UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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U.S. COURTS
SOUTHERN DISTRICT OF TEXAS
United States Courts
Southern District of Texas
FILED
APR 29 2002
Michael N. Milby, Clerk

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| MARK NEWBY, | § | |
| Plaintiff | § | |
| | § | |
| V. | § | Consolidated Lead No. H-01-3624 |
| | § | |
| ENRON CORP., ET AL., | § | |
| | § | |
| Defendants | | |

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| INVESTORS PARTNER LIFE INSURANCE COMPANY, JOHN HANCOCK LIFE INSURANCE COMPANY, and JOHN HANCOCK VARIABLE LIFE INSURANCE COMPANY, Individually and on Behalf of All Others Similarly Situated, | § | |
| Plaintiffs | § | |
| | § | |
| V. | § | Civil Action No. H-02-1364 |
| | § | |
| KENNETH L. LAY, et al. | § | |
| | § | |
| Defendants | § | |

**HANCOCK PLAINTIFFS' REQUEST FOR CLARIFICATION OF, OR, ALTERNATIVELY, OBJECTION TO, THE ORDER OF CONSOLIDATION**

Plaintiffs Investors Partner Life Insurance Company, John Hancock Life Insurance Company (formerly John Hancock Mutual Life Insurance Company) and John Hancock Variable Life Insurance Company (collectively, the "Hancock Plaintiffs"), respectfully request clarification that the order entered by this Court April 15, 2002, consolidated the above-captioned putative class action lawsuit brought by the Hancock Plaintiffs (the "Hancock Class Action") with Newby v. Enron Corp., Civil Action No. H-01-3624, ***solely*** for purposes of discovery and

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trial, and did not operate to designate The Regents of the University of California (the "California Regents") as Lead Plaintiff, or the law firm of Milberg Weiss Bershad & Lerach LLP as Lead Counsel, of the class described in the Hancock Class Action. Alternatively, the Hancock Plaintiffs object to the consolidation order to the extent it does so operate to designate the California Regents as Lead Plaintiff and Milberg Weiss as Lead Counsel in the Hancock action.

## FACTS

### A. The Non-Publicly Traded Securities in the Hancock Class Action are Not Covered by *Newby*

The Hancock Plaintiffs commenced this class action lawsuit on behalf of a class which consists of purchasers of the ***non-publicly traded*** securities issued by Enron and Enron's special purpose vehicles.[1] The subject securities, by definition, ***do not*** include any of the securities which were included within the class definition in the Consolidated Complaint for Violation of the Securities Laws filed by the Milberg firm on behalf of the California Regents in Newby. That complaint was brought solely on behalf of purchasers of all Enron "***publicly traded*** equity and debt securities . . ." (¶¶ 1, 986 ). Thus, the non-publicly traded securities in the Hancock Action are expressly excluded. Indeed, the California Regents never sought to be appointed lead

[1] The Hancock plaintiffs' complaint defines the class as all persons who purchased "non-publicly traded securities (collectively, the "Class Securities") that were (a) issued by Enron or by Enron affiliates or by trusts or other issuers (collectively with Enron, "Enron Entities") and (b) that either were secured or guaranteed, in whole or in part, directly or indirectly, by Enron or by Enron's issuance of other Enron debt or preferred or equity securities, or which benefitted from any such guarantee, including, without limitation, Enron performance guarantees or Enron payment guarantees that were issued in connection with securities or that were structured to be repaid, in whole or in part (including without limitation payments of dividends, yield or interest with respect to such Class Securities) from a stream of income generated by notes or by other securities or other payment obligations of Enron. The Class Securities do not include any securities which are included within the class definition in the Consolidated Action captioned *Amalgamated Bank, et al. v. Kenneth L. Lay, et al.*, Civil Action No. H-01-4198, filed in the same court." Hancock Complaint ¶ 1.

plaintiff – nor did the Milberg firm seek to be lead counsel – of a class which would include non-publicly traded securities, nor could they have.

The claims being asserted in the Hancock Class Action are thus not being pursued or in any way represented by the California Regents in Newby. Indeed, although settlement negotiations in that action have been ongoing for months, the claims of the Hancock class are not being addressed in those discussions.

**B. Significant Defendants and/or Their Affiliates in *Newby* are Class Members in the Hancock Action, *i.e.*, There is a Conflict-of-Interest Preventing Milberg from Representing the Class in the Hancock Action**

The California Regents has named a number of major financial institutions as defendants in Newby which are themselves, or through their affiliates, known or believed to be substantial holders of the securities in the action brought by the Hancock Plaintiffs. For example, the California Regents has sued Citigroup, Inc., parent company of The Travelers, which was a purchaser of tens of millions of dollars of Marlin Trust certificates, which are securities within the Hancock Class definition.

In addition, the consolidated complaint in Newby advances allegations with respect to the Enron special purpose vehicles which demonstrate that the California Regents has interests antagonistic to the members of the class in the Hancock Class Action. In particular, the Newby complaint alleges that the Enron special purpose vehicles in which the Hancock Class members invested, in essence aided and abetted the Enron fraud. For example, the complaint calls the special purpose vehicles "illicit" (¶707) and "manipulative off-balance-sheet transactions . . ." (¶808) and describes them as part and parcel of the Enron fraud. Clearly, these allegations show that the Milberg firm cannot adequately represent the interests of the holders of interest in these

special purpose vehicles.

## ARGUMENT

Rule 42(a) provides:

> Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Fed. R. Civ. P. 42(a).

Consolidation of cases does not mean that the two cases are fully merged into one, nor does it make those who were parties to one suit parties in another. McKenzie v. United States, 678 F.2d 571, 574 (5th Cir.1982) ("consolidation does cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other."); Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir.1998) ("consolidation of cases under Fed.R.Civ.P. 42 does not strip the cases of their individual identities"); Alfred Dunhill of London v. Republic of China, 425 U.S. 682, 726 (1976) (consolidated actions "were not merged; they were simply consolidated for trial in the interest of economy."); see also Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933) (decision pre-dating Federal Rules of Civil Procedure holding that consolidated cases are not thereby merged into single action).

Thus, as the Fifth Circuit has held, "one or many or all of the phases of the several actions may be merged. But merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately. The

actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action." Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir.1984).

Here, the Hancock Plaintiffs respectfully request clarification that the order entered by the Court on April 15, 2002, consolidated the class action lawsuit brought by the Hancock Plaintiffs with Newby solely for purposes of discovery and trial, and did not operate to designate the California Regents as Lead Plaintiff, or the Milberg firm as Lead Counsel, of the Hancock Plaintiffs' class.

The Hancock Plaintiffs understand this to be the case because this is the only result provided for pursuant to Rule 42.

Indeed, as indicated above, the non-publicly traded securities in the Hancock Class Action are ***not covered*** by the Newby action. The consolidated complaint filed by the Milberg firm on behalf of the California Regents in Newby has been brought solely on behalf of purchasers of all Enron "***publicly traded*** equity and debt securities . . ." (¶¶ 1, 986). The non-publicly traded securities subject to the Hancock Class Action are expressly excluded.

Additionally, it would be impossible for the California Regents or the Milberg firm to represent the class in the Hancock Class Action. This is because, as indicated above, there is a conflict-of-interest preventing a single plaintiff or law firm from representing the class in Newby and the class in the Hancock action.

As the court held in Gibb v. Delta Drilling Co., 104 F.R.D. 59 (N.D.Tex. 1984):

> conflicting interests within the class are incompatible with maintenance of a class action. Conflicts of interest, especially antagonistic or divergent claims, preclude formulation of relief

> which will benefit all members of the class. A lack of congruence among the interests of the class representative and class members may render counsel for the class, despite their qualifications, unable to fully and fairly counsel the named plaintiffs and class members, to each of whom they owe a duty. A plaintiff whose interests conflict with those of certain class members limits his attorneys' ability to counsel the class and is, therefore, an inadequate representative. A court must decline to entertain a suit as a class action if it discerns that the interests of the proposed class representatives are in significant part antagonistic to those of the class they purport to represent.

Id. at 80; see also In re Cendant Corp. Litigation, 182 F.R.D. 144 (D.N.J. 1998) (appointing separate lead plaintiff for subclass because lead plaintiff in main action had substantial investment in underwriter which would be a necessary defendant in action by subclass).

Here, as indicated above, significant defendants and/or their affiliates in Newby, such as Citigroup/Travelers, are members of the class in the Hancock action. Additionally, the consolidated complaint in Newby advances significant allegations with respect to the Enron special purpose vehicles which demonstrate that the California Regents has interests antagonistic with the members of the Hancock class. Having clear conflicts of interest, the California Regents and the Milberg firm cannot represent the interests of the Hancock Plaintiffs or the class they seek to represent.

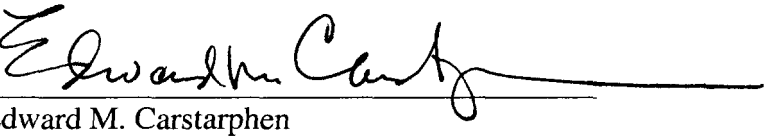
## CONCLUSION

The Hancock Plaintiffs respectfully request clarification that the order entered by this Court on April 15, 2002, consolidated the above-captioned putative class action lawsuit brought by the Hancock Plaintiffs with Newby, solely for purposes of discovery and trial, and did not operate to designate the California Regents as Lead Plaintiff, or the law firm of Milberg Weiss as Lead Counsel, of the putative Hancock class. Alternatively, to the extent that this court's April

15, 2002 order was intended to effect the appointment of the California Regent and Milberg Weiss as lead plaintiff and lead counsel, respectively, in the Hancock case, the Hancock Plaintiffs object to this appointment and, for the foregoing reasons, respectfully request that the Hancock Plaintiffs be appointed lead plaintiff for the class they represent (which consists of purchasers of the ***non-publicly traded*** securities issued by Enron and Enron's special purpose vehicles), and that the attorneys and law firms identified below be appointed lead class counsel to represent the Hancock class in this consolidated action.

Respectfully submitted,

ELLIS, CARSTARPHEN, DOUGHERTY
& GOLDENTHAL P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April 2002, a copy of the foregoing was sent by United States certified mail/return receipt requested to Plaintiffs' counsel.

Edward M. Carstarphen

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