United States Courts
Southern District of Texas
FILED
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Michael N. Milby Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ §	
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§ § § § § § § § § § §	Civil Action No. H-01-3624 (Consolidated)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated, Plaintiffs, vs. KENNETH LAY, et al., Defendants.	§ § § § § § § § § § §	

MOTION OF DEFENDANT CIBC WORLD MARKETS PLC TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

Defendant CIBC World Markets plc moves to dismiss the Newby plaintiffs' First Amended Consolidated Complaint (the "Complaint"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In support of its motion, CIBC World Markets plc adopts the arguments and law set forth in the previously filed *Motion of Defendants CIBC World Markets Corp., f/k/a CIBC Oppenheimer Corp., and Canadian Imperial Bank of Commerce to Dismiss the First Amended*

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Consolidated Complaint and Memorandum of Law in Support. That Motion (Docket Entry # 1505) was filed on June 18, 2003, and is referred to herein as "CIBC's Motion to Dismiss."

In further support of its Motion, CIBC World Markets plc states as follows:

CIBC World Markets plc is a London-based subsidiary of defendant Canadian Imperial Bank of Commerce. CIBC World Markets plc is named as a defendant only in plaintiff's Fourth Claim for Relief ("Count IV"). Count IV purports to state a claim for relief against CIBC World Markets plc and ten other defendants under Section 12(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77(l)). The claims set forth in Count IV are sometimes referred to as the "Foreign Notes" claims. The claims asserted in Count IV arise out of certain Notes issued by various trusts linked to Enron. Though Count IV addresses nine separate offerings of Foreign Notes, CIBC World Markets plc is alleged to have participated in only one of those offerings: the July 12, 2001 offering of certain notes issued jointly by Marlin Water Trust II and Marlin Capital Corp. II (the "Marlin Notes"). The Marlin Notes were:

$475 million in 6.31% Senior Secured Notes due 2003

€515 million in 6.19% Senior Secured Notes due 2003

The Complaint alleges that CIBC World Markets plc was Initial Purchaser of some of the Marlin Notes, and that the Marlin Notes later were traded on the Luxembourg Stock Exchange. The Complaint alleges that the Marlin Notes Offering Memorandum was false and misleading because "[t]he repayment of these Notes was dependent upon the credit, financial condition and ability to pay of Enron," and because the Offering Memorandum incorporated false and misleading information about Enron's financial condition. First Am. Compl., ¶¶ 641.37-641.39.

The Complaint fails to allege any facts about the alleged offer or sale of the Marlin Notes—who purchased them, where the offers or sales were made, or which of the twelve initial

purchasers sold which Marlin Notes to what particular buyers. Not a single named plaintiff claims to have *actually* purchased any of the Marlin Notes. Rather, plaintiffs propose the creation of a broad class of purchasers of the Marlin Notes, and they speculate that some members of the proposed class may have purchased Marlin Notes from the various named defendants. However, only *actual* purchasers of the Marlin Notes could qualify as members of the proposed class. And since there are no allegations that the named plaintiffs actually purchased Marlin Notes, they do not qualify as members of the proposed class and cannot seek to represent it. *See in re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 522 (5th Cir. 1995). The named plaintiffs lack standing to allege a violation of Section 12(a)(2) of the 1933 Act arising out of the Marlin Notes, and all claims based on the sale or offering of those Notes must be dismissed.

Moreover, the Complaint fails to allege that any of the named plaintiffs—or any member of the proposed class, for that matter—purchased Marlin Notes directly from CIBC World Markets plc. or that anyone made such a purchase after being solicited by CIBC World Markets plc. Absent such allegations, Count IV fails to state a claim against CIBC World Markets plc. As set forth in CIBC's Motion to Dismiss, a purchaser has no standing to sue a particular defendant under Section 12(a)(2) unless he can allege either that he purchased the securities in question directly from that defendant, or that he did so after being solicited directly by that defendant. *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988); *Rosenzweig v. Azurix Corp.*, 2003 U.S. App. Lexis 11685 at *41 (5th Cir. June 13, 2003). Plaintiffs do not allege the direct sale of any Marlin Notes by CIBC World Markets plc to any plaintiff or member of the proposed class, nor do they allege any communications between CIBC World Markets and any plaintiff or member of the proposed class. The arguments of CIBC World Markets plc are set forth more

fully in CIBC's Motion to Dismiss at pages 13-14, and hereby are adopted by CIBC World Markets plc. Plaintiffs' Section 12(a)(2) claim fails as a matter of law.

Further, as set forth in CIBC's Motion to Dismiss, the rescission remedy sought by plaintiffs in Count IV (Complaint ¶ 1016.8) is not available to them. Plaintiffs do not allege that the Marlin Notes were sold in a public offering. Under the Supreme Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995), the rescission remedy provided by Section 12(a)(2) is available *only* when a prospectus is used to sell securities to the public. As pointed out in CIBC's Motion to Dismiss and discussed more fully in briefs submitted by J.P. Morgan (Docket Entry # 1498) and Bank of America (Docket Entry # 1514), the Offering Memorandum for the Marlin Notes explicitly disclaimed any intention of serving as a "prospectus" for a public offering.

Finally, plaintiffs' Section 12(a)(2) claim is barred by the one year statute of limitations under Section 13 of the 1933 Act. See CIBC's Motion to Dismiss, pp. 7-12. CIBC World Markets plc also adopts the arguments on this point set forth in the Motions to Dismiss filed by the other financial institution defendants.

Conclusion

For the foregoing reasons, CIBC World Markets plc urges the Court to dismiss plaintiffs' Fourth Claim for Relief in its entirety, and dismiss all claims made against CIBC World Markets plc in the Second Amended Complaint.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on September 16, 2003, true and correct copies of Defendant CIBC World Markets plc's Motion to Dismiss the First Amended Consolidated Complaint and Memorandum of Law in Support, and the proposed Order, have been served upon all counsel of record in accordance with the Order Regarding Service of Papers and Notice of Hearings entered on April 10, 2002.

Mark D. Manela

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