UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOYLE CONSTRUCTION MANAGEMENT, INC.	)	
Plaintiff,	)	
vs	)	CAUSE NO. 1:05-cv-00979-SEB-VSS
IRVING MATERIALS, INC., and UNIDENTIFIED CO-CONSPIRATORS	)	
Defendants.	)	

DEFENDANT IRVING MATERIALS, INC.'S RESPONSE TO SUSMAN GROUP'S SECOND MOTION TO CONSOLIDATE AND FOR APPOINTMENT OF INTERIM COUNSEL UNDER RULE 23(g)

Summary

Plaintiffs' responses to IMI's motions for appointment of interim counsel for the putative class collectively demonstrate why the Court should require competitive bidding as a part of its decision making process for selecting a single interim counsel under Rule 23(g)(2).

No one disputes that this Court acting as a fiduciary for the putative class "is to select the firm that seems likely to generate the highest recovery net of attorneys' fees" or that the Seventh Circuit requires a "market-based" approach to establish fees which should be done at the beginning, not the end, of this case.[1] Attorney fees will impact the net recovery and Rule 23(g) contemplates that fee proposals will impact this Court's decision. Fees not established by a

[1] *In re Sythroid Marketing Litigation*, 264 F.3d 712, 720 (7th Cir. 2001), the Seventh Circuit emphasized the requirement of a market-based approach which can only occur *ex ante* (and only approximated *ex post):* "We have held repeatedly that that when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of non-payment and the normal rate of compensation in the market at the time" *id* at 717, and that "only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the costs and benefits of particular systems and risk multipliers be assessed intelligently. But in this case, the District Judge let the opportunity slip away, turning to fees only *ex post*. Now the court must set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred." *Id*. at 718.

market-driven approach *ex ante* are doomed to failure under the Seventh Circuit standards. But there can be no market-driven fee proposals so long as the attorneys for the original seventeen or eighteen separate class actions—each of whom originally affirmed that each was adequate to represent the class—are allowed to reduce the competition in the marketplace. If the Susman firm, the Spector firm, or the Levin firm are qualified and adequate to represent the class, they should not be allowed to shrink the pool of competitors in the marketplace by implied or express promises of a piece of the action.

While a contingent fee will best align the interests of the class and the class attorney, the three groups have essentially putrefied the marketplace by eliminating competition and two of the three have not even made a fee proposal *ex ante*. Not only should this Court require each applicant to submit a fee proposal, but it should require each of the attorneys for the seventeen or eighteen class actions submit separate bid proposals, or else withdraw. Only then can this Court make an informed decision on "which firm seems likely to generate the highest recovery net of attorneys' fees."

The Susman Group

The Susman Group falsely pledges fealty to the Seventh Circuit's requirement of a market-based approach, claiming that it has proposed a "market-mimicking approach." Susman Second Motion, p. 3. Notably, the Susman Group neither responds to the authorities presented by IMI criticizing large groups of counsel for lessening competition nor does the group offer to break itself up and submit competing bids. **If real competition is to occur here and the market price is to be discovered as the Seventh Circuit requires, it will only be at the Court's direction.**

In its September 7 brief, the Susman Group makes essentially three arguments: (1) that competitive bidding is an "effort to influence selection of class counsel and distort counsel's incentives"; (2) that "IMI's arguments are based largely on its misconception that plaintiffs' counsel must be compensated by a lodestar method"; and (3) that bidding "would cause delay and is unnecessary and inappropriate".[2]

Far from "distorting counsel's incentives", properly conducted competitive bidding aligns those incentives with the interests of the putative class.[3] Counsel's incentives are a function of the fee structure, which bidding allows plaintiffs' counsel, not IMI, to propose and the Court to accept or reject as a fiduciary for the putative class.[4] The Court "acts as an agent for the class, selecting the firm that seems likely to generate the highest recovery net of attorneys' fees." *In re Synthroid Marketing Litigation*, 264 F.3d 712, 720 (7th Cir. 2001). There is simply no question of improper influence or distortion.

Competitive bidding does not presuppose a lodestar method for calculating fees. The Federal Judicial Center study's finding is that bidding results in a lower attorney's fee relative to class members' recovery under a percentage-based method of calculation. Where bidding occurred, "[a]ttorneys' fees were generally less than the reported percentages in other class actions in the respective circuits. The majority of fee awards was less than 9% (may or may not include expenses) of the total recovery and ranged from a low of approximately 5% in *In re Auction Houses* to a high of 22.5% in *In re Oracle*." L. Hooper & M. Leary, *Auctioning the Role*

[2] *See* Susman Group's Second Motion to Consolidate, to Appoint Interim Lead Counsel and for Entry of Case Management Order No. 1 and Brief in Support, p. 5.

[3] *See* IMI's Brief in Response to Motions to Consolidate, filed September 6, 2005 (IMI Brief), pp. 4-10.

[4] *Id*. at pp. 10-11.

of Class Counsel in Class Action Cases: A Descriptive Study, 209 F.R.D. 519, *531 (2001). The Susman Group's proposed 25% is above the high end of this range.[5]

Mr. Susman's Affidavit states that fees "in cases like this normally range from one-third to one-half of the gross recovery . . . ." Susman Aff., ¶25. There is a dramatic difference between Mr. Susman's estimate and the cases where bidding occurred and "[t]he majority of fee awards was less than 9%. 209 F.R.D. at *531. It is little wonder that plaintiffs' attorneys so dislike auctions! Again, the Court's role as a fiduciary for the putative class, of course, is to "select the firm that seems likely to generate the highest recovery *net of attorneys' fees*." *Synthroid*, 264 F.3d at 720 (emphasis added). The empirical data show that competitive bidding accomplishes this goal.

Competitive bidding will result in no unreasonable delay. The Court can establish a prompt deadline for submission of bids. Moreover, any delay is self-inflicted: counsel should have developed independent proposals from the beginning rather than reacting to IMI's motion by forming large, cartel-like groups of firms.

The Spector Group

Missing from the Spector Group's analysis is any suggestion about getting to the market price *ex ante*—whether by bidding or otherwise..

The Spector Group makes a rather half-hearted effort to argue that bidding is "currently disfavored" but cites neither case law nor anything in Rule 23 in support of this proposition, and simply ignores the Seventh Circuit requirement of a market-based *ex ante* approach.. Spector Memo, p. 3. Rule 23(g)'s endorsement of bidding is not just IMI's notion -- the *Manual for*

[5] The Federal Judicial Center study published the results of its inquiry into the effect of bidding on fee awards in Table One of its report. 209 F.R.D. at *232-38. Of the cases where the winning bid percentage was available, the high of 22.5% was actually something of an outlier. Most of the awards were in the 6 to 8% range. *Id*. at *531-38.

Complex Litigation (4th) § 21.272 notes that the new rule promotes bidding. It is true that "no single factor" controls in selecting counsel, as the bidding cases recognize. *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190, 1196 (N.D. Ill. 1996) ("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 competitive bidding] into the straw man category"). However, Rules 23(g)(1)(C)(iii) and 23(g)(2)(C) expressly authorize the Court to consider fees as a part of the process—and such proposals are the beginning, not the end, of that process.

The Spector Group lists a series of objections to bidding summarized in the Third Circuit Task Force Report of 2002. Spector Memo, pp. 3-4. The Third Circuit report was superceded by the 2003 enactment of Rule 23(g), subsection (g)(2)(B) of which expressly requires competition among counsel where "more than *one* adequate applicant seeks appointment . . . ." In these circumstances, "the court must appoint the applicant best able to represent the interests of the class" and in doing so may consider counsel's fee proposals. *See* Rule 23(g)(1)(C)(iii).

Neither before nor after enactment of Rule 23(g) has any court cited the Third Circuit report to hold that class counsel cannot be chosen by competitive bidding or that bidding should be limited to cases of clear liability and large, collectible damages. The Third Circuit has itself emphasized that "the function of the Task Force is limited to making general recommendations to the bench and bar at large . . . and that its recommendations would have no precedential effect in any circuit." *In re Cendant Corp. Litigation*, 264 F.3d 201, 258 n. 36 (3d Cir. 2001). By contrast, many courts have found bidding to be a useful and efficient practice.[6]

[6] *See* the Federal Judicial Center study at 209 F.R.D. 519 (2001) (collecting bidding cases) and IMI Brief, pp. 10-12. The Third Circuit report has also been subject to some pointed criticism by a judge with substantial experience with bidding. V. Walker, *The Task Force Got It Wrong*, 74 Temple L. Rev. 783 (2001) ("The Third Circuit Task Force Report on the Selection of Class Counsel is less than meets the eye. Replete with conjecture, the

Even taken on its own terms, however, the Third Circuit report certainly does not purport to prohibit competitive bidding. As both the report and the Spector Group note, the goal in selecting counsel "should be maximizing class recovery" not lowering counsel fees as such. Spector Memo, pp. 3-4. As the Seventh Circuit observed in *Synthroid*, however, the point of bidding is precisely "selecting the firm that seems likely to generate the highest recovery *net of attorneys' fees*." *Synthroid*, 264 F.3d at 720 (emphasis added). As the empirical data cited above demonstrate, all available evidence indicates that the class' *net* recovery is enhanced, not reduced, by competitive bidding since members of the class end up with a higher percentage of any recovery.

The Spector Group adds little to the issue—stating that in light of the plea agreement between IMI and the Department of Justice "the liability of IMI is clear given its guilty plea . . . ." Spector Memo, p. 4. Under the Spector Group's own view then, this case meets the Third Circuit report's main criterion for using a bid process. *See* 208 F.R.D. at *355 (defining the "paradigmatic case" for use of bidding).[7]

The Levin Group

The Levin Group simply ignores the Seventh Circuit's requirement of a market-based *ex ante* approach to establishing fees. Like the other groups, the Levin Group avoids confronting the central issue: why are no less than fourteen or fifteen law firms needed to prosecute this case (other than to lessen competition)? The fact that the Levin Group "proposes a leadership

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report offers no evidence, advances no theory and suggests no way to confirm its conclusion that leaving the selection of class counsel to the lawyers themselves best serves the interests of the class and the administration of justice.").

[7] The Spector Group's remaining objections to bidding, such as "the bidding process can result in the cutting of corners by counsel" or "bids are often difficult to compare" or the bidding process involves "subjective considerations" are largely directed toward the Court's analysis of the bids and supervision of counsel and do not address the question of bidding *vel non*. The Court is perfectly capable of accounting for such factors in its analysis of competing bids.

structure composed of one lawyer" without committees misses the broader point. Levin Memo, pp. 11-12. The Levin Group makes no attempt to show that a fourteen-firm (or maybe forty-firm) consortium is needed to litigate this case involving a local market, local companies and local discovery. Indeed, Mr. Levin's own allegations in the *Boyle* complaint, alleging the adequacy of Cohen & Malad and one Chicago firm to handle the case, belie any such notion. *Boyle* Complaint.

IMI is not interested in Mr. Levin's mental impressions or litigation strategy. Levin Memo, pp. 12-13. Given plaintiffs' request for fee shifting under the Clayton Act, 15 U.S.C. § 15(a), IMI is very much interested in avoiding overstaffing and "make work". IMI's objection goes not to the details of how Mr. Levin would organize his colleagues as lead counsel, and still less to his work product, but rather to the very fact that there are so many firms involved in the first place when no evidence has been adduced that they are needed.

A related point is the theory that fourteen or more plaintiffs' firms are needed in order to share resources or spread risk. The Levin Group raises this point obliquely (Memo, pp. 13-14 & n. 11) but simply ignores the case law presented by IMI rejecting this rationale for suppressing competition among counsel. *In re Wells Fargo Securities Litigation*, 156 F.R.D. 223, 226 (N.D. Cal. 1994) ("Judicial acceptance of this practice in class actions effectively extinguishes competition among the plaintiff lawyers and therefore harms the interests of the class."); *In re Oracle Securities Litigation*, 136 F.R.D. 639, 651 & n. 26 (N.D. Cal. 1991); IMI Brief, pp. 8-9. Under Rule 23(g) courts determine "what will serve the interests of the parties and the efficient administration of justice, and not will advance the professional or personal interests of the lawyers." *Manual for Complex Litigation (4th)*, § 10.23 (2004).

The Levin Group's discussion of competitive bidding devotes much rhetoric to impugning IMI's motives but overlooks the uncontested empirical data gathered by the Federal Judicial Center, noted above, which shows a larger *net* recovery to class members where *ex ante* bidding occurs. 209 F.R.D. at *531. The Court will look to the substance of the matter. IMI has openly avowed its interest in reducing a potential fee award—but that interest is shared by the putative class, which would "select the firm that seems likely to generate the highest recovery net of attorneys' fees." *Synthroid*, 264 F.3d at 720. This is not an interest shared by plaintiffs' attorneys, as their vehement reaction to the prospect of competition demonstrates.

The Levin Group acknowledges that Rule 23(g) encourages competition but derides the process as "a bidding war in which the role of lead counsel is essentially auctioned off to the lowest bidder." Levin Group Memo, p. 15. As both the Seventh Circuit and Judge Shadur of the Northern District of Illinois have observed, the process is far more refined than a mere search for the "low bid". *Synthroid*, 264 F.3d at 720 ("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); *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190, 1196 (N.D. Ill. 1996). All of the Rule 23(g) factors and other qualitative factors suggested by plaintiffs' counsel are to be placed before the Court for an appropriate selection.

In *Synthroid Marketing Litigation*, the Seventh Circuit held that district courts must look to market factors in awarding fees to class counsel. Integral to the Court's understanding of a market price for legal services is the rule that "the district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred *at the outset of the case* (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the

suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low)." *Synthroid*, 264 F.3d at 718. The Seventh Circuit held the district court had erroneously disregarded these market forces. The Court's discussion of *ex ante* bargaining with respect to fees is an essential component of the Court's rationale and in no way "dicta" as asserted by the Spector and Levin Groups.

Nor, contrary to the Levin Group's suggestion, did the Seventh Circuit reverse itself in *Synthroid* II, *In re Synthroid Marketing Litigation*, 325 F.3d 974 (7th Cir. 2003). After remand from *Synthroid* I, the district court used bidding results from other cases to award fees to class counsel *ex post*. The need to do so arose precisely because "in this case the district judge let the opportunity [to establish fees *ex ante*] slip away, turning to fees only *ex post*." *Synthroid I*, 264 F.3d at 719. In these circumstances, the Seventh Circuit found that exclusive reference to bidding results from other cases was a less reliable indicator of market results than *ex ante*, arms-length fee negotiations actually conducted by a sophisticated institutional client in the case at hand. *Synthroid* II, 325 F.3d at 979. The Court in no way retreats from or qualifies its holding in *Synthroid* I requiring fees to be set *ex ante*.

The Levin Group points to academic commentary critical of competition among counsel but ignores the much larger body of opinion from federal judges who actually have experience with the process. Levin Memo, pp. 18-19. In interviews with the Federal Judicial Center, these judges uniformly expressed satisfaction with bidding. 209 F.R.D. at *611-*616. IMI respectfully submits that these judges have the more solid foundation for expressing an opinion on the subject. As summarized by the Judicial Center:

> Several bidding judges reported that bidding allowed them to handle the class action more efficiently than under the traditional method of appointment because it was necessary to only deal with one firm on each side of the case, both during settlement negotiations and for submission of the fee application. There were no

> liaison committees or multiple parties that needed to engage in mass communication in order to respond to any inquiry which delays many aspects of the case. One judge stated that more effective management of the case was achieved because bidding permitted the judge to become familiar with the bidders, especially the winning bidder, and learn what their desired fee range was. Commencing the case with the auction procedure enabled another judge to get a handle on the case early on, set perameters, and move the case along.
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> The most commonly reported problem with the traditional method of selection of class counsel concerned the *ex post* evaluation of the attorneys' fee applications usually submitted by teams of attorneys. One judge complained that the high overlap and duplicative activity resulting from multiple counsel costs the class in terms of total class recovery and results in fee applications so time consuming and difficult to evaluate that they warrant appointing a special master to analyze the fees.

209 F.R.D. at *614-615.

The academic critique, in other words, is itself subject to critique. Judge Walker of the Northern District of California, referring to the Third Circuit report, has said it best: "The Third Circuit Task Force Report on the Selection of Class Counsel is less than meets the eye. Replete with conjecture, the report offers no evidence, advances no theory and suggests no way to confirm its conclusion that leaving the selection of class counsel to the lawyers themselves best serves the interests of the class and the administration of justice." V. Walker, *The Task Force Got it Wrong*, 74 Temp. L. Rev. 783, *783 (Winter 2001). This Court should not be deterred by unfounded conjecture.

Conclusion

Competitive bidding is the only way in this case to find the market *ex ante* and the Court should proceed as suggested in the Summary, *supra*..

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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. Parties may access this filing through the Court's system.

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