UNITED STATES COURTS
SOUTHERN DISTRICT OF TEX
FILED

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MICHAEL N. MILBY, CLERK OF COU

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.	

SUR-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.

Plaintiff, the Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS Fund" or "Movant" or "Proposed Lead Plaintiff"), submits this Sur-Reply Brief in support of its Motion to be Appointed as a Lead Plaintiff and simply to correct a misstatement contained in certain Response Briefs and Reply Briefs of other movants. As explained below, the AMS Fund does not seek and has never sought the creation of a separate class or subclass for the purchases of debt securities at this time but, rather, seeks appointment as a lead plaintiff to represent the interests of all putative class members.

In their Response Briefs and Reply Briefs, a number of movants assert that the AMS Fund seeks to create separate class, a subclass or a "carve out" for purchasers of debt securities.[1]

[1]In contrast, Staro Asset Management, LLC ("Staro") and Pulsifer & Associates or, in the alternative, Murray Van de Velde (collectively "Pulsifer"), two other movants that purchased debt securities, do seek such a "carve out."

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Notwithstanding those assertions, it is crystal clear that the AMS Fund ***does not seek any such carve out at this time.*** As the AMS Fund specifically explained in its initial Memorandum of Law filed on December 21, 2001, "[a]t this time, the AMS Fund is not requesting that this Court rescind or modify its consolidation order or 'carve out' a special class or subclass for these purchasers." See Memorandum of Law 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 at 10. Similarly, as the AMS Fund stated in its Response Brief filed on January 22, 2002:

> The AMS Fund does not seek to "carve out" a separate action for itself on behalf of all debt holders via creation of a subclass or to modify this Court's consolidation order. As this Court properly concluded in *In re Waste Management, Inc.*, absent the existence (as opposed to the possibility) of a conflict of interest between purchasers of different securities, the appointment of a lead plaintiff to represent a subclass is not appropriate at the time that lead plaintiffs are selected by the Court. *Id.* at 432. Here, as explained in the AMS Fund's Memorandum of Law in Support of its Motion for Appointment as Lead Plaintiff, although it is possible that a conflict of interest may arise between purchasers of debt securities and other securities, AMS Fund's Lead Plaintiff Memorandum at 3, 10, no present conflict exists. Other movants, although raising the specter of a potential conflict between the interests of different securities' holders in an effort to "carve out" independent cases for themselves within this litigation or, in the alternative, to represent a separate class or subclass of purchasers, also cannot identify any ***presently*** existing conflict between the interests of purchasers of common stock, preferred stock and debt securities (i.e., bonds and other debt instruments). *See* Memoranda of Law filed on behalf of Movants, JMG/TQA (aggregated hedge funds that purchased debt securities), Pulsifier & 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). Nevertheless, these movants prematurely seek to

> "carve out" separate cases or subclasses for themselves in an effort to obtain appointment as lead plaintiff. The AMS Fund respectfully suggests that, at this stage of the proceedings, such a fractious approach does not serve the interests of the entire proposed class of purchasers of Enron securities, including the interests of debt security purchasers. Rather, at this stage of the proceedings, as this Court effectively recognized in *In re Waste Management, Inc.*, the orderly prosecution of this complex litigation is best served by lead plaintiffs, such as the AMS Fund, able and willing to work on behalf of the interests of the entire class with other lead plaintiffs who can readily represent the interests of purchasers of non-debt securities. For this reason alone, at this stage in the proceedings, the AMS Fund is uniquely well suited to serve the interests of the entire class of securities' purchasers, including, but not limited to, the purchasers of Enron debt securities.

See Response and Supporting Memorandum of Law of the Archdiocese of Milwaukee Supporting Fund, Inc. to All Other Movants' Motions for Appointment as Lead Plaintiff in this Consolidated Action at 5-6.

Finally, the AMS Fund's Reply Brief also fully explains its position that, "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." See 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 at 9-13.

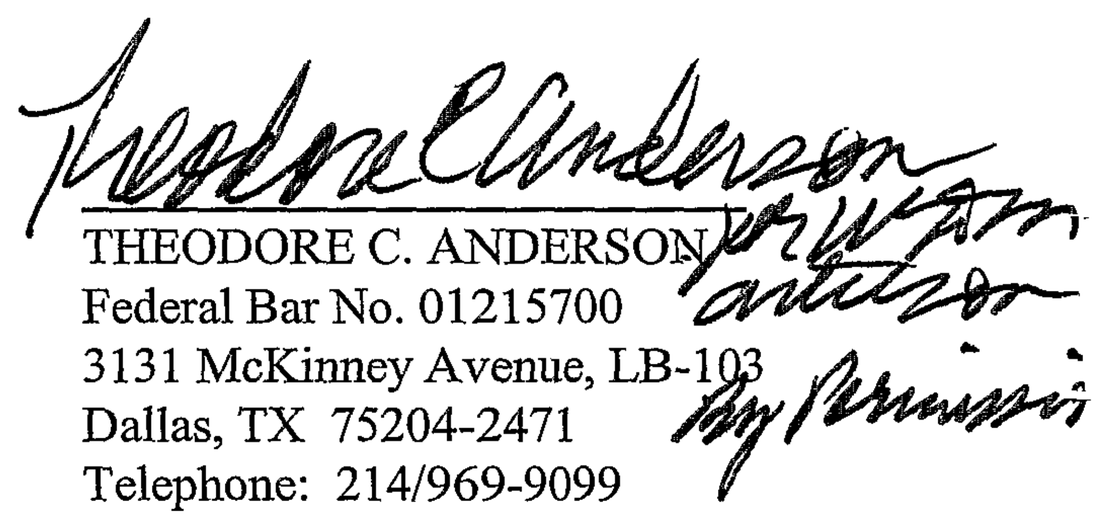
Thus, any assertion by other movants that the AMS Fund seeks a "carve out" on behalf of debt securities purchasers in this consolidated action is mistaken. Rather, the AMS Fund is the only movant that (a) solely purchased debt securities during the class period, and (b) seeks to be appointed as a lead plaintiff to represent the interests of all class members in this consolidated action. For these reasons, as well as the reasons stated in its Motion for Appointment as Lead

Plaintiff, its Response to the Motions of All Other Movants for Lead Plaintiff and its Reply Brief in Support of its Motion for Appointment as Lead Plaintiff, the AMS Fund, which is a non-profit charitable organization, is well qualified to serve as a lead plaintiff in this consolidated action and should be appointed by the Court to serve in that representative role in order to protect the interests of all of the members of the putative class.

DATED: February 7, 2002

Respectfully submitted,

KILGORE & KILGORE PLLC



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