cir. 2001). Moreover, at the outset of the case, the District Court had run an auction to determine both class counsel and the appropriate fee award. The Third Circuit found this procedure to violate the Private Securities Litigation Reform Act ("PSLRA"), and so it reinstated the original fee agreement between the lead plaintiffs (three very large pension funds) and their counsel. Both *Cendant*'s auction procedure for the selection of lead counsel and the Third Circuit's deference in that case to a retainer agreement between the very sophisticated lead plaintiffs and their class counsel make its mode of analysis largely inapplicable to this case.

15. Nonetheless, the data compiled by Logan, Moshman and Moore shows that only *Cendant* rivals the direct monetary recovery in this case (and *Cendant* involved no prospective or injunctive relief). When supplemented with some more recent cases, the Logan, Moshman and Moore data also enables me to assemble a list of the dozen largest antitrust recoveries in federal

class actions, which is set forth below and constitutes in my judgement a more comparable and useful sample:

TABLE 2: 12 LARGEST ANTITRUST CLASS ACTION RECOVERIES[4]

CASE	RECOVERY	YEAR	ATTORNEY'S FEE AWARD (INCLUDES EXPENSES IN SOME CASES)
1. NASDAQ Market-Makers	$1.027 billion	1998	14.4%
2. Brand Name Prescription Drug	$696 million	2000	25.4%
3. In re Corrugated Container	$550 million	1983	8.0%
4. In re Vitamins Antitrust Litig.	$365 million	2001	34.6%
5. In re Buspirone Patent[5]	$220 million	2003	33.3%
6. In re Lease Oil	$190 million	1999	35.1%
7. In re Plywood Antitrust Litig.	$171.4 million	1983	14.9%
8. Petroleum Products Litig.	$140 million	1994	21%
9. In re Sumitomo Copper Litigation	$132 million	2000	28.3%

[4] The citations to the cases listed in this table are as follows: *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000); *In re Corrugated Container Antitrust Litig.*, M.D.L. No. 310 (S.D. Tex. Sept. 1, 1983); *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 16, 2001); *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999); *In re Plywood Antitrust Litig.*, M.D.L. 159 (E.D. La. Apr. 29, 1983); *In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litig.*, No. MDL 150, 1994 WL 675265 (C.D. Cal. Aug. 11, 1994); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999); *In re Infant Formula Antitrust Litig.*, MDL No. 878 (N.D. Fla. Sept. 7, 1993); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-19 (E.D. Mich. Nov. 26, 2002);*In re Methionine Antitrust Litig.*, No. C 99-3491, MDL No. 00-1311, at 8-9 (N.D. Cal. Oct. 3, 2002).

[5] This decision, which was rendered by United States District Judge John G. Koetl on April 11, 2003, was too recent to be included in the Logan, Moshman and Moore sample. *See In re Buspirone Patent*, 01-MD-1410 (S.D.N.Y. April 11, 2003).

10. In re Infant Formula Antitrust Litig.	$125.7 million	1993	26.3%
11. In re Cardizem Antitrust Litig.[6]	$110 million	2002	30%
12. In re Methionine Antitrust Litig.	$107 million	2002	23.3%

This list seems to include all antitrust recoveries over $100 million;[7] the next largest recovery ($90.5 million) came in *In re Antibiotics Antitrust Litigation*, a 1975 case in which the court awarded a 28.3% fee. If we simply aggregate the recoveries in the foregoing dozen cases and their corresponding fee awards, the average fee award in these cases on a weighted average basis comes to 21.34 % of the aggregate recovery.

16. Even this approach ignores the trend of the recent cases. Here, it must be noted that, out of three lowest fee awards (as a percentage of the recovery) in the above sample, two were awarded in 1983 (*In re Corrugated Container* and *In re Plywood*). In my judgment, these lower awards were likely at least partially the product of the reflexive use of the lodestar method in the early 1980s, whose use was then mandated by the Fifth Circuit (in which Circuit both *In re*

[6] This decision, which was rendered by United States District Judge Nancy G. Edmunds on November 26, 2002, was also not included in the Logan, Moshman and Moore sample, possibly because it was too recent. *See In re: Cardizem CD Antitrust Litig.*, Master File No. 99-md-1278 (E.D. Mich. November 26, 2002).

[7] This list does not include one very recent decision: *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 2003 U.S. Dist. LEXIS (D.Me. July 9, 2003), which consisted of cash payments of $67,375,000 plus the distribution of $75.7 million in CDs to schools and libraries, for a total of $143 million. Because there are issues surrounding the valuation of "in kind" consideration to cy pres beneficiaries, I have excluded this case from my list. The Court awarded class counsel's requested fee of 8.7% of the total recovery or 18.5% of the cash recovery. *Id.* at n.50. Also, this action was quickly resolved within two years and had followed closely on the heels of an investigation by several state attorneys general.

Corrugated Container and *In re Plywood* were decided). Then, after a highly critical report by a Third Circuit Task Force in 1985,[8] the popularity of the lodestar waned, and a strong national trend toward greater use of the percentage method has been evident for some time. In the Second Circuit, district courts have repeatedly indicated their preference for the percentage of the recovery method and have noted a marked trend in favor of its use. *See In re American Bank Note*, 127 F.Supp. 2d 418, 431 (S.D.N.Y. 2001; *Baffa v. Donaldson*, 2002 U.S. Dist. LEXIS 10732 (S.D.N.Y. June 17, 2002) at *3. As the foregoing table shows, the nationwide trend in antitrust mega fund cases has been to award over 20%, and sometimes over 30%, even in cases with recoveries in the several hundred million range. Indeed, Logan, Moshman and Moore find that across all antitrust cases (and there were one hundred antitrust cases in their sample), the average percentage awarded has been 20.6%.[9] Because the weighted average fee award in the foregoing antitrust settlements over $100 million was higher (*i.e.*, 21.34%), this is strong evidence that the percentage awarded does not necessarily decline as the recovery enters the "mega fund" zone. Rather, courts seem to focus more on the level of risk and the exemplary nature of the recovery. Finally, if we drop *Corrugated Container* and *Plywood* from the foregoing sample as now disfavored lodestar decisions, then the aggregate fee award in the remaining ten cases rises to 24.05%.

17. A subtler way to assess the level of success associated with this settlement is to

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[8] *See* "Court Awarded Attorney Fees: Report of the Third Circuit Task Force," 108 F.R.D. 237, 248 (1985) (criticizing lodestar approach as creating a disincentive for settlement).

[9] *See* Logan, Moshman and Moore, *supra*, at Table 2.

compare the settlement against the damages initially sought. Plaintiffs' expert argued that the maximum recoverable losses were in the neighborhood of $24.91 billion to $31.56 billion (before prejudgment interest).[10] On this basis, simply the present value of the compensatory relief ($3.38 billion) represents between approximately 13.6% and 10.7% of those amounts. Obviously, the question becomes: how do these ratios compare with those in other large settlements? Although there appears to be no data available on the relationship between damages sought and actual recoveries in antitrust cases, there is such data available for securities class actions, which are a functionally similar context. The latest empirical survey shows that in cases after 1995 (the date of the Private Securities Litigation Reform Act (or "PSLRA")), the median settlement has amounted to 2% of estimated damages when the estimated damages exceeded $1 billion. Cornerstone Research, "Post-Reform Act Securities Case Settlements, Cases Reported through December 2002" (2003), at Figure 5. Here, the recovery of between 10.7% to 13.6% of the estimated damages is between 5 and almost 7 times better than the typical 2% ratio between the actual recovery and the estimated damages in Cornerstone's study. To put this level of success in perspective, it is useful to note that in *In re Ikon Office Solution, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000), the court found the settlement to be fair and adequate (and to justify a 30% fee award) in part because it amounted to "approximately 5.2% of the best possible recovery for those who acquired common stock, and approximately 8.7% for those who acquired convertible preferred stock." 2000 WL 567104 at *17 (E.D. Pa. May 9, 2000). If a 5.2% recovery of the estimated damages justified a 30% fee award, then this settlement with its 10.7%

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[10] *See* Supplemental Expert Report of Franklin M. Fisher, dated September 23, 2002, at pp. 41 to 42. Under an "Alternative Scenario," Professor Fisher calculates the damages as between $23.08 to $30.3 billion (exclusive of prejudgment interest). *Id.* at 43.

to 13.6% ratio would seemingly justify a significantly higher fee award (although in fact a much lower percentage fee is actually requested). Moreover, this analysis has still not yet factored in the issue of risk.

18. Cornerstone's recent study of securities class actions finds that the average settlement in such cases is slightly below \$25 million (and falls to below \$17 million if the \$3.19 billion *Cendant* settlement is eliminated from the sample). *Id.* at Figure 9. Here, even if we consider only the present value of the compensatory relief in this settlement, that \$3.38 billion figure is well over one hundred times the average securities class actions settlement. Of course, the antitrust laws provide for treble damages, and this may explain in part the size of this recovery. But it is questionable whether defendants would have been able to settle for anything more without having to make an assessment on their members. Indeed, Visa has had to amend its bylaws to prevent defections by dissatisfied members. *See* Jathon Sapsford and Mitchell Pacelle, "Visa Puts Squeeze on Defectors," Wall Street Journal, August 5, 2003 at C-1 (noting that costs of this settlement were leading some banks to seek to leave Visa); Sheryl Jean, "Visa Plan for Card Fee Angers TCF," St. Paul Pioneer Press, August 5, 2003 (noting Visa statement that it instituted "settlement service fee" in case check card volumes decline and Visa needs more money to pay its \$2 billion share of settlement). Realistically, plaintiffs appear here to have recovered as much as was possible.

19. Other studies also illustrate just how "off the charts" this recovery was. The Federal Judicial Center's 1996 study of class actions in four federal district courts (which study covered all forms of class actions, not just securities class actions) found that the median settlement in these courts ranged between \$1,978,725 (the Eastern District of Pennsylvania) and

$5,100,000 (the Northern District of California). *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, AN EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: Final Report to the Advisory Committee on Civil Rules (1996) (hereinafter, "Federal Judicial Center Study"), paragraph 19, at Table 16A4. On this basis, the present value of the compensatory relief in this settlement (*i.e.*, $3.38 billion) is over 600 times the average class action settlement in the most "generous district court" in this study.

IV. <u>THE PROPOSED ATTORNEY'S FEE AWARD</u>

The Empirical Backdrop

20. Although the decision as to the appropriate fee award ultimately involves a normative judgment, it should begin with an awareness of the empirical reality. This requires the Court to understand what the prevailing range of fee awards in similar cases actually is. Such information at least provides a realistic frame of reference in an area of the law where the need for predictability and legal certainty is high. Plaintiffs' attorneys need to be able to make accurate judgments about the fee determinations that courts are likely to make years later if these attorneys are to be able to undertake lengthy and risky litigation on a contingent fee basis. A law firm simply cannot invest millions of dollars plus billable time in an action based upon an anticipation of the likely fee award if the law is unclear or unpredictable.

21. Again, the Logan, Moshman and Moore study assembles the fullest and most recent data base. Their study includes 1,120 class actions of all varieties. It finds that, across all these cases, attorneys' fees plus judicially awarded expenses came to 18.4% of the recovery. More important, however, may be their findings about "mega fund" cases - - that is, cases in which the recovery is above $50 million. Their data permits grouping by recovery level so that it

becomes possible to gain more comprehensive information about the fee awards in "mega fund" cases:

<u>TABLE 3: FEE AWARDS IN "MEGA FUND" CASES</u>

<u>RECOVERY RANGE</u>	<u>NUMBER OF CASES</u>	<u>FEES AND EXPENSES AS A PERCENTAGE</u>
1. $100 million and over	64	15.1%
2. $75 to $100 million	26	20.9%
3. $50 to $75 million	37	23.6%

In short, the percentage awarded in these "mega fund" cases often exceeds the 18.4% that was the overall average for the total of 1,120 class actions that they analyzed. They also found evidence that the percentage awarded had increased over the last decade. In 1990, in a prior study that covered 404 cases, they found that the average percentage awarded was 14.8%. In 2003, with 1,120 cases in their sample (which <u>included</u> the earlier 404 cases), the average percentage had risen to 18.4%. Hence, older cases may not be representative of current trends or norms.

22. Because the Logan, Moshman and Moore study covers every type of class action, a potential problem exists in that it may over-aggregate, effectively grouping apples with oranges, instead of examining a more precise context. As noted earlier at paragraph 16, these authors found the average fee award in all antitrust class actions to be 20.6% (versus 21.34% in all "mega fund" antitrust cases or 24.05% in recent "mega fund" antitrust cases). Yet, as a further cross-check, it is prudent to consider some other more specialized studies. While no study has examined in depth antitrust class actions, the most analogous category that has been

studied is that of securities class actions. Here, the most complete analysis of fee awards in securities class actions has been conducted by the National Economic Research Associates, an economics consulting firm. For the fullest statement of their findings, *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 to December 1994, the NERA Study reached a number of findings based on data that is both more current and reliable than that underlying other class action studies. On the central question of attorneys fees, this study reports:

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

23. Given the importance 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 5: PLAINTIFFS' 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%
$50.00 + Million	2	31.67%	31.67%
Total or Average:	**289**	**31.71%**	**33.33%**

Here, it is immediately apparent that the requested fee (18% of the present value of the compensatory relief) will fall well below these prevailing averages.

24. Another recent study of attorney fee awards, prepared by Vincent O'Brien of the Law & Economics Consulting Center, covered securities fraud cases from April 1988 through September 1996 and collected data from some 1280 securities class action cases. *See* Vincent E. O'Brien, A Study of Class Action Securities Fraud Cases, 1988-1996 (the "O'Brien Study"). Examining the period from April 1993 to September 1996, the O'Brien Study found that the average fee awarded to plaintiffs' counsel in securities cases amounted to 32% of the settlement fund (which was up from the 29% level that was the average from April 1988 to March 1993). This result is only slightly higher than the 31.7% average fee reported in the NERA Study, and seems closely consistent with that study. The O'Brien Study also reports that some other studies (whose methodology it questions) have found the average fee award to be as high as 40% of the settlement fund. (*See* O'Brien Study, Part III, page 2).

25. Of course, both the NERA Study and the O'Brien Study focus only on securities class actions. In that light, it may be useful to consider another wider-angled look at the data. The earlier noted 1996 study by the Federal Judicial Center focused on all class actions resolved or settled over a two year period in four selected federal district courts (the Eastern District of Pennsylvania, the Northern District of California, the Southern District of Florida, and the Northern District of Illinois) and reached reasonably similar findings to the NERA Study on fee awards. These four districts were chosen because each had substantial experience with, and a high volume of, class actions; thus, they may be more comparable to the practice in New York than would a more national study. Although the Federal Judicial Center study had a smaller

sample than Logan, Moshman and Moore, it covered all class actions in these courts (not just securities class actions). Nonetheless, it reported findings very similar to those in the O'Brien and NERA studies. As to the size of attorney fee awards as a percentage of the recovery, the Federal Judicial Center Study found:

> "Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement." (*Id.* at 69).

Interestingly, there was very little variation among the four district courts surveyed in this study. Although geographically and demographically diverse, each district seemed to award fees within the same narrow percentage-of-the-recovery band.

26. As a result, the findings across these different studies show some disparities, but they are irrelevant for purposes of this case because, as next discussed, these figures exceed the 18% requested in this case. As noted earlier, Logan, Moshman and Moore find the average fee award in the one hundred antitrust class actions in their study was 20.6% (while their figure for the average fee award in all class actions was 18.4%). In securities class actions, the average fee award appears to be over 30%, even in the case of actions in which the recovery exceeds $50 million (which was the highest level for which data was tabulated). More important, in the case of mega fund antitrust class actions (defined for present purposes as recoveries over $100 million), Table 2 above showed that recoveries over 25% were common, and that the weighted average fee award in these "mega fund" antitrust cases was 21.34% (or 24.05% in more recent "mega fund" antitrust cases). None of these conclusions should surprise this Court, as this Court has previously noted on several occasions that a 25% fee award range was the operative benchmark range today in complex commercial class actions. *See Snapp v. The Topps Company,*

Inc., 1997 WL 106687 (E.D.N.Y. Feb. 12, 1997) at *3 (noting "25% perhaps being thought of as the 'benchmark'") (Gleeson, J.); *In re Int'l Murex Technologies Corp. Secs. Litig.*, 1996 WL 108899 (E.D.N.Y. Dec 4, 1996) at *4 (same) (Gleeson, J.); *Slomovics v. All For A Dollar, Inc.*, 906 F.Supp. 146, 151 (E.D.N.Y. 1995) (same) (Gleeson, J.).

V. Risk and Delay

27. The foregoing analysis has been largely quantitative, comparing this case to the available data about other cases. While useful, such a quantitative analysis necessarily omits any assessment of the level of risk assumed by plaintiffs' counsel and the degree of commitment made by them in taking this case on a contingent fee basis. As next discussed, this is the context in which the facts of this case are most unique and unequaled.

28. High risk and high return naturally go together. A consensus exists among courts and commentators that a higher percentage fee award is appropriate in a higher risk case. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (justifying a 28% fee award on a $96.8 million recovery based on risk and exemplary result); *Bebchick v. Wash. Metro Area Transit Comm'n*, 805 F.2d 396, 408 (D.C. Cir. 1986). District courts in this Circuit have similarly justified 30% fee awards based on the risk assumed by counsel and the novelty of the legal theory. *See e.g., Steiner v. Williams*, 2001 U.S. Dist. LEXIS 7097 (S.D.N.Y. 2001). Thus, the real issue is: how does the court appraise the riskiness of an action? Multiple elements necessarily go into this assessment. Among these are: (1) the legal difficulty and complexity of plaintiffs' legal position; (2) the degree to which plaintiffs could piggyback on governmental actions or other proceedings; (3) the foreseeable period over which counsel would have to litigate without compensation; and (4) the undiversifiable risk to the individual firm from the action (that

is, it is far safer to undertake ten actions each having a 25% chance of success than to expend the same total resources on a single action having the same 25% chance). Each of these factors is examined briefly below.

29. A useful perspective on the legal risk inherent in this action can be gained from the contemporaneous assessments of impartial experts. Here, numerous antitrust experts expressed the view at the outset of this action that plaintiffs had little chance of success. For example, in 1996, The American Banker quoted neutral legal observers saying that the action would "be difficult to prove 'because the case does not fit into the traditional antitrust box. Most antitrust cases fail.'" *See* Lisa Fickenscher, "2 Retail Giants Sue Visa Over Having to Take Debit Cards Series," American Banker, Vol. 161, No. 210, October 31, 1996, 1996 WL 14013117. Others echoed this assessment, quoting observers who were "not optimistic about the retailers' chances" and who "believe Visa will not lose the case." *See* Joanne Kolor, "The Online-Offline Debit Card Debate," Bank Technology News, January 1, 1997, 1997 WL 9510979; *see also*, "Merchants Go to Bat for On-Line Debit," Bank Network News, Vol. 15, No. 13 November 28, 1996, 1996 WL 11829649 ("[M]any believe the merchants face an uphill fight."). Even after class certification was granted in 2000, one expert, Anita Boomstein, a partner at Hughes, Hubbard and Reed LLP in New York, still predicted defeat for plaintiffs:

> "I think realistically in this case, the plaintiffs have a very difficult burden of proof, and they would face the same burden of proof whether it was class or merely an action on behalf of the individual retailers that banded together to bring the suit. I think as a practical matter that the ultimate outcome is not necessarily going to be different." *See* "Class Certification Granted in Lawsuit," Card News, March 8, 2000, 2000 WL 4447399.

30. The reasons for their pessimism seem clear. As Professor Harry First points out in

his declaration, it has been uncertain for some time whether courts would continue to follow a *per se* approach to tying or whether they would adopt a "rule of reason" approach. The general tendency of the Supreme Court in antitrust cases has recently been to favor a "rule of reason" approach. *See State Oil v. Khan*, 522 U.S. 3 (1997). Indeed, the D.C. Circuit has expressly taken a "rule of reason" approach to tying in its influential *Microsoft* decision. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (Oct. 9, 2001). For these and other reasons, Professor First concludes that "plaintiffs undertook an extremely risky case, one which was well outside the mainstream of cases generally brought by antitrust plaintiffs."

31. In evaluating the prospects for litigation success or a settlement, experienced litigators would also consider not only the legal merits of the action, but also the litigation track record of their adversary. Visa has long had a reputation as a tough aggressive adversary, who does not settle. Indeed, in two major prior antitrust cases, it had been entirely successful. *See National Bancard Corporation (Nabanco), v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986) and *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995). At a minimum, this track record realistically implied to plaintiffs' counsel that they were in for a long fight, which they would have to finance themselves, as they were litigating on a contingent fee basis.

32. Still, another obvious reason for pessimism was that, despite vigorous efforts, plaintiffs and their counsel had been unable to convince either the Federal Trade Commission or the Antitrust Division to join with them. Given the obvious desirability of greater competition, this reluctance on the part of the regulators can only be read as reflecting doubts on their part about the legal or factual merits of plaintiffs attempt to mount a "tying" attack.

33. Of course, the Antitrust Division did ultimately bring its own partially overlapping action, but not until October 7, 1998, nearly two years later, and it never attacked the critical "Honor All Cards Rules." Moreover, the Antitrust Division's case appears to have been the mirror image of the traditional antitrust litigation in which the private enforcer piggybacks on the government's efforts. Based on this Court's July 3, 2000 modification of its protective order to permit the sharing of discovery material, the Antitrust Division received the benefits of the work done by plaintiffs' counsel, but, in part because plaintiffs' counsel had already conducted their own discovery, plaintiffs' counsel did not benefit or receive information from the Government. Rather, information basically flowed in one direction only: from plaintiffs to the Government.

34. A critical factor in evaluating risk is the period that plaintiffs' counsel must go uncompensated, in effect financing the imputed costs of the action (including their associates salaries and their own overhead) out of the firm's capital or the revenues received from other clients. This action has lasted over six and one half years, and Mr. Constantine, its principal architect, states in his declaration that he began devoting substantial time to it well before it was filed. Earlier, I compared this action to the dozen largest antitrust class actions. Returning to that same comparison, I find this case has lasted longer than any other case on that list, with two exceptions, as indicated below:

TABLE 4: DURATION OF LARGEST ANTITRUST CLASS ACTIONS

CASE	DURATION
1. NASDAQ Market Makers	4.5 years
2. Brand Name Prescription Drug	6.0 years

3. In re Corrugated Container	6.5 years
4. In re Vitamins Antitrust Litig.	3.3 years
5. In re Buspirone Patent	2 years[11]
6. In re Lease Oil	3.8 years
7. In re Plywood Antitrust Litig.	9.0 years
8. Petroleum Products	20 years
9. In re Sumitomo Copper Litig.	3.6 years
10. In re Infant Formula	3.0 years
11. In re Cardizem Antitrust Litig.	4 years
12. In re Methononine Antitrust Litig.	3.3 years

In addition, if we re-examine the largest class action recoveries in the Logan, Moshman and Moore study, we find the same pattern: only one case remained pending longer than this action.

TABLE 5: DURATION OF LARGEST CLASS ACTIONS

CASE	DURATION
1. Price (Miles) v. Philip Morris	4.4 years
2. Cendant Securities Litig.	4.8 years
3. Cox v. Shell Oil Co.	2.2 years
4. NASDAQ Market Makers	4.5 years
5. Shaw v. Toshiba American Info. Sys.	1 year
6. Brand Name Prescription Drugs	6.0 years

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11 Some 26 actions were consolidated before Judge Koetl in this proceeding in 2001. *See In re Buspirone Antitrust Patent Litigation*, 162 F.Supp. 2d 686 (JPML 2001). Most appear to have been filed in 2001, but I am unable to say that all were filed in that year. The two year duration estimate is correct at least for most of these cases, and is in any event correct for the period between consolidation and settlement approval.

7. WPPSS	12.5 years
8. Standard Oil/BP Litig.	1.0 years
9. Corrugated Container	6.5 years
10. Naef v. Masonite Corp.	3.1 years
11.Sandpiper Village v. Louisiana Pacific	0.8 years
12. Bankamerica Securities	4.0 years
13. Waste Management Securities	2.6 years

35. Overall, Logan, Moshman and Moore find that the 1,120 cases in their class action study remained pending on average 4.5 years (not surprisingly, with the cases compensated on a lodestar basis remaining pending somewhat longer than those compensated on a percentage fee basis). *See* Logan, Moshman and Moore, supra, Table 1. If one further refines their data and looks only at the cases with recoveries of over $100 million (some 64 cases), the duration is slightly longer (4.8 years). But, however one slices the data, this case has remained pending longer by roughly two years (or roughly 45% longer). This erodes the value of plaintiffs' counsel's recovery (because the plaintiffs counsel are in effect being paid in part for work they did in 1996, which will be more than seven years ago before payment is received). More important, it places a plaintiff's law firm under great organizational stress, as some attorneys must subsidize the rest of the firm out of their current earnings in the hopes of receiving an eventual contingent return. The extent of that stress was probably unparalleled in this case, as next discussed.

36. In his declaration, Lloyd Constantine sets forth some remarkable data showing the

level of commitment that his firm made to this case. While for the total period from 1997 through settlement this year, this case consumed more than half of his firm's total time, the demands it made on his firm accelerated as the case progressed. Indeed, for five consecutive years, from 1999 to 2003, it consumed the majority of the time of attorneys and paralegals at his firm for each of those years:

TABLE 6

	YEARS						
	1997	1998	1999	2000	2001	2002	2003
C&P attorneys:	20%	29%	55%	52%	52%	59%	83%
C&P paralegals:	47%	59%	75%	51%	83%	80%	88%

Overall, from 1997 to the present, he reports that more than half (52%) of C&P attorney and paralegal time were devoted to this case. This is an extraordinary level of commitment. As he further notes, his firm "was required to forego and turn away numerous important, lucrative, and professionally challenging assignments" over roughly a seven year period. Having studied class actions for over two decades and having been involved in numerous such actions as an expert witness, I am unaware of any similar level of commitment. No law firm of which I am aware has concentrated as single-mindedly or for as long on a single case. Indeed, most plaintiffs firms that handle primarily contingent fee matters make a considerable effort to remain diversified and to avoid such a concentration on a single case. Most are also considerably larger in size, so that a more diversified portfolio of cases naturally results. In any event, the bottom line is that this case represented for Constantine & Partners a level of risk that few, if any, other firms have ever experienced. Moreover, as just noted, they remained exposed to this high level of risk for nearly seven years.

VI. The Lodestar Cross Check

37. In *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), the Second Circuit recommended analyzing the hours submitted by counsel as a "cross check" on the reasonableness of the requested percentage. The purpose of this cross check is to assure that plaintiffs' counsel is not receiving a windfall, as counsel might, for example, if counsel had piggybacked on the efforts of a public enforcer and achieved a settlement in the immediate wake of a public enforcement action. Here, the total hours expended by plaintiffs' counsel come to 223,459 and the total lodestar at the normal hourly rates of the participating plaintiffs' counsel comes to $62,545,603. If we divide this amount into the requested fee award that is generated by counsel's request for an award of 18% of the present value of the compensatory relief, the resulting multiplier is 9.74.

38. Clearly, this multiplier is well above average (although it by no means represents a record). Still, at least four points need to be made about this multiplier:

> First, as next discussed, the high multiplier in this case is to a considerable extent the artifact of the very low billing rates assigned by Constantine & Partners to its younger partners. Because of these low rates, the multiplier is artificially high and hence is misleading as a guide to the effort actually expended on this action.
>
> Second, greater weight should be placed on the multiplier when a high percentage of the recovery is sought than when, as in the instant case, a below average percentage is sought.
>
> Third, this is not a case that plaintiffs' counsel has quickly settled, or one in which it has piggybacked on the efforts of a public

enforcer; rather, this case has been intensively litigated for over six years and without assistance from regulatory actions.

Fourth, recent cases in the Southern District have approved similar multipliers. Moreover, none of those cases involved the same concentrated effort, risk, or exemplary result, as this case has.

39. The principal reason that this seemingly high multiplier in this case is largely illusory is that the total lodestar has been understated as the result of Constantine & Partners' low billing rate. Of the $62,545,603 total lodestar in this case, over half (or $32,997,292) is attributable to the efforts of Constantine & Partners. Indeed, from the standpoint of actual hours expended, they accounted for well over 50% (*i.e.*, 125,788 hours out of 223,459 - - or 56%). Yet, the overall billing rate for Constantine & Partners was only $262 per hour, well below the level of most other firms, some of whom charged an average rate of over $400 and even $500 per hour for attorneys. During the pendency of this action, two of the partners at Constantine & Partners most actively involved in this case charged a rate of $295 per hour, and another two charged a rate of $320 per hour. These low numbers contrast sharply with the rates charged by other New York firms for their younger partners. According to a survey done by the National Law Journal in late 2002, the rates of the lowest billing partner at a number of New York firms begin at over $400 in some firms and over $300 per hour in virtually every large New York City firm surveyed. The average rate charged for an associate per hour is over $300 at some New York firms, or well above Constantine & Partners' overall rate. Indeed, the average rate charged by Constantine & Partners as a firm in this case ($262) is below the average rate charged for associates at most well-known New York firms. *See* Ruth Singleton, "Rates Stay High Despite Recession," National Law Journal, December 9, 2002 at B9-15.

40. To illustrate the impact of this disparity in billing rates, if Constantine & Partners had charged at the $325 median rate charged by Kramer Levin Naftalis & Frankel for its associates, or at the $375 average hourly rate charged by its co-counsel, Hagens, Berman, then the total lodestar would have become $70,428,718 or $76,718,103 respectively. Correspondingly, the multiplier would thereby fall to 7.94 or 8.65, respectively. Indeed, if it had charged at the median billing rate for partners at Hughes Hubbard & Reed of $500 per hour, the multiplier under the same assumptions would have fallen to 6.59.

41. Overall, the blended hourly rate charged by all the participating class counsel in this case came to $280. Not only is this below the rate charged by many large firms for their associates, but it is well below the blended hourly rate that plaintiffs' counsel sought to charge in some recent settlements approved in federal courts in New York, as set forth below:[12]

CASE	BLENDED HOURLY RATE
1. *Duncan v. The Unity Life and Antitrust Ins. Assoc.*, 2003 WL 1907959 at *2, 4 (S.D.N.Y. April 18, 2003)	$516 per hour
2. *Baffa v. Donaldson*, 2002 WL 1315603 at *3	$448 per hour
3. *Varljen v. H.J. Meyers & Co., Inc.*, 2000 WL 1683656 at *5 (S.D.N.Y Nov. 8, 2000)	$412 per hour
4. *In re Arakis Energy Antitrust Litig.*, 2001 WL 1590512 at *10	$389 per hour
5. *In re American Bank Note*, 127 F.Supp. 2d 418, 432 (S.D.N.Y. 2001)	$368 per hour

[12] It is not clear that these rates were approved in all these cases, and in some, less than the total lodestar was awarded. For example, in *Baffa v. Donaldson*, the rates charged by counsel in this case ranged from $275 to $595. *See Baffa v. Donaldson*, 2002 U.S. Dist. LEXIS 10732 at n.7. However, the District Court refused to award such a lodestar and instead awarded a 30% fee award plus $230,122 in costs.

6. *Maley v. Del Global Tech. Corp.*, 186 F.Supp. 2d 358, 371 (S.D.N.Y. 2002)	$366 per hour
7. *Cromer Finance Ltd. v. Berger*, 2003 WL 203197 at *1, n.4 (S.D.N.Y. Jan. 28, 2003)	$366 per hour
8. *In re Lloyd's*, 2002 WL 31663577 at * 27 (S.D.N.Y. Nov. 28, 2002)	$326 per hour
9. *In re Twinlab Corp. Sec. Litig.*, 187 F.Supp. 2d 80, 86 (E.D.N.Y. Feb. 23, 2002)	$318 per hour

To be sure, courts in the Second Circuit have sometimes balked at such high hourly fees, but the relative modesty of Constantine & Partners is far from a universal characteristic in the plaintiffs' bar.

42. The point of the foregoing list is not simply that Constantine & Partners (and thus all class counsel on a blended basis) have charged a lower blended rate than many of their peers in the plaintiff's bar, but that it would be a perverse irony to reduce their fee because of a high multiplier when that high multiplier was in turn the product of charging only a low hourly rate.

43. The low lodestar in this case is also the product of a conscientious effort made by Constantine and Partners to identify and eliminate time that was billed either for duplicative efforts or at commercially unreasonable rates. As explained in more detail in the declaration of Stacey Anne Mahoney, Esq., Constantine and Partners, with the assistance of an outside accounting firm, Cornick, Garber & Sandler LLP, conducted an analysis of all claimed time and expenses submitted by all of the law firms representing the class in this action, and succeeded in reducing the total lodestar by approximately $3.05 million dollars or 6,280 hours. Commendable as this effort is, it would be discouraged if this court were to impose an absolute ceiling on the multiplier.

44. To be sure, there is a legitimate role for the lodestar cross check. That role is to identify circumstances in which an automatic application of the percentage of the recovery would result in a windfall to counsel, either because the case settled quickly or because others did the real work. But that is clearly not this case, which has been litigated intensively for six and one half years and was not preceded or assisted by any governmental action.

45. Some courts have also adopted as a "general guideline" the principle that: "the idea that the 'more the percentage of the recovery falls below the norm, the more the multiplier may rise above average. One balances the other,'" *See In re Rite Aid Corp. Secs. Litig.*, 146 F.Supp. 2d 706, 736 n. 44 (E.D. Pa. 2001) (quoting this declarant). As the *Rite Aid* court recognized, if this balancing approach is not used, then "the lodestar approach begins to dominate and supercede the percentage of the recovery formula," particularly in those exemplary cases where the recovery greatly exceeds the national averages for such litigation. *Id.* It is precisely in these cases where an above average fee is justified and where a rigid application of the multiplier cross check would deny it.

46. These reasons for not allowing the lodestar cross check to override the percentage approach have recently persuaded other courts in this Circuit to accept a seemingly high multiplier. In *In re Buspirone*, 01-Md-1410 (S.D.N.Y. April 11, 2003), United States District Judge John Koetl earlier this year awarded a 33⅓% fee with an 8.46 multiplier. Earlier, in *Newman v. Carabiner Int'l, Inc.*, 99 Civ. 2271 (S.D.N.Y. October 19, 2001), where a 7.7 multiplier was approved, United States Judge Gerald Lynch expressly commented:

> "I wanted to note that, in my view, there is no difficulty with the fact candidly acknowledged in the papers that, in terms of the time expended, this a profitable case for the plaintiffs' lawyers who

> worked on it. Contingency type percentage settlements serve an important purpose.... so it is important in awarding fees or approving a fee settlement in a case of this kind not to be... blinded or distorted that in this particular case, calculated on an hourly basis, this is a very large, high proportion to what the hourly charges would have been." Id. at 6.

VI. Summary and Recommendations

47. In my judgment, the most an expert should attempt to do with regard to attorney fee determinations is suggest the parameters that he or she believes should be applicable and the factors that deserve the greatest weight. Thus, I will not attempt to pinpoint precisely the fee award to which my analysis leads, but will instead evaluate only whether the requested fee award fits within the parameters of a reasonable fee. Earlier, it was pointed out that in a sample of 64 class action settlements over $100 million, fees and expenses averaged 15.1% (*see* paragraph 21). Similarly, a variety of studies (*see* paragraphs 22-24) find typical fee awards in securities class actions to exceed 30%. More important, in the twelve largest antitrust class action settlements, fees and expenses averaged 21.34% (*see* paragraph 15) and rose to 24.05% if earlier decisions were excluded (*see* paragraph 16). Finally, the Logan, Moshman and Moore study finds that across all antitrust class actions (and their sample included 100 cases), the average fee awarded came to 20.6% of the recovery (*see* paragraph 16). These statistics set only the general boundaries.

48. An additional factor that deserves special emphasis is the factor of risk. Antitrust class actions are far less common than securities class actions and on average considerably riskier. Most antitrust class actions seem to fail, not settle. Moreover, this action was particularly outside the "mainstream," as Professor First explains in his declaration. More

important still, this is an action in which the law firm serving as principal lead counsel devoted more than 50% of the hours expended by that firm over each year of a five year period (1999 to 2003) on this case (*see* paragraph 36). In so doing, it accepted an extraordinary level of undiversified risk, and, had it not done so, it is questionable whether this action would have advanced to settlement.

49. Finally, one aspect of this extraordinary recovery has not yet been given adequate attention. The prospective relief from this settlement is valued by Professor Fisher at not less than $25 billion over the next ten years. While I do not suggest that this value can be included in the common fund for purposes of computing the fee award, I do suggest that a court cannot ignore it and should give weight to it in choosing the applicable percentage of the common fund to award. This is a key fact that distinguishes this case from a *Cendant*, *Toshiba* or other high monetary recovery cases. If we value this settlement at $28.46 billion (i.e., the present value of the compensatory relief plus the injunctive relief), the proposed fee award comes to only 2.1%. So viewed, this would be as low a fee award as any court has granted in a "mega fund" case.

50. Against these arguments, there stands the unavoidable argument that historically courts have used a declining percentage of the recovery method; thus, it might be argued, this $3.38 billion settlement (in terms of the present value of the compensatory relief alone) should not necessarily receive the same 21.34 % to 24.05% of the settlement that has applied in antitrust mega fund cases, because this settlement dwarfs even the *NASDAQ Market Makers* settlement. Yet, there is a serious policy problem surrounding this tradition of a declining percentage of the recovery. It was well recognized by Judge Kaplan in the *Auction House Antitrust Litig.*, where he wrote that the declining percentage method "can create an incentive to settle quickly and

cheaply when the returns to effort are highest" and fails to reward counsel for "investing additional time and maximizing plaintiffs' recovery." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y 2000). Late last year, in *In re Cardizem CD Antitrust Litig.*, Master File No. 99-md-1279, MDL No. 1278, the District Court expressly agreed with Judge Kaplan's logic, awarded a 30% fee on a $110 million recovery, and rejected the claim that "[a] lower percentage is ... required simply because the settlement obtained on behalf of the class is large." Finally, the Ninth Circuit has also recently rejected a claim that the percentage of the recovery must decline in the "mega fund" case. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (approving a 28% fee award on a $96,885,000 recovery). If that argument was wrong in *Vizcaino*, it is even more inapplicable here, where the risk and the exemplary result were greater.

51. I have long argued that the courts are correct in rejecting the declining percentage approach. Put simply, if courts were to hold that the percentage should decline sharply after, say, the $1 billion threshold was passed, then plaintiff's counsel would have had little incentive to hold out for $3.38 billion (as they did hold out here) when by holding out they exposed themselves to real litigation and appellate risk. Moreover, defendants would quickly come to understand that plaintiffs' counsel lacked an incentive to maximize the recovery (at least beyond some threshold), and they could exploit this lack of incentive.

52. Accordingly, I would urge this Court to apply a straight percentage to the recovery, one that recognizes that an extraordinary victory with enormous prospective benefits has been obtained in the face of very high risk. In my judgment, plaintiffs' counsel's requested 18% fee award falls within the contemporary guidelines and is, on the special facts of this case, reasonable and justified.

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

John C. Coffee, Jr.

August 17, 2003
New York, New York