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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 GARY DAVIS, on behalf of himself and all
15 others similarly situated,

16 Plaintiff,

17 v.

18 FREMONT INVESTMENT ADVISORS,
INC., FREMONT MUTUAL FUNDS, INC.,
19 ARMSTRONG SHAW ASSOCIATES, INC.,
DELAWARE INTERNATIONAL ADVISERS
20 LTD., JARISLOWSKY FRASER LIMITED,
KERN CAPITAL MANAGEMENT LLC,
21 NORTHSTAR CAPITAL MANAGEMENT,
INC., TIMESSQUARE CAPITAL
22 MANAGEMENT, INC., LEND LEASE
ROSEN REAL ESTATE SECURITIES LLC,
23 QUASAR DISTRIBUTORS LLC; FREMONT
GLOBAL FUND, FREMONT
24 INTERNATIONAL GROWTH FUND,
FREMONT LARGE CAP VALUE FUND
25 (FORMERLY, FREMONT NEW ERA
VALUE FUND), FREMONT LARGE CAP
26 GROWTH FUND (FORMERLY, FREMONT
NEW ERA GROWTH FUND), FREMONT
27 STRUCTURED CORE FUND (FORMERLY,
FREMONT GROWTH FUND), FREMONT
28 U.S. SMALL CAP FUND, FREMONT U.S.

) Case No. C-04-1016-JW

) **NOTICE OF MOTION AND MOTION**
) **TO APPOINT BEVERLY E. LAYMON**
) **AS LEAD PLAINTIFF AND FOR**
) **APPOINTMENT OF LEAD**
) **COUNSEL; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF**

) Date: June 28, 2004

) Time: 9:00 a.m.

) Courtroom: 8

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MICRO-CAP FUND, FREMONT REAL)
ESTATE SECURITIES FUND, FREMONT)
BOND FUND, FREMONT CALIFORNIA)
INTERMEDIATE TAX-FREE FUND,)
FREMON T MONEY MARKET FUND, and)
DOES 1-100,)
Defendants.)

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on June 21, 2004, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, the Motion To Appoint Beverly E. Laymon As Lead Plaintiff And
4 Appointment Of Lead Counsel will be heard before the Honorable James Ware, District Court
5 Judge, Courtroom 8, 4th Floor, 280 South 1st Street, San Jose, California, 95113.

6 Pursuant to Section 27(a)(3)(B) of the Securities Act of 1933 and Section 21D(a)(3)(B) of
7 the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act
8 of 1995 (the “PSLRA”), Beverly E. Laymon moves for her appointment as lead plaintiff,
9 Schiffrin & Barroway, LLP and Wechsler Harwood, LLP as lead counsel for the Class and
10 Kaplan Fox & Kilsheimer LLP as liaison counsel for the Class. This motion is made on the
11 ground that Beverly E. Laymon is the most adequate plaintiff as defined by the PSLRA.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **PRELIMINARY STATEMENT**

14 The above-captioned action is a class action lawsuit that has been brought against The
15 Fremont Investment Advisors, Inc., Fremont Mutual Funds, Inc. (collectively, “Fremont” or the
16 “Company”) and various Mutual Funds the Company manages (the “Fremont Mutual Funds”),¹
17 alleging violations of Sections 11 and 15 of the Securities Act of 1933 (the “Securities Act”),
18 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), and Rule
19 10b-5 promulgated thereunder, and the Investment Company Act.

20 Beverly E. Laymon (“Movant”) was an investor of Fremont Mutual Funds² between
21 March 15, 1999, and March 1, 2004, inclusive (the “Class Period”) who, in response to notice of
22 the pending lawsuits, retained the law firms of Schiffrin & Barroway, LLP and Wechsler
23 Harwood, LLP to represent her interests – has combined investments in Fremont Mutual Funds

24 _____
25 ¹ A complete list of the Fremont Mutual Funds named as defendants is attached hereto as
26 Exhibit A to the Declaration of Linda M. Fong In Support Of Motion To Appoint Beverly E.
27 Laymon As Lead Plaintiff And To Approve Plaintiff’s Choice Of Counsel (the “Fong Decl.”).

28 ² Beverly E. Laymon invested in the following Fremont Mutual Funds: Fremont Bond
Fund.

1 totaling approximately \$89,554.^{/3}

2 As demonstrated herein, Movant is suitable and adequate to represent the Class of
3 investors in Fremont Mutual Funds. Movant’s investments represent the largest known “financial
4 interest” of any Class member(s) seeking to be appointed as lead plaintiff.^{/4} See Fong Decl. at
5 Exhibit B.^{/5} Movant is not aware of any other Class member or group of Class members that has
6 filed an action or an application for appointment as lead plaintiff with as large an investment in
7 the relevant Fremont Mutual Funds. Moreover, the Movant satisfies each of the requirements of
8 the Private Securities Litigation Reform Act of 1995 (“PSLRA”) and Rule 23 of the Federal
9 Rules of Civil Procedure (“Rule 23”) and therefore, is qualified for appointment as lead plaintiff
10 in this action. Thus, as demonstrated herein, Movant is presumptively the most adequate
11 plaintiff and should be appointed lead plaintiff.

12 Movant respectfully submits this memorandum of law in support of her motion, pursuant
13 to Section 27 of the Securities Act, 15 U.S.C. §77z-1(a)(3)(B) and Section 21D of the Exchange
14 Act, 15 U.S.C. §78u-4(a)(3)(B), as amended by the PSLRA, for an order: (1) appointing Beverly
15 E. Laymon to serve as lead plaintiff pursuant to Section 27 of the Securities Act and Section 21D
16 of the Exchange Act; (2) approving Movant’s selection of Schiffrin & Barroway, LLP and

18 ^{/3} In addition to the Fremont Mutual Funds invested in by Beverly E. Laymon, Schiffrin &
19 Barroway, LLP has been retained by investors in the following additional Fremont Mutual Funds
20 to pursue this action on their behalf: Fremont U.S. Micro-Cap Fund and Fremont Structured Core
Fund (f/k/a, Fremont Growth Fund).

21 ^{/4} Absent an approved formula for measuring financial losses at this time, Beverly E.
22 Laymon submits her certification (pursuant to Section 27 of the Securities Act, 15 U.S.C. §77z-
23 1(a)(2)(A) and Section 21D of the Exchange Act, 15 U.S.C. §78u-4(a)(2)(A)) which reflects the
24 value its investments in the various Fremont Mutual Funds. Regardless of the formula eventually
25 approved for assessing financial losses in these actions, the total investment value held by Class
26 members during the relevant Class Period will be essential in determining “financial interest.”
Should the Court require more information at a later date regarding Movant’s transactions, it
expressly reserves the right to supplement this filing. One’s investment totals, however, should
not be confused with one’s legally compensable damages, measurement of which is a complex
legal question and which has not been determined at this stage of the litigation.

27 ^{/5} Beverly E. Laymon’s sworn certification documenting her investments pursuant to the
28 federal securities laws is attached as Exhibit B to the Fong Decl.

1 Wechsler Harwood, LLP as lead counsel for the Class; and (3) approving Movant’s selection of
2 Kaplan Fox & Kilsheimer LLP as liaison counsel for the Class.

3 **PROCEDURAL BACKGROUND**

4 The above-captioned action was commenced in this jurisdiction on or about March 12,
5 2004. Pursuant to 15 U.S.C. §78z-1(a)(3)(A)(i) and 15 U.S.C. §78u-4(a)(3)(A)(i), on March 12,
6 2004, the first notice that a class action had been initiated against defendants was published over
7 *PR Newswire*, a widely circulated national business-oriented wire service, advising members of
8 the proposed Class of the pendency of the action as well as their right to move the Court to serve
9 as lead plaintiff no later than May 11, 2004. See Fong Decl. at Exhibit D.

10 Movant is a class member (see Fong Decl. at Exhibit B) and is timely filing this motion
11 within the 60-day period following publication of the March 12, 2004 notice pursuant to Sections
12 27 and 21D of the PSLRA.

13 **STATEMENT OF FACTS**⁶

14 Fremont Investment Advisors maintains its principal executive offices in San Francisco,
15 California. Fremont markets, sponsors and provides investment advisory, distribution and
16 administrative services to mutual funds.

17 Throughout the Class Period, defendants Fremont and its various mutual fund co-
18 managers agreed to allow favored investors to engage in “timing” of the Fremont Mutual Funds.
19 “Timing” is an investment technique involving short-term “in-and-out” trading of mutual fund
20 shares designed to exploit the inefficiencies in the way mutual fund companies set their net asset
21 values (“NAVs”), contrary to the traditional buy-and-hold investment theory of mutual funds.
22 Additionally, the Fremont Mutual Funds’ prospectuses stated that the funds monitor for “timing”
23 and work to prevent it.

24 Aside from dilution, “timers” also harm the target funds by imposing their transaction
25 costs on the long-term investors. Trades necessitated by “timer” redemptions may also lead to
26 the realization of taxable capital gains at an undesirable time or may result in managers having to

27 ⁶ These facts were derived from the allegations contained in the class action styled as *Davis*
28 *v. Fremont Investment Advisors, Inc., et al.*, Case No. C-04-1016-JW.

1 sell stock, therefore reducing the overall performance of the fund by requiring the fund manager
2 to keep a certain amount of the funds' assets in cash at all times. As a result, investors are
3 deprived of the ability to be fully invested in a rising market.

4 Fremont, its managers of the Fremont Mutual Funds, and each of the relevant fund
5 managers, profited from fees Fremont charged to the Fremont Mutual Funds. These fees are
6 measured as a percentage of the assets under management. The Fremont Mutual Fund managers
7 accepted the offers by favored investors for more assets in exchange for the right to "time," also
8 known as "sticky assets."

9 In another scheme pursuant to which the defendants violated the securities laws and
10 breached their fiduciary duties to investors, certain favored investors were permitted to "late
11 trade" Excelsior Funds' shares. As described in greater detail below, the daily price of mutual
12 fund shares is generally calculated as of 4:00 p.m. EST. Orders to buy, sell or exchange mutual
13 fund shares placed at or before 4:00 p.m. EST on a given day receive that day's price.

14 Conversely, orders placed after 4:00 p.m. EST are supposed to be priced using the following
15 day's price. These favored investors allowed to place after 4:00 p.m. on a given day would
16 illegally receive that day's price (as opposed to the next day's price, which the order would have
17 received had it been processed lawfully). This allowed the favored investors to capitalize on
18 post-4:00 p.m. information while those who bought their mutual fund shares lawfully could not.

19 By allowing favored investors to dilute the value of the Fremont Mutual Funds by
20 allowing timing and late trading to occur, Fremont essentially allowed favored investors to take a
21 cut of the profits from the class members.

22 ARGUMENT

23 **I. BEVERLY E. LAYMON SHOULD BE APPOINTED LEAD PLAINTIFF**

24 **A. Beverly E. Laymon Has Satisfied The Procedural Requirements Pursuant To The PSLRA**

25 The PSLRA sets forth a detailed procedure for the selection of a lead plaintiff to oversee
26 securities class actions brought pursuant to the Federal Rules of Civil Procedure. See 15 U.S.C.
27 §77z-1(a)(3)(B); 15 U.S.C. §78u-4(a)(3)(B).
28

1 First, the plaintiff who files the initial action must, within 20 days of filing the action,
2 publish a notice to the class informing class members of their right to file a motion for
3 appointment as lead plaintiff. 15 U.S.C. §77z-1(a)(3)(A)(i); 15 U.S.C. §78u-4(a)(3)(A)(i).

4 Plaintiff in the first-filed action published a notice over the *PR Newswire* on March 12, 2004.
5 See Fong Decl. at Exhibit D.⁷

6 Within 60 days after publication of the required notice, any member or members of the
7 proposed Class may apply to the Court to be appointed as lead plaintiff(s), whether or not they
8 have previously filed a complaint in this action. 15 U.S.C. §77z-1(a)(3)(a) and (B); 15 U.S.C.
9 §78u-4(a)(3)(A) and (B). This notice indicated that applications for appointment as lead plaintiff
10 were to be made no later than May 11, 2004. Movant, having filed her motion by this deadline is
11 therefore timely.

12 **B.. Beverly E. Laymon Constitutes The “Most Adequate Plaintiff”**

13 According to the PSLRA, the Court shall consider any motion made by a Class member
14 and shall appoint as lead plaintiff(s) the member or group of members of the Class that the Court
15 determines to be most capable of adequately representing the interests of class members within
16 90 days after publication of the initial notice of pendency. 15 U.S.C. §77z-1(a)(3)(B)(i); 15
17 U.S.C. §78u-4(a)(3)(B)(i). In determining who is the “most adequate plaintiff,” the Act provides
18 that:

19 [T]he court shall adopt a presumption that the most adequate plaintiff in any
20 private action arising under this title is the person or group of persons that-

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

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

(cc) otherwise satisfies the requirements of Rule 23 of the Federal
Rules of Civil Procedure [pertaining to class actions].

25 ⁷ *PR Newswire* is a suitable vehicle for meeting the statutory requirement that notice be
26 published “in a widely circulated national business-oriented publication or wire service.” See
27 generally In re Nice Systems Sec. Litig., 188 F.R.D. 206, 215 (D.N.J. 1999); Greebel v. FTP
28 Software, Inc., 939 F. Supp. 57, 62-64 (D. Mass. 1996); Lax v. First Merchants Acceptance
Corp., No. 97 C 2715, 1997 U.S. Dist. LEXIS 11866, at *2 (N.D. Ill. Aug. 6, 1997).

1 15 U.S.C. §78u-4(a)(3)(B)(iii). See generally Greebel, 939 F. Supp. at 64; Lax, 1997 U.S. Dist.
2 LEXIS 11866, at *7.

3 In applying this presumption, Movant is demonstrably the most adequate plaintiff.
4 Movant has timely filed her motion to be appointed lead plaintiff along with her certification
5 attesting to her investments in Fremont Mutual Fund shares during the Class Period. See Fong
6 Decl. at Exhibit B. In addition, Movant, with investments totaling approximately \$89,554 as a
7 result of her purchasing shares of Fremont Mutual Funds during the Class Period, has the largest
8 known financial interest in the relief sought by this action among Class members filing motions
9 for appointment as lead plaintiff. See Fong Decl. at Exhibit C. Indeed, Movant’s Class Period
10 investments are believed to represent the largest financial interest in this action. Moreover,
11 Movant has selected and retained competent and experienced counsel to represent herself and the
12 Class. See Fong Decl. at Exhibit E, F and G.

13 Accordingly, Movant has satisfied the individual requirements of 15 U.S.C. §77z-1
14 (a)(3)(B) and 15 U.S.C. §78u-4(a)(3)(B) and respectfully submits that the Court should appoint
15 Beverly E. Laymon as lead plaintiff, approve her selection of Schiffrin & Barroway, LLP and
16 Wechsler Harwood, LLP as lead counsel for the Class and approve her selection of Kaplan Fox
17 & Kilsheimer LLP as liaison counsel for the Class.

18 **1. Beverly E. Laymon Has Made A Motion For Her Appointment As Lead Plaintiff**

19 Pursuant to the provisions of the PSLRA and within the requisite time frame after
20 publication of the notice, Movant timely moves this Court for the appointment of Beverly E.
21 Laymon as lead plaintiff on behalf of all plaintiffs and Class members covered by the above-
22 captioned action and any other actions deemed related by this Court.

23 **2. Beverly E. Laymon Has The Largest Financial Interest**

24 According to 15 U.S.C. §77z-1(a)(3)(B)(iii) and 15 U.S.C. §78u-4(a)(3)(B)(iii), the Court
25 shall appoint as lead plaintiff the Class member who represents the largest financial interest in
26 the relief sought by the action.

27 In traditional securities class actions brought pursuant to the PSLRA, the “financial
28 interest” of a lead plaintiff movant is typically measured by the difference between the class-

1 period purchase price and sale price of the securities after corrective disclosure of defendants’
2 materially false and misleading statements. Shares held at the close of a class period are typically
3 valued at the mean trading price for the security during the 90-day period following the
4 corrective disclosure.

5 Undoubtedly, there will be a great deal of debate as to how precise damages should be
6 calculated in these cases and it is a debate that will most likely not be answered completely at this
7 stage of the litigation. For this reason, Movant presents this Court with her approximate total
8 investment value in Fremont Mutual Funds as well as the number of defendant funds in which
9 Movant invested for purposes of assessing her “financial interest.”

10 Movant’s total investments in the Fremont Mutual Funds are valued at approximately
11 \$89,554. Accordingly, upon information and belief, Movant has the largest financial investments
12 in the defendant Fremont Mutual Funds of any other Movant or Movant group. As such, for
13 purposes of this motion, Movant has the largest known financial interest in the relief sought by
14 the Class and accordingly, is presumed to be the “most adequate plaintiff.”

15 **3. Beverly E. Laymon Otherwise Satisfies Rule 23**

16 According to 15 U.S.C. §77z-1(a)(3)(B) and 15 U.S.C. §78u-4(a)(3)(B), in addition to
17 possessing the largest financial interest in the outcome of the litigation, the lead plaintiff must
18 also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.”
19 Rule 23(a) provides that a party may serve as a class representative if the following four
20 requirements are satisfied:

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

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

26 Of the four prerequisites to class certification, only two – typicality and adequacy –
27 directly address the personal characteristics of the class representative. Consequently, in
28 deciding a motion to serve as lead plaintiff, the Court should limit its inquiry to the typicality and
adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the

1 lead plaintiff moves for class certification. Fischler v. Amsouth Bancorporation, No. 96-1567-
2 CIV-T-17A, 1997 U.S. Dist. LEXIS 2875, at *7-*8 (M.D. Fla. Feb. 6, 1997); Lax, 1997 U.S.
3 Dist. LEXIS 11866, at *20. As detailed below, Movant satisfies both the typicality and
4 adequacy requirements of Rule 23, thereby justifying her appointment as lead plaintiff.

5 **a. Beverly E. Laymon Fulfills The Typicality Requirement**

6 Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of
7 those of the class. Typicality exists if claims “arise from the same course of events, and each
8 class member makes similar legal arguments to prove the defendant's liability.” See In re Drexel
9 Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992), cert. dismissed sub nom., 506
10 U.S. 1088 (1993); Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985), cert. denied, 474 U.S.
11 946 (1985). However, the claims of the class representatives need not be identical to the claims
12 of the class to satisfy typicality. Instead, the Courts have recognized that:

13 The typicality requirement may be satisfied even if there are factual distinctions
14 between the claims of the named plaintiffs and those of other class members.
15 Thus, similarity of legal theory may control even in the face of differences of fact.

16 De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted);
17 see also Halperin v. Nichols, Safina, Lerner & Co., No. 94 C 6960, 1996 U.S. Dist. LEXIS
18 16111, at *13-*14 (N.D. Ill. 1996).

19 Movant seeks to represent a class of purchasers of Fremont Mutual Fund shares which
20 have identical, non-competing and non-conflicting interests. Movant satisfies the typicality
21 requirement because, just like all other class members, she: (1) purchased Fremont Mutual Fund
22 shares during the Class Period; (2) at prices allegedly artificially inflated by defendants’
23 materially false and misleading statements and/or omissions; and (3) suffered damages thereby.
24 Thus, Movant’s claims are typical of those of other Class members since her claims and the
25 claims of other Class members arise out of the same course of events.

26 **b. Beverly E. Laymon Fulfills The Adequacy Requirement**

27 Under Rule 23(a)(4), the representative party must “fairly and adequately protect the
28 interests of the class.” The PSLRA directs the Court to limit its inquiry regarding the adequacy
of lead plaintiff movants to: (1) whether there are any conflicts between the interests of the lead

1 plaintiff movant and the members of the Class; (2) whether the lead plaintiff movant is an
2 adequate representative of the Class; (3) whether the interests of the lead plaintiff movant are
3 clearly aligned with the members of the putative Class; and (4) whether there is evidence of any
4 antagonism between their respective interests. As detailed above, Movant shares common
5 questions of law and fact with the members of the Class and her claims are typical of the claims
6 of other class members. Further, Movant already has taken significant steps demonstrating that
7 she has and will protect the interests of the Class: she has executed a certification detailing her
8 Class Period investments and expressing her willingness to serve as a representative plaintiff; she
9 has moved this Court to be appointed as lead plaintiff in this action; and she has retained
10 competent and experienced counsel who, as shown below, will be able to conduct this complex
11 litigation in a professional manner. See generally Lax, 1997 U.S. Dist. LEXIS 11866, at *21-
12 *25. Furthermore, Movant has the largest known financial interest so that her “financial stake in
13 the litigation provides an adequate incentive for the [Movant] to vigorously prosecute the
14 action.” In re Milestone Scientific, 183 F.R.D. at 416. Thus, Movant, in addition to having the
15 largest financial interest, also prima facie satisfies the typicality (Rule 23(a)(3)) and adequacy
16 (Rule 23(a)(4)) requirements of Rule 23 of the Fed. R. Civ. P. and therefore, satisfies all
17 elements of the Securities Act and Exchange Act’s prerequisites for appointment as lead plaintiff
18 in this action pursuant to 15 U.S.C. §77z-1 (a)(3)(B)(iii) and 15 U.S.C. §78u-4(a)(3)(B)(iii),
19 respectively.

20 **II. THE COURT SHOULD APPROVE MOVANT’S CHOICE OF COUNSEL**

21 Pursuant to 15 U.S.C. §77z-1(a)(3)(B)(v) and 15 U.S.C §78u-4(a)(3)(B)(v), lead plaintiff
22 shall, subject to Court approval, select and retain counsel to represent the Class. In that regard,
23 Movant has selected and retained Schiffrin & Barroway, LLP and Wechsler Harwood, LLP to
24 serve as lead counsel for the Class and Kaplan Fox & Kilsheimer LLP to serve as liaison counsel
25 for the Class. These firms have extensive experience in prosecuting complex securities actions
26 and are well qualified to represent the Class. See Fong Decl. at Exhibits E, F and G.

27 Because there is nothing to suggest that Movant or her counsel will not fairly and
28 adequately represent the Class, or that Movant is subject to unique defenses – which is the only

1 evidence that can rebut the presumption of adequacy under the Securities Act and the Exchange
2 Act – this Court should appoint Beverly E. Laymon as lead plaintiff and approve her selection of
3 Schiffrin & Barroway, LLP and Wechsler Harwood, LLP as lead counsel for the Class and
4 Kaplan Fox & Kilsheimer LLP as liaison counsel for the Class.

5 **CONCLUSION**

6 For the foregoing reasons, Movant respectfully requests that the Court: (a) appoint
7 Beverly E. Laymon as lead plaintiff; (b) approve Movant’s selection of Schiffrin & Barroway,
8 LLP and Wechsler Harwood, LLP as lead counsel; and (d) approve Movant’s selection of Kaplan
9 Fox & Kilsheimer LLP as liaison counsel for the Class.

10 Dated: May 11, 2004

11 Respectfully submitted,

12 **KAPLAN FOX & KILSHEIMER LLP**

13 By: _____ /s/

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