IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§	MDL 1446
MARK NEWBY, ET AL., Plaintiffs	§	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
VS.	§	
ENRON CORPORATION, ET AL., Defendants	§	
SILVERCREEK MANAGEMENT, INC., et al., Plaintiffs,	§	CIVIL ACTION NO. H-02-3185
VS.	§	
SALOMON SMITH BARNEY, INC, et al., Defendants.	§	
SILVERCREEK MANAGEMENT, INC., et al., Plaintiffs,	§	CIVIL ACTION NO. H-03-0815
VS.	§	
CITIGROUP, INC., et al., Defendants.	§	
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Plaintiff,	§	CIVIL ACTION NO. H-03-3481
VS.	§	
BANC OF AMERICA SECURITIES LLC, et al., Defendants.	§	

ORDER

Pending before the Court in the above referenced cases are three motions: (1) Plaintiffs Silvercreek Management, Inc., Silvercreek Limited Partnership, Silvercreek II Limited, OIP Limited, and Pebble Limited Partnership's (the "Silvercreek Plaintiffs'") Motion to Extend the Date to Opt Out of the Bank of America and Outside Director Class Action Settlements (#3424 in *Newby*),[1] with supporting documentary evidence; (2) Plaintiff California Public Retirement System's ("CalPERS'") Motion to Extend the Date to Opt Out of the Bank of America and Outside Director Class Action Settlements (#3428 in *Newby*); and (3) Bank of America's Opposed Motion for an Order that Bank of America May Participate in Discovery Without Prejudice to Its Position on the Motions of Silvercreek and CALPERS Regarding Their Tardy Requests for Exclusion from the Class Settlement with Bank of America, filed on May 13, 2005 (#3462). Because the parties have indicated that any opposition to the last motion is based on the legal issue in the first two, the Court addresses the motions to extend the opt-out deadline.

Silvercreek Plaintiffs explain that they are Canadian entities based in Toronto. They originally filed suit in the Southern District of New York, but that since transfer by the Judicial Panel on Multidistrict Litigation on June 24, 2002 and consolidation with *Newby* on September 6, 2002 of the first suit

[1] Duplicates are filed as #69 in H-02-3185 and #11 in H-03-815.

(now H-02-3185),[2] their counsel of record has appeared as counsel of record and has been actively litigating their independent suits' claims in this Court. They point out that on February 4, 2005, this Court entered an order preliminarily approving settlement with Bank of America, Ken Harrison, and the Outside Directors. Although counsel for Silvercreek Plaintiffs was served with this order through the esl website, the date for opting out of the settlement was left blank in that order, and he never received the notice by mail ("Notice of Pendency and Partial Settlement of Class Action"), which contained the opt out deadline of March 28, 2002 sent by claims administrator Gilardi & Co. Declaration of Louise Morwick, Pres. of Silvercreek Management Inc. (#3425)(declaring under penalty of perjury that she had not received any mailed notice regarding the proposed settlements nor seen the publication notice in the *Houston Chronicle* or *Investors Business Daily*); Declaration of D. Lee Janvrin, employee of claims administrator Gilardi & Co. (#3426)(stating that he was not instructed to mail a notice to counsel for Silvercreek Plaintiffs). Although he concedes that it is not typical to send notice to counsel of record, because this is a complex multidistrict litigation in which he has appeared and actively litigated for years and all parties knew that Silvercreek Plaintiffs were represented by counsel, he should have been given notice, especially in light of the specific language of the notice

[2] What is now designated H-02-0815 was filed in the Southern District of New York on November 7, 2002, transferred to this Court and consolidated with *Newby* on March 17, 2003.

that stated that class members could appear through their own counsel as long as notice was provided to the parties. Arguing that it has shown good faith in litigating the independent actions since their transfer here and a reasonable basis for not opting out timely, counsel maintains that had Silvercreek Plaintiffs' counsel received such notice, he would have opted out. Counsel argues that since he did not receive the notice and a reasonable opportunity to opt out, there is good cause for the Court to grant his request to enlarge the exclusion period for opting out. *See, e.g., In re Enron Corp. Sec. Litig.*, Nos. H-01-3624 and H-01-3913, 2003 WL 22962792, *7 (S.D. Tex. Nov. 15, 2003)("Clearly the late notice was not within class members' control, and the Court finds excusable neglect in their failure to timely object and/or exclude themselves from the litigation.")(and cases cited therein)[3]; *In re Del-Van Financial Corp. Sec. Litig.*, 154 F.R.D. 95, 96 (S.D.N.Y. 1994)("It is within our discretion to grant an enlargement of time after expiration of the specified opt-out period if we find 'excusable neglect.'"); Fed. Rules of Civil Procedure 6(b)(2) and 60(b)(1).

CalPERS' motion, filed by its counsel of record Cotchett, Pitre, Simon & McCarthy, supported by copies of the

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[3] The opposition point out that the Court found excusable neglect by some class members who received notice too late to opt out because the brokerage houses were late in sending in their client lists and "there is no indication . . . that these class members had actual notice through counsel of the settlement. In fact, there is no indication that they were represented by counsel, much less by counsel who had actual notice of the settlement, the Preliminary Approval Order, the date of the final approval hearing . . . ." #3432 at 19.

order and notice, a declaration from counsel Steven N. Wilson, (#3429) and a declaration from D. Lee Janvrin, presents essentially the same argument, although CalPERS is based in this country, in California. While counsel for Silvercreek Plaintiffs states that the claims administrator "may have mailed notice to some of the Silvercreek Plaintiffs," CalPERS concedes that notices were mailed to its custodians, but not directly to it.

Lead Plaintiff initially did not object to the Silvercreek Plaintiffs' motion, but Bank of America Corporation and Banc of America Securities LLC (collectively "Bank of America") and the Outside Directors did, with a supporting declaration from Gregory G. Ballard (#3423). Lead Plaintiff subsequently joined in their opposition (#3471) with respect to the propriety under Rule 23 and due process of the class notice procedures employed in the settlements. Bank of America and Outside Directors argue that the Movants have not met their burden of demonstrating "excusable neglect." Movants had knowledge of the settlements through their experienced counsel, the esl website, and the briefing schedules on motions for preliminary and final approval of the settlements. From the Preliminary Approval Order served on them via the esl website, they knew about the form and content of the proposed Notice of Pendency and Partial Settlement of Class Action (the "mailed" notice), when the Claims Administrator would mail those notices, i.e., by February 14, 2005, and publication of the Summary Notice twice in the *Houston Chronicle* and the *Investor's Business Daily* by February 28, 2005.

The Preliminary Approval Order also made clear that any class members "who wish to exclude themselves from the Settlement Class must do so in accordance with the instructions contained in the Mailed Notice," and expressly admonished that those within the class definition "who do not timely and validly request to be excluded shall be subject to and bound by the provisions of the Stipulation, the releases contained therein, and the Judgment with respect to all Released Claims." Despite admittedly having received the Preliminary Approval Order by the esl website around February 4, 2005 and asserting they did not receive the subsequent mailed notice,[4] counsel did not check, did not ask anyone about the deadline, did not seek out the publication, and did nothing from mid-January 2005, when they were served with the settlement

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[4] The Outside Directors insist that notice was mailed to both Movants and provide a letter from Gilardi & Co. to support that point. Ex. A to #3469. They correctly note that under established law if the notice was mailed, it is sufficient to bind a class member; whether it is received is not the test. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950)(mailed notice is adequate to bind a class member because the "reasonable risks that notice might not actually reach every beneficiary are justifiable."); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486-87 (D.C. Cir. 1992)(class member who did not receive notice because it omitted his apartment number and zip code was still bound; "the proper inquiry is not whether Peters received the notices but instead whether the method of providing the notices was reasonably calculated under all the circumstances, to inform him of the pendency of the class action and his right to be excluded from it.") Outside Directors highlight the fact that this Court found in the Preliminary Approval Order that mailed notice "constitutes the best notice practicable under the circumstances, including individual notice to all Settlement Class Members who can be identified through reasonable effort, and constitutes valid, due and sufficient notice to all persons entitled thereto, complying fully with the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process."

papers, until sending out their untimely opt out requests on April 25, 2005, nearly a month after the March 28, 2005 opt-out deadline and two weeks after the final approval deadline. Movants' counsel did not attend the preliminary approval hearing or the final approval hearing, but clearly knew that the opt-out deadline had to be before the final approval hearing on April 11, 2005. The Outside Directors and Bank of America maintain that courts routinely reject claims of excusable neglect in such circumstances. *See, e.g., Langford v. Devitt*, 127 F.R.D. 41, 44-45 (S.D.N.Y. 1989)(denying request for late exclusion from class because attorney knew a class had been certified and, as counsel, understood "the significance and potential effects of the class action, the means available to review details of the class action, and legal options regarding participation in the class action. He was also in a position to understand the significance of not having received formal notice and how to correct that problem."); *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1185-86 (2d Cir. 1974)(where notices were mailed to class members but not their attorneys, Second Circuit affirmed denial of request to allow late opt-out requests because the order certifying the class for settlement purposes "did not direct any additional notice to counsel for plaintiffs who had filed individual suits" and because counsel had received correspondence from one of the defendant's attorney that put him on notice of impending settlement and a duty of diligence to monitor developments); *In re National Student Mktg. Litig.*, 530 F.2d 1012, 1015-16 (D.C. Cor. 1976)("having been

informed during argument . . .that a motion for class action determination was then pending in federal district court, . . . counsel was under a duty of diligence to keep abreast of events which so clearly affected the interests of his clients"); *In re Diet Drugs Prods. Liability Litig.*, 2002 U.S. Dist. LEXIS 12139, at *21-22 (E.D. Pa. Jan. 16, 2002)("The pendency of an individual action does not excuse class members from filing valid requests for exclusion. It therefore was not reasonable for plaintiffs' counsel to rely on the pending lawsuit as sufficient to opt out and make no inquiries whatsoever regarding whether anything further had to be done."); *Prince George Center, Inc. v. U.S. Gypsum Co.*, 704 A.2d 141, 146 (Pa. Super. Ct. 1997)(no excusable neglect where class member who had an independent action failed to monitor class action, to obtain a copy of notice of settlement, or to timely opt out); *In re Prudential Ins. Co.*, 177 F.R.D. 216, 240, 231, 234 (D.N.J. 1997)("Lack of notice to counsel . . . cannot constitute a basis for finding excusable neglect" because neither Fed. Rule of Civ. P. 23 nor due process requires actual notice of opt out deadline to plaintiffs in independent actions, but only use of a means likely to apprize interested parties).

Furthermore, allowing late opt-outs would prejudice the settling parties by exposing the Outside Directors to $140 million of Section 11 claims without a right to terminate the settlement. If they had been timely, the opt outs would have provided the Outside Directors with the right to terminate the settlement because the carefully negotiated threshold of exposure which

depended upon the exhaustion of the insurance policies would have been upset. Sealed Ex. E to #3469. Thus the combined loss of the termination right and the increased exposure without insurance are the type of prejudice that warrants denying extension of the opt-out period. *In re Diet Drugs*, 2002 U.S. Dist. LEXIS 12139. Outside Directors have also spent substantial sums litigating settlement issues, many in connection with or subsequent to the Final Approval Hearing.

After reviewing the briefing (including reply and surreply, which the Court has not summarized because it finds the arguments therein either irrelevant or unpersuasive) and the case law on this issue, the Court agrees with Bank America and the Outside Directors that Movants have not shown excusable neglect. Moreover, even if the Court had found excusable neglect, it still has the discretion to grant or deny an extension. *In re Prudential Ins. Co.*, 177 F.R.D. at 237 ("Even upon a finding of excusable neglect, however, it is still in the district court's discretion whether to grant the extension.")(citing Fed. R. Civ. P. 6(b)(2). Since the beginning of this mammoth MDL 1446 this Court has emphasized the significance of a controlled time schedule for discovery and litigation stages. Indeed the pending motins have been expedited because depositions involving these parties are set to begin this coming Monday, May 23, 2005 and preparations for the remaining cycles would be impaired by permitting late opt outs. The Court finds no persuasive reason

for allowing experienced counsel to be excused from what should have been to them a significant and easily obtainable deadline.

Accordingly, the Court

ORDERS that the motions to extend the opt-out period are DENIED. Bank of America's motion to participate in discovery is MOOT.

SIGNED at Houston, Texas, this 19th day of May, 2005.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE