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

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
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 CREDIT SUISSE DEFENDANTS' MOTION TO DISMISS

Pending before the Court in the above referenced cause is Defendants Credit Suisse First Boston LLC, Credit Suisse First Boston (USA) Inc., and Pershing LLC's (f/k/a Donaldson, Lufkin & Jenrette Securities Corporation's[1]") (collectively, "Credit Suisse

[1] Credit Suisse First Boston LLC merged with Donaldson, Lufkin & Jenrette Securities Corporation, a former investment bank competitor, in November 2000, and Donaldson Lufkin & Jenrette Securities Corporation is now known as Pershing LLC. Credit Suisse First Boston LLC also acquired Donaldson Lufkin & Jenrette Securities Corporation's parent company, Donaldson Lufkin & Jenrette, Inc, now known as Credit Suisse First Boston (USA) Inc. ("DLJ Parent"), which became the holding company of Credit Suisse First Boston LLC.

Defendants'") motion to dismiss (instrument #1502) all claims against them in the First Amended Consolidated Complaint (#1388).

The latest complaint asserts claims against Credit Suisse First Boston Corporation LLC, Donaldson, Lufkin & Jenrette Securities Corporation, and Credit Suisse First Boston (USA), Inc. under § 10(b) and § 20(a) of the Securities Exchange Act of 1934. Under the Securities Act of 1933, the First Amended Consolidated Complaint also alleges that Credit Suisse First Boston Corporation LLC and Donaldson, Lufkin & Jenrette Securities Corporation violated § 12(a)(2), and that Credit Suisse First Boston (USA), Inc. is liable as a "control person" under § 15.[2]

Credit Suisse Defendants seek dismissal under Fed. R. of Civ. P. 12(b)(6) on several grounds.

First they argue that all the claims against Credit Suisse First Boston (USA), Inc. and Donaldson, Lufkin & Jenrette Securities Corporation are time-barred by the one-year statute of limitations.

Second, Credit Suisse Defendants contend that the new § 10(b) claims against Credit Suisse First Boston (USA), Inc. and

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[2] According to the First Amended Complaint the 1933 Act allegations under § 12(a)(2) arise out of three public offerings: (1) Donaldson, Lufkin & Jenrette Securities Corporation's role as underwriter of a September 23, 1999 offering of 8.31% Senior Secured Notes issued by Osprey Trust and Osprey I, Inc. and due in 2003; (2) Donaldson, Lufkin & Jenrette Securities Corporation's underwriting of a September 28, 1999 offering of 7.79% Senior Secured Notes and of 6.375% Senior Secured Notes, also both issued by Osprey Trust and Osprey I, Inc. and due in 2003; and (3) Credit Suisse First Boston Corporation's underwriting of a July 12, 2001 offering of 6.31% Senior Secured Notes and 6.19% Senior Secured Notes, issued by Marlin Water Trust II and Marlin Water Capital Corp. II and due in 2003. #1388 at 409-10, ¶ 641.2.

Donaldson, Lufkin & Jenrette Securities Corporation are not pled with any, no less the requisite, particularity,[3] but instead by improper group (or guilt by association) pleading. Credit Suisse Defendants object that Lead Plaintiff asserts the same allegations that it originally brought against Credit Suisse First Boston Corporation against the two new Credit Suisse Defendants as a group, collectively, by repeatedly referring to all three Credit Suisse Defendants in the amended pleading as "CS First Boston." They contend that the First Amended Complaint does not contain any substantive allegations about Credit Suisse First Boston (USA) or Donaldson, Lufkin & Jenrette Securities Corporation, individually, for purposes of the § 10(b) and Rule 10b-5 claims; indeed after identifying these parties it does not mention Credit Suisse First Boston (USA) again, and mentions Donaldson, Lufkin & Jenrette Securities Corporation individually only three times, twice as one of several underwriters of Enron securities (¶¶ 641.2, 1016.4) and once (¶ 707) as the former employer of ten Credit Suisse bankers (Laurence Nath's group; allegations summarized in #1194 as discussed *infra*).

Third, with respect to the § 12(a)(2) claims, Credit Suisse Defendants raise several challenges. They argue that the claims related to the September 1999 Osprey offering are time-barred by the three-year statute of repose as well as by the one-

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[3] Credit Suisse Defendants insist the amended complaint fails to identify any false statements made or any acts committed in furtherance of the Ponzi scheme by Credit Suisse First Boston (USA) or Donaldson, Lufkin & Jenrette, nor does it establish scienter with respect to either.

year statute of limitations in § 13. Lead Plaintiff has not responded to the statute-of-repose challenge. Furthermore, Credit Suisse Defendants contend that Lead Plaintiff lacks standing to assert § 12(a)(2) claims relating to the Osprey and Marlin Offerings because no Plaintiff claims to have purchased these securities. Credit Suisse Defendants additionally argue that the § 12(a)(2) claims fail because the Osprey and Marlin offerings were not public nor made pursuant to prospectuses.

Fourth, Credit Suisse Defendants maintain that the derivative control person allegations under § 20(a) of the Exchange Act and § 15 of the 1933 Act are time-barred because the predicate acts are time-barred. The § 12(a)(2) claims also fail, according to Defendants, because there are no specific allegations of actual control by Credit Suisse First Boston Corporation LLC, Donaldson, Lufkin & Jenrette Securities Corporation, and/or Credit Suisse First Boston (USA), Inc. over a primary violator.

The Court hereby incorporates its previous memoranda and orders in *Newby*, in particular for Credit Suisse 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 Credit Suisse Defendants, 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.

Credit Suisse Defendants argue that Lead Plaintiff "acknowledged the existence of" the additional parties and offerings in the First Consolidated Complaint filed on April 8, 2002, more than a year before they were named as defendants in the First Amended Consolidated Complaint filed on May 14, 2003. Thus, they maintain, the statute of limitations began to run on all these claims at the latest on April 8, 2002, when Plaintiffs had actual knowledge of the alleged violations.

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 #2034 at 53-75, the Court 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 the various Bank Defendants and found that January 14, 2003 was therefore the date the First Amended Consolidated Complaint was timely filed for limitations purposes. #2036 at 66-74.

The Court has further 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), including those underwritten by the Credit Suisse Defendants, since the earliest potential storm warnings to trigger notice inquiry for these offerings were in the fall of 2002. January 14, 2003 is 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 only the claim based on the third offering in dispute, the July 12, 2001 offering of Marlin Water Trust notes, was filed within the three-year repose period for claims asserted against the Credit Suisse Defendants under § 12(a)(2) and measured from the date of sale of the securities to the investor-plaintiffs. #2036 at 63-63. The other two Osprey offerings took place in September 1999, more than three years before the claims based on these offerings were brought. Thus the §§ 12(a)(2) and 15 claims based on the September 23, 1999 and September 28, 1999 offerings are time-barred, and only the §§ 12(a)(2) and 15 claims based 2001 Marlin offering may proceed.

3. Pleading With Requisite Particularity

Regarding the § 10(b) claims against them, the Credit Suisse Defendants have complained of Lead Plaintiff's use of group pleading, which this Court has ruled did not survive the PSLRA, but which in the amended complaint lumps the three entities together and imputes liability from one to the other without setting out specific fraudulent conduct or establishing scienter with respect to each. They cite as authority, *McNamara v. Bre-X Minerals Ltd.*, 57F. Supp. 2d 396, 428 (E.D. Tex. 1999)("a subsidiary's [alleged] fraud cannot be automatically imputed to its corporate parent")(quoting *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997), and argue that this proposition is

particularly true here because Credit Suisse First Boston Corporation LLC and Donaldson, Lufkin & Jenrette Securities Corporation "were separate and competing entities with knowledge independent from each other" up until the merger was announced in August 2000. #1594 at 23-24.

The Court first observes that 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 is recognized by the Second Circuit "when the facts are exclusively within the defendant's knowledge," especially where "'defendants are insiders or affiliates participating in the statement at issue,'" as Lead Plaintiff contends is the case with the Credit Suisse affiliates here. *Bre-X Minerals*, 57 F. Supp. 2d at 427-28, *quoting In re Health Management Inc. Sec. Litig.*, 970 F. Supp. 192, 208 (E.D.N.Y. 1997). Lead Plaintiff urges that "the joinder of the CSFB Defendants by merger during the Class Period, and the number of different CSFB entities all working at the direction of the parent pursuant to a maze of corporate interconnections, in addition to the sheer complexity of the Enron scheme and its thousands of affiliates and related entities, cautions against a hyper-technical application of the particularity requirements." #1574 at 73. This Court agrees, 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.

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.

In *In re American Bank Note Holographics, Inc. Sec. Litig.*, 93 F. Supp. 2d 424 (S.D.N.Y. 2000), the district court also referenced the rule that "a subsidiary's fraud cannot be 'automatically' imputed to its corporate parent," but noted that where factual allegations [such as about interlocking financial, managerial and business relationships between parent and subsidiary] are sufficient to make a claim for participation in the fraudulent scheme, a corporate parent may be liable." *Id.* at 443-444. The *American Bank Note Holographics* court cited *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 142 (S.D.N.Y. 1999), in which Judge Brieant "sustained plaintiffs' complaint against all of the defendants, even those 'who did not directly make the fraudulent statements,' but 'had knowledge of the fraud and assisted in its preparation.'" *Id.* at 444.

Lead Plaintiff has an explanation for its "lumping together" of the three Credit Suisse Defendants. Among the totality of circumstances that this Court cited in denying Credit Suisse First Boston's first motion to dismiss (#1194 at 169-75), the Court wrote,

> The complaint charges that a group of ten bankers from Credit Suisse First Boston, headed by Laurence Nath, created some of the illicit SPEs, a process dubbed "structured products," including Marlin, Firefly, Mariner, Osprey, Whitewing, and the Raptors. Moreover Credit Suisse First Boston helped Enron sell assets at inflated prices, even though Enron could never have sold them at such prices in arm's-length transactions for profit, and thereby created sham profits and concealed massive debt. Lead Plaintiff alleges that Laurence Nath and Credit Suisse First Boston worked closely with Vinson & Elkins and Arthur Andersen to create and document these SPEs and transactions. When an asset was sold to one of the SPEs as a quick-fix solution to remove that asset from Enron's balance sheet, it was referred to as "monetising" the asset. Laurence Nath would go to Houston for a week or two, meet with a group from Enron's treasury and global finance departments ("Fastow's field marshals"), including Jeff McMahon or Ben Glisan (successive treasurers of Enron), and create a solution in order to doctor the Enron books. According to the complaint, most of the vehicles created in this manner by Nath shared the same unusual feature: the SPEs held Enron stock to reassure lenders and secure an investment grade rating, but there were set "trigger points," or prices between $83-$19 per share, at which the stock's declining value would require Enron to put more shares into the entity or even force liquidation if Enron's credit rating was downgraded. At that point the debt of the SPEs became recourse to Enron. A knowledgeable banker stated, "Taken in combination, these partnerships clearly posed a material risk for the company." Complaint at 369. An Enron insider remarked, "There's no question that senior people at CFSB knew

> what was going on and that it was a house of cards." *Id.* One individual who attended stated that the triggers were discussed by senior Enron executives and Credit Suisse First Boston bankers at a meeting in July 2001, when Enron's stock had fallen into the $40s. It was reported that the bankers remarked, "If this thing hits the $20s, you better run for the hills," and "There was no question that they knew exactly what lay inside the structures, when the triggers went off--everything. You could almost say they knew more about the company than people in Enron did." *Id.* at 369-70.

#1194 at 172-74. Lead Plaintiff maintains that the alleged admissions by the bankers occurred after the merger and the scienter is attributable to all of the Credit Suisse Defendants.

In its earlier ruling that Lead Plaintiff had stated a claim against Credit Suisse First Boston based on numerous allegations (#1194 at 284-90), the Court noted particularly, "Not only does such specific involvement [of Credit Suisse First Boston] in the scheme give rise to a strong inference of scienter, but the alleged acts of Nath and his team would constitute primary violations of the statute." Lead Plaintiff explains that Nath and his team worked for all three Credit Suisse Defendants, first as employees of Donaldson, Lufkin & Jenrette Securities Corporation (now Pershing LLC) and its parent company Donaldson, Lufkin & Jenrette Inc. ("DLJ Parent"), and then upon the merger, they became employees of Credit Suisse First Boston Corporation under Credit Suisse First Boston (USA) (f/k/a DLJ Parent), all during the Class Period. The merger "folded [these entities] into the same corporate structure," and thus "the scienter of Mr. Nath and his 'leagues" is attributable to all, and all have now been named in

the Amended Consolidated Complaint. Lead Plaintiff has also alleged that "DLJ Parent"/Credit Suisse First Boston (USA) acted through its controlled subsidiaries in furtherance of the Ponzi scheme , as did "DLJ Parent" through Donaldson, Lufkin & Jenrette Securities Corporation before the merger. #1388 at 120-22, ¶ 102.

Lead Plaintiff also contends that statements in Credit Suisse First Boston Corporation's answer (#1207) are admissions revealing the involvement of all three entities in the Ponzi scheme. Although Defendants object that the burden of pleading is on Lead Plaintiff and that their answer should not shift that burden, these statements are judicial admissions[4] which the Court may consider as some of the total circumstances from which it may find that a claim has been stated. In ¶ 42, Credit Suisse First Boston Corporation states that "upon information and belief in October 2000 NewPower conducted an initial public offering of

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[4] "A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them. *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). The general rule is that "factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them." *Id.; White v. ARCO/POLYMERS, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983). A judicial admission must be made in the case in which it is to be asserted. *Heritage Bank V. Redcom Laboratories, Inc.*, 250 F.3d 319, 329 (5th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001). While not viewed as evidence, the effect of a judicial admission is that it "withdraw[s] a fact from contention" and is "'is conclusive, unless the court allows it to be withdrawn.'" *Wyatt V. Hunt Plywood Co., Inc.*, 297 F.3d 405, 412 n.18 (5th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); *see also Bally's Louisiana, Inc.*, 244 F.3d at 477 ("'A judicial admission is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party.[citations omitted'"). Credit Suisse First Boston Corporation has not asked the Court to withdraw any of the statements cited by Lead Plaintiff.

NewPower common stock at $21 per share, admits that CFSB, DLJ, DLJdirect Inc., and CIBC and CitiGroup were among the underwriters . . . ." NewPower is one of the core entities of the Ponzi scheme targeted by Lead Plaintiff in both consolidated complaints. It also identifies Credit Suisse First Boston Corporation and Donaldson, Lufkin & Jenrette Securities Corporation (and other Credit Suisse entities not named as Defendants) as underwriters of a number of Enron securities offerings relating to various SPEs and entities allegedly used to commit the fraud, as well as continuing involvement with other banking Defendants charged in *Newby* scheme. It also identifies the "who, what, where, when and why" for allegations of regarding false analyst reports and prospectus/offering circulars. Finally, Lead Plaintiff provides copies two documents issued by Credit Suisse Defendants demonstrating that they refer to themselves collectively and hold themselves out as an integrated investment bank entity. #1575, Ex. 15 (Joint Press Release issued by Credit Suisse Group and Donaldson, Lufkin & Jenrette, Inc. on August 30, 2000 ("Upon completion of the transaction DLJ will integrated into Credit Suisse Boston")) and Ex. 16 (Credit Suisse Group Press Release Dated November 3, 2000 (With the exception of DLJ's "clearing business," "DLJ will become Credit Suisse First Boston for all other institutional businesses. . . . The integration of these businesses was accomplished very quickly and seamlessly.")).

Although Credit Suisse Defendants have charged Lead Plaintiff with group pleading, this Court observes that the judge-

created group pleading rule was applied to individuals, i.e., officers and occasionally directors, in securities fraud case; it allowed a plaintiff to allege that these individuals were part of a group that published a statement and that because of their positions in that group, there was a presumption that these individuals participated in the making of that statement. *See, e.g., Wool v. Tandem*, 818 F.3d 1433, 1440 (9th Cir. 1987)("In the case of corporate fraud where the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers."); *Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986)("[N]o specific connection between fraudulent representations in the Offering Memorandum and particular defendants is necessary where, as here, defendants are insider or affiliates participating the offer of the securities in question."); William O. Fisher, *Don't Call Me a Securities Law Groupie; The Rise and Possible Demise of the 'Group Pleading' Protocol in 10b-5 Cases*, 56 Bus. Law 991 (2001). Thus it is not applicable nor employed here, where Lead Plaintiff is not suing individual members of the Credit Suisse entities.

Moreover, Lead Plaintiff is dealing not only with multinational corporations composed of numerous interrelated subsidiaries and affiliates, but also, in essence, successor entities that continued involvement with Enron during the Class

Period.[5] Taking all the factors into consideration, as well as the other allegations not repeated in this order (including involvement with and investment in the LJM partnerships, the underwriting of a number of the Enron-related entities and loans, both disguised and otherwise, to sustain Enron projects that were used to defraud the public, false and misleading statements in registration statements, prospectuses and the analyst reports) as part of the totality of the circumstances, the Court finds that Lead Plaintiff has sufficiently stated a claim against the three Credit Suisse Defendants under § 10(b) and derivatively under § 20(a).

3. Standing for § 12(a)(2) Claims

As discussed in #1999 at 65-66, 72-74, Lead Plaintiff has standing to sue for the timely-filed § 12(a)(2) claim based on the July 12, 2001 offering of 6.31% Senior Secured Notes and 6.19% Senior Secured Notes, issued by Marlin Water Trust II and Marlin Water Capital Corp. II, and underwritten by Credit Suisse First Boston LLC. 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 the Osprey or Marlin notes from the Credit Suisse Defendants, the § 12(a)(2) and § 15 claims will be dismissed. #1999 at 10-12, 65-66.

3. Only Public Offerings are Sold Via A Prospectus

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[5] According to the complaint, DLJ Parent, the parent company of Donaldson, Lufkin & Jenrette, has morphed into Credit Suisse First Boston (USA), which is the holding company of Credit Suisse First Boston, while Donaldson Lufkin Jenrette Securities Corporation has become Pershing LLC.

As detailed in #2036 at 76-90, given Lead Plaintiff's allegations about the nature of the Foreign debt Securities offerings, whether the offerings are actually public or private for purposes of § 12(a)(2) liability, despite what the face of the offering memorandum may state, is a fact issue not properly resolved in the 12(b)(6) motion stage. It is Credit Suisse Defendants' burden to prove an affirmative defense of exemption from the registration requirements or that the Marlin Offerings were private.

4. Control Person Liability

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 Credit Suisse First Boston (USA) under § 20(a) and § 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, 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). Moreover control is a question of fact that "will not ordinarily be resolved summarily at the pleading stage." 2 T.L. Hazen, *Treatise on the Law of Securities Regulation* § 12.24(1)(4th ed. 2002). Discovery is necessary to flesh out the facts for the record before the issue can properly be resolved.

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 Credit Suisse First Boston (USA) under § 20(a) of the Exchange Act and/or under § 15 of the 1933 Act.

Accordingly, for the reasons stated, the Court

ORDERS that the Credit Suisse Defendants' motion to dismiss is GRANTED as to the 1933 Act claims based on the 1999 Osprey offerings only, but is otherwise DENIED.

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

MELINDA HARMON
UNITED STATES DISTRICT JUDGE