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.	§	

REPLY MEMORANDUM OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE IN SUPPORT OF ITS MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

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INTRODUCTION

Despite its extraordinary length, plaintiffs' 124-page opposition to the motion to dismiss filed by defendant Canadian Imperial Bank of Commerce ("CIBC") fails to respond to (and hence concedes) many of the points made in CIBC's opening brief. Although plaintiffs continue to insist that they have stated a claim against CIBC based on alleged misstatements in analysts' reports and registration statements, they offer little to support that claim except repetition of the lengthy allegations of their complaint. Plaintiffs do not respond at all to CIBC's argument that the analysts' reports contained only non-actionable statements of opinion. Nor do they offer any factual basis for inferring that the analysts and underwriters who actually made the allegedly misleading statements did so with any intent to deceive investors. See Part I, below.

In apparent recognition of the weakness of their misstatement claims, plaintiffs devote most of their brief to their contention that CIBC and the other bank defendants participated in Enron's alleged "scheme" to defraud investors. Plaintiffs describe their misstatement and "scheme" theories as separate and distinct, arguing that they would be entitled to pursue their "scheme" theory even if "CIBC had no knowledge that its *own statements* in analysts' reports or Registration Statements were false and misleading." Pl. Br. at 103 (emphasis in original). As demonstrated in Part II below, however, plaintiffs' scheme theory fails on two separate and independent grounds.

First, regardless of what label plaintiffs may apply to their theory, it is clear that it is nothing more than an aiding and abetting claim, which is precluded by the Supreme Court's decision in *Central Bank.* Plaintiffs' own complaint makes it abundantly clear that their injuries are the result of Enron's alleged misrepresentations concerning its financial condition. Plaintiffs contend that CIBC helped to make some of those misrepresentations possible by investing in three entities that Enron subsequently used to engage in transactions that Enron then improperly reported. But making

investments that helped Enron engage in transactions that the company later improperly accounted for — without any alleged assistance by or participation from CIBC — cannot possibly provide a basis for holding CIBC primarily liable under Section 10(b); on the contrary, these are precisely the kind of "aiding and abetting" allegations that *Central Bank* precludes.

Second, plaintiffs' "scheme" theory fails because they have not alleged any facts to support a strong inference that CIBC's "participation" was accompanied by the requisite intent to defraud. Plaintiffs are extremely vague about the exact parameters of the "scheme" that CIBC supposedly participated in, as well as what kind of knowledge they would have to prove in order to establish that CIBC participated with scienter. See Pl. Br. at 105 (arguing that "scheme liability" "requires neither an agreement nor the joining of a scheme," nor apparently knowledge of any of the details of the overall scheme). But whatever the standard may be, plaintiffs have failed to point to any facts that would give rise to the necessary "strong inference" that CIBC must have known that its investments in Enron-related entities would enable Enron to defraud investors.

Despite the vehemence of their presentation, plaintiffs seem to acknowledge that their position does not comport with the law as it is today. Instead, plaintiffs urge the Court to apply the law as they believe it *should* be, stating that "Congress will have to act" to change the law if the combination of the heightened pleading requirements of the PSLRA and *Central Bank's* prohibition of aiding and abetting claims "shield[s] the banks . . . from even having to answer the [complaint] and defend the allegations on the merits." Pl. Br. at 42. The only real rationale plaintiffs offer in support of this plea for nullification of the PSLRA and *Central Bank* is that the Banks and the law firm defendants represent the defrauded investors' last hope for "any significant recovery." Pl. Br. at 41.

That investors have suffered as result of Enron's collapse does not justify suspending the basic rules governing securities fraud claims. On the contrary, it is precisely because this case has been described as the "largest and worst financial fraud in U.S. history" (Pl. Br. at 41), that particular care should be taken to ensure that defendants are not swept up in the litigation absent a real factual basis for believing that they may have engaged in securities fraud. Because plaintiffs have not offered any factual or legal basis for believing that CIBC violated Section 10(b), plaintiffs' claims against CIBC should be dismissed.

ARGUMENT

I. Plaintiffs Have Failed To State A Claim Based On Alleged Misstatements By CIBC.

Plaintiffs' claims against CIBC for alleged misstatements in analysts' reports and registration statements are based on a simple pleading trick. First, plaintiffs define "CIBC" to include not only Canadian Imperial Bank of Commerce — the only CIBC entity they have named as a defendant — but also all of CIBC's subsidiaries, including its brokerage subsidiary, CIBC World Markets Corp. Compl. ¶ 103. Then, plaintiffs describe various statements and conduct by "CIBC," without ever identifying *which* CIBC entity supposedly made those statements or engaged in the conduct in question. Finally, in their brief opposing CIBC's motion to dismiss, plaintiffs argue that they are entitled to invoke the so-called "Collective Knowledge Doctrine" to attribute the knowledge of employees of all CIBC-related entities across corporate lines so that every employee of a CIBC-related entity is presumed to possess the collective knowledge of *everyone* who works for a CIBC-related entity.

Plaintiffs attempt to use this sleight-of-hand to accomplish two goals: (1) to turn statements made in analysts' reports and registration statements for which CIBC World Markets Corp. was responsible into statements made by CIBC itself and (2) to provide a basis for fabricating a claim of scienter, by attributing the knowledge of CIBC employees to the CIBC World Markets Corp. employees responsible for making statements in analysts' reports and registration statements. For the reasons outlined below, neither ploy should succeed.

A. Plaintiffs Have Not Pleaded Any Facts To Show That Statements Made By CIBC World Markets Corp. Should Be Attributed To CIBC.

Following *Central Bank*, the majority of courts to consider the issue have concluded that a defendant cannot be held liable for a statement made by someone else unless the statement is publicly attributed to the defendant. See *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("in light of *Central Bank*, in order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made"); *Wright v. Ernst & Young LLP,* 152 F.3d 169, 175 (2d Cir.1998) ("a secondary actor cannot incur primary liability . . . for a statement not attributed to that actor at the time of its dissemination"); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996). In this case, plaintiffs do not dispute that the analysts' reports state on their face that they were issued by CIBC World Markets Corp. See Ex. A to CIBC Motion. Similarly, the registration statements plaintiffs rely upon identify CIBC World Markets Corp. as one of the underwriters. See Ex.B to CIBC Motion at 1; Ex. D hereto at 5. Nowhere in either the analysts' reports or the registration statements is there any hint that the parent company, CIBC, was making any statement to investors. As a result, under the reasoning in *Ziemba*, *Wright* and *Anixter*, plaintiffs cannot sue CIBC for any alleged misrepresentations in either the analysts' reports or the registration statements.[1/]

[1/] As we pointed out in our opening brief, there is a minority view that a secondary actor who plays a significant role in the drafting and editing of allegedly false or misleading statements may be held primarily liable under Section 10(b). See *In re Software Toolworks, Inc.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994). In this case, however, plaintiffs do not allege any facts to suggest that CIBC

Under identical circumstances, the court in *Gabriel Capital, L.P. v. NatWest Finance, Inc.*, 122 F.Supp.2d 407, 429-32 (S.D.N.Y. 2000), concluded that the only way a plaintiff could show that a parent company was primarily liable under Section 10(b) for statements made by its subsidiary was by piercing the subsidiary's corporate veil and collapsing the two corporations into one, so that statements made by the subsidiary would be deemed to have been statements made by the parent.[2/] In this case, plaintiffs have tried to assert what appears to be a veil-piercing claim, alleging that CIBC "is a large integrated financial services institution" and that it "engaged and participated in the [alleged] scheme to defraud purchasers of Enron securities" " through its controlled subsidiaries and divisions," including CIBC World Markets. Compl. ¶ 103. Plaintiffs argue that this allegation is enough at this stage of the proceedings because whether a subsidiary's separate corporate identity should be respected is a question of fact that cannot properly be decided on a motion to dismiss. Pl. Br. at 3 n.6.

As the court observed in *Zishka v. American Pad & Paper Co.*, 2000 WL 1310529 at *4 (N.D. Tex. Sept. 13, 2000), however, "it is insufficient for the Plaintiffs to allege conclusorily" in a Section 10(b) case "that [the parent company] controlled or conspired with one or both of its subsidiaries." Where, as in this case, "plaintiffs' securities fraud and veil-piercing claims are inextricably intertwined," "[t]he heightened pleading requirement of Rule 9(b) applies to plaintiffs'

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played any role at all in drafting either the analysts' reports or the registration statements. Accordingly, even under the minority view, there is no basis for holding CIBC primarily liable for statements made by CIBC World Markets Corp.

2/ The court in *Gabriel Capital* noted that plaintiffs could also seek to hold the parent company liable under Section 20(a) as a control person of the subsidiary. 122 F.Supp.2d at 426. In this case, however, plaintiffs have not argued that they are asserting a control person claim, despite some ambiguity in their complaint on that point. See CIBC's Br. at 36. In any event, in order to assert a control person claim based on alleged misstatements by CIBC World Markets Corp., plaintiffs would have to properly plead a primary violation by the subsidiary. For all of the reasons outlined below, plaintiffs have not met that burden.

attempt to pierce the corporate veil." *Gabriel Capital, L.P. v. NatWest Finance, Inc.*, 122 F.Supp.2d at 433 & n. 14. Thus, in order to state a claim against CIBC based on statements made by its subsidiaries, plaintiffs would have to allege specific facts to support their conclusory assertion that CIBC and its subsidiaries "operated as a single economic entity in committing [the alleged] violations." *Id.* at 432.[3]

Plaintiffs have not even attempted to meet their burden. They have not alleged any facts that would support piercing CIBC World Markets' corporate veil generally or in connection with the particular conduct alleged in this case. Thus, for example, plaintiffs have not alleged (nor could they allege) that CIBC World Markets is the "alter ego" of CIBC or that it is grossly undercapitalized or that CIBC fails to observe the formalities necessary to preserve its subsidiary's separate corporate identity. Nor do plaintiffs allege any facts to support their conclusory assertion that CIBC directed or controlled any of CIBC World Markets' statements or activities with respect to Enron.

Because plaintiffs have failed to plead any factual basis for treating CIBC and CIBC World Markets as if they were a single entity, all of plaintiffs' claims against CIBC based on alleged misstatements in analysts' reports and registration statements should be dismissed, without any need even to consider whether plaintiffs have properly pleaded either falsity or scienter.

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[3] The two cases plaintiffs cite for the proposition that "alter ego" allegations raise questions of fact were not securities fraud cases and do not address the question of what a plaintiff must plead in order to state a claim against a parent company under Section 10(b) based on alleged misstatements by a subsidiary. See *Burnside v. Sanders Assocs., Inc.*, 507 F.Supp. 165, 166 (N.D. Tex. 1980), *aff'd*, 643 F.2d 389 (5th Cir. 1981); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985) (cited in Pl. Br. at 3 n.6).

B. Plaintiffs Have Failed To Meet Their Burden Of Alleging Specific Facts Giving Rise To A Strong Inference That The Alleged Misstatements Were Made With Scienter.

A separate and independent reason for dismissing plaintiffs' claims against CIBC based on alleged misstatements in analysts' reports and registration statements is that plaintiffs have failed to meet their burden of pleading specific facts giving rise to a strong inference that the allegedly false statements contained in those reports were made with the necessary level of scienter. In our opening brief, we pointed out that it is difficult, if not impossible, to tell from plaintiffs' "puzzle-style" pleading which statements made by the analysts were supposedly false, let alone why plaintiffs believe that the analysts or anyone else at CIBC *must have known* they were false at the time they were made. CIBC Br. at 22. In their opposition, plaintiffs respond to this argument by simply repeating, verbatim, all of the allegations of the complaint that quote CIBC analyst reports, along with their lengthy allegations of the "true facts" that supposedly show that the quoted statements were not true. Pl. Br. at 81-101.

Repetition of plaintiffs' confusing allegations is no substitute for analysis. It is still impossible to tell from plaintiffs' brief precisely which statements made by CIBC analysts plaintiffs are claiming were untrue and why plaintiffs believe each particular statement was untrue at the time it was made. See *In re BMC Software, Inc. Sec. Litig.*, 183 F.Supp.2d 860, 886 (S.D. Tex. 2001) (plaintiffs cannot meet their pleading burden under the PSLRA by "lump[ing]" the defendant's statements together followed by a "laundry list of 'true but concealed facts'"). To the extent that plaintiffs are claiming that the information *Enron* supplied to analysts was untrue, plaintiffs also fail to offer any explanation as to why *CIBC* should be liable for merely repeating that information. After all, the CIBC analysts never purported to be vouching for any Enron-supplied information. On the contrary, each report warned that, while the analysts had obtained the information and statistical information set forth therein "from sources which we believe to be reliable, . . . we do not represent that they are accurate or complete, and they should not be relied upon as such." See Ex. A to CIBC's Motion.

To the extent that plaintiffs are complaining about the analysts' predictions, which were based on information supplied by Enron, they have also failed to state a claim. Plaintiffs do not respond to CIBC's argument that the analysts' predictions were non-actionable statements of opinion and were immaterial because they were not the kinds of statements on which reasonable investors would rely. CIBC Br. at 26 n.11. Nor do they dispute CIBC's argument that, even if these were the kinds of statements that could be actionable, plaintiffs failed to meet their burden of alleging specific facts giving rise to a strong inference that the analysts *knew* the information supplied by Enron was false and therefore could not have had an honest belief in the opinions they offered or the predictions they made. *Id.* at 25-28.

The basic premise of plaintiffs' complaint is that the entire market was defrauded by Enron's alleged misrepresentations. Under those circumstances, absent allegations showing that the CIBC analysts did not actually believe Enron's statements or that they were aware of specific information that cast doubt on the veracity of the information Enron had provided to them, there is simply no basis for questioning the good faith of the analysts' opinions. See, *e.g.*, *In re Oak Technology Sec. Litig.*, 1997 WL 448168 at *14 (N.D. Cal. 1997) (holding that plaintiffs had failed to properly plead scienter based on analysts' reports where they "fail[ed] to cite specifically any internal documents or other contemporaneous facts indicating that H&Q did not believe its projections concerning Oak's performance. Instead, they merely recite portions of H&Q's analysts' reports and declare them fraudulent"); *McNamara v. Bre-X Minerals Ltd.*, 57 F.Supp.2d 396, 420 (E.D. Tex. 1999).[4/]

Plaintiffs' only response to this argument is to invoke what they characterize as the "Collective Knowledge Doctrine" and to claim that whatever knowledge anyone anywhere in the CIBC corporate family may have had about Enron should be imputed to the analysts. But that argument fails for a number of reasons.

1. Plaintiffs Cannot Use The Collective Knowledge Doctrine To Attribute Information Between Corporations.

First, assuming that the Collective Knowledge Doctrine applies at all to Section 10(b) claims, it would, at most, allow the Court to attribute the knowledge gained by an employee acting in the scope of his employment to the corporation that employs him. See, *e.g.*, *In re Hellenic Inc.*, 252 F.3d 391, 395 (5th Cir. 2001) ("An agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority"). Plaintiffs have not cited a single case where the doctrine has been used to impute knowledge across corporate lines, from an employee in one company to an employee in another.

[4/] As we pointed out in our opening brief, the comparison between the allegations made here and the allegations the court still found to be insufficient to state a claim against the analyst in *Bre-X Minerals* is striking. CIBC Br. at 28 n.12. In *Bre-X Minerals*, plaintiffs alleged that the analyst had visited the site of an alleged gold strike and had reviewed reports that must have alerted him to the fact that the claimed strike was a hoax. Nevertheless, the court concluded that plaintiffs had failed to plead sufficient facts to give rise to a strong inference of scienter because they had not provided sufficient detail about what was in the test reports or at the site that plaintiffs claimed made the fraud obvious. Here, by contrast, plaintiffs' allegations are much weaker than the allegations the court found insufficient in *Bre-X Minerals*: in this case, plaintiffs have not alleged any facts to suggest that the analysts had *any* information at all about Enron other than the public information Enron supplied to the entire market.

2. In The Absence Of Specific Allegations, The Court Cannot Simply Presume That Analysts Received Material Inside Information About Enron In Violation Of Legal Prohibitions On The Transfer Of Such Information.

Second, it would be particularly inappropriate to attribute knowledge of whatever inside information a CIBC employee may have had about Enron to the CIBC World Market Corp. analysts who wrote the reports that plaintiffs claim were misleading. Plaintiffs do not dispute that analysts employed by CIBC World Markets Corp. were required by law to be screened off from whatever material inside information the firm or its affiliates might obtain in the course of providing investment banking, lending or other services to issuers. See CIBC Br. at 7 & n.9. Nowhere in either their complaint or their response do plaintiffs offer any factual basis for believing either that CIBC failed to erect the required screens or that material inside information flowed to CIBC World Markets Corp. analysts despite the existence of required Chinese walls.

Plaintiffs' only response to this argument is to claim that CIBC should have the burden of proving that it had an effective Chinese wall in place that in fact prevented the flow of information about Enron. In support of that contention, plaintiffs cite the Ninth Circuit's decision in *Cooper v. Pickett*, 137 F.3d 616, 628-29 (9th Cir. 1997). Pl. Br. at 116 n.60; see also Pl. Br. at 75-76. *Cooper*, however, does not support plaintiffs' argument. It is true that in *Cooper* the court rejected the defendant underwriters' contention that the plaintiffs were required to "allege in detail the basis of [the defendants'] knowledge that the statements their analysts made were fraudulent: how that information filtered from the corporate finance department into the analysts' department; and what specific information the analysts falsified in preparing their reports" (137 F.3d at 628) and held that defendants would have to raise the existence and effectiveness of a Chinese wall as a defense to plaintiffs' Section 10(b) claims (*id.* at 629). But what plaintiffs fail to tell the Court is that the Ninth

Circuit arrived at this conclusion under the law that was in effect *before* the enactment of the PSLRA.

The *Cooper* court held that plaintiffs were not required to plead the specific facts outlined above because "[t]his amounts to an argument that scienter, not falsity, must be pled with specificity" and the Ninth Circuit had concluded, before the PSLRA was enacted, that Rule 9(b) did *not* require scienter to be pled with particularity. 137 F.3d at 628. In a footnote, the court acknowledged that Congress had overruled the Ninth Circuit's position and that in cases commenced after December 22, 1995, plaintiffs would not only be required to plead scienter with particularity, but with enough particularity to give rise to a "strong inference" of scienter. *Id.* at 628 n.2.[5] Thus, far from supporting plaintiffs' position, *Cooper* supports CIBC's argument that, under the heightened pleading requirements of the PSLRA, plaintiffs must plead facts showing that, notwithstanding the legal requirement that analysts be protected from inside information by a Chinese Wall, specific, material inside information about Enron in fact flowed to the analysts, alerting them to the fact that the statements they were making about Enron were not true. Plaintiffs have not even attempted to meet that burden here.

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[5] At pages 76-77 of their brief, plaintiffs cite similar passages from *Murphy v. Hollywood Entertainment Corp.*, 1996 U.S. Dist. LEXIS 22207 (D. Ore. 1996), and *Flecker v. Hollywood Entertainment Corp.*, 1997 U.S. Dist. LEXIS 5329 (D. Ore. 1997), which seem to suggest that allegations of "close association" between underwriters and an issuer, which gave the underwriters "constant access" to "all relevant non-public information about the company" would be enough to state a claim under Section 10(b). However, these cases are also pre-PSLRA cases brought in the Ninth Circuit. Because the Ninth Circuit had already ruled that plaintiffs were *not* required to plead scienter with particularity, the defendants in these cases did not even bother to challenge the adequacy of plaintiffs' scienter allegations in their motions to dismiss. Accordingly, these cases provide no guidance whatsoever to the Court in deciding this case, where the PSLRA's requirement that a strong inference of scienter be pled with particularity does apply.

3. Plaintiffs Have Failed To Allege Specific Facts To Show That *Anyone* At Any CIBC Entity Had Knowledge Of Inside Information That Called Into Question The Accuracy Of Statements Made In Analysts' Reports Or Registration Statements.

Third, and perhaps most importantly, the Collective Knowledge Doctrine does not help plaintiffs because they have not alleged facts to show that *any* employee of any CIBC-related entity was aware of specific information about Enron that called into question the material accuracy of any statement made by a CIBC analyst or underwriter. As noted above, at pages 81-101 of their brief, plaintiffs list the alleged misstatements in the analysts' reports and registration statements, followed by a long list of supposedly "true facts" showing that those statements were false. But they provide no explanation at all as to how anyone at any CIBC entity could possibly have been aware of the vast majority of these "true facts" at the time of the alleged misstatements.

For example, plaintiffs allege that "CIBC" acted as an underwriter for a May 1999 offering of Enron notes and claim that the Registration Statement for that offering was false and misleading because it incorporated Enron's allegedly false 1998 financial statements. But nowhere in their complaint or their brief do plaintiffs explain how or why anyone at CIBC would have known in May 1999 that Enron's 1998 financial statements were materially misstated. Similarly, plaintiffs allege that various statements the analysts made were untrue because Enron abused "mark to market" accounting and engaged in a practice known as "moving the curve" to artificially inflate its profits. Pl. Br. at 83, 87, 90-91, 94, and 96. But, again, plaintiffs do not provide even a hint as to how CIBC could possibly have known — or was reckless in not recognizing — that Enron was engaged in these allegedly improper accounting practices.

The only possible grounds plaintiffs have to support these claims are their allegations that, in their capacities as lender and underwriter, unidentified CIBC entities had "access" to inside information about Enron and were in constant contact with Enron insiders who were allegedly engaged in fraud. At page 113 of their Response, plaintiffs try to embellish these allegations, claiming that CIBC was "required to" perform "extensive credit analyses of Enron" and to "closely monitor Enron by frequently reviewing its financial condition and ongoing operations for any material changes." Plaintiffs contend that as a result of this analysis and monitoring CIBC "obtained extremely detailed information concerning the actual financial condition of Enron throughout the Class Period and knew that the actual condition . . . was far worse than was being publicly disclosed." *Id.* Significantly, nowhere in their complaint or their brief do plaintiffs ever explain what the "extremely detailed information" they claim CIBC received consisted of, when it was received, or who received it — let alone why that information must have alerted CIBC to Enron's "true" financial condition.

As demonstrated in CIBC's opening brief (at 29-30) these kinds of vague allegations of "access" to unidentified information are insufficient to meet plaintiffs' burden of pleading scienter under the PSLRA. In *In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948 (S.D. Tex. Feb. 20, 2001), this Court concluded that virtually identical allegations against an underwriter were insufficient to meet the heightened pleading requirements of the PSLRA. This Court explained that allegations that the underwriter "had access to confidential corporate information and communicated frequently with [insiders] about the business" constituted mere speculation; in order to state a claim under the PSLRA, plaintiffs were required to "identify specifically what kind of information" was communicated to the underwriters, "when it was conveyed, by whom and to whom." Slip. op. at 66. *Accord, Abrams v. Baker Hughes Inc.*, 2002 U.S. App. LEXIS 9565 at * 16 (5th Cir. May 21, 2002) ("[a]n unsupported general claim about the existence of confidential corporate reports that reveal information contrary to reported accounts is insufficient to survive a motion to dismiss").

Nowhere in their 500-page complaint or their 124-page brief do plaintiffs attempt to provide the kind of specific information the PSLRA requires to meet their burden of pleading scienter. Indeed, as far as we can tell, in 20 pages of alleged misstatements and "true facts," there are only three instances in which plaintiffs make any effort at all to tie specific alleged misstatements to contradictory information that was supposedly in CIBC's possession at the time the misstatement was made.

First, plaintiffs claim that an analyst's report issued on July 24, 2000 was false and misleading because (i) it rated Enron a "buy" based on (among other things) the "high potential of Enron's broadband communications strategy," (ii) it reported that "[f]ull scale roll-up" of the Blockbuster Content Delivery Agreement was "expected in 2001," and (iii) the report commented that Enron's entry into the Blockbuster agreement "has to be viewed as a strong endorsement of Enron's content delivery capabilities in video streaming technology." Pl. Br. at 89. Plaintiffs contend that "this [analysts'] report is especially significant" because "CIBC was in Braveheart — the VOD joint venture with Enron — and thus knew the project was failing due to both content and technology problems and would not achieve a 'full scale rollout' in 2001." *Id.*

According to the allegations of the complaint, however, CIBC did not enter into the so-called Braveheart deal until the end of 2000 — six months *after* the analysts' report plaintiffs quote was issued. Complt. ¶ 727. Nowhere in their complaint do plaintiffs allege any facts to suggest that CIBC had any inside information about the Blockbuster agreement at the time the statements quoted above were made, in July 2000. Indeed, for all of the reasons outlined in CIBC's opening brief (at 31-32), there is no reason to believe that CIBC thought the Blockbuster deal would fail even six months later, when the Braveheart deal was closed. Plaintiffs do not allege that CIBC was privy to any information that would have alerted it to technological or legal problems with the VOD venture.

On the contrary, the fact that CIBC allegedly invested $115 million in that venture in return for 93% of Enron's profits over the next twenty years (Compl. ¶ 727) strongly suggests that CIBC did *not* believe that the venture was likely to fail.[6]

Second, plaintiffs contend that all of the analysts' reports issued after year-end 1999 were materially misleading because they failed to disclose that CIBC or its officers had invested in the LJM2 partnership and that CIBC had invested in the Braveheart and Hawaii 125-0 transactions. Pl. Br. at 98. Plaintiffs quote the disclosure that appeared in every analysts' report, which stated that CIBC World Markets or its affiliates might perform investment banking and other services or have a variety of lending or other credit relationships with Enron. Plaintiffs contend that, beginning in late 1999, these statements were materially misleading because the analysts failed to disclose the interests that CIBC or its executives had in LJM2.

Plaintiffs' argument fails as a matter of law. CIBC World Markets Corp. analysts owed no affirmative duty to the market to disclose all information that investors might find material in evaluating the analysts' opinions or recommendations. See *In re Oak Technology Sec. Litig.*, 1997 WL 448168 at *13 (N.D. Cal. 1997) (analysts owed no affirmative duty to disclose to the market); *In re Valence Technology Sec. Litig.*, 1996 WL 37788 at *9 (N.D. Cal. 1996) (finding no authority for the proposition that analysts had an affirmative duty to disclose "materially adverse facts"). Instead, the analysts' duty, at most, was to avoid statements that were false or that omitted facts necessary to make what was said not materially misleading.

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[6] As described in our opening brief (at 32), plaintiffs allege that CIBC received a "secret guarantee" of its investment in the Braveheart project and therefore must have known that the project was likely to fail. But even if CIBC had received assurances from Enron that its investment would be protected, that would hardly be enough, standing alone, to raise a strong inference that CIBC must have known that the venture was a complete failure and that the entire Braveheart transaction was a sham designed solely to inflate Enron's earnings.

As we pointed out in our opening brief, the disclosures the CIBC analysts routinely made about possible conflicts of interest were not rendered materially misleading by the omission of information about particular relationships CIBC in fact had with entities that were related in some way to Enron. CIBC Br. at 23. The Ninth Circuit recently explained that Rule 10b-5 does not impose a duty of complete disclosure on those who choose to speak to investors: "Rule 10b-5 . . . prohibit[s] only misleading and untrue statements, not statements that are incomplete." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). The fact that a statement fails to disclose all relevant information does not make it misleading. Instead, "[t]o be actionable under the securities laws, an omission . . . must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Id.* As an example, the Ninth Circuit explained that if a company reports that its sales have risen from one year to the next, its statement does not become misleading because it fails to include a breakdown of the sales on a region-by-region or month-to-month basis. *Id.* at n.8.

The same analysis applies to the disclosure that CIBC World Markets or its affiliates might have investment banking or lending or other credit relationships with Enron. The failure to disclose the specific fact that CIBC or its officers had invested in a separate partnership that was related in some way to Enron did not "affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." Investors who read the analysts reports *knew* that CIBC entities might have significant relationships with Enron or Enron-related entities. They were not misled because CIBC failed to disclose the nature and extent of those relationships.

Third, plaintiffs offer an entirely new argument that was not made anywhere in their 500-page complaint, claiming that CIBC made false and misleading statements in the Registration Statement issued in connection with the sale of New Power stock to investors in October 2000. Pl.

Br. at 99.[7] Plaintiffs contend that this Registration Statement falsely represented that "New Power could succeed in a volatile energy market . . . through sophisticated risk management strategies conceived and managed by its affiliate, EES" and falsely suggested that Enron and its affiliates were long-term investors in New Power. *Id.* at 100. They claim that, in fact, an EES executive had informed Kenneth Lay that EES had failed to develop a hedging strategy for two years and that it had been reporting hedging losses as gains; plaintiffs also contend that, contrary to the impression conveyed in the Registration Statement, "Enron and the underwriters anticipated that New Power's shares would decline from the IPO price." *Id.*

The Court can take judicial notice that the underwriter whose name appears on the New Power Registration Statement was, once again, CIBC World Markets Corp. — and not CIBC itself. See Ex. D hereto at 5. Once again, plaintiffs offer no basis for attributing statements made in this Registration Statement to CIBC. And even if CIBC were somehow deemed responsible for those statements, plaintiffs have failed to plead any facts to give rise to an inference — let alone the required "strong inference" — that CIBC knew that the statements plaintiffs identify were false at the time they were made or acted with severe recklessness by ignoring information that made their falsity obvious. Plaintiffs' claim that Kenneth Lay was given specific information that cast doubt on the veracity of statements made in the registration statement might be enough to show that *Enron* acted with scienter; but plaintiffs offer no factual allegations at all to explain how *CIBC* supposedly knew that New Power's strategies had failed in the past or why plaintiffs believe that CIBC thought the price of New Power stock would drop in the future after the IPO was consummated.

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[7] In ¶ 723 of the complaint, plaintiffs identify only one registration statement — the May 1999 registration statement issued in connection with the sale of Enron notes — in which CIBC allegedly made false or misleading statements. Plaintiffs mentioned the New Power IPO in ¶ 731, but did not allege that there were any misleading statements in the registration statement issued in connection with the IPO. Of course, "it is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."*BMC Software Litig.*, 183 F.Supp.2d at 915.

4. Plaintiffs' Implausible Motive Theory Cannot Salvage Their Failure To Plead Any Circumstantial Evidence Of Scienter.

In *Abrams v. Baker Hughes Inc.*, 2002 U.S. App. LEXIS 9565 at *11, the Fifth Circuit reiterated its ruling in *Nathenson v. Zonagen Inc.,* 267 F.3d 400 (5th Cir. 2001), that "[a]llegations of motive and opportunity, standing alone, are no longer sufficient to plead a strong inference of scienter." While "appropriate allegations of motive and opportunity may enhance other allegations of scienter,"*id.*, the Court emphasized that allegations of motive that could be made with respect to any defendant in the same position — such as an officer's generalized desire to protect his compensation or the company's desire to keep its stock price up — are not sufficiently probative to "support a strong inference of scienter." *Id.* at * 22.

In this case, plaintiffs have not offered any allegations of scienter that could be "enhanced" even by "appropriate" allegations of a motive on CIBC's part to deliberately defraud investors. Therefore, there is no need for the Court even to consider plaintiffs' claims concerning CIBC's motives. Furthermore, as we argued in our opening brief (at 33), plaintiffs' allegations of motive remain wholly implausible, providing yet another reason to dismiss the claims made against CIBC. No rational banker would risk hundreds of millions of dollars in loans to a company he knew was effectively a Ponzi scheme, for the privilege of earning investment banking fees and interest on loans.[8] Indeed, the best evidence that the banks did *not* know that Enron was on the verge of collapse comes from the fact that in August 2001 — just two months before Enron "shocked the market" with its first announcement of a substantial loss — CIBC and other bank defendants

[8] At page 36 of their brief, plaintiffs try to make their motive allegations sound more plausible by baldly asserting that CIBC pocketed "*billions* of dollars of fees, commission, interest and other charges . . . from its investment in the fraudulent scheme and course of business." (Emphasis added). Plaintiffs offer no explanation whatsoever as to how they came up with this outrageous accusation, which is not supported by any allegation in the complaint and which is absurd on its face.

entered into a $3 billion committed credit facility with Enron to back up Enron's commercial paper. Compl. ¶ 719. If the banks had *known* that Enron was a Ponzi scheme, as plaintiffs allege, they would have been getting their money out — not putting more in.

In their response, plaintiffs argue that the banks' conduct is not inconsistent with their motive theory. Contrary to all common sense and human experience, plaintiffs contend that the banks must have believed that they could keep the Ponzi scheme going indefinitely — and thus were not worried about the fact that they had put a great deal of their own money at risk. But this argument is no more than rank speculation and falls far short of the kind of specific allegation of a concrete motive that is necessary to support a strong inference of scienter.

Unable to come up with a plausible motive based on the allegations of the complaint, plaintiffs resort in their brief to exaggerating and adding to those allegations. For example, plaintiffs assert (at 29) that Enron "secretly paid CIBC grossly excessive interest rates on billions of dollars of concealed/disguised loans," even though there are no facts alleged anywhere in the complaint to back up that claim. Plaintiffs also exaggerate the extent and importance of CIBC's relationship with Enron, describing CIBC as having sold over $2.3 billion in Enron and Enron-related securities to the public and having extended $4.2 billion in loans or lending commitments to Enron. Pl. Br. at 29. As the allegations of the complaint demonstrate, however, CIBC's alleged underwriting activities for Enron were relatively modest, involving a total of six offerings of Enron securities over a period of six years (Compl. ¶ 718) — only one of which occurred less than three years before the complaint was filed.[9] Plaintiffs also conveniently leave out the fact that CIBC did not lend or commit to lend billions of dollars to Enron all by itself; instead, according to the allegations of the complaint, CIBC

[9] Furthermore, as plaintiffs' own brief shows, "CIBC" was only one of a number of underwriters on each offering. Pl. Br. at 21.

participated to an unidentified extent along with other banks in providing $3 billion in credit to Enron during the class period. Complt. ¶ 716.

Plaintiffs also cite a recent newspaper article in which Jeffrey Skilling was quoted as saying that the profits earned by the LJM partnerships were so lavish that even he — who claims to have lacked any financial sophistication — would have realized immediately that the partnerships must have been used to loot Enron. Pl. Br. at 109. Plaintiffs argue that if "poor Mr. Skilling" could have "immediately figure[d] out LJM2 was a vehicle to defraud Enron" then it is reasonable to infer that CIBC and the other banks must have known. *Id.* at n. 59. That plaintiffs rely on Skilling's self-serving statements is remarkable in light of their own allegations that Skilling himself was one of the chief wrongdoers who was personally responsible for the decision to use LJM2 to manipulate Enron's financial statements by creating the SPEs known as the "Raptors." Complt. ¶ 465.

In any event, plaintiffs' claim that huge "payoffs" coming from LJM2 provided an incentive for CIBC and the other banks to continue misleading investors about Enron is long on rhetoric but woefully short on facts. Nowhere in their complaint or their brief do plaintiffs identify *who* received the alleged payoffs, *how much* was actually received, *when* it was received, or *why* whatever payments were received were so plainly out of line that it must have been obvious that they were not the product of a legitimate investment. Instead, plaintiffs allege only that unnamed "top executives of CIBC" were allowed to invest approximately $15 million in LJM2 and that the investment generated "huge" rewards. Complt. ¶ 732. These kind of conclusory allegations are clearly not enough to support a strong inference that CIBC acted with scienter.

II. Plaintiffs' Allegations That CIBC Participated In A "Scheme" Fail To State A Claim.

For all of the reasons outlined above, plaintiffs have failed to state a claim against CIBC based on alleged misstatements in analysts' reports or registration statements. As a result, all plaintiffs have left against CIBC is their claim that CIBC "participated" in a "scheme" to defraud investors in Enron securities. That claim fails both because it is barred by *Central Bank* and because plaintiffs have failed to allege any facts to support their allegations that CIBC acted with scienter.

A. Plaintiffs' "Scheme" Allegations Are Barred By *Central Bank.*

Section 10(b) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" rules and regulations established by the SEC. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994), the Supreme Court held that § 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act" and that the "proscription does *not* include giving aid to a person who commits a manipulative or deceptive act." Thus, in order to state a claim against CIBC under Section 10(b), plaintiffs must be able to plead facts showing that CIBC itself committed a manipulative or deceptive act in connection with the purchase or sale of Enron securities.

As demonstrated in CIBC's opening brief (at 19-20) "manipulation" is a term of art that "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). Plaintiffs have not alleged that CIBC engaged in any such manipulative activity in this case. Accordingly, in order to state a claim against CIBC under Section 10(b), they must be able to identify "deceptive" acts that CIBC allegedly committed in connection with the purchase or sale of a security. As the Supreme Court explained in *Central Bank*, the statutory prohibition on deceptive acts includes either a material misstatement of fact or an omission in violation of a duty to disclose.[10] Plaintiffs do not allege that CIBC owed any duty to investors to disclose any information. Accordingly, the *only* way that plaintiffs can state a claim against CIBC for primary liability is by alleging that CIBC itself made a material misstatement of fact on which investors relied.

CIBC's opening brief cites a host of cases in which courts following *Central Bank* have followed precisely this logic, holding that a secondary actor like an accountant or a bank cannot be held liable under Section 10(b) absent proof that they made an allegedly misleading statement that was communicated directly to investors. See, *e.g.*, *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d at 1205 (11th Cir. 2001); *Wright v. Ernst & Young LLP,* 152 F.3d at 175 (2d Cir.1998); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d at 1226 (10th Cir. 1996). These cases make it clear that it is not enough to assist someone else in making a false or misleading statement; instead, plaintiffs must show that the defendant itself "spoke" to the market.[11]

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[10] "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella v. United States*, 445 U.S. 222, 235 (1980). Thus,"[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988).

[11] As described above, a number of cases in the Ninth Circuit have disagreed with the "bright line" approach taken in the Second, Tenth and Eleventh Circuits and have concluded that a defendant who substantially participates in the drafting of allegedly misleading statements may also be held liable as a "speaker" even though the statements are never publicly attributed to that defendant. Plaintiffs cite a number of those cases in their response at 72 n.47; 76-77. These cases do not help plaintiffs with respect to CIBC, however, because plaintiffs do not contend that CIBC ever participated in the drafting of any statements by Enron. See, *e.g.*, *In re ZZZZ Best Sec. Litig.*, 864 F.Supp. 960, 970 (C.D. Cal. 1994) (accountant's participation in "the creation of" the issuer's public statements must be "extensive enough to attribute those misstatements" to the accountant); *Murphy v. Hollywood Entertainment Corp.*, 1996 WL 393662 at *6 n.10 (agreeing with underwriter defendants that "mere participation in a 'scheme' that includes the issuance of false financial statements . . . would fail under *Central Bank.* Plaintiffs must prove . . . that the underwriters were direct, knowing participants in the drafting of documents which included material misstatements and/or omissions").

Plaintiffs try to circumvent this case law by cobbling together snippets from a variety of cases that either pre-date *Central Bank*, involve entirely different issues, or do not discuss under what circumstances a secondary actor like an accounting firm, a law firm or a bank can be held liable as a primary violator. For example, plaintiffs argue that their theory that primary liability for participation in a "scheme" survives *Central Bank* is supported by case law holding that a defendant need not have made a false or misleading statement in order to be held primarily liable under Section 10(b). Pl. Br. at 65. But plaintiffs conveniently leave out the fact that the point being made in all of these cases is that proof of an affirmative misstatement is unnecessary where the defendant bought or sold securities without disclosing information the defendant had a duty to disclose. Thus, in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152 (1972), the Court concluded that the bank could be held liable for employing a scheme to defraud sellers of certain stock because the bank was a market maker in that stock and as such owed an affirmative duty to disclose the prevailing prices being paid for the stock. Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), the Court held that a defendant who secretly engaged in insider trading based on information misappropriated from an issuer was guilty of employing a "deceptive device" in connection with the purchase or sale of a security. *Accord, In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, slip op. at 9 n.13 (stating that "[a] defendant need not have made a false or misleading statement to be liable" and citing insider trading cases in support of that statement); *In re Waste Management, Inc. Sec. Litig.*, No. H-99-2183 (S.D. Tex. Aug. 16, 2001), slip op. at 75 (same).[12]

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[12] The other Supreme Court cases plaintiffs cite are similarly irrelevant. The Court's recent decision in *SEC v. Zandford*, 122 S.Ct. 1899 (2002), dealt with an entirely different question — whether a fraud should be deemed to have occurred "in connection with" the purchase or sale of a security— in an entirely different context — where the defendant was a broker who sold his client's stock with the undisclosed intention of misappropriating the proceeds of the sale. And in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), the Court concluded that the defendants could be held liable under Section 10(b) for engaging in a "scheme" when they duped

In this case, by contrast, plaintiffs do not claim that CIBC itself purchased or sold stock through any kind of deceptive device. Nor is CIBC alleged to have omitted any information in violation of a duty to disclose. Instead, plaintiffs' claim is that they were defrauded by misrepresentations made by Enron and that CIBC's conduct enabled Enron to make those misrepresentations. Whenever similar allegations have been made following *Central Bank*, the courts have been unanimous in concluding that they fail to state a claim for anything other than aiding and abetting. See CIBC Br. at 20-21. That is true even if, as in this case, plaintiffs try to dress up their allegations by claiming that the defendants participated in a "scheme" to defraud. See *In re HI/FN Sec. Litig.*, 2000 WL 33775286 at *11 (N.D. Cal. Aug. 9, 2000) ("'scheme allegations have been rejected as inconsistent with *Central Bank's* prohibition of 'conspiracy' pleading. . . . Accordingly, plaintiffs' allegations of a scheme to defraud by individual defendants who are not alleged to have made statements do not support a claim for violation of § 10(b)"); *Scone Investments, L.P. v. American Third Market Corp.*, 1998 WL 205338 at * 7 (S.D.N.Y. 1998) (a bank that allegedly enabled another defendant to make a misrepresentation "is not liable for [that] misrepresentation simply because it is alleged to have been a participant with [other defendants] in a conspiracy or scheme to defraud"); *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 762 (N.D. Cal. 1997) ("Plaintiffs' scheme allegations appear to be 'no more than a thinly disguised attempt to avoid the impact of the *Central Bank* decision.'" "In accordance with *Central Bank*, the Court finds that each defendant is liable for perpetrating a fraudulent scheme only to the extent that

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a corporation they controlled and as to which they had fiduciary obligations into selling valuable securities for virtually nothing. The two pre-*Central Bank* Fifth Circuit cases plaintiffs cite, *Shores v. Sklar*, 647 F.2d 462 (5th Cir.1981), and *Finkl v. Docutel/Olivetti Corp.*, 817 F.2d 356 (5th Cir. 1987), are also inapposite. In both of those cases, the court held that misstatements in SEC filings could give rise to liability under the "scheme" provisions of Rule 10b-5 (subsections (a) and (c)) even if the plaintiff had not directly relied on the misstatements, under a fraud-on-the-market theory.

he is also found liable for insider trading or making false or misleading statements or as a control person").[13]

In *In re Lake States Commodities, Inc.*, 936 F.Supp. 1461, 1471-72 (N.D. Ill. 1996), the court rejected precisely the same scheme theory that plaintiffs propose here. As in this case, the plaintiffs in *Lake States Commodities* argued that a defendant who had not made any statement to the market and admittedly owed no duty to disclose could nevertheless be held liable under subsections (a) or (c) of Rule 10b-5 for "participating" in a "scheme to defraud" in which *other* participants had allegedly made material misstatements to investors. The court rejected this argument as "stretch[ing] 10b-5 beyond its text and accompanying case law." *Id.* at 1472. It explained that,"[a]lthough subsections (a) and (c) do not explicitly require misstatements or omissions, the schemes and practices prohibited by 10b-5 are necessarily those of a *fraudulent* nature. In other words, just as with common-law fraud claims, 10b-5 claims must allege either (1) material misstatements or (2) material omissions by a person having a duty to disclose." *Id.* Thus, as to each defendant, plaintiffs had to allege either a material misstatement or an omission in violation of a duty to disclose.

The cases plaintiffs cite do not hold to the contrary. For example, plaintiffs quote extensively from *In re Livent, Inc. Noteholders Sec. Litig.*, 174 F.Supp.2d 144 (S.D.N.Y. 2001) (Pl. Br. at 77-

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[13] Plaintiffs rely on the Ninth Circuit's decision in *Cooper v. Pickett*, 137 F.3d at 624, for the proposition that "scheme" liability survives *Central Bank*. However, *Cooper* is entirely consistent with the cases cited above. *Cooper* recognizes that "[a]fter *Central Bank*, there is no private right of action for 'conspiracy' liability." *Id.* It then goes on to state that "*Central Bank* does not preclude liability based on allegations that a group of defendants acted together to violate the securities laws *as long as each defendant committed a manipulative or deceptive act in furtherance of the scheme.*" *Id.* (emphasis added). The court explained (quoting *Central Bank*) that a secondary actor such as a lawyer or accountant or bank "who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, providing all of the requirements for primary liability under Rule 10b-5 are met." *Id.* at 625. Thus, in order to state a claim against CIBC under *Cooper* plaintiffs would have to allege that CIBC itself employed a manipulative act or made a material misstatement on which purchasers of Enron stock relied — a burden that plaintiffs have not met.

79), yet leave out a key portion of the court's opinion. In that case, plaintiffs sued two CIBC entities for alleged fraud in connection with the sale of certain notes issued by Livent. In their first complaint, plaintiffs alleged that the CIBC defendants had "effectively becom[e] an accomplice of Livent's [alleged] misconduct" by entering into a transaction that Livent later improperly reported to conceal its true financial condition. *Id.* at 149. Plaintiffs conveniently omit the fact that the district court granted the CIBC defendants' motion to dismiss on *Central Bank* grounds, holding that their alleged "assistance and participation in a securities law violation" by entering into an agreement that Livent later misrepresented "without more, would not suffice to establish primary liability under § 10(b)"— even if CIBC "had knowledge of at least some portion of Livent's alleged fraud." *Id.* It was not until plaintiffs amended their complaint to allege that, in addition to entering into the alleged agreement with Livent, CIBC had "personally" solicited the class representatives and other security holders and made affirmative misrepresentations to them that the district court concluded that plaintiffs had stated a claim. *Id.* at 155.

So too, in this case, plaintiffs cannot state a claim under *Central Bank* simply by alleging that CIBC somehow helped to create a condition that made it possible for *Enron* to defraud investors by making material misstatements. Instead, in order to state a claim against CIBC for primary liability, plaintiffs would have to allege sufficient facts to create a "link" between CIBC's alleged "awareness of and participation in [Enron's] fraudulent scheme" and "an actual public misrepresentation made by or attributable to CIBC in connection with the purchase or sale of securities on the basis of which the [plaintiffs] made their investment decision." *Livent*, 174 F.Supp.2d at 150. There is no such "link" alleged in this case. Unlike *Livent*, plaintiffs do not allege that any CIBC entity sold any Enron securities after CIBC entered into the transactions that constitute its alleged "participation" in Enron's claimed scheme. Indeed, the last time any CIBC entity is alleged to have sold any Enron securities was in May 1999 — more than six months before the first transaction plaintiffs challenge (the investment by CIBC or its senior officers in LJM2). Furthermore, plaintiffs do not contend that CIBC ever made any representations to investors about the way in which Enron had accounted for transactions with any entity in which CIBC is alleged to have invested.[14] Accordingly, under *Central Bank*, plaintiffs have failed to state a claim against CIBC based on its alleged "participation" in a scheme to defraud.

B. Plaintiffs Have Not Alleged Sufficient Facts To Give Rise To A Strong Inference That CIBC Participated In The Alleged "Scheme" With An Intent To Defraud.

Even if plaintiffs could state a claim for primary liability against CIBC based on CIBC's alleged participation in Enron's "scheme" to defraud investors, that claim would fail because plaintiffs have failed to meet their burden of pleading scienter. Plaintiffs are extremely coy in their brief as to what precisely the scheme is or what they would have to prove in order to show that CIBC "participated" in that scheme with the requisite scienter. Plaintiffs explain at length what they are *not* required to prove. See Pl. Br. at 104 (arguing that a defendant may be liable for participating in a scheme "even if it did not interact with all the other participants, was unaware of the identity of each of the other participants, did not know about the specific roles of the other participants in the scheme, did not know about or participate in all of the details of each aspect of the scheme, or joined the scheme at a different time than the other participants"); *id.* at 105 (arguing that "scheme" liability requires "neither an agreement nor the joining of a scheme"). Plaintiffs never quite get around to

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[14] Throughout their *Central Bank* argument, plaintiffs repeatedly characterize their claim as involving alleged misrepresentations by CIBC. To the extent plaintiffs rely on alleged misstatements in analysts' reports and registration statements, their argument fails on two grounds. First, for all of the reasons outlined in Part I above, plaintiffs have not stated a claim against CIBC under Section 10(b) based on those alleged misstatements. Second, plaintiffs have not identified any direct linkage between the alleged misstatements and CIBC's claimed misconduct in enabling Enron to improperly report its financial results. Thus, unlike the plaintiffs in *Livent*, plaintiffs here do not allege that CIBC made misstatements to the market that misled investors about the validity of Enron's accounting for the transactions that CIBC supposedly enabled.

explaining what they think they *do* have to prove. But it appears from their description of their theory that a defendant could be held liable for all of the damages caused by an overarching scheme even if it did not realize that such a scheme existed.

Plaintiffs cannot have it both ways. If plaintiffs seek to impose liability on CIBC for all of the consequences of the alleged "scheme," they would have to be able to plead and prove that CIBC was aware of the broad outlines of the entire scheme. Thus, for example, it would not be enough for plaintiffs to show that a bank defendant knew (or was reckless in not knowing) that Enron had misrepresented the particular transaction that bank was involved in. Instead, plaintiffs would have to plead facts giving rise to a strong inference that the bank knew that it was contributing to a broad scheme to misrepresent the company's financial statements.

Plaintiffs do not allege any facts to suggest that CIBC knew that Enron was engaged in any such broad scheme. Nor do plaintiffs allege any facts to support their conclusory assertion that CIBC knew that Enron was planning to use and in fact used the three partnerships CIBC is alleged to have invested in to materially misstate its financial statements. As demonstrated in CIBC's opening brief (at 11-16, 30-32), plaintiffs have not alleged any facts to suggest that CIBC had any information that called into question the legitimacy of the investments made by LJM2. In their brief, plaintiffs claim that CIBC knew what Enron was doing with LJM2 because it was not only a limited partner, but also was "administering LJM2's affairs." Pl. Br. at 109. This is not an allegation that plaintiffs made anywhere in their complaint, nor is there any basis for such a claim.[15] In fact, as the Private Placement Memorandum ("PPM") for the LJM2 partnership explains, the limited partners (including

[15] In their complaint, plaintiffs allege that JP Morgan and CitiGroup "administered all of the financial affairs of LJM2." Complt. ¶ 27. There was no such allegation with respect to CIBC. Plaintiffs' brief could also be read as claiming that CIBC "structured" LJM2. Pl. Br. at 29. Once again, however, the complaint makes no such allegation. See Complt. ¶ 740 (alleging that Merrill Lynch structured LJM2).

CIBC) were not going to be involved in administering the affairs of the partnership. Instead, they "will be relying entirely on the General Partner [controlled by Fastow] and the Manager to conduct and manage the affairs of the Partnership . . . and must rely on the ability of the General Partner to make appropriate Investments for the Partnership and to dispose of such Investments and of the Manager to manage such Investments." Ex. C to CIBC Br. at 301; see also Pl. Br. at 11 (acknowledging that "LJM2's day-to-day activities would be managed by Fastow, and other Enron insiders").

In their complaint, plaintiffs relied primarily on the PPM as evidence that CIBC and the other investors must have known that LJM2 would be used for improper purposes. In our opening brief (at 12-13), we demonstrated that the disclosures in the PPM provided no reason to question Enron's or Fastow's good faith in creating the partnership or their intent to use it for proper business purposes. In their response, plaintiffs no longer concentrate on the PPM. Instead, they now rely heavily on the newspaper article described above in which Skilling was quoted as saying that the partnership was obviously a vehicle to be used to loot Enron. But Skilling's self-serving, after-the-fact statements do not provide any basis for inferring that CIBC or any of the other investors who financed LJM2 understood that Fastow would be "looting" Enron. More importantly, plaintiffs still have not provided any explanation as to how or why CIBC would have known that Enron intended to use LJM2 to engage in transactions that would enable it to misrepresent its financial results.[16/]

[16/] Plaintiffs repeat their allegation that the banks put up their money early, in order to enable LJM2 to complete year-end deals. But they still have not offered any rationale as to why putting money in an investment vehicle before the payment is required is suspicious in any way. See CIBC Br. at 13-14). Plaintiffs also argue in their brief (at 108) that CIBC "put[] up much more money than its allocated share of LJM2's equity was or would have been." This allegation does not appear anywhere in the complaint. Moreover, it is belied by plaintiffs' own chart at page 51 n.32 of their brief, where CIBC is shown as having "pre-funded" $2.25 million of a $15 million commitment; the chart indicates that the CIBC investment was later adjusted when other investors joined, so that CIBC's total net investment as of 6/30/00 was only $700,000. Again, plaintiffs offer no explanation whatsoever as to how or why these facts are suspicious.

Plaintiffs also have not alleged any facts to suggest that CIBC knew that the Hawaii 125-0 partnership it invested in would later be used to consummate what plaintiffs describe as a phony "hedge" transaction. Plaintiffs claim that CIBC's $125 million loan to Hawaii 125-0 was secured by a "secret" "total return swap" guarantee, but they still do not even attempt to provide a factual basis for their assertion that the total return swap was a secret or explain why it supposedly evidenced knowledge of any impropriety in the transaction. See CIBC Br. at 16, 32.

Finally, plaintiffs repeat their allegation that CIBC was protected by a "secret guarantee" of its investment in the Project Braveheart partnership. But once again plaintiffs fail to respond to the arguments made in CIBC's opening brief (at 14-15, 31-32) and fail to offer any explanation as to why they believe that CIBC invested $115 million in a project that it supposedly knew was doomed to fail, in reliance on an alleged "secret" guarantee that it knew Enron would never be able to satisfy and which CIBC never attempted to call upon when the investment went bad.[17]

At the end of the day, all that plaintiffs have offered in support of their claim that CIBC was a knowing participant in Enron's alleged scheme to defraud is speculation and invective. Under the PSLRA, plaintiffs' allegations fall far short of what is necessary to state a claim.

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[17] Plaintiffs try to analogize the Braveheart transaction to the situation in *In re Livent*, 174 F.Supp.2d 144, where the court found that plaintiffs had alleged sufficient facts to state a claim. In that case, however, the plaintiffs had alleged the details of a claimed secret side agreement under which Livent agreed to buy back the assets it had purportedly sold within a fixed period of time, for a fixed price — making it clear that the transaction was merely a loan and not a sale. In this case, by contrast, plaintiffs have not alleged what the specific terms of the alleged "secret guarantee" supposedly were; indeed, plaintiffs have failed to allege sufficient facts to suggest that the guarantee even existed. Moreover, as described above, in *Livent*, plaintiffs had alleged that the CIBC entities had effectively endorsed the company's accounting treatment of the loan as a sale; in this case, by contrast, there is no allegation that CIBC ever made any statements to investors about the way in which Enron accounted for the Braveheart transaction.

III. Plaintiffs Have Failed To State A Claim Against CIBC Under Section 11 Based On The May 1999 Registration Statement.

Finally, plaintiffs' Section 11 claim against CIBC should be dismissed for the simple reason that CIBC was not the underwriter for the May 1999 note offering in question. Plaintiffs do not dispute that it was CIBC World Markets Corp. — and not CIBC — who was the underwriter on that offering. Plaintiffs have offered no explanation as to why, under these circumstances, they are entitled to sue CIBC under Section 11.

As described above, plaintiffs try to hold CIBC liable for all of the actions of its "controlled subsidiaries." Compl. ¶ 103. But that theory, in turn, is based on the claim that CIBC "engaged and participated in the [alleged] scheme to defraud purchasers of Enron securities." *Id.* Because this is a fraud claim, Rule 9(b) applies. Thus, in order to state a claim against CIBC under Section 11, plaintiffs would have to plead specific facts showing that CIBC World Markets Corp.'s underwriting activities in connection with the May 1999 offering were undertaken as part of the overall scheme to defraud investors. For all of the reasons outlined above, plaintiffs have failed to meet that burden.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in CIBC's opening brief, plaintiffs' claims against CIBC should be dismissed.

Dated: June 24, 2002

Respectfully submitted,

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AS FILED WITH THE SECURITIES AND EXCHANGE COMMISSION ON OCTOBER 4, 2000

REGISTRATION NO. 333-41412

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

AMENDMENT NO. 4
TO
FORM S-1
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

TNPC, INC.

(Name of registrant as specified in its charter)

DELAWARE	4931	52-2208601
(State or other jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification No.)

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CREENWICH, CONNECTICUT 06831
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(Address, including zip code, and telephone number, including

EXHIBIT D

area code, of registrant's principal executive offices)

MARC E. MANLY
MANAGING DIRECTOR, LAW AND GOVERNMENT AFFAIRS
10 GLENVILLE STREET
GREENWICH, CONNECTICUT 06831
(203) 531-0400

(Name, address, including zip code, and telephone number, including area code, of agent for service)

COPIES TO:

[redacted]

SCOTT N. WULFE G. MICHAEL O'LEARY

[redacted]

VINSON & ELKINS L.L.P.
1001 FANNIN, SUITE 2300
HOUSTON, TEXAS 77002-6760
(713) 758-2222

ANDREWS & KURTH L.L.P.
600 TRAVIS STREET, SUITE 4200
HOUSTON, TEXAS 77002
(713) 220-4200

APPROXIMATE DATE OF COMMENCEMENT OF PROPOSED SALE TO THE PUBLIC:
As soon as practicable after this registration statement becomes effective.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box. / /

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box. / /

THE REGISTRANT HEREBY AMENDS THIS REGISTRATION STATEMENT ON SUCH DATE OR DATES AS MAY BE NECESSARY TO DELAY ITS EFFECTIVE DATE UNTIL THE REGISTRANT SHALL FILE A FURTHER AMENDMENT WHICH SPECIFICALLY STATES THAT THIS REGISTRATION STATEMENT SHALL THEREAFTER BECOME EFFECTIVE IN ACCORDANCE WITH SECTION 8(a) OF THE SECURITIES ACT OF 1933 OR UNTIL THE REGISTRATION STATEMENT SHALL BECOME EFFECTIVE ON SUCH DATE AS THE SECURITIES AND EXCHANGE COMMISSION, ACTING PURSUANT TO SAID SECTION 8(a), MAY DETERMINE.

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WE WILL AMEND AND COMPLETE THE INFORMATION IN THIS PROSPECTUS. ALTHOUGH WE ARE PERMITTED BY US FEDERAL SECURITIES LAW TO OFFER THESE SECURITIES USING THIS PROSPECTUS, WE MAY NOT SELL THEM OR ACCEPT YOUR OFFER TO BUY THEM UNTIL THE DOCUMENTATION FILED WITH THE SEC RELATING TO THESE SECURITIES HAS BEEN DECLARED EFFECTIVE BY THE SEC. THIS PROSPECTUS IS NOT AN OFFER TO SELL THESE SECURITIES OR OUR SOLICITATION OF YOUR OFFER TO BUY THESE SECURITIES IN ANY JURISDICTION WHERE THAT WOULD NOT BE PERMITTED OR LEGAL.

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SUBJECT TO COMPLETION--DATED OCTOBER 4, 2000

PROSPECTUS

, 2000

[LOGO]

TNPC, INC.

21,000,000 SHARES OF COMMON STOCK

TNPC, INC.:

- Through our subsidiary, The New Power Company, we intend to become the first nationally branded provider of electricity and natural gas to residential and small commercial customers in the United States.

- TNPC, Inc.
  10 Glenville Street
  Greenwich, Connecticut 06831
  (203) 531-0400

PROPOSED SYMBOL & MARKET:

- NPW/NYSE

THE OFFERING:

- We are offering 21,000,000 shares of our common stock.

- The underwriters have an option to purchase an additional 3,150,000 shares of common stock from us to cover over-allotments.

  This is our initial public offering, and no public market currently exists for our shares.

- We anticipate that the initial public offering price will be between $18 and $20 per share.

- Closing: , 2000.

[redacted]

	Per Share	Total
Public offering price:	$	$
Underwriting fees:		
Proceeds to TNPC, Inc.:		

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THIS INVESTMENT INVOLVES RISK. SEE "RISK FACTORS" BEGINNING ON PAGE 6

Neither the SEC nor any state securities commission has determined whether this prospectus is truthful or complete. Nor have they made, nor will they make, any determination as to whether anyone should buy these securities. Any representation to the contrary is a criminal offense.

CREDIT SUISSE FIRST BOSTON DONALDSON, LUFKIN & JENRETTE

CHASE H&Q

CIBC WORLD MARKETS

PAINEWEBBER INCORPORATED

SALOMON SMITH BARNEY

DLJDIRECT INC.

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DESCRIPTION OF GRAPHICS/MAP FOR EDGAR FILING:

The two maps of the United States, One map shows states in which significant portions of the markets will be open by the end of the year 2000 and the other map shows states in which significant portions of the markets will be open by the end of year 2002.

2000	ELECTRICITY & NATURAL GAS	ELECTRICITY	NATURAL GAS
	California	Arizona*	Colorado
	Maryland	Connecticut	Delaware*
	Massachusetts	Maine	Georgia
	Montana*	New Hampshire	Illinois*
	New Jersey	Rhode Island	Indiana*
	New York		Kentucky*
	Pennsylvania		Michigan*
	Virginia*		Nebraska*
			New Mexico
			Ohio
			South Dakota*
			Washington, D.C.
			West Virginia*
			Wisconsin*
			Wyoming*

2002:	ELECTRICITY & NATURAL GAS	ELECTRICITY	NATURAL GAS
	California	Arizona	Colorado
	Delaware*	Arkansas	Georgia
	Illinois*	Connecticut	Indiana*
	Maryland	Maine	Kentucky*
	Massachusetts	New Hampshire	Nebraska*
	Michigan*	Rhode Island	South Dakota*
	Montana	Texas	Wyoming*
	New Jersey		
	New Mexico		
	New York		
	Ohio		
	Pennsylvania		
	Virginia*		
	Washington, D.C.		
	West Virginia		
	Wisconsin*		

The above information reflects our internal estimates based on current legislation and regulations, some of which remain to be finalized and may change. Restructuring of retail natural gas and electricity markets is implemented on a utility-by-utility basis. The maps above show states in which some, if not most, of the utility markets are or are expected to be open to competition as of the dates indicated

* Pilot Programs.

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PROSPECTUS SUMMARY

THE FOLLOWING SUMMARY HIGHLIGHTS SELECTED INFORMATION FROM THIS PROSPECTUS AND MAY NOT CONTAIN ALL THE INFORMATION THAT IS IMPORTANT TO YOU. TO LEARN MORE ABOUT THE OFFERING AND OUR BUSINESS, YOU SHOULD READ THE ENTIRE PROSPECTUS, INCLUDING OUR FINANCIAL STATEMENTS AND RELATED NOTES APPEARING ELSEWHERE IN THIS PROSPECTUS.

OUR COMPANY

UNDERWRITING

Subject to the terms and conditions of an underwriting agreement dated , 2000, the underwriters named below, who are represented by Credit Suisse First Boston Corporation, Donaldson, Lufkin & Jenrette Securities Corporation, Chase Securities Inc., CIBC World Markets Corp., PaineWebber Incorporated, Salomon Smith Barney Inc. and DLJDIRECT Inc., have severally agreed to purchase an aggregate of 21,000,000 shares of our common stock from us. The number of shares of our common stock that each underwriter has agreed to purchase is set forth opposite its name below.

IN EXCEL

UNDERWRITERS:	NUMBER OF SHARES
Credit Suisse First Boston Corporation......................	
Donaldson, Lufkin & Jenrette Securities Corporation....... ..	
Chase Securities Inc.................................	
CIBC World Markets Corp.	
PaineWebber Incorporated.....................	
Salomon Smith Barney Inc...................................	
DLJDIRECT Inc..............................	
Total.............	21,000,000

The underwriting agreement provides that the obligations of the underwriters to purchase and accept delivery of the shares of our common stock in this offering are subject to approval by their counsel of certain legal matters and certain other conditions. The underwriters are obligated to purchase and accept delivery of all the shares of our common stock (other than those shares covered by the over-allotment option described below) if they purchase any of the shares of our common stock.

The underwriters initially propose to offer some of the shares of our common stock directly to the public at the initial public offering price set forth on the cover page of this prospectus and some of the shares of our common stock to certain dealers (including the underwriters) at the initial public offering price less a concession not in excess of $ per share. The underwriters may allow, and these dealers may re-allow, a concession not in excess of $ per share on sales to certain other dealers. After the initial offering of the shares of our common stock to the public, the representatives may change the public offering price and other selling terms at any time without notice.

We have granted to the underwriters an option, exercisable within 30 days after the date of this prospectus, to purchase from time to time, in whole or in part, up to 3,150,000 additional shares of our common stock at the initial public offering price less underwriting fees. The underwriters may exercise this option solely to cover over-allotments, if any, made in connection with this offering. To the extent that the underwriters exercise this option, each underwriter will become obligated, subject to certain conditions, to purchase a number of additional shares of our common stock approximately proportionate to its initial purchase commitments.

The following table shows the underwriting fees we will pay to the underwriters in connection with this offering. The amounts are shown assuming both no exercise and full exercise of the underwriters' option to purchase additional shares of our common stock.

	NO EXERCISE	FULL EXERCISE
Per Share..	$	$
Total..............	$	$

We estimate our expenses relating to this offering to be $ million.

An electronic prospectus is available on the Internet site maintained by DLJDIRECT Inc., an affiliate of Donaldson, Lufkin & Jenrette Securities Corporation. Other than the prospectus in electronic

format, the information on the Internet site relating to the offering is not part of this prospectus, has not been approved or endorsed by us or any underwriter and should not be relied on by prospective purchasers.

We have agreed to indemnify the underwriters against certain liabilities, including liabilities under the Securities Act, or to contribute to payments that the underwriters may be required to make for these liabilities.

For a period ending 180 days from the date of this prospectus, we and our executive officers and directors and certain of our stockholders have agreed not to, without the prior written consent of Donaldson, Lufkin & Jenrette Securities Corporation:

- offer, pledge, sell, contract to sell or sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, lend or otherwise transfer or dispose of, directly or indirectly, any shares of our common stock or any securities convertible into or exercisable or exchangeable for our common stock; or

- enter into any swap or other arrangement that transfers all or a portion of the economic consequences associated with the ownership of any common stock, whether any such transaction described above is to be settled by delivery of common stock or other securities, in cash, or otherwise.

However, we may:

- grant stock options and restricted stock pursuant to our 2000 Stock Plan,

- issue shares of our common stock upon the exercise of our options, warrants or rights or the conversion of currently outstanding securities or pursuant to currently outstanding agreements to issue securities; and

- issue shares of our common stock or securities convertible or exchangeable into our common stock as payment of any part of the purchase price for businesses we acquire so long as such shares issued in this manner shall not be transferable during the 180-day lock-up period.

Also, holders of shares who have not been employees since the date of this prospectus may offer, sell or otherwise dispose of:

- 25% of the shares they own on the date of this prospectus if at the end of the 90-day period after the date of this prospectus or the second trading day following the first public release of our quarterly results after the date of this prospectus, whichever is later, the reported last sale price of the common stock on the New York Stock Exchange has been at least twice the price per share in this offering for 20 of the 30 trading days ending on the last trading day of such 90-day period; and

  an additional 25% of those shares if at the end of the 135-day period after the date of this prospectus the reported last sale price of the common stock on the New York Stock Exchange is at least twice the price per share in this offering for 20 of the 30 trading days ending on the last trading day of this 135-day period.

In addition, during this 180 day period, we have also agreed not to file any registration statement for the registration of any shares of our common stock or any securities convertible into or exercisable or exchangeable for our common stock, other than with respect to our 2000 Stock Plan, without the prior written consent of Donaldson, Lufkin & Jenrette Securities Corporation. Likewise, during

this 180 day period, our executive officers and directors and certain of our shareholders have agreed not to make any demand for, or exercise any right for, registration of any shares of our common stock or any securities convertible into or exercisable or exchangeable for our common stock without Donaldson, Lufkin & Jenrette Securities Corporation's written consent.

At our request, the underwriters have reserved up to five percent of the shares offered by this prospectus for sale at the initial public offering price to our officers, directors, employees and their family members and to business associates of TNPC and Enron, including clients, consultants and other friends. These persons must commit to purchase after the registration statement has become effective but before the opening of business on the following business day. The number of shares available for sale to the general public will be reduced to the extent these persons purchase the reserved shares. Any reserved shares not purchased will be offered by the underwriters to the general public on the same basis as the other shares offered hereby

Our common stock has been approved for listing on the New York Stock Exchange under the symbol "NPW," subject to notice of issuance.

Other than in the United States, no action has been taken by us or the underwriters that would permit a public offering of the shares of common stock included in this offering in any jurisdiction where action for that purpose is required. The shares of our common stock included in this offering may not be offered or sold, directly or indirectly, nor may this prospectus or any other offering material or advertisement in connection with the offer and sale of any shares of our common stock be distributed or published in any jurisdiction, except under circumstances that will result in compliance with the applicable rules and regulations of that jurisdiction. Persons who receive this prospectus are advised to inform themselves about and to observe any restrictions relating to this offering of our common stock and the distribution of this prospectus. This prospectus is not an offer to sell or a solicitation of an offer to buy any shares of our common stock included in this offering in any jurisdiction where that would not be permitted or legal.

In connection with this offering, the underwriters may engage in transactions that stabilize, maintain or otherwise affect the price of the common stock. Specifically, the underwriters may over-allot the offering by making short sales. Short sales involve the sales by the underwriters of a greater number of shares than they are required to purchase. There are two types of short sales. "Covered" short sales are sales made in an amount not greater than the amount of shares the underwriters can purchase pursuant to their over-allotment option. "Naked" short sales are sales in excess of their over allotment option. A naked short position is more likely to be created if the underwriters are concerned that there may be downward pressure on the trading price of shares in the open market that could affect investors who purchase shares in the offering. The underwriters may reduce or close out their covered short position either by exercising the over-allotment option or by purchasing shares in the open market. In determining which of these alternatives to pursue, the underwriters will consider, among other things, the price at which shares are available for purchase in the open market as compared to the price at which they may purchase shares by exercising their over-allotment option. Any "naked" short position however, will be closed out by purchasing shares in the open market. Purchases to cover a short position may have the effect of preventing or retarding a decline in the market price of the stock following this offering. As a result, the price of the stock may be higher than the price that might otherwise exist in the open market. The underwriters may also bid for and purchase shares of common stock in the open market to stabilize the price of the common stock. In addition, the underwriting syndicate may reclaim selling concessions if the syndicate repurchases previously distributed common stock in syndicate covering transactions, in stabilizing transactions or in some other way or if Donaldson, Lufkin & Jenrette Securities Corporation receives a report that indicates clients of such syndicate members have "flipped" the common stock. These activities may stabilize or maintain the market price of the common stock above independent market levels. The underwriters are not required to

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engage in these activities, and may end any of these activities at any time

Prior to this offering, there has been no established market for our common stock. The initial public offering price for the shares of our common stock offered by this prospectus will be determined

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by negotiation between us and the representatives of the underwriters. The factors to be considered in determining the initial public offering price include:

- the history of and the prospects for the industry in which we compete;

- our past and present operations;

- our historical results of operations;

- our prospects for future operational results;

- the recent market prices of securities of generally comparable companies; and

- general conditions of the securities market at the time of this offering.

Donaldson, Lufkin & Jenrette Securities Corporation has in the past provided, and may in the future from time to time provide, investment banking and general financing and banking services to us and our affiliates for which they have in the past received, and may in the future receive, customary fees and reimbursement of expenses. In addition, DLJ Merchant Banking Partners II, L.P. and its affiliated funds, all of which are affiliated with Donaldson, Lufkin & Jenrette Securities Corporation, own an aggregate of 1,750,000 shares of our common stock and warrants to purchase in the aggregate 9,560,800 shares of our common stock. A portion of these warrants will be exercised concurrently with this offering. Upon consummation of this offering, the DLJ Merchant Banking funds will beneficially own approximately 8% of our outstanding common stock and Class A warrants, assuming all Class A warrants are exercised. Peter Grauer, who is a Managing Director at DLJ Merchant Banking, Inc., is currently a director of our company. For more information about our relationship with these parties, please read "Principal Shareholders" and "Relationships and Related Transactions."

General Electric Capital Services, Inc. indirectly owns approximately 21.67% of the issued and outstanding common stock of PaineWebber Incorporated. General Electric Capital Services owns 100% of the outstanding common stock of General Electric Capital Corporation which in turn owns 100% of the capital stock of GE Capital Equity Investments, Inc. PaineWebber Incorporated will participate in the distribution of the common stock offered by this prospectus. In addition, GE Capital Equity Investments, Inc owns 1,750,000 shares of our common stock and warrants to purchase in the aggregate 8,863,000 shares of our common stock. A portion of these warrants will be exercised concurrently with this offering.

The decision of Donaldson, Lufkin & Jenrette Securities Corporation and PaineWebber Incorporated to participate in this offering was made independent of DLJ Capital Funding, Inc. and DLJ Merchant Banking Partners II, L.P and its affiliated investment funds and GE Capital Equity Investments, Inc., which entities had no involvement in determining whether or when to participate in this offering or in determining the terms of this offering. Donaldson, Lufkin & Jenrette Securities Corporation and PaineWebber Incorporated will not receive any payment from us in connection with this offering other than their respective portion of the underwriting fees and related expenses.

Because DLJ Merchant Banking Partners II, L.P. and its affiliated funds and GE Capital Equity Investments, Inc each may be deemed to beneficially own more than 10% of our outstanding common stock for purposes of the rules of the National Association of Securities Dealers, Inc (which calculation may disregard the dilutive effect of outstanding warrants), this offering is being

made in compliance with Rule 2720 of the Conduct Rules of the National Association of Securities Dealers, Inc This rule requires that the initial public offering price be no higher than that recommended by a "qualified independent underwriter" meeting certain standards. In accordance with this requirement, Salomon Smith Barney, Inc. will act as the qualified independent underwriter in connection with this offering and assume the customary responsibilities of acting as a qualified independent underwriter in pricing and conducting due diligence for this offering. Salomon Smith Barney, Inc. will receive a fee of $10,000 for acting as the qualified independent underwriter.