UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
JAN 22 2002
Michael N. Milby, Clerk

MARK NEWBY, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	Civil Action No. 01-CV-3624
v.	)	
ENRON CORPORATION, KENNETH L. LAY, JEFFREY K. SKILLING, and ANDREW S. FASTOW,	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFF MOTIONS AND IN FURTHER SUPPORT OF MOTION OF PRIVATE ASSET MANAGEMENT TO BE APPOINTED LEAD PLAINTIFF AND FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL AND LIAISON COUNSEL

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Enron Corporation ("Enron") shareholder Private Asset Management ("PAM") respectfully submits this memorandum of law in opposition to competing lead plaintiff motions and in further support of its motion to be appointed lead plaintiff and for approval of its selection of lead counsel.

PRELIMINARY STATEMENT

PAM sustained financial losses of approximately $10,304,959 as a result of its transactions in Enron common stock. Twelve lead plaintiff motions were filed by shareholders and/or bondholders of Enron. Of those twelve motions, only three motions were made on behalf of common stock purchasers who were not part of an artificial, attorney-manipulated group.[1] PAM is one of these three movants who seeks its appointment alone as a lead plaintiff. In addition, PAM suffered by far the greatest losses of any common stock movant not part of some artificial group. Furthermore, PAM has submitted a Declaration of its Vice President/General Counsel which demonstrates that PAM is serious about its responsibilities as a lead plaintiff and is quite capable of carrying out those responsibilities. *See* Exhibit A to the Affidavit of Stuart L. Berman In Opposition To Lead Plaintiff Motions And In Further Support Of Motion Of Private Asset Management To Be Appointed Lead Plaintiff And For Approval Of Lead Plaintiff's Selection Of Lead Counsel and Liaison Counsel (the "Berman Aff."). Accordingly, PAM should be appointed as lead plaintiff and its selection of Schiffrin & Barroway, LLP, a law firm which specializes in complex class action litigation, should be approved as lead counsel.

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[1] Two motions were brought on behalf of bondholders only. One motion was brought on behalf of preferred shareholders only. Four motions were brought on behalf of groups of unrelated common stockholders assembled by their attorneys. Two motions have been amended to reflect the creation of a lawyer-created group. Only three motions were brought on behalf of common stockholders who are not part of some artificial group created solely to advance the interests of their respective counsel.

ARGUMENT

I. PAM SHOULD BE APPOINTED AS LEAD PLAINTIFF

A. PAM Has the Largest Financial Interest of all Common Stockholders not Affiliated with an Artificial Group

The Private Securities Litigation Reform Act of 1995 ("PSLRA" or the "Reform Act") provides that the Court shall appoint as lead plaintiff the "most adequate plaintiff." 15 U.S.C. §78u-4(a)(3)(B)(i). In determining who is the "most adequate plaintiff," the Reform Act provides that:

> [T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the person or group 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 [pertaining to class actions].

15 U.S.C. §78u-4(a)(3)(B)(iii).

PAM is a growth/value institutional investor which lost more than $10 million due to defendants' alleged false and misleading statements and/or omissions. No other common stock movant who is not part of some attorney-assembled group suffered more losses than PAM. Additionally, PAM has timely filed a motion seeking its appointment as lead plaintiff, has submitted a Certification attesting to its transactions in Enron common stock during the Class Period and has now submitted a Declaration of its Vice President/General Counsel further demonstrating its ability and willingness to serve as a representative party (*see* Exhibit "A" to the

Berman Aff.). Moreover, PAM has selected and retained competent and experienced counsel to represent it and the Class.

B. The Court Should Not Appoint Groups Artificially Assembled By Their Attorneys

Of the nine lead plaintiff motions made by common stockholders, only three seek to appoint a single individual or institution not artificially arranged by counsel. The other six lead plaintiff motions were made by groups of two to six individuals or entities with no apparent pre-existing association (other than having common counsel). In each of these six applications, it remains unclear why it is necessary or how it is beneficial to the class for a group of unrelated investors to fulfill the responsibilities of lead plaintiff.[2] *See Gluck v. CellStar Corp.*, 976 F.Supp. 542, 549-50 (N.D. Tex. 1997):

> The best way for the Court to effectuate the purposes of the Reform Act is to appoint [single institution] to serve as sole Lead Plaintiff. Increasing the number of Lead Plaintiffs would detract from the Reform Act's fundamental goal of client control, as it would inevitably delegate more control and responsibility to the lawyers for the class and make the class representatives more reliant on the lawyers. It would also reduce the influence and responsibility of [single institution], something Congress clearly did not wish the Court to do. Further, appointing co-Lead Plaintiffs would unnecessarily increase the time and expense spent on preparing and litigating the case, especially if the co-Lead Plaintiffs decided to hire co-Lead Counsel.

What is and remains abundantly clear, however, is that the idea to group together unrelated investors for purposes of serving as lead plaintiff originated with, and was carried out by, the attorneys.

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[2] Moreover, this Court should question each group's members' true motives and qualifications for serving as lead plaintiff. The fact that these candidates felt compelled to move only as a group rather than alone is significant, especially when there is a qualified institutional candidate, like PAM, which seeks its sole appointment as lead plaintiff.

To entrust the prosecution of an important shareholder litigation to a disjointed group whose only link is that its members share the same counsel is in direct conflict with the spirit and purpose of the PSLRA. Indeed, an essential motivation behind the lead plaintiff provisions of the PSLRA "was to prevent lawyer-driven litigation." *In re Donkenny, Inc. Sec. Litig.*, 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997). The Reform Act envisioned that large investors would assume control of cases from "figurehead plaintiffs who exercise no meaningful supervision of litigation." *Ravens v. Iftikar*, 174 F.R.D. 651, 661 (N.D. Cal. 1997). As expressed in House, Senate and Conference Committee Reports, the lead plaintiff provisions of the PSLRA arose from Congress' concern that class action securities litigation had become a "lawyer-driven" enterprise in which law firms sought to bring cases and then sought out nominally interested plaintiffs in the hope of obtaining quick settlements. Congress enacted the PSLRA in an effort to curb this practice and to protect investors who join class actions by increasing "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." House Conference Report No. 104-369, 104th Cong., 1st Sess. at 32 (1995), 1995 WL 709276 at *28. Indeed, in *In re Network Assocs., Inc. Sec. Litig.*, 76 F.Supp.2d 1017 (N.D. Cal. 1999), the court concluded:

> Not once was any reference made [in the legislative history] to the possibility of the lead plaintiff being an amalgam of unrelated class members . . . . <u>It seems clear that Congress intended a single, strong lead plaintiff to control counsel and the litigation</u>. No reference whatsoever was made in the reports to multiple, unrelated individuals at the helm.

Id. at 1024-25 (emphasis added).

Courts have become increasingly wary of appointing groups arranged by counsel as lead

plaintiffs, believing that such an arrangement cuts against the purpose behind the PSLRA. In *Aronson v. McKesson HBOC, Inc.*, 79 F.Supp.2d 1146 (N.D. Cal. 1999), the court analyzed whether aggregation of unrelated investors serves the purposes of the Reform Act and concluded "in economic terms, the goal of the statute is to reduce the 'collective action' problems that widely dispersed clients face in supervising their attorneys. To that end, it makes sense that one client will provide more control than a disjointed group concocted by plaintiffs' counsel -- even if the group consists of institutional investors."). *Id.* at 1152-53 (emphasis added). In *In re Telxon Corp. Sec. Litig.*, 67 F.Supp.2d 803, 813 (N.D. Ohio 1999), the court held that a group cannot be "a mere assemblage of unrelated persons who share nothing in common other than the twin fortuities that (1) they suffered losses and (2) they entered into retainer agreements with the same attorney or attorneys." That court further reasoned:

> The larger the group, the less incentive any single member of the group – and certainly the group as a whole – will have to exercise any supervision or control over the litigation . . . . This is especially so if the group consists of not only a larger number of persons, but also of persons who bear no relation and have no connection with one another beyond the fact that they suffered financial loss . . . . Without 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. Thus, the problem sought to be remedied by the [Reform Act]'s lead plaintiff provisions would remain unaddressed.

Id. at 815-16.

Other courts have considered the same issues and reached the same conclusion – that it is inconsistent with the Reform Act to designate a "group" as lead plaintiff because that allows and encourages attorneys, rather than their clients, to direct the litigation. *See, e.g., In re Razorfish, Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 5736 (S.D.N.Y. 2001) (court rejected proposed group

which "is simply an artifice cobbled together by cooperating counsel for the obvious purpose of creating a large enough group of investors to qualify as 'lead plaintiff' . . . . Given, moreover, that the [group] has no independent existence and its composite members have no prior relationship, there is nothing to suggest that they will collectively ride herd on counsel anywhere as well as could a single sophisticated entity.") (emphasis added); *The Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F.Supp.2d 435 (W.D. Pa. 2001) ("The aggregation of disparate investors solely for the purpose of establishing a plaintiff group is contrary to the purposes of the PSLRA, and has been strongly disfavored by the courts.").

In the instant case, six of the nine lead plaintiff candidates include groups of two or more members who have no pre-litigation association and who have been arranged by counsel solely for purposes of advancing counsel's own interests in controlling the litigation. In contrast, PAM is an institutional investor which suffered significant financial losses (more than $10 million) and which has its own general counsel, who brings knowledge and legal expertise to the role of lead plaintiff. In connection therewith, PAM has submitted a Declaration of its Vice President/General Counsel attesting to his familiarity with the relevant provisions of the Reform Act, his commitment to vigorously prosecuting this action, and his (and PAM's) qualifications to serve as lead plaintiff. *See* Exhibit "A" to the Berman Aff. No other single lead plaintiff candidate seeking to represent Enron common stock investors lost more than PAM and has better qualifications than PAM for serving as lead plaintiff. Accordingly, by appointing PAM as sole lead plaintiff, the Court can be assured that it is satisfying both the letter and spirit of the PSLRA.

II. PAM'S SELECTION OF LEAD COUNSEL SHOULD BE APPROVED BY THE COURT

The PSLRA vests authority in the lead plaintiff to select and retain counsel to represent the class, subject to the approval of the Court. See 15 U.S.C. §78u-4(a)(3)(B)(v). Thus, this Court should not disturb lead plaintiff's choice of counsel unless necessary to "protect the interests of the class." 15 U.S.C. §78u-4(a)(3)(B)(iii).

Here, PAM has selected and retained the law firm of Schiffrin & Barroway, LLP to represent it and the class. This firm has extensive experience in the area of complex shareholder litigation and is well-qualified to serve as lead counsel. See Schiffrin & Barroway's firm resume attached as Exhibit D to the Affidavit of Stuart L. Berman in Support of Motion of Private Asset Management to Consolidate Actions, to be Appointed Lead Plaintiff, and for Approval of Lead Plaintiff's Selection of Lead Counsel and Liaison Counsel, filed with the Court on or about December 21, 2001.

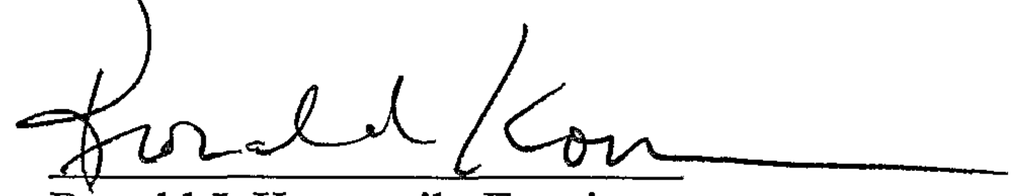
CONCLUSION

For the foregoing reasons, PAM respectfully requests that the Court: (a) appoint PAM as Lead Plaintiff; (c) approve Schiffrin & Barroway, LLP as Lead Counsel for the Class; (d) and approve Sydow, Kormanik & Eckerson as Liaison Counsel for the Class.

Dated: January 22, 2002

Respectfully submitted,

SYDOW, KORMANIK & ECKERSON

By: 

Ronald J. Kormanik, Esquire
Sydow, Kormanik, Carrigan & Eckerson
1111 Bagby, Suite 4650
Houston, Texas 77002
Telephone: (713) 654-8100

Proposed Liaison Counsel

SCHIFFRIN & BARROWAY, LLP
Richard S. Schiffrin, Esq.
Andrew L. Barroway, Esq.
Stuart L. Berman, Esq.
Three Bala Plaza East
Suite 400
Bala Cynwyd, Pennsylvania 19004
Telephone: (610) 667-7706

Proposed Lead Counsel

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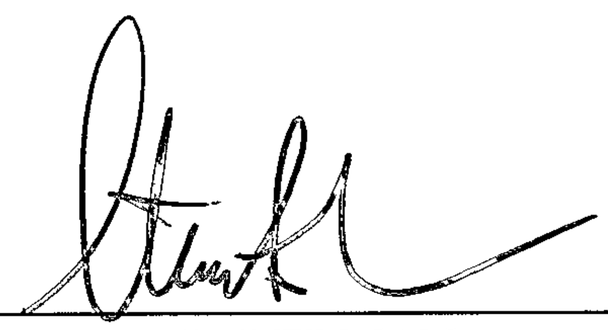
CERTIFICATE OF SERVICE

I, Stuart L. Berman, hereby certify that on this 21st day of January, 2002, I caused a true and correct copy of the Memorandum of Law in Opposition to Lead Plaintiff Motions and in Further Support of Motion of Private Asset Management to be Appointed as Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel and Liaison Counsel and Affidavit of Stuart L. Berman in support thereof to be served via facsimile on the parties identified on the service list attached hereto.



STUART L. BERMAN

Thomas E. Bilek
HOEFFNER BILEK & EIDMAN
440 Louisiana
Suite 720
Houston, TX 77002-1634

Tom Alan Cunningham
Richard J. Zook
CUNNINGHAM DARLOW ET AL
600 Travis
Suite 1700
Houston, TX 77002

David R. Scott
Neil Rothstein
SCOTT & SCOTT LLD
208 Norvich Avenue
Suite 1700
Colchester, CT 06415

James D. Baskin, III
BASKIN BENNETT ET AL
919 Congress Avenue
Suite 1000
Austin, TX 78701

Alfred G. Yates, Jr.
LAW OFFICES OF ALFRED G. YATES, JR.
429 Forbes Avenue
Pittsburgh, PA 15219

Sherrie R. Savett, Esquire
Carole A. Broderick, Esquire
BERGER & MONTAGUE, P. C.
1622 Locust Street
Philadelphia, PA 19103

Marc H. Edelson
Jerold B. Hoffman
HOFFMAN & EDELSON, LLC
45 W. Court Street
Doylestown, PA 18901

William B. Federman
FEDERMAN & SHERWOOD
2926 Maple Avenue
Suite 200
Dallas, TX 75201

Leo W. Desmond
LAW OFFICE OF LEO W. DESMOND
2161 Palm Beach Lakes Blvd.
Suite 204
West Palm Beach, FL 33409

Peter D. Bull
Joshua M. Lifshitz
BULL & LIFSHITZ
18 East 41st Street
New York, NY 10017

Christopher Lovell
Robert Rodriguez
LOVELL & STEWART
500 Fifth Avenue
New York, NY 10110

Darren J. Robbins
G. Paul Howes
MILBERG WEISS BERSHAD HYNES & LERACH LLP
401 B. Street, Suite 1700
San Diego, CA 92101-5050

Steven J. Toll
Andrew N. Friedman
COHEN MILSTEIN HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue NW, Suite 500
Washington, DC 20005-3964

Thomas Sahpiro
SHAPIRO HABER & URMY, LLP
75 State Street
Boston, MA 02109

Jules Brody
Aaron Brody
STULL STULL & BRODY
6 East 45th Street
4th Floor
New York, NY 10017

Robert T. Harwood
Frederick W. Gerkens
WECHSLER HARWOOD HALEBIAN & FEFFER LLP
488 Madison Avenue, 8th Floor
New York, NY 10022

Deborah R. Gross
LAW OFFICES OF BERNARD M. GROSS, PC
1515 Locust Street
2nd Floor
Philadelphia, PA 19102

Joseph V. McBride
RABIN & PECKEL LLP
275 Madison Avenue
New York, NY 10016

Kenneth A. Elan
LAW OFFICES OF KENNETH A. ELAN
217 Broadway
Suite 404
New York, NY 10007

Klari Neuwalt
LAW OFFICE OF KLARI NEUWALT
110 East 59th Street
29th Floor
New York, NY 10022

Michael Egan
BERNSTEIN LIEBHARD & LIFSHITZ, LLP
10 East 40th Street
New York, NY 10016

Andrew M. Shatz
SHATZ & NOBLE
30 Main Street
Hartford, CT 06106

Peter D. Fischbein
LAW OFFICES OF PETER D. FISCHBEIN
777 Terrace Avenue
5th Floor
Hasbrouck Heights, NJ 07604

Paul A. Scarlato
WEINSTEIN KITCHENOFF SCARLATO & GOLDMAN LTD.
1845 Walnut Street
Suite 1100
Philadelphia, PA 19103

G. Sean Jez
FLEMING & ASSOCIATES
1330 Post Oak Blvd.
Suite 3030
Houston, Tx 77056-3019

Joe R. Whatley, Jr.
Peter H. Burke
WHATLEY DRAKE, LLC
2323 Second Avenue North
Birmingham, AL 35202-0647

Michael D, Donovan
DONOVAN SEARLES, LLC
1845 Walnut Street
Suite 1100
Philadelphia, PA 19103

Roger B. Greenberg
SCHWARTZ, JUNELL, CAMPBELL & OATHOUT, LLP
Teo Houxton Center
909 Fanin, Suite 2000
Houston, TX 77010

Arthur Bolognese
Joshua H. Grabar
BOLOGNESE & ASSOCIATES, LLC
One Penn Center Plaza
1617 JFK Blvd., Suite 650
Philadelphia, PA 19103

Fred E. Stoops, Sr.
RICHARDSON, STOOPS, RICHARDSON & WARD
6555 South Lewis Avenue
Suite 200
Tulsa, OK 74136-1010

Marc S. Henzel, Esq.
THE LAW OFFICE OF MARC S. HENZEL
273 Montgomery Avenue
Suite 202
Bala Cynwyd, PA 19004-2808

Richard M. Frankel
HACKERMAN FRANKEL & MANELA
1122 Bissonnet
Houston, TX 77005

James V. Pianelli
Timothy D. Riley
MCGHEHEE & PIANELLI, LLP
1225 N. Loop W.
Suite 810
Houston, TX 77008

Thomas W. Sankey
SANKEY & LUCK, L.L.P.
600 Travis Street
Suite 6200
Houston, TX 77002

Frederic S. Fox, Esq.
KAPLAN FOX & KILSHEIMER LLP
805 Third Avenue
22nd Floor
New York, NY 10022

Daniel W. Krasner
Jeffrey G. Smith
WOLF HALDENSTEIN ADLER FREEMAN
HERZ LLP
270 Madison Avenue
New York, NY 10016

Joseph H. Weiss
WEISS & YOURMAN
The French Building
551 Fifth Avenue, Suite 1600
New York, NY 10176

Jeffrey C. Zwerling
Richard A. Speirs
ZWERLING, SCHACHTER ZWERLING LLP
767 Third Avenue
New York, NY 10017

Louis F. Burke
LOUIS F. BURKE, PC
360 Lexington Avenue
New York NY

Solomon B. Cera
Steven O. Sidener
GOLD BENNETT CERA & SIDENER, LLP
595 Market Street
Suite 2300
San Francisco, CA 94105

Paul T. Warner
LAW OFFICE OF PAUL T. WARNER
4265 San Felipe
Suite 1000
Houston, TX 77027

Melvyn I. Weiss
Steven G. Schulman
MILBERG WEISS BERSHAD HYNES &
LERACH LLP
One Pennsylvania Plaza
New York, NY 10119-0165

Curtis V. Trinko
LAW OFFICES OF CURTIS V. TRINKO LLP
16 West 46th Street
Seventh Floor
New York, NY 10036

Robert M. Roseman
Jay S. Cohen
SPECTOR, ROSEMAN & KODROFF, P.C.
1818 Market Street
Suite 2500
Philadelphia, PA 19103

Lionel Z. Glancy
LAW OFFICES OF LIONEL Z. GLANCY
1801 Avenue of the Stars
Suite 311
Los Angeles, CA 90067

Stephen Susman
SUSMAN GODFREY LLP
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096

Bruce Hiler
O'MELVENY & MYERS LLP
555 13th Street, NW
Washington, DC 20004-1109

Jack C. Nickens
CLEMENTS, O'NEILL, PIERCE, NICKENS &
WILSON, LLP
Wells Fargo Plaza
1000 Louisiana, Suite 1800
Houston, TX 77002

Craig Smyser
SMYSER KAPLAN & VESELKA, LLP
700 Louisiana Street
Suite 2300
Houston, TX 77002

Kathy D. Patrick
GIBBS & BRUNS, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

J. Clifford Gunter, III
BRACEWELL & PATTERSON, LLP
South Tower Pennzoil Place
711 Louisiana Street
Suite 2900, Houston TX 77002/-2781

John J. McKetta III
GRAVES, DOUGHERTY, HEARON & MOODY,
P.C.
515 Congress Avenue
Suite 2300
Austin, TX 78701

William R. McLucas
WILMER, CUTLER & PICKERING
2445 M Street, NW
Washington, DC 20037-1420

Michael P. Carroll
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. ENRON CORPORATION, KENNETH L. LAY, JEFFREY K. SKILLING, and ANDREW S. FASTOW, Defendants.	)	Civil Action No. 01-CV-3624

AFFIDAVIT OF STUART L. BERMAN IN OPPOSITION TO LEAD PLAINTIFF MOTIONS AND IN FURTHER SUPPORT OF MOTION OF PRIVATE ASSET MANAGEMENT TO BE APPOINTED LEAD PLAINTIFF AND FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL AND LIAISON COUNSEL

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF MONTGOMERY)

Stuart L. Berman, being duly sworn, deposes and says:

1. I am an attorney at Schiffrin & Barroway, LLP, counsel for lead plaintiff candidate Private Asset Management. I submit this Affidavit in opposition to competing lead plaintiff motions and in further support of the motion of Private Asset Management for its appointment as Lead Plaintiff and for approval of its selection of Lead Counsel and Liaison Counsel.

2. Attached hereto as Exhibit A is a true and correct copy of the signed declaration of Michael D. Berlin, Vice President/General Counsel of Private Asset Management. This Declaration is submitted in further support of the motion of Private Asset Management to be appointed lead plaintiff and for approval of its selection of lead counsel and liaison counsel.

I hereby declare under penalty of perjury that the foregoing is true and correct.

STUART L. BERMAN

Subscribed and sworn to before
me this 21st day of January 2002.

NOTARY PUBLIC

Notarial Seal
Kathy L. VanderVeur, Notary Public
Lower Merion Twp., Montgomery County
My Commission Expires Sept. 29, 2003
Member, Pennsylvania Association of Notaries

DECLARATION IN SUPPORT OF MOTION
TO BE APPOINTED LEAD PLAINTIFF

I, Michael D. Berlin, hereby depose and state, in further support of the application of Private Asset Management ("PAM") to be appointed lead plaintiff in this Action pursuant to the Private Securities Litigation Reform Act of 1995 (the "Reform Act"). I have personal knowledge of the matters stated herein and if called as a witness, I could and would competently testify to the following:

1. I am Vice President/General Counsel of PAM, which was founded in 1992. PAM is a growth/value investor with assets of over $600 million which primarily invests in stocks with market capitalizations of $1 billion or greater.

2. As Vice President/General Counsel of PAM, I am responsible for legal decisions regarding PAM. I am an experienced litigator who specialized in complex litigation having been continually licensed since 1974. Based on my legal background and experience, I am very capable of carrying out my responsibilities as a lead plaintiff and will pursue this litigation vigorously. I am aware that, in addition to PAM, various individuals and institutions have filed motions seeking their appointment as lead plaintiff. I am also aware that many of these other individuals and institutions filed motions as groups which are represented by multiple counsel. I believe the competing lead plaintiff motions involve structures which are too cumbersome in regard to both the number of proposed lead plaintiffs and lead counsel. I am confident that PAM and its selected counsel, Schiffrin & Barroway, LLP, can successfully prosecute this litigation on behalf of the class.

3. I am familiar with the responsibility of the lead plaintiff with respect to selecting and retaining proposed lead counsel and overseeing the prosecution and resolution of this Action.

4. I am aware that Schiffrin & Barroway has a significant track record of successfully prosecuting cases of this magnitude and has the requisite experience, expertise and resources to serve as lead counsel in this litigation.

5. I understand that as lead plaintiff and a representative of the class in this litigation, I will have certain obligations, which include the following:

a. monitoring this Action, which entails review of pleadings, orders and other important documents in the Action, as well as regularly discussing the status and strategies of this case with my counsel;

b. participating in the discovery process such as: (i) providing documents that may be requested by my counsel and/or defense counsel; (ii) responding to written discovery requests, such as interrogatories and/or requests for admissions; and (iii) appearing for a deposition (if defendants request one); and

c. participating in the trial process if necessary.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of January, 2002, at San Diego, California.

MICHAEL D. BERLIN