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

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'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

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I. INTRODUCTION

Defendants' Opposition and Response confirms the need for a protective order. Defendants cannot refute that their noticed depositions are unduly burdensome and present unnecessary risk of redundancy and waste of judicial and litigant resources. The Bank Defendants and the Outside Directors do not (and cannot) justify deposing five individuals from the University of California's Office of the Treasurer, then deposing individual Regents, and only then deposing Rule 30(b)(6) designees. In contrast, plaintiffs' position is reasonable and well warranted. Defendants should take Rule 30(b)(6) depositions of persons most knowledgeable of the subject matter. ***Then*** defendants can determine whether additional depositions are necessary. The Federal Rules and case law in the Fifth Circuit as well as in other circuits and districts supports this judicious approach.

Nonetheless, the Bank Defendants' Opposition is rife with finger-pointing. Defendants blame the Court's Scheduling Order for their oppressive discovery schedule. Bank Defs.' Opp. at 2. Defendants blame plaintiffs for the exorbitant costs of their proposed discovery, claiming the number of defendants is the sole cause of the expense. Bank Defs.' Opp. at 16. And defendants blame Lead Counsel for the impasse resulting in The Regents' motion for a protective order. Bank Defs.' Opp. at 1-4. Lead Plaintiff is justifiably concerned that defendants insist on pursuing duplicative discovery which will result in undue burden and expense. The Regents agreed to significant class certification discovery, including Rule 30(b)(6) depositions from each institutional plaintiff and depositions from each individual named plaintiff. Defendants, however, refused this commonsense approach and instead wish to ignite a barrage of repetitive depositions, affidavits, and then still more depositions.

Defendants suggest their class certification discovery is necessary, but they do not provide any sufficient basis for the duplicative depositions they want. Having reviewed defendants' purported reasons for their deposition notices defendants seek, it is clear to Lead Plaintiff the Rule 30(b)(6) depositions will provide the information to which defendants are entitled. For example, defendants repeatedly state all these noticed depositions are necessary because these individuals have information concerning portfolio risk management and investment risk. Yet The Regents' Rule

30(b)(6) designee is the person ***most knowledgeable*** concerning strategic focus, management, and policies concerning The Regents' equity portfolio.

Defendants also argue the instant motion is premature. Not so. The parties negotiated for more than two weeks – without agreement. As the negotiations reveal, defendants ***did not*** reduce the scope of their discovery. At most, defendants agreed to minor alternate scheduling, but they never agreed to depose first the Rule 30(b)(6) designees, nor did they proffer a meaningful discovery reduction.

Finally, plaintiffs do not (as defendants suggest) seek protection from defendants' extraordinarily invasive document discovery requests at this time. Instead, plaintiffs seek a deposition protocol prohibiting oral examination questions concerning non-Enron personnel financial matters wholly unrelated to Enron, which defendants have signaled by the extraordinarily intrusive document production requests. Defendants' discovery is designed not to elicit probative information, but to harass, intimidate and embarrass – tactics that increasingly appear to comprise the core of defendants' class certification opposition strategy.

II. ARGUMENT

A. The Motion for a Protective Order Is Not Premature

Defendants argue The Regents' motion is premature and the meet-and-confer process never ended, to which defendants ascribe Lead Plaintiff the fault. In truth, the negotiations were significant and continued for almost two weeks – without meaningful progress. Due to defendants' absolute refusal to take first the proffered Rule 30(b)(6) depositions and due to defendants' improper demand for numerous depositions and affidavits, the parties could not reach agreement. *See* Hodges Decl., ¶¶7, 9 (noting the Bank Defendants refused to first depose institutional designee, agreement was unlikely, and defense counsel would be unavailable to meet and confer).[1]

The Outside Directors additionally argue the motion is "plainly" premature because the Court stayed all discovery. *See* Outside Directors' Response, at 1. The Outside Directors apparently ignored The Regents' Motion for Protective Order, for the introductory paragraph states, "***[w]hen*** the

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[1]Citations to the Declaration of Helen J. Hodges in Support of The Regents' Motion for Protective Order, filed with the Court on August 13, 2002, are designated "Hodges Decl."

discovery stay is ***lifted***, Lead Plaintiff requests the Court issue a protective order on the bases discussed below."[2] Delaying briefing until the discovery stay is lifted would be an extraordinary waste of time. Briefing this issue now, while the motions to dismiss are being decided, accords with the Court's desire to promptly resolve this litigation.

B. Defendants Never Agreed to Reduce the Scope of Their Discovery

The Bank Defendants distort the amount of discovery they demand. Having originally noticed seven individual depositions from The Regents, defendants now claim they "agreed" to reduce that number to only "three or four representatives," citing a letter by Lead Counsel as proof of this "agreement." *See* Bank Defs.' Opp. at 4 (citing Hodges Decl., Ex. F). Defendants misrepresent the record. What Lead Counsel's letter reflects is exasperation, not agreement. The letter actually states defendants insist on deposing "at least three or four representatives from The Regents ***to begin with***," and states defendants demand declarations from personnel within the Office of the Treasurer to determine whether certain individuals noticed for deposition even need be deposed. Hodges Decl., Ex. F. Defendants' conduct speaks for itself. To date, defendants have not withdrawn any portion of their notice of depositions.

What defendants demanded, and continue to demand, are all the depositions, subject to the filing of numerous declarations by Office of the Treasurer employees to hopefully convince defendants the depositions are unnecessary.[3] Defendants' conduct ***confirms*** the need for a protective order, as plaintiffs requested defendants first take the Rule 30(b)(6) depositions to avoid precisely this. In any event, defendants are in no position to demand that employees of the University of California submit affidavits to satisfy defendants' mere speculation that myriad individuals have "some responsibility" for The Regents' investment decisions. *See* Hodges Decl., Ex. C. As Mr. Heil's declaration explicitly states, certain individuals noticed for deposition perform routine tasks

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[2]Unless noted otherwise, emphasis is added and citations are omitted.

[3]Defendants belatedly claim they wish to depose ***either*** Regent Judith Hopkinson ***or*** Regent Gerald Parsky, but this concession appears to have been made to thwart entry of a protective order Defendants never agreed to this during the meet-and-confer.

such as order processing and transaction confirmation. Yet defendants still demand the sworn statements of even those individuals.

Before noticing redundant depositions, defendants could have employed less burdensome, less expensive means to determine who should be deposed. Instead, defendants noticed a large wave of depositions, requiring plaintiffs to respond. Defendants' flawed process is only exacerbated by their recent request for indefinite scheduling extensions to allow this harassing discovery.

C. The Regents' Proposed Discovery Method Is Reasonable, Prudent, and Supported by the Law

According to defendants, The Regents "attempt to present class certification as a *fait accompli*." Bank Defs.' Opp. at 6. Defendants state the Court "may not simply accept the Regents' assertion that they or any other named plaintiff are an adequate class representative or that their claims are typical of those of the class." Bank Defs.' Opp. at 8. The Regents has done no such thing. Far from "simply" accepting adequacy and typicality, The Regents and other plaintiffs agreed to significant class certification discovery, but requested the Rule 30(b)(6) depositions proceed first. It should come as no surprise plaintiffs and their counsel believe the proposed class representatives will adequately protect the interests of the Class and that certification is appropriate.

Defendants ignore the central tenet of *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991), and similar cases cited by plaintiffs. The Fifth Circuit's directive in *Salter* could not be more clear: when a party seeks to depose numerous individuals from an institution, and when those individuals do not possess information greater than the designated deponent, the 30(b)(6) depositions should proceed ***before*** top-level individuals are deposed. *Salter*, 593 F.2d at 651. This is precisely the approach recommended by The Regents.

Defendants claim to observe an "important distinction" in Lead Plaintiff's authority, which is the cases are "typically ... by individual plaintiffs seeking to depose high-level officers of corporate defendants or third parties." Bank Defs.' Opp. at 15 (emphasis omitted). If this purported distinction is so important, why do defendants fail to cite even a single case so stating? Moreover, there is no such distinction in Lead Plaintiff's authority. For example, in *FMR* the court recognized, "courts

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 *7 (Trademark Trial and Appeal Board July 15, 1999). In *FMR*, the court granted a protective order to prohibit the cumulative deposition of an "apex" level employee of the party that instituted legal action. Thus, defendants are incorrect when they assert, "none of the cases relied on by the Regents involve a plaintiff seeking to avoid its own deposition." Bank Defs.' Opp. at 15. Defendants' purported distinction simply has no basis in the law. Indeed, Rule 26(c) of the Federal Rules of Civil Procedure does not so distinguish between plaintiffs and defendants. *See Folwell v. Sanchez Hernandez*, No. 1:01CV01061, 2002 U.S. Dist. LEXIS 18740, at *11 (M.D.N.C. Sept. 27, 2002) ("The Court need not permit a ***party*** to wear out or harass a corporation with a number of futile Rule 30(a)(1) depositions.").

Further, defendants' attempt to distinguish The Regents' authority on the basis that this is a securities class action is equally unavailing. Rule 23 does not absolve defendants from comporting themselves in a manner consistent with the discovery rules, and the class action vehicle most certainly does not permit defendants to engage in cumulative, wasteful, abusive discovery. When conducting expensive, burdensome discovery where top-level individuals are targeted for deposition, the parties must scale the discovery ladder, not resort to the shotgun approach defendants employ here. *See Salter*, 593 F.2d at 651.

D. Defendants' Strenuous Explanations Do Not Justify the Numerous Depositions Defendants Want

1. Defendants Overstate the Fifth Circuit's Adequacy Requirement

Defendants claim individual Regents have information "uniquely" available to them, including the decisions to retain counsel, file a lawsuit and undertake the "burden" of acting as a class representative. Bank Defs.' Opp. at 9. Defendants overstate the Fifth Circuit's adequacy requirement. Indeed, defendants fail to cite even ***one*** case holding they are entitled to inquire into The Regents' decision to retain counsel, file suit, or inquire about other class action litigation. Even if such far-flung areas of inquiry were justifiable under Fifth Circuit law and in this case (they are

not), defendants do not (and cannot) explain their desire to take redundant depositions of individual Regents.

The Fifth Circuit's test for adequacy has ***nothing*** to do with defendants' jumble of purported "adequacy" questions. According to the Fifth Circuit:

> [Rule 23's] adequacy requirement mandates an inquiry into (1) the zeal and competence of the representative[s'] counsel and ... (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees.

Berger v. Compaq Computer Corp., 257 F.3d 475, 479 (5th Cir. 2001) (quoting *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982)). "To satisfy the adequacy requirement of class certification, Plaintiffs must [show] that 'the representative[s] will vigorously prosecute the interests of the class through qualified class counsel.'" *Dartley v. Ergobilt*, No. 3:98-CV-1442-M, 2001 U.S. Dist. LEXIS 20631, at *5 (N.D. Tex. Dec. 3, 2001). As this Court stated in *U.S. Liquids*, the Fifth Circuit neither read the PSLRA into Rule 23(a)(4)'s adequacy requirement nor changed Fifth Circuit law when conducting the Rule 23(a)(4) adequacy inquiry. *In re U.S. Liquids Sec. Litig.*, No. H-99-2785, Order at 4 (S.D. Tex. June 12, 2002) (Hodges Decl., Ex. I) Here, the inquiry into adequacy simply does not permit defendants to question individual Regents or a Rule 30(b)(6) designee concerning the retention of counsel or The Regents' innermost decision-making processes with respect to their prosecution of the Enron fraud.

For example, inquiring about the "retention" of class counsel will not elicit information concerning the zeal of class counsel. Nor will questions about non-Enron class action litigation or The Regents' intimate litigation discussions show they will vigorously prosecute the interests of the class through qualified class counsel. The Court should reject defendants' attempt to expand class certification discovery in such an unprecedented manner.

2. Treasurer David H. Russ Cannot Provide Information Greater Than That of The Regents' Rule 30(b)(6) Designee

Far from justifying their burdensome discovery, defendants' Opposition and Response amplifies The Regents' concern the discovery is redundant. According to defendants, Mr. Russ should submit to a deposition because he "should have knowledge of the basis for the decision to sell some, but not all, of the Enron holdings" on November 16, 2001. Bank Defs.' Opp. at 11. In truth,

nearly all of The Regents' purchases and sales of Enron stock occurred before Mr. Russ even began his tenure as Treasurer for The Regents. The information defendants seek may be obtained from The Regents' Rule 30(b)(6) designee, who can competently testify to ***all*** the purchases and sales of Enron stock.

What's more, the timing of The Regents' sales of their Enron stock shows nothing of substance can be gained from Mr. Russ' deposition. As The Regents' Certification shows, 2.22 million shares of Enron stock were sold from November 14 to November 29, 2001, *i.e.*, The Regents sold their Enron shares after the Enron fraud began to unfold. What evidence can be gleaned from Mr. Russ concerning the unremarkable fact that The Regents sold Enron stock after defendants' fraud began to be revealed?

Defendants try to cure this by stating Mr. Russ is one of the "key ***individuals*** responsible for managing the University's investments" and has knowledge of "'portfolio risk management processes'" and management of investment risk. Bank Defs.' Opp. at 11-12. Even assuming "portfolio risk management processes" were relevant to class certification, and they are not, Mr. Russ is not the person to depose concerning this topic. For example, Rule 30(b)(6) designee Mr. Heil possesses information ***superior*** to that of Mr. Russ because Mr. Heil is responsible for the strategic focus, management, and development of policies and procedures for The Regents' equity portfolio. Heil Decl., ¶3 (filed on August 13, 2002). The simple facts are at no time during Mr. Russ' tenure did The Regents purchase Enron stock and The Regents' November stock sales occurred after the Enron fraud began to be revealed. Mr. Russ' deposition would be cumulative and wasteful because Mr. Russ can offer no greater scope of testimony than Mr. Heil, or, for that matter, other potential Rule 30(b)(6) designees.

3. Defendants Do Not (and Cannot) Justify Deposing Randolph E. Wedding

According to defendants, Mr. Wedding must sit for a deposition to provide information concerning a single – irrelevant – category of questions, namely, to "explore the reasons for the decision not to invest in Enron bonds .. while ... the Regents decided to invest in Enron stock." Bank Defs.' Opp. at 12. Plainly, Mr. Wedding's deposition is wasteful. Even if Mr. Wedding made

a conscious decision not to invest in Enron bonds, does this mean The Regents' claims are atypical? What can be gained from exploring why The Regents did not purchase more Enron securities?

Far less costly and burdensome discovery tools are available. For example, while the subject matter is irrelevant, defendants can question The Regents' Rule 30(b)(6) designee and likely learn even more information than they are entitled to know. And this could be accomplished without seeking an additional deponent to testify on an irrelevant matter.

4. Defendants Do Not (and Cannot) Justify Deposing Both Regents Judith Hopkinson and Gerald Parsky

Regents Judith Hopkinson and Gerald Parsky are the Chairpersons of the Committees on Finance and Investment, respectively. According to defendants, their depositions are necessary because they "should have knowledge" concerning the diversification of investment portfolios and risk exposure. Bank Defs.' Opp. at 9. ***First,*** diversification and risk exposure are ***not*** relevant to class certification and defendants do not (and cannot) cite any decision so holding. If such matters were relevant to class certification they would defeat the central purpose of the fraud-on-the-market theory, namely, investors may rely on the integrity of the market when purchasing stock.[4] Diversification has nothing to do with an investor's reliance on the integrity of the stock market. ***Second,*** none of these reasons demonstrates Ms. Hopkinson or Mr. Parsky possess unique information, and in fact, these are the very same reasons purportedly demonstrating the depositions of Mr. Russ and Mr. Wedding are necessary. *Compare* Bank Defs.' Opp. at 11 (Mr. Russ is "responsible" for managing investments and has information concerning "portfolio risk management process" and investment risk management) *with* Bank Defs.' Opp. at 9 (individual Regents have information concerning implementation of policies for risk exposure and portfolio diversification).

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[4]As this Court stated in *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860 (S.D. Tex. 2001):

> The Fifth Circuit has reasoned, "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."

Id. at 906 n.46 (quoting *Basic, Inc. v. Levinson,* 485 U.S. 224, 299 (1988)). The presumption of reliance may be rebutted, however, investor diversification is clearly ***not*** a basis for rebuttal. *See* 183 F. Supp. 2d at 906 n.46; *Fine v. American Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990).

Once again, there are other persons most knowledgeable to testify on these matters. Indeed, as Mr. Heil declares, Ms. Hopkinson and Mr. Parsky did ***not*** "make decisions concerning The Regents' individual investments in securities. Neither Ms. Hopkinson nor Mr. Parsky was involved in the decision-making process to purchase Enron stock." Heil Decl., ¶9. Hence, rather than identify specific or unique information that can be provided by individual Regents, defendants merely regurgitate the same bases for these depositions that is proffered for every other deponent.

Defendants argue these individuals must be deposed because they have "knowledge concerning the replacement of the former treasurer, Patricia Small, who authorized the initial purchase of Enron stock." Bank Defs.' Opp. at 9. Defendants fail to explain how Ms. Small's replacement is even remotely germane to class certification. Accordingly, there is no justification for the depositions of Ms. Hopkinson and Mr. Parsky.

E. Defendants' Noticing the Depositions of Robert Yastishak and Paul Ferreira and Subsequent Demand for Affidavits Further Demonstrates Defendants' Discovery Is Wasteful and Vexatious

After noticing Messrs. Yastishak and Ferreira for deposition, defendants now state they will "forgo" these depositions. Before they agree to do so, however, Messrs. Yastishak and Ferreira must submit sworn affidavits disclaiming their participation in The Regents' investment decisions. Apparently Mr. Heil's declaration was not enough. Mr. Heil, a Managing Director with oversight responsibility of public equity portfolio employees, could not be more clear: Messrs. Yastishak and Ferreira have "***never***" been involved in the decision-making process to purchase Enron stock and perform transaction and trade-clearing functions for the Treasurer. *See* Heil Decl., ¶¶5-6. These individuals cannot provide superior or unique knowledge compared to Mr. Heil or other potential Rule 30(b)(6) designees.

F. The Regents Has Vigorously Pursued the Interests of the Class

Defendants claim the instant motion "calls into question [The Regents'] commitment to the litigation." Bank Defs.' Opp. at 15. Nonsense. Plaintiffs have agreed to significant class certification discovery. Plaintiffs merely seek to circumscribe discovery that is unduly expensive, cumulative, and burdensome, which is their right under Rule 26 and which comports with their duties to the Class. The Regents' Motion for Protective Order outlined its vigorous efforts to

prosecute this action, to which defendants have no response. The seeking of a protective order furthers The Regents' and other plaintiffs' commitment to the Class, since it is proposed ***Class representatives*** that plaintiffs seek to protect, in addition to conserving litigant resources and prohibiting the bleeding of directors' and officers' liability policies.

Defendants argue The Regents and other plaintiffs should be deposed in Houston because they "voluntarily" selected Houston and thus plaintiffs cannot "complain" about appearing for deposition here. *See* Bank Defs.' Opp. at 17. This is ridiculous. Enron's headquarters, accountants and lawyers are in Houston. That Houston is the center of gravity in this litigation is demonstrated by the consolidation and transfer of suits to Houston by the Judicial Panel on Multidistrict Litigation. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002) ("We are persuaded that this litigation has a strong Texas nexus ... many parties, witnesses and documents will be found in Houston, where Enron is headquartered and where Enron's auditors performed much of their audit work ...."). However, that does not justify defendants' claims that myriad employees of institutional plaintiffs should be hauled to Houston for their deposition on class certification issues.

III. DOCUMENT PRODUCTION REQUESTS

The Regents does not "seek a protective order to avoid producing several categories of requested documents." Bank Defs.' Opp. at 18. The Regents seeks an order establishing deposition protocol, including the prohibition of invasive personal questions to individuals concerning tax returns, personal net worth, the "universe" of securities owned by plaintiffs, and similar harassing questions that form the basis for defendants' document production requests. Lead Plaintiff's request for an order establishing a deposition protocol is necessary because defendants' discovery questions signal they intend to turn class certification into a relentless probe of plaintiffs' personal and private financial lives unrelated to Enron. Innocent investors in Enron securities are not on trial. They simply should not be forced to endure invasive questioning in a detestable effort to embarrass, harass, and intimidate.

As The Regents explained in its Motion, plaintiffs and their counsel will interpose objections and responses to defendants' improper document production requests. *See* Lead Plaintiff The

Regents' Motion For Protective Order, at 12 n.3. If defendants do not curtail their wildly invasive document discovery requests, plaintiffs will oppose and seek further protection from the Court. Lead Plaintiff will not permit oral examination to devolve into a sweeping attack on these investors' private lives.

IV. CONCLUSION

Rule 30(b)(6) and individual plaintiff depositions should proceed first to provide maximum information to defendants while avoiding redundant, cumulative, burdensome, costly, and unnecessary depositions defendants noticed. Only after the Rule 30(b)(6) depositions are taken should defendants determine what, if any, additional discovery is necessary. Defendants' purported reasons for the numerous depositions noticed demonstrate institutional Rule 30(b)(6) designees can provide all of the information to which defendants are entitled. Lead Plaintiff's motion should be granted.

DATED: November 20, 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 November 20, 2002, declarant served the LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER 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 20th day of November, 2002, at San Diego, California.

Mo Maloney

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November 20, 2002

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