UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	

LEAD PLAINTIFF'S SECOND SUPPLEMENTAL OPPOSITION TO PENDING MOTIONS FOR SUMMARY JUDGMENT (DOCKET NOS. 4816, 4817, 4818, 4824, 4825, 5333)

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

LEGISLATIVE HISTORY

SECONDARY AUTHORITIES

I. INTRODUCTION

When an investment bank, with superior knowledge,[1] engages the market for an issuer's securities by trading, underwriting and recommending those securities, that bank has a duty to disclose to the market any material adverse information about that issuer. *See First Virginia Bankshares v. Benson*, 559 F.2d 1307 (5th Cir. 1977) (multi-factor test to determine disclosure duty includes examining the relationship between the parties; access to information; benefit derived; reliance and role in initiating those transactions). Because sufficient facts exist to allow a jury to find such a duty, summary judgment must be denied. Defendants basically ignore the *First Virginia Bankshares* test in their briefing,[2] raising a barrage of a scatter-shot collateral arguments. Just why defendants run from the *First Virginia Bankshares* test is clear: Straightforward application of that test to the evidence in this case inexorably yields a triable issue of fact as to whether a duty to disclose exists.

Addressing defendants' central response, Lead Plaintiff's case is not "dead" as a result of the Fifth Circuit's decision in this case or the Supreme Court's decision in *Stoneridge Inv. Partners LLC*

---

[1] Here the defendant investment banks, Credit Suisse First Boston (USA), Inc. (n/k/a Credit Suisse (USA), Inc.), Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corp.) (n/k/a Credit Suisse Securities (USA) LLC) and Pershing LLC (f/k/a Donaldson, Lufkin & Jenrette Securities Corporation) ("CSFB"); Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch & Co., Inc. ("Merrill"); and Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.("Barclays") (collectively referred as "Banks"), gained superior knowledge of the financial fraud at Enron by engaging in (structuring, investing in, purchasing and selling), the deceptive financial transactions, *i.e.*, the prepays, FAS 125/140, share trust, related party and minority interest transactions ("Transactions"). *See* Lead Plaintiff's Trial Plan Pursuant to Court Order Docket No. 4706 (Docket No. 4729).

[2] In the 101 pages of briefing defendants submitted, the Banks are willing to devote but a few paragraphs to discussing *First Virginia Bankshares*. *See* Joint Supplemental Memorandum of Law in Support of Financial Institution Defendants' Motion for Summary Judgment (Docket No. 5970) ("Joint Brief" or "Joint Supplemental Memorandum") at 30-32. CSFB and Merrill each filed separate briefs which omit any mention of the case. Defendants also seek to circumvent application of the test by claiming that it has not been applied since 1993 and attempt to engraft upon it phantom requirements, such as the existence of a fiduciary duty – which the Fifth Circuit has never required.

v. Scientific-Atlanta Inc., 128 S. Ct. 761 (2008). The Fifth Circuit ***never addressed*** Lead Plaintiff's alternative theory of reliance based on the Banks' Enron-related market activity giving rise to a duty to disclose. Nor did the Supreme Court in *Stoneridge*, which dealt only with a transaction-based theory of liability.[3]

As a result, the Mandate Rule relied on by defendants – a specific application of the law-of-the-case doctrine – has no application here. The law-of-the-case doctrine provides that an issue of law or fact decided on appeal may not be ***re-***examined by either the district court on remand or by the appellate court on subsequent appeal. *See Fuhrman v. Dretke*, 442 F.3d 893, 897 (5th Cir. 2006). The doctrine thus has no application where – as here – the precise issues were never decided, even if those issues "'might have been decided but were not.'" *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 425 (5th Cir. 2006).

Defendants' attempt to manufacture a requirement that there exist a fiduciary relationship before a duty to disclose arises is without basis. Instead, the test requires a fact-driven examination of the relationship between the plaintiff and defendant; the parties' relative access to information to be disclosed; the benefit derived by the defendant; the defendant's awareness of plaintiff's reliance; and defendant's role in initiating the purchase or sale. *First Virginia Bankshares*, 559 F.2d at 1314. If the Fifth Circuit required a fiduciary duty as a prerequisite to a duty to disclose (as defendants claim), the Fifth Circuit in *First Virginia Bankshares* would never have articulated a multi-factor test; the court simply would have used the existence of a fiduciary duty *vel non* as a litmus test.

---

[3] *See Stoneridge*, 128 S. Ct. at 769. The Court did not, of course, address the question of whether a duty to disclose arises from the market activities in which defendants herein engaged. If anything, the *Stoneridge* decision supports this revised theory, for it reaffirms the availability of a presumption of reliance where, as here, a duty to disclose exists. *See Stoneridge*, 128 S. Ct. at 769.

In their briefing, the Banks shrink from addressing the facts of this case – which are that defendants had extensive interaction with ***the market*** for Enron securities in marketing, vouching for and recommending Enron and Enron-related securities. The market understands that an investment bank's central activity is "informational," *i.e.*, maintaining an information marketplace that facilitates security transactions.[4] Thus, when an investment bank engages in the activity alleged here, the market – quite reasonably – expects a level of candor. The Banks had superior knowledge over investors in that defendants were aware of the massive fraud being perpetrated through the structured finance Transactions. The Banks benefited from the market for Enron, making millions in investment banking fees, which would continue only as long as Enron's securities remained marketable. Defendants were also aware that the market relied on them in making their investment decisions – admitting that Enron "needed" them to "sell" their shares to investors, and claiming that they added great "value" to these shares.[5] Finally, by their underwritings, contact with credit rating agencies, and issuance of analyst reports recommending the purchase of Enron securities, defendants

---

[4] John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L. Rev. 301, 309 (2004) (securities analysts and investment bankers are among the "professional gatekeeper[s]" who "essentially assess[] or vouch[] for the corporate client's own statements about itself or a specific transaction"); Richard W. Painter, Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. Rev. 225, 276 n.200 (1996) ("Investors rely on 'reputational intermediaries,' such as bond rating agencies, investment advisors, and investment banks to cost effectively tap into the information market on their behalf."); Alan D. Morrison, William J. Wilhelm, Jr., *Investment Banking: Past, Present, and Future*, Journal of Applied Corporate Finance, at 10 (Winter 2007) (Ex. 1) ("[I]nvestment banks exist because they maintain an information marketplace that facilitates information-sensitive security transactions."). All references to exhibits, trial transcripts, expert reports or deposition transcripts are attached to Lead Plaintiff's Appendix of Exhibits in Support of Lead Plaintiff's Second Supplemental Opposition to Pending Motions for Summary Judgment (Docket No. 4816, 4817, 4818, 4824, 4825, 5333), filed concurrently herewith.

[5] *See* Ex. 15648 (CSFB analyst email "[Enron] needed us to publicly sell their stock almost as much as we needed them for the fees"); Ex. 50028 (Merrill's deceptive barge and electricity trades added "great value in their [Enron's] stock price"); Ex. 11114 (Enron paid Barclays half a million for the "privilege" of using Barclays' name for the cover of an offering prospectus to help sell it.).

were in fact seeking to initiate the purchase of Enron securities. These facts support a finding of a duty to disclose under the multi-factor *First Virginia Bankshares* test.

Defendants also misapply *Abell, Southland* and *Oscar* to argue that this is not an omissions case and that evidence of scienter and loss causation are lacking. Defendants' arguments are flawed and based on selective quotations or a misapplication of those cases. First, this case remains one primarily of omissions. Neither *Abell* nor any other Fifth Circuit authority stands for the proposition that in an omissions case the defendant must otherwise stand completely mute.[6] This Court has already held this is an omissions case. *In re Enron Corp. Sec. Litig.*, Opinion and Order (S.D. Tex. Feb. 8, 2007) (Docket No. 5391) ("2/8/07 Order") at 44. Next, scienter is present. Lead Plaintiff has identified the individual or individuals engaged in designing and structuring the Transactions providing knowledge of the fraud. These same individuals controlled the market activities at each bank as to Enron. Finally, defendants argue that loss causation is absent, but this is based only on a clear misconception of Lead Plaintiff's revised theory of liability. As this case remains an omissions case, the *Greenberg* to *Oscar* line of cases are inapplicable.[7] Loss causation is established as the realization of the risk surfaced, *i.e.*, disclosure of the true state of Enron's operations and financial condition.

---

[6] The Court has previously held:

> This Court follows the literal meaning of "primarily" in *Ute*, 406 U.S. at 153 ("primarily a duty to disclose"), *Finkel*, 817 F.2d at 359, and progeny and concludes a mixed context does not *per se* preclude the application of the *Ute* presumption, but does require the court to find the allegations are ***primarily*** of omissions.

In re Enron Corp. Sec. Litig., 529 F. Supp. 2d 644, 683 (S.D. Tex. 2006) (emphasis in original).

[7] This Court has already held that in the omissions context *Greenberg* is inapplicable. *Enron*, 529 F. Supp. 2d at 744. Even if *Greenberg* were applicable, Lead Plaintiff can meet the *Greenberg* standard. *See* Lead Plaintiff's Opposition to Motion for Summary Judgment filed by Defendants Merrill Lynch, Pierce Fenner & Smith Incorporated and Merrill Lynch Co., Inc. (Docket No. 5197) ("LP Merrill Opp.") at 183-186.

Having failed to defeat Lead Plaintiff's theory of liability, defendants are not entitled to summary judgment. This case should be decided on the merits. The Enron investors whom the Banks knowingly and willingly defrauded are entitled to submit their claims to a jury.

II. ARGUMENT

A. The Rule of Mandate Does Not Preclude Lead Plaintiff's Revised Theory of Reliance Based on a Duty to Disclose Arising from Market-Related Activities

In their Joint Supplemental Memorandum, the Banks assert that the Fifth Circuit's decision in *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1120 (2008), requires under the Rule of Mandate entry of summary judgment in their favor on Lead Plaintiff's revised theory of reliance. Joint Brief at 5.

In fact, as discussed in detail below, the Rule of Mandate does not preclude litigation of Lead Plaintiff's revised theory because the Fifth Circuit did not address or issue a holding on plaintiff's revised theory, and also because two exceptions to the Rule of Mandate – different evidence/change-in-law – allow consideration of plaintiff's revised theory.

The "Mandate Rule" is a specific application of the law-of-the-case doctrine. *Fuhrman*, 442 F.3d at 897. The law-of-the-case doctrine provides that "'an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.'" *Id.* at 896. Similarly, absent certain established exceptions, the Mandate Rule "compels compliance on remand" with both the "letter and spirit" of the appellate court's directions and "'forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" *Id.* at 897; *Tollett v. City of Kemah*, 285 F.3d 357, 363-65 (5th Cir. 2002).

"'The law of the case doctrine is closely related to the principle of *res judicata*.'" *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). As in cases involving *res judicata* or collateral estoppel, the law-of-the-case doctrine and the Mandate Rule preclude only matters

actually decided – holdings – not issues of fact or law discussed in *dicta*. *Society of the Roman Catholic Church v. Interstate Fire & Cas.*, 126 F.3d 727, 735 (5th Cir. 1997).[8] Unlike *res judicata*, however, the Mandate Rule does not preclude litigation of questions that "'might have been decided, but were not.'" *Af-Cap, Inc.*, 462 F.3d at 425.

In addition, even issues squarely addressed on appeal nonetheless may be reexamined when (i) the evidence on remand is "substantially different" from that considered on the appeal; (ii) a controlling authority has since made a contrary decision of law applicable to such issues; or (iii) the appellate court decision was clearly erroneous ***and*** would work a manifest injustice. *Fuhrman*, 442 F.3d at 897.[9] Here, the evidence supporting Lead Plaintiff's alternative theory is substantially different, and there has been a change and clarification of the law by the Supreme Court. The Supreme Court rejected the Fifth Circuit's holding that deceptive conduct alone could not form the basis of §10(b) liability, but held deceptive conduct in the realm of ordinary business transactions, *i.e.*, not the investment sphere, could not support reliance. *Stoneridge*, 128 S. Ct. at 769-771, 774 Under these circumstances the Mandate Rule does not preclude Lead Plaintiff's revised theory.

The Banks assert that Lead Plaintiff presented the duty-to-disclose issue to this Court for decision on the merits in the context of class certification. They say, in fact, that there was "extensive briefing and an evidentiary hearing" on the duty-to-disclose issue, and that "Lead Plaintiff vigorously argued to this Court that it could establish reliance based on an

---

[8] Nowhere below did Lead Plaintiff rely on the bank defendants' market activity giving rise to a duty to disclose. Thus, the Fifth Circuit never addressed the issue on appeal. Statements in judicial opinions which are "unnecessary" to the outcome of the case are generally considered *dicta*. *Breen v. Tex. A & M Univ.*, 485 F.3d 325, 336 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 377 (2007). Simply put, "*dicta* are not part of the mandate." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §4478.3, at 749 (2008).

[9] As noted, plaintiffs rely on the first two exceptions – not the clear-error exception.

omissions/*Affiliated Ute* theory because the Financial Institutions Defendants owed a duty of disclosure." Joint Brief at 6, 13. But the Banks fail to provide even a single citation to this purported "extensive briefing" or "vigorous argument." In fact, Lead Plaintiff did ***not*** extensively brief or argue that the Banks owed an independent duty to disclose, because at that time Lead Plaintiff was proceeding on a different theory of reliance, *i.e.*, that the existence of deceptive conduct – conduct that had both the ***purpose and effect*** of creating a false impression of earnings, cash flow or debt – was sufficient in and of itself to support findings on the issues of deception ***and*** reliance. Lead Plaintiff had neither the incentive nor the obligation to pursue an alternative reliance theory, especially in the context of a class certification hearing on which it prevailed.

Further to the point, ***the arguments and evidence on which Lead Plaintiff now relies in the wake of the Stoneridge decision are different and thus new***. It was only after *Stoneridge* that Lead Plaintiff analyzed the case in light of that decision and presented circumstances demonstrating that the Banks were engaged in extensive market activity ***in addition to*** the deceptive Transactions. This raises and supports an independent duty to disclose. That Lead Plaintiff began to develop this theory only after *Stoneridge* is hardly surprising. Before the Court's opinion was rendered, most parties and observers thought the issue for decision was whether the conduct of Motorola and Scientific Atlanta was "deceptive" within the meaning of §10(b). That is where the battle lines were drawn in the many briefs filed in that case. The *Stoneridge* opinion – in which the Court recognized that such conduct ***was deceptive*** within the meaning of, and thus violated, §10(b), but then held that no private damage claim had been stated for want of reliance under the facts of that case – occasioned re-analysis by Lead Plaintiff.

This Court, in certifying this case for class action treatment, rejected the view that an independent duty to disclose was necessary in the context of a scheme case under Rule 10b-5 (a) and (c), holding instead that the requisite duty was the "'duty not to engage in a fraudulent "scheme" or

"course of conduct" [that] could be based primarily on an omission'" that is "owed to the investing public generally." *Enron*, 529 F. Supp. 2d at 683, 739 (citing *Smith v. Ayres*, 845 F.2d 1360, 1363 & n.8 (5th Cir. 1988)). This Court's rulings that it agreed with the financial institutions that "under the circumstances alleged" the financial institutions did not owe a duty to disclose to plaintiffs (529 F. Supp. 2d at 683) was a comment that under the circumstances presented for consideration, the Banks owed no independent duty. It was Lead Plaintiff's contention – one this Court agreed with – that the Fifth Circuit had indicated the requisite duty is not a duty to disclose, but a duty not to engage in deceptive conduct that violates §10(b). The Court's comment was not on the evidence ***now*** presented and certainly not critical or necessary to the Court's decision that a class-wide presumption of reliance ***was*** available and that the class should be certified. Thus, it did not establish the law of the case.

The issue for decision before the Fifth Circuit in the context of its narrow Rule 23(f) review was whether this Court's class certification order – which did ***not*** in any sense depend upon a finding that the Banks did or did not have disclosure duties – should be upheld. Because the issue was not germane to the class certification decision, Lead Plaintiff did not brief or argue it, and the record on appeal (consisting primarily of the record developed at the class certification hearing itself) contained little if any of the evidence upon which Lead Plaintiff now relies in support of its post-*Stoneridge* duty argument. Thus, the duty-to-disclose issue was not fully and fairly litigated on appeal.

The Fifth Circuit reversed and remanded the class certification decision, ***holding*** that this Court erred in concluding that the requisite duty in a scheme case was a duty not to engage in a fraudulent scheme or course of conduct and in adopting a presumption of reliance on the record before it, and therefore erred in certifying the class on the basis of that record. As discussed below, on a Rule 23(f) appeal, that was all that the appellate court could have ruled upon. To the extent the

panel went further and assumed or suggested as a matter of ultimate fact that the Banks had no duty to disclose, its comments were based on the "circumstances alleged" below in the district court, not on Lead Plaintiff's alternative theory. The market activity facts were not the basis for plaintiffs' argument in this Court as to the Banks' violation of §10(b).

Appellate courts decide issues that are properly before them. To determine what an appellate court has held requires inquiry into the precise issues before it. *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *Society of the Roman Catholic Church*, 126 F.3d at 735. Here, the Fifth Circuit's review was "bridled by rule 23(f). Under that rule, 'a party may appeal only the issue of class certification; no other issues may be raised.'" *Bell v. Ascendant Solutions Inc.*, 422 F.3d 307, 314 (5th Cir. 2005) (citing *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001)). The appellate review necessarily focused on, and was limited to, consideration of this Court's class certification decision. Rule 23(f) review does not encompass other prior rulings of this Court. *Bell*, 422 F.3d at 314; *McKowan Lowe & Co. Ltd. v. Jasmine Ltd.*, 295 F.3d 380, 390 (3d Cir. 2002). Thus, to determine what issues were properly before the Fifth Circuit requires an understanding of what this Court actually decided in connection with class certification.[10]

"Thus, it is critical to determine what issues were actually decided in order to define what is the 'law' of the case. This requires a careful reading of the Court's opinion: observations, commentary, or mere dicta touching upon issues not formally before the Court do not constitute binding determinations." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982). The same analysis applies here: the existence of facts supporting a duty to disclose was not before the Fifth

---

[10] As noted above, in granting class certification, this Court held that the requisite duty in a scheme case is a "'duty not to engage in a fraudulent "scheme" or "course of conduct" [that] could be based primarily on an omission'" that is "owed to the investing public generally." *Enron*, 529 F. Supp. 2d at 683, 739 (citing *Smith*, 845 F.2d at 1363 & n.8).

Circuit, and that Court's "observations, commentary, or mere dicta touching upon" that issue "do not constitute binding determinations." *Id.*

In an attempt to expand the reach of the law of the case as established by the Fifth Circuit, the Banks argue that their own briefing brought the duty-to-disclose issue before the Fifth Circuit. In "dispensing" with a similar claim, the Third Circuit aptly held: "It is the limitation of Rule 23(f), not any arguments of the appellees, that determines our jurisdiction." *McKowan*, 295 F.3d at 390.

The Banks suggest that Lead Plaintiff ***should have*** presented and litigated the duty-to-disclose issue and may not now raise it. But the proceedings both in this Court and before the Fifth Circuit were limited in scope to this Court's finding as to the duty being a general one not to violate §10(b), and neither side was required to adduce evidence on all conceivable issues or face a waiver argument. Lead Plaintiff prevailed on its class certification motion. There was no adverse order to appeal; Lead Plaintiff certainly could not have taken a Rule 23(f) appeal from this Court's non-decisive comment to the effect that the Banks did not owe a duty to disclose under the circumstances alleged. The Banks' "Catch-22" approach – that Lead Plaintiff should now be thrown out of court for failing to appeal a non-appealable non-order – is contrary to *United States v. Lee*, 358 F.3d 315, 324 (5th Cir. 2004).

All other arguments aside, Lead Plaintiff should be able to advance and develop its revised theory of reliance because the law has changed. The *Stoneridge* decision requires a legal analysis different from the one this Court applied at the class certification hearing, and different from the one adopted by the Fifth Circuit panel. Lead Plaintiff should be permitted to re-sculpt the contours of its arguments in view of the *Stoneridge* decision.

B. Defendants Had a Duty to Disclose Rendering Them Liable to Lead Plaintiff and the Proposed Class[11]

1. Defendants Disregard the Fifth Circuit's Controlling Duty-to-Disclose Test of *First Virginia Bankshares*; Application of This Test Yields for Defendants a Duty to Disclose to the Entire Market

As Lead Plaintiff explained in its Supplemental Opposition, application of the *First Virginia Bankshares* factors creates a triable issue of fact as to whether the Banks had a duty to disclose to Lead Plaintiff and the proposed class.[12] Lead Plaintiff analyzed each of the factors' application to the facts of this case, arguing that they are satisfied here. *See* Supp. Opp. at 30-36. As stated, defendants fail to offer much in response, and to the extent they do, it fails to impugn Lead Plaintiff's analysis.

Defendants first attempt to divert this Court's attention from *First Virginia Bankshares* by claiming that *Chiarella v. United States*, 445 U.S. 222 (1980), supposedly limits the existence of a

---

[11] Merrill claims the Court has "twice" held that it owed no duty of disclosure to investors. Second Supplemental Submission of Defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch & Co. Inc. in Support of Their Motion for Summary Judgment (Docket No. 5970) ("Merrill Brief") at 6-7 (citing *Enron*, 529 F. Supp. 2d at 683 and 2/8/07 Order at 44). But this is misleading. In those opinions, the Court addressed Lead Plaintiff's transactions-based scheme liability theory – not the alternative theory presented here. Thus while the Court did not find a duty to disclose, such conclusion was limited to the facts before it; the Court stated it agreed with the Banks' argument that "***under the circumstances alleged***" – *i.e.*, where their relevant conduct was the structured financial Transactions – they owed no duty to disclose to investors. *Enron*, 529 F. Supp. 2d at 683. Citations and footnotes are omitted and emphasis is added unless otherwise noted. Because this ruling was limited to the transactions-based scheme liability theory, it does not foreclose Lead Plaintiff's alternative theory presented in Lead Plaintiff's Supplemental Opposition to Pending Motions for Summary Judgment (Docket No. 5939) ("Supp. Opp." or "Supplemental Opposition"), which is that defendants' marketing activity while engaging in the Transactions created a duty to disclose.

[12] Again, the *First Virginia Bankshares* factors are "the [(1)] relationship between the plaintiff and defendant, [(2)] the parties' relative access to the information to be disclosed, [(3)] the benefit derived by the defendant from the purchase or sale, [(4)] defendant's awareness of plaintiff's reliance on defendant in making its investment decisions, and [(5)] defendant's role in initiating the purchase or sale." *First Virginia Bankshares*, 559 F.2d at 1314.

duty to disclose to situations where there occur "specific transactions between" the parties and there exists a "fiduciary" relationship. *See* Joint Brief at 26. But this argument fails for a number of reasons.[13]

First, *Chiarella* simply does ***not*** say, as defendants claim, that the duty to disclose is limited to situations where there occur "specific transactions between" the parties and a "fiduciary" relationship exists. *See* Joint Brief at 26. While the *Chiarella* court examined whether there was "a relationship" between the parties (*see* 445 U.S. at 231-32), it did ***not*** require a fiduciary duty or transactions between the parties.[14] And the need to examine the relationship of the parties is already incorporated into the *First Virginia Bankshares* test, as that test includes this inquiry as a factor. *See* n.12, *supra*. Lead Plaintiff has described how this factor militates in favor of finding a duty to disclose here. *See* Supp. Opp. at 32-33.[15]

---

[13] At one point defendants criticize Lead Plaintiff's reliance on *United States v. O'Hagan*, 521 U.S. 642 (1997), asserting that because *O'Hagan* "involved an appeal of a criminal conviction for insider trading," it supposedly has no bearing on the standard for civil liability. *See* Joint Brief at 32. Yet *Chiarella* itself was an appeal from a criminal conviction for insider trading. Thus, under defendants' own reasoning, *Chiarella* has no bearing on the duty-to-disclose issue here. *See Chiarella*, 445 U.S. at 225 ("In January 1978, petitioner was indicted on 17 counts of violating §10 (b) of the Securities Exchange Act of 1934 (1934 Act) and SEC Rule 10b-5. After petitioner unsuccessfully moved to dismiss the indictment, he was brought to trial and convicted on all counts. The Court of Appeals for the Second Circuit affirmed petitioner's conviction. 588 F.2d 1358 (1978). We granted certiorari, 441 U.S. 942 (1979), and we now reverse.").

[14] That *Chiarella* does not require a fiduciary duty or transactions between the parties for there to exist a duty to disclose is further made clear the Fifth Circuit's reapplication of the *First Virginia Bankshares* test in two subsequent cases ten years after *Chiarella* was decided (*Kaplan v. Utilicorp United*, 9 F.3d 405, 407-08 (5th Cir. 1993); *Abbott v. Equity Group*, 2 F.3d 613 (5th Cir. 1993)). In those cases the Fifth Circuit did not require a fiduciary duty or transactions between the parties.

[15] Defendants also cite *SEC v. Zandford*, 535 U.S. 813 (2002), for the proposition that a duty to disclose supposedly "requires" a relationship of trust and confidence between the parties. *See* Joint Brief at 26. *Zandford*, however, does not impose any such "require[ment]," but instead simply states that silence may be actionable where such a relationship creates a duty to disclose. *See Zandford*, 535 U.S. at 823.

It is, moreover, clear that the *First Virginia Bankshares* test does ***not*** require the existence of a fiduciary duty before finding a duty to disclose. Indeed, if a fiduciary duty were required, this five-factor test would not exist at all; rather the analysis would turn solely on the existence of a fiduciary duty. Also, in the *First Virginia Bankshares* case itself, the court did not find the existence of a fiduciary relationship before concluding that the jury could rightly find that a duty to disclose existed. The defendant Heller (the financier) was a ***complete stranger*** to Michelman (broker for the acquiror of Benson, the company Heller financed) when he contacted Heller for information. Yet the court ruled that the jury could conclude that a duty to disclose existed.[16]

Next, defendants attempt to argue against the finding of a duty to disclose under *First Virginia Bankshares* because in *Abbott*, 2 F.3d 613, those factors were held not satisfied. *See* Joint Brief at 31-32. In *Abbott*, there was virtually no evidence to satisfy any of the *First Virginia Bankshares* factors; this in no way renders the *First Virginia Bankshares* test unavailable to Lead Plaintiff. As indicated in the Supplemental Opposition, Lead Plaintiff has marshaled a sizeable body of evidence sufficient to support a favorable jury finding on each prong of the test. For example, defendants observe that in *Abbott* there was no evidence the defendants' conduct was viewed by the plaintiffs as an "'approval of the merits of the investment.'" *See* Joint Brief at 32 (quoting *Abbott*, 2 F.3d at 623). Yet such evidence exists here – defendants themselves acknowledged that their marketing activities were calculated to endorse and thus sell Enron's securities to the public.[17] And

---

[16] This complete lack of preexisting relationship between Heller and Michelman also renders invalid defendants' repeated insistence that *First Virginia Bankshares* "require[s]" a "nexus" between the parties for the duty to disclose to exist. *See* Joint Brief at 30-31.

[17] *See* Ex. 15648 (CSFB analyst email stating that "***[Enron] needed us to publicly sell the stock*** almost as much as we needed them for the fees"); Ex. 11114 (email between Barclays personnel concerning the Zero Coupon Notes offering states that Enron paid the bank $500,000.00 "[f]or the privilege of having Barclays on the cover of the prospectus"). That is, Barclays' mere association

in issuing analyst reports with buy recommendations and high target prices for Enron stock, defendants CSFB and Merrill literally made public "approval[s] of the merits of the investment." *Abbott*, 2 F.3d at 623. As discussed *infra* at §II.B.3.(d), analyst reports such as those issued by CSFB and Merrill were immediately picked up by media agencies which repeated their general content to ***the market at large***. Thus, it is hardly "speculation" (Joint Brief at 31) that the entire market learned of Merrill's and CSFB's endorsements of Enron stock, and defendants of course were aware of this.

Also, critically, in *Abbott* the court found no evidence that the defendants had "superior knowledge" over the plaintiffs. 2 F.3d at 622. As Lead Plaintiff explained, this factor appears to be near definitive in the analysis, as in *First Virginia Bankshares* itself, the parties did not have ***any*** significant relationship – yet the Fifth Circuit highlighted Heller's "'superior knowledge of inside information'" in finding the duty to disclose existed (559 F.2d at 1317). *See* Supp. Opp. at 33 n.57.[18] Notably, defendants here do not even address this factor – much less dispute that it is satisfied. This factor is patently satisfied here (*see* Supp. Opp. at 33), and sharply distinguishes *Abbott* from the instant case.[19]

---

with the offering had enormous value to Enron – and this was only because it meant so much to the investing public.

[18] *See First Virginia Bankshares*, 559 F.2d at 1317 ("As matters stood, Heller had superior knowledge of inside information. ***On the basis of this information***, the jury could find that Heller had a duty to disclose to Michelman the information uncovered by the May 1972 examination.").

[19] Defendants also contend that Lead Plaintiff cannot rely on *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), to create a duty to disclose because, supposedly, "the proposed class representatives confirmed that the Financial Institution Defendants did not make any express representations to them." Joint Brief at 28. This misses the point. The Banks' marketing activity created a relationship between the Banks and the class. In addition, Lead Plaintiff and several named plaintiffs received analyst reports from and/or were clients of CSFB and Merrill. This information was produced to defendants in this case.

Defendants also point to the *Abbott* court's observation that the defendants had "no contact" with the plaintiffs. *See* Joint Brief 32. But this does not represent some requirement that there be "contact" between the parties for the duty to exist. In *Abbott* the court considered this fact as bearing on the fourth factor, "'the defendant's role in initiating the purchase or sale.'" 2 F.3d at 623. This factor is satisfied in this case, as in this case a jury could find that the Banks did play a role in initiating the purchase of the securities through underwritings, analyst reports, and the equity trades.[20] In any event, the Fifth Circuit does not require that there be contact between the parties,[21] or that there must be inducement of the purchase or sale, before the duty to disclose arises. *Abbott* itself cited approvingly to *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1330 (8th Cir. 1991), *aff'd*, 507 U.S. 170 (1993), as applying the *First Virginia Bankshares* test. *Abbott*, 2 F.3d at 622. *Reves* rejected the defendant's argument that no duty arose because there was no evidence of its "contact" with the class, and found a duty to disclose notwithstanding that the inducement factor was ***not*** satisfied. *See Reves*, 937 F.2d at 1331. *Reves* also confirms that a "relationship for purposes of Rule 10b-5 liability . . . requires neither a 'physical presence nor face to face conversation.'" *Reves*, 937 F.2d at 1329 (citing *SEC v. Washington Co. Util. Dist.*, 676 F.2d 218, 223 (6th Cir. 1982)).

---

[20] As explained *infra* at §II.B.3.(a), many of the equity trades done by CSFB, and the one by Merrill, were calculated to give a false impression to the market of increased demand for Enron stock. The goal was to support the price of Enron stock in part through increased buying activity wrought by this false impression.

[21] Nor did the Supreme Court in *Affiliated Ute* require the contact defendants now argue is imperative. Just the opposite. In *Affiliated Ute*, the Supreme Court found the defendants liable to persons to whom they made no representations or purchases from, noting: "The individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 81 1/3% of the sales, but for other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers." 406 U.S. at 153.

Thus, what little argument defendants make against the use of *First Virginia Bankshares* to find a duty to disclose here is unavailing. For the reasons Lead Plaintiff originally stated, application of this test creates a duty to disclose for defendants. *See* Supp. Opp. at 30-36.

2. The Kitchen Sink Arguments

Defendants make several kitchen-sink arguments (not addressing the *First Virginia Bankshares* factors), which they consider to be related to the duty-to-disclose issue. *See* Joint Brief at 21-27. Many of these arguments are unrelated to the duty issue, and all of them are meritless, straw-man distractions. Defendants argue that reliance is lacking because Lead Plaintiff previously said the issues in this case and *Stoneridge* are the "same." *See* Joint Brief at 21-23. But as Lead Plaintiff makes clear, its current proposed claim is an "***alternative*** theory of liability" (Supp. Opp. at 43) – *i.e.*, "***alternative***" to the case Lead Plaintiff said was the "same" as *Stoneridge*. Again, this alternative theory was never presented in *Stoneridge*.

Defendants also argue that the Supreme Court's denial of certiorari in *Regents* (as opposed to the "grant, vacate and remand" order it issued in *Avis Budget Group, Inc. v. Cal. State Teachers' Ret. Sys.*, 128 S. Ct. 1119 (2008)) must mean that the Supreme Court saw no possible merit in this case. *See* Joint Brief at 23-24. But again, the Supreme Court was never presented with the legal theory in the Supplemental Opposition, and in any event, the High Court has repeatedly held that "'denial of certiorari imparts no implication or inference concerning the Court's view of the merits.'" *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *see also Farr v. Pitchess*, 409 U.S. 1243, 1245 (1973); *Hughes Tool Co. v. Trans-World Airlines*, 409 U.S. 363, 365 n.l (1973); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

Defendants further claim it dispositive that *Stoneridge* mandates that liability should turn on "the conduct of the defendants, not their commercial status or economic role." Joint Brief at 24. But in its Supplemental Opposition, Lead Plaintiff indeed seeks to hold defendants liable for their

conduct – *i.e.*, their engagement in the deceptive transactions coupled with the Banks' activity in the market for Enron and Enron-related securities and their failure to disclose material information about Enron (Supp. Opp. at 27) – not their mere "commercial status or economic role." Defendants' need to distort Lead Plaintiff's position evinces their inability to prevail legitimately.

Defendants claim that the "distinction that Lead Plaintiff tries to find in the *Stoneridge* decision – between defendants who operate in 'the marketplace for goods and services' and those who operate in the 'investment sphere'" – supposedly "does not exist" and also is a mere "policy observation." Joint Brief at 24-25. Not so; the three dissenting Justices observed that this was an important part of the majority's holding: "The Court next ***relies*** on ***what it views as a strict division*** between the 'realm of financing business' and the 'ordinary business operations.'" *Stoneridge,* 128 S. Ct. at 777 (Stevens, J., dissenting).[22]

Defendants also claim to have found yet "another example of Lead Plaintiff abandoning prior positions in a last-ditch effort to salvage its . . . [claims]" in that Lead Plaintiff, in an *amicus* brief, stated that §10(b) "'plainly does not distinguish among potential defendants based on title, profession, or other relationship.'" Joint Brief at 28 n.18. Defendants take this statement by Lead Plaintiff in the *amicus* brief to somehow mean that Lead Plaintiff committed to the position that a duty to disclose requires a "fiduciary relationship" and does not turn on "commercial status!" *Id.* at 25. As is clear from the quote used by defendants, Lead Plaintiff said nothing of the sort.

Defendants are completely off-base when they claim that Lead Plaintiff's contention that "a duty to disclose is often found where the relevant audience – here, the market – can be said to have a

---

[22] In *Stoneridge*, the issue of where the conduct occurred bore on the question of whether the "deceptive acts were . . . communicated to the public." This question, in turn, related to entitlement to the fraud-on-the market presumption of reliance. *See id*. at 769. This has nothing to do with the question of whether there exists a duty to disclose, which brings with it eligibility for the *Affiliated Ute* presumption of reliance.

reasonable expectation of disclosure" (Supp. Opp. at 12), supposedly represents Lead Plaintiff's "latest invention [which] is not supported by the law" (Joint Brief at 26-27). In fact, it was the Fifth Circuit in *First Virginia Bankshares* which, over twenty years ago, recognized that a factor in the duty analysis was defendant's awareness of the "plaintiff's reliance on defendant in making its investment decisions." 559 F.2d at 1314. In context, such "reliance" can only mean the plaintiff's "reliance" that the defendant would provide accurate information.[23] Thus, far from being Lead Plaintiff's "latest invention," under the controlling law, the plaintiff's expectation of disclosure ***is*** a factor in the duty-to-disclose analysis. And because in this case investors did look to defendants for full disclosure (*see* Supp. Opp. at 32), this factor militates in favor of finding a duty to disclose.

Finally, citing *Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 636 (S.D. Tex. 2007), defendants insist that whether a duty to disclose exists is "clearly a question of law." Joint Brief at 27 n.19. They omit, however, that the *Celanese* court concerned a disclosure duty in a unique context – ***that of a Texas common law fraud claim*** – and thus simply repeated the state's precedent on the issue. *Celanese*, 475 F. Supp. 2d at 636 (citing various Texas state-law citations). That state-law context renders defendants' broad assertion inapposite to this federal securities action. (Indeed, it would even be incorrect as a broad statement of solely state law, for the issue varies from state to state. *See, e.g.*, *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 223-24 (E.D. La. 1998) (noting that several states reserve the question of a duty to disclose to jurors).)

Rather than citing state law, then, defendants should have heeded Fifth Circuit authority on the duty to disclose under the ***federal securities laws***, such as *First Virginia Bankshares*. There, in affirming the jury's verdict for federal securities fraud, the Fifth Circuit discussed three areas of

---

[23] Indeed, the significance of the *First Virginia Bankshares* court's observation that Heller at one point knew that the plaintiff was seeking to purchase Benson (559 F.2d at 1314) was of course that Heller understood the plaintiff was looking to it for ***accurate information*** about Benson.

potentially actionable omissions and explained that the "***jury could properly find a duty to disclose*** in any of these situations." *First Virginia Bankshares*, 559 F.2d at 1317. Plainly, whether a duty to disclose exists as to each of the Banks is a fact-laden inquiry best suited for a trier of fact; all that this Court is required to do at present is decide whether a ***triable*** issue of such fact exists.[24]

3. Defendants' Duty to Disclose Extended to the Entire Market

As indicated above, the defendants had a duty to disclose under the multi-factor *First Virginia Bankshares* test. As also demonstrated, this duty to disclose runs to the entire market – *i.e.*, to Lead Plaintiff and the proposed class. The reason: As in *Affiliated Ute*, the defendant Banks' market activity in Enron established a relationship with the entire market for Enron – even those investors with which they had no direct contact. Lead Plaintiff's Supplemental Opposition explains that pursuant to the multi-factor *First Virginia Bankshares* test, defendants owed a duty to disclose to all Enron investors. Not once do defendants address this in their briefs.

That the application of the *First Virginia Bankshares* test yields a duty to the entire market explains the particular tactical approach taken by defendants in their briefs: ignore the *First Virginia Bankshares* case, heavily emphasize procedural arguments, and analyze their various market conduct (*i.e.*, equity trades, underwritings, interactions with credit ratings agencies, and issuance of analyst reports) *seriatim*, concluding that no market-wide duty could emanate from any of them individually. *See, e.g.*, CSFB Defendants' Separate Supplemental Memorandum of Law in Support of Their Motion for Summary Judgment (Docket No. 5969) ("CSFB Brief"); Merrill Brief; Barclays Defendants' Supplemental Memorandum in Response to Lead Plaintiff's Supplemental Opposition to Pending Motions for Summary Judgment (Docket No. 5971) ("Barclays Brief" or "Barclays

---

[24] Defendants' ancillary argument that the purported "question of law" has already been decided "against Lead Plaintiff" (Joint Brief at 27 n.19) is dealt with extensively elsewhere in this Brief. *See* §II.A.

Supplemental Memorandum"). However, *First Virginia Bankshares* requires that all of the defendants' activities be considered in connection with each other – not separately – in determining whether a duty arises.

Defendants persistently engage in another error, both in attempting to extract themselves from their duty to shareholders and in their discussion of other elements of plaintiffs' claim: defendants confuse the requirements of creation of a duty with the requirements of liability for failing to comply with that duty. So, for example, defendants complain that plaintiffs have not demonstrated that the acts that establish their duty – analyst "buy" recommendations, their trading in Enron stock, their contacts with rating agencies, etc. – were accompanied by scienter, or that they caused plaintiffs' losses. But the creation of a duty does not require scienter or loss causation. A duty can exist in the absence of any wrongdoing at all. Rather, it is defendants' failure to act in accordance with their duty – their failure to disclose material information about Enron – that is the wrongdoing and that must meet the other elements of §10(b).

a. Equity Trades

As Lead Plaintiff explained, CSFB and Merrill's engagement in the equity trades created for these banks a duty to abstain or disclose.[25] *See* Supp Opp. at 37. Defendants traded and failed to disclose their knowledge of the fraud.[26]

Defendants cavil that "in order to plead any insider trading claim with requisite particularity," Lead Plaintiff "must identify a specific employee who engaged in an alleged inside transaction, possessed material non-public information, and knowingly failed to make relevant disclosures." Joint Brief at 35-36. The point of Lead Plaintiff's argument is that defendants' conduct gives rise to a duty – it is not defeated with an argument about scienter. By addressing a liability element of §10(b), the Banks hope to distract the Court from the real inquiry here . Lead Plaintiff is not making an "insider trading claim" *per se*. *See* CSFB Brief at 12 ("Lead Plaintiff

---

[25] Merrill claims: "Because Lead Plaintiff cannot base an abstain or disclose duty on the fact that Merrill Lynch participated in and knew about the barge and energy transactions or the funding of LJM2, Lead Plaintiff argues that the necessary fiduciary relationship arose ***by virtue of Merrill Lynch's participation as an underwriter*** in Enron's 1998 and 1999 common stock offerings and by virtue of Merrill Lynch's participation as an underwriter of certain foreign debt securities in 2000 and 2001." Merrill Brief at 16. CSFB makes similar claims. CSFB Brief at 12. The Banks mischaracterize Lead Plaintiff's claim. Under *Dirks*, an underwriter, consultant or other outsider may obtain information and become a fiduciary to shareholders for purposes of the abstain-or-disclose rule. *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983). This occurred here, as the Banks were engaged by Enron for the financing Transactions, as well their numerous underwritings, turning the Banks into fiduciaries for the abstain-or-disclose rule. *See* Supp. Opp. at 37.

[26] As to Merrill's claim that "Lead Plaintiff does not identify a basis for applying a relevant abstain or disclose duty on the particular days of Merrill Lynch's share purchases," Merrill Brief at 15, Merrill has it backwards. The "basis" for the abstain-or-disclose duty ***is*** the share purchases. Nor can CSFB obtain relief under *Stoneridge* arguing that because the trades were "undisclosed" transactions, *Stoneridge* demonstrates reliance is unavailable. In the first instance this is factually wrong. While the parties to the equity trades were not disclosed, the trades were apparent to the market in that they impacted volume and share price. Second, it is not the trades *per se* that form the basis of Lead Plaintiff's argument; it is the undisclosed information coupled with a disclosure duty leading to an *Affiliated Ute* presumption of reliance. *See Shapiro v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 495 F.2d 228, 238 (2d Cir. 1974) (The basis for the tort upon which causation rests is the non-disclosure, not the trading. It is that nondisclosure coupled with a disclosure duty because of the trades that gives rise to an *Affiliated Ute* presumption of reliance.).

never has and does not now purport to bring a claim for insider trading."). Lead Plaintiff is asserting that CSFB's and Merrill's trading in Enron securities (*i.e.*, the equity trades) while in possession of material non-disclosed information gained from their engagement by Enron in the deceptive structured finance Transactions, as well as numerous underwritings, created a duty to disclose. The issue here is the duty ultimately created by the abstain-or-disclose rule, not scienter. In any event, Lead Plaintiff has identified all of the required information to establish scienter as to both CSFB and Merrill. *See* Supp Opp. at 45-51. Each Bank had a small select group of individuals who had knowledge of Enron's financials from the Transactions and orchestrated the Banks' Enron-related market activities – including the equity trades. *See supra* §II.C.1.

Defendants argue that to the extent their trading created a duty to disclose, this duty did not extend to "the entire market." *See* Joint Brief at 36-37. But this argument is wrong for a number of reasons. In making this argument, defendants rely on the fact that §20A of the Securities Exchange Act provides for liability ***only*** to those trading contemporaneously with the insider. *See id*. at 37. But Lead Plaintiff is ***not*** suing defendants under §20A; its suit is proceeding under §10(b). So the strictures and limitations of §20A for liability do not apply here.[27] In fact, Congress provided for such in enacting §20A:

---

[27] Even if plaintiffs were pursuing a §20A claim, The Regents of the University of California and other named plaintiffs traded on the same day or within days of CSFB's and Merrill's equity trades. The following chart sets forth the number of shares purchased by a named plaintiff on the same day (or day after) CSFB/Merrill purchased.

Date	CSFB	Merrill Lynch	Plaintiff
04/17/00	511,200		SFERS: 500
06/27/00	750,000		Regents: 60,000
06/29/00		150,000	Amalgamated Bank: 1,800
06/30/00		636,700	Regents: 145,000
07/18/01	100,000		Regents: 2,000
07/19/01	125,000		SFERS: 300
07/23/01	700,000		SFERS: 1,000
08/14/01	400,000		S. Smith: 100 (8/15/01)

> (d) Authority not to restrict other express or implied rights of action. Nothing in this section shall be construed ***to limit or condition*** the right of any person to bring an action to enforce a requirement of this title [15 USCS §§78a *et seq*.] or the availability of any cause of action ***implied*** from a provision of this title [15 USCS §§78a *et seq*.) [(*i.e.*, the implied cause of action under §10(b))].

15 U.S.C. §78t-1(d). The legislative history indicates that at the full Committee markup, the Committee had accepted an amendment to delete language in the bill that would have created an express cause of action for non-contemporaneous traders, but only because it wanted the implied cause of action for such to develop freely:

> The Committee's intention in this amendment was to avoid creating an express private cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to give[] the courts leeway to develop such private rights of action in an ***expansive fashion*** in the future.

H.R. Rep. No. 100-910, at 27 (1988). Again, because Lead Plaintiff is not asserting liability for insider trading but relying on the activity to establish a duty, defendants' arguments miss the mark. Moreover, the same Congress specifically recognized that insider trading results in injury to persons other than contemporaneous traders:

> Despite the absence of explicit statutory language for private rights of action outside of the contemporaneous trader plaintiff situation, the Committee recognized that ***there clearly are injuries caused by insider trading to others beyond contemporaneous traders***. In the view of the Committee, Section 10(b), Rule 10b-5, and other relevant provisions of the Exchange Act have sufficient flexibility to recognize and protect any person defrauded, or harmed by a violation of any provision of this title or the rules or regulations thereunder by another person's purchasing or selling a security while in the possession of material, nonpublic information, or communicating such information to others.

Id. at 27-28. It is precisely this type of harm which Lead Plaintiff seeks to remedy. As discussed directly below, CSFB and Merrill's breach of disclosure duty engendered by the abstain-or-disclose

---

There is no doubt that numerous class members purchased while defendants' trades still affected the price of Enron stock.

rule harmed Lead Plaintiff and the proposed class giving rise to a disclosure duty to the entire class.[28]

The tort underlying the abstain-or-disclose rule is not an injury occasioned by the trades but an injury based on the undisclosed material information. *See Shapiro*, 495 F.2d 228. As a result, causation in fact, reliance is presumed by the Supreme Court's holding in *Affiliated Ute*. *Id.* In *Shapiro* the district court described the fraud:

> [T]he fraud is not, as defendants would have this Court rule, the act of trading. The essence of the fraud was the nondisclosure of material information when defendants chose to make their sales. Thus employing the proper conception of defendants' fraudulent acts, plaintiffs have alleged that defendants' fraud "induced" them to purchase shares they would not otherwise have purchased.

Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 353 F. Supp. 264, 277 n.5 (S.D.N.Y. 1972), *aff'd*, 495 F.2d 228 (2d Cir. 1974).

The Second Circuit in *Shapiro* took the causation-in-fact standard from the decision in *Affiliated Ute*. The Second Circuit said *Affiliated Ute* had "dispense[d] with . . . proof of reliance as a prerequisite . . . [for] recovery in a private damage action" based on nondisclosure. *Shapiro*, 495 F.2d at 240. Although "[d]efendants [in *Shapiro*] argued that the *Affiliated Ute* rule of causation in fact should be confined to . . . case[s] . . . involving face-to-face transactions," the Second Circuit rejected this and maintained that *Affiliated Ute* was controlling on the causation issue. *Id.* It said the

---

[28] It is entirely proper in nondisclosure cases to analyze causation in terms of what would have happened had disclosure been made. In *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), the court addressed a claim by the plaintiff that a share-for-share merger of a company in which he held stock was accomplished through fraudulent and manipulative practices which rendered the share ratio unfair to him. The plaintiff contended that the defendant was liable under, *inter alia*, Rule 10b-5, for failing to disclose the improper practices in the merger proxy. The court, in finding the element of causation satisfied, analyzed the issue by inquiring about what would have transpired had disclosure been made: "Thus, ***had there been full disclosure here, the merger ratio would have been unfair on its face and the shares of Penn-Dixie in the open market would have sold for less*** . . . . [W]e are of the view that sufficient causation is alleged." 507 F.2d at 384.

Affiliated Ute rule was not dependent on the "character of the transaction" (that is, whether it was face-to-face or on a national securities exchange), "but rather . . . [on] whether . . . [there was a duty] to disclose the inside information." *Id.* In *Shapiro*, the Second Circuit held the "defendants were under a duty to the general investing public, including plaintiffs, not to trade in or to recommend trading in Douglas stock without publicly disclosing the revised earnings information in their possession. They breached that duty. Causation in fact has therefore been established." *Id.* Here, the Banks breached their duty by not disclosing their knowledge of the fraud at Enron to the investing public. Causation in fact is thus established.

Thus, while the law provides that even though liability for insider trading may be limited to contemporaneous traders, the disclosure duty – if it is to be satisfied – requires a full, public disclosure to the entire market of the material facts. Merrill cites and also relies on *Shapiro*, 353 F. Supp. at 276, as authority defining the extent of liability in the insider trading context. *See* Merrill Brief at 17. That case – indeed, the very sentence which Merrill partially quotes – is instructive on the extent of the disclosure duty:

> [O]n a national securities exchange . . . it is virtually impossible for an investor to predict ***who will match his buy or sell order*** . . . .
>
> . . . [T]his Court finds that defendants, who were trading on an essentially anonymous market, were obligated to disclose the information in their possession to ***all potential investors*** trading in the same market, including plaintiffs and the members of their proposed class. It may very well be that for transactions in market places such as the New York Stock Exchange, where the number of potential investors is almost unlimited, some form of publication of the information intended ***to reach the entire investing public*** is required.
>
> * * *
>
> ***[A]ll*** investors trading on the same market as defendants had the right to evaluate the information withheld before making their investment decisions.

Shapiro, 353 F. Supp. at 276-78 (some emphasis in original).[29]

The rule that, in the context of a national exchange, effective disclosure must be to the full public only makes sense. The Supreme Court has held the duty to disclose is (quite obviously) one which requires disclosure "***before***" trading. *See Dirks*, 463 U.S. at 653 ("The SEC found that not only did breach of this common-law duty also establish the elements of a Rule 10b-5 violation, but that individuals other than corporate insiders could be obligated either to disclose material nonpublic information ***before*** trading or to abstain from trading altogether", discussing approvingly the "seminal" case of *Cady Roberts*, 40 S.E.C. 907). Again, the insider cannot tell who her counterparty will be in such a circumstance. Thus, if disclosure is to be made "before" trading – as the law requires – it must be to the entire investing public.

Here, had CSFB honored its duty of disclosure, the Enron fraud would have been revealed. For example, on April 5, 2000, pursuant to an equity swap with Enron, CSFB purchased 790,000 shares of Enron's common stock on the open market. *See* Ex. 2 at (CSFBLLC005126757-58) (term sheet for 4/5/00 equity swap). On that date, to honor its duty of disclosure, CSFB would, ***at a minimum***, need to have made full public disclosure to the entire market that Enron's financial results were falsified by CSFB's structured finance Transactions in the following ways:

---

[29] *Shapiro* here echoes two, seminal cases which hold that the disclosure requirement of the abstain-or-disclose doctrine requires ***full public*** disclosure. In *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 854 (2d Cir. 1968), *cert denied* 394 U.S. 976 (1969), *disapproved on other grounds* by *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976), the court held that to avoid liability, "at the minimum Coates [the insider] should have waited until the news could reasonably have been expected to appear ***over the media of widest circulation***, the Dow Jones broad tape." In *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 915 (1961), the SEC instructed insiders "to keep out of the market until the established procedures for ***public*** release of the information are carried out." *Cf. In the Matter of Certain Trading In the Common Stock of Faberge, Inc.*, 45 S.E.C. 249, 255-256 (1973) ("Proper and adequate disclosure of significant corporate developments can only be effected by a public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group.").

12 Months Ended 12/31/99 (in millions)					
CSFB Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated /(Understated)					
Iguana			208.4	(208.4)	
Rawhide				(750.0)	
LJM1/Rhythms	95.0	95			166.0
LJM1/Cuiaba	63.3	63		(200.0)	63.3
Firefly				(475.0)	
Osprey	47.3		744.7	(1,327.4)	1,000.0
Marlin			0	(954.9)	
Selected LJM2 transactions ***(see*** Note)	21.1	21.1	201.0	(105.0)	21.1
Total	$226.7	$179.4	$1,154.1	$(4,020.7)	$1,250.4
Note: "Selected LJM2 transactions" are Yosemite I, Fishtail/Bacchus, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

3 Months Ended 3/31/2000 (in millions)					
CSFB Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated/(Understated)					
Iguana				(208.4)	
Rawhide				(740.0)	
LJMl/Rhythms	8.0	8.0			(60.0)
LJM1/Cuiaba				(200,0)	63.3
Firefly				(475.0)	
Osprey	16.4		30.6	(1,358.2)	1,000.0
Marlin				(954.9)	
Selected LJM2 transactions *{see* Note)				(105.0)	21.1
Total	$24.4	$8.0	$30.6	$(4,041.5)	$1,024.4
Note: "Selected LJM2 transactions" are Yosemite I, Fishtail/Bacchus, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

And on June 7, 2001, CSFB Purchased 1.67 million Enron shares on the open market pursuant to another swap. *See* Ex. 3 (EC001513293) (June 7, 2001 trade ticket for 1,672,000 shares); Ex. 4 (CSFBLLC006284903). The disclosure duty required the bank make public disclosure, ***at a minimum***, of the following:

12 Months Ended 12/31/2000 (in millions)					
CSFB Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated /(Understated)					
Rawhide				(740.0)	
CSFB Prepay			150.0	(150.0)	
LJMl/Rhythms	8.0	8.0			(60.0)
LJMl/Cuiaba				(200.0)	63.3
Osprey	66.1		611.4	(2,646.3)	1,000.0
Marlin				(954.9)	
Selected LJM2 transactions *(see* Note)	73.7	73.7	64.30	(105.0)	94.8
Total	$147.8	$81.7	$825.7	$(4,796.2)	$1,098.1
Note: "Selected LJM2 transactions" are Yosemite I, Fishtail/Bacchus, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

3 Months Ended 3/31/2001 (in millions)					
CSFB Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated /(Understated)					
Rawhide				(740.0)	
CSFB Prepay				(150.0)	
LJMI/Rhythms					(60.0)
LJMl/Cuiaba				(200.0)	63.3
Osprey	16.6		82.9	(2,280.2)	1,000.0
Marlin				(954.9)	
Selected LJM2 transactions (*see* Note)				(105.0)	94.8
Total	$16.6	$0	$82.9	$(4,430.1)	$1,098.1
Note: "Selected LJM2 transactions"' are Yosemite I, Fishtail/Bacchus, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

Between June 28 and July 6, 2000, Merrill purchased 1.38 million shares of Enron pursuant to a swap. *See* Ex. 5 (MLNBY0157962). The disclosure duty required the bank, ***at a minimum***, to disclose the year end 1999 and LJM2 transactions as well as the impact of the Q1 2000 transactions which had the following impact:

12 Months Ended 12/31/99					
Merrill Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated /(Understated)					
Barges	13.0	13.0	0	0	13.0
Electricity Trades	49.0	49.0	0	0	49.0
Selected LJM2 transactions (*see* Note)	21.1	21.1	1,001.0	(1,655.0)	21.1
Total	83.1	83.1	1,001.0	(1,655.0)	83.1
Note: "Selected LJM2 transactions" are Yosemite I, Rawhide, Fishtail/Bacchus, Osprey add-on certificates, Osprey II, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

3 Months Ended 3/31/2000					
Merrill Transactions	**Pre Tax Income**	**EBITDA**	**Cash Provided by (Used in) Operating Activities**	**Total Debt**	**Total Equity**
Overstated /(Understated)					
Barges	0	0	0	0	13.0
Electricity Trades	0	0	0	0	49.0
Selected LJM2 transactions (*see* Note)	0	0	0	(1,645.0)	21.1
Total	0	0	0	(1,645.0)	83.1
Note: "Selected LJM2 transactions" are Yosemite I, Rawhide, Fishtail/Bacchus, Osprey add-on certificates, Osprey II, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.					

At each of these points in time, unbeknown to investors, Enron was already insolvent. *See* Report of Professor Bernard Black ("Black Report") at 71-74 (concluding that Enron was insolvent no later than at the end of 1999). These disclosures, had they been made, would have gone a long way towards revealing this insolvency, thus ending the Enron fraud.[30] The crux of Lead Plaintiff's argument here is that these market activities by the defendant Banks in Enron's equity clearly establish a relationship between the market and the Banks. This relationship mandated a duty of disclosure to the market thereby helping to establish the first of several factors in the *First Virginia Bankshares* multi-factor test.

---

[30] Further, it is important to note that while we have discussed the trades giving rise to a duty by focusing on the initial purchase dates because the swaps were converted to forwards and these contracts were to be settled within a year out at various times (CSFB also engaged in numerous such trades) it is fair to argue that the contemporaneous "trades" spanned months or even years, mandating disclosure over the entire period the "trade" was ongoing. But no disclosure was forthcoming from these defendants.

(1) The Equity Trades Themselves Were Manipulations Giving Rise to Yet Another Disclosure Obligation

The trades were in Enron's own common stock, executed by CSFB and Merrill. They were manipulative and operated as follows: The relevant bank would purchase Enron common stock on the open market. The purchases were on behalf of Enron; Enron effectively owned the stock. But the purchases were made without any public announcement that it was Enron who was effectively buying the stock. Thus the market saw only an increase in buying volume wrought by the purchase – but did not know that it was merely Enron purchasing its own stock.[31]

Upon purchase, the bank would hold the shares for Enron, subject to a contemplated settlement at a later date (within one year of the date of purchase). The terms depended on whether the transaction was one of two types: either a "swap" or a "forward contract." For the swap

---

[31] Phone conversations between Enron and CSFB trading personnel were recorded. Lead Plaintiff has obtained some of these tapes and they contain evidence of the manipulative intent behind the trades, which belies CSFB's and Merrill's assertions of their supposed innocuous character. For example, Ex. 6 is a transcript of a call on July 20, 2001 between Enron trader David Vitrella and a CSFB trader, "J.C." On the call, Vitrella expresses concern that purchases of Enron stock will not have the desired upward manipulative effect because sales in the market that day by another person or entity would neutralize the effect of any purchases. Vitrella remarks that "I would rather save the firepower for another day" (*i.e.*, share purchase power to support the stock price). Ex. 6 at 3:21-22 (audio of recorded phone call). J.C. expresses his understanding that Enron has no interest in ultimately owning the stock CSFB will be purchasing, but seeks only to "bid" up the price. J.C. states: "Get hit? I want to buy it to bid it but not to own it." Ex. 6 at 4:8-9 (audio of recorded phone call). J.C. also tells Vitrella that Enron stock will not reach the desired price unless CSFB does a manipulative trade: ***"It's not going get above 49 without me getting involved."*** Ex. 6 at 4:11-12 (audio of recorded phone call). The other tapes contain similar indicia of manipulative intent. *See* Ex. 7 at 5:7-9 (audio of recorded phone call, July 20, 2001, 8:49:06.82 - 8:50:34.89) (discussing presence of seller in market for Enron stock); Ex. 8 at 5:7-9 (audio of recorded phone call), July 20, 2001, 9:21:05.80 - 9:25:11.57) (Conversation between Enron personnel only; Freeland tells Vitrella: "Just when – whenever you – whenever you kind of feel like there's an opening to do something go ahead."); Ex. 9 at 3:22-23 (audio of recorded phone call), July 20, 2001, 11:08:08.36-11:12:53.04) (Conversation between Enron personnel only; Enron's Tim DeSpain wonders if Enron had CSFB purchase 700,000 shares, whether that would neutralize a seller in the market: "I mean, if we did another 700,000 shares would that clean him out?").

transactions, upon settlement Enron would be entitled to any appreciation on the stock, and the bank would be entitled to be made whole by Enron if the shares declined in value. *See* Ex. 10 (CSFBLLC005260512-16 (swap term sheet)). The latter case included provisions for Enron to "pay" the banks with its own shares. *See* Ex. 11 (EC001513327-28).

As to the forward contracts, the parties contemplated settlement of these in one of three ways: (1) a gross physical settlement where Enron pays the bank cash for the shares; (2) a net share settlement where Enron pays the amount owed using Enron shares; or a (3) net cash settlement, which is settled in a similar fashion as a swap, *i.e.* the net loser pays in cash. *See* Ex. 12 (MLNBY0258683). Under all circumstances, whether a forward contract or swap, and regardless of changes in Enron's stock price, CSFB would receive a commission for the purchase, plus interest payments. *See* Ex. 2 (CSFBLLC005126757-58).

Many of these trades were executed to create upward pressure on Enron's stock price by increasing the volume of shares traded in "buy" orders. This stimulated buying activity by deceiving investors into believing that the volume and at times, price increases, were the result of true market activity, as CSFB and Merrill concealed the fact that they were purchasing the shares for Enron. *See*

Supp. Opp. at 20, 23 nn.28, 38. This is classic market manipulation.[32] Such acts of manipulation themselves create a duty to disclose.[33]

An examination of the relevant evidence establishes that these trades were not the innocent derivative transactions CSFB and Merrill claim they were. Again, these manipulations, which impacted the entire market for Enron's shares, are not the sole basis for the duty to disclose, but another factor establishing a causal link between the Banks, their activities and the entire class under *First Virginia Bankshares*.

(2) April 2000: CSFB Purchases 1,761,200 Enron Shares to Artificially Support the Price

On April 4, 2000, Enron's stock opened at $73.563. Ex. 13 (intra-day stock price- 4/4/00, 9:30 am). By noon that day, however, it had tumbled to $63. Ex. 14 (intra-day stock price-4/4/00, noon). The stock eventually closed at $65.437 – down $8-1/8. Report of Blaine F. Nye, Ph.D. ("Nye Report"), Ex. 5B. CSFB had been aware of the stock drop. *See* Ex. 15 (CSFBLLC005248798 (Email from Salles to Launer with subject line: "CEO Can't Explain Stock Drop.")).

---

[32] *See SEC v. Martino*, 255 F. Supp. 2d 268, 286 (S.D.N.Y. 2003) ("Stock market manipulation is any 'intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'") (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)); *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 976 (S.D.N.Y. 1973) ("[S]ufficient proof of manipulation [exists] if the manipulator caused either actual or apparent activity ***or*** caused a rise in the market price.") (some emphasis in original); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004) ("Market manipulation is defined as 'the illegal practice of raising or lowering a security's price by creating the appearance of active trading.'") (quoting Blacks Law Dictionary 982 (8th ed. 2004)).

[33] *See Enron*, 529 F. Supp. 2d at 739 ("'Where a defendant has engaged in conduct that amounts to "market manipulation" under Rule 10b-5(a) or (c), that conduct creates an independent duty to disclose . . . .'") (quoting *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 381-82 (S.D.N.Y. 2003)). The duty to disclose engendered by market manipulation arises even "in the absence of a fiduciary duty." *United States v. Russo*, 74 F.3d 1383, 1392 (2d Cir. 1996) (citing *United States v. Regan*, 937 F.2d 823, 829 (2d Cir. 1991)).

On the morning of April 5, Enron called CSFB, asking the bank to execute an equity transaction. CSFB acceded to the request. *See* Ex. 16 (CSFBLLC005016868 (Email from Ogunlesi to Abib stating that "ENE wanted to do a derivative trade with us.")). That same day, CSFB and Enron entered into an "equity swap" on 790,000 shares of Enron's common stock – pursuant to which the bank purchased that number of shares on the open market. *See* Ex. 2 (CSFBLLC005126757-58 (term sheet for 4/5/00 equity swap)).[34]

On April 6, CSFB and Enron entered into another "equity swap," which required CSFB to purchase 460,000 shares of ENE on the open market. The "Equity Initial Value" established by CSFB's purchase of its hedge shares was $67.6129/share. *See* Ex. 17 (CSFBLLC005126759-60 (term sheet for 4/6/00 equity swap)).

Both of these purchases by CSFB gave the false appearance of significant additional demand for Enron stock. On April 5, 2000, the reported volume of shares traded (*i.e.*, including the 790,000 purchased by CSFB) was only 3,968,800. Nye Report, Ex. 5B. Thus this swap represented 19.9% of the day's total volume, and boosted legitimate volume by 24.8%.[35] On April 6, 2000, the effect was also significant. The reported volume that day was 2,909,100. Nye Report, Ex. 5B. Thus the swap comprised 15.8% of reported volume, and wrought an increase of 18.7% over legitimate volume. The additional, artificial volume applied on both days helped buoy the stock; it closed up

---

[34] For the swap, the notional pricing, or "Equity Initial Value" (as referenced in the applicable term sheet) established by CSFB's purchase of its hedge shares was $66.9165/share. This dollar per share amount represented the average purchase price of CSFB's hedge shares plus a commission of approximately three cents. *See id* at CSFBLLC005126757.

[35] That is, subtracting the 790,000 share trade from the reported volume of 3,968,800 yields a legitimate volume of 3,178,800. The additional 790,000 shares represents an increase of 24.8% over the 3,178,800 figure.

on both days (rising 1.719% (Nye Report, Ex. 5B) April 5 over April 4; and 2.066% (Nye Report, Ex. 5B) April 6 over April 5), and continued on an upward trend until April 11, 2000.

Enron announced its first quarter 2000 earnings on April 12, 2000. The stock rose a few dollars on April 13, but closed down $4.813 on Friday, April 14. Apparently believing that the stock needed a little help the following Monday, on April 17, CSFB and Enron entered into another equity swap whereby CSFB would purchase 511,200 Enron shares in the open market at $64.7881 per share. *See* Ex. 18 (CSFBLLC005420673-74 (term sheet for 4/17/00 equity swap)). Given the reported volume that day of 3,990,300 (Nye Report, Ex. 5B), the swap increased legitimate volume by 14.69%. The stock closed down that day, but the sizeable volume boost provided by the swap prevented it from dropping further than it did.

(3) May 2000: CSFB Improperly Converts the April Swaps to Forward Contracts to Fraudulently Inflate Enron's Reported Financial Results

By April 20, 2000, Enron's stock was trading in a range of around $71. Nye Report, Ex. 5B. On May 2, however, Enron publicly announced its introduction of "bandwidth" products to EnronOnline, and that day the stock increased 5.099% to close at $76. Nye Report, Ex. 5B. CSFB acted to allow Enron to take advantage of this rise in stock price. Effective May 8, 2000, and in a manner not provided for by their term sheets, CSFB agreed to "convert" the April 5, 6 and 17, 2000 swaps into a single "equity forward." *See* Ex. 19 (CSFBLLC000237698 (letter agreement between CSFB and Enron)). The term sheet reflecting the May 8 conversion set the "Initial Share Price" of the "forward" contract at $76.125/share (*see* Ex. 20 (EC000007737-39 (CSFB terms and conditions summary))) – a significant increase over the Equity Initial Value of any of the constituent swaps.

Also, as part of the conversion, the parties "reset" (increased) the notional pricing of the transactions(s), and CSFB paid to Enron the resulting aggregate "gain," calculated according to the increase in Enron's market price from the aggregate initial value (as determined by the prices at

which the shares were acquired by CSFB on April 5, 6, and 17, 2000) to the "market" value as of May 8, 2000. As adjusted for the interest due from Enron to CSFB, the net result was a payment by CSFB to Enron of $16,324,659 on May 11, 2000. *See* Ex. 21 (EC001513539 (wiring instructions for payment)). Enron booked this payment as income for the second quarter of 2000, recording it as "Gain or Loss on Merchant Investment," an income account. *See* Ex. 22 (ECTe000826790). Booking this payment as income, and failing to disclose the transaction properly in the financial statement was improper under GAAP and SEC rules,[36] materially and artificially inflated Enron's reported basic earnings per share by $.02 and understated both mandatorily redeemable stock and treasury stock by $243 million in Enron's financial statements filed with the SEC for the quarter ended June 30, 2000.

(4) June and July 2000: CSFB and Merrill Purchase 750,000 and 1,388,100 Enron Shares, Respectively, to Artificially Support the Stock Price and Fund LJM2 Raptor Transactions

CSFB again purchased Enron shares in June 2000 on Enron's behalf, as did Merrill, whose investment in LJM2 benefited if Merrill could help support Enron's stock price. The LJM2 partnership, in which Merrill was an investor and had helped structure, had created and funded four "Raptors" (denominated Raptor "I," "II," "III" and "IV"), which were SPEs used to effect hedges on several of Enron's assets. *See* Expert Report of Saul Solomon ("Solomon Report") at 89 n.228. The repayment of LJM2's equity investment in the Raptor SPEs was guaranteed, and was to be accomplished through Enron's agreement to purchase put options on Enron stock from the Raptor SPEs. *See id*. at 106-07. The put options gave Enron the right to sell Enron stock to the Raptor at a

---

[36] *See* Financial Accounting Standards Board Emerging Issues Task Force ("FASB EITF") No. 96-13, FASB EITF 00-7, FASB EITF 00-19. *See also* Reg. S-X, 5.02.28, SEC Accounting Series Release no. 268, codified as FRR 211 and SEC Staff Accounting Bulletin No. 64.

designated price (the "strike price"). Enron paid each respective Raptor a monetary premium to purchase those put options. If the market price for Enron stock fell below the strike price, it reduced the compensation to LJM2's investors, because Enron could sell the stock to the Raptor for a price in excess of the market price. Such an event would erode the monetary premium paid to the LJM2 investors; the latter obviously preferred the market price of Enron stock to remain above the strike price, so that the option would expire worthless to Enron.

Effective June 28, 2000, Raptor II sold Enron a put option on Enron stock, receiving a $41 million premium payment from the Company. *See* Exs. 23-24 (E04595, E232432). The put option had a share count of 7,427,536, and a strike price of $57.50 per put option. *See* Ex. 23 (E04595). This share count was in compliance with a restriction set in place by Enron's Board, which limited the number of shares to be used in the transaction to 7.5 million. *See* Ex. 25 (EC2000014904).

But at a share price of $57.50 and a share count of 7,427,536, the total market-based value of the put option was only $19,999,475.[37] This amount could not justify the $41 million premium paid for the option, and thus would likely prevent the deal from being approved by Arthur Andersen. At the same time, the value of the option could not be increased by adding more shares because, again, the Board limited their number to 7.5 million. Thus, it was understood that the strike price would need to be increased – and it ultimately was – as on June 29, 2000, an amendment to the put was written which changed the strike price on the 7,427,536 put option from $57.50 to $64.96. *See* Ex.

---

[37] For put options, the premium payment is calculated by multiplying the "premium per option" by the number of shares the buyer is allowed to sell. This premium per option is calculated using a stochastic calculus formula known as the "Black Scholes" model. As an example, a put option entitling the buyer of the put option to sell to the put option writer 100 shares at a strike price of $50, at the end of 6 months, may cost the buyer 100 times $5, or $500, as a premium for the right to sell the shares to the put option writer. In this example, the $5 per option premium is what a willing buyer and a willing seller would pay in the open market. Option premiums are readily obtainable from various market sources such as *Bloomberg*. At this time, the per option premium for the shares was approximately $2.69, yielding the $19,999,475 valuation. *See* Ex. 26 (E279432).

27 (E04600). The premium for a $64.96 put option ($5.52 per share), multiplied by the share count, yielded the $41 million price. *See* Ex. 28 (E279466).

But with a strike price of $64.96, the LJM2 investors' compensation was threatened; the price of Enron stock was in a downtrend, declining from the month's peak closing price of $74.187 Nye Report, Ex. 5B) set on June 21, 2000, to an intra-day low of $68.94 on June 26, 2000, a decline of over $5 per share. Ex. 29. Again, if the market price of the stock declined below $64.96, Enron would exercise the option and require payment from LJM2.

Thus, to stem the price decline and protect the compensation to LJM2, CSFB agreed to purchase more Enron stock on the open market to support the price. Early on June 27, 2000, CSFB executed a 750,000 share swap with Enron, with pricing at $68.4743 per share. Because the reported volume that day was 3,809,700 (Nye Report, Ex. 5B), the manipulative CSFB trade represented 19.69% of that total volume, and represented an increase of 24.51% over legitimate volume.

On June 28, 2000, the stock opened at $70.75 (Ex. 30 (intra-day stock price-6/28/00, 9:32 am) (up $2 from the prior day's close), but started heading lower within minutes. By 10:15 EDT, the price had hit $69. Ex. 31 (intra-day stock price-6/28/00, 10:15 am). Approaching full capacity with CSFB, Enron turned to Merrill, who acted to support the stock price by engaging in swaps where it purchased a total of 1,388,100 Enron shares on the open market over five of the next six trading days. *See* Ex. 5 (MLNBY0157962). These manipulative trades fraudulently boosted stock volume as follows:

Trade Date	Shares Purchased	Reported Volume	% of Total Volume	% Increase Over Legitimate Volume
6/28/00	110,100	1,963,300	5.64	5.94
6/29/00	150,000	2,307,500	6.5	6.95
6/30/00	636,700	3,937,400	16.17	19.29
7/5/00	430,200	2,652,600	16.22	19.36
7/6/00	61,100	1,758,900	3.47	3.60

In doing so, Merrill pleased Enron's executives by preserving the compensation (and thus continued viability) of LJM2, but also helped itself: Merrill had structured LJM2, invested in it and sold it to the market. As an "investor" in LJM2, Merrill's compensation would be enhanced by the put option expiring worthless to Enron. Thus, providing artificial support to the stock price provided direct financial benefit to the bank.

(5) July-August 2000: CSFB and Merrill Improperly Convert Their Outstanding Equity Swap Transactions to Fraudulently Inflate Enron's Reported Q3 2000 Financial Results

At the end of the second quarter 2000 (June 30), Enron stock closed at $64.50 (Nye Report, Ex. 5B) per share, placing both the CSFB and Merrill swaps in a loss position. As Enron had been recording quarterly gains on such swaps, it believed it now would be forced to book a loss in order to maintain the consistency required by GAAP in its accounting treatment for such swaps. At $64.50 per share, Enron believed it needed to record a loss of $3.014 million on the 750,000 share CSFB swap of June 27, 2000.[38] The Company also believed it faced an additional loss of $3.514 million at

[38] This is because that swap was done at $68.4743 per share. At that price, the shares were worth $51,355,725; at the June 30 market price of $64.50 per share, the shares were only worth $48,375,000. This $3,013,507 loss (which includes $32,782.07 in interest) is reflected on the June 30, 2000 Stock Book; *See* Ex. 32 (EC08320A0150130); Ex. 33 (LECe000779413).

June 30, 2000 for the 896,800 shares worth of swaps done with Merrill before quarter end, because those positions too were out-of-the-money by that amount.[39]

On July 5, Buy, DeSpain, and Skilling (among others) were notified that Enron Global Finance ("EGF") had exceeded its $5 million daily loss limit because the share price disparity on these swaps meant a combined loss of $6.528 million. *See* Ex. 34 (EC000162919 (Interoffice Memorandum dated July 5, 2000 from Michael Moscoso to Buy, Skilling, DeSpain, *et al.*; subject heading: "Loss Notification")); Exs. 35-36 (ECTe000952081 and ECTe000952111-16 (emails from David Port, Clint Freeland ("Freeland") and Samantha Davidson from July 11, 2000 through July 26, 2000)).

To remedy the situation, Enron first turned to CSFB. On July 7, 2000, Enron's Freeland called CSFB's Haratunian to discuss the matter, and Haratunian agreed on behalf of CSFB that the bank would change the 750,000 share trade from a "swap" to a "forward" retroactive to the quarter ended June 30, 2000. *See* Ex. 37 (CSFBLLC006284869), Ex. 38 (ECTe001138293-95).[40] Freeland then moved the trade from a swap to a forward on the Stock Book. *See* Ex. 32 (EC08320A0150130).[41] Steve Ross in Enron's accounting department made the change and then faxed a copy of the adjusted Stock Book back to Freeland. The trade was then designated as a

---

[39] Merrill had three swaps in loss positions at June 30, 2000 of $446,725, $606,602 and $2,461,355. Combined, the total loss was $3,514,682 (including $34,682 in interest). *Id*.

[40] It is improper to backdate documents to earlier reporting periods simply to obtain a favorable accounting treatment. Section 13(b)(2)(A) of the Exchange Act requires an issuer to keep books, records and accounts, which in reasonable detail, accurately and fairly reflect its transactions. It does not allow for the backdating of documents.

[41] *See* Ex. 39 (EC08320A0150176 (July 5, 2000, version of Stock Book, indicating 750,000 share trade as an "OPEN MTM POSITION[].")).

"**NON**-MTM POSITION[]" (*see* Ex. 39 (EC08320A0150177)), and thus provided Enron with its after-the-fact justification to avoid recording the loss. [42]

By July 10, 2000, Enron's stock price recovered to close at $68.75 (Nye Report, Ex. 5B) – *i.e.*, above the $68.4743 per share price for the June 27 swap transaction – and thus the trade no longer threatened a loss. So on the morning of July 11, Freeland called Stephen Haratunian ("Haratunian") asking to re-convert the June 27 transaction back to a swap (retroactive to June 30), so that Enron could improperly apply mark-to-market accounting to book a "gain" on the appreciation of Enron's stock price in the future. *See* Ex. 37 (CSFBLLC006284870) (Haratunian's handwritten notes); Ex. 40 (CSFBLLC006283749) (email from Haratunian to Marie-Anne Clark, *et al.*). Haratunian stated to others at CSFB that "I don't think there is any economic substance to doing this since all the terms would be identical. . . . This is ***simply accounting driven*** . . . ." *See* Ex. 40 (CSFBLLC006283749).

The re-conversion of the 750,000 share forward contract back to a swap was done solely to allow Enron to manipulate its earnings in the future by booking gains on the appreciation of its stock. The substance of the transaction had not changed at all. In substance it remained a forward. All the terms would be identical. *See id.*

Between July 12 and 20, 2000, Enron's stock price hovered in a narrow band at prices between $71.31 and $72.5625. Nye Report, Ex. 5B. On July 24, 2000 Enron announced reported earnings of $0.34/share, beating analysts' estimates by $0.02/share. After an initial downturn on July 25th, the stock rallied on July 27th, the closing at $77. Nye Report, Ex. 5B. On August 4,

---

[42] Apparently, Merrill refused to convert its swap transactions to forwards at Enron's request. This is likely why Glisan maintained that Merrill was in the "penalty box" in October 2000. *See United States v. Bayly*, No. H-03-363, Trial Transcript (S.D. Tex., dated Oct. 7, 2004) at 3722:19-23 (Glisan testimony).

2000, the stock hit an intraday high of $79.125. Ex. 41 (intra-day stock price-8/4/00). On that day, CSFB agreed to Enron's request to unwind the 750,000 share swap and again convert it back to a forward contract at a notional price of $79.00. *See* Ex. 42 (ECTe008652462-63) (email from Freeland to Sara Shackleton, *et al.*). This conversion resulted in Enron recording a gain of $7,547,351 and a CSFB payment to Enron in the amount of $7,453,600.67 (once interest was deducted). *See* Ex. 43 (ECTe008487034). The conversion increased the notional value of the trade from $51,355,725, to $59,250,000 (*i.e.*, 750,000 shares x $79/share). *See* Ex. 42 at ECTe008652463.

Merrill also agreed to convert the 1,388,100 share swap it entered into with Enron with trade dates between June 28, 2000 and July 6, 2000 to a forward contract with an effective date of August 4, 2000. *See* Ex. 44 (MLBNY0258669-76); Ex. 44 (MLBNY0258682-90). Upon conversion to a forward, Enron improperly booked a gross gain of $18,508,876 to income in the third quarter. *See* Ex. 43 (ECTe008487034-85) (Stock Book). As adjusted for interest due from Enron to Merrill, the net result was a cash payment from Merrill to Enron of $15,393,743 on November 17, 2000. *See* Ex. 45 (EC001513119).

Both the re-conversion of CSFB's 750,000 share trade back to a forward contract and Merrill's conversion of its 1,388,100 share swap trade to a forward were improper. Booking the $7.45 million payment from CSFB and the $15.4 million payment from Merrill as gains on the appreciation of Enron's stock price and failing to disclose the transaction properly in the financial statements was improper under GAAP and SEC rules, [43] materially and artificially inflated Enron's reported basic earnings per share by $0.03, and understated both mandatorily redeemable stock and

---

[43] *See* FASB EITF 96-13, FASB EITF 00-7, FASB EITF 00-19. *See also* Reg. S-X, 5.02.28, SEC Accounting Series Release No. 268, codified as FRR 211 and SEC Staff Accounting Bulletin No. 64.

treasury stock by $303 million in Enron's financial statements filed with the SEC for the quarter ended September 30, 2000.

(6) Q4 2000, Q1 2001 and Q2 2001: Enron Misstates Mandatorily Redeemable Stock and Treasury Stock

As a result of Enron's failure to record Merrill's and CSFB's forwards and swaps as mandatorily redeemable stock on a separate balance sheet line item as required by GAAP and SEC rules,[44] Enron improperly understated both mandatorily redeemable stock and treasury stock by $193 million, $193 million and $275 million in its financial statements filed with the SEC for the periods ended December 31, 2000, March 31, 2001, and June 30, 2001, respectively.

(7) June 7, 2001: CSFB Purchases 1.67 Million Enron Shares on the Open Market, Manipulating the Price Upwards, to Prevent the Company from Collapsing

CSFB and Merrill were not the only investment banks who engaged in equity trades with Enron. Enron had made similar trades with Bear Stearns, UBS and Lehman Brothers. As of June 7, 2001, Enron had outstanding equity trades with investment banks as follows:[45]

---

[44] *Id*.

[45] *See* Ex. 46 (ECTe0011316961). Total Physical Settlement Obligation is derived by multiplying the number of shares times the price per share at purchase.

Counterparty	Effective Date	Type	Number of Shares	Price Per Share at Purchase	Total Physical Settlement Obligation
Bear Stearns	06/01/2000	Forward	323,000	$ 79.415	$ 25,651,045
Lehman	03/05/2001	Forward	850,000	$ 72.349	$ 61,496,905
Lehman	08/04/2000	Forward	1,388,100	$ 83.776	$ 116,289,049
Lehman	04/02/2001	Forward	1,000,000	$ 75.264	$ 75,263,700
CSFB	08/09/2000	Forward	750,000	$ 79.000	$ 59,250,000
CSFB	05/11/2001	Forward	1,761,200	$ 76.125	$ 134,071,350
UBS Warburg	04/12/2001	Forward	4,405,303	$ 76.061	$ 335,071,311
UBS Warburg	12/13/2000	Forward	706,274	$ 76.126	$ 53,765,532
UBS Warburg	04/24/2001	Swap	821,000	$ 61.870	$ 50,795,270
UBS Warburg	03/19/2001	Swap	205,000	$ 79.563	$ 16,310,313
				Total	**$ 927,964,475**

Yet Enron faced a serious problem by June 7, 2001 concerning these trades. All the Bear Stearns, UBS and CSFB forward contracts above contained "triggers" – *i.e.*, a term in the deal ***which gave the bank the right to require Enron to settle the trades should the Company's stock price fall below a certain amount***. At this point in time, all of the triggers in the forward deals required such settlement if Enron's stock dropped below $50 for two, or in one case, three, consecutive business days.

The occurrence of such an event would have disastrous consequences for the Company. As indicated in the chart above, the settlement amounts for these trades totaled $927,964,475. Should a stock price drop below $50 in June 2000 force Enron to settle the forward equity contracts containing triggers, such a settlement would have the domino effect of effectively requiring settlement of the remaining UBS and Lehman equity trades already set to expire in June 2000. For example, while the three Lehman forwards no longer contained triggers, they were set to expire on June 29, 2001. *See* Ex. 47 (EC001513070). Similarly, the UBS Warburg swap initiated on April 24,

2001 was set to expire June 18, 2001. *See* Ex. 48 (EC001512817-18). Should Bear Stearns, CSFB and UBS require Enron to pay the $608 million[46] to settle their forward contracts containing the trigger price clauses, it was also highly likely that Lehman and UBS would hold Enron to the existing June 2000 settlement dates on their existing forwards and swaps while Enron still had the perceived ability to raise the necessary funds to settle the trades. Thus, upon a trigger event in June 2001, Enron would be required to pay between $877,169,205 million and $927,964,475 million to the banks in cash to settle the outstanding contracts at June 30, 2001.

This likely would have spelled doom for Enron in the Summer of 2001. First, Enron's June 30, 2001 balance sheet indicates that Enron did not have cash on hand sufficient to make payments as high as $928 million; and because the Company's June 30, 2001 six-month cash flow from operations was a ***negative*** $1.3 billion, it could not have funded the redemption from ongoing operations. *See* Ex. 49.

But even if Enron could have financed the redemption payments to the Banks by incurring additional debt, such financing would have severely damaged the Company's debt-to-equity ratio, thus threatening its credit rating. For example, borrowing $877,169,205 million to make the settlement payments would have increased Enron's debt-to-equity ratio to almost 50% at June 30, 2001.[47] This threatened the Company's credit rating, as evidenced by the fact that, on October 16, 2001, when Enron actually reported a 50% debt-to-equity ratio, the ratings agencies warned the Company that it would need to improve the ratio to maintain its credit ratings. *See* Nye Report, ¶134.

---

[46] Total Bear Stearns, CSFB and UBS forwards in above chart equals $607,809,238.

[47] Enron's total debt reported at June 30, 2001 was $12,812 million. An additional $877 million increases it to $13,689 million. The Company's total capitalization reported at this time was $27,850 million. Dividing total debt of $13,689 million by $27,850 million yields a ratio of 49.2%.

Second, Enron would have had to reduce shareholder's equity and increase debt by at least $877 million in its Q2 2001 financial statements to reflect such a borrowing. Enron would also be required to disclose the terms of the equity trade settlements in the footnotes to the June 30, 2001 quarterly financial statements.[48] This too would have caused a share sell-off by investors, driving the already tumbling price of Enron shares lower, further pushing the Company into the death spiral. *See* Ex. 10729 at EC000057972 (describing "stock sell-off" prompted by disappointing financial results as having potential to cause the death spiral).[49]

Third, such a large payment would have revealed the nature of the previously undisclosed equity trades and caused further inquiry, creating a crisis of confidence in the quality of Enron's financial reporting and the honesty of its management.

There need be no speculation that these events would likely have caused the fall of Enron in the Summer of 2001 (as opposed to in Winter of that year, when the Company did in fact collapse). Enron's actual fall came about in large part because of the reporting of a $1.2 billion reduction in shareholder's equity, credit ratings downgrades, and inquiries launched into the nature of certain suspicious transactions. *See* Nye Report, ¶¶128-133 ($1.2 billion reduction in shareholder equity announced on 10/16/01); Nye Report, ¶¶134-137, 147, 153-154, 159 (Enron's credit downgraded by ratings agencies); Nye Report, ¶¶138-145 (financial media questions Enron's use of related-party transactions to affect financial results).

---

[48] Reg. S-X, 5.02.28; FASB SFAS Nos. 128 and 129.

[49] A sharply declining share price coupled with a ratings downgrade also threatened to activate triggers in the Marlin and Osprey transactions, if Enron's debt was downgraded to below investment grade, and the share price dropped to below $59.78 in the case of Osprey, and $34.13 in the case of Marlin.

In June of 2001, Enron faced the real possibility of having to make a $927,964,475 payment and the ensuing collapse of the Company. In the first two weeks of May 2001, Enron stock traded on daily volume of between approximately 1.7-4.8 million shares, at an average closing price of $58.864. But May 16 and 17 saw the shares drop to closing prices of $55.01 and $52.20, respectively, on heavily increased volume of 7.27 and 12.39 million, respectively. Mindful of the approaching $50 triggers, Skilling on May 18 had Freeland contact CSFB to confirm the bank's willingness to do more manipulative trades to support the stock price and thus prevent the triggers from being activated. CSFB responded that it could handle up to 2.5 million shares worth of manipulative trades. *See* Ex. 50 (CSFBLLC005290196) (5/18/01 email from Abib to Haratunian and James Moran).

On the morning of May 18, before the market open, CSFB's Launer reiterated his "strong buy" rating on Enron. *See* Ex. 51 (CSFBLLC000048043-46). Enron rebounded to close at $54.90, on heavy volume of about 10 million shares. But in the seven consecutive trading days following May 28, the stock hovered dangerously in the low-$50 range:

Date	Closing Price	Volume
05/29/2001	$ 53.05	3,667,600
05/30/2001	$ 53.23	3,578,200
05/31/2001	$ 52.91	2,822,300
06/01/2001	$ 53.04	2,576,700
06/04/2001	$ 54.54	3,696,600
06/05/2001	$ 53.75	4,117,200
06/06/2001	$ 52.33	3,843,500

On the morning of June 7, 2001, there was negative news in the market concerning Enron's Dabhol project (*see* Ex. 52 (CSFBLLC006872428) and Ex. 53 (ECTe00826518)) and role in the California power crisis. *See* Ex. 54 (CITINEWBY00006344). Enron stock opened at $52.05 and immediately headed lower. The stock fell below $50 at 11:30 EDT. That day, Enron asked CSFB to

do another manipulative swap trade (*see* Ex. 4 (CSFBLLC006284903)), and the bank purchased 1.67 million shares on the open market the same day (*see* Ex. 56 (EC001513293) (June 7, 2001 trade ticket for 1,672,000 shares)).

The manipulation worked. On June 7, the stock recovered to close at $50.52 – above the $50 trigger. CSFB's purchase seems to have sparked a volume increase, as volume for the day was about 8.97 million – dramatically up from about 3.84 million the day before. The manipulative trade comprised 18.6% of total volume that day, and wrought an increase over legitimate volume of 22.85%. Moreover, CSFB received the order for the trade that day at 11:57 a.m. (12:57 p.m. EST). *See* Ex. 56 (EC001513293) (Enron trade ticket). Volume from the market open that day until 12:57 p.m. EST was only 4,044,800. *See* Ex. 57 (Enron intra-day stock prices for 6/07/01). Thus the order for 1.67 million shares represented an increased of 70.3% over legitimate volume at the time it was placed. CSFB's manipulative purchase staved off the collapse of Enron until Winter 2001.[50]

b. Underwritings

As Lead Plaintiff explained, defendants' conduct in underwriting Enron and Enron-related securities created for them a duty to disclose, both because they sold the securities and thus had the duty to abstain-or-disclose, or by virtue of duty to disclose specific to underwriters. *See* Supp. Opp. 38-43. Moreover, their underwriting activities fit squarely into the *First Virginia Bankshares* analysis.

Defendants, however, contend that this Court's prior rulings foreclose this claim. *See* Joint Brief at 37-40. Once more, defendants' arguments confuse the issues of duty and liability.

---

[50] After CSFB's June 7, 2001 purchase temporarily saved Enron from the triggers, Enron and the bank counterparties to the equity trades ultimately amended the transaction agreements to lower the triggers to $40. *See* Ex. 58 (EC0920A0060974-81); Ex. 59 (EC001513413-14); Ex. 60 (CSFBLLC006283665-82).

Defendants contend that they cannot be liable for the underwritings, but they fail to dispute that the underwritings may, especially in combination with their other market activities, create a duty to disclose. Nor do they address the fact that as a result of their underwriting activity they gained additional information about the fraud – which information they failed to disclose.

Defendants do not respond to the duty argument directly but assert it does not apply because something ***else*** is necessary for a particular set of actions before §10(b) liability attaches. These circular arguments simply fail to address Lead Plaintiff's claims in the context of a duty. As an example, defendants claim this Court has already ruled that there could be no reliance on offering documents, and that Lead Plaintiff had not identified false or misleading statements. *Id*. at 38-39. But because Lead Plaintiff does not base a claim on the statements in the offering documents, these objections are unavailing. Defendants then claim that the offering memoranda are "confirmatory" and thus under *Greenberg* "'cannot be the basis for a fraud-on-the-market presumption of reliance.'" Joint Brief at 39 (quoting *Enron*, 529 F. Supp. 2d at 774). Again, Lead Plaintiff is not pursuing a claim based on the statements in the offering memoranda, the tort is the failure to disclose, *i.e.*, an omissions case utilizing the *Affiliated Ute* presumption of reliance. Thus, *Greenberg* does not apply. So defendants are incorrect in stating that this Court has already "heard and rejected" (Joint Brief at 40) Lead Plaintiff's revised theory of liability. Defendants flatly claim that "this Court has rejected the very argument Lead Plaintiff now makes." Joint Brief at 37-38. This is not true. This Court was never presented with the current duty-to-disclose theory, and thus did not reject it. Rather, in the opinion defendants cite, the Court dismissed Deutsche because it held the alleged conduct insufficient to plead a Rule 10b-5(a) or (c) claim and because it held that plaintiff failed to plead scienter with respect to the statements in the offering memoranda and analyst statements and loss causation as to the offering memoranda. *Enron*, 529 F. Supp. 2d at 772-77. These rulings as to Deutsche are no impediment to Lead Plaintiff's theory of liability. Lead Plaintiff does not endeavor

to make a claim under its alternative theory on the offering memoranda and analyst statements *per se*; rather it contends that these activities created a duty to disclose, the breach of which Lead Plaintiff asserts as a claim. Thus, scienter of the particular analyst is irrelevant in this context. The same is true for the issue of whether "there is loss causation as to the offering memoranda." The proper focus is whether there exists loss causation for ***the breach of the duty to disclose*** engendered by the offering memoranda. Such causation exists. *See infra* at §II.C.3.[51]

Merrill attempts to minimize its underwriting activities, comparing them to the role Deutsche played in connection with confidential private placements of non-Enron debt securities (the Foreign Debt Securities). As noted above, the Deutsche situation is inapposite – but particularly so as the Merrill. The evidence here demonstrates that Merrill was the sole or lead ***underwriter*** of eight different offerings of yen-denominated Enron debt securities between November 1999 and June 2001; these were ***public offerings***; the total amount of the underwritten debt securities was 155 billion yen, or more than $1.3 billion; the 2001 "program" and at least one of the offerings were listed on the Luxembourg Stock Exchange; Merrill organized and attended "road shows" in connection with the 2001 offerings; the roadshows and offerings received public coverage in periodicals; and Robert Furst ("Furst"), as Relationship Manager ("RM"), conducted a series of "due diligence" calls and thereafter provided a series of "Representation Letters" which, among other things, affirmed that Merrill was aware that investors would utilize the information reviewed by

---

[51] CSFB cites to this Court's prior ruling that "Lead Plaintiff provides no satisfactory reason why . . . purchasers of other Enron securities, would be relying on the offering memoranda of the Foreign Debt Securities at issue to support a §10(b) claim." CSFB Brief at 6. But this is inapposite here. Again, Lead Plaintiff contends that the activity of doing underwritings created a duty to disclose. Thus, it need not show that investors relied on those statements. As demonstrated, *infra* §II.C.2, Lead Plaintiff has demonstrated that the plaintiffs relied on defendants' omissions.

Merrill (including Enron's financial reporting) "as a basis for their investment decision." Thus, there is simply no comparison between Deutsche's activities and Merrill's.

Specifically, Merrill underwrote two yen-denominated Enron bond offerings in April/May 2000 – a "yen bond" offering in the amount of $189,573,460.00 due May 2, 2001, and a "yen bond" offering in the amount of $182,815,356.00 due May 17, 2001.[52] Merrill characterized these offerings as "public."[53] Schuyler Tilney ("Tilney"), who was intimately involved with the year-end 1999 Nigerian Barge and Power Trade transactions and was a significant investor in LJM2 (and thus knew of all LJM2 transactions) was listed as the RM for these offerings.[54] In connection with the offerings, Merrill conducted "due diligence" as it would for any public offering.[55] Included in the due diligence were questions concerning, among other things, Enron's operating performance, reported debt levels, "off balance sheet items," and "other issues that should have been addressed" – all issues about which Merrill/Tilney/Furst already had a great deal of information that in fact contradicted Enron's reported financial results.[56]

During the Summer of 2000, Merrill and Enron negotiated the terms of what became the "Euro Medium-Term Note Program" ("EMTN Program"). The terms for this $1 billion offering

---

52 Ex. 61 (EC48450A0010867); Ex. 62 (ECTe008652565).

53 *See, e.g.*, Ex. 63 (which is a summary of information contained in MLNBY0289969-073); Ex. 64 (MLNBY0289972-73); Ex. 64 (MLNBY0289998-99); Ex. 64 (MLNBY0290024-25); Ex. 64 (MLNBY0290050-51).

54 *See, e.g.*, Ex. 63.

55 *See, e.g.*, Ex. 65 (ECTe008665764-65); Ex. 66 (ECTe008665847-48).

56 *Id.*

program for Enron debt securities were contained in an Offering Circular dated August 30, 2000, which listed Merrill as the "Arranger."[57]

In connection with the establishment of the EMTN Program, Merrill arranged for the listing of debt securities on the Luxembourg Stock Exchange.[58] Further, in connection with the establishment of the EMTN Program, Merrill appointed Furst as its "attorney to execute and deliver the SAS 72 representation letter[s] … in connection with the Programme."[59] Furst executed a series of "SAS 72 representation letters" in 2000 and 2001, each of which affirmed that Merrill "will be reviewing certain information relating to Enron Corp. that will be included and or incorporated by reference in the Offering Circular dated August 30, 2000 … which may be delivered to investors and utilized by them as a basis for their investment decision."[60] The Merrill/Furst SAS 72 representation letters also acknowledged that Merrill's "review process, applied to the information relating to the Issuer, is substantially consistent with the due diligence review process that [Merrill] would perform if this placement of securities were being registered pursuant to the Securities Act of 1933."[61] The SAS 72 representation letters were updated each quarter following a "due diligence" call involving Merrill and Enron personnel.[62]

---

57 Ex. 67 (MLNBY0002296-349).

58 *See, e.g.*, Ex. 68 (ECTe008665877-78); Ex. 69 (MLNBY0272452-53); Ex. 70 (MLNBY0249977); Ex. 71 (MLNBY0249990).

59 *See, e.g.*, Ex. 72 (MLNBY0249939); Ex. 73 (MLNBY0250000); Ex. 74 (MLNBY0250003).

60 *See, e.g.*, Ex. 75 (MLNBY0249946); Ex. 76 (MLNBY0249945); Ex. 77 (MLNBY0250001); Ex. 78 (MLNBY0250002). The SAS 72 representation letters from and after November 28, 2000 also included specific reference to Merrill's review of Enron's "most recent Quarterly Report on Form 10Q." *See, e.g.*, Ex. 77 (MLNBY0250001); Ex. 78 (MLNBY0250002).

61 *Id.*

62 *See, e.g.*, Ex. 79 (MLNBY0250004).

Merrill underwrote five different offerings of yen-denominated debt securities for Enron pursuant to the EMTN Program:[63]

Date	Description of Offering	Size of Offering (Yen)	Size of Offering (USD)
5/15/2001	Yen-denominated euro-bond due 5/15/02 – 0.52%	25 billion	$ 205,592,105.30
6/18/2001	Yen-denominated euro-bond due 6/18/03 – floating interest	40 billion	$ 336,558,687.00
6/18/2001	Yen-denominated euro-bond due 6/16/04 – 0.97%	10 billion	$ 83,892,617.00
6/14/2001	Yen-denominated euro-bond due 6/14/02 – 0.493%	20 billion	$ 165,084,606.00
6/18/2001	Yen-denominated euro-bond due 6/18/03 – 0.77%	10 billion	$ 84,139,672.00

In connection with each such offering, Merrill/Furst prepared and signed SAS 72 representation letters.[64] Merrill also organized and attended road show presentations to a number of institutional investors in connection with these offerings.[65] Through the roadshow process, Merrill and Enron "developed an ongoing dialogue with the largest ITMs and Asset Managers" concerning Enron and its future financings.[66]

The June 18, 2001 10 billion yen offering at 0.97% yield due June 18, 2004, was individually listed on the Luxembourg Exchange.[67] The rules of the Luxembourg Exchange required, among other things, that documents concerning the offering and the EMTN Program, including Enron financial reporting documents and documents concerning Merrill's role as Arranger and underwriter, be made and kept available to the public.[68]

---

63 Ex. 80 (EC48450A0010861).

64 Ex. 81 (MLNBY0249835); Ex. 82 (MLNBY0249819-21); Ex. 83 (MLNBY0249690-91).

65 *See, e.g.*, Ex. 84 (MLNBY0068873-74).

66 Ex. 84 (MLNBY0068874).

67 *See, e.g.*, Ex. 85 (MLNBY0249549-50); Ex. 86 (MLNBY0249558-564).

68 Ex. 87 (Luxembourg Stock Exchange).

Merrill characterized each of these 2001 EMTN offerings as "public," and internal Merrill documents reflect that Furst was the RM.[69] Furst was intimately involved with the year-end 1999 transactions, including the Nigerian Barge transaction and the Power Trades (as to which he was listed as the RM).[70] Furst was also involved with LJM2 from its inception and was an LJM2 investor (and therefore knowledgeable about all LJM2 transactions), and he was the RM for the "own-share" equity derivative transactions.[71] In other words, Furst – who performed the "due diligence" in connection with the EMTN Program and offerings – knew all about the various deceptions in which Merrill had been involved and their effect on Enron's financial reporting. These facts are sufficient to answer Merrill's complaint that Lead Plaintiff had not provided specific evidence tying these offerings to knowledge of the fraud. Merrill Brief at 12-13.

Thus, Merrill's assertion that this Court has dismissed "virtually identical claims against Deutsche" based on "Foreign Debt Securities" (Merrill Brief at 11) is simply not so. As noted above, the "Foreign Debt Securities" Deutsche underwrote were private placement securities which were issued by entities other than Enron. *Enron*, 529 F. Supp. 2d at 724. It bears repeating that the debt securities Merrill underwrote ***were*** issued by Enron and were public offerings.[72]

Defendants also contend that to the extent they had a duty to disclose as underwriters, this duty ran only to purchasers of the securities in the offerings. Defendants rely on *Gallagher v. Abbott*

---

69 *See, e.g.*, Ex. 63. *See also* Ex. 88 (EC10820A0241376); Ex. 89 (MLNBY0249595); Ex. 90 (MLNBY0249824); Ex. 91 (EC10820A0241383).

70 Ex. 63.

71 *Id.*

72 *See, e.g.*, June 8, 2001, Euromoney Institutional Investor PLC Euroweek article: "Merrill Lynch sole lead managed the dual tranche bond issue for the Baa1/BBB+ rated company, following a roadshow in Japan two weeks ago." *Enron Blazes a Trail For Triple-B Credits into Samurai Market with ¥50bn Two Year Deal*, Euromoney Institutional Investor PLC Euroweek, June 8, 2001 (Ex. 92) at 1.

Labs., 269 F.3d 806, 809 (7th Cir. 2001), for this proposition. But that case is inapposite; the parenthetical defendants offer construes the "1933 Act." *See* Joint Brief at 40. Sections §11(a) and §12(a)(2)of that Act expressly limit liability to "any person acquiring such security" and "the person purchasing such security," respectively. Liability under §10(b), which Lead Plaintiff pursues here, bears no such limitations.[73]

Accordingly, that CSFB's underwriting activities during the class period primarily involved private placements is of little consequence; the activities were visible to the market, *i.e.*, to institutional investors.[74] For example, in March 2000, CSFB sold Enron notes to institutions which, as of March 31, 2000, held about 10.4% of the issued and outstanding shares of Enron common stock.[75] Janus was by far the largest holder, with about 9.26% at March 31, 2000. Other buyers which were also large shareholders included Strong, Invesco, Prudential, and New York Life.

---

[73] In making the same argument, Merrill relies on *Vannest v. Sage, Rutty & Co.*, 960 F. Supp. 651, 656 (W.D.N.Y. 1997), *aff'd*, 2001 U.S. App. LEXIS 26434 (2d Cir. Dec. 6, 2001). *See* Merrill Brief at 11. This case is inapposite as well, as it concerned a cause of action for breach of fiduciary duty under New York state law.

[74] The offerings in which defendants engaged were communicated beyond the purchasers of the specific securities sold in them, into the wider market. For example, mainstream media reported on their efforts to sell Enron via the Foreign Debt Securities offerings. On September 29, 2000, *Euromoney Institutional Investor PLC Euroweek* reported Enron raised $750 million and Eu 315 million from Osprey, where DLJ was a co-lead manager. "The leads spent around 10 days marketing Enron's credit and the Osprey structure to European investors, particularly pension funds, insurance companies and mutual funds." *Credit Appeal Powers Enron's Rapid Divestment Vehicle*, Euromoney Institutional Investor PLC Euroweek, Sept. 29, 2000 (Ex. 93) at 1. Given the efficiency of the market in Enron stock (which defendants do ***not*** dispute), the material omissions from statements made to countless potential investors through the offering memoranda and roadshows undoubtedly impacted the market for Enron stock. Lead Plaintiff has shown in the omissions context that a duty to disclose material information has been breached. *See Basic Inc v. Levinson*, 485 U.S. 224, 245 (1988). Because the entire market could see defendants' conduct of vouching for the quality of Enron securities, and thus the Company itself, violation of defendants' duty to disclose impacted the entire market for Enron securities.

[75] *See* Ex. 94 (CSFBLLC005512618).

Speaking to institutional investors holding in the aggregate over 10% of Enron's shares is tantamount to speaking to the Enron market.

This and other private placements of Enron debt securities were visible to the institutional investor community and thus had the effect of disseminating information to the marketplace. The above-described offering was conducted pursuant to SEC Rule 144A. Such offerings, though exempt from registration, bear many of the same earmarks as public offerings in terms of disseminating information to the institutional investor community. Mark Spradling of Vinson & Elkins put it this way:

> [In a 144A offering,] the [Issuer] will sell all the Notes to . . . "Initial Purchasers" (like underwriters) in one transaction . . . .
>
> > As I understand it, immediately (like 30 seconds) after the Initial Purchasers purchase the Notes, quasi-public trading of the Notes among sophisticated investors will be initiated in the capital markets on a special "exchange" that is really just a virtual exchange done through computer blips and the notes will be "resold" by the Initial Purchasers to investors they have lined up to buy the Notes as trading begins. Thereafter, the Notes may be traded continuously on this special sophisticated investor exchange.

Ex. 55 at EVE28224.

Defendants raise the fact that potential claims for securities offerings would be time-barred. *See* Merrill Brief at 9; CSFB Brief at 4. But this is irrelevant. Lead Plaintiff contends that the Banks' conduct in the offerings is part of the relationship the Banks had with the market for Enron's securities. Thus, even though some of the offerings were from before the class period, at the start of that class period, investors were aware that the Banks had done offerings for Enron or Enron-related securities in the past, *i.e.*, had a long history with Enron. This is relevant to the expectation of disclosure by these class-period investors. A jury may properly consider such evidence even though it dates from outside the class period or statute of limitations. This Court has already held that time-barred conduct can be relevant to events within the class period:

> Lead Plaintiff has responded that it is not seeking to recover damages for alleged misconduct that occurred more than three years before suit was filed, but is pleading such purported violations solely to establish evidence of a scheme and of scienter. Such evidence is admissible for this purpose. [*United States*] *v. Ashdown*, 509 F.2d 793 (5th Cir. 1975) (mail fraud); *United States v. Blosser*, 440 F.2d 697, 699 (10th Cir. 1971) (same); *Fitzgerald v. Henderson*, 251 F.3d 345 (2d Cir. 2001) (Title VII). The Court agrees and considers those allegations to be admissible solely for the purpose of establishing a scheme and/or scienter.

In re Enron Corp. Sec. Litig., 235 F. Supp. 2d 549, 689 (S.D. Tex. 2002). *See also Fitzgerald v. Henderson*, 251 F.3d 345, 365 (2d Cir. 2001) ("A statute of limitations does not operate to bar the introduction of evidence that predates the commencement of the limitations period but that is relevant to events during the period."); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) (court considered pre-class period information as relevant to class period events).

Defendants contend that Lead Plaintiff cannot use Regulation S-K because there is no "private cause of action" for its violation. But Lead Plaintiff is not suing defendants under this Regulation; it contends this Regulation created a duty to disclose. This is permissible. *See* Supp. Opp. at 42-43 (discussing *Kunzweiler v. Zero.net, Inc.*, No. 3:00-CV-2553-P, 2002 U.S. Dist. LEXIS 12080, at *31-*32 (N.D. Tex. Jul. 3, 2002) ("courts have held that an affirmative duty to disclose does arise when . . . a statute or regulation requires disclosure")).

Finally, defendants are completely wrong in asserting that this Court's ruling on class certification forbids consideration of certain offerings because it supposedly limited the offerings which could be part of this case. In fact, in that ruling, the Court limited only the types of securities for which claims could lie – it did not, as defendants confusingly suggest, forbid any other offerings from being used as evidence in supporting those claims. This is entirely consistent with what Lead Plaintiff is doing here; it seeks to use those offerings as evidence of the defendant Banks' relationship with Enron and Enron's investors, creating a duty to disclose.

c. Contacts with Credit Ratings Agencies

As to the contacts with credit ratings agencies, Merrill contends that this conduct is inactionable because (a) it was not disclosed to the market, and thus is barred by *Stoneridge*; and (b) this Court has already held that similar conduct by Deutsche is inactionable. Merrill Brief at 19. But Merrill misses the point. Lead Plaintiff does not claim that Merrill's contact with credit ratings agencies is "actionable." Instead, it claims that this conduct, along with the other market conduct discussed, ***created a duty to disclose***, and the breach of this duty is actionable.

Merrill also disputes that Lead Plaintiff's evidence establishes that the bank interacted with the ratings agencies for the purpose of raising the ratings on non-Enron securities. *Id.* at 19-20. These issues merely create a triable issue of fact on the matter, precluding summary judgment. Merrill further dismisses its contact with a Japanese credit rating agency because Lead Plaintiff "does not have standing to assert claims based on the foreign debt securities." *Id*. at 20. This is irrelevant because, again, Lead Plaintiff does not claim that Merrill's contact with credit ratings agencies is "actionable," but that this conduct, along with the other market conduct discussed, created a duty to disclose, and the breach of this duty is actionable.[76]

d. Analyst Reports

CSFB and Merrill make various arguments concerning their analyst reports. All of them are meritless.

Defendants contend that Lead Plaintiff is barred from using the analyst reports in its omissions case because it previously asserted that these reports contained false and misleading statements. But as explained *infra* at §II.C.4., Lead Plaintiff is guilty of no inconsistency. Lead Plaintiff previously maintained that this was an omissions case. *See* 2/8/07 Order at 44 (this Court

---

[76] Merrill also raises this "standing" argument with regard to the Foreign Debt Securities (*see* Merrill Brief at 11), and the same response applies.

stated it has "found that Newby is a case primarily of omission"). Also, Lead Plaintiff simply argues that these same analyst reports are actionable on an omissions theory under Rule 10b-5(a) and (c). This represents a change of legal theory only; Lead Plaintiff is ***not*** (as defendants wrongly argue; *see* Joint Brief at 16) ***factually*** characterizing any document or statement differently than it had before. This is permissible. *See infra* at §II.C.4.

Moreover, Lead Plaintiff's alternative theory does not advance a claim for misrepresentations in the analyst reports, as defendants wrongly suggest. *See* Joint Brief at 34. Lead Plaintiff is ***not*** seeking to maintain an independent claim under §10(b) for analyst reports in this alternative theory; instead, it contends that the issuance of these analyst reports ***created a duty to disclose*** under *First Virginia Bankshares*.[77] And it is for the breach of this duty that Lead Plaintiff maintains a claim. This alternative-theory claim thus does not focus on the falsity of the statements in the analyst reports, but that they featured favorable buy recommendations for Enron common stock and debt.

Defendants also contend that Lead Plaintiff's current claim supposedly must fail because this Court previously dismissed analyst claims for failure to plead scienter under *Southland*. Joint Brief at 43-45. But here defendants again misapprehend Lead Plaintiff's revised theory. Again, Lead Plaintiff makes no §10(b) claim for analyst reports, but is instead contending that a duty to disclose was created for CSFB and Merrill and these defendants breached it. Thus, the question of scienter of any particular analyst is beside the point. The main issue is whether the conduct of issuing analyst reports, when analyzed along with CSFB's and Merrill's other market conduct, creates a duty to disclose under the *First Virginia Bankshares* factors. As to scienter on this claim (properly

---

[77] Apart from the duty under *First Virginia Bankshares*, the issuance of analyst reports also subjects CSFB and Merrill to the abstain-or-disclose duty because that duty is activated not simply by trading in securities, but by "recommending" them. *See infra* at n.81.

construed as one for breach of a duty of disclosure, not analyst reports), Lead Plaintiff demonstrates that this element is fully satisfied. *See infra* at §II.C.1.

Defendants similarly confuse the issues when they contend that a claim for the analyst reports fails to satisfy *Greenberg* and *Oscar*. Joint Brief at 4. Once more, here Lead Plaintiff makes no claim for the analyst reports. Instead, it claims these reports created a duty to disclose, and CSFB's and Merrill's breach of this duty forms the basis for Lead Plaintiff's claim. When Lead Plaintiff's claim is properly construed thus, application of *Greenberg* and *Oscar* to the analyst reports is nonsensical. And as Lead Plaintiff explains elsewhere in this brief, those cases are inapplicable here because, being based on the breach of a duty to disclose, this case is one for omissions and thus a presumption of reliance arises under *Affiliated Ute*. *See supra* at n.7 ("This Court has already held that in the omissions context *Greenberg* is inapplicable."); *infra* at §II.C.3 ("The *Oscar* decision is explicitly limited to cases employing the fraud-on-the-market presumption of reliance.").[78]

CSFB's and Merrill's analyst reports clearly created a duty to disclose which ran to the entire market. In the reports these banks recommended the purchase of Enron common stock and debt, and the reports were widely disseminated to institutional investors, including Lead Plaintiff. The salient features of these reports were also picked up by media agencies, who disseminated them to the larger retail investing public. For example, First Call routinely sent emails to institutional investors, issuers, and others, with highlights of and web links to sell-side analyst reports, including Merrill and CSFB reports on Enron.[79] Merrill and CSFB reports were also picked up and carried by the

---

[78] The same reasoning defeats defendants' assertion that Lead Plaintiff has not shown loss causation for the underwritings. *See* Joint Brief at 39.

[79] *See, e.g.*, "First Call Email Alert" for 3/9/00, which included links to two Merrill reports on Enron and its group. Ex. 95 (ECTe001089961-62).

financial press. Thus, in November 1998, *Bloomberg* reported: "Enron Corp. (ENE US) was reinstated near-term 'accumulate' by analyst Donato J. Eassey at Merrill Lynch & Co. The 12 to 18-month target price is $67.21 per share. The long-term rating was reinstated 'buy.'"[80] *Enron Corp. Reinstated Near-Term 'Accumulate' at Merrill*, Bloomberg, Nov. 6, 1998 (Ex. 96).

Dow Jones similarly reported on November 6, 1998, that Merrill had reinstated Enron "at near-term accumulate." *Merrill Restarts Enron Corp. At Near-Term Accumulate > ENE*, Dow Jones, Nov. 6, 1998 (Ex. 97).

When Enron reported its 1998 earnings, *Dow Jones* quoted Donato Eassey's comment: "'Their diversification shows they were clearly doing a lot of things right.'" Loren Fox, *Enron Corp. Looks To Energy Services Growth > ENE*, Dow Jones, Jan. 19, 1999 (Ex. 98). McGraw-Hill's *Megawatt Daily* added, again quoting Eassey: "'If one cylinder is not performing, the other ones step up and produce,' he said. 'Unlike some one trick ponies that are out there, we are encouraged that by diversifying their business over several growth platforms, Enron is able to smooth out its earnings.'" *Enron's Earnings Rise On Wholesale Power Sales*, Megawatt Daily, Jan. 20, 1999 (Ex. 99).

In March of 1999 "two leading analysts: Donald J. Eassey of Merrill Lynch and Curt Launer of Donaldson, Lufkin & Jenrette" conducted an "in-depth roundtable" on the natural gas transmission and distribution industry as reported on *Business Wire*. *The Wall Street Transcript Publishes Special Natural Gas Transmission & Distribution Industry Issue*, Business Wire, Inc., Mar. 22, 1999 (Ex. 100). They recommended Enron.

After Enron reported its 1999 earnings, on January 21, 2000, *Reuters* reported: "Research Alert – Enron raised. . . . Merrill Lynch said Friday it raised Enron Corp to a buy rating and a 12-

---

[80] This report was issued after Merrill fired John Olson, the analyst Enron was unhappy with.

month price target of $95 per share. . . . Donaldson Lufkin & Jenrette said it raised Enron's fiscal 2000 profit estimate to $1.45 from $1.35 and increased its 12-month price target to $82 from $52." *Research Alert – Enron Raised*, Reuters News, Jan. 21, 2000 (Ex. 101).

The next day, *The Oregonian* published an article titled "Market Likes Enron's Internet Deal," which quoted Eassey:

> Wall Street clearly applauded Enron's lofty plans this week, in part because the company has a proven track record, Eassey said. Enron, in its other businesses, has proved it can execute its plans and take lessons learned from one industry to another.
>
> "When you look at a company that's gone from zero revenues in wholesale energy and trading just a few years ago to $35.5 billion today, it's just incredible," Eassey said.

Market Likes Enron's Internet Deal, The Oregonian, Jan. 22, 2000 (Ex. 102).

On February 3, 2000, *Dow Jones* published an article entitled "Smartmoney.com: Is Latest Fiber-Optic Play Enron?" and quoted Eassey "'Although this is still an energy company, in our view, Enron fits the description of a "new economy" stock' because it has moved its wholesale trading operations online and announced a unique broadband strategy, wrote Donato Eassey, a Wall Street Journal All-Star analyst at Merrill Lynch." Karyn McCormack, *Smartmoney.com: Is Latest Fiber-Optic Play Enron?*, Dow Jones, Feb. 3, 2000 (Ex. 103).

On April 12, 2000, after Enron announced its first quarter earnings, *Reuters* reported: "Donaldson Lufkin & Jenrette said at midday Wednesday that analyst Curt Launer raised his target price on Enron Corp. stocks, after the gas and electricity marketer posted earnings above Wall Street forecasts. Launer boosted his target on Enron to $97 per share from $82." *Research Alert – DLJ Boosts Target Price on Enron*, Reuters News, Apr. 12, 2000 (Ex. 104).

On April 19, 2000, *Reuters* reported: "Enron was the subject of a report by Merrill Lynch analyst Donato Eassey who said Wednesday the company had uniquely positioned itself to be the General Electric of the 'New Economy,' by leading the charge to deregulate the natural gas and

power industries and now through a well thought out strategy it is looking to make a big splash as a broadband service provider." *Utilities With Telecom Buck Lower Trend*, Reuters News, Apr. 19, 2000 (Ex. 105).

On May 16, 2000, *Bloomberg* reported: "Enron Corp. (ENE US) was reiterated near-term 'buy' by analyst Donato J. Eassey at Merrill Lynch. The long-term rating was also reiterated 'buy.' The 12-month target price is $95.00 per share." *Enron Corp. Reiterated Near-Term "Buy" at Merrill*, Bloomberg, May 16, 2000 (Ex. 106).

On June 27, 2000, *Bloomberg* reported: "Enron Corp. (ENE US) was reiterated 'top pick' by analyst Curt N Launer at Donaldson Lufkin & Jenrette Securities." *Enron Corp. Reiterated "Top Pick" at DLJ*, Bloomberg, June 27, 2000 (Ex. 107).

Because CSFB's and Merrill's reports marketed Enron securities to the entire market, these banks' duty to disclose ran to that larger market, which includes Lead Plaintiff and the proposed class. [81]

---

[81] Also, the abstain-or-disclose duty attaches not just to traders, but also to one who ***recommends*** a security. *See Kurtzman v. Compaq Computer Corp.*, No. H-99-779, 2000 U.S. Dist. LEXIS 22476, at *80 n.32 (S.D. Tex. Dec. 12, 2000) ("A corporate insider with material inside information is required to disclose it ***to the investing public*** or, if he cannot . . . , ***he must abstain from*** trading in ***or recommending securities concerned*** while that inside information remains undisclosed."); *Shapiro*, 353 F. Supp. at 276 ("This duty arises when one in possession of material inside information decides to trade ***or recommend*** the securities concerned."); *Texas Gulf*, 401 F.2d at 848 ("[An insider] ***must abstain from*** trading in ***or recommending the securities concerned*** while such inside information remains undisclosed."); *United States v. Lang*, 766 F. Supp. 389, 399 (D. Md. 1991) ("Since [*Texas Gulf Sulphur*], it has been ***black letter law*** that" corporate insiders with undisclosed information cannot either trade in, ***or recommend***, the securities concerned.). Thus because CSFB and Merrill recommended Enron common stock and debt in their analyst reports, they had the duty to disclose for the entire period in which they issued their reports.

4. Even if Defendants Lacked a Duty to the Entire Market, Their Breach of Their Limited Duty Is Nevertheless Actionable by Lead Plaintiff and the Proposed Class

Defendants expend much energy arguing that to the extent a duty to disclose exists, that duty runs only to certain subsets of the proposed class. *See e.g.*, Joint Brief at 40; CSFB Brief at 2-18. As such, defendants contend, Lead Plaintiff's claim is not actionable.

Defendants are incorrect. As Lead Plaintiff detailed in its Supplemental Opposition, because the breaches of duty relating to defendants' underwritings, analyst reports, equity trades and contact with credit rating agencies harmed all Enron investors who purchased during the class period and held until inflation was removed,[82] these investors may state claims against defendants even if the Court were to conclude the relevant duties ran only to subsets of that group. *See* Supp. Opp. at 60-61 (discussing *O'Hagan*, 521 U.S. 642). Again, this is because the Supreme Court has held that "'a fraud or deceit can be practiced on one person, with resultant harm to another person or group of persons.'" *O'Hagan*, 521 U.S. at 656.

Defendants, however, claim that *O'Hagan* has no application to this case. But all of their arguments are invalid.

Defendants criticize Lead Plaintiff's reliance on *O'Hagan*, asserting that because it "involved an appeal of a criminal conviction for insider trading," it supposedly has no bearing on the standard for civil liability. *See* Joint Brief at 32-33. Yet defendants then go on to argue that *Chiarella,* 445 U.S. 222, is controlling on the duty-to-disclose issue here. *See* Joint Brief at 26, 29, 36. Seeing that

---

[82] *See* Supp. Opp. at 60 ("Had the Banks satisfied their duty to disclose, the Enron fraud would have been revealed.") (original emphasis omitted).

Chiarella was itself an appeal from a criminal conviction for insider trading, this argument should be summarily rejected.[83]

It is also clear that *O'Hagan*'s holding that a breach of duty to one can yield actionable harm to another is not limited to the criminal context. *See Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 790 (2d Cir. 1969). *Crane* concerned the civil application of Rule 10b-5 to one company's conduct in manipulating the price of a tender offer target's stock, so as to defeat a tender offer by another company. The suit was instituted by Crane, which had set about to acquire Air Brake. Crane initiated a tender offer to purchase the shares of Air Brake from its stockholders at $50. At the time, such an offer presented a sufficient premium over the market price of Air Brake stock as to make the tender offer appealing to those shareholders.

A company called Standard (which itself desired to acquire Air Brake), however, sought to thwart Crane's merger plans by manipulating upwards the price of Air Brake stock, thereby eviscerating the potential premium offered by Crane's tender offer. Thus, on the critical day the tender offer was to terminate, Standard purchased large quantities of Air Brake stock (secretly reselling them at a loss, as the only point of the scheme was to increase the purchase volume that day), manipulating upwards the price of Air Brake stock to closer to the tender offer price. As a result, the ***Air Brake stockholders*** were deceived about the true value of their Air Brake stock:

> An ***ordinary investor*** watching the tape could only conclude that there was a wide-based demand for Air Brake stock and that it would be unprofitable to tender his stock to Crane at that time.

---

[83] *See Chiarella*, 445 U.S. at 225 ("In January 1978, petitioner was indicted on 17 counts of violating § 10(b) of the Securities Exchange Act of 1934 (1934 Act) and SEC Rule 10b-5. After petitioner unsuccessfully moved to dismiss the indictment, he was brought to trial and convicted on all counts. The Court of Appeals for the Second Circuit affirmed petitioner's conviction. 588 F.2d 1358 (1978). We granted certiorari, 441 U.S. 942 (1979), and we now reverse.").

Crane Co., 419 F.2d at 795. But as a result, ***Crane suffered injury*** in that its tender offer was defeated and, because Standard ultimately acquired Air Brake itself, Crane was forced to sell its air Brake shares pursuant to antitrust laws.

One major issue presented in the case was whether Crane was even a proper party to complain of the violation, which the court defined as Standard's "failure to disclose its manipulation." *Id*. After all, Standard's nondisclosure harmed Crane by deceiving not the latter but Air Brake's shareholders:

> Standard's extraordinary buying on April 19, coupled with its large secret sales off the market distorted the market picture and deceived ***the Air Brake stockholders***.

Id. at 796; *see also id*. at 795 (Standard engaged in the manipulative trades "at a price level ***calculated to deter Air Brake shareholders*** from tendering to Crane.").

The court concluded that because Standard's deception of the Air Brake shareholders harmed Crane, the latter could recover under §10(b):

> It is clear that Crane was one of the class of persons intended to be protected by the statute against Standard's violation.
>
> * * *
>
> Standard's failure to disclose its manipulation operated as a fraud or deceit ***on Crane*** in connection with the purchase and sale of securities . . . .

Id. at 794-96. The same analysis applies here; even if defendants' duty to disclose ran to certain persons, because the breaches of that duty harmed Lead Plaintiff and the proposed class, defendants' conduct remain actionable under Rule 10b-5 in this civil context.

Defendants next urge that use of *O'Hagan* is flawed because the case did not discuss reliance. But that is irrelevant because in this case, Lead Plaintiff may avail itself of the *Affiliated Ute* presumption of reliance, and so this element is satisfied.[84]

5. All of the Banks' Enron-Related Market Activities, When Considered Together, Satisfy the *First Virginia Bankshares* Multi-Factor Test

As just discussed above (and in the Supp. Opp.), each of these market activities (*i.e.*, analyst reports, equity trades, underwritings and contact with ratings agencies) yield free-standing duties to disclose for the Banks, even apart from the *First Virginia Bankshares* test. *See, e.g.*, Supp. Opp. at 59 ("the Banks' failure to disclose . . . violated the Fifth Circuit multi-factor *First Virginia Bankshares* criteria ***and*** several independent duties to disclose"). But it bears reiterating how this market conduct, as specifically described above and as depicted in Exs. 108-110, creates a duty to disclose under the *First Virginia Bankshares* test.

Concerning the first factor of this test, the "relationship between the plaintiff and defendant" (559 F.2d at 1314), the defendant Banks' numerous market activities created a relationship – at times a fiduciary relationship – between investors and the Banks. First, under the abstain-or-disclose rule, these outside Banks became "fiduciaries to the investing market," having been hired as consultants for the structured finance Transactions which provided the Banks with superior knowledge – inside knowledge – about Enron, preventing the Banks from trading in Enron securities without first disclosing what they knew. *See Dirks*, 463 U.S. at 655 n.14 ("Under certain circumstances, such as

---

[84] Defendants simply misapprehend Lead Plaintiff's use of *O'Hagan* when they claim Lead Plaintiff seeks to "'transfer'" duties between persons. Joint Brief at 33. As stated, Lead Plaintiff does not assert that the duty is "'transfer[red],'" but rather that the breach of that duty is actionable by those to whom it did not run. Defendants only reinforce the soundness of this conclusion when they emphasize that in the case O'Hagan's duty ran only to his "law firm and client" (*id*. at 33), and not the investors.

where corporate information is revealed legitimately to an ***underwriter***, accountant, lawyer or ***consultant*** working for the corporation, these outsiders may become ***fiduciaries of the shareholders***.”). The Banks did not disclose and engaged in the equity trades and debt offerings described above. Banks like CSFB also provided financing to Enron just as Heller did to Benson in *First Virginia Bankshares*. *See supra* §II.B.1.

The trading in Enron stock was also manipulative and created another “relationship” between the Banks and the investing market. As this Court has already held, when “‘a defendant has engaged in conduct that amounts to “market manipulation” under Rule 10b-5(a) or (c), that conduct creates an independent duty to disclose.’” *Enron*, 529 F. Supp. 2d at 739. The various underwritings, some of which were public, also created a relationship with the market which expected candor from the investment banks in fulfillment of the underwriting due diligence obligations. Further, CSFB’s and Merrill’s discussions with rating agencies and the issuance of analyst reports – where these Banks purported to offer the market an honest and objective evaluation of Enron’s common stock and debt – created an additional relationship with the market in the purchase and sale of Enron securities – those at issue here.

As to the second factor, “the parties’ relative access to the information to be disclosed” (*id*.), again, each of these Banks were privy to material non-public information about Enron which they gained through their underwritings and structured finance Transactions for the Company. Thus the Banks had superior knowledge *vis-á-vis* investors. It is undisputed that Lead Plaintiff and the proposed class had no knowledge of the deceptive Transactions or their impact on Enron’s financials. In *First Virginia Bankshares*, this factor appears to have been near definitive as the parties did not have a substantial relationship, and the Fifth Circuit highlighted Heller’s “superior knowledge of inside information.” 559 F.2d at 1317.

In this regard, Fastow viewed certain banks as "problem solvers" – *i.e.*, the Banks, including CSFB and Merrill, "worked to solve certain of [Enron's] financial problems." Declaration of Andrew S. Fastow (Docket No. 5048) ("Fastow Decl."), ¶¶6, 8. "In many instances, ***the banks primarily devised the financial structures***, which contributed to Enron achieving its financial reporting objectives." *Id.*, ¶6.[85] Fastow and certain of Enron's banks "worked together, ***intentionally and knowingly***, to engage in ***transactions that would affect Enron's financial statements***" (*id.*, ¶7):

> We told certain banks of our financial objectives and they, in many instances, ***created solutions*** utilizing complex financial structures, including prepays, FAS 125/140 deals, share trusts, minority interests, and synthetic leases. I believe that the manner in which some of these deals were reflected in Enron's financial statements might make it difficult for an investor to understand Enron's true financial condition and ***was deceptive***. I believe that ***the banks presented these structured-finance transactions*** in response to the problems we described to them. We paid a premium – in the aggregate, hundreds of millions of dollars – in order to engage in structured-finance transactions that contributed to causing Enron to report its financial statements in the desired manner.

Id., ¶8.[86]

As Fastow confirmed in his deposition, the transactions engaged in by banks such as CSFB and Merrill were done specifically for the purpose of falsifying Enron's financial statements, and the transactions "created that deception":

> As a general rule and for most of the – related to most of the structured finance transactions in which I was engaged or involved or directed at Enron, they were done for one simple reason.

---

[85] *See also, e.g.*, 10/23/06 Deposition Transcript of Andrew S. Fastow ("10/23/06 Fastow Depo. Tr.") at 53:24-54:7 ("In many cases, the banks brought us these structures, and we executed the transactions with the banks.").

[86] *See also* 10/23/06 Fastow Depo. Tr. at 75:17-76:1 (Enron's reported financial condition was improved "through prepays, financial prepays, share trust structures, FAS 125/140 deals, LJM-related deals, as well as others.").

> When you boil it all down, Enron wanted to paint a picture of itself to the outside world that was ***different from the reality*** inside Enron. And these structured finance transactions, along with other things that Enron did, ***created that deception***.

11/1/06 Deposition Transcript of Andrew Fastow ("11/1/06 Fastow Depo. Tr.") at 1895:4-13; *see also* 10/23/06 Fastow Depo. Tr. at 45:11-46:7, 52:12-20. With access to this information, the Banks were in a superior information position compared to investors.

With regard to the third factor, "the benefit derived by the defendant from the purchase or sale" (*First Virginia Bankshares*, 559 F.2d at 1314), all three Banks had substantial business relationships with Enron which yielded for them lucrative investment banking fees for underwriting or otherwise participating in offerings.[87] But these fees from offerings would only continue as long as Enron securities continued to trade at favorable prices. Thus, the Banks had a substantial financial interest in seeing that the public continued to purchase Enron securities of all kinds. The record in this case is replete with the Banks' admissions that Enron was a critical relationship for them. Also, like Heller in *First Virginia Bankshares*, the Banks had significant credit exposure to Enron.

Concerning the fourth factor, "defendant's awareness of plaintiff's reliance on defendant in making its investment decisions" (559 F.2d at 1314), CSFB and Merrill certainly knew investors were in the market at the same time as their equity trades which impacted volume and price. These Banks knew others were ***not*** in possession of the adverse material information as they themselves executed risk-free trades. Nor is there a question that investors rely on underwriters. And in underwriting offerings all three Banks knew that "[t]he investing public properly relies upon the

---

[87] *See* Ex. 11114 (email between Barclays personnel concerning the Zero Coupon Notes offering states that Enron paid the bank $500,000.00 "[f]or the privilege of having Barclays on the cover of the prospectus"); Ex 111 at 38-86 (during the relevant time period CSFB/DLJ earned approximately $97.6 million in fees from Enron offerings).

underwriter to check . . . the soundness of the offer." *Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341, 370 (2d Cir. 1973). It is immaterial here that "the offer" may only have been bought by a limited group of purchasers (as defendants emphasize). ***To vouch for the "soundness" of Enron's securities is to vouch for the "soundness" of Enron itself*** – for the common sense reason that an offering cannot be sound if the Company is not.[88] The wider market learned that the Banks were vouching for the soundness of Enron because their underwritings were reported in the financial media.[89] And, contrary to Merrill's argument, there is ***no*** reason for the Banks to speak to credit

---

[88] The fact that in the offerings the Banks vouched for Enron is illustrated by, *e.g.*, the offering memoranda for the CSFB-underwritten Marlin II securities offering, which on the cover featured the Enron logo and a statement that "***Enron*** is one of the world's leading natural gas, electricity and communications companies." Ex. 112 at 1.

[89] For example, on February 10, 2000, at 9:43:01, *Bloomberg* reported that Enron's Azurix Corp. would have a $500 million bond issue, and DLJ and Merrill would manage the sale. *See Corporate Bond Alert: Bellsouth, Classic Cable, Azurix Seen*, Bloomberg, Feb. 10, 2000 (Ex. 113) at 1. On May 21, 1999, *Reuters* reported on Enron's Azurix that it would have an IPO of 36.6 million shares, and that Merrill, CSFB and DLJ, along with a few other banks, would "manage the offering." *See Enron's Azurix Sets IPO at 36.6 Mln Shrs*, Reuters, May 21, 1999 (Ex. 114) at 1. On June 9, 1999, at 15:21:10, *Bloomberg* reported that Azurix sold 36.6 million shares in its IPO, and that Merrill "handled the sale." *See Azurix and Shareholder Raise $695.4 Million in IPO*, Bloomberg, June 9, 1999 (Ex. 115) at 1. On September 16, 1999, at 10:07:08, *Bloomberg* reported that Enron's Osprey Trust sold $1.4 billion of notes, and that DLJ and another bank "arranged the sale." *See Osprey Trust Sells $1.4 Billion of Notes in Private Sale*, Bloomberg, Sept. 16, 1999 (Ex. 116) at 1. On July 14, 2000 at 13:47:01, *Bloomberg* reported that Enron's The New Power Company filed for a $400 million IPO of shares, and that the underwriters included DLJ. *See Enron's TNPC File with SEC for $400 Million IPO*, Bloomberg, July 14, 2000 (Ex. 117) at 2. On September 29, 2000, *Euromoney Institutional Investor PLC Euroweek* reported that Enron raised $750m and Eu315M with a second issue from Osprey Trust, and that the transaction was led by DLJ and another bank. *See Credit Appeal Powers Enron's Rapid Divestment Vehicle*, Euromoney Institutional Investor PLC Euroweek, Sept. 29, 2000 (Ex. 93). On November 27, 2000, *Power Markets Week* reported that Enron's The New Power Company "received $473-million in additional net proceeds from an IPO led by underwriters Credit Swiss First Boston and Donaldson, Lufkin and Jenerette." *See Dot-Com Promise of Supplier Channel to Mass Market Fades; Shakeout Coming*, Power Markets Week, Nov. 27, 2000 (Ex. 118) at 1. On June 8, 2001, *Euromoney Institutional Investor PLC Euroweek* reported "Merrill Lynch sole lead managed the dual tranche bond issue for the Baa1/BBB+ rated company, following a roadshow in Japan two weeks ago." Ex. 92 at 1 (6/8/01 Euroweek).

rating agencies ***other than*** to garner favorable ratings for their client and to ensure continued sales of Enron equity and debt. Merrill and CSFB also issued analyst reports on Enron (that were disseminated to the entire investing public), which purported to advise investors precisely on their investment decisions regarding Enron common stock and debt. Such analyst reports effectively operated to "sell" Enron stock to investors.[90]

Finally, as to the fifth factor, "defendant's role in initiating the purchase or sale" (559 F.2d at 1314), CSFB's and Merrill's analyst reports support this final factor in addition to several other factors. In issuing "buy" recommendations on Enron common stock that were disseminated to the public, these Banks played a role in initiating the purchase of these securities. *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 842 (11th Cir. 2004) ("Research analysts . . . exert considerable influence in the marketplace. The reports and/or recommendations of such analysts can influence the price of a company's stock . . . ."). And CSFB's and Merrill's other market activities also helped initiate the sale of Enron stock. Their participation in the market for Enron equity increased volume and sale price. And favorable ratings from their discussions with credit rating agencies certainly had the impact of encouraging the purchase of equity and debt. Without the debt offerings, Enron would not have been able to operate, because the fact was that Enron was insolvent by year-end 1999. As to this final factor, it played little role in *First Virginia Bankshares*. Heller did absolutely nothing to

---

[90] *See* Ex. 15648 (11/29/01 email between CSFB analysts Brian Gibbons and Andy Devries stating that "[Enron] needed us to publicly sell the stock almost as much as we needed them for the fees"). Merrill of course understood investors were influenced by its analyst coverage of Enron: "[I]t was well-known to the investment banking community that in order to be a friend of Enron, the analysts had to be on board in giving strong ratings[.]" 12/7/04 Deposition Transcript of John Olson ("12/7/04 Olson Depo. Tr.") at 141:14-19. Merrill knew that this was only because such analyst coverage yields powerful influence on the investing public. As the SEC confirms that analyst reports "exert ***considerable influence*** in today's marketplace" and "[a]nalysts' recommendations or reports can influence the price of a company's stock." *Analyzing Analyst Recommendations*, dated April 20, 2005 (Ex. 119).

initiate First Virginia's purchase of Benson. And in *Abbott*, 2 F.3d at 621, the Fifth Circuit identified the Eighth Circuit case of *Reves*, 937 F.2d 1310, as applying the Fifth Circuit's multi-factor test. In the *Reves* case, the court found a duty to disclose even though the initiating factor was not satisfied. *See id*. at 1331. Yet, in this case a jury could find that the Banks ***did*** play a role in initiating the purchase of the securities through analyst reports and Enron and Enron-related securities brought to market through underwritings or otherwise. As noted earlier, the situation here is more analogous to the situation in *Affiliated Ute* where the Court found the defendants' activities ***induced*** the purchase and sale of the stock at issue. 406 U.S. at 153.

Having satisfied each of the five *First Virginia Bankshares* criteria, plaintiffs have established or proffered sufficient evidence to raise a triable issue of fact as to whether the Banks owed investors a duty to disclose. No disclosure of the adverse material information in the Banks' possession occurred, giving rise to a presumption of reliance under *Affiliated Ute*.

C. The Elements of Scienter, Reliance and Loss Causation Are Satisfied for Lead Plaintiff's Claims

1. Scienter

Merrill and CSFB argue that their market activity through analyst reports should be completely disregarded now on summary judgment because the Court dismissed claims based on analyst statements in the ruling on class certification, for lack of pleading the analysts' scienter. Joint Brief at 43. But the Court specifically left open the possibility of allowing a claim based on analyst statements to go forward when it stated: "If there is a question, it should be raised by motion for summary judgment." *Enron*, 529 F. Supp. 2d at 778. In accordance with that ruling, Lead Plaintiff provided evidence of scienter in its oppositions to summary judgment briefing. *See* Lead Plaintiff's Opposition to the CSFB Defendants' Motion and Memorandum of Law in Support of

Their Motion for Summary Judgment (Docket No. 5217) ("LP CSFB Opp.") at 214-232; LP Merrill Opp. at 47-53, 70-74, 95-96, 127-144; Supp. Opp. at 43-51.[91] The new theory, however, is not ***based*** on the analyst reports *per se*, but on the duty that arises from the Banks' active participation in the sale of Enron shares. In other words, the analyst ***case*** in the context of Lead Plaintiff's ***new*** theory does not rest on a misstatement under Rule 10b-5(b), but the market activity in general leading to a duty to disclose. To be clear, liability arises from defendants' engagement in the Transactions coupled with their market activity – not on a statement.

In this context, Lead Plaintiff is clearly correct that because this case focuses on omissions, not statements, *Southland*'s focus on the mind of a "speaker" is obviously inapplicable.[92] *See* Joint Brief at 44-45. Merrill claims that in making this analysis, Lead Plaintiff seeks to "circumvent[]"*Southland*. Merrill Brief at 5. In this regard, Merrill quotes *Southland* as instructing "this Court" to "'look to the state of mind of the individual corporate official or officials who make or issue the statement.'" *Id*. Aside from the patent absurdity of looking to the mind of one who makes a "the statement" in an omissions case, it should be noted that Merrill's Brief conveniently omits the preceding words of that quote where the Fifth Circuit qualifies this holding as limited to statements, not omissions. The entire quote actually reads:

---

[91] Lead Plaintiff does not "acknowledge[] that had it continued to plead its case based on 'affirmative statements by the Banks,' it would fail to satisfy the Fifth Circuit's decision in *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. Tex. 2004)." Joint Brief at 44. Lead Plaintiff has substantial evidence to support a finding of scienter under that case. *See* LP CSFB Opp. at 214-232; LP Merrill Opp. at 47-53, 70-74, 95-96, 127-144.

[92] *See* Supp. Opp. at 44-45 ("[T]his case does not concern affirmative statements by the Banks, but instead focuses on omissions. Thus, ***there is no speaker*** whose state of mind can be examined for scienter. As such, the proper scienter inquiry here should focus on whether relevant individuals at the Banks had knowledge that the Banks were engaging in the deceptive Transactions, that the Transactions distorted Enron's financials in a material manner, that the Banks were active in the market for Enron securities, and that no disclosure of the fraud was made.").

> ***For purposes of determining whether a statement made by the corporation*** was made by it with the requisite Rule 10(b) scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement . . . .

Southland, 365 F.3d at 366.

Merrill also employs a hollow scare tactic in cautioning this Court that should it adopt Lead Plaintiff's argument on scienter, the grave result will be that "every plaintiff will simply plead claims based on one employee's failure to correct another's misrepresentation." Merrill Brief at 5. What Merrill completely overlooks is that such pleading – which would supposedly "nullify *Southland*" (*id*.) – has been explicitly sanctioned by the Fifth Circuit:

> Where it is pled that one defendant knowingly uttered a false statement and ***the other defendant knowingly failed to correct it***, even if it is not alleged which defendant made the statement and which defendant did not correct it, the fraud is sufficiently pleaded as to each defendant.

Barrie v. Intervoice-Brite, Inc., 409 F.3d 653, 656 (5th Cir. 2005).

Thus, Lead Plaintiff need not prove that any particular analyst had scienter.[93] Moreover, even if *Southland* applied (which it does not), that decision permits examination of the mind not just of the speaker, but also of those who "order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like." *Southland*, 365 F.3d at 366. Although it need not, Lead Plaintiff has met this standard.[94]

---

[93] Lead Plaintiff has demonstrated that CSFB's analysts knew of the concealed fraud. *See* Supp. Opp. at 45-48. And Lead Plaintiff has demonstrated the individuals that fired, hired and ultimately controlled Merrill's analysts for the benefit of obtaining Enron's business had scienter. *See* §II.C.1.(b).

[94] For example, the evidence would support a finding that, for CSFB, Abib could "order or approve" the bank's analyst reports. CSFB analyst Jill Sakol, who wanted to release negative information on Enron, felt pressured to, and did, send a draft report to Abib, among others. *See* Supp. Opp. at 47 n.65; LP CSFB Opp. at 225-27. Again, Abib acted with scienter. *See* Supp Opp. at 46-47.

Nor need Lead Plaintiff show that any bank employee working on the underwritings had scienter, as defendants wrongly insist. *See* Joint Brief at 39. Again, Lead Plaintiff here makes no claim for the statements in the offering documents. Instead, it argues that the defendants' conduct in doing the offerings created a duty to disclose. It is for the breach of this duty to disclose that Lead Plaintiff sues defendants. As demonstrated directly below, however, Lead Plaintiff has sufficient proof of scienter.

a. CSFB Scienter

(1) Abib

Lead Plaintiff has identified CSFB's Managing Director Abib as having scienter. Abib was the Bank's Relationship Manager for Enron during part of the Class Period. Abib of course knew how CSFB interacted with Enron; this was his job. As a "coverage team leader," Abib testified he spent "most" of his time at CSFB "trying to understand ***what my colleagues were doing on behalf of Enron*** in terms of various products and services that we might – might be – might have been providing to them at that time." 6/16/04 Deposition Transcript of Osmar Abib ("6/16/04 Abib Depo. Tr.") at 57:25-58:9.

Abib knew CSFB traded Enron stock in the equity swaps and forwards, which were also referred to as "Enron Own-Share Trades." *See* Exs. 11303; 21872. Abib's "role with respect to the own share equity derivative transactions between CSFB and Enron" was "relate[d] to the relationship elements of doing those transactions." 9/16/05 Deposition Transcript of Stephen Haratunian ("9/16/05 Haratunian Depo. Tr.") at 350:18-351:3. He was, among other things, a contact person for Enron for engaging in equity trades. *See, e.g.*, Ex. 16 (CSFBLLC005016868) (email from Ogunlesi to Abib stating that Fastow was trying to contact both of them to "do a derivative trade with us"); Ex. 50 (CSFBLLC005290196) (5/18/01 email from Abib to Haratunian and James Moran re bank's ability to handle up to 2.55 million shares worth of manipulative trades

for Enron); Ex. 120 (CSFBLLC000555148) (Email from Haratunian to, *et al.*, Abib stating: "I have had a number of conversations this evening with Freeland and DeSpain regarding trying to get them to sign the outstanding confirms on the trades done over the summer. There are 3 such trades . . . with a total exposure of $131.2MM."); Ex. 121 (CSFBLLC000213381) (Email from Abib stating that: "I just received a call from Tim [DeSpain] and he wants to move some of his equity derivative positions ***to equity forwards and back*** in a period of a week or so.").

Because Abib spent "most of [his] time" examining what his "colleagues were doing on behalf of Enron" (6/16/04 Abib Depo. Tr. at 57:25-58:9), he of course knew that CSFB issued analyst reports for the Company. CSFB analyst Jill Sakol, who wanted to release negative information on Enron, felt pressured to, and did, send a draft report to Abib, among others. *See* LP CSFB Opp. at 225-27. This only confirms the obvious fact that Abib knew his bank issued analyst reports on the Company.

It is also indisputable that Abib knew of CSFB's fraud in the structured finance transactions with Enron. As to Osprey, Abib received an email stating: "'As you probably know, Osprey is a vehicle enabling Enron to raise ***disguised*** debt which ***appears*** as equity on Enron's balance sheet. . . . Osprey serves the added purpose for Enron of being an off-balance-sheet ***parking lot*** for certain assets.'" LP CSFB Opp. at 153. As to LJM1, Abib, among others, served as a purported "'director[]'" of an entity in the LJM1 Rhythms Hedge transactions to give the entity the false appearance of not being a shell. *See* LP CSFB Opp. at 53-55.

Regarding the prepays, Abib was informed that CSFB's 2000 and 2001 prepays were really just a "loan" to the Company. LP CSFB Opp. at 93. Fastow testified he discussed the "intent of the [prepay] transaction and the problem it was solving with" Abib. 10/23/06 Fastow Depo. Tr. at 230:2-13. Geoff Smailes, the senior energy trader at CSFB's London oil desk who executed the

actual swaps in the prepays informed Abib the deal was really just a loan from CSFB to Enron: "Osmar, our 150M$ oil-linked loan to Enron matures on the 12th of this month." Ex. 50094.

As to Nile, Abib submitted a New Bank Opportunities Form for Nile, identifying the deal as a "loan." LP CSFB Opp. at 117. Memoranda submitted to the credit department repeatedly identify CSFB's funding of the Nile transaction – even the supposed "equity" portion – as a loan. For example, the Nile deal was funded in two tranches, with "Tranche A" corresponding to the 97% debt, and "Tranche B" for the supposed 3% "equity." *See* Ex. 50098 at ERN0124468 (9/19/01 credit memorandum). But in the credit documents, even Tranche B is identified as a loan: "The Company plans to issue the debt in two tranches – Tranche A (97% or $135.8 million) and Tranche B (3% or $4.5 million) . . . ." These memoranda were sent to Abib. *See, e.g.*, Ex. 50098 at CSFBCO006011391, CSFBO006011394-95.

Banker Brian McCabe informed Abib that the assets in Nile were vastly overvalued: "EES (Mark Muller and his team) have a company that they own and are creating another New Power type story. . . . They gave us a model a week or so ago with (in my view) a very aggressive valuation ($500mm pre-money). I have told them their valuation is too aggressive and have been drilling them on the model assumptions over the past week." Ex. 13106A.

Abib also knew of CSFB's underwritings for Enron. On March 7, 2000, CSFB underwrote $1 billion in Enron floating rate notes in a Rule 144A/Reg. S offering. *See* Ex. 122 at CSFBLLC005512678, CSFBLLC005512691; Ex. 123 at CSFBLLC005517429; Ex. 124 at CSFBLLC005111978. The CSFB working group for the $1 billion floating rate notes included Abib, managing director and Enron Relationship Manager. Ex. 125 at CSFBLLC005517273; Ex. 126 at CSFBLLC005512642. Abib participated in a March 1, 2000 "[c]omprehensive due diligence discussion" with Enron regarding the offering. Ex. 126 at CSFBLLC005512643.

Abib also knew of fraudulent transactions Enron was engaging in with other banks. An August 18, 2000 email to Abib (and Ogunlesi and Yellen) described a $500 million credit linked note transaction between Enron and Citigroup: "The beauty of the deal from Enron and SSB/Citi's stand point is that it does not appear to be 'new' money on Enron's balance sheet, and it creates new capacity for SSB/Citi to make loans to Enron. . . . Behind the scenes . . . Citi has basically hedged it's [sic] other Enron exposure . . . since they had laid off $500 mm of Enron exposure to the market. . . . The ***'market' doesn't see that behind the scenes, Citi is lending $500 mm of new money to Enron***." Ex. 14085.

(2) Ogunlesi

Adebayo Ogunlesi was the head of CSFB's Global Energy Banking Group and one of the bankers who aggressively solicited Enron's business. Fastow Decl., ¶47. Ogunlesi had knowledge of CSFB's equity trades with Enron, how the bank's structured finance transactions falsified Enron's financial reporting, and that CSFB underwrote offerings for Enron.

Ogunlesi had knowledge of the bank's equity trades with Enron . He was (as was Abib) a contact person for Enron for engaging in equity trades. *See* Ex. 16 (CSFBLLC005016868) (email from Ogunlesi to Abib stating that Fastow was trying to contact both of them to "do a derivative trade with us"); *see also* Ex. 127 (CSFBLLC000232913-16) (containing emails to and from Ogunlesi discussing CSFB equity trades with Enron).

Ogunlesi also had full knowledge of CSFB's fraud in engaging in the structured finance transactions with Enron. As to LJM1**,** Fastow spoke with Ogunlesi about the Rhythms Hedge. 10/24/06 Deposition Transcript of Andrew Stuart Fastow ("10/24/06 Fastow Depo. Tr.") at 463:4-27. Ogunlesi served as a director of ERNB – a shell company created and controlled by CSFB that was a limited partner in LJM1 (12/7/04 Deposition Transcript of Adebayo O. Ogunlesi ("12/7/04

Ogunlesi Depo. Tr.") at 464:3-18) and told Fastow he "loved the LJM structures." 10/23/06 Fastow Depo. Tr. at 222:11.

The LJM authorization request, sent by Ogunlesi and others, described the "Rationale for Investment in LJM2" as follows:

> The LJM1 investment has provided significant returns to CSFB over a short time period. Investing in LJM2 should solidify the relationship with Enron, enable Enron to continue its aggressive growth with ***off-balance sheet capital***, and garner appropriate returns on CSFB capital.

Ex. 10175 at CSFBCO000009961. Fastow told Ogunlesi about LJM2's Raptor transactions and that these transactions were similar to the fraudulent LJM1/Swap Sub transaction. 10/23/06 Fastow Depo. Tr. at 220:16-222:16.

Regarding the prepays, Ogunlesi recommended that COO of investment banking Adrian Cooper authorize investment banking to "underwrite the $150m of ***credit*** risk" for a prepay (Ex. 11772); thus Ogunlesi knew the deal was not a true commodity trade but just a loan. Ogunlesi understood Enron's primary purpose in doing prepay transactions. 10/23/06 Fastow Depo. Tr. at 230:2-231:7.

Ogunlesi received Nile credit memoranda detailing that even the supposed equity portion of the deal was "100%" "Enron" "Credit Risk" "via put." Ex. 50854A at CSFBCO006011362-63. Even though Nile was approved by CSFB's credit risk management group, Ogunlesi testified that true equity investments in SPF transactions would not need such approval. 12/6/04 Deposition Transcript of Adebayo O. Ogunlesi ("12/6/04 Ogunlesi Depo. Tr.") at 78:23-79:4; Ex. 50854A at CSFBCO006011359. Ogunlesi received the Nikita credit memorandum, Ex. 10214, so he knew this deal had no true equity component as well.

Concerning offerings, Abib notified Ogunlesi of CSFB serving as lead manager for a floating rate note offering. *See* Ex. 128 (CSFBLLC005135479).

(3) Nath

Nath (who worked for DLJ) had knowledge of how that bank's structured finance transactions operated to falsify Enron's reported financial results. Fastow testified: "I viewed Larry Nath as the person most responsible for developing and executing the following transaction structures: Marlin, Whitewing, Osprey, and Firefly." Fastow Decl., ¶48; *see also* 10/23/06 Fastow Depo. Tr. at 192:10-14 (Fastow identifies Nath as the person associated with DLJ's structuring capability). Fastow describes that Nath pitched transactions to Enron by detailing the reporting effect they would achieve for the Company. *See* Fastow Decl., ¶48.

Nath admitted he knew Osprey was really just a financing. 1/12/05 Deposition Transcript of Laurence J. Nath ("1/12/05 Nath Depo. Tr.") at 195:9-11. Thus he knew that Osprey's structure was only window dressing – fashioned simply to cloak this admitted "financing" as something else. Also regarding Osprey, Nath knew that "Enron employees" would be on "both sides" of the asset transactions. *See* 1/12/05 Nath Depo. Tr. at 184:12-185:7. CSFB worked on an Enron presentation to Standard & Poor's regarding Osprey. Ex. 20544 at DBG 036891-919; 8/1/05 Deposition Transcript of Dominic Capolongo at 68:18-69:25. Nath, while at CSFB, discussed some of Enron's structured-finance transactions with a representative from Standard & Poor's. 9/21/05 Deposition Transcript of Todd A. Shipman ("9/21/05 Shipman Depo. Tr.") at 354:25-356:5. Nath made a presentation to Standard & Poor's regarding the Osprey transaction. 9/22/05 Deposition Transcript of Todd A. Shipman ("9/22/05 Shipman Depo. Tr.") at 622:21-623:10. DLJ met with Standard & Poor's regarding the Marlin I transaction. 3/16/05 Deposition Transcript of Ronald Barone ("3/16/05 Barone Depo. Tr.") at 790:18-792:17. CSFB assisted Enron in presentations to Standard & Poor's regarding the Osprey transaction. 3/16/05 Barone Depo. Tr. at 804:19-23; 806:2-6. Enron's presentation to Moody's Investors Service regarding Marlin Water Trust and Marlin Water Trust II listed Nath and Capolongo as "contacts." *See* Ex. 11401 at MDY007413.

b. Merrill Scienter

Merrill's activities with Enron were known to and coordinated by a small group of senior bankers in Merrill's Houston and Dallas offices. Chief among them were Tilney and Furst.[95] Tilney had long been one of Enron's investment bankers and by the mid-1990s, had become the head of Merrill's Houston office. And, by early 2001, he was head of Merrill's worldwide energy-and-power investment banking group.[96] Tilney was, during the relevant period, Merrill's "senior relationship manager" for its Enron relationship.[97] Furst also enjoyed a long-term close relationship with Enron, and in the fall of 1999, Furst assumed the role of Merrill's "relationship manager" with respect to the Enron account.

Tilney and Furst were centrally involved in the Nigerian Barge transaction, the Power Trades and LJM2.[98] They also coordinated all other aspects of the Merrill/Enron relationship, including the equity swaps and forwards.[99] Thus, they were aware of Merrill's analyst coverage of Enron, as well as its other market-related activities. In fact, it was Tilney that had John Olson fired from Merrill because Enron was upset with Olson's coverage. *See* Supp. Opp. at 24-25. As Olson testified, it was common knowledge that in order to obtain Enron's banking business, Enron required favorable

---

[95] Lead Plaintiff has set out in exhaustive detail the activities Tilney and Furst engaged in, the knowledge gained from those activities and the evidence supporting such. *See* LP Merrill Opp.

[96] Notably, Merrill's principal equity analysts assigned to the Enron account – first John Olson, then after Olson's firing, Donato Eassey – worked in Tilney's Houston office.

[97] As we have discussed elsewhere, Tilney had very close personal relationships at Enron as well. Not only was he close personally to Fastow, but his wife, Elizabeth Tilney, was a senior executive at Enron.

[98] Other very senior Merrill bankers were involved in or aware of some or all of these transactions, but it is sufficient that knowledge of all things Enron was centralized with Tilney and Furst in the late 1999-2001 time frame.

[99] In his "Contact Report Summary," dated September 26, 2000, Furst noted that he reviewed the "forward equity swaps" with Tim DeSpain. Ex. 129 (MLNBY0272735).

analyst coverage. 12/7/04 Olson Depo. Tr. at 141:14-19. Tilney, with knowledge of the fraud, ensured that Merrill provided that favorable coverage. Supp. Opp. at 24-25.

Tilney and Furst, as well as other top Merrill bankers, were also aware of, and specifically discussed internally, the impact of their activities on Enron's stock. As noted above, Tilney, in discussing the circumstances surrounding the pre-arranged pact to "unwind" the Power Trades, emphasized that "***they [Enron] knew what we were making at . . . the quarter and year (which had great value in their stock price, not to mention personal compensation)***."[100] Thus, Merrill was well aware that its deceptive conduct was impacting the "***value***" of Enron's stock in the market.

In addition, Merrill gained significant knowledge about other-bank activities when Rob Furst moved from CSFB to Merrill in the Fall of 1999. Furst knew LJM1 was purchasing a part of Enron's Cuiaba interest (Ex. 50239 at DPOEX00006081), and that CSFB planned to monetize the Enron treasury shares not supporting the Rhythms Hedge through a "SAILS" transaction. Ex. 11231 at CSFBLLC006359806. Furst also knew that Enron was monetizing a number of its international assets through the "Rawhide" transaction (*see* 11/10/04 Deposition Transcript of Jamie Welch at 26:13-27:13) and that Enron regularly used off-balance sheet transactions at quarter-end to meet financial objectives.[101] Merrill nowhere discusses that it has agreed to accept "responsibility for the conduct of its employees giving rise to any violation in connection with the Year-End 1999 Transactions."[102]

---

100 Ex. 50028 at MLBE0370956 (5/30/00 email from Tilney to Dan Gordon and Furst).

101 An internal CSFB email from March 1999, recounting a meeting with an Enron employee and forwarded to Furst, states: "***As we were aware they are very active in using off balance sheet/monetization structures to manage revenues/cash flow on a quarter to quarter basis (he said we should make a point of calling them six weeks before the end of each quarter as that was when they were likely to be handing out mandates)***." Ex. 11181 at CSFBLLC006362179.

102 Ex. 130 (Merrill DOJ Agreement).

2. Reliance

As Lead Plaintiff has explained, this element is satisfied here because Lead Plaintiff is entitled to the *Affiliated Ute* presumption of reliance, in that this is a case primarily of omissions and defendants had a duty to disclose. *See* Supp. Opp. at 59 (discussing *Regents*, 482 F.3d at 384).

Defendants, though, dispute that Lead Plaintiff has identified any true "omissions" which would entitle Lead Plaintiff to the *Affiliated Ute* presumption of reliance. *See* Joint Brief at 17-18; Merrill Brief at 7-8, 12. But defendants' argument here rests only an inaccurate reading of *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1119 (5th Cir. 1988), *vacated on other grounds sub nom.*, *Fryar v. Abell*, 492 U.S. 914 (1989). *See* Joint Brief at 17-18. Defendants insist that *Abell* provides that an omission will lie only where the defendant said nothing about the "subject matter." *Id*. at 17. They assert that here, this would require that defendants have said nothing at all about "Enron's financial condition." *Id*.

This, however, is not the law. As Lead Plaintiff argued in its Supplemental Opposition, the test is whether defendants said anything about the ***material facts*** of which Lead Plaintiff was unaware – *i.e.*, the details of the fraud. Supp. Opp. at 28-29. The cases confirm this as the correct approach.

While quoted correctly in two instances, in other places defendants are fond of shortening the relevant quote from *Abell* to imply that an omission is present where the defendant fails to disclose "any information whatsoever." *See* Joint Brief at 18; Merrill Brief at 7, 8, 12 (featuring quote so shortened). This is done because the full quote supports only Lead Plaintiff's position:

> Such non-disclosure suits are those in which the complaint is grounded primarily in allegations that the defendant has failed to disclose any information whatsoever relating to ***material facts about which the defendant has a duty to the plaintiff to disclose***.

Abell, 858 F.2d at 1119. It is indisputable that the "material facts" here are the facts demonstrating that Enron's reported financial condition had been falsified by defendants' structured financial

transactions – and not that Enron simply had a "financial condition," as defendants seek to improperly read *Abell*. Another quote from *Abell* makes it even clearer that defendants' interpretation makes nonsense of the case:

> To omit a fact, however, is to say absolutely nothing about matters ***whose very existence plaintiffs have no reason to consider***.

Id. Thus, the information which the defendant is to never have discussed is that which was concealed from the plaintiff. Here, again, that is the fraud, not simply that Enron had a "financial condition," which is a fact every Enron investor knew about.

The soundness of this conclusion is reinforced by *First Virginia Bankshares*. In that case, the plaintiff and defendant had an explicit conversation about Benson's financial practices and condition:

> Michelman's inquires elicited the following information, as recorded in his memorandum concerning the call:
>
> > "Bob told me their experience with Benson has been satisfactory for many years. Heller is aware that Benson is thinking of selling, but said that if Benson were not following this course, there is no doubt in his mind that more money could be made available to Benson. Bob characterized the operation as somewhat better than average, although there are areas of ***sloppiness in bookkeeping*** as they find in almost all of their clients. ***Benson has always met its obligations promptly***. Bob characterized Alan [Benson] as capable and hard working and said that in his opinion, the operation is better now that Alan is running the show."

559 F.2d 1311. But notwithstanding defendant's discussion of the "subject matter," *i.e.*, Benson's "financial condition" (Joint Brief at 17), the defendant was still liable for the pure omission of failing to reveal the fraud, to wit, "Heller's failure to inform Michelman of the abuses discovered in the May 1972 investigation." 559 F.2d at 1317.

Defendants also claim that this Court's previous Order of February 8, 2007, supposedly "rejected" an attempt by Lead Plaintiff to make claims for omissions in offering documents previously asserted to contain misrepresentations. *See* Joint Brief at 16-17. This is incorrect; in that Order this Court did not "reject[]" any attempt to recast misrepresentation claims as omission claims;

in fact, in that Order the Court found that the case against these banks is a "case primarily of omission and not misconduct." 2/8/07 Order at 44.[103]

3. Loss Causation

As Lead Plaintiff explained, under this Court's existing loss causation framework, this element is satisfied because "The Banks' breach of their duty to disclose the truth they knew about Enron's financial condition operated to conceal the true state of affairs – *i.e.*, that Enron's reported financial condition was falsified." Supp. Opp. at 62. Defendants contend that this analysis does not satisfy *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007). But defendants are incorrect. The *Oscar* decision is explicitly limited to cases employing the fraud-on-the-market presumption of reliance.[104] Because Lead Plaintiff seeks to utilize the *Affiliated Ute* presumption of reliance, not the fraud-on-the-market presumption, *Oscar* does not apply.

Merrill also argues that Lead Plaintiff has not presented evidence to "link" loss causation to the bank's analyst reports – but in reality Lead Plaintiff has. As indicated, Lead Plaintiff contends that Merrill's (and CSFB's) analyst reports created for those banks a duty to disclose. Breach of this duty to disclose created artificial inflation in the price of Enron stock, which inflation was removed.

---

[103] Also, the cases cited in n.14 of the Joint Brief do not aid defendants because they were not cases of primarily omissions. *See Krogman v. Sterritt*, 202 F.R.D. 467, 479 (N.D. Tex. 2001) ("Plaintiffs' claims are not primarily failure to disclose allegations . . . ."); *Griffin v. GK Intelligent Systems, Inc.*, 196 F.R.D. 298, 305 (S.D. Tex. 2000)("claims . . . presented . . . in this case . . . are primarily that the defendant company made false statements"); *Young v. Nationwide Life Ins. Co.*, 183 F.R.D. 502, 505 (S.D. Tex. 1998) ("The crux of Plaintiffs' complaint arises from their allegations that the Defendants made material misrepresentations and/or omissions in connection with the marketing and sale of the variable contracts.").

[104] *See Oscar*, 487 F.3d at 264 ("This dispute turns on whether the certification order properly relied upon the fraud-on-the-market theory."); *id.* (court explains that its decision is pursuant to its authority to "'develop its own fraud-on-the-market rules'").

See Nye Report, ¶¶112-172. This loss causation theory fits within the loss causation framework established by this Court. *See* Supp. Opp. at 61-62.[105]

The same reasoning defeats defendants' assertion that Lead Plaintiff has not shown loss causation for the underwritings. *See* Joint Brief at 39-40. As indicated, Lead Plaintiff contends the offerings created for those banks a duty to disclose. Breach of this duty to disclose created artificial inflation in the price of Enron stock, which inflation was removed; this theory fits the Court's loss causation framework.

4. The Law Permits Lead Plaintiff to Change Its Legal Theory Without Necessitating Amendment of the Pleadings

In another effort to avoid adjudication of Lead Plaintiff's claims on the merits, defendants argue that Lead Plaintiff is barred from contending that public statements by defendants are actionable as omissions because, supposedly, Lead Plaintiff previously cast these as misstatements. *See* Joint Brief at 16-17, 19-20. Specifically, defendants claim that lead Plaintiff is guilty of a "fatal inconsistency" here, that it is "judicially estopped" from seeking to hold defendants liable for their

---

[105] Merrill claims that Lead Plaintiff's claims concerning LJM must supposedly fail under *Stoneridge* for a lack of causation (*see* Merrill Brief at 14), but it is incorrect. First, causation does exist: in marketing the LJM partnerships, had Merrill satisfied its duty of disclosure, the Enron fraud would have been revealed, and the proposed class would not have purchased Enron securities at inflated prices. *See* Supp. Opp. at 60 ("Had the Banks satisfied their duty to disclose, the Enron fraud would have been revealed."). It is entirely proper in nondisclosure cases to analyze causation in terms of what would have happened had disclosure been made. In *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), the court addressed a claim by the plaintiff that a share-for-share merger of a company in which he held stock was accomplished through fraudulent and manipulative practices which rendered the share ratio unfair to him. The plaintiff contended that the defendant was liable under, *inter alia*, Rule 10b-5, for failing to disclose the improper practices in the merger proxy. The court, in finding the element of causation satisfied, analyzed the issue by inquiring about what would have transpired had disclosure been made: "Thus, had there been full disclosure here, the merger ratio would have been unfair on its face and the shares of Penn-Dixie in the open market would have sold for less . . . . [W]e are of the view that sufficient causation is alleged . . . ." 507 F.2d at 383-84. Second, Merrill misapprehends Lead Plaintiff's claims. Lead Plaintiff does not assert "claims" regarding LJM; it asserts that Merrill's marketing of the partnerships created a duty to disclose, and brings claims for Merrill's breach of that duty.

omissions, and that proceeding on an omissions theory would require amendment of the Complaint. *Id*.

Defendants' contentions should be rejected for a number of reasons. First, Lead Plaintiff is guilty of no inconsistency. Lead Plaintiff previously maintained that this was an omissions case. *See* 2/8/07 Order at 44 (Court states it has "found that *Newby* is a case primarily of omission.").

Moreover, initially recognizing that defendants made certain misstatements is ***not*** inconsistent with Lead Plaintiff's revised theory of liability. For example, Lead Plaintiff previously contended that Merrill's and CSFB's analyst statements contained misrepresentations. Now Lead Plaintiff contends, for purposes of this alternate theory, that the issuance of those statements, along with other market conduct, created a duty to disclose under *First Virginia Bankshares*, which defendants breached by nondisclosure. Lead Plaintiff is ***not*** (as defendants wrongly argue; *see* Joint Brief at 16) ***factually*** characterizing any document or statement differently than it had before. Indeed, when Lead Plaintiff sought to hold those analyst statements actionable under a misrepresentation theory, it did ***not*** deny that they contained omissions; and now that Lead Plaintiff is proceeding under a revised legal theory, it does ***not*** deny that the analyst statements contain misrepresentations.[106]

Defendants' argument here contains the implicit premise that a document cannot consistently be understood as containing misstatements, on the one hand, and omissions, on the other. Common experience shows this premise to be false, and the case of *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176 (S.D.N.Y. 2005), *vacated and remanded on other grounds, Fogarazzo v. Lehman Bros.*, No. 07-

---

[106] This same analysis applies as well to Lead Plaintiff's contentions concerning defendants' underwritings.

0437, slip op. (2d Cir. Jan. 26, 2007),[107] confirms this as so. A securities fraud case by investors against investment banks concerning their analyst reports, *Fogarazzo* held that allegations concerning those reports properly alleged them to contain misstatements, on the one hand, and omissions, on the other. Indeed, the court certified the case as a class action and ruled that the plaintiffs were entitled to both the fraud-on-the-market and *Affiliated Ute* presumptions of reliance. 232 F.R.D. 185-88. After concluding that the fraud-on-the market presumption applied, the Court held that

> the theory behind the *Affiliated Ute* presumption . . . is not undermined simply because a defendant makes misstatements ***at the same time*** it omits material information.

232 F.R.D. at 186. Just like in *Fogarazzo*, defendants' analyst reports and offering documents in this case can be seen as containing misstatements and omissions "at the same time."

Thus, any supposed "fatal[] inconsisten[cy]" (Joint Brief at 19) is but a desperate fabrication by defendants. As indicated, all Lead Plaintiff has done is ***revise its legal theory***, without taking any inconsistent factual positions. This is undoubtedly permissible. While defendants struggle to cast Lead Plaintiff's Complaint as limited to misrepresentations under Rule 10b-5(b) (*see* Joint Brief at 16 n.13), this is not true; that Complaint sought to recover against defendants for, *inter alia*, engaging in "acts, practices and a course of business that operated as a fraud or deceit upon plaintiffs and others similarly situated in connection with their purchases of Enron securities during the Class Period." First Amended Consolidated Complaint (Docket No. 1388), ¶995(c). Lead Plaintiff's revised legal theory – *i.e.*, that defendants' market activities engendered a duty to disclose which was

---

[107] A vacated decision, although no longer binding precedent, is still persuasive. *See United States v. Cisneros*, 456 F. Supp. 2d 826, 839 (S.D. Tex. 2006); *see also DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) ("at minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value").

breached by omissions, thus defrauding Lead Plaintiff – clearly fits within this scenario. Accordingly, Lead Plaintiff may permissibly change its legal theory (and do so without need of amending its Complaint):

> Having specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint.

Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997).

> "[There exists a] liberal rule of federal practice under which the complaint is not to be dismissed because the plaintiff's lawyer has ***misconceived the proper legal theory of the claim***, but is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief."

Laird v. Integrated Res., 897 F.2d 826, 841 n.69 (5th Cir. 1990); *Dotschay v. Nat'l Mut. Ins. Co.*, 246 F.2d 221, 223 (5th Cir. 1957) (same quote); *see also United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963) (same quote).

The choice of the "wrong" theory will not preclude recovery under a "correct" one.

2A James Wm. Moore, *Moore's Federal Practice* ¶8.14, at 8-74 to 8-75 (1995).[108]

Moreover, it is beyond peradventure that it is squarely within this Court's power to allow Lead Plaintiff to raise this revised theory at this stage of the proceedings. The Fifth Circuit has held: "A district court possesses the discretion to consider a claim raised for the first time in a ***post-trial*** motion." *United States for the Use of American Bank v. C.I.T. Constr., Inc.*, 944 F.2d 253, 259 (5th Cir. 1991) (citing *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1458 (5th Cir. 1987) (implying that the district court could have considered a legal defense newly raised in a motion for a new trial)). If

---

[108] *See also Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) ("[A] complaint sufficiently raises a claim even if it points to no legal theory or ***even if it points to the wrong legal theory*** as a basis for that claim, as long as 'relief is possible under any set of facts that could be established consistent with the allegations.'"); *Schwartz v. United States*, 745 F. Supp. 1132, 1135 (D. Md. 1990) ("'[A] mere change in legal theory does not create a new cause of action.'"), *aff'd*, 976 F.2d 213 (4th Cir. 1992).

such is permissible post-trial, its propriety is all the more clear at this stage – before even summary judgment has been ruled on.

In fact, defendants' arguments to the contrary seek improperly to enforce a now-discredited and abolished doctrine known as "the theory of the pleadings": "The federal rules effectively abolish the restrictive theory of the pleadings doctrine," which held that "a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §1219 (2008). Thus, even if defendants were correct that the Complaint posited a legal theory only encompassing misstatements and not omissions (which it does not), Lead Plaintiff would still be permitted to pursue the omissions case it now presents. *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000) ("The 'form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim.'"); *In re Hence*, No. 06-32451-H4-13, 2007 Bankr. LEXIS 4156, at *22 n.9 (S.D. Tex. Dec. 5, 2007) ("So long as a plaintiff alleges facts upon which relief can be granted, he does not need to specify the correct legal theory or include any 'magic words.'").[109]

D. Barclays' Summary Judgment Motion Should Be Denied

Lead Plaintiff responds below to Barclays' argument. Nonetheless, Lead Plaintiff recognizes that its case against Barclays is different than the one against CSFB and Merrill because the evidence against them under the revised theory is far more extensive.

---

[109] Defendants' citation to *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 n.2 (5th Cir. 1992), is unavailing. This case is inapposite because it addresses change of a new legal theory after a party has lost on summary judgment. Defendants have never obtained summary judgment against Lead Plaintiff.

In Barclays' Supplemental Memorandum, Barclays claims it cannot be held liable for its role in certain market-related activity in relation to two offerings. Barclays argues that because it ultimately did not act as a purchaser or seller of securities for the two offerings it was involved in, it cannot be liable as an underwriter. Barclays Brief at 5. This is incorrect. Indeed, the securities laws define underwriter far more broadly than does Barclays. The Securities Exchange Act of 1934 defines underwriter in the same manner as used in the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 *et seq*.). Under that definition:

> "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

15 U.S.C. §80b-2(a)(20).

In relation to the two offerings at issue, the Zero Coupon Note Offering and the Yosemite Offering, Barclays cannot dispute its name (Barclays Bank in the case of the Yosemite Offering and Barclays Capital in the case of the Zero Coupon Notes) appears on the offering memoranda.[110] *See* Ex. 15322; Ex. 131 at 87. Nor can Barclays dispute that it was rewarded handsomely for its role in the offerings, earning $197,467 for the Yosemite Offering and $489,585 for the Zero Coupon Notes. *See* Ex. 132 at 24-25.

Whether or not Barclays purchased or sold in the offerings, it participated in the offerings as the evidence shows. Indeed, the evidence demonstrates Enron utilized Barclays' services to lend

---

[110] While Barclays Capital is listed on the front of the offering memorandum for the Yosemite Notes, Barclays Bank PLC is listed as the initial purchaser elsewhere in the document.

credibility to the offerings. An email between Barclays personnel concerning the Zero Coupon Notes offering states that Enron paid the bank $500,000.00 "[f]or the privilege of having Barclays on the cover of the prospectus." Ex. 11114 at BRC000114460.[111] Investors relied upon Barclays putting its imprimatur on the offering and Barclays was rewarded for lending its name to the endeavor.

A high-ranking Barclays banker admitted under oath that Barclays had a role in the Yosemite offering. Ian Jefferson, a senior Relationship Manager in Barclays' London office testified to that effect:

> Q. And did Barclays play any role in the Yosemite bond offering?
>
> A. Yes, we had an involvement. I couldn't say exactly what it was. We had a 10 percent of something involvement.

2/17/05 Deposition Transcript of Ian Jefferson at 175:4-8.

Barclays cannot deny that its name appeared on offering documents for the Yosemite Notes and the Zero Coupon Notes or that it received fees for allowing its name to be used to market those securities. For the reasons stated at §II.B.3.(b) above (re underwriting), Barclays' marketing of Enron gave rise to a duty to disclose. Accordingly, the jury should be permitted to determine whether Barclays' market activities were sufficient to create a duty of disclosure to investors.

E. Should the Court Require Additional Facts, Lead Plaintiff Requests Further Discovery Under Fed. R. Civ. P. 56(f)

Lead Plaintiff submits that it has (more than) sufficient evidence supporting its claims against the defendants, thus creating a genuine issue of material fact, rendering summary judgment for

---

[111] *See Chris-Craft Indus.*, 480 F.2d at 370 ("Since he often has a financial stake in the issue, he has a special motive thoroughly to investigate the issuer's strengths and weaknesses. Prospective investors look to the underwriter – a fact well known to all concerned and especially to the underwriter – to pass on the soundness of the security and the correctness of the registration statement and prospectus.").

defendants improper. In this regard, no further discovery is necessary in order to defeat their motions.

Should this Court be inclined to grant CSFB's or Merrill's motions concerning the claims against it, however, Lead Plaintiff requests that it be permitted to conduct additional discovery concerning defendants' trading in Enron securities and derivatives of those securities. As discussed, Lead Plaintiff is presenting a revised theory of liability. While Lead Plaintiff obtained some evidence regarding defendants' trading, additional evidence, such as Enron accounting records and documents that CSFB and/or Merrill produced in Enron's Equity Trades case, exists and would support Lead Plaintiff's case. As Lead Plaintiff revised its theory of liability, it has sought and obtained Enron trading tapes and accounting records relating to CSFB from Enron, but Merrill, through its settlement with Enron, prohibited Enron from providing any Enron documents relating to Merrill.

A request for additional discovery in response to a motion for summary judgment implicates Fed. R. Civ. P. 56(f). This subsection provides that a court may deny or defer ruling on a motion for summary judgment to permit the opposing part to obtain further facts essential to opposing the motion. Requests for additional discovery under Fed. R. Civ. P. 56(f) "are generally favored, and should be liberally granted." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 534 (5th Cir.

1999).[112] Thus, if this Court requires of Lead Plaintiff additional facts to support its claims, it should deny defendants' motions and give Lead Plaintiff a fair opportunity to uncover such facts.[113]

III. CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment should be denied. Lead Plaintiff respectfully requests oral argument on defendants' summary judgment motions.

DATED: June 9, 2008

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
HELEN J. HODGES
BYRON S. GEORGIOU
G. PAUL HOWES
SPENCER A. BURKHOLZ
JAMES I. JACONETTE
ANNE L. BOX
RAY A. MANDLEKAR
JAMES R. HAIL
ALEXANDRA S. BERNAY
MATTHEW I. ALPERT
JENNIFER L. GMITRO

/s/ Roger B. Greenberg *signed by permission
PATRICK J. COUGHLIN

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

---

[112] *See also Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) ("The Supreme Court itself has cautioned against granting summary judgment prematurely. In *Anderson*, [477 U.S. at 255], the Court indicated that the nonmoving party's obligation to respond to a motion for summary judgment 'is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had ***the opportunity*** to discover information that is essential to his opposition.'").

[113] Lead Plaintiff's entitlement to this additional discovery is demonstrated in the Supplemental Declaration of Helen J. Hodges Pursuant to F. R.C.P. 56(f) filed concurrently with this Second Supplemental Opposition to Pending Motions for Summary Judgment.

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
REGINA M. AMES
9601 Wilshire Blvd., Suite 510
Los Angeles, CA 90210
Telephone: 310/859-3100
310/278-2148 (fax)

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932

/s/ Roger B. Greenberg
ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2700
Houston, TX 77010
Telephone: 713/752-0017

THE BILEK LAW FIRM
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
808 Travis, Suite 802
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
MATTHEW L. TUCCILLO
53 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for Nathaniel Pulsifer

E. LAWRENCE VINCENT
3020 Legacy Drive, #100-324
Plano, TX 75023
Telephone: 214/680-1668
972/491-2417 (fax)

Attorneys for the Archdiocese of Milwaukee Supporting Fund, Inc.

CUNEO GILBERT & LaDUCA, L.L.P.
JONATHAN W. CUNEO
MICHAEL G. LENETT
507 C Street, N.E.
Washington, DC 20002
Telephone: 202/789-3960
202/789-1813 (fax)

Washington Counsel

CICCARELLO DEL GIUDICE & LAFON
MICHAEL J. DEL GIUDICE
1219 Virginia Street, East, Suite 100
Charleston, WV 25301
Telephone: 304/343-4440
304/343-4464 (fax)

Attorneys for Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S SECOND SUPPLEMENTAL OPPOSITION TO PENDING MOTIONS FOR SUMMARY JUDGMENT (DOCKET NOS. 4816, 4817, 4818, 4824, 4825, 5333) document has been served by sending a copy via electronic mail to serve@ESL3624.com on June 9, 2008.

Deborah S. Granger

DEBORAH S. GRANGER