United States Courts
Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	Consolidated Civil Action No. H-01-3624
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants.	

MOTION OF THE SECONDARY ACTOR BANK DEFENDANTS' FOR SECTION 1292(b) CERTIFICATION FOR IMMEDIATE APPEAL OF THE DECEMBER 20, 2002 ORDER AND BRIEF IN SUPPORT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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IN RE ENRON CORPORATION SECURITIES LITIGATION	Consolidated Civil Action No. H-01-3624
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	
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MOTION OF THE SECONDARY ACTOR BANK DEFENDANTS' FOR SECTION 1292(b) CERTIFICATION FOR IMMEDIATE APPEAL OF THE DECEMBER 20, 2002 ORDER AND BRIEF IN SUPPORT

Defendants Canadian Imperial Bank of Canada, Barclays PLC, Citigroup, Inc., Credit Suisse First Boston Corp., and J.P. Morgan Chase & Co. (collectively, the "Secondary

Actor Bank Defendants") respectfully submit this motion for certification for immediate appeal of this Court's December 20, 2002 order denying the Secondary Actor Bank Defendants' motions to dismiss the Consolidated Complaint (the "December 20 Order") and brief in support. If such an appeal is granted there will be no delay in these proceedings. To the contrary, permitting an appeal to proceed now — regardless of outcome — will expedite the resolution of this case without prejudice to any party.

PRELIMINARY STATEMENT

This Court's December 20 Order broke new ground on a controlling question of law where prior decisions have demonstrated substantial grounds for a difference of opinion. The Secondary Actor Bank Defendants concur with the Court's observation that "this consolidated action raises a number of novel and/or controversial issues that the law has thus far not addressed or about which the courts are in substantial disagreement." December 20 Order, at 5. Lead Plaintiff's counsel agrees: "Nobody has really addressed these issues this definitively or this exhaustively." Kurt Eichenwald, *Ruling Leaves Most Players Exposed to Suits on Enron*, N.Y. TIMES, Dec. 21, 2002, at C3 (quoting Lead Plaintiff's counsel, William Lerach, Esq. of Milberg Weiss Bershad Hynes & Lerach LLP).

Under these circumstances, the Secondary Actor Bank Defendants request Section 1292(b) certification on the central and controlling securities law question in this case:

> Given the Supreme Court's holding in *Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164 (1994) that no private right of action for aiding and abetting a securities fraud exists under Section 10(b) of the Securities Exchange Act and Rule 10b-5, what is the proper test for determining whether alleged conduct by a "secondary actor" goes beyond aiding and abetting a securities fraud and gives rise to a cause of action under these provisions?

In analyzing this question, this Court made two basic legal determinations, both of which, the Secondary Actor Bank Defendants respectfully submit, run contrary to the weight of authority and about which there are therefore substantial grounds for a difference of opinion. The combined effect of these two legal determinations is an extraordinarily narrow reading of *Central Bank's* proscription against aider and abettor liability and an unprecedented and expansive view of primary liability under Section 10(b) and Rule 10b-5.

First, this Court rejected the "bright line" test that has been articulated and adopted by the vast majority of the federal appellate and district courts that have considered the issue and which requires a plaintiff to plead and prove that a defendant actually made a material misstatement or omission in connection with the purchase or sale of security. Instead, this Court applied an interpretation of a "creation" test, a standard that has not been adopted by any other court, but advocated by the SEC in an amicus brief filed in this litigation.

Second, this Court declined to follow the established view of what constitutes a "manipulative or deceptive device or contrivance" — namely, misstatements or omissions, wash sales, insider trading and other fraudulent transactions that *directly* involve the sale or purchase of a security. Instead, this Court redefined such conduct to include substantive participation in alleged "contrivances, deceitful devices, schemes and courses of business" employed by Enron that did *not* directly involve the sale or purchase of any security, but allegedly "operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings." December 20 Order, at 273.

Although there are other aspects of the December 20 Order with which the Secondary Actor Bank Defendants respectfully disagree and which might appropriately be certified pursuant to Section 1292(b), they submit that had this Court adopted the majority

"bright line" test, employed the established view of "manipulative or deceptive devices," or resolved these issues differently in a number of other respects, the issues at stake in this litigation would be substantially narrowed. As a result, some or all of the Secondary Actor Bank Defendants would have either been dismissed from the case or benefited substantially from a significant reduction of the actionable allegations against them. Accordingly, the Secondary Actor Bank Defendants seek this Court's permission to bring the Order that embodies these crucial holdings on these "novel and/or controversial issues" to the United States Court of Appeals for the Fifth Circuit for timely review pursuant to 28 U.S.C. § 1292(b).

In seeking certification, the Secondary Actor Bank Defendants seek no delay in this litigation and will not seek a stay of the underlying proceedings herein in connection with this request to appeal. Should the Court grant this motion and the Fifth Circuit accept this appeal, the Secondary Actor Bank Defendants will seek expedited appellate review. It is the Secondary Actor Bank Defendants' hope and expectation that the controlling question of law that underlies this motion will be resolved by the Fifth Circuit promptly, in advance of the completion of discovery and any summary judgment briefing. A grant of the motion for certification therefore would not prejudice the plaintiffs in any way.

Moreover, allowing an appeal to proceed now would, in all events, speed resolution of this case. In addition to the potentially dispositive impact on the Section 10(b) and Rule 10b-5 claims against some or all of the Secondary Actor Bank Defendants, a resolution of the issues presented by such an appeal could affect, among other things, the legal standard applied to the alleged conduct of secondary actors, the scope of discovery, the quantum and type of proof offered at trial, and the instructions to the jury.

ARGUMENT

The primary purpose of Section 1292(b) certification is the avoidance of unnecessary expense and delay by expediting the ultimate termination of the litigation. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 n.25 (1978) (citing H.R. Rep. No. 1667, 85th Cong., 2nd Sess. 5-6 (1958)). A district court may make this certification either in the original order or through a subsequent order. *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347 (6th Cir. 1998); *Ricke v. Armco, Inc.*, 92 F.3d 720, 723 (8th Cir. 1996); *Aparicio v. Swan Lake*, 643 F.2d 1109, 1112 (5th Cir. 1981). *See also* FED. R. APP. P. 5(a). Section 1292(b) certification is particularly appropriate in large cases, such as this one, that are both complicated and have a high public profile. *See, e.g., Fernandez-Roque v. Smith,* 671 F.2d 426, 431 (11th Cir. 1982) ("[W]e believe that this case presents the truly 'rare' situation in which it is appropriate for this court to require certification of a controlling issue of national significance."); *In re Air Crash Off Long Island on July 17, 1996,* 27 F. Supp. 2d 431, 436 (S.D.N.Y. 1998), *appeal accepted*, 209 F.3d 200 (2d. Cir. 2000) ("Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called 'big' cases."); *Castano v. Am. Tobacco Co.,* 162 F.R.D. 112, 115 (E.D. La. 1995), *appeal accepted*, 84 F.3d 734 (5th Cir. 1996); *In re Northern Distr. of Calif. "Dalkon Shield" IUD Prod. Liability Litig.*, 526 F. Supp. 887, 919 (N.D. Cal. 1981), *appeal accepted*, 693 F.2d 847 (9th Cir. 1982).

Certification pursuant to Section 1292(b) is appropriate where: (1) the order to be appealed involves a controlling question of law; (2) there is a substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b); *Ichinose v. Homer*

Nat'l Bank, 946 F.2d 1169, 1177 (5th Cir. 1991); *Thompson v. City of Starkville*, 901 F.2d 456, 459 (5th Cir. 1990). Each of these requirements is satisfied here.

I. THE PROPER SCOPE OF SECONDARY ACTOR LIABILITY UNDER *CENTRAL BANK* IS A CONTROLLING QUESTION OF LAW IN THIS CASE

A controlling question is one that "has the potential of substantially accelerating the disposition of the litigation." 19 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 203.3[3] (3d ed. 1999). But the "resolution of an issue need not necessarily terminate an action in order to be 'controlling.'" *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). *See also Larsen v. Senate of the Commonwealth of Pennsylvania*, 965 F. Supp. 607, 609 (M.D. Pa. 1997), *appeal accepted*, 152 F.3d 240 (3d Cir. 1998) (finding an issue regarding which reversal would "greatly simplify the litigation" by terminating numerous claims to be a controlling question of law); *SCM Corp. v. Xerox Corp.*, 474 F. Supp. 589, 594 (D. Conn. 1979), *appeal accepted*, 645 F.2d 1195 (2d Cir. 1981) ("A controlling question within the meaning of § 1292(b) is not limited to threshold issues . . . which are a predicate for all future proceedings in a lawsuit."). To satisfy Section 1292(b), the resolution of the issue need only "affect the outcome of the litigation in the district court." *Castano,* 162 F.R.D. at 115. This Court's interpretation of *Central Bank* and the sub-issues that inform its holding on this question clearly meet the Section 1292(b) standard.

