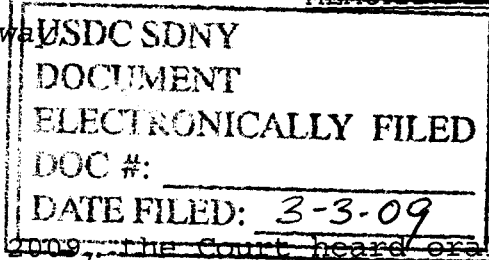


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: MERRILL LYNCH & CO., INC., : Master File No.:
SECURITIES, DERIVATIVE AND ERISA : 07 Civ. 9633 (JSR)
LITIGATION :
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PERTAINS TO *Louisiana Sheriffs' Pension and Relief Fund v. Conway* MEMORANDUM ORDER
08 Civ. 9063



JED S. RAKOFF, U.S.D.J.

On February 17 and 19, ~~2009, the Court heard oral~~ argument on the defendants' motions to dismiss the complaint in the above-captioned matter, which alleges violations of sections 11, 12 and 15 of the Securities Act of 1933. While the Court reserved judgment so as to give plaintiffs the opportunity to file an Amended Complaint, the Court, to give guidance to plaintiffs' counsel in drafting that complaint, indicated from the bench, see transcript 2/19/09, and confirmed in the Court's recent scheduling order dated February 23, 2009, that it would provide a determination of whether the averments of the present Complaint sufficiently sound in fraud as to be subject to the heightened pleading standards of Rule 9(b), Fed. R. Civ. P. See Rombach v. Chang, 355 F.3d 164 (2d Cir. 2004).

The Court now determines that the current Complaint is, in fact, subject to Rule 9(b). Although fraud is not a prerequisite to the legal claims asserted in the Complaint, such claims are often predicated on fraud, see Rombach at 171, and here, on any fair reading, much of the "wording and imputations of the complaint are classically associated with fraud," id. at 172. Indeed, after

describing at some length the underlying allegations, the Complaint goes on to allege that, party in response thereto, "the Federal Bureau of Investigation had launched a 'mortgage fraud task force,'" Complaint, ¶ 197, and the "Massachusetts state authorities had accused Merrill of fraud..." *id.* at ¶ 202. Plaintiffs' counsel's claim at oral argument that these suggestions of fraud were added to buttress the plaintiffs' assertions of materiality, and not to impute fraud, ring hollow to say the least.

If, however, as plaintiffs' counsel also asserts, it was not his intention to allege fraud in any respect, presumably his Amended Complaint will be bereft of the many insinuations of fraud that characterize the current Complaint. Alternatively, even if not asserting fraud, plaintiffs' counsel may deem it prudent to draft his Amended Complaint with an eye to the requirements of Rule 9(b). In any event, the Court, as previously indicated, will only take up the motions to dismiss after the Amended Complaint is filed and the Court receives the further briefing permitted by its Order of February 23, 2009.

SO ORDERED.



JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
February 27, 2009