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Introduction

Plaintiffs' Response to Vinson & Elkins L.L.P's ("V&E") Motion To Dismiss (the "Motion") fails to accept the Supreme Court's reading of Section 10(b) of the Securities Exchange Act in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and attempts to distract this Court from the legal question at issue with a dizzying array of irrelevant allegations and arguments. Ninety pages of argument and rhetoric, however, cannot mask the core issue under the federal securities laws, which is whether the Complaint adequately alleges that V&E made deceptive statements on which Plaintiffs relied. One important reason for this bright line test is that any other standard would allow class action securities fraud plaintiffs to sue virtually any securities lawyer whose client is accused of securities fraud. Securities plaintiffs would be required merely to allege broadly and repeatedly that the lawyers drafted every alleged misstatement by their clients, and lawyers would then be drawn into the quagmire of these massive cases and forced to spend huge sums defending themselves. One can rightly question the willingness of law firms to provide securities advice in such circumstances.

The Supreme Court's interpretation of Section 10(b) drew a jurisprudential line in the sand and invited Congress to amend the statute if it concluded that non-speakers should be subject to private civil actions. This has been an ongoing debate in the halls of Congress, but Congress has taken no action to overrule *Central Bank*. Thus, the Supreme Court's rule from *Central Bank* remains the law of the land, and exaggerated allegations, rhetoric, and ephemeral distinctions should not be a means of undercutting that standard.

The history of securities litigation since *Central Bank* demonstrates that not even the plaintiffs' bar believes that conduct such as that alleged against V&E triggers Section 10(b)

liability. Over 1700 securities fraud lawsuits have been filed in the United States since 1994.¹ To our knowledge, very few of these cases involved claims against lawyers, and virtually none of those held that plaintiffs had stated claims against attorneys based on the type of conduct alleged here. Indeed, Plaintiffs' Response has identified only one such case – and that was in a district court in the Ninth Circuit, which has interpreted *Central Bank* in a way no other court of appeals has adopted.² This Court should not rewrite the law based on the notoriety of the Enron case or the inflammatory allegations made by Plaintiffs.

Although Plaintiffs mischaracterize V&E's position as an argument for attorney immunity, V&E acknowledges that lawyers are not shielded from Section 10(b). Like all people, lawyers can be held liable under Section 10(b), but only if "all of the requirements for primary liability under Rule 10b-5 are met." *Central Bank*, 511 U.S. at 191 (emphasis added). This is not that case.

Summary of Argument

Section 10(b) of the Securities Exchange Act does not create unlimited liability on the basis of a business or professional relationship with a failed corporation. Rather, it only imposes liability on persons who engage in certain deceptive or manipulative conduct. Plaintiffs have not and cannot allege facts demonstrating that V&E engaged in such conduct. This failure is fatal to Plaintiffs' claims.

Nowhere in their Response do Plaintiffs show that they have pled either deceptive or manipulative conduct on the part of V&E. Instead, the Response conflates the two branches

¹ See generally Stanford Law School Securities Class Action Clearinghouse, available at <http://securities.stanford.edu/>.

² See *Employers Ins. v. Musick, Peeler & Garrett*, 871 F. Supp. 381 (S.D. Cal. 1994), which is discussed below at Section I.B.3. While a Third Circuit panel reached a similar result in *Klein v. Boyd*, the facts of that case were considerably different, and the panel decision was later vacated.

of Section 10(b). Then, under the guise of reading the federal securities laws “flexibly,” Plaintiffs essentially claim in the broadest of terms that virtually any “bad” act is covered by Section 10(b). Plaintiffs are wrong. Moreover, as to the nature of V&E’s alleged involvement in the conduct complained of in the Complaint, the Response makes clear that Plaintiffs are urging the Court to ignore the Supreme Court’s decision in *Central Bank* eliminating private civil actions for aiding and abetting securities violations.

As to deceptive conduct, Plaintiffs place primary reliance on the Ninth Circuit’s ill-considered minority view that a person may be liable for statements that were never publicly attributed to him. We submit that the Ninth Circuit has not faithfully applied *Central Bank* and that this Court would be wrong to follow its approach. The other courts of appeal to consider the issue have rejected the Ninth Circuit’s theory. Plaintiffs also attempt to undermine *Central Bank* and its progeny by asserting that the claims they make against V&E are different than those made against defendants who have successfully moved to dismiss the claims against them. As we demonstrate from the underlying briefs and pleadings in the cases on which we rely, however, Plaintiffs’ allegations against V&E are not distinguishable from the allegations in those cases. Plaintiffs’ unsuccessful effort to distinguish this precedent only emphasizes our principal thesis: claims of aiding and abetting, however creatively described, are still subject to dismissal under *Central Bank*.

As to manipulative conduct, the inquiry begins and ends with Plaintiffs’ concession that they do not assert a claim for market manipulation. *See* Response at 67. That is because market manipulation is the only conduct that satisfies Section 10(b)’s definition of manipulative conduct. Unable to allege market manipulation, Plaintiffs argue that manipulative conduct is not limited to market manipulation. However, they fail to cite even a single case

supporting this argument – nor can they, for it directly contradicts the Supreme Court’s holdings on this point. The only cases to consider the issue have held that the type of conduct alleged by Plaintiffs here cannot give rise to Section 10(b) liability.

Plaintiffs argue that the Complaint states a Section 10(b) claim against V&E because it alleges that V&E participated in a “scheme to defraud” and a “course of business that operates as a fraud” under Rule 10b-5. But Plaintiffs cannot hide the substantive flaws in their lawsuit merely by attaching such labels to their factual allegations. Nor can Plaintiffs rely on the language of Rule 10b-5 to expand statutory liability. As Plaintiffs concede, and as the Supreme Court has held, Section 10(b) and Rule 10b-5 are co-extensive. If Section 10(b) does not create liability, *a fortiori*, Rule 10b-5 does not either.

Notwithstanding Plaintiffs’ lengthy discussion of what are claimed to be “facts,” there are only two pivotal questions that this Court need consider to resolve the legal issues presented by this Motion: (1) Were any of the statements at issue publicly attributed to V&E, and (2) Do Plaintiffs allege that V&E engaged in market manipulation? Because the answer to both questions is “no,” this Court need not even consider the specific factual allegations concerning V&E. However, if this Court were to proceed to that step, it should conclude that Plaintiffs have failed to comply with their obligation to plead fraud with particularity. First, the Complaint fails to allege facts (as opposed to conclusions) about what any of the firm’s lawyers actually did with respect to Enron’s disclosure process that could possibly render V&E liable for statements made by Enron. Second, despite the PSLRA’s heightened standard for pleading scienter, the Complaint fails to set forth specific factual allegations that could support Plaintiffs’ conclusory assertions that V&E “knew” of the alleged misrepresentations in Enron’s disclosures.

Argument

I. Plaintiffs' Allegations Against V&E Do Not Amount to Deceptive Conduct Within the Meaning of Section 10(b).

A. Section 10(b) liability for deceptive conduct applies only to persons who are the attributed authors of misrepresentations.

Three of the four circuits to consider the issue since *Central Bank* have held that a secondary actor who participates in the drafting of others' statements can be liable for those statements only if authorship is attributed to it. *See Ziembra v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996). Many district court decisions are in accord.³

³ *See* Motion at 13 n.9. *See also In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230, 1247 (N.D. Ga. 2002) (the preparation by an attorney of false settlement statements and closing binders for a real estate transaction, which enabled the issuer to create misleading financial statements that were disseminated to investors, was not sufficient to give rise to primary liability on the part of the attorney); *Roer v. Oxbridge Inc.*, 198 F. Supp. 2d 212, 226 (E.D.N.Y. 2001) (dismissing the plaintiffs' claim that primary liability under 10b-5 occurred when rendering "substantial assistance" to others in connection with a violation); *Great Neck Cap. Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 137 F. Supp. 2d 1114, 1120-21 (E.D. Wis. 2001) (accountants could not be held primarily liable for alleged misstatements in press release that they reviewed); *In re HI/FN, Inc., Sec. Litig.*, No. C-99-453151, 2000 WL 33775286, at *11 (N.D. Cal. Aug. 9, 2000) ("[P]laintiffs' allegations of a scheme to defraud by individual defendants who are not alleged to have made statements do not support a claim for violation of §10(b)."); *Advanced Laser Prods., Inc. v. Signature Stock Transfer, Inc.*, 1999 Fed. Sec. L. Rep. ¶ 90,468 (CCH) No. Civ.A.3:98-CV-1624-D, 1999 WL 222385, at *2 n.2 (N.D. Tex. Apr. 12, 1999) ("To the extent that [plaintiff] alleges that [defendant] 'acted in complicity' with [a third party's] theft of securities, [plaintiff] has failed to assert an act that violates § 10(b) and Rule 10b-5. . . . To be liable under § 10(b), [defendant] must have directly committed a manipulative or deceptive act."); *Copland v. Grumet*, 88 F. Supp. 2d 326, 331-33 (D.N.J. 1999) (dismissing claims against officers of a subsidiary for statements in the parent company's financial reports because the statements regarding the subsidiary were not attributed to the officers); *Krieger v. Gast*, No. 98 C 3182, 1998 WL 677161, at *9 (N.D. Ill. Sept. 22, 1998) (dismissing claims against certain defendants alleged to have made specific statements in a shareholder notice when they were not the attributed authors); *Chan v. Orthologic Corp.*, No. Civ. 96-1514PHXRCV, 1998 WL 1018624, at *17 (D. Ariz. Feb. 5, 1998) (dismissing conspiracy claims against underwriters and company for statements made in reports by underwriters and analysts as violating *Central Bank*); *In re Valence Tech. Sec. Litig.*, No. C 95-20459JW, 1996 WL 37788, at

The rule requiring attribution is compelled by an essential element of every claim of deceptive conduct under Section 10(b) – reliance. As the Supreme Court has made clear, what must be shown to satisfy this element is “reliance on the defendant’s misstatement or omission,” *Central Bank*, 511 U.S. at 180 (emphasis added). That is why the majority of circuits considering the issue since *Central Bank* have insisted that a plaintiff must show reliance on public statements of the defendant being sued. See *Ziemba*, 256 F.3d at 1205 (“the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff’s investment decision was made”); *Wright*, 152 F.3d at 175 (“a secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination” because “[s]uch a holding would circumvent the reliance requirements of the Act”). Here, there is no allegation that Enron stock purchasers relied in any way on V&E having said anything to the market.

Because Plaintiffs concede that no public statement was attributed to V&E,⁴ *Central Bank* compels dismissal of any claim that V&E committed a deceptive act. Plaintiffs’ various attempts to avoid this result fail.

*11 (N.D. Cal. Jan 23, 1996) (dismissing claim for “scheme” liability against lead underwriter of company as prohibited by *Central Bank*); *Strassman v. Fresh Choice, Inc.*, No. C-95-20017RPA, 1995 WL 743728, at *17 (N.D. Cal. Dec. 7, 1995) (dismissing claims against underwriters premised on “scheme” liability for statements made by others); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (allegations that accountant participated in “structuring” of certain transactions that were then improperly reported in the company financial statements did not suffice to state a claim under *Central Bank* absent a public statement by the accountant).

⁴ Rather, Plaintiffs attempt to evade this requirement by advertent to allegedly false opinion letters authored by V&E, Response at 52-53, but this argument fails to satisfy the reliance requirement. In order to make out an actionable claim of securities fraud under the fraud-on-the-market theory, the defendant’s statement must be public. See *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988). The premise of the fraud-on-the-market theory is that investors may presumptively establish reliance on false information that is reflected in the market price of the

B. Plaintiffs' attempts to salvage a deceptive conduct claim without identifying a public statement by V&E must fail.

1. Plaintiffs fail to distinguish the progeny of *Central Bank*.

Plaintiffs attempt to sidestep the clear law that bars their claim against V&E by asserting that they have alleged that V&E “made” fraudulent statements. This is mere wordplay. Plaintiffs have identified no statement made by V&E to the investing public. Nor do vague allegations that V&E “drafted” or “approved” allegedly fraudulent statements made by Enron justify Plaintiffs’ assertions. Even if Plaintiffs’ allegations are credited,⁵ they amount to no more than aiding and abetting and fail to state a claim under *Central Bank*.⁶

Plaintiffs try to buttress their claim by arguing that V&E played a larger behind-the-scenes role than did the defendants in some of the cases cited in the Motion. Response at 44-46. However, the reasoning of those cases is not limited to the factual allegations Plaintiffs focus on in trying to distinguish them. Moreover, Plaintiffs’ characterization of those cases is inaccurate. Plaintiffs’ discussion of *Ziembra* is illustrative. Plaintiffs assert that *Ziembra* did not involve allegations that the law firm defendant drafted its client’s statements. Response at 44. In fact, the plaintiffs in *Ziembra* alleged that the client’s fraudulent press release “was in large

security. That premise does not apply to information that is not conveyed to the marketplace. See *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). Here, because Plaintiffs have not alleged that V&E’s “true sale” opinions were conveyed to the market, they cannot base a viable Section 10(b) claim on such alleged opinions.

⁵ As set forth in Section V below, these vague allegations, which do not identify who, when, or how V&E allegedly “drafted” or “approved” Enron’s disclosures, are insufficient to meet the pleading requirements of the PSLRA and Rule 9(b).

⁶ Plaintiffs insinuate that V&E has admitted that its conduct amounted to aiding and abetting. That is not so. V&E argues that Plaintiffs’ allegations, even if they were pleaded with the requisite particularity, would show no more than aiding and abetting. V&E denies that Plaintiffs’ allegations are true.

measure drafted by [the law firm].” Brief of *Ziembra* Appellants at 17.⁷ Contrary to Plaintiffs’ assertions, the *Ziembra* plaintiffs specifically argued that the defendant law firm “created” fraudulent statements. Reply Brief of *Ziembra* Appellants at 16-17 (Ex. 2). The Eleventh Circuit’s holding – that these allegations were insufficient under *Central Bank* – is therefore squarely on point.

2. Plaintiffs’ reliance on pre-*Central Bank* authority from the Fifth Circuit is misplaced.

Plaintiffs further underscore the weakness of their deceptive conduct argument by relying on two pre-*Central Bank* decisions by the Fifth Circuit to argue that a lawyer who drafts his client’s statements is primarily liable for misstatements in them. See Response at 48 (citing *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981), and *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated sub nom.*, *Fryar v. Abell*, 492 U.S. 914 (1989)). These cases are inherently suspect on this issue because the courts at that time often did not critically analyze the distinction between primary liability and aiding and abetting liability. See Elliot Cohen & Erica S. Kornblau, *Section 10(b) Attorney Liability Post-Central Bank*, 14 PLI/NY 675, 682 (1998). Given the potential liability under either theory, the distinctions between the two were academic, and courts did not see a need to differentiate clearly between the two theories. See Ben D. Orlanski, *Comment: Whose Representations Are These Anyway? Attorney Prospectus Liability After Central Bank*, 42 U.C.L.A. L. REV. 885, 887 (1995); Thomas L. Reisenberg, *Fraud Claims Against Professionals After Central Bank*, 2 *Insights* 9, 10 (February 1995). Accordingly, this Court should accord these two pre-*Central Bank* decisions no weight in determining what the current state of the law is.

⁷ Relevant excerpts of the *Ziembra* Appellants’ opening brief are attached as Exhibit 1. Excerpts from the Appellants’ reply brief are attached as Exhibit 2.

In any event, the facts and analyses in those cases do not support Plaintiffs' argument. The *Shores* court said nothing indicating that the attorney defendant in that case could be primarily liable. Indeed, the *Shores* court's analysis appears to have been premised on a conspiracy theory, 647 F.2d at 469, a basis for liability that clearly did not survive *Central Bank*.⁸ Likewise, *Abell* provides no assistance to Plaintiffs. Contrary to Plaintiffs' position, the Fifth Circuit did not hold that lawyers could have been liable for checking and revising an offering memorandum. *Abell*, 858 F.2d at 1123. The Fifth Circuit never reached the issue of whether the lawyers could be liable for these statements because it held that the plaintiffs did not rely on any statements in the offering memorandum. *Id.* For the reasons discussed in V&E's Motion, *Abell* strongly supports dismissal of the claims against V&E.

3. This Court should not follow the minority position espoused by *Software Toolworks* and its progeny.

As expected, Plaintiffs rely on the Ninth Circuit's position in *In re Software Toolworks Securities Litigation*, 50 F.3d 615 (9th Cir. 1995), and subsequent cases from courts sitting in that Circuit following *Software Toolworks*. Response at 43, 51, 52. The Ninth Circuit's approach, however, cannot be squared with *Central Bank*. Especially telling is the striking similarity between the Ninth Circuit's test for primary liability and the test for aiding and abetting as adopted by the Fifth Circuit prior to *Central Bank*. Before *Central Bank*, the Fifth Circuit had held that aiding and abetting liability was present when the defendant rendered "substantial assistance" in the Section 10(b) violation. *Abell*, 858 F.2d at 1126. Yet according to the Ninth Circuit, "substantial participation" in a fraudulent statement gives rise to primary liability. There is no meaningful distinction between these formulations. The only conclusion is

⁸ See, e.g., *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998).

that the Ninth Circuit has taken aiding and abetting and called it primary liability, contrary to *Central Bank*. Not surprisingly, every other Circuit to consider this issue has rejected the Ninth Circuit's approach. *See* Motion at 11-15.

Much of Plaintiffs' remaining authority consists of district court decisions based on the erroneous *Software Toolworks* approach. This includes the only post-*Central Bank* case the Response identifies that has refused to dismiss a claim against a lawyer for a public company based on the lawyer's work on the company's statements. *Employers Insurance v. Musick, Peeler & Garrett*, 871 F. Supp. 381 (S.D. Cal. 1994) (relying on *Software Toolworks* for the proposition that drafting and editing of an offering document can give rise to primary liability). Because *Software Toolworks* is wrong, these cases warrant no deference here.

In addition to citing several decisions from district courts in the Ninth Circuit, Plaintiffs cite a handful of opinions from district courts in Texas. None of those cases provides any guidance here. Contrary to Plaintiffs' suggestion, Judge Kent's decision in *Young v. Nationwide Life Insurance Co.*, 2 F. Supp. 2d 914 (S.D. Tex. 1998), did not adopt the Ninth Circuit standard. The court's cryptic reference to one defendant (American Century) playing "a more substantial role" in another party's alleged misrepresentations was clearly dictum in light of its holding that the plaintiffs had sufficiently alleged misstatements directly by American Century. *Id.* at 921.

Similarly, any favorable statements concerning the Ninth Circuit approach in *McNamara v. Bre-X Minerals Ltd.*, 57 F. Supp. 2d 396 (E.D. Tex. 1999), were also dicta. There, the engineering firm in question had provided reports to its client "knowing that [the clients] were distributing those reports and their contents to the investing public." *Id.* at 424 (quotation omitted). The engineering firm specifically consented to the use of its name and the results of its

tests in Bre-X's public statements. *Id.* Thus, the defendants' liability was justified based on their own statements, which they knew investors were relying on.⁹ That is not the case with V&E.

Likewise, *Hartsell v. Source Media, Inc.*, 2000 Fed. Sec. L. Rep. (CCH) ¶ 90,948, No. 3:98-CV-1980-M, 2000 WL 422912 (N.D. Tex. Apr. 17, 2000), is inapposite. In that case, Ernst & Young's unqualified audit reports were filed with the SEC and attached to its annual report. Thus, the *Hartsell* court did not hold that a party other than the attributed author of public statements can be liable under section 10(b).¹⁰

4. The Court should not adopt the SEC's position that has been proffered (and rejected) in other cases.

Plaintiffs advocate the position advanced by the SEC in other cases that Section 10(b) liability should extend to parties who "create" fraudulent statements without being the issuers or attributed authors of the statements. But the SEC's position has not been accepted in any circuit; nor does it apply here. Moreover, this Court is not bound to follow the SEC's expansive view of the statute.¹¹

⁹ The same can be said of the later opinion in the same case, *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622 (E.D. Tex. Mar. 30, 2001). The court there reiterated its position that the engineering firm could be liable where it knew that Bre-X would use its reports to attract investors, and Bre-X's announcements specifically named the engineering firm.

¹⁰ Plaintiffs' citations to other district court cases from outside the Fifth Circuit are no more helpful to their position. Two cases relied upon by Plaintiffs – *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324 (N.D. Ga. 1998), and *Phillips v. Kidder, Peabody & Co.*, 933 F. Supp. 303 (S.D.N.Y. 1996), *aff'd mem.*, 108 F.3d 1370 (2d Cir. 1997) – are no longer good law in light of the Eleventh Circuit's decision in *Ziamba* and the Second Circuit's decision in *Wright*.

¹¹ See, e.g., *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) ("deference [to agency interpretation] is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history . . . [and on] a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts.") (citing *SEC v. Sloan*, 436 U.S. 103, 117-19 (1978); *Piper v.*

a. The SEC’s position is contrary to law.

Plaintiffs cite two cases – *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324 (N.D. Ga. 1998), and *Klein v. Boyd*, 1998 Supp. Fed. Sec. L. Rep. (CCH) ¶ 90,136 (3d Cir. Feb. 12, 1998), *vacated*, 1998 Supp. Fed. Sec. L. Rep. (CCH) ¶ 90,165 (3d Cir. Mar. 9, 1998) – as supporting the SEC’s position, but neither is precedential (or persuasive) authority. *Carley Capital* was overruled by the Eleventh Circuit’s decision in *Ziembra*. Indeed, in *Ziembra*, the plaintiffs cited *Carley Capital* and expressly argued that their allegations against the law firm defendant satisfied the SEC’s proposed “creation” standard,¹² but the Eleventh Circuit rejected that standard and ruled that only attributed authors of statements may be held liable under Section 10(b). *Ziembra*, 256 F.3d at 1205. The panel decision in *Klein v. Boyd* was vacated and has no precedential value. No other decision has accepted the SEC’s proposed test, and a majority of the circuits have implicitly rejected it.

b. In any event, Plaintiffs’ allegations do not satisfy the SEC’s proposed test.

Even if the SEC’s proposed standard were correct (and it is not),¹³ it would not impose liability on V&E in this case. The SEC’s submission in this case expressly states that the

Chris-Craft Indus., Inc., 430 U.S. 1, 41 n.27 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 858 n.25 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 759 n.4 (1975) (Powell, J., concurring); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 425-27 (1972)).

¹² Reply Brief of *Ziembra* Appellants at 16-17 (Ex. 2).

¹³ Analyzed on its merits, the SEC’s proposed standard has little to recommend it. Applying the “creation” standard would be highly problematic in practice. The line-drawing that would be necessary in each case would lead to a great deal of uncertainty, which would be fundamentally inconsistent with the Supreme Court’s insistence that the boundaries of Section 10(b) liability be clear. See *Central Bank*, 511 U.S. at 188. For example, the SEC’s position in *Klein v. Boyd* 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 idea for those misrepresentations came from someone else,” is hopelessly muddy. See SEC *Klein* Amicus Brief at 2 (Attachment One to the

SEC takes no position whether its proposed standard is applicable here (SEC Mem. at 2, 4 n.4), and the allegations against V&E are, at best, of a type the SEC has characterized as aiding and abetting in the past. For example, in *SEC v. Fehn*, 97 F.3d 1276 (9th Cir. 1996), the SEC alleged that an attorney's conduct in "preparing and filing" three false quarterly reports for his client constituted aiding and abetting, not primary liability.

Similarly, the SEC's decision in *In the Matter of William R. Carter, Charles J. Johnson, Jr.*, SEC Release No. 17597, 1981 SEC LEXIS 1940 (Feb. 28, 1981), demonstrates that the conduct alleged by Plaintiffs here amounts to nothing more than aiding and abetting. *Carter* involved allegations of securities fraud against two of a company's outside lawyers, who allegedly drafted misleading press releases and SEC filings, assisted management in efforts to conceal material facts concerning the company's financial condition, and failed to take action to correct misleading public statements issued by the company – allegations that are similar to the ones lodged against V&E. Based on evidence supporting the foregoing allegations, an administrative law judge found the two attorneys liable as primary violators of Section 10(b). The Commission reversed, holding "we do not believe that respondents' involvement in the affairs or decisionmaking processes of the company was sufficient to justify a finding against them as direct, primary violators of Section 10(b) or Rule 10b-5," and concluded that the alleged conduct of the outside lawyers could only be considered as an "aiding and abetting" violation. *Id.* at *75. In reaching this conclusion, the Commission drew a sharp distinction between actions

Motion of Securities and Exchange Commission for Leave, as *Amicus Curiae*, to Submit Briefs Pertinent to Certain Legal Issues Raised by Motions to Dismiss). What happens when an allegedly misleading statement is proposed by one person, commented on by another, edited by a third, approved by a fourth, and publicly attributed to a fifth? The SEC's proposed standard gives no guidance with respect to this very common scenario. In *Klein*, for instance, the SEC alleged that the law firm was the sole drafter of the alleged misstatements. That is not the fact pattern alleged here.

that are directly attributable to an issuer of securities and actions of those who assist the issuer of securities. *Id.*

Moreover, the information properly before this Court shows that Plaintiffs cannot satisfy the SEC standard they advocate. The SEC's position asserts that persons participating in the disclosure process should be liable if they "played such a substantial role in the creation of the statement that the person could fairly be said to be the 'author' or 'co-author' of the statement." *See, e.g.*, Response at 50. While Plaintiffs allege in conclusory terms that V&E drafted the third-party disclosures, one of the principal documents they rely on to support this allegation (*see* Response at 53-54) points to the opposite conclusion. The Powers Report described the disclosure process as follows:

Enron's related-party disclosures in its proxy statements, as well as in the financial statement footnotes in its periodic reports, resulted from collaborative efforts among Enron's Senior Management, employees in the legal, accounting, investor relations, and business units, and outside advisors at Andersen and Vinson & Elkins. Nevertheless, it appears that no one outside of Enron Global Finance, the entity principally responsible for the related-party transactions, exercised significant supervision or control over the disclosure process concerning these transactions.

Powers Report at 181 (emphasis added) (excerpts attached as Exhibit 3).

The Powers Report concluded that the major problem in the disclosure process was that Enron's Global Finance Group assumed too great a role:

Enron's disclosures and the information we have about how they were drafted reflect a strong predisposition on the part of at least some in the Company to minimize the disclosures about the related-party transactions . . . [T]he inadequate disclosures concerning the related-party transactions resulted, at least in part, from the fact that the process leading to those disclosures appears to have been driven by the officers and employees in Enron Global Finance, rather than by Senior Management with ultimate responsibility, in-house or outside counsel, or the Audit and Compliance Committee.

Powers Report at 201-02 (emphasis added) (Ex. 3). In short, the Powers Report criticizes V&E for not being sufficiently involved, not for drafting the allegedly inadequate disclosures. Thus, the very document Plaintiffs rely on does not support a “creation” claim; it negates it.

The SEC also has made clear that its “creation” standard would be appropriate only where the PSLRA’s stringent pleading requirements, especially with respect to scienter, have been satisfied. In its amicus brief in *Klein v. Boyd*, the SEC highlighted that pleading requirement as a response to the specter that its proposed “creation” standard would lead to a flood of lawsuits against lawyers.¹⁴ As described in Section V below, Plaintiffs here have done no more than make conclusory – and unsupported – assertions about V&E’s knowledge of a sort that could be made about any law firm that assists a major corporation. This case is not an appropriate vehicle to implement the SEC’s proposed standard.

5. The fraud on the market theory cannot save Plaintiffs’ claims against V&E.

Plaintiffs argue that the fraud-on-the-market theory excuses their failure to plead the essential element of reliance on V&E’s conduct. It does not. The fraud-on-the-market theory is simply one (rebuttable) means of satisfying the Plaintiffs’ burden of proving reliance. *See Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). It does not alter the substance of what must be shown – that is, “reliance on the defendant’s misstatement or omission,” *Central Bank*, 511 U.S. at 180 (emphasis added). This conclusion is confirmed by the fact that many of the cases on which V&E relies have applied the fraud-on-the-market theory, which is the typical means of proving reliance in securities fraud cases involving securities traded on an exchange.

¹⁴ *See* Brief of the Securities and Exchange Commission, Amicus Curiae in *Klein v. Boyd*, at 12-13 (Attachment One to the Motion of Securities and Exchange Commission for Leave, As Amicus Curiae, to Submit Briefs Pertinent to Certain Legal Issues Raised by Motions to Dismiss).

As demonstrated by these cases, the fraud-on-the-market theory is in no way inconsistent with the bright line rule requiring reliance on statements attributed to the defendant being sued. *See, e.g., Ziembra*, 256 F.3d at 1205; *Wright*, 152 F.3d at 175.

There is no allegation in this case that Enron stock purchasers relied in any way on V&E having said anything. Nor could there be since V&E is not alleged to have said anything to the market. Plaintiffs' failure to plead reliance requires dismissal of their claims.

6. Plaintiffs' allegations fail to establish the requirements necessary to assign Section 10(b) liability to non-speakers.

Plaintiffs erroneously contend that V&E argues that only speakers can be liable under Section 10(b). *E.g.,* Response at 39, 62-63. They cite several cases for the conclusory proposition that non-speakers also can be liable under Section 10(b). *E.g.,* Response at 66. Juxtaposing these two propositions, however, does not support a conclusion that V&E can be liable in this case. In fact, non-speakers can be liable only in circumstances that are analytically far different from the facts alleged here. Non-speakers can be liable only if (1) they had a duty to disclose, such as in insider trading cases, or (2) they engaged in manipulative conduct. The authorities that Plaintiffs cite are not to the contrary. *See id.* Because Plaintiffs do not allege that V&E had a duty to disclose or that it engaged in manipulative conduct, this straw man argument is irrelevant.

II. Plaintiffs' Allegations Against V&E Do Not Amount to Manipulative Conduct Within the Meaning of Section 10(b).

A. Section 10(b)'s prohibition of manipulative conduct applies only to conduct that manipulates market activity.

It is settled that the Section 10(b) prohibition on "manipulative" conduct is a term of art that applies to a clearly defined category of activities – "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting

market activity.” *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). This construction of Section 10(b) has been routinely and consistently applied by the lower courts. *See, e.g., Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979) (manipulative devices are limited to those “practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply and demand or tampering with the price itself”); *Schreiber v. Burlington N., Inc.*, 568 F. Supp. 197, 202 (D. Del. 1983) (manipulative conduct consists of “artificial acts of stimulative trading designed to mislead investors into believing there was a heavy market demand for the stock” (quotation omitted)), *aff’d*, 731 F.2d 163 (3d Cir. 1984), *aff’d*, 472 U.S. 1 (1985); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 267 (W.D. Tex. 1979) (manipulation is defined narrowly to include activities that interfere with the market’s proper functioning).

B. Plaintiffs’ allegations concerning V&E’s work do not allege manipulative conduct.

Plaintiffs concede that they have not alleged market manipulation. Response at 67. Plaintiffs contend that their manipulation claims can stand, but they make no meaningful attempt to address *Santa Fe* and *Hundahl*. Instead, they merely assert that V&E’s recitation of these authorities “is incorrect” and that “the term ‘manipulative’ throughout the [Complaint] refers to the heading of Rule 10b-5, and the full range of conduct prohibited thereunder, not market manipulation.” Response 67. Plaintiffs fail to cite a single decision holding that the term “manipulative” applies to conduct beyond that identified in *Santa Fe* and *Hundahl*.

It is clear from both the Complaint and Plaintiffs’ Response that their claim that V&E engaged in “manipulative” conduct is that the firm allegedly participated in the structuring of “bogus transactions.” *See, e.g.,* Complaint ¶¶ 802-803; Response at 70-71. No case has held

that “structuring” business transactions constitutes manipulative conduct within the meaning of Section 10(b). “Structuring” is not a statutory term nor a term of art under the securities laws. Many cases in which the Section 10(b) claims were dismissed – including *Central Bank*, *Ziembra*, and *Hundahl* – involved conduct that could be described as “structuring.”¹⁵ In fact, in the one case of which V&E is aware in which an allegation of “structuring” was expressly considered, the court held that “structuring” transactions does not constitute a violation of Section 10(b). *Kendall*, 868 F. Supp at 28 n.1.

Even if this type of conduct could satisfy the “manipulative” prong of a Section 10(b) claim, Plaintiffs’ claims would still fail because the alleged level of participation on the part of V&E arises to no more than aiding and abetting. *See* Motion at 20-21; *see also In the Matter of William R. Carter*, 1981 SEC LEXIS 1940. Under *Central Bank*, such conduct cannot be the subject of a securities fraud action brought by private plaintiffs.

III. Plaintiffs Cannot Cure the Fatal Defects in the Complaint by Premising Liability on Vague Notions of “Scheme” or “Course of Business.”

Plaintiffs attempt to use the language of Rule 10b-5 (and especially subsections (a) and (c) of the rule) to expand the scope of Section 10(b). One dominant motif of the Response is that V&E is liable for participating in a “scheme” to defraud Enron’s shareholders.

¹⁵ In *Central Bank*, the defendant bank, in its role as indenture trustee, was alleged to have had “extensive involvement in the issuance of the bonds” in question and to have taken “affirmative steps to ensure that the shortage of collateral . . . would be hidden from plaintiffs,” including by entering into a “concealed side agreement” with the project’s developer. Brief of *Central Bank* Respondents at 1993 WL 40732 at *1-*3, *7. In *Ziembra*, the defendant law firm was alleged to have issued a baseless opinion letter in order to justify its client’s accounting decision not to consolidate a subsidiary’s financial results with its own, and thereby to have been “integral in the scheme to falsely report the financial results” of the client. Brief of *Ziembra* Appellants at 17-18 (Ex. 1). None of these allegations were held to give rise to liability on a “manipulation” theory. *See also Hundahl*, 465 F. Supp. at 1360-62 (rejecting claim that “manipulation” includes dubious transactions and accounting devices that result in the market forming an erroneous judgment about the value of the stock).

In substance, Plaintiffs equate their scheme theory with a conspiracy claim and ask the Court to interpret the terms “scheme” and “course of business” without regard to the strictures of Section 10(b). Response at 69. But as Plaintiffs themselves point out, Rule 10b-5 and Section 10(b) are “coextensive.” Response at 63 (quoting *Zanford*); see also *U.S. v. O'Hagan*, 521 U.S. 642, 651 (1997) (“Liability under Rule 10b-5, our precedent indicates, does not extend beyond conduct encompassed by § 10(b)'s prohibition.”); *Central Bank*, 511 U.S. at 173 (“We have refused to allow [private] 10b-5 challenges to conduct not prohibited by the text of the statute.”). Therefore, deceptive or manipulative conduct is a necessary element of a “scheme” or “course of business” violation under Rule 10b-5. Plaintiffs essentially concede this, stating that “[a] defendant may be held liable for participating in a scheme to defraud simply if it knowingly commits manipulative or deceptive acts in furtherance of the scheme.” Response at 69.

Consistent with this conclusion, numerous federal courts have agreed that allegations of a “scheme” are insufficient to evade *Central Bank* where the defendants’ underlying conduct was neither deceptive nor manipulative within the meaning of Section 10(b). See, e.g., *Stack v. Lobo*, 903 F. Supp. 1361, 1374 (N.D. Cal. 1995); *Valence*, 1996 WL 37788, at *10-11; *SEC v. U.S. Envtl., Inc.*, 897 F. Supp. 117, 120 (S.D.N.Y. 1995); *In re Oak Tech. Sec. Litig.*, No. 96-20552 SW, 1997 WL 448168, at *10 (N.D. Cal. Aug. 1, 1997); *Continental Cas. Co. v. State of New York Mortgage Agency*, No. 94 C 1463, 1994 WL 532271, at *2-3 (N.D. Ill. Sept. 26, 1994).¹⁶

¹⁶ Plaintiffs’ quotation of a brief and unilluminating portion of the Senate floor debate of the PSLRA, Response at 47, adds nothing to their argument. It merely reiterates the uncontroversial point that secondary actors such as lawyers can be liable under Section 10(b), but only if all the requirements of primary liability are met. Moreover, Plaintiffs do not and cannot answer the fact that Congress chose to give the SEC – and only the SEC – the power to bring actions against aiders and abettors. Plaintiffs cannot avoid Congress’s intent with a wide-ranging theory of scheme liability.

Plaintiffs' reliance on *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981), to support their broad theory of scheme liability is misplaced. That now-outdated case was premised on the theory that Plaintiffs could make out a Section 10(b) claim if the defendants (collectively) "knowingly conspired" to commit fraud, *id.* at 469, a theory that has since been clearly repudiated in light of *Central Bank*, *see, e.g., Dinsmore*, 135 F.3d 837. To the extent that *Shores* has any vitality, it is for the "fraud created the market" theory it spawned. That theory applies only where there is no active public market for a security, and a defendant perpetrates a scheme to sell the otherwise unmarketable security. Whether or not this theory falls within Section 10(b)'s deception prong or the manipulation prong,¹⁷ it is clearly not applicable here.

Moreover, Plaintiffs' theory is refuted by the facts of *Central Bank* itself. The plaintiffs in that case "alleged that the [bonds in question] were marketed as part of a fraudulent scheme," the crux of which was to hide from purchasers the impaired value of the bonds' collateral.¹⁸ The plaintiffs also alleged that the defendant bank had "extensive involvement" in the bonds' issuance and "took affirmative steps to ensure that the shortage of collateral and the defects of the appraisal [of the collateral] would be hidden from plaintiffs and other potential purchasers," and they further alleged that the defendant bank entered into a "concealed side agreement" with the project's developer to delay an independent appraisal until after the bonds had been sold.¹⁹ *Central Bank* thus necessarily rejected the notion that invocation of the term

¹⁷ Although not entirely clear, the *Shores* court indicated in a footnote that it viewed the matter as one of market manipulation. 647 F.2d at 470 n.8 (citing *Santa Fe*). This footnote is significant because it demonstrates that the *Shores* court believed that scheme liability was limited by the need to allege deceptive or manipulative conduct that comported with the Supreme Court's understanding of those terms.

¹⁸ Brief for Respondents, 1993 WL 407323 at *1-*3 (emphasis added).

¹⁹ *Id.* at *2.

“scheme to defraud” eliminates the need to allege deceptive or manipulative conduct by the defendants.

Plaintiffs also attempt to rely on *SEC v. Zandford*, 122 S. Ct. 1899 (2002), but that recent decision does not hold that one may be liable for a “scheme” under Section 10(b) without having either made a statement or omitted to speak where there is a duty to disclose. *Zandford* merely held that a broker committed deceptive conduct when he converted the proceeds of sales of his customers’ stock to his own use without disclosing that fact to the customers, to whom he owed a fiduciary duty of disclosure. 122 S. Ct. at 1904-05. The Supreme Court made clear that its decision hinged on the broker’s omission in the face of a duty to disclose; it observed that “if the broker told his client he was stealing the client’s assets, that breach of fiduciary duty . . . would not involve a deceptive device or fraud.” 122 S. Ct. at 1906 n.4.²⁰ Plaintiffs repeatedly quote the *Zandford* Court’s statement that “neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the [Exchange] Act,” 122 S. Ct. at 1903, but that statement is irrelevant. The focal point of the Court’s statement is its final clause, which addressed the issue of whether a misrepresentation must involve the value of a security to constitute a violation of Section 10(b). That issue is not present here.

²⁰ For similar reasons, Plaintiffs’ reliance on *O’Hagan*, 521 U.S. at 654-55, and *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), misses the mark. *O’Hagan* involved the misappropriation theory of insider trading. The *O’Hagan* Court made clear that such conduct transgresses Section 10(b) because it violates a duty of disclosure owed by a fiduciary. 521 U.S. at 654-55. Here, Plaintiffs admit that V&E owed them no such duty. Likewise, *Bankers Life* involved a scheme to purchase a company using its own assets. The parties involved installed a confederate as the company’s president who then caused the company to sell securities and diverted the proceeds to those purchasing the company. Thus, this case, too, centered on a fiduciary’s failure to inform his principal of material facts. 404 U.S. at 7-10.

IV. This Court Cannot Ignore Section 10(b)'s Language Based on a "Broad" View of the Statute.

Plaintiffs also contend that this Court should interpret Section 10(b) "flexibly" to effectuate its remedial purposes. Response at 39; *see also id.* at 64-66. Accordingly, they argue, "there is no limitation on the scope of fraudulent conduct prohibited under § 10(b) and Rule 10b-5." *Id.* at 65. In essence, Plaintiffs ask this Court to ignore the clear language of the statute in order to accomplish what Plaintiffs contend is the correct result. This argument goes too far. The Supreme Court has held that courts cannot apply a flexible interpretation of a statute if the statutory language is to the contrary. *See Central Bank*, 511 U.S. at 177 ("It is inconsistent with settled methodology in 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."); *id.* at 188 ("Policy considerations cannot override our interpretation of the text and structure of the Act.").²¹ Here, as the Supreme Court has concluded, the terms "deceptive" and "manipulative" have defined meanings that courts cannot ignore. *Id.*; *see also id.* at 193-200 (Stevens, J., dissenting) (noting that *Central Bank's* holding rejected notion that securities laws are to be interpreted flexibly to effectuate its remedial purposes). Accepting Plaintiffs' "flexible interpretation" argument would require this Court to rewrite the securities laws – an act that lies exclusively within the province of Congress.

V. Plaintiffs Have Not Satisfied the Stringent Pleading Requirements of the PSLRA and Rule 9(b).

As set forth in V&E's opening brief, both the PSLRA and Fed. R. Civ. P. 9(b) impose stringent requirements on the pleadings in this case. Despite embellishing the

²¹ *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (stating that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration."); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) ("[T]he objective of a statute is not a warrant to disregard the terms of the statute.").

Complaint's allegations, the Response merely highlights Plaintiffs' failure to satisfy these standards. Plaintiffs have failed (1) to plead with particularity any facts that could conceivably make V&E liable for Enron's statements, or (2) to plead specific facts giving rise to a strong inference of scienter on V&E's part.

A. Plaintiffs have not pled particularized facts as to V&E's alleged involvement in Enron's statements.

Even if it were legally appropriate to hold V&E liable for statements made by Enron (and it is not, *see* Section I above), such claims could be sustained only if the relevant circumstances were pled with particularity. Contrary to Plaintiffs' assertions, Response at 54-55, it is not enough for the Complaint to identify which of Enron's statements Plaintiffs allege were false. Before V&E could ever be held liable based on Enron's statements, the Plaintiffs must plead the "who, what, when, where, and how" of V&E's conduct. *See Melder v. Morris*, 27 F.3d 1097, 1100 & n.5 (5th Cir. 1994).

That rule is particularly important in this case, where Plaintiffs' entire argument hinges on their conclusory allegations that V&E authored Enron's disclosures behind the scenes. In the context of this liability theory, it is not sufficient for Plaintiffs to identify specific public statements by Enron and assert that they are attributable to V&E. Otherwise, plaintiffs could name anyone as the behind-the-scenes "author" and claim that they had satisfied their pleading obligations by identifying the "authored" disclosures.²² That cannot be sufficient under the PSLRA's heightened pleading requirements. To support their conclusory allegation that V&E "drafted" the disclosures, Plaintiffs must plead specific facts (*i.e.*, when V&E lawyers drafted the

²² Such an argument is also a variant on the discredited group-pleading doctrine, where plaintiffs would identify a company's public statement and conclusorily allege that it was attributable to company management. Not surprisingly, Plaintiffs deny that they are relying on the group-pleading doctrine. Response at 55-56. However, while the Complaint does not use that term literally, its factual theory necessarily relies on that doctrine.

disclosures, who at V&E did so, and what specific disclosure language originated with V&E). See Motion at 24-26. Plaintiffs instead rely on vague and conclusory assertions that V&E “drafted” or “approved” large numbers of Enron documents or “structured” various Enron transactions.²³

Plaintiffs’ Complaint presents a paradigm case illustrating why the particularity requirements exist. It is clear from a comparison of Plaintiffs’ numerous responses to the motions to dismiss filed by the various defendants (*see* Exhibit 4 attached) that Plaintiffs created a generic template brief into which they substituted different defendants’ names in an attempt to demonstrate their “particularized” pleadings concerning the defendants. The result is that Plaintiffs have taken fundamentally inconsistent positions on what roles different defendants played. For example, Plaintiffs have accused numerous other defendants of being the “creators” of the exact same things that they accuse V&E of “creating,” often using exactly the same words:

- For instance, Plaintiffs’ Response claims that “Lay Skilling and Fastow and V&E” formed Chewco. Response at 5. In their response to Kirkland & Ellis’s motion to dismiss, Plaintiffs assert that Lay, Skilling and Fastow handpicked Kirkland to form Chewco. Kirkland Response at 3, 24. In their response to Barclay’s motion to dismiss, Plaintiffs argue that Enron and Barclays created Chewco. Barclays Response at 3. They took similarly inconsistent positions in their other responses.
- In opposing V&E’s motion, Plaintiffs assert that “[i]n 99, Enron and V&E participated in the creation of the two LJM partnerships,” while elsewhere they assert that “[i]n 99, Enron and several of Enron’s banks created two LJM partnerships,” and yet elsewhere that “Enron and Andersen created two LJM partnerships,” and yet elsewhere they say that “Enron and

²³ Plaintiffs’ allegations concerning V&E’s role also fall afoul of the PSLRA’s provision concerning information-and-belief pleading. The PSLRA requires that “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). Although Plaintiffs’ allegations concerning V&E’s role are not expressly denominated as based on information and belief, that is clearly the case, as no personal knowledge is averred. *See, e.g., ABC Arbitrage Plaintiffs Group v. Tchuruk*, ___ F.3d ___, 2002 WL 975299 (5th Cir. May 13, 2002). As such, the allegations are legally insufficient. *Id.*

Kirkland & Ellis created two LJM partnerships,” and finally elsewhere they say that “Fastow created LJM2.” (emphasis added).

- The Response also claims that “Enron and V&E created an LJM2 SPE called ‘Hawaii 125-0.’” Response at 17. Conversely, in other briefs, Plaintiffs claim, alternatively, that Hawaii 125-0 was created by (1) Kirkland & Ellis, or (2) Enron, or (3) Enron and CIBC.
- In opposing V&E’s motion, Plaintiffs assert that “Enron and V&E used these LJM contrivances and deceptive devices to inflate Enron’s reported financial results,” while elsewhere they assert that “Enron *and* Enron’s banks used the contrivances and devices to deceive to inflate Enron’s reported financial results,” and yet elsewhere that “Enron and Andersen used these contrivances and manipulative devices to inflate Enron’s reported financial results.”
- The Response asserts that “Enron & V&E again ‘restructured’ the Raptor vehicles” in 2001. Response at 26. Using virtually identical language in other briefs, Plaintiffs contend that the restructuring was done by (1) Enron and Kirkland & Ellis, or (2) Enron and CS First Boston, or (3) Enron and certain of its banks, or (4) Richard Causey.

See generally Exhibit 4, which identifies many of the prime examples of Plaintiffs’ template pleading strategy.

Allegations so vague – so lacking in the “who, what, where, and when” required by the PSLRA – that they can be applied in cookie-cutter fashion to many different defendants, as has been done here, clearly fail to satisfy the stringent pleading requirements that apply in this case. This conclusion is particularly compelling here, where Plaintiffs’ conclusory allegations are contradicted by the Powers Report on which they so heavily rely. *See* Section I.B.4(b), *supra*.

B. Plaintiffs have not pled specific facts giving rise to a strong inference of scienter

Plaintiffs assert in conclusory fashion that V&E “knew” various facts. *See, e.g.*, Response at 11 (V&E “knew” Enron had to do four 99 year-end deals with LJM2 SPEs); *id.* at 13 (V&E “knew” that McMahon promised Merrill Lynch a buy-back of its investment); *id.* at 14

(V&E “knew” that Enron had agreed to make LJM1 whole for its investment); *id.* at 15 (V&E “knew” that CIBC got a secret no-loss guarantee from Enron); *id.* at 17 (V&E “knew” of a secret agreement as to the New Power IPO). Missing, however, is precisely what is required by the PSLRA – specific facts underpinning these vague allegations of knowledge. There is no allegation of who at V&E “knew” this laundry list of facts, or when, where, and how they allegedly learned of them. Plaintiffs’ failure to allege facts giving rise to any (let alone a strong) inference that any V&E lawyers “knew” these alleged facts is fatal to the claims against V&E. *See, e.g., Mortensen v. Americredit Corp.*, 123 F. Supp. 2d 1018, 1023 (N.D. Tex. 2000) (dismissing securities fraud action where plaintiffs’ conclusory allegations failed to adequately plead scienter); *accord Zishka v. American Pad & Paper Co.*, 2000 Fed. Sec. L. Rep. (CCH) ¶ 91,208, No. 3:98-CV-0660-M, 2000 WL 1310529, at *3 (N.D. Tex. Sep. 13, 2000); *Coates v. Heartland Wireless Communications, Inc.*, 100 F. Supp. 2d 417, 427 (N.D. Tex. 2000); *Calliott v. HFS, Inc.*, 2000 Fed. Sec. L. Rep. (CCH) ¶ 90,939, No. Civ.A. 3:97CV0924I, 2000 WL 351753, at *8 (N.D. Tex. Mar. 31, 2000); *Branca v. Paymentech, Inc.*, 2000 Fed. Sec. L. Rep. (CCH) ¶ 90,911, No. Civ.A. 3:97-CV-2507-L, 2000 WL 145083, at *10 (N.D. Tex. Feb. 8, 2000).

Plaintiffs offer up various other attempts to meet the scienter pleading requirement, but all of them fail. For instance, Plaintiffs create a straw man by characterizing V&E’s position as being that the firm “did not understand what it was doing,” and then they purport to knock it down by quoting from newspaper articles and the firm’s website. None of this remedies the fundamental failure to allege facts showing what any V&E lawyer knew.

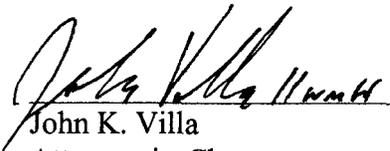
Plaintiffs’ argument that V&E’s preliminary investigation of Sherron Watkins’ concerns demonstrates scienter because “any layman on the street” would have recognized fraud,

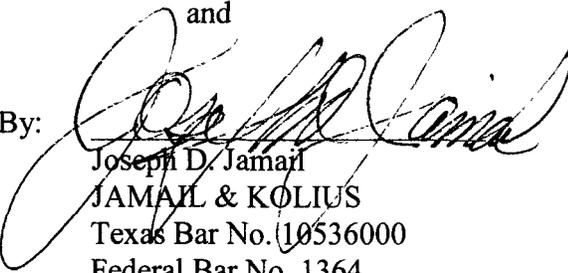
Response at 75, is contradicted by the Complaint's other allegations. Plaintiffs quote the Powers Report's assertion that V&E's fault was in not "see[ing] through these particularly complex transactions." Response at 82. That assertion, adopted by Plaintiffs, negates rather than supports a strong inference of scienter on V&E's part.

Conclusion

For the foregoing reasons and the reasons set forth in V&E's original Motion, the Motion should be granted.

Respectfully submitted,

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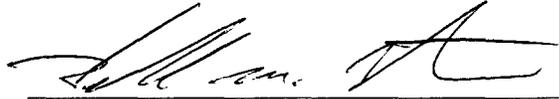
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel on June 24, 2002, via e-mail or certified mail, return receipt requested.

A handwritten signature in black ink, appearing to read "Wallis M. Hampton", written over a horizontal line.

Wallis M. Hampton

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