UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TROTTER CONSTRUCTION COMPANY, INC., on behalf of itself and all others similarly situated Plaintiff, vs. IRVING MATERIALS, INC. and UNNAMED CO-CONSPIRATORS, Defendants.	CASE NO. 1:05-CV-01216-SEB-VSS **DEFENDANT IRVING MATERIALS, INC.'S BRIEF IN RESPONSE TO MOTIONS TO CONSOLIDATE AND IN SUPPORT OF DEFENDANT'S PROPOSED PRETRIAL ORDER NO. 1**
VAN VALKENBURG BUILDERS, INC., individually and on behalf of a class of all those similarly situated Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01005-SEB-VSS
R. SHANE THARP, on behalf of himself and all others similarly situated, Plaintiff, vs. IRVING MATERIALS, INC., et al, Defendants.	CASE NO. 1:05-CV-01045-SEB-VSS

MICHAEL REISERT, on behalf of himself and all others similarly situated, Plaintiff, vs. IRVING MATERIALS, INC. and Unnamed Co-Conspirators Defendants.	CASE NO. 1:05-CV-01046-SEB-VSS
SINIARD CONCRETE SERVICES, INC., individually and on behalf of a class of all those similarly situated, Plaintiffs, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01056-SEB-VSS
ENVIRON, LLC, individually and on behalf of a class of all those similarly situated, Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01057-SEB-VSS

DAN GROTE, A Sole Proprietorship, individually and on behalf of a class of all those similarly situated Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01055-SEB-VSS
M & M PROPERTIES OF LOUISVILLE, LLC, MDR PROPERTIES OF LOUISVILLE, LLC and 502 PROPERTIES, LLC., on behalf of themselves and all others similarly situated, Plaintiffs, vs. IRVING MATERIALS, INC., PRICE IRVING, FRED R. "PETE" IRVING, JOHN HUGGINS and DANIEL C. BUTLER, Defendants.	CASE NO. 1:05-CV-01103-SEB-VSS
STACY M. WISSEL, Trustee of Chapter 7 Debtor GROHOFF CONSTRUCTION, INC., individually and on behalf of a class of all those similarly situated Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01104-SEB-VSS

CHEROKEE DEVELOPMENT, INC., individually and on behalf of a class of all those similarly situated Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01105-SEB-VSS
SCOTT PENTECOST D/B/A A&K CONCRETE, individually and on behalf of a class of all those similarly situated Plaintiff, vs. IRVING MATERIALS, INC., Defendant.	CASE NO. 1:05-CV-01133-SEB-VSS
CRAW-CON, INC., individually and on behalf of all others similarly situated, Plaintiffs, vs. IRVING MATERIALS, INC., et al. Defendants.	CASE NO. 1:05-CV-01190-SEB-VSS
BOYLE CONSTRUCTION MANAGEMENT, INC., Plaintiffs, vs. IRVING MATERIALS, INC., et al. Defendants.	CASE NO: 1:05-CV- 00979-SEB-VSS

KORT BUILDERS, INC., on behalf of itself and all others similarly situated Plaintiffs, vs. IRVING MATERIALS, INC., et al. Defendants.	CASE NO. 1:05-CV-1002-SEB-VSS
DENNIS LEON MYERS d/b/a MYERS CONCRETE FINISHING, on its behalf and on behalf of all others similarly situated Plaintiffs, vs. IRVING MATERIALS, INC., et al. Defendants.	CASE NO. 1:05-CV-1081-SEB-VSS
ENGELHARDT CONTRACTING, on behalf of itself and all others similarly situated Plaintiffs, vs. IRVING MATERIALS, INC., et al. Defendants.	CASE NO. 1:05-CV-1130-SEB-VSS

DEFENDANT IRVING MATERIALS, INC.'S BRIEF IN RESPONSE TO MOTIONS TO CONSOLIDATE AND IN SUPPORT OF DEFENDANT'S PROPOSED PRETRIAL ORDER NO. 1

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I. Summary

In response to Defendant Irving Materials, Inc.'s (IMI) motion for appointment of interim counsel for the putative class under Rule 23(g), three groups of proposed interim counsel have emerged to date: the Susman Group, the Spector Group and the Levin Group.[1] While the formation of these groups is obviously the result of a substantial effort, each group suffers from the very infirmities Rule 23(g) was enacted to remedy. Most importantly, there has been no attempt to show that any one of these large, experienced firms is incapable of handling the case on its own and that "litigation by committee" is necessary. Equally, the proposals offer no detail

