

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

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§ 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.

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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.

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United States Courts  
Southern District of Texas  
FILED

APR 16 2004

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Michael N. Milby, Clerk of Court

**LEAD PLAINTIFF'S OPPOSITION TO LEHMAN BROTHERS HOLDINGS INC.'S  
AND LEHMAN BROTHERS INC.'S MOTION FOR RECONSIDERATION OF THE  
LEHMAN DEFENDANTS' MOTION TO DISMISS  
(DOCKET NO. 2079)**

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Lehman moves for reconsideration of the Court's Order dated March 30, 2004. Plaintiffs do not oppose Lehman's motion as it pertains to Lehman Brothers, Inc. ("Subsidiary" or "LBI"). However, plaintiffs do oppose the motion for reconsideration as it pertains to Lehman Brothers Holdings, Inc. ("Parent" or "LBHI").

Lehman asserts: "Because there is no dispute that plaintiffs' Section 11 claims against LBI based on the May 19, 1999 offering of 7.375% Enron notes is time-barred, plaintiffs' claim for control person liability against LHBI under Section 15 of the 1933 Act also must fail." Motion for Reconsideration at 3. Lehman contends that the Court should dismiss plaintiffs' control-person claims against Parent for only one reason: plaintiffs' primary liability claims are time-barred as to Subsidiary. *Id.* Lehman is incorrect.

Notably, Lehman does *not* assert that plaintiffs' control-person claim against LBI's Parent was brought outside the three-year statute of repose established in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). Lehman can make no such claim because plaintiffs alleged §15 control-person claims against the Parent in its Consolidated Complaint filed with the Court on April 8, 2002. See ¶¶151, 1005-1016. Accordingly, Lehman's purported authorities are distinguishable from the facts present here; in each instance, plaintiff had failed to bring either primary liability or control-person claims against any defendant in a timely fashion.<sup>1</sup>

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<sup>1</sup> None of Lehman's authorities addresses the instance where plaintiff's control-person claim is timely filed but the claim against the primary violator is time-barred. 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"); *LaSalle v. Medco Research*, No. 93 C 5381, 1996 U.S. Dist. LEXIS 6413, at \*34 (N.D. Ill. May 10, 1996) ("there can be little doubt that Plaintiffs were on 'inquiry notice' more than a year prior to their filing of the present action" alleging both primary and control-person claims), *aff'd sub nom.*, *Law v. Medco Research*, 113 F.3d 781 (7th Cir. 1997).

In this action, dismissal of the claim against LBI has no bearing upon plaintiffs' timely control-person claim against LBI's Parent. "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 Memorandum in Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint ("Lead Plaintiff's Opposition") (Docket No. 1574) 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). Lehman cites not one single authority that provides any analysis of the issue before this Court; Lehman cannot distinguish plaintiffs' cases; and, Lehman cites not one authority disputing any of the cases plaintiffs cite here and in Lead Plaintiff's Opposition.

For the reasons stated herein, and as set forth in Lead Plaintiff's Opposition, plaintiffs respectfully request the Court deny Lehman's motion for reconsideration as it pertains to LBI's Parent, LBHI.

DATED: April 16, 2004

Respectfully submitted,

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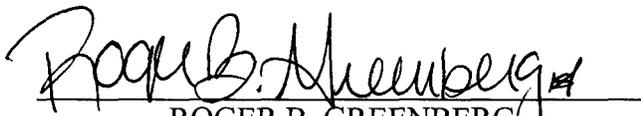
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Michael N. Milby, Clerk of Court

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**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<br>§20(a)     | §10(b) & TSA: JP Morgan Chase Bank<br>§§10(b), 12(a)(2) & TSA: JP Morgan Secs. Inc.  |
| Credit Suisse First Boston (USA), Inc. | §15<br>§20(a)     | §§10(b), 12(a)(2): Pershing LLC<br>§§10(b), 12(a)(2): Credit Suisse First Boston Corp.   |
| CIBC                                   | §15<br>§20(a)     | §§10(b), 11, 12(a)(2): CIBC World Markets Corp.<br>§§10(b), 12(a)(2): CIBC World Markets plc<br>§10(b): CIBC Oppenheimer Corp. |
| Bank of America Corp.                  | §15               | §§11, 12(a)(2): Banc of America Secs. LLC  |
| Barclays PLC                           | §15<br>§20(a)     | §10(b): Barclays Bank PLC<br>§§10(b), 12(a)(2): Barclays Capital, Inc.   |
| Lehman Brothers Holding, Inc.          | §15<br>§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.<sup>49</sup>

In any event, under §§20(a) or 15, "*if 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); *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

<sup>49</sup> 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.<sup>50</sup>

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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<sup>50</sup> 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 LEHMAN BROTHERS HOLDINGS INC.'S AND LEHMAN BROTHERS INC.'S MOTION FOR RECONSIDERATION OF THE LEHMAN DEFENDANTS' MOTION TO DISMISS (DOCKET NO. 2079) document has been served by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com) on this April 16, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO LEHMAN BROTHERS HOLDINGS INC.'S AND LEHMAN BROTHERS INC.'S MOTION FOR RECONSIDERATION OF THE LEHMAN DEFENDANTS' MOTION TO DISMISS (DOCKET NO. 2079) 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



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Mo Maloney