

As to Mr. Kean, allegations of scienter are altogether lacking. Plaintiffs do not allege (1) what Mr. Kean specifically knew at any point in time, (2) what material undisclosed information Mr. Kean may have known, (3) when or how Mr. Kean became aware of any such undisclosed material information, or (4) any facts giving rise to an inference that Mr. Kean acted with the required state of mind. Plaintiffs' allegations of insider trading are also inadequate. Plaintiffs have failed to identify what material inside information Mr. Kean was aware of when he traded or anything suspicious or unusual about Mr. Kean's sales of Enron stock. Finally, they have not alleged any particularized facts as to how Mr. Kean participated in any scheme to defraud.

In short, Plaintiffs have not met the particularity requirement, the basis requirement, or the strong inference requirement of pleading an action under the PSLRA or Rule 9(b) as to Mr. Kean.

I. THE APPLICABLE PLEADING REQUIREMENTS

The standards applicable to pleading this securities fraud case against Mr. Kean are set forth in the Joint Brief of Officer Defendants, which is incorporated herein by reference. Among the pertinent requirements, as stated by this Court, is "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). As regards alleged misstatements, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 865 n.14 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)). It is therefore necessary to examine the "specific" allegations that have been made against Mr. Kean.

II. THE ALLEGATIONS SPECIFICALLY REFERENCING KEAN DO NOT MEET RULE 9(b) OR PSLRA PLEADING REQUIREMENTS.

“Specific” allegations in the Complaint concerning Mr. Kean fall into three categories: (a) his position with Enron; (b) four references to statements made (but not attributed specifically to Mr. Kean) during presentations to analysts or investors; and (c) Mr. Kean’s sales of Enron stock. None of these allegations – either individually or in the aggregate – satisfy pleading requirements under Rule 9(b) and the PSLRA.

A. Mr. Kean’s Position with Enron

In paragraph 83(m), Plaintiffs identify Mr. Kean as Executive Vice President and Chief of Staff of Enron since 1999. They also allege, in paragraph 88, that he was the Senior Vice President, Public Affairs, in 1998 and that he was a member of the Enron Management or Executive Committee for the years 1997 through 2000. These allegations are not sufficient to state a claim against Mr. Kean for securities fraud. *See* Section II.A, Joint Brief of Officer Defendants.

B. Statements Made During Presentations to Analysts

In paragraphs 282, 329, 343, and 366, Plaintiffs allege that Mr. Kean was one of a group of Enron officers who participated in discussions with analysts and investors about Enron’s businesses and financial performance. In each of these paragraphs, Plaintiffs allege that the Enron representatives “stated” various matters set forth in bold, italicized bullet points. As alleged, two of the presentations stretched over two or more days, and three included both conference calls as well as “follow-up conversations” and/or “formal presentations and break-out sessions.” Thus, it is impossible to ascertain exactly what was said, when, in what circumstances, and to which analysts and/or investors (none of whom are identified by name). But even more problematic, in none of

those four paragraphs do Plaintiffs attribute any specific statement(s) to Mr. Kean.² Instead, in each instance, Mr. Kean is simply lumped in with four other Enron representatives. In the end, then, there are *no* allegations as to what statements *Mr. Kean* made, *if any*.

Accordingly, Plaintiffs do not plead any actionable misrepresentations or omissions as to Mr. Kean in paragraphs 282, 329, 343, or 366. *See Schiller v. Physicians Resource Group, Inc.*, 2002 WL 318441 (N.D. Tex. 2002):

The PSLRA and Rule 9(b) require Plaintiffs to identify the particular individual who made the misstatement or omission. Plaintiffs cannot avoid the bar on group pleading by simply identifying the constituents of a group of defendants in rote and conclusory fashion. Plaintiffs cannot satisfy Rule 9(b) by attributing statements or omissions to the corporation without any identification of the officer or director responsible for making the statement.

Id. at *6. And there are no other allegations in the entire Complaint concerning statements by Mr. Kean.

C. Plaintiffs Do Not Allege Actionable “Insider Trading” by Kean.

In Paragraphs 83(m), 84 and 401, Plaintiffs cite trading history of Mr. Kean showing only two sales of shares in a three-year period in an effort to assert an insider trading claim against him. As they do with all “Enron Defendants,” Plaintiffs attempt to support their “insider trading” claim with the conclusion of their “expert” (Scott D. Hakala) that it was statistically “more probable than

² This failure apparently is the result of deliberate choice. Transcripts of the analysts conference calls are available at one or more Internet sites for most (and perhaps all) of the fifteen analyst conference calls Plaintiffs refer to in the *Newby* Complaint. Indeed, it appears that Plaintiffs availed themselves of those transcripts in pleading those fifteen paragraphs, but (with one notable exception) instead of quoting directly from the transcripts and attributing a statement to a specific speaker, they paraphrased selected statements, set them off in bold italicized type, and then attributed them to a group of speakers. (The one exception is paragraph 343, in which they do quote a number of statements and attribute them specifically to two speakers, neither of whom is Mr. Kean.) Had they truly desired to, they could have attributed most of the alleged misstatements to a specific speaker. The “group” approach appears to be an effort to tar someone like Mr. Kean against whom Plaintiffs would otherwise have nothing at all.

not” that Mr. Kean’s limited stock trades were made with “the possession and use of material adverse non-public information.” (Complaint ¶ 415.) This “expert analysis” is clearly statistically lacking and does not take into account other material information such as portfolio concentration, vesting dates, and other material individualized trading information. The Hakala Declaration should not be considered by the Court. *See* Joint Brief of Officer Defendants at section II.C.2. Further, as paragraph 415 makes evident, the “certainty” of Plaintiffs’ allegations, based on Dr. Hakala’s inadmissible analysis, that Mr. Kean engaged in illegal insider trading, is at best “more probable than not”; this contrasts markedly with what Plaintiffs assert to be the “scientific acceptance standard (95%).” Plaintiffs’ effort to allege insider trading against Mr. Kean fails and the insider trading claims against him should be dismissed.

Plaintiffs have altogether failed to plead anything “unusual” or “suspicious” about Mr. Kean’s stock sales, or otherwise meet the requirements of Rule 9(b) and the PSLRA for pleading illegal insider trading, as reviewed in Section II.C.1, Joint Brief of Officer Defendants. None of the insider trading paragraphs identifies any specific material, non-public information known to Mr. Kean when he made the limited stock sales about which Plaintiffs complain. Plaintiffs only generally allege that Mr. Kean was in possession of some unspecified “adverse undisclosed information.” (Complaint ¶ 83(m).) They do not plead that Mr. Kean was aware of any specific non-disclosure; nor do they allege that Mr. Kean was aware of any public misstatement. It is well settled that simply being a member of management — *i.e.*, in a position to know inside information — does not equate to scienter or knowledge of false statements. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (allegations of motive and opportunity alone are almost always insufficient to establish scienter). This is the kind of generalized, non-specific allegations the PSLRA outlawed. Paragraph 83(m) is further flawed by the absence of any allegation that the undisclosed information (itself

unidentified) was material. The Complaint is devoid of (1) any specific allegations concerning nonpublic information (2) of which Mr. Kean was aware or (3) how he knew the undisclosed information was material or nonpublic. *See In re Securities Litigation BMC Software*, 183 F. Supp. 2d at 916. Plaintiffs also make no specific allegations regarding how Mr. Kean's sales are improper, unusual, or suspicious. The closest Plaintiffs come is to allege that "[t]hese defendants' illegal insider selling escalated massively as Enron's stock moved to more inflated levels during the Class Period and also when internally they knew the scheme was unraveling." This is yet another instance of group pleading, now prohibited by the PSLRA, and clearly does not apply to Mr. Kean.

Beyond that defect, Plaintiffs' asserted insider trading claim against Mr. Kean fails — and must be dismissed — for the following reasons. First, Plaintiffs do not — and cannot — allege a "pattern" of trading by Mr. Kean. Plaintiffs point to two sales during the three-year class period by Mr. Kean — thin material from which to weave a pattern. Further, Plaintiffs point to no sales history outside the class period against which the relevant sales could be measured. *See In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d at 901-02 (citing *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 987 (9th Cir.), *reh'g and reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999), for proposition that "stock sales cannot be viewed as 'unusual' where defendant 'ha[s] no significant trading history for purposes of comparison.'")

Second, Mr. Kean's insider trades or "pattern" (such as it is) are inconsistent with Plaintiffs' allegations concerning the trading "pattern" of other Defendants who, according to the Complaint, were also "aware" of some undisclosed information. Indeed, according to the Complaint, one or more (but not all) of the Defendants collectively sold in almost every month of the Class Period. Plaintiffs then claim that each Defendant's sales "pattern" — although different from the others — somehow supports the same statistically certain inference. If, however, there truly is a specific

“pattern” that demonstrates the use of inside information and other Defendants’ sales match or establish that pattern, then Mr. Kean’s two sales cannot possibly match that purported pattern. For example, it is patent nonsense for Plaintiffs to allege that Mr. Kean’s “pattern” matches the “pattern” of Mr. Lay’s trades (which number in the hundreds), and that both are recognized patterns of trading on inside information. Any trading “matches” this “pattern.” Indeed, according to Plaintiffs, every sale by every insider in the three-year Class Period was suspect. Like all “one size fits all” garments, Plaintiffs’ droops here and pinches there.

Third, the timing of Mr. Kean’s two sales are neither suspicious nor unusual. His sale of shares, on dates after vesting, is exactly the type of activity that one would expect from a rational investor seeking to diversify his portfolio.³ To establish “suspicious timing,” Plaintiffs must show that Mr. Kean’s trades were “at times calculated to maximize personal benefit” to him. *In re Apple Computer Litigation*, 886 F.2d 11090, 1117 (9th Cir. 1989). A recognized example would be the sale of a significant percentage of his shares “immediately before a negative earnings announcement.” *See, e.g., Wenger v. Lumisys*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998). Conversely, sales made before the market peak, after its fall, or at other times not maximizing seller’s proceeds, give rise to no inference of scienter. *See Nathenson*, 267 F.3d at 420-21 (sales made when stock well below “class period high” were “so inauspiciously timed” they “d[id] not meet this test.”); *Greebel v. FTP Software*, 194 F.3d 185, 206 (1st Cir. 1999) (“timing does not appear very suspicious” where stock not “sold at the high points of the stock price”). “When insiders miss the boat [by selling well off the market peak], their sales do not support an inference” of scienter. *Ronconi v. Larkin*, 253 F.3d

³ Under Plaintiffs’ model, however, an Officer Defendant who sold everything as it vested (a not irrational diversification strategy), or simply sold enough to cover taxes on the exercise of options, would automatically be assumed to have traded on illegal inside information, *even if he had no inside information*.

423, 435 (9th Cir. 2001). Mr. Kean's transactions were below the market peak.

Fourth, according to Plaintiffs' own figures, Mr. Kean sold only 57 percent of his total shares in the Class Period. Even by Plaintiffs' calculations, Mr. Kean left nearly half his Enron stock unsold. Contrary to suggesting the intent to cash out based on inside information of impending doom, Mr. Kean's trading history suggests either that he had no such inside information or that he did not use it to his benefit. Regardless, he left millions of dollars in the Company. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *In re Securities Litigation BMC Software*, 183 F. Supp 2d at 902 (citing *In re FVC.COM Sec. Litig.*, 136 F. Supp. 2d 1031, 1038-39 (N.D. Cal. 2000)) ; *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d at 1238 n.6 & 1251. Plaintiffs' allegation regarding the percentage of shares sold by Mr. Kean during the three-year Class Period establishes nothing where, as here, he cannot be charged with any alleged misstatements. *See In re Scholastic Corp. Sec. Litig.*, 2000 WL 91939, at *13 (S.D.N.Y. Jan. 27, 2000) (stock sales of eighty percent of holdings by executive that did not make any alleged misstatements did not establish scienter); *Head v. NetManage, Inc.*, 1998 WL 917794, at *5 (N.D. Cal. Dec. 30, 1998) (executives' sales of 76 percent and 94 percent held "insufficient to create the requisite strong inference of scienter in light of the lack of any specific allegations as to their fraudulent conduct, including the lack of any allegation that they personally made any of the fraudulent statements.").

Further, analysis of the alleged percentages of stock sales by Mr. Kean must be placed in the context of the extraordinarily long class period selected by Plaintiffs – 37 months. *See* Joint Brief of Officer Defendants at Section II.C.1.a. It is obvious that more sales would occur in a three-year class period than in a shorter, more reasonable timeframe. A number of courts have found nothing suspicious or alarming in sales of stock by insiders in percentages that, if adjusted to reflect a three-year "window," would dwarf Mr. Kean's sales. *See, e.g., In re Silicon Graphics*, 183 F.3d at 985-86,

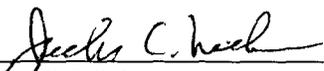
987 (sales by some individuals ranging up to 75 percent insufficient to infer scienter even in a fifteen week class period); *Ronconi*, 253 F.3d at 435 (sale of 17 percent of holdings in a seven-month period clearly “not suspicious in amount.”); *In re Waste Management, Inc. Securities Litigation*, C.A. No. H-99-2183 (S.D. Tex. Aug. 16, 2001), at *16 & *131 (no basis for strong inference of scienter when individuals sold as much as 39.6 percent in a five-month class period).

In sum, Plaintiffs have not pleaded adequate specific facts to support a claim for insider trading against Mr. Kean.

III. PLAINTIFFS’ SECTION 20(a) AND 20A CLAIMS AGAINST MR. KEAN SHOULD BE DISMISSED.

For the reasons set forth in section III of the Joint Brief of Officer Defendants, Plaintiffs have failed to plead an actionable claim against Mr. Kean under either sections 20(a) or 20A of the Exchange Act.

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