

United States Courts  
Southern District of Texas  
FILED  
MAY 0 9 2004

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES  
LITIGATION

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

§  
§  
§ CLASS ACTION

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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.

\_\_\_\_\_  
**PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR  
RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST CANADIAN  
IMPERIAL BANK OF COMMERCE  
(DOCKET NO. 2048)**

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Plaintiffs hereby respond to the opposition of Canadian Imperial Bank of Commerce (“CIBC Parent”) and CIBC World Markets (“CIBC Subsidiary”) (collectively “CIBC”) to plaintiffs’ motion for reconsideration of the Court’s April 1, 2004 Order (Docket No. 2048) (the “Order”).<sup>1</sup>

**I. PLAINTIFFS’ CONTROL-PERSON CLAIMS RELATE BACK TO THE FILING OF THE CONSOLIDATED COMPLAINT**

CIBC erroneously argues that plaintiffs’ §§15 and 20(a) claims against CIBC Parent are time-barred as to the May 19, 1999 Enron Note Offering because plaintiffs did not bring any such claims in their Consolidated Complaint, but rather first asserted them in the First Amended Consolidated Complaint more than three years later. CIBC states: “Nowhere in the Consolidated Complaint was there any suggestion that CIBC was being sued under a control person theory for alleged violations by CIBC World Markets of Section 11 or Section 10(b).” Opposition Brief at 3. *See also id.* at 4-5 (“there is simply no basis for plaintiffs’ claim that they sued CIBC from the beginning under a control person theory”). The law of this case demonstrates that CIBC is wrong.

On May 22, 2003, the Court found the Consolidated Complaint filed on April 8, 2002 (well-within the three year statute of repose) properly asserted viable control-person claims against CIBC Parent under §§15 and 20(a). In denying CIBC Parent’s motion for summary judgment, the Court held:

The *consolidated complaint* defined both Defendants as encompassing the relevant subsidiaries that they now claim are the real parties in interest and thus the

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<sup>1</sup> CIBC asserts:

The same issues raised by plaintiffs’ motion for reconsideration are currently before the Court on motions for reconsideration filed by Bank of America Corporation and Lehman Brothers Holding Inc. CIBC adopts the arguments made by Bank of America and Lehman Brothers with respect to those motions.

Memorandum of Defendant Canadian Imperial Bank of Commerce in Opposition to Plaintiffs’ Motion for Reconsideration of Order Dismissing Claims (Docket No. 2048) (“Opposition Brief”) at 1 n.1. Plaintiffs likewise incorporate by reference their arguments with respect to those motions.

proper defendants (Bank of America Securities LLC; and CIBC Capital Corporation, CIBC Oppenheimer Corporation, and CIBC World Markets Corporation). Lead Plaintiff raises several legal theories for imposing liability against Bank of America, CIBC, and these subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment, and do not require piercing the corporate veil: *control person liability under §15 of the 1933 Act and §20(a) of the 1934 Act; enterprise liability; and common-law agency principles*). Lead Plaintiff also underlines a number of admissions by these Defendants and presents some evidence, *both of which raise issues of fact about the control exerted by the parent company over the subsidiaries*.

May 22, 2003 Order at 2 (emphasis added). The Court’s May 22, 2003 Order concerning plaintiffs’ §§15 and 20(a) claims was premised upon the Consolidated Complaint and clearly found plaintiffs sufficiently pleaded control-person claims as to CIBC Parent. CIBC is simply incorrect to assert that the Consolidated Complaint “nowhere” asserted these claims.

The Court’s ruling in this regard was more than amply supported by the allegations in the Consolidated Complaint. *See, e.g.*, Consolidated Complaint, ¶103 (“Defendant Canadian Imperial Bank of Commerce is a large integrated financial services institution that *through its controlled subsidiaries and divisions* (such as CIBC Oppenheimer or CIBC World Markets (collectively ‘CIBC’)) ... engaged and participated in the scheme to defraud purchasers of Enron securities ....”) (emphasis added). In the Consolidated Complaint, plaintiffs sued each of the bank defendants for primary liability and under a control theory pursuant to both §§15 and 20(a). *See* Consolidated Complaint, ¶¶151, 992-997 (concerning §10(b) and §20(a) liability) and ¶¶1005-1016 (concerning §§11 and 15 liability).<sup>2</sup> CIBC does not (and cannot) credibly assert that the Consolidated Complaint

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<sup>22</sup> Indeed, defendant Lehman, whose arguments CIBC adopted at page 1 of its Opposition, conceded Lead Plaintiff alleges control theories. *See* Reply in Support of the Lehman Defendants’ Partially Unopposed Motion to Reconsider Order Regarding the Lehman Defendants’ Motion to Dismiss (Docket No. 2106).

failed to allege either §§15 or 20(a) claims against any of the bank defendants, including CIBC Parent.<sup>3</sup>

Because plaintiffs asserted control-person claims against CIBC Parent in the Consolidated Complaint filed on April 8, 2002, plaintiffs' identical claims in the First Amended Complaint relate back to April 8, 2002 pursuant to Fed. R. Civ. P. 15(c) and are not time-barred.<sup>4</sup>

## II. PLAINTIFFS' PRIMARY LIABILITY CLAIMS UNDER §10(b)

CIBC argues: "When plaintiffs filed their First Amended Consolidated Complaint in May 2003, they abandoned their claim that CIBC was primarily liable for alleged misstatements in the May 1999 Note Offering." Opposition Brief at 3. That is not true. Plaintiffs continue to assert in the First Amended Complaint §10(b) claims against CIBC Parent for the May 19, 1999 Note Offering, as plaintiffs did in the Consolidated Complaint. *See* Plaintiffs' Motion at 1. These primary liability claims are therefore not time-barred and should be reinstated.

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<sup>3</sup> CIBC also argues that it would be "internally contradictory" for plaintiffs to have sued CIBC Parent as both the primary violator and the controlling person, which therefore means (according to CIBC) plaintiffs must have sued CIBC Parent under only a primary theory of liability. Opposition Brief at 4. Nothing in the controlling person statutes, however, suggest they are exclusive remedies or that plaintiffs cannot plead alternative theories of liability. Indeed, the Fifth Circuit has recognized that plaintiffs may proceed under both theories simultaneously. *See Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111 (5th Cir. 1980) (reversing and remanding district court's directed verdict for corporate defendant sued under both under both §10(b) and §20(a)).

<sup>4</sup> Even assuming, *arguendo*, plaintiffs did not assert control-person claims against CIBC Parent in the Consolidated Complaint, the control person allegations in the First Amended Complaint still relate back to April 8, 2002 and are not time-barred because plaintiffs sued CIBC Parent for the May 19, 1999 Enron Note Offering under §§10(b) and 11. *See* Plaintiffs' Motion at 2 n.1. CIBC only cites one authority in opposition, *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F. Supp. 227, 269 (W.D. Tex. 1979). Opposition Brief at 5. *Commonwealth Oil* is inapposite because there, plaintiffs sought to assert a §11 claim after previously asserting only a §10(b) claim, which would have resulted in a "shift in the burden of proof and the elimination of the scienter requirement." 467 F. Supp. at 260. Here, because plaintiffs originally sued CIBC Parent under both §§10(b) and 11, CIBC Parent cannot assert that purportedly new control-person claims result in any "shift in the burden of proof" or "the elimination of the scienter requirement" to the detriment of CIBC Parent.

**III. THE PRIMARY PERPETRATOR NEED NOT BE A PARTY FOR PLAINTIFF TO STATE A CLAIM UNDER §20(a) AS TO THE CONTROLLING ENTITY**

CIBC does not (and cannot) cite any authority disputing the plethora of cases plaintiffs cite for the proposition that the primary violator need not be a party to this action to bring a controlling entity claim under §§15 and 20(a) against CIBC Parent. Rather, CIBC argues that “in this case, for all of the reasons outlined above, plaintiffs did not bring a control person claim against CIBC challenging the conduct of CIBC World Markets before the three year statute of repose had expired.” Opposition Brief at 6. This is not a response to plaintiffs’ argument, and therefore CIBC implicitly concedes plaintiffs are correct. Besides the arguments at pages 4-5 of its Reply, which are without any basis, CIBC offers no other argument for its assertion that the dismissal of primary claims as to CIBC Subsidiary demands dismissal of the control-person claims against CIBC Parent.

**IV. CONCLUSION**

For all the reasons stated herein, and in plaintiffs' moving papers, plaintiffs respectfully request the Court reinstate any dismissed claims against CIBC Parent on the Enron Notes offered May 19, 1999.

DATED: May 3, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST CANADIAN IMPERIAL BANK OF COMMERCE (DOCKET NO. 2048) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this May 3, 2004.

I further certify that a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST CANADIAN IMPERIAL BANK OF COMMERCE (DOCKET NO. 2048) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this May 3, 2004.

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



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Mo Maloney