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no escape from the rule in *Central Bank*, where the Supreme Court held that there is no private right of action for aiding and abetting under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), and persons cannot be liable for misrepresentations or omissions unless they speak directly to the investing public or fail to disclose material information they had a duty to disclose. Because as we show in Parts I(A) & (B), no direct misrepresentations or actionable omissions by V&E are alleged, the Complaint fails that test.

Plaintiffs will no doubt try to downplay the impact of *Central Bank* by arguing that one of the four courts of appeals (the Ninth) that has considered the issue has suggested, on facts very different from those here, that one can be a primary violator of Section 10(b) even if not a direct speaker. The plaintiffs try to make V&E a “primary violator” under the Ninth Circuit decisions by alleging that the firm “drafted and approved” various public disclosures. As we demonstrate in Part I(C), the Ninth Circuit’s dubious application of *Central Bank* has been explicitly rejected by the Second, Tenth, and Eleventh circuits and even stands in stark contrast to the pre-*Central Bank* rule set forth by the Fifth Circuit in *Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989). It would be surprising, to say the least, for the Fifth Circuit to abandon its prior position in *Abell*, subsequently endorsed by the Supreme Court and three other circuits, for the dubious precedent in the Ninth Circuit.

Recognizing the force of this analysis and the unhappy result for their case against V&E, Plaintiffs make an allegation that attempts to circumvent *Central Bank*. As discussed in Part I(C), one of these attempts – labeling V&E’s conduct a “scheme to defraud” or a “course of business that operated as a fraud” – has been repeatedly rejected by courts since *Central Bank* as merely recasting classic aiding and abetting allegations.

In a last-ditch effort to avoid confronting the direct-misrepresentation requirement in *Central Bank*, Plaintiffs sprinkle the statutory term “manipulative device” liberally throughout the Complaint. As demonstrated in Part II, Plaintiffs’ effort is in vain because this claim is barred by even more long-standing Supreme Court precedent. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), restricts the term “manipulative device” to practices like wash sales that aim to mislead investors by artificially affecting market activity – none of which V&E (or Enron) is alleged to have used or employed.

As we discuss in Part III, following *Central Bank*, Congress again considered the policy question whether federal securities law liability should extend to non-speakers, such as the many lawyers and other professionals who advise public companies on their securities disclosures. Congress concluded that, on balance, the benefits to be achieved through expanding the number of defendants who can be sued would be outweighed by the drawbacks. That judgment was correct because, as the Supreme Court recognized in *Central Bank*, the uncertain reach of aiding and abetting liability would deter lawyers from advising public companies on securities disclosures for fear of being drawn into lawsuits with gargantuan and ruinous damage claims.

Although responding to the lengthy Complaint will take us on a tour of Plaintiffs’ various proffered theories of liability for non-speakers, the analysis will end where it began—the question of whether V&E is alleged to have made an actionable misrepresentation or omission. The answer is plainly “no.” *Central Bank* mandates dismissal of the claims against V&E. And while the Complaint also suffers from fatal pleading deficiencies under the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) and FED. R. CIV. P. 9(b) (see Part IV), its failure to set forth a legally cognizable claim against V&E cannot be cured by re-pleading.

Description of Plaintiffs' Claims

The Complaint alleges that Enron engaged in a wide range of conduct that allegedly violated the securities laws; however, the gravamen of this lawsuit is the allegation that Enron engaged in accounting fraud. According to Plaintiffs, “the scheme to defraud Enron investors was extraordinary in its scope, duration and size. Billions of dollars in phony profits were reported. Billions of dollars of debt was hidden. Enron’s shareholders’ equity was overstated by billions of dollars.” (Complaint ¶ 70.)

Plaintiffs allege that V&E rendered legal services to Enron that helped it effectuate this alleged scheme. (*E.g.*, Complaint ¶ 70(b).) Specifically, the Complaint criticizes (1) V&E’s advice regarding disclosure issues, (2) its legal work on certain transactions, and (3) its preliminary investigation of Sherron Watkins’ concerns. (*E.g.*, Complaint ¶ 801.) The nature of V&E’s legal services was no different than what law firms do for corporate clients across the United States every day. When stripped of its rhetoric and conclusory allegations, the Complaint does not suggest otherwise.

Plaintiffs’ complaint against the Enron defendants concerning financial disclosure issues is—as in most securities fraud cases—the real heart of the lawsuit. Plaintiffs contend that Enron misrepresented numerous facts to the public, causing Enron’s stock prices to be artificially inflated throughout the Class Period. (*E.g.*, Complaint ¶ 2.) Notably, though, Plaintiffs do not identify even one statement actually made by any V&E attorney to the investing public. Instead of alleging direct misrepresentations by V&E, Plaintiffs generally assert that V&E “drafted and/or approved the adequacy of Enron’s press releases, shareholder reports and SEC filings.” (Complaint ¶ 801; *see also id.* ¶¶ 67, 70(b), 136, 141, 215, 221, 292-93, 800-01, 824, 826-27, 830-32, 834-35, 838, 843-44, 846-48.) Plaintiffs then summarily assert that V&E should be held liable for what its client said.

Plaintiffs also contend that V&E “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.” (Complaint ¶ 801; *see also id.* ¶¶ 802-823.) According to Plaintiffs, these underlying transactions were “manipulative devices which falsified Enron’s reported profits and financial condition.” (Complaint ¶ 801.)

The focus of the allegations concerning these transactions and Enron’s disclosures about them is on their accounting treatment. Most fundamentally, the dominant theme of the Complaint is that the financial results of various transactions—including those involving the so-called Special Purpose Entities (“SPE”)—were misrepresented in Enron’s financial statements. (*E.g.*, Complaint ¶¶ 829, 831, 844.) Even in the section purportedly addressing V&E’s conduct, the Complaint repeatedly refers to Enron’s balance sheet and alleges that “[h]ad proper accounting procedures been followed,” the results of other entities should have been included in Enron’s financial statements. (Complaint ¶¶ 805-07, 815.) Although Plaintiffs identify various examples of routine transactional legal work performed by V&E relating to SPEs, the Complaint makes clear that the real issue—consolidation of financial statements—is governed by Generally Accepted Accounting Principles (“GAAP”) (Complaint ¶ 910), a subject not within the purview of lawyers.

Finally, Plaintiffs contend that V&E conducted a whitewash investigation of Sherron Watkins’ allegations in the fall of 2001. According to Plaintiffs, the purpose of this investigation was to prevent public disclosure of Watkins’ concerns. (Complaint ¶¶ 801, 851, 855.) Yet Plaintiffs do not allege that V&E made, or had any obligation to make, any public statements about this internal investigation. On the contrary, Plaintiffs refer only to a privileged letter prepared by V&E for its client, Enron. (Complaint ¶ 855.) V&E’s investigation was not

disclosed to the public until Enron waived the privilege and produced the document for Congress held hearings in 2002, well after the putative Class Period ended on November 27, 2001. (Complaint ¶¶ 800, 855.)

Argument

Securities prices are affected by two broad factors. First, information disclosed to the public about a company, its industry group, and the economy as a whole affects the value that investors assign to a company's stock. Second, the actual trading patterns in a company's stock also can affect the stock's pricing. For instance, a series of fictitious trades can drive stock prices up (or down). *See generally Comment: Market Manipulation and the Securities Exchange Act*, 46 YALE L.J. 624, 624-25 (1937). To proscribe improper behavior in these two arenas, Congress enacted Section 10(b), which, appropriately, has two prongs:

It shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security . . . *any manipulative or deceptive device or contrivance* in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (emphasis added).

“Thus Section 10(b) bars conduct ‘involving manipulation or deception, manipulation being practices . . . that are intended to mislead investors by artificially affecting market activity, and deception being misrepresentation or nondisclosure intended to deceive.’” *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.18 (S.D. Tex. 2001) (ellipsis in original) (quoting *Field v. Trump*, 850 F.2d 938, 946-47 (2d Cir. 1988)). Section 10(b)'s deceptive-act prong imposes liability on only those persons who themselves make misstatements or omissions. The manipulative-act prong concerns only market manipulation, such as wash sales and rigged

prices. The Complaint does not allege that V&E engaged in either type of conduct, and therefore it fails as a matter of law to state a claim that V&E violated Section 10(b).²

I. V&E did not engage in deceptive conduct within the meaning of Section 10(b) as interpreted in *Central Bank*.

In order to state a Section 10(b) claim for deceptive conduct against V&E, Plaintiffs must allege: (1) a misstatement or omission by V&E; (2) of a material fact; (3) made with scienter; (4) on which they relied; (5) that proximately caused their injury. *BMC Software*, 183 F. Supp. 2d at 865 n.15 (citing *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996)). Plaintiffs' claim against V&E lacks the essential elements of deceptive conduct: a representation or omission by V&E on which investors or purchaser relied.

A. In its *Central Bank* decision, the Supreme Court eliminated aiding and abetting liability.

In *Central Bank*, the Supreme Court held that securities fraud plaintiffs could not assert claims for aiding and abetting Section 10(b) violations. *See Central Bank*, 511 U.S. at 175. "It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.* at 177. The text of the statute provided no basis for aiding and abetting claims:

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

² Count I's caption refers also to Section 20(a) of the Exchange Act, which creates control person liability. If Count I is meant to state a claim for control-person liability against V&E, it fails. Unlike major shareholders, officers, and directors, outside counsel lack the ability to control a client corporation as a matter of law. *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494 (7th Cir. 1986); *Burnstein v. Graves*, No. C 92-3623 FMS, 1994 WL 792541, at *5 (N.D. Cal. Dec. 20, 1994), *aff'd mem.*, 110 F.3d 67 (9th Cir. 1997). In any event, the Complaint contains no allegations that could support control-person liability as to V&E. *See Abbott v. The Equity Group, Inc.*, 2 F.3d 613, 620 (5th Cir. 1993).

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.

Id. at 177-78 (citations omitted).

In addition, the Court concluded that Congress's failure to include aiding and abetting liability in other sections of the Exchange Act demonstrated that it would not have included such liability in Section 10(b) if it had expressly created a private cause of action. *See id.* at 179-80. The Supreme Court reasoned that an implied cause of action for aiding and abetting would impose 10b-5 liability when the reliance element was not satisfied. *See id.* The Court reiterated that "[a] plaintiff must show reliance on the *defendant's* misstatement or omission to recover under 10b-5." *Id.* at 180 (emphasis added). The Court concluded that a defendant cannot be liable under Section 10(b) unless all of the elements of a primary claim are satisfied. *Id.* at 191.

B. V&E did not make any of the representations or omissions at issue.

1. V&E did not make any statements.

Plaintiffs do not allege that V&E made any misrepresentations directly to them or to the market.³ V&E was not a speaker in any of the challenged statements and was not identified as such. V&E cannot be charged with a misstatement that it did not make. Indeed, Plaintiffs do not even claim that, at the time of the issuance of Enron's statements, they had any knowledge or belief that V&E had participated in any fashion in formulating the statements. This failure to allege an essential element of a Section 10(b) claim dooms Plaintiffs' claim.

³ Paragraph 14 makes the global statement that "Enron, it[s] lawyers and Enron's banks" made a number of misstatements. (Complaint ¶ 14(a).) This generalized allegation fails to comply with the PSLRA's pleading requirements. *See generally* 15 U.S.C. § 78u-4(b)(1). None of the Complaint's 1000+ paragraphs identifies a single statement that V&E or its lawyers directly made to the market. While Plaintiffs allege that V&E prepared various opinion letters concerning some of the transactions at issue (Complaint ¶¶ 98, 800-01, 807), they do not allege that the alleged opinion letters were ever relied on by investors.

2. V&E is not liable for failure to disclose material facts about Enron.

Plaintiffs also contend that V&E failed to disclose to them certain details about Enron's business. (E.g., Complaint ¶ 995(b).) For instance, Plaintiffs contend that V&E failed to disclose to the public the allegations leveled by Ms. Watkins last August.⁴ (Complaint ¶¶ 60, 70(b), 855.) This theory fails because V&E had no duty to disclose anything to the investing public. Silence is not misleading under Section 10(b) unless there is a duty to disclose. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *Central Bank*, 511 U.S. at 174.

V&E owed no duty of disclosure to the investing public as a matter of law. *Abell* controls this case.⁵ In *Abell*, lawyers for the underwriters of a bond offering were sued based on their work reviewing and revising their client's offering statement. 825 F.2d at 1122-23. In that case—as here—the law firm had not made any direct representations to the bond purchasers. The Fifth Circuit rejected the plaintiffs' claim that the attorneys failed to disclose certain material facts to the bond purchasers:

Traditionally, lawyers are accountable only to their clients for the sufficiency of their legal opinions. It is well understood in the legal community that any significant increase in attorney liability

⁴ Plaintiffs cannot characterize the Watkins investigation as giving rise to an actionable misrepresentation. First, no misrepresentation is alleged. Second, this investigation did not become public knowledge until January 2002, well after the Class Period ended, when Enron waived its attorney-client privilege by producing the letter to a Congressional committee. (E.g., Complaint ¶ 800.) Third, V&E performed the investigation for Enron, not its investors. (Complaint ¶ 855.) Under Texas law, "an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client." *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). Any deficiency in V&E's investigation—and V&E denies that there was any—is a matter between the firm and its client; Plaintiffs have no standing.

⁵ *Abell*, in which non-lawyer defendants were also found liable under RICO, was vacated by the Supreme Court for reconsideration in light of the Supreme Court's RICO decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). *Northwestern Bell* did not address *Abell*'s discussion of securities law liability of attorneys; *Abell* "remains authoritative on the non-RICO issues." *Abbott v. The Equity Group, Inc.*, 2 F.3d 613, 621 n.23 (5th Cir. 1993).

to third parties could have a dramatic effect upon our entire system of legal ethics. An attorney required by law to disclose “material facts” to third parties might thus breach his or her duty, required by good ethical standards, to keep attorney-client confidences. Similarly, an attorney required to declare publicly his or her legal opinion of a client’s actions and statements may find it impossible to remain as loyal to the client as legal ethics properly require.

Id. at 1124 (footnote omitted). Consequently, the court concluded, the attorneys owed no duty of disclosure to the investors. *See id.* at 1126-27.

In reaching this conclusion, the Fifth Circuit also rejected the argument that by advising their clients on the public disclosures, the lawyers assumed any obligation to the investing public. *See id.* Other courts have echoed this conclusion, holding that lawyers who participate in drafting their corporate clients’ disclosures do not assume a duty of disclosure to the investing public. *See Ziembra v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1207 n.7 (11th Cir. 2001); *Austin v. Bradley, Barry & Tarlow, P.C.*, 836 F. Supp. 36, 39 (D. Mass. 1993). These holdings follow inexorably from the logic of *Central Bank*. If V&E’s disclosure advice to Enron somehow created a duty to disclose, then one could use an aiding and abetting theory to create duties that do not exist under the Exchange Act.

Other courts also have held that under Section 10(b), an attorney has no duty to disclose negative information about its corporate client to prospective stock purchasers. *See Ziembra*, 256 F.3d at 1206-07; *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 473-74 (4th Cir. 1992); *see also Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986) (lawyers are not required to “tattle” on their clients in the absence of some duty to disclose); *Renovitch v. Kaufman*, 905 F.2d 1040, 1048 (7th Cir. 1990) (same); *Austin*, 836 F. Supp. at 38-39 (refusing to impose on an attorney a duty to disclose negative facts that were material to statements in the client’s prospectus because such a duty would conflict with the attorney’s duty to the client).

C. Under *Central Bank*, V&E is as a matter of law not liable for assisting Enron with its public statements.

Unable to cite any misrepresentations or omissions by V&E, Plaintiffs instead try to build a case against V&E based on statements made by Enron. Plaintiffs' theory here is that by drafting and approving Enron with its disclosures about certain transactions, V&E became liable for Enron's statements.⁶ However, these are classic aiding and abetting allegations that the Supreme Court eliminated in *Central Bank*. As numerous decisions interpreting *Central Bank* have confirmed, this sort of activity cannot give rise to primary liability no matter what label Plaintiffs place on it.

Since the *Central Bank* decision in 1994, securities-fraud plaintiffs have repeatedly argued that secondary actors themselves "make" a misstatement or omission if they assist a company in preparing its public disclosures. Three of the four circuits to consider this argument have flatly rejected it, holding that the secondary actor must itself make a direct affirmative statement or omission to investors before primary liability for deceptive conduct can attach. See *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202-07 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997);

⁶ Ultimately it is the issuer who collects the recommendations from all its employees and outside advisors and decides what disclosures it will make. It is the issuer that has "the final authority to control the contents of the registration statement, other filing, or prospectus." David M. Brodsky, *Sins of Our Clients: Professional Liability Issues After Central Bank: Aiding and Abetting; Rule 2(E); and Lawyers as Directors and Stockholders — What Are the Rules of the Road?*, 1083 PLI/Corp. 161, 191 (November 1998). Indeed, "[a] central policy underlying most of the securities statutes is that management should bear the burden of disclosure, and that this burden can be delegated only in specific narrow circumstances." Ben D. Orlanski, *Whose Representations Are These Anyway? Attorney Prospectus Liability After Central Bank*, 42 U.C.L.A. L. REV. 885, 926 (1995).

Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226 (10th Cir. 1996).⁷ These decisions are consistent with Fifth Circuit law that predated *Central Bank*. See *Abell*, 858 F.2d 1104.

In reaching their decisions, these courts held that there is a bright-line test and that plaintiffs could not circumvent *Central Bank* by blurring the distinction between making a disclosure and assisting the company that made the disclosure. See *Ziembra*, 256 F.3d at 1206; *Wright*, 152 F.3d at 175. “If *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 the aid may be, it is not enough to trigger liability under Section 10(b).” *Shapiro*, 123 F.3d at 720 (quotation marks omitted) (emphasis added).

The plaintiffs’ allegations in *Ziembra* are indistinguishable from those in this case. In *Ziembra*, the plaintiffs alleged that a corporation’s outside lawyers were primarily liable under Section 10(b) because they played a “significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases.” 256 F.3d at 1205 (quotation omitted). In affirming the dismissal of these claims, the Eleventh Circuit relied on the fact that the marketplace was not informed of the attorneys’ role in drafting the representations at issue and, therefore, did not rely on the attorneys’ representations:

Plaintiffs argue that primary liability should attach to those who were never identified to investors as having played a role in the misrepresentations. We disagree. To permit Plaintiffs’ allegations

⁷ V&E anticipates that Plaintiffs will cite *Klein v. Boyd*, Nos. 97-1143, 97-1261, 1998 WL 55245 (3d Cir. Feb. 12, 1998), *reh’g en banc granted, judgment vacated* (3d Cir. Mar. 9, 1998), to support their argument that attorneys can be primarily liable if they participate in drafting their clients’ disclosures. Three weeks after the panel issued its decision, the Third Circuit granted *en banc* rehearing and vacated the panel’s decision. See *Klein v. Boyd*, No. 97-1143 (3d Cir. Mar. 9, 1998) (order vacating panel decision). The case then settled. The vacated panel decision has no precedential effects even in the Third Circuit. See *Hanover Potato Prods. v. Shalala*, 989 F.2d 123, 126 (3d Cir. 1993).

against [the law firm] to survive a motion to dismiss would permit Plaintiffs to avoid the “reliance” requirement for stating a claim under Rule 10b-5. Holding [the law firm] primarily liable for its alleged conduct would “effectively revive aiding and abetting liability under a different name, and would therefore run afoul of the Supreme Court’s holding in *Central Bank*.”

Id. at 1206 (quoting *Wright*, 152 F.3d at 175).⁸

Even in a pre-*Central Bank* securities case involving lawyers, the Fifth Circuit had made clear in *Abell* that a lawyer who assists a client in making statements cannot be held liable under Section 10(b) for failing “to correct [the client’s] false statements and distortions rather than acquiesce in them.” 858 F.2d at 1124-25 & n.22. The same reasoning applies here and disposes of Plaintiffs’ claim that V&E is liable for statements made by Enron.

The Second and Tenth Circuits also have concluded that persons who participate in drafting issuers’ disclosures cannot be liable for those disclosures. *See Wright*, 152 F.3d at 175 (“[A] secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination.”); *Shapiro*, 123 F.3d at 719-21 (holding that accountants were not liable for preparing financial projections that were included in an offering memorandum); *Anixter*, 77 F.3d at 1226-27 (holding that accountants could not be liable unless they actually made the false or misleading statement that reached the investors).⁹

⁸ Other courts have also held that attorneys who assist companies with their disclosures cannot be liable for any misstatements in those disclosures. *See, e.g., Friedman v. Arizona World Nurseries Ltd. P’ship*, 730 F. Supp. 521, 533 (S.D.N.Y. 1990) (counsel who merely draft an offering memorandum cannot be liable for general statements in the document not specifically attributed to them), *aff’d mem.*, 927 F.2d 594 (2d Cir. 1991); *Ames v. Uranus, Inc.*, No. 92-2170-JWL, 1994 WL 482626, at *7 (D. Kan. Aug. 24, 1994) (attorneys who advised their client on the disclosures that needed to be included in the offering memorandum could not be liable for misrepresentations in the memorandum).

⁹ Numerous other district courts have held that secondary actors who participate behind the scenes in formulating a client’s public disclosures cannot be liable under Section 10(b) or Rule 10b-5 unless the disclosures are specifically attributed to them. *See, e.g., In re IKON Office Solutions, Inc. Sec. Litig.*, 131 F. Supp. 2d 680, 685 n.5 (E.D. Pa. 2001) (accountants who

The Supreme Court's decision in *Pinter v. Dahl*, 486 U.S. 622 (1988), reinforces this interpretation of *Central Bank*. The Court rejected an argument very similar to the theory advanced by Plaintiffs here: that the definition of "seller" under Section 12(1) of the Securities Act of 1933 (the "Securities Act") should include persons who "substantially participate" in a sale. Particularly relevant here is the Supreme Court's observation that Congress knew of the concept of "collateral participation" when it enacted the securities laws and could have imposed liability on participants in sales if it had so desired. *Pinter*, 486 U.S. at 650 & n.26. The same point applies here: that the Congress that passed the Exchange Act knew how to create liability based on "participation" but did not do so in Section 10(b) is fatal to any claim against V&E based on its alleged "participation" in Enron's statements.

Indeed, since *Central Bank*, only one circuit court has adopted a theory even remotely akin to what Plaintiffs advance here. In a decision rendered shortly after *Central Bank*, the Ninth Circuit tersely stated in a footnote without any substantive analysis that accountants who participated in reviewing and drafting two letters the company sent to the SEC could be

approved a company's press release could not be primarily liable for misstatements in the press release when it did not mention the accountants), *aff'd*, 277 F.3d 658 (3d Cir. 2002); *Danis v. USN Communications, Inc.*, 121 F. Supp. 2d 1183, 1193 (N.D. Ill. 2000) (accountant who reviewed financial report but did not make any public representations could not be liable under Rule 10b-5); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355, 363-64 (E.D.N.Y. 2000) (public relations firm that disseminated company's misleading press release did not violate Section 10(b) because nothing in the release was attributable to the firm), *aff'd mem. sub. nom.*, 242 F.3d 369 (2d Cir. 2000); *In re JWP Inc. Sec. Litig.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996) (dismissing Section 10(b) claims based upon alleged misrepresentations not made by defendants); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1119-20 (W.D. Mich. 1996) (decisions holding that a defendant may be liable for "substantially participat[ing]" in misleading statements conflict with *Central Bank*); *In re Cascade Int'l Sec. Litig.*, 894 F. Supp. 437, 441 (S.D. Fla. 1995) (auditors who advised a parent company on whether a subsidiary's assets needed to be included in the parent's company's financial statements were not liable for any resulting misrepresentation of the company's financial condition); *Vosgerichian v. Commodore Int'l*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (allegations that accounting firm "advised" and "guid[ed]" client in making allegedly fraudulent misrepresentations did not state a claim).

primarily liable for misstatements in those letters. *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1995). But *Software Toolworks* is distinguishable because the accountants' role was explicitly disclosed in the first letter, which actually referred the SEC to two of the accountants for additional information, and the issuer's prospectus included the auditors' certified financial statements. *See id.* at 627, 628 n.3. In any event, every other circuit court considering the issue has rejected *Software Toolworks*. *See Ziembra*, 256 F.3d at 1205; *Wright*, 152 F.3d at 173; *Anixter*, 77 F.3d at 1226 n.10.

Plaintiffs thus are asking this Court to ignore controlling Supreme Court precedent and the clear weight of authority interpreting that precedent. This Court should follow the well-reasoned majority approach. As Judge Hughes of this Court has recognized, “[a]n individual investor may not sue someone for helping the issuer sell a security through having furnished a service to the issuer.” *Cogan v. Triad Am. Energy*, 944 F. Supp. 1325, 1337 (S.D. Tex. 1996) (dismissing securities fraud claims against underwriters, insurance brokers, accountants, and others).

D. Plaintiffs cannot create a deceptive conduct claim by re-labeling aiding and abetting allegations with phrases from Rule 10b-5.

Plaintiffs will by necessity argue that *Central Bank* stands only for the narrow proposition that aiding and abetting liability does not exist and that they are suing on different theories purportedly authorized by the provisions of Rule 10b-5. That is undoubtedly why Plaintiffs attempt to track language found in Rule 10b-5 by alleging that V&E participated in a “scheme to defraud” investors (Complaint ¶¶ 2, 17, 394, 800-01, 995(a)) and in a “course of business that operated as a fraud or deceit” (Complaint ¶¶ 2, 17, 394, 801, 995(c)). *Compare* Rule 10b-5(a), (c). Plaintiffs' approach fails. Primary liability for deceptive conduct under

Section 10(b) depends on a direct representation or omission by the defendant on which the plaintiff relies, *see Anixter*, 77 F.3d at 1225, which is not alleged against V&E here.

The scope of Rule 10b-5 “cannot exceed the power granted the Commission by Congress under § 10(b).” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976); *see also Santa Fe*, 430 U.S. at 472-73 (same). Thus, a “private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b).” *Central Bank*, 511 U.S. at 173. And as interpreted in *Central Bank*, Section 10(b) forecloses deceptive conduct claims against persons who did not make misstatements or omissions, regardless of the label plaintiffs affix to their claim. *See, e.g., Erickson v. Horing*, No-99-1468 JRT/FW, 2001 WL 1640142, at *12 n.12 (D. Minn. Sept. 21, 2001) (“Courts since *Central Bank* have found that allegations of conspiracy or a common scheme do not create liability under section 10(b).”);¹⁰ *Shapiro*, 123 F.3d at 721-22 (allegation that accountants had “participated in the defendants’ fraudulent scheme” by providing professional services to the principal defendants construed as aiding and abetting claim barred by *Central Bank*); *Primavera Familienstiftung v. Askin*, No. 95 Civ. 8905 (RWS), 1996 WL 494904, at *6-7 (S.D.N.Y. Aug. 30, 1996) (allegations that brokers participated in a fraudulent scheme could not give rise to liability where the substance of the allegations constituted aiding and abetting); *In re Lake States Commodities, Inc.*, 936 F. Supp. 1472 (N.D. Ill. 1996) (plaintiff

¹⁰ The Complaint also alleges at one point that V&E participated in a conspiracy. (Complaint ¶ 393.) Based on the allegations in the specific counts, it does not appear that Plaintiffs are asserting a conspiracy claim under the Exchange Act. In any event, such a conspiracy claim would fail. The federal courts are virtually unanimous in holding that *Central Bank* precludes conspiracy claims under Section 10(b). *See, e.g., Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998) (citing cases); *Kidder Peabody & Co. v. Unigestion Int’l, Ltd.*, 903 F. Supp. 479, 497-98 (S.D.N.Y. 1995).

cannot circumvent bar of *Central Bank* by alleging that defendant who did not make a statement or omission engaged in a course of business that operated as a fraud).¹¹

E. Plaintiffs have not alleged that they relied on any statement, omission, or act of V&E.

A necessary element of private civil liability under Section 10(b) is for the plaintiff to plead and prove that he relied on the defendant's statements. *Central Bank*, 511 U.S. at 180. Indeed, one crucial factor in the *Central Bank* analysis was that the Court recognized that a cause of action for aiding and abetting securities fraud would "[allow] plaintiffs to circumvent the reliance requirement" which forms one of the "careful limits on 10b-5 recovery mandated by our earlier cases." *Id.* For the same reason that Plaintiffs have not pled a direct statement that satisfies *Central Bank*, they also fail the "reliance requirement."

Plaintiffs have not alleged that any investor heard, read, or even knew of any statement, omission, or act on the part of V&E. Simply stated, the essential element of reliance cannot be satisfied in the absence of such an allegation. *See, e.g., Ziembra*, 256 F.3d at 1206; *Dinsmore*, 135 F.3d at 843. This provides an independent ground for dismissal of Plaintiffs' claim against V&E.

¹¹ The Ninth Circuit held in 1998 that *Central Bank* does not preclude liability for participating in a scheme to defraud. *See Cooper v. Pickett*, 137 F.3d 616, 624-25 (9th Cir. 1998). *Cooper* is inapposite. It involved the question whether the issuer itself could be liable for its own disclosures and statements to analysts. *See id.* at 619-20, 624-25. The court had already concluded that the issuer could be directly liable for making misrepresentations to analysts. *See id.* at 624. It is well-established that statements to analysts are considered statements to the market. *See Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc.*, 178 F. Supp. 2d 1255, 1277 n.8 (S.D. Fla. 2000); *see also In re Waste Management Inc. Sec. Litig.*, No. H-99-2183 (S.D. Tex. Aug. 16, 2001), at 123 n.41 (defendants can be liable for providing misleading information to analysts). Thus, the defendant had already committed the manipulative or deceptive device required by *Central Bank*. *Cooper* does not address the extreme theory that Plaintiffs advance here: that someone who made no misrepresentations or omissions to the market can be held liable for an alleged scheme to defraud.

II. Plaintiffs do not, and cannot, allege that V&E engaged in manipulative conduct within the meaning of Section 10(b) as interpreted in *Santa Fe Industries*.

Plaintiffs repeatedly apply the word “manipulative” to V&E’s alleged conduct. (*E.g.*, Complaint ¶¶ 23, 24, 27, 31, 33, 44, 70(b), 98.) The text of Section 10(b) makes it unlawful to “use or employ . . . any manipulative . . . device or contrivance.” 15 U.S.C. § 78j(b). Plaintiffs’ principal allegation in this regard is that V&E “participated in the negotiations for, prepared the transaction documents for, and structured” various corporate transactions for Enron. (Complaint ¶ 801.) Plaintiffs then characterize these corporate transactions as “manipulative devices which falsified Enron’s reported profits and financial condition.” (Complaint ¶ 801.)

A. The term “manipulative” has a narrow meaning under Section 10(b) that refers to market manipulation, not the sort of activities alleged by Plaintiffs.

The Supreme Court has made clear that the term “manipulative” in Section 10(b) has a narrow meaning. “‘Manipulation’ is ‘virtually a term of art when used in connection with securities markets.’ The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.” *Santa Fe Indus., Inc. v. Green*, 430 U.S. at 476 (citation omitted) (quoting *Ernst & Ernst*, 425 U.S. at 199).¹² Applying *Santa Fe*, one court explained that manipulative conduct consists of “artificial acts of stimulative trading designed to mislead investors into believing there was a heavy market demand for the stock.” *Schreiber v. Burlington Northern, Inc.*, 568 F. Supp. 197, 202 (D. Del. 1983), *aff’d*, 731 F.2d 163 (3d Cir. 1984), *aff’d*, 472 U.S. 1 (1985); *see also* Robert

¹² Wash sales are fictitious sales of publicly traded stock involving no change in beneficial ownership, which are made to give the impression of active trading in the security. Matched orders, aimed at the same purpose as wash sales, are orders for the purchase or sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security. Price-rigging refers to schemes to set prices of securities at other than the free market price. *See generally* *SEC v. U.S. Env’tl, Inc.*, 155 F.3d 107, 109 (2d Cir. 1998); *Marble v. Batten & Co.*, 36 F.R.D. 693, 693-94 (D.D.C. 1964).

Charles Clark, CORPORATE LAW §8.12.1, at 348 (1986) (“Manipulation is behavior aimed at creating trading, or the appearance of active trading, in a security for the purpose of inducing others to buy or sell the security.”); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 267 (W.D. Tex. 1979) (manipulation is defined narrowly to include activities that interfere with the market's proper functioning).¹³

None of these manipulative practices is at issue in this case. Plaintiffs do not allege that they were victims of wash sales, matched orders, price rigging, or any other form of market manipulation. *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979), rejects virtually the same “manipulative device” claim as Plaintiffs advance here. The plaintiffs in *Hundahl* alleged that the defendant insurance companies engaged in manipulative conduct in order to artificially depress the stock of one of the companies so that the other could more cheaply purchase its shares through a series of open-market purchases. *Id.* at 1353. The alleged manipulative devices consisted of improper allocation of expenses, improper restriction of dividends, the creation of unnecessarily large reserves, and the use of “grossly conservative accounting principles” in connection with the target’s books. *Id.* at 1354.

Judge Higginbotham reviewed in detail the applicable authorities and legislative history in order to determine whether “the Supreme Court’s definition of manipulation in *Santa Fe* encompasses acts occurring outside the marketplace which, absent an intent to manipulate, would constitute only a breach of fiduciary duty.” *Id.* at 1359. He concluded that it does not and

¹³ See generally 8 Louis Loss & Joel Seligman, SECURITIES REGULATION at 3939-42 (3d ed. 1991) (discussing the sort of conduct that constitutes market manipulation); *Comment: Regulation of Stock Market Manipulation*, 56 YALE L.J. 509, 512-16 (1947) (discussing the various forms of market manipulation, such as fictitious stock transactions like wash sales); *Comment: Market Manipulation and the Securities Exchange Act*, 46 YALE L.J. 624 (1937) (same). This Court has previously stated in dicta that insider trading is a manipulative act. See,

that manipulative devices are limited to those “practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply and demand or tampering with the price itself” *Id.* at 1360. Accordingly, the plaintiffs could not prevail on a manipulation claim because they alleged only that the defendants engaged in transactions and accounting devices that resulted in the market forming a judgment about the value of the stock. *Id.* at 1362. “The mere fact that the market reacted to them by price changes does not make the acts manipulative.” *Id.*

The same is true here. The fact that the accounting for the underlying transactions may have affected Enron’s stock price does not mean that those transactions themselves could constitute “manipulative devices” under Section 10(b).¹⁴

B. *Central Bank* also forecloses Plaintiffs’ theory that V&E can be liable for assisting Enron with various corporate transactions.

Plaintiffs’ “manipulative device” claim also fails because Plaintiffs seek to hold V&E liable for assisting Enron with the alleged manipulative conduct. Even assuming that the transactions identified in the Complaint involved manipulative conduct, a lawyer who merely assists a client in conducting transactions does not “use or employ” the devices or contrivances, as required by Section 10(b). V&E was not a principal in these transactions. The decisions at issue—what transactions to engage in, how they should be accounted for, and what to tell the

e.g., *BMC Software*, 183 F. Supp. 2d at 868 n.18. Here, there are no allegations that V&E engaged in insider trading.

¹⁴ One basis for the Supreme Court’s refusal to extend Section 10(b) to allegations regarding the terms of business transactions was that such claims are the province of state law. *Santa Fe*, 430 U.S. at 477-78; *see also Hundahl*, 465 F. Supp. at 1362 (noting that the narrow scope of a manipulation claim under Section 10(b) reflects a “concern with limiting the scope of the securities laws so as not to intrude on the province of the states”). In *Santa Fe*, the Supreme Court rejected a lower court’s holding that “without any misrepresentation or failure to disclose relevant facts, [a] merger itself constitute[d] a violation of Rule 10b-5 because it was accomplished without any corporate purpose.” 430 U.S. at 469 (internal quotation omitted).

public about them—were Enron’s, not V&E’s. Thus, the manipulative conduct theory also violates *Central Bank’s* prohibition on aiding and abetting liability. If the law were otherwise, the many other law firms that worked on Enron’s transactions—indeed, all corporate lawyers who do work for companies whose stock prices drop—would be threatened with liability under Section 10(b). *Central Bank* does not permit that result. Just as *Central Bank* precludes liability for an attorney who assists its client in preparing disclosures, so too it precludes liability for attorneys who assist their clients with transactions.

III. Congress has decided that public policy does not justify rewriting the securities laws to impose liability for the conduct allegedly engaged in by V&E.

Plaintiffs assert that Enron’s collapse is “likely the worst financial scandal involving a public company in the history of the United States.” (Complaint ¶ 68.) In making this and similar pronouncements, Plaintiffs apparently hope to convince this Court that the intense public interest in this case justifies excusing Plaintiffs from the strict requirements for pleading a Section 10(b) claim under governing Supreme Court precedents. Any such appeal is properly directed to Congress, not to this Court. The Supreme Court has repeatedly held that it is for Congress to weigh the competing policy considerations that dictate the scope of Section 10(b) liability, and Congress has done so. *See, e.g., Central Bank*, 511 U.S. at 188-90; *Ernst & Ernst*, 425 U.S. at 214 n.33 (“As we find the language and history of § 10(b) dispositive . . . , there is no occasion to examine the additional considerations of ‘policy,’ set forth by the parties, that may have influenced the lawmakers in their formulation of the statute.”).

Congress has declined to create the enhanced liability regime that Plaintiffs propose in this case. In the wake of *Central Bank*, Congress chose not to pass laws that would have held attorneys liable if they assisted in their clients’ securities fraud. When it enacted the PSLRA the year after *Central Bank*, Congress recognized that secondary actors who themselves do not make

misstatements but substantially assist in securities fraud are not liable under Section 10(b) after *Central Bank*. See 141 Cong. Rec. S9110 (daily ed. June 27, 1995). Senator Bryan wanted to “correct” this legal bar. See *id.* The SEC concurred, asking Congress to allow private parties to sue an actor for “substantially assisting” a securities violation in instances where the actor did not directly make the misleading statement or omission, but instead acted “behind the scenes.” S. Rep. No. 104-98, at 49 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 727-28.

After hearings, written submissions, and floor debates, Congress ultimately decided that *Central Bank* should remain the law and that aiding and abetting liability has no place in private securities litigation. As explained in the Senate Report for the PSLRA, “[u]nderwriters, lawyers, accountants, and other professionals are prime targets of abusive securities lawsuits. The deeper the pocket, the greater the likelihood that a marginal party will be named as a defendant in a securities class action.” S. Rep. No. 104-98, at 9, *reprinted in* 1995 U.S.C.C.A.N. at 688. Instead of creating a private right of action for this sort of assistance to primary violators, Congress decided to authorize the SEC alone to bring enforcement actions against “any person that knowingly provides substantial assistance to another person in violation” of the securities laws. 15 U.S.C. § 78t(e) (2000).¹⁵ Since Congress declined to overrule *Central Bank* by

¹⁵ Moreover, the very structure of the Securities Act undercuts Plaintiffs’ theory that lawyers who provide disclosure advice to their clients should be liable for their clients’ disclosures as a matter of public policy. Congress has declined to hold attorneys liable for statements they help draft on behalf of their clients. Section 11 of the Securities Act establishes who is liable for material misrepresentations in registration statements. See 15 U.S.C. § 77k(a) (2000). It limits liability to those who sign the registration statement, directors and prospective directors, underwriters, and certain “experts” who expressly consent to being “named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement.” 15 U.S.C. § 77k(a)(4). In other words, the only portions of the company’s statements that can be attributed to the attorneys are those that the attorneys publicly adopt as their own. See *id.* This helps ensure that the “primary responsibility for the accuracy of information filed with the Commission and disseminated among investors rests upon management.” Loss & Seligman, *supra* note 13, at

amending the securities laws to permit private damages suits against non-speakers, suits like this one against lawyers for public companies have virtually never been filed, let alone succeeded.

There were sound public policy reasons for Congress not to extend Section 10(b) to encompass the sort of conduct alleged against V&E. As the Supreme Court has recognized, the securities laws should create clearly defined rules that unmistakably define the scope of liability. *Central Bank*, 511 U.S. at 188; *Pinter*, 486 U.S. at 652. Acceptance of the open-ended theories advanced by Plaintiffs here would contravene the Supreme Court's call for certainty and make it impossible for securities attorneys to predict when they risk exposure for their clients' statements. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747-48 (1975). Faced with this specter of liability, lawyers either would stop providing legal advice on these corporate law issues or they would include risk premiums for their services. Neither would be in the shareholders' best interest. *See generally Central Bank*, 511 U.S. at 189.

In any event, because Congress's intent is reflected so clearly and specifically in the statutory scheme, the courts are not permitted to substitute their own judgment as to what constitutes proper public policy. *See Central Bank*, 511 U.S. at 814; *Blue Chip Stamps*, 421 U.S. at 748 (“[t]he duty of the Judicial Branch [is] to administer the law which Congress enacted”).

4260-61. Attorneys who do not satisfy the narrow definition of expert in Section 11 cannot be liable thereunder. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 n.22 (1983). Accordingly, attorneys who advise the issuer on its disclosures or who draft those disclosures are not experts under Section 11. *See Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 683 (S.D.N.Y. 1968). This statutory framework demonstrates Congress's awareness of the fundamental difference between those who advise an issuer on its disclosures and those who actually decide what disclosures to make.

IV. Plaintiffs have failed to satisfy the PSLRA's pleading requirements.

Plaintiffs' claims against V&E are so vague and general that even if they could otherwise survive legal scrutiny, they still would not satisfy the PSLRA's pleading requirements. These pleading deficiencies also mandate dismissal of the claims against V&E.

A. Plaintiffs' allegation that "V&E" drafted and approved various public statements by Enron fails to satisfy the PSLRA's particularity requirement.

The PSLRA's particularity requirement requires Plaintiffs to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). Similarly, Federal Rule of Civil Procedure 9(b) requires Plaintiffs to specify the statements they contend are fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177-78 (5th Cir. 1997); *BMC Software*, 183 F. Supp. 2d at 865 n.14. As the Fifth Circuit held in *Williams*, "[a] complaint can be long-winded, even prolix, without pleading with particularity." 112 F.3d at 178.

The Complaint fails to satisfy this pleading obligation. Throughout the Complaint, Plaintiffs allege in conclusory fashion that V&E participated in drafting Enron's disclosures:

- Plaintiffs repeatedly allege that V&E "approved" various disclosures by Enron. (*E.g.*, Complaint ¶¶ 136, 215, 293, 801, 826.)
- Plaintiffs also allege that V&E "drafted and approved" many of Enron's disclosures. (*E.g.*, Complaint ¶¶ 801, 824, 826-27, 830-32, 835, 838, 843-44, 846-47.)
- At other points, Plaintiffs contend that V&E was part of the team that drafted various of Enron's disclosures. For instance, Plaintiffs allege at several points that V&E advised Enron on what its disclosure obligations were. (*E.g.*, Complaint ¶¶ 800, 848.) Plaintiffs also allege that V&E "helped," "collaborated," "participated," or "assisted" in writing the disclosures. (*E.g.*, Complaint ¶¶ 70(b), 141, 221, 292, 800.) They also contend that some disclosure decisions resulted from a joint effort by V&E, Enron, Andersen, and Kirkland & Ellis. (*E.g.*, Complaint ¶ 67.)

These general allegations are inadequate because they do not identify any particular alleged misstatements by V&E attorneys. Nor do Plaintiffs even identify what input V&E had in Enron's disclosures, what specific suggestions V&E made, or whether the actual disclosures reflect V&E's suggestions. Accordingly, Plaintiffs' conclusory allegations here do not satisfy the particularity requirement. *See, e.g., Friedman*, 730 F. Supp. at 533-34 (complaint failed to satisfy Rule 9(b) where it merely alleged that the attorneys prepared the offering memorandum without identifying any specific statements that were attributable to them); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1443-44 (S.D. Cal. 1988) (complaint failed to satisfy Rule 9(b) where it listed the misrepresentations and omissions in the public documents but failed to attribute specific statements to particular defendants or to differentiate defendants' disparate responsibilities for the statements).

Plaintiffs try to obscure this lack of detail by making categorical statements that "V&E" drafted, or "participated" in drafting, the disclosures. This is essentially an extreme version of the group-pleading doctrine under which courts presumed that statements in company-generated documents were the collective work of those individuals directly involved in the company's management. *See BMC Software*, 183 F. Supp. 2d at 902 n.45. Here, Plaintiffs want this Court to adopt an even more aggressive approach that would hold not just Enron's management responsible for the company's written statements, but also some of the outside consultants who advised Enron on its disclosures. This is impermissible because the group-pleading doctrine no longer exists. *See BMC Software*, 183 F. Supp. 2d at 903 n.45, 912 n.50; *Waste Management* at 92. Even if it did, the theoretical basis of the doctrine—that management has the ability and responsibility to decide what public statements a company should make—does not apply to

outside lawyers. *See Barker*, 797 F.2d at 494. Outside counsel do not make disclosure decisions. All they can do is provide advice, which the client then accepts or rejects.

Plaintiffs' failure to plead V&E's alleged misstatements and omissions with particularity mandates dismissal of the allegations concerning V&E's role in the disclosure process. *See* 15 U.S.C. § 78u-4(b)(3).

B. Plaintiffs have failed to plead facts raising a strong inference of scienter.

The Complaint also fails to plead specific allegations giving rise to a strong inference of scienter on the part of V&E, as required by the PSLRA. To state a claim under Section 10(b), Plaintiffs must allege that V&E acted with scienter. *See Lovelace*, 78 F.3d at 1018. Scienter is a mental state embracing intent to deceive, manipulate, or defraud. *Ernst & Ernst*, 425 U.S. at 193 n.12; *Lovelace*, 78 F.3d at 1018. Plaintiffs thus must demonstrate that V&E acted with knowledge or severe recklessness. *See Ernst & Ernst*, 425 U.S. at 193 n.12; *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 409 (5th Cir. 2001).

In order to plead scienter under the PSLRA, Plaintiffs must "with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Allegations that raise only a reasonable inference of scienter are insufficient. *See Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196-96 (1st Cir. 1999). This requirement operates in tandem with Rule 9(b), which requires Plaintiffs to plead specific facts making it reasonable to believe that V&E knew that any of its alleged statements were materially false or misleading when made. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1069 (5th Cir. 1994); *see also Lovelace*, 78 F.3d at 1020.

1. The nature of the alleged conduct does not give rise to a strong inference of scienter.

Plaintiffs cannot meet their obligation to plead facts giving rise to a strong inference of scienter by alleging that V&E helped structure transactions or worked on disclosures that were allegedly deceptive or manipulative. (Complaint ¶¶ 801, 811, 826, 830.) Although the Complaint describes many transactions, the unifying theme is that the challenged transactions resulted in falsely presenting the financial condition of Enron to the public. Presentation of financial condition, however, is largely a matter of the application of GAAP, which is not a rigid set of rules but rather “characterizes the range of reasonable alternatives that management can use.” *Waste Management* at 24 n.11 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 n.10 (3d Cir. 1997)); see also *Lovelace*, 78 F.3d at 1020-21 (same).

GAAP is properly the province of accountants, not lawyers. Given the primacy of accounting judgments in the presentation of Enron’s financial condition, Plaintiffs’ admission that Andersen “was involved in every facet of Enron’s business” and opined that Enron’s financial statement “present[ed] fairly, in all material respects, the financial position of Enron” (Complaint ¶¶ 897, 903-04) is highly significant. In these circumstances, where the client retained and relied on the advice of qualified professionals to account properly for its business transactions, Plaintiffs’ allegations about the legal work V&E did on the transactions do not present facts raising a strong inference of scienter against V&E. See *Waste Management* at 184-85 (complaint failed to plead strong inference of scienter where one individual (Buntrock) had expressed doubts about an issue but management had contrary opinions by two experts).

2. Plaintiffs’ attempted reliance on motive pleading is insufficient.

The requisite strong inference of scienter also does not arise from Plaintiffs’ allegations regarding V&E’s alleged receipt of “over \$100 million in legal fees.” (Complaint ¶ 73; see also

id. ¶ 394.) Plaintiffs pointedly do not allege that V&E benefited from insider trading or directly from transactions with Enron—typical allegations that are made to try to demonstrate financial benefits and thus scienter.

In *Nathenson*, 267 F.3d at 410, the Fifth Circuit adopted the approach to pleading scienter articulated by the Sixth Circuit in *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 551 (6th Cir. 1999). Under this test, plaintiffs cannot raise a strong inference of scienter simply by pleading motive and opportunity: “Motive and opportunity is properly only an analytical device for assessing the logical strength of the inferences arising from particularized facts pled by a plaintiff to establish the necessary mental state.” *Nathenson*, 267 F.3d at 411; *see also Kurtzman v. Compaq Computer Corp.*, No. H-99-779, at 16-17 (S.D. Tex. April 1, 2002). The Fifth Circuit concluded that “simply because motive and opportunity is alleged does not of itself automatically and categorically mean that the necessary strong inference of scienter is present.” *Nathenson*, 267 F.3d at 412. Allegations of motive are thus weighed to determine their probative value in demonstrating scienter.

Alleging, as Plaintiffs do, that lawyers received legal fees for the work they performed is a species of “generic” pleading of motive that this Court has repeatedly found unpersuasive. *See BMC Software*, 183 F. Supp. 2d at 896; *Waste Management* at 88-89, 127 (“generalized motives of corporate profitability . . . that could be imputed to any corporate officer [are] factually insufficient to raise a strong inference of scienter”).

In keeping with this rule, courts generally reject the theory that professionals are motivated to commit securities fraud to ensure the flow of work from their clients. *Melder v. Morris*, 27 F.3d 1097, 1103 (5th Cir. 1994) (rejecting the plaintiff’s argument because “[a] contrary conclusion would universally eliminate the state of mind requirement in securities fraud

actions against accounting firms.”); accord *Friedman*, 730 F. Supp. at 532; see also *Queen Uno Ltd. Partnership v. Coeur d’Alene Mines Corp.*, 2 F. Supp. 2d 1345, 1360 (D. Colo. 1998) (branding the argument “absurd”); *Ellison v. American Image Motor Co.*, 36 F. Supp. 2d 628, 639 (S.D.N.Y. 1999) (receipt of attorneys’ fees does not by itself provide adequate basis for a strong inference of scienter); *Zucker v. Sasaki*, 963 F. Supp. 301, 308 (S.D.N.Y. 1997) (“mere receipt of compensation and the maintenance of a profitable professional business relationship” is not a sufficient motive for pleading scienter).¹⁶ While Enron was surely a large client of V&E, the benefit received by V&E was legal fees common in kind to all attorneys, not insider trading profits or other forms of benefits from transactions like those typically asserted in these cases to show scienter.

V. This Court should not grant Plaintiffs leave to replead their claims against V&E.

If this Court grants the Motion To Dismiss, it should not grant Plaintiffs leave to replead their claims against V&E. Most fundamentally, repleading would be futile because each of Plaintiffs’ liability theories against V&E is foreclosed by controlling authority in ways that cannot be corrected. See *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872-73 (5th Cir. 2000) (if the amended complaint would fail to state a claim, it is within the trial court’s discretion to deny leave to amend). Moreover, given the unique history of this litigation and the investigations spawned by Enron’s collapse, Plaintiffs have had sufficient opportunity to formulate their claims. There is no reason to give them another bite at the apple.

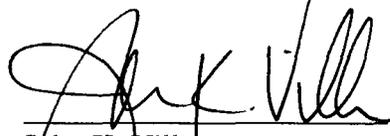
¹⁶ One recent case appears to depart from this well established general rule. See *In re CFS-Related Sec. Litig.*, No. 99-CV-825-K(J), at 32 (N.D. Okla. Apr. 4, 2002) (finding that legal fees in combination with other allegations of recklessness indicative of scienter). However, this Court should adhere to the majority view.

Conclusion

Vinson & Elkins L.L.P. requests that the Court dismiss the Complaint with prejudice. A proposed form of Order is attached.

Respectfully submitted,

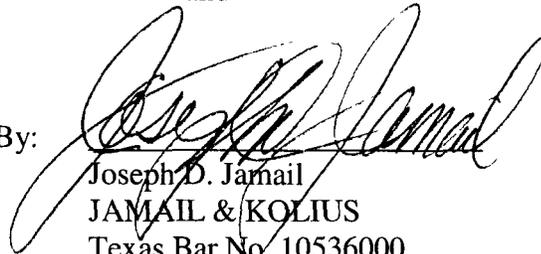
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record by e-mail or certified mail, return receipt requested on May 8, 2002.

A handwritten signature in black ink, appearing to read "Wallis M. Hampton", written over a horizontal line.

Wallis M. Hampton

