United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
Plaintiffs,	§	CLASS ACTION
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S OPPOSITION TO THE COMPETING MOTIONS FOR LEAD PLAINTIFF

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I. INTRODUCTION

The Regents of the University of California ("Regents") filed a motion to be appointed lead plaintiff along with other institutions that had a substantial financial interest in the relief sought by this litigation. Four of those movants have now agreed to withdraw their motion in favor of the appointment of Regents, a portfolio of related University of California investment funds totaling more than $54 billion, and the paradigmatic lead plaintiff envisioned by Congress when it enacted the PSLRA. The other remaining movants which have submitted lead plaintiff applications are either plaintiffs with nominal losses, or, in the case of the Florida State Board of Administration ("FSBA")/New York City Pension Funds Group ("NYC Funds") and the State Retirement Systems Group ("Ohio/Washington/Georgia/AlabamaGroup"), comprised of unrelated, aggregated investors who each propose the appointment of multiple lead plaintiffs and numerous law firms as class counsel. By contrast, Regents is the single largest lead plaintiff movant which is not presumptively barred by the PSLRA and possesses the sophistication, expertise and resources to actively prosecute this litigation and direct the efforts of its lead counsel, a single law firm.

Regents is the presumptive lead plaintiff under this Court's application of the lead plaintiff provisions of the PSLRA in *Waste Management, NCI,* and *Landry's*. No other movant can rebut the presumption which is properly in Regents' favor. FSBA/NYC Funds Group and the Ohio/Washington/Georgia/Alabama Group fail to meet their burden of justifying the appointment of multiple lead plaintiffs and lead counsel or of demonstrating cohesiveness necessary to adequately monitor, coordinate and account for the actions of counsel in this litigation. Regents, unlike FSBA/NYC Funds Group and the Ohio/Washington/Georgia/AlabamaGroup, functions as a single investor. Besides demonstrating that it has the largest financial interest in the relief sought, *see infra* §II.A., Regents clearly demonstrates that, among the competing movants, it alone best satisfies the requirements of Rule 23. Regents has also demonstrated unparalleled commitment to the diligent investigation, development and prosecution of this action. *See infra* §II.B. Regents' litigation team of attorneys, investigators, and forensic accountants is top-notch and has devoted considerable resources to a comprehensive factual investigation and the prosecution of this action. *See infra* §II.B.1.-2. The results are apparent.

Regents was the first to evidence illegal document shredding by Enron, and has now moved quickly to remedy Enron's attempts to destroy inculpating evidence. On behalf of Amalgamated Bank, counsel for Regents was also the first to move to preserve evidence purposely destroyed by Andersen. *See infra* §II.B.4.-5. Counsel for Regents also moved swiftly to protect from the unlawful dissipation of insider trading proceeds – a very important source of recovery for investors. *See infra* §II.B.3.

None of the other movants is entitled to be the presumptive lead plaintiff. FSBA/NYC Funds Group is not the "most adequate plaintiff" or "co-lead plaintiffs" because the FSBA impermissibly exceeds the PSLRA's "Restrictions on Professional Plaintiffs" and otherwise is subject to unique defenses. The FSBA admits that it presently serves as a lead plaintiff in at least nine securities class actions. This alone presumptively bars the FSBA from serving as a lead plaintiff in this action. Moreover, the FSBA is actively involved in at least 18 major securities ***class actions*** and six ***private*** securities actions. *See infra* §II.D.1. The FSBA puts forth no justification for exemption from §21D's ban. *See infra* §II.D.2.

The FSBA has other problems as well. ***First,*** it is subject to unique defenses and therefore lacks typicality under Rule 23. The FSBA accumulated millions of shares of Enron stock ***after*** significant fraudulent information had been disclosed. *See infra* §II.E. Indeed, the FSBA purchased over 1.27 million shares of Enron stock while the market was trumpeting that a fraud had occurred and the investing public was dumping Enron's stock. *See id.* ***Second,*** the FSBA is subject to adequacy defenses under Rule 23 due to its litigiousness, which frustrates effective monitoring.[1] *See infra* §II.D.2.b. These facts tend to rebut any presumption or showing of adequacy. But, more importantly, such ***threats*** of unique defenses or adequacy defenses here counsel against raising the presumptive bar, for so doing could frustrate the policies of the PSLRA. *See infra* §II.D.2.

Finally, "niche" plaintiffs need not be appointed, and subclasses need not be created, at this time. *See infra* §II.F.

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[1]Indeed, there is a significant chance that the FSBA will sue its former investment manager, Alliance Capital Management, for buying Enron stock while knowing of the fraud because Alliance has a representative on Enron's Board of Directors. Others have already done so. *See infra* §II.E.2.

Among the competing movants, Regents alone is exactly the type of lead plaintiff that Congress envisioned when it enacted the PSLRA – a large institutional investor with a significant stake in the outcome that is capable of actively prosecuting a complex securities class action and directly overseeing the efforts of its counsel. Regents should be appointed lead plaintiff to represent the class in these consolidated class actions, and its choice of counsel, should be approved.

II. ARGUMENT

A. Regents Is the Presumptive Lead Plaintiff as it Has the Largest Financial Interest in the Relief Sought By Any Investor Not Barred From Lead Plaintiff Status Under §21D

Section 21D of the PSLRA provides that in securities class actions, courts "shall appoint as lead plaintiff(s) the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class members." 15 U.S.C. §78u-4(a)(3)(B)(i). In determining which class member is "the most adequate plaintiff," the PSLRA provides that:

> [T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the ***person or group or persons that*** -
>
> (aa) has either filed the complaint or made a motion in response to a notice ...;
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(aa)-(cc).[2]

Regents purchased Enron securities throughout the relevant class period and has the largest financial interest of any single investor not presumptively barred from lead plaintiff status under §21D. Two other unrelated groups are also presently seeking appointment as lead plaintiff: (1) FSBA/NYC Funds Group, and (2) Ohio/Washington/Georgia/AlabamaGroup. These "groups" are

[2]Here, as elsewhere, emphasis has been added and citations omitted unless otherwise noted.

artificial aggregations of distinct and unrelated funds, apparently joined by lawyers.[3] As addressed at §II.C.3. of this brief, neither group functions as a single investor. Accordingly, Regents possess the greatest financial interest in the relief sought of any movant which timely filed a lead plaintiff application, as set forth below:

Comparison of Losses: Regents vs. Other Non-barred Movants

Movants	**Losses Incurred**
Regents	($144,719,678)
Others	
State Retirement Systems Group	
Georgia	($127,077,353)
Ohio	($114,451,314)
Washington	($42,312,320)
Alabama	($47,700,000)
FSBA/NYC Pension Funds Group	
New York City Pension Funds[4]	($109,000,000)
Staro Asset Management	($38,000,000)
Private Asset Management	($10,304,959)
JMG/TQA	($5,100,000)
Local 710 Pension Fund	($2,517,360)
Pulsifer & Associates	($1,453,635)
Preferred Purchaser	($1,004,067)
The Davidson Group	($130,043)

[3]FSBA, as a member of the FSBA/NYC Funds Group, is also presumptively barred as a lead plaintiff under §21D and otherwise does not satisfy Rule 23 addressed at §II.E below. Therefore, Regents does not table the losses of FSBA below.

[4]New York City Pension Funds actually is a "group" of 10 constituent funds, including: New York City Fire Officers' Variable Supplements Fund (FOVSF - ($53,164.24)); New York City Superior Police Officers' Variable Supplements Fund (PSOVSF - ($800,441.58)); New York City Police Officers' Variable Supplements Fund (POVSF– ($877,616.63)); New York City Firefighters' Variable Supplements Fund (FFVSF - ($1,089,015.77)); New York City Board of Education Retirement System (BERS - ($1,534,101.54)); New York City Teachers' Retirement System (NYCTRS VAR A - ($10,122,323)); New York City Teachers' Retirement System (NYCTRS VAR B - ($13,751,353.72)); New York City Fire Department Pension Fund (FDPF - ($14,303,610.39)); New York City Police Department Pension Fund (PDPF - ($27,566,590.59)); New York City Employees Retirement System (NYCERS - ($39,349,591.01)).

Archdiocese of Milwaukee ($70,000)

As shown above, the losses suffered by Regents significantly exceed the losses of each investor not presumptively barred from lead plaintiff status under §21D. Therefore, Regents is the presumptive lead plaintiff as it has the largest financial interest in the relief sought by the class. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb).

In the event that this Court finds the relative financial interests of single investors "inconclusive," Regents is still the presumptive lead plaintiff because Regents best satisfies the requirements of Rule 23.

B. Regents Is the Presumptive Lead Plaintiff Because it Best Satisfies Rule 23, as It Has Demonstrated Unparalleled Commitment to Diligent Investigation, Development and Prosecution of This Action

Section 21D(a)(3)(B)(iii)(I)(cc) requires that a lead plaintiff movant must also satisfy the requirements of Rule 23 in order to be the presumptive lead plaintiff. As demonstrated in the Declaration of the Regents in Support of Its Motion for Appointment as Lead Plaintiff and for Approval of Lead Counsel, Regents satisfies the requirements of Rule 23. Even clearer is that Regents is also the lead plaintiff applicant that will ***most*** fairly and adequately protect the interests of the class under Rule 23. Nobody has done more to protect and advance the interests of the class to date than Regents and Amalgamated Bank.

Indeed, Regents has demonstrated unparalleled commitment to the effective investigation, development and prosecution of this action. Regents brings to this action a securities litigation team which consists of more than two dozen attorneys, investigators, and forensic accountants who have already undertaken the painstaking process of unraveling many of Enron's 3,000+ partnerships, analysts and corporate governance and accounting experts, all of whom have devoted, and will continue to devote substantial resources to the prosecution of this action. In fact, Regents and its counsel have vigorously prosecuted this action since the outset while other movants have done little if anything.

Working with Amalgamated Bank, Regents has already brought significant results: after swiftly moving to freeze more than $1.1 billion in insider trading proceeds, on January 8, 2002,

Judge Lee H. Rosenthal, in a 44-page Memorandum Opinion and Order, ruled in plaintiffs' favor, holding the district court had the authority to freeze assets. Judge Rosenthal further held that on the current evidentiary record such a freeze order would not issue, and therefore requested further briefing on the issue of expedited discovery.

1. Litigation Team

Regents' securities litigation team, comprised of scores of professionals, brings a wealth of experience and resources necessary to litigate this action:

- securities litigation attorneys experienced in the effective and efficient prosecution of complex securities class actions;
- a team of investigators who already have developed significant witness contacts, gathered detailed factual information concerning Andersen, Enron and its top executives, businesses, and accounting practices;
- experienced forensic accountants, certified fraud examiners, and accounting experts who have undertaken the painstaking process of penetrating Enron's obscure financial statements, confusing array of more than 3,000 related entities and partnerships, and various businesses and accounting practices; and
- corporate governance experts who are examining conflicts of interest on Enron's Board of Directors, including Enron's Audit Committee.

2. Comprehensive Factual Investigation and Case Development

The investigation is led by a former federal prosecutor with more than 20 years of experience who has worked exclusively on developing the factual investigation of the case. As part of their on-going investigation, the Regents' team has interviewed more than 100 witnesses with knowledge concerning the myriad organizations within Enron including its Broadband Services Divisions, Wholesale Energy Operations and Services, and the illicit partnerships such as Chewco, JEDI, LJM1, and LJM2 Co-Investment LP, which defendants used to fraudulently inflate Enron's earnings and manipulate Enron's balance sheet to omit billions of dollars in debt.

The success of Regents' comprehensive investigation cannot be overstated. Plaintiffs' counsel have garnered significant facts establishing senior Enron executives scienter and knowledge of material, non-public information while they reaped millions in insider trading proceeds. The investigation is ongoing, but the detailed information concerning Enron will be instrumental in not

only proving the case against Enron, but also its executives, and Andersen. By way of example, the investigation has revealed:

- Internal communications concerning the motive of Enron's executives to (i) fraudulently finance new transactions, (ii) secretly collateralize Enron's positions in various partnerships, and (iii) inappropriately draw earnings from its own shares in the case of the JEDI-II/Chewco transactions;

- How Enron and Andersen abused "mark-to-market" accounting, including the identification of those who caused Enron to violate GAAP;

- The identity of Enron executives and employees who knew Enron's accounting and business practices were problematic and voiced their concerns to senior executives, including the identity of Enron's executives, officers, and directors to whom these concerns were voiced;

- How defendants knew about material failures in Enron's broadband division and the identification of those who caused Enron to grossly overstate its national fiber backbone and overstate the connectivity of the "Enron Intelligent Network";

- How Enron created a fraudulent market for broadband trading and dark fiber swaps, and thereby falsified Enron's financial statements, and the vice chairmen, officers, and directors who knew of these improprieties;

- How Enron used various "special purpose entities" to improperly report earnings and hide debt, and the identity of the Enron officers and directors who approved such entities and their improper accounting treatment;

- The identity of Enron Finance and Accounting personnel who contacted Andersen representatives and consultants when structuring fraudulent broadband transactions, and the identity of Andersen employees who were complicit in such transactions;

- How defendants engaged in unreported, sophisticated derivatives trading using zero-cost collars and possibly other exotic derivatives trading vehicles with investment banks and counterparties such as Oppenheimer and Deutsche Bank;

- The Enron deal approval process used to fraudulently keep debt off Enron's consolidated balance sheets; and

- How Enron fraudulently used international power projects to conceal debt, losses, and expenses.

3. Motion to Freeze Insider Trading Proceeds

On December 5, 2001, Amalgamated Bank filed an *ex parte* application for a temporary restraining order and order to show cause why a preliminary injunction should not be ordered freezing and imposing a constructive trust over the insider trading proceeds of the individual defendants. Plaintiffs further requested particularized discovery and an accounting of defendants' insider trading proceeds. The *ex parte* application also sought limited expedited discovery. At a

day-long hearing, Regents' counsel made key arguments concerning the Court's equitable power to freeze defendants' insider trading proceeds and the factual predicate for plaintiffs' insider trading claims. At the hearing the Court ordered further briefing on whether limits imposed by the Supreme Court under *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), prohibited the Court from granting the requested relief.

In response to this Order, and the defendants' unified 26-page submission, Amalgamated Bank filed a supplemental brief on December 21, 2001. The supplemental brief provided an in-depth examination of the Court's equitable powers under the federal securities laws and argued persuasively that the Court possessed the authority to grant the asset freeze. Defendants argued the Court lacked any equitable power under the securities laws to freeze insider trading proceeds, plaintiffs' lacked an equitable interest in defendants' insider trading proceeds, and the federal securities laws did not authorize the equitable relief sought by plaintiffs. Judge Rosenthal, in a detailed, 44-page Memorandum Opinion and Order, ruled in plaintiffs' favor, holding plaintiffs had asserted a cognizable claim for an equitable remedy and holding the Court possessed the power to grant equitable relief. Judge Rosenthal found that on the current evidentiary record there was not a sufficient showing of threat of dissipation and directed plaintiffs to file their brief in support of expedited discovery in connection with the requested injunctive relief.

4. Motion to Preserve Andersen Evidence

Beyond its efforts to freeze defendants' illegal insider trading proceeds, Amalgamated Bank, in cooperation with Regents, also sought limited expedited discovery from Enron's auditors, Andersen. On January 10, 2002, Andersen revealed it destroyed an untold number of relevant documents related to Enron. Just 24 hours after the bombshell revelation, Amalgamated Bank, in cooperation with Regents, went back to court, filing an *ex parte* application seeking limited expedited discovery from Andersen to preserve evidence.[5] Andersen's likely violation of the PSLRA's document preservation requirements and the common law duty to preserve relevant evidence were the bases for the motion. As new disclosures revealed the document destruction was

[5]The FSBA group quickly adopted the motion of Regents' counsel.

systemic and orchestrated at the highest levels within Andersen, Regents' counsel supplemented its filings, requesting the Court create a document depository to preserve potentially relevant documents and requesting the Court select an independent forensic computer data investigator to preserve the electronic evidence that remains and to attempt to recreate the electronic evidence Andersen employees has destroyed at the direction of Andersen's Chicago headquarters.

5. The Regents' Investigation Has Now Uncovered *Enron's* Document Destruction

The Regents' factual investigation has discovered that Enron has been and is engaging in extensive document destruction at its Houston headquarters. The litigation team has interviewed former Enron employees who have provided detailed information concerning Enron's assembly of document destruction teams. These witnesses have informed Regents that large numbers of documents were collected, placed in boxes, and brought to areas near shredding teams, allowing the efficient shredding of documents. Regents has produced hard evidence to support these serious allegations. No other lead plaintiff applicant has uncovered this information.

As of this filing, Regents' counsel will move the Court to enjoin the document destruction and preserve evidence.

C. Regents Is Most Capable of Adequate Monitoring, Coordination, and Accountability in This Litigation

Regents is a single investor, with the largest losses of any one investor seeking appointment as lead plaintiff who is not presumptively barred from lead plaintiff status. Regents has selected a single law firm as lead counsel to prosecute this action, a law firm with exceptional resources and capability to advance this complex class action. Together with their counsel, Regents and Amalgamated Bank have demonstrated unparalleled commitment to the investigation, development and prosecution of this action. *See* Declaration of the Regents of the University of California In Support of its Motion for Appointment as Lead Plaintiff and for Approval of Lead Counsel ("Regents Decl."). As a single investor with the significant resources at its disposal, Regents is most capable of adequate monitoring, coordination, and accountability in this litigation. *See* Regents Decl., ¶¶4-12.

On the other hand, FSBA/NYC Funds Group and the Ohio/Washington/Georgia/Alabama Group are aggregations of unrelated investors with no substantive pre-litigation relationships. That they are unrelated, aggregated investors is clearly demonstrated by the declarations in support of their motions, in addition to the multi-layered counsel structures they ask the Court to endorse. Indeed, there are six law firms representing the FSBA/NYC Funds Group, and at least four law firms involved in representing the Ohio/Washington/Georgia/Alabama Group. The burden is on each of these groups to justify why this action warrants the appointment of multiple lead plaintiffs and to demonstrate the cohesiveness of their purported "group" – but they fail to do this.

1. The Burden Is On Those Seeking to Aggregate to Demonstrate Their Group Should Be Considered a Single Investor in Determining the Presumptive Lead Plaintiff

The "most adequate plaintiff" requirement of §21D was designed by Congress (in enacting the PSLRA) to remedy the wide spread perception that securities litigation had become "lawyer-driven." As this Court recognized in *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401 (S.D. Tex. 2000), "[o]ne response by Congress was the requirement that the Court appoint as 'lead plaintiff' in each securities class action the shareholder, preferably an institutional investor, with the largest financial interest in the litigation in order to encourage institutional investors to come forward to manage the litigation and supervise the class action lawyers." *Id.* at 411 (footnote omitted). Under §21D, Congress intended the client to choose the counsel and control the litigation "rather than have counsel choose the plaintiff." S. Rep. No. 104-98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690.

Accordingly, in *Waste Management*, this Court stated:

> ***The burden is on those seeking to aggregate to demonstrate the cohesiveness of their purported "group"*** and ... failure to provide significant information about the identity of the mem her than a conclusory statement of names, transactions for purchase of secu nd largest financial interest should result in denial of their application for app ent as Lead Plaintiff. Furthermore ... "The Commission believes that ordinari in order to ensure adequate stakes, monitoring, coordination and accountability, such a group should be no more than three to five persons, and ***the fewer the better.*** " ***Even then, the SEC emphasizes that the group's "members should be evaluated separately for their incentive and ability to work together to control the litigation.***"

128 F. Supp. 2d at 413 (internal citations omitted). *Accord In re NCI Building Sys., Inc. Sec. Litig.*, No. H-01-1280, Order at 14 (S.D. Tex. Jan. 11, 2002) ("*NCI*"). In *Waste Management*, this Court held that "***the strictest approach***, requiring at a ***maximum*** a small group with the largest financial interest in the outcome of the litigation ***and a pre-litigation relationship based on more than their losing investment***, satisfies the terms of the PSLRA and serves the purpose behind its enactment." *Id.*

This Court chose Connecticut as lead plaintiff in *Waste Management*, finding that (among other things) Connecticut was a "single investor" with the "largest interest in the recovery," and that it was "capable of adequate monitoring, coordination, and accountability." 128 F. Supp. 2d at 432. In contrast, the Court in *Waste Management* ***rejected*** lead plaintiff bids of several unrelated aggregations of institutional investors with combined losses ranging from approximately 200% to over 1000% greater than Connecticut's losses. *Compare* 128 F. Supp. 2d at 414 *with* 128 F. Supp. 2d at 421, 424, 429. And in *In re Landry's Seafood Rest., Inc. Sec. Litig.*, Class Civ. A. No. H-99-1948, 2000 U.S. Dist. LEXIS 7005 (S.D. Tex. Mar. 30, 2000), this Court executed a similar analysis in evaluating a stipulated lead plaintiff group. In *Landry's*, the Court expressed a preference that the number of lead plaintiffs be restricted to "two," and that the Court "be informed whether there is any institutional investor that would qualify as a Lead Plaintiff because it has the largest financial interest in the outcome of the litigation." *Id.* at *18-*19. There, the Court also stated that "two firms" can more efficiently pursue the case together, *id.* at *19, and ultimately reduced the number of firms proposed by lead plaintiffs as counsel for the class. *See also NCI*, Order at 15.

As with Connecticut in *Waste Management*, here, Regents – not the competing unrelated groups – is the single largest lead plaintiff movant and is capable of adequate monitoring, coordination and accountability in this action.

2. Regents Is the Single Largest Nonbarred Lead Plaintiff Movant and Is Capable of Adequate Monitoring, Coordination and Accountability in This Action

Regents is not only the single investor with the largest losses before the Court, but it is also the one movant who has demonstrated unparalleled commitment to the investigation, development

and prosecution of this action. Regents has demonstrated that above all others it is the "most adequate plaintiff" in the consolidated actions pending before the Court.

Regents has a single Treasurer responsible for managing the investments, treasury operation and banking services of the UC system, and the treasurer is custodian of and currently manages a portfolio totaling more than $54 billion. Regents Decl., ¶1. The related investment funds under management of the treasurer consist of the University's retirement, defined contribution and endowment funds. Regents' general counsel, who has direct oversight responsibility for the litigation, has monitored and coordinated with Regents' class counsel in the investigation, development and prosecution of this action. Regents Decl., ¶¶5-11. Thus, as with Connecticut in *Waste Management*, Regents functions as a single investor for the purposes of monitoring, coordinating, and accounting for the actions of class counsel in this action.

Regents has also selected a single class counsel prosecuting this action, a law firm with exceptional resources and capability to advance this complex class action. Regents' counsel selection process was diligent and the fee agreement negotiated by Regents is believed by Regents to be beneficial to the Class. Regents Decl., ¶10. Regents has demonstrated unparalleled commitment to the investigation, development and prosecution of this action. Regents Decl., ¶¶5-8; Regents' investigation is unmatched in depth and comprehensiveness. A good example of this is the recent discovery of document shredding by Enron (not just Enron's former auditor, Andersen). *See infra* §II.B.5. Regents is also moving quickly to remedy Enron's attempts to destroy inculpating evidence. Regents was first to move to preserve evidence purposely destroyed by Andersen. Regents Decl., ¶¶6, 8. In addition, Regents' counsel moved swiftly to protect from the unlawful dissipation of insider trading proceeds – a very important source of recovery for investors. *See* Regents Decl., ¶6; *infra* §II.B.3. Regents' efforts in this respect have been largely successful to date, and Regents expects to present evidence of threat of dissipation to further Regents' attempts to secure preliminary injunctive relief.

Regents is the single largest nonbarred lead plaintiff movant and is capable of adequate monitoring, coordination and accountability in this action. No other movant has demonstrated that it is the "most adequate plaintiff." Accordingly, Regents is the "most adequate plaintiff."

3. FSBA/NYC Funds Group and the Ohio/Washington/Georgia/Alabama Group Cannot Meet Their Burden of Demonstrating Group Cohesiveness in Order to Adequately Monitor, Coordinate and Be Accountable

As this Court stated in *Waste Management*, "the circumstances of each suit must be considered in determining appropriate restraints on random aggregation by counsel." 128 F. Supp. 2d at 431. Here, FSBA/NYC Funds Group and the Ohio/Washington/Georgia/Alabama Group fail to demonstrate circumstances which justify their aggregation of unrelated entities to prosecute this action. Moreover, these groups also fail to demonstrate anything other than an arbitrary pre-litigation relationship much less any cohesiveness. To the contrary, their multiple layers of counsel frustrate the purposes of §21D's lead plaintiff provisions. Neither of these groups demonstrate they should be considered a single investor for purposes of determining whether they are the "most adequate plaintiff."

a. FSBA/NYC Funds Group Fails to Meet its Burden

FSBA/NYC Funds Group fails to demonstrate it can adequately monitor, coordinate and account for the actions of class counsel. The FSBA consists of numerous Florida governmental funds. *See* Lettera Aff., ¶2 (attached to FSBA's motion). NYC Funds consists of 10 pension funds. *See* Taylor Decl., ¶¶4-12, and Ex. 2, A-J (attached to NYC Funds' motion). At a maximum, the FSBA/NYC Funds Group could be considered an aggregation of tens of funds, at a minimum, three funds. *See* Lettera Aff., ¶2; Taylor Decl., ¶12.

The FSBA and NYC Funds have no ongoing legal or substantive pre-litigation relationship. Indeed, ***the FSBA and NYC Funds did not even aggregate until after lead plaintiff motions were filed***. *See* Lettera Aff., ¶¶2-3. One of their purported reasons for forming a group: "combining" losses. Conason Decl., ¶4 (attached to FSBA/NYC Funds' amended motion). This, apparently, was to compete "against the various entities vying for lead plaintiff status in this litigation." *Id.*, ¶7. In contrast, after reviewing this Court's application of the law and conferring with other lead plaintiff applicants, Regents concluded that streamlining the prosecution of the litigation by the single investor with the largest losses who had demonstrated commitment to the investigation, development and prosecution of the action would be most beneficial to the class. Regents Decl., ¶¶4-12.

Beyond the conclusory, self-serving statements made in the declarations in support of FSBA/NYC Funds Group's motion, there simply are no facts demonstrating that the group has functioned (or will function) cohesively enough to adequately monitor, coordinate and account for the actions of counsel here. If anything, the FSBA/NYC Fund Group's request, which will involve at least nine sets of lawyers – including six outside law firms – counsels strongly against the structure proposed by FSBA/NYC Funds Group and suggests a failure to control counsel. The appointment of such lead plaintiffs would frustrate the purposes of the PSLRA. *See* FSBA/NYC Funds Group's [Proposed] Order Granting Amended Motion for Appointment of Co-Lead Plaintiffs and Approval of Co-Lead Counsel. Indeed, there is no basis to test the ability of several aggregated institutions and six law firms to efficiently and effectively prosecute an action such as this – especially given Regents' demonstrated abilities and financial interest in the relief sought.

b. The Ohio/Washington/Georgia/Alabama Group Fails to Meet Their Burden

Although the Ohio/Washington/Georgia/Alabama Group aggregates six unrelated organizations – the Teachers Retirement System of Georgia, the Employees' Retirement System of Georgia, the Teachers Retirement System of Ohio, the Employees' Retirement System of Ohio, the Washington State Investment Board and the Retirement Systems of Alabama – it fails to justify why this Court should diffuse control and responsibility over this action or demonstrate how its group can adequately monitor, coordinate and account for the actions of class counsel.[6]

The Ohio/Washington/Georgia/Alabama Group does not demonstrate that its six unrelated organizations had a pre-litigation relationship of substance that would enable it to act as a unit in a cohesive and definitive fashion to protect the interests of the class. Indeed, there is no evidence to suggest that Boards of Trustees of at least six separate entities along with three Attorneys General and their respective outside counsel could effectively and efficiently coordinate the prosecution of this action. As noted by several courts, including this one, the addition of each lead plaintiff must

[6]The Retirement Systems of Alabama seeks appointment an "Advisory Plaintiff," but the State Retirement Systems Group gives no indication as to what the role of such an "Advisory Plaintiff" would be. *See* State Retirement Systems Group memo at 1-2. Further, as Alabama's losses are aggregated to make up the group, it is clearly perceived to be a full-fledged member of the group despite the Advisory Plaintiff appellation.

be justified by a commensurate benefit to the class. Here, that cannot be done. While the members of the Ohio/Washington/Georgia/AlabamaGroup may claim common membership in organizations, attending workshops or participating in lawsuits against common defendants, they clearly lack a meaningful, ongoing relationship that would justify their collective appointment over the appointment of a single, sophisticated investor such as Regents.

Nor does the Ohio/Washington/Georgia/AlabamaGroup demonstrate how it has monitored, coordinated and accounted for counsels' actions, or how it intends to effectively prosecute this massive and complex class action via a committee decision-making process. The Ohio/Washington/Georgia/Alabama Group, like FSBA/NYC Funds Group, is already behind the curve in investigating, developing and prosecuting this action, for it cannot point to any achievements thus far, as in the case of Regents. Indeed, in a case where the insider trading proceeds are two-and-a-half times the potential insurance coverage, which is already a tiny fraction of the $20+ billion damages, the Ohio/Washington/Georgia/Alabama Group has done nothing to protect against dissipation of the insider trading proceeds. The Ohio/Washington/Georgia/Alabama Group has failed to justify why it should be allowed to aggregate under the circumstances.

D. FSBA/NYC Funds Group Is Not the "Most Adequate Plaintiff" or "Co-Lead Plaintiffs" Because FSBA Impermissibly Exceeds the PSLRA's "Restrictions on Professional Plaintiffs" and Otherwise Is Subject to Unique Defenses

1. The FSBA Has Impermissibly Exceeded the PSLRA's Ban of Overly Litigious Lead Plaintiffs

FSBA admits that it presently serves as a lead plaintiff in at least nine securities class actions. Linda Lettera Aff., ¶8.[7] Although this alone presumptively bars FSBA from serving as a lead plaintiff in this action, there are more facts that support barring FSBA from lead plaintiff status in

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[7]FSBA has failed to file a sworn certification pursuant to §21D, which requires very specific representations concerning this subject matter. Sworn certifications are required from all seeking appointment as lead plaintiff. *See Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 410 (D. Minn. 1998). Requiring sworn certifications from only plaintiffs named in a complaint would be "anomalous, if not perverse." *Id.*

Because FSBA has not filed a sworn certification and does not otherwise provide adequate information, it is unclear exactly how many actions FSBA has served in as a lead plaintiff within the last three years, in how many securities class actions FSBA has sought to serve as a lead plaintiff, and in how many class actions FSBA is currently seeking to be appointed lead plaintiff.

this action. FSBA is actively involved in over 18 major securities ***class actions*** and six ***private*** securities actions. This is in addition to the numerous other actions that the FSBA served or sought to serve in between 1996-1998.[8]

That FSBA presently serves as a lead plaintiff in at least nine securities class actions invokes the PSLRA's "Restrictions on Professional Plaintiffs" presumptive bar, which prohibits an institutional plaintiff's acting as lead plaintiff in more than five securities class actions within three years. Indeed, district judges throughout the country have rejected FSBA's motions seeking lead plaintiff status for (among other reasons) violating the "Professional Plaintiff" bar of §21D, when (as here) non-barred competing institutional investors were before the court.

In *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146 (N.D. Cal. 1999), Judge Whyte found that FSBA was a "professional plaintiff" by the text of §21D and rejected FSBA's argument that FSBA was exempt from the statutory limit on the number times a party can serve as a lead plaintiff. *Id.* at 1156-57. In *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803 (N.D. Ohio 1999), Judge O'Malley denied FSBA's lead-plaintiff bid for two independent reasons, one being FSBA was "barred from serving as the lead plaintiff" under the "Professional Plaintiff" provision of §21D. *Id.* at 818. And, in *Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435 (W.D. Pa. 2001), Judge McLaughlin rejected FSBA's bid for lead plaintiff as a result of its litigiousness, noting that "FSBA was appointed lead plaintiff in seven separate securities class actions" and "FSBA is also a frequent non-lead plaintiff in securities actions." *Id.* at 441 & n.2.[9]

As this Court stated in *Waste Management,* the "PSLRA bars a person from serving as a lead plaintiff in more than five securities class actions during any three-year period," except as the court may permit consistent with §21D. 128 F. Supp. 2d at 424 n.23 (discussing plaintiff's argument

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[8]"By comparison, CalPERS, the giant California public employees pension fund frequently cited as a model in the corporate governance monitoring arena, has acted as lead plaintiff in only one case and petitioned to lead one other." Jaconette Opp. Decl., Ex. 1.

[9]FSBA's litigiousness has also drawn publicly-expressed concern from FSBA's own Investment Advisory Council presided over by Florida Governor Jeb Bush. As reported by the *Miami Daily Business Review* on January 2, 2002, a member of that council "plans to call for a review of [FSBA's] litigation policy." Jaconette Opp. Decl., Ex. 1.

concerning City of Philadelphia). The PSLRA so limits participation as lead plaintiff in securities class actions:

> Restrictions on Professional Plaintiffs. Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

15 U.S.C. §78u-4(a)(3)(B)(vi). As Judge Whyte stated in *McKesson* when he also denied FSBA's bid for lead plaintiff in favor of a lead plaintiff which had a loss of approximately $50 million or just 30% of the FSBA's claimed damages, "***[t]his provision gives the court considerable discretion to bar repeat litigants, creating a rebuttable presumption that the same plaintiff should not direct more than five securities class actions in three years***." 79 F. Supp. 2d at 1156.

The statutory text of the "Restrictions on Professional Plaintiffs" provision contains no express exception for institutional investors. *See, e.g., McKesson,* 79 F. Supp. 2d at 1156 (text contains "no flat exemption"); *Telxon*, 67 F. Supp. 2d at 821-22 ("***expressly stated*** limitations;" "exemption ... not supported by the language of the statute"). However, as FSBA will point out, Congress in 1995 expressed a strong preference for having institutional investors serve as lead plaintiffs under the theory that, as a group, they are best able to direct the litigation and protect the interests of absent class members. H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 733.

The drafters of the PSLRA resolved this tension by granting the court discretion to exempt institutional investors from the "Restrictions on Professional Plaintiffs" provision if an institutional investor could establish the need for the exemption. In this regard, the Conference Report states:

> ***The conference report seeks to restrict professional plaintiffs from serving as lead plaintiff*** by limiting a person from serving in that capacity more than five times in three years. Institutional investors seeking to serve as lead plaintiff ***may need*** to exceed this limitation and do not represent the type of professional plaintiff this legislation seeks to restrict. As a result, ***the Conference Committee grants courts discretion to avoid the unintended consequence of disqualifying institutional investors*** from serving more than five times in three years. ***The Conference Committee does not intend for this provision to operate at cross purposes with the "most adequate plaintiff" provision....***

H.R. Conf. Rep. No. 104-369, at 35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 734. Thus the Conference Report makes it clear that the phrase, "[e]xcept as the court may otherwise permit,

consistent with [this] purpose[]," in 15 U.S.C. §78u-4(a)(3)(B)(vi),grants courts discretion to allow institutional investors to serve as lead plaintiff more than five times during a three year period but ***only if*** the institutional investor can establish the ***need*** to exceed the limitation. And, this discretionary exemption provision is not to "operate" inconsistent with the purposes of the "most adequate plaintiff" provision.

Regents is unaware of any decision by a court holding that a plaintiff's status as an institutional investor alone is sufficient to exempt such a plaintiff from the "Restrictions on Professional Plaintiffs" ban of §21D. As Judge O'Malley held in *Telxon*, that "should not be the dispositive factor." 67 F. Supp. 2d at 822. To the contrary, courts look for case-specific or "special" circumstances to determine whether there is a basis to excuse §21D's "presumptive bar" of frequent filers such as the FSBA. *McKesson*, 79 F. Supp. 2d at 1156. *See also Telxon*, 67 F. Supp. 2d at 822. FSBA and NYC do not attempt to (and cannot) demonstrate circumstances here which justify FSBA's exemption from the presumptive bar of §21D's "Restrictions on Professional Plaintiffs" provision.

Indeed, the Court should not lift the presumptive bar for the FSBA and the FSBA/NYC Fund Group's appointment as lead plaintiff here would be inconsistent with the policies of the PSLRA, because of each of the three following separate and independent factors: (i) there is a highly qualified substantial institutional investor seeking lead plaintiff status, namely Regents, which is effectively monitoring the diligent investigation, development, and prosecution of this suit; (ii) there is a threat that the FSBA cannot demonstrate Rule 23 adequacy, or at least make its preliminary showing in this massive securities class action, given that the FSBA is currently actively involved in 24 securities fraud cases, 18 of which are class actions; and (iii) there is a significant ***threat*** that FSBA is subject to ***unique defenses*** and other distracting factual issues.

2. FSBA/NYC Pension Funds Have Not Attempted to (and Cannot) Demonstrate Why FSBA Should Be Excused From §21D's "Restrictions on Professional Plaintiffs" Ban of Overly Litigious Lead Plaintiffs

a. No Circumstances Here Justify Exemption From the Presumptive Bar Precluding the FSBA From Serving as Lead Plaintiff

The FSBA's request to serve as a lead plaintiff should be rejected under §21D's "Restrictions on Professional Plaintiffs" ban because the FSBA has made no effort whatsoever to demonstrate why this Court should relieve FSBA from the statutory limit on lead plaintiff status under the particular circumstances of this litigation.

Courts have recognized some case-specific or "special" circumstances which might rebut or justify exemption from the "presumptive bar" of §21D for frequent filers such as the FSBA. *McKesson*, 79 F. Supp. 2d at 1156. *See also Telxon*, 67 F. Supp. 2d at 822. ***First,*** if the otherwise barred institution is the "only movant," service as lead plaintiff might be permitted. *McKesson*, 79 F. Supp. 2d at 1156. ***Second,*** if "the other movants ... accrued an even longer record of participation in securities litigation" than the otherwise barred institution, service as lead plaintiff by such institution might be permitted. *Id.* ***Third,*** if the otherwise barred institution were the ***only*** institutional investor moving to serve as lead plaintiff, and "dwarfed" competing noninstitutional investor's losses, service as lead plaintiff might be permitted. *Telxon*, 67 F. Supp. 2d at 822. *See also* at *McKesson*, 79 F. Supp. 2d at 1156-57. But none of the circumstances above are present in this case.

And, not a single authority supports raising the presumptive bar when another qualified institutional investor with indisputably significant financial interests has moved for lead plaintiff appointment. Rather, in cases where the FSBA has been exempted from the statutory bar, the Courts have noted that they were lifting the presumptive bar because of questions concerning the other lead plaintiff applicants.

For example, in *Naiditch v. Applied Micro Circuits Corp.*, Civ. No. 01-CV-0649 K(AJB), 2001 U.S. Dist. LEXIS 21374 (S.D. Cal. Nov. 2, 2001), the court held that FSBA was subject to 15 U.S.C. §78u-4(a)(3)(B)(vi), but made an exception to the provision as the only competing lead

plaintiff movants were two individuals with reported losses of only $980,000, compared to the $5.3 million reported by the FSBA. *Id.* at *4-*5. Similarly, in *In re Critical Path, Inc.*, 156 F. Supp. 2d 1102 (N.D. Cal. 2001), the FSBA was permitted to exceed the statutory bar because the other lead plaintiff applicants with significant losses had potentially debilitating Rule 23 issues and/or were aggregations of 2-4 class members. In fact, the court found that "the FSBA is the only acceptable institutional investor, and, indeed, the only acceptable large shareholder." *Id.* at 1112. In *Myers v. Schering-Plough Corp.*, No. 2:01-CV-829 (KSH/RJH), Order (D.N.J. July 2, 2001), the FSBA was appointed lead plaintiff because it reported losses of $27 million while the other competing lead plaintiff applicant was an individual investor who reported losses of $1 million – approximately 96% less than the FSBA's.

Accordingly, the FSBA's status as an institutional investor does not excuse it from §21D's "Restrictions on Professional Plaintiffs" ban and the FSBA does not otherwise justify relief from the "presumptive bar." Additionally, the bona fides of Regents (which is not presumptively barred) support enforcing the statutory bar against the FSBA as Regents already has proven itself highly capable of directing this litigation, has taken significant steps to protect the interests of the class and satisfies all of the elements of the lead plaintiff provisions.

b. Allowing the FSBA to Serve as Lead Plaintiff Here Would Contradict the Purposes of the PSLRA Because the FSBA's Litigiousness Frustrates Effective Monitoring

The FSBA does not (and cannot) show that it will effectively monitor this massive securities litigation despite its active involvement in 24 other securities actions, including 18 other securities class actions (nine of which require it to serve as lead plaintiff) and six individual securities cases. Allowing the FSBA to serve as lead plaintiff in a situation such as here would be ***inconsistent*** with a fundamental purpose of the PSLRA, to have a class member with a significant financial interest in a securities class action actively direct (not just passively monitor) the prosecution of the case. Courts have already so held concerning FSBA in two major securities litigations. With respect to FSBA, the court in *Telxon* stated:

> [A]n institutional investor that is simultaneously involved in one or more other securities class actions would have fewer resources available and be less able to

> police its attorney's conduct. A lessened ability to monitor the conduct of its attorneys also could be revealed by the number of actions in which it is currently seeking appointment as lead plaintiff. In either of these situations, lifting the bar would be inconsistent with the PSLRA's purpose of increasing the likelihood that the lead plaintiff will effectively monitor its counsel and actively participate in the litigation.

67 F. Supp. 2d at 822 (footnote omitted). The court then found that FSBA was serving as a lead plaintiff in more than five securities class actions, in addition to numerous private securities actions. *Id.* Based on those facts, Judge O'Malley held "***FSBA's capability to serve as an effective monitor is ... subject to question***." *Id.* Given that and certain of the other lead plaintiff applicants adequately satisfied all of the lead plaintiff criteria, FSBA's motion was denied. *Id.*

And in *McKesson*, the court, in denying FSBA's application, stated:

> Florida disputes that the professional plaintiff provision is even applicable, because it is an institutional investor, and Congress sought to encourage institutional investors to become lead plaintiffs. Citing the House Conference Report, Florida asserts that the drafters of the Reform Act fully expected institutional investors to exceed the five suits-in-three years provision of the Act. And, the argument goes, because the statute directs the court to consider "the purposes of this section" in exercising its discretion, the court should allow an institutional investor like Florida to serve as lead plaintiff, despite its apparent litigiousness.
>
> Florida's arguments do not persuade the court to lift the presumptive bar. The text of the statute contains no flat exemption for institutional investors. Indeed, looking at the section as a whole (and the statute commands consideration of "the purposes of this section"), institutional investors are already heavily favored by the requirement that the lead plaintiff have the "largest financial interest" in the litigation. Moreover, ***Congress also desired to increase client control over plaintiff's counsel, and allowing simultaneous prosecution of six securities actions is inconsistent with that goal. See Telxon, 67 F. Supp. 2d 803, 1999 WL 826076, at *17 (denying Florida's lead plaintiff motion for this very reason)***. Finally, there are no special circumstances indicating that Florida has overcome the presumptive bar created by the "professional plaintiff" provision; for instance, if Florida were the only movant, or if the other movants had accrued an even longer record of participation in securities litigation, the court might be inclined to lift the bar and allow Florida to serve. (It might even make a difference if Florida were the only institutional investor moving to serve as lead plaintiff.) ***On these facts, however, Florida has not demonstrated why it should be excepted from the ban against frequent litigants. Florida may therefore not serve as lead plaintiff.***

79 F. Supp. 2d at 1156-57.

FSBA's resources are no less extended here than in *Telxon* or *McKesson*. Indeed, since those lead plaintiff decisions, FSBA has become even more deeply involved in securities class actions. FSBA is presently serving as lead plaintiff in nine securities class actions and is actively involved in 18 securities class actions and six individual securities cases.

- *Florida State Board of Administration v. Advanced Fibre Comm. Inc.*,
  Case No. 98cv20924 (N.D. Cal.) (individual securities action)

- *Naiditch v. Applied Micro Circuits Corp.*,
  Case No. 01-cv-0649-K (S.D. Cal.) (securities class action) (lead plaintiff)

- *Florida State Board of Administration v. Bank of America/Nations Bank*,
  Case No. 00cv1888 (E.D. Mo.) (individual securities action)

- *Florida State Board of Administration v. Cendant*,
  Case No. 98cv4385 (D.N.J.) (individual securities action)

- *Columbia/HCA Healthcare Corporation*,
  Tenn. Circuit Ct.

