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

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	CLASS ACTION
This Document Relates To:	§	
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.	§	

LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE BANK DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT

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I. Introduction

Lead Plaintiff respectfully submits this Opposition in response to each of the motions to dismiss filed by the Bank Defendants.[1]

The Bank Defendants' principal ground for dismissal is the statute of limitations. The Bank Defendants assert Lead Plaintiff's claims are barred as to the bank subsidiaries upon which they recently tried to shift liability, in response to the Consolidated Complaint. This is the second chapter in the story of the Bank Defendants' shell game. First, the Bank Defendants claimed Lead Plaintiff named the wrong parties – bank parent companies – as defendants. Meanwhile the Bank Defendants limited and delayed as much as possible disclosure of the conduct implicating culpable subsidiaries. Now the Bank Defendants argue the statute of limitations bars all claims brought against those entities that could be culpable.

Perhaps the most incredible claim of the Bank Defendants is their purported surprise by Lead Plaintiff's amendment bringing suit against additional culpable bank entities. There is no reasonable basis for the Bank Defendants to suggest they could not have expected the possibility Lead Plaintiff would sue all culpable entities in this action – including the bank subsidiaries – when the opportunity came. While it is not required that Lead Plaintiff show as much, besides their attempts to limit disclosure of their subsidiaries' conduct, there is another telling indication that the Bank Defendants did in fact expect their subsidiaries would be sued. It is that the Bank Defendants, contrary the Court's Orders requiring a more immediate response, waited until well after one year had passed since the filing of the Consolidated Complaint to file their motions for summary judgment claiming mistaken identity.

Regardless, Lead Plaintiff filed its amendment within the period provided by the applicable statute of limitations. The Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley") applies to Lead Plaintiff's amendment. *See infra* §II.A-B. And, if this Court finds that Sarbanes-Oxley does not apply to non-fraud §11 claims, then there is a fact question as to

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[1] The "Bank Defendants" are those defendants listed in ¶¶100-106 and 108.

the intent of the underwriting defendants. Such a question of fact would preclude resolution of Sarbanes-Oxley's applicability to Lead Plaintiff's §11 claims on these motions. *See infra* §II.C.

Even if the Court finds Sarbanes-Oxley does not apply to Lead Plaintiff's amendment or part of it, Lead Plaintiff's claims were filed within the limitations period under *Lampf, Pleva, Lipking, Prupis & Petigrow v. Gilbertson*. *See infra* §II.D. And any claims found not filed within the limitations period relate back to the filing of the Consolidated Complaint. *See infra* §III. Lead Plaintiff clearly satisfies the requirements of Rule 15(c) for relation back of its amendment. As stated above, the Bank Defendants cannot reasonably claim prejudice by any supposed inability to anticipate their culpable entities would be added as defendants in due course. This is especially so given Lead Plaintiff's amendment addresses mistakes the Bank Defendants claimed existed in the Consolidated Complaint. If they mention the word at all, the Bank Defendants apparently say little if anything about prejudice. Given their conduct and the circumstances of this case, they simply cannot reasonably claim prejudice by surprise. *See infra* at 18-19; §III.E.

Nonetheless, the Bank Defendants claim that Lead Plaintiff's failure to name the Newly-Added Defendants[2] in the Consolidated Complaint on April 8, 2002, is evidence of a "deliberate strategy" to sue bank parents and not the culpable bank subsidiaries which are part of a myriad of similarly-named bank entities. If the timing of Lead Plaintiff's amendment is evidence of any strategy, it is that Lead Plaintiff sought amendment in accordance with the Court's Orders and schedule, when amendment could be accomplished efficiently and comprehensively, and after notice of the culpable entities' conduct. Indeed, the Bank Defendants do not (and cannot) identify a rational "strategy" explaining why Lead Plaintiff would choose to circumscribe its claims in the Consolidated Complaint – especially as to viable, significantly culpable defendants.

Certain Bank Defendants also challenge allegations which the Court already found sufficient under Rule 9(b) and the PSLRA. Each of the Bank Defendants is subject to liability for all claims asserted pursuant to the well-pleaded allegations of the First Amended Complaint. *See infra* §§VII-XI. That Lead Plaintiff has now identified bank subsidiaries as defendants does not diminish the

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[2] The Newly-Added Defendants are those listed in ¶¶100(b), (c), 101(b)-(d), 102(a), (b), 103(b)-(d), 104(b), 105(b), 106(b), (c) and 108(b).

conduct of the bank parents, nor does it mean the bank subsidiaries are any less culpable. The Bank Defendants' arguments that control liability is not alleged, and that (once again) *Central Bank* immunizes defendants for Rule 10b-5(a) & (c) claims, similarly lack merit. *See infra* §§V-VI. Certain Bank Defendants complain there is no plaintiff with standing to pursue §12(a)(2) claims, and that the claims are not adequately pleaded. This is not so. *See infra* §IV. The claims are adequately pleaded and the Court has already held that the time to address standing issues is at class certification. Moreover, at this time, Lead Plaintiff is aware of an institution which purchased securities that are the subject of the §12(a)(2) claims, and which plans to intervene as a representative plaintiff to pursue those claims.

Lead Plaintiff respectfully requests that the Bank Defendants' motions to dismiss be denied in their entirety.

II. Lead Plaintiff Amended the Consolidated Complaint Within the Applicable Statute of Limitations Period[3]

Lead Plaintiff amended the Consolidated Complaint within the statute of limitations period provided by Sarbanes-Oxley, and for certain defendants within the limitations period under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). The Bank Defendants claim that Sarbanes-Oxley does not apply to Lead Plaintiff's amendment either because the amendment is not a proceeding commenced after the effective date of Sarbanes-Oxley or because Sarbanes-Oxley does not extend the statute of limitations for claims under the 1933 Act. That is incorrect. *See infra* §II.A-B.

Even if Sarbanes-Oxley were found inapplicable here, Lead Plaintiff's amendment is not time barred for numerous other reasons. Lead Plaintiff provided notice of its intent to name as defendants the bank subsidiaries in a letter written to the Court on January 14, 2003 in order to seek permission to add those defendants. Ex. 1.[4] The letter addressed the issue as follows: "To address certain bank defendants' arguments, should Lead Plaintiff amend or supplement ***to name subsidiaries of the Bank Defendants*** or file a new complaint with the same claims and ***adding subsidiaries***." *Id.*[5] At that time, motions to dismiss the Consolidated Complaint were still pending.

On January 27, 2003, the Court entered an Order responding to Lead Plaintiff's letter and to other matters:

> To provide the parties with some direction, the Court addresses the letter first. The Court has been working intently on the motions to dismiss in *Newby* and expects to have rulings on all of them shortly. Until then, the request for a status and scheduling conference appears both premature and impractical for the following reasons.
>
> ***It makes no sense to establish a schedule, including for amendment of pleadings, without knowing all that needs to be done....*** [I]n conjunction with the individuals' motions to dismiss, the Court will resolve the Joint Motion of Certain Defendants to Strike the Pulsifier Class Action Complaint and the related issue of

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[3] This section responds to Lehman Motion at 5-7; B of A Motion at 7-12; Barclays Motion at 7-10; CSFB Motion at 6-10; CIBC Motion at 7-10; Citigroup Motion at 14-15; J.P. Morgan Motion at 5-7, 12 n.7.

[4] All exhibits are attached to Lead Plaintiff's Appendix of Exhibits filed herewith.

[5] Here, as elsewhere, emphasis is added and citations and footnotes are omitted unless otherwise noted.

> whether Lead Plaintiff should include those claims in an amended or supplemented pleading. Lead Plaintiff also asks whether it should add the subsidiaries of the bank Defendants to an amended or supplemental complaint. ***The Court indicated in its memorandum and order that if the banks object to being named defendants because a subsidiary or other entity was the real party in interest, they should file appropriate motions. The bank Defendants should do so now, and Lead Plaintiff should file its responses as quickly as possible, so that all amendment or supplementation can be efficiently and timely accomplished in one instrument.***

Order at 2-3. Lead Plaintiff followed the Court's instructions, which, in Lead Plaintiff's view, were reasonably necessary given the size and complexity of this case and to, as the Court stated, "impose orderly proceedings ... which it seeks to move efficiently toward resolution or trial." *Id.* at 6.

On the other hand, certain Bank Defendants did ***not*** file their motions as the Court requested but instead waited over three months, until well after one year had passed since Lead Plaintiff had filed its Consolidated Complaint. And neither J.P. Morgan Chase, Merrill Lynch, Lehman Brothers, nor CSFB ***ever*** filed motions as ordered by the Court, and Barclays withdrew its motion. Meanwhile, Lead Plaintiff relied on the Bank Defendants' silence and promptly filed the First Amended Complaint within the Court's schedule. Estoppel should preclude the Bank Defendants from the statute of limitations defense they now assert. *See infra* §II.D. *A fortiori*, the Bank Defendants have not been prejudiced by Lead Plaintiff's amendment.

Finally, even if Lead Plaintiff's amendment was brought outside the applicable statute of limitations period, relation back pursuant to Rule 15(c) would be proper. Lead Plaintiff establishes the requirements of mistake of fact and law, defendants clearly had the requisite notice, and defendants must have reasonably expected to be sued in due course after the correct identities of the culpable bank entities were learned. *See infra* §III.

A. Sarbanes-Oxley Lengthens the Statute of Limitations Applicable to Claims Against the Newly-Added Defendants in the First Amended Complaint

Defendants claim the Sarbanes-Oxley Act, which in part was a Congressional response to the Enron debacle, does not expand the statute of limitations as to claims under §§11, 12(a)(2), and 15 of the 1933 Act. Rather, they argue it is limited to claims asserted in fraud. *See* Lehman Motion at 5-6 n.3; CSFB Motion at 7-8; CIBC Motion at 7 n.4; J.P. Morgan Motion at 12 n.7. In addition, defendants claim that the Sarbanes-Oxley Act is not retroactive, *i.e.*, the longer statute of limitations

embodied in the Act does not apply to victims of the Enron fraud. *See* Lehman Motion at 5-6 n.3; CSFB Motion at 7; CIBC Motion at 7 n.4; J.P. Morgan Motion at 5-6. Each claim is incorrect.

1. Sarbanes-Oxley Clearly and Unambiguously Applies to Claims Under §3(a)(47), Which Includes §§11, 12(a)(2), and 15 Claims Such as Those Brought Here

Statutory interpretation begins with an examination of the text of the statute to determine whether its meaning is clear. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (holding that when a statute's language is plain, "the inquiry should end"); *Kelly v. Boeing Petroleum Servs.*, 61 F.3d 350, 362 (5th Cir. 1995) (stating that if the statutory language is plain and unambiguous, it must be given effect).

Here, the text of the statute at issue is plain and unambiguous and its meaning is clear. Section 804 of Sarbanes-Oxley amends 28 U.S.C. §1658 by extending the statute of limitations for ***all*** private securities claims to two years from the discovery of facts constituting the violation, rather than one year, and to five years from the violation, rather than three years. Indeed, the pertinent portion of 28 U.S.C. §1658 now provides:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(47)), may be brought not later than the earlier of –
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

28 U.S.C. §1658.

Contrary to what several defendants contend, the application of 28 U.S.C. §1658 is not limited to fraud claims. *See* Lehman Motion at 5-6 n.3; CSFB Motion at 7-8; CIBC Motion at 7 n.4; J.P. Morgan Motion at 12 n.7. The Sarbanes-Oxley amendment to 28 U.S.C. §1658 specifically references 1933 Act claims in defining the "securities laws" to which it applies. As stated in §3(a)(47) of the 1934 Act, identified by the amendment, "***The term 'securities laws' means the Securities Act of 1933.***" Thus, by its own terms, Sarbanes-Oxley's statute of limitations applies to private securities claims for violations of the 1933 Act. Had Congress sought to exclude 1933 Act claims from the reach of Sarbanes-Oxley, it would have done so by omitting this reference to 1933

Act claims or by referencing sections other than §3(a)(47) to define the amendment's scope. Moreover, even assuming Sarbanes-Oxley is to be construed as defendants say, there remains a fact question as to whether the securities offerings in question were fraudulent. Thus, even under defendants' interpretation of Sarbanes-Oxley, the longer statute of limitations period could apply here, and defendants' motions should be denied. *See infra* §II.C.

Thoughtful analysis of a similar question concerning Sarbanes-Oxley by the U.S. Bankruptcy Court for the Southern District of New York is particularly instructive. In *In re Gibbons*, 289 B.R. 588, 592 (Bankr. S.D.N.Y. 2003), the court discussed the application of §803 of Sarbanes-Oxley, titled "Debts nondischargeable if incurred in violation of securities ***fraud*** laws." *See* Pub. L. No. 107-204, §803. The court stated that §803 added subsection (19) to the exceptions to discharge enumerated in §523(a) of the Bankruptcy Code and provides, in pertinent part, "that a discharge in a Chapter 7 case (among others) does not discharge an individual debtor from a debt ... 'that (A) is for – (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934).'" *Gibbons*, 289 B.R. at 592. The court then explained that "Section 523(a)(19) incorporates by reference §3(a)(47) of the Securities Exchange Act of 1934, which defines 'securities laws' to mean the Securities Act of 1933 ...." *Id.* at 592 n.6. Accordingly, the court held that "***[t]he section, by its terms, applies to both statutory claims under the securities laws and common law fraud, so long as it arises in connection with the purchase or sale of a security***." *Id.* at 592.

Similarly, here, §804 of Sarbanes-Oxley expressly refers to §3(a)(47) of the 1934 Act, which defines "securities laws" to mean the 1933 Act. Thus, §804 of Sarbanes-Oxley applies to claims brought under the 1933 Act.

2. Sarbanes-Oxley Applies to the Claims Asserted Against the Newly-Added Defendants

Subsection (b) of §804, entitled "EFFECTIVE DATE," explicitly provides that "[t]he limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, ***shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act***." Subsection (b) does not in any way limit the applicability of

Sarbanes-Oxley to actions that would be within the prior, shorter statute of limitations, as defendants contend. *See* Lehman Motion at 5-6 n.3; CSFB Motion at 7; CIBC Motion at 7 n.4; J.P. Morgan Motion at 5-6. Subsection (b) simply states that Sarbanes-Oxley applies to ***all proceedings*** commenced on or after the date of enactment of Sarbanes-Oxley. The proceeding against the Newly-Added Defendants commenced on May 14, 2003 with the filing of the First Amended Complaint. Thus, the expanded Sarbanes-Oxley statute of limitations applies to the claims against them.

Defendants argue this Court has already held the Sarbanes-Oxley limitations period does not apply to this proceeding and cite this Court's March 12, 2003 Order. Their citation, however, is to *dicta* and the Court's *dicta* did not address whether Sarbanes-Oxley applied to Lead Plaintiff's amendment. *In re Enron Corp. Sec.*, 258 F. Supp. 2d 576, 2003 U.S. Dist. LEXIS 3786, at *49 n.20 (S.D. Tex. Mar. 12, 2003). The *Newby* action was filed prior to enactment of Sarbanes-Oxley. But, the amended proceeding against the Newly-Added Defendants was filed after Sarbanes-Oxley's enactment, and Sarbanes-Oxley most certainly applies to the amendment.

Here, the claims asserted against the Newly-Added Defendants were commenced on May 14, 2003, roughly eight months ***after*** Sarbanes-Oxley's enactment. Accordingly, the new, longer two year/five year statute of limitations applies to the claims asserted against the new defendants.

The only cases to have addressed this issue hold that Sarbanes-Oxley means exactly what it says, namely that the new, longer statute of limitations applies to all proceedings which are commenced on or after the date of enactment of Sarbanes-Oxley. In *Friedman v. Rayovac Corp.*, No. 02-C-308-C, Order at 22 (W.D. Wis. May 29, 2003) (Ex. 2), the court held Sarbanes-Oxley's limitation period applies to all proceedings commenced after July 31, 2002, and held "[t]he date the conduct occurred is irrelevant." Similarly, in *Roberts v. Dean Witter Reynolds, Inc.*, No. 8:02-CV-2115-T-26 EAJ, 2003 U.S. Dist. LEXIS 5676 (M.D. Fla. Mar. 14, 2003) (appeal docketed), Judge Lazzara held that "Congress intended to lengthen the statute of limitations to enable people who lost their life-savings to companies like Enron to recover some of their investments. To do so, the amendment must be given retroactive application." *Id.* at *9. And in *De La Fuente v. DCI Telecomms.*, No. 01 Civ. 3365 (CM), 2003 U.S. Dist. LEXIS 3236, at *17 (S.D.N.Y. Mar. 4, 2003),

the court stated "Congress's intent is clear – the statute of limitations established by the Sarbanes-Oxley Act applies only to proceedings commenced on or after July 30, 2002." *Id.*

In *Friedman*, three cases were consolidated, each of which was filed before July 31, 2002. *Friedman*, No. 02-C-308-C, Order at 22. Plaintiffs then amended the complaint to add an additional defendant in January 2003. *Id.* ***Thus, held the court, the "proceedings" against the newly-added defendant "commenced after the effective date of the act."*** *Id.* Seeking to avoid the longer limitations period, the newly-added defendant contended that "proceedings" should be interpreted to include only the date the lawsuit was filed and not subsequent amendments to the complaint adding new parties. *Id.* The court held the defendant's view was "inconsistent with the Federal Rules of Civil Procedure and with common sense" because:

> ***[Plaintiffs] could have filed a separate action against [the newly-added defendant] in January 2003, in which case there could be no dispute over the application of the new statute of limitations. It would make little sense to create a rule encouraging judicial inefficiency by requiring separate lawsuits for claims against different defendants arising out of the same conduct.***

Id. at 23. As the court in *Friedman* stated, "serving an additional party with the complaint commences a new 'proceeding,' even if the new claim is part of a lawsuit that was filed previously." *Id.* Accordingly, the court held the two year limitations period of Sarbanes-Oxley applied to the claims asserted against the newly-added defendant.

Like the plaintiff in *Friedman*, Lead Plaintiff has amended the complaint after the effective date of Sarbanes-Oxley to add additional defendants. Thus, the "proceedings" against the Newly-Added Defendants commenced after the effective date of the Act. *See id.* at 22-23; *see also Cmty. Found. for Jewish Educ. v. Fed. Ins. Co.*, 16 Fed. Appx. 462, 467 (7th Cir. 2001) (if a party is brought into the litigation for the first time through an amended complaint, "the claim is obviously new to that entity; thus it is a claim first made"). Lead Plaintiff could have filed a separate action against the Newly-Added Defendants, in which case there would be no dispute over the application of the new statute of limitations to these defendants. However, in the interests of judicial efficiency and economy, Lead Plaintiff made a decision to add the Newly-Added Defendants to the operative *Newby* complaint.

CSFB claims that it is entitled to repose as to allegations regarding the September 1999 Osprey offering. CSFB Motion at 12. Lehman similarly invokes repose as to a May 1999 offering of 7.375% Enron notes. Lehman Motion at 5 n.3. To the contrary, Sarbanes-Oxley expands the statute of repose to five years.

In *Roberts*, the defendants, like some of the Bank Defendants here, asserted Sarbanes-Oxley does not apply to claims that have been extinguished or expired prior to Sarbanes-Oxley's July 30, 2002 enactment. *Roberts*, 2003 U.S. Dist. LEXIS 5676, at *5-*6. The court disagreed, stating that "[t]he effective date, which is July 30, 2002, hinges on the date that 'proceedings' commence or commenced rather than on the date the violation occurred." *Id.* at *8-*9. Accordingly, "[t]his language, standing alone, seems to presume that the Act affords redress for violations that had already occurred before July 30, 2002." *Id.* at *9. *See also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 294 n.4 (S.D.N.Y. 2003). So too, this Court should also rely on the explicit language of the statute and apply the longer statute of limitations to the claims commenced against the Newly-Added Defendants after Sarbanes-Oxley's enactment.

B. The Legislative History of Sarbanes-Oxley Contradicts Defendants' Interpretation of the Act

Even assuming, *arguendo*, Sarbanes-Oxley was unclear or ambiguous on its face, a review of the Act's legislative history, and particularly the Conference Report, unequivocally indicates Congress intended Sarbanes-Oxley apply to ***all*** private securities causes of action filed after the date of the Act's enactment. The section of Sarbanes-Oxley at issue, Title VIII, was authored by Senator Leahy, who intended that Sarbanes-Oxley apply to "all existing private causes of action under the various federal securities laws." 148 Cong. Rec. S7418 (daily ed. July 26, 2002).

Indeed, Senator Leahy's section-by-section analysis of Title VIII is included in the July 26, 2002 Congressional Record as part of the official legislative history:

> Section 804. – Statute of Limitations
>
> ***This provision states that it is not meant to create any new private cause of action, but only to govern all the already existing private causes of action under the various federal securities laws that have been held to support private causes of action.*** This provision is intended to lengthen any statute of limitations under federal securities law, and to shorten none. ***The section, by its plain terms, applies to any***

> ***and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred.***

148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy). "The phrase 'regardless of when the underlying conduct occurred' demonstrates that Congress intended for the extended statute of limitations to apply retroactively." *Roberts*, 2003 U.S. Dist. LEXIS 5676, at *12. Furthermore, the phrases stating §804 was meant "to govern ***all*** the already existing private causes of action under ***the various federal securities laws*** that have been held to support private causes of action," and stating §804 applies to "***any and all cases***," demonstrate that Congress intended for the extended statute of limitations to apply to all federal securities laws, including §§11, 12 and 15 of the 1933 Act. 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy).[6]

Senator Leahy extensively addressed the intent and the applicability of Title VIII on July 10, 2002, just 16 days before its passage as a component of Sarbanes-Oxley. As he stated, Title VIII of Sarbanes-Oxley was intended to provide an opportunity for victimized Enron investors to seek redress. In fact, Title VIII of Sarbanes-Oxley was specifically intended for plaintiffs who lost money as a result of the Enron scheme, to use the new statute of limitations to bring their claims.

> When I look at places such as Washington State alone where the pension funds of firefighters and police lost $50 million because of the fraud of the leaders of ***Enron***, I don't feel too sympathetic. We already have a very short statute of limitations in here anyway. ***We ought to at least have that so people might be able to recover some of the money they have lost***, if it is at all possible, instead of just a few executives going up and building their $50 million mansions and hiding it there.
>
> ... There ought to be some way for the people who lost their pensions, lost their life savings, to get it back.
>
> * * *

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[6] In *Gibbons*, the court discussed Senator Leahy's section-by-section analysis of Sarbanes-Oxley. "***Courts frequently give substantial weight to a 'section-by-section analysis' in determining legislative intent.***" 289 B.R. at 594 (citing *Garrett v. United States*, 471 U.S. 773 (1985); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983)). "***Moreover, the purpose of the section-by-section analysis was 'to provide guidance in the legal interpretation' of the Sarbanes-Oxley Act, and it was offered by Senator Leahy, the author of the Accountability Act and Senate Judiciary Committee Chairman at the time of the enactment of the legislation.***" *Id.* at 595 (citing 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy)). Furthermore, the *Gibbons* court held, "[a] section-by-section analysis may not be as persuasive if it was introduced ***after*** the enactment of the legislation. In this case, however, the section-by-section analysis was offered into the Congressional Record as legislative history contemporaneously with the passage of the Sarbanes-Oxley Act of 2002, and without any objection." *Id.* at 595 n.12. Thus, Senator Leahy's section-by-section analysis of this section of Sarbanes-Oxley must be given substantial weight.

> Florida lost $335 million because of ***Enron***; the University of California, $144 million – all the way down to Vermont; we lost millions of dollars. ***These are people who would like, in these kinds of cases, at least to have a statute of limitations such that we can go after them.***
>
> * * *
>
> I am here to try and protect people and give them an opportunity – when there has been such enormous fraud and all the pension funds have been lost, and all the people who have lost their life savings – ***give them at least some chance to recover something***, especially as the executives of these companies walk off with tens of millions of dollars. We go two-five instead of one-three.
>
> ... That was negotiated and voted on in the Judiciary Committee, and the final bill was passed unanimously.

148 Cong. Rec. S6524 (daily ed. July 10, 2002) (statement of Sen. Leahy). Thus, Title VIII of Sarbanes-Oxley was intended to apply to defrauded Enron investors. Indeed, "***[t]he language referring to victims of Enron recovering damages indicates the intent to retroactively apply the statute of limitations***." *Roberts*, 2003 U.S. Dist. LEXIS 5676, at *11.

It is clear from both the statutory language and legislative history that §804 of Sarbanes-Oxley applies to Lead Plaintiff's claims brought against the Newly-Added Defendants.

C. Even Assuming Sarbanes-Oxley Is to Be Construed as Defendants Say, There Remain Factual Questions to Determine the Applicability of the Extended Statute of Limitations

Assuming, *arguendo*, defendants' interpretation of Sarbanes-Oxley were the law in this case, whether the extended statute of limitations applied to Lead Plaintiff's §11 claims would remain an issue. For if defendants acted with scienter (*i.e.*, fraudulently) in connection with the securities offerings underlying Lead Plaintiff's §11 claims, then the extended statute of limitations would apply here even under defendants' interpretation of the law. Thus, in any event, defendants' motions to dismiss must be denied because whether defendants acted with scienter is a factual question that cannot be resolved by their motions.

Based on the nature of the scheme in this case and Lead Plaintiff's allegations, claims arising from Enron's securities offerings have been stated for either fraudulent or negligent violations of §11. As this Court held in its Order re Secondary Actors' Motions to Dismiss:

> Lead Plaintiff has alleged numerous material transactions (***deceptive devices and contrivances***) in the complaint that were not clearly and adequately disclosed in registration statements. Moreover, given the fact that the complaint is filled with

> allegations of red flags and warnings at least some of which should have alerted an underwriter doing a due diligence investigation to look deeper and question more, the Court finds that the complaint adequately alleges Section 11 claims ***grounded in negligence and/or fraud*** against the following Defendants ....

In re Enron Corp. Sec., 235 F. Supp. 2d 549, 707 (S.D. Tex. 2002) (listing offerings and defendants for which Lead Plaintiff properly stated claims). Furthermore, this Court has held that the alleged "intrinsic nature of these devices and contrivances" not disclosed in connection with Enron's securities offerings was fraudulent such that those adequately aware of the devices would have had to have been "severely reckless" of the danger represented. *Id.* at 694.

Whether the banks' underwriting subsidiaries were negligent or severely reckless is a question of mental state that cannot be resolved by defendants' motions to dismiss. Establishing the existence or non-existence of conditions under Rule 15(c) presents questions of fact, as determining the applicability of a statute of limitations. *See, e.g.*, *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 174 (3d Cir. 1977) (whether conditions of Rule 15(c) have been met is question of fact subject to review for clear error); *Bredberg v. Long*, No. 4-82-962, 1983 U.S. Dist. LEXIS 10280, at *8-*9 (D. Minn. Dec. 31, 1983) (mental state for determining applicability of statute of limitations is a factual question). In *Bredberg*, the defendants moved for summary judgment, arguing that plaintiffs' cause of action was barred by a two-year statute of limitations, while the plaintiffs argued that defendants' violations of the Federal Labor Standards Act were willful, which invoked a three-year statute of limitations. 1983 U.S. Dist. LEXIS 10280, at *8-*9. The court denied the motion and held:

> The question of willfulness necessarily implicates questions of the mental state of the defendant which can only be resolved after a careful evaluation of all the facts.... Although plaintiffs have not alleged a willful violation, they should be permitted the opportunity to amend if they have a basis to do so.

Id. Here, even assuming defendants' interpretation of the law were correct, no motion to dismiss may be granted because the extended statute of limitations provided by Sarbanes-Oxley would apply to fraudulent violations of §11.

D. Lead Plaintiff's Amendment Was Filed Within Both the Applicable Limitations Period Under *Lampf* and Sarbanes-Oxley

Sarbanes-Oxley expanded the statute of limitations for private securities laws actions to two years from the discovery of facts constituting the violation, rather than one year, and to five years

from the violation, rather than three years. *See supra* §II.A. Lead Plaintiff's amendment clearly was filed within Sarbanes-Oxley's two-year limitations period.

Prior to the enactment of Sarbanes-Oxley, *Lampf* required that "[l]itigation instituted pursuant to §10(b) and Rule 10b-5 must be commenced within one year ***after the discovery of the facts*** constituting the violation and within three years after such violation." 501 U.S. at 364. Certain defendants argue that inquiry notice is the standard under *Lampf*, but the Supreme Court was unequivocal on this point: "The 1-year period, by its terms, begins after discovery of the facts constituting the violation ...." *Id.* at 363. *Accord Berry v. Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir. 1999).[7] Lead Plaintiff's amendment also was filed within the one-year statue of limitations under *Lampf*.

As discussed herein, even if the one-year statute of limitations applied, the Bank Defendants could not be prejudiced by the filing of the amendment after January 2003, and equitable estoppel precludes the Bank Defendants from asserting the statute of limitations defenses they now assert. As the Fifth Circuit held in *Tyler v. Union Oil Co.*, 304 F.3d 379 (5th Cir. 2002), when determining equitable estoppel, "'the issue is whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period.'" *Id.* at 391 (affirming district court's holding that estoppel saved plaintiffs' claims from being time-barred). Because "the [plaintiffs] brought their suit within the three-year period of repose, it is possible for equitable estoppel to extend the time for filing their suit beyond the one-year discovery limitation to the time that they actually filed suit within the three-year repose period." *Berning v. A.G. Edwards & Sons, Inc.*, 774 F. Supp. 480, 484 (N.D. Ill. 1991), *rev'd on other grounds*, 990 F.2d 272 (7th Cir. 1993).[8]

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[7] Defendants' inquiry argument relies on *Reed v. Prudential Sec.*, 875 F. Supp. 1285 (N.D. Tex. 1995). *See* Barclays Motion at 14-15; B of A Motion at 17-18. But the *Reed* court's conclusion that the "one-year 'discovery' limitations period begins to run on the date that the plaintiff ... should have discovered the alleged [fraud]" was based not on *Lampf*, but on cases decided before *Lampf*. 875 F. Supp. at 1288. *Reed* is not controlling because it does not address *Lampf*, nor is it persuasive.

[8] *Accord Friedman v. Wheat First Sec. Inc.*, 64 F. Supp. 2d 338, 346 n.7 (S.D.N.Y. 1999) ("the equitable estoppel doctrine as applied to the one-year from discovery period is not inconsistent with Lampf as long as the claim is brought within the three-year period of repose").

On January 27, 2003, the Court told the Bank Defendants, who had not filed motions in accordance with the Court's previous direction, to file their motions "***now***" if they objected to being named defendants because a subsidiary or other entity was the real party in interest. The Bank Defendants did not do so. Instead, they waited ***three months***, until well after one year passed since Lead Plaintiff filed the Consolidated Complaint. Certain Bank Defendants did not file motions at all. In so doing, the Bank Defendants induced the timing of Lead Plaintiff's amendment by failing to timely object on the basis that the banks' subsidiaries were real parties in interest. During the three-month-plus period in which the Bank Defendants were silent, Lead Plaintiff relied on the Court's schedule and the Bank Defendants' silence in deciding when to amend the Consolidated Complaint. Thereafter, Lead Plaintiff filed its amendment promptly after the Court's request.

Thus, even under the one-year statute of limitations period, Lead Plaintiff's amendment was timely because the Bank Defendants are ***estopped*** from asserting a statute of limitations defense for claims brought after January 27, 2003, and Lead Plaintiff had neither inquiry nor actual notice of the Bank Defendants' conduct as of January 2002.

First, Enron's initial revelations on October 21, 2001 did not provide notice of the Bank Defendants' conduct, as certain Bank Defendants claim. The Bank Defendants cite numerous cases applying the inquiry notice standard, but none of those cases are applicable here, where Lead Plaintiff asserts claims under Rule 10b-5(a) & (c). Moreover, the case pleaded against the Bank Defendants is very different than the cases cited by defendants. Defendants' authority includes auditors who publicly certified issuer financial statements, issuer officer and defendants, or other actors who made face-to-face misrepresentations.[9] Indeed, none of the defendants address the critical

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[9] *See Lampf*, 501 U.S. at 353 (misrepresentations by law firm concerning limited partnership investments); *Jackson v. Speer*, 974 F.2d 676, 677-78 (5th Cir. 1992) (false statements by seller of property to plaintiff); *Jensen v. Snellings,* 841 F.2d 600, 604-05, 608 (5th Cir. 1988) (false statements by seller of company interest); *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 526-27 (5th Cir. 1987) (false statements by investor's brokerage firm); *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981) (false statements by investor's bank and securities broker); *Westchester Corp. v. Peat, Marwick, Michell & Co.*, 626 F.2d 1212, 1217 (5th Cir. 1980) (false statements by issuer's auditor); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975) (false statements by issuer's officers and directors and other defendants identified on face of allegedly false documents); *Gaudin v. KDI Corp.*, 576 F.2d 708, 713-14 (6th Cir. 1978) (false statements by issuer); *Del Sontro v. Cendant Corp.*, 223 F. Supp. 2d 563, 567 (D.N.J. 2002) (false statements by issuer); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d

distinction that while plaintiffs may have been on notice about ***Enron's*** fraud in the late fall of 2001, the Bank Defendants' conduct did not begin to come to light until much later. But even if Lead Plaintiff was somehow on notice of the Bank Defendants' conduct as of October 21, 2001, Lead Plaintiff's claims were filed within the statute of limitations under Sarbanes-Oxley.

Second, Lead Plaintiff did not have notice of certain Bank Defendants' conduct as of April 8, 2002, as some Bank Defendants claim, much less did Lead Plaintiff have the information necessary to name bank subsidiaries as §10(b) defendants. For example, it was not until September 21, 2002 that Lead Plaintiff learned Lehman Brothers Inc. engaged in loans disguised as equity forward contracts with Enron, which was unknown until publicly disclosed in the first report filed by Enron's bankruptcy Examiner. *See* Ex. 3 at 8 n.28.

Furthermore, Lead Plaintiff was not on notice of Citibank's conduct until July 23, 2002, when Citigroup's malfeasance was disclosed in a Congressional hearing and documents. *See, e.g.*, Richard A. Oppel, Jr. and Kurt Eichenwald, "Citigroup is Linked to a Deal That Let Enron Skirt Rules" *N.Y. Times*, July 23, 2002 (Ex. 4). Likewise, notice of Merrill Lynch's conduct in connection with the Nigerian barge transactions and bogus power swaps was not revealed until after the Consolidated Complaint was filed. *See* Merrill Lynch Motion at 24.

Statements made by national news sources aptly make the point concerning the lack of information publicly known as of April 8, 2002 about the Bank Defendants' conduct. Indeed, after reviewing the Consolidated Complaint, *USA Today* reported: "Until now, Wall Street's perceived role in Enron's collapse has largely been defined by the 'buy' recommendations maintained by analysts as the company melted down last fall." Greg Farrell and Edward Iwata, "Complaint to Link

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793, 795, 798 (N.D. Tex. 2000) (false statements by issuer's auditor and attorneys); *Reed v. Prudential Sec.*, 875 F. Supp. 1285, 1287-88 (S.D. Tex. 1995) (J. Crone) (false statements by investor's securities broker), *aff'd without op.*, 87 F.3d 1311 (5th Cir. 1996); *In re Stac Elec. Sec. Litig.*, No. 92-1120-R, 1994 WL 525256, at *14-*15 (S.D. Cal. June 29, 1994) (false statements by issuer's officers and directors and venture capitalist identified in prospectus); *In re In-Store Advertising Sec. Litig.*, 840 F. Supp. 285, 289-90 (S.D.N.Y. 1993) (false statements by issuer's auditor); *In re General Dev. Corp. Bond Litig.*, 800 F. Supp. 1128, 1130-32 (S.D.N.Y. 1992) (false statements by issuer's officers and directors, underwriters and auditors); *Hallman v. Northwestern Nat'l Ins. Co.*, 766 F. Supp. 575, 576-77 (S.D. Tex. 1991) (J. Kent) (false statements by financial advisor regarding limited partnership investments).

Wall Street Banks with Enron Woes," *USA Today*, Apr. 8, 2002 (Ex. 5).[10] Likewise, *The Wall Street Journal*'s editorial board described the "list" of bank defendants in the Consolidated Complaint as "amazing," and suggested that there was no basis to sue the Bank Defendants other than "their ability to pay."[11] *See* "Lerach's Enron Sweep," *Wall St. J.,* Apr. 17, 2002 (Ex. 6). *The Wall Street Journal* changed its position after Congressional hearings in late July 2002: "We're not the type to easily bash business. But from the evidence we've looked at, these banks deserve the beating they're now getting." *See* "Enron's Enablers," *Wall St. J.*, July 29, 2002 (Ex. 7).

Lead Plaintiff's amendment should not be time barred under either the two-year statute of limitations pursuant to Sarbanes-Oxley or the one-year statute of limitations under *Lampf.*

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[10] Obviously, that Bank Defendants maintained "buy" recommendations on Enron, by itself, was not enough to alert a reasonable investor to the fact that it had a claim against these defendants for their role in the fraudulent Enron scheme.

[11] As *The Wall Street Journal* stated, "Why not go after every shareholder who sold a share of stock during the period when Mr. Fastow was keeping the price aloft with this financial levitation act? To have had any profitable dealings at all with Enron was to have aided and abetted fraud ...."

III. Lead Plaintiff's Amendment Relates Back to the Filing of Their Consolidated Complaint Pursuant to Rule 15[12]

Even assuming Lead Plaintiff's amendment was not filed within the applicable limitations period (it was), Lead Plaintiff's claims against new parties and new claims against existing parties are ***not*** time barred because the amendment adding those claims relates back to the date of the original pleading in this action pursuant to Rule 15 of the Federal Rules of Civil Procedure.[13]

Rule 15(c) states:

> (c) **Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Id.

The Fifth Circuit has stressed "the importance of a liberal application of Rule 15(c)." *FDIC v. Bennett*, 898 F.2d 477, 480 (5th Cir. 1990) (allowing relation back). Indeed, the purpose of the federal rules "is to do justice." *Shores v. Arkansas Valley Envtl. & Util. Auth.*, No. 77-6-0604-S,

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[12] This section responds to Lehman Motion at 7-10; B of A Motion at 12-18; Barclays Motion at 10-15; CSFB Motion at 10-12; CIBC Motion at 7-10; Citigroup Motion at 14-15; J.P. Morgan Motion at 5-7.

[13] Defendants CIBC, Barclays and Bank of America make the long-rejected argument that Rule 15 ***only*** applies when substituting one defendant for another and cannot be used to add defendants. *See* Barclays Motion at 12; CIBC Motion at 9; B of A Motion at 13 n.7. Many cases, and leading treatises, say otherwise. "The word 'changing' has been liberally construed by the courts, so that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §1498 (2003). *See also Roberts v. Orleans Parish Med. Staff*, No. 99-2266, 2002 U.S. Dist. LEXIS 9660, at *13-*14 (E.D. La. May 20, 2002) ("Federal Rule of Civil Procedure 15(c) provides that a plaintiff may benefit from the filing date of an original complaint when an amended complaint changes or ***adds*** a defendant after the statute of limitations has run").

1980 U.S. Dist. LEXIS 10979, at *14 (N.D. Ala. Mar. 28, 1980). As the Supreme Court stated in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966), "[t]he basic purpose of the federal rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.... If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Id.* at 373.

Lead Plaintiff meets each of Rule 15's three prerequisites.

A. All Allegations Against the Subsidiaries Are Based on the Same Transaction or Occurrence of the Original Complaint

All but one of the Bank Defendants concede the claims against them arise from the same conduct, transaction or occurrence set forth in the original pleading.[14] From the beginning of this case, Lead Plaintiff has argued that the subsidiaries and parent corporations acting in concert were involved in the massive Enron fraud. It is beyond dispute the course of conduct alleged in the First Amended Complaint arises from the same transactions or occurrences detailed in the Consolidated Complaint. *See, e.g.*, *Watkins v. Lujan*, 922 F.2d 261, 265 (5th Cir. 1991) (relation back allowed where amendment based on the same underlying facts).

B. Plaintiffs Have Satisfied the Notice Requirement of Rule 15(c)

As the Supreme Court stated in *Schiavone v. Fortune*, 477 U.S. 21 (1986), "[t]he linchpin is notice, and notice within the limitations period." *Id.* at 31. *Accord Slaughter v. S. Talc Co.*, 949 F.2d 167, 174-75 (5th Cir. 1991). In the Fifth Circuit, "notice is the critical element involved in Rule 15(c) determinations." *Williams v. United States*, 405 F.2d 234, 236 (5th Cir. 1968). *Accord Flores v. Cameron County Texas*, 92 F.3d 258, 273 (5th Cir. 1996). The Bank Defendants received sufficient notice of the institution of this amended action in numerous ways.

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[14] CSFB does make an argument regarding whether new ***claims*** in the First Amended Complaint relate to the same transaction or occurrence as alleged in the Consolidated Complaint. This argument regarding the Marlin and Osprey transactions fails. *See infra* §III.D.

1. The Banking Subsidiaries Have an "Identity of Interest" With Their Parents Through Closely-Related Business Operations

Here, the Newly-Added Defendants had more than adequate notice of this action because of their identity of interest with their parents. It is appropriate to "infer notice if there is an identity of interest between the original defendant and the defendant sought to be added or substituted." *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (citing *Moore v. Long*, 924 F.2d 586, 588 (5th Cir. 1991)).[15] "'Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.'" *Id.* (quoting *Kirk v. Cronvich*, 629 F.2d 404, 408 n.4 (5th Cir. 1980)).

The "relationship needed to satisfy the identity of interest test ... has been found between a parent and a subsidiary." 6A Wright, Miller & Kane, *supra*, §1499. *See also Franklin v. Norfolk & W. R. Co.*, 694 F. Supp. 196 (S.D. W.Va. 1988) (granting motion to amend to add subsidiary); *E.I. DuPont de Nemours & Co. v. Philips Petroleum Co.*, 621 F. Supp. 310 (D. Del. 1985) (adding additional defendant who was a wholly-owned subsidiary of original defendant). Further, the "requisite notice under Rule 15(c) may be either formal or informal." 3 James Wm. Moore, *Moore's Federal Practice* §15.19[3][c] (3d ed. 2003); *Honeycutt v. Long*, 861 F.2d 1346, 1350-52 (5th Cir. 1988) (relation back may be satisfied "as long as there is evidence of some kind of notice to the proper party, whether formal or informal, within the appropriate period").

Lead Plaintiff meets the requirements of Rule 15(c) and any denial of relation back would be to deny just claims by a technicality. But such a denial would ***not*** be appropriate.

> "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." This purpose is not furthered by giving Rule 15 lip service rather than full fealty. ***Nor is the purpose of the federal rules furthered by denying the addition of a party who has a close identity of interest with the old party and the added party will not be prejudiced.***

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[15] In *Jacobsen*, a case universally relied on by defendants, the Fifth Circuit granted the motion to amend as to one set of defendants finding there was an identity of interest between the original defendant and the defendants sought to be added or substituted. 133 F.3d at 320. As to those officers, the court held "the proposed amendment is exactly the situation at which Rule 15(c)(3) is aimed: the misidentification of the defendant." *Id.* The Fifth Circuit further found that notice could be imputed to the new party through shared counsel.

The ends of justice are not served when forfeiture of just claims because of technical rules is allowed.

Travelers Indem. Co. v. United States, 382 F.2d 103, 105-06 (10th Cir. 1967).

The Bank Defendants consist of parent companies and their subsidiaries which, together, are held out to be integrated financial institutions. These integrated companies clearly have an identity of interest. For example, Merrill Lynch stated in its Annual Report for 2002 that it provides services on a "global basis" through its various subsidiaries including Merrill Lynch Pierce Fenner & Smith, Inc. Ex. 8 at 49. And J.P. Morgan Chase stated in its Annual Report for 2002 that it operates globally through its subsidiaries. Ex. 9 at 17. Moreover, the banks' subsidiaries are controlled by their parents.[16] And risk at these institutions is measured on a firm-wide basis, which includes all the relevant subsidiaries, and in all significant instances risk is approved at the top. It cannot be reasonably disputed that the bank parents and their subsidiaries have an identity of interest within the meaning of Rule 15(c).

2. The Banking Subsidiaries and Their Parents Have an Identity of Interest Through Their Shared Counsel

Notice of the institution of this action may be imputed to the Newly-Added Defendants because they are (and have been) represented by their parents' counsel. In the Fifth Circuit, "notice may be imputed to the new party through shared counsel." *Jacobsen*, 133 F.3d at 320 (citing *Barkins v. Int'l Inns, Inc.*, 825 F.2d 905, 907 (5th Cir. 1987); *Hendricks v. Memorial Hosp.*, 776 F.2d 1255, 1257-58 (5th Cir. 1985)). For example, in *Jacobsen*, the original complaint against a city and police officer was served on the city attorney who represented the city and police officer in responding to the complaint. 133 F.3d at 320. Thereafter, other officers of the city were named as defendants. The Fifth Circuit held notice was satisfied under Rule 15 because the city attorney presumably

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[16] *See, e.g.*, CIBC Motion for Summary Judgment at 2 ("CIBC and its other affiliated companies own 100% of the voting shares of each subsidiary."); Barclays Motion for Summary Judgment at 2-4 (Barclays PLC admits it owns newly-added subsidiary defendants); B of A Motion for Summary Judgment at 3 ("Bank of America and its affiliated companies generally own up to and including 100% of the voting shares of each subsidiary directly or indirectly"); Citigroup Motion for Summary Judgment at 2, 3 (Citigroup Inc. admits it owns its subsidiaries); Lehman Brothers Inc. November 2002 Report on Form 10-K ("[Lehman Brothers Inc.] is a wholly owned subsidiary of Lehman Brothers Holdings Inc.") (Ex. 10 at 4).

investigated the allegations of the original complaint and thus knew or should have known the newly-named officers were the proper defendants. *Id.*

Here, not only are the bank subsidiaries that have been named in the First Amended Complaint wholly-owned subsidiaries of the bank parents, the subsidiaries and parent corporations all share the same counsel.[17]

Bank Parent Defendant	Counsel for Bank Parent	Bank Subsidiary Defendants	Counsel for Subsidiaries
J.P. Morgan Chase	Bruce D. Angiolillo SIMPSON THACHER & BARTLETT	JP Morgan Chase Bank JP Morgan Securities Inc.	Bruce D. Angiolillo SIMPSON THACHER & BARTLETT
Citigroup	Brad S. Karp PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP	Citibank Salomon Smith Barney, Inc. Salomon Brothers Int'l Ltd.	Brad S. Karp PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
CSFB USA Inc.	Richard W. Clary CRAVATH, SWAINE & MOORE LLP	Pershing LLC CSFB LLC	Richard W. Clary CRAVATH, SWAINE & MOORE LLP
CIBC	Alan N. Salpeter MAYER, BROWN, ROWE & MAW	CIBC World Markets Corp. CIBC Oppenheimer Corp.	Alan N. Salpeter MAYER, BROWN, ROWE & MAW
Bank of America	Gregory A. Markel CADWALADER, WICKERSHAM & TAFT LLP	Banc of America Securities LLC	Gregory A. Markel CADWALADER WICKERSHAM & TAFT LLP
Merrill Lynch	Herbert S. Washer CLIFFORD CHANCE ROGERS & WELLS	Merrill Lynch, Pierce, Fenner & Smith, Inc.	Herbert S. Washer CLIFFORD CHANCE ROGERS & WELLS

[17] Moreover, as demonstrated in recent oppositions to summary judgment motions filed by CIBC, Citigroup and Bank of America, there are many other ties between the parent corporations and the Newly-Added Defendant subsidiaries such as shared boards, officer and employee overlap, shared offices and more. *See* Lead Plaintiff's Opposition to Defendant Bank of America's Motion for Summary Judgment at 3-6, 10; Lead Plaintiff's Opposition to Defendant CIBC's Motion for Summary Judgment at 5, 12; Lead Plaintiff's Opposition to Defendant Citigroup Inc.'s Motion for Summary Judgment at 4-13.

Bank Parent Defendant	Counsel for Bank Parent	Bank Subsidiary Defendants	Counsel for Subsidiaries
Barclays	David H. Braff SULLIVAN & CROMWELL LLP	Barclays Bank PLC Barclays Capital, Inc.	David H. Braff SULLIVAN & CROMWELL LLP
Lehman Brothers	Hugh R. Whiting JONES, DAY, REAVIS & POGUE	Lehman Brothers Inc.	Hugh R. Whiting JONES, DAY, REAVIS & POGUE

Here, shared counsel represents the banking parents and subsidiaries and presumably investigated the claims brought by Lead Plaintiff against the bank parents in the Consolidated Complaint filed on April 8, 2002. The shared counsel obviously were in the best position to become aware of which banking subsidiaries were potential defendants in this action, and knew or should have known that information shortly after the filing of the Consolidated Complaint.

3. Admissions of Certain Newly-Added Defendants Demonstrate Notice

Long before they filed their motions, certain Newly-Added Defendants admitted they were defendants or potential defendants in this action.

For example, in Banc of America Securities LLC's Statement of Financial Condition from December 31, 2002, the company states:

> On April 8, 2002, the Company was named as a defendant along with, among others, commercial and investment banks ... in a putative consolidated class action complaint filed in the United States District Court for the Southern District of Texas alleging violations of Section 11 and 15 of the Securities Act of 1933 and Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. On May 8, 2002, the Company filed a motion to dismiss the complaint and on December 20, 2002, the Court granted the motion in part, dismissing the claims asserted under Section 10(b) and Rule b-5 of the Exchange Act.

Ex. 11. Thus, Banc of America Securities has always considered itself a defendant in this action. Similarly, Citigroup notes in its 2002 Annual Report that "Citigroup and, in one case, Salomon Smith Barney, Inc. (SSB) were named as defendants ... in two putative consolidated class action complaints that were filed in the United States District Court for the Southern District of Texas seeking unspecified damages." Ex. 12 at 136. CIBC's 2002 Annual Report similarly notes, "CIBC

and in some cases certain of its affiliates have been named as defendants in five Enron related actions ...." Ex. 13 at 113.

C. Plaintiffs Have Satisfied the Mistake Requirement of Rule 15(c)

There are two bases for Lead Plaintiff's assertion of mistake to satisfy Rule 15(c) in naming certain bank defendants in this case: mistake in fact as to identity, and mistake in law. In each instance of mistake, the Bank Defendants, with superior information concerning the identity and involvement of their subsidiaries in the Enron fraud, ought to have anticipated (and did) that culpable entities would be added as defendants here, after correct identities were revealed.

The Bank Defendants charge Lead Plaintiff with omniscience. They argue Lead Plaintiff somehow knew the correct identities of culpable subsidiaries, and on April 8, 2002, made a "tactical" or "strategic" decision to name certain bank defendants and not others, and therefore Lead Plaintiff is not entitled to "relation back" under Rule 15(c).[18] Lead Plaintiff's naming of the bank defendants originally sued was based on the limited information then available, without the benefit of documents and testimony later obtained and released by the Senate or by Enron's Bankruptcy Examiner. Indeed, while the Bank Defendants claimed this was a case of mistaken identity in their pleading motions and answers in response to the Consolidated Complaint, most did not divulge the identities of the culpable subsidiaries.

Certain Bank Defendants claim that their indication of the identity of their subsidiaries that did business with Enron in their motions to dismiss the Consolidated Complaint required Lead Plaintiff to immediately name those subsidiaries as defendants. *See* CIBC Motion at 2; B of A Motion at 12 n.5; Citigroup Motion at 15 n.10. According to defendants, regardless of the limited information then available, Lead Plaintiff's failure to immediately sue the subsidiaries evidences a deliberate strategy to sue only the parent companies. That is illogical.

That Lead Plaintiff sued the Newly-Added Defendants after the Court's final ruling on defendants' motions to dismiss is not evidence of a deliberate strategy to sue only the Bank Defendants originally named parties in the Consolidated Complaint. Nor did it prejudice the Bank

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[18] *See* CIBC Motion at 8-10; Barclays Motion at 13-14; B of A Motion at 15-17; Lehman Motion at 8-10; CSFB Motion at 11; Citigroup Motion at 10.

Defendants merely because Lead Plaintiff brought claims in due course against the Newly-Added Defendants, after all motions to dismiss the Consolidated Complaint had been ruled upon. If the timing of Lead Plaintiff's amendment is evidence of any tactic, it is that Lead Plaintiff amended in accordance with the Court's Orders and schedule, when amendment could be accomplished efficiently and comprehensively, after notice of the culpable entities had been garnered. As the Court recently observed, "***[t]he circumstances in this litigation are extraordinary ... caused by the sheer size, novelty and complexity of this multidistrict litigation*** ...." June 27, 2003 Order at 3.

Accordingly, Lead Plaintiff did not make a deliberate choice between potential defendants. And specific bank entities were not "strategically" omitted, as defendants suggest. Indeed, this defies common sense and defendants do not (and cannot) identify a rational "strategy" explaining why Lead Plaintiff would choose to circumscribe its claims in the Consolidated Complaint – especially as to viable, significantly culpable defendants. Likewise, Rule 15 does not limit Lead Plaintiff from pursuing all theories of recovery. It strains credulity for the Bank Defendants to claim surprise that in this case, one of the largest corporate collapses in history, Lead Plaintiff is now asserting liability against the bank subsidiaries in addition to liability against the bank parents. Thus, it is highly improbable that defendants did not reasonably expect to be sued in due course after the correct identities of the culpable entities were learned.

1. Certain Newly-Added Defendants Were Named to Correct a Factual Mistake as to Identity

Of course the Bank Defendants did not identify which of their many subsidiaries were involved in transactions underlying the Enron fraud. Rather, after Lead Plaintiff learned the correct identities of as many culpable bank entities in Enron transactions as possible – entities with names similar to existing bank defendants – Lead Plaintiff wrote the Court to seek permission for amendment, among other things. *See supra* at 14-17. The naming of the following bank entities as defendants corrected a factual mistake as to identity.

Newly-Added Defendant	First-Named Defendant
Citibank, N.A.	Citigroup
Credit Suisse First Boston (USA), Inc., Pershing LLC	Credit Suisse First Boston Corp.
CIBC World Markets plc, CIBC Oppenheimer	CIBC
Merrill Lynch Pierce Fenner & Smith, Inc.	Merrill Lynch & Co., Inc.
Barclays Capital, Inc., Barclays Bank PLC	Barclays PLC

As the list above and the chart on pp.22-23 illustrate, the names of the Bank Defendants' subsidiaries and related entities are similar. Indeed, for the most part, the difficulty in this case has not been determining the existence of culpable actors, it has been in correctly identifying the subsidiaries involved in the Enron fraud.

Compounding difficulties in identifying the culpable §10(b) actors in this case was the unprecedented massive scope and extremely complex schemes of the Enron fraud. Even witnesses with personal knowledge have not been able to recall or accurately identify the names of bank entities. And while there was significant public disclosure concerning the involvement of the banks after Lead Plaintiff filed the Consolidated Complaint, even the documents that were publicly available were not generated to (and did not) correctly identify the numerous bank entities involved in fraudulent transactions. Consequently, correctly identifying culpable actors in this case has been a tremendously difficult task. There are still questions regarding the correct identity of culpable actors.

It is established that mistake of factual identity under Rule 15(c) includes situations where a parent corporation has multiple subsidiaries with the same or similar names as the parent. *See, e.g.*, *Berrios v. Sprint Corp.*, No. CV-97-0081(CPS), 1997 U.S. Dist. LEXIS 19259, at *16-*19 (E.D.N.Y. Nov. 13, 1997) (plaintiff may additionally sue a subsidiary for the parent company and the amendment will relate back to the filing of the original complaint); *De Coelho v. Seaboard Shipping Corp.*, 535 F. Supp. 629, 637 (D.P.R. 1982) ("similarity in names and the closely related operations are factors that may be considered in determining an identity of interests between the

corporations"); *Graham v. Gendex Med. X-Ray*, 176 F.R.D. 288, 289-91 (N.D. Ill. 1997); *Zimmer v. United Dominion Indus.*, 193 F.R.D. 620, 621-23 (W.D. Ark. 2000); *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 190-91, 195-96 (S.D.N.Y. 2000); *Lynn v. JER Corp.*, 573 F. Supp. 17, 18 (M.D. Tenn. 1983).

For example, in *Berrios*, plaintiff originally sued only the parent, Sprint Corporation. Then, "[a]ccepting defendant Sprint Corporation's word for it, that she had made a serious error, plaintiff ... amended her complaint to allege that Sprint Corporation and/or Sprint Communications Company L.P." was liable. *Id.* at *18. Observing that "[n]othing in Rule 15 eliminates the availability of alternative pleading," the court held plaintiff's claim against the newly added subsidiary defendant relates back because their similarities made it "difficult to tell which corporation is ultimately responsible." *Id.*[19]

The cases cited by defendants are consistent with Lead Plaintiff's position and support relation back under the circumstances of this case and given Lead Plaintiff's justification for addition of parties.[20]

One example of a factual mistake in identity of a Bank Defendant is the mistake in misnaming Credit Suisse First Boston (USA), Inc. ("CSFB USA"), as Credit Suisse First Boston Corp. (now known as Credit Suisse First Boston LLC, and referred to herein as "CSFB LLC"), or referring to actions of both former and latter as the actions of CSFB LLC alone. This resulted in

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[19] Notably, in *Berrios*, the subsidiary defendant argued that Rule 15(c) cannot be used to add an additional party. The court disagreed and held "Rule 15(c) applies both to amended complaints that add additional parties and to amended complaints that substitute parties" so long as "the amended complaint ... correct[s] a mistake of fact or law in the original complaint." *Id.* at *16-*17.

[20] *See, e.g.*, *Rhyder v. Santos*, No. 91-2920, 1992 U.S. Dist. LEXIS 1676, at *4-*5 (E.D. Pa. Feb. 5, 1992) (no mistake because plaintiff would have to assert a "separate and distinct" claim against the new defendant); *Reyna v. Flashtax, Inc.*, 162 F.R.D. 530, 533 (S.D. Tex. 1995) (amended complaint related back, as "relation back 'is often allowed if the new and the former parties have such an identity of interest that permitting the new party to enter would not be prejudicial'"); *Arachnid, Inc. v. Valley Rec. Prods., Inc.*, No. 98 C 50282, 2001 U.S. Dist. LEXIS 21534, at *20-*22 (N.D. Ill. Dec. 28, 2001) (in contrast to here, no mistake was found because plaintiff was attempting to cast a wider net so as to end up with a defendant with assets) (in support, notice is "imputed in parent and subsidiary scenario, or with closely related corporations"); *Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) (in contrast, finding "deliberate decision not to sue" known culpable actor); *Heinly v. Queen*, 146 F.R.D. 102, 106-07 (E.D. Pa. 1993) (court found mistake and relation back where new defendants had sufficient notice of the action and knowledge of possibility of their joinder).

Lead Plaintiff mistakenly naming CSFB LLC as the entity responsible for some actions actually taken by CSFB USA. Indeed, in the Consolidated Complaint Lead Plaintiff mistakenly referred to CSFB USA as a subsidiary of CSFB LLC when the opposite is true.

This occurred because Lead Plaintiff mistakenly identified CSFB LLC as the firm that Mr. Nath and his team joined from Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ") ***prior*** to the Class Period. *See* ¶707. In fact, it was CSFB USA that Mr. Nath and his group joined. Lead Plaintiff now realizes this was in error. It appears that Mr. Nath and his team joined CSFB LLC ***during*** the Class Period, when an affiliate of CSFB LLC and CSFB USA merged. Previously, Mr. Nath and his group worked for CSFB USA. After the merger of CSFB LLC and CSFB USA, these separate entities became popularly known as one entity. This apparently caused witnesses and media to conflate actions by the two entities, lending to Lead Plaintiff's mistake. The mistake is not unreasonable, for Credit Suisse Group has 80 major subsidiaries and nearly half of those bear the name "Credit Suisse First Boston."

Any reasonable reading of the Consolidated Complaint shows that plaintiffs intended to name the entity responsible for the actions performed by Mr. Nath's structured finance group. As it turns out, Mr. Nath and his group worked for CSFB USA, not CSFB LLC, prior to the merger of CSFB USA and CSFB LLC. Lead Plaintiff made a mistake in identifying CSFB USA as CSFB LLC and has corrected that mistake.[21]

Likewise, in the Consolidated Complaint plaintiffs did not name Pershing LLC, the subsidiary of Donaldson Lufkin & Jenrette Inc. formerly known as Donaldson Lufkin & Jenrette Securities Corp. ("DLJ"), because plaintiffs believed DLJ was acquired by CSFB LLC and ceased to exist independently of CSFB LLC. *See, e.g.*, Letter of Gary G. Lynch to The Honorable Carl Levin, dated April 24, 2002 (responding to Congressional inquiries put to CSFB LLC concerning both entities and ***noting that CSFB LLC and DLJ "were separate companies" prior to their merger in 2000***) (Ex. 14). Indeed, as far as plaintiffs can determine, DLJ ceased to exist and was

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[21] Because Mr. Nath and his team eventually joined CSFB LLC during the Class Period, their actions and scienter are attributable to CSFB LLC for the period of time after the merger. *See infra* §VIII.A, C.

integrated into CSFB LLC.[22] However, CSFB LLC, which disclaims any liability for DLJ's actions, now states that DLJ (now known as Pershing LLC) is a separate entity. Lead Plaintiff made a mistake identifying DLJ as CSFB LLC and has corrected that mistake.

Similar mistakes were made in attempting to identify CIBC entities, each of which bears the name CIBC, Barclays entities, each of which bears the name Barclays, Merrill Lynch entities, each of which bears the name Merrill Lynch, and Citibank, whose operations overlap Citigroup's operations. Indeed, CIBC has more than 50 subsidiaries, most of which bear the name "CIBC." Barclays has at least 44 publicly-known subsidiaries, nearly all of which bear the name "Barclays." Merrill Lynch has more than 65 affiliates and subsidiaries, nearly all of which bear the name "Merrill Lynch." And Citigroup has over 100 subsidiaries, a majority of which bear the names "Citibank" or "Citigroup."

As discussed herein, the Bank Defendants knew the correct identity of their culpable entities before anyone else and must have reasonably expected those entities would be added as defendants, certainly such that they would not be prejudiced in their defense.

2. Certain Newly-Added Defendants Were Named to Correct a Potential Mistake in Legal Identity or Law

Defendants do not (and cannot) dispute that relation back is proper here due to mistake of law. The Bank Defendants originally named parties in the Consolidated Complaint for violations of §11 asserted they are not proper enumerated defendants pursuant to §11. Accordingly, the following newly-added §11 defendants were named to correct this potential mistake in legal identity or law.

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[22] *See, e.g.*, Joint Press Release issued by Credit Suisse Group and Donaldson Lufkin & Jenrette, Inc. on August 30, 2000 (Ex. 15) ("Upon completion of the transaction, DLJ will be integrated into Credit Suisse First Boston."); Credit Suisse Group Press Release dated November 3, 2000 (Ex. 16) (With the exception of DLJ's "clearing business," "DLJ will become Credit Suisse First Boston for all other institutional businesses." "The integration of these businesses was accomplished very quickly and seamlessly.").

Newly-Added Defendant	First-Named Defendant
Salomon Smith Barney, Inc.	Citigroup, Inc.
CIBC World Markets Corp.	CIBC
Banc of America Securities LLC	Bank of America Corp.
Lehman Brothers Inc.	Lehman Brothers Holding, Inc.

Recently, the Bank Defendants asserted that corporate separateness precludes primary liability of bank parents for the acts of bank subsidiaries. Lead Plaintiff responded with persuasive arguments that the bank parents acted through their subsidiaries. If Lead Plaintiff's theory of primary liability against the bank parents ultimately fails, it could be due to a mistake of law. Accordingly, once Lead Plaintiff learned of the correct identity of culpable bank entities, it named the following Newly-Added Defendants for §10(b) claims for the additional reason that doing so would correct this potential mistake in law.

Newly-Added Defendant	First-Named Defendant
Citibank, Salomon Smith Barney, Inc., Salomon Brothers International Limited	Citigroup, Inc.
CIBC World Markets plc, CIBC World Markets Corp., CIBC Oppenheimer	CIBC
Banc of America Securities LLC	Bank of America Corp.
Lehman Brothers Inc.	Lehman Brothers Holding, Inc.
Barclays Bank PLC, Barclays Capital, Inc.	Barclays Bank
Pershing LLC	Credit Suisse First Boston Corp.[23]
JP Morgan Chase Bank, J.P. Morgan Securities Inc.	J.P. Morgan Chase
Merrill Lynch Pierce Fenner & Smith, Inc.	Merrill Lynch & Co., Inc.

[23] As previously noted, Credit Suisse First Boston Corp. (a bank subsidiary, not parent) was improperly named. In its place, Lead Plaintiff had intended to name CSFB USA.

Under Rule 15, a mistake concerning identity encompasses both a mistake of law and a mistake of fact. *See, e.g.*, *Woods v. Indiana University-Purdue Univ.*, 996 F.2d 880, 887 (7th Cir. 1993); *Simpson v. Borg-Warner Auto.*, No. 97 C 1911, 1997 U.S. Dist. LEXIS 19502, at *4-*7 (N.D. Ill. Dec. 2, 1997); *Gaspard v. Highlands Ins. Co.*, No. 89-3385, 1991 U.S. Dist. LEXIS 3010, at *3 (E.D. La. Mar. 11, 1991) ("'Identity' can be construed to apply to 'legal identity' as well as factual identity."); 3 *Moore's Federal Practice, supra*, §15.19[3][d] ("Mistake may also include a mistake in law.").

In *Gaspard*, a newly-added defendant sought summary judgment asserting that a claim was proscribed "because the amended complaint [did] not 'relate back' to the date the original complaint was filed." *Id.* at *1. After explaining the factors that must be satisfied before an amendment would relate back, the court observed the only issue involved "mistake concerning the identity." *Id.* at *2. Thus, held the court,

> plaintiffs' "mistake" was that it sued [the original defendant], thinking that it, ... was the only indispensable defendant. The failure to join [the newly-added defendant] at the outset of the litigation was the result of plaintiffs' interpretation of the law which would identify the [original defendant] as the only indispensable defendant.

Id. at *3-*4.

In denying the newly-added defendant's motion for summary judgment and holding that plaintiffs' First Amended Complaint related back to the date the original complaint was filed, the *Gaspard* court explained:

> Plaintiffs [had] recognized the possibility that as a matter of law they may have mistakenly identified the proper defendant (if [the original defendant] is correct in either legal interpretation [asserted in its motions to dismiss]). Plaintiffs then cured the potential mistake by joining [the newly-added defendant]. The issue is whether plaintiffs made a "mistake concerning identity." (Rule 15(c)). I conclude that they did make such a mistake (***potentially***) as a matter of law; it was an actual mistake if I have ruled incorrectly as to either issue raised by defendants motion to dismiss.

Id. at *4.[24]

Similarly, in *Simpson*, plaintiff sued the parent company of Borg Warner, mistakenly believing that the parent could be held liable for the discriminatory acts of its subsidiary. 1997 U.S.

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[24] The court also observed the "counsel for [the newly-added defendant] has been actively involved in this litigation since its inception, representing [the original defendant]," and thus the newly-added defendant was on notice. 1991 U.S. Dist. LEXIS 3010, at *6.

Dist. LEXIS 19502, at *5. In response to plaintiff's request for leave to name the subsidiary as a defendant, Judge Zagel found that based on the legal arguments of the parent seeking to avoid liability, the subsidiary "***should have known*** that Simpson would have named it as a defendant but for a mistake of law." *Id.* at *6 (emphasis in original). The court also rejected defendants' claims that the plaintiff's initial decision to sue the parent company was tactical because there was no evidence for it and the defendants had "no explanation for what advantage she would gain in doing so." *Id.*

Certain Bank Defendants assert they are not proper defendants under §11 because they controlled underwriters but were not the underwriters themselves. If it is later determined those defendants are not proper enumerated defendants pursuant to §11, Lead Plaintiff has named the Bank Defendants' underwriting subsidiaries as liable under §11. If these Bank Defendants originally sued for §11 claims are found not proper defendants under §11, naming the Bank Defendants' underwriting subsidiaries corrects this potential mistake of law. Lead Plaintiff also named certain bank subsidiaries for violating §10(b), to correct a potential mistake in law concerning corporate "separateness," a defense recently raised by defendants. As in *Simpson* and *Gaspard*, here, Lead Plaintiff properly added these defendants to cure purported deficiencies.

The Bank Defendants do not (and reasonably cannot) dispute they expected their subsidiaries would be added as defendants to correct the mistakes they have claimed in an attempt to avoid liability.

D. Lead Plaintiff's New Claims Against Previously-Named Defendants Relate Back Pursuant to Rule 15

In the First Amended Complaint, Lead Plaintiff has pleaded new §15 claims against the previously-named Bank Defendants, and new §12(a)(2) claims against CSFB Corp. The Bank Defendants either conflate the rules regarding relation back of claims and the relation back of parties or neglect to address the issue in any meaningful way.

Under Rule 15(c)(2), claims against existing parties relate back to the original complaint if the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In deciding whether ***claims*** relate back, the "court is to consider whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction." *In re Digital Microwave Corp. Sec. Litig.*, No. C-90-20241-RMW(EAI), 1992 U.S. Dist. LEXIS 18469, at *4-*5 (N.D. Cal. Oct. 19, 1992). "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendants' attention by the original pleading." 6A Wright, Miller & Kane, *supra*, §1497. "Amendments that amplify or restate the original pleading or set forth facts with greater specificity should relate back." 3 *Moore's Federal Practice*, *supra*, §15.19[2].

As is the case where new parties are sought to be added the crucial issue is notice.

> [T]he question is whether the defendant ought to have known from the original complaint the facts which the plaintiff is now adding. Whether to permit an amendment is not decided by mechanically measuring it against a statute of limitations. Once a complaint has been served, the policy behind the statute of limitations has been satisfied so long as the different theories introduced by the amendment fuse together within the "conduct, transaction, or occurrence" set forth in the complaint.
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> * * *
>
> The defendant has had notice from the beginning that the plaintiff is trying to enforce a claim for damages sustained from smoking the cigarettes it manufactured and marketed. It is not unreasonable to require it to anticipate ***all theories of recovery*** and prepare its defense accordingly.

Zagurski v. Am. Tobacco Co., 44 F.R.D. 440, 442-43 (D. Conn. 1967).

CSFB argues that with respect to new claims, "Plaintiffs knew about and referenced the Marlin and Osprey transactions in the Original Complaint but chose not to allege any misstatements with respect to them until May 14, 2003." CSFB Motion at 10. CSFB in effect concedes that the claims alleged in the First Amended Complaint relate to the same transaction or occurrence as those in the Consolidated Complaint. Indeed, the First Amended Complaint's allegations merely expand upon and add detail to the original pleading. *Compare* Consolidated Complaint, ¶699 *with* First Amended Complaint, ¶¶641.3-641.6. CSFB's cases on this point are inapposite.[25]

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[25] In *Westinghouse Elec. Corp. v. Franklin*, 789 F. Supp. 1313 (D.N.J. 1992), the court denied relation back where the new complaint alleged ***completely different transactions*** than the first complaint. In *Hunt v. Am. Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986), a RICO claim

Here, CSFB and the other previously-named Bank Defendants cannot reasonably be surprised by the amplification of their wrongdoing in the First Amended Complaint. Lead Plaintiff meets the "same conduct, transaction or occurrence" test of Rule 15(c)(2). The claims against the previously-named Bank Defendants relate back and are not barred by the statute of limitations.

E. The Bank Defendants Are Not Prejudiced by Lead Plaintiff's Addition of Parties and Claims

1. Given the PSLRA Discovery Stay and the Bank Defendants' Further Delay While They Prepare Their Case, There Is No Prejudice

The Bank Defendants cannot reasonably claim prejudice here. "[T]he objective [of Rule 15(c)] is to avoid the application of the statute of limitations when no prejudice would result to the party sought to be added by the amendment." 6A Wright, Miller & Kane, *supra*, §1499. The question invoked is necessarily whether ***unfair*** prejudice will result – not merely whether the amendment will impact the bank defendants' (and their subsidiaries') potential liability. *See, e.g., Floyd v. Childs*, No. 4:92CV270-S, 1996 U.S. Dist. LEXIS 21400, at *9 (N.D. Miss. May 11, 1996) (***"[T]he 'policy objectives of the statute of limitations, i.e., to avoid undue surprise, to permit investigation and collection of evidence while it is fresh and other similar considerations,' form the yardstick by which 15(c) prejudice is measured.***").[26] In this case, the Bank Defendants cannot claim surprise, spoliation of evidence, or any other similar considerations because they are not present here.

"depend[ed] upon allegations" of two transactions which were not included in the original complaint and of which the defendant consequently had no notice. *Id.* And in *In re Bausch & Lomb Sec. Litig.*, 941 F. Supp. 1352 (W.D.N.Y. 1996), the court, noting the focus is on notice, found the original complaint "gave no indication" that plaintiffs were alleging any fraudulent conduct prior to 1993.

[26] *See also Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) ("'[P]rejudice to the non-moving party is the touchstone for the denial of the amendment.' But the non-moving party must do more than merely claim prejudice; 'it must show that it was ***unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely***.'"); *Allied Int'l v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 37 (1st Cir. 1987) ("The final leg of the Rule 15(c) journey involves questions of fundamental fairness."); *Infotronics Corp. v. Varian Assocs. Corp.*, 45 F.R.D. 91, 93 (S.D. Tex. 1968) (J. Noel) ("If the party sought to be properly named received notice, he has not been prejudiced, and it is in the interest of justice to permit the amendment."); 6A Wright, Miller & Kane, *supra*, §1498.

Undoubtedly, the Bank Defendants long ago began investigating their Enron liabilities and assessing the viability of defenses. Whether it was because they were named as defendants in this action and other actions, or because they were dragged before Congress by federal investigators and challenged by the myriad other inquiries into the Enron affair – all of the Newly-Added Defendants long ago mobilized an army of lawyers to protect their interests. Thus, each Bank Defendant was on notice as to the claims against it. In contrast, Lead Plaintiff has been severely hampered by the PSLRA–mandated discovery stay.

2. The Complex Nature of This Fraud and the Bank Defendants' Reluctance to Disclose the Conduct and/or Identity of Their Culpable Actors Further Negates Any Prejudice

The Bank Defendants have benefitted from any delay in this case, not anyone else. Indeed, their conduct demonstrates the benefit they expect to receive and have received from the delayed disclosure of their conduct. While claiming mistaken identity in response to the Consolidated Complaint, the Bank Defendants (even those identifying certain of their subsidiaries) never disclosed the conduct of their subsidiaries to Lead Plaintiff or otherwise identified culpable actors. To the contrary, they repeatedly sought the refuge of the PSLRA-mandated discovery stay – even after the Court had explicitly lifted the stay.

Even now, the Bank Defendants still have not produced documents or answered interrogatories in response to Lead Plaintiff's discovery demands. And this is despite having Lead Plaintiff's document requests since last year, and despite the Court's admonition in its February 28, 2002 Scheduling Order, that all parties prepare to produce discovery during the pendency of motions to dismiss.

Moreover, certain bank actors have refused to testify, citing the Fifth Amendment. And the size and complexity of the schemes that the Bank Defendants created has made revelation of their conduct all the more difficult. For instance, bank defendants invested in LJM2 through shell entities controlled (directly or indirectly) by the bank holding company defendants. *See, e.g.*, ¶¶648, 669, 674, 687, 693, 712, 732, 740-742, 770, 785 and 797. However, as of the date of the Consolidated Complaint and afterwards, the precise corporate affiliation of these LJM2 investment vehicles remained unclear, specifically their relationship to specific bank defendant subsidiaries. For

example, when Senator Peter Fitzgerald asked Citigroup Executive Dave Bushnell, testifying under oath on July 23, 2002, if "Citigroup invested bank funds, I imagine Citibank funds, in ... LJM2[?]", Mr. Bushnell responded, "Yes.... I can get you the exact entity within the Citigroup family which had [made that investment.] I doubt that it was Citibank ... but instead a different structure that would have made [the] investment." *See* Ex. 17 at 113.

Notably, internal Citigroup documents assert (contrary to Mr. Bushnell's sworn testimony) that it was Citibank that invested $10 million in LJM2. *See* Ex. 18. Thus, those Citigroup persons most knowledgeable about Enron were either concealing the truth while under oath or, like the rest of the world, confused by the banks' maze of corporate structures used to perpetrate the fraudulent schemes and obfuscate the players' roles.

Likewise, the bank parent companies have sought to obscure or downplay each subsidiary's role in the fraudulent scheme. Citigroup is, again, a good example. In July 2002, *The New York Times* reported that Citigroup and Citibank had entered into a disguised prepay loan known as Roosevelt. *See* Richard A. Oppel and Kurt Eichenwald, "Citigroup is Linked to a Deal That Let Enron Skirt Rules" *The New York Times*, July 23, 2002 (Ex. 4). In response, Citigroup issued a scathing press release rationalizing Citigroup's and Citibank's actions and chastising *The New York Times'* reporting. *See* Ex. 19. However, Citigroup's press release does not disclose that Citigroup's Salmon Smith Barney unit also played a major role in Roosevelt. *See* Ex. 20 (noting that Salomon Smith Barney will underwrite $375 million in Asset Purchase Agreement commitments for the Roosevelt transaction and earn $1 million plus interest – and a $625,000 structuring fee if Enron repaid the loan early). Thus, despite the fact that the media learned of Citigroup and Citibank's involvement in the fraudulent Roosevelt prepay, plaintiffs know of no media reports ***ever*** directly linking Salomon to Roosevelt.

The Bank Defendants orchestrated highly complex transactions and created entities or used multiple corporate entities from among their hundreds of subsidiaries. In light of the previous discovery stay under the PSLRA and defendants' continued refusal to either provide plaintiffs with adequate discovery or explain the true facts concerning the suspect transactions, in addition to the

sheer size and complexity of defendants' scheme, any claim of prejudice offered by the Bank Defendants should be rejected.

IV. Plaintiffs Have Adequately Pleaded Claims for Violation of §12(a)(2) Against the Bank Defendants[27]

The Bank Defendants contend they are not alleged to be statutory sellers under §12(a)(2). The First Amended Complaint, however, explicitly alleges plaintiffs or Class members "***purchased***" Foreign Debt Securities "***from***" the Bank Defendants, and the Bank Defendants "***sold***" Foreign Debt Securities "***to*** plaintiffs and/or Class members." ¶¶1016.4-5. The Bank Defendants are thus charged with passing title to the Foreign Debt Securities to plaintiffs or Class members, which under Fifth Circuit precedent satisfies the statutory seller requirement.

The Bank Defendants claim the Foreign Debt Securities were private offerings for which they cannot be liable under §12(a)(2). Between September 1999 and July 2001, the Bank Defendants, as underwriters/initial purchasers, sold billions of dollars of Foreign Debt Securities to plaintiffs or members of the plaintiff class. ¶¶641.1-2, 1016.4. By denominating the Foreign Debt Securities in dollars, pounds and euros, the Bank Defendants targeted citizens of the United States, subjects of the United Kingdom, and residents of the European Union. *See* ¶¶641.2, 1016.4. Due to the widespread solicitation efforts made in connection with the Enron-related Foreign Debt Securities, the offerings were public.

Lastly, the Bank Defendants urge dismissal of the §12(a)(2) claims due to plaintiffs' purported lack of standing. But at this point in the litigation, The Regents, as Lead Plaintiff, must pursue all viable causes of action against all possible defendants under all available legal theories. In any event, this argument is premature, as the Court has already determined the proper time to address issues of standing is at the class certification stage of the case.

A. The Bank Defendants Are Statutory Sellers Under §12(a)(2)

The Bank Defendants argue dismissal is appropriate because "Section 12(a)(2) extends liability only to 'sellers' – those persons who actively, directly and 'successfully solicit[] the purchase' of the security sued upon." J.P. Morgan Motion at 14. However, defendants construe the term "seller" too narrowly, for, in the words of the Fifth Circuit, it "includes either the person who actually

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[27] This section responds to B of A Motion at 19-26; Barclays Motion at 15-19; CIBC Motion at 11-14; Citigroup Motion at 6-14; CSFB Motion at 16-19; J.P. Morgan Motion at 12-17; Lehman Motion at 17-21.

passes title to the buyer, ***or*** 'the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner.'" *Rosenzweig v. Azurix Corp.*, No. 02-20804, 2003 U.S. App. LEXIS 11685, at *40 (5th Cir. June 13, 2003).

In the First Amended Complaint, plaintiffs allege they or Class members "***purchased***" Foreign Debt Securities "***from***" the Bank Defendants, and the Bank Defendants "***sold***" Foreign Debt Securities "***to*** plaintiffs and/or Class members." ¶¶1016.4-5. These allegations make clear the Bank Defendants are charged with "actually pass[ing] title" to the Foreign Debt Securities to plaintiffs or Class members, which under the Fifth Circuit's decision in *Rosenzweig* satisfies the statutory seller requirement. *See* 2003 U.S. App. LEXIS 11685, at *40.

The Bank Defendants mistakenly contend a "'seller must, at a minimum, directly communicate with the buyer' for the buyer to maintain a Section 12(a)(2) claim." J.P. Morgan Motion at 15 (quoting *Rosenzweig*, 2003 U.S. Dist. LEXIS 11685, at *42). The Fifth Circuit imposes no such requirement. The Fifth Circuit's statement the Bank Defendants claim supports this argument applies only to allegations made under the "***solicitation***" prong of the test for establishing a statutory seller under §12(a)(2). *See Rosenzweig*, 2003 U.S. Dist. LEXIS 11685, at *42.

The Bank Defendants urge dismissal because the First Amended Complaint fails to allege each Bank Defendant sold Foreign Debt Securities to or solicited a sale from one of the plaintiffs.[28] This argument is "trivial" nitpicking. *Griffin v. PaineWebber Inc.*, 84 F. Supp. 2d 508, 515 (S.D.N.Y. 2000). In "the context of a class action," like here, "with a large class of plaintiffs there would be sufficient numbers of purchasers to ensure that at least some of the plaintiffs purchased from the [Bank] defendants, satisfying the privity requirement."[29] *Moskowitz v. Mitcham Indus.*, No.

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[28] B of A Motion at 26; Barclays Motion at 16 n.11; CIBC Motion at 13; Citigroup Motion at 8; J.P. Morgan Motion at 15; Lehman Motion at 18 & n.14. Relying on Exhibit 1 to its motion, Banc of America Securities LLC argues it did not sell any of the €515 million 6.19% Marlin notes. B of A Motion at 25 n.17. The top of the cover page of a second Marlin offering memorandum, Exhibit 2 of its motion, identifies Banc of America Securities LLC as an initial purchaser and indicates the offering memorandum applies to both the 6.31% and the 6.19% Marlin notes. These factual questions cannot be resolved at this stage of the proceedings.

[29] Even if it were an issue, the better course is to deny the Bank Defendants' motions to dismiss on the condition Lead Plaintiff pleads "that a member of plaintiff's purported class purchased at least one" unit of the Foreign Debt Securities from each of the Bank Defendants. *See Griffin*, 84 F. Supp. 2d at 515.

H-98-1244, 2000 U.S. Dist. LEXIS 22424, at *29 (S.D. Tex. Sept. 27, 2000) (J. Gilmore). *See also Longden v. Sunderman*, 123 F.R.D. 547, 550, 553 (N.D. Tex. 1988) (investors in seven partnerships were certified to represent an investor class involving 121 partnerships). Insofar as *Dartley v. Ergobilt Inc.*, No. 3:98-CV-1442-M, 2001 U.S. Dist. LEXIS 4154, at *9 (N.D. Tex. Mar. 29, 2001), supports the Bank Defendants' position, it conflicts with the standard in this District reflected in Judge Gilmore's decision in *Moskowitz*.

Indeed, the Bank Defendants' authority misses the mark. *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 868, 893 (S.D. Tex. 2002), *aff'd, Rosenzweig*, 2003 U.S. App. LEXIS 11685, concerned §12(a)(2) liability against an issuer, its officers and related parties – ***not*** against underwriters/initial purchasers as in this case. Unlike here, in *In re WebSecure, Inc. Sec. Litig.*, 182 F.R.D. 364, 369 (D. Mass. 1998), the plaintiffs merely alleged that "'pursuant to the terms of the IPO, shares of WebSecure common stock and warrants were sold by the Underwriter Defendants directly to investors.'" The First Amended Complaint, by contrast, alleges by "means of the false and misleading Offering Memoranda," the Bank Defendants "sold the Foreign Debt Securities to plaintiffs and/or Class members." ¶1016.5.

B. The Foreign Debt Securities Were Sold in Public Offerings

"Section 12(2) imposes liability on any person who 'offers or sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of material fact ....'" *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). In *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), "the Supreme Court analyzed the legislative history of the 1933 Act to determine that Congress meant for §12 to apply only to public offerings." *Lewis*, 252 F.3d at 357. Lead Plaintiff alleges sufficient facts to demonstrate the Foreign Debt Securities were sold in public offerings.

1. The First Amended Complaint Adequately Alleges the Public Nature of the Offerings

Claiming the Foreign Debt Securities offerings were private, the Bank Defendants argue the §12(a)(2) claims must be dismissed in light of *Gustafson*.[30] But "[w]hether an offering is public or

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[30] B of A Motion at 21-25; Barclays Motion 17-19; CIBC Motion at 13; Citigroup Motion at 9-14; CSFB Motion at 17-19; J.P. Morgan Motion at 15-17; Lehman Motion at 19-21.

private is a ***question of fact*** which must be resolved in light of the particular circumstances of each case." *See Swenson v. Englestad*, 626 F.2d 421, 425 (5th Cir. 1980). Allegations in plaintiffs' First Amended Complaint, which must be construed in plaintiffs' favor, contradict the Bank Defendants' claims the Foreign Debt Securities were in fact sold in private offerings. *See Abrams v. Baker Hughes*, 292 F.3d 424, 430 (5th Cir. 2002) (construing complaint on a motion to dismiss "in the light most favorable to the plaintiffs").

"Two of the criteria for determining if a transaction is public are the size of the offering and the number of the offerees." *Lewis*, 252 F.3d at 358. Between September 1999 and July 2001, the Bank Defendants, as underwriters and initial purchasers, sold billions of dollars of Foreign Debt Securities to plaintiffs or Class members. ¶¶641.1-2, 1016.4. Two of the offerings exceeded $1 billion, and even the smallest of the offerings distributed more than $125 million in securities. ¶641.2. The Bank Defendants targeted for purchase of the Foreign Debt Securities citizens of the United States, subjects of the United Kingdom, and residents of the European Union by denominating the Securities in dollars, pounds and euros. *See* ¶¶641.2, 1016.4. These allegations contradict the Bank Defendants' contentions the Foreign Debt Securities were sold in private offerings. *Lewis*, 252 F.3d at 358; *Sloane Overseas Funds v. Sapiens Int'l Corp.*, 941 F. Supp. 1369, 1376 (S.D.N.Y. 1996) ("the wide distribution of the Offering Circular made Sapiens' Note offering public" for purposes of §12(a)(2)).

Nowhere in the First Amended Complaint do plaintiffs allege the Foreign Debt Securities "were offered only to offerees who would qualify." *UBS Asset Mgmt. (N.Y.) Inc. v. Woody Gundy Corp.*, 914 F. Supp. 66, 69 (S.D.N.Y. 1996). The Bank Defendants "do not cite any allegations in the complaint which conclusively establish that the offering was merely private." *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1229 (D. Kan. 1999). The Foreign Debt Securities, moreover, were issued for public listing and public trading on the Luxembourg stock exchange. ¶¶641.1, 641.3, 641.7, 641.12, 641.17, 641.21, 641.25, 641.29, 641.33, 641.37. At a minimum, plaintiffs' allegations raise questions of fact, precluding the Court from ruling as a matter of law the Bank Defendants are immune from claims under §12(a)(2) for selling Foreign Debt Securities. *See Swenson*, 626 F.2d at 425; *ESI Montgomery County v. Montenay Int'l Corp.*, 899 F. Supp. 1061, 1065 (S.D.N.Y. 1995)

("Had plaintiff alleged that the offering was public it would be premature for the court to ... determine the truth of plaintiff's assertion.").[31]

Looking beyond the pleadings, the Bank Defendants contend the offering memoranda themselves undermine any assertion §12(a)(2) applies to the Foreign Debt Securities.[32] Yet the offering memorandas' cover pages disclose the Foreign Debt Securities were sold in part under Regulation S, which "***is intended for use in public offerings***." *Sloane*, 941 F. Supp. at 1376 n.11. The plaintiffs in *Sloane*, a company in the British Virgin Islands, a Delaware limited partnership, and an American residing in England, sued for violations of §12(a)(2) after buying convertible notes pursuant to an offering circular. 941 F. Supp. at 1372, 1376. Like here, the offering circular at issue in *Sloane* stated the securities were to be sold overseas in accordance with Regulation S or to qualified institutions in accordance with Rule 144A. *Id.* at 1372. Like the Bank Defendants' Foreign Debt Securities offerings, the convertible notes in *Sloane* were sold to American citizens and British subjects. *Id.*

Like the Bank Defendants, defendants in *Sloane* moved to dismiss the §12(a)(2) claims on grounds the notes were privately sold. *Id.* at 1376. The *Sloane* court denied the motion. "In this case," explained the court, "the wide distribution of the Offering Circular made [the] Note offering public. Therefore, §12(2) of the 1933 Act governs the conditions of sale of the Note offering." *Id.* at 1376-77. Likewise, due to the widespread solicitation efforts made in connection with the Enron-related Foreign Debt Securities, targeting the United States, the United Kingdom and the entire European Union, the Court should sustain the §12(a)(2) allegations as did the *Sloane* court. Indeed, the offering memoranda submitted in support of the Bank Defendants' motions to dismiss prove the Foreign Debt Securities were widely distributed.

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[31] The Bank Defendants' reliance on *ESI* to support dismissal is misguided. Lehman Motion at 20 n.15. Unlike here, in *ESI*, the plaintiff had "not alleged that the offering was public" and even went so far as to "acknowledge[] that the investment memoranda were 'private offering memoranda.'" 899 F. Supp. 1065. Indeed, "Had plaintiff alleged that the offering was public," like here, the court stated "it would be premature ... to determine" the issue. *Id.*

[32] B of A Motion at 22; Barclays Motion at 18; CIBC Motion at 13; Citigroup Motion at 11-12 nn. 6-8; CSFB Motion at 18-19; J.P. Morgan Motion at 16; Lehman Motion at 20 & n.16.

2. The Bank Defendants Cannot Dismiss Lead Plaintiff's §12(a)(2) Allegations Based on Their Claims of Exemption

The Bank Defendants seek refuge in Rule 144A.[33] *See* 17 C.F.R. §230.144A. Relying on subpart (c) of the Rule, the Bank Defendants contend "Rule 144A provides that securities offered or sold by ***securities dealers*** to qualified institutional buyers are 'deemed not to have been offered to the public.'" B of A Motion at 23; *accord* CSFB Motion at 18-19. By its terms, subpart (c) does ***not*** apply to the Bank Defendants, for they acted as underwriters/initial purchasers, ***not dealers***. *See* ¶641.2. "Dealer" and "underwriter" are distinct terms under the federal securities laws. *See* 15 U.S.C. §77b(a)(11)-(12).

To support their claim the Foreign Debt Securities offerings were private, the Bank Defendants point to disclosures in the offering memoranda announcing the Securities were being sold under Rule 144A and Regulation S and were not to be registered.[34] Neither this boilerplate nor the Bank Defendants' description of the offerings is dispositive. Courts have upheld §12(a)(2) claims even though an offering circular stated the issued securities were not to be registered. *See Parkhurst v. North Am. Fin. Servs. Cos.*, 919 F. Supp. 270, 272, 275 (E.D. Mich. 1996).[35]

Plaintiffs' allegations contradict the Bank Defendants' description of the alleged nature of the offerings, not the least of which was their public distribution under Regulation S. *See Sloane*, 941 F. Supp. at 1376 & n.11. However, it is defendants' burden to prove the existence of an exemption from registration, regardless of what they may aver on a motion to dismiss. *See, e.g., Fisk v. Super Annuities, Inc.*, 927 F. Supp. 718, 730 (S.D.N.Y. 1996). The purported structure of the offerings (as argued by Bank Defendants) does not prevent plaintiffs from "prevail[ing] on the Section 12(2) claim under any facts that might be proved within the confines of the existing pleadings." *Id.* at 730-31;

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[33] B of A Motion at 22-23; Citigroup Motion at 11-12; CSFB Motion at 18-19; Lehman Motion at 20 n.16. The offering memorandum for the £200 million Yosemite offering does not purport to sell the 8.75% Linked Enron Obligations pursuant to Rule 144A. *See* Citigroup Motion at 12 n.8.

[34] B of A Motion at 22; Barclays Motion at 18; Citigroup Motion at 11-12; CSFB Motion at 18-19; J.P. Morgan Motion at 16 n.10; Lehman Motion at 20 & n.16.

[35] The Bank Defendants' citation to the opinions of Professor Weiss is unavailing. *See* Citigroup Motion at 12. His opinion is not authority and expert testimony is improper at this stage. Moreover, his commentary did not address a targeted public offering as are the offerings of the Foreign Debt Securities.

see Sloane, 941 F. Supp. at 1376 (holding a public offering, subject to Regulation S's exemption for off-shore offerings, is subject to an action under §12(a)(2)).

The offering memoranda for the Foreign Debt Securities are prospectuses. The fact the Bank Defendants, and accordingly the First Amended Complaint, do not name them as such is insignificant. *See* B of A Motion at 22; Barclays Motion at 18. *See also Gustafson*, 513 U.S. at 574 ("the term prospectus refers to a document soliciting the public to acquire securities").

3. The First Amended Complaint Sufficiently Alleges the Foreign Debt Securities Were Sold in Initial Distributions

The Bank Defendants urge the Court to discount allegations that the Foreign Debt Securities publicly traded on the Luxembourg stock exchange because "Section 12(a)(2) reaches only a plaintiff's purchases of securities in an initial public offering – not private offerings and not secondary trades whether public or private." J.P. Morgan Motion at 17. *See also* B of A Motion at 25; Citigroup Motion at 13; CSFB Motion at 19 n.8. The First Amended Complaint, construed in plaintiffs' favor, states plaintiffs or Class members purchased the Foreign Debt Securities from the underwriters/initial purchasers in the offering, not through the Luxembourg stock exchange. *See* ¶¶1016.4-5; *see also Abrams*, 292 F.3d at 430. The allegations of public listing and public trading of the Foreign Debt Securities on the Luxembourg exchange do, however, evidence that the Foreign Debt Securities were issued pursuant to a public offering and therefore are subject to §12(a)(2). The Bank Defendants' bald assertion that "issuers of private offerings routinely list the securities on the Luxembourg stock exchange" does not diminish the inference. *See* Citigroup Motion at 13.

The Bank Defendants' reliance on the Supreme Court's decision in *Gustafson* is misguided. In *Gustafson*, the Supreme Court wrote, "Congress contemplated that §12(2) would apply only to public offerings by an issuer (or a controlling shareholder). The House Report stated: 'The bill affects only new offerings of securities .... It does not affect the ***ordinary*** redistribution of securities unless such redistribution takes on the characteristics of a new offering.' The observation extended to §12(2) as well." 513 U.S. at 580. Here, the Foreign Debt Securities offerings were initial public distributions, targeted at persons from several countries and offered in various denominations. *See* ¶¶641.2, 1016.4. *Gustafson* does not preclude §12(a)(2) liability under the facts of this case.

The Bank Defendants' other authority is distinguishable. Unlike here, *Lewis*, 252 F.3d at 355, 357, involved a "bridge loan" and *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 607 (7th Cir. 1995), concerned a loan agreement between two businesses. *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 433 (S.D.N.Y. 2001), included §12 claims arising from a Rule 144A offering, but unlike here, the *Livent* "Noteholders d[id] not oppose the dismissal of their §12 claims."

Neither *Vannest v. Sage, Rutty & Co.*, 960 F. Supp. 651 (W.D.N.Y. 1997), nor *In re JWP Inc. Sec. Litig.*, 928 F. Supp. 1239 (S.D.N.Y. 1996), advances the Bank Defendants' argument. Both decisions came at the summary judgment stage of the litigation, not the motion to dismiss stage. *Vannest*, 960 F. Supp. at 653-54; *JWP*, 928 F. Supp. at 1259. And in *Vannest*, the plaintiffs did "not dispute that the offering was made pursuant to a private placement memorandum" and only claimed "that the offering was not truly a private offering ... for the first time six years after the complaint was filed." 960 F. Supp. at 655. Based on these ***facts***, the *Vannest* court concluded, "It is evident to me that until *Gustafson* plaintiffs never seriously contested the private nature of the offering at issue." *Id.* Similarly, in *JWP*, the plaintiffs' own "complaint acknowledge[d] that [the] notes were issued privately." 928 F. Supp. at 1259.

Likewise, in *Glamorgan Coal Corp. v. Ratner's Group plc*, No. 93 Civ. 7581 (RO), 1995 U.S. Dist. LEXIS 9548 (S.D.N.Y. July 7, 1995), the plaintiffs' second amended complaint referred to the sale of the securities at issue "as occurring through a 'private' placement." *Id.* at *7. And in *ESI*, 899 F. Supp. at 1065, the "plaintiff acknowledge[d] that the investment memoranda were 'private offering memoranda.'"[36]

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[36] The Bank Defendants' other authority is also inapposite. *Kainos Labs., Inc. v. Beacon Diagnostics, Inc.*, No. C-97-4618 (MHP), 1998 U.S. Dist. LEXIS 23473, at *17 (N.D. Cal. Sept. 14, 1998) (dismissing §12(a)(2) claims because "the complaint fails to allege that the sale of Beacon stock to Kainos was contemplated to be part of a public offering"); *Laser Mortgage Mgmt. v. Asset Securitization Corp.*, No. 00 Civ. 8100 (NRB), 2001 U.S. Dist. LEXIS 13746, at *19-*20 (S.D.N.Y. Sept. 5, 2001) (deciding whether a sale pursuant to a private placement memorandum, which all the parties agreed was not a statutory prospectus, was nonetheless "by a prospectus" simply by incorporating a publicly filed prospectus); *Double Alpha, Inc. v. Mako Partners, L.P.*, No. 99 Civ. 11541 (DC), 2000 U.S. Dist. LEXIS 10454, at *9-*10 (S.D.N.Y. July 26, 2000) (dismissing §12(a)(2) claim for lack of a misstatement or omission, not because the offering was private); *Ravenna v. Integrated Food Techs. Corp.*, No. 99-524, 1999 U.S. Dist. LEXIS 14681, at *6 (E.D. Pa. Sept. 10, 1999) ("the allegations state that this was a private transaction involving five investors"); *Dafofin Holdings S.A. v. Hotelworks.com, Inc.*, No. 00 Civ. 7861 (LAP), 2001 U.S. Dist. LEXIS 12347, at *22-*23 (S.D.N.Y. Aug. 16, 2001) ("Dafofin's million dollar investment in HWS

Lead Plaintiff properly alleges the Foreign Debt Securities were sold in public offerings in violation of §12(a)(2). It is now the Bank Defendants' burden to prove the existence of a registration exemption or some other defense.

C. Plaintiffs May Pursue §12(a)(2) Claims at This Stage of the Litigation

The Bank Defendants argue the §12(a)(2) claims based on their public sale of the Foreign Debt Securities may not be asserted because no plaintiff purchased any of these securities.[37] The PSLRA, however, presumes The Regents, as "lead plaintiff[,] can vigorously pursue ***all*** available causes of action against ***all*** possible defendants under ***all*** available legal theories." *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999); *accord In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 451 (S.D. Tex. 2002). Moreover, the Court has already determined the proper time to address issues of standing is at the class certification phase. *See* August 7, 2002 Order at 6. As the Court stated, "around the time of the class certification," the Court stated it "will deal with ... issues [of standing] through creation of classes or subclasses and with appropriate class representatives having standing to pursue those claims." *Id.*[38]

The number and variety of securities classes involved in the Enron fraud is unparalleled. And the statements at issue in the offering memoranda for the Foreign Debt Securities are the same as those in claims the Court has already upheld. The Osprey I offering memorandum, for example, incorporates Enron's 1998 10-K, Forms 10-Q for the quarters ended March 31 and July 30, 1999, and includes Enron's consolidated financial information for years-ended 1997 and 1998. ¶¶641.5-.6. The Court has already upheld claims based on these statements. *See, e.g.*, ¶¶141, 419, 424. Similarly,

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was made pursuant to a private transaction between the parties.").

[37] B of A Motion at 19-20; Barclays Motion at 16-17; CIBC Motion at 13-14; Citigroup Motion at 6-9; CSFB Motion at 16-17; J.P. Morgan Motion at 13-14; Lehman Motion at 17-19.

[38] Contrary to the Bank Defendants' claims, plaintiffs already represent the purchasers of the Foreign Debt Securities in their §10(b) and Rule 10b-5 claims, as there is no dispute plaintiffs have standing to assert §10(b) claims. *See* Barclays Motion at 17 n.12; Citigroup Motion at 6. A plaintiff class of different types of securities may be certified with a representative party who purchased just one of the different types of securities. *See Longden*, 123 F.R.D. at 550, 553 (investors in seven partnerships were certified to represent a class of investors in 121 partnerships); *In re Saxon Sec. Litig.*, No. 82 Civ. 3103, 1984 U.S. Dist. LEXIS 19223, at *18-*19 (S.D.N.Y. Feb. 23, 1984) (stock and debt purchases can be represented by a purchase of only one type of security). In any event, plaintiffs will move to intervene IHC Health Plans, Inc., who purchased Yosemite notes.

the offering memoranda for the other Foreign Debt Securities incorporate or include financial statements already alleged to be false and misleading. ¶¶641.9, 641.11, 641.14, 641.16, 641.19-20, 641.23-.24, 641.27-.28, 641.31, 641.39-.40.

Contrary to what the Bank Defendants suggest, the better course is to defer ruling on issues of standing (as the Court has ruled) so as not to splinter this already complex action.[39] Moreover, at the class certification stage, because the §12(a)(2) claims arise from the same illegal scheme, a purchaser of any one of the Foreign Debt Securities can represent the §12(a)(2) claims of all classes of the Foreign Debt Securities. *See, e.g.*, *Longden*, 123 F.R.D. at 550, 553 (investors in seven partnerships were certified to represent a class of investors in 121 partnerships).

Even one of the Bank Defendants' cases, *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), notes the Court has latitude in determining when to address standing issues. *See* Citigroup Motion at 9; Lehman Motion at 18 n.13. The *Brown* court noted where, as here, plaintiffs allege multiple claims, some of which are challenged on grounds of standing, the better course may be to "entertain[] an amended complaint setting up separate subsets of the proposed class," rather than simply to dismiss the claim, as the Bank Defendants would have the Court do. 650 F.2d at 771. The Bank Defendants' standing arguments should be denied pending an informed determination at the certification stage.[40]

Significantly, Imperial County Board of Retirement, who bought Marlin notes, is preparing a motion to intervene as a §12(a)(2) representative on behalf of the purchasers of Foreign Debt Securities from the Bank Defendants. Plaintiffs expect this intervention, if granted by the Court, to render moot the Bank Defendants' chief standing argument – that no plaintiff purchased a Foreign Debt Security. And because the §12(a)(2) claims arise from the same illegal scheme, a purchaser of any one of the Foreign Debt Securities can represent the §12(a)(2) claims of all classes of the

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[39] The Bank Defendants point out that plaintiffs' amended motion for class certification does not include purchasers of the Foreign Debt Securities. A briefing schedule for the class certification phase was recently set, and there is ample time for a plaintiff to intervene without prejudicing the defendants.

[40] Banc of America Securities also contends its standing arguments warrant dismissal under Fed. R. Civ. P. 12(b)(1). B of A Motion at 21 n.11. Were the Court to find for the Bank Defendants on the issue of standing, "it would be inappropriate to enter any judgment on the merits" on their other §12(a)(2) arguments. *See Verret v. Elliot Equip. Corp.*, 734 F.2d 235, 238 (5th Cir. 1984).

Foreign Debt Securities. *See, e.g.*, *Longden*, 123 F.R.D. at 550, 553 (investors in seven partnerships were certified to represent a class of investors in 121 partnerships).

V. The Court Correctly Interpreted *Central Bank*

Ignoring the law of this case, some of the Bank Defendants yet again seek immunity for their conduct, under *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994).[41] This time they cite a recent decision by a District Court for the Central District of California. *In re Homestore.com, Inc. Sec. Litig.*, 252 F. Supp. 2d 1018 (C.D. Cal. 2003).[42] *Homestore* does not support any Bank Defendant's claim that it is an "aider and abettor" and therefore not liable. Moreover, the decision does not contain any persuasive interpretation of the law that is inconsistent with the theory of primary liability to which the Bank Defendants are subject.

First, the court in *Homestore* held that under *Central Bank*, "outsider[s]" found liable by courts as primary violators "had some type of special relationship with the corporation, *i.e.* accountant, auditor, etc." 252 F. Supp. at 1039. But in *Homestore*, the defendants were "outside business partners and third party vendors" that had no special relationship with the company. *Id.* at 1040. Here, the Bank Defendants are not merely third parties "who happened to do business with Enron." Merrill Lynch Motion at 19. This Court has recognized the Bank Defendants' conduct and professional relationships with Enron. *See Enron*, 235 F. Supp. 2d at 693-95.

Second, the court in *Homestore* read into §10(b) and Rule 10b-5 a number of definitions and constructs ***not*** present in the statute, any decision of the Supreme Court, or legislative history for the 1934 Act. For example, according to the court in *Homestore*, there are "principal" and other "wrong[s]" under Rule 10b-5 and one may sue only for a "principal" wrong. 252 F. Supp. 2d at 1041 ("the principal 'wrong' alleged under the rule is the statement, not the scheme"). This is an unduly restrictive application of §10(b) and Rule 10b-5. As this Court has stated, §10(b) and Rule 10b-5 "should be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."'" *Enron*, 235 F. Supp. 2d at 569 (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)). *Accord SEC v. Zandford*, 535 U.S. 813, 819 (2002).

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[41] This Court's well-reasoned holding concerning *Central Bank* and its progeny is the law of the case. *See Enron*, 235 F. Supp. 2d at 577-94.

[42] *See* Barclays Motion at 1 n.1; Citigroup Motion at 6-7 n.2; CSFB Motion at 12-13 n.4; J.P. Morgan Motion at 5 n.2; Merrill Lynch Motion at 16.

Even if *Homestore* somehow counseled in favor of such a restrictive application of §10(b) and Rule 10b-5 in this case, the conduct of the Bank Defendants was broad reaching in comparison to the conduct of the defendants in *Homestore*. "Essentially what plaintiff alleges," wrote the court in *Homestore*, "is a scheme to make a deceptive statement or material omission." 252 F. Supp. 2d at 1041. In contrast, among other violations of Rule 10b-5, Lead Plaintiff alleges violations "in which the various participant Defendants concealed a pattern of creating unlawful SPEs and utilizing fraudulent transactions with these entities as contrivances or deceptive devices to defraud investors into continuing to pour investment money into Enron securities to keep afloat the Ponzi scheme and thereby enrich themselves in a variety of ways." *Id.* at 578 n.15.[43] And unlike the vendor defendants dismissed in *Homestore*, Lead Plaintiff alleges the Bank Defendants made false and misleading statements to the public. *Compare Enron*, 235 F. Supp. 2d at 640, 644-45, 648, 651-52, 654 (identifying the Bank Defendants' misrepresentations) *with Homestore*, 252 F. Supp. 2d at 1041 ("plaintiff can point to no independent statements or material omissions of these defendants").

The Bank Defendants' restrictive interpretation of §10(b) and Rule 10b-5 is not supported by the statute or the rule, *Central Bank*, or even the *Homestore* decision.

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[43] Echoing this Court's ruling on the Secondary Actor's motions to dismiss, the court in *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003), recently held that §10(b) and Rule 10b-5 impose "primary liability on any person who substantially participates in a manipulative or deceptive scheme by directly or indirectly employing a manipulative or deceptive device (***like the creation or financing of a sham entity***) intended to mislead investors, even if a material misstatement by another person creates the nexus between the scheme and the securities market."

VI. The First Amended Complaint Properly States Claims Against the Bank Defendants for Control Person Liability

The Bank Defendants' motions to dismiss plaintiffs' control person allegations are defective for several reasons.[44] First, the Court has already denied certain Bank Defendants' summary judgment motions, recognizing control person liability is fact-intensive, requiring at least some discovery to make an informed ruling. This conclusion applies with even greater force here, since on a motion to dismiss, plaintiffs' allegations must be accepted as true and plaintiffs adequately allege control person liability. Second, the Bank Defendants grossly distort the law concerning control person liability, misapplying precedent of this Court and the Fifth Circuit. Third, control person claims are not subject to heightened pleading standards. Finally, predicate violations are adequately alleged against the bank subsidiaries, and it is unnecessary to name those subsidiaries as defendants to assert control person claims as to their parent holding company defendants.

A. The Court Has Already Denied Certain Bank Defendants' Control Person Arguments

As the Court has recognized, on a motion to dismiss, the issue is whether plaintiff is entitled to offer evidence in support of his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In denying several of the Bank Defendants' motions for summary judgment, the Court held control person liability under §§15 and 20(a) of the 1933 and 1934 Acts "require[s] fact-intensive inquiries" and thus was inappropriate for resolution prior to discovery. May 22, 2003 Order at 2. The Court noted Lead Plaintiff had raised "issues of fact about the control exerted by the parent company over the subsidiaries." Subsequently, the Court denied Citigroup's motion for summary judgment seeking to dismiss plaintiffs' control person claims for similar reasons. June 19, 2003 Order at 4. The Bank Defendants' latest control person arguments are likewise infirm, especially since the Court must accept plaintiffs' allegations as true. *Lawal v. British Airways, PLC*, 812 F. Supp. 713, 716 (S.D. Tex. 1992).

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[44] This section responds to B of A Motion Point III A & B; Barclays Motion at 10 n.7; Citigroup Motion at 15 n.11; CSFB Motion §IV; CIBC Motion §IV; J.P. Morgan Motion §IV; Lehman Motion §IV.

B. The Bank Defendants Fail to Show Lead Plaintiff's Control Person Allegations Are Inadequate

Plaintiffs' allegations sufficiently allege the Bank Defendants' control person liability because the Fifth Circuit and this Court have made plain a plaintiff need ***not*** allege a controlling person's actual participation in the controlled person's fraud. The Bank Defendants ignore that "control" is a fact-intensive question which cannot be resolved on a motion to dismiss, the test for control is applied flexibly and liberally, and Rule 9(b)'s heightened pleading requirements are inapplicable. These failures, compounded by the Bank Defendants' misunderstanding of §§15 and 20(a) liability, necessitate denial of their motions.

Section 20(a) imposes liability on "[e]very person who, directly ***or indirectly***, controls any person liable under any provision of this title ... unless the controlling person acted in good faith." 15 U.S.C. §78t(a).[45] The Fifth Circuit defines "control" as "'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Judge Folsom has stated, "'Even "indirect means of discipline or influence short of actual direction" fulfill the statutory requirement....' [I]t is enough if the Defendant ***simply had the abstract power*** to control. ***Actual exercise*** of that power is ***not required***." *McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 635, 638 (E.D. Tex. 1999). And because control person liability is remedial in purpose, the test for establishing control is construed liberally and flexibly. *Id.* at 635.

Thus, liability attaches to one who directly or indirectly has the abstract power to "control" a person who violates any provision of the securities laws, and to state a valid claim, a plaintiff need only allege: (i) a violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §§15 or 20(a). *See In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, Order at 11 n.14 (S.D. Tex. Feb. 20, 2001) (Ex. 21).

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[45] Although worded differently, this Court and other courts note the control person liability provisions of §15 of the 1933 Act, 15 U.S.C. §77o, and §20(a) of the 1934 Act, 15 U.S.C. §78t(a), are interpreted in the same way. *See, e.g., Enron,* 235 F. Supp. 2d at 594; *Central Bank*, 511 U.S. 164.

Contrary to the Bank Defendants' position, the Fifth Circuit (and this Court) hold a plaintiff need ***not*** allege the controlling person actually exercised its power. For example, in *Abbott*, the Fifth Circuit held plaintiffs need ***only*** show the power to control, "not the actual exercise of that power." *Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993) (emphasis omitted). Similarly, in *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.17 (S.D. Tex. 2001), the Court held, "The Fifth Circuit has stated that a plaintiff need only show that the alleged control persons possessed '***the power to control*** [the primary violator], not the exercise of the power to control.'"

The Bank Defendants apparently do not dispute that "control" is construed liberally and applied flexibly. As this Court noted in *Landry's*, "control" may be established by:

> [D]emonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ownership of voting securities, by contract, ***business relationships, interlocking directors***, family relationships, and ***the power to influence and control the activities of another***.

Landry's, Order at 12 n.14 (citing *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999)). Thus, courts will generally find control person liability if plaintiffs make a *prima facie* showing defendants had the abstract, indirect power, whether exercised or not, to control a primary violator, and such power was possessed via business relationships, directorships – or even the power to "***influence***" the activities of another. *See Abbott*, 2 F.3d at 620; *BMC*, 183 F. Supp. 2d at 869 n.17; *Ellison*, 36 F. Supp. 2d at 638.

And in this case the Court has stated §20(a) may allow plaintiffs to reach defendants that control wrongdoers through ***holding companies*** – like the Bank Defendants:

> "Section 20(a) could also allow plaintiffs to reach defendants that control wrongdoers through ***holding companies***, by family connections, ***or in other nonagency ways. Controlling shareholders could be reached in situations where piercing the corporate veil was not available*** .... In other words ... the controlling person liability provisions of the 1933 and 1934 Acts were aimed primarily at situations of control over firms (and others) by behind-the-scene actors. To repeat, enactment of the controlling provisions of the 1933 and 1934 Acts 'was motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were "really responsible" for violations of the securities laws.'"

In re Enron Corp. Sec. Litig., No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (S.D. Tex. Jan. 28, 2003). Agency and contract also demonstrate "control":

> In the absence of a statutory definition of "control," the SEC has defined the word as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by ***contract***, or otherwise." 17 C.F.R. §240.12b-2(f), quoted in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Furthermore, the legislative history of the controlling person provision indicates control can be shown by ***ownership of stock, agency***, a lease or a ***contract***, and that the concept of control should be broadly construed with sufficient flexibility to cover many situations, not necessarily only those foreseen at the time of enactment.

Id. at *33.

1. Plaintiffs Allege Facts Sufficient to Plead Control Person Liability

The Bank Defendants argue plaintiffs do not allege facts sufficient to establish control. For example, J.P. Morgan Chase argues the control person allegations fail because plaintiffs do not allege facts "showing" J.P. Morgan Chase "controls" its subsidiaries, and plaintiffs do not allege "particularized facts" concerning J.P. Morgan Chase's "culpable participation" in the "fraud perpetrated by the controlled person." J.P. Morgan Motion at 17. Citigroup complains plaintiffs fail to allege "particularized" facts about Citigroup's "culpable participation." Citigroup Motion as 15 n.11.[46] These arguments are meritless. The Bank Defendants' purported interpretation of the law does not square with precedent, and the Bank Defendants simply ignore plaintiffs' allegations.

Plaintiffs allege each of the Bank Defendants is an integrated financial services institution composed of divisions and subsidiaries, including certain subsidiaries who are named as defendants (*e.g.*, JP Morgan Securities Inc., Salomon Smith Barney, Inc., Barclays Bank PLC). ¶¶100-108. Plaintiffs allege each of the Bank Defendants "conducts its business affairs through a series of wholly owned and controlled subsidiaries," and plaintiffs allege each of the Bank Defendants "directly or indirectly" own all the stock of their subsidiaries and "completely" direct and control their business operations. ¶99.1. Control is effectuated by, among other things, ownership and "the selection and appointment of their officers and, where necessary, directors." *Id.*

Plaintiffs allege the financial operations and condition of the Bank Defendants' subsidiaries are "consolidated with the bank holding company's financial statements," and thus "all revenues,

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[46] Similarly, CIBC argues plaintiffs' facts are "conclusory." CIBC Motion at 14-15. *See also* CSFB Motion at 21; Lehman Motion at 22-23; B of A Motion at 27-29.

earnings and income of the bank holding company subsidiaries are upstreamed to and belong to the bank holding companies." *Id.* Plaintiffs further allege the Bank Defendants "participated in the fraudulent scheme and course of business complained of" through its own actions and through its controlled subsidiaries and agents. *Id.*

The Bank Defendants claim these facts are not "particularized" and do not "indicate" how, for example, J.P. Morgan Chase "initiated, ratified, implemented, oversaw or monitored" the "policies and decisions" of its subsidiaries. J.P. Morgan Motion at 19. *See also* Lehman Motion at 23 (plaintiffs fail to "plead direction or control over management or policies through voting securities, by contract, interlocking directors, or any of the other means ...."). To support its claim, J.P. Morgan Chase "contrasts" plaintiffs §20(a) claims against Andersen partners with the allegations in the First Amended Complaint. J.P. Morgan Motion at 19. This is nonsense.

As discussed above, "control" is interpreted flexibly and, as emphasized repeatedly by this Court and other courts, plaintiffs need ***not*** allege the "exercise" of the Bank Defendants' power to control. *Abbott*, 2 F.3d at 620; *BMC*, 183 F. Supp. 2d at 867 n.17; *McNamara*, 46 F. Supp. 2d at 635, 638. More importantly, the Bank Defendants' argument concerning "particularized" facts evidences a fundamental misunderstanding of Rule 9(b), the PSLRA, and the Court's Orders in this case. As this Court has held, Rule 9(b)'s heightened pleading requirements do not apply to control person allegations and instead "***Rule 8's notice pleading standard*** would better effect" the remedial legislative history behind §§15 and 20(a). *Enron*, 2003 U.S. Dist. LEXIS 1668, at *44.[47] The Court

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[47] *See also Stern v. Am. Bankshares Corp.*, 429 F. Supp. 818 (E.D. Wis. 1977). Like J.P. Morgan Chase, the defendants in *Stern* argued the plaintiffs must aver "'specific aspects of activity on the part of the defendant which would support a claim of "control"'" and must further allege specific facts regarding the effective exercise of control. *Id.* at 823. The *Stern* court rejected these contentions:

> There need be no allegation of the exercise of control. ***Nor must there be factual allegations showing control.*** *Burkhart v. Allison Realty Trust*, 363 F. Supp. 1286, 1289 (N.D. Ill. 1973); *Harriman [v. E. I. Du Pont de Nemours & Co*, 372 F. Supp. 101,] 105 [(D. Del. 1974)] ("since one may be a controlling person without having in fact exercised control, a plaintiff can state a cause of action under Sections 10b-5 and 20(a) of the Act without alleging any affirmative action on the part of the defendant.").

Id. at 824. The *Stern* court denied defendants' motion to dismiss, noting the nature and extent of plaintiffs' case concerning control could be more readily determined through effective use of the

should reject the Bank Defendants' arguments to the contrary. Plaintiffs' allegations are more than sufficient.

2. The Bank Defendants are Liable as Control Persons Even if They Did Not Participate in the Controlled Person's Fraud

The Fifth Circuit has held: "Neither th[e] definition [of control] nor the statute appears to require participation in the wrongful transaction. Fifth Circuit case law appears to follow the plain meaning of the statute in this respect." *G.A. Thompson*, 636 F.2d at 958. This Court has observed, "the Fifth Circuit has ***rejected*** the requirement that a plaintiff must show that the controlling person actually participated in the underlying violation." *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41-*42; *see also BMC*, 183 F. Supp. 2d at 869 n.17. Thus, to successfully plead control person liability, plaintiffs need ***not*** allege the controlling person actually participated in the securities violation. While the Bank Defendants argue to the contrary, their contention "***lacks merit***" because, as this Court has indicated, the Fifth Circuit rejects this misreading of §§15 and 20(a). *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41.[48]

3. Plaintiffs Have Adequately Alleged Predicate Primary Violations

Certain Bank Defendant parents argue plaintiffs' control person claims fail because the First Amended Complaint does not "state primary violations" against the parents' subsidiaries. *See* J.P. Morgan Motion at 19-20; B of A Motion at 29-30; Barclays Motion at 19; CSFB Motion at 20; CIBC Motion at 14-15; Lehman Motion at 21-22. For the reasons discussed throughout this Opposition,

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discovery process. *Id.*

[48] In a footnote, Bank of America asserts it would be "fairer" and "more consistent with statutory goals" if the Court held culpable participation is required for control person liability. B of A Motion at 28 n.19. Not so. Bank of America's rewriting of the control person provisions of the federal securities laws would frustrate, not further, their purpose, and in any event, Bank of America's argument fails for several reasons. The Fifth Circuit has held it is "***consistent***" with the statutory scheme to impose control person liability on control persons who do not participate in the underlying fraudulent transaction. *G.A. Thompson*, 636 F.2d at 958. Indeed, §§15 and 20(a) were enacted to "'prevent persons from avoiding liability'" and their passage was """motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were 'really responsible' for violations of the securities laws."" *Enron*, 2003 U.S. Dist. LEXIS 1668, at *44 n.22. Accordingly, Bank of America's argument "lacks merit." *Id.* at *41. *See also Paracor Fin. v. GE Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996) ("the plaintiff need not show the controlling person's scienter or that they 'culpably participated' in the alleged wrongdoing").

the Bank Defendants are mistaken. Lead Plaintiff alleges the following predicate primary violations against the subsidiaries of the Bank Defendant parents who make this argument:

CONTROL PERSON ALLEGATIONS

Control Defendant	**Control Violation**	**Predicate Violation**
J.P. Morgan Chase & Co.	§15 §20(a)	§10(b) & TSA: JP Morgan Chase Bank §§10(b), 12(a)(2) & TSA: JP Morgan Secs. Inc.
Credit Suisse First Boston (USA), Inc.	§15 §20(a)	§§10(b), 12(a)(2): Pershing LLC §§10(b), 12(a)(2): Credit Suisse First Boston Corp.
CIBC	§15 §20(a)	§§10(b), 11, 12(a)(2): CIBC World Markets Corp. §§10(b), 12(a)(2): CIBC World Markets plc §10(b): CIBC Oppenheimer Corp.
Bank of America Corp.	§15	§§11, 12(a)(2): Banc of America Secs. LLC
Barclays PLC	§15 §20(a)	§10(b): Barclays Bank PLC §§10(b), 12(a)(2): Barclays Capital, Inc.
Lehman Brothers Holding, Inc.	§15 §20(a)	§§10(b), 11, 12(a)(2) & TSA: Lehman Bros. Inc.

The Bank Defendant parents insist that plaintiffs' control person claims as to them must be dismissed if the Court dismisses the claims against the parent companies' subsidiaries. This argument raises a moot point because each of the predicate claims alleged in the First Amended Complaint are viable claims.[49]

In any event, under §§20(a) or 15, "***[i]t is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint.***" *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978); *see also In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988) ("[T]here is nothing in the language of section 20(a) which compels the joinder of the controlled person .... [T]he liability of the primary violator is simply an element of proof of a section 20(a) claim, and that liability need not be actually visited upon the primary violator before a controlling person may be held liable for the

[49] To the extent that plaintiffs' allegations assert primary violations attributable to an unknown or un-named bank subsidiary under the control of a Defendant Bank holding company, control person liability attaches to those allegations as well.

primary violator's wrong."). Thus, a plaintiff may pursue control claims if the factual basis for a predicate violation is sufficient, notwithstanding procedural bars to naming the primary violator.[50]

For example, "where the primary offender is insolvent or otherwise unavailable, the courts have proceeded to adjudicate the underlying liability of that offender regardless of its presence as a party-defendant." *Briggs v. Sterner*, 529 F. Supp. 1155, 1171 (S.D. Iowa 1981).

> Absent legislative history resolving or even considering this issue, the remedial purpose of the statute dictates a broad construction which would not excuse control persons from ... liability for the proven wrongs of a controlled person even if the latter is not himself legally liable. Such a construction, even if arguably contravening literal statutory language, conforms to established canons of construing regulatory legislation.

Keys v. Wolfe, 540 F. Supp. 1054, 1062 n.11 (N.D. Tex. 1982), *rev'd on other grounds*, 709 F.2d 413 (5th Cir. 1983) (citing Folk, *Civil Liabilities Under the Federal Securities Acts: The Bar Chris Case*, 55 Va. L. Rev. 99, 217-18 & n.64 (1969)).

Notably, this Court held with respect to plaintiffs' claims under the Texas Securities Act that "a plaintiff does not have to sue the controlled person (here Enron Corporation) in order to sue a controlling person." *Enron*, 2003 U.S. Dist. LEXIS 3786, at *67 (citing *Summers v. Welltech, Inc.*, 935 S.W.2d 228, 231 (Tex. App.–Houston [1st Dist.] 1996, no writ) (based upon the ruling in *Keys v. Wolfe*)). The controlled entity simply need not be found guilty for the controlling person to be held liable. *Kemmerer v. Weaver*, 445 F.2d 76, 78-79 (7th Cir. 1971). Accordingly, plaintiffs sufficiently allege predicate claims.

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[50] This is not inconsistent with purported authority cited by defendants. For example, *dicta* in *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 370 n.33 (5th Cir. 2001), cited by J.P. Morgan and Bank of America, does ***not*** state that a controlled entity must always be a defendant in an action to be a predicate violator for control person liability to apply. Indeed, in *Lone Star Ladies Inv. Club*, there was not an alleged procedural bar at issue and the Fifth Circuit remanded the case for the lower court to determine if plaintiff could adduce sufficient evidence to prove violations of §12. *Id.* at 370-71.

Likewise, in the cases cited by CSFB at p.20 of its motion, there was no demonstration of facts sufficient to state a predicate violation, or, the control claim itself was time barred. *See LaSalle v. Medco Research*, 1996 WL 252474, at *10 (N.D. Ill. May 10, 1996) (§20(a) claim time barred); *Salinger v. Projectavision, Inc.*, 972 F. Supp. 222, 235 n.8 (S.D.N.Y. 1997) (fraud not pleaded with particularity); *Wynne v. Equilease Corp.*, 1995 WL 764236, at *9 (S.D.N.Y. Dec. 27, 1995) (failure to allege misstatement violating §10(b)). Here, Lead Plaintiff states claims against CSFB, and as demonstrated herein, the claims against CSFB USA are timely brought or relate back to the filing of the original complaint.

4. The Bank Defendants' Control Over Their Subsidiaries Is a Fact Issue that Cannot Be Resolved on a Motion to Dismiss

As the Court has recognized, "whether a defendant is a control person is usually a question of fact." *Landry's*, Order at 12 n.14. *Accord* May 22 Order at 2; June 19, 2003 Order at 4. To grant dismissal of plaintiffs' control person claims against the Bank Defendants "would be a determination of the ultimate fact question" that they are not control persons, whereas denial of their motion would merely indicate "only that thus far the court does not have sufficient evidence before it to be able intelligently to rule on the question." *Klapmeier v. Telecheck Int'l, Inc.*, 315 F. Supp. 1360, 1361 (D. Minn. 1970). *See Harvey M. Jasper Retirement Trust v. Ivax Corp.*, 920 F. Supp. 1260, 1268 (S.D. Fla. 1995) ("'whether a person is a "controlling person" within the meaning of federal securities law presents a question of fact which cannot ... be resolved at the pleading stage'"). Accordingly, not only are the Bank Defendants' control arguments meritless, they are premature.

VII. Lehman Brothers Holding, Inc. and Lehman Brothers Inc. Are Subject to Liability for All Claims Asserted Pursuant to the Well-Pleaded Allegations of the First Amended Complaint

On December 20, 2002, the Court held with respect to Lehman Brothers Holding, Inc.:

> Lead Plaintiff has failed to plead adequately a cause of action under §10(b) against Lehman. Although the complaint alleges that Lehman executives were among those who personally invested in LJM2, prefunding it with $1.5 million and ultimately putting $10 million into it, the profits of which should have raised red flags to the bank to ask questions, ***that alone is not sufficient to establish the requisite strong inference of scienter***. Unlike with respect to the other Defendants discussed thus far, the complaint fails to identify any specific act or material statement or omission or involvement in the alleged Ponzi scheme that would give rise to a strong inference of scienter.

Enron, 235 F. Supp. 2d at 703. The First Amended Complaint rectifies the perceived inadequacies of its predecessor.[51]

In addition to plaintiffs' prior allegations, the First Amended Complaint pleads with particularity a series of equity forward transactions, or "disguised loans," by which Lehman Brothers Holding, Inc. ("LBHI") and its controlled subsidiaries, including Lehman Brothers Inc. ("LBI") (collectively "Lehman") secretly funneled Enron millions upon millions of dollars to perpetuate the Enron Ponzi scheme. Enron and its independent bankruptcy Examiner have both acknowledged (as plaintiffs claim) that these equity forward contracts were the functional equivalent of debt; and, this debt was never disclosed as such to the investing public pursuant to Enron's "liberal" interpretation of Generally Accepted Accounting Practices ("GAAP"). *See* §II.A.1. *infra.*

Lehman's secret equity forward contracts materially distorted Enron's financial statements. ***By November 2001, Enron's equity forward debt to Lehman equaled $173,538,284.14 and Enron had been in default on the secret loans since March 12, 2001.*** And the intrinsic fraudulent nature of these equity forward contracts – disguised loans – is now no less apparent than the other Bank Defendants' schemes and practices found indicative of scienter by this Court. Thus, Lehman knew or recklessly disregarded that Enron had secret debt not publicly reported to the investing public and that Enron faced a liquidity crisis that precluded its ability to pay down these debts. Despite this

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[51] This argument addresses Lehman Motion §§II and V.

knowledge, Lehman (through defendant LBI) continued to sell Enron's securities and repeatedly issued false and misleading analyst reports urging investors to buy Enron's publicly traded securities.

Lehman was highly motivated to further the Enron scheme. Perpetuating Enron's distorted portrayal of its finances and maintaining its artificially high credit rating were critical to repayment of Enron's debt. Moreover, had Lehman stopped its participation in the scheme, it would have been immediately denied lucrative investment banking fees from future business with Enron. In addition, there was the lucrative investment in LJM2 made by Lehman and certain top executives of defendant LBI.

In sum, during the Class Period, Lehman: (i) purposefully structured debt financing for Enron so as to be concealed from investors; (ii) knew or recklessly disregarded that Enron's reported debt levels were false and that investors were being misled; (iii) knew or was reckless in not knowing that Enron was in default on the debt it owed Lehman because of an ongoing liquidity crisis at the Company; (iv) had motive to hide the true state of Enron's business so as to win additional investment banking fees and collect on the secret loans it had made to Enron; (vi) made a substantial investment in the nefarious LJM2, which raised huge red flags concerning self-dealing and financial manipulation at Enron; and (vii) Lehman publicly urged investors to buy Enron's publicly traded securities without reservation. These allegations are more than sufficient to make out an actionable claim under the federal securities laws.

A. By Disguising Loans to Enron with its Equity Forward Contracts Lehman Committed Primary Acts in the Enron Scheme

1. Over Three Hundred Million Dollars in Hidden Debt Was in the Form of Equity Forward Contracts – Mostly with Lehman

Enron's investment grade credit rating was indispensable to the Company's viability as a going concern. Maintaining this investment grade credit rating was crucial to its energy trading operations, and to its ability to access the commercial paper market where Enron borrowed billions of dollars to maintain its liquidity, finance its capital-intensive business, and pay off the money it owed the defendant banks – including Lehman. Additionally, Enron's investment grade credit rating was critical to the scheme, because, if Enron's debt was downgraded to below investment grade, much of Enron's off-balance sheet debt would become recourse to Enron, which could cause the

house of cards to topple. ¶19. To maintain its credit rating in the face of mounting economic shortcomings, Enron and its banks – including Lehman – devised, structured and executed disguised loan transactions to finance Enron's business such that rating agencies (such as Moody's and Standard & Poor's) and investors could not learn the true level of Enron's indebtedness. The Enron/Lehman equity forward contracts were among these fraudulent off-balance sheet financing transactions. ¶¶770.1-.2.

The Lehman Defendants vehemently argue that "plaintiffs' allegations of 'disguised loans' are without support." *See* Lehman Motion at 16. This is preposterous. When the obfuscating features of these transactions are removed, it is clear Lehman was executing loans to Enron collateralized by Enron stock, and plaintiffs have quoted from various documents that amply evidence and support that characterization. Lead Plaintiff's allegations more than sufficiently meet the particularity requirements required by the PSLRA and Rule 9(b). Indeed, ***Enron itself has now classified these equity forward contracts with such other fraudulent debt financings as the Mahonia/Delta prepays and Enron's bogus FAS 140 transactions (which includes, among others, the Hawaii 125-0 transactions)***. *See* Ex. 22.

Notably, internal Enron document EC03520A0190485 indicates that (as of November 21, 2001) Enron owed $173 million in debt to Lehman pursuant to equity forward contracts, ***which amount had matured not on March 12, 2002 (as indicated in the Bankruptcy Examiner's Report) but on March 12, 2001 – months before the end of the Class Period and while Lehman's LBI subsidiary was still issuing false and misleading positive statements about Enron***. *See* Ex. 22.

2. Plaintiffs' Allegations Concerning Lehman's Disguised Loans Are Pleaded with Exceptional Particularity

As the Court has held:

> In reviewing the sufficiency of a complaint in response to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), before any evidence has been submitted, the district court's task is limited. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support its claims. *Id.* The district court should consider all allegations in favor of the plaintiff and accept as true all well-pleaded facts in the complaint. *Lawal v. British Airways, PLC*, 812 F. Supp. 713, 716 (S.D. Tex. 1992). Dismissal is not appropriate "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." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Enron, 235 F. Supp. 2d at 564 n.3.

a. Plaintiffs Satisfy the Pleading Standard

Plaintiffs do not merely allege in a conclusory fashion that Lehman entered into secret loans with Enron, as defendants ask this Court to believe. *See* Lehman Motion at 14-17. Plaintiffs provide the date that the master agreement governing the series of loans was signed and provide the exact name of that agreement. ¶770.1. Plaintiffs describe in detail the nature of the transactions by which Lehman secretly lent Enron money. *Id.* Plaintiffs allege the exact date these secret loans matured, that they went unpaid, and the ***exact amount*** that Enron owed Lehman (on a particular date during the Class Period). ¶770.2. Plaintiffs allege the ***exact number*** of shares of Enron common stock that Lehman held as collateral for the loans (on a particular date during the Class Period) and plaintiffs quote from an Enron/Lehman agreement documenting this to be true, which was not public during the Class Period. *Id.* This is more than sufficient particularity.

Arguing that plaintiffs' allegations do not satisfy the PSLRA's and Rule 9(b)'s particularity requirements, the Lehman Defendants list a series of items that plaintiffs have ***not*** alleged (which specifics, the Lehman Defendants assert, are necessary). Lehman Motion at 14. First, the Lehman Defendants cite no authority that this level of detail is required. *Id.* Second, whether the First Amended Complaint is sufficiently particular depends upon what it alleges – not the universe of details that it could have provided but which are not necessary to pleading an actionable claim. And third, the Lehman Defendants' criticisms are particularly without merit because plaintiffs have provided information substantially similar to that which Lehman claims to be missing.

For example, the Lehman Defendants assert: "Plaintiffs do not allege the ***number*** of shares of stock allegedly purchased from Enron, the prices per share or ***total dollar amounts involved***, or the ***relevant dates*** of any of the 'series' of trades other than the November 14, 2000 date itself." Lehman Motion at 14. This sort of contention reveals the poverty of the Lehman Defendants' position. Moreover, it is wrong or misleading. As detailed in the First Amended Complaint, plaintiffs do plead: (i) the aggregate ***number*** of shares Lehman "purchased from" Enron – it was (as

of 11/1/01, less than one month before the end of the Class Period), exactly 2,434,339 shares of Enron common stock; (ii) the ***total dollar amounts involved*** – Enron owed Lehman (as of 11/1/01) exactly $173,538,284.14; (iii) and plaintiffs plead ***relevant dates*** – Lehman's loan to Enron had matured exactly on 3/12/01 and was still outstanding on 11/1/01. ¶¶770.1-.2.

Further, the Lehman Defendants err in claiming (without any authority for the proposition) that plaintiffs must "identify" specific equity forward contract transactions entered pursuant to the ISDA Master Agreement between Lehman and Enron. Lehman Motion at 14.[52] The Lehman Defendants compound that error by insisting that plaintiffs must plead such specific factual information as the "terms and conditions" of these individual transactions. *Id.* Where, as here, plaintiffs provide specific allegations concerning defendants' pattern of wrongdoing in the aggregate, plaintiffs need not detail each individual wrongful transaction. *See Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 79 (1st Cir. 2002) (faulting district court for requiring plaintiff to plead "specific figures regarding which transactions were misstated and by what amounts").

The Lehman Defendants compare these allegations to the allegations concerning the notorious Mahonia and Delta transactions. Lehman Motion at 15. This does not help them, for it does not change the intrinsic character of Lehman's disguised loans.

Contrary to the Lehman Defendants' arguments, the First Amended Complaint is replete with specific factual allegations that satisfy the standard for particularity.

b. Lehman Asks This Court to Draw *Unreasonable* Inferences *Against* Plaintiffs in an Effort to Disprove Plaintiffs' Allegations

As demonstrated above, plaintiffs plead particularized allegations evidencing a fraudulent transaction between Enron and Lehman, quoting from certain documents that provide more than ample support for plaintiffs' claims. But, Lehman repeatedly (and incorrectly) argues that "plaintiffs' allegations of 'disguised loans' are without support in the transaction documents on which plaintiffs

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[52] In a footnote, Lehman asserts that they are innocent because it was Lehman Brothers Finance S.A., and not them, who entered into the ISDA Master Agreement. Lehman Motion at 13 n.6. The Lehman Defendants' argument is inconsistent with plaintiffs' legal theory of these and, plaintiffs respectfully submit, should be rejected as law of the case. *See* May 22, 2003 Order; *see also* June 19, 2003 Order. If Lehman Brothers Finance S.A. is a culpable entity, it too will be named a defendant in due course, as provided in the Court's schedule.

rely." Lehman Motion at 16. According to the Lehman Defendants, plaintiffs provide the Court no document evidencing that Lehman "ever purchased stock from Enron or paid it any cash." Lehman Motion at 17. However, plaintiffs' purported failure to provide the Court with such a "smoking gun" document is hardly surprising; plaintiffs need not do so at this stage in the proceedings. *See, e.g.*, *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 356 (5th Cir. 2002) ("'[E]ven 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***.'").

Rather, plaintiffs quote specific data from documents indisputably evidencing that (i) in November 2000, Enron and Lehman entered into the ISDA Master Agreement governing equity forward contracts between them; (ii) subsequent to entering into the ISDA Master Agreement, Enron secretly owed Lehman $173+ million in November 2001 pursuant to these equity forward agreements; and (iii) Lehman and Enron agreed in November 2001 that Lehman would "transfer to Enron 2,434,339 common shares of Enron" upon payment of that sum. *See* ¶¶770.1-.2. The Lehman Defendants have not, and cannot, dispute these facts. Lehman Motion at 16-17. Given these facts, the Court must draw the reasonable inference in plaintiffs' favor that Lehman did in fact provide Enron cash/debt financing as part of these equity forward contracts. *See In re NetSolve, Inc.*, 185 F. Supp. 2d 684, 692 (W.D. Tex. 2001); *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622, 630 (E.D. Tex. 2001).

Rather than drawing the reasonable inference that Lehman made secret loans to Enron, as it must on motion to dismiss, the Lehman Defendants urge this Court to draw the opposite conclusion. Plaintiffs quote from the ISDA Agreement (the first step in establishing the equity forward contracts); plaintiffs quote from a November 1, 2001 agreement (documenting the result of Lehman and Enron's equity forward contracts – Enron owing Lehman money and Lehman holding Enron shares); the logical inference is that between November 2000 and November 2001, Lehman gave Enron money for shares of stock that Enron agreed to buy back at a later date. Further, this is exactly what an equity forward contract is supposed to be. Still, the Lehman Defendants assert that plaintiffs' allegations cannot support the inference that this middle step occurred. The Lehman Defendants' argument makes no sense and should be summarily rejected.

Lehman's argument is based upon absurd logic. By its very nature, the equity forward contract between Enron and Lehman contained a front half and a back half. The great evidentiary detail demonstrating the existence of the back half more than adequately provides for the reasonable inference that there is a front half. To conclude otherwise, as Lehman suggests, would be like assuming a bull has no head because one can only see its hind quarter. Lehman denies the undeniable and urges the Court to draw an unreasonable inference against plaintiffs.

B. Lehman Knew or Recklessly Disregarded What It and Enron Were Doing

While the PSLRA demands that plaintiffs plead facts "giving rise to a strong inference that the defendant acted with the required state of mind" (*see* 15 U.S.C. §78u-4(b)(2)), the passage of the PSLRA did not alter the fundamental principles of Fed. R. Civ. P. 12(b)(6). *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 406 (5th Cir. 2001). It still is true that, even when determining the sufficiency of scienter pleadings, the "plaintiff is entitled to all reasonable inferences that may be drawn from the allegations of the complaint." *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 660 (8th Cir. 2001); *see also Aldridge,* 284 F.3d at 82. Only after all reasonable inferences have been drawn in favor of the plaintiff should the court assess whether these inferences, in addition to the pleaded facts, "***collectively*** add up to a strong inference of the required state of mind." *Green Tree*, 270 F.3d at 660; *see also Abrams*, 292 F.3d at 431. This Court is in accord. *See Enron*, 235 F. Supp. 2d at 692 ("[S]cienter must be evaluated in view of the ***totality*** of alleged facts and circumstances, together as a whole, ***with all reasonable inferences drawn in Lead Plaintiff's favor***."). Here, there is more than sufficient factual support for a strong inference that the Lehman Defendants acted with scienter.

1. The Intrinsic Nature of Lehman's Disguised Loans, the Accumulation of Other Facts Concerning the Enron Scheme and Lehman's Motive to Generate Extraordinary Fees Demonstrate a Strong Inference of Scienter

In its prior opinion, the Court found that plaintiffs' allegations failed to plead a strong inference of scienter as to LBHI because plaintiffs' allegations concerning Lehman and LJM2 were not, alone, sufficient to satisfy the stringent pleading standards of the PSLRA. *Enron,* 235 F. Supp. 2d at 703. However, the Court found: "that the scienter pleading requirement is partially satisfied

by allegations of a regular pattern of related and repeated conduct [designed] to shift debt off Enron's balance sheet and [add] sham profits onto its books at critical times when quarterly or year-end reports to the SEC, and by extension the public, were due." *Id.* at 693-94.

That is exactly what Lehman and Enron were doing with these equity forward contracts – managing Enron's reported cash flow by infusing the Company with cash via these disguised loans. Moreover:

> The intrinsic nature of these devices and contrivances was fraudulent so that those intimately involved in structuring the entities and arranging the deals, especially more than one, would have to have been aware that they were an illicit and deceptive means to misrepresent Enron's actual financial state and mislead investors about Enron securities.

Id. at 694. This alone supports a strong inference of scienter.

Thus, plaintiffs' allegations concerning Lehman's involvement in LJM2 ***plus*** plaintiffs' new allegations concerning Lehman's purposeful structuring of hidden loans to Enron ***plus*** Lehman's underwriting of Enron's offerings and due diligence associated therewith (particularly the sale of Enron's Foreign Debt Securities, an integral part of the fraudulent scheme)[53] ***plus*** plaintiffs' allegations of motive and opportunity more than sufficiently plead a strong inference of scienter in their totality.

2. Lehman Had a Powerful Motive to Commit Fraud

During the Class Period, Lehman was pocketing millions of dollars in interest payments, syndication fees and investment banking fees by engaging and participating in the Enron scheme to defraud and stood to ***continue*** to collect these huge fees on an annual basis going forward so long as it helped perpetuate the Enron Ponzi scheme. ¶767. Further, by issuing false statements about Enron and disguising Enron's loans, Lehman sought to maintain Enron's investment grade credit

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[53] The Enron Foreign Debt Securities, such as the Enron Credit Linked Notes Trust Offering and Osprey Trust/Osprey I, Inc. Offering underwritten by LBI (*see* ¶¶641.17-641.24), were critical to the Enron Ponzi scheme. *See* ¶641.44. Indeed, an internal Citigroup presentation titled "Credit-Linked Notes" proudly boasts about that the Enron Credit Linked Notes (issued by Lehman and Citigroup) and declares that the structure of the Credit Linked Notes transaction ***"offer[s] significant accounting and rating agency benefits" and that has the benefits of "[e]liminat[ing] the need for Capital Market disclosure, keeping structure mechanics private."*** *See* Ex. 23. The presentation also recognizes that the Credit Linked Notes enable the corporate borrower to "improve cash flows from operations." *Id.* Lehman, like Citigroup, knew the structure of the Credit Linked Notes Offering was created to falsify Enron's financials.

rating so that Enron could tap that market to pay off the $170+ million the troubled Company owed Lehman. *Id.* Similarly, having invested $10 million in LJM2, Lehman stood to be rewarded handsomely from its investment in this corporate-looting venture conflicted of interest. ¶762. Lehman's analysts and underwriters knew that to disclose the truth would cause Enron's stock to crater, leading to the catastrophe that occurred. All of this was a powerful motive to initiate and continue Lehman's participation in the fraud.

C. Lehman Continued to Make False and Misleading Positive Statements About Enron After Disguising Enron Loans and After Enron Defaulted on Those Loans

As plaintiffs have pleaded with adequate particularity that Lehman secretly funneled money to Enron to disguise the true level of Enron's indebtedness, and that Lehman did so with scienter, it follows that any subsequent positive statements made by Lehman about Enron were misleading because Lehman failed to disclose the material fact that Enron's true level of debt was being hidden from investors. For instance, LBI – as the agent of LBHI – sold Enron securities after entering into the equity forward contracts with Enron. ¶765. Further, LBI – as the agent of LBHI – issued analyst reports providing false information about Enron's actual debt-to-capital ratio. *See*, *e.g.*, Ex. 24. Moreover, because of an ongoing (but undisclosed) liquidity crisis at Enron, it could not pay its secret debt to Lehman on 3/12/01 (the maturity date). ¶770.2. Thus, Lehman's positive statements about Enron made after 3/12/01 were also false and misleading for failure to disclose the material facts concerning Enron's liquidity crisis. Plaintiffs have alleged numerous such misleading statements were made in analyst reports issued by LBI, at the direction of and under the control of LBHI. Indeed, ***Lehman issued eight analyst reports between 3/12/01 and 10/24/01 – each piling on the plaudits and rating Enron common stock a "Strong Buy*.**" *See* ¶¶312, 322, 338, 341, 347, 353, 379, 381. Each of these statements is actionable.

D. Plaintiffs' Texas Securities Act Claims Meet the Pleading Requirements Established by This Court and Should Not Be Dismissed

The First Amended Complaint alleges:

> The Washington Board and each of the members of the Note Subclass acquired the 6.95% Notes and/or the 6.40% Notes from defendants JP Morgan and Lehman

> Brothers, who were underwriters in this firm commitment offering, and are in privity with JP Morgan and Lehman Brothers.

¶1016.15. This is the only allegation that Lehman challenges with respect to plaintiffs' allegations under the Texas Securities Act. Lehman Motion at 24.

Lehman's argument is not persuasive as there is nothing faulty with plaintiffs' averments as to privity. The allegation in ¶1016.15 clearly applies to both the Washington Board and the plaintiff sub-class it seeks to represent, and correctly asserts that all of the plaintiffs in the sub-class are in privity with either Lehman (LBI specifically) or J.P. Morgan Chase – the two lead underwriters in the offering. Even more, Lehman asserts that plaintiffs' claims under the TSA must fail because the Washington Board "fails to allege any ***facts*** demonstrating that the Washington Board 'bought' from either [Lehman Defendant]." Lehman Motion at 24 (emphasis in original). However, contrary to Lehman's assertion, the Washington State Board need not plead factual support for its allegation that it is in privity with LBI. Washington State Board has made this allegation based upon its own personal knowledge, not information and belief. However, to appease the Lehman Defendants' concerns, Washington Board's trading confirmations evidencing the fact that it bought from LBI are attached hereto. *See* Ex. 25.

VIII. The CSFB Defendants Are Subject to Liability for All Claims Asserted Pursuant to the Well-Pleaded Allegations of the First Amended Complaint[54]

In its December 20, 2002 Order, the Court detailed a number of plaintiffs' allegations demonstrating that Credit Suisse First Boston Corp. (now known as CSFB LLC) acted with scienter in furtherance of the defendants' fraudulent scheme. However, in answering plaintiffs' Consolidated Complaint, CSFB LLC states that it did not engage in many of the alleged actions; rather, CSFB LLC contends that the alleged actions are attributable to Donaldson, Lufkin and Jenrette Securities Corp. (now known as Pershing LLC, collectively "DLJ"), which was separate from CSFB LLC before CSFB LLC (and/or one of its affiliates) announced its acquisition of DLJ (and its parent company) in August 2000. *See, e.g.*, CSFB LLC Answer to Consolidated Complaint, ¶1.[55]

For instance, the Court's Order notes:

> The complaint charges that a group of ten bankers from Credit Suisse First Boston, headed by ***Laurence Nath***, created some of the illicit SPEs, a process dubbed "structured products," including Marlin, Firefly, Mariner, Osprey, Whitewing, and the Raptors, to which Credit Suisse First Boston helped Enron sell assets at inflated prices in non-arm's-length transactions to create sham profits and conceal massive debt for Enron.... Not only does such specific involvement in the scheme give rise to a strong inference of scienter, but ***the alleged acts of Nath and his team would constitute primary violations of the statute.***

Enron, 235 F. Supp. 2d at 699-700. But, CSFB LLC asserts that Mr. Nath and his colleagues worked on certain of the transactions alleged to be fraudulent while at DLJ and before joining CSFB LLC – for which (they claim) CSFB LLC is not liable. *See, e.g.*, CSFB LLC Answer to Consolidated Complaint, ¶707. In accordance therewith, plaintiffs' First Amended Complaint has added both DLJ and its parent Donaldson Lufkin & Jenrette, Inc. (now known as CSFB USA or "DLJ Parent").[56] ¶¶102(a)-(c).

Yet, despite providing specific admissions in its answer to plaintiffs' Consolidated Complaint that certain actions were committed by DLJ prior to the Merger, and other specific admissions that

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[54] This argument addresses CSFB Motion §II.

[55] For ease of reference, this acquisition will be referred to as the "Merger" throughout.

[56] DLJ Parent, after the announcement of the Merger, became the parent holding company of both CSFB LLC and DLJ – ultimately orchestrating all of the actions of CSFB LLC and DLJ in furtherance of the fraudulent scheme. *See, e.g.*, Ex. 26 at 1.

certain actions were committed by CSFB LLC, all three CSFB Defendants now assert (disingenuously) that plaintiffs' allegations are insufficient because there is no "indication as to which allegations (if any) apply to CSFB LLC, which apply to CSFB (USA) Inc., and which apply to DLJ." CSFB Motion at 14-15. This is a red herring. These defendants clearly know which allegations pertain to whom – as was demonstrated in CSFB LLC's Answer to the Consolidated Complaint (which allegations are fundamentally unchanged in the First Amended Complaint).

Plaintiffs' First Amended Complaint also satisfies the heightened scienter pleading requirements because Nath and his structured finance team worked for all three entities, which were subsequently folded into the same corporate structure. As detailed in §VIII.C, *infra*, because, among other things, the scienter of Mr. Nath and his colleagues is attributable to DLJ and DLJ Parent/CSFB USA, and (upon the Merger) to CSFB LLC, all three are properly named defendants in this action. Thus, plaintiffs respectfully submit, the CSFB Defendants' motions should be denied.

A. Larry Nath and His Colleagues Structured Illicit Off-Balance Sheet Entities During the Class Period, First as Employees of DLJ (Under CSFB USA) and Then as Part of CSFB LLC (Also Under CSFB USA)

Plaintiffs' First Amended Complaint fixes certain mistakes in its predecessor, which were not outcome determinative to the Court's prior denial of CSFB LLC's motion for dismissal. Plaintiffs' Consolidated Complaint mistakenly failed to name DLJ and CSFB USA. Because each of the CSFB Defendants is liable for the actions attributed to CSFB LLC in the First Amended Complaint – which actions are pled with substantially the same particularity as in the Consolidated Complaint – the CSFB Defendants' present motion for dismissal should be denied.

Plaintiffs' claims against CSFB LLC in the Consolidated Complaint clearly focus upon, among other things, the work performed by a CSFB LLC employee, Mr. Lawrence Nath and his colleagues in the structured finance group that created many of Enron's deceptive off-balance sheet entities. *See, e.g.*, Consolidated Complaint, ¶¶707-711. The Court found plaintiffs' allegations as to CSFB LLC credible and persuasive, specifically citing Mr. Nath's and his colleagues' actions as sufficiently well-pled to state a claim as to those individuals – and, consequently, their employer through traditional notions of *respondeat superior*. *Enron*, 235 F. Supp. 2d at 699-700. However, plaintiffs' Consolidated Complaint failed to name DLJ or CSFB USA, for whom Mr. Nath and his

colleagues also worked during the Class Period. *See, e.g.*, CSFB LLC Answer to Consolidated Complaint, ¶¶1, 707. This was a mistake.[57]

A recent article in *TheStreet.com* illustrates the point that Mr. Nath's team performed fraudulent acts in furtherance of the fraudulent scheme while still at DLJ, before the Merger:

> First on the hot seat will be a group of seven investment bankers from CSFB, a division of Credit Suisse Group (CSR:NYSE). Batson, on the same day he filed his report, served a subpoena seeking to take testimony from those bankers. ***One of the bankers Batson seeks to question is Laurence Nath, the head of CSFB's structured finance group, which helped put together two of Enron's biggest off-balance sheet entities: Whitewing and Osprey.*** The Batson report devotes more than 400 pages of analysis to these two off-balance sheet deals that sold billions of dollars in bonds to institutional investors.
>
> ***Nath and his team of bankers had worked on most of these deals while they were at Donaldson Lufkin & Jenrette, a firm that CSFB acquired in 2000.*** Nath also was one of a dozen CSFB investment bankers who invested $1 million of their own money into a venture called OA Investments – a deal that Nath and his associates specifically arranged for LJM2, the $394 million off-balance sheet partnership run by Andrew Fastow, the former Enron chief financial officer whose [sic] been indicted for fraud in the Enron mess.

Matthew Goldstein, "Report Depicts Enron as Vapor," *TheStreet.com*, Mar. 6, 2003 (Ex. 27). Plaintiffs' First Amended Complaint corrects that mistake by naming both DLJ (now Pershing LLC) and CSFB USA.

B. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and PSLRA Particularity Requirements

1. The CSFB Defendants' Interpretation of Rule 9(b) and the PSLRA Elevates Form Over Substance to Reach Results Wholly Unsupported by the Law

Plaintiffs do not dispute the CSFB Defendants' insistence that the First Amended Complaint must comply with the heightened pleading standards of Rule 9(b) and the PLSRA. Here, as is detailed below, there is no doubt that plaintiffs' allegations satisfy Rule 9(b) and the PSLRA. Quoting the Fifth Circuit, this Court noted:

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[57] At the time plaintiffs drafted the Consolidated Complaint, they were operating under the misunderstanding that Mr. Nath and his team joined CSFB LLC from DLJ in 1998, prior to the Class Period. *See* Consolidated Complaint at ¶707. As such, plaintiffs did not initially name DLJ as a defendant. This matter is further complicated because CSFB LLC insists it is "not liable as a matter of law for the actions of its predecessors, subsidiaries and affiliates," including, presumably, DLJ. *See* CSFB LLC Answer to Consolidated Complaint at 231, Twenty-Eighth Defense. *See also supra* §III.C.1.

> "The PSLRA was enacted, in part, to compensate for 'the perceived inability of Rule (b) to prevent abusive frivolous strike suits.' It was not enacted to raise the pleading burdens under Rule 9(b) and section 78u-4(b)(1) to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions."

Enron, 2003 U.S. Dist. LEXIS 3786, at *119.

Further, even in securities fraud actions under the PSLRA, particularity requirements are viewed within context. "'[C]ourts should be "sensitive" to the fact that application of the Rule prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud."' Accordingly, ***the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control.***" *McNamara*, 197 F. Supp. 2d at 672. This is such an instance. As indicated above, the joinder of the CSFB Defendants by merger during the Class Period, and the number of different CSFB entities all working at the direction of the parent pursuant to a maze of corporate interconnections, in addition to the sheer complexity of the Enron fraudulent scheme and its thousands of affiliates and related entities, cautions against a hyper-technical application of the particularity requirements.

2. Plaintiffs' First Amended Complaint Alleges with Particularity Each CSFB Defendant's Participation in the Fraud

The CSFB Defendants assert that plaintiffs fail to allege with particularity the fraud perpetrated by them because plaintiffs improperly lump the three CSFB Defendants together. CSFB Motion at 12-16. Among other things, this particularity argument demonstrates that the CSFB Defendants wish to re-litigate issues already determined by the Court. Plaintiffs' legal theory of liability (consistent with respect to each of the bank holding companies) is premised upon the principal that DLJ Parent/CSFB USA acted through its controlled subsidiaries in furtherance of the fraudulent scheme. ¶102(a).[58] Plaintiffs specifically and intentionally allege that after the Merger, DLJ Parent/CSFB USA and its subsidiaries (*e.g.*, DLJ and CSFB LLC) acted as a single enterprise

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[58] The Court has already addressed whether plaintiffs may state a claim pursuant to their legal theory with respect to certain other bank holding company defendants. *See* May 22, 2003 Order; June 19, 2003 Order. Under traditional notions of law of the case, the Court need not revisit this same issue now.

because that is what happened. *Id.*[59] As such, plaintiffs have not improperly lumped any of the CSFB Defendants together; particularly not DLJ Parent/CSFB USA, who is alleged to have participated in each facet of the fraud involving any CSFB entity.

Particularity is required, in part, to put a defendant on notice of the claims against it. The CSFB Defendants cannot legitimately deny that they have been given such notice. Indeed, after CSFB LLC's initial motion to dismiss was denied, CSFB LLC did not then move for a more definite statement of plaintiffs' allegations pursuant to Fed. R. Civ. P. 12(e), but answered, which is telling.[60] The allegations of the First Amended Complaint are substantially the same as the Consolidated Complaint. Thus, CSFB LLC knows which actions are attributable to it and which were performed by DLJ. Further, so that there could be no confusion, plaintiffs clearly spelled this out in ¶102.

To the extent that individual CSFB entities (particularly the CSFB Defendants) acted in a specific manner in furtherance of the fraudulent scheme, it is clear from the context of each allegation and ¶¶102(a)-(c) whether a named defendant subsidiary is being implicated. Plaintiffs charge the CSFB Defendants with, among other things, issuing false analyst reports throughout the Class Period and selling securities via false prospectuses and offering circulars (*see, e.g.*, ¶¶48-49, 102, 124, 135, 154, 158, 167, 171, 180, 191, 198, 205, 213, 229, 268, 290, 319, 345, 354, 374, 378, 641.2, 641.21, 641.37, 696, 699, 704, 714); and playing a primary role in fraudulent transactions with Enron, such as those orchestrated by Mr. Nath and his team (*see, e.g.*, ¶¶102, 460, 496, 498, 567, 693-714). As to each false analyst report and prospectus/offering circular, plaintiffs provide the requisite "who, what, when, and where" and state the reasons why each of those statements are false as this Court and the Fifth Circuit requires. *See Enron*, 235 F. Supp. 2d at 570. With respect to the CSFB Defendants' involvement in fraudulent transactions in furtherance of the fraudulent Enron scheme, plaintiffs have also pleaded with particularity how these transactions were used to

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[59] Furthermore, it is clear that DLJ Parent is alleged to have acted through DLJ prior to the Merger. ¶¶102(a), (b).

[60] *See, e.g.*, *Initial Pub. Offering*, 241 F. Supp. 2d at 333 ("Moreover, this failure, if it exists, is not a ground for Rule 12(b)(6) dismissal. If the Defendants were truly perplexed by the [operative complaint], they should have filed a motion under Rule 12(e) ....").

manipulate Enron's reported financial results, and how the CSFB Defendants acted to further these fraudulent transactions.

The best evidence that the CSFB Defendants know which entity is implicated by the allegations is the Answer to the Consolidated Complaint filed in this action by CSFB LLC. For instance, CSFB LLC specifically admits that a great many of the allegations concern DLJ. *See, e.g.*, CSFB LLC Answer to Consolidated Complaint, ¶¶1, 42, 48-49, 110, 135, 496(a), 498, 693-694, 696-700, 703, 707, 731. Thus, there can be no confusion as to who did what, and, thus, no legitimate argument of improper group pleading. Moreover, after the Merger there is every indication that DLJ and CSFB LLC were fully integrated entities (under CSFB USA/DLJ Parent), acting as one integrated investment bank, if not having one corporate existence. Thus, defendants' group pleading condemnation is particularly inappropriate.[61]

Assuming, *arguendo*, plaintiffs' allegations might be construed to be group pleading, there is no basis for the usual criticism of such pleading.[62] Here, we are not dealing with individual human beings (whose wealth is wholly independent from another defendant's) but a multinational conglomerate that reports consolidated financial information. Further, unlike individual humans with independent reputations to uphold, the purportedly separate CSFB Defendants repeatedly referred to themselves collectively and held themselves out to the public as a single enterprise after the Merger. This is not the typical situation where group pleading might be thought to result in an innocent individual corporate officer paying for the transgressions of her guilty work associate. Rather, it is the unique situation where purportedly separate defendants (and their affiliates) acted

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[61] *See, e.g.*, Joint Press Release issued by Credit Suisse Group and Donaldson Lufkin & Jenrette, Inc. on August 30, 2000 (Ex. 15) ("Upon completion of the transaction, DLJ will be integrated into Credit Suisse First Boston"); Credit Suisse Group Press Release Dated November 3, 2000 (Ex. 16) (With the exception of DLJ's "clearing business," "DLJ will become Credit Suisse First Boston for all other institutional businesses." "The integration of these businesses was accomplished very quickly and seamlessly.").

[62] *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *31 ("Without requiring the pleading of a specific factual basis demonstrating an individual's personal participation in tortious conduct, application of the group pleading doctrine might well result in a presumption that an innocent and unknowing officer of a corporation or firm is liable for group-published information created by another, which offends the pleading requirements under the PSLRA and Rule 9(b).").

together and through one another. The usual group pleading concerns are nowhere to be found as to the CSFB Defendants.

C. The First Amended Complaint Alleges Facts Demonstrating that Each of the CSFB Defendants Acted with Scienter

1. Mr. Nath's (and His Structured Finance Team's) Scienter Can Be Attributed to Each of the CSFB Defendants During the Class Period

As stated above, the Court has already found that plaintiffs' allegations concerning Mr. Nath and his structured finance team were sufficiently pleaded in the Consolidated Complaint to make out a claim against them individually, and those allegations have not changed.[63]

Rather, those allegations have gained credibility as additional facts have come to light. For instance, the Enron Bankruptcy Examiner has determined that two of the structures created by Mr. Nath's structured finance team (Whitewing and Marlin) "***overstated [Enron's] cash flow from operating activities by at least $1.1 billion*** through December 31, 2000 and understated cash flow from financing activities [*i.e.,* debt] by $2.1 billion during such period; and failed to adequately disclose more that $3.3 billion of contingent obligations on [Enron's] December 31, 2000 financial statements." *See* Ex. 28 at 68. Likewise, recent media reports indicate that federal "prosecutors may bring [criminal] charges stemming from ... Whitewing." Matthew Goldstein, "Enron Prosecutors Consider New Criminal Charges," *TheStreet.com*, May 23, 2003 (Ex. 29).

In its December 20, 2003 Order, the Court held:

> The complaint also describes discussions that it claims reflect Credit Suisse First Boston's actual knowledge of Enron's real financial condition underneath the cloak of false representations. The complaint quotes an Enron insider as remarking, "There's no question that senior people at CFSB knew what was going on and that it was a house of cards." One individual who attended a meeting in July 2001, when Enron's stock had fallen into the $40s, stated that the triggers were discussed by senior Enron executives and Credit Suisse First Boston bankers. It was reported that the bankers remarked, "If this thing hits the $20s, you better run for the hills," and "There was no question that they knew exactly what lay inside the structures, when the triggers went off–everything. You could almost say they knew more about the

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[63] Similarly, the Court previously found: "Lead Plaintiff does succeed in pleading claims cognizable under §10(b) and Rule 10b-5 with its additional allegations relating to Credit Suisse First Boston's alleged involvement in Enron's scheme to recognize a profit by taking New Power public." 235 F. Supp. 2d at 699. Immediately prior to the Merger, both CSFB LLC and DLJ underwrote the New Power offering for Enron. *See* CSFB LLC Answer to Consolidated Complaint, ¶697. As such, these allegations (previously upheld) are applicable to each of the CSFB Defendants.

> company than people in Enron did." *See* page 173-74 of this memorandum and order. While the content of these remarks may be subject to other interpretation, with respect to a Rule 12(b)(6) motion, the Court views the pleaded facts in favor of Lead Plaintiff.

Enron, 235 F. Supp. 2d at 700. Again, plaintiffs' substantive allegations in this regard have not changed. *See* ¶¶709–711. These admissions by CSFB LLC bankers, occurring while CSFB LLC was fully integrated with DLJ and was acting as the agent of and under the control of CSFB USA, are attributable to each of the CSFB Defendants and demonstrate that each of the CSFB Defendants acted with scienter.

Thus, the Court need not even address this already-decided issue of scienter. The only thing that has changed is to which corporate defendants those actions (and the corresponding scienter associated therewith) can be imputed. The simple answer is that each of the CSFB Defendants is tainted with the scienter flowing from the structured finance team's actions. As indicated above, the structured finance team worked for Enron first while at DLJ (under DLJ Parent/CSFB USA) and then, after the Merger, while at CSFB LLC (under DLJ Parent/CSFB USA). As such, each CSFB Defendant is imbued with the scienter of the structured finance team consistent therewith.

2. The CSFB Defendants Knew or Recklessly Disregarded Additional Facts Demonstrating that the LJMs Were Being Used to Deceive Investors and Pillage Enron

Concerning the Consolidated Complaint, the Court noted that plaintiffs' allegations with respect to CSFB LLC's investment in LJM2 was not enough – by itself – to support a strong inference of scienter. *Enron*, 235 F. Supp. 2d at 698-99. However, the Court did note that: "[S]cienter must be evaluated in view of the ***totality*** of alleged facts and circumstances, together as a whole, ***with all reasonable inferences drawn in Lead Plaintiff's favor***." *Id.* at 692. Plaintiffs respectfully submit that the CSFB Defendants' investments in the LJMs, viewed in conjunction with plaintiffs' other well-pleaded allegations, support a strong inference of scienter.

In addition to its investment in LJM2 (discussed in the Court's December 20, 2003 Order), CSFB LLC has admitted that it invested $52.6 million in LJM1 and loaned that illicit off-balance sheet entity $25 million. *See* Ex. 14. This only adds to the Court's prior conclusion that, "in light of the substantial sums of money Credit Suisse First Boston, a sophisticated business banking entity,

poured into LJM2 ... over time [it must] have scrutinized the structure and activities of the illicit entity." *Enron*, 235 F. Supp. 2d at 699.

Further, there is credible and substantial support for the inference that DLJ knew or recklessly disregarded the purpose for which LJM2 was being used. According to *The New York Times*:

> Merrill, which was one of the biggest underwriters of Enron stocks and bonds, was the placement agent for the partnership. The firm got the assignment after ***Enron was turned down by Donaldson, Lufkin & Jenrette, which cited its discomfort with the conflicts of interest inherent in the partnership. D.L.J. objected to the fact that Mr. Fastow would be the general partner of LJM2 while remaining a top Enron executive – a position that put him on both sides of the negotiating table as assets were traded back and forth between the partnership and the company.***
>
> In the end, a group of 96 Merrill Lynch executives invested $16.6 million of their own money in LJM2, and Merrill put in an additional $5 million for its own account. One Merrill broker, Louis Chiavacci, invested $1 million in his own name. ***Though D.L.J. passed on being placement agent, its executives put in $5 million.***

Leslie Wayne, "Chagrined Enron Partners Try To Stave Off Both Losses and Scandal's Taint" *N.Y. Times*, Mar. 31, 2002 (Ex. 30) (also noting that CSFB LLC invested $10 million in LJM2 and "arranged lines of credit for LJM2"); *see also* ¶712.[64]

DLJ knew the LJM2 arrangement to be improper from its inception. And, given the incredible returns that LJM2 garnered for its investors, could not have been ignorant to the truth.[65]

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[64] The First Amended Complaint alleges the CSFB Defendants invested $22.5 million in LJM2 based on certain publicly reported information. Other reports, such as *The New York Times* article cited above, indicate somewhat less. CSFB LLC admits that affiliates of DLJ and CSFB LLC invested $15 million. *See* CSFB LLC Answer to Consolidated Complaint, ¶23. Such differences are in degree only.

[65] According to *The New York Times*:

> Jeffrey K. Skilling, the former chief executive of Enron, has told investigators that the top-flight financial returns that investors made from a partnership that did business with the company could have been achieved only if the corporation was defrauded, according to documents and people involved in the case.
>
> ... He indicated to the S.E.C. and to investigators for a special committee of the Enron board that such returns – which were as high as 2,500 percent in one transaction – could not have been achieved through arms-length transactions, according to these people and investigative notes.

Kurt Eichenwald, "Enron Ex-Chief Said to Voice Suspicion of Fraud," *N.Y. Times*, Apr. 24, 2002 (Ex. 31).

Thus, at the very least, DLJ's involvement in LJM2 helps support a finding of a strong inference that DLJ, acting as the agent of and under the control of CSFB USA, knew or was reckless in disregarding that LJM2 was used to falsify Enron's financial reports. This knowledge, imputed to CSFB LLC upon the integration of the two companies, is more suspicious in light of the other well-pleaded facts in the First Amended Complaint, such as Mr. Nath's involvement in structuring many of the fraudulent off-balance sheet entities and their connection with LJM2.[66]

3. Additional Facts Demonstrating the CSFB Defendants' Knowledge that Their Prepay Oil Swap with Enron Was Really a Disguised Loan

After the Merger (and, thus, after DLJ Parent became CSFB LLC's parent and DLJ was integrated into CSFB LLC), CSFB LLC – under the control and at the direction of DLJ Parent/CSFB USA – entered into a fraudulent prepay transaction with Enron. ¶706. This disguised loan, much like those entered into by J.P. Morgan Chase and Citigroup, was known by CSFB LLC to be fraudulent and deceptive. Various internal CSFB LLC e-mails released by Congressional investigators indicate that persons at CSFB LLC believed the prepay to have "reputation risk" as it was really an "oil-linked loan" with a "fixed interest rate" that was an "accounting driven transaction" to be "booked in [Enron's] oil swap book and not treated as debt." *See* Ex. 32.[67] In denying CSFB LLC's initial motion to dismiss the Court noted:

> Credit Suisse First Boston is also alleged to have made another disguised "loan" or sham swap of $150 million, to be repaid over two years to Enron in 2000 in payments varying with the cost of oil. According to the complaint, it was not a swap because Enron was paid up front. Moreover, ***Credit Suisse First Boston's***

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[66] According to a former Enron employee, "***Monetise***" was the buzzword. Everyone was always saying: "'We have to monetise this.'" The quick-fix solution was: "'***We'll sell it to LJM, or to Raptor, or to whatever the partnership of the month was .... They'd pick up the phone and Larry Nath would come down to Houston for a week or two and sit down with the ... accountants and come up with something***.'" Mr. Nath would gather with a group from Enron's treasury and global finance departments known inside the Company as "'Fastow's field marshals.'" ¶708.

[67] Most of the referenced e-mails are between, among others, James Moran and Osmar Abib. Osmar Abib is a managing director of CSFB LLC's banking team and energy group and James Moran is a director of CSFB LLC's energy group. *See, e.g.*, "Credit Suisse Agrees to Depositions in Enron Case," *Bank & Lender Liability Litigation Reporter*, Apr. 3, 2003 (Ex. 33); "The Fall of Enron; Seven Credit Suisse officers subpoenaed; Examiner plans to query executive from other banks," *Houston Chron.*, Mar. 7, 2003 (Ex. 34). These e-mails postdate the Merger, at which time Mr. Abib and Mr. Moran were employees of CSFB LLC, which was an integrated entity with DLJ, working at the direction of DLJ Parent/CSFB USA.

> ***spokesman, Pen Pendleton, is quoted as conceding; "It was like a floating-rate loan. We booked it as a loan."***

Enron, 235 F. Supp. 2d at 699. These allegations have not changed, and, as such, plaintiffs have pleaded a strong inference that each of the CSFB Defendants acted to falsify Enron's financial reports and knew those reports to be false.

IX. CIBC World Markets Corp., f/k/a CIBC Oppenheimer Corp. and CIBC Are Subject to Liability for All Claims Asserted Pursuant to the Well-Pleaded Allegations of the First Amended Complaint[68]

Ignoring this Court's prior holdings, CIBC and CIBC World Markets Corp.[69] (collectively, the "CIBC Defendants") seek dismissal of plaintiffs' new allegations even though these new allegations only add detail and particularity to claims this Court has twice found sufficient at this stage of the proceedings. The CIBC Defendants' position is untenable. Rather than move forward with discovery towards an ultimate determination in this matter, the CIBC Defendants wish to (without offering new authority) reargue issues already determined. The Court has already denied CIBC's motion to dismiss and separate motion for summary judgment, and established the legal framework applicable to plaintiffs' claims against CIBC in this case. As the First Amended Complaint does not alter the allegations made against CIBC, and conforms allegations made against CIBC World Markets Corp. to the Court's prescribed framework, the CIBC Defendants' motion to dismiss should be denied.

A. The First Amended Complaint Sufficiently Alleges Claims Against Both CIBC and CIBC World Markets Corp. for Violating the Federal Securities Laws

In arguing that plaintiffs no longer state a viable claim against CIBC, the CIBC Defendants misrepresent the nature of plaintiffs' allegations. These defendants would have the Court believe that plaintiffs' allegations in the First Amended Complaint are somehow less viable than those previously alleged against CIBC and upheld by the Court. *See, e.g.*, CIBC Motion at 14-19. Plaintiffs' First Amended Complaint simply adds new named defendants and provides greater detail.

Plaintiffs' Consolidated Complaint and First Amended Consolidated Complaint both allege that the bank parent company defendants (*e.g.*, CIBC) acted through their wholly owned subsidiaries, divisions and/or affiliates (referred to collectively as subsidiaries herein) to perpetrate the fraudulent

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[68] This Argument addresses CIBC Motion §§II and IV.

[69] CIBC World Markets plc has not filed any motion to dismiss in this action, as it is an English entity that has not yet been served. *See* CIBC Motion at 1 n.2. As such, plaintiffs make no arguments as to that entity herein despite the fact that the CIBC Defendants make passing assertions as to the adequacy of the First Amended Complaint with respect to CIBC World Markets plc. CIBC Motion at 14.

Enron scheme. The Court addressed this matter in denying CIBC's motion for summary judgment. *See* May 22, 2003 Order. Plaintiffs allege – as they did previously – that each parent company is liable for its own primary actions in furtherance of the fraudulent scheme, including the direction of its subsidiaries to act in furtherance of the scheme. *See, e.g.*, ¶103(a). The CIBC Defendants ask the Court to believe that plaintiffs' claims now fail because each fraudulent action can only be attributed to one defendant, the subsidiary that committed the act.[70] This is not only factually incorrect, as many of the defendants corroborated and acted together, but it is at odds with universally accepted legal thought.

It is hornbook law that both the agent and principal are liable for the wrongs of the former. *See, e.g.*, *Enron*, 2003 U.S. Dist. LEXIS 1668, at *30 ("'As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts.'"). Moreover, the CIBC Defendants misconstrue Lead Plaintiff's theories of liability, as most recently articulated in plaintiffs' oppositions to the summary judgment motions filed by defendants Citigroup, Bank of America and CIBC.[71] The Court has already accepted Lead Plaintiff's theories of liability; and done so specifically with respect to CIBC.[72] Indeed, CIBC's arguments in an attempt to revisit issues decided on its

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[70] For instance, CIBC argues: "In amending their complaint, however, plaintiffs have ***admitted*** that CIBC itself was not the source of analysts' statements, was not an underwriter, and was not always the CIBC entity that provided credit financing and loans to Enron. At the very least, any claims for primary liability against CIBC based on those activities should be dismissed." CIBC Motion at 16 (emphasis in original). Plaintiffs, however, admit no such thing. To the contrary, plaintiffs assert quite clearly that the CIBC entities engaging in each of these activities did so at the direction of and as the agent of CIBC. ¶¶103(a)-(d).

[71] Plaintiffs incorporate by reference the entire briefing in opposition to CIBC's motion for summary judgment.

[72] As this Court held in its May 22, 2003 Order:

> Lead Plaintiff raises several legal theories for imposing liability against Bank of America, CIBC, and [their] subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment, and do not require piercing the corporate veil: control person liability under §15 of the 1933 Act and §20(a) of the 1934 Act; enterprise liability; and common-law agency principles.

Order at 2; *see also* June 19, 2003 Order (upholding same legal theory as to defendant Citigroup).

motion for summary judgment lack merit. *See* CIBC Motion at 8.[73] This is the law of the case and the Court need not address these same issues again.[74]

B. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and PSLRA Particularity Requirements

1. The CIBC Defendants' Interpretation of Rule 9(b) and the PSLRA Elevates Form Over Substance to Reach Results Wholly Unsupported by the Law

Plaintiffs do not dispute the CIBC Defendants' insistence that the First Amended Complaint must comply with the heightened pleading standards of Rule 9(b) and the PLSRA. Here, as is detailed below, there is no doubt that plaintiffs' allegations satisfy Rule 9(b) and the PSLRA. Quoting the Fifth Circuit, this Court noted:

> "The PSLRA was enacted, in part, to compensate for 'the perceived inability of Rule 9(b) to prevent abusive frivolous strike suits.' It was not enacted to raise the pleading burdens under Rule 9(b) and section 78u-4(b)(1) to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions."

Enron, 2003 U.S. Dist. LEXIS 3786, at *119.

Further, even in securities fraud actions under the PSLRA, particularity requirements are viewed within context. "'[C]ourts should be "sensitive" to the fact that application of the Rule prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud."' Accordingly, ***the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control.***" *McNamara*, 197 F. Supp. 2d at 672. This is such an instance. The number of different CIBC entities all working at

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[73] For example, the crux of CIBC's argument is that plaintiff's enterprise theory of liability does not "provide[] ***an additional basis***, separate and apart from 'control person' liability, for holding a parent company liable for the actions of its subsidiary in a securities case." CIBC Motion at 18. That simply is not true. Not only are the federal securities laws intended to stop all fraud committed in connection with the purchase or sale of securities, but the Fifth Circuit has ***specifically held that Congress did not intend "to restrict secondary liability for violations of the acts to the controlled persons formula set out in §§ 15 and 20(a)."*** *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1118 (5th Cir. 1980).

[74] *See, e.g.*, *Gochicoa v. Johnson*, 238 F.3d 278, 291 (5th Cir. 2000) (J. Harmon sitting by designation) ("[T]he doctrine of the law of the case posits "'that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states of the same case.'" This rule serves to promote policies of both finality and judicial efficiency.... If the issue has been decided either explicitly or by implication, however, the law of the case doctrine governs.").

the direction of the parent pursuant to a maze of corporate interconnections, in addition to the sheer complexity of the Enron fraudulent scheme and its thousands of affiliates and related entities, cautions against the hyper-technical application of the particularity requirements.

2. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and the PSLRA As to CIBC

The CIBC Defendants assert that plaintiffs fail to allege with particularity the fraud perpetrated by CIBC. CIBC Motion at 15. As detailed above, the Court has already found that plaintiffs' allegations as to CIBC are sufficient, and those allegations have not changed. The Court need not even address these already-decided issues, and the CIBC Defendants provide the Court with no good reason to do so. Yet, the CIBC Defendants again argue that the claims against CIBC ought be dismissed because plaintiffs "simply 'lump[] all of the defendants together'" improperly. *Id.* This is not true.

As most recently demonstrated in plaintiffs' opposition to CIBC's Motion for Summary Judgment and the Court's Order denying CIBC's Motion, plaintiffs' theory of liability against CIBC is principally that CIBC acted through its subsidiaries in furtherance of the fraudulent scheme. In the First Amended Complaint, to the extent individual CIBC entities (particularly the CIBC subsidiaries) acted in a specific manner in furtherance of the fraudulent scheme, it is clear from the context of each allegation and ¶¶103(a)-(d) whether a particular CIBC subsidiary is being implicated. As such, plaintiffs have not improperly lumped any of the CIBC Defendants together – particularly not CIBC, who plaintiffs allege participated in each facet of the fraud involving any CIBC entity, and who is responsible for being a control person. *See supra* §VI.

Assuming, *arguendo*, plaintiffs' allegations might be construed to be group pleading, there is no basis for the usual criticism of such pleading.[75] Here, we are not dealing with individual human beings (whose wealth is wholly independent from another defendant's) but a multinational conglomerate that reports consolidated financial information and issues only one dividend to the

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[75] *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *31 ("Without requiring the pleading of a specific factual basis demonstrating an individual's personal participation in tortious conduct, application of the group pleading doctrine might well result in a presumption that an innocent and unknowing officer of a corporation or firm is liable for group-published information created by another, which offends the pleading requirements under the PSLRA and Rule 9(b).").

parent company's shareholders. Further, unlike individual humans with independent reputations to uphold, the purportedly separate CIBC Defendants repeatedly referred to themselves collectively and hold themselves out to the public as a single enterprise.

Accordingly, this is not the typical situation where group pleading might be thought to result in an innocent individual corporate officer paying for the transgressions of her guilty work associate; rather it is the unique situation where two purportedly separate defendants (and their affiliates) acted together and through one another. Thus, in addition to the fact that the First Amended Complaint alleges liability for each CIBC Defendant with particularity, the usual group pleading concerns are nowhere to be found as to the CIBC Defendants.

3. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and the PSLRA as to CIBC World Markets Corp.

The CIBC Defendants assert "any Section 10(b) claim against CIBC World Markets would have to be dismissed for failure to meet the basic requirements of Rule 9(b) and failure to meet the heightened pleading requirements of the PSLRA." CIBC Motion at 11.[76] The entire basis for their position, however, is reliant upon a faulty reading of the First Amended Complaint.

The CIBC Defendants claim that the "***only*** conduct that CIBC World Markets is alleged to have engaged in consists of issuing analysts' reports, providing underwriting services and ... 'providing Enron credit financing and loans,'" which can be found exclusively in ¶103. CIBC Motion at 11 (emphasis in original). The argument continues: "Plaintiffs do not allege that CIBC World Markets did anything else with respect to Enron." *Id.* Such gloss hides the truth; plaintiffs plead explicit and detailed allegations that both CIBC and its subsidiary CIBC World Markets worked jointly to commit numerous fraudulent acts in furtherance of a massive scheme. Plaintiffs do not allege that CIBC World Markets merely issued false analyst reports or merely lent Enron money. Rather, plaintiffs' First Amended Complaint alleges that CIBC World Markets issued analyst reports known to be false and made secret off-balance sheet loans to Enron that were purposefully structured

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[76] The CIBC Defendants collectively refer to CIBC World Markets Corp. and CIBC Oppenheimer as CIBC World Markets.

to deceive the investing public as to Enron's financial health and were intended to falsify Enron's financial reports.

The CIBC Defendants twist the First Amended Complaint beyond recognition when they state that "plaintiffs do not allege that CIBC World Markets had any involvement in" the "three off-balance sheet entities or transactions" the Court previously focused upon in denying the motion to dismiss of CIBC. *See* CIBC Motion at 3.

For instance, the First Amended Complaint alleges that CIBC worked together with and through CIBC World Markets to perpetrate the massive fraud known as Project Braveheart, Enron's crooked pilot video program. *See, e.g.*, ¶¶725-730. Likewise, the First Amended Complaint specifically alleges CIBC World Markets issued false and misleading analyst reports and failed to disclose that CIBC World Markets had entered into the fraudulent Project Braveheart transaction with Enron. *See, e.g.*, ¶¶251, 269, 323. Moreover, CIBC represented as an undisputed fact in its summary judgment briefing that: "CIBC World Markets Corporation issued the research reports regarding Enron ...." *See* CIBC Motion for Summary Judgment at 4. This is more than enough to state a claim against CIBC World Markets.

In denying the first motion to dismiss by CIBC, the Court stated: "[A]ware of the fragility of Enron's financial condition and CIBC's overall exposure to Enron, CIBC did not demand that Enron honor its secret guarantee and refused to disclose its economic relationship with Enron or its affiliates, but instead used boilerplate disclosures in its analyst reports on Enron to conceal its investment and its resulting conflicts of interest." *Enron*, 235 F. Supp. 2d at 626. The Court further held: "During the New Power and ***Project Braveheart*** deals, in which CIBC's alleged involvement ***would have had to give rise to its actual knowledge or a reckless disregard*** of fraud, the complaint points out ***that CIBC continued to issue positive analyst reports with boilerplate disclosures*** ...." *Id.* at 702.[77] The very same logic applies to CIBC World Markets. CIBC World Markets played a primary role in the fraudulent Project Braveheart. It knew Project Braveheart was a fraud.

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[77] Plaintiffs attach a copy of the analyst reports issued by CIBC World Markets on Oct. 17, 2001 and July 14, 1998 for the Court's review, indicating that CIBC World Markets nowhere revealed that it had entered into such a transaction with Enron (or even altered substantially its boilerplate disclosures concerning conflicts of interest). *See* Ex. 35.

Nonetheless, CIBC World Markets continued to issue false statements about Enron that failed to disclose its material conflict of interest.

Particularity is required, in part, to put a defendant on notice of the claims against it. CIBC World Markets cannot legitimately deny that it has been given such notice. Plaintiffs charge CIBC World Markets with, among other things, issuing false analyst reports throughout the Class Period (*see, e.g.*, ¶¶113, 120, 132, 148, 151, 161, 176, 183, 194, 199, 207, 230, 251, 269, 323, 334, 349, 372); selling securities via false prospectuses and offering circulars (*see, e.g.*, ¶¶641.2, 641.37, 641.38, 718-723); and playing a primary role in fraudulent transactions with Enron (*see, e.g.*, ¶¶725-732).[78] As to each false analyst report and prospectus, plaintiffs provide the requisite "who, what, when, and where" and state the reasons why each of those statements are false as this Court and the Fifth Circuit requires. *See Enron*, 235 F. Supp. 2d at 570. With respect to CIBC World Markets and the fraudulent Enron scheme, including Enron's fraudulent transactions such as Project Braveheart and Hawaii 125-0, plaintiffs have also pled with particularity how these transactions were used to manipulate Enron's reported financial results, and how CIBC and CIBC World Markets acted to further these fraudulent transactions. *See* ¶¶725-732. This is all that can be asked of a plaintiff at this stage in the proceedings.

C. The First Amended Complaint Properly Alleges that CIBC World Markets Acted With Scienter

CIBC World Markets asserts that it is unclear whether it is named as a defendant for violating §10(b) and Rule 10b-5 promulgated thereunder. *See* CIBC Motion at 11. This is nonsense. Plaintiffs' First Claim For Relief clearly names each of the original bank defendants named in plaintiffs' Consolidated Complaint and its individual subsidiaries that have been added to the First Amended Complaint by referring to them collectively as had been previously defined. *See* ¶¶103,

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[78] CIBC admits, as it must, that it is clear CIBC World Markets is the CIBC entity that acted as the underwriter for the NewPower IPO. *See* CIBC Motion for Summary Judgment at 4. Notably, CIBC World Markets' attempt to dismiss claims against it for violating §11 of the 1933 Act and §10(b) of the 1934 Act with respect to this offering were recently denied by Judge Brieant in the Southern District of New York. *See In re NewPower Holdings, Inc. Sec. Litig.*, No. 02 Civ. 1550 (CLB), Order (S.D.N.Y. Apr. 17, 2003) (Ex. 36). As is made clear in the First Amended Complaint, ¶731, and in Judge Brieant's opinion at 4, the NewPower IPO was part of a larger fraudulent scheme to defraud Enron's shareholders.

993. Where plaintiffs did not intend to refer to a bank holding company and its subsidiaries collectively, it did so – as is clear in the First Claim For Relief. *See* ¶995.1.

According to the CIBC Defendants, "assuming" that Lead Plaintiff does intend to sue CIBC World Markets, the conduct alleged does not give rise to a strong inference of scienter. CIBC Motion at 11. This is wrong. As argued above, the Court previously held: "During the ***New Power*** and ***Project Braveheart*** deals, in which CIBC's alleged involvement ***would have had to give rise to its actual knowledge or a reckless disregard*** of fraud, the complaint points out ***that CIBC continued to issue positive analyst reports with boilerplate disclosures*** ...." *Enron*, 235 F. Supp. 2d at 702. This applies as much to CIBC World Markets as it does to CIBC.

CIBC World Markets, as has been detailed above and in the First Amended Complaint, had substantial involvement in both Project Braveheart and the New Power deal. *See* ¶¶103(b), (d), 725-731. While CIBC World Markets did so as an agent of CIBC, CIBC World Markets was no "dupe" or mere "flunky" that failed to realize the import of its actions in furtherance of the fraudulent scheme. Rather, CIBC World Markets is an investment bank made up of professional financiers with expertise in such matters and whose burden in performing due diligence on the several offerings it underwrote for Enron and its related entities should have put it on clear notice of the true facts concerning Enron's business. *See*, *e.g.*, ¶¶103(b), 642, 718-719. Thus, plaintiffs' well-pleaded allegations as to CIBC World Markets support a strong inference of scienter.

X. J.P. Morgan Chase & Co., JP Morgan Securities Inc., and JP Morgan Chase Bank Are Subject to Liability for All Claims Asserted Pursuant to the Well-Pleaded Allegations of the First Amended Complaint[79]

Ignoring this Court's prior holdings, J.P. Morgan Chase & Co., JP Morgan Securities Inc. and JP Morgan Chase Bank (collectively, the "J.P. Morgan Defendants") seek dismissal of plaintiffs' new allegations even though these new allegations only add detail and particularity to claims this Court has already found sufficient at this stage of the proceedings. The J.P. Morgan Defendants' position is untenable. They claim: "It is impossible here to differentiate in the voluminous Amended Complaint the alleged actions or knowledge of one JP Morgan Chase Entity from those of another." J.P. Morgan Motion at 10. This is not true. *See* ¶¶100(a)-(c).

The J.P. Morgan Defendants know very well which J.P. Morgan entities are responsible for the acts alleged in the First Amended Complaint. Indeed, the Answer of Defendant J.P. Morgan Chase & Co. to the Consolidated Complaint repeatedly asserts that specific allegations (unchanged in the First Amended Complaint) concerned not J.P. Morgan Chase & Co. ("JPMC") but its subsidiaries JP Morgan Securities Inc. (successor to Chase Securities, Inc., collectively "JPMSI") and JP Morgan Chase Bank (successor to The Chase Manhattan Bank, collectively "JPMCB"). *Id.* At the same time, JPMC did not move for a more definite statement of plaintiffs' allegations pursuant to Fed. R. Civ. P. 12(e), which is telling.[80]

Further, J.P. Morgan has provided Congressional investigators a summary of the securities underwriting, advisory and credit facility services it provided Enron, which specifically lists each "Project Name" and indicates which J.P. Morgan Entity – almost exclusively JPMSI or JPMCB and their predecessors – acted as primary participants in each project. *See* Ex. 37. Finally, all three J.P. Morgan Defendants acted with scienter, as each knew full well that J.P. Morgan's secret loans to Enron via the Mahonia transactions were made to falsify Enron's reported financial results and hide

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79 This argument addresses J.P. Morgan Motion §§II and V.

80 *See, e.g.*, *Initial Pub. Offering*, 241 F. Supp. 2d at 333 ("Moreover, this failure, if it exists, is not a ground for Rule 12(b)(6) dismissal. If the Defendants were truly perplexed by the [operative complaint], they should have filed a motion under Rule 12(e) ....").

its true level of debt. Thus, there should be no doubt as to the involvement and liability of these defendants, or the adequacy of the pleadings against them.

The Court has already established the legal framework applicable to plaintiffs' claims in this case. As the First Amended Complaint does not alter the allegations made against JPMC, and conforms to the Court's prescribed framework the allegations made against JPMSI and JPMCB the motions for dismissal should be denied.

A. The First Amended Complaint Sufficiently Alleges Claims Against the J.P. Morgan Defendants for Violating the Federal Securities Laws

In arguing that plaintiffs no longer state a viable claim against JPMC, the J.P. Morgan Defendants misrepresent the nature of plaintiffs' allegations. These defendants would have the Court believe that plaintiffs' allegations in the First Amended Complaint are somehow less viable than those previously alleged against JPMC and upheld by the Court. *See, e.g.*, J.P. Morgan Motion at 18-10. Plaintiffs' First Amended Complaint simply adds new named defendants and provides greater detail.

Plaintiffs' Consolidated Complaint and First Amended Consolidated Complaint both allege that the bank parent company defendants (*e.g.*, JPMC) acted through their wholly owned subsidiaries, divisions and/or affiliates (referred to collectively as subsidiaries herein) to perpetrate the Enron scheme. The Court addressed this matter in denying the motions for summary judgment of certain other bank parent company defendants. *See* May 22, 2003 Order; June 19, 2003 Order. Plaintiffs allege – as they did previously – that each parent company is liable for its own primary actions in furtherance of the fraudulent scheme, including the direction of its subsidiaries to act in furtherance of the scheme. *See, e.g.*, ¶100(a). The J.P. Morgan Defendants would have the Court believe that plaintiffs' claims now fail because the First Amended Complaint "collectively, and indistinctly, groups JPMC, JPMSI and JPMCB" which constitutes "impermissible group pleading." J.P. Morgan Motion at 8. This criticism is unpersuasive, and wrong.

First, the J.P. Morgan Defendants purposefully ignore the First Amended Complaint's actual allegations, which identify the conduct of both JPMC and its subsidiaries. *See infra* §X.C. Second, they misconstrue plaintiffs' legal theories, as most recently articulated in plaintiffs' oppositions to

the summary judgment motions filed by defendants Citigroup, Bank of America and CIBC. *See* May 22, 2003 Order; June 19, 2003 Order. The Court has already accepted both legal theories of liability.[81] This is the law of the case and the Court need not address these same issues again.[82]

B. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and PSLRA Particularity Requirements

1. The J.P. Morgan Defendants' Interpretation of Rule 9(b) and the PSLRA Elevates Form Over Substance to Reach Results Wholly Unsupported by the Law

Plaintiffs do not dispute the J.P. Morgan Defendants' insistence that the First Amended Complaint must comply with the heightened pleading standards of Rule 9(b) and the PLSRA. Here, as is detailed below, there is no doubt that plaintiffs' allegations satisfy the goals of Rule 9(b) and the PSLRA. Quoting the Fifth Circuit, this Court noted:

> "The PSLRA was enacted, in part, to compensate for 'the perceived inability of Rule 9(b) to prevent abusive frivolous strike suits.' It was not enacted to raise the pleading burdens under Rule 9(b) and section 78u-4(b)(1) to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions."

Enron, 2003 U.S. Dist. LEXIS 3786, at *119.

Further, even in securities fraud actions under the PSLRA, particularity requirements are viewed within context. "'[C]ourts should be "sensitive" to the fact that application of the Rule prior

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81 As this Court held in its May 22, 2003 Order:

> Lead Plaintiff raises several legal theories for imposing liability against Bank of America, CIBC, and [their] subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment, and do not require piercing the corporate veil: control person liability under §15 of the 1933 Act and §20(a) of the 1934 Act; enterprise liability; and common-law agency principles. Lead Plaintiff also underlines a number of admissions by these Defendants and presents some evidence, both of which raise issues of fact about the control exerted by the parent company over the subsidiaries.

Order at 2; *see also* June 19, 2003 Order (upholding same legal theory as to defendant Citigroup).

82 *See, e.g.*, *Gochicoa*, 238 F.3d at 291 (J. Harmon sitting by designation) ("[T]he doctrine of the law of the case '"posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states of the same case."' This rule serves to promote policies of both finality and judicial efficiency.... If the issue has been decided either explicitly or by implication, however, the law of the case doctrine governs.").

to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud.'" Accordingly, ***the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control.***" *McNamara*, 197 F. Supp. 2d at 672. This is such an instance. The number of different J.P. Morgan entities all working at the direction of the parent pursuant to a maze of corporate interconnections, in addition to the sheer complexity of the Enron fraudulent scheme and its thousands of affiliates and related entities, cautions against a hyper-technical application of the particularity requirements.

Finally, this Court has already determined that plaintiffs' claims against JPMC may proceed. *See Enron*, 235 F. Supp. 2d 549. Likewise, the Honorable Judge Rakoff, presiding over the action styled *JPMorgan Chase Bank, on behalf of Mahonia Limited and Mahonia Natural Gas Limited, v. Liberty Mutual Life Insurance Co.*, found there to be sufficient evidence for a jury to determine whether the Mahonia transactions devised by JPMCB (acting as the agent of and under the control of JPMC) were fraudulent disguised loans. *See* ¶665.[83] Thus, the First Amended Complaint should not be dismissed as to any J.P. Morgan Defendant for lack of particularity.

2. Plaintiffs' First Amended Complaint Satisfies Rule 9(b) and the PSLRA as to Each J.P. Morgan Defendant

The J.P. Morgan Defendants assert that plaintiffs fail to allege with particularity the fraud perpetrated by them. J.P. Morgan Motion at 8-10. As stated above, the Court has already found that plaintiffs' allegations as to JPMC are sufficient, and those allegations have not changed. Thus, the Court need not even address this already decided issue, and the J.P. Morgan Defendants provide the Court with no good reason to do so. Yet, the J.P. Morgan Defendants argue that the claims against JPMC ought be dismissed because plaintiffs resort to "impermissible group pleading." *Id.* This is not true.

The J.P. Morgan Defendants' particularity argument demonstrates that the J.P. Morgan Defendants wish to re-litigate issues already determined. As most recently demonstrated in the summary judgment briefing before the Court, and the Court's Orders denying certain Bank

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[83] Further, all three J.P. Morgan Defendants knew the Mahonia prepays to be deceptive disguised loans used to falsify Enron's publicly reported financial condition. *See* §II.C.1., *infra*.

Defendants' motions for summary judgment, plaintiffs' theory of liability against JPMC acted through its subsidiaries in furtherance of the fraudulent scheme. In the First Amended Complaint, to the extent that individual J.P. Morgan entities (particularly the J.P. Morgan subsidiaries) acted in a specific manner in furtherance of the fraudulent scheme, it is clear from the context of each allegation and ¶¶100(a)-(c) whether a named defendant subsidiary is being implicated. As such, plaintiffs have not improperly lumped any of the J.P. Morgan Defendants together, particularly not JPMC, who plaintiffs allege participated in each facet of the fraud involving any J.P. Morgan entity, and who is responsible for being a control person. *See supra* §VI.

Particularity is required, in part, to put a defendant on notice of the claims against it. The J.P. Morgan Defendants cannot legitimately deny that they have been give such notice. Plaintiffs charge the J.P. Morgan Defendants with, among other things, issuing false analyst reports throughout the Class Period (*see, e.g.*, ¶¶153, 172, 190, 204, 211, 234, 239, 242, 248, 256, 260, 284, 302, 306, 310, 320, 325, 333, 348, 352, 363, 373, 376, 380, 612-641, 663); selling securities via false prospectuses and offering circulars (*see, e.g.*, ¶¶48, 111, 288, 641.37-641.641.40, 662, 1016.4); and playing a primary role in fraudulent transactions with Enron, such as Mahonia (*see, e.g.*, ¶¶664-668). As to each false analyst report and prospectus/offering circular, plaintiffs provide the requisite "who, what, when, and where" and state the reasons why each of those statements are false as this Court and the Fifth Circuit requires. *See Enron*, 235 F. Supp. 2d at 570.

With respect to J.P. Morgan's involvement in fraudulent transactions in furtherance of the fraudulent Enron scheme, such as the Mahonia prepays, plaintiffs have also pled with particularity how these transactions were used to manipulate Enron's reported financial results, and how the J.P. Morgan Defendants acted to further these fraudulent transactions. ¶¶665-666. This is also clear in the party section of the First Amended Complaint as well. ¶100(b). Indeed, JPMC's Answer to the Consolidated Complaint filed in this action admitted that "JP Morgan Chase Bank, or its predecessor, The Chase Manhattan Bank, had involvement with certain prepaid commodity transactions involving Enron or its affiliates and one or more special purpose entities, such as Mahonia Limited and Mahonia Natural Gas Limited." JPMC Answer to Consolidated Complaint, ¶665(a).

By way of another example, it is also clear that references to analyst reports issued by J.P. Morgan and securities underwriting by J.P. Morgan implicate JPMSI. ¶100(c). JPMC admitted as much. *See* JPMC Answer to Consolidated Complaint, ¶¶655-656, 662-663. Similarly, JPMC admits that its JPMSI unit provided investment banking advice in the proposed merger between Enron and Dynegy, Inc. described in ¶671. *See* JPMC Answer to Consolidated Complaint, ¶671. Thus, there can be no confusion as to who did what, and, thus, no legitimate argument of improper group pleading.

Assuming, *arguendo*, plaintiffs' allegations might be construed to be group pleading, there is no basis for the usual criticism of such pleading.[84] Here, we are not dealing with individual human beings (whose wealth is wholly independent from another defendant's) but a multinational conglomerate that reports consolidated financial information and issues only one dividend to the parent company's shareholders. Further, unlike individual humans with independent reputations to uphold, the purportedly separate J.P. Morgan Defendants repeatedly referred to themselves collectively and hold themselves out to the public as a single enterprise.

Indeed, J.P. Morgan's analyst reports bear the emblem "J.P. Morgan," which, the analyst reports state, "***is the marketing name for J.P. Morgan Chase & Co., and its subsidiaries and affiliates worldwide***." *See, e.g.*, Ex. 38. Furthermore, J.P. Morgan's analyst reports are issued by multiple J.P. Morgan entities worldwide (including JPMSI), ***and are copyrighted by JPMC***. *Id.* Because J.P. Morgan's parent and subsidiaries share a similar name and hold themselves out to the public as affiliated entities, they are often referred to either synonymously or singularly in the press. *See, e.g.*, "The Fall of Enron; Banker can't recall e-mail about trades; Enron deals equated with 'disguised loans'" *Houston Chron.*, Dec. 31, 2002 (Ex. 39).

Accordingly, this is not the typical situation where group pleading might be thought to result in an innocent individual corporate officer paying for the transgressions of her guilty work associate.

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[84] *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *31 ("Without requiring the pleading of a specific factual basis demonstrating an individual's personal participation in tortious conduct, application of the group pleading doctrine might well result in a presumption that an innocent and unknowing officer of a corporation or firm is liable for group-published information created by another, which offends the pleading requirements under the PSLRA and Rule 9(b).").

Rather, it is the unique situation where purportedly separate defendants (and their affiliates) acted together and through one another. Thus, in addition to the fact that the First Amended Complaint alleges liability of each J.P. Morgan Defendant with particularity, the usual group pleading concerns are nowhere to be found as to the J.P. Morgan Defendants.

C. The First Amended Complaint Properly Alleges That Each of the J.P. Morgan Defendants Acted With Scienter

1. All Three J.P. Morgan Defendants Knew That the Mahonia Prepays Were Disguised Loans Being Used to Manipulate Enron's Reported Financial Results and Disguise its True Debt Levels

The very nature of J.P. Morgan's secret loans to Enron *via* Mahonia necessarily demand that JPMC, through its agent JPMCB, knew it was falsifying Enron's financial statements. This Court has already found plaintiffs' allegations sufficient in this regard.[85] Among others, Congressional investigators and Enron's Bankruptcy Examiner have unearthed additional evidence, not reviewed by this Court previously, which provides even greater support for this Court's conclusion and for an ultimate determination by a trier of fact that plaintiffs' allegations are accurate. This new evidence also demonstrates that JPMSI, the investment banking division of J.P. Morgan, knew or recklessly disregarded the truth concerning the Mahonia prepay transactions.

For the sake of brevity, plaintiffs only reference a small portion of the growing mountain of evidence against the J.P. Morgan Defendants. Detailed below is a series of e-mails written by J.P. Morgan's Donald H. Layton, which series is illustrative of J.P. Morgan's knowledge that the Mahonia prepays were disguised loans intended to deceive public investors. Mr. Layton is a high-level employee of J.P. Morgan, who, during the Class Period, was co-CEO of J.P. Morgan's investment banking activities (which is primarily JPMSI) and was one of only several senior officers who sat on JPMC's Executive Committee. *See* Exs. 40-41.

The Executive Committee is responsible for running the day-to-day operations of J.P. Morgan, and includes its most senior officers, including J.P. Morgan's Chairman of the Board and

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[85] *See Enron*, 235 F. Supp. 2d at 696 ("Lead Plaintiff does provide sufficient details to meet the pleading and scienter standards for §10(b) claims relating to J.P. Morgan regarding J.P. Morgan's repeated 'loans' of about $5 billion to Enron, disguised as commodities trades between 1997 and 2000.").

its Chief Executive Officer. Mr. Layton knew that the Mahonia transactions were deceptive. Because of Mr. Layton's position at J.P. Morgan, his understanding of the Mahonia prepays can be imputed (at a minimum) to both JPMC and JPMSI. And since JPMCB structured the Mahonia transactions, its scienter follows as a matter of course.

Mr. Layton's e-mails have been summarized as follows:

> In the Spring of 1999, Donald Layton, Vice Chairman of JPMorgan, began to voice his concerns within JPMorgan regarding whether JPMorgan's systems for monitoring credit exposure adequately reflected JPMorgan's credit exposure under certain transactions, including derivatives transactions and prepay transactions, all of which involved initial disbursements of cash by JPMorgan. Mr. Layton, who had been advised of JPMorgan's prepay transactions with Enron, referred to the up front payment components as "disguised loans" in the various emails he circulated internally at JPMorgan. For example, in an email bearing a subject line reading "PREPAID OIL SWAP," Mr. Layton said "THERE IS A CATEGORY OF 'DISGUISED LOAN' THAT SHOWS UP IN MANY UNITS OF GLOBAL MARKETS. THIS [PREPAID OIL SWAP] IS JUST ONE SUCH EXAMPLE." A few days later, Mr. Layton sent another internal email expressing his growing concern: "WE ARE MAKING DISGUISED LOANS, USUALLY BURIED IN COMMODITIES OR EQUITIES DERIVATIVES (AND I'M SURE IN OTHER AREAS). WITH AFEW [sic] EXCEPTIONS, THEY ARE UNDERSTOOD TO BE DISGUISED LOANS AND APPROVED AS SUCH. BUT I AM QUEASY ABOUT THE PROCESS...." Apparently concerned that officers and employees of JPMorgan were not giving proper consideration to the issues these types of transactions presented for JPMorgan, such as whether the transactions underpriced the loan market and whether the transactions were documented to appropriate loan standards, Mr. Layton then set into motion a "TOP LEVEL REVIEW OF OUR DISGUISED LOANS."

Ex. 42 at 31-33.[86] These e-mails provide more than substantial support of a strong inference of scienter. Indeed, based in part on these e-mails, Enron's Bankruptcy Examiner concluded: "JPMorgan's knowledge of Enron's accounting for the prepay transactions appears to be more than a general understanding. Officers of JPMorgan specifically understood the financial effects of these transactions on Enron's reported financial condition ...." *Id.* at 24.

The Honorable Jed S. Rakoff is in agreement. In ruling on the Consolidated Complaint, this Court relied, in part, upon findings in a collateral proceeding in which JPMCB sought to collect on insurance (known as surety bonds) it had bought with respect to its involvement in the Mahonia

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[86] Of course, a great many other e-mails indicate that many people within J.P. Morgan knew of the deceptive fraudulent scheme. Indeed, Enron's Bankruptcy Examiner quoted one J.P. Morgan employee's e-mail stating: "Enron loves these deals as they are able to hide funded debt from their equity analysts because they (at the very least) book it as deferred rev or (better yet) bury it in their trading liabilities." Ex. 42 at 31-33.

prepays. Commenting on those proceedings, this Court noted: "The judge, the Honorable Jed S. Rakoff, rejected a motion for summary judgment by J.P. Morgan to force immediate payment on the bonds and ruled that there was sufficient evidence to raise a factual issue for trial about whether the surety bonds were part of a larger fraudulent scheme involving Stoneville Aegean Ltd. to disguise loans as a sale of gas." *Enron*, 235 F. Supp. 2d at 642.

Subsequently, Judge Rakoff likewise commented on the contents of the Layton e-mails. He found:

> [A] reasonable juror could find these emails highly probative of the defendants' central contention that ***Chase knew that the prepays*** here in issue, when coupled other aspects allegedly not disclosed to the defendants (but, with the exception of the fact that the resales were to Enron, disclosed to Mr. Layton) ***were really loans that were being disguised as such in the case of outsiders*** but (according to Mr. Layton) should not be so disguised in terms of Chase's own internal records. Indeed, Mr. Layton, a highly experienced banker but one only modestly familiar with the particular transactions here in issue, picked up on this right away ....

JPMorgan Chase Bank v. Liberty Mut. Life Ins. Co., No. 01 Civ. 11523, 2002 U.S. Dist. LEXIS 24518, at *11-*12 (S.D.N.Y. Dec. 23, 2002). For the same reasons that Judge Rakoff found these e-mails to be "highly probative of the ... contention that Chase knew that the prepays ... were really loans that were being disguised," plaintiffs respectfully submit that this Court should likewise rule. *Id.*

2. The J.P. Morgan Defendants' Substantial Business Dealings with LJM2 and Enron Also Support a Strong Inference of Scienter

With respect to the Consolidated Complaint, the Court noted that "in light of the substantial sum J.P. Morgan, a sophisticated business banking entity, poured into LJM2 in the prefunding personal investment and the $65 million line of credit J.P. Morgan extended to the partnership, the Court finds noncredible any contention that the bank would not have reviewed the structure and activities of that entity with care and would sooner or later have discovered its alleged illicit purpose." *Enron*, 235 F. Supp. 2d at 696. The Court also agreed with "Lead Plaintiff's claim that in a short time these investors were rewarded by actual, exorbitant returns (up to 2,500% on one deal and 51% overall within the first year), in view of the implied promises of private placement

memorandum, would raise red flags to any objective party investing in it and especially a party having other business dealings with Enron." *Id.*

However, the Court also asserted that these allegations "by themselves" were not enough to raise a strong inference of scienter. *Id.* While these allegations may not be enough by themselves, they certainly support a strong inference of scienter when combined with plaintiffs' other well-pled allegations. *Id.* at 692 ("[S]cienter must be evaluated in view of the ***totality*** of alleged facts and circumstances, together as a whole, ***with all reasonable inferences drawn in Lead Plaintiff's favor.***").

Now, additional evidence has been unearthed which further indicates that the J.P. Morgan Defendants were substantially involved in structuring some of Enron's illicit SPE transactions, including those involving LJM2.

For example, on January 2, 2003, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs for the United States Senate (the "Senate Subcommittee") issued a report evidencing several such transactions, titled "Fishtail, Bacchus, Sundance, and Slapshot: Four Enron Transactions Funded and Facilitated by U.S. Financial Institutions" (the "Fishtail/Slapshot Report"). J.P. Morgan played a substantial role in the Fishtail and Slapshot transactions, described as a "sham asset sale" and a "sham loan" respectively by the Senate Subcommittee. Ex. 43 at 3. The Fishtail transaction, which involved LJM2, Enron, and JPMSI, created a "sham joint venture" "so Enron could eliminate [paper and pulp trading business] assets from its balance sheet." *Id.* at 9. JPMSI, through its Chase Securities Inc. predecessor, provided an artificially inflated valuation of those assets while JPMCB, through its Chase Manhattan Bank predecessor, provided purported equity funding to the SPE created with LJM2 (Annapurna). *Id.* at 7-8. But, "'Chase never really had any skin in the game'" and its valuation placed on the assets was double that Enron itself had valued the assets at. *Id.* at 10. Thus, the Senate Subcommittee concluded that J.P. Morgan "was paid half a million dollars for ***pretending*** to provide the bulk of financing for this so-called joint venture." *Id.* In so doing, it is inconceivable that the J.P. Morgan Defendants involved did not know that Project Fishtail was established to (and did) falsify Enron's

financial disclosures. This is particularly true in light of J.P. Morgan's other business dealings with both Enron and LJM2.

JPMSI and JPMCB also acted jointly on Project Slapshot, aka Flagstaff.[87] "Slapshot was designed as a tax avoidance scheme that centered on utilizing a one-day, $1 billion 'loan' from [J.P. Morgan] Chase to generate approximately $60 million (U.S.) in Canadian tax benefits, as well as $65 million in financial benefits for Enron." *Id.* at 26. J.P. Morgan received $5.6 million in fees for this June 22, 2001 transaction, and, in return,"provided Enron with a step-by-step description of how the Slapshot transaction was to be executed," complete with descriptions of "fake loans" and its employees "actively assisted in planning and completing the specified steps." *Id.* at 27.

The Senate Subcommittee reached, *inter alia*, the following conclusions: (i) "[J.P. Morgan] Chase constructed and sold Slapshot as a tax avoidance structure whose core transactions was a deception – a sham $1 billion loan that had no economic rationale or business purpose apart from generating ***deceptively*** large tax deductions;" (ii) Slapshot was only possible because of JP Morgan Chase's "initiative and enthusiastic backing;" and (iii) both "[JP Morgan] Chase and Enron had real concerns that Revenue Canada would overturn Slapshot, but ... were willing to continue to use ***deceptive*** strategies to avoid payment of Canadian taxes" anyway. *Id.* at 33.

Thus, there can be little doubt that the J.P. Morgan Defendants' involvement in numerous transactions with Enron's SPEs help support a strong inference that the J.P. Morgan Defendants acted with scienter.

D. Plaintiffs' Texas Securities Act Claim Meet the Pleading Requirements Established by This Court and Should Not Be Dismissed

The First Amended Complaint alleges:

> The Washington Board and each of the members of the Note Subclass acquired the 6.95% Notes and/or the 6.40% Notes from defendants JP Morgan and Lehman Brothers, who were underwriters in this firm commitment offering, and are in privity with JP Morgan and Lehman Brothers.

¶1016.15.

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[87] That Slapshot/Flagstaff was perpetrated by JPMSI and JPMCB was admitted by J.P. Morgan to Congressional investigators. *See* Ex. 37.

This is the only allegation that the J.P. Morgan Defendants challenge with respect to plaintiffs' allegations under the Texas Securities Act. J.P. Morgan Motion at 22-23. This argument is not persuasive as there is nothing faulty with plaintiffs' averments as to privity. The allegation in ¶1016.15 clearly applies to both the Washington Board and the plaintiff sub-class it seeks to represent, and correctly asserts that all of the plaintiffs in the sub-class are in privity with either Lehman Brothers or J.P. Morgan – the two lead underwriters in the offering. Plaintiff Washington Board is in privity with Lehman Brothers, which is clear from the face of its trading records (*see* Ex. 25) and which the Washington Board pled on personal knowledge. Contrary to the J.P. Morgan Defendants' assertion, however, the Washington Board is clearly in privity with one of the two underwriters (Lehman Brothers) and can represent the sub-class of plaintiffs who are in privity with either of the defendant underwriters.

XI. The Merrill Lynch Defendants Are Subject to Liability for All Claims Asserted Pursuant to the Well-Pleaded Allegations of the First Amended Complaint[88]

The Court's rulings, like the federal securities laws, pertain equally to all. Merrill Lynch, apparently, does not seem to think so. Purporting to "apply [] the test articulated by the Court in the December 19 Order," the Merrill Lynch Defendants conclude "the only ***fraudulent*** statements or conduct on which plaintiffs allege reliance were made or undertaken by Enron. Merrill Lynch itself did not say or do anything fraudulent but, under plaintiffs' allegations, assisted Enron in Enron's fraudulent conduct." Merrill Lynch Motion at 3 (emphasis in original). This, like much of the Merrill Lynch Motion, is an incorrect interpretation of the First Amended Complaint and the Court's prior Orders in this action.[89]

With respect to the initial motion to dismiss filed by Merrill Lynch & Co., the Court held:

> Lead Plaintiff has made reference to Merrill Lynch's role in the purported Nigerian barge transaction in 1999. As the Court has indicated in footnote 87 of this memorandum and order, it is one of two potential sham transactions between Enron and Merrill Lynch, the other involving ENA, which in the wake of Congressional investigations have raised significant questions about possible fraud that have drawn substantial attention through media reports. Moreover, ***these two transactions fit the patterns of the scheme alleged by Lead Plaintiff throughout the complaint.*** In the interests of justice, this Court will allow Lead Plaintiff to supplement its claims to include one or both these issues.... ***[T]he facts asserted about these two transactions in the news would raise a strong inference of scienter ....***

Enron, 235 F. Supp. 2d at 703. Plaintiffs have more than satisfied the Court's request, providing a detailed and extensive description of both fraudulent transactions, and adding further support for plaintiffs' other allegations (including those concerning Merrill Lynch's understanding of and profit from the fraudulent LJM2 transactions and the bank's one-sided analyst reports.). ¶¶742.1-.22.

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[88] This argument addresses the entire Merrill Lynch Motion. To the extent Merrill Lynch makes any argument not addressed herein or incorporates by reference arguments raised by other defendants (*see* Merrill Lynch Motion at 2 n.2), plaintiffs incorporate by reference the whole of this opposition brief.

[89] "While it is perfectly proper to use shorthand phrases to describe [plaintiffs'] claims, the Defendants have rewritten the Complaints in a way that they believe favors dismissal. It must be remembered, however, that Plaintiffs are the master of their complaint and 'neither this Court nor the defendant have the right to redraft the complaint to include new claims.'" *Initial Pub. Offering*, 241 F. Supp. 2d at 333.

Extensively quoting sources and providing the level of detail hardly ever found prior to discovery, plaintiffs have more than satisfied their burden.

Testament to the level of particularity found in plaintiffs' allegations, even the Merrill Lynch Defendants make little or no effort to dismiss the claims for failure to plead a strong inference of scienter. Notably, Merrill Lynch also forsakes plaintiffs' prior allegations to focus completely upon the new assertions. Conspicuously absent from the Merrill Lynch Motion's summary of plaintiffs' allegations is any indication that Merrill Lynch repeatedly issued false statements about Enron and its financial condition to the market via analyst reports and securities offering documents. The Court recognized as much in its prior Order with respect to the Consolidated Complaint. *See Enron*, 235 F. Supp. 2d at 651.

Of course, to admit that the First Amended Complaint is replete with such numerous false statements made by the Merrill Lynch Defendants would be to concede that the market relied upon the Merrill Lynch Defendants' actions. And, reliance is the cornerstone argument in the Merrill Lynch Motion. Even more, the Merrill Lynch Defendants' argument neglects that this Court (and the Fifth Circuit sitting *en banc*) already determined that "[r]eliance under prongs (a) and (c) [of Rule 10b-5] can also be established by the fraud-on-the-market doctrine." *Id.* at 693. Thus, the element of reliance may be satisfied even had the Merrill Lynch Defendants not made a misrepresentation. *See infra* §XI.D.

Finally, the Merrill Lynch Defendants seek to avoid liability on loss causation grounds, apparently claiming they should be rewarded for concealing their fraudulent actions until after Enron filed for bankruptcy. This argument is contrary to the law. Loss causation is more than adequately pleaded. *See infra* §XI.D. Accordingly, the suggestion that plaintiffs state no claim as to the Merrill Lynch Defendants is neither sensible nor with basis in the factual allegations, and, plaintiffs respectfully submit, should be denied.

A. Merrill Lynch Is Subject to Primary Liability Under §10(b), Rule 10b-5(b) and §11 for its False Representations to Investors

Contending the "dispositive issue on Merrill Lynch's motion to dismiss the Amended Complaint is the Supreme Court's decision in *Central Bank*," (Merrill Lynch Motion at 10), Merrill

Lynch utterly ignores its liability under Rule 10b-5(b) for making materially false and misleading representations to investors. Merrill Lynch repeatedly issued glowing statements about Enron through analyst reports and offering documents. While the Bank argues "the most that is alleged is that Merrill Lynch engaged in transactions with Enron that were later misrepresented ***by Enron*** in its financial statements," Merrill Lynch Motion at 14 (emphasis in original), the First Amended Complaint actually alleges Merrill Lynch published numerous misleading and false statements in its analyst reports and in the Registration Statements and Prospectuses for the Enron offerings it underwrote. *See* ¶¶130, 135, 142, 147, 149, 162, 181, 201, 208-09, 226, 250, 266, 321, 362, 745-746. It is simply untrue that "the only ***fraudulent*** statements ... on which plaintiffs allege reliance were made ... by Enron." Merrill Lynch Motion at 3 (emphasis in original).

In its December 20, 2002 Order addressing the Consolidated Complaint, the Court recognizes Merrill Lynch is charged with misrepresenting Enron's financial condition on a regular basis:

> ***Merrill Lynch also issued false and misleading statements in Registration Statements and Prospectuses*** for securities sales for which it was one of the lead underwriters, in particular the offering of 27.6 million shares of Enron stock at $31.34 in February 1999.
>
> Furthermore, to help artificially inflate the trading prices of Enron's publicly traded securities, because Merrill Lynch knew that Enron would have to issue substantial additional shares of stock if the price dropped below the various trigger points in its capitalization of a number of Enron-controlled entities and that Enron's investment grade credit rating would be in danger, ***Merrill Lynch's securities analysts issued reports containing false and misleading statements to the securities markets*** about Enron's business, finances, financial condition, and future prospects, including reports dated 1/20/99, 3/31/99, 4/13/99, 4/15/99, 7/14/99, 10/12/99 (Donato Eassey, *Bloomberg*), 10/12/99, 1/18/00, 1/24/00, 4/12/00, 4/13/00 (Donato Eassey, *Houston Chronicle*), 10/17/00, and 10/9/01.

Enron, 235 F. Supp. 2d at 651.

The Court observed these misrepresentations were all part of a larger scheme to defraud:

> The very nature of Defendants' personal and intimate knowledge of the fraud from the alleged direct participation in the Ponzi scheme necessarily makes their highly positive public statements and buy-stock recommendations misrepresentations of the truth. Thus the legal basis of the claims makes irrelevant a specific analysis of each statement, which would be required if they were asserting only claims of a material misrepresentation or omission under Rule 10b-5(b). The alleged absence of effective Chinese walls, which the Court has found adequate in light of the totality of the circumstances, makes knowledge gained in the lending and commercial areas of the banks imputable to their analysts.

Id. at 689. The Court ruled Merrill Lynch's statements were not immunized from §10(b) liability due to cautionary warnings. *Id.* at 689. The Court also found the facts of the sham Nigerian barge deal and fraudulent power swaps "raise a strong inference of scienter." *Id.* at 703; *see* ¶¶742.8-22.

Merrill Lynch's false representations engender primary liability under any reading of *Central Bank*, which emphasizes that:

> The absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5 .... In any complex securities fraud, moreover, there are likely to be multiple violators ....

511 U.S. at 191. Thus, while Merrill Lynch focuses on its scheme and other liability under the anti-fraud provisions of the federal securities laws, Merrill Lynch is still subject to primary liability for its false analyst reports and false statements in Enron's offering documents.

B. Merrill Lynch Is Also Subject to Primary Liability Under §10(b) and Rule 10b-5(a) and (c) As Demonstrated by the Detailed Allegations Concerning its Nigerian Barge Deal and Power Swaps

In addition to prohibiting false statements, Rule 10b-5 makes it unlawful for any person "***directly or indirectly***" to employ "***any*** device, ***scheme***, or artifice ***to defraud***" or to "***engage in any act, practice, or course of business which operates ... as a fraud or deceit upon any person***." 17 C.F.R. §240.10b-5; *see Zandford*, 535 U.S. at 819; *Affiliated Ute*, 406 U.S. at 150-53; *U.S. Quest, Ltd. v. Kimmons*, 228 F.3d 399, 407 (5th Cir. 2000). Merrill Lynch's conduct in this case is proscribed by the statute and Rule if the Bank engaged in either a scheme to defraud or in conduct calculated to operate as a fraud on investors. Accepting plaintiffs' allegations as true, Merrill Lynch did just that.

Merrill Lynch contends its conduct in relation to the Nigerian barge deals and the power swaps, standing alone, did not violate the §10(b) and Rule 10b-5. Merrill Lynch Motion at 16. This is not so. Moreover, accepting plaintiffs' allegations in the First Amended Complaint, Merrill Lynch's conduct here was ***designed*** to create a misleading impression about Enron's financial condition. ¶742.22.

In an effort to enhance its relationship with Enron and reap more investment banking fees, Merrill Lynch entered into two sets of bogus transactions with Enron to boost Enron's fourth-quarter and year-end 1999 profits by approximately $72 million. ¶742.7. In the first transaction, Merrill Lynch "purchased" Nigerian barges from Enron in late December 1999 to create fake earnings for Enron of over $12 million, which contained a secret promise that Enron would repurchase the barges from the Bank six months later. ¶¶742.7-9. Enron guaranteed Merrill Lynch would be "taken out" of the transaction within six months (with a substantial return) and Enron was obliged to resell the barges. ¶¶742.9-.10, 742.12. Because the guarantee to take Merrill Lynch out of the deal within six months could not be documented, Merrill Lynch obtained an oral side agreement from Enron CFO Andrew Fastow. ¶742.12. An internal Merrill Lynch Credit Flash Report for December 23, 1999 characterizes the transaction as a "relationship" loan and bluntly states the "transaction will allow Enron to move assets off-balance sheet and book future cash flows currently as 1999 earnings." ¶742.9.

The head of Merrill Lynch's Structured Finance Group, James Brown, even warned top executives on the Bank's Commitment Committee that the Nigerian barge transaction was bogus. ¶742.10. The barge deal presented "reputational risk" to Merrill Lynch, confessed Brown, because the Bank was participating in "Enron income stmt. [statement] manipulation." *Id.* An internal Merrill Lynch weekly summary of credit transactions added: "***Most unusual transaction of the week was IBK request to approve Enron Corporation 'relationship' loan – ML asked to invest... $7mm equity in Nigerian power project***." *Id.* Merrill Lynch knew this was a phony transaction, designed to deceive investors and creditors, yet it deliberately proceeded to practice that deceit to place the Bank in front of the "pack" of banks seeking to receive massive investment banking fees from Enron. ¶¶742.10-.11.

On June 29, 2000, LJM2 acquired Merrill Lynch's purported interest in the barges for over $7.5 million, providing the agreed-upon 15% return to Merrill Lynch. ¶¶742.14-.15. LJM2's internal view of the transaction further confirmed the existence of the secret buyback guarantee:

> Enron sold barges to Merrill Lynch (ML) in December of 1999, promising that Merrill Lynch would be taken out by sale to another investor by June, 2000. The project could not be sold by June, so with out LJM2's purchase Enron would have

> had to strain the ML/Enron relationship or repurchase the assets and reverse earnings and funds flow on the original transaction.

¶742.15.

In the second transaction, Merrill Lynch created bogus power swaps on December 31, 1999 to inflate Enron's fourth-quarter and year-end 1999 profits by $60 million. ¶¶742.7, 742.18. Enron North America had significant, incomplete power plant construction projects in the Midwest, but Enron could not book revenues from those projects because they were still under construction. ¶742.17. Consequently, these assets were a drain on Enron's financial statements. *Id.* In late 1999, Enron asked Merrill Lynch to act as a strawman and "purchase" contracts based on the future revenues of the incomplete plants, with the promise that Enron would ensure the contracts were repurchased or cancelled out in the future at a profit to Merrill. *Id.* Again, Merrill Lynch acted to deceive investors. *See id.*

Merrill Lynch "purchased" future power swaps extending four years in transactions documented as occurring in the last hours of Enron's 1999 fiscal year. ¶¶742.18, 742.20. Merrill Lynch conditioned its participation in the bogus power swaps upon Enron's clandestine agreement to cancel the swaps after Enron reported its 1999 earnings. ¶742.20. No energy was ever exchanged, and Merrill Lynch never exercised any of the purported documented rights associated with the swaps. *Id.* Four months later, in April 2000, the transaction was cancelled. *Id.* Merrill Lynch's compensation for participating in and documenting the bogus power swaps was $8 million. *Id.*

Merrill Lynch's conduct in both transactions was designed to deceive. Merrill Lynch knew the bogus power swaps, Nigerian-barges buyback, and LJM2 transactions were devised to inflate Enron's profits to meet Wall Street's expectations and Enron's internal targets, and it viewed those transactions as building "successful momentum" with Enron. ¶742.22. Otherwise, Enron would have missed its fourth-quarter and year-end 1999 targets, and its stock would have plummeted. *Id.* Instead, when Enron met analysts' estimates, its stock price increased at least 27%, and in the following two weeks Enron's executives sold over $80 million in stock. *Id.*

Merrill Lynch's conduct, which was designed to, and did, mislead the market, amounts to the kind of manipulative and deceptive conduct that §10(b) proscribes. Merrill Lynch engaged in a

scheme to defraud and in conduct that operated as a fraud within the meaning of Rule 10b-5(a) and (c).

C. The Alleged Conduct of Merrill Lynch Is Not Mere Aiding and Abetting

Whatever Merrill Lynch may say, *Central Bank* did not abolish liability for violations of Rule 10b-5(a) and (c). *See* Merrill Lynch Motion at 10-14. Any confusion that may once have existed on this point has been put to rest by *United States v. O'Hagan*, 521 U.S. 642 (1997), and *Zandford*, 535 U.S. 813. As this Court held when it denied Merrill Lynch's last motion to dismiss, "[s]ecurities fraud actions under §10(b) and Rule 10b-5 are not merely limited to the making of an untrue statement of material fact or omission." 235 F. Supp. 2d at 577. At that time, the Court stated *Zandford* "made crystal clear that a misrepresentation need not be involved and that a suit could be based on Rule 10b-5(a) or (c)." *Enron*, 235 F. Supp. 2d at 585. Contrary to what Merrill Lynch suggests, *Homestore* does not support Merrill Lynch's claim that it is merely an "aider and abettor" and therefore not liable. *See supra* §V.

Merrill Lynch contends the Nigerian barge sham and the bogus power swaps "cannot be the basis for plaintiffs' claims because plaintiffs cannot allege that they relied upon Merrill Lynch's conduct." Merrill Lynch Motion at 20. Merrill Lynch echoes the Eighth Circuit opinion in *O'Hagan*, which was reversed. If Merrill Lynch, by means of these transactions, actively worked to falsify Enron's financial results to meet Wall Street expectations, the market ***surely did rely*** on the falsification – as the Company's stock price demonstrates. *See* ¶742.22. And, as this Court recognized, plaintiffs allege Merrill Lynch analysts communicated the falsified results to investors in their own reports. *Enron*, 235 F. Supp. 2d at 651.

Reliance here is not measured by investors' knowledge of every detail of each specific defendant's individual actions in the fraudulent scheme, as Merrill Lynch maintains, but by the fact ***that the market was deceived.***[90] *See Basic Inc. v. Levinson*, 485 U.S. 224, 241-45 (1988); *Shores*,

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[90] Merrill Lynch suggests it is unclear whether the fraud-on-the-market even applies to plaintiffs' scheme allegations. Merrill Lynch Motion at 20 ("Even assuming that the fraud-on-the-market doctrine could apply ...."). There is no uncertainty. In *Shores v. Sklar*, 647 F.2d 462, 469-70 (5th Cir. 1981) (en banc), the full Fifth Circuit applied the fraud-on-the-market theory to claims alleged under Rule 10b-5(a) and c), as did this Court in its December 20, 2002 Order. *See Enron*,

647 F.2d at 469. Here, Merrill Lynch and Enron deliberately manipulated Enron's publicly disseminated financial statements through fraudulent transactions with no legitimate business purpose in order to deceive plaintiffs and the class, which they succeeded in doing. This is more than enough to show reliance.[91] *See id.*; *see also Enron*, 235 F. Supp. 2d at 693 ("Reliance under prongs (a) and (c) can also be established by the fraud-on-the-market doctrine: Lead Plaintiff has alleged that the identified contrivances, deceitful devices, schemes and courses of business operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings, thereby artificially inflating the value of Enron's publicly traded securities and continuing to attract funds from the investing public or encouraging shareholders not to sell."); *Lernout*, 236 F. Supp. 2d at 174 ("Consistent with its interpretation of the reach of §10(b) and Rule 10b-5, the Court holds that plaintiffs can satisfy the reliance requirement by alleging facts sufficient to show (1) that defendants substantially participated in a fraudulent scheme; and (2) when the scheme is viewed as a whole, the plaintiffs relied on it.").

Along similar lines, Merrill Lynch claims it cannot be held liable as a primary violator because "participation in the transactions as a counterparty to Enron – without any affirmative act of deceit by Merrill Lynch – is not a violation of Section 10(b) and Rule 10b-5." Merrill Lynch Motion at 16. Again Merrill Lynch ignores plaintiffs' allegations for false and misleading analyst reports. Moreover, Merrill Lynch's Commitment Committee actually approved and directed the Bank's participation in the Nigerian barge sham, despite knowing the deceptive nature of the transaction. ¶¶742.10-.11. Merrill Lynch was not an innocent actor, unknowingly swept up in the Enron fraud. It was an active participant.

In support of its argument that "a person who does not himself engage in a manipulative or deceptive act would not be liable as a primary violator, even if he knows that his lawful act was part of a scheme to defraud employed by another person," Merrill Lynch cites the Court's acceptance of

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235 F. Supp. 2d at 693 ("Reliance under prongs (a) and c) can also be established by the fraud-on-the-market doctrine ....").

[91] Contrary to Merrill Lynch's claims, nothing in *Basic* or *Nathenson* allows for rebutting the fraud-on-the-market presumption under the extraordinary facts of this case. *See* Merrill Lynch Motion at 20.

"the SEC's test for primary liability." Merrill Lynch Motion at 14. "This Court [only] applies the SEC's test for primary liability for a material misrepresentation or omission under §10(b) and the second prong of Rule 10b-5(b)." *Enron*, 235 F. Supp. 2d at 692; *see id.* at 590. For scheme liability under Rule 10b-5(a) and (c), "any Defendant that itself, with the requisite scienter, actively employed a significant material device, contrivance, scheme, or artifice to defraud or actively engaged in a significant, material act, practice, or course of business that operated as a fraud or deceit upon any person in connection with the purchase or sale of any security may be primarily liable."[92] *Id.* at 693. Plaintiffs' allegations against Merrill Lynch, as shown above, more than meet this test.

Turning to its settlement with the SEC, Merrill Lynch suggests even the SEC recognizes its malfeasance amounts to nothing more than aiding and abetting liability. *See* Merrill Lynch Motion at 9-10. This was a negotiated settlement, consummated after Merrill Lynch was named a party in this litigation. How this settlement, totaling $80 million, could possibly advance Merrill Lynch's position on its motion to dismiss, or even Merrill Lynch's ultimate defense, is unclear.

Merrill Lynch's efforts to narrow §10(b) and Rule 10b-5 all ignore the fact that §10(b) is designed to be a catch-all, ensuring that defendants cannot escape liability under the federal securities laws by devising novel ways to deceive investors. A district court ought not,

> "dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws."

Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 11 n.7 (1971) (emphasis omitted; quoting *A. T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)); *see Enron*, 235 F. Supp. 2d at 577. Merrill Lynch should not escape liability merely because it was creative in its efforts to deceive Enron investors and garner millions in fees.

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[92] Citing *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997), Merrill Lynch says the Court's opinion conflicts with *Central Bank*. *See* Merrill Lynch Motion at 13 n.4; *see also Enron*, 235 F. Supp. 2d at 695. Merrill Lynch misapprehends Second Circuit authority. As the court in *Rich v. Maidstone Fin.*, No. 98 Civ. 2569 (DAB), 2002 US Dist. LEXIS 24510, at *22-*23 (S.D.N.Y. Dec. 19, 2002), has written, "Despite the language in *Shapiro* and *Wright* that suggests otherwise, the Second Circuit continues to permit plaintiffs to allege 'participation in' a securities fraud scheme as one manner in which a plaintiff may state a claim under § 10(b) and Rule 10b-5."

D. Lead Plaintiff Adequately Pleads Loss Causation Against Merrill Lynch

Merrill Lynch next contends Lead Plaintiff fails to plead loss causation because the "Nigerian Barge Transaction and the Power Swaps did not become publicly known" until April and August of 2002, respectively, "long after the price of Enron securities had collapsed due to the revelation of ***other*** matters." Merrill Lynch Motion at 21. In essence, Merrill Lynch argues for dismissal because it succeeded in concealing the sham Nigerian barge deal and the fraudulent power swaps until after Enron imploded. *See* Merrill Lynch Motion at 21. According to Merrill Lynch, "revelation of other matters," instead of the Nigerian barge and power swap shams, caused Enron's security holders to suffer losses. *Id.* This is nonsense.

It is true that plaintiffs' damages were caused by an assortment of conduct that violated §10(b). Merrill Lynch played a significant role in that conduct. And loss causation is not diminished just because Merrill Lynch's Nigerian barge transaction and power swaps violate Rule 10b-5(a) and (c). Indeed, courts are loathe to apply a restrictive loss causation analysis in scheme cases. "***Whenever the rule 10b-5 issue shifts from misrepresentation or omission in a document to fraud on a broader scale, the search for causation must shift also.***" *Shores*, 647 F.2d at 472. In any event, there is no question about what caused Enron's stock price to dive until Enron's stock was worthless. Among other reasons, the market learned that Enron's financial results had been falsified via illicit transactions and accounting legerdemain. Merrill Lynch's bogus transactions, not unlike the other fraudulent transactions concocted and executed by the Bank Defendants with Enron, were at the center of the fraud that brought Enron down. Merrill Lynch's argument should be summarily rejected.

1. The First Amended Complaint States Sufficient Facts Demonstrating Loss Causation

In ruling on the Consolidated Complaint, the Court held:

> Lead Plaintiff alleges a scheme or course of business in which the various participant Defendants ***engaged*** in and ***concealed a pattern of conduct*** involving the creation of unlawful SPEs and utilizing fraudulent transactions with these entities having no economic purpose other than as contrivances or deceptive devices ***to misrepresent Enron's financial condition*** and defraud investors into continuing to pour money into Enron securities to keep the Ponzi scheme afloat and thereby enrich themselves in a variety of ways.

Enron, 235 F. Supp. 2d at 693. There is no doubt that plaintiffs allege Merrill Lynch acted in furtherance of this scheme by ***engaging*** in and ***concealing*** the "***pattern of conduct ... to misrepresent Enron's financial condition***."[93]

The Nigerian barge deal and the sham power swaps, for instance, "falsely boosted Enron's 4thQ and year-end 99 profits." ¶¶742.7, 742.13, 742.16. "Neither of the transactions had any economic purpose whatsoever, other than to increase Enron's stock price and generate present and future fees for Merrill Lynch," pleads Lead Plaintiff. ¶742.7. Rather than the notoriety of Merrill Lynch's deceptive conduct, it is Merrill Lynch's ***participation*** in the Enron Ponzi scheme, combined with Lead Plaintiff's reliance on the integrity of the trading price for Enron stock, that satisfies the element of causation. *See Shores*, 647 F.2d at 469. *See also Enron*, 253 F. Supp. 2d at 573-74 (stating "reliance" component of a §10(b) and Rule 10b-5 action is viewed as a part of the causation requirement). It is telling that Merrill Lynch again ignores Lead Plaintiff's allegations that it inflated the trading price of Enron securities by releasing false and misleading analyst reports to the public and misrepresenting Enron's financial condition in SEC filings. ¶¶745-746. That too, caused plaintiffs' damages.

When Enron's true financial condition was shown to be different from what had been misrepresented to investors, investors were damaged. This is classic loss causation. Merrill Lynch's actions only need "'***touch***[] upon the reasons for the investment's decline in value.'" *Nathenson*, 267 F.3d at 413 & n.10. They have.

That Merrill Lynch's actions touched upon plaintiffs' losses is not only self evident but also clear from the examples of instances where loss causation is not found. In each instance, some entirely different event caused the drop in the stock price. As put in the seminal Fifth Circuit case *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, 459 U.S. 375 (1983):

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[93] The Nigerian barge deal and the sham power swaps, for instance, "falsely boosted Enron's 4thQ and year-end 99 profits." ¶¶742.7, 742.13, 742.16. "Neither of the 'transactions' had any economic purpose whatsoever, other than to increase Enron's stock price and generate present and future fees for Merrill Lynch," pleads Lead Plaintiff. ¶742.7. Merrill Lynch, moreover, inflated the trading price of Enron securities by releasing false and misleading analyst reports to the public and misrepresenting Enron's financial condition in SEC filings. ¶¶745-746.

> For example, an investor might purchase stock in a shipping venture involving a single vessel in reliance on a misrepresentation that the vessel had a certain capacity when in fact it had less capacity than was represented in the prospectus. However, the prospectus does disclose truthfully that the vessel will not be insured. One week after the investment the vessel sinks as a result of a casualty and the stock becomes worthless. In such circumstances, a fact-finder might conclude that the misrepresentation was material and relied upon by the investor but that it did not cause the loss.

Id. at 549 n.25. Merrill Lynch can point to no such random, unrelated intervening event here.

Furthermore, Merrill Lynch need ***not*** be the ***sole*** reason for the artificial inflation and subsequent decline in Enron's share price. *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). Rather, Merrill Lynch's conduct in Enron's schemes makes it liable for its role – and the damages caused. *See Shores*, 647 F.2d at 469; *see also Enron*, 253 F. Supp. 2d at 573-74 (stating "reliance" component of a §10(b) and Rule 10b-5 action is viewed as a part of the causation requirement).[94]

Merrill Lynch attempts to analogize the cornerstone of its argument, *Robbins v. Koger Props.*, 116 F.3d 1441, 1447 (11th Cir. 1997), to the Fifth Circuit's decision in *Huddleston*. But Merrill Lynch's reliance on *Robbins* is misplaced. According to Merrill Lynch, under *Robbins*, allegations "that the price of a company's stock was artificially inflated due to the fraudulent conduct of the defendants are ***not*** sufficient to satisfy the requirements of loss causation." Merrill Lynch Motion at 22 (emphasis in original).

First, plaintiffs do not merely plead that the price of Enron's publicly traded securities was inflated but assert that those prices dropped upon revelations exposing the existence of the fraudulent scheme in which Merrill Lynch was a primary actor. ¶¶3-4, 74, 79, 81, 364-391, 749, 983-984, 997. In contrast, the *Robbins* plaintiffs "***offered no evidence***" "to link [the fraud] to any decline in the

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[94] Similarly, in *Lernout*, 236 F. Supp. 2d at 165, plaintiffs alleged a defendant company and its financiers, much as Lead Plaintiff pleads here, violated §10(b) and Rule 10b-5 by participating in a "scheme and course of business to defraud" by "setting up, funding, and operating sham entities" and "strategic partners" that executed fraudulent transactions with the defendant company. *Id.* "By establishing reliance, ***plaintiffs have alleged sufficient facts to support transaction and loss causation***," explained the *Lernout* court. *Id.* at 174 n.3. And in *Krogman v. Sterritt*, No. 3:98-CV-2895-T, 1999 WL 1455757, at *2 (N.D. Tex. July 21, 1999), Judge Maloney ruled the plaintiffs had "adequately alleged loss causation as well as reliance" by describing an "***elaborate scheme to artificially inflate and maintain the market price***" of the subject stock. *Id.* at *3.

value of plaintiffs' investment" because, the court determined, the stock dropped on totally unrelated concerns about the availability of financing – not because of ***any*** fraud. 116 F.3d at 1448.

Second, *Robbins* is not the law in the Fifth Circuit – particularly to the extent that Merrill Lynch suggests *Robbins* is inconsistent with binding Fifth Circuit authority in *Shores* or *Nathenson*. For instance, in *Griffin* and *Robertson*, Judge Atlas wrote, "To avoid dismissal for failure to allege causation, Plaintiffs need only allege 'facts which show that Defendants' omissions and misrepresentations ***caused the market price of the stock to be artificially inflated***, and therefore to appear to be a good risk for investment, so that ***when the truth came out about the company's condition, the stock lost value and Plaintiffs suffered a loss***.'" *Griffin v. GK Intelligent Sys.*, 87 F. Supp. 2d 684, 688 (S.D. Tex. 1999); *Robertson v. Strassner*, 32 F. Supp. 2d 443, 449 (S.D. Tex. 1998).[95]

For all these reasons, Merrill Lynch's causation arguments fail.

Merrill Lynch's causation arguments fail.

2. Merrill Lynch's Loss Causation Arguments Are Premature

Even if they were persuasive (they are not), Merrill Lynch's loss causation arguments would not be subject to resolution on a motion to dismiss. The Eighth Circuit, confronted with a similar argument, recently held, "we decline to attach dispositive significance to the stock's price movements absent sufficient facts and expert testimony, which cannot be considered at this procedural juncture [motion to dismiss], to put this information in its proper context." *Gebhardt v. ConAgra Foods, Inc.*, No. 02-3130NE, 2003 WL 21488018, at *5 (8th Cir. June 30, 2003).

In the Fifth Circuit loss causation also is a question for the fact-finder. In *Huddleston*, 640 F.2d at 550, the Fifth Circuit reversed a lower court's decision that held loss causation was "a matter of law" that need not be submitted to a jury. Likewise, in *EP Medsystems, Inc. v. Echocath, Inc.*, 235 F.3d 865, 884 (3d Cir. 2000), the Third Circuit declared loss causation is "most critical at the proof stage" and is "usually reserved for the trier of fact." *Id.* As Judge Atlas stated in *Griffin*, 87 F. Supp.

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[95] *Accord Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 626 (N.D. Tex. 1998); *see also Scattergood v. Perelman*, 945 F.2d 618, 624 (3d Cir. 1991) (plaintiffs need only allege "the market price paid by the plaintiffs exceeded the value of the stock at the time of purchase based on the true facts").

2d at 688 and *Robertson*, 32 F. Supp. 2d at 449, "'whether Plaintiffs can ***prove*** their allegations of loss caution ... is not an appropriate inquiry on a motion to dismiss.'" *Id. Accord Zuckerman,* 4 F. Supp. 2d at 626.

Accordingly, the analysis Merrill Lynch requests the Court to undertake is inappropriate at this stage of the proceedings.[96]

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[96] Even the central authority in Merrill's argument, *Robbins*, was decided after a jury trial, and the Eleventh Circuit, in that case, acknowledged "the loss causation requirement must be applied on a case-by-case basis." 116 F.3d at 1446-47.

XII. Conclusion

For all the reasons stated, Lead Plaintiff respectfully requests that the Court deny the Bank Defendants' motions to dismiss.

DATED: July 17, 2003

Respectfully submitted,

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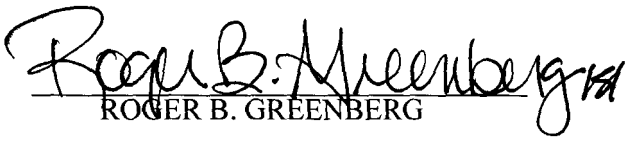

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE BANK DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT has been served by sending a copy via electronic mail to serve@ESL3624.com on this 17th day of July, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE BANK DEFENDANTS' MOTIONS 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 17th day of July, 2003.

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United States Trustee, Region 2
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Deborah S. Granger

Deborah S. Granger