

United States Courts  
Southern District of Texas  
FILED  
DEC 29 2003  
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

§ Civil Action No. H-01-3624  
§ (Consolidated)

§  
§  
§ CLASS ACTION

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This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.  
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**PLAINTIFFS' RESPONSE TO SUPPLEMENTAL SUBMISSION  
IN FURTHER SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS  
LEHMAN BROTHERS HOLDINGS INC. AND LEHMAN BROTHERS INC.**

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As part of his investigation, the Examiner examined thousands of Lehman's documents and deposed Lehman witnesses regarding the equity forwards....

[T]he Examiner's Final Report contains *no* reference whatsoever to Lehman or the equity forwards. *The only conclusion to draw from this omission* is that the Examiner ultimately determined – correctly – that Enron's equity forwards with Lehman were not “disguised loans,” or improper in any other respect. The Examiner concluded that the equity forwards were unworthy of any mention in his Final Report because the trades played no role in Enron's alleged scheme to falsify its balance sheet.

Supplemental Brief at 3 (second emphasis added).

Accordingly, Lehman's entire argument requires the Court to “draw” an inference from the “omission” of evidence in the Final Report. However, contrary to Lehman's assumption, Lehman's innocence is not “[t]he only conclusion” that can be reached from this omission. Indeed, it is highly likely the Examiner chose not to pursue claims against Lehman for reasons entirely independent of Lehman's potential liability under the federal securities laws.<sup>2</sup> Yet, Lehman purports to know why the Examiner has acted in a certain fashion – but offers no affidavit, no deposition transcript, nor proof of any kind whatsoever. Lehman's entire argument cites not one single authority supporting Lehman's contention, and is entirely improper at this stage of the proceedings.

Moreover, Lehman misconstrues plaintiffs' allegations. Plaintiffs allege that, by November 21, 2001, Enron's equity forward debt to Lehman equaled \$173,538,284.14 and that Enron had been in default on this debt since March 12, 2001. ¶770.2. Plaintiffs' allegations are well-supported by internal Enron document EC03520A0190485, which indicates that on November 21, 2001 Enron owed \$173 million in debt to Lehman pursuant to equity forward contracts that had matured not on

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<sup>2</sup> Notably, the Examiner was not charged with determining liability under the federal securities laws. Rather, with respect to assigning culpability, the Examiner's reports focus upon whether individuals breached their fiduciary duties to Enron (and whether third parties aided and abetted those violations). Perhaps the Examiner has not focused upon the Lehman equity forwards because the Examiner could not conclusively state that any Enron officer breached his/her fiduciary duty with respect to the equity forwards. Regardless, there are numerous potential explanations – none of which have anything to do with Lehman's liability for committing securities fraud.

On December 5, 2003, Defendants Lehman Brothers Inc. and Lehman Brothers Holdings Inc. (collectively “Lehman”) submitted their Supplemental Submission in Further Support of the Motion to Dismiss of Defendants Lehman Brothers Holdings Inc. and Lehman Brothers Inc. (the “Supplemental Brief”).<sup>1</sup> Therein, Lehman brings to the Court’s attention the Final Report of Neal Batson, Court-Appointed Examiner (the “Final Report”). The Supplemental Brief improperly characterizes the Examiner’s findings, and draws conclusions and inferences not supported by the Final Report. Nothing in the Final Report absolves Lehman and nothing in the Final Report changes the fact that the Court must, as on any Rule 12(b)(6) motion, “accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs.” *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 430 (5th Cir. 2002).

The Supplemental Brief simply reaches conclusions unsupported by anything in the Final Report. For instance, Lehman contends: “The purpose of [its] submission is to bring to the Court’s attention the fact that the court-appointed Examiner in the Enron bankruptcy proceedings (the “Examiner”) has *exonerated* Lehman with respect to the very transactions that plaintiffs in this case contend establish Lehman’s scienter.” Supplemental Brief at 1 (emphasis added). The Final Report did no such thing. Indeed, Lehman cites no affirmative finding of the Examiner. Rather, Lehman’s entire argument stems from the illogical inference that the *absence* of evidence specific to Lehman in the Final Report absolves or “exonerates” Lehman. Lehman’s argument must fail because it relies upon an inferential leap of faith wholly unsupported by fact, and which is improper upon a motion for dismissal. The crux of Lehman’s argument is:

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<sup>1</sup> The Supplemental Brief only pertains to Lehman’s motion for dismissal of plaintiffs’ claims brought pursuant to the Securities Exchange Act of 1934 and should have no bearing on plaintiffs’ allegations concerning violations of the Securities Act of 1933. See Supplemental Brief at 1.

March 12, 2002 (as indicated in the First Interim Report of Neal Batson, Court-Appointed Examiner at 8 n.28) but on March 12, 2001 – months before the end of the Class Period. *See* Ex. 1.<sup>3</sup> This debt was supported by 2,434,339 common shares of Enron. ¶770.2. Enron never paid Lehman. Yet, despite the fact that Enron secretly owed Lehman millions upon millions of dollars it could not pay back because of its ongoing liquidity crisis, Lehman issued eight analyst reports between 3/12/01 and 10/24/01 – each piling on the plaudits and rating Enron common stock a "Strong Buy." *See* ¶¶312, 322, 338, 341, 347, 353, 379, 381. These analyst reports provided false information about Enron's actual debt-to-capital ratio because they did not include the secret equity-forward debt owed Lehman – over \$173 million. *See, e.g.,* Plaintiffs' Opposition to Motion to Dismiss by Lehman, at Ex. 24. Thus, each of these statements is actionable.

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<sup>3</sup> This equity-forward debt was not disclosed to the public. Indeed, EC03520A0190485 indicates that Enron classified the equity forward contracts as "OFF BALANCE SHEET DEBT," and that Enron considered this unreported debt to be categorically the same as the Mahonia/Delta prepays, the Hawaii 150-0 transactions, and other sham transactions used by defendants in this action to manipulate Enron's financials.

Accordingly, for the reasons detailed herein, Lehman's ill-supported argument does not vitiate the strong inference of scienter pled by plaintiffs and does not support Lehman's motion for dismissal.

DATED: December 29, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' RESPONSE TO SUPPLEMENTAL SUBMISSION IN FURTHER SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS LEHMAN BROTHERS HOLDINGS INC. AND LEHMAN BROTHERS INC. document has been served by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com) on this December 29, 2003.

I further certify that a copy of the foregoing PLAINTIFFS' RESPONSE TO SUPPLEMENTAL SUBMISSION IN FURTHER SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS LEHMAN BROTHERS HOLDINGS INC. AND LEHMAN BROTHERS INC. document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this December 29, 2003.

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



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Mo Maloney



**OFF BALANCE SHEET DEBT**

Went to Trust P. Bankhart m.g.  
12.10.01

Transaction Type	Name	US\$ amount outstanding as of 11/21/01	Base Currency	Maturity	Support Type	Tied to Asset?
FAS 140	Carberus	517.5	USD	28/06/2002	TRS	YES
FAS 140	Stepshot	358.0	USD	19/06/2004	TRS & Put	YES
FAS 140	ETOL III	247.3	GBP	10/01/2004	TRS	YES
FAS 140	Contrauket	222.1	USD	31/03/2002	TRS & ENE Guaranty	YES
FAS 140	Hawaii 1	168.4	USD	19/07/2002	ENA TRS and ENE Guaranty	YES
FAS 140	Hawaii 2: EBSCS/McGarret I	115.2	USD	20/11/2002	ENA TRS, Put to EBS and ENE Guaranty	YES
FAS 140	EOTT/Nikita	80.0	USD	30/09/2003	ENA TRS and ENE Guaranty	YES
FAS 140	Riverside 6	73.0	GBP	15/01/2002	Put Guarantees	YES
FAS 140	Motown	62.8	USD	31/03/2002	TRS & ENE Guaranty	YES
FAS 140	Hawaii 2: Riva/McGarret O, V	52.2	USD	20/11/2002	ENA TRS and ENE Guaranty	YES
FAS 140	Backbone	48.2	USD	30/06/2002	TRS, backed by \$47.4MM direct pay lc	YES
FAS 140	ETOL VII	43.5	GBP	10/01/2004	TRS	YES
FAS 140	Hawaii 2: McGarret J	38.0	USD	20/11/2002	ENA TRS and ENE Guaranty	YES
FAS 140	Hawaii 2: Cyria/McGarret K, T	31.3	USD	20/11/2002	ENE TRS	YES
FAS 140	Hawaii 2: Tahiti/McGarret L	30.0	USD	20/11/2002	ENA TRS, Put to Pronghorn and ENE Gu	YES
FAS 140	Service Co.	25.0	USD	28/09/2003	TRS	YES
FAS 140	Hawaii 2: Tahiti II	20.0	USD	20/11/2002	ENA TRS and ENE Guaranty	YES
FAS 140	Riverside 5	2.9	USD	17/12/2003	TRS and ENE Guaranty	YES
Equity Forward	Lehman	173.0	USD	03/12/2001		
Equity Forward	CSFB	71.9	USD	02/07/2002		
Equity Forward	CSFB	44.1	USD	01/07/2002		
Structured	Osprey	1,400.0	USD	17/09/2002		YES
Structured	Osprey II-USD	750.0	USD	17/09/2002		YES
Structured	Marlin	475.0	USD	15/03/2003		YES
Structured	Marlin EUR	440.0	EUR	15/03/2003		YES
Structured	Inauguration	310.1	USD	10/07/2002	89.9% Protected Cont. Guarantees	YES
Structured	Osprey II-EUR	287.1	EUR	17/09/2002		YES
Structured	Garret	232.0	USD	31/12/2004		YES
Structured	Joshua Tree-VPP Brazos	170.0	USD	31/12/2004		
Structured	KCS-MPP	170.0	USD	31/12/2007		
Structured	Riverside 7	148.3	GBP	01/06/2008		YES
Structured	Margaux	125.0	USD	05/07/2010		YES
Structured	Destec	123.3	USD	29/02/2013		Yes
Structured	Cash V	68.3	USD	12/02/2007		
Structured	EEX-BWT	64.4	USD	31/01/2005	TRS for 1st \$10M then 10% of losses and ENE Guaranty	
Structured	Cash VI	49.0	USD	15/08/2006		
Structured	ENEXT	21.5	USD	31/03/2004		
LEASE	Enron Building	224.5	USD	12/01/2002	ENE Guaranty	YES
LEASE	Furniture + Fixture Lease	75.0	USD	29/03/2005	RVG	YES

