Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study

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I. Introduction

A. Background

By their nature, class actions tend to be complex and require active judicial oversight.[1] In most cases, multiple related claims have been filed by numerous plaintiffs' attorneys, all ultimately desiring to represent the class. Federal Rule of Civil Procedure 23 imposes unique responsibilities on the court, as well as on counsel. The attorneys and parties seeking to represent the class assume fiduciary responsibilities, and the court has a responsibility to ensure that the interests of the class are protected.

In class action cases, few decisions by the court will be as important as the appointment of lead or class counsel. Because of the high financial stakes involved in some types of cases (not typically civil rights or other constitutional litigation), competition for class counsel is often intense. Courts have wide discretion in selecting lead counsel. In carrying out their judicial responsibility, courts must examine the adequacy of proposed lead plaintiff's counsel, be aware of the importance of controlling attorneys' fees from the outset, and adopt an appropriate procedure to achieve those goals.

Courts have sometimes appointed as lead counsel the attorney who was first to file the complaint.[2] In the alternative, attorneys representing different plaintiffs or groups of plaintiffs will negotiate among themselves to determine who should serve as lead counsel and then propose the arrangement to the court. This second approach may result in what has been commonly referred to as a plaintiffs' steering committee composed of various attorney designations such as lead counsel, co-lead counsel, liaison counsel, trial counsel and committees of counsel. Some observers say such a "negotiation system" among plaintiffs' attorneys may not be in the best interest of the class because it can create pressure to generate enough work so that all the attorneys can be compensated. [3]

Courts have the authority to control fees and can use that power to create a system that will hold down costs to the class. Courts generally award attorneys' fees in common fund cases under one of two approaches: the percentage-of-fund method[4] or the lodestar method. Under the percent-

1. *See* Manual for Complex Litigation (Third) § 30 Class Actions (1995).

2. *See* S. Rep. No. 104-98 (1995), The Private Securities Litigation Reform Act of 1995, *reprinted in* 1995 U.S.C.C.A.N. 679.

3. Currently, the Advisory Committee on Civil Rules has proposed changes to Rule 23, including two new rules: Rule 23(g), covering class counsel appointment, and Rule 23(h), covering attorney fees. The proposed class action appointment rule would encourage counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might foster competitive applications; permit innovative approaches such as bidding, where appropriate; obviate later objections to the fee request; and serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact. The proposed class action attorney fee rule would not endorse the lodestar or percentage of recovery methods for attorney fees. Instead, the draft lists factors for the court to consider in its determination after the hearing. The proposed rules were distributed for public comment the week of August 13, 2001.

4. Also commonly referred to as percentage-of-recovery. *See* Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (approving the use of the percentage-of-recovery approach in common fund cases).

age-of-fund method the court awards attorneys' fees as a certain percentage of the settlement. Fee awards under this method have ranged between 20% to 40% of the gross monetary settlement.[5]

Critics of the percentage-of-fund approach say the method "might lead the plaintiffs' attorney to settle the case prematurely as soon as counsel's opportunity costs begin to mount. Early settlement allows counsel to collect a large fee after investing relatively little time in the case, rather than continuing the litigation in order to maximize plaintiffs' recovery but receiving a lower marginal rate of return on his or her work."[6]

Under the lodestar method, the court multiplies the number of hours reasonably expended by a reasonable hourly rate.[7] That figure, the lodestar, may then be adjusted (usually by applying a multiplier) upward or downward to account for several factors, including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.[8]

Critics of the lodestar method[9] claim that by focusing on hours expended, it "may induce lead counsel to prolong the litigation beyond the optimal point from plaintiffs' perspective simply in order to accrue more hours."[10] Further,

> the lodestar fee structure creates an incentive for the attorney to do unnecessary work such as filing motions with little merit, taking unnecessary depositions, or demanding production of documents, solely in order to accrue more hours. This risk is exacerbated where the class is represented by a committee of attorneys, rather than a single firm. The involvement of numerous counsel can create pressure to generate sufficient attorney hours to compensate all participating attorneys, and work may be allocated in order to further this objective, rather than in the most efficient and cost-effective manner. All of these factors may result in a higher lodestar without commensurate benefit to the class.[11]

Finally, plaintiffs' attorney may have "an incentive to settle the case before it reaches the trial stage, even if trial is in plaintiffs' best interests"[12] and may be tempted "to agree to a less-than-favorable settlement for the class while counsel collects a substantial fee."[13]

A new approach that addressed counsel selection and monitoring as well as lead counsel compensation appeared in 1990. That method involved "auctioning"[14] the role of lead or class

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5. *See* Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69 (Federal Judicial Center 1996); *see also In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 77 (S.D.N.Y. 2000) (stating fee awards generally range from 20% to 30% of the total fund).

6. *In re Auction Houses*, 197 F.R.D. at 77 (citations omitted); *In re* Oracle Sec. Litig., 131 F.R.D. 688, 689–90 (N.D. Cal. 1990).

7. *See* Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973) (vacated a percentage fee award in a common fund case and created what has become known as the *Lindy* lodestar for calculating fee awards).

8. *Id.* at 167–69.

9. *See* Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255–56 (3d Cir. 1985) (examining court-awarded attorneys' fees and recommending the percentage-of-recovery method for common fund cases). The Task Force noted the drawbacks of the lodestar method, including it is difficult to apply, time consuming to administer, and capable of manipulation to reach a predetermined result. *Id.* at 246–53.

10. *In re Auction Houses*, 197 F.R.D. at 76.

11. *Id.*

12. *Id.*

13. *Id.*

counsel and was an attempt to find a more objective way to award attorneys' fees without relying on the standard percentages routinely awarded in class actions. The auctioning method was a judicial substitute for the free market factors that would control attorney selection in a bipolar traditional lawsuit. Supporters of the auction method believe the winning bidder becomes the "owner" of the lawsuit and, consequently, has a vested interest in ensuring the highest settlement or damage recovery possible. Once a judge has decided to auction the lead counsel position, the judge will develop guidelines describing the bidding procedures and requirements. Once all bids have been received and evaluated, the court selects a winning bidder. The first judge to use an auction procedure was Judge Vaughn Walker of the Northern District of California, who employed it in *In re Oracle Securities Litigation*.[15]

Considerable commentary has been written about the advantages and disadvantages of using an auction method.[16] Some of the advantages include: (1) the procedure does away with the perceived unfairness of many large class actions being awarded to a small number of established and connected firms while equally capable firms never get the opportunity to establish their reputations for handling class action cases; and (2) the competitive process lowers attorneys' fees and costs for a greater benefit to the class. Some of the disadvantages include: (1) the suggestion that "cheaper" lawyers are not necessarily better advocates and might be worse; (2) the process can create incentives for lawyers to bring and settle cases prematurely, without adequate preparation, investigation, and discovery, and for inadequate consideration; (3) lead counsel auctions threaten the court's neutrality by casting the judge as auctioneer and referee; and (4) firms that perform work early in a case might not be compensated.

We found courts have auctioned the role of class counsel in fourteen cases—twelve securities and two antitrust actions.[17] The procedures used in these cases and the guidelines promulgated by

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14. To the extent that the term "auction" implies an iterative process by which the parties respond to each others' bids, we do not include that implication in our use of the term "auction."

15. 131 F.R.D. 688 (N.D. Cal. 1990).

16. *See, e.g.*, Jill E. Fisch, *Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 Law & Contemp. Probs. 53, 101 (2001); Andrew Niebler, *In Search of Bargained-for-Fees for Class Action Plaintiffs' Lawyers: The Promises and Pitfalls of Auctioning for the Position of Lead Counsel*, 54 Bus. Law. 763 (1999); *and* Randall S. Thomas & Robert G. Haugen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 Nw. U. L. Rev. 423 (1993). *See also In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 78–81 (3d Cir. Aug. 28, 2001).

17. *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990) (hereinafter *In re Oracle*); *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal. 1994) (hereinafter *In re Wells Fargo*); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp 1190 (N.D. Ill. 1996) (hereinafter *In re Amino Acid Lysine*); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996) (hereinafter *In re California Micro Devices*); *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998) (hereinafter *In re Cendant*); *In re* Network Assocs. Inc., Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999) (hereinafter *In re Network Associates*); Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688 (S.D. Fla. 1999) (hereinafter *Sherleigh Associates*); *In re* Lucent Techs. Inc. Sec. Litig., 194 F.R.D. 137 (D.N.J. 2000) (hereinafter *In re Lucent*); *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000) (hereinafter *In re Bank One*); Wenderhold v. Cylink Corp., 188 F.R.D. 577 (N.D. Cal. 1999) (hereinafter *Cylink*); *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2001) (hereinafter *In re Auction Houses*); *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204 (N.D. Cal. Apr. 12, 2001) (hereinafter *In re Quintus*); *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001) (hereinafter *In re Commtouch*); *In re* Comdisco Sec. Litig., 141 F. Supp. 2d 951 (N.D. Ill. 2001) (Memorandum Opinion entering attached Apr. 6, 2001, Memorandum Order) (hereinafter *In re Comdisco*). Another case, Raftery v. Mercury Finance Co., No. 97-C-624, 1997 WL 529553 (N.D. Ill. Aug. 15, 1997), deserves special mention. Although not counted as a bidding case in our study, Judge Joan Lefkow attempted to combine submissions for lead plaintiff and bidding for lead counsel into one

the courts varied considerably. Some of the judges required very detailed proposals, whereas others allowed interested bidders to present their best proposal with little guidance from the court. Consequently, how courts analyzed and compared bids varied across the jurisdictions.

The full extent to which lawyers have proposed or judges considered auctions but rejected their use remains unknown.

B. Third Circuit Task Force

In January 2001, Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit appointed a Task Force to analyze and evaluate the methods of selecting class counsel. "The decision to convene a Task Force was informed by accounts of the practice of an increasing number of district judges throughout the nation of selecting class counsel through a bidding process."[18] Judge Becker commented "that despite the apparent success of such a process in terms of lowering transactions costs with seemingly greater benefits for the class, many respected judges and lawyers have opined that the bidding process is flawed in concept and in practice, and it presents professional responsibility problems."[19] Further, said Judge Becker, critics of the bidding method have noted that the traditional method of appointing class counsel, "at the discretion of the assigned judge, has not only proved successful, but has achieved excellent results for the class and is preferable."[20]

Judge Becker asked the Federal Judicial Center to provide research assistance to the Task Force. The Task Force and the Center determined that the best way the Center could assist would to be to (1) comprehensively describe, including summarizing interview results with judges, those class action cases in which bidding had been used, and (2) interview a small sample of judges who have not used bidding and question them about their experiences in selecting and appointing class counsel.

C. Overview of the Report

Section II of this report describes our research methods. Section III highlights characteristics of cases where auctioning has been used. Section IV describes the judges' rationale for auctioning the role of class counsel. Sections V and VI describe in detail the auctioning procedures used by the judges, including the process of evaluating bids and selecting the winning bidder. Section VII describes the class recoveries and attorneys' fees in the terminated cases. The final section describes bidding and nonbidding judges' experiences with appointing class counsel and summarizes their suggestions for improving the traditional method of appointment.

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step. The two parties objected to the court's request, but ultimately complied. One party, the interim lead plaintiff, failed to address the guidelines set forth in the court's order and submitted an inadequate proposal. After reviewing the two proposals, the court wrote considering the urgency of the pending settlement, "[a]s a practical matter, it makes little sense to change pilots at this time, no matter the court's distress at the [interim lead plaintiff's] conduct in responding to its order." *Id*. at *2. The court recommended (assuring a settlement could be promptly consummated) "compensation of counsel . . . be determined without the benefit of the information critical to establishing reasonableness—the lowest fee that would be paid by a discerning client in an arms length negotiation with well-qualified counsel." *Id*. at *2–3. The court subsequently approved interim lead plaintiff's settlement agreement.

18. Third Circuit Press Release, Creation of Task Force (Jan. 30, 2001) at <http://www.ca3.uscourts.gov/classcounsel/public.htm>.

19. *Id.*

20. *Id*.

Appendix A contains the courts' guidelines or requirements for a potential bidder as well as any bid grid or other relevant document the court required interested parties wishing to be considered as class counsel to complete. Where available, Appendix B contains the names of the firms that submitted bids in the fourteen cases to date, as well as the identity of the winning bidder.

II. Research Methods

To determine the universe of bidding cases, we retrieved the docket sheets from a sample of class action cases where bidding was used, and we reviewed them to determine the terms generally used in docketing and pleading statements in bidding cases. Using this list of terms, we electronically searched the entries of federal court docket sheets maintained and updated daily by CaseStream.[21] We placed no date restriction on the search. It produced twelve cases in which bidding had been used. Since that initial search, bidding procedures have been implemented in two additional cases.[22]

In order to describe each bidding case comprehensively, we collected information using a "template" that incorporated questions identified by the Task Force. Some of the information collected included the judge's rationale for using bidding and the stage of litigation at which counsel was appointed; the mechanics of the bidding process, including whether the judge permitted any preliminary discovery to inform the bidding process, and any guidelines for the submissions of the bids that were adopted; how the court selected the winning bid; and whether there were any challenges to the court's decision to use bidding, and if so, how they were resolved. We also gathered information on the post-bidding process, including settlement amounts, class recoveries, and attorneys' fees.

Information about the bidding cases came from different sources, including published opinions, a review of docket sheets and selected pleadings from the case (e.g., motions and orders regarding appointment of class/lead counsel, settlement agreements, and orders regarding attorneys' fees), public hearing testimony, if applicable, and telephone interviews with the judges. During interviews we explored a judge's reasoning for using the bidding procedure in the target case and their reasons for not using it in other class action cases assigned to him or her. Our objective was to identify characteristics or factors in a case that judges believe might make it an appropriate case for using the auction procedure. If a judge deliberately chose not to use bidding in other cases, we inquired as to his or her reasons. If a judge did not use it because of a lack of awareness, we inquired whether he or she believed the auctioning procedure could have enhanced the quality of the litigation.

Although we strove to be as accurate and comprehensive as possible, our description of the fourteen bidding cases might contain errors and omissions. We were unable to obtain access to every relevant document in certain cases, report certain information in cases which are still pending, and confirm every instance where questions arose pertaining to reported information. More-

21. CaseStream's historical database is a consolidation of all the docket reports that are available from individual federal court's PACER (Public Access to Court Electronic Records) systems. The company has agreements with federal courts that have PACER systems to access their databases and extract updated case information on a daily basis. CaseStream also receives quarterly records from the Federal Judicial Center to double-check the accuracy and consistency of their on-line historical database. This service gives us access to all PACER docket sheets in a centralized database and allows us to search for specific terms within the entries of docket sheets.

22. *See supra* note 17 for the list of fourteen bidding cases.

over, we were not privy to the unreported communications and events surrounding these bidding cases. In addition, because of the small number of instances of auctioning and the variation in fee proposals used in those cases, definitive conclusions cannot be stated regarding the success of auctions. There have been insufficient numbers of bidding cases to allow us to draw inferences about whether, in general, using an auction procedure has resulted in a greater benefit to the class than if some other method had been used. Notwithstanding these caveats, we believe the experiences described herein will go a long way in informing the debate.

The Task Force was also interested in obtaining the views of a sample of judges who have used only the traditional non-auction methods of appointing class counsel. The Task Force wanted to learn, among other things, the criteria judges use when appointing class counsel, whether certain criteria are more important than others, the problems, if any, that have arisen regarding selection of counsel, and how such problems were resolved. In addition, the Task Force was interested in learning the interviewees' suggestions regarding procedures that might improve the traditional method of appointment.

We interviewed a small nonrandom sample of judges with experience handling securities and/or antitrust cases. At the minimum, judges had to have managed at least five class actions within the past five years and also to have been assigned a class action within calendar year 2000. The interview results offer a snapshot of judicial experience, and are thus not representative since a small nonrandom sample was used.

III. Summary of Cases Auctioning the Role of Class Counsel

In this section, we present a snapshot of selected characteristics in cases where judges have used a bidding process to select class counsel. Many of these are discussed more fully in various sections of the report. Below we summarize the characteristics presented in Table 1, which immediately follows.

A. Number of Cases and Judge Participation

We identified fourteen class actions in which judges have used competitive bidding either in attempting to select or actually selecting class counsel. Seven judges have used the practice to date. Judge Vaughn Walker of the Northern District of California has used the procedure most frequently (five cases), followed by Judge Milton Shadur of the Northern District of Illinois (three cases) and Judge William Alsup of the Northern District of California (two cases). Judge Alfred J. Lechner, Jr., of the District of New Jersey employed it twice in *In re Lucent.* Judges who have used the practice once include Judges William Walls of the District of New Jersey, Joan Lenard of the Southern District of Florida, and Lewis Kaplan of the Southern District of New York. The practice has occurred most frequently in the Northern District of California (seven times) followed by the Northern District of Illinois (three times).

B. Type of Case

Of the fourteen cases, twelve are or were securities actions and the other two were antitrust actions (*In re Amino Acid Lysine* and *In re Auction Houses*). Of the securities actions, three were filed before passage of the Private Securities Litigation Reform Act: *In re Oracle*, *In re Wells Fargo*,

and *In re California Micro Devices*. The remaining nine securities cases—*Cylink*, *Sherleigh Associates*, *In re Cendant*, *In re Bank One*, *In re Network Associates*, *In re Lucent*, *In re Comdisco*, *In re Quintus*, and *In re Commtouch*—were filed after the PSLRA and were subject to the statutory presumption that the institutional investor with the largest financial loss should serve as lead plaintiff and select class counsel (with the approval of the court). Some scholars and judges believe that presumption precludes the use of competitive bidding.

In the post-PSLRA cases, the majority of judges first decided the lead plaintiff issue and then asked for bids. In two cases, *In re Network Associates* and *In re Commtouch*, the court ordered the lead plaintiff to conduct the auction.

C. Case Status

Currently, eight of the fourteen cases have terminated and six are pending. One case, *In re Cendant*, involves two actions: the non-Prides claims (allegations involving, among other things, accounting irregularities) and the Prides claims (allegations involving materials containing false and misleading statements). The non-Prides litigation has terminated, and both the settlement and attorneys' fee award were appealed to the Third Circuit Court of Appeals. The Third Circuit upheld the settlement and plan of allocation, but vacated the fee award, holding that the district court erred in using an auction to appoint lead counsel and set attorneys' fees. The Prides litigation is still active. The attorneys' fee award in that action was also appealed to the Third Circuit, which vacated the award and returned the case to the district court for resolution.

D. Number of Bids Submitted

Based on available information, the number of bids submitted ranged from two to twenty-one. The average number of bids submitted was seven and the median was eight.[23]

Overall, bids reflected lower percentage fee awards than the firms might have been expected to obtain under a percentage-of-fund method. Information on whether the winning bidder selected by the court was also the lowest bidder in price terms alone is only available for cases in which we were able to make this determination definitively, often possible only after settlement was reached.

E. Most Frequent Bidder and Winning Bidder

In several of the cases, the number and identity of the bidders remain under seal. In cases where bidder information was known, we found fifty-four firms had expressed an interest in either serving as lead or co-counsel. The most frequent bidder was Leiff, Cabraser & Heimann, which submitted bid proposals in six cases. The following three firms, Milberg, Weiss, Bershad, Hynes & Lerach, Weiss & Yourman, and Cohen, Milstein, Hausfeld, & Toll, submitted proposals in five cases. The most frequent winning bidders were the law firms of Leiff, Cabraser & Heimann and Milberg, Weiss, Bershad, Hynes & Lerach—each was appointed lead counsel in two cases.

23. *See infra* note 295.

F. Party Opposition to Auctioning the Role of Class Counsel

In the majority of the cases, parties did not oppose the court's decision to use bidding. In the few cases where parties objected, opposition was not strong enough to deter the judges from using the procedure. A common argument raised against the use of bidding was that it contradicts the legislative intent of the Private Securities Litigation Reform Act for the largest institutional investor to serve as lead plaintiff and select lead counsel.

G. Settlement Amounts

Of the fourteen cases, eight terminated by way of settlement.[24] In these cases, gross settlement amounts ranged from a high of $3 billion[25] to a low of $13 million. Most of the settlements were between approximately $25 million and $50 million.

H. Class Recoveries

Generally, monetary distributions to the class routinely exceeded attorneys' fees by substantial margins. The majority of class recoveries was over 90% of the settlement fund and ranged from approximately 95% in *In re Auction Houses* to 77.5% in *In re Oracle*.

I. Attorneys' Fees

Attorneys' fees were generally less than the reported percentages in other class actions in the respective circuits. The majority of fee awards was less than 9% (may or may not include expenses) of the total recovery and ranged from a low of approximately 5% in *In re Auction Houses* to a high of 22.5% in *In re Oracle*.

In two cases, *In re Amino Acid Lysine* and *In re Bank One*, the winning bid contained a voluntary cap on the total amount of attorneys' fees. In both cases, fee awards were approximately 7% of the total class recovery. In *In re Amino Acid Lysine*, the figure represents the attorney fee alone and does not include the amount reimbursed for expenses.

24. *In re Cendant* is counted as one case even though it involved two actions and two settlements.
25. *See infra* note 57.

Table 1: Auctioning the Role of Class Counsel—Summary of Case Characteristics

Case Name, Docket No. (District and Judge)	**Status of Case**	**Pre- or Post-PSLRA[26]**	**Number of Bids Submitted[27]**	**Winning Bidder[28]**	**Court Chose the Lowest Bidder[29]**	**Challenge to Court's Decision to Use Bidding**	**Settlement Amount[30]**	**Percentage of Total Recovery That Went to the Class (Recovery Amount)[31]**	**Percentage of Total Settlement That Went to Class Counsel[32] (Attorneys' Fees + Expenses)**
In re Oracle Sec. Litig., No. 90-CV-931 (N.D. Cal., Vaughn Walker)	Terminated	Pre-PSLRA	Four[33] (class action against Oracle) Three (class action against Arthur Andersen)	Lowey, Dannenberg, Bemporad, Brachtl & Selsinger Lowey, Dannenberg, Bemporad, Brachtl & Selsinger[34]	Yes	Yes[35]	$25 million[36]	77.5% ($19,375,000)	22.5% ($4.8 million in fees + $825,000 in expenses)

26. The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.). The Reform Act contains a series of requirements governing federal securities fraud, including specific directives about selection of a lead plaintiff and the retention of class counsel.

27. The number of bids submitted is based on information available at this time and is accurate to the best of our knowledge.

28. The winning bidder refers to the one bid chosen by the court from among the competing bids following the court's analysis of the bids, taking into account qualitative factors in addition to the proposed fee terms. Thus, "winning bidder" is not necessarily the "lowest bidder" in price terms. The firm or firms who submitted this winning bid were selected to serve as class counsel, unless the court allowed for a right of first refusal. *See infra* notes 48 and 54.

29. Information on whether the winning bidder selected by the court was also the lowest bidder in price terms alone is only available for cases in which we were able to make this determination definitively, often possible only after settlement was reached. *See infra* Section VI.E.

30. Refers to the total amount of recovery to the class prior to the deduction of attorneys' fees and expenses. Recovery amounts may be approximations. If an "N/A" appears in the cell, the information is not available, most likely because the case is currently active.

31. Refers to the total amount of recovery to the class after the deduction of attorneys' fees and expenses. Percentages and amounts may be approximations.

32. Unless otherwise indicated, the percentage of total settlement collected by class counsel includes attorneys' fees and expenses. Percentages and amounts may be approximations.

33. Four of the firms representing Oracle shareholders bid to serve as class counsel for the class action against Oracle. For the class action against Arthur Andersen, the court received three bids. Two of these firms had also submitted bids to represent the Oracle shareholders.

34. Judge Walker had to order a second round of bidding when an additional defendant, Arthur Andersen, was named after the winning bidder had been selected. The same firm was chosen to represent both the Oracle shareholders and those with actions against Arthur Andersen.

35. A losing bidder challenged both the court's appointment of a specific lead plaintiff and the competitive bidding process in general.

36. The class received $23.25 million in the settlement reached with Oracle, and $1.75 million from Arthur Anderson.

Case Name, Docket No. (District and Judge)	**Status of Case**	**Pre- or Post-PSLRA***	**Number of Bids Submitted***	**Winning Bidder***	**Court Chose the Lowest Bidder***	**Challenge to Court's Decision to Use Bidding**	**Settlement Amount***	**Percentage of Total Recovery That Went to the Class (Recovery Amount)***	**Percentage of Total Settlement That Went to Class Counsel* (Attorneys' Fees + Expenses)**
In re Wells Fargo Sec. Litig., No. 91-CV-1944 (N.D. Cal., Vaughn Walker)	Terminated	Pre-PSLRA	Three	Leiff, Cabraser & Heimann	Yes	No	$13,713,709.54	78% ($10,632,035)	22% ($2,873,150 in fees + $208,605 in expenses)
In re California Micro Devices Sec. Litig., No. 94-CV-2817 (N.D. Cal., Vaughn Walker)	Terminated	Pre-PSLRA	Two[37]	N/A	N/A	No	$26 million[38]	84.3%[39] ($21,590,090.20)	15.7%[40] ($4,028,345.80 in fees *and* expenses)
Wenderhold v. Cylink Corp., No. 98-CV-4292 (N.D. Cal., Vaughn Walker)	Pending	Post-PSLRA	Two[41]	Innelli & Molder	Yes	No	N/A	N/A	N/A
In re Quintus Sec. Litig., No. 00-CV-4263 (N.D. Cal., Vaughn Walker)	Pending	Post-PSLRA	Five	Weiss & Yourman	Yes	Yes[42]	N/A	N/A	N/A

**Note:* For detailed explanation of category, see *supra* first page of Table 1, page 10.

37. Although 12 different plaintiffs' firms had filed suit, only two filed proposals to represent the class. Judge Walker found only one firm's proposal to be serious but ended up not selecting that firm because of its early settlement discussions with the defendants. A replacement institutional lead plaintiff was appointed and allowed to select class counsel (Hogan & Hartson) and negotiate the terms of class representation.

38. Total settlement and attorneys fees are based on a combination of a settlement reached on May 20, 1997, with all defendants except one, and a settlement with the remaining defendant on May 24, 2001. Note that settlement and attorneys' fees were not obtained by class counsel chosen from a competitive bidding process. *See supra* note 37.

39. *Id.*

40. *Id.*

41. During the first round of bidding only one firm submitted a bid, which was rejected because it did not comply with the court's directives. The court initiated a second round of bidding in which it received three proposals. Sometime later, the original firm that had submitted its bid withdrew its proposal, leaving the court to choose the winning bid from among the two remaining proposals.

42. Petitioner filed a petition for writ of mandamus with the Ninth Circuit arguing, among other things, that the district court erred by denying the petitioner, who had been selected lead plaintiff, his right under the PSLRA and the Constitution to select counsel of his own choice.

Case Name, Docket No. (District and Judge)	**Status of Case**	**Pre- or Post-PSLRA***	**Number of Bids Submitted***	**Winning Bidder***	**Court Chose the Lowest Bidder***	**Challenge to Court's Decision to Use Bidding**	**Settlement Amount***	**Percentage of Total Recovery That Went to the Class (Recovery Amount)***	**Percentage of Total Settlement That Went to Class Counsel* (Attorneys' Fees + Expenses)**
In re Amino Acid Lysine Antitrust Litig., No. 95-CV-7679 (N.D. Ill., Milton Shadur)	Terminated	N/A (antitrust action)	Eight	Kohn, Swift & Graf	Yes	Yes[43]	$49 million	93% ($45.5 million)[44]	7% ($3.5 million)[45]
In re Bank One Shareholders Class Actions, No. 00-CV-880 (N.D. Ill., Milton Shadur)	Terminated	Post-PSLRA	Nine	Wechsler Harwood Halebian & Feffer LLP	Yes	No	$45 million	93% ($42 million)	7% ($2.75 million in fees + $250,000 in expenses)
In re Comdisco Sec. Litig., No. 01-CV-2110 (N.D. Ill., Milton Shadur)	Pending	Post-PSLRA	Three	Wolf Halden-stein Adler Freeman & Herz	Will depend on stage of recovery and recovery amount	No	N/A	N/A	N/A
In re Network Asso-ciates, Inc., No. 99-CV-1729 (N.D. Cal., William Al-sup)	Terminated	Post- PSLRA	Five[46]	Leiff Cabraser Heimann & Bernstein	Yes	No	$30 million	92% ($27,559,187)	8% ($2,080,000 in fees + $360,813 in expenses)
In re Commtouch Software LTD, Securities Litig., No. 01-C-00719 (N.D. Cal., William Al-sup)	Pending	Post-PSLRA	Bids were due on July 20, 2001	Pending	Pending	Pending	N/A	N/A	N/A

**Note:* For detailed explanation of category, see *supra* first page of Table 1, page 10.

43. Some of the plaintiffs' attorneys questioned the efficacy of the auction process as well as noting that such a process violated Supreme Court precedent.

44. Figure represents total recovery to the class prior to the deduction of expenses.

45. Figure represents the attorney fee alone and does not include the amount reimbursed for expenses.

46. To the best of our knowledge at least five firms submitted bids.

Case Name, Docket No. (District and Judge)	Status of Case	Pre- or Post-PSLRA*	Number of Bids Submitted*	Winning Bidder*	Court Chose the Lowest Bidder*	Challenge to Court's Decision to Use Bidding	Settlement Amount*	Percentage of Total Recovery That Went to the Class (Recovery Amount)*	Percentage of Total Settlement That Went to Class Counsel* (Attorneys' Fees + Expenses)
In re Cendant Corp. PRIDES Litig., No. 98-CV-2819 (D.N.J., William H. Walls)	Pending	Post- PSLRA	Twelve[47]	Unknown[48] (Kirby, McInery & Squire)	Unknown[49]	No[50]	$341,480,861	94%[51] ($319,783,905)	6% ($19,329,463 in fees + $2,367,493 in expenses)[52]

**Note:* For detailed explanation of category, see *supra* first page of Table 1, page 10.

47. Seven firms bid for appointment as lead counsel to the non-Prides claims, two firms as to both the Prides and non-Prides claims, three firms for Prides claims only.

48. The identity of the firm who submitted the lowest qualified bid for the Prides claims was not revealed. *See infra* note 49. The court gave the original firm representing the lead plaintiff for the Prides claims (Kirby, McInery & Squire) the right to step in and match the terms of what the court found to be the lowest qualified bid, which they did.

49. Because litigation is still pending regarding plaintiffs representing the Prides claims, the court decided to keep the identity of the firm who submitted the lowest qualified bid and its analysis in choosing the lowest qualified bidder for the Prides claims as well as the terms of the bids under seal. Thus, we are not certain whether the bid chosen by the court is indeed the lowest bid in price terms alone. The Third Circuit recently decided that Judge Walls abused his discretion in sealing the bids and ordered the district court to unseal the bids as well as any other sealed documents related to the bids. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug. 8, 2001) (order vacating sanction for violation of district court's sealing order and requiring unsealing of all previously sealed documents).

50. However, the court-appointed lead plaintiffs did submit a letter to the court expressing their concerns that the auction process would result in the court compelling lead plaintiffs to prosecute the action with attorneys they did not choose and, in fact, with whom they may have conflicts.

51. The settlement consisted of 29,161,474 Rights valued at $341,480,861. After subtracting the attorneys fees and expenses for lead counsel ($21,696,956), 27,308,617 Rights remained. Proofs of Claim were filed with respect to 26,606,422 Rights, of which 22,502,782 Rights were validated by the claims administrator as of Aug. 8, 1999. Thus, the class received 100% recovery for their losses from the settlement fund. No claiming class members had or will have their recovery reduced by class counsels' attorney fees and expenses.

52. On March 21, 2001, the Third Circuit allowed the settlement to stand, but vacated the fee award, stating, among other things, that the District Court's fee opinion was "too cursory." *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 733 (3d Cir. 2001).

Case Name, Docket No. (District and Judge)	Status of Case	Pre- or Post-PSLRA*	Number of Bids Submitted*	Winning Bidder*	Court Chose the Lowest Bidder*	Challenge to Court's Decision to Use Bidding	Settlement Amount*	Percentage of Total Recovery That Went to the Class (Recovery Amount)*	Percentage of Total Settlement That Went to Class Counsel* (Attorneys' Fees + Expenses)
In re Cendant Corp. Litig. (non-Prides), No. 98-CV-1664 (D.N.J., William H. Walls)	Terminated	Post-PSLRA	Twelve[53]	Unknown[54] (Bernstein, Litowitz Berger & Grossman LLP and Barrack, Rodos & Bacine)	No[55]	No[56]	3,186,500,000[57]	91.3% ($2,909,407,337)	8.7% ($262,468,857 in fees + $14,623,806 in expenses)[58]
Sherleigh Assocs. v. Windmere-Durable Holdings, Inc., No. 98-CV-2273 (S.D. Fla., Joan Lenard)	Pending	Post-PSLRA	Unknown[59]	Milberg Weiss Bershad Hynes & Lerach LLP	Unknown[60]	Yes[61]	N/A	N/A	N/A

**Note:* For detailed explanation of category, see *supra* first page of Table 1, page 10.

53. *See supra* note 47.

54. The identity of the firm that submitted the lowest qualified bid for the non-Prides claims was not revealed. *See supra* note 49. The court permitted the two original firms representing the lead plaintiffs for the non-Prides claims (Bernstein, Litowitz, Berger & Grossmann LLP and Barrack, Rodos & Bacine) to match the bid and agree to the terms of what the court found to be the lowest qualified bid, which they did.

55. Two other firms were lower in terms of their fees as a percentage of total class recovery.

56. *See supra* note 50.

57. Figure represents a combined settlement derived from a $2,851,500,000 cash payment from the Cendant settlement and a $335,000,000 cash payment from the Ernst & Young settlement. The settlement was upheld on appeal to the Third Circuit. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001).

58. The attorneys' fee awarded pursuant to the court-ordered auction was vacated by the Third Circuit on appeal. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001)

59. The court order analyzing competing bids and choosing the winning bidder has been permanently sealed.

60. *Id.*

61. Two law firms filed a motion for reconsideration arguing they should be allowed to represent the class alone, or alternatively allowed a "right of first refusal" to meet the best bid.

Case Name, Docket No. (District and Judge)	**Status of Case**	**Pre- or Post-PSLRA***	**Number of Bids Submitted***	**Winning Bidder***	**Court Chose the Lowest Bidder***	**Challenge to Court's Decision to Use Bidding**	**Settlement Amount***	**Percentage of Total Recovery That Went to the Class (Recovery Amount)***	**Percentage of Total Settlement That Went to Class Counsel* (Attorneys' Fees + Expenses)**
In re Lucent Technologies, Inc.,[62] No. 00-CV-621 (D.N.J., Alfred Lechner)	Pending	Post-PSLRA	Three (Lucent I) Seventeen (Lucent II)	Milberg Weiss Bershad Hynes & Lerach LLP (Lucent I) Bernstein Litowitz Berger & Grossman LLP (Lucent II)	Unknown[63]	No	N/A	N/A	N/A
In re Auction Houses Antitrust Litig., No. 00-CV-648 (S.D.N.Y., Lewis Kaplan)	Terminated	N/A (antitrust action)	Twenty-one	Boies, Schiller & Flexner	Yes	No	$512 million	94.8% ($485.25 million)	5.2% ($26.75 million in fees *and* expenses)

**Note:* For detailed explanation of category, see *supra* first page of Table 1, page 10.

62. On December 26, 2000, the court consolidated the *Lucent II* complaints (accounting fraud allegations) with the *Lucent I* actions (dissemination of materially false & misleading statements). The court ordered a sealed bid auction in both cases.

63. Although the basic fee structure of the bids were discussed, the actual fee percentages proposed by the bidders (including the winning bidders) were not disclosed in either *Lucent I* or *II*. On August 23, 2001, Judge Lechner issued an order to show cause regarding why the submitted sealed bids should not be unsealed. A show cause hearing is scheduled for September 14, 2001.

IV. Auction of Class Counsel as an Alternative to Traditional Appointment

A. Courts' Rationales for Soliciting Bids

Our review and analysis of case opinions, orders, and other relevant documents reveal a variety of reasons that judges in the fourteen bidding cases auctioned the lead counsel position. The reasons vary depending on the type of case, but generally fall into five categories:

(1) to replicate the marketplace for legal services and reduce attorneys' fees;
(2) to improve attorney-proposed case representation;
(3) to give the class the benefit of the low risk of nonrecovery;
(4) to reduce the expenditure of judicial time; and
(5) to compensate for the presence of an inadequate or uninterested plaintiff.

These categories are not mutually exclusive and several served as the bases in a number of cases. Below we describe the categories in more detail.

1. To replicate the private marketplace and reduce attorneys' fees

We found the most common reason judges gave for employing bidding was to foster competition among counsel by replicating the private marketplace for legal services. The court's ultimate goal was to appoint counsel who would best represent the interests of the class at the lowest cost. Typically, in nonclass cases, plaintiffs negotiate at arm's length to get the best attorney for the best price. In class actions, the scenario is very different. Most of the plaintiffs play no role in deciding who should serve as lead attorney and, consequently, have no informed opinion about the quality of proposed counsel or the terms of their proposed representation.

In *In re Oracle*, Judge Walker was faced with "two warring camps of lawyers, including a very prominent Philadelphia law firm sparring over which group of famous lawyers should be designated class counsel. Both sides made scurrilous charges about the other."[64] After observing and tolerating that behavior for a period of time, Judge Walker asked the parties to make a presentation to the court about why they should be selected class counsel. Sometime later at a conference, one of the attorneys approached Judge Walker and told him "don't worry about the case. We've got the whole thing worked out."[65] Judge Walker interpreted this to mean that the arrangement "was at the lawyer's benefit and not at the benefit of the class."[66] "[S]hortly thereafter, the formerly warring lawyers submitted a proposal for a steering committee of the lawyers to run the litigation for a straight thirty percent of the recovery, plus out of pocket expenses."[67] At that point, Judge Walker decided to use a bidding procedure, saying it "most closely approximates the way class members themselves would make these decisions and should result in selection of the most appropriately qualified counsel at the best available price. Moreover, competitive bidding [would help] to ensure detachment and impartiality on the part of the court, which are essential to the ju-

64. Third Circuit Task Force on Selection of Class Counsel, Reporter's Transcript of Proceedings, Judge Vaughn Walker at 38 (March 16, 2001).

65. *Id*. at 38–39.

66. *Id*. at 39.

67. Written statement of Vaughn R. Walker, Third Circuit Task Force on Selection of Class Counsel 8 (Philadelphia, Pa. Mar. 16, 2001).

dicial process."[68] Judge Walker noted "the prospect of competition, it seems, brought peace to the fractious lawyers."[69]

In a subsequent securities case, Judge Walker explained that competitive bidding was best suited to simulate the outcome of a market process, and because the "court's task is to approximate as closely as possible the attorney selection and fee bargain that the class itself would strike if it were able to do so," he ordered lawyers interested in representing the class to submit competitive proposals.[70]

In *In re California Micro Devices*, while twelve different plaintiffs' firms had filed suits, only two filed proposals to represent the class, and Judge Walker found only one firm's proposal to be serious. Judge Walker refused to appoint that firm as class counsel because he felt they had undermined the bidding process by engaging in settlement discussions with the defendants and thus had obtained an "edge in the bidding process."[71] Judge Walker explained the importance of the court acting as surrogate client for the class by setting class counsel's terms of engagement competitively. Specifically, he wrote, "[w]hen terms of a class counsel compensation are not established through a competitive process or one that emulates the results of such a process, the court has failed to guarantee that the class representatives will 'fairly and adequately protect the interests of the class.'"[72] Judge Walker commented that "[w]hile . . . the court can always resort to the lodestar or percentage based means of attempting to mock a competition, these methods are no substitute for actual competition."[73]

Judge Walker saw the competitive bidding process as a monitoring technique designed to make the court's "'surrogate clients' capable of ensuring that class action litigation does not become a vehicle which serves class counsel before all others" by enabling the court to monitor fee arrangements between class counsel and class members.[74]

In an antitrust case, *In re Amino Acid Lysine*, Judge Shadur addressed some of these same issues saying "[i]f these were typical lawsuits—with one party (or more than one party acting jointly) suing one or more defendants—the free market process by which each client or set of clients chooses its own lawyer would of course control. Every client makes the choice on the predicate that the lawyer chosen is the best possible choice under all the circumstances, and the courts do not interfere with such choices just because clients are often wrong in those judgments. But the difficulty comes when a lawyer who is not of one's choosing is foisted on one, as is inevitable in the class action context. And the fact that the putative class representative who brings an action has chosen a particular lawyer . . . gives no assurance—or even presumptive assurance—that the selected lawyer is the best choice for the absent class members. In that situation, unlike the one-on-one situation where the court properly stays out of the decision-making process, the analogy of the direct market breaks down and only the court can bring objectivity to bear on the issue."[75] The court "must stand in the position of an intermediary acting for the class members in establishing rates."[76] Likewise, in *In re Bank One* Judge Shadur stated that if bidding ". . . evokes a significant

68. *In re* Oracle Sec. Litig., 131 F.R.D. 688, 690 (N.D. Cal. 1990).

69. *Id.*

70. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 225–26 (N.D. Cal. 1994).

71. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *5 (N.D. Cal. 1995).

72. *Id.* (citing Fed. R. Civ. P. 23(a)(4)).

73. *Id.*

74. *In re California Micro Devices*, 168 F.R.D. 257, 262 (N.D. Cal. 1996).

75. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1194 (N.D. Ill. 1996).

76. *Id*.

number of bids from well-qualified law firms or law firm combinations it is best calculated to provide precisely the efficient market information that serves as the 'ideal proxy' for the one-to-one lawyer-client agreement in conventional litigation."[77]

Similarly, in *In re Cendant*, Judge Walls adopted the rationale of Judges Walker and Shadur that the most effective way to establish reasonable attorney fees is through marketplace or adversarial competition.[78] Likewise, in *Sherleigh Associates*, Judge Lenard explained "[w]hile the Court takes no position on the validity of the claims alleged, early selection of class counsel and determination of their compensation serve the interest of the class by enabling these matters to be resolved competitively."[79] The judge indicated that "[a]s several judges and commentators have discussed, 'auctioning the privilege to serve as class counsel [helps to] promote price competition across law firms' and ensures that a baseline quality of representation will be maintained at the lowest possible price."[80]

2. To improve attorney-proposed case representation

Federal Rule of Civil Procedure 23(a)(4) directs the representative parties to fairly and adequately protect the interest of the class. In the cases we studied, the courts not only required class protection from the lead plaintiffs, but from those seeking to serve as class counsel as well. For example, in *In re Oracle*, Judge Walker explained that by breaking up the lawyer consortiums identified with the lodestar method, competitive bidding "should also increase the effectiveness of monitoring because—professional courtesies, aside—the disappointed bidders are likely to be on the lookout for shortcomings in the performance of the winner."[81]

In *Sherleigh Associates*, Sherleigh, a profit-sharing plan, was one of approximately thirteen lead plaintiff designees that appeared to be represented by a consortium of ten law firms.[82] When Sherleigh originally filed its suit it was represented by two law firms. Sometime thereafter, another plaintiff, who was represented by three firms, filed a similar class action. As other plaintiffs filed suits additional firms became involved, thus creating a hierarchy of firms. One firm sought to have itself and another firm designated as lead counsel and also as co-chairs of the proposed Executive Committee. Two other firms would be appointed members of the Executive Committee, and so forth. After reviewing the proposed arrangement, Judge Lenard wrote "[r]egardless of whether this arrangement constitutes an agreement among the first-to-the courthouse firms with their later-arriving colleagues to share any potential recovery (and the risk of no recovery) in this endeavor, or the affirmative choice of Sherleigh to enter into an extremely complicated representation arrangement, the Court rejects this proposal as not in the best interests of the class."[83]

Finally, in *In re Amino Acid Lysine*, Judge Shadur received the case after another judge had entered the case's first pretrial order, which, among other things, had designated lead counsel for

77. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 784–85 (N.D. Ill. 2000).

78. *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998). *But see In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 111-12 (3d Cir. Aug. 28, 2001) (vacating the district court's attorney fee awarded pursuant to an auction holding that "there is no need to 'simulate' the market in cases where a properly-selected lead plaintiff conducts a good-faith counsel selection process because. . . [in cases decided under the PSLRA] the fee agreed to by the lead plaintiff is the market fee.").

79. Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 692 (S.D. Fla. 1999).

80. *Id.* at 693 (citations omitted).

81. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 649 (N.D. Cal. 1991).

82. Sherleigh Assocs. LLC V. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 693 (S.D. Fla. 1999).

83. *Id*. at 693 n.1.

the entire set of multidistrict cases.[84] After reviewing the order, Judge Shadur concluded that not all of the plaintiffs' attorneys had had the opportunity to provide input about the appointment of lead counsel.

3. To give the class the benefit of the low risk of non-recovery

In *In re Auction Houses*, Judge Kaplan determined very early on that the case was well-suited for selection of lead counsel by an auction. First, the case had received a great deal of media attention and consequently attracted large numbers of competent plaintiffs' attorneys.[85] Second, the relief being sought was monetary damages rather than equitable relief. Judge Kaplan thought this fact would make the comparison of bids easier.[86] Third, Christie's had confessed to price fixing with Sotheby's and agreed to provide evidence to the Department of Justice in exchange for amnesty.[87] Consequently, there was a lot of information available about the merits of the case and potential damages. Judge Kaplan thought this information alone provided potential bidders with a strong base of information to calculate potential damages.[88]

4. To reduce the expenditure of judicial time

Some judges who advocate auctioning suggest that there is less expenditure of judicial time, compared to the ex post review of fee petitions required under other methods. For example, in *In re Amino Acid Lysine*, Judge Shadur was concerned about encountering numerous attorney fee requests at the end of litigation. He thought that the best interests of the plaintiffs' class would not be served by the kind of proliferation of plaintiffs' counsel that ordinarily marks "cases that so often spring up after a triggering event—whether in the field of securities, antitrust or in some other area potentially ripe for class treatment."[89]

5. To account for the presence of an inadequate or uninterested lead plaintiff

Of the twelve securities cases where auctioning has been used, nine were filed after 1995 and therefore subject to the PSLRA. It is generally agreed that the one goal of PSLRA was to strengthen the role of the lead plaintiff and replace lawyer-driven litigation with client-driven litigation. Title 15 of the U.S. Code, § 78u-4(a)(3)(B)(iii)(I)(bb) created a presumption that the plaintiff with the largest financial interest in the action should serve as the lead plaintiff.

In several cases filed after the PSLRA, the court had to address whether the proposed lead plaintiff's choice of counsel was in the best interest of the class, whether the proposed lead plaintiff was an adequate plaintiff, and whether the proposed lead plaintiff possessed the necessary skills to select lead counsel.

In *In re Lucent*, after the court had provisionally appointed a lead plaintiff, the lead plaintiff sought approval of its selection of the law firm Milberg Weiss to serve as lead counsel. After reviewing lead plaintiffs' motions, Judge Lechner decided to auction the role of lead counsel because he had seen no evidence that the proposed lead plaintiff had selected and negotiated with counsel at arm's length. He found that a competitive auction was "necessary to protect the inter-

84. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1192 (N.D. Ill. 1996).
85. *See In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 82 (S.D.N.Y. 2000).
86. *Id*.
87. *Id*.
88. *Id*.
89. *In re Amino Acid Lysine*, 918 F. Supp. at 1192.

ests of the proposed class."[90] Judge Lechner pointed to the discretion afforded to the court in approving counsel as justification for its intervention.[91] "The lead plaintiff owes a fiduciary duty to obtain the highest quality representation at the lowest price."[92] The court explained "[b]ased solely on a review of the Moving Brief. . . , it is not possible to determine whether the Proposed Lead Plaintiffs actively sought out and made an informed decision regarding the choice of lead counsel. In support of their selection, the Proposed Lead Plaintiffs state only that they have 'retained competent and experienced counsel to prosecute these claims…'"[93] Further, Judge Lechner explained, "Proposed Lead Plaintiffs have provided no evidence or indication of the proposed fee arrangement, its terms, or discussions or proposals leading up to it. They have provided no indication as to how the selection of Proposed Lead Counsel was arrived at or what considerations went into the decision. Significantly, there is no indication of whether other counsel were interviewed or even considered. This is troubling."[94] The court continued, saying "[t]he judgment of a lead plaintiff is not dispositive in the appointment of lead counsel. Approval of lead counsel necessarily requires an independent evaluation of, among other considerations, the effectiveness of proposed class counsel to ensure the protection of the class."[95]

In both *In re Network Associates* and *In re Commtouch*, Judge Alsup had the lead plaintiff solicit proposals from attorneys or firms interested in serving as class counsel. In *In re Network Associates*, lead plaintiff, carrying out its statutory responsibility under 15 U.S.C. § 78u-4(a)(3)(v) to select and retain counsel, proposed that the firm Barrack, Rodos & Bacine be chosen lead counsel.[96] Lead plaintiffs in its motion to the court noted the firm's experience and track record in securities class actions. The court, however, was concerned with the recommendation because of the firm's representation in another case.[97] Consequently, the court ordered the lead plaintiff to reopen the issue of who would serve as class counsel and set forth the steps it wanted lead plaintiff to complete in recommending class counsel, including publicizing a request for written proposals from counsel, evaluating the proposals, and interviewing the candidates.[98] The court also indicated that the lead plaintiff might still "after full consideration of all candidates, recommend the Barrack firm, but it should do so only after an honest effort to select the highest quality counsel at the most efficient price."[99]

In *In re Commtouch*, Judge Alsup was faced with the possibility of having a plaintiff, Mr. Jacobi, a resident of Israel with limited English skills, serve as lead plaintiff. Judge Alsup thought these factors might interfere with the plaintiff's ability to monitor the proceedings and to participate in the progress of the suit, including selecting class counsel.[100] No other proposed lead plaintiff candidate had overcome the statutory presumption in favor of Mr. Jacobi.

In looking at the specifics facts of the case, Judge Alsup indicated

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90. *In re* Lucent Techs. Inc., Sec. Litig., 194 F.R.D. 137, 156 (D.N.J. 2000).

91. *Id*. at 155.

92. *Id*.

93. *Id*. at 156.

94. *Id*.

95. *Id.* at 155.

96. *In re* Network Assocs. Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1033 (N.D. Cal. 1999).

97. The court commented on allegations that the Barrack firm and two others had failed to obtain lead plaintiff approval of the settlement in advance from one of ten plaintiffs. Consequently, the court-approved settlement is being challenged on appeal. *Id.*

98. *Id.*

99. *Id.*

100. *In re* Commtouch Software Ltd. Sec. Litig., No. C 01-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 2 (N.D. Cal. June 27, 2001).

> [w]ere the Court faced with an institutional investor as the lead plaintiff, experienced in the due diligence of selecting counsel for complex litigation, then the competitive-proposal procedure might well be modified or eliminated so long as the institutional investor could otherwise show that it had exercised due diligence in carrying out its fiduciary responsibility to select counsel in the best interests of the class. Where, however, the lead plaintiff is not so qualified, it is necessary to instruct the lead plaintiff on his or her responsibilities and to establish a due-diligence procedure for selection and approval of counsel.[101]

Judge Alsup concluded that in this case none of the candidates has any experience in selecting such counsel, including the presumptive lead plaintiff, who had not exercised sufficient due diligence in selecting class counsel.[102] To address this deficiency, Judge Alsup developed a detailed procedure that the lead plaintiff would follow in selecting class counsel, which included a questionnaire to interview class counsel candidates.[103] The court also decided, given the unique geographic aspects of this case, that the class would benefit by having counsel in Israel, fluent in Hebrew, as well as trial counsel in the United States. In addition, the court required lead plaintiff to certify that the court's procedures would be followed and that he would work and cooperate fully with counsel even if it resulted in approval of class counsel other than his present lawyer.[104]

Recently, Judge Walker had to address, in two similar, but unrelated securities actions, whether the lead plaintiffs had exercised due diligence in selecting lead counsel that would act in the best interest of the class. In *In re Copper Mountain Networks Securities Litigation*,[105] Judge Walker approved lead plaintiff's selection of counsel, stating that the lead plaintiff had selected counsel on terms that appeared to be in the best interests of the class. This was not the case in the other action, *In re Quintus*. In that case, after analyzing the positions of those seeking to serve as lead plaintiff, Judge Walker concluded that he was faced with "disinterested, figurehead plaintiffs."[106] One had not responded to the court's inquiries and none had been present at a required hearing. The court determined that the two potential lead plaintiffs had presented little evidence that they had negotiated a competitive fee arrangement or had the incentive and ability to do so.[107] The court finding none of the lead plaintiffs to be adequate believed it was left with only two options: (1) decline to appoint any lead plaintiff, finding them all inadequate; or (2) appoint Colin Hill as a nominal plaintiff and then intervene in the selection of counsel.[108] The court ultimately appointed Colin Hill as lead plaintiff and intervened in selecting class counsel.

Earlier, we discussed the presumption established by the PSLRA that the plaintiff determined to be the most adequate also has the responsibility of selecting counsel. In the cases filed after the PSLRA, we were interested in learning how often the courts thought it necessary to address in their opinions or orders two issues: (1) whether auctioning was consistent with the lead plaintiff

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101. *Id*. at 6 (citing *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204, at * 4–5 (N.D. Cal. Apr. 12, 2001)).

102. *Id*. at 4.

103. *See infra* Appendix A for a reproduction of the questionnaire.

104. *In re Commtouch*, at 4.

105. No. 00-C-3849, 2000 U.S. Dist. LEXIS 8552 (N.D. Cal. May 31, 2001).

106. *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204, at *17 (N.D. Cal. Apr. 12, 2001).

107. *Id*.

108. *Id*. at *16

provision of the PSLRA; and (2) whether the court believed that lead plaintiff's choice of counsel was entitled to deference.

We found in the majority of post-PSLRA securities cases, courts believed that the PSLRA allowed them discretion to accept or deny the lead plaintiff's recommendation of counsel, or choose some other method to select counsel.[109] For example, in *In re Cendant* Judge Walls indicated the provisions of the PSLRA that give the court discretionary authority to approve or disprove of lead plaintiff's choice of counsel (15 U.S.C. § 77z-1(a)(3)(B)(v)), and the provisions that require the court to only award attorney fees and expenses if they are reasonable in relation to the class' recovery (15 U.S.C. § 77z-1(a)(6)), allow the court to look to other mechanisms (i.e., use of an auction and thus simulate the free market in selection of class counsel) to establish reasonable attorney fees.[110] Judge Walls said "[t]he Court is required to protect the interests of all members of the class. If Congress had intended otherwise with its PSLRA, it could have easily permitted lead plaintiff to designate and retain counsel without judicial approval. It did not."[111]

However, on appeal of the settlement and the attorneys' fee awarded pursuant to the court-ordered auction, the Third Circuit addressed the question of whether the district court's decision to hold an auction in *In re Cendant* was consistent with the PSLRA.[112] After examining the overall structure of the PSLRA's lead plaintiff section and the legislative history of the PSLRA, the Third Circuit concluded that an auction is not generally permissible in an ordinary Reform Act case because it is inconsistent with the PSLRA's goal to "infuse lead plaintiffs with responsibility (and motivation) to drive a hard bargain with prospective lead counsel and to give deference to their stewardship."[113] The court explained that "[a]lthough we believe that there are situations under which the PSLRA would permit a court to employ the auction technique, this was not one of them. Here, inasmuch as the Lead Plaintiff conducted its counsel search with faithful observance to the letter and spirit of the Reform Act, it was improper for the District Court to supplant the. . . [lead plaintiff's] statutorily-conferred right to select and retain lead counsel by deciding to hold an auction."[114]

In *Sherleigh Associates* the court recognized that the PSLRA assigns the task of selecting counsel to the lead plaintiff but it also requires the court to ensure that the attorney fees awarded are reasonable.[115] Judge Lenard wrote: "[a] court presented with competing claims for designation and concerned with ensuring quality representation at a fair price is faced with a conundrum: What deference should be paid to the class representative's choice of counsel, as balanced against the court's obligation to the class to ensure such representation is of high quality and is provided at a fair price?"[116] "[T]he Court determined that a sealed-bid auction best balances the interests of the class in high quality representation at a fair price with the Reform Act's provision that the presumptive lead plaintiff selects class-counsel, subject to court approval."[117]

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109. *But cf*. *In re* Razorfish, Inc. Sec. Litig., No. 00-C-9474, 2001 WL 476504 (S.D.N.Y. May 4, 2001); *In re* MicroStrategy Inc. Sec. Litig., 110 F. Supp. 2d 427, 437–38 (E.D. Va. 2000); Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1159 (N.D. Cal. 1999).

110. *See In re* Cendant Corp. Litig., 182 F.R.D. 144, 150–51 (D.N.J. 1998).

111. *Id*. at 151.

112. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001).

113. *Id.* slip op. at 13, 103–05.

114. *Id.* at 13.

115. Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 693 (S.D. Fla. 1999).

116. *Id*.

117. *Sherleigh Assocs*., 186 F.R.D. 669, 670 (S.D. Fla. 1999) (citations omitted).

In *Cylink*, Judge Walker noted although the PSLRA permits the lead plaintiff to select lead counsel to represent the class subject to the court's approval, he also recognized that the court must ensure that the class receives quality representation at a fair price and cannot simply defer to lead plaintiff's choice of counsel. Judge Walker concluded that because of the disadvantages resulting from the lead plaintiff being an individual investor (lacking the expertise and resources of a large institutional investor) "together with the inherent conflicts and agency problems in class actions and the limited ability of the court to address such problems through case management . . . determination of lead counsel through a competitive bidding process is necessary to protect the interests of the putative class members."[118]

Further, in *In re Quintus* Judge Walker indicated that "[u]nder the PSLRA, the selection of lead counsel is 'subject to the approval of the Court.' 15 U.S.C. § 78u-4(a)(3)(B)(v). This statutory delegation, along with the 'court's fiduciary obligation to the plaintiff class,' . . . requires the Court to ensure that qualified, competitively priced counsel is selected. Thus, if the Court determines that no prospective lead plaintiff has the ability to negotiate with counsel on behalf of the class, the court must itself intervene to ensure that interests of the class are protected."[119]

In *In re Bank One*, Judge Shadur chose lead plaintiff at the same time he appointed lead counsel.[120] After examining each of the submissions seeking lead plaintiff status, he found that the shareholders identified as the Pension Group best fit the statutory considerations for presumptive purposes. He also made it clear that although the members of the Pension Group were entitled to presumptive status under §78u-4(a)(3)(B) as the "most adequate plaintiffs," this presumption would be rebutted (despite the amounts that they have at stake personally) if the presumptive lead plaintiffs were to insist on their class counsel (law firms of Schoengold & Sporn P.C. and Quinlan & Crisham, Ltd.) handling the action on a materially less favorable contractual basis than by the most favorable qualified bidder among the lawyers submitting bids. "It should be remembered that although Subsection (a)(3)(B)(v) provides that the most adequate plaintiffs may 'select and retain counsel to represent the class,' that opportunity is expressly made 'subject to the approval of the court.'"[121]

In its recent opinion finding that the district court abused its discretion by conducting an auction in *In re Cendant*, the Third Circuit disagreed with Judge Shadur's view that "any movant who is unwilling to be represented by the firm or firms that a court determines to be the lowest qualified bidder in a court-conducted auction has necessarily shown that it will not fairly and adequately represent the interests of the class."[122] The court found this argument to be inconsistent with the statutory text of the PSLRA, which clearly states that the lead plaintiff is to "select and retain" lead counsel and the court is responsible for deciding whether to "approve" that choice. "Judge Shadur's reading of the statute in effect confers upon the court the right to 'select and retain' counsel and limits the lead plaintiff to deciding whether to acquiesce in those choices, thus eliminating any discretion on the part of the lead plaintiff."[123] The court explained that "[w]hen a properly-appointed lead plaintiff asks the court to approve its choice of lead counsel and of a retainer agreement, the question is not whether the court believes that the lead plaintiff could have

118. Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587 (N.D. Cal. 1999).

119. Werner v. Quintus Corp., No. 00-C-4263, 2001 WL 789445, at *4 (N.D. Cal. Feb. 2, 2001) (case citation omitted).

120. *See In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000).

121. *Id*. at 784.

122. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 107 (3d Cir. Aug. 28, 2001).

123. *Id.* at 108.

made a better choice or gotten a better deal. Such a standard would eviscerate the Reform Act's underlying assumption that, at least in the typical case, a properly-selected lead plaintiff is likely to do as good or better a job than the court at these tasks. Because of this, we think that the court's inquiry is appropriately limited to whether the lead plaintiff's selection and agreement with counsel are reasonable on their own terms."[124] Elaborating further, the court stated that the "ultimate inquiry is always whether the lead plaintiff's choices were the result of a good faith selection and negotiation process and were arrived at via meaningful arm's-length bargaining."[125]

B. Party Opposition to the Courts' Solicitation of Bids

We did not find evidence of widespread opposition by plaintiffs' attorneys to the courts' use of competitive bidding. Nor did we find any instances where the defendants opposed the procedure.

Formal objections were made in four cases. We are unaware of objections that were not made on the record. Not surprisingly, the first objection to competitive bidding occurred in *In re Oracle*. In that case, a losing bidder motioned the court for reconsideration, challenging both 1) the court's selection of the winning firm and 2) the competitive bidding process, claiming that competitive selection of class counsel and determination of their compensation was illegal.[126] Sometime later, the winning firm and the challenging firm together brought a new class action on behalf of a class of Oracle shareholders solely against Arthur Andersen. The winning firm wished to continue against the existing defendants under the terms of its bid, but stated that the claim against Arthur Andersen should be treated separately. The losing firm argued that the competitive selection of class counsel did not and could not take changed circumstances into account.[127]

The court concluded that the competitive selection had worked well. It held that the losing firm's attack on the legality and suitability of competitive selection failed analysis and ignored the court's inherent power to protect against excessive attorney fees.[128] The court stated that the changed circumstances (Oracle's press release and the addition of Arthur Andersen as a defendant) demonstrated "a particular strength of competitive selection: increased ability of the court to monitor this litigation to protect the class and the integrity of the class action device."[129] It also rejected that firm's contention that the expense reimbursement limitation presented a conflict of interest because it would diminish the winning firm's devotion to maximizing the class's recovery.[130] Ultimately, Judge Walker denied the losing bidder's motion for reconsideration and confirmed the appointment of the winning firm as class counsel.[131]

In *In re Amino Acid Lysine* two firms noted their opposition to a lead counsel auction, saying that among other things it violated Supreme Court precedent.[132] The court wrote counsel's "flawed notion stemm[ed] from the bizarre idea that an up-front bidding process is somehow at odds with the need for the court to make a finding as to the extent of plaintiffs' success in the litigation."[133]

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124. *Id.* at 109.
125. *Id.*
126. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 640–41 (N.D. Cal. 1991).
127. *Id.*
128. *Id.* at 641.
129. *Id.*
130. *Id*. at 643.
131. *Id.* at 652.
132. *In re* Amino Acid Lysine Litig., 918 F. Supp. 1190, 1192–93 (N.D. Ill. 1996).
133. *Id*. at 1193.

And in *Sherleigh Associates*, once the court announced it was using a sealed bid auction to select class counsel, two law firms filed a motion for reconsideration, arguing they should be allowed to represent the class alone, or alternatively allowed a "right of first refusal" to meet the "best bid."[134] The firms argued that Judge Walls in *In re Cendant* allowed original lead plaintiff's counsel in that case to match the lowest bid, and also that as the affirmative choice of Sherleigh, they should be given the same opportunity and "be allowed to circumvent the bid process and be appointed class counsel directly."[135]

The court rejected the motion on two grounds. First, the court determined that because of the history of representation, "it remained unclear whether these two firms were indeed the affirmative choice of Sherleigh, and even if these firms were Sherleigh's affirmative choice of counsel, the Court found the firms had subsumed Sherleigh's interest in serving as Lead Plaintiff into the firms' own interest in representing whichever lead plaintiff was eventually selected by the Court. . . ."[136] "Second, unlike the *Cendant* court, the Court here constructed an auction with both qualitative and price considerations. Therefore, the Court determined a 'right of first refusal' would unnecessarily abrogate the Court's duty to ensure the class receive quality representation at a fair price."[137] The court concluded that

> [t]he history of representation in this case, the change in Sherleigh's representation from two firms to a consortium of ten firms and now back to one original and one different firm; the qualitative and price considerations in the bid process; and the need to weigh competing interests, all dictate denial of the motion. However, whether a firm is the affirmative choice of the Lead plaintiff may be a factor in the qualitative assessment.[138]

Finally, in *In re Quintus* two groups of plaintiffs offered to serve as lead plaintiffs. One group consisting of four investors (Quintus investors) with aggregate losses of $4,223,000 retained Milberg Weiss and two other law firms, Cauley, Geller, and Bull & Lifshitz.[139] The other group, consisting of two investors with combined losses far less than the Quintus group, were represented by Weiss & Yourman.[140] The Quintus investors proposed to hire the Milberg, Cauley, and Bull firms to represent the class and had negotiated a fee agreement.[141] The district court first rejected the Quintus investors' application to serve as a lead plaintiff group because the entire group could not represent the entire class.[142] Instead, as noted above, the court selected one investor, Colin Hill, from the group to serve as lead plaintiff. The court also concluded "that Hill had not negotiated a 'competitive fee,'"[143] and subsequently ordered a sealed bid auction and chose Weiss & Yourman as class counsel.

Lead plaintiff Hill then filed a petition for writ of mandamus with the Ninth Circuit seeking to enforce his right as lead plaintiff under the PSLRA and "under the Due Process Clause, to retain

134. Sherleigh Assocs. LLC v. Windmere-Durable Holdings, 186 F.R.D 669, 670 (S.D. Fla. 1999).
135. *Id.*
136. *Id.* at 670–71
137. *Id*. at 671.
138. *Sherleigh Assocs.*, 184 F.R.D. 688, 701 (S.D. Fla. 1999).
139. *See In re* Colin Barry Hill Petition for Writ of Mandamus 5 (N.D. Cal. May 11, 2001).
140. *Id*. at 5.
141. *Id*. at 6.
142. *Id*. at 6–7.
143. *Id*. at 7.

and select counsel of his own choice, rather than have the district court improperly intervene to select his counsel through competitive bidding."[144]

Petitioner Hill argued the "district clearly erred as a matter of law by denying [him, lead plaintiff] his right under the PSLRA and the constitution to select counsel of his own choice. Judge Walker decided to 'intervene in the selection of counsel' by inviting competitive bids and selecting lead counsel itself, simply because the court preferred a lower fee than that negotiated by Hill. The court never ruled the fee negotiated by Hill was 'unreasonable,' but only that it was not 'competitive.'''[145] In addition, Hill argued the district court's ruling was in direct conflict with the plain language of the PSLRA. "Judge Walker introduced competitive bidding prior to the PSLRA and has continued to force it upon litigants despite the Act's express terms to the contrary, that the lead plaintiff 'select and retain counsel.'"[146] In addition, petitioner noted "[i]t is not a sufficient justification for the court to reject the lead plaintiff's choice and 'intervene in the selection of counsel' as Judge Walker did here, simply because the court prefers to select counsel by his own self-proclaimed 'innovative' bidding process that he controls. In the PSLRA, Congress has chosen a different approach: the lead plaintiff selects counsel. Unless the lead plaintiff's chosen counsel is somehow inadequate, there is no statutory basis to reject his choice."[147] On June 14, 2001, the Ninth Circuit denied Petitioner Colin Hill's writ.[148]

V. Auctioning Procedures

A. Stage of Litigation at Which Counsel Was Appointed

In almost all of the cases where class counsel was chosen from a competitive bidding process, the judge decided very early on in the life of the litigation that he or she would solicit bids. Class counsel was usually chosen before any dispositive motions were decided, prior to addressing Rule 23 certification issues, but after the appointment of the lead plaintiff in post-PSLRA securities cases.

1. Before dispositive motions

In all but two of the fourteen cases, class counsel was appointed before the court decided any dispositive motions. In *In re Wells Fargo*, the complaint was filed on June 25, 1991, but Judge Walker deferred from addressing the issue of representation of the class because of a strong motion to dismiss, and allowed the class to be represented by de-facto class counsel.[149] In December 1991, Judge Walker granted the defendant's motion to dismiss, but the dismissal was reversed and

144. *Id.* at 1.
145. *Id.*
146. *Id*. at 3.
147. *Id*. at 3.
148. A recent article reported that current class counsel (Weiss & Yourman) told Judge Walker that lead plaintiff Colin Hill has refused to speak to them and, consequently, the suit was proceeding with a class representative who has no desire to speak with counsel conducting the litigation. It's reported that Judge Walker stated, "[a]t some point or other, I think there is very clearly going to have to be a class representative or a group of class representatives to serve as new lead plaintiff." *Attorneys Getting the Silent Treatment*, The Recorder 1, June 19, 2001. Colin Hill withdrew as lead plaintiff on June 20, 2001, and Weiss & Yourman are currently searching for a suitable replacement for lead plaintiff.
149. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 225–26 (N.D. Cal. 1994).

the complaint was ordered to be reinstated in April 1994.[150] Two months later, Judge Walker decided that class counsel would be selected by competitive bidding. Judge Walker admitted that with hindsight, regardless of the defendant's motion to dismiss, "appointment of class counsel and determination of the terms of their engagement should have been made when the case began" because "[e]arly selection of class counsel and determination of their compensation serve the interests of the class by enabling these matters to be resolved competitively."[151]

Although Judge Shadur requested bids only two months after the initial complaint was filed in *In re Bank One*, he delayed the selection of lead plaintiff and class counsel until he ruled on the defendants' motion to dismiss. All of plaintiffs' counsel who were listed in the consolidated complaint (whether or not they submitted bids) and any other counsel who had submitted bids were ordered to respond to the motion to dismiss.[152] After the motion to dismiss was denied, Judge Shadur appointed lead plaintiffs and awarded class counsel representation by competitive bidding.[153]

2. After choosing lead plaintiff

In the three securities bidding cases decided prior to the enactment of the PSLRA in 1995, the timing of the designation of the class representative in relation to the appointment of class counsel was not an issue since the court did not object to the nominally identified class representative. In nine post-PSLRA securities cases, courts have used two approaches to appoint lead plaintiff in relation to the competitive selection of class counsel. In most of these cases, the court addressed first the identity of the lead plaintiff, and then invited bids from attorneys and law firms for representation of the plaintiffs' class as class counsel.[154]

In contrast, in both securities class actions in which Judge Shadur asked for bids, he appointed the lead plaintiff at the same time he chose lead counsel.[155] When he announced to the parties that he was considering using the bidding procedure to select class counsel, Judge Shadur explained that bidding would be used as an adjunct to his determination of the "most adequate plaintiff," who he would appoint as soon as practicable, whether or not he decided to award the legal representation of the plaintiff class on the basis of bids.[156] In addition, Judge Shadur made it clear that the individual or group determined to be entitled to presumptive status under 15 U.S.C. § 78u-4(a)(3)(B) as the "most adequate plaintiffs" could have this presumption rebutted (despite the amounts at stake personally) if the presumptive lead plaintiffs were to insist on their class counsel

150. *In re Wells Fargo*, 12 F.3d 922 (9th Cir. 1993).

151. *In re Wells Fargo*, 156 F.R.D. at 225–26.

152. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Memorandum Order (N.D. Ill. Mar. 13, 2000).

153. *In re Bank One*, 96 F. Supp. 2d 780 (N.D. Ill. 2000).

154. *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1988); Wenderhold v. Cylink Corp., 188 F.R.D. 577 (N.D. Cal. 1999); *In re* Network Assocs., Inc., Sec. Litig., No. 99-C-01729, Order Supporting Robert A. Vatuone as Lead Plaintiff (N.D. Cal. Dec. 15, 1999); Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688 (S.D. Fla. 1999); *In re* Lucent Techs., Inc., Sec. Litig., 194 F.R.D. 137 (D.N.J. 2000) & *In re* Lucent Techs., Inc., Sec. Litig., No. 00-C-621, Letter-Opinion (D.N.J. Apr. 17, 2001) (order appointing co-lead plaintiff); *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204 (N.D. Cal. Apr. 12, 2001); *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001).

155. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re Comdisco*, 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001).

156. *In re Bank On*e, No. 00-C-880, 2000 WL 246257, at *2 (N.D. Ill. Feb. 24, 2000); *In re* Comdisco Sec. Litig., 141 F. Supp. 2d 951, 955 (N.D. Ill. 2001) (Memorandum Opinion entering attached Apr. 6, 2001 Memorandum Order).

handling the action on a materially less favorable contractual basis than by the most favorable qualified bidder among the lawyers submitting bids.[157]

3. Before Rule 23 certification

In all but one of the bidding cases, class counsel was chosen prior to final certification of the class[158] or prior to the court ruling on or addressing the certification issue at all.[159] *In re Auction Houses* is the only case where the class was certified before the court even announced that it was considering the use of an auction to select lead counsel.[160]

Judge Shadur explained that part of the Rule 23 certification process depends on the adequacy of representation, including the adequacy of plaintiff and plaintiff's counsel.[161] In *In re Bank One* and *In re Comdisco*, he inquired of defense counsel as a threshold matter whether they anticipated a likely objection to class certification, assuming the ultimate class representative and class counsel met the adequacy of representation requirements. In both cases, defense counsel indicated there would not be a problem with certification.[162]

B. Discovery Prior to Bid Submission

None of the bidding cases gave any indication that the judge permitted any type of preliminary discovery by any of the bidders to assist them with their proposals *prior* to the commencement of the initial bidding period. Discovery either had not yet commenced in the case, or, if it had, once the court requested bids, any discovery in the case was stayed.[163]

In several cases, limited discovery was permitted for very specific reasons. In *In re Auction Houses*, prior to the submission of final bids, the court learned that the interim lead counsel had engaged in settlement discussions with the defendants in which they had obtained information regarding potential damages. On motion by another prospective bidder, the court made this information available to all counsel solely for the purpose of assisting them in preparing their bids.[164] Judge Kaplan explained that these documents were ordered disclosed to even the playing field,

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157. *In re Bank One*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000); *In re Comdisco*, 141 F. Supp. 2d at 953. *See also supra* Section IV.A.5.

158. *In re* Oracle Sec. Litig, No. 90-C-931 (Walker N.D. Cal.); *In re* Wells Fargo Sec. Litig., No. 91-C-1994 (Walker N.D. Cal.); *In re* California Micro Devices Sec. Litig., No. 94-C-2817 (Walker N.D. Cal.); *In re* Amino Acid Lysine Antitrust Litig., No. 95-C-7679 (Shadur N.D. Ill.); *In re* Cendant Corp. Litig., No. 98-C-1664 (Walls D.N.J.); Wenderhold v. Cylink Corp., No. 98-C-4292 (Walker N.D. Cal.); *In re* Network Assocs., Inc., Sec. Litig., No. 99-C-1729 (Alsup N.D. Cal.); *In re* Bank One Shareholders Class Actions, No. 00-C-880 (Shadur N.D. Ill.).

159. *In re* Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., No. 98-C-2273 (Lenard S.D. Fla.); *In re* Lucent Techs., Inc., Sec. Litig., No. 00-C-621 (Lechner D.N.J.); *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894 (Walker N.D. Cal.); *In re* Comdisco Sec. Litig., No. 01-C-2110 (Shadur N.D. Ill.); *In re* Commtouch Software Ltd., Sec. Litig., No. 01-C-00719 (Alsup N.D. Cal.). Final class certification is either still pending in these cases or has not been addressed yet in the case.

160. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 73 (S.D.N.Y. 2000).

161. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

162. *Id.*

163. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 698 (S.D. Fla. 1999). Note that for cases filed after the effective date of the Private Securities Litigation Reform Act of 1995, discovery is stayed until after selection of lead plaintiff and class counsel. 15 U.S.C. § 772-1(b)(1), § 78u-4(b)(3)(B).

164. *In re Auction Houses*, 197 F.R.D. 71, 74 (S.D.N.Y. 2000).

facilitate bidders in assessing accurately the value of the case, and improve the overall quality of the bids submitted.[165]

In *In re Oracle*, because the winning bidder selected by Judge Walker to represent a class of Oracle Shareholders against Oracle was unwilling to add Arthur Anderson as a defendant, Judge Walker ordered a second round of bidding to chose a firm to represent a class of Oracle shareholders against Arthur Anderson and any other new defendant. Since discovery had already commenced in the class action against Oracle, the court ordered chosen counsel for the class on claims against Oracle (the Lowey firm) to "make any discovery obtained in the litigation which relates to Arthur Anderson available to any firm notifying the court and the Lowey firm of an intent to bid on representing a class against Arthur Anderson."[166]

Judge Shadur explained that because the object of bidding is to attempt to simulate the market as if there was an individual client hiring a law firm, discovery should not be a component of bidding cases since clients and their attorneys negotiate a fee up front without the benefit of discovery. Allowing discovery before addressing selection of counsel puts the cart before the horse, especially in securities cases where the court is supposed to be choosing the most adequate plaintiff early in the case. It is also wasteful because it leaves the litigation without lead counsel during the discovery period, which can be complex and lengthy in large cases.[167]

Although not directly related to bid submission, Judge Alsup explained that early in the litigation when deciding whether to allow aggregation of plaintiffs, he granted the request of two proposed lead plaintiffs to conduct limited discovery as permitted under the PSLRA. The two potential lead plaintiffs were allowed a four-hour deposition of each of the other's main institutional candidate.[168] Judge Alsup indicated that the depositions revealed that both of the potential plaintiffs were inadequate to serve as lead plaintiff.[169]

C. Limitations on Field of Potential Bidders

With only three exceptions, the courts opened the bidding to any attorney or firm anywhere in the country interested in serving as class counsel whether or not they had filed a complaint or were somehow previously involved in or connected to the litigation. Bidding was opened to as large a potential pool of bidders as possible in hopes of increasing the numbers of bidders and the competition among them. In fact, in *In re Cendant* the court received bids from law firms who had not filed a preliminary complaint in the case.[170] Likewise, the winning bidder chosen to represent the class in *In re Network Associates* did not come with a lead plaintiff.[171]

Except for Judge Alsup, none of the other bidding judges took any special action to notify other potential bidders. In *In re Commtouch*, Judge Alsup ordered that a copy of his recent order containing guidelines for bid submission was to be posted on the Stanford Securities Class Action

165. *Id.* at 84.

166. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 651 (N.D. Cal 1991).

167. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

168. *In re* Network Assocs. Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1027 (N.D. Cal. 1999).

169. Telephone Interview with District Judge William Alsup, Northern District of California (June 29, 2001).

170. Telephone Interview with District Judge William H. Walls, District of New Jersey (July 5, 2001).

171. Telephone Interview with District Judge William Alsup, Northern District of California (June 29, 2001).

Clearinghouse Web site within a week from the Order's date inviting proposals from candidates who wanted to serve as class counsel.[172]

The three exceptions were all before Judge Shadur. He limited the bidding to all attorneys of record in the actions, and, in his two securities cases, to any other attorneys who timely filed motions for lead plaintiff for any member of the class.[173] Judge Shadur explained that bidding should be limited to attorneys or firms (1) with preliminary knowledge sufficient to make a judgment about what would be an appropriate or fair fee and (2) with a client willing to have the attorney or firm represent them by filing a complaint. Bidding should not be open to the world generally because this invites the prospect of bidding by firms with no knowledge of the case merely seeking to grab a piece of the representation.[174]

D. Overview of Court-Imposed Guidelines for Bid Proposals

The guidelines provided to potential bidders varied greatly among the cases,[175] ranging from a very detailed list of the necessary submissions to hardly any guidance at all. These guidelines can be separated into two categories: (1) guidelines for providing qualitative information; and (2) guidelines for providing information regarding the proposed fee structure under which the potential bidder is willing to represent the class. Once again, the level of detail required from the bidders regarding each of these categories varied among the cases.

1. Guidelines for qualitative submissions

With the exception of Judge Shadur, who requested a comprehensive curriculum vitae from the bidding attorneys or firms, including information on their prior class action experience,[176] the judges who have used bidding since Judge Walker introduced the procedure in 1990, have required an increasingly detailed array of submissions from potential bidders in terms of qualitative information. In fact, this progression is clearly evidenced in Judge Walker's five bidding cases that span the entire eleven-year period covered by the fourteen bidding cases studied in this report. In *In re Oracl*e, Judge Walker required potential bidders to submit information on the firm's qualifications to serve as lead counsel consisting of "detailed descriptions of the role such firm played in each class action it has brought or assisted in bringing and the contribution such firm made to the welfare of the class plaintiffs."[177] In *In re Wells Fargo*, in addition to the firms' and relevant attorneys' experience in securities class action litigation, Judge Walker asked for the potential bidders to indicate their willingness to post a completion bond or other security for the faithful completion

172. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 4 (N.D. Cal. June 27, 2001).

173. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* Bank One Shareholders Class Actions, No. 00-C-880, 2000 WL 246257, at *1 (N.D. Ill. Feb. 24, 2000): *In re* Comdisco Sec. Litig., 141 F. Supp. 2d 951, 954 (N.D. Ill. 2001) (Memorandum Opinion entering attached Apr. 6, 2001 Memorandum Order).

174. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

175. See *infra* Appendix A for a reproduction of the complete guidelines provided by the court in each of the 14 bidding cases discussed in this report.

176. *In re Amino Acid Lysine*, 918 F. Supp. 1190, 1200 (N.D. Ill. 1996); *In re Bank One*, No. 00-C-880, 2000 WL 246257, at *1 (N.D. Ill. Feb. 24, 2000); *In re Comdisco*, 141 F. Supp. 2d 951, 955 (N.D. Ill. 2001) (Memorandum Opinion entering attached Apr. 6, 2001 Memorandum Order).

177. *In re* Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990).

of its services to the class, as well as proof of the firm's insurance coverage for malpractice.[178] Judge Walker rejected the contention by the three bidding firms that the need for security toward completion of performance was obviated by the firms' interest in maintaining their reputations. He pointed out that "[e]ven prominent, well-respected law firms dissolve, declare bankruptcy or otherwise become unable to carry on their practices."[179]

In *In re California Micro Devices*, because of Judge Walker's frustrations over past requests for information on the firm and attorneys' experience in securities class actions leading to submissions of "unhelpful puffery," Judge Walker requested that each bidder's qualifications be accompanied by a table that included the title, court, docket number, and date filed for each securities class action in which the bidder served as sole class counsel during the past three years; the amount of recovery obtained on behalf of the class; the percentage of the securities in the class for which claims were submitted; the amount of recovery (if any) distributed to the class; and total amounts received by the bidder, including fees and costs (if any).[180] In *Cylink*, he added a request for "evidence that the firm has evaluated the case, including specifically the range and probability of recovery."[181] Finally, in *In re Quintus*, Judge Walker did not add any new requirements to his previous guidelines for submission of qualitative information from potential bidders.[182]

Except for Judge Shadur (*see supra*) and Judge Alsup, the remaining bidding judges asked for submissions identical or similar to Judge Walker's requirements for qualitative information, adopting a few or all of the above requests.[183]

In *In re Network Associates* and very recently in *In re Commtouch*, both post-PSLRA cases, Judge Alsup adopted a very different approach to auctioning the role of class counsel in that he ordered the appointed lead plaintiff to conduct the auction instead of the court, explaining that the "lead plaintiff has a fiduciary duty to obtain the highest quality representation for the class at the lowest reasonable cost."[184] Thus, his bidding guidelines were very different from those issued by the judges in the other bidding cases. The lead plaintiff was required to publicize a request for written proposals from counsel; evaluate all of the proposals received; and interview any candidates deemed appropriate. Lead plaintiff was then ordered to submit his recommendations for his first and second choices as class counsel to the court under seal, including a full description of his selection process, his conclusions, and his reasons.[185] In terms of qualitative information, the court specified that each proposal was to include "(i) the firm's experience in securities class actions and, by case as practicable, its track record in results achieved (in terms of net dollars to the class); (ii) the securities and trial experience of the proposed individual to be lead counsel, the second chair and a commitment that the lead or the second chair shall conduct all important depositions,

178. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 229 (N.D. Cal. 1994).

179. *In re Wells Fargo*, 157 F.R.D. 467, 471–72 (N.D. Cal. 1994).

180. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *3 (N.D. Cal. 1995).

181. Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587-88 (N.D. Cal. 1999) & 189 F.R.D. 570, 573–74 (N.D. Cal. 1999).

182. *In re* Quintus Sec. Litig., Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204, at *16–17 (N.D. Cal. Apr. 12, 2001).

183. *See In re* Cendant Corp. Litig., 182 F.R.D. 144, 151 (D.N.J. 1998); Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 695–97 (S.D. Fla. 1999); *In re* Lucent Techs., Inc., 194 F.R.D. 137, 157 (D.N.J. 2000) & No. 00-C-621, Letter-Opinion 44–45 (D.N.J. Apr. 17, 2001); *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 73–74 (S.D.N.Y. 2000).

184. *In re* Network Assocs., Inc., Sec. Litig., No. 99-C-01729, Lead Plaintiff's Request for Proposals for Class Counsel 2 (N.D. Cal. Dec. 22, 1999).

185. *Id.* & *In re Network Assocs.*, 76 F. Supp. 2d 1017, 1034 (N.D. Cal. 1999).

court hearings and settlement negotiations, and that the lead shall conduct the trial. . ."[186] In addition, Judge Alsup required the lead plaintiff to inquire into and eliminate any conflict issue that a firm submitting a bid proposal might have before recommending that firm.[187]

Likewise, in his recently issued order appointing lead plaintiff in *In re Commtouch,* Judge Alsup once again required the lead plaintiff to invite proposals from candidates for class counsel, interview candidates, evaluate the applications and make his recommendations for his top three choices for class counsel to the court in a private in-chambers conference.[188] Judge Alsup went even further in *In re Commtouch* than he did in *In re Network Associates* by requiring each bid proposal to include responses to a court-provided "Questionnaire for Potential Class Counsel." These additional guidelines may have been necessitated by the unique circumstances in *In re Commtouch*, namely, the lead plaintiff is a resident of Israel with limited facilities in English.[189] In terms of qualitative information, the Questionnaire required each firm to identify the one individual that would serve as lead class counsel, and provide details concerning the proposed candidate's (1) trial experience as lead trial counsel; (2) experience as lead class counsel in securities-fraud class actions for which a resolution at the district court was reached, including details of any settlement; and (3) extent of commitment to the case. In addition, with regard to the candidate for lead trial counsel and all other individual lawyers who the firm identifies as having a substantial role in investigation, discovery, trial or settlement, the firm's bid proposal must state whether the identified attorneys have ever been subject to any disciplinary action. [190]

2. Guidelines for quantitative submissions

With respect to guidelines for fee proposals, once again Judge Walker's cases evidence the increasing specificity in this area. And once again Judge Shadur is the exception to this trend. In *In re Oracle*, Judge Walker asked bidders to specify the percentage of any recovery they would charge as fees and costs if a recovery for the class is achieved. Bidders were also requested to certify that its compensation proposal was independently prepared and that no part was revealed to any other bidder prior to filing with the court. Potential bidders were barred from conferring with other firms as they prepared their bids.[191] In *In re Wells Fargo*, in addition to specifying the percentage of any recovery the firm would charge as fees and costs, potential bidders had to include the terms under which such fees and costs would be charged, such as monetary increments, and time and event contingencies.[192] *In re California Micro Devices* marked the initial appearance of the "bid grid." All bidders were required to specify fees and costs as a percentage of recovery using a table or grid created by the court with input from the attorneys that set forth specific recovery ranges and event contingencies.[193]

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186. 76 F. Supp. 2d at 1034.

187. *In re Network Assocs*., No. 99-C-01729, Order Supporting Robert A. Vatuone as Lead Plaintiff 2 (N.D. Cal. Dec. 15, 1999).

188. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re: Lead Plaintiff Selection and Class Counsel Selection 5 (N.D. Cal. June 27, 2001).

189. *Id.* at 2.

190. *Id.* at 2, app. B. For a reproduction of the entire questionnaire, see *infra* Appendix A.

191. *In re* Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990). The court left it within an applicants discretion whether or not to specify alternative contingent events and the corresponding percentages to be charged. However, if they did so the applicant was required to provide an estimate of the amount of recovery at each contingent event and the basis for that estimate. *Id.* at 697 n.22.

192. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 229 (N.D. Cal. 1994).

193. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *3 (N.D. Cal. 1995). *See infra* Appendix A for a reproduction of the bid grid.

In *Cylink,* Judge Walker provided bidders with a similar table that set forth specific recovery ranges and event contingencies. In addition, potential bidders had to explain why the percentage fee arrangement they submitted was based on increasing, decreasing, or straight percentages with respect to monetary increments and/or the stage of litigation at which recovery was achieved.[194] Although bidders were permitted to chose either rising, falling, or straight percentages, Judge Walker clearly stated his strong preference for decreasing percentages as the amount of recovery increases and increasing percentages as the amount of attorney effort necessary to produce recovery increases.[195] Judge Walker explained that such a fee structure is preferable because "increasing amounts of recovery do not require corresponding increased levels of attorney effort and these economies of effort should be shared with the class."[196]

Finally, in *In re Quintus* Judge Walker required bidders to use a court-provided grid or table to specify fees and costs for each level of recovery and stage of litigation. The fee proposals were required to take a sliding scale format, meaning that for each incremental monetary level of recovery the fee percentage for that increment applied only to that increment, even if recovery exceeded that amount. The table permitted fee proposals to vary the percentage for recovery at one of four stages in the litigation: (1) from pleading through motion to dismiss; (2) after motion to dismiss through summary judgment; (3) after summary judgment through trial verdict; and (4) after trial verdict through final appellate determination.[197]

Judge Shadur's guidelines for fee proposals differed greatly from the guidelines described above. In all three of his cases, Judge Shadur left it within the "discretion of all bidding counsel to decide just how they would formulate their proposals."[198] In *In re Bank One*, Judge Shadur explained that ". . . in an effort to maximize the potential for ultimate benefit to the class members, this Court (again as in *Lysine*) did not set its own structural standards for the bids. In that respect, any bidding constraints that this Court (not having more than threshold knowledge of the litigation and its prospects) might have imposed from the outside in the form of mandated structural limitations would necessarily have generated corresponding limitations on the exercise of imagination by bidding counsel in devising proposals that they thought would provide the maximum benefit to the class, while at the same time providing the successful lawyers with adequate compensation."[199]

Judge Walls and Judge Lechner both provided potential bidders with bid grids specifying recovery increments and event contingencies.[200] In the first round of bidding in *In re Lucent (Lucent I),* Judge Lechner subsequently clarified his original fee guidelines to require that bid proposals reflect his preference that the percentage charged as compensation for fees and expenses should decline as the fund increases "in order to avoid excessive compensation to counsel, while still providing motivation to class counsel."[201] Again in the second round of bidding to select a co-lead counsel *(Lucent II),* Judge Lechner clearly stated his preference for a "schedule which allows for a

194. Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587–88 (N.D. Cal. 1999) & 189 F.R.D. 570, 573–74 (N.D. Cal. 1999). *See infra* Appendix A for a reproduction of the bid grid.

195. 189 F.R.D. at 571.

196. *Id.* at 572.

197. *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170, at *7 (N.D. Cal. May 31, 2001). See *infra* Appendix A for a reproduction of the bid grid.

198. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1193 (N.D. Ill. 1996).

199. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 785 (N.D. Ill. 2000).

200. *In re* Cendant Corp. Litig. 82 F.R.D. 144, 151 (D.N.J. 1998); *In re* Lucent Techs. Inc., Sec. Litig., 194 F.R.D. 137, 157 (D.N.J. 2000). See *infra* Appendix A for a reproduction of the bid grids.

201. *In re* Lucent Techs. Inc., Sec. Litig., No. 00-C-621, Letter-Opinion 16 (D.N.J. Aug. 2, 2000) (citing June 13, 2000 Letter).

rising fee as the litigation continues, but a declining fee as the total class recovery increases within each stage of the litigation" which results in maximum potential recovery for both class members as well as the attorneys.[202] Further, Judge Lechner stated that this format creates a disincentive for the lead counsel to "sell out" the class because at no point should its efforts hypothetically outweigh its potential recovery.[203] In all other respects including the bid grid employed, the fee guidelines were identical to those imposed in the first round of bidding.[204]

In *In re Network Associates*, although the lead plaintiff was in charge of inviting bids (*see supra*), Judge Alsup provided the lead plaintiff with guidelines for the fee portion of the proposals. Although bidders did not have to fill in a bid grid, each bidder was required to submit two fee proposals, one based on percentage of recovery and the other based on hourly rates (i.e., lodestar method).[205] However, in *In re Commtouch* the proposals to be submitted and evaluated by the lead plaintiff had to contain responses to a court-created "Questionnaire for Class Counsel Candidates" which required counsel to complete a "Fee Schedule Grid" stating the percentage fees they would accept for each of four event contingencies if selected as class counsel.[206] Counsel were permitted to adjust the monetary brackets. In addition, bidders were required to state the hourly rates they would be willing to accept on a lodestar basis. Judge Alsup clarified that the "Court will have to assess at the end of the case whether the amounts set forth are fair and reasonable, so there is no guarantee that counsel, if appointed, would automatically receive the amounts indicated."[207] Furthermore, Judge Alsup alerted bidders that if approved as class counsel, counsel would have to maintain time records in accordance with the format set forth in the form "Time Records" (*infra* Appendix A) so he could make an informed fee award, and they would have to agree to advance to the lead plaintiff all reasonable expenses incurred pursuant to his duties as lead plaintiff.[208]

In *Sherleigh Associates*, Judge Lenard required each fee proposal to set forth (1) evidence that the firm evaluated the case, the range and probability of recovery, and premised the bid on that evaluation; (2) a description of whether expenses and costs would be subtracted from the overall settlement, or from the attorney fee award portion of recovery; (3) the percentage of recovery the firm would charge as fees and costs including an explanation of why the percentage fee arrangement is based on increasing, decreasing or straight percentages with respect to monetary increments and/or stage of litigation at which recovery is reached; and (4) a certification that the firms proposal was prepared independently of any other firm, entity, or person not affiliated with the firm; that no part of the proposal was disclosed to anyone outside the firm prior to filing the proposal with the Court; and that the proposal was prepared without direct or indirect consultation with other firms that have filed actions or entered an appearance in any fashion on behalf of the proposed class.[209] Judge Lenard gave bidders the option of using a court-provided Fee Grid Schedule.[210] In addition to these requirements, some or all of which were also contained in the

202. *In re Lucent Techs.*, No. 00-C-621, Letter-Opinion 44–45 (D.N.J. Apr. 17, 2001).

203. *Id.*

204. *Id.* at 45–48.

205. *In re* Network Assocs. Sec. Litig., 76 F. Supp. 2d 1017, 1034 (N.D. Cal. 1999).

206. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 5, app. B at 2, 3 (N.D. Cal. June 27, 2001). See *infra* Appendix A for a reproduction of the questionnaire and bid grid.

207. *In re Commtouch*, at app. B, at 2.

208. *Id.* at app. B, at 2, 4–5. See *infra* Appendix A for a reproduction of the "Time Records" form.

209. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 696–97 (S.D. Fla. 1999).

210. *Id.* at 697. See *infra* Appendix A for a reproduction of the optional Fee Schedule Grid.

guidelines of most of the other bidding judges (except for Judge Shadur), Judge Lenard asked for a "defense of the bid that describes how the fees and cost charges will motivate the firm to adequately represent the class."[211]

Judge Kaplan stands alone in his approach to structuring the bidders' fee proposals. Each bidder was asked to identify an X factor, below which 100% of recovery would go to the class and above which 75% of the recovery would go to the class. The remaining 25% above X would be paid to lead counsel as attorneys' fees and costs.[212]

E. Specific Features of Auction Procedures Required by the Courts

Our review of the court-issued guidelines for bid submissions identified a number of practices that were used by one or more judges. For each bidding case described in this report, the following tables show which of these specific features were implemented by the court in each particular case. Immediately following the tables, these features are discussed in more detail.

211. *Id.*

212. *In re* Auction Houses Antitrust Litig., 192 F.R.D. 71, 74 (S.D.N.Y. 2000).

Table 2: Auction Features Required of or Permitted by the Courts

Case Name, Docket No., and Judge	Sealed Bids Required	Joint Bids Permitted	Caps on Fees or Expenses Required	Fee Proposal Required to Include Expenses	Modification of Caps at Time of Fee Award Permitted	Structured Bids Required
In re Oracle No. 90-C-931 (Walker)	Yes	No	No	Yes	No	No
In re Wells Fargo No. 91-C-1944 (Walker)	Yes	No	No	Yes	No	Yes
In re Cal. Micro Devices, No. 94-C-2817 (Walker)	Yes	No	No	Yes	No	Yes (bid grid)
In re Amino Acid Lysine, No. 95-C-7679 (Shadur)	Yes	No	No	No	Yes	No
In re Cendant No. 98-C-1664 (Walls)	Yes	Yes	No	No	No	Yes (bid grid)
Cylink No. 98-C-4292 (Walker)	Yes	No	No	Yes	No	Yes (bid grid)
Sherleigh Assocs. No. 98-C-2273 (Lenard)	Yes	No	No	Yes	No	Yes (bid grid optional)
In re Network Assocs., No. 99-C-1729 (Alsup)	Yes	No	No	No	No	No
In re Auction Houses, No. 00-C-648 (Kaplan)	Yes	No	No	Yes	No	Yes
In re Bank One No. 00-C-880 (Shadur)	Yes	Yes	No	No	Yes	No
In re Lucent No. 00-C-621 (Lechner)	Yes	No	No	Yes	No	Yes (bid grid)
In re Quintus No. 00-C-4263 (Walker)	Yes	No	No	Yes	No	Yes (bid grid)
In re Comdisco No. 01-C-2110 (Shadur)	Yes	Yes	No	No	Yes	No
In re Commtouch No. 01-C-00719 (Alsup)	Yes	No	No	No	No	Yes (bid grid)

Table 2 (cont'd): Auction Features Required of or Permitted by the Courts

Case Name, Docket No. and Judge	Use of an X-Factor Required	Fee Proposal Required to be Based on Percentage of Class Recovery	Right of First Refusal Permitted	Counsel Conducting Initial Investigation Expressly Permitted to Receive Compensation	Appointment of Unaffiliated Counsel to Assist with Case Expressly Permitted
In re Oracle No. 90-C-931 (Walker)	No	Yes	No	No	Not addressed
In re Wells Fargo No. 91-C-1944 (Walker)	No	Yes	No	Yes	Yes
In re Cal. Micro Devices No. 94-C-2817 (Walker)	No	Yes	No	No	Not addressed
In re Amino Acid Lysine No. 95-C-7679 (Shadur)	No	No	No	No	Yes
In re Cendant No. 98-C-1664 (Walls)	No	Yes	Yes	No	Yes
Cylink No. 98-C-4292 (Walker)	No	Yes	No	No	Yes
Sherleigh Assocs. No. 98-C-2273 (Lenard)	No	Yes	No	No	Yes
In re Network Assocs. No. 99-C-1729 (Alsup)	No	Yes	No	No	Not addressed
In re Auction Houses No. 00-C-648 (Kaplan)	Yes	Yes	No	No	Not addressed
In re Bank One No. 00-C-880 (Shadur)	No	No	No	Yes	Yes
In re Lucent No. 00-C-621 (Lechner)	No	Yes	No	No	Yes
In re Quintus No. 00-C-4263 (Walker)	No	Yes	No	No	Yes
In re Comdisco No. 01-C-2110 (Shadur)	No	No	No	No	Yes
In re Commtouch No. 01-C-00719 (Alsup)	No	Yes	No	No	Expressly prohibited

1. Sealed bids

In each of the fourteen bidding cases, the court required the bidders to submit their bid proposals under seal (i.e., the contents of the proposal were not available for disclosure to anyone except the court). Judge Shadur explained that he requests sealed bids in the possibility he decides not to use bidding because of events unforeseen (e.g., bids were extremely difficult to compare) when bids were solicited, in which case he will either ask the bidders to submit additional information or return the bids to the bidders and no one would be apprised of what counsel would have been prepared to do.[213]

In *In re Quintus*, Judge Walker required sealed bids to ensure their confidentiality up to the point of selection of class counsel.[214] And Judge Lechner stated that the "proposed bids are to be submitted under seal so as to mitigate against the possibility of collusion and maintain the confidentiality of attorney work product to the extent such is revealed in a bid."[215] Although a court's authority to request that documents including bids be submitted under seal was not under scrutiny, the Third Circuit recently found that the district court abused its discretion in *In re Cendant* when it issued a confidentiality order keeping the identities of the bidders and the nature of their proposals sealed until the conclusion of the case.[216]

2. Joint bids

Only Judge Walls and Judge Shadur permitted two or more firms to join together and submit a bid as a joint effort.[217] Judge Shadur barred the submission of joint bids in the first case in which he used competitive bidding "in order to maximize competition in the best interests of the prospective plaintiff class."[218] Judge Shadur explained that firms associated prior to bid submission did not fall under this prohibition of joint bids in *Lysine*. He wouldn't force a single firm to divorce itself from other firms or attorneys with whom it may have made an up-front arrangement. However, Judge Shadur would not permit firms not previously associated at the outset of the case to engage in discussions between themselves because this tends to lessen the quality and freedom of bidding by chilling the market.[219] However, he later announced in his two subsequent bidding cases that he would contemplate appointing co-class counsel.[220] Judge Shadur made it clear that if he were to appoint co-class counsel to represent the plaintiff class, a joint bid must represent the total fees that would be contemplated to be paid to all co-counsel including the bidder.[221]

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213. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Transcript of Proceedings Before the Honorable Milton I. Shadur 17 (N.D. Ill. Feb. 18, 2000).

214. *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170, at *7 (N.D. Cal. May 31, 2001).

215. *In re* Lucent Techs. Inc., Sec. Litig., No. 00-C-621, Letter-Opinion 47 (D.N.J. Apr. 17, 2001).

216. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug. 8, 2001) (Order vacating sanction for violation of District Court's sealing order and requiring unsealing of all previously sealed documents). *See infra* Section VI.G.

217. *In re* Cendant Corp. Litig., 182 F.R.D. 144, 151 (D.N.J. 1998); *In re* Bank One shareholders Class Actions, No. 00-C-880, 2000 WL 246257, at *1 (N.D. Ill. Feb. 24, 2000); *In re* Comdisco Sec. Litig., 141 F. Supp. 2d 951, 955 (N.D. Ill. 2001) (Memorandum Opinion entering attached Apr. 6, 2001, Memorandum Order).

218. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1192 (N.D. Ill. 1996).

219. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

220. *In re* Bank One Shareholders Class Actions, No. 00-C-880, 2000 WL 246257, at *1 (N.D. Ill. Feb. 24, 2000); *In re Comdisco*, 141 F. Supp. 2d at 955.

221. *Id.*

In *In re Wells Fargo*, although Judge Walker did not ban joint bids altogether, he prohibited a joint bid by the two firms who had served as de facto class counsel—the firms were de facto class counsel because of their work in the case prior to Judge Walker's announcement that he would use a competitive bidding process to select class counsel. He explained that although a "joint bid by two or more firms otherwise too small to take on class counsel responsibilities would introduce a new competitor to the selection process," in this case both Lieff, Cabraser and Milberg, Weiss were large, well-financed firms plainly able to handle the litigation without the assistance of another firm and, because of their prior work as de facto class counsel, both firms had a qualitative advantage in the bidding process.[222] Thus, he concluded that allowing a joint bid by two dominant firms "might very well eliminate whatever possibility remains in this case of a meaningful competition to secure class counsel designation. Accepting a joint bid by these two firms would be tantamount to turning over the litigation to a two-firm steering committee."[223]

In *In re Commtouch*, although Judge Alsup did not permit a consortium of firms to join together in their bid, he did invite bidders to submit proposals to the lead plaintiff for both the appointment of a firm in Israel to serve as special class counsel and a separate firm in the United States to serve as lead litigation and trial counsel.[224] He explained that "[s]ince Commtouch is an Israeli company, the class will be benefited by having a representative in Israel, fluent in Hebrew, as well as counsel in the United States."[225]

3. Fee and/or expense caps

Although bidders in several auction cases voluntarily submitted bid proposals containing a cap on the total amount of attorneys' fees and/or a cap on the total amount of expenses for which the bidder could request reimbursement,[226] not one judge required bids to include a fee or an expense cap. Although bids were not required to contain an expense cap, Judge Walker defended the winning bid's inclusion of an expense cap in *In re Oracle* explaining that "full reimbursement of expenses encourages a form of cheating. The prospect of reimbursement tempts class counsel to allocate a portion of their overhead costs to specific litigation. Law office administration, secretarial, docket, work processing, accounting, library, clerical and other costs that must be incurred to enable the firm to operate at all can under some guise be allocated to the litigation at hand."[227]

Judge Shadur admitted that in *In re Amino Acid Lysine* he did not anticipate that a bidder would voluntarily self-impose a fee cap, which proved to be an enormous benefit to the class. He would not have required a cap if he had required structured bids. However, he explained that this didn't convince him to impose fee caps in his subsequent bidding cases because it may not fit or be fair to the particular litigation.[228]

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222. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994).

223. *Id.*

224. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 4–5 (N.D. Cal. June 27, 2001).

225. *Id.* at 2.

226. *In re* Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1990) (expense cap); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996) (fee cap); *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000) (fee cap); *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001) (fee caps).

227. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 644 (N.D. Cal. 1991).

228. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

Judge Kaplan points out that although an attorney fee cap prevents the investment of needless attorney hours in a case, it may create an incentive for lead counsel to settle the case exactly at the level at which the fee reaches its maximum, even if that level is suboptimal from plaintiffs' perspective.[229] In addition, if disclosed to defendants, the fee cap can lead defendants to exploit the disjuncture of interests between plaintiffs and their counsel by making a firm settlement offer in the amount that would exactly maximize counsel's fee, even if defense counsel otherwise would be prepared to go higher. The fee cap gives lead counsel incentive to agree to settle at this amount and not press for an award more favorable to the plaintiffs. Likewise, Judge Kaplan explained that a cap on expenses, even though it reduces runaway litigation expenses, encourages lead counsel to cease prosecuting the case as soon as expenses have reached the cap level.[230]

4. Fee proposal required to include attorney fees *and* expenses

In eight of the fourteen cases, the court required bidders to include all costs or expenses in addition to fees in the percentage of total class recovery the bidder would charge in the event of recovery by the class. *See supra* Table 2. Judge Walker followed this approach in all five of his bidding cases, clearly stating that "[n]o separate reimbursement for out-of-pocket expenses would be allowed."[231] In fact, in the first round of bidding in *Cylink*, Judge Walker rejected the sole bidder's proposal and ordered a second round of bidding because the firm's bid for designation as class counsel failed to comply with the court's bid request in that its percentage-of-the-recovery fee schedule did not include litigation expenses.[232] Judge Walker explained that divorcing recovery of fees and costs "encourages counsel to inflate costs calculations, since any reimbursement of costs will supplement the percentage fee award. It creates an incentive for the firm to categorize as costs anything that could conceivably be so considered and diminished the incentives for the firm to economize by choosing the optimal mix of attorney effort and non-attorney inputs."[233]

Judge Lenard went even further in *Sherleigh Associates* and ordered the bidders to describe and justify how expenses and costs would be borne, whether they would be subtracted from the overall settlement itself, or from the attorney fee award portion, including a defense of the firm's ability to fund such costs.[234]

5. Modification of caps at time of fee award

Only Judge Shadur included a provision that would allow the successful bidder to request a fee award in excess of the cap on fees voluntarily specified by the successful bidder. *Lysine*, *Bank One*, and *Comdisco* were the only bidding cases in which bidders submitted bids with self-

229. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 80 (S.D.N.Y. 2000).

230. *Id. See also* Joseph A. Grundfest, Attorneys Fees in Class Action Securities Fraud Litigation: A Proposal for Addressing a Problem That Has No Perfect Solution 8 (Testimony Presented Before the Third Circuit Task Force on Selection of Class Counsel, June 1, 2001) (draft on file with author) & John C. Coffee, Jr., *Untangling the 'Auction Houses' Aftermath*, 224 N.Y. L.J. 1, col. 1 nn.6–7 (Nov. 30, 2000) (both criticizing the fee cap voluntarily agreed to by the winning bidder in *In re* Amino Acid Lysine Antitrust Litig.).

231. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *3 (N.D. Cal. 1995).

232. Wenderhold v. Cylink Corp., 189 F.R.D. 570 (N.D. Cal. 1999).

233. *Id.* at 573.

234. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 686–97 (S.D. Fla. 1999).

imposed fee caps.[235] Judge Shadur explained that he included the provision to avoid any potential for creating increased incentives for lead counsel to sell out the class members by settling too early.[236]

6. Structured bids

In eight of the fourteen bidding cases, bidders were required to specify the percentage of any recovery the firm would charge as fees and in some cases costs for monetary increments and/or time and event contingencies. *See supra* Table 2. In two of these cases, the court left it up to the bidders to define the recovery increments and/or stage of proceeding contingencies, although in *Sherleigh Associates* Judge Lenard did provide the bidders with an optional Fee Schedule Grid.[237] In the other six cases, the court supplied the values for the monetary increments and defined the stage of proceeding contingencies.[238] Bidders were required to fill out each block in these "bid grids" with a figure that represented fees, and in some cases costs, as a percentage of total class recovery. For example, in *In re Cendant*, for eight different recovery increments stated in dollars (i.e., first 100m, second 100m, third 100m, next 50m, next 50m, next 50m, next 50m, over 500m) and four separate phases at which litigation is resolved (i.e., recovery during pleadings through adjudication of any motion to dismiss, recovery during discovery through adjudication of summary judgment motion, recovery after adjudication of summary judgment motion through trial verdict, recovery posttrial), each bidder was required to state their fees as a percentage of total class recovery.[239]

In *In re Commtouch*, although Judge Alsup required bidders to complete a grid stating the percentage fees he or she would accept if selected as class counsel, he stressed that the grid was not intended to either encourage or discourage increasing or decreasing percentage bids or flat percentage bids, but merely to clarify and standardize presentation.[240] The court allowed bidders to adjust the brackets as they saw fit.[241] As discussed below, although the court in *In re Auction Houses* did provide specific guidelines for how each bid should be structured, this bid structure was very different from that required in the other cases discussed above.

7. Use of an X-factor

Only Judge Kaplan in *In re Auction Houses* required bidders to identify an X-factor in their bids—i.e., a figure below which 100% of recovery would go to the class. For any recovery above the

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235. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001).

236. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Transcript of Proceedings Before the Honorable Milton I. Shadur 46 (N.D. Ill. June 1, 2001).

237. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994); Sherleigh Assocs., LLC v. Windmere-Durable Holding, Inc., 184 F.R.D. 688, 697 (S.D. Ill. 1999). *See infra* Appendix A for a reproduction of the optional Fee Schedule Grid.

238. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625 (N.D. Cal. 1995); *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998); *In re* Lucent Techs., Inc. Sec. Litig., 194 F.R.D. 137 (D.N.J. 2000); *In re* Quintus Sec. Litig., *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170 (N.D. Cal. May 31, 2001): *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re lead Plaintiff Selection and Class Counsel (N.D. Cal. June 27, 2001). See *infra* Appendix A for a reproduction of the bid grids.

239. *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998).

240. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection, app. B, at 2 (N.D. Cal. June 27, 2001).

241. *Id.*

value of X, 75% of the recovery would go to the class and the remaining 25% above X would be paid to lead counsel. In addition, the bid was to be inclusive of all attorney's fees, disbursements, and other charges incurred in connection with the litigation.[242] This fee structure was revised from an earlier structure that required each bidder to identify both an X-factor and a Y-factor. One hundred percent of any gross recovery less than X would be retained by the class free of attorney's fees; 100% of any gross recovery in excess of X, up to and including Y, would go to lead counsel; and one fourth of any recovery in excess of Y would be paid to lead counsel as additional compensation and three fourths to the class.[243] The court revised the original guidelines to contain only an X-factor after considering comments from amicus submissions and several bidders.[244]

Judge Kaplan arrived at this fee structure after an extensive discussion of the problems of choosing and compensating counsel; the drawbacks of the lodestar and the percentage-of-recovery methods; the collective action dilemma in class actions (i.e., the fee structure motivates the attorney to pursue his or her own economic interest at the expense of the client); and the procedural disadvantages for class action plaintiffs.[245] In addition he examined specific features used in prior cases that have conducted lead counsel auctions discussing their advantages and disadvantages as well as possible drawbacks of lead counsel auctions.[246] Judge Kaplan stated that he "undertook to establish a method of counsel selection and a fee structure that, in the context of this case, would begin to address some of these concerns and seek to align counsel's and plaintiffs' interests more fully."[247]

Judge Kaplan does point out that there is a potential incentive problem with the fee structure he ultimately adopted in that it could become apparent at some point that the case cannot be resolved in an amount greater than X, and thus counsel would receive no further compensation, leaving counsel with an incentive to settle the case immediately.[248] This potential conflict is exacerbated by the fact that lead counsel is required to pay all expenses out of the fee award, making it even more costly for counsel to continue with the case. However, Judge Kaplan argued that the unique circumstances of *In re Auction Houses* made this potential attorney–client conflict of interest unlikely because the court can reject an inadequate settlement, and the court's access to documents the defendants furnished to the government in its criminal investigation as well as the plaintiffs' damage analysis, gave the court an advantage with which to evaluate the bids to ensure the bid selected was not unreasonably high.[249]

8. Fee proposal required to be based on increasing, decreasing or straight percentages of class recovery

All the bidding cases except for *In re Amino Acid Lysine*, *In re Bank One*, and *In re Comdisco* (Judge Shadur) required bidders to structure their fee proposals as a percentage of total class recovery.[250] Early on in *In re Wells Fargo*, Judge Walker examined three alternative methods of

242. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 74 (S.D.N.Y. 2000).
243. *Id.* at 73.
244. *Id.* at 74.
245. *Id.* at 75–80.
246. *Id.* at 78–82.
247. *Id.* at 82.
248. *Id.* at 84–85.
249. *Id.*
250. Note that in *In re Network Associates*, Judge Alsup required bidders to submit two fee proposals, one based on percentage of recovery and the other based on hourly rates (lodestar method). *In re* Network Assocs., Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1034 (N.D. Cal. 1999).

compensation (blended hourly rate method, percentage fee method, and blended hourly rate with percentage cap) and concluded that the "analysis necessary to submit an intelligent bid under all three approaches should be identical. A bidder must estimate the range of recovery likely to be achieved and the time and effort required to achieve it."[251] However, rather than permitting attorneys to submit bids with any approach they desired (which would result in the "obvious apples and oranges problem"), he would require competing attorneys to use the percentage fee approach.[252]

In *Cylink*, Judge Walker informed interested bidders that "it is the court's belief that a 'percentage of recovery fee' calculation holds the best promise of harmonizing the interests of the class and its future counsel."[253] Although bidders were permitted to choose either rising, falling, or straight percentages, in *Cylink* Judge Walker clearly stated his strong preference for a decreasing percentage scheme (decreasing percentages as recovery increases) and increasing percentages as the amount of attorney effort necessary to produce recovery increases.[254]

Besides this strong preference expressed by Judge Walker in *Cylink* and besides requiring bidders to explain why they chose either rising, falling, or straight percentages,[255] no other judges except for Judge Lechner and Judge Kaplan actually required increasing, decreasing, or flat percentage bids. In the first round of bidding in *Lucent I*, Judge Lechner stated that "although it is the view of the court that while fees should be awarded in recognition of work performed, as well as the result achieved, the percentage charged as compensation for fees and expenses should decline as the fund increases, in order to avoid excessive compensation to counsel, while still providing motivation to class counsel."[256]

Judge Kaplan pointed out the flaws in both the declining and increasing percentage-of-recovery method. By adjusting downward the percentage of the recovery awarded to counsel as plaintiffs' recovery increases, the declining percentage-of-recovery fee structure may limit windfall attorney's fee awards, but it may also create an incentive for attorneys to settle quickly and cheaply, when the returns to effort are highest, rather than investing additional time and maximizing plaintiffs' recovery.[257] Although the increasing percentage-of-recovery method gives counsel an incentive to avoid premature settlement and push for a higher plaintiffs' recovery, this fee structure may also encourage plaintiffs' lawyers to eschew settlement in search of a very high recovery, even if this strategy is overly risky for plaintiffs. In addition, it is difficult to choose the increments of plaintiffs' recovery that correspond to an increase in counsel fees so as not to set them too high or low thus eliminating the positive effect of the increasing percentage of recovery method.[258] Therefore, in order to avoid these short-comings, Judge Kaplan required bidders to adhere to a type of straight percentage scheme in which class counsel would only receive 25% of any recovery above the chosen X-factor, regardless of the size of the recovery above X.[259]

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251. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 227–28 (N.D. Cal. 1994).

252. *Id.* at 228.

253. Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587 (N.D. Cal. 1999).

254. *Cylink*, 189 F.R.D. 570, 571 (N.D. Cal. 1999).

255. *Cylink*, 188 F.R.D. at 587–88; Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 696–97 (S.D. Fla. 1999).

256. *In re* Lucent Techs., Inc., Sec. Litig., No. 00-C-621, Letter-Opinion 16 (D.N.J. Aug. 2, 2000) (citing June 13, 2000 Letter).

257. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 80 (S.D.N.Y. 2000).

258. *Id.* at 81.

259. *See supra* Section V.E.7.

9. Right of first refusal

Only Judge Walls in *In re Cendant* permitted the lead plaintiffs' original counsel to match the terms of the court-selected lowest qualified bidder. Although Judge Walls determined that counsel would be selected competitively, he recognized that the Private Securities Litigation Reform Act gave lead plaintiffs the opportunity to choose counsel subject to the court's approval.[260] Thus, he provided that if lead plaintiff's present counsel was not the lowest qualified bidder and was otherwise qualified, he would give them the "opportunity to agree to the terms of what the Court has found to be the lowest qualified bid. If that person or entity accepts those terms, lead counsel status will be conferred upon it by the Court. If counsel does not exercise this right of first refusal, the lowest qualified bidder will serve the plaintiffs."[261] Both of lead plaintiffs' original counsel[262] exercised their right of first refusal and accepted the terms and fee bid schedules of the lowest qualified bidders.

In *Cylink*, Judge Walker rejected the original counsel's plea that their representation of the designated lead plaintiff should entitle the firm to a "right of first refusal."[263] Judge Walker distinguished *In re Cendant*, explaining that lead plaintiff in *Cylink*, being an individual investor, "shares none of the characteristics that supported respect for lead plaintiffs' choice of representation in Cendant", specifically a large institutional investor with a firmly established relationship with counsel, and a demonstrated capability and willingness to monitor the conduct of class counsel.[264]

In addition to specifically refusing to provide for a right to match the most favorable attorney bid, Judge Shadur in *In re Bank One* was very critical of the practice. He explained that the "right of first refusal is the best way to get an automatic depressing effect on bidders. Certainly fewer people are going to be prepared to bid seriously if they know they can lose out even if they turn out to have submitted the best offer."[265] Likewise, Judge Kaplan pointed out that a right of first refusal "takes control over the selection of lead counsel out of the court's hands and thereby undermines the court's ability to ensure that the class receives the highest quality representation."[266]

10. Counsel conducting initial investigation expressly permitted to receive compensation (even if they do not win the auction)

Unless expressly provided for, firms involved in the case prior to bidding (even as the lead plaintiffs' original counsel) were not permitted to share in the winning bidders' fee recovery or be reimbursed for their fees and expenses incurred up to the selection of class counsel. Two judges in-

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260. *In re* Cendant Corp. Litig., 182 F.R.D. 144, 151 (D.N.J. 1998). *But see In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 111 (3d Cir. Aug. 28, 2001) (holding that the district court abused its discretion by conducting an auction to select lead counsel in an ordinary case governed by the PSLRA and rejecting the contention that the court's willingness to permit counsel chosen by the lead plaintiff to match what the District Court determined to be the lowest qualified bid fully protected the lead plaintiff's right under the PSLRA to "select and retain" lead counsel).

261. *Id.*

262. Note that due to a conflict of interest, Judge Walls appointed the Public Pension Fund Investors as lead plaintiffs for all matters except those involving Prides securities, and Welch & Forbes was appointed co-lead plaintiff to pursue all claims based on Prides securities. *In re Cendant*, 182 F.R.D. at 149–50.

263. Wenderhold v. Cylink Corp., No. 98-C-4292, Order by Judge Vaughn Walker 3 (N.D. Cal. Nov. 5, 1999).

264. *Id.*

265. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Transcript of Proceedings Before the Honorable Milton I. Shadur 20 (N.D. Ill. Feb. 18, 2000).

266. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 82 (S.D.N.Y. 2000).

cluded express provisions in their bidding guidelines providing for compensation to counsel that conducted preliminary work in the case before bidding was ordered. In *In re Wells Fargo*, from the time the complaint was filed on June 25, 1991 up to the Ninth Circuit's reversal of the district court's dismissal on April 13, 1994, the class was represented by de facto class counsel (the law firms of Lieff, Cabraser & Heimann and Milberg, Weiss, Bershad, Hynes & Lerach).[267] Although Judge Walker refused to appoint these firms as class counsel without competitive bidding, he did require bidders to include in their bid proposal the "percentage of any recovery the firm will charge in the event of a recovery as fees and costs for all the legal work performed in connection with the case, including that already performed by Lieff, Cabraser and Milberg, Weiss."[268] Further, the "total fee for all counsel in the case will be determined by the successful bid; this fee will be divided among class counsel, Lieff, Cabraser and Milberg Weiss, or between these two firms if one of them is the successful bidder."[269]

In *In re Bank One*, Judge Shadur promised that the firm listed as co-counsel in a majority of the underlying actions and who had prepared the consolidated class action complaint that superseded the original group of individual complaints would be fully compensated, either out of any recovery or from plaintiffs collectively, for their services that antedated the designations of the lead plaintiffs and of class counsel.[270] However, any other law firms that had initially represented one or more of the named plaintiffs (in hopes of ultimately representing the plaintiff class) and filed actions that were later dismissed in favor of the consolidated class action complaint were not permitted to share in class counsels' fee recovery or receive separate reimbursement of their claimed fees and expenses out of the class's recovery.[271]

11. Lead counsel selected by court expressly permitted to appoint unaffiliated counsel to assist with the case

In nine bidding cases, class counsel was expressly permitted to farm out work on the case to another law firm or firms *after* being selected by the court as the winning bidder. *See supra* Table 2. In *In re Wells Fargo*, although Judge Walker prohibited a joint bid from the two firms that had served as de facto class counsel prior to the solicitation of bids, he explained that "[n]othing precludes a firm selected as class counsel from farming out work on the case to another law firm because of specialized knowledge, geographic proximity to witnesses, or evidence or other comparative advantages, or even to spread risk. Allowing subcontracting or joint venturing after a competitive selection of class counsel is, however quite different from substituting a joint venture or plaintiff steering committee for competition in the selection of class counsel and determination of their compensation."[272] In *Cylink*, Judge Walker clarified that although lead counsel could spread its risk by farming out tasks, class counsel had to pay any other firm assisting it in prosecuting the case out of class counsel's fee.[273]

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267. *In re* Wells Fargo Sec. Litig., 12 F.3d 922 (9th Cir. 1993).

268. *In re Wells Fargo*, 156 F.R.D. 223, 229 (N.D. Cal. 1994).

269. *Id.*

270. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 790 n.13 (N.D. Ill. 2000).

271. *In re Bank One*, No. 00-C-880, Memorandum Order (N.D. Ill. June 11, 2001).

272. *In re Wells Fargo*, 156 F.R.D. at 227.

273. Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587–88 (N.D. Cal. 1999) & 189 F.R.D. 570, 573–74 (N.D. Cal. 1999). *See also In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998). Judge Walls' guidelines for bid submission stated that "payment of fees and costs of any lawyers or firms assisting the lead counsel, if any, will be the responsibility of lead counsel." 182 F.R.D. at 151.

Judge Shadur explained in *In re Comdisco* that he has always left to class counsel to choose precisely what structure the successful bidder wished to establish for anyone else's participation in rendition of legal services under class counsel's supervision and control provided that any such arrangement comes within the framework of the bid amount.[274]

In four cases, the court did not specifically address this issue in its bidding guidelines. *See supra* Table 2. However, in *In re Commtouch*, Judge Alsup specifically prohibited the "outsourcing" of work to other firms: "firms selected must do the work themselves and may not associate with other counsel."[275]

F. Time Period Court Permitted for Bid Submission

After the court announced to the parties that class counsel would be selected following a competitive bidding process, the potential bidders were given on average twenty-seven calendar days to submit their bids to the court, counted from the day the court ordered bids to be submitted to the day the court designated as the close of bidding.[276] The time period permitted for bid submission ranged from only eight calendar days[277] to fifty-four days in two cases because of an extension of the bidding period in one case and a second round of bidding in another.[278]

In four cases, the original deadlines for bid submission were extended either because of changed circumstances based on new information or the implementation of a second round of bidding. In the first round of bidding to select class counsel in *In re Lucent* (Lucent I), after the original thirty-six-day bidding deadline had passed and the court had received three bids, the court informed all claims of record that the bidding format had been clarified. Because of these modifications, Judge Lechner gave any attorney who wished to resubmit or submit an initial bid an additional seventeen days to do so.[279] Revised bids were submitted by the three firms that had submitted bid proposals by the original deadline.

In *In re Comdisco*, Judge Shadur pushed the original twenty-two-day deadline up another three weeks because of the absence of a bid from the Commonwealth of Pennsylvania State Employees' Retirement Systems (PASERS), the public pension fund that appeared to be the strongest candidate for lead plaintiff based on the information the judge had at that time. Judge Shadur was concerned that PASERS might disqualify itself as lead plaintiff because of its insistence (commu-

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274. *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order n.15 (N.D. Ill. June 25, 2001) (page numbers not available).

275. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Invitation for Competitive Proposals for Position of Class Counsel 5 (N.D. Cal. June 28, 2001).

276. Calculation of the average bidding period was obtained by dividing the sum of the number of calendar days permitted by the court for bid submission in each case (435 calendar days) by the total number of cases (16—counting the additional round of bidding in *In re Oracle* and the additional bidding period in *In re Lucent* separately; *see In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990) & 136 F.R.D. 639 (N.D. Cal. 1999); and *In re* Lucent Techs. Inc, Sec. Litig., No. 00-C-621, Letter-Opinion (D.N.J. Apr. 17, 2000) (*Lucent I*) & Letter-Opinion (D.N.J. Apr. 19, 2001) (*Lucent II*)). In those cases that either extended the original bidding period or instituted a second round of bidding shortly after the deadline for the first round, the bidding period included these additional days. The time period for submission of bids in *In re California Micro Devices* was estimated at 14 days, because the exact time period was not apparent from the materials available.

277. *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994).

278. Wenderhold v. Cylink Corp., 188 F.R.D. 577 (N.D. Cal. 1999) & 189 F.R.D. 570 (N.D. Cal. 1999) (second round of bidding instituted); *In re* Lucent Techs., Inc., Sec. Litig., No. 00-C-621, Letter-Opinion (D.N.J. Apr. 17, 2000) (Lucent I) (bidding period extended).

279. *In re* Lucent Techs., Inc., Sec. Litig., No. 00-C-621, Letter-Opinion 6 & n.1 (D.N.J. Aug. 2, 2000) (citing June 13, 2000 Letter).

nicated in a letter from Milberg, Weiss) that it would only accept Milberg, Weiss as its counsel.[280] Judge Shadur wanted to make sure this was indeed the client's position and that it had thought through the decision not to bid. Since Judge Shadur didn't want to only provide the presumptive lead plaintiff at the time with more time to bid and not give it to others equally, he extended the bidding for everyone.[281]

In *In re Auction Houses*, after receiving bids from twenty law firms during the first twenty-three-day bidding period, the court revised the fee structure and gave bidders eight additional days to submit new bids.[282] In *Cylink*, after rejecting the sole bid received in the first round of bidding because if failed to comply with the court's bidding guidelines, Judge Walker ordered a twenty-seven-day second round of bidding open to any lawyer or law firm.[283]

G. Potential for Collusion in the Auctioning Process

Starting with the very first case that used bidding, judges have included "warnings" against collusion in their bidding guidelines, and many have gone further to require each bidder to certify that it has not engaged in such collusion: "Each firm submitting an application shall certify to the court that its compensation proposal was prepared independently and that no part hereof was revealed to any other bidder prior to filing with the court. Applicants are not to confer in any manner with other firms during the preparation of bids."[284]

In *In re Comdisco*, Judge Shadur took steps to avoid any potential collusion even before he announced that he would definitively use bidding to select class counsel. He ordered counsel in the twelve different cases filed not to discuss between themselves any aspects of the fee arrangements on which they would be prepared to act as class counsel, and to submit a statement that no such discussion with counsel in any of the other cases had taken place before entry of the order or, if any such prior discussion had occurred, to submit under seal a statement describing its nature and content.[285] And members of law firms who were co-counsel in more than one of the twelve cases were ordered not to discuss the subject of any prospective fee arrangements in any of the cases in which they were acting as co-counsel (to preserve the integrity of a bidding procedure if adopted and to avoid conflict-of-interest situations for these law firms).[286]

Only one case reported actual problems involving collusion in the auctioning process. In *In re California Micro Devices*, Judge Walker refused to appoint either firm that submitted bids because he felt they had colluded to circumvent his bidding process for choosing class counsel. "[T]he conduct of the attorneys in this class action was contrary to the legal interests of the purported

280. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

281. *Id.*

282. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 74 & n.11 (S.D.N.Y. 2000).

283. Wenderhold v. Cylink Corp., 191 F.R.D. 600 (N.D. Cal. 2000).

284. *In re* Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal 1990). *See also In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 229 (N.D. Cal. 1994); *In re* Cendant Corp. Litig., 182 F.R.D. 144, 151 (D.N.J. 1998); Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587–88 (N.D. Cal. 1999) & 189 F.R.D. 570, 573–74 (N.D. Cal. 1999); *In re* Sherleigh Assocs. v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 696–97 (S.D. Fla. 1999).

285. Blitzer v. Comdisco, Inc., No. 01-C-874, Memorandum Order by Judge Shadur (N.D. Ill. Mar. 26, 2001).

286. *Id.*

class."[287] "While over a dozen law firms participated early on in this litigation, only two filed proposals to represent the class, and only one of these proposals appears serious. This suggests an understanding or collaboration among plaintiff firms engaged in securities class action litigation that many would choose not to bid for this litigation in apparent deference to the efforts of Lieff Cabraser in negotiating the proposed settlement. . . [I]t is plain that plaintiff firms in this case have not competed."[288] Judge Walker ordered the substitution of a public pension fund as representative plaintiff and ordered their attorneys to serve as class counsel, a firm which had not submitted a bid proposal.[289] Judge Walker still considers *In re California Micro Devices* to be a bidding case because the institutional investor lead plaintiff selected a firm that had not typically represented plaintiffs in securities class actions and negotiated the terms of the representation, thus mirroring a competitive or arm's length process.[290]

VI. Selection and Evaluation of Bids

A. Time Period for Evaluation and Selection of Winning Bidder

Once the bidding deadline had arrived and the court had possession of the bid proposals, the court took on average thirty-seven calendar days to analyze the bids and choose a winning bidder, counting from the day the court designated as the close of bidding to the day the court announced its selection for class counsel.[291] The time required by the court to evaluate the bids and choose a winning bid ranged from as little as one calendar day[292] to seventy-seven calendar days.[293] In most cases, the court made the necessary comparisons and performed its own unique analysis of the submitted bids relatively promptly without acting upon other pending motions. However, in *In re Bank One*, although the bidding period was closed on March 10, 2000, Judge Shadur deferred consideration of the bids to rule on the defendant's Rule 12(b)(6) motion to dismiss, delaying selection of class counsel until May 5, 2000.[294]

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287. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *1 (N.D. Cal. 1995).

288. *Id.* at *4.

289. *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996).

290. Written Responses to Interview Questions by District Judge Vaughn Walker, Northern District of California (July 12, 2001).

291. Calculation of the average time for bid analysis and class counsel selection was obtained by dividing the sum of the number of calendar days it took the court to compare the bids and choose a winning bidder in each case (512 calendar days) by the total number of cases (12). A time period for bid analysis was not included for purposes of calculating an average time for *In re Commtouch Software* since bids were not due until July 20, 2001, and at this time we have no further information. In addition, the 140-day evaluation period in *In re California Micro Devices* was also not included because Judge Walker used this time period to evaluate the bids and explain why he would reject them both and permit an institutional investor who came forward to make a selection of class counsel on behalf of the class. *In re* Calif. Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625 (N.D. Cal. Aug. 4, 1995).

292. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000).

293. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 186 F.R.D. 669 (S.D. Fla. 1999).

294. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Memorandum Order (N.D. Ill. Mar. 13, 2000).

B. Number of Bids Received by the Court

As can be seen from Table 1 in Section III, with the exception of *In re Cendant* (12 bids), *In re Lucent (Lucent II)* (17 bids), and *In re Auction Houses* (21 bids), the number of bids received by the court in the other cases for which this information was available ranged from two bids to nine bids. Comparing all cases for which the number of bids submitted was available, the average number of bids submitted was seven[295] and the median bid was eight. Concern has been expressed by others and the bidding judges themselves about the low number of bids in some cases. In *In re California Micro Devices*, Judge Walker notes that despite the fact that twelve different plaintiffs' firms filed suits in the case and seventeen separate firms had entered appearances representing members of the plaintiff class, the court only received proposals from two firms and only one of them "appear[ed] serious."[296] For the first group of complaints in *In re Lucent (Lucent I)*, Judge Lechner pointed out that the lack of interest in both lead plaintiff and lead counsel position was problematic.[297]

Despite the relatively low number of bids submitted in cases using auction procedures, except for *Cylink* (2 bids) and *In re Comdisco* (3 bids) it appears that the number of bidders has increased in cases filed in the late 1990s and early 2000s. *See* Table 1 in Section III. In his most recent case in which he utilized a bidding procedure to select class counsel, Judge Shadur expressed disappointment at the low number of bidders in *In re Comdisco* (3 bids submitted) compared to *In re Amino Acid Lysine* (8 bids submitted) and *In re Bank One* (9 bids submitted)—the other two cases in which he employed competitive bidding. Among other reasons, Judge Shadur speculated that the low bidder turnout could also have been due in part to fall out from *In re Cendant Corp Prides Litigation*.[298] A nonbidding law firm in *In re Comdisco* perceived the *Cendant* opinion as placing bidders in a "no-win situation, in which if they prove successful in becoming lead counsel, the terms of their successful bids would set a ceiling on fees, while on the downside they would be subject to ex-post second guessing by the court's utilization of a lodestar comparison as a benchmark."[299]

C. Analysis Used to Select Winning Bidder

Although each judge who has employed some type of auction procedure to select class counsel emphasizes and evaluates certain factors differently when comparing bids and selecting the winning bidder, all judges said they weighed *both* price considerations and qualitative factors when comparing the bids. Although originally articulated by Judge Walker in *In re Oracle*, all judges using bidding appear to ascribe to the following: "Selection of class counsel solely on the basis of

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295. Calculation of the average number of bids submitted was obtained by dividing the sum of the bids submitted in cases where available (97 bids) by the total number of cases (14). The two rounds of bidding in both *In re Oracle* and *In re Lucent* were counted as separate cases. The number of bids submitted in *Sherleigh Associates* was not included because it has not been disclosed, and *In re Commtouch* bids were not included because they were due on July 20, 2001, and at this time we have no further information.

296. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *4 (N.D. Cal. 1995).

297. Written Responses to Interview Questions by District Judge Alfred J. Lechner, Jr., District of New Jersey (Aug. 20, 2001). Judge Lechner noted that the high number of bids (17 bids) received in the auction for the *Lucent II* filings compared to the three bids received in *Lucent I* may have been a result of the *Lucent II* filings occurring after additional disclosures from Lucent. *Id.*

298. 243 F.3d 722, 742–43 (3d Cir. 2001).

299. *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001) (page numbers not available).

price, without consideration of qualitative factors and possible penalties for poor performance, may create an incentive for 'lemon' lawyers to drive out the good ones from the bidding process."[300] In addition, many cases evidenced a pattern showing that if the court found either quantitative or qualitative considerations to be equal, or the differences very slight among the bidders, the court would look to significant differences between the bidders with respect to the other factor to render their final selection of class counsel. Because the approaches for comparing the bids and ultimately deciding upon the winning bidder were unique to each judge, we discuss each judge's method of analysis separately below. Note that because the courts' analysis of the bids and selection of the winning bidder (in cases where provided) were generally very fact-specific and lengthy, comprehensive details from each bidding case are not discussed here. The focus in this section is on the factors that were important to each judge's evaluation. Please consult the relevant opinions for more details.

1. District Judge Vaughn Walker

In Judge Walker's early bidding cases, he utilized and discussed numerous measures of quality to look for when examining a bidder's qualitative attributes: (1) professional credentials of the firm and the firm's previous experience with securities class action work; (2) treatment of litigation expenses, preferably including expenses within the proposed fee award calculations thus giving counsel an incentive to minimize the costs of litigation if they absorb all of them; (3) evidence that one who proposes to serve as class counsel has evaluated the case, the range and probability of recovery and has premised the bid on that evaluation; (4) evidence of an ability and willingness to see the case through to recovery, such as posting a completion bond or escrow in an amount that would be forfeited in the event class counsel fails to perform; (5) evidence of a willingness and financial ability to guarantee a minimal level of recovery for the class; and (6) evidence of financial resources or insurance coverage adequate to compensate the class in the event of malpractice.[301]

In addition, in *Cylink* Judge Walker rejected the competing bidder's argument that its larger size, West Coast office, and securities litigation experience within the circuit were qualitative advantages. Instead, he concluded that the quality analysis favored the other bidder because the firm's smaller size, absence of a West Coast office, and absence of litigation experience in the circuit would give it greater incentives to succeed.[302] In *Cylink*, Judge Walker admitted that choosing counsel in the case was a "close one" because the price differences between the two proposals were "not great"; and if the losing bidder had offered a significant qualitative advantage it could have overcome the small price disadvantage he found between the bids.[303]

In *In re Quintus*, Judge Walker's most recent bidding case in which Milberg Weiss Bershad Hynes & Lerach LLP (Milberg) had filed some of the Quintus complaints and sought to represent the class but did not submit a bid, Judge Walker compared the terms of the firm's proposed representation to those of the other firms who submitted bids—something not done in any other bidding case. After discussing the qualitative differences among the bids, Judge Walker posed the question: "In light of Milberg's pre-eminence in plaintiff securities practice, it is logical to ask whether the Court's decision not to select Milberg as lead counsel in *Quintus* and *Copper Mountain*, at the

300. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 648 (N.D. Cal. 1991).

301. *In re* Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1990) & 136 F.R.D. 639, 648–49 (N.D. Cal. 1991); *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467, 470–73 (N.D. Cal. 1994).

302. Wenderhold v. Cylink Corp., 191 F.R.D. 600, 603 (N.D. Cal. 2000).

303. *Id.*

rather high fees it proposed, sacrifices the quality of the classes' representation simply for a less expensive fee."[304] After a careful analysis and review of empirical evidence, Judge Walker concluded that his failure to designate Milberg as class counsel did not sacrifice the quality of the class's representation.[305] In fact, "[w]hen the amounts of Milberg and other firms' settlements are measured against potential recoveries, Milberg does no better than other firms in this practice area."[306]

Judge Walker's quantitative comparison of the bids focused on the fee proposals alone and his method of analysis progressed in complexity with each of his bidding cases. In *In re Wells Fargo*, Judge Walker compared the prices offered for representation under the three submitted bids by first adding the expected values of fees and costs to arrive at an expected total price function for each bid which then produced differing values based upon the various time and recovery amount possibilities. The court used estimates of expenses based on a 1990 study of 404 successful securities and antitrust class actions to compare the three bids.[307]

In addition to examining the fee and expense schedules the court required each bidder to submit, in *Cylink* Judge Walker created a comparison table of the competing fee proposals expressed in terms of net recovery to the class at different stages in the litigation and at various levels of gross recovery from defendants. Judge Walker explained that "this method of expressing fee proposals is a useful supplement to the percentage-of-recovery schedule. . . [because it] focuses attention, quite appropriately, on the amount the class will receive, rather than on the lawyers' take. Under this approach, a law firm commits to delivering a set dollar amount to the class upon recovery. This should minimize ex-post haggling over the meaning of percentages."[308]

In *In re Quintus*, although Judge Walker found requiring bidders to submit a bid grid "helpful" in that it standardized the fee proposals, he found it difficult to compare the fee proposals "just by looking at the percentages proposed."[309] Thus, Judge Walker selected a number of hypothetical recoveries and then calculated the fee that recovery would generate for each firm (and the percentage of total recovery that fee would equal). From these percentages of total recovery, the court constructed a matrix by placing amount of recovery on one axis and stage of recovery on the other. In each cell, the firms' proposals were ranked from first to sixth, with first being the proposal most beneficial to the class.[310] Judge Walker, explaining that this matrix allowed him to compare the different proposals quickly, found that although no single proposal was best in all cells of the matrix, one fee proposal stood out as the most advantageous to the class in a substantial number of cells identified as being more meaningful than others.[311]

2. Senior District Judge Milton I. Shadur

In his three bidding cases, Judge Shadur first performed an economic comparison of the bids in order to identify the presumptive successful party in economic terms. In *In re Amino Acid Lysine*,

304. *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170, at *14 (N.D. Cal. May 31, 2001).

305. *Id.*

306. *Id.*

307. *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467, 474–77 (N.D. Cal. 1994) (tables depicting total fee plus costs as percentage of recovery for different stages of recovery).

308. Wenderhold v. Cylink Corp., 191 F.R.D. 600, 602, 603 app. A (N.D. Cal. 2000).

309. *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170, at *15 (N.D. Cal. May 31, 2001).

310. *Id*. at *15–16.

311. *Id*. at *17.

after admitting the difficulties of comparing the bids and that the decision was "a close call" in some respects, Judge Shadur made several assumptions "with no assertions of certainty, but arrived at on the basis of the best available judgment at present" in order to select the winning bidder in terms of price.[312]

In *In re Bank One* and *In re Comdisco*, Judge Shadur first compared the cost to the plaintiff class in lawyer's fees at every level of recovery under the competitive bids to the cost to the class in attorneys' fees under the bid Judge Shadur identified up front as the "yardstick" bid because it proved to be most favorable to the class clients.[313] Judge Shadur also compared the fee caps submitted by the various bidders (or lack thereof).[314] Next, Judge Shadur compared the "crossover point" for the competing bids against the yardstick bid. The "crossover point" for any competitive bid as against the yardstick bid was defined as occurring when the "competitive bid, which would produce a larger net amount for the class at a lower level of recovery (whether by way of settlement or litigation), becomes equal to the yardstick bid in terms of the net class recovery. As a necessary element of that condition of equality defining the 'crossover point,' any recovery greater than that crossover figure must bring more net dollars to the class under the yardstick bid than it would under the competitive bid."[315] Judge Shadur stated that it was a "simple matter to devise the necessary inequality formulations for determining such crossover points" which he did for the five competitive bids that required such analysis.[316] In an effort to provide a simplified explanation of this "crossover point" analysis, Judge Shadur explained that if the "two bids were plotted on a graph, so that the yardstick bid became a horizontal line after it reached its cap on fees, while the competitive bid continued to have an upward slope. . . the crossover point would literally be the point of intersection of the graphic depictions of the two bids."[317]

In *In re Bank One*, Judge Shadur pointed out that because of the variation among the bids, he would have to make assumptions about the potential class recovery in order to compare the bids (i.e., assumptions regarding the likelihood the plaintiff class had stated a viable claim and the estimated potential recovery for the class). Using those assumptions, he found that all of the various crossover points of the other bids in relation to the yardstick bid dropped out of significance at very low probabilities of success.[318] Judge Shadur explained that it may or may not be true that the success of the crossover idea is a function of the ability to estimate the potential recovery correctly. He said that this type of analysis usually lends itself to an easy comparison of the bids. However, he admitted that there is likely to be more variation in the bids he receives since he permits lawyers to shape their own bids, although even bids submitted under a grid have the potential for one bid to be better for the class at one level of recovery than at another level.[319]

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312. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1198 (N.D. Ill. 1996).

313. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 785–88, 786 n.6 (N.D. Ill. 2000). *See also In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001) (page numbers not available).

314. *In re Bank One*, 96 F. Supp. 2d at 785–88.

315. *Id.* at 786 n.7.

316. *Id.*

317. *Id.*

318. *Id.* at 788.

319. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001). If the initial request for bids does not allow the court to make the necessary comparison because it turns out to be very difficult, then the court has the option (since the bids are sealed) to impose more structure by requiring more information from the bidders. If this second round of information gathering does not leave the judge comfortable with being able to chose from among the bids, then the court does not have to use a bidding process to award representation. *Id.*

After identifying the presumptive successful bidder in economic terms, Judge Shadur examined the qualifications of the bidder in terms of its credentials and experience stating that "[n]ot for a moment has this Court considered the possibility of basing the choice of counsel on the money factor itself."[320] Judge Shadur looked at whether the firm had amply demonstrated its ability to handle major litigation, the experience of the firm's attorneys with principal responsibility for the case, and the detail and completeness of the firm's supporting curriculum vitae submissions.[321]

3. District Judge William Alsup

In *In re Network Associates* and recently in *In re Commtouch*, Judge Alsup decided that class counsel would be selected competitively; however, the designated lead plaintiff and not the court would solicit bids, evaluate the bids and recommend to the court under seal their choice for the "highest quality counsel at the most efficient price."[322] The court ordered lead plaintiffs to provide under seal a full description of their selection process conclusions and reasons, and reserved the right to approve the lead plaintiff's selection of class counsel.[323] Because in both *In re Network Associates* and *In re Commtouch* the lead plaintiffs were ordered to keep the proposals under seal and they remain under seal with the court, details of the bid proposals and selection process are not available.[324]

However, in *In re Network Associates*, clues about the qualitative and quantitative factors emphasized by the plaintiff in its selection process can be gleaned from the guidelines the court required to be included in each bid proposal (i.e., the firm's experience and results achieved in class actions; securities and trial experience of proposed lead counsel; complete disclosure of any conflicts and contributions made to lead plaintiff or city officials; fee proposals based both on percentage of recovery and hourly rates).[325] The court approved the lead plaintiff's recommendation stating that the "predominant factors were relevant trial and securities litigation experience and attractive fee options."[326]

In *In re Commtouch* bids were required to be submitted to the lead plaintiff by July 20, 2001. Although no analysis or selection has taken place, the court did provide the lead plaintiff with very specific considerations to guide the selection and approval of class counsel. Judge Alsup stated that "[d]ue weight must be accorded the strength, weaknesses and relevant experience of candidates," including an assessment of the actual trial and securities experience of the specific lawyers who will actually be doing the work for the class, especially the lead lawyer who, he said, cannot simply be a figurehead.[327] Judge Alsup pointed out that the firm size is important in that a "large firm with deep pockets may have more 'staying power' in advancing costs and time than a smaller

320. *In re* Amino Acid Lysine, 918 F. Supp. 1190, 1195 (N.D. Ill. 1996).

321. *Id.* at 1200–01; *In re Bank One*, 96 F. Supp. 2d at 788–89; *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001) (page numbers not available).

322. *In re* Network Assocs., Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1034 (N.D. Cal. 1999); *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 5–6 (N.D. Cal. June 27, 2001).

323. *Id.*

324. *See supra* Section VI.G for a discussion of the Third Circuit's recent decision disapproving the practice of not disclosing the contents of sealed bids received in a competitive bidding context.

325. *In re Network Assocs.*, 76 F. Supp. 2d at 1034.

326. *In re Network Assocs.*, No. 99-C-1729, Order Appointing Class Counsel (N.D. Cal. Jan. 24, 2000).

327. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re lead Plaintiff Selection and Class Counsel Selection 6 (N.D. Cal. June 27, 2001).

firm with shallower pockets. Staying power is important is resisting the ability of well-financed defendants to outlast the opposition and helps to even the field."[328]

With regard to comparing the fees and expenses proposed by the candidates, Judge Alsup reminded the lead plaintiff of its obligation to the class to evaluate carefully the differences between the fee proposals. Further, he advised that "[w]here the differences in strength and experience among candidates are not clear. . . a substantial difference in the fee proposals among candidates should ordinarily be decisive. On the other hand, a candidate with experience and strength may well be worth a higher fee, for his or her superior skills can be expected to improve any gross recovery."[329] To help the lead plaintiff elicit this information from the candidates, Judge Alsup created a "Questionnaire for Class Counsel Candidates."[330]

4. District Judge Alfred J. Lechner, Jr.

In both *Lucent I* and *Lucent II*, Judge Lechner clearly stated that in choosing among the bids submitted a "structure which demonstrates an incentive to obtain the best result for the class, as well as for the bidding firm, was preferred. . . the lowest bid is not necessarily the best bid if it does not also appear to contain any incentive for the firm to push for better results."[331] In the second round of bidding to choose co-class counsel (*Lucent II*) Judge Lechner explained that he had undertaken more than a simple analysis of the numbers to choose the best-qualified firm because the results of a bidding process may be of use to a court in awarding fees at the end of the case, but it cannot supplant post-judgment analysis to determine a reasonable fee.[332] Further, regardless of the proposed fee arrangement in the accepted bid, Judge Lechner intends to review the fee application at the end of the case using a percentage-of-recovery analysis (separate from the winning bid proposal) and checking that against the lodestar method.[333] Judge Lechner made it clear that the bid is subject to review for fairness and adequacy from both the class point of view and the counsel point of view.[334]

In both *Lucent I* and *II*, Judge Lechner described each bid submitted and explained why a particular bid was or was not selected as the winning bid. The percentage of fees and expenses to be awarded to the lead counsel was an important factor in his analysis and he disregarded any bid that did not comply with his guidelines for bid submission, especially his suggestion that the proposed fee schedule should be on a sliding scale (i.e., allows for a rising fee as litigation continues but a declining fee as the total class recovery increases within each stage of the litigation). Judge Lechner stressed that this format results in a potential maximum recovery for both the class members, as well as counsel, and creates a disincentive for the lead counsel to "sell out" the class because at no point should effort hypothetically outweigh potential recovery.[335]

Judge Lechner explained in both *Lucent I* and *II* that in addition to the proposed fee schedule, he considered a variety of factors in his selection of class counsel, including the following: firm

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328. *Id.* at 7.

329. *Id.* at 7–8.

330. *Id.* at App. B. *See also infra* Appendix A for a reproduction of the questionnaire.

331. *In re* Lucent Techs., Inc. Sec. Litig., No. 00-C-621, Letter-Opinion 13 (D.N.J. Aug. 2, 2000) (*Lucent I)* & Letter-Opinion 12 (June 12, 2001) *(Lucent II).*

332. *In re Lucent,* No. 00-C-621, Letter-Opinion 12 (June 12, 2001) (*Lucent II*) (citing *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 735 n.18).

333. Written Responses to Interview Questions by District Judge Alfred J. Lechner, Jr., District of New Jersey (Aug. 20, 2001).

334 *Id.*

335. *In re Lucent*, No. 00-C-621, Letter-Opinion 22-23 (D.N.J. Aug. 2, 2000) (*Lucent I*).

experience; serving as lead or co-lead counsel in securities cases; firm investment in the matter (i.e., time and interest, including whether the bid contains a thorough and detailed evaluation of the case and identifies the defendants from whom discovery would likely be sought); the economic ability of the firm to continue its representation through each stage of the litigation (i.e., whether the firm has—and the amount of—malpractice insurance, and the firm's willingness to post a completion bond); the location of the firm's office or offices; the experience and knowledge of the individual attorneys assigned to the case; and the effectiveness of self-enforcing incentives incorporated into the fee structure of each bid.[336]

5. District Judge William H. Walls

The criteria identified by Judge Walls as the most important to his analysis of the non-Prides bids were: (1) litigation experience, including demonstrated ability to try successfully a case, if necessary, and demonstrated ability to achieve an effective resolution by settlement; (2) fiscal ability to maintain the litigation; and (3) a fee schedule that represents a realistic incentive to pursue a determined resolution of the plaintiffs' cause at reasonable cost.[337] Judge Walls reviewed the bids for the non-Prides claims and described how the bidder or the bidder's fee schedule did or did not meet these criteria.

Judge Walls found that two bidders met all of the criteria in that both had a demonstrated history of both trial and settlement success, and both had shown they could shoulder the fiscal burden of maintaining the litigation and could easily provide whatever performance bond was required by the court. Both bidders proposed fee schedules that were realistic in the context of likely results for both discovery and trial, and both represented a "fee calculated to engender and maintain counsel's pursuit of the optimum recovery for the plaintiff's."[338] Judge Walls chose the bidder with the lower fee schedule.[339]

6. District Judge Joan A. Lenard

Because Judge Lenard provided her analysis of the bids received in *In re Sherleigh Associates* in an order that is to remain sealed during the pendency of the case, details of the court's analysis in

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336. *Id* at 23 & Letter-Opinion 42 (June 12, 2001) (*Lucent II*).

337. *In re* Cendant Corp. Litig., 191 F.R.D. 387, 390 (D.N.J. 1998). Note that this opinion originally dated October 2, 1998, was unsealed by the court with respect to the non-Prides portions only on April 7, 2000, when the Notice of Settlement was mailed to class members for non-Prides claims. Because litigation is still pending with respect to plaintiffs representing the Prides claims, the court decided to keep its analysis in choosing the winning bid as well as the terms of the bids submitted to serve as class counsel representing the Prides claims under seal. However, the Third Circuit recently held that Judge Walls abused his discretion in sealing the bids and ordered that the district court unseal the bids as well as any other sealed documents related to the bids. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug. 8, 2001) (order vacating sanction for violation of district court's sealing order and requiring unsealing of all previously sealed documents).

338. 191 F.R.D. at headnote [1].

339 On appeal of the attorneys' fee awarded pursuant to the court-ordered auction in *In re Cendant*, the Third Circuit vacated the fee award holding that the district court abused its discretion by selecting class counsel pursuant to an auction and thus the district court should not have considered the fee request submitted pursuant to the fee grid arrived at via the auction. Instead, the court should have appointed lead plaintiff's original counsel pursuant to the Retainer Agreement negotiated between them and the lead plaintiff. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 115 (3d Cir. Aug. 28, 2001).

selecting the winning bidder are not available.[340] Judge Lenard only revealed that "[b]ased on significant qualitative disparity between its bid and the next best bid, as well as price considerations, the law firm of Milberg, Weiss, Bershad, Hynes & Lerach LLP shall serve as Plaintiff's Class Counsel in this matter, *subject to certain conditions as set forth in the Court's concurrent, sealed Order*."[341] Judge Lenard added that the "overall quality of the bids was very high, and the selection process was highly competitive."[342]

7. District Judge Lewis Kaplan

Likewise, in *In re Auction Houses*, extensive details of Judge Kaplan's analysis in selecting Boies, Schiller & Flexner, LLP as lead counsel, including the terms of the winning bid as well as the competing bids were not provided in the judge's opinion defending his decision to use an auction to select lead class counsel.[343] Judge Kaplan explained that his choice merely reflects the court's judgment as to which bidder, in all of the circumstances, would most likely best serve the interests of the plaintiff class, taking into account the economic terms of the bids as well as the qualifications of the bidder.[344] In a later opinion approving the settlement, Judge Kaplan disclosed the terms of the winning bid and compared them to the mean "X" bid of $96 million submitted by four firms who were members of a proposed executive committee organized by the attorneys for the various plaintiffs in order to have that committee designated as lead counsel.[345] In addition, he compared the winning bid of the mean "X" of $130.3 million submitted by all the conforming bids, and found in both cases that the attorneys' fee would have been significantly higher than the fee awarded to Boies, Schiller & Flexner, LLP.[346]

D. Characteristics of Winning Bids

Appendix B identifies the name of the firm chosen by the court as class counsel as well as the names of firms submitting competing bids for all bidding cases for which this information was available. The table below shows whether the fee proposal chosen as the winning bid in each case included the following characteristics: expenses; an expense cap; a fee cap; time escalators or stage of proceeding escalators; an X factor (i.e., a promise to wave the fee if settlement is below a certain number); or rising, falling, or straight percentages.

To summarize the findings from cases where the information was available:

1. *Expenses included in fee proposal, fee and expense caps:* Four winning fee proposals included expenses in addition to attorney fees in the proposed percentage of recovery; three winning bids contained expense caps; and two winning bids contained fee caps.

340. *See supra* Section VI.G for a discussion of the Third Circuit's recent decision disapproving the practice of not disclosing the contents of sealed bids received in a competitive bidding context.

341. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 186 F.R.D. 669, 671 (S.D. Fla. 1999).

342. *Id.*

343. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000). *See supra* Section VI.G for a discussion of the Third Circuit's recent decision disapproving the practice of not disclosing the contents of sealed bids received in a competitive bidding context.

344. *Id.* at 74, 84.

345. *In re Auction Houses*, No. 00-C-0648, Memorandum Opinion 41–42 (S.D.N.Y. Feb. 22, 2001).

346. *Id.* at 42. *See infra* Section VII.B.6.

2. *Time and/or stage of proceeding escalators:* One winning bid structure included a pure time escalator, one included a combined time and stage of proceeding escalator, and five winning fee proposals contained stage of proceeding escalators.

3. *Use of an X-factor:* Only one winning bid used an X-factor.

4. *Rising, falling or straight percentages:* In seven winning bids the percentage of recovery increased with either time periods (1 bid), combined time periods/stages of the case (1 bid), or with stages of the case (5 bids). In nine winning bids, the percentage of recovery decreased as the amount of recovery increased. Only one winning bid increased the percentage of recovery as recovery increased. And only one winning bid kept the percentages constant as recovery increased.

Table 3: Characteristics of Winning Bids

Case Name and Judge	Fee Proposal Included Expenses	Caps on Expenses	Caps on Fees	Time and/or Stage of Proceeding Escalators	Use of an X-factor (promise not to take fee if settlement below certain number)	Rising, Falling, or Straight Percentages
In re Oracle No. 90-C-931 (Walker)						
• Class Action Against Oracle	No	$325,000	No	Time escalator[347]	No	Percentages increase after first 12 months & decrease as recovery increases
• Class Action Against Anderson	No	$500,000	No	No	No	Percentages decrease as recovery increases
In re Wells Fargo No. 91-C-1944 (Walker)	No[348]	No	No	Combined Time & Stage of Proceeding Escalator	No	Percentages increase for three combined time periods/stages of case & decrease as recovery increases
In re Cal. Micro Devices[349] No. 94-C-2817 (Walker)						
In re Amino Acid Lysine No. 95-C-7679 (Shadur)	No	No	$3.5m	No	No	Percentages decrease as recovery increases
In re Cendant[350] No. 98-C-1664 (Walls)	No	No	No	Stage of Proceeding Escalator	No	Percentages increase with phase at which litigation is resolved & increase as recovery increases
Cylink, No. 98-C-4292 (Walker)	Yes	No	No	Stage of Proceeding Escalator	No	Percentages increase through 4 stages of the case & decrease as recovery increases

347. This was the only instance where the winning bid contained a pure time escalator (otherwise referred to as an early settlement discount) which could prevent the risk of early and cheap collusive settlements by providing lead counsel with increasing marginal returns to effort over time. However, Judge Kaplan pointed out that this practice may fall short by instead motivating counsel not to maximize the class's recovery, but merely to extend the duration of the litigation, even if it would not be in plaintiffs' best interests. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 80 (S.D.N.Y. 2000).

348. Although expenses were not included in the proposed fee award, the winning bidder proposed to deduct its litigation expenses from the total amount of any recovery before application of its fee percentage. *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467, 471–72 (1994).

349. The court rejected the two submitted bids, refusing to choose a winning bidder and found that the lawyers' conduct in precipitating a premature and unsanctioned settlement undermined the ability of the bidding process to provide class members the benefits of competition in the selection of class counsel. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625, at *4–5 (N.D. Cal. 1995).

350. The characteristics in the table describe the winning bid to represent the non-Prides claims in the *Cendant* litigation. Because litigation is still pending with respect to plaintiffs representing the Prides claims, the court decided to keep the terms of the winning bid for the Prides claims under seal. *In re* Cendant Corp. Litig., 191 F.R.D. 387 (D.N.J. 1998). However, the Third Circuit recently held that Judge Walls abused his discretion in sealing the bids and ordered that the district court unseal the bids as well as any other sealed documents related to the bids. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug. 8, 2001) (order vacating sanction for violation of district court's sealing order and requiring unsealing of all previously sealed documents). *See also In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001) (holding that the district court abused its discretion by selecting class counsel pursuant to an auction in an ordinary case governed by the PSLRA).

Table 3 (cont'd): Characteristics of Winning Bids

Case Name and Judge	Fee Proposal Included Expenses	Caps on Expenses	Caps on Fees	Time and/or Stage of Proceeding Escalators	Use of an X-factor (promise not to take fee if settlement below certain number)	Rising, Falling, or Straight Percentages
Sherleigh Assocs.[351] No. 98-C-2273 (Lenard)						
In re Network Assocs.[352] No. 99-C-1729 (Alsup)						
In re Auction House No. 00-C-648 (Kaplan)	Yes	No	No	No	Yes—no fee if settlement below X ($405m)	Percentage remained constant for any recovery above X ($405m)
In re Bank One No. 00-C-880 (Shadur)	No	No	$2.75m	No	No	Percentages decrease as recovery increases
In re Lucent[353] No. 00-C-621 (Lechner)						
• Lucent I	Yes	No	No	Stage of Proceeding Escalator	No	Percentages increase through 4 stages of the case & decrease as recovery increases
• Lucent II	Yes	No	No	Stage of Proceeding Escalator	No	Percentages increase through 4 stages of the case & decrease as recovery increases
In re Quintus No. 00-C-4263 (Walker)	No	$150,000 in Stages 1 & 2 $300,000 in Stages 3 & 4	No	Stage of Proceeding Escalator	No	Percentages increase through 3 stages of the case (no increase from Stage 3 to 4) & decrease as recovery increases
In re Comdisco, No. 01-C-2110 (Shadur)	No	No	No	No	No	Percentages remain constant as recovery increases
In re Commtouch[354] No. 01-C-00719 (Alsup)						

E. Whether Winning Bidder Was Also Lowest Bidder

Table 1 shows whether the winning bidder was also the lowest bidder in price terms in cases where we were able to make this determination definitively. In some cases it was clear when the court evaluated the bids and chose the winning bidder whether the winner was the lowest bidder in

351. All bids are permanently sealed; details of winning bid are unavailable. Sherleigh Assocs., LLC v. Windmere-Durable-Holdings, Inc., 186 F.R.D. 669, 671 (S.D. Fla. 1999).

352. All bids remain sealed; details of winning bid are unavailable. *In re* Network Assocs. Inc., Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999).

353. The basic structures of the winning bids was provided but the actual fee percentages of the winning bids were not disclosed in both *Lucent I* and *II*. *In re* Lucent Techs., Inc. Sec. Litig., No. 00-C-621, Letter-Opinion (D.N.J. Aug. 2, 2000) (*Lucent I*) & Letter-Opinion (June 12, 2001) (*Lucent II*). *See supra* note 63.

354. Bids were to be submitted to the lead plaintiff by July 20, 2001, and no additional information is available at this time. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001).

price terms.[355] However, for several cases, this determination was only possible once settlement was reached because the lowest bidder changed depending on the stage of litigation at which recovery was achieved and the amount of recovery obtained.[356]

Judge Shadur explained that the question of whether the lowest bidder was chosen requires a value judgment. He admitted that although in hindsight it turned out that he in fact chose the lowest bidder in *In re Amino Acid Lysine*, there were circumstances under which this may not have been the case. He made the best projection based on information available to him at the time which indicated the winning bidder would be the lowest, and it turned out to be.[357] Likewise, at the final fairness hearing in *In re Bank One*, Judge Shadur admitted that choosing from among the submitted bids required "some assumptions about likely recovery if the plaintiffs ended up successful. . . because a number of the bids could have produced better results for the class at certain levels of assumed recovery—which my opinion regularly referred to as 'crossover points.'"[358]

F. Challenges to Lead Counsel Selected as Winning Bidder

Based on the information we were able to obtain, the courts' choices of lead counsel were challenged in three bidding cases. In *In re Oracle*, a losing bidder moved the court for reconsideration arguing that the bid submitted by the winning firm created an unethical conflict of interest between the class and the firm chosen because the winning bidder's $325,000 limitation on litigation expenses would probably force the firm to pay for some litigation expenses out of its own pocket, thus deterring it from incurring the expenses necessary to maximize the class's recovery. Further, the losing bidder argued that the expense cap would allow defendants to put the "squeeze" on the winning bidder as litigation expenses approach, then exceed, the reimbursable amount.[359] The court rejected this argument as a misrepresentation of the ethical rules and illogical since expenditures on items typically funded by out-of-pocket expenditures (e.g., expert witnesses, attorney travel) produce a larger recovery, and thus class counsel would shortchange themselves by refusing to make these outlays.[360]

In *In re Amino Acid Lysine*, one losing bidder charged that the winning bidder's self-imposed fee cap meant that the firm was unwilling to exercise its best efforts on behalf of its clients (the class members) because the firm had nothing to gain in pushing for a larger recovery from the defendants.[361] Judge Shadur responded by stating that an attorney undertaking such a position is

355. *See In re* Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1995): Wenderhold v. Cylink Corp., 191 F.R.D. 600 (N.D. Cal. 2000); *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170 (N.D. Cal. May 31, 2001).

356. *See In re* Wells Fargo Sec. Litig., 918 F. Supp. 1190 (N.D. Ill. 1996). Because figures for net class recovery under each bid proposal differed depending upon different levels of likely recovery in *In re Comdisco*, determination of whether the winning bidder was indeed the lowest bidder cannot be determined until the amount of total recovery is known. *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001)

357. Telephone Interview with Senior District Judge Milton I. Shadur, Northern District of Illinois (July 6, 2001).

358. *In re* Bank One Shareholders Class Actions, No. 00-C-880, Transcript of Proceeding Before the Honorable Milton I. Shadur 19–20 (N.D. Ill. June 1, 2001).

359. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 642 (N.D. Cal. 1991).

360. *Id.* at 643.

361. *In re* Amino Acid Lysine Antitrust Litig., No. 95-C-7679, 1996 WL 197671, at *1 (N.D. Ill. Apr. 22, 1996).

clearly unethical, and the fee cap in the winning firm's bid has in no way disadvantaged the plaintiff class.[362]

In *In re Quintus*, the designated lead plaintiff filed a petition for writ of mandamus with the Ninth Circuit arguing that the district court clearly erred as a matter of law by denying the lead plaintiff his right under the PSLRA and the Constitution to select counsel of his own choice: "Instead, Judge Walker decided to 'intervene in the selection of counsel' by inviting competitive bids and selecting lead counsel [himself], simply because the court preferred a lower fee than that negotiated by [lead plaintiff]. The Court never ruled the fee negotiated by [lead plaintiff] was 'unreasonable,' but only that it was not 'competitive.'"[363] On June 14, 2001, the Ninth Circuit denied the writ. The lead plaintiff withdrew from his appointment as lead plaintiff on June 20, 2001. The selected class counsel is currently searching for a suitable substitute.

G. Extent to Which Bid Proposals Were Unsealed

In all of the bidding cases, the court required the bids to be submitted under seal and the court kept the bids under seal at least until the bids were evaluated and the winning bidder was chosen or the bids were rejected. See Section V.E.1 for a discussion of the court's rationale for keeping bids under seal up to the point of selection of class counsel. Judges have taken several different approaches to the question of whether, or to what extent, they should unseal the bids once lead class counsel is chosen. In most cases, the court disclosed the terms of the winning bidder as well as the proposed terms of the competing bidders when the court announced its choice for lead counsel.[364]

In both *In re Oracle* and *Cylink*, the losing bidders objected to Judge Walker's disclosing the terms of the winning and losing bidders. Specifically, the losing bidder in *Cylink* argued that by disclosing the terms of their rejected bid, the court was destroying the confidentiality of their bid since the court had ordered bids submitted ex parte and under seal. Judge Walker explained that the "purpose of soliciting bids in such a manner was only to ensure nondisclosure prior to selection or rejection. For the court to continue to veil bids after that point would defeat a primary objective of the competitive bidding process, namely, dissemination of information about the market for legal services in class action cases. . . Rejection rendered the bid a nullity in all respects except for its informational value."[365] In *In re Oracle*, the losing bidder argued that disclosure of the terms of the winning bid prejudiced the class by allowing defendants to obtain information about the winning bidder's evaluation of the case, giving defendants powerful motives to delay and outspend plaintiffs.[366] Judge Walker rejected this argument, explaining that disclosure of class counsel's compensation arrangements benefits the class by producing information highly pertinent to class counsel's performance in common fund class litigation, and impedes defendants' ability to

362. *Id.*

363. *In re* Colin Barry Hill Petition for Writ of Mandamus, at 1 (N.D. Cal. May 11, 2001).

364. *In re* Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1990) & No. 90-C-931, Order (N.D. Cal. July 21, 1991); *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal. 1994); *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625 (N.D. Cal. Aug. 4, 1995); Wenderhold v. Cylink Corp., 191 F.R.D. 600, 604–05 app. B & C (N.D. Cal. 2000); *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170 (N.D. Cal. May 31, 2001); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re* Comdisco Sec. Litig., No. 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 25, 2001).

365. Wenderhold v. Cylink Corp., Order by Judge Vaughn Walker 2–3 (N.D. Cal. filed on Nov. 5, 1999).

366. *In re* Oracle Sec. Litig., 136 F.R.D. 639, 644–45 (N.D. Cal. 1991).

cut a sell-out settlement with class counsel.[367] In the order comparing bids and selecting class counsel in *In re Quintus*, Judge Walker stated that the "bids were submitted under seal to ensure their confidentiality up to the point of selection, but are, with this order, unsealed to assure transparency of the selection process."[368]

In both *Lucent I* and *II*, although the court identified the bidders and compared qualitative factors of the bids when the lead counsel was chosen, the actual percentage fees of the winning bidder as well as the losing bidders were not disclosed. Judge Lechner did indicate whether the percentages proposed by the firm to recover were "within commonly accepted ranges" or were "in line with those proposed by the majority of bidding firms" and he described the structure of the bids (i.e., whether the proposed fee schedule allows for a rising fee as litigation continues but a declining fee as the total class recovery increases within each stage of the litigation as suggested in the court's guidelines to bidders).[369]

Two judges kept the bids under seal until settlement was reached, and even then did not disclose all the details of the bids. In *In re Cendant*, when the Notice of Settlement was mailed to class members for non-Prides claims on April 7, 2000, Judge Walls unsealed his opinion dated October 2, 1998, only with respect to the non-Prides portions.[370] Although the terms of the winning bid and the losing bids were disclosed for non-Prides claims, Judge Walls decided to keep the identity of the bidders under seal because litigation continues with respect to plaintiffs representing the Prides claims. Judge Walls also kept the bids under seal with respect to the Prides claims. In *In re Auction Houses*, bids were due on May 25, 2000, and the court issued an order the next day appointing David Boies and Richard Drubel as lead counsel. The court's analysis in comparing the bids, the identity of the bidders, as well as the details of the bids, were not disclosed until the court approved a settlement on February 22, 2001.[371] And even though Judge Kaplan gave a general description of the winning bid as well as provided overall bid comparisons using the mean of all "X" bids and the average bid submitted,[372] the identity of the losing bidders as well as their specific proposals remains under seal indefinitely.[373]

Adopting a different approach, although a settlement was approved on May 21, 2001, in *In re Network Associates*, the details of the winning bid and the competing bids remain under seal indefinitely.[374] In *Sherleigh Associates*, although a settlement has not been reached, when the court selected the winning bidder Judge Lenard noted that "because the bids contained proprietary in-

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367. *Id.* at 647.

368. *In re* Quintus Sec. Litig., Nos. 00-C-4263 & 00-C-3894, 2001 WL 709170, at *7 (N.D. Cal. May 31, 2001).

369. *In re* Lucent Techs., Inc. Sec. Litig., No. 00-C-621, Letter-Opinion (D.N.J. Aug. 2, 2000) & Letter-Opinion (June 12, 2001). Note that the court's June 12, 2001 opinion (*Lucent II*) was originally filed under seal to allow the bidding firms the opportunity to alert the court of any inadvertent disclosures of work product or other privileged information which should be redacted; the opinion was unsealed and mailed to defense counsel on June 22, 2001. *See supra* note 63.

370. *In re* Cendant Corp. Litig., 191 F.R.D. 387 (D.N.J. 1998).

371. *In re* Auction Houses Antitrust Litig., No. 00-C-0648, Memorandum Opinion (S.D.N.Y. Feb. 22, 2001).

372. *Id.* at 41–43.

373. However, upon inquiry, Judge Kaplan did allow us to obtain the names of the 21 or so firms that submitted bids if their identities were apparent on the outside envelopes containing their bid proposals. *See infra* Appendix A.

374. *In re* Network Assocs. Inc., Sec. Litig., No. 99-01-1729, Order Awarding Fees and Costs (N.D. Cal. May 21, 2001).

formation, the bids shall hereafter remain permanently sealed by the clerk."[375] In *In re Commtouch*, although bids were not due until July 20, 2001, Judge Alsup has already announced that after he chooses lead counsel from among the lead plaintiff's top three recommendations, the Court "may or may not unseal the proposals and/or describe them in an order regarding the approval of counsel."[376]

The Third Circuit recently issued an opinion strongly disapproving of the practice of continuing to keep bids sealed once the court has selected lead counsel pursuant to an auction in a class action case.[377] The case reached the Third Circuit after one of the unsuccessful bidding attorneys in the *Cendant Prides Securities Litigation* appealed the district court's decision to sanction him with a $1,000 fine for speaking to a reporter from the *New York Times* about the *Cendant* bidding process. Judge Walls found that the attorney had violated a confidentiality order issued in connection with an in camera hearing where plaintiffs' attorneys, but not the general public, had access to the bids. The confidentiality order required that the identities of the bidders and the nature of their proposals were to remain sealed until the conclusion of the case in order to "maintain adversarial integrity, that of strategy and tactics, which is the prerogative of all parties, plaintiffs and defendants."[378]

A unanimous three-judge panel of the Third Circuit held that Judge Walls abused his discretion in sealing the bids because the district court did not recognize that the bids were judicial records, subject to the common-law presumption of public access, and thus had failed to provide the necessary findings to override the presumption of access when he issued the confidentiality order (i.e., the district court should have articulated the "compelling countervailing interests" it found that would authorize the continued closure through sealing of the matters it sought to protect).[379] In addition, the court wrote that the "right of public access is particularly compelling here, because many members of the 'public' are also plaintiffs in the class action."[380] Further, the

> information sealed in this case and kept secret from most of the parties was of the utmost importance in the administration of the case; it was directly relevant to the selection of lead counsel. This point is crucial. In class actions, the lead attorneys have an unusual amount of control over information concerning the litigation. By contrast, class members often have little input into the conduct of the class action and accompanying settlement negotiations, because of the large scale of litigation and disconnect between defendants' possibly enormous liability and the relatively small recovery available to the individual plaintiffs. The only stage at which class members can exercise effective control is in the selection of class counsel. Throwing a veil of secrecy over the selection process deprives class members of that opportunity. Thus, there should have been, in the present case, a strong presumption that the bids and the in

375. Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc., 186 F.R.D. 669, 671 (S.D. Fla. 1999).

376. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Invitation for Competitive Proposals for Position of Class Counsel 6 (N.D. Cal. June 28, 2001).

377. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug., 8, 2001) (order vacating sanction for violation of district court's sealing order and requiring unsealing of all previously sealed documents).

378. *Id.* (page numbers not available).

379. *Id.*

380. *Id.*

> camera proceeding would be part of an open process, accessible to the public.[381]

Although the court admitted that the practice of holding auctions to choose lead counsel gave it "serious reservations and concern," if auctions are to be held then the court feels the bidding process should be open because it will "facilitate the monitoring of lead counsel by class members and others."[382] The court further cautioned that even if reasons support sealing in a specific case, the district court must be prepared to unseal the bids and allow public access as soon as these reasons either pass or weaken.[383]

Finally, the Third Circuit found that the sealing of bids in *In re Cendant* contravened the purpose of the PSLRA to transfer control of securities class actions from the attorneys to the class members (through a properly selected lead plaintiff):

> Instead of allowing the class plaintiffs in this action to chose lead counsel, the District Court selected class counsel through a sealed bidding process which has yet to be unsealed. It also prevented many class plaintiffs and defendants from accessing the bids for lead counsel. Sealing bids in this case enabled counsel to 'litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrongdoing.'[384]

Having vacated the district court's sanction, the Third Circuit directed the district court to enter an order unsealing all sealed bids and documents in the record if it had not already done so.

H. Repeat Players and Winners

Whether accurate or not, a common perception exists among judges, attorneys, and potential plaintiffs that class action litigation is dominated by a small number of firms.[385] Some have suggested that the traditional method of appointment of class counsel exacerbates the problem by not allowing new firms the opportunity to be realistically considered.

Some suggest that by using an auction procedure new firms will have an opportunity to serve as lead counsel, but it is not clear whether the auction method will ultimately benefit the class, especially if the firm is inexperienced and, consequently, ends up litigating more than necessary. Another concern is whether an inexperienced firm will be familiar with the costs associated with not only litigating a class action, but serving as class counsel. These firms may not have the necessary resources to represent the class effectively. In *Cylink*, Judge Walker selected the lowest bidder, a two-lawyer Philadelphia firm that had not litigated previously in the circuit over a nineteen-lawyer firm with ten lawyers in California. The court indicated the case "presents an opportunity for [the low bidder] to establish a reputation in a new and important geographic market."[386]

As previously stated, in several of the cases, the number and identity of the bidders remain under seal. In cases where bidder information was known, we found fifty-four firms had expressed an interest in either serving as lead or co-counsel. The most frequent bidder was Leiff, Cabraser &

381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* (quoting S. Rep. No. 104-98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 685).
385. *Willging*, *supra* note 5, at 87–88.
386. *See* Wenderhold v. Cylink Corp., 191 F.R.D. 600, 603 (N.D. Cal. 2000).

Heimann, submitting bid proposals in six cases. The following three firms, Milberg, Weiss, Bershad, Hynes & Lerach, Weiss & Yourman, and Cohen, Milstein, Hausfeld, & Toll, submitted proposals in five cases. The most frequent winning bidders were the law firms of Leiff Cabraser & Heimann and Milberg Weiss Bershad Hynes & Lerach, each were appointed lead counsel in two cases.

For a complete listing of firms that have submitted bids as well as those who were selected by the court, see *infra* Appendix B.

VII. Attorneys' Fees and Class Recovery

A recent study of 733 federal class action securities fraud cases filed between January 1991 and May 1999 found the average fee award was approximately 30% of the settlement amount.[387] Similarly, some courts have commonly relied on the presumption that an appropriate benchmark for a fee award is between 25 to 33%.[388] A 1996 FJC study of federal class actions also looked at the ratios of attorneys' fees to recoveries and found that "[t]he fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. In these cases, median rates ranged from 27% to 30%, and most fee awards in the study were between 20% and 40% of the gross monetary settlement."[389] We found in the eight terminated bidding cases the percentage of class recovery awarded to counsel was often less than that awarded by the traditional approaches.

Below we take a closer look at the settlements, class recoveries, and attorneys' fees awarded in the eight bidding cases which have settled to date. Table 4 summarizes the key features. More specific information about these categories and others follows.

387. Written testimony of Joseph A. Grundfest, Attorneys Fees in Class Action Securities Fraud Litigation: A Proposal for Addressing A Problem That Has No a Perfect Solution 6 (June 1, 2001) (draft on file with author) (citing Todd S. Foster, et al., Trends in Securities Litigation and the Impact of PSLAR [sic] (VI), August 1999 (Table Captioned "Settlements in Securities Class Action Suits Included in this Study")). *See also* PricewaterhouseCoopers LLP 2000 Securities Litigation Study 5–6 (August 2001) (finding the average settlement for all cases filed and terminated post-PSLRA was $13.8 million).

388. *Id.* at 6. *See, e.g.*, *In re* Pacific Enterprises Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (suggesting 25% as a reasonable benchmark and approving adjustments up to 33% based on complexity, risk, and non-monetary benefits) *and* Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1993) (affirming that since a majority of common fund class action fee awards fall between 20-30%, "[t]he twenty percent [award] figure is well within the range of reasonable fees in common fund cases").

389. Willging, *supra* note 5, at 69.

Table 4: Selected Case Characteristics in Settled Bidding Cases

Case Name and Judge	**Potential Damages**	**Total Amount of Recovery to Class and Counsel[390]**	**Percentage of Total Recovery that Went to the Class (Recovery Amount)[391]**	**Percentage of Total Recovery that Went to Class Counsel[392] (Attorneys' Fees + Expenses)**	**Necessity of Any Ex-Post Fee Determinations[393]**
In re Oracle Vaughn Walker	$102 million (plaintiffs' expert estimate)[394]	$25 million[395]	77.5% ($19,375,000)	22.5% ($4.8 million in fees + $825,000 in expenses)	No
In re Wells Fargo Vaughn Walker	Unknown	$13,713,709.54	78% ($10,632,035)	22% ($2,873,150 in fees + $208,605 in expenses)	No
In re California Micro Devices Vaughn Walker	Unknown	$26 million[396]	84.3%[397] ($21,590,090.20)	15.7%[398] ($4,028,345.80 in fees *and* expenses)	No
In re Amino Acid Lysine Milton Shadur	Unknown	$49 million	93% ($45.5 million)[399]	7% ($3.5 million)[400]	No

390. Refers to the total amount of recovery to the class *prior* to the deduction of attorneys' fees and expenses. Recovery amounts may be approximations.

391. Refers to the total amount of recovery to the class *after* the deduction of attorneys' fees and expenses. Percentages and amounts may be approximations.

392. Unless otherwise indicated, the percentage of total settlement collected by class counsel includes attorneys' fees and expenses. Percentages and amounts may be approximations.

393. This category covers those instances where at the end of the litigation the court addressed class counsel's motion requesting that a higher fee be awarded than that agreed to under the terms of their original bid.

394. *See In re* Oracle Sec. Litig., 852 F. Supp. 1437, 1459 (N.D. Cal. 1994).

395. The class received $23.25 million in the settlement reached with Oracle, and $1.75 million from Arthur Anderson.

396. Although initially Judge Walker decided class counsel would be chosen by an auction process, he rejected both of the bids submitted, replaced the lead plaintiff, and permitted the new institutional lead plaintiff to select class counsel and negotiate the terms of the class representation. Thus, settlement and attorneys' fees were not obtained by class counsel using an auction process. *In re* California Micro Devices Sec. Litig., No. 94-C-2817, 1995 WL 476625 (N.D. Cal. 1995). Total settlement and attorneys fees are based on a combination of a settlement reached on May 20, 1997, with all defendants except one and a settlement with the remaining defendant on May 24, 2001.

397. *Id.*

398. *Id.*

399. Figure represents total recovery to the class prior to the deduction for expenses.

400. Figure represents the attorney fee alone and does not include the amount reimbursed for expenses.

Table 4 (cont'd): Selected Case Characteristics in Settled Bidding Cases

Case Name and Judge	Potential Damages	Total Amount of Recovery to Class and Counsel*	Percentage of Total Recovery that Went to the Class (Recovery Amount)*	Percentage of Total Recovery that Went to Class Counsel* (Attorneys' Fees + Expenses)	Necessity of Any Ex-Post Fee Determinations*
In re Cendant (non-Prides) William Walls	$8.5–8.8 billion[401]	3,186,500,000[402]	91.3% ($2,909,407,337)	8.7% ($262,468,857 in fees + $14,623,806 in expenses)[403]	No[404]
In re Cendant (Prides) William Walls	$268,250,000 to $313,950,000	$341,480,861	94%[405] ($319,783,905)	6% ($19,329,463 in fees + $2,367,493 in expenses)[406]	Yes
In re Auction Houses Lewis Kaplan	$286 million (plaintiffs' expert estimate)[407] $126.6 million (defendants' expert estimate)[408]	$512 million	94.8% ($485.25 million)	5.2% (26.75 million in attorneys' fees *and* expenses)	No
In re Bank One Milton Shadur	$4.6–4.8 billion[409]	$45 million	93% ($42 million)	7% ($2.75 million in attorneys fees + $250,000 in expenses)	No
In re Network Associates William Alsup	Unknown	$30 million	92% ($27,559,187)	8% ($2,080,000 in fees + $360,813 in expenses)	Yes

**Note:* See previous page for heading descriptions.

401. *In re* Cendant Corp. Sec. Litig., 109 F. Supp. 2d 235, 242 (D.N.J. 2000); *In re* Cendant Corp. Litig., No. 98-1664, Joint Declaration of Max W. Berger and Leonard Barrack in support of Motion for Approval of Proposed Settlement of Class Action Plan of Allocation of Net Settlement Funds, and In Support of Petition for an Award of Attorneys' Fees and Reimbursement of Expenses 47 (filed May 5, 2000).

402. Figure represents a combined settlement derived from a $2,851,500,000 cash payment from the Cendant settlement and a $335,000,000 cash payment from the Ernst & Young settlement. The settlement was upheld on appeal to the Third Circuit. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001).

403. The attorneys' fee awarded pursuant to the court-ordered auction was vacated by the Third Circuit on appeal. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653 (3d Cir. Aug. 28, 2001).

404. In response to numerous objectors to the fee and expenses requested by lead counsel following settlement, Judge Walls refused to adjust the pre-set award nor abandon the increasing percentage of settlement fee scale chosen.

405. The settlement consisted of 29,161,474 rights valued at $341,480,861. After subtracting the attorneys' fees and expenses for lead counsel ($21,696,956), 27,308,617 rights remained. Proofs of claim were filed with respect to 26,606,422 rights, of which 22,502,782 rights were validated by the claims administrator as of August 8, 1999. *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 726 n.3 (3d Cir. 2001).

406. On March 21, 2001, the Third Circuit allowed the settlement to stand, but vacated the fee award. *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 733 (3d Cir. 2001).

407. *See In re* Auction Houses Antirust Litig., No. 00-C-0648, Memorandum Opinion 15 (S.D.N.Y. Feb. 22, 2001).

408. *Id.* at 16.

409. *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 788 (N.D. Ill. May 8, 2000).

A. Potential Damages, Settlements, and Class Recoveries

In the majority of cases, the amount of potential damages was generally unknown or at best speculative. In most instances, there had been no discovery to ferret out or uncover legal wrongs, including the specific nature of damages that might have been sustained. This was aptly described by Judge Shadur in *In re Amino Acid Lysine*. In that case, Judge Shadur stated, ". . . none of the complaints has quantified the amount of lysine purchased by, or the potential damages suffered by, the respective named plaintiffs, some of the submissions by counsel have indicated that [all they really know is] that really substantial numbers are involved. . . ."[410]

Further, assessing the extent of damage in cases filed after the PSLRA is made more difficult because under the statute discovery is stayed until after the selection of lead plaintiff and class counsel.[411]

Nevertheless, some judges tried to assess potential damages. For example, in *In re Bank One*, Judge Shadur made an assumption about the potential recovery for the class to assist in his comparison of the submitted bids. He stated that if plaintiffs were totally successful in the lawsuit, the best-informed number—articulated and explained by counsel during a March 15, 2000, status hearing—appeared "to be in the $4.6 to $4.8 billion range."[412]

After a proposed settlement had been reached between the parties the issue of potential damages was again raised. Plaintiffs' memorandum in support of the proposed settlement stated "[t]he parties have entered into an agreement which provides for a cash payment of $45 million plus accrued interest to class members. Based on the record developed during merits discovery, and after consulting with a nationally recognized securities valuation expert, plaintiffs believe that the settlement represents almost a third of the total damages of approximately $148 million that plaintiffs could have potentially recovered at trial."[413] Plaintiffs' lead counsel addressed the fact that at the March 15, 2000, status hearing, another plaintiffs' counsel had indicated that damages could be in excess of $4 billion. Lead counsel dismissed this figure as "nothing more than a straight arithmetic computation of the number of shares bought during two segments of the Class Period and still held as of two particular dates (August 25 and November 10)."[414] Lead counsel said that without the benefit of discovery and information learned at the mediation sessions, the $4 billion number was (and is) unsupportable in that it failed to take many factors into account. Plaintiffs' damage expert recalculated maximum damages at $148 million (representing average damages of $0.37 per damaged share) after discovery and information learned at the mediation sessions.[415]

There were cases where experts were hired to assess potential damages. As with any party expert, the experts' opinions varied. For example, in *In re Auction Houses*, the plaintiffs' expert estimated damages to be $286 million, while the defendants' expert believed damages were considerably less at $126 million. The case ultimately settled for $512 million, considerably higher than both parties' experts' estimations. Judge Kaplan in his opinion noted that with the amount of public information available in the case, potential damages were calculable. He explained, "significant information is available regarding the market shares of the two companies, and Sotheby's

410. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190, 1194 (N.D. Ill. 1996).

411. *See* 15 U.S.C. § 77z-1(b)(1), § 78u-4(b)(3)(B).

412. *In re Bank One*, 96 F. Supp. 2d at 788.

413. *In re Bank One*, No. 00-C-880, Plaintiffs' Brief in Support of Preliminary Approval of Proposed Settlement 1, 4 (Mar. 13, 2001).

414. *Id*.

415. *Id.*

is a publicly held company, the financial statements of which are available and informative."[416] And in *In re Oracle*, plaintiffs' expert estimated damages to be over $100 million. The case settled for considerably less at $25 million. Finally, in *In re Cendant (Prides)*, the plaintiffs submitted opinions of experts that the total damages fell within a range of $268,250,000 to $313,950,000.[417] The total amount of recovery to the class was over $340 million.

Overall, with regard to settlement amounts and total class recovery, we found that gross settlement amounts ranged from a high of approximately $3 billion to a low of roughly $13 million. Monetary distributions to the class routinely exceeded attorneys' fees by substantial margins. The percentage of class recoveries ranged from approximately 95% in *In re Auction Houses* to 77.5% in *In re Oracle*.

B. Attorneys' Fees Awards

The percentage of total recovery that went to attorneys ranged from approximately 5% in *In re Auction Houses* to 22.5% in *In re Oracle*. Below we highlight some aspects of the fee awards. We have not attempted to note the specific details of the awards in each of the cases. We suggest that for more detailed information about the fee awards, the specific opinion be reviewed.

1. *In re* Oracle

In the Oracle case, class counsel proposed a basic rising calendar-based contingency fee schedule with an early settlement discount, and a proposed cap or limit of $325,000 on the amount of litigation expenses to be charged to the class. Class counsel obtained a recovery of $25 million and received a fee of $4.8 million, or 22.5% of the settlement recovery. Judge Walker noted that the bidding process had resulted in "a fee schedule that represented substantial savings to the class."[418] Similarly, Judge Kaplan in *In re Auction Houses* noted that this fee "compared favorably to what counsel would have been awarded using a standard 25 percent recovery method—$6.25 million."[419]

2. *In re* Wells Fargo

Judge Walker awarded attorneys' fees pursuant to the terms of class counsel's bid, which specified that for any recovery obtained on or before July 8, 1995, the base fee would be 24% of the first $3 million of recovery (net of reimbursable expenses); 22% of any incremental recovery from $3 million to $10 million; and 20% of any incremental recovery above $10 million. In the event of settlement after July 8, 1995, but before trial: prior percentages would be increased by 3%. If the matter proceeded to trial, the fee would increase by an additional 5%. Because settlement was reached within one year, the winning firm received $2,873,150.45 in attorneys' fees and $208,604.81for reimbursement of litigation costs and expenses. Thus, class counsel received a total of $3,081,755.26 in fees and expenses or 22% of the settlement fund.[420]

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416. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 82 (S.D.N.Y. 2000).

417. *See In re* Cendant Prides Litig., No. 98-C-2819, Affidavit of Roger W. Kirby in Support of Application for Approval of the Proposed Settlement and for Attorneys' Fees and Reimbursement of Expenses and also in Opposition to Objection 1–2 (D.N.J. filed May 14, 1999).

418. *In re* Oracle Sec. Litig., 852 F. Supp. 1437, 1458 (N.D. Cal. 1994).

419. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 79 (S.D.N.Y. 2000).

420. *In re* Wells Fargo Sec. Litig., No. C-91-1944, Order Granting Application for Award of Attorneys' Fees and for Reimbursement of Costs and Expenses (N.D. Cal.) (filed Mar. 31, 1995); *In re* Wells Fargo Sec.

3. *In re* Network Associates

Total recovery to the class was $30 million; class counsel was awarded 8% of the settlement fund net of costs, or approximately $2,080,000 plus interest. They were also reimbursed for their expenses, which had been advanced in connection with the litigation. The court determined that the fees awarded were fair and reasonable under either the percentage or lodestar method for calculating attorneys' fees and that the costs for which reimbursement was requested were reasonable.[421] In a subsequent opinion describing the fee award in this case, Judge Alsup explained that "the fee proposals of the candidates varied from as low as eight percent to over twenty-five percent. No other candidate provided substantially more strength and experience compared to the eight-percent candidate. Accordingly, in [this] case, the lead plaintiff selected and the court approved the eight-percent candidate. The difference between eight percent and twenty-five percent translated to more than five million dollars for the investor class." [422]

4. *In re* Bank One

In this case, the winning bidder proposed to charge 17% of the first $5 million recovered, 12% of the next $10 million and 7% of the next $10 million, with no fee charged for any amount recovered in excess of $25 million (thus setting a cap of $2.75 million on the total fees). Since the settlement amount was $45 million or greater than $25 million, the fee cap of $2.75 million was activated to limit lead counsel's fee recovery. The firm's bid proposal included a request for the consideration of a possible bonus fee if more than $25 million were recovered. The total amount of recovery to the class was a $45 million all-cash settlement fund, plus any accrued interest.[423] The class ultimately received 93%, or $42 million.

Although Judge Shadur would have allowed the successful bidder to request an added reward at the end of the litigation, class counsel did not request a bonus fee even though recovery exceeded the voluntary $2.75 million expense cap. Judge Shadur explained that he included the provision in his bidding guidelines to avoid any potential for increasing incentives for lead counsel to sell out the class members by settling too early.[424]

In a later opinion discussing the fee award, Judge Shadur stated that the fact that the winning firm's fee was just a bit over 6% of the total recovery provides "renewed strong support for the process of competitive bidding in awarding legal representation for class members"[425] and provides the necessary grounds to show that the winning firm's fee meets the necessary standard of reasonableness, especially in light of the fact that the 6% fee award is "only a fraction of what many cases and even treatises describe as the 'norm' for class action settlements."[426]

Litig., No. C-91-1944, Order Granting Motion to Distribute Net Settlement Amount (N.D. Cal.) (filed Dec. 22, 1995).

421. *In re* Network Assocs., Inc. Sec. Litig., C-99-01729, Order Awarding Fees and Costs 1 (May 21, 2001).

422. *In re* Commtouch Software, Ltd. Sec. Litig., No. C-01-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 7 (N.D. Cal. June 27, 2001).

423. *See In re* Bank One Shareholders Class Actions, No. 00-C-880, Stipulation of Settlement (N.D. Ill. Mar. 1, 2001).

424. *See In re* Bank One Shareholders Class Actions, No. 00-C-880, Transcript of Proceeding Before the Honorable Milton I. Shadur 46 (N.D. Ill. June 1, 2001).

425. *See In re* Bank One Shareholders Class Actions, No. 00-C-880, Memorandum Opinion (N.D. Ill. June 26, 2001) (no page numbers available).

426. *Id.*

5. *In re* California Micro Devices

The law firm that ultimately ended up representing the plaintiff class in this case (Hogan & Hartson) was not chosen by competitive bidding. We present the attorney fee award description for informational purposes only.

Comparing the total fee ($4,028,345.80) covering the work done by class counsel with the total of both settlements ($25,618,436), the percentage of fees was approximately 15.7%. In this case, the class received $21,590,090.20, or 84.3% of the total settlement fund. The total fee awarded to counsel was $4,028,345.80, which represented the hours expended by counsel multiplied by counsel's present hourly rate, and did not include any kind of multiplier. It also included expenses. Judge Walker pointed out that this was the fee arrangement that lead plaintiffs had negotiated with counsel prior to the settlement and fees were within and indeed substantially less than the Ninth Circuit's 25% benchmark guidelines. Judge Walker stated that the "best indication that the fee requested is a reasonable one is that it was calculated under a fee arrangement negotiated by sophisticated, informed institutional investors serving as lead plaintiffs."[427]

6. *In re* Auction Houses

Class counsel obtained a total recovery for the class of $537 million. This amount included $412 million in cash and $125 million in certificates. At the time the case settled, the net present value of the certificates reduced the total settlement to $512 million in current dollars.[428] The attorneys received approximately 5% of the recovery for a total of $26.75 million.

Judge Kaplan explained after comparing the six bids,

> the mean 'X' bid by the four bidding members of the counsel-selected group of interim lead counsel was $96 million. Had such a bid been accepted, the attorneys' fee in this matter would have been $104.3 million, or 20.3 percent of the recovery. Similarly, the mean of all 'X' bids was $130.4 million. Had the same settlement been achieved by lead counsel submitting such a bid, the attorneys' fees would have been $95.4 million, or 18.6 percent of the recovery.[429]

7. *In re* Cendant (non-Prides)

Judge Walls approved two settlements between the lead plaintiffs (Public Pension Fund Investors: New York State Common Retirement Fund, the California Public Employees' Retirement System, and the New York City Pension Fund) on behalf of themselves and the class: one settlement with Cendant Corporation and the HFS Individual Defendants, and one settlement with Ernst & Young LLP. The total amount of recovery to the class from the combined settlements was $3,186,500,000.

The settlement provided for a payment to the class of $2,851,500,000 in cash, provided for additional payment to the class from Cendant and the HFS Individual Defendants in the event they recover damages in their suits against Ernst & Young (50% of any recovery), and imposed certain corporate governance changes on Cendant Corporation.

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427. *In re* California Micro Devices Sec. Litig., Reporter's Transcript of Proceedings of May 24, 2001 Final Fairness Hearing 18, 20 (Judge Vaughn Walker, N.D. Cal.).

428. *In re* Auction Houses Antitrust Litig., No. 00-C-0648, Memorandum Opinion 23 (S.D.N.Y. Feb. 22, 2001).

429. *Id*. at 42.

The Ernst & Young settlement provided for a cash payment of $335,000,000 to the class. In exchange, the class agreed to release all claims that were, or could have been, brought against the CUC Defendants (who were not parties to the stipulation), Cendant, and the HFS Individual Defendants.[430]

Lead counsel for the Public Pension Fund Investors described the settlement as

> the largest securities class action settlement in United States history. The Cendant Settlement is more than three times the highest recovery ever previously obtained in a securities class action, and approximately ten times the recovery in the next largest securities class action involving fraudulent financial statements. In addition, the Cendant Settlement provides for an additional 50 percent interest in any net recovery that Cendant or the HFS Individual Defendants may obtain from Ernst & Young in resolution of claims they have or are litigating against E&Y, and important corporate governance improvements that could only have been achieved through settlement of the Action. The Ernst & Young Settlement is the largest amount ever paid by an accounting firm in a securities class action.[431]

The class received 91.725% of the combined settlements with Cendant and Ernst & Young. The court awarded lead counsel (the law firms of Bernstein Litowitz Berger & Grossman LLP and Barrack, Rodos & Bacine) an award of attorneys' fees in the amount of 8.275% of the net class action settlement (after deducting costs and expenses of litigation), for a total fee award of $262,468,857; and allowance of expenses in the amount of $14,623,806. [432] The fee request was in adherence with the 9% fee established by auction for recoveries over $500 million during discovery through adjudication of a summary judgment motion.

Judge Walls found that lead counsel's request for 8.275% of the net settlement fund to be an appropriate and reasonable percentage of recovery given that the market set the fee. Judge Walls explained that

> [t]his Court need not speculate as to what fee percentage the relevant market would have set for a case of this size. No 'simulation' of the market is necessary when the open legal market has actually defined the lowest responsible fee: 8.275 percent of the settlement. Twelve auction bids, most from law firms national in practice and prominent in the field, reflected the force of market activity to determine appropriate costs. The lowest qualified bid is the result of that market competition. Such result will be accorded weight by this Court as a 'benchmark of reasonableness' where a large number of firms, some fifteen—many national in practice and reputation—bid to provide legal services to the class. In the absence of demonstrated collusion, or even a hint of it, among these bid-

430. *In re* Cendant Corp. Sec. Litig., 109 F. Supp. 2d 235, 239, 242 (D.N.J. 2000).

431. *In re Cendant*, No 98-C-1664, Joint Declaration of Max W. Berger and Leonard Barrack in Support of Motion for Approval of Proposed Settlement of Class Action and Plan of Allocation of Net Settlement Fund, and In Support of Petition for an Award of Attorneys' Fees and Reimbursement of Expenses 46–47 (filed May 5, 2000).

432. *In re Cendant*, 109 F. Supp. 2d 285 (D.N.J. 2000).

> ders, the Court has no reluctance to accept and find the auction's lowest qualified bid as representative of the market.[433]

There were objections to the 8.275% attorney fee award. The co-lead plaintiff, New York City Pension Fund, objected to the fee request, alleging that instead of producing reduced costs for the class, the auction process resulted in an increased cost to the class of $76 million—money the class would have received under the fee proposal originally agreed to between the lead plaintiffs and their original counsel before Judge Walls called for an auction to select lead counsel. Thus, the city wanted the court to reject the fee sought and seek a reasonable fee or reinstate the retainer agreement it had negotiated with lead counsel prior to the auction, and ask lead counsel to negotiate a fee with lead plaintiffs pursuant to the terms of the retainer.[434]

Others objected because they thought, among other things, the fee award was "excessive, outrageous," and a windfall.[435] Another thought the settlement documents did not contain sufficient information regarding the lodestar figure. In response to these objections, Judge Walls explained, "[a]bsent circumstances of bid collusion, bad faith, inadequate numbers of qualified bidders or some other infirmity in the auction process, no cross-check is warranted."[436] "To reduce the fee award set by auction would be anti-ethical to the Task Force's recommendation that a fee agreement be reached early in the litigation and not later re-adjusted once recovery is known." "[T]his Court will not adjust the pre-set fee award nor will it abandon this approach because the fee scale used provided for an increasing rather than decreasing, percentage of settlement." Judge Walls defended his use of an increase in fee percentage as recovery increases stating that it was "designed to stimulate counsel to strive for ever-increasing recovery."[437]

On August 28, 2001, a three-judge panel of the Third Circuit (Chief Judge Becker, Judge Dolores Sloviter, and Judge Thomas Ambro, a Task Force member) affirmed the district court's approval of the settlement and the allocation plan, finding that the district court did not abuse its discretion in finding overall that the settlement was fair, reasonable, and adequate under Rule 23(e) and the nine-factor test the Third Circuit developed to make this determination.[438] Although the court described situations under which the PSLRA would permit a court to employ the auction technique, the Third Circuit found that the district court abused its discretion by holding an auction to select lead counsel in *In re Cendant* because the reasons provided by the district court for holding an auction were not found to be sufficient justification to overcome the Third Circuit's belief that the PSLRA does not allow an auction in the ordinary case where there is a sufficient showing that a properly selected lead plaintiff made its lead counsel choice as a result of a "good faith selection and negotiation process and [was] arrived at via meaningful arm's-length bargaining."[439] Thus, because in *In re Cendant* prior to the court-ordered auction the lead plaintiff selected and retained counsel through a "sufficiently sophisticated and sincere search," the district court should not have conducted an auction but instead should have appointed counsel whom the

433. *Id.* at 300.
434. *Id*. at 291.
435. *Id.* at 294.
436. *Id.* at 302–03.
437. *Id.*
438. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 53 (3d Cir. Aug. 28, 2001).
439. *Id.* at 109.

lead plaintiff sought to have appointed in the first place pursuant to the retainer agreement negotiated between them.[440]

Because the valid retainer agreement required lead counsel to obtain prior approval of the lead plaintiff before submitting a fee application to the court and because there was insufficient evidence that lead plaintiff gave prior approval, and because the fee request was submitted pursuant to the fee grid arrived at via the auction rather than the fee arrangement contained in the retainer agreement, the Third Circuit found that the district court erred in considering and ruling upon lead counsel's fee application.[441] The Third Circuit set aside the fee award and remanded the case instructing the district court to dismiss the fee application and refuse to accept any other applications that are submitted without lead plaintiff's prior approval.[442] In order to assist the district court on remand with evaluating the resubmitted counsel fee application, the Third Circuit set forth standards that the court should follow in evaluating a properly submitted fee request in class action cases that are governed by the PSLRA.[443]

8. *In re* Cendant (Prides)

Judge Walls approved the settlement whereby Cendant agreed to issue rights to new Prides shares, with a stated value of $11.71, in exchange for existing Prides shares. The total possible number and amount of rights to be distributed pursuant to that agreement was 29,161,474, with an approximate stated value of $341,480,861 (29,161,474 rights at $11.71 per share).[444]

Lead counsel applied to the court for an award of fees not to exceed 10% of the aggregate stated value of 29,161,474 rights, or approximately $34,148,081, plus reasonable expenses. Lead counsel argued that because most, if not all, of its fee would come from unclaimed rights, the "class will be charged less than it would be under the bid."[445]

Judge Walls found lead counsel's argument that its fee request would not impair the class's rights because they would come from unclaimed rights to be speculative at the time. Using lead counsel's October 7, 1998, acceptance of the lowest qualified bid percentage in the court-sponsored auction for lead counsel "as a benchmark of reasonableness" (and recognizing that the winning bid called for a lesser percentage of the total class recovery than lead counsel's 10% fee request), Judge Walls examined the fee request under the lodestar analysis. Finding that lead counsel spent 5,600 hours at an hourly rate of $495, he determined this would have resulted in a lodestar fee of $2,772,000.[446]

Having found that expenses of $2,367,493 were necessary and reasonable, that amount in equivalent rights (202,177) was deducted from the gross value of rights, $341,480,861 (or 29,161,474 rights), and given to lead counsel. The court found that 5.7% of the net balance of $339,113,368 (28,959,297 rights) was reasonable. Lead counsel was to receive 1,650,680 rights equivalent to 5.7% of 28,959,297 rights, approximately $19,329,463.[447] Lead counsel was directed to satisfy payment of fees and expenses first from any unclaimed rights; then, to the extent that such fees and expenses have not been satisfied, any deficiency was to be assessed against and

440. *Id.* at 115.
441. *Id.* at 116–17.
442. *Id.* at 117.
443. *Id.* at 117–24.
444. *In re* Cendant Corp. Prides Litig., 51 F. Supp. 2d 537, 540 (D.N.J. 1999).
445. *Id*. at 540–41.
446. *Id.* at 541–42.
447. *Id.* at 542.

borne by the class. Any rights unclaimed after authorized class claimants and lead counsel were issued their entitled rights were to be canceled by Cendant Corporation as provided under the terms of the settlement.[448]

On March 21, 2001, the Third Circuit vacated the district court's award of attorney fees.[449] The Third Circuit found that "[a]s in *Gunter*, the District Court's fee opinion in this case was too cursory for us to 'have a sufficient basis to review for abuse of discretion.' The district court did not even specify whether it was using the percentage-of-recovery method or the lodestar method to set attorneys' fees. Nor, if the district court intended to utilize the lodestar method, did it calculate the lodestar multiplier."[450] Although the Third Circuit found that the use of the percentage-of-recovery method is appropriate in this case, it criticized the district court for not explicitly considering any of the at least seven factors articulated in *Gunter* to be considered by district courts in setting percentage fee awards in common fund cases.[451] Further, the Third Circuit stated that although the district court indicated that it was using the bid that Kirby had agreed to "as a benchmark of reasonableness" in setting the fee, "a preliminary bidding process cannot replace subsequent analysis of the factors listed in *Gunter*. The circumstances and progression of every case are different, and these unique factors must be taken into account by district courts awarding attorneys' fees. Therefore, though the result of a bidding process may be of use to the district court in awarding fees at the end of the case, it cannot supplant post-settlement analysis to determine a reasonable fee."[452]

9. *In re* Amino Acid Lysine

In this case, the winning firm proposed a "fee of 20 percent for the first $5 million dollars recovered, plus 15 percent of the next $10 million and 10 percent of the next $10 million."[453] The firm's bid set a cap on attorney fees of $3.5 million dollars, which was met because the case ultimately settled for $49 million.

One losing bidder, Melvyn Weiss of the Milberg Weiss firm, charged that the existence of a cap on fees, which was self-imposed by the winning firm as part of its bid, meant that the latter firm was unwilling to exercise its best efforts on behalf of its clients, the class members, because the firm had nothing to gain in pushing for a larger recovery from the defendants.[454] The court responded to these comments by stating that "an attorney undertaking such a position is clearly unethical."[455] The court emphasized that it is a "total red herring to suggest that either the bidding process to obtain the best quality representation at the lowest cost to the plaintiff class members, or the cap on fees that the [winning] firm chose to include in its ultimately successful bid, has in any respects disadvantaged the plaintiff class. Instead precisely the opposite is true."[456]

After receiving the proposed settlements, Judge Shadur inserted the relevant figures into the eight different bid proposals and determined that if the settlements had been approved at that particular time, and even if no added recovery were to be made from the non-settling defendants—in other words even on the worst case scenario—the [winning] bid would have provided the greatest

448. *Id.*
449. *In r*e Cendant Corp. Prides Litig., 243 F.3d 722 (3d Cir. 2001).
450. *Id*. at 733 (*citing Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 196 (3d Cir. 2000)).
451. *Id* at 734.
452. *Id.* at 735 n.18.
453. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996).
454. *In re* Amino Acid Lysine, No. 95-C-7679, 1996 WL 197671 at *1 (N.D. Ill. Apr. 22, 1996).
455. *Id*. at *3.
456. *Id*.

benefit for the clients in comparison with all of the other bids. [457] The court determined that the other bids would have "required at least $5 million more from the Archer Daniels Midland before the plaintiff class would have come out as well as the clients would realize under the [winning bid], taking into account its $3.5 million cap on fees."[458]

C. Courts' Treatment of Expenses and Costs

One of the qualitative factors courts considered when reviewing bid proposals was the treatment of expenses and costs. In *In re Wells Fargo*, Judge Walker wrote, "[a]n attorney generally has no incentive to minimize litigation expenses unless his fee award is inversely related to such expenses. Second, when an attorney treats a resource devoted to litigation as a reimbursable expense, the attorney has a clear incentive to substitute that resource for those paid for out of the attorney fee, even if it increases the overall cost of the litigation to the client."[459]

In eight of the fourteen cases, courts either required or preferred bidders to include all costs or expenses in addition to attorneys' fees in the percentage of total class recovery the bidder would charge in the event of a class recovery. See Table 2 *supra*. Of these eight cases, five have since settled. Although the court expressed the above-described preference in its guidelines, in only one of the five settled cases, *In re Auction Houses*, did the winning bidder include expenses in its fee proposal. Thus, the percentage of the final settlement fund awarded to class counsel in *In re Auction Houses* included both attorneys' fees and reimbursement for all costs and expenses.

Because the court chose the winning bidder in the other four cases despite the failure of these bidders to follow the courts' preference of combined fees and expenses, the courts seem willing to award fees and expenses separately if they found the terms proposed by the winning bidder, as well as their other qualifications, in the best interest of the class compared to the other bidders. For example, in *In re Wells Fargo*, the court accepted the winning bidder's proposal, even though the bidder did not follow Judge Walker's preference for bidders to include expenses in their fee proposal, because the winning bidder agreed to deduct its litigation expenses from the total amount of any recovery before application of its fee percentage.[460] Under this method, the court determined that "each incremental dollar of expenses simultaneously results, on average, in a twenty-five cent reduction in attorney fees."[461]

With the exception of *In re Auction Houses*, in the other seven cases that have settled the court reimbursed class counsel for their costs and expenses out of the total class recovery separately and in addition to the amount awarded to class counsel for attorneys' fees. For example, in *In re Network Associates*, the winning firm received fees in the amount of approximately $2 million and expenses in the amount of $360,813.[462] Similarly, Judge Walls in *In re Cendant* allowed for separate reimbursement of fees and expenses. In that case, the winning firm received a fee award of $262,468,857[463] and reimbursement of expenses in the amount of $14,623,806, which included fees and expenses of experts and consultants retained by the lead plaintiffs on behalf of the class ($14,094,994 for an international investment banking firm, a damages expert, an account-

457. *Id.*
458. *Id.*
459. *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467, 470 (1994).
460. *Id*. at 471–472.
461. *Id.* at 471.
462. *In re* Network Assocs. Inc., Sec. Litig. No. C-99-01729, Order Awarding Fees and Costs 1 (May 21, 2001.
463. *In re* Cendant Corp. Sec. Litig., 109 F. Supp. 2d 285 (D.N.J. 2000).

ing firm, and an investment banking expert) and $528,812 in law firm costs, which included expenses such as photocopying and electronic research. Although we were unable to definitively ascertain the method used in the other settled cases, such as in *In re Wells Fargo*, Judge Walls deducted costs and expenses from the net settlement fund prior to awarding class counsel fees of 8.275% of the fund. The firm also sought the interest earned on fees and costs.[464] The court concluded that the expenses were reasonable and necessary to the class. Judge Walls pointed out that lead counsel had discussed the need for such experts informally with him early on—Judge Walls had no objection and expected counsel to seek competent assistance, if required, in a case of this magnitude.[465] "This Court does not recognize 'reasonable' as a synonym for 'cheap.' Reasonableness of price reflects the force of market competition by qualified providers of requested services."[466] However, the court did deny lead counsel's request for interest on fees and costs.

Although courts did not place caps on expenses or costs, in *In re* Oracle the winning bidder voluntarily agreed to a cap of $325,000 on expenses incurred in prosecuting the class claims against the Oracle defendants and $500,000 on expenses incurred in pursuing the class claims against Arthur Andersen.[467] The firm incurred $320,065.95 in expenses on the Oracle claims and $472,342.43 in expenses on the Andersen claims (these expenses equal $791,408.38 in the aggregate).[468] In addition, class counsel recorded $188,176.77 in notice expenses[469] and $174,176 for processing 24,446 proofs of claim.[470] Lead counsel asked the court to reconsider the cap, and the court denied the request for reconsideration. Judge Walker explained that the costs of administering the settlement and costs associated with giving notice to the class fall within class counsel's expense caps.

Because of the limited amount of data on caps of fees or expenses, it is premature to suggest that such caps influence case outcomes.

D. Ex-post Fee Determinations

Some judges have noted that one advantage of using an auction method to select counsel is it minimizes an indeterminate ex-post assessment of fees. We found in most cases, judges refused to reconsider fees set by the winning bid. They were unwilling to adjust the fees agreed to up front either upwards or downwards. However, in two cases with fee caps, *In re Amino Acid Lysine* and *In re Bank One*, Judge Shadur noted attorney fees might be reconsidered "so long as the ultimate fee awarded 'leave[s] the class meaningfully better off financially than under any of the other original bids. . . ."[471] Despite this provision in both cases, class counsel never requested a bonus fee, even though the fee caps were implemented because the total recovery exceeded the fee cap.

Notwithstanding the courts' lack of desire to revisit the fee issues, there were two instances where judges actually did. In *In re Network Associates* a number of firms that had submitted bids but were not selected requested that they be reimbursed from the settlement fund for expenses and work that had conferred a benefit on the class. All but one of the fee petitions were rejected on the

464. *See In re Cendant*, Petition of Lead Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses 3–4 (D.N.J. filed May 5, 2000).

465. *In re Cendant*, 109 F. Supp. 2d at 305.

466. *Id.*

467. *In re* Oracle Sec. Litig., 852 F. Supp. 1437, 1457 (N.D. Cal. 1994).

468. *Id.* at 1457.

469. *Id.*

470. *Id*. at n.12.

471. *In re* Amino Acid Lysine Antitrust Litig, 918 F. Supp. 1190, 1199 (N.D. Ill. 1996).

record. The court did allow one firm, McManis, Faulkner & Morgan, which had been representing the lead plaintiff prior to the court's appointment of Leiff, Cabraser as class counsel, to meet and confer with class counsel about a reasonable fee award. The court ordered that any resulting agreement or recommendation by class counsel had to be filed no later than June 11, 2001.[472] McManis, Faulkner & Morgan requested $112,944.00 in attorneys' fees and $14,991.00 in costs[473] from either the settlement fund or class counsel's portion of the settlement fund.[474] On June 18, 2001, the court denied awarding any fees to McManis, Faulkner & Morgan stating the firm's "billing records fail to show what time, if any, furthered the interests of the class as opposed to attempting to further the interest [of the firm] in becoming lead counsel."[475] The court stated "[t]he request is so excessive, so overreaching, that it is impossible to discern any portion of it that benefited the class."[476]

In *In re Cendant Prides*, lead counsel had requested a fee of 10% of the stated value of the total amount of rights to be distributed at settlement. The court awarded counsel considerably less at 5.7% of the number of net settlement rights (after deducting for expenses).[477] The Third Circuit in reviewing the fee award criticized the district court because it had not employed the factors which the circuit court has indicated district courts should consider when awarding fees using the percentage-of-recovery method in common-fund class actions.[478] In discussing the factors the district court should have considered, the Third Circuit said among other things, that the district court had had not accounted for the fact the case was relatively simple since Cendant had conceded liability.[479] In addition, the case settled at a very early stage in the litigation with little or no discovery.[480] Further, the Third Circuit criticized the district court for not examining other cases in which the common fund exceeded $100 million.[481] In those cases, fee awards ranged from 2.8% to 36% of the total settlement fund. The Third Circuit found that although the 5.7% fee award in *In re*

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472. *In re* Network Associates, Inc. Sec., Litig., No. C-99-01729, Further Order Re Motion For Fees and Costs By McManis, Faulkner & Morgan (June 6, 2001).

473. *In re* Network Associates, Inc. Sec. Litig. No. C 99-01729, Order Denying Motion for Fees and Costs By McManis, Faulkner & Morgan 1 (N.D. Cal.) (filed June 18, 2001).

474. *In re Network Associates*, No. 99-C-01729, Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Lead Plaintiff's Former Counsel's Application for Attorney's Fees and Reimbursement of Expenses, or Alternatively, Objection to the Proposed Settlement of Class Action 2, 11 (N.D. Cal. filed Apr. 16, 2001).

475. *See supra* note 473.

476. *Id.*

477. *In re* Cendant Corp. Prides Litig., 51 F. Supp. 2d 537 (D.N.J. 1999).

478. *In re* Cendant Corp. Prides Litig., 243 F.3d 722 (3d Cir. 2001). In a recent decision disapproving of the district court's selection of class counsel pursuant to an auction and vacating the fee awarded pursuant to the court-sponsored auction in *In re Cendant Corp. Litigation*, the Third Circuit held that in a typical PSLRA case, 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. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 119 (3d Cir. Aug. 28, 2001). Further, a modified *Gunter* review should be applied to determine whether the presumption of reasonableness has been rebutted in order to take into account some of the changed circumstances brought about by the PSLRA. *Id.* at 121. *In re Cendant Corp. Prides Litigation* was distinguished because the district court's decision to use an auction to select and retain lead counsel was not challenged on appeal and thus the case was no longer a typical PSLRA case since an auction is inconsistent with the assumptions underlying the PSLRA (i.e., the auction method relies on the court, instead of the lead plaintiff, to serve as the class's agent with regard to selecting and retaining lead counsel). *Id.* at 122 n.56. Thus, the full *Gunter* review was warranted. *Id.*

479. *Id*. at 735.

480. *Id.*

481. *Id*. at 736.

Cendant Prides appeared in line with the awards in other cases, upon further review, it was clear that the 5.7% was not justified in light of time and effort exerted by the attorneys.[482]

Finally, the Third Circuit criticized the district court for not using the lodestar method to cross check its initial percentage fee calculation and for not explaining how the application of the multiplier was justified by the facts of the case.[483] Specifically, the Third Circuit found that the district court's allowance of such a high lodestar multiplier (7 using Kirby's senior partner rate as the rate for all hours) "without even calculating it, much less explaining how it is justified" was an abuse of its discretion, "particularly where the district court appeared to be attributing more responsibility to Kirby for the quality of the settlement than may be legitimately warranted" and where "this case was neither legally nor factually complex, and did not require significant motion practice or discovery by Kirby, and the entire duration of the case from the filing of the Amended Complaint to the submission of a Settlement Agreement to the District Court was only four months."[484]

The Third Circuit subsequently vacated the district court's fee award and remanded the issue of attorneys' fees. "On remand of this case to the District Court, we strongly suggest that a lodestar multiplier of 3. . . is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion. The 3 multiplier would result in an award of no more than $8.3 million for Kirby (calculating the lodestar at $495/hour)."[485]

The Third Circuit decision motivated one judge to address the court's rationale in a case still pending when the Third Circuit issued its decision. Prior to the settlement fairness hearing in *In re Bank One*, Judge Shadur issued a Memorandum Order to address the issues that were raised by the Third Circuit's opinion. Judge Shadur disagreed with the opinion and believed it was "particularly inappropriate to employ that demonstrably flawed method [the lodestar approach] of determining fees as the benchmark by which the reasonableness of a percentage-of-recovery fee arrived at in the crucible of competition should be measured."[486] Nevertheless, Judge Shadur believed it would be irresponsible to not obtain the information appropriate to the lodestar approach to provide a complete record if an appeal were to ensue. Thus, he ordered (1) plaintiff class counsel to submit input called for under the lodestar approach (both the time spent by, and the customary hourly rate for, each lawyer involved in the litigation); and (2) "purely for comparative purposes," defense counsel is to submit a statement separately setting out the total number of hours spent by partners and associates (including time expenditures by Bank One's in-house counsel).[487]

At the final fairness hearing, Judge Shadur in *In re Bank One* once again criticized the Third Circuit's opinion as "defying logic and common sense for utilizing the lodestar method as a 'yard-

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482. *Id*. at 738.

483. *Id*. at 742. In a recent decision holding that the district court abused its discretion by using an auction to select lead counsel and vacating the attorneys' fee awarded by the court-ordered auction, the Third Circuit implied that the decision in *In re Cendant Corporation Prides Litigation* may have elevated the lodestar cross-check from being a "recommendation" to a requirement in cases not decided as a typical PSLRA case due to the use of an auction to select class counsel. *In re* Cendant Corp. Litig., Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 123 n.57 (3d Cir. Aug. 28, 2001). In addition, the Third Circuit held that the court may need to utilize a lodestar cross-check in addition to the *Gunter* factors, to test the presumption of reasonableness, if challenged, of fee agreements between lead plaintiff and lead counsel governed by the PSLRA. *Id*. at 123 & n.58.

484. *Id.*

485. *Id*.

486. *See In re* Bank One Shareholders Class Actions, No 00-C-880, Memorandum Order 2, 4–6 & n.5 (N.D. Ill. Apr. 10, 2001).

487. *Id.*

stick' for measuring the award that is obtained as a result of a well-crafted bidding process."[488] Judge Shadur explained that second guessing the bidder by requiring a post-hoc lodestar justification "deprives the bidding law firm of the benefit of the bargain, in violation of I think the unexceptionable principles of freedom of contract," and "creates for the bidder a risk on the downside without any corresponding upside potential."[489] Judge Shadur also claimed that this lack of confidence in the sanctity of the bid has chilled the bidding in another securities class action in which he is currently awarding class counsel based on bidding.[490]

VIII. Summary of Judge Interviews

In this section, we summarize the results of our telephone interviews with judges who have and have not used the bidding method to select counsel. Interviews were conducted between June 2001 through mid-August 2001. During that time, all seven bidding judges agreed to be interviewed. We contacted over fifteen judges experienced in managing securities and antitrust class actions but with no experience using the bidding procedure—only four responded to our request to be interviewed. Of these four judges, three were from the same district. We believe this low response rate may have been due to the time of year as well as the short time frame. Consequently, we present their results as illustrative examples and not as a basis for generalizing to the universe of those judges experienced using nonbidding methods to select counsel.

From both groups of judges, we were interested in learning generally about their experiences using traditional methods of appointment of counsel, including the nature of problems if any, and how such problems were resolved. Also, we were interested in the interviewees' suggestions regarding procedures that might improve the traditional methods of appointment and whether auctioning the role of lead counsel requires any special skills.

We also asked the judges who have used bidding to address to what extent they considered the merits of the case and likelihood of recovery prior to choosing the auction method. Further, we asked whether they believe certain types of cases are more suitable for auctioning, and if so, the characteristics of those cases.

A. Judges with Experience Auctioning the Role of Class Counsel

1. Consideration of the merits of the case prior to auctioning the lead counsel role

Two judges who used bidding indicated that the merits of the case were considered to some extent prior to deciding to use an auction. In one case, the court pointed out that it recognized that liability was not going to be a formidable issue in the case because of the defendant's public admission of accounting errors. Another judge explained that the merits of a case are explicitly considered in connection with selection of class counsel to the extent that counsel seeking designation as class counsel offer an assessment of the case in their bid proposals. In addition, the same judge suggested that inferential assessments about the merits of a case could possibly be made from the number of counsel interested in assuming representation of the class and the enthusiasm they dis-

488. *In re Bank One*, No. 00-C-880, Transcript of Proceeding Before the Honorable Milton Shadur 23 (N.D. Ill. June 1, 2001).

489. *Id*. at 26.

490. *See In re* Comdisco Sec. Litig., 141 F. Supp. 2d 951 (N.D. Ill. 2001) (Memorandum Opinion incorporating attached April 6 Memorandum Order).

play for the assignment, as well as the fee percentages proposed by the bidders if a bid grid is used.

Although recognizing that a general familiarity with the issues was naturally obtained from reviewing the complaint and other relevant documents submitted by counsel, the other five bidding judges reported that they did not consider nor did they seek to gain more information about the specific merits of the case. One judge said that the merits of the case had nothing to do with how lead counsel was selected, instead stating that the high interest in the case from eight or nine firms and the uncommonly large amount of losses involved were the definitive factors in the judge's decision to use competitive bidding. Another judge pointed out that it wasn't necessary to consider the merits since the defendants had publicly admitted to price-fixing and a grand jury was investigating the matter, making the issue of liability in the case clear.

2. Consideration of the likelihood and size of recovery prior to auctioning the lead counsel role

Only one judge reportedly did not consider the likelihood and size of recovery prior to soliciting bids for the role of class counsel. The other judges reported considering the extent of liability to some degree prior to deciding to use bidding. One judge said that the likelihood and size of recovery were given more importance in the decision to use bidding in a case where the government was investigating the defendant and there was widespread publicity.

To estimate the size of recovery, one judge relied on general knowledge from experience about ranges of likely success in litigation. Another judge pointed out that clearly the higher the settlement value, the less risk of not having a recovery. One judge admitted that despite the attempt to estimate the extent of liability, the court was never expecting the recovery that was ultimately settled on in the case. Finally, although not going as far as attempting to estimate actual damages, one judge acknowledged that because of the public information of the defendants' guilt, damages would be fairly easy to calculate and defendants' would want to settle quickly to diminish the damage to their public trust and confidence. This judge was bothered by the likely possibility that the plaintiffs' attorneys would try to demand a large sum for attorneys' fees in what was considered a relatively easy case.

3. Common case characteristics of bidding cases

The bidding judges reported the following characteristics as those that made certain types of cases better candidates for auctions than others: clearly accepted or stipulated liability; information from a criminal investigation; publicly known details about the case; clearly defined case; multiple cases consolidated in one jurisdiction; substantial market losses (i.e., potential for very large recovery); solvent corporate defendant; existence of a well-defined class; multiple firms competing for lead class counsel position; and common fund cases.

4. Large firm versus small firms

After noting that the one firm that dominated plaintiff securities class action practice in non-auction cases had won lead counsel position in only two bidding cases, one bidding judge concluded that the auction process appears to afford smaller firms greater opportunity to be selected class counsel in securities class actions than the traditional method of selecting class counsel. However, the same judge pointed out that since plaintiff class action practice requires capital to finance the litigation and receivables constitute a large part of the assets of any plaintiff class ac-

tion firm, the courts seldom, if ever, consider the financial responsibility that those receivables demand when selecting class counsel.

Another judge felt that a large firm would have the advantage to the extent a small firm couldn't afford to maintain the litigation by, for example, being capable of putting up a performance bond.

Two bidding judges reported that whether the auction process benefits large or small firms depends on the firms involved or the characteristics of the case. Large firms have financial resources and experience not often found in smaller firms. They can provide benefits to the class in their representation of the class and in litigating of claims. In addition, in large stakes cases it may be easier for a large firm to absorb risk by advocating a no fee position. However, a smaller firm may fare better in a less risky case, such as a one where liability is clear or not formidable.

Another judge pointed out that the auction process could benefit both large and small firms by giving small firms the opportunity to prove their experience thus enabling them to compete with larger firms while allowing large firms to emphasize their financial resources, their ability to spread risk, and their staying power in the litigation. One judge explained that bidding neither advances nor disadvantages either large or small firms because the bidding process defines itself. For example, if the case requires a large firm then by definition there would be fewer small firms able to handle it which would be the case regardless of bidding. Likewise, a suit may be comfortably managed by a firm of small to moderate size with assistance from other firms as needed. Finally, another judge who had awarded counsel to firms smaller than some of the more well-known players in the plaintiff's class action bar said that the important factors were experience, competency, and proposed compensation rather than firm size.

5. Ex parte communication concerns with auctioning the role of lead counsel

All of the bidding judges dismissed criticism that submitting sealed bids amounts to ex parte communication of information relevant to the merits of the dispute. Many of the judges pointed out that information about the quality of a firm and their attorneys, and details regarding how a firm is willing to represent a client (i.e., a fee proposal) do not disclose information relevant to the merits of a case or legal strategies describing how the attorneys will win their case. Although recognizing that a sealed bid is an ex parte communication, another judge did not feel this was problematic because the data set forth in the bid are relied on only for selecting lead class counsel and not used thereafter, except at the end of the case when reviewing the fee application. Two judges called the criticism "silly" because there was no discovery or requests for discovery prior to bid submission; bidders bid based upon the information they had; the judge took no part in discussing with the bidders beforehand what they would bid or the judge's evaluation of the case; and the bids concerned economic transactions instead of legal strategies.

One judge explained that in his bidding cases the bids were disclosed when class counsel was selected, at the outset of litigation before consideration of the merits of the case. The judge concluded that the submissions were not truly ex parte although their disclosure to defendants and any other non-bidding parties was delayed until the selection of class counsel was made.

6. Management practices with auctioning the role of lead counsel

Several bidding judges reported that bidding allowed them to handle the class action more efficiently than under the traditional method of appointment because it was necessary to only deal with one firm on each side of the case, both during settlement negotiations and for submission of the fee application. There were no liaison committees or multiple parties that needed to engage in

mass communication in order to respond to any inquiry which delays many aspects of the case. One judge stated that more effective management of the case was achieved because bidding permitted the judge to become familiar with the bidders, especially the winning bidder, and learn what their desired fee range was. Commencing the case with the auction procedure enabled another judge to get a handle on the case early on, set parameters, and move the case along. Another judge explained that although bidding does not necessarily eliminate the duty of the court to scrutinize fee applications at the conclusion of the litigation, it does give the court a significant and true market benchmark by which to assess fee applications.

7. Special skills needed to auction the role of lead counsel

Most bidding judges did not feel that a judge needs any special skills to auction the role of class counsel other than prudent decision making and confidence in their decisions. One judge felt that familiarity with auctions in general may be helpful—also helpful is carefully setting up the terms of the auction. Three judges felt that some experience handling complex civil litigation and some exposure to managing large class actions and assessing damages was necessary to avoid a judge being overwhelmed in an attempt to implement an auction procedure. Having time to evaluate the bids thoroughly and the ability to keep an open mind regarding bidding was also reported as important.

8. Problems, if any, with selection of counsel in non-auctioning cases

The most commonly reported problem with the traditional method of selection of class counsel concerned the ex-post evaluation of the attorneys' fee applications usually submitted by teams of attorneys. One judge complained that the high overlap and duplicative activity resulting from multiple counsel costs the class in terms of total class recovery and results in fee applications so time consuming and difficult to evaluate that they warrant appointing a special master to analyze the fees. Another judge said that the lodestar method is simply not well suited to evaluating fee petitions, especially in very large complex cases with, for example, forty to fifty depositions and two million documents; it is very difficult to attempt to evaluate these fee petitions with no assistance and relying on recollection. Another judge reported that the current system requires very active judicial oversight in order to compensate the risk involved in securities class actions instead of attorneys' greed since the attorneys are supposed to be fiduciaries for the class.

One judge turned to bidding to address the difficulties inherent in lodestar fee determinations and to solve the problem of selecting class counsel when plaintiffs' attorneys could not agree on the appropriate composition of the plaintiffs' steering committee. Another judge reported dissatisfaction with the common approach of appointing the attorney who gets to the courthouse first because these attorneys may not have conducted sufficient investigation of the case before filing the complaint and may not provide the best representation for the class.

9. Suggested procedures to improve the traditional appointment of counsel

Several judges suggested that, in addition to competitive selection by a court-directed auction, appointing a presumptive lead plaintiff and permitting the lead plaintiff to engage in its own competitive search for lead class counsel may prove to be very helpful in obtaining class counsel who effectively represents the interests of the class.

Another judge felt that although the traditional method is satisfactory in some cases, Rule 23 should put more emphasis on the court's gatekeeper role and its responsibility for protecting the

class in class action litigation by endorsing the use of competitive bidding so that other judges may try it in appropriate cases.

10. Judicial resources and auctioning the role of lead counsel

Most of the bidding judges felt that judicial resources were saved by auctioning the role of class counsel rather than employing the traditional method of appointment and payment of attorney's fees. One judge pointed out that although auctioning may require more effort at the outset of the case, it facilitates and informs decisions that ultimately need to be made and result in an overall savings of judicial time. Another judge said that resources are saved because the court is only dealing with one firm and competing fee petitions are eliminated.

Another judge felt that addressing the fee arguments up front definitely saves judicial resources, except if the court still has to conduct a lodestar analysis at the end of the case. This judge explained that the purpose of an auction is to obtain a market price for counsel fees, and this market price represents reasonableness if there are a sufficient number of bidders, no collusion, and bidding is open to everyone. If this reasonable market price is still subject to an ex-post lodestar review, this judge further explained, it does not make sense for a firm to submit to a bidding process when their bid could be upset by a lodestar determination.

Three judges reported that the potential savings of judicial resources played a significant role in their decision to use bidding, while two judges said that potential savings was an afterthought or not an important factor.

B. Judges with Experience Managing Securities and/or Antitrust Class Actions Using Traditional Methods of Appointing Class Counsel

1. Criteria used to appoint class counsel

There was little variation in the criteria used by judges to appoint lead counsel. In most instances, attorney or firm competence and reputation and experience handling similar types of litigation were the most common criteria used by the judges. One judge commented that in addition to the factors listed above, he also considers to what extent, if at all, an attorney has been sanctioned by a federal or state court. This same judge also considers which attorneys emerge by consensus from those desiring to serve as lead counsel. Another judge reviews the complaint to determine generally whether the case has merit and whether the party that brought the suit performed the necessary research for a ruling on class certification. For those judges who have routinely interacted with the same firms and have had favorable experiences, they noted that they generally do not give the appointment of lead counsel a second thought, especially if attorneys' fees have been reasonable and the firm was competent in handling previous litigation.

2. Nature of problems, if any, regarding lead counsel appointment

In the majority of cases, judges did not experience problems using the traditional method to appoint lead counsel. In the few instances where issues did arise, excessive counsel fees and attorney sanctions were mentioned as problems. With respect to fees, one judge indicated that he now requires counsel to file their time records by the fifteenth of the following month. The judge stated he requires this filing for two reasons: (1) to place counsel on notice that the judge is concerned with fees, and (2) to have an interim or ongoing record of attorney time. When asked whether a

bidding procedure would have minimized an attorney or firm charging excessive fees, the judge responded that just the possibility of invoking bidding tends to reduce the temptation for charging excessive fees. In addition, the judge noted that the fact that bidding is part of a judge's arsenal has had a salubrious effect.

The other problem cited involved a judge unknowingly appointing as lead counsel an attorney who had been sanctioned by a court for discovery abuses in a different state. The judge indicated that not only was he embarrassed, but he was also very frustrated because the attorney engaged in similar behavior in his case. The judge noted that had he known the attorney had been sanctioned previously he would have never appointed the attorney to serve as lead counsel. The judge expressed frustration and concern over not having more information available to him and other judges about attorneys who have been sanctioned by other federal and state courts. Further, this judge stated that the level of information currently available is not sufficient nor consistently reported by judges.

3. Suggested procedures to improve the traditional appointment of counsel

One judge thought requiring attorneys to file monthly time records would encourage more accurate timekeeping by attorneys. Another judge would like to see the creation of a federal–state database that contained information on attorneys who have been sanctioned by a court. The judge thought this information would be useful for judges who have attorneys appearing before them from other districts, and therefore the judge is not familiar with the reputation of the attorney(s) or firm.

The remaining two judges believed the current system of appointment is working and consequently did not see any need to suggest changes.

4. Considered auctioning the role of lead counsel, but subsequently rejected

One judge indicated that he had considered bidding, but subsequently rejected it because his current method of selecting counsel was satisfactory and in his opinion had produced the same results that bidding would have and was somewhat less antagonistic to the bar. Another judge said he would consider using bidding, although he doubted that as a senior judge he would be assigned the large class action case where bidding would appear to be most appropriate. Yet another judge commented that he had never considered bidding because he had never been faced with a situation where counsel was competing for the lead counsel position. This same judge indicated that he would, however, consider using bidding in a situation where numerous attorneys were competing for the position of class counsel.

5. Special skills needed to auction the role of lead counsel

The majority of the judges did not believe any special skills were needed to auction the role of lead counsel. One judge indicated that judges commonly handle a lot of complicated procedures and using an auction procedure was just a different type of procedure. Another judge commented that with auctioning, the judge is looking for quality representation at the best possible price. This same judge continued saying federal judges are as good as anyone in evaluating the quality of potential counsel and did not think that any special skill other than what a judge already possesses is necessary. Similarly, other judges noted the judge's responsibility to protect the class by appointing competent counsel. However, one senior judge believed that bidding works best if done by an experienced judge who has a trial practice background. This judge would not recommend that a

recently appointed judge use bidding to select lead counsel. If a newly appointed judge wishes to go forward with using such an approach, the judge thought it would be best if the judge appointed a special master to conduct the bidding process.

6. Lodestar versus percentage-of-recovery method

We asked judges what types of case characteristics determine whether they use the lodestar or percentage-of-recovery method to award attorneys' fees. Almost all the judges indicated that it really depends on the nature of the case and whether their circuit has a preference for a particular method. One judge said he usually requests that the attorneys calculate their fee based on both the lodestar and percentage-of-recovery methods. This judge then compares both fee schedules to determine if one is clearly higher than the other. If one is clearly higher, the judge said he would probably choose the method of calculating fees that generated the lower recovery (which is probably the lodestar method). After this analysis is done, the judge compares that information to what he has awarded in the past in similar types of cases, as well as what other judges have awarded in fees under either the lodestar or percentage-of-recovery in his district or circuit or nationwide to determine if the attorneys are entitled to more or less in attorneys' fees.

Another judge, stating his preference for the lodestar method, said he first assesses whether the class action was truly necessary (i.e., merits of the class and the amount of money involved). This judge noted that in many class actions, the class ultimately ends up receiving very little while the attorneys receive the lion's share of the settlement. Further, the judge said that he has a difficult time awarding hundreds of thousands of dollars for minimal results. For example, the judge looks at what counsel accomplished for the class and what the recovery was worth. Was the result an illusory recovery (e.g., coupons) that is probably more beneficial to the defendant than to the class or was there a real cash recovery? In sum, the judge commented that the results of the case weigh heavily in his fee award decision regardless of which method was used to award fees.

7. Circuit benchmarks and the awarding of attorneys' fees

Two of the judges could not recall whether their circuit had a benchmark. The remaining two thought their circuit did, and indicated a range between 20% and 40%. Both judges believed that they awarded fees in accordance with their circuit's benchmark, but also qualified their statements by saying fee awards are determined by the facts of a case. One judge stated that class action settlements can be so different, a judge really has to look closely at the facts of the case and the role lead counsel played to determine whether there is a real recovery before fees are awarded.

Appendix A: Guidelines for Bid Submissions

In re ORACLE SECURITIES LITIGATION
90-C-0931
131 F.R.D. 688
N.D. California
Aug. 3, 1990

IT IS HEREBY ORDERED THAT each law firm wishing to compete for the position of lead class counsel shall, on or before August 24, 1990, submit an in camera application to the court (1) establishing its qualifications to serve as lead counsel and (2) specifying the percentage of any recovery such firm will charge as fees and costs in the event that a recovery for the class is achieved.[22] Payment of the fees and costs of firms assisting in these actions, if any, will be the responsibility of the firm appointed as lead class counsel.

The court envisions that material relating to a firm's qualifications will consist of detailed descriptions of the role such firm played in each class action it has brought or assisted in bringing and the contribution such firm made to the welfare of the class plaintiffs.

Each firm submitting an application shall certify to the court that its compensation proposal was prepared independently and that no part thereof was revealed to any other bidder prior to filing with the court. Applicants are not to confer in any manner with other firms during the preparation of bids.

Upon receipt of all bids, the court will determine whether supplemental information is necessary.

22. An applicant may specify alternate contingent events and the corresponding percentages to be charged. If so, the applicant shall also provide an estimate of the amount of recovery at each contingent event and the basis for that estimate.

In re WELLS FARGO SECURITIES LITIGATION
91-C-1944
156 F.R.D. 223
N.D. California
June 30, 1994

Accordingly, any law firm which seeks to be designated class counsel for claims against one or more defendants shall submit its proposal for such representation on or before July 8, 1994. The proposal shall identify *__229__ each defendant from which recovery is sought and set forth:

(a) the firm's experience in securities class action litigation and the background and experience of those lawyers in the firm who, it is anticipated, will be engaged in representing the class in the present litigation;

(b) the bona fide qualifications of the firm to complete the work necessary for representation of the class, including the willingness of the firm to post a completion bond or other security for the faithful completion of its services to the class, the terms of any such bond or security;

(c) the firm's insurance coverage for malpractice;

(d) the percentage of any recovery the firm will charge in the event of a recovery as fees and costs for all the legal work performed in connection with the case, including that already performed by Lieff, Cabraser and Milberg Weiss;

(e) the terms under which such fees and costs will be charged (i.e., recovery, time and event contingencies); and

(f) a certification on behalf of the firm that (1) its proposal was prepared independently of any other firm, entity or person not affiliated with the firm, (2) no part of the proposal was disclosed to anyone outside the firm prior to filing with the court and (3) the proposal was prepared without direct or indirect consultation with other firms which have filed actions on behalf of the above class.

After the court has received the proposals, class counsel will be selected on the combination of monetary and nonmonetary factors as discussed in the Oracle decisions. The total fee for all counsel in the case will be determined by the successful bid; this fee will be divided among class counsel, Lieff, Cabraser and Milberg Weiss, or between these two firms if one of them is the successful bidder, on the basis of hours reasonably devoted and expenses reasonably incurred in the prosecution of the case.

The court has noted the concern expressed by various counsel that the selection process should proceed promptly. The court will endeavor to select class counsel on the basis of the proposals as soon as reasonably practicable. The court anticipates that a status conference will be scheduled to take place approximately three weeks after the selection is announced.

In re CALIFORNIA MICRO DEVICES SECURITIES LITIGATION
No. 94-C-2817
1995 WL 476625
N.D. California

***3** Bids were to include:

(a) The bidder's experience in securities class action cases and the particular relevant experience of individual lawyers likely to participate in the litigation. Because past requests by the court for such information have often led to submissions of unhelpful puffery, the court further requested that the bidder's qualifications be accompanied by a table that included: (1) the title, court and docket number of each securities class action in which the bidder served as sole class counsel during the past three years; (2) the date on which the complaint was filed; (3) the amount of recovery obtained on behalf of the class; (4) the proportion or percentage of the securities in the class for which claims were submitted; (5) the amount of the recovery distributed to the class, if any; and (6) total amounts received by the bidder, including fees and costs, if any.

(b) The quality of performance assurance the bidder would offer to complete representation of the class in this litigation. This includes, for example, the amount the bidder would to deposit with the court in escrow for the class or the amount and terms of a completion bond.

(c) The amount, terms and provider of the bidder's insurance coverage for malpractice.

(d) The percentage recovery the bidder would charge in the event of recovery by the class, including *all* costs for which the bidder will seek reimbursement from the class. No separate reimbursement for out-of-pocket expenses would be allowed.

To facilitate comparison of bids, the court worked out with lawyers from all the firms that filed complaints in this litigation the event contingencies and recovery ranges set forth on the following table. Accordingly, all bidders were required to use the following table to specify fees and costs as a percentage of recovery:

	Time to Judgment						
Recovery Range (Millions)	Before Def Depo	Before Close Merits Disc	Before Close Expert Disc	Before Trial	During Trial	After Trial	During or After Appeal
$0-1.999							
$2.0-4.999							
$5.0-9.999							
$10.0-14.999							
$15.0-19.999							
$20.0-24.999							
$25.0-29.999							
$30.0-39.999							
$40.0-49.999							
>$50.0							

Finally, bids were to be accompanied by a certification that (1) the information contained therein is accurate; (2) the bidder prepared its bid independently of any other firm, entity or person not affiliated with the bidder; (3) no part of the bid was disclosed to anyone outside the bidder prior to filing with the court; (4) the bid was prepared without direct or indirect consultation with firms or lawyers which have filed complaints in this action.

The court also proposed that plaintiff counsel's compensation be based on the amount of damages actually claimed by class members following notification rather than on a lump-sum settlement amount.

In re AMINO ACID LYSINE ANTITRUST LITIGATION
No. 95-C-7679
918 F. Supp. 1190
N.D. Illinois
Jan. 18, 1996

This Court therefore advised counsel that, as it had presaged five years ago in the context of its dealing with fee requests from ten sets of lawyers in a just-settled group of securities class actions (In re Telesphere Sec. Litig., 753 F. Supp. 716, 721 (N.D. Ill. 1990)), it would give serious consideration to the possibility (1) of obtaining sealed bids from any interested law firms and (2) of then designating the class counsel based on those bids. [FN6] To that end this Court ordered the contemporaneous filing of such bids and of submissions from any interested parties as to the desirability or undesirability of employing that bidding procedure rather than some other approach to the appointment and compensation of class counsel.

FN6. As Telesphere, id. reflected and as is well known to all practitioners who are at all active in class action litigation, District Judge Vaughn Walker of the Central District of California is the first federal judge to have adopted that procedure. To date he has had occasion to employ it in several cases, although this Court is unaware of any other courts that have done so at all. But as this opinion reflects, the factors favoring such an approach are compelling under the circumstances here.

***In re* CENDANT CORPORATION LITIGATION**
No. 98-C-1664
182 F.R.D. 144
D. New Jersey
Sept. 8, 1998

The Court shall conduct an auction to determine the lowest qualified bidder to represent the class as counsel. Any attorney or attorneys interested in serving as counsel to either of the two lead plaintiffs shall submit a sealed bid to the Court not later than 4:00 p.m., September 17, 1998 E.D.T.:

1. Each bidder shall submit his, her, or their professional qualifications to be lead counsel. Among anything else deemed relevant, this shall include a history of involvement in similar litigation, case titles, docket numbers, relevant dates, courts involved, the result, whether by trial or appeal, settlement or resolution and the time during litigation when such resolution or settlement occurred.
2. Bidders shall indicate their ability to undertake and maintain all costs of this litigation, and should express their readiness to post a performance bond and its amount, if required by the Court.
3. Bidders shall indicate how costs are to be deducted in the event of resolution favorable to the plaintiffs.
4. Applicants shall state their percentage fee bids according to one or both of the following "litigation milepost" grids: [FN8]

In re: Cendant: Application for Lead Counsel
Fee Bid Schedule (Excluding Prides Claims)
Fees as Percentage(%) of Total Class Recovery

	PHASE AT WHICH LITIGATION IS RESOLVED			
Recovery Increments in Dollars	During pleadings through adjudication of any motion to dismiss	During discovery through adjudication of SJ motion	After adjudication of SJ motion through trial verdict	Post-trial
First 100m				
Second 100m				
Third 100m				
Next 50m				
Next 50m				
Next 50m				
Next 50m				
Over 500m				

In re: Cendant: Application for Lead Counsel
Fee Bid Schedule (Prides Claims)
Fees as Percentage(%) of Total Class Recovery

	PHASE AT WHICH LITIGATION IS RESOLVED			
Recovery Increments in Dollars	During pleadings through adjudication of any motion to dismiss	During discovery through adjudication of SJ motion	After adjudication of SJ motion through trial verdict	Post-trial
First 40m				
Next 40m				
Next 40m				
Next 40m				
Next 40m				
Next 40m				
Over 240m				

FN8. Applicants may, of course, bid on both available positions. However, for obvious reasons, if one firm emerges as lowest qualified bidder for both lead plaintiffs, it shall be forced to choose. The remaining position shall go to the firm submitting the next lowest qualified bid.

5. Each bidder shall certify that its bid is made in good faith and has been formulated, determined, prepared and forwarded to the Court without any assistance, revelation or collusion, direct or indirect, with any other party or competing law firm before submission to the Court.

6. Payment of the fees and costs of any lawyers or firms assisting the lead counsel, if any, will be the responsibility of lead counsel.

7. The Court reserves the right to reject any and all bids it deems not to have been made in good faith or which are contrary to the interests of the consolidated plaintiffs. In its discretion, the Court may solicit additional bids from any source.

Recognizing that the Reform Act affords an opportunity to lead plaintiffs to choose counsel subject to the approval of the Court, the Court maintains the same in the auction process. Upon determination of the lowest qualified bidder by the Court, if present counsel to a designated lead plaintiff is the lowest qualified bidder, that person or entity will be appointed by the Court. If not, that person or entity, if otherwise qualified, will have the opportunity to agree to the terms of what the Court has found to be the lowest qualified bid. If that person or entity accepts those terms, lead counsel status will be conferred upon it by the Court. If counsel does not exercise this right of first refusal, the lowest qualified bidder will serve the plaintiffs.

As mentioned, the Court acknowledges lead plaintiffs' statutory opportunity. However, whether under the present statute or earlier discipline, the Court is the final arbiter of fees sought by successful plaintiffs' lawyers in this action. *See* F.R.Civ.P. 23(e); 15 U.S.C. § 77z-1(a)(6). The mechanism of an auction gives to the Court a measure of needed foresight to meet its obligations to members of the group. The Court need not be compelled to learn by hindsight--to be told at the end of months or years of litigation, "this is what we seek for services rendered."

The Court is required to protect the interests of all members of the class. If Congress had intended otherwise with its PSLRA, it could have easily permitted lead plaintiff to designate and retain counsel without judicial approval. It did not.

***152** The auction will not obviate the Court's final review of fees and costs pursuant to Rule 23(e), *see e.g. In re General Motors, 55 F.3d at 819* ("a thorough judicial review of fee applications is required in all class action settlements"), and/or 15 U.S.C. § 77z-1(a)(6) if this matter is ultimately resolved in favor of the putative class. During the requisite post-resolution evaluation, the results of the auction will serve as a benchmark of reasonableness.

This is not an invitation for cheapness of costs resulting from cheapness of quality. The Court is confident that professional skills of high order will be forthcoming by this procedure. Additionally, notwithstanding the absence of proof of pay-to-play, the auction is salutary because it removes any speculative doubt about that issue.

WENDERHOLD v. CYLINK CORPORATION
No. 98-C-4292
189 F.R.D. 570
N.D. California
Oct. 26, 1999

Any lawyer or law firm that seeks to be designated class counsel for claims against one or more defendants shall submit its proposal for such representation in the clerk's office on or before 4:30pm, November 22, 1999, and shall file the bid ex parte, under seal. Joint proposals will not be considered. Class counsel will, however, be allowed to spread its risk by farming out tasks in its prosecution of its case; but class counsel shall be required to pay any other firm participating in prosecuting the action out of class counsel's fee. The submitted proposals shall identify each defendant from which recovery is sought and set forth:

(1) the firm's experience in securities class action litigation and the background and experience of those lawyers in the firm who, it is anticipated, will be engaged in representing the class in the present litigation, including the terms and fee arrangements under which such representation took place;

(2) the bona fide qualifications of the firm to complete the work necessary for representation of the class, including the willingness of the firm to post a completion bond or other security for the faithful completion of its services to the class, and the terms of any such bond or security;

(3) the firm's insurance coverage for malpractice;

(4) evidence that the firm has evaluated the case, including specifically the range and probability of recovery;

(5) the percentage of any recovery the firm will charge in the event of a recovery as fees and costs for all work performed in connection with the case set forth on the Fee Schedule Grid, affixed as Appendix B below. This shall include an explanation of the percentage fee arrangement involving a straight, increasing or decreasing fee percentage based on the overall amount of recovery through monetary increments and/or stage of recovery at which litigation is reached;

(6) a certification on behalf of the firm that (a) its proposal was prepared independently of any other firm, entity or person not affiliated with the firm, (b) no part of the proposal was disclosed to anyone outside the firm prior to filing with the court and (c) the proposal was prepared without direct or indirect consultation with other firms that have filed actions on behalf of the proposed class in this matter, or entered an appearance in any fashion.

*__574__ The court notes that counsel located within this district will not necessarily receive more favorable consideration simply because of their location. This order in no way prevents any individual member of the putative class who opts out of the class from hiring the attorney of his or her choice in this matter.

APPENDIX B—FEE AND EXPENSE BID SCHEDULE

Fees and Expenses as Percentage (%) of Total Class Recovery

	From Pleading through Motion to Dismiss	After Motion to Dismiss through Adjudication of Summary Judgment	After Adjudication of Summary Judgment Motions through Trial Verdict	After Trial Verdict Through Final Appellate Determination
First $500,000				
$500,001-$1,000,000				
$1,000,001-$5,000,000				
$5,000,001-$10,000,000				
$10,000,001-$15,000,000				
$15,000,001-$20,000,000				
Over $20,000,000				

BANK ONE SHAREHOLDERS CLASS ACTIONS
No. 00 C 880
2000 WL 246257
N.D. Illinois
Feb. 24, 2000

All attorneys of record in any case included within the "all actions" category, and any other attorneys who have timely filed motions under 15 U.S.C. § 77z-1(a)(3) for any member of the putative class to serve as lead plaintiff, are authorized to file in this Court's chambers, on or before March 10, 2000, sealed bids as to the fee arrangements under which they will be prepared to represent the plaintiff class if they are appointed as class counsel or co-class counsel in this entire class action litigation (if co-class counsel were to be appointed, each such bid must represent the total fees that would be contemplated to be paid to all co-counsel including the bidder).[2] All such bids shall be accompanied by a comprehensive curriculum vitae regarding the bidding lawyers or law firm or firms, including appropriate information as to their prior class action experience. As provided in this Court's In re Amino Acid Lysine Antitrust Litigation opinion (reported at 918 F. Supp. 1190, 1192 (N.D. Ill. 1996)), any bidder or any interested party not submitting a bid may include or make a written submission on or before March 10 as to the asserted desirability or undesirability of employing the bidding procedure rather than some other approach to the appointment and compensation of class counsel. In all other respects the bidding procedure will follow the principles set forth in the Lysine opinion and in the February 11 Order.[3]

*__2__ This Court contemplates the possible utilization of the bid procedure as an adjunct to its determination of the "most adequate plaintiff" as called for by statute. That latter determination will be made as soon as is practicable whether or not the legal representation of the plaintiff class is awarded on the basis of bids.

2. This provision is intended to anticipate the possibility that the lowest responsible bidder among the lawyers or law firms electing to bid may prove to be other than the lawyers or law firm or firms who or that already represent the person or group of persons that would otherwise appear to qualify as the "most adequate plaintiff" within the meaning of 15 U.S.C. § 77z-1(a)(3)(B)).

3. As this Court stated at the status hearing, the request of Thales Fund Management for a right to match the most favorable attorney bid if this Court elects to employ a bidding procedure is denied. No similar request will be entertained from anyone else.

SHERLEIGH ASSOCIATES LLC v. WINDMERE-DURABLE HOLDINGS, INC.
No. 98-C-2273
184 F.R.D. 688
S.D. Florida
March 9, 1999

Therefore, the Court shall accept bids for representation of this putative class separate and apart from any work done on this case to date, by any counsel who has entered an appearance in this or related cases. Because the Court is concerned with fairness and fostering competition among firms, the Court specifically rejects the proposal by certain proposed lead plaintiffs' attorneys that a "steering committee" of all attorneys to date be appointed. Furthermore, the Court will not allow attorneys who have so far entered an appearance to submit a "joint proposal" to complete the litigation on behalf of the class.

All attorneys who have thus far entered an appearance, in addition to any licensed attorney or firm of attorneys may submit a bid in this matter. As Judge Walker explained in *Wells Fargo, 156 F.R.D. at 227,* firms should be allowed to "spread the risk" or leverage expertise by farming out work; but in the interest of fostering competition, submitting joint proposals will not be allowed. The firm selected as class counsel may refer work to other law firms because of specialized experience, geographic proximity to witnesses or evidence, to utilize any other comparative advantage, or to spread risk. Some very prominent and capable law firms have entered an appearance in this matter already, and nothing in this Order should be construed as an evaluation of any work completed thus far.

[6][7] The decision to award lead counsel designation by auction requires the court to select some method by which to calculate a fair and reasonable fee. *See* Niebler, *supra*, at 770. Among the several methods of remuneration available, the Court is persuaded that a contingency fee arrangement best aligns interests of the class and the attorneys.[FN7] As one commentator has suggested, ***696** the alternatives of utilizing a flat percentage fee arrangement, an increasing fee percentage as the overall settlement increases, or a decreasing fee percentage as the overall settlement increases—each contain agency pitfalls. See Niebler, supra, at 783–95. These agency problems revolve around a firm's opportunity costs and willingness to invest resources in the instant litigation vis-à-vis other work.[FN8]

[FN7] This decision is not an obvious one. Problems of asymmetric information cannot easily be discounted. Bidding firms must evaluate the case once the auction is announced, with little information available and little time to investigate. Where courts have decided upon an auction process after consultation with firms, however, problems of collusion have been encountered. *See In re California Micro Devices Sec. Litig., 168 F.R.D. 257, 260-63 (N.D. Cal. 1996)* (Walker, J.); *Wells Fargo, 156 F.R.D. at 226–27; In re Oracle Sec. Litig. 136 F.R.D. 639, 640 (N.D. Cal. 1991)* (Walker, J.) ("Oracle II"); *Lysine, 918 F. Supp. at 1192–93.* Yet firms that have already begun the "race" by filing early (and often) have a competitive advantage once the auction begins.

The court as auctioneer must then evaluate these bids with little information regarding a firm's opportunity costs and incentive structure. When trying to make a qualitative assessment the court has little recourse but to devise a bid process requiring detailed information upon which a good decision can be made.

[FN8] This is because "[a] lawyer who could earn more by investing his or her time in another case would not choose to pursue higher recoveries simply because the lawyer could earn some additional amount of money through additional effort." *Niebler, supra, at 784 n. 112.*

Courts have coupled the percentage of recovery with a qualifier, based on the stage of litigation at which any settlement is realized, such as pre-discovery, pre-trial, etc. *See, e.g.*, *Cendant, 182 F.R.D. at 151* (utilizing "litigation milepost" grid); *see also infra* Fee Bid Schedule (Appendix A). This process too has pitfalls. For example, a firm may avoid settlement toward the end of one phase of the case in order to gain a higher percentage fee associated with a later-stage agreement, and as defense attorneys likely bill by the hour, little incentive exists on their part to settle early or to otherwise weigh overall class returns.

Still, lead counsel auctions can provide both an approximation of the free market process and reduce uncertainties faced by counsel when any *ex ante* determination of fees occurs. *See* Niebler, *supra*, at 774–75. Therefore, while providing guidance to potential bidders and requiring detailed information therein, the Court will not dictate the exact form to which bids must adhere beyond certain minimum requirements, described below. The Court will evaluate bids based on the price-quality continuum, giving appropriate consideration to agency issues. A successful bidder might address not only the minimum requirements, but also discuss these additional issues in some fashion.

Therefore, as with the procedure established by the court in *Wells Fargo, 156 F.R.D. at 224–25*, and *Cendant, 182 F.R.D. at 150–51*, the Court shall employ a contingency fee arrangement. Once proposals have been received, class counsel will be selected on the combination of monetary and non-monetary factors. Specifically, the Court will weigh *both* quality and price of the bid, based on the several factors listed below. The total fee for all counsel in the case will be determined by the successful bid; this fee will be divided among class counsel.

C. Bid Proposals Accepted and Evaluated based on Specific Criteria

Accordingly, any law firm that seeks to be designated class counsel for claims against one or more Defendants shall submit its proposal for such representation in the clerk's office on or before 4:30 p.m., March 19, 1999 E.S.T., and shall file the bid ***ex parte, under seal.*** The proposal shall identify each defendant from which recovery is sought and set forth:

(a) the firm's experience in securities class action litigation and the background and experience of those lawyers in the firm who, it is anticipated, will be engaged in representing the class in the present litigation, including the terms and fee arrangements under which such representation took place;

(b) the bona fide qualifications of the firm to complete he work necessary for representation of the class, including the willingness of the firm to post a completion bond or other security for the faithful completion of its services to the class, and the terms of any such bond or security;

(c) the firm's insurance coverage for malpractice;

(d) evidence that the firm has evaluated the case, and the range and probability of recovery, and has premised the bid on that evaluation;

(e) the percentage of any recovery the firm will charge in the event of a recovery as fees and costs for all the legal work performed in connection with the case. This shall include an explanation of the contingency fee arrangement involving a straight, increasing, or decreasing fee percentage based on the overall amount of recovery through monetary increments and/or stage of recovery at which litigation is reached;

(f) a description of how expenses and costs shall be borne--whether subtracted from the overall settlement itself, or from the attorney fee award portion, including a justification for this arrangement and the ability of the firm to fund such costs;

(g) A defense of the bid that describes how the fees and cost charges will motivate the firm to adequately represent the class;

(h) a certification on behalf of the firm that (1) its proposal was prepared independently of any other firm, entity or person not affiliated with the firm, (2) no part of the proposal was disclosed to anyone outside the firm prior to filing with the Court and (3) the proposal was prepared without direct or indirect consultation with other firms that have filed actions on behalf of the proposed class in this matter, or entered an appearance in any fashion.

Additionally, the Court notes that counsel located within this district will not necessarily receive added consideration in this process. Any competitive bid by a law firm located outside of the district, which details how or whether local counsel may be utilized, will be considered. However, this in no way abrogates the duty of any firm submitting a bid to comply with the Court's requirement of independent bidding--local counsel could be designated at a later date. Finally, this Order in no way prevents any individual member of the putative class from hiring the attorney of his or her choice in this matter.

APPENDIX A- FEE BID SCHEDULE

Sherleigh Associates, et. al. v. Windmere- Durable Holdings, Inc. et. al.:

98-2273-CIV- LENARD (S.D. Fla.)

Application for Lead Counsel

Fee Bid Schedule

Fees as Percentage (%) of Total Class Recovery

		PHASE AT WHICH LITIGATION IS RESOLVED			
		During pleading through adjudication of any motion to dismiss	During discovery through adjudication of SJ motion	After adjudication of SJ motion through trial verdict	Post-Trial
RECOVERY INCREMENTS	First $500,000				
	$500,000-$1,000,000				
	$1 million-$5 million				
	Next $5 million				
	Next $ 5 million				
	Next $ 5 million				
	Over $ 20 million				

This schedule may be modified as part of any bid proposal. However, a firm making such modification shall provide an explanation as part of its submission.

In re NETWORKS ASSOCIATES, INC.
No. 99-C-1729
76 F. Supp. 2d 1017
N.D. California
November 22, 1999

***1034** Accordingly, the Board must re-open its consideration of counsel; promptly publicize a request for written proposals from counsel; evaluate the proposals; and interview candidates as appropriate--all to obtain the highest quality representation at the lowest price. The Board must then recommend a single law firm and provide under seal to the Court a full description of the Board's selection process, its conclusion, and its reasons. All of the proposals received should also be submitted under seal to the Court by the Board. The Board may still, after full consideration of all candidates, recommend the Barrack firm, but it should do so only after an honest effort to select the highest quality counsel at the most efficient price. The Board should also identify the single law firm which would be its second choice and should state its reasons, all under seal. The Board shall make its sealed recommendations to the Court by December 17, 1999.

Each law firm proposal shall at least include (i) the firm's experience in securities class actions and, by case as practicable, its track record in results achieved (in terms of net dollars to the class); (ii) the securities and trial experience of the proposed individual to be lead counsel, the second chair and a commitment that the lead or the second chair shall conduct all important depositions, court hearings and settlement negotiations, and that the lead shall conduct the trial; (iii) a complete disclosure of any conflicts and contributions made to Board or City officials within the last three years; (iv) two fee proposals, one based on percentage of recovery and the other based on hourly rates (lodestar method). Joint proposals by two or more law firms will not be approved. If a firm with a higher fee proposal is recommended, a convincing reason must be given. The Board should make whatever additional inquiries it believes appropriate to select the best counsel.

Through an officer with knowledge, the Board must also certify under oath that the selection in no way directly or indirectly has been influenced by campaign contributions and must (if the Barrack firm is recommended again) address and explain the suggestions in the articles provided by the Weiss firm that the Board’s choice of counsel has been influenced by campaign contributions. See Declaration of Elizabeth Lin, filed Nov. 10, 1999, Exhibits F and G.

Once selected and approved, (i) class counsel shall regularly inform the Board of the progress of the case and shall present all major litigation decisions to the Board for its decision in advance and in a timely manner; (ii) the firm shall log its time on a daily basis, tracking its activities by timekeeper, by individual task, and by quarter-hour increments; and (iii) duplication of effort within the firm shall be prohibited.

In re AUCTION HOUSES ANTITRUST LITIGATION
No. 00-C-648
197 F.R.D. 71
S.D. New York
September 22, 2000

B. First Proposed Fee Structure

The bids contemplated by the Court's initial order were to contain three parts.

First, each bid was to include information concerning the bidder's qualifications and evidence that the bidder had evaluated fully the risks and potential rewards of the litigation.

Second, each bid was to contain two figures, X and Y, on the basis of which the bidder was prepared to serve as lead counsel. The X and Y figures were to be determined based on the bidder's evaluation of the case and the following fee structure: One hundred percent of any gross recovery obtained by the class or class members up to and including X would go entirely to the class or class members, free of attorney's fees. One hundred percent of any gross recovery in excess of X, up to and including Y, would go to lead counsel. One fourth of any recovery in excess of Y would be paid to lead counsel as additional compensation and three fourths to the class.

Third, each bidder was to submit a brief memorandum setting forth the basis for and supporting the bid. The briefs were to explain the bidders' respective evaluation of the case, including their assumptions as to possible and likely recoveries in the event liability were established, and the bases therefore. [FN8] The order stated that, if the Court decided to use the bids in selecting lead counsel, lead counsel would be selected on the basis of both the economic terms of the bids and the qualifications of the bidder. [FN9]

FN8. This was proposed in a second order issued several days later. Order, Apr. 26, 2000 (DI 32).

FN9. In addition to submitting the X and Y figures, each bidder was required to submit a sworn certification that the bidder had not, directly or indirectly, communicated with (1) any other bidder concerning the terms of the bid or its position with respect to whether the Court should adopt this method, (2) any defendant or prospective defendant following the issuance of the order concerning settlement or possible settlement of any or all of the actions, or (3) any other attorney or firm concerning its possible performance of legal or other services for the bidder in connection with this litigation in the event the bidder were selected as lead counsel. Order, Apr. 20, 2000 (DI 119). On April 27, 2000, the Court denied a request by interim counsel that they be permitted to submit joint comments on the proposed bid structure. Memo-Endorsement on Apr. 26, 2000 letter from Interim Executive Committee. (DI 33).

The order provided also that any compensation awarded to the successful bidder was to be inclusive of all costs, disbursements and other charges incurred in connection with the litigation. Further, the Court reserved the right to compensate lead counsel on a different basis in the event the litigation were resolved in a manner that did not permit determination of a gross recovery by the class or if justice otherwise required. Finally, it noted that, in the event that lead counsel other than interim counsel were appointed and plaintiffs prevailed, it would accept a fee application on behalf of interim counsel for services performed on behalf of the class. Order, Apr. 26, 2000 (DI 32).

The bids were to be submitted sealed ex parte to the Court on or before May 12. The Court ordered also that it would receive on or before that date submissions from bidders, interim lead

counsel and any class members or their counsel as to the advisability of employing this or a similar structure. Order, Apr. 20, 2000 (DI 119), at 3.

C. Second Proposed Fee Structure

After considering the comments of the amici and bidders, the Court issued a second order revising the fee structure and soliciting a new round of bids. [FN11] This second proposed fee structure included only one variable, X, rather than two. One hundred percent of any gross recovery up to and including X was to go to the class. And twenty-five percent of any recovery in excess of X would be paid to counsel, with the remainder going to the class. Each bid was to state the value of X pursuant to which the bidder was prepared to serve as lead counsel. As before, bidders were required to submit explanatory memoranda and sworn certifications. As with the previous round of bidding, the Court stated that it would select lead counsel based on its judgment as to which bidder was likely best to serve the interests of the class, taking into account the economic terms of the bids as well as the bidder's qualifications.

FN11. Order, May 17, 2000 (DI 61).

All additional terms contained in the first proposed fee structure were included in the Court's second proposal as well, including the provision that the attorney's fee would be inclusive of all costs, disbursements and other charges incurred in connection with the litigation. The Court noted further that it did not intend to disclose any of the bids prior to the earlier of (a) final adjudication of the action, or (b) notice to the class of a proposed settlement, and it ordered that lead counsel thus selected not disclose the terms of its bid to defendants or anyone else without approval of the Court.

In re LUCENT TECHNOLOGIES, INC.
No. 00-C-621
194 F.R.D. 137
D. New Jersey
April 26, 2000

Bidding for Lead Counsel Position

[24] As mentioned, the Pension Trust Fund has been provisionally appointed as lead plaintiff, pending receipt of motions from other interested members of the class to serve as lead counsel. In an effort to keep this matter moving and in recognition of the possibility that the Pension Trust Fund may decline to continue as lead plaintiff or may be replaced following receipt of a motion from other members of the class, a determination of lead counsel will be made through a competitive bid process. It is clear this procedure is necessary to protect the interests of the proposed class. See In re Cendant Corp. Litigation, 182 F.R.D. 144, 150–52 (D.N.J. 1998); Wenderhold, 188 F.R.D. at 587. It is also clear that attorney compensation of a ***157** percentage of the recovery fee, including costs, will provide the best avenue to coordinate the interests of the Proposed Class and future counsel.

A sealed-bid auction will occur. Any law firm, including those presently unconnected with this litigation, seeking to be designated class counsel for the Proposed Class in this action shall submit a proposal for such representation to the Office of the Clerk, United States District Court, District of New Jersey on or before 4:00 o'clock p.m., 2 June 2000. The bid shall be filed ex parte under seal. The joint proposals are not to be submitted and will not be considered. Nevertheless, counsel selected to represent the class will be permitted to assign tasks to other lawyers. Each proposal to be submitted must identify each defendant from which or whom discovery is sought and further state:

1. The experience of the firm in securities class action litigation together with the background and experience of those particular lawyers in the firm who will be assigned to represent the class;

2. The qualifications of the firm to perform all work required for representation, including whether the firm will post a completion bond, or other type of security, for the rendering of services to the proposed class, together with a description of the terms of such bond or security;

3. A description of the malpractice insurance coverage for the firm and each of the lawyers to be assigned to representation;

4. A demonstration that the firm has thoroughly evaluated the case and a specification of the range, and probability of, recovery;

5. A statement of the dollar amount, as well as percentage, of any recovery the firm will charge in the event of a recovery as fees and costs for all work performed, such a statement is to be provided for each of the following four contingencies:

    a. for pleading through motions to dismiss;

    b. following the completion of the motion to dismiss through adjudication of motions of summary judgment;

c. following completions of the motions for summary judgment through verdict at trial;

d. following verdict at trial through appellate determination.

Such bid should indicate for each of the four contingencies on both a dollar amount and percentage basis of the net recovery to the class after fees and costs in at least the following recovery situations:

Dollar Amount of Total Class Recovery	Dollar Amount of Total Class Recovery Net of Attorney Fees and Expenses	Percentage of Total Class Recovery Net of Attorney Fees and Expenses	Dollar Amount of Attorney Fees and Expenses for Total Class Recovery	Percentage of Attorney Fees and Expenses from Total Class Recovery
The first $500,000				
$500,001-$1,000,000				
$1,000,001-$5,000,000				
$5,000,001-$10,000,000				
$10,000,001-$15,000,000				
$15,000,001-$20,000,000				
$20,000,001-$25,000,000				
Over $25,000,000				

In re QUINTUS SECURITIES LITIGATION
In re COPPER MOUNTAIN NETWORKS SECURITIES LITIGATION
Nos. C-00-4264, C-00-3894
2001 WL 709204
N.D. California
April 12, 2001

In the February 16, 2001, order, the court mentioned the possibility of engaging a special master to oversee the process of selecting lead counsel. The parties, however, have not embraced this idea, apparently believing the risk of the court prejudging the case if it engages in the selection process to be minimal. In the absence of concerned parties, the court will not deviate from its past procedures and will supervise the selection of counsel itself.

[22]Toward this end, any counsel interested in serving as lead counsel for the class in this action should submit a proposal to the court by May 14, 2001. The proposals may be filed ex parte and under seal. Joint proposals will not be considered but lead counsel will be allowed to out source work to other firms and lawyers. The proposals should set forth:

1. The firm's experience in securities class action litigation, the terms and fee arrangements under which past representation took place and the background and experience of those lawyers in the firm who, it is anticipated, will be engaged in representing the class in the present litigation;

2. The firm's insurance coverage for malpractice;

3. Evidence that the firm has evaluated the case, including specifically the range and probability of recovery;

4. The percentage of any recovery the firm will charge as fees and expenses for all work performed in connection with the case. This should be set forth on the Fee Schedule Grid, affixed to this order as Appendix B. The proposal should also include an explanation of why the fee arrangement was chosen including a discussion of the increasing or decreasing nature of the fee structure as well as the importance of the changes in percentage of recovery based on the size of recovery and the stage of the litigation at which recovery occurs; and

5. A certification on behalf of the firm that: (a) its proposal was prepared independently of any other firm, entity or person not affiliated with the firm, (b) no part of the proposal was disclosed to anyone outside the firm prior to filing with the court and (c) the proposal was prepared without direct or indirect consultation with other firms that have filed actions on behalf of the proposed class in this matter, or entered an appearance in any fashion.

Appendix A: Lead Plaintiff Inquiry

1. Did you investigate the legal or factual basis of the claims asserted in your complaint or did you rely solely on counsel to do this?
2. Did you seek out counsel or did counsel or someone else seek out you to serve as representative plaintiff?
3. Did you contact any lawyers other than your present counsel about this action and, if so, whom did you contact and when did you do so?
4. What did you do to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?
5. What arrangements do you have with proposed class counsel concerning their fees and expenses?
6. What benchmarks do you have in place to measure class counsel's performance during the progress of the litigation?
7. How do you plan to monitor class counsel's conduct of the litigation?
8. Do you have any prior business, professional, family or other relationships with proposed class counsel and, if so, what are those relationships?
9. What prompted you to purchase or sell the securities at issue here on the dates on, and at the prices at, which those transactions were made?
10. Did you make inquiry or do you know whether any intermediaries through whom you made your transactions in the securities at issue have any business, professional, family or other relationships with proposed class counsel?

Appendix B:
Fee Schedule Grid
Fees and Expenses as a Percentage (%) of Total Class Recovery

	From Pleading Through Motion to Dismiss	After Motion to Dismiss Through Summary Judgment	After Summary Judgment Through Trial Verdict	After Trial Verdict Through Final Appellate Determination
$0- $4,000,000				
$4,000,001- $8,000,000				
$8,000,001- $15,000,000				
$15,000,001- $20,000,000				
Over $20,000,000				

In re COMDISCO SECURITIES LITIGATION
No. 01 C 2110
2001 U.S. Dist. LEXIS 5173
N.D. Illinois
April 12, 2001

In further implementation of this Court's March 26, 2001 memorandum order ("March 26 Order"), and in conjunction with this Court's anticipated determination of the "most adequate plaintiff" (see 15 U.S.C. § 78u-4(a)(3)(B)[1]) to represent the putative plaintiff class in these actions, all attorneys of record in these actions, and any other attorneys who have timely filed motions under Subsection (a)(3)(B) for any member of the putative class to serve as lead plaintiff, are authorized to file in this Court's chambers, on or before May 4, 2001, sealed bids as to the fee arrangements under which they will be prepared to represent the plaintiff class in all actions other than Case No. 01 C 1177 if they are hereafter appointed to serve as class counsel or as co-class counsel in this entire class action litigation except for Case No. 01 C 1177 (if co-class counsel were to be appointed, each such [*12] bid must represent the total fees that would be contemplated to be paid to all co-counsel including the bidder).[2] Each such bid shall be accompanied by a comprehensive curriculum vitae regarding the bidding lawyers or law firm or firms, including appropriate information as to their prior class action experience.

Although this memorandum order has thus established a bidding procedure, it should be understood that this Court has not reached [*13] a firm conclusion as to whether the class counsel will be selected on the basis of such bidding. Accordingly, as was provided in this Court's *In re Amino Acid Lysine Antitrust Litigation* opinion (reported at *918 F. Supp. 1190, 1192 (N.D. Ill. 1996)*), any bidder or any interested party not submitting a bid may include or make a written submission on or before May 4, 2001 as to the asserted desirability or undesirability of employing the bidding procedure rather than some other approach to the appointment and compensation of class counsel. In that regard this Court is well aware of, and will take into account, the *In re Cendant Corp. PRIDES Litig., 243 F.3d 721, 2001 U.S. App. LEXIS 4246, 2001 WL 276677* opinion issued on March 21, 2001 by the Court of Appeals for the Third Circuit (the same court that now has a Task Force study under way to address that subject). In all other respects the bidding procedure will follow the principles set forth in the Lysine opinion and in the March 26 Order.[3]

As it has done in the Bank One Securities Litigation, this Court contemplates the possible utilization of the bidding procedure as an adjunct to its determination of the "most adequate plaintiff." That latter determination will be made as soon as is practicable, whether or not the legal representation of the plaintiff class is awarded on the basis of bids. If the award is not made on that basis, each bid will be returned to the bidder or bidders involved without disclosure to the other bidders or to the clients represented by such bidders.

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1. Each future reference to any subpart of 15 U.S.C. § 78u-4 will omit that portion of the statutory designation, reading simply "Subsection--."

2. In part the procedure established here is intended to anticipate the possibility that the lowest responsible bidder among the lawyers or law firms electing to bid may prove to be other than the lawyers or law firm or firms who or that already represent the person or group of persons that would otherwise appear to qualify as the "most adequate plaintiff" within the meaning of Subsection (a)(3)(B)).

3. As was true in this Court's handling of the *In re Bank One Securities Litigation*, 00 C 880, this Court will not entertain any proposal by a prospective class plaintiff for a right to match the most favorable attorneys' fee bid if this Court elects to employ a bidding procedure.

In re COMMTOUCH SOFTWARE, LTD.
No. 01-C-00719
N.D. California
June 27, 2001

Accordingly, to assist both the lead plaintiff in his selection and the Court in its approval process, the following procedure will be used:

1. By July 6, 2001, the Court shall post a copy of this order on the Stanford Securities Class Action Clearinghouse website and thereby invite proposals from candidates for class counsel.
2. By July 20, 2001, all counsel wishing to serve as class counsel shall file under seal and serve on the lead plaintiff at 56 Ha'atzmaut Boulevard, Bat-Yam, Israel, their respective proposals for representing the class. Provisionally, the Court anticipates that two firms, one in Israel as special class counsel and one in the United States as lead litigation and trial counsel, may be approved. The firms selected must do the work themselves and may not associate other counsel. Proposals for both positions are invited, including a proposal by Jacob Sabo, Esq., of Israel. Any proposal for Israel-based counsel should explain the need for such counsel. The proposals for litigation and trial counsel shall respond fully to each of the questions set forth in the appended Questionnaire for Potential Class Counsel. Once filed and served (on the lead plaintiff), a proposal may not be supplemented or improved. Counsel should, therefore, submit their best proposals at the outset. Mr. Sabo must serve and file his proposal before reviewing any other proposal or discussing the proposals with Mr. Jacobi.
3. By August 3, 2001, and after receipt of the proposals, the lead plaintiff shall complete interviews of candidates. In carrying out his due diligence in this regard, the lead plaintiff shall interview at least five candidates or, if fewer apply, at least as many as submit proposals. Given his residence abroad, Mr. Jacobi may interview candidates in New York on a single visit to the United States, with all of his travel expenses to be advanced by the interviewees equally.
4. In evaluating the applications, Mr. Jacobi may consult with Jacob Sabo, Esq., his primary counsel contact in Israel. Mr. Sabo may be present at the interviews to assist Mr. Jacobi. In deciding on and making his recommendation, the lead plaintiff and Mr. Sabo shall not disclose the terms of any proposal to anyone else.
5. On August 3, 2001 at 2:00 pm, the Court shall hold a private in-chambers conference with the lead plaintiff and Mr. Sabo to receive the recommendation of the lead plaintiff as to the selection of class counsel. Mr. Jacobi must be prepared to recommend his top three choices for both the United States counsel and Israel counsel. No other counsel for any party shall attend the conference or be entitled to a record thereof. The sole subject to be discussed shall be the selection and approval of class counsel.
6. After the conference, the Court shall approve the selection of class counsel. The Court may or may not unseal the proposals and/or describe them in an order regarding the approval of counsel. Class counsel shall then meet with the lead plaintiff and chart a course of action for the case.

PERCENTAGE METHOD
FEES AS A PERCENTAGE (%) OF TOTAL CLASS RECOVERY
BEFORE RECOVERY FOR REASONABLE EXPENSES

	Pleading Through and Including Motion to Dismiss (including any appeals re any dismissal)	After Motion to Dismiss Through and Including Summary Judgment	After Summary Judgement Through Trial Verdict	After Trial Verdict Through Final Appellate Determination
$0 - $4,000,000				
$4,000,001- $8,000,000				
$8,000,001- $15,000,000				
$15,000,001 $25,000,000				
Over $25,000,000				

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE COMMTOUCH SOFTWARE LTD. SECURITIES LITIGATION. AND CONSOLIDATED CASES.	No. C 01-00719 WHA CERTIFICATION BY LEAD PLAINTIFF

I have read and understand the Court's Order Re Lead Plaintiff Selection and Class Counsel Selection, including the duties of lead plaintiff and the procedure for selecting and approving class counsel. I agree and promise to faithfully execute those provisions and to abide by the order. Once class counsel are selected and approved, I will work and cooperate fully with such counsel for the benefit of the investor class and will do so regardless of whether the selection and approval process for counsel results in appointment of lawyers other than my initial choice.

Dated: _____ _____

MICHAEL JACOBI

Address:_____

QUESTIONNAIRE FOR CLASS COUNSEL CANDIDATES

1. *Lead Counsel:* State the name, address, telephone number and fax number of the one *individual* you propose as your lead class counsel and append his or her resume. This must be a single person, not a group or an entire law firm.

2. *Trial Experience:* Please list (by case name, number and court) the last ten trials taken to verdict, judgment or dismissal by the proposed lead counsel *as lead trial counsel.* Omit settlements before verdict, judgment or dismissal; otherwise, please state the precise outcome and whether it was a trial by jury. Please state the name, address and telephone number of opposing counsel. Cite published or available trial decisions. Please do not limit the trial experience list to securities cases.

3. *Securities Experience:* Please list (by case name, number and court) the last ten securities-fraud class actions in which the proposed lead class counsel acted as the lead class counsel (or as a co-lead class counsel) and for which a resolution at the district court has been reached. Omit any case still pending but include any case now resolved at the district court level by way of settlement, verdict, judgment or dismissal Explain the outcome. If the case was settled or won, please state the gross cash settlement, the net cash settlement (after fees and expenses) and the net cash recovery per share. Please state whether any proposed settlement was disapproved by the court at any stage. If the case was lost, dismissed or withdrawn, please state the reason. Please state the name, address and telephone number of opposing counsel. Cite any decisions publicly available on the ease.

4. *Commitment to Case:* Does the lead counsel candidate commit to supervising the preparation of all pleadings and motion practice, conducting the most important depositions (including at least all named defendants, the chief executive officer, the chief financial officer, and all experts), actively supervising discovery and investigation, being lead trial counsel, conducting all settlement negotiations, and consulting regularly with the lead plaintiff?

5. *Other Counsel:* Name all other individual lawyers who will have any substantia1 role in investigation, discovery, trial or settlement, and provide their resumes with the equivalent information requested for Question Nos. 2 and 3.

6. *Disciplinary Action:* Have any of the lawyers mentioned above been sanctioned by a court for any discovery violation, Rule 11 vio1ation, or other ethical violation or been the subject of any attorney-disciplinary proceeding since January 1, l996? If so please state the circumstances and the outcome.

7. *Fee Proposal:* Please complete the table appended hereto as "Fee Schedule Grid," stating the percentage fees you would accept if selected as class counsel. The grid is not intended to either encourage or discourage increasing or decreasing percentage bids or flat percentage bids, but merely to clarify and standardize presentation. You may adjust the brackets as you see fit. In addition, please state the hourly rates you would be willing to accept on a lodestar basis. The Court will have to assess at the end of the case whether the amounts set forth are fair and reasonable, so there is no guarantee that counsel, if appointed, would automatically receive the amounts indicated. Counsel, however, would be deemed to agree that any amounts indicated shall be fair and reasonable.

8. *Time Records:* Approved counsel must maintain time records that can be presented in the format set forth in this appendix (without inclusion to the Court of privileged material), so that the Court can make an informed fee award. Will you maintain your time records accordingly?

9. *Expenses of Lead Counsel:* Will you advance all reasonable expenses of the lead plaintiff incurred pursuant to his duties as lead plaintiff?

10. *Other Information:* Please provide any other information you wish in support of your proposal.

Lodestar Method

For each lawyer and paralegal who will work on the matter, please state the proposed hourly billing rate.

Time Records

Counsel are advised that under either the percentage or the lodestar method, they will be required at the conclusion of the case to submit to the Court a description of work done in the case to allow a comparison of fees requested with the hourly work done and the efficiency of the work. Such description would likely take the form of a declaration setting forth each discrete project and breaking down all attorney and paralegal time sought to be recovered. For each project, there must be a detailed description of the work, giving the date, hours expended, attorney name, and task for each work entry, in chronological order. A "project" means a deposition, a motion, a witness interview, and so forth. It does not mean generalized statements like "trial preparation" or "attend trial."

The following is an example of time collected by a project:

PROJECT: ABC DEPOSITION (2 DAYS IN FRESNO)

Date	Time-Keeper	Description	Hours	x Rate	= Fee
01-08-01	XYZ	Assemble and photocopy exhibits for use in deposition	2.0	$100	$200
01-09-01	RST	Review evidence and prepare to examine ABC at deposition	4.5	$200	$900
01-10-01	XYZ	Research issue of work-product privilege asserted by deponent	1.5	$100	$150
01-11-01	RST	Prepare for and take deposition	8.5	$200	$1700
01-12-01	RST	Prepare for and take deposition	7.0	$200	$1400
		Project Total:	23.5		$4350

Although the manner of presentation of the information can be dealt with later, the important point for present purposes is that the timekeeping system used by counsel must capture the foregoing data fields.

Appendix B: Firms Participating in Competitive Bidding

Case Name, Docket No., and District	Judge	Firm Selected as Class Counsel	Competing Bidders
In re Oracle Sec. Litig., No. 90-CV-931, N.D. Cal.	Walker		
• Class Action Against Oracle		Lowey, Dannenberg, Bemporad, Brachtl & Selsinger	(1) Abbey & Ellis (2) Berger & Montague (3) David B. Gold
• Class Action Against Anderson		Lowey, Dannenberg, Bemporad, Brachtl & Selsinger	(1) David B. Gold (2) Stamell, Tabacco, & Schager
In re Wells Fargo Sec. Litig., No. 91-C-1944, N.D. Cal.	Walker	Leiff, Cabraser & Heimann	(1) Lowey Dannenberg Bemporad & Selinger (2) Milberg Weiss Bershad Hynes & Lerach
In re California Micro Devices Sec. Litig.,[491] No. 94-C-1944, N.D. Cal.	Walker		(1) Gold & Bennett (2) Lieff, Cabraser, Heimann & Bernstein
Wenderhold v. Cylink Corp., No. 98-C-4292, N.D. Cal.	Walker	Innelli & Molder	(1) Weiss & Yourman
In re Quintus Sec. Litig., No. 00-C-4263, N.D. Cal.	Walker	Weiss & Yourman	(1) Beatie & Osborn (2) Berman DeValerio Pease & Tabacco (3) Cohen Milstein, Hausfeld & Toll (4) Lieff, Cabraser, Heimann & Bernstein
In re Network Assocs., Inc., No. 99-C-1729, N.D. Cal.	Alsup	Lieff, Cabraser, Heimann & Bernstein, LL	(1) Allen Ruby (2) Cohen, Milstein, Hausfeld & Toll, P.L.L.C. (3) Cotchett, Pitre & Simon (4)Weiss & Yourman
In re Commtouch Software Ltd. Sec. Litig.,[492] No. 01-C-00719, N.D. Cal.	Alsup		
Sherleigh Assocs. v. Windmere-Durable Holdings, Inc.,[493] No. 98-C-2273, S.D. Fla.	Lenard	Milberg Weiss Bershad Hynes & Lerach, LLP	

491. Judge Walker rejected both bid proposals and did not select either firm to serve as class counsel. For more details *see* Sections IV.A.1 & V.G.

492. Bids were to be submitted to the lead plaintiff by July 20, 2001. *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001). At this time we have no information regarding the number or identity of the bidders.

493. The number and identity of firms that submitted competing bids remains sealed. Sherleigh Assocs., LLC v. Windmere-Durable holdings, Inc., 186 F.R.D. 669, 671 (S.D. Fla. 1999).

Case Name, Docket No., and District	**Judge**	**Firm Selected as Class Counsel**	**Competing Bidders**
In re Bank One Shareholders Class Actions, No. 00-C-880, N.D. Ill.	Shadur	Wechsler Harwood Halebian & Feffer LLP	(1) Cohen, Milstein, Hausfeld & Toll, P.L.L.C. (2) Bid for Appointment as Co-Lead Counsel: •Berger & Montague,P.C. •Keller Rohrback (3) Krislov & Associates, LTD (4) Lowey Dannenberg Bemporad & Selinger, P.C. (5) Bid for Appointment as Co-Lead Counsel: •Schoengold & Sporn, P.C. •Quinlan & Crisham, LTD (6) Spector, Roseman & Kodroff, P.C. (7) Weiss & Yourman (8) Bid for Appointment as Co-Lead Counsel: •Wolf Haldenstein Freeman Adler & Herz LLP •Miller Faucher Cafferty and Wexler LLP
In re Comdisco Sec. Litig., No. 01-C-2110, N.D. Ill.	Shadur	Wolf Haldenstein Adler Freeman & Herz LLC	(1) Spector Roseman & Kadroff (2) Wechsler Haldenstein Adler Freeman & Herz LLC
In re Cendant Corp. Litig.,[494] No. 98-C-1664, D.N.J.	Walls	(1) Bernstein, Litowitz, Berger & Grossman LLP (2) Barrack, Rodos & Bacine	
In re Cendant Corp. Prides Litig.,[495] No. 98-C-2819, D.N.J.	Walls	Kirby, McInery & Squire	

494. The identity of the winning bidder remains under seal. The Court permitted lead plaintiff for the non-Prides claims' original firms (Bernstein, Litowitz, Berger & Grossmann LLP, and Barrack, Rodos & Bacine) to "match" the bid and agree to the terms of what the Court found to be the lowest qualified bid. The identity of the competing bidders also remains under seal. Seven firms bid for appointment as lead counsel to the non-Prides claims, and two firms as to both the Prides and non-Prides claims. *In re* Cendant Corp. Litig. , 191 F.R.D. 387 (D.N.J. 1998). However, the Third Circuit recently decided that Judge Walls abused his discretion in sealing the bids and ordered the district court to unseal the bids as well as any other sealed documents related to the bids. *In re* Cendant Corp. Sec. Litig., No. 98-C-1664 (3d Cir. Aug., 8, 2001) (Order vacating sanction for violation of district court's sealing order and requiring unsealing of all previously sealed documents).

495. The identity of the winning bidder remains under seal. The court permitted the lead plaintiff for the Prides claims' original firm (Kirby, McInery & Squire) to "match" the bid and agree to the terms of what the Court found to be the lowest qualified bid. The identity of the competing bidders also remains under seal. Three firms bid for appointment as lead counsel for the Prides claims only, and two firms bid as to both the Prides and non-Prides claims. *In re Cendant Corp. Litig.*, 191 F.R.D. 387 (D. N.J. 1998). See discussion *supra* note 494 of the recent Third Circuit opinion ordering the bids to be unsealed.

Case Name, Docket No., and District	**Judge**	**Firm Selected as Class Counsel**	**Competing Bidders**
In re Lucent Techs., Inc., No. 00-C-621, D.N.J.	Lechner		
•Lucent I		Milberg Weiss Bershed Hynes & Lerach LLP	(1) Goodkind Labaton Rudoff & Sucharow, LLP (2) Leiff Cabraser Heimann & Bernstein, LLP
•Lucent II		Bernstein Litowitz Berger & Grossman LLP	(1) Barrack, Rodos & Bacine (2) Berman DeValerio & Pease, LLP (3) Law Offices of Bernard M. Gross, P.C. (4) Cauley Geller Bowman & Coates, LLP (5) Cohen, Milstein, Hausfeld & Toll, P.L.L.C. (6) Goodkind Labaton Rudoff & Sucharow LLP (7) Johnson & Perkinson (8) Kirby McInerney & Squire, LLP (9) Lovell & Stewart, LLP (10) Rodriguez & Richards, LLC (11) Schatz & Nobel, P.C. (12) Scott + Scott, LLC (13) Spector, Roseman & Kodroff (14) Weinstein Kitchenoff Scarlato & Goldman, Ltd. (15) Weiss & Yourman (16) Wolf Haldenstein Adler Freeman & Herz LLP

Case Name, Docket No., and District	**Judge**	**Firm Selected as Class Counsel**	**Competing Bidders**
In re Auction Houses Antitrust Litig.,[496] No. 00-C-948, S.D. N.Y.	Kaplan	Boies, Schiller & Flexner, LLP	(1) Abbey, Gardy & Squitieri, LLP (2) Beatie & Osborn, LLP (3) Bernstein, Litowitz, Berger & Grossman LLP (4) Bradley, Arant, Rose & White, LLP (5) Cohen, Milstein, Hausfeld & Toll, PLLC (6) Cotcheit, Pitre & Simon (7) The Furth Firm (8) Goodkind, Labation, Rudoff & Sucharow, LLP (9) Heins, Mills & Olsen, PC (10) Kaplan, Kilsheimer & Fox, LLP (11) Kirby, McInery & Squire LLP (12) Kohn, Swift, & Graf, PC (13) Leiff, Cabraser, Heimann & Bernstein, LLP (14) Levin, Fishbein, Sedran & Berman (15) Liebenberg, White, Sandals, Langer & Taylor LLP (16) Lovell & Stewart, LLP (17) Milberg, Weiss, Bershad, Hynes & LeRach LLP (18) Nechsler, Harwood, Halebian & Feffer, LLP (19) Pomerantz, Hauder, Block, Grossman & Gross LLP (20) Rabin & Peckel LLP (21) Reinhardt & Anderson (22) Shapiro, Haber & Urmy, LLP (23) Sussman, Godfrey LLP

496. Although Judge Kaplan has not released a list of the competing bidders, he permitted us to obtain the list by asking the clerk to provide us with the firm names if they were listed somewhere on the outside of the envelopes containing the bid proposals.