United States Courts
Southern District of Texas
ENTERED

FEB 18 2005

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	§	MDL-1446
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
WASHINGTON STATE INVESTMENT BOARD and EMPLOYER TEAMSTERS LOCAL NOS. 175 and 505 PENSION TRUST FUND, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-02-3401
KENNETH L. LAY, et al., Defendants.	§	

MEMORANDUM AND ORDER OF PARTIAL DISMISSAL

The above referenced putative class action, H-02-3401, *Washington State Investment Board v. Lay, et al.,* was filed by two *Newby* Class Representatives, the Washington State Investment Board and the Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund (together, "the WSIB Plaintiffs"), along with *Newby* Lead Plaintiff, the Regents of the University of California. Plaintiffs' First Amended Complaint alleges on behalf of a putative class of purchasers of Enron securities between September 9, 1997 and October 18, 1998 (the "Class Period") against various

Enron directors, officers, and outside directors, investment banks, lenders, underwriters, Vinson & Elkins, and Arthur Andersen entities and employees, a fraudulent scheme and course of business, including numerous false and misleading statements to the public, accounting manipulations, non-arm's-length transactions with special purpose entities and partnerships illicitly controlled by Enron Corporation, to inflate Enron's financial status and hide its debt for Defendants' personal gain, in violation of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5, and of §§ 11 and 15 of the Securities Act of 1933.

Pending before the Court are the following motions to dismiss Plaintiffs' First Amended Complaint[1]:

(1) Officer Defendants Richard B. Buy,[2] Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Kevin P. Hannon, Joseph M. Hirko, and Richard A. Causey's motion to dismiss (#50)[3];

(2) Defendant Outside Directors Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan,

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[1] Instrument #47; Notice of Errata #48.

[2] The WSIB Plaintiffs filed a supplement to its amended complaint as to Richard Buy (#1569), and the Court granted leave for them to do so (#1838).

[3] Pursuant to an agreed motion (#141), Defendants Steven J. Kean, Cindy K Olson, and Stanley C. Horton were dismissed on December 9, 2004 (#143).

John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, Jerome J. Meyer, John A. Urquart, John Wakeham, Charles E. Walker, and Herbert S. Winokur, Jr.'s motion to dismiss (#51)[4] and supplemental motion to dismiss (#78);

(3) Defendant Kenneth L. Lay's motion to dismiss (#52);

(4) Defendants J.P. Morgan Chase & Co., JPMorgan Chase Bank and J.P. Morgan Securities Inc.'s motion to dismiss (#53);

(5) Defendant Jeffrey K. Skilling's notice of motion [to dismiss] (#55);

(6) Defendant Vinson & Elkins L.L.P.'s motion to dismiss (#57);

(7) Defendant Ken. L. Harrison's motion to dismiss (#58);

(8) Defendant Stanley C. Horton's motion to dismiss (#59);

(9) Defendants Citigroup, Inc., Citibank, N.A. and Salomon Smith Barney Inc.'s motion to dismiss (#60);

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[4] Outside Director Defendants Belfer, Blake, Chan, John Duncan, Foy, Gramm, Harrison, Jaedicke, LeMaistre, Meyer, Urquhart, Wakeham, Walker, and Winokur are not sued for fraud, but only under the non-fraud sections of the 1933 and 1934 Acts. First Amended Complaint at ¶ 2 n.1.

(10) Defendants Barclays PLC and Barclays Bank PLC's motion to dismiss (#62);

(11) Defendants the Deutsche Bank Entities' motion to dismiss (#63);

(12) Lehman Bothers Holdings Inc. and Lehman Brothers, Inc.'s motion to dismiss (#65);

(13) Defendant Lou L. Pai's motion to dismiss (#67);

(14) Defendant Joseph W. Sutton's motion to dismiss (#68);

Defendants Arthur Andersen LLP, and its firm members, Thomas Bauer, Debra Cash, Stephen Goddard, Gary Goolsby, and Michael Lowther have filed a joinder (#75) to the motions to dismiss, as has Defendant David B. Duncan (#77).

Plaintiff Washington State Investment Board ("the Board")[5] claims that it purchased publicly traded debt securities of Enron at artificially inflated prices, as delineated in its previously filed Certification, including the 6.40% Notes due 7/15/2006 and 6.95% Notes due 7/15/2028, both offered to the public on July 7, 1998, and suffered substantial injury as a result. Plaintiff Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund ("Teamsters 175 & 505")[6] contends that it purchased Enron securities at artificially inflated prices, as reflected in

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[5] The Board oversees the management and investment of public and retirement funds for the State of Washington.

[6] Teamsters 175 & 505 is a Taft-Harley pension fund that manages the retirement savings of thousands of Teamsters.

its Certification, and has also suffered substantial injury as a result. Because many if the factual allegations in H-02-3401 have been summarized by the Court in #1194 in *Newby*, the Court refers the parties to that memorandum and order and the WSIB Amended Complaint here rather than repeating them again here.

Because the Court has granted preliminary approval of a proposed partial settlement with the Lehman entities, the Court finds that their motion to dismiss (#65) is moot.[7]

The threshold issue in the motions to dismiss is whether this suit is barred by the statute of limitations. The initial complaint in H-02-3401 was filed on September 9, 2002, asserting claims going back five years, to a proposed Class Period of September 9, 1997 through October 18, 1998. Defendants contend that because the *Newby* Consolidated complaint was filed before the enactment of the Sarbanes-Oxley Act, the WSIB Plaintiffs filed this action after the enactment of the Sarbanes-Oxley Act to take advantage, improperly, of the new statute of limitations by filing a separate complaint that addresses the same factual allegations as the *Newby* complaint, but designates a class period reaching back five years.[8] The Bank Defendants and Plaintiff filed an agreed motion to activate this case so that the limitations issue

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[7] This Court had previously granted the Lehman entities' unopposed motion to dismiss the section 10(b) and § 20(a) claims against them. #1969 in *Newby*.

[8] The *Newby* Consolidated Complaint, filed on April 8, 2002, identified a proposed Class Period from October 19, 1998 through November 27, 2001, approximately three years before the first Enron putative class action (*Newby*) was filed on October 22, 2001.

could be decided. The Court granted that motion on September 15, 2003, and Plaintiffs filed their First Amended Complaint ("WSIB Complaint") on October 15, 2003.

Defendants contend that WSIB Plaintiffs erroneously rely on the extended statute of limitations for private securities fraud cases enacted as Section 804 of the Public Company and Accounting Reform and Investor Protection Act of 2002 ("the Sarbanes-Oxley Act"), Pub. L. No. 107-204, § 804, 116 Stat. 745, 801 (2002), codified in part at 28 U.S.C. § 1658. Before the Sarbanes-Oxley Act was passed, claims brought under § 10(b) and § 20(a) of the Securities Exchange Act of 1934 as well as the Securities Act of 1933 had to be brought within the earlier of (1) one year from the date of discovery of the facts allegedly violating federal securities law or (2) three years from the date of the occurrence of the violation. *Lampf, Pleva, Lipkind, Purpis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991)(in the absence of an express statute of limitations, applying one-year/three-year period from § 13 of the 1933 Act, 15 U.S.C. § 77m, as a uniform statute of limitations to § 10(b) claims). The Sarbanes-Oxley Act extended that statute of limitations for "a private right of action that involves a claim of fraud, deceit, manipulation or contrivance in contravention of a regulatory requirement concerning the securities laws" respectively to the shorter of (1) two years from the date of discovery or (2) five years from the date of the occurrence. The newly expanded limitations period applies only "to all proceedings addressed by this section that

are commenced on or after the date of enactment of this Act." 28 U.S.C. § 1658(b).

The *Newby* Consolidated Complaint was filed on April 8, 2002. The Sarbanes Oxley Act was enacted on July 30, 2002. This action by the WSIB Plaintiffs was commenced on September 9, 2002. Defendants argue that any claims that had accrued by July 30, 1999 were already time-barred under *Lampf* by the three-year statute of limitations. This three-year period of repose is not subject to tolling because its purpose was "clearly to serve as a cutoff." *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998)(*citing Lampf* for this proposition), *cert. denied*, 525 U.S. 1105 (1999); *Corwin v. Marney, Orton Inv.*, 788 F.2d 1063, 1066 (5th Cir. 1986)(three-year period under 15 U.S.C. § 77m "is an absolute bar, and the normal tolling rules are not applicable to toll the three-year period"). Moreover, for claims under the 1933 Act, including § 11, the WSIB Plaintiffs have indicated that they do not allege fraud, but only strict liability or negligence claims, which are therefore not covered by the new limitations provision.

If the new Sarbanes-Oxley limitations period does not apply here and the *Lampf* rule does, since the WSIB Complaint was filed on September 9, 2002, all claims based on conduct occurring prior to September 9, 1999, beyond the three-year cutoff, in other words all claims asserted here, are time-barred because they expired before the Sarbanes-Oxley Act was enacted on July 30, 2002; Section 804(c) expressly states, "Nothing in this section shall create a new, private right of action." Defendants maintain

that if applied retroactively, the Act would create a new, private right of action here. Moreover, because section 13 of the 1933 Act, 15 U.S.C. § 77m, which did and still does apply to non-fraud-based actions under § 11 and 12(a)(2), contains not only a one-year statute of limitations (suit must be "brought within one year after discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence"), but also a three-year statute of repose that cannot be tolled ("[i]n no event shall any such action be brought . . . more than three years after the security was *bona fide* offered to the public"), such claims are time-barred three years after the securities at issue are offered to the public. As noted, the Board purchased two Enron note offerings, both of which were offered to the public on July 7, 1998 (Amended Complaint at ¶ 169), so they had to file those claims before July 7, 2001, but failed to do so for more than three months, i.e., on September 9, 2002.

Furthermore, WSIB Plaintiffs' suit would be barred because even if the Sarbanes Oxley Act permitted revival of time-barred claims, Plaintiffs had a case pending, *Newby*, when the statute was enacted and the express language of the statute states that plaintiffs with securities fraud cases pending prior to the statute's enactment cannot use the expanded statute of limitations. Section 804(b)("The limitations provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are

commenced on or after the date of enactment of the Act."). They cannot circumvent this restriction merely by filing a new complaint with an expanded class period. *Central Trust Co. v. Official Creditors' Comm. of Geiger Enter., Inc.*, 454 U.S. 354, 357 (1982)(holding that a plaintiff with a pending case cannot file a new case to take advantage of a change in the law where Congress makes clear that the new law does not apply to existing cases).

As an initial matter, the Court, having reviewed both the Consolidated *Newby* complaint and the WSIB Plaintiffs' Amended Complaint, agrees with Defendants that the claims are essentially of one cloth, but the latter serves to extend the Class Period an extra year. Moreover, as Representative Plaintiffs in the *Newby* action, WSIB Plaintiffs indisputably had a case pending at the time the Sarbanes-Oxley Act was enacted.

This Court has previously examined the statute of limitations issue for federal securities claims. #1999 in *Newby* at 24-59. It concluded that the expanded limitations period of the Sarbanes-Oxley Act does not apply to non-fraud claims under § 11 and § 12(a)(2), which are still governed by § 13 of the 1933 Act. It also held that the new statute of limitations is not retroactive and does not apply to claims that would have expired before it was enacted. #1999 at 38-43, 45-59.

Since then, two appellate courts have addressed the issue of retroactivity of the new limitations period and agree that it does not revive claims that expired before Sarbanes-Oxley

was enacted. *In re Enterprise Mortgage Acceptance Co., LLC, Sec. Litig. v. Enterprise Mortgage Acceptance Co., LLC*, 391 F.3d 401 (2d Cir. 2004, amended 2005)(holding that Sarbanes-Oxley Act did not have the effect of reviving stale claims); *Foss v. Bear, Stearns & Co.*, 394 F.3d 540, 542 (7th Cir. 2005)(Easterbrook, J.)("We find *[Enterprise Mortgage]* persuasive and have nothing to add to the second circuit's explanation."). Like the Seventh Circuit in *Foss*, this Court finds that Second Circuit opinion to be thorough, well-reasoned, and persuasive.

In *Enterprise* the Second Circuit consolidated two cases from different district courts in which a number of plaintiffs with time-barred claims against various defendants attempted to use the Sarbanes-Oxley extended limitations period by filing new claims after its enactment, but in essence repeating the allegations of their older complaints.[9] The district courts granted motions to dismiss on the grounds that the Sarbanes Oxley statute of limitations did not revive expired claims. 391 F.3d at 402, 404-05. On appeal the Second Circuit affirmed.

Like this Court, to determine whether the statute should be applied retroactively, the Second Circuit applied the two-part test in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)(first the court must decide if Congress has expressly prescribed the

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[9] In one case the plaintiffs appended additional claims, while in the other they joined another defendant to attempt to take advantage of the extended limitations period.

reach of the statute[10]; if so the inquiry stops; if the statute is ambiguous or contains no such express command, the court examines whether the statute would have a "retroactive effect," i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," and if so, deny retroactivity). *Id.* at 405-06. The appellate court concluded from the language of the statute and the legislative history that the Sarbanes-Oxley Act did not expressly and unambiguously apply retroactively to revive previously expired claims, that there was no clear congressional intent that the statute apply retroactively, but that there was ambiguity. *Id.* at 406-08.[11] It emphasized that § 804(c)'s statement, "Nothing in

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[10] Because retroactive statutes raise "special concerns," "congressional enactments . . . will not be construed to have retroactive effect unless their language *requires* this result." *Enterprise*, 391 F.3d at 405, *quoting INS v. St. Cyr*, 533 U.S. 289, 315 (2001), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Thus those cases where the Supreme Court "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear it could sustain only one interpretation.'" *Id.*, *quoting Lindh v. Murphy*, 521 U.S. 320, 328 (1997).

[11] WSIB Plaintiffs argue that statutory language in § 804(b) that the extended limitations period "shall apply to all proceedings . . . that are commenced on or after the date of enactment of this Act" reflects Congress's unambiguous intent that the extended period of Sarbanes-Oxley apply to their suit since it was commenced after July 30, 2002. #88 at 7. The Second Circuit rejected the same argument:

> Although Section 804(b) is perhaps most naturally read as applying to any proceeding that is commenced after Sarbanes-Oxley's July 30, 2002, enactment, the statute contains none of the unambiguous language that the Supreme Court has asserted would amount to an express

this section shall create a new, private right of action," undermines the argument that "Sarbanes Oxley unambiguously revived previously expired fraud claim." 391 F.3d at 407 ("Where a plaintiff is empowered by a new statute to bring a cause of action that previously had no basis in law [because it was time-barred], a new cause of action has, in some sense of the word, been created."). Therefore the Second Circuit questioned "whether extending the statute of limitations to revive expired claims would have a 'retroactive effect'" that gave rise to a presumption against retroactive application and concluded that it would. *Id.*

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retroactivity command, *see Landgraf*, 511 U.S. at 255-56 & n. 8, 114 S.Ct. 1483 (stating that the language 'all proceedings *pending on* or commenced after the date of enactment" amounted to "an explicit retroactivity command")(emphasis added); *Martin v. Hadix*, 527 U.S. 343, 354 . . . (1999)(describing the sentence, "'[t]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment'" as "unambiguously address[ing] the temporal reach of the statute")(quoting *Landgraf*, 511 U.S. at 260, . . .); nor that which Congress has used in previous statutes to indicate its intent to revive time-barred claims, *see, e.g.*, Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 201(a), 108 Stat. 2338, 2368 (codified at 12 U.S.C. § 1821(d)(14)(C)(i))(amending the Act to provide that "the Corporation may bring an action on such claim without regard to the expiration of the statute of limitation applicable under State law"); Higher Education Technical Amendments of 1991, Pub. L. No. 102-026, § 3, 105 Stat. 123, 124 (codified at 20 U.S.C. § 1091a(a)(2))(eliminating statute of limitations with regard to recovering on defaulted student loans by stating "no limitation shall terminate the period within which suit may be filed").

at 406, 407-09. The panel determined that the substantive change in the statute affected both substantive and procedural rights such that imposing liability for actions that were lawful when they were taken would have an impermissible retroactive effect and therefore deferred "to the longstanding presumption against retroactive application." *Id.* at 406, 409-10 ("resurrection of previously time-barred claims . . . 'increas[s] a defendant's liability for past conduct' . . . puts defendants back at risk at a point in time when defendants reasonably believe they are immune from litigation . . . .").

Because this Court concurs with the Second Circuit's opinion in *Enterprise*, it concludes that the WSIB Plaintiffs' suit was time-barred before the enactment of the Sarbanes-Oxley Act, that the Act does not revive those claims, and that this action should be dismissed with prejudice.

Accordingly, for the reasons indicated, the Court ORDERS that

(1) the Lehman entities' motion to dismiss (#65) is MOOT; and

(2) the remaining Defendants' motions to dismiss or joinders thereto (#50, 51, 52, 53, 55, 57, 58, 59, 60, 62, 63, 67, 68, 75, and 78) are GRANTED with prejudice on statute of limitations grounds; and

(3) because Andrew Fastow has not filed a responsive pleading, H-02-3401 remains pending as to him.

SIGNED at Houston, Texas, this 16th day of February, 2005.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE