United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk of Court

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

MARK NEWBY, Plaintiff, v. ENRON CORPORATION, ANDREW S. FASTOW, KENNETH L. LAY and JEFFREY J. SKILLING, Defendants.	Civil Action No. 01-CV-3624 (Consolidated) Judge Melinda Harmon

SUR-REPLY OF THE NEW YORK CITY PENSION FUNDS AND THE FLORIDA STATE BOARD OF ADMINISTRATION IN SUPPORT OF THEIR MOTION FOR APPOINTMENT AS LEAD PLAINTIFFS

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The New York City Pension Funds (the "NYC Funds") and the Florida State Board of Administration (the "FSBA") submit this brief in response to the Sur-Reply of the State Retirement Systems Group and Response Of The Regents Of The University Of California To The Brief Of *Amicus Curiae* Filed By The State of Wisconsin Investment Board.[1] Neither the State Group nor the Milberg Group have rebutted the presumption that the NYC Funds and the FSBA – the applicants with the largest financial interest in the relief sought by the class – are the most appropriate lead plaintiffs. Indeed, the NYC Funds and the FSBA not only have the largest financial interest in the relief sought by the class, but also have the resources and experience to handle litigation of this magnitude. That, combined with their demonstrated commitment to active client management of this litigation for the benefit of the class, make them the appropriate lead plaintiffs in this litigation.[2]

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[1] Apparently recognizing that, in the briefs authorized by the Court's scheduling order regarding the lead plaintiff issue, they had not rebutted the presumption that the NYC Funds and the FSBA should serve as lead plaintiff in this case, the Milberg Group and State Group took it upon themselves to file briefs not authorized by the Court's scheduling order. The NYC Funds and the FSBA move to strike those unauthorized filings. In the event that the Court does consider those unauthorized filings, the NYC Funds and the FSBA request that the Court permit this response to be considered as well.

Contrary to the assertion of the Milberg Group, there is no provision in the Federal Rules of Civil Procedure or the Local Rules of this Court that requires an *amicus* to obtain leave of court prior to filing an *amicus* brief. The *amicus* brief filed by the State of Wisconsin Investment Board regarding the 5 in 3 issue was timely filed, and gives the Court the benefit of the views of an institutional investor, which is a class member and which, as Congress intended when enacting the PSLRA, has served as a lead plaintiff with distinction in securities litigation.

[2] The State Group attaches a declaration from the attorneys general of several states indicating that they support the application of the State Group. None of those states has filed an application to become lead plaintiff, and there is no indication that any of these supporters are even class members. The views of these non-lead plaintiff applicants are therefore of no legal significance. In In re Ribozyme Pharm, Inc. Sec. Litig., 192 F.R.D. 656, 659 (D. Colo. 2000) , the Court noted "when determining which group has the largest financial interest, courts may only look to the losses sustained by the class members actually being put forward by any particular group to

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I.

GIVEN THE LOSSES, RESOURCES, EXPERIENCE, AND COMMITMENT TO CLIENT-MANAGED LITIGATION OF THE NYC FUNDS AND THE FSBA, THIS COURT SHOULD USE ITS DISCRETION TO WAIVE THE FIVE-IN-THREE LIMITATION

Both the Milberg Group and the State Group concede, as they must given the PSLRA's language and legislative history, that this Court has the discretion to waive the five-in-three limitation in appropriate cases. (Milberg Sur-Reply at pp. 1-3; State Group Sur-Reply at p. 5, n.3.) The State Group then argues that "[a]s a practical matter, Florida is simply too busy to adequately manage a litigation of this size." (State Group Sur-Reply at p. 5, n. 3.) The Milberg Group makes the same argument in more bombastic terms. (Sur-Reply of Milberg Group at pp. 4-8.)[3] When making these arguments, both the Milberg Group and the State Group fail to address the leadership qualifications and commitment of the NYC Funds. The NYC Funds are not currently involved in

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[2](...continued)
act as lead plaintiffs." And in In re The Baan Company Sec. Litig., 186 F.R.D. 214, 217 (D.D.C. 1999), the Court rejected a 20-person subgroup of a 466-member group, noting that the "Plaintiffs are playing a shell game with the statute." In Baan, the support of other class members of a lead plaintiff applicant was irrelevant to the Court's determination of which movant was the most adequate plaintiff. Here, the support of the attorneys general of other states for the State Group's position is similarly irrelevant.

[3] The State Group and the Milberg Group argue that because the FSBA may be too busy on other matters, such as other litigations, it will not be able to manage this case properly. We note with irony that the State Group is to be managed by the Attorneys Generals of three different states: Georgia, Ohio and Washington. It is apparent that these Attorneys Generals are managing extensive litigation. In addition, these Attorneys Generals have other duties and responsibilities which will divert their attention from the active management of this litigation.

The Regents Board oversees 10 campuses, 183,000 graduate and undergraduate students, three law schools, five medical schools and the nations largest continuing education program. It has more than 155,000 employees and is governed by a 26 member board. Clearly the Regents has a lot of pressing business before it and the management of this litigation – by a 26 member board – will be competing with the business of managing a number of different universities, law and medical schools and overseeing 155,000 employees.

any class action litigation.[4] In addition, the NYC Funds have a proven track record of handling such litigation well for the class they have represented.[5] They have the resources and experience both at the New York City Comptroller's Office and the New York City Law Department to manage such litigation actively in the best interests of the class. In this litigation, the NYC Funds and the FSBA will work as a team. Indeed, under the terms of their retainer agreement, the FSBA and the NYC Funds have agreed to prosecute this litigation together on an equal basis; thus, the NYC Funds will play just as active a role as the FSBA. Combined, the NYC Funds and the FSBA have the resources and experience to oversee this litigation.[6]

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[4] The Milberg Group ignores the key issue, that the five-in-three limitation was drafted to curb professional plaintiffs, a problem which is not at issue with the FSBA and the NYC Funds. Moreover, the Milberg Group's arguments about the litigiousness of the FSBA ring hollow, as Milberg Weiss is currently acting as lead counsel in at least half of all currently active securities class actions, thus raising questions about Milberg's own ability to give its undistracted commitment to the prosecution of this important case. See Exhibit F to the Reply Brief of the FSBA and the NYC Funds.

[5] In the Cendant litigation, the NYC Funds were among a group of three public pension funds who obtained the largest settlement ever in private securities litigation – $3.2 billion. In that case, they also saved the class millions of dollars in attorneys' fees, see In Cendant, 264 F.3d 201 (3d Cir.2001), and obtained significant corporate governance changes as part of the settlement.

[6] The Milberg Group's description of Judge Alsup's rulings in In re Critical Path, Inc. Securities Litigation is misleading. Judge Alsup stated at the hearing on January 17, 2002, that he was likely to grant preliminary approval to the settlement in Critical Path upon provision of additional information and a revised form of notice. That information and revised notice have now been provided.

In October of 2001, the Critical Path litigation was mediated before retired United States Magistrate Edward Infante. Notwithstanding the PSLRA discovery stay, the FSBA insisted on document discovery prior to mediation. After two mediation sessions and further follow-up discussions, a settlement was finally reached in November 2001. At the time of settlement, Critical Path stock was trading at approximately $0.40 per share. The company's cash flow was such that, absent financing, it would have to file for bankruptcy within a matter of months. Indeed, its counsel submitted testimony indicating that bankruptcy was imminent absent resolution of the shareholder litigation and financing. Further financing could not be obtained, absent a resolution of the shareholder class action. The FSBA believes that the Critical Path settlement is an excellent settlement given the limited financial resources available in that case.

II.

THE NYC FUNDS AND THE FSBA APPROPRIATELY CALCULATED THEIR LOSSES, AND HAVE THE LARGEST INTEREST IN THE RELIEF SOUGHT BY THE CLASS

Both the State Group and the Milberg Group acknowledge that the use of a first in/first out method to offset class period stock sales against pre-class period stock holdings is the appropriate manner for calculating a potential lead plaintiff's financial interest in the relief sought by the class. (State Group Sur-Reply at pp. 7-8; Milberg Group Reply at p. 30.) This is the methodology that the NYC Funds and the FSBA used to calculate their losses. These losses exceed $443.9 million – far higher than those of any other group.[7] The State Group acknowledges this in its sur-reply. (State Group Sur-Reply at pp. 6-7, note 4, page 9.) The zealousness with which the Milberg Group wishes it otherwise does not change this fact.

III.

THE NYC FUNDS AND THE FSBA ARE ADEQUATE AND TYPICAL PLAINTIFFS

Unable to rebut the fact that the NYC Funds and the FSBA are the presumptive lead plaintiffs, both the State Group and the Milberg Group attempt to confuse the issue by attaching news articles regarding the relationship between the FSBA and one of its financial advisors, Alliance Capital Management Holding LP. The question of whether Alliance was a good investment advisor for the FSBA, however, is irrelevant to whether the NYC Funds and the FSBA are adequate and typical lead plaintiffs in this litigation. Even if one were to put aside any of the losses that the FSBA incurred in connection with the purchases made through Alliance on which the State Group and the Milberg Group focus, the NYC Funds and the FSBA still have losses in excess of $409 million, far

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[7] Whether or not the NYC Funds and the FSBA profited on pre-class period purchases from Enron securities is legally irrelevant. By definition, such losses or gains are outside the class period and, therefore, are not compensable damages.

larger than any other lead plaintiff applicants. Indeed, the October and November, 2001 purchases of Enron stock by Alliance harped on by the State Group and the Milberg Group only account for approximately 10% of the FSBA's $335 million in losses.

The FSBA has submitted the facts regarding its investment management arrangement with Alliance, including the testimony of the FSBA investment officer who dealt with Alliance. Rather than respond to these facts, the State Group and the Milberg Group submit snippets of press clippings and arguments about potential conflicts. As the accompanying Affidavit of Thomas Herndon and its other submissions to date make clear, the FSBA recognizes its obligations to the Class as a lead plaintiff and will act as a fiduciary for the Class, irrespective of what action it may or may not take with regard to Alliance Capital. Speculation to the contrary should be recognized for what it is.

IV.

THE RETAINER AGREEMENT THAT THE NYC FUNDS AND THE FSBA NEGOTIATED WITH THEIR COUNSEL SHOULD BE CONSIDERED BY THE COURT IN DETERMINING THE MOST ADEQUATE PLAINTIFF

Filed under seal concurrently with this sur-reply is the retainer agreement that the NYC Funds and the FSBA have negotiated with their lawyers. That retainer agreement demonstrates that the FSBA and the NYC Funds are committed to active client management of this litigation. They have also demonstrated their commitment to representing the class in this case effectively by negotiating a retainer agreement with their lawyers that will ensure that their lawyers will have an incentive to prosecute this on behalf of the class, but will not receive a windfall at the expense of the class. Most significantly, the retainer provides that counsel will not submit any fee application to the Court without the prior approval of the NYC Funds and the FSBA. The provisions of the retainer confirm the adequacy of the NYC Funds and the FSBA to represent the interests of the class.

In re Cendant, 264 F.3d at 265 ("one of the best ways for a court to ensure that it will fairly and adequately represent the interests of the class is to inquire whether the movant has demonstrated a willingness and ability to select competent counsel and to negotiate a reasonable retainer with that counsel. . . ."); In re Network Associates, Inc. Securities Litigation, 76 F.Supp.2d 1017, 1033 (N.D. Cal. 1999) ("The lead plaintiff owes a fiduciary duty to obtain the highest quality representation at the lowest price.")

The NYC Funds and the FSBA respectfully submit that the fee agreement entered into with their counsel provides benefits to the class not likely to be matched by the other lead plaintiff applicants, and we invite the State Group and the Milberg Group to submit their retainers for the Court's review and comparison. In order to ensure that the class members receive the benefits of the NYC Funds' and the FSBA's retainer, this Court should exercise its discretion to waive the five-in-three limitation.

Dated: February 5, 2002

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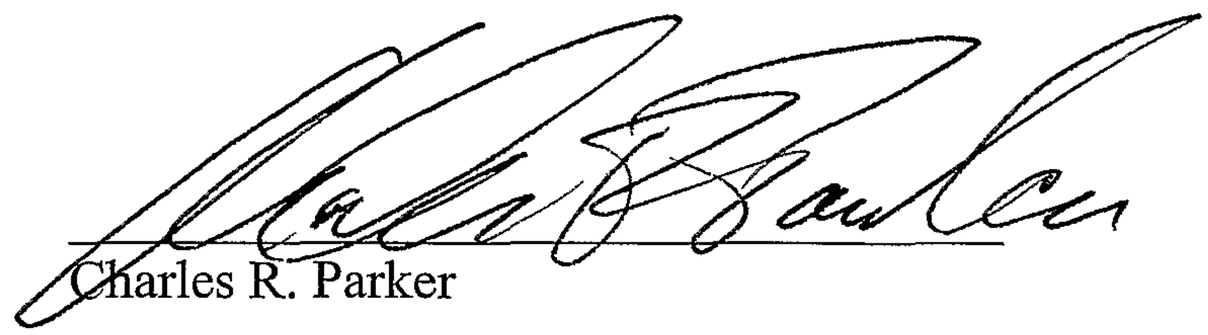
CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the F.R.C.P., I hereby certify that a true and correct copy of the above and foregoing document was served on all counsel of record by First Class, United States mail and/or facsimile on this the 5th day of February 2002, as follows: *see attached service list.*



Charles R. Parker

AFFIDAVIT OF THOMAS HERNDON

STATE OF FLORIDA)
) ss
COUNTY OF LEON)

Thomas Herndon, having been placed under oath, deposes and states as follows:

1. I am the Executive Director of the Florida State Board of Administration ("FSBA"). I have held that position since 1997. My responsibilities include direction of all of the FSBA's actions including shareholder litigation.

2. Since the enactment of the Private Securities Litigation Reform Act ("PSLRA"), the FSBA has been active in shareholder litigation in cases that present compelling evidence of fraud. Our program of shareholder litigation is motivated by two principal concerns: (1) achieving the largest possible recovery for defrauded investors, including the ultimate constituents of our pension funds; and (2) the belief that private enforcement of corporate disclosure obligations under the federal securities laws strengthens American capital markets to the benefit of all investors.

3. The Florida employee pension fund which the FSBA oversees is currently the fifth largest state employee pension fund in the United States. The pension fund has significant holdings in domestic equities. Because of the size of its domestic equity holdings, the FSBA is keenly interested in issues which relate to investor protection. These include not only litigation, but also improvements in corporate governance and improved communications with shareholders generally. In that regard, the FSBA is a member of the Council of Institutional Investors and I have served on its Executive Committee and chaired the Executive Committee. The Council of Institutional Investors has been active in the area of corporate governance and improved corporate disclosure generally since its creation more than 15 years ago. I believe that my role as

a member of the Executive Committee of the Council of Institutional Investors has enabled me to better understand issues relating to corporate disclosure, corporate governance and investor protection that are posed in the instant litigation involving Enron.

4. The FSBA is firmly committed to the prosecution of the Enron shareholder action. The FSBA will commit the resources, time and effort necessary to ensure proper and just prosecution of this landmark securities litigation. The FSBA has acted as a lead plaintiff and class representative in other litigation, and understands the fiduciary duties and responsibilities of a lead plaintiff in a shareholder action. I, the trustees and the staff of the FSBA together with our counterparts at the New York City Funds are committed to the diligent prosecution of this action and to maximizing the recovery in this action on behalf of all investors.

FURTHER AFFIANT SAYETH NAUGHT.

Tom Herndon

Thomas Herndon

Sworn to and subscribed to this
4th day of February, 2002.

Sandra J. Harsany

Notary Public

Known to me personally

Sandra J. Harsany
MY COMMISSION # CC773485 EXPIRES
September 7, 2002
BONDED THRU TROY FAIN INSURANCE, INC.

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Civil Action No. H-01-CV-3624 (Consolidated)
Mark Newby v. Enron Corporation, et al
In the United States District Court
Houston Division

Retainer Agreement that The NYC Funds and the FSBA negotiated with their counsel for in-camera review by Judge Melinda Harmon.