IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: FIRST DATABANK ANTITRUST LITIGATION	)	MASTER FILE NO. 1:01CV00879 (TPJ)
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

FEDERAL TRADE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING CLASS COUNSEL'S FEE APPLICATION OR, IN THE ALTERNATIVE, TO PARTICIPATE AS *AMICUS CURIAE*

The Federal Trade Commission ("Commission" or "FTC") moves for permissive intervention in the above-captioned action, pursuant to Fed. R. Civ. P. 24(b), for the limited purpose of enabling the agency to oppose class plaintiffs' petition for the award of counsel fees.

In the alternative, should the Court prefer to allow the Commission to participate as an *amicus curiae* and wish to treat the Commission's submission (*i.e.*, its memorandum in opposition and the attached exhibit) as an *amicus* brief, we are amenable to that resolution as well, although we believe that intervention would be preferable from the Commission's perspective.[1]

STATEMENT OF FACTS

The underlying antitrust cause of action arose from the 1998 acquisition by The Hearst Trust,

[1] Intervention would enable the Commission to appeal an adverse decision on attorneys' fees, should it choose to do so. *See Karcher v. May*, 484 U.S. 72, 77 (1987). In addition, intervention would appear better suited to the Commission's desire to submit factual information, rather than merely legal argumentation. We note, however, that courts on occasion have permitted *amici* to submit evidence where appropriate. *See, e.g., Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975).

The Hearst Corporation, and First DataBank, Inc. ("defendants") of Medi-Span, Inc. from its prior owner. As a result of this acquisition, the Commission began to receive complaints of drastically increased prices. In August 1999, the agency launched an exhaustive 20-month investigation that culminated in the filing of a complaint in this Court on April 5, 2001. The Commission's complaint charged defendants with monopolization, attempted monopolization, consummating an acquisition that may have substantially lessened competition and/or tended to create a monopoly, and failing to comply with premerger notification requirements. *See* Gibbs Decl. (Exh. 1 to FTC Memorandum in Opposition), ¶¶ 8-13, 15, 17.

During the period immediately prior to the filing of the Commission's complaint, Commission staff and defendants engaged in serious settlement negotiations, with defendants eventually offering a settlement of $17 million, to be split between disgorgement and civil penalties. That offer was rejected and the Commission proceeded to file its case. *See* Gibbs Decl. ¶ 16.

On April 13, shortly after the filing of the Commission's complaint and one week before the commencement of the first class action, defendants raised their offer to a total of $18 million, including $16 million in disgorgement and $2 million in civil penalties. Commission counsel responded that $16 million in disgorgement was acceptable (subject to later adjustment if divestiture were delayed beyond September 1, 2001), but that other outstanding issues (*i.e.*, the amount of civil penalties, which had to be negotiated with the Department of Justice, and the nature and timing of divestiture) precluded a settlement at that time. *See* Gibbs Decl., ¶ 19.

In tentatively agreeing upon $16 million in disgorgement, both the Commission and defendants recognized the potential for follow-on class actions. Consequently, the Commission agreed that it

would allow the disgorgement monies the Commission was entitled to receive to be subsumed into any private class action settlement, with the understanding that it would have the opportunity to approve the distribution plan and also to review the application for attorneys' fees. These points of agreement, reached on April 13, 2001, were discussed with the Court at the first status conference, held on August 16, 2001. *See* Gibbs Decl., ¶¶ 19, 25.

The first class action (*J.B.D.L. Corp, d/b/a Beckett Aprothecary v. Hearst Trust*, 1:01CV00870) was filed in this Court on April 20, and the complaint in that case contained "core" allegations that were virtually identical to those in the Commission's complaint. Additional class actions followed. All of the direct purchasers' class actions were eventually settled on August 7, 2001, and that settlement was preliminarily approved by the Court on August 22, 2001. *See* Gibbs Decl., ¶¶ 20, 24. Under the terms of that settlement, defendants agreed to pay a sum that now totals $24 million.

Settlement of the Commission's action was delayed by the difficulties involved in effectuating a satisfactory divestiture. Those difficulties were eventually overcome, and the Commission's action was settled by a Final Order entered by this Court on December 18, 2001. Among other things, the Commission's settlement provides for disgorgement of $19 million of illegally gained profits, the divestiture of the former-Medi-Span business, and the right for customers to terminate their contracts with Hearst/FDB and renegotiate different terms with competitors. *See* Gibbs Decl., ¶¶ 27-29.

Class plaintiffs have now petitioned this Court for an award of counsel fees in excess of $5 million, which represents 21.3% of the $24 million common fund (but over 60% of that portion of the fund for which class counsel are responsible). Although the Commission recognizes that class counsel are entitled to fees for their contributions, the agency has a responsibility to injured customers and to

this Court to ensure that those fees are reasonable and not overstated. By virtue of the role it played in the development and prosecution of the charges against defendants, the Commission is uniquely situated to provide the Court with information that is exclusively in the agency's possession concerning the agency's contributions to this case and to the common fund. That information demonstrates that at least $16 million of the common fund is attributable to the Commission's efforts, and not to the efforts of class counsel. The Commission has therefore filed the present motion requesting that it be afforded the opportunity to participate in this proceeding for the limited purpose of opposing the application for attorneys' fees.

ARGUMENT

I. THE COMMISSION'S REQUEST FOR PERMISSIVE INTERVENTION SHOULD BE GRANTED

Pursuant to Fed. R. Civ. P. 24(b)(2), anyone may be permitted to intervene in an action so long as two conditions are met. First, the applicant's "claim or defense" and the main action must have a question of law or fact in common. Second, the application must be timely and should not "unduly delay or prejudice the rights of the original parties." *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); *Bossier Parish School Bd. v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994). The decision to grant or deny a motion for permissive intervention under Fed. R. Civ. P. 24(b)(2) falls within the sound discretion of the district court. *E.g., Brewer v. Republic Steel Corp.*, 513 F.2d at 1225; *Bossier Parish School Bd.*, 157 F.R.D. at 135. Moreover, courts in this Circuit generally take a generous approach to intervention. *See, e.g., Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000).

Taking these points in reverse order, there can be no doubt that the Commission's application is timely. The Commission responded to the fee application as soon as possible after receiving a draft, and the present motion has been filed several days in advance of the fairness hearing. In addition, prejudice or delay is not an issue here, since intervention is not sought on the merits, but rather for the limited purpose of opposing the fee application. "Rule 26(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

Moreover, we note that the Commission has been involved in the underlying case against defendants from the outset (indeed, the Commission's involvement long precedes the commencement of the class actions), yet had no reason to intervene in the private actions prior to this point. Certainly, the Commission's concern about money (the bulk of which the Commission was responsible for) being paid to attorneys rather than consumers can hardly come as a surprise to anyone.

Turning to the question of "commonality" of law or fact, it is hornbook law that the degree of commonality required may depend on the nature of the requested intervention. 6 James W. Moore *et al.*, Moore's Federal Practice § 24.11 at 24-63 (3d ed.). Thus, a "less stringent standard may be applied if an applicant seeks intervention for a very limited purpose rather than full participation in the litigation." *Id.* For example, where an applicant seeks to intervene to challenge an order of confidentiality, "the requisite commonality is met by virtue of the fact that the applicant seeks to challenge the validity of an order entered in the action." *Id.*

This Circuit has readily embraced the foregoing principles, recognizing that a strict application

of Rule 24(b) is appropriate only in the circumstances where the putative intervenor seeks to become involved in an action in order to litigate a legal claim or defense on the merits. *See EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967). Thus, despite the lack of a clear fit with the literal terms of Rule 24(b), this Circuit has permitted intervention "in situations where the existence of any nominate 'claim' or 'defense' is difficult to find," *Nuesse*, 385 F.2d at 704; *National Children's Ctr.*, 146 F.2d at 1045-46, and has expressed "a willingness to adopt flexible interpretations of Rule 24 in special circumstances," *National Children's Ctr.*, 146 F.2d at 1046; *Textile Workers Union of America, CIO v. Allendale Co.*, 226 F.2d 765, 767-68 (D.C. Cir. 1955). For the reasons discussed in this memorandum, the present case involves special circumstances warranting permissive intervention.

As previously emphasized, the Commission seeks to intervene for a very limited purpose. To the extent that the Court must find both a Commission "claim" and "commonality" between that claim and this action, we submit that the requisite "claim" and nexus is provided by the Commission's agreement to permit its disgorgement funds to be subsumed into the class action settlement, with the understanding that it would have the opportunity to approve the distribution plan and also to review the application for attorneys' fees. In addition, the class action settlement agreement explicitly grants the Commission "the right to object, comment or request modification of Plaintiffs' proposed Allocation and Distribution Plan." Stipulation of Settlement Between Direct Purchaser Settlement Class Members and Defendants, ¶ XI(B). Because the plan entails the distribution of the common fund, the contents of which would be diminished by the attorneys' fees sought, the settlement agreement also implicitly provides the Commission with the right to object to the proposed fees.

This Circuit's decision in *Nuesse* is particularly instructive. In that case, the United States Comptroller of the Currency was allegedly preparing to approve the application of a national bank for permission to open a branch in the vicinity of a state bank's offices. The Wisconsin banking commissioner sought to intervene to offer his interpretation of state law and of the interaction between state and federal law. The Court of Appeals reversed the district court and permitted permissive intervention, even though a strict reading of Rule 24(b) would have compelled a different result. Among other things, the Circuit Court emphasized that "[i]t is a significant fact that the applicant for permissive intervention is a government official." 385 F.2d at 704. In justifying its decision, the Court then offered the following rationale, which is equally applicable to the present case:

> While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation.

Id. at 706.

There are a number of additional reasons why this Court should exercise its discretion to permit the Commission to intervene. First, the information offered by the Commission would be helpful to the Court in its consideration of the fee application. *See Environmental Defense Fund v. Costle*, 79 F.R.D. 235, 244 (D.D.C. 1978). In fact, the Commission would be able to make a unique contribution to the evidence that is relevant to determining the appropriate fee award. *See* 6 Moore' Federal Practice (3d ed.) § 24.10[2][b] at 24-58. Second, the Commission's interests are not adequately represented by the existing parties. *Id.* at § 24.10[2][c]. And finally, no adequate remedy is available to the Commission in another action. *Id.* at § 24.10[2][d].

II. AT A MINIMUM, THE COMMISSION SHOULD BE PERMITTED TO

PARTICIPATE AS *AMICUS CURIAE* AND TO SUBMIT EVIDENCE

The decision of whether to allow a non-party to participate as an *amicus curiae* is solely within the broad discretion of the Court. *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). Generally, "a court may grant leave to appear as an *amicus* if the information offered is 'timely and useful.'" *Id.* Where, as here, the movant has "a special interest in this litigation as well as a familiarity and knowledge of the issues . . . that could aid in the resolution [of the matter]," courts have found this to be a sufficient basis upon which to permit participation as an *amicus*. *See id.* Moreover, it is appropriate to permit an *amicus* to submit evidence, as the Commission seeks to do in the present case. *See, e.g., Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975).

CONCLUSION

The Commission's motion to intervene under Fed. R. Civ. P. 24(b)(2) for the limited purpose of opposing class counsel's fee application should be granted. In the alternative, the Commission should be permitted to participate as an *amicus curiae* and to submit factual evidence in support of its position.

Respectfully submitted,

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January 2, 2002

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FEDERAL TRADE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CLASS PLAINTIFFS' PETITION FOR AWARD OF COUNSEL FEES AND REIMBURSEMENT OF EXPENSES

The Federal Trade Commission ("Commission" or "FTC") opposes class counsel's petition for the award of counsel fees (and reimbursement of expenses) in excess of $5 million based on a common fund of $24 million. Despite having "piggybacked" on the Commission's investigation and prosecution of defendants' underlying law violations, petitioners virtually ignore the substantial role played by the Commission in developing the case and, particularly, in creating the bulk of the common fund. After the Commission concluded its extensive pre-complaint investigation of The Hearst Corporation, The Hearst Trust, and First DataBank, Inc. (collectively, "defendants") and filed its complaint, and before any private class action had been filed, defendants offered the Commission a settlement consisting of $16 million in disgorgement and $2 million in civil penalties. Petitioners' fee calculation should therefore be based only on the incremental value provided by class counsel, *i.e.*, on that part of the common fund for which class counsel were directly responsible – in this case, at most an additional $8 million. Viewed properly, petitioners' application seeks fees representing over 60% of that portion of the common fund for which class counsel are responsible. Moreover, given the prior "spadework" done by the Commission, the promptness of the settlement, the failure (and lack of need) to conduct any

formal pre-trial discovery, and various other circumstances, we submit that the appropriate percentage to be applied to the $8 million (or less) that class counsel contributed to the common fund should be set below the normal "benchmark" range of 20 to 30%.

STATEMENT OF THE FTC'S INTEREST

The Commission's mission focuses primarily on the protection of consumers. In this particular case, the Commission's goal is to ensure that injured customers are compensated to the full extent permissible by law, up to the statutory limit of trebled damages. When the Commission agreed to permit the disgorgement funds obtained in its enforcement action to be included in the common fund to be distributed through the class actions, it did so with the understanding that it would have the opportunity to approve the distribution plan and also to review the application for attorneys' fees. Although the Commission recognizes that class counsel are entitled to fees for their contributions, the agency has a responsibility to injured customers and to this Court to ensure that those fees are reasonable and not overstated. By virtue of the role it played in the development and prosecution of the charges against defendants, the Commission is uniquely situated to provide the Court with information that is exclusively in the agency's possession concerning the agency's contributions to this case and to the common fund. Such information is essential to permit this Court to determine how much of the common fund is attributable to the Commission's efforts, and how much is attributable to the efforts of class counsel. In furtherance of these ends, the Commission has determined that this opposition to the petition for attorneys' fees is necessary and appropriate.

STATEMENT OF FACTS

The Commission commenced an extensive 20-month investigation of defendants' conduct in late 1999. The investigation covered potential antitrust violations in connection with defendants' acquisition of Medi-Span and possible violations of the premerger reporting requirements due to the failure to provide required information regarding the acquisition. During the course of its investigation, Commission staff expended over 25,000 hours of time, obtained production of (and reviewed) 400 boxes of documents submitted in response to approximately 40 subpoenas, and conducted 20 investigational hearings and over 60 interviews. The Commission also worked with several experts to develop the case and prepare for eventual litigation. *See* Gibbs Declaration (Exhibit 1 hereto), ¶¶ 8-13.

In early January 2001, during the pendency of the investigation, defendants offered to divest the MediSpan assets and to pay a maximum of $2 million in civil penalties, but refused to pay any disgorgement. By April 2001, when the Commission finished building its case and was prepared to file a lawsuit, continuing negotiations with defendants had resulted in a total offer of $17 million, to be split between disgorgement and civil penalties. Defendants by this time had also agreed in principle to divestiture, but within an uncertain time frame and without an identified purchaser. *See* Exhibit 1, ¶ 16.

Believing defendants' final offer was still insufficient, the Commission filed its complaint on April 5, 2001. The Commission's complaint charged defendants with monopolization, attempted monopolization, consummating an acquisition that may have substantially lessened competition and/or tended to create a monopoly, and failing to comply with premerger notification requirements. *See* Exhibit 1, ¶ 17.

On April 13, shortly after the filing of the Commission's complaint and prior to the

commencement of the first class action, defendants informed Commission counsel that they were willing to settle for a total of $18 million, including $16 million in disgorgement and $2 million in civil penalties.[2] Commission counsel were prepared at that point to accept the $16 million disgorgement offer, but the amount of civil penalties to be paid was still at issue, as was the question of how soon, and to whom, divestiture would be accomplished. *See* Exhibit 1, ¶ 19. The first follow-on class action (*J.B.D.L. Corp, d/b/a Beckett Aprothecary v. Hearst Trust*, 1:01CV00870) was filed in this Court on April 20, and the complaint in that case contained "core" allegations that were virtually identical to those in the Commission's complaint. Indeed, there is no reason to believe that class counsel did any development work whatsoever until after until they learned of the Commission's action. *See* Exhibit 1, ¶ 20.

Both the Commission's action and the class actions were in a settlement mode from the very outset. Although the Commission's case included some litigation-related activities – *e.g.*, a meeting of the parties, the preparation of a report under Local Rule 16.3(c), the drafting and entry of a protective order, and the exchange of document requests (with repeatedly adjourned compliance dates) – pretrial discovery was repeatedly postponed and no formal pretrial discovery ever took place. *See* Exhibit 1, ¶¶ 18, 21, 23.

Similarly, it is our understanding that there was no formal pretrial discovery in the class actions.

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[2] Because the date of any future divestiture was uncertain, the Commission made clear to defendants that the $16 million in disgorgement that Commission staff had tentatively accepted would have to be revised upward after September 1, 2001, to take account of the increased monopoly profits that the Commission believed defendants would continue to earn until an acceptable divestiture had been accomplished. Commission staff further stated that the appropriate amount of the upward revision would be $1 million per month. *See* Exhibit 1, ¶ 19.

Rather, class counsel and defendants apparently engaged in voluntary "confirmatory discovery" aimed at providing a basis for any settlement reached.[3] The class actions settled on August 7, 2001, without requiring class counsel to have engaged in any motions practice. *See* Exhibit 1, ¶ 24.

At the first status conference, held on August 16 for both the Commission's case and the class actions, class counsel presented their $24 million settlement to the Court for preliminary approval. Commission counsel then represented to the Court that we had previously agreed in principle with defendants on a disgorgement amount of $16 million if the case could be settled in the immediate future, and further that any disgorgement funds to which the Commission was entitled would be ceded to the class action plaintiffs and subsumed into the class action settlement (*i.e.*, defendants would not be asked to pay FTC disgorgement in addition to the private settlement) if two conditions were met. First, the Commission would have to determine that the distribution plan was acceptable. Second, none of the FTC's disgorgement funds could be used for attorneys' fees. Given this settlement posture, Commission counsel also informed the Court that we had agreed with defendants to postpone discovery for an additional period of time while settlement negotiations continued regarding the divestiture and the amount of civil penalties. *See* Exhibit 1, ¶ 25.

Thereafter, defendants engaged in negotiations with the Department of Justice over the amount of civil penalties, culminating in defendants' eventual agreement to pay a record $4 million in civil penalties. The order approving the civil penalty settlement was entered on October 17, 2001. *See* Exhibit 1, ¶ 26.

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[3] It is our understanding that this voluntary "confirmatory discovery" consisted primarily of defendants providing class counsel with documents and information previously provided to the Commission during the course of its investigation. *See* Exhibit 1, ¶ 24.

