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

United States Courts
Southern District of Texas
FILED
MAY 08 2002
Michael N. Milby, Clerk

MARK NEWBY,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.: H 01-3624
	§	AND CONSOLIDATED CASES
ENRON CORPORATION, et al.,	§	
Defendants.	§	

MOTION TO DISMISS OF DEFENDANT JOHN A. URQUHART

Pursuant to Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure, Defendant John A. Urquhart respectfully submits this Motion to Dismiss all claims that have been asserted against him. Mr. Urquhart also respectfully requests oral argument on this motion.[1]

I. INTRODUCTION

Mr. Urquhart was a director on Enron's board at the inception of the alleged class period on October 19, 1998, but he had retired from the board by May 1, 2001. (See Enron's Form 10-Q, p. 31, filed 8/14/2001 for quarter ended 6/30/2001; Master SEC App. Tab 18/Vol. 2). Even in Plaintiffs' view, Mr. Urquhart was far from a central player in the events about which they complain. Throughout the 500-plus pages of the Complaint, Mr. Urquhart is mentioned in only 16 of the 1030 paragraphs, and his name is most frequently used to note his biographical

[1] For the sake of brevity and to avoid duplication of various briefing, Mr. Urquhart respectfully refers the Court to the legal analysis contained in the Joint Brief of Certain Defendants.

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information with Enron and the fact that as a director, he signed various SEC filings and registration statements.

The reason for the limited references to Mr. Urquhart is simple. Plaintiffs' claims pivot on allegations of fraud and allegedly knowing, manipulative, and intentional or reckless activities—conduct that Plaintiffs expressly disclaim as to Mr. Urquhart. Thus, Plaintiffs' state at the outset of the Complaint: "Certain defendants named herein, including . . . Urquhart . . . are not sued for fraud, but rather, only under non-fraud provisions of the 1933 and 1934 Acts. No allegations of fraud are made against or directed at these defendants." (NCC at 3, n.1).[2] Moreover, Plaintiffs do not allege that Mr. Urquhart engaged in ***any*** insider trading activities (NCC at 490-91); or that Mr. Urquhart received ***any*** ill-gotten gains or profited in ***any*** respect from ***any*** improper Enron stock sales (*id.*); or that Mr. Urquhart participated in ***any*** wrongful schemes (NCC at 488-90) or knowingly or recklessly participated in the preparation or dissemination of ***any*** false statements, misrepresentations, or omitted facts (NCC at 488-90).

Indeed, Plaintiffs explicitly explain the sole basis for their claims against Mr. Urquhart: "These directors [including Mr. Urquhart"] are defendants only as to the claims alleged under §11 of the 1933 Act. Each of these defendants signed Registration Statements issued pursuant to Enron's debt and equity offerings made during the Class Period." (NCC ¶83(dd)). As to Mr. Urquhart, Plaintiffs seek to attach liability under §11 of the 1933 Act because Mr. Urquhart allegedly signed registration statements pertaining to three debt offerings. In truth, as demonstrated below, Plaintiffs' allegations concerning Mr. Urquhart cannot support a §11 claim

[2] As we demonstrate *infra*, Plaintiffs' claims under §11 and §15 of the 1933 Act are premised on fraud, despite Plaintiffs' bare assertion otherwise. Thus, since no fraud allegations are leveled at Mr. Urquhart in any aspect of the Complaint, there is nothing whatsoever to support any liability against him in this case.

as to any of the three subject offerings. Plaintiffs' contentions concerning the alleged untrue statements in the registration statements sound in fraudulent, intentional, purposeful conduct—allegations that Plaintiffs confess are not applicable to Mr. Urquhart. Once those allegations of fraud are stripped from the Complaint, nothing remains to support any §11 claims against Mr. Urquhart. Moreover, the allegations of fraud that Plaintiffs purport to relate to the subject debt offerings are not pled with the particularity required under Rule 9(b). And, because the Complaint itself clearly demonstrates that the portions of the registration statements about which Plaintiffs complain were expertised by Anderson and the lawyers whom Plaintiffs are seeking to hold accountable, the §11 claims against Mr. Urquhart must be dismissed. Similarly, Plaintiffs' claim against Mr. Urquhart pursuant to §15 of the 1933 Act—which is tethered in the Complaint to the §11 claim—must be dismissed, since Plaintiffs fail completely to demonstrate the requisite "controlling person" liability.

Apparently forgetting for the moment their assertion that Mr. Urquhart is a defendant "only as to the claims alleged under §11 of the 1933 Act," Plaintiffs include him as a nominal defendant in Plaintiffs' Fourth Claim for Relief under the Texas Securities Act ("TSA"), in connection with two additional debt offerings. (NCC at ¶1019). Nevertheless, no cognizable claims arise against Mr. Urquhart under the TSA in any capacity in which Mr. Urquhart is alleged to have acted. Mr. Urquhart is not a statutory seller; he is not a "control person," nor is he even alleged to be for purposes of the TSA; and Plaintiffs admit that Mr. Urquhart is not an "aider" under the statute because he was not engaged in any intentionally deceptive, fraudulent, or reckless conduct. Moreover, Plaintiffs fail to particularize any allegations of untruths or omissions in these debt offerings, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The TSA claims also must be dismissed.

II. The Section 11 Claims Against Mr. Urquhart Must Be Dismissed.

Section 11 of the 1933 Act provides:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—(1) every person who signed the registration statement . . . .

15 U.S.C. § 77k(a). Section 11 claims are limited to those arising from the text of the registration statement. *See Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 234 (S.D.N.Y. 1999).

Here, Plaintiffs assert §11 claims as to four debt offerings: (1) 5/19/99 7.375% Notes due 5/15/2019 ($500 million) ("the 5/19/99 Offering"); (2) 8/10/99 7% Exchangeable Notes due 7/31/2002 ($222 million) ("the 8/10/99 Offering"); (3) 5/18/00 Notes due 5/23/05 and 7.875% Notes due 6/14/03 ($500 million) ("the 5/18/00 Offerings"); and (4) 7/18/01 Zero Coupon Convertible Sr. Notes due 2021 ($1.9 billion) ("the 7/18/01 Offering"). The §11 claims alleged against Mr. Urquhart concern only the first three debt offerings; no claim is lodged against Mr. Urquhart over the 7/18/01 Offering.

A. Because Plaintiffs' Section 11 Claims Sound in Fraud And Plaintiffs Have Admitted That Mr. Urquhart Did Not Commit Fraud, Plaintiffs' Claims Against Mr. Urquhart Must Be Dismissed.

Despite Plaintiffs' avowed disassociation of their §11 claims from allegations of "fraud or intentional or reckless misconduct," (NCC ¶1005), it is undeniable that the Complaint—including the §11 claim for relief—is fundamentally and completely predicated on alleged fraud. A review of the paragraphs incorporated by reference in ¶1005 as the basis for the §11 claims is

illustrative. For example, ¶¶ 75-86 accuse individual Defendants of engaging in fraud through "illegal insider trading." Similarly, ¶¶ 101, 103, 104 and 108 charge that bank defendants "engaged and participated in the scheme to **defraud** purchasers of Enron securities and Enron's course of business which operated as a **fraud and deceit** on purchasers of Enron's securities..." Paragraph 121 contains so-called "true but concealed facts" alleging fraud (see, e.g., ¶121(k), contending that historical earnings "were **falsified** and the result of improper accounting **manipulation**" – terms premised on fraud). Paragraph 621 alleges that "those on the inside **knew** that the stock price issuance triggers were toxic for Enron"). Paragraph 624 alleges that "the banks and Vinson & Elkins **knew** . . . because they had structured and prepared the documents for the **bogus** hedging transactions).

Paragraph 1005 of the §11 claim incorporates ¶164, which in turn references the allegedly false financial statements described by Plaintiffs in ¶¶418-611 as part of an allegedly elaborate fraud. Thus, Plaintiffs say:

- "In order to overstate Enron's assets...and present materially misleading financial statements during the Class Period, the defendants caused the Company to violate GAAP and SEC rules...." NCC ¶418.
- "Enron's **manipulation** of its results also had a dramatic impact on its key 'debt-to-equity' ratio . . . ." NCC ¶420.
- "The Enron Defendants engaged in many other egregious **manipulations** of Enron's financial statements...." NCC ¶422.
- "These **manipulations**, among others, caused the financial results to be presented in violation of GAAP and SEC rules. NCC ¶426.
- "Enron management and its bankers developed a **scheme** to keep loans ... off Enron's financial statements...." NCC ¶429.
- "Enron's purchase of the put option ... was a **sham**...." NCC ¶479.
- "Enron also **concealed** ... billions of dollars more in debt...." NCC ¶496.

- "Accordingly, the Enron defendants caused Enron's financial statement disclosures to be materially false and misleading during the Class Period because they failed to disclose Enron's related-party transactions as required by GAAP. Defendants **knew** that if they properly disclosed Enron's related-party transactions as alleged herein, it would uncover Enron's **scheme** to hide the massive debt it was keeping off its books." NCC ¶506.

- "To **conceal** the failure of [broadband] the Enron Defendants engaged in several **accounting manipulations**...." NCC ¶520.

- "The Enron Defendants also engaged in **deceptive practices** with certain banking defendants to disguise loans to the Company as hedging or derivative transactions." NCC ¶558.

- "As a result of these factors, the Enron Defendants **knew** that the assets would not provide the benefits estimated when they were acquired, but in order to report inflated earnings to investors, did not take required writedowns as per SFAS No. 121." NCC ¶587.

Plaintiffs' mere re-labeling of their §11 claims cannot alter the fact that those claims are actually predicated on allegations of fraud. Accordingly, the precise pleading requirements of Rule 9(b)—which Plaintiffs do not even attempt to satisfy as to Mr. Urquhart—apply here. As the United States Court of Appeals for the Fifth Circuit has noted: "When 1933 Securities Act claims are grounded in fraud rather than negligence . . . Rule 9(b) applies." *Melder v. Morris,* 27 F.3d 1097, 100, n. 6 (5th Cir. 1994) (affirming dismissal of claims under §§11, 12(2) and 15 of the 1933 Act due to inadequate pleading of scienter). *See also, Lone Star Ladies Investment Club v. Schlotzky's Inc.,* 238 F.3d 363, 368 (5th Cir. 200) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not"); *In re Stac Electronics Sec. Litig.,* 89 F.3d 1399, 1404-05 *(*9th Cir. 1996*) cert. denied,* 117 S.Ct. 1105 (1997) (Rule 9(b)'s particularity requirements apply to § 11 claims that sound in fraud); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520, 521 (5th Cir. 1993); *Shapiro v. UJB Financial Corp.*, 964 F.2d 272 (3rd Cir. 1992), *cert. denied,* 113 S.Ct. 365 (1992)(although fraud is not an element of a § 11 claim, Rule 9(b) applies if the claim is grounded in fraud); *Sears v. Likens*, 912 F.2d 889, 892-93

(7th Cir. 1990); *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1111 n.17 (D. Conn. 1992) ("[W]hen fraud lies at the core of an action under Sections 11 and 12, Rule 9(b) must be satisfied").

Plaintiffs seek to avoid the particularized pleading requirements of Rule 9(b) and the reach of cases like *Melder, supra*, by superficially declaring that the §11 claims are not based on fraud. In the face of the actual nature of Plaintiffs' allegations, however, Plaintiffs' passing attempt to distance the §11 claims from their allegations of fraud and intentional misconduct must yield to the real core of the Complaint.

In *In re Ultrafem Inc. Sec. Litig.*, 91 F.Supp.2d 678, 691 (S.D.N.Y. 2000), the court dealt with the plaintiffs' attempt, like here, to re-cast their fraud claims as negligence actions. The court dismissed the plaintiffs' claims under §§ 11, 12(2) and 15, and in words equally applicable here stated:

> With respect to the Individual Defendants . . . , plaintiffs make little, if any, effort to differentiate their asserted negligence claims from the fraud claims which permeate the Complaint. Plaintiffs argue that their Section 11, Section 12(2) and Section 15 allegations, which incorporate certain paragraphs of the Complaint "except to the extent" any allegations in the cited paragraphs "sound in fraud," is sufficient to remove those allegations from the requirements of Rule 9(b). I disagree.
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> [B]y merely disavowing any allegations that would make Rule 9(b) applicable to Securities Act claims and without specifying the allegations that would support a negligence cause of action, plaintiffs essentially request that the Court parse their allegations to find a negligence claim. . . . Plaintiffs do not specify the basis for a negligence claim (i.e., duty, breach, damage resulting proximately from breach [citation omitted]), in the Complaint or in their opposition to defendants' motions to dismiss. Moreover, without ruling on their sufficiency, ***the allegations that are made here are classic fraud allegations [citation omitted], that is, allegations of misrepresentations and omissions made with intent to defraud upon which plaintiffs relied.*** [citation omitted.] ***Thus, plaintiffs' boilerplate disclaimer is not enough to make out a claim for negligence and, therefore, Rule 9(b) applies to the Section 11, Section 12(2) and Section 15 claims against the Individual Defendants.*** [emphasis added].

Simply put, Plaintiffs' §11 claims *do* sound in fraud. An illustrative case is *Taam Associates Inc. v. Housecall Medical Resources, Inc.*, 1998 WL 1745361, *12, (N.D.Ga. 1998), where the court, after reasoning that the plaintiffs' §11 claims concerning financial statements sounded in fraud, dismissed those claims for failure to plead with particularity:

> Essentially, plaintiffs allege that defendants knew that they failed to follow GAAP and deliberately failed to provide adequate reserves for doubtful accounts. Moreover, a purpose is given for the failure to disclose this information. Namely, plaintiffs allege that defendants had to create an "illusion of financial strength and a high price for its stock" to raise sufficient funds through the IPO to obtain a waiver under a credit agreement with NationsBank. Plaintiffs are not alleging that defendants' non-compliance with GAAP arose from an arithmetic or accounting mistake. Instead, they indicate that defendants purposefully set its reserves low so that it could project a false sense of financial strength to unsuspecting purchasers who would then buy the resultingly overpriced stock. ***Clearly, this is an allegation of fraud.*** Its mere presence could operate to injure the reputations of the defendants in this case.
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> Yet, while in theory, it is possible that such an egregious breach of accounting principles could be triggered innocently, without any knowledge of the "falsity" of such statement by those who stand to benefit from the misrepresentation –the issuers of the stock–typically, those issuers will have had the primary motive to manipulate the financial statement so as to inflate the price of the stock that they are offering. When the latter occurs, it is fraud and the case law reveals that plaintiffs generally so describe the conduct, thereby subjecting themselves to the ***duty to plead particularly the facts underlying this serious allegation.***

Id. at *15[emphasis added].

This Court too has recognized that when a §11 claim sounds in fraud, plaintiffs must satisfy the heightened pleading requirements of Rule 9(b). *Kurtzman v. Compaq Computer Corporation,* Slip Op. at 163-64 (S.D.Tex. 2000) ("Plaintiffs must at least plead specific time, place and contents of the false representation and the identity of the person making the representation as well as what the person obtained thereby."). With respect to alleging scienter for purposes of a § 11 claim:

> [C]onclusory or boilerplate allegations of fraudulent intent or conspiracy to commit securities fraud to inflate the price of the company's stock to increase

> executives' compensation are not sufficient because such an allegation would effectively encompass nearly all corporate officials; rather plaintiff must set out facts sufficient to give rise to a proper inference of scienter, of conscious behavior.

Compaq, at 163-64.

Plaintiffs not only utterly fail to allege scienter with Rule 9(b) particularity as to Mr. Urquhart, they explicitly decline even to suggest that Mr. Urquhart committed any fraudulent, knowing or reckless conduct whatsoever. Because Plaintiffs' allegations of untrue, omitted or misleading statements as a predicate for §11 liability clearly sound in fraud, the absence of any such allegations as to Mr. Urquhart means there is no basis for §11 liability against him. The claims must be dismissed.

B. The Complaint Fails To Allege That There Were Any Known Material Untruths or Omissions As To The 5/19/99 Offering, the 8/10/99 Offering Or The 5/18/00 Offerings.

Plaintiffs allege generally that the Registration Statements and Prospectuses for the Notes "were false and misleading, as they omitted to state facts necessary to make the statements made not misleading and failed to adequately disclose material facts as described above." NCC ¶1006. Plaintiffs fail to allege that any specific untruths, misrepresentations or omissions were material to the purchasers of such a debt security, or to plead any facts demonstrating the materiality of any misrepresentations or omissions.[3] Yet, the determination of materiality requires an analysis

[3]The Complaint alleges in non-specific, conclusory fashion that"[e]ach of the plaintiffs. . . purchased the Enron securities detailed in ¶1006 above traceable to a false and misleading Registration Statement" and that "[a]s a direct and proximate result of defendants' acts and omissions in violation of the 1933 Act, and [sic] plaintiffs and members of the Offering Subclasses suffered substantial damage in connection with their purchases of the Enron securities sold in the offerings." NCC ¶1014. This is inadequate as a matter of law. There is no explanation of why Plaintiffs' allegations would be material to the purchasers of debt instruments. *Cf., AUSA Life Ins. Co. v. Ernst & Young,* 119 F.Supp.2d 394, 403 (S.D.N.Y. 2000) (holding no loss causation was shown by plaintiffs who purchased debt securities where despite erroneous financial statements including "inflation of its earnings and assets," issuer still had "more than sufficient cash flow and equity cushion to discharge all its obligations on plaintiffs' notes" at the time; question is whether, if earnings statement had been corrected, reported net income would have

of specifics. Thus, "[m]ateriality is not judged in the abstract, but in light of the surrounding circumstances." *Krim v. BancTexas Group*, 989 F.2d 1435, 1448-49 (5th Cir. 1993). As this Court has recognized, "The appropriate inquiry is whether, under all the circumstances, the omitted fact or the prediction without a reasonable basis 'is one [that] a reasonable investor would consider significant in [making] the decision to invest, such that it alters the total mix of information available about the proposed investment.'" *BMC*, 183 F.Supp.2d at 869, n. 18 (quoting *Krim v. BancTexas Group*, 989 F.2d at 1445). *See also Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("On a motion to dismiss. . . [w]e do not, however, accept [the Plaintiffs'] conclusory allegation that the prospectus was materially misleading. Conclusory allegations and unwarranted deductions of fact are not admitted as true.").

Additionally, to maintain a § 11 claim, Plaintiffs must "come forward with facts to suggest that reasonable jurors might be able to find that the information allegedly omitted or misrepresented <u>was known to</u> [Enron] at the time the prospectus was prepared and disseminated, or at the time [plaintiff] purchased his securities." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993) (affirming summary judgment when prospectus allegedly failed to disclose information on changes that occurred four months later). Here, Plaintiffs have failed to specify the material omissions or misrepresentations and that the information was known by Defendants at the time the purchases occurred. [4]

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been altered by such a percentage that "it would have scarcely diminished the attractiveness" of the notes.).

[4] Mr. Urquhart respectfully refers the Court to the legal analysis concerning adequacy of disclosures, forward-looking statements and bespeaks caution doctrines presented in the Joint Brief of Certain Defendants.

C. The Section 11 Claims Against Mr. Urquhart Should Be Dismissed Because The Complaint Itself Demonstrates That He Has A Complete Defense To Those Claims.

Section 11 provides a complete defense to claims brought thereunder where a director such as Mr. Urquhart has signed a registration statement relying on the opinion of an expert and he had no reasonable basis to believe that the information was untrue. Specifically, §11 states:

> "No person ... shall be liable ... who shall sustain the burden of proof that as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe ... that the statements therein were untrue."

15 U.S.C. ¶77k(b)(3)(c); *see also Lone Star Ladies Inv. Club v. Schlotsky's Inc., 238 F.3d 363, 369 (5th Cir. 2001)(citing Herman & MacLean v. Huddleston,* 459 U.S. 375, 382 (1983)(noting it is a "hornbook principle[] of securities law," that "[d]efendants other than the issuer can avoid liability by demonstrating due diligence"); *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 623 (9th Cir. 1994) (section 11 claims barred against individuals who may establish due diligence or reliance on experts defense); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 688-89 (S.D.N.Y. 1968)(holding that directors had defense to §11 based on portions of the registration statements expertised by independent auditors); *In re Worlds of Wonder Sec. Litig.*, 814 F.Supp.850 (N.D. Cal. 1993) (defendants' reliance on accountants' decisions that form basis for plaintiffs' §11 claim represents type of information on which §11 permits non-experts to rely).

Plaintiffs' allegations of false or misleading information in the registration statements concern "financial statements and results." NCC ¶121(a) et seq.; NCC ¶ 164 ("these financial results were false"); *id.* at ¶ 610 (alleging: "Due to . . . accounting improprieties . . . "financial results . . . violated GAAP"); NCC ¶ 613 (alleging that 10Ks were "false"). Plaintiffs also allege

that Andersen represented that "Enron's financial statements . . . were presented in accordance with GAAP and that Andersen's audits of Enron's financial statements had been preformed in accordance with . . . GAAS." NCC ¶ 899. The following references in the Complaint are indicative of Plaintiffs' allegations regarding the pervasiveness of Anderson's expert involvement in the matters about which Plaintiffs complain:

- "Andersen...was involved in every facet of Enron's business. Andersen audited Enron's financial statements, it acted as internal auditors for Enron, it prepared Enron's tax returns, it provided consulting services on a wide range of topics and consulted on the accounting for the very transactions at issue in this litigation throughout the Class Period." ¶897

- "Andersen... was intimately familiar with Enron's business affairs and its personnel were present at Enron's Houston headquarters on a year-round basis." ¶897.

- "Andersen . . . consented to the incorporation of its reports on Enron's financial statements in Enron's Form 10-Ks ... and in Enron's Registration Statements ... [and] consented to the use of its name as an expert in each Prospectus filed and issued pursuant to these offerings, ..." NCC ¶ 899.

- Anderson issued "'clean' audit opinions" throughout the class period. NCC ¶ 926.

- The 1997 and 1998 financials were "certified by Andersen and [had] an unqualified report thereon," NCC ¶141;

- Andersen had issued a "clean opinion" as to the 1998, 1999, and 2000 financials, NCC ¶ 221, 292, 931, and the report in early 2001 was "certified by Andersen"), NCC ¶ 54.

- "Andersen certified" the financials in 1998, 1999, and 2000), NCC ¶14;

- The LJM transactions were "structured, reviewed, and *approved* by Andersen, Vinson & Elkins, Kirkland & Ellis, and certain of Enron's banks", NCC ¶ 32;

- "Misleading disclosures were crafted and *approved* by Enron's outside auditors and its outside counsel," NCC ¶ 67

- Andersen "actually actively engaged and participated in structuring transactions, NCC ¶70(a);

- The 1999 "financial statements [were] certified by Andersen," NCC ¶ 219;

- "Enron's 00 Annual Report also contained Enron's 00 financial results and statements, as audited and certified by Andersen," NCC ¶ 296;

- Andersen's audit reports were presented to the "Board of Directors of Enron Corp.," NCC ¶¶ 903-04;

- Andersen reported in 1997-2000 to the Board that "In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Enron Corp . . . in conformity with accounting principles generally accepted in the United Sates"), NCC ¶¶ 903-04;

- "Andersen was consulted on, and reviewed, . . . [and] signed off on Enron's mark-to-market accounting," NCC ¶ 935;

- "The accounting decisions relating to the SPEs *were made at the highest levels of Andersen,*" NCC ¶ 942;

- "Andersen in fact offered Enron advice *at every step*, from inception through restructuring and ultimately terminating the Raptors", NCC ¶ 953; and

- ("Andersen . . . did not issue a qualified or adverse opinion on Enron's financial statements," NCC ¶ 959.

Additionally, Plaintiffs' have alleged that Vinson & Elkins and other lawyers provided further expert opinions concerning the financial information.[5] For example, Plaintiffs admit,

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[5]*See, e.g.*, NCC ¶ 70(b) ("Vinson & Elkins participated in writing, reviewing, and *approving* Enron's SEC filings, as well as its shareholder reports and financial press releases"); NCC ¶ 141 ("Vinson & Elkins reviewed and collaborated in writing the Form 10-K report"); NCC. ¶ 221 ("Vinson & Elkins reviewed and helped write the [1999] Form 10-K report"); NCC ¶ 292 ("Vinson & Elkins reviewed and participated in writing the [2000] Form 10-K report"); NCC ¶ 801 ("Vinson & Elkins participated in the negotiations for, prepared the transaction documents for, and structured Enron's LJM and Chewco/JEDI partnerships and virtually all of the related SPE entities and transactions"); NCC¶ 801 ("Vinson & Elkins

"Vinson & Elkins [] drafted and/or approved the adequacy of Enron's press releases, shareholder reports and SEC filings (including 10Ks and Registration Statements alleged in this Complaint)." NCC ¶ 801. Indeed, according to Plaintiffs, "Kirkland & Ellis engaged and participated . . . [by the] issuing of dozens of legal opinions concerning the structure, legality and *bona fides* of SPE's." NCC ¶ 859. Moreover, Plaintiffs state, "Vinson & Elkins repeatedly gave 'true sale' and other opinions." NCC ¶ 801. Plaintiffs expressly allege that with regards to the specific offerings complained of under §11, "Vinson & Elkins drafted and approved Enron's related-party disclosures . . . [which] were incorporated by reference into the following Prospectus and Registration Statements . . .". NCC ¶ 824.

Having pled that the directors received and relied upon the certified opinions of Andersen and the expert accounting and legal opinions of Andersen and others, Plaintiffs have conclusively established the directors' defense under §11.

Based on Andersen's unqualified certifications, and the many expert accounting and legal opinions cited by Plaintiffs, Mr. Urquhart had "no reasonable ground to believe and did not believe at the time such part of the registration statement became effective, that the statements

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also wrote the disclosures regarding the related party transactions"); NCC ¶ 802 ("Vinson & Elkins provided advice in structuring virtually every one of Enron's off-balance-sheet transactions and prepared the transaction documents (including opinions)"); NCC ¶ 803 ("Vinson & Elkins issued opinions *to Enron*, Mahonia and JP Morgan representing that billions of dollars in forward sales contracts of natural gas and oil by Enron were legitimate"); NCC ¶ 807 (alleging Vinson & Elkins provided "'true sale' opinions" for Chewco/JEDI); NCC ¶ 811 ("The LJM1 and LJM2 transactions were structured, reviewed, and *approved* by Vinson & Elkins"); NCC ¶ 814 ("Vinson & Elkins structured each of these transactions for Enron"); *id.* at ¶ 815 (describing LJM1 and LJM2 transactions as "structured, reviewed, and approved by Vinson & Elkins"); NCC ¶ 832 ("[R]elated-party disclosures drafted and approved as adequate by Vinson & Elkins"); NCC ¶ 833 ("Vinson & Elkins . . . provided legal advice in structuring the LJM and Raptors transactions"); NCC ¶ 855 (alleging Vinson & Elkins provided Enron, and an outside director, and a committee of the board with the opinion that "Enron may also take comfort from AA's audit opinion and report to the Audit Committee which implicitly approves the transactions"); NCC ¶ 862 ("Kirkland & Ellis issued numerous legal opinions in connection with the formation and later transactions of the LJMs, and other related SPEs"); NCC ¶ 896 ("Kirkland & Ellis reviewed and approved Enron's SEC filings as they related to Enron's Chewco and LJM partnerships and related party SPE transactions").

therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert." 15 U.S.C. § 77k(b)(3)(C). And, of course, Plaintiffs have pled no facts otherwise.

On the contrary, Plaintiffs' themselves have amply demonstrated Mr. Urquhart's absolute defense to their § 11 claims. Where as here, the Complaint and the very documents on which Plaintiffs rely thoroughly establish the affirmative defense, dismissal is the appropriate remedy. A recent instructive case is *In re DNAP Sec. Litig.*, 2000 WL 1358619, *3 (N.D. Cal. 2000). There the court granted a motion to dismiss a § 11 claim because the loss causation was evident on the face of the complaint. Similarly, in *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), the Court recognized that "a complaint that shows relief to be barred by an affirmative defense . . . may be dismissed for failure to state a cause of action" pursuant to Rule 12(b)(6) (*citing United Transportation Union v. Florida East Coast Railway Company*, 586 F.2d 520, 527 (5th Cir. 1978); *Mann v. Adams Realty Company, Inc.*, 556 F.2d 288, 293 (5th Cir. 1977); *Joe E. Freund, Inc. v. Insurance Company of North America*, 370 F.2d 924, 924 (5th Cir. 1967); *J.M. Blythe Motor Lines Corporation v. Blalock*, 310 F.2d 77, 78 (5th Cir. 1962); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958). *See also*, *Torrie v. Cwayna*, 841 F. Supp. 1434, 1440 (W.D. Mich. 1994) (quoting 2A James W. Moore, *Moore's Fed. Prac.*, ¶ 12.07[2.5] (2d ed. 1991)) ("Dismissal is also proper if . . . 'an affirmative defense or other bar to relief is apparent from the face of the complaint.'").

C. Certain Plaintiffs' §11 Claims Fail, Since Reliance Is Not Pled.

If a plaintiff purchases a security after the issuer has provided an earnings statement covering at least twelve months after the effective date of the registration statement, the plaintiff must establish reliance on the allegedly untrue statement or omission. Specifically, 15 U.S.C. § 77k(a) provides:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Thus, if a Form 10-K earnings statement is filed after the registration statement on which the plaintiff has based his claim, and before the plaintiff's purchase, then the plaintiff must show *reliance* on the alleged misrepresentation or omission. Here, four of Plaintiffs' §11 claims wither in the face of the "reliance" pleading requirement.

One of Amalgamated Bank's purchases, made on June 29, 2001, occurred after Enron filed its Form 10-K for 2000. Amalgamated must, therefore, prove reliance.

Murray Van de Velde, the sole subclass representative for the 7% Exchangeable Notes (the 8/10/99 Offering) bought securities offered pursuant to a July 23, 1999 registration statement. Enron's 10-K for 1999 was issued in March of 2000. Mr. Van de Velde's certification was attached as an exhibit to the Motion of Pulsifer & Associates for lead counsel status. According to the certification, Van de Velde bought 500 shares on November 5, 2001, for $25.50, and bought 500 more shares on November 9, 2001, for $27.85 per share. Thus, he too

must prove reliance.[6] The Hawaii Laborers assert purchases pertaining to a registration statement filed on February 5, 1999. They did not buy their notes, however, until an offering in May of 2000. Importantly, this offering occurred after Enron filed its Form 10-K for 1999. The Archdiocese of Milwaukee has the same difficulty. It bought securities relating to the February 5, 1999 registration statement, but did not do so until an offering in May that was made after Enron filed its Form 10-K for 1999. Both the Hawaii Laborers and the Archdiocese must, therefore, prove reliance.

None of these plaintiffs, however, has alleged that they relied on any misrepresentation or omission in a registration statement when they purchased their notes. As a result, these Plaintiffs' claims under section 11 should be dismissed. *See* 15 U.S.C. Section 77(k)(a).

II. The Complaint Fails To State A Claim Against Mr. Urquhart Under § 15 For "Controlling Person" Liability.

Section 15 of the 1933 Act provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency or otherwise, controls any person liable under sections 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of facts by reason of which the liability of the controlled person is alleged to exist.

Section 15 establishes derivative liability for persons who "control" those who have primary liability under the 1933 Act. *In re BMC Software*, 183 F.Supp.2d 860, 869 n.17 (S.D. Tex. 2001). Plaintiffs' claim against Mr. Urquhart under §15 is fatally defective because Plaintiffs have failed to satisfy the essential elements of controlling person liability.

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[6]That would present a daunting challenge, since Mr. Van de Velde made his first purchase after Enron announced its 1.2 billion reduction in shareholder equity, and his second purchase was made the day after Enron's restatement.

To make a *prima facie* case of liability under §15, Plaintiffs must show (1) a primary violation by a controlled person; (2) that the controlling person had "actual power or influence over the controlled person;" and (3) that the controlling person "induced or participated in the alleged violation." *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990). This Court recently expressed a plaintiff's challenge in overcoming a motion to dismiss a claim under §15:

> To survive a motion to dismiss a claim for controlling person liability under Section 15, a plaintiff must allege (1) an underlying primary violation by the controlled person, (2) control by the defendant over the controlled person, and (3) ***particularized facts*** as to the controlling person's culpable participation in (exercising control over) the fraud perpetrated by the controlled person." *Ellison v. American Image Motor Co.*, 36 F.Supp.2d 628, 637-38 (S.D.N.Y. 1999) (applying same test to 1933 Securities Act Section 15 claims and 1934 Exchange Act Section 20(a) claims).
>
> *Compaq*, sl. op. at 133 n.49 (emphasis added).

Here, Plaintiffs' § 15 allegations against Mr. Urquhart miss the mark. As discussed above, Plaintiffs have failed to plead with particularity their alleged fraud-based claim under § 11 against Mr. Urquhart. Because the underlying § 11 claim requires dismissal, the § 15 claim fails as well. *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994) (affirming dismissal of claims under §§ 11, 12(2) *and* 15 for failure properly to plead scienter). Failure to plead adequately a primary violation under § 11 mandates dismissal of Plaintiffs' § 15 control persons claims. *In re Azurix Corp. Sec. Litig.*, Slip Op. at 50. *See also Taam Associates Inc. v. Housecall Medical Resources, Inc.*, 1998 WL 1745361 (N.D.Ga. 1998) (dismissing § 15 claims where § 11 claims sounded in fraud and were not pled with particularity).

Additionally, Plaintiffs must show—and they have not—that Mr. Urquhart "possessed 'the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" *In re Sotheby's,* 2000

U.S. Dist. LEXIS 12504, *24, *citing SEC v. First Jersey Securities*, 101 F.3d 1450, 1473 (2d Cir. 1996) (quoting 17 C.F.R. §240.12b-2); *Dennis*, 918 F.2d at 509 (affirming summary judgment where plaintiff failed to make out a prima facie case under § 15 that each defendant had actual power or influence over the controlled person and that each induced or participated in the alleged violation, and holding that mere director status is insufficient to allege "requisite power, required for a finding of a Section 15 or 20 control person, to direct" the corporation).

Plaintiffs fail to allege control by Mr. Urquhart over a primary violator, instead glossing over this essential element in conclusory fashion. For example, Plaintiffs inadequately allege: "By reasons of the conduct herein alleged, each defendant violated, and/or in violation of § 15 of the 1933 Act controlled a person who violated, §11 of the 1933 Act." NCC ¶1014. This is insufficient as a matter of law. Plaintiffs must identify the primary violator and allege facts sufficient to demonstrate actual control over the primary violator and the transactions in question in order to establish controlling person liability. *See In re Blech Sec. Litig.*, 961 F.Supp. 569, 586-87 (S.D.N.Y. 1997).

Plaintiffs simply have not shown that Mr. Urquhart had the power to control any person potentially liable under § 11, much less such power concerning any alleged violation under § 11. Nor, according to this Court's teaching in *Compaq*, have Plaintiffs alleged any "particularized facts" as to any "culpable participation (exercising control over)" the alleged underlying fraud. *Compaq*, Sl. Op. at 133, n.49. The § 15 claim against Mr. Urquhart must be dismissed.

IV. The Complaint Fails To State A Claim Against Mr. Urquhart Under The Texas Securities Act.

Plaintiffs' Fourth Claim for Relief generally alleges violations of the Texas Securities Act, art. 581-33 (the "TSA") in connection with the issuance by Enron Corp. of two notes (the

"Notes"). Plaintiffs list Mr. Urquhart as a nominal defendant to that claim.[7] Plaintiffs fail to state a claim against Mr. Urquhart under the TSA because (i) Mr. Urquhart was not a "seller" of the Notes, (ii) Plaintiffs cannot show a causal connection between the alleged misstatements and the purchase of the Notes, (iii) Plaintiffs' claims fall outside of the alleged Class Period, and (iv) Plaintiffs have failed to plead with the particularity required by Fed. R. Civ. P. 9(b).

A. Mr. Urquhart Was Not a Seller.

The TSA provides for primary liability for material untruths and omissions against sellers.[8] Because Mr. Urquhart was not a seller, any claims against him under the TSA must be dismissed.[9]

To impose seller liability under the TSA, the defendant must have been in privity with the plaintiff. *Frank v. Bear Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App. -- Houston [14th Dist.] 2000, pet. denied) (rejecting argument that claims of primary violation of the TSA extend beyond those in privity with plaintiffs). In the comments to the 1977 revisions to the TSA, the commentators noted that the untruth or omission liability provision "is a privity provision, allowing a buyer to recover from his offeror or seller." Tex. Rev. Civ. Stat., art 581-33, cmt. (1977). In reaching its decision in *Frank*, the Fourteenth Court of Appeals noted that "commentators at the time of the revision [to the TSA in 1977] had little doubt that the revision

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[7] The Complaint, in identifying Mr. Urquhart, unequivocally states at ¶ 83(dd) that Mr. Urquhart is a defendant "only as to the claims alleged under section 11 of the 1933 Act." NCC ¶ 83(dd).

[8] The TSA provides for primary liability against issuers also, but Mr. Urquhart was clearly not the issuer of the Notes. Texas law defines an issuer as a person who proposes to issue or has issued a security. Tex. Rev. Civ. Stat., art. 581-4. The definition of an issuer is strictly construed. *Gollust v. Mendell*, 501 U.S. 115, 123 (1991). (The issuer is "the corporation that actually issued the security").

[9] The TSA also allows secondary liability for control persons and aiders. Plaintiffs do not allege that Mr. Urquhart is a TSA control person. Control person allegations are made only against Defendants Lay, Causey, Buy, Fastow and Skilling. NCC ¶ 1028. Plaintiffs likewise do not allege that Mr. Urquhart

was intended to contain a privity provision." *Frank*, 11 S.W.3d at 383. The TSA does not extend to "those who merely participate in preparing an offering." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 551 (5th Cir. 1981) (en banc) reversed in part on other grounds, 459 U.S. 375 (1983); *see also Pinter v. Dahl*, 486 U.S. 622, 650 (1988) (finding under the similar 1933 Act, "There is no support in the statutory language or legislative history for expansion of § 12(1) primary liability beyond persons who pass title and persons who 'offer,' including those who 'solicit' offers. Indeed, § 12's failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants collateral to the offer or sale.").

Plaintiffs bring their TSA claim on the basis of a firm commitment offering. Jt. SEC Tab 82.[10] In other words, not even Enron -- much less Urquhart-- sold the Notes to the public. *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1215 (1st Cir. 1996)[11] ("[T]he issuer in a firm commitment underwriting does not pass title to the securities"); *Dartley v. Ergobilt*, 2001 WL 313964, *2 (N.D. Tex. March 29, 2001) ("Where there is a firm commitment underwriting . . . the issuer sells the stock to be offered to the group of underwriters for the offering. . . . Plaintiffs do not allege any facts to support the conclusion that [the defendants] were statutory sellers as to any of the Plaintiffs.") Indeed, Plaintiffs themselves acknowledge that only "JP Morgan and Lehman Brothers together **offered for sale and sold**" the securities "**purchased** by the

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is an aider. Liability as an aider requires an intent to deceive or defraud or a reckless disregard for the truth or the law. Plaintiffs expressly disclaim such a state of mind for Mr. Urquhart. NCC at 3, n. 1.

[10]By the terms of the offering, "Enron has agreed to sell to each of the Underwriters named below . . . Under the terms and conditions of the Underwriting agreement, the Underwriters are committed to purchase all of the Notes, if any are purchased." Jt. SEC App. Tab 82 at S-5.

[11]"Because of the obvious similarities between the TSA and the federal securities acts, Texas courts look to decisions of the federal courts to aid in the interpretation of the TSA." *Quest Medical, Inc. v. Apprill*, 90 F.3d 1080, 1091 n.16 (5th Cir. 1996).

Washington Board." NCC ¶ 1023. No such allegation of seller liability is made against Urquhart. Because plaintiff fails to allege that Urquhart was a seller -- a required element of the TSA claim -- the claims against Urquhart must be dismissed.

B. Plaintiffs Cannot Establish a Causal Connection.

Plaintiffs allege that they purchased the Notes on July 7, 1998. Plaintiffs do not identify any misrepresentation or omission in the July Note offering documents. Instead, they simply incorporate by reference more than 1000 paragraphs of the *Newby* Complaint. *See* NCC ¶ 1017 (incorporating ¶¶ 1-1016 of the Complaint). Those paragraphs, however, relate to offerings and events that occurred after October of 1998. By definition, if plaintiffs purchased notes in July of 1998, they were not induced to purchase them "by means of" representations that were not made until months later. Plaintiffs' claims under the anti-fraud section of the TSA must therefore be dismissed. *See* Tex. Civ. Stat. Ann. Art. 581-33(A)(2) (requiring an allegation that the purchase be induced "by means of" an untruth or omission). *Cf. Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, (S.D.N.Y. 1999) (dismissing "all claims pertaining to statements made by Defendants after the time of the Offering").

C. Plaintiffs' Claims Fall Outside of the Alleged Class Period.

Plaintiffs' claims are, in any event, outside the alleged Class Period. Their purchase was allegedly made in July of 1998, *NCC* at 1019, but the class period in the *Newby* complaint begins in October of 1998. *Id.* at 2. As a matter of law, any alleged pre-class period statements cannot constitute actionable securities fraud. *In re*: *International Bus. Machines Corp. Securities Lit.*, 163 F.3d 102, 107 (2d Cir. 1998) (finding an alleged misrepresentation made one day before the class period began not actionable because "[a] defendant . . . is liable only for those statements

made during the class period"); *see also In re: Clearly Canadian Sec. Lit.,* 875 F. Supp. 1410, 1420 (N.D. Cal. 1995) (striking alleged statements made before and after class period). In fact, none of the relevant events are alleged to have occurred during the class period. Plaintiffs purchased in July 1998, the Notes' offering document was dated in July 1998, SEC App. Tab 82, and the registration statement for the offering was filed in December of 1997 -- nearly a year before the claimed class period. SEC App. Tab 83. Given that Plaintiffs have not alleged a purchase within the class period, the TSA claims must be dismissed.

D. Plaintiffs' Claims Are Not Pleaded in Compliance with Rule 9(b).

Plaintiffs' TSA claim must also be dismissed for failure to plead as required by Rule 9(b).[12] Rule 9(b) applies even to claims grounded in state law. *See Williams*, 112 F.3d at 177 (applying Rule 9(b) to state law claims alleging fraud); *Rubinstein*, 20 F.3d at 165-66 (same). Plaintiffs expressly incorporate and rely upon the fraud allegations in the preceding 1,016 paragraphs of the complaint. NCC at ¶ 1017. As has been demonstrated earlier in this brief, however, those allegations are wholly inadequate to state a claim of fraud against Mr. Urquhart. If those allegations are inadequate, and they are, they are not saved by being rehashed in a separate claim under the state securities laws. *See D'Addio v. L.F. Rothschild, Inc.*, 697 F. Supp. 698, 706 (S.D.N.Y. 1988) (where plaintiff incorporates by reference, nothing new is added when the incorporated paragraphs are reasserted to support a state common law claim).

[12]The Federal Rules of Civil Procedure govern procedure in federal courts, whether state or federal claims are at issue. *See e.g., Simon v. U.S.*, 891 F.2d 1154, 1156 (5th Cir. 1990); *Morgan Guarantee Trust Co v. Blum*, 649 F.2d 342, 344-45 (5th Cir. 1981). Rule 9(b) is no exception. *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (applying Rule 9(b) to state law claims alleging fraud); *Rubinstein v. Collins*, 20 F.3d 160, 165-66 and n.11 (5th Cir. 1994) (same).

Plaintiffs have also failed to plead a single untruth or omission in the offering documents on which they sue, much less a material untruth or omission.[13] As the Fifth Circuit has found, conclusory allegations that the offering documents are "materially misleading" should not be accepted, particularly when they are contradicted by facts in public documents central to the Plaintiffs' claims. *Assoc. Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("On a motion to dismiss . . . [w]e do not, however, accept [the Plaintiffs'] conclusory allegation that the prospectus was materially misleading. Conclusory allegations and unwarranted deductions of fact are not admitted as true."); *see also Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001) (finding that accepting the plaintiffs' allegations as true does not require acceptance of conclusory allegations); *Kaiser Aluminum*, 677 F.2d 1045, 1050 (5th Cir. 1982) (same); *Azurix*, H-00-4034 at 52 (S.D. Tex. Mar. 21, 2002) ("Because plaintiffs have put forth only conclusory allegations in support of their claims, their claims fail. . . [C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (citations omitted); *Eizenga v. Stewart Enterprises, Inc.*, 124 F. Supp. 2d 967, 978 (E.D. La. 2000) (finding "conclusory allegations . . . insufficient to allege that there were material omissions"). As an "untrue statement of a material fact or an omission to state a material fact" is a required element of plaintiffs' TSA claim, and plaintiff wholly fails to plead these elements, plaintiffs' TSA claims should be dismissed.

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[13]Both an untrue statement or omission, and materiality are required elements of Plaintiffs' TSA claim. Liability of sellers under the TSA extends to:

> Untruth or Omission. A person who offers or sells a security(whether or not the security or transaction is exempt under Section 5 and 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which thy are made, not misleading, is liable to the person buying the security from him.

Tex. Civ. St. Art. 581-33(A)(2).

III. Conclusion

Because the claims alleged against him are legally deficient, and for the reasons set forth above, John A. Urquhart respectfully requests that all claims asserted against him be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss of John A. Urquhart was served upon counsel of record pursuant to the Court's April 4, 2002 Order Regarding Service of Papers and Notice of Hearings, on the 8th day of May, 2002.

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

MARK NEWBY,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.: H 01-3624
	§	AND CONSOLIDATED CASES
ENRON CORPORATION, et al.,	§	
Defendants.	§	

ORDER

Defendant John A. Urquhart's Motion to Dismiss is GRANTED.

SIGNED this _____ day of _____, 2002.

_____
Judge Presiding