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
ENRON CORPORATION, ET AL., Defendants	§	CONSOLIDATED CASES
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.	§	

ORDER RE CITIGROUP DEFENDANTS' MOTION TO DISMISS

Pending before the Court in the above referenced cause is Defendants Citigroup, Inc.,[1] Citibank N.A., Salomon Smith Barney Inc., and Salomon Brothers International Limited (collectively "Citibank Defendants'") motion to dismiss (#1497) the First Amended Consolidated Complaint (#1388).

Only Citigroup was named in the First Consolidated

[1]Although Lead Plaintiff spells the name CitiGroup, Inc., the Court uses the lower case g because Defendants identify the entity in that manner.

Complaint and the motion does not address the numerous allegations against it which the Court found sustained a claim against Citigroup. #1194 at 282-84. Citigroup Defendants' motion challenges only new claims based on of some of the Foreign Debt Securities issued by Enron-related entities allegedly in violation of § 10(b) and § 20 of the Securities Exchange Act of 1934 and § 12(a)(2) and § 15 of the Securities Act of 1933.

All three Citigroup Defendants are sued under § 10(b) and § 20(a). Lead Plaintiff claims that Salomon Smith Barney, Inc. and Salomon International are liable under § 12(a)(2), while Citigroup, Inc. is liable as a control person under § 15. Either Salomon Smith Barney or Salmon Brothers International was allegedly an underwriter and initial purchaser of the following offerings of Foreign Debt Securities: the 9/23/99 offering by Osprey Trust Osprey I of 8.31% Senior Secured Notes due in 2003; the 11/15/99 offering by Yosemite Securities Trust I of 8.25% Series 1999-A Linked Enron Obligations due on November 15, 2003; the 2/15/00 offering by Yosemite Securities Co. Ltd. of 8.75% Series 1999-A Linked Enron Obligations due in 2007; the 8/17/00 offering by Enron Credit Linked Notes Trust of 8% Enron Credit Linked Notes due in 2005; the 5/17/01 offering by Enron Euro Credit linked Notes Trust of 6.5% Enron Euro Credit Linked Notes due in 2006; the 5/17/01 offering by Enron Credit Linked Notes Trust II of 7.75% Enron Credit Linked Notes due in 2006; and the

5/17/01 offering by Enron Sterling Credit Linked Notes Trust of 7.25% Enron Sterling Credit Linked Notes due in 2003.

Citigroup Defendants assert the new Foreign Debt Securities claims under both § 10(b) and § 12(a)(2) should be dismissed for three reasons. First, as a "fundamental issue of standing under the federal securities laws," none of the plaintiffs has standing to assert these claims since no plaintiff alleges that he, she, or it bought any of these securities issued by these Enron-related entities. Second, Citibank Defendants contend that the notes were issued in private, not public, offerings and thus are not actionable under § 12(a)(2). Third the claims against Citibank, Salomon Smith Barney, and Salomon Brothers International Ltd. are time-barred by the one-year statute of limitations.

This Court has previously made rulings that apply to the instant motion to dismiss and hereby incorporates all its previous relevant memoranda and orders issued in *Newby*, in particular for the CIBC Defendants' instant motion the recent memoranda and orders regarding ICERS' motion to intervene (#1999) and Merrill Lynch and Deutsche Bank Entities' motions to dismiss (#2036).

1. Standing

As discussed in #1999 at 65-66, 72-74, Lead Plaintiff, as distinguished from a class representative, has standing to sue for the § 12(a)(2) claims based on the Foreign Debt Securities.

If however, at the time of class certification, there is no class member that has standing to serve as a class representative for those each of the notes underwritten by Citibank Defendants, the § 12(a)(2) and derivative § 15 claim will be dismissed. #1999.

Furthermore the Court has distinguished standing to assert claims under § 10, which does not require privity with the seller, from standing to assert claims under § 12(a)(2) which requires that the defendant qualify as the plaintiff's direct statutory "seller." #1999 at 90-97. With respect to § 10(b), the Court has recognized that where class members allege a course of conduct or illegal scheme, the class representative may have purchased different types of securities than those in the class. *Id.* at 95.

2. Public or Private Offering under § 12(a)(2)

As detailed in #2036 at 76-90, given Lead Plaintiff's allegations about the nature of the Foreign Debt Securities offerings despite the statements on the face of the offering memoranda, under Fifth Circuit law whether the offerings are public or private for purposes of § 12(a)(2) liability is a fact issue not properly resolved in the 12(b)(6) motion stage. It is Citigroup Defendants' burden to prove an affirmative defense of exemption from the registration requirements or that offerings were private.

3. Statute of Limitations

Lampf's and Section 13's one-year/three-year statute of limitations/statute of repose governs Lead Plaintiff's claims against the Citigroup Defendants. #1999 at 24-63.

This Court has previously rejected the argument that Plaintiffs had inquiry notice of their Foreign Debt Securities claims against secondary actors as early as the October 2001, when Enron startled Wall Street with announcements of its restatement and when plaintiffs filed their first lawsuit (which did not name any secondary actors and was limited to a few Enron officers), especially in light of the extraordinarily complex schemes involved.

The Court has found that the First Amended Consolidated Complaint does not "relate back" to the First Consolidated Complaint with respect to the added bank subsidiaries and claims against them under Federal Rule of Civil Procedure 15(c). Nevertheless, under the circumstances of this litigation, detailed in #2036 at 53-75, and pursuant to Federal Rule of Civil Procedure 15(a), the Court has found good cause for construing and has construed the January 14, 2003 letter from Lead Plaintiff's counsel as a motion for leave to amend to name the subsidiaries of Bank Defendants and finds that January 14, 2003 was therefore the date the Amended Consolidated Complaint was timely filed for limitations purposes. #2036 at 66-74.

The Court has also found that Lead Plaintiff has timely asserted within the one-year statute of limitations the 1933 Act claims based on the Foreign Debt Securities (#1388 at 409-10, ¶ 641.2), since the earliest potential storm warnings to trigger notice inquiry for the Foreign Debt Securities Offerings were in the fall of 2002, and the motion for leave to amend, and therefore the amended complaint, were deemed filed on January 14, 2003, within one year of notice inquiry.

Accordingly, for the reasons indicated, the Court

ORDERS that Citigroup Defendants' motion to dismiss is **DENIED**.

SIGNED at Houston, Texas, this 31st day of March, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE