STATEMENT OF RICHARD B. DRUBEL,
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THIRD CIRCUIT TASK FORCE
ON SELECTION OF CLASS COUNSEL

Philadelphia, Pennsylvania
June 1, 2001

Chief Justice Becker and distinguished members of the Task Force:

It is an honor and a pleasure to testify before you today. I have been in practice for over 20 years, much of it occupied with class action litigation. (A copy of my resume is attached.) Together with my partner, David Boies, I serve as co-lead counsel for the class in In re Auction Houses Antitrust Litigation.

Having participated in what I believe was a highly successful lead counsel auction, I would like to share some thoughts with you regarding the structure of such auctions, the results of the auction in light of the settlement in Auction Houses, and then address some of the purported limitations on the use of lead counsel auctions.

1. Auction Structures.

Presumably there is broad agreement that the goal in selecting and compensating lead counsel is to maximize the net recovery of the class. Professor Coffee is surely right in observing that class members want the largest net recovery, not the lowest attorney's fee.

Lead counsel auctions present a wide variety of structures that are available to attempt to achieve this goal. As other presenters have noted, however, when we discuss the suitability of auctions it is important at the outset to note the type of auction we are speaking about. Some

auctions, e.g., a low-bid, fixed fee auction, may be worse than the arrangement they are intended to replace.

In Auction Houses, Judge Kaplan used a two-tier, increasing percentage of recovery fee structure, in which lead counsel received zero percent of the first tier and 25% of the second tier. The bidding thus consisted of each law firm submitting the highest number it felt could be justified for the first tier (the "x" or floor amount). The auction thus allowed an easy, "apples to apples" comparison of bids. It also addressed directly the goal of selecting lead counsel, viz., maximizing net recovery for the class, by requiring law firms to compete with each other by increasing the amount that would go directly to the class without any deduction for lead counsel's fees or expenses.

Such a structure (which is also true of increasing percentage auctions generally) gives a big advantage to firms that have demonstrated the ability to try cases successfully. (The advantage is magnified in a mandatory treble damages case like Auction Houses.) This is because defendants are more likely to settle for larger amounts with lead counsel whom they know to be successful trial lawyers than with those who rarely try cases, or who have not been successful at it. Knowing this, the firm that is confident of its ability to go to trial and win can bid higher than others, making their selection as lead counsel more likely. This is a desirable result for the class, since even if the case never goes to trial, the fact that lead counsel could credibly bring it to trial and win substantially increases the settlement value of the case to the benefit of the class and lead counsel. This is not, as Professor Coffee characterizes it, a case of "winner's curse", but rather of "trial lawyer's opportunity". The class' recovery increases because the claim is put in the hands of the lawyers that can make the most of it. In Auction

Houses, for example, I have no doubt that the size of the settlement we were able to achieve reflected the fact that one of the greatest trial lawyers in the country is my partner and co-lead counsel. That consideration, I assure you, was not lost on me when I prepared our bid in that case.

Judge Kaplan's auction structure is also significant for what it did not do. First, it did not impose a cap on either fees or expenses. Expenses were to be paid out of lead counsel's fee, if any, and not separately reimbursed by the Court out of any recovery. It is difficult to see how a cap on either fees or expenses could ever by anything other than what Judge Milton Shadur referred to as the substitution of a judge's "gestalt" notion of what constitutes a reasonable fee or reasonable expenses for the free market. Such artificial line-drawing is inevitably arbitrary and, in cases where the caps actually come into play, may be contrary to the class's interest in obtaining the last possible dollar of recovery.

Judge Kaplan's auction procedure also wisely avoided any discount for early settlement. Why on earth any client would want to discourage their lawyer from obtaining a fair recovery sooner rather than later escapes me. If no client would do it, why should a court? In Auction Houses we reached a settlement just four months after our appointment as lead counsel. The speed with which we were able to achieve a recovery for the class is, to my mind, one of the positive attributes of the settlement, not an occasion for financially penalizing lead counsel. The problem with what Judge Kaplan referred to as "cheap early settlement" is not that such settlements are early, but that they are cheap. Courts can and should act as gatekeepers for the class in rejecting cheap, sell-out settlements whether they came early or late in the lawsuit.

One feature of Judge Kaplan's auction that has come in for particular questioning, for

example by the prolific Professor Coffee, concerns the use of a "two-tier" approach with the first tier of any recovery going entirely to the class. This feature is intended, I think, to help eliminate what Andrew Niebler refers to as the "lemon lawyer", the sponsor of the sell-out settlement. Professor Coffee has argued that with a bid of $405 million such as we made in Auction Houses, what would have been the result if, after our bid, we had discovered that there were serious factual or legal difficulties with the case and, as a result, defendants had refused to settle for any more than $300 million? The answer is that if the case were really worth only $300 million we would have tried to settle it for that amount as quickly as possible. A $300 million case doesn't get better by putting more time and expenses into it.

What, however, would be the result if the case were worth $300 million and defendants were firm in offering only $200 million? What economic incentive does lead counsel in that case have to hold out for an extra $100 million for the class when such effort will still result in a zero fees? This hypothetical would appear to be an anomaly in which the interests of lead counsel and the class are in conflict. Professor Coffee suggests that this result can be eliminated by using a more progressive fee structure, in which lead counsel shares in an increasing percentage of all (or virtually all) dollars of recovery, rather than only in second tier dollars. This strikes me as a sensible suggestion, particularly since the evil that a substantial first tier is intended to eliminate – a sell-out settlement by a "lemon lawyer" – can also be prevented by the supervising court exercising its discretion vigorously to reject inadequate settlements.

2. Auction Results.

It would appear that Judge Walker is certainly correct that "no matter what else is said, the fees that have been generated in cases where lead counsel have been competitively selected

are less, and usually substantially less, than the share of recovery that has been taken through the standard benchmark approach." Task Force on Selection of Class Counsel, Public Hearings, March 16, 2001, pp. 39-40. For example, the fee award in Cendant amounted to 8.27 percent of the actual recovery, and the fee in Auction Houses (together with expenses) came to approximately 5 percent. Compare these awards to NERA's estimate of the average fee award in securities class actions, which is in the neighborhood of 33 percent. The fee (including expenses) in Auction Houses is one-third of the "going rate" for attorney fees in mega-fund cases of about 15 percent. In fact, Auction Houses is the first time I have ever heard the complaint by one of my colleagues in the plaintiff's bar that our a fee was too low.

Of course, statistics such as the above relate only to the split between plaintiffs and lead counsel of the recovery obtained. While useful as a means of obtaining a certain perspective, they do not measure the real goal of selecting lead counsel, which is to maximize the net recovery of the class. In order to do that, we need to compare the amount of plaintiffs' net recovery with plaintiffs' damages. That is the percentage a client really cares about.

In Auction Houses, we received a cash value of $512 million (actually somewhat more, because of the extra coupons contributed by defendants, but that's a different story). After deduction of lead counsel's fees and expenses the settlement amounted to 1.69 times single damages, which I think is a record for an antitrust settlement.[1] Taken together, the results in Auction Houses amount to what amounts to the legal equivalent of a "hat trick" in hockey: a record high class recovery percentage and a record low fee percentage obtained in record time.

[1] There will also be some further reduction for the fees and expenses of non-lead counsel, almost exclusively for work done before the auction, but this will not materially change the percentage of recovery.

3. Appropriateness of Lead Counsel Auctions Generally.

Notwithstanding the extremely positive results of lead counsel auctions in the limited number of cases so far, reaction to their use has been met with skepticism by some and outright hostility by others. Beyond the predictable reactions of those who for personal or economic reasons oppose any change in the status quo, some thoughtful commentators have suggested that auctions are appropriate only for a minority of cases, and are positively inappropriate for certain types of cases. I would now like to address some of these purported limitations on the use of lead counsel auctions.

a. Claim Jumping. Some commentators and judges have suggested that lead counsel auctions are not appropriate where the case in question was filed by one or more lawyers whose original work discovered the violation of law in the first place. If such cases are then handed off to a bidder willing to allocate more of any recovery to the class, so the argument goes, lawyers whose forte is the investigation and discovery of legal violations will go do something else rather than have their cases usurped by higher bidders, to the detriment of the public good. The first thing to notice about this argument is that it seems to disregard the first principle of selecting and compensating lead counsel: that it should be done to maximize the net recovery to the class. Rewarding with a lead counsel position a lawyer who may be a great investigator but an inexperienced or inept trial lawyer would not seem to be the best way to maximize the recovery of the class. A much better approach, thoroughly in keeping with the common fund doctrine, would be to reward the finder separately for his work in some fashion, e.g., with a percentage of the recovery, but to auction the position of lead counsel to the firm that can get the most value to the class. The finder thus has a continued incentive to unearth

violations and lead counsel can be selected consistent with the principle of maximizing the net recovery of the class.

b. Insufficient Information. Some commentators have stated that auctions are a bad idea when liability is "uncertain" or the extent of harm is unknown. Indeed, in Auction Houses Judge Kaplan noted that the lead counsel auction in that case approached an efficient market for legal services in part because the bidding attorneys had more information with which to evaluate liability and damages than typically is available. That may well be, but I can assure you that liability in Auction Houses was far from certain, specifically with respect to proving collusion as to the buyers' premium, which was where 70 percent of the class's total damages were. Defendants consistently denied any collusion with respect to the buyers' premium and the Department of Justice to this day has not indicted any defendant for conduct relating to the buyers' premium. If lead counsel auctions were only appropriate in cases where liability is all but conceded, then Auction Houses would not have been a good case for a lead counsel auction.

The problem with limiting lead counsel auctions to cases where liability is virtually conceded, or more generally where "enough information is known to be able to make an informed bid", is that the former cases will be relatively rare and the latter will be utterly in the eye of the beholder. How much needs to be known in order to make an "informed" bid? The reality is that lawyers who make their living doing contingent fee work "bid" on potential cases with incomplete information virtually every time they propose a retainer agreement to a client. In most cases liability is uncertain and the extent of damages problematic. That does not stop a good lawyer from being able to handicap both and propose a sensible contingent fee. Class actions are no different. The only circumstance in which "incomplete" information should

prevent a court from selecting lead counsel by auction is where information is so lacking that no qualified firm is willing to submit a bid.

In this respect, I mildly disagree with Professor Coffee's suggestion that some minimum number of qualified bidders (Professor Coffee suggests six) is necessary in order for an auction to be appropriate. It may be true that a very small number of bidders will not necessarily provide the court with the same level of confidence in the result that a large number of bidders will do, but it is surely not the case that no significant benefits accrue in using an auction even in that situation. One benefit of an auction is to drive each participant to compete against the others for the benefit of the class. Unless a bidder is assured in advance that no one else will bid, that competitive discipline will still exist – and the class will still reap the benefits – whether there is one bidder or twenty. In Auction Houses, we had no idea how many firms would bid. Although twenty firms ended up submitting bids in that case, if it had turned out that only one or two actually did so, our bid would still have been the same. The point is that even auctions with small numbers of bidders can result in the selection of lead counsel by competition, which would appear to be far preferable to approaches having little, if anything, to do with increasing the net recovery of the class. I believe courts should be guided by practical considerations of competition in describing whether to use an auction in the cases presented to them, rather than by laying down specific requirements for a minimum number of bidders.

Conclusion

Lead counsel auctions can be a very effective tool for increasing net recoveries to class members by (1) lowering fees through competition, and (2) increasing the value of claims by

putting them in the hands of the lawyers who can do most with them. Courts should be encouraged to try lead counsel auctions in a wide variety of cases, preferably with structures that provide direct economic incentives for lead counsel to maximize recoveries for the class, along the lines of Auction Houses and Cendant.

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Born: New York, New York, February 16, 1951

Admitted to bar: 1980, District of Columbia
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Education: University of Michigan (B.A., 1973)
University of Michigan (J.D.; magna cum laude, 1977)
Free University of Brussels (LL.M., cum laude, 1978)

Order of the Coif, Editor, Michigan Law Review, 1976-1977.

Co-Author with Professor Peter Westen, University of Michigan Law School, "Toward a General Theory of Double Jeopardy," The Supreme Court Review, 1978.

Experience: Special Assistant, John Temple Lang
Legal Service of the Commission of the European Communities
Antitrust Division, 1978.

Law Clerk, to the Honorable Louis F. Oberdorfer
U.S. District Judge for the District of Columbia, 1978-1979.

Special Assistant to the General Counsel
U.S. Department of Energy, 1979-1980.

Cleary, Gottlieb, Steen & Hamilton, Washington, D.C., New York, N.Y., Brussels, Belgium, 1980-1985.

Susman Godfrey, Houston, Texas, 1985-1998.

Boies, Schiller & Flexner LLP, Hanover, New Hampshire, 1998 - present.

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RICHARD B. DRUBEL

Cases (1986 - 2000)

1. ***In re: Auction Houses Antitrust Litigation***, 00 Civ. 0648 (LAK), United States District Court for the Southern District of New York; The Honorable Lewis A. Kaplan (2000).

   Case Type: Antitrust Price Fixing
   Represented: Plaintiff Class
   Result: $512 million settlement cited by the National Law Journal as one of the largest settlements of the year 2000.

2. ***In re: SmithKline Beecham Clinical Laboratory Test Billing Practices Litigation,*** MDL 1210, United States District Court for the District of Connecticut; The Honorable Alfred V. Covello; ***May v. SmithKline Beecham Clinical Laboratory,*** C.A. No. 3:98-108 or 97L-1230, In The Circuit Court of Madison County, Third Judicial Circuit, State of Illinois; The Honorable Randall A. Bono (2000).

   Case Type: ERISA, RICO and state law claims
   Represented: Plaintiff Classes
   Result: $30 million settlement

3. ***In re: Cincinnati Radiation Litigation***, C-1-94-126, United States District Court for the Southern District of Ohio; The Honorable Sandra S. Beckwith (1999).

   Case Type: Tort arising out of radiation experiments on hospital patients
   Represented: Plaintiff opt-outs
   Result: $1.8 million settlement

4. ***Ceska Sporitelna v. Unisys Corporation,*** 96-CV-4152, United States District Court for the Eastern District of Pennsylvania; The Honorable Charles R. Weiner (1999).

Case Type: Fraud
Represented: Defendant Unisys Corporation
Results: Confidential settlement

5. ***County of Orange vs. AgAmerica, FCB, et al.***, U.S. Bankruptcy Court, C.D. Ca., Case No. SA 94-22272 JR; The United States District Court, Central District of California, Southern Division; The Honorable Gary L. Taylor (1999).

Case Type: Securities Fraud
Represented: Defendants Farm Credit Banks
Results: Settlement and dismissal with $0 paid by clients

6. ***Rosalina Quiroga, Individually and as Next Friend of Martin Quiroga, Daniel Quiroga, and Martin Quiroga, Jr. v. Sunbelt Regional Medical Center d/b/a Columbia East Houston Medical Center (f/k/a Sunbelt Regional Medical Center), et al.***, No. 98-14707; In the District Court, Harris County, Texas, 125th Judicial District Court; The Honorable Harvey G. Brown, Jr. (1999).

Case Type: Medical Malpractice
Represented: Plaintiff
Results: $1.635 million settlement after 6 day jury trial

6. ***Gene Cyre v. Georgia-Pacific Corporation, et al,*** No. 97-24399; In the District Court of Harris County, Texas; The Honorable Russell Lloyd (1997).

Case Type: Toxic Tort
Represented: Defendant, Georgia-Pacific Corporation
Result: Non-suit in favor of Georgia-Pacific Corporation

7. ***Farm Credit Bank of Texas v. Kemper Securities, Inc. and PaineWebber Incorporated, NationsBank Capital Markets,*** No. 95-E153069; In the District Court of Jefferson County, Texas; The Honorable Donald J. Floyd (1996).

Case Type: Securities Fraud
Represented: Plaintiff Farm Credit Bank
Result: Kemper: $1.90 million settlement
PaineWebber: $365,000 settlement
NationsBank: defense decision in arbitration

8. ***Judith Rubinstein and Howard Greenwald v. J. Patrick Collins, et al.,*** Civil Action No. H-92-1297; In the United States District Court for the Southern District of Texas, Houston Division; The Honorable Nancy Atlas (1996).

Case Type:	Securities Fraud
Represented:	Plaintiff Class
Result:	**$6.25 million settlement**

9. ***Edwin C. Crouch, et. al. v. Cornelius B. Prior, Jr., et. al.***, Civil Action No. 1995/108-F-STX; In the District Court of the Virgin Islands, Division of St. Croix; The Honorable Raymond J. Finch and ***Atlantic Tele-Network, Inc. and Cornelius B. Prior, Jr. v. Jeffrey J. Prosser, Sir Shridath s. Ramphal, and John P. Raynor***; Civil Action No. 14443; In the Court of Chancery of the State of Delaware in and for New Castle County; The Honorable Myron T. Steele (1995-1996).

Case Type:	Proxy Fight
Represented:	Jeffrey J. Prosser, Chairman of Atlantic Tele-Network, Inc.
Result:	Settlement reinstating client as Chairman of the Board of Directors.

10. ***Brian D. Backstrom, et al. v. The Methodist Hospital***; Civil Action No. H-94-1877; In the United States District Court for the Southern District of Texas, Houston Division; The Honorable Sim Lake (1995-1996).

Case Type:	Product Liability
Represented:	The Methodist Hospital
Result:	Class Action settlement extremely favorable to client.

11. ***In re Taxable Municipal Bond Securities Litigation***, MDL 863, United States District Court for the Eastern District of Louisiana; The Honorable Morey Sear, Chief Judge (1995).

Case Type:	Securities Fraud
Represented:	Plaintiff Class
Result:	**$124 million settlements**

12. ***In re The Drexel Burnham Lambert Group, Inc.***, 90 Civ. 6954 (MP) and ***In re Michael Milken Securities Litigation***, MDL 924, United States District Court for the Southern District of New York; The Honorable Milton Pollack (1993-1995).

Case Type:	Securities Fraud
Represented:	Selected by The Honorable Milton Pollack to serve as one of five attorneys to administer **over $475 million** in Drexel and Michael Milken recoveries.

13. ***Belman v. Sanifill, Inc.***, Civil Action No. H-91-3767, United States District Court for the Southern District of Texas; The Honorable Ken Hoyt (1993).

Case Type:	Securities Fraud
Represented:	Plaintiff Class
Result:	**$3.3 million settlement**

14. ***Marine Drilling Management Company v. Bethlehem Steel Corporation***, No. 91-3598-C, Nueces County District Court (Corpus Christi), Texas; The Honorable Vernon Harville (1993).

Case Type:	Breach of Contract, Fraud
Represented:	Plaintiff
Result:	**$10 million settlement**

15. ***Diamond v. Chamberlain, Hrdlicka, White, Johnson & Williams***, 89-24204, 165th Judicial District, Harris County, Texas; The Honorable Elizabeth Ray (1993).

Case Type:	Legal Malpractice
Represented:	Defendant
Result:	**$1 million settlement**

16. ***Sunrise Systems, Inc. v. Xerox Corporation***, No. 3:88-CV-0617-X, United States District Court for the Northern District of Texas (Dallas); The Honorable Joe Kendall (1992).

Case Type:	Breach of Contract
Represented:	Plaintiff in 3-week jury trial
Result:	**Jury verdict for plaintiff: $23.3 million judgment** (Settled for $21 million while on appeal.)

17. ***The Dow Chemical Company v. Liberty Oil and Refining Association, Inc.***, No. A 199968 II D, Clark County (Las Vegas), Nevada; The Honorable Nancy Becker (1991).

Case Type:	Breach of Contract
Represented:	Defendant Dow Chemical
Result:	**Settlement of less than $1 million**

18. ***In re Terra-Drill Partnerships Securities Litigation***, MDL 791, C.A. No. H-86-3808, United States District Court for the Southern District of Texas (Houston); The Honorable Lynn Hughes and The Honorable Milton Pollack (1989).

Case Type:	Securities Fraud
Represented:	Plaintiff Class in 3-week jury trial
Result:	**Jury verdict for plaintiffs: $72 million judgment called "one of the most significant verdicts of the year" by the *National Law Journal***

19. ***Friedman Holdings, Inc. and Friedman Acquisition Corporation v. Friedman Industries, et al.***, No. 88-012513, 333rd District Court, Harris County (Houston), Texas; The Honorable Dave Lee Wilson (1989).

Case Type:	Breach of Contract
Represented:	Plaintiffs

Result: **$800,000 settlement**

20. ***The Republic of the Philippines v. Ferdinand Marcos, et al.***, C.A. No. H-86-1184, United States District Court for the Southern District of Texas (Houston); The Honorable John Singleton (1987).

Case Type: RICO, Fraud
Represented: Campos Defendants
Result: **Settlement**

21. ***Arkansas Gazette Co. v. Camden News Publishing Co., et al.***, LR-C-84-1020, United States District Court for the Eastern District of Arkansas (Little Rock); The Honorable William R. Overton (1986).

Case Type: Antitrust Predatory Pricing
Represented: Plaintiff in a 10-day jury trial
Result: **Verdict for defendant**

22. ***In re Invoil Securities Litigation***, MDL No. 585, United States District Court for the Western District of Oklahoma (Oklahoma City); The Honorable Luther Eubanks (1986).

Case Type: Securities Fraud
Represented: Plaintiff Class
Result: **Settlement at commencement of trial**