

Table Of Contents

Table Of Authorities iii
Preliminary Statement 2
Argument 2
Conclusion 5
Certificate of Service 7

Table Of Authorities

Cases

*Central Bank of Denver, N.A. v. First Interstate
Bank of Denver, N.A.*, 511 U.S. 164 (1994) 2, 4, 5

Coates v. Heartland Wireless Communications, Inc.,
26 F. Supp.2d 910 (N.D. Tex. 1998) 4

In Re Sec. Litig. BMC Software, Inc.,
183 F. Supp.2d 860 (S.D. Tex. 2001) 4

Tuchman v. DSC Communications Corp., 14 F.3d 1061
(5th Cir. 1994) 4

Williams v. WMX Technologies, Inc., 112 F.3d 175
(5th Cir. 1997) 3

Wright v. Ernst & Young L.L.P., 152 F.3d 169 (2d
Cir. 1998) 5

Zishka v. American Pad & Paper Co.,
No. 3:98-CV-0660-M, 2000 U.S. Dist. LEXIS
13300 (N.D. Tex., Sept. 13, 2000) 3

Statutes

17 Code of Federal Regulations § 240.10b-5 (2002) .. 1, 2, 3, 4, 5

1934 Act, § 10(b) 3

Private Securities Litigation Reform Act, 15
U.S.C. § 78u-4 (1995) 1, 2, 3, 4, 5

Rules

Federal Rule of Civil Procedure 12(b)(5) 2

Federal Rule of Civil Procedure 12(b)(6) 1

Federal Rule of Civil Procedure 9(b) 1, 2, 3, 4, 5

Preliminary Statement

The only claim the *Newby* complaint asserts against Odom, who served as an Arthur Andersen audit practice director, is an alleged violation of 10b-5. However, this claim cannot stand, for the simple reason the complaint does not allege Odom made any representation, much less a misrepresentation upon which any plaintiff relied. Because Federal Rule of Civil Procedure 9(b), the PSLRA, and *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), all require plaintiffs to plead with particularity some statements by or attributed personally to Odom upon which plaintiffs relied to their detriment, the 10b-5 claim against Odom must be dismissed.

Argument

A complaint that fails to allege any representation by a particular defendant cannot sustain a 10b-5 claim against that defendant. Because the *Newby* complaint does not allege that Odom made any representation whatsoever, plaintiffs' 10b-5 claim against him fails as a matter of law.

Rule 10b-5, in relevant part, makes it unlawful for any person in connection with the purchase or sale of a security:

(. . . continued)
of [the *Newby*] Plaintiffs' Consolidated Complaint," dated May 8, 2002, as additional grounds for dismissal of the 10b-5 count against him. Finally, because Odom has not been served, Odom moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(5).

[t]o make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading

17 C.F.R. § 240.10b-5 (2002).

To state a claim under § 10(b) of the 1934 Act, plaintiffs must allege: (1) a misrepresentation or omission; (2) of a material fact; (3) made with the intent to defraud; (4) on which the plaintiffs relied; (5) which proximately caused the plaintiffs' injury. *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997).

A plaintiff's claim for a violation of § 10(b) of the 1934 Act must satisfy the strict pleading requirements for fraud set out in Federal Rule of Civil Procedure 9(b) and the PSLRA. Federal Rule of Civil Procedure 9(b) requires a specification of the alleged fraudulent statements, identification of the speaker, a description of when and where the statements were made, and an explanation of what makes such statements fraudulent. *Williams*, 112 F.3d at 178. Similarly, to comply with the PSLRA, plaintiffs must plead with particularity their allegations against each individual defendant; this requires the complaint to delineate specifically what each defendant allegedly said. *Zishka v. American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 U.S. Dist. LEXIS 13300 (N.D. Tex., Sept. 13, 2000).

Even prior to the enactment of the PSLRA, courts in the Fifth Circuit held that general allegations that did not state with particularity what representations each defendant made failed to meet the particularity requirement of Federal Rule of

Civil Procedure 9(b). See, e.g., *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) (pleading fraud with particularity in the Fifth Circuit requires plaintiffs to allege the "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby."). The PSLRA has further reinforced this standard. In *In Re Sec. Litig. BMC Software, Inc.*, 183 F. Supp.2d 860, 902 n.45 (S.D. Tex. 2001) (Harmon, J.), this Court held that the "group pleading doctrine," which "relieved [the plaintiff] of his Rule 9(b) and/or PSLRA burden of attributing statements to a particular defendant with scienter," did not survive the enactment of the PSLRA. See *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp.2d 910, 916 (N.D. Tex. 1998) ("It is nonsensical to require [under the PSLRA] that a plaintiff specifically allege facts regarding scienter as to each defendant, but to allow him to rely on group pleading in asserting that the defendant made the statement or omission.").

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), in which the Supreme Court held there is no private right of action against aiders and abettors under 10b-5, also makes it clear that a plaintiff cannot state a 10b-5 claim against a defendant if the plaintiff did not rely on a misrepresentation made by that defendant. In *Central Bank*, the court explained:

A plaintiff must show reliance on the defendant's misstatement or omission to recover under 10b-5.

511 U.S. at 179 (emphasis added).

The Second Circuit applied this rule in *Wright v. Ernst & Young L.L.P.*, 152 F.3d 169 (2d Cir. 1998), holding that a 10b-5 claim cannot be sustained against a defendant when the document on which plaintiff relied does not attribute any statements to the defendant and does not mention the defendant by name. There, the Second Circuit explained:

[A] secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination. Such a holding would circumvent the reliance requirements of the Act, as "[r]eliance only on representations made by others cannot itself form the basis of liability." Thus, the misrepresentation must be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.

Id. at 174 (citations omitted).

It is clear that Rule 9(b), the PSLRA, and *Central Bank* all require the very thing that plaintiffs have failed to do in this case: attribute any alleged misrepresentations personally to Odom. That failure is fatal to plaintiffs' claim against Odom. Because the complaint does not allege a single misrepresentation by Odom, the 10b-5 claim against him must be dismissed.

Conclusion

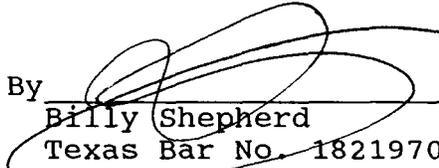
For the reasons stated above, the Complaint should be dismissed in its entirety as to Odom.

Signed this 8th day of May, 2002.

Respectfully submitted,

CRUSE, SCOTT, HENDERSON & ALLEN L.L.P.

By


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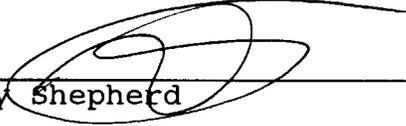
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Certificate of Service

I hereby certify that on this 24th day of March, 2002, a true and correct copy of the foregoing instrument was served upon counsel of record in accordance with the Court's Order Regarding Service of Papers and Notice of Hearings.



Billy Shepherd

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

PAMELA M. TITTLE, et al., on	§	
Behalf Of Herself And A Class	§	Civil Action
Of Persons Similarly Situated	§	No. H-01-3913
	§	and Consolidated Cases
v.	§	
	§	(lead ERISA case)
ENRON CORP., an Oregon	§	
Corporation, et al.	§	

ORDER

The Court grants Defendant Michael C. Odom's Motion To Dismiss Pursuant To Fed. R. Civ. P. 9(b) And 12(b)(6) And The PSLRA, and dismisses with prejudice and in its entirety Plaintiffs' First Consolidated And Amended Complaint as against Defendant Michael C. Odom.

Signed this ____ day of _____, 2002.

Melinda J. Harmon
United States District Judge