- *In re Critical Path, Inc. Sec. Litig.*,
  Case No. C-01-0551-WHO (N.D. Cal.) (securities class action) (lead plaintiff)

- *In re Daimler/Chrysler AG*,
  Case No. 00cv993 (D. Del.) (securities class action) (lead plaintiff)

- *In re Dollar General Corp. Sec. Litig.*,
  Case No. 3:01-0388 (M.D. Tenn.) (securities class action) (lead plaintiff)

- *Florida State Board of Administration v. Green Tree Financial*,
  Case No. 98cv1162 (D. Minn.) (individual securities action)

- *Florida State Board of Administration v. Lucent Technologies, Inc.*,
  Case No. 2:01CV3790 (D.N.J.) (individual securities action)

- *Fanni v. Northrop Grumman Corp.*,
  Case No. 98cv7448 (C.D. Cal.) (securities class action) (lead plaintiff)

- *Florida State Board of Administration v. Oxford Health Plans, Inc.*,
  Case No. 98cv3236 (S.D.N.Y.) (securities class action)

- *Sands Point Partners v. Pediatrix Med. Group*,
  Case No. 99cv6181 (S.D. Fla.) (securities class action) (lead plaintiff)

- *Ezra Charitable Trust v. Rent-Way, Inc.*,
  Case No. 00cv323 (W.D. Pa.) (securities class action)

- *State Board of Administration v. Rite Aid Corp.*,
  No. 00-cv-5367 (E.D. Pa.) (securities class action)

- *Myers v. Schering-Plough Corp.*,
  Case No. 01cv00829 (D.N.J.) (securities class action) (lead plaintiff)

- *Piven v. Sykes Enterprises*,
  Case No. 00cv212 (M.D. Fla.) (securities class action) (lead plaintiff)

- *Florida State Board of Administration v. Brick (Telxon Corporation)*,
  Case No. 99cv561 (N.D. Ohio) (securities class action)

- *Laperriere v. Vesta Insurance Group, Inc.*,

Case No. 98cv01407 (N.D. Ala.) (securities class action) (lead plaintiff)

- *Florida State Board of Administration v. Waste Management, Inc.*, Case No. 01cv00984 (S.D. Tex.) (securities class action)
- *Florida State Board of Administration v. Xerox Corp.*, Case No. 02cv00008 (N.D. Fla.) (securities class action)

Each of these cases is a multimillion dollar individual action or a complex securities class action. Obviously, to fulfill its fiduciary obligations, the FSBA will undoubtedly have to commit a substantial amount of time and energy to prosecute each of these cases. Given the unprecedented size and complexity of this case, which has only been complicated by Enron's bankruptcy filing, this action will consume significant amounts of a lead plaintiff's time and energy. Accordingly, the reasoning of the courts in *McKesson* and *Telxon* applies with even more force here.

c. Allowing FSBA to Serve as Lead Plaintiff Instead of Nonbarred Competing Institutional Investors Would Further Contradict the Purposes of the PSLRA Because There Is a Significant Threat that FSBA is Subject to Unique Defenses

The FSBA does not (and cannot) make an adequate initial showing that it satisfies the requirements of Rule 23. *See infra* §II.E. Regardless of whether the FSBA would ultimately be found ***inadequate*** to represent the class, there is a ***threat*** that the FSBA is subject to ***unique defenses***, and there is a ***threat*** that the FSBA will be distracted by litigation against its financial advisor, Alliance Capital Management ("Alliance"), in addition to the substantial litigation in which it is already involved. *See infra* §II.E. Each of these threats counsels against raising the presumptive bar for the FSBA because one of the purposes behind the presumptive bar is to facilitate effective monitoring. Here, the FSBA should demonstrate there is no such threat before it can rebut the presumptive bar against its appointment as lead plaintiff. This policy issue is even more compelling in light of the monumental litigation effort this case will require, and the overwhelming public interest and scrutiny in the outcome of this case.

E. FSBA Is Not Presumptively the Most Adequate Lead Plaintiff Because FSBA Does Not (and Cannot) Show that it Otherwise Satisfies the Requirements of Rule 23

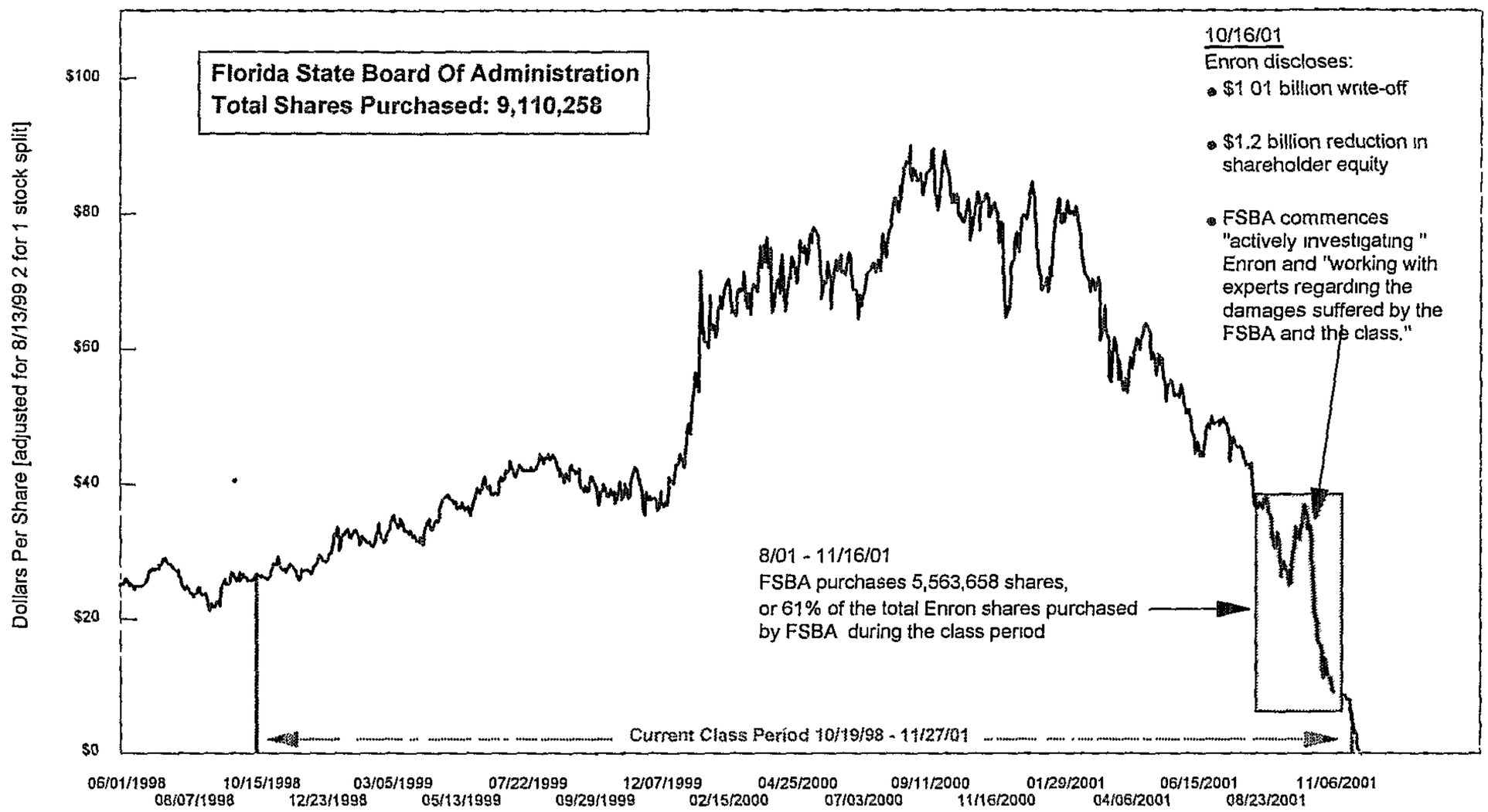
Even if the FSBA was barred under §21D and was found to have the largest financial interest in the relief sought by the class, the FSBA does not (and cannot) show that it otherwise satisfies the

requirements of Rule 23 in order to entitle the FSBA to the rebuttable presumption that it is the "most adequate plaintiff." *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). ***First,*** the FSBA does not (and cannot) show that it satisfies the typicality requirements of Rule 23 – it is subject to unique defenses given the timing and amount of its trades, including the fact that a majority of its purchases were by a fund manager with alleged knowledge of the Enron fraud. ***Second,*** the FSBA's extensive involvement in two dozen securities actions simultaneous with its attempt to control this one confirms that it simply cannot devote sufficient time and attention to effectively monitor the litigation. Therefore, the FSBA does not show that it can meet the adequacy requirements of Rule 23 entitling it to be presumptive lead plaintiff.

1. The FSBA's Accumulation of Millions of Shares of Enron Stock After the Fraud Began to Be Revealed Renders it Unable to Demonstrate Typicality Under Rule 23

The timing and amount of the FSBA's stock purchases evidence the fact that the FSBA continued to accumulate ***millions of shares*** of Enron's stock after market analysts were claiming a fraud had occurred and: (i) that Enron had overstated shareholder equity by approximately $1.2 billion; (ii) that Enron would have to write-off over $1 billion of its assets; (iii) that Enron would post a massive restatement of its earnings; (iv) that Enron had fired its Chief Financial Officer and was being investigated by the SEC; and (v) that Enron's bankruptcy was imminent.[10]

[10]The trading patterns of the New York City Funds and the Retirement Systems of Georgia and Ohio also raise typicality issues which might preclude them from presumptive lead plaintiff status if they possessed (which they do not) a sufficient financial interest in the relief sought which entitled them to presumptive lead plaintiff status. For example, the New York City Funds sold 2,484,556 shares ***at a profit*** during the Class Period, thus benefitting from the defendants' fraud. Similarly, the Georgia Funds sold 1,342,600 Enron shares at a profit during the Class Period. And, the Ohio Funds sold 2,283,523 shares at a profit during the Class Period, or almost 70% of the 3,275,000 shares of Enron stock held by them at the beginning of the Class Period. Unlike these other movants, Regents did ***not*** benefit from defendants' fraud by selling millions of Enron shares at a substantial profit during the Class Period.



