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

United States District Court
Southern District of Texas
FILED

MAR 5 - 2003

Michael N. Milby, Clerk

IN RE ENRON SEC. LITIG.	§	
	§	
This document relates to:	§	
	§	
WASHINGTON STATE INVESTMENT BOARD and EMPLOYER-TEAMSTERS LOCAL NOS. 175 and 505 PENSION TRUST FUND, On Behalf of Themselves and All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-02-3401**
	§	**(Consolidated in Civil Action No.**
vs.	§	**H-01-3624)**
	§	**CLASS ACTION**
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	

JOINT MOTION OF CERTAIN DEFENDANTS TO STRIKE WASHINGTON STATE BOARD 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, Jerome Meyer, John Wakeham, Charls E. Walker, Herbert S. Winokur, Jr., John Urquhart, and Rebecca Mark-Jusbasche move to strike the purported "securities class action" complaint filed by Lead Plaintiff the Regents of the University of California and by "Washington State Investment Board and Employer-Teamsters Local Nos. 175 and 505 Pension Trust Fund, On Behalf of Themselves and All Others Similarly Situated," on grounds that it violates the Court's Scheduling Orders and constitutes an impermissible and

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unauthorized amendment to the consolidated class action complaint required by the Court's Orders in the consolidated securities action of *Newby, et al., v. Enron Corp., et al.,* Civil Action No. H-01-3624 ("*Newby*"). In support of this motion to strike, moving Defendants would respectfully show the Court as follows:

1. A purported "securities class action" complaint was filed on September 9, 2002, listing as captioned plaintiffs "Washington State Investment Board and Employer-Teamsters Local Nos. 175 and 505 Pension Trust Fund" and "all others similarly situated" (hereafter "*Washington Board* Class Action Complaint" or "CAC," attached as **Exhibit A**). Despite the caption, Court-appointed Lead Plaintiff the Regents of the University of California is specifically listed as plaintiff in ¶ 27, and the *Washington Board* CAC was filed by Milberg Weiss Bershad Hynes & Lerach LLP – the same firm appointed Lead Counsel in *Newby*. (*See* Exhibit A, cover page and signature block.)

2. Lead Plaintiff filed the *Washington Board* CAC five months after April 8, 2002 – the date set by this Court for the filing of a consolidated federal securities complaint; four months after May 8, 2002 – the date set by this Court for Defendants to file motions to dismiss; and ten 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 (*see* Scheduling Orders attached as **Exhibit B**).[1]

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[1]Moving Defendants believe the *Washington Board* claims against them are without merit, but Defendants obviously have had no chance to test or brief the merits of those claims. Filing of this motion to strike does not waive any other procedural or substantive challenges and defenses which Defendants (or any of them) may have to the *Washington Board* claims, including without limitation defective service and motions to dismiss.

3. By the device of filing the *Washington Board* CAC, Lead Plaintiff apparently seeks two ends. First, Lead Plaintiff seeks to expand to a longer class period the same 1934 Act claims made in *Newby,* by asserting class claims for an alleged Class Period of 9/9/97 to 10/18/98 (*Newby* alleged in ¶ 1 a Class Period between 10/19/98 and 11/27/01). Second, Lead Plaintiff seeks to expand the *Newby* 1933 Act claims, by adding two notes which Lead Plaintiff did not include in *Newby.*

4. That *Washington Board* is an unauthorized attempt to expand *Newby* is evident from the *Washington Board* 1934 Act alleged claims under §§ 10(b), 20(a) and Rule 10b-5, which mirror the *Newby* 1934 Act alleged claims. All of the 39 individuals and 16 entities sued in *Washington Board* under §§ 10(b), 20(a) and Rule 10b-5 (Arthur Andersen entities, law firms, banks) are already sued by Lead Plaintiff in *Newby.* (*Compare* Exhibit A, First Claim for Relief, ¶¶ 331-336, with *Newby* Complaint, First Claim for Relief, ¶¶ 992-997; a copy of the *Newby* Complaint without exhibits is attached as **Exhibit C**.) Indeed, the *Washington Board* 1934 Act claims are virtually identical to those already asserted in *Newby*: *Washington Board*'s "First Claim for Relief" (¶¶ 331-336) is word-for-word the same as *Newby's* First Claim for Relief (¶¶ 992-997), except for the paragraph numbers referenced and the additional defendants in *Newby. Id.* While the *Washington Board* CAC is shorter, its allegations echo *Newby,* with many *Newby* paragraphs and sections imported wholesale. Both complaints (1) chronicle alleged misstatements concerning Enron's financial condition and culminating in Enron's bankruptcy, *compare Washington Board* ¶¶ 5-14 and 106-116 with *Newby* ¶¶ 5-21 and 418-428; (2) address Enron's alleged improper use of off-balance sheet transactions and SPE's, *compare Washington Board* ¶¶ 126-137 with *Newby* ¶¶ 429-447; (3) allege abuse of mark-to-market accounting, *compare Washington Board* ¶¶ 141-145 with *Newby* ¶¶

533-537; (4) allege that certain bank transactions were essentially disguised loans, *compare Washington Board* ¶¶ 16-19, 117-121, and 122-124 with *Newby* ¶¶ 558-564 and 565-568; (5) allege Enron failed to make proposed audit adjustments and reclassifications, *compare Washington Board* ¶ 138 with *Newby* ¶ 517; (6) contend Enron's restatement constitutes an admission that its prior financial statements were materially false, *compare Washington Board* ¶¶ 139-140 with *Newby* ¶¶ 518-519; (7) charge defendants with failing to write down Enron's impaired long-term assets, *compare Washington Board* ¶¶ 153-159 and 160-164 with *Newby* ¶¶ 583-589 and 598-602; (8) allege that Enron's financial statements violated GAAP, *compare Washington Board* ¶ 167-168 with *Newby* ¶¶ 610-611; and (9) specifically devote a section to alleged faulty accounting by Andersen, *compare Washington Board* ¶¶ 286-321 with *Newby* ¶¶ 897-971.

5. Thus, *Washington Board* is a barely-disguised effort by Lead Plaintiff to re-plead *Newby* and to expand *Newby*'s 1934 Act class action claims by an additional year.

6. Second, *Washington Board* attempts to expand *Newby's* 1933 Act class claims by asserting §§ 11 and 15 claims concerning two Enron offerings which Lead Plaintiff omitted from the *Newby* complaint: the 6.40% Notes due 7/15/2006 ($250 million) and 6.95% Notes due 7/15/2028 ($250 million). (*Washington Board* CAC, Second Claim for Relief, ¶¶ 337-348.) *Washington Board's* Second Claim for Relief tracks the same 1933 Act claims in *Newby*, with many paragraphs lifted verbatim from *Newby*. *Compare*, e.g., *Washington Board* ¶¶ 341-348 with *Newby* ¶¶ 1009-1016. *Washington Board* sues the same defendants, plus J.P. Morgan, who are already sued in *Newby* for the notes for which Washington Board and Local Nos. 175 & 505 already serve as "Sub-Class Representative." *Newby* ¶ 1006. Furthermore, class claims – not individual claims – are clearly contemplated. While one sentence in ¶338 seems initially to limit this claim to the

Washington Board ["This Claim is brought....by the Washington Board"], every other reference in the Second Claim for Relief is either to "plaintiffs" or "Plaintiffs herein and the members of the Offering Subclasses." *See, e.g.*, ¶¶ 337 ("Plaintiffs"), 346-347 ("Plaintiffs herein and the members of the Offering Subclasses"), 348 ("plaintiffs"). Thus, *Washington Board*'s 1933 Act claims, like its 1934 Act claims, are intended to expand the class action claims made in *Newby*.

7. Dilatoriness and unexcused delay also warrant striking the *Washington Board* 1933 Act claims. Lead Plaintiff certainly knew of these specific alleged claims at the time of filing what was to be a consolidated class action complaint in *Newby*. Indeed, *Newby* omitted any of the alleged claims on the 6.40% Notes and the 6.95% Notes even while (1) listing Washington Board as a named plaintiff and alleging in ¶ 81(a) that Washington Board purchased these very notes – the 6.40% Notes and the 6.95% Notes; (2) listing Local Nos. 175 & 505 as named plaintiffs in *Newby* ¶ 81(c) for other notes; and (3) listing both Washington Board and Local Nos. 175 & 505 as "Sub-Class Representative" for the Enron Corp. 7.375% Notes due 5/15/2019. *Newby* ¶1006. However, Lead Plaintiff chose to omit from *Newby* any alleged claim on the 6.40% Notes or 6.95% Notes. *Newby* ¶ 1006. Briefing is now over on the *Newby* motions to dismiss – motions in which Defendants relied on the alleged class claims as constituted in the *Newby* Complaint. *Washington Board*'s alleged class action claims under §§ 11 and 15 should be stricken for inexcusable delay.

8. By this device – filing a new class action complaint which seeks to expand *Newby*'s 1934 Act claims via an expanded Class Period, and seeks to expand *Newby*'s 1933 Act claims to two issues omitted from *Newby*, after briefing has ended in the consolidated *Newby* class action – Lead

Plaintiff once again attempts an end run around this Court's scheduling orders and procedures.[2] In the February 15, 2002, Memorandum and Order appointing Milberg Weiss as Lead Counsel, this Court required that Lead Plaintiff represent the entire class. 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.**) Lead Plaintiff was to file one consolidated class action complaint – not a series of additional class complaints which – if permitted to stand – will lead to a seemingly endless cycle of motions to dismiss.

8. The *Washington Board* CAC is an unauthorized class action complaint which violates the schedule and structure put in place by this Court in managing this litigation. It should also be stricken as an unauthorized attempt to amend the *Newby* consolidated class action complaint. Having amended at least twice,[3] Lead Plaintiff effectively seeks to add still another amendment without asking leave of Court, in a fashion which strikes at the heart of the consolidation structure created by this Court. Lead Plaintiff now seeks to add claims, through this device, which Lead Plaintiff declined to include during the *Newby* briefing schedule, when Defendants could respond to them. 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

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[2]Similar issues have been raised to the Court by Certain Defendants' Motion to Strike *Pulsifer* Class Action Complaint, filed on September 27, 2002. The *Pulsifer* CAC similarly attempts to resurrect, on a class action basis, § 11 claims which Lead Plaintiff expressly disavowed during the briefing of *Newby*.

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

decided, in an orderly fashion. Indeed, the Washington Board 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." (Order attached as Exhibit C.) *Washington Board*'s class claims represent an unauthorized end run around not only the explicit schedules set by this Court, but consolidation as well.

9. Defendants do not, by this motion, seek to preclude the Washington State Investment Board, or Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund, from filing an individual complaint (as opposed to the present Class Action Complaint), using counsel other than present Lead Counsel, which counsel is appointed to 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 *Washington Board* Class Action Complaint as unauthorized, untimely, and inconsistent with this Court's Orders, without prejudice to the refiling of individual complaints by the Washington Board and Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund, that will be subject to any appropriate defenses or other objections. A proposed Order of dismissal is submitted herewith.

Respectfully submitted,

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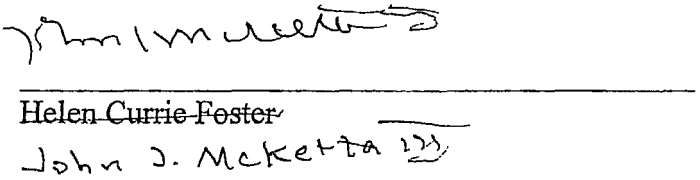
CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the above and foregoing document has been served on all counsel by posting the same to the website www.esl3624.com 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 4th day of March, 2003.



~~Helen Currie Foster~~
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The Exhibit(s) May

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The Service List

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