

JAN 22 2002 LF

Michael M. Milby, Clerk

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

MARK NEWBY,

Plaintiff,

v.

ENRON CORPORATION, ANDREW S.
FASTOW, KENNETH L. LAY, and
JEFFREY K. SKILLING,

Defendants.

C.A. No. H-01-3624

JURY TRIAL DEMANDED

HENRY H. STEINER, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

ENRON CORP., KENNETH L. LAY,
JEFFREY K. SKILLING, ANDREW S.
FASTOW, and ARTHUR ANDERSEN
LLP,

Defendants.

C.A. No. H-01-3717

JURY TRIAL DEMANDED

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF PLAINTIFFS STEINER ET AL. OPPOSING EIGHT LEAD
PLAINTIFF MOTIONS TO THE EXTENT THEY SEEK THE APPOINTMENT
OF A SINGLE LEAD PLAINTIFF FOR ONE CLASS OF PURCHASERS OF BOTH
ENRON COMMON AND PREFERRED STOCK (AND BONDS), AND IN FURTHER
SUPPORT OF THE PREFERRED PURCHASER PLAINTIFFS' MOTION FOR
APPOINTMENT OF A SEPARATE CLASS WITH SEPARATE LEAD PLAINTIFFS
FOR PURCHASERS OF ENRON PREFERRED STOCK AND APPROVAL
OF THEIR SELECTION OF SEPARATE LEAD COUNSEL**

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Introduction

When the Enron matter exploded into public view in mid-October, 2001, it was a major news event, transcending mere business news. But, even then, initially, it was difficult to foresee that it would become, potentially, one of the handful of major corporate litigation matters in the history of American law. To be sure, the Enron debacle, and the response of our system of laws to it, will reverberate through and will be scrutinized for years, perhaps decades, indeed, even centuries, to come.

Plaintiffs Henry H. Steiner, Christine L. Benoit, Daniel Kaminer, Michael and Jennifer Cerone, and Harold Karnes (hereinafter, the "Proposed Preferred Purchaser Lead Plaintiffs") respectfully submit this responsive memorandum of law in further support of their motion, pursuant to Section 21D(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a), as amended by the Private Securities Litigation Reform Act of 1995, (the "PSLRA"), for: (1) their appointment as separate lead plaintiffs for a class of purchasers of the preferred shares of Enron Corporation; and (2) approval of their selection of lead counsel.¹ This memorandum also is submitted in opposition to the motions of eight of the other twelve lead plaintiff applicants, each of which, apparently, seeks to have this Court designate one class comprised of all purchasers of Enron common stock, bonds, and presumably preferred stock, in each case with all categories of purchasers represented by one lead plaintiff and its designated lead counsel.²

The Proposed Preferred Purchaser Lead Plaintiffs incorporate by reference the Declaration of Steven R. Wolfe (executed on December 20, 2001), which has been submitted as an

¹ Their initial memorandum stated that the moving preferred purchasers together lost \$189,000, which was an incorrect mathematical computation. Movants in the aggregate lost at least \$423,865 on their purchases of Enron preferred stock. Further, that memorandum stated the lead plaintiff motion for preferred purchasers was brought on behalf of other purchasers of Enron preferred stock who lost a total of \$814,803. This latter dollar amount referred to those individuals who, as of mid-December, had contacted proposed lead counsel. Obviously, the class of purchasers of Enron preferred stock (there were approximately 28 million shares of preferred stock outstanding) lost, at the very least, hundreds of millions of dollars.

² The eight motions which seek the appointment of one class represented by one lead plaintiff and one lead counsel are: State Retirement Systems Group; Florida State Board of Administration; Amalgamated Bank; New York City Pension Funds; Private Asset Management; William DePhillipo and Ashley Fields; Local 710 Pension Fund; and The Davidson Group.

expert witness declaration in support of both this lead plaintiff motion and in support of named plaintiff Henry H. Steiner's Objection to Consolidation of the Federal Securities Actions Involving Enron Corporation. As we noted in those papers, Mr. Steiner does not oppose, and indeed, urges the coordination of all of the federal securities actions before one judge for discovery and pretrial purposes. The Proposed Preferred Purchaser Lead Plaintiffs, believe, however, that consolidation for all purposes of the preferred shareholders' claims with those of the common shareholders and bondholders would prejudice the preferred shareholders' rights. For the reasons detailed below, this Court should designate a separate class of Enron preferred stock purchasers to be represented by their own lead plaintiff and by separate lead counsel (or, at the very least a separate subclass of preferred stock purchasers who are represented by separate class representatives and separate counsel).

First, the Proposed Preferred Purchaser Lead Plaintiffs are the only ones who have proposed preferred stock purchasers as lead plaintiffs and class representatives. None of the other twelve proposed lead plaintiffs purchased any preferred shares. Consequently, this Court should view this motion by the Proposed Preferred Purchaser Lead Plaintiffs as virtually unopposed in terms of contending class representatives and proposed lead plaintiffs.

Second, and most critically, as we set forth in our Memorandum of Law in Support of Motion for Appointment of Separate Lead Plaintiffs for Enron Preferred Shareholders and Approval of the Proposed Lead Plaintiffs' Selection of Counsel ("Initial Memorandum") and in Mr. Wolfe's declaration in support of this motion, there are material differences and conflicts of interest between Enron common stock purchasers and preferred stock purchasers which compel the conclusion that there should be separate classes, each with its separate lead plaintiffs and lead counsel. These material differences and conflicts extend beyond the threshold conflict that Enron has filed for bankruptcy protection, which conflict in itself is virtually dispositive of the need for a separate class, separate class representatives and separate counsel for Enron preferred stock purchasers. Common stock purchasers have a lesser claim on bankruptcy assets than do preferred stock purchasers, who indisputably have a preference in bankruptcy not only with respect to their

status as holders but also in their status as 10b-5 claimants. See our Initial Memorandum herein; Wolfe Decl. ¶11. To be sure, the conclusion that there should be a separate class, separate lead plaintiff and separate lead counsel for preferred stock may be equally applicable to Enron bonds.

Apart from the conflict concerning the Enron bankruptcy, material differences and conflicts exist with respect to proof of liability and calculation of damages, as well as the division of any settlement funds, or judgment amounts, regardless of whether these funds come from the Enron bankruptcy or from Arthur Andersen and/or the individual defendants, or their insurers, who should not be subject to bankruptcy protection.

Third, the law firm chosen by the Preferred Purchaser Lead Plaintiffs as their proposed lead counsel – Wolf Haldenstein Adler Freeman & Herz LLP – has extensive experience prosecuting securities fraud claims against the major certified public accounting firms, as will be required here against Arthur Andersen LLP. Wolf Haldenstein was co-lead counsel in the In re Microstrategy Securities Litigation, where the major accounting firm PriceWaterhouseCoopers (“PwC”) also was a defendant. The claims against PwC were very similar to those here. Wolf Haldenstein secured a \$55 million payment in cash from PwC as its share of the settlement fund. Upon information and belief, the \$55 million is the third largest cash payment ever paid by a public auditor in a securities fraud action.

I. Only the Proposed Preferred Purchaser Lead Plaintiffs Have Proffered A Proposed Lead Plaintiff Who Purchased Enron Preferred Stock; Hence, This Court Should View This Motion as Being Virtually Unopposed

Although potentially lost in the mass of paper submitted here, review of the thirteen lead plaintiff motions submitted to this Court shows that none of the other twelve movants include persons who purchased preferred stock. None of the plaintiffs’ certifications/tables identifying transactions and damages submitted in support of each of the other twelve motions lists purchases of preferred stock (not even one transaction). Hence, only the Proposed Preferred Purchaser Lead Plaintiffs who submitted this motion include persons who purchased Enron preferred stock and assert claims in connection with those purchases.

Indeed, since no other movant claims purchases of Enron preferred stock, this Court should deem this motion by the Proposed Preferred Purchaser Lead Plaintiffs as virtually unopposed.

II. There Should Be a Separate Class of Purchasers of Enron Preferred Stock Because Preferred and Common Stock Are Materially Different; Conflicts of Interest Between Them Are Present; and to Date No Movant Has Suggested Opposition to Such Class

In the securities law class action context, courts routinely create separate classes or subclasses when conflicts of interest exist among class members as a result of the different securities they hold. See Weisfeld v. Spartans Indus., Inc., 58 F.R.D. 570, 582 (S.D.N.Y. 1972) (courts have refused to permit a class action where “the rights and interests of the holders of a different class of securities may not be identical and possibly may be adverse”); Lesch v. Chicago & Eastern Illinois R.R. Co., 279 F. Supp 908 (N.D. Ill. 1968) (preferred shareholder whose stock was redeemed for cash held not to be a proper representative plaintiff with respect to preferred shareholders who voluntarily exchanged their stock for common stock); Herbst v. Able, 278 F. Supp. 664, 668 n.6 (S.D.N.Y. 1967) (court held purchasers of debentures would not be proper representatives of a class consisting of all security purchasers stating, “[i]ndeed, the interests of the debenture holders might be in conflict with the interests of the holders of other Douglas securities.”).

A. There Are Material Differences Between Enron Preferred and Common Stock Which Mandate the Appointment of a Separate Preferred Stock Purchaser Class

The case law clearly shows that a separate class of preferred stock purchasers should be appointed as a lead plaintiff by this Court. Weisberg v. APL Corp., 76 F.R.D. 233 (E.D.N.Y. 1977) is directly on point and indisputably demonstrates that the preferred stock purchasers should be a separate class. The Weisberg plaintiffs alleged unlawful conduct by defendants in that defendants failed to disclose a scheme to cause the price of APL securities to rise by reducing the amount of its common stock and convertible securities, including convertible preferred securities; failing to disclose their intention to pay a dividend; making the positive misrepresentation that APL does not pay cash dividends or stock dividends, and thereafter declaring a dividend on the reduced amount of common stock. The district court held that a common stockholder would not be permitted

to represent holders of securities other than the common stock, stating:

The court has ruled that Leonhardt will not be permitted to represent holders of securities other than APL common shares. It is true that in some circumstances, a trader in one type of security has been permitted to represent traders in another [citation omitted]. However, we believe that Leonhardt as a common stockholder is in no position to represent non-common stock sellers because the damages to the holders of convertible and other nonconvertible securities are much more tenuous and remote and difficult of determination so that Leonhardt would have no real incentive to delve into these complications when the determination of damages to the common stock by manipulation is so much easier. Thus Leonhardt's claims are not typical of and he cannot adequately represent sellers of non-common securities.

Id. at 238.

Similarly, In re Salomon Securities Litigation, 1994 U.S. Dist. LEXIS 8038 (S.D.N.Y. 1994) alleged section 10(b) violations concerning the issuance of false press releases with respect to unlawful bids on U.S. Treasury securities. In Salomon, the court designated four plaintiff subclasses including common stock, preferred stock C, and debt securities because of potential conflicts. Id. at *15-16.

Likewise, in In re Nanophase Technologies Corp., Litig., 1999 U.S. Dist. LEXIS 16171 (N.D. Ill. Sept. 27, 1999), the District Court for the Northern District of Illinois granted the plaintiff's motion to modify a pretrial order and to be appointed a lead plaintiff in a pending class action that was the consolidation of five related actions brought on behalf of purchasers of common stock pursuant to the defendant's initial public offering and traceable to the defendant's registration statement. The moving plaintiff, unlike the plaintiffs in the cases it had been consolidated with, sought to represent a class of persons who owned convertible preferred stock of the defendant prior to the initial public offering, whose shares were then converted to common stock upon that initial public offering. Id. at **5-6. The district court, after analyzing the preferred shareholder class under the requirements of Rule 23, separated the preferred holders from the class of common stock purchasers. Id. at *16. "The presence of even an arguable defense peculiar to the named plaintiff class or a small subset of the plaintiff class may destroy the required typicality of the class." Id. at *17 (quoting Shields v. Local 705, International Brotherhood of Teamsters, 1996 U.S. Dist. LEXIS

15772, *4 (N.D. Ill. 1996) (quoting J.H. Cohn & Co. v. American Appraisal Assocs., Inc., 628 F.2d 994, 999 (7th Cir. 1980)).

