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

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

In re ENRON CORPORATION SECURITIES LITIATION	§	
	§	**Civil Action No. H-01-3624**
This Document Relates To:	§	(CONSOLIDATED)
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

DEFENDANT KIRKLAND & ELLIS' MOTION TO DISMISS

In accordance with this Court's February 28, 2002 Scheduling Order, defendant Kirkland & Ellis respectfully moves to dismiss with prejudice *Newby* Count I, the only claim against it. This motion is filed pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in 15 U.S.C. §§ 77 and 78) ("PSLRA"), because, as explained herein, plaintiffs have failed to state a claim, and cannot state a claim, against Kirkland & Ellis for securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b), and Rule 10b-5 promulgated thereunder.

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INTRODUCTION

In their effort to cast the net of liability as broadly as possible, the shareholder plaintiffs in *Newby* have included a securities fraud claim against Kirkland & Ellis, a law firm that (1) did not represent the issuer of securities, (2) made no representations to the investing public, and (3) did not participate in any stock offerings or trades. No court has ever allowed a law firm to be held liable for federal securities fraud under these circumstances. The securities laws, after all, are intended to regulate the purchase or sale of securities, not the practice of law. Indeed, courts routinely dismiss securities claims against law firms, even where they represent securities issuers. Allowing a claim against a law firm like Kirkland – which represented third parties in business transactions with the issuer, but not the issuer itself – would be wholly unprecedented. This Court should not allow plaintiffs to ignore all bounds of principle and precedent in their quest for solvent defendants. Instead, under settled law, this Court should dismiss the single count against Kirkland for three basic reasons:

First, the claim against Kirkland is a classic "aiding and abetting" claim: plaintiffs contend that Kirkland "helped," "enabled," "allowed," and "facilitated" Enron and its insiders to commit fraud in connection with the purchase or sale of Enron securities. Compl. ¶¶ 70(b), 393, 860, 865, 871, 874, 878. The U.S. Supreme Court, however, expressly ***rejected*** such a claim in *Central Bank of Denver v. First Interstate Bank*, holding as a matter of law that "a private plaintiff may ***not*** maintain an aiding and abetting suit under § 10(b)" or Rule 10b-5. 511 U.S. 164, 191 (1994) (emphasis added). *Central Bank of Denver* thus forecloses plaintiffs' attempt to bring Kirkland within the scope of the securities laws by alleging that it helped ***others*** to commit fraud in connection with the purchase or sale of securities. No amount of "artful pleading" can change this result.

Second, the claim against Kirkland does not remotely satisfy the basic elements for a claim of ***primary*** liability under the securities laws. That claim is governed by the PSLRA, 15 U.S.C. § 78*u*-4, recently enacted by Congress for the very purpose of allowing courts to dispose of such claims on the pleadings. In order to state a claim for primary liability under the securities laws, plaintiffs must set forth specific factual allegations supporting each of the required elements of liability. The claim against Kirkland fails to meet even traditional pleading requirements, much less the PSLRA's heightened requirements, with respect to at least three basic elements:

- ***Conduct***: The complaint fails to allege that Kirkland engaged in conduct constituting a primary violation of the statute (as opposed to aiding and abetting alleged violations by others). In particular, a primary violation of the statute requires either (1) a misrepresentation or omission in connection with the purchase or sale of securities, or (2) the use of a manipulative device in connection with the purchase or sale of securities. The complaint simply does not (because it cannot) allege that Kirkland – a law firm that did not even represent the issuer – committed either type of primary violation.

- ***Reliance***: The complaint fails to allege facts showing that plaintiffs relied on any actions or omissions by Kirkland in the purchase or sale of securities – which of course follows logically from the basic point that Kirkland did not make any statements or use any devices in connection with the purchase or sale of securities.

- ***Scienter***: The complaint fails to allege facts showing that Kirkland acted with the intent to defraud investors in the purchase or sale of securities – which yet again follows logically from the basic point that Kirkland did not make any statements or use any devices in connection with the purchase or sale of securities.

Third, plaintiffs' claim against Kirkland seeks to extend liability to a ***law firm*** based on its representation of a client. It is a bedrock principle of our system of representative justice that attorneys are not liable for the transgressions of their clients. To the contrary, the rules of professional responsibility impose duties of loyalty and confidentiality on attorneys that may conflict with the imposition of countervailing duties to third parties. Indeed, in light of these principles, the Fifth Circuit had sharply limited attorney liability under Section 10(b) even before

Central Bank of Denver. *See Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989). After *Central Bank of Denver*, it follows *a fortiori* that a law firm (like Kirkland) that did not even represent the securities issuer (and is thus twice removed from the issuer's shareholders) cannot be held liable for an alleged violation of the securities laws.

In sum, plaintiffs' single count against Kirkland is an aiding and abetting claim masquerading as a primary liability claim. If *Central Bank of Denver* stands for anything, it is the proposition that the securities laws cannot be stretched to impose liability on an entity such as Kirkland, a law firm that was not involved in the purchase or sale of securities and that did not even represent the issuer of securities. Similarly, if the PSLRA stands for anything, it is the proposition that plaintiffs cannot avoid a motion to dismiss by simply hiding behind conclusory allegations, but must instead set forth all of the facts necessary to establish a primary violation of the securities laws. This Court should decline plaintiffs' invitation to defy *Central Bank of Denver* and the PSLRA, not to mention basic principles of loyalty and confidentiality governing the legal profession, by radically expanding law firm liability under the securities laws. Accordingly, this Court should dismiss with prejudice plaintiffs' sole count against Kirkland.

BACKGROUND

Although the *Newby* complaint goes on for some 500 pages, fewer than 20 pages tucked in the back of the complaint contain the allegations specifically directed to Kirkland & Ellis. Compl. ¶¶ 857-896. This brief assumes that the Court is very familiar with the facts surrounding the failure of Enron and the controversy that underlies this suit. On that assumption, only a few factual points bear mentioning.

First, a brief overview of the relationship between Enron and Kirkland's clients is appropriate. Kirkland & Ellis did not represent Enron. That is why plaintiffs have not pled that Kirkland advised Enron on any securities offerings or had any responsibility at all for drafting Enron's filings with the SEC or communications with Enron's shareholders. Kirkland has been brought into this case because it represented certain private partnerships that engaged in transactions with Enron. The crux of the allegations against Kirkland is that the firm violated the federal securities laws by performing legal work for these separate entities, which ***Enron*** purportedly used to disguise the company's true financial condition. The Kirkland allegations all make the same central point, namely, that Kirkland violated the federal securities laws by allegedly "enabling," "helping," or "permitting" ***other persons or entities*** to violate the securities laws. *See, e.g.*, Compl. ¶¶ 865, 872, 874, 875, 878, 883. Moreover, there is no allegation that Kirkland – as opposed to Enron – used or employed these partnerships for any purpose at all, let alone in connection with the purchase or sale of securities.

Second, as is the practice on a motion to dismiss, the court must assume the well-pleaded facts alleged in the complaint to be true. Of course, "conclusory allegations or legal conclusions masquerading as factual conclusions" – like plaintiffs' allegations of what Kirkland "knew" or that the firm "participated in the implementation of misleading devices" – cannot defeat a motion to dismiss. *In re Securities Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 865 n.13 (S.D. Tex. 2001). Although plaintiffs' allegations generally cannot be challenged at the motion to dismiss stage, Kirkland does want to state for the record that it vigorously disputes the allegations in the complaint, which is riddled with material misstatements of fact and outrageous allegations of complicity and intent that have no basis in reality. Plaintiffs made no effort to contact Kirkland (or apparently anyone else with any knowledge of matters relating to Kirkland) before filing,

and, as a result, made significant errors even with respect to such objectively verifiable facts as the time frame of Kirkland's representation and the amount of fees that it earned. Even accepting plaintiffs' baseless allegations as true, however, they still have failed to state a claim.

ARGUMENT

I. Plaintiffs' Claim Against Kirkland Is An Impermissible Aiding and Abetting Claim.

Plaintiffs' claim against Kirkland fails for the simple reason that it is an aiding and abetting claim, and neither Section 10(b) nor Rule 10b-5 allows a private cause of action for aiding and abetting an alleged securities fraud. *See Central Bank of Denver*, 511 U.S. at 191. Plaintiffs cannot avoid that conclusion by simply characterizing their claim as involving ***primary*** rather than ***secondary*** liability. What matters is not how plaintiffs label their claim, but whether the claim alleges facts sufficient to establish ***all*** of the elements of primary liability. The key, as *Central Bank of Denver* and subsequent cases make clear, is that the complaint must allege that ***the defendant itself*** engaged in the conduct proscribed by those laws, *i.e.*, "[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 [SEC] may prescribe." 15 U.S.C. § 78*j*(b).[1]

Notwithstanding the complaint's repeated assertion that Kirkland committed a "primary" violation of Section 10(b) and Rule 10b-5, plaintiffs' own allegations leave no doubt that this is

[1] The SEC's Rule 10b-5 provides in pertinent part that it is unlawful to "employ any device, scheme, or artifice to defraud . . . [t]o make any untrue statement of a material fact or to omit to state a material fact . . . or [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a-c). The Supreme Court has made clear that the Rule cannot create liability broader than the text of Section 10(b). *See Central Bank of Denver*, 511 U.S. at 173 ("We have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute."); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996) ("To the extent Rule 10b-5 could be read more broadly than 10(b), the text of the statute controls.").

an aiding and abetting case. Over and over again, the complaint alleges that Kirkland ***assisted*** the fraud allegedly committed by Enron and its insiders, using virtually every conceivable synonym for "aiding and abetting" in setting out the allegations against Kirkland. Specifically, the complaint alleges that:

- Kirkland "***help[ed] structure***" the Chewco partnership to "***allow Enron*** to conceal the true state of its indebtedness by improperly moving debt off its balance sheet." Compl. ¶ 872 (emphasis added);

- Kirkland "***participat[ed] in*** the monetization of assets ***to facilitate the falsification of Enron's financial statements and results***." *Id.* ¶ 860 (emphasis added);

- Kirkland created the LJM partnerships, which were designed to "***permit Enron to accomplish transactions it could not otherwise accomplish***[.]" *Id.* ¶ 874 (emphasis added);

- Kirkland represented LJM1 and LJM2 in transactions that "***permitted Enron to conceal its true debt levels*** by removing the assets from Enron's balance sheet and, at the same time, record large gains." *Id.* ¶ 875 (emphasis added);

- Kirkland "***helped Enron use these contrivances and manipulative devices*** to inflate ***Enron's*** reported financial results." *Id.* ¶ 878 (emphasis added);

- Kirkland represented LJM2 in transactions in late 1999, thus "***enabling Enron to report strong EPS growth*** for 99." *Id.* ¶ 883 (emphasis added);

- Kirkland and others "structured increasingly more aggressive SPEs ***to enable Enron to create profits and/or shift assets*** off Enron's balance sheet at the end of reporting periods to inflate Enron's reported income and improve its balance sheet." *Id.* ¶ 890 (emphasis added);

- Kirkland's representation of LJM2 was intended "***to enable Enron to project an image of a financially sound company*** with an investment grade credit rating and strong revenue and earnings growth[.]" *Id.* ¶ 865 (emphasis added).

These are "aiding and abetting" allegations in their purest form.

Accordingly, plaintiffs' allegations concerning Kirkland are insufficient as a matter of law to state a claim of primary liability after *Central Bank of Denver*. The Supreme Court unambiguously held that the proscription of Section 10(b) "does not include giving aid to a

person who commits a manipulative or deceptive act." 511 U.S. at 177. But this is precisely what plaintiffs allege here with respect to Kirkland, namely, that Kirkland assisted Enron in ***Enron's*** manipulative and deceptive acts. And plaintiffs' choice of words other than "aid" and "abet" to make that point cannot change the result. As the Second Circuit squarely held in addressing virtually identical allegations:

> Allegations 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 (2d Cir. 1997). Plaintiffs' allegations that Kirkland "participated in" a scheme with Enron to defraud investors, as well as their allegations of "enabling," "helping," and "permitting" Enron to commit fraud, are all inadequate as a matter of law to state a claim of primary liability after *Central Bank of Denver*. *See id.*[2]

Plaintiffs' attempt to cast this case as a massive "conspiracy" in which Kirkland "played an important role," Compl. ¶ 393, also fails as a matter of law. Courts have repeatedly rejected "conspiracy" charges as an improper attempt to evade *Central Bank of Denver*. *See Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998) ("[E]very court to have addressed the viability of a conspiracy cause of action under § 10(b) and Rule 10b-5 in the wake of *Central Bank* has agreed that *Central Bank* precludes such a cause of action.") (collecting cases). As one court explained, "[t]o permit a private plaintiff to maintain an action for conspiracy to violate Rule 10b-5 would make *Central Bank of Denver* meaningless, since

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[2] Following *Central Bank of Denver*, Congress gave the SEC, but ***not*** private plaintiffs, the right to pursue legal action based on a defendant's allegedly "knowingly provid[ing] substantial assistance to another person" in violation of the federal securities laws. 15 U.S.C. § 78*t*(e). As the Second Circuit has held, "[t]hat congressional act did not create a private cause of action" on behalf of shareholders. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 176 (2d Cir. 1998); *see also Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1206 n.6 (11th Cir. 2001) ("Noticeably, Congress did not create a private cause of action in this subsection.").

virtually every aiding and abetting claim can be alleged as a conspiracy claim." *Kidder Peabody & Co., Inc. v. Unigestion Int'l, Ltd.*, 903 F. Supp. 479, 498 (S.D.N.Y. 1995) (quotations omitted).

II. Plaintiffs' Claim Against Kirkland Fails For The Independent Reason That They Have Not Alleged All Of The Required Elements For "Primary Liability."

Putting aside the fact that plaintiffs have pleaded right into *Central Bank of Denver's* proscription of aiding and abetting claims, the complaint fails for an independent reason: plaintiffs have not alleged well-pleaded facts sufficient to establish "***all*** of the requirements for primary liability under Rule 10b-5," as required by *Central Bank of Denver*, 511 U.S. at 191 (emphasis in original), and no amount of "artful pleading" can save their claim.

First, plaintiffs have failed to allege that Kirkland made even a ***single*** misrepresentation or omission to investors in connection with the purchase or sale of Enron securities. This pleading defect is fatal to any claim that Kirkland deceived any purchasers or sellers of securities in contravention of Section 10(b).

Second, plaintiffs also fail to allege that Kirkland used or employed a "manipulative device" in violation of Section 10(b). Plaintiffs do allege that ***Enron*** used certain entities as manipulative devices, but there is no allegation that Kirkland itself ever used or employed the partnerships to manipulate anything, much less in connection with the purchase or sale of Enron stock.

Third, because plaintiffs have not alleged that Kirkland made any misrepresentations or employed any manipulative devices, it is no surprise that plaintiffs have also failed to allege that any Enron investor ever relied on any statement or act by Kirkland.

Fourth, plaintiffs have not even come close to satisfying the PSLRA's heightened pleading requirements for scienter. To the contrary, plaintiffs merely make the conclusory allegation that Kirkland "knew" that Enron was committing accounting and securities fraud,

without providing the detailed factual basis required to give rise to a strong inference that Kirkland itself had the requisite intent to defraud Enron shareholders. Each of these grounds alone is sufficient to require the dismissal of Count I against Kirkland for failure to state a claim.

A. Plaintiffs' Failure To Allege That Kirkland Made Any Representations To Investors Precludes Section 10(b) Liability For Deception.

Although plaintiffs attempt to plead that Kirkland & Ellis committed a primary violation of Section 10(b), they do not allege that Kirkland made even a single representation communicated to any Enron shareholder. Not only is an alleged misrepresentation or omission a necessary element of a Section 10(b) claim based on deception, but the PSLRA specifically requires plaintiffs in securities cases to "specify each statement alleged to have been misleading," as well as "the reason or reasons why the statement is misleading." 15 U.S.C. § 78*u*-4(b)(1). Accordingly, plaintiffs cannot establish primary liability for "deceptive" conduct as a matter of law.

In a string of decisions since *Central Bank of Denver*, the Second, Tenth, and Eleventh Circuits have all required that, to state a claim of ***primary*** liability against a particular defendant, a plaintiff must allege that a defendant itself actually made a misrepresentation communicated to the investing public. As the Second Circuit explained:

> [I]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b). . . . [B]ecause § 10(b) and Rule 10b-5 focus on fraud made in connection with the sale or purchase of securities, a defendant must "know or should know" that his representation would be communicated to investors.

Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998) (quotations omitted). And, in a recent case brought against a law firm, the Eleventh Circuit held that a plaintiff must allege not

only a direct misstatement by the defendant, but also that the statement was "publicly attributable to the defendant at the time that the plaintiff's investment decision was made." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001). Unless the statement is attributed to the defendant, the court reasoned, no plaintiff could possibly plead reliance on that defendant's representations. *See id.*; *see also Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("The critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff. Reliance only on representations made by others cannot itself form the basis of liability.").

When plaintiffs themselves actually identify the entities alleged to be responsible for Enron's "disclosures . . . to investors," Kirkland is conspicuously absent from the list. *See* Compl. ¶ 862. In fact, the ***only*** representations Kirkland is alleged to have made ***were never communicated to the investing public*** – and, by definition, were never publicly attributed to Kirkland. These representations therefore cannot sustain a claim of primary liability. Thus, plaintiffs have not alleged and cannot allege that the "opinions" that Kirkland allegedly produced were transmitted to a single Enron shareholder; to the contrary, the complaint itself makes clear that they were drafted in connection with private transactions between Enron and the partnerships and were ***not*** included in or drafted for any public disclosure or shareholder solicitation. *See* Compl. ¶¶ 862, 863, 865.[3] Plaintiffs' allegation that Kirkland authored a private placement memorandum for LJM2 is likewise insufficient to state a claim of "deception"

under Section 10(b). Plaintiffs themselves emphasize that the LJM2 private placement memorandum "***was not a public document***," Compl. ¶ 880 (emphasis in original), but went only to potential institutional investors in the partnership. Nor do plaintiffs cite even a single specific statement in the private placement memorandum (or the opinions) that is alleged to be false or misleading. To the contrary, as plaintiffs concede, the private placement memorandum truthfully disclosed the role that Enron employees would play in LJM2, and it explicitly disclosed the potential for conflicts of interest. *Id.* Thus, to the extent plaintiffs seek to allege a Section 10(b) claim based on deception in the form of misrepresentations or omissions, it plainly is subject to dismissal under both *Central Bank of Denver* and its progeny as well as the PSLRA.

B. Plaintiffs' Allegations That Other Parties Employed "Manipulative Devices" Cannot State A Claim Against Kirkland.

Without a single potential misrepresentation on which to base a securities fraud claim against Kirkland, plaintiffs must allege, in order to state a claim, that Kirkland itself "employ[ed] a manipulative device" in connection with the purchase or sale of a security. *Central Bank of Denver*, 511 U.S. at 191. In this regard, plaintiffs allege that Kirkland's private partnership clients were essentially manipulative devices that ***Enron*** used to disguise ***Enron's*** financial position. The problem with that allegation is that it is Enron and Enron's insiders – not Kirkland – who are alleged to have "use[d] or employ[ed]" these partnerships to "manipulate" Enron's financial statements in connection with the purchase or sale of Enron securities. Indeed, plaintiffs do not make much of an effort to plead otherwise. For example, in paragraph 878, they

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[3] Plaintiffs' allegations concerning Kirkland's supposedly "false opinions" would have been insufficient to state even an aiding and abetting claim in this Circuit before *Central Bank of Denver* was decided. *See Abell*, 858 F.2d at 1124-25 (legal opinion issued by law firm cannot give rise to Section 10(b) aiding and abetting liability where opinion was never transmitted to actual or potential shareholders). Under controlling Fifth Circuit law, for a law firm's opinion letter to be actionable under the securities law, the opinion must be drafted "***for the benefit of the plaintiff***," *id.* at 1124 (emphasis added), and here there can be no such allegation.

allege that Kirkland "***helped Enron use these contrivances and manipulative devices*** to inflate Enron's reported financial results." Compl. ¶ 878 (emphasis added).

These allegations are fatally deficient to state a "manipulation" claim under Section 10(b). As an initial matter, an "off balance sheet" special purpose entity, or "SPE," is not a "manipulative device" within the meaning of Section 10(b).[4] The Supreme Court has observed that the term "manipulative device" is "virtually a term of art when used in connection with securities markets," referring "generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activities." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977) (quotations omitted). Following *Santa Fe*, courts have construed the term "manipulative device" to refer specifically to practices designed to create a false impression of market activity when no such activity is occurring. *See, e.g., In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 267 (W.D. Tex. 1979) (Higginbotham, J.) ("manipulative devices" within the meaning of Section 10(b) mean "devices that have the effect of misinforming investors by creating the false impression that certain market activity is occurring when in fact such activity is unrelated to supply and demand"). Here, there is not a single allegation that any act by Kirkland constituted "matched orders" or "wash sales" or any similar transaction that would create a false impression of artificial market activity. Accordingly, plaintiffs fail to allege Section 10(b) liability against Kirkland on a "manipulative device" theory.

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[4] SPEs and "off-balance-sheet" transactions are routinely used in a wide variety of forms by corporations and banks, including for securitization of debts or assets and in order to manage their balance sheets. *See, e.g.*, Exclusion from the Definition of Investment Company for Certain Structured Financings, SEC Rel. No. IC-18736, 57 Fed. Reg. 23980 (June 5, 1992) (discussing developing uses of SPEs for secured financings and similar financing structures); Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Rel. Nos. 33-8056, 34-45321, 67 Fed. Reg. 3746 (Jan. 22, 2002) (discussing SPEs and off-balance-sheet transactions in connection with the issuer's disclosure obligations).

Moreover, even assuming that the private partnerships or SPEs themselves were "manipulative devices" within the meaning of Section 10(b), there is still no allegation that Kirkland – as opposed to Enron – actually "used or employed" them "in connection with" the purchase or sale of securities. The whole point of *Central Bank of Denver* was to make clear that a party cannot be held liable under Section 10(b) unless ***that party's*** conduct falls within the statute's proscription. Thus, with respect to a fraud claim based on a deception (*i.e.*, a misrepresentation), the courts of appeals have required that defendants "must ***themselves*** make a false or misleading statement (or omission)" in order to be found liable. *Anixter*, 77 F.3d at 1226 (emphasis added). Because the "use or employ" requirement of Section 10(b) applies equally to deception and manipulation, it necessarily follows that the rule in *Anixter* must also apply to fraud claims based on alleged manipulative devices, *i.e.*, that defendants must "themselves" "use or employ" the manipulative device in connection with a securities transactions to be held liable. Here, however, plaintiffs do not allege that Kirkland itself actually used or employed the alleged manipulative devices in connection with the purchase or sale of securities.[5]

In the end, plaintiffs' entire theory against Kirkland appears to be an attempt to fit within two outlier decisions of the Ninth Circuit. The first, *In re Software Toolworks, Inc.*, 50 F.3d 615 (9th Cir. 1994), suggests in a footnote that a secondary actor may be primarily liable under Section 10(b) if it played a "significant role" in drafting documents containing actionable misrepresentations. *Id.* at 628 n.3. This *Software Toolworks* dictum has been rejected as

[5] The Supreme Court has similarly construed "use or employ" in other statutes to require the active utilization of the proscribed object for one's own benefit. Thus, in *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that liability for "use" of a firearm in relation to drug-trafficking crimes requires the defendant's "active employment of the firearm." *Id.* at 144. The Court reasoned that "[t]he word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as '***to convert to one's service***,' '***to employ***,' '***to avail oneself of***,' and '***to carry out a purpose or action by means of***.'" *Id.* at 145 (emphases added) (case and dictionary citations omitted). *See also Jones v. United States*, 529 U.S. 848 (2000).

inconsistent with *Central Bank of Denver* by every court of appeals to consider it.[6] Plaintiffs also appear to rely on the Ninth Circuit's statement that the *Central Bank of Denver* decision did "not preclude liability based on allegations that a group of defendants acted together to violate the securities laws, as long as each defendant committed a manipulative or deceptive act ***in furtherance of the scheme***." *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997) (emphasis added). To the extent that *Cooper* requires only an act in furtherance of the scheme – without also requiring that a plaintiff allege ***all*** the elements of a claim under Section 10(b) and Rule 10b-5 – the case is obviously wrongly decided under *Central Bank of Denver*. *See* 511 U.S. at 191. In any event, as this Court has recognized, *Cooper* (like *Software Toolworks*) is a pre-PSLRA case, which therefore did not take into account Congress's decision after *Central Bank* to authorize ***only*** the SEC to bring "substantial assistance" claims under Section 10(b). *See BMC Software*, 183 F. Supp. 2d at 908-09 & n.48 (rejecting reliance on *Cooper* and citing *Pegasus Holdings v. Veterinary Ctrs. Of Am.*, 38 F. Supp. 2d 1158, 1165-66 (C.D. Cal. 1998), as "rejecting plaintiffs' argument that non-speakers may be liable if they participated in a fraudulent scheme"); 15 U.S.C. § 78*t*(e).

C. Plaintiffs' Failure To Plead Reliance Upon Any Statement Or Act Of Kirkland Constitutes An Independent Ground For Dismissal.

Because plaintiffs fail to identify any misrepresentation, omission, or manipulative device used or employed by Kirkland in connection with the purchase or sale of any security, it comes as no surprise that plaintiffs also have failed to allege that plaintiffs reasonably relied on

[6] *See Anixter*, 77 F.3d at 1226 n.10 (declining to follow *Software Toolworks* because to the extent it "allow[s] liability to attach without requiring a representation to be made by defendant, and reformulate[s] the 'substantial assistance' element of aiding and abetting liability into primary liability, [it does] not comport with *Central Bank*"); *Wright*, 152 F.3d at 176 (stating, in response to plaintiff's invitation to follow footnote 3 of *Software Toolworks*, "[w]e decline to do so"); *Ziemba*, 256 F.3d at 1205 (following the Second Circuit's decision in *Wright* and rejecting *Software Toolworks*).

anything that Kirkland allegedly said or did. The Supreme Court made clear in *Central Bank of Denver*, however, that the reliance element is "critical for recovery under 10b-5." 511 U.S. at 180. The Court explained that one important reason why aiding and abetting liability is not available under Section 10(b) is that such a theory would allow a plaintiff to circumvent the reliance requirement. If plaintiffs were allowed to proceed on a theory of secondary liability, a "defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." *Id.* at 180. This would improperly "disregard the careful limits on 10b-5 recovery mandated" by the Court's earlier cases. *Id.* The absence of specific allegations of reliance on a defendant's allegedly wrongful acts is thus an independent ground for dismissal under Rule 12(b)(6). *See Dinsmore*, 135 F.3d at 843.

Here, plaintiffs have not alleged that either they personally, or the market generally, relied on any act or statement by Kirkland. The mere two paragraphs in the complaint directed to reliance allege only that reliance in this case is based on the "fraud-on-the-market" theory, *i.e.*, the theory that "the market for Enron's publicly traded securities promptly digested current information regarding Enron from all publicly available sources and reflected such information in the price of Enron's securities," and that Enron investors therefore can be presumed to have relied upon such publicly available information. *See* Compl. ¶¶ 983-984.

The presumption that individual investors relied upon information conveyed generally to the market, however, does not apply to Kirkland's alleged statements and actions because none is alleged to have been conveyed to the public. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (rationales for "fraud-on-the-market" do not "explain[] how prices would respond to ***non-public*** information") (emphasis added). Plaintiffs have not alleged – as they must in order to plead reliance – that Kirkland said (or refrained from saying) or did ***anything***

upon which the market allegedly relied. It is not enough in Kirkland's case to allege that others made misrepresentations to the public or manipulated trading in Enron stock. As the Tenth Circuit has explained, "[r]eliance only on representations made by others cannot itself form the basis of liability." *Anixter*, 77 F.3d at 1225. Indeed, the Second Circuit in *Dinsmore* applied precisely this rationale in dismissing a Section 10(b) claim against a law firm. The court found reliance lacking because, as in this case, "far from relying upon [the law firm's] communications in purchasing their securities," the plaintiffs "were entirely unaware of them." *Dinsmore*, 135 F.3d at 843.

D. Plaintiffs' Complaint Against Kirkland Must Be Dismissed Because It Fails To Plead Scienter.

Plaintiffs' failure to adequately plead that Kirkland acted with "scienter" – that is, with an "intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 188 (1976) – provides yet another independent ground requiring dismissal of the claim. As this Court recognized in the *BMC Software* case, a "conclusory statement . . . is insufficient to give rise to a strong inference of scienter." 183 F. Supp. 2d at 901. But that is all that plaintiffs have alleged here with respect to Kirkland. Indeed, plaintiffs' conclusory and circular allegations of scienter against Kirkland are the prototype for dismissal under the heightened pleading standards of the PSLRA and Federal Rule of Civil Procedure 9(b).

As an initial matter, it is important to emphasize that plaintiffs must satisfy Rule 9(b)'s heightened pleading requirements ***and*** the PSLRA's even more stringent pleading requirements in order to state a securities fraud claim against Kirkland. *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001); *BMC Software*, 183 F. Supp. 2d at 895-96, 901. Rule 9(b) governs all fraud claims in federal court and requires that "the circumstances constituting the fraud . . . shall be stated ***with particularity***." Fed. R. Civ. P. 9(b) (emphasis added). Even before

Congress enacted the PSLRA, the Fifth Circuit read Rule 9(b) to require that securities fraud plaintiffs state specifically the "who, what, when, where, and how" of the alleged fraud. *Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994).

"Unsatisfied with . . . the perceived inability of Rule 9(b) to prevent abusive, frivolous strike suits," *Nathenson*, 267 F.3d at 407, Congress imposed even more substantial pleading requirements over and above Rule 9(b)'s high bar. Among other requirements, the PSLRA mandates that plaintiffs' scienter allegations ***must***, "with respect to each act or omission alleged to violate this title, ***state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind***." 15 U.S.C. § 78*u*-4(b)(2) (emphasis added). Moreover, because all the allegations against Kirkland are plainly based on "information and belief," plaintiffs ***must*** "***state with particularity all facts on which [their] belief is formed***." 15 U.S.C. § 78*u*-4(b)(1)(B) (emphasis added). Under the heightened standards applicable to plaintiffs' fraud claim, "mere conclusory allegations" do not "plead scienter adequately." *BMC Software*, 183 F. Supp. 2d at 900. Plaintiffs may not simply "couple a factual statement with a conclusory allegation of fraudulent intent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994).

Because the complaint alleges absolutely no factual basis to support the inference that Kirkland had the scienter to commit a ***primary violation*** of Section 10(b), plaintiffs' allegations plainly do not satisfy the PSLRA's dictates. The Fifth Circuit has held that the requisite mental state under Section 10(b) "of intent to deceive, manipulate, or defraud," *Ernst & Ernst*, 425 U.S. at 188, may be satisfied by a showing of "severe recklessness" bordering on "intentional misconduct." *Nathenson*, 267 F.3d at 408; *see BMC Software*, 183 F. Supp. 2d at 867-68 n.18. Thus, to show scienter, plaintiffs must allege "***particularized facts***" that give rise to the "***strong***

inference" that Kirkland intended to commit fraud (as opposed to intending to assist Enron's fraud), or that Kirkland's conduct was so reckless that the "danger of misleading buyers or sellers" was "known to" Kirkland or was "so obvious that [Kirkland] must have been aware of it." *Nathenson*, 267 F.3d at 408, 412. Plaintiffs, however, have completely failed to provide the requisite factual allegations to give rise to a strong inference that Kirkland had any intent whatsoever to defraud "buyers or sellers" of Enron stock, or that any act or statement of Kirkland would ever be communicated to Enron investors. *Id.*

The complaint's fundamental failure to allege scienter as to Kirkland is nowhere more evident than with respect to the allegations of Kirkland's knowledge of the alleged accounting fraud committed by Enron and Arthur Andersen. Although plaintiffs attempt to plead the case to shift focus away from the bankrupt Enron and its financially troubled accounting firm, there can be no dispute that the accounting determinations and financial disclosures of Enron and Andersen are at the center of this case. And here, plaintiffs allege no particularized facts whatsoever to support the proposition that Kirkland ***knew*** that Enron and Andersen would account for the transactions improperly and publish materially inaccurate financial statements – much less that Kirkland itself somehow intended to deceive Enron investors.

Thus, with respect to the Chewco transaction, plaintiffs conclusorily allege that Kirkland "knew Chewco/JEDI was not a valid SPE meeting the requirements for non-consolidation." Compl. ¶ 872 (emphasis omitted). But plaintiffs do not allege that Kirkland had the expertise, opportunity, or responsibility for making this accounting determination, or any facts to support the inference that Kirkland knew that the structuring of this transaction somehow undermined ***Enron's*** technical accounting decisions about whether to consolidate JEDI on Enron's balance sheet and financial disclosures. Similarly, with respect to the Raptor transaction, plaintiffs allege

that Kirkland "devised mechanisms and structures to enable Enron to create purported income by abusing mark-to-market accounting." Compl. ¶ 890. There is not a single allegation, however, that Kirkland, a law firm, had any expertise in the complex field of "mark-to-market accounting," let alone the intent to use this expertise to defraud Enron investors or the knowledge that Enron was doing so.[7]

Plaintiffs also seemingly attempt to establish Kirkland's scienter with the allegation that Kirkland's client, LJM2, engaged in deals with Enron "close to the end of financial reporting periods to artificially boost reported results to meet forecasts Enron and other participants in the scheme had been making." Compl. ¶ 875 (emphasis omitted). Of course, there is nothing unusual about a party engaging in transactions at the end of a quarter. *See, e.g.*, *DSAM Global Value Fund v. Altris Software, Inc.*, ___ F.3d ___, 2002 WL 598417, at *2-4 (9th Cir. Apr. 19, 2002) (dismissing complaint where plaintiffs' "red flag" allegations included issuer's recording transactions "on the last day of the year"). Plaintiffs are alleging at most that Kirkland should have suspected something was awry, but the Fifth Circuit has long held that "[a]roused suspicions . . . do not constitute actual awareness of one's role in a fraudulent scheme." *Abell*, 858 F.2d at 1128.[8] Plaintiffs provide absolutely no specific factual support for the proposition

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[7] Indeed, the Special Committee investigating Enron's collapse said that "it would be inappropriate to fault" Enron's outside counsel "for accounting matters, which are not within its expertise." Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp., at 26 (Feb. 1, 2002) (publicly available on the World Wide Web at http://energycommerce.house.gov/107/hearings/02052002Hearing481/hearing.htm#docs). If Enron's own attorneys cannot be faulted for Enron's accounting, there can be no suggestion that Kirkland – which did not even represent Enron – should be held accountable for Enron's financial reporting. (As much of plaintiffs' complaint is drawn directly from the Special Committee's Report, and as the fact of the Special Committee's Report is not subject to dispute, the Court may take judicial notice of it on this motion. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *BMC Software*, 183 F. Supp. 2d at 882-84.)

[8] Although *Abell* was vacated as to issues under the federal RICO statute, the Fifth Circuit has held that the decision "remains authoritative on the non-RICO issues." *Abbott v. The Equity Group, Inc.*, 2 F.3d 613, 621 n.23 (5th Cir. 1993).

that Kirkland knew these transactions were being misused by Enron to misstate Enron's earnings.[9]

Moreover, the only motive that plaintiffs allege for Kirkland to participate in this massive fraudulent scheme – the incentive to earn hourly fees, Compl. ¶ 864 – has been expressly rejected by the Fifth Circuit as a basis for pleading scienter. In *Melder*, the Fifth Circuit dismissed a complaint against Coopers & Lybrand on the ground that plaintiffs failed to plead scienter with sufficient particularity. There, as here, the "plaintiffs' only allegations of the accounting firm's intent in participating in the securities fraud [were] that the firm sought to . . . protect and enhance the substantial auditing and other fees received" from its client. 27 F.3d at 1102. The Fifth Circuit expressly rejected this allegation as inadequate and reasoned that "[a] contrary conclusion would universally eliminate the state of mind requirement in securities fraud actions against accounting firms." *Id.* at 1103. The same reasoning applies to law firms like Kirkland & Ellis, which, like accounting firms, routinely charge fees for their professional services, and therefore could be subject to suit based on this type of motive allegation in every

[9] Plaintiffs' inclusion of a handful of inflammatory – and entirely conclusory – allegations of alleged misconduct by Kirkland do nothing to substantiate the scienter allegation. In particular, the complaint suggests without any factual basis whatsoever that Kirkland falsified a document in the Chewco transaction, Compl. ¶ 869, and backdated a document in the Yosemite transaction, Compl. ¶ 884. These baseless allegations cannot survive the PSLRA. Plaintiffs specify no document in the Chewco transaction that was falsified, they point to no statement in any document that was untrue, and they fail to allege who falsified the unspecified document, when it was falsified, and how it was falsified. Likewise, plaintiffs never specifically identify which document in the Yosemite transaction was "backdated," who "backdated" the document, in what sense it was "backdated," or how it allegedly differed from the deal actually struck on the date of the document. These bare allegations plainly cannot survive the PSLRA's stringent pleading requirements. *See* 15 U.S.C. §§ 78*u*-4(b)(1), 78*u*-4(b)(2); *Nathenson*, 267 F.3d at 412.

case. *See id.* Like the Fifth Circuit in *Melder*, this Court should "not indulge irrational inferences of the firm's fraudulent intent based on these generic allegations." *Id.*[10]

III. Plaintiffs' Claim Against Kirkland Is An Impermissible Attempt To Use The Federal Securities Laws To Expand Attorney Liability.

Kirkland is in a unique position among the many defendants in this case. Kirkland is not an insider, is not accused of insider trading, and is not accused of investing in any Enron partnership or profiting from any dealings with Enron other than by performing routine legal work for the partnerships. Nor is Kirkland alleged to have provided any accounting or banking advice to Enron. And, most important, Kirkland never had an attorney-client relationship with Enron, did not serve as Enron's counsel for purposes of securities offerings or SEC filings, and did not make any statements or representations concerning Enron to the investing public. Kirkland's role, succinctly stated, was that of legal counsel to certain non-public entities that engaged in transactions with Enron.

Against this backdrop, plaintiffs' Section 10(b) claim against Kirkland is extraordinary. Plaintiffs effectively ask this Court to sweep aside time-honored principles governing the relationships between attorneys and their clients, and to create unprecedented forms of attorney liability under the federal securities laws. In essence, plaintiffs allege that Kirkland – which

[10] Plaintiffs' allegation that some unspecified "part of Kirkland & Ellis's fees was paid directly or indirectly by Enron," Compl. ¶ 864, does not show that Kirkland was counsel to Enron or responsible for Enron's accounting determinations or public SEC disclosures. Even taking the allegation as true (and as pleaded in sufficient detail, which it is not), it is well established that the entity that pays the lawyer's fees does not thereby become the client. *See, e.g., Mason Tenders Dist. Council Pension Fund v. Messera*, 4 F. Supp. 2d 293, 300 (S.D.N.Y. 1998) ("the payment of legal fees by a third person creates no attorney-client relationship or privity between the attorney and his client's benefactor") (quotation omitted); *see also Premium Prods. Sales Corp. v. Chipwich, Inc.*, 539 F. Supp. 427, 433 (S.D.N.Y. 1982); *In re Federal Bank & Trust Co., Ltd., Sec. Litig.*, 1983 U.S. Dist. LEXIS 17352 (D. Ore. 1983). Plaintiffs' conclusory allegation that Andrew Fastow "directed" Kirkland, Compl. ¶ 861, is likewise insufficient to establish that Enron "controlled" Kirkland, because as plaintiffs themselves concede, Enron's Board authorized Fastow to act in these transactions not for Enron, but for the SPEs and

represented parties in transactions with Enron – had a duty not only to detect the frauds Enron is alleged to have committed but also a duty to "blow the whistle" on Enron, even if to do so would have violated Kirkland's duties of loyalty and confidentiality to its clients. The Fifth Circuit, like many federal courts, has emphatically rejected this theory of lawyer liability because attorneys' duties of loyalty and confidentiality run to their ***clients***, not to third parties; a plaintiff cannot state a federal securities claim against a law firm for allegedly assisting (or failing to stop) a client's fraudulent scheme, let alone that of some other party that is not a client. *Abell*, 858 F.2d at 1124.

To be sure, Kirkland appreciates that attorneys, as officers of the Court, have certain duties that are broader than those to their clients; and Kirkland understands, particularly in situations like the demise of Enron, the impulse to look for parties that might have been able to prevent the fall. But, consistent with a longstanding body of caselaw, plaintiffs' effort to dramatically expand lawyer liability to ensnare Kirkland must be rejected. As the Fourth Circuit has explained, the policy argument in favor of expanding lawyer liability through the securities laws, "[l]ike most policy arguments, . . . has two sides." *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 475 (4th Cir. 1992). "An omnipresent duty of disclosure would not only be unfair to law firms; it would destroy incentives for clients to be forthcoming with their attorneys and would artificially inflate the cost of involving legal counsel in commercial ventures." *Id.* The Seventh Circuit has therefore instructed that "an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards." *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986).

In *Abell* itself, the Fifth Circuit held that an underwriter's counsel could not be held liable for securities fraud, notwithstanding plaintiffs' allegations that: underwriter's counsel was

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partnerships that were Kirkland's clients. *Id.* ¶¶ 395, 451, 460, 479.

responsible for reviewing the offering statement and was aware of inaccuracies in the statement; counsel had a duty of "due diligence" to investigate the representations in the statement; the firm allowed its name to appear on the cover of the offering statement; and counsel adopted false statements and distortions of the facts offered by the sellers of the bonds. 858 F.2d at 1111. The court refused to impose upon the law firm a duty to disclose its clients' misrepresentations:

> 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 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.

The Fourth Circuit followed *Abell's* reasoning in *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991). There, the purchaser in a securities transaction alleged that the seller's law firm: had access to internal information about the seller and its principal; had a copy of the principal's financial statement, which the firm knew to be false based upon information obtained in the course of providing legal services; prepared draft closing documents for the transaction, incorporating into the documents false statements by the seller's principal; delivered the false documents to plaintiffs' lawyers; provided plaintiffs with the closing letter from the seller's principal falsely stating that there had been no material adverse changes in his financial condition; and represented that the seller's financial statement and an update letter were accurate in all material respects, when in fact they were not. *Id.* at 489. The court held these allegations to be insufficient to state a securities fraud claim against the firm, reasoning that neither federal nor state law, nor considerations of "public policy," require lawyers to disclose their clients'

misrepresentations "to innocent third parties." *Id.* at 493. "Any other result may prevent a client from reposing complete trust in his lawyer for fear that he might reveal a fact which would trigger the lawyer's duty to the third party." *Id.* *See also Fortson,* 961 F.2d at 472-75 (law firm that prepared tax opinion letter for private placement memorandum had no duty under federal securities law to ensure accuracy of balance of memorandum absent pre-existing fiduciary duty to plaintiff investors); *Barker,* 797 F.2d at 497 (refusing to impose upon law firm duty to disclose information relevant to its client's financial stability to third party investors); *Renovitch v. Kaufman*, 905 F.2d 1040 (7th Cir. 1990) (absent fiduciary duty to third party investor, issuer's law firm has no duty to disclose financial information about its client to investor).

Plaintiffs' attempt to impose liability on Kirkland is even more extreme than the claims rejected in *Abell* and the other authorities discussed above because, here, Kirkland is ***two duties*** removed from the plaintiff class. Issuer's counsel ordinarily has no fiduciary duties to its client's shareholders; here, Kirkland did not even represent the issuer, but instead represented parties engaged in transactions with the issuer. Allowing plaintiffs' claim to proceed against a law firm in Kirkland's position would seriously undermine a firm's ability to represent its client's interests; the firm would also be charged – as a matter of federal securities law – to concern itself not simply with the interests of other, non-client parties to the transaction, but with non-client shareholders of those non-clients. This bizarre result would be at odds with binding Fifth Circuit authority, the well-reasoned decisions of other Circuits, and the basic tenets of attorney-client confidentiality and loyalty that form the basis for our legal system.

CONCLUSION

Because plaintiffs have failed to plead a claim against Kirkland & Ellis for securities fraud under Section 10(b) and Rule10b-5, and because their complaint leaves no doubt that it is impossible for them to state such a claim, we respectfully request that the Court dismiss with prejudice Count I of the *Newby* complaint as against Kirkland. *See Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872-73 (5th Cir. 2000) (court has discretion to deny leave to amend where amendment would be futile). A proposed order is submitted with this motion.

DATED: May 8, 2002

Respectfully submitted,

John W. Spiegel /KA with permission

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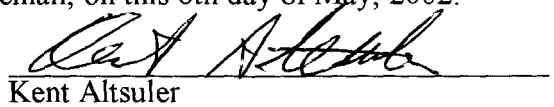
CERTIFICATE OF SERVICE
Per Court Order 4/04/02

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by facsimile or email, on this 8th day of May, 2002.



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

In re ENRON CORPORATION SECURITIES LITIATION	§	
	§	**Civil Action No. H-01-3624**
This Document Relates To:	§	(CONSOLIDATED)
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

ORDER GRANTING DEFENDANT KIRKLAND & ELLIS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b) and 12(b)(6), AND THE PSLRA

Pending before the Court is Defendant Kirkland & Ellis' Motion to Dismiss the Amended Consolidated Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and the PSLRA.

Based upon a review of the pleadings, moving papers, responsive and reply papers, oral argument of counsel, and all other matters properly presented,

IT IS HEREBY ORDERED that Defendant Kirkland & Ellis' Motion to Dismiss is GRANTED, and the Complaint against Kirkland & Ellis is DISMISSED WITH PREJUDICE.

SIGNED at Houston, Texas, this _____ day of _____, 2002.

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE