

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

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

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In Re ENRON CORP. SECURITIES,
DERIVATIVE, & ERISA LITIGATION

This Document Relates To:

MARK NEWBY, et al.,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

MDL 1446

CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES

**MEMORANDUM OF LAW OF BANK OF AMERICA CORPORATION
AND BANC OF AMERICA SECURITIES LLC IN OPPOSITION TO
LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**

1778

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LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**

Defendants Bank of America Corporation (“BAC”) and Banc of America Securities LLC (“BAS”) respectfully submit this memorandum of law in further opposition to Lead Plaintiff the Regents of the University of California’s (“Lead Plaintiff”) amended motion for class certification.¹

¹ BAC and BAS hereby join in and incorporate by reference the arguments set forth in The Financial Institution Defendants’ Memorandum of Law In Opposition to Lead Plaintiffs’ Amended Motion for Class Certification (the “Joint Memorandum” or “Defendant-Financial Institutions’ Opposition to Class Certification”), as and where relevant to the claims against BAC and/or BAS (namely, with regard to certain of the claims asserted in the First Amended Consolidated Complaint under Sections 11, 12, and 15 of the Securities Act of 1933).

PRELIMINARY STATEMENT

In the First Amended Consolidated Complaint (the “FAC”) filed in this action on May 14, 2003, Plaintiffs have asserted various state and federal securities law claims against, among others, former Enron executives, Arthur Andersen LLP (“Andersen”), Enron’s outside legal counsel, BAC, BAS, and numerous other financial institutions. Only certain of these claims, however, are asserted against BAS and BAC.

Specifically, Plaintiffs assert that BAS violated Section 11 of the Securities Act of 1933 (the “Securities Act”) in connection with the sale of: (i) Enron’s \$500 million 7.375% Notes due May 15, 2019 (the “7.375% Notes”) and (ii) Enron’s \$222 million 7% Exchangeable Notes due July 31, 2002 (the “7% Exchangeable Notes”). In addition, Plaintiffs assert that BAS violated Section 12(a)(2) of the Securities Act in connection with the sale of Marlin Water Trust II and Marlin Water Capital Corp. II’s \$475 million 6.31% Senior Secured Notes due 2003 and €515 million 6.19% Senior Secured Notes due 2003 (collectively, the “Marlin Notes”). BAC is not sued for any primary violation of the federal securities laws (or on any state law claim); rather, BAC is named solely as a purported control person of BAS and therefore is alleged to be liable for BAS’ alleged securities law violations under Section 15 of the Securities Act. Plaintiffs do not assert that either BAC or BAS violated Section 10(b) or 20(a) of the Securities Exchange Act of 1934 (the “1934 Act”) or Rule 10b-5 promulgated thereunder.

The Court should decline to certify a class with respect to the claims asserted against BAS and BAC. Class certification must be addressed on a claim-by-claim basis. See Bertulli v. Indep. Ass’n of Cont’l Pilots, 242 F.3d 290, 296 (5th Cir. 2001). BAS and BAC submit this separate memorandum of law to demonstrate that the Securities Act claims asserted in the FAC have serious defects which should preclude class certification. Those claims also

dramatically aggravate the manageability problems and class period problems addressed in the Joint Memorandum.

The Section 12(a)(2) claims asserted in the FAC appear to have been added as an after-thought in an attempt to bring in claims to the class action on securities that were not issued by Enron. For the reasons stated in the Joint Memorandum, these claims present a number of problems for purposes of class certification. In particular, certification of the Section 12(a)(2) claim asserted against BAS in connection with the Marlin Notes is inappropriate because: (i) Plaintiffs lack standing to assert a Section 12(a)(2) claim with respect to the Marlin Notes since no Plaintiff purchased such securities; (ii) Plaintiffs' proposed "cure" for this standing defect -- having Imperial County Employees Retirement System ("ICERS"), which allegedly purchased the Marlin Notes, move to intervene as a plaintiff -- will not "revive" this claim because, among other things, ICERS' claim is barred by the statute of limitations applicable to Section 12 claims; and (iii) no person could at this time assert a claim under the Securities Act relating to the Marlin Notes in that, as with ICERS, all such claims would be barred under the limitations period governing Section 12 claims. In short, because there is no person that could assert a valid, non-time barred claim under Section 12(a)(2) relating to the Marlin Notes, such a claim is not appropriate for class certification. See Point I.

In addition, class certification should be denied with respect to both the Section 12 claim asserted in connection with the Marlin Notes and the Section 11 claims asserted against BAS in connection with the 7.375% and the 7% Exchangeable Notes because none of the proposed class representatives that acquired these Notes satisfies Rule 23(a)(4)'s mandate that the representative adequately protect the interests of the class. To the contrary, the three proposed class representatives -- ICERS (the Marlin Notes), the Employer-Teamsters Local Nos. 175 and 505 Pension Trust Fund (the "Employer-Teamsters Fund") (the 7.375% Notes), and

Nathaniel Pulsifer (the 7% Exchangeable Notes) -- have abdicated their obligation to “take an active role in and control the litigation and to [thereby] protect the interests” of absent class members. See Berger v. Compaq Computer Corp., 257 F.3d 475, 479 (5th Cir. 2001); Point II.

ARGUMENT

POINT I

THE COURT SHOULD NOT CERTIFY A CLASS WITH RESPECT TO THE SECTION 12 CLAIM ASSERTED AGAINST BAS IN CONNECTION WITH THE MARLIN NOTES

A. Plaintiffs Lack Standing to Sue under Section 12(a)(2) with Respect to the Marlin Notes

BAC and BAS argued in their motion to dismiss the FAC, which is currently pending before the Court, that the Section 12(a)(2) claim asserted against BAS in connection with the sale of the Marlin Notes is defective and must be dismissed. Specifically, BAS argued that, because no proposed class representative named in the FAC purchased the Marlin Notes, the Plaintiffs lacked standing to assert the Section 12(a)(2) claim related to the sale of such Notes.²

It is well settled that a plaintiff seeking to represent a putative class must be a member of the class he purports to represent. See Bailey v. Patterson, 369 U.S. 31, 33 (1962); In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995) (“it is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be a part of that class”). It follows, then, that plaintiffs who did not purchase the securities in question lack standing to bring a federal securities law claim and are not entitled to maintain a class action on behalf of persons who did purchase such securities. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975) (the “remedy granted by Section 12 . . . is limited to the person purchasing [the] security”); Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 518 (5th Cir. 1985)

² See Memorandum of Law in Support of Defendants Bank of America Corp. and Banc of America Securities LLC’s Motion to Dismiss the First Amended Consolidated Complaint (“BAC and BAS’ Motion to Dismiss the FAC”), Point II.

(plaintiffs did not have standing under Section 12(2) because they did not purchase any securities); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 893 (S.D. Tex. 2002) (dismissing Section 12(a)(2) claim because plaintiffs did not purchase their shares in public offering and thus lacked standing), aff'd sub nom. Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003).

In light of the foregoing, Plaintiffs plainly lack standing to assert a Section 12 claim against BAS relating to the Marlin Notes. As explained by this Court in In re Paracelsus Corp. Sec. Litig., 6 F. Supp. 2d 626 (S.D. Tex. 1998) -- in an observation equally applicable here:

[A] plaintiff bringing suit under either Section 11 or Section 12 of the Securities Act at least must allege that he or she purchased or acquired the security at issue. Plaintiffs in the instant matter do not allege that any named Plaintiff purchased or acquired any of the Paracelsus notes at issue. In fact, Plaintiffs concede in their Response that none of the Plaintiffs acquired any of the Notes. . . . Moreover, an individual plaintiff who lacks standing to assert a claim on his or her own behalf cannot avoid dismissal by purporting to maintain the action on behalf of a class of which he or she is not a member.

Id. at 631.

B. The Proposed Intervenor's Claim under Section 12 Relating to the Marlin Notes Is Barred by the Applicable Statute of Limitations

In light of the foregoing, the FAC suffers from a fatal defect with respect to the Section 12(a)(2) claim asserted against BAS concerning the Marlin Notes -- i.e., no Plaintiff purchased such securities and thereby had standing to assert this claim. Thereafter, ICERS, which allegedly had purchased the Marlin Notes, filed a motion seeking to intervene as a plaintiff (and class representative) in this action. In this fashion, Plaintiffs admitted and simultaneously sought to "cure" the undeniable fact that Plaintiffs lacked standing to assert a Section 12(a)(2) claim against BAS related to the Marlin Notes.

In opposition to ICERS' motion for intervention (and in its motion to dismiss), BAS argued, among other things, that intervention was futile because Plaintiffs' claim under Section 12(a)(2) was barred by the statute of limitations applicable to Sections 11 and 12(a)(2).³ The applicable statute of limitations is set forth in Section 13 of the Securities Act, which provides:

No action shall be maintained to enforce any liability created under section [11] or [12](a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . . In no event shall any such action be brought to enforce a liability created . . . under section [12](a)(2) of this title more than three years after the sale.

15 U.S.C. § 77m (2003). Thus, claims under Sections 11 and 12 are barred if plaintiffs had inquiry notice of the alleged misstatements and omissions for more than one year, even if fewer than three years have elapsed since the transaction giving rise to the claim. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991); In re Gen. Dev. Corp. Bond Litig., 800 F. Supp. 1128, 1135 (S.D.N.Y. 1992), aff'd sub nom. Menowitz v. Brown, 991 F.2d 36 (2d Cir. 1993).

As BAS argued in its motion to dismiss the FAC, Plaintiffs failed to name BAS as a defendant, or assert a Section 12(a)(2) claim against BAS or BAC relating to the Marlin transactions, until they filed their FAC on May 14, 2003, more than one year after they named BAC as a defendant. Moreover, Plaintiffs asserted the Section 12(a)(2) claim for the first time more than one and a half years after Enron's October 16, 2001 announcement that it was taking \$1 billion in charges and reducing shareholders' equity by \$1.2 billion and Enron's November 8,

³ See Bank Defendants' Memorandum of Law in Opposition to Imperial County Employees Retirement System and IHC Health Plans, Inc.'s Motion to Intervene and Desert Mutual Benefit Administrator's Motion Joining Motion to Intervene ("Bank Defendants' Opposition to ICERS' Motion to Intervene"), Point II and BAC and BAS's Motion to Dismiss the FAC, Point I.

2001 announcement that it was restating its financials for the years 1997 through 2000. It cannot be disputed that Enron's October 16 and November 8, 2001 announcements put any potential plaintiffs on inquiry notice of their claims. The Section 12(a)(2) claim against BAS (first asserted in May 2003) is therefore barred by the applicable statute of limitations, which requires that the claims be brought within one year after discovery of the facts underlying the claim (i.e., by Fall 2002).

Not only were Plaintiffs (and all potential plaintiffs/intervenors) on inquiry notice of claims against BAS relating to the Marlin Notes in the Fall of 2001, but any such current or potential plaintiffs plainly had actual knowledge of a Section 12 claim related to the Marlin Notes by April 8, 2002, when the Consolidated Complaint for Violation of Securities Laws was filed in this action (the "Consolidated Complaint"). The Consolidated Complaint alleged that the same Marlin transactions which are the subject of Plaintiffs' new Section 12(a)(2) claims against BAS were vehicles utilized by Enron and its insiders to further their fraudulent scheme, and that BAC (which was defined to include BAS) acted as an "underwriter" of the Marlin transactions. Nonetheless, BAS was not named as a defendant nor was a Section 12 claim asserted against BAS relating to the Marlin Notes until more than one year after the Consolidated Complaint was filed. Since Plaintiffs' Section 12(a)(2) claim against BAS falls well beyond the expiration of the one year "discovery" prong of the statute of limitations, the claim is time-barred and should be dismissed.

C. Class Certification of a Section 12 Claim Relating to the Marlin Notes Is Inappropriate

As set forth above, Plaintiffs' Section 12(a)(2) claim against BAS with respect to the Marlin Notes is subject to dismissal -- and ICERS' motion to intervene should be denied as

futile -- because such a claim is barred under the statute of limitations applicable to Section 12. These same facts preclude certification of a class with respect to this claim.

As the Fifth Circuit has held, “[b]oth standing and class certification must be addressed on a claim-by-claim basis.” James v. City of Dallas, 254 F.3d 551, 563 (5th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). In other words, in order to certify a class with respect to a particular claim, there must be “at least one named Plaintiff” with standing to seek relief on that claim. Id. Stated differently, a court should “certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate. . . . Certification on a claim-by-claim, rather than holistic, basis is necessary to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members.” Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000); Bertulli, 242 F.3d at 296 (same).

Here, there is no person (including ICERS) that could assert a claim under Section 12(a)(2) against BAS with respect to the Marlin Notes. To the contrary, any such claim, whether asserted by ICERS or any other person, would be time barred since this claim was not asserted until May 14, 2003 -- well over one year past the time any potential plaintiff was on inquiry notice of the claim. See Point I.B. As a result, there is not “at least one named Plaintiff,” James, 254 F.3d at 563, that has a valid claim and could represent a class asserting a Section 12 claim relating to the Marlin Notes. Accordingly, the Court should not certify a class with respect to this claim.⁴

⁴ The Section 12 claim asserted in the FAC also is subject to dismissal and/or should not be certified on the additional grounds (asserted in BAC and BAS’ motion to dismiss and/or the other defendant-financial institutions’ opposition to class certification) that: (i) Section 12(a)(2) governs only public offerings made pursuant to a prospectus, and does not apply to the offering of the Marlin Notes, which was exempt from registration and sold only to qualified institutional buyers pursuant to Rule 144A, 17 CFR § 230.144A, and Regulation S, 17 CFR §§ 230.901-230.905; (ii) the FAC does not allege, as it must, that BAS “sold”

POINT II

CLASS CERTIFICATION OF PLAINTIFFS' SECTION 11 AND 12 CLAIMS WITH REGARD TO THE MARLIN NOTES, THE 7.375% NOTES, AND THE 7% EXCHANGEABLE NOTES IS INAPPROPRIATE BECAUSE THE PROPOSED CLASS REPRESENTATIVES DO NOT MEET THE ADEQUACY REQUIREMENTS OF RULE 23(a)(4)

The Supreme Court has made clear that a class action “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982) (emphasis added). Rule 23(a) of the Federal Rules of Civil Procedure (the “Rules”) requires, among other things, that a class representative “adequately and fairly protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This adequacy requirement, in turn, “mandates an inquiry into, [among other things,] the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees.” Berger, 257 F.3d at 482 (internal quotation omitted); Krim v. pcOrder.com, Inc., 210 F.R.D. 581, 587 (W.D. Tx. 2002). Thus, proposed representatives “must possess a sufficient level of knowledge and understanding to be capable of ‘controlling’ or ‘prosecuting’ the litigation.” Berger, 257 F.3d at 482; see also Krim, 210 F.R.D. at 587 (“Representatives should understand the action in which they are involved and their understanding should not be limited to derivative knowledge acquired solely from counsel.”) (internal quotations omitted); Greene v. Brown, 451 F. Supp. 1266, 1276 (E.D. Va. 1978) (requiring that representative participate in and exercise adequate oversight over the conduct of the litigation, so as to ensure that plaintiff’s lawyer does not “substitute” for the client, and

the Marlin Notes to Plaintiffs; and (iii) the Section 12 claims pose additional substantial manageability problems because, among other things, the Notes involved (i.e., the Marlin Notes) were not issued by Enron, and all were issued at different times pursuant to offering documents that contain different allegedly misleading financial statements. See BAC and BAS’ Motion to Dismiss the FAC, Point II and Defendant-Financial Institutions’ Opposition to Class Certification, Point III.

thereby “turn an individual’s suit for vindication of his personal rights into [a] lawyer’s suit for vindication of [the] rights of a class”); In re Goldchip Funding Co., 61 F.R.D. 592, 595 (M.D. Pa. 1974) (“An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.”).

Indeed, courts often have denied certification due to concerns over permitting “a pure class action lawyer’s suit” where a proposed class representative fails to review or take any action to ensure the accuracy of the complaint filed in the particular case or is unfamiliar with basic aspects of the case. See, e.g., Butterworth v. Quick & Reilly, Inc., 171 F.R.D. 319, 323 (M.D. Fla. 1997) (“The plaintiff fails to demonstrate that she is familiar with the facts of the current case sufficiently enough to represent the proposed class.”); Rolex Employees Ret. Trust v. Mentor Graphics Corp., 136 F.R.D. 658, 665-66 (D. Or. 1991) (named plaintiff who “contributed nothing to [the] drafting of the complaint” held to be inadequate representative); Levine v. Berg, 79 F.R.D. 95, 97 (S.D.N.Y. 1978) (denying certification where proposed representative, among other things, only “glanced briefly through the complaint before it was filed”).

In short, if a proposed class representative has “extremely limited or nonexistent” knowledge of the facts, then the representative is inadequate. Darvin v. Int’l Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985); see also 7A Charles A. Wright, et al., Federal Practice & Procedure § 1766, at 308-11 (2d ed. 1986) (“If the representative displays . . . a lack of knowledge or understanding concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is not satisfied. This inquiry into the knowledge of the representative is to ensure that the party is not simply lending his name to a suit controlled entirely by the class attorney; the named party must be an adequate representative in addition to having adequate counsel.”).

Each of the three proposed class representatives that allegedly acquired these securities that are the subject of Plaintiffs' Section 11 and 12 claims against BAS are patently inadequate, and are incapable of protecting both the interests of absent class members and Defendants' interest in protecting a "favorable judgment on the merits from collateral attacks on the adequacy of the class representative, and hence, the sufficiency of the judgment." See Hansberry v. Lee, 311 U.S. 32, 41, 45 (1940). Since these proposed representatives have relinquished control of the litigation to counsel and possess virtually no knowledge of the most elementary facts surrounding this litigation (i.e., the parties, the claims, the class period, etc.), certifying them as class representatives would render Rule 23(a)(4)'s adequacy requirement a virtual nullity and improperly convert "an individual's suit for vindication of his personal rights into a lawyer's suit for vindication of the rights of a class." Greene, 451 F. Supp. at 1276.

A. ICERS Is Not an Adequate Representative

In addition to all the other problems with the Section 12 claim asserted in the FAC, Plaintiffs' sole proposed intervenor plaintiff is clearly inadequate to represent the class. Barbara McFetridge, the ICERS representative with responsibility for supervising this litigation on behalf of ICERS, demonstrated virtually no familiarity with this litigation. Nor did ICERS make the decision to purchase the Marlin Notes; that decision was made by an outside investment advisor. When asked about her understanding of the case, Ms. McFetridge, among other things:

- was unsure who ICERS purportedly seeks to represent should the class of purchasers of the Marlin Notes be certified (McFetridge Tr. 99:3-5, 99:15-25);
- was unsure of the proposed class period (McFetridge Tr. 99:11-14);
- was unsure of the identities of all of the defendants that ICERS purportedly seeks to sue (McFetridge Tr. at 57:7-17); and

- was unsure of the wrongdoing asserted in the FAC against BAS, BAC and the other financial institution defendants (McFetridge Tr. 57:18-65:7).

For example, Ms. McFetridge testified as follows:

Q: Can you point to anything the bank defendants knew that would have suggested to them that the financial statements were incorrect?

...

A: No, I can't recall specifically, no.

Q: Can you point to any action that the banks should have taken that would have led them to uncover that the financial statements were inaccurate?

A: No, I can't recall anything specific.

* * *

Q: Okay. And as to each of the banks that I just named, can you point to anything that they -- any information that they knew of that would have suggested that the financial statements were inaccurate?

...

A: Not specifically.

McFetridge Tr. 63:22-64:6, 65:1-7. Neither ICERS nor Ms. McFetridge made any effort to ensure the accuracy of or even reviewed the FAC prior to the time ICERS decided to pursue this litigation and adopted the allegations in the FAC in its intervention motion. See McFetridge Tr. at 78:8-17 (testifying that ICERS adopted the allegations in the FAC "based on the advice of their county counsel and the fact that [ICERS] had owned some of Enron's stock . . . [T]hat's all [ICERS] did."); id. at 230:4-231:2 (testifying that ICERS does not know and never asked whether county counsel ever conducted any investigation of Lead Plaintiff's allegations); id. at 54:5-22 ("we discussed it with county counsel . . . , and I believe that was the most we had done on that"); id. at 74:9-75:4.

Nor does ICERS possess the requisite knowledge of the Marlin Notes transaction.

For instance, Ms. McFetridge:

- Did not believe that the Marlin Notes were “foreign debt securities,” as described in ICERS’ motion for intervention (McFetridge Tr. 79:16-25);
- Did not have any understanding as to whether the Marlin Notes were offered to the public generally or (as is correct) to a more limited group of investors, i.e., qualified institutional buyers (McFetridge Tr. at 72:23-73:12);
- Had no understanding (legal, business or otherwise) of the term “qualified institutional buyer” (McFetridge Tr. at 71:13-72:11);
- Did not know why ICERS’ investment manager, Bradford & Marzac (“B&M”), decided to purchase or sell the Marlin Notes (McFetridge Tr. at 101:9-12, 105:21-106:9) nor did Ms. McFetridge ever inquire of B&M regarding this issue (McFetridge Tr. at 105:24-106:3, 106:7-9);
- Did not know who at B&M made the decisions with regard to the purchase and sale of the Marlin Notes, or what, if any, materials B&M relied upon in making such decisions (McFetridge Tr. at 104:3-105:10), including whether B&M prior to its purchase reviewed the allegedly false and misleading offering documents for the Marlin Notes (McFetridge Tr. at 109:21-24);
- Did not know why B&M waited until December 2001 to sell the Marlin Notes (McFetridge Tr. at 109:10-20);
- Did not know how the Marlin Notes transaction contributed to alleged errors in Enron’s financial statements (McFetridge Tr. at 111:24-114:23); and
- Could not recount any aspects of the underlying Marlin Notes transaction (McFetridge Tr. at 114:24-115:12) (“Q. Can you tell me any aspects of the Marlin transaction? A. No. Q. Have you heard of something called Azuriz, A-z-u-r-i-x? A. That sounds familiar. Q. What is it? A. I’m sorry. I don’t recall that. Q. Okay. What is Marlin? A. Marlin Water was as an investment for us. That’s all we -- all our knowledge in that. Q. But other than being an investment for you, do you know what it was as an entity? A. No, I do not.”).

Moreover, with regard to the offering memorandum for the Marlin Notes, Ms. McFetridge testified that she had never seen (much less reviewed) this allegedly false and misleading, and hence, critical, document:

Q: Okay. Exhibit 210 is the offering memorandum for notes issued by Marlin Water Trust II. Have you ever seen that document before?

A: Only one similar, earlier today.

Q: And today is the first time you saw the similar one?

A: Yes.

Q: Okay. But as far as you know, you've never seen Exhibit 210 before?

A: No, I have not.

Q: Do you understand what this document is?

A: I believe this document would be -- without reading it at all, would be when Marlin Water was offered as an investment, the information at that time.

Q: What in here are you claiming is false and misleading?

A: I haven't seen this document so I couldn't tell you.

McFetridge Tr. 143:18-144:11; see also id. at 240:3-241:23 (testifying that she was unaware that any Enron SEC-filed documents were incorporated by reference into the Marlin Notes offering memorandum; that she was unable to describe how any of these Enron SEC-filed documents were misleading or false (if at all); that she never reviewed any of those documents; and that she did not know whether county counsel ever reviewed any of those documents).

In short, ICERS has demonstrated complete reliance on counsel and passive "involvement" in this action, and admitted as much during its deposition:

Q: Do you also believe that it's one of ICERS' duties as a class representative to take an active role in the litigation?

A: No. I think that's the lead plaintiff and the lead counsel's job. We need to stay informed and provide whatever needs to be done.

Q: Do you believe that it's ICERS' job or lead plaintiff's job to direct or control the litigation?

A: I believe that would be lead plaintiff and the lead counsel's job of keeping us informed.

McFetridge Tr. 183:15-24. Ms. McFetridge added that:

Q: Okay. What documents have you reviewed in this lawsuit?

A: I've -- I've reviewed the complaint. I reviewed what I've signed, and I've also reviewed the request for the discovery documents.

Q: And when you say what you signed, you mean your certification?

A: Yes.

Q: Have you reviewed any other documents?

A: I don't recall reviewing any others, no, sir.

Q: Have you reviewed drafts of any documents before they were filed?

A: No.

Q: Have you provided any instructions to your counsel regarding this litigation?

A: No.

Q: Have you asked your counsel to show you drafts prior to filing documents?

A: No. That would have been our county counsel's job.

Q: Has your county counsel done that?

A: I don't know if he has or not.

McFetridge Tr. 96:2-23.

Because “the class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives,” and the proposed intervenor is so clearly defective even aside from statute of limitations problems, that ICERS should not be certified as a class representative. In re Goldchip, 61 F.R.D. at 594; see also Jaurigui v. Arizona Bd. of Regents, 82 F.R.D. 64, 65 (D. Ariz. 1979) (and cases cited therein).

B. The Employer-Teamsters Fund Is Not an Adequate Representative

The Employer-Teamsters Fund, the sole proposed representative of the alleged class of purchasers of the 7.375% Notes, is similarly inadequate. Mr. Atkins, the business agent and witness for the Employer-Teamsters Fund in this action, is unfamiliar with and lacks a basic understanding of the case and the underlying transaction at issue. As demonstrated below, the Employer-Teamsters Fund has abdicated control of the litigation to counsel and, hence, is not an adequate representative of the proposed class.

For instance, Mr. Atkins has not read the FAC, nor is he willing to do so:

Q: Did you read the amended complaint, sir?

A: No, sir. No, sir. 600 pages, I'm not going to read that.

Q: Did you read any of it?

A: I just looked through some of it. It's pretty redundant.

Q: How much time did you spend reviewing it?

A: Not a very long time, sir.

Q: Approximately 10 minutes, 15 minutes?

A: Twenty, 30 minutes looking at it.

...

Q: Other than the five-minute telephone conversation with your counsel that you mentioned before, do you recall

doing anything else prior to the commencement of this litigation?

A: I did not do anything else.

Atkins Tr. 68:18-22, 80:14-23. Furthermore, Mr. Atkins does not intend to read any of the other pleadings filed in this case either, as he believes this to be counsel's responsibility. Atkins Tr. 159:9-20, 160:11-14.

More alarmingly, Mr. Atkins lacks knowledge of the basic aspects of this litigation. For instance, Mr. Atkins is unsure of the parties, and does not know which persons or entities are defendants:

Q: Who are the defendants?

A: Washington State and the Teamsters, the Employer Teamsters is two that I know of.

Q: Those are the plaintiffs.

A: Yeah, plaintiffs.

Q: Who are the defendants in that case? I'm not -- I'm not asking you to read the caption, but generally do you know who the defendants are?

A: All of the people listed. Do I know them all? No.

Q: Do you know what their positions were or why they're named as defendants?

A: They had Lee Eap (phonetic), I remember him on TV, that they named him on TV. I don't know all them's names. I do not know that.

Atkins Tr. 70:22-71:11. Nor is Mr. Atkins familiar with the allegations in the FAC or even the general nature of the allegations against BAS and/or BAC and the other financial institutions:

Q: What charges are in this complaint? What wrongdoing is alleged to have been undertaken by --

A: I do not know the wrongdoing. I did not -- I didn't read that. I said I didn't -- looked over it. We lost money as a

fund, our pension fund and possibly our health and welfare fund also that had money in Enron.

Q: So you don't know what wrongdoing that you're charging against the defendants?

A: Well, they had false -- they had false records.

Q: What kind of false records?

A: Their accounting and their value was way higher than what it was supposed to -- what it actually was, is my understanding.

Q: And what's --

A: And I don't know what the charge or what that is in legal terms.

Q: All I'm trying to understand is what you're claiming in this complaint that the defendants did wrong.

A: I am not an attorney. I am a business agent officer of the local union, and I -- the attorneys handled this. I don't handle this. I didn't sign that document. Our attorney signed that document, and I base it on his knowledge and respect for him. As far as what they're charged with, I can't answer that and give you terms.

...

Q: Do you know specifically what the false information was that you charged the defendants with filing?

A: No, sir, I do not.

Q: Do you know how much the value of Enron was overstated according to your complaint?

A: No, I do not.

Q: Do you know what incorrect accounting methods were used according to the complaint?

A: No, sir.

...

Q: What did CitiGroup -- what wrongdoing did CitiGroup engage in?

A: I do not know.

Q: What wrongdoing did J.P. Morgan Chase engage in?

A: I do not know.

Q: What wrongdoing did CS First Boston engage in?

A: I do not know.

Q: What wrongdoing did Bank of America engage in?

A: I don't know.

Q: What wrongdoing did CIBC engage in?

A: I do not know that.

Q: What wrongdoing did Lehman Brothers engage in?

A: I don't know.

Q: What wrongdoing did Barclays engage in?

A: Who?

Q: Barclays Bank.

A: I don't know that.

Q: What wrongdoing did Merrill Lynch engage in?

A: I don't know.

Q: What wrongdoing did Deutsche Bank engage in?

A: I don't know.

Atkins Tr. 71:12-72:14, 73:10-19, 74:23-75:19. In addition, and at least as late as the date of his deposition, Mr. Atkins was unaware as to whether the Employer-Teamsters Fund had lost any money on its purported investments in Enron securities. Atkins Tr. 64:10-16; see also id. at 60:15-19, 61:7-8.

Moreover, Mr. Atkins has not been involved with discovery and, indeed, was not aware that BAS and/or BAC and the other financial institution defendants had requested any documents from the Employer-Teamsters Fund and, furthermore, was not asked to and did not search for or collect any documents in response to that request for production. Atkins Tr. 50:15-17, 51:15-17. He also does not know the status of the litigation or how the Employer-Teamsters Fund intends to communicate the status of the case to the purported class members it seeks to represent. Atkins Tr. 77:17-23, 160:1-4. Indeed, Mr. Atkins could not identify the purported class or class period. Atkins Tr. 78:19-21, 79:2-15. Finally, Mr. Atkins admitted that, since the filing of the FAC, he has not had any involvement in the litigation and, moreover, has not issued any instructions to counsel with regard to, for example, the filing of motions. Atkins Tr. 76:17-77:4.

C. Mr. Pulsifer Is Not an Adequate Representative

Mr. Pulsifer is the sole proposed class representative for the 7% Notes and is likewise an inadequate representative of the purported class of purchasers of the 7% Notes. He has not been actively involved in this case, but, instead, has relied, and intends to continue to rely, on his counsel to control the litigation. Simply put, Mr. Pulsifer (like ICERS and the Employer-Teamsters Fund) is unfamiliar with basic aspects of this litigation.

Mr. Pulsifer's involvement in this litigation has been minimal, at best. For instance, Mr. Pulsifer has not read the FAC and, indeed, had never seen the FAC until it was shown to him at his deposition, nor had he investigated the accuracy of the allegations therein:

Q: So, the Shooters Hill Complaint [filed by Mr. Pulsifer in his capacity as trustee of the Shooters Hill Trust] is incorporating by reference various charges --

A: Okay.

Q: -- made in the consolidated Complaint?

A: Yes.

Q: Is that right?

A: Yes.

Q: Did you ever read the consolidated Complaint before the Shooters Hill Complaint was filed?

A: No.

Q: Did you do anything to satisfy yourself that the paragraphs of the consolidated Complaint that you were incorporating by reference were accurate?

A: No, I leave that to counsel.

Q: Do you have any understanding of what your counsel did, if anything, to be assured of the accuracy of the allegations that are incorporated by reference here?

A: No.

Q: You never asked that question?

A: No.

Pulsifer Tr. 126:20-127:17.

Mr. Pulsifer also was unable to identify any specific transactions or events concerning the alleged misstatements made by the various defendants in this litigation. Pulsifer Tr. 100:11-102:13. Mr. Pulsifer, for instance, was unaware of the alleged misconduct of BAS, BAC and the other financial institution defendants:

Q: Can you tell me what misconduct Citigroup engaged in?

A: Specifically, no.

Q: How about J.P. Morgan Chase?

A: No.

Q: How about CSFB -- CS First Boston?

A: (Witness nods.)

MR. SHAPIRO: You need to speak.

A: I'm sorry. No. I cannot identify any specific misconduct.

Q: How about CIBC?

A: No.

Q: Bank of America?

A: No.

Q: Lehman Brothers?

A: No.

Q: Barclay's?

A: No.

Q: Merrill Lynch?

A: No.

Q: Deutsche Bank?

A: No.

Pulsifer Tr. 102:22-103:18. Nor is he aware of the allegations of wrongdoing asserted against the individual defendants. Pulsifer Tr. 208:14-24, 209:7-15, 209:18-20, 210:1-8, 211:4-7, 211:22-212:1, and 212:3-12.

Similarly, Mr. Pulsifer knows nothing regarding the status of the litigation, apart from the fact that he “presume[s] that there are activities like this going on in which information is being obtained,” and that the lawsuit is “taking a long time.” Pulsifer Tr. 122:15-123:3. He also cannot identify the proposed class period or the members of the putative class he seeks to represent. Pulsifer Tr. 123:12-24; 124:3-7. Incredibly, Mr. Pulsifer lacked a basic understanding of the 7% Notes underlying his claim even after he commenced this action, at that time having not reviewed the prospectus distributed in connection with the 7% Notes and having been under

the mistaken belief that the 7% Notes were secured obligations of Enron (as he erroneously informed his investment clients). Pulsifer Tr. 160:11-19.

Under the decisions set forth above, Mr. Pulsifer does not qualify as a class representative. See Berger, 257 F.3d at 482. Since he (as with ICERS for the Marlin Notes and the Employer-Teamsters Fund for the 7.375% Notes) is the sole proposed class representative for the 7% Exchangeable Notes, class certification should be denied.

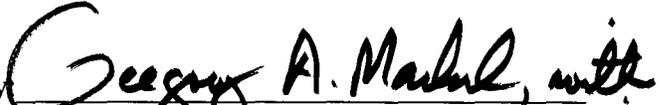
CONCLUSION

For the reasons set forth above, Defendants BAC and BAS respectfully request that the Court deny Lead Plaintiff's amended motion for class certification to the extent Plaintiffs seek to certify a class of purchasers of the Marlin Notes, the 7.375% Notes, and the 7% Exchangeable Notes.

Dated: October 23, 2003

Respectfully submitted,

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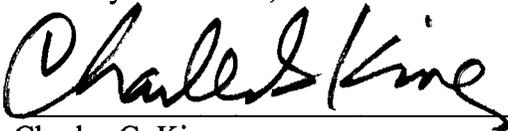
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by website, <http://www.esl3624.com>, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this the 23rd day of October, 2003.



Charles G. King