

1. The Defendants¹ believe they have valid motions to dismiss the claims against them. If those motions are granted, there will be no need to schedule discovery. The Defendants recognize, however, that a case of this magnitude requires the Court to anticipate how discovery might be conducted in light of the multiple parties and broad allegations at issue in the consolidated cases. Thus, although the Defendants believe that dismissal of all of the cases is warranted, they share a common concern that any discovery that is conducted proceed efficiently so as to achieve "the savings in time, expense and harassment of parties and witnesses," Order Denying Remand at pg. 7, promised by the consolidation of these actions.

2 As the Court has observed, "it is centrally important to the litigants on both sides and to this Court, especially because there are so many parties involved and all are entitled to equal access to the evidence, that the discovery process not disintegrate into chaos and harassment." See Order Appointing Lead Plaintiff at pg. 63. Coordinated discovery is particularly important because all of the consolidated actions--Securities, ERISA and Derivative--arise from a common core of operative facts: To a greater or lesser extent, all of them relate to the demise of Enron and the resulting decline in the value of its securities.

3. With this in mind, various Defendants through their respective counsel have endeavored to negotiate a coordinated schedule with Plaintiffs' counsel in the Securities and the *Tittle* group of ERISA cases. The Parties' ability to resolve all scheduling issues has been hampered

¹ This response is filed on behalf of all defendants, other than Enron Corporation and those defendants that have not yet been served or otherwise appeared in these actions. It pertains solely to the ERISA and PSLRA actions. There is no need to implement a schedule in the derivative actions, as those are property of the Bankruptcy Estate. See Order of February 6, 2002 denying remand of Coy and Mounter actions at pg. 5. The so-called "derivative" action recently filed by the *Tittle* group of ERISA plaintiffs does not fall into the category because it asserts ERISA, securities, and other claims derivatively on behalf of two employee benefits plans, not on behalf of Enron Corp. Accordingly, it apparently should be included in part with the ERISA cases and in part with the securities cases.

by: (a) a lack of knowledge of the allegations to be asserted in the Master Complaints for the ERISA and Securities cases; and (b) uncertainty as to which, if any, of the claims asserted will survive a motion to dismiss. This uncertainty speaks in favor of entering a docket control order limited to briefing on the motions to dismiss or, at minimum, a scheduling order with dates sequenced from the disposition of motions to dismiss. Within those limitations, counsel have achieved certain agreements. As to other areas, the parties have agreed to disagree. This pleading will set out first the areas of agreement. Defendants will then explain their views on those areas as to which the parties disagree.

Agreements

4. The Defendants, the *Tittle*² Plaintiffs, and Court-appointed lead counsel in the securities case have agreed to the following initial pleading schedule:

Filing of Amended Master Complaints	May 1, 2002 ³
Motions to Dismiss	June 15, 2002
Oppositions to Motions to Dismiss	July 30, 2002
Replies to Motions to Dismiss	August 15, 2002

5. In addition, although they disagree as to when class certification discovery should begin, the *Tittle* Plaintiffs and the Defendants have agreed on a proposed class certification schedule for their ERISA claims. It is set out below:

Class Certification Motion	September 1, 2002
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²The *Tittle* group of plaintiffs consists of a significant portion, but not all, of the ERISA plaintiffs in the *Tittle* matter. No other ERISA plaintiff or plaintiffs group has presented a proposed schedule to Defendants.

³Defendants' have acceded to Lead Plaintiff's request for more than sixty days to file their Amended Master Complaint. The time frames that flow thereafter were agreed to in order to provide all parties with equivalent response times.

Class Certification Discovery Period	90 Days
Plaintiffs' Class Certification Experts Must be Designated	45 Days after discovery begins
Defendants' Class Certification Experts	75 days after discovery begins
Defendants' Opposition to Class Certification	120 days after discovery begins
Plaintiffs' Replies in Support	150 days after discovery begins

Lead Plaintiff in the securities cases does not agree to this schedule. Instead, they contend that all class discovery (including experts, depositions and briefing) should be completed in seventy-five days. For the reasons stated below, Defendants believe such an abbreviated schedule is not realistic. *See infra* at pp. 6.

Disagreements

Length of Fact Discovery

6. The parties were unable to reach agreement on the length of the fact discovery period. Some of the ERISA plaintiffs advocated a nine month period for fact discovery; Lead Plaintiff in the securities cases advocated a twelve month period, with an absolute cut-off of November 15, 2003-- regardless of when fact discovery begins. The defendants believe both schedules are impossible to achieve in light of the allegations made in these cases and the nature of the discovery that will be required to address them.

7. The Court is well aware of the breadth of the allegations made in the consolidated cases. As the court accurately observed, this may be the largest class action ever filed. It is impossible to determine how many parties will be named, and what allegations will be made, in the

amended complaints to be filed in the Securities and ERISA cases. Any fact discovery plan entered now, before the amended complaints are filed and tested through motions to dismiss, has to provide flexibility in the event that pleadings with broader allegations, and possibly additional parties, are the subject of discovery.

8. Even if not a single allegation were altered, and not one new party was added, any discovery in this case could be massive. Arthur Andersen's report to the court concerning document destruction reflects that they have assembled 1500 boxes of documents. Their counsel estimates that more than 1000 boxes may be relevant given the current state of the pleadings. Andersen's production alone will exceed more than 3,000,000 pages that must be reviewed by counsel for the parties. Enron advises that the FBI has seized some 500 boxes of documents that are relevant to its investigations. An additional 100 boxes had been produced to the government before those boxes were taken. In addition to the boxes it has taken, the FBI has copied the computer hard drives of more than 100 Enron employees. When the contents of those drives are printed and produced, they could well total hundreds of additional boxes of material.

9. It is wholly unrealistic to suggest that the parties can review, assimilate and take depositions based upon more than 1600 boxes of material in less than a year's time. That time frame becomes impossible when one considers that 1600 boxes is the production from just two defendants. When one considers that in this case, as in many other securities cases, there is likely to be discovery from analysts, rating agencies, lenders and creditors--the potential volume of document production is staggering. It is also entirely foreseeable that there will be several hundred witnesses deposed in these actions. Many of these witnesses are likely to be absent, so their depositions will be their trial testimony. No responsible lawyer would take the deposition of an absent trial witness without first reviewing the relevant documents, and it is irresponsible to suggest that anyone should do so. Any

discovery plan should therefore incorporate, as Defendants have suggested, a period of time devoted to the assembly and review of the millions of pages of documentary evidence. Allowing time for adequate document review will ensure that witnesses are deposed thoroughly—and only once.

10. The Defendants considered all of these factors when they offered to agree with plaintiffs to a fact discovery period of eighteen months. This is the bare minimum that Defendants believe they can live with on the assumption that everything in discovery proceeds smoothly. We are, as a group, committed to trying to meet that schedule--but we must advise the Court that even an eighteen month schedule is optimistic and may well need to be extended.⁴

Class Discovery

11. Defendants and the *Tittle* plaintiffs have agreed to the intervals for class discovery. Lead Plaintiff disagrees, and suggests that the entirety of class discovery—including document production, interrogatories, depositions, experts and briefing—can be completed in seventy-five days. Defendants believe Lead Plaintiff's proposal fails to take account of: (a) uncertainties about the parameters of the class(es) that will be plead; (b) the diversity of interests among the potential plaintiffs in the different cases; and (c) the potential that reliance may be diverse based upon information actually considered by the plaintiffs before they purchased their Enron securities. The schedule proposed by Lead Plaintiff also fails to include any schedule for expert discovery on class certification issues. Given that expert testimony will be necessary, among other things, to establish "typicality" of the class claims, Defendants believe any schedule for class discovery should make provision for expert discovery.

⁴A review of the schedule in a similar massive securities action proves the point. In *In re BMC Securities Litigation*, the Court approved a discovery schedule that allowed two and a half years for discovery. See Exhibit "A," attached. Lead Plaintiff in that case, as in this one, was the Milberg Weiss firm.

12. Given the likelihood of expert testimony, and the diversity among the potential classes, Defendants believe a class period of 120 days is more realistic. Defendants have therefore proposed, and the *Tittle* Plaintiffs have agreed, to the following schedule:

Class Discovery Period	Ninety days
Plaintiffs' Class Experts	45 days after discovery begins
Defendants' Class Experts	75 days after discovery begins
Class Discovery Ends	Ninety days after fact discovery begins
Defendants' Oppositions to Motions for Class Cert	Thirty days after class discovery closes
Plaintiffs' Reply	Thirty days after opposition is filed

Expert Discovery

13. The Parties are closer to agreement on expert discovery, but there remain significant differences between them.

14. Lead Plaintiff proposes a four month expert discovery period, in which three months are consumed with the mutual exchange of expert reports but only one month is available for depositions of all of the experts for the more than 35 parties to these consolidated actions. Defendants believe this would be unworkable for two reasons: The time allotted is inadequate and the sequence proposed by Lead Plaintiff is unworkable. Defendants have proposed a five month expert discovery period affording each side equal time for expert discovery. This proposal is based upon a realistic assessment of the breadth of the allegations contained in the current complaints. Virtually every business decision made by Enron is attacked in some way in the complaints. Expert testimony may be required on accounting issues, loss causation, fraud on the market, valuation, comparable company analysis, insider trading, economics and other disciplines. Although Defendants are united in their view as to a reasonable potential discovery schedule, there are

important differences between them as to matters relevant to their individual defenses. It is quite likely that Defendants would have more than one expert on a particular topic--and Plaintiffs are likely to have a number of experts as well. It is inconceivable that depositions of all of the likely expert witnesses could be completed in one month's time.

15. Defendants also disagree with Lead Plaintiffs' proposed sequence for expert discovery. Lead Plaintiff proposes that the parties would exchange all of their reports before any of plaintiffs' experts are deposed. Defendants propose, instead, that Plaintiffs would file their reports, present their experts for deposition, after which time Defendants would file their reports and present their experts. This schedule recognizes that the burden of proof is on the Plaintiffs. It also would permit Defendants' experts to formulate their opinions and rebuttal based not on a bare bones report but, instead, on the testimony the expert gives to explain her analysis. This would not be prejudicial to Plaintiffs. To the contrary, under this proposal, experts designated by Defendants could address the full scope of opinions offered by experts designated by Plaintiffs.

Reform Act Stay

16. Defendants and all plaintiffs disagree as to when discovery should begin. Under the Private Securities Litigation Reform Act ("Reform Act"), there is to be no discovery in the securities case until Plaintiffs' Complaint survives a motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B).⁵ In order to overcome the Reform Act stay, Lead Plaintiff must demonstrate that discovery in advance of the dismissal ruling is necessary to preserve evidence or to avoid undue prejudice. *Id.* "Undue prejudice" has been held to mean that, in the absence of the requested discovery, the defendant

⁵The PSLRA does not require the filing of a motion to dismiss to trigger the automatic stay. See Order (Exh. "A") at 43 (emphasis in the original) ("discovery is stayed from the filing of the complaint until the court has determined the sufficiency of the plaintiff's pleading, unless the plaintiff can establish one of the exceptions."). *Accord In re Carnegie Int'l Corp. Sec. Lit.*, 107 F. Supp. 2d 676, 681 (D.Md. 2000); *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, 1999 WL 223158 at * 1 (S.D.N.Y. Apr. 16, 1999).

would be shielded from eventual liability. *Medical Imaging Ctr. of Am., Inc. v. Lichtenstein*, 917 F. Supp. 717, 720 (S.D. Cal. 1996).

17. Although Lead Plaintiff has argued that limited discovery is appropriate on its application for Temporary Restraining Order,⁶ it has never suggested to the Court that the Reform Act discovery bar should be abrogated wholesale. In the absence of a showing of "undue prejudice," discovery in the securities cases cannot proceed. Defendants have, therefore, endeavored to agree with Plaintiffs on appropriate intervals for discovery (e.g. eighteen months for fact discovery, five months for expert discovery, etc.) in the recognition that the cut-off dates ultimately will be driven by the Court's rulings on the motions to dismiss. Those intervals are laid out in the scheduling order that is attached as Exhibit "A".

ERISA Cases

18. The ERISA plaintiffs have somewhat differing views. The *Tittle* Plaintiffs, who speak for plaintiffs in a significant number of the ERISA actions, generally agree that discovery on the merits must await the resolution of the Reform Act cases so that discovery between the two cases can be coordinated. The Defendants do not know the position of the other ERISA Plaintiffs because these plaintiffs have not attempted to discuss these issues with them.

19. Defendants make the following observations. First, many of the ERISA cases contend that the 401(k) participants were fraudulently induced to purchase Enron stock in their savings plan by means of misrepresentations by unidentified defendants. *See e.g. Rinard, et. al. v. Enron Corp. Svgs. Plan, et.al.*, C.A. No. H-01-4060 at Par. 215 ("....defendants withheld and concealed material information during the Class Period and before as set forth above, and instead

⁶The Defendants that are parties to that motion emphatically disagree, for the reasons stated in their pleadings, that Lead Plaintiff has made an adequate showing to warrant even a limited category of discovery in the TRO proceedings.

actively mislead the participants and beneficiaries of the Savings Plan about the Company's earnings prospects and business condition, thereby encouraging participants and beneficiaries of the Savings Plan to continue to make and to maintain substantial investments in Company stock in the Savings Plan."). Save for the way in which Enron stock was purchased, this allegation is virtually identical to the claims made in the securities actions. It would eviscerate the Reform Act if a sub-group of Enron purchasers were permitted to take merits discovery simply because they have asserted additional claims under ERISA.⁷

20. Second, as the Court has observed, "discovery by the ERISA and PSLRA parties will necessarily overlap." The same core of operative facts is at issue in both the ERISA and the Securities cases. As a result, documents should be produced once, witnesses should be deposed once and discovery should be coordinated--as much as is possible--so as to minimize duplication of effort. The slight delay that would result from the need to coordinate the ERISA cases with the securities cases is vastly outweighed by the waste of resources that will result if discovery in these cases proceeds on separate tracks.

21. Third, the Bankruptcy Court in New York has apparently ordered Enron to produce to the ERISA plaintiffs documents relating to the ERISA claims that Enron provided to government agencies. These documents may account for the bulk of the documents specifically relating to the ERISA claims that are in all Defendants' possession, custody, or control. Any need to begin arguably ERISA-specific discovery against other defendants in the ERISA cases, before discovery begins in the securities cases, is correspondingly reduced. Putting the remainder of discovery in both sets of cases on the same track will minimize duplication of effort and burden, as discussed in the preceding paragraph.

⁷The current class definition in the securities cases does not exclude purchases who bought Enron stock through their 401(k) plans.

22. Although they have agreed to the intervals that will apply to class certification issues, the *Tittle* Plaintiffs and Defendants disagree as to when class certification proceedings should begin. The *Tittle* Plaintiffs prefer to begin class-certification proceedings in their cases before similar proceedings begin in the Reform Act cases and before the rulings on the motions to dismiss.

23. Defendants did not agree to this proposal for a number of reasons. First, as the Court has noted, the ERISA plaintiffs have yet even to agree as to which law firm[s] will take the lead in developing their claims. *See Order of February 20, 2002.* It is difficult to contemplate commencing class discovery immediately when the parameters of the class, and the counsel responsible to prosecute the class claims, have yet to be identified. Second, Plaintiffs have yet to file their amended consolidated complaint(s). When they do, it is likely that many of the Defendants will file motions to dismiss one or more of the claims asserted by Plaintiffs. Until the Court determines which (if any) of the ERISA claims survive, it makes little sense to expend significant resources discovering the parameters of class claims that the Court may reject as a matter of law. *See e.g. Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997)(recognizing that judicial economy may be served by resolving motions to dismiss prior to ruling on class certification); *Wynn v. Symons Int'l Group, Inc.*, 2001 WL 278113(S.D. Ind. 2001)(denying motion for class certification without prejudice because motions to dismiss had not yet been resolved); *Nelson v. Greenwood*, 849 F. Supp. 1233, 1236 (N.D. Ill. 1994)(noting earlier order deferring certification pending motion to dismiss).

24. Finally, as the Court is aware, class certification proceedings in the Securities cases must necessarily await the Court's rulings on the motions to dismiss. *See 15. U.S.C. Section 78u-4(b)(3)(B)* ("all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss"). The core of the factual allegations in the ERISA and Securities cases is common. Thus, as the Court has observed, counsel in the ERISA cases "will necessarily have to coordinate

their activities with those of Lead Counsel in the Newby case.” Defendants therefore urge that coordinated discovery should include the adoption of a uniform class certification schedule in all cases, to commence after the motions to dismiss are resolved.

Bankruptcy

25. If any claims survive a motion to dismiss, the Court will then have to consider how to manage discovery in light of Enron’s bankruptcy proceedings. Enron has professed a desire to emerge quickly from bankruptcy. If that occurs before this Court rules on the motions to dismiss, then the bankruptcy proceedings need not interfere with discovery. If, however, Enron remains in bankruptcy, the automatic stay will preclude any party from taking discovery against Enron in the absence of an order lifting the stay.

26. Lead Plaintiff suggests the bankruptcy stay will not interfere with discovery because “Lead Plaintiff anticipates seeking Company discovery through the jurisdiction of the bankruptcy court.” The ERISA Plaintiffs have apparently obtained an order from the bankruptcy court requiring Enron to produce to them certain documents it has produced to governmental agencies.⁸

27. Defendants, however, do not believe that discovery through the bankruptcy court is a viable option. First, as is evident from the *Tittle* Plaintiffs’ action in the bankruptcy court, those defendants who are not Enron creditors receive no notice of events that occur in the bankruptcy court.⁹ Non-creditor defendants may also have difficulty invoking the jurisdiction of the bankruptcy

⁸The *Tittle* Plaintiffs have suggested that the Bankruptcy Court ordered Enron to produce all of the Enron documents now in the possession of governmental agencies. Defendants do not have the same understanding. Obviously, the court’s ruling is what it is. We simply note that, at this time, Plaintiffs have provided neither an order nor a transcript to document the Bankruptcy Court’s ruling.

⁹The Court has previously evidenced its disapproval of efforts by parties to obtain discovery in other fora outside the supervision of this Court. See Order Granting All Writs Act Injunction, February 15, 2002. Plainly, as it pertains to the merits of the actions pending here, all parties are entitled to notice and an opportunity to be heard on matters relevant to discovery in these cases.

court to obtain the discovery they need. These facts alone make it impractical to rely on the offices of the bankruptcy court to obtain discovery.

28. The means of discovery available in bankruptcy proceedings are also a poor substitute for civil discovery. Rule 2004 depositions are ordinarily used to discover the location of the debtor's assets. Their focus may be much narrower than a regular deposition. Equally significant, if the defendants cannot attend and cross-examine during the 2004 examination, then the testimony obtained cannot be used in this case. *See Fed. R. Civ. P. 32(a).*

29. Finally, it is well-known that Enron's is the largest corporate bankruptcy in history. The bankruptcy service list is 35 pages long.¹⁰ The ultimate goal of the bankruptcy proceedings is to maximize recovery for Enron's creditors--many of whom are the defendants' adversaries in this litigation. It is simply unrealistic to suggest that "discovery" through the bankruptcy court is an adequate substitute for the defendants' rights to obtain discovery in this court under the Federal Rules of Civil Procedure.

30. Defendants respectfully submit, therefore, that discovery in all of these actions must be stayed until such time as the bankruptcy stay is lifted to permit discovery against Enron. This is the only fair approach. The claims against the defendants are interwoven with allegations relating to Enron's operations and disclosures. Both the ERISA and the Securities cases center on the disclosures made concerning Enron's business operations and financial transactions. The prosecution and defense of these claims will necessarily involve an analysis of what Enron did or did not do, what it did or did not represent to investors, and whether particular defendants had knowledge of Enron's actions. To conduct discovery on these points without Enron is roughly

¹⁰See Exhibit "B," attached.

similar to watching a movie in which the leading role has been edited out. It will be uninformative, misleading and at the end will be simply incomprehensible.

Conclusion

For the reasons stated above, Defendants respectfully request that any Scheduling Order entered by the Court keep intact the PSLRA discovery stay during the pendency of their motions to dismiss and, in the event the case continues thereafter, afford them a minimum of eighteen months of fact discovery and five months of expert discovery.

Respectfully submitted,

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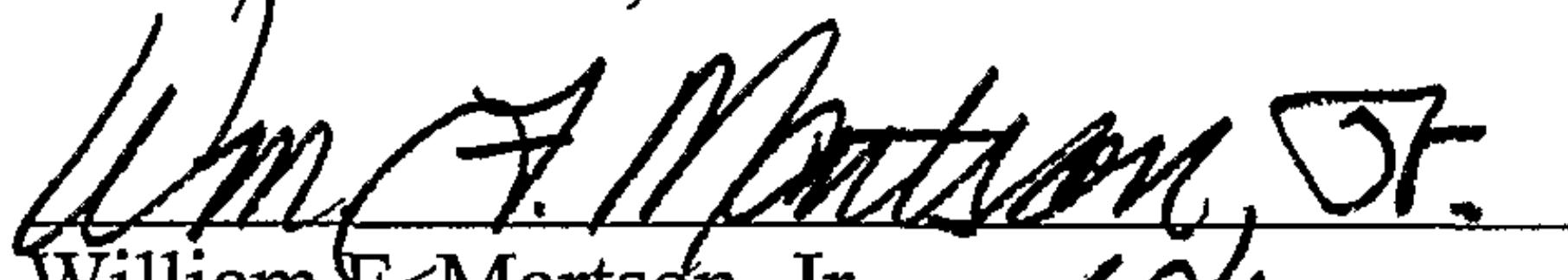
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record via hand delivery, certified mail, return receipt requested, federal express and/or facsimile this 22nd day of February 2002.



Kathy D. Patrick

A handwritten signature in black ink, appearing to read "Kathy D. Patrick". The signature is fluid and cursive, with a horizontal line drawn underneath it.

UNITED STATES DISTR'

COURT

SOUTHERN DISTRICT OF TEXAS

DOV KLEIN, et al.,
Plaintiffs,
versus

BMC SOFTWARE, INC., et al.,
Defendants.

United States Court
Southern District of Texas
ENTERED

JUL 24 2000

Michael N. Maby
Clerk of Court

CIVIL ACTION H-00-359

RULE 16 SCHEDULING ORDER

The following schedule shall be followed. All communications concerning the case shall be directed in writing to Ellen Alexander, Case Manager for Judge David Hittner, P.O. Box 61010, Houston, TX 77208.

1. July 1, 2001

NEW PARTIES shall be joined, with leave of court, by this date. The attorney causing such joinder shall provide copies of this ORDER to the new parties.

2.A. Sept 1, 2002

PLAINTIFF shall designate EXPERT WITNESSES. Designation shall be in writing to opponent. Expert reports shall be filed within 60 days of the designation.

B. Oct 1, 2002

DEFENDANT shall designate EXPERT WITNESSES. Designation shall be in writing to opponent. Expert reports shall be filed within 60 days of the designation.

3. JAN 16, 2003

DISCOVERY shall be completed by this date.

4. JULY 1, 2002

AMENDMENTS to pleadings, with leave of court, shall be made by this date.

5. JAN 30, 2003

MOTION CUT-OFF. No motion shall be filed after this date except for good cause shown. See Local Rule 6.

6. April 20,
2003

The JOINT PRETRIAL ORDER shall be filed on or before this date, notwithstanding that a motion for continuance may be pending. Parties shall exchange all trial exhibits on or before this date notwithstanding that a motion for continuance may be pending. NO LATE EXCHANGES OF EXHIBITS WILL BE PERMITTED. All motions in limine shall be submitted with the pretrial order. Failure to file timely a joint pretrial order, motions in limine, or exchange all trial exhibits may result in this case being dismissed or other sanctions imposed, in accordance with all applicable rules.

7. MAY / JUNE
NOV / DEC 2003

TRIAL TERM. Cases will be set for trial at a docket call, conducted prior to the trial term or by order of the Court. Your position on the docket will be announced at that time. Class certification shall be in accordance with Rule 23.

The parties request that the court enter a new scheduling order if any All documents filed must be 14 point font, double spaced with not less than one inch margins. It's complaint is sustained.

SIGNED on July 21, 2000

Marcia A. Crone

Marcia A. Crone

United States Magistrate Judge

David E. Shantz, Greenberg, Peden et al.

Counsel for Plaintiffs

Chas. Schwartz

Vinson & Elkins L.P.

Counsel for Defendants

#46

EXHIBIT

A

MASTER SERVICE LIST PLEASE OPEN DOCUMENT NUMBER NY2005637 FOR COMPLETE DIRECTIONS FOR ADDING TO THIS LIST AND FOR CREATING LABELS. PLEASE DO NOT USE RETURNS – USE MANUAL LINE BREAKS – PLEASE MAINTAIN SAME FORMAT – USE ABBREVIATIONS FOR THE STATE – THANK YOU

Entity
Enron Metals & Commodity Corp. 520 Madison Avenue New York, NY 10022
Enron Corp. 1400 Smith Street Houston, TX 77002
Enron North America Corp. 1400 Smith Street Houston, TX 77002
Enron Power Marketing, Inc. 1400 Smith Street Houston, TX 77002
PBOG Corp. 1400 Smith Street Houston, TX 77002
Smith Street Land Company 1400 Smith Street Houston, TX 77002
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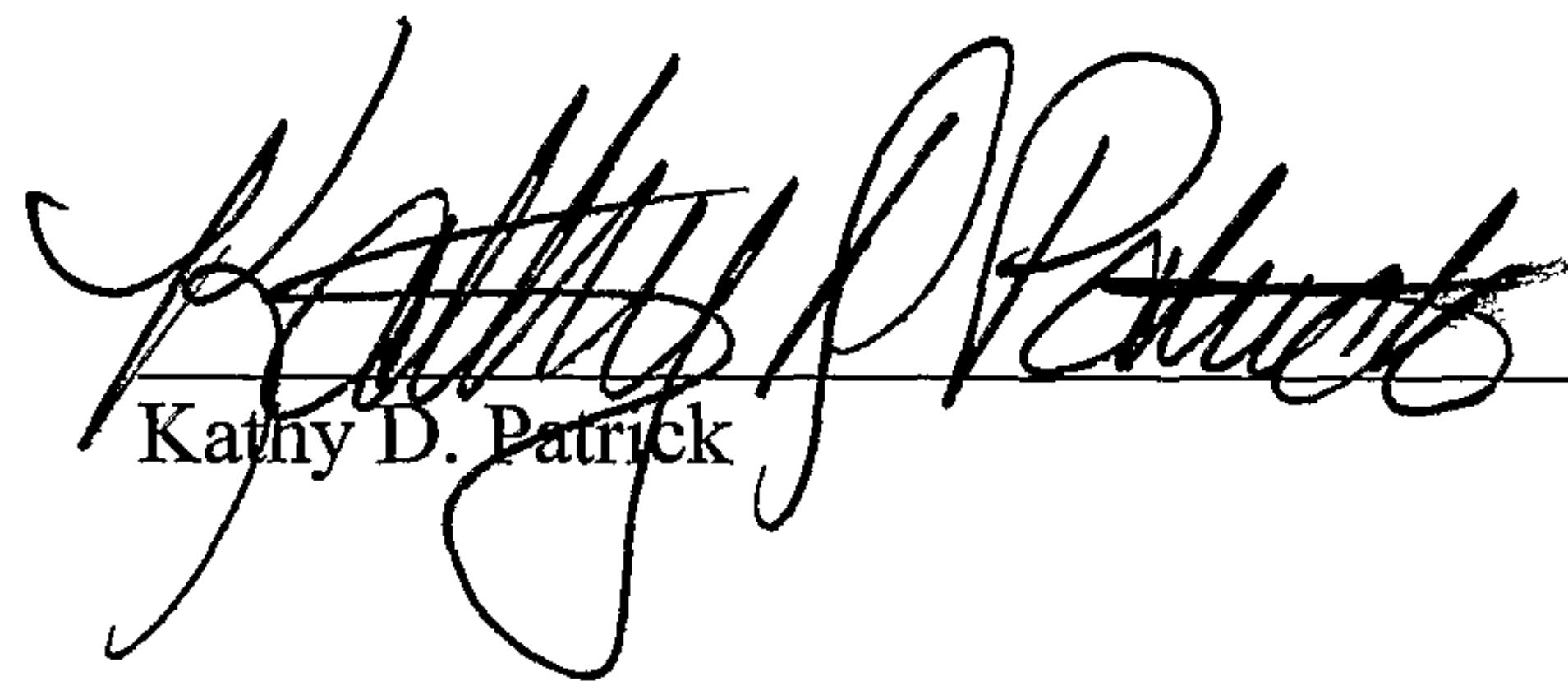
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record via hand delivery, certified mail, return receipt requested, federal express and/or facsimile this 20 day of February 2002.



Kathy D. Patrick

A handwritten signature in black ink, appearing to read "Kathy D. Patrick". The signature is fluid and cursive, with "Kathy" on top and "D. Patrick" below it.

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