UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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.	United States Courts Southern District of Texas FILED JUL 31 2003 Michael N. Milby, Clerk of Court
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.	

REPLY MEMORANDUM OF LAW IN FURTHER 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 reply brief in response to Lead Plaintiff's Memorandum In Opposition To The Bank Defendants' Motions To Dismiss The First Amended Complaint ("Opposition" or "Opp.") and in further support of the Memorandum of Law in Support of Defendant Bank of America Corporation and Banc of America Securities LLC's Motion to Dismiss ("Moving Brief") the First Amended Consolidated Complaint for Violation of Securities Laws ("First Amended Complaint" or "FAC") pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6).

PRELIMINARY STATEMENT

Faced with the sobering reality that their newly-alleged claims against BAS under Sections 11 and 12 of the Securities Act of 1933 ("1933 Act") are time-barred, and that they do not "relate back" to the Consolidated Complaint for Violation of Securities Laws ("Consolidated Complaint" or "Consolidated Cplt."), Plaintiffs argue in their Opposition that they should have the benefit of the expanded statute of limitations effectuated by the Public Company Accounting Reform Act and Investor Protection Act of 2002 (the "Sarbanes-Oxley Act" or the "Act"), Pub. L. No. 107-204 § 804(b), 116 Stat. 745 (2002). As shown below, Plaintiffs are wrong.

Plaintiffs also attempt to avoid having their newly-asserted claims dismissed by rewriting the procedural history of this case, disregarding the well-established legal doctrine of inquiry notice, dismissing as a mere technicality Rule 15(c)(3) which governs relation back of amendments, asserting that BAS is estopped from arguing that the newly-added claims are time-barred, and withdrawing myriad concessions and admissions they have made over the course of the past one and one-half years. Plaintiffs are so determined to avoid dismissal that they also blame Defendants for Plaintiffs' own intentional, if ill-advised, delay, and go so far as to claim that perhaps the most experienced plaintiffs' securities firm in the country delayed naming certain defendants because they made a mistake of law.

The Opposition also fails to demonstrate the sufficiency of the Section 12(a)(2) claims against BAS arising from the offering of 6.19% Marlin Notes and 6.31% Marlin Notes.

First, Plaintiffs concede that they do not have standing to assert these claims but ask this Court to postpone its analysis of standing until the class certification stage. Standing, however, is a threshold issue that must be determined at the commencement of an action. Lead Plaintiff and named plaintiffs, each of whom lack standing to assert Section 12(2) claims, cannot serve as placeholders while they search for a plaintiff who has standing to assert them. Second, Plaintiffs ignore Gustafson v. Alloyd Co., 513 U.S. 561 (1995) and assert that Section 12(a)(2) governs the Marlin Offering Memoranda. The memoranda, however, are not prospectuses and are therefore not subject to Section 12(a)(2), the First Amended Complaint does not allege that the offering was public, and the memoranda themselves demonstrate that the offering was private. Finally, since no plaintiff purchased Marlin Notes, Plaintiffs cannot allege that BAS sold 6.19% or 6.31% Marlin Notes to Plaintiffs or solicited Plaintiffs' purchase of such Notes.

Plaintiffs also fail to undermine BAC's showing that the control person claims against it pursuant to Section 15 of the 1933 Act are deficient and should be dismissed. In their Opposition, Plaintiffs rely on the wholly conclusory allegation that BAC is the corporate parent of BAS but are unable to point to any facts in the First Amended Complaint that show that BAC possessed the power to control BAS or how its ownership of BAS gave it the power to direct or cause the direction of the management and policies of BAS. They also fail to allege facts to show that BAC actually controlled BAS, or that it culpably participated in the alleged wrongdoing of BAS. Indeed, Plaintiffs' control person allegations against BAC are essentially identical to those asserted against the other bank holding company defendants. In addition, since they are derivative of the claims against BAS, those claims should be dismissed both because they are time-barred and, as to the Section 12(a)(2) claim, because Plaintiffs fail to plead a primary violation against BAS with respect to the Marlin transaction. Finally, Plaintiffs' assertions that this Court already decided the control person argument when it ruled on BAC's real party in interest motion, and that the proper pleading of a control person claim is an issue of fact, demonstrate nothing more than Plaintiffs' misunderstanding of the different issues and standards relevant on motions pursuant to Federal Rules of Civil Procedure 56 and 12(b)(6).

POINT I

PLAINTIFFS CANNOT ESTABLISH THAT THE CLAIMS AGAINST BAS AND BAC IN THE FIRST AMENDED COMPLAINT ARE TIMELY

A. As This Court has Already Determined, The Sarbanes-Oxley Act Does Not Apply to the *Newby* Action

Notwithstanding Plaintiffs' arguments to the contrary, the change in the statute of limitations effectuated by the Act does not apply to this case. Indeed, this Court has already so concluded. In re Enron Corp. Sec., Derivative & ERISA Litig., 258 F. Supp.2d 576 (S.D. Tex. 2003). In that decision, the Court stated that under Sarbanes-Oxley, "the limitations period for such causes of action for securities laws has been amended and increased to the earlier of two years after discovery of the violation or five years after the violation occurred, for ***suits*** commenced on or after July 30, 2002. This amended limitations period does not apply to *Newby*." Id. at 601 n.20 (emphasis added). Notably, the Court used the term "suits" in place of the term "proceedings" used in the Act, thereby equating a "proceeding" with a "suit." The Court also declared that the amended limitations period is inapplicable to Newby as a whole, not any single stage or specific aspect of it. In a desperate attempt to avoid application of the one year/three year statute of limitations to the First Amended Complaint, Plaintiffs now contend that the Court's March 12, 2003 determination was dictum. Even if Plaintiffs were correct that it was dictum, the Court still made such a determination and should make the same determination now.

1. The Limitations Period in the Sarbanes-Oxley Act Does Not Apply Because The First Amended Complaint is not a "Proceeding Commenced on or After" its Enactment of the Sarbanes-Oxley Act

The new statute of limitations in the Sarbanes-Oxley Act does not apply to actions pending on the date the Act was enacted – July 30, 2002 – but only to new actions commenced on or after that date. Section 804(b) of the Act provides:

> The limitations period provided by Section 1658(b) of Title 28, United States Code, as added by this section, shall apply to all *proceedings* addressed by this section that are commenced on or after the date of enactment of the Act.

Id. § 804(b) (emphasis added).

The First Amended Complaint is simply an amendment to the pending Newby case, suit, action or proceeding. It is not a separate and distinct case, suit, action or proceeding commenced on or after the Sarbanes-Oxley Act became law. Plaintiffs cannot take advantage of the longer statute of limitations available under the Act by filing an amendment and calling it a new "proceeding" under the Act. The definition of "proceeding," the caselaw, the legislative history of the Act and plain logic all dictate against Plaintiffs' argument.

a. The Definition of "Proceeding" Does Not Support Plaintiffs' Argument

The first definition of "proceeding" in Black's Law Dictionary states that a "proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary 1221 (7th Ed. 1999). See also Black's Law Dictionary 1368 (4th Ed. 1968) ("The word may be used synonymously with 'action' or 'suit' to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the bill until the entry of the final judgment. . . . Gonzales v. Gonzales, 240 Mass. 159, 133 N.E. 855, 856").

Black's similarly defines "action" as "[a] civil or criminal judicial ***proceeding***." Black's Law Dictionary 28 (7th Ed. 1999) (emphasis added). "Suit" is defined as "[a]ny ***proceeding*** by a party or parties against another in a court of law." Id. at 1448 (emphasis added). "Case" is defined as "[a] ***proceeding,*** action, suit or controversy at law or in equity." Id. at 206. These definitions establish that a proceeding is synonymous with an action, suit or case. It is the entire action from start to finish, from initial complaint to final judgment; each individual step in the proceeding, action, case or suit is not a separate "proceeding."

b. Plaintiffs' Argument is not Supported by the Caselaw

Plaintiffs cannot take advantage of the longer statute of limitations available under the Act by filing a "new" case that in reality is only an amendment to a pending case. Courts have repeatedly held that a plaintiff with a pending case cannot file a new complaint to accomplish that which it could not do by amending its pending complaint. Thus, "[p]laintiffs may not file duplicative complaints in order to expand their legal rights." Curtis v. Citibank, N.A., 226 F.3d 133, 140 (2d Cir. 2000) (affirming district court's dismissal of a second suit based on an amendment which plaintiff feared the court would not allow in his first suit); Serlin v. Arthur Andersen & Co., 3 F.3d 221, 223-224 (7th Cir. 1993) (finding no abuse of discretion in dismissing a second complaint despite the possibility that the first would be dismissed for untimely service); Oliney v. Gardner, 771 F.2d 856 (5th Cir. 1985) (dismissing second suit in which plaintiff sought nothing more than to amend allegations in the initial action relating to diversity jurisdiction); Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) (filing of second complaint would not be allowed to result in greater right to trial by jury, where plaintiff filed the second complaint to evade waiver of jury trial in her first complaint).

The Supreme Court has also made clear that a plaintiff with a case pending cannot simply file a new case to take advantage of a change in the law, where Congress has made it clear that the new law was not intended to apply to pending cases. See Central Trust Co. v. Official Creditors' Committee of Geiger Enters., Inc., 454 U.S. 354 (1982). In Central Trust, a debtor filed a Chapter 11 petition under the Bankruptcy Act of 1898 and a few weeks later the Bankruptcy Act of 1978 (the "'78 Act") was passed. The debtor apparently wanted to take advantage of the new act. The language of the '78 Act, however, made it clear that it did not apply to pending cases. Thus, the debtor voluntarily dismissed his action and brought a "new" one. The Supreme Court concluded that because the debtor's case was already pending and because the new act applied only to actions commenced after the date of enactment, he could not simply refile it in order to benefit from the changes in the act. Id. at 359-60.

Like the plaintiffs in those cases, Plaintiffs in this case cannot file an amended complaint or a separate action and call it a new "proceeding" to take advantage of the extended limitations period when Congress clearly intended that the extended limitations period of the Sarbanes Oxley Act not apply to pending cases. The First Amended Complaint is not a "proceeding . . . commenced on or after the date of the enactment" of the Act within the meaning of Section 804. Rather, it is an amendment to a pending proceeding that was filed prior to the effective date of the Act.

In Gerber v. MTC Electronic Technologies Co., 329 F.3d 297 (2d Cir. 2003), the Second Circuit confronted an issue analogous to the one before this Court. Non-settling defendants in a securities class action argued that bar orders must be mutual for the ***claims*** of nineteen plaintiffs who were added to the case by amendment after the effective date of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Section 108 of the PSLRA provides that the PSLRA's provisions relating to settlement "shall not affect or apply to any private ***action*** [brought under the 1934 Act] commenced before and pending" on December 22, 1995 (emphasis added). Pub. L. No. 104-67, § 108 (1995), 109 Stat. 758; 15 U.S.C. § 77l, Note, Effective and Applicability Provisions. As the Second Circuit explained, amending the complaint to add new parties did not create a new ***action*** and, thus, the PSLRA's settlement provisions did not apply to the claims of the newly added parties:

> This statutory language refers to "actions" not to "claims." We agree with the district court's conclusion that the "action" here was commenced when the complaint was filed on January 23, 1995. See Fed. R. Civ. P. ("A civil action is commenced by filing a complaint with the court."). ***Amending the complaint, even to add additional plaintiffs, did not create a new action. In the absence of any indication to the contrary, we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint.***

Id. at 309-310 (emphasis added; citation omitted). The construction of Sarbanes-Oxley urged by Plaintiffs would have precisely the effect the Gerber court warned against – it would apply different substantive and procedural rules to identical claims in a single action based solely on when the claim was asserted. See also McKowan Lowe & Co. v. Jasmine, Ltd., 976 F. Supp. 293 (D.N.J. 1997) (discovery stay did not apply to defendant added by second amended complaint after effective date of the PSLRA).

Instead of the reasoned approach adopted by the court in Gerber, Plaintiffs rely on the flawed reasoning applied by the court in Friedman v. Rayovac Corp., No. 02-C-308-C (W.D. Wis. May 29, 2003). (Ex. 2 to Plaintiffs' Appendix). Friedman held that an amended complaint adding a new defendant in January 2003 to consolidated cases filed before July 31, 2002 was a "proceeding" commenced on or after the effective date of the Act. Order at 22. According to the court, "serving an additional party with the complaint commences a new 'proceeding', even if the new claim is part of a lawsuit that was filed previously. . . ." Id. at 23. The court's reasoning that its result was consistent with Fed. R. Civ. P. 3, under which "[a] civil action is commenced by filing a complaint with the court", and Fed. R. Civ. P. 15, governing relation-back of amendments, defies logic and would allow plaintiffs to make an end-run around the Federal Rules as well as the Sarbanes-Oxley Act. Id. at 22-23. Also illogical is the court's rationale that the plaintiffs could simply have filed a separate action "in which case there would have been no dispute over the application of the new statute of limitations." Id. at 23.

Under both Friedman and Plaintiffs' reading of the Act, two different statutes of limitations would apply to a single claim in a single "case" or "proceeding." Defendants named before July 30, 2002 would be subject to a three year statute of limitations, while defendants named on or after July 30, 2002 would be subject to a five year limitations period. As a result, some Bank Defendants would be subject to a three year statute of limitations, while their own subsidiaries, which were added more than one year later, would be subject to a five year statute of limitations. There is no legal or logical support for this position. Besides being illogical, this view is inconsistent with the applicable law discussed above, the plain meaning of the term "proceeding," and the legislative intent behind Sarbanes-Oxley.[1]

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[1] Plaintiffs' other authority is either inapposite or supports BAS's position. See De La Fuente v. DCI Telecommunications, 259 F. Supp .2d 250, 258 n.5 (S.D.N.Y. 2003) (Opp. at 8-9) (imposing sanctions and dismissing complaint filed before July 30, 2003 because "the statute of limitations established by the Sarbanes-Oxley Act applies only to *proceedings* commenced on or after July 30, 2002") (emphasis added). Cmty. Foundation for Jewish Education v. Federal Insurance Co., 16 Fed. Appx. 462, 467 (7th Cir. 2001), Opp. at 9, has no bearing on the issue at bar. That case involved the meaning of the term "claim[s] first made," an insurance concept specific to the law of insurance coverage. Roberts v. Dean Witter Reynolds, Inc., No. 8:02-CV-2115-T-26 EAJ, 2003 U.S. Dist. LEXIS 5676 (M.D. Fla. Mar. 14, 2003), in which the court retroactively applied Sarbanes-Oxley to revive a claim that had expired before

For the same reason that amending the complaint to add new plaintiffs in Gerber did not create a new "action," amending the Consolidated Complaint in Newby to add new defendants did not create a new "proceeding." Accordingly, the First Amended Complaint should be dismissed.

c. The Legislative History of Sarbanes-Oxley Makes Clear that the Act Does Not Apply to Pending Actions

Even assuming *arguendo* that the text of the Act is ambiguous, the legislative history establishes that the Act does not apply to pending securities actions. In his remarks during debate on the Leahy Amendment extending the limitations period, Senator Gramm stated:

> [S]urely everybody understands that our system has no ex post facto laws. So if ***the provision raising that statute of limitation*** to 5 years became law, it ***would have no effect on anybody who has committed one of these violations*** about which we are talking.

148 Cong. Rec. S6537 (daily ed. July 10, 2002) (statement of Sen. Gramm) (emphasis added).

Similarly, in floor debate on July 15, 2002, Senators Murray and Hatch made clear that the extended limitations period is forward-looking in its applicability. Senator Murray stated:

> Congress cannot restore the jobs and retirement savings caused by this wave of corporate and auditing scandals. ... We need to work to prevent ***future*** scandals . . . . During last week's debate I voted

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the Act's effective date, is inapposite as this motion does not relate to the retroactive application of Sarbanes-Oxley. Moreover, the decision would mandate the absurd result that a four-year old claim asserted on July 29, 2002 (the day before the effective date of the Act) would be time-barred, while the same claim, filed by a more dilatory plaintiff one day later, would be deemed timely. Roberts is also contrary to well-established authority that a statute extending a period of limitations will not be deemed to revive claims that were time-barred before the statute was enacted unless the statute expressly states a clear intent to revive such claims. See, e.g. Resolution Trust Corp. v. Seale, 13 F.3d 850, 853 (5th Cir. 1994) ("Subsequent extensions of a limitations period will not revive barred claims in the absence of a clear expression of contrary legislative intent."). This "clear statement" requirement ensures that Congress has affirmatively considered the potential unfairness of retroactive application and actually decided that it is an acceptable price to pay for the countervailing benefits. Landgraf v. USI Film Prods., 511 U.S. 244, 272-73 (1994). Section 804(b) of Sarbanes-Oxley does not come close to the "clear statement" required before a newly-extended limitations period will be held to revive already time-barred claims. To the contrary, the statute says nothing whatsoever about reviving time-barred claims. The Roberts court erred by equating the absence of language forbidding retroactivity to an affirmative determination by Congress that the statute revives lapsed claims. Landgraf, 511 U.S. at 280.

> for three amendments, including an amendment by Senator Leahy, that would close gaps in current law.

148 Cong. Rec. S6758 (daily ed. July 15, 2002) (statement of Sen. Murray) (emphasis added).

Likewise, Senator Hatch stated:

> I also supported Senator Leahy's amendment, a measure I worked to improve in committee. This amendment includes new criminal and civil provisions that I believe will also assist in deterring and punishing ***future*** corporate wrongdoing.

148 Cong. Rec. S6762 (daily ed. July 15, 2002) (statement of Sen. Hatch) (emphasis added).

Plaintiffs gloss over the question of whether the Act applies to pending actions by intentionally conflating statements regarding the *causes of action* to which the Act applies with the *actions* to which it applies. They state that the legislative history "unequivocally indicates Congress intended Sarbanes-Oxley apply to *all* private securities *causes of action* filed after the date of the Act's enactment" (Opp. at 10; emphasis added), instead of to all *proceedings* filed after that date. By so stating, Plaintiffs attempt to graft statements regarding the Act's application onto the Act's plain language and thereby enlarge its scope, making it applicable to claims or causes of action filed after its effective date instead of actions, suits or proceedings filed after that date.

Moreover, the legislative history of the Act is not unambiguous or unequivocal, as Plaintiffs contend. They suggest that statements from the legislative debate on Sarbanes-Oxley referring to losses experienced by Enron investors evince Congressional intent to extend the limitations period for those investors, despite the clear statements that the Act is not intended to apply to past violations. Admittedly, the legislative history of Sarbanes-Oxley contains multiple references to Enron and other accounting scandals, and it is clear that the Act was passed to prevent such scandals from reoccurring in the future. However, Plaintiffs misinterpret these references, arguing that they demonstrate Congressional intent to extend the statute of limitations to investors of those companies in pending lawsuits.

Even Senator Patrick Leahy, a sponsor of the amendment extending the limitations period and on whose statements Plaintiffs heavily rely, stated six days before the Act was signed by President Bush that "[In the Act] we extend the statute of limitations in security-fraud cases -- something that *would've* helped so many people who were defrauded by Enron and others." Federal News Service, Conference Report on Corporate Responsibility Legislation, July 24, 2002, available at LEXIS, News Library, Federal News Service file (emphasis added). Senator Leahy also stated that "In Washington State alone, the short statute of limitations may cost [investors]... nearly $50 million in lost Enron investments which *they can never recover*." Legislative History of Title VIII of HR 2673: The Sarbanes Oxley Act of 2002, 107th Cong., 148 Cong. Rec. 7418 (2002) (emphasis added). In short, Senator Leahy's remarks do not support Plaintiffs' argument. His section-by-section analysis[2] of the Act echoes the clear text of the statute, stating that the limitations extension applies only to proceedings "***filed after*** the effective date of the Act." 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy) (emphasis added).

2. Sarbanes-Oxley Does Not Apply to Claims Under the 1933 Act That Do Not Sound in Fraud

Section 804(a) of the Act provides in relevant part:

> [A] private right of action that involves ***a claim of fraud, deceit, manipulation, or contrivance*** in contravention of a regulatory requirement concerning the securities law, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47), may be brought not later than the earlier of
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> (1) 2 years after the discovery of the facts constituting the violation; or

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[2] Relying on In re Gibbons, 289 B.R. 588, 594-5 & n.12 (Bankr. S.D.N.Y. 2003), Plaintiffs assert that courts frequently give "substantial weight" to section-by-section analyses in determining legislative intent. None of the four cited by Gibbons, however, states that section-by-section analyses are to be given substantial weight. In the Fifth Circuit, section-by-section analyses are not dispositive of legislative intent. See United States v. Mejia-Orosco, 868 F.2d 807, 809-10 (5th Cir. 1989) ("Legislative history is not like the text of the statute, voted upon by both houses of Congress, then signed by the President, and so an authoritative expression of the law. Legislative history cannot be used to distort the plain text of the statute. Moreover, a particular passage may represent no more than a single member's opinion. We will not give such a passage dispositive import absent any indication that it represented the views of Congress as a whole."); see also Landgraf, 511 U.S. at 262 (with respect to a section-by-section analysis, the Court opined: "The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.").

(2) 5 years after such violation.

28 U.S.C. § 1658(b) (emphasis added).

Plaintiffs emphasize that the 1933 Act is contained in the definition of "securities laws" in Section 3(a)(47) of the 1934 Act but ignore the language in Section 804(a) of Sarbanes-Oxley that restricts the new limitations period to claims of "fraud, deceit, manipulation, or contrivance" in connection with an alleged violation of the securities laws. See Act § 804(b); see also Public Company Accounting Reform and Investor Protection Act of 2002, 103rd Cong. 148 Cong. Rec. 6524 (July 10, 2002) (Statement of Sen. John McCain) ("This amendment also extends the current statute of limitations for matters concerning securities *fraud, deceit or manipulation*.") (emphasis added). The extended limitations period does not apply to the newly added claims against BAS and BAC because those claims do not allege, fraud, deceit, manipulation or contrivance.[3]

In the First Amended Complaint, Plaintiffs assert claims against BAS and BAC under Sections 11 and 12 (a)(2), and 15, respectively, of the 1933 Act. FAC ¶¶ 1005-1008, 1013-1015; 1016. The Section 11 claim against BAS and the Section 15 claim against BAC in the First Amended Complaint expressly disclaim any allegation of fraud. FAC ¶ 1005 (". . . . For purposes of this claim, Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on claims of strict liability and/or negligence under the 1933 Act."). Although the First Amended Complaint's claim for relief alleging the Section 12(a)(2) claim against BAS and the corresponding Section 15 claim against BAC does not contain a similar express disclaimer, it does allege that "Plaintiffs assert negligence claims in this Claim for Relief." In addition, the claims against BAC alleging a scheme to defraud were dismissed by the Court in its December

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[3] Some courts have flatly held that the extended limitations period under Section 804 of the Act does not apply to 1933 Act claims. See In re Merrill Lynch & Co. Research Reports Sec. Litig., -- F. Supp. 2d --, No. 02 MDL 1484, 2003 WL 21518833, at *19 (S.D.N.Y. July 2, 2003) (claims under §§ 11 or 12 of the 1933 Act must be brought within one year of discovery, but for claims arising under § 10(b) of the 1934 Act "brought after the enactment of the Sarbanes-Oxley Act, the applicable statute of limitations is two years" from discovery).

20, 2002 Order, and Plaintiffs have expressly stated that they are no longer pursuing those claims against "BankAmerica." FAC ¶ 104 n. 7.[4]

Because the Section 11, 12(a)(2) and 15 claims against BAS and BAC do not sound in fraud, deceit, manipulation, or contrivance, the Act's extended statute of limitations does not apply to those causes of action.[5] Therefore, as demonstrated below, Plaintiffs' Sections 11, 12(a)(2) and 15 claims are time-barred under the 1933 Act and must be dismissed.

B. Plaintiffs Have Not Rebutted the Showing by BAS and BAC that the Claims Against Them in the First Amended Complaint are Time-Barred

1. BAC and BAS Are Not Equitably Estopped From Raising the Statute of Limitations

Plaintiffs argue that even if the one-year statute of limitations applied, equitable estoppel precludes the Bank Defendants from asserting the statute of limitations because their "'conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period.'" Opp. at 14 (quoting Tyler v. Union Oil Co., 304 F.3d 379, 391 (5^{th} Cir. 2002)).[6] Plaintiffs' estoppel argument is premised on the theory that they delayed filing the First Amended Complaint because certain Bank Defendants, including BAC, waited three months to file summary judgment motions after the Court, on January 27, 2003, directed them to do so. According to Plaintiffs, the Bank Defendants thereby "induced the timing of Lead Plaintiff's amendment by failing to timely object on the basis that the bank's subsidiaries were real parties in interest." Opp. at 15.

