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

In Re Enron Corporation
Securities Derivative &
ERISA Litigation

MARK NEWBY, ET AL.,

Plaintiffs

VS.

ENRON CORPORATION, ET AL.

Defendants

MDL-1446

United States Court
Southern District of Texas
FILED

JR DEC 06 2002

Michael N. Milby, Clerk

CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES

PAMELA M. TITTLE, on behalf of
herself and a class of persons similarly
situated, ET AL.,

Plaintiffs

VS.

ENRON CORP., an Oregon
Corporation, ET AL.

CIVIL ACTION NO. H-01-3913
CONSOLIDATED WITH

KEVIN LAMKIN, JANICE SCHUETTE,
and ROBERT FERRELL, Individually and
on Behalf of All Others Similarly Situated

VS.

UBS PAINWEBBER, INC. and
UBS WARBURG, LLC

C.A. NO. H-02-0851

MEMORANDUM IN SUPPORT OF AGREED MOTION FOR RECONSIDERATION OF
CONSOLIDATION, OBJECTIONS TO CONSOLIDATION, MOTION FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW TO SUPPORT CONSOLIDATION,
AND REQUEST FOR CLARIFICATION

1 Plaintiffs Kevin Lamkin, Janice Schuette, Robert Ferrell and Steve Miller, individually and
2 as Representatives of the putative class herein, file this Agreed Motion for Reconsideration of
3 Consolidation, Objections to Consolidation, Motion for Findings of Fact and Conclusions of Law
4 to Support Consolidation of this case with *Lamkin with Newby v. Enron Corp., et al.*, Cause No. H-
5 01-3624, and *Tittle v. Enron Corp., et al.*, Cause No. H-01-3913, and Request that the Court clarify
6 its consolidation order¹:

7 **BACKGROUND**

8 On December 12, 2001, Judge Rosenthal signed an Order consolidating pending litigation
9 concerning Enron Corporation in a single court (Docket No. 10) (the "Consolidation Order"). The
10 Motion to Consolidate was filed by Enron, its outside directors and Arthur Anderson, LLP.

11 In the Consolidation Order, Judge Rosenthal made the following specific fact findings
12 regarding the consolidated cases: (1) The cases all arise from a common core of operative facts; (2)
13 the cases are filed against common defendants; (3) many of the cases contain identical claims; (4)
14 the legal issues will overlap; and (5) much of the discovery will be common to all the cases. The
15 Court consolidated the cases for the purpose of avoiding unwarranted duplication of discovery and
16 motion practice (Docket No. 10, p. 17).

17 *Lamkin, et al. v. UBS PaineWebber, Inc., et al.*, Cause No. H-02-0851 was originally filed
18 on March 7, 2002, more than eight months prior to its consolidation with *Newby* and *Tittle*. The case
19 originally was assigned to Judge Ewing Werlein, Jr. In July, 2002, Judge Werlein recused himself,
20 and the case was transferred to Judge Vanessa Gilmore.

21 Plaintiffs are individual investors who had brokerage accounts with PaineWebber. Plaintiffs
22 allege that PaineWebber and UBS Warburg committed a fraud on PaineWebber's retail clients
23 through commission of the specific acts set out in the Second Amended Complaint. Pursuant to the
24 Private Securities Litigation Reform Act ("PSLRA"), Plaintiffs brought a class action suit against
25 PaineWebber and UBS Warburg for alleged securities fraud violations under the Securities Exchange
26

27 ¹Defendants UBS PaineWebber and UBS Warburg are simultaneously filing a similar
28 motion objecting to the consolidation of this case with the *Newby* and *Tittle* actions.

1 Act of 1934 (the "1934 Act") and strict liability claims under the Securities Act of 1933 (the "1933
2 Act"); specifically, (1) claims pursuant to Section 10(b) of the 1934 Act and SEC Rule 10b-5; and
3 (2) strict liability claims under Sections 11 and 12(2) of the 1933 Act.

4 Plaintiffs filed, but did not serve, an initial Class Action Complaint, then filed and served
5 their First Amended Class Action Complaint on April 18, 2002. On May 21, 2002, Defendants filed
6 a Motion to Dismiss the First Amended Complaint along with a Memorandum of Law in support.
7 Plaintiffs filed their Second Amended Complaint and in July, 2002, the Court entered an Order
8 establishing a schedule for the briefing of a new motion to dismiss. Defendants filed their Motion
9 to Dismiss the Second Amended Complaint in August, 2002 and an Opposition and a Reply Brief
10 were filed pursuant to the Court's scheduling order. Briefing on the Motion to Dismiss the Second
11 Amended Complaint closed on November 15, 2002.

12 Plaintiffs filed a motion to appoint lead plaintiffs and lead counsel. On November 14, 2002,
13 the Parties participated in a tele-conference hearing on the motion to appoint lead plaintiffs. On
14 November 21, 2002 the Court granted the motion, appointing Kevin Lamkin, Janice Schuette, Robert
15 Ferrell, and Stephen Miller lead plaintiffs for the putative class, and appointing Provost ★ Umphrey
16 Law Firm, L.L.P. as lead counsel for the putative class.

17 On or around November 22, 2002, *Lamkin* was reassigned to Judge Melinda Harmon and this
18 Court entered an order consolidating *Lamkin* with *Newby* and *Tittle* (the "*Lamkin* Order") on
19 November 26, 2002.

20 LEGAL STANDARD

21 Consolidation pursuant to Rule 42 of the Federal Rules of Civil Procedure ("Rule 42") is
22 improper where the consolidation order "would prejudice the rights" of any party. *St. Bernard*
23 *General Hospital, Inc. v. Hospital Service Assoc.*, 712 F.2d 978, 989 (5th Cir. 1983); *see also Dupont*
24 *v. Southern Pacific Co.*, 366 F.2d 193, 195-96 (5th Cir. 1966) (holding that a judge considering
25 consolidation "must be most cautious" with regard to potential "prejudice" resulting from a
26 consolidation order, noting that failure to do so is reversible error). Moreover, consolidation
27 pursuant to Rule 42 is not justified solely on the basis that the actions may include some overlapping
28 questions of fact or law. To the contrary, "when cases involve some common issues, but individual

1 issues predominate, consolidation should be denied." *Lewis v. Intermedics Intraocular, Inc.*, No. Civ.
2 A. 93-7, 1998 WL 139988, at *2 (E.D. La. Mar. 24, 1998); *see also In re Consolidated Parlodel*
3 *Litig.*, 182 F.R.D. 441, 445 (D. N.J. 1998). In securities cases in particular, consolidation may be
4 considered only where there is "more than one action on behalf of a class asserting substantially the
5 same claim or claims." 15 U.S.C. § 78u-4(a)(3)(B)(ii) (emphasis added).

6 Before a court may order consolidation, the court must assess "whether the specific risks of
7 prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common
8 factual and legal issues, the burden on the parties, witnesses and available judicial resources posed
9 by multiple lawsuits, the length of time required to conclude multiple suits against a single one, and
10 the relative expense to all concerned of the single-trial, multiple-trial alternatives." *Cantrell v. GAF*
11 *Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (internal quotations omitted). "The systemic urge to
12 aggregate litigation must not be allowed to trump our dedication to individual justice, and we must
13 take care that each individual plaintiff's - and defendant's - cause not be lost in the shadow of a
14 towering mass litigation." *Malcolm v. National Gypsum Co.*, 995 F.2d 345, 350 (2d Cir. 1993)
15 (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)). While
16 conservation of judicial resources remains a laudable goal, consolidation must not result in otherwise
17 avoidable prejudice. *See id.* "[I]f the savings to the judicial system are slight, the risk of prejudice
18 to a party must be viewed with even greater scrutiny." *Id.*

19 As explained below, all factors weigh decisively against consolidation of *Lamkin* with *Newby*
20 and *Tittle*. The Parties would be severely prejudiced and little or no judicial savings would result,
21 especially when compared to the confusion and burdens imposed upon the Parties by the "towering
22 mass litigation."

23 OBJECTIONS

24 The Plaintiffs object to the consolidation of this case because the claims herein fall within
25 none of the categories set out in the Consolidation Order. First, the claims in the consolidated cases
26 do not arise from a common core of operative facts. While this case has Enron stock as the securities
27 in question, the claims are asserted against PaineWebber and UBS Warburg, for violations of
28 securities laws and the loss these violations allegedly occasioned for its retail clients, independent

1 of Enron's actions. In fact, some of the claims made in this case allege strict liability claims based
2 on PaineWebber's alleged captive broker and underwriter status. Such issues have never been, and
3 can not be, alleged in the *Newby* or *Tittle* cases because this alleged title and position belong,
4 uniquely, to the Defendants in this case.

5 Second, the Plaintiffs object to the consolidation because the cases are not filed against
6 common defendants. Neither PaineWebber nor UBS Warburg are defendants in the consolidated
7 cases. Additionally, since Plaintiffs filed their suit eight months ago, neither the *Newby* nor the *Tittle*
8 plaintiffs have ever filed any claims against Defendants.

9 Third, the Plaintiffs object to the consolidation because the cases concern neither identical,
10 nor even similar, claims. While all of the cases assert claims under the PSLRA, *Lamkin* also includes
11 substantial claims based on strict liability under the 1933 Act with regard to PaineWebber. Such
12 claims are not issues in the consolidated cases. Further, the factual basis for the 1934 Act claims
13 differ substantially from those pled in the consolidated cases. The factual scenarios are so different,
14 in fact, that adding this case to the mix would serve only to cause confusion among the fact finders.

15 Fourth, the Plaintiffs object to the consolidation because the legal issues herein will not
16 substantially overlap with the consolidated cases. The plaintiffs in *Newby* and *Tittle* allege a virtual
17 global conspiracy between Enron, its accountants, lawyers, investment firms, banks and control
18 persons. *Lamkin* does not espouse this global conspiracy theory, but makes straightforward 10(b)
19 and 10b-5 liability allegations, in addition to its unique theory of Section 11 and Section 12(2)
20 liability that may only be alleged as to PaineWebber, not against any other investment bank, law
21 firm, or other defendant implicated in the consolidated cases.

22 Fifth, the Plaintiffs object to the consolidation because little or none of the discovery will be
23 common to the consolidated cases. The discovery that will proceed in the Enron litigation is
24 unnecessary for the prosecution of this case. The discovery to be conducted in this case, specifically
25 the depositions to be taken, regard few, if any, current Enron employees. It is highly prejudicial to
26 place the Parties under the discovery schedule of *Newby* and *Tittle* when their case regards so few
27 of the operative facts that a significant portion of the discovery in those cases will be worthless to
28 these Parties. The *Lamkin* Parties' discovery needs are different and will not be met by the discovery

1 in the consolidated cases. The *Lamkin* Parties should not be embroiled in a case of monolithic
2 proportions and drive up the cost exponentially. Furthermore, the *Lamkin* Parties will have to review
3 a multitude of orders, motions, pleadings and discovery that has virtually no bearing on this class
4 action, leading to a waste of time, economy and money. Finally, this class action will be appreciably
5 delayed in its prosecution because of the sheer size and bulk of the consolidated litigation.
6 Consolidation will postpone a timely decision in this case when all concerned had looked forward
7 to a relatively quick resolution.

8 Sixth, the purpose of consolidation is to promote economy in administration. The Plaintiffs
9 object to the consolidation because it promotes neither in this case. The operative facts in this case
10 differ from those in *Newby* and *Tittle*. Defendants' Motion to Dismiss is brought on different
11 grounds that those filed in *Newby* and *Tittle*. Discovery Motions, if any, will regard different people,
12 documents and issues. The consolidation would cause the parties unnecessary cost, delay and
13 confusion.

14 Seventh, the simple contrast between *Lamkin* and the consolidated ERISA case, *Tittle*, shows
15 the insufficient overlap of factual and/or legal issues for necessary under Rule 42. In *Tittle*, a
16 factually distinct putative class² alleges that defendants violated fiduciary duties imposed by the
17 ERISA statute. See *Tittle* Complaint ¶¶ 738-86. This is an entirely different legal theory than that
18 pursued in *Lamkin* – where Plaintiffs allege, in addition to securities fraud claims under the 1934 Act
19 and SEC Rule 10b-5, that UBS PaineWebber's role with regard to an employee stock option plan
20 renders UBS PaineWebber an "underwriter" and/or a "seller" for purposes of liability under Section
21 11 and/or 12(2) of the 1933 Act.

22 These legal theories not only fail to overlap, but pursuit of both claims in the same
23 proceeding would cause confusion, particularly at trial. "In securities actions where the complaints
24 are based on the same public statements and reports, consolidation is appropriate if there are

25
26 ²To be a member of the *Tittle* putative class, the employee must be a "participant" in either the "Enron
27 Corp. Stock Ownership Plan," the "Cash Balance Plan," the "Enron Corp. Savings Plan," or have received grants of
28 "phantom stock" from Enron. *Tittle* Complaint ¶ 1. In contrast, the *Lamkin* putative class includes only those
employees who participated in the Enron stock option plan or owned, held, sold, and/or acquired Enron stock
through a PaineWebber account. *Lamkin* Complaint ¶ 10.

1 common questions of law and fact and the defendants will not be prejudiced.” *Internet Law Library,*
2 *Inc. v. Southridge Capital Management, LLC*, 208 F.R.D. 59, 61 (S.D.N.Y. 2002) (emphasis added,
3 citations omitted). Here, however, the Defendants’ public statements and actions in *Lamkin* are not
4 challenged in *Newby* and *Tittle*, although consolidated complaints in *Newby* and *Tittle* were filed
5 **after** the *Lamkin* complaint was filed. In fact, neither UBS PaineWebber nor UBS Warburg are
6 defendants in either *Newby* or *Tittle*.

7 Eighth, where, as here, there is no substantial overlap in either the factual or legal issues,
8 consolidation is not appropriate. Notably, in a recent decision in the *WorldCom* matter, the court
9 declined to consolidate a case similar to *Lamkin* and with a larger case involving WorldCom and
10 WorldCom’s officers, directors, and auditors. The court there refused to consolidate because “the
11 factual and legal issues [in the two suits] are likely to be largely distinct.” *In re WorldCom, Inc., Sec.*
12 *& “ERISA” Litig.*, No. 1487, 2002 WL 31300772, at *2 (Jud. Pan. Mult. Lit. Oct., 8, 2002). The
13 same result is appropriate here.

14 Ninth, the Plaintiffs object to the consolidation because its timing is itself prejudicial. This
15 case was filed in March, 2002. Since then, the parties herein have proceeded with the litigation.
16 Plaintiffs have filed two amended pleadings. Plaintiffs obtained the designation of lead Plaintiffs
17 and counsel. Defendants filed two separate Motions to Dismiss. Plaintiffs responded to the pending
18 Motion. The parties have reached and filed an Agreed Scheduling Order regarding Class issues. The
19 parties herein have never had any indication that the case would be considered for consolidation into
20 the *Newby* and *Tittle* cases. To the contrary, the various scheduling orders entered by the Court and
21 progress of the litigation from March 7, 2002 through November 22, 2002 led the parties to believe
22 that the *Lamkin* matter was to proceed as a separate case. Indeed, the *Lamkin* parties have expended
23 substantial time and resources to prosecute and defend this matter, an effort that would have been
24 greatly reduced if the Court had consolidated the case early on, or even if the Court raised the issue
25 that consolidation was a possibility and requested the Parties to brief the issue.

26 Tenth, given that the motion to dismiss in *Lamkin* is fully briefed and ready for adjudication,
27 consolidation will bring the progress of *Lamkin* to a standstill at the very moment the case was ready
28 for disposition of this motion. Consolidation is simply not appropriate when, as here, "consolidation

1 will cause delay in the processing of one or more of the individual cases." Wright & Miller, Fed.
2 Practice & Procedure § 2382; see also *Henderson v. National R.R. Passenger Corp.*, 118 F.R.D.
3 440, 441 (N.D. Ill. 1987) (rejecting consolidation when it would cause a litigant to "suffer
4 unnecessary delay"). Moreover, consolidation would appear to render moot the substantial efforts
5 of the *Lamkin* Parties to this point.

6 Finally, the Plaintiffs object to the consolidation because they will be unfairly prejudiced
7 thereby. The Court's eight-month delay in consolidating *Lamkin* into *Tittle* deprived the *Lamkin*
8 parties of the opportunity to participate in class discovery or class certification briefing. In fact,
9 given the extreme differences in the cases, there is little chance that any discovery at all has been
10 conducted on the *Lamkin* class issues. This discovery and briefing is now closed.

11 All Parties in *Lamkin* respectfully request that the Court reconsider its order of November 22,
12 2002 consolidating the *Lamkin* matter into the *Newby* and *Tittle* matters and reverse that order,
13 allowing *Lamkin* to proceed as a separate case.

14 15 **REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW**

16 Alternatively, should the Court overrule the Plaintiffs' objections herein, the Plaintiffs
17 respectfully request that the Court issue findings of fact and conclusions of law that set out the
18 specific basis of the consolidation so that the Plaintiffs may understand which issues the Court
19 believes warrant a consolidation of this case.

20 21 **REQUEST FOR CLARIFICATION**

22 Consolidation "does not merge suits into a single cause, or change the rights of the parties,
23 or make those who are parties in one suit parties in another." *Langley v. Jackson State University*,
24 14 F.3d 1070, 1073 (5th Cir. 1994). In this case, given the very different nature of the *Newby* and
25 *Tittle* suits, the Plaintiffs are uncertain as to the effect and purpose of the consolidation. Thus,
26 should the Court overrule the Plaintiffs' objections to consolidation, the Plaintiffs respectfully
27 request that the Court clarify its consolidation order to explain the following:

28 Is *Lamkin* consolidated with *Newby* and *Tittle* solely for the purpose of resolving common

1 issues of fact and law and, if so, what is the nature and identity of those common issues?

2 Is *Lamkin* consolidated with *Newby* and *Tittle* solely for the purpose of pre-trial motions and
3 discovery, or is it consolidated for trial as well?

4 Is *Lamkin* stayed in its entirety, pending the outcome of the pending motions to dismiss in
5 the *Newby* and *Tittle* cases, despite the fact that like motions are ripe for consideration in *Lamkin*?

6 Will the Court's scheduling order be amended to allow the *Lamkin* parties to conduct
7 discovery and brief class issues?

8 If the Court denies the pending Motion to Dismiss in this case, and given that the great
9 majority of the discovery to be conducted in this case is not common to *Newby* and *Tittle*, how will
10 the *Lamkin* parties proceed with the discovery that is individual to this case?

11 Will the *Lamkin* parties be entitled to participate in the discovery conducted in the *Newby*
12 and *Tittle* cases?

13 Conversely, will the *Lamkin* parties be required to participate in all of the hearings, and
14 discovery conducted in the *Newby* and *Tittle* cases, even if there are no overlapping issues?

15 CONCLUSION

16 The *Lamkin* Plaintiffs respectfully request that the Court reconsider its order of
17 November 22, 2002 consolidating the *Lamkin* matter into the *Newby* and *Tittle* matters and vacate
18 that order, allowing *Lamkin* to proceed as a separate case. Alternatively, the *Lamkin* Plaintiffs
19 respectfully request that the Court issue findings of fact and conclusions of law to specify the
20 common issues that warrant a consolidation of the cases. Finally, should the Court overrule the
21 *Lamkin* Plaintiffs' objections, the Plaintiffs respectfully request that the Court clarify its
22 consolidation order to address the issues raised above.
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CERTIFICATE OF SERVICE

I certify that on December 6, 2002, a true and correct copy of the foregoing document was served upon Defendant, through its counsel of record, by fax transmission and First Class U.S. Mail.

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