

United States Courts  
Southern District of Texas  
FILED

DEC 21 2001

Michael N. Milby, Clerk of C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MARK NEWBY,

Plaintiff,

v.

ENRON CORP., et al.,

Defendants.

Civil Action No. H-01-3624  
(Securities Suits)

**MOTION OF THE FLORIDA STATE BOARD OF ADMINISTRATION  
FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL  
OF ITS SELECTION OF CO-LEAD AND LIAISON COUNSEL**

56

## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT .....	1
II.	STATEMENT OF FACTS.....	4
III.	ARGUMENT .....	10
	A. The FSBA's Motion Is Properly Made Pursuant To The PSLRA.....	12
	B. The FSBA Has The Largest Financial Interest In the Relief Sought By The Class .....	12
	C. The FSBA Is Precisely The Type of Lead Plaintiff Envisioned By Congress When Enacting the PSLRA .....	13
	D. The FSBA Satisfies Fed. R. Civ. P. 23 .....	15
	1. The FSBA's Claims Are Typical Of The Claims Of The Class .....	16
	2. The FSBA Will Fairly And Adequately Represent The Interests Of The Class .....	18
	E. Berman DeValerio and Entwistle & Cappucci Should Be Appointed Co-Lead Counsel and Yetter & Warden Should Be Appointed Liaison Counsel .....	19
IV.	CONCLUSION .....	22

## TABLE OF AUTHORITIES

### CASES

<u>Aronson v. McKesson HBOC, Inc.</u> , 79 F. Supp. 2d 1146 (N.D. Cal. 1999) .....	15
<u>Berger v. Compaq Computer Corp.</u> , 257 F.3d 475 (5 <sup>th</sup> Cir. 2001).....	18, 19
<u>Bowman v. Legato Sys.</u> , 195 F.R.D. 655 (N.D. Cal. 2000) .....	14
<u>Gluck v. Cellstar Corp.</u> , 976 F. Supp. 542 (N.D. Tex. 1997).....	11, 12, 13, 14, 16, 17
<u>Greebel v. FTP Software, Inc.</u> , 939 F. Supp. 57 (D. Mass. 1996) .....	12, 14
<u>Horton v. Goose Creek Indep. Sch. Dist.</u> , 690 F.2d 470 (5 <sup>th</sup> Cir. 1982).....	18
<u>In re Baan Co. Sec. Litig.</u> , 186 F.R.D. 214 (D.D.C. 1999).....	14
<u>In re Cendant Corp. Sec. Litig.</u> , 264 F.3d 201 (3d Cir. 2001).....	11, 13
<u>In re Critical Path Inc. Sec. Litig.</u> , 156 F. Supp. 2d 1102 (N.D. Cal. 2001) .....	15
<u>In re Network Assocs. Sec. Litig.</u> , 76 F. Supp. 2d 1017 (N.D. Cal. 1999) .....	14, 15
<u>In re Sykes Enterprises, Inc. Sec. Litig.</u> , 137 F. Supp. 2d 1295 (M.D. Fla. 2000) .....	15
<u>In re Telxon Co. Sec. Litig.</u> , 67 F. Supp. 2d 803 (N.D. Ohio 1999) .....	15
<u>In re Waste Mgmt. Sec. Litig.</u> , 128 F. Supp. 2d 401 (S.D. Tex. 2000) .....	3, 11, 14, 16

<u>Jenkins v. Raymark Indus.</u> , 782 F.2d 468 (5 <sup>th</sup> Cir. 1986).....	18
<u>Lightbourn v. County of El Paso</u> , 118 F.3d 421 (5 <sup>th</sup> Cir. 1997).....	16
<u>Mullen v. Treasure Chest Casino, LLC</u> 186 F.3d 620 (5 <sup>th</sup> Cir. 1999) <u>cert.denied</u> , 528 U.S. 1159 (2000) .....	17
<u>Priest v. Zayre Corp.</u> , 118 F.R.D. 552 (D. Mass. 1988).....	17
<u>Randle v. SpecTran</u> , 129 F.R.D. 386 (D. Mass. 1988).....	17
<u>Rubenstein v. Collins</u> , 162 F.R.D. 534 (S.D. Tex. 1995).....	18

#### UNREPORTED DECISIONS

<u>In re Critical Path Sec. Litig.</u> , No. C-01-0551 WHO (N.D. Cal. Aug. 10, 2001) .....	19
---	----

#### STATUTE

15 U.S.C. § 78u-4(a)(3)(A)(i) .....	10, 12
15 U.S.C. § 78u-4(a)(3)(B) .....	1, 11
15 U.S.C. § 78u-4(a)(3)(B)(ii).....	1
15 U.S.C. § 78u-4(a)(3)(B)(iii) .....	2
15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).....	11
15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa) .....	12
15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc) .....	16
15 U.S.C. § 78u-4(a)(3)(B)(v).....	19
15 U.S.C. § 78u-4(e)(1).....	13

## RULES

Fed. R. Civ. P. 23 .....	2, 15
Fed. R. Civ. P. 23(a).....	16
Fed. R. Civ. P. 23(a)(3) .....	16
Fed. R. Civ. P. 23(a)(4).....	18

## OTHERS

House Conference Report. No. 104-369, 104 <sup>th</sup> Cong. 1 <sup>st</sup> Sess. (1995) <u>reprinted in</u> 1995 U.S.C.C.A.N. 730 .....	3, 14, 15
Senate Report No. 104-98, at 11 (1995) <u>reprinted in</u> 1995 U.S.C.C.A.N. 679 .....	3

The Florida State Board of Administration ("FSBA"), by its counsel, respectfully move this Court: (1) to appoint the FSBA as Lead Plaintiff in the consolidated action; and (2) to approve its selection and retention of Berman DeValerio Pease Tabacco Burt & Pucillo and Entwistle & Cappucci, LLP as Co-Lead Counsel and Yetter & Warden, LLP as Liaison Counsel. As grounds, FSBA shows as follows:

### I. PRELIMINARY STATEMENT

Pursuant to 15 U.S.C. § 78u-4(a)(3)(B), Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), the Florida State Board of Administration ("FSBA") ("Proposed Lead Plaintiff") respectfully submits this memorandum of law in support of its motion to: (1) be appointed Lead Plaintiff in this consolidated securities class action;<sup>1</sup> and (2) approve its selection and retention of Berman DeValerio Pease Tabacco Burt & Pucillo ("Berman DeValerio") and Entwistle & Cappucci LLP ("Entwistle & Cappucci") as Co-Lead Counsel and Yetter & Warden, LLP ("Yetter & Warden") as Liaison Counsel.

The FSBA is one of the largest employee pension funds in the world, with over \$123 billion in assets under management as of March 31, 2001. The FSBA oversees the retirement benefits for Florida government employees and retirees. The FSBA has statutory authority for the investment and re-investment of certain retirement funds for employees of the State of Florida, including the Florida Retirement System Trust Funds.

---

<sup>1</sup> Proposed Lead Plaintiff has simultaneously filed this motion with three district courts: the Southern District of Texas, Houston Division; the Eastern District of Texas, Texarkana Division and; the Southern District of California, San Diego Division. These securities class actions involve substantially similar claims against Enron and certain of its officers and outside auditors. Proposed Lead Plaintiff is aware that the Court will not make a determination on the lead plaintiff motions until after the actions have been consolidated for pretrial purposes. See 15 U.S.C. § 78u-4(a)(3)(B)(ii).

During the period between October 18, 1998 and November 27, 2001 (the "Class Period"), the FSBA purchased 9,107,558 shares of Enron Corporation ("Enron" or the "Company") common stock and, as a result of the alleged fraud at Enron, suffered losses of approximately \$325 million during the Class Period. The FSBA also purchased 10.5 million par amount of Enron bonds, and suffered a loss of over \$9 million.

The Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(iii), affords a presumption that the person or group of persons with the largest financial interest in the relief sought by the Class, and who otherwise preliminarily satisfies the requirements of Fed. R. Civ. P. 23, is presumed to be the most adequate plaintiff and should therefore be appointed as lead plaintiff. Here, the FSBA is believed to be the person with the largest financial interest in the relief sought by the Class and the FSBA satisfies the applicable requirements of Fed. R. Civ. P. 23.

Linda Lettera, Esq., the FSBA's general counsel, has submitted an Affidavit with this motion attesting to the FSBA's losses in Enron stock and bonds, the selection of its counsel for the prosecution of this lawsuit, that the FSBA understands its role and obligations as lead plaintiff, and that it is prepared to undertake those responsibilities. See Affidavit of Linda Lettera ("Lettera Affidavit"), attached as Exhibit C to the Affidavit of Glen DeValerio ("DeValerio Affidavit"). The FSBA has selected and retained competent counsel who have represented the FSBA in prior securities litigation to prosecute this lawsuit on behalf of the FSBA and the Class and has negotiated an attorneys' fee agreement which provides for the payment of attorneys' fees, subject to this Court's approval, below the amounts typically requested in securities class actions.<sup>2</sup>

---

<sup>2</sup> The FSBA is prepared to submit a copy of its Retainer Agreement to the Court for review, should the Court wish to review it.

Moreover, the FSBA is precisely the type of lead plaintiff contemplated by the PSLRA. The legislative history of the PSLRA establishes that Congress clearly intended to encourage institutional investors, and particularly state retirement systems, to serve as lead plaintiffs. The explanatory report by the Conference Committee accompanying the PSLRA's enactment expressly states that the PSLRA was intended "to increase the likelihood that institutional investors will serve as lead plaintiffs" because, among other reasons, "[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." H.R. Conf. Rep. No. 104-369, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. at 34 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 733; see also In re Waste Mgmt. Sec. Litig., 128 F. Supp. 2d 401, 411 (S.D. Tex. 2000) (stating through the PSLRA, Congress sought to encourage institutional investors' appointment as lead plaintiff). 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.

Sen. Rep. No. 104-98, at 11 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690.

Clearly, the FSBA is precisely the type of investor Congress envisioned would serve as a lead plaintiff in securities class actions after the passage of the PSLRA. For the reasons set forth below, the FSBA respectfully requests that this Court grant its motion for appointment as Lead Plaintiff and approve its selection of Co-Lead and Liaison Counsel.

## II. STATEMENT OF FACTS

This securities class action arises from one of the largest and most stunning financial collapses in American corporate history. Just one year ago, Enron was ranked number 7 on the Fortune 500 list of the largest corporations world wide, with its stock trading at approximately \$80 per share. At its peak, Enron's market capitalization exceeded \$70 billion.

Today, Enron is in Chapter 11 proceedings with its stock trading below \$1 per share. The Company's swift and spectacular collapse is directly attributable to a massive accounting fraud perpetrated by the defendants named in these class actions. Since 1997, Enron overstated its publicly reported earnings by almost \$600 million – or 20%. Defendants caused Enron to issue false financial statements principally by hiding debt and operating losses in off-balance sheet entities.

As part of the restatement, Enron admitted that it overstated its net income and earnings per share during the Class Period by failing to properly include the financial results of three related entities into Enron's consolidated financial statements from 1997 through 2000. Enron improperly accounted for several of these entities as Special Purpose Entities ("SPE") and omitted such entities' related debt and losses from Enron's consolidated financial statements. Enron has now admitted that these entities did not meet the accounting criteria to qualify as SPEs and, as a result, Enron has restated its financial results to consolidate the debt and losses from these entities into the Company's financial statements. Including these entities in Enron's balance sheet dramatically reduced the Company's earnings and substantially increased the Company's liabilities.

Enron further admitted that it improperly accounted for a note the Company received from a related party in exchange for Enron common stock. Enron accounted for the note as an asset – an increase in shareholder equity - when, instead, under the most basic of accounting principles, the note should have been recorded as a deduction to shareholders' equity. Consequently, Enron overstated shareholders' equity by \$1.2 billion.

Finally, Enron has also admitted that it failed to make proposed audit adjustments and reclassifications in prior years that would have substantially reduced the Company's net income during the Class Period.

The effects of the restatement are staggering. The Company revealed that net income was overstated by \$96 million in 1997, \$113 million in 1998, \$250 million in 1999, and \$132 million in 2000. These adjustments to net income represent 91% of net income as originally reported in 1997, 16% in 1998, 28% in 1999, and 28% in 2000. In addition, the restatement increased Enron's debt by \$711 million in 1997, \$561 million in 1998, \$685 million in 1999, and \$628 million in 2000, for a total debt increase of \$2.58 billion.

Enron's restatement results, in principal part, from its admission that it improperly failed to consolidate the financial results of two partnerships, Chewco Investments, L.P. ("Chewco") and Joint Energy Development Investments Limited Partnership ("JEDI"), and a wholly-owned subsidiary of JLM Cayman L.P. ("LJM1"). Counsel for the FSBA has been conducting their own investigation into the wrongdoing at Enron. Through their investigation, with the assistance of private investigators, the FSBA's counsel have determined that Enron established at least 70 partnerships, which are/were controlled by

persons related to Enron, and for which Enron has failed to account properly. Further restatements of Enron's financial results from these partnerships, we believe, are likely.

In addition to an acknowledged accounting fraud, this case presents unprecedented amounts of stock sales by Enron insiders. For example, from January 1997 through November 2001, Kenneth Lay, Enron's Chairman, Jeffrey Fastow, the Company's former Executive Vice President and Chief Financial Officer, and Jeffrey Skilling, the Company's former President and Chief Executive Officer, plus other senior officers and directors, sold more than \$1.1 billion of their Enron common stock. Indeed, at a January 2001 investor conference, Mr. Skilling told stock market analysts that he believed Enron was undervalued at \$90 per share, and that he believed the stock was worth \$125 per share. A few weeks later, Mr. Skilling sold 130,000 shares of Enron at prices around \$85 per share. This amount of insider trading – while the Company was “cooking its books” is, without peer in American securities law.

The unprecedented nature of this stock fraud is further evidenced by the fact that the United States Congress has already commenced an investigation into, and held hearings on, the accounting fraud at Enron. On December 12, 2001 a joint hearing was held by two House Financial Services subcommittees concerning the accounting debacle at Enron. Joseph P. Berardino, Chief Executive Officer of Arthur Andersen LLP (“Andersen”), which served as Enron's outside auditors during the Class Period, testified before Congress that Enron officials had engaged in “possible illegal acts” concerning the preparation of Enron's financial statements. Andersen itself is a target of both this shareholder class action and the Congressional hearings. Andersen apparently had unrestricted access to Enron's accounting department, serving not only as the Company's

outside auditor, but also as its internal auditor. Congress has scheduled additional hearings and is continuing its investigation into the massive Enron accounting fraud.

In addition to the Congressional investigation, the United States Department of Justice has reportedly commenced criminal investigations of the Enron fraud and the United States Securities and Exchange Commission has commenced a formal investigation of Enron.

On December 2, 2001, Enron filed for reorganization under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York. Counsel for the FSBA have already been carefully monitoring those proceedings, including attending many of the bankruptcy court hearings. In addition, the FSBA's counsel have spoken with bankruptcy counsel about possible retention, and have analyzed and considered an array of strategies that they might employ in the bankruptcy proceedings to maximize the recovery for the Class.

Since October 16, 2001, the date that Enron began to disclose facts suggesting the existence of accounting irregularities, the FSBA's counsel have been actively investigating: (1) Enron; (2) Enron's officers, directors and other members of management; (3) Arthur Andersen LLP; and (4) certain other persons and entities. The investigation of the FSBA and its counsel is comprehensive and entails, among other things, (1) reviewing Enron's public filings and press releases; (2) reviewing reports and articles concerning the Company available in the print and electronic media; (3) reviewing reports of securities analysts and investor advisory services; (4) interviewing former employees of the Company; (4) obtaining and analyzing formation documents for certain partnerships and other entities related to Enron; (5) working with forensic

accountants to analyze the Company's disclosures and accounting practices; (6) collecting and analyzing insider trading data, as well as uncovering the existence of other concrete, substantial motivations possessed by the Company and its management to engage in securities fraud; (7) working with experts regarding the damages suffered by the FSBA and the Class; and (8) monitoring Enron's proceedings in the U.S. bankruptcy court.

In particular, the FSBA's counsel have reviewed thousands of press reports, press releases, analyst reports and other documents related to Enron and its management. Counsel have also reviewed Enron's filings with the SEC prior to and during the Class Period, sifting carefully through the Company's disclosures. Professional investigators, working on behalf of the FSBA and its counsel, have interviewed former employees of Enron. As a result of its investigation, the FSBA has uncovered the existence of many other undisclosed entities with close ties to Enron and to certain members of Enron's management, each of which was formed during the Class Period. The FSBA is searching for and closely analyzing the formation documents for these entities. While the FSBA's investigation is ongoing, most of the aforementioned entities appear to have been formed to conduct operations whereby Enron faced significant liabilities in the event that these entities could not meet their obligations. The Company has not yet disclosed the full extent of its liabilities arising from the foregoing related entities. With respect to insider trading, counsel have been reconstructing the trading history of the Company's management and top officers, focusing on the timing and amounts of stock sales during the Class Period.

Finally, the FSBA is also investigating other audits performed by Andersen in which it engaged in conduct similar to its alleged conduct in connection with serving as Enron's auditor. In particular, the FSBA has examined documents and information in recent SEC enforcement actions involving Andersen, as well as private actions under the federal securities laws in which Andersen is a defendant.

Beyond gathering evidence and developing the facts of this complex litigation, however, the FSBA's counsel have engaged – and continue to engage – in substantive legal analysis of all claims that may be asserted on behalf of the FSBA and the Class arising out of defendants' conduct, and have considered all of the defenses likely to be asserted. The Company sold different types of securities to the investing public at different times during the Class Period, including issuing securities pursuant to the Securities Act of 1933. The FSBA's counsel's analysis also entails ascertaining the persons and entities who should appropriately be named as defendants in this action. Moreover, as mentioned above, counsel have worked with experts and other professionals in the areas of damages and forensic accounting to develop fully all potential claims.

Of course, this litigation – like all complex litigation – is an extremely fluid process with additional facts and circumstances surfacing on a daily basis. The FSBA's counsel have reviewed each of the complaints filed in this action to date. Most, if not all, of those complaints failed to incorporate the ever-changing factual landscape. Moreover, certain plaintiffs have pursued a “shotgun” approach to naming defendants, failing to articulate in a meaningful way the bases for their assertions of each defendant's liability. The FSBA has been – and will continue to be – directly engaged in the vigorous

prosecution of this action. To ensure that this case is prosecuted in the most comprehensive manner, with the highest possible recovery for the Class, counsel for FSBA have been continually monitoring and analyzing all factual and legal developments and crafting a thoughtful, deliberate litigation strategy prior to the filing of any complaint in this action.

### III. ARGUMENT

On December 22, 1995, Congress enacted Public Law 104-67, the PSLRA, which amended provisions of the the Exchange Act. The PSLRA sets forth, among other things, procedures for providing notice to members of the proposed Class regarding the selection of a lead plaintiff or plaintiffs to prosecute the action on behalf of the Class and the retention of lead counsel.

Section 78u-4(a)(3)(A)(i) of the PSLRA provides that within 20 days after the date on which a securities class action is filed:

the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class -- (I) of the pendency of the action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 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.

15 U.S.C. § 78u-4(a)(3)(A)(i).

Further, Section 78u-4(a)(3)(B) of the PSLRA directs the court to consider any motions by putative class members to serve as lead plaintiff in response to any such notice by the later of: (i) 90 days after the date of publication of the notice; or (ii) as soon as practicable after the Court decides any pending motion to consolidate any actions "asserting substantially the same claim or claims."

15 U.S.C. §78u-4(a)(3)(B).

The PSLRA also directs the Court to presume that the "most adequate plaintiff" to serve as lead plaintiff 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 Third Circuit, in In re Cendant Corp. Sec. Litig., 264 F.3d 201 (3d Cir. 2001) addressed the lead plaintiff provisions of the PSLRA. Under the Cendant court's interpretation of the PSLRA, the Court is to first determine which "person or group of persons" has the largest financial interest in the relief sought by the class and is to next determine whether that lead plaintiff applicant has made a threshold showing of typicality and adequacy. If so, then that applicant is the "presumptive lead plaintiff" and the competing movants may attempt to rebut the presumption of adequacy only with proof that the presumptive lead plaintiff possesses atypical claims or will not adequately represent the class. See Cendant, 264 F.3d at 262-68 ("[O]nce the presumption is triggered, the question is not whether another movant might do a better job of protecting the interests of the class than the presumptive lead plaintiff; instead, the question is whether anyone can prove that the presumptive lead plaintiff will not do a "fair and adequate" job"); see also Waste Mgmt., 128 F. Supp.2d at 410-12; Gluck v. Cellstar Corp., 976 F. Supp. 542, 543-45 (N.D. Tex. 1997).

**A. The FSBA's Motion Is Properly Made Pursuant To The PSLRA.**

Pursuant to Section 78u-4(a)(3)(A)(i) of the PSLRA, on October 22, 2001, the law firm of Shapiro Haber & Urmy caused to be published a notice over a national business-oriented wire service, *PR Newswire*, advising members of the proposed class that a securities class action was filed and that investors had the right to move for appointment as lead plaintiff no later than December 21, 2001. See 15 U.S.C. § 78u-4(a)(3)(A)(i); *DeValerio Aff.* ¶ 2. Having timely filed the instant motion, the FSBA satisfies the requirements set forth in Section 78u-4(a)(3)(B)(iii)(I)(aa) of the PSLRA. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

*PR Newswire* is a national business-oriented news wire service that distributed the Notices to more than 2,000 different outlets, including *Bloomberg Business News*, *Dow Jones News Retrieval*, *Associated Press*, and *Reuters*. *DeValerio Aff.* ¶ 3. The Notices were reprinted, verbatim, by *Dow Jones*, *Lexis/Nexis* and *Westlaw*. *DeValerio Aff.* ¶ 4.

In *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57 (D. Mass. 1996), the court found that the notice requirements of Section 78u-4(a)(3)(A)(i) of the PSLRA are satisfied when the plaintiff publishes notice through a national business wire service (in that case, *Business Wire*) and when the notice is republished on a medium such as *Bloomberg Business News*. Id. at 62-64; see also *Gluck*, 976 F. Supp. at 545-46 (finding publication of notice over *Business Wire* adequate.) Thus, the notice requirements of Section 78u-4(a)(3)(A)(i) of the PSLRA have been satisfied in this case.

**B. The FSBA Has The Largest Financial Interest In The Relief Sought By The Class.**

The FSBA reasonably believes it has the largest financial interest in the relief sought by the Class and among all the Class members seeking appointment as lead

plaintiff. The FSBA suffered losses of \$325,243,851 on its purchases of Enron common stock during the Class Period. The FSBA believes that no applicant for lead plaintiff status has a loss on its investment in Enron common stock that approaches this amount. The FSBA also lost over \$9 million on its purchases of Enron bonds.

To determine the “largest financial interest,” courts look to “(1) the number of shares that the movant purchased during the putative class period; (2) the total net funds expended by the plaintiffs during the class period; and (3) the approximate losses suffered by the plaintiffs.” Cendant, 264 F.3d at 262; see also Gluck, 976 F. Supp. at 546.

Here, the FSBA purchased a total of 9,107,558 shares of Enron common stock during the Class Period, expended \$681,142,482 on those purchases, and suffered losses of \$325 million.<sup>3</sup> With its losses in bonds, the FSBA has suffered a loss totaling approximately \$335 million.

**C. The FSBA Is Precisely The Type of Lead Plaintiff Envisioned By Congress When Enacting the PSLRA.**

The legislative history of the PSLRA demonstrates that it was intended to encourage institutional investors, such as the FSBA, to serve as Lead Plaintiff in securities class actions. The explanatory report accompanying the PSLRA’s enactment specifically states that:

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.” . . .

---

<sup>3</sup> The average price per share of Enron common stock for the period from November 28, 2001 through December 18, 2001 was \$0.6315. Using this mean or average closing price, the FSBA suffered losses of \$325,243,851. See 15 U.S.C. § 78u-4(e)(1) (requiring damages to be based upon the mean trading price for the 90 days after the correction was revealed, which period has yet to expire); see also DeValerio Aff. ¶7.

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.

H.R. Conf. Rep. No. 104-369, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. at 34 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 733 (emphasis added); see also Waste Mgmt., 128 F. Supp. 2d at 431 (stating Congressional preference to appoint institutional investors “that have the greatest financial interest in the recovery sought by the class . . .”); Bowman v. Legato Sys., 195 F.R.D. 655, 657 (N.D. Cal. 2000) (public pension funds are “exactly the type of lead plaintiff envisioned by Congress when it instituted the [PSLRA] lead plaintiff requirements . . .”); In re Network Assocs. Sec. Litig., 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999) (“Congress expected that the lead plaintiff would normally be an institutional investor”); Gluck, 976 F. Supp. at 548 (“through the PSLRA, Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors”).

Indeed, Congress deemed institutional investors “presumptively most adequate to serve as lead plaintiffs in securities class actions.” Greebel, 939 F. Supp. at 63-64. Furthermore, Congress believed 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.” In re Baan Co. Sec. Litig., 186 F.R.D. 214, 221 (D.D.C. 1999).

The FSBA is one of the largest public pension funds in the United States, responsible for overseeing and protecting the retirement assets of employees of the State

of Florida. The FSBA is a large, sophisticated entity, with the resources necessary to direct and prosecute this lawsuit, including the resources and experience of investment professionals, the FSBA's legal department, and the Office of State Attorney General.

In addition to the foregoing, the FSBA has significant experience in the prosecution of securities fraud class actions. As set forth in the Lettera Affidavit, the FSBA has prosecuted a number of securities fraud class actions to successful conclusions.<sup>4</sup> The FSBA's experience in prosecuting complex securities class actions will inure to the benefit of the Class, and further supports this application.

**D. The FSBA Satisfies Fed. R. Civ. P. 23.**

Section 78u-4(a)(3)(B) (iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, the

---

<sup>4</sup> Some earlier cases following the enactment of the PSLRA have applied the rule precluding institutional investors from serving as lead plaintiff in more than five cases within a three-year period. See Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1154-57 (N.D. Cal. 1999); In re Telxon Co. Sec. Litig., 67 F. Supp. 2d 803, 819-22 (N.D. Ohio 1999). The more recent approach, however, permits institutional investors to exceed the PSLRA's limit of five lead appointments within a three-year period. See, e.g., In re Critical Path Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001) (relying on Congressional intent and the express language of the PSLRA in appointing FSBA as lead plaintiff despite having served as lead plaintiff in more than five actions in the previous three years); In re Sykes Enterprises, Inc. Sec. Litig., 137 F. Supp. 2d 1295, 1304 (M.D. Fla. 2000) (appointing FSBA as co-lead plaintiff and stating that fact that it exceeded the PSLRA's five lead appointments in three years did not preclude its appointment); In re Network Associates, Inc., Sec. Litig., 76 F.Supp.2d 1017, 1030 (N.D. Cal. 1999) (permitting pension fund to serve as lead plaintiff, despite exceeding PSLRA's statutory limitation on number of times it could serve as lead plaintiff).

Indeed, the Conference Report specifically states that institutional investors may be granted special leave to serve as lead plaintiffs in more than five securities class actions within a three-year period:

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

H.R. Conf. Rep. No. 104-369, at 35.

lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B) (iii)(I)(cc). Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

- (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 adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Of the four prerequisites to class certification, only two, typicality and adequacy, directly address the personal characteristics of the class representative. Consequently, in deciding a lead plaintiff motion, the court should limit its inquiry to the typicality and adequacy prongs of Rule 23, and defer its examination of the remaining requirements until the lead plaintiffs move for class certification. See Gluck, 976 F. Supp. at 546. A court's determinations with respect to typicality and adequacy are without prejudice to defendants' right to contest these issues later in the action. See Waste Mgmt., 128 F. Supp. 2d at 409-10. As set forth below, the FSBA satisfies the typicality and adequacy requirements of Rule 23(a), thereby justifying its appointment as Lead Plaintiff.

**1. The FSBA's Claims Are Typical Of The Claims Of The Class.**

The typicality requirement of Fed. R. Civ. P. 23(a)(3) is satisfied when the prospective lead plaintiff's claims arise out of the same course of conduct and are based on the same legal theory of the other members of the class. See Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5<sup>th</sup> Cir. 1997) (stating "typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the . . . theories of those

whom they purport to represent”); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5<sup>th</sup> Cir. 1999) cert.denied, 528 U.S. 1159 (2000) (typicality requirement met where named plaintiffs’ claims have same essential characteristics as claims of class); Gluck, 976 F. Supp. at 546 (typicality established where, upon proving its own injury and losses resulting from the defendant’s allegedly fraudulent scheme, proposed lead plaintiff would necessarily prove the conduct which underlies the claims of all purported plaintiffs, just as it would establish the elements of those claims).

As other courts have explained, in order to meet the typicality requirement of Rule 23(a)(3):

plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of absent members. . . . The question is simply whether a named plaintiff, in presenting his case, will necessarily present the claims of the absent plaintiffs.

Randle v. SpecTran, 129 F.R.D. 386, 391 (D. Mass. 1988) (citing Priest v. Zayre Corp., 118 F.R.D. 552, 555 (D. Mass. 1988)).

The FSBA’s claims are typical of, if not identical to, the claims of the other members of the Class. The FSBA will charge the current and former management of Enron, certain directors who knew or recklessly disregarded the underlying facts giving rise to the accounting fraud, and Andersen, the Company’s outside auditors, with violating Sections 10(b) and 20(a) of the Exchange Act and related SEC regulations, by publicly disseminating false and misleading financial statements, opinions on financial statements, and other public statements during the class period alleged in the complaint. The FSBA, like all members of the Class, relied upon the integrity of the market in

purchasing Enron securities during the Class Period. Thus, the typicality requirement is satisfied in this case.

**2. The FSBA Will Fairly And Adequately Represent The Interests Of The Class.**

Under Fed. R. Civ. P. 23(a)(4) courts have consistently applied a two-prong test to assess the adequacy of representation: (1) whether the named plaintiffs have interests antagonistic to those of the class; and (2) whether the plaintiffs' attorneys are qualified to conduct the litigation. See Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986); Rubenstein v. Collins, 162 F.R.D. 534, 538-39 (S.D. Tex. 1995). The FSBA satisfies this test. First, there is no conflict between the FSBA and other Class members - all investors are aligned in the common interest of recovering the maximum possible damages from the defendants. Indeed, the enormous loss suffered by the FSBA creates an incentive to maximize the recovery in this case. Second, the FSBA has selected qualified law firms, Berman DeValerio and Entwistle & Cappucci as Co-Lead Counsel and Yetter & Warden as Liaison Counsel. These firms specialize in the prosecution of federal securities fraud class action lawsuits and are thoroughly committed to vigorously prosecuting this action. These firms have represented institutional investor clients and other class representatives in other major class actions.

Moreover, this Court's determination of whether the FSBA is an adequate plaintiff to represent the interest of the Class "mandates an inquiry into. . . the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." Berger v. Compaq Computer Corp., 257 F.3d 475, 482 (5<sup>th</sup> Cir. 2001) (quoting Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 484 (5<sup>th</sup> Cir. 1982)). The FSBA will adequately represent the interests of the Class by managing,

directing, and controlling this litigation, and will vigorously prosecute the claims and relief sought by the Class. See Berger, 257 F.3d at 481-83.

Accordingly, the FSBA satisfies the requirements of Section 78u-4(a)(3)(B)(iii)(I) of the PSLRA and should be appointed Lead Plaintiff.

**E. Berman DeValerio and Entwistle & Cappucci  
Should Be Appointed Co-Lead Counsel  
and Yetter & Warden Should Be Appointed Liaison Counsel.**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to approval by the Court. See 15 U.S.C. §78u-4(a)(3)(B)(v). The FSBA has selected and retained the law firms of Berman DeValerio and Entwistle & Cappucci as Co-Lead Counsel, and Yetter & Warden as Liaison Counsel in this action. All of these firms are highly skilled and experienced practitioners who specialize in federal securities class action litigation.

Berman DeValerio is a firm consisting of 30 attorneys located in Boston, West Palm Beach, Florida, and San Francisco who concentrate their practice in securities and anti-trust class actions. The firm<sup>5</sup> has more than 20 years of experience in prosecuting securities class actions. In its recent approval by the Court to represent the FSBA in In re Critical Path Sec. Litig., No. C-01-0551 WHO, at 3 (N.D. Cal. Aug. 10, 2001) (order appointing lead counsel), the court found that Berman DeValerio acting as counsel for the FSBA “has achieved favorable results in [securities] litigation, including obtaining changes in corporate governance to protect against future wrongdoing. It is evident from

---

<sup>5</sup> Berman DeValerio is comprised of the recent merger of three law firms, Berman DeValerio & Pease, LLP, Berman DeValerio Pease & Tabacco P.C. and Burt & Pucillo LLP. Berman DeValerio & Pease, LLP has more than 20 years of securities experience and the founding partners of Berman DeValerio Pease & Tabacco and Burt & Pucillo each have more than 20 years of experience in prosecuting securities fraud class actions.

the Application that [Berman DeValerio] has broad experience in securities litigation, and its record of securing favorable results in such litigation extends beyond its work on behalf of the [Florida State Board of Administration].” Ex. A attached hereto. The firm is presently lead or co-lead counsel in almost 30 securities class actions pending throughout the country and has handled scores of class actions on behalf of defrauded investors over the past 20 years. The Firm is also counsel to a number of public pension funds throughout the country including FSBA, Louisiana State Employees Retirement System, the State Universities Retirement System of Illinois, the Los Angeles County Employees Retirement System and was recently selected as Securities Litigation counsel to the New York City Pension Funds. A copy of the firm’s resume is annexed to the DeValerio Affidavit as Exhibit E and is incorporated herein.

Entwistle & Cappucci is a firm with 28 attorneys, having offices located in New York, Princeton, Chicago, Austin, Tallahassee, and Washington, D.C. The Firm has a variety of practice areas, which include Complex Business and Commercial Litigation, Securities Litigation and Corporate Governance, Business Transactions, Bankruptcy, Employment and Labor, and Administrative Law. Entwistle & Cappucci represents institutional, corporate, governmental, and individual clients in many industries, and its securities clients include some of the largest investment management firms, venture capital firms, broker-dealers, corporate, and Taft-Hartley entities. Over the years, lawyers at Entwistle & Cappucci have represented many public pension funds across the country including the New York State Common Retirement and Teachers Retirement Systems, the New York City Pension Funds, and the California Public Employees Retirement System.

Entwistle & Cappucci currently represents the FSBA as lead plaintiff in In re Daimler Chrysler Sec. Litig., Master Docket No. 00-0993 (JJF) (D. Del.) and In re Dollar General Corp. Sec. Litig., No. 3:01-0388 (M.D. Tenn.), two significant pending securities class actions, as well as in private securities actions. Entwistle & Cappucci was recently selected as Securities Litigation Counsel to the State Universities Retirement System of Illinois. Entwistle & Cappucci's ability to prosecute the most complex securities actions is well demonstrated by its efforts to date in In re BankAmerica Corp. Sec. Litig., one of the largest pending securities actions in the country, which seeks damages sustained by former merged NationsBank shareholders by reason of the failure to disclose trading exposure within old BankAmerica's derivative trading venture with D.E. Shaw. A copy of the Entwistle & Cappucci firm resume is annexed to the DeValerio Affidavit as Exhibit F and is incorporated herein.

Yetter & Warden, L.L.P. is a firm of nine trial lawyers, located in Houston, which specializes in securities, antitrust, intellectual property, and other complex business litigation for both plaintiffs and defendants. Since its founding in 1997, the firm has achieved considerable success on behalf of its clients, including eleven settlements in excess of \$1 million, representing total recoveries of almost \$500 million. The firm also has broad experience in securities fraud class actions, having served as both Lead Counsel and as a member of the Plaintiffs' Executive Committee. A copy of the firm resume of Yetter & Warden is annexed to the DeValerio Aff. as Exhibit G.

#### IV. CONCLUSION

For all of the foregoing reasons, the FSBA respectfully requests that the Court grant its motion and appoint it as Lead Plaintiff and approve its selection of Berman DeValerio and Entwistle & Cappucci as Co-Lead Counsel, and Yetter & Warden as Liaison Counsel.

Date: December 21, 2001

Respectfully submitted,



---

R. Paul Yetter  
Attorney-in-Charge  
State Bar No. 22154200  
S.D. Tex. Bar No. 3639  
**YETTER & WARDEN, LLP**  
600 Travis, Suite 3800  
Houston, TX 77002  
(713) 238-2000

**[Proposed] Liaison Counsel**

Of Counsel:

Michael J. Pucillo  
Wendy H. Zoberman  
**BERMAN DEVALERIO PEASE TABACCO**  
**BURT & PUCILLO**  
515 North Flagler Drive  
Northbridge Centre, Suite 1701  
West Palm Beach, FL 33401  
(561) 835-9400

Glen DeValerio  
Jeffrey C. Block  
Michael G. Lange  
Michael Matraia  
N. Nancy Ghabai  
**BERMAN DEVALERIO PEASE TABACCO**  
**BURT & PUCILLO**  
One Liberty Square  
Boston, MA 02109  
(617) 542-8300

Vincent R. Cappucci  
Andrew J. Entwistle  
Catherine A. Torell  
Johnston de F. Whitman, Jr.  
**ENTWISTLE & CAPPUCCI LLP**  
299 Park Avenue, 14<sup>th</sup> Floor  
New York, N.Y. 10171  
(212) 894-7200

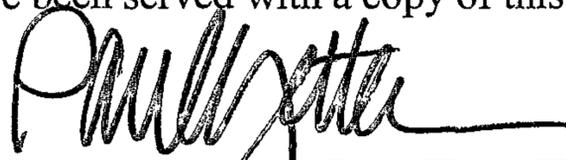
98 San Jacinto Blvd.  
Suite 1300  
Austin, TX 78071  
(512) 703-5712

**[Proposed] Lead Counsel**

**Attorneys for The Florida State Board  
Of Administration**

## Certificate of Service

I certify that an identical version of this brief has been filed in related pending actions in the United States District Court, Eastern District of Texas, Texarkana Division; and in the United States District Court, Southern District of California, San Diego Division. I further certify that the attached list of counsel of record have been served with a copy of this motion by regular mail on this 21<sup>st</sup> day of December 2001:



---

R. Paul Yetter

### PLAINTIFFS COUNSEL:

James D. Baskin, III, Esq.  
**Baskin Bennett & Komkov LLP**  
919 Congress Avenue  
Suite 1000  
Austin, TX 78701  
512-381-6301  
512-322-9280 (Fax)

Sherrie R. Savett, Esq.  
**Berger & Montague**  
1622 Locust Street  
Philadelphia, PA 19103  
215-875-3000  
215-875-5715 (Fax)

Glen DeValerio, Esq.  
**Berman DeValerio Pease Tabacco  
Burt & Pucillo**  
One Liberty Square  
Boston, MA 02109  
617-542-8300  
617-542-1194 (Fax)

Joseph J. Tabacco, Jr.  
**Berman DeValerio Pease Tabacco Burt &  
Pucillo**  
425 California Street  
Suite 2025  
San Francisco, CA 94104  
415-433-3200  
415-433-6382 (Fax)

Michael J. Pucillo, Esq.  
**Berman DeValerio Pease Tabacco  
Burt & Pucillo**  
Northbridge Centre  
Suite 1701  
515 North Flagler Drive  
West Palm Beach, FL 33401  
561-835-9400  
561-835-0322 (Fax)

Mike Egan, Esq.  
**Bernstein Liebhard & Lifshitz, LLP**  
10 East 40th Street  
New York, NY 10016  
212-779-1414  
212-779-3218 (Fax)

Anthony Bolognese, Esq.  
**Bolognese & Associates, LLC**  
One Penn Center  
1617 JFK Boulevard, Suite 650  
Philadelphia, PA 19103  
215-814-6750  
215-814-6764 (Fax)

Peter D. Bull, Esq.  
**Bull & Lifshitz, LLP**  
18 East 41st Street  
New York, NY 10017  
212-213-6222  
212-213-9405 (Fax)

Robin L. Harrison, Esq.  
**Campbell Harrison & Wright L.L.P.**  
4000 Two Houston Center  
900 Fannin Street  
Houston, TX 77010  
713-752-2332  
713-752-2330 (Fax)

Paul J. Geller, Esq.  
**Cauley Geller Bowman & Coates, LLP**  
One Boca Place, Suite 421A  
2255 Glades Road  
Boca Raton, FL 33431  
561-750-3000  
561-750-3364 (Fax)

Steven E. Cauley, Esq.  
**Cauley Geller Bowman & Coates, LLP**  
P.O. Box 25438  
Little Rock, AR 72223  
501-312-8500  
501-312-8505 (Fax)

Steven J. Toll, Esq.  
**Cohen, Milstein, Hausfeld &  
Toll, P.L.L.C.**  
1100 New York Avenue, NW  
West Tower, Suite 500  
Washington, DC 20005  
202-408-4600  
202-408-4699 (Fax)

Richard J. Zook, Esq.  
**Cunningham, Darlow, Zook & Chapoton,  
LLP**  
1700 Chase Tower  
600 Travis  
Houston, TX 77002  
713-659-5500  
713-255-5555 (Fax)

R. Douglas Dalton, Esq.  
Ron Kilgard, Esq.  
**Dalton Gotto Samson & Kilgard, P.L.C.**  
Suite 900  
National Bank Plaza  
3101 North Central Avenue  
Phoenix, AZ 85012  
602-248-0088  
602-248-2822 (Fax)

Michael D. Donovan, Esq.  
**Donovan Searles, LLC**  
1845 Walnut Street  
Suite 1100  
Philadelphia, PA 19103  
215-732-6067  
215-732-8060 (Fax)

Vincent R. Capucci, Esq.  
**Entwistle & Capucci**  
299 Park Avenue  
14th Floor  
New York, NY 10171  
212-894-7200  
212-894-7273 (Fax)

William B. Federman  
**Federman & Sherwood**  
120 North Robinson  
Suite 2720  
Oklahoma City, OK 73102  
405-235-1560  
405-239-2112 (Fax)

Jeffrey Krinsk, Esq.  
**Finkelstein & Krinsk**  
501 West Broadway  
Suite 1250  
San Diego, CA 92101  
619-238-1333  
619-238-5425 (Fax)

George M. Fleming, Esq.  
**Fleming & Associates**  
1330 Post Oak Boulevard  
Suite 3030  
Houston, TX 77056  
713-621-7944  
713-621-9638 (Fax)

Gwendolyn Giblin, Esq.  
**Gold Bennett Cera & Sidener LLP**  
595 Market Street  
Suite 2300  
San Francisco, CA 94105  
415-777-2230  
415-777-5189 (Fax)

Eli Gottesdiener, Esq.  
**Gottesdiener Law Firm**  
3901 Yuma Street, NW  
Washington, DC 20016  
202-243-1000  
202-537-1989 (Fax)

Richard Frankel, Esq.  
**Hackerman Peterson Frankel & Manela,  
P.C.**  
1122 Bissonnet  
Houston, TX 77005  
713-528-2500  
713-528-2509 (Fax)

Steve W. Berman, Esq.  
**Hagens Berman**  
1301 Fifth Avenue  
Suite 2900  
Seattle, WA 98101  
206-623-7292  
206-623-0594 (Fax)

Thomas E. Bilek, Esq.  
**Hoeffner Bilek & Eidman, L.L.P.**  
440 Louisiana Street  
Suite 720  
Houston, TX 77002  
713-227-7720  
713-227-9404 (Fax)

Marc H. Edelson, Esq.  
**Hoffman & Edelson, LLC**  
45 West Court Street  
Doylestown, PA 18901  
877-537-6532  
215-230-8735 (Fax)

Corey Holzer, Esq.  
**Holzer & Holzer**  
6135 Barfield Road, NE  
Suite 102  
Atlanta, GA 30328  
404-847-0085  
404-847-0036 (Fax)

Frederic S. Fox, Esq.  
**Kaplan Fox & Kilsheimer LLP**  
805 Third Avenue  
22nd Floor  
New York, NY 10022  
212-687-1980  
212-687-7714 (Fax)

Laurence D. King, Esq.  
**Kaplan Fox & Kilsheimer LLP**  
100 Pine Street  
26th Floor  
San Francisco, CA 94111  
415-336-1238  
415-677-1233 (Fax)

Lynn Lincoln Sarko, Esq.  
**Keller Rohrbach, L.L.P.**  
1201 Third Avenue  
Suite 3200  
Seattle, WA 98101  
206-623-1900  
206-623-3384 (Fax)

Alfred G. Yates, Jr.  
**Law Offices of Alfred G. Yates, Jr.**  
519 Allegheny Building  
429 Forbes Avenue  
Pittsburgh, PA 15219  
412-391-5164  
412-471-1033 (Fax)

Deborah R. Gross, Esq.  
**Law Offices of Bernard M. Gross, P.C.**  
1515 Locust Street  
2nd Floor  
Philadelphia, PA 19102  
215-561-3600  
215-561-3000 (Fax)

Charles J. Piven, Esq.  
**Law Offices of Charles J. Piven**  
World Trade Center-Baltimore  
104 East Pratt Street  
Suite 2525  
Baltimore, MD 21202  
410-986-0036

Curtis Trinko, Esq.  
**Law Offices of Curtis V. Trinko, L.L.P.**  
16 West 46th Street  
Floor 7  
New York, NY 10036  
212-490-9550  
212-986-0158 (Fax)

Frank W. Morgan, Esq.  
**Law Offices of Frank W. Morgan &  
Associates, P.C.**  
1776 Woodstead Court  
Suite 228  
The Woodlands, TX 77380  
281-367-9200  
281-367-2453 (Fax)

Kenneth Elan, Esq.  
**Law Offices of Kenneth Elan**  
217 Broadway  
Suite 606  
New York, NY 10007  
212-619-0261  
212-385-2707 (Fax)

Klari Neuwelt, Esq.  
**Law Offices of Klari Neuwelt**  
110 East 59th Street  
New York, NY 10022  
212-593-8800  
212-593-9131 (Fax)

Leo W. Desmond, Esq.  
**Law Offices of Leo W. Desmond**  
2161 Palm Beach Lakes Boulevard  
Suite 204  
West Palm Beach, FL 33409  
888-337-6663

Lionel Z. Glancy, Esq.  
**Law Offices of Lionel G. Glancy**  
1801 Avenue of the Stars  
Suite 311  
Los Angeles, CA 90067  
310-201-9150  
310-201-9160 (Fax)

Marc S. Henzel, Esq.  
**Law Offices of Marc S. Henzel**  
273 Montgomery Avenue  
Suite 202  
Bala Cynwyd, PA 19004  
610-660-8000  
610-660-8080 (Fax)

Christopher Lovell, Esq.  
**Lovell & Stewart, LLP**  
500 Fifth Avenue  
New York, NY 10110  
212-608-1900  
212-719-4677 (Fax)

Jack E. McGehee, Esq.  
**McGehee & Pianelli, L.L.P.**  
1225 North Loop West  
Suite 810  
Houston, TX 77008  
713-864-4000  
713-868-9393 (Fax)

Melvyn I. Weiss, Esq.  
Steven G. Schulman, Esq.  
**Milberg Weiss Bershad Hynes  
& Lerach LLP**  
One Pennsylvania Plaza  
New York, NY 10119  
212-594-5300  
212-868-1229 (Fax)

William S. Lerach, Esq.  
**Milberg Weiss Bershad Hynes & Lerach  
LLP**  
600 West Broadway  
Suite 1800  
San Diego, CA 92101  
619-231-1058  
619-231-7423 (Fax)

George H. Niblock, Esq.  
**Niblock Law Firm**  
324 North College Avenue  
P.O. Drawer 818  
Fayetteville, AR 72702  
501-521-5510  
501-444-7608 (Fax)

Marvin L. Frank, Esq.  
**Rabin & Peckel LLP**  
275 Madison Avenue  
New York, NY 10016  
212-682-1818  
212-682-1892 (Fax)

Clay Ragsdale, Esq.  
**Ragsdale & Wheeler, LLC**  
The Farley Building  
Suite 550  
1929 Third Avenue  
Birmingham, AL 35203  
205-251-4775  
205-251-4777 (Fax)

Fred E. Stoops, Sr.  
**Richardson Stoops Richardson & Ward**  
The Richardson Building  
6555 South Lewis Avenue  
Suite 200  
Tulsa, OK 74136  
918-492-7674  
918-493-1925 (Fax)

Thomas W. Sankey, Esq.  
**Sankey & Luck, L.L.P.**  
600 Travis Street  
Suite 6200  
Houston, TX 77002  
713-224-1007  
713-223-7737 (Fax)

Andrew M. Schatz, Esq.  
**Schatz & Nobel, P.C.**  
330 Main Street  
Hartford, CT 06106  
860-493-6292  
860-493-6290 (Fax)

Roger B. Greenberg, Esq.  
**Schwartz, Junell, Campbell & Oathout,  
LLP**  
Two Houston Center  
909 Fannin  
Suite 2000  
Houston, TX 77010  
713-752-0017  
713-752-0327 (Fax)

David R. Scott, Esq.  
**Scott & Scott, LLC**  
108 Norwich Avenue  
Colchester, CT 06415  
860-537-3818  
619-231-7423 (Fax)

Thomas G. Shapiro, Esq.  
**Shapiro Haber & Urmy LLP**  
75 State Street  
Boston, MA 02109  
617-439-3939  
617-439-0134 (Fax)

Scott Shepherd, Esq.  
**Shepherd & Finkelman, LLC**  
117 Gayley Street  
Suite 200  
Media, PA 19063  
610-891-9880  
610-891-9883 (Fax)

Robert M. Roseman, Esq.  
**Spector, Roseman & Kodroff, P.C.**  
1818 Market Street  
Suite 2500  
Philadelphia, PA 19103  
215-496-0300  
215-496-6612 (Fax)

Tzivia Brody, Esq.  
**Stull, Stull & Brody**  
6 East 54th Street  
New York, NY 10017  
212-687-7230  
212-490-2022 (Fax)

John G. Emerson, Jr., Esq.  
**The Emerson Firm**  
P.O. Box 25336  
Little Rock, AR 72221  
832-723-8850  
501-537-4888 (Fax)

John G. Emerson, Jr.  
**The Emerson Firm**  
2600 South Gessner  
Suite 600  
Houston, TX 77063  
832-723-8850  
713-789-0033 (Fax)

Frederick W. Gerkins, III, Esq.  
**Wechsler Harwood Halebian & Feffer  
LLP**  
488 Madison Avenue  
New York, NY 10022  
212-935-7400  
212-753-3630 (Fax)

**Weiss & Yourman**  
The French Building  
551 Fifth Avenue  
Suite 1600  
New York, NY 10176  
212-682-3025  
212-682-3010 (Fax)

Alex N. Kapetan, Jr., Esq.  
**Wites & Kapetan, PA**  
1761 West Hillsboro Boulevard  
Suite 403  
Deerfield Beach, Fl 33442  
954-570-8989  
954-428-3929 (Fax)

Jeffrey G. Smith, Esq.  
**Wolf Haldenstein Adler Freeman & Herz,  
LLP**  
270 Madison Avenue  
New York, NY 10016  
212-545-4600  
212-545-4653 (Fax)

Damon Young, Esq.  
**Young, Pickett & Lee**  
4122 Texas Boulevard  
Texarkana, TX 77503  
870-774-3206  
903-792-5098 (Fax)

Jeffrey C. Zwerling, Esq.  
**Zwerling, Schachter & Zwerling, LLP**  
767 Third Avenue  
New York, NY 10017  
212-223-3900  
212-371-5969 (Fax)

**DEFENDANTS' COUNSEL:**

Richard B. Drubel, Jr., Esq.  
**Boies Schiller & Flexner LLP**  
26 South Main Street  
Hanover, NH 03755  
603-643-9090  
603-643-9010 (Fax)

James E. Coleman, Jr., Esq.  
**Carrington Coleman Sloman &  
Blumenthal LLP**  
200 Crescent Court  
Suite 1500  
Dallas, TX 75201  
214-855-3000  
214-855-1333 (Fax)

Robin C. Gibbs, Esq.  
Kathy D. Patrick, Esq.  
**Gibbs & Bruns LLP**  
1100 Louisiana  
Suite 5300  
Houston, TX 77002  
713-650-8805  
713-750-0903 (Fax)

Elizabeth H. Baird, Esq.  
**O'Melveny & Myers, LLP**  
555 13th Street, NW  
Washington, DC 20004  
202-663-8515  
202-663-8007 (Fax)

Charles F. Richards, Esq.  
**Richards, Layton & Finger, P.A.**  
P.O. Box 551  
Wilmington, DE 19899  
302-651-7738  
302-651-7701 (Fax)

Russell Hardin, Jr., Esq.  
**Rusty Hardin & Associates**  
1201 Louisiana  
Suite 3300  
Houston, TX 77002  
713-652-9000  
713-652-9800 (Fax)

Craig Smyser, Esq.  
**Smyser, Kaplan & Veselka, LLP**  
700 Louisiana  
Suite 2300  
Houston, TX 77002  
713-221-2300  
713-221-2320 (Fax)

Stephen D. Susman, Esq.  
**Susman Godfrey L.L.P.**  
1000 Louisiana Street  
Suite 5100  
Houston, TX 77002  
713-651-9366  
713-654-6666 (Fax)

James E. Coleman, Jr., Esq.  
**Wilmer Cutler & Pickering**  
2445 M Street, NW  
Washington, DC 20037  
202-663-6000  
202-663-6363 (Fax)

Exhibit A

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2001

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE CRITICAL PATH, INC. ) No. C-01-0551 WHO  
SECURITIES LITIGATION )  
ORDER APPOINTING  
LEAD COUNSEL )

On July 9, 2001, lead plaintiff the Florida State Board of Administration ("FSBA") filed an Application for the Approval of Its Choice of Lead Counsel ("Application"), pursuant to the Opinion and Order of June 28, 2001 ("Opinion"), appointing the FSBA lead plaintiff in this related and consolidated securities litigation. The Application was filed under seal, pursuant to the Opinion, and seeks approval of the firm of Berman DeValerio Pease Tabacco Burt & Pucillo as lead counsel for the class.

The Private Securities Litigation Reform Act of 1995 ("PSLRA") provides that, in securities class actions of this type, "[t]he most adequate 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)(v) (emphasis added). Pursuant to this explicit statutory language, the Court directed the FSBA to prepare and submit an application for approval of its choice of lead counsel. The Court

1 | directed that the application be filed under seal. To ensure that the  
2 | Court was adequately informed of the FSBA's reasons for its choice and  
3 | the capabilities of its chosen counsel, the Court required that the  
4 | FSBA's application set forth:

5 |           1. The manner in which it selected lead counsel;

6 |           2. The fee arrangement between it and its proposed counsel,  
7 | which was to provide for a cap on fees, but leave it to the Court to  
8 | determine an actual fee to be awarded;

9 |           3. The fee arrangements it has reached with its counsel in  
10 | other securities litigation in which it is currently serving as lead  
11 | plaintiff;

12 |           4. A statement of the results its lead counsel has achieved  
13 | in other securities litigation for which it has served as lead  
14 | counsel;

15 |           5. A statement clearly specifying how the out-of-pocket  
16 | costs of the litigation would be funded, and what the obligations of  
17 | the lead plaintiff will be should the suit be unsuccessful;

18 |           6. A statement as to how counsel plans to staff the case,  
19 | including the number of lawyers and paralegals to be involved, the  
20 | breakdown between partners and associates, and an estimate of the  
21 | number of hours to be expended through various stages of the  
22 | litigation. If lead counsel planned to parcel out work to other law  
23 | firms, the application was to detail the need for and extent of such  
24 | delegation;

25 |           7. If the lead plaintiff planned to select co-counsel to  
26 | represent it, the application was to forth the reasons for appointing  
27 | two law firms and the plans for allocating work between them; and

28 |           8. The role of any local, or liaison counsel, to avoid

1 duplication of services, wasted time and unnecessary expense.

2 (Opinion at 17-18.)

3           The Court has reviewed the Application, and has determined  
4 that it complies with the requirements set forth in the Opinion. The  
5 Application sets forth a fee arrangement that is favorable to the  
6 class and leaves the final fee award to the Court's discretion. The  
7 Application demonstrates that the FSBA has retained its proposed lead  
8 counsel in other securities litigation, and that proposed lead counsel  
9 has achieved favorable results in such litigation, including obtaining  
10 changes in corporate governance to protect against future wrongdoing.  
11 It is evident from the Application that proposed lead counsel has  
12 broad experience in securities litigation, and its record of securing  
13 favorable results in such litigation extends beyond its work on behalf  
14 of the FSBA. The Application sets forth personnel assignments and  
15 estimates of hours that are reasonable in light of the scope of this  
16 litigation. In sum, the Application makes clear that counsel was  
17 carefully selected by a committed and knowledgeable lead plaintiff,  
18 and counsel has examined the case thoroughly and is prepared to begin  
19 litigating in earnest.

20           After careful consideration, and pursuant to its authority  
21 under the PSLRA, the Court approves the FSBA's selection of Berman  
22 DeValerio Pease Tabacco Burt & Pucillo as lead counsel for the class.

23           Accordingly,

24           IT IS HEREBY ORDERED that:

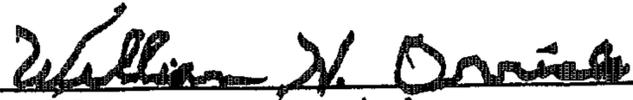
25           1. The FSBA's choice of Berman DeValerio Pease Tabacco  
26 Burt & Pucillo LLP as lead counsel is approved, and that firm shall  
27 serve as lead counsel in this related and consolidated litigation.

28           2. The FSBA will file an amended consolidated class action

1 | complaint on or before August 31, 2001.

2 | Dated: August 9, 2001.

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
7  
28

  
\_\_\_\_\_  
William H. Orrick  
United States District Judge