No. 06-20856

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re ENRON CORPORATION SECURITIES,
DERIVATIVE & "ERISA" LITIGATION

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Plaintiffs-Appellees,
vs.
CREDIT SUISSE FIRST BOSTON (USA), INC., et al.,
Defendants-Appellants.

On Appeal from the Southern District of Texas
Newby v. Enron Corp., No. H-01-CV-3624
The Honorable Melinda Harmon

VOLUME 1

APPELLEES' BRIEF RESPONDING TO MERRILL LYNCH, CREDIT SUISSE AND VINSON & ELKINS APPEALS

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
G. PAUL HOWES
ERIC ALAN ISAACSON
SPENCER A. BURKHOLZ
JAMES I. JACONETTE
ANNE L. BOX
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545

Lead Counsel for Appellees and for Lead Plaintiff
The Regents of the University of California

[Additional counsel appear on signature page.]

Regents of the University of California, et al., Plaintiffs/Appellees v. Credit Suisse First Boston (USA), Inc., et al., Defendants/Appellants
Fifth Circuit No. 06-20856

CERTIFICATE OF INTERESTED PERSONS/ CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs:	**Counsel for Plaintiffs:**
Lead Plaintiff: Regents of the University of California Other Named Plaintiffs: Amalgamated Bank, as Trustee for the LongView Collective Investment Fund, LongView Core Bond Index Fund and Certain Other Trust Accounts; Hawaii Laborers Pension Plan; George M. Placke; Michael J. Bessire; John Zegarski; San Francisco City and County Employees' Retirement System; Washington State Investment Board; Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund; Mervin Schwartz, Jr.; Stephen M. Smith; and Greenville Plumbers Pension Plan	William S. Lerach, Attorney-in-Charge Darren J. Robbins Helen J. Hodges Eric Isaacson G. Paul Howes Spencer A. Burkholz Byron S. Georgiou James I. Jaconette Michelle M. Ciccarelli Anne L. Box James R. Hail John A. Lowther Alexandra S. Bernay Matthew P. Siben Robert R. Henssler, Jr. LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP 655 West Broadway, Suite 1900 San Diego, CA 92101

Regents of the University of California, et al., Plaintiffs/Appellees v. Credit Suisse First Boston (USA), Inc., et al., Defendants/Appellants
Fifth Circuit No. 06-20856

Plaintiffs:	**Counsel for Plaintiffs:**
	Patrick J. Coughlin Sandy Svetcov 100 Pine Street, Suite 2600 San Francisco, CA 94111 Jerrilyn Hardaway 1111 Bagby, Suite 2100 Houston, TX 77002 Regina M. Ames 9601 Wilshire Blvd., Suite 510 Los Angeles, CA 90210 Roger B. Greenberg SCHWARTZ, JUNELL, GREENBERG & OATHOUT, LLP Two Houston Center 909 Fannin, Suite 2700 Houston, TX 77010 Thomas E. Bilek HOEFFNER & BILEK, LLP 1000 Louisiana Street, Suite 1302 Houston, TX 77002 Jonathan W. Cuneo Michael G. Lenett CUNEO GILBERT & LaDUCA, L.L.P. 507 C Street, N.E. Washington, DC 20002

Plaintiffs:	**Counsel for Plaintiffs:**
Staro Asset Management	Sherrie R. Savett BERGER & MONTAGUE, P.C. 1622 Locust Street Philadelphia, PA 19103
Nathaniel Pulsifer	Robert C. Finkel WOLF POPPER LLP 845 Third Avenue New York, NY 10022
Archdiocese of Milwaukee Supporting Fund, Inc.	David R. Scott SCOTT + SCOTT, LLC 108 Norwich Avenue Colchester, CT 06415
Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund	Michael J. Del Giudice CICCARELLO DEL GIUDICE & LAFON 1219 Virginia Street, East, Suite 100 Charleston, WV 25301

Defendants:	**Counsel for Defendants**
Arthur Andersen LLP	Charles W. Cox Ethan J. Brown Miles N. Ruthberg Peter A. Wald Catherine E. Palmer Melanie M. Blunschi James Farrell LATHAM & WATKINS LLP 633 West Fifth Street, Suite 4000 Los Angeles, CA 90071-2007 Andrew Ramzel Derek Hollingworth RUSTY HARDIN

Defendants:	**Counsel for Defendants**
	& ASSOCIATES, P.C. 5 Houston Center 1401 McKinney Street, Suite 2250 Houston, TX 77010 Theresa A. Foudy Myles K. Bartley Christopher C. Costello Eliot Lauer CURTIS, MALLET-PREVOST, COLT & MOSLE LLP 101 Park Avenue New York, NY 10178-0061
Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.	Barry Abrams, Attorney-in-Charge ABRAMS SCOTT & BICKLEY, LLP 700 Louisiana, Suite 4000 Houston, TX 77002 David H. Braff Michael T. Tomaino, Jr. Jeffrey T. Scott Daniel H.R. Laguardia SULLIVAN & CROMWELL LLP 125 Broad Street New York, NY 10004-2498
Credit Suisse First Boston (USA), Inc. (n/k/a Credit Suisse (USA), Inc.), Credit Suisse First Boston LLC (n/k/a Credit Suisse Securities (USA) LLC), Pershing LLC (f/k/a Donaldson, Lufkin & Jenrette Securities Corporation)	Richard W. Clary Julie A. North Darin P. McAtee CRAVATH, SWAINE & MOORE LLP Worldwide Plaza 825 Eighth Avenue New York, NY 10019-7475

Defendants:	**Counsel for Defendants**
	Lawrence D. Finder Odean L. Volker HAYNES AND BOONE, LLP 1 Houston Center 1221 McKinney Street, Suite 2100 Houston, TX 77010 George W. Bramblett, Jr. Noel M.B. Hensley HAYNES AND BOONE, LLP 901 Main Street Dallas, TX 75202-3789
Merrill Lynch, Pierce, Fenner & Smith Incorporated; Merrill Lynch & Co., Inc. (Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch & Co., Inc. is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly-held company owns more than 10% of Merrill Lynch & Co., Inc.'s shares.)	David J. Beck David M. Gunn BECK, REDDEN & SECREST, L.L.P. One Houston Center 1221 McKinney Street, Suite 4500 Houston, TX 77010-2010 Stuart J. Baskin Herbert S. Washer Adam S. Hakki SHEARMAN & STERLING LLP 599 Lexington Avenue New York, NY 10022
Vinson & Elkins LLP	John K. Villa, Attorney-in-Charge Mary G. Clark Gilbert O. Greenman George A. Borden WILLIAMS & CONNOLLY LLP 725 Twelfth Street, N.W. Washington, DC 20005

Defendants:	**Counsel for Defendants**
	Joseph D. Jamail JAMAIL & KOLIUS 500 Dallas Street, Suite 3434 Houston, Texas 77002
Richard B. Buy, Jeffrey McMahon and Lawrence Greg Whalley	Tom Kirkendall LAW OFFICES OF TOM KIRKENDALL 65 Hollymead Drive The Woodlands, Texas 77381-5118
Richard A. Causey	C. Robert Mace TEKELL, BOOK, MATTHEWS & LIMMER, L.L.P. 1221 McKinney Street, Suite 4300 Houston, Texas 77010
David Duncan	Barry G. Flynn, Attorney-in-Charge FLYNN & THAYER, P.C. 1300 Post Oak Blvd., Suite 750 Houston, TX 77056
Andrew S. Fastow	Craig Smyser Justin Waggoner SMYSER KAPLAN & VESELKA, L.L.P. 700 Louisiana, Suite 2300 Houston, TX 77002
Lou L. Pai	Roger E. Zuckerman Deborah J. Jeffrey Logan D. Smith ZUCKERMAN SPAEDER LLP 1800 M Street, N.W., Suite 1000 Washington, DC 20036
Kenneth D. Rice	Jacks C. Nickens, Attorney-in-Charge Paul D. Flack Jessica L. Wilson NICKENS, KEETON, LAWLESS,

Defendants:	**Counsel for Defendants**
	FARRELL & FLACK, L.L.P. 600 Travis Street, Suite 7500 Houston, TX 77002
Kevin P. Hannon	Reid M. Figel David L. Schwarz KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C. 1615 M Street, N.W. Washington, DC 20036
Joseph M. Hirko	Barnes H. Ellis David H. Angeli STOEL RIVES LLP 900 SW 5th Avenue, Suite 2600 Portland, OR 97204
Mark E. Koenig	Philip T. Inglima Justin P. Murphy CROWELL & MORING LLP 1001 Pennsylvania Avenue, N.W. Washington, DC 20004
Jeffrey K. Skilling	Jeffrey W. Kilduff, Attorney-in-Charge Karen M. Wahle Shannon M. Barrett Robert M. Stern O'MELVENY & MYERS, LLP 1625 Eye Street, N.W. Washington, DC 20006 Ronald G. Woods RONALD G. WOODS, ATTORNEY AT LAW 5300 Memorial, Suite 1000 Houston, TX 77007

STATEMENT REGARDING ORAL ARGUMENT

This Court's order granting petitions for leave to appeal under Federal Rule of Civil Procedure 23(f) specified: "This appeal is *sua sponte* EXPEDITED to the next available regular oral argument calendar, with the time allocated for argument to be set by the panel to which the case is assigned." CSFB RE6:2.[1]

The case is an important one, implicating the rights of thousands of investors who lost billions purchasing securities of a publicly traded company whose debts had been hidden, and whose profits and cash-flows were largely fabricated, by a series of deliberately contrived, deceptive transactions. Under the guise of an interlocutory appeal from a class-certification order – and ignoring the narrow scope of this Court's jurisdiction to entertain such an appeal – two of the financial institutions that deliberately engaged in the massive scheme to defraud ask this Court to eviscerate the case against them ***on its merits***. If, as and when this Court ever considers challenges

---

[1] Documents are cited as they appear in the Record on Appeal ("R"), by volume and using the page number that follows USCA5, *e.g.*, "8R:37280." When citations are to a document that is also in Appellees' Record Excerpts ("ARE"), the citation begins with the tab in the ARE where it is located followed by the specific page number, *e.g.*, "4ARE:36717." Some referenced documents appear to be missing from the Record on Appeal. Those documents are cited by their numbers on the district court docket sheet and by page number, *e.g.*, "Docket#5197:COR00052," and are attached to Appellees' Motion to Correct Omissions from the Transmitted Record. In addition, some referenced documents are attached to CSFB's Record Excerpts and are cited by tab and page number to that Record Excerpts, *e.g.*, "CSFB RE6:2."

to the merits of the Enron victim's claims, they deserve to be heard ***on a complete factual record***, not on an interlocutory appeal from a procedural class-certification order.

TABLE OF CONTENTS

Page

VOLUME 1

I. JURISDICTION 1

II. INTRODUCTION 1

III. FACTUAL SUMMARY 4

1. The Banks Structured the Contrived and Deceptive Transactions 6

2. CSFB's Manipulative and Deceptive Conduct 9

3. Merrill's Manipulative and Deceptive Conduct 16

IV. SUMMARY OF ARGUMENT 35

V. ARGUMENT 36

A. The Appeal Should Be Dismissed Since the Issues Raised Are Outside the Jurisdiction and Scope of Review Under Rule 23(f) 36

B. The District Court Committed No Abuse of Discretion in Finding that the Requirements for Class Certification Are Satisfied 48

C. The District Court Correctly Held that the Standard for Primary Scheme Liability Under Rule 10b-5(a) and (c) Was Satisfied on the Facts Preferred 50

D. The District Court Properly Found that Reliance Can Be Presumed 63

1. The *Affiliated Ute* Presumption Applies 63

2. *Greenberg* Is Inapposite 70

Page

3. The Banks Misallocate the Burdens of Proof 74

4. This Case Satisfies the Purported *Greenberg* Tests 77

5. The "Actual Movement" Test 79

6. Merrill's Activities Did Move the Stock 82

E. Joint-and-Several Liability for Knowingly Engaging in a Scheme to Defraud Does Not Defeat the Loss-Causation Requirement 85

1. The PSLRA's Loss-Causation Requirement Does Not Preclude Class Actions Against Knowing Violators Who the Statute Provides Shall Be Jointly and Severally Liable 87

2. The Joint-and-Several Liability Provisions Do Not Conflict with the Loss-Causation Provision 98

3. Plaintiffs Will Show Loss Causation for Each Defendant 106

VOLUME 2

VI. ISSUES PRESENTED 111

VII. STATEMENT OF THE CASE 111

VIII. STATEMENT OF FACTS 113

A. Facts Demonstrating V&E's Liability for Course of Conduct of Deception, Manipulation and Contrivances Pursuant to Rule 10b-5(a) and (c) 117

1. Chewco 119

Page

2. Cuiaba 121

3. Rhythms 122

4. Raptors 123

5. Watkins Investigation 125

B. Facts Demonstrating V&E's Liability for Material Misstatements and Omissions Pursuant to Rule 10b-5(b) 126

IX. SUMMARY OF ARGUMENT....129

X. ARGUMENT....130

A. This Court Should Dismiss V&E's Appeal 130

B. The District Court Chose a Correct Legal Standard in Adopting the "Creator" Test....137

C. Lead Plaintiff and the Class Have Standing to Pursue Their Claims Against V&E....149

XI. CONCLUSION....151

TABLE OF AUTHORITIES

Page

Abell v. Potomac Ins. Co.,
858 F.2d 1104 (5th Cir. 1988),
vacated, remanded, Fryar v. Abell,
492 U.S. 914 (1989).....66

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972)..... *passim*

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002).....90

Basic Inc. v. Levinson,
485 U.S. 224 (1988)..... *passim*

Bell v. Ascendant Solutions, Inc.,
422 F.3d 307 (5th Cir. 2005) ..... *passim*

Bertulli v. Indep. Ass'n of Cont'l Pilots,
242 F.3d 294 (5th Cir. 2001) 37, 42, 43

Blair v. Equifax Check Servs, Inc.,
181 F.3d 832 (7th Cir. 1999) 45

Bruschi v. Brown,
876 F.2d 1526 (11th Cir. 1989) 100

Cashman v. Coopers & Lybrand,
877 F. Supp. 425 (N.D. Ill. 1995).....145

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 39, 43

Central Bank N.A. v. First Interstate Bank, N.A.,
511 U.S. 164 (1994)..... *passim*

Page

Chiarella v. United States,
445 U.S. 222 (1980).....67

Colbert v. Dymacol, Inc.,
344 F.3d 334 (3d Cir. 2004) 1, 45

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993).....38

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005).....99, 108

EEOC v. Neches Butane Prods. Co.,
704 F.2d 144 (5th Cir. 1983) 45

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974).....139

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976).....61

Faison v. Nationwide Mortgage Corp.,
839 F.2d 680 (D.C. Cir. 1987).....96

Fidel v. Farley,
392 F.3d 220 (6th Cir 2004) 152

Fine v. Am. Solar King,
919 F.2d 290 (5th Cir. 1990) 74, 75, 77

Finkel v. Docutel/Olivetti Corp.,
817 F.2d 356 (5th Cir. 1987) ..... *passim*

Fogarazzo v. Lehman Bros.,
232 F.R.D. 176 (S.D.N.Y. 2005).....68

Page

Franze v. Equitable Assur.,
296 F.3d 1250 (11th Cir. 2002) 37

G.A. Thompson & Co. v. Partridge,
636 F.2d 945 (5th Cir. 1981) 95, 98

Gariety v. Grant Thornton,
368 F.3d 356 (4th Cir. 2004) 43

Garner v. Wolfinbarger,
433 F.2d 117 (5th Cir. 1970) 46

Greenberg v. Crossroads Sys.,
364 F.3d 657 (5th Cir. 2004) ..... *passim*

Hevesi v. Citigroup Inc.,
366 F.3d 70 (2d Cir. 2004) 134, 135

Hughes Aircraft v. Jacobson,
525 U.S. 432 (1999) 90

Hundahl v. United Benefit Life Ins. Co.,
465 F. Supp. 1349 (N.D. Tex. 1979) 62

In re Charter Commc'n., Inc.,
443 F.3d 987 (8th Cir. 2006) 60, 62

In re Daou Sys. Inc. Sec. Litig.,
411 F.3d 1006 (9th Cir. 2005) 82

In re Delta Air Lines,
310 F.3d 953 (6th Cir. 2002) 41, 104, 133

In re Dynegy, Inc. Sec. Litig.,
339 F. Supp. 2d 804 (S.D. Tex. 2004) 62

Page

In re Enron Corp. Sec. Litig.,
235 F. Supp. 2d 549 (S.D. Tex. 2002)..... *passim*

In re Enron Corp. Sec. Litig.,
236 F.R.D. 313 (S.D. Tex. 2006) ..... *passim*

In re Enron Corp. Sec. Litig.,
310 F. Supp. 2d 819 (S.D. Tex. 2004)..... *passim*

In re Enron Corp. Sec. Litig.,
439 F. Supp. 2d 692 (S.D. Tex. 2006).....41, 54, 104, 106

In re Enron Corp. Sec. Litig.,
No. H-04-0087, 2005 U.S. Dist. LEXIS 41240
(S.D. Tex. Dec. 22, 2005).....104

In re Enron Corp. Sec. Litig.,
No. H-01-3624, 2006 U.S. Dist. LEXIS 43146
(S.D. Tex. June 5, 2006)..... *passim*

In re Enron Corp. Sec. Litig.,
No. H-01-3624, 2006 U.S. Dist. LEXIS 88121
(S.D. Tex. Dec. 4, 2006).....41

In re Global Crossing, Ltd. Sec. Litig.,
322 F. Supp. 2d 319 (S.D.N.Y. 2004) 55

In re Initial Pub. Offering Sec. Litig.,
241 F. Supp. 2d 281 (S.D.N.Y. 2003) 55

In re James,
444 F.3d 643 (D.C. Cir. 2006).....42

In re Lernout & Hauspie Sec. Litig.,
236 F. Supp. 2d 161 (D. Mass. 2003).....55

Page

In re Lorazepam & Clorazepate Antitrust Litig.,
289 F.3d 98 (D.C. Cir. 2002).....40, 41, 134

In re Parmalat Sec. Litig.,
376 F. Supp. 2d 472 (S.D.N.Y. 2005).....58, 62, 63, 68

In re Software Toolworks Sec. Litig.,
50 F.3d 615 (9th Cir. 1995).....139

In re WorldCom Inc. Sec. Litig.,
No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 3791
(S.D.N.Y. Mar. 15, 2005).....96

In re ZZZZ Best Sec. Litig.,
864 F. Supp. 960 (C.D. Cal. 1994).....139

Kerns v. McWilliams,
435 F.2d 1306 (5th Cir. 1971).....1, 46

Klein v. Boyd,
Nos. 97-1143, 97-1261, [1998 Supp. Tr. Binder] Fed. Sec. L. Rep.
(CCH) ¶90,136 (3d Cir. Feb. 12, 1998)
opinion withdrawn for rehearing en banc,
1998 U.S. App. LEXIS 4121 (3d Cir. Mar. 9, 1998).....114, 140

Latham v. Shalala,
36 F.3d 482 (5th Cir. 1994).....77

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....149

McGann v. Ernst & Young,
102 F.3d 390 (9th Cir. 1996).....62

Page

McKowan Lowe & Co. v. Jasmine, Ltd.,
295 F.3d 380 (3d Cir. 2002) ..... *passim*

McNamara v. Bre-X Minerals, Ltd.,
57 F. Supp. 2d 396 (E.D. Tex. 1999) 140

Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc.,
168 F.3d 211 (5th Cir. 1999) 77

Miller v. Mackey Int'l,
452 F.2d 424 (5th Cir. 1971) 38, 39, 133

Nathenson v. Zonagen,
267 F.3d 400 (5th Cir. 2001) 70, 73, 74, 75

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) 45

Owen v. Kerr-McKee Corp.,
698 F.2d 236 (5th Cir. 1983) 98

Parcel Tankers, Inc. v. Formosa Plastics Corp.,
764 F.2d 1153 (5th Cir. 1985) 45

Pickett v. Iowa Beef Processors,
209 F.3d 1276 (11th Cir. 2000) 37

Prado-Steiman v. Bush,
221 F.3d 1266 (11th Cir. 2000) 45, 136

Quaak v. Dexia, S.A.,
357 F. Supp. 2d 330 (D. Mass. 2005).....55

Raila v. United States,
355 F.3d 118 (2d Cir. 2004) 90

Page

Rivera v. Wyeth-Ayerst Labs.,
283 F.3d 315 (5th Cir. 2002) 149

Robbins v. Koger Properties, Inc.,
116 F.3d 1441 (11th Cir. 1997) 100

Robinson v. Tex. Auto Dealers Ass'n,
387 F.3d 416 (5th Cir. 2004) 39

SEC v. Hopper,
No. H-04-1054, 2006 U.S. Dist. LEXIS 17772
(S.D. Tex. Mar. 24, 2006).....55, 56, 145

SEC v. Zandford,
535 U.S. 813 (2002).....53, 62

Santa Fe Indus. Inc. v. Green,
430 U.S. 462 (1977).....52, 62

Schreiber v. Burlington N., Inc.,
472 U.S. 1 (1985).....61

Scott v. Brown,
[1892] 2 Q.B. 724 (C.A.).....61

Semernko v. Cendant Corp.,
223 F.3d 165 (3d Cir. 2000) 62

Sharp v. Coopers & Lybrand,
649 F.2d 175 (3d Cir. 1981) 68

Shores v. Sklar,
647 F.2d 462 (5th Cir. 1981) 63

Page

Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
482 F.2d 880 (5th Cir. 1973) 43

Simpson v. AOL Time Warner Inc.,
452 F.3d 1040 (9th Cir. 2006) 56, 57, 59, 60

Smith v. Ayres,
845 F.2d 1360 (5th Cir. 1988) 63, 64, 68

Spurlin v. Gen. Motors Corp.,
426 F.2d 294 (5th Cir. 1970) 46, 136

Superintendent of Ins. v. Bankers Life,
404 U.S. 6 (1971).....61

TBG, Inc. v. Bendis,
36 F.3d 916 (10th Cir. 1994) 95, 98

Thompson v. Johns-Manville Sales Corp.,
714 F.2d 581 (5th Cir. 1983) 96

Unger v. Amedisys Inc.,
401 F.3d 316 (5th Cir. 2005) ..... *passim*

United States v. Bear Marine Serv.,
696 F.2d 1117 (5th Cir. 1983) 45

United States v. O'Hagan,
521 U.S. 642 (1997).....51

Walco Invs. v. Thenen,
168 F.R.D. 315 (S.D. Fla. 1996).....68

Warshaw v. Xoma Corp.,
74 F.3d 955 (9th Cir. 1996) 139

Page

Waste Mgmt. Holdings, Inc. v. Mowbray,
208 F.3d 288 (1st Cir. 2000).....45

West v. Prudential Secs., Inc.,
282 F.3d 935 (7th Cir. 2002).....135

STATUTES, RULES AND REGULATIONS

1 U.S.C.
§1 .....86, 99

15 U.S.C.
§77k 89
§78i 60
§78j(b)..... *passim*
§78t(b).....139
§78u-4(b)(2).....148
§78u-4(b)(4).....85, 86, 98, 100
§78u-4(d) 86
§78u-4(f) 94
§78u-4(f)(2) 4, 88, 101
§78u-4(f)(3) ..... *passim*
§78u-4(f)(4) 93
§78u-4(f)(5) 110
§78u-4(f)(7) 93
§78u-4(f)(8) 94
§78u-4(f)(10) 52, 95

28 U.S.C.
§1292(b).....115

Federal Rules of Appellate Procedure
Rule 32(a)(5).....1
Rule 32(a)(6).....1
Rule 32(a)(7).....1

Page

Federal Rules of Civil Procedure
Rule 23 ..... *passim*
Rule 23(a) 48
Rule 23(b)(3) 2, 49
Rule 23(c)(1) 40
Rule 23(f) ..... *passim*

17 C.F.R.
§240.10b-5 ..... *passim*
§240.10b-5(a) ..... *passim*
§240.10b-5(b) ..... *passim*

H.R. Rep. No. 104-369 (1995) 88, 89, 90

S. Rep. No. 104-98 (1995) 88, 102

SECONDARY AUTHORITIES

A.A. Berle, Jr., *Liability for Stock Market Manipulation* (1931)
31 Colum. L. Rev. 264 61

A.A. Berle, Jr., *Stock Market Manipulation* (1938)
38 Colum. L. Rev. 393 61

Richard A. Brealey & Stewart C. Myers, *Capital Investment and Valuation* (2003) 72

Eugene F. Fama & Merton H. Miller, *The Theory of Finance* (1972) 72

3 Fowler V. Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts* (2d ed. 1986)
§10.1 96

Page

4 Fowler V. Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts* (2d ed. 1986)
§20.2 100

Burton G. Malkiel, *Is The Stock Market Efficient?* 243 Science 1313 (1989) 72

Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth and the Valuation of Shares*, 34 J. Bus. 411 (1961).....72

Restatement of Law (Second) of Torts (1979)
§875 96

I. JURISDICTION

Jurisdiction over this interlocutory appeal "is bridled by Rule 23(f)." *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 314 (5th Cir. 2005). "Under that rule, 'a party may appeal only the issue of class certification; no other issues may be raised.'" *Id.* *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389-90 (3d Cir. 2002) (dismissing Rule 23(f) appeal to the extent it dealt with requirements of the federal securities laws rather than with class-certification issues); *Colbert v. Dymacol, Inc.*, 344 F.3d 334 (3d Cir. 2004) (*en banc*) (same); *Kerns v. McWilliams*, 435 F.2d 1306, 1306 (5th Cir. 1971) (same).

II. INTRODUCTION

Underlying Enron's extraordinary rise and fall was a pervasive corporate fraud, the most devastating in history. The appellant Wall Street banks, Merrill and CSFB, engaged in the scheme to misrepresent and conceal the truth about Enron's financial condition. The overarching scheme in which defendants participated involved numerous off-the-books partnerships, special purpose entities ("SPEs"), and other exotic structures, through which dozens of contrived transactions were executed. The fraudulent scheme's complexity merely reflects its size. The case as a class action remains manageable. The district court carefully considered the detailed Trial Plan submitted by Lead Plaintiff, finding it "an orderly and methodical approach for trying

the alleged overarching scheme, arising from a common nucleus of fact and common course of conduct, to misrepresent Enron's financial status, fool credit agencies, and deceive investors." *In re Enron Corp. Sec. Litig.*, 236 F.R.D. 313, 316 (S.D. Tex. 2006). The district court properly found that the Trial Plan provided support for the requirements of predominance and superiority under Rule 23(b)(3). No ruling could be more in the trial court's discretion.

The issues raised on this appeal must be limited to the district court's certification order. Many of the arguments raised by the banks are "merits" issues inappropriate for Rule 23(f) review, including the proper test for primary liability in light of *Central Bank N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), whether transaction causation has been established, and the proper interpretation of the joint-and-several liability provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The district court has already decided many of these issues at the pleading stage, refined those rulings in later orders, and it will further consider them at summary judgment and trial (and possibly post-trial). The banks have enjoyed procedural fairness to date and will continue to have proper review of these issues. And, whatever the interpretation of these merits issues, they are issues common to the class and appropriate for class-wide application and determination.

The district court did not, in any event, contravene *Central Bank* by adopting the SEC-endorsed primary-liability test that participants in a fraudulent scheme are liable ***only*** if they employ deceptive or manipulative acts or devices or contrivances with the primary "purpose and effect" of manipulating a company's financial statements.

Similarly misplaced is appellants' argument that the district court erred in determining *Affiliated Ute*'s presumption of reliance applies because the case against these defendants is based primarily on omissions and concealment of the truth. The district court found that the "primarily" qualifier under established Fifth Circuit precedent allows the presumption's application despite affirmative false statements that produced a "mixed context" of misstatements and omissions. *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2006 U.S. Dist. LEXIS 43146, at *101-*103, *112 (S.D. Tex. June 5, 2006); *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 359, 363 (5th Cir. 1987) (there are no "pure" omissions cases). No other rule makes sense for our modern securities markets.

Finally, the district court correctly followed the PSLRA's plain language to hold that each actor found to be a primary violator as a participant in a scheme is

jointly and severally liable for all damages ***if*** – but only if – that actor "***knowingly***" violated the statute. 15 U.S.C. §78u-4(f)(2)(A).[2]

The banks that hid Enron's debt and concealed its true financial condition by generating its phony profits and operating cash flow have received and will continue to receive full due process in the district court. The appeal should be dismissed, or if heard on the merits, the district court's class-certification order, affirmed.

III. FACTUAL SUMMARY

Enron, with Merrill and CSFB as key players, implemented a scheme using deceptive and manipulative transactions to distort Enron's reported results from operations and financial statements.[3] The scheme created the false appearance that Enron had far less debt and much more operating cash flow and earnings than it really did. By structuring sham transactions to hide debt and losses, defendants created a grossly misleading appearance of sustained growth and financial success. The district court found that Lead Plaintiff's Trial Plan, which broke proof of the scheme into eight categories of transactions, "present[ed] an orderly and methodical approach for

---

[2] Citations and footnotes are omitted and emphasis is added unless otherwise noted.

[3] Other key players, including Citigroup, JP Morgan and CIBC, have collectively paid over $7 billion to settle claims in this case.

trying the alleged overarching scheme." *Enron*, 236 F.R.D. at 316. The eight categories are: (1) prepays, (2) share trusts, (3) forest products, (4) FAS 125/140, (5) tax, (6) minority interest, (7) related party, and (8) other (five hybrid transactions).[4]

While the specific transactions, dollar amounts and participants varied, there were consistent themes. Most, if not all, of the transactions lacked a true business purpose – their primary purpose was to engineer a positive impact on Enron's financial statements, to improve the perception of the Company's financial strength and liquidity in the financial community and to pay off the banks for their illicit conduct. Key measures used by the analyst community, including debt/equity ratios and coverage ratios, were manipulated in Enron's favor. In addition, most transactions were executed at or near the end of the Company's reporting periods, dressing up Enron's financial statements for public consumption.

Enron, CSFB and Merrill each had a thorough understanding of what they were doing and why, as they structured and executed inherently deceptive transactions to circumvent Generally Accepted Accounting Principles ("GAAP") and mislead Enron's auditors, the rating agencies, and the securities markets, *i.e.*, investors.

---

[4] The eighth category of these transactions, other or eight-ball transactions, are transactions such as the Merrill sham Nigerian Barges and Electricity Trades transactions, which were core to the scheme and allowed Enron to meet expectations at key junctures.

1. The Banks Structured the Contrived and Deceptive Transactions

Appellees allege – and the proof will show – that CSFB and Merrill knowingly engaged in the scheme to defraud. Each bank knew that to obtain part of Enron's lucrative business it had to structure, fund, and execute bogus transactions. Each knew that other banks, competing for the same business, were also engaging in sham transactions – all with the goal of falsifying Enron's reported financial condition. Indeed, the banks evaluated Enron's financial statements in light of the misleading effect of the transactions for which they and the other bank defendants were responsible.[5]

For example, CSFB wrote internally about an SSB/Citi deal: "The beauty of the deal from Enron and SSB/Citi's stand point is that it does not appear to be 'new' money on Enron's balance sheet, and it creates new capacity for SSB/Citi to make

---

[5] Barclays Bank, which has moved to join the appeal, described Enron's minority-interest transactions, such as Rawhide and Nighthawk, as structures in which "***debt masquerades as a limited partnership interest***." 7R:34330. When calculating Enron's true debt, the bank reclassified the minority interests as well as other structured financings as debt, stressing that it was "***essential [to] take these considerations into account***" when calculating Enron's balance-sheet leverage or cash-flow coverage of financing costs. 7R:34333. As a result of these reclassifications, the bank concluded that Enron's ***1998 year-end debt was actually $11.9 billion as opposed to the year-end balance sheet amount of $7.4 billion***. 7R:34329. Therefore Enron's debt-to-total-capitalization ratio was actually 63%, as opposed to the ***41.9% Enron claimed***. *Id.*

loans to Enron. . . . Behind the scenes . . . Citi has basically hedged it's other Enron exposure . . . since they had laid off $500 mm of Enron exposure to the market. . . . The ***'market' doesn't see that behind the scenes, Citi is lending $500 mm of new money to Enron***."[6] In the summer of 2001, CSFB was enlisted by Enron to possibly split up the Company. Having engaged in dozens of deceptive transactions to hide Enron's enormous debt, CSFB knew the off-the-books debt was a major obstacle, noting the "[t]otal debt including on and off balance sheet indebtedness is currently over $36 billion."[7]

In a similar vein, Merrill's involvement in structuring, funding and launching LJM2 gave it knowledge of the scope and size of the scheme, including the other banks' involvement. The September 1999 draft of the LJM2 Private Placement Memo ("PPM") prepared by Merrill noted that "Enron has $34 billion of assets on its balance sheets, ***but has in excess of $51 billion of assets under management (the difference between these numbers represents the amount of assets financed off-balance***

---

[6] Email from Jennifer Powers to Osmar Abib, James Moran, Adebayo Ogunlesi, and others, August 18, 2000. *See* Appellees' Request for Judicial Notice ("Jud. Not.") filed herewith, Ex. B.

[7] CSFB call report dated August 27, 2001. *See* Jud. Not., Ex. C.

sheet)."[8] The significance of the off-balance-sheet debt was not lost on Merrill; deals like those contemplated for LJM2 had to be done to create cash for Enron ***but not show more debt on its financial statements***! The same section of the draft PPM (entitled "Rationale for Enron Deal Flow") noted that "***[a]dditional debt may place [Enron's] investment grade credit rating in jeopardy***."[9]

The banks' own documents show that they knew their conduct was concealing Enron's true financial condition:

As CSFB noted in 1999:

- "As you probably know, Osprey is a vehicle enabling Enron to ***raise disguised debt*** which appears as equity on Enron's balance sheet. . . . Osprey serves the added purpose for Enron of being ***an off-balance sheet parking lot*** for certain assets."[10]

As Merrill noted at year-end 1999 ("Nigerian Barges"):

- "Jeff McMahon, EVP and Treasurer of Enron Corp. has asked ML to purchase $7MM of equity ***in a special purpose vehicle that will allow Enron Corp. to book $12MM of earnings***. Enron must close this transaction by 12/31/99. Enron is viewing this transaction as a bridge to permanent equity and they have

---

8 *See* Docket#5197:COR00349 (Draft PPM Executive Summary).

9 *Id.*

10 Docket#5217/5257:COR01703 (email from Jonathan Yellen to Osmar Abib, and others, dated 9/16/99).

assured us that we will be taken out of our investment within six months. The investment would have a maximum 22.5% return."[11]

As Merrill noted in the spring of 2000 ("Electricity Trades"):

- Internally Merrill discussed the "***unwind***," "***at yearend when we did this trade***,"[12] emphasizing that circumstances had not changed to justify a lower fee, for "***they [Enron] knew what we were making at . . . the quarter and year (which had great value in their stock price, not to mention personal compensation)***."[13]

2. CSFB's Manipulative and Deceptive Conduct

CSFB structured and executed many of the transactions at the heart of the Enron Ponzi scheme. From 1999 onward, CSFB was one of Enron's "Tier One" Banks, pocketing more fees in 1999 than any other. By 2001 it had the dubious label of Enron's "Best Bank" in North America. The depth and breadth of CSFB's involvement in Enron's operations and finances from 1997 onward is staggering. CSFB underwrote 30 Enron-related transactions, participated in 54 revolving-credit facilities, was engaged by Enron to sell significant assets and otherwise engaged in deceptive transactions, including: (1) related-party transactions; (2) prepays; (3) FAS

---

[11] Docket#5197:COR01180-84 (12/23/99 Internal Merrill Lynch Appropriation Request).

[12] Docket#5197:COR01177 (5/30/00 email from Schuyler Tilney to Dan Gordon and Robert Furst).

[13] *Id*.

125/140 transactions; (4) share-trusts transactions; and (5) minority-interest transactions.

As a result, CSFB had a comprehensive understanding of Enron's operations and finances. Its deceptive activities included transactions that lacked a true business purpose – their primary purpose being to conceal Enron's true financial condition, creating the ***false appearance*** of strength and liquidity in its operations. Specifically, CSFB deceptively structured, designed, funded and/or otherwise engaged in the following transactions:

- ***Related-party transactions: CSFB, as one of only two limited partners, structured and capitalized through a sham entity, CSFB's Enron Rhythms Netconnections Bet ("ENRB"), the now notorious LJM1 partnership, designing it specifically to falsify Enron's financial statements by allowing the Company to establish a fake hedge against a position in a volatile Internet stock – Rhythms Netconnections.***

- ***Prepays: These were loans CSFB disguised as commodity transactions, without any risk, which Enron reported as "price risk management liabilities" (Enron's term for trading liabilities) on its balance sheet instead of debt. As CSFB reviewed its second prepay in December 2000, CSFB's knowledge of the deception was reflected in the credit memo: "but it is really a loan to ENE."[14] Internally CSFB traders***

---

[14] *See* Docket#5217/5257:COR01729.

***questioned whether*[15] *it was "ok" for CSFB to be "entering into such an 'obvious loan' transaction*."[16]

- ***FAS 125/140 transactions**: To disguise debt as revenues, CSFB and DLJ structured three FAS 125/140 transactions for Enron – Nile, Nikita and Iguana. These transactions allowed Enron to report hundreds of millions from operations versus what it truly was – debt*.

- ***Share-trust transactions**: Deceptive share-trust transactions hid $4.3 billion in debt, keeping it off Enron's balance sheet. CSFB and DLJ engaged in and worked to structure three of these transactions, Marlin I, Firefly and Osprey.*[17] *DLJ and CSFB were fully aware of the impact of their deceptive actions, with CSFB noting in 2000 these "vehicle[s] enabl[e] Enron to raise disguised debt which appears as equity on*

---

[15] Docket#5217/5257:COR01486-90 (12/12/00 email from Ian Emmett (CSFB) to Geoff Smailes (CSFB)).

[16] Docket#5217/5257:COR01492 (12/12/00 email from Ian Emmett, CSFB, to Steven Wootton, Director, CSFB: "Is it OK for us to be entering into such an 'obvious' loan transaction?"). CSFB on prepays: "I am being asked to quote on a structure for Enron that enables Enron to borrow USD that are treated as price risk management rather than debt on balance sheet." Docket#5217/5257:COR01722.

[17] The fraudulent Marlin I transaction involved issuing Marlin certificates that were never "at risk," allowing Enron to acquire Wessex Water in 1998 for $2.4 billion without impacting Enron's financial statements. *See* 8R:37112-15. Docket#5217/5257:COR01494-1701 (12/8/98 Marlin Water Trust Offering Memorandum). Firefly was structured to shift $400 million of debt off Enron's books. *See* Docket#5217/5257:COR01713; Docket#5217/5257:COR01705; Docket#5217/5257:COR01746. Finally, Osprey notes raised $2.6 billion which flowed through Whitewing, an Enron-related entity that purchased distressed Enron assets at inflated figures. 8R:37101-06.

***Enron's balance sheet " and "serves the added purpose for Enron of being an off-balance sheet parking lot for certain assets*."[18]**

- ***Minority-interest transactions: CSFB was a co-lead bank on the Rawhide transaction, a bogus financing transaction which allowed Enron to raise $750 million of off-balance-sheet debt. CSFB undertook the due diligence on the Rawhide structure and on the supporting Rawhide assets*.[19]**

As Enron's CFO Andrew Fastow recently testified, the banks, including CSFB, "worked to solve certain of [Enron's] financial problems." 4ARE:36721-22 (Fastow Declaration, ¶¶6, 8). "In many instances, ***the banks primarily devised the financial structures***, which contributed to Enron achieving its financial reporting objectives." 4ARE:36721 (Fastow Declaration, ¶6).[20] Fastow and certain of Enron's banks "worked together, ***intentionally and knowingly***, to engage in ***transactions that would affect Enron's financial statements***." 4ARE:36722 (Fastow Declaration, ¶7). According to Fastow:

> 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

---

[18] Docket#5217/5257:COR01703 (9/16/99 email from Wesley Jones to Jonathan Yellen, Osmar Abib and forwarded to others).

[19] Docket#5217/5257:COR01806 (Mandanas Deposition); Docket#5217/5257: COR01810 (Mandanas Deposition).

[20] *See also, e.g.*, Docket #5217/5257:COR01758-59 (Fastow Deposition) ("In many cases, the banks brought us these structures, and we executed the transactions with the banks.").

> Enron. And these structured finance transactions, along with other things that Enron did, ***created that deception***.

Docket#5217/5257:COR01788 (Fastow Deposition); *see also* Docket#5217/5257: COR01756-58 (Fastow Deposition).

According to Fastow, CSFB's Laurence Nath played a key role in structuring many of the transactions at issue: "I viewed ***Larry Nath as the person most responsible*** for developing and executing the following transaction structures: Marlin, Whitewing, Osprey, and Firefly." 4ARE:36736 (Fastow Declaration, ¶48). *See also* Docket#5217/5257:COR01775 (Fastow Deposition). Indeed when, prior to joining CSFB, Nath was at Citibank, he "***presented***" to Fastow the Nighthawk transaction, which "had a material impact on Enron's financial statements." 4ARE:36723 (Fastow Declaration, ¶10). Other than financial reporting benefits, Fastow "can recall no real business purpose associated with" Nighthawk. *Id*. In one instance, Nath felt so strongly about his ownership of a particular transaction structure that he insisted Fastow sign a ***confidentiality agreement*** before disclosing it. Docket#5217:5257: COR01769 (Fastow Deposition). In his recent deposition, Fastow elaborated on the banks' role:

> Q. What do you mean when you say "solve Enron's financial reporting problems"?
>
> A. Well, Enron had a problem in that its – the results it would otherwise have published from just its business operations were usually

> insufficient in order for Enron to maintain its investment grade credit rating or to meet its earnings targets.
>
> And we were looking with banks who could help us solve this problem, meaning doing transactions that would, as we described internally, fill the gap between what was really happening inside Enron and what – the way we wanted Enron to appear to the outside world.

Docket#5217/5257:COR01754 (Fastow Deposition).

The following chart shows the pervasive impact of the CSFB deceptive and manipulative transactions on Enron's financial statements during 1999-2001:

CSFB's Deceptive Conduct Materially Impacted Enron's Reported Financial Condition

EARNINGS BEFORE INTEREST, TAXES AND DEPRECIATION (IN MILLIONS)											
	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended		
	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001		
Effect on EBITDA Overstated/(Understated)	127.3	179.4	8.0	62.1	110.7	718.2	260.0	300.0	579.9	2,345.60	2,345.60
Iguana										-	
Nikita									10.0	10.00	
Nile									18.9	18.90	
Rawhide										-	
CSFB Prepay										-	
LJM 1 / Rhythms	95.00	95.0	8.0	8.0	8.0	8.0	-	-	-	222.00	
LJM1/Cuiaba	32.30	63.3	-	-	-	-				95.60	
Firefly										-	
Osprey										-	
Marlin										-	
Selected LJM2 transactions (See Note)	-	21.10	-	54.10	102.70	710.20	260.00	300.00	551.00	1,999.10	
CASH PROVIDED BY (USED IN) OPERATING ACTIVITIES											
	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended		
	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001		
Effect on Cash Provided by (Used in) Operating Activities Overstated/(Understated)	345.0	1,954.1	830.6	860.6	893.4	1,825.7	882.9	836.9	920.9	9,350.10	9,350.10
Iguana	-	208.4	-	-	-	-	-	-	-	208.40	
Nikita	-	-	-	-	-	-	-	-	29.0	29.00	
Nile	-	-	-	-	-	-	-	-	22.2	22.20	
Rawhide	-	-	-	-	-	-	-	-	-	-	
CSFB Prepay	-	-	-	-	-	150.0	-	-	-	150.00	
LJM 1 / Rhythms	-	-	-	-	-	-	-	-	-	-	
LJM1/Cuiaba	-	-	-	-	-	-	-	-	-	-	
Firefly	-	-	-	-	-	-	-	-	-	-	
Osprey	345.0	744.7	30.6	30.6	63.4	611.4	82.9	236.9	269.7	2,415.20	
Marlin	-	-	-	-	-	-	-	-	-	-	
Selected LJM2 transactions (See Note)	-	1,001.00	800.00	830.00	830.00	1,064.30	800.00	600.00	600.00	6,525.30	
TOTAL DEBT											
	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended	12 mo ended	3 mo ended	6 mo ended	9 mo ended		
	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001		
Effect on Total Debt Overstated/(Understated)	(3,106.2)	(4,820.7)	(4,841.5)	(4,580.6)	(5,261.4)	(5,796.2)	(5,430.1)	(5,350.4)	(5,241.8)	(44,428.90)	(44,428.9)
Iguana	-	(208.4)	(208.4)	-	-	-	-	-	-	(416.80)	
Nikita	-	-	-	-	-	-	-	-	(80.0)	(80.00)	
Nile	-	-	-	-	-	-	-	-	(25.0)	(25.00)	
Rawhide	(750.00)	(750.0)	(740.0)	(740.0)	(740.0)	(740.0)	(740.0)	(740.0)	(691.0)	(6,631.00)	
CSFB Prepay	-	-	-	-	-	(150.0)	(150.0)	(150.0)	(150.0)	(600.00)	
LJM 1 / Rhythms	-	-	-	-	-	-	-	-	-	-	
LJM1/Cuiaba	-	(200.0)	(200.0)	(200.0)	(200.0)	(200.0)	(200.0)	(200.0)	-	(1,400.00)	
Firefly	(475.00)	(475.0)	(475.0)	(475.0)	-	-	-	-	-	(1,900.00)	
Osprey	(926.30)	(1,327.4)	(1,358.2)	(1,305.7)	(2,461.5)	(2,646.3)	(2,280.2)	(2,400.5)	(2,350.8)	(17,056.90)	
Marlin	(954.90)	(954.9)	(954.9)	(954.9)	(954.9)	(954.9)	(954.9)	(954.9)	(1,040.0)	(8,679.20)	
Selected LJM2 transactions (See Note)	-	(905.00)	(905.00)	(905.00)	(905.00)	(1,105.00)	(1,105.00)	(905.00)	(905.00)	(7,640.00)	

NOTE: "Selected LJM2 transactions" are Yosemite I, Rawhide, Fishtail/Bacchus, Osprey add-on certificates, Osprey II, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.

3. Merrill's Manipulative and Deceptive Conduct

Merrill was at the center of the scheme to defraud. Merrill structured LJM2, setting up the contrived entity to distort Enron's true financial picture ***throughout the Class Period***. Fastow testified "Merrill Lynch and I structured – came up with the structure together."[21] The Nigerian Barges "sale" was a sham – not a real sale at all. The Electricity Trades, in Merrill's own words, were "delta neutral" or "mirror image" transactions, *i.e.*, they were not intended to be real trades at all.[22] Merrill does not really try to defend these deceptive acts – instead they are arguing their responsibility for the fraudulent scheme should end in early 2000. Yet, according to expert testimony, without the Nigerian Barges and Electricity Trades at the end of 1999, Enron would have "missed" its numbers and its stock price would have collapsed.[23] Due to Merrill's manipulative and deceptive conduct, the fraud was allowed to

---

[21] Docket#5197:COR01271 (Fastow Deposition). *See also* 4ARE:36733 (Fastow Declaration, ¶41).

[22] Docket#5197:COR01169-71. *See also* Docket#5197:COR01277-80, COR01286, COR01288 (Foster Deposition); Docket#5197:COR01304-05, COR01306 (Foster Deposition) ("[T]hese transactions weren't real transactions.").

[23] *See, e.g.*, Docket#5256:COR02030-31; Docket#5197:COR01413-21 (Solomon Report); Docket#5197:COR01429-38 (Solomon Supp. Report at Schedules 3-6, 8); Docket#5197:COR01348 (Nye Report, ¶51); Docket#5197:COR01265 (Fastow Deposition). *See* Docket#5197:COR01339-40 (Expert Rebuttal Report of Claire A. Hill). 3ARE:35785-86 (Hakala Declaration, ¶¶7-8).

continue on into 2000-2001 with LJM2 – Merrill's manipulative device that falsified Enron's financials for the rest of the Class Period.

LJM2: Merrill claims its role in LJM2's formation and the launching of LJM2 was *de minimus*. But this is a factual issue. It has nothing to do with Rule 23. It also is not true.

According to Fastow, LJM2 was formed to make Enron's financial statements "what Enron desired them to be" for the purpose of "managing [Enron's] earnings."[24] Merrill conceptualized and structured LJM2 in concert with Fastow.[25] Merrill drafted the PPM for LJM2 and executed its marketing approach. Fastow summed up, in an April 2000 e-mail, that "***LJM2 was a unique and challenging transaction. If it weren't for [Merrill's] vision and determination, it wouldn't have happened***."[26]

---

[24] 4ARE:36733-34 (Fastow Declaration, ¶42). *See also* Docket#5197:COR00338-44; Docket#5197:COR01477 (*United States v. Lay, Skilling*, No. H-04-25, Trial Transcript (S.D. Tex. Mar. 7, 2006) ("*Lay/Skilling* Trial Transcript")) (Fastow testimony).

[25] 4ARE:36733 (Fastow Declaration, ¶41); Docket#5197:COR01239 (Fastow Deposition); Docket#5197:COR01248-49 (Fastow Deposition); Docket#5197: COR01271 (Fastow Deposition).

[26] Docket#5197:COR00002.

Merrill helped fund and executed LJM2's early closing in late December 1999, and it knowingly "***approved***"[27] and funded several deceptive 1999 year-end LJM2/Enron transactions that, along with the sham Nigerian Barges sale and the bogus Electricity Trades, caused Enron to falsely report that it had met Wall Street's earnings expectations for the fourth quarter of 1999.[28] With the LJM2 contrivance in place, designed and structured by Merrill, Enron had a go-to entity to unload unwanted assets. Throughout 2000, Merrill funded additional LJM2 transactions – including the infamous Raptors as well as the so-called Backbone transaction with Enron's broadband business – with knowledge of their deceptive purpose and intended effect.[29] As Fastow has aptly characterized it, LJM2 was a "conduit" through

---

[27] Docket#5197:COR00004 ("L.P.'s have approved 5 out of 6 [year-end] deals").

[28] 4ARE:36734 (Fastow Declaration, ¶44); Docket#5197:COR01249 (Fastow Deposition) (As Fastow testified, when he "talked about . . . manipulating or managing earnings" with Enron's banks who were limited partners in LJM2 (including Merrill), he specifically discussed how LJM2 would manipulate Enron's earnings, including "the timing of earnings, the actual creation of earnings, and changing the nature of earnings that Enron was recording.").

[29] 4ARE:36734-35 (Fastow Declaration, ¶46); Docket#5197:COR00006-15; Docket#5197:COR00017.

which Merrill (and the other LJM2 partners) participated in the deceptive earnings transactions.[30]

LJM2's Nowa Sarzyna Transaction: Nowa Sarzyna – the largest of the 1999 year-end earnings manipulation transactions – involved the "warehousing" of an Enron asset, meaning the temporary "sale" of the asset in a deal in which neither the downside risk or upside potential of the asset was really transferred to the "buyer" (LJM2) and in which Enron maintained actual control of the asset.[31] Nowa Sarzyna was an unfinished power plant being built in Poland by an Enron Europe subsidiary. Enron had planned to sell Nowa Sarzyna into a new structure called "Project Margaux." That transaction was supposed to have created significant "earnings" for Enron in the fourth quarter of 1999. But the power plant was behind schedule and could not become operational by year-end. The Margaux structure was also behind schedule and could not be in place in time to transact the much-needed year-end earnings deal. Enter LJM2. Problem solved.

---

30 Docket#5197:COR01258, COR01263 (Fastow Deposition).

31 A contemporaneous Enron email illustrates the point: "Most of our share of Poland will be sold to a friendly third party, and then bought back some time next year. . . . The third party is basically a thinly-capitalized SPV . . . but we will still have complete operational control . . . ." Docket#5197:COR00357. *See also* Docket#5197: COR01252 (Fastow Deposition).

LJM2 "acquired" a 75% equity interest in Nowa Sarzyna in late December 1999, allowing Enron to fraudulently book $16 million in earnings. LJM2 agreed to serve as a short-term "parking lot" for the asset. LJM2's holding period would be three months or less, after which it would be transferred to the Margaux structure or, pursuant to "an 'informal' agreement among senior Enron management,"[32] Enron would "provide liquidity" (*i.e.*, buy it back).[33] Enron paid LJM2 an up-front fee of $750,000[34] and agreed to pay LJM2 a 25% return on its "investment."[35] Enron performed as agreed; in late March 2000, an Enron subsidiary repurchased 33% of the interest LJM2 had acquired, and Condor purchased the other 67%, at the agreed rate of return. Nowa Sarzyna was subsequently placed in the newly finished Margaux structure – a structure that was only completed with LJM2's purchase of 40% of Margaux.

Fastow confirmed the deceptive nature of the Nowa Sarzyna transaction:

---

32 Docket#5197:COR00360.

33 *Id*.

34 Docket#5197:COR00362.

35 Docket#5197:COR00364.

A. ***[L]JM was basically, what we called, warehousing the asset, just owning it for a short period of time with no intention of being the permanent owner of the asset***.

This allowed Enron to record the sale at year-end for financial reporting purposes, even though we knew LJM wasn't going to be the real owner of it in the future.

* * *

A. ***It allowed Enron to report the numbers it wanted to report***.[36]

Merrill engaged and funded the Nowa Sarzyna transaction knowing it was a warehousing deal,[37] not a real purchase. ***An internal Merrill document noted: "LJM2 to hold [the Nowa Sarzyna facility] until Enron finds a long term investor."***[38]

---

[36] Docket#5197:COR01479 (*Lay/Skilling* Trial Transcript).

[37] *See also* Docket#5197:COR00413. *See, e.g.*, Docket#5197:COR00399. Merrill was familiar with the Margaux structure – Robert Furst, who by December 1999 was Merrill's Relationship Manager with respect to Enron, had worked on the Margaux structure while employed at CSFB.

[38] Docket#5197:COR00418. In a sales presentation prepared by Merrill for a February 7, 2000 meeting with an investor, it showed that Nowa Sarzyna was still to be transferred to Margaux – even though LJM2 then "owned" it. Docket#5197:COR00420-48. Finally, by no later than March 20, 2000, Merrill knew that LJM2 was going to complete the phony deal by purchasing 40% of the equity in the new Margaux structure and that Margaux would acquire – largely from LJM2 – Nowa Sarzyna. Docket#5197:COR00462.

LJM2's Backbone Transactions: As the second quarter of 2000 was coming to a close, Enron was yet again faced with an earnings shortfall. Moreover, its broadband business ("EBS"), which it had announced to great effect at a January 2000 analyst conference, had been unable to come close to its revenue and earnings targets. So, consistent with its purpose, LJM2 was used for a transaction known as "Backbone," through which it "purchased" (on paper) a large quantity of "dark fiber"[39] from EBS in a transaction valued at about $100 million: $30 million cash, the remainder in seller financing in the form of a $70 million non-recourse promissory note.[40] This transaction alone constituted about 67% of gross revenues reported by

---

[39] "Dark fiber" refers to strands of optical fiber that have been laid, generally underground, but which have not been "lit" and thus are not in use. Generally, dark fiber is not usable until it is mated with additional infrastructure and incorporated into a network.

[40] In form, EBS sold 7-year IRU's for 40 dark fibers to LJM2-Backbone2, LLC for approximately $100 million, comprised of approximately $30 million in cash plus a note for about $70 million. *See* Docket#5197:COR00470, COR00476; Docket#5197:COR00617-23. LJM2 acquired the dark fiber through a two-tier structure. Docket#5197:COR00631-36. LJM2-Backbone2, LLC, wholly owned by LJM-Backbone, LLC, purchased the dark fiber and was the counterparty for future IRU's. *Id.* LJM2-Backbone, LLC guaranteed the seller note to EBS and pledged its interest in LJM2-Backbone2, LLC as security. However, LJM2-Backbone, LLC's only asset was its interest in LJM2-Backbone2, LLC; the additional "security" was illusory. *Id.* EBS acted as marketing agent to sell the fiber on behalf of LJM2 to other third parties and the commission for this service equated to the majority of the upside on the sale in excess of LJM2's return. Docket#5197:COR00470, COR00476. Thus, upon sale of any of the fiber routes, the proceeds were distributed to pay down the

EBS for the quarter.[41] It also accounted for about $67 million in gross margin for EBS (out of total EBS gross margin of $75 million).[42]

Merrill knew the essential details of this earnings management deal[43] – another asset warehousing contrivance – designed to prop up EBS. As Merrill knew, LJM2 was not in the dark fiber business and had no use for dark fiber. Moreover, dark fiber sales were rarely transacted for cash; most transactions involved fiber "swaps."[44] Yet Merrill engaged in the transaction funding LJM2 pursuant to the capital call.

Fastow's "Benefit[s]" summary states that Backbone "[c]reated funds flow," "[g]enerated earnings to reach EBS's earnings targets," and "[p]rovided upside to EBS on ultimate sale to 3rd party."[45]

---

note and make payments to LJM2 such that LJM2 earned an 18% return in the first two years and a 25% return after that, and all excess proceeds went to EBS. *Id.* The note was to be repaid from proceeds of fiber sales to third-party buyers and was non-recourse to the partnership. Docket#5197:COR00638-40. In fourth quarter 2000, LJM2 was taken out and repaid their cash investment plus the promised 18% return in the Backbone 2 transaction. *Id.*

41 Docket#5197:COR00764.

42 *Id.*

43 *See, e.g.*, Docket#5197:COR00965-67.

44 *See, e.g.*, Docket #5197:COR00978.

45 Docket#5197:COR00465-67 (LJM Investments Deal Benefit Summary).

LJM2's Raptors Transactions: A further example of Merrill's continuing role in the scheme are the deceptive Raptor transactions. These transactions involved hedges that, due to secret guarantees from Enron about which Merrill knew, were riskless transactions for LJM2. The four transactions took place between the summer of 2000 and the spring of 2001. In Raptors, LJM2 purportedly capitalized risk management transaction structures with $30 million cash and received its money back plus huge internal returns within six months. Concerning the Raptors structure, Fastow testified "I and others at Enron, including Enron's Chief Accounting Officer, had an unwritten agreement that LJM2 would be paid the return of its investment, plus a profit, prior to Talon [Raptor SPE] engaging in any hedging."[46] In other words, not only was LJM2 not at risk in the Raptor transactions – a requirement if Enron were to book revenue – but it had already received a profit before the first transaction. ***Fastow told Merrill***[47] ***about the side agreement, whose purpose was to eliminate LJM2's risk***

---

[46] Docket#5197:COR01106.

[47] While acknowledging Merrill's important role in setting up LJM2, *i.e.*, raising $390 million in capital commitments, investing directly, enabling 97 senior Merrill executives to invest and receipt of investor information regarding capital calls, distributions, valuations and updates summarizing the transactions in which LJM2 participated (Third Interim Report of Neal Batson, Appendix I at 45-46), Enron's Bankruptcy Examiner Neal Batson could not determine if Merrill was more than a private placement agent or passive investor because Batson did not have the benefit of

on a conference call on March 21, 2000.[48] In Raptor I, LJM2 received an internal rate of return of ***89%***.[49] In Raptor II, ***290%***.[50] In Raptor III, over ***5000%***.[51] In Raptor IV, ***213%***.[52] Through the Raptors, Enron's pretax income for the year ended December 31, 2000, was overstated $532 million and for the nine months ended September 30, 2001, $545 million! Also, Enron's total equity for the year ended December 31, 2000, was overstated $704 million and for the nine months ended September 30, 2001, $1.077 billion due to the Raptors. Docket#5197:COR01430, COR01437-38 (Solomon Supp. Report at Schedules 3 and 8). Andersen's Carl Bass testified the side agreements in the Raptors would have changed the proper accounting because, "[f]or accounting purposes, [the Raptors] wouldn't be valid SPEs; and, therefore, the hedging transactions would not be a hedging transaction with an outside

---

Fastow's recent testimony that it was he and Merrill that initially structured LJM2 and without Merrill's vision there would be no LJM2.

48 Docket#5197:COR00450.

49 Docket#5197:COR01022.

50 *Id.*

51 *Id.*

52 *Id.*

party. So, therefore . . . the accounting that [Enron] achieved in the financial statements would not have been appropriate."[53]

As Fastow testified:

> ***My opinion is that many of the transactions that LJM2 did with Enron caused Enron's financials to be misleading and deceptive***.[54]

Fastow also stated:

> ***Based on my conversations with its executives, Merrill understood that LJM2 would be used to manage Enron's earnings and balance sheet, and that the transactions undertaken by LJM2 with Enron in December 1999 resulted in Enron reporting higher earnings than it would have otherwise absent those transactions with LJM2***.[55]

The Nigerian Barges Transaction: When Enron tried in 1999 to sell electricity-generating barges moored off Nigeria but could find no legitimate buyer,[56] it turned to Merrill to take the barges off its hands ***just long enough*** for it to book a profit in 1999, then it would buy back the barges or "***facilitate [Merrill's] exit from***

---

53 Docket#5197:COR01188-89 (Bass Deposition).

54 Docket#5197:COR01249 (Fastow Deposition).

55 4ARE:36733 (Fastow Declaration, ¶41).

56 *See* Docket#5197:COR00020-21 (12/23/99 Merrill Lynch Credit Flash Report); Docket#5197:COR00023 (12/8/99 internal Enron email from James Hughes: "subject: Nigerian Barge Mo[n]etization"); Docket#5197:COR01466 (*United States v. Bayly*, No. H-03-363, Trial Transcript (S.D. Tex. Sept. 23, 2004)) (testimony of Merrill employee Tina Trinkle: Enron wanted Merrill to do the deal "to help them get the sale done by the end of the year and book these earnings.").

the transaction."[57] The transaction was a sham, a false sale, designed solely to fabricate income in 1999. Merrill's internal documents reflect knowledge of the manipulative device:[58]

> Enron is viewing this transaction as a bridge to permanent equity ***and they have assured us that we will be taken out of our investment within six months***. The investment would have a maximum 22.5% return.
>
> * * *
>
> Dan Bayly will have a conference call with senior management of Enron ***confirming this commitment to guaranty the ML takeout within six months***.[59]

Fastow's testimony in the criminal trial confirms the oral guaranty given to Merrill:

---

[57] Docket#5197:COR001180. *See also* 4ARE:36731 (Fastow Declaration) (stating that in December 1999, Fastow told Merrill's Tilney why Enron was "asking Merrill, rather than LJM2, to purchase the [b]arges at that time, and I told him of the assurance Mr. Skilling had given me with respect to the barges").

[58] *See, e.g.*, Docket#5197:COR00020 (Credit Flash Report); Docket#5197: COR00026-27 (12/29/99 Minutes of ML IBK Positions, Inc. Board of Directors Special Meeting describing the Nigerian Barges transaction as a "financing"); Docket#5197:00029-76 (8/4/00 Merrill Discussion Materials Prepared for Fixed Income Discussion with Enron); *see also* Docket#5197:COR00035 (referencing, under work for Enron, participation in the "Nigerian Barge loan").

[59] Docket#5197:COR00078-85; *see also* Docket#5197:COR00084-85.

> "***I let [Bayly] know that Merrill Lynch would be out of the deal in six months. That means by June 30, 2000, they'd get their specified rate of return and the fee as – we had agreed on a fee as well***."

Docket#5197:COR01482 (*Lay/Skilling* Trial Transcript).

Merrill's December 23, 1999 "Credit Flash Report" admitted the "transaction will allow Enron to move assets off-balance sheet and book future cash flows currently as 1999 earnings."[60]

To continue the Nigerian Barges deception, on June 29, 2000, ***exactly six months after the transaction closing***, Enron arranged for Merrill's position to be bought out by an SPE controlled by LJM2,[61] which purchased Merrill's $7 million equity interest for $7.525 million[62] – the $7 million put up by Merrill plus a rate of return of 15% per annum and Merrill's upfront fee of $250,000.[63] Counting the $250,000 payment to Merrill for entering into this contrived transaction, ***Merrill***

---

60 Docket#5197:COR00020-21 (Credit Flash Report).

61 *See* Docket#5197:COR00087 (6/14/00 email from Bill Fuhs, Merrill, to Geoffrey Wilson, Merrill); *see also* Docket#5197:COR00089-111 (LJM2-Ebarge, LLC Share Purchase Agreement).

62 Docket#5197:COR00089-111 (LJM2-Ebarge, LLC Share Purchase Agreement).

63 *See* Docket#5197:COR00209 (4/28/03 Sworn Statement of James A. Brown, Managing Director, Merrill Lynch to Robb Hellwig); *see also* Docket#5197: COR00089-111 (LJM2-Ebarge, LLC Share Purchase Agreement).

received a return of 22.14% on its $7 million advance[64] – just as secretly promised to Merrill at year-end 1999.

Fastow stated with respect to the Nigerian Barges transaction:

> ***[T]he guarantee from me reduced the risk to Merrill in a manner sufficient so that Arthur Andersen, had it known of the guarantee, would not have treated the transaction as a true sale. As a result of the true sale treatment, Enron recorded higher income and funds flow at year-end than it otherwise would have***.[65]

Andersen partners have testified that even they were misled by the secret side no-loss/resale agreement with Merrill in the Nigerian Barges transaction.[66] Obviously, so was the investing public deceived by the financial impact of this deceptive and manipulative device.

The Electricity Trades: In December 1999, Enron approached Merrill about a transaction between Enron Power Marketing, Inc. and Merrill Lynch Capital using

---

64 *See* Docket#5197:COR00336 (1/17/02 email from Kira Toone-Meertens, Merrill Lynch, to Joseph Valenti, Merrill Lynch).

65 4ARE:36731 (Fastow Declaration, ¶34).

66 *See* Docket#5197:COR01231-32 (Cash Deposition); Docket#5197:COR01189-92 (Bass Deposition); Docket#5197COR01209 (Bauer Deposition); Docket#5197: COR01216 (Bauer Deposition); Docket#:5197COR01331-32, COR01334-36 (Odom Deposition).

two electricity derivative contracts.[67] This was another of the three major transactions Merrill and Enron engaged in for the purpose of falsifying Enron's year-end 1999 earnings. Like the Nigerian Barges transaction, Merrill and Enron had a clandestine understanding to unwind the Electricity Trades ***after*** Enron reported its fourth quarter and year-end 1999 earnings. As Fastow stated:

> Based on my conversations with senior Enron and Merrill executives, I understood that, at the time the transaction closed in December 1999, there was a verbal agreement between Mr. Baxter and Mr. Tilney to unwind the transactions in 2000 in exchange for a predetermined fee to be paid by Enron to Merrill. Before the transaction closed I assured Mr. Tilney that Mr. Baxter's verbal agreement would be honored by Enron. I do not believe Merrill would have entered into these transactions absent the agreement to unwind the transactions and to pay the predetermined fee.[68]

As with the Nigerian Barges transaction, Merrill and Enron entered contracts that on their face appeared to be physical and financial trading contracts, and that appeared to transfer risk of loss, ***despite the secret understanding and true contrary intent of those parties that the transaction was structured to be risk free***.[69]

---

67 *See* Docket#5197:COR01165-66.

68 4ARE:36732 (Fastow Declaration, ¶36); *see also* 4ARE:36732-33 (Fastow Declaration, ¶¶37-40).

69 John Foster testified that although the physical contract appeared to be a physical contract, in fact it was not. Docket#5197:COR01277-80, COR01286, COR01288 ("if there was an agreement to unwind before any delivery of power, that

In an email dated December 16, 1999, Merrill explained "a few key points."[70] The first "key point" was that "$0.20/MWh does not justify doing anything unless it is ***truly risk free***."[71] Merrill acknowledged the purpose of the Electricity Trades was not to deliver power, but rather was "***for accounting***" and emphasized the need for the transaction to have "***no execution risk***," *i.e.*, be risk free:

> ***If Enron is committed to making this transaction for accounting purposes, they should be able to either demonstrate to us that there is no execution risk or give us an actual financial back to back trade independently with ECT*** e.g. we charge them $0.75 for this trade and pay ECT $0.73 for the financial component.[72]

As the year-end 1999 Electricity Trades went to Merrill's Special Transactions Review Committee (the "STRC"), Merrill knew its own deceptive conduct was designed to create a false impact on Enron's fourth-quarter and year-end 1999 earnings. The STRC presentation communicated there would be no significant risk that would pass to Merrill in the Electricity Trades:

---

would indicate that the physical contract was probably not a physical contract"); Docket#5197:COR01304-05, COR01306 ("[T]hese transactions weren't real transactions.").

70 Docket#5197:COR01075.

71 *Id.*

72 *Id*.

- "The Global Power Trading Group requests permission to enter into a '***back-to-back***' electricity derivative transaction with Enron Power Marketing, Inc. ('EPMI')."[73]

- "The quantities, pricing points, market locations and term are ***'mirror' image***."[74]

- "The two call options . . . serv[e] to create a ***delta-neutral*** position for both parties . . . ."[75]

- "**Market Risk Management** . . . . ***The proposed transaction is 'back-to-back' and is therefore 'delta-neutral***.'"[76]

Members of the STRC contacted Enron's Chief Accounting Officer, Causey, who confirmed Enron intended to take $50-$60 million in earnings on the transaction and that it would affect bonuses of senior management at Enron.[77]

When Enron sought to unwind the transaction pursuant to the secret agreement, it also sought to renegotiate Merrill's $17 million fee. Internally Merrill discussed its understanding of the "***unwind***" as something planned "***when we did this trade***,"[78]

---

73 Docket#5197:COR01169.

74 *Id.*

75 Docket#5197:COR01170.

76 Docket#5197:COR01171.

77 Docket#5197:COR01318 (Kronthal Deposition).

78 Docket#5197:COR01177 (5/30/00 email from Schuyler Tilney to Dan Gordon and Robert Furst).

emphasizing that circumstances had not changed to justify a lower fee, for "***they knew what we were making at . . . the quarter and year (which had great value in their stock price, not to mention personal compensation)***."[79] Merrill's Gordon agreed: "in light of their earnings number (and personal compensation benefits), ***the $17 million does not seem too significant for them***."[80] Acknowledging that the transaction was for "servicing" Enron's "***particular accounting need***," Merrill accepted an $8.5 million fee, at least $10 million less than what the purported trading contracts stated Merrill was entitled to.[81]

Andersen auditors testified that had they discovered an oral side agreement to unwind the transaction such as the one here, it would have ***negated the accounting treatment*** for the transaction, eliminating all ***profits***.[82] Again, as the auditors were deceived by Enron and Merrill so were investors.

Fastow stated the Electricity Trades

---

79 *Id*.

80 *Id.* Merrill later agreed to take $8.5 million.

81 Docket#5197:COR01078 (50% of the original $17 million fee agreed to was "a flat fee for doing the trade and servicing [Enron's] particular accounting need").

82 Docket#5197:COR01206-07 (Bauer Deposition); Docket#5197:COR01218-21 (Bauer Deposition).

had the effect of increasing Enron's reported income by $40 million or more and contributed to causing Enron to report higher income at year end than it would otherwise have been able to report.[83]

The following chart shows the impact of the fraudulent and deceptive Nigerian Barges, Electricity Trades, and LJM2 transactions during the Class Period:

Merrill's Claim that Its Conduct Was Limited and Had De Minimus Impact on Enron's Financials Is Not True

EARNINGS IMPACT BEFORE INTEREST, TAXES AND DEPRECIATION (IN MILLIONS)

	12 mo ended 12/31/99	3 mo ended 3/31/00	6 mo ended 6/30/00	9 mo ended 9/30/00	12 mo ended 12/31/00	3 mo ended 3/31/01	6 mo ended 6/30/01	9 mo ended 9/30/01
EBITDA Overstated/(Understated)	83.1	-	54.1	102.7	710.2	260.0	300.0	551.0
Barges	13.0	-	-	-	-	-	-	-
Electricity Trades	49.0	-	-	-	-	-	-	-
Selected LJM2 transactions	21.1	-	54.1	102.7	710.2	260.0	300.0	551.0

CASH PROVIDED BY (USED IN) OPERATING ACTIVITIES

	12 mo ended 12/31/99	3 mo ended 3/31/00	6 mo ended 6/30/00	9 mo ended 9/30/00	12 mo ended 12/31/00	3 mo ended 3/31/01	6 mo ended 6/30/01	9 mo ended 9/30/01
Cash Provided by (Used in) Operating Activities Overstated/(Understated)	1,001.0	-	30.0	93.4	875.7	82.9	36.9	69.7
Selected LJM2 transactions	1,001.0	-	30.0	93.4	875.7	82.9	36.9	69.7

TOTAL DEBT

	12 mo ended 12/31/99	3 mo ended 3/31/00	6 mo ended 6/30/00	9 mo ended 9/30/00	12 mo ended 12/31/00	3 mo ended 3/31/01	6 mo ended 6/30/01	9 mo ended 9/30/01
Total Debt Overstated/(Understated)	(905.0)	(1,645.0)	(1,645.0)	(4,106.5)	(4,491.3)	(4,125.2)	(4,045.5)	(3,946.8)
Selected LJM2 transactions	(905.0)	(1,645.0)	(1,645.0)	(4,106.5)	(4,491.3)	(4,125.2)	(4,045.5)	(3,946.8)

TOTAL EQUITY

	12 mo ended 12/31/99	3 mo ended 3/31/00	6 mo ended 6/30/00	9 mo ended 9/30/00	12 mo ended 12/31/00	3 mo ended 3/31/01	6 mo ended 6/30/01	9 mo ended 9/30/01
Total Equity Overstated/(Understated)	83.1	83.1	309.2	1,357.8	1,965.3	3,053.3	3,093.3	2,344.3
Barges	13.0	13.0	13.0	13.0	13.0	13.0	13.0	13.0
Electricity Trades	49.0	49.0	49.0	49.0	49.0	49.0	49.0	49.0
Selected LJM2 transactions	21.1	21.1	247.2	1,295.8	1,903.3	2,991.3	3,031.3	2,282.3

NOTE: "Selected LJM2 transactions" are Yosemite I, Rawhide, Fishtail/Bacchus, Osprey add-on certificates, Osprey II, Bob West Treasure, Nowa Sarzyna, ENA CLO, MEGS LLC, Backbone, Catalytica, Avici and the Raptors.

---

83 4ARE:36732 (Fastow Declaration, ¶36).

IV. SUMMARY OF ARGUMENT

While defendants' appeal focuses on the legal merits of plaintiffs' claims and theories of liability, this Court's Rule 23(f) jurisdiction is limited to reviewing the district court's finding that the procedural requirements for class certification were met. *Infra* 36-48.

The district court did not abuse its discretion by finding those requirements satisfied where thousands of investors who purchased Enron securities lost billions when the Company collapsed. Common questions of fact and law clearly predominate. Indeed, defendants' arguments themselves focus on what are ***common questions of law***. *Infra* 48-50.

Their arguments about the nature and scope of primary liability under §10(b) lack merit. Those who structure and engage in sham transactions, with the primary purpose and effect of misleading investors by hiding corporate debt and fabricating earnings, engage in "manipulative or deceptive" conduct, violating §10(b) and Rule 10b-5. Such deceptive conduct amounts to ***a primary violation***, not mere "aiding and abetting." *Infra* 50-63.

Victims of the Enron fraud are entitled to a presumption of reliance. This was the largest financial fraud in history – involving a NYSE company – accomplished by hiding the true financial condition of the Company – and fabricating earnings – until

the house of cards came crashing down as the truth came out. Appellants, with others, concealed the scheme in an effort to ensure the continuation of the huge banking fees generated by the fraud. Because this case is primarily about concealed facts, investors are entitled to a presumption of reliance under *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), which mandates that reliance be inferred from the materiality of wrongfully concealed information. *Infra* 63-85.

Finally, those who knowingly commit such manipulative and deceptive acts in a scheme may be jointly and severally liable for the losses caused, even if each individual defendant did not know every detail of the entire scheme. With the PSLRA, Congress reaffirmed full joint and several liability for ***knowing*** violators, specifying a regime of proportionate liability for defendants whose violations do not involve actual knowledge, with a detailed series of provisions to further protect both violators and victims in multi-defendant cases. Defendants are not entitled to overturn Congress's carefully fashioned plan. *Infra* 85-110.

V. ARGUMENT

A. The Appeal Should Be Dismissed Since the Issues Raised Are Outside the Jurisdiction and Scope of Review Under Rule 23(f)

CSFB and Merrill do not challenge the district court's findings that Rule 23's requirements for class certification were met. Rather, they challenge the ***merits*** of

plaintiffs' claims – attacking the legal theories on which they are based, and asserting that the facts plaintiffs can demonstrate will fall short of what is needed to prove a claim. These are repackaged motion-to-dismiss and summary-judgment arguments, which raise questions of law or fact ***common to the class***. Indeed, they have been raised and rejected previously in a series of orders that are beyond this Court's review, and have been raised again in summary-judgment motions now pending before the district court. This appeal is an attempted end-run around jurisdictional limitations precluding interlocutory review of merits rulings on those motions in this Rule 23(f) appeal.

Rule 23(f) permits discretionary interlocutory review of class-certification orders. But that review is ***strictly limited*** – first to assuring that subject-matter jurisdiction exists, and then to reviewing only the ***class-certification issues*** encompassed within the appealed order. "Under that rule, 'a party may appeal only the issue of class certification; no other issues may be raised.'" *Bell*, 422 F.3d at 314 (quoting *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 294 (5th Cir. 2001)).[84]

---

[84] *Accord, e.g., Franze v. Equitable Assur.*, 296 F.3d 1250, 1252 (11th Cir. 2002) ("Under Rule 23(f), our review is limited to the class certification issue . . . ."); *McKowan*, 295 F.3d at 389-90 (Courts have been "scrupulous about limiting Rule 23(f) inquiries to class certification issues."); *Pickett v. Iowa Beef Processors*, 209

Rule 23(f) does not permit interlocutory review of merits issues that were decided on motions to dismiss or for summary judgment.

Rule 23(f)'s narrow jurisdictional scope is underscored by this Court's opinion in *Bell*, where plaintiffs based their motion for certification of a securities-fraud class action on an expert's declaration opining that certain securities traded in an efficient market. Excluding the declaration under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the district court denied class certification because the plaintiffs' showing of the market efficiency, required for class issues to predominate over individual issues, was based entirely on the excluded report.[85] Accepting a Rule 23(f) appeal, this Court held that it lacked jurisdiction to consider the critical *Daubert* ruling: "Because we hear this appeal on an interlocutory basis, however, our review is bridled by rule 23(f)." *Bell*, 422 F.3d at 314. As a consequence, this Court held, "we may not review the exclusion of [the plaintiffs'] expert report" on which plaintiffs' class-certification motion was based, for whether the expert report satisfied *Daubert* was not itself ***a class-certification issue***. *Id*. "'***The determination whether there is a***

F.3d 1276, 1279 (11th Cir. 2000) ("We do not address the merits of Plaintiff's claims.").

[85] Defendants do not challenge Judge Harmon's careful findings regarding market efficiency. *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *285-*385.

proper class does not depend on the existence of a cause of action.'" *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971). And courts cannot transform "a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment" by evaluating "the possible merit of the plaintiff's claims at this stage of the proceeding. Failure to state a cause of action is entirely distinct from failure to state a class action." *Id*. at 428, 430.

Of course, this does not mean that a court is rigidly limited to the pleadings as it endeavors to "'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). A court must, of course, understand what claims are presented – and also how the parties will frame and litigate the issues they raise – in order to determine, for example, whether common issues of law and fact will predominate, and the case is manageable as a class action. *See id*.; *Robinson v. Tex. Auto Dealers Ass'n*, 387 F.3d 416, 421-22 (5th Cir. 2004). However, Judge Harmon undertook just such a rigorous analysis, as conceded by

appellants (CSFB AOB at 16),[86] examining the nature of the claims before her in determining that they arose from a common nucleus of facts and a common course of conduct. This does not turn every merits issue addressed in her order – and in prior orders – into a class-certification issue reviewable under Rule 23(f). Rule 23's Advisory Committee Note emphasizes that "an evaluation of the probable outcome on the merits is not properly part of the certification decision," even if the court must, at class certification, "identify the nature of the issues that actually will be presented at trial." Fed. R. Civ. P. 23(c)(1)(A) Advisory Committee's Note; *see In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107 (D.C. Cir. 2002).

The district court's December 20, 2002, order denying motions to dismiss rejected the central arguments advanced by CSFB and Merrill in their opening briefs before this Court – that under *Central Bank*, 511 U.S. 164, they could not be liable for deliberately participating in a scheme to defraud, and that their conduct amounted to no more than aiding and abetting. *In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 590-91, 708 (S.D. Tex. 2002); *see also id*. at 577-81 (discussing liability for schemes to defraud); *id.* at 581-94 (discussing application of *Central Bank*); *id.* at 644-47 (discussing CSFB's role in the scheme); *id.* at 649-51 (discussing Merrill's role in the

---

[86] "CSFB AOB" refers to Brief of Appellants Credit Suisse First Boston (U.S.A.), Inc., Credit Suisse First Boston LLC and Pershing LLC.

scheme); *id.* at 656-69 (discussing V&E's role); *id*. at 686-92 (discussing defendants' common objections that *Central Bank* protects them from liability for deliberately participating in the Enron scheme); *id.* at 698-701 (discussing CSFB's liability in particular); *id.* at 702-03 (same for Merrill).[87]

Thus, this case is like *In re Delta Air Lines*, 310 F.3d 953, 961 (6th Cir. 2002), where "much of the defendants' argument with respect to the class certification decision arises from their disagreement with the district court's earlier rulings on the motions to dismiss," presenting issues "so enmeshed with the merits of the case as to disfavor immediate review." A defendant's "effort to recast its Rule 12(b)(6) arguments as a challenge to class certification" should be flatly rejected. *Lorazepam*, 289 F.3d at 107. Simply stated, the issues are beyond Rule 23(f) review "because whether the plaintiffs state a cause of action is only relevant to class certification to the extent the inquiry relates to the requirements of Rule 23." *Id*. at 107.

---

[87] The district court revisited those arguments and entered rulings on the same issues in a series of orders over the ensuing years, including one rejecting Merrill's arguments concerning the elements and scope of liability under §10(b). *In re Enron Corp. Sec. Litig.*, 310 F. Supp. 2d 819, 827-32 (S.D. Tex. 2004). The district court issued three rulings in and after the certification order – dismissing one bank (Deutsche Bank) from the case, and dismissing, and then reconsidering its ruling dismissing another bank (Barclays). *Enron*, 2006 U.S. Dist. LEXIS 43146; *In re Enron Corp. Sec. Litig.*, 439 F. Supp. 2d 692 (S.D. Tex. 2006); *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2006 U.S. Dist. LEXIS 88121 (S.D. Tex. Dec. 4, 2006).

CSFB contends review is appropriate ***now*** because the district court's June 5, 2006 Order on class certification ("June 5, 2006 Order") "specifically reconsidered the primary violator standard that had been applied at the motion to dismiss stage, noting that the Court had 'the power to reconsider such interlocutory decisions,'" and because a district court may "'look behind the pleadings at evidence to determine whether a class should be certified.'" CSFB AOB at 5-6 (quoting *Enron*, 2006 U.S. Dist. LEXIS 43146, at *156). But the fact that a district court ruling on class certification may consider the elements of a claim does not turn its rulings on the merits issues into rulings on class-certification issues reviewable under Rule 23(f). *See Bertulli*, 242 F.3d at 294 & n.7 (5th Cir. 2001) ("a party may appeal only the issue of class certification; no other issues may be raised"); *see also McKowan*, 295 F.3d at 389-90; *In re James*, 444 F.3d 643, 644 (D.C. Cir. 2006).

Here there is little or no overlap between the issues appellants argue and the conditions for certifying a class under Rule 23(f). CSFB and Merrill challenge the district court's merits rulings on what it takes to prove primary liability under §10(b), without regard to the requirements for class certification under Rule 23. Their briefs say very little about Rule 23 and the standards for class certification – because that really is not what their appeals are about. Instead, they brief the elements of liability, and whether plaintiffs have stated a claim. Under *Bertulli* and *Bell*, this Court may

only consider class certification as such, and cannot reach the merits issues that the defendants advance. *See Bell*, 422 F.3d at 314 (quoting *Bertulli*, 242 F.3d at 294).

One issue touching on the merits that sometimes relates directly to class certification is reliance. Findings regarding reliance may be required at the class-certification stage in cases where, without a presumption of reliance, individual reliance of each class member would have to be separately established – possibly causing individual issues to predominate over common issues. For "'[a] fraud class action can not be certified ***when individual reliance will be an issue***.'" *Bell*, 422 F.3d at 310 n.3 (quoting *Castano*, 84 F.3d at 745 (citing *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973)); *see also, e.g.*, *Unger*, 401 F.3d at 319, 322.

This is not such a case. The defendants do not – and cannot – seriously contend that in this case efforts to prove reliance could ever overwhelm the common issues presented. None of them so much as suggest how individual reliance could become an issue to be litigated separately for each class member.[88] Rather, each contends that

---

[88] Thus, the case is nothing like *Gariety v. Grant Thornton*, 368 F.3d 356 (4th Cir. 2004), which involved individual stockbrokers' pitches of a thinly traded unlisted stock, where the existence of an efficient market and public statements that might affect it were both in doubt, while the individual "'plaintiffs were in fact exposed to differing combinations of omissions and representations, including some oral, making

it made no statements on which ***anyone*** could have relied, or that their conduct had no effect on the market price of Enron securities – which if it was true would foreclose proof of any individual class member's claims. The appeal should be dismissed because appellants' arguments exceed the scope of this Court's jurisdiction under Rule 23(f).

The litigation arises from one of the largest corporate securities frauds in ***history***. It has been ongoing for five years. Hundreds of motions have been filed, nearly 400 depositions taken, millions of pages of documents reviewed, motions for summary judgment have now been filed, and the case has a current trial date in April 2007. Significantly, the district court's June 5, 2006 Order closes by stating that if "any other party [other than Deutsche Bank] wishes to challenge claims against it on the grounds that they are merely aiding and abetting allegations, it shall do so by summary judgment." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *391. In at least two orders,[89] the district court reiterated the April 2007 trial date.

---

individual reliance a live issue.'" *Id*. at 364. Defendants have not shown how individualized proof could realistically become an issue in the context of this case.

[89] December 6, 2006 Order (Docket#5248) at 4 (allowing dates for depositions to be amended "so long as the date does not require amendment of the scheduled trial date"); November 9, 2006 Order (Docket#5176) at 4 ("the court intends to keep the current trial date, April 9, 2007").

Under these circumstances, "allowing the litigation to follow its natural course" provides "an adequate remedy" and interlocutory review is unnecessary.[90] Accordingly, "an end-of-case appeal promises to be an adequate remedy" for resolving appellants' supposedly "novel or unsettled question[s] of law."[91] With the substantial developments since the district court's June and July 2006 rulings, later appeal on a fuller factual record is the superior way to resolve issues intertwined with the merits, and the motions panel's granting leave to appeal does not bind the merits panel. *United States v. Bear Marine Serv.*, 696 F.2d 1117, 1120 n.6 (5th Cir. 1983) ("we are not bound by the motions panel's grant of leave to appeal"); *Colbert v. Dymacol, Inc.*, 344 F.3d 334 (3d Cir. 2003) (en banc) (Rule 23(f) appeal discussed as improvidently granted); *EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 147 & n.2 (5th Cir. 1983) (merits panel not bound to motions-panel order finding jurisdiction); *Parcel Tankers, Inc. v. Formosa Plastics Corp.*, 764 F.2d 1153, 1154 (5th Cir. 1985) (dismissing discretionary appeal because "we conclude that, in light of the current status of this litigation, permission to appeal the district court's order was

---

[90] *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001).

[91] *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272 (11th Cir. 2000); *accord Blair v. Equifax Check Servs, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

improvidently granted"); *Kerns*, 435 F.2d at 1306 ("After considering the briefs and oral arguments we conclude that the order allowing the interlocutory appeal was improvidently granted."); *Spurlin v. Gen. Motors Corp.*, 426 F.2d 294 , 295 (5th Cir. 1970) (same); *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970) ("leave to appeal was improvidently granted").

Finally, there is no credible claim that the class ruling has put significant pressure on the banks to settle. The same issues were raised years ago at the motion-to-dismiss stage, appellants lost those issues, continued to litigate, filed petitions for mandamus, moved for judgment on the pleadings, continued to litigate, fought certification, continued to litigate, filed for summary judgment and are now preparing for a trial just months away. These appellants aren't settling – they're fighting – which is their right. Plaintiffs' right is to have the merits reviewed at the appropriate time ***on a fully developed record***. The largest financial institutions in the world are not being cowed here – nor could they be. They are just hoping this Court will let them off the hook.

Judge Harmon has diligently handled this litigation from inception, providing no basis for this Court to intervene and upset one of the district court's most carefully considered and structured orders. After all, class certification still remains a matter within ***the discretion*** of the district court. The thorough class-certification decision

now before this Court is a continuation of the district court's careful management of this litigation. For instance, at the motion-to-dismiss stage, the district court sustained some claims, dismissed others, found some claims pleaded in adequate detail, found others insufficiently specific, granted the dismissal requests of some defendants, and denied others. This pattern of thorough analysis, carefully balancing the interests involved with the careful legal reasoning continued. Judge Harmon barred certain claims based on the statute of limitations and considered motions for reconsideration both by the defendants and Lead Plaintiff granting some, denying others.

Judge Harmon's treatment of the class-certification issue is no less thorough and balanced. Judge Harmon did not wholly accept or in any way rubber-stamp plaintiffs' request for class certification here. Over plaintiffs' objection, Judge Harmon declined to certify the claims of foreign debt purchasers of Enron-related securities which involve billions of dollars of damage. Further, the primary liability test to be applied in this case was refined and further restricted to reflect the ongoing evolution of relevant case law. Refusal to respect the district court's exercise of discretion here is surely contrary to the proper standard of appellate review – including deference to resolution of factual disputes and discretionary application of accepted legal principles. The class-certification record is several feet high. It includes hundreds – no thousands – of pages of evidence, including expert

declarations and live testimony before Judge Harmon. There is nothing more a district court could do than was done here.

B. The District Court Committed No Abuse of Discretion in Finding that the Requirements for Class Certification Are Satisfied

The only question properly presented by a Rule 23(f) appeal is whether the district court abused its discretion in finding the requirements for class certification have been met: "The class certification decision rests within the sound discretion of the district court, so long as that discretion is exercised within the framework of rule 23." *Bell*, 422 F.3d at 311. Judge Harmon acted within Rule 23's framework, and committed no abuse of discretion.

"First, the district court must find what has been termed numinosity, commonality, typicality, and representativeness." *Unger*, 401 F.3d at 320. Specifically, Rule 23(a) requires findings that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Judge Harmon carefully and methodically found that each of these elements is satisfied. *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *62-*81. No one challenges those findings.

"For class actions seeking money damages, like this one, the district court must make additional findings of predominance and superiority." *Unger,* 401 F.3d at 320. Specifically, Rule 23(b)(3) requires a finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Judge Harmon's orders demonstrate that she understood and carefully applied these requirements. *Enron*, 2006 U.S. Dist. LEXIS 43146, at *81-*142 (predominance of common issues); *id.* at *143-*156 (superiority). She committed no error here.

Defendants' appellate briefs ***confirm*** that questions of law and fact common to the class predominate over individual issues. They mainly address the nature and scope of primary liability under §10(b), and whether facts may be proven to show they are liable. These are ***common questions***. Whether facts can be proved sufficient to establish their liability similarly presents common issues. So do their contentions relating to relative fault and thus obligation for the loss caused.

The district court's rulings concerning reliance, on the other hand, look something like rulings that this Court has reviewed on appeal of class-certification orders – in cases where "'[a]bsent an efficient market, individual reliance by each plaintiff must be proven, and the proposed class will fail the predominance

requirement.'" *Bell*, 422 F.3d at 313 (quoting *Unger*, 401 F.3d at 322). ***But here, defendants do not challenge Judge Harmon's findings concerning market efficiency!*** *See Enron*, 2006 U.S. Dist. LEXIS 43146, at *291-*374. More importantly, defendants' reliance arguments relate to the merits of the claims presented in a way that is common to the class as a whole – presenting no threat that individual issues could defeat the predominance of common issues.

C. The District Court Correctly Held that the Standard for Primary Scheme Liability Under Rule 10b-5(a) and (c) Was Satisfied on the Facts Preferred

CSFB and Merrill contend that even if they deliberately hid Enron's debt and generated false revenues and profits for Enron, only Enron can be primarily liable, because only the issuer of securities files the resulting financial statements with the SEC, or issues press releases containing the fabricated results. Under the Supreme Court's opinion in *Central Bank*, these defendants argue, no one but Enron and its top officers can be primarily liable for perpetrating the largest financial fraud in history.

Central Bank, however, indicates quite clearly that in addition to the issuer of securities, "***[a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a 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." *Central Bank,* 511 U.S. at 191. With these words, the Court sought "to clarify that secondary actors, although not subject to aiding and abetting liability, ***remain subject to primary liability***" if they engage in any manipulative or deceptive conduct prohibited by Rule 10b-5. *United States v. O'Hagan,* 521 U.S. 642, 664 (1997).

"In any complex securities fraud," the Court emphasized in *Central Bank,* "***there are likely to be multiple violators***." 511 U.S. at 191. This case – involving the largest and one of the most complex frauds in history – can be expected to implicate a "lawyer, accountant, or bank" in the acts designed and intended, deliberately, to mislead investors. *See id*.

Central Bank's 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) make it unlawful 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.[92] Liability for nonrepresentational conduct under subsections (a) and (c) of the Rule is commonly called "scheme liability." As the SEC has noted and courts have held, both §10(b) and Rule 10b-5 cover (among other things) deceptive conduct, acts, and practices beyond mere false statements or narrowly defined "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.

5ARE:37280-81. Moreover, when Congress provided for proportionate liability among defendants liable for non-knowing violations, it retained joint and several liability for those who ***either*** make a statement "with actual knowledge" of falsity, ***or*** engage in "conduct" of a nonrepresentational character, "with actual knowledge of the facts and circumstances that make ***the conduct . . . a violation of the securities laws***." 15 U.S.C. §78u-4(f)(10)(A)(ii). Manipulative or deceptive conduct – including any

---

[92] *See, e.g., Affiliated Ute*, 406 U.S. at 152-53 ("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.").

scheme to defraud or conduct that operates as a fraud – is a primary violation of §10(b).

Thus in *SEC v. Zandford*, 535 U.S. 813 (2002), the 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 that the broker faced liability although he made no 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 absence of a misrepresentation was immaterial, as "***neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act***." *Id.* at 820.

As a result, the district court here has upheld Lead Plaintiff's allegations of scheme liability. *See, e.g.*, *Enron*, 235 F. Supp. 2d at 698-701 (upholding allegations that CSFB committed a primary violation of Rule 10b-5(a) and (c)); *id.* at 703 (Merrill's Nigerian Barges sham and bogus Electricity Trades deal "fit the patterns of the scheme alleged by Lead Plaintiff throughout the complaint"); *Enron*, 310 F. Supp.

2d at 830. The district court further recognized that Lead Plaintiff properly alleged "an ongoing scheme in which Merrill Lynch participated in a substantial way over years," including "early in the Class Period when it participated in establishing and funding LJM2 at a critical accounting time, despite red flags identified in the complaint and known to Merrill Lynch." *Enron*, 310 F. Supp. 2d at 830.

The district court recently observed that "the relevant law has evolved and been modified and clarified, often in different ways by different courts, and the [district court] has attempted to address the problem." *Enron*, 439 F. Supp. 2d at 713. In its June 5, 2006 Order, the district court examined the SEC's position on the issue as stated in the SEC's *Homestore* Brief, and adopted 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."

5ARE:37283. Under this test, liability follows for "***engaging in a transaction whose principal purpose and effect is to create a false appearance of revenues***." 5ARE:37285. As the district court explained:

> "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. . . . 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.
>
> [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."

Enron, 2006 U.S. Dist. LEXIS 43146, at *164-*165, *173-*174.[93]

Appellants argue the transactions at issue were nothing but legitimate business transactions. This factual claim is plainly wrong. But even if this were the case, appellants' conduct still had the principal purpose and effect to deceive and did deceive investors. Primary liability in a scheme to defraud lies even if the transaction within the scheme was arguably legitimate, so long as defendants' conduct had the principal purpose and effect to deceive. In *Hopper*, 2006 U.S. Dist. LEXIS 17772, defendants engineered "round-trip" energy trades that involved the simultaneous

---

[93] *Accord, e.g., SEC v. Hopper*, No. H-04-1054, 2006 U.S. Dist. LEXIS 17772, at *37 (S.D. Tex. Mar. 24, 2006); *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003), *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 381-82 (S.D.N.Y. 2003); *Quaak v. Dexia, S.A.*, 357 F. Supp. 2d 330, 342 (D. Mass. 2005); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336-37 (S.D.N.Y. 2004).

purchase and sale of electric power or natural gas. The SEC charged these transactions were illegitimate shams. Defendants responded that no scheme liability could arise because the "round-trip" transactions were not illegal, but were permitted under certain federal statutes. *Id*. at *36-*37. Rejecting defendants' argument, the court found:

> The fact that individual round-trip trades may not have been proscribed by the regulatory scheme governing the electric power and natural gas markets . . . does not mean that the series of huge bogus trades did not violate the securities laws' proscription against schemes to defraud and practices that operate as a fraud or deceit upon any person.

Id. at *37.

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 CSFB (LJM1) and Merrill (LJM2) were, in many of the transactions at issue. *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1051 (9th Cir. 2006) ("*Homestore*"); 5ARE:37278 ("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, CSFB's and Merrill's own deceptive conduct as part of the scheme subjects them to primary liability.

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.[94] 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." 5ARE:37274.

In addition, CSFB and Merrill cannot avoid liability simply by claiming that they were not responsible for conveying misinformation directly to the market – or

---

[94] *Homestore*, 452 F.3d at 1053. The Ninth Circuit adopted the SEC's test: "We agree with the SEC that engaging in a transaction, the principal purpose and effect of which is to create the false appearance of fact, constitutes a 'deceptive act.'" *Id*. at 1048. CSFB asserts the Ninth Circuit effectively rejected the SEC's test by elaborating: "Participation in a fraudulent transaction by itself, however, is insufficient to qualify the defendant as a 'primary violator' if the deceptive nature of the transaction or scheme was not an intended result, at least in part, of the defendant's own conduct." *Id.* But this merely restates the SEC's standard, which – the SEC was careful to point out – does not reach those who enter business transactions for legitimate purposes (*see, e.g.,* SEC *Homestore amicus* brief at 20-21, Jud. Not., Ex. A (giving examples)), and which requires "that the defendant ***himself*** engage in a 'manipulative or deceptive' act." SEC *Homestore amicus* reply brief at 5 ("[t]he crux of the test is the requirement that the defendant ***himself*** engage in a 'manipulative or deceptive' act") (emphasis in original), Jud. Not., Ex. A.

that the deception did not occur until the issuer of the financial statements fraudulently accounted for the transactions. As the district court 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.[95]

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.

5ARE:37289.

---

[95] In *Parmalat I* the court noted "[t]he 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." *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) ("*Parmalat I*").

The above-discussed law rejects appellants' suggestion that no liability lies because Enron, not CSFB or Merrill, issued the financials made false by the deceptive conduct. The law as set forth in these cases and by the SEC logically embraces the following premise: Of necessity, in any public-company fraud involving a scheme with multiple participants, the financial statements ultimately issued to investors remain those of the issuer, primarily created by it. Seldom will a third party involved in the scheme have the ability or the responsibility to formally account for any transaction on the issuers' financial statements. But perfecting the ultimate deceit on investors by issuing false financial statements is not the only point at which acts of deception occur or are important in a complex securities fraud. Earlier acts of deception in the chain of conduct must occur, to deceive lawyers or accountants who have obligations concerning the issuer's financial statements. In short, the issuer cannot misaccount for the transaction unless, earlier, the third party acts deceptively – *i.e.*, designs, structures or engages in transactions that were by their nature inherently deceptive – so that outsiders to the transactions without knowledge of their deceptive nature, including 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.").

Appellants say the SEC/*Homestore* approach conflicts with *In re Charter Commc'n., Inc.*, 443 F.3d 987 (8th Cir. 2006). However, 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 appellants would read it, limiting liability under §10(b) to representational conduct, it stands in stark contrast to established Supreme Court and Fifth Circuit law – as well as the SEC's considered reading of the statute and precedents.

Appellants also cite *Charter* for the proposition that "manipulation" must be interpreted narrowly, as limited to manipulative securities ***trading*** practices covered by §9. The district court rejected this view, noting that the SEC itself rejects such a "narrow reading of the term." *Enron*, 2006 U.S. Dist. LEXIS 43146, at *166-*68.

This is consistent with the understanding of the term when §10(b) adopted it,[96] and with Supreme Court precedent showing that "manipulation" is not defined so restrictively. "The meaning the Court has given to the term 'manipulative' is consistent with the use of the term at common law, and with its traditional dictionary definition," the Court noted in *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 6-7 (1985), emphasizing that the law recognizes "'no substantial distinction between false rumors and false and fictitious acts,'" *id.* at 6 & n.4 (quoting *Scott v. Brown*, [1892] 2 Q.B. 724 (C.A.)), and that the dictionary definition generally covers the "'use of unfair, scheming, or underhanded methods.'" *Id*. at 7 n.5; *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199-200 n.21 (1976) ("'manipulate"' means "'manage or treat artfully or fraudulently; as to manipulate accounts,"' as well as "'[t]o force (prices) up or down, as by matched orders, wash sales, [or] fictitious reports'"). The banks' conduct fits within the SEC test of "manipulative or deceptive" acts under §10(b) and Supreme Court precedent. *Superintendent of Ins. v. Bankers Life*, 404 U.S. 6, 11 n.7 (1971) (§10b "prohibit ***all*** fraudulent schemes . . . whether the artifices employed involve a garden variety type of fraud, or present a unique form of

---

[96] *See generally* A.A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264 (1931); A.A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393 (1938).

deception") (emphasis in original); *see also Affiliated Ute*, 406 U.S. at 151.[97] The Court's latest instruction is that §10(b) be construed "'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Zandford*, 535 U.S. at 819.

The district court in this case relied on Judge Kaplan's opinion in *Parmalat*, which reviewed the statute's terms, and their definitions finding arrangements involving the regular factoring and securitization of worthless invoices were deceptive devices or contrivances for purposes of §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

---

[97] *Charter*, 443 F.3d at 992, cited Judge Higginbottom's decision in *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979), which like *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462 (1977), involved a breach of fiduciary duty rather than "manipulation" or deception. Furthermore, appellants' reliance on *Dynegy* is similarly misplaced. Plaintiff did "not allege any facts showing that Citigroup's allegedly manipulative and deceptive acts coincided with sales of Dynegy securities." *In re Dynegy, Inc. Sec. Litig.*, 339 F. Supp. 2d 804, 915-16 (S.D. Tex. 2004). *Dynegy*'s assertion that a third party's deceptive or manipulative act must "coincide with sales" conflicts with §10(b)'s text which "does not limit liability to those who actually trade securities." *McGann v. Ernst & Young*, 102 F.3d 390, 393 (9th Cir. 1996); *see Semernko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000). The *Dynegy* court's reliance on *Zandford*, 535 U.S. 813, for this proposition was misplaced. Just because *Zandford* involved the sale of a customer's securities does not mean that all deceptive acts under §10(b) must be limited. There is no "coinciding with sales" requirement under *Zandford* or any other Supreme Court precedent. Not even appellants argue that their primary liability is predicated on an act that "coincided with the sale" of Enron securities.

different. *Parmalat I*, 376 F. Supp. 2d at 504. The same is true here. The related-party transactions, the phony prepays, the FAS 125/140 transactions, the share trusts and minority interests all gave the appearance of legitimate financing, but were in fact shams, contrivances and schemes intending to deceive, hide debt and create a false appearance of cash flow.

As this Court has held, "*Ute* expressly recognized that rule 10b-5 was not limited to dealing with misrepresentation or omission cases under 10b-5[(b)], but reached 'a 'course of business" or a 'device, scheme or artifice" that operated as a fraud.'" *Shores v. Sklar*, 647 F.2d 462, 471-72 (5th Cir. 1981) (*en banc*). This Circuit has long recognized scheme and deceptive-conduct liability. *Id.*; *Finkel v. Docutel/Olivetti*, 817 F.2d 356, 359-60 (5th Cir. 1987); *Smith v. Ayres*, 845 F.2d 1360, 1363 & n.8 (5th Cir. 1988).

D. The District Court Properly Found that Reliance Can Be Presumed

1. The *Affiliated Ute* Presumption Applies

The district court 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).

This decision was 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, the banks' 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.

Appellants make two principal attacks to avoid the *Affiliated Ute* presumption: (1) they argue the presumption applies only in "pure omissions" cases, and (2) they argue the presumption can be applied only where the defendant has a duty to disclose. Neither is well taken.

Appellants argue 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 – at least not in the extreme sense urged by the banks. The individual defendants talked with the plaintiffs about 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.

This Court 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 the banks is not based on Enron's fraudulent acts; the banks are subject to primary liability because ***they engaged*** in deceptive conduct. The facts concerning the banks' 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, Fryar v. Abell*, 492 U.S. 914 (1989).

The district court properly rejected appellants' 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.[98] But here the allegations concern active deception, not mere silence. The district court correctly held that the relevant duty was the duty not to engage in conduct proscribed by Rule 10b-5(a) and (c):[99]

> [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, Merrill's current argument that it had no "duty to disclose" is of no import.

---

[98] 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.

[99] 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.

The district court's holding on this point is thoroughly grounded in Fifth Circuit law. In *Smith*, 845 F.2d at 1363, relied upon by the district court, 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).[100]

The district 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

---

[100] *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 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).

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). *Id.* 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. *Id.* 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, 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 Merrill were correct and there is a disclosure-duty requirement, the district 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.

2. *Greenberg* Is Inapposite

Appellants argue that this Circuit's decision in *Greenberg* defeats class-wide reliance because the stock price was not impacted by their conduct. This is not true. *Greenberg* says that in cases depending on fraud-on-the-market theory, "'the complained of misrepresentation or omission [must] have actually affected the market price of the stock.'" *Greenberg v. Crossroads Sys.*, 364 F.3d 657, 662 (5th Cir. 2004) (quoting *Nathenson v. Zonagen*, 267 F.3d 400, 414 (5th Cir. 2001). There is no doubt that conduct by CSFB and Merrill in hiding Enron's debt and fabricating earnings substantially affected Enron's stock price. As Merrill recognized at the time, its year-end transactions had added "***great value" – real inflation – to Enron's stock price***.[101]

---

[101] When Enron sought to unwind the transaction pursuant to the earlier understanding, Enron also sought to renegotiate the $17 million fee promised Merrill. Executives at Merrill were furious. Internally Merrill discussed the "***unwind***" "***at yearend when we did this trade***" (Docket#5197:COR01177 (5/30/00 email from Schuyler Tilney to Dan Gordon and Robert Furst)), emphasizing that circumstances had not changed to justify a lower fee, for "***they knew what we were making at . . . the quarter and year (which had great value in their stock price, not to mention personal compensation)***." *Id.* Merrill's Gordon agreed: "in light of their earnings

This said, the district court properly noted that the price-movement test applied in *Greenberg*, 364 F.3d 657, did ***not*** appear to apply to non-representational claims under Rule 10b-5(a) and (c). *Enron*, 236 F.R.D. at 316. Urging this Court to uncritically and mechanically apply the "tests" gleaned from *Greenberg*, appellants ignore critical differences between the cases.

Judge Harmon observed that *Greenberg* was a garden-variety Rule 10b-5(b) misrepresentation case, while this is a scheme case under Rule 10b-5(a) and (c).[102] *Greenberg* involved a few allegedly deceptive statements that the plaintiffs contended had contained new misleading information that should have moved the stock price – but that clearly did not. This case primarily involves allegations of deceptive ***conduct hidden from the market***. As the district court observed, "'[a] person cannot rely upon what he is not told.'" *Enron*, 2006 U.S. Dist. LEXIS 43146, at *288.

Here, as in *Basic*, the very purpose of the deception was to ***prevent*** price movement – to ***hide*** from the market a truth that, if known, would very likely have

---

number (and personal compensation benefits), ***the $17 million does not seem too significant for them***." *Id.* Merrill later agreed to take $8.5 million.

[102] The banks say *Greenberg* was a scheme case. But the opinion's opening paragraph specifies: "The action is based on several statements made by defendants." 364 F.3d at 659. The opinion then identifies sub-section (b) as the "pertinent part" of Rule 10b-5. *Greenberg*, 364 F.3d at 661 n.5.

moved the market. The focus should not be on whether or when the stock price ***actually moved***, but on whether it ***would have moved*** absent the fraud. This what-would-have-happened inquiry is distinct in ways both practical and theoretical from the what-did-happen inquiry in *Greenberg*.

Where, as in *Greenberg*, plaintiffs' contention is that the fraud ***changed*** the market's prior expectations as to discounted future cash flows,[103] it is reasonable to inquire whether the stock price in fact moved.[104] But where – as here and in *Basic* – the purpose of the deception is to artificially ***maintain*** market expectations – that is, to ***hide*** facts that if disclosed would materially change expectations – it makes no sense to look for price movement. Simply put, there is no reason for the price to change if

---

[103] Stock prices are largely a function of the market's understanding of the current (discounted) value of the company's future cash flows. *See* Burton G. Malkiel, *Is The Stock Market Efficient?*, 243 Science 1313, 1316 (1989); Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth and the Valuation of Shares*, 34 J. Bus. 411, 415-16 (1961); Richard A. Brealey & Stewart C. Myers, *Capital Investment and Valuation* 77 (2003); Eugene F. Fama & Merton H. Miller, *The Theory of Finance* 87-89 (1972).

[104] The novel finance theory defendants purport to find in the *Greenberg* opinion fails to account for potential price-affecting factors other than the misstatement itself. In defendants' view, *Greenberg* assumes that, but for the misstatement, the relevant stock price would have remained static – that it would not have moved at all in response to other market, industry, or firm-specific factors – and that, as a result, it is reasonable to use raw stock price data to assess whether the price "moved."

the fraud succeeds and the market's expectations do not change. In *Nathenson*, this Court recognized as much:

> We also realize that in certain special circumstances public statements falsely stating information which is important to the value of a company's stock traded on an efficient market may affect the price of the stock even though the stock's market price does not soon thereafter change. For example, if the market believes the company will earn $1.00 per share and this belief is reflected in the share price, then the share price may well not change when the company reports that it has indeed earned $1.00 a share even though the report is false in that the company has actually lost money (presumably when that loss is disclosed the share price will fall).

Nathenson, 267 F.3d at 419. In the "special circumstances" identified by *Nathenson*, the market is led to believe either explicitly (*Basic*) or implicitly (*Enron*) that X has not happened or is not going to happen, *i.e.*, that there is no "new news" and thus nothing new to react to. *Greenberg's* "actual movement" test, fashioned in a case grounded in allegations that new information moved the stock price, should not apply in this different setting.

For similar reasons, *Greenberg's* "non-confirmatory test" should not be imported into this different setting. The deceptive scheme in this case, intended to ***maintain*** market expectations, was generally hidden from view. It is not possible to "confirm" a fact that has not come to light in the first place.

The differences between this case and *Greenberg* are critical. Judge Harmon properly recognized that *Greenberg* does not control here.

3. The Banks Misallocate the Burdens of Proof

The Court's decision in *Basic* and a line of Fifth Circuit precedents hold that a material fraud presumptively affects the price of securities traded in an efficient market. *Basic*, 485 U.S. at 246-48; *Fine v. Am. Solar King*, 919 F.2d 290, 298-99 (5th Cir. 1990); *Nathenson*, 267 F.3d at 413-14; *Unger*, 401 F.3d at 322-23. As noted in *Nathenson*, the fraud-on-the-market presumption has two parts: "First, that 'the market price of shares traded on well-developed markets reflects all publicly available information,' . . . [a]nd, second, that 'the reliance of individual plaintiffs on the integrity of the market price may be presumed.'" 267 F.3d at 413-14 (quoting *Basic*, 485 U.S. at 247 & n.24).

The presumption may be rebutted by a "showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248; *see also Fine*, 919 F.2d at 299. This Court observed in *Nathenson* that the link may be severed by, among other things, "a showing that 'the market price would not have been affected by' the alleged 'misrepresentations,' as in such a case 'the basis for finding that the fraud had been transmitted through market price would be gone.'" 267 F.3d at 414 (quoting *Basic*, 485 U.S. at 248).

Defendants say *Greenberg* reversed the *Basic* presumption, shifting to Lead Plaintiff the burden of proof. In other words, defendants assert that to benefit from presumed reliance, Lead Plaintiff now must affirmatively show that the fraud in fact distorted the price of Enron stock. "[W]hen a court is asked to ***presume*** that a market relied upon a misrepresentation, it must receive evidence that the misrepresentation actually impacted the price of the relevant security." Merrill AOB at 43-47 (emphasis in original).[105]

This is wrong. Under *Basic*, once Lead Plaintiff identified a material fraud, defendants had the burden, on rebuttal, of "showing that 'the market price would not have been affected'" by it. *Nathenson*, 267 F.3d at 414. *Basic* explicitly allocated ***to the defendant*** this burden, emphasizing that presumptions are "useful devices for ***allocating the burdens of proof between parties***." 485 U.S. at 245. Fifth Circuit precedent holds that the defendant bears the burden of proof here. *See, e.g.*, *Fine*, 919 F.2d at 299 (holding that the defendant "could rebut the presumption of reliance . . . by showing: (1) that the nondisclosures did not affect the market price; or (2) that the Plaintiffs would have purchased the stock at the same price had they known the information that was not disclosed; or (3) that the Plaintiffs actually knew the

---

[105] "Merrill AOB" refers to the Brief of Merrill Lynch Appellants.

information that was not disclosed to the market" and placing on the defendant "the burden of showing that the Plaintiffs knew of the omitted or misstated facts, or that they would have traded at the same price had they known").

Greenberg specifies how, in certain cases, rebuttal (*i.e.*, severing link between the fraud and the price paid for the stock) may be proved. But there is no indication that the *Greenberg* panel intended to overturn the presumption, or the allocation of burdens of proof, announced in *Basic*. To the contrary, *Greenberg* explicitly recognizes *Basic*'s holding, including its allocation of burdens of proof. 364 F.3d at 661. Moreover, this Court observed in *Unger* – decided after *Greenberg* – that only the Supreme Court could ***fundamentally change*** the presumption by requiring a plaintiff to prove "'not the efficiency of the relevant market but rather whether a misstatement distorted the price of the affected security.'" *Unger*, 401 F.3d at 323 n.4.

Greenberg says, in *dictum*, that "*Nathanson* makes it clear that to establish this nexus the plaintiffs must be able to show that the stock price was actually affected." 364 F.3d at 665. But *Nathanson* did not purport to change the Supreme Court's careful allocation of the burdens of proof in connection with establishing or rebutting the fraud-on-the-market presumption.

Were *Greenberg* read, as defendants urge, to fundamentally change the presumption or reverse the allocation of burdens of proof set out in *Basic*, 485 U.S. 248; *Fine*, 919 F.2d 299, and numerous other authorities, it would not be binding. "When panel decisions are in conflict, the earlier one controls." *Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc.*, 168 F.3d 211, 214 n.4 (5th Cir. 1999); *see also Latham v. Shalala*, 36 F.3d 482, 483 n.1 (5th Cir. 1994) ("Where decisions conflict, the earlier decision should be followed.")

Clear Supreme Court and Fifth Circuit precedents allocate to defendants the burden of showing that the Enron fraud did not distort the price of the stock. Defendants have not carried this burden to date. But they can continue to assert this factual defense at summary judgment or trial – a defense that raises a factual issue common to class members. The presumption established by Lead Plaintiff at the class-certification hearing stands unrebutted and, accordingly, the reliance issue does not defeat predominance.

4. This Case Satisfies the Purported *Greenberg* Tests

Even if *Greenberg* meant what the banks contend, reversing *Basic*'s burden of proof, it would ***not*** require reversal of class certification.

Merrill asserts that the fraud-on-the-market presumption is unavailable because news of its deception was merely "confirmatory information," which *Greenberg*

defined as "information [that] has already been digested by the market." 364 F.3d at 666. But no information concerning Merrill's deceptive conduct or its effect on Enron's financials was released to or digested by the market; it was hidden from the market. Merrill's attempted sleight-of-hand cannot make its illegal conduct disappear.

At issue in *Greenberg* were statements about the company's new product line and earnings based on projected sales of those products. The Court viewed the second or third announcement of the same fact as merely "confirmatory" of the initial announcement; repetition of old news did not move the market because, as the Court observed, "a market will not double-count the same information." 364 F.3d at 663.

Here, in contrast, there is no recycled old news. Merrill stands *Greenberg*'s language on its head, claiming that ***new information*** that has ***not*** been disclosed to or digested by the market in the first place can nevertheless be deemed "confirmatory" and accordingly ineligible for fraud-on-the-market treatment.

Merrill confuses the meaning of "information" as used in *Greenberg*. In that case, the "information" was what had been announced about the new product line and earnings based on product sales. Merrill erroneously assumes that the relevant "information" was only the expected earnings number, without regard to product or other announcements that were explicitly embedded in those expectations. So, according to Merrill, the principal test in a case involving hidden, end-of-quarter fraud

is whether it was effective, *i.e.*, did the fraudulent acts or transactions in fact permit the company to announce – falsely – that it had met earnings expectations? If, according to Merrill, the fraud was effective in that sense and the company did announce earnings in line with expectations, the earnings announcement would be deemed "confirmatory" and any claim based on that fraud would be ineligible for treatment as a class action. That is not the law in this or any other Circuit.[106]

5. The "Actual Movement" Test

The banks say that *Greenberg* created a new "actual movement" test which Lead Plaintiff cannot meet. *See, e.g.*, Merrill AOB at 45-47. This argument fails both because it reverses the burden of proof, and because any such "test" cannot apply to a case, such as *Basic*, in which the deception is designed to ***maintain*** market expectations in order to ***prevent*** price movement.

---

[106] The proposed "Merrill Rule" thus would also preclude class action treatment of cases such as *Worldcom*, where company insiders cooked the books through end-of-quarter expense manipulations in order to meet Wall Street's earnings expectations. Under the Merrill Rule, such fraud could not be pursued on a class-action basis – and probably not at all – because fraud enabled Worldcom to announce (falsely) that it met Wall Street's expectations. Thus, according to Merrill, the earnings announcements were merely "confirmatory," so no presumption of reliance could be applied. The Merrill Rule also would preclude actions against auditors who fraudulently certify a company's phony financial results, because the auditors' certification is merely "confirmatory" of results already reported by the securities issuer.

In no event, however, would the purported "actual movement" test require reversal of class certification. There is ample evidence that the massive deception in which the banks were engaged, the natural results of which reached the market through Enron's financial statements, ***did*** affect Enron's stock price. Merrill itself acknowledged at the time its activities "added great value to the stock."[107]

Of course *Greenberg* was not a multi-year, multi-actor scheme case either. By the very nature of such a case not every act by each schemer – even acts important to keeping the scheme going – will have an immediate upward impact on the price of the issuer's stock. A false and misleading proxy statement to disguise or conceal the true nature of a nefarious related-party transaction may be essential to keep the scheme going – for if such fraudulent conduct became known the scheme would unravel and the stock price collapse – but the false proxy statement will not push the stock price higher. Or, a new securities issuance by the issuer, underwritten by a bank that is in on the scheme, accomplished by the issuer's false financial statements the bank knows about because its deceptive conduct helped falsify them, may raise fresh capital that is indispensable to keeping the Ponzi scheme going – helping to maintain the stock price at its current level, but not necessarily pushing it higher. Or, what about a contrived

---

[107] *See* footnote 101, *supra*.

deal to "resell" an asset previously sold in a fake deal that earlier generated phony income – a resale not meant to generate more false income, but to prevent the unwind of the earlier deal to avoid reversal of the earlier bogus financial benefit, where the disclosure of the reversal would cause the unwinding of the scheme and a decline in the stock? Thus, even if *Greenberg* requires an upward-stock-movement rule for an inference of reliance to arise in that type of case, the restriction does not fit – and should not control – the inference of reliance in a multi-party, multi-year ***scheme*** case where the conduct of key schemers – indeed, the scheme itself – is not known, because it is essential to the success of the scheme that ***it remain concealed***.

In any event, the underlying issue involves "the causal connection between the allegedly false statement and its effect on a company's stock price." *Greenberg*, 364 F.3d at 665. This connection exists where there is "actual negative movement in stock price following the release of the alleged 'truth' of the earlier misrepresentation." *Id.*

Merrill would read this language as requiring specific information about its activities, but this is too narrow a reading. Particularly in cases like this one, in which the deception was designed to conceal facts that, if known, would have moved the market, the later-revealed "truth" can be ***either*** the revelation of the facts concerning

the deception ***or*** the revelation that the previously reported state of facts (*i.e.*, that Enron was financially sound and growing) was incorrect.[108]

In this case, there is a "stock price movement" and compelling evidence supports the conclusion that the stock-price decreases in the summer and fall of 2001, in fact, were related to the market's belated understanding that, for several quarters (including the quarterly results reported on January 18, 2000) Enron had not been as reported, *i.e.*, financially strong and growing.[109]

6. Merrill's Activities Did Move the Stock

As noted above, no information about the year-end 1999 transactions at issue was released prior to January 18, 2000, so the numbers announced were not confirmatory as to the falsity alleged.[110] In addition, Merrill's conduct in connection

---

[108] *See In re Daou Sys. Inc. Sec. Litig.*, 411 F.3d 1006, 1025-27 (9th Cir. 2005). (All that is required is that a truer picture of the company's financial condition be revealed; there is no requirement of specific disclosure about the deception.)

[109] The *Greenberg* test, even if applied in the absurd way Merrill would apply it, would not preclude reliance on the January 18, 2000 announcement because, in fact, that announcement was ***not*** confirmatory of what the markets expected of Enron, *i.e.*, that Enron beat expectations. Because Enron did not beat expectations, its stock dropped nearly 2% from the previous day, as Merrill concedes. *See* Merrill AOB at 45.

[110] Merrill was approached in August 1999 by Enron to structure LJM2. On October 12, 1999, Merrill's estimate was $0.24 a share. *See* Docket#5197:COR01030 (Merrill 10/12/99 report at 12:13 p.m.). At the close of business, Merrill raised its

with LJM2, the Nigerian Barges and Electricity Trades continued to significantly impact Enron's reported financial condition into 2000 and 2001. Each quarter and year-end built on the previous false financials. Enron's total equity remained overstated by $62 million as a result of the Nigerian Barges and Electricity Trades transactions up to and through September 30, 2001 (*see* chart *supra* 34). Further, the LJM2-Raptors transactions alone in fourth quarter 2000 and first quarter 2001 falsely inflated earnings by $532 million and $253 million, respectively.[111] On January 22, 2001, Enron announced fourth-quarter and year-end 2000 financial results that were artificially inflated by LJM2-Raptors. The results ***exceeded*** many analyst estimates and Merrill issued "BUY" rating analyst reports on January 22-23, 2001, calling the results "impressive," increasing 2001 and 2002 EPS estimates, and stating "ENE's operating growth is what legends are made from."[112] Enron's stock price increased

---

estimate to $0.29 a share. *See* Docket#5197:COR01036 (Merrill 10/12/99 report at 16:48 p.m.). The raise in estimate by Merrill caused the stock to rise 2.39% the next day, a statistically significant rise under any expert's view. *See* Docket#5197:COR01445 (Nye Report, Ex. 11 (entry for 10/13/99)). Of course, the stock continued to rise based, at least in part, on expectations that Enron would meet or exceed fourth quarter and year-end 1999 estimates. The "false" and "deceptive" December 1999 transactions were not confirmatory of anything in the market.

111 *See* Docket#5256:COR02030-31; Docket#5197:COR01429-32 (Solomon Supp. Report at Schedules 3-4).

112 Docket#5256:COR02033. *See also* Docket#5197:COR01046-47; Docket#

significantly.[113] On April 17, 2001, Enron announced financial results for first quarter 2001 artificially inflated by LJM2-Raptors. The results ***exceeded*** consensus estimates and Merrill issued "BUY" rating analyst reports on April 17-18, 2001, stating "ENE's operating growth continues to soar/scream," and "once again raising EPS expectations in '01 and '02."[114] Enron's stock price increased significantly.[115]

The falsity of public perceptions concerning the strength of Enron's operations and financials was revealed as information in the Spring of 2001 hit the market, as well as on November 8, 2001, when, as Lead Plaintiff's expert witness discusses, Enron admitted the falsity of its financial statements, prompting a precipitous decline in the price of Enron stock:[116]

5197:COR01059-67; Docket#5217/5257:COR01831-32 (Nye Report, ¶¶90-91).

[113] *See* Docket#5217/5257:COR01831-32 (Nye Report, ¶¶90-91); Docket#5197: COR01452 (Nye Report, Ex. 11 (entries for 1/22-1/23/01)).

[114] Docket#5197:COR01069-73; Docket#5197:COR01049-57. *See also* Docket#5256:COR02033; Docket#5197:COR01360-61 (Nye Report, ¶¶106-107).

[115] *See* Docket#5197:COR01360-61 (Nye Report, ¶¶106-107); Docket#5197: COR01457 (Nye Report, Ex. 11 (entries for 4/17-4/18/01)).

[116] Merrill acknowledges that the *Greenberg* actual-movement test is satisfied in the alternative if and when information correcting the earlier deception results in a related decrease in the stock price. Merrill AOB at 40. That is what occurred in this case.

> On November 8 . . . Enron's share price fell significantly yet again. The 7.1% decline in share price from $9.05 to $8.41 was statistically significant net of market and industry effects (a net decline of 7.8%). Enron's share price fell on confirmation from the Company that Enron had ***misstated its financial results and financial condition for years*** and very likely on the prospect of a deal with Dynegy that could significantly dilute shareholders' interests. . . . At 10:06 am EST, First Call carried an Enron press release announcing the filing of a Form 8-K with the SEC in which Enron declared its intent ***to restate its financial statements for years 1997 through 2000***, and for year 2001 through the second quarter, *i.e.*, all the quarterly financial statements released for 2001.[117]

Accordingly, *Greenberg*'s so-called "actual movement" test is in fact satisfied under the facts of this case.

E. Joint-and-Several Liability for Knowingly Engaging in a Scheme to Defraud Does Not Defeat the Loss-Causation Requirement

Merrill and CSFB argue 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). This is absurd. To prove loss causation or proximate cause, plaintiff need only prove that a defendant's

---

[117] Docket#5197:COR01399-400 (Nye Report, ¶158). *See also* Docket#5197: COR01409-10 (Nye Rebuttal Report, ¶7).

conduct was a ***substantial or significant factor*** in the loss caused – not the sole or only factor. Secondly, 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, Merrill and CSFB insist that this means Lead Plaintiff must prove a separate loss attributable to each defendant. 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.

The banks 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 collectively. 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.

1. 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 judicially determined, defining the contours of the 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 defendant is 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 the 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 (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 (1995) (Conf. Rep.). 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 (1995) (Conf. Rep.). 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.

Thus, "[t]he Conference Report imposes full joint and several liability, ***as under current law***, on defendants who engage in knowing violations of the securities law." H.R. Rep. No. 104-369, at 64 (1995) (Conf. Rep.). "Defendants who are found liable but have ***not*** engaged in knowing violations are responsible only for their share of the judgment (based upon the fact finder's apportionment of responsibility), with two key exceptions." *Id.* (The exceptions were that proportionate-fault defendants would have to pay 50% more than their share if amounts were not collectible from other defendants, and in cases of small investors with less than $200,000 net worth and damages more than 10% of their net worth, the proportionate fault defendant would be responsible for any uncollectible amount.)[118]

---

[118] Congress also found that since "the current imposition of joint and several liability for non-knowing Section 11 violations by outside directors presents a particularly glaring example of unfairness," it changed the law for §11 to relieve outside directors of joint-and-several liability for non-knowing conduct, and carried over that provision to cases brought under the Securities Exchange Act of 1934 ("Exchange Act") for all defendants. H.R. Rep. No. 104-369, at 64 (1995) (Conf. Rep.); 15 U.S.C. §77k.

This legislative history shows that Congress specifically modified joint and several liability, designing a system of proportionate fault, but kept intact the rule that "knowing" violators of the federal securities laws will still face joint and several liability.

The statute was carefully crafted and its clear language must be followed. Federal courts are required "to interpret the language of the statute enacted by Congress," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002), and that interpretation begins with the plain language of the statute, for "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 438 (1999); *Raila v. United States*, 355 F.3d 118, 120 (2d Cir. 2004).

The statute's meaning is plain: "The Conference Report imposes full joint and several liability, as under current law, on defendants who engage in knowing violations of the securities laws." H.R. Rep. No. 104-369, at 64 (1995) (Conf. Rep.). It provides no exception, no reduction, and no apportionment of liability here for any ***knowing violator*** who deliberately joins a scheme to defraud. The Conference Report explains "[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 (1995) (Conf. Rep.).

None of the bank defendants 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 jury must "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)(B). 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 (as Merrill claims) to the precise dollar figure of a given transaction or its impact on earnings. Nor is the fact Merrill did fewer transactions necessarily determinative of its proportion of fault, but it might be – ***the jury will make this determination***. 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 Merrill 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. For instance, in this case, if Enron had missed its 1999 fourth-quarter and year-end numbers – and they would have but for Merrill's conduct in engaging in the deceptive transactions that had the principal purpose and effect of distorting Enron's 1999 financials – Enron's stock would have collapsed and its credit rating would have been put in jeopardy. *See* 3ARE:35785 (Hakala Declaration). In short, the scheme might well have stalled – even collapsed – if Enron's 1999 results fell far short of forecasts. *See* Docket #5197:COR01339-40 (Expert Rebuttal Report of Claire A. Hill). Rather than a formulaic approach to proportionate liability that Merrill argues (*i.e.*, we only did two transactions out of 66

so we are only liable for 1/33 of plaintiffs' damages), a jury could fix their proportionate liability much higher due to the nature of Merrill's conduct. This provision of the statute is further support for why joint and several liability for "knowing" violators' conduct must be read as being responsible for all of the entirety of the judgment plaintiff obtains, as the statute plainly provides, subject of course to the "judgment reduction" provisions and rights of contribution.

That Congress was deliberate in its construction of the statute is further supported by other carefully detailed provisions balancing the interests of defrauded investors and violators of the statute's prohibition against fraud. Congress legislated that a defendant who is non-knowing and therefore proportionately liable is exposed to paying plaintiff a supplement of up to 50% of the defendant's proportionate share to make up for uncollectible amounts from other defendants. 15 U.S.C. 78u-4(f)(4)(A)(ii). This 50% upcharge shows that Congress was willing, even in that "reckless" context, to have defendants held responsible for loss caused by others. The statute also provides for a judgment-reduction credit that equates to a settling defendant's payment to plaintiff or its proportionate fault.[119] 15 U.S.C. 78u-

---

[119] 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

4(f)(7)(B). Congress also provided "contribution" rights for defendants by providing that anyone "who becomes jointly and severally liable for damages in any private action may recover ***contribution*** from any other person who, if joined in the original action, would have been liable for the same damages," with the claim for contribution to "be determined based on the percentage of responsibility of the claimant and of each person against whom a claim for contribution is made." 15 U.S.C. §78u-4(f)(8). All of these provisions show that Congress was careful in its enactment of this part of the PSLRA.

CSFB condemns the district court's observation that contribution rights help to "remedy for any unfairness" (4R:17843), for "ignor[ing] the realities of this case, in which many of the key participants in the alleged 'scheme' to defraud, including Enron, Enron's directors and officers and Enron's outside auditor, Arthur Andersen, are effectively judgment proof." CSFB AOB at 43. First, having cheated investors out of billions by making Enron appear to be financially sound, CSFB cannot now complain that Enron or even its accountants are insolvent. Surely Congress was entitled to conclude that the risk of such insolvency is better borne by those who "knowingly" engaged in a primary §10(b) violation than by their innocent victims. 15

---

is greater, shall reduce judgment that Merrill or CSFB would have to pay even if it was found they are "knowing" violators.

U.S.C. §78u-4(f). Secondly***, there are several large solvent bank defendants that CSFB or Merrill can pursue – either at trial or in a later contribution action – and CSFB and Merrill have joined together to list over 100 "others" they believe contributed to the loss***.

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.[120]

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." *Masters Mates*, 957 F.2d at 1027. 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 v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 n.8, 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979). For this reason, a

---

[120] 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 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).

> 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, 220, 128 L.Ed. 2d 148, 114 S. Ct. 1461 (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 sum, the liability rules for securities violations with multiple actors were modified to limit the impact of joint and several liability to "knowing" violators and to protect them with judgment reduction and rights of contribution. There is no provision or limitation in the statute which would limit the "knowing" violators' liability to the victims to anything less than the entire judgment. Merrill's claim that "knowing" violators are only liable for a portion of the judgment that somehow relates to the financial impact of their transactions on Enron's financial statements is nowhere to be found in either the statute, legislative history, or any case law. In fact, their proposed interpretation would render the joint-and-several provisions meaningless and ignores the extensive statutory protections Congress provided even knowing violators.

Merrill also contends that joint and several liability cannot be imposed because it is inconsistent with the testimony of Lead Plaintiff's own experts. 7R:30953. Merrill misconstrues the relevant testimony and the purpose for which these experts

were called. The quoted testimony merely reveals that Lead Plaintiff's experts, as economists, not jurists, have no opinion as to whether it would be "fair and rational" to impose joint and several liability. *See* 7R:30953.[121] It should hardly be surprising to Merrill that Lead Plaintiff's experts will not opine on the law governing the imposition of joint and several liability since it "invades the court's province." *Owen v. Kerr-McKee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983).

2. The Joint-and-Several Liability Provisions Do Not Conflict with the Loss-Causation Provision

The argument by Merrill and CSFB that the joint and several provisions conflict with loss-causation provisions which were enacted at the same time is misplaced. Exchange Act §21D(b)(4) provides: "In any private action arising under this title, the

---

[121] Merrill's complaint that plaintiffs' expert did not isolate out a loss caused by its actions and therefore there is no proof of loss causation is without basis. Merrill AOB at 54. Plaintiffs' expert did opine that each of the defendants' acts (including Merrill and CSFB) caused the plaintiffs' loss. Docket#5197:COR01409-10 (Nye Rebuttal Report, ¶¶7-9); Docket#5197:COR01343-406 (Nye Report, ¶¶27-30, 41-51, 74-75, 94-171). There is no requirement that each defendant's actions in a single scheme be isolated to show the impact on Enron's stock. Under Merrill's proposed rule, a plaintiff would be required to break-out inflation as to the issuer, the officers, including the CEO, CFO, controller, its CIO, the directors, other officers, and the auditors, lawyers and/or bankers. In this case, Merrill and CSFB have themselves identified over 100 actors each claim contributed to the loss. Breaking out fractional losses per defendant has never been a requirement in a §10(b) action. *TBG*, 36 F.3d at 927 ("***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***.") (citing *G.A. Thompson*, 636 F.2d at 963).

plaintiff shall have the burden of proving that the act or omission of the defendant[s][122] 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 Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). "The statute thereby makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Dura*, 544 U.S. at 346. This imposes a "requirement that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Id.* Plaintiff accepts the requirement that it must establish loss causation as to each defendant and cannot rely on the causation by a co-schemer to establish loss causation as to another.

That requirement will be satisfied when Lead Plaintiff demonstrates that CSFB and Merrill hid debt and devised or executed deceptive transactions to conceal Enron's true financial condition. That investors who purchased Enron securities suffered an economic loss from defendants' conduct concealing Enron's true financial

---

[122] Again, under 1 U.S.C. §1, the singular includes the plural. Complex securities frauds often involve multiple actors. As the Court in *Central Bank* noted "there are likely to be multiple violators." 511 U.S. 164, 191. And secondary actors like accountants, bankers and lawyers are liable if found to be primary violators. *Id.*

condition cannot be doubted. For Enron securities collapsed – and investors suffered tremendous losses – when the Company's true financial condition was exposed.

There is no requirement here that Lead Plaintiff demonstrate CSFB and Merrill were the ***only*** cause of this loss. For 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 Properties, 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*, at §20.2, at 91 (1986) (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).

Applying the statute as written, then, Lead Plaintiff must show that defendants' manipulative or deceptive conduct, in fabricating phony financial results or hiding debt, "caused the loss for which the plaintiff seeks to recover damages," not that it was the exclusive cause of that loss, or that it caused the entire loss. 15 U.S.C. §78u-4(b)(4). It is then up to the jury to "specify the total amount of damages . . . and the percentage of responsibility of each covered person found to have caused ***or***

contributed to the loss incurred," 15 U.S.C. §78u-4(f)(3)(B), by determining relative "fault," 15 U.S.C. §78u-4(f)(3)(ii), considering factors that include the nature of the conduct and the nature and extent of the relationship between the conduct and damages incurred. 15 U.S.C. §78u-4(f)(3)(C).

At this point, a defendant "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). Thus, Congress determined that a defendant who acted with actual knowledge of the deceptive character of its conduct is liable for the whole loss, which may be more than what its actions "caused" or "contributed to." 15 U.S.C. §78u-4(f)(3)(A)(ii).

Defendants' loss-causation arguments also presume they did not understand the nature or scope of the Enron scheme, when, in fact, they understood the purpose of their deceptive acts as part of the broader scheme. This is what the evidence will show – on a fully developed record.

CSFB, which took the leading role in dozens of deceptive transactions, objects that "a defendant found to have knowingly violated Section 10(b) by engaging in a single transaction with Enron on October 19, 1998, the first day of the class period, would nevertheless be jointly and severally liable for all damages sought by every

purchaser over a three-year period." CSFB AOB at 41. But these are not the facts of this case nor what the statute provides for. First, CSFB was engaged in deceptive acts throughout the Class Period. Second, were it to be found to have been a knowing primary violator, in but a few transactions, the jury would make such a determination and its responsibility for the loss would flow from those findings. In other words, it will only be liable for the percentage of responsibility the jury determines CSFB should bear. Only if other schemers cannot pay their share will CSFB ultimately have to pay more. In the reckless context, 50% more than its proportionate fault. In the knowing context, 100% of the judgment if CSFB cannot get contribution from others that caused or contributed to the loss.[123] In the knowing context, 100% of the judgment if no one else can pay after offsets, etc. The "rationale of this concept is that a fraud will fail if one of the participants reveals its existence and, as a result, all wrongdoers are held equally culpable if the fraud achieves its aims." S. Rep. No. 104-98, at 97 (1995). This is not unfairly singling out knowing violators because, as noted, the statute provides that even "proportionately" responsible defendants will have to pay 50% more than their allocated fault if there are other bankrupt or judgment-proof

---

[123] In this case neither CSFB nor Merrill will ever have to pay 100% of the judgment, even if they are found to be knowing violators, because they will receive an offset the greater of $7 billion plus in settlements ***or*** the percentage of fault a jury determines the settling defendants caused or contributed to the loss.

defendants. These provisions show that Congress carefully considered who should bear the risk of insolvent defendants and Congress chose defendants to bear the risk of additional responsibility in both the non-knowing and knowing context versus innocent investors.

Merrill makes a similar argument to CSFB's, but, again, the facts as to Merrill's involvement are quite different than portrayed by Merrill. Judge Harmon observed in denying Merrill's motion to dismiss that the case presents "an ongoing scheme in which Merrill Lynch participated in a substantial way over years," with specific acts of deception casting "a long shadow over Merrill Lynch's ongoing, substantial participation in the alleged Ponzi scheme," including "early in the Class Period when it participated in establishing and funding LJM2 at a critical accounting time, despite red flags identified in the complaint and known to Merrill Lynch." *Enron*, 310 F. Supp. 2d at 830. Rejecting Merrill's claims that its culpability was limited to a couple year-end 1999 transactions, Judge Harmon ruled that these "transactions are not to be viewed in isolation," but as part of a "unified scheme to defraud." *Id.*

The district court held "plaintiffs have adequately pleaded that their loss was directly and ***foreseeably*** caused by Defendants' alleged fraudulent practices at Enron, including Merrill Lynch's Nigerian barge transaction and bogus power trades involving Enron North America." *Enron*, 310 F. Supp. 2d at 832. The district court's

other orders have, moreover, established a comprehensive legal framework for proving loss causation. *In re Enron Corp. Sec. Litig.*, No. H-04-0087, 2005 U.S. Dist. LEXIS 41240, at *45-*74 (S.D. Tex. Dec. 22, 2005) (denying RBC motion to dismiss); *see also Enron*, 439 F. Supp. 2d 692 the (Barclays motion for judgment on the pleadings).[124] Rule 23(f) does not permit this Court to review the foregoing orders, which are the real targets of this Rule 23(f) appeal. *See Bell*, 422 F.3d at 311-13; *Delta*, 310 F.3d at 957; *McKowan*, 295 F.3d at 389-90.

Merrill contends its year-end 1999 transactions affected only Enron's 1999 financial results, and that " long before revelation of Enron's fraud and its collapse in 2001, no trace remained of Merrill's transactions in Enron's financial statements or stock price." Merrill AOB at 12. Merrill even quotes Judge Werlein from the Nigerian Barges criminal trial, overlooking the fact it was proven beyond any

---

[124] The district court has held that 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).

reasonable doubt that Merrill's bankers "caused Enron and its shareholders to suffer a loss,"[125] and that Judge Werlein so found.[126]

But the Nigerian Barges transactions, Electricity Trades and LJM2 transactions in which Merrill engaged (and their financial impact on Enron) also extended into 2000 and 2001.[127] Moreover, the year-end 1999 transactions were critical to the ***entire*** charade.[128] Without them, Enron's stock would have collapsed.[129] Dr. Hakala, Lead Plaintiff's expert, opined that "had Enron's true fourth-quarter 1999 financial results been disclosed – absent either the purported earnings derived from the two Merrill year-end transactions or its engagement in LJM2 – the Company would have missed earnings expectations substantially," (by over 30%) producing "compound negative effects that would have substantially reduced earnings expectations ***and*** reduced the

---

[125] *See* Docket#5197:COR01459 (*United States v. Bayly*, No. H-03-363, Trial Transcript (S.D. Tex. Nov. 5, 2004)) (loss-causation jury instruction); Docket#5197: COR01159-63 (jury verdict).

[126] Docket#5197:COR01472 (*United States v. Bayly*, No. H-03-363, Sentencing Transcript (S.D. Tex. Apr. 21, 2005)) ("the Court is satisfied that there was some loss by Enron and its shareholders").

[127] Docket#5197:COR01413-21 (Solomon Report); Docket#5197:COR01429-38 (Solomon Supp. Report at Schedules 3-6, 8).

[128] *See* 3ARE:35782-83; Docket#5197:COR01343-44, COR01346-47 (Nye Report, ¶¶27-29, 43); Docket#5197:COR01422 (Solomon Report).

[129] 3ARE:35783. *See also* 3ARE:35782.

earnings multiple applied to expected future earnings." 3ARE:35785 (emphasis in original). Andersen audit partners have testified that had they known of the collusion between Enron and Merrill, this would have led to the withdrawal of Andersen's audit opinions and the resignation of Andersen.[130] Hiding Enron's true financial condition also maintained Enron's investment-grade credit rating.[131] 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.

3. Plaintiffs Will Show Loss Causation for Each Defendant

The banks next assert Judge Harmon erred by holding they could be liable for harm they did not cause. The district court found 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

---

[130] 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 Merrill's fraud was revealed in January 2000. *See* Docket#5197:COR01334-35 (Odom Deposition); Docket#5197:COR01201 (Bauer Deposition); Docket#5197: COR01216 (Bauer Deposition).

[131] *See, e.g.*, Docket#5256:COR02030-31; Docket#5197:COR01413-21 (Solomon Report); Docket#5197:COR01429-38 (Solomon Supp. Report at Schedules 3-6, 8); Docket#5197:COR01348-51 (Nye Report, ¶51); Docket#5197:COR01265 (Fastow Deposition). *See* Docket#5197:COR01339-40 (Expert Rebuttal Report of Claire A. Hill).

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. Judge Harmon's holding ***simply acknowledges in the single scheme context that a single and indivisible harm may be proximately caused by two or more defendants, who then may be jointly and severally liable even if they did not know of the other's conduct***. This is traditional tort law, not some radical departure from the mainstream, and it is not at variance with the PSLRA.[132] To the extent Merrill argues it should not be liable for separate losses caused by a separate scheme, plaintiffs agree, but that clearly is not the situation in this case. CFO Fastow's testimony (taken after the class-certification decision) further confirms the district 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

---

[132] The district court found 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. Again, this finding is based on the district court's rigorous review of the evidence and should not be disturbed. By stipulation, the pleadings in this case now reflect the extensive evidence uncovered and put forth in opposition to petitioners' recent motions for summary judgment. Agreed Motion to Deem Complaint Amended (Docket #5293), Tab 6 to Appellees' Motion for Leave to File Overlength Optional Record Excerpts, filed herewith.

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 created that deception***." Docket#5217/5257:COR01788 (Fastow Deposition).[133]

Merrill's argument continues that Merrill should not be responsible for later actions by other defendants it did not know about because the Supreme Court's decision in *Dura* holds that a defendant cannot be responsible for later "'firm-specific facts, conditions, or other events'" that postdate its "'earlier misrepresentation.'" Merrill AOB at 53 (quoting *Dura*, 544 U.S. at 342-43). This is a misreading of *Dura's* holding. The reference in *Dura* on this point is to non-fraudulent facts, conditions or events that are unrelated to the fraud and thus do not lead to recoverable damages. Plaintiffs' expert has removed these non-fraud factors and neither Merrill nor any other defendant will be liable for those losses.

Appellants next argue that they cannot be responsible for others' acts that "predate" their own first deceptive act, because they had no involvement in the scheme until a certain point (Merrill AOB at 54) or that claims against them are time

---

[133] Fastow further asserted "[c]ertain Enron banks, particularly Merrill, CSFB, RBS and Barclays, worked to solve certain of our financial problems." 4ARE:36722 (Fastow Declaration, ¶8). "I worked with certain banks to accomplish this goal . . . ." 4ARE:36721 (Fastow Declaration, ¶6).

barred until a certain time in the Class Period. CSFB AOB at 42. Plaintiffs agree. This is scheme liability – not conspiracy liability. Neither Merrill nor CSFB (or any other defendant) will be responsible for damages that predate the time that plaintiff is able to establish all the elements of a §10(b) claim against that defendant. In CSFB's case, due to an earlier ruling by the district court as to the statute of limitations, CSFB cannot be liable for damages before April 1999. In Merrill's case, Merrill cannot be responsible for damages that pre-date the January 18, 2000 publication of Enron's false year-end 1999 financial results.[134]

CSFB argues the trial is not manageable because CSFB and Merrill will attempt to assign responsibility for loss to non-parties. CSFB AOB at 45-46. Yet, the district court found the case was manageable and acknowledged the provision in the statute that states that the jury shall consider "each of the other persons ***claimed*** by any of the parties to have caused or contributed to the loss incurred by plaintiff" and decide if they committed a violation of the federal securities laws, their percentage of responsibility out of the total fault, and if it was knowing. 15 U.S.C. §78u-4(f)(3)(A)-

---

[134] Damages are determined on a day-by-day basis in securities cases as inflation may vary day-by-day. The judgment CSFB can be liable for will thus only encompass the April 1999 timeframe forward. The judgment Merrill will be liable for will be from January 18, 2000 forward. The district court, of course, can "mold" the verdict into an appropriate judgment.

(B); 15 U.S.C. §78u-4(f)(5)(D). This provision will help defendants avoid any payments that may be required above their proportionate fault. This provision would be applicable in either a class case or an individual one and thus does not impact manageability as to the class case. In fact, it supports the allocation being done once – in a class setting not repeated over and over in individual trials.

Defendants' loss-causation argument, in short, is without basis, and is far beyond the reach of this Court's limited jurisdiction under Rule 23(f).

No. 06-20856

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re ENRON CORPORATION SECURITIES,
DERIVATIVE & "ERISA" LITIGATION

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Plaintiffs-Appellees,
vs.
CREDIT SUISSE FIRST BOSTON (USA), INC., et al.,
Defendants-Appellants.

On Appeal from the Southern District of Texas
Newby v. Enron Corp., No. H-01-CV-3624
The Honorable Melinda Harmon

VOLUME 2

APPELLEES' BRIEF RESPONDING TO MERRILL LYNCH, CREDIT SUISSE AND VINSON & ELKINS APPEALS

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
G. PAUL HOWES
ERIC ALAN ISAACSON
SPENCER A. BURKHOLZ
JAMES I. JACONETTE
ANNE L. BOX
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545

Lead Counsel for Appellees and for Lead Plaintiff
The Regents of the University of California

[Additional counsel appear on signature page.]

VI. ISSUES PRESENTED

1. Whether the district court's choice of legal standard regarding who may be liable for false and misleading statements and omissions under §10(b) and Rule 10b-5(b), in an order denying V&E's motion to dismiss, is properly the subject of this Court's review under Rule 23(f).

2. Did the district court err by holding that those who create misleading statements in order to mislead investors may be liable under §10(b) and Rule 10b-5(b) for those false and misleading statements and omissions even though others disseminate them to the market?

3. Whether Lead Plaintiff has standing.

VII. STATEMENT OF THE CASE

This is an action by defrauded investors under the Securities Exchange Act of 1934 ("Exchange Act") §10(b) and Securities and Exchange Commission ("SEC") Rule 10b-5, seeking redress for one of American history's largest and most egregious frauds. Lead Plaintiff's allegations and evidence disclose appellant V&E's actionable role in that fraud, working with Enron to create false public disclosures for Enron, and to accomplish major transactions in the Enron Ponzi scheme. V&E's conduct hurt Enron investors who lost billions.

Four years ago, the district court ruled that V&E faces liability under §10(b) and Rule 10b-5 for its role in co-authoring certain of Enron's public disclosures

deemed false and/or misleading. This ruling applied the SEC's "creator" test for liability, under which a so-called "secondary actor" may be liable under Rule 10b-5(b) for creating a false or misleading disclosure to deceive investors, provided, of course, it acts with scienter. *See In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 581-93 (S.D. Tex. 2002). The district court adopted this test as a reasonable implementation of §10(b), faithful to statutory text, legislative purpose, and Supreme Court precedent, including *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). *See Enron*, 235 F. Supp. 2d at 585-91. The district court also ruled that V&E faces liability under Rule 10b-5(a) and (c) for its transactional work in the Enron scheme. *See id*. at 704-05.

The district court, having determined after a thorough analysis that the requirements of Rule 23 are met, subsequently certified this case as a class action under Rule 23. Trial is scheduled to begin in April 2007. V&E appeals under Rule 23(f) from the Order certifying the class, but really challenges the district court's December 2002 ruling on the scope of liability under §10(b).

The district court chose the SEC's "creator" standard in 2002 after careful analysis, giving due consideration to *Central Bank*'s prohibition on liability for aiding and abetting. *Enron*, 235 F. Supp. 2d at 582-83. Indeed, the district court rejected a

looser "'substantial participation'" test in part because it "may fail to differentiate between primary liability and aiding and abetting." *Id*. at 585.

Agreeing with the SEC, the district court found that V&E's proposed "bright line" test is not mandated by *Central Bank*, and would allow wrongdoers who merely conceal their identities to escape liability. *Id*. at 586-87. The district court adopted the "creator" test because:

> [T]he SEC's approach to liability under § 10(b) and Rule 10b-5(b) is well reasoned and reasonable, balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants (including businesses, law firms, accountants and underwriters), in addition to the policies underlying the statutory private right of action for defrauded investors and the PSLRA. Moreover, it is consistent with the language of §10b(b), Rule 10b-5, and *Central Bank*. Therefore since the SEC's proposed test is a reasonable interpretation of the text of the statute and serves its underlying policies, the Court adopts and applies it in this litigation to claims under §10(b) and Rule 10b-5(b).

Enron, 235 F. Supp. 2d at 590-91.

This ruling on a motion to dismiss cannot be reviewed by way of an interlocutory appeal under Rule 23(f). *Infra* 21-28. The district court's ruling was, in any event, a sound one. *Infra* 28-42.

VIII. STATEMENT OF FACTS

In late 2002, the district court denied V&E's motion to dismiss. *See Enron*, 235 F. Supp. 2d at 704-05. It held that V&E may be liable under Rule 10b-5 for the firm's work: (1) in authoring certain of Enron's public disclosures; (2) on transactions

forming part of the Enron scheme; and (3) in investigating allegations contained in an internal memorandum by Enron employee Sherron Watkins (the "Watkins Investigation"). *Id*. at 656-71.

To V&E's authorship of certain Enron disclosures, the district court applied the SEC's "creator" test, which holds that:

> "When a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter."

Id. at 692.[135] The SEC advocated this test in an *amicus* submission providing an April 1998 brief it had previously filed in *en banc* proceedings before the Third Circuit in *Klein v. Boyd*, Nos. 97-1143, 97-1263 (3d Cir. 1998). 1A ARE:1783-1803.[136]

---

[135] Unless otherwise noted, all emphasis is added and all citations and footnotes are omitted.

[136] *See Enron*, 235 F. Supp. 2d at 585-86. The SEC's brief in *Klein* appears in the Record on Appeal at 1R:1783-1803 and in the ARE at 1A ARE:1783-1803, and is referred to herein as the "SEC *Klein* Brief." In *Klein*, a district court order dismissing plaintiffs' claims was reversed by a Third Circuit panel, whose opinion was withdrawn for the case to be reheard *en banc*. *Klein v. Boyd*, Nos. 97-1143, 97-1261, [1998 Supp. Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶90,136 (3d Cir. Feb. 12, 1998), *opinion withdrawn for rehearing en banc*, 1998 U.S. App. LEXIS 4121 (3d Cir. Mar. 9, 1998). The SEC submitted its brief in the *en banc* proceeding, and the case settled before the court issued an opinion.

The district court also upheld Lead Plaintiff's claims against V&E under Rule 10b-5(a) and (c) on a theory of scheme liability, given V&E's work on the scheme's critical transactions and its conduct in the Watkins Investigation:

> Contrary to Vinson & Elkins' contention, the situation alleged in the consolidated complaint is not one in which Vinson & Elkins merely represented and kept confidential the interests of its client . . . . Instead, the complaint alleges that the two were in league, with others, participating in a plan, with each participant making material misrepresentations or omissions or employing a device, scheme or artifice to defraud, or engaging in an act, practice or course of business that operated as a fraud, in order to establish and perpetuate a Ponzi scheme that was making them all very rich.

Enron, 235 F. Supp. 2d at 704.

> [T]he [Watkins] [I]nvestigation . . . can serve as the basis of a §10(b) and Rule 10b-5(a) or (c) claim alleging use of a device, scheme or artifice to defraud or engagement in an act, practice or course of business that operated as a fraud in the perpetuation of the Ponzi scheme.

Id. at 705.

Since then, V&E has many times tried to challenge the district court's adoption of the "creator" test. *See* V&E AOB at 6-7 (describing V&E's unsuccessful attempts at obtaining interlocutory appeal under 28 U.S.C. §1292(b) and writ of mandamus).[137]

During discovery, Lead Plaintiff uncovered extensive evidence substantiating its allegations against V&E. It shows that V&E was deeply involved in the Enron

---

[137] "V&E AOB" refers to Brief of Appellant Vinson & Elkins LLP.

scheme, and in framing Enron's public disclosures. It shows that V&E not only knew of the fraudulent nature of Enron's financial reporting, but that its lawyers considered it V&E's job to craft disclosures in order to obscure Enron's real financial condition. V&E lawyers worked, moreover, at the heart of many deceptive Enron transactions operating as a fraud on investors – at the very core of the Enron Ponzi scheme.

V&E and Enron were intimately related. Lawyers frequently moved back and forth between the two organizations, and V&E served as Enron's principal outside law firm – its "***go to***" law firm – for most legal matters, including securities disclosures and structured-finance transactions.[138] Enron was, by far, V&E's most important client, generating over $160 million in fees paid from 1997 to 2001.[139] From 1997 through late 2001, V&E was involved in over 60 significant SPE transactions for Enron, and was Enron's primary outside counsel for securities filings and the fraudulent securities offerings that kept Enron afloat.[140]

---

[138] 4R:18461, 18203-07 (Lead Plaintiff's Opposition to V&E's Motion for Summary Judgment ("MSJ Opp")); 6R:27072-74 (V&E's Responses to Interrogatory 4); 6R:27855-64; 6R:29797-883; 6R:25845 (Walls Deposition).

[139] 4R:18461, 18207, 18209 (MSJ Opp); 6R:27070-71, 27076-153 (V&E's Response to Interrogatory No. 1 and referenced Ex. 1); *see also* 4R:18966 (Expert Report of Geoffrey Miller). *See* 6R:25546 (Dilg Deposition).

[140] 4R:18209 (MSJ Opp).

A. Facts Demonstrating V&E's Liability for Course of Conduct of Deception, Manipulation and Contrivances Pursuant to Rule 10b-5(a) and (c)

V&E engaged in Enron's scheme of deception and manipulation in a variety of ways, including (i) negotiating and structuring bogus FAS 125/140 deals while issuing illusory "true issuance" opinions so that Enron would report hundreds of millions in phony income and hide billions of dollars of debt off its balance sheet; (ii) creating Enron's false proxy statements and 10-Q and 10-K filings, as well as its false registration statements/offering circulars; (iii) writing illusory and false 10b-5 assurance opinions to facilitate sale of billions of dollars of securities in a gigantic Ponzi scheme; and (iv) undertaking to "investigate" Sherron Watkin's allegations but whitewashing the fraud.[141]

V&E's internal documents – bills and attorney self-evaluations – repeatedly discuss and even boast about its lawyers' role in "structuring" the deceptive transactions that generated Enron's false financial reports.[142] Their purpose was to deceive investors and rating agencies about Enron's debt, earnings and income. V&E knew the transactions' objective was to manipulate Enron's books to meet targeted

---

141 4R:18461, 18473, 18488-89 (MSJ Opp).

142 4R:18489, 18210-11, 18216-17, 18220, 18223 (MSJ Opp).

financial reporting objectives, and not to achieve real economic benefits.[143] V&E also knew that Enron was hiding billions dollars of debt off its books with the FAS 125/140 transactions that V&E was working to structure.[144]

The FAS 125/140 transactions required a legal opinion, so V&E delivered dishonest "true issuance" opinions – in order to mislead. V&E knew Enron required a "true sale" legal opinion for the FAS 125/140 transactions, but that the transactions did not qualify for such an opinion.[145] V&E accordingly generated fictitious "true issuance" opinions, misrepresenting that the transactions met the necessary legal and accounting requirements.[146]

The following transactions illustrate V&E's conduct:

---

[143] 4R:18462-63, 18489, 18214-16 (MSJ Opp); 6R:28033-44; 6R:27064-65; 6R:27517; 6R:25667 (Spradling Deposition); 6R:25233-34 (Astin Deposition); 4R:19227 (Expert Report of Richard Leisner).

[144] 4R:18463-65, 18489, 18231-32, 18248-49 (MSJ Opp); 6R:27539; 6R:27879; 6R:27535; 6R:27881-83.

[145] 4R:18463-65, 18489, 18226-36 (MSJ Opp); 6R:27543; 6R:27537; 6R:25849, 25855 (Yates Deposition).

[146] 4R:18463, 18489, 18226-36 (MSJ Opp).

1. Chewco

Throughout fall 1997, V&E attorneys met with Enron to structure the Chewco deal, providing a template for many other phony deals throughout the class period.[147] The transaction had to include 3% outside equity for Enron to avoid consolidating the JEDI debt on its books. V&E knew that Barclays was the counter-party, however, and that it was actually a Barclays' ***loan*** that was being mischaracterized to create the fictitious appearance of 3% outside equity.[148] Indeed, V&E created the very "side letter" withheld from Enron's auditors because it defeated the accounting treatment of

---

[147] 4R:18465, 18489, 18236-48 (MSJ Opp); 6R:28998-9002 (10/31/97 facsimile to McGee and Spradling from St. Clair re Project Chewco Transaction); 5R:22950-51 (St. Clair notes re Meeting with Enron's Hudler, Barber, Astin, Kopper, and Edsall of Kirkland Ellis, discussing reserve accounts that 3% of all Chewco distribution goes to the reserve account); 5R:22957-58 (12/3/97 notes from St. Clair meeting, indicating side letter was discussed and the intent was to "fund reserve account" to "repay Chewco loans"); 6R:30008-12 (12/16/97 memorandum from Ephross re draft of side letter to Astin, Barber, Spradling, Chandler); 5R:22953-56 (memorandum re meeting with Glisan, Kopper, Jordan, Astin, Barber, Lynch and Spradling, discussing the waterfall provisions with the Chewco deal and specifying how these provisions were for Barclays' benefit); 6R:30013-15 (12/11/97 memorandum from Spradling to various partners re Revised Chewco Credit Agreement); 6R:28535-43 (Astin Partnership Share memo); 6R:27962-67 (Chewco timeline); 6R:27968-69 (V&E letter re Chewco formation documents); 6R:25943-44 (Dilg poem); 6R:26264-70 (outline of closing documents for Chewco); 6R:26261-63 (side letter from closing documents).

[148] 4R:18465, 18236-48 (MSJ Opp); 5R:22953-56 (memorandum re meeting with Glisan, Kopper, Jordan, Astin, Barber, Lynch and Spradling, discussing the waterfall provisions with the Chewco deal and specifying how these provisions were for Barclays' benefit).

the transaction by promising repayment that made Barclays' stake a loan, and not Barclays' "equity."[149] V&E's deceptive work on this transaction, which inspired a sarcastic holiday-party parody,[150] was critical.

The damage to investors from V&E's fraudulent conduct in the Chewco/JEDI deal is palpable. When Enron filed an 8-K in November 2001 with financials revised due to the failed JEDI/Chewco transaction, it: eliminated $405 million in income as a result of having to eliminate earnings related to the appreciation of the Enron stock held as an investment in JEDI; reduced equity by an aggregate of $800 million to reflect the 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 for the 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 at

---

[149] 4R:18465, 18236-48 (MSJ Opp); 6R:30008-12 (12/16/97 memorandum from Ephross: draft of side letter to Astin, Barber, Spradling, and Chandler); *see also* 5R:20785-86 (12/11/97 notes of St. Clair on Chewco Structuring Meetings); 5R:22952 (12/3/97 notes); 5R:22957 (12/4/97 notes); 4R:18511 (12/12/01 Powers Committee Interview of Astin).

[150] 4R:18465, 18489 (MSJ Opp) ("[A] Chewco, a Jedi 2 . . . and no sooner could you say mark-to-market our client's year-end financials began to sparkle.)."

December 31, 2000, which reflects the addition of debt recorded on Chewco and JEDI's financial statements.[151]

2. Cuiaba

V&E documented the Cuiaba transaction in the last days of the third quarter 1999, presenting a "sale" of Enron's interest in a Brazilian power plant to a subsidiary of Fastow's LJM partnership, to keep $200 million of debt off Enron's books and generate $65 million in phony "mark to market earnings."[152] V&E knew this was no "sale." Enron gave LJM a guaranteed return for serving as a mere "'short term equity warehouse,'" merely to get past the reporting period.[153] V&E's own records demonstrate its knowledge that the deal was a fraud, when it nevertheless closed the deal.[154] When Enron could find no buyer for LJM, V&E documented Enron's

---

[151] 4R:18472 (MSJ Opp); Docket #5217/5257:COR01913-14 (Expert Report of Saul Solomon at 94-95).

[152] 4R:18464, 18249-52 (MSJ Opp); s*ee* Docket #5217/5257:COR02020-21 (Expert Report of Saul Solomon at 295-96).

[153] 4R:18464, 18466, 18488-89, 18249-52 (MSJ Opp); 6R:29507-09; 6R:29492-95; 6R:26676-79; 6R:29486; 6R:29057; 6R:27580-83; 6R:29516-519. As V&E partner David Keyes joked: "[A]ny resemblance between Enron sales and other people's sales is purely coincidental." 6R:27580.

[154] 4R:18464, 18466, 18488-89, 18249-52 (MSJ Opp); 6R:29507-09; 6R:29492-95; 6R:26676-79; 6R:29486; 6R:29057; 6R:27580; 6R:29516-19.

"repurchase" of the Cuiaba interest to take LJM out of the deal, ensuring – just as promised – that LJM never bore any risk from its "warehousing."[155]

3. Rhythms

In March 1998, Enron invested $10 million in RhythmsNet stock, a volatile Internet company. By June 1999 the paper value had risen to $260 million, but Enron was restricted from selling its shares.[156] Hoping to capture the value on its books despite the restriction, Enron turned to V&E. Because Enron could not sell the stock, V&E structured a hedge agreement with an LJM subsidiary – but the only asset it held to support the hedge was Enron stock. V&E knew both that Enron was hedging with itself, and that the entire transaction was solely for accounting purposes – it was not a real economic transaction.[157] V&E nevertheless proceeded with this deceptive and

---

155 *Id.*

156 Rhythms stock closing price on June 1, 1999, was $48.50 per share. *See* http://www.DJInteractive.com.

157 4R:18259-66 (MSJ Opp); 5R:20761 (10/23/03 Osterberg Statement to Batson); *see also* 6R:27765-68 (memorandum from Chandler to Dilg outlining Rhythms); 6R:27715-18; 6R:27719-32; 6R:27746-50 (V&E invoices for time on Rhythms – V&E billed a total of 450 hours on Rhythms/Martin); 6R:25559 (Dilg Deposition); 6R:25270-71 (Astin Deposition); 6R:28606-07 (memo on Project Martin outlining the process of the transaction); 6R:29063-66 (same); 6R:28573-79; 6R:28580-86 (outlines steps to accomplish Martin); 6R:29067 (email from Chandler distributing her drafts of the Security Agreement and the Master Stock Purchase Agreement).

manipulative transaction. In addition to its extensive transactional work on Rhythms, V&E provided advice on the disclosure of this transaction in the related-party transaction footnote of Enron's second quarter 1999 10-Q.[158] The harm to investors was significant: Enron's booked paper gain of $250 million from the Rhythms transaction accounted for one-third of Enron's 1999 earnings, but when the value of Enron stock plummeted there was nothing left to support the hedge and the booked paper gain was, just as was so much of Enron's apparent value, illusory.[159]

4. Raptors

V&E structured the four Raptor vehicles so that LJM2 could provide ostensible "outside funding," but with assurances of getting all of its money back, plus a huge return (return of and on investment), before any "hedges" were transacted. In other words, V&E structured the deal so that it would appear to be financially backed by a third party.[160] In truth, Enron was hedging with itself. The Raptors were extremely

---

158 4R:18259-66 (MSJ Opp); 6R:26782-83; 6R:28682-83.

159 4R:18259-66 (MSJ Opp); 4R:19414-83 (Enron's 1999 Annual Report: Enron's net income for 1999 was $893 million).

160 4R:18266-72 (MSJ Opp); 6R:27157 (8/13/01 memo from Chandler to V&E Partnership Admission Committee: "This transaction was viewed as a banner transaction for Enron because it allowed Enron to achieve important accounting benefits. . . . involved ***creating a new structure*** and drafting many of the documents entirely from scratch.").

complex, serving to shield the scheme from transparency, but V&E lawyers understood them better than anyone. In fact, Enron's in-house counsel invited V&E partners Astin and Spradling to conduct an in-house seminar to educate Enron employees about the Raptor deals.[161] V&E knew that their objective was to "smooth" Enron's quarter-to-quarter earnings, based on mark-to-market accounting, and to achieve accounting rather than real economic benefits.[162] V&E also knew that Enron ***guaranteed*** LJM a payment of $41 million on the Raptors for an investment of only $30 million after only approximately six months. The $41 million was a guaranteed return ***of*** and ***on*** capital, but V&E claimed in depositions to knowing only that the $41 million represented a return to LJM ***on*** capital.[163] Knowing the transactions were a sham, V&E provided advice on structuring the deals, and then documented all of the

---

[161] 4R:18266-72 (MSJ Opp); 6R:27692 (10/25/00 email from Enron's Mintz to Astin and Spradling: "if you can make a Raptor Presentation that appeals to both lawyers and Support it would go a long way in educating a group of people who are being asked to play a role in supporting Raptor, but do not have a full appreciation of 'how it works'").

[162] 4R:18266-72 (MSJ Opp); 6R:27600-10 (Hendrick's notes from interviews with Astin on 8/23/01 and 9/13/01, during the Watkins investigation).

[163] 4R:18266-72 (MSJ Opp); 6R:28031-32; 6R:25308 (Astin Deposition).

Raptors, including the cross-collateralization at year-end 2000 and the re-structuring in first quarter 2001, and provided training on the structures to Enron employees.[164]

5. Watkins Investigation

In August 2001, Enron gave its "go-to" law firm, V&E, a whistleblower letter from Enron executive Sherron Watkins warning that Enron ("a 'crooked company'") risked imploding in a "'wave of accounting scandals.'"[165] Watkins alleged that the structured-finance transactions, in which V&E had been so heavily involved, were fraudulent. Watkins implored Chairman and CEO Ken Lay to conduct an investigation, warning that V&E was too heavily involved in the transactions to conduct it. Despite Watkins' clear warning about this conflict of interest, V&E undertook the investigation to whitewash the fraud.[166]

---

[164] 4R:18266-72 (MSJ Opp); 6R:25605-06 (McKean Deposition: "Q: Did [V&E] know about these cross-guarantees as well? A: Yes. They worked with us to get them documented."); 6R:27244-49, 29948-69, 29970-84 (Invoices – "Structuring Raptor"); 6R:27157 (Chandler Self-Evaluation Memo: "Project Raptor . . . involved creating a new structure . . . ." And she admits that if the ENE stock price went down that this would affect the creditworthiness of Raptor, which would be a negative fact.); 6R:25457 (Chandler Deposition).

[165] 4R:18466-67 (MSJ Opp); 6R:27504-15.

[166] 4R:18466-68, 18316-28 (MSJ Opp); *See Enron*, 235 F. Supp. 2d at 705.

B. Facts Demonstrating V&E's Liability for Material Misstatements and Omissions Pursuant to Rule 10b-5(b)

V&E's role in creating materially misleading statements (and omissions) is best summarized in testimony of CFO Andrew Fastow, who was involved in developing Enron's SPE Raptor vehicles. When Fastow told V&E partner and footnote author Ron Astin that he could not understand a footnote in Enron's SEC filings describing the Raptor vehicle, Astin "laughed and said, well, it's [my] job to write technically correct but incomprehensible footnotes."[167]

V&E essentially co-authored Enron's false proxy statements, participated in writing numerous false registration statements/offering circulars to sell securities, reviewed and approved false 10-Q and 10-K filings, and authored the false 10b-5 assurance opinions in connection with securities sales to class members in order to raise cash and keep the Ponzi scheme afloat.[168] Documentary evidence shows V&E lawyers adding materially false statements in their own handwriting to drafts of Enron proxy statements, which were carried verbatim into the final proxies. V&E knew that Fastow's LJM partnerships were getting risk-free, guaranteed returns on transactions

---

[167] Docket#5217/5257:COR01764-65 (Fastow Deposition).

[168] 4R:18461, 18465-66, 18473, 18489 (MSJ Opp); 6R:28544-53 (Astin 9/30/00 Partnership Ratio Adjustments memo); 5R:24821-22; 6R:25291 (Astin Deposition). *See also* 4R:18274-316 (MSJ Opp).

with Enron, but nevertheless modified proxy statements to mischaracterize the deals as done at "'arms' length.'"[169] Enron's 2000 proxy concealed Fastow's financial interest in LJM and in earnings on the LJM deals.[170] These V&E lawyers were known around Enron as the Company's 10-Q and proxy "'"gurus."'"[171]

As time went on, Enron told V&E "we need to be 'creative' . . . so as to avoid any type of stark disclosure if at all possible." Enron told V&E of "steps to be taken so as to minimize any related-party and proxy disclosures . . . with respect to transactions executed with [the LJM entities] during 2001" and learned that CFO Fastow "sold" his LJM interests to another former Enron executive, who had just left Enron, to avoid additional LJM disclosures. V&E told Enron it had "no objections" to

---

169 4R:18302-11 (MSJ Opp); 6R:29486-91 (Carano's 9/29/00 notes to file re Cuiaba); 6R:26678 (Carano phone message: "Boyd, I'm copying you back with your message so I can send it on to Ron [Astin]."); 6R:29516-19 (LJM making 14% "risk free" return on deals with Enron); 6R:27607 (Hendricks typed notes of Astin debriefing during Watkins investigation); 6R:29461-65 (Hendricks handwritten notes of Astin debriefing during Watkins investigation).

170 4R:18465-66, 18302-11 (MSJ Opp); 6R:26710-11 (Astin's advice re disclosure of Fastow's LJM compensation, triggering "where practicable" defense).

171 4R:18465 (MSJ Opp); 6R:27516 (Astin is Enron's "'proxy guru'"); 5R:24821-22 (Baird as Enron's "'10Q guru'").

concealing ("'avoid mentioning'") that the "'purchaser of [Fastow's] LJM interests was a former Enron employee.'"[172]

V&E wrote some of the most misleading language in Enron SEC filings regarding Enron's related-party transactions. V&E knew Fastow considered any disclosure of his earnings from his LJM partnerships to be a "BIG issue." V&E understood Fastow "believ[ed] (perhaps rightly so) that Skilling will shut down LJM if he knew how much Andy earned with respect to the Rythms [sic] transaction." V&E knew the transactions between Enron and Fastow's LJM partnerships were wired to provide Enron's "counter-party" with huge, guaranteed, risk-free returns for short-term "investments," all for "accounting" rather than "economic" transactions designed solely to provide window-dressing for Enron's reported financial statements.[173]

---

[172] 4R:18466, 18302-11 (MSJ Opp); 6R:26712 (Mintz reports that Fastow said Skilling would shut down LJM if he knew how much Fastow earned from it); 6R:28801 (Astin edits to Mintz 5/01 memo to Fastow re proxy disclosures); 5R:22031.

[173] 4R:18466, 18302-11 (MSJ Opp); 6R:26710-11 (whether to disclose Fastow's LJM compensation is a "BIG issue"); 6R:26712 (Mintz reports that Fastow said Skilling would shut down LJM if he knew how much Fastow earned from it); 6R:26852 (Astin's edits to proxy statement, related to transactions between Enron and LJM and LJM2, adding "negotiated on an arm's lengths basis"); 6R:29486-91 (Carano's 9/29/00 notes to file re Cuiaba); 6R:26678 (Carano phone message: "Boyd, I'm copying you back with your message so I can send it on to Ron [Astin].");

Nevertheless, V&E wrote in to publicly issued financials that the LJM transactions "occurred in the ordinary course of Enron's business and were negotiated on an arm's length basis with senior officers other than Mr. Fastow," adding to Enron's representation that "[m]anagement believes that the terms of the transactions were reasonable and no less favorable than the terms of similar agreements with unrelated third parties." These representations were fraudulent. No officer "senior" to Fastow had negotiated these deals – his subordinates (whom he controlled and paid) had negotiated the deals. The deals were not at arm's length and their terms were not reasonable or no less favorable than they would have been with unrelated third parties.[174] The statements drafted by V&E and published with Enron's disclosures were materially misleading.

IX. SUMMARY OF ARGUMENT

V&E's appeal is improper under Rule 23(f), which permits review of only class-certification orders. As briefed, V&E's appeal concerns not class certification, but the district court's earlier rulings denying motions to dismiss based upon its

---

6R:29516-19 (LJM making 14% "risk free" return on deals with Enron); 6R:27607 (Hendricks typed notes of Astin debriefing during Watkins investigation); 6R:29461-65 (Hendricks handwritten notes of Astin debriefing during Watkins investigation).

[174] *Id*.

interpretation of a substantive standard of liability under the securities laws. Whether V&E's conduct actually violated §10(b) is, moreover, a mixed question of fact and law, better decided on a full factual record – such as the summary-judgment motion now pending in the district court. This Court should dismiss V&E's appeal.

The district court did not err by holding that those who frame misleading statements, with the intention that they shall be disseminated to the public, cannot avoid liability on the ground that they did not "make" the statements. The SEC's "creator" standard of liability properly implements the full scope of liability under Rule 10b-5(b), is consistent with *Central Bank*, and presents none of the potential dangers that V&E portrays. V&E's alternative bright-line test for liability would allow conniving defrauders to escape liability simply by having others disseminate their statements without attribution, eliminating incentive for securities counsel to create disclosures that are truthful and accurate.

Finally, Lead Plaintiff, having suffered an economic loss because of V&E's manipulative and deceptive conduct, has standing to sue.

X. ARGUMENT

A. This Court Should Dismiss V&E's Appeal

While Rule 23(f) provides that interlocutory appeal is at the "discretion" of the court of appeals, the appeal must be limited to issues bearing directly on class certification. This Court should dismiss V&E's appeal for four important reasons.

First, V&E's appeal relates not to a class certification order and the requirements for class certification, but to earlier rulings on the elements of primary liability under §10(b). In essence, V&E's challenge is to the district court's opinion on a motion to dismiss, holding that those who frame, draft, or create misleading statements – intending for them to be disseminated to and mislead the public – cannot avoid liability on the ground that they did not "make" those statements. *See Enron*, 235 F. Supp. 2d at 581-94, 704-05, 708.

V&E's brief explains that V&E first ***moved to dismiss*** citing *Central Bank*, 511 U.S. 164, and arguing that its conduct amounted to no more than aiding and abetting fraud. "On December 20, 2002, the district court denied V&E's motion," citing a theory of liability endorsed "by the SEC, under which a secondary actor such as a law firm may be primarily liable for statements made by an issuer if the secondary actor 'created' those statements." V&E AOB at 4 (citing *Enron*, 235 F. Supp. 2d at 590-91, 708; 1R:2680-989). "Applying this standard to the allegations against V&E, the district court held that plaintiffs' allegations that V&E had 'drafted and approved'

Enron's statements satisfied its new 'creator' standard and therefore permitted the conclusion that V&E had 'ma[d]e statements to the public." *Id.*[175]

It is, in substance, that December 20, 2002, ruling on certain elements of the claims against them that V&E challenges – by means of a Rule 23(f) appeal from the district court's July 5, 2006, class-certification ruling. V&E concedes that it, and other defendants, previously "sought permission under 28 U.S.C. §1292(b) to take an interlocutory appeal of the district court's ruling denying their motions to dismiss, but [that] the district court refused," noting that interlocutory appeals would "'seriously obstruct'" the proceedings before it. V&E AOB at 6 (quoting 1R:3597 (2ARE:3597)). Several defendants, including V&E and CSFB, then filed mandamus petitions – which this Court denied. V&E AOB at 7; *see In re Vinson & Elkins LLP*, No. 03-20185 (5th Cir. Mar. 11, 2003) (denying mandamus petition); *In re Credit Suisse*, No. 03-20197

---

[175] The same December 20, 2002, order rejected the central arguments advanced by CSFB, Merrill, and V&E in their opening briefs before this Court – that under *Central Bank* they could not be liable for deliberately participating in a scheme to defraud, and that their conduct amounted to no more than aiding and abetting. *See Enron*, 235 F. Supp. 2d at 577-81 (discussing liability for schemes to defraud); *id.* at 581-94 (discussing application of *Central Bank*); *id.* at 644-47 (discussing CSFB's role in the scheme); *id.* at 649-51 (discussing Merrill's role in the scheme); *id.* at 656-69 (discussing V&E's role); *id.* at 686-92 (discussing defendants' common objections that *Central Bank* protects them from liability for deliberately participating in the Enron scheme); *id.* at 698-701 (discussing CSFB's liability in particular); *id.* at 702-03 (same for Merrill); *id.* at 704-05 (same for V&E).

