United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORP. SECURITIES, DERIVATIVE & "ERISA" LITIGATION	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§	Civil Action No. H-01-3624 ✓ CONSOLIDATED CASES
NATHANIEL PULSIFER, TRUSTEE OF THE SHOOTERS HILL REVOCABLE TRUST, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. KENNETH L. LAY, et al., Defendants.	§	Civil Action No. H-02-3010

PLAINTIFFS' OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO STRIKE THE *PULSIFER* COMPLAINT

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I. Introduction

Lacking any basis in fact or law, defendants' motion to strike the now-consolidated class action complaint filed by Nathaniel Pulsifer, Trustee of Shooters Hill Revocable Trust ("*Pulsifer* Complaint") should be denied. Defendants claim the *Pulsifer* Complaint violates the Court's scheduling orders and constitutes "an impermissible unauthorized amendment" to the Consolidated Complaint filed by Lead Plaintiff on April 8, 2002. Neither of these assertions has merit. The *Pulsifer* Complaint simply seeks to ensure valid claims are not time-barred. Lead Plaintiff does not view the *Pulsifer* Complaint as an attempt to amend the Consolidated Complaint. Even if it were, leave to amend must be freely given.

II. The Current Dispute

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[1] ("defendants") seek an order striking the *Pulsifer* Complaint filed on August 9, 2002 on behalf of purchasers of Enron Corp. exchangeable 7% notes (the "7% Notes" and "7% Note Purchasers," respectively). Defendants argue the 7% Note Purchaser claims were required to be brought as part of the Consolidated Complaint filed by Lead Plaintiff, The Regents of the University of California ("The Regents").

Defendants do not address the merits of the 7% Note Purchaser claims, and appear to concede the *Pulsifer* Complaint states valid claims on behalf of the 7% Note Purchasers. The only issue in dispute is whether, pursuant to the prior Orders of this Court, this action should have been filed as an amendment to the Consolidated Complaint rather than as a separate action. Plaintiff Nathaniel Pulsifer, in consultation with The Regents, filed this action as a separate action to toll the running of the statute of limitations. Neither Pulsifer, nor The Regents, prefers that this action proceed as a separate action, and both are amenable to amending the Consolidated Complaint, or having the

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[1]Defendants Joseph W. Sutton, Kenneth L. Harrison, Richard A. Causey, and Kenneth Lay have filed separate briefs joining in the motion to strike the *Pulsifer* Complaint. Oddly, three former Enron Board Members who are not named in the *Pulsifer* Complaint (Frank Savage, Charls E. Walker, and Paulo Ferraz Pereira), also join in the motion to strike.

Court order that the Consolidated Complaint be deemed amended, after determination of the pending motions to dismiss, to include the claims asserted in this action. Pulsifer and The Regents only sought to avoid amending the Consolidated Complaint piecemeal while the motions to dismiss were pending.[2]

Defendants are not prejudiced by whether this action remains a separate action, or whether the Consolidated Complaint be deemed amended by this action. No additional parties are named; no new claims are asserted. There is no prejudice. Moreover, Lead Plaintiff has acted in a timely and orderly fashion. Defendants' arguments that Lead Plaintiff has been dilatory are without merit.

None of the prior Orders of this Court bars The Regents or any other plaintiff from filing complaints to avoid the running of a statute of limitations, and any such result would be illogical. Rather, the August 5, 2002 Order of this Court envisions that other cases outside of the Consolidated Complaint would exist, but that those actions would be stayed for the time being in favor of the claims asserted in the Consolidated Complaint and that "[e]ither shortly before or after the time of class certification, and subject to the Court's rulings on the motions to dismiss, those Plaintiffs asserting viable state-law, or different federal claims ... or opting out of a certified class to pursue their claims on an individualized basis may move to reinstate their pleadings on the Court's active docket." *See* Hodges Decl., Ex. 2 at 5.

In fact, Lead Counsel, in serving the *Pulsifer* Complaint, expressly acknowledged that pursuant to the prior Orders of this Court, the action would be stayed pending determination of the pending motions. *See* letter dated August 15, 2002 from Helen J. Hodges to Defense Counsel, appended as part of Exhibit A to Defendants' Motion to Strike.

The filing of that separate complaint was necessary to protect the 7% Note Purchasers' interests in tolling the statute of limitations, and has caused no prejudice to the defendants. If defendants have a defense against the new pleading, they can make their motion under Fed. R. Civ. P. 12(b)(6) after determination of the currently pending motions to dismiss. They are not prejudiced

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[2]The Court has already ordered that the *Pulsifer* action be consolidated into the *Newby* action. *See* Order dated August 19, 2002, attached as Ex. 1 to the Declaration of Helen J. Hodges, filed herewith.

in being required to make that motion against the new complaint as opposed to against an Amended Consolidated Complaint.

III. Procedural History

The first such class action on behalf of the 7% Note Purchasers was commenced by the filing of a complaint on December 14, 2001, by Pulsifer & Associates against defendants Kenneth L. Lay, Andrew S. Fastow, Jeffrey K. Skilling, Richard A. Causey, Arthur Andersen LLP, Goldman Sachs & Co., Salomon Smith Barney, Inc., and Banc of America Securities, LLC, No. H-02-3010 ("Pulsifer & Associates Complaint") (Hodges Decl., Ex. 3). The Pulsifer & Associates Complaint alleged, among other things, that the Registration Statement filed in connection with the $225 million July 17, 1999 initial offering of the 7% Notes was materially false and misleading. The Registration Statement had incorporated by reference Enron's audited financial statements and schedules for the years ended December 31, 1998 and December 31, 1997. Enron has acknowledged that those financial statements and schedules were materially false and misleading, and compiled in violation of Generally Accepted Accounting Principles, and has restated those financial statements. The 7% Notes were first sold pursuant to the Registration Statement on August 10, 1999. Pulsifer & Associates' first purchase of the 7% Notes identified in the certification filed with its class action complaint was for 19,500 units on December 30, 1999.

In its Memorandum and Order dated February 15, 2002, this Court denied Pulsifer & Associates' motion for appointment as lead plaintiff on behalf of the 7% Note Purchasers and appointed The Regents as Lead Plaintiff on behalf of all Enron securities purchasers. *See* February 15, 2002 Order appointing lead plaintiff, attached as Ex. D to Defendants' motion.

Claims under §§11 and 10(b) on behalf of the 7% Note Purchasers were thereafter asserted by the Lead Plaintiff in the Consolidated Complaint. In addition to the four individual defendants named in the Pulsifer & Associates Complaint who were signatories to the Registration Statement, the two Underwriter Defendants, and the Auditor Defendant, the Consolidated Complaint named as defendants, on behalf of the 7% Note Purchasers, 15 Enron Board Members who signed the Registration Statement.

The Consolidated Complaint named in Count III Murray van de Velde as the plaintiff and representative of the class of 7% Note Purchasers for purposes of asserting the §11 claim. *See* ¶¶1005-1016 of the Consolidated Complaint. By naming van de Velde as the plaintiff, counsel sought to avoid a collateral dispute whether Pulsifer & Associates was the beneficial purchaser or nominee for purchasers of the 7% Notes.[3]

The §10(b) claims were asserted by The Regents and other named plaintiffs, collectively, on behalf of the class of purchasers of all Enron publicly traded securities in Count I of the Consolidated Complaint (¶¶992-997). Neither van de Velde nor the 7% Notes were specifically referenced in Count I. Each of the defendants named as defendants on the §11 Count were also named as defendants in the §10(b) Count (with the exception of outside Board members Mendelsohn, Meyer, Urquhart, and Winokur).

Defendants thereafter moved to dismiss the §11 claims asserted by van de Velde on behalf of the 7% Note Purchasers, on grounds that he had acquired his 7% Notes in November 2001, after Enron had filed its Form 10-K for 2000, and that he had failed to plead reliance on the materially false and misleading Registration Statement in the Consolidated Complaint, in violation of §11(a).

Rather than litigate the issue of whether van de Velde was required to allege in the Consolidated Complaint reliance on the Registration Statement, or could plead or prove a §11 claim on behalf of 7% Note Purchasers, it was decided to substitute Nathaniel Pulsifer, as Trustee of Shooters Hill Revocable Trust, as the representative plaintiff for the §11 claim on behalf of the 7% Note Purchasers. Pulsifer, as trustee, purchased 1000 7% Notes on January 25, 2000.[4]

Plaintiffs, however, were concerned that defendants would argue that the 7% Note Purchaser claims would be time barred if they were not filed before the three-year anniversary of the first sale of the Notes pursuant to the Registration Statement on August 10, 1999. Under §13 of the Securities

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[3]Pulsifer & Associates is an investment advisor that purchased 7% Notes on behalf of its clients.

[4]While Mr. Pulsifer who is trustee of the trust is the same Mr. Pulsifer who is a principal in Pulsifer & Associates, Mr. Pulsifer is now suing in his capacity as a trustee of a family trust, who purchased 7% Notes for the trust. Thus, there is no issue as to his standing.

Act, there is an absolute bar against bringing claims under §11 of the Securities Act more than three years after the first offer of a security.[5]

This Court, in its Order dated August 5, 2002, expressly envisioned the filing of complaints alleging claims not encompassed in the Consolidated Complaint. *See* Hodges Decl., Ex. 2. The August 5, 2002 Order provided that those actions would be stayed pending the determination of the motions to dismiss the Consolidated Complaint. *Id.* There is nothing in the August 5, 2002 Order, or other Orders of this Court, that would require claimants to defer the filing of valid claims, while statutes of limitations run, pending the determination of the motions to dismiss.

Accordingly, on August 9, 2002, Nathaniel Pulsifer filed a class action complaint on behalf of purchasers of the 7% Notes. That complaint named as defendants the previously named 19 Enron Board Member Defendants, the Underwriter Defendants, and the Auditor Defendants. In her cover letter dated August 15, 2002, addressed to defendants' counsel, counsel for Lead Plaintiff informed the defendants that "[i]n accordance with Judge Harmon's recent orders, our view is that this *Pulsifer* case will be stayed pending the Court's ruling on the motions to dismiss in *Regents v. Lay*." *See* Defendants' Exhibit A.

IV. Argument

A. Lead Plaintiff Did Not Voluntarily Release the 7% Note Purchasers' §11 Claims

The Board Member Defendants' first argument that Lead Plaintiff voluntarily released the 7% Note Purchasers' §11 claims is absurd. The only defense that defendants raised in their initial motions to dismiss the 7% Note Purchaser §11 claims is that the named plaintiff, Murray van de Velde, acquired his notes after the filing of Enron's fiscal 2000 Form 10-K and therefore was required to plead reliance on the July 1999 Registration Statement. Defendants must acknowledge that there is no impediment to the prosecution of the 7% Note Purchasers' §11 claims on behalf of investors who acquired the Notes before "the issuer has made generally available to its security

[5]The running of the three-year statute of limitations on the 7% Note Purchaser claims may have been tolled by the pendency (initially) of the Pulsifer & Associates Complaint, and (subsequently) of the Consolidated Complaint. However, plaintiffs justifiably sought to avoid statute of limitation risk on the 7% Note Purchaser claims.

holders an earnings statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. §77k(a)(5).

Lead Plaintiff, on June 10, 2002, in responding to the Board Member Defendants' Motion to Dismiss, stated only that "Plaintiffs are no longer pursuing their claim with respect to the 7% Exchangeable Notes." *See* Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss filed by Enron Defendants Buy, et al., at 141 n.47. Similarly, Lead Plaintiff stated in the Notice of Withdrawal of Named Plaintiff Murray van de Velde that his withdrawal "will have no detrimental effect on the Class." These statements only reflect that van de Velde failed to plead a §11 claim that did not require proof of reliance and that he, as a named plaintiff, was withdrawing. Lead Plaintiff did not waive its right to assert claims based on the 7% Notes. *Russo v. Johnson*, 129 F. Supp. 2d 1012, 1020 (S.D. Tex. 2001) ("'Waiver is the "intentional relinquishment or abandonment of a known right."'") (citations omitted). Here, the 7% Note claims were reinstituted within nine days of van de Velde's voluntary withdrawal as a named plaintiff. "Under the totality of the circumstances," Lead Plaintiff's "conduct cannot be equated with voluntary relinquishment" of the 7% Note Purchaser claims. *Id.* at 1021. Additionally, plaintiffs did not withdraw their §10(b) claims asserted in Count I on behalf of all purchasers of publicly traded securities, including the 7% Notes, nor did they waive rights of the 7% Note Purchasers to file §11 claims. Rather, by filing the *Pulsifer* Complaint, plaintiffs acted in the best interests of the class. Allowing Pulsifer to "intervene" is well-supported by case law.[6]

B. Plaintiffs Did Not Violate the Orders of this Court

Plaintiffs sought to include in the Consolidated Complaint all valid claims of purchasers of Enron publicly-traded securities for which they had standing and that were not time barred. It was

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[6]*See Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 812 n.15 (5th Cir. 1982) ("In *Silva v. Vowell*, 621 F.2d 640, 649 (5th Cir. 1980) we stated that if the court had found no named plaintiff qualified to represent a subclass, "'the court could have considered "whether it is in the interest of justice and judicial economy to postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action."'") (citations omitted). In *Sullivan v. Winn-Dixie Greenville Inc.*, 62 F.R.D. 370, 377 (D.S.C.1974), the court followed this procedure but did not require notice to the subclass members. In *Alexander v. Avco Corp.*, 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974), the court gave notice to class members to give them an opportunity to intervene as individuals before dismissing the class action.

not plaintiffs' intention to litigate those claims in separate actions. The Court noted in its Order dated August 5, 2002 that separate claims could be filed, and would be stayed pending determination of the motions to dismiss the Consolidated Complaint.

In filing the separate *Pulsifer* Complaint, Lead Plaintiff has acted within the letter and the spirit of this Court's Orders. Importantly, at all times, Lead Plaintiff has tirelessly litigated this action to protect the interests of all class members. Defendants' procedural roadblocks should not be allowed to derail valid claims.

C. In the Alternative, Leave to Amend the Consolidated Complaint Should Be Granted

Federal Rule of Civil Procedure 15(a) directs that leave to amend "'shall be freely given when justice so requires.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citation omitted); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 367 & n.5 (5th Cir. 2001). As the Fifth Circuit explained:

> ***The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.***

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981) (emphasis added; citing *Foman*). The Supreme Court held:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182. Although the decision to grant or deny leave to amend is typically within the district court's discretion, "'[d]iscretion' may be a misleading term, for rule 15(a) ***severely restricts*** the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.'" *Dussouy*, 660 F.2d at 597 (emphasis added; citation omitted). *Accord Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872 (5th Cir. 2000) (same).

Coghlan v. Wellcraft Marine Corp., 240 F.3d 449 (5th Cir. 2001), decided shortly after *Lone Star Ladies*, underscores the importance of freely allowing leave to amend. Noting "the discretion of the district court is limited by Fed. R. Civ. P. 15(a)," *Coghlan* held that "[i]t contravenes the

liberal pleading presumption of Rule 15(a) and constitutes an abuse of discretion for a district court to deny a timely motion to amend where the underlying facts or circumstances relied upon a plaintiff may be a proper subject of relief." *Id.* at 452.

Thus, under the Fifth Circuit's directive, "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Dussouy*, 660 F.2d at 598. For all these reasons, if the Court determines the *Pulsifer* Complaint is an attempt to amend the Consolidated Complaint, amendment should be allowed.

V. Conclusion

Despite defendants' rhetoric, Lead Plaintiff has not attempted an "end-run" around this Court. Rather, as Court-appointed representative of all absent class members, Lead Plaintiff has attempted, in this highly complex, multi-defendant, multi-plaintiff action, to pursue all viable claims. Defendants' motion to strike should be denied.

DATED: October 17, 2002

Respectfully submitted,

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DECLARATION OF SERVICE BY WEBSITE AND UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on October 17, 2002, declarant served the PLAINTIFFS' OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO STRIKE THE *PULSIFER* COMPLAINT by posting to the website or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of October, 2002, at San Diego, California.

Mo Maloney

Mo Maloney

The Service List

May be Viewed in

the Office of the Clerk