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Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

LEAD PLAINTIFF THE REGENTS' MOTION FOR PROTECTIVE ORDER

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I. INTRODUCTION

On August 7, 2002, the Court ordered "***all*** discovery is STAYED, pursuant to the PSLRA, until the Court has ruled on the pending motions to dismiss." August 7, 2002 Order, at 4-5 (emphasis in original). The Court's August 7 Order stayed the noticed "class certification" depositions and accompanying document discovery requests. When the discovery stay is lifted, Lead Plaintiff requests the Court issue a protective order on the bases discussed below.

Under the guise of "class certification" discovery, Defendants have propounded onerous and duplicative discovery compelling the oral examination of two individual Regents (board members of the University of California), five individuals from the Office of the Treasurer of The Regents (including the Treasurer himself), and Federal Rules of Civil Procedure Rule 30(b)(6) depositions regarding four subjects to The Regents' representatives. In addition to these 11 depositions, Defendants have noticed at least 20 other depositions of institutional plaintiffs, their representatives, and the individual named plaintiffs.[1] The alleged reason for these depositions is "purposes of class certification." *See* Declaration of Helen J. Hodges in Support of Lead Plaintiff The Regents' Motion for Protective Order ("Hodges Decl."), Ex. A (Defendants' Notice at 2).

The ***real*** purpose for these numerous depositions is harassment. Nothing justifies deposing ***five*** individuals from the Office of the Treasurer, two individual Regents ***and*** multiple Rule 30(b)(6) designees to obtain information about investments in Enron securities. These depositions are vexatious, unnecessary and a waste of litigant resources and insurance proceeds.

In response to Defendants' Rule 30(b)(6) notice, The Regents has agreed to produce the person most knowledgeable, Mr. Jeff Heil of the Office of the Treasurer, who is Managing Director of The Regents' public equity portfolio and is responsible for the equity portfolio's strategic focus and management. Mr. Heil also manages the equity investment analyst staff, *i.e.*, certain of the

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[1]Lead Plaintiff brings this motion for a protective order on behalf of all individuals and institutions noticed for deposition. *See infra* at 3 (chart of noticed depositions). J.P. Morgan Chase & Co., CitiGroup, Inc., Credit Suisse First Boston Corp., Canadian Imperial Bank of Commerce, Bank of America Corporation, Merrill Lynch & Co., Inc., Barclays PLC, Deutsche Bank AG and Lehman Brothers Holding, Inc. (collectively, "Defendants") noticed the depositions pursuant to Rules 30 and 30(b)(6) of the Federal Rules of Civil Procedure. On July 30, 2002, the Outside Directors cross-noticed the same depositions.

individuals noticed for deposition. Lead Counsel, after conferring with other plaintiffs, also agreed to produce persons most knowledgeable on behalf of each institutional plaintiff and agreed to produce each individual named plaintiff, committing to at least ***sixteen*** person most knowledgeable and individual depositions. In addition to the depositions, The Regents is responding to 26 document discovery requests propounded by Defendants.

Despite this good-faith proffer, Defendants refuse to reduce the scope of their class certification discovery. To justify their unbridled demands to depose senior-level executives and office personnel of The Regents (and others), Defendants claim the seven individuals from The Regents have been "identified" as "having some responsibility" for The Regents' investment decisions. *See* Hodges Decl., Ex. C. This explanation (which is wrong) offers no defense for noticing numerous depositions of senior officials and staff members from The Regents. Nor does it explain why Defendants refuse to depose ***first*** the persons most knowledgeable from the institutional plaintiffs, because only ***after*** the Rule 30(b)(6) depositions have concluded can Defendants determine whether additional class certification depositions are necessary.

Defendants' original proposed deposition schedule underscores their true purpose. ***Six*** of the individual Regents depositions are noticed for the ***same day***, starting at the ***same time***, to be taken at ***six*** different locations in Houston. Two more Regents depositions, including the Rule 30(b)(6) deposition, are noticed for the ***next*** day, again simultaneously. This schedule ensures seven individuals from The Regents are to be deposed – at great expense and inconvenience – ***before*** Defendants discern whether the person produced as the Rule 30(b)(6) designee can provide the information they seek.

But this is not all. Defendants also intend to depose representatives of other institutional plaintiffs, individual named plaintiffs, and plaintiffs' class certification experts and witnesses – all of whom are to be deposed over ***four*** business days, in Houston, at seven different defense firms. In all, Defendants noticed a minimum of ***twenty-nine*** depositions over ***five*** business days. The following chart illustrates Defendants' proposed schedule:

Defendants' Noticed Depositions For "Class Certification" Discovery

August 12	August 13	August 14	August 15	August 16
David H. Russ (Regents) Jeffrey E. Heil (Regents) Randolph E. Wedding (Regents) Robert O. Yastishak (Regents) Paula Ferreira (Regents) Judith L. Hopkinson (Regents)	Gerald L. Parsky (Regents) Regents 30(b)(6) David Kushner (San Francisco City and County Employees Retirement System) San Francisco CCERS 30(b)(6) Washington State Investment Board 30(b)(6)	Ernie Bello (Hawaii Laborers Pension Plan) Mel Cremer (Hawaii Laborers Pension Plan) Hawaii Laborers Pension Plan 30(b)(6) Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund 30(b)(6) Murray Van de Velde (individual plaintiff)	Staro Asset Management LLC 30(b)(6) Amalgamated Bank 30(b)(6) Long View Core Investment Fund 30(b)(6) Robert V. Flint (individual plaintiff) John Zegarski (individual plaintiff) Mervin Schwartz (individual plaintiff) Seymour Berman (individual plaintiff) Steven Smith (individual plaintiff) Any expert(s) plaintiffs intend to call re class certification	Long View Core Bond Index Fund 30(b)(6) Central States Southeast and Southwest Areas Pension Fund 30(b)(6) Archdiocese of Milwaukee Supporting Fund 30(b)(6) Any witness(es) plaintiffs intend to call re class certification.
All noticed for various Houston defense firms at 9:30 a.m.	All noticed for various Houston defense firms at 9:30 a.m.	All noticed for various Houston defense firms at 9:30 a.m.	All noticed for various Houston defense firms at 9:30 a.m.	All noticed for various Houston defense firms at 9:30 a.m.

Although they did agree to work with plaintiffs concerning locations and dates, Defendants refused to substantially reduce the number of depositions and, incredibly, still contend these depositions are necessary. Nonsense. If their discovery was a sincere effort to elicit information germane to class certification, Defendants would have selected less expensive, less burdensome and less intrusive methods, and most certainly would have first deposed persons who are most knowledgeable at the institutions and then, if ***necessary***, seek additional depositions. This reasoned approach, recommended by The Regents' counsel during the meet and confer process, is embraced by the Fifth Circuit and district courts.

The Court should reject Defendants' shotgun method of targeting senior-level individuals and staff who do not possess unique or special information and whose depositions will be cumulative, unduly expensive and burdensome. The number of defendants in the Enron litigation ensures numerous lawyers will attend each of these depositions, resulting in truly exorbitant attorneys' fees that will diminish officers' and directors' insurance policies and other sources of recovery for the Class. The Court has recognized the need to curtail unnecessary costs in this litigation. *See* August 7, 2002 Order Establishing Website (noting costs are a "key concern").

The Regents' modest request for a protective order should be granted. Rule 23's class certification requirements simply should not spawn burgeoning satellite litigation, requiring dozens of witnesses to sit for repetitive depositions that will be attended by hordes of lawyers. The Regents' reasonable proposal for a single Rule 30(b)(6) deposition from each institutional plaintiff and a single deposition from each named plaintiff is fair and preferred. Entry of a protective order will not prejudice Defendants, who will be afforded significant class certification discovery without incurring massive deposition costs and without wasting litigant resources through cumulative and harassing depositions of senior-level individuals and staff.

The Regents' requested protective order should be granted not only because Defendants' requests are harassing and wasteful, but also because the record in this case demonstrates the requisites of Rule 23 are met. The Regents is a model Lead Plaintiff. The Regents has been closely monitoring the prosecution of the litigation, directing Lead Counsel's efforts and vigorously pursuing the interests of the Class. The Regents has filed motions to preserve and enhance the Class' recovery, filed a comprehensive Consolidated Complaint, served discovery and has filed motions in this case and in Enron's bankruptcy to obtain evidence that has been produced pursuant to government and bankruptcy litigant requests. The Court noted The Regents' counsel has done an excellent job of representing the Class. After reviewing the record in this case, no one can legitimately argue a Class should not be certified. Thus, The Regents requests the Court to enter a protective order to stop Defendants from harassing plaintiffs through costly and wasteful depositions.

II. STATEMENT OF CONFERENCE

In accordance with Rule 26(c) and this Court's Procedures Manual, §IV.D., counsel for Lead Plaintiff conferred with Defendants' counsel in an attempt to resolve the dispute. On July 29, 2002, Helen Hodges, counsel for The Regents, wrote to Greg Markel, counsel for Defendants, proffering a Rule 30(b)(6) deposition on behalf of The Regents, a Rule 30(b)(6) deposition on behalf of each institutional plaintiff, and a deposition of each individual plaintiff on mutually agreeable places and dates. Also on July 29, Darren Robbins, counsel for The Regents, conferred with Mr. Markel by telephone. On July 31, 2002, Mr. Markel wrote to Ms. Hodges insisting all seven individuals from The Regents be deposed. On August 1, 2002, Ms. Hodges wrote to Mr. Markel indicating The Regents would not permit seven individual depositions for class certification discovery – in addition to the proffered Rule 30(b)(6) depositions – because the noticed depositions are wasteful, cumulative, overly burdensome and designed to harass. On August 6, 2002, Ms. Hodges and Mr. Markel conferenced via telephone. On August 9, Ms. Hodges conferred with Mr. Markel's partner, Nancy Ruskin. Correspondence regarding these discussions is attached to the Hodges Decl. as exhibits B-F. Counsel were unable to reach an agreement.

III. ARGUMENT

Federal Rule of Civil Procedure 26(c) authorizes district courts to issue protective orders to shield persons from "annoyance, embarrassment, oppression, or undue burden or expense" due to abusive discovery. The Court has broad discretion to limit the scope of discovery. *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) ("We have constantly emphasized the broad discretion which a district judge may properly exercise in discovery matters."). A district court's entry of a protective order will be reversed only for a "clear abuse" of that discretion. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 856 (5th Cir.) (district courts have "'broad discretion in all discovery matters'" and "'such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse'") (citation omitted), *cert. denied*, 513 U.S. 979 (2000).

A protective order is necessary for several reasons. Before even taking Rule 30(b)(6) depositions of The Regents and other institutional plaintiffs, Defendants intend to subject numerous senior personnel to duplicative and burdensome oral examination. Scheduling a minimum of 29

depositions alone necessitates a protective order. The Fifth Circuit, along with other circuits and district courts, have granted protective orders to prevent vexatious discovery of apex-level executives, as Defendants attempt to do here.

Most of the individuals noticed for deposition have no unique or specialized knowledge of the Enron fraud or The Regents' purchases of Enron stock. For example, Defendants have noticed the deposition of David H. Russ, The Regents Treasurer, even though he became Treasurer on June 1, 2001, six months ***after*** the Treasurer's Office made its ***last*** purchase of Enron stock. And these initial purchases of Enron stock were approved by ***former*** Treasurer Patricia Small. Declaration of Jeffrey E. Heil, CPA ("Heil Decl."), ¶4. None of the individuals noticed for deposition have knowledge greater than Mr. Heil, The Regents' equity portfolio Managing Director, who has been proffered as the person most knowledgeable. *See* Heil Decl., ¶¶4, 7. ***Defendants' insistence on the remainder of these cumulative apex depositions, especially before Mr. Heil's deposition has been taken, is intended to harass Lead Plaintiff***. These needlessly wasteful depositions will bleed both the insurance policies and plaintiffs' resources of hundreds of thousands of dollars (if not over $1 million, or approximately $34,000 per deposition) in travel, hotel and lawyer fees.[2]

The Regents has been a paradigmatic Lead Plaintiff and has assiduously protected the interests of the Class. The Regents has been monitoring the litigation with utmost care, including conducting weekly meetings with Lead Counsel, dispatching representatives to monitor hearings before the Court, participating in settlement negotiations and otherwise directing the litigation. The Court should prohibit Defendants from running roughshod over The Regents and other institutional and individual plaintiffs and enter an appropriate protective order.

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[2]This is a conservative estimate. For example, the deposition of Andersen Partner David Duncan concerning document destruction was attended by counsel for many of the officer and director defendants of Enron, counsel for other defendants, and counsel for plaintiffs, resulting in more than 27 attorneys participating in Mr. Duncan's deposition. And this was ***before*** the investment banks, Andersen Individuals and others were named as defendants. Assuming 30 attorneys for defendants and plaintiffs attend a single five-hour deposition with an average billing rate of $300 per hour, lawyers' fees alone will reach $45,000 per day. And even if a reduced number of attorneys attend the depositions, court reporter, videographer, travel, hotel and meal costs and fees – multiplied 29 times – will ensure the costs are exorbitant.

A. A Protective Order Should Issue to Limit Defendants' Unreasonably Burdensome, Cumulative, and Needlessly Expensive Depositions Since the Information Sought Is Readily Available Through Alternative, Less Expensive, Less Burdensome Means

Defendants' purposefully cumulative depositions – for example, noticing seven individuals from The Regents ***plus*** Rule 30(b)(6) corporate designees – belies any notion of their legitimacy.

> [A] court is not required to blind itself to the purpose for which a party seeks information.... [D]iscovery should be denied when a party's aim is to ... harass the person from whom he seeks discovery.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 n.17 (1978). And here, the purpose ***is*** harassment. Nothing justifies noticing the depositions of two Regents and five individuals from the Office of the Treasurer for class certification purposes. This is especially true since The Regents has agreed to produce the person most knowledgeable concerning its purchase of Enron stock.

In the Fifth Circuit, a party should first depose lower-level employees or pursue alternative means of discovery before deposing an organization's senior officials. Requiring litigants to scale the discovery ladder before deposing apex-level individuals is a proper application of the Court's "broad discretion" to control discovery. This common sense approach, from the seminal case of *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), arises from the Fifth Circuit upholding a district court's order protecting a company president from being deposed until other employees, who the company indicated had more knowledge of the facts, had first been examined. *Id.* at 651. Defendants have already noticed a Rule 30(b)(6) deposition and noticed the deposition of Mr. Heil, the person who is the most knowledgeable of the facts concerning The Regents' investment in Enron stock. As in *Salter*, the Court should require Defendants to proceed first with the proffered Rule 30(b)(6) deposition.

The abuse The Regents and other plaintiff institutions can suffer if the apex depositions go forward is apparent to courts across the country.

> Virtually every court which has addressed the subject has observed that the deposition of an official at the highest level or "apex" of corporate management creates a tremendous potential for abuse and harassment.... [C]ourts have granted a protective order when a party seeks to initiate its discovery "at the top" before exhausting less intrusive discovery methods.

FMR Corp. v. Alliant Partners, No. 108,350, 1999 TTAB LEXIS 354, at *6-*7 (July 15, 1999 Trademark Trial and Appeal Board) (granting protective order to protect apex-level employee of plaintiff). *Accord Consol. Rail Corp. v. Primary Indus. Corp.*, No. 92 Civ. 4927 (FNL), 1993 U.S. Dist. LEXIS 12600, at *3 (S.D.N.Y. Sept. 10, 1993) (stating it is appropriate to "preclude a redundant deposition of a highly-placed executive" while permitting other witnesses with the same knowledge to be questioned). Moreover, deposing ***seven*** individuals from The Regents is "of ***limited*** probative value and ***largely cumulative***," *In re Evangeline Ref. Co.*, 890 F.2d 1312, 1321 (5th Cir. 1989) (emphasis added), and Defendants "'should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.'" *Am. Sterilizer Co. v. Surgikos, Inc.*, No. 4-89-238-Y, 1992 U.S. Dist. LEXIS 6347, at *5 (N.D. Tex. Apr. 8, 1992) (citation omitted).

Courts disdain the shotgun approach to discovery Defendants employ here. In *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332 (N.D. Ala. 1991), for example, the plaintiff sought to depose a corporate vice president and 18 individuals who received a memorandum written by the vice president. *Id.* at 333-34. In response, the defendants in *Baine* offered a Rule 30(b)(6) deposition and requested the plaintiff to depose fewer than 18 recipients. Like Defendants here, the plaintiff in *Baine* refused to take first the proffered Rule 30(b)(6) deposition. The *Baine* court held it "inappropriate" to depose the vice president without first attempting less burdensome, cumulative discovery. *Id.* at 335. The court explained "[t]he corporate deposition has not yet been taken, and it could satisfy some of plaintiffs' needs. At the very least, it would aid in developing and refining a line of questioning. These avenues have not yet been exhausted ***or even pursued***." *Id.* (emphasis added).

The Court should require Defendants to exhaust other avenues of discovery before resorting to the duplicative, harassing depositions noticed by them. The Regents believes its proffered representative will provide the relevant information concerning its investment in Enron stock.

B. Defendants Should Be Prohibited from Harassing Individual Regents and the Office of the Treasurer's Senior Executives

The harassing nature of Defendants' discovery is exemplified by the notice to depose David H. Russ, The Regents' Treasurer. Mr. Russ became Treasurer on June 1, 2001, after working the previous four years for the University of Texas Investment Management Company. *See* Heil Decl., ¶7; *see also* Hodges Decl., Ex. G ("Manager of $55-Billion Portfolio Hired," *Los Angeles Times*, April 4, 2001, at A18). Mr. Russ' hiring occurred almost six months ***after*** the Office of the Treasurer made its last purchase of Enron common stock:

> UC acquired a total of 2.2 million Enron shares through two different procedures. The Treasurer's Office purchased most of those shares (1.75 million) through its actively managed funds. Those share[s] were bought at an average price of $68.50 per share ***between May 24, 2000 and Jan. 9, 2001***.

Hodges Decl., Ex. H ("Update on UC's Enron Investments and Lawsuit"). *See* Heil Decl., ¶7 ("I have reviewed The Regents' transactions in Enron stock. Each purchase occurred prior to Mr. Russ's appointment as Treasurer."). Further, ***former*** Treasurer Patricia Small approved the initial purchases of Enron stock by the Office of the Treasurer. Heil Decl., ¶4. What unique testimony can Mr. Russ provide if he did not even work for The Regents until well after the Treasurer's Office made all its purchases of Enron stock under a different treasurer? Mr. Russ' noticed deposition alone necessitates entry of a protective order.

Defendants have also noticed the deposition of Randolph E. Wedding, who like Mr. Russ, is another executive with limited, if any, knowledge of the relevant facts. Mr. Wedding is the managing director of ***fixed-income – not equity*** – portfolios for The Regents. He never was involved in the Office of the Treasurer's decision-making process to purchase Enron stock. *See* Heil Decl., ¶8. And The Regents never invested in Enron bonds. *See* Hodges Decl., Ex. H. Consequently, Mr. Wedding cannot offer testimony to the facts of this case that are beyond those of Mr. Heil.

Also targeted for deposition are Judith L. Hopkinson and Gerald L. Parsky, Regents of the University. Notably, individual Regents "do ***not*** make decisions about the sale or purchase of stock in individual companies." *See* Hodges Decl., Ex. H (emphasis added). *Accord* Heil Decl., ¶9. Neither of them were involved in the decision-making process to purchase Enron stock. *Id.* Robert

O. Yastishak and Paula Ferreira, the director and supervisor, respectively, of the Office of the Treasurer, also are noticed for deposition, which is further evidence of Defendants' shotgun method of discovery, since their duties include administrative tasks such as trade settlement, gift processing, wire transfers and trade executions. Heil Decl., ¶¶5, 6. They neither participated in equity investment decisions nor were included in decisions to purchase Enron stock. *Id.*

The indiscriminate noticing of depositions of Mses. Hopkinson and Ferreira and Messrs. Russ, Wedding, Yastishak and Parsky confirms the need for a protective order. These individuals do not have the unique knowledge possessed by Mr. Heil, who, as Managing Director of The Regents' public equity investments, has responsibility for the strategic focus and management of the equity portfolio. The Fifth Circuit and other circuits support protecting apex-level individuals in similar circumstances. *See Salter*, 593 F.2d at 651; *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (upholding district court's issuance of protective order because CEO lacked knowledge of the pertinent facts); *Thomas v. IBM*, 48 F.3d 478, 483-84 (10th Cir. 1995) (barring deposition of IBM's chairman because he lacked personal knowledge of events concerning the underlying litigation); *see also Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985) (prohibiting deposition of board chairman until less burdensome, "orderly discovery process" demonstrated whether deposition was necessary).

Nor should these individuals be subjected to harassing depositions because the information Defendants seek ***is*** "cumulative ... duplicative [and] is obtainable from some other source that is more convenient, less burdensome, [and] less expensive." Fed. R. Civ. P. 26(b)(2). That is precisely the case here, for Mr. Heil can provide the most informed answers to Defendants' questions. Not only does he manage the equity portfolio and formulate its strategic focus, he manages the equity-investment analyst staff and develops analytic tools, policies and procedures "to achieve the investment objectives of the various U.S. equity investment portfolios." Heil Decl., ¶3. Noticing five depositions from the Office of the Treasurer highlights the harassing nature of this discovery, since it is beyond dispute that Mr. Heil possesses the relevant facts and will provide more information than the other five cumulative, wasteful depositions. *See Evangeline*, 890 F.2d at 1321 (upholding

quashing of subpoena as cumulative); *Baine*, 141 F.R.D. at 333-34 (rejecting shotgun method in noticing depositions).

C. The Depositions Should Be Taken at the Institutional Plaintiffs' Principal Places of Business

Finally, Mr. Heil's deposition and the depositions of the other institutional plaintiffs' representatives should be conducted at their principal places of business – none of which is Houston. In *Salter*, the Fifth Circuit declared, it "is well settled that '[t]he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business.'" 593 F.2d at 651 (citation omitted). This principle applies to both plaintiffs and defendants. *See, e.g.*, *Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin*, 144 F.R.D. 87, 91 (N.D. Ind. 1992) (where representatives of organizational plaintiff had no "personal knowledge" of underlying facts in complaint, defense counsel, rather than institution, "should assume the expense and inconvenience of obtaining this discovery"). The Regents requests the Court to enter an order requiring the institutional plaintiff class certification depositions be taken near their respective places of business and that individual plaintiff depositions be taken near their residences.

D. Plaintiffs' Private Financial Affairs, Trading Histories, Litigation History and Communications with Counsel Are Privileged and Irrelevant

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981) (citation omitted). In addition to proffering Rule 30(b)(6) designees, The Regents and other plaintiffs, responding to Defendants' document production requests, will be producing their transaction-history documents in Enron securities and certain public documents from the institutions. But Defendants have signaled they intend to turn class certification into trench warfare, posing highly invasive questions wholly unrelated to the Enron fraud or plaintiffs' investments in Enron

securities. Defendants' Rule 30(b)(6) deposition notice and accompanying document production requests amply support The Regents' concern.[3]

For example, Defendants' document Request No. 9 commands production of a breathtaking amount of highly personal – and privileged – information, including "all documents setting forth ... Plaintiffs' current net worth, assets, debts, other liabilities, and financial status, including financial statements and loan applications." This same request demands the production of plaintiffs' tax returns going back to 1997.[4] What do loan applications, individual net worth and tax returns have to do with class certification? These requests are ***grossly*** improper and are designed to embarrass, intimidate and harass deponents, not elicit probative class certification information. Courts grant extraordinary relief when fundamental privacy rights are imperiled through abuse of the discovery process:

> The protection of privacy is of fundamental – indeed, of constitutional – importance. Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept to the minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can ***only be information of relevancy and materiality to the matters in controversy***.... A litigant so subjected to an invasion of his privacy has ***a clear legal right to an extraordinary remedy*** since there can be no relief on appeal; privacy once broken by the inspection and copying of income tax returns by an adversary cannot be retrieved.

Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (emphasis added); *accord Tilton v. Marshall*, 925 S.W.2d 672, 683 (Tex. 1996) (holding litigant's tithing records irrelevant to underlying litigation and granting protective order because records were "highly sensitive and personal").

Similarly, document Request No. 15 demands each non-institutional plaintiff to produce "***all*** trading activity for ***all*** positions in securities, investments, and financial contracts" since 1997, and institutional plaintiffs are commanded to produce ***all*** trading activity for ***all*** investments in the Defendants' stocks and bonds and "general investment procedures" for "***all stocks***." These sweeping

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[3]In its responses and objections to Defendants, The Regents objects to these and other improper document production requests. On this motion, The Regents requests the Court issue a deposition protocol prohibiting Defendants from harassing plaintiffs and their representatives during oral examination. *See infra* §IV.

[4]To the extent The Regents or any other public institutions make such documents available to the public, they will be produced.

requests, unrelated to Enron and unrelated to class certification, further evidence abuse. Information concerning plaintiffs' trading in or investment procedures for the entire ***universe*** of securities bears no relevance to plaintiffs' ability to serve as class representatives. *See DeRance, Inc. v. PaineWebber, Inc.*, 872 F.2d 1312, 1326 (7th Cir. 1989) ("we hold that [plaintiff's] other investments are not directly probative of the issue in this case" and "examining the details of each of [plaintiff's] other investments would have substantially increased the burdens of discovery without likely leading to the discovery of relevant evidence"); *Weiss v. Blech*, No. 95 Civ. 6422 (RWS), 1997 U.S. Dist. LEXIS 11701, at *9 (S.D.N.Y. Aug. 11, 1997) (plaintiff's "other securities trading activity would not be relevant" and thus discovery was limited to transactions concerning defendant company); *Burstein v. Applied Extrusion Techs.*, 153 F.R.D. 488, 490 (D. Mass. 1994) (where defendants requested plethora of trading, brokerage and account statements concerning publicly traded securities, court held "the discovery sought at this time is ***simply not relevant on the issue of class certification***") (emphasis added); *Malanka v. Data Gen. Corp.*, No. 85-2154-M, 1986 U.S. Dist. LEXIS 23277, at *5 (D. Mass. July 2, 1986) ("The Court notes that the plaintiff has agreed to produce documents relevant to his investment services specifically related to the case sub judice.... [P]roduction of these documents is sufficient to satisfy [typicality] concerns .... Accordingly, the Court concludes that documents of plaintiff's investment services and sophistication unrelated to this claim are not relevant and are, therefore, not discoverable."). Because the PSLRA itself requires a prospective lead plaintiff only to certify class period trades in the security at issue, 15 U.S.C. §78u-4(a)(2)(A)(iv), the Court should prohibit Defendants from orally examining any deponent on these unbounded, privileged and irrelevant matters.

Defendants also appear intent on revisiting appointment of Lead Plaintiff. One of their Rule 30(b)(6) class certification deposition topics is "all actions taken to date to manage and control the prosecution of this action." Another concerns each and every class action in which each plaintiff or its designated representative participated. *See* Hodges Decl., Ex. A (Defendants' Notice at 3). And they intend to throw plaintiffs' counsel into the mix, demanding production of "all documents concerning the Plaintiffs' decision to retain the Milberg Weiss law firm," including engagement letters, nature of legal services to be provided, previous attorney-client relationships, social contacts

between plaintiffs, their families and any of plaintiffs' counsel or counsel's families and documents concerning the payment of costs and fees. *See* Hodges Decl., Ex. A (Request No. 9).

Defendants have no legal basis for deposing individuals or Rule 30(b)(6) designees on these sweeping – and privileged – topics. The PSLRA does ***not*** contain "the same presumption for selection of ***class representatives***.... [T]he class representative is selected not pursuant to the PSLRA, but pursuant to Rule 23." *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 125 (S.D.N.Y. 2001) (emphasis in original). This Court has explicitly stated that the Fifth Circuit did ***not*** set a new standard for adequacy of class representatives in securities cases:

> [T]he Fifth Circuit's brief *per curiam* opinion on the petition for rehearing appears to have retreated and pronounces emphatically that it has ***not*** "created an additional independent requirement for the adequacy standard for class certification under [Rule] 23 by reading provisions of the [PSLRA] in to rule 23(a)(4)" nor "changed the law of this circuit regarding the standard for conducting rule 23(a)(4) adequacy inquiry."

In re U.S. Liquids Sec. Litig., Master File No. H-99-2785, Order at 3-4 (S.D. Tex. June 12, 2002) (emphasis added) (quoting *Berger v. Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002)) (Hodges Decl., Ex. I). Moreover, class certification is a ***procedural*** determination and plaintiffs' allegations are presumed to be true, further undermining any purported need for this highly intrusive, abusive discovery. *See Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."); *Keasler v. Natural Gas Pipeline Co.*, 84 F.R.D. 364, 365 (E.D. Tex. 1979) ("In determining the propriety of a class action, the Court is to regard all substantive allegations contained in the Plaintiffs' complaint as being true, and factual disputes arising at the hearing and in the pleadings are to be resolved in the Plaintiffs' favor.").

The Court should prohibit Defendants from abusing the deposition process by harassing plaintiffs about their private financial affairs unrelated to Enron, non-Enron class action litigation, non-Enron investments or trading histories, attorney-client communications and work product, decisions to retain a particular firm or payments of costs and fees. *See, e.g., Epstein v. MCA*, 54 F.3d 1422, 1423 (9th Cir. 1995) ("Any information [defendant] may have gleaned from these discovery

requests would have no bearing on either the merits of the case or the motion for class certification ...."); *Weiss*, 1997 U.S. Dist. LEXIS 11701, at *11 (plaintiff's ability to repay counsel is "irrelevant and inadmissable").

E. The Regents Is a Model Lead Plaintiff that Has Vigorously Pursued the Interests of the Class

The Regents and Lead Counsel have been vigorous and diligent in their prosecution of the Enron litigation on behalf of the Class and proactive from the start:

- The Regents, together with other lead-plaintiff movants, sought to freeze more than $1 billion in insider-trading proceeds;
- The Regents, together with other lead-plaintiff movants, was the first to seek an order preventing further destruction of documents at Andersen and sought depositions on this issue;
- Lead Counsel uncovered document destruction at Enron's headquarters, prompting monitoring by federal law-enforcement officers;
- A representative of The Regents attended each of the mediation sessions with Andersen;
- The Regents actively monitors the litigation and Lead Counsel's prosecution strategy, reviewing all pleadings and conducting a weekly conference call with Lead Counsel;
- The Regents' in-house lawyers attend court hearings;[5]
- The Regents' in-house legal team reviewed the Consolidated Complaint prior to its filing; and
- The Regents has been active in Enron's bankruptcy in New York, filing motions to obtain evidence produced by Enron and third parties pursuant to requests by other litigants, and, most recently, filing a motion to lift the bankruptcy stay to facilitate preparing the securities class action for trial in December 2003, and to maximize the class's recovery through protections afforded by the PSLRA.

Class certification should not result in profligate satellite litigation, and most certainly not here. The Regents has been intensely involved and has directed Lead Counsel's efforts in vigorously prosecuting the Enron fraud on behalf of injured investors. *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 458 (S.D. Tex. 2002) ("the Court feels confident that the Regents ... is capable of monitoring the lawyers here and industriously pursuing Plaintiffs' claims"). No more is required.

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[5]*See, e.g.*, January 22, 2002 Injunction hearing transcript concerning Andersen's destruction of documents (attended by Dorothy Dana and Lloyd Lee, senior counsel of the Office of General Counsel of The Regents); February 25, 2002 Scheduling Conference hearing transcript (attended by James Holst and Chris Patti, The Regents' General Counsel and University Counsel, respectively).

Instead of litigating this protective order, the parties should be stipulating to class certification and preparing to take merits-based discovery. But because Defendants insist on the depositions, a protective order is necessary.

IV. THE PROTECTIVE ORDER LEAD PLAINTIFF SEEKS

The Regents requests the Court enter a protective order permitting Defendants to take appropriate discovery of knowledgeable representatives of the institutional plaintiffs. The Regents propose Defendants be permitted to take one Rule 30(b)(6) deposition for each institution – a reasoned position endorsed by the Fifth Circuit and other Circuit and district courts – at their respective principal places of business, and that individual named-plaintiff depositions be taken near their residences.

The Regents further requests the Court enter an order establishing a deposition protocol. Defendants' questions concerning investment and trading histories or investment methodology should be limited to transactions in Enron securities during the Class Period as defined in the Consolidated Complaint. Defendants should be prohibited from posing questions about plaintiffs' (1) net worth, assets, debts, loan applications, liabilities and tax returns (to the extent the information is not publicly available); (2) privileged client communications and work product; (3) litigation unrelated to the consolidated actions; or (4) decision to retain any particular law firm to represent them in this litigation. The Regents' proposed protective order strikes the appropriate balance between plaintiffs' desire to provide appropriate discovery at minimum cost and Defendants' desire to take boundless discovery.

V. CONCLUSION

The noticed depositions are an extraordinary waste of time and resources. Given the record in the litigation, offering the depositions of the individual plaintiffs and one Rule 30(b)(6) corporate designee per institutional plaintiff is more than sufficient for Defendants' class certification opposition. Thus, a protective order should issue.

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Respectfully submitted,

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