UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEIN LAW FIRM
David M. Nieporent (DN-9400)
25 Philips Parkway
Montvale, New Jersey 07645
(201) 391-0770
Fax (201) 391-7776
dnieporent@stein-firm.com

John J. Pentz, Esq.
Class Action Fairness Group
2 Clock Tower Place, Suite 260G
Maynard, MA 01754
Phone: (978) 461-1548
Fax: (707) 276-2925
Clasaxn@earthlink.net

Attorneys for Class Member/Objector
David T. Murray

SHAWN SULLIVAN, et al. **Plaintiffs** **v.** **DB INVESTMENTS, INC., et al.** **Defendants**	Civil Action No. 04-02819 (SRC) **OBJECTION TO REQUEST FOR ATTORNEY's FEES AND NOTICE OF INTENT TO APPEAR**

OBJECTION TO REQUEST FOR ATTORNEY'S FEES AND NOTICE OF INTENTION TO APPEAR OF CLASS MEMBER DAVID MURRAY

Class member David T. Murray, 431 Bunker Hill Street, Unit #3, Charlestown, MA 02129, hereby objects to the proposed class action settlement of this action and the request for attorney's fees for the following reasons. Class member Murray intends to appear and argue at the fairness hearing scheduled for April 14, 2008 through his undersigned counsel. Mr. Murray resided at the above address as of October 1, 2007.

Mr. Murray is a member of the Indirect Purchaser Consumer Subclass. He purchased the following Diamond Jewelry Products from business entities other than a Defendant during the class period:

Diamond Jewelry	Date of Purchase	Purchase Price	Place of Purchase
Necklace	1999	Approx. $1500	Boston, MA
Ring	2001	Approx. $10,000	Boston, MA
Earrings	2003	Approx. $2500	Boston, MA

See Affidavit of Class Member David Murray submitted herewith.

I. The 25% Fee Recommended By Special Master Wolin Is An Excessive Attorney's Fee In This Circuit.

Class counsel's request for attorney's fees of $73.15 million (25% of the $295 million settlement fund less expenses), is clearly in excess of the least amount necessary to litigate the case effectively. When measured against recent precedents in this and other Circuits, the requested fees are clearly unreasonable and excessive.[1]

The chart of attorney's fee awards compiled by Class Action Reports in 2003 (attached hereto as *Exhibit A*) reflects an average percentage fee in cases that settle for over $100 million of 15%. A 15% attorney's fee in this case would amount to $43,890,000, which represents a lodestar multiplier of 2, which is right in the middle of the range noted in *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 772, 742 (3d Cir. 2001).

[1] Objector Murray concurs with Special Master Wolin's recommendation that this Court not award Class Counsel any portion of the interest that has accrued on the settlement fund since it was established, for the reason that Class Counsel had and has no right to any portion of the settlement fund until this Court enters an order awarding fees. Class Counsel should receive interest on its fee award from the date of entry of judgment awarding fees, as is customary. With regard to Special Master Wolin's recommendation that Class Counsel be eligible to receive unclaimed funds remaining after claims are paid, Objector Murray expresses no opinion.

Moreover, a multiplier of 2 is the maximum multiplier permitted under applicable New Jersey state law.[2] As noted by Special Master Wolin, "plaintiffs had to rely on state law causes of action for the Indirect Purchaser Class damages claims." Report & Recommendation at p. 22. Under relevant New Jersey law, the maximum multiplier that may be awarded under any New Jersey statute that contains a fee-shifting provision is 2. *Rendine v. Pantzer*, 141 N.J. 292, 343 (1995)[3]. Ordinarily, contingency enhancements in New Jersey cases should range between five and fifty percent of the lodestar fee; "with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id*. The New Jersey Supreme Court in *Rendine* did allow for the possibility of a multiplier of 2 in a "rare and exceptional case in which the risk of nonpayment has not been mitigated at all." *Id*.

A 15% fee award would be in line not only with the 1120 cases included in the Class Action Reports chart attached hereto as *Exhibit A*, but also with the level of multipliers awarded by New Jersey courts in the most rare and exceptional cases. Whether this is one of those cases, as Special Master Wolin seems to suggest, or whether the settlement is more a result of lucky timing and a decision by DeBeers to have a United States presence in a changing diamond industry, as argued by the July 14, 2004 Washington Post article referenced in SM Wolin's Report and Recommendation at p. 33,

---

[2] In cases of diversity and pendant jurisdiction, federal courts apply state substantive law to determine the method of calculating attorney's fees. *Mangold v. California Public Utilities Com'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *Northern Heel Corp. v. Compo Indus.*, 851 F.2d 456, 475 (1st Cir. 1988); *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992).

[3] This is a case brought pursuant to fee-shifting statutes, New Jersey's consumer protection and antitrust acts, N.J.S.A. §56:8-1, *et seq.*, and therefore the guidelines set forth in *Rendine* clearly apply here.

a 15% fee and multiplier of 2 rewards class counsel at the maximum level permitted under applicable New Jersey law. Class counsel may not request any more.

Furthermore, the Second Circuit recently announced the principle that, in class action cases, fees should be set at "the minimum necessary to litigate the case effectively." *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Albany*, 484 F.3d 162 (2d Cir. 2007). In *Arbor Hill* (a case on which retired Justice Sandra Day O'Connor sat by designation), the Second Circuit emphasized that "a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively," *id*. at 169, and that "the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively." *Id*. at 164.

Before *Arbor Hill*, district courts in the Second Circuit and elsewhere focused on the theoretical *upper limit* on attorney's fees, beyond which the fees would shock the conscience, violate the Rules of Professional Conduct, or otherwise be "absurd." *See In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d at 522* (describing requested fee of $609 million, which was almost ten times hourly rate, as "absurd"). In light of *Arbor Hill*, however, it is clear that the entire procedure that a district court should follow in trying to ascertain a minimum reasonable fee has fundamentally changed. Rather than starting with class counsel's requested amount of fees and (possibly) working down from there, a district court should instead start at zero and move up incrementally until it arrives at a number that is not unfair to class counsel.

"The rationale for the [common fund] doctrine is an equitable one; it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its costs." *Goldberger v. Integrated Resources , Inc.* , 209 F.3d 43, 47 (2d Cir. 2000)(*citing Mills v.*

Electric Auto-Lite Co., 396 U.S. 375, 392(1970)). Therefore, a common fund attorney's fee award should be set at a level that just eliminates the last bit of unjust enrichment to the class beneficiaries. To award even one million dollars more to the attorneys would result in unjust enrichment of the attorneys at their clients' expense, something that was never contemplated by the common fund exception.

When a district court is evaluating a request for attorney's fees in a common fund case, it should endeavor to determine that point at which the class is no longer being unjustly enriched, and the attorneys are not receiving a windfall. In fulfilling its duty, the court must explain why an attorney's fee that is less than the one requested by class counsel is inadequate to completely disgorge the class of any unjust enrichment.

Class counsel have demanded a fee of $73.15 million, but have given no reasons why this Court should approve a fee of that magnitude other than the fact that they have asked for it, an entirely arbitrary and circular methodology. Class counsel point out that the resulting percentage and multiplier are within ranges previously approved by some courts, but that too proves nothing in this Circuit. The import of *Arbor Hill* is that, assuming that there is a so-called "range of reasonableness," the fee awarded must be at the lower limit of that range.

Class counsel must show that the fee they have requested is *the lowest one* that will adequately compensate them. In other words, they must show that if class counsel were to receive $44 million or even $55 million they would be so undercompensated that they would have declined to take the case in the first place. Class counsel cannot make this argument. A multiplier of 2 – *i.e.*, compensation at the rate of $1136 per hour for each hour worked by every partner, associate, paralegal and contract attorney for a period of seven years – is more than ample compensation for what class counsel have

accomplished here. As the Second Circuit stated in *Wal-Mart Stores v. Visa USA Inc.*, 396 F.3d 96, 123 (2d Cir. 2005), "If this fee award amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases."

The burden is on Class Counsel to show that a fee award of 15% of $292 million, or $44 million, is somehow unfair to them and an unjust windfall to the Class. Class Counsel has not and cannot do that. Class Counsel cannot argue that a lodestar multiplier of 2 fails to compensate them for the work performed in this case and the risk assumed. That is a *very healthy* rate of return on the investment made in this case.

Finally, the most practically significant reason for ensuring that the fee award is no more than the minimum necessary in this case is that there will likely be a *pro rata* reduction of claim amounts. Claimants like David Murray are highly likely to have their claims reduced if there are insufficient funds to pay all of the claims at their face values. Awarding a reasonable fee of $44 million instead of the requested $73 million will go a long way toward minimizing any reductions that may be required, and maximizing the claimants' recoveries. Because an award of $73 million is not necessary in the context of this case to avoid unfairness to class counsel, the Court should not award any more than the minimum reasonable fee to class counsel in order to avoid taking more money than necessary out of the class members' pockets.

II. Class Counsel Should Receive No Multiplier On Lodestar Generated Since the Establishment of the Settlement Fund.

A further factor supporting the reasonableness of an overall multiplier of 2 in this case is the fact that this case has been settled since late 2005. The settlement effectively eliminated all risk of non-recovery in the case, and guaranteed Class Counsel a fee in the

amount of at least its lodestar. The matter of intra-class allocation of the settlement fund remained to be worked out, but that process did not threaten the basic fact that there was now $295 million available to satisfy the class' claims and to pay attorney's fees. Post-settlement attorney time should receive no multiplier. *Bowling v. Pfizer*, 132 F.3d 1147, 1151 (6th Cir. 1998)("Regarding contingency, this case has settled so there is no risk… Class and special counsel do not merit the benefit of a multiplier.").

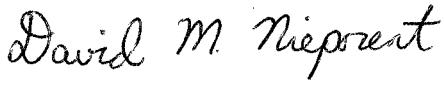
Special Master Wolin did not remark upon this aspect of the case, nor did he provide the total lodestar amounts generated pre-settlement and post-settlement in his Report and Recommendation. However, there is no question that a significant portion of Class Counsel's lodestar was generated post-settlement in connection with the allocation mediation. Assuming that one-half of Class Counsel's total lodestar amount was incurred post-settlement (not an unreasonable assumption), and that a fee of 15%, or $44 million, is awarded, that would mean that the effective multiplier on pre-settlement time is 3, even though the overall multiplier would turn out to be 2.

Rounding off for purposes of simplicity, if Class Counsel generated $11 million in lodestar prior to reaching settlement, and that time receives a multiplier of 3, that would amount to $33 million for pre-settlement attorney work, reflecting the high degree of pre-settlement risk. The $11 million generated post-settlement, while related to necessary and important work, was hardly risky, and therefore should appropriately receive a multiplier of one, for a total of $11 million. Adding the $33 million for pre-settlement time to the $11 million in post-settlement compensation equals $44 million, a 15% fee that represents an *overall* lodestar multiplier of 2, but an *effective* multiplier for the risky part of the case of 3.

CONCLUSION

For the foregoing reasons, this Court should award Class Counsel a total reasonable attorney's fee of no more than 15% of the fund, and should apply no multiplier to any time incurred by Class Counsel after the date the settlement fund was established.

Respectfully submitted,
David T. Murray,
By his attorneys,



David M. Nieporent, Esq.
STEIN LAW FIRM
The Empire Corporate Center
25 Philips Parkway
Montvale, New Jersey 07645
Telephone (201) 391-0770
Fax: (201) 391-7776
dnieporent@stein-firm.com

John J. Pentz, Esq.
Class Action Fairness Group
2 Clock Tower Place, Suite 260G
Maynard, MA 01754
Phone: (978) 461-1548
Fax: (707) 276-2925
Clasaxn@earthlink.net

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2008 I mailed the foregoing objection by ordinary U.S. mail, postage prepaid to the following address:

Diamonds Claims Administrator
PO Box 9432
Minneapolis, MN 55440-9432

David M. Nieporent

David M. Nieporent