

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Court
Southern District of Texas
FILED

SEP 20 2002

Michael N. Milby, Clerk

In Re ENRON CORPORATION §
SECURITIES, DERIVATIVE & § MDL 1446
"ERISA" LITIGATION, §

MARK NEWBY, ET. AL. §

Plaintiffs §

VS. §

CIVIL ACTION NO. H-01-3624 ✓
AND CONSOLIDATED CASES

ENRON CORPORATION, ET.AL. §

Defendants §

DAVID A. HUETTNER, Individually and as §
Custodian of the David A. Huettner Individual §
Retirement Account; SUSAN B. HUETTNER; §
and DONALD E. HUETTNER, Individually §
and as Custodian of the Donald E. Huettner §
Individual Retirement Account §

Plaintiffs §

VS. §

CIVIL ACTION NO. H-02-2984

EOTT ENERGY PARTNERS, L.P.; §
EOTT ENERGY CORP.; KENNETH LAY; §
DANA R. GIBBS; STANLEY C. HORTON; §
MARY ELLEN COOMBE; §
DAVID R. HULTSMAN; LORI L. MADDOX; §
PEGGY B. MENCHACA; §
MOLLY M. SAMPLE; SUSAN C. RALPH; §
DANIEL P. WHITTY; and §
ARTHUR ANDERSEN, L.L.P. §

**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND RENEWED
MOTION TO TRANSFER VENUE**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

EOTT Energy Partners, L.P., ("EOTT"), Dana R. Gibbs, Mary Ellen Coombe, David R.
Hultsman, Lori L. Maddox, Peggy B. Menchaca, Molly M. Sample, Susan C. Ralph, Daniel P.

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Whitty (collectively referred to as the “Individual Defendants”) (The Individual Defendants and EOTT collectively are referred to as the “Defendants”) file this Motion to Dismiss for Failure to State a Claim and renew EOTT’s Motion to Dismiss for Improper Venue and Alternative Motion to Transfer Venue and respectfully states as follows:

I. INTRODUCTION

The Plaintiffs apparently are investors in EOTT. EOTT is a publicly traded master limited partnership whose core business is the purchase, gathering, transportation, storage, processing and reselling of crude oil, natural gas liquids and related products. EOTT’s general partner is EOTT Energy Corp., a subsidiary of Enron Corp. However, EOTT’s business is completely separate and distinct from Enron Corp. and its business. Neither EOTT nor its general partner are parties in the Enron related bankruptcies pending in New York.

This case originally was filed in federal court in Ohio but was transferred to the Southern District of Texas, Houston Division by order of the Judicial Panel on Multi-District Litigation (Docket No. 1446) dated June 28, 2002 for discovery purposes only. None of the participants filed a notice of opposition. By order of this court dated August 19, 2002, the case was consolidated into the Newby consolidated litigation, Case No. H-01-3624.

Several of the Individual Defendants are officers of EOTT Energy Corp., EOTT’s general partner (the “General Partner”), who also is a defendant in this case. Ms. Menchaca is a former Secretary of the General Partner. Mr. Whitty is a former outside director and former chair of the audit committee of the board of the General Partner. Mr. Gibbs is the President and Chief Executive Officer and former director of the General Partner. Ms. Coombe is the Vice President of Human Resources and Administration of the General Partner. Mr. Hultsman was the former Vice President of Business Transformation of the General Partner. Ms. Maddox is the Vice President and

Controller of the General Partner. Ms. Sample is the Vice President and General Counsel of the General Partner. Ms. Ralph is the Treasurer of the General Partner.

The Plaintiffs' allegations are vague and conclusory and do not satisfy the strict pleading requirements of Fed.R.Civ.Proc. 9(b) and the Private Securities Litigation Reform Act ("PSLRA"). This is the only securities fraud case that has been filed by an EOTT investor. Plaintiffs' allegations are baseless and in some cases defy common sense and logic. The Plaintiffs' lawsuit is a transparent attempt to take advantage of the negative publicity surrounding Enron and Arthur Andersen, without stating any actionable claim. Plaintiffs' complaint should be dismissed.

II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A complaint shall be dismissed pursuant to Fed.R.Civ.Proc. 12(b)(6) when it either asserts a legal theory that is not cognizable as a matter of law, or fails to allege sufficient facts to support a cognizable claim. *Smilecare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1993), *cert. denied*, 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513 (1996); *Romero v. Barcelo Hernandez-Agosto*, 75 F.3d 23, 28 n. 2 (1st Cir. 1996); *Lillard v. Shelby Country Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996). Under the standard required for dismissal based on Fed.R.Civ.Proc. 12(b)(6), the allegations of the complaint must be taken as true. However, "[w]hile the District Court must accept as true all factual allegations in the complaint, it need not resolve unclear questions of law in favor of the plaintiff." *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1366 (5th Cir. 1994). In addition, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)(quoting *Fernandez-Montex v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)(emphasis added)); *see also Tuchmand v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)(stating that while a

Court must accept as true the complaint's allegations where well-pled, it will not accept as true conclusory allegations or unwarranted deductions of fact); and *Blumel v. Mylander*, 919 F.Supp. 423, 425 (M.D. Fla. 1996)(“a plaintiff may not merely ‘label’ claims to survive a motion to dismiss.”)

In the instant matter, Plaintiffs have failed to allege sufficient facts to support cognizable claims and thus, have failed to state claims upon which relief can be granted. Accordingly, for the reasons discussed more fully below, Plaintiffs' claims should be dismissed pursuant to Fed.R.Civ.Proc. 12(b)(6).

A. Plaintiffs Fail to State a Claim Under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

1. Requisite Elements of a Section 10(b) and SEC Rule 10b-5 Claim.

Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 of Title 17, Code of Federal Regulations, prohibit the use of any manipulative or deceptive device in connection with the purchase or sale of securities. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *Anderson v. Dixon*, 1996 U.S. App. LEXIS 11895 (10th Cir. 1996). Specifically, Section 10(b) provides in pertinent part that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Likewise, under Rule 10b-5,

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange: (1) To employ any device, scheme, or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to

make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5 (1999). In order to state a *prima facie* case under Section 10(b) and Rule 10b-5, a plaintiff must allege, “in connection with a purchase or sale of securities, ‘(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which plaintiff relied (5) that proximately caused [the plaintiffs’] injury.’” *Nathenson v. Zonagen, Inc.* 267 F.3d 400, 407 (5th Cir. 2001)(quoting *Tuchman*, 14 F.3d at 1067); see also *Wilsman v. Upjohn Co.*, 775 F.2d 713, 719 (6th Cir. 1985), *cert. denied*, 476 U.S. 1171, 106 S.Ct. 2893, 90 L.Ed.2d 980 (1986).

2. Heightened Pleading Standards for a Section 10(b) and SEC Rule 10b-5 Claim under Fed.R.Civ.Proc. 9(b) and the PSLRA.

Claims under Section 10(b) and Rule 10b-5 are based on securities fraud, and thus, are subject to a heightened level of pleading as established by Fed.R.Civ.Proc. 9(b). Such allegations must therefore be set forth “with particularity.” *In Re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d 778, 783 (S.D.Miss. 2002)(citing *Tuchman*, 14 F.3d at 1067); *In re Paradyne Networks, Inc. Securities Litigation*, 2002 U.S. Dist. LEXIS 6735 (S.D.Fl. 2002)(citing *In re Theragenics Corp. Securities Litigation*, 105 F.Supp.2d 1342, 1348-49 (N.D.Ga. 2000)). This “heightened pleading standard ‘provides defendants with fair notice of the plaintiffs’ claims, protects defendants from harm to their reputation and good will, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs.’” *In Re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d 778, 783 (S.D.Miss. 2002)(citing *Tuchman*, 14 F.3d at 1067.) “Rule 9(b) ordinarily requires the ‘who, what, when, where, and how: the first paragraph of any newspaper story.’” *In re Paradyne Networks, Inc.*, 2002 U.S. Dist. LEXIS 6735

(S.D.Fl. 2002)(quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)(emphasis added)).

“These requirements alone, however, proved ineffective in curtailing vexatious securities litigation.” *In re Unicapital Corp. Securities Litigation*, 149 F.Supp.2d 1353, 1370 (S.D.Fl. 2001)(citing *In re Comshare, Inc. Securities Litigation*, 183 F.3d 542, 548 (6th Cir. 1999)(“Despite the application of the Rule 9(b) heightened pleading requirement to securities fraud cases, the Supreme Court recognized long ago that ‘litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general’”)(quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-44, 44 L.Ed.2d 539, 95 S.Ct. 1917 (1975))). Accordingly, Congress amended the Exchange Act, through the Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4(b). The PSLRA provides that plaintiffs must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(1)(emphasis added.) Additionally, plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(emphasis added). Courts have interpreted this to mean a “strong inference of either intentional misconduct or severe recklessness,” which requires pleading of facts that “constitute persuasive, effective and cogent evidence from which it can be logically deduced that defendants acted with intent to deceive, manipulate or defraud.” *In Re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d at 783(quoting *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 407 (5th Cir. 2001), and quoting *Coates v. Heartland Wireless Communications, Inc.*, 100 F.Supp.2d 417, 422 (N.D.Tex. 2000)). Severe recklessness has been defined as “highly unreasonable omissions or misrepresentations that involve . . . an extreme departure from the standards of ordinary care, and that

present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.” *Bryant v. Avado Brands*, 187 F.3d 1271 (11th Cir. 1999) The PSLRA mandates dismissal of “any private action arising under this chapter ... if the [pleading] requirements ... are not met.” 15 U.S.C. §§ 78u-4(b)(3)(A).

3. Plaintiffs’ Complaint Fails to Allege Facts with Sufficient Particularity.

Contrary to the above requirements, Plaintiffs’ complaint contains only vague, non-specific allegations. Such conclusory allegations and legal conclusions do not satisfy the requirements of the PSLRA and Fed.R.Civ.Proc. 9(b). *Blackburn*, 42 F.3d at 931. Plaintiffs fail to assert any specific misleading statements or omissions, fail to assert the reasons why such statements are misleading, fail to state with particularity cogent facts from which it can be logically deduced that defendants allegedly acted with an intent to deceive, manipulate or defraud, and fail to state specific facts concerning their reliance upon such allegedly misleading statements and omissions. Plaintiffs assert the following general allegations of misstatements and omissions in their Complaint¹:

- (a) EOTT represented that as a result of its acquisition of certain processing, storage and transportation assets and “the apparently consistent performance of its businesses, EOTT was raising its full year 2001 earnings target from 60 cents to 95 cents per unit;”
- (b) EOTT’s “disclosures with respect to its acquisition of certain processing, storage and transportation assets were materially false and misleading;”
- (c) “While the transaction was portrayed as being in the best interests of EOTT and its unit holders, the transaction was actually intended to inflate the value of Enron’s assets on its balance sheet;” and
- (d) “EOTT’s reorganization permitted EOTT to materially misstate the effects of

¹ Plaintiffs’ complaint contains several general allegations, which solely concern Enron, which quite notably is not a party to this suit. These allegations, which are also insufficient under Fed.R.Civ.Proc. 9(b) and the PSLRA, are clearly immaterial to any alleged claims Plaintiffs may have with respect to EOTT and are an obvious attempt by the Plaintiffs to try to inflame the Court. Opinions and predictions expressed by persons or entities other than the defendant are not properly the subject of a claim for securities fraud. See *In re Mobile Telecomm. Techs. Corp. Securities Litigation*, 915 F.Supp. 828, 833 (S.D.Miss. 1995).

the purchase of the MTBE Assets and in particular to disguise the fact that profitability of the sale from EOTT's perspective depends upon EOTT's ability to continue to manufacture MTBE for a period of years, and upon the continued viability of EOTT's agreements with EGL."

Plaintiffs' Complaint at ¶¶ 19, 26, and 27. Clearly, these vague allegations fail to allege with particularity any misrepresentations or omissions actionable under Section 10(b) and Rule 10b-5. *See In re Stac Electronics Securities Litigation*, 89 F.3d 1399 (9th Cir. 1996)(dismissing claims under Rule 9(b) and stating that statement of time, place and content in the broadest of terms does not suffice under Rule 9(b)). Indeed, Plaintiffs assert no specific alleged misstatements. The closest the Plaintiffs come to specifying a specific statement is their reference to a representation made concerning EOTT's increase of its 2001 earnings target from 60 cents to 95 cents. Plaintiffs, however, do not state when this representation was made, in what context the representation was made or how Plaintiffs came to rely upon it. As a matter of law, such "vague, optimistic statements are not actionable." *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997); *see also Tarica v. McDermott Intern., Inc.*, 2000 U.S. Dist. LEXIS 14144, 2000 WL 1346895 at *6 (E.D.La. 2000)(finding that "general sentiment of optimism is mere puffery and does not give rise to a federal securities claim").

Plaintiffs also fail to state any material omission. Because Plaintiffs' complaint solely contains conclusory allegations, it is impossible to ascertain exactly what material facts Defendants allegedly possessed and failed to disclose. Generally, Plaintiffs' complaint and conclusory allegations relate to EOTT's acquisition of certain processing, storage and transportation assets. Plaintiffs do not plead, however, but merely assume that because EOTT "may have to recognize a non-cash impairment of up to \$30 million related to its contracts with EGL, and has suspended its distribution to limited partners for the first quarter of 2002," EOTT somehow must have committed

an illegal act. Plaintiffs are not entitled to make such assumptions under the heightened pleading requirements. *See In re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d at 789-90 (holding that plaintiffs may not assume and must plead specific facts to survive a motion to dismiss).

By way of background, in June 2001, EOTT purchased certain liquids, processing, storage and transportation assets through its wholly-owned subsidiary EOTT Energy Liquids, L.P. EOTT concurrently entered into ten-year toll conversion and storage agreements with Enron Gas Liquids, Inc. (“EGLI”), a wholly-owned subsidiary of Enron. EOTT paid \$117 million for all these assets. The acquisition included a hydrocarbon processing complex located in Morgan’s Point, Texas; an underground natural gas liquids storage facility located in Mont Belvieu, Texas, which consists of ten active storage wells with a total capacity of approximately ten million barrels; a 120-mile liquids pipeline grid system used for transportation of natural gas liquids; and related loading, unloading and transportation facilities, consisting of a barge dock, railcar, and truck loading and unloading facilities, as well as several interconnections to other pipelines. EOTT financed the purchase price through borrowings from Standard Chartered Trade Services Corporation. As a result of the contractual arrangements with EGLI, EOTT expected that the future performance of the acquired assets would differ substantially from the historical financial and operating performance of the assets. Under the toll conversion and storage agreements, EOTT was to receive a constant and predictable stream of income. EGLI, however, was included in Enron’s Chapter 11 filings on December 3, 2001, in the United States Bankruptcy Court for the Southern District of New York and failed to perform under the agreements. On April 2, 2002, the Bankruptcy Court entered a stipulation and agreed order approving EGLI’s rejection of the toll conversion and storage agreements, which became final and non-appealable on April 12, 2002. As a result of the rejection of these agreements, EOTT filed a claim for rejection damages in the bankruptcy proceedings. These

facts are undisputed, and Plaintiffs either knew these facts, or should have known them.

For example, Plaintiffs imply that they made an investment in EOTT based on information regarding Enron's alleged involvement with EOTT. They imply that had they known of Enron's financial troubles, they would not have invested in EOTT. In addition to this claim not being actionable, it is disingenuous because Plaintiffs invested in EOTT after public disclosures were made regarding Enron's multi-million dollar write-offs and after Enron's subsequent bankruptcy. Therefore, not only do Plaintiffs fail to state a claim, their claims are groundless and made in bad faith.

Under a support agreement with Enron, which expired December 31, 2001, Enron was obligated to provide cash distribution support to EOTT for any shortfall in available cash necessary to pay minimum quarterly distributions with respect to quarters ending on or before December 31, 2001, up to a maximum aggregate amount. Due to Enron's bankruptcy and that of certain of its subsidiaries, the resulting uncertainty related to EOTT's term financing and working capital facilities, along with the continued weakness in the crude oil markets, projected expenditure requirements related to scheduled turnaround costs for EOTT's Morgan's Point hydrocarbon processing complex and certain capital expansion projects currently underway, EOTT's distribution for the fourth quarter of 2001 was \$0.25 per common unit, which was lower than the intended minimum quarterly distribution of \$0.475 per common unit. Although Enron was obligated under the support agreement to provide cash distribution support to EOTT for any shortfall in available cash for the fourth quarter of 2001 below the minimum quarterly distribution amount, Enron did not pay the fourth quarter cash distribution shortfall of \$0.225 per common unit. Accordingly, EOTT will submit a claim for such distribution support amount through Enron's bankruptcy proceedings.

Enron's related bankruptcy filings have had a number of material effects on EOTT's business. It is obvious, however, that EOTT had no way of knowing in June 2001 that EGLI would file for bankruptcy in December 2001 and not perform under the agreements. EOTT had no crystal ball that told it that Enron would file for bankruptcy in December 2001 and would not provide distribution support for the fourth quarter of 2001. Accordingly, not only does Plaintiffs' complaint fail to plead sufficient facts of a material misstatement or omission, Plaintiffs' complaint fails to plead the requisite scienter, i.e., "persuasive, effective and cogent evidence from which it can be logically deduced that defendants acted with intent to deceive, manipulate or defraud." *In Re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d at 783 (quoting *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 407 (5th Cir. 2001) and quoting *Coates v. Heartland Wireless Communications, Inc.*, 100 F.Supp.2d 417, 422 (N.D.Tex. 2000)). The facts (as opposed to speculation or supposition) evidence a clear lack of the requisite intent.

Another example of Plaintiffs' failure to plead the requisite scienter concerns Plaintiffs' vague assertion that EOTT's reorganization somehow permitted EOTT to "materially misstate the effects of the purchase of the MTBE Assets and in particular to disguise the fact that profitability of the sale from EOTT's perspective depends upon EOTT's ability to continue to manufacture MTBE for a period of years, and upon the continued viability of EOTT's agreements with EGL." Complaint at ¶ 27. To "establish scienter based on improper accounting, Plaintiffs must plead with particularity facts demonstrating that 'the accounting judgments that were made were such that no reasonable accountant would have made the same decision if confronted with the same facts.'" *In re MCI Worldcom, Inc. Securities Litigation*, 191 F.Supp.2d 778 (S.D.Miss. 2002) (quoting *In re Miller Indus., Inc.*, 120 F.Supp.2d 1371, 1382 (N.D.Ga. 2000), and finding that plaintiffs did not plead facts showing that the defendant's decision to write-off accounts on October 26, 2000, rather than on an

unspecified earlier date was unreasonable and thus, plaintiffs did not plead facts which raise a strong inference of scienter based on the alleged failure of defendants to timely write-off the uncollectible accounts.) Nowhere in Plaintiffs' complaint do they allege facts demonstrating that reorganization of EOTT's subsidiaries was unreasonable. Moreover, Plaintiffs' allegation is mere speculation unsupported by any facts and contrary to common sense.

Additionally, in order to be actionable under Section 10(b) and Rule 10b-5, the "in connection with" language requires proof that the alleged fraud was "integral to the purchase and sale of the security in question." *Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 598 (2nd Cir. 1991). Plaintiffs, however, do not allege when they purchased their common units, the circumstances under which they purchased their common units, or when they became aware of any allegedly fraudulent scheme. Section 10(b) is not violated by a fraudulent scheme that occurs some time after a purchase of securities. *Flickinger*, 947 F.2d at 598. Rather, the fraud must be integral to the plaintiff's purchase or sale of the security. *Id.* Plaintiffs' complaint fails to provide any facts to support this element of its cause of action.

Finally, EOTT respectfully asserts that any alleged misstatements or omissions are also likely protected under the "bespeaks caution" doctrine and the safe harbor provision of the PSLRA. Since Plaintiffs fail to allege any particular misstatements or omissions, it is impossible for Defendants to specifically analyze the application of the doctrine and the safe harbor provision to the instant matter. Generally speaking, however, "[u]nder the bespeaks caution doctrine, forward-looking statements 'will be considered immaterial if cautionary language is sufficiently specific to render reliance on the false or omitted statement unreasonable.'" *Credit Suisse First Boston Corp. v. ARM Fin. Group, Inc.*, 2001 U.S. Dist. LEXIS 3332 (S.D.N.Y. 2001)(quoting *Milman v. Box Hill Sys. Corp.*, 72 F.Supp.2d 220, 230 (S.D.N.Y. 1999)). A "safe harbor" provision, which protects forward-looking

statements is also contained in the PSLRA. The PSLRA safe harbor was modeled after the judicial “bespeaks caution” doctrine, but was not meant to displace the doctrine. *Credit Suisse First Boston Corp. v. ARM Financial Group, Inc.*, 2001 U.S. Dist. LEXIS 3332 (S.D.N.Y. 2001). Under the PSLRA safe harbor, a company is not liable “if and to the extent that the forward-looking statement is identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or [is] immaterial ...” 15 U.S.C. § 78u-5(c)(1)(A). Forward-looking statements include projections of revenue or earnings, plans and objectives for future operations, statements of future economic performance, and any assumption underlying or relating to any other forward-looking statement. *See* 15 U.S.C. § 77z-2(i)(1); 15 U.S.C. § 78u-5(i)(1). In order for a defendant to be liable for a forward-looking statement, the plaintiff must establish that the defendant had actual knowledge that the statement was false or misleading when made, which Plaintiffs have not asserted and cannot assert. 15 U.S.C. § 78u-5(c)(1)(B).

Accordingly, for all of the above reasons, Plaintiffs’ claim for relief under Section 10(b) of the Exchange Act and Rule 10b-5 must be dismissed pursuant to Fed.R.Civ.Proc. 12(b)(6) for failure to state a claim and for failure to plead fraud with particularity under Fed.R.Civ.Proc. 9(b) and under the PSLRA.

B. Plaintiffs Fail to State a Claim Under Section 20(a) of the Exchange Act.

Pursuant to § 20(a) of the Exchange Act, “[e]very person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable ...” 15 U.S.C. § 78t (emphasis added). Thus, by definition, there can be no liability under § 20(a) of the Exchange Act without first a finding that a provision of

the Exchange Act has been violated. *See In re MCI WorldCom, Inc., Securities Litigation*, 191 F.Supp.2d 778, 793 (S.D.Miss. 2002)(finding that the plaintiffs' claim brought pursuant to § 20(a) must be dismissed because plaintiffs did not state a claim under § 10(b) of the Exchange Act or Rule 10b-5.) In the instant matter, Plaintiffs have failed to state a claim under Section 10(b) of the Exchange Act and Rule 10(b)(5) and have not stated a claim under any other provision of the Exchange Act. Accordingly, Plaintiffs Section 20(a) claim must be dismissed for failure to state a claim under Fed.R.Civ.Proc. 12(b)(6) because they have failed to allege an Exchange Act violation. Moreover, Plaintiffs allegations against the Individual Defendants are conclusory, self-serving assertions that are insufficient to support a cognizable claim against any of the Individual Defendants.

C. Plaintiffs Fail to State a Claim Under Section 11 of the Securities Act of 1933.

Section 11 of the Securities Act of 1933 (“’33 Act”) creates a private cause of action for “any person acquiring [a] security” for which a registration statement contained an untrue statement of material fact or an omission of a material fact that is required to be stated therein or necessary to make the statements therein not misleading. 15 U.S.C. § 77k(a); *In re Adams Golf, Inc., Securities Litigation*, 176 F.Supp.2d 216, 222-23 (Del. 2001). “To set forth a *prima facie* claim under Section 11, a plaintiff must allege that ‘[a] part of the registration statement, when such part became effective, contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.’” *Dorchester Investors v. Peak Int’l Ltd.*, 134 F.Supp.2d 569, 578 (S.D.N.Y. 2001); 15 U.S.C. § 77K.

Generally, the heightened pleading requirements of Rule 9(b) do not apply to Section 11 claims. The plain language of Rule 9(b), however, covers all “averments” of fraud and extends to cover complaints where the plaintiffs’ allegations nonetheless allege that the defendant’s actions

were fraudulent, intentional, or knowing. *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 287-88 (3rd Cir. 1992). In the instant matter, the Plaintiffs' Section 11 claim is grounded in fraud. They assert the same allegations for their Section 11 claim as their Section 10 and common law fraud claims. Accordingly, the pleading requirements of Rule 9(b) apply. *See Shapiro* 964 F.2d 272, 287-88 (3rd Cir. 1992); and *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)(stating that Rule 9(b) applies to claims brought under Section 11 when they are grounded in fraud.)

Plaintiffs' complaint fails to state a claim under Section 11 because it fails to allege with any particularity: (1) what registration statement allegedly contained an untrue statement of material fact or omission; (2) what statement was allegedly untrue or omitted; and (3) why such statement was allegedly untrue or a material omission. Plaintiffs also fail to allege how they purchased their common units. Section 11 relief is only available to those individuals who purchase the securities directly through an offering subject to a registration statement or if they purchase the securities in the secondary market, and such securities are traceable to an offering that was covered by the allegedly false registration statement. *See In re Adams Golf, Inc.*, at 226-227. If the Plaintiffs are only able to trace their securities to the secondary market and such securities were already issued on the date of the allegedly misleading registration statement, they cannot satisfy the tracing requirement and thus, cannot bring a Section 11 claim. *See Shapiro*, 964 F.2d at 285-6.

Further, as discussed more fully above with respect to Plaintiffs' Section 10(b)/Rule 10b-5 claim, Plaintiffs fail to allege with any particularity any material misrepresentation or omission. In order to state a claim for a material omission, Plaintiffs' allegations must identify that the alleged undisclosed material risk was known and material at the time it was made. *See In re Adams Golf, Inc.* at 233-34 (dismissing plaintiff's complaint with respect to the plaintiffs' Section 11 claim where plaintiffs failed to allege that any statements made in the registration statement were false and failed

to allege facts that, if proved, would demonstrate that at the time of the filing of the registration statement, the defendants had reason to know of the material risk); *Scibelli v. Roth*, 2000 U.S. Dist. LEXIS 790 at *10, 98 Civ. 7228 (S.D.N.Y. January 31, 2000)(dismissing Section 11 action and noting that plaintiffs' complaint failed to allege a securities violation because "to infer that Nortel possessed such information on July 24 because Nortel announced such information on September 29 is not a reasonable inference"); *Zucker v. Quasha*, 891 F.Supp. 1010, 1016 (D.N.J. 1995)("Even Section 11, which provides strict liability against the issuer of stock for misstatements in the prospectus, does not impose liability for the omission of material information which was unknown to, and not reasonably discoverable by, the defendants")(internal citations omitted); *In re Number Nine Visual Tech., Corp. Securities Litigation*, 51 F.Supp.2d 1, 17 (D.Mass. 1992)(plaintiffs "insufficiently alleged material misstatements based solely on the subsequent announcement of inventory markdowns by [defendant]" eight months after the initial public offering); and *Castlerock Management, Ltd. v. Ultralife Batteries, Inc.*, 68 F.Supp.2d 480, 488 (D.N.J. 1999) ("omissions that create a misleading impression – particularly one that is misleading only in hindsight – are not sufficient to constitute the basis of a securities action under Section 11.")

Plaintiffs' conclusory allegations, at most, attempt to claim fraud by using 20/20 hindsight. "The securities laws require that companies disclose known material facts; they do not require companies to disclose speculative facts that might have some material albeit unknown impact on future earnings." *In re Adams Golf, Inc.*, at 234, citing *Craftmatic*, 890 F.2d at 644. "Fraud by hindsight" is clearly not actionable. See *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1040 (6th Cir. 1991) Accordingly, Plaintiffs' allegations are insufficient to state a claim under Section 11 and thus, Plaintiffs' Section 11 claim must be dismissed for failure to state a claim under Fed.R.Civ.Proc.

12(b)(6) and for failure to plead fraud with particularity under Fed.R.Civ.Proc. 9(b) and the PSLRA².

D. Plaintiffs Fail to State a Claim Under Section 15 of the Securities Act of 1933.

Section 15 of the '33 Act extends liability under Section 11 to cover "control" persons and provides that any person who, "by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise," controls any person subject to liability under Section 11 may also be liable to the same extent as the controlled person, unless the controlling person "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77o. "Section 15 liability, therefore, is predicated on a primary violation of § 11 or § 12 by a controlled person." *In re Adams Golf, Inc.*, at 223. Thus, when plaintiffs fail to state a claim under Section 11, courts are compelled to find that plaintiffs have not stated a claim under Section 15. *In re Adams Golf, Inc.*, at 238.

As discussed above, Plaintiffs have failed to state a claim under Section 11 of the '33 Act. Accordingly, Plaintiffs have failed to state a claim under Section 15 of the '33 Act and pursuant to Fed.R.Civ.Proc. 12(b)(6) such claim must be dismissed. Moreover, Plaintiffs have failed to allege any facts that support the contention that the Individual Defendants were or are persons in control of EOTT, as required by 15 U.S.C. § 770.

E. Plaintiffs Fail to State a Claim for Common Law Fraud.

² Defendants also asserts its argument concerning forward-looking statements previously discussed above with respect to Plaintiffs' Section 10(b)/Rule 10(b)(5) claim as the bespeaks caution doctrine applies to both Section 10(b) and Section 11 claims. *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1415 n.3. (9th Cir. 1994) Under the "bespeaks caution" doctrine, if "an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements," those forecasts cannot be the basis of a securities claim unless it is reasonable to assume that the statements affected the total mix of information the document provided investors. *In re Donald J. Trump Casino Securities Litigation Taj Mahal Litigation*, 7 F.3d 357, 364 (3rd Cir. 1993). Defendants, however, are unable to specifically analyze such defense because Plaintiffs fail to identify any specific statements and Registration Statements.

In Delaware, the elements of actionable fraud consist of a false representation of a material fact, knowingly made with intent to be believed to one who, ignorant of its falsity, relies thereon and is thereby deceived. *Continental Illinois Nat'l Bank & Trust Co. v. Hunt Int'l Corp.*, 1987 Del.Ch. LEXIS 537 (Del.Ch. 1987)(dismissing common law fraud claim because it was deficient under Rule 9(b) as the plaintiff did not support its theory of fraud with specifics in the complaint.)

Plaintiffs repeat and reallege the same conclusory allegations for their common law fraud claim as they did for their Section 10(b)/Rule 10b-5 claim. Accordingly, Defendants adopt and reassert its above arguments concerning Plaintiffs' Section 10(b)/Rule 10b-5 claim and respectfully asserts that Plaintiffs' claim for common law fraud must be dismissed for failure to state a claim and for failure to plead fraud with particularity under rule 9(b) because Plaintiffs fail to allege with particularity any false representation of a material fact, the requisite intent of EOTT and the requisite reliance thereon by Plaintiffs.

F. Plaintiffs Fail to State a Claim for Breach of Fiduciary Duty.

Plaintiffs assert their claim of breach of fiduciary duty in their individual capacities and not on behalf of EOTT. Claims of breach of fiduciary duty, however, are facially claims of injury to the corporation and not individual bases for litigation. Indeed, a "suit for damages arising from an injury to the corporation can only be brought by the corporation itself or by a shareholder derivatively if the corporation fails to act, *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n. 13 (9th Cir. 1979), since only the corporation has an action for wrongs committed against it." *Gaff v. Federal Deposit Insur. Corp.*, 814 F.2d 311, 315 (6th Cir. 1987). Accordingly, suits claiming breach of fiduciary duty must be brought as derivative actions. *Pullman-Peabody Co. v. Joy Manufacturing Co.*, 662 F.Supp. 32 (D.N.J. 1986); *Clinton Hudson & Sons v. Lehigh Valley Co-op Farms, Inc.*, 73 F.R.D. 420, 427 (E.D. Pa. 1977); *Penquin Industries, Inc. v. Kuc*, 1984 U.S. Dist. LEXIS 15419

(D.PN 1984)(finding that minority shareholders failed to state a claim for breach of fiduciary duty where they brought suit in their individual capacities.) Thus, Plaintiffs' claim of breach of fiduciary duty must be dismissed for failure to state a claim under Fed.R.Civ.Proc. 12(b)(6).

III. DEFENDANTS RE-URGE EOTT'S MOTION TO DISMISS FOR IMPROPER VENUE

On June 24, 2002, EOTT filed a Motion to Dismiss for Improper Venue and Alternative Motion to Transfer Venue in the Northern District of Ohio. ("Motion to Dismiss") See Exhibit "A." The Individual Defendants join EOTT in its Motion to Transfer, and urge the Motion to Transfer, as if it was filed on their behalf.

On July 31, 2002, the multidistrict litigation panel signed a Conditional Transfer Order transferring this case to the Southern District of Texas. See Exhibit "B." However, the Ohio court never ruled on EOTT's Motion to Dismiss. Therefore, Defendants incorporate the Motion to Dismiss filed in the Ohio District Court by reference, and re-urge that motion and request that this Court order that the venue of this case be transferred to this Court for all purposes, specifically including trial. The Individual Defendants join in such request.

IV. PRAYER

For these reasons, EOTT Energy Partners, L.P. and all the Individual Defendants ask the court to enter judgment that Plaintiffs take nothing, dismiss Plaintiffs' suit with prejudice, assess costs against Plaintiffs, and award EOTT Energy Partners, L.P., Dana R. Gibbs, Mary Ellen Coombe, David R. Hultsman, Lori L. Maddox, Peggy B. Menchaca, Molly M. Sample, Susan C. Ralph, Daniel P. Whitty all other relief to which they are entitled.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing pleading has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure, on this 20th day of September, 2002

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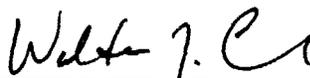
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