United States Courts
Southern District of Texas
ENTERED
APR - 8 2004
Michael N. Milby, Clerk of Court

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

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
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, Plaintiffs,	§	
VS.	§	
KENNETH L. LAY, et al., Defendants.	§	

ORDER RE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS

Pending before the Court in the above referenced cause is Defendants Bank of America and Banc of America Securities LLC's (collectively, "Bank of America Defendants'") motion to dismiss (#1514) the First Amended Consolidated Complaint (#1388) pursuant to Fed. R. Civ. P. 12(b)(6).

Only Bank of America was named in the First Consolidated Complaint, and the Court found that Lead Plaintiff had failed to state a claim against it under § 10(b) of the Securities Exchange Act of 1934, but had stated a claim under § 11 of the 1933 Act

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arising out of a May 19, 1999 issuance of 7.375% Notes. The First Amended Consolidated Complaint asserts claims against Banc of America Securities LLC, instead of the Bank of America, under § 11 and control person liability against Bank of America under § 15 of the 1933 Act, both arising out of the Enron 7% Exchangeable Notes and 7.375% Notes. Lead Plaintiff further alleges claims against Banc of America Securities LLC under § 12(a)(2) and against Bank of America as a control person under § 15, both arising out of 7/12/01 offering by Marlin Water Trust II and Marlin Water Capital Corporation of 6.31% Senior Secured Notes and 6.19% Senior Secured Notes, both due in 2003.

The Bank of America Defendants move for dismissal on several grounds. First, they argue that claims against newly added Banc of America Securities LLC are time-barred by the one-year statute of limitations. Second, they insist, the claims are not saved by "relating back" under Federal Rule of Civil Procedure 15(c) because Bank of America Defendants had actual notice of the claims and of the identity of Banc of America Securities LLC when the First Consolidated Complaint was filed on April 8, 2002, but failed to assert them until it filed the First Amended Consolidated Complaint on May 14, 2003. Bank of America Defendants also move for dismissal of the newly added § 12(a)(2) claims against Banc of America Securities LLC because (1) Plaintiffs lack standing to sue on both of the Marlin Notes since

no named plaintiff claims to have purchased either, (2) the offerings of both were private, not public, and were not made pursuant to a prospectus, and thus not actionable under § 12(a)(2), and (3) Lead Plaintiff has failed to allege facts demonstrating that Banc of America Securities LLC qualified as a statutory "seller" of the Notes. Finally, noting that the only claims against Bank of America are for "control person" liability under § 15, Bank of America Defendants maintain that since the predicate claims against Banc of America Securities LLC are time-barred and/or deficient, and because Lead Plaintiff has not alleged facts demonstrating that Bank of America was a control person, the derivative control person claims should also be dismissed.

The Court hereby incorporates its previous memoranda and orders in *Newby*, in particular #1194, #1269, the recent memoranda and orders regarding ICERS' motion to intervene (#1999) and Merrill Lynch and Deutsche Bank Entities' motions to dismiss (#2036), and its new orders on various Bank Defendants' motion to dismiss (#2042, 2043, 2044, 2048, and 2050). Because the Court has already ruled on all the arguments put forth by Bank of America Defendants for dismissal, it merely summarizes those conclusions and applies them here.

1. Statute of Limitations

Lampf's and Section 13's one-year/three-year statute of

limitations/statute of repose governs Lead Plaintiff's claims against the Bank of America Defendants. #1999 at 24-63.

This Court has previously rejected the argument that Plaintiffs had inquiry notice of their Foreign Debt Securities claims against secondary actors as early as the October 2001, when Enron startled Wall Street with announcements of its restatement and when plaintiffs filed their first lawsuit (which did not name any secondary actors or assert 1933 Act claims and was limited to a few Enron officers), especially in light of the extraordinary complexity and extent of the schemes involved. Instead it found that the earliest possible storm warnings came in October 2002.

The Court has also found that the First Amended Consolidated Complaint does not "relate back" to the First Consolidated Complaint with respect to the added bank subsidiaries and claims against them under Federal Rule of Civil Procedure 15(c). Nevertheless, 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 finds 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 within the one-year statute of limitations the 1933 Act claims based on the Foreign Debt Securities (#1388 at 409-10, ¶ 641.2), since the earliest potential storm warnings to trigger such notice inquiry for the Foreign Debt Securities Offerings were in the fall of 2002, and the motion for leave to amend and therefore the amended complaint were deemed timely filed on January 14, 2003, within one year of notice inquiry.

2. Standing and Private Offering under § 12(a)(2)

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. Moreover, intervenor Plaintiff ICERS purchased Marlin Notes from the offering underwritten in part by Banc of America Securities LLC, although it is not clear from which Defendant ICERS bought them. If, at the time of class certification, there is no class member that can demonstrate has standing to serve as a class representative for those who purchased Marlin Water Trust Notes from Banc of America Securities LLC, the § 12(a)(2) against it and the derivative § 15 claim against Bank of America will be dismissed. #1999.

As detailed in #2036 at 76-90, given Lead Plaintiff's allegations about the nature of the Foreign Debt Securities offerings, under Fifth Circuit law 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

Bank of America Defendants' burden to prove an affirmative defense of exemption from the registration requirements or that the Marlin Water Trust Notes Offering was private.

3. Pleading Control Person Liability under § 20(a) and § 15

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 adequately pled a predicate securities violation by Banc of America Securities Inc. under § 12(a)(2), it has also pled the basis for a derivative control-person liability claim against Bank of America 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 standards compared with those of other Circuit Courts of Appeals. As discussed in #1241, it appears that the Fifth Circuit requires the pleading, in addition to status or position, of 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 Bank of America under § 15 of the 1933 Act.

4. Supplement

In an eleventh-hour supplement (#2049), Bank of America Defendants attempt to distinguish the facts of their situation from those of the other Bank Defendants whose motions to dismiss the Court has recently denied. Bank of America Defendants emphasize that they, unlike Deutsche Bank, Lehman Brothers and possibly others, did not remain silent but placed Lead Plaintiff on notice on May 8, 2002 in their memorandum of law (#665) in support of their motion to dismiss (#664) that Lead Plaintiff had sued the wrong party and that Banc of America Securities LLC is the proper party.[1] Defendants also point out that counsel for Lead Plaintiff sent them a letter on September 20, 2002 to advise Banc of America Securities LLC that Lead Plaintiff's ongoing

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[1] Bank of America Defendants also argue that, in compliance with the Court's orders of December 20, 2002 and January 27, 2003 requiring Bank Defendants to file appropriate motions if they wished to contend that the wrong entity had been named as a defendant, Bank of America filed a motion for summary judgment on April 30, 2003 asserting it was not a proper party.

The Court notes that its order of January 27, 2003 directed that such challenges to be filed **immediately**, not three months later, i.e., more than a year after the filing of the First Consolidated Complaint, which Defendants have insisted gave Lead Plaintiff actual inquiry notice.

investigation had uncovered a basis to sue Banc of America Securities LLC and to ask Banc of America Securities LLC to enter into a tolling agreement since limitations might expire on or before October 16, 2002 or Lead Plaintiff might have to sue it prior to that date. Bank of America Defendants further argue that the Lead Plaintiff's January 13, 2003 letter to the Court, which the Court has construed as a motion for leave to amend and deemed the First Amended Consolidated Complaint as filed on that date, should not apply to Bank of America Defendants because "it was not the cause of Plaintiffs' delay in suing" Banc of America Securities LLC; instead Plaintiffs "had already affirmatively decided for reasons known only to themselves, not to sue [Banc of America Securities LLC] despite their recognition that limitations might run on October 16, 2002." #2049 at 3.

The deficiency in this argument is that the Court has rejected October 16, 2001 as the date inquiry notice was given to Plaintiffs. Had the Court decided otherwise, Bank of America Defendants might have a persuasive argument. While Bank of America Defendants rely on the September 20, 2002 letter from Lead Plaintiff's counsel to demonstrate that Lead Plaintiff consciously chose not to sue Bank of America Defendants, after being informed the previous May that it had sued the wrong party, by the same token the September 20, 2002 letter reflects that Lead Plaintiff was involved in continuing investigations following the May 2002

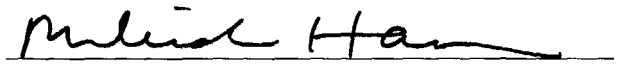
notice from Bank America and was not yet certain that Lead Plaintiff had a viable claim. Indeed Lead Plaintiff, in choosing not to file claims against Banc of America Securities LLC by October 16, 2002 before Lead Plaintiff was ready, took a chance that the Court might find that Plaintiffs had received inquiry notice on October 16, 2001 and the claims were time-barred. Nevertheless, as this Court has emphasized, in light of the size and complexity of the alleged Ponzi scheme and the difficulties of discovering the roles of Enron insiders, no less of the banks as alleged secondary actors/primary violators, the Court does not find that the risk taken by Lead Plaintiff was a substantial one. Moreover, not only was Lead Plaintiff's January 14, 2003 letter to the Court timely filed, within four months of the September 20, 2002 letter to Bank of America Defendants' counsel, within three months of the date the Court has concluded was the earliest possible date of inquiry notice, and less than a month after the Court ruled on the secondary actors' motions to dismiss, but the Court has also found that Lead Plaintiff clearly relied on the Court's order that no amendment should be made until all motions to dismiss had been ruled upon to avoid a multiplicity of amendments. Indeed, the record reflects that it fully complied with that order.

Accordingly, for the reasons stated, the Court

ORDERS that the Bank of America Defendants' motion to

dismiss is DENIED.

SIGNED at Houston, Texas, this 6th day of April, 2004.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE