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## INTRODUCTION

In their 83-page response to Kirkland & Ellis's 25-page motion to dismiss, plaintiffs do not cite a single case – not one – that recognizes or allows the unprecedented securities fraud claim alleged against Kirkland & Ellis. Indeed, plaintiffs' response appears to be nothing more than a "cut and paste" brief addressed principally to arguments made by other defendants. Plaintiffs never come to grips with Kirkland & Ellis's unique position in this securities case: that of a law firm that did *not* represent the securities issuer, made *no* representations to investors, and had *no* involvement in any securities offering or trade. None of the private entities that Kirkland & Ellis actually represented is even named as a defendant in the case, and plaintiffs state over and over both in their brief and in the complaint that it was *Enron* that used or employed these entities to disguise its financial condition and defraud its own shareholders. All that is alleged with respect to Kirkland & Ellis is that, by representing separate third parties in transactions with Enron, Kirkland "facilitated" or "assisted" Enron's commission of securities fraud. This is an aiding-and-abetting claim pure and simple, and it is subject to dismissal as a matter of law.

Plaintiffs' failure to respond to the merits of Kirkland's argument is telling. Indeed, the bulk of plaintiffs' brief is devoted to attacking straw-man arguments that Kirkland & Ellis never made in the first place. Thus, plaintiffs vigorously challenge the contention that law firms are immune from Section 10(b) liability. That is a contention that Kirkland & Ellis never advanced. Plaintiffs likewise take on the argument that *Central Bank of Denver* "eliminated scheme liability." That is, again, an argument that Kirkland never made. What plaintiffs do not challenge (because they cannot) is the proposition that *Central Bank of Denver* eliminated all

forms of aiding-and-abetting liability under the securities laws. Plaintiffs cannot circumvent that ruling by simply calling their aiding-and-abetting claim by a different name.

In particular, plaintiffs cannot “plead around” *Central Bank of Denver* by repackaging their aiding-and-abetting allegations as “participation in an unlawful scheme.” What matters is not the *label* used by a plaintiff, but the nature of the conduct alleged. Under any of the various tests for Section 10(b) liability proposed in this case – including in the *amicus curiae* materials submitted by the Securities and Exchange Commission – plaintiffs’ allegations of “participation” by Kirkland & Ellis amount to nothing more than *assistance to others* in violating the securities laws, and thus are not actionable under Section 10(b). As the SEC recognized in its *amicus curiae* motion, the Court must look to the particular facts alleged with respect to each defendant in considering the various motions to dismiss. To allow plaintiffs’ claim to proceed against Kirkland & Ellis in the face of *these* factual allegations would obliterate the distinction between primary and secondary liability, render *Central Bank of Denver* meaningless, and impose perverse obligations on attorneys directly at odds with a lawyer’s duties of loyalty and confidentiality to the client.

Lacking any legal basis for their claim, plaintiffs’ final strategy is to emphasize the unprecedented size and scope of Enron’s collapse in an apparent effort to justify keeping Kirkland & Ellis in the case. Kirkland understands the gravity of Enron’s fall and appreciates the impact it has had on shareholders and employees. But those considerations cannot justify bending the rule of law to allow an otherwise unmeritorious claim to proceed against a defendant who happens to be solvent. In cases that have generated less publicity, courts have repeatedly dismissed securities fraud claims based on efforts to “plead around” *Central Bank of Denver*.

The result should be no different here, and Count I of the complaint as it relates to Kirkland & Ellis should be dismissed for failure to state a claim.

## ARGUMENT

### I. The Opposition Brief Confirms That The Claim Against Kirkland & Ellis Is An Impermissible “Aiding-and-Abetting” Claim.

#### A. Plaintiffs Are Incapable Of Articulating A Claim Against Kirkland & Ellis Without Reliance On “Aiding-and-Abetting” Allegations.

Plaintiffs’ opposition brief – like the complaint it tries to defend – relies exclusively on “aiding” and “abetting” allegations to describe Kirkland & Ellis’s alleged conduct. Kirkland’s opening brief laid out in detail the “aiding-and-abetting” allegations set out in the complaint, which used virtually every synonym for “aid” and “abet” in articulating the claim against Kirkland. *See* Kirkland Mem. at 6 (summarizing allegations that Kirkland & Ellis “helped,” “enabled,” “facilitated,” and “allowed” Enron to commit fraud). Plaintiffs ask the Court to disregard the complaint’s allegations on the basis that their 500+-page complaint was carelessly drafted. *See* Opp. at 20 n.9. Even accepting the implausible assumption that plaintiffs misspoke repeatedly in what plaintiffs themselves trumpet (and indeed attempt to copyright) as the most thoroughly researched securities fraud complaint in history, the fact remains that when plaintiffs were given a second chance to clean up their language in the opposition brief, they again could not help but cast the claim against Kirkland as one for aiding and abetting:

- “By forming Chewco at year-end 97 and structuring the contrived JEDI buyout, Kirkland & Ellis *enabled Enron* [to] . . . inflat[e] Enron’s 97 reported profits by \$45 million.” Opp. at 3-4 (emphasis added).
- “Kirkland & Ellis created two LJM partnerships” that “*enabled Enron* to inflate its reported financial results.” Opp. at 6 (emphasis added).
- “The reason for establishing these partnerships was that they would *permit Enron* to accomplish transactions it could not otherwise accomplish.” Opp. at 6 (emphasis added).

- Kirkland “arranged” year-end deals in 1999, which “*allowed Enron*” to avoid consolidation and otherwise inflate its financials. Opp. at 9 (emphasis added).
- The partnerships represented by Kirkland “*were used by Enron* to enter into transactions that Enron could not, or would not, do with unrelated commercial entities . . . .” Opp. at 16 (emphasis added).
- The Raptor transactions, in which Kirkland represented LJM2, “*allowed Enron* to conceal from the market very large losses.” Opp. at 16 (emphasis added).

The opposition brief thus only confirms what is plain from the face of the complaint: It is simply not possible to frame a claim against Kirkland & Ellis except as one for aiding and abetting.

*Central Bank of Denver*, however, explicitly rejected “aiding-and-abetting” liability under Section 10(b), and courts have repeatedly rejected efforts to circumvent that holding by artfully pleading other terms that mean exactly the same thing. *See, e.g., Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) (“Allegations of ‘assisting,’ ‘participating in,’ ‘complicity in’ and similar synonyms used throughout the complaint all fall within the prohibitive bar of *Central Bank*.”). It is the *substance* of plaintiffs’ claim that counts, not what plaintiffs choose to call it. The substance of plaintiffs’ claim here is plainly aiding-and-abetting, and it is barred by *Central Bank of Denver*.

**B. Courts Following *Central Bank Of Denver* Have Repeatedly Rejected Efforts To Revive “Aiding-And-Abetting” Liability Under Another Name.**

Plaintiffs do not even really dispute that their claim against Kirkland is a classic aiding-and-abetting claim, devoting just a footnote of their 83-page brief in response to the argument. *See* Opp. at 20 n.9. Rather, their theory seems to be that as long as they use the magic words that a defendant “participated in a scheme,” factual allegations that would constitute an impermissible “aiding-and-abetting” claim under *Central Bank of Denver* are somehow

transformed into actionable securities fraud. Plaintiffs candidly admit that their claim is based on the notion that

persons who participate in a scheme to defraud or course of business that operates as a fraud or deceit on purchasers of a public company's securities or employ acts or manipulative or deceptive devices are actually "helping" to defraud investors [and] "enabling" "allowing" or "facilitating" the commission of the fraud.

*Id.* Apparently, under plaintiffs' approach, "aiding" and "abetting" the commission of the fraud would also be actionable as "participation in a scheme."

Plaintiffs attempt to tether their argument to the text of Rule 10b-5, which prohibits not only misrepresentations but also "scheme[s] to defraud" and any "act, practice or course of business" that operates as a fraud. *See* Rule 10b-5 (a) & (c). But this effort fails from the outset, because the Supreme Court has consistently "refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute." *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 173 (1994); *see also Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996) ("To the extent Rule 10b-5 could be read more broadly than § 10(b), the text of the statute controls."). Because the Court held in *Central Bank of Denver* that "the text of § 10(b) does not prohibit aiding and abetting," 511 U.S. at 191, it necessarily follows that a plaintiff cannot rely on Rule 10b-5, including the "scheme" language seized upon by plaintiffs, to bring an aiding-and-abetting claim that the statute does not allow.<sup>1</sup> To be clear, contrary to plaintiffs' characterization, Kirkland & Ellis does not argue that *Central Bank of Denver* "eliminated" all forms of "scheme liability" under Rule 10b-5(a). *See* Opp. at 51. What

Kirkland argued in its opening brief is that the "scheme" language of Rule 10b-5 – whatever its

<sup>1</sup> Indeed, that is exactly the conclusion reached by the district court in one of the cases on which plaintiffs principally rely. *See Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1288 n.2 (D. Utah 1999) ("The *Central Bank* decision did not limit its analysis to claims under subsection (b) of Rule 10b-5, but rather addressed the scope of all conduct prohibited in general by § 10(b) and held 'aiding and abetting' to not be within such prohibited conduct regardless of the subsection being applied.").

valid applications – cannot be used to re-create the very “aiding-and-abetting” liability rejected by the Supreme Court in *Central Bank of Denver*.<sup>2</sup>

Following *Central Bank of Denver*, virtually every federal court to consider plaintiffs’ “scheme” argument has rejected it. For example, while plaintiffs contend that the Second Circuit has recognized the “substantial participation” test urged on this Court, *see* Opp. at 58-59 (citing *SEC v. First Jersey Sec.*, 101 F.3d 1450 (2d Cir. 1996)), they fail to cite the Second Circuit’s *subsequent* decisions in *Shapiro v. Cantor, supra*, and *Wright v. Ernst & Young LLP*, 152 F.3d 169, 173 (2d Cir. 1998). In *Shapiro*, the Second Circuit held that an allegation of “participating” in a scheme fails to state a claim under *Central Bank of Denver*. 123 F.3d at 720. And in *Wright*, the plaintiffs (like the plaintiffs in this case) argued that *First Jersey Securities* authorized liability for anyone “alleged to have ‘substantially participated’ in the fraud.” 152 F.3d at 171 (quoting *First Jersey*). The Second Circuit flatly rejected that argument as “foreclosed by *Central Bank*.” *Id.*

Likewise, district court after district court has rejected the very same “participate in a scheme” theory that plaintiffs are now trying to “shop” to this Court. In many of these cases this theory of liability was advanced unsuccessfully by the very same lawyers who represent the class in this case, all in opinions that plaintiffs’ counsel fail to bring to this Court’s attention. *See, e.g., In re Valence Tech. Sec. Lit.*, 1996 WL 37788, at \*11 (N.D. Cal. Jan. 23, 1996) (“Many courts, including those in this district, have held that ‘conspiracy’ or ‘scheme’ allegations are not

<sup>2</sup> For this reason, the Supreme Court’s recent decision in *SEC v. Zandford*, 122 S. Ct. 1899 (2002), has no bearing upon Kirkland’s motion. While the Supreme Court in *Zandford* did recognize liability under Section 10(b) for employing a “scheme to defraud,” the defendant in that case was a stockbroker who personally induced an elderly man to invest with him and then misappropriated the proceeds. *Zandford* did not involve secondary liability of any kind; rather, the defendant was a primary actor who himself employed the “scheme.” *Zandford* does not even remotely suggest that mere “participation” in another’s scheme to defraud, for example, by the broker’s lawyer, could give rise to liability under Section 10(b), let alone against a party like Kirkland, which is yet another step removed from the primary violator.

actionable under section 10(b) after *Central Bank*. Courts have dismissed claims alleged as ‘schemes’ on the grounds that they were merely non-actionable conspiracy claims that had been recharacterized.”) (internal citations omitted). For the Court’s convenience, the publicly available decisions rejecting the “participate in a scheme” theory are summarized in an Appendix to this brief.

The SEC also has urged avoidance of plaintiffs’ “participate in a scheme” theory of primary liability, though plaintiffs misleadingly suggest otherwise. *See* Opp. at 64 (arguing that the SEC “has urged courts to hold primarily liable those who substantially participate in securities fraud”). The truth is that the SEC, in its *amicus* brief in *Klein v. Boyd*, No. 97-1143 (3d Cir. 1998), specifically argued that the Third Circuit should *not* adopt a test creating liability for those who “significantly participate in the creation of their client’s misrepresentations” because that test could “be taken to encompass lesser degrees of involvement” in violation of *Central Bank of Denver*. *See* SEC Brief in *Klein v. Boyd* (SEC Mot., Attach. 1) at 15. What the SEC did argue in *Klein v. Boyd* was that “a person can be a primary violator if he or she *writes misrepresentations* for inclusion in a document *to be given to investors*,” even if the statement is not specifically attributed to the writer at the time it is disclosed. *Id.* at 13-15 (emphasis added). As the SEC itself acknowledged in its *amicus* filing in this Court, “the allegations in the complaint vary for each of the defendants,” and resolution of this question “could have different effects for different defendants.” SEC Mot. at 4 n.4. Under the SEC’s test in *Klein*, allegations that Kirkland “participated” in Enron’s scheme to defraud does not state a claim because plaintiffs do not allege a single representation that Kirkland drafted concerning Enron that was ever communicated to investors.

The only Court of Appeals even to suggest that mere “participation” in a fraudulent scheme is enough to state a claim – the Ninth Circuit in *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997) – did so in dictum that has been rejected by every other Court of Appeals to consider it, as well as by most district courts (including district courts in the Ninth Circuit). See Kirkland Mem. at 14 & n.6 & Appendix hereto. Moreover, in *Cooper* the defendants were the securities issuer and its officers; the only question was whether false statements that they actually made were intentionally communicated to the investing public through analysts. 137 F.3d at 620. Thus, *Cooper* and its “participate in a scheme” dictum are totally inapplicable in the context of Kirkland’s motion to dismiss, where Kirkland is not alleged to have made any representations that were communicated to the investing public. *ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994), is inapposite for the same reason. There, the defendant accounting firm – unlike Kirkland – was alleged to have been “intricately involved” in the “creation” of false and misleading statements in the issuer’s disclosure documents, *id.* at 964, and even then the district court found the question whether primary liability had been stated to be a “close call.” *Id.* at 970.

Courts also have repeatedly rejected the use of “conspiracy” theories to resurrect secondary liability after *Central Bank of Denver*. See *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998) (“[E]very court to have addressed the viability of a conspiracy cause of action under § 10(b) and Rule 10b-5 in the wake of *Central Bank* has agreed that *Central Bank* precludes such a cause of action.”) (collecting cases); *In re GlenFed, Inc. Sec. Litig.*, 60 F.3d 591, 592 (9th Cir. 1995) (“The Court’s rationale [in *Central Bank*] precludes a private right of action for ‘conspiracy’ liability.”). “To permit a private plaintiff to maintain an action for conspiracy to violate Rule 10b-5 would make *Central Bank of*

*Denver* meaningless, since virtually every aiding and abetting claim can be alleged as a conspiracy claim.” *Kidder Peabody & Co., Inc. v. Unigestion Int’l, Ltd.*, 903 F. Supp. 479, 498 (S.D.N.Y. 1995) (quotations omitted). Although plaintiffs now try to disavow reliance upon any conspiracy theory, *see* Opp. at 71 n.36, they expressly **allege** conspiracy in their complaint, *see* Compl. ¶ 393, and their opposition brief asks this Court to recognize a theory of secondary liability that is indistinguishable from a conspiracy theory. *See* Opp. at 50 n.16, 71-72 (citing conspiracy cases).

## **II. Plaintiffs’ Inability To Allege The Elements Of A Primary Section 10(b) Claim Against Kirkland Confirms That This Is An “Aiding-And-Abetting” Case.**

That plaintiffs’ claim against Kirkland asserts nothing more than aiding-and-abetting is confirmed by their inability to plead all of the elements of a primary Section 10(b) violation by Kirkland, as *Central Bank of Denver* makes clear that they must. *See* 511 U.S. at 191. The complaint is devoid of allegations – let alone the particularized factual allegations required by the PSLRA – establishing that Kirkland *itself* committed primary securities fraud, as opposed to enabling or facilitating the fraud of others.

### **A. Plaintiffs Do Not Identify A Single Representation That Kirkland Made To Investors.**

Like the complaint, the opposition brief does not identify a single statement by Kirkland & Ellis that was ever communicated to investors in Enron securities. The opposition brief seeks to establish a misrepresentation claim against Kirkland & Ellis on the allegations that (i) Kirkland & Ellis allegedly “reviewed and approved” certain unspecified portions of unspecified Enron SEC filings, *see* Opp. at 38, 48-49, 61, and (ii) Kirkland allegedly issued false

“true sale” opinions that were not disclosed to the investing public, *see id.* at 22-23, 48-49, 79, an allegation that appears nowhere in the complaint.<sup>3</sup>

Neither of these allegations can state a claim for “false statement” liability under any of the three tests that have been argued to the Court. As Kirkland explained in its opening brief, the Second, Tenth, and Eleventh Circuits have all recognized that, if *Central Bank of Denver* is to have any meaning, a defendant must actually make and be publicly identified with a misrepresentation that is communicated to investors. *See* Kirkland Mem. at 9-11. The SEC, in its *amicus* brief in *Klein v. Boyd*, would allow for liability where a defendant is not publicly identified with the statement, but only where the defendant in question actually “*writes* misrepresentations for inclusion in *a document to be given to investors.*” SEC Mot. (Attach. 1) at 13-15 (emphasis added).<sup>4</sup> And even the cases plaintiffs cite for the proposition that

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<sup>3</sup> Plaintiffs’ addition of new facts in their opposition brief (concerning both “true sale” opinions and other alleged conduct) is improper and should be disregarded. *See In re Securities Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 915 (S.D. Tex. 2001) (“[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.”) (quoting *In Re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d 630, 646-47 (S.D. Tex. 2001)). Like the facts alleged in the complaint, the new allegations contained in the opposition brief are riddled with inaccuracies and outright falsehoods, and Kirkland & Ellis vehemently disputes them. But even accepting these new allegations as amendments to the complaint, plaintiffs still fail to state a claim because they cannot allege that Kirkland represented the issuer of securities, made any statements that were ever communicated to Enron investors, or used or employed any of the devices alleged to be manipulative or deceptive. For this reason alone, the Court can and should grant Kirkland’s motion to dismiss with prejudice. *See Cowell v. Palmer Township*, 263 F.3d 286, 296 (3d Cir. 2001) (leave to amend properly denied where plaintiffs already added new facts in their opposition to motion to dismiss, and those facts failed to state a claim); *see also Lemmer v. Nu-Kote Holding, Inc.*, 2001 WL 1112577, at \*13 (N.D. Tex. Sept. 6, 2001).

<sup>4</sup> It is clear that the SEC’s proposed test would not create liability for Kirkland. “Under the Commission’s test, a person who prepares a truthful and complete portion of a document would not be liable as a primary violator for misrepresentations in other portions of the document,” because, “[e]ven assuming such a person knew of misrepresentations elsewhere in the document and thus had the requisite scienter, he or she would not have created those misrepresentations.” SEC Mot. (Attach. 1) at 15. Thus, even if Kirkland & Ellis “reviewed and approved” Enron’s SEC filings, as plaintiffs allege, Kirkland could not possibly be liable for misrepresentations in those documents under the SEC’s test because Kirkland is not alleged to have “prepared” *any* portion of those documents. *Id.* *See also Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (allegations that defendant “reviewed and approved” issuer’s

“substantial participation” in creating a misrepresentation can be a basis for liability involve situations where the defendant actually drafted at least portions of the misleading public disclosure documents.<sup>5</sup>

Under any of these theories of liability a defendant must at least have (i) “made” or “created” (*i.e.*, drafted, uttered, or published) a misrepresentation that was (ii) communicated in one form or another to the public. While Enron’s SEC filings were disclosed to the public, there is not a single allegation anywhere that Kirkland drafted or created any portion of them. At the same time, while the complaint does allege that Kirkland drafted “opinions” on behalf of its clients in private transactions with Enron (although not the “true sale” opinions attributed to Kirkland for the first time in the opposition brief), there is no allegation that these opinions were ever communicated to the public. That is the beginning and end of plaintiffs’ “false statement” claim against Kirkland & Ellis.

**B. Plaintiffs Have Not Alleged That Kirkland “Used Or Employed” A “Manipulative Or Deceptive Device Or Contrivance.”**

As Kirkland explained in its opening brief, plaintiffs cannot state a primary liability claim against Kirkland based on someone else’s “use” or “employment” of a manipulative or deceptive device. Kirkland Mem. at 11-14. When the Supreme Court said in *Central Bank of Denver* that a plaintiff must allege *all* of the elements of a Section 10(b) claim against *each* defendant, *see*

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financial statements “do not constitute the *making* of a material misstatement; at most, the conduct constitutes aiding and abetting and is thus not cognizable under Section 10(b)” (emphasis in original).

<sup>5</sup> Although plaintiffs cite *In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615 (9th Cir. 1994), in support of their “substantial participation” theory, the claim actually involved an accounting defendant alleged to have “played a significant role in *drafting and editing*” a misleading letter submitted to the SEC. *Id.* at 628 n.3 (emphasis added). Similarly, in *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622, 672 (E.D. Tex. 2001), the court found that defendant, an engineering company, played a “significant role” in preparing an allegedly false and misleading study that was delivered to the public because, among other things, the defendant prepared and provided a certification for the study. *See id.*

511 U.S. at 191, it meant that the “use or employ” element must be pleaded against each defendant in order to state a claim. *See Anixter*, 77 F.3d at 1226.

Here, the complaint and the opposition brief repeatedly allege that it was *Enron* (and not Kirkland) that “used” and “employed” the alleged “deceptive devices” to inflate Enron’s own financial statements and deceive its own shareholders.<sup>6</sup> The allegations against Kirkland – that it provided “assistance” in “structuring” the transactions and otherwise “enabled” Enron to commit fraud – cannot equate with “using” or “employing” the alleged “deceptive device,” but rather are pure aiding-and-abetting claims barred by *Central Bank of Denver*. *See Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 n.1 (D. Mass. 1994) (holding that an accountant’s “participation in the ‘structuring’ does not constitute the making of a material misstatement; rather, it is the improper reporting of the ‘structured’ transactions by the [issuer] in its quarterly statements that constitutes the alleged Section 10(b) violation”); *In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230 (N.D. Ga. 2002) (dismissing Section 10(b) claim against law firm despite allegations that firm was a “direct participant” in structuring “improper transactions” for client).

Plaintiffs never directly address this issue. The cases upon which plaintiffs rely, *see* Opp. at 47-60, address only *what* can constitute a “manipulative or deceptive device”; they do not answer the question that Kirkland’s motion squarely presents: even assuming that the partnerships and special purpose entities described in the complaint could be deemed “deceptive

<sup>6</sup> *See, e.g.*, Compl. ¶ 465 (accusing Enron of “[e]mploying artifices” to defraud with the assistance of accountants and lawyers); *id.* ¶ 542 (accusing *Enron* of “improperly employing mark-to-market accounting”); *id.* ¶ 878 (alleging that Kirkland “helped *Enron* use these contrivances and manipulative devices to inflate Enron’s reported financial results”) (emphases added). *See also* Opp. at 5 (alleging that Kirkland participated in structuring transactions “which *Enron* was using as artifices to defraud”); *id.* at 6 (Kirkland structured entities that “*Enron* secretly controlled and was using to structure contrived transactions with to [sic] improperly boost its reported profits”); *id.* at 16 (partnerships were “used by *Enron*” to enter into transactions that otherwise would be prohibited) (emphases added).

or manipulative devices,” *who* can be said to have “used” or “employed” those devices to commit securities fraud.<sup>7</sup> While plaintiffs’ allegations may state a claim of primary liability against Enron, they cannot state a claim of primary liability against Kirkland & Ellis.

**C. Plaintiffs’ Failure Adequately To Allege Scienter Requires Dismissal.**

Scienter is the one element of the Section 10(b) claim against Kirkland that plaintiffs actually do address in their opposition brief. But plaintiffs’ argument on this point confirms that they have not pleaded the particularized facts necessary to give rise to a “strong inference” of scienter, as required by Rule 9(b) and the PSLRA. Rather than plead with specificity, plaintiffs baldly assert that Kirkland must have known about Enron’s fraud because of “the cumulative effect of [Kirkland’s] involvement” with entities engaging in transactions with Enron. *See* Opp. at 79. This is a textbook example of pleading “fraud by hindsight” – alleging that, because a defendant had repeated interactions with an issuer, and the issuer’s financial reporting and SEC disclosures turned out to be false or misleading, that defendant *must* have known there was fraud afoot. It is an argument that plaintiffs’ counsel has made before in this Court, and that this Court has rejected. *See In re Securities Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 916-17 (S.D. Tex. 2001) (“pleading by hindsight” has “not survived the enactment of the PSLRA,” and

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<sup>7</sup> As discussed above, *see supra* n.2, the Court in *Zandford* did not address secondary liability, but rather held that the defendant himself had conceived and executed an unlawful “scheme to defraud.” The Court in *Superintendent of Ins. v. Banker’s Life & Cas. Co.*, 404 U.S. 6 (1971), decided only that a transaction in which a corporation was induced under false pretenses into selling its corporate stock was actionable under Section 10(b). The Court expressly declined to address *which* defendants could be held liable for the transaction. *Id.* at 13-14. Likewise, the SEC’s briefs from the *O’Hagan* and *Bryan* cases do not address at all the question of who may be liable for the “use” or “employment” of a “manipulative or deceptive device.” Both cases involved pure primary liability for insider trading, where the defendant himself had misappropriated confidential information and then himself traded securities based upon that information.

complaint fails to plead with required specificity where it attributes knowledge based on “high positions” and “day-to-day involvement in the business”).

Kirkland’s opening brief specifically challenged plaintiffs to spell out the “who, what, when, where, and how” of their conclusory allegations concerning Kirkland’s knowledge that Enron’s SEC filings and financial reporting were fraudulent. Kirkland Mem. at 17. The opposition brief, however, does not provide the slightest indication of which SEC filings Kirkland is claimed to have reviewed, when they were reviewed, who reviewed them, or anything of the kind. *See* Opp. at 76 (conclusorily stating with no factual support that “Kirkland & Ellis knew or recklessly disregarded that the Enron SEC filings it reviewed and approved concerning Enron’s transactions with its unconsolidated affiliates . . . were false”). Plaintiffs have simply failed to allege the specific facts that would justify the strong inference that Kirkland, which represented parties other than Enron in transactions with Enron, knew that Enron’s disclosures were false and misleading.

Rather than plead scienter with specificity, plaintiffs ask this Court to ratchet *down* the showing they have to make regarding Kirkland’s mental state. Plaintiffs insist they need only satisfy the standard for a typical conspiracy defendant, and that it is enough for liability to show that Kirkland was aware of “the essential nature of the plan.” Opp. at 71-73 (quoting *SEC v. National Bankers Life Ins. Co.*, 324 F. Supp. 189 (N.D. Tex. 1971)). Plaintiffs’ reliance on *National Bankers Life*, a three-decade old conspiracy case, is misplaced not only because every Court of Appeals to consider the question has correctly held that *Central Bank of Denver* bars conspiracy liability, but also because the Fifth Circuit made clear after *National Bankers Life* that even *underwriter’s counsel* cannot be held liable for providing “grist of the mill” securities advice absent a showing of “*clear proof of intent* to violate the securities laws.” *Abell v.*

*Potomac Ins. Co.*, 858 F.2d 1104, 1126-27 (5th Cir. 1988) (quoting *Woodward v. Metro Bank*, 522 F.2d 84, 96 (5th Cir. 1975)) (emphasis added), *vacated on other grounds*, 492 U.S. 914 (1989). Kirkland, of course, did not represent the issuer or its underwriter; it represented parties doing transactions with the issuer. It is unfathomable that Kirkland could be liable based on a lesser showing of scienter than that required for counsel for the issuer.

Finally, plaintiffs urge the Court to ignore controlling Fifth Circuit authority and hold that Kirkland risked its professional reputation and was motivated to defraud Enron's shareholders by a "lust" for hourly fees. *Opp.* at 69. As Kirkland pointed out in its opening brief, the Fifth Circuit *rejects* this type of "They did it for the Money" allegation as a basis for imputing scienter. *Melder v. Morris*, 27 F.3d 1097, 1103 (5th Cir. 1994). Plaintiffs do not cite or discuss *Melder* but instead ask the Court to follow conflicting out-of-Circuit cases and find scienter adequately pled on the invalid theory that Kirkland had a "vested interest" in Enron's "profitability." *Opp.* at 69. The complaint, however, does not allege that Kirkland's representation of these partnerships generated a significant portion of Kirkland's overall revenues, that the fees Kirkland charged were anything other than its rate for comparable transactional work, or any other facts suggesting that Kirkland would have been willing to place its reputation at risk by committing securities fraud. This Court should decline plaintiffs' invitation to disregard controlling Fifth Circuit precedent.

**D. Plaintiffs' Reliance Allegations Are Inadequate As A Matter Of Law.**

Plaintiffs barely acknowledge Kirkland's argument on reliance, namely, that the complaint does not adequately allege that any individual plaintiff, or the market generally, relied upon any act or statement by Kirkland. In *Central Bank of Denver*, the Court made clear that reliance is "critical" for recovery under Section 10(b). 511 U.S. at 180. Plaintiffs' single-

sentence response is to assert that, because the alleged “fraudulent scheme” caused the price of Enron securities to rise, the reliance element is therefore “satisfied.” Opp. at 47. But this ignores the Court’s entire point in *Central Bank of Denver*, which was that secondary liability is impermissible precisely because it would allow a plaintiff to circumvent the requirement of showing reliance on “the statements or actions” of each defendant before the Court. The fact that the market price of Enron securities may have risen as a consequence of someone else’s actions, which is all that plaintiffs assert, does not satisfy *Central Bank of Denver*’s requirement that plaintiffs allege reliance upon Kirkland’s statements or actions. On this same rationale, numerous courts following *Central Bank of Denver* have held that the absence of specific allegations of reliance upon a particular defendant’s actions or statements is an independent ground for dismissal. See, e.g., *Dinsmore*, 135 F.3d at 843; *Anixter*, 77 F.3d at 1225 (“Reliance only on representations made by others cannot itself form the basis of liability.”). Given that plaintiffs have not even tried to allege reliance on anything Kirkland did, their claim must be dismissed.

### **III. Plaintiffs Cannot State A Claim Against Kirkland & Ellis Under The Fifth Circuit’s Decision In *Abell*.**

The Fifth Circuit’s decision in *Abell* – this Circuit’s controlling decision on lawyer liability in securities cases – also requires dismissal of the claim against Kirkland & Ellis. Contrary to the straw-man argument set up by plaintiffs, Kirkland & Ellis does not contend that lawyers are immune from liability under the securities laws. See Opp. at 42. However, the Fifth Circuit explicitly recognizes that securities claims against lawyers are in tension with counsel’s duties of loyalty and confidentiality to the client and therefore should only rarely be allowed. Thus, in *Abell*, the court rejected a claim of securities fraud against *underwriter’s* counsel, even though the lawyers were aware of inaccuracies in their client’s offering statement and did not

prevent disclosure of those inaccuracies to investors. The Fifth Circuit emphasized that, unlike the issuer and possibly its bond counsel, counsel for the underwriter had assumed no legal duties to the investors. 858 F.2d at 1126. Here, where Kirkland & Ellis did not represent the issuer *or* the underwriter, but represented non-public third parties (who are not even named in this case), it follows *a fortiori* that Kirkland cannot be held liable based on its alleged awareness of Enron's securities fraud. That was the law in the Fifth Circuit even before *Central Bank of Denver*, and it requires that the claim against Kirkland be dismissed.<sup>8</sup>

Plaintiffs have essentially no response to *Abell*'s holdings concerning the scope of lawyer liability under Section 10(b). In a footnote, plaintiffs attempt to distinguish *Abell* on the ground that the complaint in this case "alleges Kirkland & Ellis made false and misleading statements." Opp. at 66 n.34. But the *only* statements that the complaint alleges Kirkland made *were never communicated to the investing public* – a fact that plaintiffs simply ignore. Plaintiffs also argue that *Abell* is not controlling because, according to plaintiffs, the court's refusal to hold the law firm liable turned on questions of reliance. Opp. at 49 n.14 (citing 858 F.2d at 1123). Although it is true that reliance was an issue in *Abell*, plaintiffs simply ignore the portion of *Abell* that deals specifically with lawyer liability under the securities laws and that is dispositive of the claim against Kirkland. See 858 F.2d at 1125-26 ("The mere fact that [the securities] laws were designed to protect the investing public does not convince us that [underwriter's counsel] assumed more than the duty to protect its own clients from legal liability").

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<sup>8</sup> The Fifth Circuit's position in *Abell* concerning lawyer liability under the securities laws is in accord with a long line of precedent from other Courts of Appeals. See *Schatz v. Rosenberg*, 943 F.2d 485, 493 (4th Cir. 1991); *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 472-75 (4th Cir. 1992); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986); *Renovitch v. Kaufman*, 905 F.2d 1040, 1048 (7th Cir. 1990). Kirkland discussed these cases extensively in its opening brief. Kirkland Mem. at 21-24. Plaintiffs' opposition brief does not cite any of them.

Plaintiffs apparently set out to catalogue for the Court every case allowing a securities fraud claim to proceed against a law firm, but the cases that plaintiffs have dredged up (including numerous pre-*Central Bank of Denver* cases) have no bearing on Kirkland's motion to dismiss. Plaintiffs' showpiece case in this regard is *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981) (en banc). *Shores*, however, based liability on a conspiracy theory. *Id.* at 469 (noting that plaintiff's burden of proof "will be to show . . . that the defendants knowingly conspired to bring securities onto the market which were not entitled to be marketed"). As discussed above, conspiracy liability under Section 10(b) is no longer tenable after *Central Bank of Denver*. Apart from *Shores* and two other cases applying the discredited "aiding-and-abetting" and conspiracy theories,<sup>9</sup> every single one of plaintiffs' lawyer liability cases involved firms that (1) were counsel to the seller of securities and (2) made misleading statements communicated to purchasers or the SEC.<sup>10</sup> Plaintiffs' lawyer liability cases thus only underscore how unprecedented plaintiffs' claim is against Kirkland, which did not represent the issuer, did not

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<sup>9</sup> See Opp. at 63 (citing *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 517 (2d Cir. 1994) (aiding and abetting)); Opp. at 46 n.11 (citing *Wenneman*, 49 F. Supp. 2d at 1286-89 (conspiracy)). Plaintiffs' reliance on conspiracy theories employed in mail fraud cases, see Opp. at 71-72, is equally inapposite, since the mail fraud statute, unlike Section 10(b), directly authorizes conspiracy liability.

<sup>10</sup> See *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 266-67 (6th Cir. 1998) (cited in Opp. at 65) (issuer's counsel made false representations to the purchaser of securities); *Kline v. First W. Gov't Sec. Inc.*, 24 F.3d 480, 491 (3d Cir. 1994) (cited in Opp. at 43, 65) (issuer's counsel issued opinion letters communicated to purchasers); *Ackerman v. Schwartz*, 947 F.2d 841, 847 (7th Cir. 1991) (cited in Opp. at 66) (opinion letter issued by seller's counsel disseminated to investors' representatives); *SEC v. Frank*, 388 F.2d 486, 488 (2d Cir. 1968) (cited in Opp. at 43) (issuer's counsel drafted false and misleading offering circular); *United States v. Benjamin*, 328 F.2d 854, 863-64 (2d Cir. 1964) (cited in Opp. at 43) (stock promoter's lawyer drafted false opinion and made false statements to SEC examiner); *In re Keating, Muething & Klekamp*, SEC Release No. 34-15982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124 (1979) (issuer's counsel made false statements to SEC in registration statements and other periodic filings).

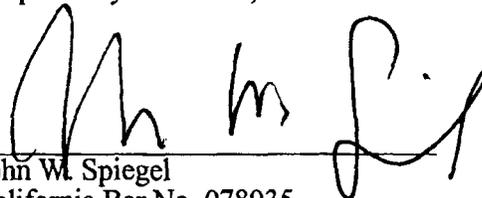
make any statements communicated to the public, and did not use or employ any devices identified in the complaint.

In the end, all plaintiffs are left to do is mischaracterize Kirkland's argument as a claim that "[l]aw firms are . . . exempt from the federal securities laws" and then respond to that argument. Opp. at 83. Kirkland has never argued any such thing. What Kirkland does argue is that controlling law limits attorney liability under Section 10(b) and Rule 10b-5 to the lawyer's own statements communicated to purchasers or the lawyer's own use or employment of manipulative or deceptive acts or devices that mislead investors – as, for example, in the cases cited with approval in *Abell* where lawyers were held liable based on their opinion letters that were communicated to investors. 858 F.2d at 1125. But plaintiffs' complaint alleges none of these things. Stripped of its rhetoric, the complaint alleges that Kirkland committed securities fraud because it did not recognize or report that Enron – the party engaged in transactions with Kirkland's clients – was committing securities fraud. *Abell* would preclude exactly this type of claim even if Kirkland represented Enron – which it did not. Because Kirkland is yet another step removed, plaintiffs' allegations against it simply cannot make out a claim for securities fraud under *Abell*.

#### CONCLUSION

For the reasons stated herein and in Kirkland's opening brief, Count I of the complaint should be dismissed with prejudice with respect to Kirkland & Ellis.

Respectfully submitted,



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## APPENDIX

### Cases Rejecting Primary Liability Based On “Participation” in Someone Else’s “Scheme to Defraud”

(\*\* designates cases in which argument was advanced by  
plaintiffs’ counsel in this action)

- **\*\*Stack v. Lobo**, No. Civ. 95-20049, 1995 WL 241448, at \*10 (N.D. Cal. Apr. 20, 1995) (“Plaintiffs’ ‘scheme’ allegations are no more than a thinly disguised attempt to avoid the impact of the *Central Bank* decision”).
- **\*\*Strassman v. Fresh Choice, Inc.**, No. C-95-20017 RPA, 1995 WL 743728, at \*17 (N.D. Cal. Dec. 7, 1995) (“Plaintiffs’ ‘scheme to defraud’ claims are barred by *Central Bank*”; noting that, like claims of aiding and abetting and conspiracy, “secondary liability claims premised on ‘schemes to defraud’ have also been found to not be actionable under § 10(b)”).
- **\*\*In re Valence Tech. Sec. Lit.**, 1996 WL 37788, at \*11 (N.D. Cal. Jan. 23, 1996) (“Many courts, including those in this district, have held that ‘conspiracy’ or ‘scheme’ allegations are not actionable under section 10(b) after *Central Bank*. Courts have dismissed claims alleged as ‘schemes’ on the grounds that they were merely non-actionable conspiracy claims that had been recharacterized.”).
- **\*\*In re Oak Tech. Sec. Litig.**, No. 96-20552 SW, 1997 WL 448168, at \*15 (N.D. Cal. Aug. 1, 1997) (rejecting theory of liability predicated on allegation that defendant “participated in a ‘scheme’ designed to defraud the investing public” as foreclosed by *Central Bank of Denver*)
- **\*\*Molinari v. Symantec Corp.**, No. C-97-20021-JW, 1998 WL 78120, at \*11 n.6 (N.D. Cal. Feb. 17, 1998) (dismissing claim as foreclosed by *Central Bank of Denver* where “Defendants are alleged to have participated in a ‘scheme’ to defraud”)
- **\*\*In re HI/FN, Inc., Sec. Litig.**, No. C 99-4531, 2000 WL 33775286, at \*11 (N.D. Cal. Aug. 9, 2000) (“‘[S]cheme’ allegations have been rejected as inconsistent with *Central Bank*’s prohibition of ‘conspiracy’ pleading.”).
- **\*\*Fidel v. Farley**, No. 1:00-CV-48-M, 2001 U.S. Dist. LEXIS 9461, at \*29 n.19 (W.D. Ky. June 22, 2001) (“The Plaintiffs suggest that Ernst & Young may be liable for securities fraud, as part of a ‘fraudulent scheme,’ simply by showing that it committed a manipulative or deceptive act in furtherance of the scheme. This assertion, if not incorrect, is at least incomplete. In order for Rule 10b-5 liability to attach to *any* defendant, all of the elements of such a claim (*i.e.*, a misrepresentation/omission; materiality, scienter; justifiable reliance, damages,

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and causation) must be satisfied.”) (emphasis in original; internal citations omitted).

- *Lycan v. Walters*, 904 F. Supp. 884, 901 n.12 (S.D. Ind. 1995) (rejecting under *Central Bank of Denver* plaintiffs’ allegations that the defendants “played a substantial part in a scheme to defraud them”).
- *In re Matter of Lake State Commodities, Inc.*, 936 F. Supp. 1461, 1471 (N.D. Ill. 1996), *overruled on other grounds* by *Damato v. Hermanson*, 153 F.3d 464 (7th Cir. 1998) (rejecting plaintiffs’ argument that “primary liability under Rule 10b-5 require[s] . . . only the defendant’s ‘participation’ in a scheme to defraud”).
- *Benedict v. Cooperstock*, 23 F. Supp. 2d, 754, 758 (E.D. Mich. 1998) (“allegations of mere participation in a fraudulent scheme are insufficient to state a claim under § 10(b)”).
- *Malin v. Ivax Corp.*, 17 F. Supp. 2d 1345, 1361 (S.D. Fla. 1998), *aff’d*, 226 F.3d 647 (11th Cir. 2000) (allegations that defendant knew of and participated in fraudulent “scheme” do not survive *Central Bank of Denver*).
- *Krieger v. Gast*, No. 98 C 3182, 1998 WL 677161, at \*9 (N.D. Ill. Sept. 22, 1998) (allegations that defendants participated in and were critical to a scheme to defraud insufficient after *Central Bank of Denver*).
- *Erickson v. Horing*, No. 99-1468, 2001 WL 1640142, at \*12 n.12 (D. Minn. Sept. 21, 2001) (“Courts since *Central Bank* have found that allegations of conspiracy or a common scheme do not create liability under section 10(b).”).

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