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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| DIRECTORS GUILD OF AMERICA, INC., JOELLE DOBROW, LUTHER JAMES, LORRAINE RAGLIN and CESAR TORRES, Plaintiffs, v. WARNER BROTHERS, INC., Defendant. | NO. CV 83-4764-PAR<br>MEMORANDUM OF DECISION AND ORDER |
| DIRECTORS GUILD OF AMERICA, INC., BILL CRAIN, DICK LOOK, SHARON MANN, SUSAN SMITMAN, and FRANK ZUNIGA, Plaintiffs, v. COLUMBIA PICTURES INDUSTRIES, INC., Defendant. | NO. CV 83-8311-PAR |

This is an action alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Pursuant to Fed.R.Civ.P. 23(c), the

Directors Guild of America ("DGA") and the named individual plaintiffs move for an order certifying a class of plaintiffs which would consist of all women and racial minorities who have been or would be applicants for employment with defendants as Director, Assistant Director, Stage Manager, or Production Assistant but for defendants' discriminatory practices and reputation. The class would also include those women and racial minorities who are on a qualifications list for Unit Production Manager, First Assistant Director, and Second Assistant Director but who have not succeeded in gaining employment because of defendants' discriminatory practices and reputation.

In order to maintain a lawsuit as a class action, the plaintiffs must satisfy each of the four conjunctive criteria set forth in Fed.R.Civ.P. 23(a). Additionally, the action must fall within one of the three subdivisions established in Rule 23(b) before it may proceed as a class action. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 (1974). Rule 23(a) provides:

> "(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."

Before ordering that a lawsuit may proceed as a class action, the trial court must rigorously analyze whether the prerequisites of Rule 23 have been met. General Telephone Co. of the Southwest v. Falcon, 102 S.Ct. 2364, 2372 (1982). The class

plaintiff bears the burden of establishing that the action may be maintained as a class action. In re Northern District of California, Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 854 (9th Cir. 1982); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1312 (9th Cir. 1977); Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 36 (N.D. Cal. 1977). Thus, the failure of plaintiffs to carry their burden as to any one of the requirements of Rule 23 precludes the maintenance of the lawsuit as a class action. Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975).

Having considered the papers and oral argument, I conclude that the class cannot be determined at this time. Prior to argument I issued a Tentative Ruling which raised a number of concerns, including adequacy of representation, commonality and typicality. Further briefing was requested as to the former. I am persuaded first, that the DGA may not serve as a class representative and second, that counsel, having been an attorney for the DGA in connection with matters which are at issue in this action, cannot also represent the plaintiff class. Although waiver of a conflict could be obtained from the named plaintiffs individually, no effective mechanism exists for doing so from the class and no alternative, such as creation of a subclass coextensive with the principal class to prosecute claims against the DGA, would sufficiently erase the taint of conflict. With respect to the latter requirements, after argument I am convinced that neither an evidentiary hearing nor notice would facilitate the class determination but would simply increase costs unnecessarily if interposed at this point. Accordingly,

recognizing that no class determination is final until judgment is rendered, I shall rule on the record adduced and deny the plaintiffs' motion.

1. Numerosity.

Defendants do not oppose class certification on the basis of plaintiffs' failure to meet the numerosity requirement. In any event, this element is best analyzed after the other requirements have been applied so that "the appropriate parameters and size of the membership of the resulting class" can be determined. Harriss, 74 F.R.D. at 39.

2. Common Questions of Law or Fact.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." To establish commonality, the plaintiff must present significant evidence from which it may be inferred that there is "an identifiable pattern or practice affecting a definable class in common ways." Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267, 277 (4th Cir. 1980). In an action alleging employment discrimination, the relevant considerations in determining the existence of commonality are as follows:

(i) whether the nature of the unlawful employment practice charged is one that genuinely has a class-wide impact;

(ii) the degree of uniformity or diversity of the relevant employment practices of the employer. Appropriate factors to take into account include: degree of decentralization of administration, size of the work force, number of plants and installations involved, extent of diversity of employment conditions, occupations and work activities and degree of

geographic dispersion of the employees;

(iii) the degree of uniformity or diversity of the membership of the class in terms of the likelihood that the members' treatment will involve common questions;

(iv) the nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices; and

(v) the length of time encompassed by the allegations and the degree of probability that similar conditions prevailed throughout the period. Harris, 74 F.R.D. at 41.

Consideration of these factors in light of the evidence submitted by plaintiffs and defendants leads me to conclude at this time that plaintiffs have not carried their burden of establishing the existence of common questions of law or fact.

In the motion picture industry, hiring decisions for DGA-covered positions are made in a decentralized manner. Hiring decisions are vested in numerous individuals who act independently of each other. For each production, the individuals responsible for the hiring process will vary. Independent or outside producers will often have a significant degree of influence over the decision. Moreover, highly subjective criteria are utilized to select the individuals to staff the production. Typically, personnel responsible for filling the DGA-covered positions will look for prior experience in the type of production planned, technical competence, an ability to work effectively with the other members of the staff and specific personality traits.

At Columbia, theatrical motion pictures are staffed on a project by project basis which varies according to the motion picture under production. Typically, several individuals will consult in the decision to fill any one position and different individuals will be involved in each project. Occasionally, a project will be offered to Columbia with the director already selected. In that case, Columbia will either produce the motion picture with the director as designated or decline the offer. (Schrager Decl., ¶ 6.) If Columbia decides to produce the picture without a director already chosen, the director will be selected according to the consensus of Columbia executives and other individuals involved in the project such as the producers, actors or writers. (Schrager Decl., ¶ 7.)

Columbia usually makes the initial recommendation for unit production managers subject to the acceptance of the producer and the director. However, Columbia will often accede to the wishes of the director or producer if they have a particular unit production manager in mind at the time Columbia accepts the project. (Schrager Decl., ¶ 8.) Selection of the unit production manager is strongly influenced by the particular demands of the production such as foreign locations, special effects and action shots. Under Section 7-204 of the Basic Agreement, the director has the right to select the first assistant director. As is the industry custom, the first assistant director will select the second assistant director with recommendations from the director, unit production manager and a Columbia executive. (Schrager Decl., ¶¶ 10, 11.)

Selection of DGA-covered personnel in Columbia's

television subsidiary exhibits many of the same characteristics seen in the theatrical film division. The President of Columbia Pictures Television, Inc., Barbara Corday, states: "Hiring decisions are made on a consensus basis by different groups of individuals acting independently of each other, although on occasion some of the individuals in each group may be the same. . . . [D]ecisions regarding the hiring for a television program will be made by a consensus process including, depending on the job category, the producer or producers, the network broadcasting the program, the director, the first assistant director, the unit production manager, and one or more Columbia executives associated with that program. The combination of individuals involved in this process will change from program to program and, within each program, from job category to job category." (Corday Decl., ¶ 8.) In 1984, thirty-five different producers worked on Columbia's ten television productions. (Corday Decl., ¶ 10.) Columbia's thirteen theatrical motion pictures employed twenty-six different producers, and thirteen different directors and first assistant directors. (Schrager Decl., ¶¶ 7, 10, 11.)

In television, the hiring process at Columbia varies according to the type of program such as daytime serial, television movie, mini-series, episodic drama, situation comedy and pilot as well as the medium such as film or videotape. For example, in hiring a director for a filmed or videotaped television program, the producer will have the direct authority to make the selection but the television network which will broadcast the program and Columbia executives will have the right to approve it. (Corday Decl., ¶ 11.) When selecting the

1 director for a pilot production, mini-series or television movie,
2 the producer, network and Columbia executive will confer but the
3 network will tend to have somewhat more input in the decision
4 than with episodic programs. (Corday Decl., ¶¶ 15-17.)

5 As with theatrical motion pictures, section 7-204 gives
6 the director the right to select the first assistant director for
7 the production of a mini-series or television movies. As a
8 matter of practice, the director will select the first assistant
9 director for a pilot production. (Corday Decl., ¶ 19.) The same
10 consensus process between the producer, the director and Columbia
11 operates in the selection of the second assistant director.
12 (Corday Decl., ¶ 20.)

13 The decision of whom to hire for unit production
14 manager for an episodic filmed television program is made by
15 consensus between the producer and Columbia. (Corday Decl., ¶
16 12.) In turn, the unit production manager generally selects the
17 first assistant director for the television program in
18 consultation with the Columbia production department. (Corday
19 Decl., ¶ 13.) The first assistant director then may choose the
20 second assistant director and the first assistant director's
21 choice is usually honored unless Columbia objects. (Corday
22 Decl., ¶ 14.)

23 At Warner Brothers, hiring decisions for DGA-covered
24 jobs are also made on a job-by-job basis which is highly
25 decentralized and subjective. With respect to theatrical movies
26 produced at Warner Brothers, the producer generally exercises the
27 discretion to hire the director. (Gallo Decl., ¶ 17.)
28 Generally, producers seek to hire directors who have demonstrated

their ability to make commercially successful and artistically satisfying films as well as familiarity with the type of film to be produced. Section 7-204 gives the director the unfettered right to select the first assistant director and the director will usually try to hire persons who have worked for him or her previously. (Gallo Decl., ¶ 22.) Typically, the first assistant director has considerable influence over the selection of the first assistant director although the choice is theoretically that of the producer. The studio would only rarely deny the first assistant director his choice of second assistant. (Gallo Decl., ¶ 23.)

In episodic television productions at Warner Brothers, the idea for the production may originate within Warner Brothers or by an independent producer who wishes to collaborate with the studio. In conjunction with a television network, the producer will compile a list of directors to direct the various episodes planned. (Credle Decl., ¶ 8.) The directors will be selected based on their previous success, familiarity with the particular type of production under consideration and ability to work well with the members of the staff and cast. (Credle Decl., ¶ 15.) The producer will then hire a unit production manager who in turn will often consult with the producer to hire a first assistant director. (Credle Decl., ¶ 10.) Either the unit production manager or the first assistant director, or both, will select the second assistant director. (Credle Decl., ¶ 11.)

Thus, at both Columbia and Warner Brothers the hiring decisions are not made by a single authority but are instead made in a highly decentralized manner. The individuals who make the

hiring decisons rarely do so for several productions and most decisions are shared among many key individuals. Moreover, the hiring decision is essentially subjective in nature, especially where the position requires creative talent. For purposes of filling DGA-covered positions, hiring decisions at both studios are not made according to a uniform policy or set of guidelines. Instead, hiring decisions are made project-by-project by a variety of persons, only some of whom are employed by the studios, and who utilize different criteria which varies depending on the type of project involved. Additionally, DGA-covered employment at the two studios takes place at a myriad of different locations and under a variety of conditions. These factors, coupled with the diversity of the proposed class leads me to conclude that the existence of common questions of law or fact has not been demonstrated.

The evidence adduced by plaintiff does not compel a different result. Plaintiffs submit the deposition testimony of a number of executives employed by defendants for the purpose of demonstrating the existence of a system of word-of-mouth hiring. For example, Warner Brothers executive Barry Meyer testified that with respect to choosing directors for television productions, executives at the studio usually confer and compile a list of candidates. (Hunt Decl., 15:17-19.) Meyer stated that there was no formal application process and that Warner Brothers did not advertise openings. (Hunt Decl., 17:6.) He also indicated that candidates were recommended by other executives with whom they have worked or by their agents. (Hunt Decl., 20:1-8.)

Columbia executive William Fischer described the

process for hiring a director of a pilot production. To find the most qualified applicants, he sought to determine who had previously directed successful pilots. (Hunt Decl., 34:20-22.) If those identified are not available, he considers the names of individuals offered by agents or individuals who promote their own candidacy as well as the recommendations of other producers or executivess. (Hunt Decl., 36:1-12.) Fischer testified that the recommendations are "word of mouth" and typically from the executive's "own personal experience." (Hunt Decl., 36:17.) He also acknowledged that when no one was hired through the word-of-mouth process, he usually looked to someone already on the production, such as an associate director or a writer, to direct the episode. (Hunt Decl., 38:20.)

Columbia executive Sheldon Schrager testified that candidates for unit production manager prositions are identified first by recommendation of the producer, director or writer. (Hunt Decl., 42:20.) If that process does not yield a candidate, the producer, director and executive will examine the book published by the DGA which lists all of its members and their credits. (Hunt Decl., 43:21.) Schrager testified that he also keeps his own file of personnel involved in various projects, refers to the DGA's availability list on a weekly basis and interviews individuals referred by other producers or directors. (Hunt Decl., 46:1, 46:9, 47:245, 49:4.)

In addition, several of the named plaintiffs testified that they did not have access to information of job openings or to the individuals who did the hiring. For example, in response to the question why he could not obtain employment at Warner

Brothers, Luther James testified, "I have never been able to have any kind of contact that might lead to work there . . . I don't know people there. And that is the way that people get work." (Plaintiff's Reply Brief at 19.)

The deposition testimony offered by plaintiffs suggests that there is no systematic mechanism for notifying women and minority members of the DGA of job openings and that word-of-mouth recommendation is the predominant method for identifying potential applicants. However, due to the decentralization of the industry and the subjective nature of the hiring process, plaintiffs have not demonstrated that this action is susceptible to class treatment despite the apparent prevalence of word-of-mouth notification. See Doninger v. Pacific Northwest Bell, 564 F.2d 1304, 1311 (9th Cir. 1977); Michigan State University Faculty Assn. v. Michigan State University, 93 F.R.D. 54 (W.D. Mich. 1981); Seidel v. GMAC, 93 F.R.D. 122, 124 (W.D. Wash. 1981); Townsel v. University of Alabama, 80 F.R.D. 741, 743 (N.D. Ala. 1978); Jamerson v. University of Alabama, 80 F.R.D. 744, 747 (N.D. Ala. 1978); Lucky v. Board of Regents, 34 F.E.P. 986 (S.D. Fla. 1981); Sanday v. Carnegie-Mellon University, 17 F.E.P. 562 (W.D. Pa. 1976).

3. Claims or Defenses Typical of the Class.

Rule 23(a)(3) requires that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Under Rule 23(a)(3), the representative plaintiff must show that he or she "has a claim which affects the members of the class to an extent that 'the interest of the representative party . . . [is] coextensive with the interest of

the entire class . . .'" Harris v. Pan American World Airways, Inc., 74 F.R.D. 24, 42 (N.D. Cal. 1977). The class representative "must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight System v. Rodriguez, 431 U.S. 395, 405, 97 S.Ct. 1891, 1896 (1977). Thus, finding that the representative's claims are typical of the class rests on a determination of the existence of a class with common questions of fact or law. Harris, 74 F.R.D. at 42. There being no class with common questions, there is no need to determine if the claims of the representatives are typical of the purported class.

4. Fair and Adequate Protection of the Interests of the Class.

In this case, the fourth requirement of Rule 23(a), whether the representative parties will fairly and adequately protect the interests of the class, also presents an obstacle to class certification. This prerequisite has been called the most crucial requirement because of the preclusive effect a judgment will have on the rights of absent members. Hansberry v. Lee, 311 U.S. 32, 41, 61 S.Ct. 115 (1940). There are two prongs to the requirement of fair and adequate representation. First, the trial court must be satisfied that the representative party's attorneys are qualified and able to conduct the litigation. Second, the named plaintiffs must establish that the suit is not collusive and that their interests are not antagonistic to those of the remainder of the class. Jordan v. Los Angeles County, 669 F.2d 1311, 1323 (9th Cir. 1982), vacated 459 U.S. 810, 103 S.Ct. 35, amended 726 F.2d 1366 (9th Cir. 1984); Harris v. Pan American

World Airways, Inc., 74 F.R.D. 24, 42 (N.D. Cal. 1977).

With respect to the first prong, there is no question that counsel for the named plaintiffs possess sufficient qualifications and experience ably to conduct this litigation.

It is the second prong -- the absence of conflicting interests between the named representatives and the class -- that poses the most serious problem. The DGA is named as representative of the class composed of women and minority members. At the same time, defendants have filed counterclaims against the DGA which assert that it is wholly or partially responsible for whatever discrimination may exist against women and minorities as a result of its role as bargaining representative and acquiescence in discriminatory practices, if any. Specifically at issue are sections 7-204 and 7-203 of the Basic Agreement by which the Director of filmed productions has the right to select the First Assistant Director and the DGA's acceptance of responsibility for any discriminatory effect of that provision; the Director's right to consult in the selection of a Unit Production Manager; the Qualifications List system proposed by the DGA; the DGA's rejection of an affirmative action override proposed by the employers; the one director rule set forth in section 7-207; and the DGA's acquiescence in the word-of-mouth system.

Whether a union will adequately represent a class of persons is a question of fact to be determined on a case-by-case basis. Social Services Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 947 (9th Cir. 1979). In County of Santa Clara the Court determined that the union would be an adequate

class representative on evidence which showed that: (1) a majority of the union's statewide officers were women; (2) women comprised between 70 and 80 percent of the local union's members and 100 percent of its officers; (3) the union consistently sought equal pay for its female members through its collective bargaining efforts; (4) the union filed complaints with the Equal Employment Opportunity Commission over unequal pay scales; (5) no economic conflicts between male and female members was indicated; (6) no male union members objected to the union representing the class; (7) no evidence that male union members would suffer pecuniary loss if the female members prevailed in the suit was presented; and (8) a counterclaim had not been filed against the union.

In contrast here: Eighty percent of the DGA's members are white males; only four percent are minorities and only 15% are females. (Dila Decl., Exhs. A, B.) Of the ten DGA officers, two are women and none is a member of a minority group. (Franklin Depo. at 83.) With the exception of one female, all eleven members of the DGA's national board are white males. (Id.) There is no showing that the DGA has consistently sought equal rights through its collective bargaining efforts. To the contrary, the defendants' counterclaims raise serious issues concerning the DGA's role in creating and perpetuating the allegedly discriminatory system of hiring. As noted in prior motions for summary judgment, there exist triable issues of fact whether the DGA, by negotiating the collective bargaining agreement, has contributed to any discriminatory impact.[1]

Furthermore, two separate lawsuits filed in the Central

District demonstrate that at least some members of the DGA perceive conflicting interests. In Breschard v. Directors Guild, 34 F.E.P. 1045 (C.D. Cal. 1984), two white male second assistant directors alleged reverse discrimination as a result of the DGA's attempts to induce the production companies to hire more women and minorities. At the other extreme, in Metoyer v. Franklin, Directors Guild, et al., CV 85-308 RMT (Gx), a black male production coordinator recently filed suit against the DGA for violations of Title VII based on its membership practices.

The conflict of interest raised by the DGA's role is sufficiently concrete and immediate to preclude the DGA's representation of the class comprised of females and minorities.[2] Accordingly, the DGA is dismissed as a plaintifff.

It is equally clear that the attorneys representing the individual plaintiffs, the law firm of Hunt & Cochran-Bond, may not represent both the plaintiffs and the DGA. In view of counsel's duties to give their undivided loyalties, avoid the appearance of impropriety and, in a class action, pay scrupulous attention to the interests of the class, representation of parties with substantially adverse interests is inappropriate. Even if both the DGA and the class plaintiffs consented to the representation by Hunt & Cochran-Bond, it cannot reasonably be said that "the representation will not be adversely affected" and thus the law firm may not represent both clients. ABA Model Rule of Professional Conduct 1.7; see Chateau de Ville Productions v. Tams-Witmark Music Library, Inc., 474 F.Supp. 223, 226 (S.D.N.Y. 1979); Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 (9th Cir. 1981); Klemm v. Superior Court, 75 Cal.App.3d 893,

898, 142 Cal.Rptr. 509 (1977); IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978); Cinema 5 Ltd. v. Cinerama, 528 F.2d 1384, 1387 (2d Cir. 1976); Sapienza v. New York News, 481 F.Supp. 676, 679 (S.D.N.Y. 1979); Government of India v. Cook Industries, Inc., 422 F.Supp. 1057 (S.D.N.Y. 1976).

In their supplemental memoranda, plaintiffs' attorneys indicate their desire to continue representation of the plaintiff class, while allowing the DGA to secure new counsel. However the prior representation by Hunt & Cochran-Bond of both the class plaintiffs and the DGA implicates a number of issues of professional responsibility.[3] Specifically these issues include (a) representation adverse to a former client, ABA Model Rule of Professional Conduct 1.9; (b) receiving compensation from one other than the client, Model Rule 1.8(f); and (c) lawyer as a witness, Model Rule 3.7.

a. Representation adverse to a former client. Model Rule 1.9 provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [confidentiality] would permit with respect to a client or when the information has become generally well known."

There are a wide range of concerns which underlie the prohibition against representing a client whose interests are adverse to a former client. A lawyer's duty to a client

continues past the termination of the lawyer-client relationship and adverse representation potentially violates the attorney's duty of undivided loyalty. Representation against a former client also presents a risk that confidential information may be used to the detriment of the former client. Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980). Finally, the proscription against representing another person against a former client is based on fundamental fairness to the client and maintaining the integrity of the bar and judicial system by avoiding the appearance of impropriety. Gas-A-Tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir. 1976); Spragins v. Huber Farm Service Inc., 542 F.Supp 166 (D. Miss. 1982). In this regard, the court must balance the client's right to choose his own counsel against its obligation to "safeguard the integrity of the judicial process in the eyes of the public." Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1349-50 (9th Cir. 1981); see also IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978).

All of these concerns operate here. In their papers and at oral argument, Hunt & Cochran-Bond has asserted the position that the defendants' counterclaims are without merit and that the DGA is not responsible for any discrimination which may exist in the television or motion picture industry. At the same time, by virtue of its representation of the DGA the law firm has had access to confidential information which may disadvantage the DGA in this litigation. Additionally, Mr. Hunt was apparently involved in negotiations on behalf of the DGA which led to the signing of the 1981 collective bargaining agreement and he would thus be privy to confidential information concerning those

negotiations.

Even where, as here, the former client's interests are adverse to the present client's and the two are involved in the same matter, Rule 1.9(a) provides that an attorney may continue his representation if the former client consents after consultation. In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Dodson v. Floyd, 529 F.Supp. 1056, 1064 (N.D. Ga. 1981); Koehring Co. v. Manitowoc Co., Inc., 418 F.Supp. 1133, 1138 (E.D. Wis. 1976); Black v. State of Missouri, 492 F.Supp. 848, 865 (W.D. Mo. 1980). To this end, Hunt & Cochran-Bond submit the declaration of the DGA's President Michael Franklin who states that "the DGA has no objection to attorneys Hunt and Cochran-Bond continuing to represent the interests of the individual plaintiffs and the putative class."

Whether Hunt & Cochran-Bond may continue representing the named plaintiffs is measured by the standard applied to representation of present clients with adverse interests. Unified Sewerage Agency, 646 F.2d at 1345 n.6. Disciplinary Rule 5-105(C) allows a lawyer to represent multiple clients if it is obvious that the attorney can adequately represent the interest of each client and if each consents to the representation after full disclosure.[4] In this case, it is conceivable that full disclosure could be made, and consent could be obtained, from the named plaintiffs individually.

b. Receiving compensation from one other than the client. Model Rule 1.8(f) provides that "[A] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation;

1 (2) there is no interference with the lawyer's independence of
2 professional judgment or with the client-lawyer relationship; and
3 (3) information relating to representation of a client is
4 protected as required by Rule 1.6." Hunt & Cochran-Bond has
5 declared that it received compensation from the DGA for services
6 rendered in this case. There is nothing before the Court which
7 suggests that counsel's professional judgment will be impaired or
8 that confidential information will be revealed in violation of
9 Rule 1.6. Thus, if the law firm discloses the fact that
10 compensation has been or will be provided by the DGA and the
11 individual plaintiffs approve, representation of the plaintiffs
12 by Hunt & Cochran-Bond would not be inappropriate.
13 c. Lawyer as a witness. Defendants assert that
14 Mr. Hunt, who participated in the negotiations leading to the
15 signing of the 1981 collective bargaining agreement, must be
16 disqualified because he may be called to testify at trial. Model
17 Rule 3.7 provides in pertinent part: "(a) A lawyer shall not act
18 as advocate at a trial in which the lawyer is likely to be a
19 necessary witness except where: (1) the testimony relates to an
20 uncontested issue; (2) the testimony relates to the nature and
21 value of legal services rendered in the case; and (3)
22 disqualification of the lawyer would work substantial hardship on
23 the client." The rule seeks to avoid the appearance of
24 impropriety, protect the opposing party from prejudice, and guard
25 the integrity of the attorney's advocacy by preserving the
26 distinction between advocacy and testimony. MacArthur v. Bank of
27 New York, 524 F.Supp. 1205, 1208 (S.D.N.Y. 1981). Under the
28 Model Rules, an attorney must be disqualified only if counsel is

1 likely to be a necessary witness. So long as Mr. Hunt's role in
2 the collective bargaining process and the possibility of his
3 being called as a witness -- together with the probability of his
4 being disqualified as trial counsel should that possibility
5 materialize -- is disclosed, there no reason for his
6 disqualification at this time. Thus, Hunt & Cochran-Bond may
7 continue to represent the named plaintiffs if the firm receives
8 informed consent both from them and from the DGA.

9 However, in a class action the court has a special
10 obligation to assure representation that is unfettered by even
11 the appearance of divided loyalty. See Mandujano v. Basic
12 Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976). Because
13 of the DGA's dismissal as a class representative but its
14 continued presence as a counterclaim defendant, the dual capacity
15 in which plaintiffs' counsel were cast makes it impossible to
16 wipe the slate that clean.

17 In its supplemental brief, Hunt & Cochran-Bond made two
18 proposals to remedy any problems raised by these ethical
19 considerations: first, a separate subclass was to be formed and
20 represented by separate counsel to prosecute the suit against the
21 DGA; second, notice was to be provided to the class members
22 informing them of the possible conflicts and allowing the
23 individual class members to give their consent to Hunt &
24 Cochran-Bond's representation. While possibly explicable to, and
25 waivable by an individual acting solely in his own interest, I am
26 not persuaded that any form of notice could adequately explain --
27 or eliminate -- the taint of conflict. That being the case, it
28 cannot knowingly or intelligently be waived by members of the

class. Nor would creation of a subclass, cumbersome under the best of circumstances, be a sensible solution. The subclass proposed would be coextensive with the main class and would exist solely for the purpose of hiring new counsel, considering DGA's complicity, and prosecuting claims against the DGA. The only net gain from such a procedure would be preserving Hunt & Cochran-Bond's role as counsel for the class; in this case, that appears contrived (since their historic client has been the DGA) and unnecessary for assuring their continued input as that could be accomplished either by their representing the DGA or appearing as *amicus*.

Accordingly, IT IS HEREBY ORDERED that

1. Plaintiffs' motion to certify the class is denied;

2. The DGA is dismissed as a class representative;

3. The law firm of Hunt & Cochran-Bond may continue their representation of the named plaintiffs in accordance with the requirements for client consent set forth above; and

4. A further status conference in this case shall be held September 30, 1985 at 8:30 a.m.

DATED: August 29, 1985.

Pamela Ann Rymer
United States District Judge

FOOTNOTES

1/ DGA's assertion that it has no conflict with the interests of women and minorities, but instead has an interest congruent with such a class to establish that the defendants are responsible for their underemployment, is not convincing. To accept this position would leave the DGA in control of the classes' suit and the defendants as the parties prosecuting the claims of illegal discrimination against the DGA. The result would be to delegate the responsibility for fully vindicating the rights of women and minorities to someone other than the class itself.

2/ With the exception of one, every case which has considered union representation of a class in the face of a counterclaim alleging union liability has denied class certification. See Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1970); IBEW, Local 805 v. Westinghouse Electric Corp., 25 FEP 1093, 1095 (D. Md. 1979); Power Division Ass'n v. NOPSI, 14 FEP 257, 258 (E.D. La. 1975); CWA v. New York Telephone, 8 FEB 509, 5152-13 (S.D.N.Y. 1974); IUE v. Westinghouse Electric Corp., 25 FRServ2d 126, 128 (D.W.Va. 1977); Johnson v. Vancouver Plywood Co., Inc., 21 FRServ2d 7807, 708 (W.D. La. 1976); but see International Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1269 (4th Cir. 1981) (counterclaim alleging breach of the collective bargaining agreement for the union's failure to submit the dispute to the grievance procedure did not create the kind of concrete conflict that would prevent adequate representation); see also Maguire v. TWA, Inc., 55 F.R.D. 48,

49-50 (S.D.N.Y. 1972) (union having separate counsel obviates any conflict of interest).

3/ The Model Rules of Professional Conduct, adopted by the House of Delegates of the American Bar Association in August, 1983, are applied by this Court when determining whether counsel must be disqualified. Securities Investor Protection Corp. v. Vigman, 587 F.Supp. 1358, 1362-63 (C.D. Cal. 1984); Paul E. Iacono Structural Engineering, Inc. v. Humphrey, 722 F.2d 435, 439-40 n.6 (9th Cir. 1983).

4/ Disciplinary Rule 5-105, part of the ABA Model Code of Professional Responsibility, was replaced in 1983 by Model Rule of Professional Conduct 1.7 which provides:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the

lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

5/ Model Rule 1.6(a) provides in pertinent part:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ."