

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
VH NOV 26 2003
Michael N. Milby, Clerk

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' NOTICE OF SUPPLEMENTAL AUTHORITY IN
SUPPORT OF THEIR MOTIONS TO DISMISS THE FIRST AMENDED
CONSOLIDATED COMPLAINT**

Defendants J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., JPMorgan Chase Bank, Citigroup, Inc., Citibank N.A., Salomon Smith Barney, Inc., Salomon Brothers International Limited, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Pershing LLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (formerly known as CIBC Oppenheimer Corp.), CIBC World Markets PLC, Bank of America Corporation, Banc of America Securities LLC, Deutsche Bank AG, Deutsche Bank Securities Inc., DB Alex.Brown LLC, Deutsche Bank Trust Company Americas, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Inc., and Lehman Brothers Holdings Inc. (collectively, "Bank Defendants") respectfully submit this notice of supplemental authority in support of their motions to dismiss the First Amended Consolidated Complaint (the "Amended Complaint") in Newby.

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The Bank Defendants submit this notice to bring the Court's attention to the November 21, 2003 decision by the U.S. District Court for the Southern District of New York in State of Alaska Dept. of Revenue v. Ebbers (In re WorldCom, Inc. Securities Litigation), Case No. 03 Civ. 6592, slip op. (S.D.N.Y. Nov. 21, 2003) (opinion and order attached hereto as Exhibit A).¹ The court's decision in Alaska is relevant to two issues raised by the Bank Defendants in their respective motions to dismiss: 1) whether the Amended Complaint naming additional underwriter defendants is time-barred under the applicable statute of limitations; and 2) whether a private placement of debt securities in an unregistered offering made pursuant to Rule 144A and Regulation S supports a claim under Section 12(a)(2) of the Securities Act of 1933 (the "1933 Act").

Statute of Limitations

The Alaska plaintiffs filed their original complaint in April 2003. They later filed an amended complaint on September 24, 2003 in which they included as defendants ten additional members of the underwriting syndicates for various bond offerings and fifteen additional individuals. The newly-added underwriter defendants moved to dismiss the amended complaint as time-barred on the grounds that the amended complaint did not relate back to the date of the filing of the initial complaint, and that plaintiffs were on inquiry notice of their claims more than one year before they filed the amended complaint. The Alaska court agreed.

First, the Alaska court rejected the plaintiffs' argument, like that of Lead Plaintiff here, that the Sarbanes-Oxley Act applied to their Sections 11 and 12(a)(2)

¹ Alaska is an individual action brought by Milberg Weiss, counsel for Lead Plaintiff, the Regents of California, in the case at bar.

claims.² Rather, the court held that the one-year/three-year limitations period set out in Section 13 of the Securities Act applied to those claims.

Next, the Alaska court held that the amended complaint did not “relate back” to the filing of the original complaint under Federal Rule of Civil Procedure 15 because the plaintiffs knew the identities of the additional underwriter defendants when they filed the original complaint, were not required to name them to make their original complaint legally sufficient and chose not to name them. As the court explained: “[t]he Additional Underwriter Defendants were identified by name in the Offering documents giving rise to the claims alleged in the Initial Complaint Since the plaintiffs knew of the proposed defendants and chose not to name them, they are assumed to have omitted [them] intentionally, not by mistake.” Slip op. at 37-38. The same is true here. There is ample evidence that Lead Plaintiff knew the identities of the bank subsidiaries and affiliates added to the Amended Complaint when it filed the initial Consolidated Complaint but deliberately chose not to name them. As in Alaska, the offering documents for the transactions at issue prominently listed the names of those banking subsidiaries and affiliates.

Finally, the Alaska court determined that the amended pleading was not filed within the applicable limitations period because the plaintiffs were on inquiry notice of their claims under Sections 11 and 12(a)(2) “at least as of Worldcom’s announcement on June 25, 2002 – that it would have to restate its publicly reported financial results . . . by \$38 billion. . . .” Slip op. at 38. Because the plaintiffs filed their amended

² As in this case, the plaintiffs in Alaska explicitly disavowed that their Section 11 claim alleged fraud.

complaint in September 2003, more than one year later, the claims against the newly-added defendants were barred by Section 13's statute of limitations.

Under the reasoning in Alaska (as well as the Fifth Circuit precedent cited in the Bank Defendants' respective motions to dismiss), the Lead Plaintiff in Newby was on inquiry notice of its claims, at the latest, on November 8, 2001, when Enron announced that it was restating its financial results for 1997 through 2000. Indeed, Lead Plaintiff filed the initial Consolidated Complaint naming the bank holding companies, which were defined as including their subsidiaries, on April 8, 2002, and the first complaint in this action was filed on October 22, 2001. Like the newly-added claims in Alaska, the newly-added claims in the Newby Amended Complaint are time-barred because they were not filed until May 14, 2003, more than one and one-half years after Enron's November 8, 2001 announcement of its restatement, when Plaintiff plainly knew or should have known of its claims.

Section 12(a)(2) Claim

The Alaska court also dismissed with prejudice the claim under Section 12(a)(2) of the 1933 Act against a defendant underwriter who sold bonds in an unregistered offering made pursuant to Rule 144A and Regulation S. The court explained: "It is undisputed that Section 12(a)(2) does not provide a cause of action for private placements." Order at p. 47. Further, as the Supreme Court held in Gustafson v. Alloyd Co., 513 U.S. 561 (1995), "Section 12(a)(2) [does] not create a cause of action for written misrepresentations [] other than those contained in a prospectus." Id. at 48. In examining the offering memorandum, the Alaska court concluded: "[t]he fact that the December 2000 Offering was a private placement is clear from its face." Id. at 49. The

court held that the offering memorandum was not a prospectus within the meaning of Section 12(a)(2) and therefore Section 12(a)(2) did not apply. Id. at 52-54.

The recent decision in Alaska provides additional authority to grant the Bank Defendants' motions to dismiss the Section 12(a)(2) claims in Newby. As in Alaska, the Section 12(a)(2) claims based on the offerings of debt securities by Osprey Trust / Osprey I, Inc., Yosemite Securities Trust I, Yosemite Securities Co. Ltd., Enron Credit Linked Notes Trust, Enron Euro Credit Linked Notes Trust, Enron Credit Linked Notes Trust II, Enron Sterling Credit Linked Notes Trust and Marlin Water Trust II / Marlin Water Capital Corp. II should be dismissed because those offerings were not made pursuant to a prospectus, and for all of the additional reasons set forth in the Bank Defendants' respective motions to dismiss.

Dated: November 26, 2003

Respectfully submitted,

KING & PENNINGTON, LLP

By: 

Charles King
Texas Bar No. 11470000
Southern District I.D. No. 1344
1100 Louisiana Street, Suite 5055
Houston, Texas 77002
Telephone: 713-225-8404
Facsimile: 713-225-8488

CADWALADER, WICKERSHAM & TAFT LLP

Gregory A. Markel (Attorney-in-Charge)

Ronit Setton

Nancy I. Ruskin

100 Maiden Lane

New York, New York 10038

Telephone: 212-504-6000

Facsimile: 212-504-6666

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

WILSHIRE SCOTT & DYER P.C.

By: 
Jacalyn D. Scott
Texas Bar No. 17899900
Eugene B. Wilshire
3000 One Houston Center
1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Facsimile: (713) 651-0020

Apparition 

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

Brad S. Karp

Mark F. Pomerantz

Richard A. Rosen

Michael E. Gertzman

Claudia Hammerman

1285 Avenue of the Americas

New York, New York 10019-6064

Telephone: (212) 373-3000

Facsimile: (212) 757-3990

*Attorneys for Defendants Citigroup Inc.,
Citibank N.A., Salomon Smith Barney Inc. and
Salomon Brothers International Inc.*

HAYNES AND BOONE, LLP

By: Lawrence D. Finder, *by permission*


Lawrence D. Finder
Attorney-in-Charge
Southern District I.D. No. 602
Texas Bar No. 07007200
Odean L. Volker
Southern District I.D. No. 12685
Texas Bar No. 20607715
1000 Louisiana, Suite 4300
Houston, Texas 77002
Telephone: (713) 547-2000
Facsimile: (713) 547-2600

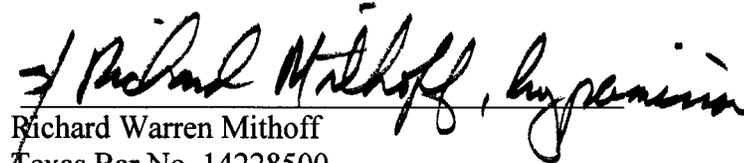
CRAVATH, SWAINE & MOORE LLP

Richard W. Clary
Julie A. North
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Defendants Credit Suisse First
Boston LLC (formerly known as Credit Suisse
First Boston Corporation), Credit Suisse First
Boston (USA), Inc. and Pershing LLC*

MITHOFF & JACKS, L.L.P.

By:



Richard Warren Mithoff
Texas Bar No. 14228500
Southern District I.D. No. 2102
Janie L. Jordan
Texas Bar No. 11012700
Southern District ID No. 17407
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, TX 77002
Telephone: (713) 654-1122
Facsimile: (713) 739-8085

JENKINS & GILCHRIST, P.C.

Charles A. Gall
Texas Bar. No. 07281500
Southern District I.D. No. 11017
James W. Bowen
Texas Bar No. 02723305
Southern District I.D. No. 16337
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Facsimile: (214) 855-4300

SIMPSON THACHER & BARTLETT LLP

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Jonathan K. Youngwood
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

*Attorneys for Defendants
J.P. Morgan Chase & Co., J.P. Morgan
Securities Inc. and JPMorgan Chase Bank*

ABRAMS, SCOTT & BICKLEY, L.L.P.

By: Barry Abrams 

Barry Abrams

Texas Bar No. 00822700

Southern District I.D. No. 2138

700 Louisiana, Suite 1800

Houston, Texas 77002

Telephone: (713) 228-6601

SULLIVAN & CROMWELL LLP

David H. Braff

Michael T. Tomaino, Jr.

Jeffrey T. Scott

Adam R. Brebner

125 Broad Street

New York, New York 10004

Telephone: (212) 558-4000

Facsimile: (212) 558-3588

Attorneys for Defendants

Barclays PLC, Barclays Bank PLC and

Barclays Capital Inc.

MAYER, BROWN, ROWE & MAW LLP

By: Mark Manela, Attorney
Mark Manela
Texas Bar No. 12894500
Southern District I.D. No. 1821
700 Houston Street, Suite 3600
Houston, Texas 77002-273 0
Telephone: (713) 221-1651

MAYER, BROWN, ROWE & MAW LLP

Alan N. Salpeter
Michele Odorizzi
T. Mark McLaughlin
190 South LaSalle Street
Chicago, Illinois 60603
Telephone: (312) 782-0600

*Attorneys for Defendants Canadian Imperial
Bank of Commerce, CIBC World Markets Corp.
(formerly known as CIBC Oppenheimer
Corp.) and CIBC World Markets PLC*

JONES DAY

By: Hugh R. Whiting, Esq.
Hugh R. Whiting
Texas Bar No. 21373500
Southern District I.D. No. 30188
717 Texas Avenue
Suite 3300
Houston, TX 77002

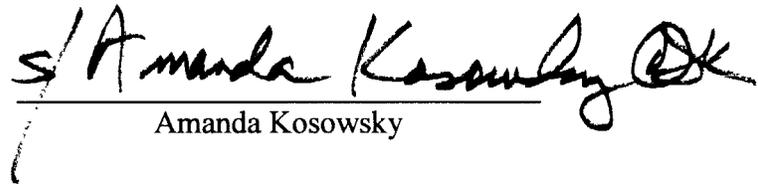
JONES DAY

David L. Carden
Robert C. Micheletto (not admitted in New
York)
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Facsimile: (212) 755-7306

*Attorneys for Defendants Lehman Brothers
Holdings Inc. and Lehman Brothers Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2003, a true and correct copy of the above and foregoing Bank Defendants' Notice of Supplemental Authority in Support of their Motions to Dismiss the First Amended Consolidated Complaint is being served upon all counsel of record by website, <http://www.es13624.com>, pursuant to this Court's Order.


Amanda Kosowsky

The Exhibit(s) May
Be Viewed in the
Office of the Clerk