UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHAEL FEDER, Individually And On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS CORPORATION, JAMES E. DALEY, and RICHARD H. BROWN,

Defendants.

Case No. 02-CV-207
(Folsom, David)

MAYER HORWITZ, and BARBARA HORWITZ, On Behalf of Themselves And All Others Similarly Situated,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS CORPORATION, RICHARD H. BROWN, PAUL J. CHIAPPARONE, and JAMES E. DALEY,

Defendants.

Case No. 02-CV-232
(Ward, T. John)

SECURITIES CLASS ACTION

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NEW JERSEY'S MOTION TO BE APPOINTED LEAD PLAINTIFF PURSUANT TO § 21D(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND TO APPROVE PROPOSED LEAD PLAINTIFF'S CHOICE OF COUNSEL

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the Department of the Treasury of the State of New Jersey and its Division of Investment, on behalf of Common Pension Fund A ("New Jersey") respectfully moves this Court, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a)(3)(B), for entry of an Order appointing it Lead Plaintiff in the above-captioned Actions and any actions consolidated therewith, and approving its choice of the law firms of Bernstein Litowitz Berger & Grossmann LLP and Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP as Lead Counsel, and Nickens, Keeton, Lawless, Farrell & Flack, LLP as Local Counsel.

This motion is made on the grounds that New Jersey suffered a loss in excess of $50 million by virtue of its purchases of common stock of Electronic Data System Corporation between September 7, 1999 and September 24, 2002, as set forth in the accompanying Memorandum and Declaration. The appointment of New Jersey as Lead Plaintiff would advance one of the primary goals of the Private Securities Litigation Reform Act of 1995 – to encourage institutional investors with large financial stakes in the outcome of the litigation to assume control over securities class actions. In addition, New Jersey meets the requirements of Rule 23 of the Federal Rules of Civil Procedure because its claims are typical of other class members' claims and New Jersey will fairly and adequately represent the class.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Robert S. Gans, the Declaration of John E. McCormac CPA, Treasurer of the State of New Jersey, the pleadings and other files herein, and such other written or oral argument as may be permitted by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

New Jersey suffered a loss in excess of $50 million as a result of its purchases of common stock of Electronic Data Systems Corporation ("EDS" or the "Company") between September 7, 1999 and September 24, 2002 (the "Class Period"). Pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(3)(B) (the "Exchange Act"), as amended by Section 101(a) of the Private Securities Litigation Reform Act of 1995, P.L. 104-67, 109 Stat. 737 (the "Reform Act"), New Jersey respectfully submits this memorandum of points and authorities in support of its motion for an Order: (1) appointing New Jersey as Lead Plaintiff, and (2) approving New Jersey's choice of the law firms of Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") and Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP ("Greenbaum Rowe") as Lead Counsel, and Nickens, Keeton, Lawless, Farrell & Flack, LLP ("Nickens Keeton") as Local Counsel.[1]

This motion fulfills one of the principal goals of Congress in enacting the Reform Act – to encourage institutional investors to serve as lead plaintiffs in class actions brought under the federal securities laws. Congress envisioned that the provisions of the Reform Act would increase the likelihood that institutional investors like New Jersey would serve as lead plaintiffs because such investors, "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, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733. In fact, the Senate stated that:

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[1] The Reform Act specifically authorizes members of the putative class, regardless of whether they have filed a complaint, to move for appointment as Lead Plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B).

> [I]ncreasing the role of institutional investors in class actions [would] ultimately benefit the class and assist the courts . . . [and] that an institutional investor acting as lead plaintiff [could], consistent with its fiduciary obligations, balance the interests of the class with the long-term interests of the company and its public investors.

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

Accordingly, numerous courts have recognized that "one goal of the PSLRA is to have the plaintiff class, represented by a member with a substantial financial interest in the recovery as incentive, monitor the litigation to prevent its being 'lawyer-driven.' Therefore, the statute operates to ensure that institutional plaintiffs with expertise in the securities market and real financial interest in the integrity of the market would control the litigation, not the lawyers." *In re Enron Corp. Securities Litigation*, 206 F.R.D. 427, 442 (S.D. Tex. 2002). *See also In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999) ("Congress expected that the lead plaintiff would normally be an institutional investor with a large stake in the outcome.").

New Jersey is precisely the type of institutional investor that Congress intended to serve as lead plaintiff in class actions brought under the federal securities laws. *See Gluck v. CellStar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997) ("Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors."). New Jersey is a public pension fund with tens of billions of dollars in assets under management. Indeed, the Division of Investment manages in excess of $72 billion, while Common Pension Fund A controls over $28 billion in assets. These funds are under the control of the Treasurer of the State of New Jersey, who has submitted a detailed declaration evidencing New Jersey's commitment to the vigorous prosecution of this litigation. *See* Exhibit C to the Declaration of Robert S. Gans in Support of the Motion of New Jersey To Be Appointed Lead Plaintiff pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934 And To Approve Proposed Lead Plaintiff's Choice of Counsel ("Gans

Decl."), filed concurrently herewith. As a large institutional investor, New Jersey possesses the financial sophistication and expertise to ensure that the litigation proceeds in the best interest of the class. Furthermore, with losses exceeding $50 million as a result of its purchases of EDS common stock during the Class Period, New Jersey's claims are typical of the claims of the class. New Jersey will also fairly and adequately represent the interests of the class as it is "'willing' and 'able' to 'take an active role in and control the litigation and to protect the interests. . .'" of the class. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). Accordingly, New Jersey should be appointed Lead Plaintiff in this action.

II. SUMMARY OF FACTS

EDS, located in Plano, Texas, provides information technology services to companies and governmental agencies, including the management of computers, networks, and business operations. To provide these services, EDS and its clients typically enter into large, multi-year contracts whereby EDS installs, operates, and maintains computer networks and back office operations.

On September 18, 2002, EDS announced that it expected its earnings and revenue for its third quarter 2002 to fall short of the Company's prior issued guidance by approximately 80 percent and 11 percent, respectively. On September 24, 2002, following this initial disclosure, securities analysts reported that the Company had not disclosed certain financial obligations relating to the sale of put contracts on its own stock, which would require EDS to pay $225 million. Analysts also questioned whether the earnings shortfall resulted from improper revenue recognition practices in violation of generally accepted accounting principles ("GAAP"). These analysts specifically questioned the Company's use of "percentage of completion" accounting, which requires that EDS accurately and objectively estimate the cost and profit of its long term contracts and accounts for 40

percent of EDS's revenues. Following these disclosures, the price of EDS common stock fell from $36.46 prior to the Company's initial announcement to $11.68 on September 24, 2002, erasing approximately $11.8 billion in shareholders' equity.

III. PROCEDURAL BACKGROUND

Following these adverse disclosures, seventeen cases were filed in this District alleging claims for violation of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, on behalf of investors who purchased EDS securities in the open market during the Class Period.[2] These cases are:

ABBREVIATED CASE NAME	COURT	CASE #	DATE FILED
1. *Feder v.EDS Corp.*	E.D. Tex.	5:02-CV-207	September 26, 2002
2. *Barry Family LP v. EDS Corp.*	E.D. Tex.	4:02-CV-300	September 27, 2002
3. *Braun, et al. v. EDS Corp.*	E.D. Tex.	4:02-CV-304	September 30, 2002
4. *Harnik v. EDS Corp.*	E.D. Tex.	4:02-CV-308	October 2, 2002
5. *Bridgewater Partners v. EDS Corp.*	E.D. Tex.	4:02-CV-310	October 2, 2002
6. *Vanderwarter v. EDS Corp.*	E.D. Tex.	4:02-CV-314	October 4, 2002
7. *Thorne-Thompsen v. EDS Corp.*	E.D. Tex.	4:02-CV-321	October 10, 2002
8. *Britt v. EDS Corp.*	E.D. Tex.	4:02-CV-322	October 11, 2002
9. *Sved v. EDS Corp.*	E.D. Tex.	4:02-CV-323	October 11, 2002
10. *Zia v. EDS Corp.*	E.D. Tex.	4:02-CV-329	October 16, 2002
11. *Stanton Pharmacy v. EDS Corp.*	E.D. Tex.	4:02-CV-336	October 18, 2002

[2] Five cases with virtually identical allegations also have been filed in the United States District Court for the Southern District of New York by plaintiffs with only nominal holdings in EDS securities. New Jersey believes that venue is improper in New York and that these cases were filed in an attempt to make an "end-run" around the Lead Plaintiff provisions of the Reform Act. New Jersey also believes that these "place holder" cases should and will be transferred to this Court, and has filed a statement to this effect in the New York court.

12. *Kluemper v. EDS Corp.*	E.D. Tex.	4:02-CV-331	October 18, 2002
13. *McLoughlin v. EDS Corp.*	E.D. Tex.	4:02-CV-335	October 18, 2002
14. *Horwitz v. EDS Corp.*	E.D. Tex.	5:02-CV-232	October 23, 2002
15. *Miller v. EDS Corp.*	E.D. Tex.	5:02-CV-233	October 24, 2002
16. *Thompson v. EDS Corp.*	E.D. Tex.	5:02-CV-248	November 4, 2002
17. *Fink v. EDS. Corp.*	E.D. Tex.	4:02-CV-365	November 12, 2002

These actions allege that defendants violated Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, by making material public misrepresentations during the Class Period (September 7, 1999-September 24, 2002), thereby artificially inflating the price of EDS securities.[3] These statements were allegedly false and misleading because they failed to disclose that: (i) the Company's earnings had been inflated by improperly booking revenue in violation of GAAP and percentage-of-completion accounting rules; and (ii) the Company had entered into undisclosed and risky derivative transactions that exposed it to a $225 million liability.[4]

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[3] The actions pending against EDS allege class periods that vary in terms of the beginning date, with some beginning as early as September 7, 1999. For purposes of this motion, New Jersey utilizes a Class Period beginning on September 7, 1999, and ending on September 24, 2002, because it is the longest Class Period and the one most often alleged in the complaints filed. If New Jersey is appointed Lead Plaintiff, it will file a consolidated amended complaint that will resolve these differences.

[4] The Reform Act provides that "if more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed," the Court shall not make the determination of the most adequate plaintiff until "after the decision on the motion to consolidate is rendered." 15 U.S.C. § 78u-4(a)(3)(B)(ii). *See also Enron*, 206 F.R.D. at 438. Consolidation is particularly appropriate in securities class action litigation especially where, as here, the claims asserted in all the actions are virtually identical. *See* Fed. R. Civ. P. 42(a).

In re Universal Access, Inc. Sec. Litig., 209 F.R.D. 379, 383 (E.D. Tex. 2002) (securities fraud claims should be consolidated where they are brought by various investors who each "allegedly purchased [] securities during the relevant time period in reliance of the integrity of the market for such securities and were allegedly injured by the fraud on the market that was perpetrated through

IV. ARGUMENT

A. New Jersey Should Be Appointed Lead Plaintiff Pursuant To The Reform Act

The Reform Act sets forth a detailed procedure for the selection of lead plaintiff to oversee class actions brought under the federal securities laws. Section 21D(a)(3)(A)(i) of the Exchange Act provides that, within 20 days after the date on which a 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.

See 15 U.S.C. § 78u-4(a)(3)(A)(i). Notice of this case was first published on *The Business Wire* on September 26, 2002. *See* Exhibit B to the Gans Decl. Accordingly, this motion is timely filed within 60 days of the date of publication.

The Reform Act directs the Court to consider any motions brought by plaintiffs or purported class members to appoint lead plaintiffs, filed in response to any such notice, not later than 90 days after the date of publication, **or** as soon as practicable after this Court decides any pending motion to consolidate any actions asserting substantially the same claims. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). In selecting a Lead Plaintiff, the Court must appoint the "most adequate plaintiff" based on the following statutory factors:

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the issuance of materially false and misleading statements and concealment of material information, thus artificially inflating the price of [] securities at all relevant times."); *Enron*, 206 F.R.D. at 438; *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 410 (S.D. Tex. 2000).

the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that . . .

(aa) has either filed the complaint or made a motion in response to a notice;

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii).

When applying these factors, courts have emphasized that, in enacting the Reform Act, Congress "call[ed] for greater supervision by the Court in the selection of which plaintiffs will control the litigation." *Enron*, 206 F.R.D., at 439. As a result, each movant has the initial burden of demonstrating to the court that it is the most adequate plaintiff. *See Berger*, 257 F.3d at 481 ("[a]dequacy is for the plaintiffs to demonstrate"); *Enron,* 206 F.R.D. at 441 ("The adequacy of the putative class representative(s) and of plaintiffs' counsel should not be presumed, however, in the absence of proof to the contrary; ***plaintiff bears the burden of demonstrating his and his counsel's adequacy.***") (emphasis added).

1. New Jersey Has A Significant Financial Interest In The Relief Sought By The Class

Although the Reform Act does not delineate a procedure for determining the "largest financial interest," courts generally consider four factors: (1) the number of shares purchased by the movant during the class period; (2) the number of net shares purchased by the movant during the class period; (3) the total net funds expended by the movant during the class period; and (4) the losses suffered by the movant. *See Enron*, 206 F.R.D. at 440.

Based on these four factors, New Jersey has a very significant financial interest here: (1) it

purchased a total of 1,115,000 shares of EDS common stock during the Class Period; (2) it purchased 685,000 net shares during the Class Period; (3) it spent a combined total of $66,091,301.00 on its purchases of EDS common stock during the Class Period; and (4) it suffered estimated losses in excess of $50 million as a result of these purchases.[5]

As of this filing, New Jersey has not been served with any papers on behalf of any other movant for Lead Plaintiff in this case. Nor has New Jersey received any notice that any other potential applicant has sustained a greater financial loss in connection with the purchase and sale of EDS securities during the Class Period. Accordingly, New Jersey believes that it has the largest financial interest in the relief sought by the class and therefore satisfies the first prong of the most adequate plaintiff test.

2. New Jersey Has Made A Substantial Showing That It Satisfies The Adequacy And Typicality Requirements Of Rule 23

Lead Plaintiffs must also fulfill the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). Rule 23(a) provides that a party may serve as a class representative only if the following four prerequisites are met:

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

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[5] Pursuant to Section 21D(e)(1) of the Exchange Act, the calculated damages for plaintiffs holding their shares after the end of the class period is "the difference between the purchase or sale price paid or received . . . and the mean trading price [of EDS stock] during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. § 78u-4(e)(1). Because 90 days have not passed since September 24, 2002 (the date of the corrective disclosure), New Jersey has calculated a mean trading price of $13.93 for EDS common stock from September 24, 2002 through November 19, 2002. A copy of a chart summarizing its loss calculation in EDS securities is attached as Exhibit D to the Gans Decl.

representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

In deciding a motion to serve as Lead Plaintiff, courts limit this inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until class certification. *See Enron* 206 F.R.D. at 441; *In re Waste Management*, 128 F. Supp. 2d at 411; *Switzenbaum v. Orbital Sciences Corp.*, 187 F.R.D. 246, 248-49 (E.D.Va.1999). However, in its determination and selection of the most adequate plaintiff, the "[c]ourt must be inordinately careful, making certain that the requirements of section 21D(a) are assiduously applied in line with the purposes of Congress in the enactment of the 1995 Reform Act." *See Burke v. Ruttenberg*, 102 F. Supp. 2d 1280, 1309 (N.D. Ala. 2000). *See also Berger*, 257 F.3d at 484 (stating that the district court has an obligation "to assess the representatives own qualifications to take an active role in and control the litigation"). As set forth below, New Jersey more than satisfies the adequacy and typicality requirements of Rule 23(a), and thus the second prong of the most adequate plaintiff test.

a. New Jersey's Claims Are Typical Of Those Of The Class

The typicality requirement of Rule 23(a) of the Federal Rules of Civil Procedure is satisfied when a plaintiff's claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. *See Enron,* 206 F.R.D. at 441; *Berger*, 257 F.3d at 479-80. Rule 23 does not require that the Lead Plaintiff be identically situated with all class members. It is enough that Lead Plaintiff's situation share a common issue of law or fact. *See Berger*, 257 F.3d at 480.

The questions of law and fact common to the members of the Class which also affect New Jersey include the following:

(i) whether EDS issued false and misleading statements during the alleged Class Period relating to its business and financial results;

(ii) whether EDS acted knowingly or recklessly in issuing false and misleading financial statements;

(iii) whether the market prices of EDS's securities were artificially inflated during the Class Period because of defendants' conduct alleged in the complaints; and

(iv) whether the members of the Class sustained damages and, if so, the proper measure of damages.

These questions apply equally to New Jersey as to all members of the purported Class. Accordingly, because New Jersey's claims are based on the same legal theories and arise from the same event or course of conduct giving rise to the claims of other class members, the typicality requirement is satisfied. *See Id.*

b. New Jersey Will Fairly And Adequately Protect The Interests Of The Class

The determination of fair and adequate representation rests on two bases: "'(1) the zeal and competence of the representative[s'] counsel and . . . (2) the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of the absentee[][.]'" class members. *Enron,* 206 F.R.D. at 441 (quoting *Berger*, 257 F.3d at 479). In addition, "[t]he adequacy inquiry also serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *Berger* 257 F.3d at 479-80. As the Fifth Circuit held:

> Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the [Reform Act's] requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, ***the [Reform Act] raises the standard adequacy threshold.***

Berger, 257 F.3d at 483 (emphasis added).

Here, the interests of New Jersey are clearly aligned with those of the class, and there is no evidence of antagonism between New Jersey and any other member of the class. Indeed, New Jersey's financial stake in the outcome of this litigation alone provides significant and compelling evidence of its interest in prosecuting this action. In addition to fulfilling these minimum requirements, however, New Jersey has submitted a Declaration from the State Treasurer in which he affirms his fiduciary duties to the members of the class and details New Jersey's commitment to supervising the litigation and the work of counsel. *See* Exhibit C to Gans Decl. Specifically, New Jersey has designated a former state superior court judge to oversee the litigation, and to consult with both the Attorney General and the Treasurer as the case progresses. New Jersey also has retained competent and experienced counsel and negotiated a fair and reasonable fee arrangement well below the fees customarily awarded in securities fraud class actions. *In re Conseco, Inc. Sec. Litig.*, 120 F. Supp. 2d 729, 732 (S.D. Ind. 2000) (showing of adequacy buttressed by lead plaintiff movants that had entered into retainer agreement with counsel prior to commencement of litigation). Accordingly, New Jersey has demonstrated the experience and ability to monitor this action and act in the best interests of the class to obtain the maximum recovery. *See Berger*, 257 F.3d at 483 ("securities class actions [should] be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation."); *Gluck*, 976 F. Supp. at 546 ("an institutional investor . . . is accustomed to acting in the role of a fiduciary, and its experience with investing and financial matters will only benefit the class.").

Numerous courts that have considered the adequacy of a lead plaintiff applicant have concluded that a demonstration as thorough as New Jersey's evidences the movant's ability and willingness to represent the best interests of the class, favoring its appointment over less qualified

movants. *See In re Conseco*, 120 F. Supp. 2d at 732-34 (holding that declaration from public pension funds stating that they were willing and able to serve as lead plaintiffs and that they had entered into retainer agreement with counsel was sufficient to establish adequacy, but that competing movant with larger loss was not most adequate plaintiff since it had not provided comparable information that would give the court confidence that it was capable of adequately representing the class); *See also Piven v. Sykes*, 137 F. Supp. 2d 1295, 1305 (M.D. Fla. 2000) (rejecting lead plaintiff motion of institution that failed to provide information regarding movants' location, the type of business it was engaged in, its resources and experience); *In re Gemstar-TV Guide Int'l Inc. Sec. Litig.*, 209 F.R.D. 447, 452 (C.D. Cal. 2002) (rejecting lead plaintiff movants that failed to provide a declaration and sufficient information concerning their ability to act as lead plaintiff); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 635 (D.N.J. 2002) (rejecting lead plaintiff motion for, *inter alia*, failing to provide appropriate declarations or affidavits with requisite information about movant and specifically failing to provide any evidence of movant's willingness to "accept substantial obligations associated with being named lead plaintiff."); *In re Lucent Techs. Inc. Sec. Litig.*, 194 F.R.D. 137, 149 (D.N.J. 2000) ("A preliminary, fact-specific inquiry is, nevertheless, necessary under Rule 23 to determine whether the presumptively most adequate plaintiff will adequately represent the interests of the class."). Based on these facts, the Court should find that New Jersey will adequately represent the interests of the Class, and appoint it Lead Plaintiff.

V. THE COURT SHOULD APPROVE NEW JERSEY'S CHOICE OF COUNSEL

Pursuant to the Reform Act, the proposed Lead Plaintiff shall, subject to the Courts' approval, select and retain counsel to represent the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). New Jersey has selected the law firms of Bernstein Litowitz and Greenbaum Rowe to serve as Lead

Counsel, and the law firm of Nickens Keeton to serve as Local Counsel. New Jersey has also entered into an agreement with counsel that limits the fees to set percentages of the recovery. The agreed upon fees represent a significant reduction from what has typically been awarded in cases of this type. *See* Declaration of John E. McCormac CPA, Treasurer of the State of New Jersey, at 3, attached as Exhibit C to Gans Decl.[6]

Bernstein Litowitz, Greenbaum Rowe, and Nickens Keeton have extensive experience in successfully prosecuting securities fraud actions and have each appeared in major actions before this and other courts. For example, Bernstein Litowitz has been appointed lead counsel in some of the largest cases brought since the passage of the Reform Act, including the *WorldCom*, *Cendant*, *McKesson*, and *Lucent* securities litigations. *See* Firm Resumes, Gans Decl., Ex. E-G. The resumes submitted with this motion demonstrate that these firms are more than qualified to prosecute this Action, and will provide the highest caliber of representation to the class.

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[6] The fee agreement is available to the Court for its *in camera* review.

VI. CONCLUSION

For all the foregoing reasons, New Jersey respectfully requests that the Court: (1) appoint New Jersey as Lead Plaintiff; and (2) approve its selection of counsel.

Dated: November 25, 2002

Respectfully submitted,

NICKENS, KEETON, LAWLESS,
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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), counsel hereby certifies that it is unaware at this time whether this matter shall be opposed or unopposed, or whether any competing motions for appointment as lead plaintiff will be filed. Therefore, counsel has been unable to confer with opposing counsel as set forth in this Rule.

Jacks C. Nickens