

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS**

DAMONIE EARL, LINDA RUGG, ALESA
BECK, TIMOTHY BLAKEY, JR.,
STEPHANIE BLAKEY, MARISA
THOMPSON, MUHAMMAD MUDDASIR
KHAN, ELIZABETH COOPER, JOHN
ROGERS, VALERIE MORTZ-ROGERS, and
LAKESHA GOGGINS, each individually and
on behalf of all others similarly situated,

Plaintiffs.

v.

THE BOEING COMPANY,
SOUTHWEST AIRLINES CO.,

Defendants.

Civil Action No. 4:19-cv-00507

**BATHAE DUNNE LLP'S REPLY TO THE
RESPECTIVE OPPOSITIONS TO ITS MOTION TO DESIGNATE
INTERIM LEAD CLASS COUNSEL UNDER FED. R. CIV. P. 23(g)(3)**

INTRODUCTION

On May 14, 2020, Bathae Dunne LLP (“BD”) moved for appointment as interim lead class counsel under Federal Rule of Civil Procedure 23(g)(3). (ECF No. 99 (“Motion”).) BD’s Motion—which was supported by co-counsel Dovel & Luner LLP and Capshaw DeRieux LLP (“Supporting Co-Counsel”)—was grounded on three basic facts:

- *First*, this is a putative class case, and as such, the litigation decisions made by counsel in this action affect the legal interests of potentially thousands of persons whose names are not currently on the case caption.
- *Second*, there is actual and immediate rivalry and uncertainty with respect to litigation strategy and adequacy considerations between counsel who purport to represent the putative class.
- *Third*, BD and its Supporting Co-Counsel are plainly adequate to represent the putative class as interim lead counsel.

These facts provide a canonical case for a Rule 23(g)(3) appointment, as the Motion explained.

(See ECF No. 99 at 3-9.)

In respective opposition briefs filed last week, Defendants and ostensible “plaintiffs’ co-counsel” from Pierce Bainbridge Beck Price & Hecht LLP (“Pierce Bainbridge”)¹ each proceeded to make BD’s case—and underscored it with subsequent filings and communications. (See ECF No. 108 (Defendants’ opposition); ECF No. 110 (Pierce Bainbridge’s opposition).) These filings (i) deliberately ignored the role of Rule 23(g)(3) in protecting putative class members not before the Court (and the interests of those absent, but affected parties); and (ii) attempted to leverage conflicts and adequacy distinctions between proposed interim lead counsel (BD and its Supporting Co-Counsel) and other attorneys on the docket, most notably those allegedly working for Pierce

¹ As of the date of this filing, it is not clear what entity David Hecht or Andrew Lorin—the attorneys who signed ECF No. 110—actually work for. However, for purposes of this Reply, BD will take Mr. Hecht and Mr. Lorin at face value that they filed ECF No. 110 on behalf of “Pierce Bainbridge Beck Price & Hecht LLP.” (ECF No. 110 at 1.)

Bainbridge. As this brief explains below, the record is now even clearer that BD should be appointed interim lead counsel for the class, and Defendants and Pierce Bainbridge have *themselves* provided that clarity.

ARGUMENT

A. An Interim Lead Counsel Appointment Under Rule 23(g)(3) is Immediately Necessary and Appropriate

Fed. R. Civ. P. 23(g)(3) has a straightforward role. As the Advisory Committee Notes explain, Rule 23(g):

recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. *The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it.* The class representatives do not have an unfettered right to fire class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.

FED. R. CIV. P. 23(g) advisory committee’s note to 2003 amendment (emphasis added); *see also* 1 NEWBERG ON CLASS ACTIONS § 3:82 (5th ed.) (Dec. 2019) (quoting *id.*).

As Newberg explains, “[t]he Advisory Committee note implies, quite strongly, that it is class counsel who speaks for the class, not the class representatives.” *Id.* To wit, “[t]he Advisory Committee note essentially acknowledges that Rule 23(g) is aimed at responding to the fiction inherent in the conventional pretense that the class representative monitored class counsel. Rule 23(g) shifts this counsel-monitoring function from the class representatives to the court” *Id.*

Rule 23(g)(3) takes these larger principles and recognizes that the interests of the putative class may be materially—even dispositively—impacted prior to certification where there is “rivalry or uncertainty” amongst lawyers prosecuting the action. In such a situation, Rule 23(g)(3)

provides for the designation of interim lead class counsel by the Court. Per the 2003 advisory committee's notes to the identically-worded predecessor to Rule 23(g)(3):

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. *Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate.* Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made.

FED. R. CIV. P. 23, advisory committee's note to 2003 amendment (emphasis added).

The Court's task on this Motion is therefore to determine whether, in view of the particular facts and circumstances before it, "rivalry or uncertainty . . . makes formal designation of interim counsel appropriate" in order to "protect the interests of the putative class." *Id.* On this inquiry, the record in this case could not be clearer: there is significant, immediate "rivalry and uncertainty" that threatens the interests of the putative class members, *and the parties opposing BD's motion have fomented and sought to leverage it* (and continue to do so). Interim appointment of lead class counsel is necessary and appropriate here.

Neither Defendants' Opposition (ECF No. 108) nor Pierce Bainbridge's Opposition (ECF No. 110) even addresses the indisputable fact that Rule 23(g)(3)—which is directed to putative *class members*, not individual plaintiffs—is designed to protect the interests of persons *not presently before the Court*. Instead, Defendants contend that "[t]here is no need for a traffic cop when there is only one car on the road" (whatever that means), and pretend that BD asks for something it does not: an order naming Bathae Dunne "lead representation" for "the named

Plaintiffs.”² (ECF No. 108 at 1-2.) Pierce Bainbridge, for its part, makes the head-scratching argument that BD cannot be appointed interim *class counsel* cannot because “BD does not mention whether *the Plaintiffs* have consented to having BD as interim lead counsel.” (ECF No. 110 at 2.) The willful blindness of not just Defendants, but purported *plaintiffs’ counsel*, to the interests of thousands of persons not named in the caption whose interests may be materially affected by every litigation decision in this matter is telling, and weighs in favor of granting the Motion.³

But more critically—and quite dispositively—both Defendants and Pierce Bainbridge have been actively and unambiguously *sowing and seeking to leverage* “rivalry and uncertainty” against the plain interests of the putative class. For example, Pierce Bainbridge has opposed BD’s Motion as “premature,” while simultaneously “reserv[ing] its right to move for co-lead status” and “request[ing] that the Court order a mediation between co-counsel to resolve issues of coordination of representation.” (ECF No. 110 at 3.) It is hard to get more “uncertain” or “rivalrous” than that. And as if on cue, Defendants—who, again, have told the Court from one side of their mouths that there is only “one car on the road” and “no need for a traffic cop”—have said the following to BD and its Supporting Co-Counsel in their attempts to set up a simple discovery meet-and-confer:

² *Womack v. Nissan North America, Inc.*, 2007 WL 9724942 (E.D. Tex. 2007), is irrelevant. There, Rule 23(g)(3) appointment was sought to avoid other lawyers filing future lawsuits. *Id.* at *1. There was no rivalry or uncertainty among plaintiffs’ counsel in that action. *See id.*

³ Defendants and Pierce Bainbridge both assert that Rule 23(g)(3) is not implicated in this case because of the alleged absence of “multiple sets of plaintiffs with unrelated lawyers” in this action. (ECF No. 110 at 2; *see also* ECF No. 108 at 4 (“this putative class action lawsuit was brought by a single counsel—Pierce Bainbridge—acting on behalf of a single group of plaintiffs”).) This is legally off-base: the standard is whether “rivalry and uncertainty” justifies formal appointment of interim counsel to “protect the interests of the putative class,” and that standard is met in spades here, as the exhibits to this Reply brief make clear. But it is also factually wrong. BD will soon move to add to this case several new individual plaintiffs represented by BD and its Supporting Co-Counsel—plaintiffs that have never had and will not have any relationship with Pierce Bainbridge (or any of the lawyers that claim to currently be affiliated with that firm).

[I]n light of the pending disputes among counsel purporting to represent the plaintiffs as to who is counsel, who is not, and what the respective counsel's authority is or might be, I don't see how a productive meet and confer can take place at this time. I note, for example, that your letter indicated a cc to "All counsel," but it appears you did not include a cc or otherwise Messrs. Hecht and Lorin who claim to represent the plaintiffs and are presently opposing you on at least one motion. *Until we know who has authority to speak for the Plaintiffs, and who can bind them to concessions and make binding agreements on scope of discovery issues, a meet and confer on the issues raised in your letter is simply premature. Once the issue of who can and does act on behalf of Plaintiffs is resolved, we can promptly set up a meet and confer on the various issues.*

(Dunne Decl. Exh. A at 1-2 (T. Farrell email of Jun. 1, 2020) (emphasis added); *see also id.* at 1 (M. Swarzendruber joining Jun. 1, 2020 Farrell email); *id.* at Exh. B at 1-2 (T. Farrell email of Jun. 3, 2020) ("Given the pending disputes regarding the representation of the named Plaintiffs, including Bathae Dunne's pending opposed motion, competing engagement letters, an unproduced 'Co-Counsel Agreement,' and requests for the Court potentially to order co-lead status or mediation *among Plaintiffs' counsel*, we are concerned about the ability to conduct a meaningful and binding meet and confer with just Yavar and local counsel on the line." (emphasis in original)); *id.* at 1 (M. Swarzendruber joining Jun. 3, 2020 Farrell email).) As these emails make clear, absent appointment of interim lead counsel for the class, Defendants clearly intend to use the very rivalry and uncertainty they have sown to stop this matter from progressing and to halt discovery (as they have done repeatedly since the very beginning of this case).

Further complicating this "rivalry and uncertainty," an attorney who has never worked a single hour on this case has suddenly reappeared and is now making representations to the Court *in this case* that can at best be described as misleading. This attorney has further declared the controversy regarding his statements to be a "sideshow," and has injected issues concerning his own adequacy into the fray with promises of "significant funds" and "sufficient resources" through

a law firm that by all accounts appears to be insolvent and devoid of lawyers. (Dunne Decl. Ex. C May 13 Tr. at 4:23; 5:8.) The Rule 23(g)(3) inquiry isn't for later: the putative class needs protection right now.

B. Bathae Dunne and its Supporting Co-Counsel are Indisputably Adequate

BD comfortably meets every prong of the Rule 23 adequacy requirement—and neither Defendants nor Pierce Bainbridge can plausibly contend otherwise. As BD explains in its Motion, its attorneys are exceptionally capable and experienced; its firm is sufficiently capitalized; and its interim lead status is expressly supported by the Dovel and Capshaw firms, which each have significant resources and expertise to ensure the putative class is adequately represented. (ECF No. 99 at 8; ECF No. 99-1 at ¶ 7.)⁴

Rather than actually join issue on *BD's* adequacy, Defendants repeatedly challenge the adequacy of *Pierce Bainbridge*—pointing to that firm's wholesale failure to respond to information requests, public solvency concerns, attorney departures, and uncertainty about whether the law firm will even exist in two months (if it even meaningfully exists now). (See ECF No. 108 at 9-10; ECF No. 108-2 at 1-3.) To Defendants' arguments about Pierce Bainbridge, BD and its Supporting Co-Counsel say: “*exactly.*”

Rule 23's interim lead provision was designed for just this circumstance. The rivalry and uncertainty created by those purportedly working at Pierce Bainbridge and repeatedly exploited by Defendants is not a basis to deny the motion. To the contrary, it is the reason to grant it.

CONCLUSION

Bathae Dunne LLP should be appointed interim lead class counsel under Rule 23(g)(3).

⁴ If the Court would like additional information about BD or its Supporting Co-Counsel, these counsel would be happy to provide that information to the Court. But the Court should reject Defendants' conclusory and unfounded attacks on counsel's adequacy.

Dated: June 4, 2020

John Jeffrey Eichmann (CA 227472)
jeff@dovel.com
Gregory S. Dovel (CA 135387)
greg@dovel.com
Simon Franzini (CA 287631)
simon@dovel.com
Julien A. Adams (CA 156135)
julien@dovel.com
Jonas Jacobson (CA 269912)
jonas@dovel.com
DOVEL & LUNER, LLP
201 Santa Monica Blvd., Suite 600
Santa Monica, CA 90401
Telephone: 310-656-7066
Facsimile: 310-657-7069

/s/ Brian J. Dunne
Yavar Bathaee (NY 4703443) (Lead Counsel)
yavar@bathaeedunne.com
Brian J. Dunne (CA 275689)
bdunne@bathaeedunne.com
Edward M. Grauman (TX 24081931)
egrauman@bathaeedunne.com
Andrew Wolinsky (NY 4892196)
awolinsky@bathaeedunne.com
BATHAEE DUNNE LLP
445 Park Ave. 9th Floor
New York, NY 10022
Tel: (212) 918-8188

Elizabeth L. DeRieux (TX 05770585)
ederieux@capshawlaw.com
S. Calvin Capshaw (TX 03783900)
ccapshaw@capshawlaw.com
CAPSHAW DERIEUX LLP
114 E. Commerce
Gladewater, Texas 75647
Telephone: (903) 236-9800
Facsimile: (903) 236-8787

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, a true and correct copy of the above was served via email through the Eastern District of Texas's CM/ECF system.

/s/ Brian J. Dunne
Brian Dunne