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**REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT DEUTSCHE BANK AG'S MOTION TO DISMISS**

Deutsche Bank AG (“Deutsche Bank”) respectfully submits this reply brief in further support of its motion to dismiss the Consolidated Complaint for Violation of the Securities Laws in the Newby action (the “Newby Complaint”), and in response to Plaintiffs’ Memorandum of Points and Authorities In Opposition to Motion to Dismiss by Deutsche Bank AG, dated June 10, 2002 (“Pl. Mem.”). Deutsche Bank’s initial brief will be referred to as “DB Mem.”

PRELIMINARY STATEMENT

In its moving papers, Deutsche Bank showed that a group of cases from this Circuit and this Court mandate dismissal of the Newby Complaint because Plaintiffs had utterly failed to plead properly the elements of securities fraud under Section 10(b) or Rule 10b-5.¹ A review of Plaintiffs’ opposition brief confirms that Plaintiffs have either wholly ignored these cases or have failed to address them and thereby have ignored their holdings.

These cases, plus this Court’s ruling in In re Landry’s Seafood Restaurant, Inc. Sec. Litig., No. H-99-1948 (S.D. Tex. Feb. 20, 2001), hold that Plaintiffs may not claim *either* a fraudulent scheme *or* the making of false and misleading statements by Deutsche Bank based on mere conclusions, surmises, or press reports. Rather, these cases uniformly require Plaintiff to plead *facts* showing specifically how, when, by what means, and precisely through whom Deutsche Bank allegedly learned of or participated in the alleged Enron fraud. No such facts are pled and no argument offered by Plaintiffs provides a way around this strict requirement or a way to save the Newby Complaint from dismissal.

¹ Nathenson v. Zonagen Inc., 267 F.3d 400 (5th Cir. 2001); Lovelace v. Software Spectrum Inc., 78 F.3d 1015 (5th Cir. 1996); Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994); Tuchman v. DSC Communics. Corp., 14 F.3d 1061 (5th Cir. 1994); In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862 (S.D. Tex. 2002); In re Sec Litig. BMC Software, Inc., 183 F. Supp. 2d 860 (S.D. Tex. 2001); McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396 (E.D. Tex. 1999); McNamara v. Bre-X Minerals Ltd., No. 5:97-CV-159, 2001 WL 732017 (E.D. Tex. Mar. 30, 2001) (hereinafter “Bre-X II”).

Under cases like Landry's and Bre-X II, it is not sufficient for Plaintiffs simply to assert repeatedly that Deutsche Bank (along with other banks) “had constant access” to Enron executives, “knew” that the LJM2 limited partnership was engaging in illicit transactions, “knew” that its research reports were false or misleading, or “knew” of the alleged Enron fraud because of the amount of business it did with Enron or because “Wall Street” is “corrupt.” Absent these allegations, however, there is no predicate in the Newby Complaint for *any claim* under Section 10(b) or Rule 10b-5, whether based on an alleged scheme, alleged course of business, or alleged statements made in the market.

That Plaintiffs understand the problem they face is shown (i) by their simply ignoring the governing case law; (ii) by their reliance on cases decided outside the Fifth Circuit and before the PSLRA; and, most remarkably, (iii) by their demand that this Court ignore the law so Plaintiffs can find some alleged deep pockets to pay damages: Plaintiffs bluntly admit that this case has come down to a search for deep pockets, and in support of that search Plaintiffs seek a new rule of law: “If Enron investors are to achieve any significant recovery here . . . it will only be because our Nation’s securities laws permit these victims to hold accountable *securities professionals like banks . . . who are supposed to safeguard the public in securities transactions . . .*” Pl. Mem. at 40 (emphasis in original). Knowing full well that no statute or case makes banks the general guardians of the securities market, Plaintiffs declare that absent such a rule “Congress will have to act by . . . restoring aiding and abetting liability.” Id. at 41. (Thus, in the end, having spent scores of pages denying that this is actually an aiding and abetting case, Plaintiffs ultimately seek the shelter of that doctrine for their claims.)

Finally, Plaintiffs' brief largely ignores the other grounds for dismissal advanced by Deutsche Bank in its initial brief. These other grounds remain valid, and provide additional, independent bases for dismissing all claims against Deutsche Bank.

ARGUMENT

POINT I

PLAINTIFFS HAVE IGNORED THIS COURT'S RULINGS IN FAILING TO PLEAD SPECIFIC FACTS AS TO DEUTSCHE BANK'S ALLEGED KNOWLEDGE OR SCIENTER

Plaintiffs spend scores of pages arguing that their theories of liability do not involve aiding and abetting or conspiracy, arguing instead that they may characterize their allegations against Deutsche Bank as either deceptive acts (under Rule 10b-5(a) and (c)) or as false and misleading statements under Rule 10b-5(b). See Pl. Mem. at 29-35, 38-41, 52-64. These discussions, however, cannot hide the point that as to *either* offense Plaintiffs must plead specific facts to support a fraud claim. That is, as this Court has held, Plaintiffs must plead specific facts establishing Deutsche Bank's knowledge of and intent to engage in conduct that is manipulative or deceptive. Landry's, Slip Op. at 6-7 nn. 10, 12, citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976) and Field v. Trump, 850 F.2d 938, 946-47 (2d Cir. 1988).²

It is the absence of any specific factual predicate establishing knowledge or scienter that mandates dismissal of the Newby Complaint. In Landry's, this Court dismissed claims against banks and investment banks which allegedly engaged in the same of type of scheme Plaintiffs have alleged against Deutsche Bank in the instant case. In Landry's, the underwriters allegedly

² Plaintiffs' cases agree. See Pl. Mem. at 90-91, citing Lemmer v. Nu-Kote Holding, Inc., No. A:398-CV-0161L, 2001 WL 1112577, at *8 (N.D. Tex. Sept. 6, 2001)(which, citing Cooper v. Pickett, 137 F.3d 616, 624 (9th Cir. 1997), recognizes that a primary violation under the securities laws requires a showing that "each defendant committed a manipulative or deceptive act in furtherance of the scheme."). Moreover, the Supreme Court's recent decision in SEC v. Zandford, 122 S. Ct. 1899 (2002) (Pl. Mem. at 34-35, 54-55), in no way relieves Plaintiffs of this pleading burden.

engaged in a scheme to disseminate false information about the issuer, including through research reports, in order to inflate the issuer's stock price. Slip Op. at 6 n.11, 27, 31-32. As Plaintiffs claim here, the underwriters in Landry's allegedly were motivated by the prospect of earning fees, which fees would be higher if Landry's stock sold at inflated prices. Id. at 32.

In addition to this alleged motive, it was alleged that the underwriters had the opportunity to commit fraud by (i) preparing presentations by the company for investors, (ii) conducting due diligence relating to the underwritings, and (iii) their "intimate access to Landry's confidential corporate information," and "constant communication" with two officers of the issuer "about the details of the business." Based on these allegations, plaintiffs claimed that the underwriters knew or recklessly disregarded Landry's deteriorating financial condition and knowingly issued false and misleading reports about the company. Id. at 32-33.

In a carefully reasoned decision, this Court dismissed the Section 10(b) claims against the underwriters. Consistent with the Fifth Circuit cases cited in Deutsche Bank's initial papers (see DB Mem. at 1 n.1), and after a detailed analysis of the law relating to the PSLRA's effect on pleading under Section 10(b), this Court enunciated a standard for pleading scienter under the PSLRA, and, in particular, for pleading motive and opportunity. Slip Op. at 51. That standard was the standard ultimately articulated by the Fifth Circuit in Nathenson, 267 F.3d at 400, 410, 412-13. Accord Abrams v. Baker Hughes Inc., No. 01-20514, 2002 WL 1018944, at *4 (5th Cir. May 21, 2002); ABC Arbitrage Plaintiffs Group v. Tchuruk, No. 01-40645, 2002 WL 975299, at *8-9 & nn. 61-68 (5th Cir. May 13, 2002) (noting that these pleading requirements "must be laid out *before* access to the discovery process is granted").³

³ Accord In re Waste Mngmt., Inc. Sec. Litig., No. H-99-2183, Slip Op. at 187-89 (S.D. Tex. Aug. 16, 2001) (dismissing claims against issuer's officers to extent plaintiffs failed to plead specific facts identifying how and when each defendant received specific information that should have informed them of the alleged fraud). This Court also has held that scienter may not be pled through broad conclusory statements that defendants were in

This Court's holding as to the underwriters, which is ignored by Plaintiffs in their brief, applies with equal force to the allegations made against Deutsche Bank:

As for the § 10(b) claims, Plaintiffs have conclusorily alleged that the underwriters made an illegal agreement with Landry's to protect the Underwriters from any liability for their participation in the alleged fraudulent scheme, issued false and misleading analyst reports, arranged and prepared the script for the Roadshow to sell the public on Landry's business prospects with false information, in order to artificially inflate the prices of Landry's stock, which in turn provided them with greatly increased fees Plaintiffs have generally alleged without any particularity that the Underwriters also conducted a comprehensive due diligence investigation into Landry's operations and future prospects in connection with the secondary offering for which they helped prepare the Registration Statement and Prospectus. They purportedly had access to confidential corporate information and communicated frequently with [two senior Landry's officers] about the business, but Plaintiffs fail to provide any details or identify specifically what kind of information, when it was conveyed, by whom and to whom. Plaintiffs have failed to identify any specific information communicated by document or conversations to the Underwriter Defendants or uncovered by them in their due diligence investigation. Instead, they have made general statements that might give rise to speculation, but not particularized facts giving rise to a strong inference that the Underwriters acted with severe recklessness or knowingly to support allegations of fraud under the Exchange Act.

Landry's, Slip Op. at 65-66 (emphasis added).⁴

Plaintiffs assert that they have provided "more detailed" allegations than those rejected in Landry's (Pl. Mem. at 70-71), but then only recite a list of *conclusions* based on Deutsche Bank's alleged banking or business relationships with Enron. What is missing from these "unsupported general claim[s]" are "corroborating details regarding the contents of allegedly contrary reports [i.e., documents showing the falsity of other information relevant to the alleged

"constant contact" with wrongdoers or had "direct direct access to information" from them based on unspecified documents, conversations, meetings, reports, etc. are insufficient as alleged source of defendants' knowledge of critical facts." Landry's, Slip Op. at 52, citing In re Splash Technology Holdings, Inc. Sec. Litig., 2000 WL 1727377, at *21 (N.D. Cal. Sept. 29, 2000). This Court also held that group pleading – as opposed to pleading specific facts as to specific defendants – did not survive passage of the PSLRA. Landry's, Slip Op. at 54-55.

⁴ Counsel for the Newby Plaintiffs also were plaintiffs' counsel in Landry's and In re Waste Mngmt.

fraud], their authors and recipients.” Abrams, 2002 WL 1018944, at *6. Thus, Plaintiffs have pled no specific facts to support bald conclusions like “Deutsche Bank took affirmative steps to falsify Enron’s financial results and further the fraudulent scheme and course of business...” Pl. Mem. at 71. Accord ABC Arbitrage, 2002 WL 975299, at *15 (documentary or personal sources must be pled to tie each specific defendant to specific relevant facts of alleged fraud).

Also unavailing is Plaintiffs’ attempt to rely on Bre-X II (Pl. Mem. at 38-39), in which an investment bank, facing allegations like those at issue here, *was* dismissed. Compare Pl. Mem. at 68 with DB Mem. at 12-14. In Bre-X II, the alleged scheme to defraud related to a mining company’s gold deposits. The court required plaintiffs to plead (i) the specific information that each *named* research analyst at each *named defendant* received on the issuer’s gold deposits; (ii) when that information was received by *each* analyst; (iii) what testing of deposits *each* analyst witnessed; (iv) *each* analyst’s professional background (*i.e.*, what should they have understood about what they saw); and (v) what *each* analyst saw during specific visits to the issuer’s mining site that should have alerted them to the substantial risk of fraud. Bre-X II, 2001 WL732017, at *66. The court dismissed all claims as to an investment bank against whom these facts were not pled (*id.* at *66-68). The Newby Plaintiffs have offered nothing in the instant case approaching this level of pleading. (Two other cases cited by Plaintiffs⁵ are, upon close examination of their facts and holdings, also consistent with Landry’s and Bre-X II.⁶)

⁵ In re Livent Inc. Noteholders Sec. Litig., 174 F. Supp. 2d 144 (S.D.N.Y. 2001) (Pl. Mem. at 38-39, 97-98) and Lemmer v. Nu-Kote Holding, Inc., No. A.3:98-CV-01610-L, 2001 WL 1112577 (N.D. Tex. Sept. 6, 2001) (Pl. Mem. at 94 n.51).

⁶ In Livent, the district court denied a motion to dismiss where plaintiffs provided specific details of how, when, and why a specific bank defendant had directly participated in the alleged fraud. The bank (i) made what was publicly described as an “investment” in Livent, which the company treated in its financial statement as income; (ii) but knew that the “investment” was actually a loan because the bank had entered into an undisclosed side agreement requiring the company to repay the “investment”; and (iii) then sold Livent securities without disclosing what it knew about the “investment” (qua loan) or Livent’s financials (which failed to reflect the loan). 174 F. Supp. 2d at 147-48. Here, unlike Livent, the Newby Plaintiffs have failed to allege any specific facts regarding any person at

Unable to meet the pleading standards of Landry's, BMC Software, and Bre-X II, Plaintiffs rely on cases: (i) outside the Fifth Circuit;⁷ (ii) decided prior the PSLRA;⁸ (iii) decided prior to the Ninth Circuit's interpretation of the PSLRA pleading standard;⁹ or (iv) not subject to the PSLRA.¹⁰

In the instant case, an examination of the allegations against Deutsche Bank (Pl. Mem. at 3-27) shows that this Court would have to ignore its holding in Landry's, as well as other Fifth Circuit authority, to uphold the Newby Complaint.

A. Alleged Access to Enron Information

Plaintiffs have alleged that Deutsche Bank had substantial access to Enron and the alleged truth about its financial condition based on unspecified "constant contact" with Enron executives, Deutsche Bank's work in connection with various Registration Statements and loans made to Enron, Deutsche Bank's issuance of research reports on Enron, and the bank's small

Deutsche Bank having any contact with any person at Enron relating to any specific information that should have informed Deutsche Bank of the alleged Enron fraud. In Leimmer, contrary to Plaintiffs' assertion that the court allowed a scheme to be pled against a group of defendants, the court actually held that "the group pleading doctrine is inconsistent with the particularity requirements of PSLRA and therefore no longer is a viable means of pleading securities fraud." 2001 WL 1112577, at *7. The court dismissed the complaint, in part, because it failed to make specific allegations against specific defendants as to the alleged fraudulent scheme. Id. at 8.

⁷ See, e.g., Pl. Mem. at 38-39, 91, 97-98, citing Cooper v. Pickett, 137 F.3d 616, 624, 628 (9th Cir. 1998); Livent, 174 F. Supp. 2d at 144, 150-53; Murphy v. Hollywood Entm't Corp., No. 95-1926-MA, 1996 U.S. Dist. LEXIS 22207 (D. Or. May 9, 1996); Flecker v. Hollywood Entm't Corp., No. 95-1926-MA, 1997 U.S. Dist. LEXIS 5329, at *25 (D. Or. Feb. 12, 1997); In re Cascade Int'l Sec. Litig., 840 F. Supp. 1558, 1568 (S.D. Fla. 1993); SEC v. U.S. Env'tl. Inc., 155 F.3d 107, 112 (2d Cir. 1998); Scholnick v. Continental Bank, 752 F. Supp. 1317, 1323 & n.9 (E.D. Mich. 1990); Blackie v. Barrack, 524 F.2d 891, 903 n.19 (9th Cir. 1975); and Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972).

⁸ See, e.g., Pl. Mem. at 32, 38-39, 91, citing Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 363 (5th Cir. 1987); In re Cascade Int'l; Scholnick; Blackie; and Affiliated Ute. Cooper, Flecker and Murphy also fall into this category.

⁹ Pl. Mem. at 38-39, 91. In 1999, the Ninth Circuit considered the PSLRA's heightened pleading requirements and held that the statute had substantively changed scienter to now require a showing of "deliberate recklessness." In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 978-79 (9th Cir. 1999). Plaintiffs ignore this dramatic change in Ninth Circuit law, relying instead on pre-Silicon Graphics cases which applied a very lenient pleading standard for scienter. See e.g., Cooper; Murphy; Flecker; and Blackie.

¹⁰ Pl. Mem. at 39, citing SEC v. U.S. Env'tl. Inc., 155 F.3d 107, 112 (2d Cir. 1998) and Affiliated Ute.

participation as a limited partner in LJM2. None of these alleged contacts – taken together or alone – satisfy the pleading requirements of the PSLRA or Rule 9(b).

1. “Constant Contact”

As in Landry’s, although Plaintiffs rattle off the names of certain former Enron executives (Pl. Mem. at 88), they provide no detail as to who at Deutsche Bank ever had the alleged “constant contact” with whom at Enron, nor do they pinpoint any documents, conversations, or specific incidents during which Deutsche Bank would have garnered information sufficient to support an inference that it knew or should have known about the alleged Enron fraud. See Landry’s, Slip Op. at 52, citing In re Splash Technology. This type of pleading has been roundly rejected in numerous cases and should be rejected here.

2. Registration Statements, Loans and Research Reports

Tracking the Complaint, Plaintiffs assert that by working on various Enron underwritings, making loans to Enron, and – through Deutsche Bank Alex. Brown (a subsidiary) – issuing research reports on Enron, Deutsche Bank must (or should) have had knowledge of the Enron fraud. See, e.g., Pl. Mem. at 14, 37-38, 42-44 & n. 26, 53, 71-87. Under the settled law of this Circuit, however, none of these broad allegations – even when taken together – support a claim of securities fraud.

None of these facts satisfy the particularity requirements adopted in Nathenson and its progeny, or in Landry’s, Bre-X II, BMC Software and other cases. Once again, what is missing is any specific fact regarding specific instances in which a specific person at Deutsche Bank – while doing business with a specific person at Enron – received information specifically relating to the alleged fraud. In each of Landry’s and Bre-X II, bank defendants were alleged to have had multiple sources of business contact with an issuer. Nonetheless, greater specificity was

required. In Landry's, plaintiffs also identified specific investor presentations prepared and due diligence conducted by the banks. These added facts still did not plead knowledge or scienter because there was no fact linking those activities to defendants' receipt of information relating to the alleged fraudulent scheme. Similarly, in Bre-X II, that an individual analyst received testing data and visited the issuer's mining site did not establish a link to the alleged fraud. Accord Abrams, 2002 WL 1018944, at *6.

That more must be required than simple allegations of otherwise lawful business dealings is confirmed by the Fifth Circuit's ruling in Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994). There, rejecting allegations that different defendants engaged in securities fraud simply for financial gain, the Court noted that this "nihilistic approach to Rule 9(b) jurisprudence" would "universally eliminate the state of mind requirement in securities fraud actions..." Melder at 1102-03. As bad, such an approach also would ratify the very boilerplate pleading rejected by this Court in Landry's, because the idea of banks doing credit analyses or providing multiple financial services to large public companies is neither new nor rare.

Finally, with regard to Deutsche Bank's underwriting activities, it is worth noting again (see DB Mem. at 4, 11) that no specific portions of any Registration Statement or Prospectus relating to any Deutsche Bank transaction are singled out as false or misleading. In addition, Plaintiffs studiously ignore this Court's dismissal of securities fraud claims relating to the Azurix IPO, on which Deutsche Bank was an underwriter. See In re Azurix Corp.

3. LJM2

Plaintiffs place great stock in the LJM2 limited partnership as a way of trying to link Deutsche Bank to the alleged Enron fraud. Indeed, Plaintiffs assert that merely by investing in LJM2 as a limited partner, Deutsche Bank "intentional[ly] participat[ed] in the falsification of

Enron's financial results." See Pl. Mem. at 87-89. There are at least two problems with such fantastic assertions. First, these are conclusions, not facts. What again is missing is any pleading of any specific incidents, documents, meetings or other factual predicates to support the idea that Deutsche Bank was given a window into the alleged fraud perpetrated by Enron, let alone actively participated in that fraud. Under Landry's and the other cases Deutsche Bank has cited (see DB Mem. at 10-14), such conclusory pleading is inadequate as a matter of law. Second, the facts before the Court on LJM2 undercut any inference of fraud Plaintiffs might attempt to draw.

Plaintiffs refer to LJM2 as simply a partnership. As pled in the Tittle Complaint, however, LJM2 was in fact a *limited* partnership the General Partner of which was an Enron executive. Tittle Complaint ¶ 309. As such, Deutsche Bank was "a passive investor, similar to a corporate shareholder." Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 714 A.2d 96, 99 (Del. Ch. 1998). Also, contrary to Plaintiffs' brief (Pl. Mem. at 28), both the Newby and Tittle Complaints allege that Enron and another bank – *not* Deutsche Bank – structured the LJM2 limited partnership. Newby Complaint ¶¶ 647, 651, 740; Tittle Complaint ¶¶ 316-18.¹¹

The Tittle Complaint also states that LJM2 had over fifty limited partners (only a few of which are defendants here) with commitments of almost \$400 million. Tittle Complaint ¶¶ 310, 318 (leaving Deutsche Bank's alleged \$10 million investment equal to an approximately 2.5% limited partnership interest, hardly a platform from which to perpetrate a fraud). Moreover, based on documents that Plaintiffs have chosen to place before the Court as to other defendants' motions to dismiss, it is clear that LJM2 actually was offered to a broad variety of investors, not just banks that did business with Enron. Thus, Plaintiffs' documents show that, far from a

¹¹ Plaintiffs also mistakenly assert that Deutsche Bank funded various of the special purpose entities associated with LJM2. Pl. Mem. at 17. The Newby Complaint, however, says nothing of the kind, citing a different bank in that role. Newby Complaint ¶¶ 39-40.

“reward” to selected parties (e.g., Pl. Mem. at 10-11; Newby Complaint ¶¶ 23, 29, 647), the LJM2 limited partnership had many “investors including pension funds, insurance companies, banks, private funds, individuals.” See Appendix in Support of Plaintiffs’ Oppositions to Motions to Dismiss (“Pl. App.”), Tab 26, at C-2962.

Plaintiffs offer no well-pled facts to explain why or how a 2.5% limited partner would have detailed knowledge about Enron’s activities or would know things other limited partners – who have not been sued and about whom Plaintiffs have said nothing – did not. Nothing in any of the documents offered by Plaintiffs supports the idea that any of the limited partners in LJM2 had access to or received any specific information regarding Enron’s financial statements or the alleged fraud by Enron in not properly accounting for LJM2’s transactions. Indeed, the only “facts” pled are statements by Skilling, *an Enron insider*, regarding the fraudulent actions of *an Enron insider* – Fastow. Pl. Mem. at 95-96. What is not pled, however, is the required link from these Enron insiders to Deutsche Bank. As such, under the cases discussed above, there is no factual predicate for Plaintiffs’ charge that Deutsche Bank “witnessed” or “participated” in any fraudulent transactions (or any manipulative or deceptive conduct) by its limited partnership interest in LJM2. Compare Pl. Mem. at 89, 95-96.

Finally, Plaintiffs assert that Deutsche Bank had a duty to disclose its investment in LJM2 (because it allegedly knew that LJM2 was not independent of Enron) and that by failing to do so the bank defrauded investors. See Pl. Mem. at 87-88. But again, this is premised on Plaintiffs’ *conclusion* on what Deutsche Bank knew and that it was “participating” in the Enron fraud. This also again ignores the documents Plaintiffs have chosen to place before the Court. These documents show that Enron structured LJM2 to be an independent entity, and had Arthur Andersen review that structure. See Pl. App., Tab 23, at C-2888. LJM2’s independent status

was then described in Enron's SEC filings. See Enron Corp. Form 14A, Proxy Statement at 29-30 (Mar. 21, 2000). Absent a well-pled factual predicate showing that Deutsche Bank knew or should have known that LJM2 was not what it was represented to be (i.e., independent of Enron) – which Plaintiffs have not provided – there was nothing false or misleading about the disclaimer in Deutsche Bank's research reports on Enron.

B. The Alleged Profit Motive

Plaintiffs have alleged that Deutsche Bank profited in two ways from its dealings with Enron. First, by receiving as a “reward” an opportunity to participate in the LJM2 limited partnership, and second, by earning fees on continued business with Enron, which business would only exist if Enron remained afloat.

As above, the allegation that Deutsche Bank was “rewarded” is nothing but a conclusion. Indeed, non-defendant pension funds, insurance companies, and others apparently received this alleged “reward.” See Pl. App., Tab 26, at C-2962. Plaintiffs have pled no specific facts to support the idea that the offer to participate in the LJM2 limited partnership was in return for participation in a fraud. Rather, Plaintiffs in effect argue that the “reward” to Deutsche Bank for participating in the alleged Enron fraud is an entitlement to participate in the LJM2 limited partnership on the terms available to every other investor. Indeed, the Newby and Tittle Complaints make clear that LJM2 was neither established nor structured by Deutsche Bank. See Newby Complaint ¶¶ 651, 740; Tittle Complaint ¶¶ 316-18.

As above, the Fifth Circuit's ruling in Melder renders ineffective Plaintiffs' attempt to plead fraud based on Deutsche Bank making money from Enron-related business. The law simply does not assume that a successful commercial entity would risk its reputation and expose itself to billions of dollars in damages and millions of dollars in costs to aid a customer in

defrauding the public. See Melder, 27 F.3d at 1103; Abrams, 2002 WL 1018944, at *6; DB Mem. at 13-14. This, however, is the assumption upon which Plaintiffs have rested their Complaint, and another reason why the Newby Complaint should be dismissed.

C. “Collective Knowledge”

With regard to Deutsche Bank’s research reports, the best that Plaintiffs can do is to assert that an alleged absence of “Chinese Walls” made Deutsche Bank’s researchers privy to the knowledge regarding the alleged Enron fraud that the bank allegedly gained through its other Enron-related activities. The only bases for this conclusion are opinions contained in news articles, none of which even mention Deutsche Bank. See Pl. Mem. at 1 n.3, 42 n.25. These articles are not facts, and, ignoring Landry’s and the holdings of other courts in this Circuit, Plaintiffs offer no facts – indeed, do not even identify any specific researcher (compare Bre-X II) – to support their allegations.

Plaintiffs also overstate the collective knowledge doctrine by treating Deutsche Bank as a unified “overall legal entity.” Pl. Mem. at 101, citing Newby Complaint ¶ 789. Thus, before imputing knowledge to a corporation, Plaintiffs must (i) identify individual(s) with knowledge; (ii) who were in a sufficiently high position;¹² and (iii) who also then acted with scienter relating to the alleged scheme to defraud.¹³ Here, Plaintiffs fail to identify anyone at Deutsche Bank

¹² In re Hellenic Inc., 252 F.3d 391, 395 (5th Cir. 2001) (“While courts generally agree that the knowledge of directors or key officers, such as the president and vice president, is imputed to the corporation, they differ as to the effect of knowledge acquired by other employees.”).

¹³ First Equity Corp. v. Standard & Poor’s Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988) (“While it is not disputed that a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind” unless that state of mind is possessed by individual(s) of the corporation.); Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380, 1386-87 (9th Cir. 1986) (to the same effect; applying Texas law). Indeed, all of Plaintiffs’ cases involve identified employees with specific knowledge of a fraud, which knowledge either was used for the benefit of the corporation or was misappropriated by the employee (in which case no knowledge was imputed). See Pl. Mem. at 102-04; e.g., Standard Oil Co. v. United States, 307 F.2d 120, 129 (5th Cir. 1962) (refusing to impute knowledge to company where identified employees acted in their self-interest). Plaintiffs also ignore the fact that the research reports cited (issued by Deutsche Bank Alex. Brown) were not issued by the same corporate entity which did business with Enron (Deutsche Bank), further

meeting any of the required criteria, much less all of them. Accordingly, the collective knowledge doctrine may not be used to circumvent the PSLRA's heightened pleading standards.

D. The Alleged "Special Nature" of the Enron Fraud

As a final surmise, Plaintiffs assert that the alleged Enron fraud is special because of its size and because it happened after the repeal of the Glass-Steagall Act, such that investment banks and banks could now offer banking, investment banking and financial advisory services to companies like Enron. Pl. Mem. at 98-99. Plaintiffs then assert that in this new environment "Wall Street" has been "corrupted," such that, among other things, "Chinese Walls" are routinely ignored. Pl. Mem. at 101-02. Again, the sole basis for these claims is news articles. See Pl. Mem. at 1 n.3, 42 n.25.

Once again, there are no facts to support these conclusions. To the contrary, the large business frauds cited by Plaintiffs (Pl. Mem. at 40 n.24) occurred *prior to* the repeal of the Glass-Steagall Act. Moreover, the basis for Plaintiffs' claims are news articles, which are not facts and are not necessarily correct or authoritative. Finally, just as the law does not presume that businesses will engage in massive financial fraud simply to make money that could otherwise be made by lawful activities, the law does not presume that entire systems – let alone individual parties within systems – are "corrupt" simply because the press (or Plaintiffs) say so.¹⁴ See Abrams, 2002 WL 1018944, at *6-7 (that a company's affairs go awry does not necessarily support an inference of wrongful conduct).

undercutting any collective knowledge argument. See, e.g., Chill v. General Elec. Co., 101 F.3d 263, 268 (2d Cir. 1996) ("the district court's determination that the Kidder defendants 'arguably' had a motive does not necessarily mean that the parent company, GE, had any motive."); In re Am. Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1051 (D. Md. 1997) (parent cannot be held liable for subsidiary's conduct "solely by virtue of its ownership of and control over the subsidiary").

¹⁴ Indeed, such allegations of corruption are routinely rejected, for example, as a basis for opposing forum non conveniens motions. See, e.g., Gonzales v. P.T. Pelangi Niagra Mitra Int'l, 196 F. Supp. 2d 482, 487-88 (S.D. Tex. 2002) (citing cases).

Accepting Plaintiffs' premise also would again require rejection of a long line of cases, cited above, in which this and other courts have made clear that allegations of fraud may not be pled against broad groups, but must be pled against individual defendants based on individual and particularized facts. See, e.g., Landry's, Slip Op. at 52-54, McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 427 (E.D. Tex. 1999); Zishka v. Amer. Pad & Paper Co., No. 3:98-CV-0660-M, 2000 WL1310529 at *1 (N.D. Tex. Sept. 13, 2000). Accordingly, this allegation, like all the other allegations discussed above, cannot support a claim that Deutsche Bank engaged in a scheme or any other form of securities fraud, and the Newby Complaint should be dismissed.

POINT II

PLAINTIFFS HAVE FAILED TO RESPOND TO DEUTSCHE BANK'S OTHER GROUNDS FOR DISMISSAL

In addition to establishing that Plaintiffs have failed to plead specific facts sufficient to support knowledge or scienter, Deutsche Bank's initial papers also established that Plaintiffs failed to plead facts necessary to support the materiality of any research report cited in the Newby Complaint, and that all such reports were otherwise non-actionable as opinions. DB Mem. at 14-18. Plaintiffs' response is to lift and copy from the Complaint excerpts of Deutsche Bank's research reports and then argue that by alleging that the bank participated in a scheme to defraud all of the bank's statements become material.¹⁵ Pl. Mem. at 71-87, 77 & n.46. It follows from this argument, however, that if a scheme is not properly pled then Plaintiffs have not

¹⁵ Plaintiffs mistakenly assert that in late 2000 into early 2001, Deutsche Bank joined with Enron and other banks in ensuring "investors of the correctness of Enron's accounting" and in making "continued . . . positive statements" about Enron. Pl. Mem. at 21. The Newby Complaint, however, cites no Deutsche Bank research reports after September 2000, and the last cited report makes no reference to "Enron's accounting." Newby Complaint ¶ 257.

addressed the materiality and opinion arguments, and that the Newby Complaint should then be dismissed on these grounds as well.¹⁶

POINT III

THE NEWBY COMPLAINT VIOLATES RULE 8

In its initial papers, Deutsche Bank established that under the Fifth Circuit's ruling in Gordon v. Green, 602 F.2d 743 (5th Cir. 1979), the Newby Complaint violated Federal Rule 8, particularly as to its reliance on news articles and group pleading for key allegations as against Deutsche Bank. DB Mem. at 18-19. Plaintiffs have not responded to this or any of the other authority cited by Deutsche Bank.¹⁷ The only defense offered is that the Newby Complaint is “*very similar* in format and style to the [complaint] the Court found adequate in most respects” in Landry's. (Pl. Mem. at 2) (emphasis in original).

To the extent that the “format” and “style” of a complaint, as opposed to the substantive pleading itself, is even a defense, Plaintiffs are incorrect. The Landry's complaint was nowhere near the size of the Newby Complaint, comprising only 72 pages and 147 paragraphs. As a matter of substance, it also did not require any defendant to wend its way through allegations directed at large, undifferentiated groups of defendants, nor did it rely for critical segments on batches of news articles that are nothing more than extraneous hearsay (indeed, it cited *none*). Finally, Landry's, as well as the other cases cited above, leaves no doubt that the huge tracts of the Newby Complaint that rely largely or wholly on group pleading and/or news articles are, as a

¹⁶ Contrary to Plaintiffs' assertion (Pl. Mem. at 77 n.46), the Fifth Circuit has expressly ruled that these types of materiality issues *may* be resolved on a motion to dismiss. ABC Arbitrage, 2002 WL 975299, at *16.

¹⁷ Contrary to Plaintiffs' assertion, Deutsche Bank nowhere characterized the Newby Complaint as a “puzzle pleading” nor did Deutsche Bank “mock the [Complaint], going so far as to call it an ‘abuse’ and ‘bloated’ – even a ‘long-winded journey to nowhere.’” (Pl. Mem. at 1). Rather, Deutsche Bank objected to Plaintiffs' “attempt to lump Deutsche Bank together with several other defendants and to rely on the widespread publicity that Enron's activities have received.” DB Mem. at 1-2.

matter of law, improper and ineffective methods of pleading under the PSLRA. Cf. Williams v. WMX Techs. Inc., 112 F.3d 175, 179-80 (5th Cir. 1997) (rejecting news articles as basis for fraud allegations). Accordingly, the Newby Complaint violates Rule 8 and should be dismissed.

POINT IV

PLAINTIFFS HAVE CONCEDED THAT THERE IS NO CONTROL PERSON LIABILITY AS TO DEUTSCHE BANK

In its initial papers, Deutsche Bank established Plaintiffs' failure to meet their burden to plead facts establishing Deutsche Bank's control or ability to control Enron (or any other defendant accused of securities fraud in the Newby Complaint). DB Mem. at 20. Plaintiffs have not responded to Deutsche Bank's motion on this point. Thus, Plaintiffs' Section 20(a) claim also should be dismissed.

CONCLUSION

For the reasons stated above and in its moving papers, Defendant Deutsche Bank AG respectfully requests that this Court dismiss the Newby Complaint against it, and grant Deutsche Bank AG such other and further relief to which they may be entitled.

Dated: June 24, 2002

Respectfully submitted,

Handwritten signature of Lawrence Byrne in cursive script.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Reply Memorandum of Law in Support of Defendant Deutsche Bank AG's Motion Dismissed has been served on counsel shown on the attached service list on June 24th, 2002.

*Laurence Byrne / WP
Dicky Lopez*

The Service List
Attached
to this document
may be viewed at
the
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