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	§	
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	Consolidated Civil Action No. H-01-3624
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS
THE DEUTSCHE BANK ENTITIES' MOTION TO DISMISS

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS THE DEUTSCHE BANK ENTITIES' MOTION TO DISMISS

Deutsche Bank AG ("DB"), Deutsche Bank Trust Company Americas[1] (formerly known as Bankers Trust Company) ("DBTC"), and Deutsche Bank Securities Inc.[2] (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") (collectively, the "DB Entities") respectfully submit this memorandum of law in support of their motion to dismiss the First Amended Consolidated Complaint for Violation of the Securities Laws in the Newby action (the "Amended Complaint" or "Am. Compl.") pursuant to Fed. R. Civ. P. 12(b), 9(b) and 15.

PRELIMINARY STATEMENT

The Amended Complaint renamed DB to this action. Despite the growth of the Amended Complaint to 648 pages, plaintiffs still have not pled facts giving rise to a strong inference of scienter as to the DB Entities. The Amended Complaint ignores this Court's holding that even under the "creator test" plaintiffs must plead *all* the elements of a Section 10(b)/Rule 10b-5 claim. In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 591 (S.D. Tex. 2002) (hereinafter "December Order"). It is this test and the heightened pleading standards of the PSLRA and Rule 9(b) that mandate the dismissal of claims against the DB Entities.

Most of the Amended Complaint remains directed against others — particularly the public statements, SEC filings and actions of Enron Corporation, including its officers and

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[1] It is a matter of public record that on or about June 4, 1999, Tanus Corporation, a subsidiary of Deutsche Bank AG, merged with Bankers Trust Corporation, owner of 100% of the common stock of Bankers Trust Company Americas. See Olsen DBTC Aff. Ex. 1 ¶ 2. On or about April 15, 2002, Bankers Trust Company changed its name to Deutsche Bank Trust Company Americas. Id. ¶ 4.

[2] Also a matter of public record is the fact that on or about December 3, 1999, BT Alex. Brown Incorporated converted into a Delaware limited liability company named DB Alex. Brown LLC. See Olsen DBSI Aff. Ex. 2 ¶ 3. On or about January 12, 2001, DBSI merged with and into DB Alex. Brown LLC. Id. ¶ 4. DBSI was the surviving company and changed its name to Deutsche Bank Alex. Brown Inc. Id. Subsequent to January 12, 2001, there has been no legal entity registered under the name Deutsche Bank Alex. Brown LLC. Id. On or about March 29, 2002, Deutsche Bank Alex. Brown Inc. changed its name to Deutsche Bank Securities Inc. Id. ¶ 6. Therefore, neither DB Alex. Brown LLC, nor Deutsche Bank Alex Brown Inc. are legal entities capable of being sued as entities distinct from DBSI. See Davis v. Raney Auto Co., 249 S.W. 878 (Tex. Civ. App. 1923) ("It is elementary that suit can be maintained by and against only parties having an actual or legal existence.")

directors ("Enron"), and Enron's former accountants, Arthur Andersen LLP ("Andersen"). The Amended Complaint continues to allege a Section 10(b)/Rule 10b-5 claim against the DB Entities for engaging in the lawful activities of providing banking, financial advisory and underwriting services to Enron, and for issuing research reports (through "Deutsche Bank Alex. Brown" now DBSI) about Enron. The principal change from the previously dismissed Newby Complaint are new allegations that "Bankers Trust" (now DBTC) and DB allegedly structured six tax-saving and income generating transactions (the "Six Structured Transactions" or "SSTs") with respect to which *Enron* reported earnings in its financial statements. Am. Compl. ¶ 797. The new allegations appear to assert that DBTC and DB knowingly designed the SSTs to enable Enron to mislead investors – an assertion that plaintiffs incorrectly claim has been confirmed by Congress and an Examiner appointed by the Enron bankruptcy court (the "Examiner"). The Amended Complaint also asserts claims against DBSI and DB under Sections 12(a)(2) and 15 of the 1933 Act for their role in certain Rule 144A/Regulation S private placements.

All of the newly added allegations concerning the SSTs and all claims now asserted against DBSI and DBTC are time-barred and do not relate back under Rule 15(c). (Point I, below.) The Amended Complaint also fails to state a claim under Section 10(b) and Rule 10b-5 as to the DB Entities because it only alleges that the DB Entities engaged in what were arm's-length transactions, and fails to plead particular facts alleging that: (i) each of the DB Entities engaged in fraudulent activity; (ii) each of the DB Entities acted with scienter; (iii) plaintiffs relied on the SSTs in connection with their purchase of Enron or Enron-related securities; and (iv) the SSTs were a proximate cause of plaintiffs' injury. (Point II, below.) The newly added claim under Section 12(a)(2) also fails to state a claim against DBSI because nowhere is it alleged that the Offering Memoranda ("OMs") contained material misstatements or omissions,

and because the Supreme Court has held that Section 12(a)(2) does not apply to private placements. (Point III, below.)[3] Finally, the Amended Complaint fails to state a claim for control person liability under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act. (Point IV, below).

FACTUAL BACKGROUND

The original complaint in this action was filed on October 22, 2001. On April 8, 2002, plaintiffs, in the Consolidated Complaint for Violation of the Securities Laws (the "Newby Complaint" or "Newby Compl."), first added DB as a defendant, and only as to the First Claim For Relief under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5. Newby Compl. ¶¶ 992-97. On December 19, 2002, this Court granted DB's motion to dismiss. The Amended Complaint, filed on May 14, 2003, renames DB and adds DBSI and DBTC as defendants to the First Claim for Relief under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5. Am. Compl. ¶¶ 992-97. The Amended Complaint also names DB and DBSI as defendants in the new Fourth Claim for Relief under Sections 12(a)(2) and 15 of the 1933 Act. Am. Compl. ¶ 1016.

The Amended Complaint asserts that "Deutsche Bank" and its "Bankers Trust division" devised, structured and executed hundreds of millions of dollars in SSTs for Enron. Am. Compl. ¶ 797.1. In support of their new allegations concerning the SSTs, plaintiffs reference (i) the First Interim Report of Neal Batson, Court-Appointed Examiner, dated September 21, 2002 (the "First Report") (Am. Compl. ¶ 106(b)); (ii) the Second Interim Report of Neal Batson, Court-Appointed Examiner, dated January 21, 2003 (the "Second Report") (Am. Compl. ¶¶ 797.2 & n.17, 797.9, 797.13; and (iii) the Joint Committee on Taxation Report of Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues, and Policy

[3] For the convenience of the Court, and in the interests of brevity, arguments made by other bank defendants in their motions to dismiss have not been repeated. To the extent applicable, however, those arguments are adopted and incorporated in the DB Entities' motion to dismiss.

Recommendations (the "JCT Report") (Am. Compl. ¶¶ 797.3, 797.4, 797.6-797.8, 797.13, 797.14, 797.16-797.18, 797.20, 797.27-797.28).[4] These documents discuss the SSTs.

Given that (i) this Court has taken judicial notice of other public documents;[5] (ii) plaintiffs have previously incorporated amendments to the Newby Complaint in their opposition briefs;[6] and (iii) plaintiffs have indicated an intention to further amend the Newby Complaint,[7] the DB Entities will also address below the recently issued Third Interim Report of Neal Batson, Court-Appointed Examiner (the "Third Report").

The SSTs are: Projects (i) Teresa, closed in March 1997; (ii) Steele, closed in October 1997; (iii) Tomas, closed in September 1998; (iv) Renegade, closed in December 1998; (v) Cochise, closed in January 1999; and (vi) Valhalla, closed in May 2000. Am. Compl. ¶¶ 797.10, 797.11, 3d Report, App. G at 14, 2d Report, App. D at 69. Four of the SSTs (Steele, Cochise, Teresa and Tomas) were structured by DBTC in part for Enron's accounting, tax and other business benefits, and generated future tax benefits that resulted in current income that Enron reported in its financial statements. 3d Report, App. G at 27-28, 36-38, 42-43, 48-49.

