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NOV 21 2001
Michael A. ... Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

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

§
§
§ CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

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.

**LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO CONSECO
ANNUITY ASSURANCE CO.'S OPPOSITION TO CLASS CERTIFICATION**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	4
III. STANDING IS NOT AN ISSUE HERE	6
IV. CONSECO’S ATTACKS REGARDING ADEQUACY ARE WITHOUT MERIT	9
A. Consecos Arguments Regarding HPI Are False.....	9
B. No Real Conflict Exists	13
V. CONSECO SUFFERS FROM DISABLING CONFLICTS	15
A. Consecos Is Conflicted Because Co-Counsel Represents a Plaintiff in <i>Newby</i>	15
B. Consecos Is Also Conflicted Because it Is Bringing Both Individual and Class Actions Based on the Same Scheme	16
VI. CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page
<i>Advanced Display Sys. v. Kent State Univ.</i> , No. 3-96-CV-1480-BD, 2001 U.S. Dist. LEXIS 19466 (N.D. Tex. Nov. 29, 2001).....	16
<i>Central Bank, N.A. v. First Interstate Bank, N.A.</i> , 511 U.S. 164 (1994).....	13, 14
<i>Doe v. A Corp.</i> , 709 F.2d 1043 (5th Cir. 1983)	16
<i>Endo v. Albertine</i> , 147 F.R.D. 164 (N.D. Ill. 1993).....	7
<i>Fiandaca v. Cunningham</i> , 827 F.2d 825 (1st Cir. 1987).....	16
<i>In re American Airlines, Inc.</i> , 972 F.2d 605 (5th Cir. 1992)	16
<i>In re Colonial Ltd. P'ship Litig.</i> , 854 F. Supp. 64 (D. Conn. 1994).....	8
<i>In re Dresser Indus.</i> , 972 F.2d 540 (5th Cir. 1992)	16
<i>In re Enron Corp. Sec. Litig.</i> , 235 F. Supp. 2d 549 (S.D. Tex. 2002).....	13, 14
<i>In re Paracelsus Corp. Sec. Litig.</i> , 6 F. Supp. 2d 626 (S.D. Tex. 1998).....	8
<i>In re Saxon Sec. Litig.</i> , No. 82 Civ. 3103, 1984 U.S. Dist. LEXIS 19223 (S.D.N.Y. Feb. 23, 1984).....	7
<i>In re WorldCom Sec. Litig.</i> , No. 02 Civ. 3288 (DLC) (S.D.N.Y Oct. 24, 2003).....	6
<i>Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co.</i> , 102 F.R.D. 183 (N.D. Ohio 1984)	15
<i>Kuper v. Quantum Chem. Corp.</i> , 145 F.R.D. 80 (S.D. Ohio 1992).....	15

Levitan v. McCoy,
 No. 00 C 5096, 2003 U.S. Dist LEXIS 5078
 (N.D. Ill. Mar. 28, 2003).....16

Nenni v. Dean Witter Reynolds, Inc.,
 CV 98-12454-REK (D. Mass. Sept. 29, 1999)8

Ramos v. Patrician Equities Corp.,
 765 F. Supp. 1196 (S.D.N.Y. 1991).....8

Sanders v. Robinson Humphrey/Am. Express,
 634 F. Supp. 1048 (N.D. Ga. 1986)7

Spira v. Nick,
 876 F. Supp. 553 (S.D.N.Y. 1995)8

Sullivan v. Chase Inv. Servs., Inc.,
 79 F.R.D. 246 (N.D. Cal. 1978).....16

STATUTES, RULES & REGULATIONS

15 U.S.C.

§77k.....6, 7

§77l(a)(2)5, 6, 8

§78j(b).....4, 5, 7, 8

§78t(a).....5

§78t-15

§78u-4(a)(4)12

Federal Rules of Civil Procedure

Rule 231

I. INTRODUCTION

Conseco's opposition to class certification is premised on two flawed arguments. First, Conseco argues none of the proposed class representatives in the *Newby* action has standing to bring claims based on what Conseco refers to as Citigroup CLNs. But the Lead Plaintiff can represent those who purchased the Citigroup CLNs, and, if the Court grants Imperial County Employees Retirement System's ("ICERS") pending intervention motion, ICERS can also serve as a representative for all purchasers of the foreign debt securities, including the Citigroup CLNs.¹ Second, Conseco claims the *Newby* plaintiffs fail to satisfy the adequacy element of Rule 23. But Conseco ignores the fact that the interests of the class representatives are perfectly aligned with those of the class; and Lead Counsel is well-qualified to vigorously prosecute the action. Conseco's arguments to the contrary are nothing more than self-serving attacks by disappointed counsel whose lead plaintiff application has been denied as moot by the Court.

Conseco's brief is notable for what it fails to say. Conseco does *not* say a class should not be certified. Conseco does not say it should be appointed as a class representative – indeed, Conseco has not moved for class certification. Conseco similarly fails to note its significant and disabling

¹ Importantly, as Conseco's certification reveals, it did not purchase all of the securities it seeks to represent. Conseco moved to be lead plaintiff for all purchasers of any credit linked notes issued by Citigroup, which had Enron as the credit reference entity. *See* Hudson Soft Co., Ltd.'s and Conseco Annuity Assurance Company's Reply to Defendants' Opposition to the Motion of Hudson Soft Co., Ltd. and Conseco Annuity Assurance Company to be Appointed as Lead Plaintiffs and for the Approval of their Selection of Co-Lead Counsel at 3 (Ex. 5) ("Conseco Lead Plaintiff Brief"). But Conseco's certification reveals it did not purchase each of the credit linked notes issued by Citigroup. *See* Conseco Annuity Assurance Co.'s signed certification (detailing Conseco's purchases of only three of the Citigroup credit linked notes). Ex. 6.

Indeed, Conseco argued, in response to defendants' argument that it had not purchased each series of credit linked notes that that failure "does not defeat CAA's ability to serve as Lead Plaintiff *or to represent a class of purchasers that includes each series of credit linked notes.*" Conseco Lead Plaintiff Brief at 5 n.3 (citing cases) (emphasis added). Conseco cannot have it both ways. Thus, Conseco must be relying on the same line of authority as Lead Plaintiff when it purports to speak on behalf of those who purchased securities it did not purchase.

conflicts in this litigation. Instead, Conseco's argument is a tempest in a teapot – it distorts the truth, and is flatly contradicted by deposition testimony. Conseco's counsel is so desperate to “corner the market” on this part of the Enron debacle, that reason and facts are tossed aside. The Court should see through this feigned concern for the class and reject Conseco's “opposition” to class certification.

Conseco's counsel is attempting to Balkanize this case by objecting to a unitary class and seeking to carve out a “niche” class of purchasers, just one of the several types of debt securities sold by Enron and its bankers to investors during the Class Period, with a separate lead plaintiff/lead counsel, in fact, if not in name, to prosecute these “niche” claims. There is nothing unique about the legal and factual bases of the claims of the purchasers of any of the foreign debt securities that differentiates them from claims already asserted in this class action not only for purchasers of those notes, but for purchasers of other of Enron's publicly traded debt securities. These notes were sold via offering circulars that contained the same misrepresentations and falsifications that permeated Enron's SEC filings and financial statements. The same investment banks sued by Conseco and Hudson Soft are already defendants in this case and stand accused of participation in the scheme to defraud Enron's equity and debt investors, in, *inter alia*, selling these credit linked notes. The class claims brought by The Regents have the same strengths and weaknesses as the claims brought by Conseco against Citigroup.

When there is a judgment in this case via trial or a settlement, the recovery ultimately generated will have to be allocated, with the help of experts, among the several differing claimants within the class, including open market common stock purchasers and those who bought securities via public offerings, including preferred stock and debt ranging from Enron's zero coupon convertible notes, to more traditional interest-bearing debt securities and the more exotic Enron-related debt securities, such as Marlin Water Trust, Yosemite, Osprey and the other credit linked

notes. If each of these claimants were separately certified with its own class action and with its own lead plaintiff and counsel, this litigation would disintegrate into chaos, resulting in hugely wasteful, duplicative activities and increased fees and expenses. It would also greatly increase the burden on the Court to administer and oversee the case and inevitably would delay the recovery ultimately obtained by the victims of this fraud. Under the leadership of The Regents to date, no one can dispute this case has been litigated with unusual efficiency and effectiveness. Setting to one side the legal victories obtained under this Lead Plaintiff's stewardship, even more important is the collegial, cooperative manner in which the case has been conducted. Great care should be taken in altering in any way this structure, which has proven itself so effective thus far.

At an appropriate time in this litigation, the credit linked note purchasers and other members of the class will be allocated a portion of the ultimate recovery. That allocation, of course, will be fashioned with the help of expert consultants to the Lead Plaintiff and will be subject to judicial review and approval before it can become effective or any money is distributed to the class members. That plan of allocation will be disclosed in detail to all members of the class who retain their right to comment on it or object as part of any approval process. Thus, any purchaser of credit linked notes, whether represented by the lawyers now attempting to secure control of a "niche" class, or other lawyers, or even those appearing *pro se*, will be able to appear at an appropriate time and make whatever arguments they believe are necessary if they believe their claims have not been treated fairly. This is clearly the best way to proceed.

If what Conseco truly seeks is to be certified as a class representative, it should respond to the discovery that defendants have served and provide a deposition. It is very doubtful that Conseco could establish its adequacy, given the conflicts its counsel has.

II. FACTUAL BACKGROUND

On February 15, 2002, the Court appointed The Regents to serve as Lead Plaintiff. The Regents was charged with controlling and directing the litigation. On April 8, 2002, The Regents filed the Consolidated Complaint, which added numerous claims and defendants. On December 20, 2002, and in a series of Orders after that date, the Court denied, in large part, multiple defendants' motions to dismiss. In its Memorandum and Order re Remaining Enron Insider Defendants entered on April 24, 2003, the Court granted plaintiffs 20 days to file an amended complaint. On May 14, 2003, Lead Plaintiff filed its First Amended Consolidated Complaint, which contained claims on behalf of those who purchased the "foreign debt securities," which include the credit linked notes that Consecoco bought.

On July 22, 2002, Hudson Soft Co. Ltd. filed a class action complaint in the Southern District of New York against Credit Suisse First Boston Corp. ("CSFB"), certain CSFB subsidiaries and CSFB employees, Citigroup, Inc., certain Citigroup subsidiaries and Citigroup employees, a number of Enron executives, Arthur Andersen LLP and several Andersen partners, Vinson & Elkins LLP and certain Vinson & Elkins partners. This complaint alleged *only* RICO claims. The lawyers for Hudson Soft on the complaint were Abbey Gardy LLP and Puls Taylor & Woodson.

Two months later, on September 29, 2002, Hudson Soft filed its first amended class action complaint. This complaint, against the same defendants, continued to allege RICO violations, but added, as an "alternative," securities fraud claims under §10(b) of the 1934 Act. Also on September 29, 2002, Abbey Gardy LLP published a notice on the *PR Newswire* purportedly to comply with the PSLRA's lead plaintiff provisions.

On October 30, 2002, Hudson Soft Co. Ltd. moved for appointment as lead plaintiff. Then, a month later, Hudson Soft and Consecoco filed a joint motion to be appointed lead plaintiffs and sought

to have Abbey Gardy LLP and Shapiro Haber & Urmy LLP appointed as co-lead counsel.² Several defendants opposed Hudson Soft and Conseco's gambit. Before the district court in New York ruled on the motion for lead plaintiff, the Judicial Panel on Multidistrict Litigation ordered the *Hudson Soft* action transferred to the Southern District of Texas for inclusion in MDL 1446. Also, before Hudson Soft and Conseco responded to defendants' arguments, Hudson Soft and Conseco sought to voluntarily dismiss most of the defendants named in Hudson Soft's two complaints. After the dismissal was granted, only CSFB, certain CSFB subsidiaries and CSFB employees, Citigroup, certain Citigroup subsidiaries and Citigroup employees remained as defendants.

Hudson Soft and Conseco on February 28, 2003 moved to sever claims based on CSFB's Enron credit linked notes from claims based on Citigroup credit linked notes. In the motion to sever, Hudson Soft stated it was no longer seeking to pursue class claims and had "determined to pursue only" individual claims under RICO or alternatively the federal securities laws. Ex. 7 at 6. In its response filed March 10, 2003 to defendants' opposition to Conseco and Hudson Soft's lead plaintiff motion, Hudson Soft and Conseco also stated that Hudson Soft no longer sought lead plaintiff status. Ex. 5 at 3 n.2.

On March 5, 2003, Conseco filed a class action complaint in the Southern District of New York against Citigroup, certain Citigroup subsidiaries and Citigroup employees. This complaint alleged violations of the 1934 Act under §§10(b), 20A and 20(a), as well as under §§12(a)(2) and 15 of the 1933 Act.

On March 17, 2003, this Court issued an order denying as moot the motion for appointment as lead plaintiff in the *Hudson Soft/Conseco* action because lead plaintiff and lead counsel had

² Conseco's brief claims its motion for appointment as lead plaintiff is pending. *See* Conseco Opp. at 3 n.3. Not so. Conseco's motion was denied as moot by the Court. *See* March 17, 2003 Order of Consolidation (Ex. 8).

already been appointed in *Newby*. Abbey Gardy LLP is counsel for plaintiffs in both the *Hudson Soft* case (now an individual action) and the *Conseco* case. Co-counsel in the *Conseco* action, Shapiro Haber & Urmy LLP, currently represent Nathaniel Pulsifer, one the proposed class representatives in *Newby*.

Conseco now *opposes* class certification of the class that includes purchasers of the credit linked notes issued by Citigroup. Conseco has not sat for a deposition, nor has it turned over documents as ICERS, the proposed representative for purchasers of foreign debt securities and proposed intervenor, has.

III. STANDING IS NOT AN ISSUE HERE

Conseco's primary argument is that the "Newby Plaintiffs" lack standing to assert claims based on credit linked notes issued by Citigroup. However, as the court in *In re WorldCom Sec. Litig.*, No. 02 Civ. 3288 (DLC), Order (S.D.N.Y Oct. 24, 2003) (Ex. 1), recently held in granting class certification, where a common course of conduct is alleged and the same legal theories and factual allegations inform the claims, a party can represent a class despite the fact that it did not purchase the precise security underlying a claim. In *WorldCom*, defendants argued two proposed class representatives, Fresno and FCERA, lacked standing to pursue a §12(a)(2) claim. The court disagreed:

The Section 12(a)(2) claim arises from the same course of conduct and the same Offerings, and involves the same defendants, legal theories and factual allegations that give rise to and inform the Section 11 claims.... Even [Lead Plaintiff] although it did not purchase in either Offering 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.

Id. at 27-28.

Judge Cote's persuasive reasoning should apply here. Like the lead plaintiff in *WorldCom*, Lead Plaintiff here also has an interest and "incentive to pursue and prove many of the facts that

underlie the Sections 11 and 12(a)(2) claims.” *Id.* Thus, even if the Court denies ICERS’ pending motion, Lead Plaintiff can properly pursue claims based on the foreign debt securities.

Conseco’s standing argument is a red herring. Indeed, in a filing related to its now moot application for lead plaintiff, Conseco *conceded* that it is not necessary to own the *precise* security at issue in order to represent a class of purchasers. *See* Conseco Lead Plaintiff Brief at 5 n.3. In Conseco’s Lead Plaintiff Brief it argued that it need not have purchased each series of credit linked notes in order to “serve as Lead Plaintiff or to represent a class of purchasers that includes each series of credit linked notes.” *Id.* Conseco then cited a series of cases noting that 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. *Id.* (citing *Endo v. Albertine*, 147 F.R.D. 164, 167 (N.D. Ill. 1993)). Where, as here, the claim involves common misrepresentations and omissions, it is appropriate to allow a named plaintiff to represent a class even if she purchased a different security than other class members. *See Endo*, 147 F.R.D. at 167; *In re Saxon Sec. Litig.*, No. 82 Civ. 3103, 1984 U.S. Dist. LEXIS 19223, at *19-*20 (S.D.N.Y. Feb. 23, 1984) (claim consisting of both debenture and common stock purchases certified); *Sanders v. Robinson Humphrey/Am. Express*, 634 F. Supp. 1048, 1057 (N.D. Ga. 1986) (“when 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”).

The standing of the proposed class representatives is laid out in sharp relief here because the same financial statements forming the crux of the §10(b) claims (and the §11 claims, for that matter) were incorporated into the offering documents for the foreign debt securities. For example, the Marlin Water Trust offering memorandum incorporates Enron’s 2000 10-K, Form 10-Q for the quarter ended March 31, 2000, Forms 8-K filed January 31 and February 28, 2001, and includes Enron’s consolidated financial information for years ended 1998-2000. ¶¶641.37-.40. The Osprey I

offering memorandum 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. The Court has already upheld claims based on the 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. The constitutional threshold for standing is clearly met here.

Conseco's authority works against it.³ Conseco's certification filed with its moot lead plaintiff application reveals that Conseco (under its conception of standing) would not be able to represent all of the credit linked notes issued. According to its certification, it purchased only three of the Citigroup credit linked notes. *See* Ex. 6. But five series of notes were issued. Conseco's cases are distinguishable on other bases as well. For example, *Spira v. Nick*, 876 F. Supp. 553

³ *In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626 (S.D. Tex. 1998), is not on point. In that case, none of the named plaintiffs had alleged they purchased any of the notes upon which a §12(a)(2) claim was pursued. In *Ramos v. Patrician Equities Corp.*, 765 F. Supp. 1196 (S.D.N.Y. 1991), the court, without real analysis, held certain plaintiffs had no standing to bring RICO and other claims against numerous defendants in connection with several real estate partnerships. The court noted plaintiffs had failed to allege the various parties were involved in a "grand scheme" to commit fraud in connection with all the partnerships. *Id.* at 1199. Here, in sharp contrast, the complaint clearly alleged a fraudulent scheme involving numerous actors. In *In re Colonial Ltd. P'ship Litig.*, 854 F. Supp. 64, 82-84 (D. Conn. 1994), the court held, on a motion to dismiss, that certain plaintiffs lacked standing to bring §10(b) claims because they did not purchase each of the partnerships at issue. In that case, however, the issue was the application of the statute of limitations, not class certification. Moreover, as detailed above, applying *Colonial Ltd.* as Conseco would have it, would necessarily imply Conseco lacks standing to bring claims on those credit linked notes it did not buy. *Nenni v. Dean Witter Reynolds, Inc.*, CV 98-12454-REK, Order (D. Mass. Sept. 29, 1999) (Ex. 9), is an unpublished order which Conseco neglects to attach to its brief. There the plaintiff, alleging fraud in connection with undisclosed portability issues related to mutual funds, sought to bring suit based on all funds that failed to disclose portability limitations. The court held the plaintiff could only bring suit for those funds he invested in. Unlike the situation in the instant case, the mutual funds were not based on the same underlying false financial statements as the foreign debt securities are here.

(S.D.N.Y. 1995), was a RICO action. Unlike this case, the plaintiff had no interest in the partnerships he had not invested in. Here, by contrast, ICERS (and other plaintiffs) clearly plead claims based on the same financial statements that underlie the offering documents of the various foreign debt offerings.

IV. CONSECO'S ATTACKS REGARDING ADEQUACY ARE WITHOUT MERIT

Conseco further argues that in addition to a purported standing problem, the adequacy requirement is not met. Conseco manufactures supposed "conflicts" and, notably is the *only* party of all those filing oppositions to class certification to question the adequacy of counsel.

A. Conseco's Arguments Regarding HPI Are False

Conseco makes a number of statements regarding counsel that are demonstrably false and necessitate correction. Attached to Conseco's brief and liberally cited therein is a declaration by Jacque Millard of IHC Health Plans, Inc. ("HPI"). The falsity of HPI's declaration and Conseco's "spin" on the declaration can be disproved via reference to the sworn deposition testimony of Ms. Millard, Chief Investment Officer for HPI. The deposition itself is something of an oddity as counsel for *Conseco* were permitted to run the deposition and in fact used the opportunity to intimidate and threaten the deponent.

Conseco lists five points it claims HPI testified to. Each is false or an artful twisting of the words of a non-lawyer deponent. First, Ms. Millard *did not* testify she was contacted by a cold call via a London intermediary or, as the brief also states, an "agent" of Lead Counsel. *See* Conseco Opp. at 16. Instead, Ms. Millard actually testified that she was contacted by a company from London called Magenta One which "track[s] class action lawsuits, and then they help institutional investors that – that own those bonds collect." Ex. 10, 23:23-24:1. She further testified she was "not sure what the relationship [was] between" Magenta One and counsel. *Id.* at 24:6. *See also id.* at 14-17. Ms. Millard, when asked whether Magenta One told her it had a business relationship with

Milberg Weiss said, "Uh-huh." *Id.* at 24:10. While this testimony is hardly a ringing endorsement of Conseco's assertion, the fact of the matter is, there is no business relationship between Milberg Weiss and Magenta One. Second, and critically, Conseco claims HPI was never informed of the *Conseco* action. This is flatly contradicted throughout Ms. Millard's deposition. "I was informed by our counsel at IHC that there was potentially another litigation" *See id.* at 18:19-23.

Q: Have you ever heard of an entity called Conseco Annuity Assurance Company?

A: Yes.

Q: When did you first hear of that entity?

A: When – when I asked – I asked Mr. Howes about this other litigation.

Q: And when was that?

A: Friday.

Q: What did you learn about Conseco?

MR. HOWES: Without – I direct you not to answer your question based on what you and I discussed. If you had other sources of information about Conseco or about any other lawsuit, you may answer the question.

* * *

Q: Do you know if Conseco Annuity Assurance Company has filed claims on behalf of purchasers of credit linked notes in this case?

A: I don't know directly. I don't know specifically any details other than the discussion that I had with Mr. Howes. I can make assumptions, but I don't know any real details, no.

Q: Did you ever speak to Mr. Pugsley about whether Conseco Annuity Assurance Company had filed claims on behalf of purchasers of credit linked note obligations in this litigation?

A: No, no. Just the – just the law firm, but there was no discussion about Conseco. He may not have even known – and I'm not sure how Conseco is really related to this Boston law firm. I'm not –

Q: If at all?

A: If at all. I don't know that. I just know that there's a Boston law firm, and then there's – that's involved in the Yosemite Trust, and that's all I know. And he was the one that was going to look into that further.

Id. at 123:5-124:22.

She also clarified the record on direct examination:

Q: Have you had discussions with Mr. Pugsley about what you earlier referred to as the Boston case?

A: Yes.

Q: And through the questioning of Mr. Paradis, do you understand now that the Boston case and Conesco Assurance case is the same case?

A: Well, I would assume they're the same case. I'm not sure how they're related, but I'm assuming they're the same.

Q: And in the time that you have spent with me, have we had any discussions about what you've earlier called the Boston case?

A: Yes. I asked you about that, given my discussions with Mr. Pugsley and what Mr. Pugsley had commented about in the e-mail, and I asked you about that specifically.

Q: And what did – go ahead.

A: Probably Friday, I think.

Q: What did I tell you about the Boston case? Do you recall?

A: That there were some, I guess, legal issues or legal battles, if you will, I guest, as to which – who had jurisdiction, I guess. I don't know if that's the right word, but where we fit in it. That would be something that – that you would deal with or the attorneys work out with Mr. Pugsley and yourself.

Q: Do you have any reason to believe that Milberg Weiss and your lawyers won't work out those legal issues?

A: No. I believe that will happen.

Id. at 285:20-286:25.

Third, Conesco falsely suggests HPI was not informed that claims regarding Yosemite were being challenged as time-barred. Although not testified to directly, Ms. Millard did testify that there were “legal issues or legal battles” going on and she expected counsel to work those differences out.

Id. at 286. The statute of limitations issue plainly fits into this notion of “legal issues” Ms. Millard described. Fourth, while Consecoco claims HPI was not informed of any opposition to its then-pending motion to intervene, Ms. Millard testified on September 15, 2003 that she was “*not sure*” whether she had seen Consecoco’s opposition to HPI’s intervention motion which was filed on September 8, which raised the statute of limitations issue. Ms. Millard, when asked whether she knew whether she had been sent Consecoco’s brief filed just seven days before, testified: “I’m not sure. Like I said, I’ve got – I’ve got a lot of documents. I haven’t looked at them for a little while. I don’t know.” *Id.* at 287:20-22. Any supposition on Consecoco’s part that HPI was not informed of Consecoco’s opposition is purely guesswork.

Finally, capitalizing on the fact that Ms. Millard is a non-lawyer, who clearly misspoke during her deposition, Consecoco claims it is Lead Plaintiff’s intent to allocate damages regardless of the strength of the various claims set forth in the litigation. Leaving aside the fact that any allocation of damages is a matter well down the road and experts will clearly be needed to assist in drawing up an equitable plan of allocation, at this stage of the litigation it is plainly inappropriate for one proposed representative to insist that its claim is more “valuable” than any other representative’s. Pursuant to the PSLRA, the class representative’s share of any settlement shall be equal on a per share basis to the share awarded to all other class members. 15 U.S.C. §78u-4(a)(4).

Ms. Millard’s testimony may have been influenced by her understanding of the role of a representative and the share of recovery that a representative is entitled to. The certification signed in accordance with the PSLRA requires plaintiffs to aver that they will accept no more than a pro rata share of any recovery. This certification, which Ms. Millard signed may have been the source of her misunderstanding that all class members would receive a *pro rata* share of the recovery. *See Ex. 11.* Moreover, the leading question by Consecoco’s counsel may have also caused Ms. Millard’s confusion. *See Ex. 10, 75:3-25.*

B. No Real Conflict Exists

Conseco also argues serious conflicts exist between the class as proposed in *Newby* and itself. But no real conflicts, indeed none that “go to the subject matter of the litigation” exist. *See* Conseco Opp. at 14.

First, Conseco argues a conflict exists because, in its estimation it has “stronger” claims against Citigroup.⁴ Not so. Conseco argues its claims against Citigroup are “direct” and the claims in *Newby* are subject to attack under *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). Conseco contends its allegations show Citigroup directly violated the securities laws. But the *Newby* complaint also pleads a claim against Citigroup as a primary violator of the securities laws. And, as the Court has previously held, plaintiff has pleaded Citigroup (and others) are *directly* liable for their role in the Enron fraud. *See, e.g., In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002). While the Bank Defendants and others are likely to reargue the proper application of *Central Bank*, this certainly does not mean the argument will succeed. Indeed, as discovery progresses, plaintiffs are confident the “direct” role of the banks and others will become more apparent.

Based on the faulty premise that it has “stronger” claims, Conseco argues that its claims would be diluted if they remain part of the *Newby* class. Conseco again refers to the Millard testimony for the proposition that lead counsel plans to divide the settlement pro rata among class members. Combining its assertions that it has “stronger” claims and that the proceeds of settlement will be divided pro rata, Conseco concludes that the credit linked note purchasers’ claims are in conflict with those of the Lead Plaintiff. As discussed above, Lead Plaintiff’s claims against

⁴ Notably, Conseco’s counsel did not even plead initially the securities claims they now assert are stronger than Lead Plaintiff’s. Rather, they brought solely RICO claims in the Hudson Soft complaint against Citigroup.

Citigroup have already survived a challenge based on *Central Bank* and the allocation among class members has neither been proposed by Lead Counsel nor addressed by the Court. There is no conflict between Lead Plaintiff and those who purchased the credit linked notes.

While Conseco asserts that it should get more in any recovery than other class members, it fails to mention that it did not sue numerous securities law violators. Conseco has sued only Citigroup and a few subsidiaries and employees – omitting other banks, Enron officers, the lawyers and the auditor. Indeed, Conseco and Hudson Soft *dismissed* claims against numerous Enron insiders, Andersen, Vinson & Elkins, and Andersen and Vinson & Elkins partners. At her deposition, Ms. Millard testified that numerous parties, *not* named in Conseco's complaint, should be named as defendants.

Q: Who is it that Health Plans intends to sue as a defendant in this case if Health Plans is permitted to be a representative plaintiff in this case?

A: The directors and officers of Enron; Vinson & Elkins, the law firm; Arthur Andersen, the auditing firm; the banks, all not just Citibank, but the banks involved in these deals.

Ex. 10, 134:22-135:3.

She further testified that it appeared the defendants in the *Newby* case were “appropriate parties.” “[I] would say that they've got the appropriate parties involved, that they're suing the appropriate parties.” *Id.* at 136:5-7. Even HPI would have to concede Conseco has failed to name appropriate defendants. Thus, the recovery for credit linked note purchasers will be enhanced – not diluted – if they are part of the class.

Conseco also argues a conflict exists because (in its view) claims regarding credit linked notes are barred by the one-year statute of limitations. But these claims are not barred. As extensively briefed during the pending round of motions to dismiss, the claims are subject to the statute of limitations provided by Sarbanes-Oxley or alternatively relate back to the filing of the first complaint.

In sum, there is no conflict and Lead Plaintiff (and proposed representatives) are more than adequate. Lead Counsel, unquestioned by any other opponent to class certification, has proved itself again and again as capable of litigating the case against *all* defendants.

V. CONSECO SUFFERS FROM DISABLING CONFLICTS

A. Conseco Is Conflicted Because Co-Counsel Represents a Plaintiff in *Newby*

Conseco suffers from two separate but equally disabling conflicts. Shapiro Haber & Urmy LLP, co-counsel in the *Conseco* action, represents Nathaniel Pulsifer, one of the proposed class representatives in the *Newby* action. Mr. Pulsifer is seeking to represent the class in *Newby*. Thus, Shapiro Haber seeks to represent both the *Newby* class and the *Conseco* “niche” class of Citigroup CLN purchasers. This conflict is clearly disabling. *Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992) (“competing claims may impair counsel’s ability to vigorously pursue the interests of both classes”). *Accord Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co.*, 102 F.R.D. 183, 192 (N.D. Ohio 1984). In *Kuper*, counsel attempted to simultaneously represent competing classes which were “vying for relief from the same limited source.” 145 F.R.D. at 83. The court determined that such situation would subject counsel to “divided loyalties” and is therefore impermissible. *Id.*

This is the exact conflict Model Rule of Professional Conduct 1.7(a)(2) was designed to protect against. Comment 23 to Model Rule 1.7 specifically states that “simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.” Model Rules of Prof’l Conduct, Rule 1.7, cmt. 23 (2002).

In addition to the Model Rules of Professional Conduct, the Fifth Circuit has repeatedly referred to the canons of ethics developed by the American Bar Association as a source for the standards of the legal profession. *See In re Dresser Indus.*, 972 F.2d 540, 543-45 (5th Cir. 1992); *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992); *Doe v. A Corp.*, 709 F.2d 1043, 1048-49 (5th Cir. 1983); *Advanced Display Sys. v. Kent State Univ.*, No. 3-96-CV-1480-BD, 2001 U.S. Dist. LEXIS 19466, at *20 (N.D. Tex. Nov. 29, 2001). Canon 5 of the ABA Model Code of Professional Responsibility states “A lawyer should exercise independent professional judgment on behalf of a client.” Under Disciplinary Rule 5-105(B) the Code further elaborates on the purpose of the canon, stating that “A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests” Model Code of Prof'l Responsibility, DR 5-105 (2002).⁵ If Conseco truly believes there is a conflict between Conseco's interests and those of the *Newby* class, then Shapiro Haber suffers from that same conflict and cannot represent both.

B. Conseco Is Also Conflicted Because It Is Bringing Both Individual and Class Actions Based on the Same Scheme

Conseco's counsel is trying to represent Conseco in a class case and another client, Hudson Soft, in an individual case. Conseco Lead Plaintiff Brief at 3 n.2. Conseco's counsel thus has a disabling conflict; they simply cannot represent both class and individual claimants. *Levitan v. McCoy*, No. 00 C 5096, 2003 U.S. Dist LEXIS 5078, at *16 (N.D. Ill. Mar. 28, 2003) (if counsel represents both an individual and a proposed class, a conflict of interest exists due to the competing claims); *Sullivan v. Chase Inv. Servs., Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978) (counsel cannot

⁵ *See also Fiandaca v. Cunningham*, 827 F.2d 825, 828-31 (1st Cir. 1987) (reversing district court and disqualifying counsel from representing potentially competing classes).

((

represent both an individual and a putative class against the same defendant because of obviously conflicting interests).

Counsel for Conseco can be expected to argue that the *Hudson Soft* case and the *Conseco* action are not the same. But the cases share core operative facts and are based on the same scheme. Quite simply, if Conseco's lawyers were allowed to be counsel for the class, would they maximize the amount that CSFB (the defendant Hudson Soft sues in an individual action) would pay the class? Or would they try to maximize the amount CSFB pays Hudson Soft?

These two independent conflicts demonstrate Conseco (and its counsel) should not be permitted to speak for a class of credit linked note purchasers.

VI. CONCLUSION

The class, including those who purchased credit linked notes, should be certified. The Lead Plaintiff, ICERS, and the other proposed class representatives will continue to ably prosecute the case on behalf of the class. If the Court is concerned with the representation of the credit linked notes,

Lead Counsel suggests that Consecos respond to discovery. In any event, due to its conflicts, Consecos' counsel cannot serve as class counsel for the credit linked notes purchasers.

DATED: November 24, 2003

Respectfully submitted,

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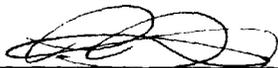
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO CONSECO ANNUITY ASSURANCE CO.'S OPPOSITION TO CLASS CERTIFICATION document has been served by sending a copy via electronic mail to serve@ESL3624.com on this November 24, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO CONSECO ANNUITY ASSURANCE CO.'S OPPOSITION TO CLASS CERTIFICATION document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this November 24, 2003.

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



Mo Maloney