

Defendant JPMorgan Chase Bank respectfully submits this Brief in response to plaintiffs' Sur-Reply and in further support of its motion to reconsider the Court's April 5, 2004 Order denying its motion to dismiss Plaintiffs' Amended Complaint.

ARGUMENT

Plaintiffs now do not dispute that virtually all of the factual allegations in *Newby* mirror the allegations publicly disclosed as of December 22, 2001 in the *JPMorgan Chase Bank* Action counterclaim. Thus, by December 22, 2001 – over one year before the Amended Complaint was deemed filed – the *JPMorgan Chase Bank* Action counterclaim “provided not merely the ‘storm warnings,’ but nearly all of the facts” underlying Plaintiffs’ claim against JPMorgan Chase Bank. *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

Plaintiffs argue nevertheless that their complaint contains “distinct” allegations not encompassed by the *JPMorgan Chase Bank* Action counterclaim. See Sur-Reply at 1. That is not disputed. But Plaintiffs again misconstrue the standard required to trigger the statute of limitations by suggesting that they had to be in possession of all of the facts underlying their claim against JPMorgan Chase Bank. To the contrary, the statute was triggered no later than when, via the *JPMorgan Chase Bank* Action counterclaim, Plaintiffs were put on notice “of the possibility of fraud, not full exposition of the scam itself.” *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002) (emphasis added); *Jensen*, 841 F.2d at 610 n.6 (“What on the one hand is tantamount to actual discovery of fraud should not be confused with what on the other carries a duty to investigate [F]acts in the sense of indisputable proof or any proof at all, are different from facts calculated to excite inquiry which impose a duty of reasonable diligence and which, if pursued, would disclose the fraud.”).

In any event, most of the so-called “distinct” factual allegations are, in reality, no different than the public disclosures known as of December 22, 2001. For example, Plaintiffs’ allegation in *Newby* that “JP Morgan secretly controlled the Mahonia SPE in violation of GAAP,” was reflected in December 2001 news articles. *See, e.g.,* Andrew Hill, *JP Morgan Faces Extra Dollars Ibn Exposure Over Enron*, FIN. TIMES, p. 1, Dec. 20, 2001 (“Mahonia gives a Jersey address that is the office of . . . a law firm specializing in setting up special purpose vehicles” even though “[t]he contracts describe Mahonia as ‘the energy arm of The Chase Manhattan Bank.’”). Furthermore, Plaintiffs’ allegation that the Mahonia prepay transactions were intended to “falsify Enron’s reported financial results” was readily inferred from the *JPMorgan Chase Bank* Action allegation that the prepays were devised “to secure loans to be made to Enron in the guise of forward supply contracts.” Ex. 8 ¶ 23.¹ To conclude otherwise would illogically suggest that Enron and JPMorgan Chase Bank misled insurers into believing Enron accounted for the prepays as forward supply contracts while Enron publicly accounted for the transactions as loans.

Indeed, as JPMorgan Chase Bank explained in its earlier papers, the January 3, 2002 *Platt’s Oilgram News* article reveals that the accounting implications of the Mahonia prepay transactions were evident from the *JPMorgan Chase Bank* Action allegations. Plaintiffs’ attempt to distinguish the competence of the article’s author from that of the ordinary investor is misplaced. *See* Sur-Reply at 3. It took no industry expertise to reason that an alleged loan by JPMorgan Chase Bank to Enron in the “guise” of a supply contract would have not been reported

¹ Exhibit 8 is attached to JPMorgan Chase Bank’s Opening Brief in support of its Motion to Reconsider the Court’s April 5, 2004 Order.

as a loan on Enron's publicly filed financial statements for all to see, including the insurers and ordinary investors.

CONCLUSION

For the foregoing reasons, and the reasons set forth in JPMorgan Chase Bank's opening and reply briefs, JPMorgan Chase Bank respectfully requests that this Court reconsider its April 5, 2004 Order and dismiss JPMorgan Chase Bank from the action.

Houston, Texas

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 13th day of May, 2004.

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