

United States Court
Southern District of Texas
FILED

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Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

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

§
§ CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD PLAINTIFF'S MOTION TO COMPEL DEEMED ADMISSIONS BY
DEFENDANT CIBC**

2080

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Lead Plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, hereby respectfully moves this Court for an order deeming admitted certain requests for admission in Lead Plaintiff's First Set of Requests for Admission propounded upon defendant Canadian Imperial Bank of Commerce ("Requests for Admission" or "RFAs").

I. INTRODUCTION

On December 22, 2003, defendant Canadian Imperial Bank of Commerce ("CIBC") entered agreements with the United States Department of Justice ("Department of Justice" or "DOJ"), the Federal Reserve Bank of New York, the Superintendent of Financial Institutions, Canada, and the United States Securities and Exchange Commission ("SEC"). The agreement between CIBC and the Department of Justice sets forth the background upon which the various agreements were based:

1. During the Department's ongoing criminal investigation into matters relating to the collapse of Enron Corp. ("Enron"), the Department has notified CIBC that, in the Department's view, CIBC and its personnel have violated federal criminal law. In particular, the Department has notified CIBC that CIBC and certain CIBC employees: (a) violated federal criminal law in connection with certain FAS 125/140 transactions, explained in Appendix A hereto; and (b) aided and abetted Enron's violation of federal criminal law in connection with the same transactions.

2. CIBC accepts responsibility for the conduct of its employees giving rise to any violation in connection with the FAS 125/140 transactions. As more fully addressed in paragraph 8, CIBC will not contradict the factual statements set forth in Appendix A hereto (incorporated by reference herein (hereinafter, "Factual Statement")). CIBC does not endorse, ratify, or condone criminal conduct and, as set forth below, has taken steps to prevent such conduct from occurring in the future.

Ex. A, ¶¶1-2. Based upon the above, CIBC agreed to cease engaging in certain structured finance transactions with U.S. public companies, adopt internal governance and compliance measures, and pay a fine of \$80 million, among other things. CIBC also twice agreed that it would not contradict the statements in the Factual Statement appended to its agreement with the Department of Justice, once as set forth above and also as set forth at ¶8 of the agreement. CIBC agreed at ¶8 (among other things) it will be subject to prosecution if it contradicts "any of the facts" recounted in the Factual Statement "in litigation or otherwise."

The Factual Statement appended to CIBC's agreement with the Department of Justice tends to establish plaintiffs' claims, for it describes a pattern of fraudulent acts and participation in a scheme, in violation of §10(b) and Rule 10b-5. Consequently, Lead Plaintiff propounded admissions based on the Factual Statement. The Requests for Admission are important to Lead Plaintiff's case and the progress of this complex litigation in general, as they seek to facilitate proof and eliminate issues for trial. For example, Request for Admission No. 8 states:

In connection with its three percent equity investment in Projects Leftover, Nimitz, Alchemy, Discovery and Hawaii 125-0, Canadian Imperial Bank of Commerce sought and obtained oral promises from Enron's senior management that its three percent independent equity stake for the FAS 125/140 transactions would be repaid at or before maturity at par plus and agreed-upon yield.

Ex. B at 3. These facts demonstrate CIBC's purported FAS 125/140 transactions were not true sales of assets as they were supposed to be, but in fact were sham transactions, as alleged by plaintiffs. The facts stated in Request for Admission No. 8, like the other Requests for Admission Lead Plaintiff propounded, also support the scienter element of Lead Plaintiff's claims by demonstrating CIBC acted with knowledge or severe reckless disregard.

Lead Plaintiff's Requests for Admission created a dilemma for CIBC. While CIBC could have denied the admissions, if it did so, CIBC would have risked prosecution for violating its agreement with the Department of Justice. On the other hand, if CIBC forthrightly admitted the facts stated in the Requests for Admission, CIBC would have seriously increased the risk of a judgment against it in this action, a judgment with liability dwarfing the fine it paid the SEC.

CIBC resolved its dilemma by responding with evasive answers. In its responses CIBC referenced pages of "Objections" and "Objections and Clarifications to Definitions," which render CIBC's purported admissions incomprehensible and hollow. *See infra* §III.A.3 and III.A.4. CIBC also convoluted its responses with unnecessary, evasive qualifications, and a labyrinth consisting of multiple objections and repeated cross-referenced incorporation of previous responses. *See infra*

§III.A.1. In addition, CIBC refuses to answer the second sentence to Request for Admission No. 5, based on the meritless objection that the request calls for a legal conclusion. *See infra* §III.B.

Finally, CIBC refuses to answer Request for Admission No. 2 because CIBC contends it is conferring with the Department of Justice to “verify the accuracy” of financial information. (Request for Admission No. 2 asks CIBC to admit Enron’s income and cash flows were inflated as presented in the Factual Statement.) Certainly CIBC has sufficient information to admit or deny at least some of the numerous financial entries it agreed to in the Factual Statement. But CIBC will not agree to any date by which it will respond to Request for Admission No. 2. CIBC’s responses to Lead Plaintiff’s Requests for Admission are unacceptable, and the importance of facilitating proof and reducing issues in this massive and complex litigation cannot be questioned.

Accordingly, Lead Plaintiff respectfully requests the Court enter an order deeming admitted without objection or any qualification Request for Admission Nos. 1 and 3-9, and requiring CIBC to, within seven days, fully respond with admission or denial as to Request for Admission No. 2.

II. STATEMENT OF CONFERENCE

In accordance with Rule 26(c) and the Court’s Procedures Manual, §IV.D., counsel for Lead Plaintiff conferred with counsel for defendant CIBC in an attempt to resolve the deficiencies in CIBC’s responses. On February 2, 2004, Lead Plaintiff served CIBC with Lead Plaintiff’s First Set of Requests for Admission (Ex. B); CIBC filed its Responses on March 3, 2004 (Ex. C). On March 24, 2004 by phone conversation and by e-mail, counsel for Lead Plaintiff conferred with Mark Manela. On March 25, 2004, counsel for Lead Plaintiff met and conferred with Mark Manela and Phillip Reed, counsel for defendant CIBC, concerning Lead Plaintiff’s Requests for Admission. Counsel were unable to reach agreement concerning the subject matter of this Motion.

III. ARGUMENT

Rule 36(a), in pertinent part, states:

A party may serve upon any other party a written request for admission ... of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to ***statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.***¹

The Fifth Circuit has stated, “Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact.” *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001). *Accord Stubbs v. Comm’r*, 797 F.2d 936, 938 (11th Cir. 1986). “Such breadth allows litigants to winnow down issues prior to trial and thus focus their energy and resources on disputed matters.” *Carney*, 258 F.3d at 419. The purpose of Rule 36(a) is to “expedite trial by removing essentially undisputed issues, thereby avoiding time, trouble and expense which would otherwise be required to prove issues.” *Diederich v. Dept. of Army*, 132 F.R.D. 614, 616 (S.D.N.Y. 1990). Judges have encouraged the use of requests for admission “because [they] view the ‘facilitation of the expeditious resolution of factual issues [as] an important consideration in the equitable and efficient administration of justice, particularly for backlogged federal courts.’” *Id.* (quoting *Branch Banking & Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 657 (E.D.N.C. 1988)).

A. CIBC’s Evasive Responses to Lead Plaintiff’s Requests for Admission Violate Rule 36

Rule 36(a) provides the following with respect to the form of responses to requests for admission:

The matter is admitted unless ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter The answer shall ***specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.*** A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter to

¹ Emphasis is added and citations and footnotes are omitted unless otherwise noted.

which an admission is requested, ***the party shall specify so much of it as is true and qualify or deny the remainder.***

It is well established that a responding party “may not avoid the failure to deny matters necessarily within their knowledge by giving ... [an] evasive answer The rule requires a sworn statement denying ‘specifically’ the matters of which an admission is requested or a statement ‘setting forth in detail’ the reasons why an admission or denial cannot truthfully be given.” *Southern Ry. Co. v. Crosby*, 201 F.2d 878, 880 (4th Cir. 1953).

Rule 36(a) further provides, “A denial shall fairly meet the substance of the requested admission, and when in good faith requires that a party qualify an answer or deny only a part of the matter to which the admission is requested, the party shall ***specify so much of it as is true and qualify or deny the remainder.***” “The above-quoted portion of Rule 36(a) sets forth clearly ‘the drastic character of the burden placed upon the one to whom the requests are made.’ It is clear, unambiguous, unequivocal and means just what it says.” *Benner v. V & O Press Co.*, No. 85-2891, 1986 U.S. Dist. LEXIS 25981, at *4-*5 (E.D. Pa. May 2, 1986); *see also Havenfield Corp. v. H & R Block, Inc.*, 67 F.R.D. 93, 97 (W.D. Mo. 1973) (same); *Dulansky v. Iowa-Illinois Gas & Elec. Co.*, 92 F. Supp. 118, 123 (S.D. Iowa 1950) (same); *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566, 573 (E.D.N.Y. 1939) (“Rule 36 provides a drastic remedy”). “Furthermore, when good faith requires that a party deny only a part or qualify a certain matter of which an admission is requested, such qualification or part denial must be clear. One cannot answer properly in the alternative, but must comply strictly and literally with the terms of the statute upon peril of having [one’s] response construed to be in legal effect and admission.” *Benner*, 1986 U.S. Dist. LEXIS 25981, at *5; *Crosby*, 201 F.2d at 880.

CIBC’s numerous evasive tactics violate Rule 36. In its responses to Lead Plaintiff’s Requests for Admissions, CIBC references pages of “Objections” and “Objections and Clarifications to Definitions,” which render CIBC’s purported admissions incomprehensible and hollow. CIBC

also convolutes its responses with unnecessary, evasive qualifications, and a labyrinth consisting of multiple objections and previous responses repeatedly incorporated into the various responses.

1. CIBC's Evasive Tactic of Incorporating by Reference Objections and Previous Responses Violates Rule 36

CIBC repeatedly incorporates by reference objections and previous responses in its various responses to Lead Plaintiff's Requests for Admission. This evasive tactic, exemplified in the excerpts from CIBC's responses below, violates Rule 36:

- **RESPONSE TO REQUEST FOR ADMISSION NO. 1:** "CIBC incorporates its Responses to RFA Nos. 2, 3, 5, 6, 7, 8 and 9 as its Response to RFA No. 1."
- **RESPONSE TO REQUEST FOR ADMISSION NO. 7:** "CIBC expressly incorporates its Responses to RFA Nos. 5 and 8 as its Response to RFA No. 7."
- **RESPONSE TO REQUEST FOR ADMISSION NO. 8:** "CIBC expressly incorporates its Responses to RFA No. 5 and RFA No. 7 as its Response to RFA No. 8."
- **RESPONSE TO REQUEST FOR ADMISSION NO. 9:** "CIBC incorporates its Responses to RFA Nos. 1, 2, 3, 4, 5, 6, 7 and 8 as its Response to RFA No. 9."

Ex. C at 4, 7. Rather than simplify the issues in this litigation, as intended by Lead Plaintiff's use of Rule 36, these are the sort of responses that would likely confuse the trier of fact.

For example, one need only look at the complete literal response to Request for Admission No. 7 to see the absurdity of CIBC's response:

REQUEST FOR ADMISSION NO. 7:

Canadian Imperial Bank of Commerce provided three percent independent equity stake for Projects Leftover, Nimitz, Alchemy, Discovery and Hawaii 125-0 only because Enron's senior management first orally promised Canadian Imperial Bank of Commerce that the equity would be repaid at or before maturity at par plus an agreed-upon yield.

RESPONSE: CIBC expressly incorporates its responses to **RFA Nos. 5 and 8** in its response to RFA No. 7. **Response to RFA No. 5:** CIBC admits the facts set forth in the first sentence of RFA No. 5. The second sentence of RFA No. 5 states a legal conclusion rather than facts and requires no admission or denial by CIBC. CIBC admits the facts set forth in the third sentence of RFA No. 5. **Response to RFA No. 8:** CIBC expressly incorporates its Responses to RFA No. 5 and RFA No. 7 as its Response to RFA No. 8. Further answering RFA No. 8, CIBC admits the facts set

forth in RFA No. 8. **Response to RFA No. 5:** CIBC admits the facts set forth in the first sentence of RFA No. 5. The second sentence of RFA No. 5 states a legal conclusion rather than facts and requires no admission or denial by CIBC. CIBC admits the facts set forth in the third sentence of RFA No. 5. **Response to RFA No. 7:** CIBC expressly incorporates its responses to **RFA Nos. 5 and 8** in its response to RFA No. 7. Further answering RFA No. 7, CIBC admits the facts set forth in RFA No. 7.

