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Southern District of Texas
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Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)** § § CLASS ACTION
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs ENRON CORP., 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.	§ § § § § § § § § § § §

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f)

1399

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I. Introduction

The motion for summary judgment filed by defendant Canadian Imperial Bank of Commerce ("CIBC") seeks dismissal on the basis that a reasonable jury could only conclude this case is one of mistaken identity. CIBC's Statement of Undisputed Facts and supporting affidavits largely serve a single purpose, to identify the CIBC subsidiaries involved in the transactions underlying Lead Plaintiff's claims. Simultaneously, CIBC admits facts demonstrating that CIBC owns and controls its subsidiaries, notwithstanding CIBC's assertion those subsidiaries maintain some corporate formalities. According to CIBC, a jury could now only conclude CIBC is not liable because the only reasonable inference to draw from CIBC's identification of its subsidiaries is that CIBC did not participate in the scheme or otherwise violate securities laws

But CIBC's admissions and its "undisputed facts" fail to demonstrate the absence of any genuine issue justifying dismissal, and significant contradictory inferences may be drawn from the evidence. Indeed, a reasonable jury could easily draw a contradictory inference from the evidence CIBC claims justifies dismissal, namely that CIBC extensively participated in the Enron scheme or otherwise violated securities laws through CIBC's controlled entities. The breadth of CIBC entities involved in the transactions underlying Lead Plaintiff's allegations is ***not*** a coincidence. Notably, CIBC had not submitted even an iota of evidence explaining how or why CIBC's entities engaged in the transactions alleged. However, without more evidence, for example, explaining how or why CIBC – CIBC Inc. – CIBC World Markets Corp. – CIBC Capital Corp. – CIBC World Markets Corp. – CIBC World Markets plc – CIBC Oppenheimer Corp. – and CIBC Wood Gundy – engaged in the relevant transactions, CIBC cannot controvert its liability. And, to the extent CIBC does this, it will bear consequences because certain of CIBC's subsidiaries are now named defendants in this action.

And if in fact CIBC's contention is (as CIBC suggests) that its knowledge was entirely innocent or that this is one big coincidence, CIBC must explain that to a jury – because such a notion certainly is not supported and does not justify a dismissal by summary judgment. This is especially so in light of the evidence clearly demonstrating CIBC's involvement in the Hawaii 125-0 and Project Braveheart sham transactions, including damning e-mails sent by CIBC's investment bankers.

See infra §III.B. Although it admits that in addition to CIBC, CIBC Inc. was involved in these transactions, for the most part, CIBC does not claim a case of mistaken identity concerning Hawaii 125-0 and Braveheart. What CIBC says, though, is that it had only "innocuous" involvement with those sham transactions. This is ***not*** demonstrated by the evidence, in particular, CIBC's internal communications and the intrinsic fraudulent structure of Hawaii 125-0 and Braveheart.

To reach its incredible conclusions, CIBC ignores other obvious points as well. Resolving a scheme actor's liability on a motion for summary judgment is generally inappropriate because of the broad scope of liability proscribed by §10(b) and Rule 10b-5. *See infra* at 6. In addition to being potentially subject to primary liability for securities law violations, CIBC is also potentially subject to secondary liability for being a control person under federal securities laws. *See infra* §IV. Veil piercing is irrelevant to this case because CIBC's "corporate veil" need not be "pierced" in order for CIBC to be liable under the securities laws. *See infra* §VI. CIBC also faces liability under agency and enterprise legal theories. *See infra* §§III.C., V.

CIBC does not meet the substantial burden upon it in seeking summary judgment, and it should not. Issues of intent, control, agency, and veil-piercing are fact intensive and normally most appropriate for a jury rather than determination by summary judgment. *See infra* §II, *passim*. CIBC's Motion should be denied for failing to demonstrate the absence of a genuine issue of material fact. However, if this Court decides that CIBC's Motion is, instead, premature, CIBC's Motion should be denied or continued pursuant to Rule 56(f). While there is an unprecedented amount of publicly-known and counsel-investigated evidence in this case, CIBC's Motion was filed days after this Court lifted the discovery stay imposed by the PSLRA. Lead Plaintiff has submitted with this Opposition an affidavit which meets the standards of Rule 56(f) and alternatively requests denial or continuance pursuant to Rule 56(f), should it be necessary. *See infra* §VII.

For all the reasons stated, Lead Plaintiff respectfully requests that the Court deny CIBC's Motion for summary judgment.

II. Rule 56(c) Legal Standards

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only when "'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment

as a matter of law.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992) (citation omitted).[1] To support a motion for summary judgment, "the moving party [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Not only "must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them " *Donahue v. Windsor Locks Bd.*, 834 F.2d 54, 57 (2d Cir. 1987); *accord Anderson*, 477 U.S. at 254-55.[2] Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1334 (9th Cir. 1980).

Movant "bears a ***substantial*** burden in showing that it is entitled to summary judgment." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 (1992). A defendant meets that burden only "when he '***conclusively show[s]*** that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them.'" *Id.* at 2083 n.14. A district court "is not entitled to weigh the evidence and resolve disputed underlying factual issues." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). When "'direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.'" *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). The non-movants' "version of any disputed issue of fact thus is presumed correct." *Eastman Kodak*, 504 U.S. at 456.

CIBC's burden is also higher than ordinary because of the issues that it seeks to resolve. As the Fifth Circuit held in *Guillory v. Domtar Indus.*, 95 F.3d 1320, 1326 (5th Cir. 1996), "summary

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[1] *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, as elsewhere, emphasis is added and citations and footnotes are omitted unless otherwise noted.

[2] "[W]hen intent is at issue, the court should be cautious in granting summary judgment. In such a case, the moving party bears a heavier burden of showing that there exists no genuine issue of material fact." *Admiralty Fund v. Jones*, 677 F.2d 1289, 1295 (9th Cir. 1982).

judgment is rarely proper when an issue of ***intent*** is involved."[3] Resolving a defendant's liability for participation in a ***scheme*** is usually inappropriate and rare, and should instead depend on the facts "developed at trial." *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir. 1971). *See also infra* at 6. The issue of ***control*** is also a fact-intensive question more appropriate for a jury rather than for determination on a motion for summary judgment. *See, e.g., In re Executive Telecard, Ltd. Sec. Litig.*, 913 F. Supp. 280, 286 (S.D.N.Y. 1996); *infra* at 13. The question of ***agency*** is inherently fact specific and ordinarily an issue for the jury. *See, e.g., TransAmerica Leasing, Inc. v. La Republica de Venez.*, 200 F.3d 843, 849 (D.C. Cir. 2000); *infra* at 15. Similarly, ***veil piercing*** is "heavily fact-specific" and generally must be submitted to a jury. *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985). *See also infra* at 16.

III. The Evidence Will Demonstrate CIBC Is Subject to Primary Liability for Securities Law Violations

CIBC's Motion fails to appreciate the crux of the case pleaded against it and the other banks. As the Court's Orders have demonstrated, CIBC and other bank defendants are potentially subject to liability under the entire ambit of prohibitions defined by §10(b) and Rule 10b-5. Piercing the corporate veil simply is not relevant to whether CIBC is subject to primary or secondary liability under the securities laws. Even parsing CIBC into discrete units as CIBC would have the Court do, fails to rescue CIBC from liability. CIBC committed fraudulent acts through its organization, regardless of whether those acts were made in CIBC's name or in the name or entities owned and controlled by CIBC.

A. The Evidence Will Demonstrate CIBC Is Subject to Primary Liability for Fraudulent Acts CIBC Committed Through its Organization

In its Order entered December 20, 2002, this Court specifically held CIBC could be subject to primary liability under §10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, for participating in a course of business or a device, scheme or artifice that operated as a fraud. *See In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 577-94, 701-02 (S.D. Tex. 2002). In so ruling, this Court recognized that those who "'directed' or 'contrived'" fraudulent acts

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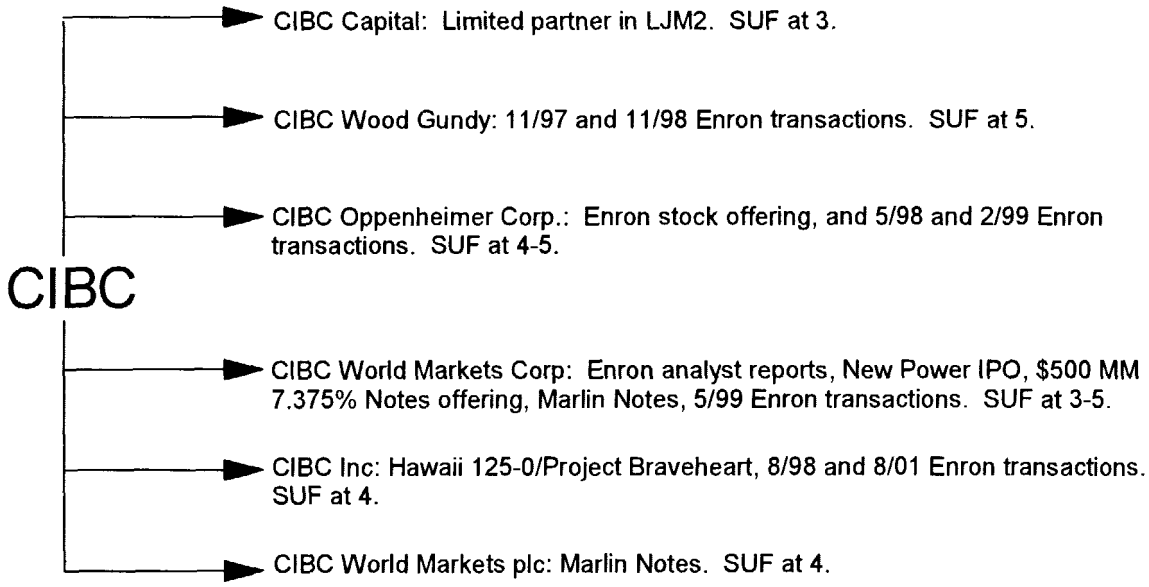
[3] *Accord EEOC v. Home Ins. Co.*, 672 F.2d 252, 257 (2d Cir. 1982) ("summary judgment is rarely appropriate where the moving party's state of mind is a material issue").

are liable under §10(b), and thoroughly discussed the relevant law. *Id.* at 579; *see also id.* at 577-94. CIBC claims that it could not have violated §10(b) because the subsidiaries and affiliates in its enterprise are distinct entities, and suggests that it is mere coincidence those entities engaged in the transactions that gave rise to Lead Plaintiff's claims.

The evidence will demonstrate this is ***not*** the case. CIBC's admissions and its "undisputed facts" fail to show the absence of any genuine issue as to its ownership and control of its entities. *See* Motion at 2, 6, 12 (admitting 100% ownership of voting shares, overlap in officers and employees, and natural integration); *infra* at 12. Moreover, contradictory inferences may be drawn from CIBC's undisputed facts which show the breadth of CIBC's entities in the Enron fraud. *See* Statement of Undisputed Facts ("SUF") at 3-5. CIBC says that because its different named entities had various roles alleged by Lead Plaintiff, a jury could thus only find CIBC did not participate in the fraud. But a reasonable jury could easily draw a contradictory inference from those facts, namely that CIBC extensively participated in the Enron fraud or otherwise violated securities laws through those entities.



Based on the present "undisputed facts," it is up to a jury to decide if the broad involvement of CIBC's entities is a coincidence or ***participation*** by CIBC. Indeed, CIBC offers no evidence whatsoever to explain ***how*** or ***why*** its entities got involved in the Enron fraud. CIBC should not be entitled to summary judgment on any of Lead Plaintiff's claims until, at a minimum, the evidence

answering those questions demonstrates there is no genuine issue of material fact. But the evidence will not lead to that result.

In addition, resolving a scheme actor's liability on a motion for summary judgment is particularly inappropriate and rare because of the breadth of conduct proscribed by §10(b) and Rule 10b-5, which does not "specify what forms of deception are prohibited; rather, all fraudulent schemes in connection with the purchase and sale of securities are prohibited." *Richardson*, 451 F.2d at 40. Because participation in a scheme is such a highly factual inquiry, federal appellate courts have held that whether a defendant's conduct amounts to a manipulative or deceptive act "depends upon the facts and circumstances developed at trial." *Id.* (citing *A.T. Brod. & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967)). CIBC clearly does ***not*** present the unusual circumstance where summary adjudication of scheme liability could be warranted.

B. The Evidence Will Demonstrate CIBC Is Subject to Primary Liability for the Hawaii 125-0 and Project Braveheart Sham Transactions

Besides failing to refute its liability as stated above, CIBC fails to show there is no genuine issue of fact concerning its liability arising out of the Hawaii 125-0 and Project Braveheart sham transactions. What CIBC claims is that "[t]o the extent that the alleged Enron dealings involved CIBC entities in any meaningful way, it was CIBC subsidiaries." Motion at 8. But CIBC's Statement of Undisputed Facts belies its claim, and falls well short of to resolving Lead Plaintiff's detailed allegations as to Hawaii 125-0 and Project Braveheart. *See, e.g.*, ¶¶715-734.

Indeed, CIBC acknowledges its involvement in Hawaii 125-0 but does not demonstrate such involvement was "innocuous" as it claims. *See* Motion at 8 & n.5. Moreover, CIBC admits that CIBC Inc. owned one of the Hawaii 125-0 entities. *See* SUF at 4. The Court identified Lead Plaintiff's allegations regarding Hawaii 125-0 (among other things) as a basis for denying CIBC's motion to dismiss:

> Enron, Vinson & Elkins, Kirkland & Ellis, Arthur Andersen, and CIBC created an SPE designated Hawaii 125-0. CIBC and several other Enron banks ... made a sham "loan" of $125 million to Hawaii 125-0, but actually Enron gave the banks a secret "total return swap" guarantee that protected them from any loss.

Enron, 235 F. Supp. 2d at 626. Despite this and the obvious intrinsic fraudulent nature of Hawaii 125-0 and Project Braveheart, CIBC fails to explain why it should not be liable. CIBC does not (and

cannot) state that it unknowingly participated with CIBC Inc. in the Hawaii 125-0 sham transactions. Instead, CIBC completely ignores allegations regarding its sham transactions alleged in the Consolidated Complaint and seeks to shift all blame to its controlled subsidiaries.

More damaging details regarding CIBC's conduct have recently been revealed. In the April 29, 2003 superseding indictment brought by the United States Government against numerous Enron executives, the fraudulent nature of CIBC's transactions and CIBC's knowledge of the scheme is further evidenced. *See* Ex. 1.

According to the indictment, CIBC was involved in the series of bogus transactions known as Project Braveheart, as alleged in the Consolidated Complaint. Braveheart involved the Hawaii 125-0 structure which was "created and funded by the Canadian Imperial Bank of Commerce (CIBC)." Ex. 1 at 8. Enron recognized approximately $111 million of the $115 million it received from CIBC through Braveheart as revenue in the fourth quarter of 2000 and the first quarter of 2001. Earnings from the Braveheart transaction could only be recognized if certain accounting requirements were met. Among the principal requirements was that the Hawaii 125-0 trust's capital structure had to include at least a 3% at-risk equity investment by CIBC. But CIBC and Enron structured Braveheart to give the appearance that there was such an "at-risk" investment when there was ***not***. In particular, the indictment charges that Enron executives Howard, Krautz and others "'sold' an interest in the joint venture to CIBC even though Howard and others knew that Enron had promised CIBC that it would not lose money on its Hawaii 125-0 transactions." Ex. 1 at 10.

The complaint filed by the Securities and Exchange Commission against Howard and Krautz further expands on CIBC's involvement. According to the complaint, Braveheart was a fraudulent transaction because it evaded accounting requirements through a secret oral guarantee by Enron that CIBC would not lose money on any of its large number of Hawaii 125-0 transactions with Enron. The SEC recounted the following evidence.

On June 21, 2001, a CIBC banker sent an e-mail to colleagues asking about the bank's risk exposure from the Hawaii 125-0 transactions. Two CIBC bankers responded to that query. One banker sent an e-mail stating that Enron's Chief Financial Officer, Andrew Fastow, had "'given his strongest possible assurance that the risk won't be realized.'" Ex. 2, ¶28. The e-mail noted that when

the value of one particular asset sold to Hawaii 125-0 became impaired, Enron returned the money from the transaction to CIBC. The second banker replied:

> "Unfortunately, there can be no ***documented*** means of guaranteeing the equity or any shortfall or the sale accounting treatment is affected. We have a general understanding with Enron that any equity loss is a very bad thing. They have been told that if we sustain any equity losses, we will no longer do these types of transactions with them. Not many other institutions are willing to take such risks, so it is important to Enron to keep us happy.... We have done many 'trust me' equity transactions over the last 3 years and have sustained no losses to date. If there has been a case where the value of the asset has been in question, Enron has repurchased the asset at par plus our accrued yield."

Id. (emphasis in original). And internally at Enron, a "CIBC Exit Strategy" had been documented, whereby Enron would have to replace CIBC with "true" outside equity, as opposed to the sham Hawaii 125-0 structure CIBC and Enron created. *Id.*

Accordingly, CIBC does not (and cannot) demonstrate there is no genuine issue of fact as to its culpable involvement in the Enron fraud.

C. CIBC Is Liable as an Enterprise

CIBC, as each of the bank defendants in this case, is attempting to exploit the multiple entities in its organization. Its finger pointing resembles a "shell game," with CIBC's scienter under the shell. This is no wonder, for CIBC, like each of the banks, organized its enterprise with a view to reducing potential liability under the securities laws. But, as Judge Posner stated in *Papa v. Katy Indus.*, 166 F.3d 937, 941 (7th Cir. 1999), "[t]he privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties."

Treating a holding company and its affiliated subsidiaries as one entity for the purposes of assessing liability consistent with the intent of Congress, sometimes referred to as "enterprise liability," is well-accepted. *See, e.g.*, *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 763 (5th Cir. 1997) (noting that in "civil rights actions, 'superficially distinct entities may be exposed to liability upon a finding they represent a single, integrated enterprise'"). Indeed, the Supreme Court recognized the validity of enterprise liability when it refused to acknowledge the legal separation of a ***bank holding company and its subsidiary*** even though the separate legal entities were "organized in good faith and [were] not a sham." *Anderson v. Abbott*, 321 U.S. 349, 356 (1944) The Court went on to state:

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Justice Cardozo stated that a surrender of that principle of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld." The cases of fraud make up part of that exception. But they do not exhaust it.... ***It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. The Court stated in Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Assn., that "the courts will not permit themselves to be blinded or deceived by mere forms or law" but will deal "with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." We are dealing here with a principle of liability which is concerned with realities not forms.***

Id. at 361-63.

The principles espoused by the Supreme Court in 1944 are very much effective today. As articulated by one esteemed commentator:

> In the last decade and one half, the Supreme Court has had to resolve, in a series of major cases, controversies presenting a fundamental jurisprudential choice between enterprise law and traditional corporate entity law. Enterprise law would determine the legal rights and obligations of the parties by focusing on the corporate group as a unit and traditional corporate entity law by treating the various constituent corporations as separate juridical entities, each with its separate rights and obligations.
>
> In each of these cases, the Court embraced enterprise principles firmly in order to implement the underlying objectives of the law in the area and rejected application of the traditional corporate doctrines .... In some of these cases, the Court accompanied its rejection of entity law by pointing out the lack of utility of "piercing the veil jurisprudence" in contributing a solution to the jurisprudential problems involved.

Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996). As made clear by Blumberg, enterprise liability is a crucial component of the laws governing the banking industry. "***American banking law, federal and state, is committed firmly to enterprise law.***" *Id.* Enterprise principles also "play a major role" in the federal securities laws, as manifested in the statutes providing for control-person liability *Id.*

While enterprise liability is mutually exclusive of control-person liability, the purpose and intent of the two are consistent. CIBC violated securities laws, regardless of whether it was in CIBC's name, as in the Hawaii 125-0 and Project Braveheart sham transactions, or in the name of its subsidiaries or affiliates. Lead Plaintiff respectfully submits that CIBC should not be allowed to

circumnavigate securities laws by hiding behind the maze of subsidiaries of affiliated entities that it engineered.

IV. The Evidence Will Demonstrate CIBC Is Subject to Control Person Liability for Federal Securities Law Violations Committed by its Subsidiaries and Affiliates

CIBC is not only subject to primary liability under the Federal Securities laws, but it is also subject to secondary liability under §20(a) of the 1934 Act and §15 of the 1933 Act for the securities violations of its subsidiaries and affiliates. Noticeably absent from CIBC's Motion for summary judgment is any reference to the claims Lead Plaintiff pleaded against CIBC under §20(a) of the 1934 Act and §15 of the 1933 Act. *See* ¶¶103, 715-734, 992-997, 1005-1008. However, these are claims which this Court upheld in its December 20, 2002 opinion. *Enron*, 235 F. Supp. 2d at 708 ("CIBC's motion to dismiss is DENIED").

Sections 15 and 20(a) are remedial in nature and should be construed liberally *See, e.g.*, *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 877, 880-81 (7th Cir. 1992) (cited favorably in *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *36 (S.D. Tex. Jun. 28, 2003)); *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967). "Although worded in different ways, the control person liability provisions of §15 of the 1933 Securities Act and §20(a) of the 1934 Exchange Act are interpreted the same way." *Enron*, 235 F. Supp. 2d at 594. Thus, to state a valid claim under §§15 or 20(a), a plaintiff need only allege: (i) a violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §§15 and 20(a). *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.17 (S.D. Tex. 2001).

This Court recently stated:

> In the absence of a statutory definition of "control," the SEC has defined the word as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ***ownership of voting securities, by contract, or otherwise***." 17 C.F.R. §240.12b-2(f), quoted in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Furthermore, the legislative history of the controlling person provision indicates control can be shown by ***ownership of stock, agency***, a lease or a ***contract***, and that the concept of control should be broadly construed with sufficient flexibility to cover many situations, not necessarily only those foreseen at the time of enactment.

Enron, 2003 U.S. Dist. LEXIS 1668, at *33.[4] Similarly:

> Section 20(a) could also allow plaintiffs to reach defendants that control wrongdoers through ***holding companies***, by family connections, ***or in other nonagency ways. Controlling shareholders could be reached in situations where piercing the corporate veil was not available*** .... In other words ... the controlling person liability provisions of the 1933 and 1934 Acts were aimed primarily at situations of control over firms (and others) by behind-the-scene actors. ***To repeat, enactment of the controlling provisions of the 1933 and 1934 Acts "was motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were 'really responsible' for violations of the securities laws***.

Id. at *44 n.22.

This Court has repeatedly observed that "the Fifth Circuit has rejected the requirement that a plaintiff must show that the controlling person actually participated in the underlying violation, and appears to insist that a plaintiff need only demonstrate that the controlling person possessed 'the power to control [the primary violator], [but] not the exercise of the power to control.'" *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41-*42 (citing 235 F. Supp. 2d at 594); *see also BMC Software*, 183 F. Supp. 2d at 869 n.17.[5] As this Court noted,

> control can be established by demonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ***ownership of voting securities***, by contract, ***business relationships, interlocking directors, family relationships, and the power to influence and control the activities of another***.

235 F. Supp. 2d at 598. Thus, courts will generally find control person liability if plaintiffs make a *prima facie* showing defendants had the abstract, indirect power, whether exercised or not, to

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[4]*See also* Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 Notre Dame L. Rev. 263, 314 (1997) (cited in *Enron*, 2003 U.S. Dist. LEXIS 1668, at *33, *65-*69). *See also* Dana M. Muir and Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is It Curtains for Veil Piercing?*, 1996 U. Ill. L. Rev. 1059, 1093 (1996) (noting "because of the direct liability of controlling persons under the [securities] statutes, courts generally do not need to decide whether to pierce the corporate veil .... Rather, those persons and entities who might be held accountable under a veil piercing analysis are instead held directly liable under the terms of the statutes").

[5]*See also Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993) (actual participation in the underlying §10(b) violations is not required; whether effective day-to-day control of the general operations and affairs of the company is necessary to impose controlling person liability is uncertain); *Enron*, 2003 U.S. Dist. LEXIS 1668, at *67 ("'[t]he decisional actors within formal organizational hierarchies with authority to ratify, manage and monitor are ***majority shareholders, boards of directors***, and executive officers'") (quoting Carson, *supra*, 72 Notre Dame L. Rev. at 281-83).

control a primary violator – and such power was possessed via business relationships, directorships, or even the power to "influence" the activities of another. *See Abbott*, 2 F.3d at 620; *BMC Software*, 183 F. Supp. 2d at 869 n.17; *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999).

Although admitting to possess the power to control its subsidiaries and affiliates, CIBC contends it "was not a participant in the years-long Enron 'scheme'" and therefore, is not a proper party to this action. Motion at 6. Similarly, CIBC repeatedly argues it can only be liable for the conduct of its subsidiaries if the corporate form may be ignored. *Id.* at 7-13. These arguments are meritless. *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (***under §20(a) "[c]ontrolling shareholders could be reached in situations where piercing the corporate veil was not available"***). There is more than enough evidence for a reasonable jury to conclude CIBC controls its subsidiaries.

CIBC has identified the subsidiaries involved in the transactions alleged by Lead Plaintiff. SUF at 3-5. CIBC admits it owns the subsidiaries which plaintiffs allege were in violation of §10(b) of the 1934 Act and §11 of the 1933 Act. *See* Motion at 2 ("***CIBC and its other affiliated companies own 100% of the voting shares of each subsidiary***."). Furthermore, CIBC admits that CIBC and its subsidiaries have close ties "such as through stock ownership" and "a certain overlap in officers and employees." Motion at 6. For example, the CEO of CIBC World Markets is the Vice Chair of CIBC. *See* Ex. 3. CIBC calls this "a natural integration" with its subsidiaries. Motion at 12. CIBC owns the significant trademarks and copyrights of its subsidiaries. *See* Ex. 4. CIBC consolidates its subsidiaries' balance sheets and other financial statements onto its financial statements. And CIBC describes its companies as an integrated enterprise with CIBC at the top. For example, CIBC states that CIBC World Markets is its "Investment banking arm." Ex. 5. CIBC refers to its subsidiaries as its "business lines," treats them as integral within its organization, and reports its own financial results based on those "business lines."[6]

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[6]*See for example,* Ex. 6 at 20 (CIBC acquisitions "have enabled CIBC to increase its Canadian full-service brokerage platform under the CIBC Wood Gundy name"); *Id.* at 23 (CIBC earnings down due, in part, to "lower revenue from the CIBC World Markets business line"); *Id.* at 29, 109 (referring to "business lines" as part of integrated whole rather than separate entities).

Even if this were not enough to demonstrate CIBC's control of its subsidiaries (it is), the issue of control could not be determined at this time. Control is a fact-intensive question appropriate for determination by a jury. *See, e.g., Executive Telecard*, 913 F. Supp. at 286 (issue of controlling person liability "is necessarily fact-intensive" and a question for a jury); *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 143 (S.D.N.Y. 1999) ("fact-intensive" question for a jury); *In re Paracelsus Corp.*, 6 F. Supp. 2d 626, 633 (S.D. Tex. 1998) (question of control "is generally a fact intensive question"); *Klapmeier v. Telecheck Int'l, Inc.*, 315 F. Supp. 1360, 1361 (D. Minn. 1970) ("complex fact question"); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1368 (S.D. Fla. 2001) (fact-intensive issue). The evidence demonstrates CIBC had the power to control its subsidiaries and the determination of control should now be left to the jury.

V. The Evidence Will Demonstrate CIBC Is Subject to Liability for Acts of its Agents

Also noticeably absent from CIBC's Motion is any attempt to address the issue of CIBC's liability based upon the fraudulent actions of its agents. Lead Plaintiff's Complaint clearly alleges CIBC is liable not only for the actions it performed directly but also for those actions performed by its subsidiaries acting as agents of the parent corporation – actions which were conducted at the direction of CIBC. *See* ¶¶103, 715-734, 992-997, 1005-1008. Fifth Circuit precedent leaves no ambiguity as to the viability of plaintiffs' theory of liability:

> ***[C]ommon law agency principles, including the doctrine of respondeat superior, remain viable in actions brought under the Securities Exchange Act and provide a means of imposing secondary liability for violations of the Act independent of §20(a).***
>
> * * *
>
> Limiting secondary liability under the 1934 Act to that liability provided by §20(a) would contradict the pervasive application of agency principles in nearly all other areas of the law.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111, 1118 (5th Cir. 1980); *see also Tranchina v. Howard, Weil, Labouisse, Friedrichs*, No. 95-2886, 1997 U.S. Dist. LEXIS 12361, at *14-*15 (E.D. La. Aug. 18, 1997) (acknowledging continued force of *respondeat superior* after *Central Bank*).

The simple fact that the principle-agent relationship alleged by Lead Plaintiff is that of a parent company and its wholly owned subsidiary does not diminish CIBC's potential liability. "***[T]he relationship between a corporation and its subsidiary is analyzed with the same agency principles that apply to natural persons or otherwise unrelated corporations***." *United States v. Tianello*, 860 F. Supp. 1521, 1525 (M.D. Fla. 1994); *see also Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Restatement (Second) of Agency* §14M (1958). Thus:

> It is an accepted principle of agency that the term "agent" includes both natural persons and corporations. Likewise, a "principal" may be either human or a corporation. Further, the terms "master" and "servant" denoting a particular kind of principal-agent relation can properly be applied to corporations notwithstanding the anthropomorphic sound of the titles. It follows that a corporation can be an agent for another corporation. It also follows that a corporation may be liable as a master for torts committed by its servants including torts committed by the servants of a corporation which is its servant....
>
> A special situation arises when two corporations have a permanent connection with each other through ownership by one of a controlling stock interest in the other or through ownership of a controlling interest in both corporations by one person or corporation. Where such a situation exists the stock control gives the parent a power to convert the relation into one of agency.

Reporters Notes to *Restatement (Second) of Agency* §14M (1958).

CIBC apparently suggests Lead Plaintiff's claims can only succeed upon a ruling to pierce the corporate veil. This is wrong, and agency theory is distinct from veil piercing.

> ***Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil.*** In the first instance, the claim against the parent is premised on the view that the subsidiary had authority to act, and was in fact acting, on the parent's behalf – that is, in the name of the parent.... In the latter situation, the putative plaintiff does not dispute that the underlying obligation belongs to the corporate subsidiary; however, he seeks to hold the parent liable on the theory that the parent fraudulently induced the subsidiary to incur the obligation.
>
> * * *
>
> [J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same. ***If such an agency arrangement is alleged, then the plaintiff should not have to also allege domination and intent to defraud for the claim to survive***. The parent-principal should not be allowed to escape liability simply because it owns stock in the subsidiary-agent. Rather, as in any agency case, the issue should be one of authority: did the subsidiary have authority, actual or apparent, to act on behalf of the parent?
>
> * * *
>
> [T]his rule will not undermine jealously safeguarded notions of corporate separateness. The theory behind any such agency claim is that the subsidiary's acts

were, in both form and substance, those of the parent. ***Thus, there is no veil to pierce – the parent is the only party in interest.***

Royal Indus. v. Kraft Foods, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996); *see also TransAmerica Leasing,* 200 F.3d at 849; *Expediters Int'l v. Direct Line Cargo Mgmt. Servs.*, 995 F. Supp. 468, 481 (D.N.J. 1998); *National Council on Compensation Ins. v. Hopkins*, No. 1:92-CV-082, 1995 U.S. Dist. LEXIS 21030, at *80 (E.D. Tenn. Dec. 19, 1995) ("The principal corporation can be held liable for the acts of its agent within the scope of the agent's authority. The agency theory is distinguishable from the usual 'piercing of the corporate veil' and 'alter-ego' doctrines.").

The question "how much control is required before parent and subsidiary may be deemed principal and agent ... defies resolution by 'mechanical formulae,' for the inquiry is inherently fact-specific" and, thus, warrants denial of CIBC's Motion. *TransAmerica Leasing*, 200 F.3d at 849; *see also National Council*, 1995 U.S. Dist. LEXIS 21030, at *80 ("ordinarily an issue of fact for the jury"). In any event, the demonstrated significant control that CIBC has over its subsidiaries is sufficient for a reasonable jury to conclude there is an agency relationship between CIBC and its investment bankers and analysts. *See supra* at 5, 7-8, 12.

VI. Veil Piercing Is Irrelevant to This Case, and, in Any Event, Premature at this Stage in the Litigation

CIBC asserts that it "cannot be held liable for the alleged wrongful acts of its independent subsidiaries" because there is not adequate evidence to create a genuine issue as to whether CIBC's "corporate veil" may be "pierced." Motion at 9-12. This is a red herring. As shown herein, CIBC has failed to refute that it can be subject to primary liability, for participating in the Enron fraud, and secondary liability, for the fraudulent acts of its subsidiaries and affiliates.

Even if veil piercing were relevant to CIBC's liability in this action, the cases CIBC cites do ***not*** support CIBC's position that the case against it must be dismissed. In *United States v. Bestfoods,* 524 U.S. 51, 62 (1998), the Supreme Court held that the "corporate veil" may be "pierced" when it is "misused" to avoid liability, as can be demonstrated here. In *Abbell Credit Corp. v. Bank of America Corp.*, No. 01-C-2227, 2002 WL 335320, at *4 (N.D. Ill. Mar. 1, 2002) and *Zishka v. American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 U.S. Dist. LEXIS 13300, at *13-*14 (N.D Tex. Sept. 13, 2000), plaintiffs had not argued or alleged facts to support the argument that corporate

formalities should be disregarded. Here there is an evidentiary basis to pierce CIBC's purported veil and Lead Plaintiff asserts piercing the veil would be appropriate if the issue were relevant to CIBC's liability.

CIBC does not (and cannot) cite any authority which states the "corporate veil" must be "pierced" in order for liability to attach to a violator of the securities laws. Even if this were a relevant issue, it would be premature for resolution now. As the Fifth Circuit held in *Jon-T Chem.*, 768 F.2d at 694, resolution of whether a parent corporation is responsible for acts of its subsidiaries is "heavily fact-specific." Specifically, "whether it is a defendant who seeks to preserve a corporate shield over him, or a plaintiff who is attempting to pierce the corporate veil, corporate disregard often raises genuine issues of material fact, thus making summary judgment inappropriate." *American Mgmt. Corp. v. Dunlap*, 784 F. Supp. 1245, 1248 (N.D. Miss. 1992).[7] The cases CIBC cites also support the proposition that veil piercing cannot occur before there has been a fully-developed factual record.[8]

VII. Alternatively, Lead Plaintiff Requests That the Court Deny or Continue CIBC's Motion, Pursuant to Rule 56(f)

CIBC's Motion should be denied for failing to demonstrate there is no genuine issue of material fact as to its liability. However, if this Court decides that CIBC's Motion is, instead, premature, CIBC's Motion should be denied or continued pursuant to Rule 56(f). The discovery stay in this action was lifted on April 23, 2003. *See* April 23, 2003 Memorandum and Order re Remaining Enron Insider Defendants. Only six days later, on April 29, 2003, defendant CIBC moved for summary judgment. However, "Summary judgment assumes ***some*** discovery." *Brown*

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[7]*See also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1129, 1133 (N.D. Ala. 1993) ("Given the fact-intensive nature of the veil-piercing analysis, the determination is typically one to be resolved at trial ...."), *vacated in part on other grounds*, 887 F. Supp. 1455 (N.D. Ala. 1995); *Carte Blanche PTE., Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908, 914 (S.D.N.Y. 1991) ("fact-intensive issue that generally must be submitted to the jury").

[8]*See, e.g., Mt. Dynamics, Inc. v. Sona Innovations, Inc.*, No. 02 CV 223634 SR, 2002 WL 1862520 (Ont. Sup. Ct. of Justice Sept. 30, 2002) (cross-examination, competing affidavits and testimony); *Robinson v. Daewoo Canada, Ltd.*, No. 95-CQ-60575, 2000 WL 1439274 (Ont. Sup. Ct. of Justice Sept. 28, 2000) (same); *Transamerica Life Ins. Co. v. Canada Life Assurance Co.*, 28 O.R. 3d 423 (Ont. Ct. of Justice 1996) ("extensive discovery, cross-examination or affidavits"); *Chill v. GE*, 101 F.3d 263, 272 (2d Cir. 1996) ("ample opportunity to collect the facts").

v. Miss. Valley State Univ., 311 F.3d 328, 333 (5th Cir. 2002); *see also F.D.I.C. 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."); *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*, 477 U.S. at 257 (summary judgment may be entered against a plaintiff "***as long as the plaintiff has had a full opportunity to conduct discovery***"). Here, assuming Lead Plaintiff were required to move forward with further evidence in response to CIBC's Motion, the discovery to date would clearly be inadequate for any purpose.

A. Rule 56(f) Legal Standards for Denial or Continuance

Rule 56(f) provides, in relevant part:

> Should it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

Federal Rule of Civil Procedure 56(f) is an alternative to opposing summary judgment by affidavit and "'is designed to safeguard against a premature or improvident grant of summary judgment.'" *Brown*, 311 F.3d at 333 n.5; *see also* 10A Charles Alan Wright et al., *Federal Practice and Procedure, Civil 3d* §2740 (1998). The Fifth Circuit has stated that Rule 56(f) "motions are generally favored, and should be liberally granted." 311 F.3d at 333 n.5. Furthermore, "[w]here the evidence that the non-moving party contends will create a genuine issue for trial is in the exclusive possession of the moving party, ""a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."""" *Id.*; *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (same); *see also Snook v. Trust Co.*, 859 F.2d 865, 871 (11th Cir. 1988) ("the interests of justice will sometimes ***require*** a district court to postpone its ruling on a motion for summary judgment").

In the Fifth Circuit, "[a] party opposing summary judgment under Rule 56(f) must demonstrate (1) why additional discovery is needed and (2) how the additional discovery will likely

create a genuine issue of material fact." *Brown*, 311 F.3d at 333 n.5; *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999). As set forth below and in the Affidavit of Helen J. Hodges herewith, Lead Plaintiff has satisfied the requirements of Rule 56(f) and alternatively requests denial or continuance of CIBC's Motion, if necessary.

B. Lead Plaintiff Has Satisfied the Requirements of Rule 56(f)

Given that discovery has now proceeded for only a matter of days, Lead Plaintiff's alternative request under Rule 56(f) is compelling. This not-so small fact is completely ignored by CIBC in its Motion as it repeatedly asserts "the undisputed facts" show CIBC did not engage in the conduct alleged to be in violation of the securities laws. *See* Motion *passim*. If Lead Plaintiff were required to respond to CIBC's Motion with further evidence, there is no question additional discovery would be needed, for no production whatsoever has been made by CIBC to plaintiffs. This is significant because the evidence that will further demonstrate CIBC's scienter and participation in the scheme is almost entirely within CIBC's control.

It would be inequitable for plaintiffs to be compelled to reveal an entire discovery plan at this early stage of the litigation. Nevertheless, should this Court decide to continue CIBC's Motion rather than deny it, Lead Plaintiff can identify the following discovery needs which are representative of an overall discovery plan that will be conducted to prove CIBC's liability.

First, discovery concerning CIBC's involvement in the Hawaii 125-0 and Project Braveheart sham transactions would further evidence CIBC's liability. CIBC admits it "did loan money to the Hawaii 125-0 Trusts" but contends that this action "does not suffice to name CIBC as a defendant in this case." Motion at 4 n.4. CIBC claims that "[s]uch an innocuous action" cannot implicate it in the "'Ponzi scheme.'" *Id.* at 8 n.5. This is not enough for a reasonable jury to decide in CIBC's favor. If it were, Lead Plaintiff should be given the opportunity to conduct the relevant discovery. Lead Plaintiff has served requests for production and interrogatories regarding this very issue. *See* Lead Plaintiffs' First Request for Production of Documents (No. 34. Documents concerning any business relationship between CIBC and Enron, any SPE or Trust; No. 36. Documents concerning transactions CIBC executed with Enron) and Interrogatories attached as Ex. C to the Hodges Aff (Interrogatory No. 2. Describe the business relationship between CIBC and Enron, any SPE or

Trust). Furthermore, after reviewing this discovery, Lead Plaintiff intends to take the depositions of the CIBC employees involved in and most knowledgeable about these loans. This includes the unnamed CIBC bankers whose e-mail messages indicate the loans from CIBC to Hawaii 125-0 were shams as detailed in the Consolidated Complaint and the SEC's criminal complaint. *See* Hodges Aff., ¶12. This discovery will further demonstrate triable issues as to CIBC's participation in the Enron fraud.

Second, Lead Plaintiff seeks discovery that would further evidence the other fraudulent acts CIBC directed and contrived in furtherance of the scheme, and its knowledge of the false statements made by its analysts and investment bankers, as alleged in the Consolidated Complaint. *See* ¶¶103, 715-734, 992-997, 1005-1008.[9] CIBC does no more than identify the names of its controlled subsidiaries and affiliates that (i) issued Enron analyst reports, (ii) underwrote Enron securities offerings, (iii) invested in LJM2, and (iv) participated with it in the Hawaii 125-0 and Project Braveheart sham transactions. Motion at 3-5. Apparently CIBC suggests this absolves it of scienter. According to CIBC, this entitles it to summary judgment, but such evidence does not establish the absence of a genuine issue under the theories of liability available to Lead Plaintiff. If Lead Plaintiff were required to present additional evidence, it should be entitled to relevant discovery. *See* Hodges Aff., ¶¶4-5, 8, 11-14 (*for example*, Document Request No. 52. Documents concerning research reports on Enron; No. 55. Communications between any CIBC investment banker and any research analyst concerning Enron; No. 62. "Pitch books" or other presentation documents which CIBC presented to Enron concerning marketing or execution of any transaction or service; No. 63. Documents concerning any offering of Enron securities, including due diligence files; No. 66. Documents concerning Enron broadband products, Braveheart or Video-on-Demand; No. 71. Documents concerning investment into Enron or LJM Partnerships of any CIBC Fund or CIBC investment vehicle or any CIBC executive or employee).

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[9]Specifically, Lead Plaintiff is entitled to discovery regarding CIBC and its now defendant subsidiaries regarding their involvement with LJM2, their underwriting of Enron offerings, their involvement with project Braveheart, Project Blackbird, their analyst reports regarding Enron, their involvement in the NewPower IPO, their participation in the Marlin Water Trust II and Marlin Water Capital Corp. II Notes, and their loans to Enron during the Class Period.

Third, Lead Plaintiff seeks discovery that would further evidence CIBC is a single organization composed of CIBC and the subsidiaries and affiliates it owns and controls. CIBC states that its subsidiaries "carefully maintain their own identities and businesses by, for instance, being fully capitalized, generating their own revenues, separately keeping their books and records, managing their day-to-day operations, and conducting their own board meetings." Motion at 6. But at the same time the evidence, including CIBC's admissions, demonstrates that CIBC owns its subsidiaries and their trademarks and copyrights, has stock voting control of its subsidiaries, has overlapping top officers and employees with its subsidiaries, and holds itself out as a single enterprise. *See supra* at 5, 7-8, 12. There should be no question that contradictory inferences may reasonably be drawn from the undisputed evidentiary facts here. However, if Lead Plaintiff were required to present additional evidence, it should be entitled to the relevant discovery. This discovery would further demonstrate (among other things) CIBC and its subsidiaries are one organization, CIBC's control, agency, and the basis for enterprise liability. *See* Hodges Aff., ¶¶4-5, 8, 14. For example, Lead Plaintiff is entitled to discovery regarding the corporate structures within CIBC's organization, including such matters as the common officers, executives and directors, contracts defining the business relationship between the entities, and management of responsibility for the Enron relationship. *See id.*, ¶¶4-5, 8, 14. Lead Plaintiff is also entitled to have these defendants produce all documents regarding the corporate structures of the allegedly separate organizations.

Finally, CIBC has submitted the affidavits of Valerie K. Pettipas, Lucia Martinez, Patricia Bourdon, Gary W. Brown, David Austin and Bruce Renihan to support its Motion. Lead Plaintiff should be entitled to depose those persons to determine if, concerning the transactions at issue, those persons have personal knowledge beyond simply the names of the CIBC entities that were involved.

VIII. Conclusion

Lead Plaintiff respectfully requests the Court deny CIBC's Motion because CIBC has not met its burden under Rule 56(c), or, alternatively, deny or continue CIBC's Motion pursuant to Rule 56(f).

DATED: May 19, 2003

Respectfully submitted,

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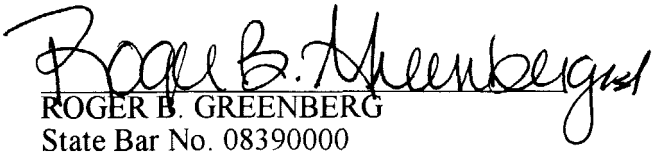

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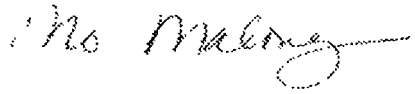
Washington Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served by sending a copy via electronic mail to serve@ESL3624.com on this 19th day of May, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 19th day of May, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004



Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk