

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

MAR 31 2004

In Re Enron Corporation
Securities, Derivative &
"ERISA Litigation

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§

MDL-1446
Michael N. Milby, Clerk of Court

MARK NEWBY, ET AL.,

§
§
§
§

Plaintiffs

VS.

CIVIL ACTION NO. H-01-3624
CONSOLIDATED CASES

ENRON CORPORATION, ET AL.,

§
§
§

Defendants

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,
Individually and On Behalf of
All Others Similarly Situated,

§
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§
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§
§

Plaintiffs,

VS.

KENNETH L. LAY, et al.,

§
§
§

Defendants.

ORDER RE BARCLAYS DEFENDANTS' MOTION TO DISMISS

Pending before the Court in the above referenced cause is Defendants Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.'s (collectively, "Barclays Defendants'") motion to dismiss (instrument #1512) all claims against them in the First Amended Consolidated Complaint (#1388).

The new complaint asserts § 10(b) Exchange Act claims against Barclays PLC and two of its subsidiaries, Barclays PLC, Barclays Bank and Barclays Capital, and controlling person liability under § 20(a) against Barclays PLC. Under the Securities Act of 1933, the First Amended Consolidated Complaint also alleges that Barclays Capital violated § 12(a)(2) and that

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Barclays PLC is liable as a "control person" under § 15 of the Securities Act of 1933.

Barclays Defendants seek dismissal under Fed. R. of Civ. P. 12(b)(6) on the grounds that the claims against Barclays Bank PLC and Barclays Capital Inc. are time-barred¹ and because the § 12(a)(2) (and derivative § 15) claims under the Securities Act of 1933 fail because (1) no plaintiff has alleged that it purchased in the Yosemite Securities Offering on February 15, 2000² and thus no plaintiff has standing to sue, and (2) the Yosemite Securities Offering was not made pursuant to a prospectus.

The Court hereby incorporates its previous memoranda and orders in *Newby*, in particular for Barclays Defendants' instant motion, the recent memoranda and orders regarding ICERS' motion to intervene (#1999) and Merrill Lynch and Deutsche Bank Entities' motions to dismiss (#2036). Because the Court has already ruled on all the arguments put forth by Barclays Defendants, it summarizes those conclusions and applies them here

1. Limitations

Lampf's and Section 13's one-year/three-year statute-of-limitations/statute-of-repose governs Lead Plaintiff's claims against the Barclays Defendants. #1999 at 24-63.

¹ In the First Consolidated Complaint (#441), filed on April 8, 2002, Lead Plaintiff sued only Barclays PLC, but in the First Amended Consolidated Complaint (#1388), filed on May 14, 2003, Lead Plaintiff added Barclays Capital Inc. and Barclays Bank PLC as Defendants.

² The Yosemite Securities Offering was of 8.75% Series 2000-A Linked Enron Obligations, issued on February 15, 2000 and due in 2007. #1388 at 409, ¶ 641.2.

Barclays Defendants argue that Lead Plaintiff had actual notice of the identity of Barclays Capital and Barclays Bank when it filed the First Consolidated Complaint on April 8, 2002, more than a year before they were named in the First Amended Consolidated Complaint filed on May 14, 2003. The April 8, 2002 complaint reflects that Lead Plaintiff knew of the facts forming the basis of the securities violations that it later asserted against the subsidiaries in the amended complaint and alleged that Barclays underwrote the Yosemite Securities Offering. Thus the one-year statute of limitations began to run on all these claims on April 8, 2002 at the latest had expired by the filing of the First Amended Complaint fourteen months later.

Under the circumstances of this litigation, detailed in #2036 at 53-75, and pursuant to Federal Rule of Civil Procedure 15(a), the Court has found good cause for construing and has construed the January 14, 2003 letter from Lead Plaintiff's counsel as a motion for leave to amend to name the subsidiaries of Bank Defendants and found that January 14, 2003 was therefore the date the Amended Consolidated Complaint was timely filed for limitations purposes. #2036 at 66-74.

The Court has also found that Lead Plaintiff has timely asserted the 1933 Act claims based on the Foreign Debt Securities (#1388 at 409-10, ¶ 641.2), since the earliest potential storm warnings to trigger notice inquiry for these offerings, including the Yosemite Securities Offering involving the Barclays Defendants, were in the fall of 2002, and the motion for leave to

amend, and therefore the amended complaint, was deemed filed on January 14, 2003, within one year of notice inquiry and within three years of the investor-plaintiffs' Yosemite purchases. #2036 at 63-63.

2. Standing for § 12(a)(2) Claims

As discussed in #1999 at 65-66, 72-74, Lead Plaintiff, as distinguished from a class representative, has standing to sue for the § 12(a)(2) claims. If however, at the time of class certification, there is no class member that has standing to serve as a class representative for those who purchased Yosemite notes from Barclays Capital, the § 12(a)(2) and § 15 claims will be dismissed. #1999.

3. Control Person Liability

For control person liability generally and Lead Plaintiff's pleading burden, see #1194 at 64-67, 71-73; #1241 at 24-42. Because the Court has found that Lead Plaintiff has pled predicate securities violations under § 12(a)(2), it has pled the basis for a derivative control-person liability claim under § 15.

In *Newby*, the Court has discussed not only the lack of clarity in the Fifth Circuit's position regarding the pleading requirements for control person liability (see, e.g., #1241 at 24-31), but also its more lenient standard of proof compared with those of other Circuit Courts of Appeals. As discussed in #1241, it appears that the Fifth Circuit requires pleading, in addition to status or position, some facts that show the defendant had power to directly or indirectly control or influence corporate

policy, e.g., through ownership of voting securities, contract, etc., or had knowledge of the primary violation by the controlled person. As elements of a *prima facie* case of controlling person liability, the Fifth Circuit has expressly rejected more stringent requirements such as actual participation in the primary violation and/or the actual exercise of the controlling person's power to control. This Court has also held that notice pleading under Rule 8 (a "short plain statement of the claim showing the pleader is entitled to relief"), rather than heightened pleading under Rule 9, applies to control person liability claims, and thus a plaintiff need not allege facts to support every element of a *prima facie* case (#1241 at 31-42). Discovery is available to flesh out the facts.

Here the First Amended Consolidated Complaint at 116, ¶99.1, has alleged that

Each of the bank holding company entities sued as defendants herein conducts business affairs through a series of wholly owned and controlled subsidiaries where the bank holding company directly or indirectly owns 100% of the stock of the subsidiaries and completely directs and controls their business operations through the selection and appointment of their officers and, where necessary, directors. These controlled subsidiaries are also the agents of the bank holding company entities and include investment bank subsidiaries as well as other specialized subsidiaries rendering financial advice and services to public companies, including Enron. The financial operations and condition of these subsidiaries are--for financial reporting and other purposes--consolidated with the bank holding company's financial statements. Thus, all revenues, earnings and income of the bank holding company subsidiaries are upstreamed to and belong to the bank holding companies. The

bank holding companies named as defendants in this action all participated in the fraudulent scheme and course of business complained of, not only by way of the actions of the holding company itself, but also by way of the actions of numerous of its controlled subsidiaries and agents, some of which have been named as defendants in this action as well.

The Court finds that Lead Plaintiff has given sufficient notice and stated a claim for controlling person liability against Barclays PLC under § 20(a) of the Exchange Act and under § 15 of the 1933 Act.

4. Public or Private Offerings

As detailed in #2036 at 76-90, given Lead Plaintiff's allegations about the nature of the Foreign debt Securities offerings, whether the offerings are public or private for purposes of § 12(a)(2) liability is a fact issue not properly resolved in the 12(b)(6) motion stage. It is Barclays Defendants' burden to prove an affirmative defense of exemption from the registration requirements or that the Yosemite Offering was private.

Accordingly, for the reasons stated, the Court ORDERS that Barclays Defendants' motion to dismiss is DENIED.

SIGNED at Houston, Texas, this 30th day of March, 2004.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE