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

United States Courts
Southern District of Texas
FILED
JUN 24 2002
Michael N. Milby, Clerk

MARK NEWBY,	:	
Plaintiff,	:	
VS.	:	CIVIL ACTION NO. H-01-3624 (Consolidated)
ENRON CORP., et al.,	:	
Defendants.	:	

DEFENDANT KEVIN P. HANNON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS

Kevin Hannon's motion to dismiss should be granted because despite having drafted a 500 page Consolidated Complaint, and a 160 page memorandum of law in opposition to the motion to dismiss, plaintiffs still cannot specify what they think Kevin Hannon did wrong.

In his Opening Brief, Kevin Hannon showed that plaintiffs have not alleged that he made *any* misstatement or omission. Kevin Hannon further demonstrated that contrary to this Court's mandate in In re Sec. Litig. BMC Software, Inc., 183 F. Supp.2d 860, 886 (S.D. Tex. 2001), plaintiffs have not pled with particularity *any* acts specifically attributed to him which could give rise to primary liability under Section 10(b), but instead, base their claim solely on his position as COO of an Enron business unit and improperly rely on group pleading. Kevin Hannon further showed that plaintiffs have failed to allege *any* details about his alleged stock sales or other information which would support a finding that he used material nonpublic information to trade. Kevin Hannon also showed that in any event, plaintiffs did not present *any* facts, much less the requisite particularized facts to sufficient to support the *strong* inference of scienter that the PSLRA now requires.

920

Plaintiffs do not address these deficiencies, but simply regurgitate the inadequate allegations of the Complaint. Like the Complaint, Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss Filed by Enron Defendants Buy, Causey, Derrick, Fastow, Frevert, Hannon, Harrison, Hirko, Horton, Kean, Koenig, Lay, Mark-Jusbasche, McMahon, Olson, Pai, Rice, Skilling, Sutton and Whalley ("Opp. Br."), barely mentions Kevin Hannon. Its particular references to Kevin Hannon are set forth in full text below:

> This memorandum addresses the motions to dismiss filed by [twenty] Enron Defendants [including Hannon] . . . who were integral executives who created a company that vastly overstated its profits and hid enormous, crushing debts and contingent liabilities through accounting manipulations. (Opp Br. at 1).
>
> **8. Claims Against Hannon are Pleaded with Particularity**
>
> Kevin Hannon was Operating Officer of EBS until his resignation in 8/01, and previously president of Enron's trading and commodities business. He served in 97-00 on the Management Committee, which approved all significant Enron business transactions, including the Fastow-controlled partnership/SPE deals specified. ¶¶83(t), 88. Beyond his participation in the fraudulent scheme, during the Class Period, while in possession of adverse, material, undisclosed information, Hannon sold his Enron stock for millions in illegal insider-trading proceeds, plus call options before 5/1/01 by which he would profit so long as Enron's stock price dropped below $70 per share by 1/19/02. ¶83(t). (Opp. Br. at 51).
>
> The CC sufficiently set forth that Hannon knew of the false statements being issued about EBS. Hannon was intimately involved with EBS and knew of its inherent failure. For example, the CC alleges that a coup attempt by several executives who reported to Hannon took place in spring 01. ¶339(j)(iii). They wanted Hannon and EBS CEO Rice removed, because EBS was clearly failing under his supervision. They informed Skilling that EBS was in extremely dire straits -- there was "no way to win," EBS "had no income," and the "cash-burn rate was too high" -- and they showed Skilling ***actual*** EBS performance numbers. *Id.* Hannon knew the EBS Unit was a terrible failure, which was not disclosed to the public. (Opp. Br. at 52).
>
> **c. Hannon's Co-Defendants' Insider Sales During the Class Period Should Be Considered**
>
> Hannon argues that Dr. Hakala's declaration does not mention him.

> This is so because Hannon did not report his trades to the SEC. In any event, his sales should be considered in the Court's evaluation of scienter. (Opp. Br. at 121).
>
> Plaintiffs do not allege a violation of §20A against Hannon. Rather the CC adequately alleges his liability under § 10(b) and Rule 10b-5 based on his participation in the fraudulent scheme, as well as his illegal insider trading. (Opp. Br. at 136 n.42).

Notably absent from plaintiffs' Opposition is the requisite who, what, when, where and how: Plaintiffs have not pled what misstatements Kevin Hannon allegedly made (and, as they must, seemingly concede that he has not made any), what action Kevin Hannon took in furtherance of the alleged fraud, what material nonpublic information Kevin Hannon allegedly possessed at the time of his "unknown" stock sales, how Kevin Hannon learned of any alleged material nonpublic information, false or misleading statement, or fraudulent activity, and when Kevin Hannon allegedly learned of it.

Because plaintiffs have failed to plead the elements of securities fraud under the 1934 Act, Rule 9(b) and the PSLRA, the claims against Kevin Hannon should be dismissed.

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATIONS OF SECTION 10(b) AND RULE 10b-5 AGAINST HANNON

In Mr. Hannon's Opening Brief, Mr. Hannon showed that plaintiffs pled no facts, let alone particularized facts, that Mr. Hannon made any material misrepresentation or omission. Mr. Hannon showed that *none* of the challenged statements in the Complaint are attributed to him and that plaintiffs improperly rely on group pleading. (Hannon Br. at 6-14). In response, plaintiffs agree and state that their Section 10(b) claims against him are based solely on his alleged "participation in the fraudulent scheme" and insider trading. (Opp. Br. at 136 n.42). Both these claims fail under Section 10(b), Rule 9(b) and the PSLRA.

A. Plaintiffs Have Not Identified a Single Fraudulent Statement Spoken by Hannon or Set forth a Primary Violation Based on His Alleged Participation in a Fraudulent Scheme

Unable to point to a single misstatement or omission made by Mr. Hannon, plaintiffs assert that he "participated in a fraudulent scheme." (Opp. Br. at 51, 136 n.42). Plaintiffs, however, plead no facts to support their "scheme" charge. The few cursory paragraphs in the Complaint referencing Mr. Hannon, and plaintiffs' two paragraph characterization of those facts in their Opposition, simply allege his position in the company, unspecified transactions in Enron stock, and alleged complaints about Mr. Hannon to Mr. Skilling by unnamed subordinates. This is not enough to plead a primary violation of the securities laws.

As set forth in Mr. Hannon's Opening Brief, Rule 9(b) requires that the circumstances of the fraud be pled "with particularity" so as to provide the defendant fair notice of plaintiffs' claims, protect the defendant from harm to his or her reputation and goodwill, and prevent plaintiffs from filing baseless claims and then attempting to discover unknown wrongs. Tuchman v. DSC Comm. Corp., 14 F.3d 1061, 1067 (5th Cir. 1994). Contrary to plaintiffs' assertion (Opp. Br. at 10), Rule 9(b) serves an important screening function in securities fraud suits and is more than a mere technical requirement that plaintiffs can freely ignore.[1] At a minimum, therefore, plaintiffs must plead *what* Mr. Hannon did in furtherance of the alleged fraud. See ABC Arbitrage Plaintiffs Group v. Tchuruk, __ F.3d __, 2002 WL 975299, at *8 (5th Cir. May 13, 2002) ("'[D]irectly put, the who, what, when, and where must be laid out *before* access to the discovery process is granted.'"). The conclusory assertion that Mr. Hannon "participated" in the fraudulent scheme coupled with his

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[1]See Pegasus Holdings v. Veterinary Ctrs. of America, Inc., 38 F. Supp.2d 1158, 1163 (C.D. Cal. 1998) ("To state a claim of fraudulent conduct, which carries substantial reputational costs, plaintiffs must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'").

position in the company is simply not enough.[2]

Not only do plaintiffs fail to meet Rule 9(b)'s pleading requirement, plaintiffs fail to state a claim for a primary violation of Section 10(b) or Rule 10b-5.[3] At best, plaintiffs' conclusory "fraudulent scheme" allegations amount to nothing more than a claim for aiding and abetting which the Court prohibited in Central Bank v. First Interstate Bank, 511 U.S. 164 (1994). Following Central Bank, a plaintiff must prove that each defendant meets the requirements for primary liability under Section 10(b) and Rule 10b-5. See id. at 191. A number of courts interpreting Central Bank

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[2]See BMC Software, 183 F. Supp.2d at 915 ("Nor have plaintiffs specifically alleged how the individual nonspeaking Defendants have participated in the alleged scheme to defraud or how they could have controlled misstatements by other named Defendants."); Lemmer v. Nu-Kote Holding, Inc., 2001 U.S. Dist. LEXIS 13978, at *24 (N.D. Tex. Sept. 6, 2001) (dismissing claim where plaintiff "makes no allegations of acts specifically attributed to Defendants . . . [Plaintiff's] only allegations as to the scheme to defraud are vague, general and unsupported by specific details that might support a strong inference of such a scheme"); Coates v. Heartland Wireless Comm., Inc., 26 F. Supp.2d 910, 196 (N.D. Tex. 1998) ("Plaintiffs' must properly plead wrongdoing . . . as to each individual defendant and cannot rely on the individuals' positions or committee memberships with [the company]."); Pegasus Holdings, 38 F. Supp.2d at 1164 (dismissing claim where none of the non-speaking defendants is alleged to have made any representations to the plaintiff or performed predicate acts in furtherance of the scheme; "Allegations of stock ownership and attendance at certain meetings is not enough to establish a functional relationship to a fraudulent scheme. . . . Conclusory allegations of 'willful consent' are insufficient to state a cause of action without factual information as to how and when the non-speaking defendants 'consented,' [and] to whom they expressed, exhibited or otherwise demonstrated their consent."); Malin v. Ivax Corp., 17 F. Supp.2d 1345, 1361 (S.D. Fla. 1998) ("Plaintiffs' failure to plead sufficient facts implicating Klein's participation in the fraud provides an alternative and independent basis for dismissal."), aff'd, 226 F.3d 647 (11th Cir. 2000).

[3]In arguing that their fraudulent scheme allegations state a claim under Section 10(b), and do not violate Central Bank's prohibition on aiding and abetting liability, plaintiffs rely primarily on pre-Central Bank authority and insider trading cases which are inapposite. Mr. Hannon does not dispute that courts have implied a private right of action under Section 10(b) in circumstances where an insider uses material non-public information to trade in violation of his duty to disclose or abstain; Plaintiffs' fraudulent scheme charge, however, does not rest on a primary violation of the securities laws by Mr. Hannon, but on his alleged participation in a primary violation by another person. At best, and as set forth above, this constitutes aiding and abetting which is not actionable. Moreover, for the reasons set forth infra, at I.B, plaintiffs cannot maintain a claim against Mr. Hannon for insider trading.

have held that "participation" in a scheme to defraud is not enough to state a claim for a primary violation under Section 10(b) unless the defendant's alleged participation consisted of making a false or misleading statement. See Zimeba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001); Anixter v. Home-State Production Co., 77 F.3d 1215, 1225-26 (10th Cir. 1996); see also In re HI/FN, Inc. Sec. Litig., 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)."). Other courts, however, have found that a defendant may be liable if he or she substantially participated, or played a significant role, in making the allegedly misleading statement. See In re Software Toolsworks, Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994); see also McNamara v. Bre-x Minerals Ltd., 57 F. Supp.2d 396, 429 (E.D. Tex. 1999) (discussing the two approaches).

Although plaintiffs' advocate the application of the "significant role" test (Opp. Br. at 78-82), plaintiffs' allegations as to Mr. Hannon do not met either of these tests: Plaintiffs have not pled that Mr. Hannon made any false or misleading statement, nor have they alleged that Mr. Hannon played any role, let alone a significant role, in making any false or misleading statement. In effect, plaintiffs' scheme allegations are nothing more than a "thinly disguised attempt to avoid the impact of the Cental Bank decision" See In re Silicon Graphics, Inc. Sec. Litig., 970 F. Supp. 746, 762 (N.D. Cal. 1997) ("Plaintiffs' effort to describe various schemes are unavailing because plaintiffs fail to explain each individual defendant's participation in them. Plaintiffs' scheme allegations appear to be 'no more than a thinly disguised attempt to avoid the impact of the Cental Bank decision.'"); Pegasus Holdings v. Veterinary Ctrs. of America, Inc., 38 F. Supp.2d 1158, 1164 (C.D. Cal. 1998) ("Plaintiffs fail to address how the non-speaking individuals were involved in the scheme, and the acts each performed (or omitted) which furthered the conspiracy. Plaintiffs' alleged

'scheme' theory of liability is not only inartfully drawn, but also fundamentally inconsistent with judicial interpretations of section 10(b)").

Because plaintiffs have pled no particularize facts as to how Mr. Hannon participated in the alleged scheme, much less any facts that would give rise to primary liability, the fraudulent scheme claim against him should be dismissed.

B. Plaintiffs' Insider Trading Claim Fails Because Plaintiffs Have Not Pled with Particularity that Hannon Traded Contemporaneously with any Named Plaintiff or Used Material, Nonpublic Information to Trade

Plaintiffs similarly cannot maintain a cause of action against Mr. Hannon under Section 10(b) for insider trading. As shown in Mr. Hannon's Opening Brief, any attempt to assert a claim based on Mr. Hannon's "unknown" stock sales fails because there are no allegations, let alone particularized allegations, that Mr. Hannon traded contemporaneously with any named plaintiff or used material nonpublic information to trade. (Hannon Br. at 18-23). Plaintiffs concede as much in their Opposition and do not address these deficiencies.

Plaintiffs acknowledge that they cannot assert a claim against Mr. Hannon for insider trading in violation of Section 20A. (Opp. Br. at 136 n.42). Curiously, however, in a footnote, and with no analysis, plaintiffs contend that they have adequately alleged liability against Mr. Hannon for insider trading under Section 10(b). Id. For the very reasons they cannot maintain a claim under Section 20A, plaintiffs cannot maintain a claim against Mr. Hannon for insider trading under Section 10(b).

Plaintiffs do not dispute that the elements for insider trading under Section 10(b) and 20A are the same (Opp. Br. at 136): To state a claim based on insider trading, under *either* Section 10(b) *or* 20A, the plaintiffs must plead with specificity that Mr. Hannon used material, nonpublic information, knew or recklessly disregarded that the information was material and nonpublic, and

that they traded contemporaneously with Mr. Hannon. See BMC Software, 183 F. Supp.2d at 916.[4] Plaintiffs have not done so here.

Plaintiffs do not specify what material nonpublic information Mr. Hannon possessed at the time of his alleged stock sales, when Mr. Hannon obtained this information, how Mr. Hannon obtained the information, from whom Mr. Hannon obtained the information, or how Mr. Hannon used it for his own advantage. Moreover, plaintiffs do not allege any details of Mr. Hannon's alleged stock transactions or that plaintiffs traded contemporaneously with Mr. Hannon. The absence of any allegations regarding the nonpublic information the Mr. Hannon allegedly possessed, and the circumstances of Mr Hannon's alleged stock sales necessarily precludes a finding that the plaintiffs traded in stock contemporaneously with Mr. Hannon and mandates that the insider trading claims against him be dismissed.[5]

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[4] See also Browning-Ferris Indus. Inc. Sec. Litig., 876 F. Supp. 870, 909 (S.D. Tex. 1995) ("A private cause of action for insider trading exists under Rule 10(b) for persons who traded contemporaneously with the insider"; "The contemporaneous trading requirement must be met 'because noncontemporaneous traders do not require protection of the 'disclose or abstain' rule because they do not suffer the disadvantage of trading with someone who has superior access to information.'"); Neubronner v. Milken, 6 F.3d 666, 670-72 (9th Cir. 1993) (holding that liability for insider trading under Section 10(b) is "confined to persons who traded contemporaneously with the insider" and that the strict pleading requirements of Rule 9(b) apply); Perry v. Eastman Kodak Co., 962 F.2d 10, 1992 WL 103695, at *6 (7th Cir. May 15, 1992) (applying contemporaneous trading rule to dismiss insider trading claim under Section 10(b)); Wilson v. Comtech Tel. Corp., 648 F.2d 88, 94-95 (3d Cir. 1981) (same); Copland v. Grumet, 88 F. Supp.2d 326, 337 (D.N.J. 1999) (noting that both Sections 10(b) and 20A contain a contemporaneous trading requirement).

[5] See Neubronner, 6 F.3d at 672 (affirming dismissal of insider trading claim where "Complaint catalogs in summary fashion the investment banking services that Drexel performed for GFC, as well as adverse information about GFC's financial condition that apparently eventually became public. The complaint then asserts that Drexel and Milken must have known about that information in advance of its public release, and therefore must have used it to trade for their own benefit. Neubronner does not allege specifically what information Miliken obtained, when and from whom he obtained it, and how he used it for his own advantage."); Colby v. Hologic, Inc., 817 F. Supp. 204, 215-16 (D. Mass. 1993) (dismissing insider trading claim where plaintiff did not sufficiently allege contemporaneous trades or what materially adverse information any defendant possessed); Gaylinn v. 3Com Corp., 2000 WL 33598337, at *9 (N.D. Cal. Jun. 9, 2000) (same).

C. Plaintiffs' Opposition Offers No Remedy for the Complaint's Failure to Plead Particularized Facts Giving Rise to a Strong Inference of Scienter

In Mr. Hannon's Opening Brief, Mr. Hannon also showed that the Complaint is devoid of facts giving rise to any inference of scienter, much less the strong inference required by the PSLRA. Mr. Hannon demonstrated that plaintiffs did not plead any facts to suggest conscious misbehavior or recklessness on his part, but instead, impermissibly relied upon conclusory group pleading allegations, his position with the company, and "unknown" stock sales. (Hannon Br. at 14-18). As set forth below, Plaintiffs' Opposition does not redeem their deficient pleading.

Plaintiffs still have not identified any scienter allegations that are specific to Mr. Hannon. The only reference to Mr. Hannon in plaintiffs' entire scienter argument is that Mr. Hannon engaged in "unknown" stock sales and that these unknown stock sales "should be considered in the Court's evaluation of scienter." (Opp. Br. at 121).[6] This argument, however, runs counter to Fifth Circuit precedent which admonishes that "a strong inference of scienter is not raised where a plaintiff merely alleges facts of a defendants' motive and opportunity to commit fraud," and requires that a defendant's stock sales be "'unusual' to have meaningful probative value." See Abrams v. Baker Hughes Inc., __ F.3d __, 2002 WL 1018944, at *3 (5th Cir. May 21, 2002); Nathenson v. Zonagen Inc., 267 F.3d 400, 420-21 (5th Cir. 2001).

Beyond Mr. Hannon's unknown stock sales, plaintiffs rely on little more than supposition and fall back on conclusory allegations regarding the defendants state of mind. Plaintiffs argue that scienter may be alleged by "specifying the problems, that if true, would have been obvious

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[6]In addition, in a heading and without citation to any authority, plaintiffs seemingly suggest that the court may infer scienter as to Mr. Hannon based on his co-defendants' alleged insider sales. (Opp. Br. at 121). The PSLRA, however, does not allow a court to impute scienter to one defendant through the scienter allegations of the remaining defendants. To the contrary, plaintiffs must plead scienter as to each defendant. See BMC Software, 183 F. Supp.2d at 902 n.45; Coates, 26 F. Supp.2d at 916. Plaintiffs have not done so with respect to Mr. Hannon.

to the Insiders" (Opp. Br. at 98), and that "Hannon was intimately involved with EBS and knew of its inherent failure."[7] (Opp. Br. at 52). Notwithstanding plaintiffs' improper reliance on group pleading, this is simply another way of saying that Mr. Hannon must have known the statements were false because he was an officer of Enron's business unit, a proposition that the Fifth Circuit has categorically rejected. See Abrams, 2002 WL 1018944, at *5 ("Plaintiffs point to no allegations that the defendants knew about the internal control problems, only that they should have known or that their lack of knowledge based on their corporate positions demonstrates recklessness. A pleading of scienter may not rest on the inference that defendants must have been aware of the misstatements based on their positions within the company."). Moreover, the Court has rejected plaintiffs' "core business" argument in circumstances such as this where the defendant is not alleged to have made any statements.[8] See Nathenson, 267 F.3d at 425 (finding no scienter based on core business allegations, stating "[t]he result . . . is otherwise as to Blasnik and Sutter, both of whom were outside directors, neither of whom is alleged to have made any statements or issued any press release about any patent (or Vasomax itself), and as to neither of whom is any other allegation made tending to

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[7]Plaintiffs' attempt to plead actual knowledge through paragraph 338(j)(iii) fails because plaintiffs have not alleged that the unnamed executives spoke to Mr. Hannon about their concerns. To the contrary, it alleges that the executives spoke with Skilling, and advised Skilling of their concerns. See Compl. ¶ 339(j)(iii).

[8]In addition, this Court has questioned the validity of the "core business" argument in Collmer v. U.S. Liquids, Inc.: "[T]he purpose of the PSLSRA's particularized pleading requirements leads this Court to find that such an imputation, without some additional facts such as exposure to content-identified internal corporate documents (and who drafted them, who received them or how plaintiffs learned of them) or specific conversations or attendance at specified management or board meetings dealing with such problems, is inadequate to plead scienter." 2001 U.S. Dist. LEXIS 23518, at *96 (S.D. Tex. Jan. 23, 2001). "Additional facts" as to Mr. Hannon's knowledge are exactly what is missing here. Although plaintiffs claim to have provided "detailed facts about [the defendants] involvement with Enron's core business, risk management, complex SPEs, fraudulent financial structures, and off-balance-sheet transactions to hide Enron's debt and liabilities," (Opp. Br. at 99), the few paragraphs of the Complaint show that they have not provided any of this information with respect to Mr. Hannon.

support an inference of scienter in this respect.").[9]

In sum, as shown in Mr. Hannon's Opening Brief and above, plaintiffs fail to plead particularized facts, as the PSLRA requires, giving rise to a strong inference that Mr. Hannon acted with scienter. The Complaint may be dismissed on this basis alone.

II. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST HANNON FOR CONTROL PERSON LIABILITY UNDER SECTION 20(a)

In Mr. Hannon's Opening Brief, Mr. Hannon also showed that plaintiffs purported claim against him for control person liability fails because plaintiffs have not alleged (and cannot allege) that Mr. Hannon controlled any of the defendants named in the Complaint. (Hannon Br. at 23-25). Plaintiffs do not respond to Mr. Hannon's argument and authority. Instead, without citing to any allegations in the Complaint, they baldly assert that they have properly pleaded that *all* the insiders are liable as control persons because they had the power to control and influence the activities of "another." (Opp. Br. at 154).

Whether Mr. Hannon had the ability to control "another" person, however, is not the test. At a minimum, the test is whether the defendant possessed the power to control a primary violator.[10] See BMC Software, 183 F. Supp. 2d at 869 n.17. Here, there are *no allegations* in the

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[9]Plaintiffs' cases are inapposite. Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989) predates the PSLRA. In In re Netsolve, Inc. Sec. Litig., 185 F. Supp.2d 684, 697 (W.D. Tex. 2001), the individual defendants were only four of the top officers of the company, and three were directly responsible for discussing the company's business with the public. In addition, Epstein v. Itron, Inc., 993 F. Supp. 1314, 1326 has been called into question by a number of courts including this Court in Collmer, 2001 U.S. Dist. LEXIS 23518, at *98 (requiring additional facts); see also In re Read-Rite Corp. Sec. Litig., 2000 WL 1641275, at *6 (N.D. Cal. Oct. 13, 2000) (finding core business allegations will not "operate to make insufficiently particularized allegations of scienter sufficient").

[10]Although the Fifth Circuit has not been entirely consistent in its interpretation of the test for control person liability, the Court in Abbott v. Equity Group, Inc., did not reject the "culpable participation" standard. See Abbott v. Equity Group, Inc., 2 F.3d 613, 620 & n.18 (5th Cir. 1993)

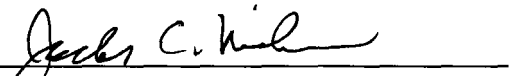
Complaint (let alone particular allegations) that Mr. Hannon possessed the power to control any person alleged to be a primary violator. Accordingly, plaintiffs' Section 20(a) claim against Mr. Hannon must be dismissed.[11]

CONCLUSION

No securities fraud has been alleged against Mr. Hannon. Mr. Hannon respectfully requests that the claims against him be dismissed with prejudice.

Dated: June 24, 2002

Respectfully submitted,



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(noting that Dennis v. General Imaging, Inc., 918 F.2d 496, 509 (5th Cir. 1990) which required "culpable participation," was a departure from G.A. Thompson & Co. v. Partridge, 636 F.2d 945 (5th Cir. 1981), but finding that it did not need to resolve the inconsistency). This Court, however, need not decide which test applies because as set forth above, plaintiffs' claim against Mr. Hannon fails even under the less stringent standard set forth in G.A. Thompson.

[11]See, e.g., Dartley v. ErgoBilt, Inc., 2001 WL 313964, at *1 (N.D. Tex. Mar. 29, 2001); Rich v. Maidstone Fin., Inc., 2001 WL 286757, at *9 (S.D.N.Y. Mar. 23, 2001); Wenneman v. Brown, 49 F. Supp.2d 1283, 1290 (D. Utah 1999); Copland v. Grumet, 1998 WL 256654, at *15 (D.N.J. Jan. 9, 1998); Komanoff v. Mabon, Nugent & Co., 884 F. Supp. 848, 859 (S.D.N.Y. 1995).

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all counsel by posting it on the website previously agreed to by the Plaintiffs and the Officer Defendants on this 24th day of June, 2002.

Jacks C. Nickens