IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
APR 2 2 2003
Michael N. Milby, Clerk

MARK NEWBY,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
	§	
Defendants.	§	

DEFENDANT JOSEPH W. SUTTON'S
MOTION TO RECONSIDER HIS MOTION TO DISMISS

Defendant Joseph W. Sutton ("Sutton") respectfully moves the Court to reconsider its March 24, 2003, order [DE 1299] ("Order") denying Sutton's Motion to Dismiss the claims asserted against him in Plaintiffs' Consolidated Complaint for Violation of the Securities Laws (the "Complaint").

I. Introduction

1. The Court denied Sutton's Motion to Dismiss because it found that he served on a committee of Enron officers called the "Management, or Executive, Committee." *See* Order at 5. According to the Court, Sutton's position on this committee not only exposed him to most, if not all, of the accounting and financing irregularities at issue in this lawsuit, but also required that he "again and again" approve those irregularities in multiple committee resolutions and that he knowingly sign allegedly misleading documents filed with the SEC. *Id.* at 8-10. The Court denied Sutton's Motion to Dismiss because such acts "sooner rather than later had to be made with full knowledge or severely reckless disregard of the fraudulent scheme" described in the Complaint. *Id.* at 10.

2. The Court's analysis is not supported by the Complaint. There has never been a committee of Enron officers with the powers and responsibilities that the Court attributes to the

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committee described in the Order. Relevant to this motion, the Complaint does not allege that there ever was such a committee. The committee described in the Order is a fiction produced by the Complaint's allegation that Sutton served on Enron's Management Committee and the Court's mistaken belief that Enron's Management Committee held powers and responsibilities similar to those held by Enron's Executive Committee of the Board of Directors (hereinafter the "Executive Committee of the Board"). In reality and as stated in the Complaint, the Management Committee did not hold such powers and responsibilities. The Court's mistaken belief that it did clouds its entire analysis.

3. With this motion, Sutton respectfully asks that the Court reconsider his Motion to Dismiss considering only to the allegations actually pled against him and the committee on which he actually served. As shown below, the law and Court's rulings on other defendants' motions to dismiss demonstrate that Sutton does not belong in this lawsuit. Sutton's Motion to Dismiss should be reconsidered and granted.

II. The Court Analyzed and Denied Sutton's Motion to Dismiss Based on Allegations that Do Not Appear in the Complaint.

A. The Complaint alleges that Sutton and other Enron officers served on Enron's Management Committee.

4. The Complaint alleges that Sutton and other Enron officers served on Enron's Management Committee. *See* Complaint ¶88. The Complaint makes clear that each officer-member served on the committee by way of his or her position within the various departments, business groups, and affiliated entities that composed Enron. *Id.* Although the Complaint alleges that the Management Committee conducted Enron's day-to-day business and approved the transactions at issue in this lawsuit, the Complaint does not particularize any facts supporting these allegations. *Id.*

Nowhere does the Complaint particularize one fact demonstrating that the Management Committee, as a governing body, had the power to control or actually controlled Enron. Nowhere does the Complaint particularize one fact demonstrating that the Management Committee was required to substantively review and approve the transactions at issue, much less that it was required to review and approve the specific accounting treatments and financing structures for those transactions. The Complaint does not allege, even in conclusory terms, that Management Committee members signed or were required to sign any of the allegedly misleading documents filed with the SEC.[1]

B. The Complaint alleges that certain Enron directors served on Enron's Executive Committee of the Board.

5. Separate from the Management Committee allegations, the Complaint alleges that certain members of Enron's Board of Directors served on various Board committees. The Complaint alleges that Enron's Board used these committees to oversee and control Enron's business and to review and approve the transactions at issue in this lawsuit (including the accounting treatment and financing structures for those transactions). *Id.* ¶85. Included among these committees was the Executive Committee of the Board, which, according to the Complaint, exercised the full powers of Enron's Board of Directors. *Id.* The Complaint alleges that the Executive Committee of the Board's director-members, like all Enron directors, signed allegedly misleading documents filed with the SEC. *Id.* ¶1006. The Complaint does not allege that Sutton was a director or that he was a director-member of the Executive Committee of the Board.

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[1] Some Management Committee members signed documents filed with the SEC, but they did so by virtue of other positions that they held with Enron. No one signed such a document simply because he or she served on the Management Committee.

C. The Court's Order denying Sutton's motion mistakenly fused the Complaint's allegations regarding the Management Committee with the Complaint's allegations regarding the Executive Committee of the Board.

6. The Court's Order denying Sutton's Motion to Dismiss mistakenly fused the Complaint's allegations regarding the Management Committee with the Complaint's allegations regarding the Executive Committee of the Board.[2] For example, on page 8 of the Order, the Court correctly cites to the Complaint's two-sentence conclusory allegation regarding the powers and responsibilities of the Management Committee. *See* Order at 8. In the next sentence, however, the Court cites to the Complaint's allegation that the Executive Committee of the Board exercised the full power of Enron's Board of Directors as though that allegation applied to the Management Committee. *Id.* As a result, the Court analyzed and denied Sutton's Motion to Dismiss based on the mistaken belief that Sutton served on a "key" and "all powerful"committee of Enron officers with "the power to exercise all of the powers of the Board of Directors." *Id.* at 8-13. As seen throughout the Order, the Court believed that this hybrid Management/Executive Committee of the Board substantively reviewed and formally approved each transaction at issue in this lawsuit and that the committee's officer-members were required to sign the allegedly misleading documents filed with the SEC:

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[2] The Court's mistake in combining these two committees is understandable given the proximity of the Complaint's discussions of each and the Plaintiffs' allegation that the Management Committee's name changed to the "Executive Committee" for the year 1999. *See* Complaint ¶¶ 85-88. The Complaint does not allege that the Management Committee assumed the powers of the Executive Committee of the Board of Directors (or any other committee) with that name change. Clearly, however, the presence of two committees that might properly be referred to as the "Executive Committee," one of officers and one of directors, creates an environment ripe for misunderstandings such as that evidenced in the Court's Order. For clarity, this motion will refer to the committee of officers described in Complaint ¶88 as the Management Committee and the committee of directors described in Complaint ¶85 as the Executive Committee of the Board.

> To obtain *formal permission for corporate acts*, again and again this key Committee was presented with *successive requests to authorize* virtually the same modes enabling fraud and self-aggrandizement throughout the vast business empire of Enron, yet the Committee continued to *rubber-stamp approvals*[.]

Id. at 5-6 (*emphasis added*).

> Insider Defendants' *successive resolutions at committee and board meetings*, again and again authorizing virtually identical deceptive devices and contrivances at critical reporting times, were essential to effectuating them and Enron's course of business.

Id. at 10 (*emphasis added*).

> As pleaded in Lead Plaintiff's complaint, Insider Defendants' *successive votes of approval*, which sooner rather than later had to be made with full knowledge or severely reckless disregard of the fraudulent scheme they were erecting, comprised material deceptive acts or contrivances in furtherance of Enron's course of business and the alleged Ponzi scheme, intended to deceive investors, and thus constituted primary violations of §10(b).

Id. (*emphasis added*).

> So, too, did the *allegedly false filings, misleading statements under the statute, authorized (i.e., effected, made) by them to be filed with the SEC . . . with Insider Defendant's imprimatur*[.]

Id. (*emphasis added*).

> Insider Defendants' positions on the *all-powerful* Management Committee and their *votes while on that Committee* demonstrate that they had the power to control Enron.

Id. at 13 (*emphasis added*).

7. As these examples show, the Court's belief that Sutton sat on an "all powerful," transaction-approving committee and that he signed the allegedly misleading documents filed with the SEC was the determinative factor to the Court's analysis. As shown below, however, nothing

in the Complaint supports an inference that the Management Committee substantively reviewed or approved anything or that service on the committee required members to sign SEC documents.

III. The Complaint's Allegations Against Sutton Do Not Support the Court's Order Denying His Motion to Dismiss.

A. The Complaint's allegations regarding the Management Committee do not support the Court's Order.

8. The Complaint's allegation that Sutton served on Enron's Management Committee does not support the Court's Order denying his Motion to Dismiss. First, such "position pleading" does not satisfy the PSLRA's heightened pleading requirements unless it is accompanied by facts particularized to each individual defendant:

> Plaintiffs must properly plead wrongdoing and scienter as to each individual defendant and cannot merely rely on the individual's positions or committee memberships.

See Sutton's Motion to Dismiss p. 14 (quoting *Coates v. Heartland Wireless Communications, Inc.*, 26 F.Supp.2d 910, 916 (N.D. Tex. 1998)). This is true even where, as here, a complaint alleges high-level corporate office, membership on powerful corporate committees, and substantial day-to-day involvement in corporate operations. *Id.* at 14-15 (citing multiple sources within the Fifth Circuit, including this Court's opinion in *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 916 (S.D. Tex. 2001)). As this Court and others have repeatedly held, the PSLRA requires that a securities plaintiff particularize facts showing *what* each defendant knew, *when* he knew it, and *how* the plaintiff came to know those facts:

> Moreover, the amended complaint only conclusorily alleges that Defendants' scienter was based on their executive positions, their involvement in day-to-day management of BMC's business, their access to internal corporate documents, conversations with corporate officers and employees, and their attendance at management and Board meetings. . . . Plaintiffs must allege what actions *each*

> Defendant took in furtherance of the alleged scheme and specifically plead *what* he learned, *when* he learned it, and *how* Plaintiffs know what he learned.

BMC Software, 183 F.Supp.2d at 885-86 (*emphasis added*).

9. In this case, the Complaint fails to particularize any facts demonstrating what Sutton supposedly learned while serving on the Management Committee, when he learned that information, and how Lead Plaintiff came to know those facts. Instead, the Complaint's allegations regarding the Management Committee relate only to the committee as a whole. As such, the Complaint's allegation that Sutton served on the "all powerful" Management Committee is insufficient under the PSLRA to support an inference that Sutton knew of or participated in Enron's alleged fraud. For this reason, the Complaint's Management Committee allegations do not support the Court's Order denying Sutton's Motion to Dismiss.

10. Another reason why the Complaint's Management Committee allegations fail to support the Court's Order is that the Complaint simply does not allege that the Management Committee exercised many of the powers and responsibilities attributed to it by the Court. Nothing in the Complaint suggests that (a) the Management Committee exercised the full power of Enron's Board of Directors, (b) Management Committee approval was a formal prerequisite to corporate action, or (c) the Management Committee's officer-members were required to sign the allegedly misleading statements filed with the SEC. The Court's mistaken belief that the Complaint does allege these powers and responsibilities is evident throughout the Order.

11. A third reason why the Complaint's Management Committee allegations do not support the Court's Order is that those allegations are too conclusory to satisfy the PSLRA. As this Court has said, each allegation, whether pled on "information and belief" or on "investigation of

counsel," must meet the PSLRA's particularized pleading requirements. *BMC Software*, 183 F.Supp.2d at 885 n.33. This means that every plaintiff must particularize the factual basis for his belief that an allegation is true. *Id.* A plaintiff must therefore do more than simply *say* that a committee performed a certain act; he must plead facts demonstrating why he believes that the committee performed the act.

12. In this case, the Complaint generically alleges that the Management Committee controlled Enron and approved each transaction at issue in this lawsuit. *See* Complaint ¶88. This allegation, however, is wholly unsupported by particularized pleading. Nowhere does the Complaint point to any Management Committee resolution approving an allegedly fraudulent transaction, accounting method, or financing structure.[3] Nowhere does the Complaint reference any Management Committee minutes showing that such issues were discussed, if at all, in any substantive way. Most importantly, nowhere does the Complaint proffer any explanation for its utterly remarkable and counterintuitive proposition that the accounting and financing for transactions within a particular Enron division required the review and approval of Enron employees working in separate, wholly unrelated divisions.

13. For example, if one takes the Complaint's conclusory allegations as true, then every transaction by Enron Energy Services (including the accounting treatment and financing structures of those transactions) first required the review and approval of Enron's Vice President of Corporate Affairs and Workforce Diversity, Enron India's CEO, and Portland General Electric's COO. *See*

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[3] Sutton believes that the facts will show that the Management Committee was not a deal-approving body. It was an "updating" body designed to keep Enron's top executives (*i.e.*, Lay and Skilling) informed of macro-developments throughout the company. It was not charged with substantively analyzing and approving anything. This is why there are no Management Committee minutes evidencing the "successive resolutions" or "votes of approval" referenced in the Order.

Complaint at ¶88; Lead Plaintiff's Opposition to Certain Officer Defendants' Motion for Reconsideration [DE 1338], Exhibit 1. This simply could not have been the way Enron did business, and the law does not allow the Court to assume that this was the way Enron did business, absent more particularized allegations in the Complaint. The PSLRA requires that Lead Plaintiff do more than simply *say* that the Management Committee controlled Enron and reviewed and approved every transaction at issue in this lawsuit. The PSLRA requires that Lead Plaintiff support those allegations with particularized facts.

14. Finally, perhaps the best evidence that the Complaint's Management Committee allegations do not support an inference that its members necessarily knew about or participated in the alleged fraud at Enron is that Lead Plaintiff does not believe the inference itself. In footnote one of the Complaint, Lead Plaintiff explicitly states that "[n]o allegations of fraud are made against or directed" at certain defendants, including one defendant who served on the Management Committee for multiple years during the relevant time period. *See* Complaint at n.1. This statement nullifies any presumption that a defendant's membership on the Management Committee necessarily evidences that defendant's participation in the fraud alleged in the Complaint. Indeed, Lead Plaintiff elected not even to name numerous persons who served on the Management Committee during the relevant time period as defendants. *Compare* Complaint and Lead Plaintiff's Opposition to Certain Officer Defendants' Motion for Reconsideration [DE1338], Exhibits 1 and 2. Lead Plaintiff's actions belie any argument that service on the Management Committee required each member not only to come face to face with Enron's alleged fraud, but also to participate in that fraud first-hand.

B. The Complaint's other allegations against Sutton do not support the Court's Order.

15. As detailed in Sutton's Motion to Dismiss, the Complaint's allegations against Sutton do not satisfy the PSLRA's heightened pleading requirements. *See generally* Sutton's Motion to Dismiss; Sutton's Reply Supporting His Motion to Dismiss. The Complaint mentions Sutton in only nine of its 1,030 paragraphs. *See* Sutton's Motion to Dismiss at p. 6. Aside from references to Sutton's Management Committee position, the Complaint's substantive allegations against Sutton are that he (a) served as an officer at Enron International and then as Enron's Vice Chairman until early 2001, *which is false*,[4] (b) received bonuses for his work, (c) sold Enron stock during and immediately before the class period, and (d) attended a multi-day analyst conference in July 1999 where an unidentified speaker may have said positive things about Enron. *Id.*

16. These allegations do not meet the PSLRA's heightened pleading requirements. First, the Complaint fails to particularize one fact linking any of the alleged wrongdoing at Enron to Sutton except to allege that, as Enron's new Vice Chairman, he attended the July 1999 analysts' conference mentioned above.[5] Second, as the Court recently held, "[w]ithout particularized factual allegations

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[4] The Complaint provides no basis for the allegation that Sutton served as Vice Chairman until early 2001. To the extent that it is made "on information and belief," the PSLRA requires that Plaintiffs' plead the facts and circumstances underlying that belief. Although Plaintiffs failed to do so, Sutton admits that he served as Vice Chairman of Enron Corp. from July 1999 until he was asked to leave Enron in October 2000.

[5] Sutton believes that the facts will show that the office of Vice Chairman was informally known as the "ejection seat" within Enron. Sutton assumed the position after Enron dissolved Enron International, where Sutton served as COO and CEO. As alleged in the Complaint, Vice Chairman was not a Board position. Sutton believes that the facts will show that his tenure as Vice Chairman was characterized by his increasing marginalization from Enron's business operations up until his termination by Lay and Skilling in October 2000. Indeed, the Board minutes that Plaintiffs offer as proof that the Board reviewed and approved Fastow's participation in LJM2 transactions also show that Sutton, who did not vote on the LJM2 resolution, was merely called upon to present and discuss information related to Enron's "Human Rights" policy and "Social and Environmental Responsibility" program. *See* Appendix in Support of Plaintiffs' Oppositions to Motions to Dismiss, Exhibit 24 at 17-20. These issues are a far cry from those regarding Enron's adherence to GAAP and SEC disclosure requirements. Sutton's involvement with these and similar non-core issues epitomizes his activities as Vice Chairman.

that show that [a defendant] knew or recklessly disregarded indications [of Enron's alleged fraud], . . . receipt of large bonuses based on Enron's apparent success is not sufficient to plead scienter." *See* Mark-Jusbasche Order [DE 1300] at 13. Third, as the Court recently determined with regard to another defendant with a similar Enron stock trading pattern, Sutton's Enron stock trading lacks the suspicious qualities that might suggest scienter. *Id.* at 12-13. *See discussion infra.* Finally, the allegation regarding the July 1999 analyst conference is so vague that one cannot even tell who, if anyone, made the allegedly fraudulent statements or if they made those statements in Sutton's presence. *See* Sutton's Motion to Dismiss at 11-12. The Complaint also fails to provide any basis for Lead Plaintiff's belief that the alleged statements were, in fact, made at (or in conjunction with) that conference. As stated above, the PSLRA requires that Lead Plaintiff plead its basis for each allegation. Its failure to do so, coupled with its failure to particularize factual allegations to Sutton, require that Sutton's Motion to Dismiss be granted.

IV. The Court's Orders Regarding Other Defendants' Motions to Dismiss Demonstrate That Sutton's Motion Should Be Granted.

17. The Court has already addressed and rejected allegations similar to those made against Sutton as too vague to meet the PSLRA's pleading requirements. For instance, the Court dismissed the §§ 10(b), 20A, and 20(a) claims against outside members of Enron's Board of Directors, including those directors who actually served on the Board's Executive, Finance, and Audit Committees. In that order, the Court correctly concluded that "attendance at *management* and Board of Directors meetings and committees" are "vague generalities that do not meet the heightened pleading standards laid out by this Court in prior orders for pleading scienter under §10(b)." *See* Outside Director Order [DE 1269] at 112 (*emphasis added*). The Court observed that Enron's accountants had approved many of the allegedly fraudulent transactions and concluded that the

Complaint failed to state a §§ 10(b), 20(a), or 20A claim against the outside directors because it failed to particularize facts inferring that they were severely reckless in relying on those accountants. *Id.* at 102-03.

18. There is no good reason why this analysis should not apply equally to Sutton. As with the outside directors, the Complaint fails to particularize one fact inferring that Sutton, who is neither an accountant nor a lawyer, was severely reckless in relying on the well-documented assurances of Enron's accountants and lawyers that Enron's accounting and SEC disclosures were within the law. Likewise, nowhere does the Complaint particularize one fact inferring that Sutton received information detailing Enron's alleged accounting irregularities, or, if he did, that he was severely reckless in not knowing that those irregularities were improper. The Court's order granting the outside directors' motions to dismiss demonstrates that Sutton's motion should also be granted.

19. The Court's order dismissing the §§ 10(b), 20(a), and 20A claims against Rebecca Mark-Jusbasche similarly demonstrates that Sutton's Motion to Dismiss should be granted. *See* Mark-Jusbasche Order [DE 1300] at 15. The Complaint's allegations against Mark-Jusbasche are substantially similar to those against Sutton. Both held similar, often identical, positions at Enron and Enron International. *See* Complaint at ¶¶ 86-88. Both served on the "all-powerful" Management Committee in 1997, 1998, and 1999. *Id.* at ¶88. Both had their working relationship with Enron terminated in 2000: Mark-Jusbasche in August 2000 and Sutton in October 2000. *See* Order at 4; Mark Jusbasche Order at 3. Both received similar bonus compensation for their work at Enron International. *See* Complaint at ¶83(n), (r). Both traded Enron stock before and during the

class period on a relatively infrequent basis and in a manner that does not suggest that their trading was improper.[6] *Id.*

20. Regarding Mark-Jusbasche's Motion to Dismiss, the Court correctly held that the Complaint's conclusory allegations against Mark-Jusbasche did not meet the PSLRA's heightened pleading requirements:

> Lead Plaintiff does not allege any particular facts demonstrating Mark–Jusbasche's participation in, or knowledge of, or exposure to red flags warning of, the snowballing activity, nor even access to information about the allegedly fraudulent accounting practices at either Enron International or Enron.

Id. at 3–4.

> Lead Plaintiff's complaint and the Memorandum in Opposition fail to connect the alleged fraudulent entities and transactions (*e.g.* Chewco, LJM Partnerships, Broadband, New Power, Project Braveheart, the Raptors, etc.) or the purported wrongdoing at Enron International during the Class Period with Mark–Jusbasche even conclusorily, no less with allegations of specific facts.

Id. at 5 n.3.

> Lead Plaintiff fails to state a primary violation of § 10(b) based on Mark–Jusbasche's trading of her Enron securities for personal gain while violating her duty to disclose material, non public information because Lead Plaintiff has failed to plead with specificity what material information she knew or when and how she obtained it.

Id. at 11.

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[6] The Complaint shows that the timing of Sutton's and Mark-Jusbasche's stock trading was similar during the part of the class-period in which they both worked at Enron (or an Enron-related company). *See* Complaint ¶¶83 (n), (r); Appendix to Complaint, Exhibit C. During that period, each traded stock on a relatively infrequent basis, often during the same months. *Id.* The most significant difference in their trading alleged in the Complaint is that Sutton traded Enron stock in the month between Mark-Jusbasche's departure from Azurix and Enron's Board and his own departure from Enron. *Id.* As the Court has said, however, selling stock immediately prior to leaving a company is not suspicious. *See* Outside Director Order [DE 1269] at 68-69.

> Without particular factual allegations that show that Mark–Jusbasche knew or recklessly disregarded indications that the financial reports were fraudulent, her receipt of large bonuses based on Enron's apparent success is not sufficient to plead scienter.

Id. at 13. As these examples show, the Court properly dismissed the §§ 10(b), 20(a), and 20A claims against Mark-Jusbasche because the Complaint wholly failed to particularize facts specifically linking Mark-Jusbasche to Enron's alleged fraud.

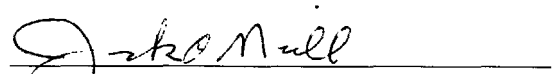
21. The same analysis applies equally, if not more so, to the Complaint's allegations against Sutton. For example, as with Mark-Jusbasche, nowhere does the Complaint "connect the alleged fraudulent entities and transactions (e.g., Chewco, LJM Partnerships, Broadband, New Power, Project Braveheart, the Raptors, etc.) or the purported wrongdoing at Enron International" with Sutton "even conclusorily, no less with allegations of specific facts." Nowhere does the Complaint "[allege] with specificity what material information [Sutton] knew or when and how [he] obtained it." Indeed, each of the excerpts quoted from the Court's order granting the Mark-Jusbasche motion could have been (and should have been) part of an order granting Sutton's motion. Only the name needs changing. The Court's order granting Mark-Jusbasche's motion to dismiss demonstrates that Sutton's Motion to Dismiss should also be granted.

V. Conclusion

22. The Court's mistaken belief that Sutton served on an "all powerful" committee that did not exist and is not alleged to have existed at Enron requires that the Court vacate its Order denying Sutton's Motion to Dismiss and reconsider that motion based solely on the allegations actually pled against him in the Complaint. The law and the Court's orders granting similar motions filed by other defendants demonstrate that Sutton does not belong in this lawsuit. Sutton's Motion to Dismiss should be reconsidered and granted.

WHEREFORE, Sutton respectfully asks this Court to grant this motion and to reconsider and grant his Motion to Dismiss.

Respectfully submitted,



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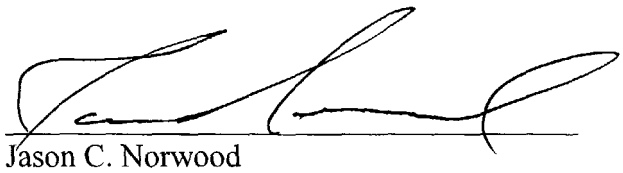
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon each counsel of record on this 22nd day of April 2003, as shown on Exhibit "A" attached hereto.



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