United States Courts
Southern District of Texas
FILED

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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)
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	
ENRON CORP., et al.,	§	
Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	
KENNETH LAY, et al.,	§	
Defendants.	§	
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, et al.	§	Civil Action No. H-01-3913
	§	(Consolidated Action)
Plaintiffs,	§	
v.	§	
ENRON CORP., et al.	§	
Defendants	§	

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CERTAIN OFFICER AND DIRECTOR DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S PROPOSED PRETRIAL SCHEDULING ORDER

Certain Officer and Director Defendants (the "Enron Insureds") suggest the following modifications with regard to five issues addressed in Lead Plaintiff's Proposed Pretrial Scheduling Order and related Memorandum and the Bank Defendants' (the "Banks") Response to Lead Plaintiff's Proposed Pretrial Scheduling Order:

A. Other Pending Cases:

The Banks propose procedures that could result in the potential premature reinstatement of *100+* of the consolidated cases. The Banks first proposed scheduling only nine consolidated cases into a single schedule in *Newby*, but recently amended its proposal to include 100+ cases. The Enron Insureds agree that the goal of coordinating discovery in the consolidated cases is laudable and is one of the primary purposes of the class action and MDL procedures. It is plainly desirable to know as early as practicable who the parties are, what issues have been asserted and which counsel will be serving in leadership capacities. The Enron Insureds disagree, however, that the proposals for the scheduling and administration of the consolidated cases made by the Banks are practical or necessary to achieve these goals. With regard to the issue of practicality, the list of consolidated cases first submitted by the Banks contained only the cases in which the Banks are defendants. As the amended list recognizes, there are at least ninety other similarly situated cases involving other defendants. It is impractical and imprudent to expect those plaintiffs to make a decision whether to pursue their cases separately before the scope of the class has been determined. For example, these plaintiffs could theoretically ask the Court to approve 100 separate cases now which, if reinstated, would require 100 motions to dismiss now which, in turn, would require the Court to address the 100

motions now, all without the benefit of knowing the parameters of the class. Lead Plaintiff has stated to the Enron Insureds that it recognizes the management issues inherent in having as many as 100 cases questioning consolidation. Rather than promoting efficiency, this proposal threatens to cause the very anarchy the class action and MDL rules are designed to prevent or ameliorate.

The Court's August 5 Order (filed August 7) suggests that these decisions occur around the time of class certification, which is the earliest time such determination can reasonably be expected:

> "Either shortly before or after the time of class certification . . ., 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. . . ."

Only at the time of the class certification proceedings will the Court know which plaintiffs in the consolidated cases have elected to remain in the putative class or have opted out. Once that is clear, the individual actions filed by plaintiffs who elect to remain in the class can be dismissed administratively. The Court can then proceed to enter a scheduling order for appropriate motions regarding the opt out actions, **if there are any**. All of this can be done without great inefficiencies in the discovery process.

For the time being, this approach will streamline the proceedings significantly. It avoids the need for the Court and the parties to file motions addressed to individual actions that may later be rendered moot by the scope of the class certification order. It conserves the parties' resources and need not be a cause for delay. The discovery that will occur prior to the class certification decision involves document production and the class certification issues. The Court has the authority to coordinate discovery in all consolidated cases throughout this period and even afterwards under the MDL guidelines, while implementing a procedure for the orderly disposition of appropriate motions

addressed to the issues in the consolidated cases.

B. Fact Depositions:

In discussions with Lead Plaintiff, the Enron Insureds agreed with the proposition that it made sense to postpone fact depositions until the conclusion of document production, so as to avoid having the same witness deposed on multiple occasions. Lead Plaintiff now refuses to incorporate this principle into the Order. Instead, Lead Plaintiff suggests that a specific date for commencement of depositions would foreclose "taking a witness's testimony at some earlier date in discovery." Lead Plaintiff's position allows the exception to negate the principle and should not be controlling for the following reasons:

- Defendants estimate that during the document production period proposed (5/28/03 - 10/01/03), at least 50 million pages of documents will be produced by the various parties.
- It is advisable and prudent not to go forward with fact depositions until the parties have had an opportunity to review these documents, in part to prevent the necessity of deposing a witness more than once.
- If fact depositions prior to the date specified for commencement of depositions become necessary, the parties can agree to the exception or in the absence of agreement, the Court can so order if justification is presented.

The principle, however, should be made clear in the Order: No fact depositions, other than by agreement of the parties or further order of the Court, should take place before January 10, 2004.

C. Mediation:

Lead Plaintiff has not accurately presented the Enron Insureds' suggestion of a mediation date. The Enron Insureds are amenable to settlement discussions at any time, the earlier the better, and have so stated to Lead Counsel. Unfortunately, Lead Counsel has repeatedly said that he was not in a position to have settlement discussions with the Enron Insureds alone. It was only in that

context, and in an effort to ensure that settlement negotiations would occur at some point, that the Enron Insureds suggested the March 2004 date for mediation. The Enron Insureds have been and remain advocates for mediation/settlement at any time and favor the earliest possible date.

D. Expert Discovery/Summary Judgment:

The Enron Insureds support the Bank Defendants' position with regard to the time for expert discovery, summary judgment motions and the interplay between the two.

E. Confidentiality:

The Enron Insureds are unsure what Lead Plaintiff intended when it wrote "the Court's analysis in its March 27, 2003 Order on Enron's confidentiality motion should be applied to all parties in this litigation." Enron, as a corporate party, is differently situated than are individuals who have constitutional and personal privacy concerns that warrant the entry of a protective order. The Court has made clear that it will consider properly supported motions for protection. Several of the Enron Insureds have filed such motions. Those motions should be dealt with on their terms, in specific, and in accordance with the Court's earlier indication that it would consider properly supported motions when they were filed. A blanket denial of the individual defendants' motions, based upon an earlier ruling with regard to Enron's production, would be inappropriate.

The Enron Insureds renew their request for a hearing with regard to the above items in the Lead Plaintiff's Proposed Pretrial Scheduling Order.

Respectfully submitted,

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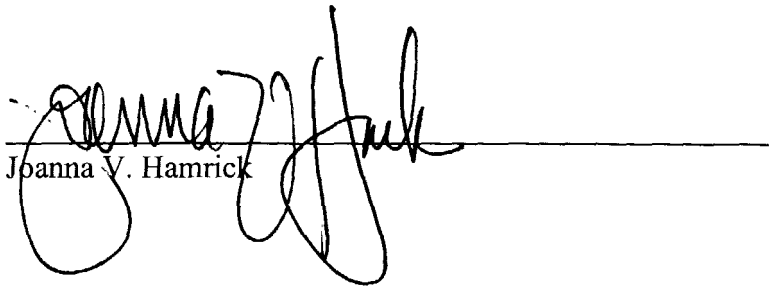
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served on all counsel of record on the Service List on May 23, 2003 via posting to www.esl3624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearing Via Independent Website.



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