

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

MARK NEWBY, *et al.*,
Plaintiffs,
vs.
ENRON CORP., *et al.*,
Defendants.
Consolidated Lead No.. H-01-3624

AMERICAN NATIONAL INSURANCE
COMPANY, *et al.*,
Plaintiffs,
vs.
JPMORGAN CHASE & CO.,
Defendant.
Civil Action No. G-02-299,

**DEFENDANT JPMORGAN CHASE & CO.'S
MOTION TO DISMISS PLAINTIFFS' ORIGINAL
PETITION AND BRIEF IN SUPPORT**

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Defendant JPMorgan Chase & Co. (“JPMorgan Chase”), pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, files this its Motion to Dismiss Plaintiffs’ Original Petition (the “Petition”) and Brief in Support.

PRELIMINARY STATEMENT

The Plaintiffs in this action allege that they were purchasers of preferred stock, bonds and commercial paper of Enron Corporation and its affiliates (“Enron”). Plaintiffs further assert that they were induced to purchase Enron securities because of Enron’s failure to disclose its true financial picture.

Plaintiffs do not allege that they purchased any securities from JPMorgan Chase or, for that matter, that Plaintiffs and JPMorgan Chase had any type of relationship or dealings. Plaintiffs likewise do not allege that JPMorgan Chase was in any way involved in the preparation or certification of Enron’s financial statements, or that Plaintiffs purchased Enron securities in reliance on any statement by JPMorgan Chase. To the contrary, Plaintiffs have filed a separate lawsuit, which is also pending in this Court, against those who the Plaintiffs say participated in the issuance of false and misleading financial statements on which the Plaintiffs purportedly relied. *See American National Insurance Co., et al. v. Arthur Andersen, L.L.P., et al.*, Civil Action No. G-02-0084 (S.D. Tex.) (now consolidated in *Newby, et al. v. Enron Corp., et al.*, Civil Action No. H-01-3624). In contrast to their allegations against the other defendants, Plaintiffs allege in this case only that *Enron* improperly accounted for certain transactions it conducted with JPMorgan Chase and that JPMorgan Chase “knew or should have known” of Enron’s alleged misconduct.

Plaintiffs commenced this action in Texas state court asserting claims under the Texas Securities Act,¹ Texas statutory fraud in a stock transaction,² and for common law fraud

¹ TEX. REV. CIV. STAT. ANN. Art. 581-10 *et seq.*

against JPMorgan Chase. JPMorgan Chase timely removed the action and the case has been consolidated in the lead *Newby* case. See May 14, 2002 Order, a copy of which is annexed hereto as Ex. A.

JPMorgan Chase has already moved to dismiss the amended consolidated class action complaint in *Newby v. Enron, et al.*, Cause H-01-3624 (“*Newby Consolidated Complaint*”), and the present case has now been consolidated with *Newby*. Therefore, no further response from JPMorgan Chase is required. Indeed, this Court ordered, when JPMorgan Chase sought an extension of time to respond to Plaintiffs’ complaint, that JPMorgan Chase must file a pleading responsive to the “Lead Plaintiff’s amended consolidated class action complaint.” See May 16, 2002 Order, a copy of which is annexed hereto as Ex. B. In any event,³ even if it had not been consolidated into *Newby*, Plaintiffs’ complaint would be subject to dismissal for the following additional reasons:

First, Plaintiffs’ claims should be dismissed under the Securities Litigation Uniform Standards Act (“SLUSA”);

Second, Plaintiffs have failed to plead their claims with the particularity required by Fed. R. Civ. P. 9(b) ; and

Third, as a matter of law, Plaintiffs have failed to allege even generally certain key elements of their state law fraud claims, specifically a duty to disclose and actual reliance.

² TEX. BUS. & COMM. CODE § 27.01.

³ JPMorgan Chase believes that, as a result of the consolidation of Plaintiffs’ case into the lead securities case, no response is required other than to the *Newby Amended Complaint*. However, because of the potential ambiguity created by the stipulation entered into by JPMorgan Chase and Plaintiffs, which requires JPMorgan Chase to file a response to Plaintiffs’ Petition on or before June 12, 2002, see Stipulation and Proposed Order dated May 10, 2002, a copy of which is annexed hereto as Ex. C, JPMorgan Chase hereby also responds, in an abundance of caution, to Plaintiffs’ pre-consolidation Petition.

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ARGUMENT

POINT I

**PLAINTIFFS' ACTION HAS BEEN CONSOLIDATED INTO *NEWBY*
AND SHOULD BE DISMISSED FOR THE SAME REASONS
STATED IN JPMORGAN CHASE'S MOTION TO DISMISS
THE *NEWBY* CONSOLIDATED COMPLAINT**

On December 12, 2001, the Honorable Lee H. Rosenthal ordered the consolidation of the more than forty (40) cases then pending in the United States District Court for the Southern District of Texas. *See* December 12, 2001 Order. All of those cases arose from, or are related to, the financial difficulties of Enron.

Judge Rosenthal determined, *inter alia*, that the cases “all arise from a common core of operative facts,” and contain “largely identical claims with overlapping legal issues.” Accordingly, Judge Rosenthal ordered that:

[T]he actions involving or related to the financial difficulties of Enron, pending in the Southern District of Texas, are consolidated in the court in which the oldest case was filed in this district, which is Civil Action No. H-01-3624, *Newby v. Enron Corporation, et al.* Other actions later filed in this district relating to the same core of operative facts and issues will also be consolidated in this court . . .

December 12, 2001 Order at 17-18.

Thereafter, on or about February 15, 2002, this Court entered an Order designating The Regents of the University of California as lead Plaintiff in this action, and it further appointed Milberg Weiss Bershad & Lerach L.P. as Lead Counsel for Plaintiffs. On February 28, 2002, the Court ordered Lead Counsel to file an amended and consolidated complaint, which they did by filing the *Newby* Consolidated Complaint on April 8, 2002.

In an obvious move to avoid this Court's case management orders, on the same day that the *Newby* Consolidated Complaint was filed, Plaintiffs filed the instant action in Texas state court. On May 6, 2002, JPMorgan Chase removed the instant action to the United States District Court for the Southern District of Texas, Galveston Division. On May 7, 2002, the

Honorable Samuel Kent entered an Order of Consolidation, consolidating this action into *Newby*. On May 14, 2002, this Court entered its own order, likewise determining that “this case is hereby CONSOLIDATED in the lead case H-01-3624, *Newby v. Enron Corp., et al.*” See Ex. A.

As the Court’s Orders make clear, all federal securities fraud claims must be filed in the Consolidated *Newby* Complaint.⁴ As a result of these orders, Plaintiffs may not assert, in a separate complaint or petition, the same type of claims under state law, in the same court, and at the same time, against a party already a Defendant in *Newby*.⁵ Because JPMorgan Chase previously has moved to dismiss the *Newby* Consolidated Complaint, and the present case has been consolidated in *Newby*, JPMorgan Chase incorporates herein by reference its Motion to Dismiss the *Newby* Consolidated Complaint filed on May 8, 2002. For the reasons stated therein, Plaintiffs’ action should be dismissed against JPMorgan Chase.

POINT II

PLAINTIFFS’ STATE LAW CLAIMS, AS CONSOLIDATED INTO *NEWBY*, SHOULD BE DISMISSED UNDER SLUSA

Plaintiffs, seeking to avoid this Court’s jurisdiction over the Enron securities litigation, have based their claims entirely on state law. Although Plaintiffs purport not to assert those claims in the context of a class action, Plaintiffs’ claims properly have been consolidated into the *Newby* class action securities litigation after removal.⁶ Indeed, Plaintiffs have requested

⁴ The December 12, 2001 Order of Consolidation consolidated “federal” securities claims in *Newby*, and Plaintiffs’ claims, on their face, are limited to state law. However, as described in Point II, *infra*, the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) requires that Plaintiffs plead their claims solely under federal law, and Plaintiffs’ state law claims therefore fail.

⁵ As the United States Court of Appeals for the Fifth Circuit has held, a plaintiff has “no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant[s].” *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985) (quoting *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977)).

⁶ Removal in this case was effected on several grounds; specifically, supplemental jurisdiction, SLUSA preemption and bankruptcy jurisdiction. On or about May 31, 2002,

“subclass” status in *Newby*. See American National, *et al.*’s Response to Cayman, L.P., *et al.* Motion for Scheduling Order and American National’s Motion to Create a Subclass and for Appointment as Subclass Representative, a copy of which is annexed hereto as Ex. E. Accordingly, Plaintiffs’ claims are barred by SLUSA, Pub. L. No. 105-353, 112 Stat. 3227, codified as amended in part at 15 U.S.C. §§ 77p and 78bb(f).

SLUSA preempts class actions based on state statutory or common law involving “covered securities.” 15 U.S.C. §§ 77p(c), 78bb(f). SLUSA states in relevant part that:

no covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f).

A state law action is preempted by SLUSA if it: (1) is a “covered class action” involving a “covered security” as defined by SLUSA; (2) is based on state statutory or common law; (3) alleges that the defendant misrepresented or omitted material facts (or used or employed a manipulative or deceptive device or contrivance); and (4) alleges that the conduct was in connection with the purchase or sale of a covered security. *Newby*, Slip op. (Ex. D) at pp. 12-14; see also *In re Waste Mgmt. Inc. Sec., Litig.*, 194 F. Supp. 2d 590, 593-94 (S.D. Tex. 2002); *Denton v. H & R Block Fin. Advisors, Inc.*, No. 01C4185, 2001 WL 1183292, at *2-3 (N.D. Ill.

Plaintiffs served a motion to remand this case to state court. JPMorgan will serve its opposition, demonstrating the propriety of the removal, in due course. To the extent that this Court determines, as JPMorgan Chase believes it should determine, that the Plaintiffs’ state law claims, when filed in state court, were preempted by SLUSA, and that federal jurisdiction existed on this basis, see *MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 912 (9th Cir. 1996), the Court would necessarily also dismiss the preempted state law claims, see, e.g., *Newby v. Enron Corp.*, Civ. Action No. H-01-3624, Slip Op. at p. 7 (S.D. Tex, Feb. 13, 2002), a copy of which is annexed hereto as Ex. D (“If SLUSA applies, the removal was proper and the court must dismiss the state law claims.”) As set forth above, however, SLUSA requires dismissal of Plaintiffs’ claims regardless of the basis for federal subject matter jurisdiction.

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Oct. 4, 2001); *Korsinsky v. Salomon Smith Barney, Inc.*, No. 01-Civ. 6085 (SWK), 2002 WL 27775, at *3 (S.D.N.Y. Jan. 10, 2002).

Plaintiffs' claims are preempted by SLUSA. As consolidated with *Newby* by Judge Kent's May 7, 2002 Order and this Court's May 14, 2002 Order, Plaintiffs' allegations constitute a "covered class action." A "covered class action" is defined as a "lawsuit in which damages are sought on behalf of more than 50 persons" involving a "covered security." 15 U.S.C. § 78bb(f). The statute defining "covered class action" specifically addresses the case of consolidated actions:

The term "covered class action" means:

* * *

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which-

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B). The instant case falls squarely within the definition of covered class action, as there is a "group of lawsuits . . . pending in the same court and involving common questions of law or fact," "damages are sought on behalf of more than 50 persons," and "the lawsuits are . . . consolidated" for multiple purposes. *Id.*

Plaintiffs' claims involve a "covered security" which is defined to include any security listed on a national stock exchange. 15 U.S.C. § 77r(b). Because Enron, prior to its recent delisting, was traded on the New York Stock Exchange and had many thousands of shareholders, Enron's common stock is a "covered security." *See Newby*, slip op. at p. 14 ("It is not disputed that Enron Corporation's common stock is a covered security because its shares are

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listed on the New York Stock Exchange.”). Thus, Plaintiffs’ action is a “covered class action” involving a “covered security.”

Further, Plaintiffs’ claims clearly, and expressly, are based on the common and statutory law of the State of Texas. Petition ¶¶ 50-67.

Finally, Plaintiffs allege a misrepresentation or omission in connection with their alleged purchase of Enron securities. Indeed, under Plaintiffs’ self-titled “*Nature of the Case*,” Plaintiffs plainly state that certain “misleading statements . . . were relied upon by Plaintiffs in their purchase of Enron stock, bonds, preferred stock, commercial paper and other securities.” Petition ¶ 18.

Thus, Plaintiffs’ claims meet all of the elements for preemption by, and are clearly of the type barred by, SLUSA. Accordingly, the Court should dismiss Plaintiffs’ Petition.

POINT III

PLAINTIFFS FAIL TO PLEAD THEIR CLAIMS WITH THE PARTICULARITY REQUIRED BY RULE 9(b)

Federal Rule of Civil Procedure 9(b) requires particularity in pleading the “circumstances constituting fraud.” *In re Azurix Corp. Sec. Litig.*, No. H-00-4034, 2002 WL 562819, at *11 (S.D. Tex. Mar. 21, 2002). Specifically, Rule 9(b) states, in part, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). Rule 9(b) applies to both Plaintiffs’ allegation of common law fraud and also to Plaintiffs’ securities fraud claims. *See Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (applying Rule 9(b) to state law claims of common law fraud); *In re Compaq Sec. Litig.*, 848 F. Supp. 1307, 1312 (S.D. Tex. 1993) (subjecting Plaintiffs’ allegations under § 27.01 to the Texas Business and Commerce Code and the Texas Securities Act to scrutiny under Rule 9(b)).

Rule 9(b)'s particularity requirement has four principal purposes: (i) to ensure defendants have sufficient information to formulate a defense; (ii) to protect defendants against frivolous suits; (iii) to eliminate fraud actions in which the facts are learned after discovery; and (iv) to protect defendants from undeserved harm to their goodwill and reputation. *Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 614 (S.D. Tex. 2001) (citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999)); see also *In re Azurix*, 2002 WL 562819, at *11 (S.D. Tex. March 21, 2002) ("Particularity is required so that the complaint provides defendants with fair notice of the plaintiffs' claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs.") (citation omitted). Rule 9(b) must be interpreted and applied in light of these purposes. *Wilkins*, 173 F. Supp. 2d at 614.

The United States Court of Appeals for the Fifth Circuit has emphasized that "a plaintiff pleading fraud must set forth the 'who, what, when, and where . . . before access to the discovery process is granted.' Anything less fails to provide defendants with adequate notice of the nature and grounds of the claims." *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000) (quoting *Williams*, 112 F.3d at 178); *Wilkins*, 173 F. Supp. 2d at 613-14. The Fifth Circuit further requires Plaintiffs to plead what the defendant obtained as a result of the fraud, why the alleged statements were false, and how the alleged fraud worked. See generally *Williams*, 112 F.3d at 177-78; *Wilkins*, 173 F. Supp. 2d at 615-16.

Finally, Plaintiffs must plead that each defendant acted with intent to defraud. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996). A plaintiff cannot survive a Rule 9(b) motion to dismiss simply by alleging that a defendant had some sort of fraudulent intent. *Id.* In order to adequately plead scienter, a plaintiff must set forth specific facts to support an inference of fraud. *Tuchman v. DSC Comms. Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994).

Plaintiffs' allegations wholly fail to meet the requirements of Rule 9(b). Plaintiffs' fraud claims, whether deriving from securities or common law fraud, fail completely to allege "who, what, when, where, and why." Although Plaintiffs generally allege that Enron made "misleading statements" that were "relied upon by Plaintiffs in their purchase of Enron stock, bonds, preferred stock, commercial paper and other securities," (Petition ¶ 18), Plaintiffs fail to allege, in the entire seventeen (17) page Petition, a single, specific statement—misleading or otherwise—made by either Enron or JPMorgan Chase.

With respect to JPMorgan Chase, Plaintiffs merely allege in conclusory fashion that JPMorgan Chase "failed to disclose" material facts. Petition ¶ 47. Plaintiffs fail, however, to allege with any specificity what material facts JPMorgan Chase should have disclosed; when the material facts should have been disclosed; to whom the material facts should have been disclosed; or why JPMorgan Chase was required to disclose the alleged material facts.⁷ It simply is impossible for JPMorgan Chase to attempt to formulate a response to allegations that are so vague. *See Williams*, 112 F.3d at 180 (dismissing complaint with prejudice under Rule 9(b) where the complaint was "insufficient to put any of the defendants on notice as to which of their assertions are challenged").

Further, Plaintiffs do not allege, even generally, from whom they bought Enron securities, when they bought them, how much they bought, what kind of securities were allegedly bought by each of the Plaintiffs, or the purchase price. The most detailed allegation in the Petition regarding purchases of Enron securities is that "[t]he total investment losses incurred by the Plaintiffs as a result of the actions and omissions of Defendant Morgan amounts to well over \$20 million." Petition ¶ 48. This is insufficient to pass muster under Rule 9(b).

⁷ Plaintiffs' failure to allege facts sufficient to show that JPMorgan Chase was under a duty to disclose facts is discussed in Point IV, *infra*.

In addition to Plaintiffs' total lack of specificity regarding the purchase of Enron securities, Plaintiffs fail to plead what JPMorgan Chase allegedly "obtained thereby," as a result of the alleged fraud. *Wilkins*, 173 F. Supp. 2d at 615-16. Finally, Plaintiffs' Petition lacks even the slightest reference, even in conclusory terms, that JPMorgan Chase acted with intent to defraud Plaintiffs when it engaged in transactions with Mahonia or Enron. *See Lovelace*, 78 F.3d at 1018 (affirming dismissal of complaint for failure to plead scienter with specificity). Plaintiffs not only have failed to set forth specific facts to support an inference of fraud, but also have failed to plead that JPMorgan Chase had a fraudulent intent.

The heightened pleading standard of Rule 9(b) serves an important screening function in securities fraud suits, by prohibiting lawsuits that utilize a "sue now, try to find grounds later" approach. *See In re Urcarco Sec. Litig.*, 148 F.R.D. 561, 564 (N.D. Tex. 1993). Based on the general and wholly conclusory allegations in their Petition, Plaintiffs clearly plan to utilize that "sue now, try to find grounds later" approach. Accordingly, the Court should dismiss Plaintiffs' complaint.

POINT IV

PLAINTIFFS FAIL AS A MATTER OF LAW TO ALLEGE KEY ELEMENTS OF THEIR CLAIMS

A. Plaintiffs Fail To Allege Facts Sufficient To Show JPMorgan Chase Had A Duty To Disclose Facts Relating To The Mahonia Trades

In the Petition, Plaintiffs allege that "Defendant Morgan knew and/or should have known that Enron was using the [Mahonia] 'trades' to manage Enron's tax liabilities . . . thereby misleading investors and/or shareholders about the true financial health of Enron." Petition ¶ 18. Plaintiffs do not allege that JPMorgan Chase had any role or involvement in preparing or certifying Enron's financial statements or SEC filings, nor do they allege that JPMorgan Chase had any role or involvement in what Enron did or did not disclose to the public or its shareholders. Instead, Plaintiffs essentially are claiming that JPMorgan Chase, as Enron's

banker and trading counter-party, had some duty to disclose Enron's alleged deception to Plaintiffs and to the market as a whole. Petition ¶ 49. However, Plaintiffs fail to plead facts upon which JPMorgan Chase would have such a duty.

A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact. *Trustees of the Northwest Laundry & Dry Cleaners Health & Welfare Trust Fund v. Burzynski*, 27 F.3d 153, 157 (5th Cir. 1994) ("We begin with some basic principles. . . . A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact."). The United States Court of Appeals for the Fifth Circuit has made clear that a duty to speak can arise only by operation of law or by agreement of the parties. *Id.* Here, Plaintiffs have not alleged (or even suggested) that there was any agreement between JPMorgan Chase and Plaintiffs to create a duty running from JPMorgan Chase to Plaintiffs. Thus, JPMorgan Chase would have a duty to disclose only if one were imposed by operation of law.

The Fifth Circuit has explained that "[a] duty to speak arises by operation of law when (1) a confidential or fiduciary relationship exists between the parties; or (2) one party learns later that his previous affirmative statement was false or misleading; or (3) one party knows that the other party is relying on a concealed fact, provided that the concealing party also knows that the relying party is ignorant of the concealed fact and does not have an equal opportunity to discover the truth; or (4) one party voluntarily discloses some but less than all material facts, so that he must disclose the whole truth, *i.e.*, all material facts, lest his partial disclosure convey a false impression." *Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001). Plaintiffs, however, fail to allege any circumstance in which JPMorgan Chase would have a duty to disclose.

First, the Petition also does not allege the existence of any fiduciary or confidential relationship between Plaintiffs and JPMorgan Chase. The Petition contains not a

single allegation of any agreement between Plaintiffs and JPMorgan Chase. Indeed, the Petition does not allege any dealings whatsoever between Plaintiffs and JPMorgan Chase, much less dealings that would give rise to a confidential relationship.

Second, Plaintiffs fail to plead facts that would create a duty to disclose because the Petition contains no allegation that JPMorgan Chase made any “affirmative statements” to Plaintiffs, much less statements that JPMorgan Chase later learned were false or inaccurate.

Third, Plaintiffs fail to plead facts that would create a duty to disclose because nowhere in Plaintiffs’ Petition do they allege that JPMorgan Chase even had knowledge that Plaintiffs were purchasing Enron securities, much less purchasing Enron securities while relying on an allegedly concealed fact. Plaintiffs do not even allege that they bought their Enron securities from JPMorgan Chase or with JPMorgan Chase’s knowledge.⁸

Fourth, Plaintiffs fail to plead facts that would create a duty to disclose because they fail to assert that JPMorgan Chase voluntarily disclosed some but less than all material facts. Although a speaker who makes a partial disclosure may assume a duty to tell the whole truth even when the speaker initially was under no duty to make any disclosure, a prerequisite to a fraud claim based upon this duty is that JPMorgan Chase made some affirmative statement to Plaintiffs. *See Burzynski*, 27 F.3d at 157. Again, the Petition fails to allege any statements or communications between JPMorgan Chase and Plaintiffs, and thus Plaintiffs fail to allege that JPMorgan Chase had a duty to Plaintiffs to disclose Enron’s true financial picture.

⁸ Further, this duty to speak does not arise absent some relationship between the parties. *See Libhart v. Copeland*, 949 S.W.2d 783, 802 (Tex.App.—Waco 1997, no writ) (plaintiff and defendants had a special duty of confidence and trust such that defendants had a duty to disclose); *see also World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex.App.—Fort Worth 1998, writ denied). Again, the Petition is devoid of any allegation that JP Morgan Chase and Plaintiffs had any type of relationship.

B. Plaintiffs Fail To Allege That They Actually Relied On Any Statement Or Omission Of JPMorgan Chase In Purchasing Enron Securities

Actual reliance is a required element in both common law fraud and fraud in a stock transaction under TEX. BUS. & COMM. CODE § 27.01. *See Griffin v. GK Intelligent Sys., Inc.*, 87 F. Supp. 2d 684, 690 (S.D. Tex. 1999) (“A necessary element of a common law fraud claim under Texas law is actual reliance on the allegedly fraudulent statements.”); *In re Compaq*, 848 F. Supp. at 1312 n. 9 (claims under § 27.01 of the Texas Business and Commerce Code are derived from common law fraud and the reliance element is the same). Although reliance is not expressly an element in the Texas Securities Act, materiality is required, and “there is little, if any, difference between materiality and reliance.” *Lutheran Bros. v. Kidder Peabody & Co., Inc.*, 829 S.W.2d 300, 307 (Tex.App.-Texarkana 1992), *pet. granted*, judgment vacated by agr., 840 S.W.2d 384 (Tex. 1992). *See also Gutierrez v. Cayman Islands Firm of Deloitte & Touche*, No. 04-01-00637-CV, 2002 WL 458898, at *9 & n.2 (Tex.App.—San Antonio Mar. 27, 2002, no writ) (“Reliance is also an element of violations of the Texas Securities Act.”); *Ponder v. Brice & Mankoff*, 889 S.W.2d 637, 640 (Tex. App.—Houston 1994, writ denied) (affirming judgment as a matter of law granted to defendants on Securities Act claim, *inter alia*, on the ground that plaintiff had failed to show reliance upon any of the defendants’ actions).

Plaintiffs have not alleged (and cannot allege) actual reliance on any statements or omissions by JPMorgan Chase. Indeed, Plaintiffs do not even attempt to allege that they relied on any statement or omission by JPMorgan Chase when they purchased Enron securities. Instead, it appears that Plaintiffs are attempting to avoid the actual reliance element by using the “fraud on the market” doctrine,⁹ but to no avail. When it applies, fraud on the market may

⁹ “A fraud on the market is any deceit that successfully disseminates false or misleading information into the securities market or withholds vital information from that market.” *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 276 (N.D. Tex. 1990). The theory, which is associated with federal law securities claims like those under Rule 10b-5, holds that such a deceit defrauds investors even when they are unaware of misrepresentations or

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obviate the need to prove specific actual reliance. *See Steiner*, 734 F. Supp. at 276. However, courts have consistently held that the fraud on the market doctrine does not apply to Texas state law claims. *See Griffin*, 87 F. Supp. 2d at 690 (“Plaintiffs have failed to allege actual reliance, and the ‘fraud-on-the-market’ doctrine does not apply to a Texas law fraud claim.”); *Steiner*, 734 F. Supp. at 279; *McNamara v. Bre-X Minerals, Ltd.*, 197 F. Supp. 2d 622, 697-98 (E.D. Tex. 2001).

In *Steiner*, the court expressly rejected plaintiff’s attempts to utilize a fraud on the market theory in Texas state law claims. *Steiner*, 734 F. Supp. at 279. “Absent Texas precedent extending the theory to this degree, this court applying state law will not fashion such an extension.” *Id.*; *see also Griffin*, 87 F. Supp. 2d at 690. Because Plaintiffs’ Petition does not allege that any of the named Plaintiffs actually relied on any representations or omissions by JPMorgan Chase, the Court should dismiss Plaintiffs’ petition.

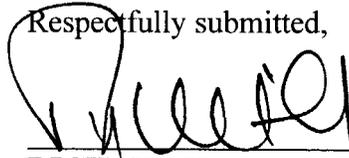
CONCLUSION

For all the foregoing reasons, as well as those contained in JPMorgan Chase’s Motion to Dismiss the *Newby* Consolidated Complaint filed on May 8, 2002, JPMorgan Chase respectfully requests that the Court grant this Motion and enter an Order dismissing Plaintiffs’

omissions that affect the market price, because investors depend upon the integrity of the market place. *Id.*

claims with prejudice and granting JPMorgan Chase such other and further relief as the Court deems proper.

Respectfully submitted,



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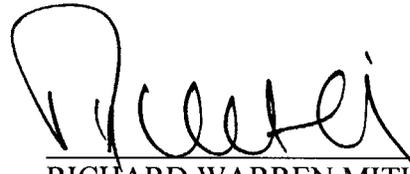
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by electronic mail to the temporary website on this 12th day of June, 2002, and that on the same day an additional copy was served on counsel for American National Insurance Co., et al. via electronic mail, facsimile and certified mail.

A handwritten signature in black ink, appearing to read "R. Mithoff", written over a horizontal line.

RICHARD WARREN MITHOFF

The Exhibit(s) May
Be Viewed in the
Office of the Clerk