UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§	CLASS ACTION
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 OPPOSITION TO THE BARCLAYS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOCKET NOS. 4817, 4818, 5333)

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I. INTRODUCTION

Barclays structured and engaged in many of the transactions at the heart of the Ponzi scheme that was Enron. From the mid-90s onward, Barclays (or the "Bank") was one of Enron's top Tier One banks, obtaining millions of dollars for engaging in a panoply of fraudulent deals. Barclays employed a vast array of contrivances to deceive investors, including fake related-party transactions, circular no-risk prepays, FAS 125/140 transactions with secret no-loss side agreements, and a synthetic lease structure with a secret no-risk/loss agreement. Lead Plaintiff detailed this fraudulent conduct in its December 29, 2006 Supplement to the First Amended Consolidated Complaint (Docket No. 5304) ("December 29, 2006 Complaint"). Barclays' liability flows from its own deceptive conduct in the challenged transactions, which lacked ***true or legitimate business purposes***. In fact, the transactions' primary purpose was to fabricate a deceptive impact on Enron's publicly reported financial statements giving the false appearance of strength, profitability and liquidity. The specific details of Barclays' conduct demonstrate that transactions structured by Barclays were inherently and intentionally deceptive and that Barclays used and employed contrivances and engaged in deceptive conduct in those structures to deceive investors. The evidence demonstrates triable issues of fact as to liability and damages. Barclays' motion for summary judgment, therefore, must be denied.

Barclays argues the December 29, 2006 Complaint fails to include new information beyond the testimony of Andrew Fastow. This is nonsense. The December 29, 2006 Complaint references hundreds of documents the Court had never seen as well as significant testimony from Fastow, Barclays' personnel and others. Moreover, the detailed recitation of Barclays' fraudulent and deceptive conduct had not previously been included in the governing complaint. As the Court noted in its December 4, 2006 Order, "supplemental allegations, ***which were not included in the governing complaint***, ***reflect an effort to cure pleading deficiencies*** in response to evolving law that must properly be made in an amended, superseding complaint." *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2006 U.S. Dist. LEXIS 88121, at *16 n.10 (S.D. Tex. Dec. 4, 2006) ("December 4, 2006 Order").[1] Lead Plaintiff has cured any pleading deficiencies by way of the December 29, 2006 Complaint.

Barclays attempts to recast Lead Plaintiff's allegations as simply Enron choosing to misaccount for honest transactions it entered into with the Bank. But it is Barclays' own use of contrived, secret no-loss side agreements as deceptive acts, that forms the basis of the Bank's liability. Specifically, Barclays deceptively structured, designed, implemented and/or otherwise engaged in the following contrived transactions:

JEDI/Chewco

- Demanded and received concealed cash "reserve accounts" via secret side letter with Enron – controlled entities that secretly altered the terms of the formal deal documentation; funded sham non-GAAP compliant SPE to deceive auditors and others; misled external auditors as to "at-risk" equity of SPE and whether transactions qualified for off-balance-sheet status.

- Created $405 million false income in 1997-2000; concealed $685 million debt between December 31, 1997 and 2001.

SO_2

- Created and used shell/sham non-GAAP compliant SPE; used fictional/non-economic trades to season SPE; disguised loan by making it look like legitimate sale of SO_2 credits; misled external auditors as to "at-risk" equity of SPE and whether transactions qualified for off-balance-sheet status.

- Concealed $168 million in debt; created $168 million in false operating cash flow.

J.T. Holdings

- Demanded Enron's secret promise to repurchase Barclays' 3% "at risk" equity knowing underlying assets were worth significantly less than stated; used sham/pretend non-GAAP compliant SPE to deceive auditors and others; made loan based on secret, no-loss promise to cover up over-valuation of assets, create false

[1] Emphasis is added and citations and footnotes are omitted unless otherwise noted.

aggregate of value; misled external auditors as to "at-risk" equity of SPE and whether transactions qualified for off-balance-sheet status.

- Concealed $110 million in debt.

Nikita/Besson Trust

- Demanded Enron's secret promise to repurchase SPE 3% "at-risk equity" to protect Barclays from loss while knowing EOTT shares were overvalued, created and used sham/pretend non-GAAP compliant SPE; disguised loan as arms-length asset sale; misled external auditors as to "at-risk" equity of SPE and whether transactions qualified for off-balance-sheet status.

- Created $10 million phony income and $80 million false operating cash flow; hid $80 million in debt.

Metals (Camelot) I and II

- Structured contrived commodities sale with circular swaps to eliminate price/market risk to Barclays; used sham option with Enron's secret agreement to "always exercise" to protect Barclays from loss.

- Concealed $1.4 billion in debt; created $1.4 billion in false operating cash flow.

Roosevelt Prepay

- Structured contrived commodities trade with circular swaps that eliminated all price/market risk to Barclays; viewing transaction as a whole shows swaps are linked; having a third party involved in deal allowed linkage between swap agreements to be hidden and risk eliminated in a deceptive manner; contrived oil/gas commodity trade to create fiction of legitimate trade and disguise loan to manipulate Enron's financial statements; deceptively structured transactions to create fiction of legitimate trade.

- Concealed $500 million in debt; created $500 million in false operating cash flow.

CSFB Prepay

- Structured contrived commodities trade with circular swaps that eliminated all price/market risk to Barclays; viewing transaction as a whole shows swaps were linked; having a third party involved in deal allowed linkage between swap agreements to be hidden and risk eliminated in a deceptive manner; contrived oil/gas commodity trade to create fiction of legitimate trade and disguise loan to manipulate Enron's financial statements; deceptively structured transactions to create fiction of legitimate trade.

- Concealed $150 million in debt; created $150 million in false operating cash flow.

Nixon Prepay

- Structured contrived commodities trade with circular swaps that eliminated all price/market risk to Barclays; viewing transaction as a whole shows swaps were linked; having a third party involved in deal allowed linkage between swap agreements to be hidden and risk eliminated in a deceptive manner; contrived oil/gas commodity trade to create fiction of legitimate trade and disguise loan to manipulate Enron's financial statements; deceptively structured transactions to create fiction of legitimate trade.
- Concealed $324 million in debt; created $324 million in false operating cash flow.

There is no fair issue or dispute as to whether Lead Plaintiff has presented facts that prove Barclays engaged in the conduct now alleged against it, *i.e.*, did the ***acts and deals*** alleged, and that those transactions had the alleged impact on Enron's reported financial condition and results. The evidence from its own documents and testimony in this regard is plentiful. The only issue in fair dispute is whether that conduct creates liability under Rule 10b-5(a) and (c) as this Court has refined the liability test for these sections of the law. Lead Plaintiff respectfully submits that it does and, as a result of Barclays' deceptive actions in structuring and engaging in the above transactions,[2] the Bank can be found liable as a primary violator, under this Court's refined scheme (Rule 10b-5(a) and (c)) liability rulings, which adopted the SEC's test: "'Where a wrongdoer, intending to deceive investors, ***engages in a deceptive act*** as part of a scheme to defraud, he can cause the same injury to investors, and the same deleterious effects on the market regardless of whether he designed the scheme.'" *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2006 U.S. Dist. LEXIS 43146, at *164 (S.D. Tex. June 5, 2006) ("June 5, 2006 Order"). As this Court explained further, it is unnecessary that Barclays actually structured or designed the transactions at issue, although it actually did so in

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[2] Even "legitimate transactions" undertaken in a deceptive manner that present a false appearance can give rise to liability. *See SEC v. Hopper*, No. H-04-1054, 2006 U.S. Dist. LEXIS 17772, at *36-*37 (S.D. Tex. Mar. 24, 2006) (round-trip electricity trades not proscribed by regulatory scheme nevertheless created a false appearance of revenues giving rise to a violation of the securities laws).

many instances, as long as Barclays itself committed a deceptive act. *Id*. Lead Plaintiff is mindful of the Court's admonition to provide "specific facts" demonstrating it was Barclays' own conduct that worked a fraud upon investors. *Enron*, 2006 U.S. Dist. LEXIS 88121, at *17-*18. Lead Plaintiff believes the December 29, 2006 Complaint provides detailed allegations showing not only why given transactions were shams, but also provides specific factual details showing Barclays' committing deceptive acts and its role in using or employing the transactions in a way that was deceptive.

The Court has also held that one need not be a "mastermind" of a fraudulent deal in order to be liable. "'Wrongdoers could studiously avoid engaging in any design activity, and effectively immunize their conduct. . . . Liability should be available against any person ***who engages in a deceptive act*** within the meaning of Section 10(b) as part of a scheme to defraud, regardless of who designed the scheme.'" *Enron*, 2006 U.S. Dist. LEXIS 43146, at *164.[3] The Court previously stated in the June 5, 2006 Order that it was not just representational conduct that subjects a primary actor to liability under the securities laws:

> "[D]eceptive acts under Section 10(b) include conduct beyond the making of false statements or misleading omissions, for facts effectively can be misrepresented by action as well as words. For example, if an investment bank falsely states that a client company has sound credit, there is no dispute that it can be primarily liable. If the bank creates an off-balance-sheet sham entity that has the purpose and effect of hiding the company debt, it has achieved the same deception, and liability should be equally available."

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[3] The "use or employ" statutory language in §10(b) does not require that a defendant be the originator or mastermind of the scheme – even though Barclays was in many of the transactions at issue. *See Simpson v. AOL Time Warner Inc.* ("*Homestore*"), 452 F.3d 1040, 1051 (9th Cir. 2006); Brief of the Securities and Exchange Commission, *Amicus Curiae*, in Support of Positions that Favor Appellant (submitted on appeal of *In re Homestore.com, Inc. Sec. Litig.*, 252 F. Supp. 2d 1018 (C.D. Cal. 2003), *aff'd*, 452 F.3d 1040 (9th Cir. 2006)) ("SEC Brief") (Ex. 1) at 11.

Enron, 2006 U.S. Dist. LEXIS 43146, at *165.[4] Nothing in the Court's later orders changes this basic blueprint for liability. Barclays seeks to draw the Court away from the test established for liability into a construct with no basis in law. Barclays appears to claim that liability cannot exist if "real commodities and/or real funds" are exchanged. Barclays Defendants' Supplemental Memorandum in Support of Their Motion for Summary Judgment ("Supp. Motion") (Docket No. 5333) at 11. This is not, and has never been, the test for liability under the securities laws. Moreover, Barclays' argument that it was only Enron's accounting and reporting of the various Barclays/Enron transactions that deceived investors is plainly contradicted by Lead Plaintiff's voluminous evidence demonstrating the deceptive conduct of the Bank itself operated as a fraud on investors.

Barclays undertook these activities with scienter, deceiving investors – and at times by deceiving Enron's auditors, Arthur Andersen ("Andersen"). Testimony by current and former employees of Barclays, Enron, Andersen and former Enron CFO Fastow, as well as findings by the Court-Appointed Bankruptcy Examiner, provide detailed evidence of Barclays' knowing and/or reckless conduct as a primary violator under the securities laws.

Barclays' effort to spin Fastow's testimony as somehow supporting the Bank merely highlights the factual issues that that insider's first-hand testimony creates – and that a fact-finder must hear and weigh. In fact, Fastow's first-hand knowledge of Barclays' fraudulent conduct is devastating to Barclays' claims of innocence. In its December 4, 2006 Order granting Lead

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4 As this Court has held, the fact that Enron ultimately published the misleading numbers arising from the deceptive transactions does not break the causal chain as to secondary actors. *In re Enron Corp. Sec. Litig.*, 310 F. Supp. 2d 819, 830 (S.D. Tex. 2004). The SEC agrees, noting "[c]ertainly where the making of the false statements by one participant in the scheme is an objective of the scheme, the making of the statements should not be viewed as breaking the chain of causation." SEC Brief (Ex. 1) at 22.

Plaintiff's motion to reconsider as to Barclays, the Court held liability under Rule 10b-5(a) and (c) will exist "if the plaintiff adequately alleges that acts of that secondary actor created an appearance of substance where it is lacking or created a fiction or false appearance of revenues intended to deceive investors in Enron securities or that engaged in acts, practices, or course of business that operated as a fraud or deceit upon any person in connection with the purchase or sale of an Enron security." *Enron*, 2006 U.S. Dist. LEXIS 88121, at *19 n.11.[5] Barclays clearly did so.

Fastow – as CFO – was a witness to numerous deceptive acts by Barclays and has provided plaintiffs with an inside look at the fraud that transpired. Fastow viewed certain banks as "***problem solvers***" – *i.e.*, the banks, including Barclays, "worked to solve certain of [Enron's] financial problems." Fastow Decl., ¶¶6, 8.[6] "In many instances, ***the banks primarily devised the financial structures***, which contributed to Enron achieving its financial reporting objectives." *Id*., ¶6.[7] Fastow and certain of Enron's banks, including Barclays, "worked together, ***intentionally and knowingly***, to engage in ***transactions that would affect Enron's financial statements***" (Fastow Decl., ¶7):

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5 Barclays appears to have dropped the argument in its original motion that a secondary actor must have made statements in order for liability to attach. *Compare* Memorandum in Support of the Barclays Defendants' Motion for Summary Judgment (Docket No. 4818) ("Motion") at 22-23 *with* Supp. Motion at 15 ("[A]lthough the secondary actor need not have participated in the preparation of the false and misleading statements, it may only be held to have committed a primary violation if ***its conduct itself*** was deceptive to investors.") (emphasis in original).

6 "Fastow Decl." refers to the Declaration of Andrew S. Fastow filed September 26, 2006 (Docket No. 5048).

7 *See, e.g.*, 10/23/06 Deposition Transcript of Andrew S. Fastow ("10/23/06 Fastow Depo. Tr.") at 54:5-7 ("In many cases, the banks brought us these structures, and we executed the transactions with the banks."). All exhibits, deposition transcripts, deposition exhibits, Bates numbered documents and expert reports are attached to Appendix in Support of Lead Plaintiff's Opposition to the Barclays Defendants' Motion for Summary Judgment and Supplemental Memorandum in Support of Motion for Summary Judgment (Docket Nos. 4817, 4818, 5333).

> 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.[8]

As Fastow confirmed in his deposition, the transactions engaged in by banks such as Barclays 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.
>
> 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.[9]

These deals routinely involved material deception:

> I am aware that I, or other Enron executives, provided Merrill, ***Barclays***, CSFB, RBS, and other Enron banks with ***oral assurances or structural features*** that I

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8 *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.").

9 Barclays tries to paint Fastow's damning testimony as supporting the Bank. This is fanciful at best. Fastow did not "substantiate" that the Barclays/Enron transactions would not have been fraudulent if Enron had accounted for the deals properly. Supp. Motion at 6. In fact, Fastow testified repeatedly that it was Barclays' (and other bank defendants') ***conduct*** with Enron that worked a fraud upon investors. *See* 10/23/06 Fastow Depo. Tr. at 72:24-73:25, 142-184 (discussing Barclays' conduct in various transactions). Barclays' attempt to rewrite Fastow's testimony fails.

> believe would have assured them of the following in certain structured-finance transactions: (1) a return of their investment capital; (2) a return on capital at a specified rate; and (3) an exit from investments within a defined period of time. I believe that ***without these assurances or structural features***, ***the banks would not have entered into all of these transactions***. Based on conversations I had with certain bankers, ***I believe that they understood that the assurances and certain other features would have caused the accounting and financial-reporting to be different than if it were documented***.

Fastow Decl., ¶13.

The evidence confirms Barclays "worked" to solve Enron's problems. Enron ranked its investment banks according to "tiers" – *i.e.*, "Tier One," "Tier Two," etc. As Fastow testified, one important criteria Enron used in ranking a bank as Tier One was whether the bank "could come up with structures and transactions" that would "fill the gap between what was really happening inside Enron and what – the way we wanted Enron to appear to the outside world." 10/23/06 Fastow Depo. Tr. at 23:3-24:7. This was because the true results of Enron's operations were "usually insufficient in order for Enron to maintain its investment grade credit rating or to meet its earnings targets." *Id.* These Tier One banks "were typically devising the structures and bringing them to Enron to help us solve these problems." *Id.* at 24:18-19. Barclays was a Tier One bank of Enron's for "eight years running" and worked hard to maintain its top status. Relationship Manager Richard Williams did not feel "comfortable taking Tier 1 status for granted," so the Bank strived to maintain its favored position. Ex. 10478.

In this Opposition, Lead Plaintiff demonstrates that its substantial evidence creates genuine issues of material fact, and that its claims against Barclays are unquestionably cognizable under the law, rendering the Bank unable to satisfy its heavy burden in seeking summary judgment. Lead Plaintiff's evidence establishes:

- Under this Court's rulings concerning the scope of primary liability under Rule 10b-5(a) and (c), Lead Plaintiff's claims that Barclays is liable for engaging in inherently deceptive activity in regards to the transactions at issue are legally cognizable (and strongly supported by the evidence);

- Barclays acted with scienter;
- Barclays' conduct was "in connection with" trading in Enron's securities;
- Loss causation exists for Barclays' conduct;
- Plaintiffs are entitled to an inference of reliance;
- Liability exists as to all Barclays-related entities sued; and
- Barclays PLC is liable as a control person.

II. THE SUMMARY JUDGMENT STANDARD

A motion for summary judgment may only be granted where "there is ***no*** genuine issue as to ***any*** material fact ***and*** . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party moving for summary judgment has the initial burden of 'informing the district court of the basis for its motion, and identifying those portions of [the summary judgment record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *accord Carson v. Dynegy, Inc.*, 344 F.3d 446, 451 (5th Cir. 2003). "If the moving party fails to meet its initial burden, ***the motion must be denied***, regardless of the non-movant's response." *Johnson v. Stewart & Stevenson Servs.*, No. H-03-4055, 2005 U.S. Dist. LEXIS 25593, at *3 (S.D. Tex. Oct. 20, 2005) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

In determining whether there is any genuine issue of material fact, the court will "view[] the evidence in the light most favorable to the nonmoving party." *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 236 (5th Cir. 2003) (citing *Canova v. Shell Pipeline Co.*, 290 F.3d 753, 755 (5th Cir. 2002)). Likewise, the court will "draw all reasonable inferences in favor of the nonmoving party." *Flock*, 319 F.3d at 236; *accord Johnson*, 2005 U.S. Dist. LEXIS 25593, at *1-*4.

As the Supreme Court has held:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).[10] Moreover, "[t]he evidence of the nonmovant ***is to be believed***." *Anderson*, 477 U.S. at 255; *see also Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 822 (E.D. Tex. 2004), *aff'd*, No. 04-41056, 2005 U.S. App. LEXIS 4565 (5th Cir. Mar. 21, 2005) (same); *accord In re Compaq Sec. Litig.*, 848 F. Supp. 1307, 1313 (S.D. Tex. 1993). Thus, the court should "construe all evidence . . . without . . . resolving any factual disputes." *Songbyrd, Inc. v. Bearsville Records*, No. 96-30670, 1997 U.S. App. LEXIS 12684, at *8 (5th Cir. Feb. 4, 1997). "If reasonable minds could differ as to the import of the evidence," summary judgment must be denied. *Anderson*, 477 U.S. at 250. All "[d]oubts are to be resolved in favor of the nonmoving party." *Priester v. Lowndes County*, 354 F.3d 414, 419 (5th Cir. 2004); *accord Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 473 (5th Cir. 2006).

In opposing the motion, "the non-movant does not . . . have to present its own evidence, but may point out genuine issues of fact extant in the summary judgment evidence produced by the movant, if any." *Johnson*, 2005 U.S. Dist. LEXIS 25593, at *4 (citing *Isquith ex rel. Isquith v. Middle S. Utils.*, 847 F.2d 186, 198-200 (5th Cir. 1988)). Thus the non-moving party need only "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324.[11]

A court should consider granting summary judgment only "with caution." *Anderson*, 477 U.S. at 255. The Fifth Circuit has repeatedly held that a district court has ***discretion to deny even a proper motion*** for summary judgment. *See Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (court has discretion to deny summary judgment "even if the standards of Rule 56 ***are met***"); *Black v. J.I.*

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[10] *See also Flock*, 319 F.3d at 236 ("In determining whether there is a dispute as to any material fact, we consider all of the evidence in the record, but we do not make credibility determinations or weigh evidence.").

[11] In this case, the governing standard of proof is that of a "preponderance of the evidence." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (private civil class action under Rule 10b-5).

Case Co., 22 F.3d 568, 572 (5th Cir. 1994) ("[t]o review pretrial denials of summary judgment motions would also diminish the discretion of the district court"); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (court may deny summary judgment "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before full trial"). As one prominent commentator observes:

> There is long-established doctrine holding that a court may deny summary judgment if it believes ***further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision***, or where further development of the facts may enhance the court's legal analysis.

11 *Moore's Federal Practice- Civil* §56.32 (3d ed. 2006).

III. THERE IS A TRIABLE ISSUE OF FACT CONCERNING WHETHER BARCLAYS COMMITTED PRIMARY ACTS OF DECEPTION UNDER RULE 10b-5(a) AND (c)[12]

A. The Standard for Primary Liability Under Rule 10b-5(a) and (c)

In *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), the Supreme Court held that private actions under §10(b) and Rule 10b-5 can only be brought against persons who are "primary violators" of that statute and rule, and not against those who merely aid and abet another's primary violation. In so holding, the Court took pains to establish that anyone – *i.e.*, even those considered merely "secondary actors" – can nevertheless be liable under Rule 10b-5 if they engage in prohibited conduct:

> The absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. ***Any person or entity***, including a lawyer, accountant, or ***bank***, who employs a manipulative device or makes a material misstatement (or omission) on which a

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[12] This Court has ruled "[t]o state a claim on conduct that violates Rule 10b-5(a) and (c), plaintiff must assert that the defendant (1) committed a deceptive or manipulative act, (2) with scienter, that (3) the act affected the market for securities or was otherwise in connection with their purchase of sale, and (4) that the defendant's actions caused the plaintiff's injuries." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *88 n.45.

> purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming ***all*** of the requirements for primary liability under Rule 10b-5 are met.

Id. at 191 (emphasis added and in original). The Court also recognized that "[i]n any complex securities fraud, moreover, there are ***likely*** to be ***multiple violators***." *Id.*

These pronouncements must be read in conjunction with the Supreme Court's longstanding and consistent recognition that liability under Rule 10b-5 is not limited to the making of a false statement or omission. Because Rule 10b-5(a) and (c) render it actionable to "'employ any device, scheme, or artifice to defraud'" and/or to "'engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,'" liability may be found under these subsections notwithstanding the absence of an actionable misstatement or omission.[13] *Enron*, 2006 U.S. Dist. LEXIS 43146, at *157. Claims for nonrepresentational conduct under subsections (a) and (c) of the Rule are commonly referred to as those for "scheme liability." *See id.* at *155-*174.[14]

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[13] *See, e.g.*, *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972) ("To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted."). This Court has rightly and repeatedly acknowledged that liability exists under Rule 10b-5(a) and (c) for conduct not amounting to misstatements or omissions. *See, e.g.*, *In re Enron Corp. Sec. Litig.*, 236 F.R.D. 313 (S.D. Tex. 2006); SEC Brief (Ex. 1) at 8 ("deceptive acts under Section 10(b) include conduct beyond the making of false statements or misleading omissions, for facts effectively can be misrepresented by action as well as words").

[14] As the SEC has noted and courts have routinely held, both §10(b) and Rule 10b-5 cover (among other things) deceptive conduct, acts, and practices beyond mere false statements or market manipulation:

> It has long been accepted that Section 10(b), and Rule 10b-5(a) and (c) thereunder, cover conduct beyond the making of false statements and misleading omissions, which are covered by Rule 10b-5(b). The Supreme Court has stated that Section 10(b) encompasses deceptive "practices," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 475-76 (1977), deceptive "conduct," *id.* at 475 n.15; *O'Hagan*, 521 U.S. 659, and deceptive "acts," *Central Bank*, 511 U.S. at 173; *see Bankers Life*, 404 U.S. at 9.

SEC Brief (Ex. 1) at 13-14.

In determining precisely what conduct warrants the imposition of scheme liability, it should be noted that "the Supreme Court has emphasized repeatedly that Section 10(b) 'should be "construed not technically and restrictively, but flexibly to effectuate its remedial purposes."'"[15] Also:

> The Supreme Court has given instruction on the meaning of the relevant terms in Section 10(b). The key phrase for present purposes is "directly or indirectly . . . to use or employ . . . any . . . deceptive device or contrivance." "Device," according to the Supreme Court, should be understood to mean "***that which is devised, or formed by design***; a ***contrivance***; an invention; ***project***; scheme; often, a scheme to deceive; a stratagem; an artifice." Contrivance, the Court noted, means "a thing contrived or used in contriving; a ***scheme, plan, or artifice***." The same dictionary used by the Supreme Court defines "deceptive" as "tending to deceive; having power to mislead."[16]

Thus in *Zandford*, 535 U.S. 813, the Supreme Court reaffirmed the validity of, and expansively construed scheme liability, overturning the Fourth Circuit's reversal of a grant of summary judgment for the SEC, which alleged that the defendant stock broker had engaged in a scheme to defraud by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent. Again, stressing that §10(b) should be construed "'flexibly to effectuate its remedial purposes'" (*id*. at 819), it ruled the broker faced liability despite the fact that he did not make false statements or omissions: "each time respondent 'exercised his power of disposition for his own benefit,' that conduct, '***without more***,' was a fraud." *Id*. at 821. The lack of a misrepresentation was immaterial, as "***neither the SEC nor this Court has ever held***

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15 *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 501 (S.D.N.Y. 2005) ("*Parmalat I*") (citing *SEC v. Zandford*, 535 U.S. 813, 819 (2002)) (quoting *Affiliated Ute*, 406 U.S. at 151); *accord Pinter v. Dahl*, 486 U.S. 622, 653 (1988); *Herman & MacLean*, 459 U.S. 375; *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 475-76 (1977); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

16 *Parmalat I*, 376 F. Supp. 2d at 502.

that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act." *Id*. at 820.

Barclays cites to various cases in support of the proposition that "there is no primary violation where the defendant's conduct itself does not involve 'some element of deception' within the meaning of Section 10(b)." *See* Motion at 23-24. Lead Plaintiff does not quarrel with this general principle, but the cases Barclays uses to make this point are inapposite.

In *Santa Fe*, 430 U.S. 462, the Supreme Court held defendants could not be found to have violated §10(b) or Rule 10b-5 where they merely breached their fiduciary duties by offering shareholders an undervalued price for their shares as part of a short-form merger. *Id*. at 474. The basis for this decision was the Court's finding that, in order to state a cause of action under Rule 10b-5, the alleged conduct must be viewed as "manipulative ***or*** deceptive." *Id.* at 473-74. Since the shareholders in *Santa Fe* were "furnished with all relevant information" and their "choice was fairly presented" to them, the Court held that the transaction was neither deceptive nor manipulative, and thus did not violate Rule 10b-5. *Id.* at 474. In issuing its opinion, however, the Court was careful to reiterate its view that "'[§]10(b) must be read flexibly, not technically and restrictively' and that the statute provides a cause of action for any plaintiff who '***suffer[s] an injury as a result of deceptive practices touching its sale [or purchase] of securities***.'" *Id.* at 475-76 (citing *Superintendent of Insurance*, 404 U.S. at 12-13).

While the defendants' intention in the *Santa Fe* case may have been to take advantage of unsuspecting shareholders, it was not to deceive them. *See* 430 U.S. at 474. As the Court pointed out, those shareholders who wished to ascertain all of the details of the transaction were able to do so. *Id*. Certainly, the same cannot be said about the transactions entered into between Barclays and Enron in this case. In these transactions, which relied on secret side agreements and the use of sham entities to disguise their true nature, the "relevant information" was clearly not available to the investing public and the transactions were anything but "fairly presented." As such, defendants' reliance on the principles advanced by the Supreme Court in *Santa Fe* to support their contention that Barclays cannot be liable as a primary violator under §10(b) or Rule 10b-5 is patently misplaced.

The remainder of the cases cited by Barclays similarly fail to address the kind of conduct engaged in by the Bank, and thus fail to absolve Barclays from liability under §10(b) or Rule 10b-5. Unlike Barclays, none of the defendants in the cases cited actively took part in deceptive conduct. In some instances, the transaction itself was simply not deceptive in nature. *See GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 207 (3d Cir. 2001) (finding no violation for lawful short selling that did not involve "injecting inaccurate information into the marketplace"). In other cases, although an element of deception was involved at some point, the defendants were not actively involved in creating that element of deception. *Advanced Laser Prods., Inc. v. Signature Stock Transfer, Inc.*, No. 3:98-CV-1624-D, 1999 U.S. Dist. LEXIS 5179 (N.D. Tex. Apr. 12, 1999) (finding no liability for defendant who merely accepted and transferred securities that had previously been misappropriated by another defendant); *Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.*, 38 F. Supp. 2d 1158 (C.D. Cal. 1998) (finding no liability for corporate officers who had no involvement in the issuance of misleading statements by other officers); *Scone Invs., L.P. v. Am. Third Mkt. Corp.*, No. 97 Civ. 3802 (SAS), 1998 U.S. Dist. LEXIS 5903 (S.D.N.Y. Apr. 28, 1998) (finding no liability for bank that indirectly facilitated securities fraud by financing defendant's initial purchase of shares and later directing that the same shares be sold in order for bank to recoup its credit). Unlike these defendants, and contrary to Barclays' contentions here, Barclays was much more than a mere helper in Enron's fraudulent scheme. Also, unlike these defendants, Barclays' conduct in its transactions with Enron was motivated by, and inseparable from, the creation of deception in that scheme.

Defendants suggest the *Santa Fe* line of cases stands for the proposition that the underlying motive or objective of a particular transaction – whether it is "improper," a "sham," or "collusive" – is not relevant to the Court's analysis of liability under §10(b) and Rule 10b-5. *See* Motion at 23, 25. However, Judge Werlein recently held that the objective or motive behind a given transaction can play a very significant role in showing that the requisite element of deception was present. *See Hopper*, 2006 U.S. Dist. LEXIS 17772.

In *Hopper,* the court found that, although round-trip trading is not the kind of inherently deceptive practice that constitutes a *per se* violation of the securities laws, the particular purpose and manner in which the defendants were alleged to have employed this practice did constitute a deceptive act within the meaning of §10(b) and Rule 10b-5. *Id*. at *36-*37. The particular transactions the defendants were alleged to have engaged in constituted a fraudulent and/or deceptive scheme because "the trades were massive ***sham bookkeeping transactions***, conducted ***not for a legitimate business purpose*** but instead to create a false picture to the industry, and concomitantly to the financial community and secondary markets through the companies' SEC filings." *Id.* at *36. Furthermore, the court stated that "[b]ecause the round-trip trades were ***sham transactions***, and ***therefore had an inherent tendency to deceive, it cannot be said*** that the alleged ***fraud or deception only occurred when the trades were misreported*** in the companies' SEC filings." *Id.* at *38. As such, *Hopper* illustrated that, contrary to defendants' contentions in this case, the objective and intent behind a transaction or a set of transactions can play a very significant role in the court's analysis of primary liability under §10(b) and Rule 10b-5. Where a particular transaction is lacking in economic substance and constitutes a complete sham, this fact can demonstrate that, not only was an element of deception involved in the transaction, but that this element was present at the point of the transaction's inception, rather than just at the time the transaction was misreported.

Another significant fact completely ignored by Barclays is that the Court has repeatedly upheld Lead Plaintiff's allegations of scheme liability in this case as to various defendants. *See, e.g.*, *In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 698-701 (S.D. Tex. 2002) (upholding allegations that Barclays committed a primary violation of Rule 10b-5(a) and (c)). This Court has observed that, in the wake of *Central Bank*, concerning scheme liability, "the relevant law has evolved and been modified and clarified, often in different ways by different courts, and the Court has attempted to address the problem." *In re Enron Corp. Sec. Litig.*, 439 F. Supp. 2d 692, 713 (S.D. Tex. 2006) ("July 20, 2006 Order").

In its Opinion and Order Re Class Certification of June 5, 2006, this Court examined the SEC's position on the issue as stated in the SEC Brief, and ruled that the Court "adopts its approach." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *174. The SEC's position is that:

> "Any person who directly or indirectly engages in a manipulative or deceptive act as part of a scheme to defraud can be a primary violator of Section 10(b) and Rule 10b-5(a); any person who provides assistance to other participants in a scheme but does not himself engage in a manipulative or deceptive act can only be an aider and abettor."

SEC Brief (Ex. 1) at 16. Under this test, liability follows for "***engaging in a transaction whose principal purpose and effect is to create a false appearance of revenues***." *Id*. at 18.[17] The SEC

[17] Barclays cites to *Foss v. Bear, Stearns & Co.*, 394 F.3d 540, 541 (7th Cir. 2005), for the proposition that someone who merely "aided and abetted" a deception cannot be directly liable under Rule 10b-5. Supp. Motion at 29. This reference, however, is entirely misleading. In *Foss*, the court held that the claim was insufficient for securities liability under Rule 10b-5 of §10(b) because a broker who transferred securities did not deceive the estate administrator who he was dealing with, "or for that matter the estate" itself. 394 F.3d at 541. Our case is distinguishable, however, because plaintiffs have put forth significant evidence of Barclays' fraudulent conduct and the deception that resulted.

Furthermore, the court characterized the circumstances in *Foss* as the "hawking or fencing [of] stolen goods," which differs from fraud. *Id*. at 543. It is outside the reach of federal law to make a "'thief [who] simply invested the proceeds of a routine conversion in the stock market'" liable under §10(b). *Id*. Again, this is distinguishable from the conduct engaged in by Barclays.

offered several examples of conduct that would be actionable, and alternatively non-actionable, under its test (SEC Brief (Ex. 1) at 20-21), which this Court noted (*see Enron*, 2006 U.S. Dist. LEXIS 43146, at *166-*169).[18] *See also Enron*, 2006 U.S. Dist. LEXIS 88121, at *8-*9, *14-*18 (discussing applicable standard).

Barclays argues throughout its brief that the majority of the transactions at issue were legitimate and that Barclays merely provided standard banking services to Enron. Primary liability in a scheme to defraud, however, lies even if the transaction within the scheme was arguably legitimate, so long as defendants' conduct had the principal purpose and effect to deceive. *See Hopper*, 2006 U.S. Dist. LEXIS 17772.

Moreover, the "use or employ" statutory language in §10(b) does not require that a defendant be the originator or mastermind of the scheme – even though Barclays was in many of the transactions at issue. *Homestore*, 452 F.3d at 1051; SEC Brief (Ex. 1) at 11 ("The district court [in *Homestore*] held that the primary violators in a scheme to defraud are the 'primary architects' of the scheme who 'designed and carried [it] out.' The 'use or employ' language of Section 10(b), however, suggests no such requirement."). Thus, even if Enron and/or Fastow, Skilling or Lay were the "originator" or "mastermind," Barclays' own deceptive conduct subjects it to primary liability.

Barclays fraudulently structured its transactions with Enron so that the investing public would not understand the significance of the transactions. The fraud here was the original transactions Barclays engineered. The fraud occurred when the deal took place, thereby making Barclays a primary actor, not an aider and abettor.

[18] In adopting the SEC's approach, this Court declined to follow the holding of *In re Charter Commc'ns, Inc.*, 443 F.3d 987 (8th Cir. 2006), which held that a seller of goods to a public company in a legitimate arm's-length business transaction cannot be held liable for participating in a scheme to falsify that company's financial statements where that seller had not engaged in any contrivance or committed any deceptive or manipulative act. This Court noted that the SEC's position stands in "contrast" to the *Charter* court's "narrow reading of the term" "manipulative or deceptive act." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *166-*168.

Nor do the securities laws require that a third party whose conduct comes within the proscriptions of the statute have a special relationship with the subject corporation in order to be deemed a primary violator under §10(b). In *Homestore*, the Ninth Circuit rejected the district court's prohibition against scheme liability beyond corporate officers and those with a special relationship with the corporation. 452 F.3d at 1053. The SEC agrees: "[T]o require a special relationship with the corporation . . . would allow a person who is not in such a relationship to accomplish the same fraud, with the same state of mind, and the same effect on investors as a person in such a relationship, and nonetheless escape liability." SEC Brief (Ex. 1) at 7.

In addition, a defendant like Barclays is not immunized from liability in a scheme to defraud by claiming simply that the deception did not occur until the issuer of the financial statements fraudulently accounted for the transactions. This is Barclays' primary argument and it is simply an inaccurate description of Barclays' conduct. In *Parmalat I*, Judge Kaplan held:

> The defendants' argument that they were at most aiders and abettors of a program pursuant to which Parmalat made misrepresentations on its financial statements misses the mark. ***The transactions in which the defendants engaged were by nature deceptive***. They depended on a fiction, namely that the invoices had value. It is impossible to separate the deceptive nature of the transactions from the deception actually practiced upon Parmalat's investors. Neither the statute nor the rule requires such a distinction.

376 F. Supp. 2d at 504. Similarly, as this Court earlier noted:

> Although Merrill Lynch argues its actions were not unlawful and that they were merely business transactions later misrepresented by Enron in its financial statements, the factual allegations suggest knowingly deceptive conduct . . . . Sham business transactions with no legitimate business purpose that are actually guaranteed "loans" employed to inflate Enron's financial image are not above-board business practices. This Court disagrees with Merrill Lynch's contention that the alleged "'deception' did not occur until Enron allegedly misreported" the transactions.

Enron, 310 F. Supp. 2d at 830.

The SEC agrees:

> Thus, a prior deceptive act, from which the making of the false statements follows as a natural consequence, can constitute a sufficient step in the causal chain

> to support a finding of reliance. Certainly where the making of the false statements by one participant in the scheme is an objective of the scheme, the making of the statements should not be viewed as breaking the chain of causation.

SEC Brief (Ex. 1) at 22.

The above-discussed case law rejects Barclays' suggestion that no liability lies because Enron, not Barclays, falsified its financials. In so doing, these cases logically embrace the following premise: In any public-company fraud involving a scheme with multiple participants, the financial statements ultimately issued to investors will always be primarily created by the issuer. Seldom will a third party involved in the scheme alleged have the ability or the responsibility to formally account for any transaction on the issuers' financial statements. Perfecting the ultimate deceit on investors by issuing false financial statements is not the only point at which acts of deception are important in a complex securities fraud. Earlier acts of deception in the chain of conduct must occur. In short, it naturally follows that the issuer is unable to misaccount for the transaction unless, earlier, the third party acts deceptively – *i.e.*, designs or structures transactions that were by their nature inherently deceptive – so that other actors participating in the transactions without knowledge of their deceptive nature (as well as investors) will see a fiction, not reality, if and when they look. *See Homestore*, 452 F.3d at 1049 ("We see no justification to limit liability under §10(b) to only those who draft or edit the statements released to the public.").[19]

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[19] Barclays continues to urge the Court to adopt *Charter*, 443 F.3d 987, and claims its holding is contrary to that relied on by the Court here. But, if *Charter* is read properly, no conflict exists because *Charter* ***only*** held that a seller of goods to a public company in a legitimate arm's-length business transaction cannot be held liable for participating in a scheme to falsify that company's financial statements where those sellers did not commit ***any deceptive or manipulative act***. The Ninth Circuit soundly reconciled *Charter* as merely refusing to impose primary liability "'on a business that entered into an arm's length non-securities transaction with an entity that then used the transaction to publish false and misleading statements to its investors and analysts.'" *Homestore*, 452 F.3d at 1050 (quoting *Charter*, 443 F.3d at 992). To the extent *Charter* stands for a more restrictive interpretation of §10(b), as Barclays would read it, limiting liability under §10(b) to

There will never be liability under Rule 10b-5(a) and (c) by so-called secondary actors if the issuer's ultimate misaccounting, without more, was enough to shield those actors who engaged in deceit in the underlying fraudulent financial transactions by creating or funding transactions designed to perpetrate a fraud and/or structuring illegitimate deals and the like, which deprive the transactions of economic substance or risk or cause them to be non-GAAP compliant. Each actor, no matter how deceptive or contrived its conduct may be, will be shielded because it always will be the issuer that later formally misaccounts for the bogus deal. Thus, the rule cannot be that the issuer who ultimately misaccounts for a transaction provides immunity to sophisticated banks who engage in the fraud with scienter, using deception or contrivances with the primary purpose and effect of deceiving investors under Rule 10b-5(a) or (c). Critically, the transactions Lead Plaintiff has pleaded against Barclays were deceptive at their inception.

In the July 20, 2006 Order, the Court relied extensively on the scheme liability analysis employed by Judge Kaplan in *Parmalat I*. *See, e.g.*, *Enron*, 439 F. Supp. 2d at 721-24. At the same time though, this Court made clear its understanding that ***the SEC's position "appears to be in accord with Judge Kaplan's analysis in Parmalat***." *Id*. at 715.

In *Parmalat I*, the plaintiffs alleged that defendant Citigroup violated Rule 10b-5(a) and (c) when it securitized certain of Parmalat's invoices that were known to the bank to be worthless. 376 F. Supp. 2d at 481-82. The plaintiffs also claimed that defendant Banca Nazionale del Lavoro ("BNL") violated Rule 10b-5(a) and (c) by factoring Parmalat's invoices which BNL knew to be without value. In the scheme, BNL paid Parmalat cash for the assignment of the bad invoices. But unlike a legitimate factoring, where "one party purchases, at a discount, receivables from the party

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representational conduct, it stands in stark contrast to established Supreme Court and Fifth Circuit law – as well as the SEC's interpretation of the statute, which is entitled to deference.

that issued them and then attempts to collect the face amount of the invoices" (*id.* at 488), "Parmalat had ***guaranteed*** to BNL . . . and the other banks, payment of the full face value of the invoices" (*id.*). As such, the so-called "factoring" and "securitization" arrangements were simply loans to Parmalat; the invoices "played ***no economic role*** in the transaction; they were simply ***a device or excuse*** that ***permitted Parmalat*** to record the revenue and to ***conceal*** the liability on the guarantees." *Id*.

Judge Kaplan rejected the defendants' argument that they only aided and abetted Parmalat's misrepresentations in its financial statements, holding that these allegations stated a claim under Rule 10b-5(a) and (c):

> The Court concludes that the arrangements involving the regular factoring and securitization of worthless invoices were deceptive devices or contrivances for purposes of Section 10(b). These were inventions, projects, or schemes with the tendency to deceive because ***they created the appearance of a conventional factoring or securitization operation when, in fact, the reality was quite different***. BNL knew when it paid Parmalat for the invoices that they were worth nothing and were in fact ***a trick to disguise its loan*** to Parmalat. The same is true of Citigroup's purchase of certain invoices. . . .
>
> The defendants' argument that they were ***at most aiders and abettors*** of a program pursuant to which ***Parmalat made misrepresentations on its financial statements*** misses the mark. The transactions in which the defendants engaged were by nature deceptive. They ***depended on a fiction***, namely that the invoices had value. It is impossible to separate the deceptive nature of the transactions from the deception actually practiced upon Parmalat's investors. Neither the statute nor the rule requires such a distinction.

Parmalat I, 376 F. Supp. 2d at 504.

Also in *Parmalat I*, the plaintiffs alleged that defendant Credit Suisse First Boston ("CSFB") (one of the bank defendants in this case) "designed and participated in a set of transactions . . . that CSFB knew Parmalat would use to conceal debt on its financial statements." *Id.* at 489. Specifically, and in short, in the alleged transaction (among other things) CSFB paid Parmalat Participacoes do Brasile ("PB") for the entirety of a PB bond issue (convertible into equity) underwritten by CSFB. At the same time, Parmalat and CSFB transferred back to Parmalat the right of conversion, pricing it at ***half the value*** of the entire bond issue – a suspiciously high ***valuation***.

Parmalat raised the funds to pay CSFB through a separate bond issue underwritten by CSFB and others. Parmalat then recorded both the conversion "right" it had purchased from CSFB, and the proceeds of the PB bond issue, as assets. This accounting treatment was allegedly improper, as it allowed Parmalat to improperly obtain financing, manufacture assets and conceal debt. *Id*.

The court held that these allegations stated a claim under Rule 10b-5(a) and (c), finding that, similar to the invoices in the schemes described above, the ***overstatement*** of the conversion right's value constituted a deception in the deal that allowed Parmalat to falsify its financial statements:

> On the one hand, CSFB's relinquishment of the conversion right presumably had some value to Parmalat. On the other hand, if the allegations are given the interpretation most generous to the plaintiffs, the parties ***grossly overstated that value and did so for the purpose of inflating Parmalat's assets on its financial statements***. The conversion right thus may well have played a role similar to that of the invoices in the BNL arrangement. The Court is obligated so to assume at this stage, where reasonable inferences are to be drawn in the plaintiffs' favor. Nor can there be any dispute that if this was a deceptive device or contrivance, then CSFB used it or engaged in a course of business that would operate as a fraud or deceit.

Parmalat I, 376 F. Supp. 2d. at 505.

Given this Court's reliance on *Parmalat I* in the July 20, 2006 Order, Lead Plaintiff notes that Judge Kaplan issued two subsequent opinions in the case, which upheld certain other allegations as stating claims under Rule 10b-5(a) and (c). In *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005) ("*Parmalat II*"), the court upheld such claims against outside lawyers for their role in the Parmalat fraud. The relevant allegations concerned two bad deals. In the first, when Parmalat was unable to find a legitimate buyer for certain brands and trademarks it needed to sell, it faked their sale to an uncapitalized ***shell corporation*** ("Newlat") formed by the law firm. Parmalat booked a receivable for the sale, despite knowledge that the shell would never pay it. *Id*. at 620.

In the second scheme, the law firm again created a shell company ("Web Holdings"), from which Parmalat booked receivables by reporting that it had purchased bonds from the shell. In reality, Parmalat's ostensible "loan" to the shell was embezzled by the family of Parmalat's CEO.

Id. at 625-26. At the same time, the booking of the receivable "made Parmalat appear healthier than it was." *Id*. at 626.

The Court upheld the allegations:

> The complaint alleges in substance that Parmalat sold assets and lent money to Newlat and Web Holdings, shell companies created and controlled by [the lawyers]. In the case of Newlat, the sale ***was a fiction*** designed to allow Parmalat to book as receivables obligations that it knew would not be paid. In the case of Web Holdings, the loan from Parmalat ***was not a loan at all***, but rather a payment to the Tanzi family. . . .
>
> Like the factoring and securitization of worthless invoices reviewed in [*Parmalat I*], these transactions were "inventions, projects, or schemes with the tendency to deceive because they ***created the appearance of a conventional" sale and loan*** "when, in fact, ***the reality was quite different***."

Id. at 625-26.

And in *In re Parmalat Sec. Litig.*, 414 F. Supp. 2d 428 (S.D.N.Y. 2006) ("*Parmalat III*"), Judge Kaplan ruled the plaintiffs' allegations that Bank of America ("BoA") engaged in a transaction with Parmalat that "in substance was a loan" but was portrayed as an "outside equity investment" stated a claim under Rule 10b-5(a) and (c). *Id.* at 434.

According to the allegations, BoA designed a transaction in which two BoA-controlled SPEs purported to purchase an equity stake in Parmalat's Brazilian arm ("PA"), which was failing. In setting the purchase price of the purported equity stake, Parmalat and BoA relied on an accountant's ***valuation*** of PA that they knew to be "'completely ***obsolete***,'" because it was so outdated it failed to represent the true, lower value of PA. (Using this valuation, as was done, implied a valuation of PA that was favorable for Parmalat.) *Id.* at 434. But BoA's "purchase" was not "equity" at all, but instead was in substance a loan, because the deal featured a "***put agreement***" which operated to effectively ***guarantee*** Parmalat's repurchase from BoA of its "equity" stake. *Id*. at 433.

The *Parmalat III* court held BoA's conduct in ***masking the loan as an equity investment***, to permit Parmalat to report a favorable valuation of PA, stated a claim under Rule 10b-5(a) and (c):

> [R]ead in the light most favorable to plaintiffs, the SAC alleges that BoA knowingly used the ***outdated . . . valuation*** to place an inflated price on the PA private placement. This caused the two SPEs to overpay for their investment in PA, a fact that was irrelevant to BoA because BoA knew that PA would not become publicly listed and that the two SPEs therefore would be able to put their entire investment back to Parmalat at a profit [via the put agreement]. The combination of ***the overvaluation and the put agreement***, then, ***created the appearance*** that BoA believed that PA was worth the full $1.6 billion and was willing to invest its own money based on that valuation, when ***in fact BoA knew that PA was worth far less and was willing to invest only because the put guaranteed that BoA would be repaid at a premium***. Accordingly, plaintiffs' allegations regarding the PA transaction state a claim under Rule 10b-5 (a) and (c).

Id. at 435.

Also in the July 20, 2006 Order, this Court examined the Ninth Circuit's decision in the appeal of *Homestore*, 252 F. Supp. 2d 1018. *See Enron*, 439 F. Supp. 2d at 719 n.33 (discussing *Homestore*, 452 F.3d 1040). In *Homestore*, the Ninth Circuit affirmed the existence of scheme liability under Rule 10b-5(a) and (c), favorably citing this Court's original 12(b)(6) order regarding Barclays and other banks and subsequent Merrill Lynch opinion as correctly decided. 452 F.3d at 1050. The court, agreeing with the SEC in large part, ruled that "[i]f a defendant's conduct or role in an illegitimate transaction has the ***principal purpose and effect*** of creating a false appearance of fact in the furtherance of a scheme to defraud, then the defendant is using or employing a deceptive device within the meaning of §10(b)." *Id*.

Lead Plaintiff is the party who submitted the SEC Brief to the Court. *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *161-*164. And Lead Plaintiff continues to believe that the SEC Brief presents the proper standard for scheme liability in this case, and that the evidence concerning Barclays' role in the Enron fraud now detailed in the December 29, 2006 Complaint is clearly sufficient for the imposition of scheme liability under the SEC's test.

Yet Lead Plaintiff can also demonstrate that Barclays' conduct renders it liable as a primary violator of Rule 10b-5(a) and (c) under *Parmalat I*, and thus under this Court's July 20, 2006 Order. Barclays argues in its supplemental motion that the July 20, 2006 Order absolves it of all liability.

This is simply untrue. In reaching its decision on Barclays' motion for judgment on the pleadings, the Court did not have before it the detailed recitation of Barclays' conduct it now possesses. Indeed, the decision to grant reconsideration demonstrates the Court's belief that Lead Plaintiff had not previously pleaded the full case against Barclays, including the testimony of Fastow and the incorporation of certain reports by Bankruptcy Examiner Batson. And because of this Court's reliance on the SEC Brief and *Parmalat I*, and due to Barclays' attempts to argue that *Homestore* and *Parmalat I* each supposedly render certain of its conduct inactionable, Lead Plaintiff believes it helpful for the purpose of resolving Barclays' Motion to highlight and summarize to the Court that, under these authorities, the following conduct is actionable under Rule 10b-5(a) and (c):

- If a "third party ***engages*** with the corporation in a transaction whose ***principal purpose and effect*** is to create a false appearance of revenues" (SEC Brief (Ex. 1) at 20);

- Where an "investment bank engages in the ***creation of a sham entity*** as part of . . . services to arrange . . . financing" that the client will use to commit securities fraud (*id*.);

- Engaging in deceptive conduct which operates to ***disguise*** a transaction as ***something other than what it in substance truly is*** – such as disguising a loan as an equity investment[20] or as a non-lending transaction in the issuer's business.[21] This deception can be practiced by, for example:

    - establishing and/or operating a ***shell entity*** used to permit the issuer to mischaracterize the economic reality of the transactions with those entities;[22]

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[20] *See Parmalat III*, 414 F. Supp. 2d at 435 (transaction that was in substance a loan "created the appearance that BoA believed that PA was worth the full $1.6 billion and was ***willing to invest its own money***").

[21] *See Parmalat I*, 376 F. Supp. 2d at 504 ("the arrangements involving the regular factoring and securitization of worthless invoices . . . were inventions, projects, or schemes with the tendency to deceive because they ***created the appearance of a conventional factoring or securitization operation when, in fact, the reality was quite different***"); *Parmalat II*, 383 F. Supp. 2d at 625-26 (same conclusion with regard to the Newlat and Web Holdings deals).

[22] *See Parmalat II*, 383 F. Supp. 2d at 625 ("Parmalat sold assets and lent money to Newlat and Web Holdings, ***shell companies created and controlled by [defendants]***."); *Homestore*, 452 F.3d at

- transaction features that "play[] ***no economic role*** in the transaction," or that otherwise operate as "***a device or excuse***" to "permit[]" the issuer to misaccount for the transaction;[23]

- using any other pretextual dummy element in the transaction to permit mischaracterization by the company, such as knowing employment of an inaccurate or overstated valuation to establish an ***ostensible but insincere*** assessment of value;[24] or

- use of a ***guarantee*** of repayment (via, for example, a ***put agreement***) from the issuer to render a purported non-lending transaction, in substance, a loan.[25]

It is equally clear that ***structuring*** or ***designing*** a transaction which has the principal purpose and effect of creating the false appearance of fact is likewise actionable under Rule 10b-5(a) and (c). This Court's holdings regarding the scope of scheme liability are strongly supported by *Homestore*, where the Ninth Circuit approvingly noted that the "principal purpose and effect" test it adopted was found satisfied in cases where the secondary actor "designed" or "masterminded" the scheme.[26]

1050 ("the invention of sham corporate entities to misrepresent the flow of income, may have a principal purpose of creating a false appearance").

[23] *Parmalat I,* 376 F. Supp. 2d at 488 (discussing securitization/factoring or worthless invoices).

[24] *See Parmalat I*, 376 F. Supp. 2d at 505 ("[***CSFB*** and Parmalat] ***grossly overstated*** that value [of the conversion right] and did so for the purpose of inflating Parmalat's assets on its financial statements."); *Parmalat III*, 414 F. Supp. 2d at 435 ("the SAC alleges that BoA knowingly used the ***outdated . . . valuation*** to place an ***inflated price*** on the PA private placement").

[25] *See Parmalat III*, 414 F. Supp. 2d at 433 ("Even the 18.18 percent equity stake purchased by the two SPEs, in plaintiffs' view, ***was not really an equity investment*** because BoA knew that PA would never become publicly listed and that Parmalat therefore would have to buy back the stake [via the ***put agreement***] at a premium.").

[26] In *Homestore*:

> Trial courts which have imposed liability under a "scheme to defraud" theory have often required that the ***defendant's actions*** in fraudulent transactions have a ***principal purpose and effect*** of creating a false appearance of fact in furtherance of the scheme to defraud. *See Quaak v. Dexia S.A.*, 357 F. Supp. 2d 330, 342 (D. Mass. 2005) (finding sufficient allegations for primary liability under §10(b) when

In applying the standard described above, Lead Plaintiff respectfully submits that the Court should be guided by the following observations. First, the Supreme Court has repeatedly ruled that §10(b) and Rule 10b-5 are imbued with sufficient breadth and flexibility to reach even unique and unprecedented forms of fraud.[27] Thus while the Court may find instructive the specific conduct described as actionable in the SEC Brief and the *Parmalat* cases, if Barclays' conduct here presents the requisite deception, factual variations from the cases should not insulate it from liability.

Second, conduct which yields deception only ***indirectly*** is nevertheless actionable under Rule 10b-5(a) and (c).[28] Third, in determining whether ***conduct or transactions*** disclose the requisite deception, this Court should construe all reasonable inferences to that effect in Lead Plaintiff's favor.[29]

> "defendant was ***a primary architect*** of the scheme to finance the sham entities"); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336-337 (S.D.N.Y. 2004) (allowing claims of primary liability to go forward where auditors "***masterminded***" company's misleading accounting practices); *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003) (denying a motion to dismiss for outside business partners who ***invented*** sham corporate entities that allowed a corporation "to hide research and development expenses, create fictitious revenue, and ultimately overstate profits in [its] financial reports").

452 F.3d at 1049-50.

27 *See, e.g.*, *Superintendent of Ins.*, 404 U.S. at 11 ("We believe that §10(b) and Rule 10b-5 prohibit ***all*** fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception.") (emphasis in original).

28 As the SEC stated: "We do not believe that direct conduct should be a requirement for primary scheme liability. Section 10(b) and Rule 10b-5 expressly cover 'indirect' conduct. Thus, a defendant should be primarily liable where he either directly or indirectly engages in a manipulative or deceptive act as part of a scheme to defraud." SEC Brief (Ex. 1) at 18 n.4.

29 *See Parmalat I*, 376 F. Supp. 2d at 483 ("The Court accepts the allegation of a guarantee because all reasonable inferences are to be drawn in plaintiffs' favor at this stage."); *id.* at 504 n.160 ("the Court is obliged to draw from the complaint all reasonable inferences in the plaintiffs' favor and therefore assumes for present purposes that Citigroup securitized worthless invoices"); *id.* at 505 ("The conversion right thus may well have played a role similar to that of the invoices in the BNL

Finally, as demonstrated below, under these authorities and all of the Court's relevant orders, Lead Plaintiff's evidence concerning Barclays' role in the Enron fraud as detailed in the December 29, 2006 Complaint and referenced herein, creates a genuine issue of material fact as to whether Barclays is liable under Rule 10b-5(a) and (c), and thus Barclays' motion must be denied.

B. Barclays' Engagement in and Structuring of the Fraudulent Transactions Subjects It to Primary Liability

1. Chewco

The JEDI/Chewco transaction at year-end 1997 served as a template for the fraud engaged in by Enron, Barclays and other banks over the following years. While it predates the Class Period, JEDI/Chewco shows Barclays' intent, knowledge and method of acting in the scheme to falsify Enron's finances.[30] As Barclays acknowledged in an internal e-mail discussion, "this [was] not a structure [it] would consider for just anyone." Ex. 10135. Barclays and Enron created and funded a non-GAAP-compliant entity that they ***used at year-end 1997 and continued to use from 1998-2001***

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arrangement. The Court is obligated so to assume at this stage, where reasonable inferences are to be drawn in the plaintiffs' favor."). While Judge Kaplan operated under the observation that "all reasonable inferences are to be drawn in plaintiffs' favor" on a motion to dismiss (*id*. at 483), similarly on summary judgment the court will "draw all reasonable inferences in favor of the nonmoving party" (*Flock*, 319 F.3d at 236).

[30] The Court previously held:

> 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. ***The Court agrees and considers those allegations to be admissible solely for the purpose of establishing a scheme and/or scienter***.

Enron, 235 F. Supp. 2d at 689. Defendants incorrectly allege that plaintiffs use of the Chewco transaction goes only to "scheme" rather than to both scheme and scienter. Motion at 19. Barclays' conduct surrounding JEDI/Chewco is relevant to show the existence of the scheme and Barclays' conduct in it, as well as proof of "motive, opportunity, intent, preparation, plan, [or] knowledge," as it is one of several transactions which Barclays, as part of a pattern of conduct, engaged in. *See* Fed. R. Evid. 404(b).

to falsify Enron's reported financial condition, thus furthering the Ponzi scheme during the Class Period.

Chewco was an SPE set up and financed by Barclays and Enron at year-end 1997 to take the place of CalPERS in an existing joint venture known as JEDI. Enron had been properly accounting for transactions with the entity and the debt of JEDI was properly "off-balance sheet," as CalPERS was independent from Enron. But if CalPERS withdrew from JEDI, then JEDI's debt would have to be put on Enron's balance sheet – something Enron had to avoid. 10/20/04 Deposition Transcript of George McKean ("10/20/04 McKean Depo. Tr.") at 102; 10/22/04 Deposition Transcript of George McKean (" 10/22/04 McKean Depo. Tr.") at 684; 7/22/04 Deposition Transcript of Richard Williams ("7/22/04 Williams Depo. Tr.") at 402-03; 9/29/04 Deposition Transcript of Robert Clemmens ("9/29/04 Clemmens Depo. Tr.") at 50; Ex. 10643. In order for JEDI to remain unconsolidated, *i.e.*, "off balance sheet," some entity had to take over CalPERS' 50% interest. Chewco was formed to buy CalPERS' interest. Ex. 10643. Barclays and J.P. Morgan were to loan Chewco the purchase price money (guaranteed by Enron). If Chewco was a legitimate SPE, it could be considered independent of Enron – ***but if and only if***, Chewco had an investor ***independent*** of Enron with at least 3% "***at risk***" equity. Barclays' demands in the deal caused Chewco to fail this test.

Barclays loaned the 3% equity money to the Chewco investors (basically limited partnerships controlled by Enron employees). Barclays, knowing of the 3% independent equity "at risk" rule, nevertheless insisted its 3% advance of the equity money ***not bear risk*** and instead be substantially protected by a ***secret*** side agreement with Enron, creating millions of dollars of secret offsetting cash deposits into cash collateral accounts that reduced the $11.49 million equity loan it had provided to purportedly meet the 3% "at risk" equity requirement by more than 50% – to $6 million. These secret cash accounts were established at Barclays' insistence and placed at Barclays, under its control. Thus, due to Barclays' ***conduct*** in requiring the secret side deal, secretly holding onto over $6 million of the supposed Chewco "at risk" equity, Chewco was never a legitimate, GAAP-compliant SPE, as it never had 3% "at risk" equity. Due to Barclays' own conduct, this contrived arrangement presented the false appearance of fact, *i.e.*, that Chewco was a legitimate GAAP-compliant SPE with $11.49 million in at-risk equity, and that the Chewco purchase of CalPERS' JEDI interest was a legitimate arm's-length business deal when it was not.

The "official" documentation of the JEDI/Chewco deal, including Barclays' JEDI Loan Revolver, expressly and specifically provided for 3% independent at-risk equity – which made the deal look legitimate. Ex. 10510 at §§2.07, 7.02, 9.04. To fund the transaction, Enron caused JEDI to make a special $16.6 million distribution to Chewco.[31] However, a secret side letter agreement dated December 30, 1997 (the "Chewco Side Letter"), required that part of the $16.6 million would be used to "fund . . . [reserve accounts at closing] . . . in an amount equal to $6,382,600" held at Barclays. Ex. 10511; *see also* Exs. 10160, 15406, 15408, 52094, 13301; Ex. 2 at VE00318-23. This was done in response to Barclays' demands that the Bank be shielded from the required risk in the transaction:

> The Reserve Account will be for $6.5m, up from $5.0m, and held at Big River and Little River, with a ***full assignment*** [sic] to Barclays, from closing. Given the lengthy [sic] discussion on CRMD's view that we are taking asset risk we pushed Enron hard to achieve this result which effectively gives us close to 60% cash collateral from day one.

Ex. 10640.

The cash offset reserve accounts reduced Chewco's 3% purported equity investment of $11.49 million by $6.58 million. Exs. 10511, 10510; 1/17/07 Expert Report of Charles R. Drott

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31 In late November, JEDI had sold one of its assets. Chewco's proceeds of that sale were $16.6 million.

("Drott Report") at 34-35. Because of Barclays' conduct, Enron auditors looking at the deal documents would be deceived, seeing a fictional transaction with a 3% equity "at risk," GAAP-compliant SPE involved. Ex. 10504. Deceiving them was a necessary step to falsifying Enron's financial statements and deceiving Enron's investors.

Chewco was never a legitimate SPE meeting the requirements for non-consolidation treatment because the 3% equity investment in Chewco was ***never*** at risk. It was a sham, giving the appearance of an SPE that was compliant with the accounting rules when, in fact, it violated them. The Chewco equity investment, which Enron and Barclays structured together, was never at risk because Barclays demanded that a huge secret cash offset – called "***reserve accounts" – be established with it to effectively reduce Barclays' loan of the equity money***, so there would be no risk of loss to it or to the Chewco "investors" of the offset amount.[32] The cash offset accounts gave Barclays millions in ***cash collateral*** which it held at all times. Exs. 10402, 15407, 10640, 10160; 10/20/04 McKean Depo. Tr. at 79-80, 109, 116-17; 10/22/04 McKean Depo. Tr. at 673; 4/18/05 Deposition Transcript of Salvatore Esposito ("4/18/05 Esposito Depo. Tr.") at 69; 6/15/04 Deposition Transcript of John Meyer ("6/15/04 Meyer Depo. Tr.") at 389. As a result of Barclays' conduct, Chewco's equity at risk was ***always less than 3%,*** making Chewco an illegitimate SPE.

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[32] Chewco was structured as a limited partnership – Big River Funding was its limited partner. Michael Kopper, an Enron employee who controlled Big River, was the sole owner and manager of Chewco. At the time, Kopper was employed by Enron's Global Capital department which became the Enron Global Finance group headed by Fastow. Barclays was well aware of Kopper's many hats in the transaction but engaged in the deal anyway. Big River's sole member was Little River Funding. The required 3% equity for Chewco to be a legitimate SPE was $11.49 million. Barclays made the "equity loans" to Big River (Chewco's limited partner) and Little River (Big River's sole member). But, before it would make the loans, Barclays required Big River and Little River to set aside $6.6 million in cash "reserve accounts," which were held by Barclays – beyond the control of Big River and Little River. This effectively reduced Barclays' equity loan to $5+ million, far less than 3%.

The Chewco Side Letter was dated December 30, 1997, the same date as the Chewco closing. Ex. 10511. Of course, it is "***unusual***" to have a side letter dated the same date as the closing documents. As Andersen expert John Foster stated, one "***would expect to see the terms of the agreement in the main documents***." 5/15/06 Deposition Transcript of John Foster ("5/15/06 Foster Depo. Tr.") at 104:19-21. Moreover, ***the Chewco Side Letter was created in advance of the execution of the JEDI Revolver with Barclays – but its terms, which secretly modified critical provisions of the JEDI Revolver, are neither contained nor referenced in the JEDI Revolver***. Exs. 10510, 52124. Barclays knew this. A ***draft of the Chewco Side Letter was sent to George McKean at Barclays on December 16, 1997, before the close of the Chewco transaction.*** Ex. 52124. ***Barclays' bankers have admitted that the Chewco Side Letter was also a part of Barclays' documents for the Chewco transaction***. *See* 10/22/04 McKean Depo. Tr. at 703-06; 7/22/04 Williams Depo. Tr. at 510-14. Therefore, the Chewco Side Letter was not memorializing an additional or new agreement between the parties that was arrived at after the deal closed as one would expect from such a document. Instead, it was a preconceived agreement that impermissibly shielded Barclays from risk while hiding that fact from Enron's auditors by not including the substance of the deal in the primary transaction documents. *See* 8/22/06 Deposition Transcript of Thomas Bauer ("8/22/06 Bauer Depo. Tr.") at 364:17-23; 7/17/06 Deposition Transcript of Carl Bass ("7/17/06 Bass Depo. Tr.") at 289:11-290:7. Why would an auditor ask about the existence of a side letter dated the same day as closing documents which claimed to be a complete representation of the parties' agreement? The Chewco Side Letter that Barclays demanded and received to impermissibly shield itself from risk on the deal was inherently deceptive.

Fastow confirmed the fraudulent nature of Chewco/JEDI. He verified Barclays' own conduct created deception when it entered into a secret side agreement, memorialized by the Chewco Side Letter, that altered the revolving credit facility underlying the Chewco transaction. The Chewco

Side Letter required that cash collateral accounts be funded at closing and that destroyed the 3% independent equity at-risk requirement. He said:

> I and Michael Kopper, who had a carried interest in Chewco, controlled the entity. I believe that Chewco should have been consolidated with Enron because it did not have at least 3% at-risk equity, which was required for SPE accounting of the entity. Chewco did not have 3% at-risk equity because of two structural features, including one in which ***Barclays required*** that its equity loan be partially secured by cash collateral.
>
> ***The bank required that cash-reserve accounts be established at Barclays in order to provide security for its loan that funded the 3% equity. I discussed with senior Barclays executives how the cash-reserve account would become funded. The process is described in a side letter***.

Fastow Decl., ¶¶20-21.

To someone looking at Enron's financials without knowing the true state of affairs, it would appear that there was equity at risk in the Chewco transaction when in fact the required equity was not at risk because the deal was back levered.[33] Thus the disparity between the fiction of the JEDI Revolver and Enron's financials and the reality of the Chewco Side Letter is significant. As Fastow stated:

> ***My understanding of the side letter is that it, in essence, changed the way proceeds were distributed within the JEDI and Chewco structure [by modifying the JEDI Revolver]. So in this particular instance, my recollection is that JEDI was disposing of an asset called Coda, and the proceeds of that asset, instead of dropping through the normal, what I call waterfall, or application of proceeds formulas – this side letter caused the proceeds to be able to circumvent the normal waterfall and go, at least in part, to these reserve accounts***.
>
> *   *   *
>
> ***[T]he modification was done to accommodate Barclays' requirement that they have less risk in the equity***.

10/24/06 Deposition Transcript of Andrew Fastow ("10/24/06 Fastow Depo. Tr.") at 347:5-24.

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[33] Fastow defined back levering as "borrowing money, which would then be used . . . as dollars to make an equity investment." 10/23/06 Fastow Depo. Tr. at 146:15-17. Defendants complain that this is not "new" information but they cannot and do not contest its significance.

Fastow spoke directly to Richard Williams of Barclays regarding the Chewco Side Letter's effect on the waterfall provision of the JEDI Revolver:

> ***[M]y take-away from my discussion with Mr. Williams was that he was very familiar with how [the deal] worked. The concern he expressed to me was whether, in fact, the cash would – from the Coda sale would be realized, and that he understood that, if realized, it would follow the application of proceeds outlined in the side letter***.

Id. at 348:15-21.

Enron followed through with Barclays' structural requirements for the Chewco deal and funded the cash collateral accounts held at and controlled by Barclays. According to Fastow:

> [T]here were what I would call cash collateral accounts, or at least an account that was established, in order to make sure that there were some proceeds available to repay what I refer to as the equity loan or Barclays' proceeds that they had put into the deal through . . . one of Michael Kopper's partnerships.
>
> * * *
>
> My understanding, from talking with Mr. Kopper, was that this [partially securing the equity loan was] something that was necessary in order to complete the transaction in the manner we wanted to complete it.

10/23/06 Fastow Depo. Tr. at 164:5-20. Furthermore, Fastow testified: "My view is that the cash collateral in . . . that reserve account or accounts made the equity less risky than it otherwise would have been without those reserve accounts." *Id.* at 165:4-7.

The ultimate effect of Barclays' misconduct is evident. As Fastow stated: "I think, as a result of Chewco purchasing the – the CalPERS' interest, Enron was able to record earnings that were substantial – in my opinion, a substantial part of that year's [1997] earnings." *Id.* at 162:12-15. And "***I believe it contributed [to Enron's reported earnings], to some degree, in those in – at least some years subsequent to '97***." *Id.* at 162:21-23.

The deceptive nature of Barclays' conduct in this transaction between Enron and Barclays is confirmed by Andersen partners who have stated that they had no knowledge of the secret side deals present in Chewco and that, had they known of these secret deals, which were not in the official deal documents, Andersen would ***never*** have approved the accounting for these deals. Carl Bass, an accountant in Andersen's Professional Standards Group, called the Chewco transaction "***the Chewco concealment***." 7/17/06 Bass Depo. Tr. at 289:23. The secret side letter which modified the Barclays' JEDI Revolver, and negated the controls for maintaining 3% "at risk" equity, was not seen by anyone at Andersen. "***[I]t had been concealed from us***." *Id.* at 290:8. Bass stated, this "***critical document***" changed the accounting treatment and that collusion existed between Barclays and Enron in the "Chewco concealment." *Id.* at 289:23-290:12. He said:

> Well, as I – as I talked about yesterday, if we became aware of oral side agreements or collusion between management and management and third parties, then it would require us to conduct an investigation to determine whether or not – obviously, the impact on the accounting of those transactions, as well as whether or not our opinions should stay in force.

7/19/06 Deposition Transcript of Carl Bass at 715:23-716:5.

Debra Cash, an Andersen partner who worked on Chewco, has said "Barclays knew about such arrangements [the reserve accounts] and, in essence, ***misled Andersen***" in not disclosing those. 12/7/04 Deposition Transcript of Debra Cash ("12/7/04 Cash Depo. Tr.") at 1828:14-15. Cash explained why she believed Barclays had misled Andersen:

> [M]y understanding, given the sophistication of an entity of Barclays' size and stature – was aware of the implications of such an arrangement, which may lead me to believe that they understood the accounting impact, entered into such arrangement anyway, and that such arrangements was known not to be known by Andersen.

Id. at 1828:20-1829:1.

Thomas Bauer, an auditor on the Chewco transaction, confirmed that when he worked on the Chewco transaction he had no idea Barclays was planning, with Enron, to use reserve accounts as cash collateral to secure its 3% equity investment in Chewco. 8/22/06 Bauer Depo. Tr. at 364:17-23. He also testified that no one at Andersen was aware of these facts and that if they had known alarm bells would have gone off about the transaction's legitimacy. *Id.* at 364:24-366:10.

Stephen McEachern, an accounting expert saw "evidence that there were secret oral agreements, some of which were later reduced to writing and remained secret; some that were put in writing initially and remained secret." 5/17/06 Deposition Transcript of Stephen McEachern ("5/17/06 McEachern Depo. Tr.") at 230:7-10. ***He found there was collusion between Enron and Barclays on the Chewco*** deal – the side letter shows a deceptive purpose in connection with the funding of the reserve accounts in Chewco and "***prevention of detection was also key***."[34] *Id.* at 264:15.

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[34] Experts and fact witnesses in this case agree that "collusion," a term of art in the accounting and auditing profession, is deceptive conduct by parties to a transaction that impacts the accounting for the transaction. *See* Drott Report at §2.11; 5/15/06 Foster Depo. Tr. at 279:13-19; 5/17/06 McEachern Depo. Tr. at 229:17-230:1; 5/23/06 Deposition Transcript of Mark Murovitz at 117:1-6; 7/5/06 Deposition Transcript of Michael Odom at 237:3-16; 7/17/06 Bass Depo. Tr. at 291:4-15; 8/21/06 Deposition Transcript of Thomas Bauer at 214:7-15.

Such deception – collusion – is widely recognized as extremely dangerous to a company's financial statements and the auditing of those financial statements. For example, Audit Standard §230 states:

> Because of the characteristics of fraud, a properly planned and performed audit may not detect a material misstatement. Characteristics of fraud include (a) concealment through collusion among management, employees, or third parties; (b) withheld, misrepresented, or falsified documentation . . . . For example, auditing procedures may be ineffective for detecting an intentional misstatement that is concealed through collusion among personnel within the entity and third parties or among management or employees of the entity. Collusion may cause the auditor who has properly performed the audit to conclude that evidence provided is persuasive when it is, in fact, false. . . . Furthermore, an auditor may not discover the existence of a modification of documentation through a side agreement that management or a third party has not disclosed.

Drott Ex. 46, §230.12; *see also* 12/7/04 Cash Depo. Tr. at 1649:23-1650:7.

As former Chairman of the SEC, Harvey Pitt, has stated, collusion perpetrated by management with third parties (such as with the banks in this case) is "difficult, and often impossible, to discover." Drott Ex. 49 at 4. In fact, in a publication of its views regarding the significance of oral guarantees to the financial reporting process, the SEC warned financial institutions that oral guarantees cause "improprieties in the . . . financial statements" of the issuer of the oral guarantee. Drott Ex. 48; 8/25/06 Deposition Transcript of Thomas Bauer ("8/25/06 Bauer Depo. Tr.") at 1431:17-1432:22.

John Foster, another accounting expert, verified that Enron and Barclays intended to conceal material information from Andersen in the Chewco transaction. Indeed, he said there was no reason – other than to escape detection – for the secret side letter and cash offset reserve accounts to exist in the Chewco transaction:

> ***After the collapse of Enron, it was discovered that there was a secret side agreement between JEDI and Chewco, that provided for the funding of a reserve account that was dedicated to protect Barclays's equity investment in Chewco. Andersen was not aware of the existence of the side agreement***. The effect of the reserve account was to reduce Barclays's investment at risk in Chewco to well below the 3 percent required by Issue 90-15. Consequently, Chewco failed the 3 percent equity at risk test at its inception and should have been consolidated by Enron. By consolidating Chewco, Enron would have held 100 percent of the partnership interests in JEDI, and accordingly would have controlled, and thus consolidated, JEDI as well.

3/17/06 Expert Report of John M. Foster at 106.

Andersen never had the chance to fully determine the impact the Barclays' secret side deals had on the accounting of Chewco in 1997-2001 because, due to Barclays' actions, the true facts were withheld from it ***– the JEDI/Chewco deal Andersen saw was a fiction –*** one involving a legitimate, GAAP-compliant SPE, the key to the accounting treatment utilized.

However, once Andersen found out about the Chewco Side Letter, Andersen withdrew its audit opinion and Enron was forced to restate, in part, based on the reserve accounts Barclays demanded which destroyed the off-balance-sheet treatment. *See* 7/6/06 Deposition Transcript of Michael Odom ("7/6/06 Odom Depo. Tr.") at 321:17-323:19; 8/22/06 Bauer Depo. Tr. at 382:1-7; 8/25/06 Bauer Depo. Tr. at 1427:12-1428:14. When it came out that there was the secret side letter and Chewco was a sham SPE, it was apparent that JEDI should have been consolidated with Enron from 1997 onward. Ex. 3 (Core Ex. 21).

Barclays argues Lead Plaintiff's allegations regarding deception of auditors, lawyers or credit rating agencies is of no moment. Supp. Motion at 18. Barclays cites *Homestore* for this proposition. But in *Homestore*, unlike the instant case, the complaint alleged that the secondary actor defendants "assisted" and "helped" Homestore misrepresent revenues. Here, in sharp contrast, Lead Plaintiff alleges Barclays actually used or employed a deceptive device in part through the misleading of auditors, lawyers and others who had important roles in the review and approval of transactions.

The Batson Report – which this Court has relied upon in the past and is incorporated into the December 29, 2006 Complaint – concludes that Chewco was never a valid SPE, the entire JEDI/Chewco deal at year-end 1997 was a fraud, and that post-1997 Enron/JEDI transactions based on its false structure were also illegitimate. These facts would cause a fact finder to conclude that Barclays "***caused*** Enron to structure a transaction involving an SPE such that Enron covered 60% of the equity risk position in the SPE, ***knowing*** that would prevent Enron from properly giving the structure off-balance sheet accounting treatment." Ex. 4 at 3 (Third Interim Report of Neal Batson ("Batson III"), Appendix F ("App. F")).

According to expert Saul Solomon, the JEDI/Chewco deal:

- eliminated $405 million in income over the period primarily related to the elimination of earnings related to the appreciation of the Enron stock held as an investment in JEDI,

- reduced equity by an aggregate of $800 million at December 31, 2000 to reflect elimination of earnings Enron had recorded related to gains on the Enron stock held by JEDI . . . to reflect elimination of $179 million in amounts previously due from JEDI related to settlement of swaps related to the Enron stock held by JEDI, and to reflect a reduction in treasury stock related to the shares of Enron stock held by JEDI, and

- increased debt by $711 million at December 31, 1997 and $628 million in debt at December 31, 2000 which reflects the addition of debt recorded on Chewco and JEDI's financial statements.

1/17/06 Expert Report of Saul Solomon ("Solomon Report") at 94-95.

Every governmental agency or examiner that has looked at the year-end 1997 JEDI/Chewco transaction has concluded it was fraudulent. The SEC complaint against Fastow states that Chewco "failed to meet SPE non-consolidation requirements" and "should have been consolidated onto Enron's financial statements beginning the fourth quarter 1997." *SEC v. Andrew S. Fastow*, No. H-

02-0665, Complaint (S.D. Tex. Oct. 2, 2002), ¶¶29, 32 (Ex. 5). The JEDI/Chewco deception resulted in criminal prosecutions and pleas.

Barclays' ***own deceptive conduct*** in the JEDI/Chewco deal was a key part of the scheme.[35] The Court, in its December 4, 2006 Order, explained the standard plaintiffs must meet to properly allege that Barclays was a primary violator in the Enron scheme:

> Lead Plaintiff must allege specific facts demonstrating that Barclays used or employed the entities at issue as deceptive devices or contrivances (created an appearance of substance where it is lacking or created a fiction or false appearance of revenues intended to deceive investors in Enron securities) or that Barclays engaged in acts, practices, or course of business that operated as a fraud or deceit upon any person in connection with the purchase or sale of an Enron security. In other words, for its first proposition Lead Plaintiff needs to allege in detail not only why each particular entity at issue is a sham or a shell, but Barclays' specific role in using or employing it to avoid accounting requirements to deceive purchasers of Enron securities.

Enron, 2006 U.S. Dist. LEXIS 88121, at *18. Lead Plaintiff, as described in detail above and in the December 29, 2006 Complaint, have done just that. Barclays used the official Chewco deal documents, including the JEDI Revolver, to present itself as having a 3% at-risk interest in the Chewco SPE – thereby making the SPE appear to be GAAP compliant. The purpose for the ruse was to deceive Andersen and the investing public, making them believe that JEDI was actually independent from Enron and that Enron need not show that entity's debt on its financial statements.

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[35] Barclays claims any deception of investors did not occur when the transaction closed, but only transpired later when Enron reported the deal. Supp. Motion at 21. Barclays is incorrect. As Lead Plaintiff's detailed evidence reveals, the deception in the Chewco deal took place when Barclays demanded reserve accounts that funneled 60% of its supposed equity investment back to Barclays. This is so because with those secret accounts in place, anyone looking at the transaction would see a fiction, namely that an outside party had provided 3% at-risk equity. Andersen partners' testimony regarding the fact that they did not see the Chewco Side Letter when determining the accounting for the deal supports Lead Plaintiff's argument that Barclays' deceptive conduct occurred prior to Enron's subsequent fraudulent reporting.

This Court has also stated:

> [I]f, as claimed, Barclays "structure[d] a transaction in a deceptive manner to eliminate real economic risk" to itself and created the appearance of an arm's length transaction, Lead Plaintiff needs to identify how it did so and show that Barclays not only acted in a deceptive manner to eliminate economic risk to itself, but that in eliminating such personal risk, the resulting cost to investors of that self-protection was substantial enough to constitute an "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Enron, 2006 U.S. Dist. LEXIS 88121, at *18. Lead Plaintiff has met this standard and has shown that Barclays deceptively secured for itself 60% cash collateral in reserve accounts held at and controlled by Barclays from day one of the Chewco transaction.

The evidence shows that Barclays created an appearance of substance (a GAAP-compliant SPE – Chewco – with 3% independent equity at risk) where it was lacking (because of the secret reserve accounts) and created a fiction or false appearance of revenues (JEDI/Chewco generated $405 million in fictitious income and concealed $685 million in debt) intended to deceive investors in Enron securities, and that Barclays engaged in acts, practices, or a course of business that operated as a fraud or deceit upon any person (Andersen and Enron's investors) in connection with the purchase or sale of an Enron security, such that Barclays committed a primary violation of Rule 10b-5(a) and (c).[36] *See Enron*, 2006 U.S. Dist. LEXIS 88121, at *19 n.11. Again, while this primary

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[36] Barclays argues: "The alleged 'deception' of Enron's auditors and the alleged 'collusion' in connection with the Chewco transaction (and other transactions) does not amount to a primary violation because those alleged acts themselves created no appearance at all (let alone a 'false appearance') to investors." Supp. Motion at 21. As Lead Plaintiff has explained, Barclays' omission of the provisions found in the secret Chewco Side Letter from the primary deal documents created a false appearance for anyone viewing the deal documents, including Andersen, that Chewco was an appropriate, GAAP-compliant, arm's-length transaction, which of course it was not. The decision to structure the deal to deceive was carried out by Barclays. Moreover, none of the cases cited in support of Barclays' argument state that acts designed to deceive a client's auditors could not be a primary violation. Barclays' cases are inapposite. In those cases there were no allegations that the auditors were deceived. Rather, the auditors and the subject issuers worked together to execute the challenged conduct.

violation predates the Class Period, it shows Barclays' intent, knowledge and method of acting in the scheme.

Lead Plaintiff's contentions with regard to Barclays' primary violations in the Chewco transaction are further supported when compared with two examples where this Court has stated the facts demonstrate Merrill Lynch and CIBC committed primary violations – the Nigerian Barge and Braveheart transactions. *Enron*, 2006 U.S. Dist. LEXIS 43146. Like the Nigerian Barge transaction, Chewco had no other economic purpose than to achieve a false accounting effect thereby allowing Enron to maintain or increase its stock price while generating present and future Enron business and fees for Barclays. As with Merrill Lynch and the barge deal, where a secret repurchase agreement caused the transaction to lack necessary risk for it to be legitimate, Chewco was a sham SPE. Put simply, neither deal had a proper business purpose, they were sham deals, and the executives at Merrill Lynch and Barclays knew this. In both transactions the banks entered into secret side agreements/promises, impermissibly protecting their interests, that could not be written into the main deal documents for fear of disturbing the accounting treatment. Equally, in each case, an SPE was used to achieve these effects. The Chewco transaction also has key elements in common with the Braveheart deal. In each there was a secret side agreement with the banks that eliminated risk and destroyed the legitimacy of the SPE involved, rendering it a sham and the accounting that depended on its legitimacy false.

2. SO_2

Starkly demonstrating Barclay's role as a primary violator of the securities laws are the sulfur dioxide ("SO_2") deals done in the Fall of 2001. Barclays and Enron engaged in two SO_2 credits[37]

[37] SO_2 credits are Sulfur Dioxide Emission Allowances, which provide authorization by the Administrator of the EPA under the Clean Air Act to emit at least one ton of sulfur dioxide during or after a specified calendar year.

transactions in September and October 2001. A sham SPE called Colonnade, created and run by Barclays, took part in a deal Barclays structured in a circular manner to eliminate economic risk or risk of loss to Barclays, rendering the sale of SO_2 credits fictional. Colonnade was a fraud from its inception. It was capitalized with a mere $2 and had no employees (Exs. 10308, 10334; *see, e.g.*, 6/16/05 Deposition Transcript of Paul LeVersha ("6/16/05 LeVersha Depo. Tr.") at 36:7-13); it had no business office (6/15/05 Deposition Transcript of Richard Firth ("6/15/05 Firth Depo. Tr.") at 354:9-17); Enron paid its legal fees (Exs. 50778, 10314, 15758); and it did no business other than deals conducted by Barclays with Enron (Exs. 50779, 10302, 50754; 6/15/05 Firth Depo. Tr. at 352:22-353:4; 6/16/05 LeVersha Depo. Tr. at 213:21-214:18; 6/22/04 Deposition Transcript of Martin Woodhams at 130:17-24; 12/14/04 Deposition Transcript of Benoit de Vitry ("12/14/04 de Vitry Depo. Tr.") at 82:14-16, 172:19-173:11). In fact, after a "contest" to name the SPE, Barclays settled on the name Colonnade, the name of the street where Barclays' UK headquarters is located. 12/14/04 de Vitry Depo. Tr. at 202:11-22. Colonnade was simply a front for Barclays. *See, e.g.*, *id.* at 224:15-19. Barclays knew that since it set up and controlled Colonnade, any transactions it had with Colonnade would not be at arm's length.

A Barclays SO_2 Executive Summary explains the purpose of the deal:

> The underlying driver behind this [Enron's] request is a desire by Enron to "monetize" its trading stock. A significant business relationship already exists between the Commodities Team and Enron. Discussions have continued, based on this track record, to seek ways of meeting the company's needs through innovative financing structures. It is this need which this structure aims to satisfy but by a mechanism which leaves Barclays fully secured, with a sufficient margin and no or minimal Enron risk.

Ex. 10334. In other words, Barclays was to ***create*** a structure to generate the deceptive appearance of funds flow on Enron's balance sheet with no risk to the Bank. The word monetize is in quotes because it was being used as a code word to signify that the transaction's purpose was solely to generate a deceptive balance-sheet impact – there was no business purpose to the transaction. How this deceptive transaction was structured, and even the particular commodity involved, was determined by the problem-solving bankers. As Brian Smith of Barclays Business Management explained, Enron was indifferent to what commodity was used in the transactions and Barclays decided on SO_2 emission allowances: "Martin Woodhams [of Barclays Structured Products] primarily looked at this transaction, but ***I recall reviewing part of it with him and we considered many issues concerning the practicalities and other implications of dealing with the initial range of commodities that Enron came to us with***." 12/16/04 Deposition Transcript of Brian Smith ("12/16/04 Smith Depo. Tr.") at 244:22-245:4.

Likewise, the structuring and execution of the transaction, including setting up the sham/shell SPE, was done by Barclays. As of September 13, 2001, a Barclays product proposal for SO_2 boasted, "[o]ff-balance sheet commodity monetizations are a product category that the Commodities group has successfully ***delivered*** in varying structural forms to a number of clients, including Enron." Ex. 15771.

In the SO_2 transaction, Barclays was aware of the deceptions it would have to use to give the deal the false appearance necessary for passing Andersen's heightened ***smell test*** for off-balance-sheet treatment of the transaction. In preparation for creating a structure for Enron, Barclays studied Andersen's requirements. An April, 25, 2001 Barclays e-mail explains how to get past the Andersen smell test:

> Arthur Andersen have applied a US GAAP ***smell test*** on SPV's stating that any financing structure that uses a run of the mill SPV will not be given off-balance sheet treatment.
>
> Enron have successfully used a structure that is an orphan SPV ***with a few twists that passes the smell test***.
>
> Key characteristics:
>
> Entity is not called an SPV, they referred it to [sic] as a swapco
>
> Bank is the sponsor of the swapco but has zero equity holding, the swapco does not consolidate up on to the banks balance sheet.

> ***Swapco has been established for some number of years***.
>
> ***Swapco has had a history of multiple transactions pushed through it***.
>
> * * *
>
> In the case where swapco has no transaction history, the bank will state to Enron ***that the swapco will in the future do different transactions***.

Ex. 10302.

Knowing these guidelines, Barclays deceptively structured SO_2 so that it would appear that Colonnade passed the "smell test" requirements. A Barclays banker admitted that "Barclays was – was the arranger of the transaction." 6/14/05 Deposition Transcript of Richard Firth ("6/14/05 Firth Depo. Tr.") at 206:9-10. Enron and Barclays were concerned that Colonnade would have trouble showing it had a "substantive business purpose." Ex. 10313. This was because Barclays knew that in order to pass muster, Colonnade would have to appear to be something other than what it really was. Colonnade, before it could enter into the sham deals with Enron, would have to look like an entity that had a history of entering into transactions *i.e.*, it had to appear to be a GAAP-compliant operating company. Barclays knew Colonnade was nothing more than an empty shell. *See* Solomon Report at 144-46.

Next, to create the deceptive appearance of Colonnade meeting the then-heightened requirements for SPEs to permit off-balance-sheet treatment on Enron's financial statements, Barclays deceptively "***seasoned***" this SPE, to make it appear to be legitimate under this more stringent test. To do this, Barclays ran "short-dated," *i.e.*, economically meaningless, transactions through Colonnade (which had no risk to Barclays) to create the illusion of compliance with GAAP regulations. As Barclays' documents reveal: "Prior to commencing the transaction below, the SPV will undertake the following deals with counterparties external to Barclays. ***At no stage will the economic interest be passed back to Barclays***." Ex. 10326; Ex. 15741 at BARC000488496; Ex. 10327 at BARC000441351. This was done to create a fiction, so that if outsiders looked at

Colonnade, it would appear to be an SPE of substance – a legitimate, GAAP-compliant SPE with a trading history, when in truth, it was a sham.

Colonnade was created for only one purpose – the SO_2 financial-statement deal for Enron. But to conceal this – and to make Colonnade appear to be the seasoned entity that it was not – Barclays caused Colonnade to engage in a few riskless transactions, to create the deceptive appearance of having satisfied the requirement that "swapco has had a history of multiple transactions pushed through it." Ex. 10302. A September 5, 2001 Barclays' e-mail details the non-economic transactions Barclays planned to run through Colonnade to "season" it:

> 2. Prior to commencing the transaction below, the SPV will undertake the following deals with counterparties external to Barclays. ***At no stage will the economic interest be passed back to Barclays***.
>
>   a) Colonnade buys USD VS HKD from Citibank and exits the position with Citibank 2 days later.
>
>   b) Colonnade buys silver VS USD from CIBC and sells it back to Citibank 2 days later.
>
>   c) Colonnade buys copper VS USD from CIBC and sells it back to CIBC 2 days later.

Ex. 15741 at BARC000488496. Ultimately, two four-day trades of precious metals with the bank Westpac took place – trades with no risk to Barclays. Banker Woodhams, the point person at Barclays on the deal, "knew Westpac well." 12/15/04 Deposition Transcript of Benoit de Vitry ("12/15/04 de Vitry Depo. Tr.") at 344:19-20. Westpac was the Australian bank that agreed to run the meaningless trades for Colonnade, and Woodhams testified that the trades were done to "***facilitate a trading history***" for Colonnade. 6/23/04 Deposition Transcript of Martin Woodhams at 254:20-23.

These buy-and-sell-back-days-later transactions had no legitimate purpose. They were artifices to defraud, contrived transactions to create the fiction of a real trading history for the SPE Colonnade to give it the misleading appearance of legitimacy – and of meeting Enron's auditors' requirements for off-balance-sheet treatment. These trades, and the purpose behind them, was well known within Barclays. Barclays' banker, Woodhams, admitted:

> The monetization receives off balance sheet accounting treatment by fulfilling the following two conditions. a) Occurrence of an inventory true sale, whereby legal title and beneficial ownership passes from the client to another party. b) A true sale and resulting hedge that is transacted between three independent parties, necessitating a SVP [sic]. ***Recent tightening of US GAAP regulations with regard to SVP's [sic] has led to the need of incorporating an SVP [sic] that closely resembles an operating company***. ***To this end, the SVP [sic] will before it transacts with Enron, undertake a number of short dated FX, metal funding and murabaha transactions. This diverse transactional trading history is crucial to the success of achieving off-balance sheet treatment for our client***. ***Once the Enron transaction closes, it is not intended that any further transactions will be entered into by the SPV***.

Ex. 50779 at BRC000082647.

Barclays' banker, LeVersha, conceded:

> Q. Did you understand that there had to be some number of trades that were entered into by Colonnade before it could enter into trades with Enron?
>
> * * *
>
> A. ***I did understand that there needs to be one or more transactions undertaken by the company prior to the SOX transaction*** to meet certain technical criteria.

6/16/05 LeVersha Depo. Tr. at 60:24-61:8.

In addition, Barclays' banker, de Vitry stated:

> A. ***Colonnade was set up at the request of Enron a couple of weeks . . . before transactions with Enron was done, and there were some transactions done beforehand. Therefore, yes, technically they had multiple transactions***.
>
> * * *
>
> Q. And why was it important to have transactions on their balance sheet before they transacted business with Enron?
>
> * * *
>
> A. ***You know, I'm not an accounting expert, but my understanding is at the request of Enron, at the request of Arthur Andersen, that was one of the conditions required***.

12/14/04 de Vitry Depo. Tr. at 95:17-22; 96:7-15.

Colonnade not only had no legitimate pre-SO_2 transactions, it also never engaged in any transactions after SO_2. "In the case where swapco has no transaction history, the bank will state to Enron that the swapco will in the future do different transactions." Ex. 10302. Yet Barclays' banker Smith admitted:

> Q. Do you know of any transactions that Colonnade entered into subsequent to the September and October 2001 sulfur dioxide transactions other than selling the sulfur dioxide transactions to some Barclays entity – sulfur dioxide credits to some Barclays entity?
>
> A. ***No*** . . . .

12/17/04 Deposition Transcript of Brian Smith ("12/17/04 Smith Depo. Tr.") at 371:10-17.

In addition, Barclays' banker de Vitry admitted:

> Q. ***Was it intended that Colonnade would be used with clients other than Enron?***
>
> A. ***No***.
>
> Q. ***Was Colonnade ever used after the SOX transactions?***
>
> A. ***I don't believe so***.

12/15/04 de Vitry Depo. Tr. at 324:22-325:3.

A Barclays' document admitted, "***Once the Enron transaction closes it is not intended that any further transactions will be entered into by the SPV***." Ex. 50779 at BRC000082647.

After Barclays set up and deceptively "seasoned" Colonnade to make it look legitimate and GAAP-compliant, Barclays and Enron proceeded with the first SO_2 transaction, ***an extremely important third quarter 2001 deal***. Barclays recognized the importance of getting the deal done – noting "[t]he urgency of this deal arises because of the approaching quarter-end reporting date." Ex. 6 at BARC000190419-20. In September 2001, the following transaction occurred:

- Enron purportedly sold Colonnade 757,975 emission credits for $138.5 million.[38] Colonnade financed the purchase by obtaining a loan from Barclays. Colonnade pledged the emission credits as well as the put and call options described below as security. Because the SPE was created and controlled by Barclays, the money came from Barclays.

- Herzeleide LLC ("Herzeleide"), a wholly owned subsidiary of Enron formed for the transaction, bought a call option from Colonnade that allowed Herzeleide to purchase at market price up to 757,975 emission credits from Colonnade (the same number of emission credits sold to Colonnade by Enron). In exchange for the call option, Herzeleide paid Colonnade $426,659.37.[39] Given the strike price of the call option was the market price at the exercise date, the option was always "at-the-money." Therefore, the option premium was the "Cost of Carry till the Option Expiry Date."[40] The premium payment was calculated based on the interest that would accrue during the option period on the purchase price of the emission credits (*i.e.*, the payment by Herzeleide is the equivalent of prepaid interest to Colonnade on the $138.5 million "loan").

- Herzeleide sold a put option to Colonnade that allowed Colonnade to require Herzeleide to purchase at market price up to 757,975 emission credits at specified times or upon the occurrence of specified conditions (*i.e.*, a default by Enron). In exchange for the put option, Colonnade paid Herzeleide $500.[41]

Therefore, in connection with the closing of the September 2001 transaction, Enron and Colonnade (actually Barclays) ***simultaneously*** entered into swap agreements with Barclays in order to ensure that 100% of the market risk related to the emission credits stayed with Enron despite the purported sale. Under the Enron/Barclays swap, Enron would make a fixed payment (equal to the sum of the fixed price per emission credits) to Barclays at the settlement date. *See* Ex. 10 at 139 (diagram) (First Interim Report of Neal Batson). In exchange, Barclays would make a floating payment to Enron based on the current market price of the emission credits at settlement date. Under the Colonnade/Barclays swap, Barclays would make a fixed payment (equal to the sum of the

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38 Ex. 7 at AB000119904-05.

39 Ex. 7 at AB000119904-05.

40 Ex. 8 at BARC000190614-19.

41 Ex. 9 at AB000119906-07. *See also* Solomon Report at 145.

fixed price per emission credits) to Colonnade. In exchange, Colonnade would make a floating payment to Barclays based on the market price of the emission credits at settlement date. Given these contractual features, ***true ownership of the SO_2 credits never passed from Enron to Colonnade. Rather, the economic risks and rewards of ownership of the credits continued to reside with Enron***. Solomon Report at 327-30. And, of course, Barclays knew this and worked extensively to achieve this result.

In October 2001, Barclays and Enron refinanced the September 2001 transaction. Enron sold Colonnade an additional 166,607 emissions credits for $29.1 million. Enron and Barclays then entered into three new swap agreements that had the same effect as the September transaction's swaps – a fake commodities sale. Enron paid Barclays a $10.1 million fee – actually a pay-off not required by the original deal – to terminate the September transaction. In addition to the $10.1 million termination fee, Barclays billed Enron $850,000 as a transaction fee and £160,679 for fees and expenses. *See* Ex. 15755; Ex. 11 at AB000120469-70 (Termination Agreement); Ex. 12 at AB000120231-232 (October Fee Agreement).

Barclays contrived the structure of the purported emission credits sale, which was fictional and circular, its structure contrived by Barclays to eliminate any price or market risk to it. The result of all these swaps and puts and calls was that Enron would effectively repay the $167.6 million loan with a fixed payment (including interest) to Barclays. A Barclays memo simplifies the steps of this deception:

- Colonnade is an SPV set up to undertake these transactions
- Colonnade buy assets from Enron (sub 1).
- We provide a loan for this purpose.
- Enron (sub 2) has call options to repurchase assets.

* * *

- Our price risk on the assets is hedged – Barclays for Colonnade and Enron for Barclays.

Ex. 15776 at BARC000606265.

Because of how Barclays deceptively structured the transaction, it would not appear to be a loan to anyone outside the deal if they looked. Rather, an outsider would see a fiction – an apparent arm's-length commodities sale.

Another deceptive act Barclays engaged in was hiring the Carey Langlois law firm to supposedly represent Colonnade, which gave the appearance of substance. But the representation was in fact a ruse because Carey Langlois was paid by Enron via Barclays. Barclays was reimbursed by Enron for all legal fees. This two-step process was necessary to meet the requirement that "Costs for setting up the swapco ***are not seen*** to be paid by Enron." Ex. 10302. In fact, Enron reimbursed Barclays for all legal costs in setting up Colonnade – both to the firm supposedly representing Colonnade, but in fact employed by Barclays, and the other firm (Allen & Overy) representing Barclays Capital.

Barclays expressed concern about the accounting-driven nature of the deal:

> ***The committee asked whether the deal was primarily for accounting/reporting reasons. The values of Barclays Bank suggest that we would be reluctant to do a deal that was done for solely accounting reasons. Given that we are on both sides of the relationship, the committee was also concerned about disclosure issues***.

Ex. 6 at BARC000190419-20. Moreover, Barclays contacted Richard Oldfield of PricewaterhouseCoopers, one of its external auditors, and requested his services in connection with Barclays' accounting for the SO_2 transaction. But, when Oldfield saw the transaction he immediately and then repeatedly told Barclays that Enron could not achieve off-balance-sheet treatment because the transaction was not an arm's-length true sale, *i.e.*, the deal did not "work" for Barclays' client, Enron. Exs. 10327, 10328. Oldfield's view was clear:

> ***The substance of this structure ensures that Enron still has access [to] the economic risks, and rewards of the commodity securities it sells to the SPV, by virtue of the market derivative contract it undertakes with BBPLC. As such, there is a strong argument that Enron has not managed to derecognise the assets off its balance sheet, either through not being able to achieve a sale in substance or by having to consolidate the SPV (for which it can be argued that Enron is the sponsor). Either way the asset would remain on its balance sheet***.

Ex. 10330. This was not what Barclays wanted to hear. The bank had designed the structure to have the appearance of, but not the substance of, a true sale and Oldfield made this clear to Barclays that this meant Enron could not get its desired off-balance-sheet treatment. Barclays was certainly not interested in informing Andersen of Oldfield's view, even though ***Pritesh Pankhania, Barclays Manager of Management Accounts, admitted that in the normal course the bank would involve the client's auditors in accounting concerns***:

> Q. But in your experience, the normal course of action would be to inform the client about the concerns about their accounting?
>
> * * *
>
> A. That would be an action that we could have – we would have done or ask the client – ***our client to also get their – get clearance from their auditors as well, for example***.

2/16/05 Deposition Transcript of Pritesh Pankhania at 156:12-20. Despite this knowledge, Barclays went ahead with the deal. Barclays never took these concerns to Andersen. Instead it acted with Enron to deceive the auditors.

On September 24, 2001, Colonnade (Barclays) sent a letter by facsimile to Andersen, in which it falsely and misleadingly stated:

> 1) [T]he Company has undertaken transactions with entities other than Enron Corp and its subsidiaries and affiliates ("Enron");
>
> 2) The Company has assets other than those that will be acquired through transactions with Enron; and
>
> 3) The Company has unencumbered assets, which are available for application towards obligations owed to its present and future creditors (including Enron).

Ex. 41575 at EC001881318.

In fact, as Barclays well knew, the “transactions with entities other than Enron” were the bogus “seasoning” transactions in which Barclays engaged for no economic purpose, but instead were performed to create a false appearance of a transaction history to fool Andersen into believing the entity was a legitimate, ongoing enterprise with a history of arm’s-length transactions separate and apart from Enron. In addition, the letter misleadingly stated that Colonnade had assets other than those that would be acquired through transactions with Enron, when in fact it was capitalized with only $2 and intended to enter into no transactions other than those with Enron (and the two bogus “seasoning” transactions).

Barclays not only created the sham/shell SPE for the deal, it also assumed no economic risk in the actual transaction. An internal Barclays’ e-mail about the transaction stated: “I guess the key things are to show ***that it is purely a financing relationship & Barclays does not benefit from the holding of the inventory (achieved through the swap structure?) and that similarly we are not exposed to the risk*** . . . .” Ex. 50906 at BARC000432099. Barclays’ bankers admitted Barclays structured the transactions to eliminate any economic risk to Barclays:

> Q. And didn’t it effectively reduce the risk to zero?
>
> * * *
>
> A. In pure trading risk terms, if you have two swap transactions which are economically equal and opposite, ***then I would regard the trading risk to be eliminated***.

12/16/04 Smith Depo. Tr. at 92:12-20.

> Q. ***And then Barclays entered into a swap with Enron that transferred the price risk from Barclays to Enron; is that accurate?***
>
> A. ***At the time of the transaction that is correct, yes***.

12/14/04 de Vitry Depo. Tr. at 283:7-12.

> Q. In this transaction, do you know whether price risk was eliminated through the hedging transactions that occurred?

*   *   *

A. ***Yes***.

6/16/05 LeVersha Depo. Tr. at 58:5-11.

Barclays' internal documents show: "In both cases the option strike price is documented to match the floating swap price of the hedge. ***This key feature compels Enron . . . to always repurchase the entire monetized inventory***. ***Barclays actual SOX trading position is thus reduced to zero***." Ex. 10349. Another document said: "The facility ***will mimic a revolving credit facility*** as Enron sells and repurchases product on a continuous basis over the term of the contract." Ex. 10288 at BARC000091980.

Barclays' bankers have admitted they were aware that the principal purpose and effect of the SO_2 transaction was to impact Enron's financial statements as Enron desired, and needed to be done by the end of September for this reason. Barclays knew that: "***[t]hese transactions have the effect of significantly under-stating the debt level and assets on the balance sheet***." Ex. 10334 at BARC000190601. This was not an arm's-length transaction with economic substance. It was a subterfuge, having a deceptive purpose and effect – a device with the capacity to deceive Enron's investors. Barclays committed a deceptive act by structuring this transaction, which had no independent economic substance – rather, its principal purpose and effect was to create the false appearance of fact, *i.e.*, a real sale of SO_2 credits in a transaction utilizing a GAAP-compliant SPE, when the truth was quite different.

Barclays knew that the SO_2 transaction was "***for 'window dressing' purposes***" (Ex. 10334 at BARC000190600), meaning to ***give the appearance of***

> a transaction or potentially a series of transactions, the effect of which is – ***the effect of which is to change the presentation of the company's accounts, and in particular, its balance sheet, from what it would have been without that transaction taking place***.

*   *   *

> ***In a different way from how the financials would have presented had the*** transaction also, as a transaction, not taken place.

6/16/05 LeVersha Depo. Tr. at 100:4-22, 102:17-20.

Barclays knew that to achieve off-balance-sheet treatment, the SO_2 transaction had to appear to be a "true sale." However, Barclays also knew that the SO_2 transaction was not a true sale and schemed with Enron to hide that fact from Enron's outside lawyers as well. A September 27, 2001 e-mail from Enron warns Barclays: "***Just a heads-up: Please don't show the model I sent you to any of the lawyers, because when we calculated Bank's Return, we treat Barclays and Swapco as the same entity – which is a problem from a true-sale point of view***. ***Thank you!***" Ex. 10344 at BARC000146616.

Fastow confirmed the fraudulent nature of SO_2: "Barclays and Enron engaged in two SO_2 transactions, one in September and another in October 2001, providing the Company with funds through a structure that was intended to appear to be a sale of Enron SO_2 credits." Fastow Decl., ¶28. ***Barclays created and controlled the crucial element in this subterfuge to produce the false appearance of funds flow from operations, a sham SPE called Colonnade***. Fastow explained:

> I understood from Mr. Glisan that Barclays was going to establish or cause to be established a special purpose entity for purposes of entering into structured finance deals with Enron. The name of this entity was Colonnade. And I wanted to understand that, in fact, Barclays controlled Colonnade and that Enron would be comfortable having them as a counterparty in the transaction.

10/23/06 Fastow Depo. Tr. at 174:10-17.

Fastow learned from a conversation with Ben Glisan "that, in fact, Barclays was going to cause to be established and control Colonnade. And, so, [he] was comfortable having them in the transaction." *Id.* at 174:22-25. "[U]sing an SPV such as Colonnade allowed the form of the transactions we were entering into with Barclay[s] to achieve desired accounting results." *Id.* at 183:3-6. That is, by creating and employing the sham entity Colonnade, Barclays' own conduct generated the deceptive appearance of approximately $168 million in operating cash flow and concealed $168 million in debt.

Fastow confirmed that Colonnade was a sham entity created and acting at the direction of Barclays:

> Mr. Glisan explained to me that, generally speaking, Colonnade would – the way he described it is ***Colonnade is Barclays' version of Mahonia***.
>
> * * *
>
> I understood [that] to mean that Colonnade would be a minimally capitalized special purpose entity, probably formed in the Isle of Man or some other offshore jurisdiction, like Mahonia; that it would be ostensibly owned or controlled by some lawyers, but who were going to act at the direction of Barclays.

Id. at 175:18-176:6. Colonnade purported to be something it was not – an independent third party. In reality, as Fastow confirms, it was "minimally capitalized" and "act[ed] at the direction of Barclays." *Id.* at 175:25-176:6.

Fastow also confirmed the steps Barclays took to create the deception that Colonnade was an actual business. Fastow understood "that Arthur Andersen, at that – about that time [summer of 2001], outlined certain steps Enron should take to make the special-purpose vehicles that were being used in these transactions look a certain way so they would meet GAAP." 10/24/06 Fastow Depo. Tr. at 475:19-23. Fastow explained:

> [W]hen I say "to make it look a certain way," what I mean is, when I looked at the list of things that Arthur Andersen suggested . . . they looked to be form – like they were form over substance, to me. For example, they said, don't call your special-purpose entity a special-purpose entity; call it SwapCo. Have – have this entity – another thing was, have this entity engage in a few transactions before it does the one transaction it was really being established for, to make it look like it [was] really an up-and-running business. Things like that.

Id. at 476:2-13. Fastow recalled that this was called "seasoning," which he described as, "[d]oing a few transactions to make it look like this w[as] an operating company, even though it w[as] not." *Id.* at 478:11-12. Fastow summed this behavior up simply: "I would describe that as – as wiring around the rules or form over substance." *Id.* at 477:2-3. Barclays argues the effect of the seasoning transactions are "legally irrelevant" because the nature of Colonnade is unimportant except as to whether it qualified for certain accounting treatment. Supp. Motion at 38-40. This is unsupportable. The seasoning transactions in and of themselves constitute deceptive conduct, for with the faked trading history, anyone looking at the deal would believe Colonnade was a real trading company with assets – not the $2 it was actually capitalized with.

Moreover, Fastow "understood Colonnade to be a vehicle that was meant to finance activity, not meant to be a – an industry counterparty in the traditional sense of the word." 10/24/06 Fastow Depo. Tr. at 479:20-23. The SO_2 transactions were among "structured finance transactions that were done to achieve certain financial reporting objectives, like lower debt, higher income, improved funds flow from operations." 10/23/06 Fastow Depo. Tr. at 142:7-10. These transactions created a false appearance of funds flow from operations and had "'the effect of significantly under-stating the debt level and assets on the balance sheet.'" Fastow Decl., ¶29. ***Fastow agreed that he and Barclays bankers "engage[d] in a scheme by engaging in structured-finance transactions that created a false appearance of financial health by presenting a misleading picture of Enron's true business condition***." 10/24/06 Fastow Depo. Tr. at 535:20-24.

Barclays had no intention of creating a real GAAP-compliant SPE with Colonnade. Enron reported $167.6 million of cash flow from operations as a result of the SO_2 transaction. Solomon Report at 146. If the transaction had not been contrived and had been accounted for properly as a financing transaction, the $167.6 million would have been reported as debt and cash flow from financing. *Id*.

According to Bankruptcy Examiner Batson, the facts surrounding this transaction would "allow a fact-finder to conclude that Barclays"

> ***structured*** and closed the SO_2 Transaction ***knowing*** the transaction was not a "true sale," that it was ***designed*** to manipulate [Enron's] financial statements, and that it resulted in the dissemination of financial information known to be materially misleading.

Ex. 4 at 2-3 & n.2 (Batson III, App. F).

The Court's July 20, 2006 Order discussing SO_2 held merely that the creation of an unqualified SPE did not constitute a primary violation. *Enron*, 439 F. Supp. 2d at 722-23. Lead Plaintiff's December 29, 2006 Complaint alleges far more than Barclays' creation of Colonnade, but instead provides specific and detailed evidence demonstrating that the SO_2 transaction that was created by Barclays was inherently deceptive and that Barclays used or employed it to deceive investors. And the evidence herein shows Barclays engaged in a deal whose principal purpose and effect was to create a false appearance of revenues. Colonnade was far from being an operating company set up to do trading business. The parties all knew this and worked extensively to make Colonnade appear to be something other than what it was – a shell controlled by Barclays created only to engage in deceptive deals with Enron.

This bogus deal also shares striking similarities to deals using Mahonia and Delta – bank-created sham off-shore entities set up to do fictional deals with Enron that were simply disguised loans. As pointed out by Fastow, the SO_2 deal was similar to J.P. Morgan's Mahonia deals which the Court has held meet the requirements for pleading a primary violation. *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *170. Like Mahonia, an off-shore SPE controlled by the bank and falsely presented as a real company, entered into what appeared to be derivative deals that were really loans. Just like Mahonia, where J.P. Morgan assumed no economic risk, in SO_2, Barclays also had no risk in the transaction despite the fact that an outsider looking at the deal would be tricked into thinking risk was present. In all meaningful ways the deals are indistinguishable from one another.

The Court's description of certain factors that led it to find Lead Plaintiff had adequately pleaded a primary violation as to Merrill Lynch regarding the Nigerian Barge transaction are entirely applicable here. Like the facts concerning the Nigerian Barge deal, in SO_2 high-level Barclays officials questioned whether the deal was done "for 'window dressing' purposes" (Ex. 10334 at

BARC00190600), and a top sanctioning committee fretted that the deal was "primarily for accounting/reporting reasons" and that the "values of Barclays Bank suggest that we would be reluctant to do a deal that was done for solely accounting reasons." *Id*. at BARC000606265. But Barclays went ahead anyway, despite being on "both sides" of the deal. Ex. 15776.

Moreover, just as in the Nigerian Barge deal where James Brown raised concerns that the deal violated elementary accounting principles, here Oldfield, Barclays' external accountant, repeatedly warned Barclays that because of the way the deal was structured, off-balance-sheet accounting would be impermissible because the SO_2 credits were not really changing hands. *See*, *e.g.*, Exs. 10327, 10328, 10324, 10329; *see also* 11/10/05 Deposition Transcript of Richard Oldfield at 102:2-9 ("I think it raised reputational issues."). And, of course, like the Nigerian Barge transaction, Barclays created its own SPE, Colonnade.

A genuine issue of material fact exists regarding Barclays' liability for the SO_2 deal.

3. J.T. Holdings

Barclays and Enron engaged in the J.T. Holdings transaction, whose principal purpose and effect was to create a false appearance of fact, intended to deceive investors in Enron's stock. In late 2000, Barclays and Enron restructured an existing synthetic lease transaction called J.T. Holdings, which had the principal purpose and effect of achieving Enron's accounting goals by concealing $110 million in debt. According to Fastow, in 2000 J.T. Holdings "was set to expire, which would have caused millions of dollars of debt to be consolidated with Enron's balance sheet." Fastow Decl., ¶22. In order to avoid consolidation, Fastow confirmed that "Barclays worked with Enron to ***create*** a new structure to keep the lease off [Enron's] balance sheet," including an SPE, which, of course, required 3% "at risk" equity. *Id*.; *see also* Solomon Report at 325.

In 1995, Enron had entered into a lease transaction by which Enron/NGL Trust, an SPE, purchased assets from Enron which Enron then leased back from Enron/NGL Trust for five years.

See Solomon Report at 141. By late 2000, when that lease was about to expire, Enron/NGL Trust had only two assets left – a methanol plant and a storage facility. Ex. 10452; *see also* Solomon Report at 140-41. Enron wanted a five-year synthetic lease structure involving an SPE to cover 3% of the financing. Exs. 10139, 10142, 10452. Barclays understood that in order for the synthetic lease structure to create the off-balance-sheet treatment intended by Enron, the assets had to be owned by an SPE capitalized with at least 3% independent "at risk" equity. *See, e.g.*, Ex. 10151 at 21, 26, 84-85; 6/14/04 Deposition Transcript of John Meyer ("6/14/04 Meyer Depo. Tr.") at 175:23-176:16. Only this would avoid consolidation of the debt involved on Enron's financial statements. To achieve this financial statement impact in December 2000 (again a ***year-end deal***), Barclays and CSFB refinanced the synthetic lease via an SPE (Enron/NGL Trust). The 3% "at risk" equity Enron/NGL Trust needed for the entity to be a real, legitimate SPE and for Enron's financial statement treatment to be proper, came 50% from Barclays and 50% from CSFB.

This transaction did not pass muster based on its own economics because the methanol plant in the structure was not believed to be worth what Enron was valuing it at. In fact, credit officer John Meyer testified "[Barclays was] concerned that [it] might end up on day-one of the lease with an asset ***whose market value was less than had been represented to [the bank]***." *Id.* at 179:24-180:3. This level of risk was not acceptable for Barclays to do a legitimate arm's-length transaction. In short, the deal could not be done legitimately based on the actual value of the assets involved. Barclays' bankers stated in the Investment Banking Division Americas Minutes for November 13, 2000, that the bank believed J.T. Holdings was "***[n]ot attractive as a book and hold asset but [Barclays decided to] agree [because it]*** . . . ***considered [the transaction] important from a relationship standpoint***." Ex. 10140. Former Barclays' banker, and subsequent Enron employee, George McKean, even conceded that he "discussed possible other structures [with Enron] to avoid lease test[42] issues [but] due to the real estate nature of the assets, none seem to work."[43] Ex. 52104. This was a "***one-off***" one-time deal. Ex. 10452; 7/21/04 Deposition Transcript of Richard Williams ("7/21/04 Williams Depo. Tr.") at 122:13-22. Barclays did the deal as a favor to Enron, not because of the bona fide economics of the deal. Moreover, it ensured it was protected from the deal's dubious economics by a secret no-loss promise.

Because Barclays knew the assets underlying the lease were overvalued, Barclays would not do the lease deal as a straight-up arm's-length transaction. As Williams explained in a November 14, 2000 e-mail to Barclays' officials Graham McGahen, David Head, Eric Chilton and Meyer, Barclays agreed to take part in the deal only if it received "***explicit verbal support***" from Enron assuring it that "***under all circumstances Enron [would] execute its purchase option at a price sufficient to repay in full the holders of the B Notes and Certificates***," *i.e.*, the 3% equity, to Barclays. Exs. 10142, 52108, 10450. With this secret no-loss guarantee from Enron in place, Barclays engaged in this inherently deceptive transaction, the principal purpose and effect of which was to conceal ***$110 million in debt***. The SPE in the deal did not have 3% at-risk equity and the lease was not a legitimate arm's-length transaction because of this secret side deal, which also created the false appearance that the assets underlying the lease had sufficient value to support the transactions, while concealing over $110 million of debt on Enron's balance sheet.

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[42] McKean explained in his deposition that lease tests "refer[] to the model that was used to run . . . part of the transaction. . . . The model had a number of calculations . . . that . . . said whether [the transaction] worked or didn't work from a – a leasing perspective." 10/20/04 McKean Depo. Tr. at 148:14-22.

[43] In October 2000, McKean noted in an e-mail that "[Andersen needs] . . . to sign off on the lease test . . . ." "The risk is that they question the value [of the methanol plant] – as the MTBE plant was written off, it is likely they will be highly skeptical." Ex. 52104.

Bankers at Barclays wanted to make sure Barclays would "not lose on the underlying structure," according to a document drafted on December 6, 2000 by Nicholas Bell to a number of senior Barclays' bankers. Ex. 11139 at BARC000121308. Again, the secret no-loss guarantee of Barclays' supposed 3% at-risk equity made the transaction depend on a fiction and gave it the appearance of a conventional synthetic lease of substance in a deal with a GAAP-compliant SPE, based on bona fide asset values, when, in fact, the reality was quite different – a deal under a secret verbal no-loss guarantee to protect Barclays from the risk of economic loss on the overvalued assets, conducted via a sham SPE.

Enron's own documents also reflect Barclays' desire to make "structural changes" to the transaction to minimize its risk. In November 2000, former Barclays' banker McKean contacted James Moran at CSFB to discuss Barclays' "structural changes" to the transaction to ensure the Bank minimized its risk. McKean notes that Barclays devised the structure as follows:

> 1) [Barclays wanted Enron] to delink [] the A Notes and B Notes, which were previously pari-passu, in order to separate the asset risk (B Notes) from the ***Enron Risk*** (A Notes) and (2) [then have Enron] cross collateralizing the assets to provide structural enhancement to the B Note and Certificate Holders. As with other synthetic lease transactions, the expected source of repayment [was] through Enron's ability to terminate and repurchase the assets, resulting in ***Enron risk*** for repayment of the Notes and Certificates.

Ex. 52107.

It is evident that Barclays had a clear motive for restructuring the J.T. Holdings transaction with Enron in this fashion – to ensure all risk remained "Enron Risk." Barclays carried out its intentions by receiving an oral assurance from Enron that Enron would carry all the risk from the deal. Fastow recalled that "Ben Glisan was told that the bank would participate only if it were to receive assurances from Enron that it would not lose its 3% equity and that certain structural features, intended to minimize its risk, were made part of the structure." Fastow Decl., ¶22. Fastow told Glisan to provide the assurance they needed in sanctioning the transaction. ***Fastow also***

recalled personally providing Richard Williams verbal assurances that Barclays would not lose money on the J.T. Holdings transaction prior to the deal going through. 10/23/06 Fastow Depo. Tr. at 155:13-156:2. This assurance was needed because Barclays knew the methanol plant in the structure was overvalued. A November 14, 2000 e-mail from Williams explains:

> In the case of JT Holdings, we are not comfortable with the 5 year forecast of value attributable to the Methanol Plant – one of the two assets involved. While a credible case can be made that the value attributable to the storage facility implies a 1.56 X coverage ratio, this falls short of the norm of 4X coverages for synthetic leases.

Ex. 10451.

The verbal side agreement Barclays demanded while making loans on overvalued assets was inherently misleading conduct with a deceptive impact. Barclays' arguments regarding the overvaluation of the methanol plant in the structure are misguided at best. Barclays claims the valuation of the underlying assets "was irrelevant to the deception of investors." Supp. Motion. at 32. That is nonsense. The valuation of the methanol plant, which Barclays knew was significantly lower than what was being presented, played a large role in the deception because it created a false appearance to anyone looking at the transaction from the outside that the plant was worth what was being represented. Barclays, of course, since it knew the plant was overvalued, demanded and received a secret promise that it would not lose its supposed equity investment. Barclays' argument, relegated to a footnote, that the "***collective*** value" of the assets held by the SPE in the J.T. Holdings transaction was greater than the amount Barclays put into the structure is misleading and irrelevant. Supp. Motion at 32 n.7. That the combined value of the methanol plant and storage facility was greater than Barclays' debt and "equity" investments plainly has no bearing on Barclays' knowledge of the overvaluation of the methanol plant or its demand that it be promised its "equity" would not be at risk.

The key fact is that due to Barclays' deception, someone looking at the deal would think the SPE and lease were legitimate, and so the truth could not be discovered by Enron's auditors in their review of the deal documents, as the formal deal documents contained no such no-loss guarantee or monetary repurchase understanding. Nor did the documents reveal the overvaluation of the assets involved. Indeed, Barclays and Enron agreed, according to documents produced by Barclays, that the J.T. Holdings structure would be a "'***trust me' deal***." Ex. 10868. A handwritten note by Graham McGahen on a document outlining the structure by Meyer, dated November 7, 2000, made clear that "[Barclays] would be relying on Enron's ***strong verbal assurance*** that it [was] not the intention of Enron to shift the residual value risk to the banks." Ex. 52108 at BARC000171181. Another document from Richard Williams on November 14, 2000, confirmed the unwritten promise: "[Barclays] ***agreed to go forward on the basis of explicit verbal support from the company's Treasurer***." Exs. 10142, 10451. The document continues: "Specifically, Ben Glisan . . . ***commit[ted] to [Barclays that] under all circumstances Enron [would exercise] its purchase option at a price sufficient to repay [Barclays]*** . . . ." Ex. 10142. A financial expert who has reviewed the transaction has concluded it contained "***secret verbal assurances guaranteeing repayment***" of Barclays' financial investment in the deal. Drott Report at §3.25.

Barclays demanded this secret side deal because, according to Meyer it knew of "Enron's having protected the banks (and in particular Barclays) from likely/potential loss scenarios beyond its legal responsibility to do so" in other situations. Ex. 52108 at BARC000171181. The Post-Mortem also revealed "[Enron] had a history of protecting lenders to its SPV's . . . through . . . verbal assurances that often translated into near virtual guarantees." Ex. 10156 at BARC000472160. According to a Barclays' memo by Meyer dated November 7, 2000: "It should be noted that Enron ha[d] protected its banks from loss many times." Ex. 52108 at BARC000171184. In reviewing the J.T. Holdings synthetic lease, Meyer noted the deal "should not have given rise to market risk but

Barclays accepted a ***de facto guarantee*** from Enron to cover a perceived deficiency in the methanol plant's value." Ex. 10156 at BARC000472165.

Barclays clearly understood that the 3% equity component of the SPE had to be "***at risk***" in order to avoid the consolidation of the debt involved into Enron's financial statements. Specifically, Barclays' credit officer Meyer stated that the "***entity that [was] the lessor of the asset to achieve non-consolidation [had] to be capitalized with at least 3 percent at risk independent equity***." 6/14/04 Meyer Depo. Tr. at 175:23-176:16. Meyer told the Bankruptcy Examiner:

> Q. But you did work with SPEs throughout your tenure at Barclays, right?
>
> A. Yes.
>
> Q. And it was always your understanding that in order for an SPE not be consolidated, it had to have three percent equity at risk. Correct?
>
> A. Yes, that's correct.
>
> Q. And it is also your understanding that if Enron guaranteed repayment of that three percent equity, that three percent equity wouldn't be at risk, right?
>
> A. ***Yeah –*** .
>
> * * *
>
> Q. How did you become familiar with those requirements, and to make sure we're on the same page, the idea that there had to be three percent equity at risk in the SPE structure?
>
> A. ***Well, that concept was just well-known within the finance world, that that was the minimum equity that you needed to have for an off-balance sheet vehicle, to be off-balance sheet***.

Ex. 10151 at 26.

Fastow also confirmed that Barclays' own description of the structural enhancements and verbal assurances the bank required was accurate:

> Q. The last two lines of this section read: ***As a result of our challenge, Enron agreed to cash collateralize our residual value exposure to the methanol plant with proceeds received from the anticipated sale of the storage assets. Enron also provided verbal assurances to Barclays that their aim was to achieve an accounting objective and not to transfer a loss to its lenders***.

> ***Barclays accepted the valuation of the storage assets. Barclays' views the [sic] value of the methanol plant, unfortunately, have been proven correct. Barclays' views on the value***.
>
> Is that consistent, sir, with your recollection of how Enron did business with Barclays in JT Holdings?
>
> * * *
>
> A. ***That's my understanding based on my understanding of the underlying assets of the transaction and how the deal was progressing from talking with my finance people, yes***.

10/23/06 Fastow Depo. Tr. at 152:1-20.

Moreover, Fastow stated:

> I do recall the assurance with them [on J.T. Holdings], and I do recall there being some features built in, structural features, I would call them, to somehow cross-collateralize the assets, be able to take value from one asset – any excess value from one asset to help support the value of the other asset.

Id. at 156:22-157:2.

Fastow's testimony makes plain that Barclays received oral assurances that it would not lose money on deals it knew involved overvalued assets. According to Fastow, Williams, of Barclays, "was concerned about the value of . . . [the] methanol [plant involved in J.T. Holdings] and EOTT, that those assets may not be worth enough to support the transaction." *Id.* at 168:1-4. "***With respect to the methanol plant [at issue in J.T. Holdings] and the EOTT [Nikita] transaction, I can say that I recall discussions with Rich Williams of Barclays regarding the valuations of those assets, and I recall giving him assurances that they'd be okay***." *Id.* at 155:23-156:2. These ***concealed guarantees*** of repayment from Enron rendered the purported non-lending transactions inherently deceptive and, in substance, loans.

In the J.T. Holdings transaction, Barclays played a very specific role in concealing debt which falsified Enron's financial statements. Despite understanding that Enron specifically entered into transactions which had the "'effect of significantly under-stating the debt level and assets on [its] balance sheet'" (Ex. 10334 at BARC000190601), Fastow noted that Barclays created the J.T.

Holdings transactions with Enron to continue a masquerade of deceit and deception, concealing $110 million of debt from the investing public. Fastow Decl., ¶29 (quoting Ex. 10334 at BARC000190601). Barclays sought to minimize its risk by structuring J.T. Holdings to ensure that any risk involved in transactions remained "***Enron risk***." Ex. 10139.

According to Bankruptcy Examiner Batson, these facts and evidence would allow a fact finder to conclude that Barclays

> ***[o]btained*** verbal assurances from Enron in which Enron promised to cover Barclays' equity risk positions in two SPEs [one of which was J.T. Holdings] likely knowing that the assurances would not be disclosed to Enron's auditors and that, had they been disclosed, Enron could not have accounted for the transactions as it did.

Ex. 4 at 2-3 & n.2 (Batson III, App. F).

Thus, Barclays unquestionably knew the sole purpose of the J.T. Holdings December 2000 transaction, as structured, was to manipulate Enron's financial statements to keep debt off the balance sheet and engaged in the deal only after getting a secret verbal promise to protect it against risk of loss that it knew made the structure of the deal bogus – a sham. Just like many other transactions before it that Barclays had developed with Enron, the J.T. Holdings "lease [was] important to Enron because of its off balance sheet attributes and the ability to preserve the methanol asset's book value until the right circumstance ar[ose], *i.e.,* tax and/or earnings position." Ex. 10137. Barclays noted in its own deal documents that Enron consistently "enters into off balance sheet transactions" and "[t]hese transactions have the effect of significantly under-stating the debt level and assets on the balance sheet." Ex. 10334 at BARC000190601.

Enron's auditor was deceived by the secret oral promise between Barclays and Enron in the J.T. Holdings transaction. According to Andersen personnel who worked on the Enron account, "***The existence of this oral promise was concealed from and not disclosed to Andersen***." Arthur Andersen Amended Responses and Objections to Lead Plaintiff's Second Set of Interrogatories dated December 12, 2005 at 16 (Ex. 13) ("AA Second Amended Responses"). Barclays decided to conceal the true nature of the J.T. Holdings transactions, *i.e.*, secret guarantee of repayment, because the bank knew that the guarantees would destroy the required 3% accounting requirements, meaning Andersen would not approve the transaction, and Barclays would not receive its inordinate fees from the deal. Numerous Andersen personnel, including John Stewart, Richard Petersen and Carl Bass, also testified they never knew about this side agreement. 9/29/05 Deposition Transcript of John Stewart ("9/29/05 Stewart Depo. Tr.") at 1135:10-15; 10/26/05 Deposition Transcript of Richard Petersen ("10/26/05 Petersen Depo. Tr.") at 394:14-16; 7/18/06 Deposition Transcript of Carl Bass ("7/18/06 Bass Depo. Tr.") at 361:2. It is clear that Barclays did not want Andersen to have a full review of the transaction. Barclays obviously concurred with Enron and believed, as noted in an October 2000 presentation to Barclays, that "the potential risk [was that] Andersen would ask to review the transaction and use less favorable assumptions in determining the valuation of the methanol plant." Ex. 52105.

Had Andersen known of the agreement between Barclays and Enron that Barclays would not lose its equity investment, Andersen would not have allowed it to be accounted for off balance sheet. Andersen partner Stewart confirmed this, stating: "Had Andersen known about these agreements . . . these oral assurances, the accounting for the asset would have been on the balance sheet of Enron . . . and they would have – Enron would have reflected debt on their balance sheet as opposed to nothing on their balance sheet." 9/29/05 Stewart Depo. Tr. at 1135:10-15. "[I]f Andersen had become aware of this assurance, Andersen would have concluded that Enron should consolidate the SPE." 10/26/05 Petersen Depo. Tr. at 394:14-16. Barclays schemed with Enron to hide the true nature of the transaction from Andersen.

Andersen auditors, including Bass and Stewart, when later shown documents evidencing the side deal, testified they believed the internal Barclays documents referencing Enron's oral assurance in the J.T. Holdings deal showed collusion between Enron and Barclays. "***This is***

evidence of collusion," Bass said in his deposition. 7/18/06 Bass Depo. Tr. at 361:2. *See supra* n.34 (defining collusion and its effect).

Auditing experts have also testified as to the deceptive nature of the verbal assurance Barclays insisted on in the J.T. Holdings transaction. Expert McEachern testified that he knew of no reasons other than to escape detection that Barclays and Enron would enter into such an oral side agreement. 5/17/06 McEachern Depo. Tr. at 239:2-24. Foster testified: "I cannot think of another reason [other than to conceal material information from Andersen] why they would engage in this behavior." 5/15/06 Foster Depo. Tr. at 96:21-22. McEachern opined:

> Andersen should have been informed about Enron's secret oral assurances guaranteeing repayment of Barclays' B Notes and Equity Certificates in the J.T. Holdings Transaction. Had Andersen known of such assurances, Andersen would have disagreed with Enron's accounting and financial reporting for the J.T. Holdings Transaction.

3/17/06 Expert Report of Stephen McEachern ("McEachern Report") at 50.

Barclays worked closely with Enron knowing the purpose of the transaction was explicitly to impact Enron's financial statements – Barclays' documents drafted on November 17, 2000 admit this fact. Enron got Barclays to "extend . . . the synthetic lease structure ***to keep the financing off balance sheet***." Ex. 10452. Barclays knew that the "***lease is important to Enron because of its off balance sheet attributes***," according to a November 14, 2000 note from Williams. Ex. 10137.

Lead Plaintiff, as described in detail above and in the December 29, 2006 Complaint, has properly demonstrated a primary violation as to Barclays with regard to the J.T. Holdings transaction. And thus that summary judgment is inappropriate. *See, e.g., Enron*, 2006 U.S. Dist. LEXIS 88121, at *18. Put simply, Barclays used the official J.T. Holdings deal documents to (1) knowingly substantiate the overvaluation of the methanol plant; (2) present itself as having 3% equity at-risk in the lease transaction, thereby making the deal appear to be GAAP compliant, when in fact, Barclays had obtained verbal guarantees from Enron that its investment was not at risk; and

(3) deceive all who looked at the deal documents about the true nature of the transaction, including Andersen. Barclays' actions were inherently deceptive and "created an appearance of substance where it was lacking." *Id.*

In this same vein, Barclays' actions in the J.T. Holdings transaction can be easily analogized to the primary violations found by the court in both *Parmalat I* and *Parmalat III*. Like Citigroup in *Parmalat I*, Barclays' adoption of a known overvaluation was a deceptive device or contrivance under §10(b) because it "created the appearance of a conventional [synthetic lease] when, in fact, the reality was quite different." *Parmalat I*, 376 F. Supp. 2d at 504. Barclays knew the methanol plant was wildly overvalued but engaged in the synthetic lease to inflate the appearance of Enron's financial status, *i.e.*, "engaged in acts, practices, or courses of business that would operate as a fraud or deceit upon others." *Id.* These transactions depended on a fiction, namely that the methanol plant had been assigned its true value and that Barclays' 3% equity was actually at risk. *Id.* at 504; *Enron*, 439 F. Supp. 2d at 714, 716, 718, 719. Like CSFB in *Parmalat I*, Barclays accepted Enron's overvaluation for accounting treatment reasons, allowing Enron to conceal $110 million in debt. *Parmalat I*, 376 F. Supp. 2d at 489. Judge Kaplan held that these allegations against CSFB stated a claim under Rule 10b-5(a) and (c), finding that the overstatement constituted a deception in the deal that allowed Parmalat to falsify its financials. "[T]he parties ***grossly overstated that value and did so for the purpose of inflating Parmalat's assets on its financial statements***." *Parmalat I*, 376 F. Supp. 2d. at 505.

The overvaluation issue arose again in *Parmalat III* and Judge Kaplan ruled the plaintiffs' allegations that BoA engaged in a transaction with Parmalat that "in substance was a loan" but was portrayed as an "outside equity investment" stated a claim under Rule 10b-5(a) and (c), in part because the bank had accepted what it knew to be an overvaluation but proceeded with the deal anyway. *Parmalat III*, 414 F. Supp. 2d at 428, 433-34. Judge Kaplan explained:

> The combination of the overvaluation and the put agreement, then, created the appearance that BoA believed that PA was worth the full $1.6 billion and was willing to invest its own money based on that valuation, when in fact BoA knew that PA was worth far less and was willing to invest only because the put guaranteed that BoA would be repaid at a premium. Accordingly, plaintiffs' allegations regarding the PA transaction state a claim under Rule 10b-5 (a) and (c).

Parmalat III, 414 F. Supp. 2d at 435. Despite its claims, Barclays' dealings in J.T. Holdings are analogous with those found actionable in *Parmalat III*. Supp. Motion at 31-32. Barclays used the overvaluation and the deal documents to create the appearance that the methanol plant was worth $74 million (Ex. 10452) and that it was willing to invest based on that valuation when, in fact, Barclays knew the methanol plant was worth far less and was willing to invest only because the secret verbal agreement guaranteed Barclays would be repaid at a premium.

This Court has also stated:

> [I]f, as claimed, Barclays "structure[d] a transaction in a deceptive manner to eliminate real economic risk" to itself and created the appearance of an arm's length transaction, Lead Plaintiff needs to identify how it did so and show that Barclays not only acted in a deceptive manner to eliminate economic risk to itself, but that in eliminating such personal risk, the resulting cost to investors of that self-protection was substantial enough to constitute an "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Enron, 2006 U.S. Dist. LEXIS 88121, at *19. Lead Plaintiff has met this standard and has come forward with significant evidence showing that Barclays entered into a secret verbal agreement, in advance of the close of the transaction, in order to ensure Barclays would have no risk on the transaction – far less than the required 3%. Inclusion of this promise in the deal documents would have destroyed the accounting treatment. By protecting itself with the verbal assurance, Barclays was also ensuring that Andersen and the investing public would be deceived as to the true nature of the transaction.

The evidence shows that Barclays created an appearance of substance (a GAAP-compliant synthetic lease – J.T. Holdings – with 3% independent equity at risk) where it was lacking (because of the secret verbal agreement) or created a fiction or false appearance of revenues (J.T. Holdings concealed $110 million in debt) intended to deceive investors in Enron securities, and that Barclays engaged in acts, practices, or a course of business that operated as a fraud or deceit upon any person (Andersen and Enron's investors) in connection with the purchase or sale of an Enron security, such that Barclays may be liable under Rule 10b-5(a) and (c). *See Enron*, 2006 U.S. Dist. LEXIS 88121, at *19 n.11.

Plaintiffs' contentions with regard to Barclays' primary violations in the J.T. Holdings transaction are further supported when compared with two examples where this Court has stated the facts demonstrate that Merrill Lynch and CIBC committed primary violations – the Nigerian Barge and Braveheart transactions. *Enron*, 2006 U.S. Dist. LEXIS 43146. Like the Nigerian Barge transaction, there was a secret promise that Barclays would be made whole on the deal. Similarly, in J.T. Holdings, the secret verbal guarantee to Barclays created the false appearance of fact – *i.e.*, that the lease had been legitimately financed by a lender in an arm's-length transaction based on real asset values. Enron's auditor was deceived by the secret oral promise between Barclays and Enron in the J.T. Holdings transaction. J.T. Holdings had no other economic purpose than to achieve an accounting goal, thereby allowing Enron to maintain or increase its stock price while generating present and future Enron business and fees for Barclays. Put simply, neither the Nigerian Barge deal nor J.T. Holdings had a proper business purpose, they were sham deals, and the executives at Merrill Lynch and Barclays knew this.[44] The J.T. Holdings transaction also has key elements in common

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[44] Defendants argue plaintiffs have alleged that the J.T. Holdings and Nigerian Barge transactions are "identical." Supp. Motion at 32. Plaintiffs have made no such contention. Rather, plaintiffs have argued that the fraudulent nature and conduct of the banks involved in the two transactions both created the appearance of legitimate arm's-length transactions based on real asset values when in fact the deal was destroyed by secret verbal guarantees of repayment. The supposed differences laid out by Barclays in its Motion are meaningless. Motion at 33. Moreover, even Merrill Lynch admits in its Supplemental Submission of Defendants Merrill Lynch, Pierce, Fenner &

with the Braveheart deal. In each there was a secret side agreement with the banks that eliminated risk and destroyed the legitimacy of the SPE involved, rendering it a sham and the accounting that depended on its legitimacy false.[45]

4. Prepays

The principal purpose and effect of the prepay transactions Barclays engaged in was to deceive investors by falsely inflating Enron's reported cash flow from operations and falsely hiding Enron's true debt levels. Barclays argues any deception that occurred in connection with the prepays was only a result of Enron's accounting for the transactions. Motion at 24-25. This misapprehends plaintiffs' allegations regarding Barclays' own conduct.

Barclays cannot and does not persuasively contend that the prepays had some legitimate purpose. Nor can the Bank explain a legitimate purpose for structuring these transactions as complex and expensive tri-party prepaids as opposed to simpler, cheaper loans. In truth, as alleged, the ***purpose*** for doing the prepays as such was to manipulate Enron's reported financial results. Had the purpose been to provide Enron financing, it could have been done less expensively and much

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Smith Incorporated and Merrill Lynch & Co., Inc. in Support of Their Motion for Summary Judgment (Docket No. 5359) at 5-6, that the allegations against Barclays and themselves are the same. Barclays claims it lost money on the J.T. Holdings transaction and those losses prove that despite the oral assurances on the transaction there was economic risk. Supp. Motion at 33. The only "risk" on the J.T. Holdings transaction was credit risk, the same risk one would find on any loan. It was only upon Enron's bankruptcy that credit risk became a real risk. Moreover, any losses suffered by Barclays pale in comparison to those suffered by Enron's investors. Barclays made the determination to enter into these deals based on its own risk/reward calculus and any losses only resulted once the Ponzi scheme collapsed.

[45] Barclays desperately argues that Lead Plaintiff's analogies of the CIBC Braveheart deal to the J.T. Holdings and Nikita deals must fail because Barclays may not have known about or based its transactions on Braveheart at the time. Supp. Motion at 34 n.8; *id.* at 36 n.9. This, of course, misses the mark completely. A "chicken or the egg" debate about the temporal order of these transactions has nothing to do with plaintiffs' argument that the J.T. Holdings and Nikita transactions share key similarities with the Braveheart deal, which this Court has acknowledged to be an example of a bank engaged in a primary violation. Barclays' actual knowledge regarding Braveheart is a non-issue.

more easily via alternative means such as a loan. No other reasonable inference can be drawn from the pleaded facts and the evidence – the prepays were structured as they were to achieve a highly desirable financial statement manipulation. The purpose of the prepays was to deceive. Similarly, plaintiffs here easily demonstrate the ***principal effect*** of the prepay transactions was in fact to falsely inflate (in an undisclosed and misleading manner) Enron's reported cash flows from operations and to hide Enron's actual debt levels.

Moreover, Barclays' own conduct in these prepays did itself create a false appearance of fact in furtherance of the scheme. A "normal" prepay transaction involves two parties not three, there is commodity price risk, and the structure is not circular/triangular in nature. *See, e.g.*, Ex. 14 (Testimony of Robert Roach before the Senate Committee dated July 23, 2002). However, in the prepays at issue here, Barclays knowingly acted as one of three critical parties in the circular/triangular structures to disguise the true substance of the transaction. In each of the prepays, Barclays entered into a swap with Enron and then did a mirror image swap with some third party (the conduit entity) knowing that the conduit party would then do a swap with Enron to close the loop. *See, e.g.*, Ex. 52097. Having a third party in the prepays was critical to the deception. Accounting rules dictated that the swaps had to be "de-linked" and that each party had to be exposed to commodity price risk.

In the Barclays' prepays, there was clearly no commodity risk. And, when viewing the transaction as a whole, the swaps are clearly linked. By injecting a third party into the prepays, the linkage between the swap agreements was hidden and the parties were able to eliminate commodity price risk in a non-obvious manner. Had there been only two parties in the prepays, the elimination of price risk and the connection between the swap agreements would have been clear to anyone reviewing the transaction, and the deception would be exposed.

Moreover, the fact that Barclays could not have taken physical delivery of the commodities at issue further demonstrates Barclays was not entering into the deals for a legitimate business purpose. Barclays' participation in the prepays created the false appearance that the transactions were legitimate, the parties to the prepays had price risk and that the swaps were not linked. Barclays' own conduct had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme.[46]

Lead Plaintiff has presented expert testimony in this case establishing that the prepay transactions were used to falsify Enron's reported financial condition.[47] Solomon explains that a legitimate prepay commodity transaction is typically structured as follows:

> For example, a natural gas producer in need of cash might elect to sell currently to a purchaser a portion of its future production in return for an upfront payment. In return, the producer agrees to deliver the subject commodity in the future to the purchaser, usually over the course of several years. This typical two-party swap transaction provides the gas producer with cash, while allowing the gas purchaser to lock in a known price of the commodity at the time the transaction was effected.

Solomon Report at 13-14. Solomon also points out that by nature in a legitimate prepay transaction, the parties seek to profit, and face risk, from unknown future movements in the ***market price of the commodity*** that is the subject of the transaction:

> The gas producer is betting that in the future, as the commodity is delivered, the price of gas will be lower than when the contract was executed. The purchaser is betting just the opposite – the future price of the gas will be higher. As a result, one of the ***underlying tenets*** of a [legitimate] Prepay Transaction is that ***each party assumes***

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[46] Barclays should not be heard to assert that its conduct was not – by itself and independent of the other parties' conduct – deceptive. As the Ninth Circuit noted, the "conduct of each defendant [must be] evaluated in its context." *Homestore*, 452 F.3d at 1050.

[47] *See, e.g.*, Solomon Report at 13-26, 184-217; 4/13/06 Rebuttal Expert Report of Saul Solomon at 16-21; 1/17/06 Expert Report of Professor Bernard Black ("Black Report") at 11, 31-32, 54-58, 61-62. The fact that certain of defendants' experts who examined two of the Barclays/Enron prepays have "defended the accounting" is certainly no basis upon which to grant summary judgment when plaintiffs' experts have strenuously questioned the accounting. *See* Motion at 69 n.91.

> ***commodity price risk***, as neither party knows what the future price of that commodity will be at the time the swap is consummated.

Id. at 14.

The point is not simply that the prepays were loans to Enron. Rather, what is significant is that they "were in substance loans that were being ***cloaked*** inside commodity trades." Solomon Report at 187. In other words, the counterparties practiced deception by masking a loan as three ostensible commodity swaps – making a loan appear as commodity trades when, in fact, it was not. As Andrew Fastow testified, "in substance, [the prepays] were like loans, but they were structured intentionally to not appear as loans. They were structured to ***appear*** like Enron was engaging in arm's length commodity trades." 10/23/06 Fastow Depo. Tr. at 60:20-24. That the prepays involved this inherent deception was recognized by the SEC, in speaking of Enron's prepays with another bank:

> [T]he structural complexity of these transactions had no business purpose aside from ***masking*** the fact that, in substance, they were loans . . . .

Ex. 40330 at 1. The same was acknowledged by the United States Congress of Enron's prepays in general:

> [T]he prepays constructed by Enron and banks like Chase and Citigroup were phony prepays. There was ***an appearance*** of a product to be delivered at a later date, but ***the reality was different***.

The Role of Financial Institutions in Enron's Collapse – Vol. 2, Opening Statement of Senator Levin (Ex. 15) at 2.

The point of masking the prepays as commodity trades is clear. If the prepays appeared as a series of legitimate commodity trades presenting ostensible commodity price risk, one of the component steps could then favorably be accounted for as an energy trading contract under Emerging Issues Task Force Issue No. 98-10 ("EITF 98-10"). Employing EITF 98-10,

> Enron used a version of the Prepay Transactions to borrow money from a lending source (typically a Financial Institution) without reporting the borrowed proceeds as

> either debt or financing cash flows on the Company's consolidated financial statements. Rather, Enron utilized the Prepay Transactions to mischaracterize and misreport the borrowed funds as Price Risk Management liabilities on the balance sheet (i.e., as a trading liability as opposed to debt), and as operating cash flows on the statement of cash flow (as opposed to financing cash flows).

Solomon Report at 16.[48]

As Solomon opines, the application of EITF 98-10 is only appropriate for contracts "'entered into with the ***objective*** of generating profits on or from exposure to shifts or changes in ***market prices***.'" Solomon Report at 24. The circular nature of the Barclays prepays eliminated all commodity price risk from the deal. As such, there was no possible intent to profit from any such risk.[49] EITF 98-10 accounting was thus inappropriate. *Id.* at 24*ff*.[50]

a. Roosevelt

The December 1998[51] Roosevelt prepay was structured by Barclays as follows:

Step 1: Delta, a Citigroup SPE, entered into an agreement to pay Enron a lump sum of $499,916,264. In return, the documentation provided that Enron was to make monthly deliveries of 439,250 barrels of oil per month and 157,200 MMBtus per day. Since Delta did not want, and, in fact, could never accept, delivery of the physical commodities, Delta simultaneously entered into a

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48 "During the Class Period, Enron's financial statements were impacted by Prepay Transactions with the Defendant Banks totaling at least $7.497 billion." Solomon Report at 15.

49 *See* Solomon Report at 25 ("the intent of the individual parties entering into the Prepay Transactions was not to generate profit from shifts or changes in market prices – the parties intended to make interest-bearing loans to Enron that would not be reported as debt").

50 Solomon opines also that refusing to acknowledge that the combined effect of the component steps yields simply a loan to Enron with no commodity price risk to any party violated the accounting principle that "'financial statements should recognize the ***substance, rather than the legal form***, of particular transactions.'" Solomon Report at 187-89.

51 Even though the transaction closed prior to April 8, 1999, Roosevelt, like Chewco, is highly relevant to show scienter, scheme and intent. *See Enron*, 235 F. Supp. 2d at 689. *See also* Fed. R. Evid. 404(b).

marketing agreement with Enron to have Enron sell the commodities on the open market. *See* Ex. 52097; *see also* Ex. 16 at 54 (Batson III, Appendix D ("App. D")).

Step 2: The simultaneous Barclays/Delta swap required Delta to deliver 439,250 barrels of oil per month and 157,200 MMBtus per day. In exchange, Barclays made monthly payments to Delta for a total sum of $541,170,392. *Id*.

Step 3: The simultaneous Barclays/Enron swap required Barclays to deliver 439,250 barrels of oil per month and 157,200 MMBtus per day. In exchange, Enron agreed to make fixed monthly payments totaling $541,985,934. *Id*.

Barclays knew the Roosevelt transaction was structured and intended to falsify Enron's financial condition. Regarding the structure of the Roosevelt transaction, Barclays senior banker Richard Williams wrote on March 19, 1999:

> [W]hile the two swaps mirror one another in all respects, they may not cross-default.
>
> * * *
>
> ***The absence of the cross-default is to avoid tainting Enron's accounting treatment . . . . In a nutshell, the deal needs to be treated as a sale, not a financing.***

Ex. 10602 at BARC000214807-08.

The transaction was a circular contrivance structured to eliminate price and market risk for the sole purpose of creating a pre-arranged distortive impact on Enron's financial statements, and a fixed payment/pay-off to Barclays. The simultaneous swaps canceled each other out. At the outset, the circular structure of the transaction removed all price risk from the supposed sale of the commodities. In fact, ***no oil or natural gas was ever exchanged in any of these prepay transactions***, nor was it ever meant to. Internally, in its Roosevelt documents, Barclays ***called the swaps loans and explained the swap would "house all commodity price risk with Enron***." Ex. 10488.

An internal Barclays document explaining Roosevelt, which McKean called "Project Delta," refers to the swap as a "loan." *See* Exs. 52097, 52098. On the document is a reference to "P" and "I" being received by Barclays. *Id*. McKean testified that "P" and "I" are standard abbreviations for principal and interest. 10/20/04 McKean Depo. Tr. at 131:1-2. Therefore, no doubt remains that while Barclays presented Roosevelt and the other prepays in the deal documents as commodities swaps, they were, in truth, loans. Meyer, in charge of Barclays' credit review of Enron transactions, himself described Roosevelt as the "crude oil loan." 6/14/04 Meyer Depo. Tr. at 27:13-15.

Barclays' claims that "as a matter of law, when a secondary actor participates in allegedly disguised loans that an issuer improperly reports on its financial statements, that does ***not*** constitute deception by the secondary actor sufficient to support a claim for a primary violation of Section 10(b)." Supp. Motion at 24 (emphasis in original). Barclays paints with far too broad a brush. The standards for scheme liability are not as cut and dried as Barclays seems to believe.[52] Barclays' pronouncement that any alleged deception that occurred in connection with the prepay was all due to Enron's accounting neglects to take into account the true nature of the prepay.

According to expert Solomon, in these three prepays "[t]he commodity price risk or the potential to profit on any one of those legs of the transaction was eliminated by the other two legs of the transaction. So, effectively, there is no commodity price risk . . . ." 5/3/06 Deposition Transcript of Saul Solomon ("5/3/06 Solomon Depo. Tr.") at 531:14-18. In Roosevelt, a sham entity, the Citigroup-created Delta served as a trade counterparty. According to Solomon, "having the third

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[52] Moreover, whether or not Barclays performed on the contracts in the prepays has no relevance to the question of whether the Bank knowingly committed a deceptive act by engaging in a "'transaction whose principal purpose and effect is to create a false appearance of revenues'" that deceived investors. *Enron*, 2006 U.S. Dist. LEXIS 88121, at *9.

party in the transaction being this SPE, that . . . was really . . . a sham to try to affect the appearance of a separation with three independent parties." *Id.* at 482:10-15.

b. Nixon

The Nixon prepay transaction was structured by Barclays and Enron as follows:

Step 1: In December 1999, Enron entered into simultaneous swaps with Citigroup, Barclays and The Royal Bank of Scotland ("RBS"). Each of these banks made a lump-sum payment to Enron and in return Enron was to make a floating rate payment in 90 days based on the spot price of 5,377,984 barrels of oil.[53] *See* Ex. 16 at 63 (Batson III, App. D); Ex. 15762.

Step 2: Toronto Dominion ("TD") was the intermediary. Barclays, Citigroup and RBS entered into swap agreements with TD to pay TD a floating rate payment in 90 days based on the spot price of 5,377,984 barrels of oil. In return, TD agreed to pay each bank a fixed amount of $106,376,524 (Citigroup) or $112,513,644 (Barclays and RBS).[54]

Step 3: TD entered into a swap agreement with Enron which required TD to pay Enron a floating rate payment in 90 days based on the spot price of 16,754,490 barrels of oil. In return, Enron agreed to pay TD a fixed amount of $331,403,812 in 90 days. *Id.* *See also* Exs. 50795, 50796.

The simultaneous and circular floating rate payments canceled each other out, eliminating the substance of the apparent commodities trades, making it fictional. All that remained was a lump-sum payment to Enron in return for future fixed-rate payments to Barclays, Citigroup and RBS, which were made through TD. This was a disguised loan – a fictional commodities trade, contrived to eliminate the economic, *i.e.*, price and market, risk to the banks that would have existed in a

53 1/17/06 Appendix to Expert Report of Saul Solomon ("Solomon App.") at 59; *see also* Ex. 17 at EC001594892-95.

54 Solomon App. at 59-60; *see also* Ex. 18 at EC001594885-91; Ex. 19 at EC001594896-99.

legitimate arm's-length commodities trade. The transaction was structured in this deceptive manner, *i.e.*, to look like a commodities trade so that if outsiders examined it, it would look like a legitimate trade not a loan to be shown as debt on Enron's balance sheet. McKean, a Barclays' banker who went on to work at Enron, admitted during his deposition:

> Q. [I]t says, . . . we have no real net exposure. . . . What is meant by having no real net exposure?
>
> *   *   *
>
> A. Because ***if you've done an offsetting trade, you're not going to have any real net exposure***.
>
> Q. . . . The two sides kind of cancel each other out?
>
> *   *   *
>
> A. Yes.

10/20/04 McKean Depo. Tr. at 142:23-143:10; Ex. 52102. Other Barclays' bankers have also described Nixon as a "loan." Ex. 10605.

The Nixon transaction was completely pre-arranged, with fixed economics – the loan to Enron and the profits to the banks – including to Barclays. No matter what happened to the price of oil, the economy or anything else, the transaction remained, as pre-arranged, with a guaranteed risk-free profit to Barclays.

A Barclays' e-mail from Smith to Firth, dated December 15, 1999, stated:

> As you will have guessed, the transaction was booked yesterday. The income over the 3 month duration will be a little over $400,000. Even if it is closed out early we will still earn a minimum of $320,000 so I think it was worth it.

Ex. 15764. In a legitimate commodities trade, no party to the transaction knows its profit in advance – because in a legitimate trade there is uncertainty and risk – you may win or lose. The fixed return – with a guaranteed minimum payment – to Barclays and the other banks was a payoff for their engaging in a fictitious contrivance that had the ***sole*** purpose and effect of falsifying Enron's balance sheet by providing what would look like operating cash, but was a disguised loan, deceptively packaged by Barclays so that it would not appear as a loan to Enron's creditors.

c. CSFB

The September 2001 CSFB prepay was structured this way:

Step 1: In September 2001, Enron and CSFB entered into a swap agreement requiring CSFB to pay Enron a lump-sum of $150,000,000. In return, Enron agreed to make quarterly floating payments to CSFB based on the spot price of 59,521 barrels of oil and a final floating payment at maturity based on 6,581,260 barrels of oil.[55]

Step 2: CSFB entered into a swap with Barclays requiring CSFB to make quarterly floating rate payments to Barclays based on the spot price of 59,521 barrels of oil and a final floating payment at maturity based on 6,581,260 barrels of oil. In return, Barclays promised to pay CSFB a fixed amount of $1,368,983 each quarter and a final payment of $151,368,980.[56]

Step 3: Then Barclays entered into a swap with Enron requiring Barclays to make quarterly floating rate payments to Enron based on the spot price of 59,521 barrels of oil and a final floating payment at maturity based on 6,581,260 barrels of oil. In return, Enron agreed to pay Barclays a fixed rate of $1,372,554 each quarter and a final payment at maturity of $151,763,855.[57]

Enron got a lump-sum from CSFB, Barclays paid back CSFB (with interest) and Enron was obligated to pay back Barclays, with interest. This was a loan, not a commodities transaction, which came at a critical time when Enron was working to keep the Ponzi scheme going, fighting back against market rumors and a plunging stock price. As with Roosevelt and Nixon, the simultaneous

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[55] Solomon App. at 104-05; *see also* Ex. 20 at ERN0118780-85.

[56] Solomon App. at 105; *see also* Ex. 21 at ERN0118791-802.

[57] Solomon App. at 105; *see also* Ex. 22 at BARC00005130-34.

and circular floating rate payments canceled each other out eliminating the substance of the apparent commodities trades. All that remained was a fiction – a loan between the parties, not, as the documents pretended, a true commodities trade with risk. Critically, by using a third party in the deal (Barclays), the linkage between the swaps was shrouded and parties eliminated price risk in a non-obvious manner.

In a legitimate commodities trade, no party to the transaction knows its profit in advance – because in a legitimate trade there is uncertainty and risk – you may win or lose. The fixed return – with a guaranteed minimum payment – to Barclays and the other banks was a payoff for their engaging in a fictitious contrivance that had the ***sole*** purpose and effect of falsifying Enron's balance sheet by providing what would look like operating cash, but was a disguised loan.

Barclays knew that the Roosevelt, Nixon and CSFB prepays with Enron were not true commodities trades with economic risks but were disguised loans with assured profits for Barclays. In one e-mail dated June 24, 1999, Barclays' banker Jonathan Taylor discusses Enron's "***extremely creative . . . financial engineering and [how] they appear to be able to make their published figures read just about anything they want them to***." Ex. 10122 at BRC000190470-71. Meyer, the senior credit officer responsible for the Enron account, confirms these observations as to these fictional commodities transactions, discussing how the fictional nature of the deals will inevitably be misaccounted for on Enron's financial statements:

> Prepaid Crude Oil and Natural Gas – ***Don't for a second think that Enron is satisfying an operating need by selling these commodities forward. Although notionally they are agreeing to deliver the commodities in satisfaction of an obligation established at the time the banks pay for the commodities, in actual fact they are only borrowing money. Their [internal] accountant will credit the Revenue account, debit Cash, debit Revenue and credit Deferred Revenue. In other words he sees a sale but sets up a liability that is satisfied only as the commodities are delivered***. . . .
>
> ***. . . Volumes at Hand – It should be troubling for their accountants that the volumes to be delivered at the latest deal's final maturity are too large for physical***

> ***delivery. This should make it painfully obvious that the transaction's essence is not about deferred revenue but rather plain ol' debt***.

Id. at BRC000190470. ***This e-mail circulated throughout Barclays*** and is an admission as to the fictitious bases of these transactions, which involved huge amounts of money and several of Enron's banks – CSFB, TD, Citibank, and Barclays – all working together engaged in contrived, fictional transactions as part of their ongoing scheme to falsify Enron's financial statements. Few better examples of the incestuous operations of the largest financial fraud in U.S. history exist. One Barclays banker, Bob Clemmens, responded to this shocking internal Barclays' memo: "***There should be no doubt that this note will make it to very high levels in the bank over the next few days***." Ex. 10852 at BRC000190515. No doubt it did – ***yet the deals went on***.

McKean, a former Barclays' banker, has admitted during his deposition:

> Q. Did you agree – or do you agree now that, in actual fact – by doing these prepaid crude oil and natural gas transactions, that in actual fact, Enron was only borrowing money?
>
> A. I think it's – you know, . . . ***borrowed money*** or – I mean, it's – it's a – it's a future liability.

10/20/04 McKean Depo. Tr. at 70:24-71:8. And Barclays' officer Pullman testified:

> Q. ***As of June 24, 1999, did you have a view that Enron's prepay obligations were essentially plain ol' debt?***
>
> A. ***Yes***.

Ex. 10624 at 195:20-23.

The critical fact of these transactions that Barclays wholly ignores was not that Enron was able to misaccount for the deals, but rather, that the ***very structure*** of the prepays worked a fraud upon investors by cloaking the transactions as something other than what in reality they were – loans.

In fact, Barclays' sophisticated bankers knew that the first of these huge prepay transactions they engaged in with Enron, *i.e.*, Roosevelt, was a disguised loan engaged in at 1998 year-end for the purpose of distorting Enron's financial reports. An e-mail drafted by Taylor, dated February 25, 1999, explaining the Roosevelt transaction stated:

> ***Enron wanted to raise $500 million before their financial year end*****. . . .**
>
> ***Enron set up an SPV trust called Delta which borrowed $500 million from Citibank at a fixed rate of interest***. This money was then used to buy on a prepaid basis that amount of Enron's production ratably over the next three years. Delta would then sell the production in the market using Enron as the marketing agent. Insurance companies were used to insure the performance risk of Enron for the financing. ***To remove the price risk from both sides of the transaction, Enron approached us to execute a fixed for floating swap to revert the fixed price element of the pre pay to a market rate and similarly Delta needed the opposite swap to manage their fixed price exposure. We executed both swaps introducing a bid-offer that furnished us with a net present value of at least $250,000 and we charged an up-front fee of $250,000.***

Ex. 10596.

Barclays was fully aware that by 1998 Enron's publicly released financial statements grossly understated the Company's actual debt. Meyer discusses this in his deposition:

> Q. All right, sir, by 1998, 1999, whatever was the situation earlier than that, these off balance sheet transactions had become material to Enron's balance sheet?
>
> * * *
>
> A. There were enough credit equivalents out there that they were becoming material enough to have to be considered.
>
> Q. All right, sir. And you observed, did you not, sir, that if you did the analysis that you've described with debt equivalents and took them into account, Enron's debt would be billions of dollars or more than was reflected on the balance sheet?
>
> * * *
>
> A. ***The sum of Enron's debt as reflected on the balance sheet, plus its debt equivalents would have been several billion dollars greater than its debt alone***.

6/14/04 Meyer Depo. Tr. at 114:17-115:13.

> Q. And you found that Enron was reporting the cash it received in these prepays as cash from operating activities, not cash from financings; correct, sir?

A. That was my belief.[58]

6/15/04 Meyer Depo. Tr. at 257:11-15.

Barclays also knew that the banks "[would] not take physical delivery"[59] of the crude oil or natural gas that purportedly would be the commodity traded. Instead, only money would be exchanged as prearranged at the outset because the transactions were loans but called prepays to disguise the substance of the actual transaction. Ex. 10122 at BRC000190470. Smith, a senior Barclays officer, noted: "As it [Nixon] is essentially a loan we should recognize the income over the period of the loan." Ex. 10605. The natural gas and crude oil involved in these fictional

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[58] To create a clearer picture of Enron for Barclays' internal benefit, Meyer annually analyzed and added debt to Enron's balance sheet. In his report on Enron, Meyer added the prepays to debt because "a prepay had enough debt-like attributes that [he] thought [prepays] should [be treated] as a debt equivalent." Therefore, Meyer added the prepays to Enron's debt. According to Clemmens:

> Q. And when Mr. Meyer did that analysis there would be billions of dollars in debt . . . added to the amount of debt shown on the balance sheet, correct, sir?
>
> A. Yes.
>
> * * *
>
> A. I recall adjustments for prepays.

9/29/04 Clemmens Depo. Tr. at 85:11-86:8.

[59] Jonathan Taylor admitted during deposition:

> Q. In 1999 was Barclays able to take physical delivery of crude oil?
>
> A. No, I don't believe so.
>
> * * *
>
> Q. Okay. So in just the commodities section that you're familiar with, was Barclays, that you're familiar with, able to take physical delivery of natural gas?
>
> A. No.

8/11/04 Deposition Transcript of Jonathan Taylor ("8/11/04 Taylor Depo. Tr.") at 154:6-155:6.

commodities trades was never delivered, nor was it ever contemplated that it would be. Nor was there ever any market or price risk to the bankers involved – including Barclays.

Barclays engaged in these fictional commodities trades, *i.e.*, disguised loans, for its own financial gain. Not only did Barclays pocket the pre-agreed profits these deals created for its complicit conduct, it also ensured the Bank would play a key role in the ongoing scheme ***so it could get more profitable business from Enron*** as the scheme rolled on. Ian Jefferson, a Barclays' banker, e-mailed the following to Bob Diamond and others on November 26, 1999: "[W]hen we are able (hopefully) to confirm the bridge ***loan*** it would be valuable if you called Andy Fastow, (the CFO) and ***used our response to this approach to reinforce our credentials and [very] strong desire to lead manage their next Euro bond***." Ex. 50931.

Simply put, Barclays' own conduct was a deceptive part of Enron's financial distortions. Barclays knew that the prepays were fictional commodities trades – in truth "***plain ol' debt***" that falsified Enron's financial statements. Ex. 10481 at BRC000106893-94. Therefore, the Roosevelt, Nixon and CSFB prepays were three ways that Barclays engaged in fictional contrivances and non-arm's-length transactions without economic risk – using pre-agreed economics that furthered the overall fraudulent scheme that misrepresented Enron's true financial condition.

Fastow confirmed that these three prepays were loans ***disguised to appear*** as a series of commodity swaps. Barclays' ***own conduct*** yielded this deception, because executing the transactions as ostensibly independent commodity swaps gave the ***appearance*** of commodity trades, when the ***reality*** was simply that of a loan. The prepays were deceptive because the banks involved in the deals (including Barclays) made them ***appear to be*** something they were not and Barclays purported to be something it was not – a true trade counterparty, when it was really a lender. As Fastow said:

> ***[T]he financial prepays, generally speaking, in my mind, in economic substance, were loans. In other words, the banks were giving money to Enron with the expectation that they be paid back this money in the future***.
>
> ***The structure of the prepays, however, made it look like something other than loans***, so that when it was reflected in Enron's financial statements, it looked like it wasn't a financing. It looked like it was Enron receiving the cash from a normal business operation.

10/23/06 Fastow Depo. Tr. at 56:18-57:3

> I believe the primary purpose and effect of the conduct of Barclays and Enron, in structuring, funding, and executing the Roosevelt, Nixon, and the CSFB prepays, was to cause the Company to financially report cash flow from financing activities as funds flow from operations.

Fastow Decl., ¶27. Moreover, Fastow confirmed that the prepays "understated debt, as compared to Enron borrowing the money, on the balance sheet." 10/23/06 Fastow Depo. Tr. at 65:5-7.

Fastow said Barclays fully understood this:

> ***I know that***, based upon my discussions with bankers and with my own finance staff, that – that ***the people at Enron, including myself, believed that the bank understood and intended to structure the transaction so that it would not have commodity or commodity price risk embedded in the transaction, so that it would not be like a more typical commodity trade***.

Id. at 63:17-24. "I believe that based on conversations with certain bankers, that they knew that the prepays and some of the share-trust transactions created the false appearance of funds flow" – and "certain bankers" included Barclays. 10/26/06 Deposition Transcript of Andrew Fastow at 942:19-22.

Barclays was a primary violator because it went beyond funding the deals and executed and implemented them as well. As Fastow made clear: "***I am aware that they [Barclays] played a role in funding and executing those transactions [the Barclays' prepays]***." 10/23/06 Fastow Depo. Tr. at 171:24-25. "***[F]unding is actually making dollars available, delivering dollars. Executing would mean taking those steps necessary to effect the transaction or close the transaction***." *Id.* at 172:8-11.

Barclays seeks to downplay Fastow's incriminating testimony about the prepays by arguing that Fastow's testimony supports the Bank. Supp. Motion at 25-26. Barclays' highly selective cuts from Fastow's testimony ignore the significant testimony he provided that unequivocally supports Lead Plaintiff's arguments regarding Barclays' deceptive conduct in relation to the prepays. 10/23/06 Fastow Depo. Tr. at 169-71. Moreover, as stated previously, whether Enron actually received money in the prepay transactions, another one of Barclays' misguided arguments (Supp. Motion at 26), is not the linchpin for liability.

Judge Kaplan, noted with regard to the invoice schemes at issue in *Parmalat*, that because Parmalat "guaranteed to BNL . . . and the other banks, payment of the full face value of the invoices," the invoices "played ***no economic role*** in the transaction; they were simply ***a device or excuse*** that ***permitted Parmalat*** to record the revenue and to conceal the liability on the guarantees." *Parmalat I*, 376 F. Supp. 2d at 488. The same is true with the phantom commodity price risk in the various Barclays prepays – it too "played no economic role" in the deal because the circular nature of the transaction eliminated its significance. To falsely indicate the existence of commodity price risk by presenting what was in substance a single loan transaction as three purportedly independent commodity trades was "simply ***a device or excuse*** that ***permitted [Enron]*** to record" cash flow from operations and conceal a loan. *Id.*

Structuring or designing a transaction that has the principal purpose and effect of creating the false appearance of fact is sufficient for primary liability under Rule 10b-5(a) and (c). December 4, 2006 Order at 6. This ruling by the Court is strongly supported by *Homestore*, 452 F.3d at 1049, where the Ninth Circuit justified its holding in part by noting that liability had been found in other cases where the "'defendant was a primary architect of the scheme to finance the sham entities'" (*id.* (quoting *Quaak*, 357 F. Supp. 2d at 342)); "where auditors 'masterminded' company's misleading accounting practices" (452 F.3d at 1049 (citing *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp.

2d 319, 336-37 (S.D.N.Y. 2004))); or defendant "invented sham corporate entities" (452 F.3d at 1050 (citing *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003))). Thus, such activity satisfies the Ninth Circuit's requirement that the defendant's conduct have the "purpose and effect" of creating a false appearance of fact, and thus in turn would clearly satisfy the SEC's test as well. Accordingly, there is a triable issue of fact that Barclays is subject to liability under Rule 10b-5(a) and (c) for its conduct in the three prepays.

5. Nikita

This FAS 125/140 deal was deceptively structured by Barclays in late September 2001 to look like a sale of Enron's interest in EOTT, but in reality it was a disguised loan from Barclays to Enron. Like J.T. Holdings, Nikita was deceptively made to appear to be a transaction with 3% "at risk" equity provided by Barclays to an SPE. However, rather than actually having any equity "at risk," the deal was fraudulent because Barclays demanded, and got, a secret promise from senior Enron officers that Enron would "***ensure repayment***" of Barclays' 3% equity investment in the SPE. Ex. 10491. The secret promise was necessary because Barclays knew that the EOTT shares underlying the transaction were likely not worth enough to support the transaction on its own. Indeed, Fastow testified that he spoke directly with relationship manager Richard Williams about the valuation and provided a promise that Barclays would not lose its investment notwithstanding the valuation problems. 10/30/06 Deposition Transcript of Andrew Fastow ("10/30/06 Fastow Depo. Tr.") at 1497:8-13. The principal purpose and effect of this transaction was to distort Enron's financials and create a false picture of the Company's financial condition, creating $10 million in phony income and $80 million in false operating cash flow, and concealing $80 million in debt at a critical time when Enron was desperate to keep the Ponzi scheme going.

Even though Barclays understood the requirement that an SPE have at least 3% equity at risk to be legitimate, Barclays demanded verbal assurances from Enron covering its equity in the Nikita transaction ***in order to negate that risk***. Exs. 13310, 10144, 10146, 10147, 10156, 10432, 13304. Barclays' employees have admitted that they knew about and relied upon Enron's verbal assurances. According to Barclays' documents and admissions by its bankers:

- "***The market risk, however, had been covered by verbal assurances***." Ex. 10156 at BARC000472165 (Meyer, "Enron Post Mortem").

- Barclays was "***relying on [Enron's] verbal understanding to make [the Bank] whole***." Ex. 50857 (McGahen memo, October 1, 2001); *see also* 6/14/04 Meyer Depo. Tr. at 202:19-22.

- "***Barclays would rely on assurances from Enron's Treasurer that Enron would make up any shortfall in the equity return***." Exs. 10146 at BRC000035920, 10430 at BRC000035920 (document regarding Monetization of EOTT Partnership Interests, September 25, 2001); *see also* 6/14/04 Meyer Depo. Tr. at 201:18-23.

The sham SPE in Nikita was called "Besson Trust." *See, e.g.*, 7/21/04 Williams Depo. Tr. at 66:20-21; Ex. 10156. Indeed, the purposed 3% equity at risk in Besson Trust was not at risk by virtue of a verbal assurance from Enron in Nikita.[60] In fact, Barclays structured the loan as "***Enron Risk***." Ex. 50863 at BARC000108528.

Barclays engaged in the Nikita transaction, understanding that it would result in materially misleading financial statements for Enron. This was the principal purpose and effect of the transaction. Barclays knew that although it appeared to be the equity holder, this was a fiction – it had no equity "at risk" because of Enron's secret verbal assurance to Barclays to cover such risk.

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[60] The deal was also fraud because of Barclays' use of total return swaps to insulate itself and CSFB from risk. Prior to the closing of the transaction, Barclays, for regulatory reasons, determined it could not be the certificate holder for the deal and enlisted CSFB to perform that function. 6/14/04 Meyer Depo. Tr. at 200:20-201:4. "CSFB got a total return swap with Barclays under which CSFB's risk under the certificates would be transferred to Barclays" and Barclays' risk transferred to Enron via verbal assurances. *Id*. at 201:14-17, 203:2-6; *see also* 11/9/04 Deposition Transcript of Nicholas Bell at 172:24-173:4, 188:11-20; 10/30/06 Fastow Depo Tr. at 1497: 8-13; Exs. 10156 at BARC000472165, 50857, 10146, 10430. CSFB's supposed "equity" in the deal was protected by the secret repayment agreement, as that agreement protected the "equity" of Barclays – the party that CSFB looked to for repayment of its "equity." Therefore, when the total return swaps in the deal are viewed together, the only risk was Enron's.

The SPE involved was a sham, and the transaction was designed to create the appearance of a legitimate GAAP-compliant SPE engaging in an arm's-length transaction, when the substance was lacking – acts of deception directed at Enron's auditor and others.

Fastow summarized the Nikita transaction as follows:

> This FAS 140 deal was structured by Barclays and Enron, in late September 2001, to ***look like*** a true sale of the Company's interest in EOTT. I understand that Barclays considered the value of the underlying assets to be insufficient to justify the value of the deal; as a result, Barclays required and received an oral assurance from Ben Glisan that the Company would repay the bank's 3% equity investment in the SPE.

Fastow Decl., ¶24.

Regarding FAS 125/140 transactions like Nikita, Fastow testified:

> ***[T]he FAS 120/140 [sic] deals were . . . generally speaking, transactions where Enron sold an asset for financial reporting purposes. It sold the asset to a special purpose entity, as opposed to selling it to an industry counterparty that may – may have wanted to own that asset***.
>
> ***Those transactions tended to generate funds flow, and they often generated earnings that Enron could report as well***.

10/23/06 Fastow Depo. Tr. at 58:17-25. Additionally, Fastow explained why deals like Nikita were documented as FAS 125/140 transactions as opposed to what they truly were – loans:

> Well, Enron could have borrowed the money, but that was the problem. That would show up as debt on Enron's balance sheet, and the interest payments associated with that debt would have shown up in Enron's income statement and funds flow statement.
>
> Enron desired to have what otherwise was economically, in substance, a loan look like something other than a loan so it could achieve a higher credit rating.

Id. at 59:5-13. Therefore, the deal itself was deceptive, as was Barclays' conduct.

Fastow's testimony makes plain Barclays received oral assurances it would not lose money on deals it knew involved overvalued assets. According to Fastow, Williams, of Barclays, "was concerned about the value of . . . [the] methanol [plant involved in J.T. Holdings] and EOTT, that those assets may not be worth enough to support the transaction." *Id.* at 168:1-4. "***With respect to***

the methanol plant [at issue in J.T. Holdings] and the EOTT [Nikita] transaction, I can say that I recall discussions with Rich Williams of Barclays regarding the valuations of those assets, and I recall giving him assurances that they'd be okay." *Id.* at 155:23-156:2. These ***concealed guarantees*** of repayment from Enron rendered the purported non-lending transactions, in substance, loans.

Barclays claims Lead Plaintiff's December 29, 2006 Complaint contains the same evidence that was before the Court when it rendered its July 20, 2006 Order. Supp. Motion at 34. This is not true. In fact, evidence regarding Fastow's conversation with Williams about the value of the underlying EOTT shares – evidence that provides a strong basis upon which to find Barclays liable – was not before the Court. And significant details regarding Nikita not previously pleaded were also provided in the December 29, 2006 Complaint, including evidence regarding the deception of Andersen. *See, e.g.*, December 29, 2006 Complaint ¶¶761.72-761.79; *see also* 9/29/05 Stewart Depo. Tr. at 1144:24-1145:2; 10/26/05 Petersen Depo. Tr. at 402:9-12; 7/18/06 Bass Depo. Tr. at 348:2, 352; 7/6/06 Odom Depo. Tr. at 304; Drott Report at §§2.11, 3.38.

Indeed, Lead Plaintiff has provided evidence that the secret no-loss agreement in the Nikita deal was unknown to Andersen. By the very nature of the side agreement, Andersen had ***no way*** of detecting such a secret promise. Andersen has stated in response to discovery that "Enron orally promised Barclays that its three percent equity in the SPE involved in the Nikita/Besson Trust transaction would be repaid at or before maturity at par plus an agreed-upon yield. ***The existence of this oral promise was concealed from and not disclosed to Andersen***." AA Second Amended Responses (Ex. 13) at 25.

According to Andersen partner John Stewart, "had Andersen known this incremental information . . . about the verbal assurances, the accounting would have been different." 9/29/05 Stewart Depo. Tr. at 1144:24-1145:3. This was because the SPE would not have had the requisite

3% independent equity at risk as is necessary to have a non-consolidation treatment. As former Andersen partner, Richard Petersen, testified: "If Andersen was aware of the oral assurances that are in the [internal Barclays] document you have shown me, Andersen would have concluded that the SPE should be consolidated by Enron." 10/26/05 Petersen Depo. Tr. at 402:9-12. If Andersen had found out about such side promises, Bass testified, "***alarms would have gone off***." 7/18/06 Bass Depo. Tr. at 348:2. ***According to Bass, this was collusion to deceive Andersen and others about the true nature of the Nikita deal***. "***I think, equally clear, that there is evidence of – there would be evidence of collusive fraud***," Bass said under oath. *Id.* at 352:9-11; *see also* 7/6/06 Odom Depo. Tr. at 304; Drott Report at §§2.11, 3.38.

Accounting experts have also testified as to the deceptive conduct by Barclays in Nikita. Expert Foster concluded that Enron and Barclays intended to and did conceal material information from Andersen in the Nikita deal and expert McEachern opined in his report:

> Barclays was willing to assume the equity risk via the Total Return Swap only because it demanded and received from Enron's Treasurer Ben Glisan an oral assurance that Enron would guarantee repayment of Barclays' three percent equity investment in Besson.
>
> Andersen should have been told about Enron's secret oral assurance to Barclays whereby Enron would, in effect, through Barclays, guarantee repayment of CSFB's three percent equity investment in Besson.

McEachern Report at 51.

Further, McEachern noted that "examples of fraud and concealment" such as J.T. Holdings and Nikita demonstrated that Enron and "those acting in concert with it clearly understood the accounting rules at issue in the various transactions and made a deliberate and concerted effort to insure that the true nature of these transactions was withheld from and not discovered by Andersen." McEachern Report at 52. Critically, as McEachern observes in his report:

> A GAAS audit can not reasonably be expected to detect the intentional withholding of oral or written agreements by senior management of a company, and an independent third party, such as a major international banking institution.

Id. at 70.

According to Batson, these facts and evidence would allow a fact-finder to conclude that Barclays

> [o]btained verbal assurances from Enron in which Enron promised to cover Barclays' equity risk positions in two SPEs [including Nikita], likely knowing that the assurances would not be disclosed to Enron's auditors and that, had they been disclosed, Enron could not have accounted for the transactions as it did.

Ex. 4 at 2 (Batson III, App. F).

Through Barclays' and Enron's conduct in fraudulently making the Nikita loan transactions appear as a sale, Enron was able to improperly benefit from the transaction in myriad ways:

> Enron's FAS 125/140 transactions (1) provided the Company with immediate cash flow without recording the cash receipt as either debt or other obligations; (2) allowed Enron to record the proceeds from the sale as cash flow from operations rather than cash flow from financing; and (3) allowed Enron to record income from the gain on the sale of the asset. Enron's alternative – borrowing money and using the asset as collateral – would have provided access to cash to meet its operating expenses, but carried with it negative financial reporting consequences such as increased debt, no positive effect on cash flow from operations, and no positive effect on earnings.

Solomon Report at 28.

As with the prepays , Lead Plaintiff is hardly alone in asserting that the FAS 125/140 deals were fraudulent devices used to deceive Enron investors about the Company's true financial condition. The SEC has alleged that Enron and another bank engaged in fraudulent FAS 125/140 deals for the same reasons outlined above. *See* Ex. 500472 (*SEC v. Canadian Imperial Bank of Commerce, et al.*, No. 03-5785, Complaint (S.D. Tex. 2003)). The Department of Justice also entered an agreement with the Canadian Imperial Bank of Commerce regarding, in part, that bank's use of fraudulent FAS 125/140 deals with Enron. *See* Ex. 10084 (Letter Agreement between the United States Department of Justice, by the Enron Task Force and the Canadian Imperial Bank of

Commerce dated December 22, 2003).[61] And in deposition Fastow confirmed that the FAS 125/140 transactions banks such as Barclays did with Enron created the false appearance of funds flow from operations. 10/23/06 Fastow Depo. Tr. at 58:10-25; *see also id.* at 64:20-23 (FAS 125/140 transactions created "the false appearance of earnings").

Enron's FAS 125/140 transactions did not truly justify the treatment they received as sales under the applicable accounting standards. As Solomon opines, properly accounting for a transaction as a sale under FAS 125/140 requires, among other things, that "[t]he transferor [Enron] of the asset must ***surrender control*** of the asset." Solomon Report at 28.[62] Also, in the case of transfers to an ***SPE***, there must be a sufficient ***at-risk equity*** contribution (interpreted as a ***minimum 3%*** of the total assets) by an ***independent third party*** investor. *Id.* at 32. Nikita did not meet these requirements.

Plaintiffs, as described in detail above and in the December 29, 2006 Complaint, have properly alleged a primary violation as to Barclays with regard to the Nikita transaction. *See, e.g., Enron*, 2006 U.S. Dist. LEXIS 88121, at *18. Put simply, Barclays used the official Nikita deal documents to (1) knowingly substantiate the overvaluation of the assets in the deal; (2) present itself as having 3% equity at risk in the FAS 125/140 transaction, thereby making the deal appear to be

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61 Here, as there, defendants "engaged in a . . . FAS 125/140 transaction [] with Enron, knowing that Enron's purpose in entering into [the] transaction [] was to remove assets from its balance sheets and book earnings and/or cash flow at quarter and year-end." Ex. 10084, Appendix A. There, "CIBC provided the 'equity' stake only because Enron's senior management first orally promised CIBC that the 'equity' would be repaid at or before maturity . . . . CIBC sought and obtained such promises from Enron's senior management . . . ." *Id*. The exact same thing can be said of Barclays in the Nikita transaction.

62 Here, "control is considered surrendered if (i) the transferred assets have been isolated from the transferor, (ii) the transferee has the right to pledge or exchange the transferred assets or interests, (iii) the transferor does not maintain effective control over the transferred assets." Solomon Report at 28.

GAAP compliant and a true sale, when "the reality was quite different"[63] because Barclays had obtained verbal guarantees from Enron so that its investment was not at risk; and (3) deceive all who looked at the deal documents about the true nature of the transaction, including Andersen. Barclays' actions were inherently deceptive and "created an appearance of substance where it was lacking." *Enron*, 2006 U.S. Dist. LEXIS 88121, at *18.

Barclays' actions in the Nikita transaction can be easily analogized to the primary violations of the banks in both *Parmalat I* and *Parmalat III*. Like Citigroup in *Parmalat I*, Barclays' adoption of a known overvaluation was a deceptive device or contrivance under §10(b) because it "created the appearance of a conventional [true sale] when, in fact, the reality was quite different." *Parmalat I*, 376 F. Supp. 2d at 504. Barclays knew the asset was overvalued but engaged in the FAS 125/140 deal to inflate the appearance of Enron's financial status, *i.e.*, "engaged in acts, practices, or courses of business that would operate as a fraud or deceit upon others." *Id*. This transaction depended on a fiction, namely that the asset had been assigned its true value and that Barclays' 3% equity was actually at risk. *Id*.; *Enron*, 439 F. Supp. 2d at 714, 716, 718, 719. Like CSFB in *Parmalat I*, Barclays accepted Enron's overvaluation for accounting treatment reasons, allowing Enron to create $10 million in phony income and $80 million in false operating cash flow and conceal $80 million in debt. *Parmalat I*, 376 F. Supp. 2d at 489. Judge Kaplan held that these allegations against CSFB stated a claim under Rule 10b-5(a) and (c), finding that the overstatement constituted a deception in the deal that allowed Parmalat to falsify its financials. "[T]he parties ***grossly overstated that value and did so for the purpose of inflating Parmalat's assets on its financial statements***." *Id.* at 505.

63 *Parmalat I*, 376 F. Supp. 2d at 504; *see also Parmalat II*, 383 F. Supp. 2d at 625 (holding that transactions with shell entity formed by law firm "'created the appearance of a conventional' sale and loan 'when, in fact, the reality was quite different'").

The overvaluation issue arose again in *Parmalat III* and Judge Kaplan ruled the plaintiffs' allegations that BoA engaged in a transaction with Parmalat that "in substance was a loan" but was portrayed as an "outside equity investment" stated a claim under Rule 10b-5(a) and (c), in part because the bank had accepted what it knew to be an overvaluation but proceeded with the deal anyway. 414 F. Supp. 2d at 433-34. Judge Kaplan explained:

> The combination of the overvaluation and the put agreement, then, created the appearance that BoA believed that PA was worth the full $1.6 billion and was willing to invest its own money based on that valuation, when in fact BoA knew that PA was worth far less and was willing to invest only because the put guaranteed that BoA would be repaid at a premium. Accordingly, plaintiffs' allegations regarding the PA transaction state a claim under Rule 10b-5 (a) and (c).

Id. at 435. Despite the Bank's claims, Barclays dealings in the Nikita transaction are analogous to those found actionable in *Parmalat I* and *III*. Supp. Motion at 36. Barclays used the overvaluation and the deal documents to create the appearance that the asset was worth more than it truly was and that it was willing to invest its own money based on that valuation when, in fact, Barclays knew the asset was worth far less and was willing to invest only because the secret verbal agreement guaranteed Barclays would be repaid at a premium.

This Court has also stated:

> [I]f, as claimed, Barclays "structure[d] a transaction in a deceptive manner to eliminate real economic risk" to itself and created the appearance of an arm's length transaction, Lead Plaintiff needs to identify how it did so and show that Barclays not only acted in a deceptive manner to eliminate economic risk to itself, but that in eliminating such personal risk, the resulting cost to investors of that self-protection was substantial enough to constitute an "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Enron, 2006 U.S. Dist. LEXIS 88121, at *19. Lead Plaintiff has met this standard and has demonstrated Barclays entered into a secret verbal agreement, in advance of the close of the transaction, in order to ensure Barclays would have no risk on the transaction – far less than the required 3%. Inclusion of this promise in the deal documents would have destroyed the accounting treatment, so by protecting itself with the verbal assurance, Barclays was also ensuring that Andersen and the investing public would be deceived as to the true nature of the transaction.

The evidence shows that Barclays created an appearance of substance (a GAAP-compliant true sale with 3% independent equity at risk) where it was lacking (because of the secret verbal agreement) or created a fiction or false appearance of revenues (Nikita created $10 million in phony income and $80 million in false operating cash flow and concealed $80 million in debt) intended to deceive investors in Enron securities, and that Barclays engaged in acts, practices, or a course of business that operated as a fraud or deceit upon any person (Andersen and Enron's investors) in connection with the purchase or sale of an Enron security, such that Barclays may be liable under Rule 10b-5(a) and (c). *See Enron*, 2006 U.S. Dist. LEXIS 88121, at *19 n.11.

Lead Plaintiff's contentions with regard to Barclays' primary violations in the Nikita transaction are further supported when compared with two examples where this Court has stated the facts demonstrate Merrill Lynch and CIBC committed primary violations – the Nigerian Barge and Braveheart transactions. *Enron*, 2006 U.S. Dist. LEXIS 43146. This Court has stated the following about the Nigerian Barge transaction:

> [A]s an example of adequate pleading of a primary violation it points to Lead Plaintiff's allegations of Merrill Lynch's conscious wrongdoing in the Nigerian barge transaction in creating the appearance of a conventional sale. Without Merrill Lynch's deceptive participation as a "buyer," there would have been no sham "sale." The Court finds that the detailed facts alleged satisfy the pleading requirements for stating a primary violation of §10(b) and Rule 10b-5(a) and (c) and that Merrill Lynch's purported conduct constituted "employ[ment of a] device, scheme or artifice to defraud" or "engag[ement] in an[] act, practice, or course of business which operat[ed] as a fraud or deceit" upon Enron investors. The alleged principal purpose and effect of that fictional "sale" was to create a false appearance of revenues, assets from a fake sale to inflate Enron's revenue accounting and to deceive rating agencies and ultimately investors in that corporation's stock.

Enron, 2006 U.S. Dist. LEXIS 88121, at *22-*23. The exact same thing can be said of Barclays' role in the Nikita transaction.

Like the Nigerian Barge transaction, there was a secret promise that Barclays would be made whole on the deal. The secret verbal guarantee to Barclays created a false appearance of fact, *i.e.*, that the "true sale" was an arm's-length transaction based on real asset values. Enron's auditor was actually deceived by the secret oral promise between Barclays and Enron in the Nikita transaction. Nikita had no other economic purpose than to achieve an accounting goal thereby allowing Enron to maintain or increase its stock price while generating present and future Enron business and fees for Barclays. Put simply, the Nikita deal had no proper business purpose, it was a sham deal, and the executives at Barclays knew this.

The Nikita transaction also has key elements in common with the Braveheart deal. In each there was a secret side agreement between the parties that eliminated risk and destroyed the legitimacy of the SPE involved, rendering it a sham and the accounting that depended on its legitimacy false. *See supra*, §II.B.5.

Also, as mentioned above, Nikita was certainly a transaction that had the "principal purpose and effect" of creating the "false appearance of fact." *Homestore*, 452 F.3d at 1048; *see also* SEC Brief (Ex. 1) at 18. The secret guarantee made it appear as a "sale" of assets when in fact it was a loan, but Enron treated it as a sale anyway. Lead Plaintiff has raised genuine issues of material fact that Barclays committed primary acts of deception in the Nikita deal, thus rendering summary judgment inappropriate.[64]

6. Metals

Barclays and Enron engaged in two separate Metals transactions known as Camelot I and II with Enron in September and December 2000. These transactions were deceptively structured by

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[64] *See* SEC Brief (Ex. 1) at 18 ("It is reasonable to construe Section 10(b) as encompassing, within the rubric of engaging in a deceptive act, engaging in a transaction whose principal purpose and effect is to create a false appearance of revenues.").

Barclays to appear as commodities sales, but, in reality, were again disguised secretly secured loans from Barclays to Enron. Both Metals deals featured a fictional "option" as to which Barclays and Enron had a ***secret*** "***understanding***" that it would "***always***" be exercised, unlike a legitimate options which may or may not be exercised. This sham option protected Barclays from any true economic risk. Ex. 50788 at ECTe003431430. The first deal closed in September 2000 for $750 million. The second closed in December 2000 for $1 billion. The fake option is a critical feature of the deal that elevates it from a case where a bank is simply loaning money to an entity it knows will use that money to commit securities fraud. Here, specific facts demonstrate Barclays used or employed the fake option in the deal in a way that created an appearance of substance where it was lacking.

In the September 2000 Metals transaction, Enron "sold" Barclays metal warrants at a 10% discount under the London Metals Exchange ("LME") price. Exs. 50788, 50767, 50790. At the same time, Barclays gave Enron the "option" to repurchase the warrants at the same discounted price. 2/17/05 Deposition Transcript of Ian Jefferson ("2/17/05 Jefferson Depo. Tr.") at 124:4-11. But Barclays and Enron had a secret "***understanding***" that this option would ***always*** be exercised. Ex. 50788. Thus, what appeared to be a real sale with a real repurchase option was a fiction – the deal was circular from the outset due to this secret agreement regarding the option exercise.

To further give the transaction the fictional appearance of substance, Barclays then entered into a forward contract with the London Clearinghouse ("LCH") in which Barclays would sell to LCH the same amount of warrants as the initial sale at the same discounted price. 2/17/05 Jefferson Depo. Tr. at 124:4-11. But at the same time, Enron entered into a forward contract with LCH in which LCH would sell to Enron the same amount of warrants as the initial sale at the same discounted price. *Id*. Thus, the transaction continued to be ***circular and Barclays took no trading risk***, just like the prepays, but with the added deception of the fake option. Either the option would be exercised, as agreed, or Barclays would receive the same amount of money it had paid Enron from LCH, who in turn would collect the same amount from Enron.[65] Expert witness Solomon testified regarding the purpose of having an option as part of the structure:

> It's clear to me that the intent of the parties, based on the evidence I've seen, was to have – you know, Enron sold these metals. They were going to acquire them back. And that's what everybody seems to have understood, and that's how the deal was negotiated.
>
> ***It doesn't qualify for sale treatment . . . . So, substantively, even though the – the documents may have been papered otherwise, if the understanding of the parties were that this option was intended to be exercised, that would be compelling evidence that a sale does not take place***.
>
> * * *
>
> The option is in the documents, but the ***communications between Enron and Barclays about the option is what's compelling to me, that there was an agreement that everybody's expectation was that the option would be exercised***.

5/3/06 Solomon Depo. Tr. at 562:20-563:10, 565:6-11.

The December 2000 transaction had the same structure as the September 2000 transaction. The only difference was the December 2000 transaction involved the sale of ***physical metals***, for $1 billion. Simultaneously, Barclays granted Enron an "option" to purchase the same metals at the same price, but again ***with a secret understanding that the option would be exercised***. Ex. 50788. To further the deception, Barclays again entered into a forward contract with LCH where it would sell LCH the same amount of metal at the same discounted price, and Enron also entered into a forward contract with LCH in which LCH would sell to Enron the same amount of metal as the initial sale at the same discounted price. Ex. 23 at AA-EX00281134. The same deceptive conduct.

Barclays, having no interest in the metal as a commodity, did not want the metal to move locations. As an April 2001 Barclays "Off Balance Sheet Inventory Monetization Facility"

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[65] The only risk Barclays faced was if the metals purchased under the facility were damaged or lost. To cover this risk, Barclays insisted Enron arrange an insurance policy on the metals to protect Barclays. *See* Ex. 50790 at BARC000141981.

presentation explains, "the material does not move location." Ex. 10289 at BARC000092078. Barclays' proposed structure insists "metal is LME deliverable grade ***in*** LME warehouse locations." Ex. 50787 at BARC000378811. Also, Barclays did not intend to pay for the metals to be housed. In an e-mail discussion between Barclays and Enron regarding the transaction, Barclays explains "either the rent would be paid up or MG [Enron] would confirm to the warehouse that they would be responsible for the rent." Ex. 50788 at ECTe003431426. Barclays also structured the transactions so that if the metals suffered damage or were lost while Barclays supposedly owned the metals, Enron would be responsible. Enron maintained the risks and rewards of ownership and effective control of the assets while the assets were supposedly Barclays. A fake sale, but papered by Barclays via the fake option to appear to have substance when in fact there was none.

The sole purpose and effect of the transaction was to influence Enron's financial statements by ***creating the false appearance*** of cash from operations and hide debt. ***The Metals transactions enabled Enron to falsely report $1.4 billion as cash flow from operations. This amount should have appeared as debt on Enron's books because Enron, either through exercising the option or as a result of the forward contracts with LCH, was obligated to repay the money***. This false loan was critical because Enron desperately needed money, and the revelation of the huge $1+ billion loan would have had a devastatingly negative impact on Enron's public financial position and its existing credit facilities. A call report from June 19, 2000, details Enron's initial discussions with Barclays regarding the Metals transactions. Enron gave Barclays the mission "to get the $2 billion of inventory financing off the balance sheet." Ex. 50926. According to Ian Jefferson, Barclays Account Officer, by engaging in the Metals deal Enron "wouldn't have, say, ***$2 billion worth of debt through this methodology***." 2/17/05 Jefferson Depo. Tr. at 135:16-23.

Barclays designed the Metals transactions as sham commodities deals, but in reality the deals were loans disguised as sales to allow Enron to conceal debt, *i.e.*, falsify its balance sheet. ***Barclays***

assumed no economic risk in the Metals transactions despite the fact that an outsider looking at the transaction would have wrongly believed risk existed because of the option feature in the deal. Ex. 50906. This was a fiction because Barclays and Enron secretly agreed – outside of the deal documents – that the "option" would always be exercised.

A Barclays' e-mail dated August 8, 2000, from Smith to Bill Appleby of Enron, copying a number of high-level Barclays and Enron employees, lays out the fake option: "The first thing that needs to be established is that ***these are being priced on the understanding that the options are going to be exercised, i.e., it is understood that the purpose of the option is to meet accounting requirements not to give trading opportunity***." Ex. 50788 at ECTe003431430. Barclays knew Enron's purpose for engaging in the Metals transactions was to raise cash and hide debt off balance sheet using Barclays' loans to accomplish this deception.

Senior Barclays banker LeVersha wrote: "We are also aware that the company [Enron] enters into off balance sheet transactions whereby it sells and subsequently has the option to repurchase assets. . . . ***These transactions have the effect of significantly under-stating the debt level and assets on the balance sheet***." Ex. 10334 at BARC000190601; *see also* 6/16/05 LeVersha Depo. Tr. at 111:17-19.

Fastow confirmed Barclays and Enron engaged in two separate Metals transactions – Camelot I and II – in September and December 2000. Fastow confirmed these transactions had the principal purpose and effect of creating a false appearance of funds flow from operations:

> [M]y understanding of the intent of the transaction was to not convey to Barclays or its affiliates the commodity price risk or – or market price risk associated with this inventory, but, rather, to set up an off-balance-sheet financing vehicle which would serve to allow Enron to – or cause Enron to report lower debt and higher funds flow from operations than it otherwise would.

10/30/06 Fastow Depo. Tr. at 1502:19-1503:1. That is, the purpose of the transactions was not to convey commodities, but rather, solely to create deceptive off-balance-sheet financing vehicles which caused Enron to deceptively report lower debt and higher funds flow from operations.

Fastow emphasized that the purpose of the transactions was not to be a commodities sale – "the transaction was [not to] put Barclays in a position where they were taking market price risk related to the commodity." *Id.* at 1505:19-21. Rather they were loans disguised to appear as commodities sales: "My recollection is this was meant to be an off balance sheet financing and to generate funds flow from operations for Enron." 10/23/06 Fastow Depo. Tr. at 179:10-12.

Hence, Barclays' ***own conduct*** was deceptive because it accepted assurances regarding the option which made the presentation of the transactions in the deal documents inaccurate.[66] An outsider looking at the transaction documents would have been tricked – not knowing a secret agreement existed. Additionally, Fastow confirmed that oral assurances were consistent with the way Enron did business with Barclays and recalled hearing about a structural issue to minimize risk to Barclays in the Metals transactions. Fastow recalled: "I heard from my finance team that this was a structural issue that was necessary for accounting and that they had to give assurances to Barclays that we weren't trying to shift some risk to them related to that." 10/23/06 Fastow Depo. Tr. at 179:2-6. The structural issue was an oral agreement that Enron would exercise the options to repurchase the metals or metal warrants. Fastow understood that these assurances were given: "My understanding is that there were certain assurances given to Barclays regarding those options." 10/24/06 Fastow Depo. Tr. at 480:20-21. In the end, the Metals transactions were part of Barclays'

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[66] Barclays misapprehends the import of the fake option in the deal. Supp. Motion at 27. While the ultimate effect of the option was fraudulent accounting by Enron, Barclays is liable for using or employing a deceptive device (the fake option) which had the principle purpose and effect of creating a false appearance of revenues regardless of Enron's subsequent accounting. *Enron*, 2006 U.S. Dist. LEXIS 88121, at *22-*23.

and Enron's "scheme . . . [of] engaging in structured-finance transactions . . . that created a false appearance of financial health by presenting a misleading picture of Enron's true business condition." *Id*. at 536:3-7. Barclays' conduct in the Metals deal fits neatly into the Court's test for liability.

Plaintiffs have plainly demonstrated Barclays is liable as a primary violator based on its conduct in the two Metals transactions. Barclays' actions "created an appearance of substance where it [was] lacking." *Enron*, 2006 U.S. Dist. LEXIS 88121, at *18. Detailed evidence, including documents produced by Barclays, testimony of Barclays' personnel and Lead Plaintiff's experts, as well as testimony from Fastow, which corroborates plaintiff's allegations, raises genuine issues of material fact precluding summary judgment regarding these transactions.

IV. THERE IS A TRIABLE ISSUE OF FACT CONCERNING WHETHER BARCLAYS VIOLATED RULE 10b-5(b)

The securities laws render it actionable:

> To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Rule 10b-5(b). This provision of course proscribes outright lies and omissions of complete silence.

But also under the Rule, "a defendant may not deal in half-truths." *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977). "A half truth is a statement which accurately discloses some facts, but misleads the listener or reader by concealing other data necessary for a true understanding." 5C Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws* §12:2, at 12-9–12-10 (West Group 2003) (citing *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990)). In *Hoxworth*, the Third Circuit confirmed that "misleading half-truths" – which it defined as "failures to disclose sufficient information to render statements actually made not misleading" – are actionable under Rule 10b-5. 903 F.2d at 200 n.19.

As such, when a defendant speaks, it creates for itself a duty to disclose the ***full truth*** on the subject that was known (or knowable) to it. *See Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994) ("As we have long held under Rule 10b-5, 'a duty to speak the full truth arises when a defendant undertakes a duty to say anything.'"); *First Virginia Bankshares*, 559 F.2d at 1317 ("[Under Rule 10b-5], a duty to speak the full truth arises when a defendant undertakes to say anything."); *Kurtzman v. Compaq Computer Corp.*, No. H-99-779, 2000 U.S. Dist. LEXIS 22476, at *189 (S.D. Tex. Dec. 12, 2000) ("The duty to disclose information exists when such disclosure is necessary to make defendants' statements, whether mandatory or volunteered, not misleading."); *Kunzweiler v. Zero.net, Inc.*, No. 3:00-CV-2553-P, 2002 U.S. Dist. LEXIS 12080, at *36 (N.D. Tex. July 3, 2002) ("A defendant must speak the full truth when he undertakes to say anything in the first place."). Thus, under Rule 10b-5(b), "where the defendant has revealed some relevant, material information ***even though he [otherwise] had no duty***," he breaches a duty to disclose by any refusal "to speak the full truth." *First Virginia Bankshares*, 559 F.2d at 1314, 1317.

Barclays violated Rule 10b-5(b) in the SO_2 transaction by making false and/or misleading statements and omissions to Andersen. As described *supra* at §III.B.2., and as alleged in the December 29, 2006 Complaint ¶¶761.6-761.11, Barclays "seasoned" Colonnade to give it the false appearance of a transaction history. Barclays conducted two four-day trades of precious metals, trades which in fact presented no risk to Barclays. December 29, 2006 Complaint ¶761.8. These transactions had no legitimate purpose. *Id*. at ¶761.9. Yet Barclays passed them off to Andersen as legitimate trades. On September 24, 2001, Colonnade (Barclays) faxed to Andersen a letter stating, among other things, that Colonnade

> 1) "has undertaken transactions with entities other than Enron Corp and its subsidiaries and affiliates ('Enron')."

Ex. 41577 at AASDTEX002836479. This statement was false, misleading and suffered from material omissions. This statement by Barclays did not reveal that the transactions in question had no significant risk or legitimate purpose, but were done solely to give the false appearance of meeting Andersen's requirements for off-balance-sheet treatment. *See* December 29, 2006 Complaint ¶761.9; *supra*, §III.B.2.

The same letter from Barclays to Andersen also represented that Colonnade

2) "has assets other than those that will be acquired through transactions with Enron";

3) "has unencumbered assets, which are available for application towards obligations owed to its present and future creditors (including Enron)."

Ex. 41577 at AASDTEX002836479. These statements likewise were false, misleading and suffered from material omissions. The supposed "assets" here were simply loans from Barclays – and were not from operations. *See supra*, §III.B.2. These monies, being loans, thus were also encumbered. Colonnade did not have any assets of significance that were its own. It was simply a pass-through entity and any assets fleetingly held by Colonnade were given or loaned it by Barclays or passed through it in connection with Enron-related transactions. *See id*. None of these assets would be available to pay debts as if Colonnade were a legitimate entity.

These deceptive statements by Barclays directly resulted in harm to Enron investors. Andersen relied on the material false statements and omissions in connection with approving the accounting for the transaction. Ex. 41571. Had Andersen learned the truth, it would not have approved the favorable accounting Enron received in the SO_2 transaction. Accordingly, there is a triable issue of fact that Barclays is liable for a violation of Rule 10b-5(b).

V. THERE IS A TRIABLE ISSUE OF FACT THAT BARCLAYS ACTED WITH SCIENTER

It is important to note that Barclays does ***not*** assert there is no triable issue as to its scienter. Indeed, the facts are terrible for Barclays. Consequently, Lead Plaintiff briefly sets forth facts demonstrating that Barclays acted with scienter herein.

A. The Scienter Standard on Summary Judgment

Scienter encompasses "'a mental state embracing intent to deceive, manipulate, or defraud.'" *Nathenson v. Zonagen*, 267 F.3d 400, 408 (5th Cir. 2001). But:

> Strict intentional misconduct is ***not*** required to show scienter, it is sufficient to prove conduct that is an extreme departure from the standards of ordinary care and presents a danger of misleading buyers or sellers, as well as either ***knowledge of that danger***, or a danger so obvious that the actor ***must be aware of it***.

Trust Co. v. N.N.P. Inc., 104 F.3d 1478, 1490 (5th Cir. 1997). This is often formulated as a standard of "severe recklessness." *Nathenson,* 267 F.3d at 408. Thus, in order to establish Barclays' scienter in engaging in the inherently deceptive transactions with Enron, it is sufficient to demonstrate simply that Barclays knew, or was severely reckless in not knowing, that the transactions presented a danger of misleading Enron's investors.[67]

At the summary judgment stage, other considerations apply as well. First, the fact-specific nature of the scienter inquiry renders it normally inappropriate for resolution on a motion for summary judgment: "Scienter is an inherently fact-specific issue that should ordinarily be left to the trier of fact." *In re Zonagen Sec. Litig.*, 322 F. Supp. 2d 764, 774 (S.D. Tex. 2003).[68] In any event, Lead Plaintiff's evidence establishes a genuine issue of fact as to Barclays' scienter.

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67 It should be stressed here that, to be liable, Barclays need not have known it was violating the securities laws, but only have known, or been severely reckless in not knowing, the underlying facts of that violation. *See United States v. Kung-Shou Ho*, 311 F.3d 589, 605 (5th Cir. 2002) ("'[T]he term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law . . . . "The knowledge requisite to knowing violation of a statute is ***factual knowledge*** as distinguished from knowledge of the law."'") (quoting *Bryan v. United States*, 524 U.S. 184, 192 (1998)).

68 *See also Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006) ("'Scienter is normally a factual question to be decided by a jury . . . .'"); *In re Cerner Corp. Secs. Litig.*, 425 F.3d 1079, 1084-85 (8th Cir. 2005) (same quote); *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) ("'Whether a given intent existed is generally a question of fact,' appropriate for resolution by the trier of fact.") (discussing scienter under §10(b) and Rule 10b-5); *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996) ("Generally, scienter should ***not*** be resolved by summary judgment.") (emphasis in original).

Second, at this stage, the strictures of the Private Securities Litigation Reform Act of 1995 ("PSLRA") concerning scienter do ***not*** apply. As this Court is aware, the PSLRA requires that the plaintiff's ***allegations*** yield a "strong" inference of scienter. 15 U.S.C. §78u-4(b)(2). The PSLRA operates only to alter the ***pleading*** requirements for scienter – but does ***not*** alter the ***substantive*** standard of scienter. *See Nathenson*, 267 F.3d at 408 ("It seems clear to us that the PSLRA has ***not*** generally altered the substantive scienter requirement for claims brought under section 10(b) and Rule 10b-5 . . . ."); *Goldstein v. MCI Worldcom*, 340 F.3d 238, 245 (5th Cir. 2003) (same quote).

For example, Lead Plaintiff may demonstrate an inference of scienter, thus creating a triable issue of fact, by submitting evidence of motive and opportunity. *See, e.g., Howard v. Everex Sys.*, 228 F.3d 1057, 1064 (9th Cir. 2000) (holding that "[b]ecause the PSLRA did not alter the substantive requirements for scienter under §10(b)," the standard on summary judgment or judgment as a matter of law ***remains unaltered*** by cases applying the PSLRA's scienter pleading requirements); *In re Homestore.com Sec. Litig*., 347 F. Supp. 2d 790, 804 (C.D. Cal. 2004) ("unlike the high pleading burden established by the [PSLRA] under which a plaintiff must plead sufficient specific facts evincing a strong inference of 'deliberately reckless or conscious misconduct,' a plaintiff opposing a motion for summary judgment may rely on evidence of motive and opportunity to show an inference of scienter"); *Tuchman v. DSC Commc'n Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) ("The factual background adequate for an inference of fraudulent intent can be satisfied by alleging facts that show a defendant's ***motive*** to commit securities fraud."); *Nathenson*, 267 F.3d at 409 (recognizing *Tuchman* as a pre-PSLRA case accepting allegations of motive as sufficient to plead scienter).

While Lead Plaintiff's evidence establishing Barclays understood the effect of its transactions on Enron investors is fully sufficient to establish scienter, Lead Plaintiff also possesses substantial evidence establishing Barclays had a powerful motive (and opportunity) to engage in a scheme to defraud with Enron.

Indeed, Lead Plaintiff may demonstrate Barclays' scienter with circumstantial evidence. As the Supreme Court observed in *Herman & MacLean*:

> The Court of Appeals also noted that the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports ***a lower standard of proof***. In any event, we have noted elsewhere that ***circumstantial evidence can be more than sufficient***.

459 U.S. at 391 n.30.[69] In fact, circumstantial evidence is sufficient even under the PSLRA. *See Fin. Acquisition Ptnrs. v. Blackwell*, 440 F.3d 278, 287 (5th Cir. 2006) ("Circumstantial evidence can support a scienter inference.") (10b-5 action under PSLRA); *Goldstein*, 340 F.3d at 246 ("'[T]here does not appear to be any question that under the PSLRA circumstantial evidence can support a strong inference of scienter.'").[70]

Accordingly, to prevail on this point, Lead Plaintiff need not present ***any*** direct evidence of Barclays' scienter. *See, e.g., Linville v. Hawaii*, 874 F. Supp. 1095, 1108 (D. Haw. 1994) ("Circumstantial evidence is evidence which, if believed, establishes the existence of a fact ***not directly proved*** through inferences drawn from those facts that are directly proved."). Finally, it should be remembered that "there will rarely be direct evidence of intent to defraud." *In re Fleming Cos. Sec. & Derivative Litig.*, No. 5-03-MD-1530 (TJW), 2004 U.S. Dist. LEXIS 26488, at *33 (E.D. Tex. June 10, 2004).

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[69] "Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on (*e.g.,* a preponderance of) all the evidence presented." 4-74 *Modern Federal Jury Instructions-Civil* ¶74.01 (Matthew Bender 2001).

[70] *See also Do v. Wal-Mart Stores*, 162 F.3d 1010, 1013 (8th Cir. 1998) ("Several cases highlighted by the Supreme Court demonstrate that the nonmoving party may draw upon favorable inferences from circumstance evidence to defeat summary judgment.").

B. The Evidence Demonstrates Barclays Acted with Scienter

Because of its conduct, Barclays ***was ranked as one of Enron's "Tier One" banks for eight years running***. Ex. 11115. Enron was Barclays' "***most important*** relationship in the Energy sector," one of Barclays' "***most important and profitable accounts***'" and "'among the most profitable of the energy group's clients.'" Ex. 10667; 8/23/04 Deposition Transcript of Henry Pullman at 285:19-20 (quoting Ex. 10454); 5/3/05 Deposition Transcript of Helen Calvelli at 74:20-21 (quoting Ex. 13585). Barclays knew that "***Enron's tier one banks [received] a disproportionate share of the company's total wallet***," and Enron paid "***higher compensation***" to the banks like Barclays who facilitated its financial manipulations. Exs. 10423, 10156; 7/13/04 Deposition Transcript of John Sullivan ("7/13/04 Sullivan Depo. Tr.") at 243:20-24 (quoting Ex. 11116); Ex. 10156 at BARC000472161; 1/18/05 Deposition Transcript of Graham McGahen at 107:23-108:9. In other words, Barclays got excess profits for its deceptive conduct while exposing unknowing investors in Enron's public securities to the high risk of huge losses – in the billions of dollars.

According to Fastow, Barclays also understood that because it was a Tier One bank, it would "typically get more lucrative business." 10/23/06 Fastow Depo. Tr. at 26:16-17. Enron paid premium amounts to its Tier One banks for creating, structuring and executing deals that concealed Enron's financial problems and changed the way its financials appeared. Fastow stated Enron was willing to pay banks like Barclays premium fees because the banks "provided extra value to Enron in changing how its financials looked." *Id*. at 88:18-19. "They [the deceptive deals] required more work from the bank, [in] either devising the structures or implementing the structures, and [Fastow] believed [Enron] needed to compensate banks who brought [Enron] value like this so they'd continue to bring [Enron] value, additional value in the future." *Id.* at 88:19-24. He said the amount Enron paid in premiums for structured finance transactions was "in excess of a hundred million dollars, maybe hundreds of million of dollars." *Id.* at 89:5-7.

Fastow has stated Barclays understood that in connection with these illicit and deceptive transactions, Enron was not seeking to engage in straight ordinary borrowings or "plain vanilla" deals. 10/23/06 Fastow Depo. Tr. at 89:8-17. Barclays knew Enron was willing to pay "premium[s] – 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." Fastow Decl., ¶8. Fastow said: "I believe that Barclays received fees on these . . . transactions above what it would have earned for standard loans. I discussed the purpose of these transactions with the bankers involved and I believe that they understood they were being paid a premium of the impact of these structures on Enron's public financial statements." *Id*, ¶17. Barclays knew that if it "were to compare the amount of cash [Enron] paid the bank in . . . fees and interest or implied interest in a transaction, . . . structured finance transactions were – were typically more expensive than normal borrowings." 10/23/06 Fastow Depo. Tr. at 89:13-17. The quest for these lucrative deals is clearly cognizable motive evidence.

Moreover, Barclays knew each of these transactions presented the danger of misleading Enron's investors, or was severely reckless with regard thereto, as the Bank was aware of how the transactions operated, what made them deceptive and how that conduct resulted in falsifying Enron's financial statements.[71] Barclays agreed to engage in them nevertheless, to maintain and enhance Barclays' relationship with Enron.

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[71] Knowing simply the reality of the deal engaged in is sufficient to establish scienter in scheme liability cases. *See*, *e.g.*, *Parmalat I*, 376 F. Supp. 2d at 506 (Allegations that banks in an invoicing scheme knew that the invoices were worthless presented a strong inference of scienter: "BNL and Ifitalia's ***very participation*** in the factoring arrangement, which depended on the recycling of stale invoices, if proven, would constitute strong circumstantial evidence that BNL or Ifitalia understood exactly what they were receiving in exchange for their loans to Parmalat.").

Barclays' conduct involved acts undertaken voluntarily and knowingly – acts falsifying Enron's financial situation and deceiving investors. Barclays' scienter is clear. As early as 1999, one of Barclays' top managers in London, Taylor, internally expressed concern about "***the way [Enron] conducts business," concluding that Enron was "extremely creative about their financial engineering and they appear to be able to make their published figures read just about anything they want them to***." Ex. 10122 at BRC000190470-71. In considering one of Enron's requests that Barclays provide money, he noted that Enron was "***so desperate for the money***" that it looked like a company "***pedaling harder and harder to stay ahead of the wolves***," observing that Enron's figures concerning a proposed contrived "prepay" deal were "***the same smoke and mirrors that the group is so expert at using***." Ex. 10481 at BRC000106895. This e-mail was sent to Williams, Meyer, McKean, Smith and Jefferson, some of the top officers at Barclays. Barclays knew Enron wanted it to engage in transactions with Barclays solely to manipulate Enron's financial statements to hide its actual debt levels, *i.e.*, deceive investors. As senior credit officer, Meyer wrote in response to Taylor's e-mail: "***Don't for a second think that Enron is satisfying an operating need by selling these commodities forward . . . . [I]n actual fact, they are only borrowing money***." And it was to Barclays "***painfully obvious that the transaction's essence is not about deferred revenue, but rather about plain ol' debt***." *Id*. at BRC000106893-94

Internally, Barclays understood that its Enron transactions, in the words of Meyer, allowed debt to "***masquerade***" as something else on Enron's financial statements. Ex. 10155 at BRC000106846. When calculating Enron's true debt levels for its own purposes however, which it did for years, Barclays ***reclassified Enron's structured financings with it (and others) as debt, stressing that it was "essential [to] take these considerations into account***" when calculating Enron's leverage or its actual cash flow. *Id*. at BRC000106846, BRC000106849. As a result of these internal calculations, Barclays knew, for example, that Enron's actual year-end 1998 debt was at least \$11.9 billion as opposed to the publicly reported amount of \$7.4 billion – ***a 38% understatement***. *See id*. at BRC000106846, BRC000106849. Barclays calculated Enron's true debt in 1999 as at least \$14.3 billion rather than the \$10.7 billon Enron reported – a 25% understatement. *See* Ex. 10157 at BRC000107412. This pattern continued in 2000 when Barclays added back \$6.1 billion onto Enron's balance sheet for its own internal purposes in connection with estimating Enron's creditworthiness. *See* Ex. 10126 at BRC000107829. Because of this hidden debt, Barclays' highest sanctioning body noted in the minutes of its meeting on July 7, 1999, "***that Enron was paddling underneath the surface to hold on to its investment grade status***." Ex. 10123 at BRC000106828.

In the 2002 "Post-Mortem," Barclays acknowledged that Enron had a history of protecting lenders to its SPV's through ***verbal assurances that translated into "guarantees***," and that "***Enron was always willing to pay higher compensation***" of this type of complicity. Ex. 10156 at BARC000472161. It acknowledged that the purpose of its transactions with Enron "***was mostly to achieve an accounting objective rather than shed risk***," and that "[t]he driving force for ***each*** SPV transaction was to raise debt that was either (i) ***off the balance sheet entirely*** or (ii) if on the balance sheet, then ***disguised*** as an operating liability." *Id*. at BARC000472161, BARC000472163. Barclays ***admitted*** that verbal assurances from Enron were "near virtual guarantees" in deals "***transacted purely for accounting reasons***." *Id.* at BARC000472160, BARC000472168. Similarly, the total return swaps it engaged in with Enron ***were "preferable" to outright guarantees because "it was less obvious on the financial statements***." *Id.* at BARC000472163 This is not the description of normal arm's-length business dealings or of transactions engaged in for legitimate business purposes with actual economic risk, which were later transmogrified by a dishonest issuer's accounting. To the contrary, it describes years of deals artificially structured by Barclays to avoid economic risk, accomplished with full knowledge of top bank executives.

1. Chewco

Barclays' scienter for the JEDI/Chewco deal is plain. As the evidence described *supra* at §III.B.1. establishes, Barclays knew that Enron wanted to keep JEDI "***off balance sheet***," *i.e.*, to avoid reporting millions in debt on Enron's balance sheet. As Pullman, Director of Barclay's Credit Risk Management Division, wrote in an e-mail, it was "***JEDI's raison d'etre***." Ex. 10643 at BARC000001897.

Moreover, Barclays' bankers were financially sophisticated and familiar with structured finance transactions, which they knew were done to achieve specific financial statement impact for public companies. They understood the 3% ***independent*** "***at risk***" ***equity requirement*** and that the secret Chewco Side Letter, which established cash collateral accounts for Barclays, meant that approximately 60% of the money Barclays was supposed to have at risk was in fact safe within the walls of the Bank. *See supra*, §III.B.1.; Exs. 13301, 10604 ("We [Barclays] pushed Enron hard to achieve this result which effectively gives us close to 60% cash collateral from day one."). Specifically, Fastow spoke directly to Williams of Barclays regarding the Chewco Side Letter's effect on the waterfall provision of the JEDI Revolver: "***[M]y take-away from my discussion with Mr. Williams was that he was very familiar with how [the deal] worked***." 10/24/06 Fastow Depo. Tr. at 348:15-21.

Indeed, the Barclays executives responsible for Chewco and JEDI knew the accounting requirements for the deal at the transaction's outset. *See, e.g.*, Ex. 10643 at BARC000001897; 7/22/04 Williams Depo. Tr. at 402-403; 6/14/04 Meyer Depo. Tr. at 142; 10/20/04 McKean Depo. Tr. at 94; 4/18/05 Esposito Depo. Tr. at 134; 9/30/04 Deposition Transcript of Robert Clemmens ("9/30/04 Clemmens Depo. Tr.") at 345, 414. Barclays nevertheless did the deal because it was hungry for future business from Enron and for the fees the transaction would yield. As Barclays acknowledged in an internal e-mail discussion, "this [was] not a structure [it] would consider for just anyone." Ex. 10135. And Barclays received handsome fees for its part in the scheme and was repaid every penny of the money it invested in the deal.

2. J.T. Holdings

Barclays acted with scienter in the J.T. Holdings deal. As the evidence described *supra* at §III.B.3. establishes, Barclays knew this transaction did not pass muster based on its own economics because Barclays did not believe the methanol plant in the structure was worth what Enron was valuing it at. In fact, credit officer Meyer testified "[Barclays was] concerned that [it] might end up on day-one of the lease with an asset ***whose market value was less than had been represented to [the bank]***."[72] 6/14/04 Meyer Depo. Tr. at 179:24-180:3. Barclays understood J.T. Holdings was "***[n]ot attractive as a book and hold asset but [Barclays decided to] agree [because it] . . . considered [the transaction] important from a relationship standpoint***." Ex. 10140. So, Barclays structured the transaction with verbal assurances to make sure any risk was "Enron risk."

Barclays did so despite the fact that it clearly understood that the 3% equity component of the SPE had to be "***at risk***" in order to avoid the consolidation of the debt involved into Enron's financial statements. Specifically, Barclays' credit officer Meyer stated that the "***entity that [was] the lessor of the asset to achieve non-consolidation [had] to be capitalized with at least 3 percent at risk independent equity***." 6/14/04 Meyer Depo. Tr. at 175:23-176:16.

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[72] Equally, a November 14, 2000 memo from Williams explains:

> In case of JT Holdings, we are not comfortable with the 5 year forecast of value attributable to the Methanol Plant – one of the two assets involved. While a credible case can be made that the value attributable to the storage facility implies a 1.56 X coverage ratio, this falls short of the norm of 4 X coverages for synthetic leases.

Ex. 10142.

With regard to the overvaluation, plaintiffs have "demonstrate[d] that Barclays participate[d] with scienter, knowing or severely reckless as to whether the assets involved were overvalued." *Enron*, 2006 U.S. Dist. LEXIS 88121, at *20 n.13. The testimony of Meyer, Fastow, McKean and a November 14, 2000 memo from Richard Williams all confirm this. *See supra*, §III.B.3. *See also* Ex. 10142.

As with the other transactions Barclays did with Enron, the Bank worked closely with Enron knowing the purpose of the transaction was explicitly to impact Enron's financial statements. Barclays "extend[ed] . . . the synthetic lease structure ***to keep the financing off balance sheet***." Ex. 10452. Barclays knew that the "***[t]he lease is important to Enron because of its off balance sheet attributes***." Ex. 10137.

3. Nikita

Barclays' acted with scienter in the Nikita deal. As the evidence described *supra* at §III.B.5. establishes, Barclays knew that although the deal appeared to be a true sale, this was a fiction – as the risk on the deal was removed by Enron's secret verbal assurance to Barclays.

Barclays also knew the assets in the deal were overvalued. According to Fastow, Williams of Barclays "was concerned about the value of . . . [the] methanol [plant involved in J.T. Holdings] and EOTT [in Nikita], that those assets may not be worth enough to support the transaction." 10/23/06 Fastow Depo. Tr. at 168:1-4. "***With respect to the methanol plant [at issue in J.T. Holdings] and the EOTT [Nikita] transaction, I can say that I recall discussions with Rich Williams of Barclays regarding the valuations of those assets, and I recall giving him assurances that they'd be okay***." *Id.* at 155:23-156:2.

"Lead Plaintiff must demonstrate that Barclays participate[d] with scienter, knowing or severely reckless as to whether the assets involved were overvalued." *Enron*, 2006 U.S. Dist. LEXIS 88121, at *20 n.13. Fastow has confirmed that Barclays was concerned that the assets in the deal were overvalued but engaged in the transaction once he had assured Williams that Barclays would not lose money on the deal.

4. Prepays

Barclays' scienter on the Roosevelt, Nixon and CSFB prepays is clear. As the evidence described *supra* at §II.B.4. establishes, Barclays knew that the contrived and circular Roosevelt, Nixon and CSFB prepays, *i.e*., pretend commodities trades, with Enron were not true commodities trades with economic risks, but were disguised loans with assured profits for Barclays. In one e-mail dated June 24, 1999, Barclays banker Taylor discusses Enron's "***extremely creative . . . financial engineering and [how] they appear to be able to make their published figures read just about anything they want them to***." Ex. 10122 at BRC000190470-71. Meyer, the senior credit officer responsible for the Enron account, confirmed these observations as to these fictional commodities transactions, discussing how the fictional nature of the deals would inevitably be misaccounted for on Enron's financial statements:

> Prepaid Crude Oil and Natural Gas – ***Don't for a second think that Enron is satisfying an operating need by selling these commodities forward. Although notionally they are agreeing to deliver the commodities in satisfaction of an obligation established at the time the banks pay for the commodities, in actual fact they are only borrowing money. Their [internal] accountant will credit the Revenue account, debit Cash, debit Revenue and credit Deferred Revenue. In other words he sees a sale but sets up a liability that is satisfied only as the commodities are delivered***. . . .
>
> . . . ***Volumes at Hand – It should be troubling for their accountants that the volumes to be delivered at the latest deal's final maturity are too large for physical delivery. This should make it painfully obvious that the transaction's essence is not about deferred revenue but rather plain ol' debt***.

Id. at BRC00190470. ***This e-mail circulated throughout Barclays*** and is an admission as to the fictitious bases of these transactions, which involved huge amounts of money and several of Enron's banks – CSFB, TD, Citibank, and Barclays – all working together, engaged in contrived, fictional transactions as part of their ongoing scheme to falsify Enron's financial statements.

In fact, Barclays' sophisticated bankers knew that the first of these huge prepay transactions they engaged in with Enron, *i.e*., Roosevelt, was a disguised loan engaged in at 1998 year-end for the purpose of distorting Enron's financial reports. An e-mail drafted by Taylor, dated February 25, 1999, explaining the Roosevelt transaction stated:

> ***Enron wanted to raise $500 million before their financial year end. . . .***
>
> ***Enron set up an SPV trust called Delta which borrowed $500 million from Citibank at a fixed rate of interest***. This money was then used to buy on a prepaid basis that amount of Enron's production ratably over the next three years. Delta would then sell the production in the market using Enron as the marketing agent. Insurance companies were used to insure the performance risk of Enron for the financing. ***To remove the price risk from both sides of the transaction, Enron approached us to execute a fixed for floating swap to revert the fixed price element of the pre pay to a market rate and similarly Delta needed the opposite swap to manage their fixed price exposure. We executed both swaps introducing a bid-offer that furnished us with a net present value of at least $250,000 and we charged an up-front fee of $250,000***.

Ex. 10596 at BARC000214691.

Barclays was fully aware that by 1998, Enron's publicly released financial statements grossly understated the Company's actual debt. Meyer discussed this in his deposition:

> Q. All right, sir, by 1998, 1999, whatever was the situation earlier than that, these off balance sheet transactions had become material to Enron's balance sheet?
>
> * * *
>
> A. There were enough credit equivalents out there that they were becoming material enough to have to be considered.
>
> Q. All right, sir. And you observed, did you not, sir, that if you did the analysis that you've described with debt equivalents and took them into account, Enron's debt would be billions of dollars or more than was reflected on the balance sheet?
>
> * * *
>
> A. The sum of Enron's debt as reflected on the balance sheet, plus its debt equivalents would have been several billion dollars greater than its debt alone.

6/14/04 Meyer Depo. Tr. at 114:17-115:13.

> Q. And you found that Enron was reporting the cash it received in these prepays as cash from operating activities, not cash from financings; correct, sir?

A. That was my belief.

6/15/04 Meyer Depo. Tr. at 257:11-15.

Barclays also knew that the banks "[could] not take physical delivery"[73] of the crude oil or natural gas, instead only money would be exchanged as prearranged at the outset – because the transactions were loans but called prepays to disguise the substance of the actual transaction. Smith, a senior Barclays officer, noted: "As it [Nixon] is essentially a loan we should recognise the income over the period of the loan." Ex. 10605 at BARC000346804. The natural gas and crude oil involved in these fictional commodities trades was never delivered, nor was it ever contemplated that it would be. Additionally, there was never any market or price risk to the banks involved – including Barclays.

Barclays engaged in these fictional commodities trades, *i.e.*, disguised loans, for its own financial gain. Not only did Barclays pocket the pre-agreed profits these deals created for its complicit conduct, it also ensured the Bank would play a key role in the ongoing scheme ***so it could get more profitable business from Enron*** as the scheme rolled on. Jefferson, a Barclays banker, e-mailed the following to Barclays Capital CEO Bob Diamond and others on November 26, 1999: "[W]hen we are able (hopefully) to confirm the bridge ***loan*** it would be valuable if you called Andy

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73 Taylor admitted during deposition:

Q. In 1999 was Barclays able to take physical delivery of crude oil?

A. No, I don't believe so.

* * *

Q. Okay. So in just the commodities section that you're familiar with, was Barclays, that you're familiar with, able to take physical delivery of natural gas?

A. No.

8/11/04 Taylor Depo. Tr. at 154:6-155:6.

Fastow, (the CFO) and ***used our response to this approach to reinforce our credentials and v.[very] strong desire to lead manage their next Euro bond***." Ex. 50931 at BARC000207173.

Barclays' scienter as to Roosevelt, Nixon and CSFB is established.

5. SO_2

Barclays' scienter in the SO_2 deal is clear given the evidence discussed *supra* at §III.B.2. because that evidence establishes that Barclays knew that to achieve off-balance-sheet treatment, the SO_2 transaction had to appear to be a "true sale." Barclays knew, however, that the SO_2 transaction was not a true sale. Barclays understood that since it set up and controlled Colonnade (the SPE in the deal), any transactions it had with Colonnade would not be at arm's length.

Barclays also knew the sole purpose of the SO_2 transactions was to create the false appearance of funds flow from operations for Enron. A Barclays SO_2 Executive Summary explains:

> The underlying driver behind this [Enron's] request is a desire by Enron to "monetize" its trading stock. A significant business relationship already exists between the Commodities Team and Enron. Discussions have continued, based on this track record, to seek ways of meeting the company's needs through innovative financing structures. It is this need which this structure aims to satisfy but by a mechanism which leaves Barclays fully secured, with a sufficient margin and no or minimal Enron risk.

Ex. 10334 at BARC000190600. Barclays knew that "[t]hese transactions have the effect of significantly under-stating the debt level and assets on the balance sheet." *Id*. at BARC000190601.

Barclays even expressed concern about the accounting-driven nature of the deal:

> ***The committee asked whether the deal was primarily for accounting/reporting reasons. The values of Barclays Bank suggest that we would be reluctant to do a deal that was done for solely accounting reasons. Given that we are on both sides of the relationship, the committee was also concerned about disclosure issues***.

Ex. 6 at BARC000190419-20. Barclays also knew that the SO_2 transaction was "***for 'window dressing' purposes***" (Ex. 10334 at BARC000190600), meaning to ***give the appearance of***

> a transaction or potentially a series of transactions, the effect of which is – ***the effect of which is to change the presentation of the company's accounts, and in***

particular, its balance sheet, from what it would have been without that transaction taking place.

* * *

In a different way from how the financials would have presented had the transaction also, as a transaction, not taken place.

6/16/05 LeVersha Depo. Tr. at 100:4-22, 102:17-20.

In the SO_2 transaction, Barclays was aware of the deceptions it would have to use to give the deal the false appearance necessary for passing Andersen's heightened ***smell test*** for off-balance-sheet treatment of an SPE. In preparation for creating a structure for Enron, Barclays studied Andersen's requirements. Barclays "seasoned" Colonnade with a series of short, economically meaningless trades for this precise reason:

Recent tightening of US GAAP regulations with regard to SVP's [sic] has led to the need of incorporating an SVP [sic] that closely resembles an operating company. To this end the SVP [sic] will before it transacts with Enron, undertake a number of short dated FX, metal funding and murabaha transactions. This diverse transactional trading history is crucial to the success of achieving off-balance sheet treatment for our client. Once the Enron transaction closes, it is not intended that any further transactions will be entered into by the SPV [sic].

Ex. 50779 at BRC000082647.

Barclays also knew that the SO_2 deals did not meet the smell test laid out by Andersen because its auditor, Oldfield of PricewaterhouseCoopers, repeatedly told Barclays that Enron could not achieve off-balance-sheet treatment because the transaction was not an arm's-length true sale, *i.e.*, the deal did not "work" for Barclays' client, Enron. Ex. 10327. *See also* Ex. 10328 ("I am still worried about whether this works for your client."). Oldfield's view was clear:

The substance of this structure ensures that Enron still has access to the economic risk and rewards of the commodity securities it sells to the SPV by virtue of the market derivative contract it undertakes with BBPLC. As such, there is a strong argument that Enron has not managed to derecognise the assets off the balance sheet, either through not being able to achieve a sale in substance or by having to consolidate the SPV (for which it can be argued that Enron is the sponsor). Either way the asset would remain on its balance sheet.

Ex. 10330. At every turn of the SO_2 transaction, Barclays' scienter is evident.

6. Metals

Barclays acted with scienter in the Metals transactions. The evidence described *supra* at §III.B.6. establishes that Barclays knew its mission was "to get the $2 billion of inventory financing off the balance sheet" for Enron. Ex. 50926. Senior Barclays banker LeVersha wrote: "We are also aware that the company [Enron] enters into off balance sheet transactions whereby it sells and subsequently has the option to repurchase assets. . . . ***These transactions have the effect of significantly under-stating the debt level and assets on the balance sheet***." Ex. 10334 at BARC000190601; 6/16/05 LeVersha Depo. Tr. at 111:17-19. Barclays had verbal guarantees that that the options in the Metals deals would always be exercised by Enron.

A Barclays' e-mail dated August 8, 2000, from Smith to Bill Appleby of Enron, copying a number of high-level Barclays and Enron employees, further confirms that "[t]he first thing that needs to be established is that ***these are being priced on the understanding that the options are going to be exercised, i.e., it is understood that the purpose of the option is to meet accounting requirements not to give trading opportunity***." Ex. 50788 at ECTe003431430. In essence, Barclays knew full well the deal was not going to be executed the way it was documented, which demonstrates scienter.

VI. THERE IS A TRIABLE ISSUE OF FACT THAT BARCLAYS' DECEPTIVE CONDUCT WAS IN CONNECTION WITH A PURCHASE OR SALE OF SECURITIES

Barclays argues Lead Plaintiff's claims fail because conduct by the Bank was not "'in connection with' the purchase or sale of any Enron securities." Motion at 30-33. Barclays is incorrect.

As the Ninth Circuit held in the *Homestore* case, "[t]hat every participant in the scheme did not release the information to the public does not diminish the causal connection between all defendants in the scheme and the securities market." 452 F.3d at 1051. Rather, "a scheme to misrepresent the publicly reported revenue of a company may coincide with the purchase or sale of securities because the scheme will not be complete until the fraudulent information is introduced into the securities market." *Id*.

As support for its argument, Barclays relies on the Court's prior order regarding Milbank Tweed. That opinion, however, dealing with a law firm defendant, did ***not*** analyze the "in connection with requirement" at all. Instead, in one sentence the Court holds certain transactions, where Milbank Tweed served as counsel, were not "in connection with" securities sales or purchases. *In re Enron Corp. Sec. Litig.*, No. H-04-0088, 2005 U.S. Dist. LEXIS 39927, at *61-*62 (S.D. Tex. Dec. 5, 2005). Barclays ignores other orders where the Court actually addresses the "in connection with" requirement, because, of course, those decisions are wholly apt here. For example, in denying the RBC defendants' motion to dismiss the Court noted:

> Here Plaintiff alleges that RBC Defendants actively participating in a material course of business, comprised of a number of key transactions employing repeated fraudulent mechanisms, all part of a larger *Ponzi* scheme, that operated as a fraud or deceit relating to the sale or purchase of securities; with scienter RBC Defendants purportedly engaged in series of deceptive transactions (disguised loans), in and central to a scheme and course of business operating to manipulate Enron's financial statements and paint a falsely inflated picture of Enron's financial condition to the investing public. *Zandford*, 535 U.S. at 821 ("It is enough that the scheme to defraud and the sale of securities coincide.").

In re Enron Corp. Sec. *Litig.*, No. H-04-0087, 2005 U.S. Dist. LEXIS 41240, at *50 (S.D. Tex. Dec. 22, 2005).

Similarly, the Ninth Circuit's reasoning in *Homestore* is in accord with the evidence against Barclays. Here, as in *Homestore*: "If multiple participants used or employed a deceptive device in furtherance of a scheme to misinterpret the reported revenues of a company, then ***all participants*** may be viewed as having acted in connection with the purchase or sale of securities." 452 F.3d at 1051. This reasoning applies to Barclays' conduct. Each of the fraudulent transactions Lead Plaintiff has pursued against Barclays was used to misrepresent Enron's financial statements –

whether via a falsification of cash flow from operations, overstatement of income, or an understatement of debt levels – and all participants in the scheme, including Barclays, may properly be viewed as having acted "in connection with" the purchase or sale of Enron securities.

The Supreme Court's decision in *Zandford* also supports plaintiffs. In *Zandford,* the Court held conduct by a banker was a fraudulent scheme to defraud that was "in connection with" the sale of securities even though there was no deception regarding the value of a security or manipulation of a particular security. 535 U.S. at 821. Barclays tries to distance itself from this holding by weakly arguing its transactions with Enron did not "coincide" with the purchase or sale of securities. Motion at 31. Nonsense. As in *Zandford*, Barclays' scheme to defraud perfectly coincides with investors' purchases or sales, for without Barclays' conduct Enron's financials would not then have included such fraudulent information.

VII. THERE IS A TRIABLE ISSUE OF FACT AS TO LOSS CAUSATION

At the outset, Lead Plaintiff notes that the loss causation issue is particularly ill-suited for resolution on a motion for summary judgment. As many Circuit Courts have concluded, the issue is better left for trial. *See EP Medsystems, Inc. v. Echocath, Inc.*, 235 F.3d 865, 884 (3d Cir. 2000) ("Whether the plaintiff has proven causation is usually reserved for the trier of fact.") (citing *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549-50 (5th Cir. 1981)); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (Whether "the loss was caused by an intervening event . . . is a matter of proof at trial."); *Wortley v. Camplin,* 333 F.3d 284, 295 (1st Cir. 2003) ("Proximate causation and intervening cause are usually issues for the jury to resolve.").

But even if the loss causation issue is examined here, it should be resolved in Lead Plaintiff's favor. Barclays argues that imposing joint-and-several liability for engaging with others in a massive scheme to defraud is contrary to the PSLRA's loss-causation requirement, which places on

Lead Plaintiff the "burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. §78u-4(b)(4). *See* Motion at 48. This is absurd. To prove loss causation or proximate cause, a plaintiff need only prove that a defendant's conduct was a ***substantial or significant factor*** in the loss caused – not the sole or only factor. Further, by focusing on the singular "the defendant," and ignoring the fundamental federal statutory construction rule that "***words importing the singular include and apply to several persons, parties or things***" (1 U.S.C. §1), Barclays insists this means Lead Plaintiff must prove a separate loss attributable to each defendant. Motion at 80. This has never been a requirement in a §10(b) case and the Code itself mandates that the singular "defendant" be read "defendants." This is consistent with the PSLRA, which clearly imposes joint-and-several liability on multiple defendants who commit "knowing" violations as part of a complex scheme to defraud.

Barclays would have this Court change the wording of the PSLRA's loss-causation provision to say plaintiff has the burden of proving the act or omission of "***each***" defendant caused a ***separate*** loss, rather than that plaintiff's loss was caused by the "act or omission of the defendant[s]," which is what it actually says. 15 U.S.C. §78u-4(b)(4). Congress knew how to use the word "each" in the statute when it was necessary to accomplish what it intended. The word "each" appears 22 times in the PSLRA, including many references to defendants, *i.e.*, a defendant has the right to have the jury answer a written interrogatory "on the issue of ***each*** such defendant's state of mind." 15 U.S.C. §78u-4(d). Class-wide damages must be proved by plaintiffs and must be proximately caused by defendants' acts. The jury also determines which defendants acted knowingly and which acted recklessly. It also weighs the nature of each defendant's conduct to fix their percentage of responsibility. Then the joint-and-several and/or proportionate liability provisions kick in, subject to the detailed series of judgment reductions, up-charges, and contribution rights which Congress created to balance the rights of victims and violators.

A. There Is a Triable Issue of Fact that Barclays' Conduct Caused Plaintiffs to Suffer Losses

Lead Plaintiff's losses were a foreseeable result of, and caused by, Barclays' conduct. Barclays' conduct concealed the true financial condition of Enron and the material risk Enron would suffer a liquidity crisis causing it to become insolvent. Barclays' concealment caused Enron's securities to trade at artificially inflated prices. When the true financial condition of Enron could no longer be concealed and disclosures of Enron's true financial condition leaked into the market in 2001, the prices for Enron's publicly traded securities collapsed. As a result, plaintiffs were damaged.

The Court endorsed Lead Plaintiff's theory of damages as to Barclays in its July 20, 2006 Order, holding causation is pleaded where "plaintiff's loss was foreseeable and was caused by the materialization of the concealed risk." *Enron*, 439 F. Supp. 2d at 714. *See also Enron*, 2005 U.S. Dist. LEXIS 41240, at *69-*71 (finding the same legal standard and theory sufficient to state a claim as to defendant RBC). The Court also held that Lead Plaintiff's allegations adequately demonstrate loss causation as to Barclays. *Enron*, 439 F. Supp. 2d at 724. The Court's December 4, 2006 Order also supports Lead Plaintiff, for there the Court held that had Lead Plaintiff pleaded against Barclays a timely, primary violation of §10(b) which significantly contributed to and, as part of the alleged scheme, had the foreseeable effect of concealing the risk that Enron would be unable to service its debt and end in bankruptcy, thereby causing plaintiffs' losses, Lead Plaintiff could have sufficiently pleaded loss causation. *Enron*, 2006 U.S. Dist. LEXIS 88121, at *14-*15. "This Court also opined that pleading the disclosure of similar primary violations of §10(b) with the same purpose by other defendants in an alleged scheme that was a substantial cause of plaintiffs' losses is sufficient to plead loss causation for a primary violator unmasked subsequently." *Id*. The evidence amply supports plaintiffs' allegations the Court relied upon in reaching this conclusion. Accordingly, there is sufficient evidence for a reasonable jury to find Barclays caused plaintiffs' losses.

There is also sufficient evidence for a reasonable jury to conclude Barclays concealed Enron's true financial condition and caused Enron's securities to be overpriced. Lead Plaintiff's accounting expert, Saul Solomon, concluded that Barclays' transactions caused Enron's financial statements to be materially misleading.[74] By causing Enron's financial statements to be materially misleading, Barclays concealed the true financial condition of Enron. As a result, Barclays' conduct, along with that of other defendants, concealed Enron's long-term viability and solvency. *See* Black Report at 74 (concluding Enron was actually cash flow insolvent no later than the end of 1998 despite reporting financial results to the contrary). In addition, by concealing Enron's true financial condition and causing Enron's financial statements to be artificially inflated, Barclays caused Enron's securities to trade at artificially inflated prices.[75]

A reasonable jury could conclude that the artificial inflation in the price for Enron securities, caused by Barclays, was subsequently removed when the truth leaked into the marketplace.

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[74] The SO_2 transaction caused Enron's cash flow from operations to be overstated by $167.6 million and caused its debt to be understated by $167.6 million. Solomon Report at 133. The Metals/Camelot transaction caused Enron's cash flow from operations to be overstated by $1400 million and caused its debt to be understated by $1400 million. *Id*. The Roosevelt pre-pay transaction caused Enron's cash from operating activities to be overstated by $500 million and caused its debt and financing cash flow to be understated by $500 million. Solomon App. at 42. The Nixon pre-pay transaction caused Enron's cash from operating activities to be overstated by $324 million and caused its debt and financing cash flow to be understated by $324 million. *Id*. at 57. The CSFB prepay transaction caused Enron's cash from operating activities to be overstated by $150 million and caused its debt and financing cash flow to be understated by $150 million. *Id*. at 103. The J.T. Holdings transaction caused Enron's cash flow from operations to be overstated by $110 million and caused its debt to be understated by $110 million. Solomon Report at 133. The Nikita transaction caused Enron's income to be overstated by $10 million, its investing cash flow to be overstated by $80 million and caused its debt and financing cash flow to be understated by $80 million. Solomon App. at 230.

[75] *See, e.g.*, 1/17/06 Expert Report of Blaine F. Nye, Ph.D. ("Nye Report") at 23-31; 11/9/04 Deposition Transcript of David Fleischer ("11/9/04 Fleischer Depo. Tr.") at 55:20-56:10 (noting that if Enron "did not report financial earnings or other financial metrics in line with its projections during the period between 1997 and second quarter of 2001" its "stock would have been punished").

Numerous disclosures in 2001 revealed the truth concealed by Barclays and the other defendants. As explained by plaintiffs' damages expert:

> Defendants' misrepresentations and omissions caused Enron securities to be overpriced because investors were led to believe: that Enron and Enron-related debt had less credit risk than it actually had in the Class Period and that Enron could repay the debt it had assumed; that Enron's common stock represented shares in a Company which generated much more operating cash flow than it actually generated; that Enron's earnings had repeatedly met or exceeded investor expectations; and that Enron's economic earnings would grow at a rapid rate. This was the fraud: the inflation of Enron's financial health and prospects to make the Company appear a far better and less risky investment than it was. When in the latter part of the Class Period, a series of events and disclosures revealed the true risk of investing in Enron and a more accurate picture of its finances, operations, and prospects, the prices of Enron securities declined on those events and disclosures, and finally on November 28, 2001, reached a level which represented their true value. The cause of investors' economic losses was the inflation caused by the concealment of Enron's true risk, financial condition, performance, and prospects, resulting in inflated prices of Enron securities, followed by the disclosure of the truth about these subjects, events and disclosures which caused the prices of Enron's securities to decline precipitously.

4/13/06 Rebuttal Report of Blaine F. Nye, Ph.D. at 5. Lead Plaintiff's damages expert sets forth in great detail the series of leaks and partial disclosures in 2001 revealing to the marketplace that Enron's true financial condition was not what investors had previously been led to believe. *See* Nye Report at 66-118.

Lead Plaintiff offers more than sufficient evidence to establish a triable issue of fact as to whether Barclays concealed Enron's true financial condition, which, when exposed, foreseeably caused investors' losses. The testimony of Lead Plaintiff's expert on damages, well supported by the evidence, is sufficient by itself for this issue of loss causation to go to a jury.[76]

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[76] *See, e.g., In re Worldcom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 500 (S.D.N.Y. 2005) ("[A] jury will have to determine which expert's analysis is more compelling and reliable. . . . Indeed, 'where, as here, there are conflicting expert reports presented, courts are wary of granting summary judgment.'"). *See also Provenz*, 102 F.3d at 1490 ("'As a general rule, summary judgment is inappropriate where an expert's testimony supports the non-moving party's case.'"); *Sightsound.com, Inc. v. N2K, Inc.*, 391 F. Supp. 2d 321, 354 (W.D. Pa. 2003) ("Conflicts in the

Barclays argues: "Plaintiffs have not even attempted to demonstrate damages caused by Barclays' (as opposed to others') conduct." Motion at 49. In support of this argument, Barclays contends that plaintiffs must show the "challenged transactions with Barclays caused artificial stock price inflation" and "stock price decreases upon . . . 'corrective disclosures' relating to prior statements about transactions with Barclays." *Id*. at 49-50. Barclays is wrong on several fronts. ***First***, there is no requirement of "corrective disclosures." *Enron*, 439 F. Supp. 2d at 701 n.10 ("the majority [of courts] appear to have concluded that methods other than corrective disclosures satisfy *Dura's* requirement for pleading loss causation"); *id*. at 724 (disclosure of the truth "need not be by corrective disclosure"). ***Second***, plaintiffs have also demonstrated that the Barclays transactions materially affected Enron's financial results and therefore did cause artificial stock price inflation (as well as price inflation for other Enron securities). ***Third***, the Court recently concluded that plaintiffs need not demonstrate that disclosures specifically concerning Barclays' conduct resulted in Enron's crash. *See Enron*, 439 F. Supp. 2d at 724 ("Disclosure of the roles of some primary violators . . . should be viewed as sufficient to show loss causation for later-disclosed actions . . . in the same scheme.").

B. The PSLRA's Loss-Causation Requirement Does Not Preclude Class Actions Against Knowing Violators, Who the Statute Provides Shall Be Jointly and Severally Liable

Securities fraud class actions often involve multiple defendants, whose acts can make them jointly and severally liable. Prior to 1995, the parameters of joint-and-several liability were

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evidence on factual issues are not to be resolved on summary judgment, particularly where those conflicts arise from competing expert opinions, the resolution of which is a matter reserved to the jury."); *Real v. Bunn-O-Matic Corp.*, 119 F. Supp. 2d 807, 811 (N.D. Ill. 2000) ("Bunn-O-Matic now asks this Court to find that, despite the conflicting opinions of expert witnesses, there is no genuine issue of material fact, and to rule as a matter of law . . . . It asks too much. This is an issue for trial.").

judicially determined, defining the contours of the Rule 10b-5 remedy. In 1995, Congress passed the PSLRA and included a detailed section covering joint-and-several liability. Congress expressly provided that defendants will normally only face proportionate liability, unless the defendants are proven to have "***knowingly***" violated the securities laws, triggering joint-and-several responsibility for all of plaintiff's damages. Congress has legislated in a comprehensive manner the issue of joint-and-several liability under §10(b).

In enacting the PSLRA, Congress was concerned about the impact of joint-and-several liability in securities cases which then attached for even "non-knowing" violators – "[u]nder current law, a single defendant who has been found to be 1% liable may be forced to pay 100% of the damages." H.R. Rep. No. 104-369, at 63-64 (1995) (Conf. Rep.). "'[T]hose whose involvement might only be peripheral and lacked any deliberate and ***knowing*** participation in the fraud often pay the most in damages.'" H.R. Rep. No. 104-369, at 64. Because of concern about the fairness of §10(b) litigation and because of the adverse consequences of joint-and-several liability on non-knowing violators, several witnesses (including former SEC Chairmen) advocated modifying the joint-and-several liability provisions. H.R. Rep. No. 104-369, at 63-64. Congress struck a balance. "The Committee modifies joint-and-several liability to eliminate unfairness and ***to reconcile the conflicting interests of investors*** in a manner designed to best protect the interests of all investors – those who are plaintiffs in a particular case, those who are investors in the defendant company, and those who invest in other companies." S. Rep. No. 104-98, at 84 (1995).

The clear language of the PSLRA calls for joint-and-several liability whenever multiple parties knowingly engage in a fraudulent scheme by providing: "***Any covered person against whom a final judgment is entered*** in a private action ***shall be liable for damages jointly and severally*** only ***if the trier of fact specifically determines*** that such covered person ***knowingly committed a violation*** of the securities laws." 15 U.S.C. §78u-4(f)(2)(A). The joint-and-several provision will only be involved if the jury finds that a defendant "***knowingly***" committed a violation of the securities laws. And it indicates that the knowing violator "against whom a final judgment is entered" shall be liable for the entire judgment – not some fraction of it based upon the loss or portion of the loss that defendant individually caused.

Critically, despite Barclays' claim to the contrary, ***none*** of the bank defendants in the litigation, including Barclays, face any certainty of joint-and-several liability. Whether they are jointly and severally liable or proportionately liable will depend on the proof at trial. Congress was very deliberate in enacting the provisions related to joint-and-several liability. In addition to determining if each defendant was a knowing or non-knowing violator, the jury will also consider the "***conduct***" of each person claimed ***by any party*** to be liable. 15 U.S.C. §78u-4(f)(3)(C)(ii). The statute contemplates liability shared by multiple violators, with varying degrees of knowledge and fault, by requiring the jury to evaluate each defendant's "percentage of responsibility" to be "measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred." 15 U.S.C. §78u-4(f)(3)(A)(ii). The statute provides that in determining proportionate fault, the "[f]actors for consideration" the jury "shall" consider include:

> (i) the ***nature of the conduct*** of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs; and
>
> (ii) the nature and extent of the ***causal relationship*** between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs.

15 U.S.C. §78u-4(f)(3)(C).

Thus, in determining proportionate fault, the jury is not limited to the precise dollar figure of a given transaction or its impact on earnings. In fact, if the jury finds the "***nature***" of one defendant's "***conduct***" is more important to the scheme, that defendant's proportionate fault could be higher, despite fewer transactions at a lower dollar figure with a smaller impact on earnings. Even in a non-knowing situation, a defendant such as Barclays could be found responsible for a greater portion of damages if the jury finds that its actions ("***nature of the conduct***") were of greater significance to the scheme.[77]

Again, the real protection from unwarranted liability is that a defendant is only liable, even in the knowing context, for the scheme that defendant engages in. In this case, for class-certification purposes the district court has determined one overarching scheme. *Enron*, 236 F.R.D. at 316. This scheme led to the financial collapse of Enron. If a jury determines any given defendant's scienter only amounts to recklessness, then that defendant is not a "knowing" violator and is only subject to liability based on its proportionate fault. 15 U.S.C. §78u-4(f)(10)(B).

In 1995, when the PSLRA was passed, the case law was unequivocal: "***Liability in Rule 10b-5 cases is strictly joint and several and is <u>never</u> allocated among individual defendants in deciding the plaintiff's claim***." *TBG, Inc. v. Bendis*, 36 F.3d 916, 927 (10th Cir. 1994) (citing *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 963 (5th Cir. 1981)). Congress understood the broad scope of joint-and-several liability then existing, and Congress struck a new, detailed and explicit statutory balance. Congress could have further restricted the imposition of such liability; but Congress clearly did not.[78]

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[77] In this case, Citigroup, JP Morgan and CIBC have paid $6.6 billion. This amount or the proportionate fault of these settling parties (and any others), whichever is greater, can reduce judgment that Barclays would have to pay even if it was found they are "knowing" violators.

[78] This standard rule of tort liability supports the statute. "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." *Restatement of Law (Second) of Torts* §875 (1979). An injured person may sue any tortfeasor "for the full amount of damages for an indivisible injury" that its misconduct was a substantial factor in causing, even if others' wrongs contributed to the loss. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979); *accord Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 582 (5th Cir. 1983) (approving "imposition of joint and several liability on persons whose separate wrongful actions, not done in concert, contribute in unknown proportions to cause an indivisible injury"); *Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680, 687 (D.C. Cir. 1987) (where multiple defendants' fraudulent acts and statements produce a single loss, each is jointly and severally liable for the entire injury caused). As stated in *The Law of*

C. Barclays' Argument for Mini-Schemes Is Unsupported by Law

Barclays argues that it should only be jointly and severally liable for the individual transactions it engaged in, as opposed to being jointly and severally liable for all of plaintiffs' losses. Motion at 80-81. The Financial Institution Defendants have previously sought to break down the class[79] and the Court has not adopted this position. Barclays' argument, that the Court should restrict liability for each defendant to only the individual "mini-schemes" that the defendant participated in is not only contrary to the evidence and the theory of this case endorsed by the Court, it is contrary to the PSLRA. The statute states:

> In any private action, the court shall instruct the jury to answer special interrogatories . . . with respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to ***the loss*** incurred by the plaintiff . . . concerning . . . (ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to ***the loss*** incurred by the plaintiff and (iii) whether such person knowingly committed a violation of the securities laws. . . . The responses to interrogatories, or findings, as appropriate, under subparagraph (A) shall specify ***the total amount of damages that the plaintiff is entitled to recover*** and the percentage of responsibility of each covered person found to have caused or contributed to ***the loss*** incurred by the plaintiff or plaintiffs.

15 U.S.C. §78u-4(f)(3). Thus, under the PSLRA the jury is to determine "the total amount of damages that the plaintiff is entitled to recover" and if a defendant "knowingly committed a violation of the securities laws." *Id.* The defendant is jointly and severally liable for "the loss" suffered by plaintiffs. The PSLRA does not contemplate that the jury may find plaintiffs suffered multiple

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Torts, "[I]f [a] person acts to produce injury with full knowledge that others are acting in a similar manner and that such conduct will contribute to produce a single harm, a joint tort has been consummated even where there is no prearranged plan." 3 Fowler V. Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts*, §10.1, at 14 (2d ed. 1986).

[79] The Financial Institution Defendants' Memorandum of Law in Opposition to Lead Plaintiff's Amended Motion for Class Certification (Docket No. 1788).

different and distinct losses and Barclays offers no legitimate justification or authority for the Court to deviate from the clear text of the PSLRA in this regard.[80]

There is no requirement here that Lead Plaintiff demonstrate Barclays was the sole cause of loss here. To show proximate cause, "'the plaintiff need not show that the defendant's act was the sole and exclusive cause of the injury he has suffered; 'he need only show that it was "substantial," *i.e.*, a significant contributing cause.""" *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) (quoting *Bruschi v. Brown,* 876 F.2d 1526, 1531 (11th Cir. 1989)); *see* 4 Harper, James & Gray, *supra*, §20.2, at 91 (proximate cause is "not a quest for ***sole*** cause"). And the PSLRA's provisions on allocating liability for damages clearly indicate that those who "***contributed to*** the loss incurred by the plaintiff" may be liable for a larger amount than was caused by their individual actions standing alone. 15 U.S.C. §78u-4(f)(3)(A)-(4)(A).

Barclays' loss-causation arguments also suggest it did not understand the nature or scope of the Enron scheme, when, in fact, it understood the purpose of its deceptive acts as part of the broader scheme. Motion at 71-76. This is what the evidence will show – on a fully developed record. As but one example, the evidence shows as follows:

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[80] In reviewing the PSLRA's joint-and-several liability provisions, the court in *In re WorldCom Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 3791, at *23-*24 (S.D.N.Y. Mar. 15, 2005), held: Under ***joint and several liability***, "'when two or more persons' torts together cause an injury, each tortfeasor is liable to the victim for the total damages'" (citing *In re Masters Mates & Pilots Pension Fund*, 957 F.2d 1020, 1027 (2d Cir. 1992)). Under this doctrine, a "tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury." *Edmonds*, 443 U.S. at 260 n.8. For this reason, a plaintiff may satisfy an entire judgment against one of several tortfeasors. *Id*. The Supreme Court has recognized that ***joint-and-several liability*** might "result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency." *McDermott, Inc. v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202, 221 (1994). The policy behind this allocation of liability is clear: "When the limitations on the plaintiff's recovery arise from outside forces, ***joint-and-several liability*** makes the other defendants, rather than an ***innocent plaintiff***, responsible for the shortfall." *Id*.

In Barclays' July 2, 1999 Enron Corp. Annual Review written by Meyer, Barclays recalculates Enron's balance sheet, in part, by adding debt for certain transactions back onto Enron's books. Ex. 10155. Barclays determined that Enron's actual year-end 1998 debt was at least $11.9 billion as opposed the publicly reported amount of $7.4 billion – a 38% understatement.[81] The transactions characterized by Barclays as debt and added back onto Enron's balance sheet included those executed by ***other*** banks as well as those done by Barclays.

> Minority Interest Financings – Enron had two such structures outstanding at year-end: ***Rawhide and Nighthawk***. They totaled $1.3 billion. In this structure, debt masquerades as a limited partnership interest and is therefore included in Minority Interest. . . .
>
> . . . Structured Sale of Equity Interest – Enron executed two transactions at year-end that raised $1.0 billion and $600 million in the bank market to fund the purchase of 50% of the Azurix/Wessex Water group and 49% of the Elektro group by the ***Marlin and Firefly*** transactions, respectively. The transactions allowed Enron to deconsolidate their remaining investment in the two groups.

Ex. 10155 at BRC000106846. Rawhide, Marlin and Firefly were all executed by ***CSFB*** and Nighthawk was done by ***Citigroup***. Barclays was aware of the other banks' dealings with Enron and, particularly, how those transactions worked to disguise Enron debt. This flies in the face of Barclays' claim that "Barclays cannot be liable on the basis of, or for damages resulting from, an alleged overarching 'Ponzi scheme' as to which Barclays was not involved and did not know about." Motion at 71. Barclays was clearly part of the scheme at play in the Enron fraud and knew the scheme was much broader than just its own contribution to Enron's façade. Similarly, Barclays' argument that adding back on the balance sheet deals done with other banks "merely adjusts" from a credit perspective Enron's balance sheet rings hollow. *Id.* at 74. Barclay's officials knew of, and

[81] Barclays continued to be in the know about Enron's transactions with its key financial institutions and continued the practice of recalculating Enron's balance sheet throughout the Class Period. For 1999 Barclays knew Enron's true debt was at least $14.3 billion rather than the $10.7 billion Enron reported – a 25% understatement. For the year 2000, Barclays added back $6.1 billion onto Enron's books. Exs. 10157, 10126.

carefully considered, various off-balance-sheet items when determining the level of risk the Bank was willing to live with. This was critical information regarding the scheme unavailable to investors.

Moreover, the Court has already established a comprehensive legal framework for proving loss causation. *Enron*, 2005 U.S. Dist. LEXIS 41240, at *45-*74 (denying RBC motion to dismiss); *see also Enron*, 439 F. Supp. 2d 692 (Barclays motion for judgment on the pleadings). In the Court's July 20, 2006 Order, it held loss-causation requirements will be satisfied when Lead Plaintiff shows both that a defendant "'created the appearance of assets or revenue where there was none and therefore concealed, among other things, the risks that [Enron] would be unable to service its debt and consequently suffer financial collapse,'" and that the "risk materialized." *Enron*, 439 F. Supp. 2d at 712; *see also id.* at 720 (discussing loss-causation holding of *Parmalat I*, 376 F. Supp. 2d at 510).

Dr. Hakala, Lead Plaintiff's expert, opined:

> "To the extent that Defendants' wrongful conduct caused purchasers of Enron's securities during the Class Period to pay inflated prices and to suffer greater losses than otherwise would have occurred, that greater than otherwise portion of their investment losses attributable to the fraud alleged is logically and economically caused by the fraud."

4/13/06 Expert Rebuttal Report of Scott Hakala ("Hakala Rebuttal Report") at ¶9. This is wholly consistent with the Court's prior holdings regarding loss causation. Barclays' assertion that plaintiffs' experts have not conducted an analysis that takes account of *Dura* (Motion at 82) is belied by Hakala's report which extensively discusses *Dura* in its analysis. *See* Hakala Rebuttal Report, ¶¶7-12. Barclays urges the Court to "exclude[] as a matter of law" plaintiffs' expert Blaine Nye's damage analysis. Motion at 84. Barclays has not moved to strike Dr. Nye's analysis and its attempt to exclude consideration of his analysis is misplaced and procedurally improper.

Additional evidence regarding loss causation comes from Andersen audit partners who have testified that had they known of the collusion between Enron and Barclays, this would have led to the withdrawal of Andersen's audit opinions and the resignation of Andersen.[82] Hiding Enron's true financial condition also maintained Enron's investment-grade credit rating. Barclays hid Enron's true financial condition from the rating agencies, causing investors to misperceive Enron's true creditworthiness. As discussed by Dr. Nye, "[m]aintaining an investment-grade credit rating was essential to Enron," primarily to allow the Company's wholesale segment to maintain credit with, and confidence of, its trading counterparties. Nye Report at 38. Fastow's testimony also helps demonstrate that Barclays transactions that created the false appearance of funds flow and earnings, and that concealed debt, contributed to maintaining Enron's investment-grade credit rating:

> Q. Did creating the false appearance of funds flow contribute to Enron maintaining its investment-grade credit rating?
>
> A. Yes.
>
> * * *
>
> Q. Did the creating of – creation of false appearance of earnings through structured-finance transactions contribute to Enron maintaining its investment-grade credit rating?
>
> * * *
>
> A. Yes, and to – to meet earnings expectations of Wall Street.
>
> * * *
>
> Q. . . . Did reducing and concealing debt through structured-finance transactions contribute to Enron maintaining its investment-grade credit rating?
>
> * * *

[82] One need only look to the withdrawal of Andersen's audit opinions upon discovery of the Chewco Side Letter as a proxy for what would have happened if Barclays' full role in the fraud was revealed earlier. *See also* discussion *supra* regarding J.T. Holdings and Nikita.

A. I believe so, yes.

10/24/06 Fastow Depo. Tr. at 525:8-529:17.

As demonstrated herein, the transactions for which Barclays is responsible contributed to artificially maintaining Enron's investment-grade credit rating by causing one or more of each of the financial statement manipulations described by Fastow. And of course, when Enron came crashing down, investors' "loss was foreseeable and was caused by the materialization of the concealed risk." *Enron*, 439 F. Supp. 2d at 714.

The Court has held that "where a defendant knowingly engaged in a primary violation of federal securities laws that was in furtherance of a larger scheme, it should be jointly and severally liable for the loss caused by the entire overarching scheme, including conduct of other scheme participants about which it knew nothing. Indeed, express joint and several liability in the statute is a meaningless concept if it is limited to a defendant's own wrongdoing." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *222.

This Court found here there is one "overarching scheme, arising from a common nucleus of facts and common course of conduct, to misrepresent Enron's financial status, fool credit rating agencies, and deceive investors." *Enron*, 236 F.R.D. at 316. Fastow's testimony (taken after the class-certification decision) further confirms the Court's conclusion that there was one overarching scheme. "[T]he structured finance transactions in which I was engaged or involved or directed at Enron . . . were done for ***one simple reason. . . . 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 Fastow Depo. Tr. at 1895:5-13.[83]

Barclays also argues it cannot be responsible for others' acts that "predate" its own first deceptive act, because it had no involvement in the scheme until a certain point or that claims against it are time barred until a certain time in the Class Period. Motion at 91-92. Plaintiffs agree. This is scheme liability – not conspiracy liability. Barclays will not be responsible for damages that predate the time that plaintiffs are able to establish all the elements of a §10(b) claim against that defendant. For example, as to Barclays, damages stemming from Chewco and Roosevelt are not available.

VIII. THERE IS A TRIABLE ISSUE OF FACT AS TO RELIANCE

In the Court's Class Certification Order, the Court held plaintiffs may avail themselves of both the fraud-on-the-market and *Affiliated Ute* presumptions of reliance. *Enron*, 2006 U.S. Dist. LEXIS 43146, at *274. Barclays argues that the "Court's rulings concerning the applicability of the fraud-on-the-market and *Affiliated Ute* presumptions are erroneous." Motion at 34. Barclays is incorrect. Defendants' arguments to the contrary, this Court has consistently held plaintiffs here may rely on the fraud-on-the-market and *Affiliated Ute* presumptions of reliance. Lead Plaintiff respectfully submits that Barclays provides no reasonable basis for the Court to alter its prior rulings.

A. Plaintiffs Are Entitled to the Fraud-on-the-Market Presumption of Reliance as to Barclays' Conduct

According to Barclays: "The fraud-on-the-market presumption cannot be used to establish reliance as to Barclays because Barclays did not make any actionable misstatements and its conduct was unknown to the market and, therefore, Barclays' conduct did not in any way affect the market

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[83] Fastow further asserted "[c]ertain Enron banks, particularly Merrill, CSFB, RBS and Barclays, worked to solve certain of our financial problems." Fastow Decl., ¶8. "I worked with certain banks to accomplish this goal . . . ." Fastow Decl., ¶6.

price for Enron securities." Motion at 34. *See also id*. at 35-41 Barclays made the same argument in 2002 when it filed its motion for dismissal. *See* Memorandum of Law in Support of Defendant Barclays PLC's Motion to Dismiss (Docket No. 654) at 16-18. The Court rejected Barclays argument, holding: "Reliance under prongs (a) and (c) can also be established by the fraud-on-the-market doctrine." *Enron*, 235 F. Supp. 2d at 693. Opposing class certification, Barclays again raised this very same argument: "In addition to joining in the Financial Institution Defendants' briefs, Barclays, in a separate memorandum (#4492), points out that Barclays did not make any misrepresentations upon which class members or the market could have relied. It argues that the fraud-on-the-market doctrine is unavailable against Barclays because the doctrine applies only to Rule 10b-5(b) claims . . . ." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *41.[84] The Court again rejected Barclays' contention that the fraud-on-the-market presumption of reliance is inapplicable because Barclays made no statements, holding "under Fifth Circuit law the fraud-on-the-market presumption of reliance is applicable to claims under Rule 10b-5(a),(b), and (c)." *Id*. at *274. *See also id*. at *173-*174 (adopting SEC's contention that the fraud-on-the-market presumption of reliance applies to scheme allegations where a specific defendant made no false statements). There is no basis for the Court to change its well-supported decisions repeatedly rejecting Barclays' arguments.

The Court's application of the fraud-on-the-market doctrine follows Fifth Circuit precedent and decisions of other courts that have analyzed the issue. Since at least the mid-1980s, the Fifth

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[84] *See also Enron*, 2006 U.S. Dist. LEXIS 43146, at *27 ("Because the §10(b) claims against the Financial Institutions are not based on alleged material misrepresentations, but on their conduct in the alleged fraudulent scheme under Rule 10b-5(a) and (c), and because Lead Plaintiff relies on the fraud-on-the-market presumption to satisfy the reliance element, the Financial Institutions argue that since their conduct was not conveyed to investors and the market, it could not have been relied upon by the investors and the market; therefore the presumption of reliance does not apply.").

Circuit has recognized application of the fraud-on-the-market presumption to claims brought under Rule 10b-5(a) and (c). *See Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 361 (5th Cir. 1987). The SEC is in agreement. *See* SEC Brief (Ex. 1) at 8 ("The reliance element should be viewed as satisfied whenever a plaintiff relies on a material deception flowing from a deceptive act, even though the conduct of other participants in the scheme may have been a subsequent link in the causal chain leading to the plaintiff's transaction."). And numerous other courts that have analyzed the issue are in accord. *See, e.g., Homestore*, 452 F.3d at 1052 ("a plaintiff may be presumed to have relied on this scheme to defraud if a misrepresentation, which necessarily resulted from the scheme and the defendant's conduct therein, was disseminated into an efficient market and was reflected in the market price" even where a specific defendant made no misrepresentations); *Parmalat I*, 376 F. Supp. 2d at 509 (where "banks' actions in connection with the relevant transactions actually and foreseeably caused losses in the securities markets" reliance is satisfied even though "banks made no relevant misrepresentations to those markets").

Here, Barclays' conduct actually and foreseeably caused plaintiffs' losses. It is axiomatic that material falsification of a company's published financial results will cause investors to pay too much for the securities of the issuer disseminating the false financial statements.[85] Goldman Sachs equity analyst David Fleischer, among others, confirmed Enron's publicly reported financial results "were a critical part of the [Enron] story" for investors. 11/9/04 Fleischer Depo. Tr. at 31-32. *See also id.* at 33-34 (without accurate financial statements, Fleischer could not assess Enron's stock); *id.*

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[85] "Regulation S-X (17 C.F.R. §210.4-01(a)(1)) . . . states that ***financial statements that are not prepared in conformity with GAAP are presumed to be misleading and inaccurate***." *Goldstein*, 340 F.3d at 249. "[E]arnings reports are among the pieces of data that investors find most relevant to their investment decisions." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 n.9 (3d Cir. 1997). *See also* Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 Colum. L. Rev. 1335, 1355 (1996) (market places an "enormous emphasis" on earnings reports).

at 55-56 (if Enron "did not report financial earnings or other financial metrics in line with its projections" "the stock would have been punished").[86] It is also evident here that Enron's issuance of false financial statements "necessarily resulted from the scheme." The whole purpose of doing Chewco, Roosevelt, Nixon, the 2001 CSFB Prepay, Metals, J.T. Holdings, Nikita and SO_2 was so Enron could issue its inflated results to investors. There is more than adequate evidence to trigger the fraud-on-the-market presumption of reliance in favor of plaintiffs.[87]

B. Plaintiffs Do Not Run Afoul of *Greenberg*

Barclays asserts that "plaintiffs also cannot satisfy the 'actual movement' test of *Greenberg*/*Zonagen* . . . with respect to the financial statements issued by Enron reflecting the effects of transactions with Barclays that are being challenged here." Motion at 42. *See also id*. at 42-44 (elaborating on Barclays' argument). Again, this is an argument Barclays made previously and which the Court has rejected. In ruling on class certification, the Court held the "actual movement" test articulated most recently in *Greenberg* is inapplicable to allegations brought under Rule 10b-5(a) and (c) as plaintiffs allege here. The Court specifically found: "*Greenberg's* language expressly refers to alleged ***misrepresentations*** and misleading ***statements***, which must meet *Greenberg's* requirements to be actionable under Rule 10b-5(b), and not to conduct in an alleged course of business or scheme to defraud, actionable under Rule 10b-5(a) and (c)." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *287 (emphasis in original). Thus, Barclays' argument has already been rejected by the Court.

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86 *See also* Nye Report at 27.

87 Barclays makes a couple of ill-conceived arguments that are quickly dismissed. Barclays contends the Court should follow the holding of the district court in *Homestore* as it pertains to establishing reliance. Motion at 39. And Barclays argues the SEC's position on reliance (as articulated above) is "inconsistent with *Central Bank*." *Id.* at 39-40. The district court's decision is no longer good law, and the Ninth Circuit held the SEC's position on reliance is sound. *See Homestore,* 452 F.3d at 1051-52.

The only ***new*** argument Barclays puts forth concerning the purported "actual movement" requirement is found at page 41 n.42 of the Motion. Barclays contends the Court's "holding is not correct" because "[a]llegations of a 'scheme' were present in both the *Greenberg* and *Zonagen* cases, so there is no ground on which to limit the holdings of those cases to Rule 10b-5(b) claims." Motion at 41 n.42. Contrary to Barclays' contention, neither *Greenberg* nor *Zonagen* were scheme cases. In both cases, the Fifth Circuit focused entirely on Rule 10b-5(b) as opposed to scheme claims under Rule 10b-5(a) and (c), and neither case involved a multi-year complex scheme of concealment. Indeed, the word "scheme" does not appear in the *Greenberg* opinion at all. And in *Nathenson*, the Fifth Circuit specifically and expressly said that the case concerned only Rule 10b-5(b) and not Rule 10b-5(a) and (c). *See Nathenson*, 267 F.3d at 406 n.5 (stating that Rule 10b-5(b) was the only "relevant part" of Rule 10b-5 to the action). Accordingly, Barclays is simply wrong to assert the Court's "holding is not correct" because "[a]llegations of a 'scheme' were present in both the *Greenberg* and *Zonagen* cases." Motion at 41 n.42.[88]

Finally, plaintiffs here can and will demonstrate the defendants' fraudulent scheme affected the price of Enron securities. Plaintiffs experts and numerous percipient witnesses have and will again testify that the defendants' fraudulent scheme – of which the Barclays' transactions were a part – artificially inflated the prices of Enron securities during the Class Period.

Assuming, *arguendo*, that plaintiffs must satisfy the "actual movement" test articulated in *Greenberg* (plaintiffs do not), plaintiffs can certainly do so. In *Greenberg*, the Fifth Circuit held that plaintiffs are entitled to the fraud-on-the-market presumption of reliance where the decline in the

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[88] The Court rejected a similar argument Barclays made previously when it held: "Contrary to Barclays' contentions, *Dura Pharmaceuticals* did not address an umbrella scheme involving secondary actors nor conduct under Rule 10b-5(a) and (c), as does *Newby* Lead Plaintiff . . . ." *Enron*, 439 F. Supp. 2d at 713.

price of securities is the result of revelations concerning the truth of a prior misleading statement. *Greenberg v. Crossroads*, 364 F.3d 657, 666 (5th Cir. 2004). As the Court has recognized, plaintiffs plead that at the end of the Class Period, Enron's true creditworthiness was revealed and Enron's stock and bond prices crashed. *See, e.g.*, *Enron*, 439 F. Supp. 2d at 724 (disclosure of defendants' wrongful conduct was leaked into the market resulting in a steep decline in prices for Enron securities). These allegations are well supported by plaintiffs' experts.[89] Even if plaintiffs must satisfy the "actual movement" test articulated by *Greenberg* to establish reliance (the Court has ruled we do not), plaintiffs certainly could do so.[90]

C. The *Affiliated Ute* Presumption Applies

The Court has concluded that because plaintiffs' case against the banks "targets an overarching, concealed scheme" to hide the true financial condition of Enron in violation of Rule 10b-5(a) and (c), it "primarily" involves allegations of "omissions" and, accordingly, the *Affiliated Ute* presumption of reliance is available. *Enron*, 2006 U.S. Dist. LEXIS 43146, at *272 (citing *Affiliated Ute*, 406 U.S. at 153; *Finkel*, 817 F.2d at 359). Barclays ***again*** moves the Court to reconsider its decision. Motion at 44-48.

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[89] *See, e.g.*, Hakala Rebuttal Report, ¶10.

[90] Barclays argues that "plaintiffs have not offered any evidence that the so-called 'corrective disclosures' in the fall of 2001 revealed the truth about any prior, alleged false statements concerning the financial effect of transactions involving Barclays." Motion at 43. Barclays puts the cart before the horse. If, as Barclays contends, plaintiffs had not "offered" such evidence, it is only because plaintiffs had no prior obligation to do so. The more appropriate question is whether there is any disputed question of fact as to whether the 2001 revelations concerning Enron revealed that prior statements to the market were false. As plaintiffs' experts have prepared reports demonstrating these truths, there are most certainly questions of fact as to this issue. Accordingly, summary judgment would not be proper. Additionally, plaintiffs note that Barclays makes no assertion that the Enron financial statements falsified by Barclays' transactions were merely "confirmatory." Accordingly, Lead Plaintiff does not address this issue but reserves its right to do so should Barclays make any such contention in reply briefing.

But this decision is correct as a matter of law and logic. The *Affiliated Ute* presumption addresses the fact that "[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material information had been disclosed" should not be required. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). This Court has observed that the *Affiliated Ute* presumption "responds to the reality that a person cannot rely upon what he is not told." *Smith v. Ayres*, 845 F.2d 1360, 1363 (5th Cir. 1988). Thus, in assessing the applicability of the *Affiliated Ute* presumption, a major focus should be on whether the market had the opportunity directly to analyze and digest the information at the core of the fraud.

In this case, Barclays' deceptive conduct and its pernicious effects on Enron's reported financial statements were hidden from public view. Because they were hidden, neither the market nor individual investors could have known, or directly relied upon, information concerning the fact or effects of this conduct. And, because the purpose and effect of the deceptive conduct and scheme was to distort Enron's financial statements, it is reasonable to apply the presumption here; "the facts withheld [were] material in the sense that a reasonable investor might have considered them important in the making of [an investment] decision." *Affiliated Ute*, 406 U.S. at 153-54.

Barclays makes two principal attacks to avoid the *Affiliated Ute* presumption, arguing (1) the presumption applies only in "pure omissions" cases, and (2) the presumption can be applied only where the defendant has a duty to disclose. Motion at 34. Barclays is wrong on both counts.

Barclays argues that the *Affiliated Ute* presumption may be applied only in "pure omissions" cases, and that this case does not qualify because Enron made periodic (if distorted) disclosures about its earnings, cash flow, and debt. The *Affiliated Ute* presumption, however, is not confined to "pure omissions" cases; the correct statement is that the presumption is available in cases "primarily" involving omissions.

Affiliated Ute itself was not a "pure omissions" case. There the individual defendants discussed with the plaintiffs their stock sales, but did not disclose that they "were in a position to gain financially from their sales and that their shares were selling for a higher price in that market." 406 U.S. at 153. The Court described these facts as "involving ***primarily*** a failure to disclose." *Id.* Under defendants' "pure" omissions theory, the fact that the *Affiliated Ute* defendants communicated at all with the plaintiffs concerning their stock sales would preclude application of the presumption, even though the critical fact – defendants' personal interest in the stock sales – was hidden.

The Fifth Circuit has also recognized that the presumption may be applied in cases primarily – but not purely – involving omissions:

> Issuers of securities are under a continuing obligation to make disclosure. Because of the continuing obligation to make disclosure, "it is difficult to envision a pure case of nondisclosure when the issuer is a publicly reporting company." The presence of disclosure documents may prevent this from being a case of pure nondisclosure; it does not, however, prevent this case from being primarily one of nondisclosure, as in *Affiliated Ute*.

Finkel, 817 F.2d at 363.

That Enron made some financial disclosures fails to address the pertinent issue. The case against Barclays is not based on Enron's fraudulent acts; Barclays is subject to primary liability because ***it engaged*** in deceptive conduct. The facts concerning Barclays' deceptive conduct, and its effect on Enron's financial results, were ***not*** disclosed. These were material facts "whose very existence plaintiffs [had] no reason to consider." *Abell v. Potomac Ins. Co.,* 858 F.2d 1104, 1119 (5th Cir. 1988), *vacated*, *remanded, Friar v. Bell*, 492 U.S. 914 (1989).

The Court has already rejected the argument that an absence of a free-standing duty to disclose bars application of the *Affiliated Ute* presumption. A duty to disclose can be a critical element when the wrong alleged is defendant's silence.[91] But here the allegations concern active deception, not mere silence. Thus, the Court correctly held that the relevant duty was the duty not to engage in conduct proscribed by Rule 10b-5(a) and (c):[92]

> [T]he Fifth Circuit has ruled that for a presumption of reliance, a duty to disclose is relevant only to Rule 10b-5(b) claims of statements that are either false or misleading; in a scheme case brought under Rule 10b-5(a) and (c) ("employ any device, scheme or artifice to defraud" or "engage in any act, practice or course of business that operates or would operate as a fraud"), the Fifth Circuit has indicated that the requisite duty is not a duty to disclose, but . . . "the duty not to engage in a fraudulent 'scheme' or 'course of conduct' [that] could be based primarily on an omission."

Enron, 2006 U.S. Dist. LEXIS 43146, at *102. Accordingly, Barclays' argument that it had no "duty to disclose" is of no moment. Motion at 34-48.

The Court's holding on this point is thoroughly grounded in Fifth Circuit law. In *Smith*, 845 F.2d at 1363, the Fifth Circuit extensively analyzed the proper application of the *Affiliated Ute* presumption, concluding that it applies where defendants breach "the duty not to engage in a fraudulent 'scheme' or 'course of conduct'" under Rule 10b-5(a) and (c).[93]

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[91] The Supreme Court has explained that, under its holding in *Affiliated Ute*, "***silence . . . may operate as a fraud*** actionable under § 10(b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. ***But, such liability is premised upon a duty to disclose***." *Chiarella v. United States*, 445 U.S. 222, 230 (1980). In other words, the *Affiliated Ute* defendants' acts were deceptive because they had a duty to disclose, and because their acts were deceptive but hidden from plaintiffs, positive proof reliance was not required.

[92] Duty and reliance are separate and distinct elements of a claim for deceit. Defendants conflate them. They would require two separate duties – the duty not to engage in scheme conduct prohibited by Rule 10b-5(a) or (c), and a separate duty to disclose that is somehow part of the reliance element. There is no reason why a separate duty to disclose should be a prerequisite for presumed reliance. In a case involving active deception, not mere silence, there is no logical connection between a duty to disclose and the decision by the hypothetical reasonable investor to buy Enron stock.

[93] *See also Finkel*, 817 F.2d at 359-60 (*Affiliated Ute* applies regardless of the existence *vel non* of any duty to disclose); *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 185-89 (3d Cir. 1981) (without any discussion of a purported duty to disclose, upholding the jury's finding of primary liability for defendants' acts in furtherance of a Ponzi scheme and ruling the district court properly instructed the

This Court also applied *Parmalat I* where the bank defendants "made no representations in connection with those schemes, at least none relevant here." *Parmalat I*, 376 F. Supp. 2d at 509. Judge Kaplan in *Parmalat I* rejected the bank's assertion that plaintiffs therefore cannot be said to have relied on them, noting that the Supreme Court had explained there is more than one way to prove transaction causation. *Id*.; *see Basic*, 485 U.S. at 243. And while it is often said that reliance is an element of a private cause of action under Rule 10b-5, that formulation typically arises in the context of Rule 10b-5(b) actions based on misstatements and omissions – in other words, conduct in violation of Rule 10b-5(b), not (a) and (c). The court in *Parmalat I* stated that the reliance requirement in that context has a very specific foundation to provide the requisite causal connection between a defendant's misrepresentation and plaintiff's injury, or in the Second Circuit's formulation, to certify that the conduct of the defendant actually caused the injury. 376 F. Supp. 2d at 509. Because a Rule 10b-5 cause of action does not precisely track the common-law tort of fraud, and there is more than one way to prove transaction causation, in the scheme context if the defendant's (the bank's) actions were a substantial cause of the harm, *i.e.*, a foreseeable cause, and the defendant (bank) itself as well as the issuer both committed acts in violation of the rule, both may be liable. *Id*. Specifically, the court found the "banks' actions in connection with the relevant transactions actually and foreseeably caused losses in the securities markets. ***The banks made no relevant misrepresentations to those markets, but they knew that the very purpose of certain of their transactions was to allow Parmalat to make such misrepresentations***. In these circumstances,

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jury on the *Affiliated Ute* presumption of reliance on omissions even though the defendants had "misrepresented certain crucial facts"); *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 187 (S.D.N.Y. 2005) (applying *Affiliated Ute* presumption of reliance without identifying any duty of disclosure); *Walco Invs. v. Thenen*, 168 F.R.D. 315, 331-32 (S.D. Fla. 1996) (applying *Affiliated Ute* without even discussing a purported need for duty of disclosure, where plaintiffs alleged the existence of a fraudulent Ponzi scheme).

both the banks and Parmalat are alleged causes of the losses in question. So long as both committed acts in violation of statute and rule, both may be liable." *Id.* at 509.

However, even if Barclays were correct and there is a disclosure-duty requirement, this Court noted that to the extent such a duty to disclose arises, it arises as to one that engages in a scheme. *Enron*, 2006 U.S. Dist. LEXIS 43146, at *102. Every person has a duty not to engage in a secret scheme to defraud investors.

IX. A CLAIM LIES AS TO ALL THE BARCLAYS ENTITIES SUED

Defendants' claim that "[t]here is no evidence that either Barclays PLC or Barclays Capital were involved in any of those [plaintiffs' alleged] transactions" is patently false. Motion at 96. With regard to Barclays PLC, one need look no further than to Barclays Bank PLC's (hereinafter "Barclays Bank") Statement in Response to Queries from the Bankruptcy Examiner to understand the involvement of that entity. Ex. 10625. Despite the fact that the queries were put to ***Barclays Bank***, responses to questions regarding those "principally" involved in transactions, list the "identities of employees, officers or directors of ***BARCLAYS PLC***." *Id*. The individuals listed were from all three divisions of Barclays – Bank, PLC, and Capital. By responding in this fashion, defendants have admitted that all of these individuals were ultimately "employees," "officers" or "directors" of Barclays PLC. As for Barclays Capital, in nearly every case, the responses regarding various challenged transactions include ***both*** Barclays Bank ***and*** Barclays Capital employees. Moreover, hundreds of documents gathered in discovery make it painfully obvious that Barclays Capital played an important role in ***every*** transaction alleged by plaintiffs.[94]

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[94] It is noteworthy that this Court has previously rejected other defendants' attempts to shield themselves from liability at summary judgment by claiming they are legally distinct from their subsidiaries. *See* June 24, 2003 Order denying Defendant Citigroup Inc.'s Motion for Summary Judgment without prejudice and denying Citigroup Inc.'s motion to dismiss based upon control person liability (Docket No. 1531). This Court has stated, "Lead Plaintiff raises several legal

A. Barclays Capital, Inc. Is Primarily Liable Under §10(b) and Rule 10b-5

Barclays Capital was actively involved in ***every*** transaction alleged by plaintiffs which occurred between Enron and Barclays ("Barclays" refers to the three entities together). Enron viewed its relationship with Barclays Capital as an important one. "Enron, particularly Andy Fastow, CFO of Enron Corp, are keen to have a relationship with the top management of Barclays Capital. (The relationship at the transaction level is strong)." Ex. 10118. Enron and Fastow clearly achieved this relationship with Diamond, the CEO of Barclays Capital. *See* Exs. 50924, 50931. Additionally, other key players from Barclays, including Williams, who was responsible for the Enron relationship at Barclays, Sullivan, who handled syndication for many Enron deals, as well as Bell, Meyer and McKean, while he was at the bank, all used Barclays Capital e-mail addresses and/or letterhead in many of their communications internally and with Enron. *See, e.g.,* Exs. 52168, 52093, 10402, 10426, 50863, 10144, 15762. Equally, many of the transactions with Enron, alleged by plaintiffs, had to go through Barclays Capital Credit Committee for exposure approval or the Group Credit Committee (also a Barclays Capital committee) for credit approval. *See, e.g.,* Exs. 10148, 10407, 10339, 15774. As Meyer testified, each of the Enron transactions that he worked on went through the Barclays Capital Credit Committee. 6/14/04 Meyer Depo. Tr. at 65:18-22.[95] Put plainly, Barclays Capital worked with Barclays Bank on arranging every Enron deal challenged by Lead Plaintiff.

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theories for imposing liability against Bank of America, CIBC and these subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment . . . ." May 22, 2003 Order at 2 (Docket No. 1392).

[95] Meyer worked on JEDI, J.T. Holdings, Nikita and Roosevelt. So, according to Meyer, at least these were reviewed by the Barclays Capital Credit Committee. 6/14/04 Meyer Depo. Tr. at 24:24-27:22.

For the Chewco transaction, Barclays Capital along with Barclays Bank created and structured the deal with Enron. *See, e.g.*, Exs. 15412, 15410. The deal went through the Barclays Capital Credit Committee for approval and CEO Diamond was kept in the loop on the deal. Exs. 10641, 10407, 10877, 10646. Barclays Capital then served as the "Syndicating Agent" for the Revolving Facility Agreement in JEDI executed by Enron Corp. *See* Exs. 13597, 13589. Tom Kalaris, CFO of Barclays Capital in the Americas, was informed when the syndication had been completed. Ex. 10645. Barclays Capital also acted as a resource to others within the Bank for information regarding the transaction even after it closed. *See* Ex. 10414 at BARC000495466.

For the three prepays detailed in the December 29, 2006 Complaint, Barclays Capital was involved with arranging the deals. Exs. 10602, 11142, 50796, 50924, 10148; Ex. 24 at BRC000010589-93; Ex. 25 at BRC000010618-22; Ex. 26 at BRC000010613-17; Ex. 27 at BRC000010575-79. With regard to the Nixon prepay, Barclays Capital attorney and director, Firth, was involved in structuring and approving the deal. Exs. 15762, 15763. Smith at Barclays Capital was also listed as the person to whom questions could be directed on some deal documents. Ex. 50795.

Barclays Capital was also involved in arranging the J.T. Holdings deal. Ex. 11141 at BARC000104167. This entity was listed on the commitment letter sent from the Bank to Enron. Ex. 11138.

For Nikita, Barclays Capital underwrote the term loan, was lead arranger, and syndication agent for the transaction. Exs. 10433, 10435. Fees for these services went to Barclays Capital and Sullivan's signature block describes him as a Barclays Capital director. Ex. 10433. This entity was listed on the commitment letter sent from the Bank to Enron. *Id*.

In addition, evidence also demonstrates that Barclays Capital was actively involved with Enron and Barclays Bank on the structuring and approval of the SO_2 transaction. Barclays Capital directors and attorneys worked on structuring and approving the deal. *See* 6/14/05 Firth Depo. Tr. 186:23-187:11; *see also* Ex. 10314 at BRC000096431 (noting that Barclays Capital was "very keen to proceed on a 'best efforts' basis with . . . applying all necessary internal approvals in connection with the Facility and its structure, . . . drafting of the documentation, and . . . finalizing the work which needed to be done in connection with" SO_2); Exs. 10316, 10303 (Barclays Capital Proposal for structuring and monetization issues concerning SO_2). Specifically, de Vitry, Managing Director of Barclays Commodity Group, admitted that Barclays Capital and its employees were involved in the SO_2 transaction by arranging the Colonnade SPE which served as a party to the transaction. Ex. 10314, 10316. The Group Credit Committee (a Barclays Capital entity) reviewed and authorized the deal and the Barclays Capital Credit Committee also signed off on it. Exs. 10339, 15774. Additionally, Barclays Capital sent out various product proposals and a term sheet under the Barclays Capital name. Exs. 10314, 10316, 50749, 50779, 15771.

For the Metals transactions, Barclays Capital worked on arranging the deals. Exs. 50810, 50788, 50792. This entity also created marketing documents in 2001 to sell this structure to other clients. Ex. 10289.

Defendants also claim that "plaintiffs have found absolutely no evidence" of Barclays Capital Inc.'s participation in the Zero Coupon Notes Offerings of February and July of 2001. Motion at 96. This is simply false. Barclays Capital Inc. is listed as an initial purchaser on the offering memorandum for the February 2001 Notes and its involvement in the July 2001 Notes Offerings is evident in Enron's July 18, 2001 Prospectus. *See* Exs. 28, 29 (Core Exs. 82, 61).

B. Barclays PLC Is, at a Minimum, Vicariously Liable for the Acts of Its Subsidiaries

Barclays asserts in its Motion that liability can not be imputed to Barclays PLC for the conduct of its subsidiaries – Barclays Bank and Barclays Capital. Motion at 97. In fact, Barclays PLC has already admitted that those "principally" involved in the transactions alleged by plaintiffs were "employees, officers or directors" of Barclays PLC. Ex. 10625. Therefore, Barclays PLC was directly involved in the fraud and no piercing is required.

Even if this were to be ignored, a determination regarding whether to pierce the corporate veil is a question to be properly determined at trial, rather than at summary judgment. "It is not the function of the trial court upon motion for summary judgment to try the issue of fact if, as here, a factual question is presented." *Hawkins v. Frick-Reik Supply Corp.*, 154 F.2d 88, 89 (5th Cir. 1946).[96] As the Fifth Circuit held in *United States v. Jon-T Chem.*, resolution of whether a parent corporation is responsible for acts of its subsidiaries is "heavily fact-specific." *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985). Equally, "[w]hether it is a defendant who seeks to preserve a corporate shield over him, or a plaintiff who is attempting to pierce the corporate veil, corporate disregard often raises genuine issues of material fact, thus making summary judgment inappropriate." *Am. Mgmt. Corp. v. Dunlap*, 784 F. Supp. 1245, 1248 (N.D. Miss. 1992).[97] Thus, while plaintiffs maintain that Barclays PLC was itself a party to the fraud and that summary judgment is not the appropriate forum to debate adherence to corporate formalities, should the Court see it fit to consider the piercing question at this time, there is unequivocally an evidentiary basis to pierce the corporate veil and assign liability to Barclays PLC.

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[96] *See also Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982) (concluding that "the trial court has no duty to decide factual issues, only whether there is an issue of fact to be tried); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1423 (5th Cir. 1996) (finding that factual issues are properly resolved by a jury at trial).

[97] *See also Gilbraltar Sav., v. LDBrinkman Corp.*, 860 F.2d 1275 (5th Cir. 1988) (finding that decision to recognize "separate corporate existence" is a question of fact); *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 447 F.3d 411, 416 (5th Cir. 2006) (noting alter ego determinations are tied to factual realities not form); *Hardwood Tire-Arlington, Inc. v. Young*, 963 S.W.2d 881, 885 (Tex. App. Fort Worth 1998) (concluding that determination of whether the corporate fiction should be disregarded is a fact question for the jury) (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)).

To begin with, federal courts have held that the defendant has the "initial burden . . . to show the absence of material fact with respect to one or more elements of the Plaintiffs piercing the corporate veil claim." *In re Tutu Wells Contamination Litig.*, 909 F. Supp. 1005, 1008 (D.VI. 1995); *see also Rock v. ATPIC Trucking Co.*, 739 So. 2d 874, 880 (La. Ct. App. 1999).[98] Barclays makes no attempt to meet its burden in its Motion for Summary Judgment and Barclays fails to adequately cite authority that would preclude the culpability of its parent company for securities violations committed by its subsidiaries.[99]

The factors for piercing the corporate veil accepted by the Fifth Circuit and a majority of courts further solidifies plaintiffs' position. Those factors include: common or overlapping directors, stock ownership, arrangements for payments of salaries or expenses of subsidiary, filing consolidated financial statements and tax returns, whether the subsidiary is described as a department or division of the parent, origin of the subsidiary's business and assets, and if the subsidiary bears the same name or logo as its parent, among others. *See Jon-T Chem.*, 768 F.2d at 691-92.

The evidence in this case clearly demonstrates Barclays PLC consistently failed to maintain a separate and distinct identity from its subsidiaries. For instance, Barclays PLC owns ***100%*** of the common stock of Barclays Bank. *See* Barclays PLC Annual Report 2001 ("Barclays 2001 Annual

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[98] Barclays relies on *In re Alta Indus., Inc.*, 53 B.R. 567 (Bankr. W.D. Tex. 1985) (finding no factual basis existed for IRS to pierce corporate veil in order to levy upon proceeds for sale of corporation's land). The bankruptcy court in *Alta* dealt with the question of whether the assets of one company can be applied to the tax liability of another, not whether the corporate veil should be pierced for securities violations. Moreover, there is enough evidence in this case to establish a genuine issue of material fact exists regarding Barclays PLC's adherence to corporate formalities.

[99] *See Chill v. GE*, 101 F.3d 263 n.6 (2d Cir. 1996) (affirming district court's decision to grant defendant's motion to dismiss against parent company brought under §10(b) and Rule 10b-5 when plaintiffs did not present sufficient evidence of "motive" to the district court). *Chill* is clearly distinguishable as the court there ***never*** addresses veil piercing or alter ego status.

Report") (Ex. 30) at 26 . Barclays PLC also files consolidated financial statements and tax returns with Barclays Bank. *Id*.[100] Moreover, the Bank's Annual Report from 2001 also explicitly states "[t]he membership of the Boards of Directors of Barclays PLC and Barclays Bank PLC is ***identical***." Barclays 2001 Annual Report at 92 (Ex. 30). The Fifth Circuit has concluded that "***[w]hen the directors and officers of the subsidiary are also directors and officers of the parent, it makes little sense to ask whether – they take orders from the parent since they themselves constitute the parent's decision-making body and are duty-bound to act in the parent's interest***." *Jon-T Chem.*, 768 F.2d at 692.

In further support of Barclays PLC's culpability, Texas courts have held the use of a primary logo supports the conclusion that a subsidiary is functioning as the alter ego of its parent. *See Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W. 2d 534, 536 (Tex. Ct. App. 1986) (evidence showing that subsidiary of parent company Paramount Petroleum, referred to both companies as "Paramount" was evidence that separate identity did not exist between parent and subsidiary). Many of Barclays' documents, including those of its subsidiaries Barclays Bank and Barclays Capital, Inc., use the same logo or trademark, "Barclays."[101] Sullivan, a Barclays bank loan syndication's officer, admitted in his deposition that "Barclays" is the "logo we [used]." "***Whether for Barclays Bank PLC, [or] for Barclays Capital . . . we try to identify ourselves with the name Barclays***." 7/13/04 Sullivan Depo. Tr. at 241:24-242:13.

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[100] The Fifth Circuit has also concluded that "the fact that a parent holds out to the public that a subsidiary is a department of its own business increases the likelihood that the parent will be held liable for the subsidiary's acts." *Japan Petroleum Co.(Nigeria), Ltd. v. Ashland Oil Co.*, 459 F. Supp. 831, 841 (D. Del. 1978) (citing *Fitz-Patrick v. Commmonwealth Oil, Co.*, 285 F.2d 726, 730 (5th Cir. 1960)). Barclays PLC has repeatedly presented itself, along with Barclays Bank (who's stock Barclays PLC wholly owns), Barclays Capital (which is simply a division of Barclays Bank), and others as a "Group." *See, e.g.*, Barclays 2001 Annual Report at 26 (Ex. 30).

[101] *See, e.g.*, Exs. 10339, 50796, 13310, 10303, 10316, 10339, 11138, 15762, 10298.

Finally, courts have also concluded that evidence showing that a parent pays the salaries of its executives provides evidence for an alter ego theory. *Jon-T Chem*., 768 F.2d at 694. It is apparent that Barclays PLC included the cost of salaries in its operating expenses because, as the parent company, it was ultimately responsible for paying the salaries of all "Barclays" employees. Barclays' 2001 Annual Report at 46 (Ex. 30). Even Clemmens, Head of Risk for the Americas at Barclays, admitted in his deposition testimony that he was an employee of all "three legal entities in the US," but didn't receive three separate pay checks, indicating he worked for a single enterprise. *See* 9/30/04 Clemmens Depo. Tr. at 340:6-13.

C. Barclays PLC Is Subject to Liability Based on Agency Principles

Noticeably absent from Barclays' Motion is any attempt to address the issue of Barclays PLC's liability based upon the fraudulent actions of its agents. Lead Plaintiff has consistently alleged Barclays is liable not only for the actions it performed directly but also for those actions performed by its subsidiaries acting as agents of the parent corporation – actions which were conducted at the direction of Barclays. Fifth Circuit precedent leaves no ambiguity as to the viability of plaintiffs' theory of liability:

> ***[C]ommon law agency principles, including the doctrine of respondeat superior, remain viable in actions brought under the Securities Exchange Act and provide a means of imposing secondary liability for violations of the Act independent of §20(a)***.
>
> * * *
>
> Limiting secondary liability under the 1934 Act to that liability provided by §20(a) would contradict the pervasive application of agency principles in nearly all other areas of the law.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111, 1118 (5th Cir. 1980); *see also Tranchina v. Howard, Weil, Labouisse, Friedrichs*, No. 95-2886, 1997 U.S. Dist. LEXIS 12361, at *14-*15 (E.D. La. Aug. 18, 1997) (acknowledging continued force of ***respondeat superior*** after *Central Bank*).

The simple fact that the principle-agent relationship alleged by Lead Plaintiff is that of a parent company and its wholly owned subsidiary does not diminish Barclays' potential liability. "***[T]he relationship between a corporation and its subsidiary is analyzed with the same agency principles that apply to natural persons or otherwise unrelated corporations***." *United States v. Tianello*, 860 F. Supp. 1521, 1525 (M.D. Fla. 1994); *see also Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Restatement of the Law (Second) of Agency* §14M (1958).

Barclays seems to suggest Lead Plaintiff's claims can only succeed upon a ruling to pierce the corporate veil but ***does not*** (and cannot) cite any precedent that states the "corporate veil" must be "pierced" in order for liability to be imputed to a parent company for securities violations committed by its subsidiaries under §10b and Rule 10b-5.[102] Barclays' contention is wrong, as agency theory is distinct from veil piercing.

> ***Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil***. In the first instance, the claim against the parent is premised on the view that the subsidiary had authority to act, and was in fact acting, on the parent's behalf – that is, in the name of the parent . . . . In the latter situation, the putative plaintiff does not dispute that the underlying obligation

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102 Defendants cite the following: *Patin v. Thoroughbred Power Boats Inc*., 294 F.3d 640, 654 (5th Cir. 2002) (where the court found that successor corporation could be bound by its predecessor's waiver of personal jurisdiction). The court never addresses the issue of veil piercing for securities violations. *See also Seymore v. Lake Tahoe Cruises*, 888 F. Supp. 1029 (E.D. Cal. 1995) (holding that plaintiff who claimed he was fired for whisteblowing failed to present sufficient evidence to warrant piercing the corporate veil against a single shareholder). *Seymore* does not address the issue of parent culpability and is not a securities fraud case. *Mobil Oil Corp. v. Linear Films Inc.*, 718 F. Supp. 260 (D. Del. 1989) (concluding plaintiffs did not present sufficient evidence to establish that it would be inequitable not to pierce veil). Unlike our case, the court in *Mobil* resolved issues surrounding patent infringement, not securities violations under §10(b) and Rule 10b-5. *Id*. at 266. The court in *Mobil* concluded that it could not attribute liability to the parent company there because the plaintiffs failed to allege that use of the corporate form would work for fraud or injustice. *Id*. at 267. Lead Plaintiff in this case has consistently contended Barclays PLC, in conjunction with its affiliates, fraudulently structured and implemented transactions with Enron as a part of the scheme in this case. *See* Lead Plaintiff's First Amended Complaint ¶¶106(a)-(c), 752; December 29, 2006 Complaint ¶¶106(d)-(i), 752.

> belongs to the corporate subsidiary; however, he seeks to hold the parent liable on the theory that the parent fraudulently induced the subsidiary to incur the obligation.
>
> * * *
>
> ***[J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same. If such an agency arrangement is alleged, then the plaintiff should not have to also allege domination and intent to defraud for the claim to survive***.
>
> * * *
>
> [T]his rule will not undermine jealously safeguarded notions of corporate separateness. The theory behind any such agency claim is that the subsidiary's acts were, in both form and substance, those of the parent. ***Thus, there is no veil to pierce – the parent is the only party in interest***.

Royal Indus. v. Kraft Foods, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996).[103]

The question "how much control is required before parent and subsidiary may be deemed principal and agent . . . defies resolution by 'mechanical formulae,' for the inquiry is inherently fact-specific" and, thus, warrants denial of Barclays' Motion. *TransAmerica Leasing*, 200 F.3d at 849; *see also Nat'l Council*, 1995 U.S. Dist. LEXIS 21030, at *80 ("ordinarily an issue of fact for the jury"). In any event, the demonstrated significant control that Barclays has over its subsidiaries is sufficient for a reasonable jury to conclude there is an agency relationship between Barclays and its investment bankers.

D. Barclays PLC Is Subject to Liability as a Control Person Under §20(a) of the 1934 Act

Barclays PLC should also be subject to secondary liability for being a control person under federal securities laws. To state a valid claim under §20(a), a plaintiff need only allege: (i) a

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[103] *See also TransAmerica Leasing, Inc. v. La Rupublica de Venez.*, 200 F.3d 843, 849 (D.C. Cir. 2000); *Expediters Int'l v. Direct Line Cargo Mgmt. Servs.*, 995 F. Supp. 468, 481 (D.N.J. 1998); *Nat'l Council on Compensation Ins. v. Hopkins*, No. 1:92-cv-082, 1995 U.S. Dist. LEXIS 21030, at *80 (E.D. Tenn. Dec. 19, 1995) ("The principal corporation can be held liable for the acts of its agent within the scope of the agent's authority. The agency theory is distinguishable from the usual 'piercing of the corporate veil' and 'alter-ego' doctrines.").

violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §20(a). *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 869 n.17 (S.D. Tex. 2001).

This Court has stated:

> In the absence of a statutory definition of "control," the SEC has defined the word as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ***ownership of voting securities, by contract, or otherwise***." 17 C.F.R. §240.12b-2(f), quoted in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Furthermore, the legislative history of the controlling person provision indicates control can be shown by ***ownership of stock, agency***, a lease or a ***contract***, and that the concept of control should be broadly construed with sufficient flexibility to cover many situations, not necessarily only those foreseen at the time of enactment.

In re Enron Corp. Sec. Litig., No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *33 (S.D. Tex. Jan 28, 2003).[104]

This Court has repeatedly observed that "the Fifth Circuit has rejected the requirement that a plaintiff must show that the controlling person actually participated in the underlying violation, and appears to insist that a plaintiff need only demonstrate that the controlling person possessed 'the power to control [the primary violator], [but] not the exercise of the power to control.'" *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41-*42 (citing *Enron*, 235 F. Supp. 2d at 594); *see also BMC Software*, 183 F. Supp. 2d at 869 n.17.[105] As this Court noted:

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[104] *See also* Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 Notre Dame L. Rev. 263, 314 (1997) (cited in *Enron*, 2003 U.S. Dist. LEXIS 1668, at *33, *65-*69). *See also* Dana M. Muir and Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is It Curtains for Veil Piercing?*, 1996 U. Ill. L. Rev. 1059, 1093 (1996) (noting "because of the direct liability of controlling persons under the [securities] statutes, courts generally do not need to decide whether to pierce the corporate veil . . . . Rather, those persons and entities who might be held accountable under a veil piercing analysis are instead held directly liable under the terms of the statutes.").

[105] *See also Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993) (actual participation in the underlying §10(b) violations is not required; whether effective day-to-day control of the general

> Control can be established by demonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ***ownership of voting securities***, by contract, ***business relationships, interlocking directors, family relationships, and the power to influence and control the activities of another***.

Enron, 235 F. Supp. 2d at 598. Thus, courts will generally find control person liability if plaintiffs make a *prima facie* showing defendants had the abstract, indirect power, whether exercised or not, to control a primary violator – and such power was possessed via business relationships, directorships, or even the power to "influence" the activities of another. *See Abbott*, 2 F.3d at 620; *BMC Software*, 183 F. Supp. 2d at 869 n.17; *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999).

Barclays PLC contends it did not engage in any of the conduct alleged by plaintiffs and, therefore, is not a proper party to this action. Motion at 97. Similarly, Barclays argues it can only be liable for the conduct of its subsidiaries if the corporate form may be ignored. *Id*. at 97-98. These arguments are meritless. *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (***under §20(a)*** "'***[c]ontrolling shareholders could be reached in situations where piercing the corporate veil was not available***'"). In *McNamara v. Bre-X Minerals Ltd*., 46 F. Supp. 2d 628, 636-37 (E.D. Tex. 1999), the federal district court recognized that a prima facie case may be made for "control liability" when a parent owns a majority of its subsidiary's stock, and members of the parent's board comprise a significant amount of the board for its subsidiaries or there is an extensive overlap of officers. The court in *McNamara* concluded that a showing of share ownership and interlocking

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operations and affairs of the company is necessary to impose controlling person liability is uncertain); *Enron*, 2003 U.S. Dist. LEXIS 1668, at *67 ("'[t]he decisional actors within formal organizational hierarchies with authority to ratify, manage and monitor are ***majority shareholders, boards of directors***, and executive officers'") (quoting Carson, 72 Notre Dame L. Rev. 263, 281-83).

directors was sufficient in establishing an "'indirect means of discipline or influence.'" *Id*. at 637 (quoting *Harriman v. E.I. Du Pont de Nemours & Co*., 372 F. Supp. 101, 105 (D. Del. 1974).

There is more than enough evidence for a reasonable jury to conclude Barclays controls its subsidiaries. Barclays PLC, either directly or indirectly, owns each of the subsidiaries. It has already been established that Barclays PLC owns 100% of Barclays Bank stock, all of the companies' directors and officers overlap, they file consolidated financial statements, and share the "Barclays" logo. It is apparent that Barclays PLC had the ability to "influence" and "directly or indirectly control" the acts of its subsidiaries. Moreover, Barclays classified those individuals "principally" involved with the Enron transactions alleged by plaintiffs as "employees, officers or directors" of Barclays PLC. Ex. 10625.

While the evidence presented is enough to establish Barclays' control of its subsidiaries, the issue of control should not be determined at this time. Control is a fact-intensive question appropriate for determination by a jury. *See, e.g., In re Paracelsus Corp.*, 6 F. Supp. 2d 626, 633 (S.D. Tex. 1998) (question of control "is generally a fact intensive question"); *In re Executive Telecard, Ltd. Sec. Litig.*, 913 F. Supp. 280, 286 (S.D.N.Y. 1996) (issue of controlling person liability "is necessarily fact intensive" and a question for a jury); *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 143 (S.D.N.Y. 1999) ("fact-intensive" question for a jury); *Klapmeier v. Telecheck Int'l, Inc.*, 315 F. Supp. 1360, 1361 (D. Minn. 1970) ("complex fact question"); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1368 (S.D. Fla. 2001) (fact-intensive issue). The evidence demonstrates Barclays had the power to control its subsidiaries and the determination of control should now be left to the jury.

Lead Plaintiff submits that it has (more than) sufficient evidence supporting all of its claims against Barclays, thus creating a genuine issue of material fact as to those claims, rendering summary judgment for Barclays improper. In this regard, no further discovery is necessary in order to defeat Barclays' Motion. Should this Court be inclined to grant Barclays' Motion concerning the claims against it under Rule 10b-5(a) and (c), however, Lead Plaintiff requests that it be permitted to conduct additional discovery concerning those claims. As discussed, this Court only ***recently*** refined its standard for primary liability under Rule 10b-5(a) and (c). *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *155-*158; *Enron*, 439 F. Supp. 2d at 713-14. This refinement comes ***after*** Lead Plaintiff was required to complete much of its discovery concerning Barclays' role in the Enron fraud. Thus, to the extent this Court may require additional facts to satisfy its new, refined standard for primary liability concerning Barclays, Lead Plaintiff should be allowed to conduct additional discovery to uncover those facts.

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). Thus, if this Court requires of Lead Plaintiff additional facts to support its claims under Rule 10b-5(a) and (c), it should deny Barclays' Motion and give Lead Plaintiff a fair opportunity to uncover such facts.[106]

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[106] Lead Plaintiff's entitlement to this additional discovery is demonstrated in the Declaration of Alexandra S. Bernay Pursuant to F.R.C.P. 56(f) filed concurrently with this Opposition.

X. CONCLUSION

For the foregoing reasons, Barclays' Motion for Summary Judgment must be denied.

DATED: February 8, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO THE BARCLAYS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOCKET NOS. 4817, 4818, 5333) document has been served by sending a copy via electronic mail to serve@ESL3624.com on February 8, 2007.

I further certify that a copy of the foregoing document has been served via overnight mail on the following parties, who do not accept service by electronic mail on February 8, 2007.

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