United States Courts
Southern District of Texas
FILED

JUN 1 8 2003

Michael N. Milby, Clerk of Court

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

In re ENRON CORPORATION SECURITIES LITIGATION	§ 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.	§
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.	§

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO JOSEPH M. HIRKO'S MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT

1529

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I. INTRODUCTION

Joseph M. Hirko, who has been indicted for his role in the Enron fraud, and against whom the Securities and Exchange Commission and the U.S. Attorney bring claims for securities fraud, now asserts Lead Plaintiff does not and cannot properly allege fraud claims against him.

The Motion to Dismiss the First Amended Consolidated Complaint filed by Joseph M. Hirko lacks merit. First, Hirko contends the claims against him are barred by the doctrine of *res judicata*. Second, Hirko argues even if the claims against him are not barred, the FACC "fails to satisfy the stringent pleading requirements of the PSLRA" and "fails to aver fraud with particularity." Motion at 1-2.[1] Third, Hirko asserts "the Complaint alleges nothing new against" him. Motion at 4. Hirko is wrong in each instance.

As described in greater detail below, Hirko misapplies the doctrine of *res judicata* and fails to appreciate this Court's Orders, including a recent Order which leaves little doubt that its earlier dismissal of claims against Hirko was without prejudice. *See infra* §III.A. In addition, Hirko's Motion misrepresents the claims pleaded against him by the U.S. Attorney in its Superseding Indictment dated April 29, 2003. The claims alleged by the U.S. Attorney are, in and of themselves, sufficient to state a claim under the pleading standards of the PSLRA and Fed. R. Civ. P. 9(b). *See infra* §II.

Moreover, noticeably absent from Hirko's motion is any reference to claims the SEC pleaded against him in its First Amended Complaint dated May 1, 2003 (attached hereto as Ex. A). The claims pleaded against Hirko by the SEC are even more detailed than those pleaded against him by the U.S. Attorney. Lead Plaintiff requests that the Court take judicial notice of the SEC's First Amended Complaint. *See infra* n.4. The new allegations pleaded by Lead Plaintiff against Hirko clearly satisfy the standards of the PSLRA and Fed. R. Civ. P. 9(b).[2] The Superceding Indictment

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[1]References to Lead Plaintiff's First Amended Consolidated Complaint for Violation of the Securities Laws are stated herein as "FACC."

[2]Lead Plaintiff incorporates by reference the applicable standards for pleading claims under §§10(b), 20(a), 20A, and Rule 10b-5 as detailed by this Court in its numerous prior Orders. *See In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 564 n.2, n.3, 568-594, 692-93 (S.D. Tex. 2002)(detailing §10(b) and Rule 10b-5 analysis); *Id.* at 594-96 and *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *32-*56, *65-*74 (S.D. Tex. Jan. 28, 2003) (detailing §20(a) analysis);

demonstrates this, and the SEC's First Amended Complaint further illustrates the underpinnings of Lead Plaintiff's allegations.

For the reasons stated, Lead Plaintiff respectfully requests that the Court deny Hirko's Motion to dismiss.

II. HIRKO'S INVOLVEMENT IN THE ENRON SCHEME

Hirko claims the FACC fails to satisfy the pleading requirements of the PSLRA, fails to aver fraud with particularity and otherwise fails to state a claim upon which relief can be granted. *See* Motion at 2. But Hirko ignores the significant damaging information that has come to light since Lead Plaintiff filed its Consolidated Complaint regarding his role in the Enron Ponzi scheme. Lead Plaintiff attached to the FACC the Superceding Indictment which demonstrates Hirko's role in the scheme regarding the technological capabilities, value, revenue and business performance of Enron Broadband Services ("EBS"). Lead Plaintiff also attaches here the SEC Complaint which also provides compelling details regarding Hirko's role in the fall of Enron's house of cards.

According to the Superceding Indictment and SEC Complaint, Hirko and others executed the scheme by causing Enron to issue materially false and misleading press releases; making and causing others to make materially false and misleading statements to equity analysts and others; using fraudulent means to generate revenue so that EBS could appear to reach publicly declared financial targets, and failing to disclose material adverse information about EBS' poor business performance. During the same time period, the defendants, including Hirko, sold large quantities of Enron stock generating millions of dollars of profit for themselves. According to the Superceding Indictment as well as the SEC Complaint, Hirko and others participated in a wide-ranging scheme to manipulate Enron's stock price and engaged in massive insider trading. Indeed, the pattern of fraud laid out in the SEC Complaint and Superceding Indictment against Hirko merely reinforces the pattern of conduct alleged in the FACC.

In re Enron Corp. Sec., No. H-01-3624, 2003 U.S. Dist. LEXIS 3786, at *40-*50 (S.D. Tex. Mar. 12, 2003) (detailing §20A analysis). In this Court the standard is clear: a motion to dismiss must be denied "'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle him to relief.'" *Enron*, 235 F. Supp. 2d at 564 n.3 (citation omitted).

According to the Superceding Indictment and SEC Complaint, in 1998 Enron decided to enter the telecommunications business on a large scale. A plan was proposed that Enron build an advanced software-driven broadband "intelligent" telecommunications network. Superceding Indictment, ¶12; Ex. A, ¶20. This was a proposal that was backed by Hirko. Beginning in 1999, Enron made a series of false and misleading statements about its broadband network in several press releases. Superceding Indictment, ¶13; Ex. A, ¶21. Certain defendants, including Hirko, issued or caused to be issued various press releases. With respect to press releases in 1999, Hirko was aware of the content of the releases, and knew at the time of publication of the falsified statements contained in the press releases. Ex. A, ¶21.

For example, on April 19, 1999, it was announced in a press release that the plan for the Enron Intelligent Network ("EIN") had been executed. *Id.* Superseding Indictment, ¶13. Hirko is charged with reviewing those press releases and is alleged to have provided input on the content before it's publication and caused its publication. *Id.* The press release included a quote from Hirko where he claimed that EIN had "'virtually unlimited bandwidth and built-in intelligence,'" and provided "'a highly reliable pay-for-what-you-need, bandwidth-on-demand way'" to deliver opportunities over the network. Ex. A, ¶22. According to the SEC Complaint and the Superceding Indictment, these statements in the April 19, 1999 press release about EIN and its capabilities were false and misleading as EIN did not have built-in intelligence and the network could not perform services referenced in the press release. *Id.*, ¶26; Superseding Indictment, ¶13.

Another false press release was issued September 23, 1999. In that release Enron announced that it had "streamed" the Country Music Awards via media cast over EIN. Ex. A, ¶28. Hirko reviewed this press release prior to publication and caused its release. Other false and misleading press releases followed, including one on October 26, 1999 and one on November 10, 1999 where Hirko stated that EBS was transmitting video transport and video conferencing, another application with high quality and reliability over the EIN. *Id.*, ¶¶29-30. This statement, however, was false and misleading, Hirko knew it was false and misleading, and Hirko caused the release to be issued. *Id.*, ¶¶31-32.

In January 2000, Enron senior management including Hirko and defendant Rice decided to feature EBS and the EIN technology at Enron's January 20, 2000 analyst conference. *Id.*, ¶35; Superseding Indictment, ¶15. Enron featured EBS because it believed that EBS would have the greatest effect on Enron stock price. Ex. A, ¶35. In late November 1999, Hirko and others began meeting on a weekly basis to help develop the business strategy and message and to prepare for the conference. *Id.*; Superseding Indictment, ¶16. A major issue for those planning the conference was dealing with the issue of the software for the EIN which was still in the early stages of development. Hirko and others decided to market the software for the broadband operating system as "BOS" and claimed the software was completed and working even though this claim was false. Ex. A, ¶37. Hirko knew that BOS was under development and not completed and was not operating on Enron's network. On November 30, 1999, outside consultants met with Rice and others and discussed the fact that the software for the EIN was under development and not complete. During other meetings to prepare for the analyst conference, it was made clear BOS was still under development. *Id.*, ¶38.

For example, according to the SEC Complaint, in a meeting on December 8, 1999, attended by Hirko and others, the participants discussed the fact that certain BOS functions would not be available until the middle of 2000 and that a software solution was still being developed. *Id.*, ¶39. According to outside consultants and another EBS executive who attended the meetings, those at the meeting understood that the software was still under development. Drafts of a PowerPoint presentation for the January 20th analyst conference further demonstrate that Hirko and others knew that BOS was not completed and working and despite this knowledge, they intended to make or caused to be made false and misleading statements about BOS. *Id.* Drafts were circulated to the defendants in early January 2000 stating that the BOS and related software was under development and would not be available until a future date. *Id.* The drafts were progressively edited to remove all words indicating that the BOS was under development and would not be available until a future date. *Id.* When the PowerPoint presentation was actually shown by Hirko and others at the January 20th analyst conference the information in the early drafts which reflected the true state of the development of the BOS had been eliminated and was not disclosed at the conference. *Id.*, ¶42.

Also at the January 20, 2000 analyst conference Hirko and others made false and misleading statements about the BOS and the EIN technology. *Id.*, ¶¶43-44. For example, Hirko stated that Enron had fiber internationally, servers deployed on the Enron network, and they were connected with every other network in the world. *Id.* Hirko also stated software had been developed by EBS that had capabilities to, among other things, connect servers and deliver services. Hirko's statements were false and misleading, Enron did not have the software or the software-driven capability Hirko described. *Id.* And, during the analyst conference, a video was shown where the EIN software layer was discussed. After the video presentation, Hirko made additional false and misleading statements when he stated "'this software layer, is this a pipedream, is this something that we're going to get done in the next five years? No, this is something that exists today.'" Hirko said that Enron had "'a software layer that exists today that's capable of providing control of our network, our network of networks and delivering a quality of service for the Internet that has not been possible to date.'" *Id.*, ¶46. He also stated that Enron can "'deliver an Internet experience that has quality of service that's appropriate for the content being transmitted. It basically allows us to achieve the vision of the Internet that was never possible because of the way it was originally architected.'" *Id.* Hirko's statements were false and misleading because the software layer he described did not exist and was not controlling Enron's network.

The knowledge of Hirko and others that the BOS was in a developmental stage and did not exist on Enron's network as claimed is also established by events that occurred after the analyst conference. *Id.*, ¶52. Beginning January 31, 2000, Hirko and others attended an off-site meeting in Arizona to discuss EBS. *Id.*, ¶53. Among other things, the participants discussed significant problems with products, service, revenue and software development. *Id.* Also, almost simultaneously with the January 31st off-site meeting, Enron formed a technology steering committee that was responsible for solving the technological problems faced by EBS. *Id.*, ¶55. Hirko was a member of this committee. *Id.* Another off-site meeting was held between March 1 and March 3, 2000. *Id.*, ¶56. Hirko also attended this meeting where the parties discussed, among other things, significant problems with EBS, BOS and the development of EIN's capabilities. *Id.*

The SEC Complaint also points to a number of other press releases spanning January through July 2000 where Hirko was charged with being fully aware of the content of the releases as soon as they were published and knew that the statements in the releases were false and misleading. *Id.*, ¶¶58-59. Hirko is charged with reviewing several press releases prior to publication which contained false and misleading statements regarding EBS's future prospects. *Id.*

Moreover, the Superceding Indictment and SEC Complaint charge Hirko and others with violations of the insider trading prohibitions. In the Superceding Indictment, Hirko was charged with conspiracy to commit wire and securities fraud, with securities fraud in connection with the January 2000 analysts conference, and with several counts of wire fraud occurring between April 1999 and July 2000. Hirko is also charged with a number of counts of insider trading based on sales of Enron's stock while in possession of material, non-public information resulting in total proceeds of more than $35 million. Hirko was also charged by the grand jury with money laundering. Superseding Indictment, ¶¶35, 38, 40, 50, 60. These allegations, considered in their totality, more than suffice to satisfy the pleading requirements of the PSLRA.

III. ARGUMENT

A. The Court Did Not Grant Hirko's Motion to Dismiss With Prejudice

Hirko claims the Court's April 24, 2003 Order dismissed him from this action with prejudice and thus acted as an adjudication on the merits for the purposes of *res judicata*. Hirko is wrong. The Court's Order clearly contemplated Lead Plaintiff would have an opportunity to amend and therefore the decision dismissing claims against Hirko was not a dismissal with prejudice. Any purported ambiguity as to whether Hirko had been dismissed from this action with prejudice was resolved by this Court's June 5, 2003 Order. In that Order, responding to an argument from Deutsche Bank regarding the filing of the FACC, the Court made clear its dismissal of Deutsche Bank was without prejudice. *See* Order at 1. ("The dismissal was without prejudice ...."). The same logic applies with equal force here. The Court undoubtedly dismissed claims against Hirko without prejudice.

Even if the June 5 Order did not settle the matter (it does), Hirko's argument that there "can be little doubt" the Court's dismissal was with prejudice is still misplaced. Motion at 2 n.2. For when the Court has determined to dismiss a claim or party from suit, the Court has done so

explicitly. Indeed, in Enron-related litigation regarding state law claims and a motion to remand, the Court specifically dismissed state law class claims with prejudice. *In re Enron Corp. Sec.*, No. H-01-3624, 2002 U.S. Dist. LEXIS 26261 (S.D. Tex. Aug. 16, 2002). Moreover, the Court, when intending to dismiss with prejudice an action under the federal securities laws, has done so in the plainest terms. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 917 (S.D. Tex. 2001). The same holds true in other actions. *See, e.g., Morales v. Daley*, 116 F. Supp. 2d 801, 821 (S.D. Tex. 2000) (Harmon, J.) (dismissing action with prejudice), *aff'd*, 275 F.3d 45 (5th Cir. 2001). In the Court's Order dismissing Hirko's claim no such language exists, as Hirko himself recognizes. Moreover, the Court repeatedly makes reference to Lead Plaintiff's right to amend. *See, e.g., In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 7632, at *20 (S.D. Tex. Apr. 24, 2003), granting leave to "amend/supplement its complaint" to add allegations regarding defendant Causey. *See also Enron*, 2003 U.S. Dist. LEXIS 1668, at *19 n.9 ("the Court notes that it may grant leave to a party to amend its pleadings where justice requires under Fed. R. Civ. P. 15(a)").

Hirko relies on *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278 (5th Cir. 1993), for the proposition that dismissal is assumed to be with prejudice unless the court's order explicitly states otherwise. *See* Motion at 2 n.2. But *Fernandez-Montes* is not on point. In that case, the district court ***denied plaintiff's request to amend*** his complaint because "it appeared that under no facts would his claim be cognizable." 987 F.2d at 284. Thus, the Fifth Circuit was able to hold a dismissal was with prejudice when it failed to note whether it was with prejudice. The situation here is clearly different. And, in this case, the Court has made clear that Lead Plaintiff would be granted an opportunity to amend and has cleared up any ambiguity regarding the type of dismissal it handed down.[3]

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[3]Hirko also makes an argument that the Court's decision to lift the discovery stay imposed by the PSLRA is evidence that it intended to dismiss claims against Hirko with prejudice. This argument is a red herring. The Court lifted the stay after all pending motions to dismiss were decided. But the Court plainly contemplated Lead Plaintiff would amend its complaint to both add new parties and supplement its claims against existing parties when it granted leave to amend.

B. Lead Plaintiff Has Cured All Pleading Defects Identified By This Court

Hirko asserts the FACC does not and cannot cure the pleading defects identified by the Court in its April 24, 2003 Order. Motion at 4-6. The following chart demonstrates Hirko is incorrect.

The Court's April 24 Order:	**New Allegations That Satisfy the Pleading Standards:**
"When viewed in their totality, the circumstances surrounding Hirko's involvement in Enron suggest that he was distanced from the daily operations of the company and the alleged Ponzi scheme." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *21.	In contrast, the Superceding Indictment and SEC Complaint repeatedly emphasize that Hirko, through his role as Chairman and CEO of Enron Communications, Inc., and Enron Broadband Services, Inc., was intricately involved in the creation and publication of numerous false and misleading statements which he knew to be false when they were made. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105.
"Hirko remained in Oregon and never lived in Houston, where management of the day-to-day operations of Enron took place." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *22.	Although Hirko may not have lived in Houston, Hirko: (1) created false and misleading press releases and knew at the time of publication of the false and misleading statements set forth therein; (2) made numerous false statements at the January 20, 2000 analyst conference that Hirko knew to be false; (3) attended a January 31, 2000 off-site meeting in Arizona where the participants discussed, among other things, the significant problems with products, service, revenue, and software development; (4) was a member of Enron's "technology steering committee" that was responsible for solving the technological problems faced by EBS; and (5) attended a March 1-3, 2000 off-site meeting where the parties discussed significant problems with EBS, BOS, and the development of EIN's capabilities (the parties also discussed the fact that the first BOS release was not anticipated until September 30, 2000, at the earliest). *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105.
"The complaint makes no allegations that Hirko received any bonuses." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *22.	While the complaint does not allege that Hirko received any bonuses, it is alleged that Hirko engaged in a scheme to defraud and to manipulate and inflate the value of Enron stock and profited from this scheme to defraud by selling large amounts of Enron stock at the inflated prices. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50;

The Court's April 24 Order:	New Allegations That Satisfy the Pleading Standards:
	Ex. A, ¶¶1-60, 77-78, 105. These trades occurred while Hirko was in possession of material, non-public information, including information that Enron's broadband network did not work as claimed and that the stock price was inflated. Hirko's unlawful profits were substantial, $52,998,781. *Id.*
"Nor does the complaint assert that Hirko participated in the preparation of any of Enron's financial statements or accounting decisions." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *22.	True, the complaint does not allege Hirko participated in the preparation of any of Enron's financial statements or accounting decisions. However, as previously noted in this memorandum and throughout the Superceding Indictment and SEC Complaint, Hirko was an active participant in the Enron scheme to defraud through his creation of false and misleading statements and he knew at the time of publication of the false statements therein. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105.
"Hirko emphasizes that he was CEO of EBS only 'in its very early stages,' because Kenneth Rice was named co-CEO in June 1999 and then became the sole CEO in June 2000, when Hirko left EBS and Enron." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *22 (footnote and citation omitted).	It may be true that Rice was named co-CEO in June 1999 and then became the sole CEO in June 2000, when Hirko left EBS and Enron. However, the Superceding Indictment and SEC Complaint repeatedly emphasize that Hirko, through his role as Chairman and CEO of Enron Communications, Inc., and Enron Broadband Services, Inc., was intricately involved in the creation and publication of numerous false and misleading statements which he knew to be false when they were made. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105.
"[T]he sale of Hirko's Enron stock, constituting only 19.87% of his Enron holdings, occurred in the spring of 2000, just prior to his separation from EBS and Enron, and he continued to hold over 80% of his Enron investments." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *22-*23.	Hirko engaged in a scheme to defraud and to manipulate and inflate the value of Enron stock and profited from this scheme to defraud by selling large amounts of Enron stock at the inflated prices. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105. These trades occurred while Hirko was in possession of material, non-public information, including information that Enron's broadband network did not work as claimed and that the stock price was inflated. Hirko's unlawful profits were substantial, $52,998,781. *Id.*
"[T]he alleged fraud in Enron's broadband business appears to have blossomed under	***Beginning in 1999***, Hirko made false and misleading statements about Enron's

The Court's April 24 Order:	New Allegations That Satisfy the Pleading Standards:
Rice's control, after Hirko's departure in June from Enron and EBS, starting with the Enron-Blockbuster deal in July 2000." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *23.	broadband network in several press releases. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105. Hirko was aware of the content of the releases and knew at the time of publication of the false and misleading statements set forth therein. *Id.* Hirko reviewed the press releases and provided input on their content before publication, and caused their publication. *Id.*
"Lead Plaintiff has not alleged that Hirko make any false or misleading statements." *Enron*, 2003 U.S. Dist. LEXIS 7632, at *23.	Hirko made false and misleading statements about Enron's broadband network in several press releases. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50; Ex. A, ¶¶1-60, 77-78, 105. Hirko made numerous false statements at the January 20, 2000 analyst conference that Hirko knew to be false. *Id.*

Hirko argues that because the Superceding Indictment alleges criminal violations it can not satisfy Rule 9(b) pleading requirements. Motion at 4-5. Hirko then instructs this Court to compare 15 U.S.C. §78u-4(b)(1) with Fed. R. Crim. P. 7(c). *Id.* But, Hirko fails to explain that the Superceding Indictment, while not required to meet Rule 9(b) pleading requirements, not only pleads fraud against Hirko with the requisite degree of particularity required by Rule 9(b) and the PSLRA, it exceeds that standard. *See supra* §II; Superceding Indictment, ¶¶1-19, 33-39, 50. Moreover, the SEC Complaint pleads fraud against Hirko with even greater particularity than the Superceding Indictment. *See* Ex. A, ¶¶1-60, 77-78, 105. Any argument that ***civil*** fraud standards, even under the PSLRA, are more stringent than those faced by a criminal defendant simply will not wash.

Plaintiffs have satisfied the requirements of particularized pleading identified by this Court. The FACC – through the Superseding Indictment – ***identifies each*** of the statements alleged to be materially false and misleading, ***specifies who*** made the statements, ***when and where*** they were made, and ***why*** they were false. Moreover, the SEC Complaint further demonstrates the

underpinnings of Lead Plaintiff's allegations.[4] In response, Hirko offers little more than false, generalized accusations that the FACC is insufficiently specific.[5]

C. Lead Plaintiff Adequately Alleges Hirko Violated §20A

In his motion, Hirko does not address the claims pleaded against him under §20A. The FACC adequately alleges that Hirko is liable under §§10(b) and Rule 10b-5. The material, non-public information possessed by Hirko is well documented in the FACC. Dismissal of the §20A claim is simply unwarranted as plaintiffs have adequately pleaded predicate violations of the 1934 Act and clearly demonstrated that named plaintiffs traded contemporaneously with Hirko. *See* Ex. A to the FACC.

Hirko engaged in enormous insider trading while in possession of material, non-public information, selling millions of his Enron shares at artificially inflated prices.[6] For sales between February 18, 2000 and May 12, 2000, plaintiffs identify the date of each sale, the number of shares sold, and the plaintiff who made a contemporaneous trade. As Ex. A to the FACC shows, plaintiffs' trades occurred either on the very same day as the Insiders' sales or within twenty-four hours of them.

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[4]Lead Plaintiff incorporates by reference the SEC's First Amended Complaint, dated May 1, 2003. The Fifth Circuit has ruled that, in reviewing the sufficiency of a complaint, judicial notice may be taken of SEC filings, documents referred to or partially quoted in the complaint, and documents of public record "with the restriction that these documents may be considered only for the purpose of determining what statements they contain and not for proving the truth of their contents." *Enron*, 2003 U.S. Dist. LEXIS 3786, at *169 (citing *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996)); *BMC*, 183 F. Supp. 2d at 882. This Court has ruled: "Courts may routinely consider not just documents named in Plaintiffs' complaint, but even documents that, if not named, are 'pertinent,' 'central,' or 'integral to [Plaintiffs'] claim.' The Fifth Circuit recognizes the incorporation-by-reference doctrine." *Id.* at 883; *Collmer v. U.S. Liquids, Inc.*, No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *4 (S.D. Tex. Jan. 23, 2001). Consequently, documents that have recently become part of the public record, including a complaint filed by the SEC, are pertinent, central, or integral to plaintiffs' claim, and are incorporated in plaintiffs' opposition.

[5]Again misinterpreting this Court's Orders, Hirko asserts, "notwithstanding the clear language in the Court's May 2 Order ... Plaintiffs did not even inform the Court of their intention to add Mr. Hirko." Motion at 4 n.4. Lead Plaintiff did not inform the Court of their "intention to add" Hirko because Hirko is simply ***not*** a "new" defendant. *See also* June 5, 2003 Order at 2 ("The dismissal was without prejudice, and the Court finds no prejudice in allowing the amended complaint to be filed because [Hirko] can move to dismiss any new claims asserted against [him] once it has been served.").

[6]A summary of Hirko's trades is in Ex. C of the Appendix to the FACC.

Nothing more is required than what is alleged by Lead Plaintiff. *Enron*, 2003 U.S. Dist. LEXIS 3786, at *41-*42.

D. Lead Plaintiff's §20(a) Control-Person Claim Should Be Sustained

Hirko fails to explain why Lead Plaintiff's control person allegations pursuant to §20(a) are defective. In fact, Lead Plaintiff's control person allegations against Hirko are more than adequate. Lead Plaintiff has properly pleaded that Hirko is liable as a control person because they have (1) alleged a violation of the securities laws and (2) alleged he had the power – and exercised it – to control and influence the activities of another. *See, e.g.*, *Enron*, 2003 U.S. Dist. LEXIS 1668, at *32-*56, *65-*74.

IV. CONCLUSION

For all the reasons stated, Hirko's motion to dismiss should be denied.

DATED: June 18, 2003

Respectfully submitted,

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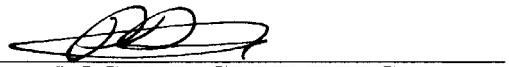

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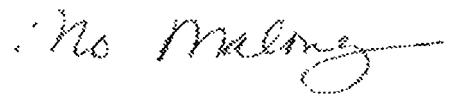
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO JOSEPH M. HIRKO'S MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT has been served by sending a copy via electronic mail to serve@ESL3624.com on this 18th day of June, 2003.

I further certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO JOSEPH M. HIRKO'S MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 18th day of June, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004



Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk