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Management, HBK Investments and the Central States Pension Fund

(collectively referred to as the "Milberg Weiss Group");

- (2) Archdiocese of Milwaukee Supporting Fund, Inc.;
- (3) Victor Ronald Frangione, Anthony P. Davidson and Seymour Nebel;
- (4) JMG Capital Partners, JMG Triton Offshore, TQA Master Fund, Ltd. and TQA Master Plus Fund;
- (5) Mark E. McKinney;
- (6) Local 710 Pension;
- (7) Private Asset Management;
- (8) Henry H. Steiner, Daniel Kaminer, Christine Benoit and Michael & Jennifer Cerone;
- (9) Pulsifer & Associates; and
- (10) Staro Asset Management LLC.

The Court should grant the State Group's application for appointment as Lead Plaintiff and deny the other applications for the following reasons:

1. The State Group consists of sophisticated institutions with experienced legal staff that are precisely the type of investors the Private Securities Litigation Reform Act of 1995 (the "PSLRA") encourages to step forward to serve as lead plaintiff. Numerous other lead plaintiff applicants do not even qualify for consideration because although they seek to represent Enron securities purchasers, the applicants are not the owners of the shares they rely on in their moving papers.

2. The State Group has suffered losses in excess of \$330 million resulting from its purchases of 5.1 million shares of common stock and \$134 million in bonds (including Alabama) of

Enron Corporation ("Enron" or the "Company").⁴ Regardless of whether Alabama's losses are included, the State Group's figure exceeds the valid losses of all other qualified lead plaintiff applicants. See Schedule of Reported Losses of Applicants for Appointment as Lead Plaintiff, attached as Exhibit A to the Compendium of Exhibits submitted in support of this memorandum (the "Compendium"). Accordingly, the State Group has the "largest financial interest" in the relief sought by the class of any qualified applicant for appointment as lead plaintiff. See 15 U.S.C. § 78u-4 (a) (3) (B) (iii) (I) (bb).

3. To the extent that certain applicants for appointment as lead plaintiff seek to represent classes of those who purchased securities other than those represented by the State Group (i.e., preferred shares, notes), there is no need for a separate lead plaintiff for any such proposed classes because their interests are shared by, and consistent with, those of the State Group. The State Group therefore can adequately pursue these claims. In addition, it is premature to be addressing class certification issues on a motion for lead plaintiff.

4. The State Group is an appropriate "group" to be appointed as Lead Plaintiff because its members have had a meaningful relationship preceding and independent of this litigation, and the State Group was formed by the clients, not the lawyers, prior to the State Group's filing of a lead plaintiff motion.

As set forth in its initial papers filed on December 21, 2001, the State Group timely filed its motion to be appointed lead plaintiff, has a tremendous financial stake in this litigation, and otherwise

⁴ Excluding Alabama, the State Group losses are \$283 million.

satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.⁵ Accordingly, the State Group should be appointed Lead Plaintiff in these proceedings.

PROCEDURAL BACKGROUND AND SUMMARY OF THE ACTIONS

By Order filed December 13, 2001, this Court consolidated, inter alia, the more than 20 related actions brought on behalf of persons and entities who purchased or otherwise acquired Enron's publicly-traded securities between October 19, 1998 and November 7, 2001, inclusive (the "Class Period"),⁶ excluding defendants and certain of their affiliates (the "Class"). Plaintiffs in these actions allege that, during the Class Period, defendants⁷ engaged in a scheme and course of conduct in violation of Sections 10(b), 20(a), and 20A of the Exchange Act and Sections 11, 12(a)(2), and 15 of the Securities Act, pursuant to which they artificially inflated the price of Enron securities through a series of materially false and misleading statements and omissions concerning the Company's financial condition. In addition, many of the complaints allege that the Individual Defendants sold more than 7 million of their personally-held Enron shares during the Class Period at artificially inflated prices, reaping hundreds of millions of dollars, and possibly more, in illicit proceeds.

⁵ See Memorandum of Law in Support of Motion of the State Retirement Systems Group for the Appointment of Lead Plaintiff and for Approval of its Selection of Counsel ("State Group's Initial Memorandum") at 7-12.

⁶ This is the class period the State Group used for purposes of this motion, and it is the class period proposed in the majority of the actions filed in this case (although other actions have stated different class periods). Such differences will be resolved when the Lead Plaintiff files a consolidated complaint.

⁷ Defendants include Enron, Arthur Andersen, LLP ("Andersen"), the Company's outside auditors, and certain of Enron's former and current officers and directors (the "Individual Defendants"). The actions against Enron have been stayed, however, by virtue of the Company's bankruptcy filing on December 2, 2001.

On December 21, 2002, motions for the appointment of lead plaintiff and lead counsel were filed with this Court. This memorandum of law first responds to the lead plaintiff motion filed by the Milberg Weiss Group – a coalition of the following unrelated private and public entities scattered throughout the United States and Germany: (1) the Amalgamated Bank (which itself is acting as a trustee for the Longview Collective Investment Fund, Longview Core Bond Index Fund and “certain other [undisclosed] trust accounts”); (2) the Regents of the University of California (which actually consists of four separate funds); (3) Deutsche Asset Management in Frankfurt, Germany (which, rather than claiming to bring the action on its own behalf, claims to be doing so “on behalf of [its] clients”); (4) HBK Investments (a hedge fund that only bought Enron bonds and bought those bonds starting on November 2, 2001 – a mere five days before the end of the Class Period and almost three weeks after Enron disclosed on October 16, 2001 that it was going to report losses in excess of \$1 billion); and (5) the Central States Pension Fund. The State Group then responds to the nine other motions by proposed plaintiffs having significantly smaller losses than the State Group and seeking the appointment of unnecessary sub-classes.

STATEMENT OF FACTS

The facts regarding Enron’s demise are now well known. On October 16, 2001, Enron revealed a previously undisclosed loss in excess of \$1 billion related to various partnerships in which the Company and Enron executives were co-investors. On November 8, 2001, Enron announced it was restating its financial results for 1997, 1998, 1999, 2000 and the first two quarters of 2001 and further stated that its financial reports for 1997-2000 should not be relied upon. Following these disclosures, the value of Enron’s stock and bonds plummeted, with the stock falling as low as \$8.20 on November

8, 2001 before closing at \$8.41, approximately 91% below the Class Period high of \$90.75. Enron's credit rating was thereafter downgraded to below-investment grade, or "junk." The Company's bonds collapsed, and the price of its stock eventually dropped as low as \$0.25 per share. Ultimately, on December 2, 2001, Enron filed for bankruptcy protection under Chapter 11 of the U. S. Bankruptcy Code.

Investigations into Enron's sudden demise were launched by the United States Department of Justice, the Securities & Exchange Commission (the "SEC"), the Department of Labor, several Congressional committees and various states. Andersen has become the focus of various investigations. Andersen has admitted that certain of its employees purposefully destroyed documents relating to Enron before and after the SEC had served Andersen with a document subpoena. Andersen has since fired the lead audit partner from the Enron account. Enron has now fired Andersen.

Following the initial disclosure of Enron's difficulties, the Attorneys General from the states of Georgia, Ohio and Washington undertook an immediate investigation.⁸ After determining that their respective state pension systems had incurred serious losses, the attorneys general and their staffs decided to join forces in the Enron class action litigation. The State Group is also working closely with state and congressional investigators.

The relationship of Georgia, Ohio, and Washington spans many years. As members of the

⁸ The large majority of state pension funds (such as Florida, for instance) are advised by in-house counsel. Georgia, Ohio, and Washington, however, are advised by their respective state's Attorney General. See Declaration of Thurbert E. Baker In Support Of The Motion Of The State Retirement Systems Group For The Appointment Of Lead Plaintiff And For Approval Of Its Selection Of Counsel ("Baker Declaration"), at ¶ 4, (Compendium at Exhibit B). This is more the exception than the rule. The Attorneys General of Georgia, Ohio, and Washington organized the State Group after initially discussing the matter on a conference call regarding Enron held by NAAG. See Baker Decl., ¶ 5.

National Association of Attorneys General (“NAAG”), the attorneys general for these three states regularly meet and discuss issues of common concern. They have previously worked together on behalf of hundreds of thousands of constituents in dozens of lawsuits, including the tobacco manufacturers litigation and lawsuits against Toys “R” Us, vitamins manufacturers, Medaphis, Nine West, and Bridgestone/Firestone. See Baker Decl., at ¶¶ 7-8 (Compendium Ex. B).

As the members of the State Group were determining the extent of their significant losses, they interviewed and retained outside counsel to represent the funds and work closely with, and at the direction of, the states’ funds and their respective state’s attorney general. The retention of counsel was the result of an intensive process that involved Requests for Proposal - (“RFP”) that went to dozens of firms and interviews with many of those firms. The State Group then negotiated a fee arrangement, which it believes will be highly advantageous to the Class. In addition, the State Group plans to actively monitor and supervise counsel throughout this case. Numerous telephone conference calls and in-person meetings between representatives of the State Group and their outside counsel have been held.

For the reasons set forth below and in its original motion for the appointment of lead plaintiff, the State Group – the qualified applicant with the largest financial loss in this case and, thus, presumptively the most adequate plaintiff – should be appointed lead plaintiff and its counsel appointed lead counsel.

ARGUMENT

I. THE STATE GROUP HAS THE LARGEST LOSS OF ANY QUALIFIED MOVANT FOR APPOINTMENT AS LEAD PLAINTIFF

A. The PSLRA Mandates The Appointment Of The Most Adequate Group Of Plaintiffs

The PSLRA provides that this Court:

[S]hall appoint as lead plaintiff the member or members of the purported plaintiff class that the Court determines to be most capable of adequately representing the interests of class members (hereinafter this paragraph referred to as the “most adequate plaintiff”).

15 U.S.C. § 78u-4(a)(3)(B)(i). In addition, the statute requires the Court to adopt a rebuttable presumption:

[T]hat the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that –

* * *

(bb) in the determination of the Court, has the largest financial interest in the relief sought by the class. . . .

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

As set forth in the State Group’s Initial Memorandum⁹ the State Group suffered losses in excess of \$330 million¹⁰ as a result of the fraud in this litigation and has the “largest financial interest” of any qualified applicant seeking to be appointed as Lead Plaintiff. See Exhibit A to the Compendium.

⁹ See State Group’s Initial Memorandum at 2; see also Affidavit of Tom A. Cunningham, Exhibits A-D attached thereto.

¹⁰ Absent Alabama, the State Group’s losses total \$283 million.

The PSLRA specifically provides that there is a “[r]ebutable presumption . . . that the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest.” 15 U.S.C. § 78u-4(a) (3) (b) (iii)(I) (bb).¹¹ The State Group has the “largest financial interest” of any qualified applicant in the relief sought and is thus presumed to be the most adequate plaintiff.

The legislative history of the PSLRA demonstrates that it was intended to encourage institutional investors, like the members of the State Group, to serve as Lead Plaintiffs. As Congress noted in the Statement of Managers:

The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the “most adequate plaintiff.”

The Conference Committee believes that . . . in many cases the beneficiaries of pension funds – small investors – ultimately have the greatest stake in the outcome of the lawsuit. Cumulatively, these small investors represent a single large investor interest. Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.

House Conference Report No. 104-369, 104th Cong. 1st Sess. at 34 (1995).

Similarly, the Senate Report on the PSLRA states in pertinent part:

The Committee believes that increasing the role of institutional investors in class actions will ultimately benefit the class and assist the courts.

Institutions with large stakes in class actions have much the same interests as the plaintiff class generally

Senate Report No. 104-89 104th Cong. 1st Sess. at 11 (1995). See also *Gluck v. Cellstar Corp.*,

¹¹ The term “group of persons” is not defined in the PSLRA.

976 F. Supp. 542, 548 (N.D. Tex. 1997)(“through the PSLRA, Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors”); Greebel v. FTP Software Inc., 939 F. Supp. 57, 63 (D. Mass. 1996) (provisions of the PSLRA “suggest a presumption that institutional investors be appointed lead plaintiff”).

Decisions interpreting the PSLRA have consistently noted that it was drafted by Congress to curtail lawyer-driven litigation and place securities fraud litigation in the hands of those plaintiffs, such as institutional investors, who have the greatest interest in seeking successful resolution of the litigation. See, e.g., In re Waste Management, Inc. Sec. Litig., 128 F. Supp.2d 401, 411 (S.D. Tex. 2000)(noting that the PSLRA was enacted in response to “significant evidence of abusive practices and manipulation by class action lawyers of their clients in private securities lawsuits.”); In re Telxon Corp. Sec. Litig., 67 F. Supp.2d 803, 815 (N.D. Ohio 1999)(“The effect of this provision is to place the leadership of the class in the hands of a plaintiff who has suffered a large enough *pro rata* loss that he will benefit from monitoring his attorneys’ conduct.”); Gluck, 976 F. Supp. at 548 (noting that in enacting the PSLRA, Congress singled out certain firms for participating in lawyer-driven securities class actions and for making decisions based on their own financial interests instead of those of their purported clients); Ravens v. Iftikar, 174 F.R.D. 651, 654 (N.D. Cal. 1997) (“the overriding goal of the Reform Act is to displace figurehead plaintiffs with real investors in securities class actions”).

As this Court recently noted in In re NCI Buildings Systems Sec. Litig., the PSLRA’s statutory presumption in favor of the investor with the largest financial interest is based on the expectation that the investor will manage the litigation and supervise the class action lawyers. Master File No. H-01-1280, slip op. at 10 (S.D. Tex. Dec. 27, 2001)(Compendium at Exhibit C).

B. Institutional Lead Plaintiffs With A Pre-Existing Relationship, Such As The State Group, Ensure A Strong, Cohesive Prosecution

As this Court has previously recognized, a pre-existing relationship among the members of a putative lead plaintiff group is an important factor in determining whether that group will adequately control the litigation. See In re Waste Management, Inc. Sec. Litig., 128 F. Supp.2d at 412 (noting that courts have permitted a group lead plaintiff where it involves “a small number of members that share such an identity of characteristics, distinct from those of almost all other class members”). Absent such a relationship, this Court has been concerned that lawyer-created groups with no relationship other than their lawyer will be unable to serve the lead plaintiff role envisioned by the PSLRA. Id.; NCI Bldgs. Sys., slip op. at 14.

The State Group, one of the three largest “groups” moving for appointment of Lead Plaintiff, is precisely the type of investor-formed group contemplated by this Court. Only the State Group has had a relationship preceding and independent of the instant litigation. See Baker Declaration, ¶ 4 (Compendium at Ex. B). Members of the State Group are members of NAAG, they have participated together in prior litigation and have regular meetings among themselves and with outside counsel. Id. ¶¶ 5-6. The members of the State Group have established a protocol for managing this litigation, including a decision-making structure, and have demonstrated their ability and intent to supervise decisions by their chosen outside counsel throughout the litigation. Id., ¶ 9. In addition, in contrast to the Milberg Weiss Group, outside counsel did not form the State Group.

Thus, the State Group, consisting of fewer than five members, has had a meaningful relationship preceding this litigation and has established itself as a single, cohesive group fully capable of monitoring

and managing this litigation. Accordingly, the State Group is an appropriate “group” to be appointed as Lead Plaintiff.¹²

**II. THE MILBERG WEISS GROUP’S MOTION
FOR LEAD PLAINTIFF SHOULD BE DENIED**

A. The Milberg Weiss Group’s Claimed Losses Are Incorrect

The Milberg Weiss Group’s motion for lead plaintiff should be denied on its face. As previously noted, in applying the PSLRA, courts have noted that the “largest financial interest” standard should be viewed broadly in terms of (1) the number of shares purchased, (2) the number of net shares purchased, (3) the total net funds expended by the plaintiff during the class period, and (4) the approximate losses suffered by the plaintiff. In re Waste Management, 128 F. Supp. 2d at 409. No matter how the standard is viewed, the Milberg Weiss Group has a smaller loss than the State Group. Coupling its greater loss with the State Group’s superior qualifications, there is no reason to appoint the Milberg Weiss Group.

In its moving papers, the Milberg Weiss Group claims it suffered a total loss of \$251 million.¹³

¹² The SEC agrees that a small group of related plaintiffs may be appointed lead plaintiff. See Memorandum of the Securities and Exchange Commission, *Amicus Curiae*, dated May 18, 1998, filed in Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246 (E.D. Va. 1999), attached as Compendium Exhibit D (“The Commission believes that to effectuate the [PSLRA’s] language and purposes the Court generally should limit a proposed lead plaintiff group to a small size capable of effectively managing the litigation and supervising counsel.”). The SEC has cited approvingly groups of up to five plaintiffs. Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 248-50 (E.D. Va. 1999); In re Baan Co. Sec. Litig., 186 F.R.D. 214, 216-17, 224-25 (D.D.C. 1996). Here, the State Group consists of three lead plaintiff applicants and Alabama, which will act in an advisory role only.

¹³ The Milberg Weiss Group’s initially claimed losses of \$244 million. On January 16, 2002, Amalgamated Bank filed an amended certification claiming losses of \$17 million, an increase of \$7 million from its original certification.

Even assuming that each member of the Milberg Weiss Group constitutes a “purchaser” of Enron securities – which is not the case – the Milberg Weiss Group still does not have as large a financial loss as the State Group. Indeed, the State Group’s financial loss of \$330 million far exceeds the Milberg Weiss Group’s loss.¹⁴

At least some members of the Milberg Weiss Group lack standing to be appointed as lead plaintiff because they were not actual purchasers of Enron securities. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975)(holding that only actual purchasers or sellers of securities have standing to bring private cause of action for a 10b-5 violation). For example, Amalgamated Bank is acting as a trustee for the Longview Collective Investment Fund, Longview Core Bond Index Fund and “certain other [undisclosed] trust accounts.” The Milberg Weiss Group motion does not identify which other trust accounts or how many other trust accounts are included in the calculation of its losses. Likewise, Deutsche Asset Management is aggregating the losses “on behalf of [its] clients.”¹⁵ This is wholly improper. Id.; see also Davidson v. Belcor, Inc., 933 F.2d 603, 606 (7th Cir. 1991)(“only actual purchasers and sellers of securities have standing” to bring 10b-5 claim); Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)(standing does not extend to one who has not suffered the injury that gives rise to the securities fraud claim); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D.

¹⁴ Even without Alabama’s losses, the State Group’s loss of \$283 million exceeds that of the Milberg Weiss Group.

¹⁵ This representation begs the question whether the clients of Deutsche Asset Management are the real members of the Milberg Weiss Group. There is no way of determining which clients, the number of such clients, or whether any are interrelated, due to the inadequate disclosure in the Milberg Weiss Group’s motion.

493, 508 (S.D.N.Y. 1996)(allowing plaintiffs to assert securities fraud claims only where they had a pecuniary interest as the actual purchasers and sellers of the securities). Moreover, the Milberg Weiss Group does not disclose which clients or how many clients are included. Thus, Milberg Weiss appears to be using figurehead plaintiffs rather than the actual purchasers of the securities.

Correcting for these various deficiencies leaves the Milberg Weiss Group with losses of \$149.5 million. This calculation is as follows:

Claimed Losses = \$251 million

Adjusted for:

The loss attributed to Deutsche Asset Management = (\$61 million)

The loss attributed to Amalgamated Bank = (\$17 million)

Adjusted loss = \$173 million

1. The Milberg Weiss Group should not be appointed lead plaintiff because it is an association of unrelated plaintiffs

It is not necessary or beneficial for this Court to appoint a group of unrelated entities as lead plaintiff, especially where there exists a group of related institutions – the State Group – with significantly larger losses than the Milberg Weiss Group. As this Court noted in In re NCI Buildings Systems, many courts have rejected the aggregation of unrelated plaintiffs in considering lead plaintiff motions. In re NCI Buildings Systems, slip op. at 11-12 (citing Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1153-54 (N.D. Cal. 1999)). See also In re Waste Management, 128 F. Supp.2d at 413 (cautioning against a loose definition of “group” such that would result in the “manipulation and manufacturing of enormous groups of unrelated investors”).

In In re NCI Buildings Systems, this Court rejected the aggregation of a married couple (the Youngs) and an individual plaintiff (Doerge). Slip op. at 15. Rather, the Court instructed the Youngs, which the Court considered a group of related plaintiffs, and Doerge to file a statement as to the sums lost by each. Id. Whichever had the largest loss would be appointed lead plaintiff. Id. In so ruling, this Court approvingly cited Aronson for its definition of a related group: “a meaningful relationship preceding the litigation and . . . united by more than mere happenstance of having bought some securities.” Id. at 12 (adding that this definition is consistent with the legislative intent to increase plaintiffs’ control over appointed counsel). Likewise, in Waste Management, decided one year prior to In re NCI Building Systems, this Court stated:

It is obvious that any law firm could attempt to control this litigation by accumulating as many plaintiffs as possible with no relationship to each other from investors during the class period and merely aggregate their claims to achieve the largest financial interest in any recovery. Thus the concerns underlying the PSLRA for wresting control of the litigation away from the lawyers and making a plaintiff or a group of related plaintiffs the monitors and controllers of the litigation must restrict such an approach, in addition to Rule 23’s requirements of typicality and adequate representation to protect the proposed class members. The Court does not believe that automatic arbitrary restrictions, such as a specific number of Lead Plaintiffs or a specific common connection should be required in all class actions under the PSLRA, but finds that the circumstances of each suit must be considered in determining appropriate restraints on random aggregation by counsel.

128 F. Supp.2d at 431 (denying a motion for lead plaintiff filed by the Milberg Weiss firm because its group was “too large and too unconnected to anything other than their loss and their counsel to serve the purposes of the PSLRA Lead Plaintiff”).

These rulings are consistent with many other district courts that have ruled on this issue. See, e.g., Crawford v. Onyx Software Corp., No. C01-1346L, slip op. at 3 (W.D. Wa., Jan. 10, 2002)(“A loose group of investors whose relationship was forged only in an effort to win appointment as lead plaintiff has no real cohesiveness, is less likely to be in control of the litigation, and is subject to all of the obstacles that normally make group action difficult.”)(attached as Compendium Ex. E); In re Razorfish, Inc. Sec. Litig., 143 F. Supp.2d 304, 308-09 (S.D.N.Y. 2001)(denying a motion by a group of unrelated plaintiffs with no prior relationship seeking lead plaintiff status and characterizing the group as “an artifice cobbled together by cooperating counsel for the obvious purpose of creating a large enough grouping of investors to qualify as ‘lead plaintiff,’ which can then select the equally artificial grouping of counsel as ‘lead counsel’ and its ‘executive committee’”); In re Century Bus. Servs. Sec. Litig., 202 F.R.D. 532, 540 (N.D. Ohio 2001)(adopting the “strong line of precedent” interpreting the PSLRA to preclude unrelated groups of plaintiffs from serving as lead plaintiff and denying motions by unrelated plaintiffs for lead plaintiff status); In re Telxon Corp. Sec. Litig., 67 F. Supp.2d 803, 809-13 (N.D. Ohio 1999)(“[w]ithout some cohesiveness within the group, or something to bind them together as a unit, there is no reason for the individual members of the group to speak and act with a uniform purpose . . . and, because there is no reason for the individual members to act collectively (no structure for decision making, etc), the group as a whole will not engage in monitoring,” defeating the purpose of the PSLRA); Sakhrani v. Brightpoint, Inc., 78 F. Supp.2d 845, 853 (S.D. Ind. 1999)(“[t]his court agrees that selecting as ‘lead plaintiff’ a large group of investors who have the largest aggregate losses but who have nothing in common with one another beyond their investment is not an appropriate interpretation

of the term 'group' in the PSLRA."); In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997)(denying motion to appoint two institutional investors and four individuals as lead plaintiff group because "[t]o allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff To allow lawyers to designate unrelated plaintiffs as a group and aggregate their financial stakes would allow and encourage lawyers to direct the litigation.").

As this Court recently stated: "The burden is on those seeking to aggregate to demonstrate the cohesiveness of their purported 'group' and that failure to provide significant information about the identity of the members other than a conclusory statement of names, transactions for purchase of securities and largest financial interest should result in denial of their application for appointment of lead plaintiff." NCI Bldgs. Sys., slip op. at 14 (citations omitted)(adding that adopting "too loose a definition of 'group' would result in the manipulation and manufacturing of large groups of unrelated investors by attorneys in order to obtain appointment of an uncohesive, disparate, and thus weakened group of Lead Plaintiffs and approval of themselves as Lead Counsel, a lucrative role.")(emphasis added).

The Milberg Weiss Group is a gathering of five, wholly unrelated plaintiffs brought together by the Milberg Weiss firm solely for this litigation.¹⁶ (1) the Amalgamated Bank; (2) the Regents of the University of California; (3) Deutsche Asset Management in Frankfurt, Germany; (4) HBK Investments; and (5) the Central States Pension Fund. Rather than being a "group" as contemplated by the PSLRA, the Milberg Weiss Group is a "melange of unrelated persons." In re Telxon Corp., 67 F.

¹⁶ Conversely, each member of the State Group has had a long-standing relationship among and between themselves preceding and independent of the present litigation. See Baker Declaration, Compendium at Exhibit B, ¶¶7-8.

Supp.2d at 809-13 (holding that the PSLRA requires a “meaningful relationship” between the proposed members of any group for lead plaintiff that preceded the litigation).

Moreover, the Regents of the University of California (“Regents”) actually consists of four separate funds. The Milberg Weiss Group does not even identify all of the funds having losses or the amount of each fund’s loss. There is absolutely no attempt made to show a prior relationship between Regents and any of the other members of the Milberg Weiss Group. There is no evidence that the members of the Milberg Weiss Group communicated with each other prior to the filing of the lead plaintiff motions, or of how the Milberg Weiss Group was formed, who among them will manage the litigation, or how they are going to work as a group on the litigation. Significantly, there is no evidence to refute that the Milberg Weiss Group is a mixed bag of entities that have nothing in common, have had no prior relationship, or that they have anything in common other than that the Milberg Weiss firm has located and gathered these entities to form the Milberg Weiss Group for the sole purpose of this litigation.

III. SUBCLASS LEAD PLAINTIFFS ARE NOT WARRANTED

There are five applicants seeking appointment as lead plaintiff on behalf of purchasers of Enron preferred shares, notes, bonds and “publicly traded debt securities” (the “Niche Applicants”): (1) Pulsifer & Associates - which is seeking to represent a sub-class consisting of purchasers of 7% Exchangeable Notes due July 31, 2002 (the 7% Notes”);¹⁷ (2) JMG Capital Partners, JMG Triton

¹⁷ For unknown and undisclosed reasons, Pulsifer & Associates (which is only claiming \$1 million in losses) also offers Murray Van de Velde, an individual who only purchased 1000 shares of the 7% Notes, as an alternative lead plaintiff “in the event that for any reason Pulsifer is not appointed or is unable to serve as Lead Plaintiff.”

Offshore Fund, TQA Master Fund, and TQA Master Plus Fund - who are collectively seeking to represent a sub-class consisting of purchasers of the following debt securities: (a) 6.95% notes pursuant to a Prospectus Supplement dated 11/24/1998; (b) 7.375% notes pursuant to a Prospectus dated 5/19/1999; (c) exchangeable notes at \$22.25 per note pursuant to a Prospectus dated 8/10/1999; (d) medium term notes pursuant to a Prospectus Supplement dated 5/18/2000; (e) 7.875% notes pursuant to a Prospectus Supplement dated 6/1/2000; and (f) zero coupon convertible senior notes;¹⁸ (3) Staro Asset Management ("Staro") - which is seeking to represent a sub-class consisting of bond purchasers;¹⁹ (4) a conglomeration of five individuals (Henry H. Steiner, Daniel Kaminer, Christine Benoit and Michael & Jennifer Cerone) seeking to represent purchasers of Enron preferred stock;²⁰ and (5) the Archdiocese of Milwaukee Supporting Fund ("AMSF") - which is seeking to represent purchasers of Enron debt securities during the Class Period.²¹

¹⁸ JMG/TQA has only sustained \$5.1 million in aggregate losses among the four funds.

¹⁹ Staro, an investment manager operating through a number of affiliates acquired Enron bonds through share swap transactions. It estimates its losses at \$35 million.

²⁰ This group of unrelated plaintiffs, which only sustained losses of \$189,000, also alleged a state claim of negligent misrepresentation which arises from the same operative facts underlying the federal claims.

²¹ While AMSF's losses are a mere \$70,000, it argues, without any supporting case law, that it should be deemed to have the largest financial interest in light of the charitable purpose of the fund and the financial impact the investment had on the fund. In addition, there have been other motions for lead plaintiff filed by plaintiffs incurring significantly smaller losses than the State Group: (1) the Davidson Group (consisting of a collection of three individual share holders with losses of approximately \$66,000 each); (2) Local 710 Pension (claiming losses of \$2.5 million); (3) Mark E. McKinney (claiming losses of \$99,000); and (4) Private Asset Management (claiming losses of \$10 million with a starting class period date of January 21, 1997, rather than October 19, 1998). In light of the three primary competing institutional investor groups, none of these plaintiffs are presumptively the most adequate plaintiff under the PSLRA.

Each of the Niche Applicants contend, generally, that their interests will not be adequately protected by any of the competing movants because of purported conflicts in proof, damages and the erroneous belief that no other competing movant seeks to represent the particular security purchased by the niche applicant. Each of these contentions is wrong.

The arguments put forth by the Niche Applicants are not new and have been routinely rejected by courts that have addressed the issue of whether purchasers of one security may adequately represent the interests of those who purchased other securities.²² For example, this Court in Waste Management rejected the appointment of a lead plaintiff for an options subclass, noting that “[s]hould conflicts arise subsequently, the Court will entertain another motion . . . that specifically addresses the issue.” 128 F. Supp.2d at 432. Similarly, the court in In re Orbital Sciences Corp. Sec. Litig., 188 F.R.D. 237, 238 (E.D. Va. 1999) held that while option holders’ interests differed from those of shareholders, “they share a mutual interest in having the Court resolve these questions about whether the Defendants made any misstatements or omissions, whether they did so with scienter and whether the price of Orbital’s common stock became artificially inflated as a result.” The Orbital court also noted that the creation of a lead plaintiff for a subclass would result in multiple counsel “needlessly duplicat[ing] the costs of the litigation.” Id. at 239-40. See also Aronson v. McKesson HBOC, Inc., 79 F. Supp.2d 1146, 1151 (N.D. Cal. 1999) (rejecting arguments for separate lead plaintiffs/subclasses based upon different claims, defendants, proof, and remedies, finding that “one lead

²² As noted above, unlike the plaintiffs in cases cited by the Niche Applicants in support of their arguments, the State Group consists of purchasers of both equity and debt securities.

plaintiff can vigorously pursue *all* available causes of action against *all* possible defendants under *all* available legal theories”(emphasis in original); In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 51 (S.D.N.Y. 1998)(refusing to create sub-class of option holders as premature and deferring issue until pre-trial discovery completed); Endo v. Albertine, 147 F.R.D. 184, 167-68 (N.D. Ill. 1993) (holding that purchasers of common stock could pursue fraud claims on behalf of a class of debenture purchasers because “[t]he facts and legal theories . . . will be identical regardless of type of security at issue”); Epstein v. Moore, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,481 at 91,286 (D.N.J. June 3, 1988) (holding that a purchaser of warrants and debentures could pursue claims on behalf of common stock purchasers).

Here, every security purchaser represented by the Niche Applicants is represented by the State Group. The underlying premise of these consolidated actions is the same: defendants artificially inflated the prices of Enron securities by issuing materially false and misleading statements. The State Group’s motion for appointment as lead plaintiff is brought on behalf of all those who purchased or otherwise acquired the securities of Enron. In addition, two members of the State Group (Washington and Alabama), purchased both debt and equity securities of Enron. See State Group’s Initial Memorandum at 2. Further, the complaints filed in this litigation specifically allege each and every federal securities claim under the Securities Act and the Exchange Act that are alleged by the Niche Applicants.²³ In any

²³ The common federal securities claims allege violations of Sections 11, 12(a)(2) and 15 of the Securities Act and Sections 10(b), 20(a) and 20A of the Exchange Act. See State Group’s Initial Memorandum at 3. This Court ruled, in its Consolidation Order, that the actions so consolidated “all arise from a common core of operative facts. They are filed against common defendants. Many of the cases contain identical claims. The legal issues will overlap. Much of the discovery will be common to all cases.” See Consolidation Order at 17.

event, a consolidated complaint will be filed at the appropriate time, which will incorporate all claims to adequately protect the interests of all class members.

Nor do the cases cited by the Niche Applicants support any different result. Unlike the situation in cases cited by Staro, Muzinich & Co., Inc. v. Safety Kleen Corp., C.A. No. 3:00-1145-17 (D.S.C.) (attached to Staro's Motion for Lead Plaintiff as Exhibit 4) and In re Ames Dep't Stores, Inc. Note Litig., 991 F.2d 968 (2d Cir. 1993), the State Group consists of both stock and bond purchasers and the State Group is seeking to represent both stock and bond purchasers. The other cases cited by the Niche Applicants similarly fail to support their positions.

**IV. THIS COURT SHOULD APPROVE THE STATE GROUP'S
CHOICE OF COUNSEL**

The State Group also seeks approval of its selection of Martin D. Chitwood of the law firm of Chitwood & Harley ("Chitwood") and Jay W. Eisenhofer of the law firm of Grant & Eisenhofer, P.A. ("Eisenhofer") as Co-Lead Counsel for the Class and Tom A. Cunningham of the law firm of Cunningham, Darlow, Zook & Chapoton, LLP ("Cunningham") as Liaison Counsel for the Class. As noted in the State Group's Initial Memorandum, Chitwood and Eisenhofer are among the preeminent securities class action law firms, having been appointed as lead or co-lead counsel in numerous important actions pending around the country.²⁴ Similarly, Cunningham has significant experience in securities and other complex litigation. Accordingly, the Court should approve the State Group's selection of Chitwood and Eisenhofer as Co-Lead Counsel for the Class and Cunningham as Liaison

²⁴ See State Group's Initial Memorandum at 13.

Counsel for the Class.

CONCLUSION

In light of the foregoing, the State Group respectfully requests that the Court: (i) appoint the State Group as Lead Plaintiff in these actions; (ii) approve the State Group's selection of Co-Lead Counsel and Liaison Counsel for the Class; and (iii) deny the other competing motions for appointment as Lead Plaintiff.

Dated: January 21, 2002

Respectfully submitted,

CUNNINGHAM, DARLOW, ZOOK &
CHAPOTON, LLP

By: 

Tom A. Cunningham
1700 Chase Tower
600 Travis
Houston, Texas 77002
(713) 255-5500

Proposed Liaison Counsel

CHITWOOD & HARLEY
Martin D. Chitwood
Special Assistant Attorney General
2900 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 873-3900

GRANT & EISENHOFER, P.A.
Jay W. Eisenhofer
1220 N. Market Street
Suite 500
Wilmington, DE 19801-2599
(302) 622-7000

Proposed Lead Counsel

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been served upon all counsel of record via facsimile on this 21st day of January, 2002.

See Fax Cover Sheet of All Counsel of Record



Tom Alan Cunningham

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

_____)	
MARK NEWBY, individually and on)	
behalf of all others similarly situated,)	CIVIL ACTION NO. H-01-3624
)	(Securities Suits)
	Plaintiff,)	
vs.)	
)	<u>CLASS ACTION</u>
ENRON CORPORATION, et al.,)	
	Defendants.)	
_____)	

COMPENDIUM OF EXHIBITS TO THE
MEMORANDUM OF THE STATE RETIREMENT SYSTEMS GROUP
IN OPPOSITION TO COMPETING MOTIONS
FOR APPOINTMENT AS LEAD PLAINTIFF

CUNNINGHAM, DARLOW,
ZOOK & CHAPOTON, LLP
Tom A. Cunningham
1700 Chase Tower
600 Travis
Houston, Texas 77002
(713) 255-5500

Proposed Liaison Counsel

CHITWOOD & HARLEY
Martin D. Chitwood
Special Assistant Attorney General
2900 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 873-3900

GRANT & EISENHOFER, P.A.
Jay W. Eisenhofer
1220 N. Market Street
Suite 500
Wilmington, DE 19801-2599
(302) 622-7000

Proposed Lead Counsel

Exhibit A

MOVANTS	LOSSES	CLASS PERIOD	LEAD COUNSEL	CO-LIAISON COUNSEL
Amalgamated Bank, The Regents of the University of California, Deutsche Asset Management, HBK Investments, and the Central States Pension Fund	Amalgamated Bank - \$17 million Regent of U of C - \$144 million Deutsche Asset - \$61 million HBK Investments - \$13 million Central State Pension - \$14 million Total - \$244 million	Purchasers of Enron Securities from 10/19/98 through 11/27/01	Milberg Weiss Bershad Hynes & Lerach, LLP Lovell & Stewart, LLP	Hoeffner Bilek & Eidman Schwartz, Junell, Campbell & Oathout, LLP
Archdiocese of Milwaukee Supporting Fund, Inc.	\$70,000.00	On 6/6/2000 \$55,000 in Enron notes purchased (7.7875% due June 15, 2003 at \$99.806)	Scott & Scott, LLC	Hoeffner & Bilek, LLP
Victor Ronald Frangione Anthony P. Davidson and Seymour Nebel (The Davidson Group)	Frangione Davidson - \$63,250.00 Nebel - \$66,793.50	Securities purchased between 01/18/00 through 10/17/01	Zwerling, Schachter & Zwerling, LLP	Federman & Sherwood
Florida State Board of Administration	Common Stock - \$325 million Bonds \$9 million	10/18/98 through 11/27/01	Berman DeValerio Pease Tabacco Burt & Pucillo Entwisile & Cappucci, LLP	Yetter & Warden, LLP
JMG/TQA	\$5.1 million	Enron debt securities purchased during the class period 10/19/98 through 11/27/01	Gold Bennett Cera & Sidener, LLP	

MOVANTS	LOSSES	CLASS PERIOD	LEAD COUNSEL	CO-LIAISON COUNSEL
Local 710 Pension	\$2.5 million	Securities purchased 10/19/98 through 11/07/01	Futerman & Howard, CHTD Kirby McInerney & Squire, LLP	Connelly Baker Wotring & Jackson, LLP Asher Gittler Greenfield & D'Alba, LTD Russell N. Luplow Law Offices
Mark E. McKinney	\$99,000.00	Purchasers of common stock from 01/18/01 through 11/23/01	Finkelstein & Krinsk	None
New York City Pension Fund	\$109 million	2.4 million in common stock and \$30 million in bonds from 10/19/98 through 11/27/01	Hill Parker & Roberson, LLP Lowey Dannenberg Bemporad & Selinger, P.C. Lief Cabraser Heimann & Bernstein, LLP	Leslie A. Conason, Esq. for The City of New York Law Department
Private Asset Management	\$10 million	Securities purchased 01/21/97 through 11/27/01	Schiffin & Barroway, LLP	Sydow Kormanick & Eckerson
Henry H. Steiner, Daniel Kaminer, Christine Benoit and Michael and Jennifer Cerone (Proposed Preferred Purchasers)	Named Plaintiffs \$189,264 Other Purchasers \$814,803.00	Federal claim class purchased preferred stock 11/28/98 through 11/28/01 and negligent misrep class purchased 1/21/97 through 11/27/98.	Wolf Haldenstein Adler Freeman & Hertz, LLP	McGehee & Pianelli, LLP
Pulsifer & Associates	\$1 million	All purchasers of 7% exchangeable notes due by July 31, 2002. Notes purchased during the class	Shapiro, Haber & Urmy, LLP Wolf Popper, LLP	Beirne Maynard & Parsons, LLP

MOVANTS	LOSSES	CLASS PERIOD	LEAD COUNSEL	CO-LIAISON COUNSEL
State Retirement Systems Group	\$330.7 million	Common stock and bonds purchased during the Class period from 10/19/98 through 11/07/01.	Chitwood & Harley Grant & Eisenhofer, PA	Cunningham, Darlow, Zook & Chapoton, LLP
Staro Asset Management, LLC	\$38 million	For bonds purchased from 12/21/98 through 11/30/01	Sherrie R. Savett Arthur Stock Carole Broderick Berger & Montague	Joseph A. McDermott, III

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

_____)	
MARK NEWBY, individually and on)	
behalf of all others similarly situated,)	CIVIL ACTION NO. H-01-3624
)	(Securities Suits)
	Plaintiff,)	
vs.)	
)	<u>CLASS ACTION</u>
ENRON CORP., et al.,)	
	Defendants.)	
_____)	

DECLARATION OF THURBERT E. BAKER IN SUPPORT OF THE MOTION OF THE
STATE RETIREMENT SYSTEMS GROUP FOR THE APPOINTMENT OF LEAD
PLAINTIFF AND FOR APPROVAL OF ITS SELECTION OF COUNSEL

I, Thurbert E. Baker, hereby declare as follows:

1. I am the Attorney General of the State of Georgia and the legal advisor for the Teachers Retirement System of Georgia and the Employees' Retirement System of Georgia (collectively, "Georgia"). Georgia, together with pension funds serving the states of Ohio and Washington, has sought to be appointed lead plaintiff in this matter (the "Litigation"). I am sui juris and make this declaration based upon personal knowledge, unless otherwise stated.
2. I am familiar with the motions made by the various other individuals and entities seeking appointment as lead plaintiff in this Litigation and the provisions of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). For the reasons set forth herein, I believe the State Retirement Systems Group (the "State Group") is exactly the sort of sophisticated and motivated lead plaintiff Congress envisioned when it passed the PSLRA.
3. The State Group's losses on transactions in Enron securities during the Class Period are

estimated at approximately \$330.7 million (including approximately \$47.7 million in losses suffered by proposed Advisory Plaintiff the Retirement Systems of Alabama), as set forth in the Memorandum of Law in Support of Motion of the State Retirement Systems Group for the Appointment of Lead Plaintiff and for Approval of its Selection of Counsel at 2, 7-8.

4. Unlike many of the other "groups" seeking lead plaintiff appointment, the members of the State Group and their representatives enjoy long-standing relationships that existed well before this Litigation and will continue well after its termination. I advise Georgia on this Litigation and all other legal matters. Similarly, the retirement systems of Ohio and Washington are advised by their Attorneys General: the Honorable Betty D. Montgomery, and the Honorable Christine O. Gregoire, respectively. We each have committed our own time -- and that of several attorneys on our staffs -- to this matter. My office has conferred with the offices of Attorneys General Montgomery and Gregoire and reached agreement concerning the statements made in this Declaration.
5. General Montgomery, General Gregoire, and I belong to the National Association of Attorneys General ("NAAG"), an organization that includes the Attorneys General of all fifty states. NAAG is devoted to facilitating interaction and cooperation among Attorneys General in order to respond effectively to emerging state and federal issues. One of the organization's goals is to promote cooperation on interstate legal matters to foster a more responsive and efficient legal system for state citizens. To these ends, NAAG has established a number of committees and working groups to address issues of particular significance, such as the Civil Rights Committee (of which I am a Co-Convener), the Consumer Protection Committee (of which General Montgomery is the Convener), and the Internet Committee (of which General Gregoire is a

Co-Convener). In fact, we organized the State Group as a result of a NAAG conference call on Enron, chaired by General Montgomery, in which my staff reported on Georgia's interest in seeking lead plaintiff status.

6. Although Georgia, Ohio, and Washington have moved for appointment as lead plaintiff, there is a high level of interest among the entire NAAG membership in the outcome of this Litigation because of the magnitude of this matter and its effect on each state's pension funds. NAAG has been involved since the case's inception, circulating materials relating to the case and holding periodic conference calls to discuss this Litigation, the Enron bankruptcy proceeding, and various state and federal investigations. In addition, members of my staff communicate frequently with other NAAG members to keep them apprised of the progress of this Litigation.
7. As the Court might imagine, this is not the first litigation our three states have worked together to prosecute. Among these jointly-prosecuted cases, the best-known may be the states' coordinated effort in litigating against the tobacco companies. As part of that effort, General Gregoire took a lead role in the negotiations that led to the Master Settlement Agreement. Georgia and Ohio also participated in the negotiations, as well as the follow-up phase that led to the National Tobacco Growers Settlement Trust, a private trust for tobacco producers that was contemplated as part of the Master Settlement Agreement.
8. In addition to the tobacco litigation, our three states have successfully teamed up in dozens of complex cases over the past few years, many of which are listed in Exhibit A hereto.
9. Consistent with the ongoing working relationships among the Attorneys General's offices and the successes our states have enjoyed in joint litigations in the past, Georgia, Ohio, and Washington have joined together to prosecute this Litigation. In addition, the Retirement

Systems of Alabama has agreed to serve in an advisory role. After extensive discussions, the State Group reached an agreement regarding the conduct of this Litigation, which, among other things (1) governs the retention of private counsel, (2) limits the payment of fees to private counsel, (3) establishes the decision-making protocol for the Litigation, and (4) outlines an apparatus for monitoring events that may impact the outcome of this Litigation. Each of these provisions has been designed to prosecute this Litigation as thoroughly and efficiently as possible and to maximize the Class's recovery in the process.

10. Since our decision to seek appointment as lead plaintiff in this Litigation, General Montgomery, General Gregoire, and I have held numerous telephone conferences to discuss recent developments and our litigation strategy. Moreover, members of our legal staffs typically communicate with each other on a daily basis about matters related to this Litigation. The cooperation among our three offices over the years and our history of success in joint litigations has fostered what I consider to be strong professional relationships among the Attorneys General and a great respect for each other that facilitates our working relationship. I believe this preceding relationship will prove invaluable in prosecuting this Litigation successfully.
11. For all the foregoing reasons, I believe that the State Group should be appointed lead plaintiff in this Litigation. The State Group is uniquely situated to provide the Class with the strongest and most efficient representation, bringing with it the legal and investment sophistication of four states with a strong track record of working together successfully.

I declare under penalty of perjury that the foregoing is true and correct. Executed this
18th day of January, 2002 in Atlanta, Georgia.


HONORABLE THURBERT E. BAKER

01/21/02 15:42 FAX 1 302 622 7100

GRANT&EISENHOFER
4048764476

IT-087 P.07/10 F-308 013

21-Jan-02 03:07pm From-CHITWOOD & HA

EXHIBIT A

Recent Actions In Which Georgia, Ohio, and/or Washington Have Collaborated
 (note: several other states participated in many of these actions)

Case Name	Brief Summary	Participating State	Date Opened
American Basketball League (ABL)	Multi-state investigation of allegations made against the NBA in connection with the demise of the ABL, a two-year old women's league	OH, WA	1/21/99
Exxon/Mobil merger	Joint FTC and state review of the competitive effects of the proposed acquisition of Mobil by Exxon Corp.	OH, WA	1/12/99
Mylan Pharmaceuticals	With the FTC, a suit against Mylan, Profarmaco, Gyma, Cambrex and SST seeking equitable and injunctive relief as well as damages on behalf of consumers and state agencies/bureaus	OH, WA	12/1/97
Payment Systems Working Group (PSWG)	NAAG working group that arose out of a multi-state settlement of a state lawsuit to enjoin Visa and Mastercard from carrying out a planned debit card joint venture.	OH, WA	1/1/87
SC/ECI Funeral Home/Cemetery merger review	Multi-state merger investigation with the FTC reviewing the competitive effects of the proposed acquisition of two of the largest funeral home/cemetery companies in the U.S.	GA, OH	10/16/98
Toys "R" Us Litigation	Anti-trust action filed on 11/17/98 against the nation's largest toy retailer, and four toy manufacturers- Mattel, Hasbro, Tyco, and Little Tykes. The defendants are alleged to have conspired to eliminate competition from warehouse clubs.	GA, OH, WA	10/1/97
USA Waste/Waste Management merger	Along with the Dept. of Justice, an investigation of the competitive effects of the merger of the two largest waste hauling/landfill operators in the country.	OH, WA	3/12/96
Vitamins Price Fixing	Investigation relating to vitamin price-fixing	GA, OH, WA	1/10/00
Bank One/First USA	Bank Privacy issues	OH, WA	7/99
Capital One	Bank Privacy issues	OH, WA	7/99
Citibank	Bank Privacy issues	OH, WA	7/99
MBNA	Bank Privacy issues	OH, WA	7/99

Case Name	Brief Summary	Participating State	Date Opened
CVS	Allegations of fully billing Medicaid and other federally paid health care programs for partially filled prescriptions without a subsequent crediting to these programs, also including a failure to credit for prescriptions that were not picked up at all.	GA, OH	3/1/99
Drug Manufacturers	This case is the result of a qui tam action involving alleged manipulations of drug prices by numerous manufacturers filed under the federal False Claims Act.	OH, WA	10/30/98
Medaphis	Upcoding emergency room physician codes for Medicaid and other federally paid health care programs.	GA, OH, WA	10/30/98
Nine West	Antitrust action alleging that the manufacturer conspired to raise retail prices of women's shoes	GA, OH, WA	3/00
State of Mo., et al v. American Cyanamid	Antitrust action involving conspiracy to raise prices of agricultural chemical products	GA, OH, WA	1/97
State of Tex., et al. v. Zeneca, Inc.	Antitrust claim for conspiracy to raise prices of agricultural chemical products	GA, OH, WA	6/97
Walgreens	Settlement of Medicaid fraud action involving prescription short counts	OH, WA	10/97
United States v. Columbia HCA	Settlement of civil and criminal Medicaid fraud actions	GA, OH, WA	10/97
In re Bayer	Multistate settlement regarding drug pricing to Medicaid programs	GA, OH, WA	9/00
Bridgestone/ Firestone	Consumer protection action involving misrepresentations regarding particular tires that had high rates of separation	GA, OH, WA	3/01

In addition, Georgia, Ohio, and/or Washington have joined together as an Amicus Curiae in the following matters:

Case Name	Brief Summary	Participating State	Date Opened
Arkansas v. Farm Credit Services	Federally chartered banking entity is not exempt from state franchise and sales taxes.	GA, OH, WA	10/1/96
Casey v. Blissett	Caps on fees under the Prison Litigation Reform Act apply retroactively.	GA, OH	10/1/98
City of Chicago v. Morales	Chicago criminal gang loitering ordinance permitting police dispersal orders where police reasonably believe a criminal gang member is among those loitering is unconstitutional.	GA, OH	10/1/97
City of West Covina v. Perkins	Notice of search pursuant to a warrant and names of officers involved is all that is required by due process regarding retrieval of seized property.	OH, WA	10/1/97
College Savings v. Florida Prepaid	Congress lacks power under the 14 th Amendment to abrogate 11 th Amendment immunity under the Lanham Act.	OH, WA	3/1/99
Hudson v. U.S.	U.S. Constitution's double jeopardy clause permits both civil sanctions and criminal punishment for same incident.	GA, OH, WA	10/1/97
Johnson v. Haddix	Caps on fees under the Prison Litigation Reform Act apply retroactively.	GA, OH, WA	10/1/98
Maryland v. Wilson	Law enforcement officers can require a passenger to exit the car during the course of a legitimate traffic stop.	OH, WA	10/1/95
Nixon v. Shrink Missouri Government PAC	\$1075 limit placed on contributions to candidates in state and local races is appropriate under Buckley v. Valeo.	OH, WA	10/1/98
North Carolina v. Jackson	"Free to leave" test for purposes of the Fourth Amendment does not apply to the definition of custody under the Fifth Amendment.	OH, WA	10/1/97
Pennsylvania Dept. of Corrections v. Yaskey	The ADA does not apply to inmates of correctional institutions.	GA, OH	10/1/97
State Board of Equalization v. SPT	Congress lacks power under the 14 th Amendment to abrogate 11 th Amendment immunity under the 4-R Act.	OH, WA	10/1/97
State of New Mexico v. Reed	There is no "duress" exception to the Extradition Clause.	OH, WA	10/1/97

Exhibit C

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

IN RE NCI BUILDING SYSTEMS,
INC. SECURITIES LITIGATION

MASTER FILE NO.
H-01-1280

CHAVY WISE, on behalf of
himself and all others similarly
situated.

Plaintiff

vs.

CIVIL ACTION NO. H-01 1280

CONSOLIDATED WITH

NCI BUILDING SYSTEMS, INC.,
ALBERT R. GINN, JOHNNIE SCHULTE,
JR., ROBERT J. MEDLOCK, BRUNETTE
W. MADDOX, AND DONNIE R.
HUMPHRIES.

Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

ROBERT STANLEY, on behalf of
himself and all others similarly
situated,

Plaintiff,

vs.

CIVIL ACTION NO. H-01-1281

NCI BUILDING SYSTEMS, INC.,
JOHNNIE SCHULTE, JR., AND ROBERT
MEDLOCK,

Defendants

LILIANE RICHMAN IRA, on behalf
of itself and all others
similarly situated,

Plaintiff,

vs.

CIVIL ACTION NO. H-01-1304

NCI BUILDING SYSTEMS, INC.,
JOHNNIE SCHULTE, JR., AND ROBERT
MEDLOCK,

Defendants

CARL A. KOPPLER, on behalf of
himself and all others similarly
situated.

Plaintiff,

VS.

CIVIL ACTION NO. H-01-1319

NCI BUILDING SYSTEMS, INC.,
A.R. GINN, JOHNIE SCHULTE, JR.,
DONNIE R. HUMPHRIES, ROBERT J.
MEDLOCK, AND KENNETH MADDOX,

Defendants

MICHELLE COLOMBUSKI, on behalf
of herself and all others
similarly situated,

VS.

CIVIL ACTION NO. H-01-1331

NCI BUILDING SYSTEMS, INC.,
ALBERT R. GINN, JOHNIE SCHULTE,
JR., ROBERT J. MEDLOCK, DENNETH
W. MADDOX, AND DONNIE R.
HUMPHRIES,

Defendants

TOM MINNICH, on behalf of
himself and all others similarly
situated,

VS.

CIVIL ACTION NO. H-01-1340

NCI BUILDING SYSTEMS, INC.,
JOHNIE SCHULTE, JR., AND ROBERT
J. MEDLOCK,

Defendants

12/31/2001 11:09 AM 113 441 8444

TARA FOUTS, on behalf of herself
and all others similarly
situated,

VS.

CIVIL ACTION NO. E-01-1437

NCI BUILDING SYSTEMS, INC.,
JOHNIE SCHULTE, JR., AND ROBERT
J. MEDLOCK,

Defendants

PETER DAILY, on behalf of himself
and all others similarly
situated,

VS.

CIVIL ACTION NO. E-01-1484

NCI BUILDING SYSTEMS, INC.,
ALBERT R. GINN, JOHNIE SCHULTE,
JR., ROBERT J. MEDLOCK, DENNETH
W. MADDOX, AND DONNIE R.
HUMPHRIES,

Defendants

DARLENE LYNDES, on behalf of
herself and all others similarly
situated,

VS.

CIVIL ACTION NO. E-01-1593

NCI BUILDING SYSTEMS, INC.,
ALBERT R. GINN, JOHNIE SCHULTE,
JR., ROBERT J. MEDLOCK, DENNETH
W. MADDOX, AND DONNIE R.
HUMPHRIES,

Defendants

PAUL SALMORE, on behalf of
himself and all others similarly
situated,

VS.

CIVIL ACTION NO. E-01-1875

NCI BUILDING SYSTEMS, INC.,
JOHNIE SCHULTE, JR., AND ROBERT
J. MEDLOCK,

Defendants

ORDER

Pending before the Court in the above referenced, consolidated, proposed class action on behalf of investors who purchased securities of Defendant NCI Building Systems, Inc. ("NCI") from August 25, 1999 through April 12, 2001 (the "Class Period"), alleging violations of federal securities laws, are (1) Joseph and Delores Young ("the Youngs") and Craig Doerge (IRA)'s ("Doerge's") unopposed motion (Instrument #5) for appointment of themselves as Lead Plaintiffs, and for approval of Bernstein, Liebhard & Lifshitz, L.L.P. and Milberg Weiss Hynes Berstad & Lerach L.L.P. as Co-Lead Counsel, and of Hoeffner, Bilek & Eidman, L.L.P. as Liaison Counsel, pursuant to Section 21D(a)(3)(B)(v) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(3)(B)(v), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"); and (2) Liliane Richman's ("Richman's") motion to appoint her Lead Plaintiff and the firm of Pomerantz Haudek Black & Gross LLP as Lead Counsel, and Burt Barr Havins & O'Dea, LLP as Liaison Counsel (Instrument #7 in H-01-1304). In light of the responses filed by counsel for various Plaintiffs to the Court's last order, it appears that these individual Movants are the only investors seeking to be appointed with their law firms as Lead Plaintiff(s), Lead Counsel and Liaison counsel, and that no institutional investor has come forward.

Applicable Law

Under 15 U.S.C. § 78u-4(a)(3)(B)(i) of the PSLRA, which amended the Securities Exchange Act of 1934 by adding Section 21D,

15 U.S.C. § 78u-4, in class actions brought under federal securities laws, "the court shall consider any motion made by a purported class member" in determining the adequacy of a proposed lead plaintiff to oversee the class action. Furthermore, "the presumption [of the adequacy of the plaintiff with the largest financial interest in the outcome of the litigation] described in [15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)] may be rebutted only upon proof by a member of the purported plaintiff class that the proposed individual or entity will not fairly and adequately protect the interests of the class or that he/she/it is subject to unique defenses that render [him/her/it] incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

Based on the express language of the statute, courts have concluded that defendants lack standing to challenge the adequacy or typicality of the proposed lead plaintiffs at this early stage of the litigation. See, e.g., Takeda v. Turbodyne Technologies, Inc., 67 F. Supp.2d 1129, 1138 (C.D. Cal. 1999); Gluck v. Cellstar Corp., 575 F. Supp. 542, 550 (N.D. Tex. 1997); Greebel v. EIP Software, Inc., 938 F. Supp. 57, 60-61 (D. Mass. 1996); Pischler

The FSLRA does not delineate a procedure for determining the "largest financial interest" among the proposed class members. A four-factor inquiry has been developed by the district court in Lax v. First Merchants Acceptance Corp., 1997 WL 462036, *5 (N.D. Ill. Aug. 17, 1997), and recognized in In re Classen Corp. Securities Litigation, 3 F. Supp.2d 286, 295 (E.D.N.Y. 1998), and in In re Visa Securities Litigation, 188 F.R.D. 206, 217 (D.N.J. 1999). The four factors relevant to the calculation are (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs. Id.

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v. AmSouth Bancorporation, 1997 WL 118429, *2 (M.D. Fla. 1997);
Zuckerman v. Forever Health Corp., 1997 WL 314422, *2 (W.D. Tex.
 1997). The Court observes that while defendants lack standing to
 challenge plaintiffs' motions to appoint certain among them as Lead
 Plaintiff, defendants do have the right subsequently in a class
 certification hearing to object to those Plaintiffs as typical of
 and adequate representatives of the proposed class. In re Nicc
Systems Securities Litig., 188 F.R.D. 206, 228 n.11 (D.N.J. 1999);
Zuckerman, 1997 WL 314422 at *2; Gluck, 975 F. Supp. at 947;
Grechaj, 939 F. Supp. at 60-61; In re Centalen Securities Litig.,
 1996 WL 515203 (S.D. Aug. 27, 1996). Furthermore, this Court may
sua sponte evaluate the adequacy of any proposed person or group of
 persons as Lead Plaintiff(s). Takeda, 67 F. Supp. at 1130;
Sakhrani, 75 F. Supp.2d at 954 (court has independent
 responsibility to consider appointment of lead counsel). It is
 clear that "[t]he PSLRA calls for greater supervision by the Court
 in the selection of which plaintiffs will control the litigation."
In re Oxford Health Plans, Inc. Securities Litigation, 182 F.R.D.
 42, 45 (S.D.N.Y. 1999).

Under the relevant portions of 15 U.S.C. § 78u-
 4(a)(3)(A)(i) and (ii)(I), after national notice² of the pending

² Under § 210 of the Exchange Act, 15 U.S.C. § 78u-
 4(a)(3)(A)(i), a plaintiff seeking to represent the class

shall cause to be published in a widely-
 circulated national business-oriented
 publication or wire service, a notice advising
 members of the purported class--
 (I) of the pendency of the action, the
 claims asserted therein, and the purported

proposed class action by a plaintiff within twenty days of plaintiff's filing of a class complaint, any member of the putative class may file within sixty days of the publishing of that notice a motion to serve as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A). If more than one suit is filed with substantially the same claims, only the plaintiff in the first-filed action need publish the notice. 15 U.S.C. § 78u-4(a)(3)(A)(ii).

After consolidation of parallel actions, under the PSLRA a district court

shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

Furthermore, Section 21(d)(3)(B) of the amended Securities

class period;

(iii) that, not later than 90 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

Thus being first to file a complaint is no longer a guarantee of the lead plaintiff position. Section 21(d)(3)(B)(i), 15 U.S.C. § 78u-4(a)(3)(B)(i) provides.

Not later than 90 days after the date on which a notice is published . . . the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff 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 member

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Exchange Act of 1934 requires the Court to adopt a rebuttable presumption that

the most adequate plaintiff in any private action arising under this chapter is the person or group of 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). The statutory presumption of appointment as lead plaintiff, as noted, may only be rebutted by another plaintiff through evidence that the lead plaintiff "will not fairly and adequately protect the interests of the class" or is "subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

Under Section 217(a)(3)(B) of the Exchange Act, therefore, the lead plaintiff or plaintiffs must possess not only the largest financial interest in the outcome of the litigation, but must also meet the requirements of Federal Rule of Civil Procedure 23. Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are met:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and

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adequately protect the interests of the class.

Typicality is achieved where the named plaintiffs' claims arise "from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory." London v. Sudarman, 123 F.R.D. 547, 556 (N.D. Tex. 1988). Typicality and adequacy are directly relevant to the choice of the class representative and lead plaintiff in securities fraud cases. See, e.g., In re Oxford Health Plans, Inc. Securities Litig., 182 F.R.D. 42, 49 (S.D.N.Y. 1998); Gluck, 976 F. Supp. at 545; Fischler, 1997 WL 118429 *2. Although the inquiry at this stage of the litigation in determining the lead plaintiff is not as searching as the one triggered by a subsequent motion for class certification, the proposed lead plaintiff must make at least a preliminary showing that it has claims that are typical of those of the putative class and the capacity to provide adequate representation for those class members. Switzenbaum v. Orbital Sciences Corp. ("Orbital I"), No. 99-197, slip op. at *10 (S.D. Va. May 21, 1999) (Compendium (Ex. F), citing Chill v. Green Tree, 181 F.R.D. 398, 407 n.8 (D. Minn. 1998), and Lax v. Silver Merchants Acceptance Corp., 1997 WL 461036, *6 (N.D. Ill. Aug. 11, 1997).

Under the PSLRA, the lead plaintiff, subject to court approval, is to select and retain lead counsel. 15 U.S.C. § 78u-4(a)(3)(A)(v). The Court should not disturb the lead plaintiff's choice of counsel unless it is necessary to "protect the interests of the [plaintiff] class." 15 U.S.C. § 78u-4(a)(3)(A)(iii)(II)(aa).

In passing the PSLRA in December 1995, Congress was

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reacting to significant evidence of abusive practices and manipulation by class action lawyers of their clients in private securities lawsuits. H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 31 (1995), reprinted in 1995 U.S.C.A.A.N. 730 at 731 ("Conf. Report") (Ex. A to #38). One response by Congress was the requirement that the Court appoint as "lead plaintiff" in each securities class action the shareholder, preferably an institutional investor,³ 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. 15 U.S.C. § 78u-4(a)(3)(B); Conf. Report No. 104-369 at 712-34. The Conference Report, at 34, explained, "Throughout the process, it is clear that the plaintiff class has difficulty exercising any meaningful direction over the case brought on its behalf Because class counsel's fees and expenses sometimes amount to one-third or more of the recovery, class counsel frequently has a significantly greater interest in the litigation than any individual member of the class." Thus one goal of the PSLRA is to have the plaintiff class, represented by a member with a substantial financial interest in the recovery as incentive, monitor the litigation to prevent its being "lawyer-driven."

In the instant consolidated action, procedural requirements have been fulfilled by Movants and counsel all appear

³ Conference Report No. 104-67 at 34-35; Sen. Rep. No. 104-94 at 10-11, reprinted in 1995 U.S.C.A.A.N. 679, 689-90. Shelton v. Brightpoint, 78 F. Supp.2d 845, 850 (S.D. Ind. 1999); Gluck v. CellStar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997); In re Enron Co. Securities Litig., 186 F.R.D. 214, 218 (D.D.C. 1999) (appendix).

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qualified to serve the roles requested. Richman reports losses of approximately \$2,121. Aggregated, the Youngs (a married couple) and Doerge's losses are \$17,107.50. The issues here appear to whether the Youngs and Doerge's losses ought to be aggregated and they be allowed to proceed together as lead plaintiffs because they have the largest financial interest in the relief sought by the class and, if so, whether appointment of their two law firms to serve as lead counsel is appropriate.

Courts have diverged in deciding whether the losses of individual plaintiffs may be aggregated into a group loss to create a lead plaintiff group with the "greatest financial interest" in the outcome of the litigation. Aranson v. McKesson HCO, Inc., 79 F. Supp. 1146, 1152-53 (N.D. Cal 1988) (and cases cited therein). Some courts have read literally the statute dealing with determining who is the most adequate plaintiff, which employs the phrase, "the person or group of persons" that meet the designated criteria. 15 U.S.C. § 78u-4(a) (3) (B) (1)(i) (I). Id. at 1153 & n.2. citing as published opinions of courts allowing aggregation of unrelated plaintiffs into a lead plaintiff group. In re Glaxo Corp., 3 F. Supp.2d 286 (E.D.N.Y. 1998); Mylan v. Orbital, 187 F.R.D. 246 (E.D. Va. 1999); In re Milestone Scientific, 193 F.R.D. 404 (D.N.J. 1998); In re Candace, 182 F.R.D. 144 (D.N.J. 1998); In re Oxford, 182 F.R.D. 43; Gill v. Green Tree Financial, 181 F.R.D. 398 (U. Minn. 1998); Gluck, 976 F. Supp. 542; In re Donkenny, Inc. Securities Litig., 171 F.R.D. 166 (S.D.N.Y. 1997); Grubel, 939 F. Supp. 57. See also Yousefi v. Lockheed Martin

Corp., 70 F. Supp.2d 1061, 1067-68 (C.D. Cal. 1998) (recognizing tension between RSRA language permitting aggregation of claims and its emphatic purpose of placing control of securities class actions in hands of a small and finite number of plaintiffs, but finding that it contemplates the aggregation of unrelated plaintiffs as a permissible, if suboptimal, result).

Other judges have allowed aggregation where necessary to represent varying class periods or to guarantee effective control and supervision of the lawyers. Aronson, 79 F. Supp. at 1153, citing Wanderhold v. Cylink Corp., 186 F.R.D. 577, 585-86 (N.D. Cal. 1999). See also In re Baan Co. Sec. Litig., 186 F.R.D. 214, 224 (D.D.C. 1999) ("a court generally should only approve a group that is small enough to be capable of effectively managing the litigation and the lawyers").

Some courts have rejected aggregation of "unrelated" plaintiffs and permit a group lead Plaintiff only where it involves "a small number of members that share such an identity of characteristics, distinct from those of almost all other class members, that they can almost be seen as being the same person." Aronson, 79 F. Supp. at 1153-54, citing In re Talxon Corp. Securities Litig., 67 F. Supp.2d 903, 909-13 (N.D. Ohio 1999) (contrasting a "group" with a "melange of unrelated persons"). Aronson characterizes this approach as defining a "group" under the RSRA as having "a meaningful relationship preceding the litigation, and . . . united by more than the mere happenstance of having bought some securities. The classic example of such a

restrictive group would be a partnership, which has no separate legal identity, but shares in both assets and liabilities. Other such groups might be the various subsidiaries of a corporation or members of a family." Id. at 1153-54. The Aranson court, faced with groups of plaintiffs as large as 4,000 competing for lead plaintiff, adopted this strict approach. Id. at 1154. Aranson emphasizes that such a narrow view accords with several dictionary definitions of the word "group" and is consistent with the legislative intent to increase investors'/clients' control over appointed counsel, since any ambiguity in the statute should be resolved by a determination of the drafters' intent." See also In re Network Associates, 75 F. Supp.2d at 1026 (a group of plaintiffs should be appointed as lead plaintiff only where they can effectively control the litigation; aggregations of unaffiliated persons or entities whose only connection is the litigation do not satisfy this requirement); In re Donkany Securities Litigation, 171 F.R.D. 155, 157-58 (S.D.N.Y. 1997) (denied plaintiff's motion to appoint two institutional investors and four individuals as lead plaintiffs group because "[t]o allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff To allow lawyers to designate unrelated plaintiffs as a 'group' and aggregate their financial stakes would allow and encourage lawyers to direct the litigation."); Sakhrani, 78 F. Supp. 2d at 853 (the ESRA gives court discretion to appoint a single plaintiff or a small group with effective oversight of class counsel and with a greater

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connection than their common losing investment as lead counsel, based on facts of particular case).

The burden is on those seeking to aggregate to demonstrate the cohesiveness of their purported "group" and that failure to provide significant information about the identity of the members other than a conclusory statement of names, transactions for purchase of securities, and largest financial interest should result in denial of their application for appointment as Lead Plaintiff. Switzenbaum v. Orbital Sciences Corp. ("Orbital I"), No. 99-197, slip op. at 10-11 (E.D. Va. May 21, 1999) (Compendium (#Ex. F)); Ravens v. Iffikar, 174 F.R.D. 551, 554 (N.D. Cal. 1997). Furthermore, the SEC in an amicus curiae brief filed in the Orbital litigation, Compendium Ex. G at p. 14, made clear that a group of plaintiffs should be quite small: "The Commission believes that ordinarily, in order to ensure adequate oversight, 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." Id.

It appears to this Court that too loose a definition of "group" would result in the manipulation and manufacturing of large groups of unrelated investors by attorneys in order to obtain appointment of an uncohesive, disparate, and thus weakened, group of lead plaintiffs and approval of themselves as lead counsel, a lucrative role. Sakhrani, 78 F. Supp.2d at 551-52 (and cases cited

therein): In re Network Associates, 76 F. Supp. at 1022.

After a careful review of the case law, this Court finds that the strictest approach, requiring one Lead Plaintiff or at maximum a small group with the largest financial interest in the outcome of the litigation and, if more than one, a pre-litigation relationship based on more than their losing investments, satisfies the terms of the PSIAA and serves the purpose behind its enactment.

It is evident that either the Youngs or Doerge, or both, have greater losses than Richman. Nevertheless despite substantial opportunity and the express concern of the Court about identifying the most adequate plaintiff, the Youngs as a unit, since they are related, and Doerge have not met their burden of proof by identifying any prior relationship between them, nor have they indicated specifically what sum the Youngs lost and what sum Doerge lost. Furthermore, given the relatively small amounts of money lost by named Plaintiffs in this action in comparison with those lost by most other securities fraud litigants, the Court finds questionable the need for more than one firm to serve as Lead Counsel. Accordingly, the Court

ORDERS that Richman's motion is DENIED and the Youngs and Doerge's motion is GRANTED to the following extent. The Youngs and Doerge shall within five days file a statement with the Court, to be served on all parties, as to the sums lost by each. Whichever's loss is greater shall serve as Lead Plaintiff(s). As indicated, the Youngs qualify as a related group and may proceed as co-lead plaintiffs if their loss is greater than that of Doerge. Moreover,

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whichever is then designated Lead Plaintiff(s), they or he shall designate one law firm, which shall serve as Lead Counsel and one firm as Liaison Counsel. Moreover, the Court

ORDERS that the firm designated as Lead Counsel shall file an amended complaint on behalf of the class by February 1, 2002. Defendants shall file a responsive pleading, which they have previously indicated will be a motion to dismiss, by March 15, 2002. Plaintiffs shall have until April 30, 2002 to respond.

SIGNED at Houston, Texas, this 22nd day of December, 2001.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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Exhibit D



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U.S. Securities and Exchange Commission

Legal Brief:
Orbital Sciences Corporation, et al.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ROBIN SWITZENBAUM, individually
and on behalf of all others
similarly situated,
Plaintiff,
v.
ORBITAL SCIENCES CORPORATION,
DAVID R. THOMPSON, and
JEFFREY V. PIRONE,
Defendants.

MEMORANDUM OF THE SECURITIES AND
EXCHANGE COMMISSION, AMICUS CURIAE

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II. THE COURT SHOULD NOT APPOINT COMPETING APPLICANTS AS "CO-LEAD PLAINTIFFS."

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Testimony of Securities and Exchange Commission Concerning S.1260, the "Securities Litigation Uniform Standards Act of 1997," Before the Subcommittee on Securities, Committee on Banking, Housing, and Urban Affairs, -U.S. Senate (Oct. 29, 1997)

MEMORANDUM OF THE SECURITIES AND
EXCHANGE COMMISSION, AMICUS CURIAE

INTRODUCTION AND SUMMARY OF THE COMMISSION'S POSITION

The Securities and Exchange Commission respectfully submits this memorandum, as amicus curiae, to address certain legal issues raised by the pending motions for appointment of lead plaintiff and lead counsel under the Private Securities Litigation Reform Act of 1995 ("Reform Act" or "Act"), codified at Section 21D of the Securities Exchange Act of 1934, 15 U.S.C. 78u-4. Specifically, the Commission will address legal standards for evaluating: (1) a proposal for appointment of a "group of persons" as lead plaintiff; (2) a proposal for appointment of competing applicants as "co-lead plaintiffs"; and (3) a proposal for appointment of multiple lead counsel.

The Commission, the agency principally responsible for the administration and enforcement of the federal securities laws, has long expressed the view that legitimate private actions under these laws serve an important role. Such actions work to compensate investors who have been harmed by securities law violations and, as the Supreme Court has repeatedly recognized, they "provide `a most effective weapon in the enforcement' of the securities laws and are `a necessary supplement to Commission action.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (citation omitted).

In adopting the Reform Act, Congress affirmed that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses." It further stated that private lawsuits "promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." Joint Explanatory Statement of the Committee of Conference, Conference Report on Securities Litigation Reform, H.R. Rep. No. 104-369, at 31 (1995) ("Conf. Rep.").

Congress sought through the Reform Act's lead plaintiff provisions, 15 U.S.C. 78u-4(a), to ensure more effective representation of investors' interests in private securities class actions by transferring control of the actions from lawyers to investors. Conf. Rep. 32-35. The Act establishes specific procedures and criteria for the appointment of lead plaintiff; it further provides that the lead plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class. 15 U.S.C. 78u-4(a)

(3)(B)(iii)(I)-(III) & (v).

The Commission believes that the term "group of persons" in the lead plaintiff provisions should be construed in light of the language and purposes of the Reform Act to mean only those groups capable of effectively managing the litigation and supervising counsel. Accordingly, the Commission believes that the Court should limit a proposed lead plaintiff group to a size that is small enough to ensure adequate monitoring, coordination, and accountability. The Commission believes that normally this will be three to five members, but even if a proposed group is within this range, the Court should consider the reasons for and effects of including each member in the "group." The Court should scrutinize with care situations in which the "group" appears to have been assembled in disregard of, or at the expense of, its capacity for effective, unified decisionmaking, simply in an attempt to give it "the largest financial interest in the relief sought by the class," 15 U.S.C. 78u-4(a)(3)(B)(iii)(I)(bb).

To enable the Court to evaluate the proposed group, the "group" should provide the Court with appropriate information about its members, structure, and intended functioning. The Court should reject any proposed group that does not demonstrate to the Court's satisfaction that it is constituted in such a way that it can effectively lead the class action.

Where the Court limits the size of a proposed group, the Court should consider only the alleged losses of the "group" as limited in determining which lead plaintiff applicant has "the largest financial interest." Once the Court determines that one person or properly constituted group satisfies all of the Reform Act's criteria for appointment as lead plaintiff, it would be contrary to the language and purposes of the Act to appoint a competing applicant as "co-lead plaintiff."

With regard to the pending lead counsel motions, the Commission believes that the Reform Act gives the lead plaintiff a large role in the choice of counsel and ensures that only in very unusual circumstances will it have to accept counsel that it did not choose for itself. However, the Act otherwise preserves the Court's traditional discretion to evaluate the likely effectiveness of counsel for the protection of the class, and the Commission believes that the Court should actively exercise that discretion to review proposals for multiple lead counsel. 1

BACKGROUND

A. Legislative History Of The Lead Plaintiff Provisions

The Reform Act was enacted in December 1995. The President had vetoed the bill, but did not object to its provisions for the appointment of lead plaintiff and lead counsel, 15 U.S.C. 78u-4(a), which his staff described as "appropriate class action reform provisions." See 141 Cong. Rec. H15214-15, S19054 (1995).

These provisions arose out of Congress' concern, reflected in the House, Senate, and Conference Committee Reports on the bill, that some class action securities litigation had become a "lawyer-driven" enterprise, in which law firms sought to bring cases and then sought out plaintiffs in

whose name they could sue. 2 Congress sought to "protect[] investors who join class actions against lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer." Conf. Rep. 32; accord S. Rep. 4 (Congress "intends * * * to empower investors so that they -- not their lawyers -- exercise primary control over private securities litigation"), 6 ("to transfer primary control of private securities litigation from lawyers to investors"), 10 ("The lead plaintiff should actively represent the class[;] * * * the lead plaintiff -- not lawyers -- should drive the litigation."). This concern also was expressed repeatedly during the floor debate. 3

Congress viewed this problem as stemming from the fact that the lead counsel in the case commonly had a greater financial stake in the litigation than did the plaintiffs:

Throughout the process, it is clear that the plaintiff class has difficulty in exercising any meaningful direction over the case brought on its behalf. * * *
* Because class counsels' fees and expenses sometimes amount to one-third or more of recovery, class counsel frequently has a significantly greater interest in the litigation than any individual member of the class.

Furthermore, class counsel * * * may have a greater incentive than the members of the class to accept a settlement that provides a significant fee and eliminates any risk of failure to recoup funds already invested in the case.

H. Rep. 17-18; accord S. Rep. 6-7.

The lead plaintiff provisions were "intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class." Conf. Rep. 32. They were "intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." Id. In Congress' judgment, "[i]nstitutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake." Id. at 34.

In particular, Congress wanted to "encourage institutional investors to take a more active role in securities class action lawsuits." Id. Congress "believe[d]" that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." Id.

Congress gave the initial choice of lead counsel to the lead plaintiff. See id. at 35. As a result, Congress "expect[ed]" that the plaintiff will choose counsel rather than, as is true today, counsel choosing the plaintiff." Id.; S. Rep. 11. However, Congress "d[id]" not intend to disturb the court's discretion under existing law to approve or disapprove the lead plaintiff's choice of counsel when necessary to protect the interests of the plaintiff class." Id. at 35; S. Rep. 11.

B. Facts 4

Multiple securities fraud class actions have been filed in this Court against Orbital Sciences Corporation. Two motions for appointment of lead plaintiff and lead counsel are pending.

Five New York City employee pension funds claiming losses totalling \$715,592 jointly seek to be lead plaintiff. 5 The Comptroller of the City of New York manages the investments of each of the pension funds, and the Corporation Counsel for the City of New York serves as counsel to each of the funds. See NY Mem. 3. The pension funds propose one law firm as lead counsel.

The "Orbital Plaintiffs Group," consisting of from about 150 to 200 persons represented by 21 separate law firms, has filed a competing motion. The Group proposes to "streamline the litigation" (OG Mem. at 3) by seeking appointment of only certain of its members. Yet, the Group relies (see OG Mem. 1, 2; OG Opp. 2, 7) on the sum of the losses of all of its members, not only those put forward as lead plaintiff. The Group's motion does not describe these members other than to give their names and alleged losses; it does not state whether they have any pre-existing relationships or even any contact with one another or whether they are even aware they have been put forward, individually or as part of a proposed "group," as lead plaintiff.

Originally, the Group asked that a subgroup of seven persons be appointed lead plaintiff. OG Mem. 3, 13. These individuals claim losses of \$271,000 (Mr. Copansky), \$231,000 (Ms. Meyer), \$142,000 (Mr. Greiff), \$125,000 (Mr. Golinsky), \$80,000 (Mr. Basch), \$4,500 (Mr. Fletcher), and \$4,000 (Ms. Askew), a total of about \$850,000. The limited information provided indicates that Mr. Copansky is a resident of California and client of Berger & Montague; Ms. Meyer is a resident of Rhode Island; and Mr. Greiff is a resident of Massachusetts.

In responding to the pension funds' motion, the Orbital Group invites the Court to replace the subgroup's four smallest investors with Mr. O'Keefe, who claims \$252,000 in losses and was not previously identified as a member of the Orbital Group. See OG Mem. 3 n.2. As thus reconstituted, the Group members actually proposed as lead plaintiff are the three of the original seven subgroup members, who claim a total of \$644,000 in losses, plus the new member, for a combined total claim of \$896,053 in losses.

The Group has moved for appointment of Berger & Montague and Schiffrin & Barroway as "co-lead counsel" and two other law firms as "executive committee counsel," one of which would also act as "liaison counsel." Each of the proposed counsel represents a named plaintiff in one or more separate actions against Orbital. The Group's only explanation of its counsel arrangement is that the proposed law firms "possess extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud actions" and that multiple counsel "will be able to deploy sufficient resources to prepare for trial in the shortest possible time." O.G. Mem. 13; O.G. Opp. Mem. 7.

The Group does not describe the intended duties and responsibilities of its four proposed law firms. Nor does it describe the lines of authority among the firms, explain the reason why it has (apparently) divided the leadership

of the proposed executive committee between two "co-lead counsel," or describe the manner in which the various counsel would function with members of the proposed lead plaintiff group. Nor does it contend that the pension funds' proposed counsel lacks "extensive experience in the area of securities litigation," lacks a record of "successfully prosecut[ing] numerous securities fraud actions," or would be unable "to deploy sufficient resources."

ARGUMENT

I. THE COURT SHOULD LIMIT A PROPOSED LEAD PLAINTIFF "GROUP" TO A SMALL SIZE THAT IS CAPABLE OF EFFECTIVELY MANAGING THE LITIGATION AND EXERCISING CONTROL OVER COUNSEL, SCRUTINIZE EVEN A SMALL PROPOSED GROUP, AND REJECT ANY PROPOSED GROUP THAT DOES NOT DEMONSTRATE THAT IT WILL HAVE THIS CAPABILITY.

The Commission believes that to effectuate the Reform Act's language and purposes the Court generally should limit a proposed lead plaintiff group to a small size capable of effectively managing the litigation and supervising counsel. The Court should consider each member's incentive and ability to work together to control the litigation, especially where it appears that the "group" was formed simply to make a nominal claim to the largest financial interest. The Court should consider only the alleged losses of the "group" as limited and should reject any "group" that does not demonstrate to the Court's satisfaction that it is constituted to lead the class action effectively.

Although the Reform Act states that lead plaintiff may be a "group of persons," this does not mean the Court must accept as a "group" any number and assortment of persons proposed. Courts should interpret this general statutory language by reference to the Act's language as a whole and to the Act's purposes. 6

The Act refers to a "group of persons," as an alternative to a "person," in the provision that establishes a presumption that the "most adequate plaintiff" to lead a securities class action is the one with the largest claimed financial loss. 15 U.S.C. 78u-4(a)(3)(B)(iii)(I). As discussed above, Congress intended by that provision to protect plaintiff investors by making securities litigation less of a "lawyer-driven" enterprise, and by vesting control of the litigation in the lead plaintiff.

The presumption is intended to effect this result by assuring that the lead plaintiff has a substantial stake in the litigation, and thus the ability and incentive to control the lawyers. This will, Congress anticipated, commonly be an Institutional Investor which has the sophistication and ability to control complex litigation. See, e.g., Gluck v. Cellstar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997) ("The legislative history of the Reform Act is replete with statements of Congress' desire to put control of such litigation in the hands of large, institutional investors."); Greebel v. FTP Software, Inc., 939 F. Supp. 57, 63-64 (D. Mass. 1996) (same). 7 The Commission has noted in other contexts that institutions have skills and expertise that are likely to be very valuable to investors, and, because institutions frequently have a substantial financial interest at stake, are likely to devote substantial time and resources to representing investors in litigation. 8

This does not suggest that the lead plaintiff must be an institution. But it

strongly suggests that a "group of persons" within the meaning of the Act should, like an institution, be able to effectively manage the litigation and supervise counsel.

The mere fact that a proposed group might have the largest combined financial stake does not guarantee that result. Indeed, that is particularly unlikely where the group consists of a large number of previously unaffiliated persons, who have little or no contact with one another, who by and large claim relatively modest individual losses, and who have no demonstrated incentive or ability to work together to control the litigation. The problem is made worse if the persons have been enlisted to become lead plaintiff by counsel. 9 Ordinarily, such an assemblage will be unable to control the litigation. The net result will be that while the "group" nominally has a large stake in the litigation, the lawyers will dominate decisionmaking.

Construing the term "group of persons" in light of the language and purposes of the Reform Act, the Commission believes that a court generally should not approve a group as lead plaintiff unless it is small enough to be capable of effectively managing the litigation and the lawyers. The Commission believes that ordinarily, 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. 10

Even if the proposed group is within this range, however, its members should be evaluated separately for their incentive and ability to work together to control the litigation. The Court should consider the marginal benefit of including each member in the "group" as weighed against the further division of decisionmaking authority and the other problems attendant to enlargement of the group. The Court should scrutinize with care situations where the "group" appears to have been formed in disregard of, or at the expense of, its capacity for effective, unified decisionmaking, simply in an attempt to aggregate a larger nominal financial interest. Unless the court is convinced that additional members would add to -- or not hinder -- the ability of the group as a whole to manage the litigation effectively, it should not allow their addition. 11

In order for a court to analyze a proposed lead plaintiff group, full information should be provided about the "group." Such information should include descriptions of its members, including any pre-existing relationships among them; an explanation of how the "group" was formed and how its members would function collectively; and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation. If the "group" fails to explain and justify its composition and structure to a court's satisfaction, its motion should be denied.

A recent hearing on a proposed settlement suggests the sort of problems that can arise if a group is not constructed, and does not function, properly. See Parnes v. Digital Lightwave, Inc., No. 98-152-CIV-T-24(C), Tr. 46-52, 98-103, 109-11, 126-27, 132-44 (M.D. Fla. Mar. 12, 1999) (in Appendix). One member of a ten-person lead plaintiff group complained that the settlement was made by the lawyers and that the group members had not been consulted. The court chastised the group's counsel for a "very poor job" of communicating with the objector, and noted that "clearly the purpose in enacting the law was to get lead plaintiffs in there that had a

stake and -- and perhaps some knowledge, and -- and the ability to actually communicate" (Tr. 143-44). Counsel replied that "the language [of the Reform Act] is one thing and the practicalities are another" (Tr. 43), and questioned the "so-called enhanced management role that the individuals are supposed to play" under the Act, suggesting that the group members were "inexperienced" and did not have the knowledge necessary to manage the litigation (Tr. 48). This highlights the importance of careful scrutiny at the outset of the members, structure, and intended functioning of the group, and how it will manage the litigation.

Many courts have limited proposed lead plaintiff groups in accordance with the principles outlined above. For example, in In re Baan Co. Sec. Litig., 1999 WL 223178, at *3 (D.D.C. Apr. 12, 1999), the court noted that a number of courts "have determined that multiple lead plaintiffs will be unable to control the litigation, effectively negotiate retention agreements, and supervise the conduct of counsel." The court stated that its "experience with class actions and multidistrict litigation * * * teaches that a small committee will generally be far more forceful, effective and efficient than a larger aggregation." Id. It held that "[t]he Lead Plaintiff decision should be made under a rule of reason but in most cases three should be the initial target, with five or six the upper limit," and provisionally chose the three "group" members with the most losses. Id. 12 Courts have also rejected "groups" that did not sufficiently explain or justify their composition. 13

Of course, if the court limits a group in size, it should consider only the losses of the group as limited in determining which applicant has the largest claimed losses and thus is the presumptive lead plaintiff. There is no basis for the Orbital Group's invitation to the Court to "consider[] the aggregate losses of all [150 to 200 of its] members," O.G. Opp. Mem. 7, even though the Group proposes that only four to eight of them act as lead plaintiff, and the Court may accept even fewer. The Reform Act provides that "the court * * * shall appoint as lead plaintiff" the "most adequate plaintiff," which is presumed to be the "person or group of persons" that "has the largest financial interest." 15 U.S.C. 78u-4(a)(3)(B)(i) & (iii). Thus, only the financial interest of the "person or group of persons" that the court "shall appoint as lead plaintiff" is considered. Any other approach would be "playing a shell game with the statute." In re Baan Co. Sec. Litig., 1999 WL 223178, at *4 (D.D.C. Apr. 12, 1999) (in SEC Appendix).

The Orbital Group contends (see OG Rep. 4-5) that it is under no obligation to provide the class or this Court with any more information about its proposed lead plaintiff "group" than its members' names, data relevant to their loss calculations, and the bare minimum facts required in statutory certifications under 15 U.S.C. 78u-4(a)(2). It essentially argues that the Court must accept as a "group" any number and assortment of persons proposed. See, e.g., OG Rep. 5 (collapsing "group" inquiry into the "simple mathematical test" of the largest financial interest requirement). 14 The Group's rationales for its untenable position -- whether based on statutory language, case law, or policy -- do not withstand scrutiny.

The Orbital Group argues that the "plain meaning" of "group of persons" is "an aggregation of individuals united to pursue a common goal." OG Rep. 1. It argues that "unity of interest in the claim alone has always been the basis for class action litigation" (OG Opp. 4; emphasis omitted). Under this view,

a "group" could include hundreds of members, or, for that matter, every member, of the plaintiff class. Courts in other cases have had no difficulty rejecting such an assertion. 15 The Group's argument ignores the fact that Congress adopted the Reform Act in order to assure that effective lead plaintiffs, capable of controlling the lawyers, were appointed. The Orbital Group's approach would eviscerate the legislation by allowing large, lawyer-formed and lawyer-controlled amalgamations of investors to serve as the lead plaintiff. The Orbital Group simply ignores "the Reform Act's fundamental goal of client control," Gluck, 976 F. Supp. at 549; see pp. 4-8, supra.

None of the cases the Orbital Group cites (OG Mem. 7; OG Opp. Mem. 5) holds that a "group" can be of unlimited size and indiscriminate composition. Most contain little or no analysis of the "group" issue; indeed, the issue does not appear to have been contested, briefed, or argued in the cases. In contrast, where the issue has been litigated, courts have routinely limited, and have even rejected, proposed lead plaintiff groups.

Contrary to the Orbital Group's assertion (OG Rep. 4-5), other sections of the Reform Act do not support its position. The mere fact that one section of the Act, 15 U.S.C. 78u-4(a)(2), requires a plaintiff to provide certain minimum information in a certification attached to a complaint does not preclude the court from requiring additional information where necessary to make a proper lead plaintiff determination. 16 Nor does the fact that the Act contemplates a "tight time frame" (OG Rep. 5) for lead plaintiff motions preclude careful inquiry into the way in which a proposed group is constituted. There is no reason why a careful analysis of a proposed group cannot be done within the time frames indicated by the Act.

The Reform Act's "mixed inquisitorial/adversarial model for developing a record to make the Lead Plaintiff decision" is not inconsistent with resolving the motions "with dispatch." See Baan, 1999 WL 223178, at *1. The Commission assumes that in evaluating proposed groups courts will make their best judgments based on reasonably available information. 17 If a proposed group is unwilling or unable to provide appropriate information in a timely manner, then this is no reason to weaken the statutory language "group of persons" and deprive the Court of an independent role in evaluating a proposed "group"; it means the motion should be denied or modified as the Court sees fit.

Finally, the Orbital Group touts its approach as quicker and simpler (OG Rep. 4-5). But the pre-Reform Act "race to the courthouse" to file complaints and selection of counsel on a "first-come, first serve" basis could also be described as "simple" (OG Rep. 5) or "swift and inexpensive" (OG Rep. 4). Congress disposed of those practices with the Reform Act because it viewed them as harmful in the long run of litigation. See Conf. Rep. 33. The Orbital Group's approach ignores the long-term benefits, both in terms of effectively run litigation and maximized recovery, that could result from a properly constituted and functioning lead plaintiff group.

II. THE COURT SHOULD NOT APPOINT COMPETING APPLICANTS AS "CO-LEAD PLAINTIFFS."

The Orbital Group requests (OG Opp. 7) that even if the pension funds meet

all of the Reform Act's requirements for appointment as lead plaintiff and the Orbital Group does not, the Court should appoint the Orbital Group as "co-lead plaintiff." The Commission believes that the Orbital Group's request is contrary to the language and purposes of the Reform Act.

The language of the Act strongly indicates that Congress did not intend for there to be "co-lead plaintiffs." The Act establishes a procedure and criteria for evaluating competing lead plaintiff motions. See 15 U.S.C. 78u-4(a)(3)(B)(iii) (referring to appointment of "the person or group of persons * * * who filed a complaint or a motion" and has "the largest financial interest") (emphasis added). The Act speaks in the singular, of the court appointing a "lead plaintiff," not lead plaintiffs. See 15 U.S.C. 78u-4(a)(3)(A)(i)&(ii). It provides a mechanism for identifying "the most adequate plaintiff," not the two or more most adequate plaintiffs. 15 U.S.C. 78u-4(a)(3)(B)(i)-(iii). It specifies that the most adequate plaintiff is presumptively the "person or group of persons" which "has the largest financial interest" in the case. 15 U.S.C. 78u-4(a)(3)(B)(iii)(I)(bb). It seems unlikely that Congress contemplated that in the typical case there could be more than one plaintiff with "the largest" financial interest.

The mere fact that the lead plaintiff provisions refer to "the member or members of the purported plaintiff class" and "person or group of persons" as lead plaintiff does not mean that there can be multiple lead plaintiffs. Under the statutory presumption, multiple class "members" or "persons" can be appointed lead plaintiff only to the extent that they form a single "group." The statute refers to a "person or a group of persons," not a combination of multiple groups or multiple persons not part of one group. As discussed above, a "group" must serve the same statutory purposes as a "person," which requires it to have unified decisionmaking. 18

There is no indication that Congress intended in specifying procedures and criteria for the determination of the most adequate plaintiff to give plaintiffs a basis for urging courts to exercise wide discretion to combine class members and loss amounts and create coalitions. The Group cites no basis in the statute or the legislative history for a court to compel a single movant that satisfies all of the criteria for appointment as lead plaintiff and which objects to divided leadership of the class action to join a faction of competing lead plaintiff movants.

Were the plaintiff with the largest financial interest to be joined by competing "co-lead plaintiffs," that plaintiff's ability to negotiate effective legal retention agreements and to exercise control over the litigation and the lawyers would be dissipated. See *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 147-49 (D.N.J. 1998). Institutional investors, which are already reluctant to seek lead plaintiff status, 19 might be even more reluctant to do so if they could not exercise effective control of the litigation, and instead had to share decisionmaking authority and possibly engage in disputes with "co-lead plaintiffs." 20 Appointing "co-lead plaintiffs" would dilute the presumptive lead plaintiff's ability to manage the litigation and supervise counsel effectively.

Numerous cases have rejected proposals for appointment of "co-lead plaintiffs." In *In re Advanced Tissue Sciences Sec. Litig.*, 1998 U.S. Dist. LEXIS 16926, at *13-14 (S.D. Cal. Oct. 20, 1998), a proposed lead plaintiff group "appeal[ed] to the Court's equitable powers for the creation of a co-lead plaintiff/co-lead counsel leadership structure." The court rejected the

proposal, holding that "where two or more parties are competing for appointment as lead plaintiff, the mandate of the [Act] is unambiguous" and that "the plain language of the [Act]" requires appointment of the single applicant that meets all of the statutory criteria. Id. at *14. 21

The only decision of which the Commission is aware that has attempted to set forth a rationale for the appointment of "co-lead plaintiffs" is In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42 (S.D.N.Y. 1998). In Oxford, the court appointed "co-lead plaintiffs" despite the fact it determined that one lead plaintiff movant with a larger financial interest than any of the other competing movants combined met all of the criteria for appointment as lead plaintiff. The Commission disagrees with the Oxford court's reasoning in appointing "co-lead plaintiffs."

Language in the Oxford opinion suggests that the court may have been concerned about adequacy of representation and the resources needed for litigation. 22 However, rather than addressing any such concerns within the framework of the Act itself, under an adequacy of representation analysis or through an evaluation of the counsel arrangement proposed by the movant with the largest financial interest, the court misinterpreted and essentially disregarded the statutory presumption. Moreover, in substituting its own "principle of providing the class with the most adequate representation" for the statutory presumption of the "most adequate plaintiff," id. at 49, the Oxford court relied on policy considerations such as "diverse representation," id., that Congress rejected in adopting the Act. 23

The Oxford court's suggestion that "the lead plaintiff movants are not in fact competing with each other," 182 F.R.D. at 49, ignores Congress' judgment that certain members of the class are more effective representatives than others. Regardless of whether the court believes that "each plaintiff [can] control its own chosen counsel," id., competing views among the "co-lead plaintiffs" will necessarily diminish their ability to control the litigation. See Cendant, 182 F.R.D. at 147 ("representation by a disparate group of plaintiffs * * * could well hamper the force and focus of the litigation"). There is no question that as a general matter the existence of multiple lead plaintiffs will diminish the bargaining power (e.g., regarding retention of counsel) of the lead plaintiff with the largest stake and will dilute its ability to control the litigation and the lawyers.

Rather than erroneously appointing multiple lead plaintiffs, the Oxford court should have exercised its traditional discretion to evaluate counsel and adequacy of resources. As noted in Cendant, 182 F.R.D. at 149-50, "[i]n contrast to the strictly defined procedures and considerations that prescribe the determination of lead plaintiff * * * the Court's approval [of the proposed lead counsel] is subject to its discretionary judgment that lead plaintiff's choice of representative best suits the needs of the class." The Cendant court rejected "the argument that additional plaintiffs bring to the litigation other counsel capable of advancing additional funds" as a basis for appointing "co-lead plaintiffs." Id. at 148.

III. ALTHOUGH COURTS SHOULD NOT, EXCEPT IN VERY UNUSUAL CIRCUMSTANCES, FORCE A LEAD PLAINTIFF TO RETAIN COUNSEL IT HAS NOT SELECTED ITSELF, THEY SHOULD ACTIVELY EXERCISE THEIR DISCRETION TO REVIEW MULTIPLE LEAD COUNSEL PROPOSALS.

For the reasons fully explained in the Commission's amicus curiae brief in Baan, which the district court appended to its decision in that case, 1999 WL 223178, the Commission believes that courts should actively exercise their traditional discretion, retained under the Reform Act, to review multiple lead counsel proposals. While multiple counsel arrangements may at times be warranted where firms bring complementary resources and skills to the case, they can also give rise to increased costs, conflicts, and other serious problems. 24 The court should carefully scrutinize these arrangements to assure that multiple counsel are needed and will not give rise to problems.

CONCLUSION

For the foregoing reasons, the Commission believes that the Court should appoint lead plaintiff and lead counsel based on careful attention to the facts of this case and in accordance with the considerations discussed in this memorandum.

Respectfully submitted,

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Dated: May 18, 1999

CERTIFICATE OF SERVICE

I certify that on this _____ day of May, 1999, I caused to be served a copy of the foregoing MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, by first-class U.S. mail (postage prepaid) or by overnight delivery to each of the counsel on the attached service list.

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FOOTNOTES

1 The Commission takes no position on Issues not referenced in this memorandum that are or might be raised in this case, such as disputes about the dollar amount of losses, or on the ultimate questions of who should be appointed lead plaintiff and lead counsel under the facts of this case.

2 Congress was especially concerned that in some such cases lawyers engage in abusive practices and "often receive a disproportionate share of settlement awards." Conf. Rep. 36; accord id. at 31-33; Report on the Private Securities Litigation Reform Act of 1995, S. Rep. No. 104-98, 6-12 (1995) ("S. Rep."); Report on the Common Sense Legal Reform Act of 1995, H.R. Rep. No. 104-50, 14-20 (1995) ("H. Rep.").

3 See, e.g., 141 Cong. Rec. S8895 (Sen. D'Amato) ("the legislation empowers investors so that they, not their lawyers, have greater control over their class action cases"), S8897 (Sen. Domenici) ("So what we have and what is wrong with this system is very, very fundamental. Lawyers, not clients, control these cases.") (June 22, 1995); 141 Cong. Rec. S9055 (Sen. Frist) ("the lawyer-driven nature of these lawsuits tends to shortchange investors who have truly been defrauded"), S9065 (Sen. Grams) ("the plaintiff who is bringing the suit [now] * * * this is basically the attorney"), S9075-76, 77 (Sen. Hatch) ("the bill contains a number of reforms of securities litigation class actions that are designed to increase participation of the real shareholder plaintiffs and decrease the control of attorneys"), S9077 (Sen. Murray) ("[investors] have a right to have more of a say in steering the course of litigation") (June 26, 1995); 141 Cong. Rec. S9172 (Sen. Hatfield) ("This legislation is about curtailing the abuses in this country's securities litigation system and empowering defrauded investors with greater control over the class action process."), S9173 (Sen. Mikulski) ("with this bill, the court will be able to pick one person -- who has lost a lot of money in a class action suit -- to be the leader. This way the system works for investors instead of against them," as when "lawyers seek out clients just so they can have cases to litigate") (June 27, 1995); 141 Cong. Rec. S9212 (Sen. Domenici) (bill "puts investors with real financial interests, not lawyers in charge of the case"), S9321 (Sen. Dodd) (bill "empowers investors so that they, not their lawyers, have greater control over their class action cases") (June 28, 1995); 141 Cong. Rec. S17934 (Sen. D'Amato) ("[Bill] will empower real investors, especially pension funds and other institutional investors, to take control of the lawsuit."), S17956 (Sen. Dodd), S17967, S17969 (Sen. Domenici) ("[Bill] contains provisions which place investors, not lawyers, in control of the lawsuit. Unlike the current lawyer-driven system, under this new law the investors with the greatest stake in the outcome of the litigation will control the case."), S17980 (Sen. Murray) (bill "will reform our securities law so that investors will have more of a say in the outcome of their suit"), S17982 (Sen. Frist), S17983 (Sen. Dole) (bill "diminishes the likelihood that these cases will be driven by lawyers, instead of real plaintiffs by allowing the most adequate plaintiff to be the party with the greatest financial interest"), S17984 (Sen. Moseley-Braun) ("Many investors also support this bill because it gives them, rather than the lawyers who are supposed to be working for them, control of any class action suits filed. It is the client, rather than the attorney, that is supposed to control a lawsuit, and part of

the reason this bill is so necessary is that this simple principle has somehow gotten lost in recent years." (Dec. 5, 1995); 141 Cong. Rec. H14038 (Rep. Cox) ("What we are seeking to do here is to protect investors so that they are in charge of these kind of lawsuits."), H14039 (Rep. Bliley) (bill "puts control of class action lawsuits back in the hands of the real shareholders, where it belongs"), H14048 (Rep. Harman) (bill "ends abusive practices and restores investor control over lawsuits"), H14050 (Rep. Deutsch) (bill "will restore power to real investors in securities lawsuits, changing the rules so that actual investors, not predatory lawyers call the shots") (Dec. 6, 1995); 141 Cong. Rec. S19054 (Sen. Hatch), S19084 (Sen. Reid) ("Defrauded investors are not adequately compensated because attorneys, not investors, control these class actions.") (Dec. 21, 1995).

4 This section is based on the opening ("OG Mem."), opposition ("OG Opp."), and reply ("OG Rep.") briefs, and accompanying materials, of the "Orbital Plaintiffs Group" (or "Orbital Group" or "Group"); and the opening ("NY Mem."), opposition, and reply briefs, and accompanying materials, of the "New York City Pension Funds" (or "pension funds").

5 These funds are: New York City Employees' Retirement System; New York City Fire Department Pension Fund; New York City Board of Education Retirement System; New York City Police Superior Officers' Variable Supplement Fund; and New York City Firefighters' Variable Supplement Fund. NY Mem. 2-3.

6 See Greebel v. FTP Software, Inc., 939 F. Supp. 57, 63-64 (D. Mass. 1996) (interpreting Reform Act's notice provision in conjunction with largest financial interest requirement because a "statutory provision should be read by reference to the whole act"), citing John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993); see also Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); United States v. Taylor, 487 U.S. 326, 333 (1988) (reviewing legislative history to interpret general statutory language); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983) (considering "congressional concerns that led to the enactment of [the statute]").

7 As explained in a law review article cited in the Act's legislative history as "provid[ing] the basis for the 'most adequate plaintiff' provision," S. Rep. 11 n.32, "[i]nstitutions' large stakes give them an incentive to monitor, and institutions have or readily could develop the expertise necessary to assess whether plaintiffs' attorneys are acting as faithful champions for the plaintiff class." Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2095 (1995) ("Weiss & Beckerman"). The authors further argue that institutions can obtain more favorable settlements, and should be "in a position to negotiate fee arrangements with plaintiffs' lawyers before class actions are initiated[,] * * * [which] may well * * * differ substantially from the fee structures that courts currently employ." Id. at 2107, 2121; accord City Nominees, Ltd. v. Macromedia, Inc., No. C97-3521-SC, slip op. at 2 (N.D. Cal. Jan. 23, 1998) ("As courts have noted, large institutional investors have proven to be more efficient plaintiffs than unrelated plaintiffs grouped together, producing larger recoveries with smaller attorney's fees than individual plaintiffs."); In

re California Micro Devices Sec. Litig., 168 F.R.D. 257, 275 (N.D. Cal. 1996) (discussing institutions in non-Reform Act case), 965 F. Supp. 1327, 1330-32 (N.D. Cal. 1997) (same).

8 See, e.g., Memorandum of Securities and Exchange Commission in Support of Motion for an Order Permitting Securities Trading in Certain Circumstances, filed in In re WRT Energy Corp., No. 96-BK-5012 (Bankr. W.D. La. May 6, 1996) at 2, 4 (advising bankruptcy court that entities such as investment advisers, broker-dealers, pension funds, banks, and insurance companies, while serving on creditors' committees, should be allowed to engage in trading in the securities of debtors, subject to certain restrictions designed to prevent trading on material nonpublic information).

9 In its 1997 report on the Act, the Commission's Office of General Counsel stated that some lawyers, "[t]aking advantage of [the Act's] provision" allowing appointment of a "group of persons" as lead plaintiff, have attempted "to recruit investors as additional clients." Office of the General Counsel, Securities and Exchange Commission, Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 65 (Apr. 1997) ("SEC Staff Report"). Specifically, some lawyers have "phrased [notices to the class under the Act] in a way more likely to attract clients, rather than competition from investors (and other law firms) independently vying to be named lead plaintiff." Id.

10 There may, of course, be unusual circumstances that warrant departure from these limits. Such circumstances might include pre-existing relationships among the members or other factors indicating that they have a special capacity to provide able and unified decisionmaking independent of counsel.

11 A form of gamesmanship appears to be at work in some Reform Act cases in which the proponents of a lead plaintiff "group" adjust its members for the purpose of assuring that, in total, it has more losses than a competing lead plaintiff applicant (typically an institution), and thus should be the presumptive lead plaintiff. For example, in LaPerriere v. Vesta Ins. Group, Inc., No. 98-AR-1407-S (N.D. Ala., Acker, J.), a large "group" originally proposed that five of its members be appointed lead plaintiff. When an institution with losses rivalling the subgroup's filed a competing motion, the "group" enlarged its proposed subgroup to nine members (and proposed another law firm representing one of the new members as a third "co-lead counsel"). We believe that this sort of conduct warrants scrutiny by the courts.

In this regard, the Orbital Group initially proposed seven persons, with claimed losses totalling \$850,000, as lead plaintiff. While \$850,000 in losses is more than those claimed by the pension funds, the number of persons in the "group" exceeded the three, and no more than five, persons recommended by the Commission and the recent Baan decision. The Group apparently decided to jettison four subgroup members (see OG Opp. 3 n.2), but this would have reduced the sum of the remaining three members' losses to less than the pension funds'. The Group then added a new person with a \$252,000 claim to the Group and subgroup, bringing the subgroup's total claims up to almost \$900,000, more than the pension funds', but keeping the subgroup's size at four.

12 See In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 46 (S.D.N.Y. 1998) (limiting a proposed 30-member group to three members, "each of whom has suffered from two to three million dollars in losses"); Chill v. Green Tree Financial Corp., 181 F.R.D. 398, 409 (D. Minn. 1998) (appointing a "smaller subset" of a large proposed lead plaintiff group); In re Advanced Tissue Sciences Sec. Litig., 1998 U.S. Dist. LEXIS 16926, at *19-23 (S.D. Cal. Oct. 20, 1998) ("courts have repeatedly rejected motions for the appointment of large amalgamations of unrelated persons as lead plaintiffs as being directly contrary to the [Act]"); Lubitsch v. Dataworks Corp., No. 98-2012-IEG (JAH), slip op. at 4 (S.D. Cal. Feb. 9, 1999) (appointing group of three, rather than 25, to "minimiz[e] lawyer-driven litigation" and avoid "making administration of this action needlessly complex and unwieldy"); Zaltzman v. Manugistics Group, Inc., No. S-98-1881, slip op. at 11 (D. Md. Oct. 8, 1998) (limiting proposed group consisting of 92 individuals and entities to the two members with the largest claimed losses); City Nominees v. Macromedia, No. C97-3521-SC, slip op. at 2, 7 (limiting proposed group where "counsel has presented no rationale for [its] breadth" and its size "would make the administration of this complex civil action even more complex"); In re Informix Corp. Sec. Litig., No. C-97-1289-SBA, slip op. at 6 (N.D. Cal. Oct. 17, 1997) (rejecting large "group," stating that it "would not be able to have the type of meaningful participation in the conduct of the litigation which was one of the guiding purposes of the lead plaintiff provisions"); see also In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 418 (D.N.J. 1998) (stating that a "fundamental goal of the [Act] * * * [is to] empower[] a unified force to control the litigation" and that "[t]he composition of the proposed [group] must be scrutinized carefully" because it raises "concerns regarding the division of authority and dilution of control").

13 See Ravens v. Iftikar, 174 F.R.D. 651, 662-63 (N.D. Cal. 1997) (denying without prejudice proposed group's lead plaintiff motion, in part due to its failure to provide sufficient information about its members' "background, experience and capabilities"); In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997) (where six formerly competing, unrelated investors had not justified their "group," appointing one member with significantly more losses than the others); Sherleigh Assocs. v. Windmere-Durable Holdings, Inc., 1999 U.S. Dist. LEXIS 2905, at *11-14 & n.1 (S.D. Fla. Mar. 9, 1999) (appointing "one of approximately thirteen" group members), aff'd, 1999 U.S. Dist. LEXIS 3744 (S.D. Fla. Mar. 18, 1999); Tumolo v. Cymer, Inc., No. 98-CV-1599 TW (POR), slip op. at 2-4 (S.D. Cal. Jan. 22, 1999) (denying motion without prejudice because "[p]laintiffs have failed to present sufficient evidence that this smaller group of seven plaintiffs is any more qualified to serve as lead plaintiff than any of the other 332"); In re Graham-Field Health Products Litig., No. 98-CV-19:3 (DRH), slip op. at 3, 4 (E.D.N.Y. Aug. 10, 1998) (declining to approve 50-person "group" because "it may well * * * defeat the [Act's] purpose").

14 Although the Group advocates (OG Rep. 5) a "simple mathematical test" for determining largest financial interest, it earlier urged the Court to consider to whom "the case matters more" (OG Opp. 3). It argued that the Court should discount the pension funds' losses to some unspecified degree based on "presum[ing]" that the Orbital Group members had losses "of magnitude greater if measured as a percentage of their individual portfolios" (id.).

But the lead plaintiff presumption is framed in terms of "the largest financial interest in the relief sought by the class," not in terms of loss as a percentage of net worth. See In re Cendant Corp. Litig., 182 F.R.D. 144, 147 (D.N.J. 1998). The Cendant court explained the presumption in terms of absolute dollar loss: "plaintiffs with the assets necessary to have made large investments will also be able to negotiate the most advantageous rates to the class" and have "the most to gain from any marginal increase in dollars recovered per share." Id. at 148-49. Moreover, the Group's "portfolio" argument is inconsistent with the fact that when Congress enacted the Reform Act, it was well aware that institutions have millions or billions of dollars of assets under management and that these amounts easily could dwarf losses in particular cases. See, e.g., Conf. Rep. 34 (noting that "[i]nstitutional investors are America's largest shareholders, with about \$9.5 trillion in assets, accounting for 51% of the equity market" and that "pension funds account[] for \$4.5 trillion [] or nearly half of institutional assets"); Weiss & Beckerman, 104 Yale L.J. at 2089-91 (study of claims reports for 20 settled class actions shows that institutions sometimes had largest claim with losses of \$450,000 to \$626,374).

15 See, e.g., Baan, 1999 WL 223178 (denying motion to appoint 466 persons); Tumolo, slip op. at 2-4 (same; 332 persons); Advanced Tissue, 1998 U.S. Dist. LEXIS 16926, at *19-23 (denying competing motions for appointment of 165 and 250 persons); Informix, slip op. at 6 (same; 979, 274 persons).

16 For example, each certification submitted by the Orbital Group states that an individual is willing to serve as a class representative; it does not indicate that the person is even aware that he or she has, in fact, been put forward, individually or with someone else, as lead plaintiff. See Parnes, Tr. 98-103, 109-11 (member of ten-person group states that he was not aware he was lead plaintiff until learning that a settlement had been presented to the court).

17 The Orbital Group offers no basis for concluding that it would be "[] expensive" (OG Rep. 4) or "cost[ly]" (OG Rep. 5) or time-consuming (OG Rep. 4-5) to include additional information about its own proposed group's members, structure, and intended functioning in its own lead plaintiff motion. There is no reason to assume that "discovery would frequently be needed" (OG Rep. 5) if a proposed group provided appropriate information about its "group." Lead plaintiff submissions would establish a record and the arguments, and the court could conduct the inquiry.

18 See Milestone, 183 F.R.D. at 417 ("While the [Act] refers to 'a person or group of persons' as capable of serving as the lead plaintiff, the surrounding statutory language forecloses the appointment of multiple groups or multiple persons not part of a cohesive group.").

19 The Commission has reported that "[i]n the 105 cases filed in the first year after passage of the Reform Act, we have found only eight cases in which institutions have moved to become lead plaintiff." SEC Staff Report at 51. More recently, Commissioner Isaac C. Hunt, Jr. testified that out of 124 federal class actions filed between January 1997 and October 1997, the Commission was aware of only six in which institutions had sought lead plaintiff status. Testimony of Securities and Exchange Commission

Concerning S. 1260, the "Securities Litigation Uniform Standards Act of 1997," Before the Subcommittee on Securities, Committee on Banking, Housing, and Urban Affairs, U.S. Senate (Oct. 29, 1997).

20 See SEC Staff Report at 51-52; D'Hondt v. Digi Int'l Inc., 1997 WL 405668, at *4 n.9 (D. Minn. Apr. 3, 1997) (noting that institution "elected not to seek the status of a Lead Plaintiff" because it "would prefer to separately litigate its claims so as not to impair its autonomy").

21 Accord Cendant, 182 F.R.D. at 147-48 (denying "all motions for appointment as co-lead plaintiff that do not challenge the [largest stakeholder's] statutory presumption of adequacy," including motions "offer [ing] little more than the general assertion that diversity of representation would benefit the class" or "the argument that additional plaintiffs bring to the litigation other counsel capable of advancing additional funds"); Gluck, 976 F. Supp. at 549-50 (rejecting "co-lead plaintiff" proposal because it would detract from client control, reduce the influence and responsibility of the lead plaintiff, delegate more control and responsibility to the lawyers, and unnecessarily increase the time and expense spent on preparing the case); Steiner v. Frankino, 1998 U.S. Dist. LEXIS 21804, at *15-16 (N.D. Ohio July 16, 1998) (same); Reiger v. Altris Software, Inc., 1998 U.S. Dist. LEXIS 14705, at *16-18 (S.D. Cal. Sept. 14, 1998) (same); Chan v. Orthologic Corp., No. CIV 96-1514 PHXRCB, slip op. at 6, 12 (D. Ariz. Dec. 19, 1996) (rejecting applicant's request to be appointed "co-lead plaintiff" on grounds that a competing applicant qualified as presumptive lead plaintiff under the Act and the would-be "co-lead plaintiff" had "failed to rebut the [Act's] presumption"); Malin v. Ivax Corp., No. 96-1843, Order at 7 (S.D. Fla. Nov. 1, 1996) (same); see Milestone, 183 F.R.D. at 417-18.

22 See id. at 45-46 ("concern[ing] with the potential costs and expenses of this litigation" and referring to "joint funding," "pooling * * * of the resources of the plaintiffs' counsel in order to support what could prove to be a costly and time-consuming litigation"); 47 (expressing concern that an institution that funds the litigation might "become[] conflicted and have to drop out"); 49 ("[i]n light of the magnitude of this case, * * * the use of three lead plaintiffs * * * allows for broad representation and the sharing of resources and experience to ensure that the litigation will proceed expeditiously against Oxford and the experienced counsel it has retained to represent it"); see also id. at 50 (expressing concern about "potential defenses * * * successfully rebut[ting] a finding of typicality").

23 See Milestone, 183 F.R.D. at 417 ("Focusing on considerations such as diverse representation and additional financing overlooks the fundamental goal of the [Act], that of empowering a unified force to control the litigation."); Greebel, 939 F. Supp. at 63-64 (citing legislative history).

24 See, e.g., Donnkenny, 171 F.R.D. at 158 (warning against "duplication of attorneys' services" and "increase [in] attorneys' fees and expenses"); Gluck, 976 F. Supp. at 549 (to enlarge number of counsel "would unnecessarily increase the time and expense spent on preparing and litigating the case"); Milestone, 183 F.R.D. at 419 (reserving decision on motion to appoint three lead counsel where motion had "not delineated any specific responsibilities for counsel and "not shown how the benefits derived from appointing multiple lead counsel outweigh the complications and increased costs and expenses associated with the 'litigation by committee' approach"), motion denied, 1999 U.S. Dist. LEXIS 6798 (D.N.J.).

Mar. 25, 1999); Sherleigh, 1999 U.S. Dist. LEXIS 2905, at *13-14 & n.1 (finding that "consortium of ten firms [was] not in the best interests of the class members").

<http://www.sec.gov/litigation/briefs/orbital.htm>

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Modified: 12/07/1999

Exhibit E

FILED
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JAN 10 2002

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

CV 01-01509 #00000013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

C01-1509

CONNIE D. CRAWFORD, on behalf of herself
and all other similarly situated,

Plaintiffs,

v.

ONYX SOFTWARE CORPORATION, et al.,

Defendants.

No. C01-1346L

ORDER APPOINTING LOUISIANA
SHERIFF'S PENSION & RELIEF
FUND AS LEAD PLAINTIFF

This matter comes before the Court on "The Louisiana Sheriff's Pension & Relief Fund's Motion for Appointment as Lead Plaintiff and for Appointment of Lead Counsel" and the "Motion of John R. Peterson to Consolidate Related Actions, to Appoint Lead Plaintiff and to Appoint Lead and Liaison Counsel." The two plaintiffs' groups seek appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PLSRA"), which requires that the Court determine which member or members of the plaintiff class is most capable of adequately representing the absent class members' interests. 15 U.S.C. §§ 77z-1 and 78u-4. Having reviewed the competing motions for appointment as lead plaintiff, considered the arguments of counsel in open court on January 10, 2002, and made certain oral findings on the record which are hereby incorporated, the Court finds as follows:

(1) Consolidation of all claims arising out of the sale of Onyx Software Corporation stock between January 10, 2001, and August 10, 2001, inclusive, is appropriate. Pursuant to Fed R.

ORDER APPOINTING LEAD PLAINTIFF

Handwritten signature

Civ. P. 42(a) and 15 U.S.C. § 78u-4(a)(3)(B)(ii), the following actions are hereby consolidated for all purposes:

Crawford v. Onyx Software Corporation, et al., C01-1346L;

Little v. Onyx Software Corporation, et al., C01-1509L;

Gordon v. Onyx Software Corporation, et al., C01-1556L;

Skirball v. Onyx Software Corporation, et al., C01-1567L;

Weinstein v. Onyx Software Corporation, et al., C01-1601L; and

Capelli v. Onyx Software Corporation, et al., C01-1690L.

Every pleading filed in this consolidated action shall bear the following caption:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: ONYX SOFTWARE,
CORPORATION

No. C01-1346L

Counsel shall make efforts to identify all cases, other than those listed above, which might properly be consolidated as part of this action, whether the cases are currently pending before the Court or are later filed in or transferred to this district.

(2) If any other actions on behalf of a class asserting substantially the same claim or claims against Onyx Software Corporation are identified, lead counsel shall notify the Court and serve a copy of this Order on the attorneys for plaintiff(s) and any new defendant(s) in the newly identified case. The case shall then be consolidated under Cause No. 01-1346L and the terms of this Order shall apply unless a party in the newly identified case files, within ten (10) days after the date upon which a copy of this Order is served on them, an application for relief from this Order or any provision herein and the Court deems it appropriate to grant such application.

1 (3) Pursuant to 15 U.S.C. §§ 77z-1(a)(3)(A)(i) and 78u-4(a)(3)(A)(i), plaintiff in the
2 action entitled Crawford v. Onyx Software Corp., et al., published a notice of pendency of the
3 action over the *Business Wire* on August 30, 2001.

4 (4) Pursuant to 15 U.S.C. §§ 77z-1(a)(3)(A)(i)(II) and 78u-4(a)(3)(A)(i)(II), the LSPRF,
5 John Peterson, and the Skirball Group filed timely applications to be appointed lead plaintiff(s).

6 (5) The alleged losses suffered by LSPRF are approximately \$77,400 and are greater than
7 the losses suffered by either John Peterson (approximately \$60,000) or the Skirball Group
8 (approximately \$25,000).

9 (6) Plaintiffs Peterson, Skirball, and Wunsch's aggregation of their claims in an attempt
10 to show that they have the largest financial interest in this litigation is not convincing in light of
11 the purposes of the PSLRA. A loose group of investors whose relationship was forged only in
12 an effort to win appointment as lead plaintiff has no real cohesiveness, is less likely to be in
13 control of the litigation, and is subject to all of the obstacles that normally make group action
14 difficult. Even though the Peterson Group consists of only three individuals, their decision
15 making requires either (a) levels of coordination, negotiation, and collective action which far
16 exceed that which would be necessary of an individual litigant or (b) undue control by their
17 lawyer-representatives.

18 (7) Whether plaintiffs Peterson, Skirball, and Wunsch could satisfy the typicality
19 requirement of Fed. R. Civ. P. 23 is doubtful. None of the individual plaintiffs purchased stock
20 directly in Onyx' secondary offering. Their claims for violation of Sections 11 and 12(2) of the
21 Securities Act of 1933 may, therefore, be susceptible to defenses not applicable to other class
22 members, such as LSPRF.

23 (8) Pursuant to 15 U.S.C. §§ 77z-1(a)(3)(B) and 78u-4(a)(3)(B), LSPRF is most capable
24 of adequately representing the interests of absent class members and is hereby appointed as lead
25 plaintiff in the consolidated actions.

26 (9) Pursuant to 15 U.S.C. §§ 77z-1(a)(3)(B)(v) and 78u-4(a)(3)(B)(v), LSPRF has

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selected the law firms of Bernstein Litowitz Berger & Grossman LLP and Hagens Berman LLP to act as co-lead counsel. Those selections are hereby approved

(10) Lead counsel shall have the following responsibilities and duties, to be carried out either personally or through counsel whom lead counsel shall designate:

- a. to coordinate the briefing and argument of any and all motions;
- b. to coordinate the conduct of any and all discovery proceedings;
- c. to coordinate the examination of any and all witnesses in depositions;
- d. to coordinate the selection of counsel to act as spokesperson at all pretrial conferences and hearings;
- e. to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time;
- f. to coordinate all settlement negotiations with counsel for defendants;
- g. to coordinate and direct the pretrial discovery proceedings, the preparation for trial, the trial, and the post-trial proceedings in this matter;
- h. to coordinate the preparation and filings of all pleadings; and
- i. to supervise all other matters concerning the prosecution or resolution of the consolidated actions.

(11) No motion, discovery request, or other pretrial proceedings shall be initiated or filed by any plaintiff without the approval of lead counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of lead counsel.

(12) Lead counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokesperson for all plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel.

(13) Lead counsel shall be the contact between the Court and plaintiffs and their counsel.

(14) Lead counsel shall have the responsibility of receiving and disseminating Court

1 orders and notices. Defendants shall effect service of papers on plaintiffs by serving copies on
 2 both lead counsel by overnight delivery service, telecopy, or hand delivery. Plaintiffs shall
 3 effect service of papers on defendants by serving copies on each of their counsel by overnight
 4 delivery service, telecopy, or hand delivery.

5
 6 For all of the foregoing reasons, "The Louisiana Sheriff's Pension & Relief Fund's
 7 Motion for Appointment as Lead Plaintiff and for Appointment of Lead Counsel" is GRANTED
 8 and the "Motion of John R. Peterson to Consolidate Related Actions, to Appoint Lead Plaintiff
 9 and to Appoint Lead and Liaison Counsel" is DENIED. The Clerk of Court is directed to
 10 consolidate and alter caption as described in paragraph (1) of this Order.

11 DATED this 10th day of January 2002.

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 15 Robert S. Lasnik
 16 United States District Judge
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

<hr/>)	
MARK NEWBY, individually and on)	
behalf of all others similarly situated,)	CIVIL ACTION NO. H-01-3624
)	(Securities Suits)
	Plaintiff,)	
vs.)	
)	<u>CLASS ACTION</u>
ENRON CORP., et al.,)	
	Defendants.)	
<hr/>)	

**DECLARATION OF THURBERT E. BAKER IN SUPPORT OF THE MOTION OF THE
STATE RETIREMENT SYSTEMS GROUP FOR THE APPOINTMENT OF LEAD
PLAINTIFF AND FOR APPROVAL OF ITS SELECTION OF COUNSEL**

I, Thurbert E. Baker, hereby declare as follows:

1. I am the Attorney General of the State of Georgia and the legal advisor for the Teachers Retirement System of Georgia and the Employees' Retirement System of Georgia (collectively, "Georgia"). Georgia, together with pension funds serving the states of Ohio and Washington, has sought to be appointed lead plaintiff in this matter (the "Litigation"). I am sui juris and make this declaration based upon personal knowledge, unless otherwise stated.
2. I am familiar with the motions made by the various other individuals and entities seeking appointment as lead plaintiff in this Litigation and the provisions of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). For the reasons set forth herein, I believe the State Retirement Systems Group (the "State Group") is exactly the sort of sophisticated and motivated lead plaintiff Congress envisioned when it passed the PSLRA.
3. The State Group's losses on transactions in Enron securities during the Class Period are

estimated at approximately \$330.7 million (including approximately \$47.7 million in losses suffered by proposed Advisory Plaintiff the Retirement Systems of Alabama), as set forth in the Memorandum of Law in Support of Motion of the State Retirement Systems Group for the Appointment of Lead Plaintiff and for Approval of its Selection of Counsel at 2, 7-8.

4. Unlike many of the other "groups" seeking lead plaintiff appointment, the members of the State Group and their representatives enjoy long-standing relationships that existed well before this Litigation and will continue well after its termination. I advise Georgia on this Litigation and all other legal matters. Similarly, the retirement systems of Ohio and Washington are advised by their Attorneys General: the Honorable Betty D. Montgomery, and the Honorable Christine O. Gregoire, respectively. We each have committed our own time – and that of several attorneys on our staffs – to this matter. My office has conferred with the offices of Attorneys General Montgomery and Gregoire and reached agreement concerning the statements made in this Declaration.
5. General Montgomery, General Gregoire, and I belong to the National Association of Attorneys General ("NAAG"), an organization that includes the Attorneys General of all fifty states. NAAG is devoted to facilitating interaction and cooperation among Attorneys General in order to respond effectively to emerging state and federal issues. One of the organization's goals is to promote cooperation on interstate legal matters to foster a more responsive and efficient legal system for state citizens. To these ends, NAAG has established a number of committees and working groups to address issues of particular significance, such as the Civil Rights Committee (of which I am a Co-Convener), the Consumer Protection Committee (of which General Montgomery is the Convener), and the Internet Committee (of which General Gregoire is a

Co-Convener). In fact, we organized the State Group as a result of a NAAG conference call on Enron, chaired by General Montgomery, in which my staff reported on Georgia's interest in seeking lead plaintiff status.

6. Although Georgia, Ohio, and Washington have moved for appointment as lead plaintiff, there is a high level of interest among the entire NAAG membership in the outcome of this Litigation because of the magnitude of this matter and its effect on each state's pension funds. NAAG has been involved since the case's inception, circulating materials relating to the case and holding periodic conference calls to discuss this Litigation, the Enron bankruptcy proceeding, and various state and federal investigations. In addition, members of my staff communicate frequently with other NAAG members to keep them apprised of the progress of this Litigation.
7. As the Court might imagine, this is not the first litigation our three states have worked together to prosecute. Among these jointly-prosecuted cases, the best-known may be the states' coordinated effort in litigating against the tobacco companies. As part of that effort, General Gregoire took a lead role in the negotiations that led to the Master Settlement Agreement. Georgia and Ohio also participated in the negotiations, as well as the follow-up phase that led to the National Tobacco Growers Settlement Trust, a private trust for tobacco producers that was contemplated as part of the Master Settlement Agreement.
8. In addition to the tobacco litigation, our three states have successfully teamed up in dozens of complex cases over the past few years, many of which are listed in Exhibit A hereto.
9. Consistent with the ongoing working relationships among the Attorneys General's offices and the successes our states have enjoyed in joint litigations in the past, Georgia, Ohio, and Washington have joined together to prosecute this Litigation. In addition, the Retirement

Systems of Alabama has agreed to serve in an advisory role. After extensive discussions, the State Group reached an agreement regarding the conduct of this Litigation, which, among other things (1) governs the retention of private counsel, (2) limits the payment of fees to private counsel, (3) establishes the decision-making protocol for the Litigation, and (4) outlines an apparatus for monitoring events that may impact the outcome of this Litigation. Each of these provisions has been designed to prosecute this Litigation as thoroughly and efficiently as possible and to maximize the Class's recovery in the process.

10. Since our decision to seek appointment as lead plaintiff in this Litigation, General Montgomery, General Gregoire, and I have held numerous telephone conferences to discuss recent developments and our litigation strategy. Moreover, members of our legal staffs typically communicate with each other on a daily basis about matters related to this Litigation. The cooperation among our three offices over the years and our history of success in joint litigations has fostered what I consider to be strong professional relationships among the Attorneys General and a great respect for each other that facilitates our working relationship. I believe this preceding relationship will prove invaluable in prosecuting this Litigation successfully.
11. For all the foregoing reasons, I believe that the State Group should be appointed lead plaintiff in this Litigation. The State Group is uniquely situated to provide the Class with the strongest and most efficient representation, bringing with it the legal and investment sophistication of four states with a strong track record of working together successfully.

I declare under penalty of perjury that the foregoing is true and correct. Executed this
18th day of January, 2002 in Atlanta, Georgia.


HONORABLE THURBERT E. BAKER

01/21/02 15:42 FAX 1 302 677 7100

GRANT&EISENHOFER

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21-Jan-02 03:07pm From-CHITWOOD & HARLEY

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EXHIBIT A

Recent Actions In Which Georgia, Ohio, and/or Washington Have Collaborated
 (note: several other states participated in many of these actions)

Case Name	Brief Summary	Participating State	Date Opened
American Basketball League (ABL)	Multi-state investigation of allegations made against the NBA in connection with the demise of the ABL, a two-year old women's league	OH, WA	1/21/99
Exxon/Mobil merger	Joint FTC and state review of the competitive effects of the proposed acquisition of Mobil by Exxon Corp.	OH, WA	1/12/99
Mylan Pharmaceuticals	With the FTC, a suit against Mylan, Profarmaco, Gyna, Cambrex and SST seeking equitable and injunctive relief as well as damages on behalf of consumers and state agencies/bureaus	OH, WA	12/1/97
Payment Systems Working Group (PSWG)	NAAG working group that arose out of a multi-state settlement of a state lawsuit to enjoin Visa and Mastercard from carrying out a planned debit card joint venture.	OH, WA	1/1/87
SCI/ECI Funeral Home/Cemetery merger review	Multi-state merger investigation with the FTC reviewing the competitive effects of the proposed acquisition of two of the largest funeral home/cemetery companies in the U.S.	GA, OH	10/16/98
Toys "R" Us Litigation	Anti-trust action filed on 11/17/98 against the nation's largest toy retailer, and four toy manufacturers- Mattel, Hasbro, Tyco, and Little Tykes. The defendants are alleged to have conspired to eliminate competition from warehouse clubs.	GA, OH, WA	10/1/97
USA Waste/Waste Management merger	Along with the Dept. of Justice, an investigation of the competitive effects of the merger of the two largest waste hauling/landfill operators in the country.	OH, WA	3/12/96
Vitamins Price Fixing	Investigation relating to vitamin price-fixing	GA, OH, WA	1/10/00
Bank One/First USA	Bank Privacy issues	OH, WA	7/99
Capital One	Bank Privacy issues	OH, WA	7/99
Citibank	Bank Privacy issues	OH, WA	7/99
MBNA	Bank Privacy issues	OH, WA	7/99

Case Name	Brief Summary	Participating State	Date Opened
CVS	Allegations of fully billing Medicaid and other federally paid health care programs for partially filled prescriptions without a subsequent crediting to these programs, also including a failure to credit for prescriptions that were not picked up at all.	GA, OH	3/1/99
Drug Manufacturers	This case is the result of a qui tam action involving alleged manipulations of drug prices by numerous manufacturers filed under the federal False Claims Act.	OH, WA	10/30/98
Medaphis	Upcoding emergency room physician codes for Medicaid and other federally paid health care programs.	GA, OH, WA	10/30/98
Nine West	Antitrust action alleging that the manufacturer conspired to raise retail prices of women's shoes	GA, OH, WA	3/00
State of Mo., et al v. American Cyanamid	Antitrust action involving conspiracy to raise prices of agricultural chemical products	GA, OH, WA	1/97
State of Tex., et al. v. Zeneca, Inc.	Antitrust claim for conspiracy to raise prices of agricultural chemical products	GA, OH, WA	6/97
Walgreens	Settlement of Medicaid fraud action involving prescription short counts	OH, WA	10/97
United States v. Columbia HCA	Settlement of civil and criminal Medicaid fraud actions	GA, OH, WA	10/97
In re Bayer	Multistate settlement regarding drug pricing to Medicaid programs	GA, OH, WA	9/00
Bridgestone/ Firestone	Consumer protection action involving misrepresentations regarding particular tires that had high rates of separation	GA, OH, WA	3/01

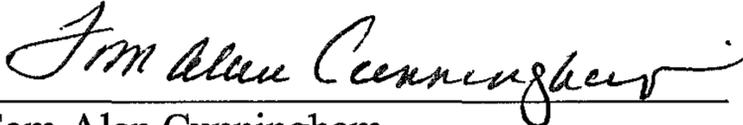
In addition, Georgia, Ohio, and/or Washington have joined together as an Amicus Curiae in the following matters:

Case Name	Brief Summary	Participating State	Date Opened
Arkansas v. Farm Credit Services	Federally chartered banking entity is not exempt from state franchise and sales taxes.	GA, OH, WA	10/1/96
Casey v. Blissett	Caps on fees under the Prison Litigation Reform Act apply retroactively.	GA, OH	10/1/98
City of Chicago v. Morales	Chicago criminal gang loitering ordinance permitting police dispersal orders where police reasonably believe a criminal gang member is among those loitering is unconstitutional.	GA, OH	10/1/97
City of West Covina v. Perkins	Notice of search pursuant to a warrant and names of officers involved is all that is required by due process regarding retrieval of seized property.	OH, WA	10/1/97
College Savings v. Florida Prepaid	Congress lacks power under the 14 th Amendment to abrogate 11 th Amendment immunity under the Lanham Act.	OH, WA	3/1/99
Hudson v. U.S.	U.S. Constitution's double jeopardy clause permits both civil sanctions and criminal punishment for same incident.	GA, OH, WA	10/1/97
Johnson v. Haddix	Caps on fees under the Prison Litigation Reform Act apply retroactively.	GA, OH, WA	10/1/98
Maryland v. Wilson	Law enforcement officers can require a passenger to exit the car during the course of a legitimate traffic stop.	OH, WA	10/1/95
Nixon v. Shrink Missouri Government PAC	\$1075 limit placed on contributions to candidates in state and local races is appropriate under Buckley v. Valeo.	OH, WA	10/1/98
North Carolina v. Jackson	"Free to leave" test for purposes of the Fourth Amendment does not apply to the definition of custody under the Fifth Amendment	OH, WA	10/1/97
Pennsylvania Dept. of Corrections v. Yaskey	The ADA does not apply to inmates of correctional institutions.	GA, OH	10/1/97
State Board of Equalization v. SPT	Congress lacks power under the 14 th Amendment to abrogate 11 th Amendment immunity under the 4-R Act.	OH, WA	10/1/97
State of New Mexico v. Reed	There is no "duress" exception to the Extradition Clause.	OH, WA	10/1/97

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Declaration of Thurbert E. Baker in Support of the Motion of the State Retirement Systems Group for the Appointment of Lead Plaintiff and for Approval of its Selection of Counsel has been served upon all counsel of record via facsimile on this 21st day of January, 2002.

See Fax Cover Sheet of All Counsel of Record



Tom Alan Cunningham