UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
DEC 01 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' CORRECTED 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 corrected 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)

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[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

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[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: December 1, 2003

Respectfully submitted,

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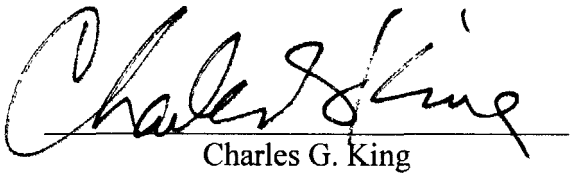
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2003, a true and correct copy of the above and foregoing Bank Defendants' Corrected 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.esl3624.com, pursuant to this Court's Order.



Charles G. King

The Exhibit(s) May

Be Viewed in the

Office of the Clerk