

MAR 25 2003

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

Michael R. Milby, Clerk of Court

In Re Enron Corporation	§	
Securities, Derivative &	§	MDL-1446
"ERISA Litigation	§	
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THIS DOCUMENT RELATES TO:	§	
	§	
All Cases	§	
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MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	CIVIL ACTION NO. H-01-3624
	§	CONSOLIDATED CASES
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants	§	
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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.	§	

**MEMORANDUM AND ORDER RE**

**ENRON INSIDER DEFENDANT REBECCA MARK-JUSBASCHE**

The above referenced putative class action, brought on behalf of purchasers of Enron Corporation's publicly traded equity and debt securities during a proposed federal Class Period from October 19, 1998 through November 27, 2001, alleges securities

#1300

violations (1) under Sections 11 and 15 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §§ 77k and 77o; (2) under Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934 ("Exchange Act" or "the 1934 Act"), 15 U.S.C. §§ 78j(b), 78t(a), and 78t-1, and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5; and (3) under the Texas Securities Act, Tex. Rev. Civ. Stat. Ann., article 581-33 (Vernon's Supp. 2002).

Pending before the Court is Enron Insider Defendant Rebecca Mark-Jusbasche's ("Mark-Jusbasche's") motion to dismiss (instrument #597) pursuant to Rules 8, 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure, and section 21D(b)(3) of the Exchange Act, as amended, the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), codified at 15 U.S.C. §78u-4(b)(3)(A).

The Court hereby incorporates its summaries of the alleged facts and applicable law in its prior memoranda and orders of December 20, 2002 (#1194), of January 28, 2003 (#1241), and of March 12, 2003 (#1269).

Having reviewed the complaint and all pleadings relating to Mark-Jusbasche's motion to dismiss, without summarizing the arguments made by the parties the Court directly addresses the pleading sufficiency of the remainder of the complaint with respect to Mark-Jusbasche.

Mark-Jusbasche served as Chairman and CEO of Enron International,<sup>1</sup> and later as Vice Chairman and CEO of Azurix Corporation from October 1998 to August 2000, when she left Enron. She was on the Enron Board of Directors from July 1999 to August 2000, but did not serve on any Enron committees during her tenure.

The complaint charges that in part "under Mark-Jusbasche," from 1993 to 1997, i.e., prior to the Class Period, "Enron International repeatedly deferred capital expenditures, including developer, financing and promotional fees, that were incurred on failed project proposals" and that these deferred expenses were accumulated, a widespread practice at Enron known as "snowballing." Complaint ¶ 155(k) at 127. The complaint further represents that Enron (individuals not identified) exerted tremendous pressure on its executives (only Causey and Skilling identified) to meet earnings expectations, a goal "which prohibited write-offs--even when it was clear that the proposed project would never go forward." *Id.* Lead Plaintiff does not allege any particular facts demonstrating Mark-Jusbasche's participation in, or knowledge of, or exposure to red flags warning of, the snowballing activity, nor

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<sup>1</sup> According to Lead Plaintiff's Memorandum of Law in Opposition (#858 at 56) and Mark-Jusbasche's Reply Memorandum at 1, Mark-Jusbasche served as CEO of Enron International, a subsidiary of Enron, from 1993 until October 1998. At the beginning of the Class Period, she became CEO of Azurix Corporation, a publicly held affiliate of Enron, and remained in that position until August 2000, when her employment was terminated. She served on Enron's Board of Directors for just over one year, from July 1999 to August 2000.

even access to information about the allegedly fraudulent accounting practice at either Enron International or Enron. Furthermore, she left Enron International before the Class Period commenced to become CEO of Azurix, about which there are no specific snowballing allegations.

The complaint claims that she was also among those Enron insiders who signed the Form S-3 filed with the SEC to register 10 million 7% exchangeable notes,<sup>2</sup> which contained Enron's 1999 second-quarter financial results and incorporated Enron's Form 10-K for 1998. Complaint ¶ 164 at 132. She additionally signed Enron's 1999 Report on Form 10-K filed with the SEC, which contained Enron's 1998 and 1999 annual financial statements, which Arthur Andersen had certified with a "clean" opinion. Complaint ¶ 221 at 158.<sup>3</sup>

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<sup>2</sup>Although Mark-Jusbasche emphasizes that with Van de Velde's withdrawal, Lead Plaintiff has withdrawn the only § 11 claim against her, which was based on the 7% Notes (chart of § 11 claims at ¶ 1006, pp. 490-91 of the complaint), the Court has granted leave to Lead Plaintiff to add the Pulsifer complaint's claims to *Newby*, which includes claims based on the 7% Notes. In the interests of economy of time and effort, the Court therefore views as pending a 7% notes claim against Jusbasche as a signator of the registration statement.

<sup>3</sup>Lead Plaintiff's Memorandum in Opposition (#856 at 56) asserts that Mark-Jusbasche knew the financial statements were false "because she had personally approved waiving Enron's conflict-of-interest policy to allow CFO Fastow to control LJM2" when she attended a Board of Directors' meeting in October 1999, as reflected in the minutes of that meeting. As this Court indicated in its memorandum and order regarding the Outside Directors' motions to dismiss, this conclusory allegation and the minutes are insufficient to give rise to a strong inference of

The complaint briefly explains that in July 1998 Enron announced that it had formed a new international water company, Azurix, by initially acquiring for \$2.8 billion Wessex Water in the

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scienter.

Perhaps trying to make up for deficiencies in the complaint, the Memorandum in Opposition also asserts, without specifying what, when or how, that Mark-Jusbasche "learned material, adverse, inside information while serving as CEO of Enron International, even though that wrongdoing occurred mainly before the Class Period." #856 at 56. The Memorandum generally asserts, "The same underlying problems persisted within Enron International throughout the Class Period, thus making certain positive statements--Enron's financial statements--false." #856 at 57. Nevertheless, Lead Plaintiff's complaint and the Memorandum in Opposition fail to connect the alleged fraudulent entities and transactions (e.g., Chewco, LJM partnerships, Broadband, New Power, Project Braveheart, the Raptors, etc.) or the purported wrongdoing at Enron International during the Class Period with Mark-Jusbasche even conclusorily, no less with allegations of specific facts.

In her role as CEO of Azurix, according to the Memorandum in Opposition,

she knew that Atlantic Water Trust was formed in 1998 by Enron to purchase part of Azurix, that Atlantic Water Trust was capitalized in part by Marlin Water Trust, which was capitalized by \$915 million in debt and \$125 million in equity, and the debt was supported in part by Enron Stock. ¶ 593. She knew that if the stock price dropped below \$34.13 per share, Enron would be in default and obligated to make up the difference, an obligation that was not adequately disclosed. But she traded her stock while in possession of this material, non-public information anyway. ¶ 84(n).

#856 at 57. The Memorandum presents no specific facts as to how or when she learned this information, nor that she would know there was anything illegitimate about the financing of Azurix, no less how she would know, from the structuring of this one entity, of the alleged fraudulent Ponzi scheme, which becomes evident based on the purported repetitive pattern of such concealed financing arrangements and of questionable accounting practices ripe for abuse, such as snowballing and mark-to-market techniques.

United Kingdom, over which Mark-Jusbasche was made CEO as a "pay-off" after she lost to Jeffrey Skilling in a bitter struggle to succeed Kenneth Lay as Enron's CEO. The complaint further states that she got the new position "to fulfill her ambition to be CEO of a public company" and "to silence her" because she "possessed extraordinarily dangerous and damaging information about the wrongdoing that had gone on at Enron," which is also not specified. Complaint ¶ 121(h) at 112. Nor does the complaint specify when and how she obtained the "extraordinarily dangerous and damaging information."

The complaint challenges two statements made by Mark-Jusbasche as materially false and misleading. First it quotes Mark-Jusbasche at the announcement of the new water company on July 24, 1998: "Enron's water subsidiary initially will pursue the development of water projects in Europe, Latin America and Asia-markets in which privatization is occurring and in which Enron has gained significant international experience and has established a substantial operating presence." Complaint ¶ 114 at 17. Lead Plaintiff has not explained why it considers this very general statement to be false or misleading, and the Court fails to see how it would constitute a primary violation of § 10(b). The complaint quotes a second statement by Mark-Jusbasche, which it does not analyze, on September 25, 1998: "We have gathered top players from the water, gas and power industries, who have proven track records

in developing new business and growing existing businesses domestically and abroad. . . . All of these executives have exhibited strong leadership skills and have an unparalleled commitment to develop our international water business." On their face, the statements appear to this Court to constitute mere corporate puffery and are not actionable under § 10(b); nor has Lead Plaintiff alleged any facts that show that at the time the statements were made, Mark-Jusbasche knew or was severely reckless in disregarding red flags that the statements were false or misleading.<sup>4</sup>

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<sup>4</sup>The Honorable Sim Lake recently dismissed for failure to state a claim a class action securities violation complaint filed by the investors in Azurix. *In re Azurix Corp. Sec. Litig.*, 198 F. Supp.2d 862 (S.D. Tex. 2002). In that suit the plaintiffs alleged

that defendants misrepresented the future success of Azurix's business plan in the prospectus by "touting [Azurix's] ability to take advantage of the growing trend of privatization and outsourcing of government-owned water and wastewater assets and services" and by "tout[ing] Azurix's ability to become a successful player in the global water and wastewater industry."  
[footnote omitted]

*Id.* at 881. Judge Lake also concluded "that these statements are not actionable because they are merely statements of corporate optimism. Such statements are not actionable because no reasonable investor would rely on obvious 'puffery' [citations omitted]." The plaintiffs also characterized as misrepresentations in violation of § 10(b) Azurix's statements touting

its "experienced management and business development teams," "operating experience and technical expertise," and other areas of expertise. The court concludes that these statements are not actionable because plaintiffs

Without identifying individuals involved in the purchase of Wessex Water, intended to serve as the foundation for a global water business, the complaint also asserts that Enron grossly overpaid for Wessex Water and that Enron never performed an adequate feasibility study or prepared a detailed business plan for the aspiring global business, but does not plead that Mark-Jusbasche had any role in Enron's purchase of Axurix or that she was aware of these alleged facts, no less how or when she learned of them.

According to the complaint Azurix was never competitive in bidding wars against its enormous multi-national rivals like Vivendi and Suez Lyonnaise des Eaux, and Azurix's business suffered. The fact that a business fails is not necessarily an indication of fraud.<sup>5</sup> The complaint does allege facts

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have not pleaded any facts indicating that the statements were untrue or that Azurix's management team actually lacked such experience. A company's expressions of confidence in its management or business are not actionable, especially where, as here, all historical information appears to be factually correct. [citation omitted]

*Id.* at 882. The same is true of the Mark-Jusbasche's similar statements about Azurix that are challenged in this suit.

<sup>5</sup>In *In re Azurix*, Judge Lake found,

Plaintiffs' conclusory allegations that defendants fraudulently "touted" their probabilities for success, simply because Azurix's business prospects ultimately declined, are not sufficient to state a claim for securities fraud. . . . Although Azurix ultimately performed poorly in its business enterprises, even



demonstrating that decline. According to the pleadings, in 1998, Enron formed the Atlantic Water Trust to purchase part of Azurix, but failed to disclose that Atlantic Water Trust was partially capitalized by Marlin Water Trust, which in turn was capitalized by \$915 million in debt (partly supported by Enron stock) and \$125 million in equity; if Enron's stock dropped below \$34.12 per share, Enron would be in default and obligated to make up the difference. After revenues at Wessex Water failed to meet expectations and regulators forced it to cut its prices, Azurix was cash-strapped and one-third of it was sold at a public offering in 1999. Shares subsequently plummeted in price. Furthermore, according to the complaint, Azurix overpaid for a \$489 million franchise to supply water to Buenos Aires, Argentina, for which the government failed to provide a promised new infrastructure. The complaint nowhere links Mark-Jusbasche to any role in these matters, nor pleads how, when, and where she learned of them. In part because of the company's poor financial performance, Mark-Jusbasche was terminated as CEO of Azurix in 2000. The complaint continues describing

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well-managed enterprises can fail. The mere fact that a business did not live up to expectations is insufficient to create an inference of fraud. [citations omitted].

198 F. Supp.2d at 881, 882.

Enron's alleged fraud relating to Azurix after Mark-Jusbasche left, but the allegations again are not linked in any way to her.<sup>6</sup>

The graph in the complaint at 69 and Mark-Jusbasche's Form 4 in January 1998 (Tab 1 to Appendix to #598) reflect that prior to the Class Period she sold Enron stock only once, in the spring of 1998. The Complaint ¶ 83(n) at 69, ¶ 401 at 258, and ¶ 402 at 259, and Lead Plaintiff's Appendix (#442, Exh. C) reflect that during the Class Period, in five sales Mark-Jusbasche sold a total of 1,895,631 shares (100% of her holdings)<sup>7</sup> of Enron stock for \$82,536,737, allegedly while she was in possession of adverse undisclosed information about Enron, which the complaint fails to identify or explain with any facts, not to mention any indication

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<sup>6</sup> In particular the complaint asserts that in the fourth quarter of 2000, Enron recorded an after-tax charge of \$326 million for its portion of impairments recorded by Azurix. In 2001 Enron privatized Azurix for \$327.5 million and recorded it as an asset, even though defendants, unnamed, knew that Azurix was impaired from the time of acquisition, if not previously. The next year Azurix continued to do poorly, but in order to inflate its earnings, Enron did not take any charges for impairment until the third quarter, when it recorded a charge of \$287 million. There are no allegations made or facts presented linking Mark-Jusbasche in any way with the accounting or knowledge of the purported delay in taking a charge.

<sup>7</sup> Mark-Jusbasche, in her motion at 26-27, points out that Lead Plaintiff has ignored the 21,025 shares that she continued to hold in the Enron Employee Stock Ownership Plan and the 10,502.99 shares in her 401k plan. Her May 2000 Form 4, Tab 6 of the Appendix to her motion, reflects that on May 3, 2000 she retained 31,529 shares, or 23.22% of her holdings. She further objects that the complaint fails to recognize the substantial unvested stock options and restricted stock that she also retained.

how and when she gained access to whatever nonpublic information she might have had. In a slight discrepancy, Exhibit C (Summary of Class Period Insider Sales) to Lead Plaintiff's Appendix of Exhibits in Support of Consolidated Complaint (#442) provides information, but not the percentage of her holdings, for each of six sale "periods" during the Class Period: In November 1998, she sold 107,600 shares at between \$27.88 and \$28.00 per share; on February 23, 1999 she sold 394,346 shares, again at a relatively low price, approximately \$32.500 per share; a month later on March 23, 1999, she sold 609,020 shares at approximately \$34 per share; on April 1, 1999, she sold 28,016 shares at \$31.90; on May 16, 1999 she sold 233,334 shares at \$35.68 per share; on February 18, 2000, she sold 419,075 shares at \$68.91 per share; and on May 3, 2000, she sold 104,240 shares at \$74.59 per share.

Lead Plaintiff fails to state a primary violation of § 10(b) based on Mark-Jusbasche's trading of her Enron securities for personal gain while violating her duty to disclose material, nonpublic information because Lead Plaintiff has failed to plead with specificity what material information she knew or when and how she obtained it. Lead Plaintiff has not alleged any facts demonstrating fraud at Azurix, no less that Mark-Jusbasche was aware of or severely reckless in disregarding signs of such conduct. The complaint's only specific allegation linking Mark-Jusbasche to Enron's alleged Ponzi scheme is that she attended a

1999 board meeting at which she and other directors voted to waive Fastow's conflict of interest with respect to LJM2, as reflected in the minutes. This Court has already indicated that the minutes fail to give rise to a strong inference of scienter.

Mark-Jusbasche's sole trade outside, but just before commencement of the Class Period, hardly qualifies as prior trading history, but this Court finds too harsh the Ninth Circuit's position that it will not consider insider trading allegations where there is no prior trading history for purposes of pleading scienter. Obviously with no or minimal trading history, such as that here, trading within the Class Period necessarily would be unusual and, where there is more than one trade, dramatically out of line with the defendant's earlier sales, so a plaintiff would need to establish by other factors that the trading during the Class Period was suspicious. Assuming that Lead Plaintiff has properly pleaded primary violations of § 10(b) by Enron Insider Defendants, this Court observes that the first four of her six Class Period sales, in which she sold the great majority of her stock (1,372,316 shares) clearly were at very low prices in view of the Class Period high of \$90 per share and do not demonstrate insider trading to maximize her personal gain. The last two sales, totaling 523,315 shares, though sold at higher prices (\$68.91 and \$74.60), are at prices still far from the peak price of the Class Period and occurred during the year when she left the company after

overseeing Azurix's continuing poor business performance. The complaint has not alleged any facts demonstrating that she knew of or recklessly disregarded facts that should have informed her of fraud at Azurix or at Enron. Thus the facts alleged and the absence of maximization of personal gain in her sales as a whole do not raise a strong inference of scienter and certainly do not constitute a primary violation of 10(b).

The complaint further charges that Mark-Jusbasche received bonus payments of \$1.9 million, in addition to her salary, in 1997, 1998, 1999, and 2000, based on Enron's false financial reports and Enron's success in hitting certain performance targets. Lead Plaintiff states that the bonus is another motive to commit fraud by misrepresenting and inflating Enron's financial status. Motive and opportunity are generally insufficient to plead scienter under Fifth Circuit precedent. Without particular factual allegations that show that Mark-Jusbasche knew or recklessly disregarded indications that the financial reports were fraudulent, her receipt of large bonuses based on Enron's apparent success is not sufficient to plead scienter.

Beyond conclusory allegations of an unsuccessful water business, the complaint's lack of factual particularity results in a failure to plead a claim against Mark-Jusbasche for primary liability under § 10(b) and Rule 10b-5, whether based on insider trading (because Lead Plaintiff fails to show that she had material

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nonpublic information, traded on it, and made secret profits) or on employing a device scheme or artifice to defraud or making a material, misleading statement or engaging in any other act, practice or course of business that defrauded. Lead Plaintiff has failed to allege facts giving rise to a strong inference of scienter, but relies on vague and conclusory allegations of Mark-Jusbasche's high position in a subsidiary before the Class Period and an affiliate during the Class Period and her short term on the Enron board of directors. Even with respect to her signing of the two SEC documents, thereby "making" a false statement under § 10(b), Lead Plaintiff fails to assert specific facts that give rise to the requisite strong inference of scienter for a § 10(b) claim.

Nor does the complaint meet the requirements for controlling person liability under § 20(a). Plaintiff has not alleged facts demonstrating that either Enron International or Azurix (or each's employees) violated § 10(b) or giving rise to a strong inference of scienter on the part of either entity. Nor does Lead Plaintiff plead facts showing that she had the power to control Enron (or its individual officers) with respect to the alleged wrongdoing; again, the only allegation is her attendance at one board meeting where the board voted to waive Fastow's conflict of interest. Nor has the complaint alleged that she had the power to control any alleged individual Enron Insider violator of §

10(b). The complaint essentially reveals her role during the Class Period as a CEO running Azurix.

Finally the Court finds that Lead Plaintiff has alleged facts sufficient to state a claim under § 11, but not for controlling person liability under § 15 based on alleged § 11 violations by other Enron directors.

Accordingly, the Court

ORDERS that Mark-Jusbasche's motion to dismiss is GRANTED as to Lead Plaintiff's claims against her under §§ 10(b), 20(a), and 20A of the Exchange Act and under § 15 of the 1933 Act. The motion to dismiss is DENIED as to claims under § 11 of the 1933 Act.

**SIGNED** at Houston, Texas, this 24<sup>th</sup> day of March, 2003.



MELINDA HARMON  
UNITED STATES DISTRICT JUDGE