

United States Court  
Southern District of Texas  
FILED

SEP 15 2003

C.H.

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
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,

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.

\_\_\_\_\_

**LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION  
FOR PROTECTIVE ORDER**

1679

( (

**TABLE OF CONTENTS**

|   | <b>Page</b> |
|---|-------------|
| I. INTRODUCTION .....   | 1           |
| II. ARGUMENT .....  | 3           |
| A. The 1998 Energy Contract Is Irrelevant and Further Discovery on It<br>Would Be Wasteful..... | 3           |
| B. No Further Discovery Is Necessary Concerning The Regents' Typicality.....                    | 10          |
| C. The Regents Has Timely Responded To Discovery .....  | 12          |
| III. CONCLUSION.....  | 13          |

**TABLE OF AUTHORITIES**

|  | <b>Page</b> |
|--|-------------|
| <i>Anderson v. Bank of the South</i> ,<br>118 F.R.D. 136 (M.D. Fla. 1987).....   | 9           |
| <i>Baffa v. Donaldson</i> ,<br>222 F.3d 52 (2d Cir. 2000).....   | 10, 11      |
| <i>Basic, Inc. v. Levinson</i> ,<br>485 U.S. 224 (1988).....   | 11          |
| <i>Endo v. Albertine</i> ,<br>147 F.R.D. 164 (N.D. Ill. 1993).....   | 9           |
| <i>Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner &amp; Smith</i> ,<br>903 F.2d 176 (2d Cir. 1990) ..... | 10          |
| <i>Glick v. E.F. Hutton &amp; Co.</i> ,<br>106 F.R.D. 446 (E.D. Pa. 1985).....   | 9           |
| <i>Grace v. Perception Tech. Corp.</i> ,<br>128 F.R.D. 165 (D. Mass. 1989).....  | 8, 9        |
| <i>Henry v. Cash Today, Inc.</i> ,<br>199 F.R.D. 566 (S.D. Tex. 2000).....   | 10          |
| <i>In re Enron Corp. Sec. Litig.</i> ,<br>206 F.R.D. 427 (S.D. Tex. 2002).....   | 12          |
| <i>In re FirstPlus Fin. Group, Inc. Sec. Litig.</i> ,<br>2002 WL 31415951 (N.D. Tex. Oct. 28, 2002).....               | 11          |
| <i>In re Healthsouth Corp. Sec. Litig.</i> ,<br>213 F.R.D. 447 (N.D. Ala. 2003).....                                   | 9           |
| <i>J.H. Cohn &amp; Co. v. American Appraisal Assocs., Inc.</i> ,<br>628 F.2d 994 (7th Cir. 1980) .....                 | 11          |
| <i>Koos v. First Nat'l Bank</i> ,<br>496 F.2d 1162 (7th Cir. 1974) .....   | 10          |
| <i>Lightbourn v. County of El Paso</i> ,<br>118 F.3d 421 (5th Cir. 1997) .....   | 10          |
| <i>Ligon v. Frito-Lay, Inc.</i> ,<br>82 F.R.D. 42 (N.D. Tex. 1979).....  | 10          |

|   | <b>Page</b> |
|---|-------------|
| <i>Phillips v. Joint Legislative Comm. on Performance &amp; Expenditure Review</i> ,<br>637 F.2d 1014 (5th Cir. 1981) ..... | 10          |
| <i>Zandman v. Joseph</i> ,<br>102 F.R.D. 924 (N.D. Ind. 1984) .....   | 9           |
| <b>STATUTES, RULES &amp; REGULATIONS</b>  |             |
| Federal Rules of Civil Procedure  |             |
| Rule 23 .....   | 2, 3        |
| Rule 30(b)(6).....  | 1, 13       |

## I. INTRODUCTION

Defendants have taken an extraordinary amount of class certification discovery consisting of multiple document production requests, sets of interrogatories, requests for admission and, to date, approximately 17 videotaped depositions with at least six more depositions scheduled. Indeed, defendants have obtained a significant amount of discovery from The Regents. The discovery includes: responsive documents, answers to interrogatories and requests for admissions, and an eight-hour deposition of The Regents' Rule 30(b)(6) designee, Mr. Jeffrey Heil, who was the Managing Director of The Regents' equity portfolio when The Regents purchased Enron securities.

As Mr. Heil testified, he made the decision to invest in Enron stock and determined how much to invest.<sup>1</sup> In deciding to purchase Enron stock, Mr. Heil relied on publicly available

---

<sup>1</sup> As Mr. Heil explained in his deposition:

Q: Explain to me ... kind of the process ... that you expected to occur in connection with making a decision whether to invest in a particular equity.

A: Well ... I guess I would say first, essentially, that I designed most of the process that was in place at that point ....

\* \* \*

For the investment-decision process ... the first step was essentially a peer review. So any time that an investment analyst was ready to make a recommendation for a purchase into the portfolios ... he or she would have been reviewing this with me, showing me their work, their models, keeping me up to speed on their evaluation, their research on the stock.

\* \* \*

The final decision rested solely with me, and I would decide to either make a recommendation in the stock that they were – an investment in the stock that they were recommending or to tell them that they needed to do more work or that I simply thought it wasn't an appropriate investment for the portfolios.

information and Enron's financials, including Enron's income statement and balance sheet, and Mr. Heil specifically recalled he was unaware of any "red flags" concerning Enron's balance sheet. Heil Tr. at 58:23-59:18, 100:11-13.

After all this discovery it should be apparent that class certification is well warranted, and the class representatives which Lead Plaintiff proposes meet Rule 23's requirements. Nonetheless, days before the scheduled close of class certification discovery, defendants Frevert and Pai seek another 30(b)(6) deposition from The Regents despite the fact they received eight hours of testimony from Mr. Heil, the person who "solely" made the "final decision" to invest in Enron securities. Frevert and Pai claim the need for additional deposition testimony concerning the University's 1998 energy contract with Enron Energy Services. However, Mr. Heil was not even aware of the contract when he decided to invest in Enron. *See infra* §II.A. Moreover, Mr. Heil considered the contract litigation "immaterial" to Enron's overall results and therefore not relevant to subsequent decisions of whether to purchase or sell Enron securities.

As The Regents explained in its Motion for Protective Order, the energy contract dispute concerns the unilateral movement of the University from "Direct Access" electricity service to "utility default" service. That contract had absolutely nothing to do with The Regents' decision to purchase Enron stock. Nor is the contract relevant to Lead Plaintiff's allegations. Frevert and Pai grossly distort Lead Plaintiff's allegations and public documents to manufacture their "foundation" for this purported "class certification" discovery. Defs' Mem. at 4. For example, they argue The

---

The final step, which was solely my decision, was to determine the amount that the investment would be in for each of the three portfolios. And a lot of that was affected by what I wanted our industry weights to be versus each other and our weights versus the benchmarks in our indexes.

Heil Tr. at 35:6-12, 37:4-37:12, 37:22-38:9. All Heil Tr. references are attached hereto as Ex. A.

Regents tried to injure Enron's shareholders by exploiting the California energy crisis. This assertion is false, and more to the point, it was Enron that helped cause the energy "crisis" via market manipulation and Enron profited from its manipulation. *See infra* §II.A.

Frevert and Pai concede the Fifth Circuit holds the test for typicality is *not* demanding. Neither Rule 23 nor the Fifth Circuit permit wasteful discovery on matters having no bearing on The Regents' decision to purchase Enron securities, the similarity of The Regents' injury with the proposed Class's injuries, or The Regents' zealous representation of the Class. The current discovery is more than sufficient to determine if the requirements of Rule 23 have been met. A protective order should issue to prohibit wasteful depositions.

## **II. ARGUMENT**

### **A. The 1998 Energy Contract Is Irrelevant and Further Discovery on It Would Be Wasteful**

Defendants Frevert and Pai argue The Regents had "unique knowledge of EES," "extraordinary access to Enron executives," and thus defendants are entitled to even more discovery concerning the Regents' purported "vulnerability to unique defenses." Defs' Mem. at 4-5, 9. Nothing could be further from the truth. The 1998 energy contract is irrelevant and Mr. Heil, who was the decision maker concerning The Regents' purchases of Enron securities knew nothing of the contract when he decided to invest in Enron's stock.

As Mr. Heil testified:

Q: Were you aware that this [energy] contract existed when you made the decision to invest in Enron?

A: No.

Q: So you only discovered it after the fact?

A: Yes.

Q: Was there ultimately litigation over the contract to your knowledge?

A: I'm not sure. I know that there was the threat of it.

Q: So you don't know whether a lawsuit was ever filed?

A: No.

Q: Do you know how the problem was ever resolved?

A: No.

Q: Do you know who would know that?

A: Procurement, which is a department at the University.

Heil Tr. at 150:15-151:7.

Not only was Mr. Heil unaware of the 1998 energy contract when he decided The Regents would invest in Enron securities, thereafter, when he learned of the energy contract litigation, he found it "immaterial" to Enron's overall results and therefore not relevant to subsequent decisions of whether to purchase or sell Enron securities.

Q. And does this appear that Mr. Holm was present at a conversation with Mr. Behrens on March 21, 2001?

A. Yes. Well, Arild was being consulted for his knowledge of the California energy markets, so it was a noninvestment issue, so I had zero involvement. They were just talking to him related to his knowledge or hoped for knowledge in assessing where pricing might go and, you know, other suppliers and, you know, things related to being a customer, rather than an investor.

Q. Well, was he also trying to evaluate what impact the lawsuit might have on Enron?

A. Which – which lawsuit?

Q. I'm sorry. The lawsuit between the University of California and Enron over their power contract.

A. No, because that's the only thing he discussed with me regarding this, and we decided that it would be *immaterial* to the company's overall results.

\* \* \*

Q. At the time that you bought additional Enron stock in November of 2000, did Mr. Holm address this issue of the dispute with the University of California over the energy supply contract?

- A. I don't remember if it was – I mean, it was brought up. I'm not sure if it was brought up before that purchase or afterwards because – since *our conclusion was that the dispute between University procurement and Enron Energy Services was too small to affect the company's overall results, that our only choice of action would be whether we wanted to somehow ethically or morally support the University by not being a shareholder in a company that they thought was, you know, renegeing on a contract with them. And we just decided to keep the two issues separate.*

*Id.* at 267:9-269:1 (emphasis added). Because Mr. Heil “had a fiduciary responsibility to the pension fund,” his decisions concerning investment in Enron’s securities were focused on Enron as an investment and not otherwise influenced by the contract dispute. *Id.* at 269:4-7.

Furthermore, the 1998 energy contract and the facts learned in the litigation concerning the energy contract could provide no basis whatsoever to infer Enron was committing securities violations. A plain reading of the documents Frevert and Pai describe at pages 5-8 of their opposition demonstrates this. There is *nothing* suggesting Enron falsified its financial statements or abused mark-to-market accounting. There is *nothing* suggesting Enron used phony SPEs. There is *nothing* suggesting Enron used disguised loans or other bogus transactions to inflate profits and cash flow and conceal debt. There is *nothing* suggesting securities violations by Enron’s directors and officers, banks, accountants, lawyers, or others. There is *nothing* suggesting insider trading. The matter of the 1998 energy contract is wholly irrelevant.

Frevert and Pai, citing ¶155(f)<sup>2</sup> of the Amended Complaint, state The Regents alleges “it did not know that EES was losing money on certain retail contracts.” Defs’ Mem. at 7. But this distorts what is alleged, for ¶155(f) states the “value of contracts entered into by EES was grossly overvalued by the *misuse and abuse of mark-to-market accounting*,” allowing EES to prematurely

---

<sup>2</sup> Citations to the First Amended Complaint are designated “¶\_\_.”

recognize hundreds of millions of dollars of revenue and thus fraudulently boost financial results. (Emphasis added.)

Not only do Frevert and Pai distort what is alleged on this point, they mistakenly claim The Regents learned EES was “incurring significant monetary losses,” and further learned these losses would be at least \$144 million over the next year due to the 1998 energy contract. Defs’ Mem. at 7. According to Frevert and Pai, The Regents learned of EES’s losses from a declaration by EES employee Evan G. Hughes, which was publicly filed in the energy contract litigation. Defs’ Ex. 21, ¶7. **First**, the Hughes’ declaration states that “If Enron were required” to provide direct service, then “Enron would incur damages of approximately \$12 million a month.” *Id.* Hughes said **nothing** about Enron’s or EES’s financial results, including reported losses, and of course says nothing from which to infer Enron abused mark-to-market accounting – the **real** issue concerning EES in this case. **Second**, Frevert’s and Pai’s exhibits show the University believed Enron would **not** incur losses. “Enron’s claims of ‘losses’ ring hollow. Enron told the University last year that it had purchased future reserves to protect against price increases for the duration of the 1998 Agreement.” *See* Defs’ Ex. 27, at 7 n.10. Finally, as Mr. Heil testified, he was not even **aware** of the energy contract at the time he decided to purchase Enron stock. *See supra* p. 3.

Frevert and Pai argue The Regents attempted to “profit” at the “expense” of Enron shareholders because “EES was losing money as a result of the California energy crisis” at the same time the University demanded EES provide the services contracted for. Defs’ Mem. at 7-8. This is absurd. The University simply wanted the service for which it contracted and EES promised to provide, and believed Enron (not the University) needed to seek reimbursement from utilities. A judge agreed on that. *See* Defs’ Exs. 23, 27. Frevert and Pai do not (and cannot) explain their claim that The Regents acted improperly. Nor can they explain Enron’s obvious role in the California energy crisis. Indeed, two Enron energy traders pleaded guilty to criminal fraud and criminal

conspiracy for manipulating California's energy market. See Rebecca Smith, *Enron Ex-Trader Pleads Guilty in Energy Case*, The Wall S. J., Feb. 5, 2003 at B2.

Frevert and Pai criticize The Regents for endorsing long-term energy contracts while making what Frevert and Pai claim is a contradictory allegation in the Amended Complaint, namely, EES could not “enter into contracts that extended beyond three years” and accurately forecast energy costs or savings. Defs’ Mem. at 8. Frevert and Pai once again evidence a misunderstanding of Lead Plaintiff’s allegations, for what the First Amended Complaint alleges does not concern long-term energy contracts *per se*, but Enron’s *misuse* of variable energy costs and savings “to manipulate its assumptions – ‘moving the curve’ to create higher values and thus **record higher revenues** using mark-to-market accounting.” ¶121(g) (emphasis added). It’s not long-term energy contracts, but Enron’s fraudulent accounting, that is in issue.

Frevert and Pai argue The Regents had “extraordinary” access to Enron executives because two Regent research analysts visited Enron and met with Enron executives. Defs’ Mem. at 5. This has nothing to do with the 1998 energy contract and was not part of The Regents’ decision making concerning Enron’s stock. See *supra* pp.1-2 & n.1. That The Regents’ analysts met with Enron is neither extraordinary nor atypical, but instead is a routine occurrence among large institutional investors like The Regents.<sup>3</sup>

---

<sup>3</sup> As explained by Jeffrey Heil, The Regents’ designee, meetings with corporate management, far from unique, were routine:

Q: In connection with the research process, was it your practice ... to communicate directly with management of a company in which you expected or were considering an equity investment?

A: Yes.

Q. Typically, would you physically visit the company?

Frevert's and Pai's authority on this point is unavailing, for it is based on cases where discovery was taken from the decision-maker on the purchase of the securities. Here that discovery has already been given, with the deposition of Mr. Heil. Frevert's and Pai's cases are distinguishable for additional reasons. For example, in *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 168 (D. Mass. 1989), Grace met with two officers of the defendant company prior to purchasing 90% of his stock. *Id.* at 169. Grace admitted he had a "frank discussion" with the CFO and "became privy to

---

A. The analysts would. I would meet with management if they came to our offices, which they did frequently because we were large investors, and we tended to be long-term investors. So they – they liked having us as investors, so we were visited pretty regularly by most major corporations.

\* \* \*

A. ... I would say that anyone with significant investments would have that sort of access that we were talking about earlier ....

Heil Tr. at 38:10-23, 225:8-10.

Moreover, while The Regents purchased a large amount of Enron stock, given the magnitude of The Regents' portfolio (over \$50 billion), Enron represented only 0.7% of its holdings:

Q. ... In the rankings of securities holdings of the Regents at that time, was your holding of Enron securities in your top 10?

A. No.

Q. Do you recall where it would rank?

A. Probably the lower – bottom 50 percent, lower half of our holdings.

Q. And how many holdings did you have?

A. About a hundred.

Q. I saw somewhere in this material, I think, it comprised .7 percent of your portfolio. Does that sound correct to you?

A. Uh-huh.

Heil Tr. at 89:9-21.

‘a lot of information’” about the company. *Id.* The court held “for a purchaser to buy 81,500 shares after PTC’s financial condition was publicly deteriorating, Grace must have received special information about the company from the corporate officers.” *Id.* at 169 n.1. *Grace* is clearly not analogous to here. In *In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447 (N.D. Ala. 2003), two proposed class representatives, in contrast to The Regents, were employees of the defendant and “were aware of the very facts the plaintiffs claim were withheld by the defendants or that caused certain statement by defendants to be misleading.” *Id.* at 459.<sup>4</sup>

Frevert and Pai argue The Regents had “first-hand” experience concerning EES’s billing processes and infrastructure, including problems with billing and metering, of which a research analyst became aware. Defs’ Mem. at 5-6. Frevert and Pai further argue The Regents cannot “pretend” to be surprised EES offered individual energy contracts since the University itself had a contract providing for individualized energy service. Defs’ Mem. at 6-7. This, however, has nothing to do with the allegations in the First Amended Complaint that EES’s cost of performance precluded making a profit and Enron used unrealistic projections and bogus mark-to-market accounting “to mislead investors into believing that the EES contracts were making money.” ¶¶214(g), 300(g), 339(g).<sup>5</sup>

---

<sup>4</sup> Frevert’s and Pai’s other cases also are distinguishable. In *Endo v. Albertine*, 147 F.R.D. 164, 168 (N.D. Ill. 1993), a proposed class representative worked at the defendant company, had access to “all” financial and operational data of the company, and attended company meetings where a major issue in the underlying securities fraud class action was discussed. In *Anderson v. Bank of the South*, 118 F.R.D. 136, 148 (M.D. Fla. 1987), the proposed representative admitted to gaining insider information before investing. Similarly, in *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 448 (E.D. Pa. 1985), the plaintiff relied on inside information in purchasing his shares. And in *Zandman v. Joseph*, 102 F.R.D. 924 (N.D. Ind. 1984), the plaintiff “persisted in extracting information from company officers” and “admitted to ‘direct reliance’ on personal conversations with company insiders prior to purchasing his stock.” *Id.* at 931.

<sup>5</sup> Lead Plaintiff alleges Enron had to “continually feed[] the monster,” *i.e.*, pull the revenues for executed EES contracts into a single quarter by abusing mark-to-market accounting.

**B. No Further Discovery Is Necessary Concerning The Regents' Typicality**

The Fifth Circuit holds “The test for typicality, like the test for commonality, *is not demanding*,” *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (emphasis added), and the Court need only focus on the “legal and remedial theories of the named plaintiffs and the class members they seek to represent.” *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000). *Accord Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981) (the typicality “requirement ... does not mean that all claims must be identical”); *Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42, 47 (N.D. Tex. 1979) (“A class representative and a class member must be similarly, not identically, situated.”) (citation omitted). The University’s energy contract is irrelevant to the “legal and remedial” theories in this case.

However, Frevert and Pai assert “[u]nder well-established authority, a plaintiff that is potentially subject to unique defenses cannot serve as a class representative.” Defs’ Mem. at 9. Their authority does not square with the facts present here. For example, in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith*, 903 F.2d 176, 180 (2d Cir. 1990) and in *Baffa v. Donaldson*, 222 F.3d 52, 59 (2d Cir. 2000), the Second Circuit held “class certification is inappropriate where a putative class representative is subject to unique defenses *which threaten to become the focus of the litigation*.” (Emphasis added.) Likewise, in *Koos v. First Nat’l Bank*, 496 F.2d 1162, 1164 (7th Cir. 1974), the Seventh Circuit wrote, “[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.” (Emphasis added.)

---

¶¶214(g)(ii), 300(g)(ii), 339(g)(ii). The perceived uniqueness of the University’s 1998 energy contract is irrelevant.

The focus of this litigation is Enron's false financial statements and use of fraudulent structured financing to conceal debt and inflated revenues and income. EES is a minor issue in this case, and the 1998 energy contract is irrelevant to the EES allegations, which concern EES's abuse of mark-to-market accounting – a matter not even remotely connected to the energy contract. Thus, the 1998 energy contract could never “threaten to become the focus of the litigation.” *See, e.g., Baffa*, 222 F.3d at 59 (citation omitted).

Defendants' other authority is equally unpersuasive. In *In re FirstPlus Fin. Group, Inc. Sec. Litig.*, 2002 WL 31415951, at \*5 (N.D. Tex. Oct. 28, 2002), the court declined to certify plaintiff Rich as a class representative because his “role as an insider makes him an inappropriate class representative.” And *J.H. Cohn & Co. v. American Appraisal Assocs., Inc.*, 628 F.2d 994, 997 (7th Cir. 1980), decided before *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), provides no guidance here. Frevert's and Pai's authority in fact demonstrates additional discovery is unnecessary.

Frevert and Pai point to the Court's “reject[ion]” of FSBA as another basis for additional deposition testimony, claiming the Court held an “attenuated business relationship” gives rise to unique defenses. Defs' Mem. at 10. But the Court never said any such thing, and Frevert and Pai once again distort the facts. As the Court held at that time, FSBA was subject to unique defenses or otherwise inadequate not because of an “attenuated business relationship,” but because:

- FSBA's stock purchases from 10/19/01-11/16/01, “after the initial public disclosure regarding Enron's overstatement of its assets and partnership liabilities, after the first suits in this consolidated action were filed, and after the SEC announced that it was investigating Enron,” created a conflict of interest;
- Investment advisor Alliance Capital Management Holdings (“Alliance”) one of Enron's largest shareholders had advised FSBA's purchase of 2.9 million shares of Enron stock at the same time an Alliance partner, Frank Savage, was a director of Enron;
- The Florida Attorney General and Florida State Legislature were formally investigating whether Alliance used FSBA's funds improperly while in possession of nonpublic information and had subpoenaed documents from Alliance;

- At that time FSBA was contemplating suing Alliance – and in fact FSBA went on to sue Alliance for its recommending Enron stock;
- The House Banking Committee was investigating investment manager Alfred Harrison “who purchased the Enron common stock for FSBA after disclosure of Enron’s precarious financial state and who had business ties to the Enron Board Member, Frank Savage”; and
- The number of class actions involving FSBA “so far exceeds the statutory cap that at least some of the purposes of the provision would be lost” and other competent institutional applicants (like Regents) were better qualified.

*In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 455-57 (S.D. Tex. 2002). Thus, far from an “attenuated” business relationship, the conflicts plaguing FSBA went to the heart of FSBA’s acquisition of Enron stock after the Enron fraud began to be revealed. Indeed, FSBA purchased a massive amount of Enron’s stock as the price was plummeting shortly before Enron’s bankruptcy. This is in sharp contrast to Frevert’s and Pai’s allegations about the 1998 energy contract, which has nothing to do with The Regents’ purchase of Enron stock and nothing to do with this litigation.

### **C. The Regents Has Timely Responded To Discovery**

Defendants Frevert and Pai claim documents concerning the energy contract are “now long overdue” and imply The Regents has been dilatory in providing defendants with responsive class certification documents. Defs’ Mem. at 3 and n.5. They are wrong.

Frevert and Pai waited over a year, and just a short time before the close of class certification discovery, to begin seeking information on the 1998 energy contract. Other defendants began propounding discovery as early as July 2002, and followed with their interrogatories and deposition notices. The Regents and other class representatives, in conjunction with Lead Counsel, responded to all this discovery, meaningfully and in good faith, in anticipation of the depositions proffered by Lead Counsel.

Further, The Regents responded in good faith, searching for responsive documents to respond to Pai’s belated document discovery requests. Before Mr. Heil’s deposition was taken, Lead

Counsel confirmed in writing the Office of the Treasurer had no responsive documents concerning Pai's request for certain categories of documents, and stated The Regents continued to gather and review documents. *See* Ex. C to the Declaration of Helen J. Hodges in Support of Lead Plaintiff's Motion for Protective Order.

Defendants soon will have taken over 20 videotaped depositions for their class certification opposition. Defendants have already conducted a Rule 30(b)(6) deposition of Mr. Heil, the person the most knowledgeable of the facts concerning The Regents' investment in Enron stock. The Regents has produced responsive documents, answered interrogatories and requests for admission, and has expended significant resources in responding to defendants' discovery. Another Rule 30(b)(6) deposition of The Regents is not required and would be a wasteful use of judicial and litigant resources.

### III. CONCLUSION

For all the reasons stated, Lead Plaintiff respectfully requests the Court issue a protective order.

DATED: September 15, 2003

Respectfully submitted,

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
WILLIAM S. LERACH  
DARREN J. ROBBINS  
HELEN J. HODGES  
BYRON S. GEORGIU  
G. PAUL HOWES  
JAMES I. JACONETTE  
MICHELLE M. CICCARELLI  
JAMES R. HAIL  
JOHN A. LOWTHER  
ALEXANDRA S. BERNAY  
MATTHEW P. SIBEN  
ROBERT R. HENSSLER, JR.

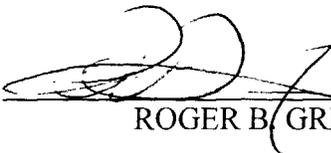
  
\_\_\_\_\_  
JAMES I. JACONETTE (w/permission)

401 B Street, Suite 1700  
San Diego, CA 92101  
Telephone: 619/231-1058

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
STEVEN G. SCHULMAN  
One Pennsylvania Plaza  
New York, NY 10119  
Telephone: 212/594-5300

**Lead Counsel for Plaintiffs**

SCHWARTZ, JUNELL, CAMPBELL  
& OATHOUT, LLP  
ROGER B. GREENBERG  
State Bar No. 08390000  
Federal I.D. No. 3932



ROGER B. GREENBERG

Two Houston Center  
909 Fannin, Suite 2000  
Houston, TX 77010  
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP  
THOMAS E. BILEK  
Federal Bar No. 9338  
State Bar No. 02313525  
440 Louisiana, Suite 720  
Houston, TX 77002  
Telephone: 713/227-7720

**Attorneys in Charge**

BERGER & MONTAGUE, P.C.  
SHERRIE R. SAVETT  
1622 Locust Street  
Philadelphia, PA 19103  
Telephone: 215/875-3000

**Attorneys for Staro Asset Management**

WOLF POPPER LLP  
ROBERT C. FINKEL  
845 Third Avenue  
New York, NY 10022  
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP  
THOMAS G. SHAPIRO  
75 State Street  
Boston, MA 02109  
Telephone: 617/439-3939

**Attorneys for Nathaniel Pulsifer**

SCOTT + SCOTT, LLC  
DAVID R. SCOTT  
NEIL ROTHSTEIN  
S. EDWARD SARSKAS  
108 Norwich Avenue  
Colchester, CT 06415  
Telephone: 860/537-3818

**Attorneys for the Archdiocese of Milwaukee  
Supporting Fund, Inc.**

LAW OFFICES OF JONATHAN D. McCUE  
JONATHAN D. McCUE  
4299 Avati Drive  
San Diego, CA 92117  
Telephone: 858/272-0454

**Attorneys for Imperial County Board of  
Retirement**

CUNEO WALDMAN & GILBERT, LLP  
JONATHAN W. CUNEO  
MICHAEL G. LENETT  
317 Massachusetts Avenue, N.E.  
Suite 300  
Washington, D.C. 20002  
Telephone: 202/789-3960

**Washington Counsel**

C:\Documents and Settings\mflowers\Local Settings\Temporary Internet Files\OLK11\brf000007201 doc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 15 September 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 15 September 2003.

Carolyn S. Schwartz  
United States Trustee, Region 2  
33 Whitehall Street, 21st Floor  
New York, NY 10004



---

Mo Maloney

(

(





1 A. Yes.

2 Q. Would that have been true in 2000 as well?

3 A. Yes.

4 Q. And in connection with your work, the

5 treasurer's office did its own in-depth research

6 regarding the investments that it considered, correct?

7 A. Yes. We managed -- I guess two-thirds of our

8 equity investments were managed internally, in house,

9 actively. One-third was indexed, and so all of the

10 internal actively managed funds were done by this

11 staff.

12 Q. The Enron investment would have been an

13 internally managed investment, correct?

14 A. It was actually both. It was in the index

15 funds, and it was internally managed.

16 Q. It was in the index fund simply by virtue of

17 the fact that that's the way the index is operated,

18 correct?

19 A. Right, right.

20 Q. That -- that had nothing to do with a

21 decision made by the Regents --

22 A. Right.

23 Q. -- other than the decision to invest in an

24 index fund?

25 A. Right.

9/12/2003 2:09 PM

0034

1 research.

2 The bottoms-up research was typical

3 fundamental securities analysis done by analysts on an

4 industry and company-specific basis, whereby you have

5 a team of analysts, each assigned a homogeneous group

6 of industry sectors and companies to follow on a

7 regular basis.

8 So, for instance, in the case of Enron,

9 Arild Holm was my oil and gas, energy and natural

10 resource analyst. The process that they actually used

11 to do their evaluation of the company was two-pronged

12 as well in that we used what I call the relative

13 valuation approach and an absolute valuation approach.

14 The absolute valuation is more typical

15 of corporate finance or investment banking work. It's

16 using discounted cash flow models to come up with an

17 absolute number that you think the company is worth.

18 The relative valuation approach is more like

19 Wall Street, sell-side analysts and most buy-side

20 investment firms, whereby you use typical investment

21 ratios; PE ratios, PE to growth, market to book. And

22 it's really more of a -- the reason I call it relative

23 is that it's more of a peer comparison.

24 So it doesn't tell you what a company is

25 worth when you use a PE ratio, but it tells you what a

9/12/2003 2:09 PM

0038

1 Q. But as you -- when the Regents considered

2 whether to make an investment in a particular equity,

3 they would conduct their own research into the

4 company, correct?

5 A. Yes.

6 Q. Explain to me, if you would, in your own

7 words, kind of the process that -- that you expected

8 to occur in connection with making a decision whether

9 to invest in a particular equity.

10 A. Well, we had -- I guess I would say first,

11 essentially, that I designed most of the process that

12 was in place at that point, and it consisted of -- I

13 guess to lay it out, it consists of a process to make

14 a decision and a process by which to do the research

15 to facilitate that decision. So I guess I would ask

16 first if you're interested in both components.

17 Q. I am.

18 A. So --

19 Q. Why don't you take them one at a time,

20 whichever is most convenient for you.

21 A. Well, it makes sense that I would talk about

22 the research process first because that comes before

23 you make an investment decision. And the research

24 process was, I guess, two-pronged in two ways. So

25 first we did what I call top-down and bottoms-up

9/12/2003 2:08 PM

0035

1 company is selling for relative to the market and to

2 its competitors. So we used both valuation methods to

3 be a check on each other.

4 For the investment-decision process, it

5 was essentially -- the first step was essentially a

6 peer review. So any time that an investment analyst

7 was ready to make a recommendation for a purchase into

8 the portfolios, along the way, he would have been --

9 he or she would have been reviewing this with me,

10 showing me their work, their models, keeping me up to

11 speed on their evaluation, their research on the

12 stock.

13 When they're ready to make a formal

14 recommendation, they would make a presentation to the

15 team of analysts, and the team could then question

16 their -- you know, their thought process, their

17 assumptions and their conclusions in this research.

18 I would listen to this presentation, the

19 questioning, the critiquing and the whole peer review

20 to help me make my evaluation of whether to accept the

21 recommendation or not.

22 The final decision rested solely with

23 me, and I would decide to either make a recommendation

24 in the stock that they were -- an investment in the

25 stock that they were recommending or to tell them that

9/12/2003 2:09 PM

0037

1 they needed to do more work or that I simply thought  
 2 it wasn't an appropriate investment for the  
 3 portfolios.  
 4 The final step, which was really solely  
 5 my decision, was to determine the amount that the  
 6 investment would be in for each of the three  
 7 portfolios. And a lot of that was affected by what I  
 8 wanted our industry weights to be versus each other  
 9 and our weights versus the benchmarks in our indexes.  
 10 Q. In connection with the research process, was  
 11 it your practice at the Regents' office while you were  
 12 in charge of the equity investment side to communicate  
 13 directly with management of a company in which you  
 14 expected or were considering an equity investment?  
 15 A. Yes.  
 16 Q. Typically, would you physically visit the  
 17 company?  
 18 A. The analysts would. I would meet with  
 19 management if they came to our offices, which they did  
 20 frequently because we were large investors, and we  
 21 tended to be long-term investors. So they -- they  
 22 liked having us as investors, so we were visited  
 23 pretty regularly by most major corporations. But the  
 24 analysts, if that visit wasn't timely, they would go  
 25 out and visit the company themselves.

1 Q. I'll come back to that. While we're on the  
 2 investment process, let me mark as the next  
 3 exhibit, 45, the -- a document that's been provided to  
 4 us, I believe.  
 5 (Deposition Exhibit 45 was marked.)  
 6 Q. Let's start out with a full question to make  
 7 it clear. Do you have Exhibit 45 before you?  
 8 A. Yes.  
 9 Q. Can you identify Exhibit 45?  
 10 A. Yes.  
 11 Q. What is it?  
 12 A. It's a policy and process outline that I  
 13 wrote for the office of the treasurer, both as a -- I  
 14 guess an instructional manual and as a part of our  
 15 policies and procedures manual.  
 16 Q. Does Exhibit 45 describe in written form the  
 17 investment process that you described for us in answer  
 18 to my questions just a few moments ago?  
 19 A. Yes.  
 20 Q. Is this the process that you would have  
 21 expected Mr. Holm to employ in connection with making  
 22 a decision whether to recommend an investment in  
 23 Enron?  
 24 A. Yes.  
 25 Q. Have you -- have you checked to determine

1 Q. You said you were a large investor who  
 2 typically tended to be a long-term investor, correct?  
 3 A. Uh-huh.  
 4 Q. Yes?  
 5 A. Yes.  
 6 Q. In your experience, did that give you greater  
 7 access to management than, say, the typical small  
 8 investor?  
 9 A. I think that it -- compared to a small  
 10 investor and compared to a shorter-term investor, yes.  
 11 Q. Do you recall whether representatives of  
 12 Enron ever visited the Regents?  
 13 A. They did not.  
 14 Q. But representatives of the Regents did -- did  
 15 visit with Enron in connection with the analysis of  
 16 whether to invest in Enron, correct?  
 17 A. Yes.  
 18 Q. Did you ever visit Enron?  
 19 A. No.  
 20 Q. Mr. Holm did?  
 21 A. Yes.  
 22 Q. Anyone else?  
 23 A. Satish Swamy.  
 24 Q. Prior to the decision to invest?  
 25 A. Yes.

1 whether Mr. Holm did, in fact, follow this process?  
 2 A. Well, I -- I was a part of the process, so I  
 3 guess, yes. I mean, I didn't have to check post  
 4 process. I was continuously apprised of what he was  
 5 doing.  
 6 Q. If you would look at the last page of that  
 7 exhibit, there is a document that is labeled equity  
 8 investment decision process?  
 9 A. Yes.  
 10 Q. Is this a schematic description of the  
 11 investment process that was utilized in connection  
 12 with the decision to invest in Enron?  
 13 A. Yes.  
 14 Q. In connection with a potential investment,  
 15 the analyst himself would be the first one to suggest  
 16 a particular equity, correct?  
 17 A. Yes, but it could be an iterative process,  
 18 meaning that I might ask an analyst -- or I might tell  
 19 an analyst that I want to add some weight in our  
 20 portfolios within their sector, so that would prompt  
 21 them to look for some new companies.  
 22 For instance, if I wanted to add two  
 23 percent to the technology group because I was feeling  
 24 that technology was undervalued, then the technology  
 25 analyst, no matter what else he was doing at the time,

1 Exhibit 49.

2 (Deposition Exhibit 49 was marked.)

3 Q. (By Mr. Gall) Can you identify Exhibit 49?

4 A. Yes. This is the investment recommendation  
5 that -- and its draft form was Exhibit 47. It looks  
6 like actually what he did was combined Exhibit 48 and  
7 some of Exhibit 47 into a shorter recommendation.

8 Q. You would have reviewed that recommendation  
9 prior to approving it?

10 A. Yes.

11 Q. Including the attachments?

12 A. Yes.

13 Q. Does Exhibit -- 48, is it?

14 A. Forty --

15 MR. HOWES: The last one is 49.

16 A. Forty-nine.

17 Q. (By Mr. Gall) Forty-nine. I'm sorry. Does  
18 Exhibit 49 accurately describe the factors that were  
19 material to you in recommending the purchase of Enron  
20 or approving the purchase of Enron?

21 A. Along with the models that he would have done  
22 and along with the earlier forms, Exhibits 46 and 47.

23 Q. Did you review the financial data that was  
24 attached to that exhibit in connection with your  
25 decision to approve the investment?

9/12/2003 2:09 PM

0058

1 investments, rather than giving up too much of the  
2 return to the third party in the entities.

3 So assuming that there was a -- a third  
4 party to any of these investments or these entities,  
5 my concern was that they don't capture the lion's  
6 share of the returns, but that the company be as  
7 aggressive as possible in getting a better deal out of  
8 these investments, which would then benefit  
9 shareholders.

10 Q. What did you do to satisfy yourself that, in  
11 fact, Enron was getting its share fair -- fair share  
12 of the returns from those investments?

13 A. Just asked Arild to make sure he discussed  
14 that with management in his meetings with them.

15 Q. Did he report back to you concerning his  
16 discussions on that subject?

17 A. Yes.

18 Q. What did he tell you?

19 A. That they thought that these partnerships or  
20 investments were well structured for the benefit of  
21 the company. so -- I mean, they didn't give us any  
22 documents showing what the structure was. He could  
23 just, you know, take them at their word.

24 Q. Did you have any understanding at that time  
25 that any Enron officers or directors were involved in

9/12/2003 2:09 PM

0060

1 A. Yes.

2 Q. Attached -- may I see that for a second?  
3 Attached as Exhibits 10 and 11 are some financial data  
4 concerning Enron, correct?

5 A. Yes. The income statement and the balance  
6 sheet.

7 Q. Exhibit 10 is the income statement;  
8 Exhibit 11 is the balance sheet, correct?

9 A. Yes.

10 Q. And you would have reviewed this carefully in  
11 connection with your decision to invest?

12 A. Yes.

13 Q. Do you recall whether there was anything on  
14 the balance sheet of Enron Corporation that troubled  
15 you in connection with your analysis of whether to  
16 approve the investment of the Regents' funds in Enron  
17 securities?

18 A. Not that I would say troubled me, no.

19 Q. Was there anything that stood out to you?

20 A. I -- I remember at the time noticing, as a  
21 lot of people did, that they had fairly large  
22 investments in other entities. And my concern at the  
23 time, which I think is appropriate, was that they  
24 get -- that they are ensuring that they're getting a  
25 good return to the -- to the company itself from these

9/12/2003 2:09 PM

0059

1 connection with those partnerships?

2 A. No. I had assumed that they were other  
3 institutional investors or other energy companies, you  
4 know, true third-party participants that were being  
5 used to provide nonequity funding without having to go  
6 to debt.

7 Q. As you looked at the balance sheet of Enron  
8 Corporation, what particular line was it that -- that  
9 brought to your attention the fact that they had  
10 investments with third parties that you should  
11 investigate?

12 A. Well, everything below the total deferred  
13 credits and long-term debt; so, you know, just looking  
14 at the breakout in their capital structure, the  
15 minority interests and subsidiaries and the  
16 company-obligated debt.

17 Q. Okay.

18 A. So out of shareholders' equity of \$7 billion  
19 in 1998, three billion was nontraditional equity, so  
20 it was almost half.

21 Q. And that was -- that was something that  
22 caught your eye?

23 A. Yeah. I wouldn't say it concerned me. It  
24 just meant that they needed to look and see what the  
25 potential ROIC would be from these because it wasn't

9/12/2003 2:09 PM

0061

1 A. Right.

2 Q. -- has made the following transactions during

3 the class period in the securities which are the

4 subject of this action. And this is filed in the

5 Enron securities litigation.

6 A. Okay.

7 Q. And it lists a series of purchases, correct?

8 A. Yes.

9 Q. As well as a series of sales transactions.

10 Do you see that?

11 A. Uh-huh, yes.

12 Q. And all I'm trying -- there's no trick here.

13 I'm just -- if Exhibit 52 is a list of the securities

14 purchases, it should match up with Exhibit 53,

15 correct?

16 A. Yes, except that I -- you know, I didn't

17 prepare Schedule A. So if I had prepared it, I

18 could -- I could certainly attest to that. But if

19 they did this correctly, then I would assume it

20 matches.

21 Q. Have you attempted to determine whether they

22 did it correctly?

23 A. It was done after I left.

24 Q. Okay.

25 MR. GALL: Okay. Let's -- we got to

1 immediately. And that's -- as I can see here, we

2 received this small gift of Enron stock on the 16th of

3 November 1999 and sold it the next day, November 17th.

4 And it's just a matter of not owning the shares in the

5 widely held portfolios, so we don't want to keep one

6 small holding of a stock, so we just sell it.

7 Q. Is it your testimony there was no investment

8 analysis made in connection with the decision to sell?

9 A. None.

10 Q. It was simply a matter of --

11 A. Procedure.

12 Q. -- procedure because you didn't own the stock

13 otherwise?

14 A. Right.

15 Q. Had you owned Enron stock, you might have

16 kept it and added it to your portfolio?

17 A. Yes, we most surely would have, unless we

18 were planning on selling the stock imminently.

19 Q. Do you have a recollection of what the total

20 investment by the Regents in Enron securities was?

21 A. I -- I think it was about -- well,

22 internally, about 200 million, and then I'm not sure

23 what the index funds held.

24 Q. Let's take it one at a time so that the

25 record's clear. The internal Enron purchases that

9/12/2003 2:09 PM

0086

9/12/2003 2:09 PM

0088

1 stop for the tape.

2 THE VIDEOGRAPHER: We're off record.

3 The time is 11:36. This is the end of Tape 1.

4 (A recess was taken.)

5 (Deposition Exhibit 52-A was marked.)

6 THE VIDEOGRAPHER: We're back on the

7 record. This is the beginning of Tape 2. The time is

8 11:45.

9 Q. (By Mr. Gall) Mr. Hell, we're back on the

10 record. I've put before you, while we were off the

11 record, a document we've marked as Exhibit 52-A, which

12 is a slightly better copy of the last page of

13 Exhibit 52.

14 A. Right.

15 Q. Looking at that Exhibit 52-A, can you

16 identify for us the holder of that portion of the

17 Regents' securities in Enron?

18 A. Yes, this is -- it's into our fund that's

19 known as the gift fund, so that when people make

20 donations to the University of marketable stocks, they

21 can be put into this fund. If it's a stock that we

22 already own, we'll move it into GEP, into the existing

23 holdings.

24 If it's a stock that we don't own and

25 there are no restrictions on its sale, we'll sell it

1 were made as a result of Mr. Holm's analysis totaled

2 approximately \$200 million?

3 A. Yeah, I remember specifying depending on

4 price, market conditions and other purchases in those

5 weeks, that I wanted to invest between 150 and

6 200 million. So 200 would have been the highest. It

7 might have been more like 175, if it came right in the

8 middle of that recommendation.

9 Q. In the -- in the rankings of securities

10 holdings of the Regents at that time, was your holding

11 of Enron securities in your top 10?

12 A. No.

13 Q. Do you recall where it would rank?

14 A. Probably the lower -- bottom 50 percent,

15 lower half of our holdings.

16 Q. And how many holdings did you have?

17 A. About a hundred.

18 Q. I saw somewhere in this material, I think, it

19 comprised .7 percent of your portfolio. Does that

20 sound correct to you?

21 A. Uh-huh.

22 Q. Yes?

23 A. Yes. Sorry.

24 Q. Now, we talked about this process that you

25 went through in connection with making your decision

9/12/2003 2:09 PM

0087

9/12/2003 2:09 PM

0089

1 addition to the Enron position in our portfolios that  
2 was made by Arild and approved by myself in November  
3 of 2000.

4 Q. Would this recommendation have gone through  
5 basically the same analytical process that you used in  
6 connection with the decision to make your initial  
7 purchase?

8 A. The same process but in a streamlined manner  
9 because we already have much of the research in place,  
10 so it would have focused on change at the company or  
11 within the industry since the initial recommendation  
12 was made.

13 Q. Do you recall any discussions you had with  
14 Arild Holm or anyone else in connection with your  
15 decision to increase your investment in the Enron  
16 securities in November of 2000?

17 A. I recall that it was Arild's initiation. In  
18 other words, I was -- I was satisfied with our current  
19 weight in Enron and the industry. Arild thought that  
20 the company was being unfairly penalized at the time  
21 related to some -- literally, some mix-ups in CNN  
22 reporting related to some lawsuits, and so he thought  
23 it was an opportunity to buy the stock cheap and that  
24 it would rebound fairly shortly after that. So it was  
25 a little bit more tactical than we usually are.

9/12/2003 2:09 PM

0098

1 that may not be foreseen yet.

2 So it was more of an industry discussion  
3 than a company-specific discussion. The discussions  
4 on Enron tended to focus not on their traditional  
5 areas but more on the broadband opportunity and a  
6 little bit on the trading of broadband.

7 Q. Do you recall any discussion regarding  
8 Enron's balance sheet in connection with the  
9 presentation and peer group review in connection with  
10 the decision to invest in Enron?

11 A. No. There was -- I mean, I can specifically  
12 recall that there were -- that there were no red flags  
13 for people at that point regarding the balance sheet.  
14 There was concerns about the size of the commitment  
15 needed for the trading operation, which is what I  
16 assume that that price management liability was for.

17 Since we were all used to Wall  
18 Street-type activities, we know the type of dollars  
19 that are needed to trade effectively. It's a big  
20 commitment. So we wanted to make sure that Enron  
21 wasn't going to face any sort of liquidity crisis that  
22 would lead them to not be able to trade in the markets  
23 that they're making so much money from.

24 Q. Anything else you can recall about comments  
25 or questions made in the peer group review?

9/12/2003 2:09 PM

0100

1 Q. Backing up to the -- back to the initial  
2 purchase decision, you've -- you've told me that Arild  
3 would have presented his position regarding Enron to  
4 this group of 10 or 12 people that you identified  
5 earlier. Do you actually have a recollection of that  
6 presentation?

7 A. Of his presentation?

8 Q. Uh-huh.

9 A. Yes.

10 Q. And -- and the discussion that went on, I  
11 take it?

12 A. Yes.

13 Q. Can you tell me what you recall about his  
14 presentation and the discussion that occurred at the  
15 table in as much detail as you can recall?

16 A. It won't be a whole lot of details since it  
17 was a couple of years ago, few years ago. But,  
18 essentially, the concern of the other analysts was not  
19 so much with Enron as with the industry sector for  
20 independent power producers

21 This was going in a little bit late in  
22 the game in all of our views, so that our question was  
23 how much growth in this sector was already built into  
24 the stock price of these companies versus how much  
25 growth was there in the country for these companies

9/12/2003 2:08 PM

0099

1 A. No, not really

2 Q. How about when it came time in November to  
3 consider an increased investment, do you recall  
4 anything that occurred during the peer group analysis  
5 in connection with that recommendation?

6 A. It was purely a discussion of price because  
7 from our initial purchase to that point, Enron had  
8 been a very strong performer, so that tends to  
9 alleviate people's fears on the underlying business  
10 and company. So the concern at that point was, you  
11 know, are we buying this too rich, you know, did it  
12 have its run; and is it now back down to what you  
13 might call fair value.

14 Q. Can I see Exhibit 54, please?

15 A. Fifty-four.

16 Q. Who were the two people that signed  
17 Exhibit 54 or initialed Exhibit 54 along with you?

18 A. So the second, since we already mentioned  
19 her, is the head equity trader, Linda Fried. And the  
20 first was the treasurer at that time, who was  
21 treasurer on an interim basis, which is DeWitt Bowman.

22 Q. I see. There's written on here, stock down  
23 18 percent; add approximately 15 percent to position,  
24 below \$70, approximately 200,000 shares. Whose  
25 handwriting is that?

9/12/2003 2:08 PM

0101

1 A. That's mine.  
 2 Q. Is that what you approved?  
 3 A. That's actually what I recommended. He  
 4 wanted to add to the position but didn't have an  
 5 amount in mind, so as I have actually typically done,  
 6 because it's an easy answer to sometimes a question  
 7 that doesn't have an easy answer, is I wanted to buy  
 8 enough stock to bring our position back to what it had  
 9 been prior to the price decline.  
 10 Q. Okay. Prior to the decision to invest in  
 11 Enron, had you personally talked to anyone that you  
 12 understood to be an employee of Enron?  
 13 A. No.  
 14 Q. Had you ever attended any seminars or  
 15 conferences where any Enron personnel had made any  
 16 presentation?  
 17 A. I don't recall any, and if there was a  
 18 conference, I didn't attend the Enron presentation.  
 19 I've never seen Enron management at a conference.  
 20 Q. When we were talking earlier, you said you  
 21 had concerns about the broadband issue, and you -- you  
 22 asked Mr. Holm to follow up on that.  
 23 A. Yes.  
 24 Q. Those concerns would have been concerns that  
 25 existed in the spring of 2000?

9/12/2003 2:09 PM

0102

1 A. Yes.  
 2 Q. Do you know who Mr. Holm talked to at Enron  
 3 concerning the broadband issue before he reported back  
 4 to you?  
 5 A. I do not.  
 6 Q. Did he tell you who he talked to?  
 7 A. Oh, he might have at the time, but it -- the  
 8 name just wouldn't have mattered to me, just that the  
 9 level of the person. So if he had said he spoke to  
 10 the investor relations manager, I would have sent him  
 11 back again. So I'm fairly certain that he said he  
 12 spoke to, you know, a senior VP or higher so that it  
 13 was somebody that I was sure understood the business  
 14 rather than just, you know, somebody who was in  
 15 communications.  
 16 Q. With respect to your concern about the  
 17 partnerships, was that also a concern that you had in  
 18 the spring of 2000 prior to the investment decision?  
 19 A. Yes.  
 20 Q. Do you know who Mr. Holm talked to at Enron  
 21 concerning the partnership issue?  
 22 A. I don't know exactly. I know that he  
 23 generally tried to talk to the treasurer or the CFO on  
 24 anything financial, which this would have fallen  
 25 under.

9/12/2003 2:09 PM

0103

1 Q. But you don't have a recollection that he  
 2 reported back to you that he talked to a particular  
 3 person?  
 4 A. He would have just said, you know, I spoke to  
 5 the treasurer or the company regarding --  
 6 Q. Mr. Holm, I take it, would be the best person  
 7 for us to talk to to find out exactly who he talked to  
 8 and what he was told?  
 9 MR. GALL: Paul, it's a good point to --  
 10 I'm getting ready to change subjects, so it's a good  
 11 point to take a break.  
 12 MR. HOWES: Sure.  
 13 MR. GALL: I think it fits with your  
 14 lunch hour, so --  
 15 THE VIDEOGRAPHER: We're off record.  
 16 The time is 12:10.  
 17 (A recess was taken.)  
 18 THE VIDEOGRAPHER: We're back on record.  
 19 The time is 1:41.  
 20 Q. (By Mr. Gall) Are you ready, Mr. Hell?  
 21 A. Yes.  
 22 Q. We've talked about Arild Holm today.  
 23 A. Yes.  
 24 Q. How long did you work with him?  
 25 A. I would say two and a half years.

9/12/2003 2:09 PM

0104

1 Q. What do you know about his education or  
 2 background?  
 3 A. Well, he was from Norway, born and raised in  
 4 Norway, and went to school in London and in Colorado.  
 5 I think he has his master's degree in -- his MBA from  
 6 University of Colorado.  
 7 Q. Did you consider him a capable research  
 8 analyst?  
 9 A. Yes.  
 10 Q. A talented research analyst?  
 11 A. Uh-huh.  
 12 Q. Yes?  
 13 A. Yes.  
 14 Q. Did he have stocks other than Enron he was  
 15 responsible for monitoring on behalf of the Regents?  
 16 A. Yeah, he was responsible for the energy  
 17 sector as a whole, and -- which is what we called  
 18 natural resources and basic materials. So it was  
 19 energy, utilities, chemical companies, steel  
 20 companies, all within that sort of broad framework.  
 21 And I would guess that he had about a  
 22 medium workload as far as number of companies that he  
 23 followed, number of holdings in the portfolio. There  
 24 were generally eight analysts in the funds.  
 25 So, you know, if you take -- that's, I

9/12/2003 2:09 PM

0105

1 with the University.

2 Q. Did that cause you any concern about the fact  
3 that you had a substantial investment in Enron?

4 A. Well, it cut both ways. On one hand, it  
5 caused me concern if I thought that they might fail on  
6 a contract because of inability. On the other hand,  
7 if they were just playing hardball with a -- a  
8 customer that they saw was going to cost them too much  
9 money, I guess depending on how severe they went or  
10 how hard to the mats they went with this potential --  
11 with this customer would concern me. So I -- you  
12 know, I never was able to see it to the conclusion,  
13 out, you know, that would have been my -- were my  
14 concerns.

15 Q. Were you aware that this contract existed  
16 when you made the decision to invest in Enron?

17 A. No.

18 Q. So you only discovered it after the fact?

19 A. Yes.

20 Q. Was there ultimately litigation over the  
21 contract to your knowledge?

22 A. I'm not sure I know that there was the  
23 threat of it.

24 Q. So you don't know whether a lawsuit was ever  
25 filed?

9/12/2003 2:09 PM

0150

1 A. No.

2 Q. Do you know how the problem was ever  
3 resolved?

4 A. No.

5 Q. Do you know who would know that?

6 A. Procurement, which is a department at the  
7 University.

8 Q. Would you turn over to pages that are marked  
9 Regents 2412? These appear to be notes of an Enron  
10 second quarter conference call, correct?

11 A. Yes.

12 Q. Another one of these conference calls that  
13 Enron senior management had with chosen investors?

14 A. Yes.

15 Q. Do you have any knowledge of this call other  
16 than what -- what you can read from the notes?

17 A. No, only that it was expected and routinely  
18 done that an analyst would update me after such a  
19 call. And, of course, with a hundred holdings and  
20 another 50 or so potential holdings at any one time,  
21 they didn't and couldn't spend too much time  
22 debriefing me on it. There just wasn't enough time in  
23 the day.

24 So it's usually only if there was  
25 something significant to report; otherwise, they would

9/12/2003 2:09 PM

0151

1 just let me know that it's sort of business as usual  
2 for Enron or for whatever other company was reporting.  
3 And they would also put into the primary files a copy  
4 of either the release itself or their notes or both so  
5 that if I ever needed to, I could just go to the file  
6 and look at their write-up of the call.

7 Q. All right. So --

8 A. Which is where this would have been taken  
9 from. There usually was two copies, so Arild would  
10 have had a copy of this in his files, but we also had  
11 a primary office file that had a duplicative copy.

12 Q. Did Arild prepare some summary of these calls  
13 for you?

14 A. He did not go beyond his notes. There was a  
15 few different forms that the analysts did, and I was  
16 happy with all of them. One was they would just file  
17 their notes. Another is they would write their notes  
18 and comments on the earnings release itself, which  
19 actually was my preferred method because I could see  
20 the release and their comments. And then others would  
21 actually write up a more formal memo, which actually  
22 was my least favorite because it ends up being more  
23 interpretive, and I like to see some of the raw data,  
24 so --

25 Q. Would you, from time to time, go in and

9/12/2003 2:09 PM

0152

1 review analysts' notes regarding conference calls they  
2 had?

3 A. Only if something came up. I wouldn't do it  
4 mechanically because that was really their job.

5 Q. At any time, did Mr. Holm report to you that  
6 he was aware that Enron was somehow manipulating its  
7 balance sheet?

8 A. Not -- well, certainly he did at some point.  
9 I'm just trying to really think when. It was, you  
10 know, well after this call certainly. And I don't  
11 know if used the word "manipulation," but I think he  
12 certainly used words like "restatements,"  
13 "restatements will be coming."

14 Q. Okay. I'm not really -- I'm not really  
15 talking about restatements based on the Andersen  
16 accounting. Let's say in the year 2000 first. At any  
17 time during 2000, did Mr. Holm suggest to you that  
18 Enron was doing anything that he thought involved  
19 manipulation or -- yeah, manipulation of its balance  
20 sheet?

21 A. I don't -- not in 2000, no.

22 Q. Did he say anything to you to suggest that  
23 there was anything on their balance sheet that was  
24 hidden?

25 A. No.

9/12/2003 2:09 PM

0153

1 with the investment in Enron securities?  
 2 A. He thought it was appropriate for the  
 3 company. I don't recall him making any comments about  
 4 extending it to the banks or, you know, the law firm  
 5 or the accountants.  
 6 Q. Okay. I assume that you don't have any  
 7 knowledge about what the agreement is between the  
 8 Regents and its lawyers in this case; is that fair?  
 9 A. Right. I do not.  
 10 Q. Somebody else would have more knowledge about  
 11 that?  
 12 A. Right.  
 13 Q. And you don't intend to have any ongoing role  
 14 in either the management or supervision of this  
 15 lawsuit, do you?  
 16 A. No.  
 17 Q. Prior to giving your deposition and getting  
 18 ready to give your deposition, had you met with any  
 19 lawyers from Milberg, Weiss?  
 20 A. Well, I met yesterday.  
 21 Q. Right. That was in connection with getting  
 22 ready for your deposition.  
 23 A. Oh, prior --  
 24 Q. Prior to yesterday.  
 25 A. -- to getting ready for it, no.

9/12/2003 2:09 PM

0222

1 those to when you gathered them?  
 2 A. To the University's general counsel.  
 3 Q. And then what he did with them, as far as  
 4 communicating with Milberg, you don't know?  
 5 A. Right.  
 6 Q. Mr. Holm would have had communications with  
 7 Jeff Skilling, Lou Pai, among others, correct?  
 8 A. Yes, though, as I mentioned, compared to a  
 9 lot of our investments in larger corporations, access  
 10 to the CEO is, of course, the hardest. In this case,  
 11 the -- so that was about normal. But usually you have  
 12 more access to the CFO than we were able to get here.  
 13 So I would say that his access to Ken Lay,  
 14 Jeff Skilling and Andrew Fastow was more limited than  
 15 we normally were used to.  
 16 Q. Okay. Was that a cause for concern to you?  
 17 A. Some. I didn't know if it was arrogance on  
 18 the company's part or they were just so busy and  
 19 involved with so many deals and other investors that  
 20 they found it truly hard to make time. I'm not sure.  
 21 But, I mean, you like to be -- I wouldn't want a  
 22 company to be at our beck and call because I'd rather  
 23 have them focused on running their business, but I  
 24 would like to occasionally speak to them. And it was  
 25 a little tougher here.

9/12/2003 2:09 PM

0224

1 Q. Prior to yesterday, had you met with or  
 2 talked with any lawyers from Milberg, Weiss?  
 3 A. No, other than to arrange yesterday's  
 4 meeting.  
 5 Q. Certainly the fact that Mr. Holm had -- well,  
 6 let me back up. There's no doubt that both during the  
 7 period when you were considering the investment in  
 8 Enron and thereafter, Mr. Holm had access to senior  
 9 management at Enron, correct?  
 10 A. Yes.  
 11 Q. And he participated in analyst calls,  
 12 correct?  
 13 A. Yes.  
 14 Q. And those facts are borne out with these  
 15 documents, correct?  
 16 A. Yes.  
 17 Q. And those documents were provided to your  
 18 attorneys early on in this process, correct?  
 19 A. Yes.  
 20 MR. HOWES: Chuck, it may not matter,  
 21 but when you say provided to your attorneys, are you  
 22 referring to the Regents' counsel or to Milberg?  
 23 MR. GALL: Well, let me ask.  
 24 Q. (By Mr. Gall) The documents you've gathered  
 25 that we've gone through today, who did you provide

9/12/2003 2:09 PM

0223

1 Q. Do you know where the Regents stood in the  
 2 size of investors in Enron?  
 3 A. Not precisely, but I would assume we were  
 4 easily in the top 10. We tended to be top 10 for a  
 5 lot of our investments.  
 6 Q. And that's the reason why you had kind of  
 7 extraordinary access to management, yes?  
 8 A. Well, I would say that anyone with  
 9 significant investments would have that sort of access  
 10 that we were talking about earlier, like the earnings  
 11 conference calls. I mean, they wouldn't exclude -- a  
 12 company wouldn't typically exclude a smaller investor  
 13 if it was still an institutional shareholder, so the  
 14 threshold isn't quite as high as you might think.  
 15 Q. Do you know how those thresholds are  
 16 established?  
 17 A. I'm sure it differs by company, but, you  
 18 know, just surmising from being on occasional calls, I  
 19 would guess there could be up to 50 people on a  
 20 conference call so that if 10 or 15 are Wall Street  
 21 analysts at the most, then you might have 35 or  
 22 40 large shareholders, so top 40 shareholders.  
 23 Q. Those are the kind of shareholders that  
 24 typically could get access like you're able to get?  
 25 A. Yes.

9/12/2003 2:09 PM

0225

1 A. I don't know if there was an actual lawsuit.  
 2 I know there was a dispute.  
 3 Q. There is a lawsuit, but we don't have to get  
 4 into it. I was asking you about whether you know what  
 5 is claimed in the securities lawsuit concerning EES's  
 6 operations?  
 7 A. No.  
 8 Q. Do you know who Mr. Gary Matteson (phonetic)  
 9 is?  
 10 A. Well, the name is familiar, but offhand, I  
 11 don't remember.  
 12 (Deposition Exhibit 73 was marked.)  
 13 Q. Do you have Exhibit 72 in front of you?  
 14 A. Seventy-three?  
 15 Q. Pardon me.  
 16 A. Yes.  
 17 Q. Would that appear to be Mr. Holm's notes of a  
 18 conversation with Gary Matteson on June 6th, 2000?  
 19 A. Yes.  
 20 Q. And do you have any information concerning  
 21 this conversation other than what is reflected on  
 22 Exhibit 73?  
 23 A. No.  
 24 Q. Do you know who Eric Behrens is?  
 25 A. No.

9/12/2003 2:09 PM

0266

1 A. No, because that's the only thing he  
 2 discussed with me regarding this, and we decided that  
 3 it would be immaterial to the company's overall  
 4 results.  
 5 Q. I gather, then, he didn't discuss with you  
 6 the last two sentences of this page from Exhibit 58,  
 7 which as best I can read, a provision in the contract  
 8 that allows them to turn it over to the utilities, a  
 9 small paragraph buried in the contract. Have any  
 10 conversation with you about that?  
 11 A. No.  
 12 Q. At the time that you bought additional Enron  
 13 stock in November of 2000, did Mr. Holm address this  
 14 issue of the dispute with the University of California  
 15 over the energy supply contract?  
 16 A. I don't remember if it was -- I mean, it was  
 17 brought up. I'm not sure if it was brought up before  
 18 that purchase or afterwards because -- since our  
 19 conclusion was that the dispute between University  
 20 procurement and Enron Energy Services was too small to  
 21 affect the company's overall results, that our only  
 22 choice of action would be whether we wanted to somehow  
 23 ethically or morally support the University by not  
 24 being a shareholder in a company that they thought  
 25 was, you know, renegeing on a contract with them. And

9/12/2003 2:09 PM

0266

1 Q. I'm going to hand you a page, and I'll tell  
 2 you that it is -- this particular page is already a  
 3 part of Exhibit 58. Yes, I'm sorry. Does that  
 4 refresh your recollection that Mr. Behrens was counsel  
 5 to the University of California?  
 6 A. No.  
 7 Q. In the dispute with Enron?  
 8 A. No.  
 9 Q. And does this appear that Mr. Holm was  
 10 present at a conversation with Mr. Behrens on  
 11 March 21, 2001?  
 12 A. Yes. Well, Arild was being consulted for his  
 13 knowledge of the California energy markets, so it was  
 14 a noninvestment issue, so I had zero involvement.  
 15 They were just talking to him related to his knowledge  
 16 or hoped-for knowledge in assessing where pricing  
 17 might go and, you know, other suppliers and, you know,  
 18 things related to being a customer, rather than an  
 19 investor.  
 20 Q. Well, was he also trying to evaluate what  
 21 impact the lawsuit might have on Enron?  
 22 A. Which -- which lawsuit?  
 23 Q. I'm sorry. The lawsuit between the  
 24 University of California and Enron over their power  
 25 contract.

9/12/2003 2:09 PM

0267

1 we just decided to keep the two issues separate.  
 2 Q. Did you ever reach an assessment as to the  
 3 merits of the lawsuit?  
 4 A. No. I never -- my conversations were always  
 5 focused on the portfolio effect of holding the stock.  
 6 And, you know, I had a fiduciary responsibility to the  
 7 pension fund to keep that focus.  
 8 So, for instance, if I sold Enron stock  
 9 because I thought that they were screwing the  
 10 University over on this energy contract and the stock  
 11 rose 20 points in the following six months, I would  
 12 have been, in my mind, violating my fiduciary  
 13 responsibility to the pension -- pension fund  
 14 beneficiaries.  
 15 MR. NICKENS: Why don't we take a break  
 16 and hope the room cools off a little.  
 17 THE VIDEOGRAPHER: We're off the record  
 18 at 6:27.  
 19 (A recess was taken.)  
 20 THE VIDEOGRAPHER: We're back on record.  
 21 The time is 6:37.  
 22 MR. NICKENS: This is what, 74?  
 23 (Deposition Exhibit 74 was marked.)  
 24 Q. (By Mr. Nickens) Mr. Heil, you should have  
 25 in front of you Exhibit 74, is that correct?

9/12/2003 2:09 PM

0269