United States Courts
Southern District of Texas
FILED
APR 0 4 2003
Michael N. Milby, Clerk

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

MARK NEWBY,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.H-01-3624
	)	(Consolidated)
ENRON CORP., et al.,	)	
	)	
Defendants.	)	

CERTAIN OFFICER DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COURT'S DENIAL OF THEIR MOTIONS TO DISMISS

Defendants Steven J. Kean, Mark E. Koenig, Lawrence Greg Whalley, Mark A. Frevert, and Cindy K. Olson ("Officer Defendants") respectfully move the Court to reconsider and clarify its March 24, 2003 Order (the "Order") denying their motions to dismiss Plaintiff's claims.

The impetus for this motion is the need for the Court to reconsider and clarify its decision in four independent areas:

1) The Court has made a clear and obvious, but understandable error in characterizing Plaintiff's allegations about Enron's "Executive Committee;"

2) The Court's decision goes beyond and "embellishes" Plaintiff's pleadings, in violation of well-established rules and the PSLRA;

3) The Court's decision reverses the Court's own prior decisions in this case and others with regard to the PSLRA's core principles of group and position pleading;

4) The Court's decision appears to disregard or obfuscate matters favorable to the Officer Defendants that are essential in analyzing the motions to dismiss.

The Court's Order creates the strong impression with the Officer Defendants and the public

1318

that the Court has pre-judged the case, based upon media accounts and perhaps other sources. If, as the Officer Defendants hope, the Court has not pre-judged the case, then the Court must rectify this impression. Failure to do so unfairly prejudices these defendants and will adversely affect the tone and conduct of the case.

I. The Officer Defendants did not serve on the Executive Committee referenced in this Court's Order.

In its Order denying the Officer Defendants' motions, the Court relies upon allegations that the Officer Defendants served on the Executive Committee and that "[t]he Executive Committee had 'the power to exercise all of the powers of the Board of Directors.'" (Order at 8 quoting Complaint at 89, ¶ 85 (c)). However, the Complaint does not allege that any of the Officer Defendants served on that "Executive Committee" and, in fact, none of the Officer Defendants did serve on that committee. The Executive Committee that the Court references as allegedly having "all of the powers of the Board of Directors" was a committee of Enron *board members*, not a committee of Enron officers. The Board of Directors could not have delegated all of its powers to a committee of officers who were never elected to the board.

The paragraph of the Complaint describing that committee begins, "Enron's *Board of Directors* used working committees to oversee and control Enron's business." (Complaint at 88, ¶ 85 (emphasis supplied)). That paragraph then describes the board's Audit Committee and its Finance Committee and, finally, its Executive Committee. (Complaint at 88-89, ¶ 85). The description of the Board's Executive Committee includes the phrase on which the Court relies: "The Executive Committee met on a frequent basis to oversee and review Enron's business and had the power to exercise all of the powers of the Board of Directors." (Complaint at 89 , ¶85 (c)).

The next two paragraphs list the members of each of the Board of Directors' three committees, including the Board's Executive Committee. The Officer Defendants are *not* listed as members of the Executive Committee. The Executive Committee is comprised entirely of directors. (Complaint at 89-91 ¶ 86).

The Court's mistake probably resulted from the fact that Enron's internal (non-board) Management Committee's name changed from time to time and the Complaint makes at least one mistaken reference to an "Executive Committee" of Enron managers in 1999. (Complaint at 93 ¶ 88). Because the Court's decision is fundamentally based on that mistaken premise, the Officer Defendants ask the Court to reconsider and correct its decision.

II. The Court's Decision is based on a mistaken understanding of the Management Committee.

A. The Court relies upon allegations about the Management Committee that do not appear in the Complaint.

The Complaint the Court sustained does not exist. While the Complaint alleges that the Officer Defendants served on the Management Committee, there are no allegations to support this Court's view of the committee as an "all-powerful" body that voted on the transactions at issue in this case. There are no allegations in the Newby Complaint or any other pleading that support the following alleged "facts" relied upon by the Court with respect to the Management Committee and the Officer Defendants:

(1) "Every corporate Insider Defendant had intimate personal involvement in Enron's daily business operations . . ." (Order at 5).

(2) "To obtain formal permission for corporate acts, again and again this key Committee was presented with successive requests to authorize virtually the same modes enabling fraud and self-aggrandizement throughout the vast business empire of Enron, yet the Committee continued to issue rubber-stamp approvals . . . ." (Order

at 5-6).

(3) "[T]he other Insider Defendants were in charge of actually running . . . the sham SPEs and partnerships at the core of the alleged fraud over the critical years prior to and during the Class Period." (Order at 6).

(4) "It was [the Management Committee] who again and again provided the requisite authorizations for deceptive devices and contrivances at the core of the alleged Ponzi scheme." (Order at 8-9).

(5) "As members of these committees, they had to approve not only the formation and financing, but the transactions of the SPEs and partnerships, which 'miraculously' drew off debt and provided sham earnings at critical reporting times, again and again." (Order at 9).

(6) "Insider Defendants' successive resolutions at committee and board meetings, again and again authorizing virtually identical deceptive devices and contrivances at critical reporting times, were essential to effectuating them and Enron's course of business." (Order at 9-10).

(7) "Insider Defendants' positions on the all-powerful Management Committee and their votes while on that Committee demonstrate that they had the power to control Enron." (Order at 13).

In contrast to the many strong statements regarding the Management Committee in the Court's Order, the Complaint contains only four paragraphs (out of 1,030) that refer to the Management Committee. (Complaint at 91-95, 256, 257, ¶¶ 88, 89, 395, 397). None of those four paragraphs alleges any specific details related to any alleged activity of the Management Committee. The Management Committee is nowhere alleged to have been "all-powerful," or "key" as the Court suggests. (Order at 5, 13). Rather, the sole allegations in the Complaint concerning the Management Committee are: (1) the day-to-day business of Enron was conducted by Enron's top executives and its "Management Committee" (Complaint at 91, ¶ 88); (2) the Management Committee "was aware of and approved all significant business transactions of Enron, including each of the partnership/SPE deals specified herein" (Complaint at 91, ¶ 88); and (3) the transactions at issue required the

"personal attention of several top executives of Enron, especially those sitting on the Enron Management Committee," as well as the review and approval of Enron's board members. (Complaint at 256, ¶ 395). Neither the Officer Defendants nor the Management Committee is ever alleged to have passed a single resolution, let alone the "successive resolutions" passed "again and again" to which the Court refers. Neither the Management Committee nor any of the Officer Defendants are alleged to have cast a single vote in any Management Committee meeting, let alone votes "demonstrat[ing] that they had the power to control Enron." (Order at 13). The Court's embellishment of Plaintiff's bare bones allegations is improper. The Court cannot write the pleadings it needs to support its decision.

Building upon these unplead allegations, the Court finds that since the Management Committee was "all-powerful" (it was not) and because it voted on the "formation and financing" and "the transactions of the SPEs and partnerships" (it did not), each of the Officer Defendants must have been aware of the purported fraud. The Court finds, "the longer each Insider Defendant served on the Management Committee, the more frequently he or she would have been exposed and required to approve questionable or highly risky, cumulative misconduct" (Order at 9) and "the patterns of fraud must have grown more evident and more unmistakable to those involved in and regularly informed of internal operations over the years." (Order at 9). Neither the conclusions nor their premises are plead in the Complaint.

There can be no dispute that the Court must base its ruling only on well-plead allegations within the four corners of the Complaint. *See, e.g. See Rubinstein v. Collins*, 20 F.3d 160, 169-70 n.38 (5th Cir. 1994) (refusing to look beyond the four corners of the complaint when reviewing a motion to dismiss); *Jackson v. Procunier*, 789 F.2d 307, 309-10 (5th Cir. 1986) (holding that a

motion to dismiss is to be evaluated only on the pleadings); *Chevalier v. Animal Rehabilitation Ctr., Inc.*, 839 F. Supp. 1224, 1230 (N.D. Tex. 1993) ("A motion under Rule 12(b)(6) tests the legal sufficiency of claims stated in the complaint and must be evaluated solely on the basis of the pleadings."). It is axiomatic that even allegations the Plaintiff may include in opposition papers cannot be considered.[1] *In re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d 630, 646-47 (S.D. Tex. 2001) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.") (quoting *O'Brien v. National Property Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989)), *aff'd*, 292 F.3d 424 (5th Cir. 2002); *Coates v. Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 644 n.26 (N.D. Tex. 1999) (because allegation made in plaintiff's brief opposing motion to dismiss "is not contained in the amended complaint, plaintiffs may not rely on it."); *Schneider v. Calif. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (emphasis in original).[2]

Because the law requires the Court to consider only allegations in the Complaint, the Officer Defendants respectfully request that the Court reconsider its decision. If the Court concludes, as the

---

[1] Plaintiff's Memorandum of Law in Opposition to Motions to Dismiss filed by the Officer Defendants (and others) [DE 856] adds nothing about the Management Committee that is not already contained in the Newby Complaint.

[2] In most cases, the Officer Defendants do not know what source or sources the Court relied upon in reaching its conclusions about the Management Committee because none are cited. But in some parts of the Order, the Court cites sources outside the Complaint, including newspaper articles and hearsay comments by legislators, as support for its decision. (Order at 7 n.6). Such materials are not evidence and are not plead in the complaint. Consideration of these sources is improper; this Court has noted that it cannot properly consider facts not in the Complaint that are subject to reasonable dispute. (August 12, 2002 Newby Order at 12 n.8 [DE 996]).

Officer Defendants believe it should, that the allegations in the Complaint are insufficient to state a claim, then Plaintiff's claim must be dismissed. While the Court notes in its opinion that it may allow the Plaintiff leave to supplement its Complaint, the Court cannot supplement the Complaint for the Plaintiff and then deny the motion to dismiss based on allegations that the Plaintiff has not yet made. For many reasons, Plaintiff may choose not to make the allegations suggested by the Court, one very good reason being the Plaintiff knows they are not true.

B. The allegations about the Management Committee that do appear in the Complaint are not sufficient to state a claim against the Officer Defendants.

In fact, if the pleaded allegations were accepted in their entirety, they still could not support the conclusions in the Court's Order. But these allegations cannot be accepted, because they are far too vague to satisfy the PSLRA. As this Court and every other have recognized, the PSLRA requires specific pleading. *See, e.g.,* January 28, 2003 Order at 12 n.8 [DE 1241]; *see also Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 430 (5th Cir. 2002); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 407 (5th Cir. 2001); *In re Securities Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 886-87 (S.D. Tex. 2001); *In re Waste Management, Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 592 (S.D. Tex. 2002). The reason for requiring such specificity is to ensure that the Plaintiff has a basis for its allegations. *See* H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 ("The House and Senate hearings on securities litigation reform included testimony on the need to establish uniform and more stringent pleading requirements to curtail the filing of meritless lawsuits."); *see also ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) ("The PSLRA was enacted, in part, to compensate for 'the perceived inability of Rule 9(b) to prevent abusive, frivolous strike suits.'") (quoting *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407 (5th Cir. 2001)).

Plaintiff cannot and does not offer any specificity in its Complaint. Plaintiff does not allege any facts of any meeting or action by the Management Committee. Plaintiff does not point to one resolution by the Management Committee. Plaintiff provides not a single hour, day, month or even year, when a Management Committee meeting was to have taken place. Plaintiff points to no minutes of any Management Committee meeting. Plaintiff points to no disclosure of any of the "partnership/SPE deals" or any other "significant business transactions" to the Management Committee. Plaintiff points to no "approval" of any such transactions by the Management Committee. Plaintiff does not allege how any of the Officer Defendants voted on any proposed transaction. Indeed, Plaintiff does not (and cannot) allege that any of the Officer Defendants ever voted on anything at any Management Committee meeting. What was actually plead does not support the Court's embellishment. Because Plaintiff has not and cannot allege any specifics to support its vague general allegations, those allegations must be rejected.[3]

This Court has already addressed and rejected Plaintiff's allegation that the alleged fraudulent transactions required the "personal attention of several top executives of Enron, especially those sitting on the Enron Management Committee and the review and approval of board members, especially those sitting on the Enron board's Executive, Finance and Audit Committees, which had direct jurisdiction over these types of corporate transactions and activities." (Complaint at 256, ¶ 395). In granting the board members' motion to dismiss, this Court found this allegation was too vague to state a claim against the members of "the Enron Board's, Executive, Finance and Audit

---

[3]The developed facts will show, as Plaintiff well knows, that the members of the Management Committee conducted Enron's business through their respective business units not through the Management Committee. In fact, because at least one of Enron's business units was regulated by FERC, that unit's CEO who was a member of the Management Committee, was prohibited from participating in the day-to-day operations of Enron's other companies.

Committees." (*See* March 12, 2003 Order at 98, 111 [DE 1270]). There is even more reason to reject it as an allegation against the Officer Defendants, because the Officer Defendants are not alleged to have been among the "several top executives of Enron" whose attention was required for the transactions Plaintiff attacks. As explained more fully below, the Officer Defendants are not alleged to have had any involvement in the allegedly fraudulent transactions. Those transactions took place in business and finance units of Enron that were run by others and separated from the Officer Defendants' areas of responsibility.

III. The Court's allowance of group and position pleading is contrary to the PSLRA and this Court's prior opinions in this case and others.

A. Plaintiff offers group pleading.

Recognizing the Complaint's lack of specificity, Plaintiff argues that the Court should accept group pleading and "presume that the false, misleading and incomplete information conveyed in the Company's public filings, press releases and other publications, as alleged herein, are the collective action of the Enron Defendants identified above [which includes all of the officers and all of the directors]" and further find that "Enron's press releases, reports to shareholders, SEC filings and the like are '**group published**' materials of the Enron Defendants. " (Complaint at 95, ¶ 89 (emphasis supplied)).[4]

B. This Court has rejected the group pleading in Plaintiff's Complaint.

The Court accepted Plaintiff's group pleading in denying the Officer Defendants' motions,

---

[4] The Court claims that "misleading financial statements [were] filed with the SEC with Insider Defendants' imprimatur." (Order at 10). There is no allegation that any of the Officer Defendants signed any of Enron's SEC filings and this Court has dismissed fraud claims against a number of defendants who did sign Enron's SEC filings.

even though this Court has properly rejected the same group pleadings in prior opinions in this case[5] and in other cases.[6] As the Court recognized in its January 28, 2003 Order dismissing claims against the Individual Andersen Defendants, "[t]his Court has previously held that the group pleading did not survive the passage of the PSLRA . . . . the Court's current research demonstrates that nearly all of the district courts within the Fifth Circuit . . . have come to a similar conclusion . . . [and] this Court's recent review of growing case law has not persuaded it to change its decision." (January 28, 2003 Order at 18-19 [DE 1241]). The Court rejected the old group pleading "presumption that the higher executives of a corporation directly involved in its day-to-day management may be personally liable for material misrepresentations or omissions in public statements" without specific allegations of the liability of each individual defendant. (January 28, 2003 Order at 16 [DE 1241]). The Court refused to "attribute all the statements to all the defendants as 'collective actions.'" *Id.*; *see also id.* at 17 n.13, 18, 20. The Court further held:

> Most of Lead Plaintiff's allegations are collective claims, i.e., against Arthur Andersen as an entity, and the claims against the partners individually are fatally vague and conclusory. Lead Plaintiff fails to identify any person who personally performed the purportedly fraudulent accounting or auditing, no less under what factual circumstances. Lead Plaintiff fails to allege that any partner specifically directed a particular auditor to perform a specific action with regard to Enron's accounting or auditing.
>
> * * * *
>
> Nor has Lead Plaintiff provided any details about which of the partners were involved in the drafting of which Enron reports, press releases, etc. While the collective actions of Arthur Andersen's employees in accounting and auditing Enron's books, in certifying Enron's financial statements for 1997-2000 as being in

---

[5] January 28, 2003 Order at 16-23 [DE 1241]; March 12, 2003 Order at 98 [DE 1270].

[6] *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 902 n.45; *In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, Civil Action No. H-99-1948 (S.D. Tex. Feb. 20, 2001) (Slip Op. at 54-55).

> compliance with GAAP and its audits of financial statements in compliance with GAAS, and in consenting to having those financial statements included in registration statements, prospectuses, and shareholders' reports, together, do support claims for potential liability of the Arthur Andersen firm under § 10(b) and Rule 10b-5, **the lack of specificity about each partner's involvement to demonstrate his personal culpability warrants dismissal of claims against each, individually.**
>
> * * * *
>
> Because Lead Plaintiff has not identified who did the auditing, who certified the audits, who consented to have the reports included in registration statements, or, in other words, who actually committed a primary violation of § 10(b) . . . .

Id. at 44, 46, 48-49 (emphasis supplied).

C. Plaintiff offers position pleading.

Plaintiff also openly requests that it be permitted to rely upon position pleading. Plaintiff claims in conclusory fashion that, "because of their **positions** of authority as officers and/or directors of the Company, [the Enron Defendants] were able to and did control the content of various SEC filings, press releases and other public statements pertaining to the Company during the Class Period." (Complaint at 95, ¶ 90 (emphasis supplied)).

D. This Court has rejected Plaintiff's position pleading.

This Court also has repeatedly acknowledged that an individual defendant's position at a company, membership on committees or access to non-public information, without more, is insufficient to support a federal securities fraud claim. Dismissing claims against the Outside Directors, the Court rejected pleadings about position and access to knowledge through "**attendance at management** and Board of Directors **meetings and committees**" as "vague generalities [that] do not meet the heightened pleading standards laid out by this Court in prior orders for pleading scienter under § 10(b)." (March 12, 2003 Order at 112 (emphasis supplied) [DE 1270]). The Court further held, "[t]he Outside Directors['] . . . status as members of the board and of key committees at Enron

and their attendance at various meetings . . . cannot support a claim of fraud against any of them." (March 12, 2003 Order at 98 (emphasis supplied) [DE 1270]). Although the Plaintiff pointed to minutes disclosing that the topics discussed at the meetings were related to the same transactions and issues attacked in the Complaint, this Court correctly recognized that the minutes provided "merely brief allusions or lists of topics touched on, presented and/or discussed during the meetings, but no particular facts or details about the presentation or discussion . . . that would indicate that the Outside Directors knew or recklessly disregarded that there was a Ponzi scheme afoot . . . ." (March 12, 2003 Order at 98 [DE 1270]). Plaintiff has provided no minutes of any Management Committee meetings and Plaintiff has offered no hint at what was discussed at any such meeting. Accordingly, the allegations against the Officer Defendants do not even offer the "brief allusions" that this Court found insufficient when it dismissed the fraud claims against the Directors.

This Court's rejection of position pleading was squarely in line with the Fifth Circuit's recent holding in *Abrams v. Baker Hughes Inc.*, 292 F.3d 424 (5th Cir. 2002). In *Abrams,* the defendants were two senior level executives of Baker Hughes who were alleged to be "intimately familiar with the inner workings of the company." *Abrams*, 292 F.3d at 431. The *Abrams* plaintiffs alleged that these officers received unidentified daily, weekly and monthly financial reports that apprized them of the company's true financial status, the company's violations of GAAP, and that the officers had motive and opportunity to commit fraud because of their need to raise additional capital, a desire to protect their incentive compensation, and insider stock sales. *See id.* at 432. The allegations in the Newby Complaint against the Officer Defendants are less extensive than those in *Abrams*, which the Fifth Circuit concluded "fail to reach the required standard." *Id.* The Fifth Circuit held that "[a] pleading of scienter may not rest on the inference that defendants must have been aware of the

misstatement based on their positions within the company." *Id.* [7]

E. This Court's ruling on the Officer Defendants' motions cannot be reconciled with its prior correct rulings on group and position pleading.

In its Order on the Officer Defendants, this Court departed from both the binding precedent from the Fifth Circuit and its own prior pronouncements. The Court's conclusion that Plaintiff has adequately plead scienter based solely on the inference that the Officer Defendants must have been aware of the alleged fraud from some unspecified presentation at some unidentified Management Committee meetings cannot be reconciled with the Court's rejection of the same allegations in its decisions on the Directors and its decision on the Individual Andersen Defendants issued just a few weeks ago. This Court's decision on the Officer Defendants also appears irreconcilable with the Court's decision issued the same day that rejected the fraud claims against another officer who served on the same Management Committee as the Officer Defendants. [DE 1300].

This Court was correct when it found that "attendance at management and Board of Directors meetings and committees" are "vague generalities that do not meet the heightened pleading standards laid out by this Court in prior orders for pleading scienter under § 10(b)." (March 12, 2003 Order at 112 [DE 1270]). The Court was incorrect when it found that the vague allegation that the Officer Defendants attended unspecified "committee and board meetings" (Order at 9-10) meets the

---

[7]The Court observes, somewhat dismissively, that each of the Officer Defendants "maintains that he or she heard, saw, did and knew no evil." (Order at 5). Of course, in dismissing a number of other defendants, the Court recognized the probability that some at Enron "heard, saw, did and knew no evil." Similarly, the Department of Justice apparently does not believe that the Officer Defendants must have known of the alleged fraud by virtue of their position; instead, in indicting Mr. Fastow, the grand jurors have alleged that Mr. Fastow's alleged activities were, indeed, hidden from the others at Enron. This is precisely why the PSLRA prohibits the pleading of guilt by association. In a company as large as Enron, it is not only possible but probable, that a great many employees--even very senior ones--were entirely innocent and ignorant of the wrongdoing of others.

heightened pleading standards laid out by this Court in prior orders for pleading scienter under § 10(b).

This Court was correct when it rejected Plaintiff's position pleading against the Directors because "status as members of the board and of key committees at Enron and their attendance at various meetings, which are minimally summarized in the minutes of those meeting, by themselves, cannot support a claim of fraud against any of them." (March 12, 2003 Order at 98 [DE 1270]). The Court was incorrect when it found that the Officer Defendants' membership on a "key committee" and attendance at "various meetings" that are not summarized at all could support a claim of fraud against each of them. (Order at 5-6).

This Court was correct when it rejected the "presumption that the higher executives of a corporation directly involved in its day-to-day management may be personally liable for material misrepresentations or omissions in public statements." (January 28, 2003 Order at 16 [DE 1241]). This Court erred when it accepted the presumption that the Officer Defendants should be liable for alleged misrepresentations and omissions in public statements because they allegedly "were in charge of actually running the day-to-day business of Enron corporation." (Order at 6).[8]

This Court incorporated its prior Orders into its Order on the Officer Defendants', but it failed to apply the correct legal principles in those orders to the Officer Defendants. The Officer Defendants respectfully request that the Court do so on reconsideration.

---

[8]The Court writes that "the other Insider Defendants were in charge of actually running the day-to-day business of Enron Corporation or the sham SPEs and partnerships at the core of the alleged fraud over the critical years prior to and during the class period." (Order at 6). As explained above, the Officer Defendants are nowhere accused of running or being involved with "the sham SPEs and partnerships at the core of the alleged fraud" and, as explained in the text, a claim that they were "actually running the day-to-day business of Enron Corporation" cannot support a claim for fraud.

IV. Plaintiff's few specific references to the Officer Defendants are inadequate.

Once stripped of impermissible group and position pleading, the Complaint offers nothing against any of the Officer Defendants. The Officer Defendants are hardly mentioned in the Complaint.

A. Steve Kean

Steve Kean is alleged to have been "Executive Vice President and Chief of Staff of Enron" (Complaint at 68, ¶ 83(m)), an administrative position. He is not alleged to have run any business unit, let alone one involved in the alleged fraud. (*See generally* Defendant Steven J. Kean's Motion to Dismiss [DE 657]). Mr. Kean is nowhere alleged to have made even one misrepresentation. Although he is alleged to have been present at a few analyst calls or conferences, no statements were attributed to him, nor are there any allegations about information that he specifically knew that would have caused him to doubt any statement he heard others make in those calls.

Plaintiff relies solely upon the allegation that Mr. Kean attended Management Committee meetings, but again Plaintiff fails to even allege which, if any, of the Management Committee meetings Mr. Kean attended or how he could have learned what was going on in other parts of Enron. As the Court is well aware, Enron was a world-wide conglomerate and no one person could be expected to have knowledge of all of the activities of "the vast business empire of Enron." (Order at 5). Plaintiff offers no allegations that would support an inference that Mr. Kean knew about the intricacies or the alleged improprieties of Enron's accounting and finance.

The only allegations that actually mention Mr. Kean by name relate to his trading of Enron securities. Allegations that this Court already noted, "may not satisfy the requirements for pleading scienter." (Order at 10).

B. Mark Koenig

Mark Koenig was head of investor relations and also did not run a business unit. (*See generally* Defendant Mark E. Koenig's Motion to Dismiss [DE 656]). As with the other Officer Defendants, there are no allegations in the Complaint that Mr. Koenig made any misrepresentation or that he or his department were involved with any of the questioned SPEs or partnerships. Like Mr. Kean, Mr. Koenig is alleged to have been present at a few analyst calls or conferences, but like Mr. Kean, no specific statements are attributed to him.

Plaintiff instead relies solely on Mr. Koenig's alleged membership in the Management Committee, but, as with the others, Plaintiff does not point to a single Management Committee meeting Mr. Koenig is alleged to have attended, let alone identify anything that was disclosed at the unidentified meeting. Without some specific allegation of how he supposedly learned of it, there can be no reasonable presumption that Mr. Koenig knew of transactions far outside of his area of responsibility.

As with the other Officer Defendants, most of the few allegations that actually mention Mr. Koenig by name relate to his trading of Enron securities. Allegations that this Court already noted, "may not satisfy the requirements for pleading scienter." (Order at 10).

C. Lawrence Greg Whalley

Lawrence Greg Whalley is not specifically alleged to have been involved in the creation or management of any SPE or partnership, Enron's accounting, or the preparation of Enron's financial statements. (*See generally* Defendant Lawrence Greg Whalley's Motion to Dismiss [DE 643]). He is alleged to have been on a total of two analyst calls in October and November, 2001 toward the end of the Class Period and shortly after Mr. Whalley became President and Chief Operating Officer of

Enron. Mr. Whalley is not alleged to have made any statements on those calls, and none of the statements made on those calls is even alleged to have been false. The Complaint relies solely upon his position on the Management Committee, but recognizes that Mr. Whalley was not on the Management Committee for the first two years of the Class Period.

Plaintiff's allegations of Mr. Whalley's stock trading are even more deficient than the others that this Court already found wanting. Plaintiff alleges only that Mr. Whalley's stock trades were "[u]nknown but substantial." (Complaint at 88, ¶ 84). Such an allegation does meet PSLRA standards. In effect, the Court has sustained an allegation of insider trading without a cognizable allegation of any trading.

D. Mark Frevert

Mark Frevert was Chairman and CEO of Enron Europe and lived and worked out of the United States until June 2000. (*See generally* Defendant Mark E. Frevert's Motion to Dismiss [DE 646]). As with the others, Mr. Frevert is not alleged to have had anything to do with any fraud or any SPEs or partnerships. Mr. Frevert is alleged only to have been on two analyst calls in 2000, but he is not alleged to have made even one statement during those calls. The Complaint relies solely upon Mr. Frevert's membership on the Management Committee but does not allege which, if any, meetings he attended. This is particularly troubling since Mr. Frevert was out of the country for much of the Class Period.

Mr. Frevert's stock sales prove beyond any doubt that he lacked scienter of any fraud. Mr. Frevert's last stock sale occurred nearly a year before the close of the Class Period. Mr. Frevert is alleged to have sold only 44 percent of his total shares held during the Class Period. He held the

majority of his stock until it became worthless when Enron filed for bankruptcy.[9] Mr. Frevert's investment shows that there could not have been any disclosure to him (or the other Officer Defendants) at the Management Committee meetings that Enron was a "Ponzi scheme." As this Court has noted, "Retention of the vast majority of their stock negates any inference of scienter." *In re Waste Management, Inc. Sec. Litig.*, C.A. H-99-2183 (S.D. Tex. 2001), at 131 (citing *In re Vantive Corp. Sec. Litig.*, 110 F. Supp. 2d 1209, 1219 (N.D. Cal. 2000), at *8 (no scienter because sales of 38 percent of stock "necessarily means they retained 62 percent").

E. Cindy Olson

Cindy Olson was not involved in carrying out the "business" of Enron during the Class Period; she managed Enron's human resources department. (*See generally* Defendant Cindy K. Olson's Motion to Dismiss [DE 641]). Plaintiff offers no allegations about what Management Committee meetings, if any, she attended, or what she heard at those meetings.[10] Ms. Olson is not alleged to have made any misrepresentations. She was not, nor was she alleged to have been, involved in the creation and publication of Enron's financial statements. She had no involvement in the creation, management or transfer of assets to any SPE or partnership. She also is not alleged to have had any involvement with Arthur Andersen or any aspect of Enron's accounting. This Court dismissed the Arthur Andersen Individuals because of the lack of specificity about each partner's involvement in Arthur Andersen's "group" accounting effort. This Court also dismissed claims

---

[9]At one time, Mr. Frevert had more than $60 million invested in Enron, all of which became virtually worthless with Enron's bankruptcy.

[10] The Court also relies upon allegations regarding Ms. Olson's stock sales. But the Complaint recognizes that her term on the Management Committee ended in 1999, almost a year before the stock sales discussed in the Court's Order.

against the members of Enron's Audit Committee that received regular presentations from Arthur Andersen. Inexplicably and without any specific allegations related to Olson's culpability, the Court concludes that because Ms. Olson had been an accountant years before she took over the human resources responsibilities and, therefore, was "no layman to accounting manipulations," Olson "had to be aware of" something. (Order at 7, 12). The Court correctly dismissed the individual accountants and the audit committee. It should also dismiss Ms. Olson.

F. The allegations against the individual Officer Defendants cannot support any inference of scienter.

Since Plaintiff's allegations lack the specificity required by the PSLRA, and amount to nothing more than allegations of position, compensation and stock trades, the allegations fail to support an inference of scienter. *See Abrams*, 292 F.3d at 431-32; *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 349-50 (5th Cir. 2002). Because the Court has recognized that the Officer Defendants' trading patterns do not support a finding of scienter, the claims against the Officer Defendants must be dismissed.

V. Defendants seek clarification that the Court's opinion is based solely upon an acceptance of the allegations in the pleadings as true and does not purport to find any facts.

While the Court has noted in a few places in the Order that it is relying upon the Plaintiff's allegations, in others the Court makes what appear to be unqualified and emphatic statements of fact that suggest to the reader that the Court is stating a conclusion rather than repeating an unsubstantiated allegation. Examples include, but are not limited to: "Enron's sham success and inevitable collapse" (Order at 5); "[e]very corporate Insider Defendant had intimate personal involvement in Enron's daily business operations" (Order at 5); "[t]o obtain formal permission for

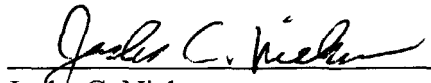
corporate acts, again and again this key [Management] Committee was presented with successive requests to authorize " (Order at 5); "[v]iewing the circumstances of the full scale, expansive, long-term scam" (Order at 6); "the other Insider Defendants were in charge of actually running . . . the sham SPEs and partnerships" (Order at 6); "[Blockbuster and Braveheart] never had any economic viability" (Order at 7); "the powerful Management Committee," (Order at 8); "[i]t was they who again and again provided the requisite authorizations for deceptive devices . . ." (Order at 8); "[a]s members of these committees, they had to approve not only the formation and financing, but the transactions of the SPEs and partnerships, which 'miraculously' drew off debt and provided sham earnings . . ." (Order at 9); and the Court's repetition of Plaintiff's characterization of Enron as a "Ponzi scheme." While counsel familiar with the motions to dismiss understand that the Court has seen no evidence and could not have made any determination that the allegations have merit, the Court's language suggests to the public that the Court has determined the allegations to be true. It is important that the Court, at a minimum, clarify that the language in its Order reflects only the Court's characterization of the Plaintiff's allegations and not any assessment as to the veracity of those allegations.

VI. Conclusion

For the foregoing reasons, Steven J. Kean, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig and Cindy K. Olson respectfully request that the Court grant their motion to reconsider the Court's March 25, 2003 Order, and that upon reconsideration, the Court grant the Officer Defendants' motions to dismiss. In addition, the Officer Defendants also respectfully request that the Court clarify that its references to wrongdoing are intended only to paraphrase Plaintiff's

allegations and do not indicate a pre-determination by Court that those allegations have merit.

Respectfully submitted,



Jacks C. Nickens
State Bar No. 15013800
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191 (phone)
(713) 571-9652 (fax)

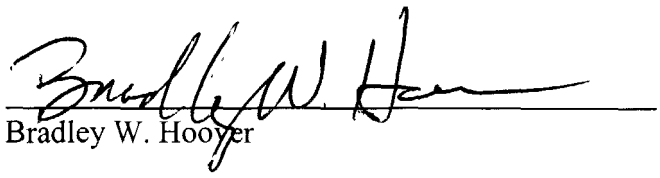
Attorney-in-Charge for Defendants Stanley C. Horton, Cindy K. Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig and Steven J. Kean

OF COUNSEL:

Richard P. Keeton
Paul D. Flack
Bradley W. Hoover
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191
(713) 571-9652 (fax)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the pleading was served on all counsel of record on the Service List on October 21, 2002 via posting to *www.esl3624.com* in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website.



Bradley W. Hoover