UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	:	MASTER FILE NO. 02 Civ. 3288 (DLC)
This Document Relates to:	:	
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MEMORANDUM OF LAW IN SUPPORT OF AN AWARD TO LEAD COUNSEL OF ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES

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Table of Contents

Page

Table of Authorities

Page(s)

Cases

Other Authorities

This memorandum is submitted in support of Lead Counsel's application for an award of attorneys' fees and reimbursement of expenses (the "Fee and Expense Application") on behalf of itself and other plaintiffs' counsel (collectively "Plaintiffs' Counsel") who assisted in the prosecution of this Action with the prior approval of Lead Plaintiff and the Court, as detailed below. For the reasons set forth herein, Lead Counsel respectfully suggests that the Fee and Expense Application should be approved.

I. PRELIMINARY STATEMENT

Lead Plaintiff, the New York State Common Retirement Fund ("NYSCRF"), by its sole Trustee, Alan G. Hevesi, the Comptroller of the State of New York, and Lead Counsel, the law firms of Barrack Rodos & Bacine and Bernstein Litowitz Berger & Grossmann LLP, have succeeded in achieving a settlement with the Citigroup Defendants (the "Settlement") that provides an extraordinary recovery for the Class – the payment of $2.65 billion in cash plus interest that began to accrue for the benefit of the Class on September 3, 2004.[1] The Settlement constitutes the second largest recovery ever achieved in a securities law class action suit, and the largest recovery by far from entities that did not issue the securities involved in the case. Moreover, the Settlement represents a significant percentage of the Class's likely recoverable damages against the Citigroup Defendants. Lead Counsel is continuing to prosecute the case

[1] The terms and conditions of the Settlement are contained in the Stipulation and Agreement of Settlement, dated July 1, 2004 (the "Stipulation"), the original of which was previously filed with the Court. Unless otherwise defined herein, capitalized terms shall have the meaning ascribed to them in the Stipulation.

Under the terms of the Settlement, all claims of Class members asserted against defendants Citigroup Inc., Citigroup Global Markets Inc., formerly known as Salomon Smith Barney Inc., Citigroup Global Markets Limited, formerly known as Salomon Brothers International Limited, and Jack B. Grubman (the "Citigroup Defendants") will be dismissed with prejudice. As further explained in note 4, below, there is a provision in the Stipulation that could result, based on the holdings of WorldCom stock or bonds of persons who requested to be excluded from the Class, in some reduction in the Settlement Amount, but the parties to the Settlement have not yet determined whether any such reduction is appropriate.

against the non-settling Defendants, thus leaving open the potential of additional, significant recoveries for the benefit of the Class.

The prosecution of this Action was undertaken by Lead Counsel on an entirely contingent basis.[2] As more fully described below, in fulfilling our duties and obligations as Lead Counsel over the past two-plus years, we have incurred millions of dollars of expenses and, with other assisting counsel, spent more than 172,000 hours prosecuting this case – time and expenses that would not be compensated or reimbursed unless and until we achieved a recovery for the benefit of the Class.

A. Summary of Case Prosecution and Risks

Over the course of the past two years, this Court has often recognized the massive nature of this litigation, and the amount of work being done by counsel (and the Court) within the schedule established to set the case for trial on January 10, 2005. As set out in more detail in the Joint Declaration, among numerous other tasks, Lead Counsel filed Lead Plaintiff's Consolidated Complaint on October 11, 2002, which revealed for the first time certain material facts regarding the relationship between WorldCom, Inc. ("WorldCom") and the Citigroup Defendants; sought and obtained key documents relating to the fraud at WorldCom in the Fall of 2002 by successfully moving to partially lift the discovery stay imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the automatic stay imposed by the Bankruptcy Code; engaged in extensive motion practice, including briefing four sets of motions to dismiss the Complaint; motions to sever the so-called "analyst" claims asserted against the Citigroup

[2] In late June 2002, the former Comptroller of the State of New York approached our firms to represent NYSCRF and requested that we move on behalf of NYSCRF for appointment as lead plaintiff in this Action. *See* Joint Decl. ¶ 5. On July 1, 2002, we moved to consolidate the class action cases then pending before the Court into one consolidated action; for appointment of NYSCRF as lead plaintiff; and for approval of NYSCRF's choice of counsel, our firms, as lead counsel for the Class. The Court thereafter, by order of August 15, 2002, appointed NYSCRF as Lead Plaintiff and approved its selection of counsel as Lead Counsel. Joint Decl. ¶¶ 5-6.

Defendants from this Action, and numerous motions to stay the Action and/or delay the trial date; coordinated the efforts of Lead Counsel with counsel for various other plaintiffs in order to ensure an efficient prosecution of the case; attended scores of Court hearings and conferences; reviewed and analyzed more than four million pages of documents produced by WorldCom, defendants, and more than thirty non- parties; engaged in numerous meet and confer conferences with defense counsel; engaged in extensive discovery relating to class certification; filed comprehensive briefs and expert reports in support of the class motion; prepared for and took more than seventy depositions of fact witnesses, briefed petitions for writs of mandamus to the Second Circuit in connection with the Court's Orders pertaining to consolidation of the Individual WorldCom Actions and the discovery schedule; briefed the Citigroup Defendants' and the Underwriter Defendants' Rule 23(f) appeals of the Court's class certification order; and engaged in protracted, arm's-length settlement negotiations that ultimately resulted in the $2.65 billion Settlement with the Citigroup Defendants.

Moreover, the case against the Citigroup Defendants involved numerous, significant risks. Among the defenses asserted by the Citigroup Defendants were:

- With respect to the Securities Act claims asserted against them, that they had conducted reasonable due diligence investigations, and were entitled to rely on WorldCom's management and the audit opinions and comfort letters presented by Arthur Andersen LLP ("Andersen") for each bond offering;

- With respect to the Exchange Act claims asserted by the Class, that Plaintiffs could not establish scienter, or intent to defraud, as there was no allegation that these Defendants participated in or orchestrated the fraud at WorldCom; and

- That no class should be certified with respect to the analyst-related claims because, among other reasons, Plaintiffs were not entitled to a fraud-on-the-market presumption for the statements attributed to Grubman.

The Citigroup Defendants also vigorously disputed the amount of damages estimated by Plaintiffs. With respect to WorldCom bonds and stock, the Citigroup Defendants argued that

the vast majority of the decline which occurred in the prices of WorldCom securities during the Class Period was not attributable to the fraud, but rather to general market conditions. Further, under the proportionate fault requirements of the PSLRA, there was a material risk that, even if Plaintiffs established the Citigroup Defendants' liability under Section 10(b) of the Exchange Act, a jury would conclude that these Defendants were only liable for a small percentage of the damages suffered by the Class.

It was in the face of these risks (and others) that Lead Counsel achieved for the benefit of the Class the $2.65 billion Settlement now pending before the Court.

B. The Basis for the Fee and Expense Application

Lead Plaintiff is applying for a fee that constitutes 5.45% of the Settlement Amount, and for reimbursement of the expenses incurred in the prosecution of the Action. As more fully discussed in the Joint Declaration (¶¶ 110-113) and the Declaration of Alan P. Lebowitz ("NYSCRF Decl.") (¶ 7), submitted herewith, the fee request is in strict accordance with the Retainer Agreement, dated July 30, 2003, between Lead Plaintiff and Lead Counsel. The Retainer Agreement was entered into following lengthy negotiations between Lead Plaintiff and Lead Counsel, and at a stage of the litigation where Lead Plaintiff and Lead Counsel had sufficient information to make an informed judgment regarding the risks inherent in the case and the potential magnitude of the Action. The fee and expense request has been reviewed and approved by the Lead Plaintiff – an institutional investor with a significant financial stake in the outcome of the litigation, and the paradigm fiduciary for the Class that Congress envisioned in enacting the PSLRA.[3] Evaluating counsel's work now, at the end of the case, Lead Plaintiff is in

[3] As the Court is aware, Congress enacted the PSLRA in large part to encourage sophisticated institutional investors to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." *See* The "Private Securities

a position to determine that the fee request is fair and reasonable and should be awarded. As the Third Circuit held in *In re Cendant Corp. Litigation*, 264 F.3d 201 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002), a fee approved by a Lead Plaintiff is presumptively reasonable: "Courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *Id*. at 220.

At the time the Retainer Agreement was negotiated, Lead Plaintiff was familiar with the strengths and weaknesses of this case, including the risks of litigation and achieving a recovery, and was actively involved in the prosecution of the Action and the settlement negotiations to that point (which had not been fruitful in any respect). Indeed, the Retainer Agreement was the product of lengthy negotiations between Lead Plaintiff and Lead Counsel at a time when the contours of this case had been clarified, at least in part, by the many Court rulings to that point and the discovery and investigations undertaken by then. For instance, at the time the Retainer Agreement was negotiated:

- Lead Counsel, on behalf of Lead Plaintiff, had conducted an extensive investigation prior to the filing of the Complaint;
- Lead Plaintiff had filed motions to lift the automatic stay in the Bankruptcy Court and the stay of discovery with this Court, and thereby obtained significant discovery of WorldCom documents that head been provided to various government entities before the time normally allowed by the PSLRA;
- Initial settlement discussions had been undertaken and suspended;
- Lead Counsel had successfully opposed the Citigroup Defendants' motion to sever the so-called "analyst" claims from this Action;

Reform Act of 1995," H.R. Conf. Report No. 104-369, 104th Cong., 1st Sess. (1995), 1995 WL 709276, at *32. Congress believed that institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request.

- Lead Counsel had, with limited exception, defeated all motions to dismiss filed by Defendants; and

- Lead Plaintiff had filed its motion for class certification, and was producing documents and witnesses as part of the class certification discovery proceedings.

Thus, while Lead Counsel had agreed from the outset of the case that it would undertake the prosecution of this Action on an entirely contingent basis, and not recover any monies unless and until there was a recovery achieved for the Class, it was not until July 30, 2003 that the parameters of the fee agreement was established between Lead Plaintiff and Lead Counsel. The Retainer Agreement was thereafter made available for all Class members to review. It was posted on the website maintained by Lead Counsel for the purpose of this case, at www.worldcomlitigation.com., and it was further referenced in the Notice of Class Action, mailed to Class members beginning on December 11, 2003. As more fully set forth below, the fact that Lead Plaintiff has approved and recommended the fee request should be given considerable weight. *Cendant*, 264 F.3d at 282; *accord In re Lucent Technologies, Inc. Sec. Litig.*, 327 F. Supp.2d 426, 433-34 (D.N.J. 2004).

The fee application precisely follows the terms and conditions of the Retainer Agreement, and has been approved by Lead Plaintiff. The fee request constitutes 5.45% of the Settlement Amount, or $144.5 million, of the $2.65 billion that the Citigroup Defendants agreed to pay to settle the claims of the Class.[4] The percentage sought by Lead Counsel is well below the norm in securities law cases of this type, even in so-called "mega-fund" cases. Moreover, the fee is fair and reasonable when viewed in light of the considerable lodestar plaintiffs' counsel has amassed. Indeed, the collective lodestar of Lead Counsel and the firms that provided

[4] The Stipulation provides for a potential reduction in the Settlement Amount based on the value of holdings of persons, other than persons who had already filed individual WorldCom actions, who requested exclusion from the Class within the time set by the Court. No determination has yet been made whether, or to what extent, there should be any reduction of the Settlement Amount. However, should there be any such a reduction, Lead Counsel would reduce the amount of its fee request in accord with the Retainer Agreement's fee structure.

assistance to Lead Counsel with Lead Plaintiff's and the Court's prior approval totaled $51.2 million through June 30, 2004, which results in a multiple of 2.82. The lodestar multiple of 2.82 is well below the 4 to 5 cap on lodestar multiples approved in the Retainer Agreement, and well within the range of multipliers commonly awarded in contingent fee litigation. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (Sweet, J.) (a multiplier of 3.97 "is not unreasonable in this type of case" and noting that multiples between 3 and 4.5 "have become common") (citation omitted); *Cromer Finance Ltd. v. Berger,* 2003 WL 203197 (S.D.N.Y. Jan 29, 2003) (awarding fee constituting 3.56 multiple to one of two lead counsel).

Through this application, Lead Counsel further seeks reimbursement of some, but not all, of out-of-pocket expenses incurred in connection with the prosecution of the Action, in the amount of $4,206,913; reimbursement of the fees and expenses incurred by the Administrator appointed by this Court to carry out its notice and settlement administrator functions pursuant to the Court's Orders of December 12, 2003, March 9, 2004, and July 16, 2004, in the amount of $7,129,474.65; and the establishment of a litigation fund in the amount of $5 million to defray costs incurred in connection with the continuing prosecution of the Action against the non-settling defendants.[5]

[5] The Retainer Agreement requires Lead Counsel to submit reports on a quarterly basis to Lead Plaintiff with the time, lodestar and expenses incurred by Plaintiffs' Counsel. Lead Plaintiff's staff reviews the reports, and seeks whatever additional information or documentation it believes necessary to evaluate the reports. For purposes of this application, we are utilizing data for the quarter ended June 30, 2004, because that is the last report supplied to Lead Plaintiff. However, the Retainer Agreement provides for certain caps on expenses (*e.g.*, caps on hotel and per diem allowances for out-of-town travel, and a cap on in-house copying rates) and Lead Plaintiff is continuing its review of counsel's reported expenses, which total $5,258,642 through June 30, 2004. As a result, Lead Plaintiff and Lead Counsel have agreed that the request for reimbursement of expenses, at this point, will be for only 80% of the counsel's total reported expenses, and that a final reimbursement request, with the Court's permission, will be submitted prior to the hearing on the fee and expense application. Lead Plaintiff and Lead Counsel have further agreed that this request for reimbursement may be modified for additional payments for expenses made by plaintiffs' counsel after June 30, 2004, assuming that such expenses are reviewed and approved by Lead Plaintiff.

C. Notice of the Fee and Expense Application

Pursuant to this Court's Order,[6] a printed Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Notice"), in the form approved by the Court, was mailed to more than four million potential Class Members beginning on August 2, 2004 and a Summary Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Publication Notice"), in the form approved by the Court, was published in the national editions of *The Wall Street Journal, The New York Times, PR Newswire* and *Bloomberg News* on August 10-12 and 16, 2004. Garr Aff. ¶ 25. The Notice contained a detailed description of the Action, the terms of the Settlement, the average recovery per share and bond, and the amounts and types of expenses for which Lead Counsel may seek payment in their Fee and Expense Application. It also advised Class Members of their right to object to the Fee and Expense Application. While the time to object does not expire until October 8, 2004, to date not one Class Member has filed an objection to the Fee and Expense Application.[7] Joint Decl. ¶ 132.

Lead Counsel respectfully submits that, given the risks faced by counsel in this Action and the enormous benefit conferred on the Class by the proposed Settlement, the Fee and Expense Application is fair and reasonable, comports with applicable precedent, and should be approved.

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[6] On July 16, 2004, the Court preliminarily approved the Settlement, set a hearing on November 5, 2004 to determine the fairness, reasonableness and adequacy of the Settlement, Lead Plaintiff's Plan of Allocation, and Lead Counsel's fee and expense application (the "Fairness Hearing") and directed that Notice of the Fairness Hearing be given to the Class. *See* Joint Decl. ¶¶ 97-99; *see also* Affidavit of Shandarese Garr, submitted September 14, 2004 ("Garr Aff.") ¶¶ 17, attached to the Joint Declaration (without exhibits) as Exhibit 5.

[7] Should any objections be received, they will be addressed by Lead Counsel in a further submission to the Court by October 22, 2004, pursuant to the Hearing Order.

II. ARGUMENT

A. Plaintiffs' Counsel Are Entitled To The Reasonable Fee Requested By This Application

1. The Legal Standards Governing Awards Of Attorneys' Fees

It is well-settled that attorneys who represent a class and achieve a benefit for the class members are entitled to be compensated for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir. 1996). The Supreme Court has further emphasized that private securities actions, such as the instant action, provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).[8]

2. The Fee Award Should Be Based On The Percentage Method And Should Replicate The Market

The Supreme Court has consistently held that in the case of a common fund, the fee awarded should be determined on a percentage-of-recovery basis. *See Trustees v. Greenough*, 105 U.S. 527, 532 (1882); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-70 (1939). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("*Blum*"), the Supreme Court stated that "under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class .... ".

[8] Awards of attorneys' fees from a common fund serve a dual purpose by encouraging representatives to seek redress for damages caused to an entire class of persons and discouraging future misconduct of a similar nature. *Dolgow v. Anderson*, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). In the long run, fees that fully reward excellent results encourage the successful prosecution of meritorious cases.

The clear trend of district courts within this Circuit is to utilize the percentage of recovery approach when calculating attorneys' fees in common fund cases. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) ("the trend within this Circuit is to use the percentage of recovery method to calculate fee awards to class counsel" in common fund cases); *In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 431 (S.D.N.Y. 2001) (same). In his opinion in *In re Lloyd's American Trust Fund Litig.*, 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002), Judge Sweet, who awarded class counsel 28% of the settlement fund using the percentage method, noted:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process – to both counsel and the courts – of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

Id. at *25 (quoting "Court Awarded Attorney Fees," Report of the Third Circuit Task Force (Arthur F. Miller, Reporter) *reprinted in* 108 F.R.D. 237, 258 (3d Cir. 1985)). For many years, courts within this Circuit have recognized that "[s]upport for the lodestar/multiplier approach in common fund cases has eroded, and there has been a 'groundswell of support for mandating a percentage-of-the-fund approach' in the common fund cases." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) (citation omitted, emphasis in original). *See also In re NASDAQ Market-Makers*, 187 F.R.D. at 483-85 (chronicling and discussing strong support for percentage of recovery method).

The overwhelming trend among circuit courts is also to utilize the percentage of recovery method. With the decision in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit has now joined eight other circuits (the First, Third, Sixth, Seventh,

Ninth, Tenth, Eleventh and District of Columbia Circuits) in affirmatively endorsing the percentage of recovery method as an appropriate method for determining an award of attorneys' fees.[9] In addition, the PSLRA implicitly supports the use of the percentage of the fund method. *See* 15 U.S.C. § 78u-4(a)(6) ("[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

From a public policy perspective, the percentage-of-the-fund approach is the most efficient means of rewarding the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (criticizing lodestar approach as one that "tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation"), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987).

In addition, a percentage-of-the-fund approach is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients. *See American Bank Note*, 127 F. Supp. 2d at 432 (citing *In re Sumitomo*, 74 F. Supp. 2d at 397). The fee here should be based on the percentage method because that is the method that Lead Plaintiff and Lead Counsel agreed to utilize in the

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[9] *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) (permitting use of percentage method; "Contrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent."); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (authorizing percentage and holding that use of lodestar/multiplier method was abuse of discretion); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994) (percentage approach is appropriate in common fund case); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) (percentage approach appropriate); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Swedish Hosp. Corp., v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (percentage approach applicable).

Retainer Agreement as the primary method for determining the fee that Lead Counsel can seek in this Action. As noted above, the Retainer Agreement provides for the submission of fee requests by Lead Counsel based on the percentage-based fee grid (with percentages that decrease as the amount of the recovery increases, and increase at later stages of the litigation), with a cross-check on the reasonableness of the fee request to be submitted based on allowable lodestar multiples.

Since passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable. *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002); *accord In re Lucent Technologies Sec. Litig.*, 327 F. Supp.2d 426, 433-34 (D.N.J. 2004). As the Third Circuit stated in *Cendant*, passage of the PSLRA "shift[ed] the underpinnings of our class action attorneys' fees jurisprudence in the securities area." *Cendant*, 264 F.3d at 282.

In *Cendant*, the court held that the district court abused its discretion by invalidating a fee agreement negotiated between counsel and three sophisticated institutional investors, in favor of a sealed-bid auction for legal services. In so holding, the Court explicitly recognized that, in enacting the PSLRA, Congress expressed its strong belief that an institutional lead plaintiff would be in a better position than the court to protect the interests of the class by monitoring lead counsel throughout the litigation and by negotiating a reasonable fee for counsel's representation. *Id*. at 276 (Congress believed that "institutional investors would likely do a better job than courts at selecting, retaining, and monitoring counsel than courts have traditionally done"). Accordingly, the Circuit Court held that a fee agreement negotiated between a properly selected lead plaintiff and its counsel should be accorded a "presumption of reasonableness":

> [U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into

> between a properly-selected lead plaintiff and a properly-selected lead counsel . . . This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers.

Id. at 282.

This presumption "preserves the lead plaintiff's role as 'the class's primary agent vis-à-vis its lawyers." *Lucent*, 327 F. Supp. 2d at 433 (quoting *Cendant*, 264 F.3d at 282). It is also appropriate because a fully informed lead plaintiff has been seen by the courts as being in the best position to review the work of counsel, and to evaluate as a surrogate for the class the results achieved in light of the risks of the litigation. Indeed, the court in *Cendant* went so far as to hold that, consistent with the PSLRA and absent unusual and unforeseen changes, courts should honor the presumption of the reasonableness of a fee approved by the lead plaintiff.

Here, in recognition of their fiduciary duties to the Class, Lead Plaintiff negotiated and entered into the Retainer Agreement with Lead Counsel after the contours of this Action had become clearer than they were at the outset of the Litigation. Consistent with the law in this Circuit, the Retainer Agreement's fee structure was based on percentages of potential recoveries and the stage of litigation at which such recoveries might be obtained, and further cross-checked against the cumulative lodestar of Lead Counsel and other assisting counsel.

Accordingly, here, there is a strong record on "what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Integrated*, 209 F.3d at 52.

The Retainer Agreement that Lead Plaintiff and Lead Counsel negotiated results in this fee application constituting just 5.45% of the Settlement Amount. If the full fee request and all reimbursement expenses sought by Lead Counsel are granted by the Court, the Class will recover approximately 94% of the Settlement Amount. In this circumstance, Lead Counsel respectfully

submits that the fee request is well within the range of reasonableness set by the market for such services.[10]

Significantly, the fee requested here is also fair and reasonable when measured against the fees awarded in other "mega-fund" cases. For example, in *In re NASDAQ Market-Makers*, 187 F.R.D. at 485-88, Judge Sweet awarded a fee of $143 million, constituting 14% of the $1.027 billion recovery obtained in that case. Similarly, in *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942, 981 (E.D. Tex. 2000), the court approved a fee of $147.5 million, constituting over 14% of the value of that settlement, which consisted of $597.5 million in cash and other benefits for a total settlement value conservatively valued at $1 billion. Indeed, the following chart shows that, in cases which have resulted in settlements of at least $100 million, courts have often awarded fees in the range of 25% of the recovery:

[10] Many courts in this Circuit and elsewhere have awarded fees in class actions with far greater percentages than Lead Counsel seeks here pursuant to the terms of the Retainer Agreement. *See In re Oxford Health Plans, Inc. Sec. Litig.*, MDL No. 1222 (CLB) (S.D.N.Y. June 12, 2003) (Brieant, J.) (awarding 28% of gross settlement amounts valued at approximately $300 million); *Lloyd's American*, 2002 WL 31663577, at *28 (Sweet, J.) (awarding 28% of the total settlement consideration valued at approximately $20 million); *American Bank Note*, 127 F. Supp. 2d at 433 (McMahon, J.) (awarding 25% of a $21 million settlement). *See also Del Global*, 186 F. Supp. 2d at 368 (McMahon, J.) (awarding 33 1/3% of a settlement valued at approximately $11.5 million and noting that courts in the Southern and Eastern Districts of New York have "recently awarded 33 1/3% in securities class actions where there has been a significant monetary recovery" even in cases where settlement occurred early in the litigation). In *Del Global*, Judge McMahon further cited the following cases: *In re APAC Teleservices, Inc. Sec. Litig.*, No. 97 Civ. 9145, slip op. at 2 (S.D.N.Y. Dec. 10, 2001) (Jones, J.) (awarding 33 1/3% of an all cash $21 million settlement prior to the commencement of depositions); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (Lynch, J.) (awarding 33 1/3% of an all cash $15 million settlement prior to the commencement of depositions). Notably, unlike the risks of this Action, Judge McMahon specifically noted with respect to these cited cases that the fee awards were made "where Counsel was not assuming any risk in the form of payment." *Del Global*, 186 F. Supp. 2d at 368.

Case	Recovery	Percentage Awarded
In re Lucent Technologies, Inc Sec. Litig., 327 F. Supp.2d 426 (D.N.J. July 19, 2004)	$517 million	17%
In re DaimlerChrysler AG Sec. Litig., No. 00-0993 (KAJ) (D. Del. Feb. 5, 2004)	$300 million	22.5%
In re Oxford Health Plans, Inc. Sec. Litig., MDL 1222 (S.D.N.Y. June 2003)	$300 million	28%
In re Rite Aid Corp. Sec. Litig.,(Rite Aid II) 269 F. Supp. 2d 603 (E.D. Pa. 2003)	$126 million	25%
In re Rite Aid Corp. Sec. Litig., (Rite Aid I) 146 F .Supp. 2d 706 (E.D. Pa. 2001)	$193 million	25%
Informix Corp. Sec. Litig., Master File No. C-97-1289-CRB (N.D. Cal. Nov. 2, 1999)	$132 million	30%
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111 million	30%
In re Prison Realty Sec. Litig., Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001)	$104 million	30%
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190 Million	25%
Kurzweil v. Philip Morris Co., Inc., Nos. 94 Civ. 2373 (MBM), 94 Civ. 2546 (BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123 million	30%
In re Combustion, Inc., 968 F. Supp. 1116 (W.D. La. 1997)	$127 million	36%
In re Sumitomo Copper Litig., 74 F. Supp. 2d 393 (S.D.N.Y. 1999)	$116 million	27.5%
In re Home-Stake Prod. Co. Sec. Litig., MDL No. 153 (N.D. Okla. Jan. 2, 1990)	$185 million	30%
In re Prudential Sec. Inc. Ltd. P'ships Litig., 912 F. Supp. 97 (S.D.N.Y. 1996)	$110 million	27%

See also Lucent, 327 F. Supp.2d at 439-41 (compiling cases).

Clearly, when judged against these awards, the Retainer Agreement – which set the rate for a recovery of $2.65 billion during the fact discovery phase of the case at 5.45% -- should be accorded a presumption of reasonableness. For these reasons, Lead Counsel respectfully submits

that the Court should utilize the percentage method to determine the reasonableness of the fee, and approve the present application as fair and reasonable.

3. The Requested Fee Is Also Reasonable As Measured by the Grinnell Factors

In determining a reasonable fee, the Second Circuit has advised courts to be guided by the traditional factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). As summarized by the court in *Integrated*, those factors include:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation … ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

209 F.3d at 50. Here, as shown below, each of these factors supports the fee request.

(a) The Time and Labor Expended by Counsel

The efforts expended by Plaintiffs' Counsel in the prosecution of the action have been extensive and they are well known to the Court. The Joint Declaration sets forth the myriad tasks undertaken by Plaintiffs' Counsel, the time and labor expended, and the creativity of these efforts. For instance, the filing of the Consolidated Complaint on October 11, 2002 was reported upon in articles in *The Wall Street Journal* and other publications, which specifically cited the new information uncovered by Lead Counsel concerning the relationship between and among the Citigroup Defendants, WorldCom and Ebbers. Joint Decl. ¶¶ 8-14 . The filing of motions to lift the automatic stay in the Bankruptcy Court to obtain early discovery from WorldCom, and to lift the stay of discovery generally applicable in PSLRA cases, led to early discovery of important documents, which enabled Lead Counsel to conduct merits discovery of Defendants more quickly and efficiently when the discovery stay was lifted. After defeating, to a large extent, Defendants' motions to dismiss the Complaint, as well as the Citigroup Defendants' motion to sever certain claims from this Action and transfer them to be prosecuted in tandem with the

overall *SSB Analyst Litigation* now pending before Judge Lynch, Lead Counsel and other firms approved by Lead Plaintiff and this Court to assist in the litigation: (a) conducted extensive discovery of Defendants and third parties, (b) made numerous motions to compel additional documents from Defendants; and (c) spent considerable time and effort working with their accounting experts, telecommunications experts, investment banking experts, valuation experts, and damages experts in addressing central issues to the establishment of their claims. *Id*. ¶ 47. Counsel responded to extensive discovery demands that Defendants put to Lead Plaintiff, the Named Plaintiffs and many of their investment advisors, and undertook enormous efforts in order to support the record and arguments that demonstrated the propriety of this case proceeding as a Class Action against all Defendants. *Id*. ¶ 47. Lead Counsel prepared, for the consideration by the Court, the Notices to be sent to Class members, and later the proof of claim form and other materials that the Court directed to be sent to Class members. Further, counsel prepared for and took over seventy depositions of defendants, representatives of WorldCom, Andersen, KPMG, other WorldCom and KPMG advisors, even as documents were still being produced in this case.

The negotiation of the Settlement also required extensive efforts on the part of Lead Counsel and counsel for the Named Plaintiffs. Settlement discussions spanned more than eighteen months, and moved in starts and stops. Lead Counsel, under the careful guidance and supervision of the Settlement Judges, expended enormous efforts in providing analyses of claims and damages for purposes of the settlement negotiations; in meeting with Lead Plaintiff and the Named Plaintiff's counsel; in analyzing Plaintiffs' claims and the defenses asserted by the Citigroup Defendants; and in participating in arduous negotiating sessions, culminating in a face-

to-face meeting between Comptroller Hevesi and Citigroup's Chief Executive Officer Prince that resulted in an agreement in principle on May 6, 2004. *Id*. ¶ 47.

The number of hours spent by Lead Counsel, and by the other Plaintiffs' Counsel attests to the extensive effort by all concerned. Joint Decl. ¶ 116. Lead Counsel alone spent a total of more than 125,000 hours through June 30, 2004 in the prosecution of the Action; together with the Assisting Counsel, we spent more than 172,000 hours on the case through June 30, 2004. *See* Joint Decl. ¶ 116, and Exhibit 6. The cumulative lodestar of Lead Counsel and the Assisting Firms was $51 million through June 30, 2004. *Id.* Lead Counsel supervised every aspect of the prosecution of the Action to avoid duplication and ensure its efficient prosecution. Joint Decl. ¶ 117. Plaintiffs' Counsel compiled the hours reported from contemporaneous time records maintained by each attorney affiliated with the firms that participated in the Action. Joint Decl., Exhibit 6. Accordingly, the time and labor expended by counsel here amply supports the requested fee.

(b) <u>The Magnitude and Complexities of the Litigation</u>

There can be no dispute as to the magnitude of this Action – this case is likely the largest and most complex securities litigation in history. The Action was prosecuted on behalf of investors of one of the 9formerly) pre-eminent telecommunications companies in the world. It was brought against more than thirty-five different defendants, including Company executives and directors, WorldCom's outside auditor, the Citigroup Defendants (which involved claims based on registration statements as well as statements and opinions made in analyst reports), and sixteen other underwriters of two massive bond offerings by WorldCom in May 2000 and May 2001. It is fair to say that this case has been watched, and reported upon, by as many news publications as any civil securities prosecution in the country. It is also fair to say that the magnitude and complexities of this case – involving analysis of the reasons for the downfall of

the second largest long distance carrier in the country and the interrelationship of the accounting and other non-disclosure issues – are unrivaled. The class proceedings involved the production of tens of thousands of documents from Lead Plaintiff and Named Plaintiffs, depositions of Plaintiffs and certain of their investment managers, and the submission of detailed briefs and expert reports by Plaintiffs, the Citigroup Defendants and the Underwriter Defendants. The granting of the motion was quickly followed by the submission of briefs to the Second Circuit – first on the Citigroup Defendants' and the Underwriter Defendants' petitions for immediate appeal of this Court's class decision, and then on the substance of the Citigroup Defendants' appeal. And, in addition to the complexities of the substance of this Action, there are of course the unprecedented procedural challenges posed by the numerous individual action ('IA") cases, and the parallel class actions concerning ERISA, GOALS and TARGETS -- all of which are pending before this Court and for which Lead Counsel served as principal coordinator on the plaintiffs' side. *Id.* ¶¶ 41-44.

The size of the Class is also significant. As reflected in the Garr Affidavit, more than four million potential Class Members have been identified. *See* Garr Aff. (Exhibit 5 to Joint Decl.) ¶ 28. As reflected in the Proof of Claim form, there are numerous securities that are part of this case: common stock; MCI tracking stock; bonds issued in the May 2000 and May 2001 offerings; other pre-existing bonds that traded during the Class Period; and still other bonds that began to be traded as WorldCom securities during the Class period.

