STATEMENT OF ARTHUR M. KAPLAN,
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TASK FORCE ON SELECTION OF CLASS COUNSEL[1]

Thank you for permitting me to testify before the Third Circuit Task Force on Selection of Class Counsel. Auctions are not necessarily inappropriate under all circumstances. However, I have five principal concerns about auction procedures, which lead me to believe that auctions should not become the norm.

1. Auction Procedures Deviate from the Way Sophisticated Private Litigants Select Counsel

First and foremost, auction procedures sharply deviate from the way sophisticated private litigants select their counsel in high-stakes litigation. In my experience (as someone who has represented large corporations), sophisticated private litigants evaluate quality first and foremost (by reputation and credentials, and through interviews probing experience, ability

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and ideas for the case at hand). Negotiating a fee is usually the final step, explored only with the final candidate or few candidates.

Auctions, by contrast, are almost by definition price driven. Auctions are well calculated to minimize the price of fungible commodities. However, there are several cases in which auction-based fees probably have exceeded the fees that would have been awarded after-the-fact under a traditional mix of percentage-of-the-recovery and lodestar-multiplier methodologies.

More fundamentally, legal services in high-stakes cases, like medical services, are not fungible. A sophisticated litigant with a high-stakes legal claim or defense would no more put its representation out to general bid than you or I would put our choice of a physician out to bid.

2. Auctions Create A Sea-Change In Professional Relationships and Responsibilities

My second concern is that auctions create a sea change in professional relationships and responsibilities. Auctioning class representation among counsel is ironic in response to criticisms that class actions already are too lawyer driven.

Auctions can forcibly divorce a class representative from his or her chosen attorney and result in a shotgun remarriage to a stranger, thereby creating novel and difficult issues of professional relationships and professional

responsibilities. Auctions marginalize the role of the class representatives, who may be paired with unfamiliar counsel.

Auctions arguably are the polar opposite of Securities Reform Act procedures, through which Congress sought to enhance the authority of the largest class representatives. Basically, the auction model treats the class representatives as a cipher.

3. The Auction Model May Encourage Favoritism By Defense Counsel

A third, and widely voiced, concern with the auction model is that it encourages cozy communications between well-connected plaintiffs' counsel and defense counsel. Information is power in preparing an auction bid. Information regarding the strength or weakness of the case, as well as information regarding the probability of early settlement and the likely settlement range, is tremendously helpful in preparing an informed bid.

This creates the perception, and potential, for sweetheart deals in which a winning bid is based upon information available only to the bidder favored by defense counsel. This in turn may influence the outcome of the litigation if the favored bidder is selected.

Settlements often have followed swiftly on the heals of auctions. They also sometimes have occurred close to the reported break point at which the auction bid maximizes fees. At

a minimum, there may be an appearance of favoritism and, at worst, impropriety.

4. Auctions May Discourage Meritorious Cases From Being Filed And Discourage Extensive Early Investigation

Auctions also may discourage meritorious class actions from being investigated and filed, since the lawyer and client face the prospect of the case being appropriated by others. For this reason, auctions are particularly inappropriate where litigation is based in substantial part upon information and legal theories developed by the initiating attorneys and clients. This is a frequently occurring circumstance.

For example, in the In re Nasdaq Market-Makers Antitrust Litigation, 187 F.R.D. 465, 488 n.23 (S.D.N.Y. Nov. 9, 1998)(citation omitted) in which I was Plaintiffs' Co-Lead Counsel, the Court in approving a $1.027 billion settlement observed that:

> Notably, this is not a case where "plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill."

Auctions can create a disincentive against the investigation and spade work that develops meritorious cases, such as Nasdaq.

5. Auctions Are Time Consuming And Create A Vacuum of Initial Leadership

Last, but not least, is there really a current problem sufficient to justify injecting into every class action a procedure that is time-consuming for the court and parties, and which likely creates an early vacuum of leadership?

Auctions are always time consuming for the courts as well as counsel. Auctions also tend to discourage extensive early preparation by plaintiffs, since the courts usually deny fees (or award only modest fees) to all but the winning bidder.

More fundamentally, auctions tend to create a vacuum of organized leadership on the plaintiffs' side, during the early months of the case, while the auction procedures are vetted and the auction is in progress.

Conclusion

As noted above, auctions are not necessarily inappropriate under all circumstances. However, these concerns lead me to believe that auctions should not become the norm.

June 1, 2001 Arthur M. Kaplan