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

United States Courts
Southern District of Texas
FILED
JR SEP 27 2002
Michael N. Milby, Clerk

H01-3624

IN RE ENRON SEC. LITIG.	§	
	§	
This document relates to:	§	
	§	
NATHANIEL PULSIFER, TRUSTEE OF SECURITIES SHOOTERS HILL REVOCABLE TRUST, individually and on behalf of all others similarly situated,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-02-~~3020~~ 3010**
	§	
vs.	§	**CLASS ACTION**
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	

JOINT MOTION OF CERTAIN DEFENDANTS TO STRIKE PULSIFER CLASS ACTION COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome Meyer, Paulo Ferraz Pereira, Frank Savage, John Wakeham, Charls E. Walker, Herbert S. Winokur, John Urquhart, and Rebecca Mark-Jusbasche move to strike the purported class action complaint alleging violations of the federal securities laws filed by "Nathaniel Pulsifer, Trustee of Securities Shooters Hill Revocable Trust, individually and on behalf of all others similarly situated," on grounds that it violates the Court's Scheduling Orders and constitutes an impermissible unauthorized amendment to the consolidated class action complaint contemplated by the Court's Orders. In support of this motion to strike, Defendants would respectfully show the Court as follows:

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1. A purported class action complaint was filed on August 9, 2002, on behalf of Nathaniel Pulsifer and "all others similarly situated" by the law firm of Milberg Weiss Bershad Hynes & Lerach LLP – the same firm which serves as Lead Counsel in the consolidated securities action of *Newby, et al., v. Enron Corp., et al.,* Civil Action No. H-01-3624 ("*Newby*"). (Pulsifer Class Action Complaint, attached as **Exhibit A**.)

2. The Pulsifer Class Action Complaint was filed four months after April 8, 2002 – the date set by this Court for the filing of a consolidated federal securities complaint; three months after May 8, 2002 – the date set by this Court for the Defendants' motions to dismiss; and six weeks after June 24, 2002 – the deadline for any defendant's reply brief on the motions to dismiss. Scheduling Order entered February 28, 2002, as modified by Order entered March 22, 2002 (Scheduling Orders attached as **Exhibit B**).

3. The Pulsifer Class Action Complaint asserts a class action claim under § 11 of the Securities Act with respect to the 7% Exchangeable Notes due 7/31/02 issued by Enron Corp. pursuant to a Registration Statement and Prospectus dated August 10, 1999 (the "7% Notes"). Pulsifer Class Action Complaint, paragraph 1. These are the same 7% Notes which were the subject of Nathaniel Pulsifer's December 13, 2001 Certification, attached as Exhibit 3 to the Pulsifer & Associates' Motion to Be Appointed Lead Plaintiff and for Approval of its Selection of Lead Counsel. The Pulsifer Motion specifically sought lead plaintiff status as to the 7% Notes. (Pulsifer Motion, attached as **Exhibit C**.) Indeed, this Court specifically discussed the Pulsifer Motion in the February 15, 2002, Memorandum and Order appointing Milberg Weiss as Lead Counsel, and denying motions of the "Niche Plaintiffs," including Pulsifer, in deciding that Lead Plaintiffs should represent the entire class, including purchasers of the 7% Notes. February 15, 2002 Order at 50, 61-

64, 81, 84 (finding Lead Plaintiff capable of "representing the Plaintiff and the class" and appointing Lead Counsel to direct and coordinate on behalf of all Plaintiffs' counsel). (February 15, 2002, Order attached as **Exhibit D.**)

4. The Pulsifer Class Action Complaint now seeks to reassert the same class action claim which the *Newby* Lead Plaintiffs subsequently, and on behalf of the Class, abandoned. In response to Defendant Mark Jusbasche's Motion to Dismiss, seeking dismissal with prejudice of the § 11 claims,[1] Lead Plaintiffs stated, "**Plaintiffs are no longer pursuing their claim with respect to the 7% Exchangeable Notes offering**"[2] (emphasis added). Similarly, in responding to the Motions to Dismiss filed by the Outside Directors, Plaintiffs stated, "**Plaintiffs are no longer pursuing § 11 claims on the 7% Exchangeable Notes.** Thus, Meyer and Winokur's arguments as to the 8/99 offering are moot"[3] (emphasis added). Defendants accordingly re-urged dismissal with prejudice of the *Newby* claim on the 7% Notes.[4]

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[1]*See, e.g.*, Motions to Dismiss Filed by Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome Meyer, Paulo Ferraz Pereira, Frank Savage, John Wakeham, Charls E. Walker, and Herbert S. Winokur, at 71, 79, and Mark-Jusbasche's Memorandum in Support of Her Motion to Dismiss at 61.

[2] *See* Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss Filed by Enron Defendants Buy, Causey, Derrick, Fastow, Frevert, Hannon, Harrison, Hirko, Horton, Kean, Koenig, Lay, Mark-Jusbasche, McMahon, Olson, Pai, Rice, Skilling, Sutton and Whalley, at 140 (n. 47) (June 10, 2002).

[3]*See* Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss Filed by Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome Meyer, Paulo Ferraz Pereira, Frank Savage, John Wakeham, Charls E. Walker, Herbert S. Winokur and John A. Urquhart, at 97 n. 43 (June 10, 2002).

[4]*See* "Outside Director Defendants' Reply in Support of Motion to Dismiss Consolidated Complaint at 61 n. 41," joined in and incorporated by reference in Defendant John A. Urquhart's (continued...)

5. Furthermore, after the *Newby* briefing was complete, on July 31, 2002, Lead Plaintiffs filed a Notice of Withdrawal of Named Plaintiff Murray van de Velde– sole class representative for the §11 claim on the 7% Notes[5] – which stated in full as follows:

> PLEASE TAKE NOTICE that plaintiff Murray van de Velde hereby withdraws as a named plaintiff. The Class will continue to be represented by the Lead Plaintiff, The Regents of the University of California and other named plaintiffs. Thus, Murray van de Velde's withdrawal will have no detrimental effect on the Class and will streamline the class certification discovery that is underway.

Notice of Withdrawal of Named Plaintiff Murray van de Velde, July 31, 2002 (attached as **Exhibit E**).

6. Having provided notice, on behalf of the entire Class, that the *Newby* Plaintiffs are no longer pursuing their claim with respect to the 7% Notes, and that van de Velde's withdrawal will have no detrimental effect on the Class, and in the face of Defendants' continuing request that the Court dismiss with prejudice the *Newby* claim on the 7% Notes, Milberg Weiss as Class Counsel cannot now file <u>another</u> class action complaint concerning the same 7% Notes. Indeed, Nathaniel Pulsifer is a member of the *Newby* Class. The Class is bound by its representations to this Court and to Defendants. The Pulsifer Class Action Complaint should be stricken as completely inconsistent with the positions advanced by Lead Counsel to the Court and to Defendants. Lead Counsel notified Defendants in mid-stream – before reply briefs were due – that they "were no longer pursuing" the § 11 claim on the 7% Notes, and <u>also</u> notified the Class, all Defendants and this Court that

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[4](...continued)
Reply in Support of Motion to Dismiss (Responding to Plaintiffs' Opposition to Motion to Dismiss) and Joinder in Outside Directors' Reply in Support of Motion to Dismiss Consolidated Complaint, at 8; *see also* Rebecca Mark-Jusbasche's Reply Memorandum in Support of Her Motion to Dismiss, at 33.

[5]The *Newby* Plaintiffs offered M. Van de Velde as sole class representative for the § 11 claim on the 7% Notes. *Newby* Complaint at ¶ 1006.

withdrawal of named Plaintiff Murray van de Velde would not detrimentally affect the Class. In appointing Lead Counsel, this Court appointed Lead Counsel to represent the entire Class. Representations by Lead Counsel should bind and preclude members of the Class – including Nathaniel Pulsifer – from an unauthorized class action which violates the schedule and structure put in place by this Court in managing this litigation.

7. The Pulsifer Class Action Complaint should also be stricken as an unauthorized attempt to amend the *Newby* consolidated class action complaint. Having amended at least twice,[6] Plaintiffs effectively seek to add still another amendment without asking leave of Court, in a fashion which strikes at the heart of the consolidation concept. Plaintiffs now seek to add a claim, through this device, which they expressly withdrew during the *Newby* briefing schedule. Whether the Court considers the "Plaintiff" to be the Lead Plaintiffs, or Nathaniel Pulsifer "on behalf of all others similarly situated," Lead Counsel by this class action complaint effectively seeks to deconsolidate the case. This Court's orders in *Newby* contemplated that all Class claims would be raised, and briefed, and decided, in an orderly fashion. Indeed, the Pulsifer Class Action Complaint was filed after the Court entered the Order of August 7, 2002, which specifically provided, "the Court first ORDERS that all claims and/or complaints not encompassed within the Consolidated Complaint are STAYED at this time; this consolidated action will go forward based on the Consolidated Complaint." August 7, 2002 Order (attached as Exhibit F). The Pulsifer Class Action Complaint attempts an unauthorized end run around not only the explicit schedules set by this Court, but consolidation as well. In now contending that the Pulsifer Class Action Complaint should be

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[6]*See, e.g., Amalgamated Bank, et al., v. Kenneth L. Lay, et al.,* C.A. No. H-01-4198, filed December 4, 2001; Amalgamated Bank, represented by present Lead Counsel, filed its Amended Class Action Complaint on December 11, 2001.

"stayed" pursuant to the Court's Order entered August 7, 2002, Plaintiffs conveniently ignore the fundamental fact that there should be nothing *to* stay. Plaintiffs' Lead Counsel previously and deliberately determined that Pulsifer should not be a class representative or participate as a named party in the consolidated class action. Permitting Pulsifer now to emerge as a named party, thereby according Plaintiffs' Lead Counsel an unauthorized de facto amendment of the consolidated class complaint, is hardly ameliorated by treating the "amendment" as stayed. Having understandably abandoned the class claim on the 7% Notes during the Court-ordered briefing schedule, Lead Counsel should not be allowed to resurrect the same claims under the banner of a different (and previously rejected) class representative.[7]

8. Finally, the Pulsifer Class Action Complaint should be stricken as dilatory and as flouting the Court's Scheduling Orders. Information on Nathaniel Pulsifer's claim concerning the 7% Notes was available to Lead Counsel (and hence the Class) at least by December 21, 2001, when Pulsifer & Associates sought lead plaintiff status. Briefing is over on the *Newby* motions to dismiss – motions in which Defendants relied on the class claims as constituted in the *Newby* Complaint. The Pulsifer Class Action Complaint should be stricken for inexcusable delay.

9. Defendants do not, by this motion, seek to preclude Nathaniel Pulsifer from filing an individual complaint (as opposed to the present Class Action Complaint), using counsel other than

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[7]*See, e.g.*, *Lemmer v. Nu-Kote Holding, Inc.*, 2001 WL 1112577, *12 (N.D.Tex., Sept. 6, 2001)(denying leave to amend a PSLRA complaint where experienced securities counsel failed to move to amend until after defendants moved to dismiss). *See also In re The Vantive Corp. Sec. Litig.* , 2002 WL 398498, *14 (9th Cir., March 15, 2002), (affirming the district court's dismissal with prejudice and refusal to grant leave to amend in a PSLRA case where plaintiffs filed three separate complaints, and then a consolidated amended class action). When Plaintiffs' 7% Note claim withered, Lead Counsel did not directly seek permission to substitute Pulsifer as a class representative. Instead, Plaintiffs' Lead Counsel indirectly sought to escape the rigors of the Court's scheduling order and the briefing process by labeling his de facto amendment as a "stayed" new action.

present Lead Counsel, who represent the entire Class. (Defendants do not by the foregoing waive any defenses or other objections to such an individual complaint.)

WHEREFORE, Defendant requests that the Court enter an order striking the entire Pulsifer Class Action Complaint, as unauthorized, untimely, and inconsistent with this Court's Orders. A proposed Order dismissing the Pulsifer Class Action Complaint is submitted herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the above and foregoing document has been served by posting the same to the website pursuant to the order entered by United States District Judge Melinda Harmon, Southern District of Texas, Houston Division, in Civil Action No. H-01-3624 (Consolidated Cases) (Instrument # 819), on this the 27th day of September, 2002.

Jeremy L. Doyle

The Exhibit(s) May

Be Viewed in the

Office of the Clerk