United States Courts
Southern District of Texas
ENTERED

SEP 23 2003

Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES LITIGATION	}	
This Document Relates To:	}	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	}	Civil Action No. 01-CV-3624
Plaintiffs,	}	
VS.	}	
ENRON CORP., et al.,	}	
Defendants	}	

ORDER ON LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Pending before the Court is the Lead Plaintiff's Motion for Protective Order (Instrument No. 1627). Lead Plaintiff, the Regents, maintains that defendant Mark A. Frevert's Rule 30(b)(6) deposition notice on the subject of the Regents' electricity contract with Enron Energy Services is vexatious because it does not relate to the class certification issues. In response defendants Frevert and Louis Pai argue that the discovery relates specifically to the class certification issue of typicality and adequacy to serve as class representative.

Specifically, their response sets out, "Defendants seek the deposition of a single representative witness who can testify regarding (1) the energy services contract between Regents and EES; and (2) meetings between Regents and Enron or EES. [reference omitted]. Reasonably in advance of that deposition, Defendants are also entitled to production of documents, now long overdue, concerning these same subjects." Defendants' Opposition to Lead Plaintiff's Motion for

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Protective Order (Instrument No. 1648) at 3. In footnote 4 Defendants point out that items 4-6 of Frevert's 30(b)(6) notice are no longer in dispute. In footnote 5 Defendant Pai points out that he has not received any documents in response to his request of July 2, 2003 for documents concerning the UC/CSU Energy Services Contract, which he sought in connection with class certification. In its Reply in Support of Motion for Protective Order, the Regents point out that they searched for responsive documents to Pai's request, but found none responsive in the Regents' Office of the Treasurer before the Jeffrey Hell deposition. They maintain that they continue to gather and review documents.

Defendants argue that they need the additional deposition and documents in order to show that the Regents is not an adequate class representative because it is not typical of the others in the putative class because the Defendants have defenses against the Regents unique to Lead Plaintiff. These defenses are, briefly state, unique knowledge of Enron and Enron Energy Services that precludes the Regents' reliance. The argument is based on a number of isolated meetings between representatives of the Regents, Enron, and EES and statements of representatives of the Regents. The Regents point out, however, that these incidents are often taken out of the context of the full statements and are not related to investment decisions made by the Regents in Enron Corporation.

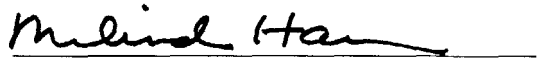
The Regents point out that in the Fifth Circuit the typicality test is not a demanding one and that the court's focus must be on the named plaintiff's legal and remedial theories, comparing them to those of the class members sought to be represented. *Lightbourn v. County of El Paso*, 118 F.3d 421,426 (5th Cir. 1997); *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review,* 637 F.2d 1014, 1024 (5th Cir. 1981). Second, although the Regents concede

that a plaintiff who is burdened with unique defenses cannot serve as a class representative, the case law establishes that the unique defenses must threaten to become the focus of the litigation before they can bar a plaintiff from class representation. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith*, 903 F.2d 176, 180 (2d Cir. 1990); *Baffa v. Donaldson*, 222 F.3d 52, 59 (2d Cir. 2000). The Seventh Circuit concurred with this reasoning in *Koos v. First Nat'l Bank*, 496 F2d 1162,1164 (7th Cir. 1974) when it stated, "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." The snippets of information provided by the defendants as potential unique defenses to the Regents' claims, and which the Defendants desire to develop during the class certification discovery stage, do not rise to the level of a potential unique defense to the Regents' claim so major to the litigation that it would preclude the Regents from serving in a representative role.

The Court is convinced that a further development of the facts surrounding the 1998 energy contract between the Regents and Enron Energy Services would not be fruitful for the class certification stage, and accordingly, it is hereby

ORDERED, that the Notice to the Regents of Rule 30(b)(6) Deposition by defendant Mark A. Frevert dated 18 August, 2003 is hereby QUASHED, and that, for purposes of class certification discovery, no further Rule 30(b)(6) deposition of the Regents may be taken.

Signed at Houston, Texas, this 19th day of September, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE