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March 8, 2001

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

VIA FEDEX

Dear Ms. Slawsky:

Enclosed is my written statement for the Task Force on Selection of Class Counsel. I received your invitation to testify on March 16 and your request for a written statement yesterday and I am due to leave on a long-planned trip tomorrow, from which I will not return until the evening of March 14. Therefore, the enclosed is not a polished as would have been the case if I had more time to prepare it.

I would appreciate it if you would circulate this letter to the members of the Task Force, together with my statement, so that they will understand the circumstances in which it was written.

Sincerely yours,

Elliott J. Weiss

WRITTEN STATEMENT OF ELLIOTT J. WEISS
BEFORE THE THIRD CIRCUIT TASK FORCE
ON SELECTION OF CLASS COUNSEL

I appreciate the opportunity to present my views to the Task Force, which is addressing an important group of issues. My relevant experience and expertise relate primarily to securities class actions and the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995.* Therefore, I will focus on the questions the Task Force has listed under Topic 4 on its agenda: "Auctioning of class counsel and the Private Securities Litigation Reform Act."

My views are very similar to those expressed by the U.S. Securities and Exchange Commission in the *amicus curiae* brief it recently submitted to the Third Circuit in *In re Cendant Corp. Litig.* The Commission summarized its views on the relevant provisions of the Reform Act, the purposes they serve, and the manner in which they should be interpreted as follows:

> The Reform Act provides that '[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." This lead counsel provision means that, in general, the lead plaintiff which is appointed according to the procedure and criteria specified in the Act selects and retains the proposed class counsel and that the court reviews the lead plaintiff's proposal.
>
> Through the Reform Act, Congress sought to encourage institutions and other large investors to become lead plaintiff, and contemplated that such investors would seek out well-qualified counsel, engage in hard, arms-length bargaining at the outset of the cases, and negotiate fee agreements favorable to the class. Evaluating the circumstances of each case, these investors could structure the agreements in such a

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* Elliott Weiss is the Charles E. Ares Professor of Law at the James E. Rogers College of Law, University of Arizona, Tucson, Arizona. He was the lead co-author of Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995) (hereinafter "*Monitoring*"), which provided the basis for the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. 104-67, 109 Stat. 737 (1995). *See* SEN. REP. 104-98, 104th Cong., 1st Sess. (1995) at 11, n. 32; H.R. CONF. REPT. 104-369, 104th Cong., 1st Sess. (1995), at 34, n.3, 35, n.6. The lead plaintiff provisions now are codified as Section 27(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77z-1(a)(3) (1999), and Section 21D(a)(3) of the Securities Act of 1934, 15 U.S.C. § 78u-4(a)(3) (1999).

The Task Force also should be aware that Professor Weiss submitted a Declaration in support of the New York City Pension Funds' objection to Lead Counsel's request for attorney fees in *In re Cendant Corp. Litig.*, No. 98-CV-1664 (WHW). The district court's decision awarding attorney fees, *In re Cendant Corp. Litig.*, 109 F.Supp.2d 285 (D. N.J. 2000), currently is on appeal to the Third Circuit Court of Appeals, Nos. 00-2769, 00-3653 (Consolidated Cases).

This statement and the testimony Professor Weiss will provide to the Task Force reflect his personal point of view. They were not solicited by, and are not submitted on behalf of, the New York City Pension Funds.

way as to give counsel the right incentives and hold down costs. Where the lead plaintiff possess the qualities and acts in the manner contemplated by Congress, the court should rely, in appointing lead counsel and in awarding attorney fees, on the lead plaintiff's judgement and efforts. Indeed, failing to do so could enhance counsel's control and deter institutions from participating.

When the above is not true of the lead plaintiff, or when its counsel proposal is inadequate under general class action standards, the court can and should exercise its traditional discretion to protect the interests of the class. The court's review function under the lead counsel provision could take the form of stricter review, in-depth inquiry, and modification of the lead plaintiff's lead counsel proposal. Moreover, the lead plaintiff or its efforts could be so problematic or deficient concerning counsel that the court must move beyond its review function altogether and assume a more active role. However, the court should do so only in circumstances very different from the model envisioned by the Act.

