

OCT 23 2003

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Michael N. Milby, Clerk

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

In Re Enron Corporation Securities,
Derivative & "ERISA" Litigation

MDL-1446

THIS DOCUMENT RELATES TO:

MARK NEWBY, *et al.*

Plaintiffs,

v.

ENRON CORP., an Oregon corporation,
et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, *et al.*, Individually and On
Behalf of All Others Similarly situated,

Plaintiffs,

v.

KENNETH L. LAY, *et al.*,

Defendants.

CIVIL ACTION NO. H 01-3624
AND CONSOLIDATED CASES

U.S. COURTS
SOUTHERN DISTRICT
OF TEXAS

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RESPONSE OF DEFENDANT KEN L. HARRISON TO PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS CLAIMS

TO THE HONORABLE MELINDA M. HARMON:

Defendant Ken L. Harrison opposes plaintiffs' motion for class certification of their claims under SEC Rule 10b-5, Sections 10(b), 20(a), and 20A of the Securities and Exchange Act of 1934, and Section 11 of the Securities Act of 1933 for the reasons set forth below.

With respect to plaintiffs' claims under Rule 10b-5 and Sections 10(b) and 20(a), class certification is inappropriate under Federal Rule of Civil Procedure 23 for the reasons set forth in Certain Defendants' Brief in Opposition to Class Certification of Plaintiffs' Section 10(b) and Rule 10b-5 Claims.¹ Mr. Harrison was not with Enron for the entire class period, and his unique circumstances help show how common issues do not and cannot predominate in the unmanageably long class period that plaintiffs propose. For example, the question whether Mr. Harrison had the scienter required to support liability under Rule 10b-5 and Section 10(b) depends on his own unique factual circumstances, which plaintiffs have failed to plead properly under the PSLRA, 15 U.S.C. § 78u-4(b)(2).² For the same reasons, certification of a Section 20(a) class is also inappropriate. According to this Court, because plaintiffs have "failed to plead predicate violations of § 10(b), [their] claims for controlling person liability under § 20(a) of the Exchange Act also fail."³

With respect to plaintiffs' claims under Section 20A, class certification is not appropriate for the reasons set forth in Certain Individual Defendants' Opposition to Class

¹ That brief was filed by Kenneth Lay and other defendants on October 23, 2003.

² For a discussion of the deficiency of plaintiffs' pleadings, we direct the Court's attention to Defendant Ken L. Harrison's Motion to Dismiss First Amended Complaint (# 1494) and our Reply in Support of Defendant Ken L. Harrison's Motion to Dismiss First Amended Complaint (# 1591), which we incorporate by this reference.

³ Memorandum and Order regarding Enron Outside Director Defendants' Motions [to Dismiss] (#1269), March 12, 2003, at 133.

Certification With Respect to Plaintiffs' § 20A Claims.⁴ As noted in that brief, certification is not appropriate because of the predominance of individual issues, among other deficiencies. Moreover, because of the number of individual transactions at issue, the creation of subclasses cannot alleviate the class certification problems presented under Section 20A. As the Certain Individual Defendants' Opposition demonstrates, such subclasses would not satisfy the standards of Rule 23. Finally, any classes that might be certified should be limited by a trading window of no more than one day.

Last, with respect to Section 11, plaintiffs' proposed class is not proper under Rule 23 for the reasons set forth in The Outside Directors' Memorandum Concerning Certification of Class Claims Under Section 11.⁵ Mr. Harrison supports the establishment of a separate Section 11 class with subclasses relating to the particular note offerings for the reasons set forth in The Outside Directors' Memorandum. Mr. Harrison further contends that those subclasses should be time-limited consistent with 15 U.S.C. § 77k(a).

For the foregoing reasons, defendant Ken L. Harrison opposes plaintiffs' motion for class certification of claims under SEC Rule 10b-5, Sections 10(b), 20(a) and 20A of the Securities and Exchange Act of 1934, and Section 11 of the Securities Act of 1933.

Mr. Harrison adopts and incorporates by this reference the relevant arguments contained in Certain Defendants' Brief in Opposition to Class Certification of Plaintiffs' Section 10(b) and Rule 10b-5 Claims, Certain Individual Defendants' Opposition to Class Certification With

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⁴ That opposition was filed by Jeffrey Skilling and other defendants on October 23, 2003.

⁵ That memorandum was filed by Robert Belfer and other defendants on October 16, 2003.

Respect to Plaintiffs' § 20A Claims, and The Outside Directors' Memorandum Concerning
Certification of Class Claims Under Section 11.

DATED: October 23, 2003.

Respectfully submitted,

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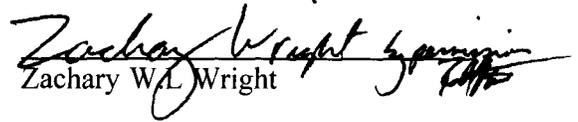
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONSE OF DEFENDANT KEN L. HARRISON TO PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS CLAIMS** has been served by sending a copy via electronic mail to serve@ESL3624.com on this 23rd day of October, 2003.

I further certify that a copy of the foregoing **RESPONSE OF DEFENDANT KEN L. HARRISON TO PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS CLAIMS** has been served via overnight mail on the following parties, who do not accept service by electronic mail, on this 23rd day of October, 2003:

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


Zachary W. Wright

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