



From the start of this case, the Court made clear its intention to expedite this litigation. In its Scheduling Order of February 28, 2002, the Court wrote, "It is the nation's impression that the justice system grinds slowly in a Dickensian fashion, and it is the hope of this Court that that impression can be changed by an efficient resolution of these cases." *Newby v. Enron Corp.*, No. H-01-3624, Order at 2 (S.D. Tex. Feb. 28, 2002). The Court reemphasized its commitment to hasten this case by denying the requests of several defendants, including the Bank Defendants, to extend their time to respond to the Consolidated Complaint. *See, e.g., Newby v. Enron Corp.*, No. H-01-3624, Order at 2 (S.D. Tex. Apr. 17, 2002). Mindful of the Court's prior Orders, The Regents filed its oppositions to the motions to dismiss and its motion for class certification within the prescribed time periods and without requesting any time extensions. Incredibly, the Outside Directors view Lead Plaintiff's compliance with the Court's Scheduling Order – filing a motion for class certification by October 1, 2002 – as a mere attempt "to [prematurely] force the class certification issue before discovery has been conducted."<sup>1</sup>

The Bank Defendants, the Outside Directors, and various other defendants, on the other hand, seek to delay these proceedings by extending the class certification briefing schedule. Defendants urge the Court to defer ruling on the pending class certification motion until the motions to dismiss have been decided and they complete class discovery. Defendants do not disclose how long they wish to delay this case. But postponing the class certification phase, even for just a few months, substantially jeopardizes The Regents' ability to be prepared for the December 1, 2003 trial date.

Defendants assert that discovery from The Regents and the other proposed class representatives is essential. The Bank Defendants claim the Court cannot perform a "rigorous analysis" of the requirements of Rule 23 without discovery from the class representatives. An adequate factual record, however, already exists. The evidence submitted in connection with the motion for class certification, along with other evidence presented during the course of this litigation, more than demonstrates class certification is proper. *See Lead Plaintiff's Motion for Class Certification at 13-24; Declaration of James I. Jaconette, filed with the motion for class certification.*

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<sup>1</sup>The Outside Directors' Objection to Plaintiffs' Motion for Class Certification and Motion to Suspend Class Briefing Pending Completion of Appropriate Class Discovery at 2.

The Court itself has praised The Regents' diligence and the efforts of its counsel. It expressed "confiden[ce] that the Regents of a large public university, experienced in investment and litigation, is capable of monitoring the lawyers here and industriously pursuing Plaintiffs' claims." *In re Enron Corp., Sec. Litig.*, 206 F.R.D. 427, 458 (S.D. Tex. 2002). The Regents "and its attorneys' zealous prosecution of this action is already evident," observed the Court. *Id.* at 454. And the Court found Lead Counsel Milberg Weiss capable of representing The Regents and the proposed class. *Id.* at 458. Based on the documentation presented and its prior rulings on the adequacy of The Regents and its counsel, the Court has ample evidence with which to conduct a thorough review of Rule 23's prerequisites, thereby protecting the due process rights of absent class members. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001).

In *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982), the Supreme Court recognized that in certain cases a "rigorous analysis" of the class certification prerequisites can be made without resorting to expensive class discovery. "Sometimes the issues are plain enough from the pleadings," wrote the *Falcon* Court, "to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Id.* at 160. Here, the pleadings, Lead Plaintiff submissions, class certification motion and accompanying evidence prove the proposed class representatives' interests are aligned with those of absent class members. Lead Plaintiff does not simply urge the Court, as defendants claim, to certify a class "on the basis of incontestable allegations in the complaint" *Szabo v. Bridgeport Mach. Inc.*, 249 F.3d 672, 677 (7th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 348 (2001).

Defendants, moreover, contend "Courts have long recognized that discovery is essential to determine whether the requirements for certifying a class have been satisfied."<sup>2</sup> Defendants overstate the law. "Maintainability [of a class action] *may be* determined on the basis of pleadings," and the "court *may* ... permit discovery relating to the issues involved in maintainability." *Huff v. N.D. Cass Co.*, 485 F.2d 710, 713 (5th Cir. 1973) (en banc) (emphasis added). But "*[w]hether discovery will be permitted in connection with a motion for a class certification determination 'lies within the*

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<sup>2</sup>The Bank Defendants' Motion to Modify Scheduling Order and Request for Expedited Consideration at 7.

*sound discretion of the trial court.*" *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) (emphasis added; citation omitted). The factual record in this case provides the Court with sufficient justification to certify a class. Here, it is appropriate for the Court to exercise its discretion and decline defendants' requests for an indefinite extension of the class certification briefing schedule.<sup>3</sup>

Finally, the Outside Directors accuse Lead Plaintiff of attempting to use the current discovery stay as both a sword and a shield. There are no machinations here. The Regents has merely complied with the Court's Orders. Lead Plaintiff ceased discovery in compliance with the Court's August 7, 2002 Order and filed its motion for class certification in compliance with the Court's Scheduling Order.

Lead Plaintiff cannot agree to extend the class certification phase of the litigation. The Regents filed its motion for class certification within the deadline, and the defendants have a sufficiently developed record on which to base a challenge to the motion. Extending the schedule as the defendants propose jeopardizes the trial schedule this Court has set – and which Lead Plaintiff is striving to meet – and allows the defendants' insurance policies to be further depleted. Instead of forcing Lead Plaintiff and the class to incur substantial costs from discovery that serves no purpose in this case, the defendants should be stipulating to class certification. Accordingly, the Court should deny the Bank Defendants' Motion to Modify Scheduling Order and Request for Expedited Consideration and Outside Directors' Objection to Plaintiffs' Motion for Class Certification and Motion to Suspend Class Briefing Pending Completion of Appropriate Class Discovery and should

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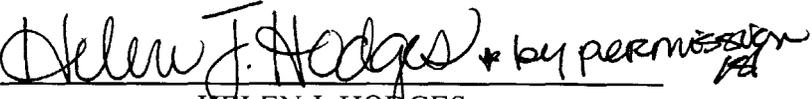
<sup>3</sup>Should the Court conclude some class discovery is warranted, Lead Plaintiff requests it be limited to the scope proposed in its pending motion for protective order. This will ensure that Lead Plaintiff and the other proposed class representatives are not forced to suffer through duplicative and harassing discovery.

require defendants to respond to the motion for class certification by November 1, 2002 as previously ordered.

DATED: October 25, 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 25, 2002, declarant served the LEAD PLAINTIFF'S OPPOSITION TO THE BANK DEFENDANTS' MOTION TO MODIFY SCHEDULING ORDER AND THE OUTSIDE DIRECTORS' OBJECTIONS TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION 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 25th day of October, 2002, at San Diego, California.

*Mo Maloney*

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Mo Maloney

The Service List

May be Viewed in

the Office of the Clerk