

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

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Michael N. Milby, Clerk of Court

In re ENRON CORPORATION §
SECURITIES LITIGATION §

This Document Relates To: §
§
MARK NEWBY, et al., Individually and §
On Behalf of All Others Similarly Situated, §
§
Plaintiffs, §
§
vs. §
§
ENRON CORP., et al., §
§
Defendants. §

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

**BANK DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
IMPERIAL COUNTY EMPLOYEES RETIREMENT SYSTEM'S AND IHC
HEALTH PLANS, INC.'S MOTION TO INTERVENE AND DESERET MUTUAL
BENEFIT ADMINISTRATORS' MOTION JOINING MOTION TO INTERVENE**

September 30, 2003

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Defendants Bank of America Corporation, Banc of America Securities LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (f/k/a CIBC Oppenheimer Corp.), CIBC World Markets plc, Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Pershing LLC, J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., J.P. Morgan Chase Bank, Lehman Brothers Inc., Lehman Brothers Holdings Inc., Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce Fenner & Smith Incorporated, (collectively, the "Bank Defendants") respectfully submit this memorandum of law in opposition to the Motion to Intervene under Federal Rule of Civil Procedure 24(b)(2) of Imperial County Employees Retirement System ("ICERS") and IHC Health Plans, Inc. ("HPI") and the Motion Joining ICERS' and HPI's Motion to Intervene of Deseret Mutual Benefit Administrators ("Deseret").¹ For the reasons discussed below, the Court should deny intervention.

Preliminary Statement

On May 14, 2003, plaintiffs filed their First Amended Consolidated Complaint (the "Amended Complaint") attempting to, among other things, sweep into this case nine so-called "Foreign Debt Securities Offerings" that were not the basis of any claims in the prior Consolidated Complaint, filed on April 8, 2002. (*See* Am. Compl. ¶¶ 641.1-641.44.) These privately-offered Foreign Debt Securities were not issued by

¹ In this memorandum, ICERS, HPI and Deseret are collectively referred to as the "Intervenors."

Enron but by other issuers and are alleged to have been dependent in various different ways upon Enron's credit rating, financial condition and/or ability to pay. Although none of the named plaintiffs is alleged to have purchased any of the Foreign Debt Securities, plaintiffs assert claims in the Amended Complaint against the Bank Defendants based upon these securities under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") and Sections 12(a)(2) and 15 of the Securities Act of 1933 (the "1933 Act"). Likewise, plaintiffs expanded the class definition in the Amended Complaint, purporting to bring class claims not only on behalf of all persons who allegedly acquired Enron's publicly traded securities from October 19, 1998 through November 27, 2001 (the "Class Period") (*see* Consol. Compl. ¶ 986 n.15), but also persons who allegedly purchased the Foreign Debt Securities during the Class Period (*see* Am. Compl. ¶ 986 ("includ[ing] purchasers of all securities identified herein issued by Enron-related entities")).

On June 18, 2003, the Bank Defendants moved to dismiss all claims based on the Foreign Debt Securities Offerings for several independent reasons. Of particular relevance here, the Bank Defendants argued that plaintiffs lack standing to assert claims based on the Foreign Debt Securities Offerings because no plaintiff is alleged to have purchased any of these securities. In their opposition to those motions, plaintiffs did not dispute that they did not purchase any of the Foreign Debt Securities. Instead, they asked the Court to defer ruling on the Bank Defendants' motions to dismiss for lack of standing until they could seek to add a new named plaintiff that might have standing, thus demonstrating that plaintiffs improperly asserted claims with respect to the Foreign Debt Securities Offerings in the Amended Complaint merely as a placeholder until they could

find someone who allegedly purchased those securities. (See Pl. Opp. Mem. at 38, 46 n.38, 47.)

On August 27, 2003, plaintiffs' counsel filed the instant motion to intervene on behalf of ICERS and HPI, which allegedly purchased in only *two* of the *nine* Foreign Debt Securities Offerings listed in the Amended Complaint.² According to plaintiffs' counsel, ICERS and HPI seek leave to intervene "as plaintiffs and additional class representatives" to "pursue claims based on the Foreign Debt Securities." (Mot. Intervene at 1, 3.) Plaintiffs' counsel admittedly filed the motion to intervene to cure any "standing defects" with respect to the Foreign Debt Securities Offerings. (*Id.* at 1 & n.1.)³

The motion to intervene should be denied for the following independently sufficient reasons. First, intervention cannot be used to "cure" jurisdictional defects, such as plaintiffs' lack of standing to pursue any claims based on the Foreign Debt Securities Offerings. Second, the motion to intervene should be denied as futile because Intervenors' proposed claims based on the Foreign Debt Securities Offerings are time-

² In their certifications, ICERS claims to have purchased 6.31% "Marlin Water Trust II" Foreign Debt Securities and HPI claims to have purchased "Yosemite Securities Trust" Foreign Debt Securities. (See Mot. Intervene, Exhs. A, B.) Because the proposed intervenors allege that they purchased in only these two Foreign Debt Securities Offerings, their motion cannot cure plaintiffs' lack of standing with respect to the other Foreign Debt Securities Offerings. See *In re Paracelsus Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing 12(a)(2) claims because "[p]laintiffs . . . do not allege that any named plaintiff purchased or acquired any of the Paracelsus notes at issue"); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995); *Brown v. Sibley*, 650 F.2d 760, 772 (5th Cir. 1981).

³ On September 15, 2003, plaintiffs' counsel filed on behalf of Deseret a motion seeking to join ICERS' and HPI's motion to intervene and to serve as a class representative. (See Mot. Joining Mot. Intervene at 1.) In its certification, Deseret claims that it purchased securities in the "Yosemite Securities Trust" Foreign Securities Debt Offering (apparently the same offering in which HPI allegedly purchased). (See *id.* Exh. A.)

barred for the same reasons that the identical claims asserted against the Bank Defendants in the Amended Complaint (although by plaintiffs without standing) are time-barred by the applicable one-year statutes of limitations.

ARGUMENT

I. INTERVENTION CANNOT BE USED TO CURE PLAINTIFFS' LACK OF STANDING.

Plaintiffs cannot “cure” their lack of standing to pursue claims predicated on the Foreign Debt Securities Offerings through the pending motion to intervene because intervention cannot be used to create jurisdiction. A “motion for intervention under Rule 24 is not an appropriate device to cure a situation in which plaintiffs may have stated causes of action that they have no standing to litigate.” *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979). As the Fifth Circuit has observed, intervention is only permissible where it “is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought *by at least one subsisting party with standing to do so.*” *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (emphasis added).

Indeed, federal courts have repeatedly denied motions to intervene where, as here, plaintiffs have attempted to manufacture jurisdiction through such motions. *See, e.g., Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 26 (1st Cir. 1990) (intervention not available to “cure” standing deficiency); *Lambert v. Mortgage Guaranty Ins. Co.*, No. CV199-238 (S.D. Ga. May 3, 2000) (unpublished order) (denying intervention by a putative member of an uncertified class under Rule 24(b) where initial plaintiffs lacked standing); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 382 (D. Mass. 1987) (denying intervention of actual purchasers of stock where nominal plaintiffs lacked standing to

represent class); *see also Lidie v. State of California*, 478 F.2d 552, 555 (9th Cir. 1973) (intervention should be denied where it is a “back-door attempt to begin the action anew” because the original plaintiffs were unsuited to litigate the claims on behalf of class); *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926) (where minimum amount in controversy was insufficient as to original plaintiffs, defect could not be cured by intervention of additional plaintiffs); *Interstate Commerce Comm’n v. S. Ry. Co.*, 380 F. Supp. 386, 394-95 (D.C. Ga. 1974) (“it is elementary that jurisdictional defects in the original complaint [such as standing] cannot be remedied by the papers of intervenors, nor can authority to bring suit be bestowed by intervenors on an original plaintiff where no such authority existed prior to intervention”), *aff’d in relevant part*, 543 F.2d 534 (5th Cir. 1976); *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 180-81 (W.D. La. 1970) (intervenor takes case as he finds it and may not intervene if there is not already a proper suit before court).

Warden v. Crown American Realty Trust is particularly instructive. In that case, defendants filed motions to dismiss arguing that the named plaintiffs did not allege (in support of claims under Sections 11 and 12(2) of the 1933 Act) that they purchased their shares in the initial public offering of the securities in question. *See* No. Civ. A. 96-25J, 1998 WL 725946, at *1 (W.D. Pa. Oct. 15, 1998). “Although [plaintiffs] vaguely argu[ed] in their brief in opposition that [named plaintiffs] do indeed have standing, plaintiffs’ principal response on this issue was to file a motion to allow [a proposed intervenor], who it is averred did purchase his shares in the IPO, to intervene.” *Id.* Finding the issue “clear-cut,” the court dismissed plaintiffs’ claims for lack of standing, and found that, in light of the original plaintiffs’ lack of standing, the motion for

intervention was an “improper attempt . . . to reinvigorate an otherwise defunct [claim].”

Id. at *7.

The logic of these decisions is straightforward. Standing is an issue that implicates the subject matter jurisdiction of the court; without it, the court lacks the power — as a constitutional matter — to hear and decide the case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III” of the United States Constitution) (citation omitted). Intervention, because it is only an ancillary proceeding in a pending suit, necessarily presupposes the power of the court to preside over the subject matter in question. *See Ruiz*, 161 F.3d at 832 (“Rule 24, authorizing intervention, presumes that a justiciable case or controversy already exists before the court.”). Therefore, with respect to plaintiffs’ purported claims based on the Foreign Debt Securities Offerings as to which they lack standing to sue, there is no live case or controversy into which intervention is possible. *See Applebaum v. State Farm Mut. Auto Ins. Co.*, 109 F.R.D. 661, 663 (M.D. Pa. 1986); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989) (“[S]tanding doctrine ensures that a justiciable case and controversy exists between the parties. Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene.”).

Recognizing they lack standing with respect to all claims predicated upon the Foreign Debt Securities Offerings and that this Court has not yet ruled on the Bank Defendants’ pending motions to dismiss such claims for lack of standing, plaintiffs seek to avoid dismissal of the claims by interposing an intervention motion before the Court’s

disposition of those motions. It is precisely this procedural gamesmanship that the court soundly rejected in *Dietrich v. Bauer*, 76 F. Supp. 2d 312, 326 (S.D.N.Y. 1999):

[Plaintiff] seeks to bolster the Section 12 claims in his Amended Complaint by adding additional class representatives in order to withstand the current round of motions to dismiss, . . . [h]owever, [he] cannot salvage his . . . claims by contending that the proposed new representatives have standing to prosecute when they are not named as plaintiffs and when . . . he himself lacks standing.

See also Applebaum, 109 F.R.D. at 664 (holding that, where intervention was sought to cure named plaintiff's apparent lack of standing, court "necessarily had to consider [named plaintiffs]'s standing to bring suit *before* . . . granting intervention") (emphasis added). Indeed, because standing is a "threshold" inquiry, any other result would effectively abrogate the standing doctrine. *See Lujan*, 504 U.S. at 569.

The two decisions cited by plaintiffs and Interveners as supposedly "demonstrat[ing] the propriety of" their motion to intervene — *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117 (S.D.N.Y. 2002) and *In re Worldcom, Inc. Sec. Litig.*, No. 02 CIV. 3288, 2003 U.S. Dist. LEXIS 8245 (S.D.N.Y. May 19, 2003) — are totally inapposite. (Mot. Intervene at 1.) Neither of these decisions addressed the issue presented here: whether intervention can be used to add a plaintiff with standing to a putative class action in which none of the existing named plaintiffs has standing. The *IPO* case, unlike this case, concerned a motion for leave to amend pursuant to Federal Rules of Civil Procedure 15 and 20. *See* 214 F.R.D. at 119, 122. The defendants in the *IPO* case opposed joinder of the new plaintiffs on the ground that the *lead* plaintiff, as opposed to *named* plaintiffs, needed to have standing for all claims being asserted on behalf of the putative class. *Id.* at 122. The court rejected that argument, observing that the lead plaintiff did not need to have standing with respect to all claims as long as at

least one named (non-lead) plaintiff has standing for each claim. *See id.* Here, however, the named plaintiffs lack standing to pursue the asserted claims based on the Foreign Debt Securities Offerings.

Similarly, defendants in *Worldcom* argued, in the context of a motion to dismiss, that it was necessary for the *lead* plaintiff to have standing for all claims and that it was insufficient that three of the *named* plaintiffs had standing. *See* 2003 U.S. Dist. LEXIS 8245 at *76. The Intervenor's mischaracterization of the issue in *Worldcom* is readily apparent from the court's response to the *Worldcom* defendants' arguments:

Defendants have not shown that there is any legal bar to a lead plaintiff asking other plaintiffs to join a [consolidated] lawsuit as named plaintiffs in order to represent more broadly the interests of the class *at the time of the filing of the consolidated class complaint*. . . . [I]t [is] well established that named plaintiffs may jointly represent the class and *it is their claims that determine whether there is standing to bring the claims alleged on behalf of the class*.

Id. at *81 (emphasis added). Because plaintiffs here lack standing to pursue any claims based on the Foreign Debt Securities Offerings asserted in the Amended Complaint, the motion to intervene cannot be used to create such standing and should be denied.⁴

⁴ The proposed intervention also fails to satisfy the requirements of Rule 24(b) in that, among other things: (i) the intervention motion, filed nearly two years after the original complaint in this case, is not timely; (ii) the intervenors' proposed claims do not share common questions of law or fact with plaintiffs' claims; and (iii) such an intervention would delay or prejudice the rights of the original parties. *See* FED. R. CIV. P. 24(b); *Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co.*, 172 F.3d 385, 389 (5th Cir. 1999); *see generally* Conseco Annuity Assurance Company's memorandum of law in opposition to the motion to intervene, dated September 8, 2003.

II. INTERVENTION SHOULD BE DENIED AS FUTILE BECAUSE INTERVENORS' PROPOSED CLAIMS ARE TIME-BARRED.

Intervenors' motion should also be denied as futile because their proposed claims are barred by the applicable one-year statutes of limitations. As demonstrated in the Bank Defendants' pending motions to dismiss, all of plaintiffs' purported claims predicated on the Foreign Debt Securities Offerings in the Amended Complaint are — leaving aside the lack of standing — barred by the applicable one-year statutes of limitations.⁵ And, even if Intervenors were entitled to rely on the May 14, 2003 filing date of the Amended Complaint — which Intervenors' contend is the “operative” complaint for purposes of the intervention motion (Mot. Intervene at 4) — based on tolling principles (and they are not),⁶ Intervenors' proposed claims based on the Foreign Debt Securities Offerings would still be time-barred for the same reasons. (*See supra* note 6.)

⁵ See, e.g., Bank of America Mot. Dismiss, dated June 18, 2003, at 7-18; Barclays Mot. Dismiss, dated June 18, 2003, at 7-15; Citigroup Mot. Dismiss, dated June 18, 2003, at 14-15; J.P. Morgan Chase Mot. Dismiss, dated June 18, 2003, at 5-7, 11-12; Lehman Mot. Dismiss, dated June 18, 2003, at 5-10; Credit Suisse First Boston LLC, et al., Mot. Dismiss, dated June 18, 2003, 6-12.

⁶ Although not raised in the Intervenors' moving papers, it should be noted that the statutes of limitations applicable to the Intervenors' proposed claims have not been tolled by the doctrine announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). The federal courts have consistently held that “if the original plaintiffs lacked standing to bring their claims in the first place [like plaintiffs here], the filing of a class action complaint does not toll the statute of limitations for other members of the purported class [*i.e.*, the Intervenors here].” *In re Colonial Ltd. P'ship Litig.*, 854 F. Supp. 64, 82 (D. Conn. 1994); see also *Elscint*, 674 F. Supp. at 378 (“it would be improper to allow the filing of a class action by nominal plaintiffs who are wholly inadequate to represent the asserted class to have the effect of tolling limitation [*sic*] to permit the otherwise untimely intervention of proper class representatives”); *Lambert*, No. CV199-238 (same); *Warden*, 1998 WL 725946 at *6-7 (same) (citations omitted). To the extent Intervenors argue that they are entitled to rely on tolling principles to salvage their untimely proposed claims, the Bank Defendants would request permission to file an additional brief addressing that issue in more detail.

Moreover, as explained in the Bank Defendants' pending motions to dismiss, the two-year statute of limitations in the Sarbanes-Oxley Act, *see* Pub. L. No. 107-204, § 804(b), 116 Stat. 745, 801 (July 30, 2002) (cited herein as "Sarbanes-Oxley"), does not apply to any of the claims based on the Foreign Debt Securities Offerings asserted in the Amended Complaint (or for that matter any other claim asserted in that complaint). (*See, e.g.*, Citigroup Reply Br. at 17-25.) Because the Intervenors purport to adopt the Amended Complaint and insert themselves in a proceeding commenced prior to the enactment of Sarbanes-Oxley, the statute of limitations in this Act does not apply to the Intervenors' claims. (*See id.*)

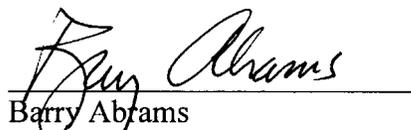
CONCLUSION

For the foregoing reasons, the Court should deny intervention here, and should grant the Bank Defendants' pending motions to dismiss all claims asserted in the Amended Complaint against the Bank Defendants based on the Foreign Debt Securities Offerings. And even if the Court were to grant intervention, it should still grant the Bank Defendants' pending motions to dismiss all claims with respect to the Foreign Debt Securities Offerings in which even the proposed Intervenors did not purchase; there is no

standing with respect to these claims even if ICERS, HPI and Deseret are permitted to intervene.

Dated: September 30, 2003
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Respectfully submitted,



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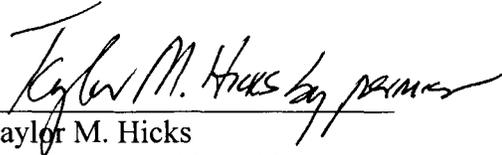


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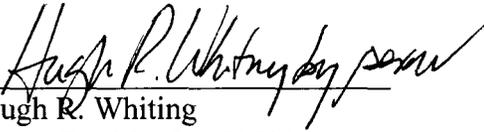
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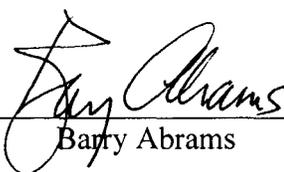
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 30th day of September, 2003 a copy of the foregoing Bank Defendants' Memorandum of Law in Opposition to Imperial County Employees Retirement System's and IHC Health Plans, Inc.'s Motion to Intervene and Deseret Mutual Benefit Administrators' Motion Joining Motion to Intervene has been served on all counsel of record via www.esl3624.com website posting and served on the following party via first class mail:

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