United States Courts
Southern District of Texas
FILED
AUG 2 0 2002
Michael N. Milby, Clerk

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

IN RE ENRON CORPORATION SECURITIES LITIGATION	§	CIVIL ACTION NO. H-01-3624
	§	Consolidated
	§	
THIS DOCUMENT RELATES TO: All Cases Consolidated with Newby And The Regents of the University Of California	§	CLASS ACTION

PREFERRED PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLARIFICATION OF THIS COURT'S ORDER ENTERED AUGUST 7, 2002, AND FOR AN EXPEDITED TELEPHONIC HEARING (OR IN-PERSON HEARING IF PREFERRED BY THIS COURT) ON SAID CLARIFICATION MOTION

Henry H. Steiner, Daniel Kaminer, Christine Benoit, Michael and Jennifer Cerrone, Harold Karnes, Henry H. Steiner, Trustee u/w/o Jakob Hirschberger, Etta K. Steiner, The Eshe Fund, Dr. Thomas Barnett, Esther Phillips Jackson, Michael G. Palmiero, James A. Van Burgh, and the Preferred Purchaser Plaintiffs (hereinafter collectively the APreferred Purchaser Plaintiffs@) submit this memorandum in support of their motion for clarification of this Court's August 7, 2002 Order, and for an expedited telephonic hearing (or in-person hearing if preferred by this Court) on said clarification motion.

Lead Plaintiff the Regents and lead counsel have objected to having to prosecute the preferred purchasers' Texas Securities Act claims. This Court in its August 7, 2002 Order ruled that lead plaintiff and lead counsel do not have to prosecute those claims, and that they should be prosecuted by the preferred purchasers and their counsel. Since the preferred purchasers and their counsel always have been ready to prosecute their claims, regardless of the document in which they were contained, the issue that arises from this Order is a different one: whether the preferred purchasers' TSA claims should be included as a Supplement to the Consolidated Complaint, although prosecuted by the preferred purchasers' counsel Wolf

1016

Haldenstein, or whether these claims must be pursued in a separately filed new action since the original preferred purchaser actions (and all of their extant claims) have been consolidated into Newby and no longer have any separate existence. This issue is compounded because lead plaintiff's apparent position -- that even if it does not have to spend the time and energy to prosecute the preferred purchasers' TSA claims, they should not be included in the Consolidated Complaint -- will expose the preferred purchasers' TSA claims to dismissal on statute of limitations grounds, while including these claims in the Consolidated Complaint may protect the preferred purchasers under the relation back doctrine from certain statute of limitations defenses.[1]

On August 7, 2002, this Court entered its Order (Dkt. No. 983) which stated that:

> Still remaining is the issue of those tort claims asserted under the Texas Securities Act by the Preferred Purchasers that fall outside of the Class Period as defined in the Consolidated Complaint and that Lead Plaintiff has objected to adding to the Consolidated Complaint. After fully reviewing the extended briefing, this Court is persuaded by Lead Plaintiff's Response to Wolf Haldenstein's Additional Memorandum (#963), for the reasons expressed therein, that Preferred Purchasers' 1996-97 Class Period claims should not be pursued in Newby by Lead Plaintiff. Thus, as suggested by Lead Plaintiff, the Court grants leave to counsel for Preferred Purchasers to pursue these claims once the discovery stay is lifted following resolution of the motions to dismiss. . . . (4) Counsel for Preferred Purchasers shall independently prosecute Preferred Purchasers' tort claims under the Texas Securities Act after resolution of the pending motions to dismiss.[2]

---

[1] Indeed, it was improper for lead counsel (given its acknowledged fiduciary duty to these Class Members) to on the one hand assert that it should not have to expend time and energy on these claims, which suggestion was readily acceptable to both the preferred purchasers and the Court, but then to reject including the preferred purchaser TSA claims in the Consolidated Complaint which would protect that (sub)class from dismissal on statute of limitations grounds while not imposing any obligations upon the Regents and their counsel.

[2] The Order also anticipates that this Court might divide the class at the class certification stage to provide separate representation for Enron's preferred share purchasers.

The Preferred Purchaser Plaintiffs are the only plaintiffs to have filed an action exclusively on behalf of purchasers of Enron=s preferred stock. And, they are the only plaintiffs to have filed, under the Texas Securities Act ("TSA") claims concerning public offerings which took place in late 1996 and early 1997.

The remaining question is how, meaning in precisely what forum, should these claims be "independently prosecuted"?

Lead plaintiff and lead counsel objected to pursuing the preferred purchasers' TSA claims, equivocating on the reasons but essentially stating that they did not want to divert their time and energy from the claims in the Consolidated Complaint which they are pursuing because they considered these additional claims questionable. The preferred purchasers and their attorneys have stated their willingness to put in the time and effort required to pursue these claims. Nevertheless, although these claims will be prosecuted by the preferred purchasers and their counsel, these TSA claims on behalf of a class of certain preferred purchasers must be contained in the Supplement to the Consolidated Complaint previously filed with this Court, so as not to dispositively prejudice these claims.

Perhaps this point was not emphasized sufficiently in our July 12, 2002 memorandum and Proposed [Amended] Order submitted therewith, although that brief stated (among other things) that "defendants may argue that the relation back doctrine does not apply to these claims even though the Consolidated Complaint alleges an ongoing course of conduct . . . ." (at 5 and note 5). This statement and the analysis within which it occurred were based upon the fact that the Supplement containing the preferred purchaser TSA claims will be deemed an amendment to the Consolidated Complaint -- even if the time and energy to prosecute them are expended by the preferred purchasers and their counsel and not lead plaintiff and lead counsel.

Only the preferred purchasers can be prejudiced if the TSA claims contained in the Supplement are not deemed part of the Consolidated Complaint; lead plaintiff and its counsel cannot be prejudiced under any circumstances. This is so because the two public offerings of preferred stock occurred in November 1996 and January 1997, and the TSA has a five year

statute of limitations. The first actions herein, including Newby and the original preferred purchaser complaint, were filed in October 2001, before the five-year statute of limitations expired. It is likely that only if the preferred purchaser TSA claims are contained in the Consolidated Complaint will the relation back doctrine apply. That doctrine will apply because the Consolidated Complaint alleges an ongoing course of conduct (beginning no later than at some point in 1997 with the financial restatements), which included initial public offerings prior to the commencement of the federal class period; virtually all of the defendants named in the Supplement are already defendants herein; these very same Enron preferred share public offerings are named in the Consolidated Complaint under the heading "Enron's Access to the Capital Markets" (CC¶48); and where the Consolidated Complaint in that very same paragraph alleges that Enron had easy access to the capital markets because of its ongoing, illicit transactions. Id.; Fed. R. Civ. P. 15(c).

Moreover, it should be noted that there is no other document within which to prosecute the preferred purchaser TSA claims because the claims of preferred purchasers in their original and amended complaint have been subsumed into the Consolidated Complaint. Accordingly, the only way to assert these claims as part of the ongoing litigation would be to amend or supplement Newby.

Most significantly, adding the Preferred Purchasers' TSA claims to the Consolidated Complaint by Supplement and having them prosecuted by the preferred purchasers' counsel (and not prosecuted by lead plaintiff and lead counsel), does not prejudice lead plaintiff and lead counsel in any way. This is so because the Consolidated Complaint already includes a claim under the Texas Securities Act, concerning a public offering which also occurred prior to the three year federal class period, and that claim is asserted not by the Regents who was appointed Lead Plaintiff by this Court but by additional plaintiffs unilaterally included by lead counsel in the Consolidated Complaint who have never been appointed by this Court as a lead plaintiff. The pending motions to dismiss address that TSA claim.

Given that the Consolidated Complaint alleged an unlawful course of conduct by defendants which included numerous public offerings, including public offerings before the commencement of the three year federal class period on October 18, 1998, denying the preferred purchasers the opportunity to assert their claims on a relation back theory will in effect deny them their day in court on any legal theory.

Conclusion

Accordingly, as contained herein and in the proposed order submitted herewith, this Court should amend the Consolidated Complaint to add the Supplement, and the claims therein will be prosecuted by Wolf Haldenstein Adler Freeman & Herz LLP.

Dated: August 20, 2002

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

By: Daniel W. Krasner

Daniel W. Krasner
270 Madison Avenue
New York, New York 10016
(212) 545-4600
(212) 545-4653
www.whafh.com
Lead Counsel for the Preferred Purchaser Plaintiffs

MCGEHEE & PIANELLI, L.L.P.
Jack E. McGehee, TBN 13623700, Fed No. 8163
James V. Pianelli TBN 15966740, Fed No. 11557
1225 N. Loop West, Suite 810
Houston, Texas 77008
(713) 864-4000
(713) 868-9393 fax
TEXLAW@LAWTX.COM

Local Counsel for the Preferred Purchaser Plaintiffs

287704