

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**IN RE COMPACT DISC MINIMUM            |**  
**ADVERTISED PRICE ANTITRUST        |                    MDL DOCKET No. 1361**  
**LITIGATION                               |**

**ORDER**

This is an antitrust proceeding challenging the pricing practices of musical compact disc manufacturers and retailers. The Multi-District Panel has transferred over 41 lawsuits to this District for pretrial management. As a result of an initial conference, there is now a consolidated complaint on behalf of 42 State and 3 Territory Attorneys General suing in their *parens patriae* capacities under the Clayton Act; and a different consolidated complaint filed by private consumer plaintiffs seeking class action status to represent (a) individual purchasers in 8 states and the District of Columbia and 2 territories and (b) entity purchasers everywhere in the United States.<sup>1</sup> Some 80 law firms are listed on the consolidated complaint brought on behalf of private plaintiffs.

I have already appointed lead counsel and liaison counsel for the State Attorneys General. See Order Appointing Liaison Counsel, MDL No. 1361, Nov. 29, 2000; Initial

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<sup>1</sup> A tag-along case, Roy v. Sony Music Enter., Inc., No. 00-6065 (S.D.N.Y.), was conditionally transferred with the private and state actions. The amended complaint purports to represent a class that purchased compact discs directly from distributors, including purchases through music clubs owned by those distributors. The distributor defendants have filed a motion to vacate the conditional transfer order of the Roy case, arguing that the issues involving record club sales are unique and vastly different from the other transferred cases. This motion is currently pending before the Judicial Panel of Multidistrict Litigation.

Pretrial Order, MDL No. 1361, Nov. 29, 2000. I have also appointed local liaison counsel for the private plaintiffs. See Order Appointing Liaison Counsel, MDL No. 1361, Nov. 29, 2000. Pending are the requests of five law firms for a leadership role in the private plaintiffs' action. In addition, four private plaintiffs, represented by two law firms seeking a leadership role, have moved to disqualify altogether two other firms.

The firms seeking a leadership role have variously proposed a leadership structure of two firms; or a steering committee; or some form of auction. The circumstances here do not counsel an auction. In my judgment, a single firm should be able to manage the role of lead counsel given the scope of the proposed class, and given the involvement of the State Attorneys General. Keeping management to a single firm should also help avoid duplicative legal fees. I have concluded that the firm of Kohn, Swift & Graf has the experience, skill, resources and expertise best able to move this matter forward, and I hereby designate that firm as lead counsel. Compare with the assessment of Kohn, Swift & Graf in In re Amino Acid Lysine Antitrust Lit., 918 F. Supp. 1190, 1200-01 (N.D. Ill. 1996).

In doing so, I rule upon part of the motion to disqualify and defer action upon part of it. Specifically, I reject the argument that any alleged disqualification pertaining to Milberg Weiss Bershad Hynes & Lerach is also shared by Kohn, Swift & Graf. Milberg Weiss has been challenged on the basis that the firm formerly represented four small retailers in an antitrust lawsuit against the manufacturers in a putative class action transferred to the Central District of California. Milberg Weiss's representation of the class of consumer purchasers here has been challenged as adverse to the interests of their former

retailer clients. Whatever the merits of that argument (a decision that I defer), it does not affect Kohn, Swift & Graf. The moving parties seeking disqualification assert that Kohn, Swift & Graf is disqualified because it is “affiliated” with Milberg Weiss. Under Maine Bar Rule 3.4(b)(3)(i), if a lawyer is disqualified, “no lawyer affiliated with the lawyer or the lawyer’s firm” may continue. ME. BAR R. § 3.4(b)(3)(i) (West 2000). The only affiliation here, however, is the fact that Milberg Weiss and Kohn, Swift jointly sought appointment as lead counsel of all the private lawsuits transferred to Maine. That is not “affiliated” within the plain meaning of the Rules. The Maine Bar Rules do not define the term “affiliated” but nothing in the Advisory Committee Notes suggests the broad scope advocated by the moving parties. (The language previously appeared in Maine Bar Rule 3.4(k).) Moreover, the Restatement (Third) of the Law Governing Lawyers clearly interprets such imputation rules (they are common among the states) more narrowly. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 (2000).<sup>2</sup> The motion to disqualify, therefore, is **DENIED** insofar as it pertains to Kohn, Swift & Graf.

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<sup>2</sup> Section 123 states in relevant part:

[T]he restrictions upon a lawyer imposed by §§ 125-135 [disqualification] also restrict other affiliated lawyers who:

(1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;

(2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or

(3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

I defer action on the motion so far as Milberg Weiss is concerned. I observe, however, that all the experts whose affidavits the parties have submitted agree that because class action status was never achieved in the California litigation, Milberg Weiss is not to be treated as having represented any retailers other than the 4 retailers who were its clients. Specifically, the expert of the party seeking disqualification, Professor Lubet, states: “I do not disagree . . . that Milberg Weiss may litigate against the ‘major CD retailers’ whom they did not expressly represent in the earlier action.” Lubet Rep. ¶ 9. Professors Hazard and Simon, experts for Kohn Swift and Milberg Weiss respectively, agree. I agree as well. Any other rule—that every potential member of the class is a client—would mean that every law firm that has sought to participate on behalf of plaintiffs in this putative class action would have to treat every purchaser of CD’s (at least in the 8 states, the District of Columbia and 2 territories) as a former client in the future. That is not a reasonable reading of the Rule. Instead, the issue of disqualification as to Milberg, Weiss has to do with whether its representation of consumers charging a conspiracy among distributors and retailers is adverse to the retailers it formerly represented; and alternatively, if it takes steps to avoid any adversity as to its former clients, whether it has thereby impaired its ability to represent its consumer clients vigorously. ME. BAR R. § 3.4(b)(1) (West 2000).

I have concluded that the better course is to wait three weeks before ruling on the motion to disqualify counsel. It may be that, in light of my appointment of lead counsel and the consolidation of the private actions, the dispute will become moot. If not, I will proceed to rule thereafter.

**SO ORDERED.**

**DATED THIS 26TH DAY OF JANUARY, 2001.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**