STATEMENT OF HOWARD LANGER, SANDALS & LANGER, LLP.

My name is Howard Langer and I appear to speak very briefly in opposition to adoption of an auction based system for appointment of lead counsel. My principal concerns are the following:

A. Adoption of an auction based system will allow firms to appropriate the often extensive work of others undertaken pre-complaint to prepare major cases. At the same time it usurps the right of clients to select counsel of their choosing. The underlying assumption of the auction proposal, that complex cases—or even the majority of complex cases—begin based upon matters of public knowledge equally accessible to all, is not accurate. Even were it accurate, application of an auction based system to the considerable number of cases not based upon public information would be highly prejudicial to clients and counsel.

B. The auction based system enmeshes courts in the unseemly role of selecting the counsel to appear before them. Counsel are not a fungible commodity. The court cannot conduct an "auction" without some qualification process that weighs the relative merits of bidders. Two firms bidding the same amount do not necessarily represent the same quality of representation to the class. Selection by the court of counsel for one party—but not the other—creates an appearance of impropriety or bias.

C. Adoption of an auction based system will effectively freeze small firms out of the area of complex litigation. It is crystal clear that the Securities law reform legislation of the last decade has had exactly that unintended effect of concentrating the area of shareholder litigation in a handful of major firms who divide the leadership of such cases

and dole out work as they deign to others. With this enormously lucrative class action practice having now been concentrated in the hands of a few firms, there is a genuine threat that these larger firms will dominate other fields of class action law.

D. Auction based systems undercuts the well-settled jurisprudence of fee awards. Courts recognize a series of criteria under which fees are to be awarded. In this circuit, a percentage fee is to be cross-checked against an hourly lodestar calculation. In other circuits, a pure percentage is used. In either instance, such factors as risk, the quality of counsel's work, and the result obtained are factors that the Courts of Appeal apply. Most of those criteria cannot properly be assessed in an auction.

While I am submitting a curriculum vitae with my written statement. I want to speak briefly about my background and practice. I spent my first twenty years of practice at Berger & Montage, before forming my present firm in 1997. Sandals & Langer, LLP. is a five lawyer firm that engages exclusively in large commercial litigation—both class actions and individual actions. We do all types of complex cases except securities law. We do antitrust, consumer fraud, contracts, civil RICO and we have a specialized practice in ERISA, an area of the law in which my partner Alan Sandals is a recognized authority. We only take on a very limited number of cases, generally affiliating with other firms, and only get involved in cases in which we have a leadership position. Examples of the cases in which the firm is presently lead counsel are the Linerboard Antitrust Litigation before Judge DuBois and the huge Unisys Retirees ERISA Litigation, now before Judge Kaufman. We have pursued many smaller class action cases, such the Cullen case last year in the Eastern District, a case no other firm would undertake, which resulted in the largest recovery ever against a trade school.

The auction process assumes that class action cases are generally commenced on the basis of equally available public information. However, not all cases begin with a public announcement of a government investigation or the occurrence of a major catastrophe, be it a toxic tort or some other public event. Very major class action cases have been bought and developed by private parties—these include the leading antitrust precedent in this circuit, Bogosian v. Gulf Oil Corp. 561 F.2d 434 (3d Cir. 1977), as well the largest antitrust class action recovery ever, In re NASDAQ Marketmakers Antitrust Litigation, in which the government action followed well after actions undertaken by the private bar. While I oppose an auction based selection process in any case, such a process is particularly inappropriate where the case is not commenced on the basis of generally available public knowledge of the kind described.

Most of our firm's cases result from referral of a client who has suffered a serious harm. They come to our office because of our knowledge and expertise. For example, in an ERISA case a retiree or employee group will approach our office through their counsel because of our reputation and expertise in that area. We generally spend several monthsinvestigating a case. Only a fraction of the cases initially brought to us ever result in the filing of a complaint. As is well known, there are firms who track the new filings lists in the *Legal Intelligencer* by firm. There have been cases where our firm has spent many months developing a case and within days of filing, copycat complaints are filed—this has particularly been so in our ERISA practice where we possess particular expertise and have been able to develop cases that others could not. Under the present system, there is some protection. Our firm possess the key information or has the special expertise, which either my peers, or counsel filing related cases and particularly

the judges of this district respect. Under an auction based system my firm's efforts can simply be stripped by another firm filing a copycat case and then demanding an auction. The assumption that a public auction should be held in such circumstance, denying the client the counsel of their choice and jeopardizing our firm's months of work product is clearly wrong.

Aside from denying clients counsel of their choosing and appropriating the work of counsel who have developed the cases, the auction based system necessarily enmeshes the courts in the unseemly position of selecting the firm that is to represent one of the parties that it is to appear before it in a civil case. This is inevitable. As discussed above, all firms are not the same and all firms will not provide the same quality of representation to the class. How is a court to assure the quality of representation? How is the court to know what the particular firm brings to the case? Even assuming some pre-bid qualification, how is the court to know in a particular case whether a particular firm brings some expertise—such as its own prior investigation other than the mere knowledge gleaned from a government indictment—to the case? Assuming the court can properly make such distinctions—how can it make such distinctions without enmeshing itself in unseemly fashion in selection of counsel at the outset of the case.

In the larger, and generally more lucrative, cases following a government action, the auction based system will effectively exclude smaller firms like mine. Certain larger plaintiff's firms—and they are not always exclusively plaintiff's firms—have an ability to cross subsidize. For example, certain class action firms that have been entrenched by the securities law reforms can reap the profits from that insulated area to accept significantly lower returns in other areas of complex litigation. In certain cases, courts

have prohibited counsel from presenting a joint bid—effectively excluding smaller firms which generally cannot assume the risk of cases of certain magnitude entirely by themselves and generally undertake such cases by sharing the risk with affiliated counsel.

For all of these reasons, I respectfully urge the Task Force, not to recommend application of an auction based system to selection of lead counsel in class action cases.