

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-3624 and Consolidated Cases
(Jury)

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

Plaintiffs,

v.

ENRON CORP., et al.,

Defendants.

United States Courts
Southern District of Texas
FILED

NC

MAY 08 2002

Michael N. Milby, Clerk

**DEFENDANT J.P. MORGAN CHASE & CO.'S
MOTION TO DISMISS THE CONSOLIDATED
COMPLAINT AND BRIEF IN SUPPORT**

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632

TABLE OF CONTENTS

Preliminary Statement.....	1
At Most, JPMorgan Chase Is Charged With Aiding And Abetting.....	4
The Complaint Fails To Allege Any Misrepresentations Or Omissions By JPMorgan Chase	5
The Complaint Fails To Allege Scienter	5
The Tag-Along Texas Securities Act Claim Is Also Defective.....	6
Statement Of Facts.....	6
The Collapse Of Enron And The Alleged Fraud	6
JPMorgan Chase’s Enron-Related Activities.....	7
Argument	11
I. The Allegations Against JPMorgan Chase Are Nothing More Than Aiding And Abetting A Federal Securities Fraud Claim And Should Be Dismissed Under <i>Central Bank</i>	11
A. Allegations Concerning JPMorgan Chase’s Activities As Lender, Passive Investor And Counterparty Fail To State A Claim Under <i>Central Bank</i>	12
B. JPMorgan Chase Cannot Be Liable For Statements It Did Not Make	15
II. The Complaint Fails To State A Rule 10b-5 Claim Against JPMorgan Chase Under Rule 9(b) And The Reform Act	17
A. The Complaint Does Not Allege Any Misleading Statements By JPMorgan Chase	17
1. JPMorgan Chase Made No Statements About Enron As Lender, Counterparty, Passive Investor, Investment Banker or Issuer of Credit Default Puts	18
2. Analyst Research Notes Based On Public Information And Expressing Opinions Are Not Actionable.....	18

3.	The Complaint Fails To Plead With The Required Particularity Any Alleged Misstatements Or Omissions In The Analyst Research Notes.....	21
B.	The Complaint Fails To Plead Scienter With Particularity As Required By The Reform Act And Rule 9(b).....	22
1.	The Complaint Fails To Plead Specific Facts Giving Rise To A “Strong Inference” Of Scienter By JPMorgan Chase.....	23
(a)	Mere Conclusory Allegations That JPMorgan Chase Had Access To Non-Public Enron Information Does Not Establish Scienter.....	24
(b)	Plaintiffs Have Failed To Present A Logical Theory Of JPMorgan Chase’s Alleged Fraud	26
(c)	Plaintiffs’ Scienter Allegations Amount To No More Than Conclusory And Insufficient Motive And Opportunity Allegations.....	27
2.	Plaintiffs Cannot Impute The Knowledge Of JPMorgan Chase Bank Personnel To J.P. Morgan Securities Analysts.....	30
III.	The Texas State Law Claim Should Be Dismissed Because The Complaint Does Not Allege That The Securities Were Sold In Texas	31
IV.	The Complaint Should Be Dismissed Without Leave to Replead.....	34
	Conclusion	36

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adam v. Silicon Valley Bancshares</i> , 884 F. Supp. 1398 (N.D. Cal. 1995)	16
<i>Allen v. Oakbrook Sec. Corp.</i> , 763 So. 2d 1099 (Fl. Dist. Ct. App. 1999)	33
<i>Anixter v. Home-Stake Prod. Co.</i> , 77 F.3d 1215 (10 th Cir. 1996).....	13, 15-17
<i>Atlantic Gypsum Co. v. Lloyds Int'l Corp.</i> , 753 F. Supp. 505 (S.D.N.Y. 1990)	27
<i>Baron v. Strassner</i> , 7 F. Supp. 2d 871 (S.D. Tex. 1998)	33
<i>Capri Optics Profit Sharing v. Digital Equip. Corp.</i> , 950 F.2d 5 (1 st Cir. 1991)	22
<i>Cashman v. Coopers & Lybrand</i> , 877 F. Supp. 425 (N.D. Ill. 1995).....	16
<i>Central Bank of Denver v. First Interstate Bank of Denver</i> , 511 U.S. 164 (1994).....	<i>passim</i>
<i>Chan v. Orthologic Corp.</i> , No. Civ. 96-1514 PHX RCV, 1998 WL 1018624 (D. Ariz. Feb. 5, 1998)	21, 29, 34
<i>Clauder v. Sears, Roebuck & Co.</i> , 805 F. Supp. 445 (E.D. Tex. 1992)	35
<i>Coates v. Heartland Wireless Communications, Inc.</i> , 55 F. Supp. 2d 628 (N.D. Tex. 1999)	27
<i>Collins v. Morgan Stanley Dean Witter</i> , 60 F. Supp. 2d 614 (S.D. Tex. 1999), <i>aff'd</i> , 224 F. 3d 496 (5 th Cir. 2000)	35
<i>Cors v. Langham</i> , 683 F. Supp. 1056 (E.D. Va. 1988).....	33
<i>Danis v. USN Communications</i> , 121 F. Supp. 2d 1183 (N.D. Ill. 2000)	15
<i>Edgar v. Mite Corp.</i> , 457 U.S. 624 (1982)	32
<i>Eizenga v. Stewart Enters., Inc.</i> , 124 F. Supp. 2d 967 (E.D. La. 2000)	24-25
<i>Enntex Oil & Gas Co. v. State</i> , 560 S.W.2d 494 (Tex. Ct. App. 1978)	33

<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976).....	10
<i>Feinberg v. Leach</i> , 243 F.2d 64 (5 th Cir. 1957).....	34, 35
<i>Fisher v. Offerman & Co.</i> , No. 95 Civ. 2566 (JGK), 1996 WL 563141 (S.D.N.Y. Oct. 2, 1996).....	29
<i>General Guaranty Ins. Co. v. Parkerson</i> , 369 F.2d 821 (5 th Cir. 1966).....	35
<i>Grossman v. Novell, Inc.</i> , 120 F.3d 1112 (10 th Cir. 1997).....	20
<i>Guidry v. Bank of LaPlace</i> , 954 F.2d 278 (5 th Cir. 1992).....	6
<i>Helwig v. Vencor</i> , 251 F.3d 540 (6 th Cir. 2001).....	27
<i>In re Azurix Corp. Sec. Litig.</i> , No. H-00-4034, 2002 WL 562819 (S.D. Tex. March 21, 2002).....	20
<i>In re Baker Hughes Sec. Litig.</i> , 136 F. Supp. 2d 630 (S.D. Tex. 2001).....	23-24, 28-29
<i>In re Boston Tech., Inc. Sec. Litig.</i> , 8 F. Supp. 2d 43 (D. Mass. 1998).....	22
<i>In re Burlington Coat Factory Sec. Litig.</i> , 114 F.3d 1410 (3d Cir. 1997).....	27
<i>In re Kendall Square Research Corp. Sec. Litig.</i> , 868 F. Supp. 26 (D. Mass. 1994).....	16-17
<i>In re Revco Sec. Litig.</i> , No. 89CV593, 1991 WL 353385 (N.D. Oh. Dec. 12, 1991).....	32-33
<i>In re Sec. Litig. BMC Software, Inc.</i> , 183 F. Supp. 2d 860 (S.D. Tex. 2001).....	6, 24, 28, 31
<i>In re Silicon Graphics, Inc. Sec. Litig.</i> , 970 F. Supp. 746 (N.D. Cal. 1997).....	14
<i>In re Silicon Graphics, Inc. Sec. Litig.</i> , No. C96-0393, 1996 WL 664639 (N.D. Cal. Sept. 25, 1996).....	8
<i>In re Software Toolworks</i> , 50 F.3d 615 (9 th Cir. 1995).....	16
<i>In re Syntex Corp. Sec. Litig.</i> , 95 F.3d 922 (9 th Cir. 1996).....	22
<i>In re Urcarco Sec. Litig.</i> , 148 F.R.D. 561 (N.D. Tex. 1993), <i>aff'd</i> , <i>Melder v. Morris</i> , 27 F.3d 1097 (5 th Cir. 1994).....	22

<i>In re ZZZZ Best Sec. Litig.</i> , 864 F. Supp. 960 (C.D. Cal. 1994).....	16
<i>Int'l Erectors, Inc. v. Wilhoit Steel Erectors & Rental Svc.</i> , 400 F.2d 465 (5 th Cir. 1968)	34-35
<i>J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.</i> , 189 F. Supp. 2d 24 (S.D.N.Y. 2002).....	8
<i>Jones v. United States</i> , No. Civ. 11-97-4096, 1998 WL 1113323 (S.D. Tex. Nov. 25, 1998).....	35
<i>Krieger v. Gast</i> , No. 4:99-CV-86, 2000 WL 288442 (W.D. Mich. Jan. 21, 2000).....	29
<i>Kurtzman v. Compaq Computer Corp.</i> , slip op., Civ. Action No. H- 99-779, (S.D. Tex. April 1, 2002).....	20, 24, 26
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	10
<i>Lovelace v. Software Spectrum Inc.</i> , 78 F.3d 1015 (5 th Cir. 1996).....	23, 26
<i>McNamara v. Bre-X</i> , 57 F. Supp. 2d 396 (E.D. Tex. 1999)	28-29
<i>Melder v. Morris</i> , 27 F.3d 1097 (5 th Cir. 1994).....	5-6, 13, 28
<i>Nathenson v. Zonagen Inc.</i> , 267 F.3d 400 (5 th Cir. 2001)	17-18, 20, 22-23, 28
<i>Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.</i> , 38 F. Supp. 2d 1158 (C.D. Cal. 1998).....	14
<i>Pludo v. Morgan Stanley Dean Witter & Co.</i> , No. 01 Civ. 7072 (MP), 2001 WL 958922 (S.D.N.Y. Aug. 21, 2001)	21
<i>Raab v. General Physics Corp.</i> , 4 F.3d 286 (4 th Cir. 1993).....	20
<i>Rio Grande Oil Co. v. State</i> , 539 S.W.2d 917 (Tex. Ct. App. 1976).....	33
<i>Santa Fe Indus., Inc. v. Green</i> , 430 U.S. 462 (1977).....	14-15
<i>Schiller v. Physicians Res. Group, Inc.</i> , No. Civ. A 3:97-CV-3158- L, 2002 WL 318441 (N.D. Tex. Feb. 26, 2002)	23, 25, 29
<i>Shapiro v. Cantor</i> , 123 F.3d 717 (2d Cir. 1997).....	13, 15
<i>Shields v. Citytrust Bancorp, Inc.</i> , 25 F.3d 1124 (2d Cir. 1994)	20
<i>Shushany v. Allwaste, Inc.</i> , 992 F.2d 517 (5 th Cir. 1993)	23

<i>Special Situations Fund III, L.L.P. v. ViaGrafix Corp.</i> , No. Civ. A. 3:98-CV-1216-M, 2001 WL 182666 (N.D. Tex. Jan. 22, 2001)	34-35
<i>Thornton v. Microgafx, Inc.</i> , 878 F. Supp. 931 (N.D. Tex. 1995)	27
<i>Tuchman v. DSC Communications Corp.</i> , 818 F. Supp. 971 (N.D. Tex. 1993), <i>aff'd</i> , 14 F.3d 1061 (5 th Cir. 1994)	8
<i>United States v. O'Hagan</i> , 521 U.S. 642 (1997)	15
<i>Vogel v. Sands Bros. & Co.</i> , 126 F. Supp. 2d 730 (S.D.N.Y. 2001).....	29
<i>Vosgerichian v. Commodore Int'l</i> , 862 F. Supp. 1371 (E.D. Pa. 1994)	15
<i>Wenger v. Lumisys, Inc.</i> , 2 F. Supp. 2d 1231 (N.D. Cal. 1998).....	29
<i>Williams v. WMX Techs., Inc.</i> , 112 F.3d 175 (5 th Cir. 1997).....	21
<i>Wright v. Ernst & Young, LLP</i> , 152 F.3d 169 (2d Cir. 1998), <i>cert. denied</i> , 525 U.S. 1104 (1999)	13, 15, 16
<i>Ziamba v. Cascade Int'l, Inc.</i> , 256 F.3d 1194 (11 th Cir. 2001).....	13, 15
<i>Zishka v. American Pad & Paper Co.</i> , No. Civ. 398CV0660M, 2001 WL 1645500 (N.D. Tex. Dec. 20, 2001)	28

Federal Statutes

Fed. R. Civ. P. 9(b)	<i>passim</i>
Fed. R. Civ. P. 12(b)(6).....	<i>passim</i>
15 U.S.C. § 77m.....	10
15 U.S.C. § 78j(b).....	<i>passim</i>
15 U.S.C. § 78o.....	31
15 U.S.C. § 78u-4(b)(1)	18, 22
17 C.F.R. 240.10b-5.....	<i>passim</i>

State Statutes

Tex. Civ. St. § 581-3331

Other Authorities

H.R. Rep. No. 98-355, *reprinted in* 1984 U.S.C.C.A.N. 227431

Defendant J.P. Morgan Chase & Co. respectfully submits this Motion to Dismiss the Consolidated Complaint and Brief in Support, together with the accompanying appendix (the "Appendix") of certain public documents and materials cited in the Consolidated Complaint (the "Complaint"). For the reasons set forth herein, the Complaint should be dismissed with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), codified at 15 U.S.C. § 78u-4(b)(3)(A).

Preliminary Statement

Faced with the bankruptcy of Enron Corporation ("Enron") and the declining fortunes of its auditor, Arthur Andersen, the Plaintiffs have amended their Complaint to add numerous banking and investment banking firms, including J.P. Morgan Chase & Co., as defendants. The Complaint, however, does not claim that J.P. Morgan Chase & Co. was involved in the preparation of the allegedly false and misleading Enron financial statements which are the basis for Plaintiffs' securities fraud claims. Stripped of its hundreds of pages of rhetoric and repetition, the Complaint states no more than that various subsidiaries and affiliates of J.P. Morgan Chase & Co. or its predecessors (collectively "JPMorgan Chase") engaged in financial transactions with Enron over the years before Enron's collapse in December 2001.¹ The Complaint does not allege any facts challenging the economic substance or the arm's length nature of any of these transactions. Rather, the Complaint alleges that Enron did not report properly on

¹ Although the Complaint lumps together various JPMorgan Chase subsidiaries, affiliates and predecessors, these corporations are separate entities.

its financial statements some of its business dealings with others, including JPMorgan Chase.

Ultimately, the Complaint against JPMorgan Chase rests on the wholly conclusory allegations that JPMorgan Chase (1) must have known of Enron's financial chicanery because of their long banking relationship, and (2) knowingly facilitated Enron's fraud by providing some of its financing through "structured" transactions. Neither allegation states a federal securities law claim.

The Complaint's assertion that JPMorgan Chase knew about Enron's true financial condition is rank speculation, unsupported by any well-pleaded factual allegation. It also defies common sense. As a result of its transactions with Enron, JPMorgan Chase now has at risk as much as \$2.6 *billion* in Enron obligations. JPMorgan Chase could not have rationally taken on this risk had it known Enron's true condition. Similarly, that Enron insiders would tell their banks of their Ponzi scheme with the expectation that these banks would continue to advance billions of dollars is an impossible story to believe.

The notion that there is something wrong with "structured" financings is similarly without factual support in the Complaint, or in reality. It is true that many of Enron's transactions, including some with JPMorgan Chase and other respected financial institutions, are complex transactions that provided financing in a way that met various accounting or tax objectives of Enron. Such structured transactions may be unfamiliar to some, but they are commonplace in the world of corporate finance, and they contribute to the efficiency of the American economy by lowering the cost of capital for business. Thus, it is not the use of structured financings, but rather the alleged fraudulent *reporting*

of such financing that is at issue. And there, JPMorgan Chase played no role. JPMorgan Chase does not provide tax, accounting, or auditing services to its customers, including Enron. The Complaint does not allege otherwise. Indeed, as the Complaint itself makes clear, Enron had legions of accountants and auditors who advised on, and prepared, its audited financial statements.

In short, insofar as JPMorgan Chase is concerned, the Complaint is an overheated and longwinded journey to nowhere. No amount of lawyer-engineered publicity can paper over the Complaint's lack of specific factual allegations of fraud by JPMorgan Chase, nor can it get around the Supreme Court's ruling that aiding and abetting claims do not exist under the federal securities laws. That Enron is now bankrupt (and has no reasonable prospect of covering its stockholders' losses) does not exempt Plaintiffs from the legal rules for pleading a securities fraud claim. If the Complaint is examined under conventional and well-settled legal standards applicable to securities lawsuits – as it must– JPMorgan Chase should be dismissed from this case.

The Complaint's federal securities fraud claim against JPMorgan Chase should be dismissed for three separate and independent reasons. *First*, no matter how it is sliced, the Complaint alleges only aiding and abetting conduct by JPMorgan Chase, which is not actionable under the federal securities laws. *Second*, the Complaint fails to allege any actionable misrepresentation or omission—as opposed to naked hypotheses, bald conclusions and colorful hyperbole—by JPMorgan Chase. And *third*, the Complaint offers nothing whatsoever to satisfy the scienter requirement. Indeed, the premise of the Complaint against JPMorgan Chase is nonsensical, demanding that JPMorgan Chase acted against its core business, financial and reputational interests over an extended

period of time and on a massive scale. Unless JPMorgan Chase is deemed to have been completely irrational in its billions of dollars in business dealings with Enron, there is no way to reconcile the Complaint with reality. Plaintiffs' counsel's assertion that the Complaint "is a creative work" (Complaint, cover) deserving of copyright protection could not be more true regarding JPMorgan Chase. The Complaint is a work of fiction based on fantasy.

At Most, JPMorgan Chase Is Charged With Aiding And Abetting

The Complaint recites that JPMorgan Chase engaged in the following business activities with Enron:

- Acting as a lender to Enron;
- Providing commodity swaps to Enron;
- Making a passive investment in an Enron-related partnership, LJM2;
- Working as one of the investment bankers in the proposed, but failed, Dynegy merger;
- Having a working relationship with Enron executives;
- Issuing "credit-default puts" for Enron debt securities; and
- Preparing analyst research notes containing opinions and recommendations based upon publicly available information.

These activities, according to the Supreme Court, cannot support a claim of securities fraud. Despite what Plaintiffs might wish the law to be, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the Supreme Court held that aiding and abetting another's alleged fraud—precisely what Plaintiffs accuse JPMorgan Chase of having done here—is not actionable under the federal securities laws. The fraud alleged here was Enron's fraud on its own stockholders. Plaintiffs allege that Enron—and not JPMorgan Chase—committed the financial fraud set out in the

Complaint. It was, according to the Complaint, Enron, not JPMorgan Chase, that ultimately misused funds advanced by JPMorgan Chase and others, and it was Enron, not JPMorgan Chase, that allegedly abused the accounting rules.

The Complaint Fails To Allege Any Misrepresentations Or Omissions By JPMorgan Chase

The Complaint does not plead any misstatement or omission by JPMorgan Chase concerning Enron. Whether as lender, investment banker, counterparty, analyst or passive investor, JPMorgan Chase made no public statements about any of its Enron-related financial transactions. Regarding the JPMorgan Chase analyst research notes, the Complaint fails to allege that they contain anything more than the repetition of publicly available information about Enron and the analysts' personal opinions. Furthermore, just claiming that "all defendants" are responsible for page after page of alleged misstatements over a several-year period is no substitute for pleading facts demonstrating that any misstatements were attributable to JPMorgan Chase.

The Complaint Fails To Allege Scierter

The Complaint does not contain any factual allegation indicating that any JPMorgan Chase employee ever knew or should have known that Enron was engaging in fraud. The Complaint offers nothing more than the truism that JPMorgan Chase sought to make a profit from its Enron transactions. The Fifth Circuit has expressly held that this is no substitute for pleading scierter:

[T]his is the familiar "They did it for the Money" chorus sung by the plaintiffs We are not moved by this music, and . . . must reject the plaintiffs' allegations of scierter as insufficient.

Melder v. Morris, 27 F.3d 1097, 1103 (5th Cir. 1994). The Complaint also provides no basis whatsoever for imputing the knowledge of every JPMorgan Chase employee to the individual JPMorgan Chase analysts who issued Enron research notes.²

The Tag-Along Texas Securities Act Claim Is Also Defective

The Texas Securities Act claim should be dismissed because the Complaint does not allege that the sale of the securities at issue took place in Texas.

Statement Of Facts³

The Collapse Of Enron And The Alleged Fraud

This action arises out of the collapse of Enron in late 2001 and its resulting bankruptcy. The fraud alleged is Enron's fraud on Enron's investors. According to the Complaint, Enron spiraled into financial disaster following October and November 2001 disclosures that the company had erroneously failed to consolidate certain of Enron's partnership losses in its financial statements. ¶ 61. To correct these errors, Enron made billion-dollar retroactive adjustments in November 2001 to its financial statements for 1997, 1998, 1999 and 2000. *Id.* The Complaint contains no particularized factual allegations linking JPMorgan Chase to this alleged fraudulent conduct.

² The Complaint ignores the fact that prior to 2001, J.P. Morgan Securities Inc. (the entity that issued the analyst research notes) and Chase Manhattan Bank (the entity that engaged in almost every other Enron-related activity that the Complaint ascribes to defendant JPMorgan Chase) were *two completely unrelated companies*.

³ In reviewing a motion to dismiss a securities fraud claim, a court should consider only well-pled, non-conclusory factual allegations. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). A court may also consider documents integral to and explicitly relied on in the complaint. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 881-82 (S.D. Tex. 2001). And it may take judicial notice of and consider relevant public disclosures that must be filed by law with the Securities and Exchange Commission ("SEC"). *Id.*

The Complaint places the blame for Enron's collapse on the shoulders of Enron's management and Enron's outside accountants, who allegedly agreed to the fraudulent accounting for certain Enron assets, liabilities and partnerships so as to dramatically overstate Enron's financial health. In every instance of alleged fraud enumerated in the Complaint, someone other than JPMorgan Chase is identified as the perpetrator. At most, the Complaint alleges that JPMorgan Chase participated in certain unquestionably real Enron-related transactions that *Enron* misreported or improperly accounted for in its financial statements. The Complaint does not allege that JPMorgan Chase had any role in the preparation of Enron's financial statements and disclosures, or knew that they were inaccurate prior to Enron's public restatements in late 2001. Moreover, the Complaint does not allege that JPMorgan Chase ever communicated with anyone on Enron's Board of Directors, in its senior management, or at its auditor, Arthur Andersen, about financial reporting matters.

JPMorgan Chase's Enron-Related Activities

Defendant JPMorgan Chase is a Delaware holding company with its main corporate offices in New York. *See* J.P. Morgan Chase & Co., Inc. Form 10-K, March 22, 2002, at page 1 (Appendix, Exhibit 1). It was formed on December 31, 2000 through the merger of J.P. Morgan & Co. Incorporated ("J.P. Morgan & Co.") and The Chase Manhattan Corporation ("Chase"). *Id.* The Complaint alleges – without differentiating between the activities of J.P. Morgan & Co. and Chase or their respective subsidiaries and affiliates – the following JPMorgan Chase Enron-related business dealings:⁴

⁴ With the exception of a passive investment in an Enron-related partnership and the issuance of analyst research notes, J.P. Morgan & Co. and its affiliates and employees performed none of the acts attributed to JPMorgan Chase in the

- *JPMorgan Morgan Chase Provided Enron With Financing*: Between 1998 and 2001, JPMorgan Chase, along with other lenders, provided Enron with syndicated commercial loans and other forms of financing. ¶¶ 653, 657.

- *JPMorgan Chase Engaged In Commodity Financing Transactions With Enron*: JPMorgan Chase engaged in natural gas forward contracts with Enron, Enron Natural Gas Marketing Corp, Enron North America Corp and Mahonia, a Channel Islands company. ¶¶ 559-564, 664-668. While the Complaint asserts that Enron (not JPMorgan Chase) failed to account properly for these transactions on Enron’s financial statements (¶ 564) it never spells out how the accounting was allegedly fraudulent.⁵ Indeed, *none* of these transactions were implicated in Enron’s November 2001 financial restatements which precipitated its collapse. *See* Enron Corporation Form 8-K, November 8, 2001 (Appendix, Exhibit 2).

Complaint. Moreover, scattered throughout the Complaint are countless general references to “defendants” or to “banks.” Such general allegations fail to satisfy the pleading requirements of Rule 9(b). *See In re Silicon Graphics, Inc. Sec. Litig.*, No. C96-0393, 1996 WL 664639, at *4 (N.D. Cal. Sept. 25, 1996); *Tuchman v. DSC Communications Corp.*, 818 F. Supp. 971, 977 (N.D. Tex. 1993) (“General allegations, which do not state with particularity what representations each defendant made, do not meet the particularity requirement.”), *aff’d*, 14 F.3d 1061 (5th Cir. 1994). In evaluating this motion to dismiss, only those allegations that specifically reference JPMorgan Chase should be considered by the Court.

⁵ Plaintiffs quote from the *J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 24 (S.D.N.Y. 2002) case, which involves JPMorgan Chase’s attempts, on behalf of Mahonia, to collect from various sureties who issued bonds in connection with certain prepaid forward contracts. *Id.* at 25-26. The district court merely denied JPMorgan Chase’s motion for summary judgment “at this time . . . for defendants have provided a reasonable justification for further discovery.” *Id.* at 28. Despite Plaintiffs’ characterization of Judge Rakoff’s opinion, the Court has *not* concluded that the Mahonia trades were illegal or fraudulent.

- *JPMorgan Chase Worked As An Investment Banker On The*

Unsuccessful Dynegy Sale: In late November 2001, JPMorgan Chase and Citigroup, Inc., as investment bankers, worked on the failed sale of Enron to Dynegy. ¶ 671. During that time period, senior officials at both JPMorgan Chase and Citigroup Inc. also communicated with rating agencies in an unsuccessful effort to prevent a credit rating downgrade. *Id.*

- *JPMorgan Chase Wrote Credit Default Puts On Enron's Debt:*

JPMorgan Chase provided “credit default puts” on Enron’s publicly traded debt securities in 2000 and 2001. ¶ 661. Under these puts, JPMorgan Chase assumed a substantial risk of loss for an Enron default on its publicly traded debt. *Id.*

- *JPMorgan Chase (Separately Through J.P. Morgan & Co. and Chase)*

Was A Passive Investor In LJM2: JPMorgan Chase invested (through affiliates of its predecessors, J.P. Morgan & Co. and Chase) in LJM2, an Enron-related partnership. As the LJM2 Private Placement Memorandum (“PPM”) referenced in the Complaint makes unequivocal, this was a passive investment. All management responsibilities for LJM2 rested exclusively with the Enron-related General Partner. The Limited Partners, including the JPMorgan Chase entities, were expressly barred from “engag[ing] in the active management and affairs of the Partnership.” PPM at 30 (Appendix, Exhibit 3). JPMorgan Chase also provided LJM2 with a \$65 million credit line in late 1999 (¶¶ 27, 669) but the Complaint fails to allege any facts to support the claim that JPMorgan Chase participated in any way in the initial structuring of the partnership.

- *Analysts At J.P. Morgan Securities, Inc. Issued Research Notes On*

Enron: Quoted in the Complaint are 23 one or two page “Morning Meeting Research

Notes.” the first page of a “Company Update” on Enron, and what is described as an e-mail (collectively, the “Research Notes”), all allegedly issued between June 1999 and October 2001 by analysts at J.P. Morgan Securities Inc. (“J.P. Morgan Securities”), formerly a subsidiary of J.P. Morgan & Co. and since December 31, 2000, a subsidiary of J.P. Morgan Chase & Co.⁶ Chase never published any Enron analyst research. The JPMorgan Securities Research Notes repeated public information concerning Enron and offered the analysts’ opinions about the company. ¶¶ 153, 172, 190, 204, 211, 234, 239, 242, 248, 256, 260, 284, 302, 306, 310, 320, 325, 333, 348, 352, 363, 373, 376 and 380.

- *JPMorgan Chase Was Not An Underwriter Of Any Securities Offering Relevant To The Federal Claims:* The Complaint does not allege that JP Morgan Chase underwrote any Enron securities offering within the three-year statute of limitations period applicable to the federal securities claims here. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991); 15 U.S.C. § 77m. In July 1998, JPMorgan Chase, along with Lehman Brothers, underwrote the sale of \$250 million of 6.95% Notes due July 15, 2028

⁶ On the same day that the analysts issued the June 9, 1999 Research Note, they also released a “Company Report,” the first page of which contains the same text as the June 9 Research Note. Copies of the 23 Research Notes quoted in the Complaint as well as the first page of the Company Update are reproduced in the Appendix, Exhibits 4-27. The Complaint’s listing at ¶ 663 of J.P. Morgan Chase Research Notes includes four – dated July 15, 1999, June 15, 2001, July 10, 2001 and November 2, 2001 – that are not otherwise referred to in the Complaint and that do not exist. The Complaint also erroneously lists the July 25, 2000 Research Note as July 24, the March 22, 2001 Research Note as March 23, and the October 30, 2001 Research Note as October 20. *See* Appendix Exhibits 13, 19, 27.

and \$250 million of 6.40% Notes due on July 15, 2006 (the “Notes”). ¶¶ 655, 765, 1019.

These Notes are involved in the Texas securities law claim.⁷

Argument⁸

I. The Allegations Against JPMorgan Chase Are Nothing More Than Aiding And Abetting A Federal Securities Fraud Claim And Should Be Dismissed Under *Central Bank*

The federal securities claim against JPMorgan Chase (First Claim For Relief) is unambiguously precluded as a matter of law by the Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). None of the acts attributed to JPMorgan Chase—providing Enron with financing and other financial services, passively investing in an Enron-related partnership, or issuing analyst research notes—constitutes a primary violation of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The only fraud in the Complaint that is supported by factual allegations is a fraud allegedly committed by Enron and its management against the Enron stockholders. The Complaint is devoid of any factual allegations to support Plaintiffs’ bald pronouncement that JPMorgan Chase should be held primarily liable for Enron’s wrongdoings. Fully crediting all of Plaintiffs’ allegations against JPMorgan Chase, they amount only to a standard aiding and abetting claim that is barred by *Central Bank*.

⁷ The Complaint also references JPMorgan Chase’s alleged involvement in securities underwritings for Enron affiliates (¶ 656) which form no part of Plaintiffs’ claims in this case.

⁸ Plaintiffs’ First Claim for Relief could be read literally to seek to hold JPMorgan Chase liable under § 20(a) of the 1934 Act. There are, however, no “control person” allegations anywhere in the Complaint against JPMorgan Chase.

A. Allegations Concerning JPMorgan Chase’s Activities As Lender, Passive Investor And Counterparty Fail To State A Claim Under *Central Bank*

In *Central Bank*, as here, one defendant was a bank that had performed financial services—acting as an indenture trustee for \$26 million in bonds issued by a public building authority—for its customer, a public building authority. The bonds were secured by landowner assessment liens, and the bond covenants required that the underlying land be worth at least 160 percent of the bonds’ outstanding principal and interest. *Id.* at 167. The defendant bank was aware that the appraisal of the underlying land seemed overly optimistic, purchasers were using the questionable appraisal to evaluate the collateral for the bonds, and the sale of the bonds was imminent. *Id.* at 168. Nevertheless, the bank purposely delayed an independent review of the appraisal until after the closing on the bond issue. *Id.* The public building authority defaulted on the bonds before the independent review was complete. *Id.* The Supreme Court held such conduct insufficient to state a claim under § 10(b):

As in earlier cases considering conduct prohibited by § 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. The proscription does not include giving aid to a person who commits a manipulative or deceptive act. We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute.

* * *

Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).

Id. at 177-78, 191 (citations omitted). To allow private plaintiffs to sue based on aiding and abetting under §10(b) would be to impose liability “when at least one element critical for recovery under 10b-5 is absent: reliance.” *Id.* at 180.

Numerous Circuit Courts, including the Fifth Circuit, have applied the clear rule of *Central Bank* to hold that there is no private right of action to sue for aiding and abetting under §10(b) and Rule 10b-5. *See, e.g., Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1204 (11th Cir. 2001) (“After examining the text of the statute, the Supreme Court held that ‘a private plaintiff may not maintain an aiding and abetting suit under § 10(b).’”); *Wright v. Ernst & Young, LLP*, 152 F.3d 169, 174 (2d Cir. 1998) (stating that the Court concluded in *Central Bank* that § 10(b) does not reach aiding and abetting), *cert. denied*, 525 U.S. 1104 (1999); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996) (“[T]he [Supreme] Court specifically eliminated private actions predicated on aiding or abetting those who engage in the prohibited conduct.”); *Melder v. Morris*, 27 F.3d 1097, 1104 n.9 (5th Cir. 1994) (stating that claims for aiding and abetting have been “foreclosed to private plaintiffs” under *Central Bank*). Neither allegations of “mere knowledge and assistance in the fraud,” *Wright*, 152 F.3d at 176, nor “[a]llegations of ‘assisting,’ ‘participating in,’ ‘complicity in’ and similar synonyms” are sufficient to establish liability under *Central Bank*.” *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997).

The nature of the allegations against JPMorgan Chase in this case are no more “primary” than were the allegations against the defendant in *Central Bank*. As in *Central Bank*, the alleged fraud was committed against the bank’s customer’s investors *by the customer*. There, as here, the bank was alleged to have provided assistance to its

customer. There, as here, the allegations against the bank, if proved, would establish that the bank assisted or aided the customer in carrying out the alleged fraud. Plaintiffs here allege that Enron and the Enron insiders deceived investors by misreporting on the company's financial statements funds obtained by commodity financing transactions through JPMorgan Chase. Placing aside whether JPMorgan Chase knew such misreporting would occur (and, as discussed below, there are no specific allegations to support such an inference), the misreporting was *Enron's* act. At most, JPMorgan Chase aided Enron in committing this act. JPMorgan Chase's roles as a lender, provider of commodity swaps, passive investor in LJM2, investment banker in the failed Dynegy deal, and issuer of credit default puts amount at most, and as Plaintiffs themselves allege, to aiding or "help[ing]" (¶¶ 652, 660) Enron commit fraud. Similarly, Plaintiffs can point to nothing in the analyst Research Notes beyond the repetition of publicly available information about Enron coupled with the analysts' personal opinions. Assuming that these Research Notes contained errors, they were *Enron's* errors, *Enron's* misstatements and *Enron's* omissions. At most, by repeating these statements in their Research Notes, the analysts, again as Plaintiffs themselves allege, aided or "helped" (¶ 663) Enron in further disseminating this public information.⁹

⁹ Plaintiffs' conclusory allegations that JPMorgan Chase participated in a "fraudulent scheme" (¶ 673) are nothing more than a "thinly disguised attempt to avoid the impact of the *Central Bank* decision." *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 762 (N.D. Cal. 1997) (internal quotations omitted). See also *Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.*, 38 F. Supp. 2d 1158, 1164 (C.D. Cal. 1998) ("Plaintiffs' alleged 'scheme' theory of liability is . . . fundamentally inconsistent with" *Central Bank*). Nor have Plaintiffs pled facts that establish under § 10(b) that JPMorgan Chase engaged in "manipulative devices." ¶ 664. Indeed, there are no allegations in the Complaint that so much as suggest that JPMorgan Chase engaged in any activities that the courts have defined as "manipulative" or "deceptive." See *Santa Fe Indus., Inc. v. Green*, 430

B. JPMorgan Chase Cannot Be Liable For Statements It Did Not Make

Post-*Central Bank* caselaw confirms that the Supreme Court created a clear rule that excludes any potential liability for misstatements or omissions that the defendant did not make. *See, e.g., Ziembra*, 256 F.3d at 1205 (“[I]n light of *Central Bank*, in order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff’s investment decision was made.”); *Wright*, 152 F.3d at 175 (stating that the Second Circuit has followed a “bright line” approach) (internal quotations omitted); *Shapiro*, 123 F.3d at 720-21 (“A claim under § 10(b) must allege a defendant has made a material misstatement or omission.”); *Anixter*, 77 F.3d at 1226 (“Reading the language of § 10(b) and 10b-5 through the lens of *Central Bank*, we conclude that in order for accountants to ‘use or employ’ a ‘deception’ actionable under the antifraud law, they must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors.”); *Danis v. USN Communications*, 121 F. Supp. 2d 1183, 1193 (N.D. Ill. 2000) (refusing to hold auditor liable where it reviewed a report but made no representations); *Vosgerichian v. Commodore Int’l*, 862 F. Supp. 1371, 1377-78 (E.D. Pa. 1994) (holding that an accountant could not be held liable for alleged misrepresentations made by its client, even though the accountant allegedly had provided substantial assistance to the client in

U.S. 462, 476 (1977) (manipulation “refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity”); *United States v. O’Hagan*, 521 U.S. 642, 651-53 (1997) (stating that “traditional” insider trading is a “deceptive device,” and holding that misappropriation of inside information also constitutes a “deceptive device” under § 10(b)).

making such misrepresentations); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (“Only primary violators, *i.e.*, those who *make* a material misstatement or omission or commit a manipulative act, are subject to private suit under Section 10(b).”) (emphasis in original).

Thus, at a minimum, a defendant must have actually created or made a material misstatement or omission in order to be considered a primary violator under § 10(b). *See, e.g., Wright*, 152 F.3d at 175 (“[I]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).”) (internal quotations and citations omitted). As addressed below in Section II A, JPMorgan Chase did not make any misstatements or omissions here. Nor was it “intricately involved” in the preparation of any of Enron’s alleged misstatements or omissions.¹⁰ Further, JPMorgan Chase never made any public

¹⁰ Some courts, including the Ninth Circuit, have stretched § 10(b) liability under *Central Bank* beyond the makers of misstatements or omissions. *See, e.g., In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1995); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 970 (C.D. Cal. 1994); *Adam v. Silicon Valley Bancshares*, 884 F. Supp. 1398, 1401 (N.D. Cal. 1995); *Cashman v. Coopers & Lybrand*, 877 F. Supp. 425, 432-33 (N.D. Ill. 1995). Courts have criticized this line of cases and its suggestion that a defendant could be primarily liable if it “substantially participated” or was “intricately involved” in the preparation of the misstatements or omissions of others. As the Tenth Circuit explained:

Some post-*Central Bank of Denver* cases have held that third party defendants can be liable for statements made by others, where the defendant substantially participated in preparing the statements. To the extent these cases allow liability to attach without requiring a representation to be made by defendant, and reformulate the “substantial assistance” element of aiding and abetting liability into primary liability, they do not comport with *Central Bank of Denver*.

statements about its Enron activities, and its analyst research notes – while writings – were limited to discussing public information and offering personal opinions. The allegations against JPMorgan Chase amount to – at most – aiding and abetting, and must fail as a matter of law.

II. The Complaint Fails To State A Rule 10b-5 Claim Against JPMorgan Chase Under Rule 9(b) And The Reform Act

Setting aside that *Central Bank* requires dismissal of the Complaint's § 10(b)/Rule 10b-5 claim against JPMorgan Chase, the First Claim for Relief should also be dismissed because it fails to plead with the particularity mandated by Rule 9(b) and the Reform Act, a misstatement or omission made with scienter by JPMorgan Chase. The Complaint fails to allege with particularity any JPMorgan Chase statements that contained a material misstatement or omission and fails to allege specific facts giving rise to a strong inference that JPMorgan Chase acted with scienter.

A. The Complaint Does Not Allege Any Misleading Statements By JPMorgan Chase

Under Rule 9(b), a complaint alleging securities fraud must plead with particularity (i) the statements that are allegedly fraudulent, (ii) the identity of the speaker, (iii) when and where the statements were made, and (iv) how the statements were allegedly false or misleading. *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (noting that the Fifth Circuit's "relatively strict interpretation of Rule 9(b)

Anixter, 77 F.3d at 1226 n.10 (internal citations omitted). *See also In re Kendall Square*, 868 F. Supp. at 28 n.2. Of course, even under this expansive approach, no liability attaches to JPMorgan Chase, which did not in any way participate in the preparation of Enron's alleged misstatements.

[] requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.”) (internal quotations omitted).

The Reform Act amplified Rule 9(b)’s requirements:

The complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). Plaintiffs have utterly failed to satisfy these requirements as to JPMorgan Chase.

1. JPMorgan Chase Made No Statements About Enron As Lender, Counterparty, Passive Investor, Investment Banker or Issuer of Credit Default Puts

The Complaint contains no allegations, conclusory or otherwise, that JPMorgan Chase made any misstatements or omissions in its roles as lender, financing counterparty, passive investor, investment banker or issuer of credit-default puts for Enron debt securities. To the extent that the Complaint could be read to charge JPMorgan Chase with responsibility for the statements of other parties (such as Enron or Enron insiders), these allegations fail in the first instance because the Complaint does not identify the statements being pressed against JPMorgan Chase.

2. Analyst Research Notes Based On Public Information And Expressing Opinions Are Not Actionable

Although the Complaint references a number of J.P. Morgan Securities Research Notes, it fails to allege any facts demonstrating that they contain anything more than the repetition of public information and opinions. Each of the “Research Notes” quoted in the Complaint makes clear that it is summarizing the statements (and optimistic

opinions) of Enron's management, or prefaces its views with one or more of the following indications of opinion: we "see," "feel," "believe," "foresee," "forecast," "now expect," "now view," "in our view," "continue to see," "firmly believe," "in our opinion," "expect," are "confident," "strongly believe," "feel very comfortable," and "also feel confident."¹¹ The Research Notes also contain a legend, such as the following, which emphasizes the subjective nature of the analysts' opinions:

Information has been obtained from sources believed to be reliable but J.P. Morgan Chase & Co., or its affiliates and/or subsidiaries (collectively JPMorgan) does not warrant its completeness or accuracy. Opinions and estimates constitute our judgment as of the date of this material and are subject to change without notice. Past performance is not indicative of future results. This material is not intended as an offer or solicitation for the purchase or sale of any financial instrument. . . . The recipient of this report must make its own independent decisions regarding any securities or financial instruments mentioned herein. JPMorgan generally acts as a market maker in the financial instruments of any issuer discussed herein and may act as underwriter, placement agent, advisor or lender to such issuer. JPMorgan and/or its employees may hold a position in any securities or financial instruments mentioned herein.

¹¹ The above references can be found in the following Research Notes (Appendix, Exhibits 4-27) that are cited in the following paragraphs of the Complaint: we "see" (6/9/99, ¶153; 1/21/00, ¶204; 2/9/00, ¶211; 5/15/00, ¶234; 3/13/01, ¶306; 10/09/01, ¶363; 10/17/01, ¶373; 10/30/01, ¶376), "feel" (9/23/99, ¶172; 3/12/01, ¶302; 8/15/01, ¶338), "believe" (6/9/99, ¶153; 11/26/99, ¶190; 1/21/00, ¶204; 2/9/00, ¶211; 7/3/00, ¶239; 7/19/00, ¶242; 7/25/00, ¶248; 9/15/00, ¶256; 3/13/01, ¶306; 4/18/01, ¶320; 5/18/01, ¶325; 8/15/01, ¶348; 10/17/01, ¶373; 10/23/01, ¶380), "forecast" (2/9/00, ¶211), "foresee" (2/9/00, ¶211), "now expect" (5/15/00, ¶234), "now view" (5/15/00, ¶234), "in our view" (7/19/00, ¶242; 10/30/01, ¶376), "continue to see" (9/27/00, ¶260), "continue to believe" (3/22/01, ¶310; 8/17/01, ¶352; 10/23/01, ¶380), "firmly believe" (3/22/01, ¶310), "in our opinion" (11/26/99, ¶190; 3/22/01, ¶310), "expect" (9/23/99, ¶172; 9/15/00, ¶256; 3/22/01, ¶310); are "confident" (5/3/00, ¶234; 7/25/00, ¶248; 3/22/01, ¶310; 4/18/01, ¶320; 5/18/01, ¶325; "strongly believe" (5/18/01, ¶325), and "also feel confident" (8/15/01, ¶348).

See, e.g., Research Note, dated May 18, 2001 (Appendix, Exhibit 21).

In *Kurtzman v. Compaq Computer Corp.*, slip op., Civ. Action No. H-99-779 (S.D. Tex. April 1, 2002) (Harmon, J.), this Court acknowledged that expressions of optimism about the expected future performance of a company, such as in analyst research notes, and puffery generally, are not actionable under § 10(b):

“Statements classified as ‘corporate optimism’ or ‘mere puffing’ are typically forward-looking statements or are generalized statements of optimism that are not capable of objective verification. Vague optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.” *Grossman [v. Novell, Inc.]*, 120 F.3d 1112, 1119-20 (10th Cir. 1997)] (and cases cited therein). “[M]isguided optimism is not a cause of action and does not support an inference of fraud.” *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994). “[Investors] rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen.” *Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993).

Kurtzman, slip op. at 51-52; see also *Nathenson*, 267 F.3d at 417 n.15 (“[T]he statements were at most mere optimistic generalizations consisting of the type of puffing that . . . [the] circuits have consistently held to be inactionable.”) (internal quotations omitted); *In re Azurix Corp. Sec. Litig.*, No. H-00-4034, 2002 WL 562819, at *13-14 (S.D. Tex. March 21, 2002) (holding that statements regarding Azurix's future prospects “are not actionable because they are merely statements of corporate optimism. Such statements are not actionable because no reasonable investor would rely on obvious ‘puffery.’”). The JPMorgan Chase Research Notes are precisely the type of optimistic opinions and projections that are not actionable under the securities laws.

3. The Complaint Fails To Plead With The Required Particularity Any Alleged Misstatements Or Omissions In The Analyst Research Notes

The Complaint does not reveal with the required particularity what it is about each of the Research Notes that constitutes a misstatement or omission by JPMorgan Chase. The general pattern of the Complaint is to quote from a collection of statements by various defendants (including J.P. Morgan Securities Research Notes) issued over extended time periods, some as long as seven or eight months, *see, e.g.*, ¶¶ 122-155 (October 21, 1998 through July 6, 1999), ¶¶ 156-214 (July 13, 1999 through February 28, 2000), and then list a hodgepodge of alleged errors or omissions (most of which go on for pages) concerning the group of statements. *See, e.g.*, ¶¶ 300, 339. There is no effort whatsoever to identify which specific Research Notes contain which specific alleged misstatements or omissions, why such statements were misleading or constituted omissions, and how the analysts were supposed to know those statements were false at the time they were made. Defendants are simply left to guess as to what Plaintiffs believe was wrong with each Defendant's statements.¹²

The Complaint is a template for the type of puzzle pleading that courts nationwide have held "make a mockery of Rule 9(b) and the Reform Act." *Chan v. Orthologic Corp.*, No. Civ. 96-1514 PHX RCV, 1998 WL 1018624, at *14 n.11 (D. Ariz. Feb. 5, 1998); *see also Williams v. WMX Techs., Inc.*, 112 F.3d 175, 180 (5th Cir. 1997);

¹² Plaintiffs' liberal references to news reports add nothing to the Complaint's allegations. *See Pludo v. Morgan Stanley Dean Witter & Co.*, No. 01 Civ. 7072 (MP), 2001 WL 958922, at *1 (S.D.N.Y. Aug. 21, 2001) (dismissing complaint that included an "unrestrained litany of . . . articles, reports or news items" from various publications, and noting that "[t]he jury speeches taken from the media and chronicled in the Complaint are hardly what is known as elements of proper pleading of a right to relief.").

In re Syntex Corp. Sec. Litig., 95 F.3d 922, 932 n.9 (9th Cir. 1996). Such non-specific pleading mandates dismissal. *See, e.g., In re Urcarco Sec. Litig.*, 148 F.R.D. 561, 569 (N.D. Tex. 1993) (“[G]eneral allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another do not meet the requirements of Rule 9(b).”); *aff’d, Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994). Because it is not the proper task of either the Defendants or this Court to clean up the Complaint, it should be dismissed, as a matter of law, for failing to plead alleged securities fraud with particularity as required by the Reform Act and Rule 9(b). *See In re Boston Tech., Inc. Sec. Litig.*, 8 F. Supp. 2d 43, 56 n.13 (D. Mass. 1998) (granting motion to dismiss where the “[a]llegations . . . [were] strewn about the Complaint in such a way that their relatedness [was] apparent only after repeated review. . . .”); *Capri Optics Profit Sharing v. Digital Equip. Corp.*, 950 F.2d 5, 8 (1st Cir. 1991) (“[The] burden [of matching statement with omission] should not be [the Court’s].”).

B. The Complaint Fails To Plead Scienter With Particularity As Required By The Reform Act And Rule 9(b)

Plaintiffs have fallen far short of the well-established standard for pleading a “strong inference” of scienter. *See Nathenson*, 267 F.3d at 407 (“[A] plaintiff alleging a section 10(b)/Rule 10b-5 claim must now plead specific facts giving rise to a ‘strong inference’ of scienter.”); 15 U.S.C. § 78u-4(b)(1). They have instead produced a 500-page book entirely devoid of the necessary factual information – *i.e.*, who at JPMorgan Chase is alleged to have known what and when and how. Plaintiffs’ theory of the case—namely, that JPMorgan Chase knowingly funneled billions of dollars into an entity it knew was a Ponzi scheme destined for failure—is completely illogical, and negates any reasonable inference of scienter. Ultimately, other than the usual and insufficient “they

wanted to make money” allegations, the Complaint offers no basis for inferring scienter by JPMorgan Chase.

1. The Complaint Fails To Plead Specific Facts Giving Rise To A “Strong Inference” Of Scienter By JPMorgan Chase

Plaintiffs have not satisfied the Fifth Circuit scienter standard—either actual knowledge or “severe recklessness”—as to JPMorgan Chase. Severe recklessness involves (i) “an extreme departure from the standards of ordinary care” and (ii) “a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.” *Nathenson*, 267 F.3d at 408 (internal quotations omitted); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) (internal quotations omitted); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 n.2 (5th Cir. 1996). Recklessness is *not* merely an extreme form of negligence, but instead is a form of conscious and purposeful action. *See In re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d 630, 647-48 (S.D. Tex. 2001) (“In raising a strong inference of scienter, ‘reckless’ in this context is viewed as a lesser form of intent, rather than merely a greater degree of ordinary negligence.”) (internal quotations omitted).

Plaintiffs must “plead specific facts giving rise to a ‘strong inference’ of scienter,” *Nathenson*, 267 F.3d at 407, and “may not rely on boilerplate or conclusory allegations to satisfy [their] pleading obligations.” *Schiller v. Physicians Res. Group, Inc.*, No. Civ. A 3:97-CV-3158-L, 2002 WL 318441, at *6 (N.D. Tex. Feb. 26, 2002) (internal quotations omitted). “These facts, when assumed to be true must constitute persuasive, effective, and cogent evidence from which it can logically be deduced that defendants acted with intent to deceive, manipulate, or defraud.” *Id.* (internal quotations

omitted). “A mere reasonable inference is insufficient to survive a motion to dismiss.”

Id. (internal quotations omitted).

(a) Mere Conclusory Allegations That JPMorgan Chase Had Access To Non-Public Enron Information Does Not Establish Scienter

Plaintiffs have not pleaded with even a modicum of particularity the allegation that JPMorgan Chase made any statement or took any action in conscious disregard of the truth. Instead, Plaintiffs generally allege that because JPMorgan Chase personnel performed “due diligence” in connection with their Enron transactions, received unidentified internal Enron documents, and had frequent contact with Enron executives, JPMorgan Chase personnel must have known of the alleged Enron fraud.

However, broadbrush claims that JPMorgan Chase was somehow privy to inside information about Enron’s fraudulent financial condition are not enough to establish scienter. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 885 (S.D. Tex. 2001) (Harmon, J.) (finding defendants’ “involvement in day-to-day management of BMC’s business, their access to internal corporate documents, conversations with corporate officers and employees, and their attendance at management and Board meetings” insufficient to establish strong inference of scienter); *Baker Hughes*, 136 F. Supp. 2d at 648 (finding allegations that “senior officers . . . received daily, weekly and monthly financial reports to apprise them of the true financial status of Baker Hughes” to be “the type of generalized allegations routinely rejected as failing to raise a strong inference of scienter”) (internal quotations omitted); *Kurtzman*, slip op. at 46 (dismissing § 10(b) claim where plaintiffs failed to allege any link between the speakers and reports circulated within the company that purportedly revealed the truth); *Eizenga v. Stewart Enters., Inc.*, 124 F. Supp. 2d 967, 982, 985 (E.D. La. 2000) (rejecting as

insufficient to give rise to a strong inference of scienter allegations that defendants “closely monitored the Company’s performance via detailed reports that were generated on a daily, weekly and monthly basis”); *Schiller*, 2002 WL 318441, at *10 n. 9 (finding insufficient allegations of scienter based only on “‘internal corporate documents’ or other ‘non-public information’”).

In total, the 500-page Complaint makes only two specific references to JPMorgan Chase executives. In ¶ 667, Mark Shapiro, Vice Chairman of JPMorgan Chase, is alleged to have overseen the Enron-related commodity transactions. In ¶ 671, William Harrison, Chairman and Chief Executive Officer of JPMorgan Chase, is alleged to have called Moody’s concerning Enron’s credit rating in late 2001. Neither of these allegations even remotely suggests fraud.

Here, as in *BMC*, Plaintiffs have failed to allege any “details as to what defendants knew, when and how they knew it, and the basis for [their] allegations.” *BMC*, 183 F. Supp. 2d. at 887. In essence, Plaintiffs ask this Court to *assume* scienter from JPMorgan Chase’s purportedly close involvement with Enron. Thus, for example, Plaintiffs speculate that JPMorgan Chase and the other banks named as defendants must have had access to internal Enron documents in the course of their provision of financial services to Enron, and therefore must have known of Enron’s alleged financial improprieties. ¶¶ 650-51, 670. Without offering a single supporting specific factual allegation regarding JPMorgan Chase or any other bank, Plaintiffs ask this Court to make a leap of faith that each bank knew that: (a) Enron created LJM2 to “generate artificial profits and conceal [Enron’s] true debt,” (b) Chewco, another special purpose entity, “was also permitting Enron to artificially inflate its reported earnings while moving large

amounts of debt off its balance sheet,” (c) “Enron’s actual financial condition and results from operations were far worse than what was being publicly disclosed or presented,” and (d) “Enron had entered into a number of transactions with secretly controlled SPEs, which would require Enron to issue millions of shares of Enron common stock.” ¶ 651.

The Complaint, of course, does not identify any JPMorgan Chase employee who learned any of the foregoing “facts,” or when that individual gained such guilty knowledge. Instead, Plaintiffs’ only “support” for these assertions is a supposed universal generalization about bank practices. This is plainly insufficient. *See Lovelace*, 78 F.3d at 1020 (“Plaintiffs’ bare allegation about industry custom is precisely the type of conclusory allegation that motivated the heightened pleading standards of Rule 9(b) in the first place.”)

Similarly, the Complaint alleges in a wholly conclusory manner that JPMorgan Chase executives discussed with Enron executives “Enron’s business, financial condition, financial plans, financing needs, partnerships, SPEs and Enron’s future prospects.” ¶ 653. At no point does the Complaint even attempt to specify who at JPMorgan Chase had these alleged conversations, when they took place, or what they discussed.

(b) Plaintiffs Have Failed To Present A Logical Theory Of JPMorgan Chase’s Alleged Fraud

Plaintiffs’ allegations that JPMorgan Chase was motivated to put *billions* of dollars of financing into the alleged Enron Ponzi scheme in order to earn *millions* of dollars of fees makes no sense—and is thus insufficient to create a “strong inference” of scienter as required by the Reform Act. As this Court noted recently in *Kurtzman*, theories of federal securities law violations that are illogical or bizarre must be

scrutinized with great care. *Kurtzman*, slip op. at 25. See also *Coates v. Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 643 (N.D. Tex. 1999) (rejecting plaintiffs’ theory of fraud because it “defie[d] common sense” and was “facially implausible”); *Thornton v. Micrografx, Inc.*, 878 F.Supp. 931, 938 (N.D. Tex. 1995) (holding that plaintiffs did not sufficiently allege scienter where they drew “inferences of wrongdoing based on a nonsensical premise.”); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (“Plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible.”); *Atlantic Gypsum Co. v. Lloyds Int’l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990) (where “[p]laintiffs’ view of the facts defies economic reason, . . . [it] does not yield a reasonable inference of fraudulent intent.”).

Similarly nonsensical is Plaintiffs’ suggestion that Enron management would confess the details of their Ponzi scheme to their bankers and still expect those bankers to pour millions of dollars of new credit into Enron. Because “plaintiffs are entitled only to the *most plausible* of competing inferences” under the Reform Act’s “strong inference” requirement, *Helwig v. Vencor*, 251 F.3d 540, 552 (6th Cir. 2001), Plaintiffs’ implausible scienter allegations must be rejected.

(c) Plaintiffs’ Scienter Allegations Amount To No More Than Conclusory And Insufficient Motive And Opportunity Allegations

Plaintiffs have not pled with particularity that JPMorgan Chase made any statements that were false or misleading when made with intent to deceive or with reckless disregard for the truth. The allegations in the Complaint ultimately amount, at most, to a generalized claim that Defendants had a motive and opportunity to commit securities fraud. It is, however, firmly settled in the Fifth Circuit that pleadings of motive

and opportunity *alone* are not enough to survive a motion to dismiss. *See Nathenson*, 267 F.3d at 410-12; *Azurix*, 2002 WL 562819, at *21 (“Allegations of motive and opportunity are no longer sufficient, however, to plead a strong inference of scienter under the Exchange Act and Rule 10b-5.”); *Zishka v. American Pad & Paper Co.*, No. Civ. 398CV0660M, 2001 WL 1645500, at *2 (N.D. Tex. Dec. 20, 2001) (“The passage of the [Reform Act] rendered motive and opportunity pleading alone insufficient for purposes of alleging scienter”); *BMC*, 183 F. Supp. 2d at 917 (“Plaintiffs have relied on concepts that have not survived the enactment of the [Reform Act], like the group pleading doctrine, pleading by hindsight, or *pleading scienter by motive and opportunity alone*, which this Court rejects.”) (emphasis added); *Baker Hughes*, 136 F.Supp. 2d at 641 (“[m]otive and opportunity cannot, standing alone, raise a strong inference of scienter”).

The Complaint contains nothing more than general averments of motive that are not unique to JPMorgan Chase, but instead would apply to virtually all financial institutions and businesses. Generalized allegations that JPMorgan Chase was motivated to commit fraud to collect professional fees and to enhance its business reputation are insufficient to satisfy the motive test. *See Melder v. Morris*, 27 F.3d 1097, 1103-04 (5th Cir. 1994) (“As characterized by the district court, this is the familiar ““They did it for the Money”” chorus sung by the plaintiffs We are not moved by this music, and . . . must reject the plaintiffs’ allegations of scienter as insufficient . . . Simply put, accepting the plaintiffs’ allegation of motive as sufficient would make a mockery of Rule 9(b) by effectively eliminating the scienter requirement”); *McNamara v. Bre-X*, 57 F. Supp. 2d 396, 423 (E.D. Tex. 1999) (holding that allegations that “J.P. Morgan was motivated by its desire to ingratiate itself with Bre-X, to collect professional fees for its advisory

position, and to enhance its business reputation” were “insufficient to satisfy the motive test”); *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1251-52 (N.D. Cal. 1998) (“Permitting plaintiffs to allege scienter based on these routine components of underwriting services [fees] would effectively eliminate the scienter requirement as to securities underwriters.”) (internal quotations omitted); *Fisher v. Offerman & Co.*, No. 95 Civ. 2566 (JGK), 1996 WL 563141, at *7 (S.D.N.Y. Oct. 2, 1996) (“[A]n underwriter’s alleged motive to earn its underwriting fees is not alone sufficient to sustain a strong inference of fraudulent intent.”); *Chan v. Orthologic Corp.*, No. Civ. 96-1514 PHK RCV, 1998 WL 1018624, at *23 (D. Ariz. Feb. 5, 1998) (“Courts have repeatedly held that underwriting commissions, without more, are insufficient evidence of motive.”); *Vogel v. Sands Bros. & Co.*, 126 F. Supp. 2d 730, 739 (S.D.N.Y. 2001) (“Sands’ alleged desire to realize greater transaction fees and its close relationship with Consec are insufficient to show an improper motive.”); *Krieger v. Gast*, No. 4:99-CV-86, 2000 WL 288442, at *12 (W.D. Mich. Jan. 21, 2000) (allegations that the defendant “was paid a ‘success fee’ and other compensation for its role in structuring the Merger and other transactions and that its fees were dependent upon the success of the transactions at issue” were “insufficient to support an inference of scienter”); *Schiller*, 2002 WL 318441, at *8 (“Allegations regarding compensation, without more, do not sufficiently plead a motive to commit securities fraud.”); *Baker Hughes*, 136 F. Supp. 2d at 645 (finding that “Plaintiffs’ allegations of motive and opportunity based on incentive compensation fail to raise a strong inference of scienter.”). Here, the only allegations of scienter are that JPMorgan Chase wished to make a profit from its lending and financial services activities.

2. Plaintiffs Cannot Impute The Knowledge Of JPMorgan Chase Bank Personnel To J.P. Morgan Securities Analysts

The Complaint fails to allege facts sufficient to permit the Court to impute the collective knowledge of all the employees of JPMorgan Chase to the securities analysts who prepared the Enron Research Notes. Preliminarily, Plaintiffs ignore that J.P. Morgan Securities, which issued the Research Notes, was, at least until December 31, 2000, part of J.P. Morgan & Co. Accordingly, it was a separate institution from Chase, the entity that provided Enron with the bulk of the financial services attributed in the Complaint to JPMorgan Chase. Surely, there can be no claim that any knowledge possessed by Chase personnel can be imputed to the J.P. Morgan Securities analysts when they issued Research Notes prior to the J.P. Morgan/Chase merger.

More basically, the Complaint offers no particularized allegations that so much as suggest that the analysts issuing the reports had any knowledge of facts that contradicted the Research Notes. There is simply no allegation that the analysts did not genuinely hold the opinions reflected in the Research Notes, nor is there any allegation that the Research Notes did not accurately reflect the publicly available information about Enron. Plaintiffs' conclusory allegation that the Chinese Wall applicable to the analysts was somehow deficient does not meet the pleading requirements of the Reform Act.¹³

¹³ The unsupported claim that “[t]here was no so-called ‘Chinese Wall’ to seal off the JP Morgan securities analysts from the information which JP Morgan obtained rendering commercial and investment banking services to Enron” (¶654) ignores that both the United States Congress and the SEC have recognized the ability of Chinese Walls to ensure that securities laws are not violated by the flow of information among different divisions of a single multi-service financial firm. For example, in 1988, Congress passed the Insider Trading and Securities Fraud Enforcement Act. Section 3 of that act added a new § 15(f) to the Exchange Act and a new § 204A to the Investment Advisors Act, requiring broker-dealers and investment advisors respectively to “establish, maintain, and enforce written

See BMC, 183 F. Supp. 2d at 886 (for each defendant, plaintiffs must “specifically plead what he learned, when he learned it, and how Plaintiffs knew what he learned”); *McNamara*, 57 F. Supp. 2d at 419-20 (dismissing §10(b) claims based on analyst reports where plaintiffs failed to allege with sufficient particularity analysts’ knowledge).

In sum, not one fact is pled as to when the Chinese Wall was allegedly breached at JPMorgan Chase, who was involved in the breach, what non-public Enron information was conveyed when it was breached, and which Research Notes were implicated by the breach. The wholly inadequate and conclusory nature of Plaintiffs’ allegations regarding the Chinese Wall is underscored by the allegations in ¶¶ 676 (Citigroup), 695 (CS First Boston), 717 (CIBC), 737 (Merrill Lynch), 764 (Lehman Brothers), 775 (Bank of America) and 789 (Deutsche Bank), in which Plaintiffs claim that Chinese Walls were breached at six other defendant investment banks, using *the same conclusory words* that are included in ¶ 654 in reference to JPMorgan Chase.

III. The Texas State Law Claim Should Be Dismissed Because The Complaint Does Not Allege That The Securities Were Sold In Texas

Plaintiff Washington State Investment Board (“Washington Board”) has failed to state a claim under the Texas Securities Act, codified at Tex. Civ. St. § 581-33, because the Complaint does not allege that the sales of the Notes at issue took place in Texas. According to the Complaint, the Washington Board, the alleged purchaser of

policies and procedures reasonably designed” to prevent the misuse of material nonpublic information. 15 U.S.C. § 78o. *See also* H.R. Rep. No. 98-355, *reprinted in* 1984 U.S.C.C.A.N. 2274 (acknowledging that “[u]nder both existing law and the bill [the Insider Trading Sanctions Act of 1984], such a firm with an effective Chinese Wall would not be liable for trades effected on one side of the wall, notwithstanding inside information possessed by firm employees on the other side”).

these Notes, is a Washington entity. ¶ 81(a). The alleged underwriters of these Notes are JPMorgan Chase, a Delaware corporation with its principal corporate offices in New York, *see* J.P. Morgan Chase & Co., Inc. Form 10-K, March 22, 2002, at page 1 (Appendix, Exhibit 1)), and Lehman Brothers.¹⁴ Significantly, the Complaint does not allege that *any* aspect of the sales took place in Texas.

The fact that Enron, the issuer of the Notes, is located in Texas, is legally irrelevant to any application of the Texas Securities Act to JPMorgan Chase. Under the Commerce Clause of the United States Constitution, there must be a sufficient nexus between the sale of the security and the state for a sale to be covered by a state's blue sky laws. *See generally Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982) ("The Commerce Clause [] precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."). For example, *In re Revco Securities Litigation*, No. 89CV593, 1991 WL 353385 (N.D. Oh. Dec. 12, 1991), concerned the application of Ohio's blue sky statute where a New York-based underwriter sold the securities of an Ohio-based company (Revco) to a New York entity (Arsam). The court found that the contacts of the issuer were not relevant for the purposes of determining whether Ohio's blue sky statute applied to the underwriter:

While Revco may have had significant business ties with Ohio, these contacts have little or no relationship to the sale of the securities to Arsam...Arsam has failed to allege a sufficient nexus between the sale of the debt/securities and

¹⁴ The Certification filed by the Washington Board fails to name the alleged seller of the Notes and the Complaint does not (nor could it) allege any facts demonstrating that the Washington Board bought them from JPMorgan Chase.

Ohio. Consequently, this Court dismisses Arsam's claim brought under Ohio's blue sky law.

Id. at *14. Numerous other Courts have concluded that a state's blue sky laws apply only if the alleged purchase or sale of the securities had some meaningful nexus with that state. *See, e.g., Allen v. Oakbrook Sec. Corp.*, 763 So. 2d 1099, 1101 (Fl. Dist. Ct. App. 1999) (“[C]ourts considering the issue have uniformly rejected applying one state's blue sky law where the sale of the security occurred entirely in another state.”); *Cors v. Langham*, 683 F. Supp. 1056 (E.D. Va. 1988) (dismissing claim under Maryland's blue sky laws where the plaintiffs purchased their securities through a Virginia-based representative of the defendants and the acts complained of all took place in Virginia); *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 922 (Tex. Ct. App. 1976) (finding that the Texas Securities Act applied to the sale of Texas oil and gas leases by a Texas corporation, where the corporation made telephone calls and sent letters from Texas to solicit out-of-state investors, and “the acceptances were intended to be made and were made in Texas, so the sales were Texas ones.”); *Enntex Oil & Gas Co. v. State*, 560 S.W.2d 494, 497 (Tex. Ct. App. 1978) (finding that the Texas Securities Act applied to the sale of Texas oil and gas leases by entities either incorporated in Texas or doing business in Texas, and noting that “[t]he Texas Securities Act . . . only applies to disposition of securities within the state”). *But cf. Baron v. Strassner*, 7 F. Supp. 2d 871, 876 (S.D. Tex. 1998) (finding that plaintiffs had alleged a sufficient nexus to invoke application of the Texas Securities Act where some, but not all, of the members of the plaintiff class and most, but not all, of the defendants were Texas residents).

Here, the Washington Board has not alleged that any aspect of the sale of the Notes to the Washington Board took place in Texas.¹⁵ The claim must therefore be dismissed as to JPMorgan Chase.

IV. The Complaint Should Be Dismissed Without Leave to Replead

The Complaint should be dismissed with prejudice and without leave to replead. There is no valid legal theory upon which Plaintiffs can advance their claims against JPMorgan Chase.

Where “it appears that no mere amendment could cure [a complaint’s] defect[s] and have it state a claim upon which relief can be granted,” dismissal with prejudice is warranted. *Feinberg v. Leach*, 243 F.2d 64, 68 (5th Cir. 1957); *see also Int’l Erectors, Inc. v. Wilhoit Steel Erectors & Rental Svc.*, 400 F.2d 465, 471 (5th Cir. 1968) (upholding dismissal with prejudice “where it [was] certain that plaintiff [could not] possibly be entitled to relief under any set of facts which could be proved in support of the allegations in the complaint.”); *Chan v. Orthologic Corp.*, 1998 WL 1018624, at *23 (D. Ariz. Feb. 5, 1998) (dismissing without leave to replead where plaintiffs failed to “supply any evidence of scienter,” and it seemed “clear that they [could not] allege the necessary additional facts”).

Courts have held that “no legitimate purpose is to be served by permitting [a] [p]laintiff to amend” a complaint where the plaintiff’s “legal theory is untenable.”

¹⁵ The Texas Securities Act claim fails for the additional reason that Plaintiff Washington Board has, as discussed above, not pled with the required Rule 9(b) particularity circumstances constituting fraud as to JPMorgan Chase. *See, e.g., In re Lion Capital Group*, 44 B.R. 690, 695 (Bankr. S.D.N.Y. 1984) (applying Rule 9(b) to state blue sky laws).

Special Situations Fund III, L.L.P. v. ViaGrafix Corp., No. Civ. A. 3:98-CV-1216-M, 2001 WL 182666 at *2 (N.D. Tex. Jan. 22, 2001); *see also Clauder v. Sears, Roebuck & Co.*, 805 F. Supp. 445, 448 (E.D. Tex. 1992) (dismissing claims with prejudice and denying leave to amend where “amendment of [the] complaint . . . would [still] not state a cognizable ERISA cause of action”).

The appropriate course of action in such cases is to dismiss the claims with prejudice. *See, e.g., Collins v Morgan Stanley Dean Witter*, 60 F. Supp. 2d 614, 619 (S.D. Tex. 1999) (dismissing claims with prejudice where even “Plaintiffs’ well-written Response and thoughtful analysis [could not] overcome the fundamental flaws that touch[ed] each of Plaintiffs’ alleged causes of action”), *aff’d*, 224 F.3d 496 (5th Cir. 2000); *Jones v. United States*, No. Civ. 11-97-4096, 1998 WL 1113323 at *3 (S.D. Tex. Nov. 25, 1998) (dismissing claims with prejudice where plaintiff’s “conclusory allegations of violations of constitutional and/or statutory rights fail[ed] to state a claim against the individual IRS defendants or the United States.”).

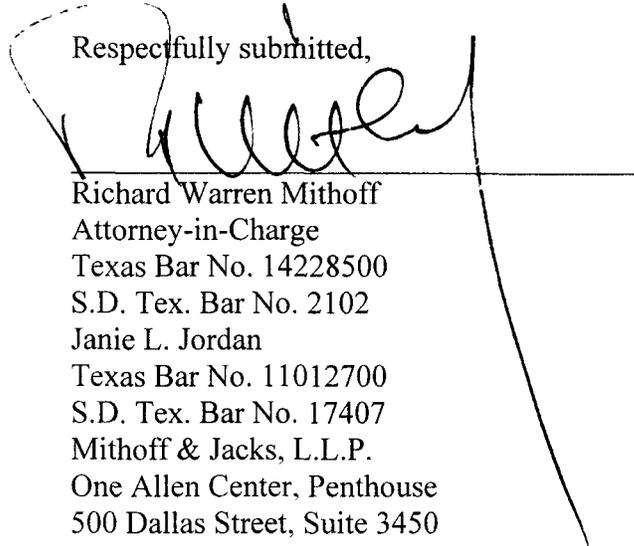
For the reasons set forth in Sections I through III, Plaintiffs cannot state a legally cognizable claim against JPMorgan Chase. Plaintiffs’ Complaint “is plagued not by what it lacks, but by what it contains. *All of the paths to relief which the pleading suggests are blocked by the allegations.*” *General Guaranty Ins. Co. v. Parkerson*, 369 F.2d 821, 825 (5th Cir. 1966) (emphasis added). Because “no mere amendment could cure [the Complaint’s] defect[s] and have it state a claim upon which relief can be granted,” the Complaint should be dismissed with prejudice. *Id.* (internal quotations omitted); *see also Feinberg*, 243 F.2d at 68; *Int’l Erectors*, 400 F.2d at 471.

Conclusion

For the foregoing reasons, Plaintiffs' claims against JPMorgan Chase should be dismissed with prejudice and without leave to replead.

Dated: Houston, Texas
May 8, 2002

Respectfully submitted,



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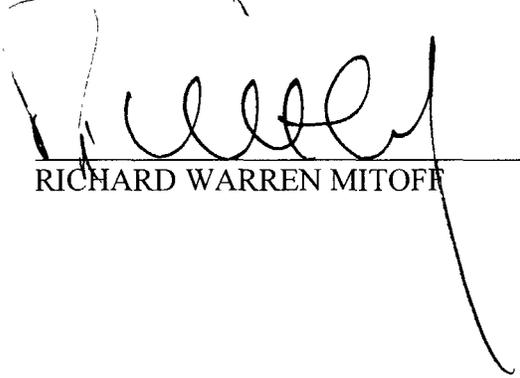
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by electronic mail, pursuant to this Court's Order, upon the following counsel of record on this 8th day of May, 2002.



RICHARD WARREN MITOFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES	§	Civil Action No. H-01-3624
<u>LITIGATION</u>	§	And Consolidated Cases
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On	§	
Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendant J.P. Morgan Chase & Co.'s ("JP Morgan Chase") Motion to Dismiss the Plaintiffs' Consolidated Complaint and Brief in Support filed on May 8, 2002 (the "Motion"). The Court, having considered the Motion, Plaintiffs' Response thereto, and JP Morgan Chase's Reply, finds that the Motion should be granted. It is therefore

ORDERED that the Motion is hereby granted; it is further

ORDERED that Plaintiffs' claims against JP Morgan Chase are hereby dismissed with prejudice.

SIGNED this ____ day of _____ 2002.

Melinda Harmon
United States District Judge