

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas

JUN 12 2002

BC

Michael N. Milby, Clerk

MARK NEWBY,

Plaintiff

V.

ENRON CORP., ET AL.,

Defendants

§
§
§
§
§
§
§
§

Consolidated Lead No. H-01-3624

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.

KENNETH L. LAY, et al.

Defendants

§
§
§
§
§
§
§
§
§
§

Civil Action No. H-02-1364

**THE HANCOCK PLAINTIFFS' MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR APPOINTMENT OF LEAD PLAINTIFF
AND FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL**

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COMPANY, JOHN HANCOCK LIFE INSURANCE	§	
COMPANY, and JOHN HANCOCK VARIABLE	§	
LIFE INSURANCE COMPANY, Individually and on	§	
Behalf of All Others Similarly Situated,	§	
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	§	
KENNETH L. LAY, et al.	§	
	§	
Defendants	§	

**THE HANCOCK PLAINTIFFS' MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR APPOINTMENT OF LEAD PLAINTIFF
AND FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL**

On April 29, 2002, 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" or "Hancock") filed a motion requesting clarification that the consolidation order of April 15, 2002, consolidated the above-captioned class action, which has been brought on behalf of purchasers of non-publicly traded

debt securities of Enron or of Enron affiliates guaranteed directly or indirectly by Enron, with Newby v. Enron Corp., Civil Action No. H-01-3624, solely for purposes of discovery and trial, and did not operate to designate the lead plaintiff and lead counsel appointed in Newby as the lead plaintiff and lead counsel of the class described in this case. This motion was unopposed.

Hancock now respectfully submits this memorandum of law, together with the Affidavit of Mark M. Strauss, in support of its motion pursuant to the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), for an order (1) appointing Hancock as Lead Plaintiff of such class, as more particularly defined in the complaint¹; and (2) approving Hancock’s choice of the law firms of Kirby McInerney & Squire and Ellis, Carstarphen, Dougherty & Goldenthal P.C. as Lead and Liaison Counsel on behalf of such Class.

PRELIMINARY STATEMENT

The above-captioned action (the “Hancock Action”) is brought on behalf of purchasers of the Class Securities against numerous officers and directors of Enron Corp. (“Enron”) and against the Enron’s auditor Arthur Andersen, LLP, alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), and Rule 10b-5 promulgated thereunder for

¹As set forth in the complaint, the class includes all persons who, between October 19, 1998 and November 27, 2001, inclusive (the “Class Period”) 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.

wrongdoing that occurred between October 19, 1998 and November 27, 2001 (the “Class Period”).

Hancock has sustained approximately \$153 million in estimated pre-tax losses² related to its purchases of the Class Securities. Hancock has suffered the largest financial loss of any movant,³ and therefore has the largest financial interest in the outcome of this litigation. In addition, Hancock satisfies each of the requirements of the PSLRA and Rule 23 of the Federal Rules of Civil Procedure. Its motion thus should be granted.

PROCEDURAL BACKGROUND

The above-captioned action — and the only action to date to assert claims on behalf of purchasers of the Class Securities -- was commenced on or about April 15, 2002. Pursuant to 15 U.S.C. §78u-4(a)(3)(A)(i), a notice of commencement of this action was disseminated over *Business Wire* on April 15, 2002, advising members of the proposed class of their right to move the Court to serve as Lead Plaintiff no later than June 14, 2002. *See* Strauss Affidavit at Exhibit A. Movant herein is a member of the proposed class and is filing this motion within the 60 day period prescribed in the April 15, 2002 *Business Wire* notice.

As indicated above, on April 29, Hancock filed a motion requesting clarification that the consolidation order of April 15, 2002, consolidated the above-captioned class with Newby v. Enron Corp., Civil Action No. H-01-3624, solely for purposes of discovery and trial, and did not operate to designate the lead plaintiff and lead counsel appointed in Newby as the lead plaintiff and lead counsel of the class described in this case, or, alternatively, objecting to the consolidation order to the extent it did so operate. As Hancock established in its motion, the Class Securities in this case, by definition, do not include any of the securities which were included within the class definition in

²Estimated pre-tax damages as of March 31, 2002.

³No other party has sought to be appointed lead plaintiff of the proposed class.

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the Consolidated Complaint for Violation of the Securities Laws filed by the lead counsel that has been appointed in the Newby case, Milberg Weiss Bershad & Lerach LLP Milberg, on behalf of the lead counsel in such case, The Regents of the University of California (the “California Regents”). The Newby 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 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. Accordingly, the claims being asserted in this action are not being pursued or in any way represented by the California Regents in Newby.

Additionally, Hancock established in its motion that, because significant defendants and/or their affiliates in Newby are class members in this case, there is a conflict-of-interest preventing Milberg from also representing the class in this action. In particular, 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.

Hancock’s motion also established that because the consolidated complaint in Newby advances allegations with respect to the Enron special purpose vehicles, the California Regents has interests which are antagonistic to the members of the class in this case. Specifically, the Newby complaint alleges that certain Enron special purpose vehicles 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 certain special purpose vehicles which it is accusing of wrongdoing.

Hancock's motion was unopposed.

STATEMENT OF FACTS

Until its recent and spectacular demise, Enron was engaged in the businesses of natural gas, electricity and communications on a wholesale and retail level. Beginning in late 2001, it was revealed that Enron would be restating its results for 1997, 1998, 1999 and 2000, and the first two quarters of 2001, to correct for errors which had (i) inflated Enron's net income by \$591 million in those years and (ii) understated the debt which should have been reported on Enron's consolidated balance sheet. The impact of the restatement was enormous:

	1997	1998	1999	2000
<u>Recurring Net Income</u> Amount of Overstatement	\$96,000,000	\$113,000,000	\$250,000,000	\$134,000,000
<u>Debt</u> Amount of Understatement	\$711,000,000	\$561,000,000	\$685,000,000	\$628,000,000
<u>Shareholders' Equity</u> Amount of Overstatement	\$313,000,000	\$448,000,000	\$833,000,000	\$1,164,000,000

In order to overstate its net income and earnings per share during the Class Period, the defendants caused the Company to violate GAAP and SEC rules by failing to consolidate entities which, pursuant to GAAP, were required to be consolidated into Enron's financial statements and which entities were incurring hundreds of millions of dollars in losses and should have reduced Enron's earnings. Enron also improperly accounted for common stock issued to a related-party entity which should have been treated as a reduction to shareholders' equity but was accounted for as a note receivable. Enron has also admitted to not recording, from 1997 to 2000, material proposed audit

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adjustments and reclassifications to shareholders' equity which Enron chose not to make until the end of the Class Period. Enron also failed to record, on a timely basis, required write-downs for impairment in the value of Enron's content services business, and for the impairment in the value of Enron's interest in The New Power Company, and its broadband and technology investments. Enron has now admitted that these results were false and improperly reported and has restated its financial results.

As the market was made aware that Enron's profits were much lower than defendants had claimed during the Class Period, that Enron's debt and liabilities were much greater than had been revealed during the Class Period, that Enron's publicly-reported and seemingly-impressive financial results as much a product of accounting mechanisms as of viable and substantive business operations, and that, in fact, Enron's financial health was precarious and its very existence in doubt, the prices of Enron's securities suffered steep declines.

Consolidated class action suits on behalf of investors in certain of Enron's publicly-traded securities and on behalf of Enron employees who purchased Enron stock through 401(k) plans are now proceeding. No action -- except for this action -- has included claims on behalf of purchasers of the Class Securities issued by Enron.

The complaint alleges that, during the Class Period, defendants materially misrepresented - through (i) through public statements, (ii) audited financial statements, and (iii) disclosure documentation provided to purchasers of the Class Securities - Enron's ability to perform pursuant to guarantees and other forms of credit enhancement issued as part of the Class Securities. Defendants' material misrepresentations concerning Enron's true operational and financial condition had the effect of artificially inflating the value of the Class Securities purchased by class members during the Class Period. The complaint alleges that had defendants's statements been accurate and

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the truth concerning Enron been known, Hancock and other members of the Class would not have purchased or otherwise acquired the Class Securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid. The action seeks recovery of losses suffered by investors from purchases of the Class Securities during the Class Period when, it is alleged, these securities traded at prices artificially inflated by defendants' misrepresentations.

ARGUMENT

I. HANCOCK IS THE MOST ADEQUATE PLAINTIFF UNDER THE PROVISIONS OF THE PSLRA AND SHOULD BE APPOINTED LEAD PLAINTIFF

A. Hancock Has Satisfied The Procedural Requirements Of The PSLRA

The PSLRA sets forth a detailed procedure for the selection of a Lead Plaintiff to oversee securities class actions brought pursuant to the Federal Rules of Civil Procedure. 15 U.S.C. §78u-4(a)(3). First, the plaintiff who files the initial action must, within 20 days of filing the action, publish a notice to the class informing class members of their right to file a motion for appointment as Lead Plaintiff. §78u-4(a)(3)(A)(i). Hancock published the requisite notice on April 15, 2002. Strauss Affidavit, Exhibit A. This notice indicated that applications for appointment as Lead Plaintiff were to be made no later than June 14, 2002. Hancock has timely made the within application and, as discussed below, is the most adequate plaintiff under the provisions of the PSLRA.

B. Hancock Has The Largest Financial Interest In This Litigation

Section 21D(a)(3)(B)(i) of the Exchange Act directs the Court to appoint as Lead Plaintiff "the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members," and further directs the court to presume

that the most adequate plaintiff is “the person or group of persons” that, among other things, “has the largest financial interest in the relief sought by the class.” Movant Hancock believes has the largest financial interest of any putative Lead Plaintiff in the outcome of this litigation, based upon substantial damages incurred as a result of its purchases of artificially inflated Class Securities during the Class Period. Strauss Affidavit, Exhibit C.

The goal of Congress in enacting §21D(a)(3)(B)(i) was to "empower investors," to "have greater control over the class action cases by allowing the plaintiffs with the greatest claim to be named plaintiff and allowing that plaintiff to select their counsel." See "Private Securities Litigation Reform Act of 1995 -- Conference Report," 141 Cong. Rec. S17933-97, at S17956 (daily ed. Dec. 5, 1995).

Movant Hancock, a class member with a significant financial interest in the outcome of this litigation, has actively proceeded to protect the interests of the Class thus far in this litigation. Hancock sought counsel to advance class claims under the federal securities laws, and filed a complaint against defendants on behalf of the class (attached as Exhibit B to the Strauss Affidavit). Hancock has duly signed and submitted a certification attesting to its transactions in the Class Securities during the Class Period, and indicated its willingness to serve as a representative party on behalf of the Class. Strauss Affidavit, Exhibit B. Hancock has also selected and retained competent and experienced counsel to represent it and the Class. Strauss Affidavit, Exhibits D and E. Hancock has, accordingly, satisfied the individual requirements of the PSLRA and should be named Lead Plaintiff.

C. Hancock Satisfies The Requirements Of Rule 23 Of The Federal Rules Of Civil Procedure

Section 21D(a)(3)(B) of the Exchange Act further provides that a member or members of the putative class that are appointed Lead Plaintiff must also "otherwise satisfy the requirements of Rule

23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Of the four prerequisites to class certification, only two -- typicality and adequacy -- directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as Lead Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification. As set forth below, Hancock best satisfies the typicality and adequacy requirements of Rule 23(a) on behalf of the Class, thereby justifying its appointment as Lead Plaintiff to represent the Class.

1. Hancock's Claims Are Typical of the Claims of the Class

The typicality requirement of Rule 23(a)(3) is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993). The claims of the class representative, however, need not be identical to the claims of the class to satisfy typicality. Instead, courts have recognized that:

[W]hen the same unlawful conduct was directed at both the named plaintiff and the class he seeks to represent, the typicality requirement is usually met "irrespective of minor variations in the fact patterns underlying the individual claims."

Becher v. Long Island Lighting Co., 164 F.R.D. 144, 151 (E.D.N.Y. 1996) (finding typicality despite minor individual distinction in claims) (citation omitted). See also Walsh v. Northrop Grumman Corp., 162 F.R.D. 440, 445 (E.D.N.Y. 1995) (noting that typicality will be lacking only where a

((conflict exists that "goes to the very subject matter of the litigation"); Follette v. Vitanza, 658 F. Supp. 492, 506 (N.D.N.Y. 1987) ("Rule 23 does not require complete identity of legal claims among class members so long as at least one common question can be identified").

The claims asserted by Hancock are typical, if not identical, to the claims of the Class. Like other Class members, Hancock purchased Enron Class Securities during the Class Period at prices allegedly artificially inflated by defendants' materially false and misleading statements and/or omissions and suffered damages thereby. Hancock's claims arise from the same course of events. Its claims are, therefore, typical, non-competing and non-conflicting. Hancock should, therefore, be appointed Lead Plaintiff.

2. Hancock Will Fairly and Adequately Represent the Interests of the Class

Prior to enactment of §21D of the Exchange Act, the courts had adopted a two-pronged approach to evaluating the adequacy of the proposed class representative. First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, the class members must not have interests which are "antagonistic" to one another. See, e.g., Becher, 164 F.R.D. at 152 (citations omitted); Follet, 658 F. Supp. at 506. Section 21D of the Exchange Act altered this analysis in the Lead Plaintiff context, however, by directing the Court to limit its inquiry to the existence of any conflicts between the interests of the proposed representatives and the members of the Class, and then allow the Lead Plaintiff(s) to retain lead counsel to represent the Class, "subject to the approval of the court." *See* Section 21D(a)(3)(B)(v) of the Exchange Act.

Hancock's interests are clearly aligned with the Class. Hancock shares numerous common questions of law and fact with the Class and has already demonstrated itself to be an advocate on behalf of the Class. Specifically, Hancock has retained experienced counsel (Strauss Affidavit, Exhibits D & E), filed the only complaint on behalf of the class, and signed a certification stating

that its willingness to assume the responsibilities of a class representative. Strauss Affidavit, Exhibit B. Thus, the close alignment of interests between Hancock and the Class, combined with its strong desire to prosecute this action on behalf of the Class and its choice of highly competent counsel, militates in favor of granting the instant motion.

II. THIS COURT SHOULD APPROVE HANCOCK'S CHOICE OF LEAD COUNSEL

Recent amendments to the Exchange Act vest authority in the member or members of the putative class member selected as Lead Plaintiff to select and retain Lead Counsel, subject only to the approval of the Court. See §21D(a)(3)(B)(v). Thus, the Court should not disturb the Lead Plaintiffs' choice of counsel unless "necessary to protect the interest of the plaintiff class." See Statement of Managers -- The "Private Securities Litigation Reform Act of 1995," 141 Cong. Rec. H13691-08, at H13700 (daily ed. Nov. 28, 1995). In the present case, Hancock has retained the law firms of Kirby McInerney & Squire, LLP and Ellis, Carstarphen, Dougherty & Goldenthal P.C. as Lead and Liaison Counsel to pursue this litigation on its behalf and that of the Class if it is appointed Lead Plaintiff.

Both law firms possess extensive experience in the area of securities class action litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors, as detailed in the firm resumes annexed as Exhibits D & E to the accompanying Strauss Affidavit. Thus, the Court may be assured that granting the instant motion will mean that members of the Class will receive the highest caliber of legal representation available.

CONCLUSION

For all of the foregoing reasons, Hancock respectfully requests that this Court (1) appoint Hancock as Lead Plaintiff to oversee the interests of the Class as defined above; and (2) approve Hancock's choice of Counsel named herein.

Dated: June 12, 2002

**ELLIS, CARSTARPHEN, DOUGHERTY
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CERTIFICATE OF SERVICE

I hereby certify that according to Rule 5 of the Federal Rules of Civil Procedure and the Order Regarding Service of Papers and Notice of Hearings filed in this case, on the 12th day of June 2002, a copy of the foregoing has been posted to the ESL3624 website and sent by United States first class mail to all known counsel of record.


Edward M. Carstarphen