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.	§	

United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk of Court

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

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INTRODUCTION

When plaintiffs sued CIBC and the other Bank defendants in this case, they made a tactical decision not to identify the various subsidiaries that were actually responsible for much of the conduct they challenged. Instead, plaintiffs decided to sue only the parent company, portraying it as the entity that directed and controlled all of the activities of a number of related entities with respect to Enron. Plaintiffs employed this strategy for a reason: plaintiffs clearly hoped to be able to meet their burden of pleading facts giving rise to a strong inference of scienter by obscuring the fact that separate (although related) corporations had engaged in independent conduct with respect to Enron.

Plaintiffs' strategy worked, helping them get by a motion to dismiss with respect to CIBC. More than a year after they sued the Bank Defendants, however, plaintiffs decided they needed a back-up plan and filed a new complaint adding as defendants, for the first time, the subsidiaries of a number of Bank Defendants, including CIBC World Markets. As demonstrated in the opening briefs filed by CIBC World Markets and the other newly-added defendants, plaintiffs' decision to name the Bank defendants' subsidiaries came too late because all of plaintiffs' claims against the newly-added defendants are barred by the applicable statute of limitations.

In their opposition to the Bank Defendants' motions to dismiss, plaintiffs offer a variety of excuses for their failure to sue CIBC World Markets and the other Bank subsidiaries in a timely manner. Perhaps the most remarkable is plaintiffs' claim that, because of the supposedly confusing nature of the Bank Defendants' corporate families, plaintiffs simply did not know when they first sued the Bank Defendants on April 8, 2002 which subsidiaries they should sue. At least with respect to CIBC World Markets, that assertion is demonstrably false. All plaintiffs had to do to determine that it was CIBC World Markets — and not CIBC — that issued analysts reports was to look at the face of the analysts reports themselves, which clearly identify the source of the information.

Similarly, all plaintiffs had to do to determine which entity served as an underwriter with respect to a May 19, 1999 issue of Enron notes was to look at the cover of the Registration Statement/Prospectus, which listed "CIBC World Markets" as the underwriter — and *not* CIBC. *See* Exhibits A (analyst reports) and B (Registration Statement/Prospectus) to CIBC's May 8, 2002 Motion to Dismiss.

That plaintiffs' decision to sue CIBC alone was the product of a conscious choice — rather than a mistake — is also apparent from plaintiffs' response to CIBC's first motion to dismiss. In that motion, CIBC argued that it could not be held responsible for statements made by "CIBC" analysts because the statements were issued by CIBC World Markets; it also argued that CIBC could not be held liable under Section 11 for alleged errors in the registration statement issued for the May 19, 1999 Enron Note Offering because CIBC World Markets was the underwriter. CIBC's May 8, 2002 Motion to Dismiss, at 22-25; 29-36. In response to that argument, plaintiffs did not contend that they were confused or that they had been unable to determine who the proper defendant was. Instead, plaintiffs emphatically denied that they had "sued the wrong party," arguing that CIBC was the proper defendant because it supposedly had been a direct participant in the claimed wrongdoing. Pl. Resp. to CIBC's Motion to Dismiss at 3 n.6.

For all of the reasons outlined in Part I below, plaintiffs' belated attempt to change course and to add CIBC World Markets as a defendant in this case is barred by the statute of limitations. Plaintiffs' claims against CIBC World Markets under Section 10(b) and Section 12(a)(2) also fail on the merits. Plaintiffs have not pleaded any facts giving rise to a strong inference that CIBC World Markets acted with scienter. Instead, plaintiffs' Section 10(b) claim against CIBC World Markets hinges on their ability to blur the distinctions between CIBC World Markets and other CIBC entities, treating all of them as if they were a single actor. *See* Part II, below. And plaintiffs' Section 12(a)(2) claim fails because, as plaintiffs themselves concede, there is currently no plaintiff in this case who claims to have purchased Marlin Water Trust II or Marlin Water Capital Corp. II notes (referred to herein as the "Foreign Debt Securities") from CIBC World Markets or as a result of a solicitation by CIBC World Markets. Accordingly, there would be no plaintiff with standing to pursue the Section 12(a)(2) claim, even if that claim were not barred by the statute of limitations. *See* Part III, below.

Finally, plaintiffs' amended complaint demonstrates why CIBC itself should be dismissed from this action. Plaintiffs argue that CIBC is simply re-hashing arguments that the Court had already rejected. But in ruling on CIBC's first motion to dismiss, the Court accepted at face value plaintiffs' allegation that CIBC was directly responsible for all of the conduct outlined in the complaint. *In re Enron Corp. Secs., Derivative and ERISA Litig.*, 235 F.Supp.2d 549, 648 n.85 (S.D. Tex. 2002). Now, however, plaintiffs have admitted that CIBC World Markets was the entity that issued analyst reports and acted as an underwriter — not CIBC. Plaintiffs also suggest that CIBC World Markets and other CIBC-related entities, which they have chosen not to sue, may have been involved in various unidentified aspects of the transactions that plaintiffs attack. *See, e.g.*, 1st Am. Compl. ¶ 103. These admissions make it clear that plaintiffs have not met their burden under Rule 9(b) to outline the basic elements of CIBC's alleged participation in the scheme to defraud — to explain *which* CIBC entities were responsible for engaging in *what* conduct and to allege particular facts giving rise to a strong inference that each CIBC entity (including CIBC itself) engaged in the conduct in question with the requisite intent to defraud investors. Under these circumstances, plaintiffs have failed to meet their burden under the PSLRA of pleading both CIBC's commission of a deceptive or manipulative act and facts giving rise to a strong inference that that act was committed with scienter.

ARGUMENT

I. All Of Plaintiffs' Claims Against CIBC World Markets Are Barred By The Statute Of Limitations.

Plaintiffs did not add CIBC World Markets as a defendant until May 14, 2003 — more than one year after plaintiffs first sued CIBC under Sections 10(b) of the 1934 Act and under Section 11 of the 1933 Act and more than three years after the Enron Notes that are the subject of plaintiffs' Section 11 claim were offered to the public. Plaintiffs do not deny that if the one- and three-year statute of limitations applies to their claims against CIBC World Markets, those claims would be barred.[1] Instead, plaintiffs argue that a variety of exceptions to the ordinary rule apply. They argue that their claims against CIBC World Markets should relate back under Rule 15(c) to the date CIBC was sued; they also contend that the new two- and five-year statute of limitations adopted in Sarbanes-Oxley should be applied to all of their claims, including their claims under the 1933 Act. Finally, plaintiffs claim that CIBC World Markets should be equitably estopped from invoking the statute of limitations. For the reasons outlined below, all of these arguments should be rejected.

A. Plaintiffs' Claims Against CIBC World Markets Do Not Relate Back To The Filing Of The Complaint Against CIBC.

"Relation back" is a narrow, precisely focused concept designed to alleviate problems of misnomer and similar "*mistaken* identification of an *intended* defendant." *Notes of the Advisory Comm. to Rule 15(c).* (1991 Amendment) (emphasis added). "Rule 15(c) was obviously not enacted to serve as a general bypass for statutes of limitation." *Miller v. Calvin*, 647 F. Supp. 199, 202 (D. Colo. 1985). Rule 15(c) allows the filing of an amended complaint against a newly-named

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1/ Plaintiffs argue at page 16 of their Response that they were not on notice of "certain Bank Defendants' conduct as of April 2, 2002," when they filed their original complaint against the Bank Defendants. But they do not contend that they did not know about their claims against CIBC World Markets when they filed their original complaint on April 8, 2002. Because plaintiffs sued CIBC World Markets more than one year later, it is clear that all of their claims are time-barred unless they can find some way around the statute of limitations.

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."

Plaintiffs argue at length in their response to the motion to dismiss that CIBC World Markets received timely notice of the institution of this action against CIBC and therefore would not be prejudiced if the Court concluded that the amendment related back to the filing of the original complaint. But the key issue here is not notice or prejudice; rather, it is whether plaintiffs' decision not to name CIBC World Markets in the original complaint was the kind of "mistake" that entitles them to invoke Rule 15(c). As the Supreme Court explained in *Schiavone v. Fortune, a/k/a Time, Inc.*, 477 U.S. 21, 29 (1986), a claim against a new defendant does not relate back under Rule 15(c) unless *all* of the requirements of that Rule are satisfied.

Plaintiffs offer two arguments to explain their alleged "mistake." First, they contend that they made a mistake of fact in naming CIBC alone as a defendant. Significantly, plaintiffs do not claim that they sued CIBC in the belief that CIBC itself had engaged in all of the conduct alleged in the complaint. Instead, their argument seems to be that they named only the parent company because they could not figure out which of the 50-odd CIBC-related entities were the right entities to sue. It is well-settled in this Circuit, however, that "relation back is not allowed when the plaintiff simply lacks knowledge of the proper party." *Jacobsen v. Osborne*, 133 F.3d 315, 321 (5th Cir. 1998).

As the Court explained in *Jacobsen*, Rule 15(c) is designed to enable the plaintiff "to correct a *mistake* concerning the identity of a party"; "failing to identify individual defendants cannot be characterized as a mistake." *Id.* (emphasis in original). *Accord*, *Wayne v. Jarvis*, 197 F.3d 1098 (11th

Cir. 1999) ("While we have stated that 'we read the word 'mistake' in Rule 15(c) liberally,' we do not read the word 'mistake' to mean 'lack of knowledge.' For these purposes, ignorance does not equate to misnomer or misidentification) (citation omitted); *Carney v. USA*, 2002 U.S. Dist. LEXIS 23439 at *29 (N.D. Tex. Dec. 6, 2002) (citing *Jackson* for the proposition that "[u]ltimately, Rule 15(c) does not allow relation back of the amendments if the reason Plaintiffs failed to name the Individual Defendants in the Original Complaint was because they did not know their identities or specific involvement").[2] So too, in this case, plaintiffs' claimed inability to determine which CIBC subsidiaries were the proper targets of the lawsuit is not the kind of "mistake of fact" contemplated by Rule 15(c).

Plaintiffs' "mistake of fact" argument also fails because the undisputed facts demonstrate that plaintiffs must have known, when they filed their original complaint in April 2002, that CIBC World Markets was the entity that had engaged in the conduct plaintiffs now attribute to it in the First Amended Complaint. Plaintiffs contend that they were unable to identify which entities participated in the various Enron deals that plaintiffs challenge. But that argument is a red herring with respect to CIBC World Markets because plaintiffs *still* do not allege that CIBC World Markets had any involvement in the deals in which "CIBC" was allegedly a participant. Instead, the only specific conduct that plaintiffs allege CIBC World Markets engaged in was the issuance of analyst reports and certain underwriting activity. *See* 1st Am. Complt. ¶ 103.[3]

Plaintiffs could hardly have been confused as to the proper identity of the CIBC entity that

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2/ Plaintiffs' explanation for their decision to name only CIBC (and the other Bank Defendants) distinguishes this case from the cases they cite at page 26 of their Response, where the plaintiffs sued the parent company in the mistaken belief that it was the entity that had engaged in the allegedly wrongful conduct.

3/ Plaintiffs also allege that when it was called CIBC Oppenheimer CIBC World Markets "provid[ed] Enron credit financing and loans and . . . underwr[ote] Enron's 2/11/99 common stock offering." 1st Am. Complt. ¶ 103. The complaint does not explain what credit financing and loans CIBC Oppenheimer supposedly provided to Enron, however.

engaged in these activities. Indeed, to use plaintiffs' phrase, it "strains credulity" for one of the nation's premier plaintiffs' securities firm to argue that it was unable to figure out who issued analyst reports or who served as an underwriter for a particular issue of notes — when the identities of the proper parties can be determined simply by looking at the documents in question. In any event, on May 8, 2002 — more than a year before the First Amended Complaint was filed — CIBC *told* plaintiffs that it was CIBC World Markets that had issued analyst reports and acted as an underwriter, when it filed its motion to dismiss.[4] That plaintiffs responded to this argument by vigorously denying that they had sued the wrong party destroys any claim that plaintiffs could possibly make that their original choice was the product of ignorance with respect to the correct identity of the CIBC-related defendants.

Plaintiffs's second, alternative argument is that they made a mistake of law by suing CIBC, rather than CIBC World Markets. Plaintiffs note that the Bank Defendants have "asserted that corporate separateness precludes primary liability of bank parents for the acts of bank subsidiaries" and argue that, if they were to lose on the corporate separateness argument, it "could be due to a mistake of law." Pl. Resp. at 30. Plaintiffs contend that they filed the First Amended Complaint "once Lead Plaintiff learned of the correct identity of culpable bank entities," including CIBC World Markets, in order to "correct this potential mistake of law" and that, under Rule 15(c), their claims against CIBC World Markets therefore relate back to April 8, 2002. Pl. Resp. at 30.[5]

4/ At page 25 of their Response, plaintiffs state that "[o]f course the Bank Defendants did not identify which of their many subsidiaries were involved in transactions underlying the alleged fraud." But that is simply not true with respect to CIBC. In our first motion to dismiss, we specifically identified CIBC World Markets as the source of the "CIBC" analysts reports that were quoted at length in the complaint and as one of the underwriters for the May 1999 issue of Enron Notes. *See* CIBC's Motion to Dismiss, filed May 8, 2002, at 10, 24.

5/ Plaintiffs describe the corporate separateness argument as a claim that the Bank Defendants have made only "recently." Pl. Resp. at 30. In so arguing, plaintiffs completely ignore the fact that CIBC raised the corporate separateness issue in its Motion to Dismiss, which was filed on May 8, 2002.

This argument should also be rejected. Courts that have allowed the addition of new parties to relate back under a "mistake of law" rationale have typically done so in pro se prisoner, civil rights, and employment discrimination cases.[6] The touchstone in all of those cases was that the pro se plaintiff or the plaintiff's lawyer had made an innocent mistake in identifying the parties they would have to sue in order to plead a legally cognizable claim. *See, e.g., Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 36-37 (2d Cir. 1996) (a mistake of law occurs when the plaintiff or her lawyer "misunderstood the legal requirements of her cause of action" and thus "did not know that [s]he needed to name individual defendants"); *Woods v. Indiana University*, 996 F.2d 880, 887 (7th Cir. 1993) (a legal mistake occurs when "if it had not been for counsel's legal blunder, those [newly-named] individuals would have been the direct targets of the Complaint from the outset"); *Rendall-Speranza v. Massim*, 107 F.3d 913, 918 (D.C. Cir. 1997) ("A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose — unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen").

Significantly, in the cases where the addition of new parties has been found to relate back because of a "mistake of law," there was no conceivable strategic advantage to be gained by suing the wrong party. Indeed, because they had clearly sued the wrong party, the plaintiffs in those cases were facing the dismissal of all of their claims if relation-back was not allowed. *See, e.g., Simpson v. Borg-Warner Automotive, Inc.*, 1997 U.S. Dist. LEXIS 19502 at *6 (N.D. Ill. Dec, 4, 1997) (rejecting the claim that plaintiffs' counsel made an "intentional, strategic choice" in suing only her employer's parent company for job discrimination, because there was "no explanation for what advantage she would gain in doing so. Quite simply, there is no indication that her failure to name

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6/ *See, e.g., Woods v. Indiana University*, 996 F.2d 880 (7th Cir. 1993), where the plaintiff brought a civil rights action against his former employers, Indiana University and the University police department, both of which were immune from suit under the Eleventh Amendment.

BWAATS as a defendant happened for any reason other than her counsel's mistake in failing to realize he should have named BWAATS"). By contrast, in *Cornwell v. Robinson*, 23 F.3d 694, (2d Cir. 1994), the Second Circuit held that Rule 15(c) did *not* apply to newly-added individual defendants in a Section 1983 and Title VII case where the original complaint had been found to be legally sufficient. The court in *Cornwell* noted that the plaintiff had always known about the individual defendants and (like plaintiffs here) had identified them in the original complaint. Under these circumstances, the Second Circuit concluded that plaintiff's failure to name the individual defendants in the original complaint must "be considered a matter of choice, not mistake." *Id.*

In this case, plaintiffs cannot (and do not) claim that their counsel misunderstood the applicable securities laws or the concept of corporate separateness when they filed their original complaint. Indeed, it would be absurd to suggest that lead counsel for plaintiffs did not realize that they could state a claim under Section 11 by suing the corporate entity that actually served as an underwriter, rather than the parent company of that entity. Instead, plaintiffs must have thought that they had two theories of liability: a conventional theory against CIBC World Markets, as an underwriter and analyst, and a much more unusual (and in our view fundamentally flawed) "enterprise" or agency theory of liability under which they sought to hold CIBC liable for the actions of CIBC World Markets. Plaintiffs could have pleaded *both* claims in their original complaint, just as they have now done in their First Amended Complaint. Their decision to plead only *one* theory against *one* of the potential defendants is simply not the kind of mistake that Rule 15(c) was designed to remedy.

The D.C. Circuit made precisely this point in *Rendall-Speranza v. Massim*, 107 F.3d at 918, in rejecting plaintiff's argument that her claims against a newly-added corporate defendant should relate back to the original filing of a complaint against the corporation's employee: "Nothing prevented [plaintiff] from naming both [the corporation and its employee] as defendants and pleading alternative theories of liability. In the adversarial system of litigation, the plaintiff is responsible for determining who is liable for [an] injury and for doing so before the statute of limitations runs out." *Accord, In re Integrated Resources Real Estate Limited Partnerships Securities Litigation*, 815 F. Supp. 620, 647 (S.D.N.Y. 1993) ("Unless the plaintiffs can allege a *specific* reason why they failed to sue *all* potentially liable parties in the original complaint," Rule 15(c) does not permit plaintiffs to add additional defendants without regard to the statute of limitations); *Jordan v. Tapper*, 143 F.R.D. 575, 590 (D. N.J. 1992) ("It is more than clear that plaintiff is attempting to add new parties and not to substitute new defendants for mistakenly identified original defendants. This is exhibited by plaintiffs' continued prosecution of the complaint against [the original defendant]"); *Miller v. Calvin*, 647 F. Supp. at 202 ("a strategic choice of naming only some of the potential defendants and not others does not qualify as a mistake under Rule 15(c)").

Plaintiffs do not quarrel with the proposition that Rule 15(c) cannot be used to save plaintiffs (or their lawyers) from the consequences of a bad strategic decision. Instead, they argue that their decision to sue CIBC alone must have been a mistake of law because there was no conceivable strategic reason for *not* proceeding on alternative theories of liability against the subsidiaries of the Bank Defendants and the Bank Defendants themselves. But that assertion is simply wrong. Plaintiffs had an obvious strategic reason for the choice they made: they hoped to — and in fact succeeded in — convincing the Court that it should aggregate the conduct and knowledge of all related entities in deciding whether plaintiffs had met their burden of pleading sufficient facts to give rise to a strong inference of scienter. By contrast, if plaintiffs had sued a number of CIBC-related entities and had carefully detailed each company's role in the alleged fraud, they would have been met with precisely the argument outlined below — that plaintiffs had failed to allege sufficient facts with respect to each *individual* entity's conduct and knowledge to give rise to a strong inference that it had acted with the scienter necessary to state a claim under Section 10(b).

In any event, even if the plaintiffs could somehow persuade the Court that — all appearances to the contrary — they were acting based on a mistake of law or fact with respect to the identity of the proper CIBC-related defendants, that would not be enough to show that plaintiffs are entitled to invoke the "relation back" provisions of Rule 15(c). The Rule requires plaintiffs to show not only that they made a mistake with respect to the proper identity of the defendant, but also that the proper defendant *knew or should have known* that it had been left out of the complaint because of such an error. *See Rendall-Speranza v. Massim*, 107 F.3d at 918 (Rule 15(c) does not apply unless "it is or should be apparent" to the newly-added defendant that he was "the beneficiary of a mere slip of the pen"). In a case like this, where a plaintiff makes a deliberate choice to sue only one of a number of potential defendants, "the missing party is under no duty to speculate as to the reason plaintiff has not pursued him." *Miller v. Calvin*, 647 F. Supp. at 202. But if CIBC World Markets had tried to divine plaintiffs' reasons for choosing not to sue it in the original complaint, the only conclusion it could have reached was that plaintiffs had made a strategic decision to stream-line their case by not suing any of the Bank Defendants' subsidiaries, betting that they would be able to hold the parent companies liable for the conduct of all related entities.

Under these circumstances, plaintiffs are not entitled to invoke Rule 15(c). As a result, for purposes of determining whether plaintiffs' claims are timely filed, they should be deemed to have sued CIBC World Markets on May 14, 2003, when the First Amended Complaint was filed.

B. Sarbanes-Oxley Does Not Apply To Plaintiffs' Newly-Filed Claims.

Plaintiffs argue that, even if the Court uses May 14, 2003 as the date when their claims against CIBC World Markets were filed, those claims were timely because they are all governed by the two- and five-year statute of limitations adopted in Sarbanes-Oxley. Contrary to plaintiffs' argument, however, Sarbanes-Oxley did not change the statute of limitations applicable to claims under Sections 11 and 12(a)(2) of the 1933 Act, nor does it apply to newly-filed claims in this particular "proceeding," which was pending long before the July 30, 2002 effective date of Sarbanes-Oxley.

1. Sarbanes-Oxley's Longer Statute of Limitations Does Not Apply To Claims Under Section 11, Section 12(a)(2) Or Section 15.

Plaintiffs contend that the plain language of Section 804 of Sarbanes-Oxley, 28 U.S.C. § 1658, makes clear that the new two- and five-year statute of limitations that went into effect as of July 30, 2002, applies to *all* claims arising under the federal securities laws, including claims under Sections 11, 12(a)(2) and 15 of the 1933 Act. But that is not what Section 804 says. Section 804 provides that a private right of action "that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws" is subject to a two- and five-year statute of limitations. Plaintiffs are right that the term "securities laws" is broadly defined to include 1933 Act claims. But plaintiffs ignore the fact that Section 804 is limited to private rights of action under the securities laws that involve "a claim of fraud, deceit, manipulation, or contrivance." As plaintiffs themselves have vigorously argued, Sections 11 and 12(a)(2) do *not* require proof of "fraud, deceit, manipulation, or contrivance."

Indeed, the very fact that Congress did not repeal or amend Section 13 of the 1933 Act, which prescribes a one- and three-year statute of limitations for 1933 Act claims, demonstrates that it did not intend to change the statute of limitations that applies to 1933 Act claims. The legislative history of Sarbanes-Oxley confirms this common-sense point, explaining that the new statute of limitations "is not intended to conflict with existing limitations periods for any express private rights of action under the federal securities laws." *See* Sen. Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, Report Together with Additional Views, S. Rep. No. 107-146 at 29 (May 6, 2002).

The only cases of which we are aware in which the application of Sarbanes-Oxley to 1933 Act claims has been considered have agreed that the one- and three-year periods prescribed by Section 13 of the 1933 Act — and not the longer Sarbanes-Oxley periods — continue to govern. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2003 U.S. Dist. LEXIS 11113 at *62-63 (S.D.N.Y. July 2, 2003) (holding that Sarbanes-Oxley's statute of limitations applies to newly-filed Section 10(b) claims, but that Section 13 of the 1933 Act continues to apply to 1933 Act claims); *Friedman v. Rayovac Corp.*, No. 02-C-308-C at 3 (W.D. Wis. June 23, 2003) (holding that the longer statute of limitations does not apply to a Section 11 claim because a Section 11 claim does not involve "a claim of fraud, deceit, manipulation, or contrivance").

As a fallback to their position that Sarbanes-Oxley always applies to 1933 Act claims, plaintiffs contend that whether or not it applies depends on the nature of each particular defendant's conduct. Plaintiffs argue that even though Sections 11 and 12(a)(2) do not require proof of scienter, the longer Sarbanes-Oxley statute of limitations applies *if* plaintiffs can prove that the defendants acted with scienter. Although plaintiffs in this case have expressly disclaimed any allegations of scienter with respect to their 1933 Act claims in order to avoid having to plead facts to support that assertion (1st Am. Complt. ¶ 1005), they nevertheless contend that the Court cannot decide what statute of limitations to apply to those claims until all of the facts have been litigated.

Plaintiffs' novel argument is not supported by either the plain language of the statute or its legislative history. Sarbanes-Oxley provides a longer statute of limitations for a private right of action under the securities laws that "involves *a claim* of fraud, deceit, manipulation, or contrivance." The statute therefore makes clear that it is the nature of the *claim* that controls the applicability of the longer statute — and *not* the actual nature of the defendants' conduct. If Congress had intended Sarbanes-Oxley to apply in the unusual manner plaintiffs suggest, it would have drafted Section 804 very differently: it would have provided that the two- and five-year statute of limitations applied to any private right of action for a violation of the federal securities laws if the defendant was found to have engaged in fraud, deceit, manipulation or contrivance.

Furthermore, it is inconceivable that Congress would have left Section 13 of the 1933 Act unaltered if it intended it to apply in the future to some, but not all 1933 Act claims, depending on the degree of each defendant's culpability. Section 13 of the 1933 Act created an absolute three-year cut-off date for private claims because Congress believed that certainty was necessary to the proper functioning of the securities industry. *See Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991) (both the plain language of the 1933 Act and its legislative history demonstrate that the three-year period is an "outside absolute period"); *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) ("the legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute"), *cert. denied*, 484 U.S. 943 (1987), *overruled on other grounds by Short v. Bellville Shoe Mftg. Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990). In 2002, Congress decided to keep the three-year repose period for 1933 Act claims. Plaintiffs offer no plausible reason why it would leave that period in place, yet completely destroy its value by making it impossible for a defendant in a 1933 Act case to invoke the three-year repose period to obtain a dismissal at the outset of the litigation.[7]

7/ Plaintiffs point out that the Fair Labor Standards Act provides a two-year statute of limitations for a violation of that Act, but gives a plaintiff who shoulders the burden of pleading and proving a willful violation three years to sue. Pl. Resp. at 13, citing *Bredberg v. Long*, 1983 U.S. Dist. LEXIS 10280 at *8-9 (D. Minn. Dec. 31, 1983). That statute, however, clearly and unambiguously provides for two different statutes of limitations, depending on whether the violation was willful, in two subsections that are right next to one another. *See* 29 U.S.C. § 255(a). In this case, by contrast, it makes no sense to assume that Congress made no alterations in Sections 11 and 12(a)(2), which do not require proof of fraud, or in Section 13's statute of limitations, yet intended to create what would essentially be a new cause of action, governed by a much longer statute of limitations, for intentional violations of Sections 11 and 12(a)(2).

2. Sarbanes-Oxley Does Not Apply To Any Claims Made In The *Newby* Case Because This "Proceeding" Did Not Commence After July 30, 2002.

Sarbanes-Oxley does, of course, apply to Section 10(b) claims. But it applies only to claims that are asserted in a "proceeding" that was commenced after the July 30, 2002 effective date of the Act. Plaintiffs argue that they fit within the plain language of the statute because their claims against the newly-added defendants were all filed after July 30, 2002. But the statute, on its face, does not apply to any and all *claims* filed after July 30, 2002. Rather, it is carefully limited so that it applies only to new "proceedings" commenced after that date. As this Court has already concluded, the *Newby* "proceeding" was commenced before July 30, 2002 and therefore Sarbanes-Oxley does not apply to *any* of the claims that may be asserted in this case. *In re Enron Secs., Derivative and ERISA Litig.*, 2003 U.S. Dist. LEXIS 3786 at *49, n. 20 (S.D. Tex. Mar. 12, 2003).

In support of their contention that Sarbanes-Oxley applies to any claim filed after July 30, 2002, regardless of when the proceeding in which the claim is asserted was commenced, plaintiffs cite an unpublished decision from a Wisconsin district court, *Friedman v. Rayovac Corp.*, No. 02-C-308-C at 20-23 (W.D. Wis. May 29, 2003). That decision, however, ignores the plain language of the statute, concluding that Congress could not have meant what it clearly said because plaintiffs could obtain the benefit of the new statute of limitations simply by filing a new complaint. As demonstrated in the Citigroup defendants' brief, *Friedman* is based on a faulty premise: under well-settled rules designed to ensure judicial efficiency, plaintiffs are not entitled to file duplicative complaints in order to avoid procedural defects in their original filings.

Plaintiffs also argue that the legislative history of Sarbanes-Oxley demonstrates that Congress specifically intended plaintiffs who suffered losses because of their investments in Enron to be able to take advantage of the longer statute of limitations — notwithstanding the fact that the *Newby* proceeding had already commenced before the effective date of the Act. The plain language of the statute cannot be varied, however, by resort to legislative history. *See Cheshire v. Commisioner*, 282 F.3d 326, 336 (5th Cir. 2002). Moreover, the legislative history itself strongly suggests that the sponsors of the bill believed that Enron investors would *not* be able to take advantage of the longer statute of limitations. Thus, for example, Senator Patrick Leahy, whose comments plaintiffs rely upon, stated that "[i]n Washington State alone, the short statute of limitations may cost [investors] . . . nearly $50 million in lost Enron investments *which they can never recover*." *Legislative History of Title VIII of HR 2673: The Sarbanes Oxley Act of 2002*, 107th Cong., 148 Cong. Rec. 7418 (2002) (emphasis added).

C. CIBC World Markets Is Not Equitably Estopped From Raising The Bar Of The Statute Of Limitations.

The final argument plaintiffs make is that CIBC World Markets should be equitably estopped from relying on the statute of limitations. Plaintiffs contend that Lead Plaintiff provided the Bank Defendants with "notice of its intent to name as defendants the bank subsidiaries in a letter written to the Court on January 14, 2003 in order to seek permission to add those defendants." Pl. Resp. at 4. Plaintiffs argue that the Court suggested putting off any amendment and ordered the Bank Defendants to file "appropriate motions" if they believed they were not properly named because a subsidiary was the "real party in interest." Because CIBC did not file its motion for summary judgment until more than a year after the original complaint was filed, plaintiffs argue that CIBC "lulled" them into waiting to file their amended complaint. Plaintiffs argue that under those circumstances, CIBC World Markets should be equitably estopped from treating the First Amended Complaint as having been filed on May 14, 2003 and that the Court should instead treat the First Amended Complaint as having been filed in January 2003.

Plaintiffs' argument is a remarkable piece of revisionist history. Plaintiffs leave out of their narrative the fact that CIBC itself made very clear in its motion to dismiss, filed on May 8, 2002, that plaintiffs had sued the wrong entity by suing CIBC for, among other things, issuing analyst opinions and acting as an underwriter with respect to a May 1999 issue of Enron notes. As noted above, CIBC's motion to dismiss not only specifically identified CIBC World Markets as the entity that had issued the analysts' reports and as one of the underwriters of the May 1999 issue of Enron notes, but also provided plaintiffs with the documentary proof necessary to back up that claim. At that point, there were still a few days left on the three-year statute of repose with respect to any claims arising out of the May 1999 sale of the notes. But plaintiffs did not respond to CIBC's motion by seeking leave to add CIBC World Markets as a defendant. On the contrary, plaintiffs denied that they had sued the wrong party and took no action whatsoever to pursue any claims against CIBC World Markets.

On January 14, 2003, after the Court had issued its opinion concluding that plaintiffs had stated a claim against CIBC, plaintiffs did write a letter to the Court. But that letter did not advise the Bank Defendants that Lead Plaintiff had definitely decided to sue specific subsidiaries, nor did it provide even a hint as to which subsidiaries Lead Plaintiff was thinking about possibly suing. Instead, the letter simply proposed as an agenda item for a conference with the Court "[t]o address certain bank defendants' arguments, should Lead Plaintiff amend or supplement to name subsidiaries of the Bank Defendants or file a new complaint with the same claims and adding subsidiaries." Pl. Ex. 1. The Court responded to the letter by stating that a conference would be premature and suggesting that the banks should file "appropriate motions" if (as they had argued in their motions to dismiss) they believed they had been wrongly sued. *See, e.g.*, January 27, 2003 Order at 2. But nothing in the Court's order purported to excuse plaintiffs from their obligation to seek leave to amend before the applicable statute of limitations expired.

That CIBC did not immediately file its motion for summary judgment could not have lulled plaintiffs into delaying the filing of their claims against CIBC World Markets. The doctrine of equitable estoppel applies only in situations where the defendant's "affirmative acts mislead" the plaintiff and "induce him not to act within the limitations period." *Manning v. Chevron Chemical Corp.*, 332 F.3d 874, 880 (5th Cir. 2003); *Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002) ("We have found that equitable tolling may be appropriate when 'the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights"); *Tyler v. Union Oil Co.*, 304 F.3d 379, 391 (5th Cir. 2002) ("The doctrine of equitable estoppel 'may properly be invoked when the employee's untimeliness in filing his charge results from either the employer's deliberate design to delay the filing or actions that the employer should unmistakably have understood would result in the employee's delay").[8] Here, neither CIBC nor CIBC World Markets ever took any action that could have misled plaintiffs with respect to the existence of their claims against CIBC World Markets, nor did they ever engage in any affirmative conduct that obviously would have resulted in a delay in plaintiffs' filing of an amended complaint against CIBC World Markets.

In our adversary system, a defendant has no obligation to warn plaintiffs that (in the defendant's view) the applicable statute of limitations is about to expire. Thus, merely remaining silent — which is all that CIBC and CIBC World Markets did here — cannot possibly be the kind of affirmative conduct that is required to invoke the doctrine of equitable estoppel.[9]

8/ In *Tyler*, which plaintiffs cite in their Response, the Court concluded that the defendant was equitably estopped from relying on the statute of limitations because it had extracted releases from the plaintiffs which appeared to release age discrimination claims, but which the defendant knew were not enforceable.

9/ It is well-settled that principles of equitable estoppel cannot be used to extend the absolute three-year statute of repose applicable to claims under the federal securities laws. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 939 F.2d at 1436. Moreover, in this case, plaintiffs' claims against CIBC World Markets under Section 11 were barred by May 14, 2000 — long before CIBC engaged in the conduct that plaintiffs contend "lulled" them into delaying the filing of their First Amended Complaint. Furthermore, as the Citigroup defendants demonstrate in their brief, under the one-year discovery rule, all of plaintiffs' claims were already barred by the time they sent their letter in January 2003.

II. Plaintiffs Have Failed To State A Claim Against CIBC World Markets Under Section 10(b).

In our motion to dismiss, we pointed out that the only activities plaintiffs had specifically attributed to CIBC World Markets in their First Amended Complaint were its issuance of analysts' reports and its underwriting activities. Although plaintiffs also allege that CIBC World Markets "provid[ed] Enron credit financing and loans" during the period when it was named CIBC Oppenheimer, plaintiffs never explain what kinds of credit financing or loans CIBC World Markets supposedly extended to Enron or when those loans were made. Significantly, nowhere in the complaint do plaintiffs try to connect CIBC World Markets to the off-balance sheet financings that provided the basis for this Court's conclusion that plaintiffs had met their burden of pleading scienter against CIBC. Because plaintiffs' specific allegations against CIBC World Markets are indistinguishable from the allegations this Court found to be inadequate with respect to Bank of America, Lehman Brothers and Deutsche Bank, CIBC World Markets argued that plaintiffs had failed to meet their burden under the PSLRA of alleging particular facts giving rise to a strong inference of scienter.

In their Response, plaintiffs repeat the claim made in their original complaint that CIBC acted through CIBC World Markets. They then go on to argue, however, that "CIBC World Markets was no 'dupe' or mere 'flunky' that failed to realize the import of its actions in furtherance of the fraudulent scheme."[10] Pl. Resp. at 88. Plaintiffs contend that as an investment bank made up of seasoned professionals, CIBC World Markets must have known, as a result of its due diligence conducted in connection with its underwriting activities, that Enron was engaged in a giant Ponzi scheme. But this is precisely the argument that this Court has already *rejected* in dismissing

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10/ Although plaintiffs never explain what CIBC World Markets' actions supposedly were "in furtherance of the fraudulent scheme," they are apparently referring to the issuance of analyst reports favorable to Enron and CIBC World Markets' underwriting activities.

plaintiffs' claims against Bank of America, Deutsche Bank, and Lehman Brothers. *In re Enron Corp. Secs., Derivative and ERISA Litig.*, 235 F.Supp.2d 549, 653-57, 703-04 (S.D. Tex. 2002). Plaintiffs argued that those defendants must also have discovered the "true facts" concerning Enron in the course of their due diligence activities and claimed that they knowingly furthered Enron's scheme by issuing favorable analysts' reports and continuing to raise money for Enron through public offerings. The Court held these allegations of "access" to be insufficient to meet plaintiffs' burden of pleading scienter under the PSLRA.

The reason why the Court denied CIBC's motion to dismiss, while granting the motions of these three Bank Defendants, was that plaintiffs had alleged CIBC's involvement in a number of off-balance sheet financings that were allegedly used to misstate Enron's financial condition. Citing ¶¶ 725-730 of the First Amended Complaint, plaintiffs argue that they have also alleged that "CIBC worked together with and through CIBC World Markets to perpetrate the massive fraud known as Project Braveheart." Pl. Resp. at 86. Later on the same page, without citing to any portion of the complaint, plaintiffs assert that "CIBC World Markets played a primary role in the fraudulent Project Braveheart." When one looks at the actual allegations of the complaint, however, there are no facts at all alleged to support the claim that CIBC worked together with CIBC World Markets on the Project Braveheart deal, let alone facts to suggest that CIBC World Markets played a "primary role" in that alleged fraud. Instead, all that is in the First Amended Complaint is plaintiffs' conclusory assertion that "CIBC"— which plaintiffs have defined to include all CIBC-related entities, including CIBC World Markets — participated in Project Braveheart.

If the particularity requirement means anything at all, it must mean that plaintiffs cannot avoid a motion to dismiss by resorting to this kind of sleight-of-hand. If plaintiffs knew that CIBC World Markets "played a primary role" in the Braveheart transaction, as they claim in their Response, then they ought to have been able to allege some particularized facts explaining what that role consisted of. On the other hand, if plaintiffs did *not* possess such facts, they have no basis at all for their assertion that CIBC World Markets was a knowing participant in the alleged fraud. Either way, the absence of particularity with respect to CIBC World Markets in the First Amended Complaint is fatal to plaintiffs' Section 10(b) claims against it. Thus, even if that claim were not barred by the statute of limitations, it would have to be dismissed for failure to plead facts giving rise to a strong inference of scienter.

III. Plaintiffs Have Failed To Plead A Claim Under Section 12(a)(2) Against CIBC World Markets.

Plaintiffs do not allege that they, or any other plaintiff purporting to sue as a class representative, purchased any of the Foreign Debt Securities. Accordingly, plaintiffs have no standing to sue under Section 12(a)(2) for alleged misstatements made in connection with the sale of those Securities. Plaintiffs' assertion (at 38, 47) that this is a mere detail that may be postponed until the Court rules on class certification is plainly incorrect. The fundamental question of standing to sue should be decided at the outset of the litigation. *In re Azurix Corp. Securities Litigation*, 198 F. Supp.2d 862, 892 (S.D. Tex. 2002), *affirmed sub. nom.*, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 2003 U.S. App. LEXIS 11685 at *40-*41 (5th Cir. 2003) ("Plaintiffs argue that the issue of whether defendants actively participated in the [§ 12(a)(2)] solicitation is best left for a later stage in the litigation. We disagree"). *Accord*, *Lewis v. Fresne*, 252 F.3d 352, 357-58 (5th Cir. 2001).

In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976), the Supreme Court squarely held, "That a suit may be a class action . . . adds nothing to the question of standing, for plaintiffs who seek to represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (internal citation omitted). Accordingly, in the context of the federal securities laws, "[i]t is settled law that a single plaintiff has no standing to assert claims against defendants with whom the plaintiff has not dealt, even though unnamed individuals that the plaintiff seeks to represent may have direct claims against those defendants." *In re Taxable Municipal Bonds Securities Litigation*, 1993 U.S. Dist. LEXIS 10997 at *12 (E.D. La.), *affirmed*, 51 F.3d 518, 522 (5th Cir. 1995) ("An individual plaintiff who lacks standing to assert a claim on his or her own behalf cannot avoid dismissal by purporting to maintain the action on behalf of a class of which he or she is not a member"). *Accord*, *In re Paracelsus Corp. Securities Litigation*, 6 F. Supp.2d 626, 630-31 (S.D. Tex. 1998) (dismissing Section 12(a)(2) claims because "Plaintiffs in the instant matter do not allege that any named Plaintiff purchased or acquired any of the Paracelsus notes at issue").

Plaintiffs also lack standing because none of them allege that they purchased any of the Foreign Debt Securities directly from or as a result of a solicitation by CIBC World Markets. In *Moskowitz v. Mitcham Ind.*, 2000 U.S. Dist. LEXIS 22424 at *28-*29 (S.D. Tex. Oct. 2, 2000), the court dismissed plaintiffs' Section 12(a)(2) claims because they had not alleged that "the defendants either sold [the plaintiffs] the stock directly or that the defendants solicited their purchases." In the recently-decided *Rosenzweig* case, the Fifth Circuit re-affirmed that a plaintiff has no standing under Section 12(a)(2) to sue a defendant who allegedly solicited his sale absent allegations of direct communication. 332 F.3d at 870-871. In their Response, plaintiffs quibble with defendants' citation of *Rosenzweig*, arguing that defendants have ignored the fact that a statutory "seller" under Section 12(a)(2) can include an underwriter who directly sells the securities in question to the plaintiff. *See* *Moskowitz*, 1999 U.S. Dist. LEXIS 23293 at *4 ("The only plaintiffs who have standing to sue under § 12 are those who have purchased their shares directly from an issuer in a public offering"). While that is undoubtedly true, it does not help plaintiffs here because there is no named plaintiff who alleges that he either bought the Foreign Debt Securities directly from CIBC World Markets or as a result of a direct solicitation by CIBC World Markets.[11]

Because plaintiffs have no claim against CIBC World Markets under Section 12(a)(2) of the Act, it necessarily follows that their "control person" claims against CIBC under Section 15 of the Act arising out of the sale of the Foreign Debt must also be dismissed. *Lewis v. Fresne*, 252 F.3d at 357 n.3 (affirming dismissal of Section 15 claims because "[w]ithout a violation of § 12, there is no claim under § 15").

IV. Plaintiffs Have Failed To State A Claim Against CIBC.

Finally, the First Amended Complaint also fails to state a claim against CIBC. For all of the reasons outlined above, plaintiffs have failed to state a claim against CIBC World Markets under Section 10(b). Accordingly, plaintiffs' control person claim against CIBC under Section 20(a) must also be dismissed.

In any event, all of plaintiffs' control person claims against CIBC should be dismissed because plaintiffs have not properly pleaded the element of control. Plaintiffs have alleged that CIBC controlled its subsidiaries. But allegations of ownership and boilerplate claims — made with respect to each and every Bank Defendant — of unitary operations are not enough, standing alone, to meet plaintiffs' burden of alleging control person status. *See Dartley v. Ergobilt Inc.*, 2001 WL 313964 at *1-2 (N.D. Tex. Mar. 29, 2001) (mere fact of majority stock ownership and participation in voting agreement was insufficient to show power to control the purported primary violator). Indeed, if plaintiffs' allegations in this case were enough, plaintiffs would be able to bring a control person claim against every corporate parent whenever a subsidiary was alleged to have violated any

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11/ As demonstrated in the briefs filed by the other Bank Defendants, plaintiffs' Section 12(a)(2) claims also fail as a matter of law because the securities in question were sold to qualified purchasers through private placements and not pursuant to a registration statement and delivery of a prospectus. Such private placements are not within the reach of the 1933 Act. *Gustafson v. Allyod Co.*, 513 U.S. 561, 581-584 (1995).

of the securities laws. That has never been the law.

Finally, the Court should also dismiss plaintiffs' remaining claims against CIBC for a primary violation of Section 10(b).[12] Plaintiffs argue that by urging the Court to dismiss CIBC from the lawsuit, CIBC is simply rehashing arguments that have already been made and rejected. But in its initial ruling, the Court assumed that CIBC had engaged in all of the conduct attributed to "CIBC" in the original complaint. Plaintiffs have now conceded that it was CIBC World Markets that issued analyst reports and CIBC World Markets that acted as an underwriter. Although plaintiffs contend that CIBC World Markets was acting as CIBC's agent in these pursuits, plaintiffs do not allege any facts to support that claim. Accordingly, the Court should disregard all of these allegations in considering the sufficiency of plaintiffs' claims against CIBC.

Plaintiffs continue to allege that "CIBC" was involved in certain off-balance sheet financings and that these activities provide a basis both for finding manipulative conduct in violation of Section 10(b) and for drawing a strong inference of scienter. But plaintiffs have provided no factual allegations to show that CIBC itself was a direct and knowing participant in these transactions — as opposed to other CIBC-related entities. Absent any factual allegations to show that CIBC itself was the entity that participated in these transactions or that it directed the activities of CIBC-related entities that acted as CIBC's agent, there is no basis for concluding that CIBC was responsible for the transactions in question.

CONCLUSION

For the foregoing reasons and the reasons set forth in its opening brief and the briefs filed by the other Bank Defendants, CIBC World Markets, f/k/a CIBC Oppenheimer, and CIBC urge the Court to dismiss the claims made against them in the First Amended Complaint.

12/ As we read the First Amended Complaint, plaintiffs no longer assert any claim against CIBC under Section 11.

Dated: July 31, 2003

Respectfully submitted,

By: ______________________

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on all counsel of record via the www.esl3624.com website on this 31st day of July 2003.

Jordan Rudnick

Jordan Rudnick