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Michael N. Milby, Clerk of Court

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

In re ENRON CORPORATION SECURITIES §
LITIGATION §

This Document Relates To: §

Civil Action No. H-01-3624
And Consolidated Cases

MARK NEWBY, et al., Individually and On §
Behalf of All Others Similarly Situated, §

Plaintiffs, §

vs. §

ENRON CORP., et al. §

Defendants. §

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS
CREDIT SUISSE FIRST BOSTON LLC'S, CREDIT SUISSE FIRST
BOSTON (USA) INC.'S, AND PERSHING LLC'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT**

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Defendants Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corp.) (“CSFB LLC”), Credit Suisse First Boston (USA), Inc. (“CSFB (USA) Inc.”) and Pershing LLC (formerly known as Donaldson, Lufkin & Jenrette Securities Corp.) (“DLJ”) respectfully submit this memorandum of law in support of their motion to dismiss Plaintiffs’ First Amended Consolidated Complaint (“Amended Complaint”). CSFB LLC and DLJ are named as defendants in claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“the ‘34 Act”) (the First Claim for Relief) and Section 12(a)(2) of the Securities Act of 1933 (“the ‘33 Act”) (the Fourth Claim for Relief); CSFB (USA) Inc. is named as a defendant in claims under Sections 10(b) and 20(a) of the ‘34 Act (the First Claim for Relief) and Section 15 of the ‘33 Act (the Fourth Claim for Relief).

Preliminary Statement

In an effort to add even more deep pockets to satisfy the billions of dollars they claim to have lost over the collapse of Enron Corporation (“Enron”), and to edge out other plaintiffs’ counsel, Plaintiffs in the Amended Complaint have now added new defendants and new claims known, but not asserted, at the time of the original consolidated complaint.¹ Those new defendants include CSFB (USA) Inc., the parent-holding company of CSFB LLC, which did not itself engage in any investment banking business with Enron or anyone else, and DLJ, which was a separate and independent investment bank competing for business with CSFB LLC until those entities became affiliates as a result of a corporate merger in November 2000.

Plaintiffs apparently have sued CSFB (USA) Inc. and DLJ on a guilt-by-association theory of Section 10(b). In a pleading tactic that has been uniformly rejected as

¹ Plaintiffs are not done: in a recent meet and confer, Plaintiffs’ counsel stated that they intend to amend the complaint yet again to add still more financial institutions and law firms as defendants. See also Lead Pl.’s Resp. to Order Entered May 2, 2003, dated May 6, 2003 (“Lead Plaintiff reserves the right to add new defendants prior to the deadline for adding parties to the litigation.”).

insufficient, the Amended Complaint simply lumps those new defendants together with CSFB LLC and fails to offer any particularized allegations about the conduct or scienter of CSFB (USA) Inc. or DLJ. In addition, the Amended Complaint adds belated and futile '33 Act claims against CSFB LLC, CSFB (USA) Inc. and DLJ for private offerings of Osprey Trust ("Osprey") and Marlin Water Trust ("Marlin") notes.

Plaintiffs' claims should be dismissed as to CSFB LLC, CSFB (USA) Inc. and DLJ for several independent reasons. First, all claims against CSFB (USA) Inc. and DLJ and the new '33 Act claim against CSFB LLC in the Amended Complaint should be dismissed as untimely. Under the federal securities laws applicable to this litigation, each of Plaintiffs' claims had to be brought within one year after Plaintiffs discovered or should have discovered the alleged fraud. Plaintiffs admit that they discovered the truth about Enron's allegedly fraudulent scheme in October 2001. That same month, Plaintiffs began filing lawsuits alleging securities fraud against Enron, Andersen and their officers, and by April 8, 2002, Plaintiffs sued CSFB LLC in a complaint that acknowledged the existence of additional parties and offerings. Notwithstanding that discovery, Plaintiffs chose not to assert any '33 Act claims against CSFB LLC and not to assert any claims at all against CSFB (USA) Inc. and DLJ until May 14, 2003-- more than one year later. As such, all of those claims are time-barred.

Second, on the merits, the new claims are deficient. The Section 10(b) claims against CSFB (USA) Inc. and DLJ fail to assert any particularized allegations against those defendants. Instead, Plaintiffs attempt to extend the allegations against CSFB LLC against these new defendants simply by grouping them all together under the monolithic label "CS First

Boston”.² That is insufficient under the PSLRA and Rule 9(b). In fact, a proper analysis of the allegations against each defendant individually reveals that the allegations against CSFB (USA) Inc. and DLJ are virtually nonexistent.

Third, the new Section 12(a)(2) claims are also deficient. As an initial matter, Plaintiffs do not have standing to bring such claims with respect to the Osprey and Marlin offerings because none of the Plaintiffs is alleged to have purchased any Osprey or Marlin securities. Even if they had standing, Plaintiffs cannot state a claim because none of the Osprey or Marlin offerings was a public offering made pursuant to a prospectus as required by Section 12(a)(2). As a result, the Section 12(a)(2) claims must be dismissed.

Fourth, Plaintiffs’ claims for control person liability under Section 20(a) of the ‘34 Act and Section 15 of the ‘33 Act are legally baseless. In addition to being time-barred along with the predicate claims, the Section 20(a) and Section 15 claims must fail because there are no specific allegations of actual control by any of CSFB LLC, DLJ or CSFB (USA) Inc. over a primary violator. Plaintiffs offer no control allegations with respect to CSFB LLC or DLJ, and only a single and conclusory sentence with respect to CSFB (USA) Inc. Such allegations are insufficient as a matter of law to hold any of those entities liable as a control person.

Statement of Facts and Procedural History

Plaintiffs filed their consolidated class action complaint on April 8, 2002, alleging that CSFB LLC violated Sections 10(b) and 20(a) in connection with the sale of Enron securities. See Newby v. Enron Corp., H-01-3624, Consolidated Compl. for Violation of the Sec. Laws

² CSFB LLC continues to believe that the allegations against it in the Original Complaint, now repeated in the Amended Complaint, fail to state a claim against CSFB LLC under Rules 9(b) and 12(b)(6) for the reasons stated in CSFB LLC’s briefs on its original motion to dismiss. (Docket Entries 659 & 925.) In light of the Court’s denial of that motion, CSFB LLC will not repeat those arguments here, but notes its continuing adherence to those arguments for appellate purposes. See also infra note 4.

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(S.D. Tex. filed Apr. 8, 2002) (“Original Complaint” or “Compl.”). Despite the fact that the existence and alleged involvement of CSFB (USA) Inc. and DLJ was a matter of public record-- and known by Plaintiffs (see Compl. ¶¶ 102, 707)--Plaintiffs chose not to assert claims against those two entities at that time. Similarly, despite Plaintiffs’ knowledge and identification of numerous offerings of Enron-related securities in their Original Complaint (id. ¶¶ 20, 48-49, 699), Plaintiffs limited that Complaint to a class of purchasers of Enron securities. Plaintiffs deliberately chose not to assert any claims against CSFB (USA) Inc. or DLJ and not to base any claims on offerings by Osprey or Marlin.

On May 14, 2003, after all of the motions to dismiss the Original Complaint had been decided, Plaintiffs filed the Amended Complaint. For the first time, the Amended Complaint added: (i) Section 10(b) and 20(a) claims against CSFB (USA) Inc. and DLJ; (ii) Section 12(a)(2) claims against DLJ and CSFB LLC; and (iii) a Section 15 claim against CSFB (USA) Inc. Also for the first time, Plaintiffs base claims on alleged misstatements in offering documents for September 1999 and September 2000 issuances of Osprey notes and a July 2001 issuance of Marlin notes. Each of those new offerings was a private placement under Rule 144A and Regulation S. (See Sept. 16, 1999 Offering Mem. for Osprey Trust Notes (attached hereto as Exhibit A); Sept. 28, 2000 Offering Mem. for Osprey Trust Notes (attached hereto as Exhibit B); July 12, 2001 Offering Mem. for Marlin Water Trust Notes (attached hereto as Exhibit C).)³ Specifically, the only new allegations in the Amended Complaint pertaining to CSFB LLC, CSFB (USA) Inc. or DLJ are: (i) ¶¶ 102(a)-(c), in which Plaintiffs, for the first time, identify CSFB (USA) Inc. and DLJ as defendants; (ii) ¶¶ 641.1-641.6, 641.21-641.24, and 641.37-641.42 in which Plaintiffs identify alleged misstatements in the Osprey and Marlin

³ In resolving a motion to dismiss, the Court may consider documents referenced in the Complaint. See Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017 (5th Cir. 1996).

offering memoranda and identify CSFB Corp. and DLJ as underwriters for those offerings;

(iii) 995.1, in which Plaintiffs conclusorily allege that CSFB (USA) Inc. “controlled [its] respective subsidiaries and affiliates” for purposes of Section 20(a) of the ‘34 Act; and

(iv) ¶¶ 1016.1-1016.9, in which Plaintiffs add claims under the ‘33 Act for the Osprey and Marlin offerings.

The Amended Complaint does not add, however, any particularized allegations about the statements or conduct of CSFB (USA) Inc. or DLJ that would be necessary to sustain claims against them. There are no allegations that either CSFB (USA) Inc. or DLJ itself made any false statements; there are no allegations that either CSFB (USA) Inc. or DLJ was responsible for any statements made by Enron; and there are no allegations that either CSFB (USA) Inc. or DLJ committed any act (much less a manipulative or deceptive act) in furtherance of an Enron scheme to defraud. Nor are there any--much less heightened--allegations of scienter with respect to either of those defendants. Instead, Plaintiffs have done nothing more than to attribute the existing (and, we submit, insufficient) allegations against CSFB LLC to two of its corporate affiliates through improper group pleading. (Am. Compl. ¶ 102(a) (defining all three entities as “collectively, ‘CS First Boston’”).) Indeed, in nearly 650 pages, the Amended Complaint says only that DLJ served as one of several underwriters of the private Osprey offerings (Am. Compl. ¶¶ 641.2, 641.42, 1016.4) and that CSFB (USA) Inc. controlled its subsidiaries and affiliates (id. ¶¶ 102, 995.1, 1016.2).

On June 6, 2003, the Court granted leave for the Amended Complaint to be filed and CSFB LLC, CSFB (USA) Inc. and DLJ now move to dismiss.

Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss must be granted where the plaintiff is entitled to no relief on the facts alleged. See In re Sec. Litig. BMC

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Software, Inc., 183 F. Supp. 2d 860, 865 n.13 (S.D. Tex. 2001) (Harmon, J.) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Although the Court must accept all well-pleaded factual allegations as true in resolving the motion, “conclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss.” In re Enron Corp. Sec. Derivative & ERISA Litig., 235 F. Supp. 2d 549, 564 n.3 (S.D. Tex. 2002) (“In re Enron”). With respect to claims under Section 10(b), Plaintiffs “must also satisfy the pleading requirements of Rule 9(b) (fraud must be pled with particularity) and for scienter under the PSLRA and Rule 10b-5.” Id. Moreover, a statute of limitations defense is properly raised and resolved on a motion to dismiss when it is clear from the face of the complaint that the time limit for bringing the claim has passed. See Songbyrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 776 n.3 (5th Cir. 1997) (citing Kansa Reins. Co. v. Congressional Mortgage Corp., 20 F.3d 1362, 1366 (5th Cir.1994)); Cross v. Lucius, 713 F.2d 153, 156 (5th Cir. 1983).

Argument

I. PLAINTIFFS’ NEW CLAIMS ARE TIME-BARRED.

All of Plaintiffs’ new claims against CSFB LLC, CSFB (USA) Inc. and DLJ are barred by the applicable one-year statute of limitations. Plaintiffs assert that the facts about Enron emerged on October 16, 2001, when “Enron shocked the markets with revelations of \$1.0 billion in charges and a reduction of shareholders’ equity by \$1.2 billion.” (Am. Compl. ¶ 61.) Recognizing that “the end of Enron” was near, Plaintiffs began to file lawsuits against Enron and its officers that very month and, after Enron filed for bankruptcy and Andersen became insolvent, against CSFB LLC and others on April 8, 2002. Notwithstanding the discovery of their claims, Plaintiffs chose not to assert ‘33 Act claims against CSFB LLC and not to assert any claims against CSFB (USA) Inc. or DLJ until more than one year later, when they filed their

Amended Complaint on May 14, 2003. For the reasons outlined below, those new claims do not relate back to any earlier pleading and, as such, fall outside the one-year statute of limitations.

A. The Statute Of Limitations For All Of Plaintiffs' Claims Is One Year From The Time Investors Had Actual Or Inquiry Notice Of An Alleged Fraud.

Claims in this litigation brought under Section 10(b) of the '34 Act and Section 12(a)(2) of the '33 Act must be commenced within one year of discovery of the general facts constituting the alleged violation, and in no event later than three years from the date of the alleged violation. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991) (Section 10(b) claims); 15 U.S.C. § 77m (Section 12(a)(2) claims). Claims in this litigation for control person liability under Section 20(a) of the '34 Act and Section 15 of the '33 Act are governed by the same statute of limitations as the predicate claims. See, e.g., Eureka Homestead Soc'y v. Zirinsky, Civ. A. No. 94-2265, 1995 WL 542482, at *2 n.2 (E.D. La. 1995).

This one-year/three-year limitations period is not affected by the Public Company and Accounting Reform and Investor Protection Act of 2002 (the "Sarbanes-Oxley Act"), Pub. L. No. 107-204 § 804, 116 Stat. 745 (2002) ("Sec. 804"), which extended the limitations period in certain circumstances to the earlier of two years from discovery of the facts constituting the alleged violation or five years after the alleged violation. First, on its face, the Sarbanes-Oxley Act extended the statute of limitations only for "proceedings . . . commenced on or after the date of enactment of this Act [July 30, 2002]". (Sec. 804(b).) Thus, as this Court has already observed, Sarbanes-Oxley "does not apply" to these proceedings, which commenced on October 22, 2001, when the first lawsuit was filed. In re Enron Corp. Sec., Derivative & ERISA Litig., Civil Action No. H-01-3624, 2003 WL 1089307, at *12 n.20 (S.D. Tex. Mar. 12, 2003) ("This amended limitations period does not apply to Newby."). Second, the Sarbanes-Oxley Act cannot apply to Plaintiffs' '33 Act claims, which "assert negligence" (Am. Compl. ¶ 1016.3), because

the Sarbanes-Oxley Act applies only to causes of action “that involve[] a claim of fraud, deceit, manipulation, or contrivance” (Sec. 804).

Accordingly, Plaintiffs’ new claims--all claims against CSFB (USA) Inc. and DLJ, and the new Section 12(a)(2) claim against CSFB LLC--are time-barred if Plaintiffs discovered or should have discovered the alleged fraud prior to May 14, 2002, or if the alleged violation occurred prior to May 14, 2000. For the reasons outlined below, Plaintiffs discovered the alleged fraud prior to May 14, 2002 (see infra Part I.B) and are not entitled to rely on the relation back doctrine to assert an earlier filing date as to the new claims (see infra Part I.C).

B. Plaintiffs Discovered or Should Have Discovered Their New Claims Prior to May 14, 2002.

The one-year statute of limitations begins to run as soon as “the plaintiff discovers, or in the exercise of reasonable diligence should discover, the alleged fraudulent conduct.” Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir. 1988). The knowledge a plaintiff must have to trigger the limitations period is merely that of “the facts forming the basis of his cause of action, . . . not that of the existence of the cause of action itself.” Id. at 606 (citations and internal quotations omitted). Moreover, although actual notice triggers the statute of limitations, inquiry notice in the form of “storm warnings” that would alert a reasonable person to the “possibility” of a fraud will also suffice. Id. at 607. The filing of lawsuits and a precipitous decline in stock price, for example, are sufficient to put investors on inquiry notice “that something was wrong”. Gaudin v. KDI Corp., 576 F.2d 708, 713 (6th Cir. 1978); see also Anderson v. Clow, Civ. No. 92-1120-R, 1994 WL 525256, at *14 (S.D. Cal. June 29, 1994) (“Here one fact shows irrefutably that Plaintiffs discovered fraud--they filed lawsuits making fraud allegations.”), aff’d sub nom, In re Stac Elecs. Sec. Litig., 89 F.3d 1399 (9th Cir. 1996).

Here, Plaintiffs admit that they had actual and inquiry notice of their claims more than one year prior to the May 14, 2003 filing date of the Amended Complaint. For example:

- Plaintiffs allege that “The End of Enron” began on “10/16/01”, when “Enron shocked the markets with revelations of \$1.0 billion in charges and a reduction of shareholders’ equity by \$1.2 billion.” (Am. Compl. ¶ 61);
- Plaintiffs allege that “[w]ithin days” after October 16, 2001, The Wall Street Journal “began an exposé” about Enron, the “SEC announced an investigation of Enron” and “Fastow, Enron’s Chief Financial Officer, resigned” (id.);
- On October 22, 2001, Plaintiffs filed their first complaint, which was followed by over 50 additional lawsuits before the consolidated complaint was filed on April 8, 2002;
- Plaintiffs allege that “[b]y 11/28/01, the charade could be continued no longer,” noting that Enron’s publicly traded debt was downgraded to “junk” status by the ratings agencies (Am. Compl. ¶ 66);
- On December 2, 2001, “Enron filed for bankruptcy--the largest bankruptcy in history” (id.);
- On December 24, 2001, Fortune Magazine asserted that the Enron fraud was a combination of “arrogance,” “greed,” “deceit, and financial chicanery” that added up to “[a] company that wasn’t what it was cracked up to be” (Am. Compl. at Preamble);
- On April 8, 2002, Plaintiffs filed a 500-page consolidated complaint detailing “what is likely the worst financial scandal involving a public company in the history of the United States”. (Compl. ¶ 68.) Notably, that complaint mentions CSFB (USA) Inc. and DLJ specifically (id. ¶¶ 102, 707) and discusses Osprey and Marlin as two of the many Enron-related entities that “directly and/or indirectly benefitted Enron”. (Id. ¶ 48; see also id. ¶¶ 20, 49, 699.)

Thus, Plaintiffs’ claims began to accrue as early as October 16, 2001. By April 2002 at the latest, all of the information Plaintiffs needed to bring the new claims they now assert in the Amended Complaint was publicly available--and in fact, already referenced in their original consolidated complaint. See Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410

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(2d Cir. 1975) (“Much of the fraud alleged here was also alleged in [an earlier filed] case. Since those plaintiffs discovered the fraud, there is no doubt that the fraud was discoverable”); Anderson, 1994 WL 525256, at *14-15 (finding claims time-barred where the “facts were equally available to Plaintiffs from the date of the first complaints” and “[i]t would have required no discovery to make the very same allegations on the date of the first complaints”). Although Plaintiffs could have asserted all of their claims and could have sued CSFB (USA) Inc. and DLJ in their Original Complaint, they chose to assert only some of those claims and to sue only CSFB LLC. That choice was fatal for the new claims, which are now time-barred.

C. Plaintiffs’ New Claims Do Not Relate Back to The Filing Date of the Original Complaint.

Because Plaintiffs made a choice and did not include the new claims in their Original Complaint when they could have, Plaintiffs cannot now save their time-barred claims by arguing that they relate back to the filing date of the Original Complaint. A claim relates back to an earlier pleading only when the new claim arises “out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading”, Fed. R. Civ. P. 15(c)(2). With respect to new parties, there is relation back only if (among other things) “the party to be brought in by amendment . . . knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party”, Fed. R. Civ. P. 15(c)(3). Neither Rule 15(c)(2) nor Rule 15(c)(3) applies here.

With respect to the new claims, Plaintiffs knew about and referenced the Marlin and Osprey transactions in the Original Complaint but chose not to allege any misstatements with respect to them until May 14, 2003. See In re Bausch & Lomb, Inc. Sec. Litig., 941 F. Supp. 1352, 1366 (W.D.N.Y. 1996) (finding that because each alleged misstatement was a separate cause of action, pleadings asserting newly added misstatements did not arise out of the

same “conduct, transaction, or occurrence”); Hunt v. Am. Bank & Trust Co., 783 F.2d 1011, 1013-14 (11th Cir. 1986) (holding that claims based upon two allegedly fraudulent transactions did not relate back to timely-filed original complaint alleging violation premised on third fraudulent transaction); Westinghouse Elec. Corp. v. B.H. Franklin, 789 F.Supp. 1313, 1319 n.14 (D.N.J. 1992) (holding that alleged omissions in proxy statement did not relate back to a complaint alleging the same omissions in a different proxy statement because “each alleged omission requires proof of independent facts and constitutes a separate claim”).

With respect to the new parties, Plaintiffs’ failure to name CSFB (USA) Inc. and DLJ--entities that Plaintiffs knew of and mentioned in the Original Complaint--was a deliberate strategic decision, not a mistake or misnomer. See Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998) (“Rule 15(c)(3) is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as a misnomer or misidentification.”); Cargill Ferrous Int’l v. M/V Emma Oldendorff, No. Civ. A. 00-0247, 2001 WL 179924, at *2 (E.D. La. Feb. 20, 2001) (“[A] critical part of the analysis under Rule 15(c)(3) is whether the party sought to be added had notice that the failure of the plaintiff to pursue a claim against it was a product of a mistake rather than simply a strategic choice.”).

Since there is no relation back to the Original Complaint as to the new claims and the new defendants, Plaintiffs’ operative filing date is May 14, 2003, and accordingly all claims against CSFB (USA) Inc. and DLJ and the new Section 12(a)(2) claim against CSFB LLC are time-barred.

D. Plaintiffs' Claims Relating to the September 1999 Osprey Offering Are Time-Barred For The Additional Reason That The Offering Occurred Prior to May 14, 2000.

Regardless of when Plaintiffs discovered their claims, Plaintiffs cannot maintain any claims based on the September 1999 Osprey offering because that offering occurred more than three years prior to the claims filed on May 14, 2003. Thus, any claims based on that offering are also barred by the three-year statute of repose. See Lampf, 501 U.S. at 364; 15 U.S.C. § 77m; see also Stamm v. Corp. of Lloyd's, No. 96 CIV. 5158 (SAS), 1997 WL 438773, at *4-5 (S.D.N.Y. Aug. 4, 1997) (dismissing Section 12 claims because offerings occurred more than three years prior to assertion of the claim).

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 10(b).

Plaintiffs in their Amended Complaint have not amended their Section 10(b) allegations against CSFB LLC at all, but instead have simply asserted those same allegations against CSFB LLC, CSFB (USA) Inc. and DLJ as a group “collectively” referred to as “CS First Boston”. (Am. Compl. ¶ 102(a).) We respectfully submit that those allegations were insufficient to state a claim when they were asserted against CSFB LLC alone.⁴ Now that those same

⁴ In light of the Court’s prior rulings, CSFB LLC will not repeat here the grounds for its motion to dismiss the Section 10(b) claim sustained against it. CSFB LLC, now joined by CSFB (USA) Inc. and DLJ, nevertheless respectfully preserve the arguments set forth in CSFB LLC’s motion to dismiss the Original Complaint. Included in those arguments is CSFB LLC’s continuing position that Plaintiffs’ claims are nothing more than aiding and abetting claims prohibited by the Supreme Court in Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994). That position is further supported by the March 7, 2003 decision in In re Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018 (C.D. Cal. 2003), in which the court dismissed Section 10(b) claims against outside entities involved in the allegedly fraudulent transaction because “Central Bank precludes liability for ordinary business partners and third party corporations doing business with the primary violator as a matter of law.” Id. at 1038. In so holding, the court observed that “the language of the Supreme Court [in Central Bank] does not suggest, and the subsequent case law does not support, the notion that a business partner with no special relationship to the corporation, let alone its shareholders, can be liable for the material misstatements or omissions of that corporation or its officers, no matter how much it assisted or participated in transactions

allegations are asserted against three defendants “collectively”--with virtually no particularized allegations against any of CSFB LLC, CSFB (USA) Inc. or DLJ individually--they are not only insufficient, but improperly pleaded as well.

A. Applicable Law.

Under this Court’s prior ruling, “secondary actors may be liable for primary violations under an alleged scheme to defraud if all the requirements for liability under Rule 10b-5 have been satisfied as to each secondary-actor defendant and any additional heightened pleading requirements have been met”. In re Enron, 235 F. Supp. 2d at 592 (emphasis added). To state a claim under Section 10(b) and Rule 10b-5, Plaintiffs must show “(1) a misstatement or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff[s] relied; and (5) which proximately caused the plaintiff[s]’ injury.” Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997); Lovelace, 78 F.3d at 1018. In addition, Rule 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). “Pleading fraud with particularity in this circuit requires ‘time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.’” Williams, 112 F.3d at 177 (quoting Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)); accord Melder v. Morris, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994). Plaintiffs have neither satisfied all the requirements for liability under Rule 10b-5 nor met the heightened pleading requirements of Rule 9(b).

that led to that statement or omission. Such a holding would broaden the scope of the securities acts so as to haul into court anyone doing business with a publically traded company.” Id. at 1039.

B. Plaintiffs' "Collective" Pleading Does Not Satisfy The PSLRA Or Rule 9(b).

Rather than adding new, particularized allegations pertaining to each of the new defendants, Plaintiffs instead attempt to extend the allegations against CSFB LLC to CSFB LLC, CSFB (USA) Inc. and DLJ as a group "collectively". Such collective pleading is not permitted by either the PSLRA or Rule 9(b).

Where Section 10(b) claims "involve multiple defendants, the alleged fraudulent conduct of each defendant must be set forth separately." In re Envoy Corp. Sec. Litig., 133 F. Supp. 2d 647, 659 (M.D. Tenn. 2001); see also Double Alpha, Inc. v. Mako Partners, L.P., No. 99 Civ. 11541, 2000 WL 1036034, at *2 (S.D.N.Y. July 27, 2000) ("[W]hen fraud is alleged against multiple defendants, a plaintiff must . . . set[] forth separately the acts complained of by each defendant."). The Court is thus "obliged to go through the complaint allegation by allegation in order to determine if claims are specifically alleged against each named defendant." Weber v. Contempo Colours, Inc., 105 F. Supp. 2d 769, 772 (W.D. Mich. 2000); see also Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 940 F. Supp. 1101, 1117 (W.D. Mich. 1996) (requiring "atomistic consideration" because "it would be manifestly unjust to require defendants against whom no actionable claim has been asserted to undergo the expense and discomfort that the discovery process imposes").

The Amended Complaint does not contain any substantive allegations directed to CSFB (USA) Inc. or DLJ individually. Other than to identify CSFB LLC, CSFB (USA) Inc. and DLJ as parties and define them as a group (see Am. Compl. ¶ 102), there is not a single mention of CSFB (USA) Inc. in the substantive portion of the Amended Complaint, and DLJ is mentioned only three times (twice as one of several underwriters in the Osprey offerings (see id. ¶¶ 641.2, 1016.4) and once as the former employer of a group of ten "CS First Boston" bankers (see id. ¶ 707)). Every other allegation is directed to "CS First Boston" or "CSFB" without any

indication as to which allegations (if any) apply to CSFB LLC, which apply to CSFB (USA) Inc., and which apply to DLJ.⁵

Such lumping together does not satisfy the pleading requirements of the PSLRA and Rule 9(b). See, e.g., Johnson v. Tellabs, Inc., No. 02 C 4356, 2003 WL 21183390, at *8 (N.D. Ill. May 19, 2003) (dismissing plaintiffs' claims because "repeated references to 'Defendants' or 'Individual Defendants' do not satisfy the PSLRA's requirements of pleading with specificity as to each Defendant"); Rich v. Maidstone Fin., Inc., No. 98 Civ. 2569 (DAB), 2002 WL 31867724, at *10 (S.D.N.Y. Dec. 20, 2002) ("A complaint may not simply 'clump defendants together in vague allegations' to meet the pleading requirements of Rule 9(b)."); Kunzweiler v. Zero.net, Inc., No. 3:00-CV-2553-P, 2002 WL 1461732, at *15 n.17 (N.D. Tex. July 3, 2002) ("General allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another, do not meet the requirements of Rule 9(b)."). For this reason alone, the Section 10(b) claims should be dismissed.

C. Plaintiffs Have Failed Adequately To Plead That Either CSFB (USA) Inc. Or DLJ Committed A Violation Under Section 10(b) Or Rule 10b-5.

Because Plaintiffs have simply incorporated CSFB (USA) Inc. and DLJ into their existing claims against CSFB LLC, Plaintiffs have failed to plead (or even attempt to plead) that either CSFB (USA) Inc. or DLJ is a primary violator under Section 10(b). In reviewing the sufficiency of the Amended Complaint, there are no well-pleaded allegations against CSFB (USA) Inc., and the only allegations about DLJ reveal that it was an underwriter for the Osprey

⁵ The confusion caused by this pleading tactic--and the reason it is forbidden--is readily apparent by an example from the Amended Complaint. In paragraph 704, Plaintiffs allege that "throughout the Class Period, CS First Boston issued analysts' reports on Enron" and identify 17 reports allegedly issued on various dates from July 6, 1999, to October 23, 2001. However, CSFB (USA) Inc. is a holding company that never issued any analyst reports, and DLJ was a separate company and competitor of CSFB LLC prior to November 2000, when DLJ and CSFB LLC became affiliates as a result of a corporate merger.

offerings and that it is the former employer of a group of bankers that subsequently joined “CS First Boston”. (Am. Compl. ¶¶ 641.2, 707, 1016.4.)

There are no allegations that either entity itself made any misstatement, no allegations that either entity committed any deceptive or manipulative act in furtherance of Enron’s alleged fraud, and no allegations about either entity’s scienter (much less “particularized facts” giving rise to a “strong inference” of scienter).⁶ Thus, Plaintiffs have failed to articulate a Section 10(b) claim against CSFB (USA) Inc. and DLJ even under this Court’s reading of Central Bank.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 12(a)(2) AGAINST CSFB LLC OR DLJ.

Plaintiffs allege that CSFB LLC and DLJ are liable under Section 12(a)(2) for underwriting three private securities placements: (1) a September 23, 1999 offering of Osprey notes; (2) a September 28, 2000 offering of Osprey notes; and (3) a July 17, 2001 offering of Marlin notes. (Am. Compl. ¶ 1016.4.) As already discussed, these claims should be dismissed as untimely. (See supra at 6-12.) Those claims should also be dismissed for the additional reasons that Plaintiffs do not have standing to sue on these offerings and, even if they did, private placements such as the Osprey and Marlin offerings are not subject to Section 12(a)(2).

A. Plaintiffs Do Not Have Standing To Bring a Section 12(a)(2) Claim Because No Named Plaintiff Is Alleged To Have Purchased Osprey or Marlin Securities.

To maintain a class action under Section 12(a)(2), the named plaintiffs must first demonstrate that they have individual standing to pursue such a claim. See In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995); Ramos v. Patrician Equities Corp., 765 F.

⁶ Plaintiffs’ failure to satisfy the scienter requirement is particularly important in light of this Court’s expansive reading of Central Bank, which this Court described as being balanced by the fact that “third-party defendants are still substantially protected from frivolous suits by the scienter requirement.” In re Enron, 235 F. Supp. at 587.

Supp. 1196, 1199 (S.D.N.Y. 1991). Under Section 12(a)(2), only “purchasers of shares issued and sold pursuant to the challenged registration statement” have standing to sue. In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d. 862, 892 (S.D. Tex. 2002) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)). Here, Plaintiffs’ certifications demonstrate that not a single named plaintiff is alleged to have purchased any Osprey or Marlin securities.⁷ (See Lead Pl.’s First and Second Apps. of Certifications in Supp. of the Original Compl.; Lead Pl.’s App. of Exs. in Supp. of the Am. Compl.) That deficiency leaves Plaintiffs without standing to sue on those offerings under Section 12(a)(2), and requires that those claims be dismissed. See, e.g., Dartley v. Ergobilt Inc., No. Civ. A 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001) (dismissing Section 12(a)(2) claims where plaintiffs failed to allege that they purchased the securities at issue).

B. Section 12(a)(2) Does Not Apply To The Osprey And Marlin Offerings Because Those Offerings Were Private Offerings Not Made Pursuant To A Prospectus.

Even if Plaintiffs had standing, their Section 12(a)(2) claims should still be dismissed because the Osprey and Marlin offerings were not public offerings made pursuant to a prospectus.

Section 12(a)(2) extends liability only to persons who directly sell a security “by means of a prospectus” that contains a misstatement or omission of material fact. 15 U.S.C. § 77l(a)(2). In Gustafson v. Alloyd Co., 513 U.S. 561 (1995), the Supreme Court held that a “prospectus” refers only to a document used in connection with a public offering and that, therefore, “§12(a)(2) [is] limited to public offerings”. Id. at 578; see also Lewis v. Fresne, 252

⁷ The bald assertion in the Amended Complaint (¶ 1016.4) that “Plaintiffs or members of the class purchased” the Osprey and Marlin securities is a classic example of the type of “conclusory allegation” that should not be credited on a motion to dismiss--especially in light of Plaintiffs’ certifications to the contrary. See In re Enron, 235 F. Supp. 2d at 564 n.3 (noting that “conclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss”).

F.3d 352, 357-58 (5th Cir. 2001) (“Section 12 of the 1933 Act does not apply to private transactions.”); Whirlpool Fin. Corp. v. GN Holdings, Inc., 67 F.3d 605, 609 n.2 (7th Cir. 1995) (“[A] ‘prospectus’ for § 12 purposes includes only public offerings . . .”).

Following Gustafson, courts have routinely held that Section 12(a)(2) does not apply to any form of private placement or private offering document. See, e.g., Lewis, 252 F.3d at 357 (affirming dismissal of Section 12(a)(2) claims because Section 12(a)(2) does not apply to a private placement); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 893 (S.D. Tex. 2002) (“In Gustafson . . . the Supreme Court analyzed the legislative history of the 1933 Act and determined that Congress meant for § 12 claims to apply only to public offerings.”); Double Alpha, 2000 WL 1036034, at *3 (holding that Section 12(a)(2) liability “does not extend to private placements of securities for which a prospectus is not required”); Moskowitz v. Mitcham Indus., No. Civ. A. 98-1244, 1999 WL 33606197, at *19 (S.D. Tex. 1999) (“Since [Gustafson], district courts have held that Section 12(a)(2) applies only to the distribution of securities by an issuer or controlling shareholder in public offerings, not secondary private ones.”) (citing cases).

Here, it is clear from the face of the offering memoranda that the Osprey and Marlin offerings at issue were private securities placements made pursuant to Rule 144A and Regulation S. (See Exhibit A (Sept. 16, 1999 Offering Memorandum for Osprey Trust Notes) at cover page, ii, 9, 74; Exhibit B (Sept. 28, 2000 Offering Memorandum for Osprey Trust Notes) at cover page, ii, 10, 90; Exhibit C (July 17, 2001 Offering Memorandum for Marlin Notes) at cover page, ii, 10, 107.) Securities placements made pursuant to Rule 144A are private transactions with qualified, sophisticated institutional buyers that are not subject to the registration requirements of the ‘33 Act. Rule 144A, which is entitled “Private Resales of Securities to Institutions”, expressly provides that securities offered or sold to qualified

institutional buyers are “deemed not to have been offered to the public”. 17 C.F.R. § 230.144A(c) (emphasis added). Similarly, Regulation S offerings are made pursuant to a safe harbor from the registration requirements of Section 5 of the '33 Act. 17 C.F.R. §§ 230.901-230.905. They are therefore not required to be issued pursuant to a prospectus, as required under Gustafson for Section 12(a)(2) liability. Id.; Gustafson, 513 U.S. at 578. Indeed, the Osprey and Marlin Offering Memoranda themselves state on their cover pages that the notes being offered “HAVE NOT AND WILL NOT BE REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933.”⁸ (Exhibits A, B & C.)

Accordingly, because the Osprey and Marlin offerings were private Rule 144A and Regulation S offerings not made “pursuant to a prospectus”, Plaintiffs’ Section 12(a)(2) claims should be dismissed.

IV. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR CONTROL PERSON LIABILITY.

Neither can CSFB LLC, CSFB (USA) Inc. or DLJ be liable as a control person.⁹ To establish control person liability under either Section 20(a) or Section 15, Plaintiffs must prove (1) the existence of a primary securities law violation and (2) that the defendant possessed

⁸ Plaintiffs’ allegation that the Osprey and Marlin “notes were publicly traded on the Luxembourg Exchange” (Am. Compl. ¶¶ 641.3, 641.21, 641.37) is irrelevant. The issue in determining whether Section 12(a)(2) liability can attach is whether the securities were initially offered “pursuant to a prospectus” as defined in Gustafson. As is clear from the offering memoranda themselves, the Osprey and Marlin notes were not.

⁹ The Amended Complaint asserts control person liability against CSFB LLC and DLJ under only Section 20(a), and asserts control person liability against CSFB (USA) Inc. under both Section 20(a) and Section 15. Because the standard for stating a claim for control person liability is the same under either section, we discuss those claims together. Moreover, we note that CSFB LLC previously moved to dismiss the Section 20(a) claim against it in its May 8, 2002 motion to dismiss the Original Complaint (Docket Nos. 658 & 659); because that portion of CSFB LLC’s motion was not addressed in the Court’s December 20, 2002 Order, and because Plaintiffs’ control person allegations remain entirely deficient--and, indeed, absent--as to CSFB LLC, we respectfully renew that motion herein.

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the power to control the primary violator. See 15 U.S.C. § 78t(a); Abbott v. Equity Group, Inc., 2 F.3d 613, 620 (5th Cir. 1993); In re BMC, 183 F. Supp. 2d at 868 n.17. Control person claims should be dismissed where “the plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person”. Collmer v. U.S. Liquids, Inc., Civ. A. No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *10 (S.D. Tex. Jan. 23, 2001) (Harmon, J.); see also Dartley, 2001 WL 313964, at *1.

First, control person claims are time-barred when the predicate claims fall outside the applicable statute of limitations. See Salinger v. Projectavision, Inc., 972 F. Supp. 222, 235 & n.8 (S.D.N.Y. 1997); Lasalle v. Medco Research, Inc., No. 93 C 5381, 1996 WL 252474, at *10 n.14 (N.D. Ill. May 10, 1996); Wynne v. Equilease Corp., No. 94 Civ. 4992 (LMM), 1995 WL 764236, at *10 (S.D.N.Y. Dec. 27, 1995). Thus, if the Court dismisses the new Section 10(b) and 12(a)(2) claims on statute of limitations grounds (as it should, see supra at 6-12), the control person claims based on those new claims should similarly be dismissed.

Second, as derivative claims, the control person claims should also be dismissed because there is no primary violation for all the reasons stated above. For example, because Plaintiffs have failed to state a claim against CSFB LLC and DLJ under Section 12(a)(2) (see supra at 16-19), CSFB (USA) Inc. cannot be liable as a control person for any alleged misstatements and omissions arising out of the Offering Memoranda in the Osprey and Marlin transactions. See Lewis, 252 F.3d at 357 n.3 (“[Because] Section 15 of the 1933 Act imposes derivative liability on ‘controlling persons’ for violations of § 12 [w]ithout a violation of § 12, there is no claim under § 15.”); Dennis v. Gen. Imaging, Inc., 918 F.2d 496, 509 (5th Cir. 1990) (“Because the Court has found that plaintiff can maintain no Section 12 . . . violations . . . none of the defendants can possibly be held liable under Section 15.”).

Third, Plaintiffs' control person claims should be dismissed because Plaintiffs have failed to plead any facts sufficient to establish control by CSFB LLC, CSFB (USA) Inc. or DLJ over Enron or any other defendant. Indeed, with respect to CSFB LLC and DLJ, there are no control person allegations at all. And with respect to CSFB (USA) Inc., there is only a sole, boilerplate allegation (repeated three times) that CSFB (USA) Inc. controlled its subsidiaries and affiliates. (Am. Compl. ¶¶ 102, 995.1, 1016.2.) That conclusory allegation is insufficient as a matter of law. See In re Enron, 235 F. Supp. 2d at 595 (stating that to plead control person liability "plaintiff needs to allege some facts beyond a defendant's position or title"). Because Plaintiffs "fail[] to plead any facts from which it can reasonably be inferred that the particular defendant was a control person", Plaintiffs' control person claims should be dismissed. Id. at 598 (emphasis added).

Conclusion

For the reasons set forth above, the Court should dismiss the Amended Complaint in its entirety against CSFB (USA) Inc. and DLJ, and should dismiss the Section 12(a)(2) and Section 20(a) claims against CSFB LLC.

Dated: June 18, 2003

Respectfully submitted,

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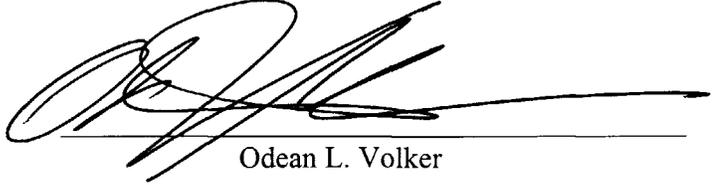
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through es13624.com in accordance with the Court's order regarding website service on the 18th day of June, 2003.



Odean L. Volker