

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES)
LITIGATION)

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.)

United States Courts
Southern District of Texas
FILED

APR 27 2004

Michael N. Milby, Clerk

Civil Action No. H-01-3624
(Consolidated)

**REPLY IN SUPPORT OF THE LEHMAN DEFENDANTS’
PARTIALLY UNOPPOSED MOTION TO RECONSIDER ORDER
REGARDING THE LEHMAN DEFENDANTS’ MOTION TO DISMISS**

Plaintiffs concede that their Section 11 claim against LBI is time-barred and should be dismissed to the extent it is based on the May 19, 1999 offering of Enron notes. Nevertheless, plaintiffs argue that they should still be permitted to proceed with their Section 15 claim against LBHI based on that same offering. But that claim too must be dismissed.

While plaintiffs are correct that they “need not proceed against the principal perpetrator” (Docket No. 2094 at 2), the law is clear that, because a claim for control person liability under Section 15 is derivative of a claim against the alleged controlled person under Section 11, when

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the Section 11 claim fails, so too must the Section 15 claim. *See, e.g., Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, No. 02-10558, 2004 WL 626721, at *22 (5th Cir. Mar. 31, 2004) (“Control person liability is secondary only and cannot exist in the absence of a primary violation.”); *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 3363, 370 n.33 (5th Cir. 2001) (“The question of controlling person liability under Section 15 of the 1933 Securities Act is derivative of liability under Sections 11 and 12(2) and must abide that ultimate resolution.”); *Lewis v. Fresne*, 252 F.3d 352, 357 n.3 (5th Cir. 2001) (“Section 15 of the 1933 Act imposes derivative liability on ‘controlling persons’ for violations of § 12. Without a violation of § 12, there is no claim under § 15.”). Accordingly, when, as here, the Section 11 claim against the alleged principal perpetrator is time-barred, there can be no control person claim under Section 15. *See Fezzani v. Bear, Stearns & Co.*, No. 99 Civ. 0793 (RCC), 2004 U.S. Dist. LEXIS 5825, at *69 (S.D.N.Y. Apr. 6, 2004) (no control person claim where claim for primary violation is time-barred); *Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1121-22 (N.D. Okla. 2003) (“Without pleading that Defendants violated federal securities laws within the limitations period, Plaintiffs have failed to demonstrate a primary violation of federal securities laws to impute control person liability to [Defendant].”).¹ Indeed, plaintiffs have not cited any contrary authority.²

WHEREFORE, for all of the foregoing reasons, the Lehman Defendants respectfully request that the Court reconsider its Order denying the Lehman Defendants’ motion to dismiss

¹ Plaintiffs attempt to distinguish *Fezzani* and *Lillard* on the ground the control person claims in those cases were themselves time-barred. (Docket No. 2094 at 1 n.1.) But that was not the basis for either of the decisions. In both cases, the courts dismissed the derivative control person liability claims solely because the primary liability claims were time-barred. *See Fezzani*, 2004 U.S. Dist. LEXIS 5825, at *69; *Lillard v. Stockton*, 267 F. Supp. 2d at 1121-22.

² Plaintiffs’ cases are inapposite. In *Kemmerer v. Weaver*, 445 F.2d 76, 78 (7th Cir. 1971), *In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988), *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), plaintiffs still had viable claims against the primary violators but were not pursuing them for various reasons. In *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1153, 1171 (D.C. Cir. 1978), the primary violation claim had not failed, it was settled.

and dismiss the Section 11 and Section 15 claims against the Lehman Defendants to the extent those claims are based on the May 19, 1999 offering of \$500M of 7.375% Enron notes.

Dated: April 27, 2004
Houston, Texas

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through es13624.com in accordance with the Court's order regarding website service on the 27th day of April 2004.


