

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 J.P. MORGAN'S
MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER
(DOCKET NO. 2095)**

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As this Court has held, prior to filing the Consolidated Complaint for Violations of the Federal Securities Laws (“Consolidated Complaint”) on April 8, 2002, plaintiffs were *not* on inquiry notice of claims against the Bank Defendant in this action. Refusing to accept this Court’s Order, JP Morgan Chase Bank (“Subsidiary) argues plaintiffs are time-barred by the one-year statute of limitations established in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). According to JP Morgan Defendants, notice arose on December 22, 2001 when the *Financial Times* reported upon certain allegations made by defendants in the action styled *JPMorgan Chase Bank v. Liberty Mutual Insurance Co.*, No. 01 Civ. 11523 (S.D.N.Y.) (the “JP Morgan Action”). This argument fails in several regards. For example, the insurance companies’ counter claims in the JP Morgan Action only informed investors that JP Morgan defrauded its own insurance companies. Nothing therein suggested that any JP Morgan Defendant (including JP Morgan’s Subsidiary) played any role in a fraudulent scheme to defraud investors in Enron’s publicly traded securities or that the Mahonia prepays even affected Enron’s financial disclosures. JP Morgan’s statute of limitations argument is without basis and its motion should be denied.

I. ARGUMENT

Here, the Court has determined that plaintiffs’ Amended Complaint against Subsidiary is deemed filed as of January 14, 2003. Mar. 31, 2004 Order at 5. Accordingly, the operative issue is whether plaintiffs were on notice prior to January 14, 2002. Plaintiffs were not.

A. JP Morgan’s Primary Role in the Enron Fraudulent Scheme Was Not Publicly Known Prior to April 8, 2002

As plaintiffs argued previously, at no time prior to filing the Consolidated Complaint on April 8, 2002 was there any publicly acknowledged “storm warnings” sufficient to cause an investor of ordinary intelligence to believe she had been defrauded by any of the Bank Defendants, including JP Morgan’s Subsidiary. *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 16-17 (Ex. 1).

Statements made by national news sources aptly make the point concerning the lack of information publicly known as of April 8, 2002 about the Bank Defendants’ conduct. Indeed, after reviewing the Consolidated Complaint, *USA Today* reported: “Until now, Wall Street’s perceived role in Enron’s collapse has largely been defined by the ‘buy’ recommendations maintained by analysts as the company melted down last fall.” Greg Farrell and Edward Iwata, “Complaint to Link Wall Street Banks with Enron Woes,” *USA Today*, Apr. 8, 2002 (Ex. 2). Likewise, *The Wall Street Journal*’s editorial board described the “list” of Bank Defendants in the Consolidated Complaint as “amazing,” and suggested that there was no basis to sue the Bank Defendants other than “their ability to pay.” See “Lerach’s Enron Sweep,” *Wall St. J.*, Apr. 17, 2002 (Ex. 3).¹

Prior to April 8, 2002, the vast scope and complexity of the Enron fraudulent scheme was known only to defendants. Given the paucity of information concerning defendants’ scheme available at that time, it is highly unlikely that an investor of ordinary intelligence could have possibly suspected she had a claim against any JP Morgan defendant, including JP Morgan’s Subsidiary. Moreover, it is important to recognize that JP Morgan now argues notice by hindsight, suggesting that discreet disclosures in a few random articles and court filings not directly concerning Enron were sufficient to inform ordinary investors that the Mahonia transactions were part of a vast Ponzi scheme to falsely inflate Enron’s reported cash flows from operations and disguise its debt levels via loans masquerading as prepay commodity swaps. This is an unreasonable assumption.

¹ Of course, *The Wall Street Journal* changed its position after Congressional hearings in late July 2002: “We’re not the type to easily bash business. But from the evidence we’ve looked at, these banks deserve the beating theyre now getting.” See “Enron’s Enablers,” *Wall St. J.*, July 29, 2002 (Ex. 4).

B. The Sureties Litigation Did Not Establish “Storm Warnings” Informing Ordinary Investors of JP Morgan’s Conduct in the Mahonia Transactions

1. The Sureties’ Allegations

The entirety of JP Morgan’s notice argument relies upon the Answer, Affirmative Defenses and Counterclaim of St. Paul Fire & Marine Ins. Co. (the “Answer”) filed on December 20, 2001 in the JP Morgan Action. *See* Motion at 4 (also citing various news articles concerning the Answer). Nothing in the Answer, however, indicates that JP Morgan acted to falsify Enron’s financial results reported to investors. Moreover, ordinary investors are not charged with having to review the universe of court pleadings to prevent the statute of limitations from running.

St. Paul’s admissions and denials of JP Morgan’s allegations provide no meaningful insight, and neither does its affirmative defenses. Likewise, St. Paul’s counterclaim sheds no light on the fraudulent scheme perpetrated by defendants in the *Newby* action. Rather, St. Paul merely alleges that Mahonia misrepresented its intent to actually purchase gas and oil in the Mahonia prepays. *See, e.g.*, Answer, ¶¶7-10 (Ex. 8 to Motion). St. Paul further alleges that “representations made by Mahonia in the Forward Sales Contracts were materially false.” *Id.*, ¶13.

Critically, the Answer alleges that Mahonia’s intent in making false representations *to the Sureties* was to “obtain surety bonds to secure loans,” which strongly suggests the deceit was of limited scope and affect. *Id.*, ¶14. The Answer nowhere alleges that Enron’s published financial results were being manipulated by the Mahonia prepays. Nor does it even suggest that the Mahonia prepays were intended to deceive Enron’s investors or did deceive Enron’s investors. The Answer nowhere demonstrates that the Mahonia prepays were material to Enron investors, or that any investor ever relied upon any misrepresentation about the substance of the Mahonia prepays. Reviewing the Answer merely indicates that Mahonia lied to the Sureties to obtain insurance. Thus the Answer concerns insurance fraud, not securities fraud. Public accusations that JP Morgan may

have committed insurance fraud, without more, were not “storm warnings” sufficient to cause an ordinary investor in Enron securities to think she had a claim against JP Morgan for participation in a fraudulent Ponzi scheme.

2. JP Morgan Told the Market that the Mahonia Transactions Were “Not Unusual” and the Sureties’ Allegations Were “Speculative” and “Conclusory”

On December 20, 2001, the day the Answer was filed, JP Morgan held a conference to discuss the substance of its litigation with the Sureties. *See* Ex. 5. During that call, JP Morgan asserted that the Sureties’ counterclaims were without merit. Indeed, JP Morgan has consistently misrepresented the substance of these transactions and publicly asserted that the Mahonia prepays actually delivered gas and oil when they did not. *See, e.g.*, Ex. 6 (analyst research report dated February 28, 2002 stating “J.P. Morgan’s position asserts that the forward contracts were used to deliver oil and gas to Mahonia, and that the surety bond deals had been reviewed and approved by the insurers.”). Moreover, JP Morgan has consistently argued that the Sureties’ fraud allegations are “speculative” and “conclusory.” *See, e.g.*, *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 24, 28 (S.D.N.Y. 2002) (“plaintiff argues that defendants’ allegations of fraud are too speculative and unsupported by admissible evidence to rebut the solid showing plaintiff has made in support of plaintiff’s motion for summary judgment”).

JP Morgan’s public misrepresentations are important for two separate reasons. *First*, JP Morgan’s public misstatements minimized any purported effect other disclosures may have had in causing investors of ordinary intelligence to realize JP Morgan had defrauded them. JP Morgan’s concealment of relevant facts may be considered when determining inquiry notice. *See Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988). *Second*, as this Court previously held: “Whether the plaintiff was aware of sufficient facts to put him on inquiry notice is frequently inappropriate for resolution on a motion to dismiss under Rule 12(b)(6).” Feb. 25, 2004 Order at 28. *See also id.* at

30. Nonetheless, the evidence available demonstrates that no pertinent “storm warnings” arose from the Sureties’ allegations.

After attending JP Morgan’s analyst call on December 20, 2001, research analysts covering JP Morgan expressed no suspicions that JP Morgan played any role in the Enron fraud. Indeed, *no* press reports or analyst statements even considered the possibility at any time prior to January 14, 2002. Rather, these analysts downplayed the significance of the Sureties’ allegations. For instance, on December 20, 2001, Salomon Smith Barney issued a report by Ruchi Madan stating:

As part of JPM’s trading relationship with Enron, JPM acted as the financier of forward energy contracts between Enron and its counterparties (*i.e.* JPM put the money up before the contracts were settled). To offset this risk, JPM purchased surety bonds from several major insurance companies to guarantee payment in the event that Enron couldn’t deliver the commodity.

JPM disclosed this morning that it was initiating litigation against the insurance companies to ensure payment of \$965m owed to JPM. We believe JPM’s actions are procedural considering that the payments from the 7-8 insurance companies are due on 12/21 and it seems unlikely that they will pay JP Morgan by then. ***We understand that it’s reasonable for insurance companies to be fact-finding before writing a large check on a claim. Management commented that it is highly confident that it will be repaid on these surety bonds.***

Ex. 7 (emphasis added).

Similarly, the *Financial Times* issued a December 21, 2001 article after the conference call. Commenting on statements made by Marc Shapiro, JP Morgan’s Vice-Chairman, the *Financial Times* reported: “The bank seems to have arranged at least \$2.2bn of ‘back-to-back’ transactions, in which companies in Jersey – called Mahonia and Mahonia Natural Gas – contracted for delivery of oil and gas from Enron and JP Morgan signed similar contracts with Mahonia. ***The deals were not unusual.***” Andrew Hill, “Concerns grow over fall-out of trader’s collapse,” *The Financial Times*, Dec. 21, 2001 (Ex. 8) (emphasis added).

Analysts and financial reporters did not change their position at any time prior to January 14, 2002. For instance, a January 22, 2002 analyst research report issued by Morgan Stanley's Henry H. McVey and Scott R. Patrick stated:

Enron-related litigation: A long haul. JPMorgan Chase has initiated litigation against nine insurance companies seeking payment under Enron-related surety bonds. The surety contracts were issued by the insurance companies to guarantee obligations of Enron North America Corporation and Enron Natural Gas Marketing Corporation under prepaid forward natural gas and crude oil contracts. At issue in the case is approximately \$1.1 billion, of which JPMorgan Chase's share is approximately \$965 million. The insurers are refusing to make payments on grounds of alleged fraud. *According to our insurance analyst Alice Schroeder, it would be premature to draw conclusions as to whether the insurers' efforts to block payments are likely to be successful.* She notes that, in similar film finance revenue guarantees, which are still in court after several years, many of the same parties, including JPMorgan Chase, were involved as facilitators. These cases still have not been resolved and appear to involve many of the same issues as the Enron surety case. She expects that the surety situation may take some time to be resolved.

Ex. 9 (emphasis added).

Accordingly, given the experts who closely followed JP Morgan and its litigation with the Sureties were unable to determine whether the Sureties' claims amounted to anything, and the Sureties' claims were not even understood to touch upon the fraudulent scheme alleged in *Newby*, it is evident there was no "storm warnings" putting investors of ordinary intelligence on notice of JP Morgan's culpability in this action.

C. Notice Is Not Established By Articles Suggesting that JP Morgan Defrauded Persons Other than Plaintiffs

JP Morgan asserts that on December 22, 2001 the "*Financial Times* reported that the contracts underlying the Mahonia prepay transactions allegedly were 'materially false.'" Motion at 2. JP Morgan also asserts that the "December 22, 2001 article stated that the Mahonia prepay transactions allegedly were 'a front to obtain security for loans.'" *Id.* These are hardly storm warnings. Indeed, there is no warning whatsoever that JP Morgan acted to do anything other than defraud its own insurance carriers (not plaintiffs in *Newby*).

In a recent Order, the Court found that a May 22, 2002 *Washington Post* article put plaintiffs on inquiry notice of claims against Deutsche Bank. Mar. 29, 2004 Order at 30 n.27. Comparison demonstrates that the December 22, 2001 article restating allegations made in the Answer is clearly insufficient. Concerning Deutsche Bank, *The Washington Post* reported:

Enron Corp. created a series of intricate tax-reduction transactions that boosted its reported profits by nearly \$1 billion between 1995 and last year, significantly exaggerating the size and strength of its operations, according to internal company documents obtained from the company's former top tax executive.

* * *

Some of the most prominent law firms and banks in the nation – including King & Spalding, Chase Manhattan Bank and Bankers Trust [n.k.a. Deutsche Bank] – helped Hermann and a small cadre of subordinates create the transactions, documents show.

April Witt and Peter Behr, “Enron’s Other Strategy: Taxes; Internal Papers Reveal How Complex Deals Boosted Profits by \$1 Billion,” *Washington Post*, May 22, 2002 (Ex. 10). This article about Deutsche Bank’s fraudulent tax transactions amounts to storm warnings because it supports the conclusion that Deutsche Bank was involved in fraudulent transaction and that the specific transaction defrauded plaintiffs. Here, JP Morgan can point to no such similar article about the Mahonia pre-pays pre-dating January 14, 2002.

The December 22, 2002 *Financial Times* article relied upon by JP Morgan never even suggested that the Mahonia pre-pays had any effect on Enron’s financial statements or were intended to deceive plaintiffs. *See* Ex. 3 to Motion. Indeed, on December 21, 2002, the very same author reported that the Mahonia pre-pays “were not unusual.” Ex. 8. Simply asserting that the underlying contracts in the Mahonia pre-pays were “materially false” does not suggest a fraud upon plaintiffs. The same is true about allegations that Mahonia simply created a “front” to get insurance. At most, the December 22, 2001 *Financial Times* article described a fraud on JP Morgan’s own insurance company – not plaintiffs in *Newby*. Accordingly, it did not amount to storm warnings.

This analysis applies with equal force to all of JP Morgan's purported authorities. See Motion at 4 n.4. Even assuming, *arguendo*, that ordinary investors are charged with reading such periodicals as *Platt's Oilgram News* and the *St. Paul Pioneer Press* – which they are not – nothing therein establishes “storm warnings,” especially given the December 22, 2001 *Financial Times* article relied upon by JP Morgan. None of the articles cited by JP Morgan connect the Mahonia prepays to the damage suffered by plaintiffs, or even hint at a connection. With the arguable exception of the *Platt's Oilgram News* article, none of JP Morgan's citations even suggests the Mahonia prepays had an impact upon Enron's accounting – and *Platt's Oilgram News* does so in only the most cursory of fashions. Moreover, any argument that *Platt's Oilgram News* notified plaintiffs of the fraud must fail because the same article reported that JP Morgan “insists the forward sales ... were standard industry commodity deals” and that the insurers “are just trying to dodge paying a valid claim.” Motion, Ex. 4.

Accordingly, not one of the articles JP Morgan cites provided “storm warnings” causing investors of ordinary intelligence to suspect that JP Morgan's Mahonia prepays were part of the then-unknown fraudulent Ponzi scheme to defraud plaintiffs. Moreover, not one of JP Morgan's citations notified ordinary investors that JP Morgan had acted to defraud anyone besides JP Morgan's insurers. Thus, these articles do not establish inquiry notice.

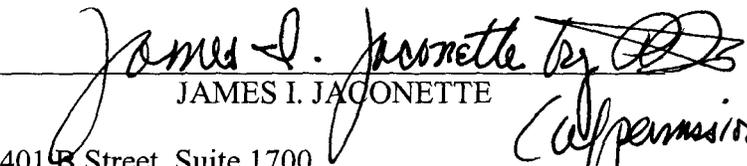
II. CONCLUSION

For the reasons stated herein, and as set forth in Lead Plaintiff's Opposition, plaintiffs respectfully request the Court deny the JP Morgan Defendants' motion for reconsideration.

DATED: April 26, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO J.P. MORGAN'S MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER (DOCKET NO. 2095) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this April 26, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO J.P. MORGAN'S MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER (DOCKET NO. 2095) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this April 26, 2004.

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Mo Maloney

The Exhibit(s) May
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