Beginning on June 25, 2001, when defendants first identified their chosen purchaser and continuing until settlement, Commission staff worked assiduously to assess the proposed divestiture and to modify the transaction and the underlying documentation to make the transaction acceptable to the agency. On October 4, 2001, defendants finally signed an Agreement in Principle with the Commission which set out the major terms of a final agreement, including both divestiture and disgorgement. Although defendants failed to meet certain deadlines imposed by the Agreement in Principle, thus voiding that Agreement, the unresolved issues were eventually settled and defendants agreed to accept a new proposed final order requiring divestiture to the identified purchaser and disgorgement in the amount of $19 million.[4] That agreement was approved by the Commission on December 13 and filed with the Court on December 14, 2001. The Final Order was entered by this Court on December 18, 2001. *See* Exhibit 1, ¶¶ 3, 29.

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[4] As previously noted (*see* n.1, *supra*), this increase in the amount of disgorgement over the $16 million previously negotiated reflects the staff's estimate that defendants continued to realize about $1 million per month in monopoly profits for each month prior to divestiture. Thus, staff believed that, given the substantial delay in finalizing a settlement with the Commission, defendants should be required to pay additional amounts for each month the divestiture was delayed, regardless of the reason(s) for the delay.

ARGUMENT

I. THIS COURT HAS CONSIDERABLE DISCRETION, SUBJECT TO THE BOUNDS OF REASONABLENESS, IN FIXING THE FEES TO WHICH CLASS COUNSEL ARE ENTITLED

It is axiomatic that, in "common fund" cases such as this, a party who "creates, preserves, or increases the value of a fund in which others have an ownership interest [is entitled] to be reimbursed from that fund for litigation expenses incurred, including counsel fees." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993). This Circuit, following several others, has determined that a "percentage-of-the-fund" approach, rather than a "lodestar" (*i.e.*, hourly rate) method, is the appropriate mechanism for determining the attorneys' fee award in such cases. *Id.* at 1271. In applying this approach to determine the proper fee, courts have historically exercised considerable discretion and have applied a reasonableness standard, focusing upon the particular circumstances of the case at hand. *Id.* at 1265. The trial court's substantial discretion in awarding legal fees stems from its familiarity with the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. *Id.* at 1271; *see Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Judicial scrutiny of attorneys' fees is especially important in this particular case. For one thing, the unusual combination of a government enforcement action and a class action makes it impossible to resolve the fee question by accepting and mechanically applying a benchmark percentage. In addition, because the reasonableness of the fee is largely dependent upon facts that are not known to the public at large, individual class members are in no position to object on their own behalf.

For the reasons discussed below, this Court should exercise its discretion to reduce class counsel's fees to an amount that is based solely on the incremental value provided by class counsel and

that is reasonable taking into account the special circumstances presented by the Commission's involvement in this case.

II. CONSIDERATION OF THE COMMISSION'S SUBSTANTIAL ROLE IN DEVELOPING AND PROSECUTING THE UNDERLYING LAW VIOLATIONS WARRANTS A SIGNIFICANT REDUCTION IN COUNSEL'S FEE PERCENTAGE

Where, as here, attorneys' fees are sought in a case that rode "piggyback" on a prior case, this factor should be taken into account as a basis for reducing the fees awarded. *See, e.g., Swedish Hosp. Corp.*, 1 F.3d at 1272. This is particularly true where the prior action or investigation involved the government.[5] The Second Circuit offered the following explanation for the weight given to the government's involvement:

> An essential condition precedent to the award [of counsel fees from a common fund] . . . is a showing that the attorney's services were a competent producing cause of the supposed benefit conferred. [Citations omitted.] Where, as often occurs, the private action follows upon the coattails of a government suit or investigation which has provided the basis for the claim, it has been suggested that the court's inquiry be directed at whether the services rendered played any part in achieving a successful result rather than at the encouragement of the litigation by increasing the fee through the use of a contingency factor.

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[5] *See, e.g., Goldberger v. Integrated Resources,* Inc., 209 F.3d 43, 53-54 (2d Cir. 2000) (4% fee awarded, in part because counsel benefitted from the spadework done by federal authorities during criminal and civil actions); *Wechsler v. Southeastern Properties, Inc.*, 506 F.2d 631, 635-36 (2d Cir. 1974) (no fees awarded where state attorney general brought action which resulted in compensation of plaintiff class, and class counsel had not contributed to attorney general's initiation of proceedings); *In re Quantum Health Resources, Inc. Securities Litigation*, 962 F. Supp. 1254, 1259 (C.D. Cal. 1997) (percentage reduced from the benchmark to 10%, in part because material allegations of complaint were supported by prior government investigations); *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 467-68 (C.D. Cal. 1978) (15% fee awarded, in part because of effect of Coast Guard's investigation on the risk assumed by counsel and the work they needed to perform); *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *SEC v. United Financial Group, Inc.*, 404 F. Supp. 908, 913 (D. Ore. 1975); *In re Gypsum Cases*, 386 F. Supp. 959, 962 (N.D. Cal. 1974).

Wechsler, 506 F.2d at 635.

The government's involvement, particularly when it includes a prior investigation, bears directly upon several factors that courts have considered in assessing attorneys' fees. Such governmental involvement substantially strengthens plaintiff's case and thus considerably reduces the risk of nonpayment that class counsel would otherwise bear. *See, e.g., In re Quantum Health Resources*, 962 F. Supp. at 1259. Also, governmental involvement often minimizes the need for, and value of, skilled and experienced class counsel, thus affecting the "quality of services rendered." *See, e.g., Donnarumma*, 79 F.R.D. at 468. For these and other reasons, the government's involvement will often substantially lessen the benefits conferred by class action counsel. Consequently, the existence of governmental action is a factor courts may properly consider in reducing class counsel's fee on either a percentage recovery or a lodestar basis.[6] *See* n.4, *supra*.

An examination of the case law confirms this conclusion. For example, *Donnarumma* concerned an explosion on a boat that resulted in a class action lawsuit. The Coast Guard had previously conducted a full investigation of the incident. In awarding a 15% fee, the court considered the effect of the Coast Guard's investigation on the risk assumed by counsel and the work they needed to perform. *See* 79 F.R.D. at 467-68.

Similarly, in *Quantum Health Resources, Inc.,* the court reduced the percentage from the

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[6] Several courts have identified as a separate factor for consideration the degree (if any) to which plaintiff's efforts were supported by prior governmental action. *See In re Gypsum Cases*, 386 F. Supp. at 962; *accord, Grinnell*, 495 F.2d at 471. But whether treated as a separate factor or not, governmental involvement should be taken into account in awarding legal fees to class counsel. *See* n.4, *supra*.

"benchmark" to 10%, in part because of the government's involvement. The court explained that

> [t]he facts of this case weighed heavily in the Class' favor from the start, largely because the material allegations of the complaint were supported by the unequivocal results of public investigations conducted by the California State Controller's Office and the California Department of Health Services.

962 F. Supp. at 1259.

The Second Circuit has also recognized that government involvement can be a significant factor in reducing a fee award. In *Goldberger,* the court of appeals approved a fee award that amounted to only 4% of the total recovery, in part because of the government's actions against the main participants. "Counsel benefitted from the spadework done by federal authorities during the criminal and civil actions brought against [defendants]." 209 F.3d at 53-54. In upholding the district court's award of a 4% fee, the court emphasized that deviation from "benchmarks" is sometimes necessary to achieve a just result:

> Applying such principles of moderation here, we cannot say that the district court abused its discretion merely because the fee awarded is at odds with the 25% "benchmark" requested by counsel. Nor does the award of a fee of about 4% constitute an abuse of discretion simply because it deviates materially from the 11% to 19% usually awarded in similar cases. Instead, we adhere to our prior practice that a fee award should be assessed on scrutiny of the unique circumstances of each case, and "a jealous regard to the rights of those who are interested in the fund."

Id. at 53; *accord, Wechsler*, 506 F.2d at 635-36 (no fees awarded where state attorney-general brought action which resulted in compensation of plaintiff class, and class counsel had not contributed to attorney-general's initiation of proceedings).

Despite the well-recognized need to take government involvement into account, petitioners' fee application virtually ignores the Commission's substantial role in this matter. Needless to say, this is an extraordinary oversight. The Commission's extensive pre-complaint efforts to develop the underlying

case, its prosecution of the defendants for their antitrust violations, and the negotiations undertaken by Commission staff were key to the results achieved in the present case.

As is apparent from the discussion of the facts in this memorandum and in Exhibit 1, it was the Commission's diligent efforts (particularly including its exhaustive investigation) – not the efforts of class counsel – that put defendants in a settlement posture even before any case had been filed against them. Although a trial is always a possibility until a settlement has been finalized, the strength of the evidence that the Commission developed virtually ensured that the outcome would be a negotiated settlement rather than litigation. Consequently, class counsel were not required to litigate this case, but merely to settle it. Moreover, due to the Commission's prior efforts, class counsel were merely required to negotiate upward from the base of $16 million in disgorgement that was already "on the table" as a result of negotiations between the Commission and the defendants prior to the commencement of the class actions. In addition, because of the strength of the Commission's evidence and because these cases were in a settlement mode from the outset, class counsel were not required to engage in any formal pretrial discovery or in any motions practice. In this connection, it is our understanding that the only discovery class counsel engaged in was voluntary "confirmatory discovery" aimed at providing a basis for any settlement reached. For these and other reasons, there can be no doubt in the present case that "the benefits conferred by the [class action] attorneys upon the . . . class are substantially lessened because of governmental involvement." *United Financial Group*, 404 F. Supp. at 913.

This Circuit has recognized that "a majority of common fund class action fee awards fall between twenty and thirty percent." *Swedish Hosp. Corp.*, 1 F.3d at 1272. Class counsel in the present case seek a fee of 22% of the total settlement amount, plus reimbursement for costs and

expenses. Yet the circumstances of this case – particularly the Commission's enormous contribution to the results and the fact that governmental involvement substantially lessened the benefits conferred (and the work undertaken) by class counsel – demonstrate that class counsel's fee should be reduced to a figure substantially below the benchmark level of 20-30%.[7]

III. THE CALCULATION OF CLASS COUNSEL'S FEES SHOULD BE BASED ONLY ON THE $8 MILLION OR LESS FOR WHICH COUNSEL WERE RESPONSIBLE

Quite apart from whatever percentage fee this Court decides is reasonable and appropriate, the question remains as to how to identify the portion of the common fund to which this percentage should be applied. Petitioners maintain that their percentage should be applied to the entire $24 million fund. However, the law is clear that the fee calculation should be based "only on that part of the fund for which counsel was responsible." *Swedish Hosp. Corp.*, 1 F.3d at 1271; *see Wechsler*, 506 F.2d at 636. Applying this standard, the calculation of class counsel's fees should be based solely on the additional amount that class counsel collected above and beyond the $16 million in disgorgement

[7] In contrast, courts in this Circuit have permitted percentage awards at the higher end of the benchmark range under circumstances far different from those in the present case. For example, in *In re Newbridge Networks Securities Litigation*, 1998 U.S. Dist. LEXIS 23238 at *11-12 (D.D.C. Oct. 23, 1998), the court observed that the request for a 30% fee was "at the high end of the customary range," but agreed that this was reasonable under the circumstances. The court pointed to the following factors in justification of its fee award: (1) the litigation continued for four years, during which counsel received no compensation; (2) class counsel engaged in extensive motions practice and conducted considerable discovery; (3) counsel's efforts "in posturing [the] case for trial" played a role in the settlement and produced a substantial payout to the class; (4) no class member objected; and (5) unlike *Swedish Hosp. Corp.*, counsel did not "piggyback" on the success of other plaintiffs and clearly faced the prospect of zero recovery. With the exception of the lack of objection (which is explicable due to class members' lack of knowledge of the extent of the Commission's involvement), *none* of the factors cited in *Newbridge Networks* is applicable here.

previously negotiated by the Commission.[8] This figure is, at most, $8 million.

The leading case in this Circuit on awarding attorneys' fees from a common fund, *Swedish Hosp. Corp.*, 1 F.3d 1261, is particularly instructive here. In *Swedish Hospital*, several hospitals brought a class action to attack the policy of the Department of Health and Human Services ("HHS") of refusing to reimburse hospitals for photocopying costs incurred in meeting the requirements of the Medicare program. Plaintiff hospitals and HHS entered into a settlement agreement, approved by the district court, in which HHS agreed to pay $27.8 million to the hospitals. Applying a "percentage-of-the-fund" methodology, the district court decided that the attorneys "should receive twenty percent of the common fund produced by their efforts." 1 F.3d at 1263. However, the court awarded only $2 million in fees, reasoning that "because the efforts of plaintiffs' attorneys had contributed only $10 million to the value of the settlement fund, the attorneys were entitled to twenty percent of only that amount." *Id.* The court explained that, in response to prior cases challenging the HHS's policy of refusing reimbursement for photocopying costs, HHS had changed its policy and issued a notice of proposed rulemaking, proposing to reimburse hospitals for photocopies at the rate of $ .0498 per page. Although this Circuit (in one of the prior cases) had rejected HHS's proposed approach as insufficient,

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[8] Even though the Commission ultimately obtained $19 million in disgorgement, there is some justification for crediting class counsel with having added $8 million in value to the common fund, representing the difference between the $16 million negotiated by the Commission on April 13 (one week prior to the filing of the first class action) and the $24 million eventually obtained. Although the Commission and defendants contemplated on April 13 that additional monies beyond the $16 million in disgorgement would have to be paid in the event that divestiture could not be accomplished by September 1, the amount of the potential increase was not firmly agreed upon by the parties. For this reason, the Court may deem it appropriate to give class counsel credit for the entire amount above $16 million, rather than using $19 million as the base and crediting class counsel with having created only a $5 million increment.

the district court concluded that counsel "could 'claim credit only for enhancing the fund' by payment at roughly $.07 per page instead of approximately $.0498 per page 'which was apparently on the table when negotiations opened.'" *Id.* at 1264. Plaintiffs appealed, arguing that their attorneys were entitled to 20% of the entire $ 27.8 million fund.

On appeal, this Circuit held that the proper methodology for calculating attorneys' fees in common fund cases was the percentage approach, and that the district court had acted within its discretion in setting the fee percentage at 20%. 1 F.3d at 1272. The Court then ruled that the district court properly based its fee calculation "only on that part of the fund for which counsel was responsible." *Id.* Upholding the district court's conclusion that the hospitals' attorneys were responsible for only $10 million in added value to the fund, the Court of Appeals reasoned as follows:

> [A]t the time this lawsuit was brought, HHS had proposed a regulation that would have paid $.0498 per page, whereas the eventual settlement agreement provided payment of $.07 per page. Based on the difference between these two figures, the District Court concluded that class counsel contributed about $10 million to the value of the common fund. We find substantial evidence in the record to support these conclusions and do not think the court abused its discretion in reaching them.

Id.

In the present case, due to the Commission's efforts, $16 million in disgorgement was already "on the table when negotiations [with class action plaintiffs] opened." *Swedish Hosp. Corp.*, 1 F.3d at 1264. Consequently, as in *Swedish Hospital*, class counsel are responsible only for the added value to the fund, namely, a maximum of $8 million. *Accord, Donnarumma*, 79 F.R.D. at 468 (substantial early settlement offers "removed any genuine risk of nonrecovery" and "their substantiality, when compared with the final settlement amount, indicates that the true measure of beneficial results achieved

by plaintiffs' attorneys approximated [the increment between the early settlement offers and the final settlement amount]").

The Second Circuit's decision in *Wechsler*, 506 F.2d 631, applies the foregoing principles to facts that bear a striking resemblance to those in the present case. *Wechsler* involved false and misleading statements and omissions in a stock prospectus. A few days after a public offering had been made pursuant to this prospectus, the state attorney general commenced an investigation to determine whether the sale of the stock had violated the state's Blue Sky laws, and ordered trading in the stock suspended. About six weeks later, after learning of the attorney general's investigation into the underlying transactions, plaintiff's attorney commenced a class action on behalf of plaintiff and other purchasers of the stock in question. Four months after the filing of Wechsler's class action, the attorney general commenced a formal action in state court against the stock issuer, alleging law violations and requesting rescission of the public offering. The parties to the attorney general's state court action agreed to a consent injunction which directed the issuer to make a tender offer to repurchase the stock at the price at which it was first offered, which resulted in full compensation for Wechsler and others similarly situated. In the meantime, Wechsler applied for attorneys' fees and the issuer sought to dismiss Wechsler's action and to obtain fees and costs. The district court dismissed the action and denied all applications for fees and costs. With respect to Wechsler's application for attorneys' fees, the district court found that neither Wechsler nor his attorney was of any direct assistance to the attorney general. *Id.* at 633-35.

In affirming the district court's refusal to award attorneys' fees, the court of appeals reasoned that plaintiff had failed to prove that his attorney's services made any contribution toward achieving the

settlement. 506 F.2d at 636. Indeed, the court found countervailing evidence showing that "the Attorney General's proceeding was completely responsible for the result achieved." *Id.* In reaching this conclusion, the court pointed out that the attorney general's investigation "had not only predated but inspired Wechsler's suit." *Id.* Moreover, the attorney general had the legal authority to prosecute his action and secure the same relief sought by Wechsler. Also, the attorney general "vigorously pursued his investigation and achieved the settlement shortly after the Attorney General's own suit was initiated." *Id.* Wechsler's lack of contribution was further demonstrated by the fact that he "did not take any serious steps toward pretrial discovery until after the Attorney General had successfully negotiated the settlement." *Id.*

In *Wechsler*, as in *Swedish Hospital*, the court sought to ascertain how much of the fund was directly attributable to counsel's efforts, with the understanding that attorneys' fees should be based only on that portion of the fund for which plaintiffs' attorneys were responsible, *i.e.*, on the "value added." Because the underlying cause of action in *Wechsler* had been developed first by the government with no assistance from Wechsler's counsel, and because the government was entitled to obtain (and did obtain) all of the relief that Wechsler had sought, the court concluded that class counsel had failed to demonstrate any contribution to achieving the settlement.

Despite the obvious similarities between this case and *Wechsler*, we do not contend that class counsel added nothing to the value of the common fund. However, for many of the same reasons articulated in *Wechsler*, it is important that class counsel's fees be based only on the incremental amount by which class counsel increased the total fund over the level of disgorgement that the Commission would have achieved on its own. As explained above, the Commission had an offer of $16

million in disgorgement relief in hand before plaintiffs even filed their case. And, because of the delay in achieving an acceptable divestiture, the Commission later sought and obtained an additional $3 million in disgorgement. Whatever doubts there may be as to the precise figure the Commission would have obtained in the absence of the private action, it is plain that class counsel added no more than $8 million to the total fund, and quite possibly as little as $5 million. Here, as in *Wechsler*, class counsel's services made no contribution whatsoever towards achieving the major part of the final settlement fund.

CONCLUSION

For the reasons set forth above, class counsel's fee application should be modified in two respects. First, the percentage should be reduced from 22% to a percentage substantially below 20%. Second, the percentage fee awarded should be applied only to the incremental value that class counsel added to the common fund, which is no more than $8 million.

Respectfully submitted,

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January 2, 2002