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Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES  
LITIGATION

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

This Document Relates To:

§ CLASS ACTION

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

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

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## I. INTRODUCTION

The Insider Defendants' Motion for Reconsideration and Clarification of the Court's Denial of Their Motions to Dismiss ("Motion") is meritless.<sup>1</sup> It repeats failed arguments, incorrectly states the Court's decision "'embellishes' Plaintiff's pleadings, in violation of well-established rules," and without basis suggests that "the Court has pre-judged the case." Motion at 1, 2.

Issues regarding the level of particularity required under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the viability of the group-pleading doctrine, and scienter have all been thoroughly briefed by the parties and addressed by the Court. Mere disappointment with the Court's Memorandum and Order Re Enron Insider Defendants Stanley C. Horton, Cindy K. Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig, Steven J. Kean, and Joseph W. Sutton ("Order") is no basis for moving for reconsideration.

The Motion's other criticisms of the Court's Order are likewise baseless and not grounds for reversal or clarification. The Insider Defendants, for example, state the Court "must rectify this impression" that "the Court has pre-judged the case" because "[f]ailure to do so unfairly prejudices these defendants." Motion at 2. They state in the Order 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." Motion at 19. However, the Order's language contradicts the Insider Defendants' claims. Throughout the Order the Court references Lead Plaintiff's allegations, not as the Insider Defendants suggest, the Court's own beliefs. *See, e.g.*, Order at 5-12 & n.5 ("Lead Plaintiff, even without benefit of discovery, has presented"; "The complaint asserts"; "The complaint reflects"; "According to the complaint"; "according to Lead Plaintiff's complaint"; "Lead Plaintiff has described"; "As pleaded in Lead Plaintiff's complaint"; "the complaint ... alleges"; defendant "purportedly learned").

Also for example, the Insider Defendants claim "the Court's decision is fundamentally based on" a "mistaken premise" concerning the Consolidated Complaint's ("Complaint") allegations.

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<sup>1</sup>The Insider Defendants are Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Cindy K. Olson, and Lawrence Greg Whalley. Defendants Stanley C. Horton and Joseph W. Sutton were also included in the Court's Order but have not moved for reconsideration.

Motion at 3. But they only point to one less-than-fundamental mistake of fact – a single sentence attributing powers of the Executive Committee of the Board of Directors to the Management Committee, on which the Insider Defendants sat. The Insider Defendants, however, fail to show how the Court's Order, as a whole, is affected by this single innocent error. The Insider Defendants' Motion should be denied.

## **II. STANDARD OF REVIEW FOR RECONSIDERATION**

The Insider Defendants ask the Court to take the exceptional step of overruling its Order. But a "judge should hesitate to undo his own work." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (citation omitted). Reconsideration "is an extraordinary remedy that should be used sparingly." *Vincent v. Dillard Dep't Store*, No. 99-74, 2000 U.S. Dist. LEXIS 3885, at \*3 (E.D. La. Mar. 23, 2000); see *Grafton v. Sears Termite & Pest Control, Inc.*, No. CA 3:98-CV-2596-R, 2000 U.S. Dist. LEXIS 7754, at \*1 (N.D. Tex. June 1, 2000) ("[m]otions for reconsideration are permitted only in limited situations"). The Insider Defendants provide no compelling reason for the Court to grant such an "extraordinary remedy." See *Vincent*, 2000 U.S. Dist. LEXIS 3895, at \*3.

## **III. THE COURT'S LONE REFERENCE TO ALLEGATIONS REGARDING THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS IS HARMLESS**

The Insider Defendants urge the Court to overturn its decision denying their motions to dismiss because it "is fundamentally based on [a] mistaken premise." Motion at 3. The purported fatal defect in the Court's Order is a lone sentence ascribing certain powers of the Board of Directors' Executive Committee to the Management Committee, on which the Insider Defendants sat. *Id.* at 2-3. The sentence reads: "The Executive Committee had "the power to exercise all of the powers of the Board of Directors."" Motion at 2 (quoting Order at 8).

The Insider Defendants suggest the Court's reference to the Executive Committee in discussing the allegations against members of the Management Committee was based on a mistaken reference at ¶88 in the Complaint. Motion at 3. But, the Complaint's identification of the committee on which the Insider Defendants sat as the "Executive Committee" is not mistaken. Indeed, the Insider Defendants themselves used the terms "Executive" and "Management" interchangeably to

refer to the same committee on which they sat. *Compare* Ex. 1 (1998 Annual Report excerpt) *with* Ex. 2 (1999 Annual Report excerpt).

Regardless of whether or not the Court's reference to the Executive Committee was a result of the Insider Defendants' own confusion, the Insider Defendants vastly overstate the meaning of this one sentence in the Court's Order. Nowhere in the Order did the Court state this allegation controlled the outcome of their motions to dismiss. Rather, the Court referenced the conduct of the Management Committee, which was based on allegations (among others) that the Management Committee conducted the "day-to-day business of Enron" and "approved all significant business transactions of Enron, including each of the partnership/SPE deals" at issue in this litigation. Order at 8 (quoting Complaint, ¶88). The Insider Defendants, wrote the Court, "had intimate personal involvement in Enron's daily business operations, combined with long-term membership on the Enron Management, or Executive, Committee." Order at 5. "It was they who again and again provided the requisite authorizations for deceptive devices and contrivances at the core of the alleged Ponzi scheme." *Id.* at 8-9. "[I]n light of the remarkable repetitive use of [abusive mark-to-market accounting, snowballing, and SPEs,]" explained the Court, "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." *Id.* at 9. "As pleaded in Lead Plaintiff's complaint," the Court concluded, "Insider Defendants' successive votes of approval, which sooner rather than later had to be made with full knowledge or severely reckless disregard of the fraudulent scheme they were erecting, comprised material deceptive acts or contrivances in furtherance of Enron's course of business and the alleged Ponzi scheme, intended to deceive investors, and thus constituted primary violations of §10b." Order at 10.

Elsewhere the Court found the extraordinary salaries, stock options, and bonuses the Insider Defendants received as a result of Enron's misleading financial statements to be "significant factors in giving rise to a strong inference of scienter." Order at 10. The Court observed, "the [Management] Committee continued to issue rubber-stamp approvals, while its members pocketed increasing compensation, and many received enormous bonuses, based on the artificially inflated

financial picture of Enron that they projected to the SEC and the investing public." *Id.* at 5-6 (footnote omitted).

The Court's repetition of Lead Plaintiff's allegations was grounded in the facts alleged by the Complaint. *See infra*, §IV. In the end, and as Fifth Circuit precedent required, it was the totality of Lead Plaintiff's allegations, rather than any single averment, that led the Court to deny the Insider Defendants' motions to dismiss: "Viewing the circumstances of the full scale, expansive, long-term scam detailed in the complaint as a whole, the Court finds that the motions to dismiss should be denied." Order at 6; *see also Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 431 (5th Cir. 2002) ("The appropriate analysis ... is to consider whether all facts and circumstances 'taken together' are sufficient to support the necessary strong inference of scienter ...."); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 425 (5th Cir. 2001) ("Taking all the above factors together we conclude that they suffice ... to support the necessary 'strong inference' of scienter ....").

Although the Order inadvertently referenced allegations about the Executive Committee of the Board of Directors in its discussion of the Insider Defendants, these allegations were not fundamental to the Court's decision. The Court relied on many allegations in upholding the claims against the Insider Defendants, none of which alone was determinative. Any error on the Court's part was therefore harmless.

#### **IV. THE COURT ACCURATELY DESCRIBES THE MANAGEMENT COMMITTEE**

The Insider Defendants accuse the Court of "embellish[ing]" the allegations regarding the Management Committee for the purpose of sustaining the claims against them. Motion at 5. They cite seven examples of the Court's purported exaggeration of the Complaint. *Id.* at 3-4. But in each example, the Court's statement is well-supported by the plain language of the Complaint or the reasonable inferences drawn from it. The Court has simply undertaken a common-sense reading of Lead Plaintiff's allegations, a course of action that honors Fifth Circuit precedent requiring courts to "construe the allegations in the light most favorable to the plaintiffs." *Nathenson*, 267 F.3d at 406. The Court is not tethered to the Complaint's literal allegations as the Insider Defendants suggest. *See id.*

The Insider Defendants criticize the Court's characterization of the Management Committee as "key" and "all-powerful." Motion at 3-4; *see* Order at 5, 13. The allegations in ¶88 of the Complaint alone show the Management Committee was a "key" Enron committee: "The day-to-day business of Enron was conducted by Enron's top executive and its 'Management Committee,' a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron's business. The Management Committee ... approved all significant business transactions of Enron, including each of the partnership/SPE deals" at issue in this litigation. Paragraph 397 adds, "The Enron Defendants who were on Enron's Management Committee were the top executives of Enron ... dealing with the important issues facing Enron's business, *i.e.*, WEOS, EES, EBS, its JEDI and LJM partnerships and the related SPEs and Enron's future revenues and profits." Together the allegations in ¶¶88 and 397 demonstrate the might the Management Committee and its members wielded over Enron. Indeed, the Management Committee was "all-powerful." *See* Order at 13.

The Insider Defendants object to the Court's assertions that the Management Committee approved and authorized the deceptive devices and contrivances Enron employed to inflate its income and conceal its debt. Motion at 3-5. Along these lines, the Insider Defendants challenge the following statements of the Court: (1) "'again and again [the Management Committee] was presented with successive requests to authorize" the fraudulent business transactions; (2) "'It was [the Management Committee] who again and again provided the requisite authorizations for deceptive devices and contrivances"; and (3) "'Insider Defendants' successive resolutions at committee and board meetings, again and again authorizing virtually identical deceptive devices and contrivances at critical reporting times.'" *Id.* at 3-4 (quoting Order at 5-6, 9). Addressing these statements, the Insider Defendants in general assert, "Neither the [Insider] Defendants nor the Management Committee is ever alleged to have passed a single resolution, let alone the 'successive resolutions' passed 'again and again'" authorizing the fraudulent SPEs and other fraudulent business transactions. *Id.* at 5. The Insider Defendants are arguing mere semantics. Paragraph 88 of the Complaint alleges the "Management Committee was aware of and *approved* all significant business transactions of Enron, including each of the partnership/SPE deals" at issue. Paragraph 395 states the fraudulent transactions of Enron were "large, frequent, widespread" and "require[d] the personal attention of

several top executives of Enron, especially those sitting on the Enron Management Committee." *See also* Complaint, ¶¶435-500, 520-573 (describing in great detail the fraudulent SPE transactions and other accounting schemes Enron used to misrepresent its financial condition). These allegations combine to support the assertion that the Insider Defendants were presented with successive requests to approve, and did indeed approve, the fraudulent Enron transactions, just as the Court has written.

The Insider Defendants also take issue with the Court's assertions that they "'had intimate personal involvement in Enron's daily business operations'" and "'were in charge of actually running [the day-to-day business of Enron Corporation or] the sham SPEs and partnerships.'" Motion at 3-4 (quoting Order at 5-6). Again, the Insider Defendants ignore ¶88, which states, "The day-to-day business of Enron was conducted by Enron's top executives and its 'Management Committee' ...." They also ignore allegations in ¶397, which plead that the members of the Management Committee ran "Enron as 'hands-on' managers, dealing with the important issues [such as Enron's] JEDI and LJM partnerships and the related SPEs."

The Insider Defendants challenge the Court's conclusion that, through their authority to vote on the Management Committee, they exerted control over Enron. Motion at 5; *see* Order at 13. Despite the express allegations in ¶88 of the Complaint that the Management Committee "*approved*" all significant transactions including the Fastow-controlled partnership and SPE deals, the Insider Defendants contend, "Neither the Management Committee nor any of the [Insider] 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.'" Motion at 5 (quoting Order at 13). This is preposterous. How else could the Management Committee approve the dubious partnership and SPE deals without its members casting a vote? And given the lesser standards for pleading control person liability under Federal Rule of Civil Procedure 8, the Insider Defendants' argument is even flimsier. *See In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at \*45-\*53 (S.D. Tex. Jan. 28, 2003).

Criticism of the Court's statements that the Insider Defendants sanctioned the "'formation and financing'" and "'the transactions of the SPEs and partnerships'" is also misguided. Motion at 5 (quoting Order at 9). The Complaint is clear: The Insider Defendants sat on the Management

Committee, which "approved all significant business transactions of Enron, including each of the partnership/SPE deals" at issue. Complaint, ¶88.

Finally, the Insider Defendants object to the Court's conclusions that "'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'" 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.'" Motion at 5 (quoting Order at 5). Lead Plaintiff's allegations fully support these statements as well. A hallmark of the Enron fraud, as the Court recognizes, is "the remarkable repetitive" abuse of mark-to-market accounting, snowballing, structured finance, and SPEs. *See* Order at 9. Certainly "the patterns of fraud must have grown more evident and more unmistakable" for those on the Management Committee, who were asked to approve a series of fraudulent transactions based on the same or similar premises. *Id*; *see, e.g.*, Complaint, ¶¶88, 435-505 (describing series of fraudulent Enron SPE and partnership transactions approved by Management Committee).

**V. THE COURT COULD FAIRLY CONSIDER WHAT LEAD PLAINTIFF WOULD ALLEGE ABOUT CONGRESSIONAL HEARINGS AND RECENT MEDIA REVELATIONS**

The Insider Defendants condemn the Court for considering allegations outside the Complaint. Motion at 6 & n.2. Revelations from Congressional investigations about Enron and its officers, in particular Cindy Olson, and other allegations of Ms. Olson's financial background were raised in Lead Plaintiff's Opposition Memorandum to Insider Defendants at 58. As a consequence, Fifth Circuit precedent required the Court to consider whether these allegations could cure any deficiencies in Lead Plaintiff's Complaint. *See, e.g., Ganther v. Ingle*, 75 F.3d 207, 211-12 (5th Cir. 1996) (brief opposing potentially dispositive motion should be deemed itself a motion to amend); *Sherman v. Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972) ("the district court should have

construed the [plaintiffs'] frantically revised theory of the case, as plainly set forth in their memorandum in opposition to summary judgment, as a motion to amend the pleadings").<sup>2</sup>

In this context, the Court was well-warranted in taking notice of "the well-publicized PowerPoint presentation for the 2000 Christmas party at Enron," which was recently incorporated into the indictment of former Enron employees. *See* Order at 7 n.6. Indeed, the Power Point revelations are in the "same vein" as allegations in the Complaint that reflect "the prevalent awareness among the Enron workforce of wrong doing in its numerous quotations of statements by non-defendant employees involved various Enron departments and ventures for whom the sham was not only a normal topic of conversation, but at times a matter for satiric jokes." Order at 7 & n.6; *see* Complaint ¶¶340, 358, 536, 542, 729. The Court need not ignore the obvious – that public disclosures would be part of Lead Plaintiff's case.

The Insider Defendants maintain the "Court cannot deny ... the motion[s] to dismiss based on allegations that the Plaintiff has not yet made." Motion at 7.<sup>3</sup> In *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000), the Fifth Circuit held that in determining whether an amended pleading may be denied as futile, or shall be permitted, the Court must "apply 'the same standard of legal sufficiency as applies under Rule 12(b)(6)'" to the facts the plaintiff might add. (Citation omitted.) *Stripling* thus permits – indeed, it may even require – the Court to consider whether Lead Plaintiff's additional allegations would state a claim. In securities cases, moreover, district courts often choose to sustain complaints based on allegations raised but not incorporated into a pleading. An example is *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 142 F. Supp. 2d 589 (D.N.J. 2001), where a district court concluded the plaintiffs' complaint failed to state a claim for securities fraud

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<sup>2</sup>*See also Elliott v. Foufas*, 867 F.2d 877, 883 (5th Cir. 1989) (statement in 12(b)(6) opposition brief that plaintiff is "willing to amend" must be "construed as a motion for leave to amend her pleadings") (citation omitted); *Vernell v. United States Postal Serv.*, 819 F.2d 108, 110 (5th Cir. 1987) (plaintiff's memorandum opposing dismissal "should have been construed as a motion to amend"); *Dawson v. GMC*, 977 F.2d 369, 372-73 (7th Cir. 1992) (facts asserted in plaintiff's briefs cannot be ignored on review of a Rule 12(b)(6) dismissal).

<sup>3</sup>Apparently this purported rule of law has no corollary applicable to the Insider Defendants' own efforts to dismiss the Complaint. *See* Motion at 13 n.7 ("Similarly, the Department of Justice apparently does not believe that the [Insider] 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 others at Enron.").

against defendant McLeod. *Id.* at 621. As here, the plaintiffs requested leave to amend their allegations if the court ruled them insufficient. *Id.* at 622. The court found that added allegations would be "sufficient to sustain a claim against McLeod." *Id.* Instead of granting leave to amend and then forcing the parties to engage in the formality of briefing a motion to dismiss whose outcome was predetermined, the New Jersey district court simply upheld "the claim against McLeod [provided the] plaintiffs file the new amended complaints within fifteen days." *Id.* The Court did not error in considering allegations raised in Lead Plaintiff's Opposition Memorandum or in recent media reports.<sup>4</sup>

## VI. LEAD PLAINTIFF'S ALLEGATIONS SUPPORT THE COURT'S ORDER

The Insider Defendants spill a great deal of ink rearguing the motions to dismiss. Again, they raise their meritless arguments that the allegations in the Complaint are too vague to satisfy the PSLRA. Briefly stated, the Complaint alleges, and the Court found, the level of detail in the Complaint sufficient to satisfy the PSLRA's heightened pleading standards. *See* Order at 6 (noting "substantial supporting factual detail" in the Complaint). Incredibly, the Insider Defendants attempt to minimize the Enron fraud by citing the PSLRA's legislative history and statements by some legislators that the Act was meant to curb "meritless lawsuits" and "frivolous strike suits." Motion at 7 (citations omitted). This Court, as well as the public, knows better. "From the totality of circumstances before it, this Court does not find, and would be greatly surprised if any reasonable person disagreed, that the *Newby* consolidated action is merely a strike suit filed solely for nuisance value or an inflated settlement." *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 3786, at \*119 (S.D. Tex. Mar. 12, 2003).

Lead Plaintiff's pleadings, moreover, reflect the level of detail the Insider Defendants claim is lacking. As to each Insider Defendant, Lead Plaintiff has outlined his position, the committees on which he served, has included minutes from various meetings he attended, and identifies various SPEs approved by him. *See, e.g.*, Complaint ¶¶83(f)-(g), (m), (q)-(s), (v), 88, 395, 435-500, 570-

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<sup>4</sup>The Insider Defendants' citation to footnote 8 of the Court's August 12, 2002 Order is unavailing. *See* Motion at 6 n.2. There the Court was addressing whether materials outside the Complaint may be considered in support of a motion to dismiss. *In re Enron Corp. Sec.*, H-01-3624, Order at 12 n.8 (S.D. Tex. Aug. 12, 2002).

573.<sup>5</sup> Lead Plaintiff also identifies conference calls in which the Insider Defendants participated and during which misrepresentations were spoken. Complaint, ¶¶119, 145, 157, 179, 224, 247, 263, 282, 309, 317, 329, 343, 366, 388. These supporting details, coupled with the copious descriptions of the fraudulent devices and contrivances approved and run by the Insider Defendants, more than suffice to meet the PSLRA's heightened pleading standard. *See ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 356 (5th Cir. 2002) ("even with the heightened pleading standard under Rule 9(b) and the Securities Reform Act we do not require the pleading of detailed evidentiary matter in securities litigation") (citation omitted).<sup>6</sup>

For the reasons stated above and in the oppositions to motions to dismiss, Lead Plaintiff has more than met its pleading burden. The Insider Defendants simply ignore the Complaint's substantial detail.

**A. The Order Does Not Conflict with the Court's Prior Decisions**

The Insider Defendants fault the Court for not holding them to the same standard as the outside director defendants. They suggest that certain allegations which the Court found not to meet the heightened pleading burden against the outside directors should be insufficient against them as well. Defendants are wrong – both factually and legally.

Lead Plaintiff details each Insider Defendant's involvement in the deceptive devices and contrivances. Lead Plaintiff, without the benefit of any discovery, has provided a well-drawn picture of numerous fraudulent devices or contrivances along with the role the Insider Defendants played in accomplishing the fraud. Based on allegations in the Complaint, the Court makes the common sense inference that the 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

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<sup>5</sup>*See also* Opposition Memorandum to Insider Defendants at 51, 54-55, 58, 67-69.

<sup>6</sup>The Insider Defendants complain that Lead Plaintiff does not provide the time, place and vote counts for various proposals presented to the Management Committee. Motion at 8, 12. Lead Plaintiff need not plead this level of detail at this stage of the proceedings. An agenda for each Management Committee meeting is simply not required. Nevertheless, Lead Plaintiff has provided extensive detail regarding the various fraudulent transactions along with the role of each defendant in approving, running, and making statements regarding such devices and contrivances. *See ABC Arbitrage*, 291 F.3d at 356.

over the critical years prior to and during the Class Period," which during that time "was so pervasive, so extensive in scope, so frequent, and involved such huge dollar sums" that "those working within the company for years had to be aware of the enormous gap between the brilliant but sham public facade fabricated by Enron." Order at 6-7.

The Insider Defendants misrepresent allegations against them in an effort to further distance themselves from the fraud. They claim in their Motion that the "Officer Defendants are not alleged to have been among the 'several top executives of Enron.'" Motion at 9. But the Complaint specifically pleads the defendants who were on the "Management Committee were the top executives of Enron." Complaint, ¶397.

The Insider Defendants misapprehend the law in urging the Court to apply precisely the same standards to them as it did to the outside directors. *See* Motion at 8. Outside directors and company insiders are often judged by different standards when determining liability for securities fraud. Indeed, this Court in its March 12 Order "distinguishes between a corporation's inside directors, who normally participate in its operations and create its policies, and outside directors, who are supposedly independent and disinterested and who, without a showing the situation is otherwise, rely on the insiders' disclosure of material information about the corporation's business." *Enron*, 2003 U.S. Dist. LEXIS 3786, at \*122.

Other courts observe this difference in recognition of the different role inside and outside directors play in a corporation. *See, e.g., Haltman v. Aura Sys.*, 844 F. Supp. 544, 548 (C.D. Cal. 1993) (noting with respect to an outside director "different rules for pleading fraud apply to him"); *In re Musicmaker.com Sec. Litig.*, No. CV00-2018 CAS (MANx), 2001 U.S. Dist. LEXIS 25118, at \*79 (C.D. Cal. June 4, 2001) (noting heightened burden required to use group published presumption to outside directors). In *In re Livent Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371 (S.D.N.Y. 2001), for example, the court found the pleadings failed to state a claim against outside directors, though it sustained the *same allegations* against the inside directors. *See id.* at 433. "The same allegations in the complaint that satisfy the pleading requirements as to [the Inside defendants]," explained the court, "work against the 'strong inference' that the Audit Committee would have been aware of the fraud." *Id.* And insiders are often held to a different standard in terms

of controlling person liability. *See In re Marion Merrell Dow, Sec. Litig.*, No. 92-0609-CV-W-6, 1993 U.S. Dist. LEXIS 14197 (W.D. Mo. Oct. 4, 1993) (finding allegations as to insiders sufficient but dismissing claims as to outside directors where same allegations were made as to each defendant).

The Insider Defendants also assert that the Court's Order conflicts with its decision regarding the Individual Andersen Defendants. Motion at 10-11. The Insider Defendants fault the Court for not comparing apples to oranges. As to certain Andersen individuals, the Court found the Complaint failed to provide any details about their roles in the fraud. Individual Andersen Defendants Order at 44. Here, by contrast the Court found the Insider Defendants "were not only intimately involved in the company's daily business, but they also sat on the Management Committee, controlling the corporation during the critical years." Order at 8. And unlike with the Andersen Individuals, where the Court found "the lack of specificity about each partner's involvement ... warrant[ed] dismissal" (Individual Andersen Defendants Order at 46), here Lead Plaintiff pleads that the Insider Defendants "approved" the very fraudulent transactions that made the Enron Ponzi scheme possible, paid personal attention to the SPE transactions, and the Insider Defendants and other members of the Management Committee dealt "with the important issues facing Enron's business, *i.e.*, WEOS, EES, EBS, its JEDI and LJM partnerships and the related SPEs." ¶¶88, 395, 397.

Similarly, the Insider Defendants claim the Court cannot reconcile its Order with the dismissal of Rebecca Mark-Jusbasche. Motion at 13. But the Insider Defendants ignore important distinctions identified by the Court. Unlike the Insider Defendants, who "were in charge of actually running" Enron and its associated SPEs, the Court found Ms. Mark-Jusbasche's duties "centered on operation of a subsidiary or an affiliate." Order at 6; *see* Complaint, ¶¶88, 395, 397. Ms. Mark-Jusbasche "left Enron International before the Class Period commenced to become CEO of Azurix," and "Lead Plaintiff," concluded the Court, "has not alleged any facts demonstrating fraud at Azurix, no less that Mark-Jusbasche was aware of or severely reckless in disregarding signs of such conduct." Mark-Jusbasche Order at 4, 11. Mark-Jusbasche, moreover, served on no board committees and was an Enron director for just one year. *Id.* at 3 n.1; Complaint, ¶86. The Court's decisions are not inconsistent.

## **B. The Court Did Not Rely on Group Pleading or Position Pleading**

Throughout the course of this litigation, the Court has been clear it does not believe the group published presumption survived passage of the PSLRA. *See* Individual Andersen Defendants Order at 15-23; *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 902 n.45 (S.D. Tex. 2001). Despite its categorical and repeated pronouncements, the Insider Defendants insist the Court applied this presumption in sustaining the claims against them. But this is simply not the case. Nowhere in the Court's Order are statements in press releases or other written material imputed to the Insider Defendants based on status alone, as would be the case if the presumption were applied.<sup>7</sup>

The Insider Defendants also posit a theory termed "position pleading" – claiming Lead Plaintiff bases its claims against them on their position with Enron. Defendants correctly point out the Court has rejected such conclusory allegations, *without more*, as being insufficient. Here, Lead Plaintiff has alleged more – indeed much more. For all of the Insider Defendants, details about their positions are certainly included, as are their specific roles in the fraud. Here, "plaintiffs are not alleging scienter based solely on the individual defendants' positions as officers." *In re NetSolve, Inc.*, 185 F. Supp. 2d 684, 697 (W.D. Tex. 2001) (scienter found through allegations that company was experiencing significant customer losses due to service problems that would have been obvious to company's top officers).

Lead Plaintiff does not deny that it has pleaded the Insider Defendants' positions. This is only one small component used to establish scienter, however. And it dovetails with detailed facts about their involvement with Enron's core businesses, risk-management, complex SPEs, fraudulent financial structures, and off-balance-sheet transactions to hide Enron's debt and liabilities as set forth in the Complaint. These allegations are then contrasted with the fraudulent transactions they contrived or approved, and what the Insider Defendants told the public about Enron's financial condition or failed to disclose before selling their Enron shares. This is not "position pleading," and the Court's Order belies defendants' arguments.

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<sup>7</sup>By selectively quoting the Order, the Insider Defendants imply the Court found they signed Enron SEC filings. *See* Motion at 9 n.4. But even a cursory review of the Court's Order shows the Court was simply applying the law announced in previous orders regarding its adoption of the SEC's standard for pleading a primary violation of §10(b). *See* Order at 10.

The Insider Defendants' reliance on *Abrams* is misplaced. Motion at 12. In that case, the Fifth Circuit found lacking allegations that two high level executives who were familiar with the workings of Baker Hughes and who received various unidentified reports had the power and influence to cause the company to issue false statements. By contrast, Lead Plaintiff has alleged the Insider Defendants did in fact approve and were fully aware of the deceptive and manipulative devices. Complaint, ¶88. Indeed, as the Court found, "[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 at critical reporting times, again and again." Order at 9. In contrast to *Abrams*, where the court found "no allegations that the defendants knew about the internal control problems" at issue, 292 F.3d at 432, here Lead Plaintiff has alleged the Insider Defendants' knowledge of and active participation in the very structures which facilitated the Enron Ponzi Scheme. Complaint, ¶¶88, 395, 397.

**C. The Insider Defendants' Defendant-by-Defendant Re-Argument of the Motions to Dismiss Should Be Rejected**

The Insider Defendants' effort to identify the Complaint's purported shortcomings on a defendant-by-defendant basis adds nothing new to their argument. Citing to, and relying upon their motions to dismiss, they rehash arguments fully addressed in earlier briefing – albeit with a decided spin. For example, the Insider Defendants ignore substantial allegations against Ms. Olson, including first that the Court found her stock sales highly suspicious. Insider Defendants also neglect to mention the Court found allegations regarding the contrast between Ms. Olson's public representation about Enron stock and her private transactions significant. Indeed, the Court found "such telling factual allegations ... add to a strong inference of scienter." Order at 12.

For purposes of brevity, Lead Plaintiff refers the Court to its Opposition Memorandum to Insider Defendants at 51, 54-55, 58, 67-69 for its defendant-by-defendant discussion, which is incorporated herein.

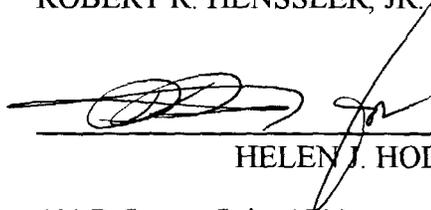
**VII. CONCLUSION**

For the reasons set forth above, the Court should deny Certain Officer Defendants' Motion for Reconsideration and Clarification of the Court's Denial of Their Motions to Dismiss.

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

2007-10-18 11:01:13

In re ENRON CORPORATION SECURITIES § Civil Action No. H-01-3624  
LITIGATION § (Consolidated)

This Document Relates To: § CLASS ACTION

MARK NEWBY, et al., Individually and On §  
Behalf of All Others Similarly Situated, §

Plaintiffs, §

vs. §

ENRON CORP., et al., §

Defendants. §

WASHINGTON STATE INVESTMENT §  
BOARD and EMPLOYER-TEAMSTERS §  
LOCAL NOS. 175 and 505 PENSION TRUST §  
FUND, On Behalf of Themselves and All §  
Others Similarly Situated, §

Civil Action No. 02-3401

CLASS ACTION

Plaintiffs, §

vs. §

KENNETH L. LAY, et al., §

Defendants. §

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

Before the Court is Certain Officer Defendants' Motion for Reconsideration and Clarification of the Court's Denial of Their Motions to Dismiss and Lead Plaintiff's Opposition thereto. After considering the motion, the opposition thereto, and the arguments of counsel, if any, the Court finds that the Motion for Reconsideration should be DENIED. It is therefore

ORDERED that Certain Officer Defendants' Motion for Reconsideration and Clarification of the Court's Denial of Their Motions to Dismiss is DENIED.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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HONORABLE MELINDA HARMON  
UNITED STATES DISTRICT JUDGE