

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

United States Courts  
Southern District of Texas  
ENTERED

MAR 31 2004

In Re Enron Corporation  
Securities, Derivative &  
"ERISA Litigation

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§  
§

Michael N. Milby, Clerk of Court

MDL-1446

MARK NEWBY, ET AL.,

§

Plaintiffs

§  
§

VS.

§

CIVIL ACTION NO. H-01-3624

CONSOLIDATED CASES

§

ENRON CORPORATION, ET AL.,

§

Defendants

§  
§

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA, et al.,  
Individually and On Behalf of  
All Others Similarly Situated,

§  
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§  
§

Plaintiffs,

§  
§

VS.

§

KENNETH L. LAY, et al.,

§  
§

Defendants.

§  
§

ORDER RE LEHMAN DEFENDANTS' MOTION TO DISMISS

Pending before the Court in the above referenced cause is Defendants Lehman Brothers Holding Inc. and Lehman Brothers Inc.'s (collectively, "Lehman Defendants'") motion to dismiss (instrument #1526) the First Amended Consolidated Complaint (#1388).

In the First Consolidated Complaint (#441), Lead Plaintiff sued only Lehman Brothers Holding Inc. In its memorandum and order entered on December 20, 2002 (#1194), the Court granted Lehman Brothers Holding Inc.'s motion to dismiss claims against it under § 10(b) of the Securities Exchange Act of 1934, but denied the motion as to claims under § 11 of the

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Securities Act of 1933 and under the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. article 581-33(A)(2), although it did require Lead Plaintiff to replead the latter.

The First Amended Consolidated Complaint, filed on May 14, 2003, alleges additional claims (1) against both Lehman Defendants under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; (2) against Lehman Brothers Holding Inc. for control person liability under § 20(a) of the Exchange Act and § 15 of the Securities Act of 1933; and (3) against Lehman Brothers Inc. under § 11 and § 12(a)(2) of the 1933 Act for misstatements in the registration statements and prospectuses for two offerings of Enron securities: (a) the August 17, 2000 offering of \$500,000,000 of 8% Enron Credit Linked Notes due in 2005; and (b) the September 28, 2000 offering by Osprey Trust and Osprey I, Inc. of \$750,000,000 of 7.797% Senior Secured Notes and 315,000,000 Euros of 6.375% Senior Secured Notes, both due in 2003.

Pursuant to an unopposed motion (#1961) from the Lehman Defendants,<sup>1</sup> on February 4, 2004 the Court dismissed Lead Plaintiff's claims under Section 10(b), and thus the derivative claims under § 20(a), of Securities Act of 1934, against the Lehman Defendants (#1969). Therefore, because the motion to dismiss is moot as to these Exchange Act claims, the Court addresses the motion to dismiss as it relates to the remaining

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<sup>1</sup> Lead Plaintiff filed a notice of withdrawal (#1957) of its opposition to the motion (#1961) before Lehman Defendants filed it and the Court granted #1961 (#1969).

claims under §§ 11, 12(a)(2), and 15 of the 1933 Act and under the Texas Securities Act.

The Lehman Defendants argue for dismissal on the grounds that (1) the 1933 Act claims are barred by limitations; (2) the claims against Lehman Brothers Inc. are time-barred because they do not "relate back" to the First Consolidated Complaint filed on April 8, 2002; (3) Plaintiffs lack standing to sue Lehman Defendants for violations of § 12(a)(2) because no Plaintiff claims to have purchased any Enron Credit Linked Notes or any Osprey II Notes; (4) because § 12(a)(2) applies only to public offerings and those charged in the amended complaint were private; (5) Lehman Brothers Holding Inc. cannot be liable as a control person under § 15 because there was no primary violation for which it can be derivatively liable and because Lead Plaintiff has not pleaded control person liability adequately; and (6) Lead Plaintiff fails to allege that Washington Board purchased securities from either of the Lehman Defendants (i.e., was in privity with either or both) for Lead Plaintiff's claim under article 581-33A(2) of the Texas Securities Act, arising out of the July 7, 1998 offerings of the 6.4% and 6.95% Enron Notes.<sup>2</sup>

The Court hereby incorporates its previous memoranda and orders in *Newby*, in particular for Lehman Brothers' instant motion

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<sup>2</sup> The First Amended Consolidated Complaint at ¶ 1016.15 alleges, "The Washington Board and each of the members of the Note Subclass acquired the 6.95% and/or the 6.40 Notes from defendants JP Morgan and Lehman Brothers, who were the underwriters in this firm commitment offering, and are in privity with JP Morgan and Lehman Brothers."

the recent memoranda and orders regarding ICERS' motion to intervene (#1999) and Merrill Lynch and Deutsche Bank Entities' motions to dismiss (#2036). Because the Court has already ruled on all the arguments put forth by Lehman Defendants for dismissal except the last, it merely summarizes those conclusions and applies them here, and then addresses the Texas Securities Act claim.

**1. Limitations**

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

**2. Relation Back Under Fed. R. Civ. P. 15(c)**

The Court has determined that the First Amended Consolidated Complaint does not meet the requirements for "relation back" under Federal Rule of Civil Procedure 15(c). #2036 at 53-65. Nevertheless, under the circumstances of this litigation detailed in #2036 at 53-75, and pursuant to Federal of Civil Procedure 15(a), the Court 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.

Lehman Defendants argue that Lead Plaintiff had actual notice of the identity of Lehman Brothers Inc. when it filed the First Consolidated Complaint on April 8, 2003, more than a year

before Lehman Brothers Inc. was named in the First Amended Consolidated Complaint filed on May 14, 2003. Lehman Defendants point out that the First Consolidated Complaint defined the original bank defendants as including their affiliates or operating subsidiaries, while publicly available documents including offering memoranda and analyst reports, identified most of the relevant bank subsidiaries.

The Court rejects these arguments. The Court has found that the First Amended Consolidated Complaint's addition of the bank subsidiaries should be deemed filed as of the January 14, 2003 letter/motion for leave to amend. Moreover, the Court has also found that Lead Plaintiff has timely asserted the 1933 Act claims based on certain Foreign Debt Securities (#1388 at 409-10, ¶ 641.2) because the earliest potential storm warnings for offerings, including those in dispute involving Lehman Brothers (on August 17, 2000 and September 28, 2000), were in the fall of 2002. January 14, 2003 is within one year of notice inquiry and within three years of the investor-plaintiffs' purchases. #1999 at 63-64.

### **3. Standing for § 12(a)(2) Claims**

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. If however, at the time of class certification, there is no class member that has standing to serve as a class representative for those who purchased from the Lehman Defendants, the claims will be dismissed. #1999.

#### **4. Public or Private Offerings**

As detailed in #2036 at 76-90, whether the offerings are public or private is a fact issue not properly resolved in the 12(b)(6) motion stage.

#### **5. Control Person Liability Under § 15 of the 1933 Act**

For control person liability generally and Lead Plaintiff's pleading burden, see #1194 at 64-67, 71-73; #1241 at 24-42. Because the Court has found that Lead Plaintiff has pled predicate securities violations under §§ 11 and 12(a)(2), it has pled the basis for a derivative control-person liability claim under § 15.

In *Newby*, the Court has discussed not only the lack of clarity in the Fifth Circuit's position regarding the pleading requirements for control person liability (*see, e.g.*, #1241 at 24-31), but also its more lenient standards compared with those of other Circuit Courts of Appeals. As discussed in #1241, it appears that the Fifth Circuit requires the pleading, in addition to status or position, of some facts that show the defendant had power to directly or indirectly control or influence corporate policy, *e.g.*, through ownership of voting securities, contract, etc., or had knowledge of the primary violation by the controlled person. As elements of a *prima facie* case of controlling person liability, the Fifth Circuit has expressly rejected more stringent requirements such as actual participation in the primary violation and/or the actual exercise of the controlling person's power to control. This Court has also held that notice pleading under Rule

8 (a "short plain statement of the claim showing the pleader is entitled to relief"), rather than heightened pleading under Rule 9, applies to control person liability claims, and thus a plaintiff need not allege facts to support every element of a *prima facie* case (#1241 at 31-42). Discovery is available to flesh out the facts.

Here the First Amended Consolidated Complaint at 116, ¶99.1, has alleged that

Each of the bank holding company entities sued as defendants herein conducts business affairs through a series of wholly owned and controlled subsidiaries where the bank holding company directly or indirectly owns 100% of the stock of the subsidiaries and completely directs and controls their business operations through the selection and appointment of their officers and, where necessary, directors. These controlled subsidiaries are also the agents of the bank holding company entities and include investment bank subsidiaries as well as other specialized subsidiaries rendering financial advice and services to public companies, including Enron. The financial operations and condition of these subsidiaries are--for financial reporting and other purposes--consolidated with the bank holding company's financial statements. Thus, all revenues, earnings and income of the bank holding company subsidiaries are upstreamed to and belong to the bank holding companies. The bank holding companies named as defendants in this action all participated in the fraudulent scheme and course of business complained of, not only by way of the actions of the holding company itself, but also by way of the actions of numerous of its controlled subsidiaries and agents, some of which have been named as defendants in this action as well.

Moreover, the amended complaint also asserts, "Lehman Brothers Holding, Inc. is a large integrated financial services institution

that through known and unknown subsidiaries, divisions, and/or affiliates acting as the agent of and under the control of Lehman Brothers, Inc., such as Lehman Brothers, Inc. and LBI Group, Inc., provides . . ." performed numerous services thereafter summarized. #1388 at 128, ¶108(a). The Court finds that Lead Plaintiff has stated a claim for controlling person liability against Lehman Brothers Holding Inc. under § 15.

**6. Article 581-33A(2) of the Texas Securities Act and Privity**

As this Court previously held, article 581-33A(2) requires a showing of privity between the statutory "seller" and a plaintiff/purchaser of the security, but no demonstration of reliance or scienter (#1269 at 37-49). Lead Plaintiff has alleged privity between the plaintiffs and Lehman Brothers as the underwriter from which they purchased their Enron notes. There is no requirement that Lead Plaintiff must plead factual support, but nevertheless it has provided documentary evidence of Lehman Brothers confirming a purchase by the Washington State Board. Ex. 25 to #1575.

Accordingly, for the reasons stated, the Court

ORDERS that Lehman Defendants' motion to dismiss Lead Plaintiff's claims under the 1933 Act and the Texas Securities Act is DENIED.

**SIGNED** at Houston, Texas, this 30<sup>th</sup> day of March, 2004.

  
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MELINDA HARMON  
UNITED STATES DISTRICT JUDGE