United States Courts
Southern District of Texas
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UNITED STATES DISTRICT COURT
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.	§	
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, vs. KENNETH L. LAY, et al., Defendants.	§	Civil Action No. 02-3401
	§	CLASS ACTION

PLAINTIFFS' OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO STRIKE THE WASHINGTON STATE INVESTMENT BOARD CLASS ACTION COMPLAINT

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I. INTRODUCTION

Moving defendants seek an order striking the now-consolidated class action complaint filed on September 9, 2002, by the Washington State Investment Board ("Washington") and Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund ("Local 175/505"), on behalf of purchasers of Enron's publicly traded securities between September 9, 1997 and October 18, 1998, including purchasers of Enron's 6.40% Notes due July 15, 2006 and 6.95% Notes due July 15, 2028 (the "Washington Complaint").[1] Defendants do not address the merits of the claims alleged in the Washington Complaint. The only issue in dispute is, according to defendants, whether the Washington Complaint is "unauthorized, untimely, and inconsistent with this Court's Orders." Motion at 7; *see also* Motion at 1-2. Defendants argue these claims were required to be brought in the Consolidated Complaint filed by Lead Plaintiff The Regents of the University of California ("The Regents" or "Lead Plaintiff").

Defendants' motion should be denied. Since Lead Plaintiff filed the Consolidated Complaint on April 8, 2002, additional class cases asserting claims outside the scope of the Consolidated Complaint have been filed by different plaintiffs and various counsel. As they recently did with the complaint filed in *Pulsifer v. Lay*, No. H-02-3010 ("*Pulsifer*"), defendants claim the Washington Complaint violates the Court's Scheduling Order and constitutes "an impermissible unauthorized amendment" to the Consolidated Complaint. Motion at 2. Neither assertion has merit. Indeed, on March 12, 2003 this Court rejected the same arguments defendants make here, and denied an indistinguishable motion to strike. The Court's Order entered March 12, 2003 is on point, and defendants' instant motion to strike should be denied for the same or similar reasons here. *See infra* §II.C. Further, there are additional reasons to deny this nearly identical motion to strike.

First, the Washington Complaint simply seeks to add claims that could not have been pleaded until enactment of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), which was signed into law July 30, 2002. For example, the Washington Complaint includes claims for purchasers of

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[1]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 ("defendants" or "moving defendants") filed their Joint Motion to Strike on March 5, 2003.

two securities, Enron's 6.40% Notes and 6.95% Notes, which were offered July 7, 1998 pursuant to a Registration Statement effective December 19, 1997. The basis for defendants' motion to strike is that those claims were not (but purportedly should have been) asserted by Lead Plaintiff in the Consolidated Complaint. Motion at 4-6. Yet, Lead Plaintiff could not have brought claims arising out of the purchase of those securities in the Consolidated Complaint filed April 8, 2002. *See infra* §II.B.

Second, the Court's scheduling orders have been vacated until after the Court rules on all pending motions to dismiss. *Newby v. Enron Corp.*, No. H-01-3624, Order (Dec. 18, 2002). This is a fact not discussed by the moving defendants. Indeed, as stated by the Court, the "litigation has raised numerous issues of first impression and the influx of additional cases since the filing of Lead Plaintiff's Consolidated Complaint" has complicated matters further. *Newby v. Enron Corp.*, No. H-01-3624, Order at 2 (Oct. 28, 2002), attached as Ex. 1. The delay in this case caused by the complexity of the litigation and the discovery stay mandated by the PSLRA ***benefits*** defendants, not plaintiffs, and clearly is not a basis for striking a meritorious complaint filed just months after the Consolidated Complaint's filing and weeks after passage of Sarbanes-Oxley. Lead Counsel filed the Washington Complaint because the plaintiffs therein seek meritorious claims outside of the claims in the Consolidated Complaint. This is perfectly reasonable and does not violate any Court order, as claimed by defendants. *See infra* §II.C.

Third, the moving defendants characterize the Washington Complaint as a nefarious, "unauthorized" attempt to amend the Consolidated Complaint. While that is clearly not the situation, even if the issue at this time were whether leave to amend should be granted, it would be well justified under the circumstances demonstrated herein. As this Court stated in its Order entered March 12, 2003:

> Moreover, it also makes practical sense, with respect to efficient use of time throughout discovery and class certification, to permit Lead Plaintiff, when it amends or supplements its complaint to comply with the Court's determinations on the motions to dismiss, to include the claims in the *Pulsifer* action in the amended or supplemented consolidated complaint. Thus the Court denies the motion to strike and grants Lead Plaintiff leave to supplement the consolidated complaint with the *Pulsifer* claims once the Court has finished reviewing the motions to dismiss and sets a deadline for such amendment.

Newby v. Enron Corp., No. H-01-3624, Memorandum and Order, at 59 (Mar. 12, 2003) ("March 12, 2003 Order"), relevant pages attached hereto as Ex. 2. Defendants' motion to strike the Washington Complaint should be denied, as was their motion to strike the *Pulsifer* complaint.

II. ARGUMENT

A. Standard of Review of Motion to Strike

Motions to strike under Rule 12(f) of the Federal Rules of Civil Procedure may only be directed at "any redundant, immaterial, impertinent, or scandalous matter" in pleadings. They are viewed with disfavor, as a potentially dilatory tactic, and not frequently granted. *Puckett v. United States*, 82 F. Supp. 2d 660, 662 (S.D. Tex. 1999), *aff'd without op.*, 213 F.3d 636 (5th Cir. 2000); 2 James W. Moore, *Moore's Federal Practice* §12.37[l], at 12-93 (3d ed. 1997).[2] This is because "'striking a portion of a pleading is a drastic remedy.'" *Stream v. Formosa Chem. & Fibre Corp.*, No. 92-1580, 1992 U.S. Dist. LEXIS 9544, at *2 (E.D. La. June 25, 1992). Indeed, motions to strike are generally not granted unless it is clear that the matter to be stricken could "'have no possible bearing upon the subject matter of the litigation.'" *Garcel, Inc. v. Hibernia Nat'l Bank*, No. 01-772, 2002 U.S. Dist. LEXIS 4129, at *9 (E.D. La. Mar. 5, 2002) (quoting *Sadler v. Benson Motors Corp.*, No. 97-1083, 1997 U.S. Dist. LEXIS 7118, at *2 (E.D. La. May 15, 1997)). Defendants do not meet the standard under Rule 12(f).

B. The Washington Complaint Could Not Have Been Filed Prior to July 30, 2002

Defendants argue the Washington Complaint should be stricken due to plaintiffs' "[d]ilatoriness and unexcused delay." *See* Motion at 5. Essentially, defendants are asserting that the claims raised in the Washington Complaint should have been included in the Consolidated Complaint filed by Lead Plaintiff on April 8, 2002. *Id.* at 2-5. Defendants are wrong.

On July 30, 2002, President George W. Bush signed Sarbanes-Oxley into law. Pub. L. 107-204. Sarbanes-Oxley lengthened the statute of limitations for claims brought under the federal securities laws "to permit defrauded investors a greater opportunity to recoup losses in cases where

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

those perpetrating the fraud have concealed it." 148 Cong. Rec. S6437 (daily ed. July 9, 2002) (statement of Sen. Daschle).

Section 804(a) of Sarbanes-Oxley amended 28 U.S.C. §1658 by adding subsection (b) which provides in full:

> Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of –
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

28 U.S.C. §1658(b). By enacting Sarbanes-Oxley, the United States Congress increased the statute of limitations for securities fraud actions from a one year/three year model to a two year/five year approach.

Just five weeks after Sarbanes-Oxley was enacted, the Washington Complaint was filed on behalf of the purchasers of Enron's publicly traded securities between September 9, 1997 and October 18, 1998.[3] Accordingly, by filing the Washington Complaint five weeks after the enactment of Sarbanes-Oxley, plaintiffs acted in the best interests of the class.

C. Plaintiffs Did Not Violate the Orders of this Court

Defendants claim the Washington Complaint is "unauthorized," "violates the schedule" and is "inconsistent with this Court's Orders." Motion at 3, 6-7. Plaintiffs sought to include in the Consolidated Complaint all valid claims of purchasers of Enron publicly-traded securities. It was 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. Plaintiffs Washington and Local 175/505, in consultation with The Regents, filed this action as a separate action to assert claims that could not

[3]In contrast, defendants waited six months after the filing of the Washington Complaint to file the instant Motion to Strike.

have been previously pleaded.[4] In filing the separate Washington Complaint, Washington and Local 175/505 have acted within the letter and the spirit of this Court's Orders.

Indeed, none of the Court's prior Orders barred the filing of the Washington Complaint. Rather, this Court's August 5, 2002 Order envisioned 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 Newby v. Enron Corp*, No. H-01-3624, Order at 5 (Aug. 5, 2002), attached as Ex. 4.

Accordingly, on September 9, 2002, Washington and Local 175/505 filed a class action complaint on behalf of purchasers of Enron's publicly traded securities between September 9, 1997 and October 18, 1998. That Complaint named as defendants the previously named 19 Enron Board Member Defendants, the Underwriter Defendants, and the Auditor Defendants. Lead Counsel, in serving the Washington Complaint, expressly acknowledged that pursuant to the prior Orders of this Court, the action would be stayed pending determination of the pending motions. In a cover letter dated September 16, 2002 addressed to defendants' counsel, counsel for Lead Plaintiff specifically informed the defendants that "[i]n accordance with Judge Harmon's recent orders, our view is that this [Washington] case will be stayed pending the Court's ruling on the motions to dismiss in *Regents v. Lay*." *See* letter dated September 16, 2002 from Helen J. Hodges to Defense Counsel, attached as Ex. 5.

Contrary to what defendants suggest, the Washington Complaint is not a "device" and there is nothing sinister about Lead Counsel's conduct. This Court should reject defendants' claims, just as it denied defendants' nearly identical motion to strike in *Pulsifer v. Lay*, No. H-02-3010, filed by Lead Counsel on August 9, 2002. *See* March 12, 2003 Order at 53-58, attached as Ex. 2.

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[4]The Court has ordered that the *Washington* action be consolidated into the *Newby* action. *See* Order dated October 16, 2002, attached as Ex. 3.

Defendants here make the same arguments they launched against *Pulsifer*. Like the Washington Complaint, *Pulsifer* was filed to toll the statute of limitations on claims that were not represented in the Consolidated Complaint. *Id.* at 55. (The only representative in the Consolidated Complaint who had standing to bring the claims alleged in *Pulsifer* had withdrawn. *Id.* at 54.) Like the Washington Complaint, *Pulsifer* was consolidated into this action. Also like this situation, in filing *Pulsifer*, Lead Counsel relied on the Court's Order dated August 5, 2002, which indicated complaints alleging claims outside the Consolidated Complaint would be filed and stayed until resolution of motions to dismiss. *Id.* at 56. And, as here, defendants claimed *Pulsifer* was "'an impermissible unauthorized amendment,'" and an "'end run ... around the explicit schedules set by this Court.'" *Id.* at 54-55.

The Court denied defendants' motion, agreeing with Lead Plaintiff that "the Court's order of August 5, 2002 clearly contemplated that claims outside those in the consolidated complaint would exist, with their claims stayed until closer to class certification stage and subject to the Court's rulings on the motions to dismiss." *Id.* at 56. *See also id.* at 59. Lead Plaintiff did not violate the Court's orders or schedule then, just as plaintiffs do not now violate the orders, "schedules" or "structure" of this Court.

D. The Washington State Complaint Was Not an Unauthorized Amendment to the Consolidated Complaint

The claims in the Washington Complaint were not pending on July 30, 2002. As discussed above, if they had been pled prior to that time, they would have been subject to a statute of limitations defense. If the Court finds it desirable for the claims in the Washington Complaint to be included in a supplement or amendment to the Consolidated Complaint, plaintiffs will prepare accordingly.

III. CONCLUSION

Despite defendants' rhetoric, plaintiffs have not attempted to evade this Court's orders. Rather, plaintiffs reasonably pursue all viable claims, within the procedural framework set by this Court. Defendants' motion to strike should be denied.

DATED: March 24, 2003

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 March 24, 2003, declarant served the following document:

PLAINTIFFS' OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO STRIKE THE WASHINGTON STATE INVESTMENT BOARD CLASS ACTION 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 24th day of March, 2003, at San Diego, California.

Deborah S. Granger

DEBORAH S. GRANGER

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March 24, 2003

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United States Courts
Southern District of Texas
ENTERED

OCT 2 8 2002

Michael N. Milby, Clerk

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

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	

ORDER

Pending before the Court is the Bank Defendants' opposed motion to modify scheduling order and request for expedited consideration (instrument #1080).

On August 5, 2002, this Court issued an order affirming a stay of all discovery in *Newby*. Subsequently Lead Plaintiff has filed a motion for class certification, the submission date for which under the docket control schedule, issued in March of this year, is November 1, 2002. The Bank Defendants in the instant motion and other parties in their objections to the motion for class certification seek a stay on briefing on the class certification issue(s) until they have been able to conduct what they deem to be necessary discovery.

In opposition the Lead Plaintiff quotes the Court's optimistic statement in its February 28, 2002 order: "It is the

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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." It argues that if the class certification phase is postponed for even a few months, Lead Plaintiff's ability to prepare for a trial on December 1, 2003 would be jeopardized. Lead Plaintiff insists that an adequate factual record exists for Defendants to file responses. Moreover, citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982), Lead Plaintiff notes that the Supreme Court has observed that at times a "rigorous analysis" of class certification prerequisites is possible without resorting to expensive discovery and that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claims." Such, argues Lead Plaintiff, is the case here. It also concedes, however, that "[w]hether discovery will be permitted in connection with a motion for a class certification determination 'lies within the sound discretion of the trial court.'" *Steward v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982).

This litigation has raised numerous issues of first impression and the influx of additional cases since the filing of Lead Plaintiff's Consolidated Complaint, including suits with new causes of action and new parties, has complicated the situation. The Court is intensively reviewing the motions to dismiss, which are its first priority, and hopes to begin issuing orders resolving them shortly. Until those motions are resolved, the

discovery stay will remain in effect. While appreciative of Lead Plaintiff's efforts to keep the schedule in place, the Court, with its limited personnel, cannot compete with the number of lawyers working for parties filing motions and responses in this case. Moreover, from its current view, the Court finds that the class certification will not be a simple matter, that modification of the current schedule is necessary, and that there should be some, expedited discovery permitted to Defendants once the stay has been lifted. Similarly, the Court will not deprive Lead Plaintiff of time needed to prepare for trial. A new schedule will be established a soon as the motions to dismiss have been resolved.

Accordingly, the Court

ORDERS that Bank Defendants' motion to modify schedule is GRANTED. The general discovery stay shall remain in effect until the Court orders otherwise.

SIGNED at Houston, Texas, this 28th day of October, 2002.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

United States Courts
Southern District of Texas
ENTERED
MAR 1 2 2003
Michael N. Milby, Clerk of Court

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

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, 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.	§	

MEMORANDUM AND ORDER REGARDING

ENRON OUTSIDE DIRECTOR DEFENDANTS' MOTIONS

Lead Plaintiff the Regents of the University of California's consolidated complaint in the above referenced putative class action, brought on behalf of purchasers of Enron Corporation's publicly traded equity and debt securities during a proposed federal Class Period from October 19, 1998 through November 27,

#1269

requisite scienter, i.e., intent to deceive or defraud, or reckless disregard." Tex. Civ. Stat. Ann. art. 531-33F(2) comment at 84 (Vernon's Supp. 2003). In sum, under the statute as revised in 1977, the standard of pleading and proving culpability is more specific than the earlier versions of the statute permitting liability "only if the aider was a 'person who sells.'"

PENDING MOTIONS

I. Joint Motion of Certain Defendants to Strike Pulsifer Class Action Complaint (#1042)

Because the motion to strike the Pulsifer class action complaint will affect the scope of Outside Directors' motions to dismiss, the Court addresses it first.

Member case H-02-3010, *Nathaniel Pulsifer, Trustee of the Shooters Hill Revocable Trust v. Kenneth L. Lay, et al.*, was filed in this court on August 9, 2002 by the firm of Milberg Weiss Bershad Hynes & Lerach, who also serve as Lead Counsel for Plaintiffs in *Newby*. *Pulsifer* was consolidated into *Newby* on August 22, 2002, months after Lead Plaintiff's consolidated complaint was filed. The *Pulsifer* complaint asserts a class action on behalf of purchasers of Enron 7% Exchangeable Notes due on July 31, 2002 and issued in a debt offering made pursuant to a July 23, 1999 Registration Statement and a Prospectus dated August 10, 1999, against Enron directors and officers, Enron's outside auditor

Arthur Andersen LLP, which consented to the issuance of its audit report, and the underwriters of the offering for violations of the 1933 Act.

The 7% Notes at issue were previously the basis of a claim brought by *Newby* Plaintiff Murray van de Velde, the sole class representative for that claim, regarding whom Lead Plaintiff filed a Notice of Withdrawal on July 31, 2002 (#979). The Notice of Withdrawal additionally stated that the "withdrawal will have no detrimental effect on the Class and will streamline the class certification discovery that is underway."

Defendants contend that the *Pulsifer* complaint is "an impermissible unauthorized amendment," filed without leave of Court, to Lead Plaintiff's consolidated *Newby* class action complaint and should be stricken. They argue that in effect, it "seeks to deconsolidate this case." *Pulsifer* was filed four months after the deadline for filing the consolidated complaint in *Newby* (April 8, 2002), three months after deadline for filing motions to dismiss (May 8, 2002), and six weeks after the deadline for Lead Plaintiff's reply briefs (June 24, 2002). Defendants emphasize that in their pleadings relating to their motions to dismiss, they repeatedly requested that the 7% Notes claim be dismissed with prejudice.[28] Furthermore, in its order of August 7, 2002 (#983),

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[28] In its memorandum and order entered on December 20, 2002 (#1194), this Court dismissed without prejudice van de Velde's § 11 claim on the 7% Notes, based on the withdrawal of van de Velde and

this Court stayed all claims or complaints not encompassed within the consolidated complaint. Defendants insist that the proposed *Newby* Class, of which Nathaniel Pulsifer is a member, is bound by Lead Plaintiff's representations to this Court that it was dismissing that claim and by the established docket control schedule in *Newby*. In sum, they maintain that the *Pulsifer* complaint is "an unauthorized end run not only around the explicit schedules set by this Court, but consolidation as well."

In opposition, Plaintiffs answer that the *Pulsifer* complaint was filed to toll the statute of limitations and ensure that its valid § 11, 7%-Note claims were not time-barred. They explain that they would be willing to amend the consolidated complaint to add the *Pulsifer* claims, but have not so moved to avoid piecemeal amendments while the motions to dismiss were pending. Plaintiffs also note the Defendants would not be prejudiced if the Court permitted Lead Plaintiff to amend the consolidated complaint to add the *Pulsifer* claims because even if amendment is not allowed, the claims will be pending against Defendants anyway, but simply as part of a separate action. Plaintiffs emphasize that no additional parties are named, nor are any truly new claims[29] asserted.

Defendants' unchallenged representation that Lead Plaintiff no longer wished to pursue it.

[29] In the consolidated complaint Lead Plaintiff did assert through van de Velde claims under § 11 and § 10(b) on behalf of the 7% Notes purchasers against the same Defendants as the *Pulsifer* complaint.

Furthermore none of the Court's orders barred the filing of claims or cases to keep the statute of limitations from running. In fact, the Court's order of August 5, 2002 clearly contemplated that claims outside those in the consolidated complaint would exist, with their claims stayed until closer to class certification stage and subject to the Court's rulings on the motions to dismiss.

Lead Plaintiff additionally clarifies that the first class action member suit that it filed on behalf of purchasers of the 7% notes was brought by Pulsifer & Associates, an investment advisor. Pulsifer & Associates then applied for appointment as Lead Plaintiff in *Newby* for a class composed of the 7% Note purchasers, but the Court decided to appoint one Lead Plaintiff to represent all Enron securities purchasers as a single class. Thereafter, the designated Lead Plaintiff incorporated into the consolidated complaint, (#441) filed on April 8, 2002, the claims of the 7% Notes purchasers in *Pulsifer & Associates*, added additional Defendants to those sued by the 7% Note purchasers, and brought 7% Note claims under both § 11 and § 10(b).[30] The consolidated complaint's Count III named Murray van de Velde as Plaintiff and representative of the class for purposes of the § 11, 7%-Note claims to avoid a collateral dispute about whether Pulsifer & Associates was the beneficial purchaser or a nominee for purchasers

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[30] Count I of the consolidated complaint asserted § 10(b) claims on behalf of a class of purchasers of *all* Enron publicly traded securities, without specifying the 7% Notes.

of the 7% Notes. Subsequently Defendants moved to dismiss the § 11 claims on the grounds that van de Velde did not acquire his notes until November 2001, after Enron had filed a Form 10-K for 2000, and had failed to plead reliance of the allegedly materially false and misleading registration statement, as required by § 11(a)(5), 15 U.S.C. § 77k(a)(5) (providing that a person who has acquired a security "after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effect date of the registration statement" must prove actual reliance on the registration statement to recover). Thus, once van de Velde had withdrawn, to insure that Plaintiffs had a 7% Note class representative with standing, Lead Plaintiff decided to substitute Nathaniel Pulsifer, although he is also a principal in Pulsifer & Associates, to sue this time in his capacity as a trustee of a family trust that had purchased 1000 7% Notes for the trust on January 25, 2000, before "the issuer had made generally available to its security 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). Because Lead Counsel was concerned that the claims would be time-barred by § 13 of the 1933 Act if not filed prior to the three year-anniversary of the first sale of the 7% Notes pursuant to the registration statement on August 10, 1999, and because the Court's order of August 5, 2002 indicated that it

expected other complaints would be filed with claims not embodied within the consolidated complaint and would stay those claims until it resolved the motions to dismiss the consolidated complaint, Lead Plaintiff filed the new suit on August 9, 1999 with a cover letter addressed to Defendants' counsel, stating, "In 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*."

Lead Plaintiff emphasizes that it did not voluntarily "waive," i.e., intentionally relinquish or abandon, all the 7% Note purchasers' § 11 claims. In response to Defendants' motions to dismiss, it did state that "Plaintiffs are no longer pursuing their claim with respect to the 7% Exchangeable Notes" and voluntarily withdrew van de Velde as a plaintiff in the face of the challenge that he had failed to plead proof of reliance. Lead Plaintiff also stated in the notice that van de Velde's withdrawal "will have not detrimental effect on the Class." Lead Counsel then reinstituted the § 11, 7%-Note claims, a mere nine days later, by filing the *Pulsifer* action. It never withdrew the § 10(b) claims for these investors.

Finally, urges Lead Plaintiff, if the Court decides to strike the *Pulsifer* complaint, it should alternatively also grant leave to amend the consolidated complaint in compliance with the policy of liberal amendment underlying Fed. R. Civ. P. 15(a).

After reviewing the matter, the Court agrees with Lead Plaintiff for the reasons it has argued that the motion to strike should be denied. Defendants have had sufficient notice and suffer no prejudice, especially in light of the stay on discovery, from the nine-day gap between the withdrawal of van de Velde and the instituting of the *Pulsifer* action to assert the same § 11 claims by 7% Note purchasers. Furthermore, the *Pulsifer* action is not the only one asserting claims based on the 7% notes that has been consolidated into *Newby*. *See, e.g., Headwaters Capital LLC and JAS Securities LLC v. Kenneth Lay et al.*, Member No. H-03-0341, order of consolidation on February 5, 2003 (#1244 in *Newby*). Moreover, it also makes practical sense, with respect to efficient use of time throughout discovery and class certification, to permit Lead Plaintiff, when it amends or supplements its complaint to comply with the Court's determinations on the motions to dismiss, to include the claims in the *Pulsifer* action in the amended or supplemented consolidated complaint. Thus the Court denies the motion to strike and grants Lead Plaintiff leave to supplement the consolidated complaint with the *Pulsifer* claims once the Court has finished reviewing the motions to dismiss and sets a deadline for such amendment.

II. Certain Current and Former Directors' Motion to Dismiss Pursuant to Fed. R. Civ. P. 8(b) [and the PSLRA] (#661)

Directors argue in generalized fashion that the complaint as

is MOOT.

SIGNED at Houston, Texas, this 12th day of March, 2003.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

United States Courts
Southern District of Texas
ENTERED

OCT 17 2002

Michael N. Milby, Clerk

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

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
WASHINGTON STATE INVESTMENT BOARD, ET AL., Plaintiffs, VS. KENNETH L. LAY, ET AL., Defendants	§ § § § § § § § § § §	CIVIL ACTION NO. H-02-3401

ORDER OF CONSOLIDATION

Pursuant to the order of consolidation entered in lead case H-01-3624, Newby v. Enron Corp. et al. on December 12, 2001, the above referenced case, H-02-3401, is hereby CONSOLIDATED into H-01-3624.

SIGNED at Houston, Texas, this 16th day of October, 2002.

Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk
By _____
Deputy Clerk

United States Courts
Southern District of Texas
ENTERED
AUG 07 2002
Michael N. Milby, Clerk

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

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	

ORDER

Pending before the Court in the above referenced consolidated action are the following motions:

(1) Movants LJM Cayman, L.P. Chewco Investments, L.P., and Michael J. Kopper's motion for entry of preliminary scheduling order for complaints consolidated into Newby and pursued by persons other than court-appointed Lead Plaintiff (instrument #610), joined by LJM2 Co-Investment, L.P. (#815);

(2) a request for clarification (within #815) from LJM2 Co-Investment, L.P., which has not been named as a Defendant in the Newby Consolidated Complaint filed by Lead Plaintiff, but is named as a Defendant in several putative securities class actions from

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other districts and other states that were transferred for consolidation into Newby by the Multidistrict Litigation Panel, of the following: since Lead Plaintiff's consolidated complaint governs at least until the time of class certification, whether any party named as a defendant in any putative class action other than the Consolidated Complaint need file any form of response or otherwise appear in any action until further order of the Court;

(3) American National Insurance Company et al.'s[1] motion to create subclass of plaintiffs asserting only Texas state-law claims and for appointment as subclass representative (#773);

(4) Preferred Purchasers' ongoing objection that Lead Plaintiff has failed to assert cognizable state-law claims on behalf of those who purchased Enron preferred stock;

(5) Hancock Plaintiffs' request for clarification of or, alternatively, objection to, the order of consolidation (#563) and motion for appointment of Lead Plaintiff and approval of Lead Counsel for a class action asserting claims on behalf of purchasers of non-publicly traded debt securities of Enron

[1] Plaintiffs in G-02-84, since remanded. Because others support the motion, it remains pending.

or Enron affiliates guaranteed directly or indirectly by Enron (#867); and

(6) Arthur Andersen LLP's motion for clarification (#895) concerning responsive pleadings in Rogers v. Duncan, Member Case No. H-02-2702.

As was to be expected in such a massive consolidated litigation composed of numerous cases in different procedural postures asserting different claims by different plaintiffs (some individuals and some on behalf of a proposed class) against different defendants based on different law, despite the central common core of facts and nature of the claims that justified consolidation, there is some confusion about requirements for those claims and parties that do not fit within the class defined, the causes of action asserted, and the defendants named in the Consolidated Complaint. The Court will attempt to clarify the situation.

Some of the member cases, whether brought in federal court on diversity grounds or asserting federal-law claims and state-law claims under supplemental jurisdiction, allege viable state-law claims against Defendants. Other Defendants have been sued under the federal securities laws in member suits, but not by Lead Plaintiff in the Consolidated Complaint. Because this Court established Lead Plaintiff's Consolidated Complaint as the governing pleading and imposed the PSLRA's discovery stay on everyone, some Defendants in these suits are uncertain whether they

need to file responsive pleadings to the claims in the member cases because the claims and/or the Defendants were not included in Lead Plaintiff's Consolidated Complaint. Clearly, one economical reason for utilization of a Lead Plaintiff and a Consolidated Complaint is to avoid having Defendants required to answer multiple complaints. For this reason, 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. The Court further

ORDERS that all discovery is STAYED, pursuant to the PSLRA,[2] until the Court has ruled on the pending motions to

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[2] Once any motion to dismiss claims arising under the federal securities statutes is filed by any defendant, the provision of the Private Securities Litigation Reform Act ("PSLRA"), automatically staying "all discovery," 15 U.S.C. § 78u-4(b)(3)(B), is triggered until the motions to dismiss are resolved. Section 78u-4(b)(3)(B), provides,

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.

The parties have not demonstrated that either of the two exceptions has been met here, i.e., that there is a threat that the evidence will be lost or destroyed or that particularized discovery is need to avoid irreparable harm and undue prejudice. "Undue prejudice" is harm that is "improper or unfair under the circumstances." CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d at 1265, citing Medical Imaging Centers of America, Inc. v. Lichtenstein, 917 F.Supp. 717, 720 (S.D. Ca. 1996). The delay inherent in the PSLRA's automatic discovery stay cannot constitute "undue" prejudice because it is neither improper nor unfair, but "prejudice that has been mandated by Congress after a balancing of various policy interests at stake in securities litigation, including a plaintiff's need to collect

dismiss. Once these rulings are made, discovery will proceed on all federal securities claims surviving the PSLRA's heightened pleading standards and on all related state-law or federal claims not pursued by Lead Plaintiff. If additional leeway is needed during discovery to pursue issues distinct from those in the Consolidated Complaint and if counsel are unable to agree how to proceed, the parties may file an appropriate motion.

Either 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 claims against Defendants not named in the Consolidated Complaint, 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 (or move for leave to file new pleadings or amend them if the Court's decisions or discovery indicate modification is appropriate). Once such pleadings are filed or reinstated, Defendants shall file timely responsive pleadings from the date of reinstatement and/or amendment, as ordered by the Court.

At that time, where needed, the parties may also move for distinct schedules, although continuing efforts should be made to coordinate the progress of all.

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and preserve evidence." Id. See generally Angell Investments, L.L.C. v. Purizer Corp., 177 F. Supp.2d 162 (N.D. Ill. 2001); In re CFS-Related Securities Fraud Litigation, 179 F. Supp.2d 1260, 1263-65 (N.D. Okla. 2001)(staying discovery even against a defendant that did not file a motion to dismiss).

Furthermore, it is evident that some groups of Plaintiffs do not fit into the class definition of the Consolidated Complaint or that Lead Plaintiff may not have standing to be a class representative of their discrete group, even though the discovery should be sufficiently broad to allow them the opportunity to obtain information about their distinct allegations. For example, the Preferred Purchasers sue on behalf of preferred stock purchasers, while the Hancock Plaintiffs sue on behalf non-publicly traded debt securities guaranteed directly or indirectly by Enron. As this Court has indicated, around the time of class certification the Court will deal with these issues through creation of classes or subclasses and with appropriate class representatives having standing to pursue those claims.

Still remaining is the issue of those tort claims asserted under the Texas Securities Act by the Preferred Purchasers that fall outside of the Class Period as defined in the Consolidated Complaint and that Lead Plaintiff has objected to adding to the Consolidated Complaint. After fully reviewing the extended briefing, this Court is persuaded by Lead Plaintiff's Response to Wolf Haldenstein's Additional Memorandum (#963), for the reasons expressed therein, that Preferred Purchasers' 1996-97 Class Period claims should not be pursued in Newby by Lead Plaintiff. Thus, as suggested by Lead Plaintiff, the Court grants leave to counsel for Preferred Purchasers to pursue these claims once the discovery stay is lifted following resolution of the motions to dismiss.

In compliance with the above decisions, the Court ORDERS the following regarding the pending motions:

(1) Movants LJM Cayman, L.P. Chewco Investments, L.P., and Michael J. Kopper's motion for entry of preliminary scheduling order (instrument #610) is currently DENIED;

(2) in response to the request from LJM2 Co-Investment, L.P. (#815), no party named as a defendant in any putative class action other than the Consolidated Complaint need file any form of response or otherwise appear in any actions until the Court lifts the discovery stay and reinstates such complaint on the Court's active docket;

(3) American National Insurance Company et al.'s motion to create subclass of plaintiffs asserting only Texas state-law claims and for appointment as subclass representative (#773) is currently DENIED;

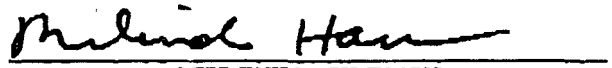
(4) Counsel for Preferred Purchasers shall independently prosecute Preferred Purchasers' tort claims under the Texas Securities Act after resolution of the pending motions to dismiss;

(5) Hancock Plaintiffs' request for clarification (#563) is GRANTED and motion

for appointment of Lead Plaintiff and approval of Lead Counsel (#867) is DENIED at this time; and

(6) Arthur Andersen LLP's motion for clarification (#895) is GRANTED.

SIGNED at Houston, Texas, this 5th of August, 2002.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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New York
San Francisco
Los Angeles
Boca Raton
Seattle

September 16, 2002

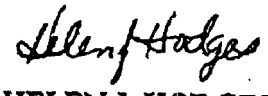
Defense Counsel

Re: Enron Securities Litigation - *Washington State Investment Board v. Lay, et al.*

Dear Counsel:

Enclosed is a complaint we have filed recently on behalf of those who purchased Enron publicly-traded securities between September 9, 1997 and October 18, 1998. Also enclosed are summons and a waiver of service agreement. Please sign the waiver and return it to me. In accordance with Judge Harmon's recent orders, our view is that this case will be stayed pending the Court's ruling on the motions to dismiss in *Regents v. Lay*.

Very truly yours,



HELEN J. HODGES

HJH:dsg

Enclosures

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