

MAY 22 2003

Michael N. Milby, Clerk

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

In Re Enron Corporation	§	
Securities, Derivative &	§	MDL-1446
"ERISA Litigation	§	
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THIS DOCUMENT RELATES TO:	§	
	§	
All Cases	§	
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MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	CIVIL ACTION NO. H-01-3624
	§	CONSOLIDATED CASES
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants	§	
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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

Pending before the Court *inter alia* are motions for summary judgment filed by Defendant Bank of America (instrument #1362) and Defendant Canadian Imperial Bank of Commerce ("CIBC") (#1357), on the grounds that they are not proper parties to this litigation.¹

¹ After the Court's resolution of Defendants' motions to dismiss, Lead Plaintiff's claim against Bank of America under § 11 of the Securities Act of 1933, based on a May 1999 offering of 7.375% Notes, and its claims against CIBC under § 11 of the 1933 Act and § 10(b) of the Securities Exchange Act of 1934 remain

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The consolidated complaint defined both Defendants as encompassing the relevant subsidiaries that they now claim are the real parties in interest and thus the proper defendants (Bank of America Securities LLC; and CIBC Capital Corporation, CIBC Oppenheimer Corporation, and CIBC World Markets Corporation). Lead Plaintiff raises several legal theories for imposing liability against Bank of America, CIBC, and these subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment, and do not require piercing the corporate veil: control person liability under § 15 of the 1933 Act and § 20(a) of the 1934 Act; enterprise liability; and common-law agency principles). Lead Plaintiff also underlines a number of admissions by these Defendants and presents some evidence, both of which raise issues of fact about the control exerted by the parent company over the subsidiaries. Furthermore, Lead Plaintiff emphasizes its minimal opportunity to conduct discovery thus far in order to challenge these motions for summary judgment and its entitlement to reasonable discovery before being forced to respond to the motions. It cites as relevant authority *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002) ("Summary judgment assumes some discovery"); *FDIC v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993) ("Summary judgment is appropriate if, after discovery, there is no genuine dispute over any material fact."), *cert. denied*, 512

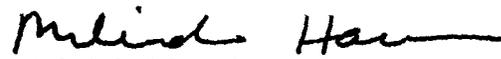
pending.

U.S. 1219 (1994); *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) ("Rule 56 'mandates the entry of summary judgment, after adequate time for discovery'"); *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986) (summary judgment may be appropriate "as long as the plaintiff has had a full opportunity to conduct discovery"). Should the Court decide that Lead Plaintiff fails to demonstrate genuine issues of material fact about the named Defendants' liability to preclude summary judgment, Lead Plaintiff requests the Court deny the motions as premature under Fed. R. Civ. P. 56(f).

The Court finds that Lead Plaintiff has made persuasive arguments for denial of the motions for summary judgment at this stage of the litigation. Accordingly, the Court

ORDERS that Bank of America's and CIBC's motions for summary judgment (# 1362 and 1357) are DENIED without prejudice. After discovery, should the evidence demonstrate that such a course is appropriate, Defendants may file amended motions for summary judgment.

SIGNED at Houston, Texas, this 21st day of May, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE