

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION  
SECURITIES LITIGATION

Civil Action No. H-01-3624  
(Consolidated)

\_\_\_\_\_  
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 LAY, et al.,

Defendants.

**MOTION OF DEFENDANTS CIBC WORLD MARKETS CORP., f/k/a  
CIBC OPPENHEIMER CORP., AND CANADIAN IMPERIAL BANK OF COMMERCE  
TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT  
AND MEMORANDUM OF LAW IN SUPPORT**

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Dated: June 18, 2003

United States Courts  
Southern District of Texas  
FILED

JUN 18 2003

Michael N. Milby, Clerk

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant CIBC World Markets Corp., formerly known as CIBC Oppenheimer Corp.,<sup>1/</sup> moves to dismiss the claims made against CIBC World Markets Corp. and CIBC Oppenheimer Corp. (referred to herein as “CIBC World Markets”) in the First Amended Consolidated Complaint on the grounds that (i) all of plaintiffs’ claims are barred by the applicable statutes of limitations, (ii) plaintiffs have failed to plead whatever claim they seek to assert against CIBC World Markets under Section 10(b) of the 1934 Act with the particularity required by Rule 9(b) and the heightened pleading requirements imposed by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), and (iii) plaintiffs have failed to show that they have standing to pursue a claim under Section 12(a)(2) of the 1933 Act and have failed to plead the required elements of such a claim.<sup>2/</sup>

In addition, defendant Canadian Imperial Bank of Commerce (“CIBC”) moves to dismiss the claims made against it in the First Amended Consolidated Complaint on the grounds that (i) plaintiffs’ control person claims fail as a matter of law because plaintiffs have not properly pleaded a primary violation on the part of any entity that CIBC allegedly controlled and have not properly pleaded that CIBC controlled any alleged wrongdoer and (ii) plaintiffs’ primary liability claims against CIBC fail because plaintiffs have not pleaded any facts to show that CIBC was directly

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<sup>1/</sup> Plaintiffs have named CIBC World Markets Corp. and CIBC Oppenheimer Corp. as separate defendants even though CIBC filed an affidavit in support of its motion for summary judgment explaining that they are the same corporation. *See* Affidavit of Patricia Bourdon, filed on April 19, 2003. As Ms. Bourdon explained, CIBC Oppenheimer Corp. simply changed its name in 1999 to CIBC World Markets Corp.

<sup>2/</sup> Plaintiffs have also named as a defendant in their First Amended Complaint CIBC World Markets plc, which is a British entity, for its alleged participation in the sale of Marlin Water Trust securities outside the United States. However, plaintiffs have not yet served CIBC World Markets plc, which would resist entry into this lawsuit on the additional ground that the Court lacks personal jurisdiction over it. Because CIBC World Markets plc has not yet been served, this motion and memorandum is being filed only on behalf of CIBC World Markets and CIBC itself.

responsible for the conduct that plaintiffs now admit was attributable to other CIBC-related entities.<sup>3/</sup>

## INTRODUCTION

On April 8, 2002, plaintiffs filed a massive Consolidated Complaint naming a number of financial institutions, including CIBC, as defendants. In that complaint, plaintiffs made a conscious decision to name as defendants *only* the parent entity of each financial institution. Thus, plaintiffs sued only CIBC, even though they must have known that most of the statements and actions alleged in the Consolidated Complaint were *not* attributable to CIBC itself, but rather were statements made by or actions taken by subsidiaries or affiliates of CIBC. In CIBC's motion to dismiss, which was filed on May 8, 2002, we argued that the Consolidated Complaint was deficient because (among other things) it failed to identify which CIBC-related entity had done what and sought to hold CIBC liable for the actions of its subsidiaries or affiliates without providing any factual basis for disregarding their separate corporate existence.

In their response to the motion to dismiss, plaintiffs denied that they had "sued the wrong party" and argued that they had sufficiently alleged that the parent company was a direct participant in the alleged wrongdoing. Pl. Resp. at 3 n. 6. Although plaintiffs could have sought leave to add other CIBC-related entities as defendants in May 2002, they chose not to do so, apparently content with their tactical decision to sue only the parent company.

On May 14, 2003 — more than one year after plaintiffs clearly knew about their claims against CIBC World Markets — plaintiffs sought leave to file a First Amended Consolidated Complaint which, for the first time, names CIBC World Markets as a defendant. The First Amended

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<sup>3/</sup> Because the CIBC defendants and a number of other defendants have filed motions to dismiss the First Amended Complaint, the automatic stay of discovery imposed by the PSLRA has once again been triggered. See August 5, 2002 Order at 4 n.2 ("Once any motion to dismiss claims arising under the federal securities statutes is filed by any defendant, the provision of the [PSLRA] automatically staying 'all discovery' is triggered until the motions to dismiss are resolved").

Complaint contains virtually no information about CIBC World Markets, apart from identifying it as the source of the “CIBC” analyst reports quoted in the complaint and as the entity that provided certain underwriting or (when it was named CIBC Oppenheimer) certain banking services to Enron over a period of years. 1st Am. Compl. ¶ 103. Remarkably, the First Amended Complaint still fails to distinguish among the CIBC-related entities for most purposes, using the term “CIBC” to include not only the parent company, but also separate subsidiaries and affiliates, including “but not limited to” CIBC, Inc. and CIBC Capital Corp. — which are not named as defendants — as well as the newly-named CIBC-related entities. *Id.*

As demonstrated below, plaintiffs’ belated attempt to sue CIBC World Markets fails on a variety of grounds. First, plaintiffs waited for more than a year after they had actual knowledge of the claims they are now asserting against CIBC World Markets before seeking leave to add it as a defendant. As a result, those claims are clearly barred by the statutes of limitations applicable to both the 1933 and 1934 Act claims. Plaintiffs cannot escape the bar of the statute of limitations by arguing that the claims against CIBC World Markets “relate back” to the date when CIBC itself was sued. The relation-back doctrine may protect a party who mistakenly named the wrong entity as a defendant, but it is not available in a case like this, where plaintiffs made a considered *choice* not to sue certain parties.

Second, to the extent plaintiffs are seeking to assert a Section 10(b) claim against CIBC World Markets, that claim also fails because the new complaint is devoid of any allegations to support a claim that CIBC World Markets acted with scienter. In denying CIBC’s motion to dismiss, the Court concluded that plaintiffs had stated a claim against CIBC because of “CIBC’s” alleged involvement in three off-balance sheet entities or transactions. But plaintiffs do not allege that CIBC World Markets had any involvement in these entities or transactions. On the contrary, according to the complaint, the involvement of CIBC World Markets was limited to issuing analysts

reports, providing underwriting services to Enron or Enron-related entities, and providing unidentified “credit financing and loans.” 1st Am. Compl. ¶ 103(b) & (d). This Court has already ruled that these kinds of activities, standing alone, are not enough to give rise to the necessary strong inference of scienter. Accordingly, any Section 10(b) claim against CIBC World Markets also fails under Rule 9(b) and the heightened pleading requirements of the PSLRA.

Third, in their First Amended Complaint, plaintiffs have added for the first time a Section 12(a)(2) claim against CIBC World Markets based on the July 2001 sale of senior secured notes for the Marlin Water Trust II and Marlin Water Capital Corp. II. This claim is barred by the statute of limitations. But it also fails on a variety of other grounds — because there is no named plaintiff who claims to have purchased these securities, because plaintiffs do not allege that the securities were sold in a public offering, and because plaintiffs do not allege that they or any member of the class purchased these securities directly from CIBC World Markets or after having been solicited by CIBC World Markets.

The First Amended Complaint makes it clear that plaintiffs’ claims against the parent company (CIBC) should also be dismissed. Because plaintiffs have not stated a claim against CIBC World Markets (or CIBC World Markets plc), it necessarily follows that any control person claims asserted against CIBC based on alleged primary violations by its subsidiaries must be dismissed as well. In addition, plaintiffs have failed to meet their burden of pleading a control person relationship between CIBC and the alleged primary violators. Finally, plaintiffs’ belated admission that CIBC itself did not engage in much of the conduct alleged should require dismissal of all of plaintiffs’ claims against CIBC because plaintiffs have not alleged any facts to support their conclusory assertion (made with respect to all of the financial institutions) that the parent company acted through or directed the activities of its subsidiaries.

## STATEMENT OF FACTS

Despite its enormous size, the First Amended Complaint adds very little explanation with respect to the roles various CIBC-related entities supposedly played in the alleged scheme to assist Enron in defrauding investors. In ¶ 103 of the First Amended Complaint, plaintiffs offer the following allegations against the three CIBC-related entities they named, for the first time, as defendants:

“(b) CIBC World Markets Corp. — under the control of Canadian Imperial Bank of Commerce — acted (as is detailed further in the section of this Complaint entitled ‘Involvement of CIBC’) to further the defendants’ fraudulent scheme by repeatedly issuing throughout the Class Period false and misleading statements in its analyst research reports and by underwriting securities issued by Enron and Enron affiliates such as: the Marlin Water Trust II, Marlin Water Corp. II 7/12/01 6.31% and 6.197% Senior Secured Notes due 0/3; and Enron’s 5/19/99 7.375% Notes due 5/15/19.

(c) CIBC World Markets plc — under the control of Canadian Imperial Bank of Commerce — acted (as is detailed further in the section of this Complaint entitled ‘Involvement of CIBC’) to further the defendants’ fraudulent scheme by acting as the initial purchaser of the Marlin Water Trust II, Marlin Water Corp. II 7/12/01 6.31% and 6.197% Senior Secured Notes due 0/3.

(d) CIBC Oppenheimer Corp., successor of CIBC Wood Gundy plc (collectively, ‘CIBC Oppenheimer’) — under the control of Canadian Imperial Bank of Commerce — acted (as is detailed further in the section of this Complaint entitled ‘Involvement of CIBC’) to further the defendants’ fraudulent scheme by providing Enron credit financing and loans and by underwriting Enron’s 2/11/99 common stock offering.”

Although the complaint promises more specificity in the section entitled “Involvement of CIBC,” that section contains no additional description of the activities of any individual CIBC-related entity. Instead, the paragraphs of the First Amended Complaint devoted to the CIBC defendants (¶¶ 715-734) invariably use the collective term “CIBC” — which is defined in ¶ 102 to mean the parent company and all of its subsidiaries and affiliates — in alleging that “CIBC” engaged in a variety of allegedly unlawful conduct.

Indeed, even in Count I of the First Amended Complaint, which lists who is being sued under

the 1934 Act, plaintiffs have used the confusing term “CIBC” to identify the entity being sued as an alleged primary violator of Section 10(b). 1st Am. Compl. ¶ 993(d). Although plaintiffs then go on to allege that Canadian Imperial Bank of Commerce and the other financial institution defendants “controlled each of their respective subsidiaries and affiliates,” it is impossible to tell from the face of the complaint whether plaintiffs are claiming that the CIBC subsidiaries they have added as defendants violated Section 10(b) and whether they are still claiming that the parent company itself is a primary violator. It is also impossible to tell whose conduct the parent company is supposedly responsible for as a control person.

By contrast, Count III of the First Amended Complaint is clear as to which CIBC-related entity plaintiffs are suing. Plaintiffs’ original complaint identified “CIBC” as the underwriter of an issue of Enron notes that were offered on May 19, 1999 and purported to sue “CIBC” under Section 11 for alleged material misstatements in the registration statement for those notes. In their First Amended Complaint, plaintiffs concede (as CIBC argued in its motion to dismiss) that it was CIBC World Markets that was one of the underwriters of that issue — and *not* the parent company. Plaintiffs now seek to hold CIBC World Markets liable under Section 11 for alleged misstatements in that Registration Statement. They seek to hold CIBC liable only under a control person theory, under Section 15 of the 1933 Act. 1st Am. Compl. ¶ 1013.

Finally, in Count IV of the First Amended Complaint, plaintiffs assert, for the first time, a Section 12(a)(2) claim based on the sale of so-called “Foreign Notes,” which were sold in private offerings and then traded on the Luxembourg Exchange. Plaintiffs allege that CIBC World Markets and CIBC World Markets plc were initial purchasers of two issues of Marlin Water Trust Notes and seek to hold them liable under Section 12(a)(2) for alleged misstatements in a prospectus that was allegedly issued in connection with the private sales of those notes. Again, plaintiffs seek to hold CIBC liable for the sale of these notes only under a control person theory, under Section 15 of the

1933 Act. 1st Am. Compl. ¶ 1016.2.

## ARGUMENT

CIBC continues to believe that the Consolidated Complaint should have been dismissed for the reasons outlined in the briefs it filed more than a year ago. In particular, CIBC does not intend to waive its argument that it cannot be held primarily liable under Section 10(b) for its alleged participation in transactions that Enron allegedly used to misrepresent its earnings and financial condition. However, CIBC will not repeat those arguments here. As demonstrated below, the Court can and should dismiss plaintiffs' First Amended Complaint against CIBC World Markets and CIBC itself without reconsidering its previous ruling on the scope of the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

### **I. All Of Plaintiffs' Claims Against CIBC World Markets Are Time-Barred.**

Claims under the 1933 Act, including plaintiffs' claims under Section 11 (Count III) and under Section 12(a)(2) (Count IV), must be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." Section 13 of the 1933 Act, 15 U.S.C. § 77m. "In no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public." The same one- and three-year limitations periods apply to claims under Section 10(b). In *Lampf, Pleva, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991), the Supreme Court held that Section 10(b) claims must be brought within one year after discovery of the facts constituting the violation and within three years after the violation.<sup>4/</sup>

There can be no question but that plaintiffs' claims against CIBC World Markets are barred

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<sup>4/</sup> Although Sarbanes-Oxley extended the statute of limitations for Section 10(b) claims asserted in new proceedings filed after July 30, 2002, this Court has already ruled that the "amended limitations period does not apply to *Newby*." *In re Enron Secs., Derivative and ERISA Litig.*, 2003 U.S. Dist. LEXIS 3786 at \*49, n. 20 (S.D. Tex. Mar. 12, 2003).

under these statutes of limitations. Indeed, plaintiffs' Section 11 claim is doubly barred because it was not filed within a year of plaintiffs' discovery of their cause of action and because it was filed more than three years after the complaint itself alleges the securities were offered to the public — on May 19, 1999. The same analysis applies to whatever claims plaintiffs intend to assert based on CIBC Oppenheimer's underwriting of Enron's 2/11/99 offering of common stock. To the extent plaintiffs seek to base a Section 10(b) claim on any statements made in that Registration Statement, their claims would also be barred by the three-year statute of repose applicable to Section 10(b) claims.

All of plaintiffs' claims against CIBC World Markets are barred because they were not asserted until more than a year after discovery. Plaintiffs obviously knew about the claims they have now asserted against CIBC World Markets by April 8, 2002, when they sued the parent company.<sup>5/</sup> The original complaint identified CIBC World Markets and CIBC Oppenheimer as entities through which the parent company allegedly provided commercial and investment banking services. Consol. Compl. ¶ 103. Moreover, as we pointed out in our first motion to dismiss, the very documents plaintiffs had relied upon in filing their original complaint showed that the analysts' reports were issued by CIBC World Markets (rather than by the parent company) and that CIBC World Markets was also the underwriter on the one issue of securities for which plaintiffs sought to hold CIBC liable under Section 11. In any event, in our motion to dismiss, filed on May 8, 2002 — more than one year before the First Amended Complaint was filed — we filed copies of those very documents with the Court and argued that plaintiffs' claims against CIBC should be dismissed to the extent they were based on analysts' reports and underwriting activities because the parent company had not

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<sup>5/</sup> In fact, plaintiffs no doubt knew about their claims much earlier. How much earlier plaintiffs discovered their claims is irrelevant, however, since they clearly knew about them more than a year before May 14, 2003, when they filed their First Amended Complaint.

engaged in the activities in question.

If plaintiffs had wanted to sue CIBC World Markets, they could have and should have responded to our motion to dismiss by promptly seeking leave to amend their complaint to add CIBC World Markets as a defendant. But plaintiffs chose instead to defend their tactical decision to sue the parent company alone, arguing in response to our motion to dismiss that they had not “sued the wrong party” because the parent company was allegedly a direct participant in the claimed wrongdoing. Pl. Resp. to CIBC’s Motion to Dismiss at 3 n. 6.

We expect that plaintiffs may try to invoke the “relation back” doctrine of Rule 15(c) to treat CIBC World Markets as if it had been named on April 8, 2002, when plaintiffs sued the parent company. But this is not a situation where the “relation back” doctrine can properly apply. Rule 15(c) allows the filing of an amended complaint against a newly-named defendant to relate back to the original filing date of the complaint *only* when “the amendment *changes* the party or the naming of the party against whom a claim is asserted” (emphasis added), the newly-named defendant received notice of the institution of the action, *and* the newly-named defendant “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the [newly-named] party.” Here, plaintiffs have not *changed* the name or identity of the CIBC entity they have sued; instead, they have *added* new parties, while keeping CIBC itself as a defendant. Furthermore, there is no basis for any claim that CIBC was previously named as a result of “a mistake concerning the identity of the proper party.” Indeed, plaintiffs themselves vigorously argued that they had *not* sued the “wrong party” by naming only CIBC and not any other CIBC-related defendant. They can hardly claim now that they were mistaken as to the true identity of the appropriate CIBC-related defendant or defendants.

The case law confirms that Rule 15(c) means what it plainly says: plaintiffs who make a tactical decision not to sue certain parties cannot subsequently use Rule 15(c) to add new parties

after the statute of limitations has expired. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 n.1 (2000) (case did not fall within Rule 15(c) because plaintiff made no “mistake” in naming corporation as a defendant rather than its president and sole shareholder); *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (plaintiff must show that he would have named the defendant in question earlier but for a “mistake” with respect to his identity); *Powers v. Graff*, 148 F.3d 1223, 1227 (11<sup>th</sup> Cir. 1998) (no relation back where plaintiff “not only knew [the newly-added] defendants’ identity, but also knew of a claim against [them]” and “elected not to sue these individuals”); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993) (no relation back where “[t]here was no mistake as to identity, but rather a conscious choice of whom to sue”); *Wells v. HBO & Co.*, 813 F.Supp. 1561, 1567 (N.D. Ga. 1992) (“Even the most liberal interpretation of ‘mistake’ cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset”); *In re Integrated Resources Secs. Litig.*, 815 F.Supp. 620, 648 (S.D.N.Y. 1993) (“Adding control persons and other partners to the existing defendants is not a mistake of the kind Rule 15(c) contemplates”).

In this case, plaintiffs made a tactical decision not to sue any subsidiaries or affiliates of CIBC or any of the other financial institutions, but to argue instead that the parent company had knowingly orchestrated the activities of its subsidiaries and affiliates in order to further Enron’s scheme to defraud investors. Plaintiffs could have leveled their accusations instead at the entities that actually issued analysts’ statements or actually engaged in underwriting and could have sought to hold CIBC itself liable under a “control person” theory. But they chose not to do so. Having consciously allowed the statute of limitations on their claims against any entity other than the parent company to lapse, plaintiffs are now bound by the choice they made.

**II. Plaintiffs Have Failed To Plead Any Facts Giving Rise To A “Strong Inference” That CIBC World Markets Acted With Scier.**

As described above, it is not clear from plaintiffs’ complaint whether they even intend to sue CIBC World Markets under Section 10(b). But assuming that they do intend to assert a Section 10(b) claim against CIBC World Markets, that claim is not only barred by the statute of limitations but is also woefully inadequate from a pleading standpoint. The *only* conduct that CIBC World Markets is alleged to have engaged in consists of issuing analysts’ reports, providing underwriting services and (when it was named CIBC Oppenheimer) “providing Enron credit financing and loans.” Compl. ¶ 103. Plaintiffs do not allege that CIBC World Markets did anything else with respect to Enron.

In ruling on the motions to dismiss filed by the financial institution defendants, this Court has already held that this kind of activity is not enough to give rise to a strong inference of scier. Indeed, the Court dismissed plaintiffs’ claims against Lehman Brothers, Deutsche Bank and Bank of America precisely because the only activity alleged with respect to those defendants was issuing analysts’ reports, providing underwriting and commercial lending services to Enron, and participating as investors in LJM2. *In re Enron Corp. Secs., Derivative and ERISA Litig.*, 235 F.Supp.2d 549, 653-57, 703-04 (S.D. Tex. 2002). Even less is alleged in the First Amended Complaint with respect to CIBC World Markets. Accordingly, even if it were not time-barred, any Section 10(b) claim against CIBC World Markets would have to be dismissed for failure to meet the basic requirements of Rule 9(b) and failure to meet the heightened pleading requirements of the PSLRA.

**III. Plaintiffs’ Section 12(a)(2) Claim Should Be Dismissed On Multiple Grounds.**

Plaintiffs allege that CIBC World Markets was an initial purchaser, along with a number of other defendants, of Marlin Water Trust senior secured notes, which were allegedly sold to investors

and subsequently were publicly traded on the Luxembourg Exchange. As demonstrated in the briefs filed by J.P. Morgan/Chase & Co. and Bank of America, which CIBC World Markets joins and adopts, this claim fails for multiple reasons.<sup>6/</sup>

*First*, plaintiffs' Section 12(a)(2) claim — like all of plaintiffs' claims against CIBC World Markets — is barred by the one-year statute of limitations under Section 13 of the 1933 Act. Plaintiffs did not make any claim in the Consolidated Complaint filed on April 8, 2002 based on the sale of the Marlin Water Trust senior secured notes. Nevertheless, at that point in time they were clearly aware of all of the facts pleaded in their First Amended Complaint about those notes. Plaintiffs specifically alleged in the original Consolidated Complaint that a CIBC-related entity or entities had been initial purchasers of Marlin Water Trust senior secured notes. Consol. Compl. ¶ 720. And plaintiffs certainly knew enough about the information contained in or incorporated by reference into the relevant Offering Memoranda to make the very same claim they are making now — that the Enron SEC filings incorporated by reference were materially false or misleading. *See* 1st Am. Compl. ¶ 641.39-.41. Although plaintiffs' Consolidated Complaint shows that in April 2002 they had all of the information necessary to bring whatever claims they had a right to bring based on the sale of the Marlin Water Trust senior secured notes, they did not assert any such claims until May 2003 — more than a year after plaintiffs unquestionably knew about or “discovered” those claims.

*Second*, even if plaintiffs' claims were not time-barred, they fail as a matter of law, because there is not a single named plaintiff who claims ever to have purchased the senior secured notes in question. Plaintiffs speculate that some members of the broadly defined class they have proposed

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<sup>6/</sup> Plaintiffs also allege that CIBC World Markets plc was an initial purchaser of the Marlin Trust senior notes. As noted above, CIBC World Markets plc has not yet been served and, if served, will dispute plaintiffs' claim that the Court has personal jurisdiction over it.

may have purchased these securities. 1st Am. Compl. ¶ 1016.4. But it is hornbook law that plaintiffs cannot seek to represent a class of which they are not members. See *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995). Because the named plaintiffs lack standing to sue for any alleged violation of Section 12(a)(2) arising out of the sale of Marlin Water Trust senior secured notes, any claims based on those sales must be dismissed.

*Third*, even if plaintiffs could somehow avoid these pitfalls, the allegations of Count IV of the First Amended Complaint are hopelessly deficient. Plaintiffs do not allege that the securities in question were sold in a public offering even though, under the Supreme Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995), the rescission remedy provided by Section 12(a)(2) is available *only* when a prospectus is used to sell securities to the public. As the J.P. Morgan and Bank of America defendants point out in their briefs, the Offering Memoranda for the Marlin Water Trust senior notes expressly disclaimed any intention of serving as a "prospectus" for a public offering.

Furthermore, plaintiffs fail to allege that they themselves — or whoever Count IV is being brought on behalf of — purchased the notes directly from CIBC World Markets or did so after being solicited by CIBC World Markets. Under the Supreme Court's decision in *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988), a purchaser has no standing to sue a defendant under Section 12(a)(2) unless he can allege either that he purchased the securities in question directly from the defendant or that he did so after being directly solicited by the defendant. In a decision issued just last week, the Fifth Circuit held in *Rosenzweig v. Azurix Corp.*, 2003 U.S. App. LEXIS 11685 at \*41 (5th Cir. June 13, 2003), that a plaintiff in a Section 12(a)(2) case must allege either a direct sale by the defendant or "at a minimum, direct[] communicat[ion] with the" defendant who solicited the plaintiff to purchase the securities in question. In this case, there is no allegation of either a direct sale or a direct communication between CIBC World Markets and any plaintiff or, for that matter, any member of

the purported class. Accordingly, plaintiffs' Section 12(a)(2) claim would fail as a matter of law, even if it were not barred by the statute of limitations.

#### **IV. Plaintiffs' Claims Against CIBC Should Also Be Dismissed.**

It is well settled that a control person claim must be dismissed if the plaintiffs fail to properly plead a primary violation by the allegedly "controlled" person. See *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 362 n.123 (5th Cir. 2002); *In re Enron Corp. Secs., Derivative and ERISA Litig.*, 2003 U.S. Dist. LEXIS 3786 at \*171. For all of the reasons outlined above, plaintiffs have failed to state a claim for primary liability under Section 10(b), Section 11 or Section 12(a)(2) against CIBC World Markets. As a result, any control person claims against CIBC arising out of those alleged violations must also be dismissed. The same analysis applies to claims of primary violations against CIBC World Markets plc. All that entity is alleged to have done is to act as an initial purchaser of Marlin Water Trust senior notes. 1st Am. Compl. ¶ 103(c). For all of the reasons outlined above, that allegation is not enough to give rise to any claim of a primary violation of Section 10(b) or Section 12(a)(2) against CIBC World Markets plc.<sup>2/</sup> Accordingly, any control person claim based on CIBC's alleged control of CIBC World Markets plc should also be dismissed.

In any event, plaintiffs have not properly pleaded their control person claims. Plaintiffs allege only that CIBC (and all of the other financial institution defendants) "controlled each of their respective subsidiaries and affiliates." 1st Am. Compl. ¶¶ 995.1 (Section 20(a) claim), 1013 (Section 15 claim for alleged Section 11 violation), 1016.2 (Section 15 claim for alleged Section 12(a)(2) violation). These conclusory allegations are not enough to meet plaintiffs' burden of pleading the "control" relationship necessary to state a claim under either Section 20(a) or Section 15. As this Court observed in *Collmer v. U.S. Liquids, Inc.*, 2001 U.S. Dist. LEXIS 23518 at \*10

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<sup>2/</sup> Plaintiffs have not asserted a Section 11 claim against CIBC World Markets plc.

(S.D. Tex. Jan. 23, 2001), “[a]lthough whether a defendant is a control person is usually a question of fact, dismissal is appropriate where the plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person.” Here, the First Amended Complaint is devoid of any facts whatsoever concerning CIBC’s alleged control person liability. Indeed, plaintiffs do not even bother to allege whether the allegedly “controlled” entities were subsidiaries or affiliates, let alone to provide any facts to support their conclusory assertion of control.

Finally, plaintiffs’ allegations of primary liability against CIBC under Section 10(b) should also be dismissed because plaintiffs still have failed to identify what CIBC itself supposedly did and what actions were undertaken by the CIBC subsidiaries and affiliates identified in the First Amended Complaint. Under Rule 9(b) and the heightened pleading requirements of the PSLRA, plaintiffs cannot simply “lump[] all the defendants together” without “specify[ing] who was involved in what activity.” *Fishman v. Meinen*, 2003 U.S. Dist. LEXIS 2527 at \*15 (N.D. Ill. Feb. 21, 2003). Instead, where a plaintiff “alleges that a group of [defendants] is part of a fraudulent scheme, he or she must put each defendant on notice of his or her alleged role.” *Id.* Thus, as the court observed in *McNamara v. Bre-X Minerals Ltd.*, 57 F.Supp.2d 396, 427 (E.D. Tex. 1999), the “Plaintiffs should, when possible, avoid attributing actions to the . . . Defendants collectively. When not possible, the Plaintiffs should offer an explanation as to why that is the case.” *See also Kunzweiler v. Zero.net, Inc.*, 2002 U.S. Dist. LEXIS 12080 at \*48 (N.D. Tex. July 3, 2002) (“General allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another, do not meet the requirements of Rule 9(b)); *Collmer v. U.S. Liquids, Inc.*, 2001 U.S. Dist. LEXIS 23518 at \*100 (“agree[ing] with those district courts that find the group pleading doctrine is at odds with the PSLRA and has not survived the amendments”).

In denying CIBC’s first motion to dismiss, the Court assumed that the parent company itself

had engaged in all of the conduct attributed to “CIBC” in the complaint and stated that if CIBC wanted to challenge plaintiffs for naming the wrong party, it should submit evidence showing that another party was responsible for the action in question. *In re Enron Corp. Secs., Derivative and ERISA Litig.*, 235 F.Supp.2d at 648 n.85. In amending their complaint, however, plaintiffs have *admitted* that CIBC itself was not the source of analysts’ statements, was not an underwriter, and was not always the CIBC entity that provided credit financing and loans to Enron. At the very least, any claims for primary liability against CIBC based on those activities should be dismissed. Furthermore, it is now clear that plaintiffs have chosen to deliberately obscure the identities of the CIBC-related entities involved in the off-balance sheet transactions that form the core of plaintiffs’ case against CIBC. Without any specificity as to what each entity did — or any explanation as to why plaintiffs are unable to provide more particularity — plaintiffs have failed to meet their basic obligation under Rule 9(b) to articulate the “who, what, when and where” of the alleged fraudulent scheme.

In responding to CIBC’s motion, plaintiffs no doubt will fall back on their allegation (repeated from the Consolidated Complaint) that the “knowledge and liability” of CIBC in this case should be determined by “looking at CIBC” — that is, Canadian Imperial Bank of Commerce and all of its separately incorporated subsidiaries and affiliates — as “an overall legal entity.” 1st Am. Compl. ¶ 717. Nowhere in their complaint, however, do plaintiffs allege any facts to support their claim that the separate corporate identities of various CIBC-related entities should simply be ignored. In responding to CIBC’s motion for summary judgment, plaintiffs argued that CIBC could be primarily liable for the actions of its subsidiaries or affiliates if it acted through those entities, making them CIBC’s “agents.” The problem with that argument, however, is that plaintiffs have not pleaded *any facts* to support their claim that CIBC orchestrated or directed the activities in question, in furtherance of the alleged scheme to defraud.

Plaintiffs may also argue, as they did in their response to CIBC's motion for summary judgment (at 8), that "treating a parent 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." But that is not the law. Indeed, plaintiffs have not cited nor are we aware of *any* case in which a court has ever concluded that plaintiffs in a securities fraud action may simply ignore the separate corporate identities of related companies by invoking an "enterprise" theory.

The only securities cases we have been able to locate on this issue have made it clear that a plaintiff who wants to treat a group of related companies as "an overall legal entity" must do so by meeting the standards for piercing the corporate veil. For example, in *Gabriel Capital, L.P. v. NatWest Finance, Inc.*, 122 F.Supp.2d 407, 429-32 (S.D.N.Y. 2000), the court concluded that the only way plaintiffs could proceed against the parent company based on their claim that "NatWest Finance, NatWest Capital and NatWest Bank 'operated as a single integrated enterprise'" was by alleging specific facts meeting the stringent requirements for piercing the corporate veil — a standard that plaintiffs have not even attempted to meet in this case. *Id.* at 433 & n. 14. Nowhere in the opinion is there any hint that plaintiffs were entitled to proceed against the parent simply by claiming that the parent and its subsidiaries constituted an integrated enterprise.

Significantly, plaintiffs did not cite a single securities case in support of their claim that "enterprise liability" is a "well-accepted" concept in the securities context. Instead, plaintiffs cited a law review article in which the author suggests that there is an increasing movement away from strict principles of corporate separateness. P. Blumberg, "The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities," 28 CONN. L. REV. 295 (1996). In that article, however, the author explains that "enterprise principles" have been applied in the context of securities claims through statutory provisions that impose liability on "control

persons.” *Id.* at 304, 311. Nowhere in the article does the author suggest that “enterprise liability” provides an *additional* basis, separate and apart from “control person” liability, for holding a parent company primarily liable for the actions of its subsidiary in a securities case. On the contrary, the author concedes that, insofar as judge-made law is concerned, “the attribution of intra-enterprise tort or contract liability are governed generally by traditional principles of entity law.” *Id.* at 330. Thus, absent proof that the subsidiary was acting at the direction of the parent or proof sufficient to pierce the corporate veil, there is simply no legal basis for imputing the conduct of a subsidiary or affiliate to the parent company. *Id.* at 329-30.

The case law plaintiffs cited in support of their novel “enterprise liability” theory is also completely inapposite. Plaintiffs cited the Supreme Court’s decision in *Anderson v. Abbott*, 321 U.S. 349 (1944). That case, however, involved an unusual statutory provision that, contrary to the ordinary rule of limited liability, subjected shareholders of a national bank to an assessment of double liability in the event that the bank became insolvent. The issue before the Supreme Court in *Anderson v. Abbott* was whether individual shareholders could avoid double liability by exchanging their bank stock for stock in a holding company. The Supreme Court concluded that this tactic was an impermissible evasion of that particular statute. But the opinion does not purport to provide any general guidance about how principles of corporate separateness should be applied in the banking industry in general or in securities cases in particular.

The other cases plaintiffs cited involved discrimination claims against employers who were ostensibly too small to be subject to federal anti-discrimination laws. In those cases, the courts considered the extent to which related corporations were integrated in deciding whether the “employer” should be deemed to meet the statutory threshold of 15 or 20 employees. *See Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761 (5th Cir. 1997); *Papa v. Katy Inds.*,

*Inc.*, 166 F.3d 937 (7th Cir. 1999).<sup>8/</sup> These cases, which also arise in a completely different statutory context, provide no guidance at all with respect to securities claims — where Congress has already established statutory liability for “control” persons.

In sum, plaintiffs’ vague and conclusory allegations that CIBC and its subsidiaries and affiliates should be viewed as an “overall legal entity” without regard to what any individual corporation did or did not do is both legally baseless and unsupported by any factual allegations.

### CONCLUSION

For the foregoing reasons, CIBC World Markets, f/k/a CIBC Oppenheimer, and CIBC urge the Court to dismiss the claims made against them in the Second Amended Complaint.

Dated: June 18, 2003

Respectfully submitted,

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<sup>8/</sup> In *Papa*, the Seventh Circuit actually rejected the “integration” test applied in other courts (including the Fifth Circuit). In an opinion written by Judge Posner, the Seventh Circuit adopted a new test, holding that the number of employees in related companies should be aggregated for purposes of determining whether anti-discrimination laws apply if (i) the veil should be pierced, (ii) the companies were set up for the express purpose of avoiding liability under the discrimination laws, or (iii) the parent corporation directed the discriminatory act in question. It was in the context of the second situation that Judge Posner made the statement plaintiffs quoted, completely out of context, in their response — that “[t]he privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties.” 166 F.3d at 941.

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**CERTIFICATE OF SERVICE**

I certify that on June 18, 2003, true and correct copies of Defendant Canadian Imperial Bank of Commerce's Motion to Dismiss the First Amended Consolidated Complaint and Memorandum of Law in Support and the proposed Order have been served upon all counsel on the attached service list in accordance with the Order Regarding Service of Papers and Notice of Hearings entered on April 10, 2002.



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Mark D. Manela