IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOYLE CONSTRUCTION MANAGEMENT, INC., on behalf of itself and all others similarly situated, Plaintiff, v. IRVING MATERIALS, INC., and UNNAMED CONSPIRATORS, Defendant.	)	CASE NO. 1:05-cv-0979-SEB-VSS **IRWIN B. LEVIN'S COMBINED REPLY TO: (1) IRVING MATERIALS, INC.'S RESPONSE TO MOTIONS TO CONSOLIDATE; (2) DEFENDANTS' MOTION FOR ENTRY OF PROPOSED PRETRIAL ORDER NO. 1; AND (3) SUPPLEMENTAL LEAD COUNSEL SUBMISSIONS OF SUSMAN GROUP AND SPECTOR GROUP**

KORT BUILDERS, INC., on behalf of itself and all others similarly situated, Plaintiff, v. IRVING MATERIALS, INC., Defendant.	)	CASE NO. 1:05-cv-1002-SEB-VSS

(*Additional captions below*)

DENNIS LEON MYERS d/b/a MYERS CONCRETE FINISHING, on its behalf and on behalf of all others similarly situated, Plaintiff, v. IRVING MATERIALS, INC., Defendant.	)	CASE NO. 1:05-CV-1081-SEB-VSS

ENGELHARDT CONTRACTING, on behalf of itself and all others similarly situated, Plaintiff, v. IRVING MATERIALS, INC., Defendant.	)	CASE NO. 1:05-cv-1130-SEB-VSS

IRWIN B. LEVIN'S COMBINED REPLY TO: (1) IRVING MATERIALS, INC.'S RESPONSE TO MOTIONS TO CONSOLIDATE; (2) DEFENDANTS' MOTION FOR ENTRY OF PROPOSED PRETRIAL ORDER NO. 1; AND (3) SUPPLEMENTAL LEAD COUNSEL SUBMISSIONS OF SUSMAN GROUP AND SPECTOR GROUP

I. Introduction.

The Defendants' proposal for determining appropriate leadership for the consolidated plaintiffs ("Plaintiffs") is little more than a self-serving attempt to limit the resources and effectiveness of Plaintiffs' counsel, and promises only to burden the Court with additional and unnecessary proceedings in the form of a lead counsel "auction." For many reasons, the interests of fairness, efficiency and the effective representation of the Plaintiffs and their counsel would be better served by the appointment Irwin B. Levin as lead counsel:

- Mr. Levin was retained by Boyle Construction in September 2004, and has been involved in this matter for over twelve months – not surprisingly, Mr. Levin was well-prepared to file the first class action against Irving Materials, on behalf of Boyle Construction, the very day after Irving entered a plea of guilty. Mr. Levin was therefore directly involved in identifying potential claims in these actions well before any other civil action, or announced criminal action, took place.

- Every responding party has agreed that Mr. Levin is highly qualified and experienced in class action and complex litigation. This experience and skill, well-known to the Court, includes a number of consolidated class action matters in which Mr. Levin has been instrumental in providing leadership and maintaining cooperation among plaintiffs' counsel. Mr. Levin is fully capable of providing effective representation and leadership for the benefit of the plaintiffs, counsel and the Court.

- Although there are other qualified attorneys in this case, Mr. Levin's location in Indianapolis and his experience in this District make him uniquely well-suited to the role of lead counsel. All of these related cases are:

    - Brought by Indiana plaintiffs against Indiana defendants;

    - Result from illegal conduct occurring in Indiana and prosecuted in Indiana;

    - Involve predominantly Indiana class members, witnesses, and documents; and

    - Are pending in an Indiana District Court.

  There is little question that this case would be best served by a qualified Indiana lawyer to lead Plaintiffs and their counsel, and to be responsible to the Court.

- In this matter, as in many others, Mr. Levin has displayed a personal commitment to building a cooperative and efficient structure among Plaintiffs' counsel, and intends to work with all such counsel who are prepared to contribute to the aggressive prosecution of this case on behalf of a Plaintiff Class. Mr. Levin is well aware of the value of the resources available to him, but also mindful of the need to closely monitor and supervise supporting counsel for the benefit of the class. This is precisely the balance required of an effective lead counsel.

All of these considerations support the appointment of Mr. Levin as Plaintiffs' Lead Counsel upon consolidation of the related actions.

In opposing the lead counsel motions filed in this litigation by Mr. Levin and others, Defendant Irving Materials, Inc. ("Irving") has made its own suggestion for determining leadership for the Plaintiffs.[1] Additionally, all Defendants, including Irving, Fred R. Irving, Price Irving, Daniel Butler and John Huggins ("Defendants"), have now moved for the entry of their own Pretrial Order No. 1. However, nothing offered by the Defendants or other applicants for lead counsel contradicts the considerations, outlined above, that support the appointment of Mr. Levin as lead counsel.

The appointment of Mr. Levin as lead counsel for the Plaintiffs would serve all of the interests at play – the Plaintiffs' interest in zealous prosecution of the consolidated cases, counsel's interest in fair and effective representation in the litigation, and the court's interest in efficient and responsive leadership. The Court should therefore enter Mr. Levin's proposed Pretrial Order No. 1 consolidating the related actions, setting certain pretrial procedures, and appointing Mr. Levin as Plaintiffs' Lead Counsel.

II. Mr. Levin is Uniquely Qualified to Serve as Lead Counsel.

In the MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) ("MANUAL"), the authors make a special point of discussing the level of responsibility placed upon counsel in complex litigation pending before the federal courts:

> Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel.
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> * * *
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> The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly. … Counsel need to fulfill their obligations as advocates in a manner

[1] There should be no mistake that the Defendants' proposals are intended to serve the interests of the Defendants, not the interests of their victims, and should be given only the consideration that such self-interest deserves.

> that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible.

Id., §10.21. *See also*, Northern Indiana Pubic Service Co. v. Certain Underwriters at Lloyd's London, 1996 WL 115466 (N.D. Ind. 1996) (discussing the role of counsel in complex litigation and citing the MANUAL §10.21).[2]

Mr. Levin's skills and experience are especially well-tailored to these demands. As already discussed in the Memorandum in Support of Motion For Entry of Order: (1) Consolidating Related Actions; (2) Setting Certain Pretrial Procedures; and (3) Appointing Irwin B. Levin As Plaintiffs' Lead Counsel (filed herein on August 30, 2005) ("Levin Mem."), Mr. Levin's experience in class action and complex litigation includes active participation in a number of consolidated actions, including single- and multi-district consolidated proceedings in federal courts around the country. Mr. Levin has often served ably in leadership roles in such litigation, and he would do so again in this case.

Perhaps most important, and as well known to this Court, Mr. Levin has a history of investing his skills and time in building consensus where possible, and assembling cooperative structures among plaintiffs' counsel when appropriate. These efforts invariably benefit both the class and the Court, and are already indicated in this case. Mr. Levin has already had multiple

[2] According to the MANUAL, the greater demands on counsel arise from:

- the amounts of money or importance of the interests at stake;
- the length and complexity of the proceedings;
- the difficulties of having to communicate and establish effective working relationships with numerous attorneys (many of whom may be strangers to each other);
- the need to accommodate professional and personal schedules;
- the problems of having to appear in courts with which counsel are unfamiliar;
- the burdens of extensive travel often required; and
- the complexities of having to act as designated representative of parties who are not their clients (see section 10.22).

Some of these factors lose their relevance when lead counsel is located in and familiar with the forum, as Mr. Levin is with Indianapolis and this federal District Court. Other demands are unavoidable, but Mr. Levin possesses the strengths and experience to meet them.

conversations with other Plaintiffs' counsel, on a very professional level, but they have not come to fruition on the lead counsel issue.[3] Levin Mem., p. 2.

As recognized by the MANUAL, the traditional role of lead counsel is to consult and cooperate with allied counsel, and then "act for the group - either personally or by coordinating the efforts of others … ." MANUAL §10.221. *See also,* In re Nissan Motor Corp. Antitrust Litigation, 385 F.Supp. 1253, 1255 (J.P.M.L. 1974), *judgment aff'd*, 577 F.2d 910 (5th Cir. 1978) (in consolidated class action proceedings, "it is most logical to assume that prudent counsel will combine their forces and apportion the workload"); 3 ALBA CONTE, HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS (4th Ed. 2002) §9:34 (lead counsel's responsibilities include consulting with, and coordinating the efforts of, other counsel).

Mr. Levin has proposed his appointment as a single lead counsel, with no formal executive committee or similar counsel structure. Such an appointment would minimize the risk of duplication of effort and inefficiencies created by a Court-appointed executive committee, and would put a fine point on lead counsel's responsibility to the Court. In effect, Mr. Levin's appointment as a sole lead counsel would better allow him to efficiently coordinate the resources available to the proposed class. Immediately upon his appointment as lead counsel, Mr. Levin will convene a meeting of Plaintiffs' counsel – without regard to who they supported for lead counsel – for the purpose of organizing this litigation and assigning specific tasks and responsibilities to appropriate counsel. At the same time, Mr. Levin is also mindful of the attendant need to closely monitor and supervise supporting counsel for the benefit of the class.

[3] In this regard, Mr. Levin can report to the Court that on September 13, 2005, the firm of Lockridge Grindal Nauen, P.L.L.P., with the assistance of Cohen & Malad, LLP, filed the related case of *T&R Contractor, Inc., individually and on behalf of all others similarly situated v. Irving Materials, Inc. et al.*, Case No. 1:05-cv-1365, and that counsel from Lockridge Grindal Nauen have authorized Mr. Levin to report to the Court that they support Mr. Levin's motion to be appointed as lead counsel in this matter.

The appointment of a sole lead counsel, as proposed by Mr. Levin, is the most practical way to balance these interests.

In addition to a displayed ability and commitment to coordinating the efforts of others, Mr. Levin's location and extensive experience in this District would make him particularly effective in the role of lead counsel. The related cases that are before the Court for consolidation have an obvious common thread:

(i) They all brought by plaintiffs that are located in Indiana;

(ii) They are all brought against defendants located in Indiana, and contemplate additional co-conspirators located in Indiana;

(iii) They all result from illegal conduct that predominantly occurred in Indiana and affected Indiana business and commerce;

(iv) They all name defendants that have been the subject of criminal investigation and prosecution in Indiana, and that have entered federal guilty pleas in the Southern District of Indiana;

(v) They all involve predominantly Indiana class members, witnesses, and documents;

(vi) They all seek damages for the artificial fixing of prices for Ready-Mix concrete above the competitive market price in Indiana; and

(vii) They are all pending in the Indianapolis Division of the U.S. District Court for the Southern District of Indiana.

There is little question that this case would be best served by a qualified Indiana lawyer to lead Plaintiffs and their counsel, and to be directly and immediately responsive to the Court.

Finally, the appointment of Mr. Levin would also meet the elements to be considered by the Court when appointing class counsel under Fed. R. Civ. P. 23(g). Rule 23(g)(2)(A) allows the Court discretion in whether to appoint class counsel on an interim basis. However, whether the appointment is interim, as suggested here, or pursuant to the certification of a class, Rule 23(g)(1)(C)(i) provides that the Court shall consider four factors:

- The work counsel has done in identifying or investigating potential claims in the action;
- Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;
- counsel's knowledge of the applicable law; and
- the resources counsel will commit to representing the class.

Id. Each of these factors supports the appointment of Mr. Levin.

With respect to the "work done," Mr. Levin was retained by his client with respect to this matter in September 2004, almost twelve months ago. It is for this reason that he was prepared to file the first class action immediately upon the announcement of federal charges and a guilty plea by Irving and certain principals. Mr. Levin also has many years of experience handling complex class actions and other complex litigation, including antitrust class actions, and brings with this experience a strong familiarity with the law applicable to such cases. No party has questioned Mr. Levin's ability to serve as lead counsel in this case. Additionally, Mr. Levin has shown his commitment marshalling and providing the resources necessary to fairly and effectively represent the interests of the class. Thus, application of Rule 23(g) supports the appointment of Irwin Levin as lead counsel for Plaintiffs in this case

III. Deficiencies in the Proposals Submitted by Other Plaintiffs' Counsel.

Although the Spector group and Susman group have filed supplemental materials in support of their respective lead counsel motions, neither has offered any compelling reason that Mr. Levin should not be appointed lead counsel. No lawyer seeking to serve as lead counsel, other than Mr. Levin, lives and works in Indianapolis, the center of gravity of this litigation. Similarly, no lawyer seeking to serve as lead counsel, other than Mr. Levin, has been involved in

this matter for months, or was retained by a Plaintiff in this case more than a year ago. These factors set Mr. Levin apart from the other firms seeking a leadership role in this litigation.

The Spector group's attempt to downplay the importance of these factors is unconvincing. For example, the Spector group suggests that Mr. Levin is improperly playing the "local card," because Drewry Simmons is an experienced and respected Indianapolis firm. While that firm certainly may have extensive experience in construction law, it does not possess the experience in complex class action litigation that Mr. Levin and Cohen & Malad, LLP bring to this matter. The Spector group also misunderstands the significance Mr. Levin's immediate filing of a case on behalf of Boyle Construction. The point is not merely that the *Boyle* case was the "first filed" case, it is that Mr. Levin and his firm, having been retained with regard to this matter many, many months before, was already familiar with the claims and prepared to initiate an action on behalf of Boyle and class members when Irving was charged and the U.S. Department of Justice announced the company and certain principals would enter pleas of guilty. Under Rule 23(g)(1), this factor is plainly relevant.

Although the Susman group has blatantly attempted to adjust its proposal to be more attractive, it also cannot overcome the benefits of appointing Mr. Levin as lead counsel. For example, Mr. Susman attempts to counter the benefit of Mr. Levin's presence in Indianapolis by offering to waive his firm's travel expenses – though not those of the other out-of-state firms associated with him. While this offer is commendable, Mr. Susman still lacks the ongoing physical presence that enables Mr. Levin not only to interact with defense counsel directly, but also to respond to the concerns of the Court on an immediate basis. Despite the Susman group's apparent flexibility, it still makes more sense to appoint Mr. Levin, an Indianapolis attorney who fully capable and ready to serve.

The Susman group has also abandoned its initial proposed executive committee structure, and realigned itself under the sole leadership of Mr. Susman. In his current affidavit, however, Mr. Susman still states that if he is selected as sole lead counsel, he will limit the participation of other lawyers to "the other firms ***supporting my appointment*** as lead counsel" which embody essentially the same structure as his initial proposal.[4] This shift in approach falls short of the streamlined, single lead counsel proposal of Mr. Levin.

In short, the ability of the Spector group and Susman group to field experienced candidates for lead counsel does not diminish the unique qualifications that Mr. Levin can bring to the position.[5] Mr. Levin should therefore be appointed lead counsel, and given the opportunity to marshal the strengths of all of the Plaintiffs' firms for the benefit of the class.

IV. Defendants' Criticism of Mr. Levin's Leadership Proposal is Unfounded.

The Court should not be unduly swayed by the Defendants' self-serving criticism of the leadership approaches proposed by their adversaries in this matter. As the Seventh Circuit observed in a frequently-quoted opinion, "[w]hen it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interest of the class,'… [taking the defendants' suggestions] is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house."). Eggleston v. Chicago Journeyman Plumbers Local Union

[4] In addition, Mr. Susman remains committed to substantial participation by the Preti Flaherty firm. Declaration of Stephen S. Susman. Unfortunately, that firm remains vulnerable to attack by the Defendants (or even by class members) because it has acknowledged that its prior conduct in this matter did not comply with Indiana's Code of Professional Responsibility. *See*, Preti Flaherty's Supplement to Motion to Consolidate (filed herein September 1, 2005), p. 6.

[5] The competition among lawyers seeking a lead counsel appointment inevitably leads to confusion as counsel characterize their own qualifications for that role, and seek to claim as much credit as possible for favorable results in other cases. For example, Mr. Susman reports that he was one of three co-lead counsel in the *In re Vitamins Antitrust Litigation* trial, that resulted in a jury verdict of nearly $150 million, as if to suggest that he achieved this result to the exclusion of others counsel who seek to participate in the current matter. In reality, lawyers from the Cohen, Milstein firm, who are supporting Mr. Levin's request to serve as lead counsel in this matter, served as one of the other co-leads in the *Vitamins Antitrust Litigation*, and played a much more significant role in the trial than Mr. Susman.

No. 130, 657 F.2d 890, 895 (7th Cir.1981) *cert. denied*, 455 U.S. 1017 (1982); Harrington v. City of Albuquerque, 222 F.R.D. 505, 511-512 (D.N.M. 2004) (same), *quoting* Eggleston. The Defendants' criticisms and counter-proposal regarding a counsel leadership structure are similarly tainted.[6]

As an initial matter, the leadership structure proposed by Mr. Levin provides for a single lead counsel, without any cumbersome or artificial committee structure, and suffers from none of the purported flaws raised by Defendants.[7] Indeed, like the Defendants, Mr. Levin proposes a leadership structure composed of one lawyer, functioning alone and without a formal executive committee structure.[8] If the Court accepts this proposal, Mr. Levin will have sole and complete authority for assigning work, unencumbered by the pressures that might be exerted by a formal court-appointed executive committee, and certainly without the informal political pressure which the Defendants seem to believe may impede Mr. Levin's ability to sue them effectively.

Refusing to take Mr. Levin at this word, however, Defendants insist that under this structure "Mr. Levin must reward those who have supported him as lead counsel in assigning work, ... or he must preside over a fractious, *de facto* 40-firm consortium of all counsel, many of

[6] The Defendants' purported desire to move this litigation forward "efficiently," for example, is belied by Irving's refusal to execute a routine Waiver of Service of Summons pursuant to F.R.Civ.P.4(d), as requested by Plaintiff Boyle Construction Management, Inc., thereby causing unnecessary delay and requiring that Plaintiff to go to the extra effort of serving process formally under Rule 4. *See*, Plaintiff's Verified Motion for Costs of Service Following Defendant's Failure to Comply with Request for Waiver (filed 8-22-05).

[7] In correcting such mischaracterizations, Plaintiffs avoid the sarcasm, innuendos and *ad hominem* attacks that Defendants have raised, such as the pointed suggestion that Mr. Levin will encourage lawyers to "make work" in the interest of "patronage," instead of efficiently allocating work in the interest of success. Levin Mem., p. 4.

[8] Defendants attempt to interpret the use of the words "a" and "the" in the current version of Rule 23 as a mandate that a single lawyer must be appointed as class counsel, with no formal committee structure. Without addressing the accuracy of that construction, Mr. Levin's leadership proposal of a sole lead counsel comports with Defendants' interpretation of Rule 23.

whose members are seriously disgruntled."[9] Irving's Response to Motions to Consolidate and in Support of Defendant's Proposed Pretrial Order No. 1 ("Irving Resp."), p. 17. Yet, it is difficult to conceive of a structure that would be more streamlined and efficient – or more responsive to the Court – than a structure that effectively places all of the authority for managing this litigation in the hands of a single lawyer, unburdened by committee votes or any other complications in the assignment of tasks. In fact, it seems the Defendants are actually more concerned with the resources that could be available to their opposition than they are with the effectiveness of any particular form of leadership.

Defendants also complain that Mr. Levin has not announced in advance which lawyers in his firm and others firms will perform which roles in this litigation. Any purported concern that Mr. Levin's leadership proposal lacks sufficient detail about the division of responsibilities among other counsel again illustrates nothing more than the Defendants' self-serving desire to avoid a level playing field. Defendants seek an advance preview of how lead counsel intends to organize lawyers and firms and allocate the work necessary to prosecute this case. Defendants' counsel certainly would resist any corresponding demand that they disclose the identities of the partners and associates who have been selected to work on this matter, the specific tasks and responsibilities that have been assigned to each of them, and the decision-making process that has been established to review and approve those projects.[10]

[9] Defendants offer no basis to suggest that any of the lawyers in this matter, other than possibly Mr. Hansel, has any reason to be "disgruntled" or has any reason to doubt that Mr. Levin will honor the commitment he made to this Court that he will lead all of the firms in this litigation without regard to leadership structures they may have supported in the past. In any event, it seems particularly inappropriate – or at least unhelpful – for Defendants to speculate about the future concerns and motivations of lead counsel.

[10] Of course, to the extent the Court is interested in a more detailed management proposal, lead counsel will certainly provide one.

Moreover, no authority cited by the Defendants suggests that a plaintiff's attorney must lay open their case plan in order to qualify as lead counsel. To suggest that Mr. Levin must disclose how the litigation will be staffed, how responsibilities will be divided – in effect how the Plaintiffs will prosecute their case – is to throw the attorney wok product doctrine out the window. Obviously, an attorney's strategies, theories and plan of litigation are confidential until they appear of necessity in the natural course of litigation. Upjohn Co. v. United States, 449 U.S. 383, 401-02, 101 S.Ct. 677, 688-89, 66 L.Ed.2d 584 (1981) (Rule 26(b)(3) expressly admonishes courts to protect against disclosure of opinion work product, meaning "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"). Any suggestion otherwise misconstrues the Court's role in selecting lead counsel.

In any event, with his extensive experience in class action litigation, Mr. Levin unquestionably understands the importance of assigning *qualified* lawyers to perform the discrete tasks involved in such litigation. The Defendants have conceded as much. Not only do the Defendants *not question* Mr. Levin's ability to perform or, when appropriate, assign and monitor these tasks, they suggest that he and his firm, Cohen & Malad, LLP, are fully capable of meeting these demands. *See*, Irving Response, p. 17 ("no one doubts Mr. Levin's qualifications").

Instead of questioning Mr. Levin's ability or commitment, as they cannot, Defendants raise the disingenuous argument that the class is not well-served by the possibility of competent firms working together. "[F]irms of the caliber of Cohen & Malad should be *competing* with and bidding against the other members of this group, not cooperating with them." Id. (emphasis original). As discussed above, sound authority, experience and simple logic suggest otherwise. MANUAL §10.221 (lead counsel should coordinate the efforts of allied counsel); Nissan Antitrust

Litigation, 385 F.Supp. at 1255 (prudent counsel combine their forces and apportion the workload); 3 NEWBERG §9:34 (lead counsel must consult with and coordinate efforts of other counsel). [11] This criticism makes little sense, and betrays the Defendants' apparent hope that they will not have to face an efficient and unified front.

In short, these criticisms of Mr. Levin's lead counsel proposal cannot escape the orbit of the Defendants' self-interest. Suggestions by a defendant that Plaintiffs' counsel are *too qualified* to fairly cooperate, or that Plaintiffs' counsel must reveal a detailed plan for the prosecution of their case even before all co-conspirators have been identified, simply do not carry enough credibility to be useful. As such, these criticisms do not serve the interests of the Plaintiffs or the proposed class, and should be rejected in favor of the Court's sound discretion.

V. The Court Need Not and Should Not Conduct an Auction for Lead Counsel.

As with their criticism of Mr. Levin's lead plaintiff proposal, Defendants' suggestions for the preferred method of determining who should serve as their adversary's counsel in this matter cannot conceal Defendant's patently self-serving goals. Defendants seek to limit the number of attorneys whose talents might be utilized on behalf class members in this matter, and to discourage those attorneys from exercising their resources fully, by placing limits on their potential compensation from the very outset of this litigation through a "bidding" or "auction" process.

[11] The Defendants' agenda is made clear by their repeated insistence that only one firm should prosecute this case and that the Plaintiffs' firms should not cooperate, particularly when the Defendants possess significant assets to finance the defense of this litigation for many years. Irving's resources alone, which allowed it to agree to pay a $29 million criminal fine, likely compare favorably against the available resources that any one law firm may have to finance the prosecution of this matter on behalf of the class for such an extended period of time. Again, Defendants would obviously prefer to litigate against a single plaintiff's firm equipped with fewer resources. All Plaintiffs' counsel, however, recognize the wisdom and necessity of sharing resources and strengths to ensure that the best efforts are put forth on behalf of the class members that have been victimized by the Defendants' misconduct.

Contrary to the Defendants' assertions, however, "auctions" to determine lead counsel are neither required nor even favored. The limitations of an "auction" approach to lead counsel appointments have been recognized by many courts, including the Seventh Circuit, and the process has been widely criticized by authorities and commentators for its questionable benefit and potential to prejudice the class.

Rule 23(g) of the Federal Rules of Civil Procedure provides that in appointing lead counsel, whether interim counsel under Rule 23(g)(2) or lead counsel under Rule 23(g)(1), the Court "must consider" the four criteria outlined in Rule 23(g)(1)(C)(i), all of which have been addressed above and in the initial memorandum in support of Mr. Levin's lead counsel appointment. Levin Mem. The same mandate does not apply to consideration of attorney fees and expenses. Rule 23(g)(1)(C) provides only that the Court "*may* direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs." (Emphasis added). Rule 23(g) thus permits – but does not require – the Court to conduct a bidding war in which the role of lead counsel is essentially auctioned off to the lowest bidder. Defendants are wrong on this point.

A more useful discussion is found in the MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra*, which describes a choice between three methods for choosing lead counsel in class actions, two of which are before the court in this matter: (i) the "private ordering" approach, in which counsel agree upon a lead counsel (which has not occurred in this case); (ii) the "selection from competing counsel" approach, in which the Court selects from proposals submitted by lawyers competing for lead counsel; and (iii) the relatively novel "auction" approach, advanced only by the Defendants in this matter:

> There are several methods for selecting among competing applicants. By far the most common is the so-called "private ordering" approach: The lawyers agree

> who should be lead counsel and the court approves the selection after a review to ensure that counsel selected is adequate to represent the class interests. ... .
>
> In the "selection from competing counsel" approach, the judge selects from counsel who have filed actions, are unable to agree on a lead counsel, and are competing for appointment. … .
>
> A third and relatively novel approach, competitive bidding, entails inviting applicants for appointment of class counsel to submit competing bids. ... Bidding remains an experimental approach to selecting counsel and establishing presumptive fee levels.

Id. at §21.272. As discussed below, it is not only within the discretion of this Court, but also wholly appropriate under the circumstances, to reject the "auction" approach suggested by Defendants.

The Defendants have attempted to present the auction approach to lead counsel appointments as favored, or even mandatory. In this respect, the Defendants' discussion of Seventh Circuit authority discussing "auctions" for lead counsel is rather misleading. Defendants cite *dicta* from the Seventh Circuit's opinion In re Synthroid Marketing Litigation, 264 F.3d 712 (7th Cir. 2001) ("Synthroid I"), and contend that "the Seventh Circuit has endorsed *ex ante* bidding as a means of introducing market forces to the selection of and payment of class counsel." Irving Resp., p. 11. Defendants fail to inform the Court, however, of the Seventh Circuit's subsequent decision in that case, in which the Court of Appeals expressed serious reservations about the value and utility of the *ex ante* auction process.

In its more recent decision, In re Synthroid Marketing Litigation, 325 F.3d 974 (7th Cir. 2003) ("Synthroid II"), the Seventh Circuit commented upon the limited value of this approach, and cited with approval academic literature criticizing that practice:

> There is, moreover, considerable question just what is being auctioned in bidding to represent a class. Normally an auction specifies the precise product to be sold (a particular painting, a share of stock in a named corporation, or 5,000 cubic yards of concrete having defined attributes). For legal services, however, it is hard

> if not impossible to hold the quality dimension constant. Contingent-fee arrangements are used when it is difficult to monitor counsel closely; otherwise some different arrangement, such as hourly rates, is superior. See Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir.1986); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 Am. L. & Econ. Rev. 165 (2003). When it is hard to monitor counsel's effort and other elements of quality, it is also hard to know what the bid represents. Maybe it shows that less work will be invested, and that less compensation then is required. See Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum. L.Rev. 650 (2002); Lucian Arye Bebchuk, *The Questionable Case for Using Auctions to Select Lead Counsel*, 80 Wash. U. L.Q. 889 (2002). Lawyers will earn a competitive return even at the lower level of compensation, but the class may be worse off. ***Large and sophisticated purchasers of legal services, such as Exxon/Mobile and General Motors, do not acquire legal services at auction; even clients able to monitor lawyers closely may be worried about the effect of the auction process on quality.***

Synthroid II, 325 F.3d at 979 (emphasis added). Far from endorsing the auction approach to lead counsel appointments, the Seventh Circuit has plainly indicated that "bidding contests" are not likely to replicate market forces and may leave the class worse off.

After the Seventh Circuit's initial opinion in Synthroid I, and prior to its subsequent decision in Synthroid II, the Third Circuit Task Force Report on the Selection of Class Counsel strongly criticized the auction approach.[12] *See*, 208 F.R.D. 340 (2002). That report discusses the auction concept at length, notes that the majority of practitioners and scholars oppose the use of auctions, and concludes with the recommendation that "auctions should be an exception to the rule that qualified counsel can be selected either by private ordering or by judicial selection of qualified counsel, and that a reasonable fee is to be awarded by the court at the end of the case."[13] Id. at 354.

[12] That report was not confined to the Third Circuit, but was prepared with input from federal judges and lawyers from around the country, as well as from members of the academic community. 204 F.R.D. at 340.

[13] The Task Force also questioned the usefulness of determining attorneys' fees *ex ante*:

> Although some ex ante guidance to class counsel is desirable, Rule 23 ultimately requires the court to examine the fairness of the fees requested by counsel at the conclusion of the case. *Thus, at best the benefits of auctions appear speculative,* except that they might over time provide the

The reluctance of a federal judicial task force to widely approve the auction process is shared by others who have considered the issue. *See, e.g.,* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FED. PRAC. & PROC. CIV. 3D §1803.1 (competitive bidding approach "has been seriously critiqued"); Lucien Arye Bebchuk, *The Questionable Case for Using Auctions to Select Lead Counsel,* 80 WASH. U. L.Q. 889, 899 (2002) (concluding that the mechanism is "problematic," cannot approximate the effect of an efficient market, and "could undermine rather than serve the interests of the class"). "Careful scrutiny reveals that auction advocates have overlooked substantial methodological problems with the design and implementation of the lead counsel auction. Even if these problems were overcome, the auction procedure is flawed: Auctions are poor tools for selecting firms based on multiple criteria, compromise the judicial role, and are unlikely to produce reasonable fee awards." Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*,102 COLUM. L. REV. 650, 650 (2002).

Thus, contrary to the Defendants' suggestion that an "auction" is the accepted, or even required, method for choosing lead counsel, competitive bidding is not required by Rule 23, is not recommended by the federal judicial task force studying the issue, and is not endorsed by the Seventh Circuit. Moreover, Defendants are also wrong in suggesting that competitive bidding is widely accepted in private securities fraud class actions. *See, e.g., Cendant Corp. Litigation*, 264 F.3d 201, 273-76 (3rd Cir. 2001) (finding that court-ordered lead counsel "auctions" are not

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> courts with an additional source of data for determining what fees are reasonable in class actions. A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel.

Id. at 355 (emphasis added). In this case, an *ex ante* fee determination would be particularly inappropriate, given that the ultimate scope and complexity of this case is far from certain at this time. As Defendants seem to concede, for example, additional participants in the conspiracy underlying the Plaintiffs' claims are certain to be identified, leading to the naming of additional parties defendant and the widening of discovery, investigation, damages analysis and claims.

generally permissible under the Private Securities Litigation Reform Act ("PSLRA"); *In re MicroStrategy, Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 437-38 (E.D. Va. 2000) (PSLRA sensibly provides that the lead plaintiff, not the court, should play the primary role in selecting lead counsel).

Nonetheless, the criticism that has been leveled at the lead counsel "auction" process in PSLRA cases is equally applicable here:

> The theoretical benefits of competitive bidding for lead counsel in a securities class action are obvious and salutary: the best lawyers for the best price. Unfortunately, the benefits are just that – theoretical – and disappear when applied. The original rationale behind competitive bidding was that this purported market process most closely approximates the way class members themselves would make these decisions, but this rationale is misguided because an auction does not simulate the market process. An auction to select class counsel is not the way it is done in the marketplace and dangerously underplays the more important values of character, compatibility, and specific expertise, which usually guide selection of counsel.

Fred B. Burnside, *"Go Pick a Client" – And Other Tales of Woe Resulting From the Selection of Class Counsel by Court-Ordered Competitive Bidding*, 8 FORDHAM J. CORP. & FIN. L. 363, 424 (2003) (footnotes and quotations omitted). For these same reasons, the Defendants' insistence upon an "auction" among prospective lead counsel in this case is unsupported.

Mr. Levin has proposed a lead counsel appointment that is consistent with the realities of this litigation. Appointment of a single lead counsel promotes the streamlined and efficient effort that Defendants, curiously enough, say they wish to face. Instead of promoting competition among Plaintiffs' counsel, as Defendants would have the Court direct, a single lead counsel appointment of Mr. Levin will allow effective cooperation among competent counsel, a benefit to which class members are entitled. Any fee proposal, which will based upon documentation ordered by the Court, the ultimate demands and complexity of this litigation, and

the result achieved by the Plaintiffs, can be properly assessed by the Court at the appropriate time under Rule 23.

Perhaps most important, the appointment of Mr. Levin as sole lead counsel would effectively permit the Court to apply its own expertise – ensuring that this litigation is pursued efficiently and effectively on behalf of the proposed class. He is prepared to litigate this case on a contingent basis, with no pre-arranged fee agreement, and to allow the Court to determine an appropriate award of attorneys fees' based upon the outcome achieved under his direction. In the Seventh Circuit, it is widely recognized that this percentage of the fund approach is favored because it simplifies the judicial task of awarding a reasonable fee and aligns the interests of class counsel with the class they represent. *See, e.g. In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 572 (7th Cir. 1992); *Florin v. NationsBank of Ga.,* 34 F.3d 560, 566 (7th Cir. 1994); *Gaskill v. Gordon,* 160 F.3d 361, 362 (7th Cir. 1998).[14]

VI. Conclusion.

For all of the foregoing reasons, the undersigned Plaintiffs respectfully request that this Court enter Pretrial Order No.1 proposed by Irwin B. Levin and Cohen & Malad, LLP, and appoint Irwin B. Levin as Plaintiffs' Lead Counsel.

Respectfully submitted,

Dated: September 14, 2005

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[14] Here again, Mr. Levin does not seek pre-approval of a fee structure in any specific range, as suggested by Mr. Susman. Susman Dec., Para. 25.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2005, a copy of the foregoing Combined Reply to: (1) Irving Materials, Inc.'s Response to Motions to Consolidate; (2) Defendants' Motion for Entry of Proposed Pretrial Order No. 1; and (3) Supplemental Lead Counsel Submissions of Susman Group and Spector Group, was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system

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Additionally, I certify that on this 14th day of September, 2005, a copy of the foregoing Combined Reply to: (1) Irving Materials, Inc.'s Response to Motions to Consolidate; (2) Defendants' Motion for Entry of Proposed Pretrial Order No. 1; and (3) Supplemental Lead Counsel Submissions of Susman Group and Spector Group, was served upon the following Counsel in each of the Actions identified in this motion by United States First Class Mail:

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