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[4] In re Gibbons, 289 B.R. 588 (Bankr. S.D.N.Y. 2003) (Opp. at 7), did not hold that the extended statute of limitations period applies to all Section 11 claims regardless of whether they sound in fraud. The court opined that "Section 804 of the Act *extends the limitations period for commencing claims for fraud* under the Federal securities laws, but it is specifically stated that the section is not applicable to *actions* pending on the date of the enactment." Id. at 594 (emphasis added). Thus, the Gibbons court both recognized that the extended limitations period was limited to fraud claims and equated the term "proceedings" with "actions."

[5] Nor, as a result, is there any fact question as to whether the securities offerings were fraudulent, as Plaintiffs suggest. Opp. at 7. Their suggestion to the contrary is a red herring.

[6] Tyler, an age discrimination case brought under the ADEA, not a securities case subject to the 1-year, 3-year statute of limitations, is inapposite. The Fifth Circuit explained that "'[t]he filing deadline is subject to equitable modification, i.e tolling or estoppel, when necessary to effect the remedial purpose of the ADEA.'" Id. at 391 (citation omitted).

Plaintiffs' estoppel argument is meritless for numerous reasons. To begin, the one-year statute of limitations had already run by January 27, 2003. The estoppel theory fails on that threshold basis alone.

Even if the statute of limitations had not run, however, Plaintiffs do not meet the two requirements for invoking equitable estoppel. "In order to invoke equitable estoppel, plaintiffs must show that: '(1) the defendant made a definite misrepresentation of fact, and had reason to believe that the plaintiff[s] would rely on it; and (2) the plaintiff[s] reasonably relied on that misrepresentation to [their] detriment.'" Friedman v. Wheat First Sec. Inc., 64 F. Supp. 2d 338, 346 (S.D.N.Y. 1999) (quoting Buttry v. Gen. Signal Corp., 68 F.3d 1488, 1493 (2d Cir. 1995) (citing Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984)). Plaintiffs do not assert either that BAS made a misrepresentation of fact or that they reasonably relied on any such misrepresentation. Thus, Plaintiffs' argument fails on that basis as well.

In addition, Plaintiffs' theory that BAC's conduct induced them to delay filing the First Amended Complaint is disingenuous for several reasons. First, as discussed in the Moving Brief, BAC's very first argument in its motion to dismiss the Consolidated Complaint was that Plaintiffs had not named the appropriate party and that it was BAS, the investment banking subsidiary, not BAC, that was involved in the transactions at issue. BAC's motion to dismiss was filed on May 8, 2002, more than eight months before the Court's January 2003 order to file summary judgment motions. In their opposition to Bank of America Corporation's Memorandum of Law in Support of its Motion to Dismiss the Complaint ("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, rather than inducing Plaintiffs not to sue BAS, BAC advised them that they had sued the wrong entity and Plaintiffs chose not to sue BAS until May 2003, more than one year later.

Second, by letter dated September 20, 2002, Lead Counsel for Lead Plaintiff wrote to BAS to advise it that "[o]ur continuing investigation reveals a basis for naming Banc of America Securities LLC as a defendant" and request that BAS enter into a tolling agreement or "we will have to name Banc of America Securities LLC as a defendant on or before October 16, 2002." The letter stated in relevant part:

> Our continuing investigation reveals a basis for naming Banc of America Securities LLC as a defendant. While we believe that the Sarbanes-Oxley legislation extends the statute of limitations to two years from the date of actual knowledge of a claim, there exists the possibility that ***a defendant could argue that the statute of limitations expires in mid-October of this year***. ***Thus***, in an abundance of caution, ***absent a tolling agreement*** signed by Banc of America Securities LLC, ***we will have to name Banc of America Securities LLC as a defendant on or before October 16, 2002***.

September 20, 2002 Letter from James I. Jaconette of Milberg Weiss Bershad Hynes & Lerach to Registered Agent for Banc of America Securities LLC ("September 20, 2002 Milberg Letter") (emphasis added). A copy of the letter is attached as Exhibit 1 to the Appendix To Reply Memorandum of Law In Further Support of Defendant Bank of America Corporation and Banc of America Securities LLC's Motion to Dismiss the First Amended Consolidated Complaint ("Reply Appendix"). BAS declined the request to enter into the proposed tolling agreement and, for reasons known only to them, Lead Plaintiff and its counsel failed to carry out their threat to sue BAS by October 16, 2002. It is clear, though, that no conduct of BAC or directive of the Court induced Lead Plaintiff's inaction.

Third, Plaintiffs' suggestion that they "relied on the Court's schedule and the Bank Defendants' silence in deciding when to amend the Consolidated Complaint" (Opp. at 15) rings hollow because the Court's earlier schedule and orders did not stop Lead Plaintiff from filing the *Pulsifer* complaint on August 9, 2002, allegedly due to statute of limitations concerns.

Plaintiffs' Opposition to Certain Defendants' Motion to Strike the Pulsifer Complaint, dated October 17, 2002, at 2. Indeed, when certain defendants argued that the *Pulsifer* Complaint violated the Court's scheduling orders and constituted "an impermissible unauthorized amendment" to the Consolidated Complaint, Lead Plaintiff argued that "[n]one of the prior Orders of this Court bars The Regents or any other plaintiff from filing complaints to avoid the running of a statute of limitations, and any such result would be illogical." Id. Plaintiffs continued, "[t]here is nothing in the August 5, 2002 Order, or other Orders of this Court, that would require claimants to defer the filing of valid claims, while statutes of limitations run, pending the determination of the motions to dismiss." Id. at 5.

In sum, Plaintiffs were advised by BAC at the earliest opportunity that they had named the wrong entity, they had numerous subsequent opportunities to file an amended complaint naming BAS, they had threatened to do so months earlier and, in fact, did file the Pulsifer complaint against BAC and others when they felt it was necessary to do so because of statute of limitations concerns. In the face of these inconsistencies, Plaintiffs' suggestion that they waited eight months for the Court's permission to file the First Amended Complaint is specious, particularly because that complaint contained amendments about which Plaintiffs had expressed concerns in their September 20, 2002 letter to BAS might be time-barred. Similarly implausible is Plaintiffs' assertion that they were induced by either BAC, BAS or the Court not to file the First Amended Complaint earlier. Moreover, Plaintiffs have failed to assert either of the elements of equitable estoppel. Accordingly, Plaintiffs' argument that BAC and BAS are estopped from raising the statute of limitations should be rejected out of hand.[7]

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[7] Although Plaintiffs rely on the theory of equitable estoppel, they undoubtedly meant to assert equitable tolling. Plaintiffs, however, cannot avail themselves of either doctrine. As one court has explained:

> [T]he difference between these two theories is that unlike equitable tolling, equitable estoppel "is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an *admittedly untimely action*

2. Plaintiffs Essentially Concede that they Failed to File their Claims Against BAS and BAC Within the Applicable Statute of Limitations Period

As discussed in the Moving Brief, the statute of limitations for causes of action under Sections 11 and 12 is set forth in Section 13 of the 1933 Act, which provides:

> 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.

15 U.S.C. § 77m (2003) (emphasis added). The applicable statute of limitations for the Section 15 control person claims is the same. See Moving Brief at 9. The inquiry notice standard -- that claims must be brought within one year after the discovery of the untrue statement or omission or after such discovery should have been made by the exercise of reasonable diligence – is expressly set out in the statute. Thus, Plaintiffs' attempt to undermine Reed v. Prudential Sec. Inc., 875 F. Supp. 1285 (S.D. Tex. 1995), and other cases relied on by BAS because they were decided before Lampf, or rely on pre-Lampf cases is unavailing. Opp. at 14. Reed and other cases cited by BAS, construe the language of Section 13 and/or are 1933 Act cases. See Reed, 875 F. Supp. At 1290; Moving Brief at 8-10.[8]

> because his conduct has induce another into forbearing suit within the applicable limitations period."

Del Sontro v. Cendant Corp., 223 F. Supp.2d 563, 571 (D. N.J. 2002), quoting Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978) (emphasis added). Thus, by asserting equitable estoppel, Plaintiffs concede that their amendment is untimely. Presumably, they do not intend to make that admission. Even if they had asserted equitable tolling instead, their reliance on that theory would also have been futile. In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991), the Supreme Court unambiguously stated that "the equitable tolling doctrine is fundamentally inconsistent with the 1- and 3-year structure." The Court explained that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling." Id. at 363.

[8] Plaintiffs argue that the cases cited by the Bank Defendants applying the inquiry notice standard are inapplicable to Plaintiffs' claims under Rules 10b-5(a) & (c). This assertion has no bearing on BAC and BAS since the First Amended Complaint does not assert claims against them under Section 10(b). See FAC ¶ 104, n.7.

Plaintiffs assert that although they might have been on notice of Enron's fraud in the late fall of 2001 the Bank Defendants' conduct did not come to light until much later. This argument is weak at best. Plaintiffs essentially concede, in their September 2002 letter to BAS requesting that BAS enter into a tolling agreement, that the statute of limitations began to run as to BAS on October 16, 2001, when 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.*" FAC ¶ 61 (emphasis in original). As previously stated, counsel for Lead Plaintiff wrote:

> Our continuing investigation reveals a basis for naming Banc of America Securities LLC as a defendant While we believe that the Sarbanes-Oxley legislation extends the statute of limitations to two years from the date of actual knowledge of a claim, there exists the possibility that ***a defendant could argue that the statute of limitations expires in mid-October of this year***. ***Thus***, in an abundance of caution, ***absent a tolling agreement*** signed by Banc of America Securities LLC, ***we will have to name Banc of America Securities LLC as a defendant on or before October 16, 2002.***

September 20, 2002 Milberg Letter (emphasis added).

Plaintiffs obviously thought there was a strong argument that they were on inquiry notice in October 2001 as to the alleged conduct of BAS or they would not have threatened to sue BAS in the absence of a tolling agreement. Indeed, Plaintiffs' letter could be construed as a concession that they were on inquiry notice in October 2001, and the only open issue was whether that inquiry notice was subject to a one-year or two-year limitations period depending on Plaintiffs' ability to claim the benefit of the extended period under the Sarbanes-Oxley Act, *i.e.* – whether the statute ran in October 2002 or 2003. As discussed above, the Act does not apply to the First Amended Complaint and, accordingly, the limitations period expired in October 2002, seven months before Plaintiffs filed their amended pleading.

Although Plaintiffs argue that they could not have been on notice of the conduct of certain of the other Bank Defendants until much later than October, 2001, they are notably silent as to BAS. Opp. at 16-17. Nor do Plaintiffs address the arguments set forth in the Moving Brief demonstrating why they had both inquiry and actual notice more than one year before they filed the Consolidated Complaint in April 2002. They fail to explain how they were not on notice of facts supporting potential claims involving other Enron or Enron-related offerings, as well as the participants in those offerings, in November, 2001, when Enron announced it was restating its financial results for 1997 through 2000. Plaintiffs' failure to explain is particularly implausible because 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. "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." In re Com. Oil/Tesoro Petroleum Sec. Litig., 484 F. Supp 253, 257 (D. Tex. 1979); see also Del Sontro, 223 F. Supp. 2d 563.

Plaintiffs also choose to ignore the showing by BAC and BAS that by the time the Consolidated Complaint was filed on April 8, 2002, Plaintiffs had actual notice of their potential claims against BAS, although they had already been on inquiry notice for five months. The Consolidated Complaint, which described 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) (emphasis added), 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.

Since 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, 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. Plaintiffs do not address any of these arguments. Accordingly, all of the claims asserted against BAS and BAC in the First Amended Complaint are time-barred and should be dismissed.

C. Plaintiffs Have not Demonstrated that Their Claims Against BAS Relate Back to the Consolidated Complaint Under Rule 15(c)(3) Because They Cannot Satisfy the Mistake Requirement

In arguing that its newly-asserted claims against BAS relate back to the Consolidated Complaint, Plaintiffs employ two tactics to divert the Court's attention from the crux of the relation back issue, which is whether they have satisfied the mistake requirement of Rule 15(c)(3).

First, Plaintiffs argue that Rule 15(c) should be applied liberally because "the purpose of the federal rules 'is to do justice.'" Opp. at 18-19.[9] Second, they devote an inordinate amount of space arguing that BAS had notice of the action against BAC and thus will not be prejudiced by its belated addition to this action. See, e.g., Opp. at 19-24, 34-35. Both of these diversionary tactics are thinly-veiled attempts to have the Court disregard the plain requirements of Rule 15(c)(3). The Court should ignore these red herrings.

The requirements of Rule 15(c) were drafted in an effort to balance the goal of promoting decisions on the merits with the policy considerations underlying statutes of limitations. See generally Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 Mich. L. Rev. 1507, 1511-12 (June 1987). Thus, to the extent that the Court seeks to do justice on this motion, it should do so by enforcing the requirements of Rule 15(c), which were the product of careful consideration of those countervailing policies. See Powers v. Graff, 148 F.3d 1223, 1226 (11th Cir. 1998) ("When relation back is too liberally

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[9] Citing FDIC v. Bennett, 898 F.2d 477, 480 (5th Cir. 1990); Shores v. Arkansas Valley Envtl. & Util. Auth., No. 77-G-0604-S, 1980 U.S. Dist. LEXIS 10979, at *14 (N.D. Ala. Mar. 28, 1980) and Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966)). In Bennett, the Court addressed the application of Rule 15(c)(2), pursuant to which the plaintiff sought to add a new claim against an originally-named defendant, which claim the Court found to arise out of the same transactions, events or occurrences as the original claims. That section of Rule 15(c) is not at issue on this motion. Both Shores and Surowitz involve the application of Rule 23, not Rule 15(c).

allowed the important policy reasons for limitations periods are circumvented."); 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.").

Further, Rule 15(c)'s "language *expressly* calls for a double inquiry," which separately addresses the "issues of nonprejudicial 'notice' and of 'mistake.'" Woods v. Indiana Univ.-Perdue Univ., 996 F.2d 880, 887 (7th Cir. 1993) (emphasis in original) ("Certainly Rule 15(c)'s language does not call for . . . treatment" of the nonprejudicial notice and mistake requirements as "inextricably intertwined."); see also Jacobsen v. Osborne, 133 F.3d 315, 320-321 (5th Cir. 1998) (After determining that new claims "arose out of the 'occurrence' set forth in the original complaint. . . . Therefore the 'notice' and 'mistake' clauses in subpart (3) come into play. Both must be satisfied."); Cornwell v. Robinson, 23 F.3d 694, 705 (2d Cir. 1994) (rejecting relation back argument where the mistake requirement had not been met, after "express[ing] no view" regarding the nonprejudicial notice requirement).

BAS did not address the issue of nonprejudicial notice in its Moving Brief, because Plaintiffs plainly had failed to meet the mistake requirement of Rule 15(c)(3)(B).[10] See, e.g., Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999) ("We discuss only the mistake requirement of Rule 15(c)(3), because where that showing is not made there can be no relation back regardless of whether other requirements, such as notice and lack of prejudice to the joined party, are met."). Thus, the question of whether BAS received notice and whether it will suffer

[10] Moreover, BAS does not dispute that it had notice of the action against BAC. Rather, BAS disputes that it knew that it was not named earlier due to Plaintiffs' mistake, as Plaintiffs must establish to meet Rule 15(c)(3)(B). Plaintiffs address this argument by BAS (Moving Brief at 17-18) simply by asserting that "it is highly improbable that defendants did not reasonably expect to be sued in due course after the correct identities of the culpable entities were learned." Opp. at 25. To the contrary, as explained in the Moving Brief, it was perfectly reasonable for BAS not to expect to be named after BAC advised Plaintiffs that BAS was the appropriate entity and Plaintiffs rejected that notion. Moving Brief at 16, 17-18. See also Plaintiffs' Opposition to BAC's Motion to Dismiss at p. 3 n. 6. In addition, the fact that BAS included a discussion of the Enron litigation in its December 2002 Statement of Financial Condition was plainly an error. Except for the word "Company", the disclosure is identical to the disclosure in BAC's 10K, which refers to the "Corporation."

prejudice from its belated addition to this action are irrelevant to BAS's motion (as are the 10 pages of argument that Lead Plaintiff devotes to these issues in its Opposition).

The only relevant question before the Court on BAS's motion is whether Plaintiffs have met their burden under Rule 15(c)(3)(B) to demonstrate that BAS "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." Because Plaintiffs have failed to and cannot make this showing, the newly-added claims against BAS do not relate back to the date of the Consolidated Complaint, and must be dismissed as time-barred.

As discussed in the Moving Brief, under Rule 15(c)(3), Plaintiffs must demonstrate that it knew the identity of BAS, intended to name it in the Consolidated Complaint, and mistakenly failed to do so. See Moving Brief at 15 (citing Kemp Indus., Inc. v. Safety Light Corp., Civ. A. No. 92-95 (AJL), 1994 WL 532130, at *12 (D. N.J. Jan. 25, 1994) ("In accordance with the language and purpose of Rule 15(c)(3) . . . courts have repeatedly held that . . . 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.'" (quoting Jordan v. Tapper, 143 F.R.D. 567, 574 (D. N.J. 1992)); see also Kilkenny, 800 F.2d at 857.

In an effort to meet their burden, Plaintiffs vacillate between arguing that (i) they were not aware of the identities of the culpable bank subsidiaries, including BAS, and (ii) they named BAS to "correct a potential mistake of legal identity."[11] The relation back doctrine is not available to Plaintiffs under either theory.

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[11] Plaintiffs also claim that, with respect to certain banks, they were aware of the culpable subsidiary but mistakenly named a different subsidiary or the parent company. Opp. at 24. Because this claim is not made with respect to BAS, it is not addressed herein. See id. at 26 (chart indicating that Citibank, CSFB, CIBC, Merrill Lynch and Barclays, but not BAS, were added to "correct[] a factual mistake as to identity."); see also id. at 29 (discussing alleged mistakes in identity with respect to CSFB, CIBC, Barclays, Merrill Lynch and Citibank, but not BAS).

1. Plaintiffs' Claim that They Did Not Know The Identity of BAS Until January 2003 Forecloses Relation Back

Plaintiffs contend that they did not know the "identities of culpable subsidiaries," including BAS, at the time they filed the Consolidated Complaint, and that to require them to have known would be to "charge Lead Plaintiff with omniscience." Opp. at 24. To start, Plaintiffs argue that they filed the Consolidated Complaint "based on the limited information then available, without the benefit of documents and testimony later obtained and released by the Senate or by Enron's Bankruptcy Examiner." Id. Next, Plaintiffs claim that most of the Bank Defendants "did not divulge the identities of the culpable subsidiaries" in their respective responses to the Consolidated Complaint. Id. As a result, "*after Lead Plaintiff learned the correct identities* of as many culpable bank entities in Enron transactions as possible," on January 14, 2003, it "wrote the Court to seek permission for amendment, among other things." Opp. at 25 (emphasis added). Finally, Plaintiffs argue that "it is highly improbable that defendants did not reasonably expect to be sued in due course *after the correct identities of the culpable entities were learned*." Id. (emphasis added).

None of the arguments offered in support of Plaintiffs' purported ignorance apply to BAS. None of the allegations against BAS in the First Amended Complaint are based on information from the Senate hearings or the Bankruptcy Examiner. Moreover, BAC did in fact identify BAS as the appropriate subsidiary in its Motion to Dismiss the Consolidated Complaint. In addition, since Plaintiffs took the position that they had not named the wrong party after BAC so advised them in May 2002, BAS had no reason to expect to be sued in due course. In any event, as discussed below, Plaintiffs' claimed lack of knowledge that they did not know the identities of the culpable bank subsidiaries until January 2003, however tenuous, bars them from invoking the relation back doctrine under Rule 15(c)(3).

"A plaintiff who fails to name the correct defendants due to a lack of knowledge as to their identity, and not mistake in their names, cannot avail himself of the relation back doctrine of Rule 15(c)." Taylor v. City of Winnfield, 191 F.R.D. 511, 514 (W.D. La. 2000).

This rule is firmly established in the Fifth Circuit, as well as the First, Second, Seventh, Eighth and Eleventh Circuits. See Jacobsen v. Osborne, 133 F.3d 315 (5th Cir. 1998).[12]

Also unavailing is Plaintiffs' implicit argument that they are entitled to relief under Rule 15(c)(3) because they complied with the Court's scheduling orders. Opp. at 2, 4, 25. The Court's January 27, 2003 Order merely references its desire to set a schedule for the amendment of pleadings after all pending motions had been resolved. See January 27, 2003 Order at 4. It does not speak to the legal permissibility of any particular amendment. In addition, as discussed above in Point I, the applicable statute of limitations as to BAS had elapsed long before the Court issued its January 27, 2003 Order.

2. A "Potential Mistake of Legal Identity" Is Insufficient to Meet the Requirements for Relation Back under Rule 15(c)(3)

Plaintiffs also argue that BAS was named as a Section 11 defendant in the First Amended Complaint to "correct [a] potential mistake in legal identity" because BAC, among other originally named Bank Defendants, asserted it was not a proper defendant under Section 11. Opp. at 29.[13] This type of "mistake" does not meet the requirements of Rule 15(c)(3). Even if it were sufficient, it is inconceivable that Plaintiffs made such a mistake.

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[12] See also Shea v. Esensten, 208 F.3d 712, 720 (8th Cir. 2000); Wayne v. Jarvis, 197 F.3d at 1103 (The Court "does not read the word 'mistake' to mean 'lack of knowledge.' For these purposes, ignorance does not equate to misnomer or misidentification."); Barrow v. Westerfield Police Dep't, 66 F.3d 466, 469-70 (2d Cir. 1995), modified by 74 F.3d 1366 (2d Cir. 1996); Wilson v. U.S. Gov't, 23 F.3d 559, 562-63 (1st Cir. 1994); Rylewicz v. Beaton Servs. Ltd., 888 F.2d 1175, 1181 (7th Cir. 1989) ("Although when filing his original complaint Rylewicz may have had a 'lack of knowledge of the proper party,' that factor does not permit an amendment to relate back . . .. Such an argument misconstrues the mistake requirement . . . . ").

[13] Plaintiffs also include BAS in a chart indicating newly-added Section 10(b) defendants. Opp. at 30. Because the First Amended Complaint does not assert a claim against BAS under Section 10(b), BAS's inclusion on the list is an error. See FAC ¶ 104 n.7. In any event, since Plaintiffs do not allege primary liability against BAC in the First Amended Complaint, Plaintiffs' argument that its theory of primary liability on the part of the bank parents could be due to a mistake of law (Opp. at 30) is irrelevant as far as BAC is concerned.

a. Plaintiffs' Purported Mistake in Legal Identity Is Insufficient As A Matter Of Law

Plaintiffs cite a trio of cases to support their argument that Rule 15(c)(3) permits relation back to correct a potential mistake of legal identity. Opp. at 31 (citing Woods v. Indiana Univ.-Purdue Univ., 996 F.2d at 887; Simpson v. Borg-Warner Auto., No. 97 [C] 1911, 1997 U.S. Dist. LEXIS 19502, at *4-7 (N.D. Ill. Dec. 2, 1997); and Gaspard v. Highlands Ins. Co., No. 89-3385, 1991 U.S. Dist. LEXIS 3010, at *3 (E.D. La. Mar. 11, 1991)). These decisions are contrary to prevailing law and distinguishable on their facts.

The United States Supreme Court has repeatedly counseled courts to construe the requirements of Rule 15(c)(3) as written. See, e.g., Nelson v. Adams USA, Inc., 529 U.S. 460, 467 n.1 (2000) (Subsection 15(c)(3) "applies only in cases involving 'a mistake concerning the identity of the proper party.' Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until is moved to amend its pleading, chose to assert its claim for costs and fees only against [the original defendant]."); Schiavone v. Fortune, 477 U.S. 21, 29 (1986) ("We do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.").

Several Courts of Appeals that have addressed the issue have interpreted the mistake requirement in Rule 15(c)(3) according to its plain terms, and have determined that it does not include mistakes as to the appropriate legal theory or legal responsibility of an additional party. See, e.g., Leonard v. Parry, 219 F.3d 25, 31 (1st Cir. 2000) ("Rule 15(c)(3) was not designed to remedy a mistake in the selection of a legal theory."); Powers, 148 F.3d at 1227 ("Nothing in the Rule or in the Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged."); Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993) (rejecting application of relation back doctrine where plaintiff "knew perfectly well that [the new defendant] was the party who had bought and resold the slag," but "thought [the original defendant] was the successor-in-interest to [new defendant] and was the proper party to sue"). Accord Rendall-Speranza v. Nassim, 107 F.3d 913, 917-18 (D.C. Cir. 1997) (rejecting the view that Rule 15(c)(3) applies where "the mistake is one of legal judgment").

The three decisions cited by Lead Plaintiff are also factually distinguishable from the case at bar. In each of those cases, an individual defendant brought suit against a party that, as a matter of well-established law, could not be held liable for the asserted claims. In Woods, a Section 1983 plaintiff sued State entities for the allegedly wrongful actions of certain State University police officers. After realizing that the State was subject to Eleventh Amendment immunity, the plaintiff attempted to add the officers as defendants in their individual capacities. A divided panel of the Seventh Circuit applied the qualified immunity standard applicable in Section 1983 actions to determine whether, under Rule 15(c)(3), the newly-added police officer defendants should have known that they were individually liable and that the State was not. Thus, Woods is of limited application.[14]

In Simpson and Gaspard, the individual plaintiffs, seeking relief for employment discrimination and personal injuries, respectively, sued entities that as a matter of well-established law could not be held liable on the claims. The district courts in those cases expanded the plain language of the Rule to include clear mistakes of law or legal theory by plaintiff's counsel. The decisions in Simpson and Gaspard, both of which Plaintiffs quote at length, have not been positively cited in any published opinion of which BAS is aware.

b. The Record Belies Plaintiffs' Claim that a Mistake, Much Less a Mistake of Law, Was Made as to BAS

In its Moving Brief, BAS demonstrated beyond dispute that Plaintiffs knew of the identity of BAS and its potential liability at the time they filed the Consolidated Complaint. Plaintiffs do not dispute that:

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[14] The only other Court of Appeals decision outside of the Seventh Circuit to cite the Woods decision involved analogous factual circumstances. See Soto v. Brooklyn Correctional Facility, 80 F.3d 34, 34-36 (2d Cir. 1996) ("This appeal concerns the not unusual situation of a pro se litigant who files a civil rights suit against an institutional defendant without naming the individual defendants who might be liable for the claims he is endeavoring to assert.").

- The relevant offering documents that show BAS's involvement in the transactions at issue in the First Amended Complaint were publicly available through EDGAR, the SEC and Thomson Financial by the time the Consolidated Complaint was filed;
- The Consolidated Complaint expressly refers to BAS as a subsidiary through which BAC allegedly acted in connection with underwriting Enron securities;
- The Consolidated Complaint references the registration statements and prospectuses that prominently identify BAS's role as underwriter in the transactions;
- On May 8, 2002, in BAC's Motion to Dismiss the Consolidated Complaint, BAC notified Plaintiffs that they had not sued the appropriate entity, and identified BAS as that entity.

Armed with this information, it is inconceivable that Plaintiffs mistakenly failed to recognize that they could assert a Section 11 claim against BAS. Indeed, Section 11 expressly identifies who can be sued for alleged violations. It imposes liability "[i]n case any part of [a] registration statement . . . contains an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading" on various players including "*every underwriter with respect to such security*." 15 U.S.C. § 77k(a) (emphasis added). Plaintiffs do not dispute that they knew at the time they filed the Consolidated Complaint that BAS was the underwriting subsidiary of BAC.

Further, Lead Plaintiff is represented by arguably the most experienced plaintiffs' securities class action attorneys in the world.[15] Not surprisingly, Lead Counsel has been reluctant to argue that it made a legal mistake when it filed the Consolidated Complaint. Not once in their summary judgment opposition papers or, for that matter, at any other time during this action have Plaintiffs claimed that they failed to name BAS because of a mistake (factual or legal) in the Consolidated Complaint. Even now, Plaintiffs claim only a "potential" mistake.

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[15] "With 35 years of experience litigating complex securities actions on behalf of institutional and individual clients, Milberg Weiss is the nation's largest plaintiff's contingency fee-based law firm and has been responsible for more than $30 billion in aggregate recoveries. Milberg Weiss has the strength of more than 200 attorneys and a support staff of more than 250, which includes over two dozen forensic accountants, investigators and damage analysts." See http://www.milberg.com (as of July 23, 2003).

All of this leads inexorably to the conclusion that Plaintiffs intentionally omitted BAS from the Consolidated Complaint, choosing instead to pursue claims against BAC. This is particularly evident from their opposition to BAC's motion to dismiss the Consolidated Complaint, where 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).[16] Plaintiffs are therefore not entitled to rely on the relation back doctrine. See Louisiana-Pacific Corp., 5 F.3d at 434 (no relation back where "[t]here was no mistake as to identity, but rather a conscious choice of whom to sue"); Powers, 148 F.3d at 1227 (no relation back because plaintiff "not only knew [newly-added] defendants' identity, but also knew of a claim against [them]" but "elected not to sue these individuals"); Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("Even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset").[17]

As a result, since Plaintiffs cannot establish that the claims against BAS in the First Amended Complaint relate back to the Consolidated Complaint, those claims should be

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[16] As discussed in the Moving Brief, Plaintiffs' arguments that they had viable claims against BAC (invoking enterprise and agency theories of liability) also dictate against any notion that Plaintiffs made a mistake. 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. Civ. A. 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]").

[17] Although Plaintiffs contend that the argument that they intentionally failed to sue the subsidiaries as part of a deliberate strategy is "illogical" (Opp. at 24), it is not defendants burden to explain or decipher Plaintiffs' litigation strategy.

dismissed as time-barred because Plaintiffs failed to file them within the applicable limitations period.

POINT II

PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 12(a)(2) AGAINST BANC OF AMERICA SECURITIES LLC WITH RESPECT TO THE MARLIN NOTES

As demonstrated in the Moving Brief, the Section 12(a)(2) claims against BAS are deficient and should be dismissed. Plaintiffs recognize that their failure to put forth any plaintiff who purchased 6.19% Marlin Notes and 6.31% Marlin Notes is fatal to their claim, and urge this Court to defer a determination of standing until the class certification stage. Standing, however, is a threshold issue. Plaintiffs may not now assert claims on behalf of a class in the hope that they will ultimately find a putative class member who meets the standing requirement. In addition, the Marlin Offering Memoranda cannot give rise to liability under Section 12(a)(2) because they are not prospectuses and the offering was a private placement. Under Gustafson, Section 12 applies only to public offerings made pursuant to a prospectus. Plaintiffs fail to refute these arguments. Finally, absent a plaintiff who purchased either the 6.19% Marlin Notes or 6.31% Marlin Notes, Plaintiffs cannot show that BAS was a statutory seller of the Notes.

A. Plaintiffs' Section 12(a)(2) Claims Fail for Lack of Standing Because they do not Allege that any Named Plaintiff Purchased the 6.19% Marlin Notes or the 6.31% Marlin Notes

Plaintiffs concede that no named plaintiff purchased either the 6.19% Marlin Notes or the 6.31% Marlin Notes. The First Amended Complaint alleges only that "Plaintiffs or members of the Class purchased the [various Foreign Debt] securities from the [Defendants]."[18] FAC ¶¶ 1016.4; Opp. at 38. Since only purchasers of the securities at issue have standing to bring claims under Section 12, Plaintiffs' Section 12(a)(2) claims should be dismissed. Blue

[18] As explained in the Moving Brief, Plaintiffs conceded in their Opposition to BAC's Motion to Dismiss the Consolidated Complaint that they lacked standing to assert a Section 11 claim against BAC based on Enron's 8.375% Notes because they did not put forth a plaintiff who purchased those notes. Moving Brief at 20-21. Plaintiffs' position with respect to their purported standing to bring claims as to the Marlin Notes is inconsistent with their withdrawal of their claim based on the 8.375% Notes.

Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975); Rosenzweig v. Azurix Corp., 332 F.3d 854, 870-871 (5th Cir. 2003) (affirming dismissal of Section 12(a)(2) claim for lack of standing where plaintiffs failed to allege they purchased shares from the defendants).

Plaintiffs fail to address the numerous cases cited by Defendants holding that a plaintiff must have standing to raise a claim in order to assert that claim on behalf of a class. See, e.g., In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995); cases cited in Moving Brief at 19-20. Instead, Plaintiffs state for the first time in their Opposition that the Imperial County Board of Retirement purportedly purchased "Marlin notes" and is "preparing a motion to intervene as a § 12(a)(2) representative on behalf of the purchasers of Foreign Debt Securities from the Bank Defendants." Opp. at 47. The Supreme Court has determined, however, that "standing is to be determined as of the commencement of suit." Lujan v. Defenders of Wildlife, 504 U.S. 555, 570 n.5 (1992) (plurality opinion); Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). In addition, Plaintiffs provide no facts to show that an intervention, if it occurs, will cure Plaintiffs' standing deficiencies. They also do not indicate whether the Imperial County Board of Retirement purportedly purchased both 6.19% Marlin Notes and 6.31% Marlin Notes, or only one of these classes of notes. Nor do Plaintiffs specify whether Imperial County Board of Retirement purchased the Notes directly from BAS or that BAS solicited its purchase. Since Plaintiffs lack standing to bring a Section 12(a)(2) claim, the claim should be dismissed.

Plaintiffs attempt to sidestep their lack of standing by contending that the Lead Plaintiff can assert claims on behalf of purchasers of the Marlin Notes. Opp. at 46. Either the Lead Plaintiff or named plaintiffs, however, must have standing for a claim to be asserted on behalf of a putative class. In re Initial Pub. Offering Sec. Litig., 214 F.R.D. 117, 122 (S.D.N.Y. 2002) ("'If the *named* plaintiffs have no cause of action in their own right, their complaint must be dismissed, even though the facts set forth in the complaint may show that others might have a valid claim'") (citation omitted). In In re Paracelsus Corp. Sec. Litig., 6 F. Supp. 2d 626, 631

(S.D. Tex. 1998), Judge Ewing Werlein rejected as insufficient the mere allegation that some members of the putative class purchased the relevant securities, and dismissed Section 11, 12 and 15 claims where the named plaintiffs lacked standing to bring the claims. As explained by the court, "a plaintiff bringing suit under either Section 11 or Section 12 of the Securities Act at least must allege that he or she purchased or acquired the security at issue." Id.

Struggling to avoid dismissal, Plaintiffs assert that this Court should defer the resolution of standing issues until the class certification stage. Despite their assertion, Plaintiffs do not cite a single case in which a court adopted this view and sustained a claim even though the complaint failed to allege a factual basis for standing. This is not surprising since "[s]tanding is a jurisdictional question under Article III and thus a threshold issues in all cases." National Gypsum Co. v. Prostok, No. CIV. A. 3:98CV0869P, 2000 WL 1499345, at *11 (N.D. Tex. Oct. 5, 2000)).[19] As the Fifth Circuit stated in Brown v. Sibley, the "constitutional threshold [of standing] must be met *before* any consideration of [class certification]" and "[i]nclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if persons described in the class definition would have standing themselves to sue." 650 F.2d 760, 771 (5th Cir. 1981) (emphasis added); see Gabrielsen v. BancTexas Group, Inc., 675 F. Supp. 367, 371 n.3 (N.D. Tex. 1987) ("Dismissal on standing grounds is to take place before class certification issues are ever reached.")

Plaintiffs cite two of this Court's prior Orders in this case and contend that this Court "has already determined the proper time to address issues of standing is at the class certification phase." Opp. at 46. Plaintiffs misconstrue these Orders, neither of which addressed standing issues. In its August 7, 2002 Order, this Court recognized only that the *Lead Plaintiff*

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[19] See Lujan, 504 U.S. at 570 n.5 (plurality opinion) ("standing is to be determined as of the commencement of suit."); Griffin v. Painewebber, Inc., No. 99 CIV. 2292 (VM), 2001 WL 740764, at *2 (S.D.N.Y. June 29, 2001) (dismissing Section 12(a)(2) claim where complaint did not allege plaintiff purchased shares from the defendant underwriter because "[a]lthough a class, when certified, may be divided into subclasses to support claims against different defendants, it is well established that 'if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.'") (citations omitted); Sierra Club v. Glickman, 156 F.3d 606, 619 (5th Cir. 1998) (standing is a component of subject matter jurisdiction).

"may not have standing to be a class representative of [each] discrete group" of plaintiffs in the consolidated cases and stated that "around the time of class certification the Court will deal with these issues through creation of classes or subclasses and *with appropriate class representatives having standing to pursue those claims*." Order at 6 (emphasis added). Similarly, in its earlier order appointing Lead Plaintiff, this Court denied other plaintiffs' "requests for splintering the action or appointing multiple Lead Plaintiffs to represent specialized interests,'" explaining that those plaintiffs could reassert their concerns at the class certification stage. In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 451 (S.D. Tex. 2002).[20] In King v. Douglass, 973 F. Supp. 707, 712 (S.D. Tex. 1996), this Court stated that it makes "logical sense" to decide a motion to dismiss asserting lack of standing before a motion for class certification, because if the plaintiffs are without standing, "class certification will be a moot issue."

Plaintiffs' assertion that a purchaser of any of the Foreign Debt Securities can represent purchasers of all of the Foreign Debt Securities (Opp. at 47) is irrelevant for a number of reasons. First, Plaintiffs have not put forth a purchaser of any of the "Foreign Debt Securities." Second, purchasers of the other securities do not assert any claims against BAS, BAS had no involvement in the offerings of the other securities (as demonstrated by the offering memoranda submitted to this Court), and the other "Foreign Debt Securities" are not related to the Marlin Notes. See FAC ¶¶ 104(a) n. 7, 641.1- 641.36, 1016.1-1016.7; Declaration of Jonathan Hurwitz in Support of Citigroup Defendants' Motion to Dismiss, dated June 18, 2003, Exs. A-C. Finally, Plaintiffs' assertions that all of the "§ 12(a)(2) claims [in the First Amended Complaint] arise from the same illegal scheme" and "plaintiffs already represent purchasers of the Foreign Debt Securities in their § 10(b) and Rule 10b-5 claims" (Opp. at 46 n.38, 47) ignore the fact that this Court dismissed the Section 10(b) and Rule 10b-5 "scheme" claims against BAC in the Consolidated Complaint, and no Section 10(b) or Rule 10b-5 claims are asserted against BAC or BAS in the First Amended Complaint. In re Enron Corp. Sec., Derivative &

[20] Plaintiffs do not address Defendants' argument that because no named plaintiff purchased 6.19% Marlin Notes or 6.31% Marlin Notes, this Court lacks subject matter jurisdiction over the claims arising from that transaction. See Moving Brief at 21 n.11.

ERISA Litig., 235 F. Supp.2d 549, 704 (2002). Plaintiffs' lack of standing requires dismissal of their Section 12(a)(2) claims.[21]

B. The Offering Memoranda for the Marlin Notes Offering do not Give Rise to Liability Under Section 12(a)(2)

Plaintiffs cannot show, as is required, that the Offering Memoranda for the Marlin transactions are prospectuses within the meaning of Section 12(a)(2) or that the private placement of Marlin Notes was a public offering. Although the First Amended Complaint alleges only that the Marlin Notes were "publicly traded" and does not allege that the offering of Marlin Notes was public, FAC ¶¶ 641.37, 986 n.20, Plaintiffs make this assertion nonetheless. Opp. at 38, 40. It is well-settled that a "Complaint cannot be amended by the briefs in opposition to a motion to dismiss." In re Baker Hughes Sec. Litig., 136 F. Supp. 2d 630, 646 (S.D. Tex. 2001); see Friedl v. City of New York, 210 F.3d 79, 83-84 (2d Cir. 2000) ("[A] district court errs when it ... relies on factual allegations contained in legal briefs or memoranda . . . in ruling on a 12(b)(6) motion to dismiss"); Coates v. Heartland Wireless Communs., Inc., 55 F. Supp. 2d 628, 644 n.26 (N.D. Tex. 1999) ("Because this allegation [asserted in the opposition brief] is not contained in the amended complaint, plaintiffs may not rely on it.").

This Court may, however, consider the Marlin Offering Memoranda on this motion. See Moving Brief at 6 n.2. The memoranda demonstrate the private nature of the offering, repeatedly stating that the Marlin Notes "have not been and will not be registered under the United States Securities Act of 1933," and that they are "offered only to 'qualified institutional buyers' ... in reliance on the exemption from the registration requirements of the Securities Act provided by Rule 144A and outside the United States to certain persons in reliance upon Regulation S." OM at Cover Page, iii, 10-11, 69, 107-108, 110-111. Contrary to Plaintiffs'

[21] Plaintiffs' citations to cases in which courts permitted purchasers of one type of security to represent purchasers of different securities are inapposite. See Opp. at 46-47 & n.38. Plaintiffs do not cite a single case in which a plaintiff was permitted to represent a purchaser of a different issuer's security. Plaintiffs' collective reference to three distinct, unrelated offerings as the "Foreign Debt Offerings" is intended to gloss over the differences among them as well as obscure the fact that Marlin Notes were offered in the United States pursuant to Rule 144A. Plaintiffs also often lump the "Bank Defendants" together and fail to note that certain arguments and citations cannot apply to BAS, since Plaintiffs do not allege that BAS participated in a fraudulent scheme.

assertion (Opp. at 43), courts consider such disclosures in determining that offerings are private. See, e.g., Vannest v. Sage, Rutty & Co., 960 F. Supp. 651, 655 (W.D.N.Y. 1997) (court relied on the private placement memorandum's repeated statement that the "offering is not subject to registration requirements" in determining that the "drafters contemplated a private offering"); ESI Montgomery County, Inc. v. Montenay Int'l Corp., 899 F. Supp. 1061, 1065 (S.D.N.Y. 1995) (private nature of offering "confirm[ed]" by statements in investment memoranda that the securities would not be registered and that they were offered in reliance upon exemptions from registration). Plaintiffs' citation to Parkhurst v. North American Financial Services, 919 F. Supp. 270, 272, 275 (E.D. Mich. 1996) (Opp. at 43), is inapposite because there is no indication that defendants argued that Section 12(2) does not apply to non-public offerings and the court did not address that point.

Because the memoranda demonstrate that the offering was private, Plaintiffs attempt to defer this Court's resolution of the issue by contending that whether the Marlin Notes Offering was public is a question of fact not suitable for resolution on a motion to dismiss.[22] Opp. at 41-42. Contrary to Plaintiffs' contention, courts routinely dismiss Section 12(a)(2) claims at the motion to dismiss stage on the grounds that Section 12(a)(2) does not apply to private offerings exempt from the registration requirements. See, e.g., Lewis v. Fresne, 252 F.3d 352, 358 (5th Cir. 2001) (affirming dismissal of Section 12(a)(2) claim "because the transaction

[22] Plaintiffs' cases are distinguishable, support defendants' position, or pre-date or ignore at Gustafson. See Opp. at 41-43. In ESI Montgomery County, 899 F. Supp. at 1065, for example, the court dismissed the Section 12(2) claim where, as here, plaintiffs did not allege that the offering was public. In Flake v. Hoskins, 55 F. Supp. 2d 1196, 1228 (D. Kan. 1999), plaintiff alleged that defendant's proxy constituted a prospectus and that defendant filed a registration statement concerning the transaction at issue. Id. No such allegations appear in the First Amended Complaint. In Fisk v. SuperAnnuities, Inc., 927 F. Supp. 718, 730 (S.D.N.Y. 1996), plaintiff alleged that the offering was not limited to the appropriate type of investors and did not come within the private placement exemption where the shareholder list showed over one hundred holders, some with holdings as small as 2500 shares. Again, the First Amended Complaint does not contain similar allegations. Cf. Lewis v. Fresne, 252 F.3d at 358 (dismissing Section 12 claim and distinguishing Fisk on the basis that the Fisk plaintiff purchased only 50,000 shares out of an offering of up to 4 million shares). In UBS Asset Mgmt. Inc. v. Wood Gundy Corp., 914 F. Supp. 66, 69 (S.D.N.Y. 1996), the court reached a decision contrary to Gustafson and failed to even mention Gustafson. Swenson v. Englestad, 626 F.2d 421, 425 (5th Cir. 1980) was decided prior to the Supreme Court's decision in Gustafson and involved Section 12(1) rather than Section 12(2).

at issue was a private one that is not governed by § 12."); Dafofin Holdings S.A. v. Hotelworks.com., No. 00 CIV. 7861 (LAP), 2001 WL 940632, at *6 (S.D.N.Y. Aug. 17, 2001) (court dismissed Section 12(a)(2) claim based on a private investment with prejudice, stating "[n]o amount of discovery can transform this private agreement into a public offering."); see also cases cited in Moving Brief at 24-25.

As noted in the Moving Brief, Rule 144A(c) provides that sales by securities dealers to qualified institutional buyers "shall be deemed not to have been offered to the public." See Moving Brief at 23. Since the Marlin Offering was made subject to Rule 144A, it cannot be deemed to be a public offering and cannot create Section 12 liability. In In re Safety-Kleen Corp. Bondholders Litigation, C/A No. 3:00-1145-17, slip op. at 3 (D.S.C. Mar. 27, 2002/) (Reply Appendix Exh. 2), the court dismissed Section 12(a)(2) claims against the initial purchasers in a Rule 144A offering to qualified institutional buyers, explaining that "Rule 144A 17 C.F.R. 230.144A expressly provides that offerings to QIBs under its provisions 'shall not be deemed to have been offered to the public.' As there was no public offering, there can be no Section 12(a)(2) liability." Slip op. at 3; see In re Hayes Lemmerz Int'l, Inc. Equity Sec. Litig., -- F. Supp. 2d --, No. 01-CV-73433, 2003 WL 21692102, at *17 (E.D. Mich. July 21, 2003) (dismissing Section 12(a)(2) claims against the underwriters of a Rule 144A offering "since Rule 144A expressly provides that offerings to QIBs are private, and Gustafson limits § 12(a)(2) liability to public offerings.") This Court should reach the same result.[23]

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[23] Plaintiffs incorrectly assert that Rule 144A(c) is inapplicable because BAS was an "underwriter/initial purchaser," as opposed to a "dealer" of Marlin Notes. Opp. at 43. Both subsection (b) of Rule 144A, governing sales by persons other than issuers or dealers, and subsection (c), governing sales by dealers, provide that a person who offers or sells securities in compliance with the requirements of Rule 144A is deemed not to be engaged in a distribution of such securities and is deemed "not to be an underwriter of such securities within the meaning of Section 2(11) of the [1933] Act." The 1933 Act does not define the term initial purchaser. Section 2(12) defines "dealer" as "any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing in securities issued by another person." 15 U.S.C. § 77b(a)(12). Contrary to Plaintiffs' baseless assertion, it is plain the BAS was a "dealer" of the 6.31% Marlin Notes. As the NASD has explained, in the typical Rule 144A private placement, as here: "[T]he issuer sells its securities to a single *broker/dealer* in reliance on the private placement exemption from registration in Section 4(2) of the [1933] Act. The *broker/dealer-purchaser* then resells such securities to the initial [Qualified Institutional Buyer] in reliance on Rule 144A." Self-Regulatory Organizations; Notice of Filing of

Nor does the post-private offering listing and trading of Marlin Notes on the Luxembourg Exchange transform the private placement into a public offering subject to Section 12(a)(2). FAC ¶¶ 641.37; 986 n.20; see Opp. at 44. Plaintiffs do not dispute that any public trading of the Marlin Notes occurred *after* the Notes were initially offered pursuant to Rule 144A and Regulation S. See Opp. at 44. Accordingly, Gustafson precludes Section 12(a)(2) liability here, since its scope is limited to initial public offerings. 513 U.S. at 571, 573, 576, 578; Azurix, 332 F.3d at 871-872 (stating that Gustafson "held § 12 not applicable to private, secondary transactions"); Dafofin Holdings, 2001 WL 940632 at *6 ("Section 12(a)(2) liability attaches to violations of registration and disclosure obligations of an initial public offering, but not to secondary private offerings, which are not burdened by such disclosure and registration obligations."). Since the Marlin Notes were not sold in a public offering by means of a prospectus, there can be no Section 12(a)(2) liability.

Because various defendants pointed out in their moving briefs that Section 12(a)(2) governs only public sales of securities made "by means of a prospectus," 15 U.S.C. § 77l(a)(2); Gustafson, 513 U.S. at 578, 584, Plaintiffs assert for the first time in their Opposition that the Offering Memoranda are prospectuses (See Opp. at 44). Since there is no such allegation in the First Amended Complaint, it should not be considered on this motion. See Baker Hughes, 136 F. Supp. 2d at 646. In addition, the Offering Memoranda, which repeatedly disclose that the Marlin Notes are unregistered, belie Plaintiffs' assertion. Since the Offering Memoranda were not required to satisfy the requirements of Section 10, they are not prospectuses and Section 12(a)(2) does not apply. See Moving Brief at 24-25. In 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), the court dismissed a Section 12(a)(2) claim with prejudice under Gustafson because the offering memorandum "did not have to comply with the registration requirements of

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Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Implementation of Mandatory Trade Reporting for Portal Securities, File No. SR-NASD-99-66, 2000 WL 11826, at *11 (Jan. 3, 2000) (emphasis added).