Plaintiffs rely, in part, on summaries of the JCT Report and the Examiner's Second Report, yet fail to disclose that the JCT Report: (i) expressly did not deal with accounting or securities law issues in any way, and (ii) with respect to tax issues concluded that the SSTs "were

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[4] This Court may consider documents which are referred to or quoted in the complaint. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 (5th Cir. 2002); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000). "The Court may also consider documents 'integral to and explicitly relied on in the complaint,' . . .as well as the full text of documents that are partially quoted or referred to in the complaint." In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 882 (S.D. Tex. 2001) (Harmon, J.) (citation omitted).

[5] See, e.g., December Order, 235 F. Supp. 2d at 642, 651 n.87, 668 n.103, 688, 698 n.28; In re Enron Corp. Sec. Derivative & ERISA Litig., No. MDL-1446, Civ. A. H-01-3624, 2003 WL 21418157, at *10, 13 (S.D. Tex, April 24, 2003) (hereinafter "April Order").

[6] See, e.g., In re Enron Corp. Sec. Derivative & ERISA Litig., 258 F. Supp. 2d 576, 624-25 (S.D. Tex. 2003) (hereinafter "March Order"); April Order, 2003 WL 21418157, at *6-7; In re Enron Corp. Sec. Derivative & ERISA Litig., No. Civ.A. H-01-3624, 2003 WL 230688, at *5 n.9 (S.D. Tex. Jan. 28, 2003) (hereinafter "January Order").

[7] Joint Motion of Lead Pl. and the DB Entities for Extension of Time at 2, ¶ 4.

designed to satisfy the literal requirements of the corporate tax laws" and "were predicated on the interaction of the corporate tax-free transfer rules and the basis rules that apply to such transfers." JCT Report at 109; see also id. at 102-03 n.187. Thus, while certain members of Congress might not agree with the SSTs from a policy perspective, the transactions nonetheless were structured to comply with the law.[8] Id. Furthermore, in the Second Report the Examiner also made no mention of fraud or scienter, indicating only that: (i) Projects Teresa, Steele, Cochise did not, and Project Tomas probably did not, comply with GAAP (2d Report, App. D at 70), and (ii) it was "more likely than not" that the IRS "could" disallow tax deductions *Enron* claimed from the transactions (and indeed, as discussed below, the main basis on which the SSTs are critiqued – that the tax opinions of *Enron's* tax counsel and the accounting conclusions of *Enron's* auditors were incorrect — belies any claim of fraud as to the DB Entities) (2d Report at 40, App. J at 39, 43, 61-62, 88).

Despite plaintiffs' assertion that the SSTs were fraudulent (Am. Compl. ¶ 797), the Examiner reached conclusions that do not support any claim of fraud against the DB Entities. Having collected voluminous information from the DB Entities through documents, interviews and sworn statements the Examiner: (i) recognized that structured transactions that generate tax and financial accounting benefits are used by companies (2d Report at 50; 3d Report, App. G at 82); (ii) did not label the SSTs as fraudulent, nor conclude that DBTC or DB committed fraud in connection with structuring these transactions (3d Report at 72-76, App. G at 71-80, 82-92); (iii) recognized that Enron, its counsel and auditors made the crucial decisions as to how the transactions would be booked and disclosed (3d Report, App. G at 31-32, 35, 40, 46, 50, 53,

[8] That the SSTs were proper legal transactions is confirmed by the bills considered since the JCT Report some of which would disallow the advantages that Enron obtained through the application of the law in effect at the time of the SSTs. See, e.g., S. 2. §§ 321-327 (2003) (containing subtitle "Enron-Related Tax Shelter Provisions" and addressing the interactions of the Code provisions that enabled Enron to obtain the desired tax treatment); H.R. 2896, 106th Cong. (2003) (containing provisions to shut down the laws Enron relied upon in the SSTs).

App. C at 16, 22-38); (iv) found that the *only* reason that the SSTs were not adequately disclosed was because they did not comply with GAAP (3d Report, App. G at 76, 78-79); (v) found that Projects Renegade and Valhalla were beneficial to Enron (3d Report, App. G at 19, 93); (vi) did not suggest that DBTC or DB were tied to any scheme to defraud (see generally, 3d Report at 72-76 & App. G); (vii) did not suggest that any other transactions done by any of the DB Entities worked a fraud on Enron or its creditors (see generally, 3d Report at 72-76; App. C at 68-77; App. G at 71-82); and (viii) did not identify a single document that indicates that DBTC or DB thought that the transactions were incorrect, misleading, or aggressive, much less fraudulent.

STANDARD FOR DISMISSAL

The December Order adopted and applied the SEC "creator" test. 235 F. Supp. 2d at 591. Applying the creator test, this Court held that plaintiffs failed to state a claim under Section 10(b) and Rule 10b-5 as to DB and granted DB's motion to dismiss. Id. at 708. The Amended Complaint also fails to meet the creator test as to the DB Entities because it only alleges that the DB Entities engaged in common and arm's length business transactions.[9]

As this Court has made clear, plaintiffs must do more than plead that defendants engaged in activities within the normal course of business to state a claim under Section 10(b) and Rule 10b-5.[10] Where plaintiffs alleged specific facts concerning activities, such as loans "disguised sales transactions," and "sham swap[s]," this Court held that plaintiffs had stated sufficient facts giving rise to a strong inference of scienter. See December Order, 235 F. Supp. 2d at 638, 695-

[9] Alternatively, the Amended Complaint also fails to state a Section 10(b)/Rule 10b-5 claim under the "bright line" and "substantial participation" tests. Plaintiffs have not alleged that the DB Entities made any material misstatement or omission to the public. December Order, 235 F. Supp. 2d at 583-85. Nor have plaintiffs alleged that there was "'substantial participation or intricate involvement'" by the DB Entities in the "preparation of fraudulent statements." Id. at 585 (citation omitted).

[10] December Order, 235 F. Supp. 2d at 580 ("conclusory 'allegations that are consistent with the normal activity' of . . . a business entity, standing alone... are insufficient to state a claim of primary liability under Central Bank.") (quoting In re Blech Sec. Litig., 961 F. Supp. 569, 584 (S.D.N.Y. 1997)).

704. Here, the Examiner did not cite to a single document that (even when taken out of context) would create a reasonable interference that DBTC or DB acted with scienter. Plaintiffs have only alleged that DBTC and DB engaged in transactions that even critics agree were designed to comply with tax law and accounting standards, and this Court has held that such allegations fail to give rise to a strong inference of scienter. Accordingly, plaintiffs' Section 10(b) and Rule 10b-5 claim must once again be dismissed as to the DB Entities. See also December Order, 235 F. Supp. 2d at 571-72.

ARGUMENT

DB, now joined by DBTC and DBSI, incorporate by reference the arguments made in DB's motion to dismiss the Newby Complaint and DB's reply in further support thereof as to all allegations against "Deutsche Bank" under Section 10(b) and Rule 10b-5. The current motion will focus on the new allegations in the Amended Complaint.

POINT I

PLAINTIFFS' NEWLY ADDED ALLEGATIONS AGAINST THE DB ENTITIES ARE TIME-BARRED

A. The Statute Of Limitations Has Expired As To The SSTs

"Litigation 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." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991). Claims which are brought under Section 10(b) and Rule 10b-5 more than three years after the alleged violation must be dismissed. Id.; see, e.g., Durning v. Citibank, Int'l, 990 F.2d 1133, 1136 (9th Cir. 1993) (rejecting plaintiffs' argument that because the alleged fraud consisted of both the misrepresentation and the subsequent redemption of the bonds the fraud

continued until the later event, and holding that plaintiffs' claim was time-barred by Lampf's three year period of repose) (citations omitted).

Here, plaintiffs do not dispute that: (i) Project Teresa closed in March 1997; (ii) Project Steele closed in October 1997; (iii) Project Tomas closed in September 1998; (iv) Project Renegade closed in December 1998; (v) Project Cochise closed in January 1999; and (vi) Project Valhalla closed in May 2000. Am. Compl. ¶¶ 797.9, 797.10, 797.11, 3d Report, App. G at 14, 2d Report, App. D at 69, JCT Report at 137. Plaintiffs filed the Amended Complaint adding allegations concerning the SSTs on May 14, 2003, over three years after the statute of repose expired for the SSTs. This is the case for five of the SSTs (Teresa, Steele, Tomas, Renegade and Cochise) even if the newly added allegations are interpreted to relate back to April 8, 2002, the date that the Newby Complaint was filed. The only transaction which might have occurred within the statute of repose period (if relation back is allowed) is Project Valhalla, for which Enron reported receiving fees from DB and as to which the Enron Examiner has concluded was beneficial to Enron *and* did not involve any questionable accounting. 3d Report, App. G at 93. Therefore, the newly added allegations based on the SSTs are time-barred by Lampf's three year statute of repose.

B. The Statute Of Limitations Has Expired As To DBTC And DBSI

The addition of DBTC and DBSI as defendants to this action is time-barred by the one-year statute of limitations for claims brought under Section 10(b)/Rule 10b-5 and Section 12(a)(2). The Amended Complaint now asserts a Section 10(b)/Rule 10b-5 claim against DBTC and DBSI and a newly-added Section 12(a)(2) claim against DBSI. A claim under Section 10(b) and Rule 10b-5 must be brought within one year after the discovery of the alleged violation.[11]

[11] Lampf, 501 U.S. at 364; Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir. 1988) (the Section 10(b) limitations period is triggered when plaintiffs have knowledge of "'facts which, in the exercise of due diligence, would have led

Similarly, Section 13 of the 1933 Act states that a claim based on Section 12(a)(2) must be commenced "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m (1998); Topalian v. Ehrman, 954 F.2d 1125, 1134-1135 n.23 (5th Cir. 1992).

Ironically, the Amended Complaint provides the best evidence that plaintiffs have allowed the statute of limitations to expire as to DBTC and DBSI. The Amended Complaint alleges that on October 16, 2001, "Enron shocked the markets with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion. Within days, The Wall Street Journal began an expose of the JEDI, Chewco and the LJM SPEs, the SEC announced an investigation of Enron, and Fastow, Enron's Chief Financial Officer, resigned." Am. Compl. ¶ 61. Plaintiffs indisputably had notice of an alleged securities fraud action on October 22, 2001, the date on which plaintiffs filed their first complaint in this action. Yet, plaintiffs waited until May 14, 2003, a period of nineteen months, to add DBTC and DBSI as defendants.

Plaintiffs also *chose* not to take advantage of the eight-month period (between the filing of their Newby Complaint and this Court's December Order) during which they could have amended the Newby Complaint as a matter of course. Whitaker v. City of Houston, 963 F.2d 831, 835-36 (5th Cir. 1992) (affirming this Court's denial of motion for leave to amend for undue delay); accord Lewis v. Fresne, 252 F.3d 352, 360 (5th Cir. 2001) (quoting Whitaker, 963 F.2d at 834-35). Plaintiffs were aware of the facts and circumstances surrounding the SSTs and the DB Entities at least as far back as May 22, 2002 (seven months prior to this Court's ruling on DB's motions to dismiss) when the Washington Post published a detailed article concerning the

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to actual knowledge [of the violation]'") (citation omitted); Reed v. Prudential Sec. Inc., 875 F. Supp. 1285, 1288 (S.D. Tex. 1995) ("the requisite knowledge that a plaintiff must have to begin the running of the limitations period 'is merely that of the *facts* forming the *basis* of [plaintiff's] cause of action,'... not that of the existence of the cause of action itself.'") (quoting Jensen, 841 F.2d at 607 (quoting Vigman v. Community Nat'l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981))) (emphasis in original).

SSTs named in Amended Complaint ¶ 797. April Witt and Peter Behr, Enron's Other Strategy: Taxes; Internal Papers Reveal How Complex Deals Boosted Profits By $1 Billion, Wash. Post, May 22, 2002, re-published at 2002 WL 20711256. Plaintiffs nonetheless ignored these transactions in briefing their opposition to the motion to dismiss the Newby Complaint. Plaintiffs also can hardly assert that they were unaware of this article since they obviously paid close attention to all news media concerning Enron as clearly demonstrated in their Newby Complaint, which quotes extensively from newspaper articles, including the Washington Post (Newby Compl. ¶¶ 30, 542, 648) and the Houston Chronicle (which also published a story concerning the SSTs) (Newby Compl. ¶¶ 160, 228, 559, 746).

Indeed, just a few days before plaintiffs filed their first motion for leave to amend, the Washington Post published another article discussing in detail the SSTs now at issue. Peter Behr and Carrie Johnson, Enron Probes Now Focus On Tax Deals; Bankr. Examiner To File Report Today; Congressional Investigation Nears Completion, Wash. Post, Jan. 21, 2003, re-published at 2003 WL 2369941. This is the same day that the Examiner's Second Report was released. Plaintiffs again decided to make no mention of the SSTs in their January 27, 2003 motion to file a supplemental complaint against another party. Therefore, plaintiffs made a strategic decision not to name DBTC and DBSI in the Newby Complaint, not to add them as defendants as a matter of course prior to December 19, 2002, and not to request leave to amend as to either thereafter with respect to the SSTs.

C. The Addition Of DBTC And DBSI Does Not Relate Back

The addition of DBTC and DBSI as defendants does not relate back under Rule 15(c)(3) of the Federal Rules of Civil Procedure. Under to Rule 15(c)(3) an amended pleading which "changes the party or the naming of the party against whom a claim is asserted" may relate back

if the claim asserted arose out of the conduct, transaction, or occurrence set forth in the original pleading and "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." Fed. R. Civ. P. 15(c) (emphasis added). Thus, for a claim against added parties to relate back plaintiffs must satisfy "the 'notice' *and* 'mistake' clauses. . . . " Jacobsen v. Osborne, 133 F.3d 315, 320-21 (5th Cir. 1998) (emphasis in original).[12]

Rule 15(c)(3) requires that plaintiffs must have "mistakenly" named DB as a defendant, and that DBTC and DBSI knew or should have known that the only reason they were not named defendants in the Newby Complaint is because of plaintiffs' mistake.[13] Courts have consistently rejected the attempt to add parties under the mistake requirement of 15(c)(3).[14] Relation back is inapplicable here because plaintiffs made no mistake as to the identity of DBTC (formerly known as Bankers Trust Company), nor DBSI (formerly known as Deutsche Bank Alex. Brown). See, e.g., Newby Compl. ¶ 83(i) (mentioning that Bankers Trust was now part of Deutsche Bank); Id. ¶¶ 71, 107, 648 (mentioning Deutsche Bank Alex. Brown). Therefore, because the addition of DBTC and DBSI do not relate back to the Newby Complaint, all claims against DBTC and DBSI should be dismissed as time-barred.

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[12] See also Duckworth v. Brunswick Corp., No. Civ. A. 700CV120R, 2001 WL 406234 at *1-2 (N.D. Tex. Apr. 17, 2001) ("The goal of Rule 15(c)(3) is to allow parties to correct their mistakes, not to allow them an indefinite amount of time in which to discover who the proper parties actually are").

[13] Rule 15(c) is "meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification." Jacobsen, 133 F.3d at 320 (citation omitted).

[14] See, e.g., Gridley v. Cunningham, 550 F.2d 551, 553 (8th Cir. 1977); Arachnid, Inc. v. Valley Recreation Prods., Inc., 2001 WL 1664052, at *7 (N.D. Ill. 2001); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 185, 196-97 (D.N.J. 1999); Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 1994 WL 324018, at *3 (S.D.N.Y. 1994).

POINT II

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 10(B) AND RULE 10B-5 AS TO THE DB ENTITIES

The Amended Complaint fails to state a Section 10(b) and Rule 10b-5 claim as to DB, DBTC and DBSI.[15] The only new allegations in the Amended Complaint as to the DB Entities concern the SSTs. Plaintiffs, however, do not allege facts sufficient to show that the SSTs were fraudulent transactions. The Amended Complaint relies on supposed summaries of the Examiner's Second Report and the JCT Report in alleging that DBTC and DB created fraudulent transactions to unlawfully inflate Enron's earnings. Am. Compl. ¶¶ 797.3, 797.4, 797.6-797.9, 797.13-797.15, 797.17, 797.20. The Examiner's Third Report, however, belies any such conclusion. The Third Report does not present facts showing that the SSTs were anything other than arm's-length business transactions. The allegations concerning why the SSTs were fraudulent also are conclusory and do not meet Rule 9(b)'s requirement that the circumstances of fraud be pled with particularity.[16]

In addition, even when read together with the other allegations concerning the DB Entities, plaintiffs have not alleged particularized facts showing that DB, DBTC or DBSI engaged in fraudulent acts *with scienter*. To state a claim for primary liability against secondary actors Central Bank and the creator test require plaintiffs to plead specific facts for *all* elements of Section 10(b) and Rule 10b-5. December Order, 235 F. Supp. 2d at 591; see also Central

[15] As this Court has recognized, group pleading is "at odds with the PSLRA" which requires particularized pleading of scienter as to *each* defendant. Collmer v. U.S. Liquids, Inc., No.Civ.A. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *101 (S.D. Tex. Jan. 23, 2001) (Harmon, J.) DB, DBSI and DBTC are *separate* legal entities. See also In re Multiponics, Inc., 622 F.2d 709, 723 (5th Cir. 1980) ("[T]he burden of proving an alter ego relationship rests squarely on the shoulders of the party seeking to disregard the corporate entity . . ."). Plaintiffs fail to specify facts giving rise to a strong inference of scienter as to *each* entity. Instead, plaintiffs resort to pleading under the umbrella of "Deutsche Bank." Am. Compl. 107(a). Such pleading is impermissible under the PSLRA.

[16] "In securities fraud actions, the Fifth Circuit applies and strictly interprets Rule 9(b) as requiring a plaintiff to 'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.'" December Order, 235 F. Supp. 2d at 564 n.2 (citations omitted).

Bank N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 177, 191 (1994). Finally, plaintiffs fail to plead transaction or loss causation as to the DB Entities. Therefore, plaintiffs' claims against the DB Entities must be dismissed.

A. The DB Entities Did Not Engage In Fraudulent Transactions With Enron

1. The SSTs Were Not Fraudulent Transactions

a. The SSTs Were Arm's-Length Transactions

The SSTs were legitimate transactions that were designed to comply with GAAP and the tax laws applicable at the time. JCT Report at 109; 3d Report, App. G at 84. As a taxpayer, Enron had a right to decrease the amount of taxes that it would otherwise owe "by means which the law permits." Gregory v. Helvering, 293 U.S. 465, 469 (1935); accord Weiner v. United States, 255 F. Supp. 2d 673, 688 (S.D. Tex. 2002); see also Multiponics, 622 F.2d at 723 ("It is unquestioned that tax avoidance particularly when coupled with another non-tax advantage, may constitute a valid business purpose") (citations omitted); Sun Props., Inc. v. United States, 220 F.2d 171, 174 (5th Cir. 1955) ("a motive of tax avoidance will not establish liability if the transaction does not do so without it. It may fairly be said that a tax avoidance motive must not be considered as evidence that a transaction is something different from what it purports to be.") (citing Gregory at 469); 3d Report, App. G at 82 & n.72 (citation omitted).[17]

Moreover, the bare fact that the SSTs were intended to result in financial accounting benefits in addition to tax and other benefits (Am. Compl. ¶ 797.6) does not establish that the transactions were illegitimate or lacked a valid purpose. DBTC and DB structured the SSTs to

[17] See also Frank Lyon Co. v. United States, 435 U.S. 561, 580 (1978) ("[t]he fact that favorable tax consequences were taken into account by Lyon on entering into the transaction is no reason for disallowing those consequences."); Compaq Computer Corp. v. Commissioner, 277 F.3d 778, 781, 786 (5th Cir. 2001) ("even assuming that Compaq sought primarily to get otherwise unavailable tax benefits in order to offset unrelated tax liabilities and unrelated capital gains, this need not invalidate the transaction."); Bramblett v. Commissioner, 960 F.2d 526, 533 (5th Cir. 1992) (quoting Frank Lyon for the proposition, inter alia, that parties' desire to achieve particular tax result is not necessarily relevant to determining substance of transaction).

comply with this legitimate business purpose, and the Examiner has recognized that these types of transaction are commonly used by major companies for financial management purposes. 2d Report at 50; 3d Report, App. G at 82. Also, in developing the SSTs, DBTC and DB consulted with, and relied upon the opinions of, recognized professionals with respect to tax and accounting issues. 3d Report, App. G at 15, 30, 39, 45, 49, 76.

DBTC and DB worked with internal and external accounting and tax advisors to obtain *hypothetical* transaction opinions for the SSTs. Id. DBTC and DB engaged Andersen on an hourly rate basis to assess the accounting of the SSTs in hypothetical form and provide so-called SAS-50 letters setting forth the accounting treatment of these hypothetical transactions. 3d Report, App. G at 15, 85-89.[18] The Andersen individuals who worked for DBTC and DB in identifying the proper accounting treatment for the hypothetical transactions were *completely* different from and *unrelated* to the Andersen auditors at Enron. Id.

In addition to developing the SSTs, DBTC served as an investor in Teresa, Tomas, Steele and Cochise. Am. Compl. ¶¶ 797.17, 797.25, 797.13, 797.21; 2d Report, App. J at 80-83; 3d Report, App. G at 18. Thus, DBTC had real economic and business risk in these transactions. See generally, 3d Report, App. G at 56. Moreover, as the Examiner acknowledges, DBTC presented the transaction structures for Projects Teresa, Steele and Cochise to the Federal Reserve, its banking regulator (3d Report at 19 n.71, 84) – a fact that undermines any suggestion that these transactions were designed to defraud anyone. Before each transaction, DBTC also obtained approvals from its accounting policy and corporate departments with respect to the

[18] In one of the worst examples of improper pleading plaintiffs suggest that since Thomas Finley, Brian McGuire and other BT employees formerly worked in Andersen's New York office they were somehow aware of Enron's financial condition. Am. Compl. ¶ 797.5. This type of unsupported allegation is insufficient to plead scienter. December Order, 235 F. Supp. at 572 (citation omitted); see, e.g., Melder v. Morris, 27 F.3d 1097, 1102-03 (5th Cir. 1994) (rejecting as insufficient allegations that defendants, because of their membership and/or their executive and managerial positions with the defendant company, knew or had access to adverse nonpublic information). This pleading is reminiscent of the McCarthy era and is completely inappropriate.

accounting and tax consequences for both DBTC *and* the potential client; obtained approvals from credit, legal, regulatory and risk management personnel; and presented each transaction to DBTC's network committee for approval. 3d Report, App. G at 18-19 & n.71.

As required by established accounting principles, Enron and its accountants *alone* verified the accuracy of any information provided to them regarding the SSTs. The Examiner confirmed that DBTC and DB never saw, nor participated in the preparation of, any opinion furnished to Enron by either its internal auditors or its outside counsel in any of the SSTs. See generally, 3d Report, App. G at 27-57; see also id. at 83-84. As the JCT Report confirms, various law firms representing Enron issued "should" level tax opinions as to the anticipated tax consequences to Enron of the SSTs, which are considered strong opinions.[19] JCT Report 142, 156, 172 197, 288-89. In some cases the SSTs were even reviewed by the IRS, which, to date, has not challenged any of the transactions.[20] JCT Report at 157. Plaintiffs allege no facts indicating that the DB Entities had reason to doubt the legal and tax consequences of the transactions or the opinions issued by independent professionals. Cf. March Order, 258 F. Supp. 2d at 617, citing In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1248, 1267 n.9 (N.D. 2000) ("Even a strong inference of negligence, which requires a much lower showing than severe recklessness, is negated by reliance on outside auditors' accounting.").

b. The SSTs Complied With GAAP And The Internal Revenue Code

Plaintiffs incorrectly assert that the SSTs violated GAAP and the tax laws (Am. Compl. ¶ 797). While the Examiner ultimately questioned whether certain of the SSTs complied with

[19] As noted by the Examiner, a "should" level opinion indicates a very high level of certainty (approximately 70%-90%). 2d Report, App. J, Annex 3, at 1-2 & n.6.

[20] Having taken an expedited review of Project Cochise, the IRS proposed no tax liability adjustments. JCT Report at 157. On Project Teresa, the Examiner admits that no IRS-related adjustments are expected. 2d Report, App. J, Annex 2 at 26.

GAAP, his opinion was based largely on his view that the IRS could *potentially* challenge the tax positions in those transactions.[21] As the Fifth Circuit has recognized, however, GAAP is not a set of rigid rules ensuring identical treatment of identical transactions, but characterizes the range of reasonable alternatives that management can use. Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1021 (5th Cir. 1996); see also In re Sec. Litig. BMC Software, Inc., H-99-715 slip. op. at 28 (S.D. Tex. June 15, 2000) ("Accountants long have recognized that 'generally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions.'") (quoting Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 544 (1979)). Here, although it is apparent that the tax and accounting advisors felt strongly that Enron's intended treatment of the SSTs was correct, certain standards surrounding the tax and accounting issues implicated by the SSTs could be subject to policy debate. Indeed, for example, as the JCT Report observed "it is unclear under present law whether Section 351(a) does require a valid business purpose and if so, how it is to be applied." JCT Report at 109; see also id. at 103 n.187.

As an initial matter, the fact that certain business transactions could potentially be the subject of a challenge by the IRS is not grounds for fraud.[22] Since the SSTs were not fraudulent, and at best — according to the Examiner — give rise to a claim of aiding and abetting certain former Enron officers' breach of fiduciary duty, the SSTs cannot give rise to a claim of primary

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[21] 2d Report, App. J at 4-7; 3d Report, App. G at 28, 43, 49. Although the Examiner is aware that DBTC structured five transactions (Teresa, Tomas, Steele, Renegade and Cochise) and DB structured one transaction (Valhalla), the Examiner has concluded that the structures and accounting for Renegade and Valhalla were proper, and raised no question as to either. 2d Report, App. D at 70. Indeed, the Examiner recognized that Renegade and Valhalla provided financial benefits to Enron. 2d Report, App. J at 69; 3d Report, App. G at 19, 93.

[22] See, e.g., Lewis v. Chrysler Corp., 949 F.2d 644, 652 (3d Cir. 1991) ("'[T]he federal securities laws do not impose a duty upon parties to publicly admit the culpability of their actions.'") (citation omitted); In re Miller Indus., Inc., Sec. Litig., 12 F. Supp. 2d 1323, 1331 (N.D. Ga. 1998) ("Plaintiff's Rule 10b-5 claim in paragraphs 72-79 of the Amended Complaint referring to the omission of potential antitrust culpability should be dismissed because the Defendants were under no duty to disclose potential but conjectural antitrust liability.").

liability against DBTC or DB. See, e.g., Goldstein v. MCI Worldcom, No. 02-60322, __ F.3d __, 2003 WL 21738963, at *13-14 (5th Cir. July 28, 2003); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1070 (5th Cir. 1994).

More importantly, the Examiner's conclusions on GAAP compliance go to his *interpretation* of rules and standards that differ from the interpretation ultimately made by Enron and its advisors in implementing these transactions. For example, with respect to Projects Steele and Cochise, the Examiner posited that Enron chose an improperly short time over which to amortize the tax benefits conferred by the transactions. See, e.g., 2d Report, App. J at 40, Annex 2 at 20; 3d Report, App. G at 41-42. Enron and its professional advisors took a different position. 2d Report, App. J at 26, Annex 2 at 3. These are differences of professional opinion and thus, there was nothing in the transaction structures that was fraudulent. This is in marked contrast to transactions that Enron undertook with other parties which have been alleged to have violated established rules for such transactions.[23]

Accordingly, there is nothing in the Examiner's Reports to support a claim that the SSTs were designed by DBTC to defraud Enron's investors. The transactions were, in fact, designed to follow applicable tax and accounting rules so that Enron, in consultation with its advisors, could properly claim the benefits of the transactions.

2. The Purchase And Sale Of The Cochise Planes Were Arm's-Length Transactions

In assessing the DB Entities' relationship with Enron, the Examiner raises a pair of transactions, which he refers to as the "Cochise Planes." The first transaction (the "Purchase") involved the June 2000 purchase by BT Leasing Corp. ("BT Leasing")[24] of two commercial jet

[23] See December Order, 235 F. Supp. 2d at 614 n.48, 703; 3d Report at 27-29, 41-46, 57-58, 66, 68-71, 79-81.

[24] An affiliate of what is now DBTC.

aircraft (which were leased to two airlines) from ECT Investments Holding Corp. ("ECT") an Enron affiliate involved in the Cochise transaction, which enabled Enron to recognize approximately $36 million of gain in the second quarter of 2000. 3d Report, App. G at 37, 51. The second transaction (the "Sale") concerned the July 2000 resale of those aircraft from BT Leasing to Oneida Leasing Inc. ("Oneida") a separate Enron affiliate. 3d Report, App. G at 3.

As an initial matter, the Examiner recognizes that ECT could have sold the Cochise Planes directly into the market (3d Report, App. G at 74) and does not dispute that there was a liquid market for such aircraft at the time (3d Report, App. G at 52-53 n.260). Since the book value of the airplanes contributed to Project Cochise had been written down to zero (2d Report at 91), the sale of the planes to *any* third-party would have triggered the reported gain. The Examiner only observed that BT Leasing knew that Enron would recognize a gain on the Purchase equal to the full *fair value* of the Cochise Planes (3d Report, App. G at 41), but never said that any DB Entity knew that this recognition of gain was unlawful or violated GAAP.

Significantly, the Examiner expressly acknowledges that the Purchase of the Cochise Planes effected a true passing of risk of ownership of the planes from ECT to BT Leasing. 3d Report, App. G at 90-92. Enron derived the full accounting benefit once the Purchase was completed, and Enron's affiliate, Oneida was under no obligation to complete the Sale with BT Leasing. Id. Despite the Examiner's position that the Purchase of the Cochise Planes did not comply with GAAP (3d Report, App. G at 57), the Examiner nowhere cites to any documents or other evidence showing that BT Leasing had been relieved of the risks of owning the Cochise Planes. This is in marked contrast to other evidence developed by the Examiner where Enron appears to have taken specific steps to relieve other parties from this type of risk, including by entering into "sales" where Enron agreed to repurchase assets with interest. 3d Report at 27, 58,

82-83, 85, App. C at 40, 47, 49, 52-53, App. D at 124, 138, App. F at 23-24, 29, App. H at 5-8, 34-38, 44-46, 54-56, 62-63, App. I at 33-37, 47-48, 51.

In addition, unlike other transactions,[25] the Examiner does not suggest that the Purchase of the Cochise Planes was not a true sale under FAS 125 or FAS 140. Thus, while BT Leasing held the aircraft after its Purchase, it was completely exposed to the risks associated with them (for example, the potential effects of an airline bankruptcy or a terrorist attack). As such, there is *no* basis for any claim that the Purchase of the Cochise Planes was fraudulent. To hold a secondary actor liable for engaging in an arm's-length transaction (which *the company* allegedly improperly accounted for as earnings in its financial statement) would be directly at odds with this Court[26] and Central Bank. Accordingly, no DB entity may be held primarily liable under Section 10(b) and Rule 10b-5 for the Cochise Planes Purchase or Sale.

B. Plaintiffs Have Once Again Failed To Plead Facts Giving Rise To A Strong Inference Of Scienter As To The DB Entities

To plead facts giving rise to a strong inference of scienter, plaintiffs must allege facts showing that at least one individual at *each* DB Entity acted with scienter.[27] The Examiner's view in hindsight[28] that some of the SSTs *may* have enabled certain Enron officers to breach

[25] See e.g., 2d Report 97-99, 116-117, 127-128, App. B 69-72.

[26] December Order, 235 F. Supp. 2d at 580 ("conclusory 'allegations that are consistent with the normal activity' of . . . a business entity, standing alone... are insufficient to state a claim of primary liability under Central Bank.") (quoting Blech, 961 F. Supp. at 584).

[27] See supra at n. 13; Unimobil 84, Inc. v. Spurney, 797 F.2d 214, 217 (5th Cir. 1986) ("general allegations, which do not state with particularity what representations *each* defendant made, do not meet [Rule 9(b)'s] requirement[s]") (emphasis added); Thornton v. Micrografx, Inc., 878 F. Supp. 931, 938 (N.D. Tex. 1995) ("Where multiple defendants must respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."); see, e.g., McNamara v. Bre-X Minerals, Ltd., 57 F. Supp. 2d 396, 427 (E.D. Tex. 1999) (dismissing plaintiffs' allegations against "the Kilborn Defendants" for failure to individually name as defendants various Kilborn entities).

[28] Since the PSLRA, plaintiffs may no longer plead "fraud by hindsight." BMC, 183 F. Supp. 2d at 887 ("Plaintiffs have relied on concepts that have not survived the enactment of the PSLRA, like the group pleading doctrine, pleading by hindsight, or pleading scienter by motive and opportunity alone, which this Court rejects."); see, e.g., Melder 27 F.3d at 1101, n.8 (rejecting allegations which "boil down to plaintiffs' attempt to chastise as fraud business practices that, in *hindsight*, might have been more cautious. [because] [m]isjudgments are not . . . fraud.")

their fiduciary duties fails to show that the DB Entities acted with scienter or engaged in fraudulent activity. See also Tuchman, 14 F.3d at 1069 ("the complaint contains no assertion of any fact that makes it reasonable to believe that the defendants knew that any of their statements were materially false or misleading *when made*. . . . without such a showing, this portion of the consolidated complaint fails to state a claim for securities fraud.") (emphasis added).

Bare allegations, like those in the Amended Complaint, that any or all of the SSTs violated GAAP are insufficient to give rise to a strong inference of scienter. As this Court has noted, as a general rule, "failure to follow GAAP, without more, does not establish scienter." December Order, 235 F. Supp. 2d at 572-73 & nn.11-12; BMC, slip. op. at 27 (citations omitted); Tuchman, 14 F.3d at 1069; see also Lovelace, 78 F.3d at 1020-21 ("[A] difference in judgment about generally accepted accounting principles does not establish conscious behavior on the part of Defendants.").

In the March Order, this Court concluded that "the information presented to Outside Directors about *business risks* by itself and in context (involving *significant discussion and assurances from Arthur Andersen and Enron management*). . . [was] not sufficient to give rise to a strong inference of scienter on the part of the Outside Defendants." 258 F. Supp. 2d at 629 (emphasis added). This Court reasoned that such allegations were insufficient because "Enron was well known and often praised for, its aggressive, 'high flying' or 'cutting edge' approach to business." Id., at 629. Likewise, the fact that the SSTs may be viewed as cutting edge or sophisticated transactions does not make them illegal or out of the normal course of business.

There are a number of reasons why the Amended Complaint fails to plead scienter as to the SSTs, including based on the Examiner's Third Report. As noted above, plaintiffs do not

(emphasis added); March Order, 258 F. Supp. 2d at 634 ("Lead Plaintiff's claim that Enron's restatement . . . is an 'admission' of fraud by Outside Director Foy. . . without identification of any participation by Foy in the alleged fraud . . . is not supportable and constitutes impermissible hindsight.")

allege any *facts* which indicate that DBTC or DB attempted to circumvent any accounting or other rules or agreed with Enron on ways to circumvent any rules as to the SSTs. Instead, these were arm's-length transactions in which DBTC and DB always took on real economic and business risk — as evidenced by the fact that these transactions were based on expected, but not guaranteed, tax consequences. Accordingly, the SSTs are different from other transactions discussed in the December Order in which it appeared that the rules relating to certain transaction structures may have been violated by Enron. 235 F. Supp. 2d at 614 n.48, 703. The Examiner also found no evidence that DBTC or DB ever advised Enron on the tax and accounting decisions made by Enron and with which the Examiner took issue. 3d Report, App. G at 85.

In addition, the Examiner's Reports show that DBTC and DB exercised care in connection with the SSTs. The SSTs went through a lengthy internal review process, and often were presented to DBTC's bank regulators before they were done with Enron. 3d Report, App. G at 18-19, 84. DBTC and DB also retained outside professionals to advise them on the tax and accounting issues in the SSTs. These professionals did not inform DBTC or DB that the SSTs violated GAAP or any other laws. Id.

Further negating any inference of scienter is that the SSTs are not linked in any way to the various transaction structures and devices that Enron allegedly used to misstate its financial results so as to keep its share price and credit ratings high. See generally, Am. Compl. ¶¶ 9-47; 2d Report at 15-16, 36. The SSTs (i) did not generate cash flow; (ii) did not remove non- or underperforming assets from Enron's balance sheet; (iii) did not hide debt; and, as shown by the Examiner, (iv) did not have *any* appreciable effect on *any* of the financial ratios that the Examiner identified as being used by the rating agencies, creditors, or investors to monitor

Enron's performance. See 2d Report, App. Q. The SSTs also were closed by DBTC well before the sharp rise in the price of Enron shares started at the end of 1999/beginning of 2000. Cf. Am. Compl. at 60; with Am. Compl. ¶ 797.10; 2d Report, App. D at 69; 3d Report, App. G at 13-14.

The Examiner's findings concerning the Cochise Planes also do not give rise to an inference of scienter as to any DB Entity regardless of whether Enron's accounting of the Purchase was proper. As discussed above, the Purchase was an arm's-length transaction where the full risks of ownership passed to BT Leasing. This is in stark contrast to documents and testimony developed by the Examiner regarding verbal assurances, side agreements and individual understandings made by Enron with other parties in connection with other transactions.[29] BT Leasing's Purchase also has not been characterized as anything other than a true sale. Moreover, the Purchase was a single transaction – undercutting any claim that DB engaged in timed transactions to help Enron manipulate its books.[30]

Plaintiffs' also do not plead scienter as to the DB Entities by hinging their pleadings to a number of exaggerated statements concerning the JCT Report and the Examiner's Second Report. For example, plaintiffs mischaracterize a Washington Post article by stating that "[t]he *Washington Post* focused upon the Joint Committee Report's finding that Deutsche Bank/Bankers Trust acted with scienter in falsifying Enron's reported financial results through the fraudulent tax transactions." Am. Compl. ¶ 797.7. The Washington Post article makes no such conclusions as to any DB Entity's state of mind. Instead, the article states that "the congressional Joint Committee on Taxation's report criticized Enron and the banks, law firms and accounting firms that helped it design the tax transactions. Leaders of the Senate Finance

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[29] See, e.g., 3d Report, App. F at 23-24, 25, 29, 55 & n. 182; App. H at 5-8, 35-38.

[30] A claim made by the Examiner against other parties that engaged in multiple transactions with Enron coincided with the ends of financial quarters. 2d Report at 61.

Committee vowed at a hearing Thursday to close the *loophole* by restricting the business purpose rule." Peter Behr, Gap in Laws Let Enron Gild Profit Picture, Wash. Post, Feb. 15, 2003, re-published at 2003 WL 13332313 (emphasis added). Thus, there is no suggestion that the SSTs were fraudulent; rather, as the JCT said, the SSTs were consistent with the tax laws, but as a matter of policy, Congress might change those laws. JCT Report at 109.[31]

The Amended Complaint is thus devoid of any particularized allegations that the DB Entities created any deceptive device or representation or otherwise acted with scienter. Accordingly, plaintiffs' claims should be dismissed.

C. The Fraud On The Market Theory Does Not Apply To The DB Entities' Activities In Connection With The SSTs

Plaintiffs' Section 10(b) and Rule 10b-5 claim must also be dismissed because plaintiffs utterly fail to plead transaction causation ("reliance") as to the DB Entities. To state a claim under Section 10(b) and Rule 10b-5 plaintiffs must show that they "relied upon the . . . statements or actions" of each of the DB Entities. Central Bank, 511 U.S. at 180; see also December Order, 235 F. Supp. 2d at 573 & n.13. As this Court explained:

> The element of reliance is the subjective counterpart to the objective element of materiality. Whereas materiality requires the plaintiff to demonstrate how a 'reasonable' investor would have viewed the defendants' statements and omissions, **reliance requires a plaintiff to prove that it *actually* based its decisions upon the defendants' misstatements or omissions.** 'Reliance is *causa sine qua non*, a type of 'but for' requirement: had the investor known the truth he would not have acted.' . . . Thus, [c]ourts sometimes consider the reliance component of the Rule 10b-5 action to be a part of the causation element. In this

[31] Also mischaracterized by the plaintiffs is a letter from Congressmen Richard Neal and Edward Markey. Am. Compl. ¶ 797.4. Plaintiffs allege that "[b]y letter dated 2/27/03, Congressmen Richard E. Neal and Edward J. Markey urged SEC Chairman William Donaldson to take all appropriate actions against Bankers Trust/Deutsche Bank for violations of federal securities regulations based on findings made in the Joint Committee Report." Id. The letter, however, nowhere asserts that the SSTs were fraudulent, nor that the JCT Report so suggested. See Letter from Richard E. Neal and Edward J. Markey, United States Congressmen, to William Donaldson, Chairman, SEC, at 1-4 (Feb. 27, 2003), published at http://www.house.gov/neal/pdfs/secenron022703.pdf. Indeed, the Joint Committee Report did not make any findings with respect to federal securities law violations.

> context, the term 'transaction causation' is used to describe the requirement that the ***defendant's fraud must precipitate the investment decision***. . . .

December Order, 235 F. Supp. 2d at 573 n.13 (citations omitted; emphasis added). "'Reliance . . . generally requires that the plaintiff have known of the particular misrepresentation complained of, have believed it to be true and because of that knowledge and belief purchased or sold the security in question.'" Id., at 573 (quoting Nathenson v. Zonagen Inc., 267 F.3d 400, 413 (5th Cir. 2001)).

As this Court concluded in the December Order, the Newby Complaint failed to state a claim under Section 10(b) and Rule 10b-5 as to DB. 235 F. Supp. 2d at 704, 708. The only new allegations as to the DB Entities concern the SSTs. Plaintiffs cannot use the SSTs to allege a claim of market manipulation as to the DB Entities because *Enron* and *its accountants* made any and all representations concerning the SSTs in Enron's financial statements. To the extent that any deception or misrepresentations were created it was due to the way Enron and its accountants reported the effects of the SSTs (although in this respect, the Examiner concluded that Enron's error in disclosing the SSTs was attributable to errors in applying GAAP (3d Report, App. G at 84)). Thus, the fraud on the market theory does not apply to the SSTs.

D. Plaintiffs Fail To Plead Loss Causation As To The DB Entities

Nowhere in the 638 pages of the Amended Complaint do plaintiffs plead any facts showing that the SSTs were the proximate cause for the collapse of the market for Enron securities. The SSTs did not even become widely known until May of 2002, nearly six months after the class period ended and long after the price of Enron and Enron-related securities were decimated by Enron's October 2001 restatement and reduction in shareholder equity and December 2002 bankruptcy filing. Indeed three of the SSTs (Projects Teresa, Steele and Tomas) were so far removed that the DB Entities' alleged role in structuring the transactions did not even

occur during the Class Period (Am. Compl. ¶ 797.10). Moreover, as noted above, the pressure on Enron's tax department to begin generating significant earnings from structured tax transactions did not begin until *after* 1999, when Enron's share price climbed sharply.[32] The last of the SSTs that was intended to result in tax and accounting benefits to Enron was Project Cochise, which closed in January 1999. Am. Compl. ¶ 797.20; 2d Report, App. D at 69. Moreover, as discussed above, the SSTs (including the four that created tax, accounting and other business benefits for Enron) are time-barred by the three year statute of repose. Finally, although plaintiffs claim that *Enron* reported earnings from the SSTs during the class period, this does not plead facts implicating any wrongdoing by the DB Entities.

The failure to plead loss causation, an essential element of a claim under Section 10(b) and Rule 10b-5, is an additional grounds for dismissal of the Amended Complaint as to the DB Entities. See 15 U.S.C. § 78u-4(b)(4). As this Court observed, "'loss causation' refers to a *direct* causal link between the misstatement and the claimant's economic loss.'" December Order, 235 F. Supp.2d at 573 n.13 (citations omitted; emphasis added). "The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value." Id. As the Fifth Circuit wisely warned, "[a]bsent the requirement of causation, Rule 10b-5 would become an *insurance plan* for the cost of every security purchased in reliance upon a material misstatement or omission." Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. 1981), aff'd in part, rev'd on other grounds, 459 U.S. 375 (1983) (citation omitted; emphasis added).

[32] Wash. Post, May 22, 2002, re-published at 2002 WL 20711256 ("the pressure on [Enron tax department's structured finance] group to bring ever-larger sums to the bottom line 'cranked up' after 1999 as Enron's stock price surged and the company's businesses struggled to achieve new heights of earnings that would keep Enron shares climbing.")

Enron's use of mark-to-market accounting created a large gap between Enron's earnings and funds flow from operations. Am. Compl. ¶18; 2d Report at 15. This gap, the so-called "mismatch" or "quality of earnings" problem required a continuous inflow of cash into Enron. 2d Report at 40; Am. Compl. ¶¶ 18-20. Since cash was critical to hiding the gap and because traditional fundraising methods would harm Enron's credit rating or share price (Am. Compl. ¶¶ 18-20), Enron resorted to a number of tactics to generate cash flow from operations, disguise debt, and remove non- or underperforming assets from its balance sheet. Am. Compl. ¶ 18; see, e.g., 3d Report at 51, App. D at 1-3, 12-15, 135, 148, App. E at 2, 18-23, App. F at 48-52. Notably, however, the SSTs had absolutely nothing to do with any of these tactics. Accordingly, plaintiffs cannot plead loss causation as to the DB Entities, and their claims must be dismissed.

POINT III

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 12(A)(2) AS TO DBSI

If the newly-added claim under Section 12(a)(2) is timely, it must be dismissed as to DBSI for failure to state a claim. DBSI is alleged to be liable under Section 12(a)(2) in connection with four Rule 144A/Regulation S private placement resales: (i) the September, 1999 Osprey Trust/Osprey I Inc. Notes; (ii) the September, 2000 Osprey Trust/Osprey I, Inc. Notes; (iii) the August, 2000 Enron Credit Linked Notes; and (iv) the July, 2001 Marlin Water Trust II/Marlin Water Capital Corp. II Notes (collectively the "Four note resales"). Am. Compl. ¶¶ 641, 1016.4.

Section 12(a)(2) does not apply to private placements. Since the Four note resales are private placements, plaintiffs' Section 12(a)(2) claim must be dismissed as to DBSI. Alternatively, plaintiffs lack standing under Section 12(a)(2) because they do not claim to have purchased securities in the Four note resales. Am. Compl. ¶¶ 641, 1016.4.

A. Section 12(a)(2) Does Not Apply To Private Placements

Private resales made under Rule 144A are exempt transactions under the 1933 Act and are not subject to liability under Section 12(a)(2). This Court has already held that "there can be no § 11 liability in connection with a Rule 144A private placement because a private placement is not made pursuant to a registration statement." March Order, 258 F. Supp. 2d at 619, citing Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 577-78 (1995). This Court's decision is consistent with another district court in the Southern District of Texas, which reasoned that since "Section 12(a)(2) and Section 11 share the same legislative history... '[t]he Gustafson reasoning is equally applicable to claims arising under [S]ection 11.'" Moskowitz v. Mitcham Indus., No. Civ. A. 98-1244, 1999 WL 33606197, at *19 (S.D. Tex. Sept. 29, 1999); accord AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC, 254 F. Supp. 2d 373, 389 (S.D.N.Y. 2003).

The face of the OMs from each of the Four note resales states that they were made pursuant to Rule 144A and Regulation S. See Ex. 3 - Ex. 6.[33] The Four note resales are Rule 144A/Reg S private placements, which are not subject to liability under Section 12(a)(2). Therefore plaintiffs' claim under Section 12(a)(2) must be dismissed as to DBSI.

B. Plaintiffs Do Not Have Standing To Bring A Section 12(a)(2) Claim As To DBSI

Even if this Court holds that Section 12(a)(2) applies to the Four note resales, plaintiffs' claim must be dismissed for lack of standing. To state a claim under Section 12(a)(2) plaintiffs must have individual standing. In re Taxable Mun. Bond. Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995). In addition, each plaintiff must "demonstrate that the defendant, as a seller of a security, misrepresented or failed to state material facts as to the plaintiff in connection with the sale" and

[33] This Court may consider documents referenced in the Complaint. Lovelace, 78 F.3d at 1017-18.

that plaintiff did not have knowledge of the misrepresentation. Collmer, 2001 U.S. Dist. LEXIS at *11, citing Junker v. Crory, 650 F.2d 1349, 1359 (5th Cir. 1981).

Furthermore, only "purchasers of shares issued and sold pursuant to the challenged registration statement" have standing to sue under Section 12(a)(2). In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 892 (S.D. Tex. 2002), aff'd, Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003). The Amended Complaint (including plaintiffs' certifications) does not show that a single plaintiff purchased securities in any of the Four note resales. See Lead Pl.'s First and Second Apps. Of Certifications in Supp. of the Original Compl.; Lead Pl.'s App. of Exhibits in Support of the Am. Compl. That failure mandates dismissal under Section 12(a)(2). See, e.g., Dartley v. Ergobilt Inc., No. Civ. A 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001).

POINT IV

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 15 OF THE 1933 ACT AND SECTION 20(A) OF THE 1934 ACT AS TO DEUTSCHE BANK AG

Plaintiffs once again have failed to state a claim against DB for control person liability under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act. Although Section 15 of the 1933 Act and Section 20(a) of the 1934 Act, are worded in different ways, they are interpreted the same way. December Order, 235 F. Supp. 2d at 594, citing inter alia Pharo v. Smith, 621 F.2d 656, 672 (5th Cir. 1980). Control person liability is derivative under both sections. December Order, 235 F. Supp. 2d at 595; accord ABC Arbitrage Plaintiffs Group v. Tchuruket, 291 F.3d 336, 348 n.57, 362 n.123 (5th Cir. 2002); Collmer, 2001 U.S. Dist. LEXIS 23518, at *30. As a predicate for control person liability plaintiffs must plead a primary violation by the controlled person under Section 12(a)(2) of the 1933 Act or Section 10(b) and Rule 10b-5 of the 1934 Act. Id. Since plaintiffs failed to state a claim against DBSI under Section 12(a)(2), their

claim for control person liability as to DB should be dismissed. Plaintiffs' failure to state their Section 10(b) and Rule 10b(b) claim as to the DB Entities is also grounds for dismissal of plaintiffs' Section 20(a) claim for control person liability as to DB.

Even if a predicate violation was pled, this Court should nonetheless dismiss plaintiffs' claim for control person liability under the 1933 and the 1934 Acts. To survive a motion to dismiss as to a claim for control person liability plaintiffs must allege: (i) that the defendant had the "'power to control [the primary violator], [but] not the exercise of the power to control.'" January Order, 2003 WL 230688, at *11 (quoting December Order, 235 F. Supp. 2d at 595 (quoting G.A. Thompson & Co., Inc. v. Partridge, 636 F.2d 945, 958 (5th Cir. 1981)). A plaintiff must allege facts beyond a defendant's position or title that show that the defendant had actual power or control over the controlled person. 235 F. Supp. 2d at 595, citing Dennis v. General Imaging, Inc., 918 F.2d 496, 509-10 (5th Cir. 1990).

Nowhere in the Amended Complaint's 638 pages are there any allegations of fact to support a finding of control person liability as to DB over DBSI and DBTC. Indeed, DB could not have possibly asserted control over DBTC until June 4, 1999 (after all of the SSTs done by DBTC had closed). See Ex. 1 ¶ 2. Likewise, DB could not have asserted control over DBSI until December 3, 1999. See Ex. 2 ¶ 3. The bare conclusion that DB controlled DBSI is insufficient to state a claim for control person liability. Am. Compl. ¶¶ 998-1004, 1016.1-1016.9. Accordingly, plaintiffs' claims for control person liability under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act should be dismissed.

CONCLUSION

For the reasons stated above, Defendants Deutsche Bank AG, Deutsche Bank Securities Inc. and Deutsche Bank Trust Company Americas, respectfully request that this Court dismiss

with prejudice the Amended Complaint against them, and grant DB, DBSI and DBTC such other and further relief to which they may be entitled.

Dated: August 18, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 18, 2003, I caused a true and correct copy of the foregoing document to be served on all counsel by e-mail and fax in accordance with the Order Regarding Service of Papers and Notice of Hearings, entered by the Court on April 10, 2002.

Dated: August 18, 2003

Respectfully submitted,

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The Exhibit(s) May

Be Viewed in the

Office of the Clerk