Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: **Septmeber 4, 2008**	
In re: *ENRON CREDITORS RECOVERY CORP.*, *et al.*, Reorganized Debtors.	Case No. 01-16034 **(AJG)**
ENRON CORP., Plaintiff, v. *J.P. MORGAN SECURITIES, INC.*, *et al.*, Defendants.	Adv. Pro. No. 03-92677
ENRON CORP., Plaintiff, v. *MASS MUTUAL LIFE INS. CO.*, *et al.*, Defendants.	Adv. Pro. No. 03-92682

Present: Hon. Arthur J. Gonzalez
Bankruptcy Judge

Appearances:

Cleary Gottlieb Steen & Hamilton LLP
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New York, New York
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Proceeding: ☒ **Motion by Goldman, Sachs & Co. to Exclude Arguments Related to the Securities Act (the "Motion")**.

Orders: ☒ **For the reasons set forth on the record on September 4, 2008, a copy of which is attached hereto as Exhibit "A," the relief sought in the Motion is denied, in part, and granted, in part.**

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez	**09/04/2008**	Jacqueline De Pierola
United States Bankruptcy Judge	Date	Courtroom Deputy

EXHIBIT "A"

Goldman Sachs and those parties joining in the motion have moved to strike Enron's arguments concerning the Securities Act. Alternatively, the movants argue that the matter should be referred to the Distrcit Court.

Goldman argues that, pursuant to the District Court's March 2008 Order, this Court is precluded from considering any arguments concerning the _ 3(a)(3) registration exemption, including interpretation of the SEC's "prime quality" gloss that purportedly applies to commercial paper or any potential dealer liability under _12(a)(1) of the Securities Act (the "Securities Act"). Goldman contends that because Enron has three separate sections in its brief discussing these Security Act issues, those sections must be stricken or the matter must now be referred to the District Court. Goldman further argues that there are independent reasons for excluding those portions of Enron's Opposition, including the doctrine of judicial estoppel.

Enron argues that it made clear in its brief that it recognized that certain of its arguments could not be addressed by this Court and that it set forth those Securities Act arguments to preserve them in the event they became relevant. Further, Enron contends that it did not want to be deemed to have waived those arguments by not timely complying with this Court's Scheduling Order. Enron further argues that this Court can consider its argument concerning the application of the Securities Act issues to whether the commercial paper was deemed a security at the time of its purported retirement. In addition, Enron disputes Goldman's argument concerning application of the doctrine of judicial estoppel, as well as Goldman's other independent arguments advanced for excluding the Security Act contentions.

The doctrine of judicial estoppel applies where a party succeeds upon advancing a certain position in a legal proceeding and then seeks to maintain an inconsistent position in a later

proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 1814, 149 L. Ed.2d 968 (2001) (citing 18 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE _ 4477, p. 782 (1981). For judicial estoppel to be invoked, the prior court must have adopted the inconsistent position that was first-advanced. *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005). If the party was not successful in advancing its inconsistent position in the first proceeding, it does not present a "risk of inconsistent court determinations." *New Hampshire v. Maine*, 121 S. Ct. at 1815 (citation omitted). Moreover, there must be an actual conflict between the two positions advanced. *Bell v. Ebbers (In re WorldCom, Inc. Sec. Lit.*, 308 F.Supp.2d 236, 248 (S.D.N.Y. 2004). If the positions can be reconciled, judicial estoppel is not applicable. *Id.*

The purpose of the doctrine is to "protect the integrity of the judicial process." *New Hampshire v. Maine*, 121 S. Ct. at 1814 (citation omitted). By precluding a party from altering its position when expedient, judicial estoppel prevents the party "from playing fast and loose" with the system. *Id.* As it is an equitable doctrine intended to prevent the improper use of the judicial process, a court has discretion whether to apply it. *New Hampshire v. Maine*, 121 S. Ct. at 1814.

In determining whether to invoke judicial estoppel, in addition to the factors previously mentioned, courts consider whether acceptance of the later inconsistent position would leave the perception that one of the court's was misled. *New Hampshire v. Maine*, 121 S. Ct. at 1815. In addition, courts consider whether the party seeking to assert a contrary position stands to gain "an unfair advantage or to impose an unfair detriment on the opposing party if not estopped." *Id.* The application of the enumerated factors is not an inflexible requirement. *Id.* Rather, the

specific factual circumstances will determine whether these factors apply or whether additional considerations must be taken into account. *Id*. The goal being to ensure that judicial estoppel is applied only if the concerns underlying the doctrine are implicated. *Bell v. Ebbers*, 308 F. Supp.2d at 248.

Thus, judicial estoppel might not apply if a party has a good explanation for pursuing an incompatible theory. *New Hampshire v. Maine*, 121 S. Ct. at 1815. Nor would it apply if no one were misled. *Uzdavines*, 418 F.3d at 148. Further, judicial estoppel might not apply if "a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 121 S. Ct. at 1816.

With respect to judicial estoppel, Goldman argues that Enron misled the District Court by arguing that the Securities Act issue only applied in the context of its secondary or tertiary argument concerning whether Goldman benefitted under a _ 550(a) analysis. Goldman further argues that had the district court known that Enron was contemplating raising the Securities Act arguments as a defense to the safe harbor, the district court would have then withdrawn the reference.

Enron argues that its position before this Court is not contrary to that taken before the District Court because the thrust of its argument in both venues is that the Bankruptcy Court can make preliminary determinations that would dispose of the summary judgment motion and which would not require the Court to reach the Securities Act arguments.

Enron further maintains that it did not attempt to mislead the District Court but has developed an additional theory that now brings the Securities Act issues into play earlier than expected. Indeed, Enron continues to maintain that certain preliminary issues, such as paydown

of debt vs. sale of securities can be addressed by this Court without having to address the Securities Act issues. Further, Enron notes that the Court could conclude, without actually reaching the Securities Act argument, that even if it applied as set forth by Enron, it would not constitute transparent manipulation.

The Court agrees with Enron that their arguments here and before the District Court can be reconciled and are not clearly inconsistent. Even if not the case, it certainly appears that the representation to the District Court was not done in a bad faith attempt to mislead the District Court. While Enron initially thought that the Securities Act arguments would not come into play until the Court was dealing with the beneficiary theory under _ 550(a), its recently developed theory has now made clear that it might be addressed earlier. However, this is not indicative of an attempt to mislead the District Court. In fact, at the time that it was before the District Court, Enron sought to have the District Court transfer the matter to the District Court judge handling the interlocutory appeal. Goldman had not joined in the interlocutory appeal proceeding because it did not consider that the Securities Act was relevant to the definition of security for purposes of _ 546(e). From Enron's perspective at that time, because it sought to have the proceeding transferred to the other District Court judge handling the interlocutory appeal issue, it would have been in its interest to inform the District Court that the application of the Securities Act was relevant in the same way as in the other proceeding and would be addressed prior to reaching the _ 550(a) beneficiary issue. Therefore, this Court finds that Enron was not "playing fast and loose" with the system and the integrity of the judicial process was not compromised. Moreover, this is not a situation where any perceived misrepresentation in a prior proceeding to an earlier tribunal cannot be undone. Here, as addressed in the next section, this Court will not be

addressing any Securities Act issues and, therefore, any perceived misrepresentation to the District Court is harmless. Thus, the concerns underlying judicial estoppel are not implicated.

As just referenced, the Court disagrees with Enron's contention that this Court can address the Securities Act issues in the context of determining whether the commercial paper is a security. Rather, pursuant to the mandate of the District Court, this Court simply has no jurisdiction over the Security Act issues regarding any facet of this case.

As the Court has determined that it will not address any Securities Act issues, there is no risk of inconsistent determinations nor of unfair detriment to the movants. The harm would be if this Court were to proceed to adjudicate the Securities Act issues. However, in accordance with the ruling of the District Court, once the Court were required to address a Securities Act issue, the reference would be withdrawn.

With respect to Goldman other arguments, the Court does not agree with Goldman that the transparent manipulation argument is a "sham" argument. Notwithstanding the availability of the fraud exception to the safe harbor defense, the *Adler* court and, subsequently, the *Grafton* court recognized that "where transactions are not merely unorthodox, but are fundamentally tainted by misconduct or impropriety, such as manipulation, deception or illegality, a payment made to effectuate such transactions has been found not be to common in the securities trade, and hence not a settlement payment." See *In re Enron Corp.*, No. M-47, 2008 WL 281972 *5 (S.D.N.Y. Jan. 25, 2008) (citing *In re Grafton Partners, L.P.*, 321 B.R. 527, 541 (B.A.P. 9th Cir. 2005); *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 481 (S.D.N.Y. 2001). This is because providing safe harbor protection to such transactions "would be contrary to the objectives of _ 546(e), to promote investor confidence by safeguarding the integrity of the

marketplace." *Id*. Further, an inference of such improper conduct can be drawn from the pleadings even in the absence of specific allegations in the complaint of coercion or improper conduct. *Id*. at *5 n. 4 (citing *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006).

Finally, Goldman argues that Enron is precluded from asserting its Securities Act argument of transparent manipulation because Enron did not timely present it in its responses to contention interrogatories even though Goldman specifically requested specific identification of the bases for Enron's contention that Enron's claims were not barred by _ 546(e).

Although, Enron did not present this argument in its answer to Goldman's contention interrogatories, Goldman has not suffered prejudice in this regard. It was aware of the Securities Act issues and deposed Enron's expert concerning factual issues for which it needed discovery.

As noted, the Court denies that portion of Goldman's motion seeking to exclude the sections of Enron's Opposition that contain arguments and evidence related to _ 3(a)(3), _12(a)(1) and the "prime quality" issues under the Securities Act. In the event that the District Court must resolve these issues, the points set forth by Enron are preserved for any such future review.

This does not, however, entirely dispose of the motion. Although the Court does not believe that striking the arguments is the appropriate remedy under the circumstances, it is apparent that the Securities law issues that were initially described to the District Court as only secondary or tertiary are now being raised in the context of the application of the safe harbor.

Nevertheless, both District Courts addressing matters concerning these adversary proceedings recognized that this Court might deny summary judgment and require a trial because

of material issues of fact concerning whether the transactions at issue involved the pay down of debt and not the sale of a security and, thereby, arguably, not qualify the payments as settlement payments. Thereafter, if Enron were ultimately to prevail on the issue that there were no settlement payments implicating the _ 546(e) safe harbor, Securities Act issues would not be addressed.

Goldman maintains that if, however, the Court were to rule in its favor on that issue, then the Court could not ultimately rule on all of the issues presented concerning the application of the _ 546(e) safe harbor defense without confronting the Securities Act issues and, at that point, the matter would have to proceed before the District Court. Goldman further argues that, in that case, because any ruling rendered by this Court would not dispose of the entire claim concerning the safe harbor, Enron could seek to have any issues resolved by this Court's ruling re-litigated de novo in the District Court. Goldman urges that this would result in redundancy and a waste of resources.

Although there may be a risk of some repetition of effort, the parties have substantially briefed these issues and the Court has already expended a great deal of time in reviewing the submissions and researching the issues. Thus, the risk of waste of resources is not as pronounced as Goldman asserts. Further, although there may be some waste of judicial resources or parties' efforts, nevertheless, addressing certain of the preliminary issues may advance the disposition of this case. If and when the Securities Act issues are confronted and are no longer speculative or remote, this Court could then not address them under the District Court's mandate on the matter.

Based upon the foregoing, the Court determines that, pursuant to the District Court

mandate, it will not address any Securities Act arguments. However, those portions of the Enron's Opposition that set forth issues related to the Securities Act arguments are preserved for any required presentation to the District Court. The Court further determines that, currently, it is premature for the matter to be before the District Court as there are certain preliminary issues that may result in never reaching any securities law issues. This is consistent with both decisions of the District Court regarding motions to withdraw the reference.

Therefore, Goldman's motion with respect to striking portions of Enron's brief is denied. The alternative relief seeking to refer this matter to the District Court is denied. However, that portion of Goldman's motion seeking that this Court not consider the Securities Act issues is granted.