§ 10." See also cases cited in Moving Brief at 24-25. Likewise, Plaintiffs' Section 12(a)(2) claims should be dismissed. [24]

Plaintiffs cite Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp., N.V., 941 F. Supp. 1369 (S.D.N.Y. 1996), for the proposition that a private placement memorandum may be subject to Section 12(a)(2). Opp. at 41-44. In Sloane, the court found that Section 12(a)(2) applied to the offering document for an offering under Regulation S because Regulation S does not expressly create an exemption from Section 10. 941 F. Supp. at 1376. Pursuant to Gustafson, however, a document is not a "prospectus" for the purposes of Section 12 liability if it "need not" comply with the statutory registration requirements and a prospectus is "confined to documents related to public offerings." 513 U.S. at 569. As explained in the Moving Brief, offering materials for a Regulation S offering are exempt from the registration requirements and Gustafson holds that Section 12(a)(2) liability can attach only to public offerings made pursuant to a prospectus. Consequently, the Sloane decision runs counter to the Supreme Court's holding in Gustafson and should not be followed. See Moving Brief at 21-23.

Sloane is also distinguishable from this case because it turned on the purported fact that the offering circular was "widely distribut[ed]." Sloane, 941 F. Supp. at 1376. Plaintiffs make no such allegation in the First Amended Complaint, but assert in the Opposition that the offering memoranda for the Foreign Debt Securities "prove the Foreign Debt Securities were widely distributed." Opp. at 41. Not surprisingly, Plaintiffs identify no statements from the Offering Memoranda to support this assertion. See id. At 42. On the contrary, the Offering Memoranda describe the *limited* group of potential purchasers of the 6.19% Marlin Notes and

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[24] The Supreme Court analyzed the legislative history of the 1933 Act in determining that Section 12(a)(2) does not apply to private securities transactions and observed: "[The House Report states] 'Sections 11 and 12 create and define the civil liabilities imposed by the Act. . . . Fundamentally, these sections entitle the buyer of securities *sold upon a registration statement* ... to sue for recovery of his purchase price ....' It will be recalled that as to private transactions, such as the Alloyd purchase [at issue in Gustafson], there will never have been a registration statement. If § 12(2) liability were imposed here, it would cover *transactions not within the contemplated reach of the statute*." Gustafson, 513 U.S. at 581 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., 9 (1933)) (emphasis added).

6.31% Marlin Notes.[25] OM at Cover Page, 10, 69, 107-108, 110-111; see Hayes Lemmerz, 2003 WL 21692102, at *15, 16 (dismissing Section 12(2) claim where Plaintiffs argued that "the Offering Memorandum was, in fact, widely disseminated to the public, soliciting hundreds if not thousands of purchasers" but failed to allege that the bonds were offered to anyone other than qualified institutional buyers and defendants argued that the number of offerees is irrelevant because "the [Rule 144A] exemption is effective even if the number of qualified institutions reached into the hundreds or thousands.")

In addition, unlike BAS and BAC, the defendants in Sloane did not argue that the offering was private, nor did they assert that the offering in question was "only made to people who do not 'need[] the protection of the Act.'" Sloane, 941 F. Supp. At 1376 n.11. As set forth in the Offering Memoranda, the Marlin Notes were exclusively offered to qualified institutional buyers ("QIBs"), whom the SEC deems able to "fend for themselves," and "non-U.S. persons" who are beyond the protection of the securities laws. See Moving Brief at 23 & n.15; see also OM at Cover Page, 10. Sloane does not support the application of Section 12(a)(2) here.

C. Plaintiffs' Section 12(a)(2) Claim is Deficient Because Plaintiffs Fail to Allege that BAS "Sold" the 6.19% Marlin Notes or 6.31% Marlin Notes to Plaintiffs

BAS also is not liable under Section 12(a)(2) because it did not "sell" either the 6.19% Marlin Notes or the 6.31% Marlin Notes to Plaintiffs. Since no plaintiff purchased either the 6.19% Marlin Notes or the 6.31% Marlin Notes, it is impossible for Plaintiffs to allege, as is required, that BAS sold any Marlin Notes to them or solicited their purchases of the Notes. Pinter v. Dahl, 486 U.S. 622, 642, 647 (1988); Azurix, 332 F.3d 871. Contrary to Plaintiffs' assertion (Opp. at 39 n.28), courts routinely dismiss Section 12(a)(2) claims on motions to

[25] The Offering Memoranda provide: "The Senior Notes are being offered for sale in the United States to QIBs in reliance on Rule 144A and outside of the United States to non-U.S. Persons ... in offshore transactions in reliance on Regulation S...." OM at 10; see also OM at Cover Page, 69, 107, 110. In addition, Rule 144A's exemption requires that "[t]he securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer." 17 C.F.R. § 230.144A(d)(1).

dismiss where the allegations of "seller" status are inadequate. See cases cited in Moving Brief at 26.

The First Amended Complaint contains only the conclusory allegation that defendants "sold the Foreign Debt securities to plaintiffs and/or class members." FAC ¶ 1016.5. Relying on dicta from Moskowitz v. Mitcham Indus., which involved Section 12(a)(2) claims by individual plaintiffs with respect to common stock, Plaintiffs argue that this allegation is sufficient. No. H-98-1244, 2000 U.S. Dist. LEXIS 22424, at *29 (S.D. Tex. Sept. 27, 2000); see Opp. at 39-40. Since the Marlin Notes were sold in a private offering to a limited number of potential purchasers, and BAS sold only $28,500,000 of the $475,000,000 offering of 6.31% Marlin Notes, there can be no assurance that a plaintiff who purchased from BAS can be found and that the privity requirement can be met. In any event, the dicta in Moskowitz contradicts controlling law. Lewis v. Casey, 518 U.S. 343, 357 (1996) ("'That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (citations omitted); In re Taxable Municipal Bond, 51 F.3d at 522 ("it is well established that '[t]o have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents.'") (citation omitted). In Dartley v. ErgoBilt, Inc., which is directly on point, the court dismissed Section 12(a)(2) class claims because none of the named plaintiffs allegedly purchased securities from the defendant underwriters or was solicited by the underwriters. No. CIV. A. 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001).

Finally, in its Moving Brief, BAS explained that it cannot be deemed a seller with respect to the €515 million 6.19% Marlin Notes for the additional reason that it did not serve as an initial purchaser of those notes. Moving Brief at 25 n.17. Plaintiffs contend that whether BAS was an initial purchaser of the 6.19% Marlin Notes is a factual question. Opp. at 39 n.28.

BAS, however, simply is listed as an initial purchaser on only one of the Offering Memoranda and the Court may consider the memoranda on this motion.[26] See Moving Brief at 6 n.2.

POINT III

PLAINTIFFS FAIL TO ESTABLISH THAT THEIR CONTROL PERSON CLAIMS AGAINST BANK OF AMERICA CORPORATION ARE SUFFICIENT

A. Plaintiffs' Control Person Allegations Against BAC Are Inadequate

In the Moving Brief, BAC discussed in detail both this Court's observation that the Fifth Circuit "has not clearly defined its position" concerning the requirements for control person liability (In re Enron Corp. Sec., Derivative & ERISA Litig., No. MDL-1446, Civ. A. H-01-3624, 2003 WL 230688, at *9 (S.D. Tex. Jan. 28, 2003)), as well as this Court's own opinions on the issue. See Moving Brief at 28 n.19. Accordingly, it is disingenuous of Plaintiffs to suggest that "the Bank Defendants grossly distort the law concerning control person liability, misapplying precedent of this Court and the Fifth Circuit." Opp. at 51. To the contrary, it is Plaintiffs who refuse to acknowledge the conflicting opinions in this Circuit on whether it is necessary to allege facts showing not only the power to control but also the exercise of that power, as well as the controlling person's culpable participation in the underlying violation. Id. at 52-56.

Despite the unsettled state of law in this Circuit, it is undisputed that 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, and (2) the defendant's control over the controlled person. As discussed in the Moving Brief, this Court has also held that plaintiffs must allege (3) "particularized facts as to controlling person's culpable participation in, i.e., exercise control over fraud perpetrated by controlled person." In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 598 (S.D. Tex. 2002) (citation omitted); Collmer v. U.S. Liquids,

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[26] See 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) (BAS is not listed as an initial purchaser).

Inc., No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *10 (S.D. Tex. Jan. 23, 2001) (same); see Moving Brief at 27. The Fifth Circuit has also required plaintiffs to demonstrate that the controlling person actually exercised control over the primary violator. Dennis v. Gen. Imaging, Inc., 918 F.2d 496, 509 (5th Cir. 1990) (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"). To make that showing, Plaintiffs must "allege some facts beyond a defendant's position or title that show that the 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).

1. Plaintiffs do not Adequately Allege that BAC Had the Power to Control BAS

Plaintiffs agree that to state a claim for control person liability under Section 15 they must allege that BAC had the power to control BAS. Opp. at 52. Despite their agreement on this pleading requirement, Plaintiffs fail to allege adequately that BAC possessed the power to control BAS.

Plaintiffs' allegations regarding BAC's control of BAS focus on BAC's status as the corporate parent of BAS. FAC ¶¶ 104(b), 1013, 1016.2. Plaintiffs argue that they adequately plead control by alleging that "[e]ach of the bank holding companies . . . conducts its business affairs through a series of wholly owned and controlled subsidiaries where the bank holding company directly or indirectly owns 100% of the stock of the subsidiaries and completely directs and controls their business operations through the selection and appointment of their officers and, where necessary, directors." FAC ¶ 99.1; Opp. at 54. This general allegation is deficient for two reasons. First, it does not distinguish among the various bank holding company defendants.[27] Second, Plaintiffs' skeletal and conclusory allegations of ownership and control

[27] Johnson v. Tellabs, Inc., 262 F. Supp. 937, 958-59 (N.D. Ill. 2003) ("Although Plaintiffs generally allege that these Individual Defendants 'had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, are presumed to have had the power to control or influence the particular transactions giving rise to the securities violations, this general allegation as to all the Individual Defendants is insufficient to establish control person liability.").

do not allege any facts that establish how BAC's ownership of BAS gave it the power "to direct or cause the direction of the management and policies of [BAS] . . . ." See Enron, 2003 WL 230688, at *8 (citations omitted). Legal conclusions uncorroborated by any facts 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").

Central to this Court's decision sustaining control person claims against some of the individual Andersen defendants were allegations in the Consolidated Complaint that not only stated the individuals' positions as "upper echelon partners" but also "distinguish[ed] the ways each [alleged control person] was involved in the Enron engagement," alleged "'the conduct that facilitated the Securities Act violations,'" and "suggest[ed] the partners had the power to control and/or, in fact, did 'control' Enron's auditor by initiating, ratifying, and implementing Arthur Andersen's policies, or overseeing and monitoring those effectuating Andersen's policies and decisions." In re Enron Corp., 2003 WL 230688, at *19.[28] Unlike these more detailed allegations of control, Plaintiffs' generalized and conclusory allegations regarding BAC fall far short of pleading, much less demonstrating, that BAC possessed the requisite power or was involved in "initiating, ratifying, and implementing [BAS's] policies, or overseeing and monitoring those effectuating [BAS's] policies and decisions." Id.[29] Although Plaintiffs respond to this contrast as "nonsense" (Opp. at 55), they do not explain why. Consequently, Plaintiffs have not adequately pled BAC's control of BAS.

If Plaintiffs' allegations against BAC were sufficient, every holding company or parent corporation would automatically be the control person of every subsidiary that the parent

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[28] In their Opposition to the Individual Andersen Defendants' motions to dismiss, Plaintiffs devoted four pages of their control person liability argument to a description of the Consolidated Complaint's allegations of control by the Andersen partners. See Lead Plaintiff's Opposition to Motions to Dismiss of the Individual Andersen Defendants and Michael C. Odom dated June 10, 2002 at pp. 63-66. By contrast, there is not a single factual allegation in the FAC supporting an inference that BAC controlled BAS.

[29] This Court observed that "[a]s asserted by Lead Plaintiff, [the individual Andersen defendants'] decisions imply that they not only had the power to control, but actually directed the affairs and policies of both the consulting and auditing Enron engagements to sustain the alleged Ponzi scheme and to benefit from it." In re Enron Corp., 2003 WL 230688, at *19.

directly or indirectly owned. As discussed in BAC's Moving Brief, however, that is not the law. See Moving Brief at 28-29. The mere allegation that BAC is the parent corporation of BAS does not satisfy Plaintiffs' pleading hurdle. Novak v. Kasaks, 997 F. Supp. 425, 435 (S.D.N.Y. 1998) (dismissing control person claim against parent corporation), rev'd on other grounds, 216 F.3d 300 (2d Cir. 2000). Indeed, even the court in Paracor Finance Inc. v. GE Capital Corp., 96 F.3d 1151, 1163 (9th Cir. 1996), relied upon by Plaintiffs, concluded that a CEO is not automatically a controlling person. Rather the plaintiff must allege that the CEO exercised direct or indirect control over the transaction in question. See also cases cited in Moving Brief at 29. Plaintiffs' Opposition completely avoids addressing these cases.[30]

2. Plaintiffs do not Adequately Plead that BAC Exercised its Alleged Power to Control BAS

Plaintiffs assert that the alleged controlling person's actual exercise of the power to control the primary violator need not be pled. See Opp. at 53. The Fifth Circuit has held, however, that the actual exercise of the power to control must be shown. Dennis, 918 F.2d at 509. Plaintiffs quote the *appellants' argument* in Abbott, 2 F.3d at 620, that the Fifth Circuit "only requires that they show [defendants'] power to control [the alleged primary violator], not the actual exercise of that power." Opp. at 53. Plaintiffs artfully omit the sentence that follows their quotation: "We need not presently analyze the above distinction because, even assuming that only the former applies, a reasonable jury could not so find based on the record before us."

[30] Plaintiffs assert that courts sustain control person liability claims where plaintiffs make a *prima facie* showing of abstract power. Opp. at 52-53. The cases they rely on, however, are distinguishable or inapposite. In both McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628, 638 (E.D. Tex. 1999) and In re Landry's Seafood Restaurant, Inc. Sec. Litig., No. H-99-1948 (S.D. Tex. Feb. 20, 2001) (Slip. op. at 29, 30, 31), the plaintiffs met their pleading burdens with much more detailed factual allegations of control than the conclusory and generic allegations made by Plaintiffs here. Plaintiffs also misread Abbott v. Equity Corp., 2 F.3d 613, 620 (5th Cir. 1993), which did not hold that plaintiffs need only show the power to control, not the actual exercise of that power. Opp. at 53. Rather, the Court concluded that "[w]e need not presently analyze the above distinction because, even assuming only the former applies, a reasonable jury could not so find based on the record before us." With respect to this Court's reliance on Abbott in In re Securities Litig. BMC Software, Inc., 183 F. Supp. 2d 860, (S.D. Tex. 2001), as explained above Abbott did not decide the issue. Finally, Plaintiffs misread Ellison v. American Image Motor Co., 36 F. Supp. 2d 628 (S.D.N.Y. 1999). The court there stated that "[a] plaintiff may not allege 'controlling person' status merely by reciting a corporate officer's title without alleging ***actual*** control and the nature of the controlling persons 'culpable participation' in the fraud." Id. at 642 (emphasis added).

Abbott, 2 F.3d at 620. In any event, Plaintiffs do not sufficiently allege either that BAC had the power to control BAS or that it actually exercised such power.

3. Plaintiffs do not Adequately Plead BAC's Culpable Participation in the Alleged Underlying Violation

Plaintiffs also fail to plead facts showing BAC's general control over BAS, much less its culpable participation in any purported misconduct by BAS. Although Plaintiffs insist that such allegations need not be pled (Opp. at 52, 56), this Court has previously held in this action that a plaintiff must allege "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 (S.D. Tex. 2002). *See also* Collmer, 2001 U.S. Dist. LEXIS 23518, at *10. Plaintiffs further misrepresent (Opp. at 52) the control person liability standard this Court set forth in In re Landry's Seafood Restaurant, Inc. Sec. Litig., No. H-99-1948, Order at 11 n.14 (S.D. Tex. Feb. 20, 2001), which likewise provided that "[t]o survive a motion to dismiss a [Section 15] claim," a plaintiff must allege the controlling person's culpable participation in the challenged conduct. The Fifth Circuit similarly has stated that the controlling person's inducement of or participation in the alleged violation is a required element of a Section 15 claim. Dennis, 918 F.2d at 509.

Plaintiffs allege no facts in the First Amended Complaint to demonstrate BAC's culpable participation in any purported wrongdoing by BAS. Even if culpable participation were not required, however, the controlling person liability claim against BAC fails because, as discussed above, Plaintiffs do not show that BAC had the power to control, much less exercised that control, over BAS. Accordingly, the control person claim against BAC should be dismissed.[31]

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[31] Plaintiffs contend that the culpable participation requirement is inconsistent with the statutory scheme of control person liability. Opp. at 56 n.48. In creating the standard governing control persons, however, "Congress did not intend anyone to be an insurer against the fraudulent activities of another." Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 885, 890 (3d Cir. 1975). Rather, "[t]he intent of Congress in adding [Section 20], passed at the same time as the amendment to Section 15 of the 1933 Act, was obviously to impose liability only on those [controlling persons] who fall within its definition of control *and* who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons." Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973) (emphasis added); Rochez, 527 F.2d at 884-85 ("The

B. Plaintiffs' Failure to Allege Primary Liability Against BAS Requires the Dismissal of the Control Person Claims Against BAC

There is no basis for the Section 15 claims against BAC since Plaintiffs' Section 11 and Section 12(a)(2) claims are insufficient. Section 15 claims are entirely derivative of claims under Sections 11 and 12(a)(2) and cannot be sustained in the absence of a cognizable primary violation. Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 370 n.33 (5th Cir. 2001); Lewis v. Fresne, 252 F.3d 352, 357 n.3 (5th Cir. 2001) (affirming dismissal of Section 15 claims because "[w]ithout a violation of [§ 11 or] § 12, there is no claim under § 15."); In re Enron Corp., 235 F. Supp. 2d at 598 ("Because a primary violation [] is a necessary element of a § 15 claim, if a plaintiff fails to state a claim for a primary violation, he has also failed to state a claim under § 15."); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 893 (S.D. Tex. 2002) (dismissing Section 15 and Section 20(a) claims because plaintiffs failed to allege adequately a violation of Sections 11 or 12(a)(2) of the 1933 Act or Section 10(b) of the 1934 Act by the purported controlled person), aff'd sub nom. Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003). As described above and in the Moving Brief, Plaintiffs' Section 11 and Section 12(a)(2) claims are barred by the statute of limitations. In addition, Plaintiffs fail to state a claim under Section 12(a)(2) with respect to the 6.19% Marlin Notes or 6.31% Marlin Notes. The failure of Plaintiffs' primary claims against BAS requires the dismissal of the control person claims against BAC.[32]

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legislative history of Section 20(a) illustrates that Congress intended liability to be based on something besides control. That something is culpable participation."). Plaintiffs assert that the Fifth Circuit, in G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 958 (5th Cir. 1981), construed Section 20 as not requiring a showing of culpable participation, but conveniently ignore that the Fifth Circuit subsequently held, in Dennis, 918 F.2d at 509, that the alleged controlling person's inducement of or participation in the purported violation is an element of a control person claim. Contrary to Plaintiffs' contention, it would be entirely consistent with Congressional intent to require a showing of culpable participation. *See* Moving Brief at 56 n. 48.

[32] Plaintiffs' argument that a control person claim does not require joinder of the controlled person is irrelevant since BAS is named in the FAC. Opp. at 57-58

C. Contrary to Plaintiffs' Argument, this Court has not Already Decided BAC's Control Person Argument, nor is the Proper Pleading of a Control Person Claim an Issue of Fact

Plaintiffs argue that when this Court denied BAC's motion for summary judgment it did so because control person liability under Section 15 required fact intensive inquiries inappropriate for resolution prior to discovery. See Opp. at 51. Plaintiffs' argument evidences a basic misunderstanding of the differences between the issues and standard relevant on a motion pursuant to Rule 56 and those on a motion pursuant to Rule 12(b)(6). BAC moved for summary judgment under Federal Rule 56 arguing that BAS, not BAC, was the real party in interest in the initial Consolidated Complaint. That Complaint alleged various theories of primary liability against BAC, including enterprise liability and common law agency principles. The issue of control arose in the context of whether BAC could be held liable as a primary violator under those various theories, or whether liability could be imputed to it because it allegedly controlled BAS, the entity that actually engaged in the transactions at issue but was not named as a defendant. The First Amended Complaint mooted the real party in interest issue because the First Amended Complaint substitutes BAS in place of BAC as the alleged primary violator and asserts only Section 15 control person claims against BAC. Control person liability under Section 15 was not at issue on the summary judgment motion, and the Court's denial of the summary judgment motion did not hinge on the Section 15 issue. Rather, the Court's denial of summary judgment focused on the fact intensive inquiries raised by the various theories of primary liability at issue, Plaintiffs' lack of discovery on those theories and the Court's belief that there were fact issues that were inappropriate for summary adjudication.

The issue before the Court on this motion pursuant to Federal Rule 12(b)(6) is whether Plaintiffs have adequately pled a claim for control person liability against BAC under Section 15. Thus, the two motions raise distinct inquiries and are subject to different standards of law.[33] Consequently, Plaintiffs' contention that this Court has already denied certain Bank

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[33] Nor did this Court ever determine whether Plaintiffs had adequately alleged control person liability against BAC in the Consolidated Complaint under Sections 15 or 20(a). See Enron, 235 F. Supp. 2d at 691 ("The Court defers ruling on the issue [of controlling person liability] under the federal and Texas statutes until it has thoroughly reviewed all the individual defendants' motions."). In any event, the

Defendants' control person arguments is based on a misunderstanding of the issues raised by the summary judgment motion and the instant motion.

Plaintiffs similarly are incorrect in arguing that the issue of control person liability under the 1933 and 1934 Acts requires fact-intensive inquiries and is inappropriate for resolution prior to discovery. Opp. at 51 (citing May 22, 2003 Order at 2). As explained above, the issues and legal standards facing the Court on the summary judgment motion are fundamentally different from those facing the Court on this 12(b)(6) motion.

This Court's decision granting motions to dismiss control person claims against some of the individual Andersen defendants in this action also belies Plaintiffs' assertion that BAC's purported control of BAS is an issue of fact that cannot be determined on a motion to dismiss. See Enron Corp., 2003 WL 230688. Contrary to Plaintiffs' assertion, courts routinely dismiss control person claims when the complaint fails to plead facts showing that the alleged controlling person controlled the primary violator.[34]

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controlling person allegations against BAC in the Consolidated Complaint are significantly different from those in the FAC. The Consolidated Complaint alleged that BAC controlled every alleged violator of Section 11, including Enron and all of the other defendants. The FAC alleges only that BAC controlled BAS. The adequacy of the allegations in the FAC are the subject of BAC's current motion to dismiss the FAC.

[34] E.g., Johnson, 262 F. Supp. 2d at 958-59 (dismissing control person claim because plaintiffs, among other things, failed to sufficiently allege that the defendants controlled the primary violator); In re Digital Island Sec. Litig., 223 F. Supp. 2d 546, 563 (D. Del. 2002) (the "complaint 'does nothing more than restate the legal standard for control person liability; it does not provide adequate facts to support these allegations.'"); Zishka v. American Pad & Paper Co., No. Civ. A. 3:98-CV-0660-M, 2001 WL 1748741, at *1 (N.D. Tex. Sep. 28, 2001) (dismissing control person allegations as insufficient because "[s]tatus alone as to persons not involved in day-to-day management is legally insufficient . . . ."); Dartley v. ErgoBilt Inc., No. CIV. A. 398CV1442M, 2001 WL 313964, at *1-2 (N.D. Tex. Mar. 29, 2001) (dismissing control person claims because mere fact of major stock ownership and participation in voting agreement were insufficient to show power to control the purported primary violator); Ellison, 36 F. Supp. 2d at 642 ("Aside from the naked assertion that the [ ] Defendants were 'officers' of the Liberian Corporations, the complaint is devoid of any allegation as to how these lawyers 'controlled' these companies.").

CONCLUSION

For all of the foregoing reasons and those discussed in their Moving Brief, this Court should dismiss the First Amended Complaint against BAS and BAC, with prejudice.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT LLP

By: Gregory A Markel, with permission CGK

Gregory A. Markel (*pro hac vice*)*
(Attorney-in-Charge)
Ronit Setton (*pro hac vice*)
Nancy Ruskin (*pro hac vice*)
100 Maiden Lane
New York, NY 10038
Telephone: (212) 504-6000
Facsimile: (212) 504-6666

Charles G. King
Texas Bar No. 11470000
S.D. Tex. Bar No.: 01344
King & Pennington LLP
1100 Louisiana Street
Suite 5055
Houston, Texas 77002-5220
Telephone: (713) 225-8404
Facsimile: (713) 225-8488

Attorneys for Defendants
Bank of America Corporation and
Banc of America Securities LLC

*Signed by Charles G. King with permission

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 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 this Court's Order.

Ronit Setton, by permission

Ronit Setton