

by the DB Entities in their motion to dismiss: plaintiffs' failure to plead (i) fraud; (ii) scienter; and (iii) loss causation.

The Examiner's Final Report presents more evidence undermining plaintiffs' conclusory assertions that the DB Entities engaged in fraudulent acts in connection with six structured tax-saving and income-generating transactions ("SSTs") (Am. Compl. ¶ 797). The Examiner found *no* evidence that the DB Entities misled or defrauded Arthur Andersen LLP ("Andersen") in connection with the SSTs (Final Report, App. B at 63–68; App. C at 20–23, 39–43), nor did the Examiner cite any evidence that the DB Entities (i) were aware of Andersen's application and interpretation of certain key accounting rules as Enron's auditors (Final Report at 105, App. B at 131–155, 161); (ii) had any knowledge about whether Andersen accurately presented the SSTs to the Enron Audit Committee (Final Report, App. B at 135–155); or (iii) knew anything about or was involved in any way in the tax cushion decisions that could have cured any accounting infirmities (see generally, Final Report, App. B).

Moreover, the Examiner's Final Report reflects developments in the Examiner's own "professional judgment" concerning his understanding and analysis of accounting and legal issues. For example, whereas the Examiner previously cited "no GAAP authority or accounting literature" that supported Enron's accounting for the income from Projects Steele and Cochise as pre-tax, his Final Report now admits that in fact there was accounting authority and some public discussion of the issue (including an opinion from the SEC which acknowledged that accounting for the transaction as pre-tax income would be technically required). Cf. 3d Report, App. G at 41; with Final Report, App. B at 114–115.¹ Similarly, despite differences in "professional judgment" regarding the legal opinions provided to Enron by its attorneys in connection with the

¹ The Examiner also admitted that the Andersen partner signing the comment on EITF 98-11, John Stewart, was acknowledged to be "one of the most preeminent GAAP experts in the nation." Final Report, App. B at 39.

SSTs (the supposed incorrectness of which was the primary reason the Examiner concluded that Enron's accounting for certain SSTs did not comply with GAAP, and thus the primary reason for the Examiner's conclusions as to DB), the Final Report cites no evidence to support a claim, and does not itself conclude that *any* of those law firms committed fraud, aided and abetted a breach of duty by anyone at Enron, or committed professional negligence. See Final Report App. C at 91–107; see generally, id., App. C. In making it clear that in relation to the SSTs Enron's attorneys were not culpable and its accountants were not deceived by DB, the Final Report undercuts any claim that the DB Entities knew or should have known that the SSTs were anything other than appropriate, and runs contrary to plaintiffs' bare allegations that the SSTs were unlawful, designed to be fraudulent or could support any inference of scienter as to the DB Entities.

The Final Report also offers additional evidence undercutting any finding that the DB Entities were a proximate cause of plaintiffs' losses. The Examiner's findings again show that Enron's accounting of the SSTs even if completely wrong had a minimal effect on its financial statements. Cf., e.g., Final Report, App. B at 44–45 (showing Enron IBIT of \$4.447 billion for eight fiscal quarters in 1999–2000); with 3d Report, App. G at 28 (showing SST-generated IBIT of \$144 million over sixteen fiscal quarters from 1997–2001). Moreover, the Final Report makes clear that Andersen had the responsibility for approving and did approve of the accounting for each of the SSTs in Enron's financials. Thus, Andersen's involvement was a supervening event which precludes plaintiffs from showing that the DB Entities were a proximate cause of their injuries.

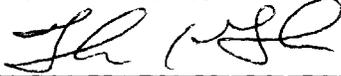
CONCLUSION

For the reasons stated above and based on the prior briefing in this matter, the DB Entities respectfully request that this Court grant their motion to dismiss the Amended Complaint in Newby with prejudice.

Dated: December 9, 2003

Respectfully submitted,

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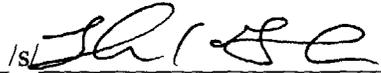
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CERTIFICATE OF SERVICE

On December 9, 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.

By: /s/ 
Thomas C. Graham