The case has been prosecuted against numerous groups of defendants: the Citigroup Defendants; the Underwriter Defendants; Andersen; the Director Defendants; and, before the stays imposed by the Court, Ebbers, Sullivan, Myers and Yates. The issues involved in the case are complex and often novel – including whether the fraud-on-the-market theory of reliance

applies to statements and opinions made by research analysts. There were numerous depositions of witnesses from WorldCom, KPMG, Dovebid, American Appraisal and Andersen concerning various GAAP issues and, as shown by the expert reports and rebuttal reports recently served by the parties, nearly all of the accounting and due diligence issues are hotly contested. The case against Andersen also involves complex issues concerning whether their audits of WorldCom's financial statements complied with generally accepted auditing standards (GAAS). The case against the Director Defendants involved the actions they took in overseeing WorldCom's management, and whether, *inter alia*, they complied with their due diligence obligations for the bond offerings. And the case against the Underwriter Defendants has required plaintiffs to analyze their conduct with respect to the offerings as well as their other dealings with WorldCom and its senior officers, and the due diligence and other defenses they have raised.

Finally, the claims against Citigroup Defendants were complex and subject to significant risk. The various investigators who extensively investigated the relationship between the Citigroup Defendants and WorldCom, including the Examiner, found no evidence that Grubman committed fraud in his reports about WorldCom. To assert the claims of the Class against these Defendants in this Action required Lead Plaintiff to successfully oppose their motion to sever and to dismiss the Complaint. It required briefing of the applicability of the fraud-on-the-market presumption in this Court, and in the Court of Appeals, with respect to the more than seventy research reports issued by Grubman during the Class Period. And, among other things, it also involved the discovery and analysis of the Citigroup Defendants' role as financial advisor and lead underwriter in the bond offerings and with respect to other transactions during the Class Period.

In short, it is hard to imagine a case more complex than the present Action. The magnitude and complexity of this litigation thus also supports approval of the request for attorneys' fees.

(c) The Risks of the Litigation

As the Second Circuit recognized in *Grinnell*, "despite the most vigorous and competent of efforts, success is never guaranteed." 495 F.2d at 471. Federal courts have long recognized that securities class action litigation "is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citation omitted). The high caliber of plaintiffs' counsel and their aggressive pursuit of a case provide no assurance that they will prevail on summary judgment, at trial, or achieve a satisfactory settlement or any settlement at all. This is confirmed by the risks that counsel assumed in commencing and prosecuting this Action.

The risks to establishing the Citigroup Defendants' liability were manifold. As identified in the Notice, the parties disagreed on both liability and damages. Other specific issues on which they disagreed also included the following:

> (a) whether the statements made or facts allegedly omitted were materially false or misleading, or otherwise actionable under the federal securities laws;
>
> (b) the appropriate economic models for determining the amounts by which WorldCom common stock and bonds were allegedly artificially inflated (if at all) during the Class Period;
>
> (c) the amounts by which WorldCom common stock and bonds were allegedly artificially inflated (if at all) during the Class Period;
>
> (d) the effect of various market forces influencing the trading prices of WorldCom common stock and bonds at various times during the class Period;
>
> (e) the extent to which external factors, such as general market and industry conditions, influenced the trading prices of WorldCom common stock and bonds at various times during the Class Period;

(f) the extent to which the various matters that Plaintiffs alleged were materially false or misleading influenced (if at all) the trading prices of WorldCom common stock and bonds at various times during the Class Period;

(g) whether Defendants' research reports had a good faith basis or were knowingly false;

(h) whether a class should have been certified;

(i) whether the Citigroup Defendants conducted appropriate due diligence in connection with the May 2000 and May 2001 bond offerings; and

(j) the extent to which the various allegedly adverse material facts that Plaintiffs alleged were omitted influenced (if at all) the trading prices of WorldCom common stock and bonds at various times during the Class Period.

Lead Counsel respectfully refer the Court to Lead Plaintiff's Memorandum of Law in Support of the Settlement, in which Lead Plaintiff explains the significant risks that faced Plaintiffs with respect to establishing the Citigroup Defendants' liability on the Securities Act and Exchange Act claims; establishing damages against the Citigroup Defendants; maintaining the Class throughout the case with respect to the analyst-related claims against the Citigroup Defendants; and establishing the element of loss causation with respect to those claims. *See* Memorandum in Support of Settlement at 12-15. Each of these potential risks was carefully weighed by Lead Plaintiff and Lead Counsel as the litigation proceeded, and in conjunction with the negotiations with the Citigroup Defendants.

In light of the risks present in this litigation, the prospects of any recovery, let alone a large recovery, were hardly assured. Critical issues included whether Plaintiffs could demonstrate loss causation for the Class' bond and stock claims; whether and to what extend the decline in the price of WorldCom stock and bonds could be attributed to misconduct of Defendants (who were not the issuer of the securities purchased by Class members); and all of the proportionate fault determinations that a jury would have to make with respect to the Section

10(b) claims in the case. Moreover, the Court of Appeals' granting of the Citigroup Defendants' Rule 23(f) petition for an immediate review of this Court's class ruling with respect to the Grubman analyst reports, absent the present Settlement, could have effectively ended Plaintiffs' ability to achieve any recovery on a class-wide basis from the Citigroup Defendants on the Section 10(b) claim.

As a result, the risks of non-payment for Plaintiffs' Counsel, who agreed to prosecute this Action solely on a contingency basis, were significant from the outset of the Action and throughout the case.

(d) Quality of Representation

The fourth criterion for evaluating the fee request is the quality of the representation of the Class. Here, through the many letters, filings and conferences with this Court, the Court has witnessed first-hand the caliber of services rendered by Lead Counsel in prosecuting this Action. The Court has also seen the recovery achieved in the Settlement with the Citigroup Defendants, and the continuing efforts being made by Lead Counsel to obtain further recoveries, either through settlements or at trial, from the remaining Defendants.

The standing and prior experience of plaintiffs' counsel are also relevant in determining fair compensation. *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989). Here, the firm resumes of Lead Counsel have previously been submitted to the Court, which demonstrate the background and experience of the Lead Counsel firms.

(e) The Results Achieved Justify the Requested Fee

As discussed, the Settlement provides the Class with an all-cash recovery that has been surpassed only once in the history of federal securities class action litigation. The result was achieved in the face of the many complexities and risks discussed above and in the Joint

Declaration. Notwithstanding those risks and complexities, as stated in the Memorandum in Support of the Settlement, the recovery for purchasers of May 2000 and May 2001 bonds is approximately 36% of damages that Plaintiffs estimate could have been recovered against the Citigroup Defendants on the Section 11 claims, and in the range of 10% to 20% of the likely recoverable damages on the Section 10(b) claims, assuming plaintiffs prevailed on liability and were able to maintain the Class for purposes of these claims.

Given these factors, the Settlement represents an excellent result.

(f) Public Policy Considerations Support the Requested Fee

Finally, private lawsuits, such as this, serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *Eltman v. Grandma Lee's, Inc.,* No. 82 Civ 1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). The Second Circuit has taken into account the social and economic value of class actions and the need to encourage counsel to undertake such litigation. *See e.g., Alpine Pharmacy v. Chas. Pfizer & Co., Inc.,* 481 F.2d 1045, 1050 (2d Cir. 1973). As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. This will occur if courts award reasonable and adequate compensation for their services where successful results are achieved. As former Chief Judge Brieant stated in *In re Union Carbide*,

> [a] large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.

724 F. Supp. at 169.

For the vast majority of Class members, this class action was their only hope of obtaining compensation for the losses they suffered as a result of the WorldCom fraud. A class action was the most efficient manner in which to prosecute the claims of Class members. In this circumstance, "[p]rivate attorneys should be encouraged to take the risks required to represent

those who would not otherwise be protected from socially undesirable activities like securities fraud." *Del Global*, 186 F. Supp. 2d at 374.

4. The Lodestar Cross-Check

The Second Circuit has encouraged the practice of performing a lodestar "cross-check" on the reasonableness of a fee award based on the percentage approach. The lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part, dissenting in part) ("market standards should prevail"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'" (citing *Blum*, 465 U.S. at 896 n.11)). In addition, the Supreme Court and other courts have held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983) (use of current rates appropriate where services were provided within two to three years of fee application).

The lodestar here, through June 30, 2004, was $51.2 million.[11] This represents over 172,000 hours spent by attorneys and paralegals on the case – a prodigious effort – through June 30, 2004.

[11] *See* Joint Decl. ¶ 116 & Exhibit 6. This is the time expended by Plaintiffs' Counsel through June 30, 2004, as contained within the quarterly report that Lead Counsel sent to Lead Plaintiff. Lead Counsel will be submitting its next quarterly report after the close of the quarter ending September 30, 2004, and will update, to the extent possible, the lodestar calculations as of that time prior to the Court hearing on November 5, 2004.

The current rates of Plaintiffs' Counsel are the competitive market hourly rates in their respective legal communities for cases of this sort -- complex class action securities litigation. Such rates necessarily reflect the reputation, experience, care, and success records of Plaintiffs' Counsel. Plaintiffs' Counsel compiled the hours reported from contemporaneous time records maintained by each attorney affiliated with the firms that participated in the Action. *See* Joint Decl. ¶ 112.

In negotiating the Retainer Agreement for this Action, Lead Plaintiff recognized and, to an extent, quantified the well-established principle in this Circuit that, when considering the lodestar check, a court may apply a multiplier to compensate counsel for contingency risk and quality of representation. *See In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 234-36. In the Retainer Agreement, the parties here determined that the fee would be based primarily on the percentage method, but "cross-checked" against counsel's collective lodestar such that Lead Counsel could not seek any fee in excess of a five times multiple of the collective lodestar, and that Lead Plaintiff retained the discretion to limit any fee request to a four times multiple of the collective lodestar. This level of negotiation was undertaken in contemplation of the significant contingency risk present in this Action from inception, but also mindful that Lead Plaintiff (and this Court) would not countenance a fee that could be seen as a "windfall" to Lead Counsel and the other approved assisting counsel.

Courts in this Circuit have often approved fee awards representing multipliers of 3 or greater.[12] In *Cromer Finance Ltd. v. Berger*, 2003 WL 203197 (S.D.N.Y. Jan. 29, 2003), this Court awarded a fee representing 22% of the settlement funds, and allowed a 3.56 lodestar multiple for one of the lead counsel. Here, based on the collective lodestar of Plaintiffs' Counsel

[12] *See In re NASDAQ Market-Makers*, 187 F.R.D. at 489 (approving fee representing 14% of $1.027 billion settlement representing a multiplier of 3.97); *Del Global*, 186 F.Supp.2d at 371 (approving 33% of the recovery representing a multiplier of 4.65).

through June 30, 2004, the lodestar multiple that equates to the fee determined by the retainer agreement's fee grid is 2.82, which is far lower than the five times multiple that served as a cap for any fee request under the terms of the Retainer Agreement, and is well within the range of multiples allowed by courts generally in this Circuit. Thus, the "cross-check" confirms the reasonableness of the percentage sought here.

B. Plaintiffs' Counsel Should Be Reimbursed For Expenses Reasonably Incurred In Connection With This Action

Reimbursement of expenses to counsel to create a common fund is appropriate. *See In re Arakis Energy Corp., Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course"); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients") (citation omitted).

The Joint Declaration ¶ 121 and Exhibit 6 thereto summarizes that Lead Counsel and the law firms that assisted in this Action incurred $5,258,642 in "reimbursable" expenses on behalf of the Class in the prosecution of the Action.[13] Such expenses were essential to the successful prosecution and resolution of this Action. For present purposes, however, Lead Counsel is seeking reimbursement for only 80% of the total expenses paid, that is, $4,206,913. As explained in note 5, above, the Retainer Agreement requires Lead Counsel to submit reports on a quarterly basis to Lead Plaintiff with the time, lodestar and expenses incurred by Plaintiffs'

[13] Pursuant to the Retainer Agreement, certain expenses that counsel incurred in prosecution of the case are either capped or not reimbursable. Joint Decl., Exhibit 1.

Counsel. The NYSCRF's staff reviews the reports, and seeks whatever additional information or documentation it believes necessary to evaluate the reports. For purposes of this application, we are utilizing data through the quarter ended June 30, 2004, because that was the period covered by the most recent report supplied to Lead Plaintiff.

The Retainer Agreement also provides for certain caps on expenses (*e.g.*, caps on hotel charges – which total $208 per night for a Manhattan hotel room – and per diem allowances for out-of-town travel, and a $0.10 per page cap on in-house copying rates) and Lead Plaintiff is continuing its review of counsel's reported expenses through June 30, 2004. As a result, Lead Plaintiff and Lead Counsel have agreed that the request for reimbursement of expenses, at this point, will be for only 80% of the counsel's total reported expenses, and that a final reimbursement request, with the Court's permission, will be submitted prior to the Hearing on the fee and expense application. Lead Plaintiff and Lead Counsel have further agreed that this request for reimbursement may be modified for additional payments for expenses made by Plaintiffs' counsel after June 30, 2004, assuming that such expenses are reviewed and approved by Lead Plaintiff.

Some of the expenses for which counsel seek reimbursement were paid out of a Litigation Fund contributed to by Lead Counsel and certain of the assisting firms, and maintained by Barrack Rodos & Bacine. A full accounting of the payments to and expenditures by the Litigation Fund is set forth in the Exhibit 7 to the Joint Declaration, and Lead Counsel is prepared to provide any additional documentation requested by the Court.

As noted in the NYSCRF Declaration (¶¶ 3-5) and Joint Declaration of Lead Counsel (¶¶ 116-122, Plaintiffs have incurred considerable expenses for experts and consultants retained by Lead Counsel. Under the Retainer Agreement, Lead Counsel was required to obtain Lead

Plaintiff's approval before retaining any expert or consultant, and did so. Moreover, when retaining such experts and consultants, Lead Counsel typically considered several potential candidates, and reviewed proposals from each of them. Lead Counsel thereafter made a recommendation to the Lead Plaintiff, which considered the recommendation and determined whether to approve the retention of the expert or consultant.

Plaintiffs' identified trial experts are: Harris Devor (auditing and accounting issues); James Miller (investment banking and due diligence); John Bise (telecommunications); and Blaine Nye (damages). Frank Torchio, of Forensic Economics, earlier provided expert services on damages in connection with the motion for class certification submissions and, as identified in the Notice, in calculating damages in connection with the settlement negotiations. Because the litigation is continuing against the non-settling Defendants, Plaintiffs are not disclosing here the identity of consultants retained for this case. We can say, however, that such consultants substantially assisted in matters pertaining to Lead Counsel's case investigation, discovery of electronic documents, due diligence issues and other matters, and that their invoices, as paid through June 30, 2004, are contained within the summary of the Litigation Fund payments, attached (in redacted form with respect to experts and consultants) as Exhibit 7 to the Joint Declaration.

In addition to the expenses already paid by Plaintiffs' Counsel, there are two other categories of expenses for which Lead Counsel seek payment in the present application.

First, the Administrator appointed by this Court for dissemination of the initial Notice of Class Action and the Individual Action notice and summary notice associated with that first mailing, for dissemination of the Notice of the Citigroup Settlement, the individual notices and summary notice associated with the second mailing, and for all other services reasonably

connected with maintaining records of exclusions, claims and the like, has also now provided an invoice for its service. See Joint Decl. ¶ 128 and Exhibit 8. The invoice comports with the retention letters that Lead Plaintiff approved for the retention of the Administrator, which retentions followed significant RFP proposals by a number of qualified bidders and the selection of Garden City Group as the Administrator for this Action (with the Court's approval). The total invoice is for the sum of $7,129,474.65 (for services and costs totaling $10,129,474.65 less the $3 million amount previously advanced from the Notice and Administration Fund established in the Stipulation and this Court's Hearing Order of July 16, 2004). Pending and subject to Lead Plaintiff's continuing review of the Invoice, Lead Counsel respectfully seeks this Court's approval of the payment of the Administrator's invoice out of the Settlement Fund.

Second, pursuant to the PSLRA, Lead Plaintiff NYSCRF is entitled to reimbursement of its reasonable expenses incurred in connection with this case. *See* 15 U.S.C. § 78u-4(a)(4). As stated in the NYSCRF Decl. (¶ 16), NYSCRF calculated the expenses that it incurred in connection with the litigation (not including any charge for the time of members of the General Counsel's staff). Such expenses include travel and meals (as allowed under the New York State Management Employees Guidelines), and other costs NYSCRF incurred as set forth in Exhibit A to the NYSCRF Declaration.

Lead Counsel respectfully submits that all of the foregoing reimbursement requests are appropriate, fair and reasonable, and should be approved, either in the amounts submitted herein or as modified by Lead Counsel, with the approval of Lead Plaintiff, prior to the final hearing on the request.

C. A Litigation Fund in the Amount of $5 Million Should Be Established

In the Notice of the proposed Settlement, members of the Class were advised that Lead Counsel might also seek to have a set-aside of a portion of the Settlement Amount to fund the continued prosecution of the Action against the non-settling Defendants. As set forth above, to date, Plaintiffs' Counsel has prosecuted this Action on a fully contingent basis. The application for reimbursement of expenses only covers expenses paid through June 30, 2004. Joint Decl. ¶ 123. But the expenses of prosecuting this case have hardly stopped. Since June 30, Lead Counsel and Assisting Counsel have made significant additional payments, and have incurred additional expenses that must be paid. Moreover, from now until the time of trial, Plaintiffs' Counsel expect to incur even further significant expenses (to say nothing of the time that Plaintiffs' Counsel is expending at they prepare for trial beginning January 10, 2005). Still to be completed are certain expert reply reports and depositions; preparation of trial exhibits and graphics; preparation of excerpts of videotaped deposition; copying of documents for trial; continuing work with experts; and the like. All of these tasks will result in expenses to be incurred in connection with all facets of the pre-trial and trial stages of this case.

It will greatly benefit the Class to ensure that Lead Counsel have a sufficient "war chest" to mount the type of case presentation that will ensure, to the greatest extent possible, a successful trial of this Action against the non-settling defendants. The appropriateness of the establishment of a litigation fund out of the proceeds of a partial settlement has been recognized in this District and elsewhere. *See Teachers' Retirement System of Louisiana v. A.C.L.N. Limited*, 2004 WL 1087261 at *6 (S.D.N.Y. May 14, 2004) (Pollack, J.); *In re Enron Corp. Inc., Derivative & "ERISA" Litig.*, 2004 WL 1900294 (S. D. Tex. Aug. 5, 2004) (Harmon, J.) (ruling on allowances from a $15 million fund established from a $40 million settlement); *In re M.D.C.*

Holdings Sec. Litig., Master File No. CV 89-0090 E, (S.D. Cal., Aug. 30, 1990) (McCue, J.); *In re Software Tech. Inc. Sec. Litig.*, Master File No. CV 90-1906 (N.D. Cal. Sept. 10, 1991) (F. Smith, J.).

With Lead Plaintiff's approval (NYSCRF Decl. ¶ 129), Lead Counsel is hereby seeking the establishment of a $5 million set-aside, (as opposed to the $10 million "not to exceed" figure in the Notice) to be used to fund the continued prosecution of the Action against the non-settling defendants. For the foregoing reasons, Lead Counsel respectfully requests that the Court this request for establishment of such a fund.

III. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests this Court: (i) approve Lead Counsel's application for attorneys' fees; (ii) approve Lead Counsel's application for reimbursement of expenses, as may be modified prior to the Hearing on November 5, 2004; and

(iii) direct that a further litigation fund in the amount of $5 million be established from the Settlement Amount.

Dated: New York, New York
September 24, 2004

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Respectfully Submitted,

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