

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re National Century : Case No. 2:03-md-1565  
Financial Enterprises, Inc., :  
Investment Litigation. : Judge Graham  
: Magistrate Judge Abel

**AMENDED PRETRIAL ORDER<sup>1</sup>**

The Judicial Panel on Multidistrict Litigation has notified the transferee court that the Panel's April 12, 2012 Conditional Remand Order became effective as of April 20, 2012. It is recommended practice for the transferee court to prepare a pretrial order that chronicles the proceedings, summarizes the relevant rulings, and outlines the remaining issues. See Manual for Complex Litig. (Fourth) § 20.133.

Under JPML Rule 10.4, the court will prepare the following materials to transmit to the clerks of the transferor districts: the Remand Order; the docket sheet in the National Century MDL, 2:03-md-1565; the case files as originally received from the transferor courts; this pretrial order; the parties' designated record on remand; and the court's December 13, 2010 and March 2, 2012 rulings (docs. 1802, 1846) on the parties' motions for summary judgment.

Should the transferor courts have any difficulty accessing this court's CM/ECF system, they may contact the Southern District of Ohio's clerk's office for assistance at 614-719-3000 or they may contact Judge Graham's chambers at 614-719-3200. The courts may contact either number in arranging for sealed access to the docket.

Arizona Cases

Three of the actions are being remanded to the United States District Court for the District of Arizona: *City of Chandler, et al. v. Bank One, N.A., et al.*, Case No. 2:03-cv-1220; *State of Arizona, et al. v. Credit Suisse First Boston Corp., et al.*, Case No. 2:03-cv-1618; *Crown Cork & Seal Co., Inc. Master Retirement*

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<sup>1</sup> This order, on pages 2 and 6, clarifies the April 23, 2012 Pretrial Order regarding exactly which defendants the plaintiffs have claims remaining against.

*Trust, et al. v. Credit Suisse First Boston Corp., et al.*, Case No. 2:03-cv-2084. The plaintiffs in these actions are a large number of institutional investors who collectively purchased about \$1.5 billion in AAA-rated notes issued by National Century Financial Enterprises, Inc., a now-bankrupt company that was founded in Ohio. Plaintiffs brought suit in state court asserting common law claims and various state securities law claims against numerous defendants, each of whom played some role in National Century's operations. Defendant Bank One removed the actions to federal court on the grounds that they related to the bankruptcy proceedings of National Century. An early ruling of this court held that the removal was proper and that subject matter jurisdiction exists. (Doc. 389).

Plaintiffs were granted leave to file amended complaints. (Doc. 683). The operative complaints are the Second Amended Complaint in *City of Chandler* (doc. 686), Second Amended Complaint in *State of Arizona* (doc. 685), and First Amended Complaint in *Crown Cork & Seal* (doc. 687).

Plaintiffs' claims against the majority of the defendants have been disposed of by settlement or voluntary dismissal. (Docs. 614, 624, 820, 835, 869, 876, 1134, 1200, 1202, 1416). Technically, plaintiffs' claims against National Century's principals (Lance and Barbara Poulsen, Donald Ayers, Rebecca Parrett, and their alter ego corporations E&D Investment, Inc. and Kuld Corp.) remain; however, the court has not been called on to decide any legal issues regarding those claims since denying the motions to dismiss filed by the Pouslens and Ayers. (Doc. 750). Plaintiffs Abu Dhabi Investment Company and Bayerische Landesbank have voluntarily dismissed all of their claims against National Century's principals. (Docs. 1200, 1202, 1416).

Plaintiffs' claims against defendant Credit Suisse Securities (USA) LLC are the ones that have been vigorously litigated in this court. Against Credit Suisse the plaintiffs asserted common law claims for fraud, negligent misrepresentation, negligence (which was voluntarily dismissed, doc. 280 at 19-20), aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conspiracy, unjust enrichment, and breach of contract. They also asserted statutory claims under the securities laws of various states. Credit Suisse moved to dismiss these claims. The court largely denied the motion, but did grant the motion as to the following claims:

- the Ohio blue sky law claims based on note purchases made in 1998 and early 1999 by Asset Allocation & Management (AAM), Bayerische Landesbank, Mutual of New York

(MONY), SanPaolo IMI, and United of Omaha (time-barred);

- United of Omaha's Nebraska blue sky law claim based on its November 1998 note purchase (time-barred);
- Oregon Insurance's claim under § 59.135 of Oregon's blue sky law (no private right of action) and its claim for primary liability under Oregon's blue sky law (lack of privity);
- the Arizona governmental entities' claims under § 44-1998(A) of Arizona's blue sky law (does not apply to private placements); and
- the claims of Pacific Investment Management Company (PIMCO) for primary liability under California's blue sky law (lack of privity).

(Doc. 1183). Plaintiffs Abu Dhabi Investment Company and Bayerische Landesbank later voluntarily dismissed all of their claims against Credit Suisse. (Docs. 1200, 1416).

The court issued two rulings at the summary judgment stage. The first concerned plaintiffs' claims under Ohio securities law. The court granted summary judgment to Credit Suisse, holding that it would violate the extraterritoriality principle of the Commerce Clause to apply Ohio's statute to the transactions between Credit Suisse, who was in New York, and plaintiffs, who were located various places outside of Ohio. (Doc. 1802). This order also resolved three issues regarding standing. First, the court held that the Arizona governmental entities did not have standing to sue, but that the Arizona State Treasurer did have standing to sue on their behalf. (*Id.* at 7-9). Second, the court rejected Credit Suisse's challenge to whether certain plaintiffs had given authorization to counsel to file suit. (*Id.* at 9-10). To resolve this standing issue, the court examined materials submitted for *in camera* review – these materials are included among the documents being transmitted to the clerk for the U.S. District Court for the District of Arizona. Third, the court held that certain plaintiffs who had sold their notes after National Century filed for bankruptcy still had standing to bring suit. (*Id.* at 10-11).

The court's second summary judgment ruling dealt with the remainder of the plaintiffs' claims. (Doc. 1846). The court held that New York law applies to the claims. (*Id.* at 18-20). As noted in the order, plaintiffs withdrew their breach of contract claim, and plaintiff Bristol withdrew its Kentucky blue sky law claim. (*Id.* at 24, 65 n.20). On the merits of the claims, the court granted in part and denied in part Credit Suisse's motion for summary judgment. Summary judgment was granted with respect to the

following claims:

- the aspect of the fraud claims of Alliance Capital Management, Grantham, Mayo, Van Otterloo & Company (GMO), Lincoln Capital, and III Finance relating to road show presentations and joint meetings with National Century;
- the “holder” fraud claims asserted by AmerUs, the Arizona Treasurer, Drake, Lincoln Capital, MONY, Ofivalmo, United of Omaha, Phoenix Life, and PIMCO;
- plaintiffs’ negligent misrepresentation claims;
- Mellon’s New Jersey blue sky law claim;
- the Indiana Retirement Fund’s Indiana blue sky law claim;
- the Nashville Government’s Tennessee blue sky law claim;
- GMO’s claim under the Massachusetts Unfair Trade Practices Statute;
- plaintiff’s claims for aiding and abetting breach of fiduciary duty;
- plaintiffs’ claims for unjust enrichment;
- Crown, Cork & Seal’s Pennsylvania blue sky law claim;
- AAM’s Illinois blue sky law claim and fraud claim;
- the Clifton Group’s Minnesota blue sky law claim and fraud claim;
- Louisiana Corporate Credit Union’s Louisiana blue sky law claim;
- Oregon Insurance’s Oregon blue sky law claim and fraud claim;
- Phoenix Life’s Connecticut blue sky law claim; and
- PIMCO’s California blue sky law claim.

Summary judgment was denied as to the following claims:

- the fraud claims (except for the holder claims) of all of the plaintiffs who purchased notes directly from Credit Suisse, and their claims for punitive damages;
- the blue sky law claims of all of the plaintiffs who purchased notes directly from Credit Suisse (except for Mellon’s New Jersey claim, the Indiana Retirement Fund’s Indiana claim, and the Nashville Government’s Tennessee claim);

- plaintiffs' aiding and abetting fraud claims and conspiracy claims; and
- the fraud claims of Louisiana Corporate Credit Union, Phoenix Life, and PIMCO.

(Doc. 1846 at 113-15).

The court has ruled on certain evidentiary issues raised by the parties in motions to strike. (Doc. 1802 at 9); (Doc. 1862 at 27 n.7; 30 n.8; 45 n.14; 48-49; 53-54; 90 n. 27). The court refrained from resolving a number of evidentiary disputes that were not necessary to resolve in deciding the motions for summary judgment. (Doc. 1802 at 40); (Doc. 1846 at 88 n.26; 113). Also, Credit Suisse moved to exclude the expert testimony and report of plaintiffs' expert. The court refrained from ruling on the motion without prejudice to Credit Suisse renewing it before the trial court. (Doc. 1846 at 48 n.16; 113).

On a final note concerning the Arizona cases, the magistrate judge issued a decision that could impact the presentation of evidence at trial. (Doc. 1642). The decision concerned Credit Suisse' motion for sanctions against certain plaintiffs for discovery abuses, including spoliation of evidence and failure to timely produce documents. The magistrate limited the ability of certain plaintiffs to present evidence that was not timely produced before the discovery deadline, and he concluded that Credit Suisse may proffer evidence at trial concerning plaintiffs' conduct that Credit Suisse believes would entitle it to an adverse inference jury instruction. (*Id.* at 42-43).

#### New Jersey Cases

Two of the actions are being remanded to the United States District Court for the District of New Jersey: *Metropolitan Life Insurance Co., et al. v. Bank One, N.A., et al.*, Case No. 2:03-cv-1882; *Lloyds TSB Bank PLC v. Bank One, N.A., et al.*, Case No. 2:03-cv-2784. The plaintiffs in these actions are institutional investors who collectively purchased about \$180 million in AAA-rated notes issued by National Century. Plaintiff Lloyds TSB Bank additionally invested \$68 million in the form of a participation interest in a National Century variable funding note. Plaintiffs brought suit in federal court asserting federal and state securities law claims and common law claims against numerous defendants, each of whom played some role in National Century's operations.

Plaintiffs were granted leave to file amended complaints. (Doc. 683). The operative complaints

are the Fourth Amended Complaint in *Metropolitan Life Insurance* (doc. 690), and Fourth Amended Complaint in *Lloyds TSB Bank* (doc. 691).

Plaintiffs' claims against the majority of the defendants have been disposed of by court ruling, settlement, or voluntary dismissal. (Docs. 621, 634, 638, 894, 971, 1247, 1274, 1340, 1368, 1393, 1395, 1421). Technically, plaintiffs still have claims remaining against Lance Poulsen, but the court has not been called on to decide any legal issues regarding those claims since largely denying Poulsen's motion to dismiss. (Doc. 750).

Plaintiffs' claims against defendants Credit Suisse Securities (USA) LLC and Credit Suisse, New York Branch, are the ones that have been vigorously litigated in this court. Against Credit Suisse the plaintiffs asserted claims under § 10(b) of the Securities Exchange Act and under New Jersey's and Ohio's blue sky laws. Plaintiffs also brought claims for fraud, negligent misrepresentation, and negligence, and Lloyds also asserted a breach of contract claim. Credit Suisse moved to dismiss these claims. The court largely denied the motion, but did grant the motion as to the following claims:

- Lloyds's claim under New Jersey's blue sky law (no nexus);
- MetLife's claim under § 49:3-52 of New Jersey's blue sky law (no private right of action); and
- plaintiffs' negligence claims (duplicative of their negligent misrepresentation claims).

(Doc. 1183).

The court issued two rulings at the summary judgment stage. The first concerned plaintiffs' claims under Ohio securities law. The court granted summary judgment to Credit Suisse, holding that it would violate the extraterritoriality principle of the Commerce Clause to apply Ohio's statute to the transactions between Credit Suisse, who was in New York, and plaintiffs, who were located outside of Ohio. (Doc. 1802).

The court's second summary judgment ruling dealt with the remainder of the plaintiffs' claims. (Doc. 1846). The court held that New York law applies to the claims. On the merits of the claims, the court granted in part and denied in part Credit Suisse's motion for summary judgment. Summary judgment was granted with respect to the following claims:

- Lloyds's tort claims relating to the Participation Agreement;
- the "holder" fraud claim asserted by Lloyds;
- plaintiffs' negligent misrepresentation claims; and
- Lloyds's breach of contract claim.

Summary judgment was denied as to the following claims:

- plaintiffs' claims under § 10(b), their fraud claims relating to note purchases, and their claims for punitive damages; and
- MetLife's New Jersey blue sky law claims.

(Doc. 1846 at 113-15).

The court has ruled on certain evidentiary issues raised by the parties in motions to strike. (Doc. 1862 at 6 n.2; 27 n.7; 45 n.14; 48-49; 55 n.18). The court refrained from resolving a number of evidentiary disputes that were not necessary to resolve in deciding the motions for summary judgment. (Doc. 1802 at 40); (Doc. 1846 at 44 n.13; 113). Also, Credit Suisse moved to exclude the expert testimony and report of plaintiffs' expert, and plaintiffs so moved with respect to Credit Suisse's expert. The court refrained from ruling on the motions without prejudice to the parties renewing them before the trial court. (Doc. 1846 at 48 n.16; 113).

April 2, 2012 Status Conference

The court held a status conference with the parties on April 2, 2012. Credit Suisse stated that, once the cases are remanded, it intends to move to transfer venue of the cases under 28 U.S.C. § 1404 to the U.S. District Court for the Southern District of New York.

s/ James L. Graham  
JAMES L. GRAHAM  
United States District Judge

DATE: April 27, 2012