UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

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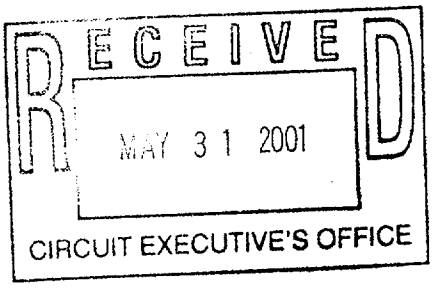

Ms. Toby Denise Slawsky
Circuit Executive
22409 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Third Circuit Task Force on Selection of Counsel in Class Actions

Dear Ms. Slawsky:

We are writing in advance of the Task Force's conclusion of its public hearings on June 1, 2001, to provide certain materials that are responsive to the list of questions to be addressed by the Task Force or that otherwise relate to the issue of selection of counsel.

In December 2000, the Securities and Exchange Commission filed an amicus curiae brief in In re Cendant Corp. Litig., Nos. 00-2769, 00-3653 (3d Cir.) that addresses the issue of the use of auctions to select, and set a fee schedule for, lead counsel in cases under the Private Securities Litigation Reform Act of 1995, the subject of Task Force Question 4. We understand that the Task Force already has a copy of that brief.

The Commission has also filed amicus briefs on the appropriateness of appointing multiple lead counsel in securities class actions. It did so at the request of Judge Alfred J. Lechner, Jr., in In re Milestone Scientific Sec. Litig., 187 F.R.D. 165 (D.N.J. 1999), and of Judge Joyce Hens Green in In re Baan Co. Sec. Litig., 186 F.R.D. 214 (D.D.C. 1999) (appending copy of SEC brief to the opinion). Enclosed is the Milestone Scientific brief. Please note that page 10, note 5 of that brief discusses an issue raised in Task Force Questions 1(e) and 3(g) about compensation of counsel who do significant work investigating and bringing meritorious securities actions but are not appointed lead counsel. The Milestone and Baan briefs are similar, except that the latter discusses (186 F.R.D. at 234 n.32) the issue of independence between a class representative and class counsel at slightly greater length.

Finally, the Cendant brief describes the role that Congress contemplated that the lead plaintiff would perform under the Reform Act. The Task Force should be aware that in participating in cases as amicus curiae the Commission has encountered situations that depart

from that model, with implications for the selection of lead counsel. We thus enclose our February 2000 brief in In re Moore, No. 00-70006 (9th Cir.) (see pp. 5-9, 17-18 n.10, 24-25).

We hope that these materials will assist the Task Force in its important work.

Respectfully submitted,

David M. Becker
General Counsel

Enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE MILESTONE SCIENTIFIC SECURITIES LITIGATION	:	No. 98-3404 (AJL)
VIVIAN BOLLAG, et al.,	:	
Plaintiffs,	:	
v.	:	No. 98-2854 (AJL)
LEONARD OSSER, et al.,	:	
Defendants.	:	

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

HARVEY J. GOLDSCHMID (HG 0499)
General Counsel

ERIC SUMMERGRAD (ES 3628)
Principal Assistant General Counsel

LUIS de la TORRE (LT 5440)
Attorney

Securities and Exchange Commission
450 5th Street, N.W. (Stop 6-6)
Washington, D.C. 20549
(202) 942-0813 (de la Torre)

Of Counsel
PAUL GONSON
Solicitor

Dated: December 3, 1998

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UNITED STATES DISTRICT COURT
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MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

INTRODUCTION AND SUMMARY OF THE COMMISSION'S POSITION

Pursuant to the Court's letter and letter opinion dated October 22, 1998, the Securities and Exchange Commission respectfully submits this memorandum, as amicus curiae, to address, as requested by the Court, the issue of "the appropriateness of multiple lead counsel in a securities fraud class action."

This issue is of importance because the selection of lead counsel can affect whether private securities litigation is prosecuted in an effective and efficient manner. The Commission has long expressed the view that legitimate private actions under the federal securities laws serve an important role, both because they work to compensate investors who have been harmed by securities law violations and because, as the Supreme Court has repeatedly recognized, they "provide 'a most effective weapon in

the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985), quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

In adopting the Private Securities Litigation Reform Act of 1995 ("Litigation Reform Act" or "Act"), codified at Section 21D of the Securities Exchange Act of 1934, 15 U.S.C. 78u-4, Congress affirmed that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses." It further stated that private lawsuits "promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." Joint Explanatory Statement of the Committee of Conference, Conference Report on Securities Litigation Reform, H.R. Rep. No. 104-369, at 31 (1995) ("Conf. Rep.").

One of the objectives of the Litigation Reform Act's provisions for the appointment of lead plaintiff was to ensure more effective representation of investors' interests in private securities class actions by transferring control of securities class actions from lawyers to investors. Conf. Rep. at 32-35. The Act's provision governing the selection and retention of lead counsel is an important part of that effort. Id. at 35.

The Act provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel

to represent the class." 15 U.S.C. 78u-4(a)(3)(B)(v). This provision gives the lead plaintiff the initial choice of counsel, and ensures that only in very unusual circumstances will the lead plaintiff have to accept counsel that it did not choose for itself. The provision otherwise preserves the court's traditional discretion to evaluate the likely effectiveness of proposed class counsel for the protection of the class.

The Commission believes that courts generally should defer to the lead plaintiff's choice of counsel (e.g., except in very unusual circumstances, courts should not force a lead plaintiff to retain counsel it has not selected itself). Particular problems may arise from multiple counsel arrangements, however, and courts should actively exercise their discretion to review proposals for such arrangements. Although appointment of more than one counsel may be appropriate in circumstances where a single firm lacks the resources or expertise to manage the litigation, appointment of multiple counsel can raise significant concerns. These include impairment of the lead plaintiff's ability to manage the litigation and supervise counsel effectively, duplication of effort, lack of coordination among counsel, delay of the litigation, and increase in attorneys' fees. The presumptive lead plaintiff should provide the court with full information about the structure and intended functioning of the proposed counsel group and efforts it has made to avoid the potential problems with multiple counsel.

A particularly important consideration in evaluating a multiple counsel proposal is that the lead counsel have sufficient resources and flexibility to manage the litigation effectively for the class. Multiple counsel may be justified where the firms provide necessary resources, skill, experience, or expertise. The court should not rely on, or give weight to, generic asserted benefits such as assuring input from more rather than fewer class members or lawyers or avoiding disputes among competing lead plaintiff movants and among their counsel.

The Commission believes that another important consideration in evaluating the proposal is the possibility of a conflict of interest involving one or more of the chosen counsel. If the circumstances justify particular confidence in the lead plaintiff's independence and ability to make choices, then deference to those choices would be appropriate. Where, however, it appears that the prospective lead plaintiff has not played an active, effective role in choosing counsel or that the relationship between the plaintiff and one or more of its chosen law firms is based on factors other than the merits of the firms, then greater scrutiny is warranted.

Finally, the Commission believes that the court should place appropriate conditions on the appointment of multiple counsel and indicate a willingness to revisit the issue.

BACKGROUND

This is a consolidated class action alleging that Milestone Scientific, which develops, markets, and sells dental products,

committed securities fraud in promoting one of its products. A group of members of the purported plaintiff class, claiming losses of approximately $10 million, filed the only motion to be appointed lead plaintiff under the Litigation Reform Act.

The group consisted of (1) an individual who is the chairman of the board, chief executive officer, and director of a mutual fund and who is the owner and one of two limited partners of an equity management firm that is the general partner of the mutual fund; (2) his wife; (3) the mutual fund; and (4) the equity management firm. The motion was unopposed, and, according to the group, is "supported by plaintiffs in 14 of the 16 pending actions and by additional class members who purchased over 400,000 shares and suffered over $3.8 million in losses." August 17, 1998 Memorandum of Law ("Mem.") at 4.

The group sought appointment as lead counsel of an "executive committee" of three law firms, with one of the firms serving as the "chair" of the committee. 1/

On October 22, 1998, the Court appointed the group as lead plaintiff, 2/ but determined that "[a]t this stage, the [group]

1/ Although the group also sought appointment of a fourth firm as "liaison counsel," the members of the proposed executive committee have since withdrawn the proposal for a liaison counsel. See Letter dated November 11, 1998 from Abbey, Guardy & Squitieri to the Court, with attached proposed order; Memorandum of Law dated November 11, 1998, with attached proposed order, submitted by Cohen, Milstein, Hausfeld & Toll and Schoengold & Sporn.

2/ The Court states that its opinion is not to be published. The Commission urges the Court to consider publishing its opinion, given the thoroughness of the Court's analysis, and the importance of guidance under the Litigation Reform Act.

has not demonstrated sufficient need justifying the approval of multiple lead counsel." Opinion at 43. The Court ordered additional briefing from the lead plaintiff "addressing the factual and legal bases for the approval of multiple lead counsel, as proposed." October 22, 1998 letter to Commission; see Opinion at 41-45.

ARGUMENT

A. The Litigation Reform Act Contemplates that the Court Will Exercise Control Over the Selection of Lead Counsel.

Although the Commission takes no position on the whether the specific lead counsel arrangement proposed in this case should be approved, the Commission believes that it is proper and, indeed, of critical importance for a court to inquire into the appropriateness of multiple lead counsel in the circumstances of each securities class action in which multiple counsel is proposed. The nature and extent of this inquiry will vary with the circumstances of each case and may take as much or as little time as appropriate. The Litigation Reform Act provides detailed procedures and criteria for the appointment of lead plaintiff, gives a large role in the choice of lead counsel to the lead plaintiff, and ensures that only in very unusual circumstances will that lead plaintiff have to accept counsel that it did not itself choose. However, the Act otherwise preserves the court's traditional discretion to evaluate counsel for the protection of the class. See 15 U.S.C. 78u-4(a)(3).

The Act provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel

to represent the class." 15 U.S.C. 78u-4(a)(3)(B)(v). One court has stated that this provision "[g]iv[es] the Lead Plaintiff primary control for the selection of counsel" and "was a critical part of Congress' effort to transfer control of securities class actions from lawyers to investors." Gluck v. Cellstar Corp., 976 F. Supp. 542, 550 (N.D. Tex. 1997).

The overall purpose of the lead plaintiff provisions was "to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class." Conf. Rep. at 32; see, e.g., Ravens v. Iftikar, 174 F.R.D. 651, 654 (N.D. Cal. 1997) ("The Reform Act affords large, sophisticated institutional investors a preferred position in securities class actions. * * * Congress sought to eliminate figurehead plaintiffs who exercise no meaningful supervision of litigation."). Congress sought to eliminate the practice that occurred at times where counsel effectively chose itself as lead counsel by selecting a plaintiff and initiating litigation. 3/

3/ See Fischler v. AmSouth Bancorporation, 1997 WL 118429, at *1 (M.D. Fla. Feb. 6, 1997); Conf. Rep. at 35 ("[T]his lead plaintiff provision solves the dilemma of who will serve as class counsel[:] * * * the plaintiff will choose counsel rather than, as is true today, counsel choosing the plaintiff."); Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2062-63, 2098 (1995) ("Weiss & Beckerman") (before passage of the Litigation Reform Act courts would "generally appoint as lead counsel either the lawyer who files the first complaint or a lawyer elected by all the lawyers who have filed complaints"). Weiss & Beckerman was cited in the legislative history of the Act as "provid[ing]

(continued...)

Although the lead counsel provision gives the lead plaintiff a large role in the choice of lead counsel, and contemplates that a court would impose additional or different counsel on the lead plaintiff only in very unusual circumstances, the selection of counsel remains "subject to the approval of the court." The legislative history of the provision makes clear that Congress "does not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class." Conf. Rep. at 35. As noted in In re Cendant Corp. Litig., 182 F.R.D. 144, 149-150 (D.N.J. 1998), "[i]n contrast to the strictly defined procedures and considerations that prescribe the determination of lead plaintiff * * * the Court's approval [of the proposed lead counsel] is subject to its discretionary judgment that lead plaintiff's choice of representative best suits the needs of the class," and "the Court should not rely solely on th[e] [lead plaintiff's] judgment" in that regard.

B. The Appointment of Multiple Lead Counsel May Allow for the Pooling of Resources and Expertise, But May Also Engender Conflict, Delay, and Inefficiency in Class Action Litigation.

There is no question that the appointment of multiple counsel may at times promote the effective management of class action litigation. A single firm may lack the resources to prosecute the action. For example, in Oxford Health Plans, Inc.

3/(...continued)
the basis for the 'most adequate plaintiff' provision." Report on the Private Securities Litigation Reform Act of 1995, S. Rep. No. 104-98, at 11 n.32 (1995).

Sec. Litig., 182 F.R.D. 42, 46 (S.D.N.Y. 1998), the court was "concerned with the potential costs and expenses of th[e] litigation" and with "the resources of the plaintiffs' counsel in order to support what could prove to be [the] costly and time-consuming litigation." After appointing "co-lead plaintiffs" (a decision with which the Commission disagrees), the court appointed as lead counsel each lead plaintiff's chosen law firm, two of which it described as "small" firms. The court appears to have determined that "[i]n light of the magnitude of this case * * * the sharing of resources and experience" was necessary "to ensure that the litigation will proceed expeditiously against Oxford and the experienced counsel it has retained to represent it." Id. at 49. 4/

Additional firms may not only add resources, but may bring particular substantive expertise to a case. For example, a firm

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4/ See generally In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994) (explaining that "plaintiff law firms, which usually take cases on a contingent fee basis, join together to prosecute major complex cases because doing so allows them to leverage their resources and spread the risks of unfavorable outcomes"); Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 546-47 (1991) ("Alexander") ("Plaintiffs' firms are quite small in comparison to defense firms, which frequently have hundreds of lawyers. * * * Several plaintiffs' firms are involved in any case, in effect forming an 'ad hoc firm' for purposes of the litigation. The firms that specialize in securities class actions * * * maintain a portfolio of such cases at any given time. Securities cases are large, complex and expensive to litigate, and take a long time to resolve. The number of such large cases a small firm can actively litigate at once is limited. * * * For most plaintiffs' firms, taking even one large case to trial could seriously strain the firm's resources.") (footnotes omitted).

may have done extensive pre-filing investigation of a case and filed a well-drafted complaint on behalf of a client that was not selected as lead plaintiff. Such a firm may therefore possess considerable knowledge and experience about the case that would be of benefit in assuring its efficient prosecution. That firm might offer unique advantages "[t]o the extent this experience could be translated into a benefit to the class" and to the extent selection of the firm was otherwise consistent with effective and efficient litigation of the case. In re Wells Fargo Sec. Litig., 157 F.R.D. 467, 470 (N.D. Cal. 1995). 5/

5/ The Commission does not believe that a court should give any weight in evaluating a multiple counsel proposal (or later fee request) to which firm simply filed a complaint first or recruited the most clients in the case. The Commission does believe, however, that the court can and should award appropriate compensation to law firms, whether or not they have been selected as lead counsel, that do significant work investigating and bringing meritorious securities actions. See Conf. Rep. at 33 (Congress sought to encourage "diligence in drafting complaints" and "thoroughly researched" complaints); Weiss & Beckerman, 104 Yale L.J. at 2108-09 (to "counter any hesitation [an attorney] might have about doing the prefiling investigation and other work necessary to prepare a complaint," if that attorney "is not retained by the lead plaintiff, the court should award her a reasonable fee for her efforts whenever the case results in a recovery for the plaintiff class"); see generally In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768, 820 n.39 (3d Cir.) ("The common fund doctrine provides that a private plaintiff, or a plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees."), cert. denied, 516 U.S. 824 (1995); Horizon/CMS Healthcare Corp. Sec. Litig., 3 F. Supp.2d 1208, 1214-15 (D.N.M. 1998) (awarding fees to counsel for institutional investors which successfully objected to amount of lead counsel's fees).

On the other hand, appointment of multiple class counsel can fail to serve the interests of the class for various reasons. The greater the number of lead counsel, the more difficult it is likely to be for the lead plaintiff to manage the litigation and supervise the lawyers. In one pre-Litigation Reform Act case, for example, the court felt the need to caution that "[a]lthough '[t]he functions of lead counsel may be handled by one person or by several,' still 'the number should not be so large as to hamper the unity of direction that is needed.'" See Ballan v. Upjohn Co., 159 F.R.D. 473 (W.D. Mich. 1994) (quoting Manual for Complex Litigation (Second) § 20.22 at 16). In "a case with eight law firms and one plaintiff," that court found that the three co-lead counsel had not "satisf[ied] the court that the [lead] plaintiff was willing and able to supervise so many firms." Id. In its report on the first year of practice under the Act, the Commission's staff identified two cases brought after the Act in which lead plaintiffs had selected 30 or 33 law firms as lead counsel, and noted that "even the most active institutional investor may have difficulty controlling thirty or more law firms." Office of the General Counsel, Securities and Exchange Commission, Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 at 51 (Apr. 1997). 6/

6/ The Report noted that the "phenomenon of multiple law firms representing the class was a familiar pattern prior to the Reform Act." Id.

Even prior to the Litigation Reform Act, courts expressed concern that appointing multiple class counsel could cause duplication of effort, increased attorneys' fees, friction or lack of coordination among counsel, and delay of the litigation. 7/ Additional concerns associated with multiple counsel include unnecessary complication of the litigation, diminished accountability for its conduct, diminished incentives for each firm to make its optimum contribution to the litigation, and a reduction in merits-based competition among firms to

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7/ See, e.g., Percodani v. Riker-Maxson Corp., 51 F.R.D. 263, 265 (S.D.N.Y. 1970) ("this Court sees no reason to saddle the plaintiff class with the burden of additional counsel fees and the added confusion which the appointment of co-lead counsel would bring"), aff'd, 442 F.2d 457 (2d Cir. 1971); Wells Fargo, 157 F.R.D. at 468 ("Because a well-advised class in this case would seek to avoid unnecessary duplication of effort, the court earlier decided that only one firm should be selected to represent the class."); Ballan, 159 F.R.D. at 491 (court "expect[s] co-lead counsel to satisfy [it] that the remaining plaintiff had determined the class would not be burdened by any unnecessary expenses arising from the presence of a legion of lawyers"); Housler v. First National Bank of East Islip, 524 F. Supp. 1063, 1068 (E.D.N.Y. 1981) (stating that if "the necessity for dual representation" of the class arose the court would inquire into "whether an appropriate understanding with all attorneys could be reached regarding the avoidance of duplication of effort").

represent the lead plaintiff. 8/ These concerns have continued to be expressed since adoption of the Act. 9/

8/ See, e.g., In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994) (the "common practice for plaintiff firms to join together * * * to prosecute big cases * * * effectively extinguishes competition among the plaintiff lawyers and therefore harms the interests of the class"); In re Revco Sec. Litig., 142 F.R.D. 659, 670 (N.D. Ohio 1992) (noting that "the presence of numerous counsel for the various plaintiffs" would "complicate the management of this case and waste judicial resources"); Ballan, 159 F.R.D. at 491 ("[e]ach of the firms designated as 'co-lead' counsel was quick to point the finger at someone else [concerning a mistake], and none assumed ultimate accountability"); John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 260-61 (1983).

9/ See, e.g., In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 158 (S.D.N.Y. 1997) (allowing lead plaintiff to select two law firms as co-lead counsel "provided that there is no duplication of attorneys' services, and the use of co-lead counsel does not in any way increase attorneys' fees and expenses"); Cendant, 182 F.R.D. at 151 (denying "all motions for appointment of liaison counsel" because "[q]ualified lead counsel will be surely capable of performing these ministerial tasks" and the court "finds no need to involve another law firm in this matter"); Reiger v. Altris Software, Inc., 1998 U.S. Dist. LEXIS 14705, at *15-16, *18 (S.D. Cal. Sept. 11, 1998) (expressing concern that enlarging the number of lead counsel through appointment of "co-lead plaintiffs" could "unnecessarily increase the time and expense spent on preparing and litigating the case," where the presumptive lead plaintiff "already has three co-counsel" and "[a]ppointing [a co-lead plaintiff] would add two more counsel") (citation omitted); Oxford, 182 F.R.D. at 50 (appointing co-lead counsel "with the understanding that there shall be no duplication of attorney's services and that the use of [three] co-lead counsel will not in any way increase attorney's fees and expenses"; stating that "[t]he efforts of the Executive Committee [led by the co-lead counsel] are to be conducted economically and without duplication," delay of the progress of the litigation, or unnecessary enlargement of expenses); In re Reliance Acceptance Group, Inc. Sec. Litig., 1998 WL 388260, at *5 (W.D. Tex. June 29, 1998) ("Counsel is warned, however, that there should be no duplication of services, and approval of three law firms should not be considered as a license to

(continued...)

C. The Courts Should Consider at the Outset of the Litigation The Appropriateness of Multiple Counsel.

The Commission believes that it is appropriate and, in general, necessary in terms of the effectiveness of the litigation effort for this Court to address the foregoing concerns at the lead counsel selection stage. Some courts have suggested, however, that these concerns can be dealt with by alternative means. For example, in Nager v. Websecure, Inc., 1997 WL 773717, at *1 (D. Mass. Nov. 26, 1997), the court stated that "[t]here should be no concern that duplicative legal efforts will result in higher legal costs to the class because the statute limits total attorneys' fees to 'a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.'" In Zuckerman v. FoxMeyer Health Corp., 1997 WL 314422, at *2 (N.D. Tex. Mar. 28, 1997), the court also seemed to disregard concerns about multiple class counsel. It stated that "[a]s in any other litigation conducted in the Northern District of Texas, the attorneys for both sides are under a continuing obligation to comply with [a case establishing standards of litigation conduct to be observed in civil actions in the District] and the local Rules," citing Civil Justice

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9/(...continued)
artificially inflate attorney's fees."); Lax v. First Merchants Acceptance Corp., 1997 WL 461036, at *7 (N.D. Ill. Aug. 11, 1997) (appointing two law firms as co-lead counsel, "provided that there is no duplication of attorneys' services, and the use of co-lead counsel does not in any way increase attorneys' fees and expenses.").

Expense and Delay Reduction Plan and 28 U.S.C. 1927 ("Counsel's liability for excessive costs").

The Commission believes that the existence of other methods of addressing the issues of cost and delay does not warrant disregarding these issues at the time the court appoints counsel. These other methods of controlling cost, delay, and inefficiency are less effective than an approach that also includes evaluation of lead counsel proposals at the outset. No rule's dictate can completely overcome the inefficiency, added cost, and delay inherent in an inappropriate multiple counsel arrangement. And although, as was true prior to the 1995 Act, courts should review settlements and requests for attorneys' fees with rigor at the end of the litigation, early review will go far to avoid the inherent inefficiency, expense, and delay in an inappropriate counsel arrangement. Post hoc review of a proposed settlement or attorneys' fee award is inevitably difficult and time-consuming, 10/ and is no substitute for having in place an efficient and effective counsel arrangement in the first place.

For these reasons, the Commission agrees with this Court that a prospective lead plaintiff should provide the court with full information about its multiple counsel arrangement. See Opinion at 43-44. The plaintiff should describe the lines of

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10/ See Horizon, 3 F. Supp.2d at 1212-13 (court "reluctant to attempt a detailed, retroactive analysis of the work allocation made by lead counsel"); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 44-50 (1991).

authority among the proposed co-counsel, the responsibilities and duties of each, and efforts it has made to avoid problems such as loss of direction of the litigation, duplication of effort, lack of coordination, and increase in costs. Where, as in this case, proposed lead counsel are described as an "executive committee," the court should inquire about plans for the use of additional counsel and the likely effectiveness of such plans. 11/

D. In Evaluating Proposed Lead Counsel, the Court Should Take into Account the Nature of the Litigation, the Counsels' Resources and Expertise, the Circumstances Under Which a Group of Counsel Was Formed, and Conflicts of Interest, but Should Not Use Multiple Counsel as a Means of Assuring Diversity of Representation.

The court, in exercising its discretion to evaluate the multiple counsel proposal, should carefully consider the nature, magnitude, and likely demands of the case. The lead counsel must have sufficient resources and flexibility to manage the litigation effectively for the class. It would therefore be relevant whether the multiple counsel proposal includes "a large, well-financed firm plainly able to handle the litigation without the assistance of another firm" or instead consists of "two or

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11/ One commentator has argued that courts should "encourage greater hierarchical control" within a committee of class counsel "so that the lead counsel, once selected, does not have to negotiate continuously with various constituencies, or to award them patronage in return for their votes." John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 909 (1987). According to this view, "[o]nce freed of 'political' constraints, the plaintiffs' lead counsel could prune deadwood from the 'ad hoc firm' but could also invite in other attorneys and firms in order to achieve efficient risk-sharing." Id.

more firms otherwise too small to take on class counsel responsibilities." See In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994).

Where the court is less concerned about individual law firms' resources and where a number of plaintiffs' attorneys are available to provide any necessary assistance to lead counsel, appointment of fewer or a single lead counsel might be warranted. See, e.g., Wells Fargo, 156 F.R.D. at 227 (appointing one law firm as lead counsel and stating that the firm could "farm[] 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"); Malin v. Ivax Corp., No. 96-1843, Order at 8 (S.D. Fla. Nov. 1, 1996) (appointing two co-lead counsel with the "expect[ation] that counsel retained by the [lead plaintiff] will utilize the talents and expertise of the various firms who were retained by the other plaintiffs in this action in their position as lead counsel"). Of course, lead counsel should be able to explain to the court why and how the use of additional law firms promotes the effective, efficient prosecution of the litigation, rather than serving the interests of the law firms.

However, because the Commission agrees with this Court that the Litigation Reform Act is intended to "empower[] a unified force to control the litigation," Opinion at 38, the Commission believes that certain purported rationales for appointing multiple counsel are not valid. In one case, a magistrate judge

seemed to suggest using the lead counsel provision as a back-door method of facilitating input from disparate class members that are not the lead plaintiff. See Chill v. Green Tree Financial Corp., 181 F.R.D. 398, 413 (D. Minn. 1998). It might similarly be suggested that the provision be used to avoid disputes over who should be lead plaintiff.

The Commission believes that such an approach works at cross-purposes with the provisions for selecting the lead plaintiff. In particular, it risks introducing disunity and dissipating the ability of the lead plaintiff to control the litigation. Nor is there cause for it, since the lead plaintiff has, by virtue of the Act's requirements, already been determined by the court to adequately represent the class. This does not mean, however, that lead counsel should not establish some mechanism for communication with members of the class other than the lead plaintiff; it merely means that assuring input or avoiding competition does not justify appointment of additional class members as lead plaintiffs or law firms as lead counsel.

The Commission also questions whether "it seems sensible to employ the [lawyer] 'committee' approach to minimize the potential for disputes about the direction of the litigation." Nager, 1997 WL 773717, at *1. An important purpose of the Act was to allow the lead plaintiff to direct the litigation. Any disputes over the direction of the litigation should be resolved by the lead plaintiff, and may merely be exacerbated if the lead plaintiff has to deal with disparate and contentious multiple

lead counsel. The goals of the Act should not be subordinated to the desire to avoid or minimize disputes among counsel. Indeed, a key goal of the Act was to lessen the influence of counsel in the process of selecting lead plaintiff and lead counsel.

Another important consideration in evaluating the multiple counsel proposal is the possibility that a conflict of interest, or other inappropriate factor, may intrude into the choice of counsel. If circumstances justify particular confidence in the lead plaintiff's independence and ability to choose counsel, deference to those choices would be appropriate.

Where, however, it appears that the prospective lead plaintiff has not played an active, effective role in choosing counsel or the relationship between the plaintiff and one or more of its chosen law firms is based on factors other than the merits of the firms, greater scrutiny is clearly warranted. For example, a law firm conceivably could make large political contributions to a decision maker at a prospective lead plaintiff which thereafter is appointed lead plaintiff; this would clearly warrant scrutiny from the court. See Elliott J. Weiss, The Impact to Date of the Lead Plaintiff Provisions of the Private Securities Litigation Reform Act, 39 Ariz. L. Rev. 561, 572 (1997) ("Weiss"). Thus, while deference to the judgment of the lead plaintiff may be appropriate where it is capable of managing

the litigation, and has acted in a manner that best serves the interests of the class, blanket deference is not. 12/

The court might find it useful in this regard to consider the relationship between each proposed counsel and the lead plaintiff and the circumstances under which that relationship was formed. Absent concerns about litigation skills, experience, or resources, a single law firm or cohesive team of firms representing a single client is likely to provide more effective representation than an ad hoc collection of firms assembled during the course of the litigation that represent (or represented) separate parties. Where a court has concerns about a multiple counsel arrangement, the court might therefore consider limiting lead counsel to the firm or firms representing the lead plaintiff at the outset of the litigation. This would be consistent with Congress' desire that the class benefit from the ways in which the lead plaintiff chooses, and negotiates with, its own counsel. See Cendant, 182 F.R.D. at 148 ("Indeed, one of the assumptions underlying the Reform Act's presumption of adequacy is that plaintiffs with the assets necessary to have

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12/ See Horizon, 3 F. Supp.2d at 1211 n.1, 1212 (contrasting "consortium" that "was constructed largely by counsel seeking the lead role in the litigation" with the Litigation Reform Act "model" of "shareholders who possess a sufficient financial interest in the outcome to maintain some supervisory responsibility over both the litigation and their counsel"); Raftery v. Mercury Finance Co., 1997 WL 529553, at *2 (N.D. Ill. Aug. 15, 1997) (expressing concern about lead plaintiff movant's retainer agreement with law firm because "the court suspects that [it] is not the result of hard bargaining," not the product of "a discerning client in an arms length negotiation with well-qualified counsel").

made large investments will also be able to negotiate the most advantageous counsel rates to the class."). 13/

For example, a number of law firms might come together during the process of applying for, or competing for, lead plaintiff status. In LaPerriere v. Vesta Insurance Group, Inc., No. 98-AR-1407-S (N.D. Ala., Acker, J.), a large proposed lead plaintiff "group" originally requested approval of two firms as "co-lead counsel." When it joined with a second "group" to compete with an institution to be lead plaintiff, the group increased, without explanation, the number of proposed co-lead counsel to three firms, adding the firm representing the second group. Ultimately, the institution negotiated with three members of the large group a joint lead plaintiff proposal, providing for two firms as lead counsel, which the court accepted. This suggests that unless there has been active, effective client participation in the process, it is possible that the counsel arrangement may simply reflect bargaining among lawyers for their

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13/ See also Weiss & Beckerman, 104 Yale L.J. at 2058, 2106, 2107 (arguing that having institutions as lead plaintiffs "would allow market forces, not courts, to play a dominant role in determining who served as plaintiffs' lead counsel in class actions, how lead counsel would be compensated, and the settlement terms that counsel for the plaintiff class would be inclined to propose" because "plaintiffs' attorneys frequently would find themselves competing to be retained by institutional investors" and institutions would be "in a position to negotiate fee arrangements with plaintiffs' lawyers before class actions are initiated"); Weiss, 39 Ariz. L. Rev. at 563 (stating that institutions are "likely to negotiate fee arrangements that more closely aligned the interests of plaintiffs' attorneys with those of the plaintiff class than do the fee structures that courts generally employ").

own stake in the case, and not serve the best interests of the class. 14/

Finally, if the court determines that it is appropriate under the circumstances to appoint multiple lead counsel, the court should condition their appointment on there being no duplication of attorney services or increase in attorneys' fees and expenses. The court should also reserve the right to alter the counsel structure if it finds that the litigation is being

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14/ Practices described in various cases and commentaries predating the Litigation Reform Act could still be at work in the formation of some "committees" of class counsel and in the allotment of work assignments by those committees. See Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1277 (3d Cir. 1994) (noting that "[t]he lead attorney position is coveted as it is likely to bring its occupant the largest share of the fees generated by the litigation" and defense counsel's "expla[nation] that in class actions additional complaints are generated so that the original attorney will have allies when a vote is taken to determine the lead attorney"); Alexander, 43 Stan. L. Rev. at 528-29 n.117 ("Some state court filings appear to be motivated primarily by strategic considerations in the intramural relations between plaintiffs' attorneys. For example, an agreement to stay the state action while the federal action proceeds * * * may depend on whether the lawyers who filed in state court are satisfied with their role in the federal case."); Coffee, The Regulation of Entrepreneurial Litigation, 54 U. Chi. L. Rev. at 908 (selection of class counsel could resemble "the legal equivalent of an unsupervised political convention * * * . Rival slates would form. Competing groups would invite other attorneys into the action in order to secure their vote for lead counsel. Eventually, a political compromise would emerge. The price of such a compromise was often both overstaffing and an acceptance of the free-riding or marginally competent attorney, whose vote gave him leverage that his ability did not."); Coffee, Rescuing the Private Attorney General, 42 Md. L. Rev. at 250 ("The centrality of lead counsel's role means that there is often a spirited contest to determine who will occupy this position. In a major case, the process can resemble a political convention: vote-trading occurs, compromises are struck, and promises of favorable work assignments are made in return for support.").

delayed, that expenses are being unnecessarily incurred, or if the structure proves otherwise detrimental to the best interests of the proposed class. The court might also find it useful in appointing a committee of law firms to require the submission of itemized, quarterly reports detailing the services rendered, the costs expended, and the hourly charges reasonably incurred in the litigation. See Oxford, 182 F.R.D. at 50.

CONCLUSION

For the foregoing reasons, the Commission believes that courts should actively exercise their discretion to review multiple lead counsel proposals for the protection of the class. The Commission believes that courts should conduct that review based on careful attention to the facts of each case and in accordance with the considerations discussed in this memorandum.

Respectfully submitted,

HARVEY J. GOLDSCHMID (HG 0499)
General Counsel

ERIC SUMMERGRAD (ES 3628)
Principal Assistant General Counsel

LUIS de la TORRE (LT 5440)
Attorney

Securities and Exchange Commission
450 5th Street, N.W. (Stop 6-6)
Washington, D.C. 20549
(202) 942-0813 (de la Torre)

Of Counsel
PAUL GONSON
Solicitor

Dated: December 3, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70006

In re: RAYMOND MOORE; et al.,

RAYMOND MOORE; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

NETWORK ASSOCIATES, INC., et al.,

Real Parties in Interest.

DC# CV-99-1729-WHA, United States District Court for the Northern District of California

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF REAL PARTY IN INTEREST VATUONE ON THE ISSUE SPECIFIED

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

ERIC SUMMERGRAD
Deputy Solicitor

LUIS DE LA TORRE
Attorney

Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0606
(202) 942-0813 (de la Torre)

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LEGISLATIVE HISTORY:

MISCELLANEOUS:

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission is the agency principally responsible for the administration and enforcement of the federal securities laws. It has long expressed the view that legitimate private actions under these laws serve an important role. Such actions work to compensate investors who have been harmed by securities law violations and, as the Supreme Court has repeatedly recognized, they "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985).

In enacting the Private Securities Litigation Reform Act of 1995 ("Reform Act" or "Act"), Section 21D of the Securities Exchange Act of 1934, 15 U.S.C. 78u-4, Congress affirmed the importance of private securities litigation. Conference Report on Securities Litigation Reform, H.R. Conf. Rep. No. 104-369, at 31 (1995) ("Conf. Rep."). Congress sought through the Reform Act's lead plaintiff provisions, 15 U.S.C. 78u-4(a), to ensure more effective representation of investors' interests in private securities class actions by transferring control of the actions from lawyers to investors. Conf. Rep. 32-35.

This may be the first court of appeals decision to address the lead plaintiff provisions. The Commission wishes to assure that the Court is accurately and completely informed about the meaning and objectives of the provisions, particularly in light

of certain mischaracterizations of those provisions by petitioners Moore, D'Alessandro, and DeNigris. 1/

The Reform Act contemplates that the lead plaintiff will select and retain counsel with the approval of the court, and will actively oversee the conduct of the litigation and monitor the effectiveness of counsel for the protection of the class. Under the Act, a district court should take care, in appointing the lead plaintiff, that the candidate can perform this function.

Particular concerns arise where the lead plaintiff applicant is a proposed group of individuals. If a group is appointed, it should generally be small in size, usually no more than three to five persons in number. It should provide appropriate, reasonably available information to the court about its members, structure, and intended functioning, to allow the court to determine if such a group will be able to actively oversee the litigation. Such information is relevant not only to determining whether the self-proclaimed "group" is indeed a "group of persons" within the meaning of the Reform Act, but whether the "group" satisfies the Act's minimum requirement that the lead plaintiff be an adequate class representative under Federal Rule of Civil Procedure 23. Additionally, the court should not appoint competing lead plaintiff applicants as "co-lead plaintiffs." The court should likewise inquire into, and

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1/ The Commission does not address KBC Equity Fund's petition, which addresses only the merits of the district court's Rule 23 ruling against it and does not appear to raise larger issues about the interpretation of the Reform Act.

actively exercise its discretion to review, proposals for multiple lead counsel.

In contending (Petition at 17) that the district court's December 15, 1999 lead plaintiff decision is "clearly erroneous," petitioners advocate a mistaken view of the lead plaintiff's role under the Reform Act. Despite statutory language, purpose, and history that make that role clear, petitioners contend (id. at 20) that "[a]ll Congress commanded was that the lead plaintiff select adequate lead counsel to prosecute the case."

Petitioners proceed from their faulty premise to erroneously argue (at 21) that in selecting the lead plaintiff the district court must apply "an objective 'bright line' test" based on financial interest. According to petitioners (at 3, 18, 21), the court "had no discretion" to make a "subjective" inquiry into "the nature and qualities" of lead plaintiff candidates, such as whether they would attend court proceedings in the case, which petitioners contend is "extraneous," not "relevant as a factor."

The Commission takes no position on whether the petitions should be granted or whether the district court was correct in appointing Real Party in Interest Vatuone, rather than one or more of petitioners, as lead plaintiff. However, the court was entitled to consider, in evaluating petitioners collectively or singly (they offer themselves as lead plaintiff either way), the fact that they had been part of a dysfunctional proposed lead plaintiff "group" of over 1700 random individuals. These persons apparently were drawn into the "group" based on notices the court

found to be defective, and do not even appear to have known who their fellow "group" members were or who its proposed lead counsel were.

After extensive analysis, the district court rejected that "group," holding that it did not "even come[] close" to qualifying as lead plaintiff. When petitioners subsequently renewed their lead plaintiff motion, this time seeking appointment as a smaller "group" or individually, their conduct in the litigation to that point was relevant under either a "group of persons" analysis or a Rule 23 adequacy of representation analysis. 2/

STATEMENT OF THE ISSUE

The Commission addresses the following issue:

Whether, under the Reform Act, a district court should evaluate a proposed lead plaintiff "group" for its ability to actively oversee the conduct of the litigation and monitor the effectiveness of counsel, and should take that information into account in considering a motion to appoint the proposed group or any of its members as lead plaintiff.

2/ Indeed, the court's December 15 order, particularly when read in conjunction with its November 22, 1999 decision rejecting the 1700-person "group," can be interpreted as reflecting an assessment that petitioners would not be adequate representatives of the proposed class. The order states that Vatuone, rather than any or all of the petitioners, "is the most capable of adequately representing the interests of class members."

STATEMENT OF FACTS

On June 7, 1999, Vatuone moved to be sole lead plaintiff in this case. He claimed losses of approximately $30,000. (See Petitioners' Exhibit 9.)

On the same day, "a group of over 1,725 investors," including the three petitioners, also submitted a lead plaintiff motion (see Pet. Ex. 8 at 1 n.1). These movants asked the district court to take into account their total combined losses of "at least $33,929,308" in deciding the motion (see id. at 2). They indicated that their entire group was fit to be appointed lead plaintiff (see id. at 1 n.1, 14 (stating that all movants "submitted signed certifications" providing information about their stock purchases and information required of a named plaintiff under Reform Act § 21D(a)(2)(A)(i)-(vi) and that "signing [such] a certification" "amply demonstrate[s]" an investor's "adequacy as [a] Class representative[]")).

These movants expressly "proffered" eleven members of their group -- including petitioners and the Board of Pensions and Retirement of the City of Philadelphia -- for appointment as lead plaintiff (see id. at 1). Petitioners claimed losses of between $250,000 and $400,000 (see Pet. at 8-9). The movants also invited the court to appoint "thirteen additional" of their members as lead plaintiff (see Pet. Ex. 8 at 4 n.4). And, as yet another variation, they proposed these 24 members "together with nineteen" additional members as lead plaintiff (id.).

None of these persons was described other than by name and loss amount; the motion provided no information about whether they knew they had been put forward as lead plaintiff or with whom. Without providing any information about their relationship with counsel, movants sought the appointment of three law firms as "co-lead counsel": Milberg Weiss Bershad Hynes & Lerach; Kirby McInerney & Squire; Barrack Rodos & Bacine (id. at 1, 15).

Around this same time, a second proposed "group," represented by different counsel and numbering approximately 3,400 members, sought appointment as lead plaintiff (Pet. Ex. 7). Its motion is not at issue in the petitions.

By order dated October 13, 1999 (Pet. Ex. 10), the court expressed concern about the proposed "groups." The court asked each "group" to "narrow its candidates" and requested information from them and Vatuone, via a questionnaire, that would enable the court "to evaluate the qualifications of single investors, either institutional investors or individuals, to serve as lead plaintiff." The court also requested their attendance at a November 4, 1999 hearing on the lead plaintiff motions.

Having alternatively offered eleven, 24, 43, and perhaps all 1725 of its members as lead plaintiff, the movant group (or its counsel) now put forward five members, including petitioners and Philadelphia, as lead plaintiff. These candidates submitted questionnaire responses, as did Vatuone (see Pet. Exs. 11-14).

At the November 4 hearing, the court and counsel questioned Vatuone and the 1725-member movant group's five candidates. Each

represented that he, she, or it would be able to perform as the lead plaintiff (see Pet. Ex. 15). Nowhere in petitioners' questionnaire responses or hearing testimony, however, did they state that they had been aware that they had been put forward as part of a lead plaintiff "group" of five, eleven, 24, 43, or 1725 persons, who these other persons were, and who and how many counsel were proposed as lead counsel in their name, much less what being a lead plaintiff means.

On November 22, 1999, the court issued a 28-page decision (Pet. Ex. 2) in which it discussed the lead plaintiff motions and appointed Philadelphia as lead plaintiff. The court held (id. at 15) that the 1725-member movant group, in any of its alternative configurations, did not "even come[] close" to qualifying as lead plaintiff. The court noted (id. at 7, 24) that investors were drawn into the huge "group" through the use of published notices that the court found to be "imperfect" because they constituted "puff pieces steering investors toward registering with counsel and steering them away from independently seeking the role of lead plaintiff." Investors responding to the notices were sent certification forms that "looked too much like claim forms and the recipients could easily have thought that they needed to sign up to participate at all" (id. at 7, 24).

The court further described (id. at 7-8, 11) the process by which the "groups" in the case had been formed:

> When the motions to appoint lead counsel are made, as here, [certification] forms are then bound into numerous thick booklets as alleged documentary support for counsel's

> motion on behalf of a group of movants, as has been done in this case. Counsel argue that the group as a whole has a large stake in the outcome -- therefore, the group should be the presumptive lead plaintiff.
>
> The only thing the investors have in common, however, is the lawyer. They have no link to each other. They are not organized with any group decisionmaking apparatus. They attended no organized meetings. They have no cohesive identity. They have no name other than one arbitrarily selected by the lawyers. They do not, in all probability, even know they belong to a group or know its name or know how their form is being used. * * * [T]housands of forms are submitted in heavy boxes to the Court * * * . The [1725-person movant group's] volumes are accused of including numerous discrepancies, ranging from unsigned forms, to forms refusing to be a lead plaintiff, to trades that could not have occurred as represented (due to Sunday dates, etc.). These defects are only those that appear on the face of the forms without the benefit of discovery.
>
> * * *
>
> The subgroups [i.e., the alternative forms of the movant group] were simply hand-picked by counsel and dressed up with names. Such unorganized groups of unrelated investors with nothing in common other than the lawyer and with no clear-cut mechanism for making decisions could not "fairly and adequately" carry out the responsibility to protect the interests of the class.

The court commented (id. at 22) that it was "impressed favorably with a number of individual investors," including Vatuone and petitioner Moore, but did not go so far as to say that any of them was an adequate class representative because Philadelphia had the largest financial interest.

The court required Philadelphia, which had been a member of the 1725-member movant group, to provide additional information

and take further actions to demonstrate its fitness to serve as lead plaintiff (see id. at 21, 26-28 (describing this information and these actions; noting that Philadelphia had "lumped itself in the [1725-member] confederation")). Thereafter, Philadelphia withdrew from consideration as lead plaintiff (see Pet. Ex. 17).

By order dated December 3, 1999 (id.), the court solicited further lead plaintiff motions. Vatuone and petitioners renewed their motions, submitting declarations (Pet. Exs. 18-21) again representing that they were fit to serve as lead plaintiff. Petitioners, represented by one of the 1725-member group's counsel, Milberg Weiss, which described itself as "proposed co-lead counsel," sought appointment as a "group" or of any one of them (see id.; Pet. at 4, 18). Petitioners gave no information about how they would function as a "group," whether they had had any contact with each other, or even whether they knew with whom they had been put forward as a "group" (see Pet. Exs. 18-20).

By order dated December 15, 1999 (Pet. Ex. 5), the court appointed Vatuone lead plaintiff, concluding that he "is the most capable of adequately representing the interests of class members." Among the factors the court considered was his ability "to attend hearings and depositions" in the case. It directed Vatuone to select counsel through a competitive bidding process involving various criteria and to advise the court of the process and the choice. After Vatuone did so, the court approved his choice of counsel, Lieff Cabraser Heimann & Bernstein, on January 24, 2000.

DISCUSSION

UNDER THE REFORM ACT, A DISTRICT COURT SHOULD TAKE STEPS TO ASSURE THAT THE LEAD PLAINTIFF IS ABLE TO ACTIVELY OVERSEE THE CONDUCT OF THE LITIGATION AND MONITOR THE EFFECTIVENESS OF COUNSEL.

A. The Role of the Lead Plaintiff Is To Select Lead Counsel With the Approval of the Court and To Actively Oversee the Litigation and Monitor that Counsel.

The Reform Act prescribed a new mechanism by which courts in securities class actions are to select the lead plaintiff. The Act sets out a procedure and criteria for appointment early in the litigation of "the most adequate plaintiff" as "lead plaintiff." The most adequate plaintiff is the "person or group of persons" that "the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. 78u-4(a)(3)(B). And, most importantly, the Act established a presumption that this plaintiff is the named plaintiff or movant who (so long as it otherwise satisfies Rule 23 requirements for adequacy of representation and typicality of claims) "has the largest financial interest in the relief sought by the class." 15 U.S.C. 78u-4(a)(3)(B)(iii)(I).

In addition, the Act specifically rejected the prior practice by which the first plaintiff to file suit or counsel themselves could select class counsel. Under the Act, "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. 78u-4(a)(3)(B)(v). Other provisions of the Act reveal

concerns about conduct of plaintiff's counsel, settlements, and attorney fee awards in securities class actions. 3/

The role of the lead plaintiff that emerges from the statutory language is also clear from the Act's legislative history. The lead plaintiff and lead counsel provisions arose from Congress' concern, expressed in the House, Senate, and Conference Committee Reports on the bill, that some class action securities litigation had become a "lawyer-driven" enterprise, in which law firms sought to bring cases and then sought out plaintiffs in whose name they could sue. 4/

Congress sought to "protect[] investors who join class actions against lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer." Conf. Rep. 32. It wanted to increase the likelihood that such persons, "whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and

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3/ See, e.g., 15 U.S.C. 78u-4(a)(2) ("Certification Filed With Complaint"), (a)(4) ("Recovery by Plaintiffs"), (a)(5) ("Restrictions on Settlements Under Seal"), (a)(6) ("Restrictions on Payment of Attorneys' Fees and Expenses"), (a)(7) ("Disclosure of Settlement Terms to Class Members"), (a)(9) ("Attorney Conflict of Interest"), and (c) ("Sanctions for Abusive Litigation"); 78o(c)(8) ("Prohibition of Referral Fees").

4/ Congress was especially concerned that in some such cases lawyers engage in abusive practices and "often receive a disproportionate share of settlement awards." Conf. Rep. 36; accord id. at 31-33; Report on the Private Securities Litigation Reform Act of 1995, S. Rep. No. 104-98, 6-12 (1995) ("S. Rep."); Report on the Common Sense Legal Reform Act of 1995, H.R. Rep. No. 104-50, 14-20 (1995) ("H. Rep.").

actions of plaintiff's counsel." Id.; accord S. Rep. 4 (Congress "intends * * * to empower investors so that they -- not their lawyers -- exercise primary control over private securities litigation"), 6 ("to transfer primary control of private securities litigation from lawyers to investors"), 10 ("The lead plaintiff should actively represent the class[;] * * * the lead plaintiff -- not lawyers -- should drive the litigation."). This concern was expressed repeatedly during the floor debate. 5/

5/ See, e.g., 141 Cong. Rec. S8895 (Sen. D'Amato), S8897 (Sen. Domenici) ("So what we have and what is wrong with this system is very, very fundamental. Lawyers, not clients, control these cases.") (June 22, 1995); 141 Cong. Rec. S9055 (Sen. Frist) ("the lawyer-driven nature of these lawsuits tends to shortchange investors who have truly been defrauded"), S9065 (Sen. Grams), S9075-76, 77 (Sen. Hatch), S9077 (Sen. Murray) ("[investors] have a right to have more of a say in steering the course of litigation") (June 26, 1995); 141 Cong. Rec. S9172 (Sen. Hatfield), S9173 (Sen. Mikulski) (June 27, 1995); 141 Cong. Rec. S9212 (Sen. Domenici), S9321 (Sen. Dodd) (June 28, 1995); 141 Cong. Rec. S17934 (Sen. D'Amato) ("[Bill] will empower real investors, especially pension funds and other institutional investors, to take control of the lawsuit."), S17956 (Sen. Dodd), S17967, S17969 (Sen. Domenici) ("Unlike the current lawyer-driven system, under this new law the investors with the greatest stake in the outcome of the litigation will control the case."), S17980 (Sen. Murray) (under bill, "investors will have more of a say in the outcome of their suit"), S17982 (Sen. Frist), S17983 (Sen. Dole), S17984 (Sen. Moseley-Braun) ("Many investors also support this bill because it gives them, rather than the lawyers who are supposed to be working for them, control of any class action suits filed. It is the client, rather than the attorney, that is supposed to control a lawsuit, and part of the reason this bill is so necessary is that this simple principle has somehow gotten lost in recent years.") (Dec. 5, 1995); 141 Cong. Rec. H14038 (Rep. Cox) ("What we are seeking to do here is to protect investors so that they are in charge of these kind of lawsuits."), H14039 (Rep. Bliley) (bill "puts control of class action lawsuits back in the hands of the real shareholders, where it belongs"), H14048 (Rep. Harman) (bill "ends abusive practices and restores

(continued...)

Congress viewed this problem as stemming from the fact that the lead counsel in the case commonly had a greater financial stake in the litigation than the plaintiffs. S. Rep. 6-7; H. Rep. 17-18. In adopting a presumption that the lead plaintiff would be the class member with the largest financial interest in the litigation, Congress "intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." Conf. Rep. 32. In Congress' judgment, "[i]nstitutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake." Id. at 34.

In particular, Congress wanted to "encourage institutional investors to take a more active role in securities class action lawsuits." Id. Congress "believe[d] that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." Id.

This objective also is reflected in Congress' decision to give the initial choice of lead counsel to the lead plaintiff.

5/(...continued)
investor control over lawsuits"), H14050 (Rep. Deutsch) (Dec. 6, 1995); 141 Cong. Rec. S19054 (Sen. Hatch), S19084 (Sen. Reid) ("Defrauded investors are not adequately compensated because attorneys, not investors, control these class actions.") (Dec. 21, 1995).

See id. at 35. As a result, Congress "expect[ed] that the plaintiff will choose counsel rather than, as is true today, counsel choosing the plaintiff." Id. 6/

The meaning of the Reform Act's lead plaintiff provisions has been recognized by numerous courts. In Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 691 (S.D. Fla. 1999), the court stated that "[t]he underlying rationale [of the lead plaintiff provisions] is the person or group with the largest financial stake can best prosecute the claims" and "is presumed best able to negotiate with and oversee counsel." As the court explained in In re Cendant Corp. Litig., 182 F.R.D. 144, 148-49 (D.N.J. 1998), "plaintiffs with the assets necessary to have made large investments will also be able to negotiate the most advantageous counsel rates to the class" and have "the most to gain from any marginal increase in dollars recovered per share." Congress "sought to eliminate figurehead plaintiffs who exercise no meaningful supervision of litigation." Ravens v. Iftikar, 174 F.R.D. 651, 661 (N.D. Cal. 1997). 7/

6/ Congress "d[id] not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class." Id.; S. Rep. 11.

7/ Accord, e.g., Gluck v. Cellstar Corp., 976 F. Supp. 542, 549, 550 (N.D. Tex. 1997); In re Baan Company Sec. Litig., 186 F.R.D. 214, 218 (D.D.C. 1999); Ehlert v. Singer, 185 F.R.D. 674, 677 (M.D. Fla. 1999); In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157 (S.D.N.Y. 1997); Greebel v. FTP Software, Inc., 939 F. Supp. 57, 61 (D. Mass. 1996); Yousefi v. Lockheed Martin Corp., 70 F. Supp. 2d 1061, 1067-1069 (C.D. Cal. 1999); In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 174-75 (D.N.J. 1999).

B. The Lead Plaintiff Should Be an Institution, Individual, or "Group" That Can Perform The Role of the Lead Plaintiff, and District Courts Should Make Appropriate Inquiries To Ensure That This Is the Case.

As noted, Congress anticipated that the lead plaintiff would often be an institutional investor. See, e.g., Gluck v. Cellstar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997); Greebel v. FTP Software, Inc., 939 F. Supp. 57, 63-64 (D. Mass. 1996) (same).

As explained in a law review article cited in the Reform Act's legislative history as "provid[ing] the basis for the 'most adequate plaintiff' provision," S. Rep. 11 n.32, "[i]nstitutions' large stakes give them an incentive to monitor, and institutions have or readily could develop the expertise necessary to assess whether plaintiffs' attorneys are acting as faithful champions for the plaintiff class." Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2095 (1995) ("Weiss & Beckerman"). The authors further argue that institutions can obtain more favorable settlements, and should be "in a position to negotiate fee arrangements with plaintiffs' lawyers before class actions are initiated[,] * * * [which] may well * * * differ substantially from the fee structures that courts currently employ." Id. at 2107, 2121.

In In re California Micro Devices Sec. Litig., 168 F.R.D. 257, 275 (N.D. Cal. 1996), a non-Reform Act case, the court noted that institutional investors "will be willing and able to monitor[] attorney conduct in securities class actions much more rigorously than either figurehead plaintiffs or courts can do."

Id.; accord 965 F. Supp. 1327, 1330-32 (N.D. Cal. 1997) (same case). Courts appointing institutions as lead plaintiff under the Reform Act have emphasized this same function. See Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 251-52 (E.D. Va. 1999); Gluck, 976 F. Supp. at 546, 549.

But nothing in the Act gives an express preference to institutions. There may, moreover, be cases where no institution seeks to be lead plaintiff. The lead plaintiff, accordingly, may be an individual or a group.

While it may be appropriate for the court to appoint a "group of persons" as lead plaintiff, 8/ the court should exercise great caution in doing so. It is not sufficient for counsel merely to aggregate large numbers of unaffiliated persons into a "group" and, because this assemblage collectively has the largest claimed losses, have it appointed as lead plaintiff. A "group of persons" within the meaning of the Act should, like an institution or single large investor, be able to actively oversee

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8/ The Act refers to a "group of persons," as an alternative to a "person," in the provision that establishes a presumption that the "most adequate plaintiff" to lead a securities class action is the one with the largest claimed financial loss. 15 U.S.C. 78u-4(a)(3)(B)(iii)(I). The law review article cited in the legislative history as "provid[ing] the basis for the 'most adequate plaintiff' provision," S. Rep. at 11 n.32, suggests that Congress used the "group of persons" language because "if several institutions were interested in becoming involved, they could either compete to become lead plaintiff or agree to work together." Weiss & Beckerman, 104 Yale L.J. at 2108. The article also suggests that Congress used this language to encompass associated or affiliated institutions (e.g., different funds from the same mutual fund group), which had filed separate claims in pre-Act class actions. See id. at 2090 n.200.

the conduct of the litigation and monitor the effectiveness of counsel. In short, the Act's allowance for a "group of persons" as lead plaintiff must be interpreted by reference to the Act as a whole and to the Act's purposes. See SG Cowen Sec. Corp. v. U.S District Court, 189 F.3d 909, 911-13 (9th Cir. 1999). 9/

It is particularly unlikely that a proposed group will have this active oversight and monitoring capability where it consists of a large number of previously unaffiliated persons, who have little or no contact with one another, who by and large claim relatively modest individual losses, and who have no demonstrated incentive or ability to work together to actively oversee the litigation. The problem is made worse if the proposed group members have been enlisted to become lead plaintiff by counsel, without understanding the role of lead plaintiff, without themselves having taken the initiative to seek the role or form a proposed group, without any knowledge of the other members, and without any direct relationship with, perhaps even any knowledge of, the law firms that ultimately present themselves to the court as proposed lead counsel. See Nov. 22 Op. at 6-8, 11, 24. 10/

9/ See also Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); United States v. Taylor, 487 U.S. 326, 333 (1988); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983); Greebel, 939 F. Supp. at 63-64.

10/ In its 1997 report on the Act, the Commission's Office of General Counsel stated that some lawyers, "[t]aking advantage of [the Act's] provision" allowing appointment of a "group of persons" as lead plaintiff, have attempted "to recruit investors as additional clients." SEC Office of the General Counsel, Report to the President and the Congress on the First Year of Practice Under the Private Securities

(continued...)

The Commission believes that ordinarily, in order to ensure adequate monitoring, coordination, and accountability, a group should have no more than three to five members, and in general the fewer the better. 11/ But even if the proposed group is within this range its members should be evaluated for their incentive and ability to work together to actively oversee the litigation. The court should consider the marginal benefit of

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10/(...continued)
Litigation Reform Act of 1995 65 (Apr. 1997). Specifically, some lawyers have "phrased [notices to the class under the Act] in a way more likely to attract clients, rather than competition from investors (and other law firms) independently vying to be named lead plaintiff." Id. at 66. See Sherleigh, 184 F.R.D. at 694 n.4.

The Commission understands from other Reform Act cases in which it has appeared, or been asked to appear, as amicus curiae, that some law firms contacted by investors in response to the notices forward the investors' names on to other law firms, which compile lists of names therefrom, from responses to their own notices, and from other sources. This list is then presented to the court as a lead plaintiff "group," typically with the alternative of a "subgroup" or "steering committee" of fewer but often still numerous names, enough to include clients of multiple law firms. The firms representing the largest or largest number of investors on the list or representing investors who posed a threat of competition for lead plaintiff, present themselves to the court as lead counsel. See, e.g., Baan, 186 F.R.D. at 215, 217; Milestone, 187 F.R.D. at 180; see also Sherleigh, 184 F.R.D. at 692-93 & n.1, 699-701. If competition is encountered, the number of subgroup members and proposed lead counsel may be enlarged to absorb competitors or outstrip their losses. See, e.g., Switzenbaum, 187 F.R.D. at 249-51. The investors' role in this process is unclear.

11/ There may, of course, be unusual circumstances that warrant departure from these limits. They might include pre-existing relationships among the members or other factors indicating that they have a special capacity to provide able and unified decisionmaking independent of counsel.

including each member in the group as weighed against the further division of decisionmaking authority and the other problems attendant to enlargement of the group, and should not hesitate to pare groups down to the minimum needed size. 12/

To enable the court to assess whether the proposed group is capable of performing the lead plaintiff function, it should provide appropriate information about its members, structure, and intended functioning. Such information should include descriptions of its members, including any pre-existing relationships among them; an explanation of how it was formed and how its members would function collectively; and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation. If the proposed group fails to explain and justify its composition and structure to the court's satisfaction, its motion should be denied or modified as the court sees fit.

In case after case in which the so-called "aggregation" issue has been litigated or in which courts themselves have addressed it, including this case and many in this Circuit, the courts have refused to appoint large, random assemblages of unrelated persons as lead plaintiff "groups" under the Reform Act. See, e.g., Nov. 22 Op. at 6-15; Sakhrani v. Brightpoint,

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12/ Only the financial interest of the "person or group of persons" that the court "shall appoint as lead plaintiff" is considered in determining the presumptive lead plaintiff. See 15 U.S.C. 78u-4(a)(3)(B)(i) & (iii). Any other approach would be "playing a shell game with the statute." Baan, 186 F.R.D. at 217; accord Switzenbaum, 187 F.R.D. at 250 & n.6.

Inc., 78 F. Supp. 2d 845 (S.D. Ind. 1999); In re McKesson HBOC, Inc. Sec. Litig., 79 F. Supp. 2d 1146 (N.D. Cal. 1999); Yousefi v. Lockheed Martin Corp., 70 F. Supp. 2d 1061, 1067-1071 (C.D. Cal. 1999); In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803, 809-16 (N.D. Ohio 1999); Wenderhold v. Cylink Corp., 188 F.R.D. 577, 583-87 (N.D. Cal. 1999). 13/

In one Reform Act case, a proposed "group" was so confused and disorganized that the court found that it did not even meet minimum standards of adequacy of representation under Rule 23. See Switzenbaum, 187 F.R.D. at 248-51. According to the court, the "group" showed "disorder among its leadership ranks," an "inability to manage itself," was "unable to agree on who its members are," "invit[ed] the Court to select a reconstituted group of managers instead," "alternatively describ[ed] itself to include approximately 200" persons, "more people than could possibly manage the case," and "has never been forthcoming about any of these conflicts at all."

13/ See also Takeda v. Turbodyne Technologies, Inc., 67 F. Supp. 2d 1129, 1135-36 (C.D. Cal. 1999); In re Nice Systems Sec. Litig., 188 F.R.D. 206, 214-15, 220-21 (D.N.J. 1999); In re Baan Company Sec. Litig., 186 F.R.D. 214, 216-17 (D.D.C. 1999) (collecting cases); Sherleigh, 184 F.R.D. at 692 & n.1; In re Advanced Tissue Sciences Sec. Litig., 184 F.R.D. 346, 352-53 (S.D. Cal. 1998); In re Oxford Health Plans Sec. Litig, 182 F.R.D. 42, 46 (S.D.N.Y. 1998); Chill v. Green Tree Financial Corp., 181 F.R.D. 398, 409 (D. Minn. 1998); Ravens, 174 F.R.D. at 662-63; Donnkenny, 171 F.R.D. at 157; Mitchell v. Complete Mgmt., Inc., 1999 WL 728678, at *2-4 (S.D.N.Y. Sept. 17, 1999); see generally In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 417-18 (D.N.J. 1998); In re Party City Sec. Litig., 189 F.R.D. 91, 103-04, 112-14 (D.N.J. 1999).

Despite that proposed group's insistence that the lead plaintiff determination was a "'simple mathematical' calculation" based on financial interest, 14/ the court rejected the entire "group" in favor of a competing movant with less total losses. The court found that that movant's "five members have established mechanisms for making sound collective decisions together" and "can monitor its actions and those of its proposed Lead Counsel."

Moreover, contrary to petitioners' assertion (Pet. at 21) that a proposed lead plaintiff's ability to attend court proceedings is not "relevant as a factor," courts routinely

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14/ Ironically, like the "group" in Switzenbaum, petitioners advocate an "objective and easily-applied standard" for deciding lead plaintiff motions but argue that their financial interest is entitled to some unspecified degree of extra weight in lead plaintiff consideration because it is a larger percentage of their net worth than Vatuone's losses are to his net worth. See Pet. at 6-7.

But the lead plaintiff presumption is framed in terms of "the largest financial interest in the relief sought by the class," not in terms of loss as a percentage of net worth. See Cendant, 182 F.R.D. at 147. As noted above (p. 14, supra), the Cendant court explained the presumption in terms of absolute dollar loss. 182 F.R.D. at 148-49. Moreover, petitioners' "net worth" argument is inconsistent with the fact that when Congress enacted the Reform Act, it was well aware that institutions, which it wanted to be lead plaintiff, have millions or billions of dollars of assets under management and that these amounts easily could dwarf losses in particular cases. See, e.g., Conf. Rep. 34 (noting that "[i]nstitutional investors are America's largest shareholders, with about $9.5 trillion in assets, accounting for 51% of the equity market" and that "pension funds account[] for $4.5 trillion [] or nearly half of institutional assets"); Weiss & Beckerman, 104 Yale L.J. at 2089-91 (study of claims reports for 20 settled class actions shows that institutions sometimes had largest claim with losses of $450,000 to $626,374).

discuss participation in the case in deciding adequacy of representation under Rule 23. See, e.g., Parker v. Anderson, 667 F.2d 1204, 1212 (5th Cir. 1982) ("Counsel consulted regularly and frequently with the class representatives throughout the case."); In re Southeast Hotel Properties Limited Partner Investor Litig., 151 F.R.D. 597, 607 (W.D.N.C. 1993) (class representative "was very active in conferring with other class members"); Epifano v Boardroom Business Products, Inc., 130 F.R.D. 295, 299 (S.D.N.Y. 1990) ("active involvement and time spent"); Efros v. Nationwide Corp., 98 F.R.D. 703, 708 (S.D. Ohio 1983) (attendance at hearings). Courts further consider the way in which a party has conducted itself to date in the litigation in determining adequacy. See, e.g., Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2251 (1997) (asking whether class representative "operated under a proper understanding of its representational responsibilities"); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405 (1977); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1351-52 (9th Cir. 1984); Ballan v. Upjohn Co., 159 F.R.D. 473, 488-90 (E.D. Mich. 1994); Williams v. Balcor Pension Invs., 150 F.R.D. 109, 118-20 (N.D. Ill. 1993).

These cases belie the contention that a court cannot consider anything more about lead plaintiff candidates than the minimal information petitioners seem to consider "relevant" under their so-called "objective 'bright line' test." The mere fact that one section of the Reform Act, 15 U.S.C. 78u-4(a)(2), requires a plaintiff to provide certain minimum information in a

certification attached to a complaint does not preclude the court from requiring additional information where necessary to make a proper lead plaintiff determination. Nor does the statement, made by some plaintiff's counsel in some cases, that the Act contemplates a "tight time frame" for lead plaintiff motions preclude careful inquiry into how a proposed group is constituted. There is no reason why a careful analysis cannot be done within the time frames indicated by the Act. 15/

And plaintiff's counsel who have argued that an approach of minimal information and nominal "groups" is quicker and simpler forget that the pre-Reform Act "race to the courthouse" to file complaints and selection of counsel on a "first-come, first serve" basis could also be described as "simple" or "swift and inexpensive." Congress disposed of those practices with the Act because it viewed them as harmful in the long run of litigation. See Conf. Rep. 33. Such an approach ignores the long-term benefits, both in terms of effectively run litigation and optimal

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15/ The Reform Act's "mixed inquisitorial/adversarial model for developing a record to make the Lead Plaintiff decision" is not inconsistent with resolving the motions "with dispatch." See Baan, 186 F.R.D. at 215. The Commission assumes that in evaluating proposed groups courts will make their best judgments based on reasonably available information. Plaintiff's counsel that have objected to providing this information offer no basis for contending that it would be "[]expensive" or "cost[ly]" or time-consuming to include additional information about proposed groups in their own lead plaintiff motions. Nor do they give any reason to assume that "discovery would frequently be needed" if a proposed group provided appropriate information about itself. Lead plaintiff submissions would establish a record and the arguments, and the court could conduct the inquiry.

recovery, that could result from a properly constituted and functioning lead plaintiff group or individual lead plaintiff.

Furthermore, consistent with the lead plaintiff's active oversight role, the courts should not appoint competing movants as "co-lead plaintiffs." The Commission believes that to do so would be contrary to the language and purposes of the Reform Act. 16/ Such appointments would dissipate a lead plaintiff's ability to negotiate effective legal retention agreements and to oversee the conduct of the litigation and monitor the effectiveness of counsel for the protection of the class. 17/

Finally, district courts should actively exercise their traditional discretion to review proposals for multiple lead counsel. See, e.g., In re Baan Co. Sec. Litig., 186 F.R.D. 214 (D.D.C. 1999) (appending SEC amicus memorandum). Although the Reform Act gives the lead plaintiff a large role in the choice of

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16/ The Act establishes a procedure and criteria for evaluating competing lead plaintiff motions. See 15 U.S.C. 78u-4(a)(3)(B)(iii) ("the person or group of persons" who "filed a complaint or made a motion" and has "the largest financial interest") (emphasis added). The statute speaks in the singular, of the court appointing a "lead plaintiff," not lead plaintiffs. See 15 U.S.C. 78u-4(a)(3) & (a)(3)(A)(i)(II). It provides a mechanism for identifying "the most adequate plaintiff," not the two or more most adequate plaintiffs. 15 U.S.C. 78u-4(a)(3)(B)(i)-(iii). And it refers to a "person or a group of persons," not a combination of multiple groups or multiple persons not part of one group.

17/ See Advanced Tissue, 184 F.R.D. at 351-52; Cendant, 182 F.R.D. at 147-48; Gluck, 976 F. Supp. at 549-50; Reiger v. Altris Software, Inc., 1998 U.S. Dist. LEXIS 14705, at *16-18 (S.D. Cal. Sept. 14, 1998); Steiner v. Frankino, 1998 U.S. Dist. LEXIS 21804, at *15-16 (N.D. Ohio July 16, 1998); see also Milestone, 183 F.R.D. at 417-18.

lead counsel, and contemplates that a court would impose additional or different counsel on the lead plaintiff only in very unusual circumstances, the selection of counsel remains "subject to the approval of the court." 15 U.S.C. 78u-4(a)(3)(B)(v). Greater scrutiny is warranted where it appears that the lead plaintiff has not played an active, effective role in choosing counsel.

* * *

In this case, the district court was entitled to consider information about whether petitioners qualify under the Reform Act as a lead plaintiff "group" and as adequate class representatives. If they do not, then they should not be appointed lead plaintiff, together or separately, regardless of their financial interest in the litigation.

In fact, information relevant to "group" and adequacy determinations was before the district court and extensively discussed in its November 22 decision. See pp. 5-9, supra. And the court's December 15 order stating that Vatuone "is the most capable of adequately representing the interests of class members" can be interpreted as reflecting an assessment that petitioners would not be adequate class representatives.

Thus, petitioners err in arguing (Pet. at 3, 21) that the court "had no discretion" to inquire into "the nature and qualities" of lead plaintiff candidates or that such information is "arbitrary" or "extraneous" or not "relevant as a factor."

CONCLUSION

For the foregoing reasons, the Commission urges the Court to reflect in its resolution of the petitions for writ of mandamus the principles discussed in this brief.

Respectfully submitted,

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

ERIC SUMMERGRAD
Deputy Solicitor

LUIS DE LA TORRE
Attorney

Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0606
(202) 942-0813 (de la Torre)

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