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I. INTRODUCTION

Defendants mock the Consolidated Complaint ("CC"), going so far as to call it an "abuse" and "bloated" – even a "long-winded journey to nowhere." They argue the Enron fraud simply does not merit the effort put forth by plaintiffs and their counsel (who are repeatedly impugned by defendants in their motion). The most charitable response to defendants' motion is they cannot bear to acknowledge Enron is the largest securities fraud *ever*. The securities markets have been roiled by the lack of investor confidence in corporate accounting and transparency. The public is outraged over defendants' schemes to line their pockets at the expense of Enron's investors. Congress, responding to Enron's collapse – the largest bankruptcy in U.S. history – has devoted enormous resources to investigate Enron and has held myriad hearings concerning defendants' misconduct. The SEC also is devoting enormous resources to the Enron fraud, and together with Congress, other government agencies and public and industry representatives, legislative and regulatory revision is likely. Everyone *except* defendants acknowledge this is not a routine securities case.

Defendants carp about the CC's length, but its size is in direct proportion to the magnitude of defendants' fraud. As the Fifth Circuit held long ago, "[w]hat is a "short and plain" statement depends of course on the circumstances of the case."¹ Viewed in this context, the CC's 500 pages – containing allegations covering years of illegal conduct and seeking to remedy a \$60+ billion market capitalization loss – is hardly the monstrosity defendants claim. Their fraud was so complex and pervasive that Enron's Special Investigative Committee produced a 203-page Report ("Powers Report") that covered only a few select transactions between defendant Andrew Fastow and certain of Enron's special purpose entities, and even at 203 pages, the Board's own Report only scratched the surface of the Enron fiasco.² Plainly, Enron is not a garden-variety securities fraud case.

¹ *Atwood v. Humble Oil & Refining Co.*, 243 F.2d 885, 888-89 (5th Cir. 1957) (holding plaintiffs and their counsel are "allowed a wide latitude" in fashioning their pleadings). All emphasis is added and all citations and footnotes are omitted.

² "Many questions ... relating to Enron's international business and commercial electricity ventures, broadband communications activities, transactions in Enron securities ... are beyond" the Special Committee's scope. Powers Report at 1.

Without citation to *even one* post-PSLRA Rule 8 case from the Fifth Circuit, defendants nevertheless argue the CC violates Rule 8 of the Federal Rules of Civil Procedure. Rule 8, which is to be liberally construed, requires defendants be given fair notice of plaintiffs' claims and the grounds for the claims. At the same time, shareholder plaintiffs must adhere to the pleading requirements of the PSLRA and Fed. R. Civ. P. 9. This plaintiffs have done.

Defendants disparage the CC as a "puzzle," its pleading structure deficient. This boilerplate argument has repeatedly been rejected by courts that respect plaintiffs' good faith efforts to provide the kind of detail and specificity required by the PSLRA and Rule 9(b), especially in complex, multi-party securities fraud cases – and among these, Enron has no equal. As Judge Debevoise so aptly stated in sustaining a lengthy complaint against a public company and certain of its officers and directors:

Defendants challenge the Complaint, claiming that rather than being a "short and plain statement of the claim" in conformity with [Rule] 8 it is "puzzle pleading" that fails to meet the requirements of Rule 9(b) and the [PSLRA]. The Complaint certainly is not short, *but if it is a puzzle, it is meant for a child and can be assembled readily*. The issues are whether plaintiffs plead actionable misrepresentations with sufficient particularity and whether plaintiffs adequately plead scienter on the part of Honeywell and each Individual Officer.

In re Honeywell Int'l Inc. Sec. Litig., 182 F. Supp. 2d 414, 416 (D.N.J. 2002). Judge Debevoise's criticism of defendants' generic puzzle-pleading argument is particularly appropriate here.

The CC provides a concise Summary of Lead Plaintiff's allegations which itself satisfies Rule 8. *See* ¶¶5-74.³ This alone necessitates denial of defendants' motion. Further, the CC logically divides the allegations into identifiable sections concerning the Enron fraud and the guilty parties. These sections contain chronologically-ordered allegations replete with clear, concise headings and subheadings identifying Enron's businesses, offerings and defendants' fraudulent practices. Plaintiffs have gone so far as to include color-coded graphs, charts and tables to assist the Court's and the parties' understanding of defendants' massive securities scheme and plaintiffs' claims arising thereunder. Under Rule 8, no more is required.

³ All paragraphs references "¶__" are to plaintiffs' CC

Courts recognize the tension among Rule 8, Rule 9(b) and the PSLRA. Where, as here, the underlying litigation is a complex securities fraud involving many tortfeasors and years of unlawful conduct, courts reject defendants' untenable position that a pleading is too lengthy or complex on the one hand, but lacks specificity or particularity on the other. The Court should not countenance defendants' doublespeak.

Defendants argue in this purported "Rule 8" motion that "group pleading" and imputed knowledge of high-level officers is improper, requiring dismissal. These arguments have nothing to do with Rule 8, but instead are properly addressed in a Rule 12(b)(6) motion. The Court should reject their consideration in this context, especially since the Court will have ample opportunity to entertain these arguments in defendants' motions to dismiss, as defendants themselves concede. Defs. Mem. at 3 n.6.

Defendants request the CC be dismissed with prejudice, arguing plaintiffs have had pretrial "discovery" and five months to "produce a pleading that complies with the PSLRA." Defs. Mem. at 12. This is nonsense. Plaintiffs have had no pretrial discovery from these defendants, and in any event, defendants' own authority undermines their request for the drastic remedy of dismissal with prejudice. The Rule 8 motion should be denied in its entirety.

Finally, should the Court find any deficiencies in the CC, plaintiffs request the Court grant leave to amend. *See* Section III, *infra*. Under Rule 15(a), plaintiffs have an absolute right to amend and leave to amend should be freely given – especially where, as here, granting leave would be the first time an amended pleading has been filed in these consolidated actions.

II. THE COMPLAINT COMPLIES WITH RULE 8

A. The Standard Under Rule 8

Rule 8 is satisfied when plaintiffs provide defendants with "fair" notice of plaintiffs' claims. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("all the Rules require is 'a short and plain statement of the claim'"). As Judge Garza held, Rule 8 "is to be liberally construed." *Barnes v. Irving Trust Co.*, 290 F. Supp. 116, 117 (S.D. Tex. 1968). Thus, motions to dismiss a CC for violating Rule 8 are disfavored and "such discretion should be exercised *sparingly*." *In re Smartalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 487, 496 (S.D. Ohio 2000).

Defendants argue the CC is "bloated" and is a "jigsaw" that they cannot understand.⁴ Defs. Mem. at 3, 6. The Fifth Circuit has expressly rejected the notion a lengthy complaint violates Rule 8, and has gone so far as to hold plaintiffs and their counsel are granted "wide latitude" in fashioning their pleadings:

Brevity is certainly desirable in order that the time of court and counsel may be conserved But such considerations *do not rank in importance* with the *right and the duty* of a litigant to present his demands through counsel of his own choosing *and in a style and form of expression which represent the attorney's honest effort to present the claims according to his own notions of their merits and their strong and weak points*. In the mechanics of getting his client's claim before the court, the attorney is allowed a *wide latitude*, and the claim is "whatever the plaintiff in good faith declares it to be;" and in the functioning of the judicial process, the role of the advocate ranks in dignity and importance with that of the judge.

Atwood, 243 F.2d at 888.

A fair reading of the CC shows plaintiffs' claims against defendants are plainly spelled out. The CC provides a "short and plain" statement of the allegations in the Summary section, which itself satisfies Rule 8. *See* ¶¶5-74. As Judge Infante has held in a securities fraud class action:

Plaintiffs have *satisfactorily set forth a short and plain statement* of their claims. The "Summary of Action" portion of the Complaint succinctly outlines plaintiffs' theory of recovery, including specific details supporting their theory. Contrary to defendants' assertion, the Complaint is far more than a "laundry list of everything that [company] said or did not say over a one year period."

In re Rasterops Corp. Sec. Litig., No. C92-20349, 1993 WL 476661, at *4 (N.D. Cal. Aug. 13, 1993). Moreover, the CC is *very similar* in format and style to the CC the Court found adequate in most respects in *In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, No. H-99-1948, slip op. (S.D. Tex. Feb. 20, 2001). Like the Enron CC, the complaint in *Landry's* provided a "short and plain" statement in the Summary section. And the *Landry's* complaint contained a "Class Period False Statements" section almost *identical* to the Enron CC, wherein the lead plaintiff in *Landry's* provided chronologically arranged excerpts of defendants' false statements, grouped them by time period, and followed the false and misleading statements with all the reasons why they were false and misleading when made. Because the Fifth Circuit affords plaintiffs and their counsel wide latitude in

⁴ If defendants cannot comprehend a 500-page document, one wonders how defendants managed Enron's labyrinth of more than 3,000 subsidiaries and limited partnerships based in tax havens and other exotic locales.

formulating pleadings, because the CC satisfactorily sets forth a short and plain statement in the Summary, and because the Court has upheld an almost *identically* formatted securities fraud pleading, defendants' Rule 8 motion must be denied.

Even if the Court were to look beyond the "short and plain" statement in the CC's Summary, it cannot be seriously disputed the allegations are clearly and succinctly pleaded. Each of the defendants and their insider trading is identified. ¶¶79-108. Class Period events and defendants' false statements are listed in chronological fashion, and clear explanations concerning their falsity is provided throughout. *See, e.g.*, ¶¶121-393. *Accord Landry's*. Due to the magnitude of Enron's restatements, which called into question more than *four years* of public reporting, plaintiffs prepared a separate section detailing defendants' false financial statements and explaining how and why Enron's 97-00 annual statements and interim 01 filings were false. ¶¶418-641. Next, the CC contains separate allegation sections for Enron's banks, lawyers and accountants. ¶¶642-985. Each of these sections is tabbed, ordered chronologically, and arranged by the topic of the fraudulent conduct in issue. Throughout the CC, headings and subheadings ease comprehension. And color-coded graphs, charts and tables provide further detail and assist comprehension of defendants complex securities scheme. The argument defendants' cannot comprehend the allegations against them strains credulity.

B. The Massive Scope of the Enron Fraud and the Federal Securities Laws Pleading Requirements Require the Detail Set Forth in the CC

The "short and plain" dictates of Rule 8 must be read together with Rule 8's command that a complaint show "that the pleader is entitled to relief," with Rule 9(b)'s command to plead fraud with particularity, and with the PSLRA's requirements for pleading securities fraud.⁵ That is not all. Because scienter is an element of §10(b) liability, investors must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." And after all this, Rule 8(f) commands that "[a]ll pleadings shall be so construed as to do substantial justice."

⁵ Investors must "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).

Courts have recognized securities plaintiffs must allege far more than a "short and simple" statement due to Rule 9(b)'s and the PSLRA's requirements. See *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1555 (9th Cir. 1994) (*en banc*); *Kaufman v. Magid*, 539 F. Supp. 1088, 1092 (D. Mass. 1982) ("[T]he federal securities laws ... are complex in their application. This makes 'concise' pleading difficult.").

Despite this tension, defendants argue plaintiffs' good faith efforts makes a "mockery" of Rule 9 and the PSLRA. Defs. Mem. at 7. But defendants' memorandum fails to address the proper interplay between Rules 8 and 9 and the PSLRA. This is not surprising, since neither the Fifth Circuit nor any Texas district court support what defendants seek here, and the Fifth Circuit has expressly rejected attempts to dismiss complaints due to their complexity or length.⁶ *Atwood*, 243 F.2d at 888. The Federal Rules are not to be read piecemeal, but must be read in conjunction. *Powell v. Abney*, 83 F.R.D. 482, 487 (S.D. Tex. 1979) ("Rule 9(b), however, must be read in conjunction with the Rule 8(a)"); *Brown v. Joiner Int'l, Inc.*, 523 F. Supp. 333, 335-36 (S.D. Ga. 1981) ("The two rules are complementary to one another and must be read in that fashion, avoiding an exclusive focusing on the requirements of one or the other.").

Defendants' contorted reading of the PSLRA also fails. Defendants argue the CC is a "textbook" example of the "problems" the PSLRA was meant to address, which, according to defendants, were "sweeping and nonspecific" securities fraud allegations. Defs. Mem. at 2. Congress, however, recognized the ongoing need for private securities litigation to keep fraudulent behavior in check:

Private securities regulation is an *indispensable tool* with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote the public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730. The PSLRA was never intended as a shield for securities fraud perpetrators such as defendants: "[W]e must do

⁶ Defendants' only Fifth Circuit case is *Williams v. WMX Techs.*, 112 F.3d 175, 178 (5th Cir. 1997). But as the Fifth Circuit has recognized, "[*Williams*] was a case filed before, and not governed by, the PSLRA, in which we held that 'the amended complaint failed to allege fraud with particularity'" *Nathenson v. Zonagen*, 267 F.3d 400, 410 n.9 (5th Cir. 2001)

all that we can to ensure that legitimate victims can continue to sue and can recover damages quickly. It is appropriate to 'raise the bar,' but we must provide the careful balance that is needed to protect the rights of fraud victims." S. Rep. No. 104-98, at 51 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 729.

Even before the passage of the PSLRA, courts anticipated the difficulty a requirement that scienter be pled with particularity would visit on Rule 8 in securities fraud cases.

[The] level of detail [in this complaint] is typical of the modern securities fraud complaint. While I deplore such a radical departure from Rule 8's command of "simple, concise, and direct" pleadings, it is inevitable that *prudent lawyers, faced with the obstacle of an inference of scienter test at the pleading stage*, will throw into their complaints every scrap of evidence they can muster.

GlenFed, 42 F.3d at 1555. Courts have refused to dismiss cases where, as is the case with Enron, the level of complexity is such that significant detail is required.

This is a complex securities fraud case involving numerous courts, numerous parties, two public offerings, numerous SEC filings, and numerous false and misleading statements. Moreover, the defendants' alleged fraud spanned 15 months, and in some cases had to be alleged with specificity. Although the complaint probably could have been shorter and more concise, I do not find that it should be dismissed for violating Rule 8 of the Federal Rules of Civil Procedure.

In re Transcript Int'l Sec. Litig., No. 98 CV3099, 1999 U.S. Dist. LEXIS 17540, at *33 (D. Neb. Nov. 4, 1999). Here, the Enron fraud is much greater than the 15-month *Transcript* fraud, since defendants restated over four years of financials and numerous public offerings are in issue.

Notably, defendants say nothing about a majority of the CC's allegations. Defendants are silent concerning their insider trading. They are silent about the allegations concerning Enron's false financial statements. ¶¶418-641. And defendants say nothing about the allegations against the banks, the law firms or Andersen. Because defendants fail to even address major portions of the CC, their motion to dismiss the entire pleading should be denied.

Defendants argue, without authority in support, the CC is a "*per se*" violation of the PSLRA and Rule 8. Defs. Mem. at 4. According to defendants, the "puzzle" pleading style purportedly used in this litigation is "cumbersome" to the point of "abuse." *Id.* They argue plaintiffs' allegations are presented via a "jigsaw" structure and "laundry list" that does not comply with the PSLRA. *Id.* at 6. As if this were not enough, defendants go so far as to say the "abuse" has been "magnified,"

particularly because the CC is 500 pages in length and at least one of the covered time periods spans a year of fraudulent conduct. *Id.* at 8.

Stripped of their colorful adjectives, defendants' arguments lack reasoned analysis and, more importantly, lack support. The law of this Circuit is clear: the Court must consider the circumstances of the Enron fraud in determining what qualifies as "short and plain."

The pleadings, the orders of the Court, and the arguments reflect that the issues involved in this case are many and varied, the amount of money sought is a very large one, the leases involved are long and complicated ... at best a complaint of some length would be required to get all of the contentions presented by such a situation before the Court: "What is a 'short and plain' statement depends of course on the circumstances of the case."

Atwood, 243 F.2d at 889 (citing 2 James Wm. Moore, *Moore's Federal Practice*, 1653 (2d ed 1986)). *Accord Karlinsky v. New York Racing Ass'n*, 52 F.R.D. 40, 43-44 (S.D.N.Y. 1971) (compliance with Rule 8 "is not to be judged by the length of the complaint.... Long and *involved* complaints do *not per se* fail to pass the test of sufficiency under Rule 8").

The only portion of the CC to which defendants even attempt to show a deficiency is the Class Period Events and False Statements section, or approximately 143 pages of the CC, and here, defendants' claims fail miserably. First, defendants object to plaintiffs' identification of a number of false and misleading statements from a particular time period, and, following the excerpted statements, a detailed explanation of why they are false or misleading. This section does not violate Rule 8 because Rule 8's requirements were met by providing a "short and plain" statement in the Summary section. ¶¶5-74. *See Rasterops*, 1993 WL 47661, at *4.

Second, the PSLRA requires shareholder plaintiffs "specify each statement alleged to have been false or misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. §78u-4(b)(1). Plaintiffs have done just that. Following the Summary section, far from endeavoring to present a "puzzle" or "laundry list," plaintiffs, attempting to satisfy Rule 9(b) and the PSLRA, provide excerpts from each statement alleged to be false or misleading. Plaintiffs then provide the reasons the statements were or are false or misleading. These allegations are clearly pleaded. For example, ¶¶122-154 identify false and misleading statements during a nine-month period. In these paragraphs, the CC pleads an excerpted portion of the particular false or misleading statement, the

issuer of the statement, the day it was issued, and other information (*e.g.*, whether the statements was a press release, report, etc.). Thus, plaintiffs identify the *who*, *what*, *when* and *where* concerning the false and misleading statements. In ¶155, the CC explains *why* these statements were false and misleading.⁷ Each of the statements is misleading for the reasons that are listed.⁸ This amount of detail is necessary because all the defendants argue plaintiffs fail to plead fraud with particularity. *See, e.g.*, Motion to Dismiss of Outside Directors, at 7 ("Plaintiffs do not specify where, in their 500 page opus, the detail of these false statements may be found.").

Courts routinely uphold such clearly pleaded allegations. In *Honeywell*, for example, Judge Debevoise rejected the defendants "puzzle pleading" argument, stating that while the "Complaint certainly is not short, but if it is a puzzle, it is *meant for a child* and can be assembled readily." 182 F. Supp. 2d at 416. There, as here, the issue is not whether defendants are amenable to the structure of the CC, but "whether plaintiffs plead actionable misrepresentations with sufficient particularity and whether plaintiffs adequately plead scienter on the part of [defendants] and each Individual Officer." *Id.* at 416. *See Landrys*, No. H-99-1948, slip op. (upholding similarly styled pleading).

Similarly, in *Transcript*, the court denied a Rule 8 motion where the underlying action was a complex securities fraud case involving "numerous counts, numerous parties, two public offerings, numerous SEC filings, and numerous false and misleading public statements." 1999 U.S. Dist. LEXIS 17540, at *32-*33. Since the *Transcript* defendants' fraud spanned 15 months and had to be alleged with specificity, the court found no ground for dismissal under Rule 8. *Id.* And the magnitude of the fraud is exacerbated here, since defendants restated more than *four years* of Enron's financials. These holdings are consistent with the recognition the pleading requirements of Rule 9 and the PSLRA demand that plaintiffs and their counsel put forth as much evidence as possible while complying with Rule 8. As Judge Norris suggested in *GlenFed*, any potential conflict should be

⁷ Where necessary, plaintiffs' allegations contain additional specificity in the False Financial Statements section.

⁸ If plaintiffs were required to excerpt each false or misleading statement, and then follow each and every excerpted statement with *all* the reasons why the statement was false or misleading (and continue this pleading structure for statements spanning a period of *years*), the CC would soon balloon to many thousands of pages of redundant explanations, resulting in the needlessly lengthy pleading defendants complain about. Plaintiffs and its counsel have labored to avoid this.

resolved in plaintiffs' favor, especially since Rule 8(f) requires pleadings be construed to do substantial justice. 42 F.3d at 1555-57.

Contrary to defendants' assertions, this case cannot be compared to *In re Splash Tech. Holdings Sec. Litig.*, 160 F. Supp. 2d 1059 (N.D. Cal. 2001) (on appeal), *Copperstone v. TCSI Corp.*, No. C97-3495 SBA, 1999 U.S. Dist. LEXIS 20978 (N.D. Cal. Jan. 14, 1999), or *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231 (N.D. Cal. 1998).

Defendants grossly distort the holding in *Splash*. See Defs. Mem. at 5 ("the court dismissed . . . complaint with prejudice as a *per se* violation" of Rule 8 and PSLRA). The *Splash* court *never* held the complaint in that case was a "*per se*" violation of Rule 8 or the PSLRA, but instead ruled the complaint failed to adequately identify which statements were false and misleading.⁹ For example, in the "False and Misleading Statements" section of the *Splash* complaint, the court took issue with the listing of specific statements, followed by the plaintiffs identifying "generally those *types* of statements" that were false and misleading, rendering it "exceedingly difficult to discern precisely which statements are alleged to be misleading." 160 F. Supp. 2d at 1073 (emphasis in original). This simply is not the case here. In the CC, plaintiffs have excerpted *each* false and misleading statement (not just "types" of statements as in *Splash*), identifying not only the statement but who issued it, when or where it was issued, and the form of the statement (press release, report, conference call, etc.). These excerpted statements are followed by succinct explanations why the preceding statements were false or misleading. Far from being a "jigsaw," this structure keeps the CC to a manageable length while identifying precisely which statements were false and misleading and the reasons for their falsity. This satisfies Rules 8 and 9, and the PSLRA. See *GlenFed*, 42 F.3d at 1555; *Honeywell*, 182 F. Supp. 2d at 416; *Transcrypt*, 1999 U.S. Dist. LEXIS 17540, at *33; *Landry's*, No. H-99-1948, slip op.

Copperstone is similarly unavailing. The *Copperstone* court dismissed the complaint because it listed only "true facts" and failed to specify the reasons *why* statements were misleading. 1999 U.S. Dist LEXIS 20978, at *16. This is *not* the case here, where plaintiffs provide succinct but

⁹ And as the *Karlinsky* court held, lengthy or complex complaints "do *not per se*" violate Rule 8. 52 F.R.D. at 43.

detailed reasons why the excerpted statements are false and misleading. *Wenger* is inapposite because the complaint did not indicate which statements were alleged to be false and failed to provide "any inkling that any statement was false when made." 2 F. Supp. 2d at 1243. Here, in contrast, the CC not only excerpts the false or misleading statements but also explains that defendants knew the statements were false when made. *See, e.g.*, ¶¶313-314 ("Enron, its accountants, bankers and lawyers knew that if Enron disclosed the true nature of its finances in reporting its 1stQ 01 results ... Enron's stock would collapse Nevertheless, Enron and its bankers continued to assure investors and the markets"). Nor do any of the preceding cases even approach the size or complexity of the scheme that is Enron, which is yet another reason defendants' authority is unpersuasive (as well as nonbinding). Defendants' authority simply is inapplicable.

C. Defendants' Group Pleading and "Particularized Facts" Arguments Are Improper on a Rule 8 Motion

In their "Rule 8" motion, defendants proffer arguments that can be decided only in a Rule 12(b)(6) motion to dismiss. Defendants challenge plaintiffs' reliance on "group pleading" and reliance on imputed knowledge of defendants due to their officer positions. Defs. Mem. at 8-10. These arguments have nothing to do with Rule 8. Moreover, these arguments are repeated *ad infinitum* by these and other Enron defendants in their motions to dismiss.¹⁰

Because these arguments may be asserted only in a Rule 12(b)(6) motion, the Court should reject their consideration here. In addition, the Court may entertain these arguments in defendants' motions to dismiss, and plaintiffs direct the Court to its Oppositions to these motions for a substantive response.

D. Dismissal with Prejudice Is Highly Inappropriate

Defendants compound their error by arguing dismissal of the CC should be with prejudice, purportedly because "the pleading under review is itself a repleading." Defs. Mem. at 11. To the contrary, the Court ordered plaintiffs to prepare and file a consolidated complaint at breakneck speed. The Court has yet to rule on any purported deficiencies in this pleading. To deny plaintiffs

¹⁰ *See, e.g.*, Motion to Dismiss of Outside Directors at 3-11, arguing plaintiffs fail to plead fraud with particularity, group pleading allegations should be disregarded, and specific allegations against individual outside directors fail to state claims for fraud.

the opportunity to replead or cure, especially when the Court has not yet informed plaintiffs of any deficiencies, is utter nonsense.

Defendants make the patently absurd argument that dismissal with prejudice is particularly appropriate here because plaintiffs have had "abundant pre-trial 'discovery.'" *Id.* at 12. As the Court is well aware, plaintiffs have taken no discovery from these defendants, which itself undermines defendants' arguments concerning Rule 9(b) and particularity.¹¹ "[I]n cases of corporate fraud, the requirements of Rule 9(b) are relaxed as to matters within the opposing party's knowledge. ***This is particularly the case where, as here, discovery has not yet commenced.***" *Degulis v. LXR Biotechnology*, 928 F. Supp. 1301, 1311 (S.D.N.Y. 1996). *Accord McNamara v. Bre-X Minerals Ltd.*, No. 5:97-CV-159, 2001 U.S. Dist. LEXIS 4571, at *135 (E.D. Tex. Mar. 30, 2001) (holding plaintiffs need not plead with particularity the "precise role" of defendants in preparing reports, especially where overzealous application of Rule 9(b) prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud").

And defendants' own authority seriously undermines their entire motion. Defendants rely on *Picard* for the proposition dismissal with prejudice is appropriate. *Picard Chem. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1116 (W.D. Mich. 1996). But in *Picard*, the court held dismissal with prejudice may have been appropriate because a "Joint Report" and a court order "explicitly" stated an amended complaint was to be filed to "clarify" the relationship between the claims against the defendants and the alleged representations and omissions. 940 F. Supp. at 1116. **No** such report or order has been issued in the instant case. This will be the first time the Court has had an opportunity to apprise plaintiffs of any pleading deficiencies, hence plaintiffs have yet to take a "bite of the apple." What's more, the *Picard* court refused to dismiss under Rule 8 for the very reasons defendants seek here:

[T]he Complaint generally sets forth its allegations of fraud with sufficient factual particularity regarding the time, place, and content of the alleged misrepresentations

¹¹ To the contrary, defendants have fought tooth-and-nail to oppose plaintiffs' attempts to lift the PSLRA's discovery stay to discern the facts concerning document destruction at Enron's headquarters (of which plaintiffs have garnered evidence); defendants vigorously opposed all efforts to discover the facts concerning the dissipation of more than \$1 billion they reaped from insider trading on material, nonpublic information.

and omissions to put defendants on notice of the illegal course of conduct plaintiffs allege against them. Thus, this Court will *decline to dismiss the entire case as a result of the length or complexity of the Complaint or the failure to allege fraud with sufficient factual particularity.*

Id. Plaintiffs urge the Court to adopt this line of reasoning from defendants' authority.

Defendants' reliance on *BMC* is similarly misplaced. As defendants' cited passage reveals, the *BMC* plaintiffs failed to request an "opportunity to replead if the court finds the pleading of their amended complaint insufficient." *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 917 (S.D. Tex. 2001). Here, plaintiffs have left no doubt they request an opportunity to replead. *See* §III. Defendants' request for dismissal with prejudice is inappropriate in the extreme and must be denied.

III. LEAVE TO AMEND SHOULD BE GRANTED

Plaintiffs have filed one of the most comprehensive complaints in the history of securities litigation. The CC is perhaps the most detailed exposition to date of the massive fraud involving Enron and its officers, directors, bankers, lawyers, and accountants. It names 81 defendants, covers more than four years of conduct, and involves countless fraudulent transactions of significant complexity.

Plaintiffs' efforts are all the more remarkable because the CC was drafted in a highly compressed time frame during which counsel was constantly engaged in intensive, albeit unsuccessful, settlement negotiations with Arthur Andersen and related entities. Admittedly, the CC is not a perfect document. But when compared with the substance and detail presented therein, the CC's mistakes are minimal. If the Court deems the CC inadequate in some respect (or believes minor mistakes should be corrected), plaintiffs request the Court grant leave to file an amended consolidated complaint – the first amended complaint to be filed in these consolidated actions.

The Enron litigation is exceedingly strong on the merits. And the Court has set forth an aggressive time schedule for the prosecution and defense of this action. Because of the strength of plaintiffs' case and the Court's compressed time frame, plaintiffs urge that under no circumstances should discovery – discovery against parties or non-parties – be delayed any longer. This request is particularly appropriate here, since plaintiffs have developed hard facts demonstrating certain defendants have destroyed – and may still be destroying – evidence critical to this litigation, tainting

the judicial process. Thus, if any part of the CC is dismissed with leave to amend, plaintiffs request the Court order discovery to proceed immediately.

A. Leave to Amend Is an Absolute Right

Federal Rule of Civil Procedure 15(a) directs that leave to amend "shall be freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 367 & n.5 (5th Cir. 2001). As the Fifth Circuit explained:

The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981) (citing *Foman*).

Indeed, the Fifth Circuit has emphasized that the right to amend "once as a matter of course" under Rule 15(a) is "absolute." *Aguilar v. Texas Dep't of Crim. Justice*, 160 F.3d 1052, 1053 (5th Cir. 1998); *see also Horton v. Cockrell*, 70 F.3d 397, 402 (5th Cir. 1995) (reversing denial of leave to amend where motion was "first request" to amend); 6 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure* §1482, at 580 (2d ed. 1990) ("the amendment should not be handled as a matter addressed to the court's discretion but should be allowed as of right").

A motion to dismiss is not a responsive pleading. *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 910-11 (5th Cir. 1993). Thus, since none of the defendants filed an Answer to the CC, under Rule 15(a), plaintiffs have a right to amend. By asking for leave to amend in its opposition memorandum, plaintiffs have made a timely request to amend its original complaint in light of any concerns the Court might express in ruling on the motions to dismiss. *Lone Star Ladies*, 238 F.3d at 367 & n.5. *See Elliott v. Foufas*, 867 F.2d 877, 883 (5th Cir. 1989) (bare statement that plaintiff is "certainly willing to amend the complaint" should be construed as motion for leave).

Several Fifth Circuit cases applying Rule 15(a) have held that leave to amend *must* be granted under these circumstances. In *Vernell v. United States Postal Serv.*, 819 F.2d 108, 110 (5th Cir. 1987), the plaintiff asked for leave in opposing a motion to dismiss her original complaint, but the district court granted dismissal without leave to amend. 819 F.2d at 109-10. The Fifth Circuit concluded the "portion of [plaintiffs'] memo in opposition" requesting leave "should have been construed as a motion to amend." *Id.* at 110. Reasoning that Rule 15(a) allows a plaintiff "to amend

his pleading once as a matter of course at any time before a responsive pleading is served," and that a motion to dismiss is not a responsive pleading, *Vernell* held that the district court had "no discretion" to deny leave to replead. 819 F.2d at 110. As emphasized in *Vernell*: "When a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court **should grant** that petition." *Id.*

B. Justice Requires Leave to Amend Be Freely Given

Apart from plaintiffs' "absolute" right to amend the CC, Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." As the Supreme Court has explained:

In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182. Although the decision to grant or deny leave to amend is typically within the district court's discretion, "[d]iscretion' may be a misleading term, for rule 15(a) **severely restricts** the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.'" *Dussouy*, 660 F.2d at 597. *Accord Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872 (5th Cir. 2000) (same).

Coghlan v. Wellcraft Marine Corp., 240 F.3d 449 (5th Cir. 2001), decided shortly after *Lone Star Ladies*, underscores the importance of freely allowing leave to amend. Noting "the discretion of the district court is limited by Fed. R. Civ. P. 15(a)," *Coghlan* held that "[i]t contravenes the liberal pleading presumption of Rule 15(a) and constitutes an abuse of discretion for a district court to deny a timely motion to amend where the underlying facts or circumstances relied upon a plaintiff may be a proper subject of relief." *Id.* at 452.

This bias is especially strong where a complaint has been dismissed for failing to plead fraud with particularity: "[D]ismissal for failure to comply with Rule 9(b) is almost always with leave to amend." *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 971 (5th Cir. 1981). "[S]uch deficiencies do not normally justify dismissal of the suit on the merits and without leave to amend, at least not in the absence of special circumstances." *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000). *Hart* cautioned that some fraud cases at the pleading stage may even require multiple

amendments: "Although a court may dismiss the claim, it should not do so without granting leave to amend, unless the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded *repeated* opportunities to do so."¹² *Id.* at 248 n.6. Thus, under the Fifth Circuit's directive, "unless there [is] a substantial reason to deny leave to amend, the discretion of the district court [is] not broad enough to permit denial." *Dussouy*, 660 F.2d at 598. *Accord Stripling*, 234 F.3d at 872; *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998). In all events, "[w]here a complaint is dismissed on the ground that it fails to state a claim, the order should also inform the plaintiff of the reason for the dismissal so that he can make an intelligent choice as to amending." *Bonanno v. Thomas*, 309 F.2d 320, 321 (9th Cir. 1962). For all these reasons, leave to amend must be granted.

IV. CONCLUSION

For the foregoing reasons, the certain current and former directors' motion to dismiss with prejudice pursuant to Fed. R. Civ. Proc. 8 should be denied. In addition, the Court should decline

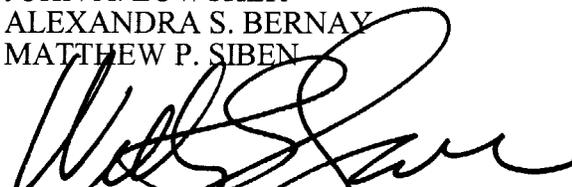
¹² See *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991) (in a securities class action, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice"); *Luce v. Edelstein*, 802 F.2d 49, 56-57 (2d Cir. 1986) ("[c]omplaints dismissed under Rule 9(b) are 'almost always' dismissed with leave to amend" and plaintiffs "*must* be allowed an opportunity to amend to remedy deficiencies under Rule 9(b)"); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("Failure to plead fraud with particularity ... does not support a dismissal with prejudice. To the contrary, leave to amend is 'almost always' allowed to cure deficiencies in pleading fraud.").

to consider defendants' Rule 12(b)(6) arguments in this motion. Finally, leave to amend should be freely granted if the Court deems any portion of the CC deficient.

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Respectfully submitted,

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