

MAR 30 2004

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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

Defendants Bank of America Corporation, Banc of America Securities LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital, Inc., Citigroup Inc., Citibank, N.A., Salomon Smith Barney Inc. and Salomon Brothers International Limited (collectively, "Bank Defendants") respectfully submit this Second Notice of Supplemental Authority in support of their motions to dismiss the First Amended Consolidated Complaint ("FAC") in Newby v. Enron Corp., Case No. H-01-3624 (S.D. Tex.) ("Newby").

The Bank Defendants submit this notice to bring to the Court's attention two recent decisions by Judge Denise Cote of the U.S. District Court for the Southern District of New York in the In re WorldCom, Inc. Securities Litigation. These decisions, captioned Public Employees Retirement System of Ohio v. Ebbers (In re WorldCom, Inc.

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Securities Litigation), No. 02 Civ. 3288 (DLC), 2004 WL 97666 (S.D.N.Y. Jan. 20, 2004) (“Ohio”) and In re WorldCom, Inc. Securities Litigation, No. 02 Civ. 3146, 2004 WL 540450 (S.D.N.Y. Mar. 19, 2004) (“WorldCom”), are attached hereto as Exhibits A and B, respectively. These decisions further support the argument set forth by the Bank Defendants in their respective motions to dismiss that Lead Plaintiff’s claims against the financial institution defendants first named in the FAC are time-barred under the applicable statute of limitations.

A. **Public Employees Retirement System of Ohio v. Ebbers**
(In re WorldCom, Inc. Securities Litigation),
Case No. 02 Civ. 3288 (DLC) (S.D.N.Y. Jan. 20, 2004) (“Ohio”)

The Ohio plaintiffs in the WorldCom Securities Litigation filed their action in September 2002. On July 11, 2003, they filed an amended complaint adding as defendants underwriters who were the European affiliates (“Additional Affiliated Underwriter Defendants”) of the originally named underwriter defendants. The claims against both the original underwriter defendants and the Additional Affiliated Underwriter Defendants were based, in part, on their participation in a May 2001 offering of WorldCom bonds. The Additional Affiliated Underwriter Defendants moved to dismiss the amended complaint as barred by the applicable statute of limitations. In response, the Ohio plaintiffs argued that their claims against the newly added defendants related back to the filing of the original complaint because the new defendants were affiliates of the underwriters named as defendants in the original complaint. The Ohio plaintiffs contended that “the original complaint ‘mistakenly alleged, due to a mistake in identities’ that certain American banks were underwriters for the bonds instead of their European affiliates.” Ohio, 2004 WL 97666, at *2.

Judge Cote rejected the Ohio plaintiffs' argument, concluding that the new claims against the Additional Affiliated Underwriter Defendants based on their participation in the May 2001 WorldCom bond offering did not relate back to the filing of the original complaint because the newly added defendants were listed in the registration statement for that offering.¹ The court reasoned:

Baldly asserting a 'mistake' in identity is insufficient to show that a mistake actually occurred. To the extent that a defendant is listed in the registration statement as an underwriter, an investor has adequate notice of identity such that a conclusory assertion of mistake is inadequate. The Ohio Action plaintiffs have not shown that they misapprehended the identities of the entities they wished to sue. As a consequence, to the extent an entity was listed as an underwriter in the registration statement for the May 2001 Bond Offering, the failure to name that entity in the original pleading *must be considered a matter of choice, not mistake.*

Id. at *2 (emphasis added). In addition, Judge Cote determined that the fact that some of the Additional Affiliated Underwriter Defendants had been named as defendants in complaints in the WorldCom Securities Litigation filed by other plaintiffs provided additional evidence that "[t]he plaintiffs' decision . . . to omit them from their own timely filed pleading . . . was a matter of choice, and not mistake." Id. at *3.

¹ Judge Cote also reiterated the conclusions that she reached with respect to statute of limitations issues in State of Alaska Department of Revenue v. Ebbers (In re WorldCom, Inc. Sec. Litig.), 294 F. Supp.2d 431 (S.D.N.Y. 2003). See Ohio, 2004 WL 97666, at *1. The Alaska opinion was the subject of the Bank Defendants' Notice of Supplemental Authority filed with this Court on December 1, 2003. Judge Cote stated that "[i]n brief, [the] relevant holding [of the Alaska opinion] for this motion was that the one year/three year statute of limitations within the Securities Act [as opposed to the statute of limitations set forth in the Sarbanes-Oxley Act] governed the filing of the Securities Act claims in that action." Id. In addition, plaintiffs were on inquiry notice of their Securities Act claims "at least as of" WorldCom's June 25, 2002 announcement that it would restate its financial results. Id. (citation omitted). Thus, the Ohio plaintiffs' newly added claims, which were asserted in July 2003, more than one year after the Ohio plaintiffs had inquiry notice of the claims, were time-barred.

B. In re WorldCom, Inc. Securities Litigation, Case No. 02 Civ. 3146, 2004 WL 540450 (S.D.N.Y. Mar. 19, 2004) (“WorldCom”)

The WorldCom plaintiffs filed their original consolidated complaint in October 2002. In that complaint, the WorldCom plaintiffs asserted claims against several underwriters of WorldCom’s May 2001 offering of U.S. dollar bonds and foreign notes. On December 1, 2003, the WorldCom plaintiffs filed an amended complaint in which they named as defendants underwriters who were the “Foreign Affiliates” of underwriters named as defendants in the original complaint. The Foreign Affiliates underwrote foreign notes issued in the May 2001 offering. Several of the newly added Foreign Affiliate defendants moved to dismiss the amended complaint on the ground that the claims against them were time-barred and did not relate back to the filing of the original complaint.

Judge Cote agreed, holding that the claims against the Foreign Affiliate Defendants did not relate back to the filing of the original consolidated complaint under Federal Rule of Civil Procedure 15 because the WorldCom plaintiffs’ failure to name them as defendants in the initial complaint was not the product of a mistake. Judge Cote observed that the Foreign Affiliate defendants were identified by name in the paragraphs of the initial complaint describing their domestic affiliates, which had been named as defendants. WorldCom, 2004 WL 540450, at *1-2. In addition, the newly added defendants were listed as underwriters in the registration statement for the May 2001 bond offering. Id. at *1. The court rejected the lead plaintiff’s argument that “it initially believed that it could hold the Foreign Affiliates liable for the Foreign Notes they sold simply by listing them in the same paragraph as their American affiliates.” Id. at *5. Rather, Judge Cote reached the same conclusion that she reached in the Ohio decision:

“[T]his is a case in which the plaintiff made a strategic decision to name only one of two entities with potential liability for certain conduct. As a consequence, the claims against the Foreign Affiliates do not relate back to the timely filed pleading.” Id.

With respect to inquiry notice, Judge Cote held that the applicable one year statute of limitations on the Securities Act claims against the Foreign Affiliates “began to run no later than June 25, 2002,” the date that WorldCom announced its restatement. WorldCom, 2004 WL 540450, at *3. Since the amended complaint adding claims against the Foreign Affiliates was not filed until December 1, 2003, more than one year later, the claims against the Foreign Affiliates were time-barred.² Id.

C. Judge Cote’s Recent Decisions Further Support the Dismissal of the Claims Against the Newly Added Financial Institution Defendants in Newby on Statute of Limitations Grounds

Under the reasoning in Ohio and WorldCom, the Newby Lead Plaintiff’s claims against the newly added financial institution defendants do not relate back to the filing of the initial Consolidated Complaint on April 8, 2002. See WorldCom, 2004 WL 540450, at *3-5; Ohio, 2004 WL 97666, at *2-3. Lead Plaintiff knew the identities of the bank subsidiaries and affiliates first named in the FAC when it filed the initial Consolidated Complaint, but made a deliberate and tactical decision not to name them. In the instant case, each of the newly added defendants is a subsidiary or affiliate of one of the bank holding companies that were named as defendants in the Consolidated Complaint. And as in Ohio and WorldCom, each of these newly added defendants was

² Two of the six newly added defendants in WorldCom had been named as defendants in a prior putative class action complaint that was ultimately consolidated into the WorldCom Securities Litigation. Thus, Judge Cote held that the claims as to those two defendants were timely, having been tolled by the filing of the prior complaint in which they were named as defendants. See WorldCom, 2004 WL 540450, at *6.

either identified in the offering documents for the transactions at issue or referenced by Lead Plaintiff in the Consolidated Complaint without being included as a defendant.³ Further, many of the claims against the newly added financial institution defendants in the FAC are based on offerings or transactions that were the subject of claims against the bank holding company defendants in the Consolidated Complaint.⁴ Thus, the Newby Lead Plaintiff's failure to name the newly added financial institution defendants in the Consolidated Complaint could not possibly have been the product of a mistake and the newly added claims do not relate back to the filing of the Consolidated Complaint.

In addition, the Ohio and WorldCom opinions support the argument set forth in the Bank Defendants' respective motions to dismiss that the Newby Lead Plaintiff was on notice of its claims against the newly added financial institution defendants no later than November 8, 2001, when Enron announced that it was restating its financial results for 1997 through 2000. In both Ohio and WorldCom, Judge Cote found that the plaintiffs were on inquiry notice of their claims against the newly added underwriter defendants no later than June 25, 2002, when WorldCom announced its restatement. WorldCom, 2004 WL 540450, at *3; Ohio, 2004 WL 97666, at *1-2. The fact that the Newby Lead Plaintiff filed the initial Consolidated Complaint against several

³ For example, Banc of America Securities LLC ("BAS"), one of the newly added financial institution defendants, was identified in the description of defendant Bank of America Corporation ("BAC") in the Consolidated Complaint. The Consolidated Complaint described BAC as "a large integrated financial services institution that through its controlled subsidiaries and divisions (such as Banc of America Securities (collectively 'Bank America')) provides commercial and investment banking services . . ." Consolidated Cplt. ¶ 104. BAS is also listed in the relevant offering documents.

⁴ With respect to the claims against BAS, for example, the Consolidated Complaint alleged Section 11 claims against BAC based on Enron's offerings of 7% Exchangeable Notes and 7.375% Notes and the FAC now alleges those claims against BAS. Compare Consolidated Cplt. ¶ 1006 with FAC ¶ 1006.

bank defendants on April 8, 2002 and the first complaint in this action was filed on October 22, 2001 further confirms that the Newby Lead Plaintiff was on inquiry notice of its newly asserted claims more than one year before it filed the FAC. Like the newly added claims in Ohio and WorldCom, the claims against the newly added financial institution defendants in the Newby FAC are time-barred because they were not filed until May 14, 2003, more than one year after Enron's November 8, 2001 announcement of its restatement, when the Newby Lead Plaintiff knew or should have known of its claims.

Dated: March 30, 2004

Respectfully submitted,

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By: 

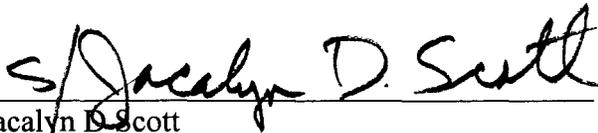
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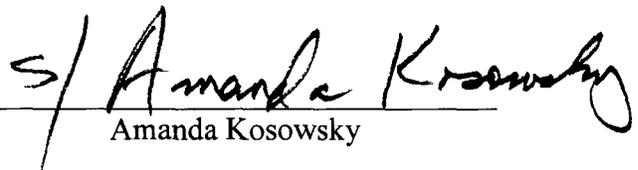
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2004, a true and correct copy of the above and foregoing Bank Defendants' Second 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.



Amanda Kosowsky

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