The court should not itself conduct an auction unless it has evaluated the lead plaintiff's own selection and retention of counsel, has particular concerns about the lead plaintiff's own selection and retention of counsel, has particular concerns about the lead plaintiff or its efforts, and, if feasible, has directed it to undertake a proper competitive selection process. It is not sufficient that the court merely prefers a process that it, rather than the lead plaintiff controls, or assumes that an auction is inherently superior to a negotiated agreement.

Brief of the Securities and Exchange Commission as *Amicus Curiae* in Support of Appellants on the Issues Specified, *In re Cendant Corp. Litig.*, Nos. 00-2769, 00-3653 (3d Cir. Dec. 20, 2000) (hereinafter "*SEC Brief*"), at 3-5.

I would like to make four points relating to the second paragraph of the above-quoted statement. First, determining the terms on which lead counsel should be retained is much more an art than a science. Relevant considerations include the nature of the claims made; what evidence supporting those claims is available at the time counsel is retained; the extent to which such evidence is the product of counsel's efforts; the likelihood that governmental investigations or other third party efforts will generate additional evidence to support those claims; the risk that plaintiffs will not be able to generate facts sufficient to allow them to file a complaint that will survive a motion to dismiss the suit or evidence that will enable them to prevail on the merits; the amount of potential damages; and the financial resources available to defendants, from their insurers or elsewhere, to pay damages or fund a settlement.

Second, as the SEC points out, the premise underlying the lead plaintiff provisions of the Reform Act is that a sophisticated investor with a large financial stake in a class action generally will is better situated and more motivated than any other party to retain lead counsel on terms advantageous to the class. Moreover, Congress adopted the lead plaintiff provisions of the Reform

Act for the express purpose of encouraging sophisticated institutional investors to volunteer to serve as lead plaintiffs in securities class actions.

Third, if courts insist in overriding institutional investor-lead plaintiffs' selection and/or retention of counsel, in situations where such lead plaintiffs have acted carefully and responsibly, they will discourage qualified institutions from volunteering to serve a lead plaintiffs in the future. In the years since the Reform Act was passed, I have had occasion to discuss the lead plaintiff provisions and the possibility of acting as lead plaintiffs with numerous institutional investors. Almost all approach that possibility with considerable trepidation. Their major incentive for getting involved is the prospect that their involvement will translate into a higher net recovery for the institution and the class, through the institution's (1) selection of counsel who are both highly qualified and attuned to conducting the litigation in a manner designed to maximize recovery for the class; (2) monitoring counsel's conduct of the litigation; and (3) negotiation of fee arrangements that ensure counsel will be adequately rewarded but protect the class against fees that represent a windfall to counsel for the class. If it becomes clear that institutional investors' good faith efforts to select and retain counsel will frequently be subjected to judicial second-guessing, it seems clear to me that fewer institutions -- and, in particular, far fewer of the most responsible and diligent institutions -- will seek to serve as lead plaintiffs in securities class actions in the future.

Finally, judicially conducted auctions constitute a particularly clumsy mechanism for selecting lead counsel is securities class actions. Auctions, in general, lack flexibility. A court often will not be able to evaluate competing bids without pre-judging aspects of the case before it. In *Cendant*, for example, the two lowest qualified bids had very different structures. Bidder 6 asked for fees calculated as a declining percentage of the amount recovered, Bidder 9 for fees calculated as an increasing percentage of any recovery. Judge Walls characterized *both* as "represent[ing] a fee calculated to engender and maintain counsel's pursuit of the optimum recovery for the plaintiffs." *Cendant*, 191 F.R.D. 387, 390, 391 (D. N.J. 1998) (*i.e.*, the court used exactly the same language to describe both bids). He rejected Bidder 6 solely because its "fee schedule is higher than that of another equally qualified bidder" -- *i.e.*, Bidder 9. But Judge Walls determination of that bid 6 was higher, of necessity, had to turn on assumptions (or pre-judgments) he was making as to the stage at which the litigation was likely to be resolved and the amount that plaintiffs were likely to recover.

Moreover, unless courts begin to use bid frameworks that involve only a single value, such as the bid structure prescribed by Judge Kaplan in *In re Auction House Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y. 2/22/01), they inevitably will be forced to make similar assumptions or pre-judgments (and single value bid frameworks will not be optimal for many securities class actions). By way of contrast, institutional investors who have elected to serve as lead plaintiffs are experimenting with a variety of different fee arrangements, some involving percentage fees set in advance, some involving combinations of contingent percentage and fixed hourly fees, and some involving the possibility of adjusting negotiated fee if unanticipated developments occur. Courts, in my view, will find it difficult to engage in similar experimentation or to maintain similar flexibility.

As indicated by the SEC's brief, the key issue facing a court in a securities class action is

whether the presumptive lead plaintiff -- *i.e.*, the class member with the largest financial interest in the action -- "possess[es] the qualities and [selects and retains counsel] in the manner contemplated by Congress." The Commission suggests that a court concerned about the lead plaintiff's process of selecting and negotiating with counsel could make inquiries along the lines suggested by Professor Joseph Grundfest in his Declaration in *In re McKesson HBOC, Inc. Sec. Litig.*, 97 F.Supp.2d 993 (N.D. Cal. 1999):

> 1. What procedures did the lead plaintiff follow to identify a reasonable number of counsel with the skill and ability necessary to represent the class in the pending matter?
>
> 2. What procedures did the lead plaintiff follow in inviting competent counsel to compete for the right to represent the class?
>
> 3. What procedures did the lead plaintiff follow to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?
>
> 4. On what basis can lead plaintiff reasonably conclude that it has canvassed and actively negotiated with a sufficient number of counsel and obtained 'the most qualified representation at the lowest cost?'
>
> 5. Did the lead plaintiff make inquiries into the full set of relationships between the proposed lead counsel, and the lead plaintiff and other members of the class, and did the lead plaintiff reasonably conclude either that there are no such relationships or that they do not affect the exercise of plaintiff's fiduciary obligations [to the class]?

SEC Brief at 19-20 (quoting Grundfest Declaration).

Similarly, Judge Walker recently issued an order in *Werner v. Quintus Corp.*, No. C-00-4263 (VRW) (N.D. Cal. 2/16/01) (copy attached), in which he posed the following questions to class members seeking to serve as lead plaintiff and to chose and retain lead counsel:

> 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?

Id. at 6-7.

The rationale supporting the questions posed by Professor Grundfest and Judge Walker, I believe, is that in light of the findings that led Congress to pass the Reform Act, the adequacy of a potential lead plaintiff should be measured not only by its ability to protect the interests of the class vis-a-vis defendants, which a potential lead plaintiff generally can demonstrate by retaining qualified counsel, but by the potential lead plaintiff's ability to protect the interests of the class vis-a-vis class counsel. If a potential lead plaintiff cannot demonstrate adequacy in this latter respect, the best course for a court generally will be to appoint a lead plaintiff who can. *See, e.g., In re Network Associates, Inc. Sec. Litig.*, 76 F.Supp.2d 1017 (N.D. Cal. 1999), where the court disqualified the City of Philadelphia from serving as lead plaintiff, because it declined to consider other than a local law firm or to negotiate fee arrangements with the law firm it had selected, and selected as lead plaintiff an individual class member who the court determined was prepared and qualified to select class counsel through a competitive process.

If no class member with the requisite ability is available to serve as lead plaintiff, the court should not dismiss the action, in my view, so long as it believes the class will be adequately represented vis-a-vis defendants. But if that is the case, the court should then, as the SEC suggests, "assume a more active role [in the selection of class counsel]." *SEC Brief* at 20. The court, however, generally should not conduct an auction. As noted above, auctions are clumsy devices and usually will force courts to at least implicitly express opinions about important substantive issues in the cases they are considering. Thus, in *Werner v. Quintus Corp.*, Judge Walker "recognize[d] the possibility (and, perhaps more importantly, the possible appearance) of the court prejudging the merits of the case [because judicial] [c]onsideration 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. *Id.* at 8, citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256 (1985).

In addition, the court may badly misjudge the terms on which an auction should be conducted. In *In re Lucent Technologies, Inc. Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000), of example, the court prescribed a bidding grid that appeared inappropriate for that action. As my wife, Wendy Weiss, who was a member of the plaintiff class, pointed out in a letter to the court, the top rung of the court's

bidding grid, a recovery of $25 million or more, amounted to only about three-quarters of one percent of a conservative estimate of the damages claimed. Thus, if the action had merit, the remaining rungs in the grid were essentially meaningless, while if the action was settled for an amount reflecting no more than its nuisance value, a serious question would arise as to whether counsel should receive substantial compensation for extracting a settlement on the basis of a non-meritorious claim. *See Letter from Wendy A. Weiss to The Honorable Alfred J. Lechner* (5/29/00) (copy attached.)

The better course, in such a situation, may well be for the court to appoint a special master pursuant to Federal Rule of Civil Procedure 53 and instruct the special master to retain class counsel. *See Werner v. Quintus Corp,, supra* at 8; *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. at 256. If a court makes such an appointment, though, it also should instruct the special master to pay careful attention to the accumulating body of information concerning the fee arrangements in securities class actions that sophisticated lead plaintiffs have negotiated in recent years. Those fee arrangements suggest that, in many cases, the norms courts and masters used prior to passage of the Reform Act (*i.e.*, fees equal to 25-33% of any amounts recovered) do not reflect the fee arrangements that sophisticated investors are now negotiating in securities class actions.

Attachments:
1. Order in *Werner v. Quintus Corp.*, No. C-00-4263 (VRW) (N.D. Cal. 2/16/01)
2. *Letter from Wendy A. Weiss to The Honorable Alfred J. Lechner* (5/29/00)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRED WERNER,

Plaintiff,

v

QUINTUS CORPORATION, ALAN ANDERSON, PAUL BARTLETT, SUSAN SALVESON,

Defendants.

AND RELATED MATTERS

No C-00-4263 VRW

ORDER

No C-00-4264 VRW
No C-00-4274 VRW
No C-00-4276 VRW
No C-00-4294 VRW
No C-00-4300 VRW
No C-00-4308 VRW
No C-00-4313 VRW
No C-00-4343 VRW
No C-00-4346 VRW
No C-00-4381 VRW
No C-00-4390 VRW
No C-00-4392 VRW
No C-00-4504 VRW
No C-00-4528 VRW
No C-00-4650 VRW
No C-00-4678 VRW
No C-00-4771 VRW
No C-01-0093 VRW
No C-01-0096 VRW
No C-01-0262 VRW
No C-01-0270 MMC
No C-01-0327 PJH
No C-00-21177 EAI

The court will conduct a case management conference in these related actions on March 8, 2001, at 10:00 am. Counsel should be prepared to discuss the pending motions to consolidate these actions, the motions to designate lead plaintiff and lead

counsel and the other matters discussed below.

I

In advance of selecting a lead plaintiff, the court must address the motions to consolidate filed by the three different groups of investors and by defendants. See 15 USC § 78u-4(a)(3)(B)(ii). Twenty-four separate actions have been filed to date; three have not yet been related. Upon a preliminary review of the complaints in these actions, the relief sought appears to be the creation of a common fund or recovery on behalf of purchasers of Quintus shares, except in Brennan v Burke, et al, C-01-0327-PJH, which is a shareholder derivative suit. FRCP 42(a).

The class periods alleged in these complaints vary. The ending date for the class period in all cases is November 14 or 15, 2000. A majority of complaints allege a starting date of November 15 or 16, 1999. Several complaints allege a class period of July 20, 2000, to November 14, 2000. One complaint alleges a class period from January 19, 2000, to November 14, 2000. The actions all name Quintus, Alan Anderson and Susan Salvesen as defendants. Many also name John Burke, Paul Bartlett, Andrew Busey, Frederic Harmon, William Herman, Alexander Rosen, Robert Shaw, Jeanne Wohlers and Donaldson Lufkin & Jenrette. Counsel should be prepared to discuss the effect of these differing periods and defendants on possible class certification and representation.

II

Turning to the selection of lead plaintiff, the court recognizes that the Private Securities Litigation Reform Act

(PSLRA), 15 USC § 78u-4, et seq, creates 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)(I)(bb).

In determining which proposed lead plaintiff has the largest financial stake, the court looks to individual plaintiffs, not an aggregation or group of plaintiffs. Except in two narrow circumstances, this court has rejected aggregation as a means of fulfilling the "largest financial interest" condition for the presumption under section 78u-4(a)(3)(B)(iii)(I)(bb). Wenderhold v Cylink Corp, 188 FRD 577, 586 (ND Cal 1999). Other courts have likewise rejected aggregation. See, e g, In re Network Associates, Inc Sec Lit, 76 F Supp 2d 1017, 1021-27 (ND Cal 1999); In re Telxon Corp Sec Lit, 67 F Supp 2d 803, 809-13 (ND Ohio 1999); Aronson v McKesson HBOC, Inc, 79 F Supp 2d 1146, 1153-54 (ND Cal 1999); In Re Donnkenny Inc Sec Lit, 171 FRD 156, 157 (SD NY 1997) ("To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff."). Aggregation may be appropriate, but only under two circumstances: (1) if intra-class periods make it impossible for a single plaintiff to represent the class adequately or (2) if the group of investors, functioning as a group, is more capable than any single plaintiff at exercising effective control over the litigation consistent with the requirements of FRCP 23 and the goals of the PSLRA. Wenderhold, 188 FRD at 586. Any prospective lead plaintiff that has grounds to establish that aggregation is appropriate in these circumstances should be prepared to demonstrate those grounds at the March 8 conference.

A named plaintiff enjoys no entitlement to lead plaintiff designation simply because that plaintiff's loss exceeds the loss for any other plaintiff that has come forward. Notwithstanding the rebuttable presumption enacted by the PSLRA, the court retains an obligation to choose the most adequate representative for the class. 15 USC § 78u-4(a)(3)(B)(i). In this regard, the PSLRA mirrors the lead plaintiff adequacy requirement of FRCP 23(a)(4). In all class actions, the class representative is a fiduciary for absent class members. Cohen v Beneficial Indus Loan Corp, 337 US 541, 549 (1949). An adequate representative plaintiff is one that is willing and able to satisfy the fiduciary obligations that attend lead plaintiff status.

In the belief that in securities class actions, institutional investors are best able to satisfy the fiduciary obligations of lead plaintiff, Congress sought to increase the likelihood that institutional investors would serve as lead plaintiffs by enacting the presumption under 15 USC § 78u-4. 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). Two potential lead plaintiffs appear to be institutional investors, e g, Bulldog Capital Management, LP and RJL Capital Management. The number of shares at issue for these investors, however, is less than the number for at least some individual plaintiffs. One of these investors may, however, secure designation as lead plaintiff by demonstrating that it is more capable of discharging the lead plaintiff fiduciary duties to the class than any other prospective lead plaintiff that claims to have suffered greater financial loss. The suggestion that there does not appear to be an institutional

investor in this litigation that may overcome the presumption of 15 USC § 78u-4(a)(3)(B)(iii)(I)(bb), in the court's order filed under seal on February 2, 2001, may be incorrect.

In a securities class action case, the PSLRA specifies that one of the lead plaintiff's obligations is to "select and retain counsel to represent the class." 15 USC § 78u-4(a)(3)(B)(v). Fiduciary responsibilities of the lead plaintiff to the class include ensuring the quality and reasonable cost of counsel for the class. One of the primary obligations of the lead plaintiff, therefore, is to obtain competent counsel and negotiate a reasonable fee arrangement.

The lead plaintiff's obligation to select lead counsel and negotiate an appropriate fee arrangement arises at the outset of a class action. This allows a court tasked with selecting the most adequate representative to scrutinize a proposed lead plaintiff's ability to act in that capacity. Consequently, a proposed lead plaintiff must demonstrate adequacy to serve as lead plaintiff by demonstrating the willingness and ability to take charge of the litigation and negotiate a reasonable representation arrangement with class counsel. If a proposed lead plaintiff cannot fulfill this obligation, such plaintiff is not a suitable class representative. 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.").

Accordingly, the court concludes that receiving certain information from each individual plaintiff that has applied (individually or as part of a group) to be lead plaintiff will

assist the court in determining whether any of them are capable of "fairly and adequately protecting the interests of the class." 15 USC § 78u-4(a)(3)(B)(iii)(II)(aa). Each individual plaintiff that has applied to be lead plaintiff is thus directed to respond to the following inquiries by serving and filing a declaration under penalty of perjury no later than February 28, 2001:

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?

The court may seek additional information based on responses to the foregoing.

III

If, after reviewing the submitted declarations, the court determines that no proposed lead plaintiff has conducted an adequate selection of counsel and negotiation of a fee arrangement with counsel, the court may request that the prospective lead plaintiffs "revisit the selection [of counsel] procedure with greater attention to the fiduciary obligations inherent in the counsel selection." See Declaration of Joseph Grundfest in Aronson v McKesson HBOC, Inc, No C-99-20743-RMW (ND Cal 1999) (Grundfest Decl), ¶ 10. If, however, the court determines that none of the prospective lead plaintiffs is capable of adequately selecting and negotiating with counsel, the court has two options: (1) determine that the action may not proceed as a class action for want of an adequate class representative, see Crawford v Hong, 37 F3d 485, 487 (9th Cir 1994) (absent class members not bound by a judgment unless the representative plaintiff is adequate); or (2) undertake to secure representation for the class on such terms as should reasonably ensure the class' interests.

If no prospective lead plaintiff adequately represents the class, the court assumes (for present purposes) that it has an obligation to conduct a search for adequate representation of the class. Under the PSLRA, the selection of lead counsel is "subject to the approval of the court." 15 USC § 78u-4(a)(3)(B)(v). This statutory delegation, along with "the court's fiduciary obligation to the plaintiff class," In re Wells Fargo Sec Lit, 157 FRD 467, 468 (ND Cal 1994), requires the court to ensure that qualified, competitively-priced counsel is selected. Thus, if the court determines that no prospective lead plaintiff has the ability to negotiate with counsel on behalf of the class, the court must itself intervene to ensure that the interests of the class are protected. See Wenderhold, 188 FRD at 587.

If the court determines that intervention is necessary, the court is considering appointing a special master, pursuant to FRCP 53. The court has in the past overseen 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, 188 FRD 577. While that approach yielded notable advantages for the class in those cases, the court recognizes the possibility (and, perhaps more importantly, the possible appearance) of the court prejudging the merits of the 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). This places the court in the anomalous position of having to speculate about its own future decisions.

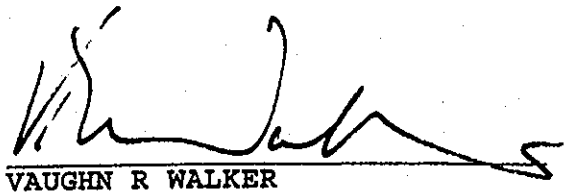
Appointment of a special master to assist in the selection of counsel may obviate this problem.

The special master would be expected to attempt to choose counsel in a way that emulates the choice that market forces would dictate if lead plaintiff were able effectively to negotiate with prospective counsel. See Grundfest Decl ¶ 21 ("Experience establishes that the most effective way to achieve the goal of retaining the highest quality representation at the lowest price is to invoke marketplace competition among interested, qualified attorneys at the outset of the litigation * * * ."); In re Wells Fargo, 157 FRD at 468 ("In performing this analysis, the court must strive to emulate the arrangements and decisions that the class itself would make were it able to negotiate."). Invoking the market to select counsel will likely lead to greater net recovery by the class. See Grundfest Decl ¶21-24.

Payment of the special master is a practical concern. The court believes that if a special master is used the firm eventually chosen to represent the class should pay the fees incurred by the special master. Thus, the court will require any firm seeking to be named lead counsel to agree to pay the special master's fee at the end of the selection process if that firm is chosen to be lead counsel. Before submitting a bid, each firm would be required to submit a letter of credit evidencing its ability to pay the special master's fees and expenses.

The court invites counsel to respond to this proposed procedure. Counsel may submit, no later than February 28, 2001, a memorandum of up to 15 pages along with the declarations requested in Part II.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Judge

Wendy A. Weiss
6350 E. Via Amable
Tucson, AZ 85750

May 29, 2000

The Honorable Alfred J. Lechner
Martin Luther King Jr. Federal Building and United States Courthouse
P.O. Box 999
Newark, NJ 07101-0999

Re: *In re Lucent Technologies, Inc., Securities Litigation*, No. CIV.A.00-621 (AJL)

Dear Judge Lechner,

I write as a potential member of the proposed plaintiff class in the above-captioned matter. The proposed class in this case includes all persons who purchased Lucent Technologies, Inc. ("Lucent") stock between October 27,1999 and January 6, 2000. Acting through my Keogh account, I purchased 100 shares of Lucent, for $79.25 per share, on November 19, 1999, and continued to hold said stock through the end of the proposed class period. (I ultimately sold said stock on January 14, 1999 for $52.25 per share, incurring a loss of $2700.00.) I am not seeking the position of lead plaintiff in this matter, nor do I have views on the merits of the claims alleged. The purpose of this letter is to comment on one aspect of your opinion dated April 26, 2000, which recently was reported as *In re Lucent Technologies, Inc., Securities Litigation*, 2000 WL 628805 (D. N.J. 4/26/00).

I prepared this letter with the assistance of my husband Elliott J. Weiss, who is the Charles E. Ares Professor at the James E. Rogers School of Law, University of Arizona and a member of the New York bar. He also was the lead co-author of *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995) (hereinafter "*Let the Money Do the Monitoring*"), which served as the basis for the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737 (1995). *See* SEN. REP. 104-98, 104th Cong., 1st Sess. (1995) at 11, n. 32 (stating that *Let the Money Do the Monitoring* "provided the basis for the 'most adequate plaintiff' provision.")

Your April 26, 2000 decision thoughtfully addresses a number of the complex issues surrounding appointment of lead plaintiff and lead counsel in securities class action litigation. Our concern relates to a single aspect of that decisions: the "grid" that you directed interested attorneys to use to submit the maximum percentage fees they would charge the plaintiff class if this action results in a monetary recovery.

The grid begins with recoveries of $500,000 to $1,000,000 and tops out with recoveries in excess of $25 million. We respectfully suggest that these levels of recovery are extremely low, when considered in relations to the damages theoretically recoverable from Lucent in the instant action.

Our research suggests that a conservative estimate of the theoretical damages recoverable in this action is $3.335 billion. We have calculated that figure as follows. During the proposed class period, a total more than 580 million shares of Lucent were traded. Our conservative estimate is that at least 25 percent of those shares, or 145 million shares of Lucent stock, were purchased during the class period and retained through the end of the class period. We also estimate, based on publicly available data, that the average purchase price of those retention shares was approximately $75.00. On January 6, 2000, following Lucent's announcement of unexpected bad news, its stock closed at $52.19 per share. Thus, class members' damages, for each retention share, would be about $23.00 (assuming the claims alleged have merit). That is the basis for our estimate that total theoretical damages recoverable are roughly $3.335 billion ($23.00 per share times 145 million shares).

Compared to this total, a recovery of $25 million would be equal to substantially less than one cent (0.75 cent, to be precise) for each dollar in damages allegedly incurred by members of the plaintiff class; a recovery of $1 million would be equal to less than three one-hundredths of one cent for each dollar lost.

Put differently, we interpret the bidding grid proposed in your April 26 decision in one of two ways. The first is that by focusing on bids relating to recoveries of less than $25 million, you anticipate that this action, if it survives a motion to dismiss, will settle for an amount reflecting that the claims alleged have only nuisance value. The second is that, if this action has merit, the bidding grid is ill-suited to allow you differentiate among the competing bids, because all portions of the submitted bids relating to recoveries of less than $25 million are essentially irrelevant.

As concerns the first of these possibilities, we note that a primary purpose of the PSLRA was to curb nuisance suits. The PSLRA's first line of attack on such suits is the imposition of heightened pleading standards. A second possible line of attack relates to attorneys' fees. In *Let the Money Do the Monitoring*, the authors suggest that institutional investors, if they become lead plaintiffs, might seek to discourage their attorneys from pursuing suits that have only nuisance value "by stipulating that they will receive no more than a nominal fee if they settle for no more than some minimum (e.g., ten percent) of the damages initially sought." *See* 104 Yale L.J. at 2107. In the instant case, we understand that you decided to conduct an auction in part because no institutional investor with a substantial financial interest in the action has come forward. We therefore urge you to consider the above suggestion in deciding which attorneys to select as lead counsel and what guidance to provide them concerning the fees that they might receive should they propose to settle this case for the amounts that appear to be contemplated by your proposed bidding grid.

We also respectfully suggest that you consider revising the bidding grid to reflect the possibility of the class recovering some meaningful percentage of its losses, if the claims alleged prove to have merit. We note that, in the recent class action involving Cendant Corporation, the plaintiff classes recovered in excess of $3.5 billion, suggesting that, where meritorious cases are brought, such recoveries are feasible.

Should you have any questions about this letter, we would be pleased to attempt to respond to them.

Respectfully submitted,

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