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I. INTRODUCTION

Imperial County Employees Retirement System (“ICERS”) is precisely the type of active and engaged party the PSLRA encouraged to become involved in securities fraud class actions. To that end, and in order to more fully represent *all* claims in this massive litigation, Lead Plaintiff The Regents invited other investors, such as ICERS, into the action.¹ Defendants oppose the inclusion of ICERS based on strained reading of the case law and a lack of appreciation of the Court’s prior pronouncements.

Defendants premise their opposition on two arguments. First, defendants argue intervention cannot be used to “cure” perceived jurisdictional defects. Second, defendants claim the intervention motion should be denied as futile because, they argue, claims based on the foreign debt securities are time barred. Defendants are wrong on both counts. Importantly, defendants ignore Orders of this Court which indicate that soon the Court will deal with issues regarding the creation of classes or subclasses “with appropriate class representatives having standing to pursue those claims.” Aug. 7, 2002 Order at 6.

Because the requirements for permissive intervention are met, ICERS’ motion should be granted.

II. INTERVENTION IN THIS CASE PROMOTES JUDICIAL ECONOMY AND IS NOT AN ATTEMPT TO MANUFACTURE JURISDICTION

Because of the sheer size and scope of the *Enron* litigation, the Court has acknowledged from the outset that at the appropriate time it will put in place a system by which the various claims brought by various entities will be determined going forward. In naming The Regents Lead Plaintiff, the Court noted “there is no requirement that the claims of all plaintiffs and class members must be

¹ After the Bank Defendants and Vinson & Elkins filed their opposition briefs, Deseret Mutual Benefit Administration and IHC Health Plans Inc. withdrew their motions to intervene. Only ICERS’ motion is before the Court.

identical.” *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 445 (S.D. Tex. 2002). Rather, the PSLRA presumes The Regents, as lead plaintiff “can vigorously pursue **all** available causes of action against **all** possible defendants under **all** available legal theories.” *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999) (emphasis added). Indeed, this Court cited several cases in the class certification context which make clear “[w]hen plaintiffs have alleged such a common course of conduct, courts consistently have found no bar to class certification even though members of a class may have purchased different types of securities.” *Sanders v. Robinson/Humphrey/American Express*, 634 F. Supp. 1048, 1057 (N.D. Ga. 1986), *aff’d in part & rev’d in part on other grounds sub nom., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987); *Endo v. Albertine*, 147 F.R.D. 164, 167 (N.D. Ill. 1993) (“a class of plaintiffs who purchased different types of securities may properly be certified with a representative party who only purchased one type of security”).

Lead Plaintiff invited other plaintiffs into the action to, as broadly as possible, represent all those damaged in the Enron debacle. Defendants have already argued that these claims should be dismissed because Lead Plaintiff did not buy every flavor of Enron securities. In the pending motions to dismiss, defendants argued no plaintiff bought foreign debt securities. Thus, out of an abundance of caution, and in an effort to properly meet its mandate to control and direct the litigation, Lead Plaintiff has sought to intervene ICERS. Once intervention is approved, ICERS can properly serve as a representative for all purchasers of foreign debt securities.²

The number and variety of securities affected in the Enron fraud is unparalleled. Each security purchaser was defrauded by the very same fraudulent scheme. And the statements at issue

² ICERS’ representative, Barbara McFetridge, has already been deposed by defendants and has proved an ideal representative.

in the offering memoranda for the foreign debt securities are the *same* as those in claims the Court has already upheld. The Osprey I offering memorandum, for example, incorporates Enron's 1998 10-K, Forms 10-Q for the quarters ended March 31 and July 30, 1999, and includes Enron's consolidated financial information for years ended 1997 and 1998. ¶¶641.5-.6, and the Marlin Water Trust offering memorandum incorporates Enron's 2000 10-K, Form 10-Q for the quarter ending March 31, 2000, Form 8-Ks filed January 31 and February 28, 2001 and includes Enron's consolidated financial information for years ended 1998-2000. ¶¶641.37-641.40. The Court has already upheld claims based on these statements. *See, e.g.*, ¶¶141, 419, 424. Similarly, the offering memoranda for the other foreign debt securities incorporate or include financial statements already alleged to be false and misleading. ¶¶641.9, 641.14, 641.16, 641.19-.20, 641.23-.24, 641.27-.28, 641.31, 641.39-.40.

Moreover, because the §12(a)(2) claims arise from the same illegal scheme, a purchaser of any one of the foreign debt securities can represent the §12(a)(2) claims of all classes of the foreign debt securities. *See, e.g., Longden v. Sunderman*, 123 F.R.D. 547, 550, 553 (N.D. Tex. 1988) (investors in seven partnerships were certified to represent a class of investors in 121 partnerships); *see also In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), Order at 27-28 (S.D.N.Y. Oct. 24, 2003) (noting that lead plaintiff NY SCRF, even though it did not purchase in either of the two offerings forming the basis of a §12(a)(2) claims “has claims based on the same Registration Statements and will have an incentive to pursue and prove many of the facts that underlie the Sections 11 and 12(a)(2) claims”) (Ex. 1 hereto). Thus, ICERS can properly represent all foreign debt securities purchasers.³

³ Even one of the Bank Defendants' cases, *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), notes the Court has latitude in determining when to address standing issues. *See Bank Defendants' Motion* at 3. The *Brown* court noted where, as here, plaintiffs allege multiple claims, some of which

The instant situation is similar to that in *Trief v. Dun & Bradstreet*, 144 F.R.D. 193 (S.D.N.Y. 1992). In *Trief*, a securities fraud class action, plaintiffs filed a motion for class certification and also moved to intervene a representative plaintiff under Fed. R. Civ. P. 24(b)(2). Defendants had argued the originally proposed class representative could not represent the interests of those class members who purchased shares after a certain date. *Id.* at 202. In essence, defendants argued the class representatives lacked standing. To allay defendants' objections, plaintiffs sought to intervene William Feldman, a later purchaser, as class representative. *Id.*

Like the instant case, the *Trief* court held plaintiff's intervention "in essence prompted by defendants' concern with adequacy of representation – merely makes his inclusion explicit. Indeed, important policy considerations support his inclusion because Mr. Feldman's presence will ensure that **all interested plaintiffs are represented.**" *Id.* at 203 (emphasis added). *See also Bromely v. Michigan Educ. Ass'n*, 178 F.R.D. 148 (E.D. Mich. 1998).

In re Initial Pub. Offering Sec. Litig., 214 F.R.D. 117 (S.D.N.Y. 2002) and *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 U.S. Dist. LEXIS 8245 (S.D.N.Y. May 19, 2003), relied upon by plaintiffs in their opening brief, are not "totally inapposite" as defendants claim. Indeed, both complex securities cases demonstrate the propriety of bringing new named plaintiffs into the action. As Judge Scheindlin explained, the PSLRA process for selecting a lead plaintiff "strongly suggests the need for named plaintiffs in addition to any lead plaintiff." 214 F.R.D. at 123. Here, Lead Plaintiff brought various claims in its First Amended Complaint. It is clear that a lead plaintiff can represent various claims of securities it did not purchase. *Enron*, 206 F.R.D. at 445; *In re Northwestern Corp. Sec. Litig.*, No. 03-4049, Order (D.S.D. Oct. 15, 2003) (same) (Ex. 2 hereto).

are challenged on grounds of standing, the better course may be to "entertain[] an amended complaint setting up separate subsets of the proposed class," rather than simply to dismiss the claim. 650 F.2d at 771.

At the same time defendants' cases stand for the proposition that where a party states a cause of action it has no standing to bring, intervention cannot cure the deficiency.⁴ This conundrum is answered, in large part, by *Initial Pub. Offering*. There, the court granted leave to join new named plaintiffs in 33 cases before the court. Lead plaintiff in *Initial Pub. Offering* case sought to join new plaintiffs "to cure certain alleged pleading deficiencies." 214 F.R.D. at 122. And although defendants in that case made slightly different arguments regarding why joinder was inappropriate, the court's decision is clearly applicable here. First, the court concluded "that in order for a claim to be asserted on behalf of a putative class, only the named plaintiffs – but not necessarily the lead plaintiff – must have standing." *Id.* The court further notes that the concept of a named plaintiff, *i.e.*, intervenor ICERS here, "survives in securities class actions distinct from the PSLRA-defined 'lead plaintiff.'" *Id.* at 123. Moreover, defendants in *Initial Pub. Offering* (as do defendants here) relied on *Dietrich v. Bauer*, 76 F. Supp. 2d 312 (S.D.N.Y. 1999).

In *Dietrich*, Judge Sweet refused to certify new class representatives before the plaintiff class had been certified; to do otherwise, he explained, would be "premature and without procedural foundation." [76 F. Supp. 2d at 326]. Judge Sweet's reasoning in so holding is the perfect accord with my holding here. In *Dietrich*, he explained that "Dietrich cannot salvage his Section 12 claims by contending that the proposed new representatives have standing to prosecute **when they are not named as plaintiffs** and when, as discussed below, he himself lacks standing to prosecute those claims." *Id.* *Dietrich*, therefore, seems to explicitly contemplate the importance of named plaintiffs above and beyond the lead plaintiff (Dietrich) at the class certification stage, only lead and named plaintiffs would be eligible for appointment as class representatives.

214 F.R.D. at 123 n.9. Judge Scheindlin's reasoning is persuasive here. Lead Plaintiff is in a Catch-22. Lead Plaintiff is allowed to bring a claim based on securities it did not purchase, but – according to defendants – cannot intervene a named plaintiff because Lead Plaintiff does not itself have

⁴ See, e.g., *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998).

standing. This result is clearly untenable and would result in substantial prejudice to the class and defy Congress' clear intent in passing the PSLRA.⁵

McClune, 593 F.2d 482, relied on by defendants, is wholly distinguishable. *McClune* was not a class action. As discussed in *Bromely*, *McClune* simply does not address the issue here. In granting intervention to remedy standing in a class action, the *Bromely* court held “*McClune* does not hold that plaintiffs cannot intervene prior to certification as party representatives in a class action to cure a deficiency.” *Bromely*, 178 F.R.D. at 157.

Defendants' other authority also misses the mark. One case, relied upon by defendants as “particularly instructive,” is not for publication. See *Warden v. Crown Am. Realty Trust*, No. 96-25-J, 1998 U.S. Dist. LEXIS 16194 (W.D. Pa. 1998). Other cases fare no better. In *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518 (5th Cir. 1995), the court, in a RICO case, found the plaintiff lacked standing because, unlike here, the plaintiff “does not share the same interests and has not suffered the same harms as the class.” *Id.* at 522.

In *In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998), the court correctly held a **named** plaintiff needs to possess standing to litigate a case. In that case, unlike here, no plaintiff with standing had moved to intervene or join the suit. *Ruiz*, 161 F.3d 814, is also unhelpful. In *Ruiz*, the question presented was whether an **intervenor** needed to have standing. Here, ICERS unquestionably has standing to bring suit on behalf of purchasers of foreign debt securities. *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374 (D. Mass. 1987), is also inapposite. In

⁵ If the Court believes Lead Plaintiff employed the wrong procedural device to add additional named plaintiffs and proposed class representatives, Lead Plaintiff requests permission to amend its complaint and join ICERS as a named plaintiff under Fed. R. Civ. P. 15 and 20(a) as plaintiffs did in *Initial Pub. Offering*. Leave to amend to add new parties can be granted to “cure” standing deficiencies. See *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952); cf. *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278 (5th Cir. 1981) (denying right to amend where refusal did not adversely effect plaintiffs with legitimate claims); *Bromely*, 178 F.R.D. 148.

Elscont, the court had already tentatively **denied** class certification. Also, the named plaintiff lacked standing to sue on any claims. In *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 26 (1st Cir. 1990), the court denied as untimely an intervention motion which came days after plaintiffs “petition to represent the investor class” and five years after the litigation commenced. Here there has been no such delay.

III. ICERS MEETS THE REQUIREMENTS OF FED. R. CIV. P. 24(b)(2)

In a footnote, the Bank Defendants argue the proposed intervention also fails to meet the requirements of Fed. R. Civ. P. 24(b). *See* Bank Defendants’ Motion at 8 n.4. As demonstrated in its opening brief, however, ICERS meets the requirements for permissive intervention.

Under Fed. R. Civ. P. 23(d), unnamed class members, such as ICERS, are permitted “to intervene and present claims or defenses, or otherwise come into the action.” Rule 24(b)(2) allows permissive intervention when (1) application is timely; (2) there exists a question of law or fact common both to the intervenor’s claims and those of the existing plaintiffs; and (3) intervention will neither unduly delay nor prejudice the rights of the original plaintiffs. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 n.8 (5th Cir. 1977). ICERS’ motion is timely, as it was filed just months after the operative complaint was filed in the action it seeks to join. ICERS correctly noted in its opening motion intervention is proper where “an applicant’s claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b); *see also Epstein v. Weiss*, 50 F.R.D. 387, 395 (E.D. La. 1970). It is beyond dispute that common questions of law and fact between the *Newby* case and the ICERS’ claim exist. *See, e.g.*, ¶¶641.37-641.40. Finally, intervention here results in no prejudice or delay. Defendants have been aware of claims based on foreign debt offerings **at least** since the filing of the First Amended Complaint in *Newby* and cannot be said to be prejudiced in any way, especially before class certification, by intervention of ICERS.

In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig., No. 99-MD-1309 (PAM), 2002 U.S. Dist. LEXIS 20163 (D. Minn. Oct. 7, 2002), is instructive. In that case the court granted a motion of class members to become representatives through intervention or amendment. The court held under Fed. R. Civ. P. 24(b) and 23(d) that permissive intervention was proper despite the fact that a prior order had eliminated claims of ten of the 11 class representatives. “In the context of class actions, courts ‘appear to be particularly amenable to permissive intervention when no additional issues are presented to the case, when the intervenor’s claims are “virtually identical” to class claims, and when intervention would strengthen the adequacy of class representation.’” 2002 U.S. Dist. LEXIS 20163, at *4-*5 (citing 3 Herbert Newberg & Allan Conte, *Newberg on Class Action* §§16.08-.09 (3d ed. 1992)).

As is the case here, defendant argued the application for intervention was untimely, that the representatives’ claims differed from the current claims, and that it would be prejudiced if intervention was allowed. *Id.* at *5. “To determine whether a motion to intervene is timely, the Court must consider ‘all of the circumstances of the case.’” *Id.* at *5 (citation omitted). Further, the court noted, “there are ‘no ironclad rules’ governing the timeliness of a motion to intervene.” *Id.* at *6. Similarly, with regard to the statute of limitations, the court found plaintiffs need not have foreseen the need to add new representatives because of statute of limitations issues because, as here, “there is substantial ground for difference of opinion on the statute of limitations issue in this case.” *Id.* at *8. The court also brushed aside arguments that the proposed representatives’ claims were not identical to the existing representatives. Enough common questions had been raised, despite factual differences, the court held. Finally, the court held no prejudice would result if intervention was granted. As to amendment, the court also found this was permissible. “Under Rule 15(a), courts have broad discretion to grant leave to file an amended complaint. The party opposing amendment bears a heavy burden to demonstrate that the amendment will create undue prejudice.” *Id.* at *16-

*17. Because adding new representatives would bolster class representation, the court permitted both intervention and amendment. The same result should obtain in this case.

IV. THE PROPOSED CLAIMS ARE NOT TIME-BARRED

Plaintiffs' claims against the Bank Defendants are not time-barred. The Bank Defendants argue the intervention motion should be denied as futile because, in their view, the claims are barred by the statute of limitations. Not so. As extensively briefed in Lead Plaintiff's opposition to the Bank Defendants' motion to dismiss the First Amended Consolidated Complaint, Sarbanes-Oxley, or, alternatively, the relation-back doctrine, applies to plaintiffs' claims. The Bank Defendants mention *American Pipe* tolling in a footnote, but tolling is not at issue here. Instead, as noted above, the claims, which Lead Plaintiff believes are not time-barred in the first instance, are saved by application of Sarbanes-Oxley or relation-back. *See* Opp. to Motion to Dismiss at 4-37.

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court grant ICERS' motion to intervene as a named plaintiff and proposed class representative.

DATED: October 31, 2003

Respectfully submitted,

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