United States Courts
Southern District of Texas
ENTERED
JAN 27 2003
Michael N. Milby, Clerk of Court

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 VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

ORDER

Pending before the Court in *Newby* are Motions for Section 1292(b) Certification for Immediate Appeal of this Court's December 20, 2002 memorandum and order (#1194) filed by Defendants the Secondary Actor Bank Defendants (#1220), Merrill Lynch & Co. (#1212, supplemented by #1229), and Vinson & Elkins (#1227). Merrill Lynch's motion alternatively requests reconsideration of that memorandum and order by the Court. Also before the Court is a letter dated January 14, 2003 from counsel for the Regents of the University of California requesting a prompt status and scheduling conference.

#1238

To provide the parties with some direction, the Court addresses the letter first. The Court has been working intently on the motions to dismiss in *Newby* and expects to have rulings on all of them shortly. Until then, the request for a status and scheduling conference appears both premature and impractical for the following reasons.

It makes no sense to establish a schedule, including for amendment of pleadings, without knowing all that needs to be done. The Court has already indicated in its recent memorandum and order that Lead Plaintiff will need to amend or supplement its complaint if it seeks to state a claim against Merrill Lynch & Co., and the Court continues to find additional claims against individual defendants that require more specific factual support to survive. Furthermore, in conjunction with the individuals' motions to dismiss, the Court will resolve the Joint Motion of Certain Defendants to Strike the Pulsifer Class Action Complaint (#1042) and the related issue of whether Lead Plaintiff should include those claims in an amended or supplemented pleading. Lead Plaintiff also asks whether it should add the subsidiaries of the bank Defendants to an amended or supplemental complaint. The Court indicated in its memorandum and order that if the banks object to being named defendants because a subsidiary or other entity was the real party in interest, they should file appropriate motions. The bank Defendants should do so now, and Lead Plaintiff should file its responses as quickly as possible, so that all amendment or supplementation can be efficiently and

timely accomplished in one instrument. In addition, Lead Plaintiff states that it seeks to add Enron Corporation as a defendant here if the bankruptcy court lifts the automatic stay; perhaps Judge Gonzales will have made a ruling on the question within the next couple of weeks.

The Court reassures the parties, however, that it will permit discovery to go forward in *Newby* and *Tittle* as soon as the *Newby* motions to dismiss have been resolved, without having to await a ruling on those pending in *Tittle*.

Merrill Lynch asks the Court to reconsider its denial of Merrill Lynch's motion to dismiss. This Court emphasizes that it granted Lead Plaintiff leave to amend its complaint expressly "in the interests of justice" and conditionally denied Merrill Lynch's motion to dismiss *provided* that Lead Plaintiff did amend. Fed. R. Civ. P. 15(a) (". . . [L]eave shall be freely given when justice so requires."). If Lead Plaintiff does amend to assert claims against Merrill Lynch, Merrill Lynch will then have an opportunity to challenge the adequacy of that new pleading through another motion to dismiss, if it so chooses. Thus the Court finds no prejudice to Merrill Lynch and denies the motion to reconsider. Moreover, for the same reasons, it finds Merrill Lynch's motion for Section 1292(b) certification to be premature.

The other Secondary Actors request certification by this Court for appeal of the denials of their motions to dismiss. A denial of a motion to dismiss is not a final order entitled to appeal as of right. *Louisiana Ice Cream Distributors, Inc. v.*

Carvel Corp., 821 F.2d 1031 (5th Cir. 1987). Title 28 U.S.C. § 1292(b) provides,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal shall not stay proceedings in the district court unless the district judge of the Court of Appeals or a judge thereof shall so order.

This provision gives district courts "first line discretion" to certify for immediate appeal interlocutory orders deemed "pivotal and debatable" that do not fall within the three categories of immediately appealable interlocutory orders listed in 28 U.S.C. § 1292(a), creating a narrow exception to the general rule limiting review to "final decisions" under 28 U.S.C. § 1291. *Swint v. Chambers County Commission*, 514 U.S. 35, 45-46 (1995). To warrant certification for appeal, Movants must show the denials of their motions to dismiss satisfy three conditions: (1) The issue must involve a controlling issue of law; (2) there must be a substantial ground for difference of opinion regarding that issue of law; and (3) the immediate appeal must appear to materially advance the ultimate termination of the litigation. *Whaley v. U.S.*, 76 B.R. 95, 96 (Bankr. N.D. Miss. 1987).

This Court emphasizes that its interlocutory denials of motions to dismiss in *Newby* are not based on substantive law nor on the merits of the claims, but on pleading standards. This Court further notes that the issue is not one of immunity from suit. As the Supreme Court made very clear in *Central Bank*,

> The absence of §10(b) aiding and abetting liability does not mean that secondary actors in securities markets are always free from liability under the securities Act. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met. . . . . In any complex securities fraud, moreover, there are likely to be multiple violators . . . .

Id. at 191. There are issues here not only of law, but of fact.

The second condition has clearly been met here. The Court and the parties acknowledge that there is a wide division of opinion among federal appellate and district courts regarding pleading a *prima facie* case of liability under § 10(b), the PSLRA, and *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and obviously there is substantial ground for these differences.

The third prong, however, has not been satisfied. Not only does this Court find that appeals to the Fifth Circuit will not materially advance the ultimate termination of this multi-district litigation, but they would seriously obstruct the progress of a very large, complex, and most likely lengthy action

over which this Court has endeavored to impose orderly proceedings and which it seeks to move efficiently toward resolution or trial.[1] Even if Defendants request and receive expedited consideration, in light of the magnitude of this consolidated action and the unsettled state of the law this Court's experience leads it to believe that any appellate review of the law and the facts will not be rapid. Moreover, because this is a multidistrict litigation, many of the consolidated member suits arose in other Circuit Courts of Appeals, which have different standards for pleading securities violations and to which the individual suits will be returned for trial, if they are to be so resolved. Thus the Fifth Circuit's determination of the questions may not be controlling. Indeed division among the courts is so substantial that either a ruling by the Supreme Court or action by Congress appears necessary to resolve the differences.

---

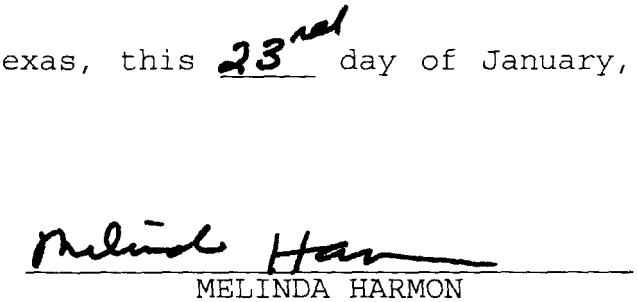
[1] The Court observes that even with respect to the narrow, collateral-order exception to the final judgment order doctrine embodied in § 1291 (i.e., the exception for interlocutory orders that "finally determine claims of right separable from and collateral to rights asserted in the action [and that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated"), the avoidance of suit merely because of cost to the litigants is not appropriate. Although "[i]t is always true . . . that 'there is a value . . . in triumphing before trial rather than after it,'" the Supreme Court has "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 497-99 (1989)(*citing United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985)).

Thus the Court, in its discretion, finds that appeals of the motions to dismiss are not warranted and

ORDERS that the motions for Section 1292(b) certification for immediate appeal are DENIED. It further

ORDERS that Merrill Lynch's motion to reconsider is DENIED.

SIGNED at Houston, Texas, this 23rd day of January, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE