

**DEUTSCHE BANK ENTITIES' SUR-REPLY IN FURTHER OPPOSITION
TO LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF MARCH 29
ORDER DISMISSING CLAIMS AGAINST DEUTSCHE BANK ENTITIES**

Deutsche Bank AG (“DB”), Deutsche Bank Trust Company Americas (formerly known as Bankers Trust Company) (“DBTC”), and Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) (“DBSI”) (collectively, the “DB Entities”) respectfully submit this Sur-reply in further opposition to plaintiffs’ Motion for Reconsideration of Order Dismissing Claims Against the Deutsche Bank Defendants (“Motion” or “Mot.”). The DB Entities incorporate by reference the arguments made in their opposition to plaintiffs’ Motion (“Opposition” or “DBE Opp.”) and prior briefing in the Newby and WSIB actions.¹

I. Plaintiffs’ Motion Is Improper Under Rule 54(b)
And Their New Allegations Are Time-Barred

Plaintiffs’ motion for reconsideration, especially their reply in further support thereof, is nothing more than a poorly disguised attempt to replead and repeat arguments that have or could have been made in their original briefs. This Court, in considering the totality of the circumstances, has *twice* rejected plaintiffs’ claims of scheme liability² as inadequate to state a claim under Rule 10b-5 and any repleading now is time-barred by both the one year statute of limitations and the three-year statute of repose, not to mention inappropriate under Rule 54(b). Despite their protestations to the contrary, plaintiffs have not identified any error of law or inconsistency between this Court’s previous rulings — which in any event are not relevant here because they dealt with the standard for stating a claim for scheme liability under Rule 10b-5(a)

¹ See DBE Opp. at 1 n.1.

² In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 591 (S.D. Tex. 2002) (hereinafter the “December Order”); In re Enron Corp. Sec., Derivative & ERISA Litig., 310 F. Supp. 2d 819, 859 (S.D. Tex. 2004) (hereinafter the “March 29 Order”).

and (c) rather than for a material misstatement or omission under Rule 10b-5(b).³ DBE Opp. at 7 (quoting December Order, 235 F. Supp. 2d at 688–89). As this Court’s orders make evident, the elements required to state a claim under Rule 10b-5(b) differ from the elements required to state a claim under Rule 10b-5(a) and (c). December Order, 235 F. Supp. 2d at 570–71, 580. This Court’s rulings as to the adequacy of scienter allegations for purposes of asserting scheme claims against other defendants under Rule 10b-5(a) and (c) are consistent with this Court’s dismissal of all Rule 10b-5 claims against the DB Entities and the Fifth Circuit’s ruling as to what is required to plead scienter under Rule 10b-5(b) and thus do not require revisiting.

II. Plaintiffs Have Failed To Plead Scienter And Timely Fraudulent Acts

Plaintiffs continue to ignore their failure to plead with sufficient particularity any specific misstatements or omissions by any DB Entity. Plaintiffs also fail to allege that any individual made any material misstatements or omissions with scienter. Instead, plaintiffs resort to disguising as grounds for scienter what are (i) no more than non-actionable puffery or opinions contained in analyst statements, or (ii) at best weak claims of negligence concerning the DB Entities’ participation in underwritings. In doing so, plaintiffs attempt to side-step this Court’s prior rulings and the Fifth Circuit’s mandate that before a corporation may be held liable for a material misstatement or omission, plaintiffs must first, inter alia, identify an individual who made each alleged misstatement or omission with scienter.

In Southland Securities Corp. v. INSpire Insurance Solutions Inc., 365 F.3d 353 (5th Cir. 2004), decided just two days after this Court’s March 29 Order, which dismissed all Section 10(b)/Rule 10b-5 claims against the DB Entities, the Fifth Circuit held that a company cannot be

³ To the extent plaintiffs contend that the DB Entities are liable under Rule 10b-5(a) or (c) based, inter alia, upon alleged material misstatements and omissions contained in analyst reports and offering materials, this Court, under the totality of circumstances, has already rejected such allegations as insufficient. March 29 Order, 310 F. Supp. 2d at 833 n.13, 836, 842–43.

liable for making a material misstatement or omission under Section 10(b)/Rule 10b-5 absent particular allegations identifying an agent of the company who, with *scienter*, made each alleged misstatement or omission.⁴ Plaintiffs' continuing failure to name any individual at any DB Entity who made a material misstatement or omission with scienter is central to their inability to state a claim under Rule 10b-5(b). Since this Court will not “strain to find inferences favorable to the plaintiffs” nor “accept conclusory allegations, unwarranted deductions, or legal conclusions,” plaintiffs' claims have no merit and were properly dismissed. Southland, 365 F.3d at 361 (citations omitted).

Indeed, even plaintiffs admit that the Fifth Circuit “determined that to properly plead fraudulent intent as to a corporation . . . plaintiffs must allege that some employee of the company acted to deceive.” Pl. Reply at 5 (citing Southland, 365 F.3d at 366). To evade the effect of this clear holding, plaintiffs embark upon a lengthy and misleading discussion with the hope of rehabilitating their inadequate scienter allegations. Pl. Reply at 5–12.

First, plaintiffs' contention that Southland does not “concern an investment bank defendant” or “the issuance of false offering documents for the sale of securities to the public or the issuance of false analyst reports” but insiders of the company (Pl. Reply at 5), does not adequately distinguish Southland, and ironically shores up this Court's dismissal of the DB Entities since claims against insiders, if anything, are generally easier to plead than those against secondary actors. While some courts have been willing to recognize the so-called group

⁴ Accordingly, plaintiffs cannot use any allegations of scienter which may have been pled in connection with claims that any DB Entity engaged in a discrete scheme to structure transactions to artificially inflate Enron's financial results. Thus, whether this Court's December 20, 2002 and March 29, 2004 orders are consistent is irrelevant. For the reasons stated in the DB Entities' opposition, however, this Court's orders may be easily reconciled. In addition, the term scheme is *not* synonymous with scheme liability. To plead that a defendant is liable under Rule 10b-5(a) or (c), i.e., has scheme liability, plaintiffs must allege that the defendant engaged in timely fraudulent acts in furtherance of a scheme or course of business to defraud. Plaintiffs here have failed to allege any timely fraudulent acts. Furthermore, as the Fifth Circuit made clear in Southland, plaintiffs cannot rely upon the scienter any DB Entity may have had as to a discrete structured transaction as a shortcut for showing that a DB Entity made material misstatements or omissions.

pleading doctrine for purposes of attributing group-published documents to officers and directors of a corporation, this doctrine does *not* apply to secondary actors. Order re Credit Suisse Defendants' Motion to Dismiss, In re Enron Corp. Sec., Derivative & ERISA Litig., MDL-1446, H-01-3624, slip op. at 13–14 (S.D. Tex. Mar. 31, 2004) (# 2044). In Southland, the Fifth Circuit rejected the group pleading doctrine as to insiders. 365 F.3d at 365. Directly on point here, the Fifth Circuit also held that a company cannot be held liable unless plaintiffs identify an individual employee who made a misstatement or omission with scienter. Id. at 367; DB Reply at 13–14 & n.13.

Plaintiffs' new conclusory assertion that "Deutsche Bank's bankers knew that Deutsche Bank's statements concerning Enron were false" (Pl. Reply at 7) is wholly inadequate under this Court's prior rulings and Southland. The Fifth Circuit has repeatedly emphasized that to state a claim under Rule 10b-5(b) plaintiffs must plead with particularity the who, what, when, where and why as to each alleged misstatement or omission. Southland, 365 F.3d at 362–63, 366–67.

In marked contrast to the highly particularized facts pled in Southland (which stated a claim against the company only under a theory of *respondeat superior*), here, the Amended Complaint nowhere contains any particularized allegations concerning any alleged material misstatements or omissions much less an individual who made such statements with scienter and were properly rejected as inadequate under Rule 10b-5(b).

In addition, whether the individual who made the alleged material misstatements or omissions is a named defendant (Pl. Reply at 8 n.3) is inconsequential to the determination of whether plaintiffs have stated a claim against any DB Entity. Rather, naming the agent as an individual defendant simply enlarges the number of defendants who may be found to be primarily liable to plaintiffs. Not surprisingly, in Southland, where plaintiffs named defendant

CEO (the agent) as an individual defendant as well as the company, the Fifth Circuit dismissed the Section 20(a) control person claims against both as “essentially immaterial” or otherwise based upon statements for which plaintiffs failed to plead a primary violation. 365 F.3d at 384. That is, where the individual agent alleged to have, with scienter, made the material misstatement or omission on behalf of the company is also named as an individual defendant (in addition to the company), any control person claim as to either party becomes redundant and unnecessary. Although plaintiffs need not name the agent who made the alleged material misstatement or omission as an individual defendant to satisfy Southland, they nonetheless *must identify the agent* who allegedly made each misstatement or omission *and allege particular facts giving rise to a strong inference of scienter* before a company can be held primarily liable for such statements under a theory of *respondeat superior*. Id. at 366–67.

Second, plaintiffs’ new time-barred assertion concerning alleged statements made in an October 4, 2000, fixed-income analyst report (a report which is not mentioned in the Amended Complaint which appears on its face to be password-protected and only recommended debt securities that could be purchased by qualified institutional buyers) (Pl. Reply at 9) also fails to establish scienter as to any DB Entity. Furthermore, *none* of the analyst reports mentioned in the Amended Complaint contains any disclosure intimating, as plaintiffs suggest (Pl. Reply at 9), that the “Deutsche Bank as a whole” believed the reports to be accurate. Regardless, even if the analyst reports contained such an intimation, plaintiffs have still failed to plead scienter because such disclosure fails to demonstrate that any individual, much less any DB Entity, believed any analyst report to be false, or was severely reckless in not knowing that any research report was false.

Moreover, in the absence of adequate scheme allegations, the statements contained in the analyst reports that were actually cited in the Amended Complaint are analyst opinions containing non-actionable puffery and forward-looking statements. Southland, 365 F.3d at 372, 375, 377, 379 (“generalized, positive statements about the company’s competitive strengths, experienced management, and future prospects are *not actionable*” under Rule 10b-5 “*because they are immaterial.*”) (citation omitted; emphasis added); DB Mem. at 17–18 (#725).

Third, plaintiffs’ suggestion that DBSI’s alleged failure to perform due diligence may be imputed to DB for purposes of scienter (Pl. Reply at 11–12) is meritless. Due diligence is an affirmative defense against a *negligence* claim under Sections 11 and 12 of the 1933 Act.⁵ Even if the knowledge of other DB Entities could be imputed for purposes of defeating any assertion of a due diligence defense to a negligence claim under Section 11 or 12 of the 1933 Act, such knowledge cannot be used to establish that any DB Entity made any material misstatements or omissions *with scienter*. Thus, “even if a corporate officer’s position supports a reasonable inference that he likely would be *negligent* in not being involved in the preparation of a document or aware of its contents, the PSLRA state of mind requirement is severe recklessness or actual knowledge.” Southland, 365 F.3d at 365 (emphasis added). Accordingly, the Fifth Circuit concluded that

[f]or purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter . . . it [is] appropriate to look to the state of mind of the individual corporate official or officials who ma[d]e or issue[d] the statement (or order[ed] or approve[d] it or its making or issuance, or who furnish[ed] information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.

Id. at 366 (citations omitted); DB Reply at 13–14.

⁵ Collmer v. U.S. Liquids, Inc., ; 268 F. Supp. 2d 718, 756 (S.D. Tex. 2003) (citing Junker v. Crory, 650 F.2d 1349, 1359 (5th Cir. 1981)); In re Enron Corp. Sec., Derivative & ERISA Litig., 258 F. Supp. 2d 576, 596 (S.D. Tex. 2003) (citing Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 697 (S.D.N.Y. 1971)).

Plaintiffs also do not plead scienter as to any DB Entity by now asserting that “the Deutsche Bank bankers who worked on the fraudulent STDs knew Enron’s financial statements to be false as did other Deutsche Bank employees who worked on the Enron account” and that “[t]hese Deutsche Bank employees had a responsibility to ensure that Deutsche Bank did not issue statements contrary to the material, non-public information known to them.” Pl. Reply at 6. Tellingly, plaintiffs fail to cite a single individual who purportedly had such information or a single case supporting their position that any DB Entity had an affirmative duty not to issue statements concerning Enron. Even if the DB Entities had such a duty (they did not) plaintiffs have failed to plead specific facts identifying at least one employee at each DB Entity who knew or was severely reckless in not knowing that any Deutsche Bank Entity was issuing false or misleading statements about Enron.

Plaintiffs’ insistence that they need not identify any individual who made any material misstatement or omission with scienter is expressly contrary to the Fifth Circuit’s holding in Southland. Thus, this Court properly dismissed plaintiffs’ claims that the DB Entities made material misstatements or omissions in violation of Rule 10b-5(b).

III. Plaintiffs Cannot Escape Their Ongoing Burden to Establish Subject Matter Jurisdiction As To The Foreign Debt Securities

Plaintiffs have failed to meet their burden to prove that this Court has subject matter jurisdiction over the Foreign Debt Securities. DBE Opp. 7–8. Surprisingly, plaintiffs seem to contest their burden of establishing subject-matter jurisdiction, arguing that the Court “implicitly found plaintiffs adequately pleaded subject matter jurisdiction.” Pl. Reply at 13. Plaintiffs also contend that they are not attempting to assert extraterritorial jurisdiction for the securities laws. Id. at 14. As previously explained, however, the Foreign Debt Securities were issued under

Regulation S, which exempts offers and sales occurring outside the United States from compliance with Section 5 of the Securities Act of 1933. The “predominantly foreign” nature of the Foreign Debt Securities alone suffices to subject plaintiffs’ claims to jurisdictional scrutiny. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975).

Attempting to evade the light of such scrutiny, plaintiffs cite the animating principle of ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) (Friendly, J.) without following the analysis which flows from it. While the Second Circuit posited that Congress did not intend that “the United States . . . be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners,” it explicitly *limited* the basis for jurisdiction to situations where “the perpetration of [the] fraudulent acts themselves . . . [not including] mere preparatory activities” occurred in the United States. Id. at 1017–18.

The Fifth Circuit, having adopted the Second Circuit’s conduct test, also requires that the conduct occurring in the United States be a “direct cause” of the fraud alleged, expressing explicit concern about unwarranted expansion of federal jurisdiction. Robinson v. TCI U.S. W. Communications, 117 F.3d 900, 906 (5th Cir. 1997). Nothing in the Amended Complaint, however, suggests a causal connection between any conduct occurring in the United States and the alleged fraudulent nature of the Foreign Debt Securities.⁶

Plaintiffs mistakenly assert that the locale of the alleged Enron Ponzi scheme may constitute conduct which serves as a *direct* cause for their claims. Instructive as to this error is a recent district court decision which held that it lacked subject matter jurisdiction over an Enron-

⁶ Notably, the Supreme Court, in the context of interpreting the extraterritorial reach of the Sherman Act under the Foreign Trade Antitrust Improvements Act (“FTAIA”), recently held that a court lacks subject matter jurisdiction over claims by foreign parties where the actionable conduct affects customers outside and within the U.S., but the adverse foreign effect is independent of any adverse domestic effect. F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2004 WL 1300131, at *9, 12 (June 14, 2004). Here, the solicitation and sale of Foreign Debt Securities was independent of sales made in the United States and accordingly, any remedies sought in connection therewith should be subject to the laws and remedies available in Luxembourg.

related security offered and sold outside the United States. Nikko Asset Mgmt. Co., Ltd. v. UBS AG, 303 F. Supp. 2d 456 (S.D.N.Y. 2004). The court in Nikko explained that “Enron’s financial fraud was at most an *indirect* cause” of plaintiffs’ losses.⁷ Id. at 467 (emphasis added). The court deemed irrelevant the defendant’s possible knowledge of Enron’s fraud based upon the absence of significant fraudulent conduct in the United States. Id. The court also rejected allegations strikingly similar to plaintiffs’ eleventh hour laundry list of factual connections between particular Foreign Debt Securities and the United States (Pl. Reply at 14–15) as nothing more than “merely preparatory” activities. Id. at 459, 466–67. Thus, in the absence of any causal link, plaintiffs erroneously assert that the transactions at issue played “an integral part of the fraudulent scheme.” Pl. Reply at 14 (quoting Am. Compl. at ¶ 641). Accordingly, since plaintiffs have failed to plead fraudulent conduct in the United States which *directly* relates to the sale of Foreign Debt Securities, their claims must be dismissed.

IV. By Their Silence Plaintiffs Concede That They Have Failed To And May Not Now Make Claims As To Certain Other Securities Offerings

As previously discussed (DBE Opp. at 9–10), this Court has already held that plaintiffs’ claims as to the Osprey I note resales in September 1999 are time-barred by the statute of repose. In addition, plaintiffs have never alleged that any DB Entity violated Section 12(a)(2) or 15 based upon their participation in any non-Foreign Debt Securities offering and cannot do so as any such claims would be time-barred. DBE Opp. at 9–10. Since plaintiffs’ reply is silent as to both points, they have tacitly conceded them.

⁷ Like the Foreign Debt Securities, the securities in Nikko were linked to but not issued by Enron.

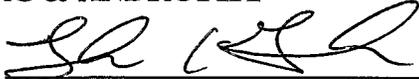
CONCLUSION

For the reasons stated above, in the DB Entities' Opposition and their briefing in support of their motions to dismiss the complaints in the Newby and WSIB actions, the DB Entities respectfully request that this Court (i) uphold its dismissal of plaintiffs' 1934 Act claims in the Newby action and dismiss these claims with prejudice, and (ii) also dismiss with prejudice all remaining 1933 Act claims against DBSI and DB.

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Respectfully submitted,

BERG & ANDROPHY

By: 

Joel M. Androphy
State Bar No. 01254700
Federal ID No. 1410
Thomas C. Graham
State Bar No. 24036666
Federal ID No. 35394
3704 Travis
Houston, Texas 77002-9550
(713) 529-5622 — Telephone
(713) 529-3785 — Facsimile

OF COUNSEL:

Lawrence Byrne
Owen C. Pell
Lance Croffoot-Suede
Johanna S. Wilson
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200 — Telephone
(212) 354-8113 — Facsimile

Attorneys for the Deutsche Bank Entities

CERTIFICATE OF SERVICE

On June 24, 2004, all other counsel of record were served in accordance with the Order Regarding Service of Papers and Notice of Hearings entered by the Court on April 10, 2004 by posting a copy to the website <http://www.es13624.com>.



Thomas C. Graham