

MAY 23 2003

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ MDL Docket No. 1446

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

Civil Action No. H-01-3624
(Consolidated)

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.

**BANK DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S
PROPOSED PRETRIAL SCHEDULING ORDER**

1412

Defendants J.P. Morgan Chase & Co., Citigroup, Inc., Credit Suisse First Boston Corporation, Canadian Imperial Bank of Commerce, Bank of America Corp, Merrill Lynch & Co., Inc., Barclays PLC and Lehman Brothers Holding, Inc. (collectively the "Bank Defendants") respectfully submit this response to Lead Plaintiff The Regents of California's ("Plaintiff's") Proposed Pretrial Scheduling Order and Memorandum in support thereof, submitted May 16, 2003.

Preliminary Statement

Although the Bank Defendants are generally in agreement with most aspects of Plaintiff's proposed scheduling order, Plaintiff's submissions do not adequately address the effect of Plaintiff's proposed amended complaint or the fact that there are now over 100 cases consolidated for coordinated proceedings with Newby. Although Plaintiff represented in its May 6, 2003 submission that its amendment would simply "correct the deficiencies" and "make other clarifying amendments", the amended complaint instead significantly expands the claims, parties, transactions and securities at issue in Newby. As a result, Newby now encompasses the transactions--and thus legal and factual issues--also raised in many of the consolidated cases, making a single, coordinated schedule among all consolidated actions the most efficient way to proceed. In addition, there are a handful of other aspects of the Plaintiff's proposed schedule that the Bank Defendants believe require some adjustment. Accordingly, we respectfully suggest five adjustments to the Plaintiff's proposed schedule: (1) all consolidated cases should be on a single schedule coordinated with Newby; (2) an additional two weeks should be added to the

time for all defendants to respond to the amended complaint;¹ (3) the schedule for defendants' document productions should account for confidentiality motions and other protections; (4) the schedule for expert reports should be adjusted slightly to provide sufficient time for defendants to respond to Plaintiff's submissions; and (5) the summary judgment schedule should be adjusted to enable the parties to make appropriate motions at any time and to provide the Court with adequate time to consider such motions in advance of trial. A proposed scheduling order reflecting these adjustments is filed herewith.

Bank Defendants' Proposed Adjustments

1. There Should Be A Single Schedule For All Consolidated Cases.

The Bank Defendants propose that there should be a single scheduling order to govern all consolidated cases coordinated before this Court.² As Plaintiff has recognized,

¹ Indeed, as discussed below, many of the new bank affiliates added to this case for the first time through the amended complaint have at least until mid-July to respond to the amended complaint by virtue of their acceptance of the Plaintiff's request for waiver of service under Rule 4(d) of the Federal Rules of Civil Procedure. See infra at 8.

² Just this week, the Honorable Denise L. Cote, the MDL judge presiding over the consolidated WorldCom securities litigation in the Southern District of New York, ruled that discovery in the many cases before her would be coordinated:

"[I]t is essential that there be a sensible structure in place for coordinating the Individual Actions. A failure to establish such a structure will be wasteful for everyone. Without a working structure, defense counsel, Lead Counsel and the Court will have to spend time addressing the same issues repeatedly with the many different law firms representing plaintiffs in the Individual Actions. This is not only inefficient and costly, but will also divert resources from the merits of the WorldCom litigation and result in unnecessary delay."

See In re WorldCom Sec. Litig., 02-Civ.-3288 (DLC), slip op. at 7 (S.D.N.Y. May 22, 2003) (an electronic copy of which is attached hereto as Ex. C). Judge Cote also noted that discovery between the securities and ERISA litigations should also be coordinated. Id. at 10 n.6.

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coordination of motion practice and discovery will conserve judicial resources, minimize the burden of duplication on the Court, the parties and non-parties, and maximize consistency and efficiency.³ See Plaintiff Mem. at 1.

To accomplish across-the-board coordination through discovery,⁴ the Bank Defendants propose that the Court adhere to the basic approach set forth in its August 7, 2002 Order ("August 7 Order"), in which the Court suggested that all consolidated cases should presumptively follow a coordinated schedule. See Order of August 7, 2002 at 5 (stating that "continuing efforts should be made to coordinate the progress of all [consolidated cases]"). Under the August 7 Order, however, consolidated cases are not automatically governed by the same schedule as Newby. Instead, those cases were stayed pending proceedings on the lead consolidated complaint, and plaintiffs in the consolidated actions were permitted to move to reinstate their claims "[e]ither shortly before or after the time of class certification" in Newby. See id. at 4-5. Absent some modification, those plaintiffs will not be able to move to have their cases reinstated until at least October under Plaintiff's proposed schedule. Accordingly, and for the reasons that follow, we believe it would be most efficient for the Court to modify its August 7 Order in certain respects.

Plaintiff's amended complaint has profound implications for the scheduling of the more than 100 cases--at least 20 of which are class actions--that have been consolidated

³ Plaintiff supports coordination for nine of the consolidated cases, but for some reason stops short of seeking it for all consolidated cases. See Lead Plaintiff's Mem. In Supp. of Proposed Pretrial Scheduling Order ("Plaintiff Mem.") at 1 (enumerating nine candidate cases for coordination).

⁴ The Bank Defendants do not at this stage address any plan for the consolidated cases after the close of fact discovery.

with Newby (or transferred and currently pending consolidation). See Ex. A (list of consolidated and transferred cases); Ex. B (list of consolidated putative class actions). Many of the consolidated cases--more than just the nine identified by Plaintiff--address the same transactions and issues now at issue in Newby. For example:

- In Conseco Annuity Assurance Co. v. Citigroup, (03-CV-1559, filed on March 5, 2003), the plaintiff (“CAA”) brings a putative class action suit on behalf of all persons and entities who purchased Yosemite I, Yosemite II, Enron CLN I and II, and Enron Euro and Sterling Credit Linked Notes. These are the exact same securities which Plaintiff’s amended complaint now covers. See Newby Am. Compl. ¶ 641.2; cf. Conseco Compl. ¶ 2. Moreover, both CAA and Plaintiff assert violations of the same sections of the Securities Act of 1933 (the “’33 Act”) and the Securities Exchange Act of 1934 (the “’34 Act”) based on the same legal theories, against some of the same defendants. See Newby Am. Compl. ¶¶ 983-1016.28; cf. Conseco Compl. ¶¶ 303-344.⁵
- In Abbey National Treasury Services plc v. Credit Suisse First Boston Corp., et al. (H-02-3869, filed in the S.D. Tex. on Oct. 11, 2002, and 02-CV-8137, filed in the S.D.N.Y. on Oct. 11, 2002 (consolidation pending)) and Internationale Kapitalanlagegesellschaft mbH, et al. v. Credit Suisse First Boston Corp., et al. (H-02-4080, filed in the S.D. Tex. on Oct. 29, 2002, and H-03-1248, filed in the S.D.N.Y. on Oct. 29, 2002), Plaintiffs have brought separate individual actions for their purchases of senior secured notes issued by Marlin Water Trust II, a security now covered by Plaintiff’s amended complaint against many of the same defendants. See Newby Am. Compl. ¶¶ 986 n. 20 & 1016.5; Abbey Am. Compl. ¶ 1; Internationale Compl. ¶ 1. All of these actions assert the same violations of the ’33 and ’34 Acts for the same alleged misstatements and omissions in the offering documents for those securities.
- In Variable Annuity Life Insurance Company, et al. v. Credit Suisse First Boston, Inc., et al., (H-02-3680, filed on Sept. 29, 2002), plaintiffs have filed an individual action for their purchases of notes issued in two offerings by the Osprey Trust. VALIC Am. Compl. ¶¶ 1-2. Those same Osprey offerings are now at issue in the Newby amended complaint, again asserting overlapping causes of action and again against the same defendants. See Newby Am. Compl. ¶¶ 986 n. 20 & 1016.5.

⁵ It appears that Conseco was filed as a replacement to the class action claims in Hudson Soft Co. Ltd. v. Credit Suisse First Boston Corp., et al., No. 01-CV-5768 (S.D.N.Y.), also consolidated with Newby (as H-03-0860).

Moreover, at a recent meet-and-confer, Plaintiff's counsel indicated that the number of depositions that Plaintiff intends to take in Newby is "closer to 500 than 100." With the prospect of impending depositions in multiple overlapping cases of hundreds of deponents from Enron, Andersen, the financial institutions, the law firms, and non-parties, it is critical that depositions be coordinated to the fullest extent possible so that each witness be deposed in all cases only once.⁶ Accord Plaintiff Mem. at 1 ("With the prospect of impending depositions of hundreds of different deponents from various entities, it is critical, to avoid delay and duplication--especially, taking a deposition only once--that all discovery, if at all possible, be coordinated and occur simultaneously."); In re WorldCom Sec. Litig., 02-Civ.-3288 (DLC), slip op. at 14 (S.D.N.Y. May 22, 2003) ("Unless otherwise ordered by the Court, an individual will be deposed one time and that deposition may be used in any of the WorldCom actions assigned to this Court."). This can only occur if all of the related cases are operating under the same schedule, so that all discovery and any discovery disputes can occur and be resolved simultaneously. In order to ensure prompt adjudication and conserve the resources of the Court and the parties and non-parties, all of these cases should be subject to coordinated motion practice and discovery.⁷

⁶ To that end, the Bank Defendants are working on a proposed deposition protocol to be shared with and negotiated among all parties so that a protocol may be in place in advance of deposition discovery.

⁷ The Court should also be aware that there are other pending cases not subject to the August 7 Order that are operating under different scheduling regimes. For instance, Connecticut Resources Recovery Authority v. Kenneth L. Lay, et. al., No.----- (D. Conn.), which has been transferred but not yet consolidated, does not appear to be governed by the August 7 Order and is not yet subject to any scheduling order. Still other cases, like the four American National cases, are stayed by the Court's Order of November 12, 2002, until the Court determines whether to keep those cases or remand

Based on the foregoing, and in order to prepare the consolidated cases for discovery on the same schedule as Newby, we respectfully request that the Court modify its August 7 Order. We propose that all plaintiffs in consolidated actions who wish to maintain their suits move to reinstate their cases immediately, and that they be afforded until 30 days from the entry of a scheduling order either to: (1) file an amended complaint; (2) file a notice of intent to stand on their complaint as filed; or (3) file a notice of dismissal of the complaint without prejudice in contemplation of joining the class as pursued by Plaintiff and lead counsel in Newby. Defendants will then have until 30 days from the date on which plaintiffs in the consolidated cases make such filings to respond to the operative complaint in each remaining case. If motions to dismiss are filed, any oppositions would be due 30 days from the date of filing, with replies due 30 days from the filing of the oppositions. Under this proposed schedule the Court would have time to decide any motions before depositions are set to begin. Such coordination would:

- Lead to significantly fewer separate motions to dismiss filed, which will ultimately lead to more prompt and efficient adjudication;

them to state court. See Order of Nov. 12, 2002. Another category of cases are those such as Silvercreek Management Inc., et. al. v. Salomon Smith Barney Inc., et. al., No. 02-CV-413 (S.D.N.Y.), which are subject to independent stipulations.

Furthermore, although we believe it premature to deal with the issue until a scheduling order is in place, the Court should be aware that there are also several cases involving some of the same issues and defendants pending in various state courts around the country. See, e.g. Pacific Inv. Mgmt. Co., LLC, et al. v. Citigroup, Inc., et al., Case No. 02CC00300 (Cal. Super. Ct.); OCM Opportunities Fund III, L.P., et al. v. Citigroup, Inc., et al., Case No. BC283342 (Cal. Super. Ct.); Principal Global Investors LLC, et al. v. Citigroup, Inc., et al., Law No. 90942 (Iowa Dist. Ct.); AUSA Life Ins. Co., Inc., et al. v. Citigroup, Inc., et al., No. LACV 0044263 (Iowa Dist. Ct.). Once a schedule is in place, the Bank Defendants intend to seek relief from the state court judges (and, if necessary, this Court) to effectuate coordination between those cases and Newby.

- Aid the Court in deciding similar legal and factual issues at the same time, maximizing both efficiency and consistency;
 - Reduce the total number of depositions and the burden on defendants and non-parties, since each deponent will have his/her deposition taken only once; and
 - Accelerate the discovery process while reducing the number of disputes for the Court to resolve.
2. **Additional Time To Respond To The Amended Complaint Is Warranted.**

Plaintiff has proposed that all defendants be required to respond to the amended complaint by June 18, 2003.⁸ The Bank Defendants request two additional weeks, until July 1, 2003, for all defendants to respond to the amended complaint. This limited additional time is warranted for at least two reasons.

First, Plaintiff has made significant substantive additions and modifications to its complaint.⁹ The amended complaint is 649 pages--149 pages longer than the original Newby complaint, not including a new appendix of an additional 130 pages. Plaintiff's amended complaint adds more than 20 new parties, purports to allege for the first time claims under Section 12(a)(2) of the '33 Act, attempts to resurrect previously dismissed claims under Section 10(b) and extends that claim against new parties, endeavors to supplement the deficient scienter allegations, and revises the claims under the Texas Securities Act. In doing so, the amendment makes numerous new allegations not previously asserted in the original complaint. See, e.g., Newby Am. Compl. ¶ 100(b) (new allegations relating to Hawaii 125-0 and Chewco); id. ¶¶ 101(b), 101(c) (new

⁸ Because leave to file the amended complaint has not yet been granted, the time to respond under Federal Rule of Civil Procedure 15(a) is not set.

⁹ The Bank Defendants note that the amended complaint in Newby has a number of serious infirmities (including material deficiencies in the allegations against the newly

allegations about the Sundance, Bacchus, Roosevelt, Truman, Nighthawk, Nahinni, and Destec transactions); id. ¶ 641.2 (new allegations relating to offerings by Osprey Trust, Osprey Trust I, Yosemite Trust I, Enron Credit Linked Notes Trust, Euro Credit Linked Notes Trust I, Enron Credit Linked Notes II, Enron Sterling Credit Linked Notes Trust, and Marlin Water Trust II); id. ¶¶ 742.7, 742.16 (new allegations about the Nigerian Barge and Power Swap transactions). Accordingly, some additional time is warranted for defendants (and in particular the newly added defendants) to analyze the complaint in light of prior rulings.

Second, certain newly added defendants have not yet been served, while others, at Plaintiff's request, have agreed to waive service and therefore have 60 days--or until approximately July 15, 2003--to respond to the amended complaint.¹⁰ See Fed. R. Civ. P. 4(d). The Bank Defendants' proposal of July 1, 2003, represents a reasonable compromise, allowing Plaintiff sufficient time to effect service and putting all served defendants on the same schedule.

In light of the substantial changes to the complaint, this small amount of additional time before responses will not delay the ultimate resolution of the case.

3. The Schedule For Substantial Completion of Document Production Should Account for Confidentiality Motions And Other Protections.

The Bank Defendants believe that they can achieve substantial completion of document production by October 1, 2003. By substantial completion, the Bank Defendants mean that by October 1, and subject to the reservations below, they will have

added defendants) and that many, if not all, Bank Defendants intend to file motions to dismiss the amended complaint, either in whole or in part.

¹⁰ Plaintiff made its requests for waiver of service on or about May 16, 2003.

completed production of nearly all of their documents, and that for any documents not produced by that date there would be a specific and articulated reason why production was not possible. There are three reservations on the Bank Defendants' ability to achieve substantial completion by that date.

First, in an effort to expedite production to Plaintiff, the Bank Defendants have requested Plaintiff's agreement on an interim confidentiality agreement pending the filing of confidentiality motions in accordance with the Court's March 27, 2003 Order. In light of this Court's ruling on Enron's request for confidential treatment, the Bank Defendants are preparing particularized showings of need with respect to particularized categories of documents. To avoid any delay in making documents available to Plaintiff, the Bank Defendants have proposed to Plaintiff an interim agreement--similar to the one agreed to between Plaintiff and Enron--to preserve the confidential status of all documents only until the producing party files its motion for confidential treatment on particularized categories of documents. Such motions will be made no later than October 1, 2003. Although this proposal would avoid any delay in production and would enable Plaintiff to review the Bank Defendants' documents while the confidentiality issues are litigated, Plaintiff rejected this proposal.

Second, the October 1, 2003 completion date would be subject to adjustment as needed based on any stay of discovery pursuant to the Private Securities Litigation Reform Act in connection with any motions to dismiss the amended complaint.¹¹

¹¹ Although they would not impact the schedule for producing documents, any stays of proceedings with respect to indicted individuals could also affect the overall discovery schedule.

Third, the Bank Defendants' ability to substantially complete document production by October 1 extends only to agreed-upon categories of responsive, non-privileged documents, i.e., those not subject to unresolved objections, which the Bank Defendants currently estimate will be in the millions of pages. If Plaintiff insists on the production of documents beyond the millions of pages the Bank Defendants have already agreed to produce, and if there is motion practice with respect to such objections that is resolved in Plaintiff's favor, the time needed for producing such additional documents may extend beyond October 1, depending on the categories and volumes at issue.

4. The Schedule For Expert Disclosures Should Be Adjusted.

Plaintiff has proposed that its expert reports be submitted on January 10, 2005; that defendants' expert reports be submitted on February 15; and that Plaintiff's expert rebuttal reports (if any) be submitted on March 15. The Bank Defendants believe that two slight adjustments to the schedule for expert reports are appropriate.

First, the Bank Defendants believe that Plaintiff should be able to submit its expert reports three days earlier, on January 7, 2005, and that defendants' submissions should be due February 25, 2005. In cases of this magnitude and complexity, and given the number of reports that defendants are likely to receive and the number of issues likely to be addressed by experts, this small adjustment in the time period would give defendants a more reasonable period of time to submit their expert reports in response to Plaintiff's submissions. (The Bank Defendants do not, however, object to the three-month period, from January 7 or 10, 2005, through April 15, 2005, for expert depositions.)

Second, the Bank Defendants believe that rebuttal reports of new experts not previously disclosed should only be allowed with permission of the Court, upon a showing of good cause.

5. The Schedule for Summary Judgment Should Be Adjusted To Ensure That The Court Has An Adequate Opportunity To Consider Those Motions In Advance of Trial.

Plaintiff has proposed a single, inflexible schedule for all summary judgment motions that requires all motions to be filed by May 2, 2005; that permits oppositions to be filed on July 1, 2005 (regardless of when the summary judgment motion is filed); and that requires replies no sooner than August 1, 2005 (again, regardless of the motion's filing date). The effect of this proposal is that summary judgment motions by all parties cannot be fully briefed--no matter how early they are filed--until August 1, 2005, giving the Court just ten weeks to decide all summary judgment motions in advance of Plaintiff's proposed October 2005 trial date.

The Bank Defendants believe that defendants should be permitted to make summary judgment motions--and have them briefed and ready for the Court's consideration--at any appropriate time after discovery has commenced. Early summary judgment motions, if made in appropriate circumstances, may both simplify the case and offer relief for deserving Defendants from the expensive process of defending these actions. Plaintiff has offered no reason why such motions must wait until after discovery is closed, nor is such a requirement consistent with the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 56 (stating that a party may "at any time. . . move with or without supporting affidavits for summary judgment"). Indeed, at the Court's direction, certain defendants have already moved for summary judgment on the issue of the real party in interest, and the Court has begun ruling on those motions. Moreover, given the number

of parties and issues in this case, Plaintiff's proposal that the Court wait until August 1, 2005, to receive all fully-briefed summary judgment motions virtually ensures that the Court will not have adequate time to fully consider and rule upon those motions in advance of trial.¹²

To avoid such burden on the Court, and to provide adequate time to consider summary judgment motions, the Bank Defendants propose that summary judgment motions may be filed any time prior to May 2, 2005; that the oppositions to each summary judgment motion be filed and served within 45 days after filing and service of that motion; and that the reply to each summary judgment motion be filed and served within 30 days after the filing and service of the opposition. If it appears that any summary judgment motion is premature, the opposing party shall meet and confer with the moving party in good faith and, absent agreement to withdraw or postpone the motion, the opposing party may seek scheduling relief from the Court pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

¹² There are currently 75 defendants named in the amended complaint, and Plaintiff has stated that it may seek to add even more defendants in a subsequent amendment. If only one-third of the defendants currently named file motions for summary judgment, the Court will receive 25 motions, all of which will be based on an extensive record of millions of pages of documents and hundreds of depositions. The Court's ruling on those motions will obviously impact the trial preparation of the parties. It is inefficient (and unfair) to demand that the Court rule on numerous complex motions for summary judgment in ten weeks; it is similarly inefficient and unfair to deprive the parties of the benefit of the Court's rulings until the eve of trial.

Conclusion

For the reasons set forth above, the Bank Defendants respectfully request that the Court enter the Bank Defendants' proposed scheduling order filed herewith.

Dated: May 23, 2003

Respectfully submitted,

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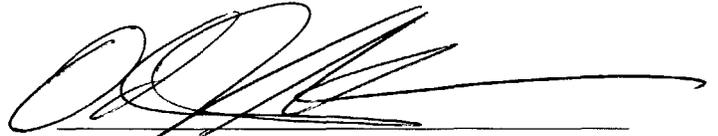
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing instrument was electronically served on the attorneys of record for all parties to the above cause in accordance with the Court's orders signed June 5, 2002 (Instrument 819) and August 7, 2002 (*Tittle* Instrument 392 and *Newby* Instrument 984) on the 23rd day of May, 2003.

A handwritten signature in black ink, appearing to read 'Odean L. Volker', written over a horizontal line.

Odean L. Volker

The Exhibit(s) May
Be Viewed in the
Office of the Clerk