

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE)
ANTITRUST LITIGATION)
_____)

) MDL Docket No. 1869
) Misc. No. 07-489 (PLF)

This document relates to:)

DIRECT PURCHASER PLAINTIFFS)
_____)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of plaintiff Dakota Granite Company for the substitution of Michael D. Hausfeld and the firm of Hausfeld LLP in place of Mr. Hausfeld's former firm, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., as Interim Co-Lead Class Counsel for the proposed direct purchaser plaintiff class in the above-captioned actions. The Cohen, Milstein firm is now known as Cohen Milstein Sellers & Toll PLLC.

On March 11, 2008, the Court appointed Cohen, Milstein, Hausfeld & Toll P.L.L.C. and Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") as Interim Co-Lead Class Counsel for the direct purchaser plaintiffs. The Court concluded that Cohen Milstein and Quinn Emanuel met all of the criteria set forth in Rule 23(g)(1) of the Federal Rules of Civil Procedure and that they were the consensus choice of all other plaintiffs' counsel in these consolidated actions, with the exception of one firm. The Court also concluded that Cohen Milstein and Quinn Emanuel would adequately represent the interests of all the plaintiffs in these cases with respect to each of the criteria set forth in Rule 23 and that, together, they were the firms best able to represent the interests of the potential class. In a separate order issued that

same day, the Court set forth the responsibilities of Cohen Milstein and Quinn Emanuel as Interim Co-Lead Class Counsel.

Thereafter, on April 28, 2008, after further submissions by all interested parties, the Court appointed five firms, as proposed by Cohen Milstein and Quinn Emanuel and agreed to by most other plaintiffs' counsel, to serve as the Executive Committee. It found that these five firms would best serve the interests of the class and were representative of the full breadth of the cases before the Court. These firms were appointed to serve "under the direction of" Interim Co-Lead Class Counsel for the direct purchasers and to assist Interim Co-Lead Class Counsel in the fulfillment of their responsibilities.

In mid-November 2008, Michael Hausfeld and his former firm, Cohen, Milstein, Hausfeld & Toll, had a parting of the ways. Almost immediately thereafter, Mr. Hausfeld created a new firm, Hausfeld LLP. Plaintiffs Dakota Granite Company and Dad's Products Co., Inc. filed a notice of substitution, purporting to substitute Hausfeld LLP for Cohen, Milstein, Hausfeld & Toll. On November 14, 2008, Dakota Granite filed a motion for substitution of Co-Lead Counsel for the direct purchaser plaintiffs, seeking to have Michael D. Hausfeld and the firm of Hausfeld LLP substituted for Cohen, Milstein, Hausfeld & Toll as Interim Co-Lead Class Counsel. The successor firm, Cohen Milstein Sellers & Toll, vigorously opposed this motion, and there have been numerous and voluminous filings by both the Hausfeld firm and the Cohen Milstein firm since that time, supported by declarations and affidavits filed by representatives of those firms. In addition, Quinn Emanuel, its partner Stephen Neuwirth, and various other lawyers and law firms, who had been designated as members of the Executive Committee, have filed memoranda and/or affidavits or declarations with respect to the dispute between Michael

Hausfeld and Hausfeld LLP and Cohen Milstein Sellers & Toll, all supporting the substitution of Mr. Hausfeld and Hausfeld LLP.

By order of January 23, 2009, the Court asked for further filings specifically to address the question of whether both Cohen Milstein and Hausfeld LLP should be designated as Co-Lead Class Counsel along with Quinn Emanuel, and/or whether the Court ought to appoint a mediator to attempt to resolve this matter. The Court is persuaded by representations made in subsequent filings by both Hausfeld LLP and Cohen Milstein that the parties have tried to resolve this dispute on their own over many months and that appointment of a mediator at this stage would not be productive.

Having carefully considered all of the submissions with respect to this important issue, the Court is persuaded that it is in the best interests of the putative direct purchaser class for Mr. Hausfeld and his new firm, Hausfeld LLP, to serve as Interim Co-Lead Class Counsel along with Stephen Neuwirth of Quinn Emanuel. Both of these firms have sufficient resources and expertise to serve in this capacity, and Messrs. Hausfeld and Neuwirth have the experience necessary to lead the effort. Indeed, it is apparent that it was largely the experience brought to the table by Mr. Hausfeld that led the many other law firms with clients in these cases to select Mr. Hausfeld's former firm in the first place. Furthermore, the Court finds that the addition of Cohen Milstein as a third Co-Lead Class Counsel would provide no particular benefit to the class, and in fact might be inefficient and add to the expense of this already expensive litigation. The addition of Cohen Milstein could disrupt the delicate equilibrium established through the private ordering of plaintiffs' counsel which was reached by a consensus of almost all of the lawyers and law firms representing plaintiffs.

As indicated by the declarations submitted by Stephen Neuwirth of Quinn Emanuel and Steven Kanner, Vincent Esades and Solomon Cera, partners in three of the five firms constituting the Executive Committee, that consensus was reached in large part because many prominent antitrust firms and their partners were willing to set aside their own leadership ambitions so long as Mr. Hausfeld and Mr. Neuwirth were given the leadership role. They have indicated that they could no longer support the consensus if Cohen Milstein were Co-Lead Class Counsel instead of Mr. Hausfeld or in addition to Messrs. Hausfeld and Neuwirth. As the second declaration of Mr. Kanner, filed on February 3, 2009, put it:

3. As I noted in my prior declaration, my firm originally intended to seek a leadership position in this matter, but ultimately opted to support the laboriously created consensus proposal of two lead counsel firms, with Michael Hausfeld, then of Cohen, Milstein, Hausfeld & Toll (“CMHT”), representing the group of District of Columbia plaintiffs and Stephen Neuwirth of Quinn Emanuel Urquhart Oliver & Hedges LLP (“Quinn Emanuel”) representing the group of New Jersey plaintiffs.

4. My firm’s support for this proposal was entirely and absolutely contingent on our understanding that Mr. Hausfeld would be leading this action on behalf of his firm. I and my partners viewed CMHT’s antitrust practice and Mr. Hausfeld as synonymous. The reason we chose not to seek our own leadership appointment in this case was because of our respect for, and confidence in, Mr. Hausfeld.

5. If Mr. Hausfeld was not at CMHT, or if he was not the attorney designated to lead CMHT’s efforts in this litigation, my firm would *not* have supported the consensus leadership proposal. Instead, my firm would have filed its own application to be named a co-lead counsel in the case.

* * *

9. Absent the private ordering agreement that was reached among all plaintiffs’ counsel, my firm would not have agreed to

forego seeking leadership in a case of this magnitude and in light of the amount of work we had done in filing, investigating and pursuing this case on behalf of Direct Purchasers. That private ordering agreement contemplated the leadership of Mr. Hausfeld as interim co-lead counsel. This agreement did not contemplate the inclusion of the antitrust attorneys now remaining at CMST as interim co-lead counsel.

Hausfeld LLP's Memorandum in Response to the Court's January 23, 2009 Order ("Hausfeld Memo."), Ex. 1 (Second Declaration of Steven A. Kanner) at ¶¶ 3-5, 9; see also Reply Memorandum in Support of Plaintiffs' Motion for Substitution of Co-Lead Counsel ("Reply"), Ex. 13 (First Declaration of Steven A. Kanner). The declarations of Messrs. Esades and Cera express the same sentiments. See Reply, Ex. 14 (Declaration of Vincent J. Esades); Hausfeld Memo., Ex. 2 (Second Declaration of Vincent J. Esades), Ex. 3 (Declaration of Solomon B. Cera).

For these reasons, the Court will grant the motion of plaintiff Dakota Granite Company for the substitution of Michael D. Hausfeld and the firm of Hausfeld LLP in place of Mr. Hausfeld's former firm, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., as Interim Co-Lead

Class Counsel [145]. Messrs. Hausfeld and Neuwirth are directed, after consultation with members of the Executive Committee, to submit proposed orders to substitute for and/or amend the orders embodied in Docket Nos. 70, 71 and 99, as appropriate.¹

SO ORDERED.

DATE: March 13, 2009

/s/ _____
PAUL L. FRIEDMAN
United States District Judge

¹ Hausfeld LLP has indicated that it would not oppose an Executive Committee or other committee appointment for Cohen Milstein Sellers & Toll. See Hausfeld Memo. at 2. Quinn Emanuel states that it “looks forward to the continued active involvement” of Cohen Milstein Sellers & Toll. Quinn Emanuel’s Memorandum Submitted Pursuant to the Court’s January 23, 2009 Order at 3 n. 2. Messrs. Hausfeld and Neuwirth should consult with members of the Executive Committee and with Cohen Milstein and reach agreement on this matter before submitting their proposed amended orders.