Here, as in Weisberg, the common stock purchasers and their counsel “would have no real incentive to delve into [the] complications [concerning liability and the calculation of damages for preferred stock purchasers] when the determination of damages to the common stock” purchasers “is so much easier.” For example, as Exhibit A to the Wolfe Declaration demonstrates, Enron common stock had already declined by 90 percent when the Dynegy acquisition was called off. But, the preferred shares (using the 8 1/8 R preferred as an example) had declined by only approximately 45 percent at the time Dynegy withdrew its acquisition offer. Thus, the different unlawful acts by Enron and Andersen had differing impacts upon common and preferred stock purchasers, as is demonstrated by (among other things) the disparity in price drop which existed at the time the Dynegy deal was withdrawn. Thus, proof of liability will involve focusing on facts which to a material extent are different for common and preferred stock purchasers. Similarly, and more importantly, proof and calculation of damages will involve the use of a different time frame for the preferred stock purchasers than for the common stock purchasers because virtually the full impact of damages was reflected in the common stock price well before the Dynegy deal was withdrawn but was not reflected in the preferred stock until the Dynegy deal failed. Wolfe Decl. ¶¶31-32, 34, Ex. A.

As another example, revenues, earnings and growth are higher visibility items than asset-based issues. The manipulation of Enron’s stock price came at the cost of diminishing the company’s assets. An accurate marking to market of Enron’s derivatives and portfolios would have hit preferred shareholders substantially more than common shareholders because the hit would have gone to assets and shareholders’ equity rather than to projected earnings and growth. Wolfe Decl. ¶¶18-21, 29-30. Indeed, recent newspaper articles have stated that Enron apparently obscured its asset base and shareholders’ equity through the use of thousands of subsidiaries and partnership affiliates. New York Times, “Enron's Collapse: The Strategy; Deals That Helped Doom Enron

Began to Form in the Early 90's" (Jan. 18, 2002). Given that there were only approximately 28 million preferred shares outstanding, versus 744 million common shares outstanding, the preferred stock purchasers' claims are the proverbial tail on the dog.³ Thus, there would be a disinclination by lead plaintiffs of only common shareholders to aggressively prosecute the claims of the preferred shareholders, particularly since the common stock lead plaintiffs would be institutional investors while the preferred stock purchasers are more likely to be individual investors (see the tax consequences discussion, infra).

Further, in Salomon, the court appointed four subclasses including preferred stock despite the fact that the defendant corporation was an ongoing company and not in bankruptcy as is Enron. Because Salomon was an ongoing company, there were none of the conflicts of interest which arise in a bankruptcy context. Hence, given that common stock purchasers here represent the overwhelming and more easily computable damages, and given Enron's limited ability to pay, if one counsel represents both common and preferred share purchasers in this action, again, there would be, as the Weisberg court noted, "no real incentive [for that one counsel] to delve into these complications." 76 F.R.D. at 238. If in both Weisberg and Nanophase a separate class of purchasers of preferred stock (in addition to a common stock class) was required then, a fortiori, a separate class of Enron preferred stock purchasers is required here because the preferred shares here are more materially different from common stock than was the convertible preferred stock in both Weisberg and Nanophase. Wolfe Decl. ¶¶12-16.

Consequently, a separate lead plaintiff and lead counsel for a class of Enron preferred stock purchasers should be appointed by this Court.

³ Moreover, trading volume for the preferred stock was much lower than for the common shares. Using the 8-1/2 R preferred as an example, the daily trading volume for Enron preferred stock and common stock was 3,620 shares and 3,485,500 shares, respectively, for the week of July 16, 2001. (Barron's, Market Week, July 16, 2001, p. 20). For the week of October 1, 2001, the respective daily trading volumes of Enron's preferred and common stock were 6,360 and 6,836,640. (Barron's, Market Week, October 1, 2001, p. 16). For the week of October 29, 2001, the respective daily trading volumes for the preferred and common stock were 82,580 and 41,518,000. (Barron's, Market Week, October 29, 2001 p. 22.)

B. There Are Conflicts of Interest Between Enron Preferred and Common Stock Purchasers Which Compel that this Court Appoint a Separate Class of Preferred Stock Purchasers

The case law demonstrates that the conflicts of interest present here compel the conclusion that a separate class of preferred stock purchasers should be appointed.

In Fischer v. Kletz, 41 F.R.D. 377, 380, 384 (S.D.N.Y. 1966), the complaints of the coordinated actions alleged that false financial statements issued by the defendants induced class members to purchase both the common stock and debentures of defendant Yale Express Systems, Inc. The court found a potential conflict of interest among the security-holders maintaining the actions, finding there was some indication of adverse interests of the common stockholders and the debenture holders. The court found that “such a conflict is an outgrowth of the allegation of plaintiffs that Yale declared and paid common stock dividends in excess of limitations set forth in the indenture under which the debentures were issued and sold to the public. Plaintiffs in the Bloch [companion] action, representing only debenture holders, maintain that they were harmed and the stockholders benefitted as a result of such payments.” Before ordering separate subclasses of debenture and stock purchasers sua sponte, the court directed counsel for the potentially adverse interests to attempt to agree to a solution (which could include separate subclasses).

Similarly, in In re Cendant Corp. Litigation, 264 F.3d 201, 244 (3d Cir. 2001), the Third Circuit, in the settlement context, addressed the issue of potential conflicts between “Sell Plaintiffs,” individuals and institutions that purchased and then sold the stock of a defendant, and “Hold Plaintiffs,” individuals and institutions who bought and continued to hold a defendant’s stock. The court took care to frame the issue of conflicts among class members, stating:

Properly understood, the issue is whether the conflict between the interests of Sell Plaintiffs and Hold Plaintiffs in a particular case is sufficiently severe so as to prevent a putative class from satisfying Rule 23's requirements for class certification, regardless whether the problem is seen as one of commonality, . . . typicality, . . . adequacy of representation, . . . or predominance.”

Id. (citations omitted).

In Cendant, no party on appeal objected to class certification based upon purported

conflicts between “Sell Plaintiffs” and “Hold Plaintiffs,” thus the court did not have to decide whether the matter should be certified as two separate classes or one class with subclasses. Id. However, the Third Circuit “call[ed] these issues to the attention of district courts for future cases, and note[d] that the use of separate class or subclasses is not inconsistent with the Reform Act because that statute deals with the identification of a lead plaintiff, and not with the proper means for defining a class in the first place.” Id. See Herbst v. Able, 278 F. Supp. 664, 668 n.6 (S.D.N.Y. 1967) (court held purchasers of debentures would not be proper representatives of a class consisting of all security purchasers stating, “[i]ndeed, the interests of the debenture holders might be in conflict with the interests of the holders of other Douglas securities.”); Knapp v. Bankers Securities Corporation, 17 F.R.D. 245, 247 (E.D. Pa. 1954) (court notes in dictum that subclasses of common and preferred stockholders would be required where there were various priority and preference provisions under which some stockholders might be entitled to a dividend and others not). See also In re Party City Secs. Litig., 189 F.R.D. 91, 108-110 (D.N.J. 1999) (recognizing possibility exists of significant conflict in many securities class actions between the interests of “Sell Plaintiffs” and “Hold Plaintiffs”).⁴

⁴ This very Court recently addressed a similar request for a separate class based upon different securities. See In re Waste Mgmt., Inc. Secs. Litig., 128 F. Supp. 2d 401, 426-28 (S.D. Tex. 2000) (Harmon, J.). In Waste Management, a class or subclass of purchasers of call options and sellers of put options of defendant corporation (the “Option Class”) sought to be represented separately by separate counsel. Id. at 426. This Court noted the opposition’s argument that options are directly derivative of and related to common stock. Id. at 428 (citing Deutschman v. Beneficial Corp., 841 F.2d 502, 504 (3d Cir. 1988), cert. denied, 490 U.S. 1114 (1998); In re Adobe Sys., Inc. Secs. Litig., 139 F.R.D. 150, 155 (N.D. Cal. 1991) (“The value of options is directly related to the value of common stock.”)). The Court went on to deny the motion to allow separate representation of the Options Class holding that such separate representation did not, at that time, “appear necessary” but noting that it would entertain another such motion in the future if conflicts arose. Id. at 432.

It is important to note that although this Court denied the request of the Options Class in Waste Management, the class of preferred shareholders in this case warrants a separate class. Whereas at issue in Waste Management were options -- securities which are directly derivative of common stock and whose price fluctuations usually move in tandem with the common stock price -- here, the conflict as to preferred stock and common stock indisputably is concrete. Preferred stock, unlike options, is not derivative of common stock and the value of preferred stock does not track the value of common stock but is instead, distinct. As analyzed in the Wolfe Declaration and our Initial Memorandum, the price of Enron preferred stock was effected by the defendants unlawful acts in

The conflicts described above concerning the conflicting issues and dates for proof of liability and damages are material. Further, there are extensive settlement conflicts present. For example, in settlements the various classes of securities purchasers are normally treated the same. Such an allocation would be unfair to the preferred shareholders here. It would not, for instance, reflect the different risk/reward ratios and risk profiles of common and preferred stock. Enron's preferred stock purchasers had an expectation of lesser risk than the risk assumed by common stock purchasers. Even though the common and preferred shares are now each worth essentially zero, treating the common and preferred purchasers the same does not take into account their reasonable, different expectations. It would not be fair to require the preferred shareholders to retroactively assume a greater risk than that for which they bargained. Conversely, it is not equitable for the common share purchasers to benefit in comparison to preferred share purchasers by permitting them to assume a level of risk equal to that assumed for – not by – the preferred purchasers. Under the circumstances here, it seems clear that the two claimant groups should be treated differently in any settlement. That fair approach is far more likely if there are separate lead plaintiffs and lead counsel pursuing each claimant groups' separate rights. Wolfe Decl. ¶¶35-36.

C. The Preferred Stock Purchasers May Have a Negligent Misrepresentation Claim Under Texas State Law With Respect to a Preferred Stock Initial Public Offering, Which Claim Is Not Available to the Common Stock Purchasers

The Steiner amended complaint on behalf of Enron preferred stock purchasers alleges a negligent misrepresentation claim under Texas state law, with a different class period beginning on January 21, 1997. As we noted in our Initial Memorandum and the Wolfe Declaration, there was an IPO of Enron preferred stock approximately one week earlier in January 1997. Discovery may

ways dramatically different than the common stock. Accordingly, the calculation of damages will not be the same.

Moreover, ownership of preferred stock carries with it contractual rights, and furthermore, enjoys priority over common stock in bankruptcy -- an extremely relevant consideration in this case where Enron has already filed for bankruptcy. Therefore, the preferred shareholders of Enron are currently in conflict with the holders of Enron common stock, as distinguished from the Options Class in Waste Management.

demonstrate that Enron's unlawful conduct commenced prior to January 21, 1997, particularly given that recent newspaper articles indicate that Enron began engaging in deals similar to those which caused its collapse far earlier than the January 1, 1997 date for which Enron has restated its earnings. Although not a federal securities law claim concerning an IPO under section 11, the negligent misrepresentation claim concerning inaccurate statements in the prospectus is different because this claim is available only to preferred stock purchasers and is unavailable to Enron common stock purchasers since there was no common stock IPO (and also because the securities claim three year statute of limitations bars claims prior to approximately October, 1998). The case law illustrates that the availability of a different type of claim based on different public documents, which is not part of the case for a different group of purchasers, constitutes another basis upon which to appoint a separate class.

For example, In re Salomon Securities Litigation, 1994 U.S. Dist. LEXIS 8038 (S.D.N.Y. 1994), alleged section 10(b) violations concerning the issuance of false press releases with respect to unlawful bids on U.S. Treasury securities. Because the preferred C stock had been issued during the class period and therefore was subject to section 11 as well as section 10 claims, preferred stock purchasers were one of four separate subclasses and they received an increased allocation of the settlement fund. at *15-16, 19 and n.6.

In In re Nanophase Technologies Corp., Litig., 1999 U.S. Dist. LEXIS 16171, at *5-6 (N.D. Ill. Sept. 27, 1999), the Court designated a separate class for purchasers who obtained their common stock through the conversion of the preferred stock of the defendant that they owned prior to an initial public offering. The district court, after analyzing the preferred shareholder class under the requirements of Rule 23, created a separate class of preferred stockholders from the class of common stock purchasers. Id. at *16. "The presence of even an arguable defense peculiar to the named plaintiff class or a small subset of the plaintiff class may destroy the required typicality of the class." Id. at *17 (quoting Shields v. Local 705, International Brotherhood of Teamsters, 1996 U.S. Dist. LEXIS 15772, *4 (N.D. Ill. 1996) (quoting J.H. Cohn & Co. v. American Appraisal Assocs.,

Inc., 628 F.2d 994, 999 (7th Cir. 1980).

In light of the negligent misrepresentation claim, the January 1997 preferred stock IPO, and the recent published allegations that Enron's unlawful conduct may have begun long before January 1997, these cases further support the conclusion that a separate class of Enron preferred share purchasers with separate lead plaintiffs and represented by separate lead counsel should be appointed here.

D. Separate Preferred Purchaser Lead Plaintiffs Should Be Appointed Because the Tax Treatment of Preferred Securities Strongly Discourages Tax-Free Institutional Investors, and Does Not Discourage Individual Investors, From Purchasing Preferred Securities

As this Court is aware, and assuming that there is no conflict between groups of class members, the PSLRA has at times been interpreted to favor institutional investors for appointment as lead plaintiff. In view of the current status of the lead plaintiff motions filed herein, it is likely that an institutional investor will be appointed as lead plaintiff for the purchasers of Enron common stock. Nevertheless, the lead plaintiff for the purchasers of Enron preferred stock should not be the same lead plaintiff as that for common stock and in fact should be individual investors, such as the individual plaintiffs who have made this motion. This is so because it is less likely that institutional investors would buy Enron preferred securities since the Tax Code discourages purchase of preferred securities by tax-free institutional investors. The Tax Code, however, does not discourage an individual from purchasing preferred securities.

E. A Class of Preferred Stock Purchasers Should Be Represented By Separate Counsel

Weisberg, Fischer, and the other decisions cited above, and the analysis herein, support the conclusion that the separate Preferred Purchaser class should have separate lead counsel. Two other recent cases decided by the United States Supreme Court ruled that potential intra-class conflicts must be addressed by assuring that independent subclasses have separate representation. Amchem Prods. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815, 847 (1999). For example, the Supreme Court held in Amchem, 521 U.S. at 625-28, that adversity

among sub-groups requires independent representation even though class representatives thought the settlement served the aggregate interest of the entire class. The Supreme Court's admonishment that separate representation is appropriate when classes have potentially conflicting claims is applicable here, where the difference between the Common Stock Class claims and claims of the Preferred Shareholders may lead to conflicts of interest -- as well as conflicts of strategic emphasis -- if a single lead plaintiff or lead counsel is appointed to represent both groups. In Mark v. Fleming Cos., Inc., Case No. CIV-96-506-M, Order (W.D. Okla, March 26, 1997), the court refused to consolidate a note purchaser case with a stockholder case and appointed a separate lead plaintiff and lead counsel for the Note class. Mark v. Fleming Cos., Inc., Case No. CIV-96-506-M, Order (W.D. Okla, March 26, 1997). Similarly, in Harbour Court LPI v. Nanophase Tech. Corp., et al., Case No. 98 C-7447 (N.D. Ill. September 27, 1999), slip. op. at 4, the court appointed separate lead plaintiffs and lead counsel for §10(b) claims and for claims under §§11, 12(2) and 15 of the Securities Act because of the requirement that scienter be approved for §10(b) claims. See also Weisberg v. APL Corp., 76 F.R.D. 233 (E.D.N.Y. 1977).

F. Coordination and Cooperation Among the Three Class Counsels Will Be Possible

If this Court appoints lead counsel for each of three classes or subclasses, it is absolutely clear that they will have no problem working together. The three lead counsel will be able to coordinate their actions and work on the matter. Moreover, it is highly likely that they will be able to agree to have a "chair" of the lead counsel group, presumably the lead counsel for common share purchasers. Such a structure will increase the likelihood of avoiding unnecessary duplication.

III. Proposed Lead Counsel Wolf Haldenstein Has Extensive and Successful Experience in Prosecuting Claims Against Major Accounting Firms Such as Arthur Andersen

The Proposed Preferred Purchaser Lead Plaintiffs' proposed lead counsel, Wolf Haldenstein Adler Freeman & Herz, was co-lead counsel in the In re Microstrategy, Inc. Securities Litigation. See initial lead plaintiff/lead counsel moving papers. Decl. Of Jack E. McGehee, Ex. C at 16.

The claims against PwC are very similar to those here against Andersen. Wolf Haldenstein secured a \$55 million payment in cash from PwC as its share of the settlement fund. Upon information and belief, the \$55 million is the third largest cash payment ever paid by a public auditor in a securities fraud action.

One of the focal points of this case undoubtedly will be the conduct of Arthur Andersen. That should have been crystal clear even before the utterly incredible, and virtually unimaginable headlines of the last few weeks, including but not limited to Andersen's wanton destruction of documents. Now more than ever, a lead counsel with extensive experience in prosecuting an action against a major accounting firm is needed here. We note that the amended complaint filed on behalf of Mr. Steiner was one of the first complaints to name Arthur Andersen as a defendant. The amended complaint naming Andersen as a defendant was filed on November 30, 2001, before the SEC announced that it had issued its subpoena to Andersen, which occurred on or about December 4, 2001.

Obviously, although certain material differences with respect to liability and damages issues, and certain conflicts of interest, require a separate class and separate counsel for preferred stock purchasers, not all issues and discovery are conflicted, and we have acknowledged the usefulness for coordination of discovery. Accordingly, Wolf Haldenstein's experience in major accounting firm litigation will serve all shareholders well, not just the preferred shareholders.

IV. Oral Argument Should Be Granted

As can be seen from this and the other briefs filed on the lead plaintiff/lead counsel motions here, the question of establishing separate classes represented by separate counsel requires substantial consideration by this Court. Thirteen lead plaintiff motions have been submitted, with some of them asserting conflicts positions. The Proposed Preferred Purchaser Lead Plaintiffs have submitted a declaration from an expert witness supporting their economic and factual analysis. As a threshold matter in PSLRA litigation, lead plaintiffs and lead counsel must be appointed before any further actions take place. We respectfully submit that oral argument be granted.

Conclusion

For the reasons set forth herein and in our prior submissions, the Proposed Preferred Purchaser Lead Plaintiffs respectfully request that the Court grant their motion: (1) appointing them as separate Lead Plaintiffs for a class of purchasers of the preferred shares of Enron Corporation; and (2) approval of their selection of lead counsel for the class of purchasers of Enron preferred stock.

Dated: January 21, 2002

** signed with permission by RB Westrauf*

Jack E. McGehee

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