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Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES §
LITIGATION §

This Document Relates To: §

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

Plaintiffs, §

vs. §

ENRON CORP., et al. §

Defendants. §

Civil Action No. H-01-3624
(Consolidated)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT
BARCLAYS PLC'S MOTION TO DISMISS**

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654

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
Preliminary Statement.....	1
THE ALLEGATIONS OF THE COMPLAINT.....	4
A. Plaintiffs Do Not Allege That Barclays Made Any Statements Concerning Enron	4
B. Transactions Alleged to Involve Barclays	6
1. The Chewco Transaction	6
2. Barclays’ Purchase of the Private Placement Notes	11
3. The Yosemite Trust.....	12
C. Scienter	12
ARGUMENT.....	14
I. The Complaint Against Barclays Must Be Dismissed Because Plaintiffs Do Not Allege That Barclays Made Any Misstatement	14
II. Because There Is No Aiding and Abetting Liability under Section 10(b), the Allegation That Barclays “Participated” in Enron’s Fraudulent Scheme Fails to State a Claim.	16
III. The Claim Against Barclays Also Must Be Dismissed Because Plaintiffs Do Not Plead Specific “Facts Giving Rise to a Strong Inference” of Scienter.	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

	<u>Page(s)</u>
<i>Anixter v. Home-Stake Production Co.</i> , 77 F.3d 1215 (10th Cir. 1996)	17
<i>Central Bank of Denver v. First Interstate Bank of Denver</i> , 511 U.S. 164 (1994).....	<i>passim</i>
<i>Cogan v. Triad American Energy</i> , 944 F. Supp. 1325 (S.D. Tex. 1996)	17
<i>Cooper v. Pickett</i> , 137 F.3d 616 (9th Cir. 1998)	19
<i>Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin</i> , 135 F.3d 837 (2d Cir. 1998).....	19
<i>Erickson v. Horing</i> , No. 99-1468 JRT/FLN, 2001 WL 1640142 (D. Minn. Sept. 21, 2001)	19
<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976).....	21
<i>Health Management Systems, Inc. Securities Litigation</i> , No. 97 Civ. 1865(HB), 1998 WL 283286 (S.D.N.Y. Jun. 1, 1998)	22
<i>Hundahl v. United Benefit Life Insurance Co.</i> , 465 F. Supp. 1349 (N.D. Tex. 1979)	20
<i>In re Kendall Square Research Corp. Securities Litigation</i> , 868 F. Supp. 26 (D. Mass. 1994).....	17
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	21
<i>Lemmer v. Nu-Kote Holding, Inc.</i> , No. CIV. A. 398CV0161L, 2001 WL 1112577 (N.D. Tex. Sept. 6, 2001)...	17, 20
<i>Lovelace v. Software Spectrum, Inc.</i> , 78 F.3d 1015 (5th Cir. 1996)	21
<i>McNamara v. Bre-X Minerals, Ltd.</i> , 57 F. Supp. 2d 396 (E.D. Tex 1999).....	17, 18

	<u>Page(s)</u>
<i>Melder v. Morris</i> , 27 F.3d 1097 (5th Cir. 1994)	16, 21, 23
<i>Nathenson v. Zonagen, Inc.</i> , 267 F.3d 400 (5th Cir. 2001)	14, 21, 23
<i>Pegasus Holdings v. Veterinary Centers of America</i> , 38 F. Supp. 2d 1158 (C.D. Cal. 1998)	19
<i>Pin v. Texaco, Inc.</i> , 793 F.2d 1448 (5th Cir. 1986)	20
<i>Rahr v. Grant Thornton LLP</i> , 142 F. Supp. 2d 793 (N.D. Tex. 2000)	21
<i>Santa Fe Industries, Inc. v. Green</i> , 430 U.S. 462 (1977).....	20
<i>Schiller v. Physicians Resource Group, Inc.</i> , No. Civ. A. 3:97-CV-3158-L, 2002 WL 318441 (N.D. Tex. Feb. 26, 2002)	15
<i>Scone Investments, L.P. v. American Third Market Corp.</i> , No. 97 Civ. 3802, 1998 WL 205338 (S.D.N.Y. Apr. 28, 1998).....	19
<i>In re Securities Litigation BMC Software, Inc.</i> , 183 F. Supp. 2d 860 (S.D. Tex. 2001)	2, 15, 16, 20, 22, 23
<i>Shapiro v. Cantor</i> , 123 F.3d 717 (2d Cir. 1997).....	17, 18
<i>In re Software Toolworks</i> , 50 F.3d 615 (9th Cir. 1994)	18
<i>Stack v. Lobo</i> , 903 F. Supp. 1361 (N.D. Cal. 1995).....	19
<i>Strassman v. Fresh Choice, Inc.</i> , No. C-95-20017 RPA, 1995 WL 743728 (N.D. Cal. Dec. 7, 1995).....	19
<i>Tuchman v. DSC Communications Corp.</i> , 14 F.3d 1061 (5th Cir. 1994).	14, 21
<i>Vosgerichian v. Commodore International</i> , 862 F. Supp. 1371 (E.D. Pa. 1994).....	18

	<u>Page(s)</u>
<i>Wenger v. Lumisys, Inc.</i> , 2 F. Supp. 2d 1231 (N.D. Cal. 1998)	22
<i>Williams v. WMX Technologies, Inc.</i> , 112 F.3d 175 (5th Cir. 1997)	15
<i>Wright v. Ernst & Young LLP</i> , 152 F.3d 169 (2d Cir. 1998).....	16, 17, 18
<i>Ziemba v. Cascade International, Inc.</i> , 256 F.3d 1194 (11th Cir. 2001)	17

Statutes

<i>Private Securities Litigation Reform Act of 1995</i> , 15 U.S.C. § 78u-4.....	<i>passim</i>
<i>Securities Act of 1933</i> , Section 11, 15 U.S.C. § 77k.....	11
<i>Securities Exchange Act of 1934</i> , Section 10(b), 15 U.S.C. § 78j(b)	<i>passim</i>
<i>Securities Exchange Act of 1934</i> , Section 20(a), 15 U.S.C. § 78t(a).....	2

Rules

Fed. R. Civ. P. 9(b)	1, 3, 14, 15
Securities and Exchange Commission Rule 10b-5, 15 U.S.C. § 240.10b-5	2, 4, 14, 15, 21

Defendant Barclays PLC (“Barclays”) respectfully submits this memorandum of law in support of its motion to dismiss the claim asserted against it in the Consolidated Complaint (the “Complaint”) with prejudice.

Preliminary Statement

It is difficult to imagine a claim that is more readily subject to dismissal under Rule 9(b) of the Federal Rules of Civil Procedure, the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4, and the Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). Rule 9(b) and the PSLRA require that securities fraud be pleaded with specificity, but nowhere in the Complaint is there specificity as to Barclays. *Central Bank* requires direct participation, not just aiding and abetting. Yet, read most generously, the Complaint, as against Barclays, alleges only aiding and abetting.

Moreover, the Complaint frequently demonstrates that plaintiffs have not merely failed to plead with specificity as to Barclays, but thoughtlessly have directed allegations to Barclays that have not a scintilla of support. Taking no care whatsoever, plaintiffs have broadly charged Barclays with the same activities as they allege against other bank defendants -- such as issuing misleading analyst reports or making misleading statements in registration statements and prospectuses -- although unlike the other bank defendants there is no specific allegation anywhere in the Complaint to suggest that

Barclays issued *any* analyst reports on Enron Corporation (“Enron”) or made *any* statements in connection with any Enron public offering.¹

Plaintiffs’ Complaint asserts claims against a wide range of persons and entities associated with Enron: 38 individual current and former directors and officers of Enron, Enron’s accountants and affiliated entities and partners and officers, two law firms, and nine banks that did business with Enron, including Barclays. The Complaint broadly alleges that these defendants all “participated” in a fraudulent “scheme” to inflate the price of Enron stock through misrepresentations contained in Enron’s prospectuses and registration statements and in securities analyst reports.

As to Barclays, the core factual allegation amounts to nothing more than that Barclays engaged in banking transactions with Enron and Enron-related entities and that these transactions were allegedly mischaracterized by Enron. This allegation cannot as a matter of law support plaintiffs’ claim that Barclays violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), and Securities and Exchange Commission (“SEC”) Rule 10b-5, 15 U.S.C. § 240.10b-5.²

¹ Nor is there any allegation that, unlike other of the banking defendants’ representatives, Barclays or its representatives made any investment in any of the partnerships described in the Complaint.

² Section 20(a) of the 1934 Act establishes derivative liability for persons who control those who are primarily liable. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 868 n.17 (S.D. Tex. 2001). There is no allegation in the Complaint that Barclays is a “control person” for the purposes of Section 20(a), *i.e.*, that it controls an entity that is primarily liable under the 1934 Act. Accordingly plaintiffs do not state a Section 20(a) claim against Barclays.

The fraud allegations in the Complaint as to Barclays are boilerplate, unsupported by any specific allegations of fact. Indeed, in all of the Complaint's 499 pages and 1,030 paragraphs, plaintiffs do not identify a single public statement -- not an analyst report, prospectus, or registration statement -- much less a material misstatement, made by, attributed to, or even reviewed by Barclays. Under the specific pleading requirements of Rule 9(b) and the PSLRA, plaintiffs must identify, at the very least, the specific alleged misstatements on which their case depends. Plaintiffs' failure to identify any such statements made by Barclays requires that the claim against Barclays be dismissed.

The allegation that Barclays "participated" in Enron's alleged fraudulent scheme because it "helped" Enron structure and finance transactions -- which transactions Enron later allegedly misstated in its financial statements -- is not actionable. At most, this allegation amounts to a claim that Barclays "aided and abetted" Enron's alleged securities fraud. But, as the Supreme Court held in *Central Bank*, 511 U.S. at 191, there is no aiding and abetting liability under Section 10(b).

Additionally, plaintiffs' claim fails because plaintiffs do not plead, as the PSLRA requires, any specific "facts giving rise to a strong inference" that Barclays acted with fraudulent intent. Plaintiffs fail to allege any misstatement by Barclays to which scienter might attach. And even putting aside this fundamental pleading deficiency, there is no specific allegation in the Complaint from which to infer that Barclays was aware of Enron's allegedly fraudulent accounting practices. The Complaint's conclusory allegation that Barclays had "access" to Enron's financial statements falls far short.

THE ALLEGATIONS OF THE COMPLAINT

A. Plaintiffs Do Not Allege That Barclays Made Any Statements Concerning Enron.

Barclays PLC is a U.K.-based financial services group. (*See* Complaint ¶¶ 106, 750.) Although plaintiffs allege that Barclays is liable for violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5, the specific allegations of the Complaint concerning Barclays amount to nothing more than an assertion that Barclays provided commercial banking services to Enron and Enron-related entities and that, allegedly, Enron misstated the related transactions.

Nowhere in the Complaint do plaintiffs attribute even a single public statement, let alone misstatement, concerning Enron to Barclays. Although plaintiffs refer to other banks' analyst reports concerning Enron, plaintiffs fail to identify a single report that Barclays issued. (*Compare* Complaint ¶¶ 663, 686, 704, 724, 746, 769, 782, 796 (other banks' analyst reports referred to by date -- none relating to Barclays) *with* Complaint ¶¶ 750-761 (no such allegations concerning Barclays).) Likewise, Barclays is not alleged to have made any statements "as an underwriter" in any registration statement or prospectus. (*Compare* Complaint ¶¶ 662, 685, 703, 723, 745, 768, 781, 795 (allegations of statements allegedly made by other banks in registration statements and prospectuses "as an underwriter" -- none relating to Barclays) *with* Complaint ¶¶ 750-761 (no such allegations concerning Barclays).) Furthermore, plaintiffs do not allege that Barclays participated in any manner in preparing, reviewing, disseminating, or providing advice concerning any statements made by Enron or by others concerning Enron.

The Complaint's flaws go beyond these glaring omissions. Plaintiffs' summary statements of their allegations against Barclays are manifestly inaccurate. For example, the Complaint refers to "false and misleading statements in analysts' reports written and issued by Barclays." (Complaint ¶ 761.) Yet, unlike the other banking defendants against which this same allegation is made, the Complaint does not reference any reports issued by Barclays. Scarcely less objectionable, is plaintiffs' conclusory statement -- with no factual reference whatsoever -- that "Barclays is directly liable to the Class for statements in Registration Statements and Prospectuses utilized by Enron and Barclays to raise billions of dollars of new capital for Enron." (Complaint ¶ 761.) This allegation -- recycled boilerplate from claims pleaded against other defendants (*see* Complaint ¶¶ 673, 692, 714, 734, 749, 772, 786, 799) -- is not supported by any specific allegation that ties Barclays to any registration statement or prospectus.³

In a further effort to avoid the absence of specificity, plaintiffs allege that Barclays "participated" in Enron's fraudulent scheme. (*See* Complaint ¶¶ 751, 761.) However, of the many transactions and events described in the Complaint alleged to support plaintiffs' securities fraud claim, Barclays is mentioned with respect only to three:

1. Barclays is alleged to have loaned money to Chewco Investments L.P. ("Chewco") and to Big River Funding LLC ("Big River") and Little River Funding LLC ("Little River"). (*See* Complaint ¶ 10.) Big River and Little

³ Plaintiffs allege that Barclays acted as a "placement agent and/or reseller" with respect to a private placement of convertible notes that subsequently were registered by Enron (*see* Complaint ¶¶ 48, 288, 752). There is no allegation attributing any statements in the prospectus or registration statement associated with these notes to Barclays. *See infra* Section B.2.

River are alleged to have used the money that they borrowed from Barclays to invest in Chewco. (See Complaint ¶¶ 438-439, 758.) Enron is alleged to have subsequently mischaracterized the Chewco transaction in order to support allegedly fraudulent public filings. (See Complaint ¶¶ 439-440, 442, 613.) Barclays is not alleged to have been involved *in any respect* in those filings;

2. Barclays is alleged to have purchased part of a private placement of \$1.9 billion in Enron Convertible Notes in February 2001 (the “Notes”). (See Complaint ¶ 288.) There is no allegation that Barclays made any public statements in connection with this transaction; and
3. Barclays is alleged to have been a co-underwriter of certificates issued, not by Enron, but by a trust called “Yosemite” in which Enron invested. (See Complaint ¶¶ 473, 753.) There is no allegation that any misstatement was made by anyone, let alone Barclays, in connection with that underwriting.⁴

B. Transactions Alleged to Involve Barclays

1. The Chewco Transaction

The principal allegation in the Complaint against Barclays is that it allegedly “participated” in, “financed,” and “helped structure” the Chewco transaction. (See, e.g., Complaint ¶¶ 750, 751, 756-759.) The Complaint describes the background to the Chewco transaction as follows:

- In 1993, “Enron created a joint venture investment partnership called Joint Energy Development Investment Limited Partnership (“JEDI”).” (Complaint ¶ 436.) Enron was the general partner and an independent entity was the limited partner. (Complaint ¶436.)
- Plaintiffs claim that under Financial Accounting Standards Board Statement of Financial Accounting Standards No. 94, Enron was not required to consolidate JEDI’s financial statements with its own if Enron did not control JEDI. (Complaint ¶ 431.) Because JEDI’s independent

⁴ The Complaint also alleges that Barclays “was one of the principal commercial lending banks to Enron” and mentions as examples several loans that Barclays allegedly made, arranged or participated in. (Complaint ¶ 754.) The Complaint fails entirely to explain how these loans are related to plaintiffs’ securities fraud claims, if at all.

limited partner and Enron had joint control, Enron did not consolidate JEDI into its financial statements. (Complaint ¶¶ 431, 436.)

- In 1997, however, JEDI required a new independent limited partner. If Enron did not put in place a new independent partner by year's end, Enron would have to consolidate JEDI's financial statements with its own. (See Complaint ¶¶ 436, 757.) This allegedly would have had undesirable consequences for Enron. (Complaint ¶ 757.)
- Andrew Fastow (an individual defendant in this action) created Chewco Investments L.P. ("Chewco") to buy the JEDI partnership interest of the independent limited partner. (Complaint ¶ 436.)

Plaintiffs allege, however, that as things stood near the end of 1997, "the transaction did not comply with [the accounting] non-consolidation rules since Kopper, an Enron employee, controlled Chewco, and Chewco had no third-party independent investors." (Complaint ¶ 437.) Plaintiffs claim that the Enron defendants -- not Barclays -- interpreted the relevant accounting standards to mean that JEDI's financial statements could remain unconsolidated after Chewco's purchase of the independent limited partner's interest, if (i) parties independent of Enron owned 3% of Chewco and (ii) such parties' equity investment was "at risk." (See Complaint ¶¶ 433, 440, 442.) Plaintiffs allege that in order to fit within this interpretation, Enron re-structured Chewco's ownership in December 1997 in the following transactions:

- On December 18, 1997, Mr. Kopper transferred his ownership interest in Chewco to William Dodson, who was not employed by Enron. (Complaint ¶¶ 437-438.)⁵
- “Enron created a new capital structure for Chewco” consisting of: (i) a \$240 million loan from Barclays to Chewco, which Enron guaranteed; (ii) a \$132 million advance from JEDI to Chewco and (iii) \$11.5 million in equity, which constituted 3% of the total capital structure. (Complaint ¶ 438; *see also* Complaint ¶ 758.)
- Big River purchased \$11.4 million of the Chewco equity, using the proceeds of loans totaling the same amount that Barclays extended to Big River and Little River. Mr. Kopper indirectly invested \$125,000 in Chewco before transferring his interest in Chewco to Mr. Dodson. (Complaint ¶¶ 10, 439.)⁶
- As part of its loan transactions with Big River and Little River, Barclays required the borrowers to establish cash reserve accounts of \$6.6 million to secure payment for the \$11.4 million in loans. Chewco or JEDI funded this reserve. (*See* Complaint ¶ 439-440, 758.)

The Complaint summarizes the allegations relating to Chewco as follows:

Barclays financed Chewco’s purchase of the JEDI interest with debt, not equity. Thus Chewco/JEDI was not a valid SPE meeting the requirements for non-consolidation.

⁵ Paragraph 756 of the Complaint alleges that Barclays “secretly controlled” Chewco. This appears to be another of the numerous errors that pervade the Complaint because two paragraphs later plaintiffs allege that Enron -- not Barclays -- controlled Chewco. (*See* Complaint ¶ 758.) The Complaint elsewhere consistently maintains that Enron and/or Mr. Kopper controlled Chewco. (*See, e.g.,* Complaint ¶¶ 121(d), 435, 437, 807.) Nevertheless, if plaintiffs did intend to allege that Barclays controlled Chewco, their allegation to this effect is wholly conclusory and inconsistent with plaintiffs’ theory that Chewco was not independent of Enron and therefore did not qualify for non-consolidated accounting treatment. (*See infra.*)

⁶ The Complaint’s “simplified diagram” of the Chewco transaction is incorrect -- and inconsistent with the Complaint’s allegations -- insofar as it suggests that Barclays loaned \$11.4 million directly to Chewco. (*See* Complaint ¶ 440.) The Complaint alleges that Barclays loaned this money to Big River and Little River and that those entities then invested the money in Chewco. (Complaint ¶¶ 10, 439.)

Notwithstanding, Enron did not consolidate Chewco/JEDI into Enron's financial statements during 97-01 and used Chewco/JEDI to generate false profits from 97 through 01.

(Complaint ¶ 22.)

Barclays allegedly "participated" in the Chewco transactions by providing banking services. The Complaint alleges nothing more than that Barclays "*helped* structure the \$11.4 million loan" (Complaint ¶ 441 (emphasis supplied)); "Barclays provided . . . banking services to Enron and *help[ed]* structure and finance . . . the critical year-end 97 deal whereby Chewco was formed" (Complaint ¶ 750 (emphasis supplied)); and "with the *help* of Barclays, Enron's insiders quickly structured a new entity called Chewco" (Complaint ¶ 758 (emphasis supplied)).

The Complaint's own allegations acknowledge that, far from assisting Enron in any fraudulent scheme, Barclays "threw a wrench into the scheme by requiring the borrowers to establish cash 'reserve accounts.'" (Complaint ¶ 439.) "[S]ince Barclays received the reserve of \$6.6 million to secure what was clearly a loan [the proceeds of the loan] therefore did not qualify as outside equity 'at risk.'" (Complaint ¶ 440.)

The plaintiffs conclude that Enron's financial statements were misleading because JEDI and Chewco "should have been, but [were] not, consolidated." (Complaint ¶ 435; *see also* Complaint ¶¶ 22, 440, 613.) Whether or not Enron's accounting treatment was improper or its financial statements were misstated in this respect, however, this conclusion does not implicate Barclays: Plaintiffs do not allege that Barclays had any involvement whatsoever in preparing, reviewing, disseminating, or providing advice concerning any of Enron's financial statements, and they do not allege

that Barclays was in any manner responsible for, or even informed about, Enron's accounting decisions.

In fact, the Complaint states that Barclays correctly characterized the "equity loans" as loans on its books, while Enron and Chewco -- not Barclays -- "simultaneously [] *mischaracterize[d]* them as equity." (Complaint ¶ 439 (emphasis supplied).) Enron, not Barclays, is alleged to have published false financial results based on *Enron's* allegedly improper accounting treatment of Chewco. (Complaint ¶ 613.)

The Complaint suggests that certain phrases used in the loan documents somehow "allowed" Enron to mischaracterize the transaction -- *e.g.*, the loan agreements were called "funding agreements" and the return on investment was called "yield" instead of "interest" -- but plaintiffs do not plead any specific nexus between the wording of the loan documentation and Enron's accounting treatment of Chewco. (*See* Complaint ¶ 439.) Nor do plaintiffs allege any specific involvement by Barclays in selecting such phrases for the contracts. Moreover, plaintiffs do not claim that these terms (which in any event sound like debt rather than equity terms) misled anyone. Indeed, plaintiffs allege that the loan documents "resembled promissory notes and loan agreements" (Complaint ¶ 439); that the transactions "clearly" were loans (Complaint ¶ 440) and that everybody involved in the Chewco transaction -- Enron, its lawyers and its accountants -- knew that the transactions were loans.⁷ (*See* Complaint ¶¶ 439, 441, 806, 868, 946.)

⁷ To the extent that the Complaint purports to allege that Barclays is liable for its conduct in respect of the Chewco transaction, which is alleged to have occurred entirely in 1997 -- well over three years before this action was filed -- such claims are time barred. *See infra* Section II.

2. Barclays' Purchase of the Private Placement Notes

Plaintiffs also allege that Barclays (and others) purchased certain Enron Convertible Notes in a private placement offering.⁸ (Complaint ¶ 288.) Barclays' alleged role in the Note offering is limited to the claim that Barclays, along with four other banks, purchased the Notes in a private placement in February of 2001 and then "resold the notes or hedged their risk of loss on the zero coupon convertible notes by shorting Enron common stock." (Complaint ¶ 288.) Plaintiffs characterize Barclays' role in this transaction only as that of a "placement agent and/or reseller." (Complaint ¶ 752.)

The Complaint also states that Enron registered the Notes through a prospectus and registration statement *six months later*. (See Complaint ¶¶ 48, 612, 1006) Plaintiffs do not attribute any of the statements in these subsequent filings to Barclays. Aside from the vague and conclusory assertion -- without factual support -- that Barclays "participated" in Enron's fraudulent scheme (Complaint ¶¶ 751, 755), there is no allegation that Barclays' involvement in the private placement was anything other than a routine financial transaction. Notably, plaintiffs' claim under Section 11 of the 1933 Act regarding the prospectus and registration statement filed in July 2001 in connection with the Notes does not name Barclays as a defendant. (See Complaint ¶ 1005-1016)

⁸ In paragraph 752 of the Complaint, Plaintiffs erroneously characterize this February 2001 note offering as a "public offering." (Complaint ¶ 752.) However, as plaintiffs state elsewhere in the Complaint, this was a private placement, not a public offering. (See Complaint ¶¶ 48, 288.)

3. The Yosemite Trust

Likewise, the Complaint contains no allegations of wrongdoing by Barclays in connection with the “Yosemite” certificates. The Complaint simply states that Enron owned half of the certificates issued by a trust called “Yosemite” and that Enron wished to sell these certificates to avoid disclosing that it owned them. (Complaint ¶ 473.) Plaintiffs claim that Enron’s accounting with respect to these certificates was fraudulent because the sale of these certificates to an Enron-related entity called LJM2 was purportedly “improper in several respects,” which they proceed to list, without reference to Barclays. (Complaint ¶ 474.) Plaintiffs do not claim that Barclays was involved in any way with Enron’s accounting for these certificates, only that the “Yosemite” certificates are “Enron-related securities” that Barclays underwrote. (Complaint ¶ 753.) There is no allegation in the Complaint that any statement at all relating to the underwriting of the certificates was fraudulent, and no allegation of any such statement attributed to Barclays.

C. Scienter

The Complaint includes conclusory and boilerplate allegations that Barclays somehow “knew” about Enron’s scheme. For instance, plaintiffs allege that Barclays “knew” the structure of Chewco “was a sham” and that Barclays “knew about the manipulation.” (See Complaint ¶¶ 441, 758, 760.) However, there is not a single specific factual allegation to support such an assertion; there is no specific allegation that Barclays knew that Enron intended to falsify its financial statements; and no allegations that Barclays ever prepared, reviewed, or gave advice to Enron concerning these statements.

Rather, plaintiffs make the same generic allegations concerning Barclays' alleged knowledge that they assert with respect to each of the other banking defendants, *i.e.*, that Barclays' "relationships with Enron were so extensive that senior executives at the bank constantly interacted with top executives of Enron . . . on almost a daily basis throughout the Class Period, discussing Enron's business, financial condition, financial plans, financing needs, its partnerships and SPEs and Enron's future prospects." (Complaint ¶ 751; *see also* Complaint ¶¶ 653, 675, 694, 716, 736, 763, 774, 788.) Yet, plaintiffs offer absolutely no specifics to support this allegation. Similarly, plaintiffs recycle the allegation they assert against others in stating that Barclays had "unlimited access to Enron's internal business and financial information as one of Enron's lead lending bank [sic], [and] intimate interaction with Enron's top officials which occurred virtually on a daily basis." (Complaint ¶ 760; *see also* Complaint ¶¶ 670, 689, 713, 733, 748, 771, 784, 798.) This conclusory allegation is equally bereft of specifics: plaintiffs do not identify even a single instance in which any Enron representative gave any Barclays representative any reason to believe that Enron was engaged in fraudulent conduct.

Plaintiffs claim, as they claim with respect to all the banking defendants, that Barclays was willing to participate in "the Enron scheme" because it collected "millions of dollars a year" in interest payments and fees from Enron. (Complaint ¶ 755; *see also* Complaint ¶¶ 660, 683, 702, 722, 744, 767, 780, 794.) But nowhere in the Complaint do plaintiffs allege that these payments were for anything other than the banking services that Barclays provided.

. ARGUMENT

I. The Complaint Against Barclays Must Be Dismissed Because Plaintiffs Do Not Allege That Barclays Made Any Misstatement.

To state a claim under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder -- the only claim asserted against Barclays (*see supra* note 2) -- a complaint “must allege, in connection with the purchase or sale of securities, (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which plaintiff relied (5) that proximately caused the plaintiffs’ injury.” *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 406-07 (5th Cir. 2001) (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).) Plaintiffs’ claim against Barclays fails because, in the first instance, they do not allege that Barclays made any public statement (much less misstatement or omission) concerning Enron or that Barclays in any way participated in making such a misstatement or omission.

The boilerplate conclusory allegation that “Barclays is directly liable to the Class for statements in Registration Statements and Prospectuses utilized by Enron and Barclays to raise billions of dollars of new capital for Enron [and] for false and misleading statements in analysts’ reports written and issued by Barclays” (Complaint ¶ 761) is not legally sufficient. A securities fraud claim must satisfy the pleading requirements of both Rule 9(b) of the Federal Rules and the PSLRA. *See Nathenson*, 267 F.3d at 412. Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” As stated by this Court, Rule 9(b) requires a plaintiff to:

[1] specify the statements contended to be fraudulent; [2] identify the speaker; [3] state when and where the

statements were made; and [4] explain why the statements were fraudulent.

In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 865 n.14 (S.D. Tex. 2001) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997).) Similarly, the PSLRA requires that violations of Section 10(b) or Rule 10b-5 be pleaded with a substantial degree of specificity:

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

15 U.S.C. § 78u-4(b)(1)(B). The PSLRA explicitly provides that complaints failing to meet these requirements “shall” be dismissed. 15 U.S.C. § 78u-4(b)(3); *see BMC Software*, 183 F. Supp. 2d at 865 n.15. Here plaintiffs do not identify a single statement allegedly made by Barclays, let alone identify the other particulars required by Rule 9(b) and the PSLRA. Although the Complaint references specific analyst reports issued *by others* and statements made *by others* as underwriters, plaintiffs make no such allegations concerning Barclays.

Likewise, the Complaint’s sweeping references to statements and acts of the “banks,” “Enron’s bankers,” or in a few cases the “defendants” (*see, e.g.*, Complaint ¶¶ 14, 33, 52, 54, 57, 324, 360, 365, 418, 429, 433, 617, 619, 621, 624, 626, 628, 630, 642-651) do not make out a claim against Barclays. In the Fifth Circuit, fraudulent statements must be pleaded particularly as to the “identity of the person making the misrepresentation.” *Williams*, 112 F.3d at 177; *Schiller v. Physicians Res. Group, Inc.*, No. Civ. A. 3:97-CV-3158-L, 2002 WL 318441, at *5 (N.D. Tex. Feb. 26, 2002); *cf.*

BMC Software, 183 F. Supp. 2d at 912 n.50 (“Because this Court believes a more stringent pleading is required by the PSLRA, it agrees with those district courts that find the group pleading doctrine is at odds with the PSLRA and has not survived the amendments.”). But here, plaintiffs attribute no statement to Barclays.

II. Because There Is No Aiding and Abetting Liability under Section 10(b), the Allegation That Barclays “Participated” in Enron’s Fraudulent Scheme Fails to State a Claim.

Because plaintiffs do not allege that Barclays made any actionable misstatements (or any statement at all), their Section 10(b) claim against Barclays must rest entirely on the allegation that Barclays “participated” in Enron’s alleged scheme. Even if Barclays’ alleged “participation” were something more than engaging in financial transactions with Enron -- and stripped of plaintiffs’ conclusory characterizations it was not -- plaintiffs’ claims would still fail.

Under the Supreme Court’s holding in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), secondary actors such as banks may not be held liable for alleged participation in a securities fraud unless those defendants themselves “employ[] a manipulative device or make[] a material misstatement (or omission) on which a purchaser or seller of securities relies.” 511 U.S. at 191. “[A] private plaintiff may not maintain an aiding and abetting suit under § 10(b),” *id.*; *see also Melder v. Morris*, 27 F.3d 1097, 1104 n.9 (5th Cir. 1994), and consequently allegations of “mere knowledge and assistance in the fraud” are not enough to state a claim. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 176 (2d Cir. 1998). Similarly, “[a]llegations of ‘assisting,’ ‘participating in,’ ‘complicity in’ and similar synonyms used

throughout the complaint all fall within the prohibitive bar of *Central Bank*.” *Shapiro v. Cantor*, 123 F.3d 717, 720-21 (2d Cir. 1997); *see also Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) (accountants “must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors”). *Central Bank* requires that plaintiffs’ claim that Barclays “participated” in Enron’s fraud be dismissed.

The majority of courts -- including the Second, Tenth, and Eleventh Circuits -- have adopted a “bright line” test under *Central Bank*.⁹ Under that test, in order for a secondary actor to be held primarily liable under Section 10(b) for a misrepresentation, a statement must have been made by or “attributed to that specific [secondary] actor at the time of public dissemination.” *Wright*, 152 F.3d at 175; *see also Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Shapiro*, 123 F.3d at 720; *Anixter*, 77 F.3d at 1226-27; *see also In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 n.1 (D. Mass. 1994) (after *Central Bank* participation in the structuring of a transaction does not give rise to liability -- “It is the improper reporting of the ‘structured’ transactions . . . that constitutes the alleged Section 10(b) violation.”);

⁹ The Fifth Circuit has not ruled on whether to apply the “bright line” test or the minority “substantial participation” test, discussed *infra*, for primary liability under *Central Bank*. *See generally McNamara v. Bre-X Minerals, Ltd.*, 57 F. Supp. 2d 396, 429-30 (E.D. Tex. 1999) (describing the two tests without adopting either); *cf. Lemmer v. Nu-Kote Holding, Inc.*, No. CIV. A. 398CV0161L, 2001 WL 1112577, at *8 (N.D. Tex. Sept. 6, 2001) (holding that each defendant must have committed a manipulative or deceptive act for primary liability to lie); *Cogan v. Triad Am. Energy*, 944 F. Supp. 1325, 1337 (S.D. Tex. 1996 (“An individual investor may not sue someone for helping the issuer sell a security through having furnished a service to the issuer.”) Under either test, however, plaintiffs’ claim against Barclays must be dismissed. (*See infra*.)

Vosgerichian v. Commodore Int'l, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (allegations that accountants “advised or concurred” and “provided direct and substantial assistance” in “misrepresenting the true nature of” transactions not cognizable after *Central Bank*). Anything short of this “is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).” *Wright*, 152 F.3d at 175 (quoting *Shapiro*, 123 F.3d at 720). Here, plaintiffs do not allege that Barclays made any public statements concerning Enron or that any such statements were attributed to Barclays. The only claim against Barclays is that it allegedly “helped” Enron commit a fraud by providing banking services to Enron and Enron-related entities. Under the “bright line” test such a claim must be dismissed.

Even under the more permissive minority interpretation of *Central Bank*, the “substantial participation” test, adopted by the Ninth Circuit and a few District Courts, plaintiffs’ claims against Barclays fail. Under this test, a securities fraud claim may be pleaded if the defendant is alleged to have played a significant role in *preparing* the false statement itself, *i.e.*, by reviewing or drafting such a statement. *See In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (statement made “after extensive review and discussion with” defendant sufficient for primary liability); *see also McNamara v. Bre-X Minerals, Ltd.*, 57 F. Supp. 2d 396, 429-30 (E.D. Tex. 1999) (describing, without adopting, the test as “if a defendant played a ‘significant role’ in preparing a false statement actually uttered by another, primary liability will lie,” and listing cases). But these cases do not support plaintiffs’ claim against Barclays because Barclays is not alleged to have played *any* role, let alone a substantial role, in preparing,

reviewing, disseminating, or even providing advice concerning any public statement relating to Enron.

Plaintiffs' conclusory allegation that Barclays participated in a "scheme" pursuant to which entities other than Barclays allegedly made fraudulent statements does not satisfy *Central Bank*. Courts have rejected similar conspiracy-type claims as "thinly disguised attempt[s] to avoid the impact of the *Central Bank* decision." *Stack v. Lobo*, 903 F. Supp. 1361, 1374 (N.D. Cal. 1995); *see also Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998) (dismissing Section 10(b) claims against alleged participant in a "Ponzi scheme" involving fraudulent offering memoranda, and listing cases); *Erickson v. Horing*, No. 99-1468 JRT/FLN, 2001 WL 1640142, at *12 n.12 (D. Minn. Sept. 21, 2001) ("allegations of conspiracy or a common scheme do not create liability under section 10(b)"); *Pegasus Holdings v. Veterinary Ctrs. of Am.*, 38 F. Supp. 2d 1158, 1164 (C.D. Cal. 1998) ("Plaintiff's alleged 'scheme' theory of liability is . . . fundamentally inconsistent with" *Central Bank*.); *Scone Invs., L.P. v. Am. Third Mkt. Corp.*, No. 97 Civ. 3802, 1998 WL 205338, at *6-*7 (S.D.N.Y. April 28, 1998) (*Central Bank* forecloses liability for participation in a "scheme to manipulate market prices of various securities"); *Strassman v. Fresh Choice, Inc.*, No. C-95-20017 RPA, 1995 WL 743728, at *17 (N.D. Cal. Dec. 7, 1995) (claims that underwriters part of "scheme to defraud investors" barred by *Central Bank*). Instead, plaintiffs must plead -- and have not pleaded against Barclays -- actions by each defendant that individually constitute violations of the securities laws. *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1998) (defendants could be liable as part of a "scheme" to defraud only if "each defendant committed a manipulative or deceptive act in furtherance

of the scheme”); *Lemmer v. Nu-Kote Holding, Inc.*, No. CIV. A. 398CV0161L, 2001 WL 1112577, at *8 (N.D. Tex. Sept. 6, 2001) (same); *see also BMC Software*, 183 F. Supp. 2d at 886 (“Plaintiffs must allege what actions each [d]efendant took in furtherance of the alleged scheme.”).

Likewise, the conclusory allegation that Barclays “participat[ed] in manipulative devices” (Complaint ¶ 761) does not state a claim under Section 10(b) either. Plaintiffs do not allege that Barclays itself engaged in any manipulative conduct. *See Central Bank*, 511 U.S. at 191. “[M]anipulation’ is not a magic word whose use . . . defeats a motion to dismiss . . . absent factual allegations that would amount to manipulative conduct, i.e. misrepresentation or nondisclosure, a complaint under § 10(b) . . . does not state a cause of action.” *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1452-53 (5th Cir. 1986). Indeed, the Complaint does not contain any specific allegations that *any party* used a “manipulative device.” The term “manipulative device” in Section 10(b) “is virtually a term of art” which “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. 462, 476 (1977); *see also Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979). The allegations of the Complaint do not rest on this sort of conduct, but rather on alleged misstatements and omissions that Enron made in its public filings. Because none of these statements is attributed to Barclays, the claim against it must be dismissed.

Moreover, to the extent that plaintiffs’ claims against Barclays are based on any conduct of Barclays relating to the Chewco transaction, they are clearly time barred. The Chewco transaction occurred at the end of 1997 and all of Barclays alleged

conduct with respect to the Chewco transaction is stated to have occurred in 1997. (See Complaint ¶¶ 435-440, 757-758.) The Complaint naming Barclays was filed on April 8, 2002. Accordingly, claims based on Barclays conduct prior to April 8, 1999 are barred by the three-year implied statute of repose for actions under Section 10(b) and Rule 10b-5. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363-64 (1991) (noting that the three-year limit cannot be tolled); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 801 (N.D. Tex. 2000) (dismissing time barred claims).

III. The Claim Against Barclays Also Must Be Dismissed Because Plaintiffs Do Not Plead Specific “Facts Giving Rise to a Strong Inference” of Scienter.

Plaintiffs’ claim against Barclays also fails because plaintiffs do not plead specific facts evidencing that Barclays acted with the requisite scienter. Under the PSLRA, plaintiffs must “with respect to each act or omission alleged to violate [the 1934 Act], 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); see *Nathenson v. Zonagen*, 267 F.3d 400, 407 (5th Cir. 2001). The required state of mind is “a mental state embracing intent to deceive, manipulate or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *Nathenson*, 267 F.3d at 408. In the Fifth Circuit, scienter can include “severe recklessness,” which is an “extreme departure from the standards of ordinary care.” *Nathenson*, 267 F.3d at 409. However, “conclusory allegations of state of mind” are insufficient to raise a strong inference of scienter. *Nathenson*, 267 F.3d at 419; see *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1019 (5th Cir. 1996); *Melder*, 27 F.3d at 1104; *Tuchman*, 14 F.3d at 1069.

The Complaint falls far short of meeting these pleading requirements. To begin with, the Complaint fails to identify any actionable act or omission, *i.e.*, misstatement, by Barclays to which the required state of mind could even arguably attach. (*See supra* Section I.) Moreover, plaintiffs plead no specific facts suggesting that Barclays was aware of Enron's allegedly fraudulent accounting practices. The boilerplate allegation that Barclays "knew" Enron was falsifying its financial results due to its "unlimited access" to Enron's financial information (Complaint ¶ 760) is the sort of allegation that courts "routinely reject" in assessing whether scienter has been pleaded. *See Health Mgmt. Sys., Inc. Sec. Litig.*, No. 97 Civ. 1865(HB), 1998 WL 283286, at *6 (S.D.N.Y. Jun. 1, 1998) (fact that defendants were Board members insufficient); *Melder* 27 F.3d at 1103-04; *BMC Software*, 183 F. Supp. 2d at 899; *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998) (allegations of knowledge via "access" to corporate documents insufficient without reference to specific documents). Rather, plaintiffs must "specifically plead what [each defendant] learned, when [each defendant] learned it, and how [p]laintiffs know what [each defendant] learned." *BMC Software*, 183 F. Supp. 2d at 886. The Complaint contains no such allegations relating to Barclays.

Plaintiffs' conclusory allegation that Barclays "knew the structure of the Chewco partnership was a sham," is not supported by any specific allegations of fact. The mere fact that Barclays financed part of the Chewco transaction does not give rise to any inference that Barclays knew that Enron would, as alleged, fraudulently mischaracterize this transaction in its subsequent financial statements. And, as discussed above, even if such an inference could be drawn, it would not, by itself, give rise to liability after *Central Bank*.

Finally, plaintiffs' allegations that Barclays collected fees for the commercial banking services it provided to Enron do not support an inference of scienter. There are no allegations that Barclays collected these fees for anything other than its banking services. As the Fifth Circuit held, even before the enactment of the PSLRA, simply pleading that a defendant had a financial interest in a commercial transaction is insufficient to establish scienter. *See Melder*, 27 F.3d at 1103-04; *accord Nathenson*, 267 F.3d at 412, 420 (holding that since the enactment of the PSLRA pleading motive and opportunity alone will rarely be sufficient to give rise to an inference of scienter); *BMC Software*, 183 F. Supp. 2d at 901.

* * *

Plaintiffs filed this lengthy Consolidated Complaint more than five months after this action was originally filed. It undoubtedly includes every allegation against Barclays that plaintiffs could concoct. Nonetheless, the Complaint does not allege *any* misleading statement by Barclays and fails utterly to satisfy the well-defined pleading requirements of the Federal Rules and the PSLRA. Because plaintiffs have had ample opportunity -- but failed -- to draft a proper complaint against Barclays, the Complaint against Barclays should be dismissed with prejudice. *See BMC Software*, 183 F. Supp. 2d at 917.

CONCLUSION

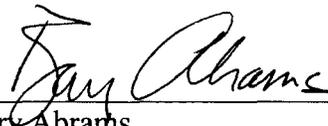
Barclays is not alleged to have participated in making any misstatement or omission, and is not alleged to have acted with the requisite scienter. Consequently, the Complaint as against Barclays should be dismissed with prejudice.

Dated: May 8, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused true and complete copies of the foregoing Defendant Barclays PLC's Motion to Dismiss the Consolidated Complaint and the accompanying (i) Defendant Barclays PLC's Memorandum of Law in Support of Its Motion to Dismiss the Complaint, and (ii) [Proposed] Order Granting Barclays' Motion to Dismiss the Complaint, to be served on this 8th day of May, 2002, as follows:

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Adam R. Brebner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
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This Document Relates To:	§	Civil Action No. H-01-3624
MARK NEWBY, et al., Individually and On	§	(Consolidated)
Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	
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**[PROPOSED] ORDER GRANTING BARCLAYS PLC'S
MOTION TO DISMISS THE COMPLAINT**

Upon the Motion to Dismiss the Consolidated Complaint and accompanying Memorandum of Law of Barclays PLC, herein filed on May 8, 2002, and for good cause shown, it is

ORDERED, that Barclays PLC's Motion to Dismiss the Consolidated Complaint pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure is hereby GRANTED.

IT IS FURTHER ORDERED that the Consolidated Complaint is dismissed as against Barclays PLC with prejudice.

Signed at Houston, Texas this ____ day of _____, 2002 at ____ o'clock ____.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE