

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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MAY 09 2002

Michael N. Milby, Clerk

MARK NEWBY,

Plaintiff,

VS.

ENRON CORP., et al.,

Defendants.

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CIVIL ACTION NO. H-01-3624
(Consolidated)

2002 MAY 09 11:31
U.S. COURTS
SOUTHERN DISTRICT OF TEXAS

DEFENDANT JOSEPH W. SUTTON'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure ("FED. R. CIV. P." or "Rule") 12(b)(6), Defendant JOSEPH W. SUTTON ("Sutton") files this Motion to Dismiss all claims asserted against him in Plaintiffs' Consolidated Complaint for Violation of the Securities Laws (the "Complaint"), for failure to state a claim upon which relief can be granted.

I. Introduction

Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") to curb the abuse and misuse of securities-related class actions. A primary tenet of the PSLRA's reforms is the requirement that securities plaintiffs particularize facts which, if true, would support an actionable claim under U.S. securities law. In other words, the PSLRA reasonably requires that plaintiffs, *at a minimum*, be able to allege facts that support their claim against a defendant *before* bringing that claim to court.

The policy underlying this requirement is clear: securities fraud allegations are simply too damaging to a defendant's reputation to allow plaintiffs free reign to sue anybody and everybody associated with a company whose stock has gone down:

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[The] heightened pleading standard provides defendants with fair notice of the plaintiffs' claims, protects them from harm to their reputations and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs.

Schiller v. Physicians Resource Group, Inc., CV-3158-L, slip op. at 4. (N.D. Tex. 2002) (Westlaw cite 2002 WL 318441 *4) (citing *Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994)).

In the present case, Plaintiffs have brought suit against anybody and everybody who exercised corporate authority at Enron Corp. ("Enron") prior to that company's bankruptcy. Included in this group is Sutton, a former Enron Vice Chairman who left the company in October of 2000 and whose only "crime" was that he exercised stock options and, on one occasion, attended meetings where someone from Enron made a positive statement about the company's business. The claims pled against Sutton represent just the sort of "*damn the facts - sue everybody*" lawsuit that Congress passed the PSLRA to prevent. With this motion, Sutton asks that these claims be dismissed.

II. Summary of Motion

A. Plaintiffs' "Group Pleading" Allegations Should Be Ignored.

Federal Rule of Civil Procedure 9(b) and the PSLRA require that securities plaintiffs particularize specific facts supporting their claims against a defendant. This requires that plaintiffs state their claims against each defendant individually, and not simply against defendants as a collective group. In the present case, Plaintiffs identify Sutton as an "Enron Defendant," a group of 38 defendants who each held various positions of authority at Enron during the Complaint's two-year class period. According to Plaintiffs, the Enron Defendants collectively engaged in an amazing array of individual acts, many occurring after Sutton left Enron in October, 2000. Plaintiffs' Complaint

particularizes no facts that justify Sutton's inclusion in this group. The PSLRA therefore requires the Court to ignore these "group pleading" allegations.

B. Plaintiffs Do Not Plead an Actionable Misrepresentation or Omission.

Plaintiffs asserting securities fraud claims must plead that the defendant fraudulently misrepresented or failed to disclose a material fact and must then particularize the specific facts establishing that conduct. In the present case, Plaintiffs assert a securities fraud claim against Sutton and, in support of that claim, merely allege that he was one of several Enron Defendants who, for three days in 1999, attended analyst meetings in three different cities where one or all of them said positive things about Enron's financial health and growth prospects. Nowhere do Plaintiffs identify (i) the specific speakers who allegedly made these remarks, (ii) the party who allegedly received the remarks, (iii) the facts that demonstrate that the remarks were false when made, or (iv) the facts that demonstrate that the speaker knew that the remarks were false when made. These allegations do not support a securities fraud claim against anybody, and certainly not against Sutton.

C. Plaintiffs Do Not Plead Facts That Strongly Infer Scienter.

The PSLRA requires that securities plaintiffs particularize facts that strongly infer that a defendant intended to commit fraud, *i.e.*, that a defendant acted with scienter. This requirement is not met where a plaintiff attempts to show that a defendant was negligent, even where that negligence was "inexcusable." In the present case, Plaintiffs allege that Sutton's (i) positions at Enron, (ii) compensation, and (iii) insider trading "pattern," strongly infer that he intended to defraud the plaintiff class. To support the last point, Plaintiffs attach the declaration of Dr. Scott D. Hakala, an alleged statistics "expert," who divines that Sutton's trading pattern reveals that he traded on non-public material information.

For a variety of reasons, these allegations do not sufficiently infer that Sutton acted with scienter. First, corporate position, standing alone, is not enough to establish scienter, and nowhere do Plaintiffs particularize *any* facts that show that Sutton’s corporate positions at Enron strongly infer that he intended to defraud the plaintiff class. Rather, Plaintiffs state simply that Sutton must have known everything that went on at Enron because he had a “high level” position. Second, compensation motivation, standing alone, is not enough to establish scienter, and nowhere do Plaintiffs particularize *any* facts that show that Sutton’s compensation at Enron strongly infers that he intended to defraud the plaintiff class. Third, insider trading does not establish scienter unless it is “unusual.” Sutton’s trading pattern is not unusual, nor does it otherwise infer scienter, because (i) Plaintiffs’ own allegations show that Sutton left tens of millions of dollars “on the table” after his allegedly improper trades, (ii) Sutton’s substantial trades occurred immediately after a sharp increase in Enron’s stock price, which even Dr. Hakala admits is not suspicious insider behavior, and (iii) Plaintiffs’ own allegations show that Sutton’s continuous (and substantial) investment in Enron – measured in dollars, not shares – does not evidence a suspicious decline in that investment during the class period. Fourth, Dr. Hakala’s declaration cannot strongly infer scienter because (i) the declaration should be stricken, (ii) Dr. Hakala is not qualified to make his declaration, and (iii) Dr. Hakala’s statistical model is not reliable. Finally, taking *all* of Plaintiffs’ allegations as true strongly infers *against* scienter because Plaintiffs allege that Enron’s accountants, lawyers, officers, and directors, whose job it was to oversee the conduct underlying Plaintiffs’ claims, actually and expressly represented throughout the class period that such conduct was appropriate and within the law.

D. Plaintiffs Do Not Allege an Actionable “Controlling Person” Claim.

“Controlling person” liability requires that a defendant exercise sufficient control over one who violates the securities laws. Plaintiffs who assert such claims must particularize the “control relationship” between the defendant and the party committing the primary violation. In the present case, Plaintiffs do not particularize *any* specific facts that show how Sutton controlled anyone who is alleged to have violated the securities laws.

E. Plaintiffs Do Not Allege an Actionable 20A Claim.

A 20A claim requires that a defendant first violate a substantive securities law provision. In the present case, Plaintiffs’ allegation that Sutton violated any substantive securities law is inadequate. As a result, Plaintiffs’ 20A claim is similarly inadequate.

III. Plaintiffs’ Allegations

Plaintiffs’ Complaint alleges that Enron Corp., Enron’s managers and directors, Enron’s accountants and lawyers, various persons and entities associated with Enron’s employee benefits plans, Enron’s investment bankers, and others, including Sutton, conspired to fraudulently inflate Enron’s stock price.¹ Underlying this conspiracy are the primary allegations that Sutton and others (i) caused Enron to improperly use partnerships and so-called Special Purpose Entities (“SPEs”) to exaggerate profits and remove debt from its balance sheet, (ii) caused Enron to file false and misleading reports with the Securities and Exchange Commission (“SEC”), and (iii) directly made fraudulent representations regarding Enron’s financial health and growth prospects to the securities market.

¹ Plaintiffs’ factual allegations against Sutton and other defendants and the manner in which Plaintiffs impermissibly attempt to convert those allegations into securities fraud and insider trading claims are the subject of other motions now before the Court. *See, e.g.*, Rebecca Mark-Jusbasche’s Memorandum in Support of Her Motion to Dismiss. Rather than duplicate those efforts here, Sutton hereby adopts the analysis of Plaintiffs’ Complaint contained in those motions, including the arguments that support the dismissal of the claims asserted against Sutton.

Despite the Complaint's 1030 paragraphs, Plaintiffs name Sutton only in nine.² In some of those paragraphs, the identification is only a generic reference that does not involve substantive allegations. Plaintiffs' specific allegations actually particularized to Sutton, if true, establish only that he (i) served on Enron's management committee in 1997 and 1998,³ (ii) served as an Enron Vice Chairman through early 2001,⁴ (iii) received bonuses for his work,⁵ (iii) sold Enron stock during the class period,⁶ and (iv) either made positive statements about Enron stock to securities analysts and investors or was "in the same room" with others at Enron who did.⁷

Despite such scant allegations, which taken together show a virtual lack of involvement by Sutton in the basis of Plaintiffs' claims, Plaintiffs assert three securities-related causes of action against Sutton for securities fraud, insider trading, and controlling person liability. Plaintiffs attempt to support these claims by identifying Sutton as one of 38 "Enron Defendants." According to Plaintiffs, Sutton's status as an Enron Defendant makes him personally responsible for much of the conduct described in the Complaint. Plaintiffs allege that as Enron Defendants, Sutton and 37 others collectively (i) prohibited Enron from disclosing the extent to which certain transactions were with "interested" parties,⁸ (ii) manipulated Enron's business model so that Enron's survival required that

² Complaint ¶¶1, 83(r), 84, 88, 157, 401, 402, 415, and 933.

³ *Id.* ¶88.

⁴ *Id.* ¶83(r).

⁵ *Id.*

⁶ *Id.* ¶¶83(r), 84, 401, and 402.

⁷ *Id.* ¶157.

⁸ *Id.* ¶506.

its stock price remain high,⁹ (iii) schemed to improperly interpret applicable accounting rules,¹⁰ and (iv) worked to restructure several failing SPEs at a time after Sutton had left Enron.¹¹

IV. Adoption of Joint Defense Brief and Other Briefs

Sutton expressly adopts the arguments and authorities presented in the Joint Defense Brief filed on behalf of other Officer Defendants, as well as Rebecca Mark-Jusbasche's Memorandum in Support of Her Motion to Dismiss, and incorporates that document here by reference.

V. Argument & Authority

A. Plaintiffs Must Particularize Facts Underlying Their Claims.

Federal Rule of Civil Procedure 9(b) requires that plaintiffs plead fraud claims with particularity, but allows plaintiffs to plead a defendant's scienter in general terms. Where such claims involve securities fraud, however, the PSLRA requires that plaintiffs plead specific facts that show that a defendant acted with scienter:

[T]he 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). According to the Fifth Circuit, a securities plaintiff must plead specific facts that "strongly infer" that the defendant acted with scienter. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 407 (5th Cir. 2001). Failure to plead any element of a securities claim with the requisite

⁹ *Id.* ¶396.

¹⁰ *Id.* ¶¶433 and 534.

¹¹ *Id.* ¶305.

particularity requires that the Court dismiss the deficient claim pursuant to FED. R. CIV. P. 12(b)(6). See 15 U.S.C. § 78u-4(b)(3); *Nathenson*, 267 F.3d at 407.

As noted above, Plaintiffs' Complaint makes three claims against Sutton. The first claim is for securities fraud, which requires that Plaintiffs plead and prove that Sutton (i) made a misstatement or omission, (ii) of material fact, (iii) in connection with the purchase or sale of a security, (iv) with the intent to defraud, *i.e.*, scienter, (v) on which Plaintiffs relied, and (vi) which proximately caused Plaintiffs' injuries. See *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997). The second claim is for insider trading, which requires that Plaintiffs plead and prove that Sutton (i) used material nonpublic information, (ii) knew or was severely reckless in not knowing that the material was nonpublic, *i.e.*, scienter, and (3) traded contemporaneously with the defendant. See *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 916 (S.D. Tex. 2001). The third claim is for "controlling person" liability, which requires that Plaintiffs plead and prove that Sutton sufficiently "controlled" someone else who committed a primary violation of a substantive securities law provision. See *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, (2d Cir. 1996) *cert. denied*. Rule 9(b) and the PSLRA require that Plaintiffs plead each element of these claims with particularity, including facts that strongly infer that Sutton acted with scienter.

B. Plaintiffs "Group Pleading" Allegations Must Be Ignored.

The PSLRA prohibits securities plaintiffs from relying on "group pleading," and instead requires that they particularize facts that support their claims as to *each* individual defendant. See *In re BMC Software*, 183 F. Supp. 2d at n. 50. This rule is consistent with the pleading requirements for other claims based in fraud that are subject to Rule 9(b). See *Mills v. Polar Molecular Corp.*, 12

F.3d 1170, 1175 (2d Cir. 1993) (“Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to ‘defendants’”); *Marriott Bros. v. Gage*, 704 F.Supp. 731, 740 (N.D. Tex. 1988), *aff’d*, 911 F.2d 1105 (5th Cir. 1990) (dismissing RICO claims where the plaintiffs failed to “plead with particularity the representations made by each defendant”) (emphasis added). Underlying the rule is a strong policy commitment to protecting defendants from their wanton inclusion in securities-related lawsuits simply because they were affiliated with a company whose stock went down. *See Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 (N.D. Tex. 1998) (stating that group pleading is inconsistent with the public policy of protecting securities defendants from unwarranted claims and strike suits).

In the present case, the vast majority of Plaintiffs’ allegations, whether against Sutton or the other defendants, consists of the attribution of specific and general conduct to groups of defendants instead of to individuals. For example, the Complaint contains over 200 generic references to “defendants” and over 240 generic references to “management.” *See, e.g.*, Complaint ¶155(n) (stating that the “defendants” knew that Azurix, an Enron subsidiary, was unlikely to generate profits). Nowhere in the Complaint, however, do Plaintiffs define those terms or otherwise indicate to whom such terms refer. This does not allow one to discern exactly who is being accused of a particular act. This is especially true for Sutton, who is both a defendant and a former Enron manager.

Even where Plaintiffs use defined terms to reference groups of individual defendants, Plaintiffs define those terms so broadly that the “who, what, when, and why” of the associated allegation are impermissibly vague and fail to adequately apprise each defendant of his or her allegedly wrongful conduct. Plaintiffs’ “group pleading” abuses are particularly egregious *vis-a-vis*

Sutton. As noted earlier, the Complaint lumps Sutton in with 37 other defendants identified as “Enron Defendants,” which allegedly include all of Enron’s “top executives,” inside directors, and outside directors.¹² Throughout the Complaint, Plaintiffs attribute a dazzling array of conduct and powers to Sutton and other Enron Defendants that clearly were not performed or exercised by them as a group. For example, Sutton and the other 37 Enron Defendants did not:

- (1) “Work feverishly” to restructure the Raptor vehicles in March 2001;¹³
- (2) Individually control the content of Enron’s SEC filings;¹⁴
- (3) “Focus” on EITF No. 90-15 to invent a loophole in the accounting rules to allow Enron to hide debt;¹⁵ or
- (4) Negotiate with Barclays and prepare documents to secure the requisite 3% “equity” for the Chewco partnership.¹⁶

Plaintiffs say little to justify Sutton’s inclusion with the Enron Defendants except to say that to do so is appropriate because he had a “high-level” position at Enron.¹⁷ Plaintiffs allege that Sutton served as an Enron Vice Chairman and was on the Management Committee, but then wholly fail to particularize any facts showing how those positions justify the inference that he was in collaboration with the 37 others “high-level” defendants, many of whom held positions very different from Sutton. This is particularly egregious when one considers that much of the wrongful conduct

¹² *Id.* ¶1(a).

¹³ *Id.* ¶305.

¹⁴ *Id.* ¶397.

¹⁵ *Id.* ¶433.

¹⁶ *Id.* ¶439.

¹⁷ *Id.* ¶89.

attributed to the Enron Defendants occurred after Sutton left Enron. For example, Plaintiffs allege that Sutton left Enron in early 2001¹⁸ but then allege that he conspired with the other Enron Defendants later that year to restructure Enron's allegedly illegal partnerships and, later on, to orchestrate the sale of Enron to a third party.¹⁹ Nowhere do Plaintiffs allege any facts showing that Sutton maintained his association with Enron or the other Enron Defendants after he left the company. For this and the reasons stated above, Plaintiffs' attempt to state a claim against Sutton through impermissible "group pleading" fails to satisfy Rule 9(b)'s and the PSLRA's heightened pleading requirements, and the Court must ignore all such allegations.

C. Plaintiffs' Fail To Particularize a Material Misrepresentation or Omission That Supports Their Fraud Claim.

Rule 9(b) and the PSLRA require "certain minimum allegations in a securities fraud case, namely the specific time, place and contents of the false representations, along with the identity of the person making the representations and what the person obtained thereby." *Melder*, 27 F.3d at 1102. Without their impermissible "group pleading" allegations, Plaintiffs completely fail to particularize that Sutton made any misrepresentation or omission that would support a securities fraud claim. As stated above, Plaintiffs assert in ¶157 that Sutton was one of four Enron insiders who, between July 13 and 16, 1999, appeared at analyst meetings in three different cities to discuss Enron's Second Quarter 1999 results and business:

On 7/13/99, Enron held a conference call for analysts and investors to discuss Enron's 2Q 99 results and its business. On 7/14-16/99,

¹⁸ He actually left in October, 2000.

¹⁹ Compare Complaint ¶83(r) (stating that Sutton worked at Enron until early 2001), with, Complaint ¶387 (stating that the Enron Defendants attempted to limit their exposure for their allegedly wrongful conduct by engineering the sale of Enron in late 2001); and Complaint ¶305 (stating that Enron Defendants restructured LJM2-related SPEs after Enron's stock fell on 3/22/01).

Enron executives Skilling, Sutton, Koenig and Causey also appeared at Enron's 2ndQ analyst meetings in New York, Boston, and Houston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analysts meetings, they stated:

- EPS in the 2ndQ increased 29% to \$.27 per share compared to \$.21 in the 2ndQ of last year. Net income in the 2ndQ increased 53% to \$222 million up from \$145 million last year.
- Enron had a great quarter. Enron was hitting on all eight cylinders. Enron was very pleased with the results for the quarter and very optimistic about the outlook for the future. Enron was very optimistic about how the business was playing out.
- Overall, Enron's businesses had been performing well. Enron was well positioned for significant continued growth.²⁰

These allegations do not support a fraud claim for several reasons. First, as alleged, it is impossible to ascertain exactly what was said, when, where, or to which analysts and/or investors (none of whom are identified by name). But even more serious, and absolutely fatal to Plaintiffs' claim, is the failure to attribute any specific statement(s) to any specific speaker, including Sutton. In the end, there are *no* allegations as to what statements *Sutton* made, *if any*. Plaintiffs simply state that he attended certain meetings and that certain things were said at those meetings. Plaintiffs' summary of the alleged statements in fact includes representations made in a conference call that occurred prior to those meetings, and Plaintiffs do not even allege that Sutton participated in that conference call.

Second, the substance of the alleged statements shows that they were "forward looking" and mere "puffery." Such optimistic and generalized statements cannot support a fraud claim. *See, e.g.,*

²⁰ *Id.* (emphasis added).

Zonagen, 267 F.3d at 419 (stating that optimistic generalizations are inactionable “puffing” that do not support a claim); *Lain v. Evans*, 123 F.Supp.2d 344, ___ (N.D. Tex. 2000) (stating that statements regarding “aggressive growth plans” are not actionable); *In re Azurix Corp. Sec. Litig.*, 2002 WL 562819, **13-14. (S.D. Tex., Mar. 21, 2002) (dismissing claims against Sutton and others that relied on similar statements).

Third, Plaintiffs do not plead that Sutton knew that the alleged statements attributed to him were false or misleading when made, much less any facts that strongly infer that knowledge. *See Azurix*, 2002 WL at *16 (citations omitted) (stating that securities fraud plaintiffs must prove that forward-looking statements were made with actual knowledge of falsity). As shown below, Plaintiffs must not only plead that Sutton knew that his representations, if any, were false, but also must demonstrate that knowledge through particularized facts.

D. Plaintiffs Fail To Plead Facts That Strongly Infer an Intent to Defraud the Plaintiff Class.

Securities plaintiffs must plead facts that *strongly* infer that a defendant committed fraud or engaged in illegal insider trading with scienter. *See supra*. This means that plaintiffs must plead facts that show that a defendant intended to deceive, manipulate, or defraud the plaintiff class. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996). To do this, plaintiffs must particularize facts that demonstrate conscious misbehavior or severe recklessness. *Zonagen*, 267 F.3d at 410; *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d 630, 635 (S.D. Tex. 2001). The standard is narrow and requires that plaintiffs show that a defendant’s culpability rise above even *inexcusable* negligence:

The Fifth Circuit has defined “severe recklessness” as being “limited to those highly unreasonable omissions or misrepresentations that

involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.

Haack v. Max Internet Communications, Inc., 2002 WL 511514, *6 (N.D. Tex., Apr. 2, 2002).

Plaintiffs attempt to show that Sutton acted with the requisite intent to defraud by merely pleading (i) his position at Enron, (ii) his compensation for that work, and (iii) his trading history regarding Enron stock during the class period. These facts, whether taken alone or together, do not even slightly infer that Sutton intended to commit fraud, or was severely reckless in defrauding the plaintiff class.

1. Sutton's Position at Enron Does Not Strongly Infer an Intent to Defraud the Plaintiff Class.

The PSLRA prohibits securities plaintiffs from relying on a defendant's corporate position to sufficiently allege scienter:

Plaintiffs must properly plead wrongdoing and scienter as to each individual defendant and cannot merely rely on the individuals' positions or committee memberships.

Coates, 26 F. Supp. 2d at 916; *see also*, *In re BMC Software*, 183 F. Supp. 2d at 886-87; *In re Baker Hughes*, 136 F. Supp. 2d at 648. Reliance on corporate position is inappropriate even where a plaintiff also pleads that a defendant was substantially involved in corporate operations. *See In re BMC Software*, 183 F. Supp. 2d at 886-87 (stating that scienter requires more than a showing that the defendant was an officer involved in the day-to-day management of the company, had access to internal corporate documents, communicated with other officers, or attended management meetings); *In re Baker Hughes*, 136 F. Supp. 2d at 648 (dismissing claims based on "generalized allegations

that the Defendants were intimately familiar with [the company's] daily operations and were otherwise knowledgeable of [the company's actual financial situation"]. Instead, plaintiffs must show *what* each defendant actually knew and *how* he or she knew it:

Plaintiffs also rely on knowledge acquired by reason of the high level positions held by Defendants at Compaq. This global allegation, too, lacks any factual specifics as to what information they were exposed, how, and when.

Kurtzman v. Compaq., Cause No. H-99-779, slip op. (Dec. 12, 2000) (quoted by this Court in *In re BMC Software*, 183 F. Supp. 2d at 886 fn. 34.)

In the present case, Plaintiffs allege that Sutton served as an Enron Vice Chairman until early 2001.²¹ Plaintiffs also allege that Sutton served as President and COO of Enron International in 1997 and 1998 and, through those positions, served on Enron's Management Committee in 1997 and 1998.²² Plaintiffs do not particularize their basis for believing that these positions charge Sutton with knowledge about the conduct and circumstances detailed in their Complaint. Rather, Plaintiffs simply conclude that Sutton, along with the other Enron Defendants, *must* have known everything that happened at Enron because Plaintiffs can imagine circumstances where he could have gained that knowledge:

It is appropriate . . . to assume that the false, misleading and incomplete information conveyed in the Company's public filings, press releases and other publications, as alleged herein, are the collective actions of the Enron Defendants . . . Each of the officers and directors of Enron, by virtue of their high-level positions with the Company, participated in the management of the Company and its business, operations, financial statements, and financial condition, as alleged herein. Each of the Enron Defendants is responsible for the

²¹ Complaint ¶ 83(r).

²² *Id.* at ¶88.

accuracy of the public reports and releases detailed herein and is therefore primarily liable for the representations contained therein.

Complaint ¶89.

The Enron Defendants, because of their positions in the Company, were able to and did control the content of various SEC filings, press releases and other public statements pertaining to the Company during the Class Period. Each Enron Defendant was provided with copies of the documents alleged herein to be misleading prior to or shortly after their issuance and/or had the ability and/or opportunity to prevent their issuance or cause them to be corrected. Enron's press releases, reports to shareholders, SEC filings and the like are "group published" materials of the Enron Defendants.

Id. at ¶ 90.

Because of the Enron Defendants' positions with the Company, they each had access to the adverse non-public information about its business, partnerships and investments, finances, products, markets and present and future business prospects via access to internal corporate documents (including the Company's operating plans, budgets and forecasts and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees, attendance at management and/or Board of Directors meetings and committees thereof and via reports and other information provided to them in connection therewith.

Id. at ¶399.

As alleged herein, the Enron Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading, that such statements or documents would be issued or disseminated to the investing public, and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, the Enron Defendants, by virtue of their receipt of information reflecting the true facts regarding Enron, their control over, and/or receipt and/or modification of Enron's materially misleading misstatements and/or their association with the Company which made them privy to

confidential proprietary information concerning Enron, participated in the fraudulent scheme alleged herein.

Id. at ¶400.

In accord with this “*they must have known*” theory, Plaintiffs also allege that (i) Enron’s fraud permeated the whole company, (ii) the size and timing of the allegedly improper transactions detailed in the Complaint were “red flags,” (iii) those same transactions were so complex that they required personal attention from “several top executives,” especially those on the Management Committee, and (iv) the Enron Defendants had to allow the fraud to continue because they had allowed Enron’s business model to “evolve” to the point where Enron would collapse without it. *Id.* at ¶¶395-96. Finally, with regard to the Management Committee in particular, Plaintiffs allege that committee members (i) had daily contact with each other, (ii) were “hands on” managers who dealt with Enron’s important issues, and (iii) controlled or had the power to control the content of Enron’s SEC filings. *Id.* at ¶397.

Despite their breadth, these scienter allegations state a claim against no one, especially Sutton. First, and quite obviously, the bulk of these allegations represents impermissible “group pleading” that the PSLRA prohibits and the Court cannot therefore consider. *See supra*. Second, except for the allegations regarding the titles of Sutton’s positions at Enron, Plaintiffs’ allegations are nothing more than generalized conclusions. For example, Plaintiffs plead scienter based on their conclusion that by virtue of his positions, Sutton had access to inside reports, but nowhere do they particularize that he actually accessed such a report.²³ Plaintiffs also plead scienter based on their conclusion that Sutton could have received inside information from other Enron Defendants, but

²³ Complaint at ¶399.

nowhere do they particularize that he actually received such information.²⁴ Finally, Plaintiffs plead scienter based on their conclusion that Sutton had “connections” with Enron employees, but nowhere do they particularize how he ever used such a “connection.”²⁵ The same can be said for all of Plaintiffs’ scienter allegations because they all rest upon the presumption that by virtue of his positions, Sutton received the “true facts” regarding anything suspicious at Enron. To state a claim against Sutton, however, Plaintiffs must do more than simply *say* that he received the “true facts;” they must explicitly show *what* facts he received and *how* he received them.

2. Sutton’s Compensation at Enron Does Not Strongly Infer an Intent to Defraud the Plaintiff Class.

An alleged desire to increase one’s compensation does not support a strong inference that a securities defendant acted with an intent to defraud. *In re Azurix*, 2002 WL 562819, *22. (citing *Tuchman*, 14 F.3d at 1068-69; *Melder*, 27 F.3d at 1102). To the contrary, compensating corporate officers with performance-based bonuses and stock options is a valid and widely-used business practice. *In re NAHC, Inc. Sec. Litig.*, 2001 WL 1241007, at *18 (E.D. Pa., Oct. 17, 2001). Given that many corporate officers and executives are paid this way, allowing securities plaintiffs to establish scienter by pleading compensation motivation would effectively wipe out the PSLRA’s heightened pleading requirements for scienter altogether. *See In re Azurix*, 2002 WL 562819, *22.

Here, Plaintiffs allege that Sutton either committed or ignored insider fraud at Enron to facilitate his receipt of corporate bonuses and profits from stock sales.²⁶ Plaintiffs’ specific bonus allegations are that Sutton “received bonus payments of \$2.3 million, in addition to his salary, for

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at ¶¶396 and 400.

'97, '98, '99 and '00 based on Enron's false financial reports and because Enron stock hit certain performance targets."²⁷ Plaintiffs also allege that Sutton made over \$40 million in proceeds from stock sales. *Id.* These allegations simply do not infer, strongly or otherwise, that Sutton intended to defraud the plaintiff class.

In *In re Azurix Corp.*, Judge Lake considered the degree to which a compensation system similar to that described in Plaintiffs' Complaint gives rise to an inference of scienter. *See In re Azurix*, 2002 WL 562819, *22. The similarities between that case and this one are not surprising because Azurix Corp. is an Enron subsidiary that was managed by many of the same Enron Defendants named in this case. *Id.* at *1 (describing Azurix Corp.'s connection to Enron). In that case, the court held that pleading Azurix Corp.'s executive compensation structure, which tied compensation to stock performance, did not satisfy the PSLRA's heightened pleading requirements for scienter because to do so "would effectively eliminate that state of mind requirement as to all corporate officers and defendants." *Id.* at *22 (citing *Melder*, 27 F.3d at 1102).

3. Sutton's Trading Pattern Regarding Enron Stock During the Class Period Does Not Strongly Infer That He Intended to Defraud the Plaintiff Class.

"Insider trading must be 'unusual' to have meaningful probative value" that a defendant intended to defraud. *Zonagen*, 267 F.3d at 420-21. This is true because there is nothing *per se* wrong with insider trading:

A large number of today's corporate executives are compensated in terms of stock and stock options. It follows then that these individuals will trade those securities in the normal course of events.

²⁷ *Id.* at ¶83(r).

In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1424 (3d Cir. 1997). Securities plaintiffs must therefore show that an insider’s trading is “dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information.” *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999).

To determine whether stock sales are “dramatically” out of line with prior trading, courts consider “(1) the amount and percentage of shares sold by insiders, (2) the timing of the sales, and (3) whether the sales were consistent with the insider’s prior trading history.” *In re Silicon Graphics*, 183 F.3d at 986. As this Court said in *BMC Software*, “plaintiffs must delineate unusual trading at suspicious times and in suspicious amounts by corporate insiders, out of line with prior trading practices, for such conduct to be probative of scienter.” 183 F. Supp. 2d at 901. Moreover, where a plaintiff cannot show that a defendant made any fraudulent representations – as here between Plaintiffs and Sutton – the facts that a defendant sold a significant portion of his stock proves very little. *See Head v. NetManage, Inc.*, 1998 WL 917794, *5 (N.D. Cal. Dec. 30, 1998) (stating that executives’ sales of 76% and 94% of their stock holdings was “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.”)

Plaintiffs allege that Sutton’s trading in Enron stock shows that he traded on material, non-public information.²⁸ Specifically, Plaintiffs allege that Sutton sold 59% of his Enron stock fewer than twenty separate trades spread across a three-year period.²⁹ But rather than particularize specific

²⁸ Complaint ¶¶83(r), 84 and 401.

²⁹ *Id.* at ¶402 and Exhibit A.

facts that show that Sutton's trading within the class period was "dramatically out of line" from his prior trading, Plaintiffs simply attach the "expert" declaration of Dr. Scott D. Hakala to their petition in an attempt to catapult their Complaint into PSLRA compliance.³⁰ For the following reasons, Plaintiffs' insider trading allegations do not establish that Sutton intended to defraud the plaintiff class. (Dr. Hakala's report will be considered in the following section.)

First, according to Plaintiffs, Sutton sold only 59% of the Enron shares that he held during the Class Period for over \$40 million. Projecting Plaintiffs' value calculations onto the remaining shares held by Sutton shows that Sutton left a substantial portion of his Enron stock – worth tens of millions of dollars – "on the table." If anything, this continuing and substantial investment in a company that Plaintiffs allege was the biggest corporate fraud in American history shows that Sutton *lacked* knowledge of that fraud, not that he knew about it.

Second, the timing of Sutton's most substantial sales are neither suspicious nor unusual. This is true because Plaintiffs allege that Sutton sold most of his Enron stock after the stock experienced a sharp price increase in early 2000.³¹ Such sales, as even Dr. Hakala admits, typical behavior for officers and executives, especially those with significant components of their wealth tied to one company.³² In fact, they are consistent with those that a rational investor would do to diversify his portfolio. Specifically, with every dramatic price increase in Enron stock, the value of Sutton's Enron shares increased. The resulting effect is that Sutton's proportionate investment in

³⁰ *Id.* at ¶406.

³¹ *See Id.* at ¶84(r) (showing stock sales in conjunction with stock price).

³² *See* Declaration ¶11 (insiders generally tend to sell immediately following a sharp rise in stock price) and ¶13 ("Executives with significant components of their wealth tied to a specific company's returns are generally willing to exercise stock options prematurely").

Enron increases relative to the total value his stock portfolio. Assuming the price doubled, then Sutton could sell *a full half* of the shares that he owned outright and continue the same dollar-value investment in Enron. Moreover, assuming that the price doubled and Sutton owned options with a strike-price at 50% the pre-increase price, Sutton could exercise *a full two-thirds* of those options at the post-increase price and continue the same dollar-value investment in Enron. Plaintiffs conveniently fail to chart the dollar-value of Sutton's continuing (and substantial) investment in Enron. Why should they? It would only show that Sutton's investment in Enron, measured in dollars, did not change in a manner that strongly infers illegal insider trading. Without this information, however, the Court cannot adequately compare the value of Sutton's Enron investment in his pre-trade portfolio to that of his post-trade portfolio. Plaintiffs' Complaint therefore fails to show how Sutton's trading was "dramatically" out of the ordinary so as to infer that he intended to defraud the plaintiff class.

Third, Sutton's insider trading "pattern" (such as it is) is inconsistent with other trading patterns that Plaintiffs attribute to other Enron Defendants who allegedly traded on undisclosed information. According to the Complaint, one or more (but not all) Enron Defendants sold Enron stock in almost every month during the class period, which is *two years long*. Sutton's limited number of trade days does not dovetail into this purported pattern. For example, it is patent nonsense for Plaintiffs to allege that Sutton's trading pattern, which involved less than twenty trades, matches Ken Lay's trading pattern, which involved *hundreds* of trades. Sutton's trading relative to the other Enron Defendants' trading, if anything, proves that there was no conspiracy among Enron's insiders.

4. Dr. Hakala's Report Does Not Strongly Infer an Intent to Defraud the Plaintiff Class.

Many sound arguments regarding the inadequacy and unreliability of Dr. Hakala's expert report are presented in various motions filed by other defendants in this case. Rather than repeat those arguments here, Sutton hereby adopts them as his own and incorporates them herein. *See, e.g.*, Rebecca Mark-Jusbache's Memorandum in Support of Her Motion to Dismiss. To the extent that Sutton can add to this "mix," he would show the Court the following:

a. Dr. Hakala's Testimony Should Be Stricken.

As a preliminary matter, and as detailed in other motions filed in this case, Dr. Hakala's declaration should be stricken because it is not appropriate for the Court to consider expert testimony at the pleading stage. *See Demarco v. Depotech Corp.*, 149 F. Supp. 2d 1212, 122-022 (S.D. Ca. 2001), *aff'd*, 2002 WL 461217 *1 (9th Cir. Feb. 21, 2002). Allowing securities plaintiffs to simply attach an "expert" declaration to their Complaint, a declaration to which the defendants are procedurally prohibited from attacking with outside evidence, would wholly frustrate the PSLRA's heightened pleading requirements for scienter. Plaintiffs should not be allowed to bootstrap scienter through unopposed conclusions of a hired expert.

b. Plaintiffs Fail To Establish that Dr. Hakala Is Qualified.

Plaintiffs do not establish that Dr. Hakala is qualified to make his declaration as an expert regarding the statistical analysis of insider trading. Rather, through Dr. Hakala's declaration and the attached documents, Plaintiffs show merely that he has a doctorate in Economics and that he currently works for a company that provides business valuation services. Declaration ¶2. Those documents also show that since January 1998, Dr. Hakala has developed a substantial (and lucrative) business for himself as an expert witness, providing testimony in over 60 cases, nine of which presumably involved securities-related issues. Declaration pp. 4-8 and Exhibit A. Regarding Dr.

Hakala's experience and qualifications in statistics, however, the declaration states only that he "studied statistics at the doctorate level." Declaration ¶2.

This assurance to the Court that Dr. Hakala's postgraduate course work included study in statistics does not qualify him to speak as an expert on the statistical implications of insider trading. Indeed, many graduate curriculums, especially those in the social sciences (*i.e.*, economics, political science, sociology, *etc.*) require that doctoral candidates study statistics at the doctorate level. Dr. Hakala's study of statistics on his way to receiving a doctor of philosophy in economics is therefore wholly unremarkable.

c. Dr. Hakala's Declaration is Clearly Not Reliable Evidence of Scienter.

The best evidence as to why Dr. Halaka is not qualified to speak as an expert on the statistical implications of insider trading is the declaration itself. As shown below and in other motions filed with the Court, Dr. Hakala's analysis is so riddled with faulty assumptions and omissions that the only thing that it proves with certainty is that Dr. Hakala should not be taken seriously.

First, Dr. Hakala's conclusions rely, in part, on his accurate identification of Enron's "peer group," whose stock performance he collectively incorporates into the statistical model that allegedly proves Sutton and others traded on inside information. Declaration ¶6 and Exhibit D thereto. A review of the companies in that peer group, however, shows that Dr. Hakala's did not adequately identify Enron's "peers" to run his calculations, which necessarily renders his statistical model unreliable. This is true because Dr. Hakala identified five energy-related companies, such as Dynegy, Inc. and Williams Companies, Inc., as Enron's peers. Declaration ¶5(d). Presumably, Mr. Hakala selected these companies on the assumption that Enron's business was similar to theirs. This

is not surprising since one might intuitively consider Enron a natural gas company, since it started out that way. If Plaintiffs' allegations in the Complaint are true, however, this assumption is patently false because the Enron described in the Complaint had become a completely different company by the beginning of the class period. Specifically, Plaintiffs allege that Enron began as a "stodgy regulated natural gas company" but then evolved into a "higher growth, higher profit enterprise" that reached way beyond natural gas:

[Lay recruited Skilling and Fastow] to become executives and help him transform Enron into a growth company which engaged in providing and trading wholesale energy resources and services, operating power plants and water supply facilities (WEOS), providing retail energy and management services to companies all over the world (EES) and later building a large broadband fiber optic communication network. . .

Complaint ¶6. Considering that the vast majority of Enron's allegedly wrongful conduct involved these new businesses, especially Enron's merchant investment business, and that these new businesses provided the foundation for Enron's market success during the class period, comparing Enron stock to "stodgy regulated natural gas company" stock poisons Dr. Hakala's scienter calculation from the start.

Second, Dr. Hakala's statistical model assumes that at all times there was an efficient market for Enron stock. Declaration ¶13 n.21. This is an inappropriate assumption. Although efficient market hypothesis may allow a particular investor to rely on the general integrity of a stock's trading price, the hypothesis itself does not prove that a company's stock price always reflects the *rational* evaluation of that company's publicly known information. If markets were as efficient as Dr. Hakala assumes and his model requires, there would be no such thing as a dot-com or biotech "bubble" or a market "correction." Dr. Hakala's assumption simply ignores the fact that market exuberance for

a stock can over-inflate its price. As Plaintiffs' Complaint documents again and again, the market's enthusiasm for Enron was enormous. *See, e.g.*, Complaint ¶¶152-54. A rational insider viewing such enthusiasm might reasonably conclude that his company's stock was over-valued, not because he knew material inside information, but because he subjectively valued the company's publicly disclosed information differently than did the "market."

Additionally, Plaintiffs' allegations, if true, *prove* that there was no efficient market for Enron stock. Specifically, Plaintiffs allege that large Wall Street firms (including Merrill Lynch, Lehman Brothers, and J.P. Morgan) actively participated in the scheme to inflate Enron's stock price by improperly hyping the stock in analysts' reports. *See, e.g.*, ¶¶724-685, 686, 704; *see also* ¶¶100-108. As Plaintiffs admit, these firms play an indispensable role in insuring the integrity of the securities market. ¶642. In fact, efficient market hypothesis relies on these firms and their analysts to digest a company's public information and then professionally value that company's stock. If Wall Street was intentionally misrepresenting the value of Enron stock, then a substantial component of the "efficient market" machine was not functioning. A rational insider viewing the resulting distortion in his company's stock, yet unaware of the underlying fraud between the company and Wall Street, might reasonably conclude that his company's stock was over-valued. This insider might then trade, not because he knew material inside information, but because he subjectively valued the company's publicly disclosed information differently than did the market.

With Dr. Hakala's model, however, there is only one rational valuation: the market's. And anyone who *rationaly* disagrees with the market's valuation is *per se* deemed to have inside information that the market does not. If it is possible that reasonable minds can assess the same

information and disagree as to the appropriate conclusion, then Dr. Hakala's declaration, which assumes that such is not the case with stock price, proves nothing.

5. Plaintiffs' Allegations, Even If True, Strongly Infer Against an Intent to Defraud.

Plaintiffs' scienter allegations particularized to Sutton do not strongly infer that he acted to defraud the plaintiff class. This would be true even if Sutton were the only defendant in this case. Ironically, however, the best argument for dismissing Plaintiffs' claims against Sutton is that their allegations against the other defendants, if true, militate *away* from an inference that Sutton knew or was severely reckless in not knowing that Enron's financial health and growth prospects were insufficiently disclosed to the market. As shown below, Plaintiffs allegations, *if true*, morph their "*He must have known*" scienter argument against Sutton into a "*How could he have known?*" dismissal argument in his favor.

First, Plaintiffs plead that Enron's army of accountants, lawyers, and investment bankers all knew about and participated in the allegedly fraudulent transactions underlying Plaintiffs' claims:

Between 98 and 01, Enron, its accountants, lawyers and bankers would create numerous other secretly controlled partnerships and entities and use them to generate billions of dollars of additional phony profits for Enron and to conceal billions of dollars of Enron debt by moving it off Enron's balance sheet.

Complaint ¶11.

To manipulate and thus falsify Enron's financial condition and inflate its reported results, Enron, Andersen, Vinson & Elkins, Kirkland & Ellis and several of Enron's banks engaged in a series of purported "partnership" and "related party" transactions[.]

Id. at 21. Yet, as Plaintiffs' allege throughout their Complaint, not only did these individuals fail to counsel Enron away from these transactions, but they also publicly "signed off" on them and

affirmatively represented to the world that each transaction was legitimate and that the underlying legal conclusions and accounting assumptions were proper:

Enron, its top insiders and its bankers assured investors of the correctness of Enron's accounting and the high quality of Enron's reported earnings, the success and strength of its business and its solid prospects for continued strong profit growth . . .

Id. at ¶52.

During early 01, Enron continued to report record results (certified by Andersen) and with its lawyers and bankers made very positive statements.

Id. at ¶54.

The allegation regarding the Vinson & Elkins ("V&E") report that was written in response to the August 2001 employee letter – warning that Enron would “collapse in a wave of accounting scandals” – is particularly telling:

Vinson & Elkins [wrote] a whitewash report dismissing these detailed accounts of fraud, even though Vinson & Elkins knew them to be true.

Id. at ¶60. V&E wrote and presented its report for the benefit Enron *insiders*, not outside third parties. This shows that any conspiracy between Enron and its lawyer, accountants, *etc.* was not joined by everyone with “high level” authority at Enron. Otherwise, V&E would not have needed to “whitewash” whistle-blower allegations that identified Enron's fraud for Enron's insiders who were themselves privy to that fraud. Assuming that Plaintiffs' allegations are true, this strongly suggests that not everyone at Enron knew about the partnerships and accounting practices underlying Plaintiffs' claims.

Second, Plaintiffs' allegations particularized to Sutton do not even come close to suggesting that Sutton actively participated in the various transactions and other allegedly wrongful conduct underlying Plaintiffs' claims. *See supra*. Nor do Plaintiffs particularize facts that suggest that Sutton had any specialized expertise in accounting, law, or otherwise that would cause him to realize, in the event that he did know something about that conduct, that Enron's accountants, lawyers, and bankers were causing or allowing Enron to break the law and mislead investors. To the contrary, assuming that Plaintiffs' allegations as to these parties are true, all that we know about Sutton is (i) that he served on Enron's management committee for two years and thereafter as an Enron Vice Chairman, (ii) that he received compensation tied to Enron's stock price, which proved very profitable when that price jumped in early 2000, (iii) that he was not involved in the partnerships, SPEs, or "related transactions" underlying Plaintiffs' claims, and (iv) that the whole while he was at Enron, every lawyer, accountant, and banker who was allegedly scheming with Enron to defraud the stock market was telling the world, and presumably Sutton, that everything at Enron was fine. Given these facts, which Plaintiffs allege and are therefore presumed to be true, it is unlikely that Sutton could have known about the alleged fraud within Enron.

E. Plaintiffs Fail To Allege an Actionable Claim for "Controlling Person" Liability.

Plaintiffs' Complaint alleges that Sutton violated the 1934 Securities Exchange Act (the "SEA"), Section 20(a), which concerns "controlling person" liability. Liability under this section is derivative and requires Plaintiffs to first prove that Sutton exercised control over one who committed a substantive SEA violation, *e.g.*, committed securities fraud. *See First Jersey Securities*, 101 F.3d at 1472-73. Rule 9(b) requires that Plaintiffs particularize the specific circumstances that demonstrate that control relationship. *See Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619-20 (5th Cir.

1993) cert. denied, 510 U.S. 1177 (1994); *In re Splash Technology Holdings, Inc. Sec. Litig.* 2000 WL 1727377, *20 (N.D. Cal., Sept. 29, 2000) (“... the complaint must plead the circumstances of the control relationship with particularity”).

Nowhere does Plaintiffs’ Complaint allege that Sutton possessed “the power to control” any person who is also alleged by Plaintiffs to have committed a primary violation of the SEA. Without this allegation, as expressed by particularized facts showing same, Plaintiffs’ conclusory allegation that Sutton occupied positions within Enron that enabled him to “control” others is inadequate. *In re Splash Technology Holdings, Inc.*, 2000 WL 1727377, *20; *Rich v. Maidstone Financial, Inc.*, 2001 WL 286757, *6 (S.D.N.Y., March 23, 2001) (“... much more than a bare allegation of ‘control status’ is required to state a claim.”). Accordingly, Plaintiffs’ Section 20(a) “controlling person” claim against Sutton must be dismissed.³³

F. Plaintiffs Fail To Allege an Actionable 20A Claim.

Plaintiffs’ Complaint asserts an SEA 20A claim against Sutton on behalf of those Plaintiffs who traded contemporaneously with him. Complaint ¶¶ 998-1004. That claim, like their 20(a) claim discussed above, is a derivative claim that first requires Plaintiffs to particularize facts showing that Sutton committed a primary SEA violation. *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 541 (3d Cir. 1999). As shown above, Plaintiffs’ Complaint fails to allege actionable claims against Sutton for either securities fraud or insider trading. Plaintiffs’ Complaint therefore fails to allege an actionable 20A claim as well.

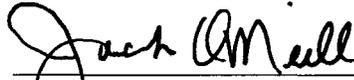
³³ Additionally, as this Court previously recognized, allegations that are “insufficient to state a claim for securities fraud under § 10(b) and Rule 10b-5” are insufficient “as a matter of law” to state a claim under § 20(a). *In re Sec. Litig. BMC Software*, 183 F. Supp. 2d at 916; *see also Greebel v. FTC Software*, 194 F.3d 185 (1st Cir. 1999); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1021 n.8 (5th Cir. 1996). This means that Plaintiffs’ 20(a) claim against Sutton fails to the extent that Plaintiffs’ primary claims against other defendants in this case fail.

VI. Conclusion & Request for Dismissal “With Prejudice”

Plaintiffs have chosen to ignore the case law issued by this Court and others that unambiguously holds that the PSLRA requires securities plaintiffs to particularize specific facts to each individual defendant. *See, e.g., In re BMC Software*, 183 F.Supp.2d at 902 n. 45. (stating that the PSLRA abolished group pleading in securities cases). Plaintiffs’ Complaint is so riddled with impermissible group pleading while, at the same time, being totally devoid of any substantive facts particularized as to Sutton, that the Complaint’s deficiencies *vis-a-vis* the PSLRA evidence nothing if not a sanctionable, nonchalant indifference to the burden placed on them by that statute. Plaintiffs’ “*shoot first and ask questions later*” approach is precisely what Congress intended to stop by enacting the PSLRA. Plaintiffs should not now be rewarded with leave to amend when they have initiated a lawsuit that undermines every policy concern that counseled the statute’s passage, namely, that defendants like Sutton should not be dragged into court and accused of fraud without good cause. For this reason, Sutton respectfully asks that the Court dismiss Plaintiffs’ claims against him with prejudice.

WHEREFORE, Defendant JOSEPH W. SUTTON respectfully prays that this Motion to Dismiss be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon each counsel of record on this 8th day of May, 2002, as shown on Exhibit "A" attached hereto.



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

MARK NEWBY, ET AL.,

Plaintiffs,

vs.

ENRON CORPORATION, ET AL.,

Defendants.

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**CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES**

CLASS ACTION

ORDER

Pending before the Court in Civil Action H-01-3624, *Newby et al. v. Enron Corp. et al.*, is Defendant Joseph W. Sutton's Motion to Dismiss all claims asserted against him in Plaintiffs' Consolidated Complaint for Violation of the Securities Laws ("Complaint"), filed on May 8, 2002.

The Court

ORDERS that as to Joseph W. Sutton, the Complaint is dismissed with prejudice.

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

MELINDA HARMON
UNITED STATES DISTRICT JUDGE