(5th Cir. Mar. 11, 2003) (same); *In re Barclays*, No. 03-20178 (5th Cir. Mar. 11, 2003) (same). These efforts reveal their character as merits challenges, concerning the substantive scope of liability under §10(b) and Rule 10b-5. *See, e.g.*, *In re Vinson & Elkins LLP*, No. 03-20185, Mandamus Petition at 18 (describing district court's adoption of "creator" standard as a "pronouncement[] on the scope of private liability under §10(b)").

V&E's renewed challenge to the district court's ruling, in denying a motion to dismiss on the substantive viability of Lead Plaintiff's cause of action under Rule 10b-5(b), is not cognizable under Rule 23(f). Under Rule 23(f), "'a party may appeal only the issue of class certification; no other issues may be raised.'" *Bell*, 422 F.3d at 314. This inquiry does ***not*** include an analysis of the viability of a cause of action: "'The determination whether there is a proper class does not depend on the existence of a cause of action.'" *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (following *Miller*).

In *In re Delta Air Lines*, 310 F.3d 953, 961 (6th Cir. 2002), the Sixth Circuit refused an appeal under Rule 23(f) because "much of the defendants' argument with respect to the class certification decision arises from their disagreement with the district court's earlier rulings ***on the motions to dismiss***." A defendant's "effort to recast its Rule 12(b)(6) arguments as a challenge to class certification" was flatly

rejected by the Third Circuit in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107 (D.C. Cir. 2002).

If anything, the district court's choice of the "creator" standard is actually a question of law ***common to all class members*** – and thus supports the grant of class certification. This issue V&E can challenge pursuant to an appeal after final judgment, but not under the false guise of being an issue of class certification, which it is not.

Second, while V&E labels the district court's ruling an "expansion" of the fraud-on-the-market presumption, it is nothing of the sort. So far as claims against V&E are concerned, the district court applied the fraud-on-the-market presumption to Enron ***SEC filings***. This is no "expansion" of the fraud-on-the-market presumption, which has been applied to SEC filings for years. "Because most publicly available information is reflected in market price, an investor's reliance on ***any*** public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

For this reason, the authorities V&E has cited to assert that this issue is proper for review are distinguishable. In *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 73 (2d Cir. 2004), the district court had, indeed, expanded the fraud-on-the-market presumption beyond issuer disclosures to analyst statements, which one defendant noted was

occurring "for the first time in the class certification context." The same species of novelty was presented in *West v. Prudential Secs., Inc.*, 282 F.3d 935, 940 (7th Cir. 2002), where the fraud-on-the-market presumption was applied to "non-public statements," not to ***public*** statements such as SEC filings. Thus, these cases provide no support for V&E's position, as they both feature applications of the presumption far outside the norm.

In fact, *Hevesi* actually supports Lead Plaintiff's position. The Second Circuit explained that even a "novel" legal question "will not compel immediate review unless it is of fundamental importance to the development of the law of class actions." 366 F.3d at 77. V&E raised no such issue. The application of the fraud-on-the-market presumption to SEC filings is no longer "'of fundamental importance to the development of the law of class actions,'" *id*., because it has long been settled as permissible. Neither is the district court's adoption of the "creator" test "of fundamental importance to the development of the law of class actions" – that issue concerns only the substantive contours of Rule 10b-5(b); it has no more significance for class actions than any other substantive legal issue.

Third, following the district court's class-certification order, the factual record concerning V&E's role in the Enron fraud has substantially developed. Extensive detailed factual material supporting Lead Plaintiff's claims concerning V&E is

contained in Lead Plaintiff's opposition to V&E's motion for summary judgment and in, for example, the Deposition of Andrew S. Fastow. Courts should decide legal questions not in the abstract, but based on a fully developed factual record, particularly where "the propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000). This Court should dismiss V&E's appeal. *See Spurlin v. Gen. Motors Corp.*, 426 F.2d 294, 294 (5th Cir. 1970) (dismissing interlocutory appeal as improvidently granted).

Fourth, as noted above, V&E faces liability on Lead Plaintiff's claims under Rule 10b-5(a) and (c) – not simply Rule 10b-5(b). *See Enron*, 235 F. Supp. 2d at 704-05. Thus, even if the outcome of this appeal on the "creator" standard were favorable for V&E, the class action would proceed against it under Rule 10b-5(a) and (c).[176]

---

[176] V&E says its liability is founded "solely" on Rule 10b-5(b). *See* V&E AOB at 4 n.7. V&E says "the district court's opinion denying V&E's motion to dismiss made clear that V&E's potential liability rested on its alleged role in connection with Enron's public statements." V&E AOB at 4 n.7. But this is hardly true. *See Enron*, 235 F. Supp. 2d at 704-05. While V&E points to the dismissal of claims against other law firms for transactional work, V&E obtained no similar dismissal for itself. In V&E's motion for summary judgment, V&E devotes substantial argument to liability under Rule 10b-5(a) and (c), *see* 3R:14873 (V&E Motion for Summary Judgment at

V&E's appeal should be dismissed.

B. The District Court Chose a Correct Legal Standard in Adopting the "Creator" Test

Were this Court to consider the merits of V&E's appeal, it should affirm the district court's adoption of the SEC's test for primary liability under §10(b), for it correctly implements the full scope of liability under Rule 10b-5(b), is consistent with *Central Bank*, and presents none of the potential dangers claimed by V&E. V&E's proposed test, on the other hand, would allow those who deliberately defraud to escape liability simply by having others disseminate their statements without attribution, and would eliminate a powerful incentive for securities counsel to create disclosures that are in fact truthful and accurate.

Judge Harmon denied V&E's motion to dismiss, holding that "'when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter.'" *Enron*, 235 F. Supp. 2d at 692. "'Provided that a plaintiff can plead and prove scienter, a person can be a primary violator if he or she writes

---

83), because V&E understands that Lead Plaintiff is proceeding on Rule 10b-5(a) and (c).

misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else.'" *Id*. at 692-93.

V&E's argument that those who ***create*** misleading statements in order for them to be disseminated to the market face no liability provided someone else actually publishes them runs afoul of the Statute's and Rule's text. Rule 10b-5 clearly visits liability on one who "makes" a misstatement. *See* 17 C.F.R. §240.10b-5(b). The plain meaning of "makes" includes "creates."[177] V&E's argument is at odds with plain English.

V&E's argument is even more fundamentally at odds with §10(b)'s text, which makes it illegal to "***directly or indirectly***" engage in manipulative or deceptive conduct, 15 U.S.C. §78j(b), and with Rule 10b-5's provision making it illegal "***directly or indirectly***" to make misleading statements. That fraud was accomplished "indirectly" is no defense. Indeed, Exchange Act §20(b), specifies that under the Exchange Act "[i]t shall be unlawful for any person, directly or indirectly, to do any

---

[177] *See The American Heritage Dictionary of the English Language*, Fourth Edition (defining "make" as including to "bring about; create"); *The New Oxford Dictionary*, Second Edition (defining "make" as including "construct; create"); *Webster's Ninth New Collegiate Dictionary*, (defining "make" as including "create" and "compose, ***write***"); *Webster's Revised Unabridged*, 1913 Edition (defining "make" as including "[t]o cause to exist; to bring into being; to form; to produce; to frame; to fashion; to create"); *Webster's 1828 Dictionary* (defining "make" as including "[t]o create; to cause to exist; to form from nothing).

act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder ***through or by means of any other person***." 15 U.S.C. §78t(b). Thus, if a company passed misinformation to the market through third parties, intentionally using "third parties to disseminate false information to the investing public," it "cannot escape liability simply because it carried out its alleged fraud through the public statements of third parties." *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996).

Judge Harmon noted decisions such as *In re Software Toolworks Sec. Litig.*, 50 F.3d 615, 628 n.3 & 629 (9th Cir. 1995), holding that an underwriter or accountant may be a primary violator of §10(b) when it plays a "significant role in drafting and editing" letters sent by its issuer client to the SEC, if "'members of the drafting group . . . had access to all information that was available and deliberately chose to conceal the truth.'" *See Enron*, 235 F. Supp. 2d at 585. Similarly, *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 970 (C.D. Cal. 1994), held that where an accounting firm was "intricately involved" in the creation of false and misleading documents it may be liable as a primary violator of §10(b) for the "resulting deception." *Cashman v. Coopers & Lybrand*, 877 F. Supp. 425, 432-34 (N.D. Ill. 1995), held that primary liability may be established against accountants "centrally involved" in preparing allegedly false information for prospectuses and promotional material issued to

investors. And *McNamara v. Bre-X Minerals, Ltd.*, 57 F. Supp. 2d 396, 429 (E.D. Tex. 1999), held that "if a defendant played a 'significant role' in preparing a false statement actually uttered by another, primary liability will lie."

Judge Harmon recognized that "without a clearer definition and a narrowing of the kind of conduct and circumstances required to constitute 'substantial participation' or 'intricate involvement,' the substantial participation test may fail to differentiate between primary liability and aiding and abetting, or even unrestricted conspiracy, and that the area of overlap may be significant under such an expansive test." *Enron*, 235 F. Supp. 2d at 585. Judge Harmon found that narrowing test in the SEC's submissions, which explained that

> "'[L]awyers and other secondary actors who significantly participate in the creation of their client's misrepresentations, to such a degree that they may fairly be deemed authors or co-authors of those misrepresentations, should be held accountable as primary violators under section 10(b) and Rule 10b-5 even when the lawyers or other secondary actors are not identified to the investors, assuming the other requirements of primary liability are met.'"

1A ARE:1793 (SEC *Klein* Brief at 7) (quoting *Klein*, ¶90,325, at 90,324).

Again, it is important to keep in mind the conduct at issue here. V&E knew there were side deals to numerous transactions that destroyed the legitimacy of the accounting treatment applied, and it knew and proposed public disclosures concerning these facts that were incomplete and misleading. V&E's own documents will prove

this at trial. For example, as the Cuiaba deal was finalized, a V&E attorney heard Cheryl Lipshutz, an Enron employee who was acting as a "go-between" for Enron and LJM, make a remark that notwithstanding the deal documents' requirement that LJM1 remain at risk for 3% of Empresa Produtora de Energia's ("EPE") total assets, at the end of the day Enron had agreed to make LJM whole.[178] Nonetheless, V&E reviewed Enron's 2000 proxy statement and, despite the concerns raised during the Cuiaba transaction, V&E itself added language to the related-party section stating that the LJM transactions "involved dispositions of interests in the ordinary course of Enron's business and were negotiated on an arm's lengths basis with senior officers [of Enron] other than Mr. Fastow."[179] Further, in January 2001, Enron's Jordan Mintz informed V&E by e-mail that Fastow had told him that he believed "Skilling will shutdown LJM if he knew how much Andy earned with respect to the Rythms [sic] transaction."[180] Mintz added to V&E "We need to be 'creative' on this point within

---

178 6R:29486-91 (Carano's handwritten notes dated 9/29).

179 6R:29901 (Astin's handwritten edits to LJM disclosure in 2000 proxy); 6R:25181-82 (Astin Deposition). In the fall of 2000, V&E received a further indication that the transactions between Enron and the LJM entities were not at arm's length. V&E learned that early settlement of the put in Raptor I had returned to LJM2 its entire investment ($30 million) plus a 30% rate of return ($11 million, for a total of $41 million) within one month. 6R:25678 (Spradling Deposition).

180 6R:26713 (1/16/01 Mintz e-mail to Astin and Rogers).

the contours of Item 404 so as to avoid any type of stark disclosure, if at all possible."[181]

V&E also knew that these structures and transactions were being designed and executed to distort earnings. V&E specifically noted that Enron was using the Raptor vehicles to "smoothe" earnings,[182] and understood the aggressive accounting implicit in the Raptor structure.[183]

V&E says that holding one who creates fraudulent statements for dissemination to the public liable under §10(b) somehow conflicts with *Central Bank*'s holding that merely aiding and abetting – lending assistance to – another's violation is not actionable. *Central Bank*, however, emphasized that the "absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are

---

181 *Id.*

182 6R:27064-65 (4/24/01 Houston BUSI Section Report to Management Committee describing one goal of Project Raptor being to "smoothe" quarter-to-quarter earnings).

183 As V&E partner Ron Astin remarked to colleagues when circulating resolutions for Enron's Board of Directors on Raptor III, "Here are the resolutions regarding the additional Raptor structures I mentioned to Mark and Trina. Pigs get fat." 6R:27184-85 (8/8/00 Astin e-mail to Spradling, Chandler, Curry re: Raptor Board Resolutions). The reference was to the old adage that "pigs get fat, hogs get slaughtered." 6R:25251 (Astin Deposition).

always free from liability under the securities Acts." 511 U.S. at 191. To the contrary:

> 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 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. . . . In any complex securities fraud, moreover, there are likely to be multiple violators . . . .

Id. (Court's emphasis).

From this it is apparent that in complex securities fraud cases, ***anyone,*** "***including a lawyer*** . . . , who employs a manipulative device or makes a material misstatement (or omission)" on which investors rely "may be liable as a primary violator." *Id*. The fact that the lawyer does this within the course of employment by a client, obviously, is no defense – or the Supreme Court's observation that lawyers involved in fraudulent schemes may be liable would amount to nothing. For a lawyer's work, almost by definition, is done for a client.

"Nothing in *Central Bank* indicates that when the Supreme Court used the word 'makes,' it meant that only persons who sign documents or are otherwise identified to investors can be primarily liable," the SEC observed in *Klein*. 1A ARE:1795 (SEC *Klein* Brief at 9). "Indeed, such an interpretation would be inconsistent with the language of Section 10(b), which makes it unlawful 'for any person, directly or indirectly . . . [t]o use or employ . . . any manipulative or deceptive device or

contrivance.'" 1A ARE:1795-96 (SEC *Klein* Brief at 9-10). Any "bright line rule" such as that advanced by V&E surely

> goes beyond any reasonable reading of *Central Bank*. The Supreme Court did not set forth a bright line rule for liability, much less one that turns on whether the identity of a defendant is disclosed.

1A ARE:1797 (SEC *Klein* Brief at 11). *Central Bank* gives no indication that the Supreme Court considers the revelation of a defendant's identity as a prerequisite for liability and, conversely, the absence of such as some free pass to co-author lies to investors. *See* 1A ARE:1799 (SEC *Klein* Brief at 13) ("The reliance a plaintiff in a securities fraud action must plead is reliance on a misrepresentation, not on the fact that a particular person made that misrepresentation.").

The Supreme Court has, moreover, warned ***against*** bright-line rules in securities-fraud cases when the issue is whether a statement was materially misleading.

> A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, or whether a defendant took part in making misleading statements, must necessarily be over- or underinclusive.

Basic, 485 U.S. at 236.

While V&E counts the Second Circuit as adopting a test requiring a defendant always to "itself speak" or to be "the publicly identified author of such a statement" (V&E AOB at 18), a review of Second Circuit precedents shows that this is not so:

> Based on [a] survey of Second Circuit law, it appears that primary liability under Section 10(b) may attach in a discrete set of circumstances in which the defendant was ***not*** identified to the public as the speaker. The [*SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996)] and [*In re Scholastic Corp. Securities Litigation*, 252 F.3d 63 (2d Cir. 2001)] decisions suggest that primary liability can attach to a corporate officer for a company's false statement where it can be shown that the officer was sufficiently responsible for making the false statement. In each case, the Court of Appeals was unconcerned with whether the statements were publicly attributed to the individual officer. The issue was not one of aiding and abetting, but rather whether the individual was sufficiently responsible for the entity's speech such that he could properly be said to have made the false statement.

SEC v. KPMG LLP, 412 F. Supp. 2d 349, 374-75 (S.D.N.Y. 2006).

Thus, *SEC v. Hopper*, No. H-04-1054, 2006 U.S. Dist. LEXIS 17772, at *32-*33 (S.D. Tex. Mar. 24, 2006), takes the *Enron* district court's "creator" test as consistent with the standard prescribed by the Second Circuit caselaw as analyzed by *KPMG*.[184]

---

[184] *Hopper* explained:

> In *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 583 (S.D. Tex. 2002), after a detailed analysis of the primary liability issue, the court ultimately concluded that "when a person, acting alone or with others, creates a misrepresentation . . ., the person can be

Neither did the Sixth Circuit in *Fidel v. Farley*, 392 F.3d 220, 235 (6th Cir 2004), adopt a "bright line" rule limiting primary liability to the identified authors of deceptive statements. The Sixth Circuit noted that certain claims against Ernst & Young were based on unaudited financial statements that the auditors had not even reviewed, and it affirmed their dismissal because

> Ernst & Young ***did not assist in the preparation or presentation of this financial information***, nor did it ever express an opinion about it. It therefore cannot be held liable for making a false statement, because it made no statement with regard to these financial results.

> liable as a primary violator . . . if . . . he acts with the requisite scienter." *Enron*, 235 F. Supp. 2d at 588, 590-91. Under this test, a person who is not publicly associated with a misstatement can nevertheless be held liable as a primary violator if the person was involved in creating the misstatement. *Id.*; *see also SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 2006 WL 176956, at *23 (S.D.N.Y. Jan. 13, 2006) ("It appears that primary liability under Section 10(b) may attach in a discrete set of circumstances in which the defendant was not identified to the public as the speaker. The [relevant Second Circuit] decisions suggest that primary liability can attach to a corporate officer for a company's false statement where it can be shown that the officer was sufficiently responsible for making the false statement.") (citing *First Jersey*, 101 F.3d 1450; *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63 (2d Cir. 2001)).

2006 U.S. Dist. LEXIS 17772, at *32-*33.

Id. Thus, the Sixth Circuit held that Ernst & Young "made no statement" because it "did not assist in the preparation or presentation of this financial information." *Id*. If anything, it appears that the Sixth Circuit was applying the "creator" test.

V&E's argument that the SEC's "creator" test eviscerates §10(b)'s reliance requirement is defeated by the fact that reliance under the securities laws amounts to causation-in-fact, and may be indirect. *See Basic*, 485 U.S. at 241-47. What matters is that investors rely on misinformation transmitted to the market – not that they know who generated it. *See id*.; *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 360 & n.9 (5th Cir. 1987). V&E says *Central Bank* requires direct reliance "***on V&E's conduct***." V&E AOB at 28 (emphasis in original). But the critical question is whether V&E took part in communicating misinformation to the market. Those who purchased Enron securities relied on V&E's conduct to the extent V&E created false or misleading disclosures affecting the valuation of Enron securities. *See Basic*, 485 U.S. at 241-47.

V&E says the SEC's "creator" test drags innocent law firms into expensive litigation, making securities counsel attractive defendants in ***any*** case involving allegedly misleading SEC filings. Nonsense. The fact that counsel must act with fraudulent intent, plus the statutory requirement that complaints "state with particularity facts giving rise to a strong inference that the defendant acted with the

required state of mind" (Exchange Act §21D(b)(2), 15 U.S.C. §78u-4(b)(2)), deters meritless claims against securities counsel. The SEC rejected a very similar claim by the defendant in *Klein*. *See* 1A ARE:1800-01 (SEC *Klein* Brief at 14-15). The SEC promulgated the standard in 1998, and the district court's decision adopting the "creator" test was entered four years ago, producing no wave of frivolous lawsuits against securities counsel.

Requiring express attribution of a false or misleading statement ***to a defendant*** would, the SEC has warned, allow deliberate wrongdoers to escape liability. V&E's rule:

> The ["bright line" rule] . . . would have the unfortunate and unwarranted consequence of providing a safe harbor from liability for everyone except those identified with misrepresentations by name. Creators of misrepresentations could escape liability as long as they concealed their identities. Not only outside lawyers would benefit from such a rule; others who are retained to prepare information for dissemination to investors, including accountants and public relations firms, could immunize themselves by remaining anonymous. Indeed, in-house counsel and other corporate officials and employees could avoid liability for misrepresentations they created, as long as their identities were not made known to the public. In sum, by providing a safe harbor for anonymous creators of misrepresentations, a rule that imposes liability only when a person is identified with a misrepresentation ***would place a premium on concealment and subterfuge rather than on compliance with the federal securities laws***.

1A ARE:1796 (SEC *Klein* Brief at 10).

C. Lead Plaintiff and the Class Have Standing to Pursue Their Claims Against V&E

V&E says Lead Plaintiff lacks standing to sue it for giving a client bad legal advice – as if the claims presented were derivative ones for legal malpractice. They are not. They are claims for fraud, grounded in the fact that V&E knowingly created material misstatements and omissions, and deliberately engaged in deceptive and manipulative acts and contrivances, causing grievous harm to Enron investors. Lead Plaintiff alone lost $140 million.

V&E cites *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002), where standing was absent because the class members had suffered no injury. On learning that a prescription drug had injured ***twelve individuals***, who had not used it as directed, its manufacturer pulled the drug from the market – offering refunds. The class plaintiffs ***conceded*** that they had suffered no physical or emotional injury from the drug, and class members faced no risk of future injury from a drug that they were not using. They sued anyway, seeking to represent people who had "suffered ***no*** physical or emotional injury." *Id*. at 317. "In fact, the class explicitly excludes any patients who have been injured by Duract." *Id*. With no injury alleged, however, standing was starkly absent. *Rivera*, 283 F.3d at 318 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Here, investors suffered catastrophic injury from V&E's deliberately deceptive conduct. For V&E and its co-defendants fashioned material misrepresentations and omissions in order to deceive. When Fastow told V&E partner Ron Astin that he did not understand Astin's description of the Raptor transaction in one of Enron's SEC-filing footnotes, Astin laughed and replied: "It's [my] job to write technically correct but incomprehensible footnotes."[185] Astin was not giving legal advice when he obfuscated reality. He was committing fraud, and deliberately concealing what investors most needed to know.

Section 10(b) proscribes ***any person*** from, directly or ***indirectly***, using or employing a device, scheme or contrivance to defraud. And Rule 10b-5 proscribes ***any person***, directly or ***indirectly***, from employing a device, scheme or artifice to defraud, making a material misstatement or omission, or engaging in an act, practice or course of conduct that would operate as a fraud or deceit on any person. It makes no exception for lawyers: "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 purchaser or seller of securities relies may be liable as a primary violator under 10b-5 . . . ." *Central Bank*, 511 U.S. at 191.

---

[185] Docket #5217/5257:COR01764-65 (Fastow Deposition).

In short, V&E's conduct hurt investors, who therefore have standing to sue.

XI. CONCLUSION

Lead Plaintiff respectfully asks the Court either to dismiss the appeals for lack of jurisdiction, or to affirm the district court's class-certification order.

DATED: January 3, 2007

Respectfully submitted,

LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
G. PAUL HOWES
ERIC ALAN ISAACSON
SPENCER A. BURKHOLZ
JAMES I. JACONETTE
ANNE L. BOX

WILLIAM S. LERACH

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

LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN

PATRICK J. COUGHLIN

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932
Two Houston Center
909 Fannin, Suite 2700
Houston, TX 77010
Telephone: 713/752-0017
713/752-0327 (fax)

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
1000 Louisiana Street, Suite 1302
Houston, TX 77002
Telephone: 713/227-7720
713/227-9404 (fax)

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

Additional Counsel for Appellees and for
Lead Plaintiff the Regents of the
University of California

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

Counsel for Nathaniel Pulsifer

SCOTT + SCOTT LLP
DAVID R. SCOTT
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

Counsel for the Archdiocese of
Milwaukee Supporting Fund, Inc.

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

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

K:\Enron\5th Circuit Appeal 23(f)\COMBINED ML CSFB V-E BRFS.doc

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The foregoing Appellees' Brief Responding to Merrill Lynch, Credit Suisse and Vinson & Elkins Appeals contains 35,579 words (Volume 1 contains 26,173 words and Volume 2 contains 9,406 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as requested in Appellee The Regents of the University of California's Motion for Leave to File an Over-Length Brief in Response to Two Appellants' Briefs.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 software in Times New Roman 14 point font for text and footnotes.

Dated: January 3, 2007

LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN

PATRICK J. COUGHLIN

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932
Two Houston Center
909 Fannin, Suite 2700
Houston, TX 77010
Telephone: 713/752-0017
713/752-0327 (fax)

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
1000 Louisiana Street, Suite 1302
Houston, TX 77002
Telephone: 713/227-7720
713/227-9404 (fax)

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

Additional Counsel for Appellees and for
Lead Plaintiff the Regents of the
University of California

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

Counsel for Nathaniel Pulsifer

SCOTT + SCOTT LLP
DAVID R. SCOTT
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

Counsel for the Archdiocese of Milwaukee Supporting Fund, Inc.

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

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

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2007, the undersigned served two copies of this APPELLEES' BRIEF RESPONDING TO MERRILL LYNCH, CREDIT SUISSE AND VINSON & ELKINS APPEALS in paper form and one copy on an electronic computer readable 3-1/2-inch disk in Portable Document Format by certified mail, return receipt requested, on counsel of record as follows:

Richard W. Clary
CRAVATH, SWAINE &
MOORE, LLP
Worldwide Plaza,
825 Eighth Avenue
New York, NY 10019-7475

Attorneys for CSFB

Herbert S. Washer
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022

Attorneys for Merrill Lynch

Gilbert O. Greenman
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

Attorneys for Vinson & Elkins

I also certify that on January 3, 2007, a copy of the above-referenced document was served electronically on counsel of record for the other appellants who have consented to electronic service, and all other counsel of record for interested parties in the underlying proceeding via the www.ESL3624.com website. This manner of electronic service is pursuant to the United States District Court's Order in *Newby v. Enron corp.*, No. H-01-3624 (S.D. Tex.).

In addition, on January 3, 2007, the undersigned forwarded the foregoing document in paper and electronic form to the Clerk of the Fifth Circuit by Federal Express overnight courier at Charles R. Fulbruge, III, Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130.

Deborah S. Granger

DEBORAH S. GRANGER