# OFF BALANCE SHEET DEBT

Transaction Type	Name	US\$ amount outstanding as of 11/21/01	Base Currency	Maturity	Support Type	Tied to Asset?
LEASE	MTBE/ARC	74.0	USD	06/12/2008	RVG	YES
LEASE	Falcon 800 / Gulfstream	56.8	USD	27/03/2002	ENE Guaranty	YES
LEASE	Software Lease	43.8	USD	31/07/2003	RVG	YES
LEASE	Data Center	26.3	USD	28/09/2007	89.9% Project Cost Guarantee	YES
LEASE	Omaha Building	24.0	USD	30/08/2002	ENE Guaranty	YES
LEASE	Hawker 1	10.0	USD	09/05/2004	ENE Guaranty	YES
Prepay	Crude: Yosemite 1	800.0	USD	15/11/2004	ENE Guaranty	
Prepay	Gas: Chase IX	533.0	USD	30/08/2005		
Prepay	Crude: ECLN I	475.0	USD	14/07/2005	ENE Guaranty	
Prepay	Crude: ECLN II USD	475.0	USD	02/04/2006	ENE Guaranty	
Prepay	Gas: Chase XI	350.0	USD	31/03/2002		
Prepay	Gas: Chase VIII	308.0	USD	30/06/2004	ENE Guaranty	
Prepay	Crude: Yosemite 2 - GBP Denominated	305.2	GBP	29/02/2007	ENE Guaranty	
Prepay	Gas: Chase X	299.0	USD	30/11/2005		
Prepay	Gas: Chase VII (APEA)	258.0	USD	30/04/2001	ENE Guaranty	
Prepay	Pwr: Energy America	211.0	USD	31/12/2012		
Prepay	Crude: Chase IMTD	184.3	USD	07/12/2011	ENE Guaranty	
Prepay	Crude: ECLN II GBP	161.6	GBP	02/04/2006	ENE Guaranty	
Prepay	Crude: ECLN II Eur	154.9	EUR	02/04/2006	ENE Guaranty	
Prepay	Crude: CSFB/Barclays	150.0	USD	01/10/2002		
Prepay	Crude: Chase VI	75.4	USD	31/12/2002		
Prepay	Gas: Chase V	48.0	USD	30/08/2002	ENE Guaranty	
Prepay	Gas: Energy America	33.0	USD	31/05/2008		
Prepay	Gas: Chase IV	19.0	USD	31/12/2001	ENE Guaranty	
Unconsolidated	TBG	1,453.0	USD	01/07/2011		
Unconsolidated	CIESA	965.0	USD	01/07/2011		
Unconsolidated	EcoElectrica	652.0	USD	01/07/2011	ENE Guaranty	
Unconsolidated	Gas Transolvierno	481.0	USD	01/07/2011		
Unconsolidated	MBPL - Revolving	474.9	USD	07/09/2009		
Unconsolidated	Wessex Water Bond	442.8	GBP	30/03/2009		
Unconsolidated	Dahbel II - BA Astis	402.2	USD	19/03/2009		
Unconsolidated	Florida Gas Transmission	325.0	USD	01/12/2010		
Unconsolidated	Florida Gas Transmission	250.0	USD	01/11/2004		
Unconsolidated	NBP - Notes	250.0	USD	16/06/2010		
Unconsolidated	Avantik	240.0	USD	15/02/2007		
Unconsolidated	EOTI	235.0	USD	01/10/2009		
Unconsolidated	NBP - Notes	225.0	USD	15/03/2011		
Unconsolidated	Dahbel II - JBIC	210.7	USD	01/10/2013		
Unconsolidated	Dahbel II - EXIM	200.0	USD	15/03/2007	ENE Guaranty	
Unconsolidated	Accovern	200.0	USD	15/06/2016	ENE Guaranty	
Unconsolidated	NBP - Notes	200.0	USD	07/09/2009		

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