

**STATEMENT OF VAUGHN R WALKER**  
**THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL**  
**Philadelphia, Pennsylvania**  
**March 16, 2001**

**Introduction**

Chief Judge Becker, distinguished members of the Task Force, fellow presenters and ladies and gentlemen:

It is a great pleasure and honor for me to appear before you today. The Third Circuit has long been an innovator. The Third Circuit, among all the circuits, took the lead in studying attorney fees in class actions. The Circuit's 1985 Task Force issued a much quoted and important report on that subject. Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 FRD 237 (1985). Under the leadership of Chief Judge Becker, the Third Circuit continues its innovative tradition. This is no surprise for Chief Judge Becker is one of the truly outstanding jurists of the United States. It was, therefore, a great honor to receive his invitation to appear before you today.

You have been charged with the duty of examining the ways that courts select class counsel in class actions and, in particular, with the consequences that attend the decisions of some courts to select counsel by competitive means. A good place to begin discussing that issue is where the Third Circuit Task Force left off in its pioneering work in 1985.

## **The 1985 Third Circuit Report**

The 1985 Task Force endorsed a method of determining fees that was designed to simulate the result that market forces would bring about. It noted that most courts awarded fees after recovery was obtained. The Task Force, however, recommended that courts “on motion or on its own initiative and at the earliest practical moment, should attempt to establish a percentage fee arrangement agreeable to the Bench and plaintiff’s counsel.” *Court Awarded Attorney Fees*, 108 FRD at 255. The Task Force assumed that “the earliest practical moment” meant “immediately after the pleadings are closed and before discovery is fully underway.” *Id.* The Task Force went on to recommend that the court appoint a person to negotiate with counsel on behalf of the class. This person, the Task Force stated, should negotiate an agreement that includes “all of the features normally contained in comparable arrangements that are negotiated directly between counsel and client.” *Id.* at 256. Under this approach, the negotiator attempts to negotiate a fee arrangement in the same way a plaintiff with sufficient sophistication and financial stake in the litigation would do so.

In practice, I have attempted to follow most of these precepts. Determining a fee arrangement at the outset of litigation, the way the market would operate. A sophisticated and interested plaintiff does not blindly select a firm and then negotiate a fee arrangement after any recovery has been obtained. Rather, the plaintiff works out the terms of representation at the outset of the litigation, perhaps after asking a number of qualified firms to submit proposed fee arrangements along with information detailing the firms’ qualifications to undertake the representation. From this and other available information, the informed and conscientious plaintiff selects a firm and

negotiates a fee arrangement. The resulting fee is thus the product of market forces.

Absent class members whose legal rights are affected in a class action are entitled to the same protection of their interests vis a vis the attorneys who represent those interests as an informed and diligent plaintiff in an individual action. That level of protection is simply impossible to achieve if fees are determined after the outcome of the litigation is known. Yet courts have long postponed the fee issue until the end of the case rather than taking it up at the outset.

The recommendations of the 1985 Task Force report for a market-based determination of attorney fee and expense arrangements at the outset of the litigation are the lasting and important contributions of that Task Force's work. Of much less import, but a feature of the report that has received extensive attention, is its emphasis on percentage fees, often called benchmark fees. The 1985 Task Force harshly, and in my view justifiably, criticized lodestar attorney fee determinations. But the shortcomings of the lodestar approach are not cured by simply shifting to the expression of attorney compensation from hours worked to a percentage of the recovery. In practice, the lodestar and the so-called percentage benchmark are simply two different ways of measuring fees. But they are not two different methods for determining fees.

Both the lodestar approach and the percentage benchmark as used by most courts suffer the same defects in practice. They rely on a retrospective determination of what is a fair fee. A retrospective determination inevitably fails accurately to assess the risk of the litigation since at the end of the case there is no longer any risk of a non-recovery; the existence of a recovery, if any, is known and,

indeed, the amount of that recovery is also known. It is for that reason primarily that there has been so little difference in the level of fees and expenses under the lodestar and benchmark approaches. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan L Rev* 497, 541 (1991); William J Lynk, *The Courts and The Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 *J Legal Stud* 185, 209 (1994).

Expressing fees in percentages has, however, produced one important benefit; it has facilitated competitive selection of class counsel at the outset of the litigation. That brings me to the main issue which the Task Force has been called upon to study: whether courts should implement competitive processes for selecting lead counsel and choosing a fee arrangement for such counsel. I believe that courts should do so.

### **Objections to Competitive Counsel Selection**

To be sure competitive selection of class counsel has its critics; undoubtedly, you will and should hear from these critics. Professor John Coffee of Columbia Law School, for example, has pointed to what he sees as a number of problems with the competitive bidding. John C Coffee, *Securities Class Auctions*, *The National Law Journal* (September 14, 1998). They include: (1) an incentive for class counsel to settle early and cheaply; (2) unfair advantages for defendants when they know class counsel's fee arrangements; (3) difficulties evaluating bids; and (4) subordination of quality of representation considerations. *Id.* Professor Coffee himself acknowledges that his concerns can be allayed. In my view, these concerns are

exaggerated. Let's take up each one.

- The danger of a cheap settlement.

The risk of settlement that sells out the class' interest is not peculiar to class actions in which counsel have been competitively selected. This is a risk in all class actions no matter how counsel are compensated. The coupon cases are notorious examples of class action abuse. But the suggestion that competitive selection of class counsel exaggerates this risk is belied by experience. In the In re California Micro Devices litigation, for example, non-competitively selected counsel presented the court with an early settlement. I rejected that settlement because plaintiff's counsel had not gone through a competitive selection process. In re California Micro Devices Sec Lit, 168 FRD 257 (ND Cal 1996). After an institutional investor, with the ability and incentive to negotiate a competitive fee arrangement, was appointed lead plaintiff and selected its own counsel through a competitive process, a second, very much larger settlement was achieved. In re California Micro Devices Sec Lit, 965 F Supp 1327 (ND Cal 1996). This settlement guaranteed the class seven million dollars more cash than the rejected settlement and was approved by the court. *Id* at 1330-31, 1337. A further settlement has just recently been concluded with the sole remaining defendant bringing the class' total recovery to about 2½ times the initial settlement negotiated by non-competitively selected counsel. Competitive selection of class counsel did not lead to an early or cheap settlement.

- Defendant's knowledge of class counsel's fee arrangements.

Again, if this is a problem, (although I seriously doubt that it is) it is not peculiar to cases where class counsel are competitively selected. Defendants' counsel

know full well how lodestar and percentage benchmark fees work when set by the court and can use that knowledge strategically if fees and costs are awarded using those approaches. Furthermore, any judge concerned that knowledge of class counsel's fee and costs arrangements can be exploited by defendants, may simply seal the arrangements until the conclusion of the litigation.

- Difficulty in evaluating bids.

This is one concern of Professor Coffee's that should be taken seriously. But again, the lodestar and percentage benchmark approaches offer no solution. Both are extremely difficult to apply fairly and rationally and the lodestar can be enormously time-consuming for the court. To be sure, judges are not accustomed to negotiating attorney fee arrangements, but as I shall explain presently, a few measures can greatly simplify and rationalize competitive selection of class counsel.

- Subordination of quality representation.

This concern deserves short shrift. Lawyer quality can probably be more readily assessed by a judge (or the judge's representative) than any other feature of representation. Moreover, of course, quality is not divorced from price. A less prestigious lawyer at a lower price may well be much better for the class than a high priced lawyer of great renown. Lawyers may not like to admit this, especially if they are high-priced. Nor may a professor at a prestigious law school that produces graduates who become high-priced lawyers like to admit this. But it's true, nonetheless.

In addition to Professor Coffee's concerns, some courts have determined that the Private Securities Litigation Reform Act (PSLRA), 15 USC § 78u-4, et seq, precludes courts from selecting counsel by a competitive auction in cases governed by

the PSLRA. See, e.g., In re Microstrategy Inc Sec Lit, 110 F Supp 2d 427, 437-38 (ED Va 2000). While the right to “select and retain counsel to represent the class” is given to the most adequate plaintiff, subject to approval by the court, 15 USC § 78u-4(a)(3)(B)(v), application of this section of the PSLRA presupposes the existence of an adequate plaintiff. As I will discuss shortly, in many securities class actions, there is no adequate plaintiff.

I would like to turn now to the process by which I began to use competitive bidding to select class counsel. Indulge me a personal war story, if you will.

### **The Oracle Case**

The year was 1990. I had been on the bench all of three months. In a securities class action, In re Oracle Securities Litigation, 131 FRD 688 (ND Cal 1990), two warring camps of lawyers, including a prominent Philadelphia lawyer, came before the court sparring over which group of plaintiffs’ lawyers should be designated class counsel. Each side made rather scurrilous charges about the other. Being a new judge and unaccustomed to watching a courtroom contretemps from the sidelines -- having always been in the middle of all such affairs that I had previously witnessed -- I let this controversy roil on for a while. Having so recently come from private practice, where it is common for lawyers to have to make representation proposals based upon fees and qualitative considerations, I suggested that these considerations guide the selection process in this case.

Silence descended on the warring lawyers. I directed that the competing

lawyers submit alternative fee proposals. A few weeks later, a prominent San Diego lawyer encountered me at the Ninth Circuit Judicial Conference. He took me aside to say, "Judge, don't worry about that Oracle case, we've got the whole thing worked out."

Sure enough, shortly thereafter, the formerly warring lawyers submitted a proposal for a steering committee of the lawyers to run the litigation for a straight thirty percent of the recovery, plus out of pocket expenses. The prospect of competition, it seems, brought peace to the fractious lawyers. But this resolution appeared self-serving to the lawyers and contrary to the interests of the class. So notwithstanding the lawyers' truce, I decided to pursue a competitive selection process.

Going along with the lawyers' agreed upon solution would have been the easier course. And I regret to say that I think the ease of going along with what the lawyers propose is what many judges find attractive in the steering committee approach to class counsel selection. But deferring to a steering committee to run the litigation, I believe, ill serves the class.

I recount the story for two reasons: (1) to illustrate that the introduction of competitive selection was not the product of some grand plan or philosophy, but was simply the result of a judge attempting to deal with a problem on his docket, and (2) to call attention to the fact that no matter what else is said, the result of competitive selection has been to reduce the share of recovery consumed by attorney fees. Without in any way impugning the motives of anyone who has criticized competitive class counsel selection, it is this second fact, I truly believe, that has largely driven the opposition to competitive selection. Of course, the goal of a court conducting counsel selection is not alone to reduce the size of attorney fees. The aim is to increase the



share of the recovery secured by the class. That such an enterprise may be troublesome to lawyers is hardly a matter that should prompt judges or observers to worry about whether competitive selection threatens professional standards.

In all cases in which I have used competitive selection, the counsel selected have been among the most able that the bar has to offer, the recoveries achieved by the class have been substantial and the fees paid out of those recoveries have been substantially less than would have been taken had the traditional percentage of recovery or lodestar approaches been followed. In short, competitive selection works and benefits the class.

### **When and Why Counsel Should be Selected Competitively**

Although it may be that I simply stumbled upon the auction method of introducing competition into class counsel selection, the principle of securing the benefits of market competition in class representation is hardly novel. The Third Circuit has long used market analogies to determine reasonable fees under the lodestar approach. See Lindy Bros Bldrs, Inc v American Radiator & Standard Sanitary Corp, 487 F2d 161 (3d Cir 1973) (Lindy I). In another case, the Third Circuit put it this way: “Our premise has been that the reasonable value of an attorney’s time is the price that time normally commands in the marketplace for legal services in which those services are offered.” In re Fine Paper Antitrust Litigation, 751 F2d 562, 590 (3d Cir 1984). The Supreme Court has also stated in the lodestar context that “market standards should prevail.” Hensley v Eckerhart, 461 US 424, 447 (1983). In another fee case, the

Supreme Court made the following trenchant observation:

We recognize, of course, that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the services of a lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively – even within a law firm.

Blum v Stenson, 465 US 886, 895 n11 (1984). In other words, market rates are not the product of a priori observation. Only markets tell us market rates.

I believe that Federal Rule of Civil Procedure 23 requires the use of market based procedures in fee determination decisions. Rule 23 provides that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class.” FRCP 23(A)(4) (emphasis added). The requirement of an adequate representative plaintiff also appears in PSLRA. The PSLRA requires the court to “appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the ‘most adequate plaintiff’) in accordance with this subparagraph.” 15 USC § 78u-4(a)(3)(B)(i) (2000). The adequacy requirement is, at its root, constitutionally required to bind absent plaintiffs to a judgment. Hansberry v Lee, 311 US 32, 45 (1940). For our purposes, however, the adequacy requirement is important because it demands the selection of competent, fairly-priced counsel.

The representative plaintiff in class litigation owes a fiduciary duty to the class. See Cohen v Beneficial Indus Loan Corp, 337 US 541, 549 (1949). Thus,

unless a representative plaintiff can dispatch this fiduciary duty to the class, the representative cannot be found to be adequate. One of the most important tasks a representative plaintiff must complete is selection of counsel. The PSLRA recognizes this by providing that “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 USC § 78u-4(a)(3)(B)(v) (2000). If a representative plaintiff does not select competent counsel, the proposed representative cannot meet the adequacy requirement of FRCP 23 and the PSLRA. See Baffa v Donaldson, Lufkin & Jenrette Securities, 185 FRD 172, 177 (SDNY 1999) (“The court also finds Dorflinger’s choice of counsel renders her inadequate to serve as class representative.”).

In order to fulfil the fiduciary duties to the class, a representative plaintiff must do more than simply select competent counsel. The representative must select counsel that will maximize the class’ share of the recovery. This requires the representative plaintiff to select counsel that are both competent and competitively-priced. Unfortunately, many plaintiffs in a class action lack the incentive and/or ability to negotiate with prospective counsel to obtain a competitive fee arrangement. Selecting between different law firms and proposals can be an expensive, time consuming and even difficult process. Often, however, an individual’s stake in a class action suit is too small to justify such an expense. See, e g, Eisen v Carlisle & Jacquelin, 417 US 156, 161 (1974).

In some class actions, a plaintiff with a sufficiently large stake in the litigation and with the skill and experience to select counsel and negotiate a competitive fee steps forward to assume this responsibility. In securities fraud class actions,

institutional investors are sometimes capable and willing to do this. It was with this in mind that Congress, in the PSLRA, created a rebuttable presumption that the named plaintiff with the largest financial interest in the action should be the lead plaintiff. 15 USC § 78u-4(a)(3)(B)(iii) (l)(bb) (2000); see House Conference Report No 104-369, 104th Cong 1st Sess at 34 (1995); see also Gluck v CellStar Corp, 976 F Supp 542, 548 (ND Tex 1997). The same principles animating the presumption in the PSLRA also apply outside of the securities arena. The procedure enacted by the PSLRA, though applicable only in securities cases, is one way to seek out an adequate plaintiff, as required by FRCP 23(a)(4), applicable to all class actions. The bottom line is that if a representative plaintiff is able and motivated to select counsel competitively, then the adequacy requirements of FRCP 23 and the PSLRA are met and court intervention to select counsel is unnecessary.

Thus, the first task facing a judge hearing a motion to appoint lead plaintiff is to determine whether any of the proposed lead plaintiffs is adequate by this standard. This requires the court to consider whether a proposed lead plaintiff has competitively and competently selected counsel or has the ability and incentive to do so. To make this determination, the court should request that each prospective lead plaintiff submit evidence to inform the court about the process by which the prospective plaintiff selected counsel. See Appendix A (list of ten questions I have used for this purpose in securities class litigation). The court can then examine this information, along with information about the plaintiff's sophistication and financial interest in the case. If it appears that the plaintiff competently engaged in a competitive selection process, the court need not involve itself further. Even if the plaintiff has not undertaken to select

counsel competitively, if it appears that the plaintiff has the ability and incentive to do so, the court may request that the plaintiff undertake such a process and appoint that party as lead plaintiff subject to a later report of how the party fulfilled the responsibility of identifying and negotiating reasonable arrangements with counsel.

Unfortunately, it is the exception rather than the rule that parties having such capabilities come forward to represent a class. Indeed, if the truth be told, most class representatives are selected by the lawyers rather than the other way round. When a court faces that situation, one possibility the is to decline to allow the case to move forward as a class action for want of an adequate class representative, an option plainly authorized by FRCP 23(a)(4)'s requirement of adequacy of representation. But to deprive the class of the ability to use the class action form whenever there is no sophisticated plaintiff with a large financial stake and interest in the litigation available would greatly reduce the usefulness of class actions. After all, class actions are designed with the view in mind that the case is likely one in which no single individual party has sufficient incentive to bring on his own.

Another option is for the court to intervene to guarantee that the fee paid to counsel is a reasonable one. When the court intervenes to ensure a reasonable fee is paid, it is acting as a judicial backstop that compensates for the inadequacy of the representative plaintiff. This intervention is contemplated by FRCP 23(e), which requires court approval of any dismissal of a class action, and by the PSLRA, which states: "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 USC § 78u-4(a)(6) (2000).

Intervention to guarantee a reasonable fee is required by the court's fiduciary duty toward the class and occurs routinely when courts award fees from a common fund. The intervention that is common, however, is typically inadequate because it fails to achieve the result a competitive market would achieve.

As the 1985 Third Circuit Task Force that studied the award of attorneys' fees recognized, court intervention to ensure fee reasonableness can be done in a number of ways. As discussed previously, two dominant methods of calculating a reasonable fee are the percentage of recovery method and the lodestar method. Both methods have their flaws, but in its 1985 report, Third Circuit Task Force settled upon the percentage of recovery method as the preferred approach to fee setting. *Court Awarded Attorney Fees*, 108 FRD at 255. Choosing the percentage fee method, however, did not end the Task Force's inquiry. The Task Force went on to endorse a method of fee determination that mirrored the competitive market for legal services.

This should also be the goal of a court that has become involved in selecting counsel and setting their fees and costs. The court owes a fiduciary duty to the plaintiff class. Merely signing off on a fee that is "reasonable" after the a recovery has been obtained is inconsistent with the court's obligation toward the plaintiff class. Fee awards that occur after recovery is obtained are not determined in an adversarial atmosphere. Plaintiff's counsel no longer is interested in recovering money for the class. At this point, the interest of the class and counsel plainly conflict. The class itself, however, generally lacks the incentive to become involved in the process. Defendant, unless liable for the fees, is disinterested. This leaves only the court to protect plaintiffs. In this setting, the interest of the class may be easily subordinated.

The solution is to implement a competitive process for fee determination before the litigation has begun.

To this point, I have been speaking of the situation that applies in so-called common fund cases. In some situations, however, the court can anticipate that class counsel's fees and costs will be paid by the defendant, rather than from the class' recovery. This occurs when suit is brought under a statute that provides for fee shifting. In these situations, it is generally thought that the adversary system functions adequately as long as there is no agreement or understanding between the parties precluding defendant from opposing class counsel's fee award and the defendant lacks an incentive to direct some of the consideration to settle the case from the class' recovery to the recovery of class counsel. But understandings which bind defendants not to oppose a fee award up to a certain dollar amount are quite common. And seldom does the court have the assurance that the defendant will vigorously oppose the fee and cost award. Hence, even in the fee shifting context there is a role for a competitive process although, plainly, it works differently in this context.

In a fee shifting situation, the court is not called upon to select counsel or the lead plaintiff in the same way that the court must do so in the common fund setting. But a court may find it helpful in evaluating the fee application at the end of the litigation if the court has at the outset of the litigation obtained counsel's anticipated hourly fee rates, expenses estimates and an estimate of the probability of a recovery. These factors are those that go into a lodestar fee determination. Any significant departures from these estimates in the final application can serve as a point of departure in the court's inquiry into the reasonableness of the fee and expense application. So inquiries

as to counsel fees can serve a useful purpose even in the fee shifting setting.

In sum, unless (1) there is a sophisticated, interested plaintiff able to select counsel and negotiate a fee arrangement or (2) fees are to be paid by the defendant and the amount of fees is completely independent of the class' recovery and the defendant can be counted upon to oppose the fee award, courts must become involved in selecting counsel and setting their fee and cost arrangements. And, even in the situation in (2), an inquiry about fees and expenses may provide the court useful information.

### **Implementing A Competitive Process**

Once a court decides to become involved in the selection of counsel and negotiation of a fee arrangement, the court must decide whether to select a third party to conduct the negotiations with competing counsel. In the past, I oversaw the selection of counsel directly. See In re Oracle Sec Lit, 132 FRD 538 (ND Cal 1990); 136 FRD 639 (ND Cal 1991); In re Wells Fargo, 157 FRD 467; Wenderhold v Cylink Corp, 188 FRD 577 (ND Cal 1999). While that approach yielded notable advantages for the class in those cases, I recognize the possibility that this approach may cause, or appear to cause, the judge to prejudge the merits of a case. Consideration of a fee arrangement necessarily entails conjecture about the likelihood of success of a case, the likelihood of settlement and the possible timing of settlement. See Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 FRD 237, 256 (1985). For this reason, I have suggested use of a third party, perhaps a special master, to select counsel and negotiate a fee arrangement on behalf of the class. In the securities cases



presently before me, I have proposed employing a special master. See In re Copper Mountain Sec Lit, CV-00-3894-VRW (10/20/00); In re Quintus Sec Lit, CV-00-4263-VRW (11/15/00). Notwithstanding these considerations, counsel and the parties showed no interest whatever in third party involvement to select class counsel.

With a percentage of recovery fee calculation, there are a number of variables to consider. A judge must decide whether the percentage of recovery should increase or decrease as the amount of recovery increases. In the Oracle case, I took the position that increasing percentages of recovery should be avoided because they create discontinuities in the class' recovery and they prevent the class from sharing in the economies of scale that correspond to increased recovery. In re Oracle Sec Lit, 132 FRD 538, 543-44 (ND Cal 1990). Others have argued that increasing percentages are desirable because they lessen the incentive for counsel to settle quickly and cheaply when further litigation would benefit the class. In the cases in which I have solicited bids, I have not required firms to submit either increasing or decreasing bids. I have left this to the firms (and thus the market) to determine, although it seems to me that the case for increasing percentages is exceedingly weak. Increasing percentages punish the class when recoveries grow and award all the economies of scale in larger recoveries to the attorneys rather than the class.

Whether increasing or decreasing percentages are chosen, the points at which the percentages change must be determined. In the most recent case in which I solicited bids I allowed counsel to select a different percentage of recovery for the following amounts of recovery: \$0-\$500,000; \$500,001-\$1,000,000; \$1,000,001-\$5,000,000; \$5,000,001-\$10,000,000; \$10,000,001-\$15,000,000; \$15,000,001-

\$20,000,000; and over \$20,000,000. Wenderhold v Cylink Corp, 188 FRD 577, 588 Appendix A (ND Cal 1999). Obviously those breakpoints will not be appropriate for all cases.

Prospective counsel can also be allowed to change the percentage of their fee depending on when a case is concluded. I have allowed different bids for these different periods or points of recovery: from pleading through motion to dismiss; after motion to dismiss through summary judgment; after summary judgment through trial verdict; and after trial verdict through final disposition on appeal. See *id.* Attached as Appendix B is an example of grid which can be filled in by prospective counsel bidding for the position of lead counsel.

Additionally, a judge must decide whether to call for bids that reimburse firms for expenses out of the class' recovery or bids that require counsel to pay expenses out of their share of the recovery. The latter is preferable because it gives counsel an incentive to minimize expenses and avoid inefficient substitution toward reimbursable expenses. See In re Wells Fargo Lit, 157 FRD 467, 470-72 (ND Cal 1994). This approach also places the burden of mis-estimating expenses on counsel, who are in a better position to estimate expenses than the class, or a judge.

Perhaps the most important thing I have learned in the process of competitive class counsel selection was that standardization of the bidding process facilitates comparison of the different bids. Toward this end, I began having firms complete a form bid sheet. See Appendix B; Wenderhold v Cylink Corp, 188 FRD 577, 588 Appendix A (ND Cal 1999). This minimizes some of the flexibility afforded firms but it allows the court, or a special master, to compare apples to apples.

Competitive selection of class counsel has typically relied upon expressing class counsel's fees (and, in many cases, costs, as well) in terms of a percentage of the recovery. I appreciate that some judges and observers have expressed a reluctance to use percentage fees and abandon the lodestar approach for fear of creating attorney fee windfalls. If the selection process is truly competitive, this should not occur. But a judge reluctant to abandon the lodestar need not forsake competitive bidding. A feature of the lodestar is the risk multiplier. This represents the risk that counsel assumes that there will be no recovery at all. Traditionally, courts attempt to measure this risk retrospectively. But such a vantage point is obviously highly clouded. An alternative, and perhaps a middle ground between the traditional approach to setting fees and competitive selection of class counsel would be to require counsel to submit proposals for the risk multiplier at the outset of the litigation. The judge could receive alternative bids and select the counsel on the basis of a combination of qualitative factors and the most attractive risk multiplier. Of course, this leaves the major disadvantages of the lodestar approach, namely a time-consuming review of counsel's time charges and a determination of the lawyers' market rates, but it is an alternative and middle ground that some judges may find suitable for particular cases.

### **What this Task Force Can Achieve**

The class action device allows meritorious claims that might otherwise never be brought to see the inside of a courtroom. Unfortunately, the large numbers of plaintiffs and the often small stakes for each individual plaintiff mean that frequently

class action law suits are lawyer driven, not client driven. When no plaintiff in a proposed class has the ability or incentive effectively to select, negotiate with and monitor class counsel, judges face a difficult choice. They can decline to certify the class or they can become involved in the selection of counsel and the negotiation of a fee arrangement. I firmly believe that a judge in this situation should implement competitive procedures for selecting counsel and negotiating fee arrangements.

This Task Force can promote the equitable resolution of class actions by articulating clearly that FRCP 23 imposes upon the judge a fiduciary duty to class members that requires the implementation of a competitive process for the selection of class counsel and negotiation of a fee arrangement, if no plaintiff is able to undertake these tasks himself. The Task Force can also set forth the various methodologies that have been used by different courts to assure competition.

The most important goal the Task Force ought to promote is continued innovation in this area. The Task Force should emphasize that there is no one-size-fits-all way of selecting class counsel. Different cases may well call for different approaches. And different judges handling highly similar cases may use different approaches, all with satisfactory results. Perhaps, some would call this judicial experimentation. Frankly, I see it as what federal judges do best. Use the privilege of their office to attempt as well as one can in a highly imperfect world, to do justice given the parties, the case and issues at hand. I strongly urge the Task Force to encourage the district judges of the Third Circuit to use the approach that appears under the circumstances at hand to work best and that the Task Force avoid suggestions that would hamstring or hinder judges from trying different approaches to this most

important task.

I appreciate the opportunity to address you on this topic and wish you all the very best in completing your task.

## Appendix A

1. Did you investigate the legal or factual basis of the claims asserted in your complaint or did you rely solely on counsel to do this?
2. Did you seek out counsel or did counsel or someone else seek out you to serve as representative plaintiff?
3. Did you contact any lawyers other than your present counsel about this action and, if so, whom did you contact and when did you do so?
4. What did you do to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?
5. What arrangements do you have with proposed class counsel concerning their fees and expenses?
6. What benchmarks do you have in place to measure class counsel's performance during the progress of the litigation?
7. How do you plan to monitor class counsel's conduct of the litigation?
8. Do you have any prior business, professional, family or other relationships with proposed class counsel and, if so, what are those relationships?
9. What prompted you to purchase or sell the securities at issue here on the dates on, and at the prices at, which those transactions were made?
10. Did you make inquiry or do you know whether any intermediaries through whom you made your transactions in the securities at issue have any business, professional, family or other relationships with proposed class counsel?

## Appendix B

### Application for Lead Counsel

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

	From Pleading Through motion to Dismiss	After Motion to Dismiss Through Summary judgment	After Summary judgment Through trial Verdict	After Trial Verdict Through Final Appellate Determination
\$0 - \$5,000,000				
\$5,000,001 - \$10,000,000				
\$10,000,001 - \$15,000,000				
\$15,000,001 - \$20,000,000				
Over \$20,000,000				

1  
2  
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FILED

APR 12 2001

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re QUINTUS SECURITIES  
LITIGATION.

No C-00-4263 VRW  
No C-00-3894 VRW

ORDER

In re COPPER MOUNTAIN NETWORKS  
SECURITIES LITIGATION.

On March 8, 2001, the court held a hearing to consider the selection of lead plaintiff and lead counsel in two securities class action lawsuits presently before the court, In re Copper Mountain Sec Lit and In re Quintus Corp Sec Lit. Because the two cases involve similar issues, the court will address both cases in this order.

Both cases involve fairly typical "stock drop" scenarios in which the complaints allege that defendants made misstatements and omitted to disclose adverse information that defendants were under a duty to disclose causing purchasers to pay more for the companies' stock than it was worth. In Copper Mountain, the alleged class consists of purchasers who bought the stock on the open market between April 18, 2000, and October 17, 2000. The Quintus complaints allege a class of purchasers of Quintus stock on



1 the open market during the period from November 15, 1999, to  
2 November 15, 2000, and a class consisting of purchasers of  
3 Mustang.com stock whose shares were converted into Quintus shares  
4 when the two entities merged.

5 Before the hearing the court requested that the parties  
6 seeking to serve as lead plaintiff respond to 10 questions  
7 regarding their stock transactions and their selection of counsel.  
8 See Appendix A.

9  
10 I

11 A

12 In the Copper Mountain case, two individuals and one  
13 group comprising five individuals seek to be appointed lead  
14 plaintiff. Each of these seven individuals submitted declarations  
15 in response to the court's 10 questions. Furthermore, each  
16 individual attended the March 8 hearing and spoke directly to the  
17 court about his qualifications and interest in representing the  
18 class. Pertinent portions of these representations follow.

19 The first proposed lead plaintiff, William A Chenoweth,  
20 is a fifty year old certified public accountant residing in  
21 Birmingham, Alabama. He has an undergraduate degree in computer  
22 science from Vanderbilt University as well as an MBA from Brigham  
23 Young University. Chenoweth asserts that he has read several news  
24 reports and objective analyses regarding the transactions at issue  
25 in this matter, and is thus prepared to direct lead counsel  
26 regarding investigation and other litigation preparation.  
27 Chenoweth, however, has not negotiated a fee arrangement with any  
28 proposed class counsel, stating that he will undertake such

1 negotiations after he is appointed lead plaintiff. Chenoweth said  
2 that he believes that he would have more leverage in these  
3 negotiations after being designated lead plaintiff than before.  
4 Chenoweth estimates his damages to be approximately \$295,000. See  
5 Hagan Decl (Doc #28), ¶ 4.

6 The second proposed lead plaintiff, Quinn Barton, was  
7 originally one of 10 individuals comprising a group seeking lead  
8 plaintiff appointment as the Prendergast group. Only Barton,  
9 however, still seeks appointment. Barton is currently a self-  
10 employed investor residing in Jacksonville, Florida. He received  
11 an MBA from George Washington University and worked on Wall Street  
12 for approximately 10 years, much of that time as a commercial bond  
13 trader. Once Barton decided to become involved in this litigation,  
14 he contacted Beattie and Osborne LLP, a New York law firm, and  
15 negotiated a descending percentage fee agreement with percentages  
16 ranging from 15% down to 10% and related fee limits as follows:

Recovery	Fee Percentage	Up to
\$0 - \$20,000,000	15%	\$2,000,000
\$20,000,001 - \$40,000,000	12%	\$4,000,000
\$40,000,00 +	10%	\$8,000,000

21 Under the agreement, the attorney fee is calculated depending on  
22 the tier within which the total recovery falls. The requisite  
23 percentage is applied to the entire recovery, not just the portion  
24 of the recovery falling within the range corresponding to that  
25 percentage. For example, a \$15,000,000 recovery would generate a  
26 fee based on 15% of the recovery, \$2,250,000, which would then be  
27 reduced by the cap to \$2,000,000. A \$35,000,000 recovery, on the  
28

1 other hand, would trigger a calculation under the second tier and  
2 generate a fee of \$4,200,000 (12% of \$35,000,000), which would be  
3 reduced by the second tier's cap down to \$4,000,000. The agreement  
4 awards expenses incurred by counsel from the recovery fund before  
5 the fee is computed. Barton purchased only 1,000 shares during the  
6 class period; he did not calculate his damages but counsel for some  
7 of the other plaintiffs calculated Barton's damages to be  
8 approximately \$59,000. See Weaver Decl (Doc #53), Exh B at 1.

9           The "Copper Mountain Investors" (CMI), a group of five  
10 individuals currently represented by Milberg Weiss Bershad Hynes &  
11 Lerach, is the final proposed lead plaintiff. The group is  
12 comprised of David Cavanaugh, Michael P Hannon, Robert A Herrgott,  
13 Raymond Pfeifer and Richard Weiss. These individuals ask the court  
14 to appoint them as a group primarily based on their assertion that,  
15 as a group, they bring a wider range of personalities, skills and  
16 decision-making abilities to the lead plaintiff role than any  
17 individual could bring.

18           The member of CMI with the greatest loss is Cavanaugh.  
19 He is a retired vice president of sales for a large international  
20 company. Cavanaugh has an undergraduate degree in business  
21 administration. Although he did not seek out other law firms  
22 before deciding to retain Milberg Weiss, he represents that he  
23 conducted some preliminary research that persuaded him to contact  
24 the firm. Cavanaugh's damages are estimated to be approximately  
25 \$943,000. Weaver Decl (Doc #53), Exh A at 1.

26           Hannon is a certified public accountant and a business  
27 broker residing in Minneapolis. He has been appointed by federal  
28 bankruptcy judges to assist in the disbursement of bankruptcy

1 assets. Because of this experience, Hannon is familiar with legal  
2 proceedings. Hannon states that he contacted and interviewed  
3 lawyers from at least eight law firms in the process of determining  
4 which counsel to hire. After much research, he decided to hire  
5 Milberg Weiss based on the recommendations of others and his own  
6 assessment of the firm's abilities. Before agreeing to retain  
7 Milberg Weiss, he discussed potential fee arrangements with the  
8 firm. Hannon's damages are estimated to be approximately \$765,000.  
9 Id at 4.

10 Weiss is a commercial real estate developer residing in  
11 Phoenix, Arizona. He has an undergraduate degree in business and  
12 has served as an expert witness in complex real estate trials.  
13 Weiss asserts that his daily job requires extensive and continuous  
14 negotiations with architects, engineers, contractors and other  
15 individuals involved in the business. Weiss initially contacted  
16 another law firm before being referred to Milberg Weiss. Weiss  
17 calculates his losses to be about \$633,000. Id.

18 Pfeifer is a senior vice president of corporate marketing  
19 at a high tech company in Silicon Valley, where he currently  
20 resides. As with others in the CMI group, Pfeifer also has an  
21 undergraduate degree in business administration. Pfeifer's damages  
22 are estimated to be about \$524,000. Id.

23 Finally, Herrgott is both the president of a construction  
24 company and a broker. He lives in Michigan and received an MBA  
25 from Wayne State University. Herrgott is also a chartered  
26 financial analyst, which he states provides him with a working  
27 knowledge of accounting-related principles. Herrgott claims that  
28 he has extensive experience trading stocks. The losses incurred by



1 #10), Exh A at 1. Cross proposes to employ Weiss & Yourman to  
2 represent the class for a fee of 25% of any recovery plus expenses.  
3 Cross Decl at 2. Micnaud acquired Quintus shares through the  
4 Mustang.com merger and approximates his losses at \$35,000. See  
5 Gordon Decl (Doc #10), Exh A at 2. Micnaud moved to be named lead  
6 plaintiff of a sub-class of plaintiffs who acquired Quintus stock  
7 through the Mustang.com merger. Micnaud has not submitted a  
8 declaration. Neither Cross nor Micnaud was present at the March 8  
9 hearing.

10 The Quintus Investors group claims losses of \$4,223,000.  
11 The group proposes to hire Milberg Weiss to represent the class  
12 with the following fee arrangement:

Recovery	Fee Percentage
\$0 - \$4,000,000	5.0%
\$4,000,001 - \$8,000,000	12.5%
\$8,000,001 - \$15,000,000	17.5%
\$15,000,001 - \$20,000,000	22.5%
\$20,000,001 +	30.0%

19 As initially proposed, the Quintus Investors proposed to have  
20 expenses paid out of the class' recovery. At the hearing, however,  
21 Milberg's representative told the court that the firm was willing  
22 to take expenses out of its fees.

23 Mulcair and Hill acquired Quintus shares through both the  
24 open market and the Mustang.com merger. Salkind acquired shares  
25 only through the Mustang.com merger and Apodaca acquired shares  
26 only on the open market. The four Quintus Investors each allege  
27 losses greater than Cross and Micnaud's losses. Apodaca, Hill and  
28

1 Salkind are willing to serve as lead plaintiff as an individual;  
2 Mulcair is not.

4 II

5 Under the Private Securities Litigation Reform Act  
6 (PSLRA), 15 USC § 78u-4, et seq, the court "shall appoint as lead  
7 plaintiff the member or members of the purported plaintiff class  
8 that the court determines to be most capable of adequately  
9 representing the interests of class members (hereafter in this  
10 paragraph referred to as the 'most adequate plaintiff') in  
11 accordance with this subparagraph." 15 USC § 78u-4(a)(3)(B)(i).  
12 The PSLRA creates a rebuttable presumption that the most adequate  
13 plaintiff is "the person or group of persons that \* \* \* has the  
14 largest financial interest in the relief sought by the class \* \* \*  
15 and otherwise satisfies the requirements of Rule 23 of the Federal  
16 Rules of Civil Procedure." 15 USC § 78u-4(a)(3)(B)(iii)(I)(bb).

17 The presumption is rebuttable if a member of the  
18 plaintiff class shows that the presumptive lead plaintiff "will not  
19 fairly and adequately protect the interests of the class" or "is  
20 subject to unique defenses that render such plaintiff incapable of  
21 adequately representing the class." 15 USC § 78u-4(a)(3)(B)(iii)  
22 (II)(aa), (bb). These provisions of the PSLRA reinforce the  
23 fundamental or overriding requirement of FRCP 23(a)(4) that "[o]ne  
24 or more members of a class may sue or be sued as representative  
25 parties on behalf of all only if \* \* \* the representative parties  
26 will fairly and adequately protect the interests of the class."  
27 FRCP 23(a)(4) (emphasis supplied). The two principal  
28 responsibilities assumed by a lead plaintiff are: (1) monitor the

1 conduct of class counsel, and (2) decide whether and when the case  
2 should be settled or taken to trial. Only a lead plaintiff who can  
3 reasonably be expected to discharge these responsibilities can be  
4 considered adequate under FRCP 23.

5           Almost certainly, the best way for the court to assess a  
6 potential lead plaintiff's adequacy is to consider the manner in  
7 which he has retained counsel and negotiated an attorney's fee for  
8 the class. Under the PSLRA, selection of lead counsel falls  
9 initially on the shoulders of the lead plaintiff, "subject to  
10 approval of the court." 15 USC § 78u-4(a)(3)(B)(v). Selection of  
11 lead counsel is one of the most important decisions a lead  
12 plaintiff makes. In making the counsel selection, the lead  
13 plaintiff must seek to vindicate the interests of the class, to  
14 whom he owes a fiduciary duty. See Cohen v Beneficial Indus Loan  
15 Corp, 337 US 541, 549 (1949). Absent class members are owed  
16 competent counsel at a reasonable fee. Thus, a proposed lead  
17 plaintiff can best demonstrate the willingness and ability to  
18 discharge the fiduciary duties of the lead plaintiff by  
19 demonstrating the willingness and ability to take charge of the  
20 litigation and negotiate a reasonable representation arrangement  
21 with class counsel. Accordingly, if a representative plaintiff  
22 does not select competent counsel, he cannot meet the adequacy  
23 requirement of FRCP 23 and the PSLRA. See Baffa v Donaldson,  
24 Lufkin & Jenrette Securities, 185 FRD 172, 177 (SDNY 1999) ("The  
25 court also finds Dorflinger's choice of counsel renders her  
26 inadequate to serve as class representative."). Similarly, a  
27 purported lead plaintiff that does not negotiate a reasonable fee  
28 arrangement with counsel cannot be deemed an adequate



1 representative.

2           Unfortunately, many plaintiffs in a class action lack the  
3 incentive and/or ability to negotiate with prospective counsel to  
4 obtain a competitive fee arrangement. Selecting between different  
5 law firms and proposals can be an expensive, time consuming and  
6 even difficult process. Often, however, an individual's stake in a  
7 class action suit is too small to justify such an effort. See,  
8 e g, Eisen v Carlisle & Jacquelin, 417 US 156, 161 (1974).

9           If the court determines that the plaintiff with the  
10 largest loss has adequately negotiated with counsel, then the  
11 adequacy requirement of FRCP 23(a)(4) is met and the presumption is  
12 not rebutted. In the event of such a showing, the court need not,  
13 and indeed should not, substitute its judgment for that of the lead  
14 plaintiff. See Declaration of Joseph Grundfest in Aronson v  
15 McKesson HBOC, Inc, No C-99-20743-RMW (ND Cal 1999) (hereinafter,  
16 Grundfest Decl), ¶ 10.

17           On the other hand, if the court determines after  
18 reviewing submissions and holding a hearing that no prospective  
19 lead plaintiff has adequately selected counsel, the court is faced  
20 with a couple of options. If it appears that a plaintiff has the  
21 ability and incentive to conduct adequate negotiations, the court  
22 may request that this plaintiff undertake such a process and  
23 appoint the plaintiff as lead plaintiff subject to confirmation  
24 that the responsibility of identifying and negotiating reasonable  
25 arrangements with counsel has been discharged. A judge in this  
26 district, Judge Alsup, followed this course in In re Network  
27 Associates, Inc, Sec Lit, 76 F Supp 2d 1017 (ND Cal 1999).

28           If, on the other hand, it appears that the purported lead

1 plaintiff lacks the ability and incentive to negotiate an adequate  
2 arrangement with class counsel or has negotiated an arrangement but  
3 one that inadequately protects the interests of the class, the  
4 court is faced with a tougher choice. The court could find that  
5 the action will be unable to proceed as a class action due to want  
6 of an adequate class representative. That, of course, has the  
7 undesirable effect of foreclosing any possibility of relief to the  
8 class until another (adequate) class representative steps forward.  
9 Alternatively, the court may itself establish terms for the class'  
10 representation or initiate a process by which those terms can be  
11 established.

12 In so doing, the court is implementing the mandate of  
13 both the PSLRA and FRCP 23. The PSLRA requires that: "Total  
14 attorneys' fees and expenses awarded by the court to counsel for  
15 the plaintiff class shall not exceed a reasonable percentage of the  
16 amount of any damages and prejudgment interest actually paid to the  
17 class." 15 USC § 78u-4(a)(6). In addition, the court's fiduciary  
18 duty toward the plaintiff class requires intervention to guarantee  
19 a reasonable fee. The Supreme Court has stated repeatedly, albeit  
20 in different contexts, that reasonableness is measured by market  
21 indicia. See, e g, Missouri v Jenkins, 491 US 274, 286 (1989);  
22 Blum v Stenson, 465 US 886, 895-96 (1984).

23 The so-called lodestar and benchmark percentage fee  
24 arrangements are examples of attempting to take that measure. A  
25 more recent, and increasingly widely used, approach is competitive  
26 bidding. The former offer the appeal of setting the fee when the  
27 outcome of the case is known. But many courts have decided that  
28 this sacrifices accurate assessment of the market for legal

1 services and the possibility of achieving the benefit of  
2 competition for the class. See Raftery v Finance Co, 1997 WL  
3 529553 at \* 2 (ND Ill 1997) ("MSBI also submits that the Reform  
4 Act's regulation of attorney fees ensures that the court will  
5 retain complete discretion over the amount of fees awarded,  
6 obviating the need for competitive bidding. This statement  
7 presupposes, of course, that the court will be able to divine the  
8 reasonable value of the services rendered when the time comes, a  
9 false presupposition.").

11 III

12 As Congress recognized in enacting the PSLRA, "[c]ourts  
13 traditionally appoint[ed] lead plaintiff and lead counsel in class  
14 action lawsuits on a first come first serve basis." S Rep No 104-  
15 98 (1995), reprinted in USCCAN 679. "This encouraged a 'race to  
16 the courthouse' among parties seeking lead-plaintiff status and  
17 spawned a cottage-industry of specialized securities litigation  
18 firms that 'researched potential targets for these suits, enlisted  
19 plaintiffs, controlled the litigation, and often negotiated  
20 settlements that resulted in huge profits for the law firms with  
21 only marginal recovery for the shareholders.'" In re Cendant Corp  
22 Lit, 182 FRD 144, 145 (D NJ 1998) (quoting Gluck v CellStar Corp,  
23 976 F Supp 542, 544 (ND Tex 1997)).

24 Under this regime, courts made fee awards to class  
25 counsel to recognize counsel's role in creating the class' fund of  
26 recovery. See Lindy Bros Builders Inc v American Radiator and  
27 Standard Sanitary Corp, 487 F2d 161, 165 (3d Cir 1973). Almost  
28 universally, courts determined counsel's fees at the close of

1 litigation. The standard for such awards was a reasonable multiple  
2 of attorney hours and rates or lodestar. See *id* at 167-70. This  
3 regime spawned wide dissatisfaction. A pioneering study by a task  
4 force of the Third Circuit Court of Appeals attacked retrospective  
5 fee determinations and called for the lodestar method to be  
6 replaced by a reasonable percentage fee. Court Awarded Attorney  
7 Fees, Report of the Third Circuit Task Force, 108 FRD 237 (1985).  
8 Early on, the percentage approach was endorsed by a judge of this  
9 court. See, e g, In re Activision Sec Lit, 723 F Supp 1373 (ND Cal  
10 1989).

11           Then in Oracle, the undersigned employed a percentage fee  
12 to resolve a conflict that had broken out among lawyers competing  
13 to represent a class of securities purchasers. See In re Oracle  
14 Sec Lit, 131 FRD 688 (ND Cal 1990). The court, in Oracle, asked  
15 prospective lead counsel to submit bids to the court and compete  
16 for the position of lead counsel. Competition worked well in that  
17 case: the class obtained a recovery of \$25,000,000 and class  
18 counsel's fee was \$4,800,000, 19.5% of the settlement fund,  
19 markedly lower than the typical or benchmark percentage of recovery  
20 consumed by fees and expenses. In re Oracle Sec Lit, 852 F Supp  
21 1437, 1457 (ND Cal 1994); see also Grundfest Decl, ¶ 23.

22           Since the Oracle case, this court has employed  
23 competitive bidding in two other cases. The first was a securities  
24 class action case not governed by the PSLRA. See In re Wells Fargo  
25 Sec Lit, 156 FRD 223 (ND Cal 1994); In re Wells Fargo Sec Lit, 157  
26 FRD 467 (ND Cal 1994). The second case was a securities class  
27 action case governed by the PSLRA. See Wenderhold v Cylink, 188  
28 FRD 577 (ND Cal 1999); Wenderhold, 189 FRD 570 (ND Cal 1999);

1 Wenderhold, 191 FRD 600 (ND Cal 2000). In Wenderhold, the court  
2 rejected the aggregation principle and appointed an individual lead  
3 plaintiff. Wenderhold, 188 FRD at 584-87. Finding that lead  
4 plaintiff incapable of negotiating a competitive fee arrangement,  
5 the court opted to employ competitive bidding. Id at 587. Upon  
6 receiving bids from the competing firms, the court selected counsel  
7 it deemed most qualified, considering both monetary and nonmonetary  
8 factors. Id at 587-88. This was essentially the procedure used in  
9 Oracle and Wells Fargo.

10 In another securities class action, the court was poised  
11 to institute competitive bidding but instead was able to appoint as  
12 lead plaintiffs two institutional investors capable of selecting  
13 and monitoring counsel. See In re California Micro Devices Sec  
14 Lit, 168 FRD 257, 275-76 (ND Cal 1996); In re Cal Micro Devices Sec  
15 Lit, 168 FRD 276, 278 (ND Cal 1996).

16 A number of other judges have employed competitive  
17 bidding to select lead counsel in class action cases. Judge Milton  
18 Shadur of the Northern District of Illinois, for example, used  
19 competitive bidding in In re Amino Acid Lysine Antitrust Lit, 910 F  
20 Supp 696 (ND Ill 1995). That case involved allegations of "a  
21 conspiracy to fix the price of lysine, an amino acid derived from  
22 corn that is used primarily as a livestock dietary supplement to  
23 speed muscle growth in poultry and hogs," in violation of the  
24 antitrust laws. Id at 698. In response to motions to appoint lead  
25 counsel, Judge Shadur had requested prospective lead counsel to  
26 submit sealed bids to the court and to argue for or against the use  
27 of competitive bidding. In re Amino Acid Lysine Antitrust Lit, 918  
28 F Supp 1190, 1192 (ND Ill 1996).

1 Judge Shadur decided to employ competitive bidding to  
2 protect the interests of absent class members. He wrote: "the fact  
3 that the putative class representative who brings an action has  
4 chosen a particular lawyer (or vice versa, as everyone knows is  
5 frequently the case in the real world) gives no assurance-or even  
6 presumptive assurance-that the selected lawyer is the best choice  
7 for the absent class members." Id at 1194. The fact that the  
8 representative plaintiffs involved in the case had large financial  
9 interests and thus had an incentive to drive a hard bargain with  
10 counsel did not dissuade Judge Shadur from using competitive  
11 bidding. Id at 1194.

12 Judge Shadur also employed competitive bidding in a  
13 securities fraud class action governed by the PSLRA. See In re  
14 Bank One Shareholders Class Actions, 96 F Supp 2d 780 (ND Ill  
15 2000). Judge Shadur's approach was for the most part similar to  
16 the approach he used in In re Amino Acid and that was employed in  
17 Oracle, Wells Fargo and Wenderhold. Judge Shadur called for sealed  
18 bids and then reviewed the bids to determine which proposed counsel  
19 would provide the best representation for the class based on  
20 monetary and nonmonetary factors. Id at 785-89.

21 Judge Shadur, however, gave a somewhat different legal  
22 rationale for imposing competitive bidding than had the  
23 undersigned. Judge Shadur refrained from appointing a lead  
24 plaintiff until after he had considered the bids from prospective  
25 lead counsel and determined which bid was the most advantageous to  
26 the class. Judge Shadur then gave the presumptive lead plaintiff  
27 (based on financial interest) the opportunity to select the counsel  
28 the court had determined to be the best. Judge Shadur stated:

1 It should be remembered that although Subsection  
2 (a)(3)(B)(v) [of the PSLRA] provides that the most  
3 adequate plaintiffs may "select and retain counsel to  
4 represent the class," that opportunity is expressly made  
5 "subject to the approval of the court." In this Court's  
6 view, if the presumptive lead plaintiffs were to insist  
7 on their class counsel handling the action on the  
8 hypothesized materially less favorable contractual basis,  
9 that insistence would effectively rebut the presumption  
10 that the putative class representatives, despite the  
11 amounts that they have at stake personally, were indeed  
12 the "most adequate plaintiffs"--that is, the class  
13 members "most capable of adequately representing the  
14 interests of class members" (Subsection (a)(3)(B)(i)).  
15 If on the other hand the presumptive class representative  
16 were willing to be represented by the most favorable  
17 qualified bidder among the lawyers submitting bids, with  
18 that bidder either supplanting the presumptive lead  
19 plaintiff's original choice of counsel or working  
20 together with that original counsel (but with the total  
21 lawyers' fees to be circumscribed by the low bidder's  
22 proposal), the presumption would clearly remain  
23 un rebutted and the presumptive most adequate plaintiffs  
24 would properly be appointed as lead plaintiffs.

25 Id at 784.

26 Under this approach, the lead plaintiff technically  
27 selects counsel himself, as called for by the PSLRA. But, the lead  
28 plaintiff's discretion is completely curtailed. If he does not  
29 select the counsel the court has deemed most advantageous, then he  
30 will be found inadequate and rejected as lead plaintiff.

31 Another judge in the Northern District of Illinois, then  
32 Magistrate Judge Lefkow, has also employed competitive bidding to  
33 select counsel in a securities class action case governed by the  
34 PSLRA. In Raftery v Finance Co, 1997 WL 529553 (ND Ill 1997), the  
35 court called for plaintiffs seeking designation as lead plaintiff  
36 to submit bids by the law firms they had retained. The court  
37 stated that it would consider the proposals and if "the court  
38 concludes that the proposal of the presumptively most adequate  
39 plaintiff is significantly less favorable than other proposals,

1 thus rebutting the statutory presumption, it will issue a decision  
2 disclosing the various proposals and will designate as lead  
3 plaintiffs that plaintiff or group of plaintiffs that will most  
4 adequately protect the interests of the class in light of all the  
5 statutory factors." Id at \*3.

6 Thus, Judge Lefkow appeared willing to defer to the  
7 presumptive lead plaintiffs choice of counsel and fee arrangement  
8 as long as it was reasonable. This differed from Judge Shadur's  
9 insistence that the best deal be obtained for the class.

10 Another approach to competitive bidding was taken by  
11 Judge Walls in In re Cendant Corp Lit, 182 FRD 144 (D NJ 1998).  
12 Cendant was a securities class action governed by the PSLRA. Thus,  
13 the court's appointment of lead plaintiff was initially dictated by  
14 the presumption that the plaintiff with the greatest financial  
15 interest in the litigation should serve as lead plaintiff. 15 USC  
16 § 78u-4(a)(3)(B)(iii). The court selected a group of institutional  
17 investors to serve as lead plaintiff. Cendant, 182 FRD at 147.  
18 The court then selected lead counsel via a competitive bidding  
19 process in which monetary and nonmonetary factors were considered.

20 Judge Walls concluded that an auction was permissible  
21 because under the PSLRA the lead plaintiff's choice of counsel is  
22 subject to the court's approval based on the court's "discretionary  
23 judgment that lead plaintiff's choice of representative best suits  
24 the needs of the class." Id at 150. The court's duty to ensure a  
25 reasonable fee also justified the use of competitive bidding.

26 Judge Walls departed from earlier approaches to  
27 competitive bidding by giving the counsel initially selected by the  
28 lead plaintiff a right to match the low bid and serve as lead



1 counsel if it was otherwise qualified. *Id* at 151. This approach  
2 preserved the lead plaintiff's choice of counsel but, in Judge  
3 Walls' view, improved the fee arrangement.

4           Competitive bidding was also employed in a post-PSLRA  
5 securities class action case by Judge Lenard of the Southern  
6 District of Florida. See Sherleigh Associates LLC v Windmere-  
7 Durable Holdings, Inc, 184 FRD 688 (SD Fla 1999). The court in  
8 Sherleigh recognized that the PSLRA assigns the task of selecting  
9 counsel to the lead plaintiff but also requires the court to ensure  
10 that the attorney fees awarded are reasonable. *Id* at 693. The  
11 court stated: "A court presented with competing claims for  
12 designation and concerned with ensuring quality representation at a  
13 fair price is faced with a conundrum: What deference should be  
14 paid to the class representative's choice of counsel, as balanced  
15 against the court's obligation to the class to ensure such  
16 representation is of high quality and is provided at a fair price?"  
17 *Id* at 693.

18           The balance the court struck was the use of competitive  
19 bidding. Of course, use of competitive bidding in all cases does  
20 not really strike a balance at all. It gives no deference  
21 whatsoever to the lead plaintiff's choice of counsel. Judge  
22 Lenard, emphasized, however, that the proposed representation in  
23 the case before her was particularly inadequate. It involved a  
24 "consortium of ten law firms" that Judge Lenard deemed not in the  
25 best interests of the class. *Id* at 692. Presumably, had a  
26 different arrangement been suggested by the lead plaintiff, Judge  
27 Lenard might not have employed competitive bidding. With respect  
28 to the bidding process, like Judge Shadur and the undersigned,

1 Judge Lenard emphasized that both monetary and non-monetary factors  
2 would be considered in selecting lead counsel based on the  
3 proposals submitted. Id at 696.

4 Judge Alsup, who as noted sits in this district, employed  
5 a variation of the competitive selection process in In re Network  
6 Associates, 76 F Supp 2d 1017. Judge Alsup provisionally selected  
7 an institutional investor to serve as lead plaintiff. Final  
8 selection, however, was made contingent on the plaintiff engaging  
9 in a competitive counsel selection process. Id at 1034. The  
10 proposed lead plaintiff, rather than the court, was to solicit bids  
11 from firms and choose the bid it considered most advantageous. Id.

12 This approach is faithful to the text of the PSLRA, which  
13 delegates the duty of selecting lead counsel to the lead plaintiff,  
14 but at the same time secures for the class the benefits of a  
15 competitive selection process. The use of this procedure, however,  
16 was only possible because a sophisticated, interested plaintiff  
17 came forward to serve as lead plaintiff. Judge Alsup did not have  
18 to face the situation in which no such party comes forward.

19 Competitive bidding was also used by Judge Lechner in  
20 another post-PSLRA case, In re Lucent Technologies, Inc, 194 FRD  
21 137 (D NJ 2000). Judge Lechner provisionally appointed a lead  
22 plaintiff and then decided to hold an auction to select lead  
23 counsel. Id at 155. There was no evidence before the court that  
24 the lead plaintiff had selected and negotiated with counsel at arms  
25 length. Thus, the court found that a competitive auction was  
26 "necessary to protect the interests of the proposed class." Id at  
27 156. Judge Lechner pointed to the discretion afforded to the court  
28 in approving counsel as justification for its intervention. Id at

1 155. Had there been evidence that the lead plaintiff competitively  
2 selected and negotiated with counsel, it seems possible that Judge  
3 Lechner would not have imposed an auction.

4 Finally, competitive bidding to select lead counsel was  
5 employed by Judge Kaplan in In re Auction Houses Antitrust Lit, 197  
6 FRD 71 (SD NY 2000), an antitrust case brought against Sotheby's  
7 and Christie's auction houses. Judge Kaplan found the case well-  
8 suited for selection of lead counsel by an auction after consulting  
9 with the parties and considering amicus curiae briefs. Id at 73-  
10 74. Judge Kaplan's approach to bidding differed from that used by  
11 the other judges mentioned. Judge Kaplan requested the parties to  
12 bid on an amount of recovery, "X", that would go completely to the  
13 plaintiff class. Id at 73. Counsel would receive 25% of any  
14 recovery over "X" and the remaining 75% of that amount would go to  
15 the class. Id. Judge Kaplan used this approach because, with  
16 access to Department of Justice documents, he concluded that the  
17 risk of no recovery was minimal. Id at 82.

18 The approach followed by this court tracks the approaches  
19 employed by the other judges discussed above in many respects.  
20 Unlike Judge Shadur's approach, however, the court would give  
21 slightly more deference to the lead plaintiff's choice of counsel.  
22 A plaintiff can be adequate even if he negotiates a fee arrangement  
23 that the court would not have selected on its own, as long as the  
24 arrangement is reasonable. And unlike Judge Walls, the court would  
25 be hesitant to employ competitive bidding if an institutional  
26 investor had come forward and negotiated a fee arrangement that  
27 appeared reasonable. In this respect, the court's approach is  
28 similar to Judge Lenard's and Judge Lefkow's. Both of those judges

1 indicated a willingness to defer to plaintiff's choice, if  
2 reasonable fee negotiation had occurred.

3  
4 IV

5 The court's assessment of the prospective lead plaintiffs  
6 in the Copper Mountain case is that at least some of them have  
7 undertaken much greater efforts than the prospective Quintus  
8 plaintiffs. Indeed, all three sets of Copper Mountain plaintiffs  
9 vying to be appointed lead plaintiff appeared at the March 8  
10 hearing and expressed a desire to take on the responsibility of  
11 lead plaintiff. Only Barton and the five individuals comprising  
12 CMI, however, demonstrated a willingness to undertake negotiations  
13 with counsel.

14 Chenoweth, on the other hand, failed to negotiate at all  
15 on behalf of the class for a fee arrangement with counsel.  
16 Chenoweth asserts that he has neglected this obligation under the  
17 belief that he could negotiate a better fee arrangement if he is  
18 appointed lead plaintiff. This argument is not impressive. It  
19 asks the court to invest its faith (and the fate of the class) on  
20 Chenoweth's apparent, as opposed to demonstrated, ability to  
21 negotiate a fair fee arrangement. In this, as in all else, actions  
22 are better than promises. Furthermore, the negotiations by all  
23 those seeking to serve as lead counsel are predicated on the  
24 assumption that they will be designated as lead plaintiff; that  
25 predicate underlies all fee arrangements proposed to the court.  
26 Indeed, the experiences of Barton and CMI evidence the availability  
27 of such pre-appointment negotiation opportunities.

28 The PSLRA charges the court with appointing the most

1 adequate plaintiff, but without a demonstration that Chenoweth is  
2 willing and able to negotiate with class counsel, the court cannot  
3 determine him to be the most adequate plaintiff. As a result,  
4 Chenoweth's motion to be appointed lead plaintiff (Docs #26 and 27)  
5 is DENIED.

6 This leaves Barton and CMI to be considered as potential  
7 lead plaintiffs in Copper Mountain. As noted, both Barton and CMI  
8 have demonstrated a willingness to negotiate with counsel. Due to  
9 the size of their claimed losses each member of the CMI group  
10 enjoys the benefit of the PSLRA most adequate plaintiff  
11 presumption. Each of the five CMI individuals has incurred  
12 individual losses that exceed the damages incurred by Barton (and  
13 exceed Chenoweth's damages as well). Under the PSLRA, therefore,  
14 CMI is presumed to be the most adequate plaintiff. 15 USC § 78u-  
15 4(a)(3)(B)(iii)(I). Aggregation for the purpose of invoking the  
16 presumption is unnecessary in this scenario.

17 But the presumption is a rebuttable presumption. 15 USC  
18 § 78u-4(a)(3)(B)(iii)(II). The legislative history of the PSLRA  
19 indicates that the presumption was an effort by Congress to  
20 encourage the involvement of institutional investors in securities  
21 class actions. See House Conference Report No 104-369, 104th Cong  
22 1st Sess at 34 (1995); see also Gluck, 976 F Supp at 548. Congress  
23 found, and most courts would agree, that institutional plaintiffs  
24 are better equipped than individuals to serve as lead plaintiffs.  
25 Institutional plaintiffs, quite simply, have greater resources and  
26 more experience of the kind beneficial for selecting counsel and  
27 monitoring class action litigation. Because no institutional  
28 investors are involved in this case, the primary objective of the

1 presumption is absent. Indeed, the presumption is only meant to  
2 favor the plaintiff with the largest financial interest; it was not  
3 intended "to obviate the principle of providing the class with the  
4 most adequate representation \* \* \* ." Wenderhold, 188 FRD at 585  
5 (quoting In re Oxford Health Plans, Inc, 182 FRD 42, 49 (SD NY  
6 1998)).

7           With this in mind, the court must assess the quality of  
8 the fee agreements negotiated by Barton and CMI. If CMI cannot  
9 demonstrate that the deal it negotiated with Milberg Weiss is  
10 competitive, then CMI cannot be the most adequate plaintiff. Quite  
11 simply, a negotiated deal with the best, competitive terms supports  
12 an inference that the negotiating plaintiff is the most adequate  
13 plaintiff. Upon review of the arrangements, the court finds that  
14 only Barton has negotiated a competitive fee arrangement.

15           Barton's negotiated fee arrangement with Beattie and  
16 Osborn is significantly better for the class than the arrangement  
17 between the CMI individuals and Milberg Weiss. Specifically,  
18 Barton's arrangement utilizes a descending fee approach with  
19 percentages ranging from 15% to 10%, and three caps depending on  
20 the total amount of recovery obtained. The percentages in CMI's  
21 arrangement, on the other hand, range from 20% to 30%.

22           Barton's negotiated fee agreement thus has two advantages  
23 over CMI's. First, the fees awarded at any level of recovery would  
24 be lower in absolute terms. The court calculates that a \$15  
25 million recovery would generate a \$3.25 million fee under CMI's  
26 arrangement, but only a \$2 million fee under Barton's arrangement.  
27 A \$75 million recovery would generate a \$20.75 million fee under  
28 CMI's arrangement, but just a \$7.5 million fee under Barton's

1 arrangement. Clearly, Barton's arrangement preserves a much  
2 greater portion of the recovery for the benefit of the class.

3 A second advantage of Barton's arrangement is the fact  
4 that it utilizes a descending percentage approach for calculating  
5 the fees. A descending approach enables the class to share in the  
6 economies of scale that correspond to increased recovery while  
7 increasing percentage agreements deprive the class of these  
8 benefits. See In re Oracle, 132 FRD at 544.

9 The court is aware of at least one respected commentator  
10 who views ascending percentage fees as advantageous to the class.  
11 John C Coffee, Jr, Securities Class Auctions, The National Law  
12 Journal (September 14, 1998), Lawrence Decl, Exh C. Professor  
13 Coffee reasons that if plaintiff's counsel will receive only a  
14 modest proportion of any additional recovery they will be unwilling  
15 "to risk the much larger portion of their expected fee award by  
16 going to trial to obtain a settlement higher than that level." Id  
17 at 3. Putting aside the fact that settlements are not trial  
18 recoveries, this view, in the undersigned's opinion, overlooks  
19 three important considerations.

20 First, recoveries in securities class actions of the type  
21 at bar are not solely (or even primarily) the product of class  
22 counsel's efforts; evidence discoverable, the availability of  
23 funding sources such as the amounts and layers of insurance  
24 coverage and other factors wholly independent of class counsel's  
25 efforts determine recoveries to a much greater extent. This means  
26 that counsel often do not have to work harder to achieve a greater  
27 recovery, making the extra incentive of an increasing fee  
28 unnecessary. Second, and related, because counsel often do not

1 have to work harder for an increased fee, an increasing percentage  
2 fee arrangement amounts to a windfall for counsel. Finally, to the  
3 extent greater efforts are needed to capture an increased fee and  
4 those efforts are not fully compensated by a decreasing percentage  
5 fee, counsel's professional obligation to achieve the best outcome  
6 possible for the class prevents a cheap settlement. A sell-out for  
7 less than a reasonable settlement seriously jeopardizes counsel's  
8 professional standing. Professor Coffee's fears, at bottom,  
9 reflect serious doubts about the ethics of plaintiffs' lawyers,  
10 doubts to which the undersigned does not subscribe. The case for  
11 increasing percentages seems to overlook the importance of these  
12 factors.

13           Because of the comparative extravagance of the fees it  
14 proposes, CMI has failed to demonstrate that it has negotiated a  
15 reasonably competitive fee arrangement. The significant  
16 differences in potential attorney fees cannot be rationally  
17 explained by intangible factors such as the well-recognized brand  
18 name in securities litigation of CMI's counsel. Accordingly, the  
19 court concludes that CMI cannot meet the adequacy requirement of  
20 the PSLRA and FRCP 23(a)(4). The presumption invoked by the CMI  
21 individuals is, therefore, rebutted.

22           Barton's arrangement, of course, is not free of  
23 imperfections. There are some discontinuity problems due to the  
24 relationship between the three caps and three fee percentages. For  
25 example, while a \$20 million recovery would generate a fee capped  
26 at \$2 million, a recovery of \$20,000,001 would generate a fee  
27 slightly greater than \$2.4 million. In addition, under Barton's  
28 arrangement, expenses are paid out of the class' recovery. CMI's



1 agreement, which obligates Milberg Weiss to cover all expenses,  
2 motivates the firm to keep costs down. Based on the court's  
3 experience, however, expenses generally do not greatly exceed  
4 \$500,000, or are often capped at such an amount in any event. So  
5 the failure to include expenses in the Barton proposal does not  
6 significantly diminish the rather large comparative advantage to  
7 the class of Barton's fee proposal.

8           The competition between law firms in Barton's  
9 negotiations, therefore, may not have been as robust as the court  
10 would desire. A competitive bidding process might prompt more  
11 intense competition among firms interested in representing the  
12 class. In this regard, at least one law firm currently uninvolved  
13 in the case has expressed an interest in participating in the  
14 process should the court find it necessary. See Letter from James  
15 M Finberg (Doc #56). But the court does not find such intervention  
16 to be necessary.

17           Barton's clearly superior fee arrangement demonstrates  
18 that he adequately negotiated with counsel. Because the terms of  
19 his agreement are competitive, it is as if Barton sought out and  
20 compared alternative law firms. Such a market-based transaction  
21 should not be disturbed. See In re Continental Illinois Sec Lit,  
22 962 F2d 566, 572 (7th Cir 1992) ("Markets know market values better  
23 than judges do."). Moreover, the court is not seeking to dictate  
24 exactly what the attorney fees should be or to make sure that the  
25 lead plaintiff negotiated the type of deal that the court would  
26 have preferred. Rather, the primary objective of the court at this  
27 time is to ensure that the class member appointed as lead plaintiff  
28 is one who is going to be actively involved in the litigation. By

1 negotiating a deal far superior to CMI's, Barton has demonstrated  
2 the willingness and ability to do this. As a result, the court  
3 finds Barton to be the most adequate plaintiff.

4 CMI argues that it should be appointed lead plaintiff  
5 anyway primarily because of the significant benefit that five  
6 diverse personalities and skills could bring to the lead plaintiff  
7 role. As the court has concluded, however, Barton has demonstrated  
8 an ability to negotiate a far superior fee arrangement without the  
9 benefit of a group dynamic. Moreover, the human personalities of  
10 lead plaintiffs have little bearing in open market securities cases  
11 because securities fraud injures anyone involved in the market, no  
12 matter how sympathetic and appealing (or otherwise) the plaintiff  
13 may be. To the extent Barton and his counsel deem it prudent for  
14 more than one plaintiff to testify at trial, they can always call  
15 other witnesses (including the CMI individuals, who should because  
16 of their large individual stakes have no reluctance to cooperate).  
17 Accordingly, the court concludes that assembling an appealing set  
18 of plaintiffs is essentially irrelevant to the lead plaintiff  
19 selection decision in this case (a case involving personal injuries  
20 or similar damages might be different).

21 For the foregoing reasons, the court concludes that  
22 Barton is "the most capable of adequately representing the  
23 interests of class members." 15 USC § 78u-4(a)(3)(B)(i).  
24 Accordingly, the court appoints Barton as the lead plaintiff and  
25 approves his selection of Beattie and Osborne to represent the  
26 class in the consolidated action. This order does not restrict  
27 Barton from further negotiating the fee arrangement with Beattie  
28 and Osborne, or if Barton determines it would be in the best

1 interest of the class, from deciding to negotiate with alternative  
2 counsel.

3 In light of these findings, Barton's motion to be  
4 appointed lead plaintiff and for the approval of Beattie and Osborn  
5 as lead counsel (Doc #25) is GRANTED. The similar motion of CMI  
6 (Doc #18) is DENIED. As noted above, Chenoweth's motion on this  
7 matter (Docs #26 and 27) is likewise DENIED.

8

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V

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A

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12 In Quintus, six individuals seek to be named lead  
13 plaintiff as part of one of two groups, either the Cross and  
14 Micnaud group or the Quintus Investor group. As discussed above,  
15 under the PSLRA, the court must appoint the most adequate  
16 plaintiff. 15 USC § 78u-4(a)(3)(B)(i). Two prospective plaintiffs  
17 can be eliminated quickly. Cross lacks standing to bring any  
18 section 11 claims on behalf of the class arising out of the merger  
19 of Quintus and Mustang.com. The court has concluded that creating  
20 a sub-class of plaintiffs who acquired Quintus stock through the  
21 Mustang.com merger is unnecessary as long as a lead plaintiff (or  
22 plaintiffs) who acquired stock both on the open market and through  
23 the merger is selected. Cross could not fill this role alone.

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Micnaud, who has standing to bring claims arising from  
the Mustang.com merger, failed completely to demonstrate adequacy.  
Not only did Micnaud fail to show up for the hearing on selection  
of lead plaintiff, he declined even to respond to the court's  
inquiries in its February 16, 2001, order (Doc #50). Counsel for  
Micnaud noted that the declarations requested by the court are not

1 mandated by the PSLRA. But the PSLRA and FRCP 23(a)(4) require an  
2 adequate class representative and a plaintiff who refuses to answer  
3 10 simple questions related to his interest in this litigation  
4 cannot be counted on to monitor complex litigation.

5           Consequently, the court DENIES the motion by Cross and  
6 Micnaud to be appointed lead plaintiffs (Doc #8-1). Because the  
7 court has not selected Cross and Micnaud to be lead plaintiffs,  
8 their motion to appoint their selected counsel to be lead counsel  
9 (Doc #8-2) must also be DENIED. This does not, however, preclude  
10 Weiss & Yourman from consideration if the court finds it necessary  
11 to receive bids from prospective lead counsel.

12           Thus, one group consisting of four individual plaintiffs  
13 remains in consideration. The court previously stated its belief  
14 that aggregation for purposes of invoking the statutory presumption  
15 based on financial interest is permissible only (1) if intra-class  
16 periods make it impossible for a single plaintiff to represent the  
17 class adequately or (2) if the group of investors, functioning as a  
18 group, is more capable than any single plaintiff at exercising  
19 effective control over the litigation consistent with the  
20 requirements of FRCP 23 and the goals of the PSLRA. 2/16/01  
21 Quintus order (Doc #50) at 3; 2/05/01 Copper Mountain order (Doc  
22 #44) at 3; Wenderhold, 188 FRD at 586.

23           In this case, aggregation for purposes of invoking the  
24 statutory presumption is unnecessary. All of the Quintus Investors  
25 suffered greater losses than Cross and Micnaud. Furthermore, the  
26 court has found Cross and Micnaud inadequate. As a result, there  
27 is no need to aggregate the Quintus Investors for purposes of the  
28 presumption.

1           Of the four prospective lead plaintiffs, only Hill and  
2 Mulcair bought both Quintus and Mustang.com shares. Because only  
3 Hill and Mulcair will therefore be able to represent all members of  
4 the class, the court will consider only these two plaintiffs. Of  
5 the two, Mulcair appears to have suffered the greater loss. See  
6 Lawrence Decl (Doc #49), Exh A, at 1. Under the PSLRA, Mulcair is  
7 thus presumed to be the most adequate plaintiff. 15 USC § 78u-  
8 4(a)(3)(B)(iii)(I). Mulcair, however, is the one "Quintus  
9 Investor" unwilling to serve as lead plaintiff individually. See  
10 Transcript of March 8, 2001, hearing at 11:15-20. For this reason,  
11 Mulcair is inadequate and the presumption is rebutted.

12           Hill cannot meet the adequacy requirement of FRCP  
13 23(a)(4) unless he has demonstrated that he is able effectively to  
14 select and negotiate with a prospective lead counsel. Hill's  
15 declaration states that he chose Bull & Lipshitz as counsel based  
16 on his broker's advice and after conversations with lawyers at the  
17 firm. Hill Decl (Doc #60) at ¶ 4, 5. Hill also states that he  
18 "discussed and considered a variety of fee structures with [his]  
19 counsel and [has] developed an understanding of how fees are  
20 customarily charged in litigation of this type." Id at ¶ 6. He  
21 further states: "I have negotiated an agreement with counsel  
22 regarding an ascending fee structure that I believe will maximize a  
23 recovery for the class." Id.

24           The declaration gives the appearance that some selection  
25 and negotiation occurred, but it provides no specifics. No mention  
26 is made of other firms considered, other fees considered or reasons  
27 for rejecting other fees. Most importantly, any notion that  
28 competitive negotiations occurred between any of the proposed

1 plaintiffs and counsel is undermined by statements made at the  
2 hearing by one of the lawyers representing Hill. The lawyer stated  
3 that the fee negotiated by plaintiffs paid expenses out of the  
4 class' recovery, rather than out of counsel's portion of the  
5 recovery. He went on to explain, however, that counsel, of their  
6 own accord, had decided to sweeten the terms of the agreement and  
7 allow expenses to be deducted from counsel's share of the recovery,  
8 pending approval by plaintiffs who did not know about this  
9 concession.

10 While counsel's benevolence toward the class is  
11 commendable, the court cannot conclude that plaintiffs negotiated  
12 anything close to a competitive fee in light of counsel's  
13 willingness to modify the fee, without even being asked, to require  
14 counsel to pay all litigation expenses. Benevolence of counsel is  
15 no substitute for hard bargaining.

16 Not only does it appear that plaintiffs did not actually  
17 negotiate a competitive fee arrangement, but it appears that  
18 plaintiffs lack the interest in the litigation necessary to  
19 negotiate a competitive agreement even if given another  
20 opportunity, as in In re Network Associates, 76 F Supp 2d 1017. As  
21 noted above, no proposed lead plaintiff attended the hearing. This  
22 was in sharp contrast to the proceedings in Copper Mountain. In  
23 that case, seven prospective lead plaintiffs attended the hearing  
24 and spoke to the court about their interest in serving as lead  
25 plaintiff. In addition to lacking the interest to serve as lead  
26 plaintiff, it is unclear whether Hill has the ability effectively  
27 to negotiate with prospective class counsel. Hill states: "I  
28 consider myself a sophisticated investor who has been actively

1 involved in the stock market since 1987." Hill Decl (Doc #60) at ¶  
2 2. Hill also states that he is the director of a brokerage firm.  
3 Id. These qualifications would undoubtedly serve him well as lead  
4 plaintiff. But there is no indication that Hill has any experience  
5 negotiating with lawyers. While prospective plaintiffs in Copper  
6 Mountain told the court about their experience negotiating with  
7 attorneys, no information of this sort was presented by Hill or the  
8 other Quintus Investors.

9           Consequently, the court concludes that Hill is unable to  
10 negotiate a competitive fee arrangement with prospective class  
11 counsel. Mulcair, the other Quintus Investor who has standing to  
12 bring both the section 10 and section 11 claims, appears similarly  
13 deficient. Faced with two possible lead plaintiffs, neither one of  
14 whom appears to have the interest or ability competitively to  
15 select and negotiate with counsel, the court sees no reason to  
16 allow an aggregation of plaintiffs to serve as lead plaintiff in  
17 this case.

18           Because the court has concluded that none of the lead  
19 plaintiffs is adequate, the court is left with two options: (1)  
20 decline to appoint any lead plaintiff, finding them all inadequate;  
21 or (2) appoint Hill as a nominal plaintiff and then intervene in  
22 the selection of counsel. Because this case appears well suited to  
23 proceed as a class action, the court concludes that declaring it  
24 unsuitable for certification under FRCP 23 would be premature.  
25 This leaves only option number two. Consequently, the court  
26 appoints Colin Barry Hill as nominal lead plaintiff, thereby  
27 GRANTING in part and DENYING in part the Quintus Investors' motion  
28 for appointment of lead plaintiff (Doc #19-1). The Quintus

1 Investors' motion for appointment of counsel (Doc #19-2) is DENIED.

2  
3 B

4 In the February 16, 2001, order, the court mentioned the  
5 possibility of engaging a special master to oversee the process of  
6 selecting lead counsel. The parties, however, have not embraced  
7 this idea, apparently believing the risk of the court prejudging  
8 the case if it engages in the selection process to be minimal. In  
9 the absence of concerned parties, the court will not deviate from  
10 its past procedures and will supervise the selection of counsel  
11 itself.

12 Toward this end, any counsel interested in serving as  
13 lead counsel for the class in this action should submit a proposal  
14 to the court by May 14, 2001. The proposals may be filed ex parte  
15 and under seal. Joint proposals will not be considered but lead  
16 counsel will be allowed to out source work to other firms and  
17 lawyers. The proposals should set forth:

- 18
- 19 1. The firm's experience in securities class action  
20 litigation, the terms and fee arrangements under which  
21 past representation took place and the background and  
22 experience of those lawyers in the firm who, it is  
23 anticipated, will be engaged in representing the class in  
24 the present litigation;
  - 25 2. The firm's insurance coverage for malpractice;
  - 26 3. Evidence that the firm has evaluated the case, including  
27 specifically the range and probability of recovery;
  - 28 4. The percentage of any recovery the firm will charge as



1 fees and expenses for all work performed in connection  
2 with the case. This should be set forth on the Fee  
3 Schedule Grid, affixed to this order as Appendix B. The  
4 proposal should also include an explanation of why the  
5 fee arrangement was chosen including a discussion of the  
6 increasing or decreasing nature of the fee structure as  
7 well as the importance of the changes in percentage of  
8 recovery based on the size of recovery and the stage of  
9 the litigation at which recovery occurs; and

- 10 5. A certification on behalf of the firm that: (a) its  
11 proposal was prepared independently of any other firm,  
12 entity or person not affiliated with the firm, (b) no  
13 part of the proposal was disclosed to anyone outside the  
14 firm prior to filing with the court and (c) the proposal  
15 was prepared without direct or indirect consultation with  
16 other firms that have filed actions on behalf of the  
17 proposed class in this matter, or entered an appearance  
18 in any fashion.

19  
20 In sum, the Quintus Investors' motion to appoint lead  
21 plaintiff (Doc #19-1) is GRANTED in part and DENIED in part. The  
22 Quintus Investors' motion for appointment of counsel (Doc #19-2) is  
23 DENIED. Cross and Micnaud's motions for appointment of lead  
24 plaintiff (Doc #8-1) and for appointment of lead counsel (Doc #8-2)  
25 are DENIED. The Harrer group's motions (Docs #12-1 & 12-2) were  
26 withdrawn and are thus DENIED as moot.

27 Additionally, the clerk is directed to terminate Quintus'  
28 motion to expedite selection of lead plaintiff (Doc #34-1) and

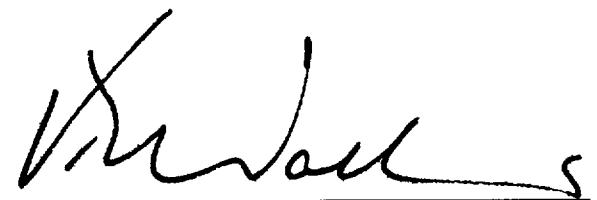
1 Cross' motion to file a brief and declaration under seal (Doc #57).  
2

3 VI

4 In Copper Mountain, all of the prospective lead  
5 plaintiffs have shown a good deal of interest in the litigation.  
6 All of the prospective plaintiffs submitted declarations and  
7 attended the March 8 hearing. Furthermore, one of the plaintiffs,  
8 Quinn Barton, appears to have negotiated a reasonably competitive  
9 fee arrangement. As a result, the court appoints Barton and  
10 approves his selection of counsel.

11 In contrast, in Quintus, the court is faced with  
12 disinterested, figurehead plaintiffs. One of them did not respond  
13 to the court's inquiries and none was present at the March 8  
14 hearing. Only two acquired Quintus shares on the open market and  
15 through the merger. These two plaintiffs, however, have presented  
16 little evidence that they negotiated a competitive fee arrangement  
17 or have the incentive and ability to do so. Consequently, in  
18 Quintus, the court has appointed plaintiff Hill but will select  
19 counsel using competitive bidding.

20  
21 IT IS SO ORDERED.



22  
23 VAUGHN R WALKER  
United States District Judge  
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Appendix A: Lead Plaintiff Inquiry

1. Did you investigate the legal or factual basis of the claims asserted in your complaint or did you rely solely on counsel to do this?
2. Did you seek out counsel or did counsel or someone else seek out you to serve as representative plaintiff?
3. Did you contact any lawyers other than your present counsel about this action and, if so, whom did you contact and when did you do so?
4. What did you do to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?
5. What arrangements do you have with proposed class counsel concerning their fees and expenses?
6. What benchmarks do you have in place to measure class counsel's performance during the progress of the litigation?
7. How do you plan to monitor class counsel's conduct of the litigation?
8. Do you have any prior business, professional, family or other relationships with proposed class counsel and, if so, what are those relationships?
9. What prompted you to purchase or sell the securities at issue here on the dates on, and at the prices at, which those transactions were made?
10. Did you make inquiry or do you know whether any intermediaries through whom you made your transactions in

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the securities at issue have any business, professional,  
family or other relationships with proposed class  
counsel?

**Appendix B: Fee Schedule Grid**

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

	From Pleading Through Motion to Dismiss	After Motion to Dismiss Through Summary Judgment	After Summary Judgment Through Trial Verdict	After Trial Verdict Through Final Appellate Determination
\$0 -				
\$4,000,000				
\$4,000,001 -				
\$8,000,000				
\$8,000,001 -				
\$15,000,000				
\$15,000,001 -				
\$20,000,000				
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