UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 16526, 16527

ARTHUR J. HOHMANN, Plaintiff-Appellant, v. PACKARD INSTRUMENT COMPANY, INC., an Illinois Corporation, et al. Defendants-Appellees, No. 16526 and CHARLES ASHBROOK, et al., Plaintiffs-Appellants, v. PACKARD INSTRUMENT COMPANY, INC., an Illinois Corporation, et al., Defendants-Appellees. No. 16527	On Appeal from an Interlocutory Order in the United States District Court for the Northern District of Illinois, Eastern Division, Nos. 63-C-953 and 63-C-981 Honorable William J. Lynch, Judge Presiding

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE

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Appellant,

v.

PACKARD INSTRUMENT COMPANY, INC.,
an Illinois Corporation, et al.,

Appellees,

and

CHARLES ASHBROOK, et al.,

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MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

STATEMENT

These are consolidated appeals from orders entered by the District Court for the Northern District of Illinois, Eastern Division, striking the class action allegations of two complaints seeking damages for alleged violations of the

federal securities laws (App. 56). In 1963, during a public offering of 100,000 shares of the stock of the defendant Packard Instrument Co., Inc., the plaintiff in Ashbrook purchased 175 shares and the plaintiff in Hohmann purchased 500 shares (App. 47).

They brought these actions based on alleged violations of the antifraud provisions of the federal securities laws to recover damages from Packard, its officers and directors and the underwriter of the public offering (App. 7-19). The actions were brought on behalf of the named plaintiffs and all other purchasers of shares allegedly injured by the acts complained of (App. 13-14, 15).

The Interest of the Commission

The Securities and Exchange Commission submits this memorandum, amicus curiae, to urge that the court below erred in holding that these actions may not be maintained as class actions under Rule 23 of the Federal Rules of Civil Procedure. While the Commission asserts no special expertise with respect to the proper interpretation of Rule 23, it believes that the application of that Rule to actions arising under the federal securities laws is a matter of great importance to the effectiveness of the civil remedies provided by those laws and that the civil

remedies, in turn, provide a "necessary supplement to Commission action" J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

Although the Securities and Exchange Commission is empowered to act in the public interest for the protection of investors [1/] none of the measures available to the Commission under the Securities Act or the Securities Exchange Act is designed to provide compensation to injured investors for damages which they may have suffered as a

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1/ The Commission is empowered to conduct investigations, Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a); to seek injunctive relief, Section 20(b) of the Securities Act, 15 U.S.C. 77t(b), Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e); to suspend trading in securities, Section 15(c)(5) and 19(a)(4) of the Securities Exchange Act, 15 U.S.C. 78o(c)(5) and 78s(a)(4); to apply administrative sanctions as, for example, by the issuance of "a stop order suspending the effectiveness of the registration statement," Section 8(d) of the Securities Act, 15 U.S.C. 77h(d), or by revocation of the registration of a securities broker and dealer, Section 15(b)(5) of the Securities Exchange Act, 15 U.S.C. 78o(b)(5); and to refer evidence of violations to the Attorney General for criminal prosecution, Section 20(b) of the Securities Act, 15 U.S.C. 77t(b), Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e).

result of violations of those Acts.[2/] For this there are private rights of action either express[3/] or implied.[4/]

The Allegations of the Complaints

The complaint in Ashbrook seeks recovery pursuant to Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. 77k and o (App. 14). The complaint in Hohmann alleges violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated by the Commission thereunder, 17 CFR 240.10b-5 (App. 11-12, 13).

2/ In rare cases, as an adjunct to injunctive relief, the Commission has urged a court to deprive violators of their illegal gains by directing that these be paid to individuals who have been injured by their violations, see, e.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D. N.Y., 1966), appeal pending, C.A. 2, No. 30882. Even in such cases the Commission does not seek to make investors whole; it seeks merely to deter violations by attempting to have them give up their profits. Payment of such profits to persons injured by the violations is not necessarily a substitute for recovery of damages, since the aggregate of investor injuries may be different from the profits defendants may have unlawfully made.

3/ See, e.g., Sections 11 and 12 of the Securities Act, 15 U.S.C. 77k and 77l; Sections 9(e) and 18 of the Securities Exchange Act, 15 U.S.C. 78i(e) and 78r.

4/ See, e.g., J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Fratt v. Robinson, 203 F. 2d 627 (C.A. 9, 1953); Vine v. Beneficial Finance Co., 374 F. 2d 627 (C.A. 2), certiorari denied, 36 U.S.L.W. 3226 (U.S., Dec. 4, 1967).

In both actions the basis of the claimed liability is the failure of the prospectus and registration statement relating to the public offering to have disclosed that Packard had found it necessary to redesign a principal product line that had accounted for approximately 2/3 of its total sales during the prior year, and that this product-line change would cause a stoppage of production, a material increase in expenses and a reduction of earnings for the then current six-month period (App. 11, 16-17). In Hohmann the complaint also alleges a failure to disclose that a portion of the proceeds from the public offering would be applied to finance the increased expenses and to replace working capital depleted by the allegedly anticipated, but undisclosed product-line change (App. 12-13).

The complaints in these actions were filed in 1963 (App. 2,4). The order of the court below granting the defendants' motions to strike the class action aspects of the complaints (App. 56) was entered in accordance with a memorandum of decision (App. 47-56) on June 30, 1967, at a time when plaintiffs' counsel indicated that they were ready for trial (App. 38-39). The court below, ruling that Rule 23 of the Federal Rules of Civil Procedure, as amended effective

July 1, 1966, should govern disposition of the motions (App. 47), held that plaintiffs had failed to meet the requirements of the amended rule because they did not show that they "will fairly and adequately protect the interests of the class" under Rule 23(a)(4), (App. 55), and that the "court cannot find—as it would be required to do under paragraph (b)(3) of Rule 23 before this cause could proceed as a class action—'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" (Ibid.) 5/

5/ The text of the Rule, as amended, is set forth in the appendix hereto.

DISCUSSION

A. Superiority of the Class Action

The court below gave no reason for its refusal to find "under the circumstances present here, . . . 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy'" (App. 55) other than that contained in its quotation from Berger v. Purolator Products, Inc., 41 F.R.D. 542 (S.D. N.Y., 1966). It was held in that case that the action there involved could not be maintained on behalf of the class because "[n]o problems of diverse litigation in several forums are presented" (App. 55). Apparently the court below held that the absence of other litigation establishes that a class action cannot be superior to other available procedures.

Amended Rule 23 recognizes that the existence of other litigation may suggest use of the class action to avoid a multiplicity of lawsuits. But the fact that few or no other actions have been brought does not justify a finding that a class action is not superior to alternative procedures. Not only does the class action afford a convenient device for the avoidance of a multiplicity of

lawsuits, it is also an appropriate means for the aggregation of claims by a large number of persons whose individual injuries may be too small to permit the separate pursuit of remedies based upon a common wrong.

Thus, in an action which, similar to the cases at bar, was brought on behalf of purchasers of securities to recover damages flowing from an allegedly false registration statement, it was held that a class action was appropriate because:

> "In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method. The holders of one or two of the debentures involved in the present action could hardly afford to take the risk of an individual action. The usefulness of the representative action as a device for the aggregation of small claims is 'persuasive of the necessity of a liberal construction of * * * Rule 23'" (Footnote omitted, emphasis added).

Escott v. Barchris Constr. Corp., 340 F. 2d 731, 733 (C.A. 2), certiorari denied, sub nom. Drexel & Co. v. Hall, 382 U.S. 816 (1965). This is in accord with the statement of this Court in a case involving antitrust litigation, in

which analogous problems arise. In Weeks v. Bareco Oil Co., 125 F. 2d 84, 88 (C.A. 7, 1941), this Court said:

> "The history of class suit litigation, its development over a century of growth, the origin and status of . . . Rule 23 of the Federal Rules of Civil Procedure, are all persuasive of the necessity of a liberal construction of this Rule 23, and its application to this class of litigation. It should be construed to permit a class suit where several persons jointly act to the injury of many persons so numerous that their voluntary, unanimously joining in a suit is concedely improbably and impracticable."

This Court further observed, id. at 90:

> "To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent."

Similarly, in Eisen v. Carlisle & Jacquelin, 370 F. 2d 119, 121 (C.A. 2, 1966), certiorari denied, 386 U.S. 1035 (1967), it was recently noted that in a case where the individual claims may be small, "[d]ismissal of the class action . . . will for all practical purposes terminate the litigation." The court in that case denied a motion to dismiss an appeal from an order dismissing a class action under the new Rule, observing:

> "We can safely assume that no lawyer of competence is going to undertake this complex and costly case

> to recover $70 for . . . [the individual plaintiff.] Id. at 120.

The Advisory Committee on the Rules, commenting upon the application of the amended Rule 23, has emphasized that issues relating to the maintenance of class actions under paragraph (b)(3) must be judged not quantitatively, but in terms of the economic practicalities. While the Notes of the Advisory Committee, 39 F.R.D. at 104, recognized that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action," they also noted, ibid., that "these interests may be theoretic rather than practical: . . . the amounts at stake for individuals may be so small that separate suits would be impracticable." 6/ Even where there may be members

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6/ Similarly, Professor Benjamin Kaplan, who was Reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966, the date upon which the amendments to the rules became effective, has recently observed that:

> "The rule sets out a number of matters pertinent to the (b)(3) findings, and among them 'the interest of members of the class in individually controlling the prosecution or defense of separate actions.' This interest can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impractible."

Kaplan, Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 391 (1967) (footnotes omitted).

of the class with substantial claims, in fraud cases such as these, they may be ignorant of their rights. This, too, may account for a lack of other actions. It has been pointed out that "the twin factors of ignorance and expense . . . are present in virtually all cases of large-scale group injuries." 7/

It is, of course, possible that the lack of litigation by other members of the class may in some circumstances suggest that the claims presented by plaintiffs are of doubtful validity. If that be the case, the defendants may seek dismissal of the complaint, move for summary judgment or prove their defense upon trial. But the dismissal of class-action claims is an inappropriate alternative to those procedures.

7/ Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi. L. Rev. 684, 685 (1941). Those authors go on to explain, id. at 686:

> "Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one."

In cases such as those here involved, where widespread injury is alleged to have been caused by misrepresentations in a single prospectus, resolution of the common questions of fact and law will result in substantial economies of time, effort and expense for both the defendants and the plaintiffs if representative parties are permitted to offer proof on behalf of the class on these issues. This is apparently why the Advisory Committee specifically referred to the usefulness of the class action in the prosecution of fraud actions stating that:

> ". . . a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class" (39 F.R.D. at 103).

An appreciation of these factors has led courts to uphold maintenance of a class action under the federal securities laws in antifraud cases which are closely analogous to the instant case. See Fischer v. Kletz, 41 F.R.D. 377 (S.D. N.Y., 1966), where plaintiffs in each of several consolidated class actions alleged that the class members had purchased securities issued by the defendant corporation at prices which had been artificially inflated by a number of false and misleading financial statements

issued by the defendant corporation over a one and one-half period. See also Dolgow v. Anderson, No. 66 Civ. 1057 (E.D. N.Y., filed January 3, 1968); [8/] Kronenberg v. Hotel Govenor Clinton, Inc., 41 F.R.D. 42 (S.D. N.Y., 1966). Cf. Escott v. Barchris Constr. Corp., supra. While these decisions are consistent with ". . . the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" in enacting the securities laws, J. I. Case Co. v. Borak, supra, 377 U.S. at 433, the contrary result reached below makes the performance of that duty more difficult. The congressional purpose may as easily be thwarted by a restrictive application of an essential procedural device as by a denial of the underlying substantive rights sought thereby to be enforced. As this Court has recognized in Weeks v. Bareco Oil Co., supra, 125 F. 2d at 90, in answering objections to the class action in that case:

"If the defense is to create barriers, and to

8/ The opinion of Judge Weinstein in Dolgow v. Anderson reflects a detailed analysis of the factors pertinent to the superiority of the class action procedure in a securities-fraud case. Issues pertinent to adequacy of representation, discussed infra pp. 15-25 as well as the role of the court in applying the requirements of amended Rule 23 are also discussed.

make litigation expensive, so as to avoid trial, the opposition by defendants to a single trial can better be understood and appreciated. Such a position does not appeal to a chancellor, who wants to know the truth, and to fix liabilities on the basis of the true facts." (Original emphasis.)

B. Adequacy of Representation

The Court below based its finding that plaintiffs had not "shown that they 'will fairly and adequately protect the interests of the class'" (App. 55) upon the facts that "there is one plaintiff in each action seeking to represent a class consisting of a great number of purchasers in which no other suits are pending, in which no additional purchasers have sought to intervene, and in which less than 30% of a select mailing group have responded favorably to a letter holding out the possibility of a favorable verdict with no assumption of any personal obligation" (App. 54, footnote omitted). We believe that reliance of the court on these factors is contrary to the decisions of this Court and the policies underlying the use of the class action procedure as a device for the aggregation of small claims.

In Hunter v. Atchison T. & S. F. Ry., 188 F. 2d 294, 301 (C.A. 7), certiorari denied, sub nom. Hunter v. Shepherd, 342 U.S. 819 (1951), where defendants offered proof that a number of the 42 named plaintiffs did not have claims representative of the class, this Court held that the "suit was properly instituted as a class action, providing proof shows one of the forty-two qualifies to represent the class." (Emphasis added).

In Weeks v. Bareco Oil Co., supra, two plaintiffs, suing on their own behalf and on behalf of approximately 900 other oil jobbers, sought to recover damages against nineteen different oil companies. While this Court held that the district court had not abused its discretion in finding that the plaintiffs did not adequately represent the class, the decision was based upon defendants' showing that the plaintiffs' claims were not typical of the class.[9/] This Court did not rely on the fact that only two plaintiffs purported to represent a class of 900 persons, as the court

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9/ The complaint alleged that the defendants reduced the jobbers' profit margins by unlawfully conspiring to fix the price of the "spot" tank car price of gasoline, which, under the contracts of the two plaintiffs, determined the cost of gasoline to them (125 F. 2d at 87). The Court found that there was considerable variance in the terms of the contracts between the 900 members of the purported class and the 19 defendants and that only a few of them contained the standard for determination of the jobbers' cost price provided for in plaintiffs' contracts. Id. at 88, 93. Under the amended Rule the question of adequacy of representation might not be reached on such facts, since there is a separately stated requirement, set forth in paragraph (a)(3) of amended Rule 23, that the individual claims of representative parties must be "typical."

below apparently believed. Indeed, after noting, upon review of pertinent authorities, that "some courts have recognized that great disparity between the number actually suing and the number in the class, is of some importance," 125 F. 2d at 91, this Court expressly stated, id. at 93:

> "Our conclusion is that dismissal would not be justified on the ground that plaintiffs are too few in number compared to the total number in the class." (Emphasis added)

These decisions make clear that the number of plaintiffs in relation to the size of the class is irrelevant to the question of the plaintiffs' qualifications to act on behalf of absent members of the class and recognize that it is anomalous to suggest that a device for the protection of a large number of small claimants may not be employed on the initiative of an individual who has a small but representative economic interest in the outcome. As pointed out in the quotation from Escott v. Barchris Constr. Corp., supra p. 8, it is upon "individual initiative, particularly the initiative of lawyers" that the

effectiveness of the class suit depends.[10] Not only the initiative to institute the action but the motivation to prosecute it diligently and effectively would presumably be unaffected by the small number of representative parties before the court but would presumably be greater as the aggregate of the claims of the class is increased by the greater number of persons represented.

In Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill., 1967), the court in upholding the right under Rule 23 of a single taxpayer to maintain a class action on behalf of several hundred other taxpayers noted that "the taxpayer suit device would lose its utility if we held that a single taxpayer could not provide representation for his fellow taxpayers." Id. at 471. Similarly, application of a test of proportionately

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10/ "Because of the lawyer's incentive, the suit which might be brought for the original plaintiff alone is legitimately turned into a class suit for all. And more important, the suit which might not be brought at all because the demands on legal skill and time would be disproportionate to the original client's stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude. Thus, the class suit as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice . . . ." Kalven & & Rosenfield, supra n. 7 at 717.

large representation could preclude the possibility of prosecuting representative actions under the federal securities laws in those instances where the wrongdoers have been most successful in perpetrating their fraud by inflicting harm on a sufficiently large number of persons. Indeed, if this be the test applied, as many as 100 plaintiffs might not meet the standard in instances where a class numbers thousands of persons, although that number would seem to approach, if not exceed, the limits of practical joinder.

The absence of other lawsuits based upon claims similar to those advanced herein likewise suggests no deficiency in plaintiffs' ability to represent the class under the standards provided by the new Rule.[11/] Where,

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11/ In conjunction with its discussion of the adequacy of the representation, the court below stated that "under Rule 23(b)(3) one of the matters to be considered by the court is 'the extent and nature of any litigation concerning the controversy already commenced by or against members of the class.'" (App. 51). That factor among others, is "pertinent to the findings" required by paragraph (b)(3) to be made, i.e., whether common questions raised by the complaint predominate over those affecting only individual class members, and whether a class action is superior to other adjudicative procedures. See supra pp. 10-11. None of the factors set forth in that paragraph purport to have relevance to any of the prerequisites to a class action set forth in paragraph (a) of the Rule, of which adequacy of representation is one. See Kaplan, supra n. 6 at 391.

as in these actions, "the twin factors of ignorance and expense" may well explain the lack of other lawsuits,[12] it cannot reasonably be suggested that the inaction of other members of the class casts doubt upon the adequacy of those who have shown the initiative to act on behalf of all.

The court below also relied upon the absence of intervention. Intervention may, of course, be employed under amended Rule 23 as a means for strengthening representation if fault is found with the way in which one or more typical claimants are proceeding on behalf of a class.[13] But the court below did not suggest that the claims made by plaintiffs are not typical, that plaintiffs have failed adequately to present those claims or to prosecute the action, that plaintiffs in any manner have interests conflicting with those whom they purport to represent or that in any other relevant respect plaintiffs are improper

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12/ See n. 7 *supra*, and accompanying text.

13/ See paragraph (d)(3) and the Notes of the Advisory Committee with respect thereto, 39 F.R.D. at 107.

representatives or inadequate or incompetent to perform the tasks they have undertaken.[14/]

The reliance of the court below on the absence of intervention in these actions by other members of the class (App. 49-51, 54) ignores an essential distinction between the provisions of amended Rule 23 and those of the former Rule. Under the former Rule, the class action in cases such as those at bar was generally viewed merely as a device for permissive joinder, since it was held that no member of a class in such a case was bound by a judgment unless he had intervened therein. See Oppenheimer v. F. J. Young & Co., 144 F. 2d 387, 390 (C.A. 2, 1944); Kainz v. Anheuser-Busch, Inc., 194 F. 2d 737, 744-745 (C.A. 7, 1952) (dictum); 3 Moore's Federal Practice ¶23.10 at 3442 (2d ed., 1967). But cf. Weeks v. Bareco Oil Co., supra, 125 F. 2d at 91, 93. Thus, unless at some stage

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14/ Absent members of the class who have not requested exclusion are entitled "to enter an appearance through counsel" and thus safeguard their individual interests, paragraph (c)(2)(C). But the entry of such an appearance, without more, gives counsel no right actively to participate in the case. See Kaplan, supra n. 6 at 392, n. 137.

of the proceeding absent members intervened, such a class action had no utility and the failure of a substantial number to intervene provided a basis for dismissal of representative claims. See Oppenheimer v. F. J. Young & Co., supra, Kainz v. Anheuser-Busch, Inc., supra. Under amended Rule 23, however, similar consequences do not flow from a lack of intervention, since all absent members of the represented class will be bound by the judgment of the court unless they expressly request exclusion from the class. See paragraph (c)(2) & (3).

Since Rule 23(c)(3) now provides that absent members of the represented class will be bound by the judgment of the court unless they expressly request exclusion, a court's concern for fair and adequate protection of their interests, as the court below observed, may be greater now than under the former provision. But it does not follow from this that the prerequisite of adequacy of representation should be so construed that the advantages of the class-suit procedure will rarely be available to those who would normally find it economically impracticable to seek individual recovery and who have not requested exclusion. The Rule mandates specific procedures and requirements and grants to the court a broad

measure of discretion appropriate to assure that the interests of absent persons will be fairly and adequately represented in the prosecution of the action. Class members may enter an appearance through counsel, paragraph (c)(2); the court may narrow the issues and redefine the class as to which it will permit representation, paragraph (c)(4); and it may make appropriate orders "imposing conditions on the representative parties," paragraph (d)(3), or requiring that other steps be taken "for the protection of the members of the class," paragraph (d)(2). In no event can the binding effect of judgment under the new Rule be said to require a more stringent test than that applied in Weeks v. Bareco Oil Co., discussed supra pp. 9, 13, 16-17, since this Court's decision in that case was based upon an assumption that "those of the class who are not plaintiffs will be bound by the judgment." 125 F. 2d at 93.

Under the new Rule, the binding effect of judgment in any action brought pursuant to paragraph (b)(3) is founded upon notice required to be directed in the best practicable manner to all members of the class advising each that "the court will exclude him from the class if he so requests by a specified date." Paragraph (c)(2)(A). The notice must also state that "the judgment . . . will

include all members who do not request exclusion," paragraph (c)(2)(B), and that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel," paragraph (c)(2)(C). The letter permitted to be sent by the court below prior to the effective date of the amendment to the Rule did not purport to meet the notice requirements of paragraph (c)(2) and is plainly inadequate for that purpose.[15/]

The Commission believes that the question whether the representative parties do in fact provide fair and adequate representation can be examined by the court at all stages of the proceeding. Whenever the court entertains

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15/ In an "effort to determine the adequacy of the representation," the court below "permitted the plaintiffs to send letters to 600 purchasers of the stock in question" advising them of the pendency of the action and inquiring whether they approved its continuance and approved the representation afforded by the plaintiffs (App. 52-53). In attributing significance to the fact that only 30 percent of those solicited had responded favorably, the court below erroneously assumed that plaintiffs had a duty to show affirmative support by members of the class. Amended Rule 23 does not impose such a duty. The provisions of paragraph (c)(2) require that notice of the class action be given to permit those who do not support its maintenance the opportunity to request exclusion from the class; but that paragraph clearly contemplates that the action will continue thereafter on behalf of those who do not choose to do so.

doubt it may issue whatever orders are appropriate to cure remediable deficiencies. See supra, pp. 19, 22-23. Dismissal of the representative claims on this ground, however, should be employed only as a last resort, and then only after a careful weighing of the harm to members of a class for whom the class action may be the only practicable means of redress for alleged injuries--a consideration which is wholly lacking in the opinion of the court below.

CONCLUSION

For the foregoing reasons, the judgment of the district court in each of these cases should be reversed.

Respectfully submitted,

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APPENDIX

RULE 23—CLASS ACTIONS

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which could as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in

subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course or proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argment; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966.) [28 U.S.C. App. (Supp. II, 1965-66).]