United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., 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.	§	

LEAD PLAINTIFF'S OPPOSITION TO BANK OF AMERICA CORPORATION'S AND BANC OF AMERICA SECURITIES LLC'S MOTION FOR RECONSIDERATION OF THE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS (DOCKET NO. 2086)

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Lead Plaintiff hereby respectfully submits its Opposition to the Motion for Reconsideration filed by defendants Bank of America Corporation and Banc of America Securities LLC (Docket No. 2086).

Plaintiffs do not oppose Bank of America's motion as it pertains to Bank of America Securities LLC ("Subsidiary" or "BAS"). However, plaintiffs do oppose the motion for reconsideration as it pertains to Bank of America Corporation ("Parent" or "BAC").

Bank of America incorrectly asserts the Court should dismiss plaintiffs' claims against Parent under §15 of the Securities Act of 1933. First, Bank of America claims plaintiffs' §15 claim against Parent in the First Amended Complaint is entirely "new" and therefore time-barred because it does not relate back to plaintiffs' Consolidated Complaint filed with the Court on April 8, 2002. Second, Bank of America claims plaintiffs' §15 claim against Parent must be dismissed because plaintiffs admit the claim against Subsidiary is time-barred. Bank of America's arguments lack basis for reconsideration.

I. Plaintiffs' §15 Claims Relate Back to the Consolidated Complaint and Are Not Time-Barred

Under Rule 15(c)(2), claims against existing parties relate back to the original complaint if the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). In deciding whether ***claims*** relate back, the "court is to consider whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction." *In re Digital Microwave Corp. Sec. Litig.*, No. C-90-20241-RMW(EAI), 1992 U.S. Dist. LEXIS 18469, at *4-*5 (N.D. Cal. Oct. 19, 1992). "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." 6A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §1497,

at 94-95 (1990). "Amendments that amplify or restate the original pleading or set forth facts with greater specificity should relate back." 3 *Moore's Federal Practice*, §15.19[2] (3d ed. 2003).

Plaintiffs' §15 claims against Parent are not time-barred if they relate back to the Consolidated Complaint, which was filed with the Court on April 8, 2002, within three years of the offerings at issue. Bank of America does not dispute this fact. That the First Amended Complaint arises from the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" is self-evident because – as it pertains to Parent – plaintiffs made the same exact allegations in the Consolidated Complaint as they did in the First Amended Complaint. Moreover, as set forth above, any perceived change in plaintiffs' legal theory of recovery as to Parent is immaterial to the analysis under Fed. R. Civ. P. 15(c).

Plaintiffs' §15 claim against Parent must relate back because it is identical to that set forth in the Consolidated Complaint. Plaintiffs alleged §15 claims against Parent for the May 19, 1999 Enron Note Offering and the August 10, 1999 Exchangeable Notes Offering in the Consolidated Complaint. *See* Consolidated Complaint, ¶¶151, 165, 1005-1016. The Court upheld plaintiffs' claims as to Parent on May 21, 2003. *See* May 21, 2003 Order at 2-3. Like its predecessor, plaintiffs' First Amended Complaint also alleges §15 claims against Parent for the May 19, 1999 Enron Note Offering and the August 10, 1999 Exchangeable Notes Offering. *See* First Amended Complaint, ¶¶151, 165, 1005-1016.

Attempting to assert the First Amended Complaint is not the same as the Consolidated Complaint, Bank of America incorrectly contends: "Lead Plaintiff did not assert a ... Section 15 claim against BAC on BAC's purported control of BAS as to these offerings until January 14, 2003, more than three years after the offerings occurred ...." Motion at 5-6. Indeed, Bank of America admits that in the Consolidated Complaint plaintiffs asserted a §15 claim against Parent for the offerings at issue here. *Id.* at 7 ("the original Consolidated Complaint which was filed within three

years of the offerings at issue purported to allege Section 15 claims against BAC"). According to Bank of America, the allegations in the First Amended Complaint are entirely different §15 control-person claims than its predecessor: "[T]he 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." *Id.* This assertion is without any reasonable basis.

It is simply unreasonable to infer that the Consolidated Complaint attempted to bring a claim against Parent for controlling the Individual Defendants, Enron or Andersen. The Individual Defendants, Enron and Andersen have no affiliation to Parent that even appears to satisfy the necessary standard for alleging control. Moreover, it is quite clear that plaintiffs alleged a control relationship between Parent and Subsidiary in the Consolidated Complaint. For instance, the Consolidated Complaint pleads: "Defendant Bank of America Corp. is a large integrated financial services institution ***that through its <u>controlled</u> subsidiaries*** and divisions (***such as Banc of America Securities*** (collectively 'Bank of America')) provides commercial and investment banking services, ... acting as ***underwriter*** in the sale of corporate securities to the public ...." Consolidated Complaint, ¶104 (emphasis added). Accordingly, Bank of America's argument is implausible on its face.

Even assuming, *arguendo*, that plaintiffs never brought a §15 claim against Parent in the Consolidated Complaint (plaintiffs did), the present claims would still relate back to April 8, 2002. The exact nature of plaintiffs' claim is irrelevant to Rule 15(c) analysis. Bank of America does not (and cannot) dispute plaintiffs pleaded §11 claims against Parent as to the offerings at issue here. This is sufficient to allow for plaintiffs' §15 claims to relate back. "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." 6A Wright, Miller & Kane, *supra*, §1497.

Pursuant to Fed. R. Civ. P. 15(c), the allegations against Parent should relate back to April 8, 2002 (the filing date of the Consolidated Complaint) and should not be time-barred. Indeed, Parent's motion for dismissal of the First Amended Complaint conceded as much. *See* Lead Plaintiff's Memorandum in Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint ("Lead Plaintiff's Opposition") (Docket No. 1574) at 19 (noting that, with one exception, the Bank Defendants did not dispute that plaintiffs' new claims stemmed from the same transaction and occurrence pled in the prior complaint). Accordingly, the claims against Parent relate back to April 8, 2002 and are not time-barred.

II. Dismissal as to the BAS Subsidiary Has No Bearing on Plaintiffs' Control-Person Claim Against Parent

Bank of America argues: "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." Motion at 9 (citing authorities). However, Bank of America's vague statement of the law is incorrect.

In each of the cases cited by Bank of America, plaintiff had failed to bring either primary liability or control-person claims against any defendant in a timely fashion. None of Bank of America's authorities (*see* Motion at 9-10) addresses the instance where plaintiff's control-person claim is timely filed but the claim against the primary violator is time-barred.[1] Moreover, Bank of

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[1] *See Fezzani v. Bear, Stearns & Co.*, No. 99 Civ. 0793 (RCC), 2004 U.S. Dist. LEXIS 5825, at *3, *69 (S.D.N.Y. Apr. 6, 2004) (because primary liability and control-person liability was first alleged on February 2, 1999, claims arising from acts committed before February 2, 1996 were time-barred); *Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1115 (N.D. Okla. 2003) (primary liability and control-person claims are "time barred because the suit was not brought within the applicable one-year statute of limitations period"); *Havenick v. Network Express*, 981 F. Supp. 480, 521 (E.D. Mich. 1997) (action for all claims first filed October 7, 1996 but inquiry notice established prior to October 1995); *Payne v. Fidelity Homes of Am.*, 437 F. Supp. 656, 657 (W.D. Ky. 1977) ("The complaint establishes that June 26, 1970, was the last occasion on which acts were allegedly committed giving

America's reliance upon *Southland Sec. Corp. v. Inspire Ins. Solutions*, No. 02-10558, 2004 U.S. App. LEXIS 5902 (5th Cir. Mar. 31, 2004), is unfounded. Motion at 9. In *Southland*, the Fifth Circuit dismissed both control-person and primary liability claims because there was "no properly alleged primary violation." 2004 U.S. App. LEXIS 5902 at *76. Here, plaintiffs allege a primary violation but cannot bring their claim against the primary actor (Subsidiary). This bar as to the primary violator, however, has no bearing on the claim against Parent.

Contrary to Bank of America's assertion, the law is clearly aligned with plaintiffs' position. "It is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint." *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978). A plaintiff may pursue control claims if the factual basis for a predicate violation is sufficient, notwithstanding procedural bars to naming the primary violator. *See* Lead Plaintiff's Opposition at 57-58 (attached hereto) (setting forth authorities, including this Court, holding that plaintiff need not sue the primary violator to bring a claim against one who controls it). Bank of America cites not one single authority that provides any analysis of the issue before this Court, nor does it cite one authority disputing any of the cases plaintiffs cite here and in Lead Plaintiff's Opposition.

The many cases finding that a plaintiff need not name the primary violator to sue the controlling entity are consistent with the purpose and spirit of the control-person statutes. As this Court recently found: "To repeat, enactment of the controlling provisions of the 1933 and 1934 Acts ***'was motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were "really responsible" for***

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rise to plaintiff's claims. ***This action was filed more than four years later***, on September 10, 1974.") (emphasis added).

violations of the securities laws.'" *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (S.D. Tex. Jan. 28, 2003) (emphasis added; citation omitted). Accordingly, it is only reasonable that the law with respect to control-person liability be consistent with or less onerous than the common law of agency upon which it was derived. Thus, it stands to reason that §15 does not require the primary violator to be named as a defendant because at common law there is no requirement that an agent be named in an action against his principal. *Nottingham v. Gen. Am. Communs. Corp.*, 811 F.2d 873, 880 (5th Cir. 1987) (§10(b) action in which court held "it is well-established that Rule 19 does not require the joinder of ... principal and agent"). *See also Rieser v. District of Columbia*, 563 F.2d 462, 469 n.39 (D.C. Cir. 1977) ("the employee is not a necessary party to a suit against his employer under *respondeat superior*").[2]

Moreover, Bank of America cannot distinguish the cases cited at pages 57-58 in Lead Plaintiff's Opposition. Bank of America argues: "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." Motion at 10. Bank of America asserts a distinction without a material difference. Here, the primary violator was not originally sued and was later dismissed for reasons other than the merit of the underlying allegations. Moreover, Bank of America asserts that plaintiffs' authorities are distinguishable "because there ... is no such joinder issue here." Motion at 10 n.7. However, as set forth above, there is no requirement that plaintiff join the primary violator in this action. Accordingly, plaintiffs' authorities are directly on point. In contrast, Bank of

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[2] *See also Strozyk v. Norfolk Southern Corp.*, No. 01-CV-1898, 2001 U.S. Dist. LEXIS 10177, at *5 (E.D. Pa. July 18, 2001) (in action under theory of *respondeat superior* "an employee is not a necessary party to a suit against his employer"), *rev'd on other grounds*, 358 F.3d 268 (3d Cir. 2004); *Campagna v. Averitt Express, Inc.*, No. 99-1007, 1999 U.S. Dist. LEXIS 8981, at *8 (E.D. La. June 10, 1999) ("Whether [primary violator] is a party to the action or not, if the alleged actions of [the primary violator] were negligent, [employer] will be liable to the Plaintiffs for all of their damages.").

America does not (and cannot) adequately support its position that a primary violator must be a defendant in a timely action against a controlling entity. Thus, Parent BAC should not be dismissed simply because Subsidiary BAS was dismissed.

III. Conclusion

For the reasons stated herein, and as set forth in Lead Plaintiff's Opposition, plaintiffs respectfully request the Court deny Bank of America's motion for reconsideration as it pertains to BAS's Parent, BAC.

DATED: April 16, 2004

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., 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.	§

LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE BANK DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT

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the Bank Defendants are mistaken. Lead Plaintiff alleges the following predicate primary violations against the subsidiaries of the Bank Defendant parents who make this argument:

CONTROL PERSON ALLEGATIONS

Control Defendant	Control Violation	Predicate Violation
J.P. Morgan Chase & Co.	§15 §20(a)	§10(b) & TSA: JP Morgan Chase Bank §§10(b), 12(a)(2) & TSA: JP Morgan Secs. Inc.
Credit Suisse First Boston (USA), Inc.	§15 §20(a)	§§10(b), 12(a)(2): Pershing LLC §§10(b), 12(a)(2): Credit Suisse First Boston Corp.
CIBC	§15 §20(a)	§§10(b), 11, 12(a)(2): CIBC World Markets Corp. §§10(b), 12(a)(2): CIBC World Markets plc §10(b): CIBC Oppenheimer Corp.
Bank of America Corp.	§15	§§11, 12(a)(2): Banc of America Secs. LLC
Barclays PLC	§15 §20(a)	§10(b): Barclays Bank PLC §§10(b), 12(a)(2): Barclays Capital, Inc.
Lehman Brothers Holding, Inc.	§15 §20(a)	§§10(b), 11, 12(a)(2) & TSA: Lehman Bros. Inc.

The Bank Defendant parents insist that plaintiffs' control person claims as to them must be dismissed if the Court dismisses the claims against the parent companies' subsidiaries. This argument raises a moot point because each of the predicate claims alleged in the First Amended Complaint are viable claims.[49]

In any event, under §§20(a) or 15, "***[i]t is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint.***" *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978); *see also In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988) ("[T]here is nothing in the language of section 20(a) which compels the joinder of the controlled person .... [T]he liability of the primary violator is simply an element of proof of a section 20(a) claim, and that liability need not be actually visited upon the primary violator before a controlling person may be held liable for the

[49] To the extent that plaintiffs' allegations assert primary violations attributable to an unknown or un-named bank subsidiary under the control of a Defendant Bank holding company, control person liability attaches to those allegations as well.

primary violator's wrong."). Thus, a plaintiff may pursue control claims if the factual basis for a predicate violation is sufficient, notwithstanding procedural bars to naming the primary violator.[50]

For example, "where the primary offender is insolvent or otherwise unavailable, the courts have proceeded to adjudicate the underlying liability of that offender regardless of its presence as a party-defendant." *Briggs v. Sterner*, 529 F. Supp. 1155, 1171 (S.D. Iowa 1981).

> Absent legislative history resolving or even considering this issue, the remedial purpose of the statute dictates a broad construction which would not excuse control persons from ... liability for the proven wrongs of a controlled person even if the latter is not himself legally liable. Such a construction, even if arguably contravening literal statutory language, conforms to established canons of construing regulatory legislation.

Keys v. Wolfe, 540 F. Supp. 1054, 1062 n.11 (N.D. Tex. 1982), *rev'd on other grounds*, 709 F.2d 413 (5th Cir. 1983) (citing Folk, *Civil Liabilities Under the Federal Securities Acts: The Bar Chris Case*, 55 Va. L. Rev. 99, 217-18 & n.64 (1969)).

Notably, this Court held with respect to plaintiffs' claims under the Texas Securities Act that "a plaintiff does not have to sue the controlled person (here Enron Corporation) in order to sue a controlling person." *Enron*, 2003 U.S. Dist. LEXIS 3786, at *67 (citing *Summers v. Welltech, Inc.*, 935 S.W.2d 228, 231 (Tex. App.–Houston [1st Dist.] 1996, no writ) (based upon the ruling in *Keys v. Wolfe*)). The controlled entity simply need not be found guilty for the controlling person to be held liable. *Kemmerer v. Weaver*, 445 F.2d 76, 78-79 (7th Cir. 1971). Accordingly, plaintiffs sufficiently allege predicate claims.

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[50] This is not inconsistent with purported authority cited by defendants. For example, *dicta* in *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 370 n.33 (5th Cir. 2001), cited by J.P. Morgan and Bank of America, does ***not*** state that a controlled entity must always be a defendant in an action to be a predicate violator for control person liability to apply. Indeed, in *Lone Star Ladies Inv. Club*, there was not an alleged procedural bar at issue and the Fifth Circuit remanded the case for the lower court to determine if plaintiff could adduce sufficient evidence to prove violations of §12. *Id.* at 370-71.

Likewise, in the cases cited by CSFB at p.20 of its motion, there was no demonstration of facts sufficient to state a predicate violation, or, the control claim itself was time barred. *See LaSalle v. Medco Research*, 1996 WL 252474, at *10 (N.D. Ill. May 10, 1996) (§20(a) claim time barred); *Salinger v. Projectavision, Inc.*, 972 F. Supp. 222, 235 n.8 (S.D.N.Y. 1997) (fraud not pleaded with particularity); *Wynne v. Equilease Corp.*, 1995 WL 764236, at *9 (S.D.N.Y. Dec. 27, 1995) (failure to allege misstatement violating §10(b)). Here, Lead Plaintiff states claims against CSFB, and as demonstrated herein, the claims against CSFB USA are timely brought or relate back to the filing of the original complaint.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO BANK OF AMERICA CORPORATION'S AND BANC OF AMERICA SECURITIES LLC'S MOTION FOR RECONSIDERATION OF THE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS (DOCKET NO. 2086) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this April 16, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO BANK OF AMERICA CORPORATION'S AND BANC OF AMERICA SECURITIES LLC'S MOTION FOR RECONSIDERATION OF THE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS (DOCKET NO. 2086) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this April 16, 2004.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004

Mo Maloney