UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK		Not For Publication
In re	:	Chapter 11
ENRON CORP., *et al*.,	:	Case No. 01-16034 (AJG)
	:	(Confirmed Case)
Reorganized Debtors.	:	
ENRON CORP.,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 03-92677
J.P. MORGAN SECURITIES INC., *et al*.	:	
Defendants.	:	

OPINION DENYING PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT ITS PENDING MOTION FOR LEAVE TO AMEND ITS COMPLAINT TO ADD BERTHOLON ROWLAND AS A DEFENDANT

A P P E A R A N C E S

VENABLE LLP
Special Litigation Counsel for the Reorganized Debtors
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, MD 21201

Richard L. Wasserman, Esq.
Michael Schatzow, Esq.
Robert L. Wilkins, Esq.
Of Counsel

TOGUT, SEGAL & SEGAL LLP
Attorneys for the Reorganized Debtors
One Penn Plaza, Suite 3335

New York, NY 10119

Frank A. Oswald, Esq.
Howard A. Magaliff, Esq.
Of Counsel

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.
Attorneys for Bertholon Rowland, Inc.
1345 Avenue of the Americas, 31st Floor
New York, NY 10105

Christine H. Black, Esq.
Of Counsel

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Attorneys for Wilmington Trust Company
1201 North Market Street, P.O. Box 1347
Wilmington, DE 19899

Robert J. Dehney, Esq.
William O. LaMotte, III, Esq.
Derek C. Abbott, Esq.
Daniel B. Butz, Esq.
Jason A. Cincilla, Esq.
Of Counsel

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

FACTUAL AND PROCEDURAL HISTORY

Commencing on December 2, 2001, and from time to time continuing thereafter, Enron Corp. ("Enron") and its affiliates (the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004.

Bertholon Rowland, Inc. ("Bertholon") is alleged by Enron to be a transferee or beneficiary of one of Enron's commercial paper prepayments. Bertholon was a customer of Wilmington Trust Company ("WTC"), a bank.

On November 6, 2003, Enron initiated this adversary proceeding to recover more than one billion dollars that was allegedly prepaid or redeemed to certain financial institutions prior to the maturity of the A2/P2 commercial paper. Enron brought this adversary proceeding pursuant to and under Rule 7001 of the Federal Rules of Bankruptcy Procedure and seeks relief under sections 502(d), 544, 547, 548, and 550 of the Bankruptcy Code and applicable provisions of state law. WTC was named as a defendant in the original complaint. On the same date, Enron filed a motion seeking the Court's assistance regarding the production of documents that identified transferees and beneficiaries of the prepayments.

Prior to Enron's filing of the original complaint, on October 13, 2003, Goldman, Sachs & Co. ("Goldman") produced to Enron trading confirmation tickets pursuant to a subpoena. One of the trade confirmations, bearing Bates number GS-ENRON CP 00106, identified a transaction marked CUSIP number 29356AXX9 with a maturity date of October 31, 2001 in the amount of $399,932,22 and identified WTC as a party to the transaction (hereinafter, the "Transaction").

On November 18, 2003, the Court issued an order (the "November 18 Order") that directed certain parties, including WTC, to initially disclose to Enron the names of the transferees and beneficiaries in connection with certain commercial paper transactions or transfers. WTC was explicitly directed to provide information regarding five specific transactions. The Transaction, marked CUSIP number 29356AXX9 with a maturity date

of October 31, 2001 and in the amount of $399,932,22, was *not* one of the five transactions for which Enron requested information from WTC. Pursuant to Schedule A(8) of the same November 18 Order, Enron requested that the Court direct J.P. Morgan Securities Inc. ("JPMSI") to provide information to Enron regarding a transaction or transfer with the same CUSIP number as the Transaction's, 29356AXX9, with the same maturity date of October 31, 2001, but in a different amount – $47,591,072.77.

On December 1, 2003, Enron amended its original complaint ("First Amended Complaint") to add transferees and/or beneficiaries of the commercial paper transactions disclosed pursuant to the November 18 Order. Bertholon was not named in the First Amended Complaint. On or about December 2, 2003, pursuant to section 546(a) of the Bankruptcy Code, the statute of limitations for preference actions expired.

On May 13, 2004, at Enron's request, the Court issued an order directing certain defendants in this adversary proceeding to comply with the November 18 Order (the "May 13 Order"). That order did not direct WTC to disclose any information concerning Bertholon. On the same date, the Court granted Enron's Motion for Extension of Time for Service of the Complaint ("Motion for Extension of Time") that extended the time for service of the First Amended Complaint to and including September 30, 2004.

Enron filed a Motion for Leave to Amend the Complaint ("Motion to Amend") on October 19, 2005 and a hearing was held on December 15, 2005. On January 26, 2006, Enron filed a motion to supplement the Motion for Leave to Amend (the "Motion to Supplement"). In the Motion to Amend and memorandum of law in support of that motion and the Motion to Supplement, Enron sought to (1) correct the names of defendants in Enron's first amended complaint, and (2) add defendants, including

Bertholon, to a second amended complaint. Bertholon filed an objection to Enron's Motion to Supplement.[1]

DISCUSSION

Parties' Contentions

Enron seeks to add a new defendant, Bertholon, relating back to its original complaint and its first amended complaint (the "Original Pleadings"), which were filed within the statute of limitations, pursuant to Federal Rule of Civil Procedure 15(c)(3) ("Rule 15(c)(3)"), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7015. As the Court has noted, the "party asserting the relation back bears the burden of proof." *In re Enron*, 298 B.R. 513, 522 (Bankr. S.D.N.Y. 2003).

In its Motion to Supplement, Enron initially claims that WTC violated the Court's November 18 Order and May 13 Order requiring disclosure and that WTC "intentionally failed to disclose to Enron that Bertholon had received a commercial paper prepayment" until just before the December 15, 2005 hearing. (Motion to Supplement, at 2.) Enron claims that the circumstances of WTC's non-disclosure are analogous to *Byrd v. Abate*, 964 F. Supp. 140 (S.D.N.Y. 1997), and *In re Randall's Island Family Golf Centers*, No. 02-2278, 2002 WL 31496229 (Bankr. S.D.N.Y. Nov. 8, 2002). Those circumstances include that the identities of transferees and beneficiaries of prepayment were "in WTC's unique possession," and that, in response to Enron's multiple requests and the Court's two orders, WTC "waited and hid Bertholon's identity" until a few days before the December 15 hearing. (Motion to Supplement, at 4.)

[1] Bertholon Rowland Inc.'s Papers in Opposition to Enron Corp's [sic] Motion for Leave to Supplement Their Motion for Leave to Amend the Complaint Pursuant to Rule 15 of the Federal Rules of Civil Procedure ("Bertholon's Opposition").

WTC responds[2] that neither of the Court's orders (the November 18 Order and the May 13 Order) directed WTC to disclose information concerning Bertholon. WTC also asserts that Enron was aware of the Transaction involving Bertholon since October 2003, via Goldman's production to Enron of the trading confirmation listed on the document marked with Bates number GS ENRON CP 00068.[3] WTC notes that Enron has itself to blame for not naming Bertholon earlier because if Enron, having knowledge of the Transaction, identified the Transaction in the November 18 Order, "then Bertholon would have fallen within the scope of the Orders as directed to WTC." (WTC Response, at 8.)

Bertholon puts forth two principal arguments in opposition. First, it argues that Enron's failure to name Bertholon in the Original Pleadings stems from a lack of knowledge that precludes relation back under Rule 15(c)(3). Second, Bertholon argues that Enron has failed to provide it with the notice required by Rule 15(c)(3). Under the notice provision of Rule 15(c), the party to be named in the amended complaint must, within the time period provided by Rule 4(m), have received notice of the action such that it will not be prejudiced in maintaining a defense on the merits. Bertholon maintains that it did not receive notice until after the court-extended deadline of September 30, 2004. Furthermore, citing *In re Teligent, Inc. Serv., et al.*, 324 B.R. 467 (Bankr. S.D.N.Y. 2005), Bertholon states that its ability to defend itself has been prejudiced by (1) the delay of fifteen months after the expiration of the statute of limitations since, among other things, "substantial motion practice" has already been undertaken, including

[2] Statement of Wilmington Trust Company In Response to Motion of Enron Corp. for Leave to Supplement its Pending Motion for Leave to Amend Its Complaint ("WTC Response").
[3] That assertion is echoed by Goldman, which filed a Statement of Goldman, Sachs & Co. In Response to Motion of Enron Corp. for Leave to Amend Its Complaint on November 29, 2005. In that statement, Goldman summarizes and re-attaches the relevant documents it provided to Enron in October 2003, including the trade confirmation marked by CUSIP number 29356AXX9 that names WTC as a party to the Transaction.

a summary judgment motion; and (2) the fact that certain Bertholon employees, including the then-Chief Financial Officer, no longer work at the company, which affects Bertholon's ability to sustain an "ordinary course of business" defense. (Bertholon Objection, at 9-10.)

In its reply to Bertholon and WTC,[4] Enron withdraws its statements or implications that WTC acted defiantly by not disclosing Bertholon's identity. Instead Enron shifts the fault for erroneous or misleading disclosures to JPMSI and Goldman. Even without WTC's non-disclosure of Bertholon, Enron contends that a Rule 15 mistake still occurred because the erroneous information Enron received from JPMSI was "compounded by the failure of Goldman" to correct the erroneous information. (Enron Reply, at 2.) Enron explains that it did not respond to the trade confirmation for the Transaction provided by Goldman in October 2003 because (1) it believed that JPMSI had received that particular prepayment, (2) Goldman had produced superfluous confirmation documents that did not relate to any prepayment, and (3) Enron had no record of any prepayment to Goldman. (Enron Reply, at 4-5.) Enron contends that Goldman responded to the November 18 Order by stating that information called for in certain schedules of that order, not including Schedule A(8), had already been produced according to the subpoena. Enron contends that Goldman misleadingly did not indicate that such already produced documents pertained to Schedule A(8) of the November 18 Order (see *supra* at page 4), which directed JPMSI to disclose information regarding the transaction marked by CUSIP number 29356AXX9 in the amount of $47,591,072.77.

[4] Reply to Bertholon Rowland, Inc.'s Opposition to, and Wilmington Trust Company's Statement in Response to, Enron Corp.'s Motion for Leave to Supplement Its Pending Motion for Leave to Amend its Complaint ("Enron Reply").

Enron asserts that it made a "mistake" in not naming Bertholon because it did not know, and was never informed by Goldman, that Goldman split the $47,591,072.77 into seven parts, with one part going to WTC. (Enron Reply, at 8.) Enron asserts that Goldman's failure to correct JPMSI's "faulty initial disclosure" or to disclose the transfer to WTC is evidence that Enron made a "mistake." (Enron Reply, at 9.) Based on the actions of JPMSI and Goldman, Enron contends that, like the plaintiffs in *Byrd* and *Randall's Island*, it was "thwarted repeatedly" in its attempts to discover Bertholon's identity. (Enron Reply, at 9.) Countering Bertholon's "lack of notice" and prejudicial delay arguments, Enron argues that Bertholon has not responded definitely as to when it received notice[5] and seeks discovery on that "unresolved factual question." (Enron Reply, at 10.) Enron dismisses Bertholon's claim of prejudice by arguing that Bertholon does not even claim that the former employees have knowledge regarding the prepayment, and, even if they did, Bertholon does not suggest that those former employees would be difficult to locate.

ANALYSIS

Rule 15(c) provides, in pertinent part, that

> An amendment of a pleading relates back to the date of the original pleading when
> . . .
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service

[5] Enron seizes upon an inconsistency between an affidavit attached to Bertholon's Objection, in which Bertholon's CFO states that "Bertholon did not have any notice that it was a potential defendant . . . until possibly December 2005" and Bertholon's Objection, that stated "[a]t best, Enron only notified Bertholon of the possibility that it could be a defendant in January 2006." Both dates are beyond the Court's extension of the Rule 4(m) deadline.

> of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15 (c)(2)-(3).

Although "[t]he purpose of Rule 15 'is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities,'" *see Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 216 (2d Cir. 1983) (citing 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1471, at 359 (1971)), a court must be mindful not to "undermine the purpose of repose for which statutes of limitations were designed." *Mackensworth v. S.S. American Merchant*, 28 F.3d 246, 252 (2d Cir. 1994). *See also Ainbinder v. Kelleher*, No. 92 CIV. 7315(SS), 1997 WL 420279, at *11 (S.D.N.Y. July 25, 1997) ("It is not the purpose of Rule 15(c) to allow plaintiffs a second chance at a new group of defendants after their first claim fails and the statute of limitations has run"); *Kaminski v. Metropolitan Life Ins. Co.*, 586 F. Supp. 384, 388 (S.D.N.Y. 1984) ("Rule 15(c) does not intend to insulate plaintiffs from the consequences of their tactical errors").

To establish "mistake" under Rule 15(c)(3), a plaintiff needs to show either a factual mistake (e.g., he or she misnamed a party it wished to sue) or a legal mistake (e.g., he or she misunderstood the legal requirements of his or her cause of action). *See In re Enron Corp.*, 298 B.R. 513, 524 (Bankr. S.D.N.Y. 2003); *see also Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35-36 (2d Cir. 1996).

Under Rule 15(c)(3), a plaintiff can amend its original pleadings by adding a new party after the statute of limitations has expired only if each of three requirements is

satisfied. *See Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468-69 (2d Cir. 1995), *modified*, 74 F.3d 1366 (2d Cir. 1996). First, the claims asserted against the new party must arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Enron Corp.*, 298 B.R. at 522 (citing Rule 15(c)). Second, the new party must have "received such notice of the institution of the action" within the period for service of the summons and complaint pursuant to Rule 4(m), so that "the party will not be prejudiced in maintaining a defense on the merits." *Id.* Third, the new party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it." *Id.*

Bertholon does not contest that Enron satisfies the first prong. The claims against Bertholon clearly arise out of the same conduct, transaction, or occurrence set forth in the Original Pleadings.

A. <u>Mistake under Rule 15(c)</u>

1. Mistake or Lack of Knowledge

In the Second Circuit, it is well settled under Rule 15(c) that a "lack of knowledge does not constitute a 'mistake' for relation back purposes." *Hickey v. City of New York*, No. 01 Civ. 6506, 2004 WL 736896, at *3 (S.D.N.Y. Apr. 5, 2004) (citing *Barrow*, 66 F.3d at 470). An amended complaint that adds new defendants will not relate back "if the newly-added defendants were not named originally because the plaintiff did not know their identities." *Barrow*, 66 F.3d at 470; *see also Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994) (dismissing the plaintiff's amended complaint against individual defendants because plaintiff knew their identities when she filed her original complaint, so her failure to name them was a choice, not a mistake); *Thomas v. Arevalo*, No. 95 Civ.

4704, 1998 WL 427623, at *15 (S.D.N.Y. July 28, 1998) (interpreting the *Barrow* plaintiff's failure to identify the right defendants as a "matter of choice"); *Mackey v. Dicaprio*, No. 02 Civ. 1707, 2006 WL 2572111, at *1 (S.D.N.Y. Sept. 7, 2006) ("Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities").

Enron attempts to distinguish *Barrow* by arguing that "[u]nlike the plaintiffs in *Barrow* and its antecedent authorities, at the time Enron filed its amended complaint . . . Enron had no knowledge that numerous defendants failed to comply with the Court's order . . . and was misled by defendants into a mistaken belief that it had correctly identified all such parties as defendants."[6] First, as shown below, Enron has not established that any party misled it or concealed Bertholon's identity. Second, Enron is not arguing that it made a mistake in identity; it is essentially arguing that it lacked knowledge of Bertholon's identity even thought it was put on notice of Bertholon's existence as a possible defendant by Goldman's disclosure of the trade confirmation detailing the Transaction. That does not constitute a mistake as it "is just another way of saying that Plaintiffs lacked knowledge regarding [the new defendant's] potential liability." *See Abdell v. City of New York*, 2006 WL 2620927, at *5 (S.D.N.Y. Sept. 12, 2006).

Contrary to Enron's argument that it made a mistake in identity under Rule 15(c) rather than lacking knowledge, the Court finds that the trade confirmation provided to Enron in October 2003 by Goldman was sufficient to alert Enron that it should seek more

[6] Global Reply of Enron Corp. to Objections to Its Motion For Leave to Amend, December 13, 2005, at 12. Enron's Motion to Supplement expressly incorporated its Global Reply. See Motion to Supplement, at 3.

information from WTC regarding the Transaction disclosed in that trade confirmation. Enron's excuses for not doing so are not credible. The trade confirmation, naming WTC as a party to the Transaction, contained several "identification markers" that pertain to different categories of a transaction or transfer.[7] The trade confirmation provided to Enron contained the CUSIP number 29356AXX9, the maturity date of October 31, 2001, and indicated that WTC was a party to the transaction. Despite having the trade confirmation in hand, Enron sought the November 18 Order directing WTC to provide information such as the identities of transferees and beneficiaries regarding five *other* transactions or transfers.

Enron implies that it did not take Goldman's production seriously because Goldman had "produced superfluous confirmations that did not relate to any prepayment in its Rule 2004 production." (Enron Reply, at 4.) Even assuming that were true, Enron should have either approached the Court regarding the superfluous document production or written to Goldman to clarify its expectations. Selectively ignoring the documents that Goldman provided was far from the best option Enron could have chosen. Next, although Enron claims that it believed the JPMSI had received the prepayment, and thus it felt free to ignore Goldman's production of the particular trade confirmation, Enron obviously knew that Goldman and WTC were involved in certain transfers and could have followed up on the trade confirmation, particularly since it was seeking information regarding other transfers from WTC.

There is no plausible reason provided why Enron did not seek to discover from WTC the identity of the party involved in the Transaction at issue after receiving the

[7] Enron and Goldman agreed to that format on October 4, 2003, pursuant to Enron's Bankruptcy Rule 2004 subpoena.

trade confirmation detailing the Transaction. According to *Barrow*, the failure to discover and name Bertholon cannot be characterized as a mistake where Enron seeks to correct a lack of knowledge concerning the identity of Bertholon, not a mistake in identity.

Additionally, the cases of *Randall's Island* and *Alberts v. Arthur J. Gallagher & Co. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 341 B.R. 91 (Bankr. D.D.C. 2006), *modified*, 2006 WL 2083500 (Bankr. D.D.C. June 26, 2006), are sufficiently distinguishable from Enron's situation.

As the Court explained in recent opinions in this Adversary Proceeding involving Enron's attempts to add Merrill Lynch Investment Managers Co. and EarthLink[8] as defendants under Rule 15(c), the plaintiff in *Alberts* believed that the originally named defendant was the sole initial transferee of each transaction and only discovered the possible existence of another defendant after the original defendant raised a conduit defense. 341 B.R. at 95. Further in its reconsideration opinion, the *Alberts* court stated that a plaintiff makes a Rule 15(c) mistake when it lacks knowledge of the new defendant's role in the transaction within the limitations period and the possible conduit relationship between the new and original defendants. 2006 WL 2083500, at *3. The EarthLink and MLIM Opinions, which allowed the complaints to be amended but deferred ruling on the relation back determination until further factual development, were similar to *Alberts* in that there was no evidence in either case that Enron received adequate notice that there might be a possible relationship between the original and added

[8] *See* Opinion Regarding Plaintiff's Motion for Leave to Amend Its Complaint Against Merrill Lynch Investment Managers Co., Ltd. (Adv. No. 03-92677, Docket No. 1411, December 15, 2006) ("MLIM Opinion"), and Opinion Granting Plaintiff's Motion for Leave to Amend Its Complaint Against EarthLink, Inc. (Adv. No. 03-92677, Docket No. 1410, December 15, 2006) ("EarthLink Opinion").

defendants within the statute of limitations period. As discussed above, that is not the situation here.

The Court in the MLIM and EarthLink Opinions, as well as in *In re Enron Corp.*, 341 B.R. 460, 469 (Bankr. S.D.N.Y. 2006), *reconsideration denied*, 2006 WL 3626326 (Bankr. Dec. 13, 2006), also considered that in *Randall's Island* there was no evidence to support that the plaintiffs knew of the added defendant's involvement in the alleged transaction within the limitations period. The *Randall's Island* court stated that "relation back usually depends on what the plaintiff knew about the identity and involvement of the added defendant when he filed the timely pleading," and that the plaintiffs were "unaware of [the added defendant's] involvement in the transaction" when they filed the original complaint. 2002 WL 31496229, at *3-4. That difference alone makes the instant matter inapposite because here Enron had knowledge of the Transaction and could have been aware of Bertholon's involvement at the time of filing the Original Pleadings.

For the foregoing reasons, the Court concludes that Enron's failure to identify Bertholon in the Original Pleadings is not a "mistake" under Rule 15(c) that justifies relation back.

2. Concealment

The Court has found that Enron possessed sufficient information regarding the Transaction involving Bertholon within the limitations period to include Bertholon as a defendant in the Original Pleadings. It would therefore seem that even if a *Byrd*-type concealment were established, it would not warrant relief under Rule 15(c), because such concealment would not have prevented Enron from timely naming Bertholon. However, for the sake of completeness, the Court will address Enron's concealment argument.

Byrd established an exception to *Barrow's* rule regarding "mistake" under Rule 15(c) and permitted relation back under certain circumstances within which a plaintiff knew that there was another defendant to be named but did not do so timely. As the Court has stated, in the MLIM and EarthLink Opinions[9] and in *In re Enron Corp.*, 341 B.R. at 469, active concealment under *Byrd* requires both diligence by the plaintiff to obtain the identity of the new defendant within the limitations period *and* repeated refusals by the defendant's counsel to cooperate in providing that information.

In *Byrd*, the plaintiff brought suit against numerous defendants after being assaulted in prison. 964 F. Supp. at 142-43. The original complaint named "John Doe," a corrections officer, as a defendant. *Id.* at 143. The plaintiff's counsel first requested disclosure of the name of the "John Doe" officer nine months before the limitations period expired. *Id.* at 144. After the defendants' counsel, Corporation Counsel, rejected the first request, the plaintiff's counsel requested log books to discover who was on duty at the time of the assault. *Id.* at 143. The counsel's second request was rejected until "either Byrd agreed to bifurcate the trial or bifurcation was determined by motion to the Court." *Id.* "Despite the resolution of the bifurcation issue, Corporation Counsel did not reveal the name of the individual officer, nor turn over log books" until after the statute of limitations expired. *Id.* The court held that the particular facts warranted a conclusion that a "mistake" had been made for Rule 15(c) purposes because of the plaintiff's "series of efforts" to obtain the identities of the individual officers "well before the end of the limitations period." *Id.* at 145. The court stated that to hold otherwise "would permit defense counsel to eliminate claims against any John Doe defendant merely by resisting discovery requests until the statute of limitations has ended." *Id.* at 146.

[9] *See* MLIM Opinion, at 10-11; EarthLink Opinion, at 13-14.

According to Enron, the holding in *Byrd* is applicable because there was concealment that kept Enron "in the dark" despite its diligent efforts to discovery the identity of all such transferees.

The Court finds Enron's reliance on the *Byrd* case to be off the mark. Three of the main particular facts present in *Byrd*, that distinguished the case from the Second Circuit precedent of *Barrow*, are not present here. One, as stated above in the "Mistake or Lack of Knowledge" discussion, the information regarding Bertholon was not exclusively within the possession of an original defendant. Second, the Court finds that Enron did not act diligently within the limitations period to discover Bertholon's identity. Finally, the original defendants here did not repeatedly refuse to cooperate with Enron by not providing information about the new defendant within the limitations period.

First, in *Byrd*, the identity of the new defendant was information that was "uniquely within the knowledge of" the defendant's counsel. *Id.* at 146. Here, in October 2003 – within the statute of limitations – Enron had knowledge of the Transaction at issue here, with WTC listed as a party. When Enron sought the Court's order in November 2003 to direct WTC to disclose further information regarding certain transfers, it did not seek information regarding the Transaction. That Enron never followed up with WTC regarding the Transaction, even though Enron requested information regarding five other WTC transactions in the November 18 order, shows Enron's lack of diligence within the limitations period. Finally, the defense counsel in *Byrd* had refused two requests by the plaintiff's counsel for information regarding the identity of the John Doe officer within the limitations period. *Id.* at 145-46. Here, Goldman cooperated with Enron within the limitations regarding the Transaction at issue,

and WTC was never asked to cooperate during the limitations period regarding Bertholon's identity or the Transaction. Considering all of the above, Enron has plainly not shown concealment of Bertholon's identity that entitles it to a *Byrd*-type exception to *Barrow*.

B. Notice and Prejudicial Delay under Rule 15(c)

Because the Court has found that Enron did not make a Rule 15(c) "mistake" in failing to name Bertholon in the Original Pleadings, the Court does not reach the issues of notice and prejudicial delay.

CONCLUSION

For the foregoing reasons, the Court concludes that Enron fails to meet its burden to satisfy the "mistake" test under Rule 15(c) for relation back to the Original Pleadings. Therefore, the Court sustains Bertholon's objection to Enron's Motion to Supplement its Motion to Amend the complaint.

Counsel for Bertholon is directed to settle an order consistent with this opinion.

Dated: New York, New York
December 21, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE