

APR 20 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.,

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 REPLY BRIEF  
IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION**

Bank of America Corporation ("BAC") and Banc of America Securities LLC ("BAS") respectfully submit this reply in further support of their motion for reconsideration of the Court's Order re Bank of America Defendants' Motion to Dismiss. As to BAS, in its opposition, Lead Plaintiff concedes that the claims against BAS should be dismissed. As to BAC, there are two reasons for dismissal of the claims at issue, and Lead Plaintiff's arguments in opposition are unavailing:

1. First, the control person claims against BAC based on the May 19, 1999 offering of 7.375% Notes and August 10, 1999 offering of 7% Exchangeable Notes are barred by the statute of repose because they were asserted for the first time in the First Amended Consolidated Complaint, more than three years after the offerings in question. Lead Plaintiff's argument that the original Consolidated Complaint asserted the claims is simply incorrect. Unlike the First Amended Consolidated Complaint, the original Consolidated Complaint did not

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assert a control person claim against BAC based on a purported primary violation by BAS. BAS was not a defendant in the Consolidated Complaint. Significantly, BAC argued in seeking dismissal of the Consolidated Complaint that the Consolidated Complaint was ambiguous about the nature of the control person claims it alleged against BAC and appeared to assert control person claims against BAC based on its purported control of Enron, Arthur Andersen LLP, or the individual defendants. In its Opposition to BAC's Motion to Dismiss the Consolidated Complaint, Lead Plaintiff did not dispute this assertion. Indeed, as BAC stated in its Reply Brief: "Bank of America established in its moving papers that since it did not have the power to control Enron, the individual Enron defendants or Andersen, it could not be held liable as a control person. The Opposition does not contain any response." 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 (emphasis added). Thus, Lead Plaintiff did not at that time argue that BAC's reading of the Consolidated Complaint was incorrect. Only now, in its opposition to the present motion for reconsideration, does Lead Plaintiff argue that this view of the Consolidated Complaint is "simply unreasonable." Opposition at 3. Thus, Lead Plaintiff's current self-serving re-characterization of the claims asserted against BAC in the original Consolidated Complaint is simply incorrect.<sup>1</sup>

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<sup>1</sup> Because the control person claims against BAC in the First Amended Consolidated Complaint are different from the previously asserted claims against BAC, they do not relate back to the April 8, 2002 filing of the Consolidated Complaint. Lead Plaintiff cites one case (Opposition at 1) in support of its argument that the claims relate back, but the case does not support its point. In In re Digital Microwave Corp. Securities Litigation, 1992 WL 465486, at \*3 (N.D. Cal. Oct. 19, 2002), the court held that claims in the second amended complaint related back to the filing of the first amended complaint because "'relation back' is appropriate where the new allegations merely elaborate on plaintiffs' original claim" and "the new allegations contained in the SAC elaborate upon plaintiffs' original claims and do not constitute an entirely new legal theory based upon a different set of facts." By contrast, the control person claims in the First Amended Consolidated Complaint do not constitute a mere "elaboration" of Lead Plaintiff's claims in the Consolidated Complaint, but rather are new and distinct claims. Moreover, Lead Plaintiff fails to address the Holmes and Commonwealth Oil cases cited in BAC and BAS's motion for reconsideration, which demonstrate that Lead Plaintiff's newly asserted claims do not relate back.

2. Second, the control person claims against BAC are not viable for the additional reason that they are derivative of the time-barred primary liability claims against BAS. Lead Plaintiff attempts to distinguish the cases cited by BAC on the ground that, based on Lead Plaintiff's own re-analysis of the facts of those cases, they arguably involved control person claims that were asserted for the first time after the statute of limitations or statute of repose had run. But the reasoning of those decisions was not based on the statute of limitations or statute of repose having run on the control person claims. Rather, the reasoning of those decisions was that the control person claims were not viable because the statute of limitations or statute of repose had run on the underlying primary liability claims. See Fezzani v. Bear, Stearns & Co., Inc., 2004 WL 744594, at \*23 (S.D.N.Y. Apr. 6, 2004) (dismissing Section 20(a) control person claim because "any claims based on primary violations by Baron that occurred [more than three years before the complaint was filed] are time-barred") (emphasis added); Lillard v. Stockton, 267 F. Supp.2d 1081, 1122 (N.D. Okla. 2003) (affirming and adopting magistrate's recommendation that Section 15 control person claim be dismissed because "[w]ithout pleading that Defendants violated federal securities laws within the limitations period, Plaintiffs have failed to demonstrate a primary violation of federal securities laws [upon which] to impute control person liability to Arthur Stockton") (emphasis added); Havenick v. Network Express, Inc., 981 F. Supp. 480, 522 (E.D. Mich. 1997) (dismissal of Section 10(b) claims as time-barred required dismissal of 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") (emphasis added); Payne v. Fidelity Homes of America, Inc., 437 F. Supp. 656, 658 (W.D. Ky. 1977) ("No claims here have been brought under [Section 11] and those falling within the scope of [Section 12] have been dismissed [as barred by the statute of repose]. All claims relating to Section 15 are therefore dismissed."). In those cases, the court determined that the control person claims should

be dismissed because the underlying claims had been extinguished. Here, as Lead Plaintiff concedes, the underlying claims against BAS should be extinguished. This should result in the dismissal of the control person claims against BAC as well.

Respectfully submitted,

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\*Signed by Charles G. King with permission

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of April, 2004, a true and correct copy of the foregoing Defendants Bank of America Corporation and Banc of America Securities LLC's Reply Brief in Further Support of their Motion for Reconsideration is being served upon all counsel of record by website, <http://www.esl3624.com>, pursuant to this Court's Order.

  
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Amanda Kosowsky\*