As this Court stated in *NCI*, the proposed Lead Plaintiff must make ***at least*** a preliminary showing that it has claims that are typical of those of the putative class. Order at 9.

Similarly, "problems that may affect the class later on in the lawsuit" should be considered by the Court at this time. *Critical Path*, 156 F. Supp. 2d at 1110. As Judge Orrick stated in *Critical Path*, if problems such as unique defenses are identified, "[r]efusing to conduct a thorough Rule 23 inquiry ... is contrary to the interests of the class." *Id.* Indeed, the threat of unique defenses at the lead plaintiff stage may properly serve as a basis for denying a movant presumptive lead plaintiff status and appointment as lead plaintiff. *See, e.g., In re Century Bus. Servs. Sec. Litig.*, 202 F.R.D. 532, 539 (N.D. Ohio 2001).

Purchases of stock late in a class period and "after the alleged fraudulent information had become known" renders a plaintiff subject to a unique defense that might "vitiate" typicality. *Epstein v. Am. Reserve Corp.*, No. 79 C 4767, 1988 U.S. Dist. LEXIS 3382, at *11-*12 (N.D. Ill. Apr. 20, 1988). Similarly, in *Koenig v. Benson*, 117 F.R.D. 330 (E.D.N.Y. 1987), the court held a plaintiff subject to unique defenses because (among other things) the plaintiff had bought stock after

undisclosed losses became public, and the undisclosed losses were so significant they forced the company into bankruptcy. *Id.* at 336. *See also Kovaleff v. Piano*, 142 F.R.D. 406, 407-08 (S.D.N.Y. 1992); *Lewis v. Johnson*, 92 F.R.D. 758, 760 (E.D.N.Y. 1981).

Here, the FSBA's trading pattern subjects it to unique defenses.

FSBA Purchases Despite Suspicious Indications of Fraud

Date	Shares Purchased	Share Price	Total Price
10/19/2001	11,000	$24.50	$280,500.00
10/22/2001	311,200	$22.82	$7,101,895.20
10/23/2001	6,658	$21.89	$145,726.98
10/23/2001	48,500	$20.63	$1,000,569.55
10/25/2001	302,500	$16.30	$4,931,960.00
10/28/2001	125,600	$15.47	$1,928,010.56
10/29/2001	373,900	$14.51	$5,427,008.94
10/30/2001	317,800	$12.23	$3,885,931.28
11/13/2001	581,900	$9.37	$5,452,635.76
11/14/2001	478,600	$9.84	$4,710,668.36
11/16/2001	209,500	$9.02	$1,890,192.80
TOTALS	**2,767,158**		**$36,755,099.43**

As in *Epstein* and *Koenig*, the FSBA purchased shares of Enron stock – millions of shares – after Enron's significant undisclosed losses and overstated debt became public. Indeed, FSBA purchased over 2.7 million shares of Enron stock on or after October 16, 2001, the day defendants' fraud began to be disclosed and after Enron disclosed: (i) that its assets were overstated by at least $1 billion; and (ii) was taking hundreds of millions of dollars in charges as a result of structured finance arrangements with obscure limited partnerships managed by Enron's Chief Financial Officer. *See* FSBA Motion at 7-8. And, the FSBA kept buying millions of shares of Enron's stock after the SEC announced it would investigate Enron and the Company had fired defendant Fastow. And it

kept buying after Enron announced that it was restating its results from operations for fiscal years ended 1997-2000 and the first and second quarters of 2001 by hundreds of million of dollars, and that its financial statements "should not be relied upon." Jaconette Opp. Decl., Exs.2, 3. Besides the SEC's announcement of its investigation following the firing of Enron's CFO, the Company's restatement on November 8, 2001 was perhaps the clearest indication that a fraud had occurred. Yet, the FSBA continued to buy Enron stock for which the FSBA now asserts it was defrauded in purchasing.

Indeed, on November 10, 2001 – at the time FSBA was continuing to purchase millions of Enron shares – the market was trumpeting that a fraud had occurred. As reported by *The Wall Street Journal*:

> [W]hat is most striking about the latest disclosures is that they show Enron's misstatements weren't limited merely to judgment calls and gray areas for the green-eye shade crowd to debate. Portions of Enron's accounting practices amounted to violations of elementary accounting principles ....

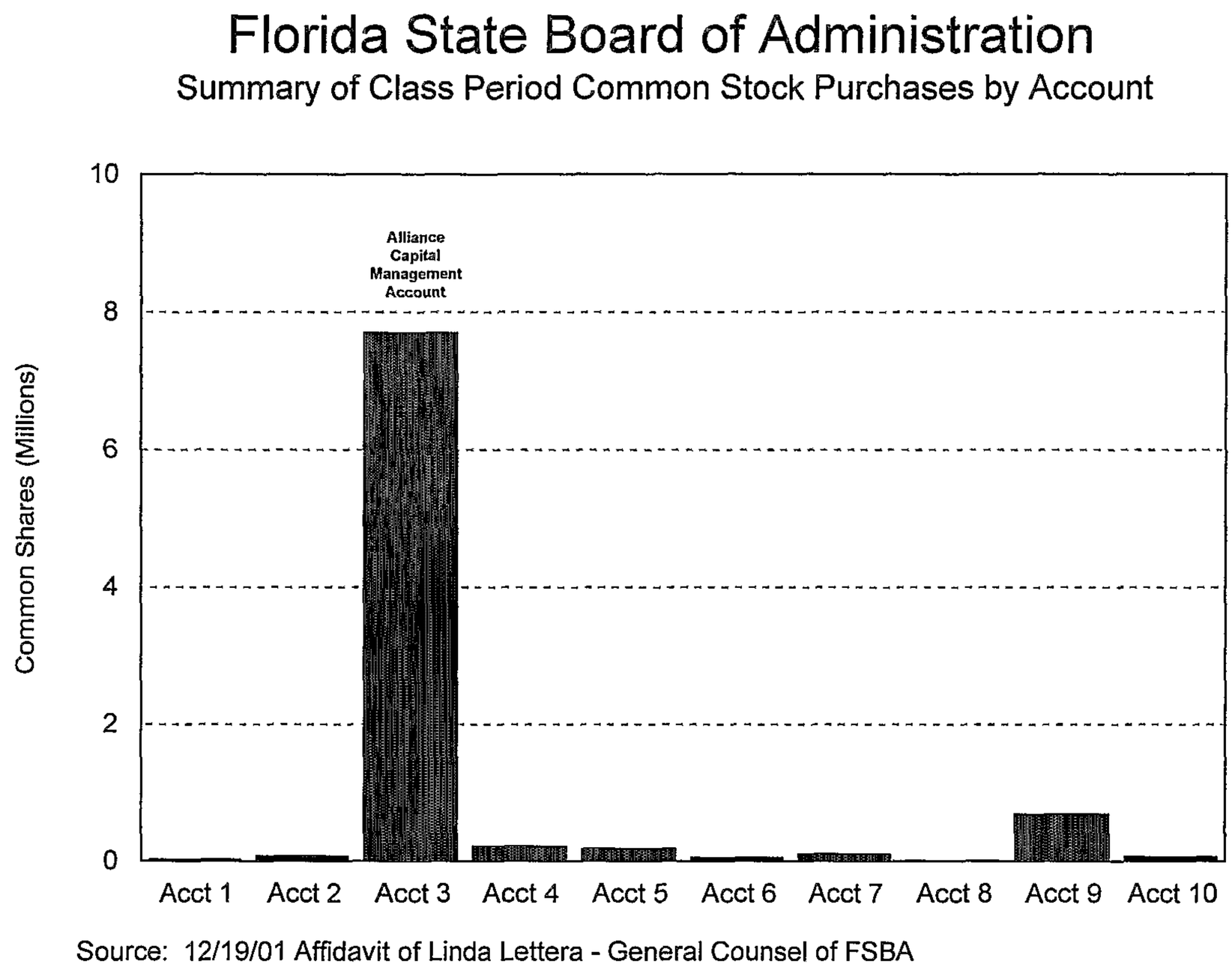
Jaconette Opp. Decl., Ex. 3. Concerning Enron's restatement, former Chief Accountant for the SEC, Lynn Turner, stated, "[i]t is basic accounting that you don't record equity until you get cash, and a note doesn't count as cash." *Id.* Yet the FSBA still purchased another 1.27 million shares of Enron's stock. As of November 16, 2001, the FSBA ***held*** over 7.5 million shares of Enron's stock. Thus, while most of the public was dumping Enron's stock upon the news of this fraud, FSBA was accumulating the stock by the millions of shares.

Defendants here are represented by some of the most capable lawyers in the country. Thus, it is highly likely that they will attempt to exploit the FSBA's trading pattern, which poses a significant threat that FSBA is subject to unique defenses.

2. The FSBA Is Subject to Unique Defenses as Its Purchases of Enron Stock Were Made by Alliance Capital Management, Which Knew About the Enron Fraud at the Time of Purchase

The ability of the FSBA to fulfill the requirements of Rule 23 is also suspect in light of the fact that almost 8 million of its 9.5 million shares were purchased through Alliance.

Throughout a majority of the Class Period, one of the



senior executives at Alliance was Enron director Frank Savage. Savage's knowledge of the falsity of Enron's public statements may be presumed not only from his position as an Enron director, but also from the fact that as a member of the Board of Directors, which was required to approve related-party transactions at Enron that exceeded $25 million, he necessarily participated in the fraudulent partnership transactions that form the basis of plaintiffs' claims. In addition, as an Enron director, Savage signed Enron's allegedly false and misleading Registration Statements. Thus, not only is Savage potentially liable to those who purchased Enron's shares during the Class Period, he is also liable to holders of shares of certain Alliance Mutual Funds under the Investment Company Act of 1940 for the violations of that Act that occurred in connection with Alliance's purchases and holdings of Enron stock during his tenure at Alliance. Indeed, as a result of the Enron debacle, Alliance was terminated by the FSBA in early December 2001. Jaconette Opp. Decl., Ex. 4.

Savage's dual role as an executive with the FSBA's investment manager and potential defendant/director of Enron subject the FSBA to the unique defense that FSBA traded in Enron shares ***despite*** its investment manager's knowledge that the statements that form the gravamen of the complaints against Enron were false.

Numerous lawsuits have already been filed by holders in Alliance funds managed by FSBA's former fund manager. For example, in *Roy v. Alliance Capital Management L.P.*, No. 8:01-CV-2449-T-24MSS (M.D. Fla.), the plaintiff alleges:

> Alliance Capital Management L.P., through at least one of its Directors, namely Frank Savage, has, for a substantial period of time, had knowledge of the fraudulent activities engaged in by Enron as alleged in detail above. Specifically, Alliance Capital Management L.P. directly acquired such knowledge because of Frank Savage's participation in, approval of, and knowledge of, the massive financial fraud perpetrated by Enron as set forth in detail above.

Jaconette Opp. Decl., Ex. 8, ¶26. *See also* Ex. 7.

F. "Niche" Lead Plaintiffs Need Not Be Appointed at This Time

Despite that numerous plaintiffs seek to represent all Enron securities holders, several lead plaintiff movants argue that this Court should appoint them as "niche" lead plaintiffs to represent subclasses in this litigation. ***First,*** the "Proposed Preferred Purchaser Lead Plaintiffs" argue that differences between Enron's common and preferred stock are so great that "conflicts between the two claimant groups with regard to presentation of proof, and calculations of damages and settlement ... necessitate the appointment of separate lead plaintiffs for the two claimant groups."[11]

Next, three other movants seek to represent Enron bond holders in various configurations, each claiming that separate representation is necessary to protect the rights of the bondholders.[12] Staro claims that the "only way to protect the interests of the Bond Purchaser Class is to appoint separate representatives for the Bond Purchaser Class and the common stock purchaser class." Staro Motion at 5. Similarly, JMG/TQA alleges it has a "larger and legally distinct financial interest in this

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[11]*See* Preferred Shareholders Motion at 4.

[12]Movant Staro Asset Management seeks to represent persons who purchased "bond securities of Enron Corporation." Movant JMG/TQA seeks to represent a debt securities class including purchasers of six different debt instruments. And finally, Pulsifer & Associates seek to represent purchasers of 7% Exchangeable Notes due July 31, 2002.

litigation, making it necessary for the debt purchasers and equity purchasers to be represented separately." JMG/TQA Motion at 3.

If any of these "niche" movants were correct, there would be 20+ subclasses in this action, each with their own representative and counsel. The "niche" movants are wrong and they do not otherwise justify adding layers of counsel and complication to this action.

As discussed above, Staro and JMG/TQA ignored the fact that this Court faced a similar situation in *Waste Management*, 128 F. Supp. 2d at 426, where one movant sought separate representation for a class of options holders. The issue in *Waste Management* was slightly different than the instant matter as options are generally considered to be derivative securities of common stock, *see In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 155 (N.D. Cal. 1991), but the same logic applies. In *Waste Management*, this Court held that appointment of lead plaintiff for a separate options class did not appear necessary at the time and thus denied the motion to appoint separate lead plaintiff and counsel for such a group. 128 F. Supp. 2d at 432; *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 51 (S.D.N.Y. 1998); *In re Tel-Save Sec. Litig.*, No. 98-CV-3145, 2000 U.S. Dist. LEXIS 10134, at *17-*18 (E.D. Pa. July 19, 2000) (both option and stockholders have an interest in proving that stock prices were artificially inflated by defendants' "material misrepresentations and omissions") (citing *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 505-06 (3d Cir. 1988)); *In re MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 440 (E.D. Va. 2000).

Other courts also hold separate classes need not be appointed. In *McKesson*, a group of movants for lead plaintiff argued they should be appointed lead plaintiffs for their "niche" actions, because differences in their causes of action justified appointment of multiple lead plaintiffs. 79 F. Supp. 2d at 1150. The *McKesson* court rejected the "niche" movants' argument that the mere difference in remedies or proof required separate treatment. "[A]s all claims are based on the same financial disclosures, the existence of different pleading standards does not create the need for a separate lead plaintiff. The Reform Act requires only that the interests of the class members be adequately represented by the lead plaintiff." *Id.* at 1151. Regents has dedicated the resources to adequately and vigorously represent ***all*** class members. Regents Decl., ¶¶4, 13.

Proposed Preferred Purchasers' arguments concerning purported differences between the preferred and common stockholders simply "do not rebut the statutory presumption that one lead plaintiff can vigorously pursue all available causes of action against all possible defendants under all available legal theories." *Id.* Other courts have similarly held multiple classes of lead plaintiffs are not contemplated by the PSLRA's lead plaintiff provisions. "[T]he statute seems to contemplate, even in consolidated actions such as this, the appointment of a lead plaintiff for a single purported plaintiff class." *In re Tyco Int'l, Ltd. Sec. Litig.*, [2000-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,207, at 95,040 (D.N.H. 2000). In *Tyco,* one group of movants sought approval of a separate lead plaintiff to represent plaintiffs bringing insider trading claims under §20A. The *Tyco* court held the possibility of future conflict between the classes did not require separate leadership. "'[C]ourts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.'" *Id.* at 95,041 (quoting *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975)).

The Proposed Preferred Purchasers' attempts to use the policy behind the PSLRA to further their purposes also fails. Movants argue the PSLRA's goals are best served by appointing separate lead plaintiffs and lead counsel. *See* Preferred Motion at 16-17. To the contrary, the goal of the PSLRA was to remedy perceived abuses in securities litigation. Balkanizing the class as proposed would mean that every securities case would require the appointment of numerous lead plaintiffs and additional layers of lawyers, with their own agenda. This cannot be what Congress intended.

The Preferred Purchasers' authority on this point misses the mark. In *Oxford*, Judge Brieant addressed the appointment of a small group as lead plaintiff, an issue previously addressed by this Court. The Court expressly rejected an attempt to appoint separate classes of lead plaintiffs, instead appointing one group to serve as lead plaintiff to represent all class members. 182 F.R.D. at 51.

Under the PSLRA, a member of the purported plaintiff class who wants to challenge appointment of a presumptively most adequate plaintiff must present proof the presumptively most adequate plaintiff either will not fairly and adequately protect the interests of the class or is subject to unique defenses that render the plaintiff incapable of adequately representing the class. *See*

McKesson, 79 F. Supp. 2d at 1151; 15 U.S.C. §78u-4(a)(3)(B)(iii)(II). Neither the Proposed Preferred Purchasers nor the bondholders have presented any proof that Regents either will not fairly and adequately protect the interest of the entire class or that it is subject to unique defenses.

G. Other Competing Movants Fail to Satisfy the Requirements of the PSLRA for Appointment as Lead Plaintiff

Several nominal movants have also sought to be appointed lead plaintiff in this action. None of these movants are entitled to the statutory presumption of "most adequate plaintiff" under the PSLRA.

With claimed losses of $10.3 million, $2.5 million and $103,043 respectively, Private Asset Management, Local 710 Pension Fund, and the Davidson Group clearly do not possess the "largest financial interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb). In addition to not possessing the largest financial interest in the relief sought, these movants also do not best satisfy the requirements of Rule 23 when compared to Regents. *See supra* §II.B.

III. CONCLUSION

For all the reasons stated herein, Regents' motion for appointment for Lead Plaintiff and Regents' selection of sole lead counsel for the Class should be granted.

DATED: January 21, 2002

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on January 22, 2002, declarant served the THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S OPPOSITION TO THE COMPETING MOTIONS FOR LEAD PLAINTIFF by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of January, 2002, at San Diego, California.

Mo Maloney

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