[1] The "Susman Group" proposes Stephen D. Susman of Susman Godfrey LLP as the leader of a multi-firm consortium, including a three-firm "Executive Committee" and 11 other law firms who have appeared in the following Concrete Antitrust Cases: *Van Valkenburg Builder, Inc., individually and on behalf of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01005-SEB-VSS; *R. Shane Tharp v. Irving Materials, Inc. and Unnamed Co-Conspirators,* 1:05-CV-1045-SEB-VSS; *Siniard Concrete Services, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01056-SEB-VSS; *Environ, LLC, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01057-SEB-VSS; *Dan Grote, a sole proprietorship, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01055-SEB-VSS; *M&M Properties of Louisville, LLC, MDR Properties of Louisville, LLC, and 502 Properties, LLC, on behalf of themselves and all others similarly situated v. Irving Materials, Inc., Price Irving, Fred R. "Pete" Irving, John Huggins and Daniel C. Butler,* 1:05-CV-1103-SEB-VSS; *Stacy M. Wissel, Trustee of Chapter 7 Debtor Grohoff Construction, Inc., individually and on behalf of a class of all those similarly situated,* 1:05-CV-01104-SEB-VSS; *Cherokee Development, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01105-SEB-VSS; *Scott Pentecost d/b/a A&K Concrete, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01133-SEB-VSS; *Craw-Con, Inc., individually and on behalf of all others similarly situated v. Irving Materials, Inc.,* 1:05-CV-01190-SEB-VSS.

The "Spector Group" is led by Eugene A. Spector of Spector Roseman & Kodroff and includes three other firms which have appeared in *Michael Reisert on behalf of himself and all others similarly situated v. Irving Materials, Inc. and Unnamed Co-Conspirators,* Case No. 1:05-CV-01046-SEB-VSS and *Trotter Construction Company, Inc., on behalf of itself and all others similarly situated v. Irving Materials, Inc. and Unnamed Co-Conspirators,* Case No. 1:05-CV-01216-SEB-VSS.

The "Levin Group" is led by Irwin B. Levin of Cohen & Malad, LLP and includes thirteen other firms which have appeared in *Boyle Construction Management, Inc. v. Irving Materials, Inc. and Unnamed Co-Conspirators,* Cause No. 1:05-CV-0979-SEB-VSS; *Kort Builders, Inc., on behalf of itself and all others similarly situated vs. Irving Materials, Inc.,* Cause No. 1:05-CV-1002-SEB-VSS*; Dennis Leon Myers d/b/a Myers Concrete Finishing, on behalf of itself and all others similarly situated v. Irving Materials, Inc. and Unnamed Co-Conspirators,* Cause No. 1:05-CV-1081-SEB/VSS and *Engelhardt Contracting, on behalf of itself and all others similarly situated vs. Irving Materials, Inc.,* Cause No. 1:05-CV-1130-SEB-VSS.

To date, counsel in the *Wininger* and *Marmax* cases have presented no proposal for appointment of interim counsel.

about the division of responsibility among counsel or how duplicative work and expenses ("patronage") are to be prevented in a verifiable, *ex ante* manner and none states the proposed fee.[2] The proposals therefore do not address the issues raised in IMI's motion for appointment of interim counsel.

Enacted in 2003, Rule 23(g) works a substantial change in prior practice. No longer are courts obliged to preside over unwieldy "committees" of plaintiffs' counsel—the ironic cartels among attorneys that suppress competition for the provision of legal services to the putative class. Instead, Rule 23(g) endorses a regime of competitive bidding designed to simulate market forces of competition and transparency for appointment as class counsel, including setting *ex ante* attorney fees. Competitive bidding signals an end to the informal patronage networks where attorneys elected "lead counsel" distribute work to their supporters in a large consortium of firms, thus rewarding overstaffing and inefficiency. As the Levin Group acknowledges, "the regional nature and relative size of this litigation compared to those of many other antitrust class actions" call for a more measured approach.[3] Yet none of the current proposals are tailored accordingly.

The Court should direct plaintiffs' counsel to craft far more lean and more specific applications with competitive bidding to occur among counsel for appointment.

IMI agrees with the essentials of the captioning, filing and service procedures proposed by plaintiffs. These proposals track the recommendations of the Federal Judicial Center's *Manual for Complex Litigation (4th)* and should be adopted by the Court. Additionally, the initial pretrial order should take account of the fact that the *Tharp* and *Marmax* plaintiffs have

[2] IMI's interest in these topics is more than academic in that each of the complaints seeks an award of attorneys' fees under the Clayton Act, 15 U.S.C. § 15(a).

[3] *See* Levin Group Memorandum of Law, at 7-8 & n. 4.

now joined several additional defendants. The pretrial order should set a date certain for the Rule 26(f) discovery conference at which appointed interim counsel for the putative class and attorneys for all defendants can be present to develop a discovery plan and a preliminary schedule for motion practice. Given these proposed refinements, IMI is tendering its own proposed Pretrial Order No. 1, which incorporates the best aspects of plaintiffs' proposals and addresses the joinder of new defendants in *Tharp* and *Marmax*.

II. Argument: The Court Should Require Plaintiffs' Counsel To Remedy Deficiencies Of Existing Interim-Counsel Proposals in Competitive Bidding.

Enacted in 2003, Rule 23(g) reflects an unmistakable goal: the Court is to preside over competition among applicants for appointment as interim counsel for the putative class, culminating in appointment of "*the* applicant" or "*the* class counsel" who is "best able to represent the interests of the class" and setting the fees *ex ante*.

Among the practices remedied by Rule 23(g) is the informal patronage system where an attorney is elected lead counsel by vote of a group of supporting firms, which are then rewarded by lead counsel's distribution of work in the ensuing litigation. The patronage system creates powerful incentives for overstaffing, duplication of effort and "makework" assignments. This is so because the more votes an attorney can garner, the greater will be that attorney's prospects for election as lead counsel—unless the Court steps in to ensure a fair market. The results of patronage are aptly summarized by Professor John Coffee:

> [T]his 'makework' occurred within the context of a patronage system. . . . At its heart was the network of committees through which those favored by the lead counsel could institutionalize themselves in order to bill the time allotted to them as payment for their support. These committees held regular meetings, invariably well attended by plaintiffs' attorneys from across the nation, but produced little of discernable value to the litigation. . . . Even more convincing evidence of the failure of the democratic political process as a basis for organizing the plaintiffs' litigation team lies in *Fine Paper's* demonstration of how easily the ballot box can be

> stuffed. In *Fine Paper*, it appears that attorneys not only intervened in the case in order to vote for their allies, but in some cases filed two complaints to get two votes. In other instances, actions were filed on behalf of clients already protected by previous complaints simply to allow additional counsel 'to get into the case.' . . . The extent of the free riding visible in the *Fine Paper* case possibly approaches a record. For only one class of plaintiffs, thirty-three law firms and eight state attorneys general offices, totaling some 160 attorneys, sought fees for their participation in the cases.

J. Coffee, *Rescuing The Private Attorney General: Why The Model Of The Lawyer As Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, *253-*61 (1983).[4]

Rule 23(g)(2) combats the problems of patronage and "litigation by committee" in two ways: (1) by authorizing the Court to appoint a single interim counsel for the putative class to the exclusion of all other counsel; and (2) by subjecting applicants for that appointment to a searching process wherein the Court may require counsel to commit, on an *ex ante* basis, to specific fee and other arrangements comparable to those that would be produced by arm's-length negotiation between counsel and the absent members of the putative class were such negotiation practicable.

[4] *See also* J. Coffee, *The Regulation Of Entrepreneurial Litigation: Balancing Fairness And Efficiency In The Large Class Action*, 54 U. Chi. L.Rev. 877, 907-09 (1987) (arguing that the Court should "allocat[e] control of the large class action at an early stage in the litigation . . . by favoring the attorney or firm that principally incurred the search costs that lead that to the action's filing"). By contrast, to allow the plaintiffs' attorneys to elect their own lead counsel results in "the legal equivalent of an unsupervised political convention without procedural rules or even a credentials committee. Rival slates would form. Competing groups would invite other attorneys into the action in order to secure their vote for lead counsel. Eventually, a political compromise would emerge. The price of such a compromise was often both overstaffing and an acceptance of the free-riding or marginally competent attorney, whose vote gave him leverage that his ability did not." *Id.* at *908.

Professor Coffee's 1983 article appeared while the *Fine Paper* case was pending on appeal. The Third Circuit ultimately affirmed the District Court's "central findings that the case was managed in a manner that involved too many attorneys spending too many hours. . . ." *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 600-01 (3d Cir. 1984).

A. Lead Counsel Required–Not a Committee

Subsection (g)(2)(B) states: "If more than *one* adequate applicant seeks appointment as class counsel, the court must appoint *the* applicant best able to represent the interests of the class. (emphasis added)" The Advisory Committee emphasized that the Court must avoid "the risk of overstaffing or an ungainly counsel structure." The Advisory Committee Note "directs the court to select the class counsel best able to represent the interests of the class." Advisory Committee Note to paragraph (g)(2). Rule 23(g) does not provide for a "leadership structure" or an "executive committee". The Rule's use of the singular, definite article "the" rather than, say, "a committee" or "a group" best able to represent the class – is quite deliberate. Lest any doubt remain, the Advisory Committee Note cautions that "overstaffing or an ungainly counsel structure" must be rejected.

Not surprisingly then, the limited case law to date under subsection (g)(2)(A) rejects the committee approach. In *In re Cardinal Health Inc. ERISA Litigation*, 225 F.R.D. 552, 554-59 (S.D. Ohio 2005), the Court considered five competing applications for appointment as interim counsel for a putative class under Rule 23(g)(2) and rejected four of them in making the appointment. *Manual For Complex Litigation (4th)*, § 10.23, at 41 (2004) ("The courts are more aggressive about assessing what will serve the interests of the parties and the efficient administration of justice, and not what will advance the professional or personal interests of the lawyers. Similarly, if one firm can fulfill the lead counsel role, adding more firms adds nothing to the process, and may only make it more cumbersome or expensive").[5] This winnowing process is required by the Rule to avoid collusion and patronage.

[5] *See also, In re Cree Inc. Securities Litigation*, 219 F.R.D. 369, 373 (M.D. N.C. 2003) ("However, plaintiffs have done nothing to show that an executive committee would aid the purported class, and the court will not appoint one in this case"); *In re Milestone Scientific Securities Litigation*, 183 F.R.D. 404, 418-19 (D. N.J. 1998) ("The potential for duplicative services and the concomitant increase in attorneys' fees works against the approval of

The competition among applicants required by the Rule is designed to simulate market forces of competition and transparency in the provision of legal services in class action lawsuits, where such forces may be skewed in the absence of close judicial supervision. *See, e.g., In re Synthroid Marketing Litigation,* 264 F.3d 712, 718-21 (7th Cir. 2001); *In re Continental Illinois Securities Litigation,* 962 F.2d 566, 568, 572 (7th Cir. 1992); *In re Wells Fargo Securities Litigation,* 156 F.R.D. 223, 225-26 (N.D. Cal. 1994) ("Early selection of class counsel and determination of their compensation serve the interests of the class by enabling these matters to be resolved competitively. . . . None of the alternatives advanced by the lawyers appears better suited to simulating the outcome of a market process than the submission of competing proposals by the firms interested in representing the class. As the Court's task is to approximate as closely as possible the attorney selection and fee bargain that the class itself would strike if it were able to do so, the Court directs interested lawyers to submit proposals as hereafter provided") (citation omitted).[6]

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multiple lead counsel. In this connection, the 'litigation by committee' approach to securities class actions may prove unnecessary and wasteful.. . . At this stage, the Gintel Group has not demonstrated sufficient need justifying the approval of multiple lead counsel") (citation omitted); *Yousefi v. Lockheed Martin Corporation,* 70 F.Supp.2d 1061, 1071-72 (C.D. Cal. 1999) ("[T]he court finds that the Act would be better served by the appointment of one law firm to manage the case" rather than three); *In re Telxon Corporation Securities Litigation,* 67 F.Supp.2d 803, 817 (N.D. Ohio 1999) (formation of a multi-firm "executive committee" rejected under the PSLRA: "While the Alsin Group has never fully explained how it envisions this structure will work in practice, it is clear that the model envisioned by the PSLRA – one strong plaintiff with one counsel who will speak on its behalf – is not what the Alsin Group proposes. . . . Regardless of the stage at which one assesses 'adequacy,' the very counsel structure proposed by the Alsin Group would seem to damn its ability to satisfy that critical requirement"); *Bell v. Ascendant Solutions Inc.*, 2002 WL 638571, *6 (N.D. Tex. 2002) ("The court is skeptical of the need to appoint three law firms as lead counsel in this case. . . . Thus, in this case, the Court finds that the PSLRA and the class would be better served by the appointment of one law firm to manage this case"); *In re Party City Securities Litigation,* 189 F.R.D. 91, 114-16 (D. N.J. 1999) ("the potential for duplicative services and the concomitant increase in attorneys' fees work against the approval of more than one law firm . . ."); *In re Orbital Sciences Corporation Securities Litigation,* 188 F.R.D. 237, 240 (E.D. Va. 1999) ("The purpose of the statute favors the choice of one law firm to act in this capacity [class counsel] absent a specific reason to use multiple firms").

[6] The Seventh Circuit made much the same point in *Continental Illinois* in the context of a fee award to class counsel: "The object in awarding a reasonable attorney's fee, as we have been at pains to stress, is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard – or any – bargain with the lawyer.

In an analogous setting under the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4(a), courts appointing class counsel have been most reluctant to name multiple firms and have done so only after a clear, concrete showing of need. *See, e.g.*, *Friedman v. Rayovac Corporation*, 219 F.R.D. 603, 605-06 (W.D. Wis. 2002) ("The lead plaintiff group has not addressed the myriad cases in which courts have expressed skepticism or have rejected outright a lead plaintiff's motion to appoint multiple lead counsel"); *Vincelli v. National Home Health Care Corp.*, 112 F.Supp.2d 1309, 1318 (M.D. Fla. 2000) ("It appears that the appointment of an executive committee consisting of five firms will not promote the efficient prosecution of this case, and is not warranted"); *In re Nice Systems Securities Litigation*, 188 F.R.D. 206, 222 (D. N.J. 1999) ("The potential for duplicative services and the concomitant increase in attorneys' fees work against the approval of more than one law firm, especially in cases in which one law firm has the proven ability to adequately manage and litigate securities class actions").

Perhaps the most thorough discussion of the question appears in *In re Wells Fargo Securities Litigation*, 156 F.R.D. 223 (N.D. Cal. 1994), a pre-PSLRA class action in which two large plaintiff's firms proposed a "joint venture" or "two-firm steering committee." *Id.* at 225-26. The Court rejected this proposal as inimical to the best interests of the class. Either of the two firms was capable of prosecuting the case on its own. Thus, the interests of the class were best served by competition between the firms for appointment as class counsel rather than collusion between the two firms.

So the judge has to step in and play surrogate client. Apparently judges do this with fair success." *Continental Illinois*, 962 F.2d at 572.

Noting that its task was to "approximate as closely as possible the attorney selection and fee bargain that the class itself would strike if it were able to do so" the Court reasoned that a well-advised client would hire one of the large, experienced firms appearing before the client as rival suitors, depending upon the outcome of arm's-length fee and other negotiations. The Court stated:

> Messrs. Heimann and Lerach also advocated that the court allow the appointment of more than one firm as class counsel; they intimated that their two firms would then submit a joint bid. The court has seriously considered this suggestion, but rejects it as inconsistent with what the class would choose in the circumstances at bar.
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> But joint ventures which substantially lessen competition are not tolerated under our competition laws. Committing control of this litigation to a steering committee of all the plaintiff lawyers filing actions consolidated in this litigation would certainly have that effect. Even a joint bid by Lieff, Cabraser and Milberg Weiss in the circumstances of the present case poses a sufficiently 'dangerous probability' of lessened competition that the class, if well advised, would refuse to accept such a bid.
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> This fact of economic life for a plaintiff law firm, coupled with the desire nonetheless to bring in big money cases, makes it common practice for plaintiff firms to join together, typically under the aegis of a plaintiff steering committee, to prosecute big cases. In that way, the firms lever themselves into cases for which their individual resources would otherwise be too small and spread the attendant risks by diversifying the number of cases in their litigation portfolios.
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> Not candidly acknowledged by anyone at the June 24 status conference is that *judicial acceptance of this practice in class actions effectively extinguishes competition among the plaintiff lawyers and therefore harms the interests of the class.*
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> * * *

> But the steering committee device, together with the self-generating nature of plaintiff work in class actions, puts a real damper on competition when it comes to the price and quality of counsel's services. No doubt, this is why plaintiff class action lawyers like the device so much.

Wells Fargo, 156 F.R.D. at 226 (emphasis added) (citations omitted). The Court concluded: "A well-advised representative would insist that firms of this caliber submit separate and independent proposals to represent the class." *Id.* at 227.[7]

B. *Ex ante* Setting Of Fees

The enactment of Rule 23(g) in 2003 is also part of an ongoing effort to bring competitive forces to bear on class action fee awards. The Rule contemplates that proposed fees would be part of the competitive process and part of the basis for this Court's selection of counsel. Rule 23(g)(1)(C)(iii) provides 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." Subsection (g)(2)(C) states: "The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h)." The Rule thus contemplates competitive bidding, which "entails inviting applicants for appointment as class counsel to submit competing bids. The fees to be awarded are one of the many factors in the selection. Rules 23(g)(1)(C)(iii) and 23(g)(2)(C) expressly permit the

[7] Judge Walker of the Northern District of California, author of the *Wells Fargo* opinion, has been a leader in the use of competitive bidding to appoint class counsel. *See* L. Hooper & M. Leary, *Auctioning The Role Of Class Counsel In Class Action Cases: A Descriptive Study*, 209 F.R.D. 519, *529, *539-40 (2001). The concept originated in *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D. Cal. 1990). In his statement before the Third Circuit Task Force on selection of class counsel, Judge Walker described the events that lead to his decision in *Oracle*: "Judge Walker was faced with 'two warring camps of lawyers, including a very prominent Philadelphia law firm sparring over which group of famous lawyers should be designated class counsel. Both sides made scurrilous charges about the other.' After observing and tolerating that behavior for a period of time, Judge Walker asked the parties to make a presentation to the court about why they should be selected class counsel. Sometime later at a conference, one of the attorneys approached Judge Walker and told him 'don't worry about the case. We've got the whole thing worked out.' Judge Walker interpreted this to mean that the arrangement 'was at the lawyer's benefit and not at the benefit of the class.' '[S]hortly thereafter, the formerly warring lawyers submitted a proposal for a steering committee of the lawyers to run the litigation for a straight 30% of the recovery, plus out-of-pocket expenses.' At that point, Judge Walker decided to use a bidding procedure . . . ." *Id.* at *539. The similarities to this case are too evident to require elaboration.

Court to consider fee arrangements in appointing counsel." *Manual For Complex Litigation (4th)* § 21.272 (2004).[8]

The Seventh Circuit has endorsed *ex ante* competitive bidding as a means of introducing market forces to the selection and payment of class counsel. *Synthroid Marketing*, 264 F.3d at 719-22. The Court emphasized that this process is most effective when used at the outset of the litigation, when it will most closely mimic market forces. The Court stated:

> Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the cost and benefits of particular systems and risk multipliers be assessed intelligently. Before the litigation occurs, a judge can design a fee structure that emulates the incentives a private client would put in place.
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> Determining lawyers' fees *ex post* is a perilous process. But any method other than looking to prevailing market rates assures random and potentially perverse results.
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> At about the same time some district judges started to conduct auctions for the right to be a lead counsel, and the outcome of these auctions provide the third benchmark.
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> At first thought, auctions appear to be a poor mechanism for replicating the market price of legal services. . . . But the word 'auction' is a imprecise description of the process that judges have used to choose lead counsel in class actions. Judges don't look for the lowest bid; they look for the best bid – just as any private individual would do in selecting a law firm, an advertising firm, or a construction company. Bidding law firms provide the judge with firm profiles, testimonials of former clients, predictions of expected recovery, fee proposals and arguments on why their firm provides good value. The judge in turn acts as an agent for the class, selecting the firm that seems likely to generate the highest recovery net of attorneys' fees.

Synthroid Marketing, 264 F.3d at 719-720 (citation omitted).[9]

[8] *See also*, L. Hooper & M. Leary, *Auctioning the Role Of Class Counsel In Class Action Cases: A Descriptive Study*, 209 F.R.D. 519 (2001). This is the Federal Judicial Center's comprehensive survey of the case law, procedures and forms associated with a competitive bidding process for appointment of class counsel.

An influential example of the bidding process at work in an antitrust context is Judge Shadur's opinion in *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190 (N.D. Ill. 1996). Concluding "that the best interests of the putative plaintiff class would not be served by the kind of proliferation of plaintiffs' counsel that ordinarily marks a like proliferation of the number of cases that so often spring up after a triggering event," the Court required counsel to submit competing bids for appointment. *Id.* at 1192-96.

Like the Seventh Circuit in *Synthroid Marketing*, the *Lysine* Court emphasized that the process is considerably more subtle than selecting a "low bid": "This Court's always-held intention to make the quality of representation an integral part of the decisional process places most of the remaining arguments offered by those two memoranda [opposing a competitive bidding process] into the straw man category." *Lysine*, 918 F.Supp. at 1196. The Court then considered the bids before it, selecting one firm as class counsel in lieu of the multi-firm groups proposed by the losing bidders. *Id.* at 1197-1202; *In re Oracle Securities Litigation*, 136 F.R.D. 639, 651 & n. 26 (N.D. Cal. 1991) ("the court will choose and compensate only *one* law firm to represent a class of Oracle shareholders against Arthur Andersen and any other new defendant. In addition to setting the stage for competitive selection, the designation of *one* firm as class counsel has other advantages. Not least among these is discouraging one of co-counsel to free

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[9] The Seventh Circuit's observations about the superiority of an *ex ante* fee structure to post-litigation review of fee applications have been echoed by many other courts. *See, e.g., Wells Fargo Securities Litigation*, 156 F.R.D. at 225 ("Early selection of class counsel and determination of their compensation serve the interests of the class by enabling these matters to be resolved competitively"); *In re Wells Fargo Securities Litigation*, 157 F.R.D. 467, 471 (N.D. Cal. 1995) (*ex ante* "incentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can *post hoc* judicial review"); *Milestone Scientific Securities Litigation*, 187 F.R.D. at 179 ("organization of counsel may be arranged at the outset of the litigation to avoid inefficiency and deter unreasonable attorneys' fees"); *Sherleigh Associates LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 688, 692 (S.D. Fla. 1999) ("Finding the proposed representation of a consortium of ten law firms not in the best interest of the class members, the Court determines a sealed-bid auction best ensures that class members receive high quality representation at a fair price"); *Oracle Securities Litigation*, 131 F.R.D. at 692-93 ("in order to obtain the best price available, there must be competition among applicants for lead class counsel; competition in turn requires an *ex ante* determination of the fee award. . . . Determining attorney fees after resolution of the litigation is thus an inherently inadequate method and one that disserves both the class and class counsel").

ride off the efforts of co-counsel. . . .") (emphasis in original). *See also In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71, 75-80 (S.D. N.Y. 2000) (another example of the bidding process used to select class counsel in an antitrust context.)

C. Proposals Are Inadequate

Rule 23(g) places the criteria to be considered and the bid format in the Court's discretion. The Federal Judicial Center's empirical study at 209 F.R.D. 519 (2001) provides some possible templates. What is clear is that these Concrete Antitrust Cases call out for some such competitive treatment. At last count, there are eighteen putative class action lawsuits and 40 plaintiffs' law firms, all seeking to represent substantially the same putative class. While the current proposals are a small step in the right direction, much more remains to be done if this litigation is to proceed in an efficient and cost-effective manner. IMI respectfully submits that the Court should consider competitive bidding as a means to achieve that end.

The current proposals of the Susman Group, the Spector Group and the Levin Group fall far short of meeting these standards. None states the fees to be approved *ex ante*. The fifteen-firm Susman Group's proposal is obviously structured to avert an internecine struggle among counsel for appointment under Rule 23(g). The Group makes no attempt to demonstrate that any one of these large, experienced firms cannot handle the case on its own. If anything, the self-laudatory biographical profiles submitted by counsel indicate that any one of them could adequately represent the putative class. That being so, Rule 23(g)(2)(B) mandates precisely the contest among counsel that the Susman Group's proposal seeks to avoid.

The goal of that rule is not to advance the lawyers' professional interests, however conceived, but to "appoint *the* applicant best able to represent the interests of the class." Fed.R.Civ.P. 23(g)(2)(B). Rather than seeking appointment through the competitive process

prescribed by the rule, the fifteen law firms in the Susman Group have, ironically enough, formed a cartel. *See In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190, 1192 n. 7 (N.D. Ill. 1996); *In re Oracle Securities Litigation*, 131 F.R.D. 688, 690 n. 3 (N.D.Cal. 1990).

The Susman Group's proposal takes counsel from ten separate cases, each of whom alleged adequacy to represent the same putative class in his own complaint, and now suggests that every one of the fifteen firms is needed in order to ensure adequate representation. The structure of the Group takes the form of lead counsel, Mr. Susman, supported in an undefined manner by a three-firm "executive committee" with equally undefined responsibilities for the eleven other firms which have signed the Susman Group's motion. Even if a need for more than one such high-powered firm to prosecute this case is not dismissed as facially implausible, the Susman Group's proposal presents no account of how responsibility is to be divided among the firms or why no less than fifteen firms should participate.

Rather, the Susman Group's proposed order says only that Mr. Susman's firm "with the assistance of the executive committee," shall issue "such work assignments to other counsel as they may deem appropriate" and "will solely determine all work assignments in the Consolidated Action and the attorneys responsible therefore." Proposed Order, ¶¶ 12(d) and 14. The fine-print of the Susman Group's proposal should awaken concerns about overstaffing and duplication of effort, not allay them. It is explicitly the Group's contention that fifteen law firms are needed to handle this case rather than one firm.

There has been no showing that this is so – nor could there be given the size and reputation of each of the firms involved. These lawsuits have been prompted by IMI's guilty plea to one count of conspiracy to fix prices *in the Indianapolis ready-mixed concrete market* over a four year period. There is no allegation in the complaints to suggest that these claims,

relating to a discrete, local market over a four year period, require a fraction of the number of lawyers envisioned by the Susman Group's motion. Plaintiffs do not allege some vast international or even national conspiracy requiring far-flung investigation. The plea agreement likewise refers solely to a local market and a limited period of time.

Particularly given the filing of multiple, identical complaints by overlapping sets of counsel within the Susman Group, the prospects of free-riding and patronage identified in the case law and academic commentary described above cannot be ignored. Nevertheless, the Susman Group says it will keep tabs on fees by having counsel monitor each other's work through a monthly billing cycle. Proposed Order, ¶ 15. But that system puts the proverbial fox in charge of the henhouse. It is no substitute for a verifiable, *ex ante* fee structure established through competitive bidding at the outset of the litigation. *Synthroid Marketing Litigation,* 264 F.3d at 718-20; *Amino Acid Lysine Antitrust Litigation,* 918 F.Supp. at 1193-97; *In re Oracle Securities Litigation,* 131 F.R.D. 688, 692-93 (N.D. Cal. 1990).

The credentials of Mr. Susman and his colleagues are formidable. IMI intends no disparagement of them. Nor is it IMI's role to say who ought to be the interim counsel: that is the Court's role as a fiduciary for the putative class. *Synthroid Marketing Litigation,* 264 F.3d at 720 ("The judge in turn acts as an agent for the class, selecting the firm that seems likely to generate the highest recovery net of attorneys' fees"); *Continental Illinois,* 962 F.2d at 572 ("[T]he judge has to step in and play surrogate client. Apparently judges do this with fair success"). But under no view can the bloated, ill-defined counsel structure proposed by the Susman Group be squared with the language or purpose of Rule 23(g)(2). If the cases described above establish anything, it is that steering committees, sterling credentials and professions of good intent are no substitute for competition when it comes to appointing counsel for a putative

class. With due respect, IMI suggests that the fifteen member firms of the Susman Group be directed to submit independent applications for appointment as part of a competitive bidding process.

While not as large as the Susman Group, the Spector Group also suffers from problems of overstaffing and vaguely defined responsibilities. Mr. Spector states that his own firm "has the financial and professional resources necessary to prosecute the class' claims." Spector Memo, p. 9. That is undoubtedly so. Why then are additional counsel, including an Ohio and two Indiana firms, necessary? One lead and one liaison counsel should be enough.

The Spector Group's proposal, like that of the Susman Group, envisages "lead counsel" as a sort of first among equals, distributing work to the other firms and collecting monthly billing records from them. Spector Memo, p. 5; Proposed Order, ¶¶ 15(g) and 20. Once again, however, committees and peer review are no substitute for the competitive process required by Rule 23(g)(2)(B). The member firms of the Spector Group should also be required to submit independent applications for appointment as interim lead or liaison counsel, as the case may be. With respect to fees and expenses, the Court should require applications at the outset of the litigation on the competitive basis encouraged by the Seventh Circuit in *Synthroid Marketing*, rather than relying on the *ex post* review proposed by the Spector Group. Proposed Order, ¶ 20.

The fourteen-firm Levin Group has all of the same problems identified above, overstaffing, undefined division of responsibility and an undisclosed, *ex post* fee structure.[10] Mr. Levin plays the hometown card, rightly noting the local character of the market involved,[11]

[10] *See* Levin Group Proposed Order, ¶¶ 17(c) (granting lead counsel sole discretion "to make all work assignments" to an unspecified number of co-counsel) and 20 (proposing peer review of bills and an *ex post* fee structure); Levin Group Memo at 4-5 (peer review of co-counsel fees).

[11] *See* Levin Group Memo at 7-8 & n. 4 ("This litigation involves an Indianapolis-based defendant and purchases and sales of ready-mixed concrete occurring predominantly in this area. . . . Due to the regional nature and

though oddly indifferent to the provenance of his own group's members from Washington, D.C., San Diego, California and points between. The issue, of course, is not whether a firm is from the east or mid-west; it is whether fourteen firms rather than one (wherever located) are needed to prosecute this "regional" case involving "sales of ready-mixed concrete occurring predominantly in this area." Levin Group Memo, p. 7 & n. 4.

Well aware of the patronage issue, Mr. Levin promises work for everyone, "including those firms supporting other leadership structures"—the members of the Susman and Spector Groups (and presumably counsel in *Wininger* and *Marmax* too). Levin Group Memo at 4 & n. 2, 8. But what does this mean in practice? Either Mr. Levin must reward those who have supported him as lead counsel in assigning work, the very practice condemned by Rule 23(g)(2)(B), or he must preside over a fractious, *de facto* 40-firm consortium of all counsel, many of whose members are seriously disgruntled. Neither alternative promotes economy.

Once again, no one doubts Mr. Levin's qualifications. Indeed, that is the whole point: firms of the caliber of Cohen & Malad should be *competing* with and bidding against the other members of this group, not cooperating with them. *Wells Fargo*, 156 F.R.D. at 227 ("A well-advised representative would insist that firms of this caliber submit separate and independent proposals to represent the class"). A large group of firms from across the nation, however organized and led, is simply unnecessary here. This case involves a local market, local companies and local discovery. Any one of the many well-qualified firms before the Court is equal to the task

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relative size of this litigation compared to those of many other antitrust class actions, such a complex court-appointed organization of Plaintiff's counsel is not warranted. . . . ")

III. The Court Should Enter IMI's Proposed Pretrial Order No. 1.

Plaintiffs' proposals with respect to captioning, filing and service are generally consistent with the *Manual's* recommendations and should be adopted to the extent reflected in IMI's own proposed Pretrial Order No. 1, tendered herewith. *See Manual For Complex Litigation (4th)*, § 40.21 (2004). IMI's proposed Pretrial Order No. 1 contains refinements to account for the joinder of additional defendants and to set a date certain for the Rule 26(f) conference. As so modified, IMI's cross-motion for entry of proposed Pretrial Order No. 1 should be granted following the appointment of interim counsel for the putative class.

Two aspects of the Levin Group's proposed order deserve further mention. Paragraph 10 of that proposed order is inconsistent with Rule 23(e)(1)(A). The proposed order "subject[s] to review and approval by the court" any proposed settlement "that resolves any claim brought in this action. . . . " Rule 23(e)(1)(A) confers such authority only after a class has been certified.[12] Because no class has been certified here, this aspect of the Levin's Group's proposed order is inconsistent with Rule 23(e).

The remainder of the Levin Group's proposed paragraph 10 arguably effects a prior restraint on settlement communications, a practice disapproved by the Supreme Court under the First Amendment. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193 (1981). The nature and scope of defendants' pre-certification communications with putative class members present difficult questions of constitutional and supervisory authority. *See generally*, 5 *Moore's Federal*

[12]The Rule states, in pertinent part: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." The rule was amended in 2003 to clarify an ambiguity in prior practice. As the Advisory Committee stated: "Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of 'a class action.'" The language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by settlement, voluntary dismissal, or compromise." 2003 Advisory Committee Note to Rule 23(e) (citation omitted).

Practice (3d) § 23.144 (2004). This topic should be fully briefed before finding its way into a pretrial order.

Lastly, the Levin Group's proposed order seeks a pretrial conference under Rule 16. Rule 16(b) provides that such a conference is to be scheduled "after receiving the report from the parties under Rule 26(f). . . . " *See also,* S.D. Ind. Local Rule 16.1(c)(2) (same). The Rule 26(f) conference comes first, as reflected in IMI's proposed Pretrial Order No. 1.

IV. Conclusion

Rule 23(g) directs competition for appointment as interim counsel in these circumstances including fees and costs. The Court should (a) establish the procedure and requirements for the bidding; (b) after the bidding, appoint a single interim counsel setting the fees *ex ante*, and (c) enter IMI's proposed Pretrial Order No. 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system (for ECF-registered counsel) or by United States mail, first class, postage prepaid. Parties may access this filing through the Court's system.

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