This Court's legal conclusion that allegations that the Secondary Actor Bank Defendants "concealed a pattern of creating unlawful SPEs and utilizing fraudulent transactions with these entities," December 20 Order, at 32 n.15, and engaged in certain "identified contrivances, deceitful devices, schemes and courses of business [that] operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings," December 20 Order, at 273, are actionable rests on its interpretation of *Central Bank*. Embedded

in this controlling question of law are two sub-questions, the resolution of which determine the broader secondary actor liability question here:

> (1) Should this Court have adopted the majority "bright line" test for determining liability of secondary actors under *Central Bank*?
>
> (2) Do the wide range of allegations that this Court summarized as "identified contrivances, deceitful devices, schemes and courses of business [that] operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings," December 20 Order, at 273, constitute "manipulative or deceptive device[s]" used or employed "in connection with the purchase or sale of any security" under Section 10(b) and Rule 10b-5?

Were the Fifth Circuit to disagree with this Court's view on either or both of these questions, the scope of secondary actor liability would be very different and would have a potentially dispositive impact on the Section 10(b)/Rule 10b-5 claims against some or all of the Secondary Actor Bank Defendants (as well as some of the other institutional defendants).

II. THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AS TO THE PROPER SCOPE OF SECONDARY ACTOR LIABILITY UNDER *CENTRAL BANK*

There is a substantial ground for difference of opinion where an issue of law is difficult, one of first impression, or one with respect to which the Circuits are split. *See, e.g., Resolution Trust Corp. v. Smith,* 879 F. Supp. 1059, 1061 (D. Or. 1995), *appeal accepted,* 83 F.3d 1051 (9th Cir. 1996) (pointing to Circuit split as evidence of substantial ground for difference of opinion); *Castano*, 162 F.R.D. at 116-17 (finding substantial ground for difference of opinion where the issue involved a developing area of the law). Here, this Court used words that nearly track the "substantial ground for difference of opinion" language of Section 1292(b), *see* December 20 Order, at 5, and detailed the Circuit split directly applicable to the issue highlighted in this motion. Thus, this element of the Section 1292(b) analysis is plainly satisfied.

The Secondary Actor Bank Defendants respectfully submit that the December 20 Order exposes the Secondary Actor Bank Defendants to potential liability for Enron's alleged securities fraud by (a) rejecting the "bright line" test adopted by a majority of the courts, and (b) according an unprecedented and expansive view to Section 10(b) and Rule 10b-5's "manipulative" and/or "deceptive" devices element. The Secondary Actor Bank Defendants respectfully submit that the Court erred in reaching these legal determinations, each of which independently satisfies the substantial grounds for difference of opinion requirement.

A. There Is a Substantial Ground For Difference Of Opinion With Respect To The Court's Rejection Of The "Bright Line" Test

This Court's rejection of the "bright line" test involves an issue on which the federal courts are indisputably split. The existence of this split alone is sufficient to satisfy Section 1292(b)'s requirement that there is a substantial difference of opinion about the legal issue presented for certification.

The majority "bright line" test limits Section 10(b) and Rule 10b-5 liability to misstatements or omissions that are publicly attributable to a defendant. It has been adopted by three of the four Circuit courts to consider the issue — the Second, Tenth and Eleventh Circuits — as well as by numerous district courts. *See, e.g., Ziemba v. Cascade Int'l Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("[I]n 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*, 152 F.3d 169, 175 (2d. Cir. 1998) (stating that the Second Circuit has followed a "bright line" approach); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d. Cir. 1997) ("If *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under

Section 10(b).") (citations omitted); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) ("Reading the language of § 10(b) and 10b-5 through the lens of *Central Bank of Denver*, we conclude that in order for accountants to 'use or employ' a 'deception' actionable under the antifraud law, they must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors."); *In re Infocure Sec. Litig.*, 210 F. Supp. 2d 1331, 1350 (N.D. Ga. 2002) ("[F]ollowing *Central Bank*, a law firm may not be held liable for securities fraud merely because it played a substantial role in the transaction at issue. . . . [I]n order for a secondary actor, such as a law firm or accounting firm 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.") (internal quotations and citations omitted); *In re Rent-Way Sec. Litig.*, 209 F. Supp. 2d 493, 503 (W.D. Pa. 2002) (holding that the auditor was not liable for its review and approval of unaudited quarterly reports where no misstatements upon which investors could have relied were attributable to defendant.); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PriceWaterhouseCoopers*, LLP, 137 F. Supp. 2d 1114, 1121 (E.D. Wisc. 2001) (holding that an auditor may not be held liable under § 10(b) where it reviewed and advised a company in that company's issuance of a press release, but did not publicly adopt or allow its name to be associated with the release); *Copland v. Grumet*, 88 F. Supp. 2d 326, 332 (D.N.J. 1999) ("[Defendants'] participation in this process [of 'cooking the books'] cannot be considered the equivalent of *making* the false statements themselves"); *Krieger v. Gast*, No. 98 C 3182, 1998 WL 677161, at *9 (N.D. Ill. Sept. 22, 1998) ("Since [the defendants] cannot be 'legally charged with responsibility' for statements in the Notice if they did not make them directly, [the plaintiff's] claim must stand or fall on the allegation that [the

defendants] *themselves* made statements to [the plaintiff] in the shareholder notice."); *Vosgerichian v. Commodore Int'l*, 862 F. Supp. 1371, 1378 (E.D. Penn. 1994) (holding that an accountant could not be held liable for alleged misrepresentations made by its client, even though the accountant allegedly had provided substantial assistance to the client in making such misrepresentations); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994) ("Only primary violators, i.e., those who *make* a material misstatement or omission or commit a manipulative act, are subject to private suit under Section 10(b)."). As the Secondary Actor Bank Defendants have argued before this Court and will be prepared to argue before the Fifth Circuit, only the bright line test is consistent with the holding of *Central Bank.*

By contrast, the "creator" test, advocated by the SEC and adopted in the December 20 Order, has not been applied by any other court.[1] Furthermore, the minority "substantial participation" test, from which the creator test appears to derive, has been adopted by only one Circuit and a few district courts. *See, e.g., Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1995); *McNamara v. Bre-X Minerals Ltd.*, 57 F. Supp. 2d 396, 426 (E.D. Tex. 1999); *Cashman v.*

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[1] The SEC's amicus brief does not, and cannot, change the holding of *Central Bank* or the holdings of the majority of the courts to have considered this issue. Moreover, this Court's reliance on *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-44 (1984), and its progeny for the proposition that the position taken by the SEC is authoritative in a case in which it is not a party concerning the proper interpretation of a controlling Supreme Court precedent, is misplaced. *Chevron* concerned the proper degree of deference afforded an agency in drafting regulations pursuant to properly enacted statutes and not the view an agency might take of a Supreme Court decision in a contested litigation. Indeed, the case law is clear that "no deference is due to an agency 'interpretation' fashioned for the purposes of litigation." *Alaniz v. Office of Personnel Mgmt.*, 728 F.2d 1460, 1465 (D.C. Cir. 1984). *See also Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) ("A position taken by an agency during litigation, however, is not sufficiently formal that it is deserving of *Chevron* deference."); *Ames v. Merrill Lynch, Pierce, Fenner & Smith,* 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) ("We cannot accept the Commission's current litigating position as an 'interpretation' by the Commission.").

Coopers & Lybrand, 877 F. Supp. 425, 432-34 (N.D. Ill. 1995); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 971 (C.D. Cal. 1994).

The substantial participation test is, for good reason, a minority and criticized rule. As the Tenth Circuit has noted:

> Some post-*Central Bank of Denver* cases have held that third party defendants can be liable for statements made by others, where the defendant substantially participated in preparing the statements. To the extent these cases allow liability to attach without requiring a representation to be made by defendant, and reformulate the "substantial assistance" element of aiding and abetting liability into primary liability, they do not comport with *Central Bank of Denver.*

Anixter, 77 F.3d at 1226 n.10.

The Secondary Actor Bank Defendants respectfully submit that this Court further erred to the extent the December 20 Order applies anything other than a bright line rule to Rule 10b-5 (a) and (c) claims. There is no case law support for an extension of the minority substantial participation interpretation of *Central Bank* to alleged securities violations that do not involve an alleged misstatement or omission. Each of the substantial participation cases cited by this Court in its December 20 Order involved alleged misstatements or omissions. *See Software Toolworks*, 50 F.3d at 628 n.3 (liability may flow from accountants' role in *drafting* two letters); *Cashman,* 877 F. Supp. at 432-34 (liability may be established against accountants "centrally involved" in preparation of alleged false and misleading *prospectuses or promotional materials*); *McNamara*, 57 F. Supp. 2d at 426 (liability possible "if a defendant played a 'significant role' in preparing a *false statement*") (emphasis added); *ZZZZ Best,* 864 F. Supp. at 970 (accounting firm intricately involved in the creation of allegedly false and misleading *documents*).

Respectfully, the Court's "creator" test, which allows liability to attach without requiring a representation to be made by a defendant, conflicts with *Central Bank.* The Fifth

Circuit has not yet had the opportunity to speak on this potentially dispositive securities law question, and should be given that opportunity before this Court and the parties expend substantial time and effort preparing and trying this complex case under the new standard announced by this Court.

B. There Is A Substantial Ground For Difference Of Opinion With Respect To The Court's Interpretation Of Section 10(b)'s "Manipulative Or Deceptive Device Or Contrivance"

The Secondary Actor Bank Defendants respectfully submit that *Central Bank* and other controlling case law do not support this Court's conclusion that allegations about "contrivances, deceitful devices, schemes and courses of business" employed by Enron that "operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings," December 20 Order, at 273, are sufficient to state a Section 10(b) and Rule 10b-5(a) and (c) claim against the Secondary Actor Bank Defendants.

First, there is no doubt that *Central Bank* precluded liability based on aiding and abetting for all aspects of Section 10(b) and Rule 10b-5 securities fraud. The *Central Bank* decision addressed not only material misrepresentations, prohibited by subsection (b) of Rule 10b-5, but *also* "manipulative" or "deceptive" *conduct* or *acts*, prohibited by subsections (a) and (c). *Central Bank*, 511 U.S. at 178 ("this case concerns the *conduct* prohibited by § 10(b)") (emphasis added); *see also id.* at 172 ("the scope of *conduct* prohibited by § 10(b)") (emphasis added); *id. at* 173 (same); *id. at* 174 ("*conduct* covered by § 10(b)") (emphasis added); *id. at* 175 (same); *id. at* 177 ("the scope of *conduct* prohibited by the statutory text") (emphasis added); *id. at* 180 ("the aider and abettor's statements or *actions*") (emphasis added). Indeed, in beginning its analysis in *Central Bank*, the Supreme Court expressly referred to Section 10(b) and *all three* sub-sections of Rule 10b-5. *Id.* at 171. Ultimately, the *Central Bank* Court plainly held:

> As in earlier cases considering conduct prohibited by § 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. The proscription does not include giving aid to a person who commits a manipulative or deceptive act. We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute.

Id. at 177-78 (citations omitted). The allegations lodged against the Secondary Actor Bank Defendants constitute *at most* "giving aid to a person who commits a manipulative or deceptive act." These allegations are not actionable under *Central Bank.*

Second, the weight of the extensive caselaw that interprets Section 10(b)'s "any manipulative or deceptive device or contrivance" is contrary to this Court's Rule 10b-5 (a) and (c) interpretation. Section 10(b)'s "any manipulative or deceptive device or contrivance" consists of a set of specifically-defined categories that do not support the Court's holding that the allegations against the Secondary Actor Bank Defendants satisfy Section 10(b). *Cf.* December 20 Order, at 11-13 nn. 8-10.

"Manipulation" is a "term of art [that] cannot be extended to cover every form of unfair dealing which appears to the layperson to be manipulative." *Billard v. Rockwell Int'l Corp.*, 526 F. Supp. 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982). It is "not a magic word whose use in a complaint automatically defeats a motion to dismiss." *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1452 (5th Cir. 1986). Section 10(b) "prohibit[s] [ ] practices deemed by the SEC to be 'manipulative' [only] in [a] *technical* sense of artificially affecting market activity." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977) (emphasis added).

"Deceptive" acts within the meaning of § 10(b) and Rule 10b-5 are limited to three categories of activities: (i) material misstatements or omissions, *see, e.g., Central Bank*, 511 U.S. at 177 (defining 'deception' as the "making of a material misstatement (or omission)");

In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 869 n.18 (S.D. Tex. 2001) (Harmon, J.) (defining 'deception' as "misrepresentation or nondisclosure intended to deceive") (internal quotations omitted); (ii) insider trading, *see, e.g., In re Landry's Seafood Rest., Inc. Sec. Litig.*, No. H-99-1948 (S.D. Tex. Feb. 20, 2001), slip op. at 9 n.12 ("A defendant need not have made a false or misleading statement to be liable. Insider trading by a corporate insider based on material, nonpublic information, qualifies as a 'deceptive device' under § 10(b) and violates the insider's duty to disclose or abstain from trading...."); *BMC*, 183 F. Supp. 2d at 869 n.18 (Harmon, J.) (same); or (iii) a defendant's improper purchase or sale of securities from, or on behalf of, another entity or individual, *see, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151-54 (1972) (defendants encouraged Native Americans to sell their UDC stock, without disclosing that defendants stood to profit from such sales); *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 9 (1971) (defendant purchased securities from insurance company without disclosing that it was using the insurance company's own assets to purchase the securities; "the seller was [thus] duped into believing that it, the seller, would receive the proceeds" of the sale). There is no caselaw cited in this Court's December 20 Order or in Plaintiffs' papers that correspond in any way to the activities that are alleged here.

Where plaintiffs in other cases have attempted to expand Section 10(b)/Rule 10b-5 liability beyond the categories that have been specifically defined by the case law, courts have dismissed plaintiffs' claims.[2] *See, e.g., Santa Fe*, 430 U.S. at 476-80 (dismissing complaint on

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[2] The recent Supreme Court case of *SEC v. Zandford*, 535 U.S. 813, 122 S.Ct. 1899 (2002) has no applicability to Plaintiffs' allegations against the Secondary Actor Bank Defendants. *Zandford* held that a broker violated Section 10(b) and Rule 10b-5 when he sold his customer's securities in order to misappropriate the proceeds. *Id. at* 1903-04. There is no allegation herein that Secondary Actor Bank Defendants improperly sold anyone's Enron securities and misappropriated the proceeds. Indeed, even if *Zandford* could be fairly classified as endorsing an expansion of the applicability of Section 10(b) and Rule 10b-5, it clearly involved a primary, not a secondary, actor.

the grounds that alleged fraudulent appraisal of the company's stock in the context of a merger in an effort to freeze out the minority stockholders at an inadequate price is not a manipulative device); *Pin*, 793 F.2d at 1451-53 (denying motion to intervene on the grounds that investor group's purchase of controlling block of shares, and company's repurchase of same at inflated prices were not manipulative devices); *Kademian v. Ladish Co.*, 792 F.2d 614, 622-27 (7th Cir. 1986) (affirming dismissal of complaint on the grounds that president's efforts to maintain control of the company by entering into a merger with low bidder were neither 'manipulative' nor 'deceptive' acts); *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51, 56 (2d Cir. 1982) (affirming dismissal of complaint on the grounds that announcement of tender offer, prior to disclosure of favorable financial reports, is not a manipulative device because "[a]nnouncement of a genuine tender offer in no way creates an artificial impact on market activity"); *Cont'l Cas. Co. v. State of New York Mortgage Agency*, No. 94 C 1463, 1994 WL 532271, at *2-4 (N.D. Ill. Sept. 26, 1994) (granting motion to dismiss on the grounds that a "scheme" to purchase mortgage loans supporting bond series, in violation of governing bond documents, is not a wash sale or any other type of 'manipulative device'); *Shamsi v. Dean Witter Reynolds, Inc.*, 743 F. Supp. 87, 91 (D. Mass. 1989) (dismissing Section 10(b) and Rule 10b-5 claims alleging that a broker made unauthorized and unsuitable investments on the grounds that "such conduct is not deceptive"); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1313-16 (N.D. Ill. 1983) (granting motion to dismiss on the grounds that company A's granting company B an option to purchase several hundred thousand shares of company A stock to help company B obtain a majority of company's A's stock and deter a competing tender offer for company A was not a 'manipulative device'); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 266-68 (W.D. Tex. 1979) (granting motion to dismiss on the grounds that misleading tender offer documents were not

manipulative devices); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1359-63 (N.D. Tex. 1979) (granting motion for summary judgment on the grounds that a complex series of transactions designed to depress artificially a company's stock price in order to facilitate a cheaper acquisition were not manipulative devices).[3]

In light of the foregoing, there is a substantial ground for difference of opinion whether the alleged conduct of the Secondary Actor Bank Defendants that allegedly "operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings," December 20 Order, at 273, constitutes a "manipulative or deceptive device or contrivance" actionable under Section 10(b) and Rule 10b-5.

III. CERTIFICATION OF THE DECEMBER 20 ORDER WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

Resolving the above issues at the earliest possible stage will materially advance the ultimate termination of this litigation. If the Fifth Circuit concludes either that (1) this Court's rejection of the "bright line" test was error, *or* (2) this Court misapplied the "any

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[3] This Court's "broad[] and flexible[]" construction of the phrase "in connection with the purchase or sale of any security," December 20 Order, at 273, is also unprecedented. The "in connection with" requirement is met only if the purchase or sale of a security is integral to the "deceptive" or "manipulative" act. *See Allard v. Arthur Andersen & Co.*, 924 F. Supp. 488, 496-97 (S.D.N.Y. 1996) (holding that corporation's losses due to misappropriation of funds by corporation's owner were not incurred "in connection with" sale of securities in limited partnership, of which corporation was general partner); *Bickhardt v. Ratner*, 871 F. Supp. 613, 618 (S.D.N.Y. 1994) (holding that a general partner's failure to pay limited partners a return in accordance with limited partnership interest was not actionable under § 10(b), because "this alleged misconduct was not integral to plaintiffs' purchase or sale of a security") (internal quotations omitted); *Trustees of the Hotel Employees & Rest. Employees Int'l Union Welfare Pension Fund v. Amivest Corp.*, 733 F. Supp. 1180, 1185 (N.D. Ill. 1990) ("Rule 10b-5 and § 10(b) proscribe fraud in connection with the purchase or sale of a security; it is not enough that the fraud occurs in a transaction of which a security is a part."); see also *Zandford*, 122 S. Ct. at 1903-04 (finding potential Section 10(b) liability only after concluding that defendants' alleged "fraud coincided with the sales themselves"); *United States v. O'Hagan*, 521 U.S. 642, 656 (1997) (holding that trading on misappropriated information met the "in connection with" requirement because "[t]he securities transaction and the breach of duty thus coincide[d].").

manipulative or deceptive device or contrivance" requirements of Section 10(b) and Rule 10b-5, the issues at stake in this litigation would be substantially affected.

Resolution of this case will also be advanced if the Fifth Circuit affirms this Court on these issues. Affirmance of this Court's rulings would reduce the uncertainty with respect to these vigorously contested legal issues, allowing the parties to more precisely develop their discovery and defense strategies. *See Atl. City Elec. Co. v. Gen'l Elec. Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962), *aff'd,* 312 F.2d 236 (2d Cir. 1962), (holding that certification is appropriate where reversal on appeal would affect "the scope of discovery procedure, the length and complexity of ultimate trial, and the expenditure of time, money and effort").

CONCLUSION

For the foregoing reasons, the Secondary Actor Bank Defendants respectfully request that this Court certify the December 20 Order for immediate appeal to the Fifth Circuit Court of Appeals.

Dated: January 13, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all counsel via electronic mail to the website, on this 13th day of January, 2003.

Richard Warren Mithoff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	Consolidated Civil Action No. H-01-3624
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants.	

[PROPOSED] ORDER AMENDING DECEMBER 20, 2002 MEMORANDUM AND ORDER RE SECONDARY ACTORS' MOTIONS TO DISMISS TO PROVIDE FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

IT IS HEREBY ORDERED THAT the Order of this Court, entered on December 20, 2002 (the "December 20 Order"), be, and the same is, amended to incorporate the following

terms to provide for certification of the December 20 Order for interlocutory appeal under 28 U.S.C. § 1292(b):

In the opinion of this Court, this Memorandum and Order re Secondary Actors' Motions to Dismiss involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

SIGNED at Houston, Texas, this __ day of _____, 2003

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE