United States Courts
Southern District of Texas
FILED
OCT 23 2003
Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES LITIGATION	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
This Document Relates To:	§	
MARK NEWBY, et al., individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP. et al.,	§	**PARTIAL OBJECTION BY PUTATIVE CLASS MEMBERS TO LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF LAW THEREON**
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.	§	

1789

TABLE OF CONTENTS

(Page)

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3

A. The Proposed Representatives and the Amended Complaint 3

B. The Objectors 5

C. The Nature and Purpose of the Osprey Trust Offering 6

1. Misrepresentations and Omissions Regarding Use of Offering Proceeds 7

2. Misrepresentations and Omissions Concerning the Whitewing Asset Purchases 8

3. Misrepresentations and Omissions Concerning Liquidation of Whitewing Assets upon a Default 9

4. Misrepresentations and Omissions Regarding Enron's Financial Condition 9

III. THE PROPOSED REPRESENTATIVE PLAINTIFFS LACK STANDING TO ASSERT CLAIMS ON BEHALF OF OSPREY NOTE PURCHASERS 9

IV. THE CERTIFICATION OF THE CLASS AS CURRENTLY DEFINED AND PRESENTED WOULD VIOLATE RULE 23'S REQUIREMENTS 1

A. There Are Numerous Differences Between the Osprey Noteholders, on the One Hand, and the Proposed Representatives and Other Class Members, on the Other 14

1. A Private Offering to QIBs Is Substantially Different from Enron Corp. Public Offerings 14

2. The Statements to the Newby Plaintiffs Differ from Those Made to the Osprey Purchasers 14

3. The Claims and Theories Asserted in this Class Action Differ from the Theories Available to the Osprey Purchasers. 14

4. The Defenses and Potential Defenses in Newby Are More Troublesome Than Those Available in State Court 17

5. Newby Has Failed to Name Important Defendants 19

TABLE OF CONTENTS (cont'd)

(Page)

B. The Proposed Representatives Have Not Met the Typicality or Adequate Representation Requirements with Respect to Osprey Claims 20

C. Common Questions Do Not Predominate 21

D. The Osprey Note Purchases Should Be Eliminated from the Class Definition and Liability on the Osprey Note Purchases Excluded from the Class Issues 22

V. ALTERNATIVELY, THE COURT SHOULD PROVIDE THE OSPREY NOTEHOLDERS WITH THE RIGHT TO OPT OUT THEIR OSPREY PURCHASES WHILE OTHERWISE PARTICIPATING IN THE OVERALL CLASS WITH RESPECT TO ANY ENRON-ISSUED SECURITIES 22

VI. CONCLUSION 23

TABLE OF AUTHORITIES

(Page)

Cases

7547 Corp. v. Parker & Parsley Dev. Partners, L.P.,
38 F.3d 211 (5th Cir. 1994) 11

Affiliated Ute Citizens v. United States,
406 U.S. 128, 31 L. Ed. 2d 741, 92 S. Ct. 1456 (1972) 19

Binder v. Gillespie,
184 F.3d 1059 (9th Cir. 1999) 18

Brown v. Sibley,
650 F.2d 760 (5th Cir. 1981) 10, 11, 14

Bowden v. Robinson,
67 Cal. App. 3d 705 (Cal. 1977) 16

Camden Asset Management, L.P. v. Sunbeam Corp.,
No. 99-8275-CIV-Middelebrooks 2001 U.S. Dist. LEXIS 11022 (S.D. Fla. July 3, 2001) 18

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 18, 19, 21

Crasto v. Estate of Kaskel,
63 F.R.D. 18 (S.D.N.Y. 1974) 23

General Telephone Co. of the Northwest Inc. v. Equal Employment Opp. Comm.,
446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) 20

Griffin v. Dugger,
823 F.2d 1476 (11th Cir. 1987) 13

In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.,
794 F. Supp. 1424 (D. Ariz. 1992) 11, 12

In re Azurix Corp. Sec. Litig.,
198 F. Supp. 2d 862 (S.D. Tex. 2002) 11

In re General Motors Class E Stock Buyout Sec. Litig.,
694 F. Supp. 1119 (D. Del. 1988) 10

In re LifeUSA Holding,
242 F.3d 136 (3d Cir. 2001) 21

TABLE OF AUTHORITIES (cont'd)

(Page)

In re Livent, Inc. Noteholders Sec. Litig.,
211 F.R.D. 219 (S.D.N.Y. 2002) 18

In re Real Estate Title and Settlement Servs. Antitrust Litig.,
869 F.2d 760 (3d Cir. 1989) 10

In re U.S. Liquids Secs. Litig.,
No. H-99-2785, 2002 Dist. LEXIS 26714 (S.D. Tex., Apr. 29, 2002) 10, 12, 20

Johnston v. HBO Film Management,
265 F.3d 178 (3d Cir. 2001) 21

Krogman v. Sterritt,
202 F.R.D. 467, 479 n.16 (N.D. Tex. 2001) 11, 18, 21

Laskey v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW),
638 F.2d 954 (6th Cir. 1981) 10

Longden v. Sunderman,
123 F.R.D. 547 (N. D. Tex. 1988) 11

Parnes v. Mast Property Investors, Inc.,
776 F. Supp. 792 (S.D.N.Y. 1991) 22

Prado-Steiman ex rel. Prado v. Bush,
221 F.3d 1266 (11th Cir. 2000) 9, 10, 20

Ramos v. Patrician Equities Corp.,
765 F. Supp. 1196 (S.D.N.Y. 1991) 12

Rathborne v. Rathborne,
683 F.2d 914 (5th Cir. 1982) 11

Ratner v. Sioux Natural Gas Corp.,
770 F.2d 512 (5th Cir. 1985) 11

Spira v. Nick,
876 F. Supp. 553 (S.D.N.Y. 1995) 12

Winokur v. Bell Federal Savings & Loan Ass'n,
58 F.R.D. 178 (N.D. Ill. 1972) 22

Wood v. Combustion Eng'g., Inc.,
643 F.2d 339 (5th Cir. 1981) 22

TABLE OF AUTHORITIES (cont'd)

(Page)

Zeidman v. J. Ray McDermott & Co., Inc.,
651 F.2d 1030 (5th Cir. 1981) 13

Statutes

15 U.S.C.
Section 77p 17

15 U.S.C.
Section 77p(f)(3) 16

15 USC
Section 77r(b) (1) and (2) 16

Cal. Corp. Code
Sections 25401, 25501 19

F.R.C.P. Rule 23(a) 13

F.R.C.P. Rule 23(b)(3) 13

F.R.C.P. Rule 23(d) 22

Other Authorities

1 Marsh & Volk, Practice Under the California Securities Laws (Revised Ed.) § 1403[3][a] 16

1 Newberg on Class Actions
Section 3:13, p. 325 (4th ed. 2002) 20

1 Newberg on Class Actions
Section 3:21, p. 408 (4th ed. 2002) 21

Rules

17 C.F.R. 230.144A 6

17 C.F.R. 230.144A(d)(3)(i) 14

F.R.C.P. Rule 23(b)(3) 13

I. INTRODUCTION

The parties submitting this partial objection[1] ("Objectors") purchased securities issued by Enron Corp. Each Objector also made large investments in notes issued by the Osprey Trust, an Enron-sponsored special purpose entity ("SPE"). Each made its investment in Osprey Notes as a Qualified Institutional Buyer ("QIB"), and each is prosecuting claims in California Superior Court against the syndicate of underwriters who marketed and sold the Osprey Notes.

Objectors do not oppose certification of a class of purchasers of Enron Corp. securities nor do they suggest that the Regents of the University of California and the other proposed representatives in Newby are not adequate representatives for purposes of an Enron Corp. securities class or set of classes. Indeed, Objectors have relied on the Newby action to protect their interests with respect to their Enron Corp. securities claims. Objectors do, however, oppose certification of a class that encompasses both purchasers of Enron Corp. securities and purchasers of Osprey Notes.

The original Newby class action complaint filed in April 2002 was limited to investor losses in Enron Corp. securities. It did not purport to cover losses incurred in securities that were not issued by Enron, such as the Osprey Notes. Accordingly, in October 2002, the Objectors jointly filed a separate non-class-action complaint in California Superior Court against the banks (and affiliated control entities) that sold them the Osprey Notes. Objectors did not include claims relating to their Enron Corp. securities purchases in reliance upon the Newby complaint. Subsequently, on May 14, 2003, plaintiffs

---

[1] The Objectors, which are specially appearing before this Court to submit this partial objection are: Pacific Investment Management Company, LLC; Total Return Fund, a Series of PIMCO Funds; Maryland State Retirement and Pension Systems; Pitney Bowes Inc. Employees Retirement Plan; Nebraska Investment Council for the School Retirement System, the State Patrol Retirement System and the Judge's Retirement System; Employees' Retirement System of Baltimore County; Oppenheimer Capital Securities Investment Trust Total Return II Trust; Oppenheimer Capital Securities Investment Trust Moderate Duration Trust; Niagara Mohawk Pension Plan; Louisiana Firefighters Retirement System; Group Trust Agreement Pursuant to the Hewlett-Packard Company Deferred Profit-Sharing Plan and Retirement Plan and the Agilent Technologies, Inc. Deferred Profit Sharing Plan and Retirement Plan; San Diego City Employees' Retirement System; Kellogg Company Master Retirement Trust; Directors Guild Of America - Producer Supplemental Pension Plan; Directors Guild Of America - Producer Basic Pension Plan; and Plan of Benefits of the Central Pension Fund of the International Union of Operating Engineers Participating Employers.

filed a first amended consolidated class action complaint (the "Amended Complaint") in Newby which purports to expand of the putative Newby class to include losses for securities issued by "entities related to Enron, the repayment of which was dependent upon Enron's credit, financial condition and ability to pay." (Amended Complaint ¶1, n.1.) This expanded class definition arguably includes the Osprey Note purchases.[2] If so, it goes too far.

Unlike Objectors, none of the proposed class representatives: purchased Osprey Notes; received any of the Osprey offering materials; discussed the Osprey Note offering with selling syndicate member banks; or read or relied upon the particularized material false and misleading statements contained in the Osprey Offering materials;. Because no proposed class representative has a stake in the Osprey claims, none has standing to bring claims on behalf of the Osprey purchasers, and none can adequately prosecute such claims. Even if a class representative who had purchased Osprey Notes were found, the typicality and predominance of common questions required for class certification of such purchasers simply do not exist.

The prejudice inherent in the proposed representatives' pursuit of claims on behalf of both Enron Corp. purchasers and Osprey Notes purchasers is already manifest. The proposed representatives failed to named any of the sellers of Osprey Notes as defendants until May of 2003 (by which time these sellers assert the statute of limitations had already expired for any "class" claims). Even then, the proposed representatives failed to Bear Stearns or UBS Warburg, two members of the selling syndicate for the Osprey Notes. Not only have the proposed representatives failed to assert key facts and legal theories or to name key defendants with respect to the Osprey claims, in the very pleading in which these plaintiffs purport to represent Osprey Note purchasers, they condemn the Osprey structure (and by

---

[2] The Osprey Notes were not registered under the 1933 Securities Act. The Osprey Offering Memorandum states that they were "offered and sold only to (i) Qualified Institutional Buyers ('QIB') in reliance on Rule 144A ('Rule 144A Notes') and (ii) in offshore transactions in reliance on Regulation S ('Regulation S Notes')." The Objectors here did not purchase any Regulation S Osprey Notes issued in offshore transactions. It is unclear whether the Amended Complaint, which is limited to publicly traded securities and which focuses on the Regulation S aspects of the Osprey Offering, seeks relief with respect to the Osprey Notes purchased pursuant to Rule 144A. However, the Objectors understand that the proposed representatives take the position that all Osprey Notes, whether or not purchased pursuant to Rule 144A or Regulation S, fall within the class definition.

implication those that purchased the Osprey Notes) as an artifice to defraud Enron's shareholders. (Amended Compl. ¶¶ 48, 83(ii), 497.) And despite the fact that certain categories of claims (such as the Osprey Note purchasers' rescission claims) are far stronger than the generalized Rule 10b-5 fraud on the market theories asserted on behalf of the bulk of the class, the representative plaintiffs insist that all recoveries be distributed pro-rata among class members.[3]

The inability of the proposed representatives to adequately prosecute the Osprey claims put Objectors to an unfair and unacceptable choice. On the one hand, opting out of Newby clearly is the best alternative with respect to Objectors' Osprey claims. On the other hand, opting out would put at risk Objectors' claims arising out of their purchase of Enron Corp. securities. Objectors did not include those claims in their California action, precisely because they were being pursued in Newby. Given the passage of time, there is no assurance that Objectors now would be entitled to pursue those claims outside of the Newby case--either as part of Objectors' existing "Osprey-only" case or as part of a new one. Objectors face this untenable choice entirely as a consequence of the belated redefinition of the proposed Newby class.

Each class member is entitled to adequate representation on all claims litigated on its behalf. Adequate representation of Osprey Note purchasers cannot occur in Newby. Objectors thus request that this Court either (a) certify a class that excludes Osprey Note purchases from the Newby class, or (b) provide Osprey Note purchasers an opportunity to opt out of the class with respect to the Osprey Note purchases, while remaining in the class for Enron Corp. securities purchases.

II. FACTUAL BACKGROUND

A. The Proposed Representatives and the Amended Complaint

The Amended Complaint differs from the initial consolidated class action complaint in several significant respects. First, while the initial complaint was filed on behalf of purchasers of Enron Corp.

---

[3] See Conseco Mem. of Law in Opp. to Amended Class Cert. Motion at 14; Decl. on behalf of Conseco Opp. To Amended Class Cert. Motion ¶18 (Noting that Lead Plaintiff's counsel informed other purchasers of so-called Foreign Debt Securities that all recoveries would be distributed pro rata among class members regardless of the relative strength of their claims vis-a-vis other differently situated class members.)

securities, the Amended Complaint expands the proposed class to include investors that purchased publicly-traded securities issued by "entities related to Enron." (Amended Compl. ¶1, n. 1.) Specifically, the Amended Complaint seeks to expand the class to represent purchasers of so-called "Foreign Debt Securities" issued by an entity other than Enron, including Osprey Trust, Osprey I, Inc., Yosemite Securities Trust I, Yosemite Securities Co. Ltd., Enron Credit Linked Notes Trust, Enron Euro Credit Linked Notes Trust, Enron Credit Linked Notes Trust II, Enron Sterling Credit Linked Notes Trust, Marlin Water Trust II, and Marlin Water Capital Corp. I. (See, e.g., Amended Compl. ¶¶ 986, n. 20, 1016.4.) Second, the Amended Complaint adds several new defendants, including some, but not all, of the Osprey syndicate members.

Notwithstanding Lead Plaintiffs' efforts to lump these "Foreign Debt Securities" into a single definition, the security offerings encompassed within this definition are varied. For example, the Osprey Trusts were not the same entities that issued the other "Foreign Debt Securities." Different banks syndicated each of the Osprey, Marlin, Yosemite and Enron Credit Linked Note offerings.[4] The assets backing these offerings were different. And, each was sold using marketing materials particularized to the offering in question with a resulting difference in the misrepresentations and omissions material to prospective investors.

None of the proposed representative plaintiffs named in the Amended Complaint purchased Osprey Notes or any of the other "Foreign Debt Securities." Although the Lead Plaintiff belatedly sponsored three motions to intervene by purchasers of some of the "Foreign Debt Securties--Yosemite/Enron Credit Linked Notes[5] and Marlin Notes[6]--it has never even sought to proffer a class representative who purchased Osprey Notes.

---

[4] See Amended Compl. ¶ 1016.4, which lists the various issuers and the investment bank syndicate sellers (*i.e.*, the underwriter/initial purchasers) for each of the so-called Foreign Debt Securities offerings that fall within the expanded class definition.

B. The Objectors

The Objectors are institutional investors who purchased over $90 million par value of Senior Secured Notes issued in the Osprey I offering. The Objectors suffered significant losses on these purchases. Many also suffered significant losses on Enron Corp. securities purchases.

In October 2002, Objectors filed an action in California state court against Enron's investment bankers with respect to their Osprey Note losses--Pacific Investment Management Co. LLC et al v. Citigroup, Inc., Los Angeles Superior Court Case No. 02CC00300.[7] Because the putative class action complaint in Newby was limited to losses arising from Enron Corp. securities purchases, Objectors did not include such losses in their state court action.

Over the past year, in the Osprey state action Objectors have battled with the bank defendants in five federal and state judicial forums[8] over removal, abstention, remand, coordination, stay, and pleading challenges. After a year of sustained procedural jockeying, California state court jurisdiction over Objectors' Osprey action is firmly and finally established, Objectors have completed their briefing in

---

[5] The two proposed representatives who purchased certain Yosemite/Credit Linked Notes recently withdrew their motions to intervene due to concerns of inadequate representation after Lead Plaintiff's counsel informed them that all recoveries would be distributed pro rata among class members regardless of the relative strength of their claims vis-a-vis other differently situated class members. (Conseco Mem. of Law in Opp. to Amended Class Cert. Motion (10/16/2003) at 14; Decl. supporting Conseco Opp. To Amended Class Cert. Motion (10/16/2003) at ¶18; Withdrawal of Motion To Intervene By IHC Health Plan and Desert Mutual (10/2/2003).)

[6] Imperial County Board of Retirement ("Imperial County"), which purchased Marlin Notes but not Osprey Notes, is the only purchaser of any of the so-called Foreign Debt Securities that continues to seek to intervene as an additional class representative. Imperial County, which purchased $345,000 par value of Marlin Notes, does not, however, have a significant stake in the nearly $1 billion Marlin offering, and it has no stake in the $2.4 billion Osprey offerings. (Imperial County Mot. To Intervene (8/27/2003) at 2; Imperial Bank's Certification of Named Plaintiff (Schedule A).) Moreover, the investment bank defendants have vigorously objected to Imperial County's request to intervene.

[7] The defendants in this California action removed the case to federal court. The United States Bankruptcy Court for the Central District of California remanded the action, and, on appeal, the United States District Court for the Central District of California affirmed the remand order.

[8] The five forums are the Orange County Superior Court, the Los Angeles County Superior Court, the U.S. Bankruptcy Court for the Central District of California, the U.S. District Court for the Central District of California, and the California Judicial Council.

opposition to the investment banks' motions to dismiss, and document and interrogatory discovery has commenced.

C. The Nature and Purpose of the Osprey Trust Offering

Osprey Trust and Osprey I, Inc. ("Osprey") are two Enron-sponsored off balance sheet SPEs. These Osprey SPEs jointly issued notes and certificates in two Rule 144A exempt offerings, a $1.5 billion 1999 offering ("Osprey I") and a $1 billion 2000 offering ("Osprey II").

The Osprey Rule 144A offerings were limited, by regulatory mandate, to Qualified Institutional Buyers ("QIBs"), such as the Objectors. See 17 C.F.R. 230.144A. The banks and brokers that marketed these offerings were members of selling syndicates[9] that initially purchased the Osprey Notes from the Osprey Trust pursuant to a plan to market and resell them to QIBs.[10] These investment banks were, therefore, the direct sellers of the notes.

The proceeds from the Osprey I Certificates and Notes were to be used by the Osprey Trust to acquire an ownership interest in a limited partnership structure known as Whitewing. Whitewing, in turn, used these funds to purchase a pool of energy-related assets from Enron and to buy out what was falsely characterized in offering materials as an "unaffiliated equity investor." The Osprey Notes were to be secured by the Osprey Trust's member and limited partner interests in Whitewing, including indirect rights with respect to the above-described pool of energy-related assets. (Objectors' Compl. ¶¶ 6,7, 60, 64-65;see also Osprey I OM, cover, 1, 23 Ballard Decl. Exs. 1, 2.)

The Osprey syndicate banks marketed the Osprey Offering pursuant to offering memoranda, marketing materials and presentations directly targeted to QIBs. (See Objectors' Compl. ¶3, Ballard Decl. Ex. 1, see also Ballard Decl. Exs. 2-4.) These offering materials are infected with multiple misrepresentations and omissions specific to the Osprey offerings. These misrepresentations and

---

[9] The Osprey I Syndicate consisted of DLJ, Deutsche Bank, Bear Stearns and Salomon Smith Barney. The Osprey II Syndicate again consisted of DLJ and Deutsche Bank, along with new syndicate members CSFB, Lehman and UBS Warburg.

[10] The Osprey Offering Memorandum states that the Notes were "offered and sold only to (i) QIBs in reliance on Rule 144A and (ii) in offshore transactions in reliance on Regulation S." The Objectors did not purchase Osprey Notes issued in Regulation S offshore transactions.

omissions, among other things, concerned the structure and purpose of the Osprey Trust, the use of the Osprey offering proceeds, the nature of the assets that would secure repayment, and the ability to liquidate such assets.

1. Misrepresentations and Omissions Regarding Use of Offering Proceeds

One of the key, but undisclosed, objectives of the Osprey I Note offering was to generate funds that would allow Enron to retire a large component of Citigroup's then-existing credit exposure to Enron. This credit exposure was the result, among other things, of Citigroup's involvement in billions of dollars of disguised loans to Enron in the form of so-called "prepaid commodity transactions." These disguised loans had, over time, caused Enron's financial statements to become highly misleading. (Objectors' Compl. ¶¶ 133, 139-40, 145, Ballard Decl. Ex. 1; see generally, Appendix E (Prepay Transactions) to Second Interim Report of Neal Batson, Court Appointed Examiner, esp. pages 1 though 5, Ballard Decl. Ex. 5). In addition to these prepay transactions, Citigroup also made another significant disguised loan to Enron through a Citigroup affiliate called "Nighthawk." (See Objectors' Compl. ¶ 70, Ballard Decl. Ex. 1.)

By September 1999, and based upon its growing concern over Enron's financial condition, Citigroup set about to limit its credit exposure to Enron. Citigroup accomplished this, in part, through the Osprey offering structure (designed to repay Citigroup's Nighthawk loan) and, in part, through the "Yosemite" notes (designed to reduce Citigroup's secret "prepay" exposure). (Objectors' Compl. ¶¶ 114-22,160-61, Ballard Decl. Ex. 1.)

To conceal the true nature of the Nighthawk payment and to reduce the likelihood of inquiry into Citigroup's reasons for reducing its Enron credit exposure, the Osprey I Offering Memorandum misleadingly represented that approximately $578 million, or over 41% of the Osprey I Note proceeds, would be used to "redeem an equity interest of an unaffiliated equity investor in Whitewing LP." (See Objectors' Compl. ¶11; Osprey I OM, cover page, Ballard Decl. Exs. 1, 2.) In fact, this unidentified "equity investor" (Nighthawk) was not an "equity investor" at all but rather a lender owned and controlled by Citigroup, the parent of Osprey I Syndicate member Salomon. (Objectors' Compl. ¶ 11, Ballard Decl. Ex. 1.) Salomon's undisclosed incentive to sell the Osprey Notes without regard to the

transaction's bona fides (i.e., to extract Citigroup from risky, unwanted Enron exposure) created a material undisclosed conflict of interest.

2. Misrepresentations and Omissions Concerning the Whitewing Asset Purchases

The Osprey I Offering Memorandum falsely stated that Enron was planning to sell certain assets as ordinary course transactions to obtain liquidity and that Whitewing would, in the future, bid for these assets on an "arms-length" basis. (Objectors' Compl. ¶ 81; Osprey I OM at 13, Ballard Decl. Exs. 1, 2.) Prior to the sale of the Osprey I Notes, however, Enron already had determined that Whitewing would use the Osprey proceeds to purchase Enron's Sarlux and Trakya power plant interests at inflated, non-negotiated prices as part of an effort to unload distressed assets while maintaining its fictional financial statements. The representation that these were "potential" purchases was intended to mislead investors into believing that the terms were uncertain, thereby omitting any discussion in the Osprey I OM of material transfer restrictions on the assets and the inappropriate prices being paid by Whitewing. (Objectors' Compl. ¶¶ 81-83, 87 106, Osprey I OM at 23, Ballard Decl. Exs. 1, 2.) [11] Whitewing paid $350 million to Enron for the Sarlux interest, when its true value was capped at $60 million.[12] Whitewing paid $100 million for Trakya, four times Enron's own estimate of Trakya's true value. (Objectors' Compl. ¶ 90, Ballard Decl. Ex. 1.)

---

[11] The Italian Sarlux and Turkish Trakya transactions, coupled with a third, indirect minority interest in the Brazilian Elektro project, consumed over $850 million of the Osprey proceeds. These three acquisitions, two of which were pre-planned before the 1999 Osprey I note investments, became some of the principal assets held by Whitewing LP and consumed almost all of the Osprey I Note proceeds that remained after the payment of $540 to 578 million to Citigroup. (Objectors' Compl. ¶ 104, Ballard Decl. Ex. 1.)

[12] The majority partner in Sarlux, SARAS, an Italian energy company, held a "call option" that allowed the partner to purchase Enron's interest for no more than $60 million if Enron ever disposed of its Sarlux interest. Even if the transfer of Enron's economic interest to Whitewing's subsidiary, Pelican Bidder, somehow did not trigger SARAS' right to purchase Enron's interest, any subsequent transfer of the Sarlux interest to an unaffiliated third party would trigger the option. This fact made Enron the only feasible buyer of the Sarlux interest, and capped the value of that interest at no more than $60 million. (Objectors' Compl. ¶¶ 85-86, Ballard Decl. Ex. 1.)

Contrary to the representation in the Osprey I OM that these purchases were mere possibilities, the Sarlux and Trakya transactions closed six days and less than one month after the Osprey I Note closing and were, as a practical matter, already finalized at the closing.

3. Misrepresentations and Omissions Concerning Liquidation of Whitewing Assets upon a Default

The Offering Memoranda further misrepresented the ability to liquidate the Whitewing assets upon a default. Specifically, the solicitation materials falsely represented that, in the event of default, the Osprey Noteholders had "the right to liquidate the Permitted Investments and the Whitewing Assets" when in fact they lacked that power. (Osprey I OM at 2, Ballard Decl. Ex. 2; see also Osprey II OM at 2, Objectors' Compl. ¶¶ 14, 109-11, Ballard Decl. Exs. 1, 3.)

4. Misrepresentations and Omissions Regarding Enron's Financial Condition

In addition to the backing provided by the Whitewing assets, the Osprey Notes were also ultimately backed by Enron stock and guaranty, making Enron's financial condition relevant to the Osprey investment. The Osprey offering memoranda, therefore, incorporated various Enron financial statements that misrepresented Enron's financial condition. While these misrepresentations also are relevant to the class or classes of purchasers of Enron Corp. securities, the case proving Enron's financial fraud and the defendant's knowledge of that fraud is separate from, and more cumbersome and difficult to prove, than the narrow Osprey-specific misrepresentations outlined above.

III. THE PROPOSED REPRESENTATIVE PLAINTIFFS LACK STANDING TO ASSERT CLAIMS ON BEHALF OF OSPREY NOTE PURCHASERS

Standing is the first criteria that must be satisfied in any class certification analysis. E.g., Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279-80 (11th Cir. 2000). It is not enough under the standing analysis that some unnamed members of the class would have standing to bring the asserted

claims.[13] Instead, at least one of the named representative plaintiffs must have standing to assert each claim or subclaim.

> [P]rior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim. . . . It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."

Prado, 221 F.3d at 1279-80 (citation omitted). See also Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981) (vacated judgment as to that portion of cause of action to which no class representative had standing to pursue); In re U.S. Liquids Secs. Litig., No. H-99-2785, 2002 Dist. LEXIS 26714 at *18 (S.D. Tex., Apr. 29, 2002), amended 2002 Dist. LEXIS 26713 (S.D. Tex. June 12, 2002) ("[s]tanding and class certification must each be addressed on a claim by claim basis").[14] Lack of standing (like lack of adequacy of representation) could open any settlement or judgment on behalf of the Osprey Note purchasers to collateral attack.[15]

Osprey Note purchases are only included in two of the Newby claims for relief: the First Claim under Section 10(b) and Rule 10b-5, and the Fourth Claim under Section 12(a)(2). Under both these

---

[13] E.g., Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981) ("[I]nclusion of class action allegations in complaint does not relieve plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue"); In re General Motors Class E Stock Buyout Sec. Litig., 694 F. Supp. 1119 (D. Del. 1988) ("[a] court must assess standing to sue based upon the standing of the named plaintiffs and not upon the standing of unidentified class members").

[14] In U.S.Liquids, this Court followed the Eleventh Circuit's analysis in Prado. U.S. Liquids, 2002 Dist. LEXIS 26714 at *16.

[15] Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981) (vacated judgment as to that portion of cause of action to which no class representative had standing to pursue); In re Real Estate Title and Settlement Servs. Antitrust Litig, 869 F.3d 760, 769 (3d Cir. 1989) (class member has right to challenge mandatory settlement in local forum on due process grounds resulting from inadequate representation); Laskey v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW), 638 F.2d 954, 956 (6th Cir. 1981) (class members are bound by res judicata only when class representation was adequate and class notice was proper).

claims, a plaintiff has standing only if it purchased or sold the relevant security.[16] None of the proposed class representatives, however, purchased Osprey Notes.

Lead Plaintiff argues that Imperial County -- as a purchaser of one of these broadly defined "Foreign Debt Securities" -- has standing, if permitted to intervene, to assert claims on behalf of all "Foreign Debt Securities" purchasers. (Lead Plaintiff's Mem. in Opp. to Bank Defendants. Mtn. to Dismiss (7/17/03) at 47.) Lead Plaintiff cannot, however, manufacture standing by conveniently lumping distinct Osprey, Marlin, Yosemite, and Credit Linked Note offerings into a single definition. These Note offerings have different issuers, different syndicate sellers, and are based on different offering documents containing different misrepresentations and omitting different material information. Thus, neither Imperial County (as a purchaser of Marlin Notes) nor the other proposed class representative (as purchasers of Enron Corp. securities) have standing to assert Section 12(a)(2), Rule 10b-5 or any other claims on behalf of Osprey Note purchasers.[17]

In the amended class certification motion, Lead Plaintiff cites In re American Continental Corp./Lincoln Savings & Loan Sec. Litig., 794 F. Supp. 1424, 1461 (D. Ariz. 1992), for the proposition

---

[16] E.g., 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 225 (5th Cir. 1994) (plaintiff must be purchaser to have standing under Section 12(a)(2)); Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 517 (5th Cir. 1985) (same); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 892 (S.D. Tex. 2002) aff'd, 332, F32 854 (5th Cir.Tex. 2003)(plaintiff's that did not purchase stock from defendants in initial offering had no standing to sue under Section 12); Rathborne v. Rathborne, 683 F.2d 914, 918 (5th Cir. 1982) (plaintiff must allege that he was purchaser or seller of securities to have standing under Rule 10b-5).

[17] Lead Plaintiffs' reliance on Longden v. Sunderman, 123 F.R.D. 547 (N. D. Tex. 1988), for the proposition that Imperial County's purchase of Marlin Notes somehow provides it with standing to assert claims on behalf of Osprey Note purchasers is misplaced. Longden does not address the question of standing but instead proceeds directly to a class certification analysis under Rule 23. (See Lead Plaintiff's 7/17/2003 Mem. in Opp. to Bank Defendants. Mtn. to Dismiss (7/17/03) at 47.) Moreover, as recognized in Krogman v. Sterritt, 202 F.R.D. 467, 479 n.16 (N.D. Tex. 2001),the Rule 23 analysis in "Longden has . . . been superceded by [Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996)] . . ." Specifically, Longden certified its class despite the fact that individual reliance would need to be proved with respect to the misrepresentations at issue. However, in Castano, the Fifth Circuit holds that a class cannot be certified when there is no presumption of reliance because in that case individual issues predominate over class issues. As discussed below, defendants will argue that a showing of individual reliance is necessary with respect to the Rule 10b-5 claims on behalf of Osprey Note purchasers.

that there is no need for a separate class representative for each subgroup of securities. (Amended Class Cert Mot. at 19.) American Continental, however, involved purchasers of various stocks and debentures from a single issuer.[18] It did not involve a situation, like here, in which the securities in question were issued by different entities, for different purposes, backed by differing assets and based upon differing misrepresentations. Even if it did, it would contradict the Fifth Circuit's rigorous standing requirements as well as this Court's prior decision in In U.S. Liquids.

Simply put, because none of the proposed class representatives purchased Osprey Notes and none suffered losses with respect to purchases of Osprey Notes, none has standing to assert Rule 10b-5, Section 12(a)(2) or other securities claims on behalf of the Osprey Note purchasers.[19] See, e.g., Ramos v. Patrician Equities Corp., 765 F. Supp. 1196, 1199 (S.D.N.Y. 1991) (plaintiffs that invested in one limited partnership but sought to represent a class of investors in 48 limited partnerships lacked standing to bring claims against defendants that did not participate in the limited partnership in which such plaintiffs invested); Spira v. Nick, 876 F. Supp. 553, 562 (S.D.N.Y. 1995) (plaintiff, as an investor in

---

[18] Specifically, that case was brought on behalf of "all persons who purchased securities, stock or debentures for American Continental Corporation." In re American Continental, 794 F. Supp. at 1432.

[19] On October 16, 2003, Conseco Annuity Assurance Company filed a Memorandum of Law in Opposition to the Newby Lead Plaintiff's Amended Motion for Class Certification. That brief sets forth a persuasive standing analysis with respect to the Enron Credit Linked Note purchases. Much of that analysis applies equally here. To avoid unnecessary duplication, the Objectors have not reiterated the entirety of that legal analysis here. The Objectors note, however, that the Osprey Note purchasers have even a stronger basis than Conseco for challenging standing and class certification. This is so because, unlike the Enron Credit Linked Notes purchased by Conseco which were backed by Enron itself, the Osprey offering were secured by Whitewing's assets, and the Osprey offering materials, therefore, contain numerous, material misrepresentations particular to the Whitewing structure and the value and liquidity of the Whitewing assets.

one entity, does not have standing to seek relief on behalf of investors of twenty-three other entities in which he does not claim an interest).[20]

IV. THE CERTIFICATION OF THE CLASS AS CURRENTLY DEFINED AND PRESENTED WOULD VIOLATE RULE 23'S REQUIREMENTS

The party seeking to certify a class action bears the burden of proof on all certification issues. Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. 1981). Under Rule 23(a), the proposed representatives must, demonstrate, among other things, that:

1. The class is so numerous that joinder of all members is impracticable ("numerosity");
2. There are questions of law or fact common to the class ("commonality");
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class, ("typicality"); and
4. The representative parties will fairly and adequately protect the interests of the class ("adequacy").

F.R.C.P. Rule 23(a). Certification of a Rule 23(b)(3) class, as Lead Plaintiff seeks here, additionally requires the proposed representatives to demonstrate that: (i) "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (ii) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." F.R.C.P. Rule 23(b)(3).

Here, the proposed representatives cannot meet these requirements with respect to the Osprey Note purchasers that they seek to represent..

---

[20] Lead Plaintiff seems to suggest in its Opposition to the Bank Defendants' recent motions to dismiss that it is sufficient for the standing analysis that some of the representative plaintiffs have standing as to some of the subclaims subsumed in the Rule 10b-5 claim. Plaintiffs are wrong. Standing must be satisfied for each subclass of claims. Prado, 221 F.2d at 1279-80 (quoting Griffin v. Dugger, 823 F.2d 1476, 1482-83 (11th Cir. 1987)). See also Brown, 650 F.2d at 771-72 (vacated judgment as to portion of cause of action to which no named plaintiff had standing to sue). Here that means that in order to seek redress for losses resulting from the purchase of Osprey Notes, at least one of the named representative plaintiffs must have purchased those Notes.

A. There Are Numerous Differences Between the Osprey Noteholders, on the One Hand, and the Proposed Representatives and Other Class Members, on the Other

There are significant differences between the situation, claims and defenses of the Osprey Note purchasers and those of the proposed representatives and the remaining members of the putative class.

1. A Private Offering to QIBs Is Substantially Different from Enron Corp. Public Offerings

Rule 144A provides a safe harbor exemption from registration for private resales of restricted securities to "qualified institutional buyers" or "QIBs." QIBs include entities owning and investing in the aggregate at least $100 million in securities. 17 C.F.R. 230.144A. The Rule 144A exemption is not available for securities that were traded on any United States securities exchange or in the NASDAQ system, such as the publicly traded Enron Corp. securities purchased by the Board of Regents and other proposed representatives. 17 C.F.R. 230.144A(d)(3)(i).

Investment banks purchase the Rule 144A securities as Initial Purchases and then resell these securities to QIBs through printed private offering memoranda and direct sales presentations. Here, the Osprey I syndicate directly solicited PIMCO and provided PIMCO with the Osprey I Offering Memorandum and the DLJ Deal Summary Sheet. (Objectors' Compl. ¶ 3, Ballard Decl. Ex. 1.)

2. The Statements to the Newby Plaintiffs Differ from Those Made to the Osprey Purchasers

The Newby plaintiffs did not receive the Osprey Offering materials and were not, therefore, parties to numerous key misleading statements made to the Osprey Noteholders regarding, among other things, the use of the Osprey offering proceeds, the purported absence of conflicts of interests, the nature of the Whitewing asset transactions, the value of the Whitewing assets, and the Noteholder's ability to force liquidatation of such assets upon default.

3. The Claims and Theories Asserted in this Class Action Differ from the Theories Available to the Osprey Purchasers.

The conduct that forms the basis of the claims for QIB purchasers of Osprey Notes are materially different from that in the Newby action.

The Osprey Noteholders purchased Osprey Notes directly from the investment banks that distributed the materially false and misleading offering memoranda. Any effective action on behalf of

Osprey Note purchasers should, therefore, target those investment banks and focus on the false and misleading statements that the banks made in the Osprey offering materials.

Newby, on the other hand, is in essence a "fraud on the market" case alleging an overarching scheme and artifice to defraud. It is directed at all of the participants who are responsible for materially inflating Enron's financial statements and who are responsible for the losses suffered by public investors who relied on the integrity of the market. Thus, none of the six claims asserted in Newby adequately cover the Osprey Note purchasers.

Newby's First Claim under Sections 10(b) and 20(a), alleging reliance on the integrity of the market, does not go far enough because -- to the extent that reliance is an element of any of the Osprey Note purchasers' claims for relief -- the QIB Osprey Note purchasers relied on material misrepresentations and omissions contained in the Osprey offering materials and other materials and statements directed to them. In the case of the Objectors, this included statements in the Osprey I OM and the DLJ Offering Summary. (Objectors' Compl. ¶3, Ballard Decl. Ex.1, see also Ballard Decl. Ex. 2, 4.)[21] Such allegations of individual reliance are antithetical to the very notion of a class action, which is why Newby relies upon the "fraud on the market" theory instead.

Newby's Second Claim under Section 20(a) for insider trading is asserted only against selected defendants who sold $1 billion of their Enron stock (not Osprey Notes) to selected plaintiffs (not including the Objectors).

Newby's Third Claim under Sections 11 and 15 is likewise asserted on behalf of selected plaintiffs (not including the Osprey Noteholders) who purchased Enron securities (not Osprey securities) pursuant to prospectuses as part of registered public offerings.

Newby's Fourth Claim under Section 12(a)(2) and Section 15 is asserted on behalf of plaintiffs who purchased "Foreign Debt Securities," described as securities offered in foreign exchanges under

---

[21] The distribution of the DLJ Offering Summary to PIMCO demonstrates the individualized nature of the Osprey sales presentations made to the QIBs. This summary, attached as Exhibit 4 to the Ballard Declaration, is an internal DLJ sales presentation summary of the Osprey offering. Although these summaries are not generally disseminated to purchasers, DLJ provided this summary to PIMCO.

Regulation S. This claim is not therefore necessarily asserted on behalf of Rule 144A purchasers, such as the Objectors, that purchased Osprey Notes issued domestically.

Newby's Fifth and Sixth Claims under the Texas Securities Act are brought on behalf of the Washington State Investment Board and "all other States, political subdivisions thereof and/or State Pension Plans" that purchased two specific series of Notes issued by Enron (not Osprey).

While the proposed representatives purchased and assert claims with respect to "covered securities" within the meaning of SLUSA (*i.e.*, Enron Corp. securities traded on national exchanges), the Osprey Notes are not "covered securities."[22] SLUSA would not therefore preempt an Osprey-only state law class action since that action would be brought by parties that exclusively allege and seek recovery with respect to non-covered securities. Nor does SLUSA preempt individual state securities actions (i.e., those brought in an action with less than 50 plaintiffs) regardless of whether the securities are "covered" or "non-covered." Such state law claims, whether maintained individually or in a class action, are critical because several state Blue Sky statutes provide purchasers with the right to rescind without proof of scienter, causation or reliance.[23]

---

[22] The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") provides that the term "covered security" "means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title [15 U.S.C. §77r(b)(1),(2)] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred . . ." 15 U.S.C. § 77p(f)(3). 15 USC § 77r(b) (1) and (2) covers securities sold on national exchanges and those issues by registered investment companies. The Enron Corp. securities purchased by the proposed representatives are traded on a national exchange and therefore constitute covered securities. The Osprey Notes, on the other hand, are not traded on a national exchange and are not issued by a registered investment company, and are therefore not covered securities.

[23] For example, California's Securities laws (which is the state in which the Objectors purchased their Osprey Notes addressed in their California lawsuit) provide a purchaser of securities with the right to rescind the transaction without proof of scienter, causation or reliance. See, e.g., Cal. Corp. Code §§25401, 25501; Bowden v. Robinson, 67 Cal. App. 3d 705, 715 (Cal. 1977). Specifically, on the scienter issue, neither section 25401 nor section 25501 "requires that the plaintiff allege or prove as part of his or her prima facie case that the misstatement or omission by the defendant was made intentionally or negligently." 1 Marsh & Volk, Practice Under the California Securities Laws (Revised Ed.) § 1403[3][a]. Rather, section 25501 merely provides a defendant with the following affirmative defense: "unless the defendant proves that the . . .defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission."

The representative plaintiffs, nonetheless, have ignored such critical state law claims. The apparent reason is that the class representatives also seek recovery for, and make allegations on behalf of, purchasers of "covered securities" under SLUSA. Such assertions of the representative parties -- as purchasers of Enron Corp. securities traded on a national exchange -- arguably trigger SLUSA's preemption of state law securities claims as to "covered class actions," thereby potentially forfeiting critical state law claims available to the Osprey Note purchasers.[24] This prospect causes such parties to be inadequate representatives of persons who wish to assert all available Osprey Note purchaser claims.

4. The Defenses and Potential Defenses in Newby Are More Troublesome Than Those Available in State Court

Defense theories pertinent to the Osprey Note purchasers' claims differ in important ways from those pertinent to the claims of the proposed representatives and the remaining class members.

Each of the Osprey syndicate members were first named as defendants in this action in the May 2003 Amended Complaint.[25] Each of these defendants has filed a motion to dismiss asserting that the statute of limitations has expired, that no plaintiff has standing to assert the Section 12(a)(2) claim, and that the Osprey offering was not public as required for a Section 12(a)(2) claims. These same defenses do not apply to Objectors' timely-filed Osprey action. First, a longer statute of limitations applies to cases filed after the July 2002 enactment of the Sarbanes Oxley legislation, and in all events, Objectors' action was timely filed by any standard. Second, the Objectors are not subject to a standing challenge.

---

[24] SLUSA bars those parties that assert either false or misleading statements or a scheme or artifice to defraud with respect to "covered securities" from asserting state law claims in the context of a "covered class action." 15 U.S.C. § 77p(b). Because Newby is, at least in part, a "covered class action" in which the same parties that assert claims on behalf of the Osprey Note purchasers also assert claims with respect to "covered securities," the defendants would presumably contend that SLUSA bars the Newby representatives from asserting the very state law claims that would be available if Osprey Note purchasers or their representatives sought recovery for Osprey Note losses alone. It is uncertain that this argument would ultimately prevail. Nonetheless, whether or not this defense ultimately has merit, it is highly material to a case on behalf of Osprey Note purchasers, particularly considering that -- presumably as a result of this defense -- the representatives have failed to assert any state causes of action on their behalf.

[25] Salomon Smith Barney, Deutsche Bank Securities Inc., Lehman Brothers, Inc., and the successors to Donaldson Lufkin & Jenrette Securities Corp. and Credit Suisse Boston Corporation , each of which are Osprey syndicate members and sellers of one or more series of Osprey Notes, have, therefore, all challenged the Amended Complaint on statute of limitations grounds.

Third, a party (like Objectors) asserting exclusively non-covered security claims is entitled under SLUSA to assert claims under state Blue Sky Laws that, unlike Section 12(a)(2), are not limited to public offerings pursuant to a prospectus.

Moreover, as noted above, the Osprey Notes are not registered securities but were instead sold to QIBs pursuant to Rule 144A and "offshore" purchasers pursuant to Regulation S. Having already asserted that the Osprey offering was not a public offering, the defendants are likely to argue that there was no efficient market with respect to the Osprey securities and that the fraud on the market presumption of reliance that lies at the crux of the proposed representatives' case is therefore unavailable for the Osprey Note purchases.

The Objectors believe that the evidence ultimately will demonstrate an efficient market justifying the fraud on the market presumption. This issue, however, is likely to be hotly contested and the proposed class representatives have not yet proffered any evidence on this issue. Because this Court cannot determine at this early juncture whether the fraud on the market presumption will apply, in analyzing class issues, it must presume that it may not apply. Accordingly, individual issues (i.e., how reliance will be proven if the fraud on the market presumption does not apply) predominate with regard to the Osprey Note purchases. See, e.g., Castano, 84 F.3d at 745 ("a fraud class action cannot be certified when individual reliance will be an issue"); Krogman, 202 F.R.D at 473-78 (held class certification improper based on lack of efficient market or other basis to justify presumption of reliance); Binder v. Gillespie, 184 F.3d 1059, 1063-66 (9th Cir. 1999) (upholding class *de*certification where fraud on the market not available due to lack of efficient market), cert. denied, 528 U.S. 1154 (2000); In re Livent, Inc. Noteholders Sec. Litig., 211 F.R.D. 219 (S.D.N.Y. 2002) (in securities fraud claim based on fraud-on-the-market theory, noteholders' motion to certify class of persons who purchased unsecured notes was denied as they failed to show that private market for notes was efficient as required by fraud on the market doctrine); Camden Asset Management, L.P. v. Sunbeam Corp., No. 99-8275-CIV-Middelebrooks, 2001 U.S. Dist. LEXIS 11022 (S.D. Fla. July 3, 2001) (court denied certification

refusing to apply any presumptions of reliance to debenture coupon initial offering and after market purchases).[26]

Further, state law rights and remedies with respect to any particular Osprey purchase depends on the facts and circumstances surrounding that purchase, and the defenses differ from state to state. Castano, 84 F.3d at 741 ("variations in state law may swamp any common issues and defeat predominance").

5. Newby Has Failed to Name Important Defendants

The proposed representatives fail to name members of the Osprey syndicates, including Bear Stearns for Osprey I and UBS Warburg for Osprey II.[27] Several state Blue Sky Laws provide rescission rights absent proof of negligence or intent and impose upon the defendant the burden to prove that it did not know the truth and could not have discovered the truth absent reasonable diligence. See, e.g., Cal. Corp. Code 25401, 25501; n. 23 supra. Bear Stearns and UBS, as members of the selling syndicates were aware, or with reasonable due diligence should have discovered, that the offering materials bearing their name misrepresented the liquidation rights set forth in the deal documents. Further, as an Osprey I syndicate member, Bear Stearns also knew or is charged with knowledge that the statement that over one-third of the proceeds would go to an "unaffiliated equity investor" was false and that the proceeds would instead pay off a debt to a co-syndicate member with enormous undisclosed financial incentives to get the Osprey offering sold.

---

[26] The Osprey Noteholders are entitled to a presumption of reliance with respect to the material omissions in the Osprey offering documents. See, e.g., Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54, 31 L. Ed. 2d 741, 92 S. Ct. 1456 (1972). However, this presumption is not likely available to the class representatives, which never received or reviewed the offering materials in question.

[27] The Objectors hereto did not name UBS Warburg in their California action because the Objectors bought Notes issued in the Osprey I offering but did not purchase Notes issued in the Osprey II Offering to which UBS was a syndicate seller.

B. The Proposed Representatives Have Not Met the Typicality or Adequate Representation Requirements with Respect to Osprey Claims

Rule 23(a) requirements, including the typicality requirement in particular, "limit the class claims to those fairly encompassed by the named plaintiff's claims." General Telephone Co. of the Northwest Inc. v. Equal Employment Opportunity Comm'n., 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). In this regard, "[t]he typicality prerequisite 'emphasizes that the representatives ought to be squarely aligned in interests with the represented group.'" 1 Newberg on Class Actions at § 3:13, p. 325 (citation omitted.) The rationale for the typicality requirement "is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation, and, in so doing, will advance the interests of the class members, which are aligned with those of the representative." Id. As this Court has found: "It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class." In re U.S. Liquids, 2002 U.S. Dist LEXIS 26714 at *16 (quoting Prado, 221 F.3d 1266, 1279 (11th Cir. 2000)). The requirement for adequate representation is essential for due process. 1 Newberg on Class Actions § 3:21, p. 408 (4th ed. 2002). When evaluating adequacy it is important for courts to ensure vigorous prosecution and absence of conflicts. 1 Newberg on Class Actions § 3:21, p. 408.

For the reasons set forth above, the proposed representatives have not and cannot establish that their claims or defenses are typical of those of Osprey Note purchasers. Because they lack any stake in the Osprey Notes, their interests are not aligned with those of the Osprey Note purchasers. Indeed, they already have declined to take into account the relative strengths and weaknesses of the Enron Corp. securities claims as compared to the "Foreign Debt Securities" claims for purposes of allocating any judgment or settlement,[28] and instead have attacked several of these securities, including Osprey, as a component of Enron's scheme to defraud.[29]

---

[28] See n.5, supra.

[29] See, e.g., Amended Comp., ¶¶ 48, 83(ii), 497) ("The Marlin Water and Atlantic Water Trusts, along with Osprey and Egret, were vehicles utilized by Enron and its insiders to further facilitate the fraudulent scheme and fraudulent course of business complained of.").

Because they lack a common stake in the Osprey claims, the proposed representatives have not adequately represented the Osprey Note purchasers and, as evidence by their conduct to date, cannot be expected to do so in the future. By failing, for example, to allege the Osprey specific misstatements and by waiting until after the statute of limitations may have run to file claims against the sellers of the Osprey Notes, the proposed representatives have ignored the Osprey Note purchasers' most direct route to recovery. Parties that had a vested interest in the Osprey Note purchasers' losses and that were vigorously representing the Osprey Noteholders would not ignore these important allegations and would not have failed to timely name key defendants.

Additionally, the Newby proposed representatives have failed to assert promising state-law claims on behalf of the Osprey Noteholders, and may be precluded from doing so under SLUSA as purchasers of Enron Corp. securities seeking to recover for losses on "covered" securities. These conflicts, individually and in combination, destroy the representative parties' ability to adequately represent the Osprey Note purchasers' interests.[30]

C. Common Questions Do Not Predominate

Due to the material differences in the misrepresentations, claims, defenses, facts, defendants and materials relied upon, the proposed representatives have failed to demonstrate that common issues predominate among the Osprey Noteholders and the remaining class members. See, e.g., In re LifeUSA Holding, 242 F.3d 136, 147 n.11 (3d Cir. 2001) (vacating district court's class certification order: "differing aspects of causation, differing state laws, and different defenses" "all operate to discourage class treatment and therefore class certification." (citation omitted)); Johnston v. HBO Film Management, 265 F.3d 178 (3d Cir. 2001) (certification denied due to lack of presumption of reliance and lack of uniform misrepresentations); Castano, 84 F.3d at 745 ("a fraud class action cannot be certified when individual reliance will be an issue"); Krogman, 202 F.R.D at 473-78 (certification

---

[30] In February 2002, when this Court appointed the Regents as the Lead Plaintiff pursuant to the provisions of the Private Securities Litigation Reform Act, the class allegations before this Court did not seek to cover Osprey losses. Thus, when appointing the Regents as Lead Plaintiff this Court did not have the ability to analyze whether the Regents claims are typical of a class including Osprey Note purchasers or whether the Regents would adequately represent the Osprey claims.

denied based upon lack of efficient market or other basis to justify presumption of reliance); Parnes v. Mast Property Investors, Inc., 776 F. Supp. 792, 799-800 (S.D.N.Y. 1991) (certification in securities fraud case denied because distinct factual questions arose in connection with each limited partnership class member); Crasto v. Estate of Kaskel, 63 F.R.D. 18, 23 (S.D.N.Y. 1974) (certification denied due to different representations to various class members); Winokur v. Bell Federal Savings & Loan Ass'n, 58 F.R.D. 178 (N.D. Ill. 1972) (different oral and written representations precluded certification).

D. The Osprey Note Purchases Should Be Eliminated from the Class Definition and Liability on the Osprey Note Purchases Excluded from the Class Issues

Because the proposed representatives do not meet the criteria for certifying a class that includes Osprey Note purchases, these purchases should be excluded from the class definition. Rule 23(c)(4) gives this Court the authority to limit the class litigation to particular issues. F.R.C.P. Rule 23(c)(4). Here, the class definition and issues should exclude the Osprey Note purchases.

V. ALTERNATIVELY, THE COURT SHOULD PROVIDE THE OSPREY NOTEHOLDERS WITH THE RIGHT TO OPT OUT THEIR OSPREY PURCHASES WHILE OTHERWISE PARTICIPATING IN THE OVERALL CLASS WITH RESPECT TO ANY ENRON-ISSUED SECURITIES

If this Court were to certify a class that includes Osprey Note purchases, fairness dictates that the Osprey Note purchasers have a means to extricate their Osprey Note claims, for which the named class plaintiffs are not adequate representatives, while permitting these Note purchasers to participate in this class litigation with respect to the remaining class issues. This relief is necessary and appropriate in order that Objectors not suffer substantial prejudice from having to make an all-or-nothing opt-out decision that necessarily would entail serious potential compromise either to Objectors' Osprey claims (if the decision were to stay in the Class), or to Objectors' other claims based on their purchase of Enron securities (if the decision were to opt out).[31]

Such relief can be fashioned pursuant to the Court's broad administrative authority under Rule 23(d), which permits the Court to "make appropriate orders": "determining the course of the

---

[31] See, e.g. Wood v. Combustion Eng'g., Inc., 643 F.2d 339, 346-47 (5th Cir. 1981) (noting that courts are divided on the issue of whether those persons that elect to opt out of a class are entitled to equitable tolling of the statute of limitations to their claims).

proceedings . . .imposing conditions on the representative parties . . .dealing with similar procedural matters." F.R.C.P. Rule 23(d). This alternative form of relief for Osprey Note purchasers could be effectively and efficiently fashioned as part of the eventual notice to prospective class members that presents them with the information necessary to allow them to decide whether and the extent to which participation in the Newby class is warranted. This could be accomplished, for instance, by specifying an alternative to opt out of the proposed class entirely, or instead to opt out only those claims arising out of the purchase of Osprey Notes and otherwise to participate with respect to any other securities within the class definition.

VI. CONCLUSION

Objectors' Osprey Note claims were (for good reasons) not included in the Newby action as originally framed and filed by the representative parties and their counsel. Since then, Objectors have diligently and independently pursued claims that were not brought as part of the Newby action. They do not wish to have their Osprey claims subsumed and potentially eviscerated by belated inclusion in Newby. They have justifiably relied on the pendency of the Newby action as originally constituted as the means by which their rights with respect to Enron securities could and would be protected by the Newby representatives and counsel. Objectors and other Osprey Note purchasers should not face an all-or-nothing decision about participation in the Newby action when only a portion of their claims are adequately represented and when a decision to opt out entirely to protect their Osprey claims could effectively entail abandoning claims based on other Enron securities that may now, due to the passage of time, only be maintained as part of the Newby action.

Forcing Objectors to this choice is unnecessary to the just and effective conduct of the Newby action and would be fundamentally unfair. To avoid this result, the Court should exclude Osprey Note claims from the scope of the Newby action as it is ultimately certified. In the alternative, the Court should provide the Osprey Note purchasers with a means to opt out of the Newby action with respect to their Osprey positions while continuing to participate with respect to other claims within the scope of the class definitions.

DATED: October 23, 2003

Respectfully submitted,

By:
J. Michael Hennigan

HENNIGAN, BENNETT & DORMAN LLP
J. Michael Hennigan
Robert E. Palmer
Kirk Dillman
Shawna L. Ballard
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Attorneys for Objectors Pacific Investment Management Company, LLC; Total Return Fund, a Series of PIMCO Funds; Maryland State Retirement and Pension Systems; Pitney Bowes Inc. Employees Retirement Plan; Nebraska Investment Council for the School Retirement System, the State Patrol Retirement System and the Judge's Retirement System; Employees' Retirement System of Baltimore County; Oppenheimer Capital Securities Investment Trust Total Return II Trust; Oppenheimer Capital Securities Investment Trust Moderate Duration Trust; Niagara Mohawk Pension Plan; Louisiana Firefighters Retirement System; Group Trust Agreement Pursuant to the Hewlett-Packard Company Deferred Profit-Sharing Plan and Retirement Plan and the Agilent Technologies, Inc. Deferred Profit Sharing Plan and Retirement Plan; San Diego City Employees' Retirement System; Kellogg Company Master Retirement Trust; Directors Guild Of America - Producer Supplemental Pension Plan; Directors Guild Of America - Producer Basic Pension Plan; and Plan of Benefits of the Central Pension Fund of the International Union of Operating Engineers Participating Employers