

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. The Statute of Limitations Does <i>Not</i> Bar Claims Filed Against Royal Bank of Scotland	3
1. Sarbanes-Oxley Lengthens the Limitations Period Applicable to Claims Against Royal Bank of Scotland	5
a. This Action Is a “Proceeding Commenced on or After” Passage of Sarbanes-Oxley and Thus Sarbanes-Oxley’s Limitations Period Applies	8
b. Sarbanes-Oxley’s Legislative History Undermines Royal Bank of Scotland’s Interpretation of the Act	10
2. Even Assuming Sarbanes-Oxley Is to be Construed as Defendants Say, Defendants’ Purported Affirmative Defense May Not Be Asserted to Dismiss Plaintiffs’ Claims and This Action Is Timely Under <i>Lampf</i>	11
a. Defendants’ Statute of Limitations Claims Should <i>Not</i> Be Resolved on a Motion to Dismiss	12
b. Neither Defendants’ Assertions Nor the Facts Pleaded in the Complaint Establish Inquiry Notice as Defendants Contend	15
c. Defendants’ Purported Inquiry Notice Authority Is Not Persuasive	18
d. The <i>Lampf</i> Three-Year Statute of Repose Does Not Bar Plaintiffs’ Claims	20
B. Plaintiffs Plead Primary Violations of the Federal Securities Laws	22
1. Royal Bank of Scotland Knew It Was Deceiving Investors	22
2. Royal Bank of Scotland Was an Active Participant in the Fraud; Royal Bank of Scotland’s Conduct Was Deceptive	23
a. Royal Bank of Scotland Was a Primary Participant in Transactions to Further the Enron Fraudulent Scheme	24

	Page
(1) LJM1	24
(2) Royal Bank of Scotland and the FAS 140 Transactions	26
(3) Royal Bank of Scotland and the Nixon Prepay	29
b. Royal Bank of Scotland Made False and Misleading Statements to Plaintiffs in Furtherance of the Fraudulent Scheme	29
3. Royal Bank of Scotland’s Actions Caused Plaintiffs’ Losses	31
a. Royal Bank of Scotland’s Loss Causation Argument Suffers a Logical Fallacy	31
b. Royal Bank of Scotland Acted to Hide Enron’s True Debt Level and to Artificially Inflate Its Publicly Reported Cash Flows and Income, Thereby Furthering a Scheme Whose Collapse Was Imminent and Which Injured Plaintiffs	32
c. Plaintiffs’ Purchase of Enron’s Securities at Artificially Inflated Prices Also Demonstrates Loss Causation	35
III. CONCLUSION	37

TABLE OF AUTHORITIES

	Page
<i>Azalea Meats, Inc. v. Muscat</i> , 386 F.2d 5 (5th Cir. 1967)	12
<i>Beedie v. Battelle Mem'l Inst., Battelle Mem'l Inst.</i> , No. 01 C 6740, 2002 U.S. Dist. LEXIS 171 (N.D. Ill. Jan. 4, 2002)	35
<i>Berry v. Valence Tech., Inc.</i> , 175 F.3d 699 (9th Cir. 1999)	14
<i>Broudo v. Dura Pharms., Inc.</i> , 339 F.3d 933 (9th Cir. 2003)	36
<i>Caremark, Inc. v. Coram Healthcare Corp.</i> , 113 F.3d 645 (7th Cir. 1997)	33
<i>Central Bank, N.A. v. First Interstate Bank, N.A.</i> , 511 U.S. 164 (1994).....	2, 29
<i>Chris-Craft Indus. v. Piper Aircraft Corp.</i> , 480 F.2d 341 (2d Cir. 1973).....	29
<i>Cnty. Found. for Jewish Educ. v. Fed. Ins. Co.</i> , No. 00-2276, 2001 U.S. App. LEXIS 13764 (7th Cir. June 12, 2001)	7
<i>Coates v. Heartland Wireless Communs., Inc.</i> , 26 F. Supp. 2d 910 (N.D. Tex. 1998)	36
<i>Columbraria Ltd. v. Pimenta</i> , 110 F. Supp. 2d 542 (S.D. Tex. 2000)	19
<i>De La Fuente v. DCI Telecomms.</i> , 259 F. Supp. 2d 250 (S.D.N.Y. 2003).....	6
<i>Dodds v. Cigna Sec.</i> , 12 F.3d 346 (2d Cir. 1993).....	20
<i>Foman v. Davis</i> , 371 U.S. 178 (1962).....	37
<i>Friedman v. Rayovac</i> , 295 F. Supp. 2d 957 (W.D. Wis. 2003)	9

	Page
<i>Gebhardt v. ConAgra Foods, Inc.</i> , 335 F.3d 824 (8th Cir. 2003)	36
<i>Gerber v. MTC Elec. Tech. Co.</i> , 329 F.3d 297 (2d Cir. 2003).....	10
<i>Huddleston v. Herman & MacLean</i> , 640 F.2d 534 (5th Cir. 1981), <i>aff'd in part and rev'd in part on other grounds</i> 459 U.S. 375 (1983).....	3, 32, 34, 35
<i>In re Beef Indus. Antitrust Litig.</i> , 600 F.2d 1148 (5th Cir. 1979)	14
<i>In re Campbell Soup Co. Sec. Litig.</i> , 145 F. Supp. 2d 574 (D.N.J. 2001).....	12
<i>In re Complete Mgmt. Sec. Litig.</i> , 153 F. Supp. 2d 314 (S.D.N.Y. 2001).....	13
<i>In re Compuware Sec. Litig.</i> , No. 02-73793, 2004 U.S. Dist. LEXIS 1522 (E.D. Mich. Feb. 3, 2004).....	6
<i>In re Enron Corp. Sec.</i> , 235 F. Supp. 2d 549 (S.D. Tex. 2002)	<i>passim</i>
<i>In re Enron Corp. Sec.</i> , 258 F. Supp. 2d 576 (S.D. Tex. 2003)	7
<i>In re Global Crossing, Ltd. Sec. Litig.</i> , No. 02 Civ. 910 (GEL), 2003 U.S. Dist. LEXIS 22930 (S.D.N.Y. Dec. 18, 2003).....	17
<i>In re Initial Pub. Offering Sec. Litig.</i> , 241 F. Supp. 2d 281 (S.D.N.Y. 2003).....	6
<i>In re Learnout & Hauspie Sec. Litig.</i> , 236 F. Supp. 2d 161 (D. Minn. 2003).....	33
<i>In re Zonagen, Inc. Sec. Litig.</i> , No. H-98-0693 (S.D. Tex. Mar. 31, 1999)	12

	Page
<i>Jensen v. Snellings</i> , 841 F.2d 600 (5th Cir. 1988)	14, 18
<i>Kennedy v. Tallant</i> , 710 F.2d 711 (11th Cir. 1983)	12
<i>Krogman v. Steritt</i> , No. 3:98-CV-2895-T, 1999 WL 1455757 (N.D. Tex. July 21, 1999)	33
<i>LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.</i> , 318 F.3d 148 (2d Cir. 2003).....	20
<i>La Grasta v. First Union Sec., Inc.</i> , No. 02-16215, 2004 U.S. App. LEXIS 1427 (11th Cir. Jan. 30, 2004)	12, 13
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	<i>passim</i>
<i>LeBlang Motors v. Subaru of Am.</i> , 148 F.3d 680 (7th Cir. 1998)	20
<i>Levitt v. Bear Stearns & Co.</i> , 340 F.3d 94 (2d Cir. 2003).....	17, 19
<i>Lone Star Ladies Inv. Club v. Schlotzsky's</i> , 238 F.3d 363 (5th Cir. 2001)	37
<i>Louisiana Gen. Servs., Inc. v. Prudential-Bache Sec., Inc.</i> , No. 89-5503, 1990 U.S. Dist. LEXIS 4432 (E.D. La. Apr. 18, 1990)	22
<i>Marks v. CDW Computer Ctrs.</i> , 122 F.3d 363 (7th Cir. 1997)	14
<i>Nathenson v. Zonagen Inc.</i> , 267 F.3d 400 (5th Cir. 2001)	13, 35
<i>Olcott v. Delaware Flood Co.</i> , 76 F.3d 1538 (10th Cir. 1996)	13
<i>Rothman v. Gregor</i> , 220 F.3d 81 (2d Cir. 2000).....	14

	Page
<i>Salinger v. Projectavision, Inc.</i> , 972 F. Supp. 222 (S.D.N.Y. 1997)	12
<i>Shores v. Sklar</i> , 647 F.2d 462 (5th Cir. 1981)	33, 34
<i>Smith v. Duff & Phelps, Inc.</i> , 5 F.3d 488 (11th Cir. 1993)	14
<i>Sterlin v. Biomune Sys.</i> , 154 F.3d 1191 (10th Cir. 1998)	20
<i>Suez Equity Investors, L.P. v. Toronto-Dominion Bank</i> , 250 F.3d 87 (2d Cir. 2001).....	36
<i>Theoharous v. Fong</i> , 256 F.3d 1219 (11th Cir. 2001)	20
<i>Toombs v. Leone</i> , 777 F.2d 465 (9th Cir. 1985)	22
<i>United States v. Ret. Servs. Group</i> , 302 F.3d 425 (5th Cir. 2002)	13
<i>Whitlock Corp. v. Deloitte & Touche, L.L.P.</i> , 233 F.3d 1063 (7th Cir. 2000)	20
<i>Young v. Lepone</i> , 305 F.3d 1 (1st Cir. 2002).....	13, 14
 STATUTES, RULES & REGULATIONS	
15 U.S.C.	
§78j(b)	21, 22, 33
§78t(a)	22
28 U.S.C.	
§1658.....	5, 7
Federal Rules of Civil Procedure	
Rule 9(b)	14
Rule 11	14
Rule 15(a).....	37

	Page
17 C.F.R.	
§240.10b-5	28, 33, 35
§240.10b-5(a).....	31
§240.10b-5(b).....	31
§240.10b-5(c).....	31

LEGISLATIVE HISTORY

Pub. L. No. 107-204,	
§804.....	5, 11

I. INTRODUCTION

Lead Plaintiff respectfully submits this Opposition in response to the motion to dismiss filed by The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, National Westminster Bank PLC, Greenwich Natwest Structured Finance, Inc., Greenwich Natwest Ltd. and Campsie, Ltd. (referred to collectively herein as “Royal Bank of Scotland” or “defendants”).

Royal Bank of Scotland’s principal purported ground for dismissal is the statute of limitations. Defendants’ argument, however, is predicated on the limitations periods in existence *before* enactment of the Public Company Accounting Reform and Investor Protection Act of 2002 (“Sarbanes-Oxley”), which extends the statute of limitations for all private securities claims from one to two years after discovery of the facts constituting the violation. In its February 25, 2004 Order (the “February 25 Order”), the Court held the expanded statute of limitations from Sarbanes-Oxley “does apply to subsequently filed actions” like this one “based on underlying conduct that occurred before the enactment of the Sarbanes-Oxley Act as long as such claims were not time-barred by the *Lampf* statute of limitations and/or repose controlling before July 30, 2001.” February 25 Order at 42-43. Because the Royal Bank of Scotland Complaint is *not* an amended complaint and Royal Bank of Scotland is *not* a defendant who had already been sued, the proceeding against Royal Bank of Scotland is governed by the Sarbanes-Oxley time periods.

Indeed, defendants fall well-short of meeting their burden to dismiss plaintiffs’ allegations. *Id.* at 30 As the Court recently held, “[w]hether the plaintiff was aware of sufficient facts to put him on inquiry notice is frequently inappropriate for resolution on a motion to dismiss under Rule 12(b)(6).” *Id.* at 28 (citing cases).¹ In this litigation, the “notable complexity of the schemes involving Enron-related entities ... were only gradually unraveled and their alleged connections to

¹ Emphasis is added and citations and footnotes are omitted unless otherwise noted.

each other and the Ponzi scheme exposed.” *Id.* at 63. And “discovery of the alleged wrongdoing outside of Enron was more difficult and less obvious to a reasonable investor.” *Id.* at 105. Contrary to what defendants claim, that Lead Plaintiff sought a tolling agreement from Royal Bank of Scotland after learning the bank transacted with Enron, falls well short of demonstrating inquiry notice. Plaintiffs first discovered Royal Bank of Scotland’s participation in the Enron fraud on **November 24, 2003**, after Enron’s Court-Appointed Examiner released his Final Report to the public. Once the Examiner’s Final Report was released they promptly brought suit. Thus, even if the pre-Sarbanes-Oxley statute of limitations under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), applied here as defendants contend, plaintiffs’ claims were filed timely.

Royal Bank of Scotland also challenges plaintiffs’ Complaint by arguing it fails to allege primary violations by Royal Bank of Scotland. Royal Bank of Scotland asserts it did not deceive investors because its “conduct was passive, not active.” Yet Royal Bank of Scotland structured and implemented financial transactions to further the fraudulent scheme knowing it would fundamentally undermine the integrity of Enron’s reported financial results. Royal Bank of Scotland, as confirmed by Enron’s Examiner in bankruptcy, played a significant role in the formation and in the implementation of transactions involving the bogus LJM1 partnership, sham FAS 140 transactions, and participated in loans disguised as prepays. Indeed, the Court has already rejected Royal Bank of Scotland’s argument, namely that under the Supreme Court’s decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), Royal Bank of Scotland cannot be a primary violator of

the federal securities laws. Royal Bank of Scotland's previously rejected arguments aside; plaintiffs have pleaded primary violations of the federal securities laws. *See infra* §II.B.1 and II.B.2.²

In addition, Royal Bank of Scotland contends plaintiffs have failed to allege loss causation. Defendants assert they are not liable for plaintiffs' damages because their roles in the Enron fraud were concealed from plaintiffs during the class period. Plaintiffs need not have known, at the time they suffered their damages, who injured them to satisfy the loss causation requirement. Royal Bank of Scotland's actions need only "touch upon" or somehow contribute to plaintiffs' damages. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983). Nor must defendants' actions be the sole reason for the artificial inflation and subsequent decline in value of Enron securities. Here, Royal Bank of Scotland falsified Enron's financial results through illicit structured financings, causing Enron's publicly traded securities to be sold at inflated prices, and also misrepresented Enron's financial condition through fraudulent offering memoranda released to the market. Plaintiffs' allegations suffice to plead loss causation. *See infra* §II.B.3.

Lead Plaintiff respectfully requests that Royal Bank of Scotland's motion to dismiss be denied in its entirety.

II. ARGUMENT

A. The Statute of Limitations Does *Not* Bar Claims Filed Against Royal Bank of Scotland

Defendants contend the claims against them should be dismissed as untimely. Royal Bank of Scotland Mem. at 4-22. Essentially, defendants argue the claims asserted against them are time-

² *See* July 11, 2003 Scheduling Order at 4 ("**COUNSEL SHALL NOT REITERATE ALLEGATIONS OR ARGUMENTS PREVIOUSLY REJECTED BY THIS COURT IN RULINGS ON MOTIONS TO DISMISS THE CONSOLIDATED COMPLAINTS.**") (emphasis in original).

barred for two reasons. First, defendants assert plaintiffs were on inquiry notice over one year prior to filing the Complaint and therefore, under *Lampf*, plaintiffs' claims are untimely. Second, defendants say the expanded Sarbanes-Oxley statute of limitations does not apply to claims asserted against them (for the first time) on December 2, 2003. Defendants are wrong on both counts.

Prior to the enactment of Sarbanes-Oxley, *Lampf* required that “[l]itigation instituted pursuant to §10(b) and Rule 10b-5 ... must be commenced within one year *after the discovery of the facts* constituting the violation and within three years after such violation.” 501 U.S. at 364.

Even if the *Lampf* one-year statute of limitations applied to this proceeding (it does not), plaintiffs were not on notice of claims for Royal Bank of Scotland's participation in the Enron scheme until November 24, 2003, when the Final Report of Neal Batson, Court-Appointed Examiner (“Final Report”) was first released to the public. *See* ¶¶4, 12(a). For example, in the Final Report, it was revealed (for the first time) that Royal Bank of Scotland had received verbal assurances from top Enron officials of repayment of the bank's equity investment in each of the FAS 140 transactions with Enron. Moreover, the Examiner revealed that Royal Bank of Scotland understood this equity needed to be “at risk” and understood these verbal assurances could neither be “formally documented for accounting reasons” nor publicly disclosed if Enron was to derive the accounting benefits that it sought from these transactions. Lead Plaintiff brought claims against Royal Bank of Scotland shortly after the Examiner's Final Report – well within the one-year statute of limitations under *Lampf*. And, even if plaintiffs were on inquiry notice on October 3, 2002, as defendants contend, plaintiffs' claims would still be timely under Sarbanes-Oxley.

Sarbanes-Oxley expanded the statute of limitations for private securities laws actions to two years from the discovery of facts constituting the violation, rather than one year, and to five years from the violation, rather than three years. *See infra* §II.A.1. Lead Plaintiff's Complaint clearly was filed within Sarbanes-Oxley's two-year limitations period.

1. Sarbanes-Oxley Lengthens the Limitations Period Applicable to Claims Against Royal Bank of Scotland

Defendants admit that prior to enactment of Sarbanes-Oxley on July 30, 2002, the statute of limitations had *not* expired as to claims arising out of the Nixon Prepay and ETOL I, ETOL II, and ETOL III transactions. Royal Bank of Scotland Mem. at 6-7.³

Nonetheless, defendants contend “plaintiffs’ claims are barred even in light of Sarbanes-Oxley.” Royal Bank of Scotland Mem. at 7. Defendants are wrong. Section 804 of Sarbanes-Oxley extends the statute of limitations for all private securities claims from one to two years after discovery of the facts constituting the violation, and from three to five years after the violation occurred. *See* Pub. L. No. 107-204, §804.⁴ Indeed, this Court recently held that the expanded statute

³ Plaintiffs believe Royal Bank of Scotland’s other transactions are also timely for the reasons stated in Plaintiffs’ Opposition to Certain Defendants’ Motions to Dismiss on Statute of Limitations Arguments (filed December 30, 2003, Docket No. 88 in *Washington State Inv. Bd. v. Lay*, No. H-02-3401). However, in light of the Court’s February 25 Order, plaintiffs will not repeat arguments previously made regarding revival of claims under Sarbanes-Oxley.

⁴ Section 804 of Sarbanes-Oxley provides:

(a) IN GENERAL. Section 1658 of title 28, United States Code, is amended –

(1) by inserting “(a)” before “Except”; and

(2) by adding at the end the following:

“(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of –

“(1) 2 years after the discovery of the facts constituting the violation; or

“(2) 5 years after such violation.”

of limitations “does apply to subsequently filed actions based on underlying conduct that occurred before the enactment of the Sarbanes-Oxley Act as long as such claims were not time-barred by the *Lampf* statute of limitations and/or repose controlling before July 30, 2001.” February 25 Order at 42-43. Furthermore, the Court held “[t]he new statutory provision clearly and unambiguously states that the two-year/five-year limitations period ‘shall apply to all proceedings addressed by this section that are *commenced on or after the date of Enactment of the Act,*’ i.e., July 30, 2002.” *Id.* at 40. (emphasis in original).

Numerous other courts have found Sarbanes-Oxley applies to *all proceedings* commenced on or after July 30, 2002. For example, in *In re Compuware Sec. Litig.*, No. 02-73793, 2004 U.S. Dist. LEXIS 1522, at *44-*45 (E.D. Mich. Feb. 3, 2004), the Eastern District of Michigan recently held, “the Sarbanes-Oxley Act applies to actions filed after July 30, 2002.” Similarly, in *De La Fuente v. DCI Telecomms.*, 259 F. Supp. 2d 250, 259 n.5 (S.D.N.Y. 2003), the court observed that “Congress’s intent is clear – the statute of limitations established by the Sarbanes-Oxley Act applies only to proceedings commenced on or after July 30, 2002.” And in *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 294 n.4 (S.D.N.Y. 2003), although the original one-year limitations period apparently ended on December 6, 2001, one “Plaintiff filed her action on December 6, 2002, taking advantage of the newly expanded statute of limitations for securities fraud actions contained in the Sarbanes-Oxley Act of 2002.”

(b) EFFECTIVE DATE. The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, *shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.*

(c) NO CREATION OF ACTIONS. Nothing in this section shall create a new, private right of action.

Pub. L. No. 107-204.

Here, plaintiffs filed suit against Royal Bank of Scotland after Sarbanes-Oxley's effective date. *See* February 25 Order at 42-43; *see also Cmty. Found. for Jewish Educ. v. Fed. Ins. Co.*, No. 00-2276, 2001 U.S. App. LEXIS 13764, at *12 (7th Cir. June 12, 2001) (if a party is brought into the litigation for the first time, "the claim is obviously new to that entity; thus it is a claim first made"). Under these circumstances, there could be no dispute over the application of the new statute of limitations.

Plaintiffs first discovered Royal Bank of Scotland's participation in the Enron fraud on November 24, 2003, after the Examiner released his Final Report to the public. *See* ¶¶4, 12(a). Just two weeks later plaintiffs sued Royal Bank of Scotland for securities fraud. Plaintiffs' claims against Royal Bank of Scotland therefore were filed less than two "years after the discovery of the facts constituting the violation." 28 U.S.C. §1658.

Royal Bank of Scotland argues this Court has already held that the extended Sarbanes-Oxley statute of limitations does not apply to *Newby* and therefore it does not apply to plaintiffs' claims against Royal Bank of Scotland. Royal Bank of Scotland Mem. at 4 n.3. However, unlike the *Newby* litigation, plaintiffs commenced their proceedings against Royal Bank of Scotland *after* Sarbanes-Oxley became law. Nothing in *Newby* precludes application of the longer, two year/five year statute of limitations to plaintiffs' claims. Defendants' reliance on *dicta* from the Court's March 12, 2003 Order at page 4 of their motion is misguided. *See In re Enron Corp. Sec.*, 258 F. Supp. 2d 576, 601 n.20 (S.D. Tex. 2003). The Court never addressed whether Sarbanes-Oxley applied to proceedings such as these against Royal Bank of Scotland, which commenced after July 30, 2002. Moreover, in its February 25 Order, the Court held that the expanded statute of limitations "does apply to subsequently filed actions" like this "based on underlying conduct that occurred before the enactment of the Sarbanes-Oxley Act as long as such claims were not time-barred by the

Lampf statute of limitations and/or repose controlling before July 30, 2001.” February 25 Order at 42-43. That is precisely the situation here.

**a. This Action Is a “Proceeding Commenced on or After”
Passage of Sarbanes-Oxley and Thus Sarbanes-Oxley’s
Limitations Period Applies**

Defendants argue Sarbanes-Oxley does not apply to the claims against Royal Bank of Scotland because this case is not a “proceeding” commenced after July 30, 2002. Royal Bank of Scotland Mem. at 4 n.3 (citing briefs). Similarly, defendants contend “[p]laintiffs have implicitly conceded that this case is a continuation of *Newby* by failing to file a motion to appoint lead counsel and lead plaintiff or otherwise to follow the procedures needed to initiate a new securities fraud class action.” *Id.* at 4. While the proceeding against Royal Bank of Scotland was consolidated with *Newby*, this does not alter the application of Sarbanes-Oxley to claims asserted against Royal Bank of Scotland, for the first time here. As a practical matter, Royal Bank of Scotland has never before been sued for its role in the Enron fraud. Thus, it can hardly be said that the claims asserted against it in the December 2, 2003 Complaint were pending as of July 30, 2002 (the date of enactment of Sarbanes-Oxley). Moreover, it would run counter to the intent of the PSLRA and would be an extreme waste of judicial resources to repeat the Lead Plaintiff procedure for each action consolidated into *Newby*.

Seeking to avoid the longer Sarbanes-Oxley limitations period, Royal Bank of Scotland argues that because *Newby* was pending prior to the enactment of Sarbanes-Oxley, the *Lampf* statute of limitations should apply to the proceeding against Royal Bank of Scotland. Royal Bank of Scotland Mem. at 4 n.3 (citing briefs). In opposing Imperial County Employees Retirement System’s (“ICERS”) motion to intervene, the objectors made a similar contention, arguing that the claims asserted in the *Newby* Amended Complaint” are part of the same “proceeding” as *Newby* and thus were pending at the time of Sarbanes-Oxley’s enactment. February 25 Order at 33. In its

Order, the Court held that “*because the latest complaint is technically an amendment of the previous consolidated complaint,*” it “does not construe the newly defined related-Enron entity claims in the last *Newby* complaint as a ‘new proceeding’ and concludes that its claims are not governed by the lengthened statute of limitations also on these grounds.” *Id.* at 44-45.

Royal Bank of Scotland will likely assert this same logic should apply to the claims asserted against it, *for the first time*, on December 2, 2003. But such an analogy would be like comparing apples to oranges. In its February 25 Order, the Court clearly stated the reasons it did not consider the claims asserted in the *Newby* Amended Complaint to be a “new proceeding.” First, as noted, the Court specifically stated that it did not construe the claims in the *Newby* Amended Complaint as a new proceeding “because the latest complaint is technically an *amendment* of the previous consolidated complaint.” *Id.* at 44. Here, however, the Royal Bank of Scotland Complaint is *not* an amended complaint; it is simply a “Complaint for Violations of the Securities Laws.” Second, the Court reasoned that because the claims asserted in the *Newby* Amended Complaint were “asserted against defendants that were substantially the same as the original defendants and their subsidiaries,” the *Newby* Amended Complaint was not a new proceeding. *Id.* Of course, neither Royal Bank of Scotland, nor any of its subsidiaries, has ever been sued in connection with the conduct alleged in the Complaint. Accordingly, because the Royal Bank of Scotland Complaint is *not* an amended complaint and Royal Bank of Scotland is *not* a defendant who had already been sued, the proceeding against Royal Bank of Scotland must be considered a “new proceeding.”

Defendants may also attempt to argue that the Court’s discussion of *Friedman v. Rayovac*, 295 F. Supp. 2d 957 (W.D. Wis. 2003), bars the application of Sarbanes-Oxley to the Royal Bank of Scotland Complaint. *See* February 25 Order at 52 n.42. This Court disagreed with the *Friedman* court’s reasoning “that an *amended complaint* that adds new parties commences a ‘new proceeding’ even if the claim was part of the previously filed lawsuit.” *Id.* Moreover, the Royal Bank of

Scotland Complaint is *not* an amended complaint. The Royal Bank of Scotland Complaint asserted claims for the first time against a new and different defendant. Accordingly, the Royal Bank of Scotland Complaint is a “new proceeding.”

Plaintiffs anticipate Royal Bank of Scotland will also argue that the Court’s discussion of *Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297 (2d Cir. 2003), supports their argument that Sarbanes-Oxley does not apply to the Royal Bank of Scotland proceeding. See February 25 Order at 54-55. In its Order however, the Court compared Sarbanes-Oxley to the PSLRA and stated that because “the extended limitations provision refers to ‘proceedings,’ not to claims or parties,” it did not apply to the claims asserted in the *Newby* Amended Complaint. *Id.* at 55. Here, the Complaint filed against Royal Bank of Scotland is *not* merely an amended complaint adding parties or claims, it is a new proceeding against a new defendant.

Logic and equitable consideration support plaintiffs here. If the Complaint against Royal Bank of Scotland filed *after* Sarbanes-Oxley was enacted cannot receive the benefit of the extended limitations period, then who can properly bring suit? Simply because the same plaintiff and certain class members in *Newby* have claims against Royal Bank of Scotland is not a basis to conclude the action against Royal Bank of Scotland is the same proceeding as initially brought in *Newby*.

Thus, the Royal Bank of Scotland Complaint is a proceeding “commenced on or after the date of enactment” of Sarbanes-Oxley and the expanded statute of limitations applies to the claims asserted therein.

b. Sarbanes-Oxley’s Legislative History Undermines Royal Bank of Scotland’s Interpretation of the Act

Even assuming, *arguendo*, Sarbanes-Oxley was unclear or ambiguous on its face, a review of its legislative history, and particularly the Conference Report, unequivocally indicates Congress intended Sarbanes-Oxley apply to *all* private securities causes of action filed after the date of Sarbanes-Oxley’s enactment. The section of Sarbanes-Oxley at issue, Title VIII, was authored by

Senator Leahy, who intended that Sarbanes-Oxley apply to “all the already existing private causes of action under the various federal securities laws.” 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy).

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

Section 804. – Statute of Limitations

This provision is intended to lengthen any statute of limitations under federal securities law, and to shorten none. *The section, by its plain terms, applies to any and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred.*

148 Cong. Rec. S7418 (daily ed. July 26, 2002). *See also* February 25, 2004 Order at 40-41 (quoting statement of Sen. Leahy).

It is clear from both the statutory language and legislative history that §804 of Sarbanes-Oxley applies to the proceeding brought against Royal Bank of Scotland.

2. Even Assuming Sarbanes-Oxley Is to be Construed as Defendants Say, Defendants’ Purported Affirmative Defense May Not Be Asserted to Dismiss Plaintiffs’ Claims and This Action Is Timely Under *Lampf*

Defendants assert a number of factual arguments purportedly supporting their claim that plaintiffs should have discovered the facts giving rise to the Complaint more than one year before the Complaint was filed, and that certain allegations are barred by the three-year statute of repose. First, defendants argue, as a matter of law, the facts pleaded in the Complaint establish that the claims against them are time barred. Royal Bank of Scotland Mem. at 4-7. Even if inquiry notice is the standard, the issue of inquiry notice cannot be resolved on the pleadings alone. Assuming *arguendo* the issue could be resolved on a motion to dismiss, the facts pleaded in the Complaint do *not* establish plaintiffs’ claims are time barred.

Second, defendants claim a letter sent by plaintiffs' counsel requesting that Royal Bank of Scotland enter a tolling agreement also conclusively establishes inquiry notice. That assertion is not correct, nor should it be decided on a motion to dismiss.

a. Defendants' Statute of Limitations Claims Should *Not* Be Resolved on a Motion to Dismiss

Determining when the statute of limitations commenced should not be resolved on the pleadings alone. As the Court recently held, “[w]hether the plaintiff was aware of sufficient facts to put him on inquiry notice is frequently inappropriate for resolution on a motion to dismiss under Rule 12(b)(6).” February 25 Order at 28 (citing cases). *See also id.* at 30 (“*Deciding when a claimant is on inquiry notice requires a fact-specific examination ...*”); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9-10 (5th Cir. 1967) (“When [inquiry notice] took place is a jury question.”); *La Grasta v. First Union Sec., Inc.*, No. 02-16215, 2004 U.S. App. LEXIS 1427, at *20-*21 (11th Cir. Jan. 30, 2004) (“Whether a plaintiff had sufficient facts to place him on inquiry notice of a claim for securities fraud ... is a question of fact, and as such is often inappropriate for resolution on a motion to dismiss under Rule 12(b)(6).”); *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983) (“particularly suited for a jury’s consideration”); *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 602 (D.N.J. 2001) (“it is inappropriate to dismiss claims as time-barred where, as here, the analysis is so fact-intensive”); *Salinger v. Projectavision, Inc.*, 972 F. Supp. 222, 229 (S.D.N.Y. 1997) (“ill-suited for determination on motion to dismiss”).⁵

⁵ Similarly, in *In re Zonagen, Inc. Sec. Litig.*, No. H-98-0693 (S.D. Tex. Mar. 31, 1999), Judge Lake held:

The “inquiry notice” doctrine is applied in security fraud actions to determine when circumstances were such that the fraud victim, by exercising reasonable diligence, would have discovered the wrongdoing. Because the Fifth Circuit has yet to determine whether plaintiffs or defendants bear the burden of pleading and proving the issue of inquiry notice or whether constructive notice of SEC filings is sufficient

Moreover, the Fifth Circuit has held:

A statute of limitations defense is an *affirmative defense*, Fed. R. Civ. P. 8(c), and thus the burden [is on defendant] to create a genuine issue of material fact regarding when [plaintiff] had sufficient knowledge to start the limitations period running.

United States v. Ret. Servs. Group, 302 F.3d 425, 430 (5th Cir. 2002); *see also La Grasta*, 2004 U.S. App. LEXIS 1427, at *12 (“A statute of limitations bar is ‘an affirmative defense’”). Because defendants bear the burden of pleading and proving their purported statute of limitations defense, this issue cannot be resolved on the pleadings alone. February 25 Order at 28, 30.⁶

Indeed, identifying a reasonable discovery date to apply a statute of limitations is a two-step process that requires weighing facts. First, it must be determined *when* a reasonable investor could learn of sufficient facts establishing a duty to inquire. Second, assuming a duty to inquire develops, it must be determined when, in the exercise of “reasonable diligence,” a plaintiff should have discovered the facts underlying the alleged claim. *See* February 25 Order at 29 (citing *Young v. Lepone*, 305 F.3d 1, 9-10 (1st Cir. 2002)); *see also In re Complete Mgmt. Sec. Litig.*, 153 F. Supp. 2d 314, 336-37 (S.D.N.Y. 2001). As this Court held recently, ““the later date on which an investor, alerted by storm warnings and thereafter exercising reasonable diligence, would have discovered the

to trigger the limitations period, this issue is not one that the court can resolve on the pleadings alone.

Order at 35-36 (*vacated and remanded on other grounds, Nathenson v. Zonagen Inc.*, 267 F.3d 400 (5th Cir. 2001)) (Ex. 1 hereto).

⁶ The Tenth Circuit’s decision in *Olcott* also is persuasive:

We remind the district court the determination of when [plaintiff] had notice of the underlying events requires an evidentiary finding. As a result, resolving the notice issue in the procedural context of a motion to dismiss is wrong. We believe it would be more appropriate to make the necessary determination on summary judgment, or, if a genuine issue of material fact remains in dispute, after an evidentiary hearing.

Olcott v. Delaware Flood Co., 76 F.3d 1538, 1549 (10th Cir. 1996).

fraud,” and not the date that sufficient storm warnings first appear, “controls because the purpose of a discovery rule is to protect plaintiffs who do exercise reasonable diligence regarding available information and because such a rule is fair to both plaintiffs and defendants since it prevents premature suits while still requiring that a suit be filed timely after the facts should have been discovered.” February 25 Order at 29 (citing *Young*, 305 F.3d at 9-10). Plaintiffs do not have notice of a potential claim “unless they are aware of some evidence tending to support it.” *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1171 (5th Cir. 1979). Concealment of relevant facts may be considered when determining inquiry notice. *See Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

On these points, defendants bear the burden of production and persuasion to demonstrate what facts the reasonable investor would have discovered to bring a claim in the course of due diligence. *See, e.g., Marks v. CDW Computer Ctrs.*, 122 F.3d 363, 367 (7th Cir. 1997); *Beef Indus.*, 600 F.2d at 1711; *Rothman v. Gregor*, 220 F.3d 81, 96 (2d Cir. 2000); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999). As the Seventh Circuit stated in *Marks*, here defendants leave the Court to speculate:

What facts, sufficiently particular to file a claim, could [plaintiffs] have found if [they] had started looking at [the time of the alleged “storm warning”]? How could [they] have confirmed or dispelled any suspicions with the materials available to [them]? Would [defendants] have had [plaintiffs] risk Rule 11 sanctions or a violation of Rule 9(b) [or the PSLRA] by filing a complaint listing the ... “storm warnings” and no other particularized evidence of fraud?

122 F.3d at 369; *accord Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 n.9 (11th Cir. 1993)

(“defendants bear the burdens of production and persuasion on [statute of limitations]”).

Defendants’ motion to dismiss is insufficient to meet their burden as a matter of law.

b. Neither Defendants' Assertions Nor the Facts Pleaded in the Complaint Establish Inquiry Notice as Defendants Contend

As noted above, plaintiffs specifically plead in their Complaint that they had no notice of claims against Royal Bank of Scotland until November 24, 2003, when Enron's Bankruptcy Examiner released to the public his Final Report, which revealed Royal Bank of Scotland's participation in the Enron fraudulent scheme. *See* ¶¶4, 12(a). Lead Plaintiff filed the Complaint against Royal Bank of Scotland less than two weeks later on December 2, 2003. Accordingly, even under the *Lampf* one-year limitations period, plaintiffs' claims against Royal Bank of Scotland are timely.

Neither Enron's general announcements about its reduction in shareholder equity (with no mention of Royal Bank of Scotland) nor Enron's SEC filings, made prior to its announcements, mentioning only in passing NatWest, caused plaintiffs to discover facts constituting Royal Bank of Scotland's securities violations. *See* Royal Bank of Scotland Mem. at 17-21. Even under an inquiry notice standard, fraud by Enron could not have reasonably been read by plaintiffs as fraud by all who did business with Enron. *See* February 25 Order at 105 ("discovery of the alleged wrongdoing outside of Enron was more difficult and less obvious to a reasonable investor").

As for the SEC filings, it appears that defendants are attempting to argue that Royal Bank of Scotland's role in the fraud was so obvious that: (1) plaintiffs should have learned of it well before Enron's fraud became public knowledge (defendants point to Enron's 1999 and 2000 securities filings where NatWest is referenced); or that (2) mere mention of defendants in Enron's November 8, 2001 8-K would suffice to place plaintiffs on inquiry notice. Royal Bank of Scotland Mem. at 19-20. Neither proposition has merit. As the Court has recently stated, "[t]he notable complexity of the schemes involving Enron-related entities ... were only gradually unraveled and their alleged connections to each other and the Ponzi scheme exposed." February 25 Order at 63. Once the Final

Report was released on November 24, 2003, containing facts constituting the violations by Royal Bank of Scotland, plaintiffs acted promptly and brought suit.

Royal Bank of Scotland relies on a number of media reports to support its contention that plaintiffs were on notice of Royal Bank of Scotland's role in the Enron fraud in the fall of 2001. This is nonsense. Not one of the articles cited by Royal Bank of Scotland even obliquely mentions the bank's role in the fraud. *See* Royal Bank of Scotland Mem. at 18-19 & nn.10-11. Indeed, as the Court has recognized on numerous occasions, this multilayered fraud has been unraveled slowly. The part played by numerous actors is still being determined. The articles cited by Royal Bank of Scotland merely detail the first layer of fraud uncovered. The media reports simply can not be viewed as putting a reasonable investor on notice of Royal Bank of Scotland's role in the Enron debacle. The attempt by Royal Bank of Scotland to paint plaintiffs with knowledge well in advance even of Enron's bankruptcy is without merit.

Defendants also contend a letter sent to Royal Bank of Scotland by Lead Counsel on October 3, 2002 establishes that plaintiffs "were on inquiry notice" of Royal Bank of Scotland's role in the Enron fraud on October 3, 2002. Royal Bank of Scotland Mem. at 5. The October 3, 2002 letter, however, merely indicated Lead Plaintiff's "continuing investigation reveal[ed] a basis for naming" Royal Bank of Scotland as a defendant.⁷ Such a statement is not sufficient to trigger the running of the statute.

Insofar as plaintiffs learned Royal Bank of Scotland did business with Enron (like many banks), at the time there was in fact a possibility that claims existed against Royal Bank of Scotland. But the only information then existing involved the specific acts of bankers working for Royal Bank

⁷ Notably, in the October 3, 2003 letter, Lead Counsel also stated "that the Sarbanes-Oxley legislation extends the statute of limitations to two years from the date of actual knowledge of a claim." *See* Royal Bank of Scotland Mem. Ex. A.

of Scotland's "NatWest" unit, who were indicted for their conduct. Plaintiffs diligently pursued their investigation and certainly would have brought any discovered claims against Royal Bank of Scotland. But no notice of facts supporting such claims was forthcoming. Indeed, the facts revealed included that bankers working for National Westminster Bank "siphoned" from or "swindled" their own employer of money owed the bank in connection with Enron transactions. As averred in the indictment against them, these bankers set up a personal offshore account at Bank of Bermuda (Cayman) Limited and directed into that account for their own benefit funds due the bank in connection with the transactions. There was no information demonstrating notice for claims against the bank.

The Second Circuit's opinion in *Levitt v. Bear Stearns & Co.*, 340 F.3d 94 (2d Cir. 2003), is persuasive here. See February 25 Order at 61, 105-06 (relying on *Levitt*). In *Levitt*, the Second Circuit reversed a district court's dismissal of a complaint as time barred in a federal securities fraud class action. 340 F.3d at 104. The Court of Appeal held because defendant Bear Stearns was a secondary actor (like Royal Bank of Scotland here), *Levitt* was "not a case where Plaintiffs could allege a *prima facie* case against Bear Stearns simply by examining ... financial statements and media coverage of the company." *Id.* at 103. This, held the Second Circuit, distinguished the case before it from the "typical storm warnings case ... brought against ... officers or directors." *Id.*

Thus:

It makes little sense from a policy perspective to require specific factual allegations – on pain of dismissal in cases of this sort – and then to punish the pleader for waiting until the appropriate factual information can be gathered by dismissing the complaint as time barred.

Id. at 104; see also *In re Global Crossing, Ltd. Sec. Litig.*, No. 02 Civ. 910 (GEL), 2003 U.S. Dist. LEXIS 22930 (S.D.N.Y. Dec. 18, 2003) (same).

Here, the facts pleaded in the Complaint do not establish inquiry notice during the period of time asserted by defendants. Likewise, defendants' assertions as to matters outside the Complaint do

not establish inquiry notice. If anything, the Complaint and plaintiffs' conduct demonstrate that, in keeping with the dictates of the PSLRA's heightened pleading requirements, Lead Plaintiff marshaled sufficient evidence before filing suit. Thus, defendants' motion should be denied.⁸

c. Defendants' Purported Inquiry Notice Authority Is Not Persuasive

In arguing that inquiry notice is the standard, defendants rely heavily on *Jensen*. See Royal Bank of Scotland Mem. at 14-15. But under *Jensen*, the requisite knowledge plaintiffs must have before the statute begins to run is greater than defendants imply. The court in *Jensen* stated “[t]he requisite knowledge that a plaintiff must have to begin the running of the limitations period ‘is ... *“the facts forming the basis of his cause of action,”*... not that of the existence of the cause of action itself.” 841 F.2d at 606. Here, plaintiffs did not know the facts which formed the basis of their cause of action until public release of the Final Report by Enron's Examiner, on November 24, 2003. ¶¶4, 12(a).⁹ The Final Report is analogous to the attorney's memorandum in *Jensen*, in that it both provided plaintiffs with facts constituting the violation and would certainly prompt further inquiry. The difference is that plaintiffs here filed their claim against the Royal Bank of Scotland within weeks of the release of the Final Report, whereas the *Jensen* plaintiffs allowed their statute of limitations to lapse.

⁸ At a minimum, “discovery should [be] permitted on the question of what information was realistically available to Plaintiffs and when it was available.” February 25 Order at 105-06 (citing *Levitt*).

⁹ The facts of *Jensen* further support plaintiffs' contention. The plaintiffs in *Jensen* had evidence implicating the specific defendants they ultimately sued, thereby causing the statute of limitations to begin to run well over two years before they filed suit. 841 F.2d at 607-08. Plaintiffs knew that defendant had lied to them about their cattle investment by spring of 1979. *Id.* at 607. By July of that year, plaintiffs had consulted a lawyer who produced a 35-page memorandum concerning plaintiffs' investments and defendants' misconduct, including “secret profits,” “misrepresentations ... as to losses” and “unjustifiable management fees.” *Id.* at 608. Plaintiffs did not bring suit until September 1981. *Id.* The court concluded that “[a] reasonable person would have been alerted to a possible fraudulent scheme on the part of [defendant].” *Id.*

Notably this is not a run of the mill “storm warnings” case. Indeed, “[t]he notable complexity of the schemes involving Enron-related entities ... were only gradually unraveled and their alleged connections to each other and the Ponzi scheme exposed.” February 25 Order at 63. This was a cover-up that remained successfully shrouded in secrecy for more than five years. Thus, “discovery of the alleged wrongdoing outside of Enron was more difficult and less obvious to a reasonable investor.” *Id.* at 105 (citing *Levitt*). The Final Report provided the facts necessary to go forward with plaintiffs’ claims against the Royal Bank of Scotland and plaintiffs acted promptly to do so.

The only Fifth Circuit case that defendants cite besides *Jensen*, in support of their contention that plaintiffs were on notice by October 2002, is *Columbraria Ltd. v. Pimenta*, 110 F. Supp. 2d 542 (S.D. Tex. 2000). See Royal Bank of Scotland Mem. at 15. In *Columbraria*, defendant Beteta discovered that plaintiff Columbraria’s shares in Sofamor/Danok “had been wrongfully sold and the proceeds invested within Interamericas Investments [another defendant] and its subsidiaries and affiliate companies.” 110 F. Supp. 2d at 545. Columbia admitted that defendant Beteta told them what had happened in September 1998 but they did not file suit against him until November 5, 1999. *Id.* at 548. The court found that “Columbraria’s knowledge in September, 1998 that the Safomor-Danek shares had been sold, without Columbraria’s permission, constituted sufficient ‘inquiry notice’ for purposes of filing an action under Rule 10b-5.” *Id.*

Unlike the situation in *Columbraria*, where defendants did not cloak their wrongdoing, here Royal Bank of Scotland did not come forward and explain its role in the fraudulent schemes.¹⁰

¹⁰ In fact, while conferring with Lead Counsel regarding the parties’ tolling agreement, counsel for the Royal Bank of Scotland repeatedly and vehemently denied any wrongdoing by Royal Bank of Scotland and insisted that Royal Bank of Scotland “acted properly” in its involvement with Enron.

Defendants fail to point to precedent, in the Fifth Circuit or elsewhere, with analogous facts to the case at bar where plaintiffs have been found to have inquiry notice.

Equally unpersuasive is defendants reliance on *Theoharous v. Fong*, 256 F.3d 1219 (11th Cir. 2001). Royal Bank of Scotland Mem. at 15. There, plaintiffs only named a corporation and its officers as defendants and were found to have inquiry notice of their claim when the corporation filed bankruptcy. Here, the Court has already addressed this argument and held that a company's bankruptcy does not put investors on inquiry notice of potential claims against more attenuated defendants like the banks. *See* February 25 Order at 61 (“*In sum, the Court is not persuaded that the Enron bankruptcy was sufficient to trigger a duty of reasonable investigation*”). Indeed, the “claims asserted here are not against Enron and its officers, but against the more attenuated Bank entities whose alleged involvement and fraudulent acts in the concerted scheme made them far less obvious wrongdoers at the start of the investigation of Enron’s collapse.” *Id.* at 60.¹¹

d. The Lampf Three-Year Statute of Repose Does Not Bar Plaintiffs’ Claims

Royal Bank of Scotland contends that several transactions it engaged in with Enron occurred before December 2, 2000. Royal Bank of Scotland Mem. at 5-7. Royal Bank of Scotland asserts

¹¹ Defendants’ other inquiry notice cases simply do not help them. *See* Royal Bank of Scotland Mem. at 15-17. Defendants cite *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 153-54 (2d Cir. 2003), but leave out of their analysis a key factor that put the plaintiffs in that matter on inquiry notice. Plaintiffs had inquiry notice because there was already litigation pending in another district against the same defendants for the same underlying claims. Here, plaintiffs did not have the benefit of a parallel case. Defendants rely on *Whitlock Corp. v. Deloitte & Touche, L.L.P.*, 233 F.3d 1063 (7th Cir. 2000), and *LeBlang Motors v. Subaru of Am.*, 148 F.3d 680, 691 (7th Cir. 1998), two cases applying Illinois state law. Of course, the Illinois statute of limitations is not at issue here. Royal Bank of Scotland’s reliance on *Sterlin v. Biomune Sys.*, 154 F.3d 1191 (10th Cir. 1998) and *Dodds v. Cigna Sec.*, 12 F.3d 346 (2d Cir. 1993), is equally misplaced. Moreover, none of these cases can credibly be compared to the Royal Bank of Scotland proceeding because “[t]he notable complexity of the schemes involving Enron-related entities ... were only gradually unraveled and their alleged connections to each other and the Ponzi scheme exposed.” February 25 Order at 63.

that “Sutton Bridge, LJM1/Rhythms Hedge, Nixon Prepay, and ETOL I violations occurred more than three years before Plaintiffs filed suit against RBSG.” *Id.* at 7. Thus, argues Royal Bank of Scotland, “Plaintiffs’ claims based on these transactions are barred by the three-year statute of repose.” *Id.* Defendants’ argument is disingenuous at best.

Even if Royal Bank of Scotland is correct that the three-year statute of repose applies and bars plaintiffs’ claims with respect to the transactions entered prior to December 2000, plaintiffs still have a timely §10(b) claim against Royal Bank of Scotland. Indeed, Royal Bank of Scotland concedes that, even under their interpretation of the law, plaintiffs have a claim based on Royal Bank of Scotland’s active participation in ETOL II and ETOL III. *Id.* Accordingly, the claims asserted against Royal Bank of Scotland are *not* time-barred under the *Lampf* three-year statute of repose.

Moreover, Royal Bank of Scotland’s participation in the other transactions can be used to show that Royal Bank of Scotland acted with scienter in ETOL II and ETOL III and that ETOL II and ETOL III were part of a larger pattern and scheme, even if some of the portions of the scheme are time-barred. *See In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 689 (S.D. Tex. 2002) (noting evidence or acts which may be time-barred is admissible to “establish evidence of a scheme and of scienter”).¹²

¹² *Enron*, 235 F. Supp. 2d at 693-94 (“scienter pleading requirement is partially satisfied by allegations of a regular pattern of related and repeated conduct involving the creation of unlawful, Enron-controlled SPEs, sale of unwanted Enron assets to these entities in clearly non-arm’s length transactions and often with guarantees of no risk, in order to shift debt off Enron’s balance sheet and sham profits onto its books at critical times when quarterly or year-end reports to the SEC, and by extension the public, were due, followed in many cases by the undoing of these very deals once the reports had been made”).

Thus, even under the *Lampf* one-year statute of limitations and three-year statute of repose, plaintiffs have plead timely §10(b) and §20(a) claims against Royal Bank of Scotland.¹³

B. Plaintiffs Plead Primary Violations of the Federal Securities Laws

Royal Bank of Scotland, purportedly relying upon the Court's December 20 Order, argues that its involvement in the fraudulent Enron scheme is nothing more than aiding and abetting, therefore inactionable pursuant to *Central Bank*. See Royal Bank of Scotland Mem. at 22-32. Royal Bank of Scotland is incorrect. Foremost, Royal Bank of Scotland devotes four pages of its brief to recharacterizing this Court's prior decision and reanalyzing the holdings of numerous decisions already closely scrutinized by the Court. *Id.* at 22-25. The Court's December 20 Order, however, speaks for itself. Accordingly, plaintiffs do not here reargue that which the Court has already decided. Rather, as demonstrated below, plaintiffs simply demonstrate why Royal Bank of Scotland is liable for committing primary fraudulent acts that caused plaintiffs to be damaged.

1. Royal Bank of Scotland Knew It Was Deceiving Investors

Royal Bank of Scotland acted with the requisite scienter to commit securities fraud. Indeed, Royal Bank of Scotland implicitly admits as much. Nowhere in its motion to dismiss does Royal Bank of Scotland assert that plaintiffs fail to plead a strong inference of scienter – and for good

¹³ In a footnote, Royal Bank of Scotland contends this case should be dismissed “due to Plaintiffs’ failure to adequately plead their compliance with the statute of limitations.” Royal Bank of Scotland Mem. at 21 n.14. However, as previously noted, the statute of limitations is an affirmative defense. See *supra* §II.A.2.a. Were plaintiffs required to allege compliance with the statute of limitations, they would need only “to ‘affirmatively plead sufficient facts in [their] complaint to demonstrate conformity with the statute of limitations.’” *Louisiana Gen. Servs., Inc. v. Prudential-Bache Sec., Inc.*, No. 89-5503, 1990 U.S. Dist. LEXIS 4432, at *2 (E.D. La. Apr. 18, 1990) (quoting *Toombs v. Leone*, 777 F.2d 465, 468 (9th Cir. 1985)). Plaintiffs have done this. See ¶4 (“Lead Plaintiff received notice of the conduct alleged herein by the public filing of the Final Report by Enron’s Court-Appointed Examiner ...”). The pleaded facts therefore “demonstrate conformity with the statute of limitations.” *Louisiana Gen.*, 1990 U.S. Dist. LEXIS 4432, at *2. Lead Plaintiff’s claims are sufficiently pleaded. However, if this Court requires Lead Plaintiff to plead more to demonstrate the timeliness of its claims, Lead Plaintiff will do so.

reason. The Examiner's Final Report provides more than ample proof that any such argument would be futile. Indeed, as detailed more fully in the Examiner's Final Report and below:

- Royal Bank of Scotland knew Enron manipulated its financial results. As one Royal Bank of Scotland internal credit analyst wrote in a March 10, 2000 e-mail: "The scale of financial manipulation [at Enron] is exceedingly worrying." Final Report, App. E at 82;¹⁴
- Royal Bank of Scotland referred to its FAS 140 transactions with Enron as "21st Century Alchemy" and the Nixon prepay as "little more than a "window dressing" request" that "raises issues over the absolute level of manipulation undertaken by Enron in its financial statements." *Id.* at 78, 81 (quoting December 1999 memorandum and September 2000 meeting minutes);
- The Examiner found: "[T]here is evidence that Royal Bank of Scotland knew that the FAS 140 Transactions in which it participated and the Nixon Prepay would result in the dissemination of materially misleading information in Enron's financial statements, and that Royal Bank of Scotland provided substantial assistance to Enron in completing those transactions." *Id.* at 85;
- The Examiner found: "There is also sufficient evidence for a fact finder to conclude that Royal Bank of Scotland was in possession of all the facts necessary to conclude that the LJM1/Rhythms Hedging Transaction was a non-economic hedge that would contribute to the dissemination of materially misleading financial information by Enron officers." *Id.* at 86.

As "scienter must be evaluated in view of the totality of alleged facts and circumstances, together as a whole, *with all reasonable inferences drawn in Lead Plaintiff's favor,*" the Examiner's findings more than adequately support a strong inference of scienter and the Complaint satisfies the PSLRA's pleading requirements. *Enron*, 235 F. Supp. 2d at 692.

2. Royal Bank of Scotland Was an Active Participant in the Fraud; Royal Bank of Scotland's Conduct Was Deceptive

As Royal Bank of Scotland cannot credibly assert ignorance, it argues that its role in the Enron fraudulent scheme was too minor to warrant liability. Royal Bank of Scotland asserts that it did not deceive investors because its "conduct was passive, not active." Royal Bank of Scotland

¹⁴ All cites to the Examiner's Final Report are attached as Ex. 2.

Mem. at 26. That is hardly the case. Likewise, Royal Bank of Scotland argues that its “conduct was not manipulative or deceptive.” *Id.* at 27. Again, Royal Bank of Scotland is wrong. Royal Bank of Scotland purposefully committed deceptive acts and was a primary actor in the Enron fraudulent scheme. Not only did Royal Bank of Scotland play a vital role in the fraudulent transactions at the heart of the Enron scheme, ***Royal Bank of Scotland directly made false and misleading statements to class members*** – acts which are clearly deceptive, primary violations of the securities laws. Accordingly, Royal Bank of Scotland’s arguments are ill-founded.

a. Royal Bank of Scotland Was a Primary Participant in Transactions to Further the Enron Fraudulent Scheme

Royal Bank of Scotland acted to deceive. Royal Bank of Scotland’s role in LJM1 was not merely that of a passive investor, as it would have the Court believe. Similarly, Royal Bank of Scotland played an active, primary role in certain fraudulent FAS 140 transactions with Enron and the Nixon Prepay.

(1) LJM1

LJM1 “existed principally to enter into a hedging transaction with Enron that it could not expect unaffiliated third parties to enter into on terms acceptable to Enron.” Final Report, App. E at 7. Through LJM1, defendants caused Enron’s financial results to be materially and falsely inflated. For example, in 1999 Enron recognized income of over \$100 million from the Rhythms’ “hedging” transaction with LJM1. *Newby*, ¶33.¹⁵ See also *Enron*, 235 F. Supp. 2d at 617 n.50. Royal Bank of Scotland was at the center of LJM1.

Royal Bank of Scotland’s role in LJM1 was an important and active one. “Royal Bank of Scotland, as the parent of one of the two limited partners in LJM1, ***played a significant role in its***

¹⁵ “*Newby* ¶__” refers to First Amended Consolidated Complaint filed in *Newby* on May 14, 2003.

formation and in the implementation of transactions involving LJM1.” Final Report, App. E at 33. Similarly, Royal Bank of Scotland purposefully structured a transaction to deceive auditor PricewaterhouseCoopers (“PWC”) in order to recognize millions of dollars of benefits while also causing Enron’s financial accounting to be in violation of GAAP. This is active, not passive, involvement.

To more fully appreciate the import of Royal Bank of Scotland’s deceptive conduct, a little background is necessary. Royal Bank of Scotland was a limited partner in LJM1, along with CSFB. ¶25. LJM1 was funded with cash from Royal Bank of Scotland and CSFB, as well as \$276 million in stock from Enron. ¶¶25-26. *See also* Final Report, App. E at 31. To ensure appropriate accounting treatment, LJM1 was not allowed to sell or otherwise encumber the stock contributed to it by Enron. ¶29. *See also* Final Report, App. E at 7-8 (“The Enron Board approved the hedging transaction, in part, based on a to-be-delivered PWC fairness opinion (the ‘Fairness Opinion’), which relied on certain restrictions (through a ‘Lock-Up Agreement’) on the transfer and use of the Enron shares transferred to LJM1.”). “Royal Bank of Scotland was aware of these restrictions even before PWC had issued its Fairness Opinion.” *Id.* at 45. “***Despite knowledge of these restrictions, Royal Bank of Scotland acted to circumvent them and thereby generated substantial profits from the property subject to the restrictions.***” *Id.* at 8. *See also* ¶29. “Indeed, even before the LJM1 Related Party Transaction closed, Royal Bank of Scotland had begun searching for a way to hedge its indirect investment in the Enron stock in LJM1” Final Report, App. E at 46. To get around the restrictions imposed by PWC, Royal Bank of Scotland ***acted*** to hedge the value of the Enron stock invested in LJM via a total return swap with third-party AIG. “Royal Bank of Scotland ***structured and implemented*** the Total Return Swap transactions with AIG, which ... circumvented certain restrictions in the Amended Partnership Agreement, contravened representations made by Fastow to

the Enron Board when he sought Enron Board Approval for LJM1, and facilitated increased distributions to Fastow and other Enron insiders.” *Id.* at 33.

Royal Bank of Scotland’s *actions* in *creating/structuring* the total return swap had dire implications. For Royal Bank of Scotland, the “transfer of these shares allowed Royal Bank of Scotland to complete, on November 30, 1999, Total Return Swaps with AIG that enabled Royal Bank of Scotland to book approximately \$67 million in income.” *Id.* at 53-54. “Royal Bank of Scotland reaped in excess of \$22 million in profits as part of this process.” *Id.* at 55. This gain, however, came at a substantial cost to purchasers of Enron’s securities. Notably, the swaps caused the PWC fairness opinion to be false and left Enron with a worthless hedge. *Id.* at 43-44.

Accordingly, Royal Bank of Scotland “*acted*” to enrich itself and certain Enron insiders, including defendant Fastow. Royal Bank of Scotland “*structured and implemented*” financial transactions to further the fraudulent scheme, despite knowing it would fundamentally undermine the integrity of Enron’s accounting treatment for material Enron transactions and, thus, Enron’s reported financial results. This is securities fraud. Royal Bank of Scotland’s actions were primary actions.

(2) **Royal Bank of Scotland and the FAS 140 Transactions**

Royal Bank of Scotland committed primary, deceptive acts in furtherance of the fraudulent scheme by participating in certain FAS 140 transactions with Enron. ¶32. Indeed, for each of four FAS 140 transactions between May 1999 and June 2001, Royal Bank of Scotland *created* and *funded* an SPE that it knew was not sufficiently capitalized to comply with accounting rules – and thus caused Enron’s publicly disclosed financial results to be false and misleading.

In the first of these FAS 140 transactions, the Sutton Bridge FAS 140, “Royal Bank of Scotland was to establish an SPE (known as ‘SBI4’), capitalized with 3% equity and 97% debt, in a total amount of \$66.5 million.” Final Report, App. E at 64. As the Court is well aware, SPEs created to facilitate FAS 140 transactions must be capitalized with at least 3% equity to (arguably)

comply with accounting standards. *See, e.g., Enron*, 235 F. Supp. 2d at 614 n.48. *See also* ¶32. Royal Bank of Scotland knew this to be true but did not abide by this rule in structuring the purportedly independent SPE.

In addition to providing the debt, Royal Bank of Scotland was the holder of the equity in Sutton Bridge. In order for Enron to account for the transaction under FAS 140, it was required that, among other things, the equity in SBI4 remain at risk at all times. Royal Bank of Scotland knew that its equity had to be at risk, but faced no such risk as the equity holder in this structure.... [There was an] understanding that Enron would repurchase the equity at an agreed upon return

Final Report, App. E at 64-65 (citing sworn testimony and internal documents). Moreover, Royal Bank of Scotland knew that this agreement with Enron could not be disclosed to Andersen and, in fact, did not disclose the verbal agreement to Enron’s auditor. *Id.*

The Sutton Bridge transaction was the model for which Enron and Royal Bank of Scotland conducted three additional FAS 140 transactions – ETOL I, ETOL II, and ETOL III. *Id.* at 66 (quoting an internal Royal Bank of Scotland e-mail comparing ETOL to Sutton Bridge FAS 140). Notably, the Examiner concluded that “Royal Bank of Scotland and Enron *worked together*” on ETOL I, II, and III, which closed in November 2000, March 2001, and June 2001, respectively. Final Report, App. E at 66. And, like in the Sutton Bridge FAS 140, Royal Bank of Scotland *created* a fraudulently under-funded SPE to appear to accommodate Enron’s accounting desires for these transactions. With respect to ETOL I:

The SPE employed to effect the “true sale” in ETOL I was RBS Financial Trading Company Ltd. (“RBSF”), which it appears was *created* for the transaction by Royal Bank of Scotland. Royal Bank of Scotland capitalized RBSF with \$207.8 million, consisting of \$200.7 million in debt and \$7.1 million in equity.

* * *

As in Sutton Bridge, Royal Bank of Scotland received verbal assurances of repayment of its equity investment in ETOL I. The existence of such an agreement – and Royal Bank of Scotland’s acknowledgment that Enron’s assurance could not be documented – is laid out in Royal Bank of Scotland’s ETOL I Credit Application.

Final Report, App. E at 67-68. Thus, Royal Bank of Scotland *created* an SPE to falsify Enron's financial results. This is active participation in a fraudulent scheme.

Royal Bank of Scotland likewise *created* an under-funded SPE in ETOL III to falsify Enron's financial results. "In ETOL III, Royal Bank of Scotland capitalized a new Royal Bank of Scotland-sponsored SPE – Sideriver Investments Limited ("Sideriver") – with \$41.7 million debt and \$1.7 million equity (to achieve the required 97% debt/3% equity capital structure [required by Andersen])" Final Report, App. E at 74. However, Enron again reassured Royal Bank of Scotland its equity investment was guaranteed. *Id.* at 75-76. This agreement was vital because, as Royal Bank of Scotland knew, the assets securitized in ETOL III could not themselves support payment of Royal Bank of Scotland's investment. "Indeed, initial proposal papers discussing ETOL III noted that, in light of the apparent inability of the performance of the underlying assets to support repayment of the amount monetized, even greater reliance was placed on the verbal agreement with Enron." *Id.* at 75.

Thus, Royal Bank of Scotland knew it was acting to falsify Enron's publicly reported financial results. As detailed above, Royal Bank of Scotland knew the SPEs it created were not sufficiently funded to comply with accounting rules. And, moreover, Royal Bank of Scotland created the SPEs vital to these FAS 140 transactions even though Royal Bank of Scotland employees repeatedly expressed concern about the propriety of doing so. As the Examiner concluded, quoting internal Royal Bank of Scotland communications, "Royal Bank of Scotland was conscious of 'the financial engineering' that the ETOL transactions would facilitate." Final Report, App. E at 78. There is little doubt that Royal Bank of Scotland acted to create structures at the heart of fraudulent transactions that it knew caused Enron's reported financial results to be false and misleading. This is primary conduct outlawed by Rule 10b-5. This is not the passive involvement Royal Bank of Scotland would have the Court believe.

(3) Royal Bank of Scotland and the Nixon Prepay

In addition to all of the transactions above, Royal Bank of Scotland funded a prepay transaction with Enron known as Nixon. ¶¶33-34. *See also* Final Report, App. E at 79. Royal Bank of Scotland secretly, and deceptively, disguised a \$110 million loan to Enron as an oil trade via a conduit entity – Toronto-Dominion. *Id.* at 79-80. Like it did with respect to the Citigroup and JP Morgan prepays in *Enron*, 235 F. Supp. 2d at 697-98, the Court should similarly uphold plaintiffs’ claims against Royal Bank of Scotland presently.

b. Royal Bank of Scotland Made False and Misleading Statements to Plaintiffs in Furtherance of the Fraudulent Scheme

As detailed above, Royal Bank of Scotland knew Enron’s financial statements to be false and misleading. Yet Royal Bank of Scotland sold Enron securities to the public, including plaintiffs. This is fraud under any reading of *Central Bank*.

Royal Bank of Scotland, specifically The Royal Bank of Scotland plc, underwrote and acted as initial purchaser of the 8.75% Series 2000-A Linked Enron Obligations due 2007 (“8.75% Notes”), the 7.25% Enron Sterling Credit Linked Notes due 2006 (“7.25% Notes”), the 7.375% Enron Credit Linked Notes due 2006 (“7.375% Notes”) and the 6.50% Enron Euro Credit Linked Notes due 2006 (“6.5% Notes”) (collectively, the “Royal Bank of Scotland Notes”). *See* Ex. 3. The *Newby* Amended Complaint details at great length the false and misleading statements made in the offering documents for each of these publicly traded securities. *See Newby*, ¶¶641.17-641.20, 641.25-.36. Among other things, these offering memoranda publish Enron’s admittedly false financial statements. *Id.* And, these false and misleading statements are attributable to Royal Bank of Scotland. *See Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341, 370 (2d Cir. 1973) (“representations in the registration statement are those of the underwriter as much as they are those of the issuer” of the securities).

Moreover, the offering memoranda for the Royal Bank of Scotland Notes were not just deceptive as to purchasers of the Royal Bank of Scotland Notes – *the Royal Bank of Scotland Notes were an integral part of the larger Enron fraudulent scheme that harmed the class*. The proceeds from the Royal Bank of Scotland Notes were used to fund Citigroup’s fraudulent disguised loans (known as the Delta Prepays) to Enron, while at the same time limiting the bank defendants’ risk to an ever more likely Enron bankruptcy. *Newby*, ¶641.44. *See also id.*, ¶681. As put by Congressional investigators: “Enron/Citibank transactions, representing \$2.4 billion of the total \$4.8 billion in prepay transactions between the two parties, were financed through bond offerings.... **By raising the funds for the prepays in this fashion, the institutional investors [i.e. Class members], rather than Citigroup, took on the risk that Enron would not or could not repay the funds.**” Ex. 4 at D-1. Moreover, the Royal Bank of Scotland Notes had a “black box” feature that “hid from investors Enron’s use of the proceeds [and which] turned out to be an ideal cloak for prepays.” *Id.* at D-9.

Thus, Royal Bank of Scotland played a vital role in the Enron fraudulent scheme. By selling the Royal Bank of Scotland Notes via the false and misleading offering memoranda, Royal Bank of Scotland was satisfying two very important parts of the scheme: infusing Enron with cash and off-loading the bank’s Enron exposure on unsuspecting public investors. As the Court described the fraud alleged by plaintiffs:

Aware of Enron’s financial fragility, the banks further made loans to Enron to insure its liquidity and continuing operations, while simultaneously aiding Enron in selling securities to public investors so that Enron could continue to pay down its short-term commercial paper and bank debt and keep the fraudulent Ponzi scheme afloat.

Enron, 235 F. Supp. 2d at 638. Accordingly, Royal Bank of Scotland’s role was not as unimportant as it would have the Court believe.

In sum, Royal Bank of Scotland actively sold securities to investors for the purpose of financing hidden loans to Enron. Royal Bank of Scotland did so to further the Enron fraudulent

scheme and is therefore liable under Rule 10b-5(a) and (c). And, further, in the offering memoranda for the Royal Bank of Scotland Notes, Royal Bank of Scotland made false and misleading statements about the strength of Enron's business and its financial condition. Royal Bank of Scotland made these false statements in connection with the sale of securities and with scienter. Therefore, Royal Bank of Scotland is also liable under Rule 10b-5(b) for its primary role selling the Royal Bank of Scotland Notes.

3. Royal Bank of Scotland's Actions Caused Plaintiffs' Losses

Royal Bank of Scotland asserts that, despite its intentional acts in furtherance of the fraudulent scheme, it is not liable for plaintiffs' damages because its role in the fraud and its fraudulent transactions were concealed from plaintiffs during the Class Period. Royal Bank of Scotland's argument finds no support in the law and would lead to absurd results. Moreover, Royal Bank of Scotland entirely ignores the fact that *Royal Bank of Scotland made false and misleading statements to the market about Enron's financial condition*. When these statements were proven false at the end of the Class Period, upon Enron's restatement admitting the falsity of its financial statements, the price of Enron's publicly traded securities collapsed and plaintiffs were damaged. This is classic loss causation. Moreover, as detailed below, Royal Bank of Scotland's primary role in fraudulent transactions created to falsify Enron's financial statements also caused plaintiffs' damages.

a. Royal Bank of Scotland's Loss Causation Argument Suffers a Logical Fallacy

Incorrectly, Royal Bank of Scotland claims the Court must dismiss the Complaint as a matter of pure logic. According to Royal Bank of Scotland, either: 1) Royal Bank of Scotland's actions were disclosed prior to December 2, 2001 and dismissal is required because plaintiffs were on notice of their claims at that time and failed to file this action within the applicable statute of limitations; or 2) Royal Bank of Scotland's actions were disclosed after December 2, 2001 and "the transactions

had nothing to do with Plaintiffs' investment losses." Royal Bank of Scotland Mem. at 32. While superficially appealing, Royal Bank of Scotland's argument fails because it improperly equates disclosure sufficient to provide inquiry notice with proximate cause.

Contrary to Royal Bank of Scotland's contention, proximate cause and inquiry notice are *not* two sides of the same coin. As a matter of law, determining the existence of proximate cause is a separate and distinct legal analysis from that which the Court should use to consider whether plaintiffs were on inquiry notice of their claims against Royal Bank of Scotland. "[T]he statute begins to run when the plaintiff has actual knowledge of the facts giving rise to his claims or has notice of facts *that in the exercise of reasonable diligence should have led to such knowledge.*" February 25 Order at 26 (emphasis in original). Proximate cause merely requires that a defendant's action "touches upon the reasons for the [plaintiffs'] investment's decline in value." *Huddleston*, 640 F.2d at 549. Moreover, as a matter of fact, in this instance plaintiffs were damaged by Royal Bank of Scotland's actions even though plaintiffs never knew during the Class Period that Royal Bank of Scotland had intentionally caused them harm. As demonstrated *supra* at §II.A.2., plaintiffs' claims are timely. And, as demonstrated below, Royal Bank of Scotland proximately caused plaintiffs' losses.

b. Royal Bank of Scotland Acted to Hide Enron's True Debt Level and to Artificially Inflate Its Publicly Reported Cash Flows and Income, Thereby Furthering a Scheme Whose Collapse Was Imminent and Which Injured Plaintiffs

Royal Bank of Scotland contends plaintiffs fail to plead loss causation. According to Royal Bank of Scotland: "If the Sutton Bridge, LJM1/Rhythms, Nixon Prepay, and ETOL I, II and III transactions did not become publicly known until after the putative class period ended on November 27, 2001, then Plaintiffs' losses could not have resulted from these alleged violations." Royal Bank

of Scotland Mem. at 32.¹⁶ Were it left to Royal Bank of Scotland to define proximate cause, murderers would walk free so long as they concealed the murder weapon from their unwitting victims. Surely, this is not the law. Rather, the law deems it sufficient that plaintiffs were damaged by the effects of defendants' actions – the victims' knowledge is irrelevant. Here, Royal Bank of Scotland acted in furtherance of the fraudulent scheme that resulted in the harm inflicted on plaintiffs' pensions, endowments, and nest-eggs. Royal Bank of Scotland's actions "touched on" plaintiffs' damages.

Royal Bank of Scotland's role in the scheme that injured plaintiffs satisfies the loss causation element. It is true that plaintiffs' damages were caused by an assortment of conduct that violated §10(b). Royal Bank of Scotland played a significant role in that conduct, for Royal Bank of Scotland was a primary participant in the fraudulent scheme that caused plaintiffs' losses. But Royal Bank of Scotland need *not* be the *sole* reason for the artificial inflation and subsequent decline in Enron's share price to be liable. *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). Royal Bank of Scotland's conduct in Enron's schemes makes it liable for its role – and the damages caused. *See, e.g., Shores v. Sklar*, 647 F.2d 462, 469 (5th Cir. 1981). "***Whenever the rule 10b-5 issue shifts from misrepresentation or omission in a document to fraud on a broader scale, the search for causation must shift also.***" *Id.* at 472.¹⁷

¹⁶ Of course, this argument ignores Royal Bank of Scotland's false and misleading statements.

¹⁷ *Accord Enron*, 235 F. Supp. 2d at 573-74; *In re Learnout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 165, 174 n.3 (D. Minn. 2003) (plaintiffs alleged a defendant company and its financiers, much as plaintiffs plead here, violated §10(b) and Rule 10b-5 by participating in a "scheme and course of business to defraud" by "setting up, funding, and operating sham entities" and "strategic partners" that executed fraudulent transactions with the defendant company); *Krogman v. Steritt*, No. 3:98-CV-2895-T, 1999 WL 1455757, at *3 (N.D. Tex. July 21, 1999) (plaintiffs "adequately alleged loss causation as well as reliance" by describing an "***elaborate scheme to artificially inflate and maintain the market price***" of the subject stock).

It is clear that Enron's publicly traded securities dove to worthlessness because defendants' fraudulent scheme could not sustain itself (or fool investors) forever. When one strand of the scheme was drawn out for public scrutiny, the whole scheme unraveled. Enron had become so highly leveraged that it precariously teetered on the brink of destruction merely awaiting the proverbial "last straw to break the camel's back." And, Royal Bank of Scotland had acted to conceal Enron's true debt, which brought Enron to bankruptcy. While the "last straw" might have been Enron's November 2001 restatement, the fraudulent scheme, of which Royal Bank of Scotland was a primary participant, had placed Enron on a course for destruction years earlier. *See Enron*, 235 F. Supp. 2d at 693. Enron collapsed because the Ponzi scheme could not continue indefinitely. Royal Bank of Scotland committed primary acts in furtherance of the Ponzi scheme. Royal Bank of Scotland proximately caused plaintiffs' damages.

That Royal Bank of Scotland's name and its fraudulent behavior were not heralded prior to Enron's collapse does not diminish causation. Rather than the notoriety of Royal Bank of Scotland's deceptive conduct, it is Royal Bank of Scotland's *participation* in the Enron Ponzi scheme, combined with plaintiffs' reliance on the integrity of the trading price for Enron securities that satisfies the element of causation. *See Shores*, 647 F.2d at 469. *See also Enron*, 235 F. Supp. 2d at 573-74 (stating "reliance" component of a §10(b) and Rule 10b-5 action is viewed as a part of the causation requirement).

To satisfy the loss causation element, plaintiffs need not have known who caused them to be injured at the time they suffered their damages; nor does loss causation require plaintiffs to know how the fraudulent scheme worked. Rather, the defendants' actions need only "touch upon" or somehow contribute to plaintiffs' damages. *Huddleston*, 640 F.2d 534. They did. Analogous

common law scenarios also demonstrate Royal Bank of Scotland's argument to be flawed.¹⁸ Were this a case of a pedestrian struck by a bus, she need not know *at the time of impact* who was driving the bus or how they had acted negligently in order to state a claim. Similarly, victims of a Ponzi scheme need not know the name(s) of the mastermind(s) orchestrating the scheme at the time they are defrauded to state a claim against them. Nor must a victim know, at the time she is damaged, exactly how the scheme worked or the individual defendants' roles in furthering the scheme. To require more of plaintiffs here is contrary to the law and the realities of the financial markets.

Indeed, financial experts acknowledge the fact that investors act without knowing all the details of an expected fraud, anticipating impact of yet undisclosed aspects of fraudulent schemes.¹⁹ Here, the market for Enron's securities not only collapsed because Enron disclosed certain bad information – it collapsed because of investors' growing fears and suspicions that Enron's prior results were really just smoke and mirrors created by a complex fraudulent scheme. Investors were right. And, because Royal Bank of Scotland made the fraudulent scheme possible, among other things, Royal Bank of Scotland proximately caused plaintiffs' damages.

c. Plaintiffs' Purchase of Enron's Securities at Artificially Inflated Prices Also Demonstrates Loss Causation

Loss causation merely requires that a defendants' action "touches upon the reasons for the [plaintiffs'] investment's decline in value." *Huddleston*, 640 F.2d at 549; *see also Nathenson*, 267

¹⁸ Loss causation under Rule 10b-5 is derived from traditional common law. *See, e.g., Beedie v. Battelle Mem'l Inst.*, No. 01 C 6740, 2002 U.S. Dist. LEXIS 171, at *8 (N.D. Ill. Jan. 4, 2002) ("Loss causation is the standard common law fraud rule, and has been borrowed by the federal courts for use in federal securities fraud cases.").

¹⁹ This is commonly referred to as "the cockroach theory," which proffers: "Unpleasant surprises are like cockroaches – you rarely find just one." Steven T. Goldberg, "The Cockroach Theory, and Seven Other Ways to Know When to Sell," *Kiplinger's Personal Financial Times*, July 2003 (Ex. 5). *See also* Julie Earle-Levine, "Learning to Read Between the Lines." *Financial Times*, June 11, 2003 ("[F]undamentals are like cockroaches. If you see one piece of bad news, there will be more.") (Ex. 6).

F.3d at 413 n.10 (defendants' actions only need "'touch['] upon the reasons for the investment's decline in value"). They have. Applying the "touches upon" standard, the Ninth Circuit recently held:

This "touches upon" language is admittedly ambiguous.... Our cases have held, however, that: "[i]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price *on the date of purchase* was inflated because of the misrepresentation...." Accordingly, for a cause of action to accrue, it is not necessary that a disclosure and subsequent drop in the market price of the stock have actually occurred, because *the injury occurs at the time of the transaction*. It is at that time that damages are to be measured. Thus, loss causation does not require pleading a stock price drop following a corrective disclosure or otherwise. *It merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause.*

Broudo v. Dura Pharms., Inc., 339 F.3d 933, 938 (9th Cir. 2003). *Accord Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 832 (8th Cir. 2003) ("[P]laintiffs were harmed when they paid more for the stock than it was worth. This is a sufficient allegation."); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 97-98 (2d Cir. 2001) ("[P]laintiffs may allege transaction and loss causation by averring both that they would not have entered the transaction but for the misrepresentations and that the defendants' misrepresentations induced a disparity between the transaction price and the true 'investment quality' of the securities *at the time of transaction*."); *Coates v. Heartland Wireless Communs., Inc.*, 26 F. Supp. 2d 910, 922 (N.D. Tex. 1998) (where plaintiff alleges damages "'as a result of the inflation of the price of [company's] common stock during [the class period]' ... the allegation is sufficient" to plead loss causation).

During the Class Period, plaintiffs and the class purchased Enron securities at prices inflated by Enron's false and misleading financial results. By acting to falsify Enron's financial results, Royal Bank of Scotland caused Enron's publicly traded securities to be sold at artificially high prices. This caused plaintiffs to be damaged.

III. CONCLUSION

For all the reasons stated herein, plaintiffs respectfully submit that Royal Bank of Scotland's motion for dismissal should be denied.²⁰

DATED: March 18, 2004

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIU
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
ANNE L. BOX
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.



JAMES I. JACONETTE *by permission

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

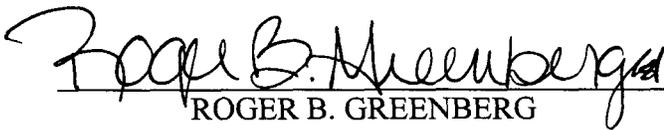
²⁰ It is well settled that leave to amend should be “freely given when justice so requires.” Fed. R. Civ. P. 15(a). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962) (Rule 15(a)’s mandate that leave to amend “shall be freely given when justice so requires” “is to be heeded.”). Indeed, the Fifth Circuit has held the Rule 15(a) “standard favors leave as a necessary companion to notice pleading and discovery.” *Lone Star Ladies Inv. Club v. Schlotzsky's*, 238 F.3d 363, 367 (5th Cir. 2001) (holding the district court erred in denying plaintiffs leave to file their amended securities complaint). Therefore, in the event this Court grants any part of defendants’ motion to dismiss, plaintiffs should be granted leave to amend.

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
REGINA M. AMES
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007
213/617-9185 (fax)

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
G. PAUL HOWES
JERRILYN HARDAWAY
Texas Bar No. 00788770
Federal I.D. No. 30964
1111 Bagby, Suite 4850
Houston, TX 77002
Telephone: 713/571-0911

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932


ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

S:\CasesSD\Enron\OppMtd\RBS MTD.doc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, NATIONAL WESTMINSTER BANK PLC, GREENWICH NATWEST STRUCTURED FINANCE, INC., GREENWICH NATWEST LTD. AND CAMPSIE, LTD. document has been served by sending a copy via electronic mail to serve@ESL3624.com on this March 18, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, NATIONAL WESTMINSTER BANK PLC, GREENWICH NATWEST STRUCTURED FINANCE, INC., GREENWICH NATWEST LTD. AND CAMPSIE, LTD. document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this March 18, 2004.

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



Mo Maloney

The Exhibit(s) May
Be Viewed in the
Office of the Clerk