United States Courts
Southern District of Texas
FILED

JUL 3 1 2003

Michael N. Milby, Clerk of Court

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

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	MDL-1446
THIS DOCUMENT RELATES TO: MARK NEWBY, *et al.* Plaintiffs, v. ENRON CORP., an Oregon corporation, *et al.*, Defendants.	CIVIL ACTION NO. H 01-3624 AND CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*, Individually and On Behalf of All Others Similarly situated, Plaintiffs, v. KENNETH L. LAY, *et al.*, Defendants.	

REPLY IN SUPPORT OF DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

1591

I. INTRODUCTION

In Defendant Ken L. Harrison's Motion to Dismiss First Amended Complaint,[1] we argued that a careful review of Lead Plaintiff's actual allegations against Harrison shows that the First Amended Complaint fails to plead the independent element of scienter that is essential to each of Lead Plaintiff's Exchange Act claims. Rather than respond directly to our arguments, Lead Plaintiff mocks us for asking a series of rhetorical questions about the Complaints' scienter allegations.[2] But those questions are not rhetorical; they are precisely the questions that the PSLRA requires the Court to ask and Lead Plaintiff to answer. Indeed, Lead Plaintiff's Opposition only raises a further series of questions, the answers to which defeat Lead Plaintiff's scienter case:

Why does Lead Plaintiff ignore our key legal argument that the Court must disregard ill-pleaded allegations when evaluating scienter? *Because Lead Plaintiff must concede that under the PSLRA only allegations pleaded with particularity may be considered among the totality of circumstances that might give rise to a strong inference of scienter.*

Why does Lead Plaintiff rely on the Court's earlier summaries of the "Management Committee" and "day-to-day business" allegations in the Complaint rather than analyzing the actual allegations as they appear in the First Amended Complaint? *Because Lead Plaintiff must concede that the actual allegations are not pleaded with the particularity required by the PSLRA, as the Court concluded with regard to Derrick, Hirko, and Mark-Jusbasche. Lead Plaintiff could make no principled argument that those allegations were stated with any*

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[1] We will cite our motion as "Harrison's Motion to Dismiss First Amended Complaint (#1494)." Unless otherwise indicated, we will use the same defined terms and references to the record that we used in Harrison's Motion to Dismiss First Amended Complaint (#1494).

[2] Lead Plaintiff's Opposition to Defendant Ken L. Harrison's Renewed Motion to Dismiss ("Opposition to Harrison Motion to Dismiss (# 1570)") at 1. It appears that Lead Plaintiff did not seek or obtain an order from the Court permitting Lead Plaintiff to file its opposition brief later than the June 8 deadline imposed by the local rules. We do not object to having the briefing on Harrison's Motion to Dismiss First Amended Complaint follow the same schedule stipulated between Lead Plaintiff and the Bank Defendants, with oppositions due on July 17 and replies due on July 31, and we file this brief consistent with that schedule.

more particularity as to Harrison because they were exactly the same allegations as to each of those four defendants.

Why does Lead Plaintiff try to bolster its scienter case by relying on allegations that are plainly irrelevant to scienter, such as the allegations that Harrison signed multiple false SEC filings? *Because Lead Plaintiff could find no other way to distinguish Harrison from those former officers and directors who have been dismissed, since the relevant, well-pleaded scienter allegations against Harrison are, in their totality, no stronger than the scienter allegations against Derrick, Hirko, Mark-Jusbasche, and the Outside Directors.*

We respectfully submit that because the relevant, well-pleaded allegations actually made against Harrison do not give rise to a strong inference of scienter, the Court should dismiss all Exchange Act claims against him in the First Amended Complaint.

II. ARGUMENT

A. The Court Should Dismiss The § 10(b) Claim Against Harrison.

Lead Plaintiff faults us for "selectively parsing" the allegations of the First Amended Complaint and ignoring the "totality of circumstances."[3] But we did exactly what the PSLRA requires this Court to do: we analyzed each of the relevant scienter allegations that actually appear in the First Amended Complaint to determine whether any of them meet the PSLRA standard of particularity. As we showed in our opening brief, the key allegations on which Lead Plaintiffs rely do not meet that standard. Indeed, the Court ruled that those very same allegations failed to meet the PSLRA particularity standard as to Derrick, Hirko, Mark-Jusbasche, and the Outside Directors. The very same allegations cannot fail the PSLRA's particularity standard as to certain defendants and succeed as to Harrison.

Where the Court erred (with the continuing encouragement of Lead Plaintiff) was in considering those ill-pleaded (*i.e*, non-particular) allegations among the totality of circumstances that might give rise to Harrison's scienter. Consistent with the PSLRA, the Court properly disregarded those ill-pleaded allegations against Derrick, Hirko, Mark-Jusbasche, and

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[3] Opposition to Harrison Motion to Dismiss (# 1570) at 1.

the Outside Directors. But the Court departed from the PSLRA when it considered those very same ill-pleaded allegations among the totality of circumstances for Harrison. It is this manifest error that we respectfully urge the Court to correct.

1. Under the three-step PSLRA analysis, the Court may not consider irrelevant or ill-pleaded circumstances when evaluating whether the totality of circumstances gives rise to a strong inference of scienter.

In our opening brief we showed that the PSLRA requires courts to ask three questions when analyzing whether an Exchange Act claim can survive a motion to dismiss challenging scienter allegations.[4] First, what relevant facts have the plaintiffs put forward to support scienter? Second, have the plaintiffs stated those facts with particularity? And third, are those facts sufficient to support a strong inference of scienter? If an allegation does not satisfy either of the first two steps, it cannot be considered among the "totality of circumstances" that may give rise to a strong inference of scienter in the third step of the analysis.[5]

It is telling that Lead Plaintiff does not challenge our description of this three-step analysis. That is because the plain language of the statute requires courts to follow those analytical steps when responding to a motion to dismiss focusing on the essential element of scienter. Judge Schiendlien followed those same three steps in *In re Initial Public Offering Securities Litigation*.[6] And this Court followed those same three steps in dismissing the Exchange Act claims against Derrick, Hirko, Mark-Jusbasche, and the Outside Directors. If the Court follows those same three steps as to the actual Harrison allegations, the Court should similarly dismiss the Exchange Act claims against him, as we showed in our opening brief.

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[4] Harrison's Motion to Dismiss First Amended Complaint (#1494) at 14-15.

[5] *See id.*; *see also In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 330, 366-68 (S.D.N.Y. 2003).

[6] 241 F. Supp. 2d at 366-68 (S.D.N.Y. 2003) (applying the PSLRA's three analytical steps to scienter allegations); *see also* Harrison's Motion to Dismiss First Amended Complaint (#1494) at 14-15 (discussing Judge Schiendlin's analysis).

2. Lead Plaintiff relies solely on irrelevant and ill-pleaded circumstances to distinguish Harrison from dismissed defendants.

Because Lead Plaintiff cannot attack our legal analysis, it instead attempts to distinguish the totality of Harrison's circumstances from those of the dismissed defendants. Lead Plaintiff thus rests its argument solely on the third step of the PSLRA scienter analysis. But the "distinguishing" circumstances on which Lead Plaintiff relies in its opposition brief are either wholly irrelevant to scienter, thus failing the first PSLRA step, or are plead without any particularity, thus failing the second PSLRA step.

a. Lead Plaintiff relies on irrelevant circumstances that fail the first PSLRA step.

Lead Plaintiff challenges us for failing to address Harrison's allegedly "false and misleading statements to the market."[7] We ignored those allegations because they are completely irrelevant to the essential element of scienter on which our motion focuses. Harrison certainly did sign some of Enron's Form 10-K and registration statements.[8] And we are willing to assume for purposes of this motion that they were false. But § 10(b) imposes no liability on a defendant who signs false financial statements or otherwise makes misrepresentations to the market unless he also did so with scienter. If the fact of having signed false financial statements had any bearing on the issue of scienter, it would effectively eliminate the independent scienter element from § 10(b) liability.

Likewise, although Lead Plaintiff cites hundreds of paragraphs in support of its contention that Harrison had "specific knowledge" and "knew" of Enron's fraud,[9] all but five of those paragraphs relate solely to the issue of Enron's alleged misrepresentations.[10] They say nothing about whether Harrison or any other defendant knew that there were misrepresentations.

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[7] Opposition to Harrison Motion to Dismiss (#1570) at 3.

[8] As did Mark-Jusbasche, First Amend. Complaint ¶ ¶ 164, 221, and the Outside Directors, First Amend. Complaint ¶ ¶ 109, 110, 126, 134, 141, 164, 221, 292.

[9] *See id.* at 4 (citing First Amend Complaint ¶¶ 121(a), 155(a), 214(a), 300(a), 339(a), 418-611, and 505-16.)

[10] Although those five paragraphs make some reference to knowledge of alleged fraud, none of them is plead with particularity, as we discuss later in this brief.

b. Lead Plaintiff relies on ill-pleaded circumstances that fail the second PSLRA step.

Although Lead Plaintiff does cite the Court to other allegations that might have some relevance to scienter, those allegations do not come close to the PSLRA's particularity requirement.

(1) The "Management Committee" and "day-to-day business" allegations.

Lead Plaintiff continues to rely on the "Management Committee" and "day-to-day" allegations that this Court has found deficient with regard to other defendants. Rather than repeat our earlier arguments, we refer the Court to Harrison's Motion to Dismiss First Amended Complaint (#1494) at 6-11, where we show how the Court properly concluded that these very same allegations failed to meet the PSLRA's particularly requirement as to defendants Derrick, Hirko, and (presumably) Mark-Jusbasche. Plaintiff does not even attempt to defend the particularity of these allegations as to Harrison.

(2) The Board of Directors allegations.

Lead Plaintiff argues that it was significant to Harrison's scienter that he was on the Board when it "approved" the Fastow "waiver conflict" and the formation of LJM2 in the October 1999 Board meeting.[11] But the Court has already twice rejected those allegations as insufficiently particular.[12] Indeed, the Court rejected as insufficiently particular all of Lead Plaintiff's averments regarding purportedly significant meetings of the Board and its committees.[13] Lead Plaintiff's opposition brief highlights the example of the Finance Committee

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[11] Opposition to Harrison Motion to Dismiss (#1570) at 4.

[12] *See* Order re Mark-Jusbasche (#1300) at 4, n.3 (rejecting allegations as "conclusory"); *see also* Order re Outside Directors (#1269) at 133 (103-04) ("Plaintiff has not pleaded the presentation to the Outside Directors [or the rest of the Board] of any specific facts, then or later, that would or should have alerted them to Fastow's alleged misconduct." (emphasis added))

[13] The Court wrote that

> "Lead Plaintiff attempts to demonstrate through minutes of meetings that the members of Enron's board [such as Harrison] and its key committees, which included Outside Directors, had if not actual knowledge of, at the very least access to full information about, and were severely reckless in

meeting of May 1, 2000.[14] There again, the Court ruled that Lead Plaintiff's allegations regarding that meeting do not meet the PSLRA's particularity requirement.[15]

(3) Other miscellaneous general allegations.

Finally, buried among the hundreds of paragraphs that Lead Plaintiff cites at page four of its opposition are five paragraphs that do allege that some unspecified defendants knew of certain allegedly fraudulent transactions.[16] These generalized allegations, of course, do not meet the PSLRA's particularity requirement. This Court has properly rejected the same

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> disregarding, the activities that Lead Plaintiff contends constituted fraud and which were contrary to representations in the financial statements and registrations that they signed as fiduciaries of the corporation. Outside Directors complain that their status as members of the board and of key committees at Enron and their attendance at various meetings, which are minimally summarized in the minutes of those meetings, by themselves, cannot support a claim of fraud against any of them."
>
> "After careful review, this Court agrees with the Outside Directors and finds that both Lead Plaintiff's allegations and the contents of the minutes too brief, general, and imprecise to establish scienter, i.e., that any Outside Director attendees knew or recklessly disregarded fraudulent acts taking place and approved them to further the alleged Ponzi scheme. Instead the references in the minutes to various entities, transactions and problems are merely brief allusions or lists of topics touched on, presented and/or discussed during the meetings, but no particular facts or details about the presentation or discussion are recited that would indicate that the Outside Directors knew or recklessly disregarded that there was a Ponzi scheme afoot or that would suggest that their resolutions as members of the board or committees were intended to further fraud."

Order re Outside Directors (#1296) at 97-98 (emphasis added).

[14] Opposition to Harrison's Motion to Dismiss at 4. Although the minutes of that meeting do indicate that Harrison was in attendance, Harrison did not serve on that or any other Board of Directors committee.

[15] The Court noted with regard to a whole series of minutes earlier submitted by Lead Plaintiff that "**none** of the minutes demonstrates that any facts making these transaction so highly questionable were presented to the members" attending those meetings. Order re Outside Directors (#1269) at 106 (emphasis added.) Those meeting minutes included the minutes of the May 1, 2000 Finance Committee. *Id.* at 106. The Court concluded that the minutes were "lacking identification of any specific facts that would support a strong inference of scienter." *Id.* at 107 (emphasis added.)

[16] *See* First Amended Complaint ¶¶ 433 ("[t]he defendants knew"); 506 ("[d]efendants knew"); 521 ("Enron's top management knew"); 536 ([t]he Enron Defendants * * * realized); 587 ("the Enron Defendants knew").

allegations in dismissing Exchange Act claims against Mark-Jusbasche, Hirko, Derrick, and the Outside Directors.[17]

3. The totality of the relevant, well-pleaded circumstances does not give rise to a strong inference of Harrison's scienter.

After the PSLRA disposes of Lead Plaintiff's irrelevant and ill-pleaded allegations, nothing remains to distinguish the totality of Harrison's circumstances from the totality of circumstances that the Court found significant for the dismissed defendants. We will not repeat here all our earlier comparisons, but instead refer the Court to the comparative analyses regarding Derrick, Hirko, and Mark-Jusbasche in our opening brief.[18] In particular, we refer the Court to the chart comparing the circumstances of Harrison and Mark-Jusbasche at page 17 of that brief, a copy of which page we attach as Exhibit A to this brief.

We do respond, however, to Lead Plaintiff's disingenuous attempts to distinguish three of the circumstances summarized in the attached chart. First, Lead Plaintiff argues that Mark-Jusbasche's one-year service on the Board of Directors was significantly shorter than Harrison's service and did not require Mark-Jusbasche to review or approve certain transactions that Lead Plaintiff persists in arguing are significant to scienter, such as the Fastow conflict waiver and formation of LJM2 addressed at the October 1999 Board meeting.[19] But Lead Plaintiff alleged in its earlier briefing that Mark-Jusbasche did attend that meeting and did approve the Fastow "waiver conflict" and formation of LJM2.[20] More importantly, as we show above, the Court rejected those allegations as insufficiently particular.[21] And as we also show

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[17] The general allegations of knowledge referenced in footnote 15 apply to Mark-Jusbasche, Hirko, Derrick, and the Outside Directors just as much as they apply to Harrison, either by definition ("the Enron Defendants", see First Amend. Complaint ¶ 1(a)) or by virtue of their vagueness ("defendants" and "top management").

[18] Harrison's Motion to Dismiss First Amended Complaint (#1494) at 15-18; *see also id.* at 4-11.

[19] Opposition to Harrison's Motion to Dismiss (#1570) at 5.

[20] *See* Order re Mark-Jusbasche (#1300) at 4, n.3 (analyzing Lead Plaintiff's allegation that Mark-Jusbashe attended the meeting and approved the transactions)

[21] *See id.* (rejecting allegations as "conclusory"); *see also* Order re Outside Directors (#1269) at 133 (103-04) ("Plaintiff has not pleaded the presentation to the Outside Directors [or

above, the Court rejected as insufficiently particular all of Lead Plaintiff's averments regarding other purportedly significant meetings of the Board and its committees, including those that occurred when Harrison was on the Board and Mark-Jusbasche was not. In sum, the fact that Harrison served longer on the Board of Directors than did Mark-Jusbasche is insignificant because Lead Plaintiff does not allege with the particularity required by the PSLRA anything Harrison reviewed or did during his additional time on the Board that might be relevant to Lead Plaintiff's scienter claims. There is simply nothing about Lead Plaintiffs' allegations concerning Board or Board committee meetings that transforms them from being insufficient to allege scienter as to the Outside Directors and Mark-Jusbasche, but sufficient to allege scienter as to Harrison.

Second, Lead Plaintiff argues that Mark-Jusbasche was in a different circumstance from Harrison because she did not conduct Enron's day-to-day business operations, as Harrison allegedly did through his service on the "key Management Committee."[22] Lead Plaintiff knows that each version of its Complaint alleges in precisely the same paragraphs that Mark-Jusbasche and Harrison served on the Management Committee and thereby conducted Enron's "day-to-day" business operations during precisely the same years.[23] Lead Plaintiff's feigned ignorance of the contents of its own Complaints serves no one, least of all the Court. It was appropriate for the Court to ignore Lead Plaintiff's allegations that Mark-Jusbasche served on the Management Committee and conducted Enron's daily business because those allegations were and remain so general that they cannot survive the second "particularity" step of the PSLRA analysis. It is wholly inappropriate for Lead Plaintiff to continue to ignore those

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the rest of the Board] of any specific facts, then or later, that would or should have alerted them to Fastow's alleged misconduct." (emphasis added))

22 Opposition to Harrison's Motion to Dismiss at 5-6.

23 As we showed at page nine of Harrison's Motion to Dismiss First Amended Complaint, paragraph 88 in both versions of the Complaint plainly alleges that Mark-Jusbasche served on the Management Committee and managed Enron's day-to-day operations during the same years as Harrison. We attach as Exhibit B to this brief a copy of page nine of our first brief, which itself includes a photocopied excerpt of Lead Plaintiff's allegations that Mark-Jusbasche served on the Management Committee.

allegations in a sly effort to create a manifestly erroneous basis for distinguishing Mark-Jusbasche from Harrison.

Third, Lead Plaintiff attempts to distinguish Mark-Jusbasche's leadership of an Enron "affiliate" (Azurix) from Harrison's leadership of an Enron "subsidiary" (PGE), as if technical corporate form had any bearing on the issue. The Court characterized leadership of a "subsidiary or an affiliate"[24] as equally significant not because of technical corporate form, but because of the remote relationship between such companies and the fraud centered at Enron's headquarters in Houston. Although it must play a role, geography is only one element in the remoteness the Court has found significant. The other element is Lead Plaintiff's failure to allege with particularity any connection between Enron's fraud and the business of the subsidiary or affiliate. At least as to Azurix and Enron International, Lead Plaintiff attempted to allege a connection. But as to PGE, the subsidiary that Harrison ran, the Complaints are completely silent.

4. It was manifest error for the Court not to dismiss Harrison.

This last point brings us to a somewhat ironic conclusion about the Court's comparative treatment of the § 10(b) claims against Harrison and the officer defendants Derrick, Hirko, and Mark-Jusbasche. Lead Plaintiff attempted to plead that each of those defendants knew of or participated in alleged fraud at their respective Enron divisions, subsidiaries, or affiliates: Hirko at EBS; Derrick at Enron's Legal Department and New Power; and Mark-Jusbasche at Enron International and Azurix. The Court carefully examined those defendant-specific allegations and found them insufficient under Rule 9 and the PSLRA. And along the way, the Court properly rejected Lead Plaintiff's other general allegations about those defendants' service on the Management Committee and alleged management of Enron's day-to-day operations because those allegations were not particular enough to be considered among the totality of scienter circumstances.

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[24] Order re Insiders (#1296) at 6.

In contrast to those defendants and their companies, Lead Plaintiff made no attempt to allege any connection between Enron's alleged fraud and the regulated utility Harrison managed in Portland, Oregon. As a result, there was nothing in the Complaint to focus the Court's attention on Harrison's alleged participation in Enron's fraud. That may help explain why the Court improperly considered the Complaint's ill-pleaded allegations regarding Harrison's service on the Management Committee and conduct of Enron's "day-today" business, even as the Court properly tested and then ignored those same, word-for-word, allegations against Derrick, Hirko, and Mark-Jusbasche.

The resulting irony is that an officer who headed a remote subsidiary that had no connection to the fraud at Enron remains a § 10(b) defendant, even as the Court has dismissed officers whose main distinguishing circumstance from Harrison is that their companies were described in the Complaints as having some connection to that fraud.

It is more than just ironic, though: it is manifest error. We respectfully ask the Court to correct that error and dismiss the § 10(b) claim against Harrison.

B. The Court Should Dismiss The § 20(a) Claim Against Harrison.

If the Court grants Harrison's motion to dismiss the First Claim for Relief under § 10(b), the Court should also dismiss the § 20(a) claim against him. As the Court clearly ruled in the Order re Outside Directors (#1269), because "Lead Plaintiff has failed to plead predicate violations of § 10(b), its claims for controlling person liability under § 20(a) of the Exchange Act also fail."[25] Lead Plaintiff does not ask the Court to reconsider that ruling or even contend that it was wrong.[26] Accordingly, if the Court dismisses the predicate § 10(b) claim against Harrison, the Court should dismiss the § 20(a) claim against him as well, just as the Court did with the Outside Directors.

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[25] Order re Outside Directors (#1269) at 133.

[26] Indeed, Lead Plaintiff takes the position that it must accept the Court's ruling on that point of law, unless it was manifestly erroneous.

C. The Court Should Dismiss The § 20A Claim Against Harrison.

Lead Plaintiff does not dispute that an independent § 10(b) violation by Harrison is a required predicate to any § 20A claim. Therefore, as with the § 20(a) claim, if the Court dismisses the § 10(b) claim, the Court should dismiss all the § 20A claims as well.

In any case, the Court should dismiss the claims of named plaintiffs the Casey Family and Amalgamated Bank for their respective trades on May 10 and 15, 2000 because in each case the plaintiff bought the day before Harrison's challenged sale. Lead Plaintiff offers only the opaque argument that it would be "premature" to dismiss these two particular claims of these named plaintiffs, relying on *In re American Business Computers Corporation Securities Litigation,* 1994 WL 848690 (S.D.N.Y. Feb. 24, 1994). But the court there held that "the term 'contemporaneously' embraces the entire period while relevant material non-public information remained undisclosed." *Id.* at *4 (emphasis added). By contrast, this Court has rejected such a broad definition of contemporaneity, expressly holding instead that "the plaintiff's trades must have taken place after the challenged insider trading transaction."[27] Accordingly, neither the Casey Family, nor Amalgamated Bank, nor any other named plaintiff alleges a trade that was "contemporaneous" with Harrison's sales on either May 11 or May 16, 2000. The Court should dismiss both these claims now.

D. The Court Should Dismiss All Of These Claims With Prejudice.

It has been well over a year since Lead Plaintiff filed its Consolidated Complaint, four months since the Court put Lead Plaintiff on notice of its failure to plead certain key allegations against former officers and directors with the particularity required by the PSLRA, and five months since the Court provided its clear definition of "contemporaneous" trades under § 20A. During that time, Lead Plaintiff has gained access to myriad discovery, both formal and informal. Also during that time, Lead Plaintiff has regularly sought to bolster its claims against other defendants by indicating in briefing how it would formally amend or supplement its Complaints, as well as by informally (and improperly) referring the Court to popular media

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[27] *Id.* at 35 (emphasis added).

reports and other sources outside both the so-called "public record" and Rule 11's certification requirement.

In Harrison's case, however, Lead Plaintiff offers no indication of what relevant, specific additional facts it would or could formally plead. It does not even allude to some news report or some other source in or out of the "public record" that might support the claim that Harrison had scienter of the fraud alleged in the First Amended Complaint. Lead Plaintiff just asks for leave to amend. That is not enough to overcome the appropriate presumption at this late date that Lead Plaintiff cannot sufficiently plead Exchange Act claims against Harrison.

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III. CONCLUSION

For the foregoing reasons, as well as the reasons earlier articulated in Harrison's Motion to Dismiss the Complaint and Motion to Dismiss the First Amended Complaint, Harrison respectfully requests that the Court dismiss with prejudice the First and Second Claims for Relief asserted against him in the First Amended Complaint.

DATED: July 31, 2003.

Respectfully submitted,

TONKON TORP LLP

By: William Martson by permission [illegible]

William F. Martson, Jr., OSB No. 72163
Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
Telephone: 503.802.2005
Facsimile: 503.972.3705
Attorney-in-Charge for
Defendant Ken L. Harrison

Of Counsel:

Michael P. Cash, Texas Bar No. 03965500,
Southern District I.D. No. 5472
Cash Allen L.L.P.
Chase Tower, Suite 6710
600 Travis
Houston, TX 77002
Telephone: (713) 224-6767
Facsimile: (713) 227-6222
e-mail: mcash@cashallen.com

Zachary W.L. Wright, OSB No. 94161
Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
Telephone: 503.802.2041
Facsimile: 503.972.3741
e-mail: zach@tonkon.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** has been served by sending a copy via electronic mail to serve@ESL3624.com on this 31 day of July, 2003.

I further certify that a copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** has been served via overnight mail on the following parties, who do not accept service by electronic mail, on this 31 day of July, 2003:

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

Zachary W.L Wright

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EXHIBIT A

Circumstance	Mark-Jusbasche	Harrison
Worked at a remote subsidiary or affiliate?	Yes. CEO of Enron International, headquartered in Houston, and Azurix, dually headquartered in Houston and London	Yes. CEO of Portland General Electric, headquartered in Portland, Oregon.
Worked at subsidiary or affiliate alleged to be involved in the fraud?	Yes.	No.
Sold Enron stock?	Yes. $82,536,737, representing 100% of her stock.	Yes. $75,416,636, representing 50% of his stock, sold upon his retirement from PGE.
Served on the Board of Directors?	Yes. 2000	Yes. 1998-2000
Served on any committee of the Board of Directors?	No.	No.
Served on the Management Committee?	Yes. 1997, 1998, 1999.	Yes. 1997, 1998, 1999.

EXHIBIT B

We presume that the Court was aware that ¶ 88 of the Complaint expressly alleged that Mark-Jusbasche was a member of the Management Committee for the same years as Harrison, as the following photocopied excerpts show:[24]

> The Enron Defendants' roles on the Enron Management Committee during 97-01 are set forth below:
>
> **Enron Management Committee - 97**
>
> * * *
>
> | | |
> |---|---|
> | Rebecca P. Mark-Jusbasche | Chairman and Chief Executive Officer, Azurix Corp. |
>
> * * *
>
> **Enron Management Committee – 98**
>
> * * *
>
> | | |
> |---|---|
> | Rebecca P. Mark-Jusbasche | Vice Chairman, Enron Corp., Chairman and CEO, Azurix and Chairman, Enron International |
>
> * * *
>
> **Enron Executive Committee - 99**
>
> * * *
>
> | | |
> |---|---|
> | Rebecca P. Mark-Jusbasche | Chairman and CEO, Enron International |

By ignoring these allegations in their entirety, it appears that the Court implicitly recognized the manifest deficiencies of ¶ 88, just as the Derrick and Hirko opinions explicitly recognized them.

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[24] Complaint ¶ 88, at 91-94. With one small exception, the allegations in the First Amended Complaint regarding Mark-Jusbasche's service on the Management Committee are unchanged from those in the Complaint. *Compare id. with* First Amended Complaint ¶ 88, at 106-08. The one small exception is that Lead Plaintiff has changed the heading stating the title of the committee in 1999, adding a parenthetical so that the heading now reads "Enron Executive (Management) Committee" *See* First Amended Complaint ¶ 88, at 107. This reflects Lead Plaintiff's understanding of the key difference between the officers' "Management Committee" and the "Executive Committee" of the Board of Directors. *See* Complaint ¶¶ 86 ,87, at 89-91; *See also* First Amended Complaint ¶¶ 86, 87, at 103-05.