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Not For Publication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 GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT AGAINST SHIZUOKA BANK, LTD., SHIZUGIN TM SECURITIES, CO. LTD., AND MERRILL LYNCH TAN-CHUKI-SAI FUND

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United States Bankruptcy Judge

FACTUAL AND PROCEDURAL HISTORY

A. The Debtors

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.

B. Motion for Leave to Amend the Complaint

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. 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.

On November 18, 2003, the Court issued an order (the "November 18 Order") that directed certain parties to initially disclose to Enron the names, and if available, the address and telephone number of the transferees and beneficiaries in connection with the commercial paper transactions. As a result of that order, Enron learned from Merrill Lynch Investment Managers L.P. ("MLIM") that Mitsubishi Trust and Banking Corporation ("MTB") and the Merrill Lynch Tanchuki Bond Open Mother Fund ("Open Mother Fund") were potential transferees and beneficiaries.

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. In that complaint, Enron alleges that MTB and Open Mother Fund (together, the "MTB Defendants"), among other defendants, were "initial transferees of the early redemptions of Enron commercial paper that was prepaid on or after October 21, 2001, . . . or were the entities for whose benefit such prepayments were made, or were immediate or mediate transferees of such prepayments."

On or about December 2, 2003, pursuant to section 546(a) of the Bankruptcy Code, the statute of limitations for preference actions expired.

In February, the MTB Defendants jointly filed a motion to dismiss. By order dated July 1, 2005, the Court denied the motion to dismiss. The MTB Defendants moved for leave to appeal the denial. As of the date of the issuance of this opinion, the motion is pending in the District Court.

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"). Specifically, the May 13 Order ordered that the November 18 Order applied to defendants added to the First Amended Complaint, such as the MTB Defendants. On May 13, 2004, the Court also issued an order to grant Enron's Motion for Extension of Time for Service of the Amended Complaint (the "Order for Extension of Time"), which extended the time for service of the First Amended Complaint to and including September 30, 2004.

On June 11, 2004, MTB disclosed the names of Merrill Lynch Tan-Chuki-Sai Fund ("Tan-Chuki-Sai Fund"), Shizuoka Bank, Ltd. ("Shizuoka Bank"), and Shizugin TM Securities ("Shizugin TM") (together, the "Added Defendants") in response to the May 13 Order (the "June 11 Disclosure"). Specifically, in the June 11 Disclosure, MTB stated that the interests in the Open Mother Fund were held by two Japanese securities investment trusts, the Merrill Lynch Tanchuki Bond Open Fund ("Baby Fund I") and Tan-Chuki-Sai Fund (together, the "Baby Funds"). Shizuoka Bank and Shizugin TM were named in the June 11 Disclosure as selling agents for the Baby Funds.

The MTB Defendants jointly filed an answer on July 31, 2005, claiming as a seventh affirmative defense that they were not the initial transferees and were "'mediate' or 'immediate' transferees within the meaning of Section 550(a)(2) of the Bankruptcy Code that took for value, in good faith and without knowledge of the voidability of the transfer."

Actual notice of this proceeding was received by Tan-Chuki-Sai Fund on September 29, 2004, and by Shizuoka Bank and Shizugin TM on September 30, 2004.

On October 19, 2005, Enron filed a motion for leave to amend its complaint (the "Motion for Leave to Amend") with accompanying memorandum, requesting to add transferees and beneficiaries of the prepayment of commercial paper, including the Added Defendants as new defendants in this adversary proceeding.

Tan-Chuki-Sai Fund, as well as Shizuoka Bank and Shizugin TM acting jointly, filed objections to Enron's Motion for Leave to Amend with accompanying memoranda. A hearing was held on December 15, 2005.

DISCUSSION

Parties' Contentions

Enron seeks to add defendants, Tan-Chuki-Sai Fund, Shizuoka Bank, and Shizugin TM, relating back to its original complaint and its first amended complaint (the "Original Pleadings"), which were filed within the applicable 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 this 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).

Enron argues that its failure to include the Added Defendants was not a strategic decision, and that its exclusion of those parties from the Original Pleadings was attributable to a "mistake" for Rule 15(c) purposes, citing *Randall's Island Family Golf Ctr. v. Acushnet Co. (In re Randall's Island),* No. 02–2278, 2002 WL 31496229 (Bankr. S.D.N.Y. Nov. 8, 2002), and *Byrd v. Abate*, 964 F. Supp. 140 (S.D.N.Y. 1997). Enron claims that "[t]he defendants in this case" thwarted Enron's diligent efforts to learn the identities of all the transferees or beneficiaries of the commercial paper prepayments, although that allegation is made against the defendants in general, who number more than 100, and not against the MTB Defendants in particular. Enron further states that prior to the June 11 Disclosure, it "had no knowledge that it had not named the correct defendants" for these transfers. Enron argues that the Added Defendants were identified only through information solely in the possession of the originally named defendants.

Shizuoka Bank and TM Securities assert that Enron fails to meet two requirements of Rule 15(c), specifically arguing (1) that Enron's failure to name Shizuoka Bank and TM Securities was not a "mistake" within the meaning of Rule 15(c) because Enron is seeking to correct a lack of knowledge, and (2) that Shizuoka Bank and TM Securities would be prejudiced by delay under Rule 15(c)(3)(A). Shizuoka Bank and TM Securities assert that Enron's delay, from when it learned their identities on June 11, 2004, until it moved to amend the complaint to add them as defendants in December 2005, is prejudicial to them and warrants denial of the leave to amend.

Tan-Chuki-Sai Fund argues, along the same lines as Shizuoka Bank and TM Securities, that Enron fails to meet two factors necessary for relation back – "mistake and prejudice." According to Tan-Chuki-Sai Fund, there is no mistake in this case "but

merely a purported 'lack of knowledge' on the part of Enron." Tan-Chuki-Sai Fund also argues that Enron cannot claim a *Byrd*-type concealment that establishes a Rule 15 "mistake" because Enron does not and cannot claim that the MTB Defendants concealed Tan-Chuki-Sai Fund's identity. As to their second point, prejudice, Tan-Chuki-Sai Fund argues that the fourteen-month delay from when Enron learned of Tan-Chuki-Sai Fund's identity to when Enron sought to amend the complaint prejudices Tan-Chuki-Sai Fund's ability to mount a defense and constitutes an undue delay that warrants denial of leave to amend.

Because the Second Circuit has not addressed the issue concerning a mistake in identity under Rule 15(c) involving a section 550 recovery action, the parties rely on factually distinct cases to support their arguments. Enron relies on *Byrd* to argue that its efforts to discover, and the defendants' concealment of, the identities of the transferees and/or beneficiaries of the commercial paper prepayments constitutes a "mistake" under Rule 15(c) and allows relation back. The Added Defendants rely on the Second Circuit *Barrow* decision to argue that because Enron is seeking to correct a lack of knowledge, rather than a mistake in identity, Rule 15(c) does not apply. Both parties mention the *Randall's Island* case that, at the time of the December 2005 hearings on this matter, may have been the case closest on point.

To summarize the dispute, there is a transfer of funds at issue here. At the time of filing the Original Pleadings, Enron erroneously believed that "it had correctly identified all such parties [transferees, beneficiaries, and recipients of the prepayment funds] and included them in the amended complaint, only to find out subsequently that other parties should have been named." Following the expiration of the statute of limitations, Enron

discovered that the originally named defendants, the MTB Defendants, disclosed that other parties may be transferees, who Enron asserts would be liable as defendants in an avoidance action. The issue is thus whether Enron's lack of knowledge as to the *existence* of those other parties, rather than Enron's lack of knowledge as to the *identities of those other parties while knowing of their existence*, can constitute a mistake under Rule 15(c).

Analysis

A. The Rule 15(c) Issue

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 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").

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 on other grounds*, 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.*

It is uncontested that Enron satisfies the first prong. The claims against the Added Defendants clearly arise out of the same conduct, transaction, or occurrence set forth in the Original Pleadings. Also, Enron asserts that the notice portion of Rule 15(c) has been satisfied because the Added Defendants received actual notice of this adversary proceeding within the time allowed by the Court's order extending time for service to September 30, 2004. While the Added Defendants do not dispute that they received notice within the time allowed by the Court's order, they argue that the delay of more than twelve months, between when they obtained notice that Enron was interested in suing them and October 2005 when Enron filed a motion for leave to amend the complaint, warrants denial of leave to amend under Rule 15. Thus, the main contested issues are (1) whether a "mistake" under Rule 15(c) has occurred so that Enron's claims against the Added Defendants can relate back to the Original Pleadings, filed within the statute of limitations; and (2) whether Enron's delay between giving notice to the Added Defendants that they may be added as defendants and when Enron moved to amend the complaint constitutes a prejudicial delay that warrants denial of leave to amend.

The *Barrow*, *Byrd*, and *Randall's Island* Cases

In this section, the Court will discuss the parties' contentions under the precedent in the Second Circuit and certain cases that have interpreted that precedent.

Tan-Chuki-Sai Fund argues that under the Second Circuit's *Barrow* decision, "a lack of knowledge as to the identity of a defendant does not constitute a 'mistake' to allow relation back." Similarly, citing *Barrow,* Shizuoka Bank and Shizugin TM argue that because Enron seeks to a new defendant to correct a lack of knowledge, the requirements of Rule 15(c) are not met. In *Barrow*, the court concluded that the

"mistake" requirement was not satisfied if adding the new defendant was not to correct a mistake, but to correct a lack of knowledge. *Barrow*, 66 F.3d at 470.

The Court disagrees with the Added Defendants' applications of *Barrow*. First, the instant case is factually distinguishable. The *Barrow* court was not confronted with a situation where a plaintiff did not know that the existing defendant might not be properly identified for each aspect of the transaction or dispute at issue. Nor was it presented with a situation where a plaintiff did not know of the existence of a possible new defendant prior to the expiration of the statute of limitations. Enron's lack of knowledge as to the *existence* of possible new defendants is different than a lack of knowledge of those other parties' *identities* while knowing of their existence.

In *Barrow*, the plaintiff filed a complaint against a police department, alleging that certain unidentified police officers used excessive force in arresting him. The district court ordered the inmate to amend his complaint by adding the individual officers as defendants and to "make every effort" to determine their names. 66 F.3d at 467. However, the plaintiff filed a complaint after the deadline set by the court and identified the officers as "John Doe" defendants. *Id.* After the statute of limitations had run, the plaintiff amended his complaint again to individually name the officers. *Id.* The defendants moved to dismiss based on the expiration of the statute of limitations. *Id.* The Second Circuit stated that the "failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake." 66 F.3d at 470, *as modified*, 74 F.3d at 1367. In contrast, the Added Defendants do not contend that Enron was aware that there were additional entities that it must name as subsequent transferees regarding the transfers at issue at the time of filing

the Original Pleadings. The MTB Defendants disclosed the possible involvement of the Added Defendants in June 11, 2004, after the statute of limitations had expired. As a result, there is no dispute that Enron did not become aware of the Added Defendants' identities and possible roles in the transfers until then. Further, Enron argues, and the Added Defendants do not dispute, that such information was uniquely within the control of the MTB Defendants. Thus, at the time of filing the Original Pleadings, Enron alleges that it was unaware of the Added Defendants' possible involvement in the Transaction.

In addition to factual differences from *Barrow*, the Court finds that Tan-Chuki-Sai Fund's interpretation of *Barrow* is too narrow. The *Barrow* court determined that correcting a lack of knowledge of the identity of the new defendant could not be characterized as a mistake when a plaintiff knew that such defendant must be named at the time of the original complaint. *Id.* (stating that "Rule 15(c) explicitly allows the relation-back of an amendment due to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants [individual officers rather than a department head] must be named cannot be characterized as a mistake"); *see also Thomas v. Arevalo*, No. 95 Civ. 4704(SS), 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"). Additionally, in its amended opinion, the *Barrow* court emphasized that the mistake requirement is fulfilled "when a defendant mistakenly sues an agency of the government without knowing that the cause of action requires the defendant to sue an agency head." *Barrow*, 74 F.3d at 1367. The *Barrow* court then found that the failure to name the new defendants due to lack of knowledge is not a mistake for the purposes of Rule 15(c)

because the plaintiff did not "mistakenly believe that suing the police department, rather than a department head, would suffice." *Id.* Instead, the *Barrow* court found that the plaintiff was informed by the trial court that he needed to name the specific new defendants within the limitations period. *Id.*

The *Byrd* Analysis

As the parties point out, one court has distinguished *Barrow's* interpretation of 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. *See Byrd v. Abate*, 964 F. Supp. 140 (S.D.N.Y. 1997).

The Court agrees with the Added Defendants that the *Byrd* case does not support relation back. The *Byrd* court, which allowed relation back to a defendant not named before the statute of limitations expired, emphasized the defense counsel's conduct that constituted concealment. *Id.* at 145-46. That court emphasized that the defense counsel *repeatedly* refused to cooperate in providing information. That court also focused on the persistent efforts of the plaintiff's counsel to obtain the concealed information.[1] *Id.* As the Court has stated in recent opinions in this Adversary Proceeding involving Enron's attempts to add Merrill Lynch Investment Managers Co. and EarthLink[2] and in *In re Enron Corp.*, 341 B.R. 460, 469 (Bankr. S.D.N.Y. 2006), *reconsideration denied*, 2006

[1] In *Byrd*, the plaintiff brought suit against numerous defendants after being assaulted in prison. *Id.* 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 Corporation Counsel rejected the first request, plaintiff's counsel requested log books to discover who was on duty. *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.*

[2] *See* Opinion Regarding Plaintiff's Motion for Leave to Amend Its Complaint Against Merrill Lynch Investment Managers Co., Ltd., at 10-11 (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., at 13-14 (Adv. No. 03-92677, Docket No. 1410, December 15, 2006) ("EarthLink Opinion").

WL 3626326 (Bankr. Dec. 13, 2006), 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.

The Court does not find that the MTB Defendants even once refused, let alone repeatedly, to cooperate within the limitations period in providing information under *Byrd*. As Tan-Chuki-Sai Fund points out, Enron makes no claim that MTB or the Open Mother Fund hindered Enron's efforts to learn of its identity, making the circumstances in the instant matter "quite different from the circumstances in *Byrd[]* relied upon by Enron." Shizuoka Bank and Shizugin TM also point out that the complaint does not allege that any of the original defendants "refused to disclose information . . . that would have led to Enron's identification of" Shizuoka Bank and Shizugin TM. Nor does the Court find that Enron made persistent efforts to obtain the concealed information.

The *Randall's Island* Case

The Court disagrees with the Added Defendants' argument that the *Randall's Island* case is inapposite to the instant matter. In that case, the debtors filed suit against two affiliated insurance agents to recover an alleged preference payment made within ninety days prior to the petition date. *In re Randall's Island,* 2002 WL 31496229, at *1. In the answer to the complaint, the defendant insurance agents asserted that they were a mere conduit because the alleged preference payment was an insurance premium due to another entity – an insurer, Crum. *Id.* The debtors then sought, after the two-year limitations period had expired, to amend their complaint to add the insurer. *Id.*

The *Randall's Island* court concluded that the debtors met the "mistake" test required by Rule 15(c)(3) after finding that the debtors misidentified the new defendant – a transferee of the alleged transactions. *Id.* at *3-5. There was no evidence to support that the debtors knew that such transferee was involved in the alleged transactions, but nonetheless decided to sue a "conduit" at the time of original complaint. *Id.*

The Court in the MLIM and EarthLink Opinions, as well as in *In re Enron Corp.*, 341 B.R. at 469, considered that in *Randall's Island* there was no evidence to support that the debtors 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 debtors were "unaware of [the added defendant's] involvement in the transaction" when they filed the original complaint. 2002 WL 31496229, at *3-4.

Tan-Chuki-Sai Fund[3] attempts to distinguish *Randall's Island* by stating that the plaintiffs "knew the identity of both the insurance agents and the insurance company involved in an alleged preferential payment of premiums but, by mistake, designated only the agents who were allegedly acting as 'mere conduits' for the insurance company." The Court disagrees. As stated above, the plaintiffs in *Randall's Island* did not know the *role* that the new defendant played in the transactions at issue. That the plaintiffs happened to know the *identity* of that new defendant does not support Tan-Chuki-Sai Fund's position. What is termed a "mistake" in *Randall's Island* is not, as Tan-Chuki-Sai

[3] Shizuoka Bank and Shizugin TM do not discuss *Randall's Island* under "mistake" but do discuss the case in their "prejudice" argument, discussed *infra*.

Fund implies, a misnomer or oversight in drafting the complaint but a lack of knowledge as to the new defendant's role in the transaction.

Furthermore, the structure of the defendants in *Randall's Island* and in the instant matter is similar. In *Randall's Island*, Mang and Granite, the original defendants, were insurance agents who claimed to be a mere conduit for a customer, an insurance supplier – the potential new defendant. Here, the relationship is less clear between the MTB Defendants and the Added Defendants but, in both cases, the plaintiff(s) only learned after filing the original complaint that there might be a subsequent transferee from disclosures made by the original defendants of knowledge that was in their unique possession.

The Court has not found another case in the Second Circuit that has addressed the issue concerning a mistake in identity under Rule 15(c) involving a section 550 recovery action. A case involving the assertion of a "conduit" defense from the United States Bankruptcy Court for the District of Columbia is instructive and persuasive on this matter. *See 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).

The *Alberts* Analysis

On facts somewhat similar to the instant matter, the *Alberts* court stated that Rule 15(c) should not be strictly construed where a trustee or debtor is seeking a section 550 recovery, intends to sue the initial transferee, and a question exists as to the identity of the initial transferee. The resolution of that question requires the bankruptcy court's factual and legal determination. *See Alberts*, 341 B.R. at 99-100. According to the *Alberts*

court, depending on the bankruptcy court's determination, a mistake in identity could be found if the plaintiff mistakenly identified an existing defendant as a sole transferee of the alleged transactions in the original complaint. *Id.*

As the Court explained in the MLIM and EarthLink Opinions, 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 MLIM and EarthLink 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 defendants within the statute of limitations period.

(a) Rule 15(c) and the Original Defendant

Alberts involved a bankruptcy proceeding in which the trustee-plaintiff, Sam Alberts, initially filed a complaint pursuant to sections 544, 547, 548, 549, and 550 of the Bankruptcy Code to avoid and recover various payments the debtors made to Arthur J. Gallagher Co. ("AJG"). *Id.* at 94-95. Initially, Alberts believed that AJG was the sole initial transferee of each transaction. *Id.* AJG filed an answer raising a conduit defense, stating that it was not the initial transferee. *Id.* at 95. Alberts subsequently filed an

amended complaint adding three insurance companies as "Additional Defendants." *Id*. at 95. The complaint did not substitute the additional defendants in place of AJG; rather, the plaintiff pointed to his right to recover from the additional defendants as initial transferees to the extent that they, and not AJG, were initial transferees. *Id.* These additional defendants sought dismissal based on the statute of limitations that would have otherwise barred the amended complaint unless the court found it related back to the original complaint under Rule 15(c). *Id.* at 94.

In the instant matter, the MTB Defendants claim they are not the initial transferees. Rather, they claim to be "'mediate' or 'immediate' transferees within section 550(a)(2) of the Bankruptcy Code that took for value, in good faith, and without knowledge of the voidability of the transfer." MTB Answer, at ¶ 69. The MTB Defendants also claim that the Tan-Chuki-Sai Fund is a "holder of interests" in the Open Mother Fund, a trustor-directed securities investment trust formed in accordance with Japanese law. In the June 11 Disclosure, the MTB Defendants disclosed that Shizuoka Bank and Shizugin TM are selling agents of the Open Mother Fund and the Tan-Chuki-Sai Fund, who may be encompassed by the November 18 and May 14 Orders. Since Enron named in the Original Pleadings defendants beyond just the initial transferees,[4] including immediate and mediate transferees, if Enron lacked knowledge concerning the Added Defendants' roles within the limitations period, and those defendants are immediate and mediate transferees, Enron made a Rule 15(c) mistake in failing to name the Added Defendants in the Original Pleadings. However, the determination of the

[4] The Amended Complaint states "the defendants identified in paragraphs 12 through 133 were the initial transferees of the early redemptions of Enron commercial paper that was prepaid on or after October 21, 2001, . . . or were the entities for whose benefit such prepayments were made, or were immediate or mediate transferees of such prepayments." Amended Complaint, ¶ 11.

Added Defendants' involvement is unresolved and will require further evidentiary development.

The *Alberts* court concluded that whether Alberts made a mistake under Rule 15(c) for relation-back purposes depended on the court's resolution of the question as to the identity of the initial transferee. 341 B.R. at 99 ("Only after the court determines which party was the initial transferee with respect to any given portion of the alleged transfer will Alberts be in a position to determine which party or parties are, in fact, the proper defendants in this action"). Since each of the parties could be an initial transferee for only a portion of the funds,[5] determining the relation-back issue requires consideration of matters outside the pleadings, such as the extent of the plaintiffs' knowledge regarding the new defendants before the limitation period expired, and would be more appropriately decided on a summary judgment motion or through findings of fact and law following an evidentiary hearing. 2006 WL 2083500, at *2. If after discovery, the court later determined that AJG was a mere conduit, not a transferee of the entire alleged preferential payment, Alberts made a mistake in naming AJG as the sole initial transferee. 341 B.R. at 99-100. If the court later determined that AJG was a conduit of a divisible portion of the preferential payment, then Alberts made a mistake to the extent that AJG was not an initial transferee. *Id.* at 100. Under both situations, Alberts could name the new defendants to the extent that AJG was a conduit. *Id.* To the extent that the court found that AJG was the initial transferee of the payment, then

[5] The *Alberts* court further explained how conduit defenses split liability

> Mere conduit defenses such as that raised by AJG typically alter liability based on the happenstance of the legal obligation governing the initial recipient's subsequent transfer of the subject funds to third parties, of which the bankruptcy trustee commonly has no direct knowledge. It is on that basis alone that § 550 liability, in instances such as this, then becomes splintered among several parties notwithstanding that the subject transfer was made to only one individual.

Alberts, 341 B.R. at 99.

Alberts could not pursue the three new defendants as subsequent transferees from AJG of same dollars for which AJG was the initial transferee. "As to such transfers, Alberts did not make a mistake in suing AJG as liable." *Id.*

As discussed previously, there has not been an adjudication as to what extent the MTB Defendants and Added Defendants may be transferees and/or beneficiaries under section 550. Thus, both in *Alberts* and the instant matter, the respective bankruptcy court will have to determine the extent to which the original defendant was properly named as transferee and/or beneficiary. Such determination will form the basis of the resolution of the issue as to whether a Rule 15(c) mistake can be established.

(b) Lack of Knowledge

The *Alberts* court is additionally instructive in its explanation of the distinction between a plaintiff who knows the involvement of the new defendant prior to the running of the statute of limitations and one that does not know of the defendant's "possible existence during that limitations period." *Alberts*, 341 B.R. at 101 (citing *Arthur v. Maersk, Inc.*, 434 F.3d 196, 209 (3d Cir. 2006)). Specifically, because Alberts sought to file suit against all initial transferees in his original complaint and "to the extent that AJG was a mere conduit [and] the [three insurance companies] were the initial transferees and hence the only appropriate defendants to sue," Alberts' lack of knowledge as to the existence of the three insurance companies in filing the complaint would be considered a mistake under Rule 15(c). *Alberts*, 341 B.R. at 101 (stating that "Alberts' lack of knowledge led to his mistake in not suing them, thus making Rule 15(c)(3)(B) applicable."). Further, the *Alberts* court explained as follows

> Here, Alberts did not simply fail to identify a theory of liability upon which a party known to him could also be named as a defendant. Rather,

> only upon revelations made by AJG in its answer to the complaint did Alberts become aware that a conduit relationship might exist between AJG and the Added Defendants that would make those Added Defendants the actual "initial transferees" of the dollars transferred within the meaning of § 550(a)(1).

Id. at 104. In its reconsideration opinion, the *Alberts* court clarified that Alberts' lack of knowledge referred to the existence of the added defendants within statute of limitations and to the *possible* conduit relationship between an original defendant and the added defendants. *Alberts*, 2006 WL 2083500, at *2. The court further explained that "the lack of knowledge the court deems relevant" is plaintiff's knowledge of a *possible* relationship or connection between added defendants and original defendants, or, between the debtors and added defendants "sufficient to put plaintiff on notice" that the added defendants "might in some way be connected to the transfers" of the alleged transactions. *Id*. at *2 n.1. Here, no evidence is present that Enron received adequate notice that there might be a *possible* relationship or connection between the MTB Defendants and the Added Defendants regarding the transfers at issue. There seems to be no dispute that Enron did not know of the Added Defendants' possible involvement until after the statute of limitations expired when the MTB Defendants made their June 11 Disclosure.

Tan-Chuki-Sai Fund claims that Enron knew of MTB's identity in November 2003, when a variation of MTB's name appeared on trading confirmations produced to Enron by defendant Lehman Commercial Paper, Inc. pursuant to a subpoena. Tan-Chuki-Sai Fund contends that Enron could have asked MTB for more information at this time, when the limitations period had not yet expired. However, having knowledge of the MTB Defendants does not show Enron had knowledge of Tan-Chuki-Sai Fund or

should have known of Tan-Chuki-Sai Fund's potential involvement in the prepayment transfers.

The *Alberts* court's analysis is consistent with *Randall's Island*, in that both supported relation back against an added defendant where the named defendant raised a conduit defense and where the added defendant's involvement in the alleged transactions was entirely unknown to the plaintiffs within the statute of limitations.

Finally, there has been recent support out of the Southern District of New York for less-stringent application of Rule 15(c) in adversary proceedings. *See Global Crossing Estate Representative v. Winnick*, No. 04 Civ. 2558(GEL), 2006 WL 2212776, at *7 (S.D.N.Y. Aug. 03, 2006). In *Global Crossing*, an estate representative of a bankrupt company brought fraudulent transfer claims against Canadian Imperial Bank of Commerce ("CIBC") within the statute of limitations, but named CIBC's subsidiaries after section 546(b)'s two-year limitations period ended. The court allowed relation back under Rule 15(c), in part because "in this welter of related entities, at the time of the initial complaint plaintiff had difficulty in determining which among them could properly be charged with liability." *Id.*

The Need for Additional Factual Development

The Court agrees with the *Alberts* decision that the issue of relation back would be more appropriately decided on a summary judgment motion or through findings of fact and law following an evidentiary hearing because matters still have to be clarified and determined, principally the identities of the initial transferee or the entities for whose benefit such transfer was made, or the immediate or mediate transferees of such initial transferees. *See Alberts*, 2006 WL 2083500, at *2; *see also Global Crossing*, 2006 WL

2212776, at *7 n.8 ("To the extent the Estate Representative seeks to hold CIBC liable for transfers made to the other CIBC defendants (a matter that is not entirely clear from the complaint), that raises factual issues that cannot be resolved at the pleadings stage") (citing § 550(a)(1)).

A court can allow the amended complaint without concurrently ruling on the relation back issue. *See, e.g., Lopez v. Ward*, 681 F. Supp. 192, 195 (S.D.N.Y. 1988). The Court will thus allow the amended complaint, to the extent it names Tan-Chuki-Sai Fund, Shizuoka Bank, and Shizugin TM as defendants, but the relation-back issue must be decided after further evidentiary hearings to determine the identities of the initial transferee or the entities for whose benefit such transfer was made, or the immediate or mediate transferees of such initial transferee, or upon a summary judgment motion.

It appears that relation back would be appropriate if the Added Defendants are immediate or mediate transferees. If the Added Defendants could be potentially liable as immediate or mediate transferees, it would appear that Enron made a "mistake" for Rule 15(c) purposes in not naming the Added Defendants. Such a determination would not prejudice any section 550(b) defenses. If the Added Defendants can establish that they took for value, in good faith, and without knowledge of the voidability of the transfer, they can avoid the Debtors' recovery power.

The determination of transferee liability must encompass liability not just among parties but also among amounts. The claims asserted are legally divisible to the extent that the MTB Defendants and the Added Defendants could be found to be transferees as to different portions of the transfers. As stated in *Alberts*, "[t]hat Alberts has decided to

pursue the recovery of the transfers in a single action does not alter the fact that his right to avoid such transfers run to each dollar individually." 341 B.R. at 100.

B. Delay

For the reasons stated below, the Court does not find that the delay here warrants a denial of the motion to amend.

Shizuoka Bank and Shizugin TM argue that the delay of more than a year from when MTB disclosed Shizuoka Bank and Shizugin TM's identities to when Enron moved to add them as defendants is an "unexplained and inexcusable delay" that prejudices Shizuoka Bank and Shizugin TM.

Although Shizuoka Bank and Shizugin TM argue that Enron is now behaving as though it can continuously investigate and add defendants *ad infinitum*, this argument overlooks both the Rule 4(m) deadline that prevents Enron from endless additions and unconvincingly dismisses Enron's proclamation in May 2004 that it would not seek to amend its complaint immediately but would do so after all the defendants had been served and made the required disclosures covered by the November 18 Order. Furthermore, the Court agrees with Enron that Shizuoka Bank and Shizugin TM's interpretation of *Randall's Island* for the proposition that the debtors' prompt actions of moving to amend after giving notice to the new defendant minimized any potential prejudice to the new defendant is immaterial to that decision. In fact, the new defendant did not dispute that the debtors satisfied the "adequate notice" element of Rule 15(c). *Randall's Island*, 2002 WL 31496229, at *2.

Also, Shizuoka Bank and Shizugin TM's claim of a "potential" loss of employees who are knowledgeable about the transfers falls short of what other courts have described

as a "credible" showing of prejudice. *See, e.g., Savage & Assoc. v. Williams Communications (In re Teligent Servs., Inc.)*, 324 B.R. 467, 474 (Bankr. S.D.N.Y. 2005) (holding that the defendant WilTel "has credibly shown that prior to and during the delay in service, several employees who worked on the transactions between Teligent and WilTel left the company, and that the loss of such personnel will likely impede WilTel's ability to defend the adversary proceeding").

Tan-Chuki-Sai Trust argues that the extensive fourteen-month delay, "without reasonable explanation" from the date of disclosure of the Tan-Chuki-Sai Trust to Enron's motion to amend its complaint warrants denial of the leave to amend. In support, Tan-Chuki-Sai Trust cites *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995). In response, Enron cites the holding from *Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir. 1993), that "[m]ere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny leave to amend." The Court finds *Zahra* distinguishable and *Block's* holding more appropriate. In *Zahra*, the request to amend was made after extensive delay and three months before trial. Also, the court considered that the motion to amend appeared to be futile; this Court has not made a similar determination as to the futility of the amended complaint.

Both Added Defendants argue that they will be prejudiced because of all that has transpired in the litigation so far,[6] such as motions to dismiss being made and denied, the parties having filed initial disclosures, and the service of extensive document demands. As Tan-Chuki-Sai Trust states, "[a] lot of water has gone under the bridge and no new

[6] The Court is mindful that the Added Defendants set forth these arguments over a year ago and that the interval of time could have heightened any prejudice. However, despite the uncertainty occasioned by the wait between arguments and the Court's determination, the Added Defendants were alerted to the possibility of having to defend against the action and were capable of protecting their interests while discovery has proceeded.

defendant should not be [sic] forced to play catch-up in this massive and complex litigation simply because Enron chose to wait until it suited Enron's convenience to name" the Added Defendants.

Enron replies that the Added Defendants will not be prejudiced, as discovery has just begun, and that the speculation about prejudice is not sufficient without a showing of actual prejudice. Enron also asserts that the Added Defendants should not be surprised by the delay between notice and moving to amend as it previously advised Court that the motion to amend would be filed after all defendants had been served and made the required disclosures.

The Court agrees with Enron that the Added Defendants have not sufficiently shown prejudice. More importantly, that the Added Defendants had timely notice of the action mitigates any claimed prejudice. When a defendant receives notice within the applicable time period, this generally eliminates prejudice as "the prejudice element of the Rule 15(c)(3)(A) analysis is dependent upon, rather than independent of, the notice requirement." *See Allen v. Nat'l R.R. Passenger Corp.*, No. Civ.A.03-CV-3497, 2004 WL 2830629, at *8 (E.D. Pa. Dec. 7, 2004); *see also Thomas v. Arevalo*, No. 95 Civ. 4704(SS), 1998 WL 427623, at *14 (S.D.N.Y. July 28, 1998) (finding that service within the Rule 4(m) deadline extended by the court indicates the party would not be prejudiced in maintaining a defense). Although the Added Defendants argue that much has transpired in this complex litigation, it has been found that notice of the action lessened the prejudice against even a new defendant who was not served before discovery had closed. *See AIG Managed Mkt. Neutral Fund v. Askin Capital Management, L.P.*, 197 F.R.D. 104, 111 (S.D.N.Y. 2000) (that the defendant "had actual notice that an action was

filed against it militates against a finding of prejudice since the 'core function' of service is to supply notice"). Like the defendant in that case, the Added Defendants should have been "aware that there was a degree of uncertainty in the situation" since receiving notice of the action, and that the Enron "might in fact be intent on pursuing the claims" despite not moving to amend sooner. *Id.*

CONCLUSION

The Court will allow Enron to amend the complaint. As to Rule 15(c)(3)(B), the failure to name the Added Defendants within the limitations period is found to be a mistake under Rule 15(c) to the extent that the Added Defendants are determined to be transferees and/or beneficiaries of the prepayments, or immediate or mediate transferees. In addition, *Barrow's* holding would not preclude the Court from permitting relation back if a correction of a mistake in the identities of the Added Defendants, not a correction of lack of knowledge, were made by Enron. If such correction of mistake were found, because the Court has determined that there was no dispute that Enron lacked knowledge concerning the Added Defendants at the time of filing the original pleadings, case law, such as *Randall's Island* and *Alberts*, would support the relation-back relief sought by Enron.

Pending a further determination as to whether the amended complaint relates back to the original pleadings, precluding the Added Defendants at this juncture from being defendants who may be ultimately found to be an liable as immediate or mediate transferees is premature when it is not disputed that Enron had no knowledge concerning the Added Defendants' roles in the transfers within the statute of limitations. The Court is also mindful of the consequences of not allowing the Added Defendants to be

conditionally named as defendants. One of the consequences would be that the Added Defendants could not actively participate as a party in discovery and motion practice as to matters that could ultimately affect their liability. Also, Enron would not have the same rights to obtain information from an entity that is only a third party, and not a defendant. Hence, for the purposes of facilitating Enron's discovery efforts and completing the further determination that will decide the roles of the Added Defendants in the transfers, the Court grants Enron's motion to file an amended complaint adding the Added Defendants as defendants. This ruling is not a final determination as to whether the amended complaint relates back to the original pleadings.

The Debtors are to settle an order consistent with this opinion.

Dated: New York, New York
January 3, 2007

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE