

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas

DEC 24 2003

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Michael N. McBy, Clerk

MDL 1446

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IN RE ENRON CORPORATION SECURITIES,
DERIVATIVE & ERISA LITIGATION

-----X
MARK NEWBY, et al.,

Plaintiffs,

v.

ENRON CORPORATION, et al.,

Defendants.

-----X
SILVERCREEK MANAGEMENT INC., et al.

Plaintiffs,

v.

SALOMON SMITH BARNEY, INC., et al.,

Defendants.

-----X
SILVERCREEK MANAGEMENT INC., et al.

Plaintiffs,

v.

CITIGROUP, INC., et al.,

Defendants.

Civil Action
No. H-01-3624
and Consolidated
Cases

Civil Action
No. H-02-3185

Civil Action
No. H-02-0815

-----X
**OPPOSED MOTION OF CERTAIN DEFENDANTS FOR AN ORDER CLARIFYING
THE COURT'S DECEMBER 10, 2003 MEMORANDUM AND ORDER**

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1. Banc of America Securities LLC (“BAS”), Banc of America Corporation (“BAC”), Salomon Smith Barney Inc. (“Salomon”), and Citigroup Inc. (“Citigroup”) (together, the “Moving Defendants”) respectfully submit this motion for an order clarifying the Court’s December 10, 2003 Memorandum and Order, in support of which they state as follows.

Preliminary Statement

2. Silvercreek Limited Partnership, Silvercreek II Limited, OIP Limited, Pebble Limited Partnership, and Silvercreek Management, Inc. (the “Silvercreek Plaintiffs”) have initiated two separate lawsuits, both of which have been consolidated into Newby and are pending before this Court. The two lawsuits involve different parties as well as different causes of action.

3. As set forth more fully below, in April 2003, the Silvercreek Plaintiffs, in the first of their two actions, filed a motion for leave to file an amended complaint. In response, certain of the parties entered into a stipulation, which this Court “so ordered.” The stipulation and order provided that defendants would have until 45 days after the Court rules on the motion for leave to amend, to answer, move to dismiss, or otherwise respond to the proposed amended complaint. Because the April 2003 stipulation and order did not provide for the automatic granting of the motion for leave to amend, and because the Court has not yet ruled on that motion, the time for the defendants to file motions to dismiss has not yet begun to run under the April 2003 stipulation and order.

4. Additionally, in July 2003, the Court issued a scheduling order providing that amendment of pleadings and briefing of motions to dismiss amended pleadings in consolidated, related, and coordinated cases are to take place after the Court decides the pending motion for class certification in Newby. Because the Court has not yet ruled on the class

certification motion in Newby, the time for briefing motions to dismiss amended pleadings also has not begun to run under the July 2003 scheduling order.

5. Certain of the statements in the Court's December 10, 2003 Memorandum and Order, including the statement that the original complaint has been superseded by stipulation and that certain claims contained in the proposed amended complaint are "unchallenged," are inconsistent with the Court's prior orders and require clarification. The Moving Defendants do intend to move to dismiss the "unchallenged" claims when there is an operative complaint.

Silvercreek I

6. The first lawsuit brought by the Silvercreek Plaintiffs was Silvercreek Management, Inc. et al. v. Salomon Smith Barney, Inc. et al., Case No. H-02-3185 (referred to hereinafter as "Silvercreek I"), and was initiated by the filing of the original complaint in the Southern District of New York in January 2002. In the original complaint in Silvercreek I, the Silvercreek Plaintiffs named four defendants: Salomon; Goldman Sachs & Company; BAS; and Arthur Andersen LLP. The original complaint in Silvercreek I purported to assert causes of action for fraud, negligent misrepresentation, and violation of Section 11 of the Securities Act of 1933.

7. The parties (other than Arthur Andersen LLP) fully briefed motions to dismiss the original complaint in Silvercreek I in March and April of 2002, prior to the transfer of Silvercreek I case to this Court and its consolidation with Newby. The Court decided this motion to dismiss in its Memorandum and Order of Partial Dismissal dated December 10, 2003 (the "December 10, 2003 Memorandum and Order"). For the Court's convenience, a copy of the December 10, 2003 Memorandum and Order is attached as Exhibit A to this motion.

8. Subsequent to the filing of the motions to dismiss the original complaint, but prior to the Court's December 10, 2003 Memorandum and Order, the Silvercreek Plaintiffs filed a Motion for Leave to File First Amended Complaint in Silvercreek I. In the proposed First Amended Complaint, the Silvercreek Plaintiffs propose to assert two additional claims: a claim under Section 10(b) of the Securities Exchange Act of 1934 against Salomon and Goldman Sachs & Company and a claim under the Texas Securities Act against all four defendants.

9. In a stipulation "so ordered" by the Court on April 17, 2003 (the "April 17, 2003 Stipulation and Order"), Defendants Salomon and BAS gave their consent to the Silvercreek Plaintiffs' motion for leave to amend on certain conditions set forth in the stipulation. For the Court's convenience, a copy of the April 17, 2003 Stipulation and Order is attached as Exhibit B to this motion.

10. The April 17, 2003 Stipulation and Order provided, among other things, that the defendants in Silvercreek I would have 45 days from the later of (a) the lifting of the stay in Newby, et al. v. Enron Corp., et al. or (b) the date the Court issues a decision on the motion for leave to amend in Silvercreek I to answer, move to dismiss, or otherwise respond to the operative complaint in Silvercreek I.

11. The Court has not issued a decision on the motion for leave to amend in Silvercreek I. Consequently, under the April 17, 2003 Stipulation and Order, the 45 day time period for the defendants in Silvercreek I to answer, move to dismiss, or otherwise respond to the proposed First Amended Complaint in Silvercreek I has not yet begun to run. Nor has the time for defendants to respond to amended pleadings begun to run under the July 11, 2003 Scheduling Order, discussed below. Accordingly, defendants have not yet had the opportunity to file, and have not filed, motions to dismiss the proposed First Amended Complaint in Silvercreek I.

Silvercreek II

12. The second lawsuit brought by the Silvercreek Plaintiffs was Silvercreek Management, Inc. et al. v. Citigroup, Inc., Case No. H-03-0815 (referred to hereinafter as “Silvercreek II”), initiated with the filing of the original complaint in November 2002. In the original complaint in Silvercreek II, the Silvercreek Plaintiffs purported to assert claims against approximately 50 defendants, including BAC and Citigroup, none of which is a defendant in Silvercreek I.

13. The Silvercreek Plaintiffs subsequently filed a First Amended Complaint in Silvercreek II dated February 25, 2003.

14. The April 17, 2003 Stipulation and Order discussed above also anticipated the consolidation of Silvercreek I and Silvercreek II and provided for a uniform motion schedule to apply to Silvercreek I and Silvercreek II. It provided that the defendants in Silvercreek II (like the defendants in Silvercreek I) would have 45 days from the later of (a) the lifting of the stay in Newby, et al. v. Enron Corp., et al. or (b) the date the Court issues a decision on the motion for leave to amend in Silvercreek I to answer, move to dismiss, or otherwise respond to the operative complaint in Silvercreek II.

15. Because the Court has not issued a decision on the motion for leave to amend in Silvercreek I, under the April 17, 2003 Stipulation and Order, the 45 day time period for the defendants in Silvercreek II to answer, move to dismiss, or otherwise respond to the proposed First Amended Complaint in Silvercreek II has not yet begun to run. Nor has the time for defendants to respond to amended pleadings begun to run under the July 11, 2003 Scheduling Order, discussed below. Accordingly, defendants have not yet had the opportunity to file, and have not filed, motions to dismiss the proposed First Amended Complaint in Silvercreek II.

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The July 11, 2003 Scheduling Order in *Newby*

16. The Court issued a Scheduling Order in Newby dated July 11, 2003 (the “July 11, 2003 Scheduling Order”), in which the Court set forth a schedule for, among other things, responses to amended pleadings in consolidated, related, and coordinated cases.

17. Under the July 11, 2003 Scheduling Order, within two weeks of the entry of an order deciding the class certification motion in Newby, plaintiffs in each remaining consolidated, related, and coordinated case are to (1) elect to proceed under the consolidated amended complaint in Newby or (2) file a statement that they will proceed under their own complaints, or request leave to amend. In cases in which plaintiffs elect to proceed under their own complaints or seek leave to amend, the July 11, 2003 Scheduling Order provides that defendants are to file any amended responsive pleadings within 30 days of the filing of such an amended complaint; and plaintiffs are to file replies to any such motions to dismiss within 30 days thereafter.

The December 10, 2003 Memorandum and Order

18. As noted above, the Court decided the issues raised in the motion to dismiss that was directed at the original complaint in Silvercreek I in its December 10, 2003 Memorandum and Order.

19. In light this Court’s December 10, 2003 Memorandum and Order, the Moving Defendants believe it is appropriate at this time to bring to the Court’s attention the fact that the Court has not yet ruled on the pending motion for leave to amend the complaint in Silvercreek I and that consequently, under the April 17, 2003 Stipulation and Order, the defendants’ time for answering, moving to dismiss, or otherwise responding to the amended complaints in Silvercreek I and Silvercreek II has not yet begun to run. Additionally, under the

July 11, 2003 Scheduling Order, the time for moving to dismiss amended pleadings has not yet begun to run because the Court has not yet decided the motion for class certification in Newby.

20. In addition, the Moving Defendants wish to bring to the Court's attention, and request clarification, regarding certain statements in the December 10, 2003 Memorandum and Order.

21. In particular, the Moving Defendants respectfully submit that this Court's statement on page 3 that the "original complaint" in Silvercreek I "has been superseded by stipulation (#65) by Plaintiffs' first amended complaint (#61)" is not accurate. The April 17, 2003 Stipulation and Order did not provide for the automatic granting of the Silvercreek Plaintiffs' motion for leave to amend, but rather provided a schedule for the defendants to answer, move to dismiss, or otherwise respond to the "operative complaint" after the Court decided the motion for leave to amend. The April 17, 2003 Stipulation and Order specifically provided for the possibility that the Court might deny, rather than grant, the motion for leave to amend, by providing that "if the Court denies the Motion [for leave to amend], Defendants may elect to rely on their motions to dismiss currently pending in this matter." April 17, 2003 Stipulation and Order at 2.

22. Moreover, the December 10, 2003 Memorandum and Order refers to the two new claims that the Silvercreek Plaintiffs proposed to add to Silvercreek I in their proposed First Amended Complaint (under Section 10(b) of the Securities Exchange Act of 1934 and under the Texas Securities Act), as "unchallenged" and as "pending." December 10, 2003 Memorandum and Order at p. 39. We respectfully submit that this statement was also made in error. Because the Court has not yet ruled on the pending motion for leave to amend the complaint in Silvercreek I and because the April 17, 2003 Stipulation and Order affords

defendants 45 days after the decision on such motion to answer, move to dismiss, or otherwise respond to the proposed First Amended Complaint, that complaint and the proposed new causes of action in it are still subject to challenge on a motion to dismiss. The amended pleadings are also still subject to challenge on a motion to dismiss under the July 11, 2003 Scheduling Order.

23. Defendants intend to move to dismiss, in whole or in part, the claims that the Silvercreek Plaintiffs seek to assert against them in the proposed amended complaints in Silvercreek I and Silvercreek II, in accordance with the schedule set forth in the July 11, 2003 Scheduling Order, once this Court decides the motion for class certification in Newby, provided that the Silvercreek Plaintiffs do not elect to proceed under the consolidated complaint in Newby.¹

24. Based on all of the foregoing, the Moving Defendants respectfully request that the Court, consistent with the above, clarify its December 10, 2003 Memorandum and Order to state that amendment of pleadings and briefing of motions to dismiss amended pleadings in Silvercreek I and Silvercreek II are to be governed by the July 11, 2003 Scheduling Order.

25. The Moving Defendants also note that in its December 10, 2003 Memorandum and Order, the Court cited the declaration of Louise Morwick, which the Court struck in a March 26, 2003 Order. The Moving Defendants respectfully request that the Court reconsider the portions of the December 10, 2003 Memorandum and Order in which the Court relied upon that declaration.

26. The Silvercreek Plaintiffs apparently oppose the present motion.

¹ Alternatively, if the Court prefers that the parties proceed under the schedule set forth in the April 17, 2003 Stipulation and Order, in Silvercreek I, Silvercreek II, or both, the Moving Defendants would be prepared to proceed on that schedule as well.

Dated: December 24, 2003

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Beginning on December 18, 2003 through December 23, 2003, Gregory A. Markel and I have had several oral and written communications with Steven N. Williams, counsel for plaintiffs Silvercreek Management Inc., Silvercreek Limited Partnership, Silvercreek II Limited OIP Limited, and Pebble Limited Partnership, regarding this motion. Despite our good faith efforts, we have been unable to obtain a clear statement from Mr. Williams that plaintiffs do not oppose the motion, and accordingly we must conclude that the motion is opposed.


Gregory G. Ballard *by permission*

CERTIFICATE OF SERVICE

I herby certify that a true and correct copy of the foregoing instrument was served upon all known counsel or record by website, <http://www.esl3624.com>, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this 24th day of December, 2003.


Gregory A. Markel *by permission*

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