Ex. C at 6. Compounding the effect of its labyrinth, CIBC incorporates its response to Request for Admission No. 7 in its response to Request for Admission No. 8. The other examples of CIBC's "incorporation by reference" are only worse, for in its responses to Request for Admission Nos. 1 and 9, CIBC "incorporates by reference" its responses to Request for Admission Nos. 2, 3, 5, 6, 7, 8, 9, and 1, 2, 3, 4, 5, 6, 7, 8, respectively. CIBC's "incorporation by reference" violates Rule 36(a). Accordingly, RFA Nos. 1, 3, 7, 8 and 9 should be deemed admitted without incorporation by reference, objection, or any qualification.

2. CIBC's Evasive Qualifications and Defense Arguments in Its Responses Violate Rule 36

Request for Admission No. 3 asks CIBC to admit that it engaged in FAS 125/140 transactions with Enron, "knowing that Enron's purpose in entering these transactions was to remove assets from its balance sheets and book earnings and/or cash flow at quarter and year-end." Ex. B at 2. CIBC's response appends a footnote which vitiates CIBC's admission and unnecessarily argues CIBC's "shell game" defense which other banks unsuccessfully raised by summary judgment motions:

Appendix A to the CIBC/DOJ Agreement refers to "CIBC" as the 3% equity investor in a number of FAS 125/140 transactions. In fact, Canadian Imperial Bank of Commerce, as a distinct corporate entity, did not invest in the equity component of the FAS 124/140 transactions. Rather, the 3% equity component was provided by wholly-owned direct or indirect subsidiaries of Canadian Imperial Bank of Commerce. For the sake of convenience, Appendix A and these Responses refer to "CIBC" as the equity investor. By using that shorthand reference, CIBC does not intend to blur the distinction between Canadian Imperial Bank of Commerce (a distinct corporate entity) and its corporate subsidiaries (which are also distinct corporate entities), nor should the shorthand reference be construed as suggesting in any way that the corporate distinction between Canadian Imperial Bank of

Commerce and its wholly-owned direct or indirect subsidiaries was not fully and properly maintained and observed.

Ex. C at 5. Either CIBC knew what it was doing (which requires an admission) or it did not (which requires a denial). Indeed, CIBC knows full well that it acted through its employees, subsidiaries and affiliates, and CIBC agreed to this very characterization of its conduct for which Lead Plaintiff seeks an admission, in its agreement with the Department of Justice. CIBC should not be entitled to foist upon the parties and this Court CIBC's evasive qualification of its admission. If CIBC wants to argue to the trier of fact it did not know what it was doing, CIBC may attempt that. But here, when CIBC raises its argument by way of an evasive qualification to an admission, CIBC is violating Rule 36. Accordingly, for these reasons, in addition to the reasons asserted elsewhere herein, Request for Admission No. 3 should be deemed admitted without objection or qualification.

3. CIBC's "Objections and Clarifications to Definitions" Impermissibly Qualify Its Admissions

CIBC qualifies all of its responses by the following "Objections and Clarifications to Definitions":

1. ... *with respect to each of CIBC's Responses to Lead Plaintiff's RFAs*, and with respect to all references in these Responses to statements set forth in Appendix A to the CIBC/DOJ Agreement, the term "FAS 125/140 transactions" shall have the meaning expressly set forth in the CIBC/DOJ Agreement. The CIBC/DOJ Agreement defines "FAS 125/140 transactions" as follows:

"FAS 125/140 transactions" refer to sales of financial assets by Enron to a special purpose entity ("SPE"), *intended to comply* with either Financial Accounting Standards ("FAS") No. 125, "Standards for Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities," or its successor, FAS No. 140. In 1999, various amendments were proposed to FAS 125, ultimately leading to the issuance of FAS 140 in September 2000. FAS 125 and 140 both provide that a transfer of assets occurs only to the extent that the transferor surrenders control over transferred assets. This requirement is met only if the transferor "does not maintain effective control over the transferred assets through ... (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity" In addition, to comply with

FAS 125/140, the SPE used to effectuate the transaction must include at least 3 percent equity investment from an independent source.

2. The term “SPE” as used in these Responses shall refer to a “special purpose entity” as that term is used in the CIBC/DOJ Agreement’s definition of “FAS 125/140 transactions.”

Ex. C. at 3-4. However, the definitions which Lead Plaintiff used in its Requests for Admission are nearly identical to what CIBC purports by way of its “Objections and Clarifications.” The key difference is that CIBC’s definition requires Lead Plaintiff to accept that CIBC “intended” its transactions “to comply” with FAS 125/140. Lead Plaintiff used the terms “purported” and “supposed” to describe the transactions because whether the transactions complied with FAS 125/140 is an issue.

If CIBC wishes to raise its defense on scienter, it may attempt that at the appropriate time. But redefining terms in Lead Plaintiff’s Requests for Admission to make CIBC’s responses pregnant with scienter arguments violates Rule 36. For this additional reason, Request for Admission Nos. 1 and 3-9 should be deemed admitted without objection or any qualification.

4. CIBC’s “General Responses and Objections,” Expressly Incorporated Into Each of CIBC’s Responses, Violate Rule 36

CIBC expressly incorporates its “General Responses and Objections” by reference into each response to the RFAs. Ex. C at 3 (“CIBC’s General Responses and Objections are hereby expressly incorporated by reference into each of CIBC’s Responses set forth below.”). Rule 36(a) provides that an objection must be addressed to a specific matter. The reason for this is easily illustrated by examining CIBC’s response to RFA No. 6 combined with just some of CIBC’s incorporated “General Responses and Objections.” CIBC’s admission is no longer an admission:

CIBC admits the facts set forth in RFA No. 6 and objects:

- to the extent it calls for disclosure of information protected by the attorney-client privilege;
- to the extent it asks CIBC to admit matters other than statement of fact or genuineness of documents;

- to the extent it calls for information that is not relevant, not calculated to lead to the discovery of admissible evidence, or otherwise beyond the scope of discovery;
- does not concede the RFA calls for relevant information; and
- denies any implication or inference that Lead Plaintiff or any other party might seek to draw from the admitted facts.

CIBC is attempting to use its “General Responses and Objections” as a global shield against the ramifications that would result from Lead Plaintiff’s use of any admission. “Rule 36 is quite clear that the objection must be addressed to the specific matter with reasons ‘therefore stated.’ [A] global guard tactic is greatly frowned upon and in the scheme of things are found ‘substantially without merit.’” *Henry v. Champlain Enters.*, 212 F.R.D. 73, 80 (N.D.N.Y. 2003) (citing *Diederich*, 132 F.R.D. at 616). Moreover, CIBC’s express incorporation of each “General Response and Objection” into each of its responses unnecessarily and impermissibly qualifies all of CIBC’s responses.

Accordingly, for this additional reason, Request for Admission Nos. 1 and 3-9 should be deemed admitted without objection or any qualification.

5. CIBC’s “Burden of Proof” Arguments May Not Be Raised in Its Responses

CIBC’s General Response and Objection No. 7 states:

With respect to the facts admitted by CIBC in its Response to any RFA, CIBC admits only the facts expressly set forth in the RFA and specifically admitted in the Responses. CIBC denies any implication or inference that Lead Plaintiff or any other party might seek to draw from the facts admitted by CIBC. CIBC further denies that any of the facts admitted in CIBC’s Responses satisfy any element of the claims asserted by Lead Plaintiff in this litigation or relieve Lead Plaintiff of its burden to prove the elements of the claims it has asserted against CIBC.

Ex. C at 3. In its response to RFA No. 4 CIBC also states in part, “*Plaintiffs bear the burden of proving* that any such ‘violation’ by CIBC employees took place.” *Id.* at 5. CIBC’s objections here (like its other objections) violate Rule 36.

“It is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters asserted therein.” *Dulansky*, 92 F. Supp. at 124 (citing *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812 (7th Cir. 1942)). Although CIBC has not expressly refused to respond to Lead Plaintiffs’ Requests for Admission, CIBC’s objection implicitly serves that purpose. It is within the province of the court, not defendants, to state a plaintiff had the burden of proving its case. Likewise, it is within the judgment of the court or a jury to decide whether a response to a request for admission has in fact proven an element of plaintiff’s case. For this additional reason, Request for Admission Nos. 1 and 3-9 should be deemed admitted without objection or qualification.

B. RFA No. 5 Is a Factual Statement Which Should Be Deemed Admitted

Request for Admission No. 5 sets forth statements of fact taken nearly verbatim from the “Factual Statement” appended to CIBC’s agreement with the Department of Justice:

In 1999, Enron solicited Canadian Imperial Bank of Commerce to become the three percent “equity” holder in the FAS 125/140 transactions as well as to provide the lucrative debt component of the transaction. *In order for such a transaction to be properly taken off balance sheet, at least 3% of the financing had to be from an independent equity source that was truly at risk.* Canadian Imperial Bank of Commerce provided the “equity” stake only because Enron’s senior management first orally promised Canadian Imperial Bank of Commerce that the equity would be repaid at or before maturity at par plus an agreed-upon yield.

Ex. B at 2. Likewise, the “Factual Statement” attached Appendix A to CIBC’s agreement with the Department of Justice states:

5. In 1999, Enron solicited CIBC to become the three percent “equity” holder in FAS 125/140 transactions as well as to provide the lucrative debt component of the transaction. *In order for such a transaction to be properly taken off balance sheet, at least 3% of the financing had to be from an independent equity source that was truly at risk.*

6. CIBC provided the “equity” stake only because Enron’s senior management first orally promised CIBC that the “equity” would be repaid at or before maturity at par plus an agreed-upon yield.

Ex. A at 6, ¶¶5-6. Notwithstanding CIBC's agreement that it "will not ... in litigation or otherwise, contradict[] any of the facts set forth in Appendix A" (Ex. A at 3), CIBC now attempts to avoid admitting or denying the second sentence highlighted above, claiming that sentence calls for a legal conclusion. Ex. C at 5-6.

Lead Plaintiff's Requests for Admission, like the "Factual Statement" to which CIBC agreed with the Department of Justice, recount CIBC's understanding of the purported FAS 125/140 transactions at the time the transactions took place. This is as clear in the Requests for Admission as it is clear in the agreement CIBC entered with the Department of Justice. Indeed, the Factual Statement is described in the agreement as an explanation for why CIBC "violated federal criminal law in connection with certain FAS 125/140 transactions." Ex. A at 1. To have meaning, the Factual Statement must be based on CIBC's understanding of the purported FAS 125/140 transactions and, indeed, if CIBC were to contradict the Factual Statement it would constitute a breach of the agreement.

During the meet and confer process, Lead Plaintiff's counsel confirmed Lead Plaintiff sought an answer based on CIBC's understanding, but counsel for CIBC continued to cite a variety of excuses for not answering RFA No. 5:

- Requiring CIBC to respond with respect to their understanding of the FAS 125/140 transaction is inviting CIBC to provide plaintiffs with a 50-page treatise;
- Responding to RFA No. 5 would be a copious dissertation of FAS 125/140 transactions and of all the ambiguities involved;
- It was a mistake to presume that the banks were entirely focused on the accounting treatment of the FAS 125/140 transactions. This does not mean that the banks did not know in general what Enron is doing. This is more of an issue for Enron and the accountants;
- Asking for CIBC's understanding asks for a declaration of what was proper off balance treatment of the FAS 125/140 transactions; and
- CIBC is not an arbiter of what was the appropriate accounting treatment.

CIBC's excuses are poppycock. Either CIBC had an understanding of the purported FAS 125/140 transactions consistent with the assertion contained in Lead Plaintiff's Request for Admission, or it did not.

A statement of a party's understanding of a matter is a statement of fact and a request for admission of that fact is authorized by Rule 36. *See, e.g., Booth Oil Site Admin. Group v. Safety-Kleen Corp.*, 194 F.R.D. 76, 80 (W.D.N.Y. 2000) ("A statement of a party's understanding of the meaning or intent" of a matter is a "statement of fact."). While *Booth* is not on point and there is little case law addressing this issue, it serves to illustrate the obvious difference between seeking a party's understanding of a matter versus seeking a legal interpretation. Similar to *Booth*, where a party's understanding of a contract's meaning in entering the contract was a statement of fact, CIBC's understanding of what was proper under FAS 125/140 is a statement of fact, and that fact could be relevant to determining CIBC's scienter.² Lead Plaintiff's Request for Admission does not call for a legal interpretation of FAS 125/140, nor is CIBC's legal interpretation necessary to admit or deny the Request for Admission.

² It should be noted that regardless of whether CIBC thought the transactions it structured and funded were designed to be recorded in compliance with GAAP, CIBC is still subject to liability if it understood the purpose of the transactions was to manipulate Enron's financial statements. *See, e.g., In re Global Crossing, Ltd.*, No. 02 Civ. 910(GEL), 2004 U.S. Dist. LEXIS 5040, at * 51 (S.D.N.Y. Mar. 23, 2004) ("Even assuming ... that the Companies' accounting ... was arguably consistent with the terms of specific accounting standards, this would not insulate [defendants] as a matter of law from liability under the securities laws"); *In re Terayon Communs. Sys.*, No. C00-01967 MHP, 2002 U.S. Dist. LEXIS 5502, at *21-*22 (N.D. Cal. Mar. 29, 2002) (manipulation of earnings need not violate GAAP to be actionable); *Malone v. Microdyne Corp.*, 26 F.3d 471, 478 (4th Cir. 1994) ("[C]ourts have found defendants liable for securities fraud under Rule 10b-5 despite having complied with GAAP"); *In re K-Tel Int'l Sec. Litig.*, 300 F.3d 881, 906 (8th Cir. 2002) ("A securities fraud complaint need not allege GAAP violations to establish that a material misstatement occurred in a company's financial statement.") (dissenting opinion). *See also In the Matter of Dynegy Inc.*, Order Instituting Proceedings, at 10 ("Consistent with *Malone*, a public company cannot wield technical conformity with GAAP as a shield against substantiated charges that the underlying transaction materially misled investors.") (Ex. D). But if CIBC understood the transactions were *not* proper under FAS 125/140, this too, would be relevant to CIBC's scienter.

It would be incredible for CIBC to claim that it did not have an understanding of the FAS 125/140 transactions at the time the transactions occurred, especially in light of CIBC's acceptance of responsibility for its conduct in connection with those transactions.

Moreover, as the Factual Statement sets forth, CIBC knew Enron's purpose in entering the purported FAS 125/140 transactions was to remove assets from its balance sheets and book earnings and/or cash flow at quarter and year-end. Ex. A, Factual Statement, ¶3. CIBC, who structured and funded those very transactions, must have had an understanding of whether for such a transaction to be properly taken off balance sheet, at least 3% of the financing had to be from an independent equity source that was truly at risk. Indeed, the definition of "FAS 125/140 transactions" in the agreement CIBC entered with the Department of Justice, which CIBC incorporates as an Objection in its responses, further evidences just that. Ex. C at 4 ("to comply with FAS 125/140, the SPE used to effectuate the transaction must include at least 3 percent equity investment from an independent source").

Accordingly, CIBC's evasive tactics should be rejected and the second sentence of Request for Admission No. 5 should be deemed admitted without objection or qualification, for the reasons stated above, in addition to the reasons stated at §III.A, *supra*.

IV. CONCLUSION

For all the reasons stated herein, Lead Plaintiff respectfully requests the Court deem admitted Request for Admission Nos. 1 and 3-9, and require CIBC to, within seven days, fully respond with admission or denial, as to Request for Admission No. 2, as set forth in the order herewith.

DATED: April 13, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO COMPEL DEEMED ADMISSIONS BY DEFENDANT CIBC document has been served by sending a copy via electronic mail to serve@ESL3624.com on this April 13, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO COMPEL DEEMED ADMISSIONS BY DEFENDANT CIBC document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this April 14, 2004.

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



Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk