UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
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IN RE ENRON CORPORATION SECURITIES LITIGATION	Consolidated Civil Action No. H-01-3624
This Document Relates To:	
MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendant.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated, Plaintiff, v. KENNETH L. LAY, et al., Defendant.	

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BANK OF AMERICA CORPORATION AND BANC OF AMERICA SECURITIES LLC'S MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT

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Defendants Bank of America Corporation ("BAC") and Banc of America Securities LLC ("BAS") respectfully submit this brief in support of their motion to dismiss the First Amended Consolidated Complaint for Violation of Securities Laws ("First Amended Complaint" or "FAC") pursuant to Federal Rule of Civil Procedure Rule ("Rule") 12(b)(6).

PRELIMINARY STATEMENT

Each of the claims against BAC and BAS is defective and should be dismissed. Plaintiffs failed to name BAS as a defendant until they filed their First Amended Complaint on May 14, 2003, more than one year after they named BAC as a defendant. Plaintiffs sued BAS more than one and a half years after Enron's October 16, 2001 announcement that it was taking $1 billion in charges and reducing shareholders' equity by $1.2 billion and Enron's November 8, 2001 announcement that it was restating its financials for the years 1997 through 2000. The claims against BAS, which are alleged under Sections 11 and 12 of the Securities Act of 1933 ("1933 Act"), are therefore barred by the applicable statute of limitations, which requires that these claims be brought within one year after discovery of the facts underlying the claim.

Although Plaintiffs were on inquiry notice of their claims against BAS in the fall of 2001, there can be no dispute that they had actual knowledge of their claims against BAS by April 8, 2002, when they filed their Consolidated Complaint for Violation of Securities Laws ("Consolidated Complaint" or "Consolidated Cplt."). That complaint alleged against BAC the same claims with respect to Enron's 7% Exchangeable Notes and 7.375% Notes that are now being alleged against BAS. The Consolidated Complaint also alleged that the Marlin transactions which are the subject of Plaintiffs' new Section 12(a)(2) claims against BAS were vehicles utilized by Enron and its insiders to further their fraudulent scheme and that BAC (which was defined to include BAS) acted as an "underwriter" of the Marlin transactions. BAS was not named as a defendant, however, until more than one year after the Consolidated

Complaint was filed. Since Plaintiffs' claims against BAS all fall well beyond the expiration of the one year "discovery" prong of the statute of limitations, these claims are time-barred and should be dismissed.

Nor can Plaintiffs salvage their new claims by arguing that they "relate back" to the Consolidated Complaint pursuant to Federal Rule of Civil Procedure 15(c). Plaintiffs cannot demonstrate, as the law requires, that their failure to name BAS in the Consolidated Complaint was the result of a mistake as opposed to a deliberate tactical decision. Plaintiffs knew the identity of BAS and its role in the transactions at issue in the First Amended Complaint by the time they filed the Consolidated Complaint. Indeed, Plaintiffs have conceded that they did not make a mistake in naming BAC instead of BAS in the Consolidated Complaint. Accordingly, Plaintiffs' claims against BAS do not relate back and should be dismissed as untimely.

Plaintiffs' newly added claims against BAS under Section 12(a)(2) of the 1933 Act, 15 U.S.C. § 77*l*(a)(2), should be dismissed for three additional reasons. These claims are based on alleged misstatements and omissions in the Offering Memoranda ("Offering Memoranda" or "OM") for a July 12, 2001 private placement of Marlin Water Trust II and Marlin Water Capital Corp. II 6.19% senior secured notes ("6.19% Marlin Notes") and 6.31% senior secured notes ("6.31% Marlin Notes"; collectively, the "Marlin Notes").

First, Plaintiffs lack standing to bring claims as to both the 6.19% Marlin Notes and the 6.31% Marlin Notes because the First Amended Complaint does not allege that any of the named plaintiffs purchased either of these notes. Second, even if Plaintiffs were to put forward proposed sub-class representatives who purchased 6.19% Marlin Notes and 6.31% Marlin Notes, Section 12(a)(2) does not govern the offering of these notes. Section 12(a)(2) only applies to *public offerings* of securities made pursuant to a *prospectus*. Gustafson v. Alloyd Co., 513 U.S. 561, 577 (1995). The Offering Memoranda for the private Marlin transactions are not

prospectuses under Section 12(a)(2). Third, Plaintiffs fail to allege, as is required, facts demonstrating that BAS sold 6.19% Marlin Notes or 6.31% Marlin Notes to Plaintiffs or that BAS solicited a purchase of either of these notes by Plaintiffs.

The sole claims now alleged against BAC are control person claims under Section 15 of the 1933 Act. This Court dismissed the Section 10(b) claim alleged against BAC in the Consolidated Complaint because the allegations failed "to identify any specific act or material statement or omission or involvement in the alleged Ponzi scheme that would give rise to a strong inference of scienter." In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 703, 704 (S.D. Tex. 2002). Plaintiffs do not re-allege 1934 Act claims against BAC, nor do they allege such claims against BAS.

The Section 15 claims against BAC should be dismissed because they are derivative of the time-barred claims against BAS and are therefore time-barred. The control person claims are also deficient because Plaintiffs cannot meet their burden to allege facts demonstrating that BAC was a control person of BAS. Instead, they rely exclusively on the conclusory allegation that BAC controlled BAS because it is the corporate parent of BAS. Plaintiffs provide no facts, as is required, to show that BAC had the power to control BAS, that it actually controlled BAS, or that it culpably participated in BAS's alleged wrongdoing. The Section 15 claims against BAS with respect to the Marlin transaction should be dismissed for the additional reason that Plaintiffs fail to plead a primary violation by BAS.

STATEMENT OF FACTS

Procedural History

On October 22, 2001, six days after Enron announced that the Company was taking $1.0 billion in non-recurring charges and reducing shareholders' equity by $1.2 billion (FAC ¶ 61), this proceeding was instituted by the filing of the initial complaint captioned

Newby v. Enron Corp. In November, 2001, Enron announced it would be restating its financial results for the years 1997 through 2000 to reflect the previously disclosed $1.2 billion reduction to shareholders' equity, and to eliminate $600 million in previously reported profits. Id. Enron filed for bankruptcy on December 2, 2002. Id. at ¶ 66.

Plaintiffs first alleged claims against financial institutions, including BAC, in the Consolidated Complaint dated April 8, 2002. In that complaint, Plaintiffs asserted claims against BAC under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act"). Plaintiffs also asserted claims against BAC under Sections 11 and 15 of the 1933 Act with respect to four Enron debt transactions. The Court dismissed the Section 10(b) claim and deferred ruling on the control person claims under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act until its review of the individual defendants' motions. 235 F. Supp. 2d at 691, 703, 704. Plaintiffs do not allege a Section 10(b) or 20(a) claim against BAC or BAS in the First Amended Complaint.

Before the Court decided Defendant Bank of America Corporation's Memorandum of Law in Support of its Motion to Dismiss the Complaint dated May 8, 2002 ("BAC's Motion to Dismiss"), Plaintiffs withdrew two of the four claims against BAC under Section 11 of the 1933 Act. Plaintiffs withdrew their claim with respect to Enron's May 18, 2000 offering of 8.375% Notes because Plaintiffs failed to put forth a representative plaintiff who purchased these notes. Id. at 655 n.89 (citing Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss by BAC, dated June 10, 2002 ("Plaintiffs' Opposition to BAC's Motion to Dismiss") at p. 51 n.38). Plaintiffs withdrew their claim with respect to Enron's August 10, 1999 offering of 7% Exchangeable Notes because the proposed representative plaintiff could not demonstrate reliance as a matter of law. Id. at 655 n.89, 690. Plaintiffs' Opposition did not address the point in BAC's Motion to Dismiss that BAC could not

be held liable for Enron's June 1, 2000 issuance of 7.875% Notes because it was not involved in that offering. (BAC's Motion to Dismiss at pp. 43-44). In its decision on BAC's Motion to Dismiss, this Court did not list the 7.875% Notes offering as one as to which Plaintiffs adequately alleged a Section 11 claim against BAC. 235 F. Supp. 2d at 708. As a result, only one claim in the Consolidated Complaint against BAC remained: a claim under Section 11 of the 1933 Act with respect to Enron's May 19, 1999 issuance of 7.375% Notes.

In the First Amended Complaint, which was filed on May 14, 2003, Plaintiffs name BAS as a defendant for the first time. The Section 11 claim as to Enron's 7.375% Notes is now alleged against BAS instead of BAC. FAC ¶¶ 1005-1015. Plaintiffs add claims against BAS under Section 12(a)(2) of the 1933 Act with respect to the 6.19% Marlin Notes or the 6.31% Marlin Notes but do not propose sub-class representatives for either of these notes. FAC ¶¶ 80-81, 1016.1-1016.9. Plaintiffs also assert a claim against BAS under Section 11 of the 1933 Act with respect to Enron's 7% Exchangeable Notes. A new sub-class representative is proposed with respect to that transaction. FAC ¶¶ 1005-1008, 1013-1015, 1016.01-1016.9. [1] The First Amended Complaint also asserts control person claims against BAC under Section 15 of the 1933 Act based upon the alleged violations of Sections 11 and 12(a)(2) by BAS. FAC ¶¶ 1013-1014, 1016.2, 1016.9. The control person claims are now the only claims asserted against BAC.

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[1] In light of Plaintiffs' withdrawal of the Section 11 claim against BAC in the Consolidated Complaint with respect to the 8.375% Notes, the Section 11 Count in the First Amended Complaint does not allege a claim in connection with these notes. FAC ¶¶ 1005-1015. A paragraph in the body of the First Amended Complaint, however, alleges that BAC violated Section 11 in connection with the 8.375% Notes. FAC ¶ 781. Since the First Amended Complaint does not put forth a proposed sub-class representative who purchased 8.375% Notes and the Section 11 Count omits a claim concerning these notes, the inclusion of the allegation in FAC ¶ 781 appears to be an editing error. To the extent paragraph 781 can be construed as re-alleging a claim against BAC based on the 8.375% Notes, that claim should be dismissed for lack of standing.

The Marlin Offerings

Plaintiffs allege that BAS is liable under Section 12 of the 1933 Act for its involvement in the offering of Marlin Notes. Marlin Water Trust II and Marlin Water Capital Corp. II issued €515 million 6.19% Notes and $475 million 6.31% Notes in a private offering pursuant to Offering Memoranda dated July 12, 2001.[2] See FAC ¶ 641.37; Appendix Exhs. 1, 2.

The Consolidated Complaint did not allege any claims with respect to the Marlin Notes, but did allege that BAC (which was defined to include BAS) served as an "underwriter" of this offering and that the Marlin Notes transactions were part of Enron's fraud. Consolidated Cplt. ¶¶ 83(ii), 497, 498, 777.

BAS, along with several of the other bank defendants in this case, was an initial purchaser of 6.31% Marlin Notes. Offering Memorandum, Appendix Exh. 2 at Cover Page, 107, F-48). The Offering Memoranda provide that the initial purchasers could re-sell the Marlin Notes to a restricted class of purchasers, not the general public. OM at 107. Specifically, the Marlin Notes were offered in a private placement to qualified institutional buyers in the United States pursuant to Securities Act Rule 144A and to persons outside the United States pursuant to Regulation S. OM at Cover Page, 10, 69, 107, 110-11. Both Rule 144A and Regulation S exempt certain offerings of securities from the registration requirements of the 1933 Act. 17 C.F.R. § 230.144A; 17 C.F.R. §§ 230.901-230.905.

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[2] The Offering Memoranda for the Marlin transactions are attached to the Appendix to Defendant Bank of America Corporation's and Banc of America Securities LLC's Motion to Dismiss the First Amended Consolidated Complaint ("Appendix") filed concurrently with this brief. See Appendix Exhs. 1, 2. In ruling on this motion to dismiss, the Court may consider documents referenced and relied upon in the complaint. In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 881-882 (S.D. Tex. 2001) (The "Court may also consider documents 'integral to and explicitly relied on in [the] complaint,' that the defendant appends to his motion to dismiss") (citing Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999)); see Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991) (court may consider public disclosure documents filed with the SEC and documents in plaintiffs' possession or of which they had knowledge of or relied on in bringing of suit, including stock purchase agreement, offering memorandum and warrant).

The Cover Page and several other provisions in the Offering Memoranda expressly state that the Marlin Notes had not been and would not be registered under the 1933 Act. The Offering Memoranda also disclose that the Notes could only be offered or sold "pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act and applicable state securities laws." OM at Cover Page, iii, 10-11, 108, 110-11. Each purchaser of Marlin Notes was required to acknowledge that the Marlin Notes were not registered and were offered only to a limited class of investors. OM at 110-12. The Offering Memoranda also state that an "[a]pplication has been made to list the Senior Notes on the Luxembourg Stock Exchange." OM at Cover Page. The First Amended Complaint does not allege a purchase of either the 6.19% Marlin Notes or the 6.31% Marlin Notes by any of the named plaintiffs, FAC ¶¶ 80-81, nor does it propose sub-class representatives for these transactions. FAC ¶¶ 641.37-641.41, 1016.4. The certifications attached to the First Amended Complaint and the certifications attached to the Consolidated Complaint that are incorporated by reference in the new complaint (see FAC ¶¶ 79, 81(a),(e), (i), (j), (l), (q)) also do not list a single purchase of either of these notes by any of the named plaintiffs. Plaintiffs' First Amended Complaint Appendix Exh. D; Lead Plaintiff's Appendix of Certifications in Support of Consolidated Complaint, filed April 8, 2002).

POINT I

THE CLAIMS AGAINST BAS AND BAC IN THE FIRST AMENDED COMPLAINT ARE TIME-BARRED

The First Amended Complaint adds BAS as a defendant and asserts claims against it pursuant to Sections 11 and 12(a)(2) of the 1933 Act. Plaintiffs' newly-asserted claims are time-barred under Section 13 of the 1933 Act because they were not filed within the applicable limitations period. The control person claims against BAC are also time-barred because they are derivative of the claims against BAS. Plaintiffs cannot salvage their newly-

added claims against BAS by arguing that they "relate back" to the filing of the Consolidated Complaint pursuant to Rule 15(c). Rule 15(c) "'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.'" Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998) (quoting Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469-470 (2d Cir. 1995)). Since Plaintiffs cannot meet their burden to demonstrate that the requirements of Rule 15(c) for relation-back of amendments have been met, their claims are time-barred and should be dismissed.[3]

A. Plaintiffs Did Not File Their Claims Against BAS Within The Applicable Statute Of Limitations Period

Plaintiffs' Section 11 claims against BAS allege misstatements and omissions in a May 19, 1999 Registration Statement for Enron's 7.375% Notes, and an August 10, 1999 Prospectus for Enron 7% Exchangeable Notes. Plaintiffs' claims under Section 12(a)(2) allege misstatements and omissions in connection with the offering of Marlin Notes, which were issued on July 19, 2001.

The statute of limitations for causes of action under Sections 11 and 12 is set forth in Section 13, which provides as follows:

> No action shall be maintained to enforce any liability created under section [11] or [12](a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created . . . under section [12](a)(2) of this title more than three years after the sale.

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[3] See Young v. Lepone, 305 F. 3d 1, 8 (1st Cir. 2002) (the plaintiff normally has the burden of pleading and proving facts demonstrating the timeliness of its action when the defendant in a securities fraud action pleads the statute of limitations as a defense); see also Hazleton v. City of Grand Prairie, Texas, 8 F. Supp. 2d 570, 580-81 (N.D. Tex. 1998) (plaintiff bears burden to meet the requirements of Rule 15 to invoke the relation back doctrine); Williams v. John Doe No. 1, 2001 WL 1645305 (N.D. Tex. Dec. 20, 2001) (plaintiff failed to meet burden to demonstrate misidentification and notice under Rule 15(c)(3)).

15 U.S.C. § 77m (2003). The applicable statute of limitations for the Section 15 control person claims is the same. Dodds v. Cigna Sec. Inc., 12 F.3d 346, 349 n.1 (2d Cir. 1993); Eureka Homestead Soc'y v. Zirinsky, Civ. A. No. 94-2265, 1995 WL 542482, *2 n.2 (E.D. La. Sep. 12, 1995). Thus, claims under Sections 11, 12 and 15 are barred if Plaintiffs had inquiry notice of the alleged misstatements and omissions for more than one year, even if fewer than three years have elapsed since the transaction giving rise to the claim. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991); In re General Dev. Corp. Bond Litig., 800 F. Supp. 1128, 1135 (S.D.N.Y. 1992), aff'd sub nom. Menowitz v. Brown, 991 F.2d 36 (2d Cir. 1993).

It is well-established in this Circuit that the one-year 'discovery' limitations period "begins to run on the date that the plaintiff discovers or in the exercise of reasonable diligence should have discovered" the alleged misconduct giving rise to the cause of action. Reed v. Prudential Sec. Inc., 875 F. Supp. 1285, 1288 & 1290 (S.D. Tex. 1995) (citing Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir.1988), aff'd, 87 F.3d 1311 (5th Cir. 1996) and Vigman v. Cmty. Nat'l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981)).[4] A plaintiff need not have actual knowledge of alleged misconduct for the limitations period to begin to run. See Jensen, 841 F.2d at 607. Instead, "[t]he requisite knowledge that a plaintiff must have to begin the

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[4] The First Amended Complaint does not assert claims against BAS and BAC under Section 10(b) of the 1934 Act. Since the standard for the one-year discovery period is the same for Section 10(b) claims and 1933 Act claims, this brief cites cases involving Section 10(b) claims in this section in addition to cases involving 1933 Act claims. See e.g. Reed, 875 F. Supp. at 1290 (one-year statute of limitations for claims under Section 12(a)(2) of 1933 Act and Section 10(b) of 1934 Act begins to run when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered the alleged misconduct; plaintiff has affirmative duty to make reasonable inquiry into the facts); Del Sontro v. Cendant Corp., 223 F. Supp.2d 563, 570-71 (D.N.J. 2002) (holding, in case involving Sections 11 and 12(a)(2) of 1933 Act and Section 10(b) of 1934 Act, that "the one-year period begins to run when a plaintiff discovered or in the exercise of reasonable diligence should have discovered the basis for [his] claim against the defendant.") (internal quotations omitted)); In re Commonwealth Oil/Tesoro Petroleum Sec. Litig., 484 F. Supp 253, 257 (W.D. Tex. 1979) (In applying the statute of limitations set forth in Section 13 of the 1933 Act, court stated that the notice standard "to be applied to [lead plaintiff] as well as to the class" is an objective one. The standard is "whether the facts available would have put a reasonably prudent investor on 'inquiry notice' of the possibility that the registration statement contained misstatements and omissions, thus triggering the duty to act with due diligence and make reasonable inquiries").

running of 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. (quoting Vigman, 635 F.2d at 459) (emphasis in original; internal quotations omitted); see also Reed, 875 F. Supp. at 1288.

Courts in this circuit apply an objective standard to determine whether a plaintiff has satisfied his duty to exercise reasonable diligence to discover misconduct. See Jackson v. Speer, 974 F.2d 676, 679 (5th Cir.1992); Jensen, 841 F.2d at 607; Vigman, 635 F.2d at 459; Hallman v. Northwestern Nat'l Ins. Co., 766 F.Supp. 575, 579 (S.D.Tex.1991). Under the objective standard, an investor is not permitted a "leisurely discovery of the full details of an alleged scheme," nor is an investor "free to ignore 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions in his securities transaction." Jensen, 841 F.2d at 607 (citations omitted). Rather, the standard requires that if "[a]n investor . . . has learned of facts which would cause a reasonable person to inquire further [the investor] must proceed with a reasonable and diligent investigation and is charged with the knowledge of all facts such an investigation would have disclosed." Reed, 875 F. Supp. at 1289 (citing Jensen, 841 F.2d at 607; In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1171 (5th Cir.1979)).

Here, Plaintiffs were on inquiry notice of their potential claims against BAS more than one year before they filed the First Amended Complaint. On October 16, 2001, Enron, according to Plaintiffs, "*shocked the markets with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion.* Within days . . . the SEC announced an investigation of Enron, and Fastow, Enron's Chief Financial Officer, resigned." FAC ¶ 61 (emphasis in original). The first complaint in this consolidated case was filed six days later. In November, 2001, Enron announced it was restating its financial results for 1997 through 2000. Id. Therefore, by the fall of 2001, Plaintiffs had actual knowledge of the alleged

misrepresentations and omissions regarding Enron's financial results. Plaintiffs were also on inquiry notice of facts supporting potential claims involving other Enron or Enron-related offerings, as well as the participants in those offerings. In fact, the documents for the Enron offerings in which BAS was involved and which discussed the role of BAS were publicly available by the fall of 2001.

As one court has explained:

> [S]tatutes of limitations exist in securities law to prevent investors, even unsophisticated ones, from sticking their head in the sand, in ostrich-like denial of events which notify them of the probability of fraud. Limitations of actions, however, also function to prevent investors and their counsel, sophisticated in the ways of complex securities litigation, from uncovering a general fraudulent scheme, initiating large scale lawsuits and concomitant discovery, and then, as a strategic ploy, delaying in the prosecution of potential claims about which they knew or should have known.

In re In-Store Advertising Sec. Litig., 840 F. Supp. 285, 291 (S.D.N.Y. 1993). Plaintiffs here should not be permitted to avoid the bar of the statute of limitations when they plainly knew or should have known of their claims against BAS.

On April 8, 2002, Plaintiffs filed their Consolidated Complaint in which they named BAC, the indirect parent of BAS, and eight other financial institutions for the first time. Although Plaintiffs had already been on actual or, at least, inquiry notice for five months, there is no question that by the time the Consolidated Complaint was filed, Plaintiffs had actual notice of their potential claims against BAS. In fact, the Consolidated Complaint describes BAC as "a large integrated financial services institution that through its controlled subsidiaries and divisions (such as Banc of America Securities (collectively 'Bank America')) provides commercial and investment banking services . . . ." Consolidated Cplt. ¶ 104. The Consolidated Complaint also

refers to the offering documents which contained the alleged misstatements and omissions, and describes the role of BAS, not BAC, in the offerings. Id. ¶¶ 781, 786, 1006-1007, 1013.[5]

The First Amended Complaint, which added BAS as a defendant, was filed on May 14, 2003, more than one year after the Consolidated Complaint was filed, and more than one and one half years after Enron announced the SEC investigation and restatement. Thus, the claims against BAS all fall well beyond the expiration of the one year "discovery" prong of the statute of limitations. Moreover, with respect to Plaintiffs' Section 11 claims, the Registration Statements and Prospectuses in which Plaintiffs claim BAS made misrepresentations and omissions were effective as of May 19, 1999 and August 10, 1999, respectively, more than three years before Plaintiffs filed the First Amended Complaint naming BAS.

