United States Courts
Southern District of Texas
ENTERED

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
Enron CORPORATION, ET AL., Defendants	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, ET AL., Defendants.	§	

ORDER RE CIBC DEFENDANTS' MOTIONS TO DISMISS

Pending before the Court are Defendants CIBC World Markets Corp. (f/k/a CIBC Oppenheimer Corporation)[1] and Canadian

[1] Although Lead Plaintiff has named both CIBC World Markets Corp. and CIBC Oppenheimer Corporation as Defendants, in support of its motion for summary judgment (#1357) CIBC filed an affidavit indicating CIBC Oppenheimer Corporation changed its name to CIBC World Markets Corporation in 1999 and they are the same corporation. Tab 3 attached to #1358. The motion for summary judgment argued that various separate and independent subsidiaries were the real parties in interest, not CIBC, which was the sole named Defendant of the group. Noting Lead Plaintiff's theories of agent and principal, common law agency, control person liability under the statues, and enterprise liability (though not "accepting" them as argued by Lead Plaintiff) and the need for fact-intensive

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Imperial Bank of Commerce's ("CIBC's") motion to dismiss the first amended consolidated complaint (instrument #1505), and Defendant CIBC World Markets plc's[2] motion to dismiss, which adopts #1505 (#1682). The Court hereafter refers to these Defendants collectively as "CIBC Defendants" and individually by name. As was the case with other Banking Defendants, in the First Consolidated Complaint Lead, filed on April 8, 2002, Lead Plaintiff named only the parent entity of each financial institution, here CIBC, and then added the subsidiaries and affiliates in the First Amended Consolidated Complaint, filed on May 14, 2003.

CIBC and CIBC World Markets Corporation are sued under § 10(b), and CIBC as a control person under § 20(a) of the Exchange Act of 1934 and Rule 10b-5, and under §§ 11, 12(a)(2), and 15[3] of the Securities Act of 1933. Lead Plaintiff contends that CIBC World Markets plc, a London-based subsidiary of CIBC, is

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inquiries under them, the Court denied the motion for summary judgment without prejudice until some discovery could be done on the issue. #1392.

[2] At the time the first motion was filed, CIBC World Markets plc had not been served and so was not among the movants. #1505 at 1 n.2.

[3] CIBC World Markets, an underwriter of the Enron Notes offered on May 19, 1999, is sued under § 11 for alleged misrepresentations in the Registration Statement, and CIBC is used under § 15 as a control person for that offering. Furthermore CIBC World Markets and CIBC World Markets plc are sued under § 12(a)(2) for alleged misstatements in the prospectuses of two July 12, 2001 offerings of Marlin Water Trust Notes, specifically of 6.31% Senior Secured Notes and 6.19% Senior Secured Notes, both due in 2003, underwritten by CIBC World Markets and CIBC World Markets plc, with CIBC allegedly liable as a control person under § 15.

also sued under § 10(b) in Count I because the First Amended Complaint at 122, ¶ 103(a), defines "CIBC" as encompassing parent CIBC and "known and unknown subsidiaries, divisions and/or affiliates acting as the agent of Canadian Imperial Bank of Commerce, such as, but not limited to . . . CIBC World Markets Corp., [and] CIBC World Markets plc . . . ." CIBC World Markets plc is expressly named as a defendant under § 12(a)(2), relating to the July 12, 2001 joint offering of the Foreign Debt Securities by Marlin Water Trust II and Marlin Capital Corp. II.

CIBC Defendants move for dismissal on a number of grounds.

First, CIBC Defendants maintain that all of the claims are barred by the statute of limitations (one-year/three-year period under both *Lampf* for the § 10(b) claims and under § 13 for the §§ 11 and 12(a)(2) claims) because Plaintiffs waited more than a year after they had actual notice (i.e., April 8, 2002, when they filed the First Consolidated Complaint) to sue the CIBC-related entities. CIBC Defendants note that in the First Consolidated complaint CIBC World Markets and CIBC Oppenheimer were identified as entities through which CIBC provided commercial and banking services, while the documents Lead Plaintiff relied upon revealed that the analyst reports were issued by CIBC World Markets and that CIBC World Markets underwrote one issue of securities that Lead Plaintiff charged to CIBC under § 11.[4] Thus

[4] CIBC Defendants also point out that with CIBC's initial motion to dismiss, filed on May 8, 2002, more than a year before the filing of the First Amended Consolidated Complaint, CIBC filed

the one-year statute of limitations began to run on all these claims on April 8, 2002 at the latest. CIBC Defendants insist that the claims do not "relate back" to when only CIBC was sued because there was no mistake about the identity of the parties, but instead a conscious choice not to sue the subsidiaries and affiliates.

In addition, CIBC Defendants contend that the § 11 claims are doubly barred because they were filed more than three years after the complaint asserts the securities were offered to the public, i.e., on May 19, 1999. CIBC Defendants urge that any § 10(b) claims based on statements in the Registration Statement for that offering would also be barred by the three-year statute of repose. Lead Plaintiff has not responded to this argument that the §§ 10(b), 11 and necessarily derivative § 15 claims based on the 1999 offering are barred by the period of repose.

Second, with respect to the § 10(b) claims, CIBC Defendants contend that Lead Plaintiff has not satisfied the PSLRA and Rule 9(b)'s heightened pleading requirements, including scienter, against CIBC World Markets and CIBC World Markets plc. They argue that the only allegations against CIBC World Markets are that it is the source of the CIBC analyst reports quoted in the complaint and that it provided certain underwriting services or, when it was still operating as CIBC Oppenheimer, certain

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copies of those very documents and argued that the claims should be dismissed because the parent company and sole defendant, CIBC, was not involved.

The Court notes that these arguments also reflect that the new CIBC Defendants had notice that they might be sued.

banking services to Enron for several years, not sufficient to sustain a § 10(b) claim against it. While the Court denied CIBC's first motion to dismiss based on its involvement in three off-balance sheet entities or transactions, Lead Plaintiff not only does not assert that CIBC World Markets was involved in these, but alleges only that it issued analyst reports and provided underwriting services and credit financing and loans to Enron or Enron-related entities.

Indeed CIBC Defendants contend that Lead Plaintiffs is attempting to obscure its claims or confuse the Court about which claims relate to which entity. They maintain that "CIBC," in effect, is defined in the First Amended Complaint at 122, ¶ 103 as the parent company and all of its subsidiaries and affiliates. They further contend that in Count I "CIBC" is purported to be the primary violator under § 10(b), yet Lead Plaintiff also alleges that all the financial institution Defendants "controlled each of their respective subsidiaries and affiliates." They maintain that it is impossible to tell from the face of the pleading who allegedly did what. In contrast, Count III concedes that for purposes of § 11, CIBC World Markets, not the parent CIBC, was an underwriter of an issue of Enron notes offered on May 19, 1999 and asserts that CIBC is liable only as a control person under § 15. Count IV identifies CIBC World Markets and CIBC World Markets plc as initial purchasers of two issues of Marlin Water Trust notes in 2001 and alleges they are liable under § 12(a)(2) for

misstatements in the prospectus, while CIBC is again charged with control person liability under § 15.

Next CIBC Defendants argue that Plaintiffs lack standing to sue under § 12(a)(2) because no named plaintiff claims to have purchased July 2001 offering of senior secured notes for Marlin Water Trust II and Marlin Water Capital Corp. II. Moreover they argue that Lead Plaintiff failed to plead the elements of such a claim against CIBC World Markets and CIBC World Markets plc based on these notes because it does not allege the offering was public or that any class member purchased directly from CIBC World Markets after having been solicited by the two. They point out that the Marlin Water Trust senior notes expressly disclaimed that they were intended to serve as a prospectus for a public offering.

Moreover, CIBC moves for dismissal on the grounds that the control person liability claims against CIBC under § 20(a) and § 15 fail as a matter of law because Lead Plaintiff has failed to allege a primary violation of either § 10(b) or §§ 11 and 12(a)(2) by any of the subsidiaries, nor has Lead Plaintiff pleaded that CIBC controlled any wrongdoer nor alleged any facts demonstrating that CIBC was directly responsible for conduct attributable to other CIBC-related entities.

The Court hereby incorporates its previous memoranda and orders in *Newby*, in particular for the CIBC Defendants' instant motion, the recent memoranda and orders regarding ICERS' motion to intervene (#1999) and Merrill Lynch and Deutsche Bank Entities' motions to dismiss (#2036). Because the Court has already ruled

on many of the arguments put forth by CIBC Defendants in these and in orders addressing other banking institutions' motions to dismiss, it summarizes those conclusions and applies them where appropriate here as well as addresses Defendants' other objections.

1. Statute of Limitations and Statute of Repose

Lampf's and Section 13's one-year/three-year statute of limitations/statute of repose governs Lead Plaintiff's claims against the Credit Suisse Defendants. #1999 at 24-63.

This Court has previously rejected the argument that Plaintiffs had inquiry notice of their Foreign Debt Securities claims against secondary actors as early as the October 2001, when Enron startled Wall Street with announcements of its restatement and when plaintiffs filed their first lawsuit (which did not name any secondary actors and was limited to a few Enron officers), especially in light of the extraordinarily complex schemes involved.

The Court has found that the First Amended Consolidated Complaint does not "relate back" to the First Consolidated Complaint with respect to the added bank subsidiaries and claims against them under Federal Rule of Civil Procedure 15(c). Nevertheless, under the circumstances of this litigation, detailed in #2036 at 53-75, and pursuant to Federal Rule of Civil Procedure 15(a), the Court has found good cause for construing and has construed the January 14, 2003 letter from Lead Plaintiff's counsel as a motion for leave to amend to name the subsidiaries of

Bank Defendants and finds that January 14, 2003 was therefore the date the Amended Consolidated Complaint was timely filed for limitations purposes. #2036 at 66-74.

The Court has also found that Lead Plaintiff has timely asserted within the one-year statute of limitations the 1933 Act claims based on the Foreign Debt Securities (#1388 at 409-10, ¶ 641.2), since the earliest potential storm warnings to trigger notice inquiry for the Foreign Debt Securities Offerings were in the fall of 2002, and the motion for leave to amend, and therefore the amended complaint, were deemed filed on January 14, 2003, within one year of notice inquiry.

As for the period of repose, however, 15 U.S.C. § 77m provides in relevant part, "in no event shall any action be brought to enforce liability under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(1) of this title [for false or misleading prospectuses and communications under § 12(a)(2)] more than three years after the sale." Thus the three-year statute of repose for § 11 claims based on allegedly false or misleading registration statements begins to run as of the date of the offering of the security to the public, while for § 12(a)(2) claims based on a false or misleading prospectuses and communications the period of repose begins to run as of the date of the sale of the security. Once triggered, a statute of repose runs without interruption even if equitable concerns might suggest tolling or even if the plaintiff has not and/or could not have

discovered that he has a cause of action. *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 102-03 (2d Cir. 2004). Here Lead Plaintiff's §§ 10(b), 11, and derivative § 15 claim based on the Enron Notes offered on May 19, 1999 are thus time-barred by the period of repose.

2. Section 10(b) Pleading Requirements

In *McNamara v. Bre-X Minerals Ltd.*, 57 F. Supp. 2d 396, 428 (E.D. Tex. 1999), the district court recognized the general rule that "a subsidiary's [alleged] fraud cannot be automatically imputed to its corporate parent". *Id.*, quoting *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997). The district court in *Bre-X Minerals* noted that while the general rule is that fraud must be pled with particularity as to each defendant in a multi-defendant case, an exception was recognized by this lower court in the Fifth Circuit, and as indicated by its cited authority, in the Third Circuit: "'[C]ourts should be 'sensitive' to the fact that application of the Rule prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.' *In re Burlington Coat Factory Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997). Accordingly, the normally rigorous particularity rule has been relaxed somewhat when the facts are exclusively within the defendant's knowledge or control, *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284-85 (3d Cir. 1992)," especially where "'defendants are insiders or affiliates participating in the statement at issue,'" as Lead Plaintiff

contends is the case with the CIBC Defendants here. *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622, 672 E.D. Tex. 2001).

The Court has already found that Lead Plaintiff stated a claim against CIBC based on numerous allegations. The First Consolidated Complaint and the First Amended Consolidated Complaint allege that CIBC acted through its wholly owned subsidiaries, divisions, and/or affiliates to effect the fraudulent Ponzi scheme; Lead Plaintiff contends, not for the first time, that under established agency law, both the agent and the principal are liable for the acts of the agent. The amended complaint also asserts that the subsidiaries engaged in each of the alleged acts at the direction of, and as the agent of, CIBC. #1388 at 122-23, ¶ 103(a)(d). Thus Lead Plaintiff maintains that CIBC is liable for its own acts and for acts of subsidiaries under CIBC's direction and control. Lead Plaintiff also urges that the Court to consider, "The number of different CIBC entities all working at the direction of the parent pursuant to maze of corporate interconnections, in addition to the sheer complexity of the Enron fraudulent scheme and its thousands of affiliates and related entities cautions against the hyper-technical application of the particularity requirements." #1574 at 94. Lead Plaintiff has painted the picture of "a multinational corporation that reports consolidated financial information and issues only one dividend to the parent company's shareholders" and CIBC Defendants that "repeatedly refer to themselves collectively and hold

themselves out to the public as a single enterprise." *Id.* at 84-85.

In a multi-defendant suit, the *Bre-X* court required more particularization **where possible** in the pleadings and insisted that "the Plaintiffs should, when possible, avoid attributing actions to the Kilborn Defendant's [*sic*] collectively. When not possible, the Plaintiffs should, when possible, offer an explanation as to why that is the case." 57 F. Supp. 2d at 428 The district court further discussed the rule that "a subsidiary's fraud cannot be automatically imputed to its corporate parent," but appeared to place the emphasis on "automatically" and required only something "more than the [mere] fact" that it was a parent company. *Id.*

Lead Plaintiff states that CIBC World Markets was centrally involved in the fraudulent Project Braveheart and the broadband/VOD Blockbuster scam, discussed in the First Amended Consolidated Complaint at 86-88, ¶¶ 725-30, and issued false and misleading analyst reports[5] and research reports while it was so involved (¶¶ 251, 269, 323), even though only "CIBC" is mentioned. Lead Plaintiff also points out that CIBC's motion for summary judgment (#1357, chart at 4-5) represents that it was CIBC World Markets that issued research reports about Enron, was one of the underwriters in the New Power IPO, and was an initial purchaser of the Marlin Water Trust Notes in 2001 relating to Lead Plaintiff's § 12(a)(2) claim. Finally, Lead Plaintiff notes that Judge

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[5] See Ex. 35 (copies of two CIBC World Markets' analyst reports relating to Enron) to #1575.

Brieant in *In re New Power Holdings, Inc. Sec. Litig.*, No. 02 Civ. 1550 (CLB), Order at 4 (S.D.N.Y. Apr. 17, 2003)(Ex. 36 to #1575), of which the Court takes judicial notice, denied CIBC World Markets' motion to dismiss claims against it under §§ 10(b) and 11 relating to the New Power IPO, which he recognized as part of a bigger scheme to defraud Enron investors.

In light of all these circumstances, this Court agrees that the situation warrants relaxation of Rule 9's strict requirements, especially in light of the stay on discovery under the PSLRA and the earlier finding of this Court that no reasonable person could characterize this litigation as the kind of "strike suit" that the PSLRA was designed to eliminate. If after discovery, CIBC Defendants wish to contest their inclusion in this litigation, they may do so by summary judgment motion.

3. Standing and Elements Under § 12(a)(2)

As discussed in #1999 at 65-66, 72-74, Lead Plaintiff, as distinguished from a class representative, has standing to sue for the § 12(a)(2) claims. If however, at the time of class certification, there is no class member that has standing to serve as a class representative for those who purchased Marlin Water Trust Notes from CIBC World Markets Corporation and CIBC World Markets plc, the § 12(a)(2) and derivative § 15 claim will be dismissed. #1999.

As detailed in #2036 at 76-90, given Lead Plaintiff's allegations about the nature of the Foreign Debt Securities offerings, under Fifth Circuit law whether the offerings are

public or private for purposes of § 12(a)(2) liability is a fact issue not properly resolved in the 12(b)(6) motion stage. It is CIBC Defendants' burden to prove an affirmative defense of exemption from the registration requirements or that the Marlin Water Trust Notes Offering was private.

4. Pleading Control Person Liability Under § 20(a) and § 15

For control person liability generally and Lead Plaintiff's pleading burden, see #1194 at 64-67, 71-73; #1241 at 24-42. Because the Court has found that Lead Plaintiff has pled predicate securities violations under §§ 10(b) and 12(a)(2), it has pled the basis for a derivative control-person liability claim against CIBC under § 20(a) and, with respect to the Marlin Water Trust securities, under § 15.

In *Newby*, the Court has discussed not only the lack of clarity in the Fifth Circuit's position regarding the pleading requirements for control person liability (*see, e.g.*, #1241 at 24-31), but also its more lenient standards compared with those of other Circuit Courts of Appeals. As discussed in #1241, it appears that the Fifth Circuit requires pleading, in addition to status or position, of some facts that show the defendant had power to directly or indirectly control or influence corporate policy, e.g., through ownership of voting securities, contract, etc., or had knowledge of the primary violation by the controlled person. As elements of a *prima facie* case of controlling person liability, the Fifth Circuit has expressly rejected more stringent requirements such as actual participation in the primary violation

and/or the actual exercise of the controlling person's power to control. This Court has also held that notice pleading under Rule 8 (a "short plain statement of the claim showing the pleader is entitled to relief"), rather than heightened pleading under Rule 9, applies to control person liability claims, and thus a plaintiff need not allege facts to support every element of a *prima facie* case (#1241 at 31-42). Discovery is available to flesh out the facts.

Here the First Amended Consolidated Complaint at 116, ¶99.1, has alleged that

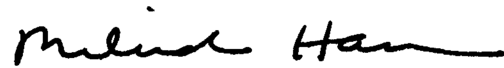
> Each of the bank holding company entities sued as defendants herein conducts business affairs through a series of wholly owned and controlled subsidiaries where the bank holding company directly or indirectly owns 100% of the stock of the subsidiaries and completely directs and controls their business operations through the selection and appointment of their officers and, where necessary, directors. These controlled subsidiaries are also the agents of the bank holding company entities and include investment bank subsidiaries as well as other specialized subsidiaries rendering financial advice and services to public companies, including Enron. The financial operations and condition of these subsidiaries are--for financial reporting and other purposes--consolidated with the bank holding company's financial statements. Thus, all revenues, earnings and income of the bank holding company subsidiaries are upstreamed to and belong to the bank holding companies. The bank holding companies named as defendants in this action all participated in the fraudulent scheme and course of business complained of, not only by way of the actions of the holding company itself, but also by way of the actions of numerous of its controlled subsidiaries and agents, some of which have been named as defendants in this action as well.

The Court finds that Lead Plaintiff has given sufficient notice and stated a claim for controlling person liability against CIBC under § 20(a) of the Exchange Act and, based in the Marlin Water Trust notes, under § 15 of the 1933 Act.

Accordingly, for the reasons stated above, the Court

ORDERS that the CIBC Defendants' motions to dismiss are GRANTED as to the § 10(b), § 11 and § 15 claims based on the 1999 Enron Note Offering only, but DENIED in all other respects.

SIGNED at Houston, Texas, this 31st day of March, 2004.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE