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Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ §	
This Document Relates To:	§	Civil Action No. H-01-3624 (Consolidated)
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§ § § §	
vs.	§ §	
ENRON CORP., et al., Defendants.	§ § §	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT BARCLAYS PLC'S MOTION TO DISMISS

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Defendant Barclays PLC ("Barclays") respectfully submits this reply memorandum of law in further support of its motion to dismiss the claim asserted against it in the Consolidated Complaint (the "Complaint") with prejudice.

Preliminary Statement

Plaintiffs' opposition ("Opp. Mem.") confirms that plaintiffs' Section 10(b) and Rule 10b-5[1] claim against Barclays rests entirely on the allegation that Barclays engaged in nothing more than commercial lending transactions with Enron and Enron-related entities, which Enron — not Barclays — subsequently mischaracterized in Enron's public filings. Plaintiffs ***concede*** that Barclays itself made no misstatements. Plaintiffs ***concede*** that Barclays did not act an underwriter of any public offering of Enron securities.

This is precisely the sort of claim that must be dismissed under the Supreme Court's decision in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver N.A.*, 511 U.S. 164 (1994), which requires that the defendant itself commit fraudulent acts, not simply aid and abet the fraudulent acts of others. Plaintiffs, however, attempt to paper over this glaring deficiency in their pleading against Barclays with a blunderbuss opposition that recites allegations that have nothing to do with Barclays and rehashes boilerplate arguments relating to other banking defendants, but which — according to the facts actually pled — do not apply to Barclays.

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[1] Plaintiffs do not contest that the Complaint fails to state a claim under Section 20(a) of the 1934 Act (*compare* Barclays' Memorandum of Law at 2 n.1); they do not even attempt to argue that Barclays is a "control person" within the meaning of Section 20(a). Accordingly, plaintiffs' Section 20(a) claim should be dismissed against Barclays with prejudice.

Cleared of this underbrush, plaintiffs' central legal argument is that acts constituting a fraudulent "scheme" or "deceptive devices or contrivances" are actionable under Rules 10b-5(a) and (c) as primary violations and are not barred by *Central Bank*, which eliminated secondary liability. Plaintiffs' reliance on Rules 10b-5(a) and (c), however, is a red herring. Plaintiffs in this case allege that they purchased securities based on Enron's alleged misstatements; they do not claim to have been misled by any "manipulative or deceptive acts." More specifically, the conduct which plaintiffs now argue is a "deceptive device" — Barclays' commercial lending to Enron and Enron-related entities in connection with the Chewco transaction — is not alleged to have misled any investor in Enron securities. Rather, such investors allegedly were misled by Enron's subsequent misstatements or omissions concerning this transaction. The cause of action in this case has nothing to do with Barclays' lending activities, but rather relates solely to the alleged Enron misrepresentations. Thus, the real question presented here is who may be accountable for Enron's alleged misstatements or omissions. As Barclays demonstrated in its opening brief, the Complaint states no cause of action against Barclays because Barclays made no statements concerning Enron and did not participate in any manner in preparing, reviewing, disseminating, or providing advice concerning any statements made by Enron or by others concerning Enron. Under *Central Bank*, Barclays' purely secondary role as commercial lender cannot give rise to liability for Enron's misstatements.

Furthermore, even if the plaintiff class were alleging harm as a consequence of conduct by Barclays, the allegations against Barclays do not support a finding of any violation of Rules 10b-5(a) and (c). Indeed, plaintiffs themselves argue that a defendant may be liable for participation in a "scheme" to defraud only so long as that particular defendant committed a "manipulative or deceptive act" in furtherance of the scheme. Plaintiffs, however, can point to no act by Barclays that constitutes a "manipulative or deceptive act." Instead, they point to a loan transaction and attempt to make it appear nefarious by calling the guarantee and collateral "secret" and adding bold type and an exclamation point. (Opp. Mem. at 31.) But there are no facts alleged that suggest any deception or manipulation by Barclays, much less any deception or manipulation that could have constituted the securities fraud about which plaintiffs complain. Moreover, the cases plaintiffs cite involve either (1) misrepresentations or omissions, (2) substantial participation in drafting or approving misrepresentations, or (3) misappropriation or undisclosed breach of fiduciary duty. Barclays is not alleged to have engaged in any such acts.

In any event, the predicate conduct that is the lynchpin of plaintiffs' "scheme" claim — Barclays' loans in the Chewco transaction — occurred prior to the three-year cut-off imposed by the statute of repose under the 1934 Act. Plaintiffs' claim thus is time-barred.

Plaintiffs also disregard their obligation under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, to plead specific "facts giving rise to a strong inference" of scienter. Instead of pointing to any allegations in the Complaint concerning Barclays' purported scienter, the opposition relies on the

Complaint's allegations of conduct (Barclays' commercial lending activity and receipt of fees for its services) and Barclays alleged access to, but not actual knowledge of, information. (No attempt is made to identify the specific "information" to which Barclays' supposedly had access.) These conclusory allegations fall far short of what the PSLRA requires.

In the end, plaintiffs' opposition is a plea to ignore the law. Plaintiffs frankly admit that they have sued Barclays, and others, because they are concerned that they will not be able to recover from Enron and Arthur Andersen. (Opp. Mem. at 26.) Moreover, plaintiffs state, "[t]o put it bluntly, if the 95 Act's enhanced pleading standard combined with the Court's decision in *Central Bank* operate to shield the banks named as defendants here . . . then Congress will have to act by ameliorating that harsh pleading standard and restoring aiding and abetting liability." (Opp. Mem. at 26-27.) Despite plaintiffs' view of what Congress might do, under the law as it *is*, plaintiffs' claims against Barclays are plainly barred.

I. PLAINTIFFS CONCEDE THAT BARCLAYS DID NOT MAKE OR HAVE ANY INVOLVEMENT IN STATEMENTS CONCERNING ENRON AND THAT BARCLAYS DID NOT UNDERWRITE ANY PUBLIC OFFERING OF ENRON SECURITIES.

Plaintiffs concede, as they must, that "Barclays itself made no false statements." (Opp. Mem. at 22 n.14; *see also* Opp. Mem. at 38 ("the [Complaint] does not allege that Barclays itself made false statements").) Plaintiffs also concede that "the [Complaint] does not plead that Barclays issued false and misleading analysts' reports on

Enron."[2] (Opp. Mem. at 22 n.13.) Moreover, unlike other banking defendants, Barclays is not alleged to have made any statements "as an underwriter" in any registration statement or prospectus, nor is Barclays alleged even to have participated in any manner in preparing, reviewing, disseminating, or providing advice concerning any statements made by Enron or by others concerning Enron. (*See*, *e.g.*, Compl. ¶¶ 750-761.)

Plaintiffs' opposition to Barclays' motion is largely a boilerplate piece which carelessly recites arguments perhaps applicable to the other banking defendants but clearly not to Barclays. Plaintiffs suggest that Barclays should have joined with other banking defendants in a joint motion to dismiss. (*See* Opp. Mem. at 2 n.3.) However, because Barclays — unlike other banking defendants — is not alleged to have made any misstatements or omissions, to have issued analyst reports or to have been an underwriter for Enron securities, Barclays' motion presents distinctly different issues for the Court to decide. As discussed *infra*, plaintiffs' opposition brief ignores these critical distinctions.

Similarly, the *amicus curiae* brief that the Attorneys General of several states ("AG Amic. Mem.") have moved to file improperly treats the banking defendants as though they were one, concluding that the banks all should be liable if the allegations of the Complaint are true. (*See* AG Amic. Mem. at 7.) But if the main legal point of the Attorneys General's brief is correct, *i.e.*, that "some significant role in the preparation or creation of a misstatement that is directly communicated to investors by another party can

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[2] Plaintiffs' statement that "we believe Barclays did so [*i.e.*, issue analyst reports on Enron] and are attempting to locate these reports," (Opp. Mem. at 22 n.13), is of no significance to this motion, given plaintiffs' concession that the Complaint fails to plead that Barclays issued such reports.

suffice for primary liability," (AG Amic. Mem. at 10), then whether the Complaint stands or fails as to each particular defendant depends on the facts alleged as to each such defendant. And as to Barclays in particular, there is *no* allegation that it had *any* role in the preparation or creation of Enron's alleged misstatements, much less a "significant" role. Likewise, the Attorneys General's brief's "scheme" and "course of business" legal points do not address the essential fact that the Complaint is wholly lacking particularized allegations as against Barclays that could support such liability under any legal standard.

Plaintiffs, in their brief, play fast and loose with the facts as alleged in the Complaint, erroneously stating at various points in their brief either that Barclays made misstatements or acted as an underwriter for Enron securities, despite the fact that they clearly concede at the outset of their brief that they have not so pled:

- Plaintiffs state that "Barclays here allegedly made false and misleading statements," (Opp. Mem. at 45), although none is identified and they explicitly and repeatedly concede elsewhere that "Barclays itself made no false statements." (Opp. Mem. at 22 n.14, 38.) And there is no allegation in the Complaint that Barclays made a false statement.

- Ignoring their own pleading, plaintiffs claim that "[h]ere what is alleged, is ... [that Barclays] via the bank's investment banking operations was selling securities of the company to the public," (Opp. Mem. at 64), although Barclays is not, in fact, alleged to have been an underwriter for Enron securities, only the Yosemite Trust, and Barclays' involvement with the Notes is alleged to have been in connection with a private placement, not a public offering. (*See* Compl. ¶¶ 48, 288; Opp. Mem. at 16.)

In describing the allegations against Barclays, plaintiffs take additional liberties with the Complaint as well. For example, they state that "Chewco was now also positioned to serve as a controlled entity which Enron *and Barclays* could use to do non-arm's-length transactions with going forward . . . ." (Opp. Mem. at 4 (emphasis added); Opp. Mem. at 16 (referring to "Chewco/JEDI deals" in 1998 through 2001).) The

corresponding allegation in the Complaint, however, makes no mention of Barclays. (*See* Compl. ¶ 11 ("Chewco was now also positioned to serve as a controlled entity which Enron could use going forward to do non-arm's-length transactions . . . .").) Even the opposition brief is not consistent on this score. (*See* Opp. Mem. at 18 ("They had . . . positioned Chewco to serve as a controlled entity which Enron could use going forward to do non-arm's-length transactions . . . ."); *see also* Opp. Mem. at 8 ("Enron entered into numerous transactions with Chewco/JEDI . . . ."); Opp. Mem. at 33 ("[T]he Chewco partnership was used by Enron management to enter into billions of dollars of transactions that Enron could not, or would not, do with unrelated commercial entities . . . .") In fact, the Complaint contains no allegation that Barclays ever engaged in, or was otherwise involved with, any transaction with Chewco after the 1997 loans, except for a 1998 loan about which nothing more is alleged. (*See* Compl. ¶ 754; Opp. Mem. at 16.)

Plaintiffs also misleadingly state in their opposition that "Barclays, Enron, and an Enron executive" controlled Chewco. (Opp. Mem. at 3; *see also* Opp. Mem. at 17.) This statement is at odds with the Complaint, which repeatedly alleges that Enron — not Barclays — controlled Chewco, (*see, e.g.*, Compl. ¶¶ 121(d), 435, 437, 807), and with other statements in plaintiffs' brief to the same effect. (*See, e.g.*, Opp. Mem. at 8 ("Chewco/JEDI, which was secretly controlled by Enron . . ."); Opp. Mem. at 9 (referring to entities "which, in fact, Enron controlled . . . including . . . Chewco"); Opp. Mem. at 12 ("Enron was forced to admit that Chewco was . . . an entity it controlled."); Opp. Mem. at 31 (referring to "the Chewco/JEDI entity which Enron secretly controlled").)

Likewise, plaintiffs' statement that Enron *and Barclays* "used" or "employed" "Chewco/JEDI" to "falsify Enron's financial results" (Opp. Mem. at 18, 23)

does not correspond to any allegation in the Complaint. Rather, the Complaint consistently states that Barclays' "participation" in the Chewco transaction allowed *Enron* — not Barclays — to falsify Enron's financial results. (*See, e.g.*, Compl. ¶¶ 751, 756, 760; *see also* Compl. ¶¶ 22, 435, 440, 613.) In fact, there is no allegation in the Complaint that Barclays had anything to do with the preparation of Enron's financial statements.

Plaintiffs attempt to raise suspicions about Barclays' involvement in the Chewco financing by repeatedly referring to the collateral arrangement as "secret," although they never explain why, if true, this would support a securities fraud claim against Barclays. (*See, e.g.*, Opp. Mem. at 3, 8, 15, 17, 18, 29, 31-32.) But "Barclays' secret funding of the Chewco/JEDI entity" (Opp. Mem. at 51) was no secret at all. In fact, in January 1998 Barclays filed UCC statements in Texas and Delaware publicly disclosing the nature of the collateral granted to it by Big River and Little River. These filings, the Texas versions of which are attached as Exhibits A and B to the Affidavit of Barry Abrams dated June 24, 2002 ("Abrams Aff.") accompanying these papers, included copies of Barclays' "Pledge and Security Agreements" with Big River and Little River. These agreements state that (1) Barclays loaned money to Big River and Little River; (2) Barclays held a security interest in Chewco and Big River — not an equity interest; and (3) Barclays also held a security interest in certain Big River and Little River reserve

accounts maintained at Barclays. Far from being "secret," the funding arrangements in question were a matter of public record.[3]

Much of plaintiffs' opposition is devoted to a description of the alleged "worldwide" fraudulent scheme "to falsify Enron's reported profits and financial condition and to continue its fraudulent course of business." (Opp. Mem. at 36.) What is described, however, has nothing whatsoever to do with Barclays. For example, Barclays is not alleged to have been in any way involved in Enron's mark-to-market accounting (*compare* Opp. Mem. at 5-7) nor to have had any relationship with the LJM or Raptor partnerships. (*Compare* Opp. Mem. at 10-11, 69-70.) In fact, vividly demonstrating just how far plaintiffs will go to attempt to blur the distinction among the bank defendants in total disregard of the alleged facts concerning Barclays, the "Conclusion" of plaintiffs' brief is devoted exclusively to the LJM2 partnership, as to which Barclays played absolutely no role. (*See* Opp. Mem. at 69-70.)

Despite plaintiffs' slipshod approach in its opposition brief, at first plainly conceding that Barclays did not engage (and is not alleged to have engaged) in the conduct in which most of the other bank defendants are alleged to have engaged, and then attempting to tar Barclays with the same brush as those other banks, two dispositive facts cannot be disputed: (1) Barclays is not alleged to have made or to have been involved in the preparation of any misstatements, and (2) Barclays is not alleged to have underwritten any public offering of Enron securities.

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[3] The Court may consider public records in connection with the motion to dismiss. *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 882 (S.D. Tex. 2001).

II. PLAINTIFFS' OPPOSITION CONFIRMS THAT THE COMPLAINT FAILS TO PLEAD A SECTION 10(b) VIOLATION BY BARCLAYS.

Having conceded that Barclays made no statements concerning Enron, plaintiffs effectively abandon any claim that Barclays violated Section 10(b) by the making of any material misstatements or omissions.[4] (*Compare* Compl. ¶ 995(b), *with* Opp. Mem. at 2.)

Instead, plaintiffs' claim against Barclays now depends entirely on the contention that Barclays is alleged to have violated Rules 10b-5(a) and (c). Rule 10b-5 states, in relevant part, that it is unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> . . .
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Plaintiffs argue that Barclays violated Rules 10b-5(a) and (c) inasmuch as Barclays is alleged to have (1) "participated in a scheme to defraud and a course of business that operated as a fraud or deceit on, purchasers of Enron securities"; and (2) "employed acts,

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[4] The argument heading IV in plaintiffs' opposition papers is misleading. The heading states that "Barclays Can Be Liable Under 1934 Act §10(b) and Rule 10b-5 (i) for Making False Statements ...," (Opp. Mem. at 34), even though plaintiffs elsewhere concede that Barclays made no such statements. (*See* Opp. Mem. at 22 n.14, 38; *see also supra* Section I.) For this reason, plaintiffs' citation to *McNamara* v. *Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622 (E.D. Tex. 2001) under this heading is inapposite. (Opp. Mem. at 51.) *Bre-X Minerals* involved alleged misrepresentations by, among others, defendant banks. These banks — unlike Barclays here — were alleged to have issued false analysts' reports. *Id.* at 629.

devices and contrivances to deceive."[5] (Opp. Mem. at 2.) The Complaint, however, does not allege that purchasers of Enron securities were misled by Barclays' alleged conduct; they are alleged to have been misled by Enron's misstatements or omissions. But even ignoring the real question in this case — whether Barclays can be held liable for Enron's misstatements or omissions on the facts alleged (which it cannot) — the Complaint does not allege any conduct by Barclays constituting either a "scheme" or "deceptive device."

Indeed, most of plaintiffs' brief is devoted to a generic discussion of Rules 10b-5(a) and (c) liability, without any real attempt to apply those principles to the specific allegations in the Complaint concerning Barclays. For all plaintiffs' discussion of "scheme," "course of conduct", and "deceptive device or contrivance" liability in the abstract, the *sole* basis cited by plaintiffs to support the existence of this liability is

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[5] Plaintiffs also effectively abandon the claim that Barclays employed any "manipulative devices." Plaintiffs concede that courts have held that the term "manipulative device" is a term of art that comprises only such "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," *e.g.*, wash sales. (Opp. Mem. at 52 (quoting *Hundahl* v. *United Ben. Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979)).) Plaintiffs argue that these holdings do not require dismissal because plaintiffs also plead that Barclays employed "deceptive devices." (Opp. Mem. at 52.) As discussed *infra*, however, the Complaint does not state a claim against Barclays on this theory, either. Because Barclays is not alleged to have committed any "manipulative" acts, plaintiffs' citation to *SEC* v. *U.S. Environmental, Inc.*, 155 F.3d 107 (2d Cir. 1998) (cited in Opp. Mem. at 25, 51) is inapposite. In that case, the court found that plaintiffs stated a claim under Rules 10b-5(a) and (c) where it was alleged that the broker executed stock trades that he knew, or was reckless in not knowing, were manipulative. The court held that the broker could be found to be a primary violator of Section 10(b), consistent with *Central Bank*, only because the broker himself committed a manipulative act "by effecting the very buy and sell orders that . . . manipulated" the securities at issue. *Id.* at 112.

plaintiffs' assertion that "Chewco/JEDI was a deceptive device and contrivance to deceive investors in Enron." (Opp. Mem. at 12; *see also* Opp. Mem. at 18.) But Enron, not Barclays, is alleged to have issued financial statements that improperly accounted for transactions related to Chewco and JEDI. Consequently, to the extent that there is a claim against anyone in connection with "Chewco/JEDI," it is against Enron and perhaps against those participating in decisions about disclosure relating to Chewco for purposes of Enron's public filings. However, there is no such claim against Barclays, which simply is not alleged to have been so involved.

A. Plaintiffs Concede That a Defendant Cannot Be Liable for Participation in a "Scheme" Unless That Defendant Engages in Conduct That Constitutes a Primary Violation of Section 10(b).

In their opposition brief, plaintiffs embellish their purported claim against Barclays by listing a host of allegations wholly unrelated to Barclays, *e.g.*, assertions that Enron engaged in improper mark-to-market accounting and that Enron engaged in fraudulent transactions with the LJM and Raptor partnerships. Although Barclays is alleged only to have engaged in very limited transactions that are allegedly relevant to this suit — plaintiffs base their entire case against Barclays on its commercial lending activity in connection with Chewco — plaintiffs argue that Barclays thereby "participated" in the Enron "scheme" and may therefore be held liable under Rule 10b-5. (*See* Opp. Mem. at 29-32.)

As plaintiffs concede, however, a defendant may be liable for participation in a "scheme" to defraud only "as long as [the] defendant committed a manipulative or deceptive act in furtherance of the scheme." (Opp. Mem. at 21 (quoting *Cooper* v. *Pickett*, 137 F.3d 616, 624 (9th Cir. 1997)); *see also* Opp. Mem. at 36 (citing *In re Health*

Mgmt., Inc. Sec. Litig., 970 F. Supp. 192, 209 (E.D.N.Y. 1997); *Adam* v. *Silicon Valley Bancshares*, 884 F. Supp. 1398, 1401 (N.D. Cal. 1995); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 969-70 (C.D. Cal. 1994)); Opp. Mem. at 48; Opp. Mem. at 58 ("[A]fter *Central Bank*, a defendant may be held liable for participating in a scheme to defraud if it has knowledge *and* commits manipulative or deceptive acts in furtherance of it." (emphasis added)).)

In other words, in order to plead a claim against Barclays under Rule 10b-5(a) for participation in an alleged "scheme," plaintiffs must plead conduct by Barclays that constitutes a primary violation of Section 10(b) meeting "all of the requirements for primary liability under Rule 10b-5." *Central Bank*, 511 U.S. at 191. The allegation of mere "participation" in a "scheme" does not suffice. *See Stack* v. *Lobo*, 903 F. Supp. 1361, 1374 (N.D. Cal. 1995); *Dinsmore* v. *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998); *Pegasus Holdings* v. *Veterinary Ctrs. of Am.*, 38 F. Supp. 2d 1158, 1164 (C.D. Cal. 1998); *Scone Invs., L.P.* v. *Am. Third Mkt. Corp.*, No. 97 CIV. 3802 (SAS), 1998 WL 205338, at *6-7 (S.D.N.Y. Apr. 28, 1998); *Strassman* v. *Fresh Choice, Inc.*, No. C-95-20017 RPA, 1995 WL 743728, at *17 (N.D. Cal. Dec. 7, 1995). The Complaint, however, pleads no primary violation by Barclays.

B. The Complaint Does Not State a Claim That Barclays Engaged in Any Conduct Constituting a Primary Violation of Section 10(b).

Under the Supreme Court's holding in *Central Bank of Denver N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), secondary actors such as banks may not be held liable for alleged participation in a securities fraud unless those

defendants themselves "employ[ ] a manipulative device or make[ ] a material misstatement (or omission) on which a purchaser or seller of securities relies . . . ." *Id.* at 191. "[A] private plaintiff may not maintain an aiding and abetting suit under § 10(b)," *id.*; *see also Melder* v. *Morris*, 27 F.3d 1097, 1104 n.9 (5th Cir. 1994), and consequently allegations of "mere knowledge and assistance in the fraud" are not enough to state a claim. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 176 (2d Cir. 1998). Similarly, "[a]llegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms used throughout the complaint all fall within the prohibitive bar of *Central Bank*." *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *see also Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) (holding that accountants "must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors").

In *Central Bank*, the Court held that permitting a plaintiff to sue under an aiding and abetting theory would undermine the requirement that plaintiffs plead reliance under Section 10(b):

> Were we to allow the aiding and abetting action proposed in this case, the defendants could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions. . . . Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

Central Bank, 511 U.S. at 180. In this case, plaintiffs do not allege that they were misled by any statements or actions of *Barclays*. Instead, plaintiffs allegedly relied on misstatements by *Enron*.

The allegations against Barclays are this and nothing more: Barclays loaned money to Enron and Enron-related entities in the Chewco transaction. Indisputably, the only fraud or deceit alleged in connection with the Chewco transaction relates to Enron's subsequent accounting and reporting decisions, as to which Barclays is not alleged to have been involved in any respect. At most, the allegations against Barclays amount to aiding and abetting fraud (and on the facts pled even an aiding and abetting claim could not be sustained); they do not, as *Central Bank* requires, constitute a primary violation of Section 10(b).

Confronted with *Central Bank*, plaintiffs now argue that they have pleaded a primary violation of Section 10(b) on what appear to be two different theories. *First*, that Barclays' "participation" in a larger "fraudulent scheme" constitutes a primary violation under Rules 10b-5(a) and (c) because "scheme" liability remains after *Central Bank*. *Second*, that the facts pleaded concerning Barclays' commercial lending to Enron and Enron-related entities constitute a "deceptive device or contrivance." Plaintiffs' claims fail on both counts.

1. Even Under the Minority Interpretation of *Central Bank*, the Complaint Does Not State a Claim That Barclays "Substantially Participated" in the Making of Any False or Misleading Statement.

Plaintiffs cite to cases holding that secondary actors may commit a primary violation of Section 10(b) consistent with *Central Bank* if they substantially participate in the making or creation of a false statement, *e.g.*, by reviewing or drafting such a statement. (*See* Opp. Mem. at 45 n.31.) Putting aside the fact that plaintiffs ignore the majority of courts which have adopted a "bright line" test under *Central Bank*,

requiring that a statement must have been made by or "attributed to that specific [secondary] actor at the time of public dissemination," *Wright*, 152 F.3d at 169, 175,[6] the Complaint simply does not allege that Barclays played any role, let alone a substantial role, in preparing, reviewing, disseminating, or even providing advice concerning any public statement relating to Enron.

Plaintiffs appear to cite these cases for the proposition that "scheme" liability survives *Central Bank*. (Opp. Mem. at 45 n.31.) However, plaintiffs' implicit suggestion that any "participation" in an alleged "scheme" triggers primary liability is directly contrary to the holding of *Central Bank* and not logically consistent with the requirement that plaintiffs plead a manipulative or deceptive act as to each defendant charged with "scheme" liability — a requirement that plaintiffs concede exists. *See supra* Section II.A. In fact, the cases cited by plaintiffs illustrate the application of this requirement.

For example, *Murphy* v. *Hollywood Entertainment Corp.*, No. CIV. 95-1926-MA (LEAD), 1996 WL 393662 (D. Or. May 9, 1996), and *Flecker* v. *Hollywood Entertainment Corp.*, No. CIV. 95-1926-MA, 1997 WL 269488 (D. Or.

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6 *See also, e.g.*, *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Shapiro*, 123 F.3d at 720; *Anixter*, 77 F.3d at 1226-27; *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 n.1 (D. Mass. 1994) (noting that after *Central Bank*, participation in the structuring of a transaction does not give rise to liability — "it is the improper reporting of the 'structured' transactions . . . that constitutes the alleged Section 10(b) violation"); *Vosgerichian* v. *Commodore Int'l*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (holding that allegations that accountants "advised or concurred" and "provided direct and substantial assistance" in "misrepresenting the true nature of" transactions not cognizable after *Central Bank*).

Feb. 12, 1997), (discussed in Opp. Mem. at 24, 49), each concerned the allegation that the defendant company, underwriters, and company insiders issued false and/or misleading statements concerning the company's financial condition. Acknowledging the limits imposed by *Central Bank*, the court allowed the claims against the underwriters to proceed only because they were "'direct participants' in the alleged wrongdoing by their role in coordinating the offering, drafting disputed offering documents and conducting a due diligence investigation." *Murphy*, 1996 WL 393662, at *6. *See also Flecker*, 1997 WL 269488, at *9 (finding that underwriter's participation in drafting creates liability under Section 10(b)). The court further acknowledged that under the Ninth Circuit's decision in *In re Software Toolworks*, 50 F.3d 615 (9th Cir. 1994), such involvement in the creation of the disputed documents was a necessary predicate to liability.[7] *See Murphy*, 1996 WL 393662, at *6; *Flecker*, 1997 WL 269488, at *8. In so holding, the court expressly rejected the inference plaintiffs seek to draw in this case:

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[7] The other cases cited by plaintiffs on this score are to the same effect. (*See* Opp. Mem. at 45 n.31.) *See, e.g.*, *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994) (accountants violated Rules 10b-5(a) and (c) only insofar as they had helped draft false and/or misleading statements and approved and/or altered misleading financial statements issued by the company whose securities were at issue); *Adam*, 884 F. Supp. at 1399 (accountants certified company's misleading financial statements, even though they had not complied with Generally Accepted Auditing Standards (GAAS) in auditing those statements, and thereby "falsely assured investors both that it had complied with GAAS and that [the company's] financial statements fairly presented its financial condition"); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 676 F. Supp. 458 (S.D.N.Y. 1987) (finding primary liability of Morgan Stanley for preparing misleading financial projections used in company's financial statements); *Cooper* v. *Pickett*, 137 F.3d 616 (9th Cir. 1997) (finding primary liability of accounting firm that certified false financial statement and of underwriter whose analysts made false statements about company).

> I do agree with the Underwriter defendants that mere participation in a "scheme" that includes the issuance of false financial statements would fail under *Central Bank*. Plaintiffs must prove what they have alleged in their complaint and other responding papers — that is that the underwriters were direct, knowing participants in the drafting of documents which included material misstatements and/or omissions.

Murphy, 1996 WL 393662, at *6 n.10 (citation omitted). Nothing of the sort has been alleged against Barclays here.

2. The Complaint Does Not State a Claim That Barclays Engaged in Any "Deceptive Device or Contrivance."

Plaintiffs also argue that Barclays' alleged conduct constitutes a "deceptive device" within the meaning of Rules 10b-5(a) and (c). Plaintiffs argue that a defendant may be liable for employing a deceptive device even if it did not *itself* make a misstatement or omission. Whether or not this interpretation of *Central Bank* is correct, plaintiffs' suggestion that conduct may be actionable under Rules 10b-5(a) and (c) even if it amounts to no more than aiding and abetting is flat out wrong.

Violations of Rules 10b-5(a) and (c) are of two types:

First, notwithstanding the provisions of Rule 10b-5(b), several courts have found Rules 10b-5(a) and (c) liability when a defendant makes a material misstatement or omission.[8] When such cases involve banking defendants, the bank is typically alleged to have acted as an underwriter and sold the securities at issue on the basis of misleading

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[8] The significance of finding a violation of Rules 10b-5(a) and (c) rather than exclusively Rule 10b-5(b) often centers on whether plaintiffs must plead direct reliance or may rely on a fraud on the market theory. *See, e.g.*, *Finkel* v. *Docutel/Olivetti Corp.*, 817 F.2d 356 (5th Cir. 1987), discussed *infra*.

statements or issued misleading analysts' statements concerning the securities. *See supra* Section II.B.2.a.

Second, other courts have found violations of Rules 10b-5(a) and (c) when no misstatements or omissions are at issue but the allegations involve inherently deceptive conduct, either (1) the defendant's alleged misappropriation of money, securities, or information or (2) the defendant's alleged undisclosed breach of fiduciary duty in connection with the purchase or sale of securities. *See supra* Section II.B.2.b.

As discussed below, none of these cases establish any exception to *Central Bank*, and their holdings do not apply to the sort of conduct alleged against Barclays.

a. The Cases Cited by Plaintiffs Involving Violations of Rules 10b-5(a) and (c) Based on Misrepresentations or Omissions Are Inapposite to the Claim Against Barclays.

Although plaintiffs concede that Barclays made no misstatements, the Rules 10b-5(a) and (c) cases on which plaintiffs primarily rely involve alleged misstatements or omissions as a predicate to liability. For example, plaintiffs rely heavily on *In re Livent, Inc. Noteholders Sec. Litig.*, 174 F. Supp. 2d 144 (S.D.N.Y. 2001), purportedly to "show[] that a valid § 10(b)/Rule 10b-5 claim [is] alleged here." (Opp. Mem. at 50.) *Livent*, however, explicitly states that allegations like those made against Barclays do ***not*** state a claim.

In *Livent*, plaintiffs alleged that CIBC violated Section 10(b) through its participation in a fraudulent scheme. As plaintiffs here put it, "[t]he key allegation against CIBC was that CIBC allegedly made a $4.6 million payment to Livent in return for theatrical royalties, which in reality was a 'secret' bridge loan, as CIBC had a side

agreement from Livent to repurchase the $4.6 million advance in six months for $4.6 million, plus interest." (Opp. Mem. at 50.) This allegedly was a "fraudulent contrivance" because Livent subsequently recorded income on the transaction but did not record the loan. (Opp. Mem. at 50.)

Plaintiffs here suggest an analogy to the alleged facts that Barclays received a "secret" guarantee from Enron for its loans in connection with the Chewco transaction and that Enron subsequently mischaracterized this transaction. From this, plaintiffs conclude that Barclays, no less than CIBC in the *Livent* case, engaged in a "fraudulent contrivance." *Livent*, however, holds just the opposite.

Although plaintiffs twice quote page-long excerpts from *Livent* (*see* Opp. Mem. at 50-51, 61-62), they fail to quote the critical passages in which the court explicitly states that the CIBC's "secret" bridge loan was not itself enough to create liability under Section 10(b) and *Central Bank*:

> The secret side letters exchanged in that arrangement could reasonably be construed as an element of Livent's improper accounting of income and false or misleading public statements regarding its financial condition. ***However, such assistance and participation in a securities law violation, without more, would not suffice to establish primary liability under § 10(b).*** *See Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

Livent, 174 F. Supp. 2d at 149 (emphasis added); *see also id.* at 151-52, 154. Instead, the claims against CIBC were allowed to go forward only because plaintiffs also alleged that CIBC "personally solicited" purchases of and sold the very securities at issue to class members. *Id.* at 151. The plaintiffs asserted "misrepresentations or omissions communicated to investors by CIBC and at the time of the investment decision." *Id.*

at 155. The court found that "in directly soliciting and selling securities to public investors, CIBC effectively communicated that Livent's false accounting of the $4.6 million proceeds from the [transaction with CIBC] as current revenue, rather than as a loan was accurate." *Id.* at 151; *see also id.* at 152 ("By soliciting and selling [the securities] . . . CIBC became a primary actor in propagating Livent's fraud."). There are no such allegations here. Barclays is not alleged to have solicited, sold, or acted as an underwriter in connection with any public offering of Enron's securities. Plaintiffs also concede that Barclays made no statements about Enron.[9]

Similarly, in *Finkel* v. *Docutel/Olivetti Corp.*, 817 F.2d 356 (5th Cir. 1987) (cited in Opp. Mem. at 20, 35), the plaintiffs claimed that "Olivetti, by virtue of its 46% interest in Docutel, controlled Docutel and used that control to hide its losses." *Id.* at 358. "The most significant event which allegedly led to the loss by plaintiff [was] the claim that Olivetti forced Docutel to take worthless inventories without disclosing that

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[9] The attempted analogy fails for several additional reasons. *First*, CIBC "agreed not to disclose" the terms of the "secret" agreement. Here, there is no allegation that Barclays agreed not to disclose the terms of its loans. To the contrary, the Complaint alleges that Barclays "prepared [the loan] documentation to allow Barclays to characterize the advances as loans (for business and regulatory reasons)." (Compl. ¶ 439.) In fact, as discussed *supra* pp. 8-9, Barclays filed UCC statements in Texas and Delaware which attached (and thus made publicly available) copies of the Big River and Little River security agreements. These agreements made clear that Barclays made a secured loan to Big River and Little River and reflected the existence of the collateral accounts. Far from being "secret" these documents are publicly available. (*See* Abrams Aff. ¶¶ 3, 4.) *Second*, CIBC's "secret" agreement directly contradicted the terms of the "public" agreement between CIBC and Livent. Here, Barclays is alleged only to have entered into a single transaction, not two contradictory ones. *Livent*, 174 F. Supp. 2d at 152. And *third*, CIBC's "secret" agreement furthered the alleged fraud. Here, in contrast, Barclays' alleged requirement that it receive a guarantee for the loans allegedly "threw a wrench into the scheme." (Compl. ¶ 439.)

fact in the market place . . . ." *Id.* at 363. The court found that defendants violated Rules 10b-5(a) and (c), but the case turned on the fact that Docutel's public securities filings did not accurately disclose these transactions despite Docutel's "continuing obligation to make disclosure." *Id.* Although the court did not address Olivetti's liability separately, Olivetti was a primary actor in the violation because it "forced" Docutel not to disclose the nature of the transactions to the public. *Id.*

These cases also demonstrate that even under the "deceptive device" and "scheme" provisions of Rule 10b-5(a) and (c), "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980). "[S]uch liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Id.* at 230. *See also Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153 (1972) (holding that bank violated Rules 10b-5(a) and (c) because its employees acted as "market makers" in securities at issue and "[t]his being so, they possessed the affirmative duty under the Rule to disclose this fact" to sellers of the securities at issue, with whom they transacted directly) (cited *passim* in Opp. Mem.). Here, plaintiffs do not even attempt to argue that Barclays had a duty to disclose information to investors in Enron securities; Barclays made no misrepresentations and did not have any relation to purchasers of Enron securities that might give rise to such a duty.

b. The Cases Cited by Plaintiffs Involving Violations of Rules 10b-5(a) and (c) Based on Misappropriation or Undisclosed Breach of Fiduciary Duty Also Are Inapposite to the Claim Against Barclays.

Plaintiffs also cite several cases finding violations of Rules 10b-5(a) and (c) where there is no misstatement or omission to the public at issue. These cases, however, do not abrogate *Central Bank*. Rather, they involve primary violations of Section 10(b) of a particular sort, specifically, inherently deceptive conduct involving the misappropriation of information or funds or an undisclosed breach of fiduciary duty in connection with the purchase or sale of securities. *See, e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997) (cited in Opp. Mem. at 21, 38, 42) (finding "deceptive device" within the meaning of Rule 10b-5 when defendant "misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information" because such "undisclosed, self-serving use . . . defrauds the principal of the exclusive use of that information"). Because there are no such allegations concerning Barclays, these cases, like the other cases cited by plaintiffs, are inapposite.

For example, in *Superintendent of Insurance of New York* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971) (cited *passim* in Opp. Mem.), a corporate insider, in collaboration with others, was alleged to have purchased securities from the company using the company's own money, in effect stripping the corporation of the securities. The court found that this "misappropriation" was a deceptive act or practice because the "seller was duped into believing that it, the seller, would receive the proceeds." *Id.* at 9; *see also id.* at 11 n.7 (citing cases finding violations of Rule 10b-5 in various circumstances of misappropriation).

Likewise, plaintiffs rely on *SEC* v. *Zandford*, 122 S. Ct. 1899 (2002), for the proposition that scheme liability survives *Central Bank*. (Opp. Mem. at 20-21.) The liability at issue in *Zandford*, however, was nothing like what is alleged here. Rather, *Zandford* concerned allegations that a broker violated Rule 10b-5 "by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent." *Zandford*, 122 S. Ct. at 1901. This conduct "was deceptive because it was neither authorized by [plaintiffs] nor disclosed to [plaintiffs]." *Id.* at 1904. *See also Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588 (2001) (violation of Rule 10b-5 to sell option without intent to honor option, which intent deprived purchaser of benefit of sale). In *Zandford* the Court noted that "[a]s in *Bankers Life*, *Wharf* and *O'Hagan*, the SEC complaint describe[d] a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. *Zandford*, 122 S.Ct. at 1906.

Plaintiffs also cite *Hill* v. *Hanover Energy, Inc.*, No. 91-1964 (JHG), 1991 WL 285295 (D.D.C. Dec. 16, 1991), for the generic proposition that "scheme liability is a form of primary liability." (Opp. Mem. at 45.) But in *Hill*, the court found that the plaintiffs pleaded a violation of Rules 10b-5(a) and (c) by alleging that defendants "induce[d] plaintiffs' contributions of capital and services with false promises that they would receive stock" in return. 1991 WL 285295, at *5. *See also U.S. Quest Ltd.* v. *Kimmons*, 228 F.3d 399 (5th Cir. 2000) (allegation that defendant represented that it would enter into two contracts transferring stock to plaintiff failed to establish violation of Rule 10b-5 based on fact that defendant ultimately entered into only one such contract where plaintiff failed to produce evidence that defendant did not intend to enter into

second contract at time it made initial representation) (cited in Opp. Mem. at 19, 35). Barclays is not alleged to have committed any acts even remotely similar. Barclays is not alleged to have "duped" or made "false promises" to anyone.

In *SEC* v. *First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996) (cited *passim* in Opp. Mem. and discussed at Opp. Mem. 48-49) the court found that a broker-dealer committed securities fraud by selling securities to its customers at prices that included excessive markups and by failing to disclose to its customers that it acted as a market maker in the securities. *Id.* at 1467-68. The individual owner of the broker-dealer firm also was found liable because he "was engaged in the purposeful planning of the pattern and repeated format of trading" that constituted the fraud and had "hands-on involvement in the pertinent decisions." *Id.* at 1471-72.

Finally, plaintiffs rely on *Shores* v. *Sklar*, 647 F.2d 462 (5th Cir. 1981), for the general proposition that "a defendant who did not himself make the statements in a misleading offering circular could be held primarily liable as a participant in a larger scheme to defraud of which that offering circular was only a part." (Opp. Mem. at 36.) Plaintiffs' suggestion that any role in such a scheme can serve as a predicate for liability — no matter how trivial the role and regardless of whether it was itself fraudulent — is, of course, incorrect. In *Shores*, the Fifth Circuit allowed plaintiffs to pursue claims under Rule 10b-5(a) and (c) on the theory that defendants "knowingly conspired to bring securities onto the market which were not entitled to be marketed." *Shores*, 647 F.2d at 469. Defendants were alleged variously to have (1) directly participated in the making of false statements in an offering circular for the securities (in this case, bonds), either by drafting the circular or furnishing false information for use in the circular; and (2) offered

unmarketable securities for sale, as underwriters, on the basis of the false statements in the circular. *Id.* at 465-67. In addition, a bank defendant, which acted as trustee of the bond proceeds, was alleged to have disregarded its fiduciary duty to bondholders to ensure the issuer's compliance with certain conditions in the bond indenture.[10] *Id.* at 466-67. *Shores* is entirely in line with the other cases cited by plaintiffs: liability rested either on (1) direct participation in making the fraudulent statements; (2) solicitations or sales on the basis of the false statements; or (3) undisclosed breaches of fiduciary duty in furtherance of the fraud.[11] Barclays is alleged to have engaged in no such conduct.

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Plaintiffs' opposition to Barclays' motion boils down to the generic point that "scheme" or "deceptive device" liability survives *Central Bank*. The cases cited by plaintiffs, however, show that Barclays cannot be liable under either theory. As plaintiffs concede, mere participation in an alleged scheme, without more, does not give rise to

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10 *Shores* was decided more than a decade before *Central Bank*. Like *Shores*, *Central Bank* concerned the allegation that the defendant bank, which served as an indenture trustee, ignored its fiduciary duty to take corrective action in the face of a breach of the indenture's covenants. To the extent that the bank's liability in *Shores* rested on similar allegations, *Central Bank* requires a different result. However, even if the bank's breach of fiduciary duty would still be actionable under Rules 10b-5(a) and (c), as plaintiffs here suggest, plaintiffs still have not pleaded a claim against Barclays. Unlike the banks in *Shores* and *Central Bank*, Barclays did not stand in any fiduciary relationship with Enron shareholders and is not alleged to have breached any fiduciary duty owed to anyone.

11 *But see Scholnick* v. *Schecter*, 752 F. Supp. 1317 (E.D. Mich. 1990) (a pre-*Central Bank* case involving allegations, not present here, that a bank received the proceeds of an offering when it was represented to investors by the issuing Company that the proceeds would be directed elsewhere).

liability; rather, the defendant must commit a primary violation of Section 10(b), *e.g.*, by making a misstatement or omission or by employing a "deceptive device." Moreover, as plaintiffs' own cases show, conduct constituting a "deceptive device" must involve, not surprisingly, deception of some sort. The defendant must either make a misstatement or omission (and if an omission, stand in some relation to the plaintiffs giving rise to a duty to speak), or misappropriate information, money, or securities, or commit some breach of fiduciary duty.

Plaintiffs fail to tie any of the cases they cite to facts alleged against Barclays. Nor could they, since there is no allegation in the Complaint supporting an argument that Barclays deceived anyone. The alleged deception here came subsequent to Barclays' involvement, when Enron made its accounting and disclosure decisions. Consequently, the claim against Barclays should be dismissed under *Central Bank*.

III. PLAINTIFFS' CLAIMS AGAINST BARCLAYS ARE BARRED BY THE THREE YEAR STATUTE OF REPOSE.

Plaintiffs concede that "the three-year statute of repose for 1934 Act claims bars plaintiffs from pursuing damages against [Barclays] for any time period prior to 4/8/99." (Opp. Mem. at 27.) As the chart on page 16 of plaintiffs' opposition shows, (1) Barclays "loans to Chewco/JEDI and Enron Strawmen," *i.e.*, the Chewco transaction; (2) Barclays "$500 million loan to Chewco/JEDI"; and (3) Barclays' participation in a "$1 billion commercial paper backup credit line" and "$250 million revolving credit facility" for Enron all took place prior to the April 8, 1999 cutoff.

Plaintiffs' opposition confirms that plaintiffs' claim against Barclays is predicated on its lending activities in connection with Chewco, but this conduct cannot be

the basis for any claim because such a claim is time-barred. Instead, plaintiffs' claims against Barclays must rest on the alleged transactions that occurred after the cutoff: (1) Barclays' underwriting of the Yosemite Trust certificates; (2) Barclays' alleged purchase of the notes in a private placement from Enron; and (3) Barclays' participation in a $3 billion backup credit line for Enron. (Opp. Mem. at 16.) None of these acts, however, even remotely qualifies as a "deceptive device or contrivance," or relates in any way to the alleged securities fraud about which plaintiffs complain, and plaintiffs do not allege that they do.

Plaintiffs argue that they are entitled to plead conduct prior to the cutoff date as "evidence" to "help[] establish the scheme and the guilty intent." (Opp. Mem. at 27, 28.) But this is beside the point. "Litigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 (1991). The three-year limitation acts as a statute of repose and operates as an absolute cutoff.

As plaintiffs concede, Barclays cannot be liable for participation in an alleged "scheme," unless plaintiffs plead conduct by Barclays that constitutes a manipulative or deceptive act. (*See* Opp. Mem. at 21, 36, 48, 58; *see also supra* p. 12.) Barclays' violation, if any, occurred when it engaged in such alleged fraudulent conduct and it is then that the three-year limit began to run. *In re Prudential Ins. Co. of Am. Sales*

Practices Litig., 975 F. Supp. 584, 602-606 (D.N.J. 1996).[12] Thus, because plaintiffs contend that the Chewco transaction is the "deceptive device" predicate to Barclays' "scheme" liability (*see* Opp. Mem. at 12, 18), this claim is time-barred. *See Seidel* v. *Lee*, 954 F. Supp. 810 (D. Del. 1996).

IV. THE COMPLAINT DOES NOT PLEAD SPECIFIC "FACTS GIVING RISE TO A STRONG INFERENCE" OF SCIENTER.

Plaintiffs' opposition ignores the stringent pleading requirements of the PSLRA and their obligation to "with respect to each act or omission alleged to violate [the 1934 Act], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Instead, plaintiffs argue that scienter has been pleaded on three grounds.

First, plaintiffs contend that "[t]he year-end Chewco/JEDI transactions are by their very nature intentional conduct." (Opp. Mem. at 59.) Plaintiffs conclude that Barclays' extension of credit in connection with Chewco itself "shows that Barclays

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[12] Although not argued in plaintiffs' brief, as noted in *Prudential*, some courts have held that the three-year period begins to run from the date of the plaintiffs' purchase of the securities in issue. *See, e.g., Kleban* v. *S.Y.S. Rest. Mgmt., Inc.*, 912 F. Supp. 361, 367-68 (N.D. Ill. 1995); *Randolph County Fed. Sav. & Loan Assoc.*, v. *Sutcliffe*, 775 F. Supp. 1113, 1121 (S.D. Ohio 1991). While the Circuit Courts, including the Fifth Circuit, have not considered this question in light of *Lampf*, the weight of recent authority is that the three year statute of repose begins to run from the date of the defendant's alleged fraudulent conduct. *See Wafra Leasing Corp.* v. *Prime Capital Corp.*, 192 F. Supp. 2d 852, 863-65 (N.D. Ill. 2002); *Antell* v. *Andersen LLP*, No. 97 C 3456, 1998 WL 102524, at *6 (N.D. Ill. Feb. 24, 1998); *Prudential*, 975 F. Supp. 605; *In re Phar-Mor, Inc. Sec. Litig.*, 892 F. Supp. 676, 687 (W.D. Pa. 1995); *see also Prieto* v. *John Hancock Mut. Life Ins. Co.*, No. CIV.A.3:97-CV-2441-H, 1998 WL 241229, at *7 (N.D. Tex. May 5, 1998). These decisions flow directly from the plain language of *Lampf*, which hold that the statute bars suits not brought within three years of the "violation." *Lampf*, 501 U.S. at 364.

knew (or recklessly disregarded) that Enron's financial statements were false, its financial condition was being misrepresented and that its purported business success was not due to strong business conditions or the skill of its managers and the success of their risk management and hedging techniques but rather to non-arm's-length fraudulent transactions with controlled entities." (Opp. Mem. at 60.) The argument that Barclays' extension of credit allows for a strong inference to be drawn that it had knowledge of Enron's alleged subsequent mischaracterization of that extension of credit and that the credit extension was therefore improper is the ulimate non sequitur. It certainly cannot satisfy the requirements of the PSLRA.

Second, plaintiffs rely on the Complaint's generic allegation that Barclays allegedly knew that Enron was falsifying its financial statements "due to [Barclays'] unlimited access to Enron's internal business and financial information as one of Enron's lead lending bank [sic], as well as its intimate interaction with Enron's top officials which occurred virtually on a daily basis." (Compl. ¶ 760; *see* Opp. Mem. at 54, 62-64.) Scienter, however, cannot be pleaded by the vague allegation that a defendant had "access" to information. Rather, what is required is that plaintiffs "specifically plead what [each defendant] learned, when [each defendant] learned it, and how [p]laintiffs know what [each defendant] learned." *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). Plaintiffs make no effort to meet this standard.

Third, plaintiffs contend that scienter may be inferred from the allegations that Barclays collected fees and interest payments from Enron in connection with its commercial lending activities and its involvement with the Yosemite Trust and purchase of Enron notes in a private placement. (*See* Opp. Mem. at 67.) But simply pleading that

a defendant had a financial interest in a commercial transaction is as a matter of law insufficient to establish scienter. *See Melder* v. *Morris*, 27 F.3d 1097, 1104 (5th Cir. 1994) ("accepting the plaintiffs' allegation of motive [to obtain substantial fees] as sufficient would make a mockery of Rule 9(b) by effectively eliminating the scienter requirement"); *accord Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400, 412, 420 (5th Cir. 2001) (holding that since the enactment of the PSLRA, pleading motive and opportunity alone will rarely be sufficient to give rise to an inference of scienter); *BMC Software*, 183 F. Supp. 2d at 900-01.

Plaintiffs also suggest that these factors considered together might satisfy their pleading obligations. They principally rely on *Livent*, to "show[] that scienter has been well alleged here." (Opp. Mem. at 60.) But *Livent* supports no such conclusion. Although the court found that scienter was pleaded in that case, the holding depended critically on the defendant's alleged active involvement in soliciting and selling the securities at issue on the basis of the alleged misrepresentation. The court had found a previous iteration of the amended complaint wanting because it did not explain "how CIBC benefited in some concrete and personal way from the alleged fraudulent conduct that would represent an extreme departure form the standards of ordinary care." *Livent*, 151 F. Supp. at 432. Only after plaintiffs amended their complaint to allege CIBC's active role in soliciting and selling the securities, was the court satisfied that scienter had been pleaded:

> On this basis, the Court regards the allegations now sufficient to satisfy the § 10(b) scienter standard. ... CIBC's particularized solicitations and sales of Notes in the context of its own involvement in a transaction that misrepresented the true value of those securities constitutes

> strong circumstantial evidence of conscious misbehavior or an extreme departure from standards of ordinary care that crossed into the realm of recklessness. By the same token, CIBC's active role in solicitation and sales of the Notes under the circumstances detailed in the [complaint] more clearly establishes that CIBC had reason to benefit in some concrete and personal way from the alleged fraud sufficient to satisfy the motive and opportunity standard.

Livent, 174 F. Supp. 2d at 152. Barclays did not solicit or underwrite any public offering of Enron securities or make any misrepresentations. Its mere participation in commercial lending transactions and alleged "access" to information is not enough to plead scienter under the PSLRA.[13]

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[13] Plaintiffs explain their inability to identify even a single case finding scienter on facts similar to those alleged against Barclays with the excuse that "this is a situation that has never before been presented since the passage of the federal securities laws in 1933-34 because only in recent years have banks been able to engage in the kind of joint commercial and investment banking activity present in this case." (Opp. Mem. at 64.) But Barclays is not here alleged to have acted as an underwriter of Enron securities; the allegations against Barclays center on its conduct as a commercial lender (plaintiffs do not allege any wrongdoing with respect to the Yosemite Trust or the Notes). Plaintiffs' failure to find a case to support its position on scienter is not due to the recent repeal of Glass-Steagall; it is due to the weakness of the factual allegations of the Complaint as against Barclays, which do not come close to satisfying the longstanding requirements of Rule 9(b) and the more stringent requirements of the PSLRA.

CONCLUSION

Plaintiffs concede that Barclays made no misstatements about Enron. The essence of their claim is only that Barclays engaged in commercial lending transactions with Enron and Enron-related entities that Enron — not Barclays — subsequently mischaracterized on Enron's financial statements. Giving plaintiffs every benefit of the doubt, this is at most a strained aiding and abetting claim that should be dismissed with prejudice under *Central Bank*.

Dated: June 24, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused true and complete copies of the foregoing Reply Memorandum of Law in Further Support of Defendant Barclays PLC's Motion to Dismiss, to be served on this 24th day of June, 2002, as follows:

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