United States District Court
Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION, MARK NEWBY, et al., Plaintiffs, -against- 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

DEFENDANTS BANK OF AMERICA CORPORATION AND BANC OF AMERICA SECURITIES LLC'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER RE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS, AGREED TO IN PART BY LEAD PLAINTIFF

Defendants Bank of America Corporation ("BAC") and Banc of America Securities LLC ("BAS") respectfully request that this Court reconsider in part its Order re Bank of America Defendants Motion to Dismiss, dated April 8, 2004 in Newby v. Enron ("Bank of America Order") because, respectfully, they believe that the Court overlooked certain grounds for the motion.

- BAC and BAS respectfully submit that the Court overlooked their arguments regarding the statute of repose with respect to claims relating to the May 19, 1999 7.375% Notes offering and the August 10, 1999 7% Exchangeable Notes offering. The Bank of America Order does not address the statute of repose.

- The fact that the Court overlooked the arguments advanced by BAC and BAS regarding the statute of repose is evidenced by the fact that the Court ruled in an inconsistent manner in its April 1, 2004 Order re CIBC Defendants' Motions to Dismiss ("CIBC Order"). In the CIBC Order, the

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Court construed Lead Plaintiff's January 14, 2003 letter to the Court as a motion for leave to amend to name certain bank defendant subsidiaries as defendants and found that Lead Plaintiff's First Amended Consolidated Complaint was therefore filed on January 14, 2003 for limitations purposes. The Court further held in the CIBC Order that because the May 19, 1999 offering of Enron's 7.375% Notes took place more than three years prior to January 14, 2003, the Section 11 claim against CIBC World Markets Corp. and the Section 15 claim against Canadian Imperial Bank of Commerce based on Enron's 7.375% Notes were barred under the statute of repose. CIBC Order at 9 ("Lead Plaintiff's §§ 10(b), 11, and derivative § 15 claim based on the Enron Notes offered on May 19, 1999 are thus time-barred by the period of repose.").[1]

- BAC and BAS raised the statute of repose with respect to the May 19, 1999 7.375% Notes offering and the August 10, 1999 7% Exchangeable Notes offering in each of their briefs in support of their motion to dismiss. See Memorandum in Support of Motion to Dismiss dated June 19, 2003 (#1533) ("Moving Brief") at 8, 12; Reply Memorandum in Further Support thereof dated July 31, 2003 (#1605) ("Reply Brief") at 18-19; Supplemental Memorandum of Defendants Bank of America Corporation and Banc of America Securities LLC in Further Support of their Motion to Dismiss the First Amended Consolidated Complaint, dated April 1, 2004 ("Supplemental Memorandum") at 8.

- With regard to BAS, Lead Plaintiff agrees with this motion and does not oppose the dismissal of the Section 11 claims against BAS with regard to the May 19, 1999 7.375% Notes offering and the August 10, 1999 7% Exchangeable Notes offering.[2]

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[1] Similarly, this Court dismissed the Sections 12(a)(2) and 15 claims against Pershing LLC (f/k/a Donaldson, Lufkin & Jenrette Securities Corporation) and Credit Suisse First Boston (USA), Inc. arising from the September 1999 offerings of Osprey Trust and Osprey I, Inc. Notes because they were filed outside the three year repose period set forth in Section 13 of the Securities Act of 1933. See Order re Credit Suisse Defendants' Motion to Dismiss, dated March 31, 2004 at 7 ("The other two Osprey offerings took place in September 1999, more than three years before the claims based on these offerings were brought. Thus the §§ 12(a)(2) and 15 claims based on the September 23, 1999 and September 28, 1999 offerings are time-barred . . . ."). Likewise, this Court dismissed the Sections 10(b) and 20(a) claims against Deutsche Bank AG, Deutsche Bank Securities, Inc., and Deutsche Bank Trust Company Americas based on their involvement with certain structured tax deals as barred by the three year statute of repose. See Memorandum and Order re Merrill Lynch and Deutsche Bank Entities, dated March 29, 2004 at 52-53, 66, 91.

[2] In accordance with Local Civil Rule 7.1, BAC and BAS have conferred with Lead Plaintiff. Lead Plaintiff does not oppose the present motion to the extent it seeks the dismissal of the Section 11 claims against BAS with respect to the 7.375% Notes and the 7% Exchangeable Notes. Lead Plaintiff opposes the motion to the extent it seeks the dismissal of the Section 15 claims against BAC with respect to these two offerings.

- As for the control person claims against BAC, we respectfully submit that the Court overlooked the fact that the control person claims against BAC in the First Consolidated Amended Complaint are entirely different from the control person claims against BAC in the original Consolidated Amended Complaint. Under the Court's recent rulings, therefore, the new control person claims against BAC do not relate back to the earlier complaint and are barred by the statute of repose.

- We respectfully submit that the control person claims against BAC are entirely derivative of the time-barred primary liability claim against BAS and are subject to dismissal for this separate reason also.

For these reasons, as set forth more fully below, BAC and BAS respectfully request that the Court reconsider in part the Bank of America Order and, consistent with the CIBC Order, dismiss the Section 11 claims against BAS and the Section 15 control person claims against BAC that are based on the May 19, 1999 7.375% Notes offering and the August 10, 1999 7% Exchangeable Notes offering.

A. The Claims Against BAC and BAS Arising from the Offerings of 7.375% Notes and 7% Exchangeable Notes Are Barred by the Statute of Repose

The 7.375% Notes offering took place on May 19, 1999, and the 7% Exchangeable Notes offering took place on August 10, 1999. Under the three year statute of repose for claims under Section 11 and Section 15, the claims based on these offerings are barred.

BAC and BAS made these arguments in their briefs in support of their motion to dismiss. See Moving Brief at 8, 12; Reply Brief at 18-19; Supplemental Memorandum at 8. Moreover, dismissal of these claims would be consistent with the Court's ruling on CIBC's motion to dismiss.

In the CIBC Order, the Court held that the claims against the CIBC Defendants based on the offering of 7.375% Notes were time-barred under the three year statute of repose:

> As for the period of repose, however, 15 U.S.C. § 77m provides in relevant part, 'in no event shall any action be brought to enforce

> liability under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under 77l(a)(1) of this title [for false or misleading prospectuses and communications under § 12(a)(2)] more than three years after the sale.' Thus the three-year statute of repose for § 11 claims based on allegedly false or misleading registration statements begins to run as of the date of the offering of the security to the public .... Once triggered, a statute of repose runs without interruption even if equitable concerns might suggest tolling or even if the plaintiff has not and/or could not have discovered that he has a cause of action.

CIBC Order at 8-9.

As noted above, BAC and BAS, like CIBC, argued in their briefs in support of their motion to dismiss the First Amended Consolidated Complaint, that the claims against them arising from the May 14, 1999 7.375% Enron Notes are barred by the three year statute of repose set forth in Section 13 of the Securities Act of 1933. BAC and BAS also argued in those briefs that the claims against them based upon the August 10, 1999 7% Enron Exchangeable Notes should be barred by the three year statute of repose. Lead Plaintiff did not address Bank of America's argument with respect to the statute of repose in its Memorandum in Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint.

Specifically, with regard to the Section 11 claims, BAC and BAS invoked the one year statute of limitations and the three year statute of repose in their Moving Brief, see Moving Brief at 8, and argued that "with respect to Plaintiffs' Section 11 claims, the Registration Statements and Prospectuses in which Plaintiffs claim BAS made misrepresentations and omissions were effective as of May 19, 1999 and August 10, 1999, respectively, more than three years before Plaintiffs filed the First Amended Complaint naming BAS." Moving Brief at 12. In their Reply Brief, BAC and BAS similarly argued that "[m]oreover, with respect to Plaintiffs' Section 11 claims, the Registration Statements and Prospectuses in which Plaintiffs claim BAS made misrepresentations and omissions were effective as of May 19, 1999 and August 10, 1999,

respectively, more than three years before Plaintiffs filed the First Amended Complaint naming BAS." Reply Brief at 18-19; see also Supplemental Memorandum at 8 (same).

Similarly, with regard to the Section 15 control person claims, BAC and BAS invoked the statute of repose, which is the same for Section 15 claims as for Section 11 claims, and argued for dismissal on that basis in their Moving Brief. See Moving Brief at 9 (citing Dodds v. Cigna Sec. Inc., 12 F.3d 346, 349 n.1 (2d Cir. 1993); Eureka Homestead Soc'y v. Zirinsky, 1995 WL 542482, *2 n.2 (E.D. La. Sep. 12, 1995)).

Like Lead Plaintiff's claims against the CIBC Defendants in connection with the offering of 7.375% Notes, Lead Plaintiff's claims against BAC and BAS arising from the offerings of 7.375% Notes and 7% Exchangeable Notes are barred by the three year statute of repose. Pursuant to the Bank of America Order, Lead Plaintiff is deemed to have asserted for the first time on January 14, 2003 a Section 11 claim against BAS and a Section 15 control person claim against BAC based on BAC's alleged control of BAS with respect to the 7.375% Notes offering and the 7% Exchangeable Notes offering.[3] Because Lead Plaintiff did not assert a Section 11 claim against BAS based on BAS's involvement in these two offerings and did not assert a Section 15 claim against BAC based on BAC's purported control of BAS as to these

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[3] On April 8, 2002, Lead Plaintiff filed the Newby Consolidated Complaint, which alleged Sections 11 and 15 claims against BAC in connection with the August 10, 1999 Exchangeable Notes offering and the May 19, 1999 7.375% Notes offering. Lead Plaintiff withdrew its Section 11 claim with respect to the offering of 7% Exchangeable Notes on July 31, 2002 because the proposed representative plaintiff could not demonstrate reliance as a matter of law. See In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp.2d 549, 655 n.89, 690 (S.D. Tex. 2002). On January 14, 2003, Lead Plaintiff submitted a letter to the Court asking whether it should amend its complaint or file a new complaint adding as defendants subsidiaries of the bank defendants named in the Consolidated Complaint. On May 14, 2003, Lead Plaintiff filed the First Amended Consolidated Complaint, which alleges Section 11 claims against BAS and derivative Section 15 claims against BAC based on the 1999 offerings of 7.375% Notes and 7% Exchangeable Notes. Pursuant to this Court's recent orders concerning motions to dismiss, the date of Lead Plaintiff's First Amended Consolidated Complaint for statute of limitations purposes is deemed to be January 14, 2003. For purposes of this Motion only, BAC and BAS accept that the Court will continue to rule the same way on this issue.

offerings until January 14, 2003, more than three years after the offerings occurred, the claims are barred and should be dismissed.

In the Bank of America Order, however, this Court did not address the statute of repose with respect to the claims against BAC and BAS. Because these claims are barred by the statute, for the same reasons already recognized and applied by the Court in the CIBC Order, BAC and BAS make the present request that the Court reconsider the Bank of America Order in order to address the statute of repose and dismiss these claims against BAC and BAS.

Significantly, Lead Plaintiff has indicated that it does not oppose the present motion for reconsideration with respect to BAS. Similarly, in its Motion for Reconsideration of the Order Dismissing Claims against Canadian Imperial Bank of Commerce dated April 7, 2004 ("Lead Plaintiff's Motion for Reconsideration"), Lead Plaintiff does not contest that the Section 11 claim against CIBC World Markets Corp., the CIBC subsidiary, is barred by the statute of repose.[4]

B. The Control Person Claims Against BAC in the First Consolidated Amended Complaint Are Barred by the Statute of Repose Because They Are Entirely New and Do Not Relate Back to the Original Consolidated Amended Complaint

Lead Plaintiff's partial opposition to the present motion to the extent it relates to BAC and Lead Plaintiff's Motion for Reconsideration of the CIBC Order to the extent that the Court dismissed the control person claim against the parent corporation are not well-founded. In the First Amended Consolidated Complaint, deemed by the Court to have been filed as of January 14, 2003, Lead Plaintiff for the first time asserted Section 15 claims of control person liability against BAC based on alleged primary violations of Section 11 by BAS in connection

[4] Lead Plaintiff opposes the present motion only as it relates to BAC. Lead Plaintiff also contests this Court's determination that the control person claim relating to the 7.375% Notes against Canadian Imperial Bank of Commerce, which allegedly controlled CIBC World Markets Corp., is also barred.

with the offerings of 7.375% Notes and 7% Exchangeable Notes. Because the offerings in question took place more than three years prior to January 14, 2003, these claims are time-barred.

Although the original Consolidated Complaint which was filed within three years of the offerings at issue purported to allege Section 15 claims against BAC, that complaint did not allege that BAC was subject to control person liability based on an underlying Section 11 claim against BAS.[5] Indeed, BAS was not named as a defendant in the Consolidated Complaint. As BAC argued in its briefs on the motion to dismiss the Consolidated Complaint, the Consolidated Complaint was unclear as to precisely what kind of control person claim the Consolidated Complaint purported to assert. If anything, as BAC argued at the time, the Section 15 control person claim against BAC in the Consolidated Complaint was based on the contention that BAC controlled Enron, Arthur Andersen LLP, or the individual defendants. However, it certainly did not assert that BAC was a control person with respect to a Section 11 claim against BAS. See Defendant Bank of America Corporation's Memorandum of Law in Support of Motion to Dismiss the Complaint, dated May 8, 2002, at 48-50; Defendant Bank of America Corporation's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Complaint, dated June 24, 2002, at 39. In contrast, the control person claims in the later filed First Amended Consolidated Complaint are not based on the contention that BAC controlled Enron, Arthur Andersen LLP, or the individual defendants. Rather, the control person claims against BAC in the First Consolidated Amended Complaint are based on BAC's alleged control of BAS with regard to the 7.375% Notes and 7% Exchangeable Notes. These claims are

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[5] The Consolidated Complaint similarly purported to assert a Section 15 control person claim against Canadian Imperial Bank of Commerce (the CIBC parent entity), but not with respect to an alleged Section 11 violation by its subsidiary, CIBC World Markets Corp. See Consolidated Complaint ¶¶ 1005-1016.

therefore new and, under this Court's prior rulings, do not relate back to the filing of the Consolidated Complaint. Consequently, they are barred by the statute of repose because they were filed more than three years after these offerings.

This Court correctly held that the new Section 15 claim against the CIBC parent entity relating to the 7.375% Notes was time-barred and should likewise determine that the new Section 15 claims against BAC (the parent of BAS) relating to the 7.375% Notes and 7% Exchangeable Notes are time-barred. Moreover, the control person claims, as this Court implicitly found in the CIBC Order, do not relate back to the filing of the Consolidated Complaint. See CIBC Order at 9; see also Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985) (amended complaint adding breach of fiduciary duty claim against union did not relate back to the filing of original complaint alleging that arbitrators' conduct was improper because the claims required proof of different elements); In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig., 467 F. Supp. 227, 260 (W.D. Tex. 1979) (holding that intervenor's Section 11 claim did not relate back to the filing of a complaint alleging a Section 10(b) claim because, among other things, "the difference in the legal base of the claims [was] marked" in that "defendants [ ] had no notice of the shift in the burden of proof and the elimination of the scienter requirement which section 11 entails").

BAC and BAS therefore respectfully request that this Court reconsider its decision denying BAC and BAS's motion to dismiss the claims against them based on the offerings of 7.375% Notes and 7% Exchangeable Notes and dismiss these claims on the ground that, like the claims against the CIBC Defendants based on the 7.375% Notes, they are barred by the three year statute of repose.

C. The Control Person Claims against BAC Are Subject to Dismissal for the Additional, Independent Reason that They Are Derivative of Underlying Section 11 Claims Against BAS That Are Time-Barred

In addition, as BAS and BAC discussed in their Moving and Reply Briefs, the Section 15 claims against BAC in connection with the offerings of 7.375% Notes and 7% Exchangeable Notes should be dismissed for the separate reason that the underlying Section 11 claims against BAS are time-barred[6] and a claim of control person liability cannot be sustained in the absence of a cognizable primary violation. See Moving Brief at 29-30 (citing cases); Reply Brief at 44. As the Fifth Circuit recently re-affirmed, "[c]ontrol person liability is secondary only and cannot exist in the absence of a primary violation." Southland Sec. Corp. v. Inspire Ins. Solutions Inc., --F.3d--, 2004 WL 626721, at *22 (5th Cir. Mar. 31, 2004) (affirming dismissal of Section 20(a) control person claim because there was "no properly alleged primary violation").

Because of the purely derivative nature of control person claims, courts have dismissed control person claims where the underlying primary claim is barred by the applicable statute of limitations or repose. For example, the district court in Lillard v. Stockton, 267 F. Supp.2d 1081, 1121-122 (N.D. Okla. 2003), recently reached precisely this conclusion. In Lillard, the court affirmed and adopted a magistrate judge's recommendation that a control person liability claim be dismissed because plaintiffs failed to allege a primary violation of Section 12(a)(1) of the 1933 Act within the one year limitations period. Lillard, 267 F. Supp.2d at 1121-22; see also Fezzani v. Bear, Stearns & Co., Inc., 2004 WL 744594, at *23 (S.D.N.Y. Apr. 6, 2004) (dismissing control person claims under Section 20(a) of the 1934 Act to the extent that they were based on primary violations by the allegedly controlled person that occurred

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[6] As noted above, Lead Plaintiff does not oppose the present motion to the extent that it seeks a determination that the claims against BAS based on the 7.375% Notes and 7% Exchangeable Notes are time-barred.

outside of the three year repose period); Havenick v. Network Express, Inc., 981 F. Supp. 480, 522 (E.D. Mich. 1997) (upon dismissing underlying Section 10(b) claim as time-barred, the court dismissed the Section 20(a) control person claim "because to maintain the Section 20(a), 15 U.S.C. § 78t claims, Plaintiffs need a predicate Section 10(b) or Rule 10b-5 claim"); Payne v. Fidelity Homes of America, Inc., 437 F. Supp. 656, 658 (W.D. Ky. 1977) (dismissing Section 15 control person claim upon dismissing the underlying Section 12 claim as barred by the statute of repose).

In its Motion for Reconsideration of the CIBC Order, Lead Plaintiff argues that this Court should have sustained the Section 15 claim against CIBC because "[a] plaintiff may pursue control claims if the factual basis for a predicate violation is sufficient, notwithstanding, procedural bars to naming the primary violator." Lead Plaintiff's Motion for Reconsideration at 2. As support for this argument, Lead Plaintiff points to cases cited in its Memorandum in Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint. See id. Lead Plaintiff's citations are inapposite, however, because in each of these cases the alleged primary violator was either not sued or was dismissed from the action for jurisdictional deficiencies.[7] Lead Plaintiff does not cite any cases like this one, in which there is no viable underlying primary liability claim.

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[7] In Keys v. Wolfe, 540 F. Supp. 1054, 1061 (N.D. Tex. 1982), rev'd on other grounds, 709 F.2d 413 (5th Cir. 1983) and Briggs v. Sterner, 529 F. Supp. 1155, 1171 (S.D. Iowa 1981), the issue was whether the control person liability claims could proceed even though the purportedly "controlled" persons could not be joined to the action because they were in the midst of bankruptcy proceedings. Similarly, in this Court's decision on the Outside Director Defendants' motion to dismiss, this Court stated merely that "a plaintiff does not have to sue the controlled person (here Enron Corporation) in order to sue a controlling person." In re Enron Corp. Sec., Derivative & ERISA Litig., 258 F. Supp.2d 576, 607 (S.D. Tex. 2003). In re CitiSource Inc., Securities Litigation, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988) is likewise distinguishable because there, the plaintiff did not sue the alleged primary violator. Unlike in these cases, there is no such joinder issue here. Lead Plaintiff has named BAS as a defendant in this action and alleged primary claims against it which underlie the control person claims against BAC. Further, SEC v. Savoy Industries, Inc., 587 F.2d 1149, 1153, 1171 (D.C. Cir. 1978) is not relevant because there the allegedly controlled person had settled with the SEC before the trial court addressed the merits of the

Thus, the Section 15 claims against BAC based on the 7.375% Notes and 7% Exchangeable Notes should be dismissed not only because the Section 15 claims themselves are barred by the statute of repose as set forth in Point A above, but also because they are derivative of underlying Section 11 claims against BAS that are time-barred.

A proposed order granting the requested relief is attached hereto.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT LLP

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control person claim and the court did not affirm the trial court's determination on control person liability but rather remanded for additional findings. Equally unavailing is Lead Plaintiff's citation to Kemmerer v. Weaver, 445 F.2d 76, 78 (7th Cir. 1971), where the alleged primary violator was dismissed for lack of personal jurisdiction due to a failure to obtain service of process. By contrast, the Section 15 claims against BAC should be dismissed because there is no underlying claim against BAS. The Section 11 claims against BAS have been extinguished by the statute of repose. In the cases cited by Lead Plaintiff, the claims are not extinguished.

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Helen Hodges, counsel for Lead Plaintiff, on April 12, 2004 and that we were able to agree about the disposition of some of the matters at issue in Defendants Bank of America Corporation and Banc of America Securities LLC's Motion for Reconsideration of the Court's Order re Bank of America Defendants' Motion to Dismiss. Ms. Hodges indicated that Lead Plaintiff does not oppose the dismissal of the Section 11 claims against defendant Banc of America Securities LLC based on the May 19, 1999 offering of 7.375% Enron Notes and August 10, 1999 offering of 7% Exchangeable Enron Notes. However, Lead Plaintiff does oppose the dismissal of the Section 15 claims against defendant Bank of America Corporation based on these offerings.

s/ Gregory Ballard

Gregory Ballard

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2004, a true and correct copy of the foregoing Defendants Bank of America Corporation and Banc of America Securities LLC's Motion for Reconsideration of the Court's Order re Bank of America Defendants' Motion to Dismiss, Agreed to in Part by Lead Plaintiff and Proposed Order, are being served upon all counsel of record by website, http://www.esl3624.com, pursuant to this Court's Order.

s/ Amanda Kosowsky

Amanda Kosowsky