

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

United States Courts
Southern District of Texas
FILED
JUN 24 2002

Michael N. Milby, Clerk

MARK NEWBY, *et al.*,)
)
Plaintiffs,)
)
vs.)
)
ENRON CORP., *et al.*,)
)
Defendants.)

CIVIL ACTION NO. H-01-3624
(Consolidated)

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT JOSEPH M. HIRKO'S
MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT**

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941

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
I. THE COMPLAINT DOES NOT ALLEGE FRAUD AGAINST MR. HIRKO WITH THE REQUISITE PARTICULARITY.....	3
A. Notwithstanding Plaintiffs’ Arguments to the Contrary, the Claims Against Mr. Hirko Improperly Rely Entirely On “Group Pleading,” a Doctrine That This Court Has Expressly Rejected.	3
B. Plaintiffs Have Plead No Facts Implying That Mr. Hirko Played a “Significant Role” in the Preparation of False or Misleading Statements.	5
II. NONE OF PLAINTIFFS’ ALLEGED INDICIA OF SCIENTER APPLIES TO MR. HIRKO.	7
A. Alleged Misstatements and Omissions Concerning Enron’s Non-EBS Businesses, or Concerning EBS After Mr. Hirko’s Departure, Cannot Support an Inference of Scienter With Respect to Mr. Hirko.	8
B. The Alleged “Internal Complaints Made to Insiders” Cannot Support an Inference of Scienter With Respect to Mr. Hirko Because None of the Complaints Was Made While He Was Employed by Enron.	10
C. The Alleged “Highly Inconsistent Statements” Preceding “Enron’s Demise” Were Made More Than One Year After Mr. Hirko’s Departure and Thus Have No Bearing on His Scienter.	10
D. Plaintiffs Allege no Facts Indicating That Mr. Hirko Played Any Role in the Alleged GAAP Violations Underlying Enron’s Financial Restatement.	10
E. Mr. Hirko’s Alleged Sale of Less than 20% of His Enron Holdings—the Smallest Percentage of any of the Individual Defendants—is Insufficient to Raise any Inference of Scienter.	12
F. Plaintiffs Do Not Allege That Mr. Hirko Received any “Performance Bonus” That Might Otherwise Support an Inference of Scienter.	12
III. THE SECTION 20(a) and 20A CLAIMS AGAINST MR. HIRKO MUST ALSO BE DISMISSED.	13
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Azurix Corp. Secs. Litig.</i> , No. H-00-4034, 2002 WL 562819, at *14 (S.D. Tex. March 21, 2002).....	6
<i>Branca v. Paymentech, Inc.</i> , No. Civ.A.3:97-CV-2507-L, 2000 WL 145083, at *10 (N.D. Tex. Feb. 8, 2000	11
<i>Coates v. Heartland Wireless Comms., Inc.</i> , 26 F. Supp.2d 910, 915 (N.D. Tex. 1998).....	2, 9, 12
<i>Coates v. Heartland Wireless Comms., Inc.</i> , 55 F. Supp.2d 628 (N.D. Tex. 1999)	6, 12
<i>Coates v. Heartland Wirelss Comms., Inc.</i> , 100 F. Supp.2d 417, 430 (N.D. Tex. 2000).....	11
<i>Fine v. American Solar King Corp.</i> , 919 F.2d 290, 297 (5th Cir. 1990)	10
<i>In re Advanta Corp. Secs. Litig.</i> , 180 F.3d 525, 539 (3d Cir. 1999)	9, 13
<i>In re Baker Hughes Secs. Litig.</i> , 136 F. Supp.2d 630, 648 (S.D. Tex. 2001)	9, 11
<i>In re Landry's Seafood Restaurants, Inc. Sec. Litig.</i> , H-99-1948, slip op (S.D. Tex. 2001).....	4
<i>In re Netsolve, Inc. Securities Litigation</i> , 185 F. Supp.2d 684 (W.D. Tex. 2001)	7
<i>In re Securities Litig. BMC Software, Inc.</i> , 183 F. Supp.2d 860, 865 n.14 (S.D. Tex. 2001)	passim
<i>In re Software Toolworks Inc. Sec. Litig.</i> , 50 F.3d 615, 628 n.3 (9th Cir. 1994)	7
<i>Lovelace v. Software Spectrum, Inc.</i> , 78 F.3d 1015, 1021 (5th Cir. 1996)	11
<i>McNamara v. Bre-X Minerals Ltd.</i> , 197 F. Supp.2d 622 (E.D. Tex. 2001)	5
<i>Melder v. Morris</i> , 27 F.3d 1097, 1102 (5th Cir. 1994)	9, 11

<i>Mortensen v. Americredit Corp.</i> , 123 F. Supp.2d 1018, 1023 (N.D. Tex. 2000).....	8, 11
<i>Nathenson v. Zonagen Inc.</i> , 267 F.3d 400, 407 (5th Cir. 2001)	2, 8, 9, 12
<i>Schiller v. Physicians Resource Group, Inc.</i> , No. Civ.A. 3:97-CV-3158-L, 2002 WL 318441 (N.D. Tex. Feb. 26, 2002).....	6
<i>Shapiro v. UJB Fin. Corp.</i> , 964 F.2d 272 (3d Cir. 1992))	5
<i>Thornton v. Micrografx, Inc.</i> , 878 F. Supp. 931, 938 (N.D. Tex. 1995).....	1, 2
<i>Williams v. WMX Techs., Inc.</i> , 112 F.3d 175, 177 (5th Cir. 1997)	2, 3

Statutes

15 U.S.C. § 78t(a) 13

15 U.S.C. § 78u-4(b)(1)..... 2

15 U.S.C. § 78u-4(b)(2)..... 2, 8

15 U.S.C. § 78u-4(b)(3)..... 2

15 U.S.C. §§ 78u-4(b)(1)..... 6

78u-5(c)(1)(B)..... 6

INTRODUCTION

Plaintiffs' opposition memorandum ("Opposition") merely underscores the fatal flaws in plaintiffs' claims against Joe Hirko. Incredibly, and notwithstanding the stringent pleading requirements imposed by the PSLRA and FRCP 9(b), the 162-page Opposition devotes just a single paragraph to Mr. Hirko. *See* Opp'n at 53. In keeping with the Complaint's flimsy allegations against Mr. Hirko,¹ the Opposition does not cite a single misleading statement uttered by Mr. Hirko nor does it allege that he was involved in preparing any financial report or Registration Statement on Enron's behalf. Indeed, the Opposition's *only* mention of Mr. Hirko is that he was an executive at Enron Broadband Services ("EBS") during its formative stages and that he sold less than 20% of his Enron stock prior to leaving the company in July 2000.

Recognizing the dearth of evidence relating to Mr. Hirko, plaintiffs transparently attempt to taint him by dwelling on allegations relating to *other* defendants. Courts in this circuit—even before passage of the PSLRA—have repeatedly and consistently rejected similar pleading tactics. Plaintiffs have utterly failed to articulate *any* factual predicate to support their allegation that Joe Hirko—as opposed to some group of other individuals who happened to work for the same employer as he did—committed securities fraud. Consequently, the Court should dismiss with prejudice plaintiffs' claims against Mr. Hirko.²

ARGUMENT

Plaintiffs have failed to satisfy their heavy burden of informing Mr. Hirko "of the nature of his alleged participation in the fraud." *Thornton v. Micrografx, Inc.*, 878 F. Supp. 931, 938

¹ Mr. Hirko's name appeared in only eight of the Complaint's 1030 paragraphs, two of which merely named him as a defendant.

² As set forth in this memorandum and in the Memorandum in Support of Defendant Joseph M. Hirko's Motion to Dismiss the Consolidated Amended Complaint ("Memorandum" or "Mem."), even if the Court were to conclude that the Complaint sufficiently states a claim as to one or more other defendants, the claims against Mr. Hirko should nevertheless be dismissed.

(N.D. Tex. 1995) (emphasis supplied); *see also Coates v. Heartland Wireless Comms., Inc.*, 26 F. Supp.2d 910, 915 (N.D. Tex. 1998) ("*Coates I*"). Plaintiffs have not attributed to Mr. Hirko, as they must, any "statements contended to be fraudulent," much less identified "when and where the statements were made, [or] why the statements were fraudulent." *See In re Securities Litig. BMC Software, Inc.*, 183 F. Supp.2d 860, 865 n.14 (S.D. Tex. 2001) ("*BMC*") (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)); *see also* 15 U.S.C. § 78u-4(b)(1). Neither have plaintiffs stated with particularity, as they must to survive a motion to dismiss, any "facts giving rise to a strong inference that [Mr. Hirko] acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2); *see also Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407 (5th Cir. 2001); *BMC*, 183 F. Supp.2d at 865 n.15.

In their Opposition, plaintiffs simply shrug off these glaring deficiencies, characterizing them as nothing more than "technical pleading arguments." *See* Opp'n at 1. As the Fifth Circuit has expressly recognized, however, Congress passed the PSLRA for the important purpose of preventing "the abuse of federal securities laws by private plaintiffs," *Nathenson*, 267 F.3d at 406, and to remedy "the perceived inability of Rule 9(b) to prevent abusive, frivolous strike suits," *id.* at 407. The PSLRA's heightened pleading standards are central to those important Congressional goals; the statute provides that, if a complaint does not meet those standards, "the court *shall*, on motion of any defendant, dismiss the complaint." 15 U.S.C. § 78u-4(b)(3) (emphasis supplied). The non-specific, conclusory allegations against Mr. Hirko are precisely the type at which the PSLRA was aimed.

I. THE COMPLAINT DOES NOT ALLEGE FRAUD AGAINST MR. HIRKO WITH THE REQUISITE PARTICULARITY.

A. Notwithstanding Plaintiffs' Arguments to the Contrary, the Claims Against Mr. Hirko Improperly Rely Entirely On "Group Pleading," a Doctrine That This Court Has Expressly Rejected.

Where multiple defendants are named, "[p]laintiffs must allege what actions *each* Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *BMC*, 183 F. Supp.2d at 886 (emphasis supplied). The failure to identify specific statements made by each defendant "is fatal to the action because it deprives the defendants of notice." *Eizenga v. Stewart Enters.*, 124 F. Supp.2d 967, 981 (E.D. La. 2000) (citing *Williams*, 112 F.3d at 179).

Plaintiffs contend that they have satisfied their pleading obligations because, they argue, "[t]he [Complaint] *identifies each* of the statements alleged to be materially false and misleading, *specifies who* made the statements, *when and where* they were made, and *why* they were false." Opp'n at 32 (emphasis in original). Plaintiffs neglect to mention that Joe Hirko is not connected with a single one of those statements. As discussed in Mr. Hirko's opening Memorandum, the Complaint fails to attribute a single statement, false or otherwise, to Mr. Hirko. *See* Mem. at 4. Similarly, Mr. Hirko is not alleged to have signed, prepared or participated in the preparation of a single Registration Statement or periodic report on behalf of Enron. *Id.* Nor does the Complaint allege that Mr. Hirko participated in the creation of any of the partnerships and SPEs underlying plaintiffs' claims, nor that he was even aware of their existence. *Id.* at 5.

In their Complaint, plaintiffs attempt to compensate for these deficiencies by contending that "[i]t is appropriate to treat the Enron Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in the Company's public filings, press releases and other publications, as alleged [in the Complaint], are the

collective actions of the Enron Defendants.” Compl. ¶ 89. Now, finally recognizing this Court’s prior explicit rejection of the group pleading doctrine, *see BMC*, 183 F. Supp.2d at 902 n.45; *In re Landry’s Seafood Restaurants, Inc. Sec. Litig.*, H-99-1948, slip op, at 55 (S.D. Tex. 2001), plaintiffs wisely retreat from their initial position. *See* Opp’n at 34 (“The Complaint Does Not Substantially Rely on Group Pleading”).³ Conceding that group pleading has not survived the PSLRA, plaintiffs now argue only that “the conclusion that the [PSLRA] eliminated the group-pleading presumption is of no help to Insiders who actually *made, signed or significantly participated* in misleading statements or transactions.” *Id.* at 36 (emphasis in original).

