Texas
2003
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION, MARK NEWBY, et al., Plaintiff, vs. ENRON CORP., et al., Defendants.	MDL 1446 and Consolidated, Related and Coordinated Cases Civil Action No. H-01-3624 and Consolidated, Related and Coordinated Cases

THE BANK DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S NOTICE OF RECENT AUTHORITY IN SUPPORT OF OPPOSITION TO THE BANK DEFENDANTS' MOTIONS TO DISMISS

In its August 15, 2003 Notice of Recent Authority in Support of Opposition to the Bank Defendants' Motions to Dismiss, Lead Plaintiff cites Levitt v. Bear Stearns & Co., No. 02-7860, 2003 U.S. U.S. App. LEXIS 16539 (2d Cir. Aug. 13, 2003), as support for its opposition to the Bank Defendants' arguments that the new claims asserted in the Amended Complaint are time-barred. According to Lead Plaintiff, the Second Circuit held:

> [B]ecause defendant Bear Stearns was a secondary actor (like the Bank Defendants here), Levitt was "not a case where Plaintiffs could allege a prima facie case against Bear Stearns simply by examining . . . financial statements and media coverage of the company." Id. at *23-*24. This, held the Second Circuit, distinguished the case before it from the "typical storm warnings case . . . brought against . . . officers or directors." Id. at 23.

"Likewise," Lead Plaintiff asserts, "here the Bank Defendants are secondary actors and their cases concerning inquiry notice are distinguishable." Lead Plaintiff's assertion

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regarding Levitt is wrong. Levitt is distinguishable from this case and irrelevant to the Bank Defendants' arguments in several respects.

First and foremost, Levitt differs from the case at bar because Lead Plaintiff here had actual notice of the identities of the newly added bank subsidiaries or affiliates and their alleged involvement in various Enron or Enron-related transactions at the time Lead Plaintiff filed the Consolidated Complaint on April 8, 2002, more than one year prior to its filing of the Amended Complaint which first named those subsidiaries and affiliates as defendants. As the Bank Defendants discussed in their memoranda of law in support of their motions to dismiss the Amended Complaint, the Consolidated Complaint defined the original bank defendants as including their affiliates or operating subsidiaries. In addition, publicly available documents referred to in the Consolidated Complaint, including offering memoranda and analyst reports, plainly identified most of the relevant bank subsidiaries. Because Lead Plaintiff in this case had actual notice of the identities of the bank subsidiaries and affiliates and their alleged involvement in various transactions, issues of inquiry notice, the focal point of Levitt, are not determinative here.

Second, as discussed above, Lead Plaintiff here, unlike the plaintiffs in Levitt, could have alleged the same case against the bank subsidiaries and affiliates when it filed the Consolidated Complaint, more than one year before filing the Amended Complaint. Indeed, other than adding the bank subsidiaries and affiliates as defendants, the allegations against the Bank Defendants in the Amended Complaint are essentially the same as those against the original bank defendants in the Consolidated Complaint. In contrast, in Levitt, the Second Circuit found that the complaint dismissed by the district court contained allegations regarding Bear Stearns' alleged role that were missing from both an earlier complaint and an NASD arbitration statement of claim brought against Bear Stearns by other shareholders that the district court had determined put the plaintiffs on notice of their claims. According to the Second Circuit, the district court should have

considered whether the factual allegations in those other pleadings were sufficient to put plaintiffs on notice of their claims against Bear Stearns and, thus, whether plaintiffs acted with reasonable diligence in discovering the facts of Bear Stearns' alleged role in the scheme.

Third, in Levitt, Bear Stearns was the clearing agent for Sterling Foster & Co., Inc., the perpetrator of the alleged market manipulation scheme. Sterling Foster, in turn, purchased the securities at issue from certain selling insiders of ML Direct, Inc., the issuer. Yet another entity, Patterson Travis, Inc., was the underwriter for the ML Direct IPO. Thus, while Bear Stearns was a "secondary actor," the Second Circuit stated that it was unclear whether and when the plaintiffs in Levitt had sufficient information regarding the alleged role of Bear Stearns to satisfy the pleading requirements. In contrast, as already discussed, Lead Plaintiff here had sufficient information regarding the bank subsidiaries and affiliates and their alleged roles to name them when Lead Plaintiff first sued the original bank defendants. Thus, while clearing agents may be secondary actors, neither their roles nor investors' knowledge of their roles are analogous to those of the newly-added bank defendants in this action.

The Second Circuit in Levitt determined that the district court erred in dismissing the complaint as time-barred because there were factual issues concerning the scope of the inquiry conducted by the plaintiffs, and whether a reasonable inquiry could have revealed enough information to satisfy the pleading requirements at least one year prior to the time the plaintiffs filed their complaint. Here, Lead Plaintiff had all the necessary information about the newly-added bank defendants when it filed the Consolidated Complaint against the original bank defendants in April 2002, but deliberately chose not to name those subsidiaries and affiliates until May 2003, more than one year later, when it filed the Amended Complaint. Accordingly, Levitt has no bearing on the Bank Defendants' motions to dismiss the Amended Complaint, and the Amended Complaint should be dismissed as time-barred.

Dated: August 26, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by website, http://www.esl3624.com, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this the 26th day of August, 2003.

Charles G. King