United States Courts
Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY,	:	Civil Action No. H-01-3624
	:	(Consolidated Securities Actions)
Plaintiff,	:	
v.	:	
ENRON CORP. et al.,	:	
Defendants.	:	

REPLY BRIEF IN SUPPORT OF THE MOTION OF THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC. FOR APPOINTMENT AS LEAD PLAINTIFF AND FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF COUNSEL.

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I. INTRODUCTION.

Plaintiff, the Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS Fund" or "Movant" or "Proposed Lead Plaintiff"), submits this Reply Brief in support of its Motion pursuant to Section 27(a)(3)(B) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77z-1(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), to be appointed as a lead plaintiff and for approval of its counsel, Scott + Scott, LLC, to serve as lead counsel and for Kilgore & Kilgore, PLLC to serve as liaison counsel for the proposed class.

The AMS Fund, in its capacity as a charitable institution, has suffered significant losses as a result of its investments in debt securities of Enron Corp. ("Enron"). The AMS Fund seeks appointment as one of the lead plaintiffs in this case so that it can represent the interests of the community of investors in Enron securities that have been harmed by defendants' alleged misconduct. Consistent with the spirit of the PSLRA and as a reflection of its capacity to serve as an appropriate lead plaintiff, to date, the AMS Fund has taken an active role in this litigation by seeking to both protect and represent the interests of the full community of Enron securities purchasers.[1] For the reasons explained below, the AMS Fund respectfully submits that, after

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[1]First, the AMS Fund has retained Scott + Scott, LLC as its outside counsel for securities and corporate governance matters, and Kilgore & Kilgore, PLLC, as its liaison counsel. Both firms are highly experienced in prosecuting securities and other complex class action litigation. As noted in the AMS Fund's initial Memorandum of Law in Support of its Appointment as Lead Plaintiff, Scott + Scott, LLC has been recognized by a number of courts as highly qualified and, as a result, has been appointed as lead counsel in other securities class actions. See e.g. Steinbeck v. Emulex Corp. et al., No.SACV-01-219-GLT (United States District Court for the Central District of California)(Order dated May 11, 2001); Twardy v. Priceline.com et al., No. 3:00CV1884 (DJS)(United States District Court for the District of Connecticut)(Order dated September 12, 2001)(approving the selection of Scott + Scott, LLC as lead counsel); In re Sprint Securities Litigation, Master File No. 01-CV-04080 (United States District Court for the District of Kansas)(Memorandum and Order dated September 28, 2001)(appointing Scott + Scott, LLC lead counsel and finding the firm to be "highly qualified" to serve in that capacity); In re Versata, Inc. Securities Litigation, Master File No. 01-1439 (Order dated August 17, 2001)(United States District Court for the Northern District of California). Similarly, Kilgore & Kilgore, PLLC is a well respected law firm located in the State of Texas which, as explained in the AMS Fund's Response and Memorandum of Law in Response to All Other Movants' Motions for

reviewing all of the submissions by the proposed lead plaintiffs, the Court should conclude that the AMS Fund is one of the most appropriate and adequate lead plaintiffs and, for that reason, appoint the AMS Fund as one of the lead plaintiffs in this consolidated action.

II. DISCUSSION.

A. Consistent With The Spirit And Purpose Of The PSLRA, The Court Should Appoint Representative Lead Plaintiffs To Protect And Represent The Interests Of The Entire Community Of Enron Investors.

The AMS Fund recognizes that, in *In re Waste Management Securities Litigation*, 128 F. Supp. 2d 401, 410 (S.D.Tex. 2000)("*Waste Management*"), this Court applied the lead plaintiff provisions of the PSLRA and appointed one institutional investor (i.e., the State of Connecticut) to serve as the class representative. The AMS Fund respectfully suggests that, in this case, the Court should appoint a small group of representative lead plaintiffs to protect and represent the interests of the entire community of plaintiffs in this consolidated action. The AMS Fund respectfully submits that such an approach is consistent with not only *In re Oxford Health Plans, Inc. Securities Litigation*, 182 F.R.D. 42 (S.D.N.Y. 1998)("*Oxford Health*"), upon which the AMS Fund admittedly places great reliance, but also with this Court's decision in Waste Management, which teaches: "[t]he Court does not believe that automatic arbitrary restrictions, such as a specific number of Lead Plaintiffs or a specific common connection should be required in all class actions under the PSLRA, but finds that the circumstances of each suit must be considered in determining appropriate restraints on random aggregation by counsel." *Id.*, 128 F. Supp. 2d at 431.

Unlike in *Waste Management*, this is not a case where the Court essentially faces multiple

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Appointment as Lead Plaintiff, also is exceptionally qualified to assist the AMS Fund in this case. Second, the AMS Fund has requested that its counsel take an active role in seeking to (a) freeze the assets of certain Enron insiders who appear to have profited from insider trading, and (b) obtain discovery with respect to alleged document destruction by Enron, as well as its former auditor, and ensure that all remaining evidence is preserved. For that reason, a representative of the AMS Fund has attended virtually all court hearings, as well as Congressional hearings, to monitor and advise the Fund regarding developments regarding these important matters.

aggregated groups of competing plaintiffs and one qualified institutional investor, all seeking to represent essentially the same putative class of plaintiffs.[2] Rather, this is a case where certain qualified institutions and individuals have offered to serve the proposed class by seeking and consenting to be appointed as the lead plaintiff(s). Consistent with both *Oxford Health* and *Waste Management*, as well as the realities and complexity of this litigation, the AMS Fund respectfully suggests that, in light of the existence of certain highly competent proposed lead plaintiffs, rather than choosing between competing groups of aggregated members of the proposed class, the Court should simply appoint a small group of qualified lead plaintiffs. Such lead plaintiffs can work together cooperatively to protect the interests of the entire putative class. Here, by choosing a representative group of adequate plaintiffs to manage this litigation and serve the putative class, the Court can guarantee effective representation of all proposed class members, as well as appropriate "control and supervision of" counsel in this case. *Waste Management,* 128 F. Supp. 2d at 412, *citing Aronson v. McKesson HBOC, Inc.*, 79 F.Supp.2d 1146, 1153 (N.D.Cal. 1999); *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 224 (D.D.C. 1999).[3] Moreover, by choosing such representative lead plaintiffs, the Court will ensure that all potential

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[2]In *Waste Management,* the Court addressed four competing motions for appointment of lead plaintiff filed by "the Taft-Hartley Pension Group [consisting of certain unrelated pension funds], Connecticut [consisting of six state retirement funds invested together and represented by the Connecticut State Treasurer as the sole fiduciary of those funds], the Waste Management Plaintiffs Group [consisting of as many as 660 members or, alternatively, a twelve member institutional group or an eleven member steering committee], and the WMI Institutional Shareholder's Group [consisting of forty-eight investors, including certain institutional investors]." *Id.* at 409. Here, unlike the circumstances existing in *Waste Management*, the Court is able to choose several lead plaintiffs that (a) have not aggregated any class members in an attempt to "create" a lead plaintiff, (b) are adequate plaintiffs since they are not subject to any unique defenses, and (c) satisfy the PSLRA since together they have the largest financial interests of any adequate plaintiffs seeking to represent the putative class.

[3]By choosing such lead plaintiffs, the Court also will eliminate any concern that attorneys have designated "unrelated plaintiffs as a 'group' and aggregate[d] their financial stakes ... [and thereby] allow[ed] and encourag[ed] lawyers to direct the litigation." *Waste Management* at 412-13, *quoting In re Donkenny Sec. Litig.*, 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997).

interests within the community of damaged Enron investors are represented, protected and provided with a meaningful voice. Simply put, rather than choosing between unrelated, aggregated groups that have been assembled and proposed by movants, as requested by certain parties in *Waste Management*, as well as in this case,[4] the Court should protect the entire community of Enron investors by choosing representative lead plaintiffs itself that are both adequate and prepared to work cooperatively with other lead plaintiffs on behalf of the entire class.[5]

Based upon its review of all of the pleadings filed by the proposed lead plaintiffs, as well as the transcipts of the hearings to date, the AMS Fund respectfully submits that, in addition to itself, the adequate institutional investor with the largest financial interest in this litigation,[6] as well as an individual investor representative,[7] should be appointed as lead plaintiffs. By

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[4]The AMS Fund notes that certain of the proposed lead plaintiffs are essentially pre-assembled groups of putative class members that have apparently joined together for the sole purpose of obtaining appointment as lead plaintiff(s). For example, the "New York City Pension Funds" and the "State Retirement System Group," which recently joined together to support each other, appear to be the kind of preassembled group which, as *Waste Management* holds, should not be appointed as lead plaintiffs because the purpose of the PSLRA is not served by such joinder of unrelated putative class members.

[5]The AMS Fund respectfully suggests that, where the Court chooses a group of representative lead plaintiffs, it is unnecessary for the Court to require "a pre-litigation relationship" between lead plaintiffs because, by choosing the best representative lead plaintiffs, the Court already has eliminated any concern that an aggregated group has been assembled solely to accomplish the goals of certain counsel, as opposed to for the benefit of the class. *Waste Management* at 413. The AMS Fund concurs with the position taken by the SEC in *Switzenbaum v. Orbital Sciences Corp.,* 187 F.R.D. 246, 248-50 (E.D.Va. 1999), and that "such a group should be no more than three to five persons...." *See also Waste Management* at 413.

[6]Based upon its review of all of the competing papers, and given the serious concerns raised by a number of parties regarding the Florida State Board of Administration, it appears that The Regents of the University of California is the single institutional investor that has the largest financial interest under the PSLRA.

[7]In the case of *Laborers Local 1298 Pension Fund v. Campbell Soup Company,* 2000 WL 486596 * 3 (D.N.J. April 24, 2000)("*Campbell Soup*"), the Court addressed the issue of whether

appointing such lead plaintiffs, the Court will ensure that the putative class receives excellent and diverse representation by parties that can work together to prosecute this action on behalf of the proposed class. Additionally, these lead plaintiffs will supervise lead counsel to ensure that the proposed class' interests are protected by effective, efficient and expeditious legal representation.

As noted in its previous papers, the AMS Fund is uniquely well suited to serve as a lead plaintiff because it is:

(a) a charitable institution with worthy goals and a conservative investment strategy, thereby rendering it above reproach and not subject to any unique defenses; and

(b) an institution that solely invested in debt securities, thereby rendering it the only "pure" debt security investor that seeks to act for the benefit of the entire community of Enron investors.

The AMS Fund, as a charitable institution that is committed to serving the needs of others, stands ready to work on behalf of the interests of all proposed class members in this important litigation.[8]

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one or more lead plaintiffs should be appointed and persuasively held that "it [is] desirable to have both an institutional investor ... and individual investors ... included as lead plaintiffs since each may bring a unique perspective to the litigation." To the best of the AMS Fund's knowledge and information, the "Davidson Group," which is comprised of certain individual investors, are the only individual investors that have sought appointment as lead plaintiffs on behalf of the entire class and, based upon the papers submitted by these individual investors, it appears that, under *Oxford Health* and *Campbell Soup*, appointment of one of them would promote and serve the interests of the PSLRA.

[8]As the Court in *Oxford Health*, 182 F.R.D. at 48, persuasively explained, "[t]he rebuttable presumption created by the PSLRA which favors the plaintiff with the largest financial interest was not intended to obviate the principle of providing the class with the most adequate representation and in general the Act must be viewed against established principles regarding Rule 23 class actions [and] [a]llowing for diverse representation, including in this case a state pension fund, significant individual investors and a large institutional investor, ensures that the interests of all class members will be adequately represented in the prosecution of the action and in the negotiation and approval of a fair settlement, and that the settlement process will not be distorted by the differing aims of differently situated claimants." Thus, by appointing the adequate proposed lead plaintiff with the largest financial interest, along with other lead plaintiffs (including the AMS Fund) capable of providing both adequate and diverse representation, the Court can ensure that the putative class is represented in a manner entirely consistent with both

B. At This Stage In The Proceedings, It Is In The Interests Of All Putative Class Members To Maintain This Action As A Consolidated Action Without The Creation Of Separate Classes Or Subclasses.

Two purchasers of debt securities and an aggregated group of purchasers of preferred stock have not moved to be appointed as lead plaintiff in this consolidated action but, rather, seek to create separate classes or subclasses on behalf of their clients and only seek appointment as lead plaintiffs for those separate classes or subclasses. *See* Memoranda of Law filed on behalf of Movants, Pulsifer & Associates or, in the alternative, Murray Van de Velde (professional money manager that purchased debt securities), Proposed Preferred Purchaser Lead Plaintiffs (aggregated group of individuals purchasing preferred stock), Staro Asset Management, LLC (hedge fund purchasing debt securities). [9] For the reasons explained below, the AMS Fund respectfully submits that such a fractious approach does not serve the interests of the putative class.[10]

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the PSLRA and Fed.R.Civ.P. 23. Here, although the AMS Fund's losses may be relatively small (based upon information received last week by the AMS Fund's General Counsel and outside counsel, the actual losses sustained by movant are approximately fifty percent (50%) of its originally calculated losses of $70,000 because, on dates in mid and late November, 2001, after it executed the certification in this case, movant was able to sell its debt securities), in light of the AMS Fund's experience in working for the benefit of others and given the fact that it did suffer both significant principal and interest losses in its Enron investment (which was limited to bond investments), it represents an institution that is well qualified to represent the interests of the putative class.

[9]JMG/TQA, two hedge funds that aggregated losses in debt securities when seeking appointment as lead plaintiff, appear to have abandoned their motion because (1) these funds did not submit any responsive papers on January 22, 2002, and (2) counsel for JMG/TQA now have appeared, without explanation, on the papers of Staro Asset Management, LLC ("Staro") and are identified, along with one other law firm, as "Attorneys for Proposed Lead Plaintiffs." This effective withdrawal may reflect that an agreement has been reached between JMG/TQA and Staro or their counsel but, since no such agreement has been disclosed to the Court or other movants, the AMS Fund is not certain as to how this withdrawal and addition of counsel should be interpreted or if it is material to this Court's determination.

[10]Obviously, since none of these movants seek appointment as lead plaintiffs that can represent the interests of the entire putative class and, in fact, assert that they currently possess interests that are antagonistic to other putative class members, none of these individuals or

As the Court observed in *Waste Management*: "the creation of a lead plaintiff for a subclass would result in multiple counsel duplicating work and would be an impediment to the effective management of the litigation." *Id.*, 128 F.Supp.2d at 428. The AMS Fund respectfully suggests that the same reasoning applies with equal force in this case. In the past several weeks, as certain proposed lead plaintiffs have moved to freeze certain assets of defendants and acted to protect and preserve evidence from acts of reported destruction, the importance that the proposed lead plaintiffs and their counsel in this proceeding work together to protect the immediate interests of all of the putative class members has become exceedingly clear. In stark contrast, if the Court creates subclasses or separate classes at this procedural stage and thereby effectively creates different factions in this case, the Court may create disharmony between the class members and thereby distract the parties from the proper and timely prosecution of this case. For that reason, the AMS Fund strongly believes that the best interests of all putative class members are best served by appointing the lead plaintiff(s) for this consolidated litigation and addressing the question of separate and distinct subclasses once certain pretrial proceedings and discovery have been completed.[11]

Such an approach is entirely consistent with the authority cited and arguments made by those movants who now seek creation of separate classes or subclasses. For example, the Proposed Preferred Purchaser Lead Plaintiffs effectively admit that creation of classes or subclasses is premature since they do "not oppose, and indeed, urge... the coordination of all of

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institutions should be considered as eligible for appointment as a lead plaintiff in this case.

[11]Although it surely is correct that the process of proof for one security purchaser, as compared to another, may be slightly different and less burdensome for certain plaintiffs with respect to certain defendants, including the AMS Fund (which purchased bonds as part of an offering), it is beyond cavil that many of the arguments in the briefing of a motion to dismiss will be the same or similar and all of the plaintiffs will seek essentially the same discovery from defendants. For that reason and because it simply is too early to determine whether any conflicts truly will arise between different purchasers of Enron securities, as in *Waste Management*, it would be premature to create any distinct class or subclass. *Id.*, 128 F.Supp.2d at 426, 432.

the federal securities actions before one judge for discovery and pretrial purposes." *See* Memorandum of Plaintiffs Steiner et al. Opposing Eight Lead Plaintiff Motions at 2. Similarly, the only rationale offered by Staro Asset Management, LLC[12] for creation of a separate class or subclass is that "debt and equity investors have different legal claims, and the evidence to be presented at trial on loss causation and damages will differ between debt and equity class members." *See* Responsive Brief in Further Support of the Motion of Staro Asset Management, LLC to Serve as Lead Plaintiffs on Behalf of the Debt Securities Class at 1. Thus, although such arguments may support the ultimate designation of certain subclasses at the time of class certification or before trial, no reason exists to reach such conclusions at this juncture when the interests of all plaintiffs are best served by pursuing a consolidated and coordinated strategy lead by competent and representative lead plaintiffs.

The cases relied upon by those plaintiffs seeking to divide this consolidated action into several, separate cases also do not support adoption of such a fractious approach at this time. For example, in *Model Associates, Inc. v. U.S. Steel Corp.*, 88 F.R.D. 338 (S.D.Ohio 1980), a case

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[12]As noted in the AMS Fund's Memorandum of Law in Response to All Other Movants' Motions for Appointment as Lead Plaintiffs, serious independent concerns exist as to the adequacy of Staro to serve in any representative capacity. As reported in Hedgefundnews.com for January, 2001, based upon an interview of Staro officer, Brian Stark, Staro is a hedge fund that specializes in and pursues convertible and other arbitrage strategies (including market neutral trading strategies) pursuant to which Staro purports to hedge against many of the risks it takes when pursuing an investment. Furthermore, the Affidavit of Staro's General Counsel attached to its response papers filed on January 22, 2002 is notable since it repeatedly discusses Staro's "losses on its debt securities investments" and "losses on its bond investments," see Affidavit of Colin Lancaster, Esquire, without disclosing whether Staro hedged against losses in all or part of this investment through its equity, derivative or other investments. If such hedging occurred, it obviously would expose Staro to substantial defenses (especially if Staro profited from other investment strategies pursued with respect to Enron). As the Court in *Waste Management, supra* at 411, observed, a "[p]laintiff must make at least a preliminary showing that it has claims that are typical of those of the putative class and the capacity to provide adequate representation for those class members." Here, at a minimum, the Court should determine whether Staro pursued such strategies with respect to Enron and registered any corresponding non-debt security gains before considering Staro's appointment to any position in this litigation.

upon which Staro places great reliance, the Court held that, at the class certification stage, a shareholder should not be certified as a class representative on behalf of bond purchasers. Similarly, in *Simon v. Westinghouse Electric Corp.*, 73 F.R.D. 480 (E.D.Pa. 1977)(holding that, at class certification stage, bond purchasers should have separate representation); *Teichler v. DSC Communications Corp.*, 1988 WL 157305 (N.D.Tex. 1988)(holding that, at class certification stage, subclass should be created for debt security purchasers with separate representation); *In re Livent, Inc. Noteholders Securities Litigation*, 151 F.Supp.2d 371 (S.D.N.Y. 2001)(discussing a separate bond purchaser class action that was certified and other class actions that were subsequently filed and certified), which also are relied upon by Staro, do not discuss whether, before class certification, it is appropriate to create separate classes of securities' purchasers and appoint lead counsel for each such class. In fact, on the contrary, the authority invoked by Staro appears to support a much different result – **appointment of lead plaintiff(s) for the class and the creation of subclasses, if appropriate, at the time of class certification.**

Notwithstanding the arguments contained in their responsive pleadings, the cases cited to by Pulsifer & Associates or, in the alternative, Murray Van de Velde,[13] also do not support the argument that, in order to have standing to protect the purchasers of 7% notes, a separate class must be created and a separate lead plaintiff must be appointed for such a class. Rather, in *In re Paracelsus Corp. Sec. Litig.*, 6 F.Supp.2d 626, 631 (S.D.Tex. 1998), none of the plaintiffs filing any of the securities fraud complaints which were consolidated in that case had suffered losses as a result of purchases of notes and, for that reason, plaintiffs lacked standing to prosecute the action. Similarly, in *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959 (9th Cir. 1990)(not a

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[13]Although Pulsifer & Associates et al. also states in its responsive papers that it is unable to determine the class of debt securities purchased by the AMS Fund, as expressly stated on page fourteen of its initial Memorandum of Law in Support of its Appointment as Lead Plaintiff, "on June 6, 2000, the AMS Fund purchased $55,000 in notes (7.7875% due 6/15/03 at $99.806) on the initial public offering of this debt...."

securities class action); and *In re Storage Technology Corp. Securities Litig.*, 630 F.Supp. 1072 (D. Colo. 1986)(a securities class action), certain claims were dismissed for lack of standing because none of the plaintiffs (as opposed to the lead plaintiff) had purchased the securities for which certain claims were asserted. Accordingly, since the cases supplied by Pulsifer & Associates or, in the alternative, Murray Van de Velde simply do not support the proposition for which they are cited, there is no reason, at this procedural stage, to divide this action into multiple class actions with separate lead plaintiff(s). Rather, the Court should appoint the lead plaintiffs that are best suited to represent the entire community of proposed class members in this important proceeding.

III. CONCLUSION.

For all of these reasons, as well as the reasons stated in its prior pleadings, the AMS Fund respectfully requests that this Court: (1) appoint it as one of the lead plaintiff(s) pursuant to Section 27(a)(3)(B) of the Securities Act; and (2) approve its selection of lead counsel and liaison counsel.

DATED: January 28, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that true and correct copies of the Reply Brief in Support of the Archdiocese of Milwaukee Supporting Fund, Inc's Motion for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Counsel and the accompanying proposed Order, as well as this Certificate of Service, were served on January 28, 2002, via first class mail on counsel for all parties and via facsimile and federal express on counsel for all other plaintiffs seeking appointment as lead counsel on behalf of the class, a separate class or any proposed subclass, and addressed as follows:

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