B. The Claims Against BAS Do Not "Relate Back" To Plaintiffs' Consolidated Complaint Under Fed. R. Civ. P. 15(c)

Since the First Amended Complaint was filed well after the expiration of the limitations period set forth in Section 13, Plaintiffs must demonstrate that the First Amended Complaint "relates back" to the Consolidated Complaint. Rule 15(c)(3), which sets forth the requirements for the application of the relation back doctrine to a newly-added party, provides that an amendment that changes a party or the name of a party will relate back to the original complaint only if (1) the same transaction or occurrence is involved, (2) the new party has "received such notice of the institution of the action" that it will not be prejudiced by defending on the merits, and (3) the new party "knew or should have known that, but for a mistake concerning the identity of the proper party," the action initially would have been brought against

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[5] In addition, BAC pointed out to Plaintiffs that they sued the wrong party in its motion to dismiss the Consolidated Complaint. See BAC's Motion to Dismiss at p.10. BAC's Motion to Dismiss was filed on May 8, 2002, more than a year prior to the filing of the First Amended Complaint.

him. See Jacobsen, 133 F.3d at 319-320. All three of these requirements must be met.[6] Plaintiffs, however, cannot establish either that their failure to name BAS in the Consolidated Complaint "was a 'mistake' and not due to strategy, lack of knowledge, or some other reason." Bass v. World Wrestling Federation Entm't, Inc., 129 F. Supp.2d 491, 508 (E.D.N.Y. 2001) (dismissing cause of action against new defendant on statute of limitations grounds).

Because Plaintiffs cannot demonstrate that BAS was omitted as a defendant from the Consolidated Complaint as the result of a mistake as opposed to a deliberate tactical decision, the newly added claims in the First Amended Complaint do not relate back and should be dismissed as time-barred. See Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997) ("A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose – unless it is or should have been apparent to that person that he is the beneficiary of a mere slip of the pen, as it were."); Kilkenny v. Arco Marine, Inc., 800 F.2d 853, 857 (9th Cir. 1986) ("Rule 15(c) was intended to protect a plaintiff who mistakenly names a party and then discovers, after the relevant statute of limitations has run, the identity of the proper party. Rule 15(c) was never intended to . . . permit a plaintiff to engage in piecemeal litigation").[7]

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[6] See Jacobsen, 133 F.3d at 320 (holding that "the 'notice' and 'mistake' clauses" of Rule 15 "[b]oth must be satisfied."); Woods v. Indiana Univ., 996 F.2d 880, 887 (7th Cir. 1993) (Rule 15(c)'s "language *expressly* calls for a double inquiry," separating the "issues of nonprejudicial 'notice' and of 'mistake'") (emphasis in original).

[7] Moreover, Plaintiffs here did not "*change*" the defendant or the name of the defendant, as the language of Rule 15(c)(3) expressly requires; rather, they kept BAC as a defendant and *added* its subsidiary BAS as a defendant. Accordingly, Plaintiffs arguably do not even meet the threshold requirement for application of the relation back doctrine. At a minimum, Plaintiffs' addition rather than substitution of BAS as a new defendant, while keeping BAC as a defendant, suggests that there was no mistake on Plaintiffs' part when they initially named BAC instead of BAS.

1. Plaintiffs' Failure To Name BAS In The Consolidated Complaint Must Be The Result Of A Mistake Or Misnomer To Satisfy The Relation Back Doctrine

In Jacobsen, the Fifth Circuit made clear that Rule 15(c) (3) applies only to correct an error such as a misnomer, such as where the proper party has simply been misnamed, or a misidentification, such as where the plaintiff has named the wrong party by mistake and amends the complaint to substitute the proper party. 133 F.3d at 319-20; see generally Rule 15(c) advisory committee's note.

A plaintiff cannot meet the mistake requirement of Rule 15(c) if, as is the case here, it made a conscious decision not to sue the newly-added defendant in the original complaint. Rule 15(c) "does not appear, on its face, to provide for relation back where the initial party sued was intended to be sued, and the omission of the second defendant was, or reasonably appeared to be, a strategic decision and not a mistake concerning the identity of a proposed defendant." Kemp Indus., Inc. v. Safety Light Corp., Civ. A. No. 92-95 (AJL), 1994 WL 532130, at * 11 (D. N.J. Jan. 25, 1994); see also Nelson v. Adams USA, Inc., 529 U.S. 460, 467 n.1 (2000) (case did not fall within Rule 15(c)(3) because plaintiff made no "mistake" in naming corporation rather than its president and sole shareholder because it knew of the latter's role and existence and, until moving to amend, chose to assert a claim only against the corporation); Louisiana-Pacific Corp. v. Asarco. Inc., 5 F.3d 431, 434 (9th Cir. 1993) (no relation back where "[t]here was no mistake as to identity, but rather a conscious choice of whom to sue"); Powers v. Graff, 148 F.3d 1223, 1227 (11th Cir. 1998) (no relation back because not only did plaintiffs know identity of defendant control persons before expiration of limitations period "but also knew of a claim against [them]" and "elected not to sue these individuals"); Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("[e]ven the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset").

Instead, to satisfy Rule 15(c)(3), Plaintiffs are required to have known of the identity of the newly added defendant at the time they filed the original complaint, intended to name it in that complaint, and mistakenly failed to name it. As stated by the court in Kemp, "[i]n accordance with the language and purpose of Rule 15(c)(3) . . . courts have repeatedly held that in order for an amendment adding a defendant to relate back under Rule 15(c)(3), 'a plaintiff may not merely have failed to sue the proposed party; rather the plaintiff must have initially [intended to sue the proposed party,] sued the wrong party and [be] attempting to correct the mistake.'" 1994 WL 532130, at *12 (quoting Jordan v. Tapper, 143 F.R.D. 567, 574 (D. N.J. 1992)). As discussed below, that is plainly not what occurred here.

2. Since Plaintiffs Knew the Identity of BAS at the Time They Filed the Consolidated Complaint, There Was No Mistake As To The Proper Party Under Fed. R. Civ. P. 15(c)(3)

Here, Plaintiffs knew the identity of BAS and its role in the transactions at issue in the First Amended Complaint by the time they filed the Consolidated Complaint and undoubtedly much earlier. In particular, the relevant offering documents, which were publicly available when the first complaint in this case was filed in October 2001, prominently state that BAS, not BAC, was involved in the various offerings of Enron and Enron-related securities described in the First Amended Complaint.[8] See Kemp, 1994 WL 532130, at *15 ("Plaintiffs failed to sue Prudential in the Complaint notwithstanding Prudential's ownership of the Hanover Site, which was public knowledge . . . . Plaintiffs' failure to name Prudential in spite of the ease of discovering Prudential's potential liability reasonably indicates Prudential was intentionally omitted from the Complaint.").

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[8] The prospectuses for the 7% and 7.375% Notes were available on both the EDGAR and SEC websites. The Offering Memorandum for the Marlin 6.31% Notes, for which BAS was an initial purchaser, was available to any investor at minimal cost through Thomson Financial.

In addition, although they did not name BAS as a defendant in the Consolidated Complaint, Plaintiffs and Lead Counsel knew that it was BAS, an investment banking subsidiary of a bank holding company, and not BAC, the parent holding company, that participated in the transactions at issue. Indeed, Plaintiffs conceded that the substantive allegations in the Consolidated Complaint related to conduct of BAC's subsidiaries. See Consolidated Cplt. ¶ 104 ("Defendant Bank of America Corp. is a large integrated financial services institution that *through its controlled subsidiaries and divisions (such as Banc of America Securities* (collectively, 'Bank America')) *provides commercial and investment banking services . . . including . . . acting as underwriter in the sale of corporate securities to the public . . . .* ") (emphasis added). The Consolidated Complaint also referred to the registration statements and prospectuses that identified BAS. Id. ¶¶ 781, 786, 1006-1007, 1013. It is inconceivable that Lead Counsel for Plaintiffs named BAC, the parent holding company, instead of BAS, its investment banking subsidiary, as the result of a mistake instead of a deliberate litigation strategy.

Indeed, Plaintiffs conceded one year ago that they did not make a mistake in naming BAC. In their opposition to BAC's motion to dismiss, Plaintiffs stated:

> Bank America suggests we sued the wrong party. We think not. The alleged fraudulent scheme involved ***both*** Bank America's investment banking ***and*** commercial operations, i.e., it is not limited to the actions of Bank America's securities subsidiary. Thus, because the liability of Bank America flows from the activities of both its commercial and investment banking operations, naming the parent corporate entity – which after all, is legally responsible for the operations and conduct of its subsidiaries – seems appropriate.

Plaintiffs' Opposition to BAC's Motion to Dismiss at p. 3 n. 6 (emphasis in original). Thus, Plaintiffs knew exactly what they were doing when they sued BAC instead of BAS and

simultaneously acknowledged the activities of BAC's investment banking subsidiary BAS, in the transactions at issue.

Plaintiffs' allegation in the Consolidated Complaint that BAC had primary liability for the alleged acts and omissions of its operating subsidiaries and affiliates including BAS, based on enterprise and agency theories of liability, also dictates against any notion that Plaintiffs made a mistake.[9] See Kemp, 1994 WL 532130, at *13 ("[I]f the omitted defendant would be liable to the plaintiff under a different theory than is alleged against the named [defendant], the unnamed defendant may be led to conclude that it was intentionally omitted from the action"); Rhyder v. Santos, No. 91-2920, 1992 WL 25863 at *2 (E.D. Pa. Feb. 5, 1992) (plaintiff could not establish mistake where "[t]he claim for relief against the [original defendant] is separate and distinct from what would be alleged against the [proposed defendant]"). Not once during the course of this action (which has been pending for almost 20 months), despite numerous opportunities, have Plaintiffs claimed that they failed to name BAS as the result of a mistake. Quite to the contrary, Plaintiffs have conceded that they did not make a mistake.

The only reasonable conclusion is that Plaintiffs' failure to name BAS at the time they named BAC was part of a deliberate strategy to target Bank of America Corporation, the parent entity and holding company. That conclusion is bolstered by Plaintiffs' pleadings, allegations, concessions and arguments.

3. Plaintiffs Cannot Demonstrate That BAS Knew That It Was Not Named Earlier Due To Plaintiffs' Mistake

As the language of Rule 15(c)(3) makes clear, "the plaintiff's mistake is not itself sufficient to permit relation back. The defendant added by amendment must, within 120 days of the filing of the original complaint, have known, or have reasonably been able to know, that it

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[9] See Lead Plaintiffs' Opposition to Defendant Bank of America's Motion for Summary Judgment and, Alternatively, Request for Denial or Continuance Pursuant to Rule 56(f), dated May 20, 2003, at pp. 1, 6-7, 11-13.

was intended to be sued . . . and was omitted by mistake." Kemp, 1994 WL 532130, at *12 (emphasis in original). Demonstrating that a newly added party knew or should have known that it was omitted from the original complaint due to a mistake is a prerequisite to the application of the relation back doctrine set forth in Rule 15(c): "[I]t is crucial to fulfillment of the mistake condition that the proposed defendant did not have reason to believe that its omission . . . was a deliberate strategy, rather than an error in pleading." Id., at *13.

The same circumstances that demonstrate that Plaintiffs' failure to name BAS was part of their deliberate strategy rather than a mistake also demonstrate that BAS did not have reason to believe that the omission was a mistake but, instead, was a conscious and intentional litigation decision by Plaintiffs and their counsel. See, e.g., Kilkenny, 800 F.2d at 857 ("A plaintiff's failure to amend its complaint to add a defendant after being notified of a mistake concerning the identity of the proper party therefore may cause the unnamed party to conclude that it was not named because of a strategic decision rather than as a result of the plaintiff's mistake."); Heinly v. Queen, 146 F.R.D. 102, 107 (E.D. Pa. 1993) ("reasonable belief that the failure to join a new defendant was a deliberate strategy" prevents amendment from relating back); Great Northeastern Lumber & Millwork Corp. v. Pepsi-Cola Metro. Bottling Co., Inc., 785 F. Supp. 514, 516 (E.D. Pa. 1992) (no relation back where added defendant "may have believed Plaintiff made a deliberate choice rather than a 'mistake' in deciding not to join it."). For all of these reasons, Plaintiffs' claims against BAS do not relate back and should be dismissed because Plaintiffs failed to file them within the applicable limitations period.

POINT II

PLAINTIFFS' SECTION 12(a)(2) CLAIMS AGAINST BANC OF AMERICA SECURITIES LLC BASED ON THE MARLIN NOTES MUST BE DISMISSED

In addition to being time-barred, the newly-added Section 12(a)(2) claims with respect to the Marlin Notes are defective for at least three additional reasons. These claims fail because (1) Plaintiffs lack standing, (2) Section 12(a)(2) governs only public offerings made pursuant to a prospectus, and (3) Plaintiffs do not allege that BAS sold Marlin Notes to them or solicited a purchase of Marlin Notes.

A. Plaintiffs Lack Standing To Assert Section 12(a)(2) Claims With Respect To The 6.19% Marlin Notes And The 6.31% Marlin Notes Because No Plaintiff Is Alleged To Have Purchased Either Of These Notes

Plaintiffs' Section 12(a)(2) claim with respect to both the 6.19% Marlin Notes and the 6.31% Marlin Notes must be dismissed because Plaintiffs do not have standing to assert these claims. Plaintiffs allege only that defendants "sold the Foreign Debt securities [including the Marlin Notes] to plaintiffs and/or class members." FAC ¶ 1016.5. The First Amended Complaint does not specifically allege, however, that any of the named plaintiffs purchased 6.19% Marlin Notes or 6.31% Marlin Notes, nor does it propose sub-class representatives for these transactions. FAC ¶¶ 79-81, 1016.4. Similarly, the certifications of the named plaintiffs do not list any purchases of these notes. (Plaintiffs' First Amended Complaint Appendix Exh. D; Lead Plaintiff's Appendix of Certifications in Support of Consolidated Complaint, filed April 8, 2002). Plaintiffs recently filed an Amended Motion for Class Certification which also fails to identify proposed sub-class representatives who purchased either of these notes. (Lead Plaintiff's Amended Motion for Class Certification dated May 28, 2003 at pp. 19-24).

Plaintiffs' failure to put forth proposed sub-class representatives for these transactions compels the dismissal of their Section 12(a)(2) claims as a matter of law. The mere allegation that a plaintiff or class member purchased Marlin Notes is insufficient. Only persons

who purchase in the challenged offering have standing to assert a Section 12(a)(2) claim. Gustafson, 513 U.S. at 571-72; Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975) (the "remedy granted by Section 12 . . . is limited to the person purchasing [the] security"); Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 518 (5th Cir. 1985) (plaintiffs did not have standing under Section 12(2) because they did not purchase any securities); Dartley v. Ergobilt, Inc., NO. CIV. A. 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001) (only plaintiffs who purchase in the public offering have standing under Section 12(a)(2)); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 893 (S.D. Tex. 2002) (dismissing Section 12(a)(2) claim because, among other things, plaintiffs did not purchase their shares in Azurix's public offering and thus lacked standing), aff'd sub nom. Rosenzweig v. Azurix Corp., _ F.3d _, 2003 WL 21242319 (5th Cir. June 13, 2003); Moskowitz v. Mitcham Indus., NO. CIV. A. H-98-1244, 1999 WL 33606198, at *2-3 (S.D. Tex. Sep. 28, 1999) (dismissing Section 12(a)(2) claims of plaintiffs who did not purchase shares in the public offering for lack of standing). [10]

In their opposition to BAC's motion to dismiss the Consolidated Complaint, Plaintiffs conceded that the absence of a plaintiff who purchased a security that is the subject of a claim is fatal to that claim. Plaintiffs withdrew their Section 11 claim against BAC with respect

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[10] Because they did not purchase Marlin Notes, Plaintiffs are likewise unable to represent a putative class with respect to these claims. Bailey v. Patterson, 369 U.S. 31, 33 (1962) (a plaintiff seeking to represent a class must be a member of the class he purports to represent); In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995) ("[I]t is well-established that 'to have standing to sue as a class representative it is essential that a plaintiff must be a part of that class ....") (quotation omitted); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 789 (8th Cir. 1967) (plaintiffs who did not purchase the securities in question lacked standing to bring a Section 12(2) claim and "were not entitled to maintain a class action on behalf of [persons who did purchase such securities]"); Gabrielsen v. BancTexas Group, Inc., 675 F. Supp. 367, 371 n.3 (N.D. Tex. 1987) (dismissing complaint for lack of standing and stating "[i]nclusion of class allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue."); In re Storage Tech. Corp. Sec. Litig., 630 F. Supp. 1072, 1078 (D. Colo. 1986) (dismissing Section 11 claim because no plaintiff had ever purchased any of the notes that were issued pursuant to the challenged registration statement and stating "[p]laintiffs who cannot assert a claim individually cannot assert that claim on behalf of a class").

to Enron's 8.375% Notes because Plaintiffs failed to put forth a plaintiff who purchased these notes. (Plaintiffs' Opposition at p. 51 n.38) ("Plaintiffs concede there is no § 11 claim for the . . . 8.375% notes for the reasons argued by Bank America"); *see* BAC's Memorandum of Law in Support of Motion to Dismiss at p. 39 ("Because there is no plaintiff who [purchased the 8.375% Notes and thus who] has standing to assert claims based upon the 8.375% Notes, Plaintiffs' . . . Section 11 claims based on these notes fail as a matter of law"). Similarly, Plaintiffs should withdraw their Section 12(a)(2) claim with respect to the Marlin Notes. If Plaintiffs do not withdraw the claims with respect to the 6.19% Marlin Notes and the 6.31% Marlin Notes, they should be dismissed for lack of standing.[11]

B. The Section 12(a)(2) Claims Fail Because the Marlin Notes Were Not Offered Pursuant to a Prospectus

Plaintiffs' Section 12(a)(2) claims against BAS would be subject to dismissal even if Plaintiffs were to put forth proposed sub-class representatives for the 6.19% and 6.31% Marlin Notes transactions. Section 12(a)(2) imposes liability for material misstatements or omissions in a "prospectus" or oral communications that relate to a prospectus. 15 U.S.C. § 77*l*(a)(2).[12] In Gustafson, the United States Supreme Court held that Section 12(2) applies only to initial public offerings of securities made pursuant to a prospectus. 513 U.S. at 578, 584 ("[t]he intent of Congress and the design of [Section 12] require that § 12(2) liability be limited to public offerings"); Lewis v. Fresne, 252 F.3d 352, 357-58 (5th Cir. 2001) (Section 12(2) claim properly dismissed because "Section 12 of the 1933 Act does not apply to private

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[11] Since Plaintiffs have failed to put forth named plaintiffs with respect to the 6.31% and 6.19% Marlin Notes, they also fail to plead that this Court possesses subject matter jurisdiction pursuant to Rule 12(b)(1) with respect to this transaction.

[12] Plaintiffs do not allege any oral communications by BAC which purportedly confer Section 12 liability.

transactions").[13] The First Amended Complaint, however, does not and cannot allege that the Marlin Offering Memoranda are prospectuses or that the private placement of Marlin Notes was a public offering. BAS is therefore not liable under Section 12(a)(2).

A review of the Offering Memoranda demonstrates conclusively that they are not prospectuses. The Offering Memoranda reflect an offer by Marlin Water Trust II and Marlin Water Capital Corp. to sell unregistered Marlin Notes to initial purchasers for resale to a limited class of buyers in a private placement. They expressly and repeatedly state that the Marlin Notes were being offered to a limited group of potential purchasers and were not registered under the 1933 Act. OM at Cover Page, iii, 10-11, 69, 107-108, 110-111. In fact, the Notice to Investors obligates every purchaser to acknowledge that "[t]he Senior Notes are being offered for resale in a transaction *not involving any public offering* in the United States within the meaning of the Securities Act." OM at 110 (emphasis added). In addition, each Marlin Note was required to bear a legend stating that it had not been registered and could not be reoffered or sold, except to qualified institutional buyers or institutional accredited investors or to persons outside the United States. OM at 111. The Offering Memoranda also repeatedly state that the Marlin Notes were unregistered and were being sold in an private placement pursuant to Rule 144A and Regulation S.[14] See OM at 107.

Rule 144A, which is titled "Private Resales of Securities to Institutions," exempts private transactions from registration under the Securities Act if certain conditions are met. See

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[13] Subsection 12(2) was recodified as Section 12(a)(2) in 1995. See Brosious v. Children's Place Retail Stores, 189 F.R.D. 138, 142 n.1 (D.N.J. 1999).

[14] The cover page of the Offering Memoranda provides: "THE SENIOR NOTES HAVE NOT BEEN AND WILL NOT BE REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933 .... THE SENIOR NOTES ARE BEING OFFERED HEREBY ONLY (A) TO 'QUALIFIED INSTITUTIONAL BUYERS" IN RELIANCE ON THE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT PROVIDED BY RULE 144A . . . ." See Offering Memorandum, Cover Page.

17 C.F.R. § 230.144A. Rule 144A offerings are exempt from registration pursuant to Section 4(2) of the 1933 Act, which expressly exempts "transactions by an issuer *not involving any public offering*." 15 U.S.C. § 77d(2) (2003) (emphasis added). Rule 144A provides that securities offered or sold by securities dealers to qualified institutional buyers are "*deemed not to have been offered to the public*." 17 C.F.R. § 230.144A(c) (emphasis added). The SEC created the Rule 144A exemption based upon its conclusion that "certain institutions can fend for themselves and that, therefore, offers and sales to such institutions do not involve a public offering." SEC Rel. No. 33-6806, 1988 WL 1024389, at *14 (Oct. 25, 1988). Similarly, Regulation S exempts offers and sales of securities to persons outside the United States from the registration requirements contained in Section 5 of the 1933 Act.[15] 17 C.F.R. §§ 230.901-230.905.

Accordingly, since the Marlin Notes were exempt from registration under the 1933 Act and the Offering Memoranda were not prospectuses in connection with a public offering, Section 12(a)(2) does not apply as a matter of law. See Gustafson, 513 U.S. at 569, 578; Lewis, 252 F.3d at 357. As stated by the Supreme Court in Gustafson, "the liability imposed by § 12(2) cannot attach unless there is an obligation to distribute the prospectus in the first place[.]" Gustafson, 513 U.S. at 571. As stated by the court in Laser Mortgage Management, Inc. v. Asset Securitization Corp., "Gustafson suggests that the purpose of Section 12 is to protect public purchasers of securities. . . . That purpose would not be served by extending liability to those who purchase securities in private placements." No. 00 CIV. 8100 (NRB), 2001 WL 1029407, at *7 (S.D.N.Y. Sep. 6, 2001).

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[15] The rationale underlying Regulation S is that "[t]he registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. market. . . ." Final Rule (Executive Summary of Regulation S), Offshore Offers and Sales, 55 Fed. Reg. 18306, 18308 (May 2, 1990).

In Gustafson, the Supreme Court determined that the term "prospectus," as used in Section 12(a)(2), is a "term of art" that refers only to a document that is required by the Securities Act to contain the information included in a registration statement. 513 U.S. at 569-70, 584. A registration statement is required only in connection with an offering of securities that must be registered under the Securities Act, *i.e.*, a public offering. Id. at 569 (citing Sections 2(11), 4, 5 of the 1933 Act). Thus, a prospectus for purposes of Section 12(a)(2) is a "document that describes a public offering of securities." Id. at 584.

Following Gustafson, courts routinely dismiss Section 12(a)(2) claims in connection with private placements of securities that are exempt from registration under the 1933 Act. See e.g., Laser Mortgage Mgmt., 2001 WL 1029407, at *5 (dismissing Section 12(a)(2) claim because the sale of securities pursuant to a private placement memorandum was not a sale "by means of a prospectus"); Glamorgan Coal Corp. v. Ratner's Group PLC, No. 93 Civ. 7581 (RO), 1995 WL 406167, at *3 (S.D.N.Y. July 10, 1995) (dismissing Section 12(a)(2) claims because the "Offering Memorandum did not have to comply with the registration requirements. . . .").[16] This Court should reach the same result.

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[16] See also Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 668-69 (7th Cir. 1998) (affirming district court's holding that Section 12(a)(2) did not apply to the challenged offering because it was private); Whirlpool Fin. Corp. v. GN Holdings, Inc., 67 F.3d 605, 609 n.2 (7th Cir. 1995) (in affirming the dismissal of a Section 12(2) claim, the Seventh Circuit stated "[a]s this case does not concern a public offering, § 12(2) is inapplicable"); In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 432 (S.D.N.Y. 2001) (court dismissed Section 12(a)(2) claim concerning Rule 144A private placement with prejudice where plaintiffs did not oppose motion); Liberty Ridge LLC v. RealTech Sys. Corp., 173 F. Supp. 2d 129, 135 (S.D.N.Y. 2001) (dismissing Section 12(a)(2) claim based on a private offering because that section only applies to public offerings); Dafofin Holdings S.A. v. Hotelworks.com, Inc., No. 00 CIV. 7861 (LAP), 2001 WL 940632, at *6 (S.D.N.Y. Aug. 17, 2001) (same); Ravenna v. Integrated Food Techs. Corp., NO. CIV. A. 99-524, 1999 WL 740384, at *2 (E.D. Pa. Sep. 15, 1999) (same); Hudson Venture Partners, L.P. v. Patriot Aviation Group, Inc., No. 98 CIV. 4132 (DLC), 1999 WL 76803, at *2 (S.D.N.Y. Feb. 17, 1999) (same); Walish v. Leverage Group, Inc., NO. CIV. A. 97-CV-5908, 1998 WL 314644, at *5 (E.D. Pa. June 15, 1998) (dismissing Section 12(2) claim with prejudice because "Gustafson clearly states that Section 12(2) does not apply to private sales of securities"); cf. Lasker v. New York State Elec. & Gas Corp., No. 94-CV-3781 (ARR), 1995 WL 867881, at *6 (E.D.N.Y. Aug. 22, 1995), aff'd, 85 F.3d 55 (2d Cir. 1996) ("The statements contained in the Annual Report cannot give rise to a § 12(2) claim because it is a document that is not required to contain the information in the registration statement.").

Section 10 of the Securities Act sets forth the information that must be contained in a prospectus for a registered public offering. It provides that a prospectus must contain all of the information contained in the registration statement. 15 U.S.C. § 77c. "[A] document is not a prospectus if, absent an exemption, it need not comply with Section 10's requirements in the first place." Gustafson, 513 U.S. at 569. Because the Offering Memoranda were prepared for a private placement of securities under Rule 144A and the sale of securities outside the United States under Regulation S, they were not required to comply with Section 10 and are therefore not prospectuses.

Although the Complaint alleges that the Marlin Notes were "publicly traded," it does not allege that they were sold in a public offering, as is required for Section 12 liability under Gustafson. FAC ¶¶ 641.37, 986 n.20. The Offering Memoranda state that an "[a]pplication has been made to list the Senior Notes on the Luxembourg Stock Exchange," OM at Cover Page, confirming further that there was no public offering of the Marlin Notes. Any trading of these securities subsequent to the private offering is irrelevant to Section 12 liability. Since the Marlin offering was private, Section 12(a)(2) does not apply and the claims should be dismissed. Lewis, 252 F.3d at 358.

C. Plaintiffs' Section 12(a)(2) Claims Fail Because BAS Did Not "Sell" The Marlin Notes to Plaintiffs

The Section 12(a)(2) claims are untenable for the independent reason that Plaintiffs fail to allege that BAS sold 6.19% Marlin Notes or 6.31% Marlin Notes to Plaintiffs or solicited their purchase.[17] A seller is only liable "to the person purchasing such security from him." 15 U.S.C. § 77l(a)(2). To be a seller for the purposes of Section 12(a)(2), a person must

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[17] In fact, Plaintiffs cannot allege that BAS was a seller with respect to the €515 million 6.19% Marlin Notes because it did not serve as an initial purchaser of those notes. Appendix Exh. 1 (Marlin Water Trust II and Marlin Water Capital Corp. II Offering Memorandum for €515,000,000 6.19% Senior Secured Notes Due 2003 and $475,000,000 6.31% Senior Secured Notes Due 2003, dated July 12, 2002, at Cover page, F-48).

either pass title to or solicit the purchase of a security. Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 370 (5th Cir. 2001) (extending the Supreme Court's interpretation of "seller" for purposes of Section 12(1) of the 1933 Act, in Pinter v. Dahl, 486 U.S. 622, 642-47 (1988), to Section 12(a)(2)). "To count as 'solicitation,' the seller must, at a minimum, directly communicate with the buyer." Rosenzweig v. Azurix Corp., 2003 WL 21242319, at *14 (affirming dismissal of Section 12(a)(2) claim for lack of standing).

Plaintiffs merely claim that defendants "sold the Foreign Debt securities to plaintiffs and/or class members." FAC ¶ 1016.5. Given that Plaintiffs did not purchase any Marlin Notes, they have not alleged, and cannot possibly allege, that BAS sold Marlin Notes to them or solicited their purchase of the Notes. In Dartley, the court dismissed a Section 12(a)(2) claim against the defendant underwriters because plaintiffs failed to allege that the underwriters were statutory sellers of the shares they purchased. 2001 WL 313964, at *2; see also Azurix, 198 F. Supp. 2d at 893 (Section 12(a)(2) claim was insufficient because plaintiffs failed to allege that they purchased stock in the offering or that defendants were statutory sellers); In re Websecure, Inc. Sec. Litig., 182 F.R.D. 364, 368-69 (D. Mass. 1998) (dismissing Section 12(a)(2) claim where no plaintiff was specifically alleged to have purchased shares from underwriter because the general allegation that shares "were sold by the Underwriter Defendants directly to investors" is insufficient to demonstrate seller status). As in Dartley, Azurix and Websecure, this Court should dismiss the Section 12(a)(2) claims here.

POINT III

PLAINTIFFS' CONTROL PERSON CLAIMS AGAINST BANK OF AMERICA CORPORATION SHOULD BE DISMISSED

A. Plaintiffs Fail To Allege Control Person Liability Against BAC

Plaintiffs fail to plead control person liability against BAC under Section 15 of the 1933 Act. Section 15 imposes secondary liability under certain circumstances upon persons who "control" persons or entities that have violated provisions of the 1933 Act. 15 U.S.C. § 77o. Plaintiffs allege that BAC controlled BAS and that BAS violated Sections 11 and 12(a)(2). FAC ¶¶ 1013, 1016.2.

To state a claim for control person liability, Plaintiffs must allege facts to show (1) a primary violation of the 1933 Act by the controlled person; (2) the defendant's control over the controlled person;[18] and (3) "particularized facts as to the controlling person's culpable participation in (exercising control over) the 'fraud perpetrated by the controlled person.'" In re Enron Corp., 235 F. Supp. 2d at 598 (citation omitted); Collmer v. U.S. Liquids, Inc., No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *10 (S.D. Tex. Jan. 23, 2001) (same). The Fifth Circuit has also required plaintiffs to demonstrate that the controlling person actually exercised control over the primary violator. Dennis, 918 F.2d at 509 (demonstrating a prima facie violation of Section 15 requires plaintiff to show that the controlling person "had actual power or influence over the controlled person and [] induced or participated in the alleged violation"). Further, Plaintiffs must "allege some facts beyond a defendant's position or title that show that the

[18] The Fifth Circuit has adopted the definition of control articulated by the SEC in SEC Rule 405(f): "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" Abbott v. Equity Group, Inc., 2 F.3d 613, 619 n.15 (5th Cir. 1993) (quoting 17 C.F.R. § 230.405(f)); Dennis v. General Imaging, Inc., 918 F.2d 496, 509-10 (5th Cir. 1990); G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 957-960 (5th Cir. 1981).

defendant had actual power or control over the controlled person." Enron, 235 F. Supp. 2d at 595 (citing Dennis, 918 F.2d at 509-10).[19]

Plaintiffs do not meet these pleading requirements. In support of their Section 15 claim, Plaintiffs merely allege in conclusory terms that "Banc of America Securities LLC [was] a wholly owned subsidiary of and *controlled by* Bank of America Corp." FAC ¶ 104(b) (emphasis added); see also id. ¶¶ 1013, 1016.2. This legal conclusion regarding BAC's control of BAS is not corroborated by any facts and need not be accepted by the Court. Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994) (in ruling on a motion to dismiss, the court need not accept plaintiffs' "conclusory allegations or unwarranted deductions of fact").

BAC's status as the corporate parent of BAS is insufficient to show that BAC had the power to control or much less that it actually controlled BAS. Novak v. Kasaks, 997 F. Supp. 425, 435 (S.D.N.Y. 1998) (dismissing Section 20(a) claim against parent holding company

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[19] As this Court has observed, the Fifth Circuit "has not clearly defined its position" concerning the requirements for control person liability. In re Enron Corp. Sec., Derivative & ERISA Litig., Nos. MDL-1446, Civ. A. H-01-3624, 2003 WL 230688, at *9 (S.D. Tex. Jan. 28, 2003). In Abbott, the Fifth Circuit's most recent opinion addressing the issue, the Court did not clarify whether a plaintiff must show both the power to control and the actual exercise of such control, because it found that the plaintiffs could not demonstrate the power to control the alleged primary violator. 2 F.3d at 620 (affirming dismissal of control person claims). The Abbott Court explained that the Fifth Circuit's prior opinions in Dennis and Thompson conflicted over the culpable participation requirement, but chose not to resolve the inconsistency because its holding turned on plaintiffs' inability to demonstrate the power to control. Abbott, 2 F.3d at 620 n.18. Compare Dennis, 918 F.2d at 509 (plaintiff must show defendant "induced or participated in the violation") with Thompson, 636 F.2d at 958 (plaintiff need not show defendant "participat[ed] in the wrongful transaction"). In its December 20, 2002 Memorandum and Order on the Secondary Actors' Motion to Dismiss, this Court articulated the standard for control person liability that requires that a plaintiff plead control and specific facts to show the defendant's culpable participation in the purported fraud by the controlled person. In two of this Court's later decisions on motions to dismiss in this action, the court concluded that a plaintiff may state a claim for control person liability by alleging that "the controlling person had the power to control the controlled person or to influence corporate policy," and that the actual exercise of such control and culpable participation in the purported fraud need not be alleged. In re Enron Corp. Sec., Derivative & ERISA Litig., No. MD-1446, CIV. A. H-01-3624, 2003 WL 1089307, at *49 (S.D. Tex. March 12, 2003) (Enron Outside Directors); Enron, 2003 WL 230688, at *11 (same) (Andersen Defendants). BAS and BAC respectfully submit that the standard set forth by this Court in its December 20, 2002 Memorandum and Order is the correct one. Requiring that the purported controlling party knew of, induced or participated in the alleged misconduct is fairer and more consistent with statutory goals than merely requiring that the alleged controlling party had the power in theory to control the primary actor, unless the plaintiff can establish alter ego liability.

and explaining that control person liability is not pled sufficiently simply by alleging that an entity is the parent company of an alleged violator since a subsidiary's violation will not be "automatically impute[d]" to the parent), rev'd on other grounds, 216 F.3d 300 (2d Cir. 2000).[20] As a matter of law, "a parent corporation ... is not liable for the acts of its subsidiaries." United States v. Bestfoods, 524 U.S. 51, 61 (1998); see Chill v. General Elec. Co., 101 F.3d 263, 270-71 (2d Cir. 1996) (the court dismissed the Section 10(b) claim against a parent corporation for failure to plead scienter, finding, among other things, that knowledge of the subsidiary's purportedly false financial statements could not be imputed to the parent); McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 428 (E.D. Tex. 1999) (dismissing Section 10(b) claim against parent company and stating the mere allegation that an entity is the parent company of a subsidiary alleged to have engaged in fraudulent conduct is insufficient to plead the parent's involvement in the purported fraud). Plaintiffs do not set forth any facts demonstrating either that BAC exercised control over the acts of BAS, much less that BAC culpably participated in or induced the challenged conduct by BAS. Since Plaintiffs provide no facts in support of their control person claims against BAC, the claims should be dismissed.[21]

B. The Control Person Claims Against BAC Also Fail Because There Is No Underlying Primary Liability On The Part Of BAS

As discussed above, Plaintiffs' claims against BAS under Sections 11 and 12(a)(2) are barred by the applicable statutes of limitations. See supra Point I. "[C]ontrolling person liability under Section 15 ... is derivative of liability under Sections 11 and 12(2)." Lone

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[20] As this Court has recognized, "the control person liability provisions of Section 15 of the 1933 Act and Section 20(a) of the 1934 Act are interpreted the same way." Enron, 235 F. Supp. 2d at 594. Thus, cases applying Section 20(a) are relevant here.

[21] Although Plaintiffs make a cursory attempt at alleging that "Bank America [defined as BAC and BAS] functioned as a consolidated and unified entity," and that "its knowledge and liability in this case is determined by looking at [Bank America's knowledge and liability] as an overall legal entity," Plaintiffs provide no facts to support this assertion. FAC ¶ 775.

Star Ladies Inv. Club, 238 F.3d at 370 n.33; see also Enron, 235 F. Supp. 2d at 597 ("if a plaintiff fails to state a primary security violation under [the 1933 Act], the plaintiff also fails to state a claim under Section 15"). Accordingly, Plaintiffs' control person claims against BAC, which are derivative of the primary claims against BAS, must be dismissed as well.

The control person claims against BAC based on the alleged Section 12(a)(2) violations fail for the additional reason that Plaintiffs have not sufficiently alleged that BAS violated Section 12(a)(2). Plaintiffs' inability to plead a primary violation of Section 12(a)(2) (see supra Point II), requires the dismissal of the Section 15 claims based on those alleged violations. Lone Star Ladies, 238 F.3d at 370 n.33, Enron, 235 F. Supp. 2d at 597.

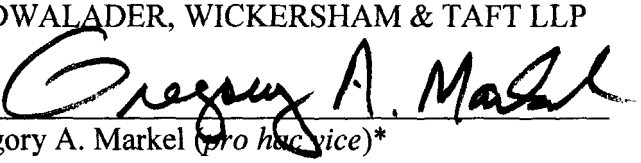
In sum, the control person claim against BAC based on the alleged Section 11 violation should be dismissed because the underlying claim is barred by the statute of limitations. The control person claims based on the alleged Section 12(a)(2) violations with respect to the 6.19% Marlin Notes and the 6.31% Marlin Notes should also be dismissed because the underlying claims are time-barred or because Plaintiffs have not sufficiently alleged the underlying claims against BAS.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the FAC against BAS and BAC, with prejudice.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT LLP

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 19th day of June, 2003, a true and correct copy of the foregoing memorandum was served on all counsel of record by website, http://www.esl3624.com, pursuant to the Court's Order.

Ronit Setton