In light of that concession, plaintiffs’ claims against Mr. Hirko are plainly untenable. Mr. Hirko is not alleged to have “made, signed or significantly participated in” *any* “misleading statements or transactions.” For example, in response to defendants’ arguments that the Complaint improperly relies on the group pleading doctrine, plaintiffs contend that they have “plead participation in specific fraudulent transactions and businesses the ignoring of red flags, and specific misstatements that the Insiders made, participated in, or signed.” *Id.* at 34. Plaintiffs then list seven individual defendants who allegedly “signed Enron’s public filings containing misstatements,” ten who purportedly “made, or participated in pertinent misstatements during conference calls,” and one who allegedly was “involved in preparation of false statements.” *See id.* at 35. Tellingly, Mr. Hirko is not among the defendants alleged to have participated in *any* of those purportedly fraudulent acts. *See also id.* at 33 (citing fifteen paragraphs from the Complaint which allege “misstatements of small groups of named Insiders,” none of which includes Mr. Hirko).

³ In *BMC*, this Court held that, because “a more stringent pleading is required by the PSLRA, . . . the group pleading doctrine is at odds with the PSLRA and has not survived the amendments.” *BMC*, 183 F. Supp.2d at 902 n.45.

Other than improperly grouping Mr. Hirko with other defendants who actually spoke during the class period, plaintiffs' entire argument regarding the sufficiency of their claims against Mr. Hirko is contained in a single paragraph on page 53 of the Opposition. There, plaintiffs baldly contend that the "claims against Hirko are pleaded with particularity," while reciting the same vague, conclusory allegations contained in the Complaint: that Mr. Hirko held an executive position with EBS and that he sold less than 20% of his Enron stock prior to departing the company. Courts in this Circuit have repeatedly held similar allegations to be insufficient to sustain claims for securities fraud. *See* Mem. at 7-8 (citing cases for proposition that vague allegations of defendant's involvement in day-to-day management of the business are insufficient to support securities fraud claims); *id.* at 8-10 (citing cases establishing that Mr. Hirko's stock sales are not indicative of any fraudulent intent).

B. Plaintiffs Have Plead No Facts Implying That Mr. Hirko Played a "Significant Role" in the Preparation of False or Misleading Statements.

Plaintiffs contend that a defendant who plays a "significant role" in preparing a false or misleading statement actually uttered by another may be liable for securities fraud, even though the defendant never personally makes any false or misleading statement. *See* Opp'n at 78-79 (citing cases). The cases cited by plaintiffs in support of that proposition, however, make clear that "[s]ubstantial involvement must be plead with *particularity*. . . . [B]oilerplate and conclusory allegations will not suffice." *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp.2d 622, 673 (E.D. Tex. 2001) (emphasis supplied) (citing *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284-85 (3d Cir. 1992)). "Plaintiffs must accompany their legal theory with specific factual allegations." *Id.* Here, plaintiffs have made no "specific factual allegations" to support their conclusory assertion that Mr. Hirko played a significant role in preparing any false or misleading statement.⁴

⁴ Plaintiffs baldly assert that, by virtue of his "position[] with the Company," Compl. ¶ 399, Mr. Hirko, among others, "controlled and/or possessed the power and authority to control"

In fact, plaintiffs allege numerous facts *undercutting* the notion that Mr. Hirko in any way participated in any alleged fraud. For example, plaintiffs acknowledge that, in June 2000, Mr. Hirko's tenure as CEO of EBS ended. *See* Opp'n at 62. Plaintiffs thus concede that Mr. Hirko was not even employed at Enron during the time of the critical events alleged in the Complaint. For example, plaintiffs concede that the "VOD joint venture with Blockbuster Entertainment," which plaintiffs cite as central to the alleged fraud involving EBS, was not even announced until July 2000, a month *after* Mr. Hirko left EBS. *See* Opp'n at 16. Similarly, plaintiffs contend that it was "in *late 00/early 01* [after Mr. Hirko's departure], [that] Enron's financial results began to come under scrutiny," *id.* at 20 (emphasis supplied), which allegedly "put pressure on Enron's top executives" to commit fraud, *id.*

Furthermore, plaintiffs allege no facts, as they must to survive a motion to dismiss, indicating that, at the time Mr. Hirko left Enron, he had "actual knowledge" that Enron's pre-July 2000 statements regarding EBS—which statements cannot be characterized as anything more than cautiously optimistic—were false when made. *See* 15 U.S.C. §§ 78u-4(b)(1), 78u-5(c)(1)(B); *see also Azurix Corp. Secs. Litig.*, No. H-00-4034, 2002 WL 562819, at *14 (S.D. Tex. March 21, 2002); *BMC*, 183 F. Supp.2d at 888. Instead, plaintiffs rely on subsequent negative developments, occurring after Mr. Hirko's departure, to conclude that the pre-July 2000 statements must have been fraudulent. But courts in this circuit have repeatedly held that similar allegations of "fraud by hindsight" are impermissible. *See, e.g., Schiller v. Physicians Resource Group, Inc.*, No. Civ.A. 3:97-CV-3158-L, 2002 WL 318441, at *10 (N.D. Tex. Feb. 26, 2002); *Coates v. Heartland Wireless Comms., Inc.*, 55 F. Supp.2d 628, 635 (N.D. Tex. 1999) ("*Coates*

the content of Enron's SEC filings, reports, and press releases, *id.* ¶¶ 397, 399. Those passages hardly contain any "specific factual allegations" describing "with particularity" Mr. Hirko's alleged role in preparing any allegedly false or misleading statement. *See McNamara*, 197 F. Supp.2d at 673.

IP”); *Eizenga*, 124 F. Supp.2d at 985. In short, plaintiffs do not allege any facts implying either that Mr. Hirko knew that any statements were false when made or that he played any “significant role” in preparing any such statement.

In re Netsolve, Inc. Securities Litigation, another case cited by plaintiffs, recognized the general proposition that “if a plaintiff explains how the defendant was involved in a misleading press release or analyst conference call, that is sufficient. Or, if a plaintiff explains how the defendant ratified or helped prepare another defendant’s misleading public statement, this may suffice.” 185 F. Supp.2d 684, 698-99. But plaintiffs here have not “explained” how Joe Hirko participated in any of those things.⁵ Rather, they rely solely on the fact that he was a member of Enron’s “Management Committee” for a period of time, and that he sold less than 20% of his Enron stock, the smallest percentage of any individual defendant. *See* Opp’n at 53. On nearly identical facts, the court in *Netsolve* actually *dismissed* the plaintiffs’ claims:

Here the plaintiffs have not alleged that defendant Pojman contributed in any manner to the allegedly misleading statements. He is not listed as participating in any conference calls or press releases. Pojman is sued solely because he was the Vice President of Operations at NetSolve, and because he allegedly sold some 10,600 shares of his stock during the class period (the lowest amount of any of the individual defendants). That is not enough to keep him in this lawsuit.

NetSolve, 185 F. Supp.2d at 699. The claims against Mr. Hirko should similarly be dismissed.

II. NONE OF PLAINTIFFS’ ALLEGED INDICIA OF SCIENTER APPLIES TO MR. HIRKO.

Without distinguishing among the various individual defendants, plaintiffs broadly assert that they have satisfied the PSLRA’s requirement that plaintiffs “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind,” 15

⁵ Plaintiffs’ allegations (or lack thereof) thus differ sharply with those cases in which courts have sustained securities fraud claims against non-speakers who played a significant role in others’ misstatements. *See, e.g., In re Software Toolworks Inc. Secs. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (plaintiffs stated claim against accountants who “played a significant role in drafting and editing” statements at issue).

U.S.C. § 78u-4(b)(2), *i.e.*, that each of the defendants acted with knowledge or severe recklessness in making misrepresentations, *see Nathenson*, 267 F.3d at 407; *BMC*, 183 F. Supp.2d at 865 n.15. *See* Opp'n at 98. In support of that assertion, plaintiffs cite several categories of "facts" which, they claim, indicate "conscious misbehavior or recklessness" on the part of the individual defendants. *See id.* at 98-119. With respect to Mr. Hirko, none of the facts alleged in any of those categories suffices to establish scienter.

A. Alleged Misstatements and Omissions Concerning Enron's Non-EBS Businesses, or Concerning EBS After Mr. Hirko's Departure, Cannot Support an Inference of Scienter With Respect to Mr. Hirko.

Plaintiffs first sweepingly contend that "Insiders' misstatements about core Enron businesses demonstrate a strong inference of scienter under any applicable pleading standard." Opp'n at 98. This is so, plaintiffs claim, because "[f]acts critical to a business's core operations or an important customer generally are so well known to senior executives that knowledge may be attributed to them for pleading purposes." *Id.*

In support of that proposition, plaintiffs cite, *inter alia*, *Nathenson v. Zonagen Inc.*, 267 F.3d 400 (5th Cir. 2001). In *Nathenson*, the Fifth Circuit "recognize[d] that normally an officer's position with a company does *not* suffice to create an inference of scienter." *Id.* at 424 (emphasis supplied). In that case, however, "a number of special circumstances . . . , taken together, suffice[d] to support a different result." *Id.* at 425. Specifically, the company at issue was "essentially a one product company" and had only approximately thirty employees. *Id.* The President/CEO had made misleading public statements specifically relating to the product in question. *Id.* "Taking all of the above factors together [the Fifth Circuit] conclude[d] that they suffice[d], if perhaps only barely so, to support the necessary 'strong inference' of scienter on the part of" the President/CEO and the company. *Id.* The court held, however, that no similar

inference could be drawn with respect to two outside directors, “neither of whom is alleged to have made any statements or issued any press releases about [the specific product at issue].” *Id.*

Unlike the situation in *Nathenson*, Enron was a far-flung company, with diverse and largely unrelated operating units and thousands of employees. For example, the Complaint is devoid of any allegations suggesting that Mr. Hirko, an executive at Enron Broadband Services, had any knowledge whatsoever of “Enron’s Dabhol, India power-plant,” the accounting treatment applied to Enron International’s alleged “failed projects,” whether or not Azurix would “become a major global water company,” the relative worth of Enron Energy Services’ “contracts to provide businesses demand-side management of bundled energy-related products and services,” or the other non-EBS related issues listed at pages 100-101 of the Opposition. Furthermore, the few alleged misstatements and omissions relating to EBS, cited at pages 100-101 of the Opposition, all occurred after Mr. Rice replaced Mr. Hirko in June 2000. *See* Opp’n at 100-01. Mr. Hirko’s situation is substantially identical to that of the two defendants who were dismissed in *Nathenson*.

Although they attempt to dress it up as something else, plaintiffs’ argument really boils down to a contention that, because of his executive-level position, Mr. Hirko *must have* been aware of the allegedly fraudulent activity, even if it related to portions of Enron’s business having nothing to do with EBS. Courts in this circuit have rejected that argument time and time again, and the result should be no different here. *See, e.g., Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994); *BMC*, 183 F. Supp.2d at 885, 916; *In re Baker Hughes Secs. Litig.*, 136 F. Supp.2d 630, 648 (S.D. Tex. 2001); *Coates I*, 26 F. Supp.2d at 916.

B. The Alleged “Internal Complaints Made to Insiders” Cannot Support an Inference of Scienter With Respect to Mr. Hirko Because None of the Complaints Was Made While He Was Employed by Enron.

Plaintiffs contend that defendants’ scienter is further evidenced by their receipt of two internal complaints in August 2001—a memo from Sherron Watkins to Ken Lay and a letter from an unnamed “EES manager” to Enron’s Board—and the defendants’ alleged failure to take action on those complaints. *See* Opp’n at 101-02. Those complaints were lodged more than a year after Mr. Hirko left EBS and obviously cannot support any inference of scienter as to him.

C. The Alleged “Highly Inconsistent Statements” Preceding “Enron’s Demise” Were Made More Than One Year After Mr. Hirko’s Departure and Thus Have No Bearing on His Scienter.

Plaintiffs allege that in conference calls on August 18, 2001—more than one year after Mr. Hirko’s departure from EBS—Messrs. Skilling and Lay made public comments indicating that Enron was succeeding and that the company was free of accounting irregularities and other problematic issues. Opp’n at 103. Plaintiffs contend that “the proximity in time between defendants’ false assurances and the revelation of the truth evidences Insiders’ scienter at the time of their misstatements.” *Id.* As an initial matter, Mr. Hirko is not alleged to have participated in either of the conference calls at issue. And for good reason: he had left the company more than a year earlier. Statements allegedly made by Messrs. Skilling and Lay in August 2001 obviously have no bearing on Mr. Hirko’s scienter.

D. Plaintiffs Allege no Facts Indicating That Mr. Hirko Played Any Role in the Alleged GAAP Violations Underlying Enron’s Financial Restatement.

Plaintiffs contend that scienter may also be inferred from Enron’s alleged violations of GAAP and the size of the resulting restatement of the company’s financials. *See* Opp’n at 103-05. Fifth Circuit precedent is clear, however, that “the mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish scienter.” *Fine v. American Solar King Corp.*, 919 F.2d 290, 297 (5th Cir. 1990); *see also Lovelace v. Software*

Spectrum, Inc., 78 F.3d 1015, 1021 (5th Cir. 1996). “GAAP violations may give rise to an inference of fraudulent intent only when coupled with specific and properly pled allegations of fraud.” *Coates v. Heartland Wireless Comms., Inc.*, 100 F. Supp.2d 417, 430 (N.D. Tex. 2000) (“*Coates III*”); *see also Mortensen*, 123 F. Supp.2d at 1025-27.

For GAAP violations to support an inference of scienter, plaintiffs must “specify with particularity that the Defendants knew they were violating GAAP principles, or were otherwise severely reckless” in releasing inaccurate financial information. *Baker Hughes*, 136 F. Supp.2d at 649 (quotation omitted); *see also Lovelace*, 78 F.3d at 1020 (to establish scienter, “party must know that it is publishing materially false information, or the party must be severely reckless in publishing such information”). In this regard, “[a]llegations that a party knew or should have known that false representations were being made merely by virtue of his position within a company are, as a matter of law, insufficient to plead scienter.” *Branca v. Paymentech, Inc.*, No. Civ.A.3:97-CV-2507-L, 2000 WL 145083, at *10 (N.D. Tex. Feb. 8, 2000) (citing *Melder*, 27 F.3d at 1103). Yet that is precisely what plaintiffs have done with respect to Mr. Hirko. The Complaint does not allege that Mr. Hirko was an accountant or that he understood or had any input in deciding how to apply the complicated set of accounting rules at issue in this matter. *See, e.g.*, Compl. ¶¶ 429-505 (discussing GAAP rules and complicated factual underpinnings of Enron’s alleged “failure to consolidate subsidiaries and special purpose entities”); *id.* ¶¶ 533-557 (discussing GAAP rules relating to “mark-to-market accounting”); *id.* at ¶¶ 558-574 (discussing Enron’s alleged attempts to disguise loans “as hedging or derivative transactions”); *id.* ¶¶ 575-579 (discussing the impact of Enron’s alleged use of “non-recourse debt to finance a wide array of its plant building projects”). Consequently, the alleged GAAP violations and Enron’s resulting restatement cannot serve as a basis upon which to infer scienter with respect to Mr. Hirko.

E. Mr. Hirko's Alleged Sale of Less than 20% of His Enron Holdings—the Smallest Percentage of any of the Individual Defendants—is Insufficient to Raise any Inference of Scienter.

Plaintiffs cite the individual defendants' stock sales as an additional indicia of scienter. *See* Opp'n at 105. Tellingly, plaintiffs' Opposition responds specifically to only thirteen of the individual defendants' arguments regarding the relationship between their trading and any inference of scienter that might be drawn therefrom. *See* Opp'n at 121-34. Plaintiffs do not even attempt to refute Mr. Hirko's arguments, and for good reason: his alleged trading cannot support any inference of scienter. As discussed at length in Mr. Hirko's opening Memorandum, the fact that Mr. Hirko, a non-speaking defendant, sold 19.87% of his Enron stock—the smallest percentage of any of the 30 individual "Enron Defendants"—is not sufficient to raise any inference of scienter. *See* Mem. at 8-10.⁶ Plaintiffs raise nothing in their Opposition to refute the points made in Mr. Hirko's opening Memorandum, and Mr. Hirko stands on those points.

F. Plaintiffs Do Not Allege That Mr. Hirko Received any "Performance Bonus" That Might Otherwise Support an Inference of Scienter.

Finally, plaintiffs contend that bonuses awarded to certain of the individual defendants "provided additional motive for them to misrepresent and conceal Enron's true condition" and that such bonuses support an inference of scienter. *See* Opp'n at 134. But plaintiffs do not allege that Mr. Hirko ever even received such a bonus. *See id.* at 134 n.41 (listing defendants alleged to have received bonuses).

⁶ Plaintiffs curiously contend that each of the individual defendants "either fail to cite judicial authority or merely rely on non-binding decisions from within the Ninth Circuit to argue that their Enron stock sales cannot aid the court in finding a strong inference of scienter." Opp'n at 108. In his opening Memorandum, Mr. Hirko cited numerous cases from courts in the Fifth Circuit (in addition to authority from courts of appeals in other circuits) in support of that argument. *See* Mem. at 9-10 (citing *Nathenson v. Zonagen Inc.*, 267 F.3d 400 (5th Cir. 2001); *In re Secs. Litig. BMC Software, Inc.*, 183 F. Supp.2d 860 (S.D. Tex. 2001); *Coates v. Heartland Wireless Comms., Inc.*, 26 F. Supp.2d 910 (N.D. Tex. 1998); *Coates v. Heartland Wireless Comms.*, 55 F. Supp.2d 628 (N.D. Tex. 1999)).

III. THE SECTION 20(a) and 20A CLAIMS AGAINST MR. HIRKO MUST ALSO BE DISMISSED.

For the reasons stated in Mr. Hirko's opening Memorandum, plaintiffs also fail to plead a cause of action against Mr. Hirko under § 20(a) or 20A of the Exchange Act. *See* Mem. at 15-16. Typical of their response to Mr. Hirko's other arguments, plaintiffs do not address Mr. Hirko's individual situation at all with regard to the §§ 20(a) and 20A claims. Instead, they merely cite alleged wrongdoing by other defendants, *see, e.g.*, Opp'n at 137, 154, and state in a completely conclusory fashion that plaintiffs have adequately pled claims against *each* of the individual defendants. Such arguments highlight the paucity of evidence relating to Mr. Hirko, and are wholly inconsistent with the stringent pleading requirements imposed by the PSLRA.

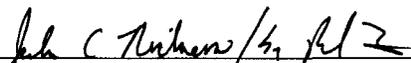
CONCLUSION

For the reasons set forth herein and in Mr. Hirko's opening Memorandum, the Court should dismiss with prejudice all claims against Joseph M. Hirko.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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



Paul D. Flack