No. _____

# In The
# Supreme Court of the United States

SAMUEL GIANCARLO, Individually and on Behalf of All Others Similarly Situated; CARLOS ALSINA, M.D.,

*Petitioners,*

v.

UBS FINANCIAL SERVICES, INCORPORATED; UBS SECURITIES, L.L.C.; UBS AG; UBS O'CONNOR, L.L.C.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented arises from the unique procedural history of this case and the actions of the courts below in disregarding Petitioners' statement of their claims.

Does manifest injustice result from the errors associated with the district court's dismissal of Petitioners' complaint, the errors of the appellate court in affirming the district court's dismissal, and the unique circumstances of this case – which include:

- Thirteen (13) years of litigation;
- Denial of Respondents' initial motion to dismiss;
- Completion of both fact and expert discovery;
- Followed by an involuntary four-and-a-half (4.5) year litigation stay;
- Followed by Petitioners' one and only request for leave to file an amended complaint;
- Followed by the district court's denial of leave to amend based solely on delay in another case;
- Followed by the district court's refusal to issue deadlines and timely rule upon motions;
- Followed five (5) years later by the district court granting a ten-year-old FED. R. CIV. P. 12(b)(6) motion to dismiss, without consideration of the proposed amendment; and

**QUESTION PRESENTED** – Continued

- Followed by the appellate court's affirmation of the dismissal framed in a failure of briefing, but without considering the brief as a whole and its record citations?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Plaintiffs-appellants below and Petitioners herein: Samuel Giancarlo and Carlos Alsina, M.D., individually and on behalf of all others similarly situated.

2. Defendants-appellees below and Respondents herein: UBS Financial Services, Inc., UBS Securities, L.L.C., UBS AG, and UBS O'Connor, L.L.C.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1-23) appears at 2018 WL 1110419. The order of the United States District Court for the Southern District of Texas, Houston Division (App. 28-151) appears at 2016 WL 4095973.

## JURISDICTION

The judgment of the court of appeals was entered on February 26, 2018. A petition for rehearing was denied on March 28, 2018 (App. 157-158). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* ("1934 Act"), including the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 78u-4 *et seq.* ("PSLRA") and 17 C.F.R. § 240.10b-5 ("Rule 10b-5") codified thereunder,

are reproduced in the appendix to the petition (App. 159-191).

## STATEMENT OF THE CASE

### A. Introduction

This case is the last hope for Enron Corp. debt investors to recover losses for one of the most damaging frauds in United States' corporate history.[1] Petitioners appreciate this Court's docket and do not make this petition lightly. Petitioners are compelled, however, to request the Court exercise its supervisory powers to remedy a clear manifest injustice. This injustice became manifest when the district court granted a ten-year-old FED. R. CIV. P. 12(b)(6) motion despite completion of discovery and this case's trial readiness after thirteen years of litigation. The appellate court sanctioned the district court's departure from the ordinary course of judicial proceedings by employing a tortured and outcome-driven analysis and by refusing to consider all of Petitioners' issues on appeal.

The Court should exercise its supervisory power to protect not only Petitioners' substantial rights, but the integrity and public reputation of judicial proceedings in this country. Justice demands that the dismissal of Petitioners' case not be rubber stamped, but that

[1] Petitioners' damages expert identified at least 94 investors damaged by the purchase of Enron debt securities during the stated class period, with a total damage amount in excess of $9.5 million (App. 457).

Petitioners be afforded their fair day in court. What justice requires under the circumstances of this case is to simply grant Petitioners leave to file their now nearly decade-old amended complaint, which both the district and appellate court have expressly ignored.

The heart of the manifestly unjust dismissal of this case is its procedural history. Petitioners have been punished by the courts below for delays imposed upon them by the district court. In short, once the parties were prepared for trial, the district court tabled this case and, thirteen years later, dismissed Petitioners' First Amended Class Action Complaint without affording them leave to amend. The only justification proffered by the district court in denying leave to amend was the delay resulting from the court's own actions. Petitioners' proposed complaint includes significantly more detailed allegations on the very points the district and appellate courts cited as insufficiently pled, and Petitioners demonstrated "good cause" below for leave to amend.

### B. The Relevant Timeline (*see* App. 192-238)

- ***October 10, 2003*** – Petitioner Samuel Giancarlo files his original class action complaint alleging claims under Sections 11 and 12 of the Securities Act of 1933 (later dismissed) and Section 10(b) of the 1934 Act (the "Claim").
- ***November 24, 2003*** – Respondents file their motion to dismiss the original class action complaint.

- ***March 25, 2004*** – This case is consolidated and coordinated with MDL No. 1446, *In re Enron Corp. Securities, Derivative & ERISA Litigation* (the "MDL"), with *Newby, et al. v. Enron Corp., et al.* serving as the lead case.

- ***June 2, 2004*** – Depositions of fact witnesses begin in the MDL and continue for eighteen months.

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- ***February 17, 2005*** – District court denies Respondents' motion to dismiss 1934 Act Claim; grants motion to dismiss 1933 Act Claims; discovery stay lifted for *Giancarlo*.

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- ***July 5, 2006*** – District court grants class certification in *Newby*.

- ***July 11, 2006*** – District court amends MDL scheduling order to require that participants elect, within two weeks of its ruling on the *Newby* class certification motion, either: (i) to proceed under the *Newby* complaint; or (ii) to proceed under their own complaint, seeking leave to amend if desired. Amended complaints or motion for leave to amend, if necessary, are due within 30 days of the election.

- ***July 17, 2006*** – Giancarlo files notice to proceed under his own complaint.

- ***August 15, 2006*** – Petitioners file their First Amended Class Action Complaint ("First Amended Complaint") adding Dr. Carlos Alsina as a named plaintiff and alleging a 1934 Act

Claim against UBS Financial Services, Inc., UBS Securities, L.L.C., and UBS AG.

- ***September 29, 2006*** – Respondents file their FED. R. CIV. P. 12(b)(6) motion to dismiss the First Amended Complaint. Respondents deny for the first time, and contrary to their sworn public filings with the SEC, that they act together as a single, integrated entity. For example, Respondents state: "To the extent plaintiffs' brief instead attempts to rely on an argument that [UBS Securities, L.L.C.] and [UBS Financial Services, Inc.] were 'one commonly controlled business enterprise . . . ' that argument is baseless."

- ***October 5, 2006*** – District court orders the issuance of a *writ ad testificandum* for the deposition of Andrew S. Fastow in the MDL to occur October 16, 2006 through November 7, 2006.

- ***November 17, 2006*** – Discovery period in *Giancarlo* concludes.

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- ***January 2, 2007*** – Petitioners file their motion for class certification.

- ***January 8, 2007*** – Briefing on Respondents' motion to dismiss the First Amended Complaint completed pursuant to the district court's scheduling order.

- ***February 1, 2007*** – The district court establishes the briefing schedule for Petitioners' motion for class certification.

- ***March 19, 2007*** – The United States Court of Appeals for the Fifth Circuit overturns class certification in *Newby*.

- ***March 20, 2007*** – The district court holds a telephonic hearing in the MDL and issues a "stay," pending further appeal in *Newby*, on all cases asserting Section 10(b) claims under the 1934 Act "relating to primary v. aiding and abetting liability of secondary actors."

- ***April 2, 2007*** – Petitioners file a motion for clarification, arguing that the stay order should not apply to *Giancarlo* because this is not an aiding and abetting case.

- ***June 14, 2007*** – The district court enters an order confirming that *Giancarlo* is stayed.

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- ***January 15, 2008*** – This Court decides *Stoneridge Investment Partners, L.L.C. v. Scientific Atlanta, Inc.*, 552 U.S. 148 (2008) and separately denies certiorari in *Newby*.

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- ***March 5, 2009*** – The district court grants the *Newby* defendants' motions for summary judgment filed June 26, 2006.

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- ***January 21, 2010*** – Anticipating action from the district court, Petitioners provide to Respondents a copy of their proposed Second Amended Class Action Complaint.

- ***July 28, 2010*** – Petitioners file a motion to lift the stay and request a scheduling conference. Respondents oppose the motion.
- ***August 6, 2010*** – Motion to lift stay briefing concludes.
- ***November 16, 2010*** – Petitioners file a notice of pending motion and request a ruling to lift the stay.

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- ***August 11, 2011*** – The district court enters an order lifting the stay, denying the scheduling conference, and stating that it will address the pending motion to dismiss "shortly."
- ***August 18, 2011*** – Petitioners file their motion for leave to file their Second Amended Class Action Complaint ("Second Amended Complaint").
- ***September 15, 2011*** – Motion for leave briefing concludes.

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- ***March 9, 2012*** – District court denies Petitioners' motion for leave to amend "in light of the long history of deadlines and extensions in the *Newby* action."
- ***July 3, 2012*** – District court declines to set new deadlines until ruling on the motion to dismiss.

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- ***July 19, 2013*** – Petitioners file a motion to perpetuate the testimony of certain expert witnesses.

- ***September 11, 2013*** – A magistrate judge grants Petitioners' motion to perpetuate the experts' testimony.

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- ***June 16, 2014*** – Petitioners file a motion for an amended scheduling order, additional briefing, and a ruling on the pending motion to dismiss. Respondents oppose the motion.

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- ***August 2, 2016*** – District court grants Respondents' FED. R. CIV. P. 12(b)(6) motion to dismiss.
- ***August 30, 2016*** – Petitioners file their motion for reconsideration.
- ***September 29, 2016*** – Petitioners file their notice of appeal to the United States Court of Appeals for the Fifth Circuit.
- ***November 30, 2016*** – District court denies Petitioners' motion for reconsideration.

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- ***February 26, 2018*** – United States Court of Appeals for the Fifth Circuit affirms the denial of leave to amend and dismissal of Petitioners' First Amended Complaint.

### C. Summary of Petitioners' 1934 Act Claim (*see* App. 250-460)

Petitioners' 1934 Act Claim concerns their purchase of Enron publicly traded debt securities in a UBS Financial Services, Inc. brokerage account. The heart of this Claim involves three relationships. The first is the relationship between Respondents.

Petitioners alleged that Respondents are members of an "integrated" business venture known as "UBS." This "integrated bank" combined the individual businesses of its member companies to offer traditional commercial loans, investment banking services, and retail brokerage services. These separate legal entities intentionally integrated their operations under the single "UBS" brand/name. The complaint mirrors UBS's own media admissions that Respondents came together to "combine" and "unite" into "a preeminent global investment services firm." Upon their including UBS Financial Services, Inc. (formerly PaineWebber, Inc.) in their venture, UBS Securities, L.L.C. and UBS AG described their "UBS" venture as creating "the world's largest private bank."

Petitioners' Claim (and Respondents' notice of it) is further supported by UBS AG's own public SEC filings at the time. UBS AG said the purpose of its single group structure was to "optimize shareholder value – making the whole worth more than the sum of the parts." Consistent therewith, UBS AG reported its "Group" financial results as "a single economic entity."

Through these filings, Respondents admit to managing "UBS" as a venture structured around three Business Groups and a Corporate Center. The UBS venture functioned "above" the UBS legal entities, which were maintained only to comply with the legal and regulatory requirements of the jurisdictions in which UBS operated. UBS's Corporate Center coordinated the activities of the Business Groups to ensure they functioned as a coherent whole and in alignment with UBS's overall goals. In 2001, over 120 registered legal entities comprised UBS, sharing together the costs and profits of the venture's business structure. The Corporate Center allocated equity to UBS business units as necessary and centrally retained excess equity. UBS employee depositions established that the legal entities within UBS were irrelevant to their responsibilities, with many employees having little or no understanding of the specific legal entity for which they or others worked.

The Group Executive Board ("GEB") strategically managed the UBS venture overall. The GEB included each Business Group's Chief Executive Officer. The GEB was "responsible for the implementation and results of those strategies, for the alignment of the Business Groups to the UBS Group's integrated model and for the exploitation of synergies across the Group." The GEB President was responsible for the Group's business and financial planning, financial reporting, and the definition and supervision of risk control. In 2001, GEB members included:

- Peter A. Wuffli – President
- John P. Costas – CEO, UBS Warburg
- Georges Gagnebin – CEO, UBS Private Banking
- Joseph J. Grano, Jr. – Chairman and CEO, UBS PaineWebber
- Markus Granzoil – Chairman, UBS Warburg
- Stephan Haeringer – CEO UBS Switzerland

Additionally, UBS utilized a larger Group Management Board ("GMB") to manage its joint venture. The GMB consisted of the most senior non-GEB managers from the Business Groups and Corporate Center. In 2001, the GMB included the following members:

- Colin Buchan – Senior Advisor, UBS Warburg
- Crispian Collins – Vice Chairman, UBS Asset Management
- Arthur Decurtins – Head of Asia, UBS Private Banking
- Jeffrey J. Diermeier – Chief Investment Officer, UBS Asset Management
- Regina A. Dolan – Chief Administrative Officer, UBS PaineWebber
- Thomas K. Escher – Head of IT, UBS Switzerland
- John A. Fraser – CEO, UBS Asset Management
- Robert Gillespie – Joint Global Head of Corporate Finance, UBS Warburg

- Jürg Haller – Head of Risk Transformation and Capital Management, UBS Switzerland
- Eugen Haltiner – Head of Corporate Clients, UBS Switzerland
- Gabriel Herrera – Head of Europe, Middle East and Africa/Investment Funds, UBS Asset Management
- Alan C. Hodson – Head of Equities, UBS Warburg
- Peter Kurer – Group General Counsel
- Benjamin F. Lenhardt, Jr. – Deputy Head of Business Management/Head of Americas, UBS Asset Management
- Donald B. Marron – Chairman UBS Americas (ex officio GMB member)
- Urs B. Rinderknecht – Group Mandates
- Alain Robert – Head of Individual Clients, UBS Switzerland
- Marcel Rohner – Chief Operating Officer, Deputy CEO, UBS Private Banking
- Gian Pietro Rossetti – Head of Swiss Clients, UBS Private Banking
- Hugo Schaub – Group Controller
- Jean Francis Sierro – Head of Resources, UBS Switzerland
- Robert H. Silver – Head of Operations, Technology, and Corporate Employee Financial Services, UBS PaineWebber

- J. Richard Sipes – Joint Head of Europe, UBS Private Banking
- Clive Standish – CEO Asia Pacific, UBS Warburg
- Walter Stürzinger – Group Chief Risk Officer
- Marco Suter – Group Chief Credit Officer
- Mark B. Sutton – Head of US Private Clients, UBS PaineWebber
- Rory Tapner – Joint Global Head of Corporate Finance, UBS Warburg
- Raoul Weil – Joint Head of Europe, UBS Private Banking
- Stephan Zimmermann – Head of Operations, UBS Switzerland

Regarding the relationship between Respondents, Petitioners allege that: (1) all of Respondents' activities were undertaken as part of "UBS"; (2) "UBS" is itself a distinct legal entity under the law – a joint venture of various UBS legal entities including UBS Financial Services, Inc., UBS Securities, L.L.C., and UBS AG; and thus (3) each member is legally responsible for the acts and omissions of the others.

The second relationship at the heart of Petitioners' Claim is the relationship between this UBS joint venture and Enron. Enron's final collapse in December 2001 was unequalled. Government hearings, legal proceedings, witness testimony, interviews, documentary films, and countless books have revealed a matter of

public fact: Enron's investment banks, including UBS, knew the truth about Enron's manipulation of its public financial appearance. Through its deepening relationship with Enron, UBS learned long before the general public about Enron's manipulations.

The First Amended Complaint identifies a number of particular transactions through which specific UBS officers gained knowledge that Enron's public appearance was false. It describes in detail how these transactions manipulated and/or misleadingly disclosed Enron's public financial appearance, and identifies some of the UBS officers involved:

- *Equity Forward Contract Amendments* – UBS/Enron transactions kept debt off of Enron's balance sheet while "funding entities" to prevent losses on Enron's balance sheet.
- *Issuance of notes by Osprey* – UBS co-managed transaction generated "income" for Enron's balance sheet by "selling" Enron's "distressed" assets.
- *Yosemite transactions* – UBS sought to structure/lead a Yosemite transaction; UBS co-led the Yosemite IV transaction providing Enron with undisclosed, disguised loans.
- *E-Next Loan Facility* – UBS lent funds to an Enron off-balance sheet entity with an oral assurance from Enron that the transaction structure would not be completed, but existed only to achieve Enron's required accounting result.

- *Project Wiamea/Kahuna* – UBS gained knowledge of Enron's accounting practices to "sell" assets to special purpose entities and to disguise debt disclosures.

- *Project Summer/Enigma* – UBS gained knowledge of Enron's misleading asset valuations and treatment of debt relating to international assets.

The First Amended Complaint demonstrates that UBS possessed material, nonpublic information revealing Enron's financial manipulations and that its true financial position was materially different from its reported financial appearance. With this knowledge, UBS changed its primary objective from generating investment banking fees from Enron to unloading UBS's own Enron exposure onto the markets before Enron imploded:

- By 2001, UBS knew Enron's "creative financing" was a problem that could cause Enron to "blow up." UBS began to unload its Enron exposure before investors began to "run for the door."

- In June/July of 2001, UBS sold to a foreign investor approximately $163 million in UBS notes specifically linked to Enron. In the event Enron filed for bankruptcy or defaulted on an obligation to UBS, UBS would not have to repay the $163 million it received from the sale of these notes.

- In July/August of 2001, UBS began selling nearly $262 million of Enron notes owned by UBS.
- In October of 2001, at the cost of terminating its investment banking relationship with Enron, UBS refused to extend one equity-based contract with Enron and early-terminated another, forcing Enron to pay UBS approximately $176 million in cash.
- In October of 2001, UBS sold into the market the 2.2 million shares of Enron stock it held as a hedge position to those two equity-based contracts.

The Complaint sufficiently detailed the above transactions to provide UBS with detailed notice of Petitioners' claims that: (1) UBS possessed knowledge concerning Enron's manipulation of its public financial appearance; (2) who at UBS possessed this knowledge; and (3) when it was learned.

The final relationship at the heart of the Petitioners' Claim is between Petitioners and the UBS joint venture. During the relevant time period, Petitioners were all retail brokerage clients of UBS. This relationship created a particular obligation for UBS to disclose the material information it knew concerning Enron. The UBS/Petitioner relationship was governed at the time by the rules and regulations of the securities industry's unique self-regulatory structure established by the 1934 Act, including the rules imposed by the SEC, NASD and NYSE. The relationship is further governed by federal statutes and common law.

The self-regulatory structure, federal statutes and common law all required UBS to abide by these rules and regulations. UBS does not dispute this obligation. Specifically, whenever these retail clients were communicating orders to purchase Enron securities, UBS had the affirmative duty to disclose its knowledge concerning Enron's financial manipulations.[2] UBS's failure to disclose this material information, despite this obligation, is the deceptive conduct giving rise to Petitioners' claim.

Despite its duty to disclose this material information, UBS argues that its "insider" relationship to Enron prohibited disclosure. UBS put itself in the position of competing duties: UBS had the duty to disclose the information to Petitioners and the duty of confidentiality to Enron. Assuming that UBS correctly states its obligation to Enron,[3] Petitioners' First Amended Complaint alleges an industry standard governing UBS when faced with such competing duties. UBS Financial Services former head of investment banking stated this standard: Suspend trading, research coverage, and

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[2] The appellate court noted in its decision, "[Petitioners] repeatedly contend that their claims are not based on any statements, so it is unclear how an NASD rule governing communications supports this theory of liability" (App. 14). The rule applies because Petitioners' orders to purchase Enron securities is a communication governed by these rules and regulations. Petitioners' claim is a nondisclosure case, not a non-communication case.

[3] UBS's own securities analyst expert, Patricia Chadwick, testified that UBS's actual obligation after discovering fraud by a securities issuer is to report the issuer to the SEC. Ms. Chadwick testified subsequent to the filing of the First Amended Complaint.

market making activities of the securities. This suspension would have prevented Petitioners from purchasing Enron securities in their UBS accounts and suffering damages as a result.

UBS failed to comply with this industry standard, and its failure was severely reckless given the obvious nature and likelihood of the damage its inaction presented. UBS's failure to suspend trading in Enron securities is particularly egregious given that UBS eliminated nearly $400 million of its financial exposure to Enron in the months leading up to Enron's bankruptcy. This is likely *why* UBS failed to comply with this industry standard. UBS could not suspend trading in Enron securities and still transfer its $400 million in Enron financial exposure to innocent investors.

### D. The District Court's Basis for Dismissal

The district court adjudicated claims Petitioners never alleged. The district court determined that Respondents' involvement in the Enron transactions discussed in the Complaint constituted aiding and abetting of Enron's fraudulent scheme and did not qualify as primary violations of the 1934 Act (App. 141). The district court also analyzed Petitioners' claim as though they were Enron employees who were damaged by UBS Financial Services' administration of Enron's employee stock option plan (App. 142-143). Petitioners do not sue for aiding and abetting liability, they were not Enron

employees, and their claims concern the purchase of Enron debt securities – not employee stock options.

After framing its decision using this incorrect factual context, the district court first determined that Respondents owed Petitioners no duty of disclosure because Petitioners' brokerage accounts at UBS Financial Services were nondiscretionary accounts. Thus, UBS Financial Services' duty to Petitioners, the district court determined, was simply to execute their purchase or sale orders (App. 143-145).

The district court next held that Petitioners failed to adequately allege scienter because they failed to demonstrate that any specific broker at UBS Financial Services acted with the required state of mind (App. 145).

The district court then addressed what it considered to be Petitioners' "alter ego theory" against Respondents, finding that Petitioners failed to allege facts showing that Respondents "must be treated as a single entity to avoid fraud or miscarriage of justice." Petitioners, however, never alleged an alter ego claim (App. 145-149).

Finally, the district court summarily made two additional findings. First, the court found that Petitioners failed to satisfy the heightened pleading standards of the PSLRA "by specifying exactly what nonpublic, material information [Respondents] knew about Enron, who discovered it, when, how, and under what circumstances and why it was fraudulent." Second, the district court found that Petitioners failed to plead facts

showing UBS Financial Services' "alleged fraudulent brokerage practices caused [Petitioners'] loss" (App. 149).

### E. The Appellate Court's Basis for Affirming

The appellate court affirmed the district court's ruling for three stated reasons. First, the appellate court determined that Petitioners "failed to establish that [Respondents'] knowledge and actions can be aggregated for purposes of assessing liability, which, due to the nature of [Petitioners'] factual allegations and legal arguments, is fatal to their claims" (App. 2-3). Essentially, the appellate court found Petitioners' supporting allegations insufficient to establish their primary allegation that Respondents operate as a *de facto* joint venture. In this context, the appellate court specifically noted that its "analysis [was] limited to the first amended complaint" (App. 11).

The appellate court then found that, having failed to sufficiently allege a joint venture, the Petitioners did not identify a defendant with both: (1) knowledge concerning Enron's manipulation of its public financial appearance; and (2) a duty to disclose (App. 17). Thus, without assessing whether the securities industry's self-regulatory system creates a duty of disclosure for purposes of a Section 10(b) claim, the appellate court simply determined that Petitioners failed to show that any defendant violated any such rule (*Id.*).

Finally, the appellate court affirmed the district court's denial of leave to amend (App. 22-23). Petitioners

filed that motion after the pleading deadline and identified five reasons for "good cause" to receive leave: (1) to incorporate into the complaint the testimony of Andrew Fastow, Enron's former Chief Financial Officer whose deposition was conducted after the deadline; (2) to incorporate numerous "joint venture" allegations from UBS's own public filings, as UBS first denied their integrated venture after the deadline; (3) to incorporate UBS's expert testimony concerning the materiality of certain information, which depositions occurred after the deadline; (4) to eliminate certain claims; and (5) to present the most complete statement of their Claim based on the evidence (App. 242-246). In support of their motion for leave to amend, Petitioners specifically provided the district court charts with the following information indicating both the new allegations of the Second Amended Complaint and the evidentiary source for these allegations:

**Fastow-Related Allegations**

- Enron's overall financial objective: Maximize its stock price, dependent partly upon maintaining its investment grade credit rating. (Fastow Deposition pp. 84, 555-556)
- Enron wanted to be viewed as a growth stock to receive a higher valuation in the equity markets. To be viewed as a growth stock, Enron needed an after-tax earnings-per-share growth rate between 15-20%. (Fastow Deposition pp. 81-82)

- Enron placed high importance on generating earnings in order to meet this target. (Fastow Deposition pp. 81-82)
- Enron adopted as its target the 40 percent debt/capital ratio preferred for companies rated BBB+. (Fastow Deposition pp. 82-83)
- Enron placed high importance on limiting debt reported on its balance sheet to meet this target. (Fastow Deposition pp. 82-83)
- To show its ability to manage debt expense, Enron wanted a "funds flow from operations" to "interest expense" ratio of about four. (Fastow Deposition p. 83)
- Enron's officers believed failure to meet these targets would cause stock price decline. (Fastow Deposition pp. 83-84)
- Enron's fraud began because its financial results from operations were insufficient to meet these targets. Enron's operations funds flow was insufficient to maintain its investment grade rating. (Fastow Deposition pp. 52, 54-55, 74-76, 80, 90-95)
- As the ends of quarters or years approached, Enron's Global Finance Group and its banks structured/executed financial transactions with particular accounting effects to "fill the gaps" created by poor operational performance. Enron wanted to "fill the gap" between its actual results and what Enron wanted the outside world to see. (Fastow Deposition pp. 52-53, 74-76, 80, 92-93)

- Enron's balance sheet frequently reflected excessive debt for an investment grade rating. (Fastow Deposition pp. 54-55, 66, 167)
- In numerous quarters and year-ends, Enron had insufficient regular operations income to meet the investing public's earnings expectations. (Fastow Deposition pp. 54-55)
- Enron's officers and banks, UBS included, manipulated its balance sheet by structuring financial transactions to produce the accounting results Enron desired. (Fastow Deposition pp. 52-53, 75-76, 80, 89-90, 92-93, 129-130)
- The primary purpose of Enron's financial transactions was to change Enron's financial statements to look different to the public than they otherwise would have looked. (Fastow Deposition pp. 52-53, 89-90, 129-130)
- These transactions, intended to make Enron appear more financially healthy than it was, were accounting-driven, substituted form for substance, and were "window dress[ings]." (Fastow Deposition pp. 92-93, 112-13, 129-130)
- Fastow and other employees in the Global Finance Group had an ongoing dialogue with its banks (especially Tier II banks like UBS who sought Tier I status), informing these bankers that it placed importance on meeting its financial targets and it expected them to stand ready to participate in transactions to solve Enron's financial reporting problems. (Fastow Deposition pp. 24-25, 74-76)

- By economic substance and intention, financial prepays were loans that created the false appearance of funds flow from operations. (Fastow Deposition pp. 56-57, 60-61)
- Enron and lending institutions structured prepay vehicles whereby they made the institution's loan look like Enron was receiving the cash from a normal business operation, e.g., an arms-length commodity trade. (Fastow Deposition pp. 56-57, 60-61)
- Had Enron borrowed money through traditional financing, the money would be reported as funds flow from financing on its funds flow statement and as debt on its balance sheet. (Fastow Deposition pp. 61-62)
- In addition to overstating funds flow from operations and understating funds flow from financing, the prepay transactions resulted in Enron underreporting its debt on its balance sheet. (Fastow Deposition pp. 65, 344)
- Share trusts such as Osprey were paper companies set up as Enron's "off balance sheet parking lot" or its "synthetic balance sheet." (Fastow Deposition pp. 57-58)
- Share trusts allowed Enron to borrow money but to keep it off of Enron's balance sheet. (Fastow Deposition pp. 57-58)
- Assets could be temporarily transferred to the share trust until Enron found a willing industry buyer for the asset. (Fastow Deposition pp. 57-58)

- This allowed Enron to generate cash from the transaction but to report the asset's debt as an affiliated company's debt instead of Enron's debt. (Fastow Deposition pp. 57-58)
- Enron reported cash generated by moving balance sheet assets to the "warehouse" share trusts, as funds flow from operations. (Fastow Deposition p. 535)
- Generally, FAS 125/140 asset sales were transactions where Enron sold assets to special purpose entities/related parties for financial reporting purposes. (Fastow Deposition p. 58)
- For these transactions, Enron reported both funds flow from operations and earnings through gains realized in the "sale." (Fastow Deposition pp. 58, 232)
- For accounting purposes, Enron used related parties to execute transactions designed to lock in the value of merchant investments. (Fastow Deposition pp. 199-201)
- These accounting hedges, however, produced no economic benefit for Enron except to obtain a net effect of zero on Enron's balance sheet. (Fastow Deposition pp. 201-204)
- Enron executives "oral[ly] assur[ed]" its banks regarding undocumented aspects of transactions, when such aspects could not be documented for the desired accounting treatment. (Fastow Deposition pp. 135-136)
- Fastow personally had many conversations with senior UBS officers, including Hunt and

Swann, regarding Enron's financial issues and the transactions Enron utilized to eliminate those issues in financial reports. Other Enron officers had similar discussions. (Fastow Deposition pp. 849-852)

**Expert-Related Allegations**

- UBS's expert securities analyst admits "[w]ith the benefit of hindsight, we know that [Enron's] [financial] statements were fraudulent." (Chadwick Deposition, p. 205)
- None of UBS's experts deny that Enron's financial statements during the class periods were misleading. (*See, e.g.*, Kothari Deposition, pp. 213-215; Erb Deposition, pp. 261-264; Ugone Deposition, pp. 102-103; Beach Deposition, pp. 169-170)
- Ms. Chadwick addressed the vital importance of an issuer's financial statements, testifying that if an investment bank becomes aware that an issuer's financial statements are the product of fraud, the investment bank has an *obligation* to report the issuer to the SEC and an *obligation* to prevent the bank's securities analysts from writing reports on the company and its securities. (Chadwick Deposition, pp. 156, 166, 205)

**Joint Venture-Related Allegations**

- The "UBS Group" describes itself as a global investment services firm that combines the resources and expertise from all of its businesses

into a single "integrated group." (UBS AG year end 31 December 2001, Financial Report ("Financial Report"), pp. 3, 83; UBS AG Form F-1 dated December 27, 2000, Prospectus ("Prospectus"), p. 12)

- This single "legal entity group structure of UBS is designed to support the Group's businesses within an efficient legal, tax, regulatory and funding framework." (Financial Report, p. 147)
- The "UBS Group" is operated through three Business Groups and a Corporate Center. (Financial Report, p. 92)
- The Business Groups and Corporate Center are not themselves registered legal entities, but function through the various registered legal entities that combine to make up the Group. (Financial Report at p. 147; Handbook 2001/2002 ("Handbook"), pp. 106, 108)
- In 2001, the Group consisted of 120+ individual registered legal entities designated as "significant subsidiaries." (Financial Report, pp. 147-149)
- The three Business Groups of the single "UBS Group" are UBS Switzerland, UBS Asset Management, and UBS Warburg. (Financial Report, pp. 4, 33, and 92; Prospectus, p. 11)
- The UBS Warburg Business Group, which includes UBS PaineWebber, Inc. and UBS Warburg, LLC, operates as UBS's global securities, investment banking, and wealth management function. (Financial Report, pp. 4, 92)

- UBS's Corporate Center coordinates the activities of the three Business Groups to ensure the Groups function as a coherent whole and in alignment with the UBS Group's overall goals. (Financial Report, pp. 4, 92; Handbook, p. 57)

- The Corporate Center is responsible for such key functions as finance, risk management and control (e.g., accounting, tax, treasury and risk management and control), controlling (financial control and accounting processes), communications and marketing (communication of strategy, values and results to clients, investors and the public, and building the UBS brand worldwide), human resources and legal (managing UBS's legal affairs and coordinating the activities of Business Group legal departments). (Handbook, p. 52)

- The Group Executive Board ("GEB") is the Group's most senior executive body and assumes overall responsibility for the development of UBS's strategies. (Prospectus, p. 15)

- The GEB is "responsible for the implementation and results of those strategies, for the alignment of the Business Groups to the UBS Group's integrated model and for the exploitation of synergies across the Group." (Handbook, p. 88; Prospectus, p. 15)

- The GEB is the body of senior management that managed the day-to-day affairs of the UBS Group. (Glockler Deposition at pp. 151-152)

- The Group Management Board ("GMB") exists to help in the management of the Group venture. (Handbook, p. 89)
- The GMB usually consists of the most senior managers from the Business Groups and Corporate Center who are not members of the GEB. (Handbook, 90; Drew Deposition, pp. 148-149)
- Beyond the GEB and the GMB, the UBS Group management structure also includes the Group Risk Committee ("GRC"). (Drew Deposition, pp. 83-84)
- The GRC is a high-level committee which met monthly to approve policy and new risk frameworks. (Drew Deposition, pp. 83-84, 148)
- The members of the GRC include the CEO of the investment bank, the Group Chief Risk Officer, the Group Chief Financial Officer, the Group Chief Credit Officer, and the President of the GEB. (Drew Deposition, p. 84)
- Other Group management functions include the Loan Portfolio Management group, which monitored the Group's aggregate loan exposure and then managed that risk. (Barnes Deposition, pp. 13-14; Bawden Deposition, p. 93)
- Other Group management functions include the Business Review Group, a group of senior officers from across the UBS Group set up to review unprofitable transaction requests and determine whether to approve the transaction based on existing or potential business with the client from other areas of the Group (e.g.,

UBS enters credit facilities not to make money on the loans, but as an accommodation to the client in hopes of making money on other Group products). (Barnes Deposition, p. 172; Casey Deposition, pp. 108-111; Steele Deposition, pp. 47-48; Field 30(b)(6) Deposition, pp. 186-188; Barnes Deposition at pp. 112-113 regarding the example provided)

- Other Group management functions include the Market Risk Control group, which is responsible for setting Group limits according to various market sensitive measures to protect the Group's profit/loss statement from movements in credit spreads, interest rates, and other market forces. (Glass Deposition, pp. 51-53; Lee Deposition, p. 11)

- UBS reports to the world its "Group" financial results as "a single economic entity," thereby eliminating the effects of intra-group transactions. (Financial Report, p. 83)

- For the purpose of monitoring the Business Groups, however, Group-level reporting systems and policies are used to segment revenues and expenses between the Business Groups. (Financial Report, p. 13)

- The Group employs revenue sharing agreements to allocate external customer revenues to Business Groups. (Financial Report, p. 32)

- If UBS's corporate finance department has a relationship with a client, equity risk management allocates fifty percent (50%) of its revenues from that client to the corporate

finance department. (Lee Deposition, pp. 231-233)

- Business units provide services to other business units without any allocation of expenses between the units. (Hunt Deposition, pp. 326-328)
- The business units share the costs of operating the Corporate Center. (Financial Report, p. 32)
- The Group allocates equity to its business units as is necessary to satisfy any applicable regulatory capital requirements, and any excess Group equity remains in the Corporate Center. (Financial Report, p. 32)
- The Group's bonus pool is determined at the Group level and then divided up between its various business units for allocation to employees. (Kamlani Deposition, pp. 56-58)
- From the employees' point of view, legal entities within UBS are irrelevant with respect to their responsibilities or the function of the Group's business. (Barnes Deposition, pp. 51-53; Bawden Deposition, pp. 21, 62; Field Deposition, pp. 29-30; Freilich Deposition, p. 8; Frieman Deposition, pp. 22-28; Glass Deposition, pp. 11-12; Kelly Deposition, pp. 25-27; Riddell Deposition, p. 8)
- Many UBS employees have little or no understanding of which specific legal entity within the UBS Group they or others work for. (Whitney Deposition, pp. 159-160)

The appellate court affirmed the district court's denial of leave to amend because it determined that Petitioners failed to demonstrate: (1) "that they were diligent, given their unexplained years-long delay," and (2) "that their proposed amendments were important" (App. 3).

## REASONS FOR GRANTING THE PETITION

### THE PETITION SHOULD BE GRANTED FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWERS TO AVOID A MANIFESTLY UNJUST RESULT IN THE COURTS BELOW

This Court may grant certiorari when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.]" SUPREME COURT RULE 10. Both the district court and the appellate court refused to consider the proposed Second Amended Complaint, which includes substantial allegations supporting the very elements of the Claim found to be insufficiently pled in the First Amended Complaint. Both courts refused to consider the proposed amendment because they fault Petitioners for circumstances created by a judicial process over which Petitioners had no control. The result is the dismissal of Petitioners' claims for reasons unrelated to the purpose or policy of relevant pleading standards, and serves to punish Petitioners for pursuing their claims.

## A. The Courts Below Have Committed Plain Errors

### 1. The District Court's Errors

The district court committed two plain errors. First, it erred in refusing Petitioners leave to file their Second Amended Complaint. Second, it erred in determining that a duty to disclose for purposes of a 1934 Act claim arises only in the context of a fiduciary duty.

Petitioners' motion for leave to file their Second Amended Complaint was *their first such request*. In response, the district court expressed a single reason for denial – **"the long history of deadlines and extensions in the *Newby* action"** (App. 27). The district court referenced neither delay in *Giancarlo* nor any fault by Petitioners. The district court made no finding that the amendment would result in any prejudice to Respondents. In fact, the district court made no determination that Petitioners failed to show good cause under FED. R. CIV. P. 16(b)(4). The only basis for the district court's denial of Petitioners' motion for leave to amend was delay in another case over which Petitioners and their counsel had no control.

Regarding the duty to disclose, the district court failed to follow the clear and binding legal precedent that a duty of disclosure, for purposes of a Section 10(b) claim, can arise outside the context of a fiduciary duty. For example, the security industry's self-regulatory rules establish such duties for purposes of a Section 10(b) claim. *See, e.g.*, *Jolley v. Welch*, 904 F.2d 988, 993 (5th Cir. 1990); *GMS Group, L.L.C. v. Benderson*, 326

F.3d 75, 82 (2d Cir. 2003); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 200 (3d Cir. 1990). SEC reporting requirements are another source of a disclosure duty for purpose of a Section 10(b) claim. *See Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100-102 (2d Cir. 2015).

The district court's error concerning the Section 10(b) duty of disclosure is critical because it means that Petitioners' theory of liability is viable. If Petitioners' allegations in their First Amended Complaint were insufficient, those allegations could be made sufficient via an amendment to their complaint. Thus, the district court's unwarranted denial of Petitioners' request for leave to amend, without correction, results in manifest injustice.

### 2. The Appellate Court's Errors

The appellate court also committed several critical errors, all of which resulted from the appellate court inexplicably disregarding the record citations in Petitioners' brief. Here, Petitioners focus only on the appellate court's plain errors concerning their request for leave to amend. In deciding whether good cause exists to grant leave to amend after expiration of a pleading deadline, a court should consider: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 328 (5th Cir. 2016). The appellate court determined the

district court did not abuse its discretion in denying Petitioners leave to amend because Petitioners "failed to demonstrate that they were diligent in pursuing their amendments or that these amendments were important."

Regarding Petitioners' diligence, the appellate court's analysis failed to consider the proper time period. The district court's July 11, 2006 scheduling order's pleading deadline was *August 16, 2006*. Petitioners filed their First Amended Complaint on August 15, 2006. The relevant period of time to consider for the "good cause" analysis under FED. R. CIV. P. 16(b)(4) was the period before the pleading deadline. *See id.* at 328 (consideration #1; why leave not *timely* sought).

The appellate court failed to consider the pleading deadline and instead wrongfully considered a separate question: Could Petitioners have requested leave to amend sooner than they did? The appellate court determined that Petitioners could have requested leave sooner than they did and, as such, the district court did not commit error.

First, this is an incorrect legal analysis. The correct question is: Why did Petitioners not request leave to amend prior to the pleading deadline? Petitioners established that Mr. Fastow and Respondents' experts were deposed after the pleading deadline.[4] Also,

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[4] The appellate court states that "three of the cited depositions were taken months before [Petitioners'] first amended complaint was filed" (App. 21). This is incorrect. All the cited depositions were taken after the pleading deadline.

Respondents did not take a position contrary to their SEC filings until after the pleading deadline. Petitioners clearly explained why they could not seek to amend their petition prior to the pleading deadline: the evidence was not yet available, and it is unreasonable to require Petitioners to anticipate Respondents denying and contradicting sworn statements made in their SEC filings.

The appellate court also faulted Petitioners for not anticipating the district court's 4.5 year stay of this litigation. The appellate court held, "[Petitioners] had at least four months before their action was stayed to request leave to amend" (App. 20). The appellate court faults Petitioners for failing to anticipate a stay imposed by the district court. This is unjust.

Regarding the importance of the amendment, the appellate court found that Petitioners "fail[ed] to explain" how additional allegations would bolster their claims and "otherwise failed to sufficiently brief this issue" (App. 20-21). The appellate court stated that Petitioners' briefing on the import of the amendment consisted of only "a single line" (App. 21). These statements demonstrate a strained compartmentalization of Petitioners' brief. The section immediately preceding that "single line" detailed the allegations in the amendment, why they were not included before the pleading deadline, and why they are important to Petitioners' Claim. The appellate court did not consider Petitioners' brief as a whole.

The appellate court strictly limited its entire analysis to the First Amended Complaint and failed to consider Petitioners' record references to the contents of the amendment. For example, the appellate court criticized Petitioners' brief because it did not "point us to the relevant portions of the relevant [SEC] filings" (App. 11). Petitioners *did* cite to the relevant portions of the record. The appellate court simply chose not to consider those citations because they led the court to information within the Second Amended Complaint.

The appellate court also stated that Petitioners "contend, generally that their additional allegations would 'bolster the joint venture allegation,' but fail to explain how they would do so" (App. 22). Immediately after the phrase quoted from their brief, Petitioners cited to a section of the record containing the Second Amended Complaint. That section of the record contains, *inter alia*, the elements of a joint venture, the allegations demonstrating each of those elements, and citations to SEC filings, deposition testimony and internal UBS documents supporting each allegation made. The record demonstrates the very evidence the appellate court deemed lacking.

This was not an isolated occurrence. The appellate court in the same way stated that Petitioners "argue that allegations based on 'UBS's expert witness testimony [would] support[ ] the[ir] §10(b) claim,' without any explanation as to what the additional testimony consists of, or how it supports their claims" (App. 22). This statement by the appellate court again demonstrates that it simply did not consider Petitioners'

record references. Immediately after the quoted language from their brief, Petitioners cited to their motion for leave to amend in the record containing the following statement: "Experts designated by UBS provided specific testimony that Enron's financial representations were material and that Enron's financial representations during the relevant time period were false and misleading" (App. 245).

### B. Denial of Leave to Amend Defies the Purposes of the Relevant Pleading Standards

Three separate pleading standards apply to Petitioners' Claim, the purposes of which have all been satisfied in this case. First, FED. R. CIV. P. 8 applies to the pleading as a whole. As this Court has stated, the "fair notice" requirements of Rule 8(a) ensures that sufficient allegations are made in order to afford the parties and the court an opportunity to evaluate the plausibility of relief "at a point of minimum expenditure of time and money." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). In conjunction with this, Rule 8(e) requires pleadings be construed "so as to do justice."

Because Petitioners' Claim involves allegations of fraud, FED. R. CIV. P. 9(b) requires Petitioners to state with particularity the circumstances constituting that fraud. This is because fraud claims are understood to present a greater risk of abusive litigation, which the heightened pleading standard of this rule aims to combat.

Finally, being a claim of fraud under the 1934 Act, the PSLRA requires Petitioners to state with particularity facts giving rise to a strong inference that Respondents acted with the required state of mind. 15 U.S.C. § 78u-4(b). This standard was one of the controls installed by Congress to accomplish the "PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

The district court dismissed Petitioners' Claim in response to Respondents' motion under FED. R. CIV. P. 12(b)(6). Application of Rule 12(b)(6) to a claim must take into account the purposes of the foregoing pleading standards to identify speculative claims, protect against abusive litigation, and eliminate frivolous claims prior to the expense of discovery. Achieving justice nevertheless remains the overarching purpose, and a Rule 12(b)(6) determination must ultimately serve this purpose. The district court's Rule 12(b)(6) determination in this case simply does not serve the end of justice.

The circumstances of this case weigh heavily in favor of granting Petitioners leave to amend their complaint. Petitioners' First Amended Complaint, their motion for leave to amend, and their proposed Second Amended Complaint demonstrate that the purposes of the pleading standards have been satisfied. Discovery has already been completed, and it is in part this discovery that Petitioners seek to include in their complaint. Nothing in the record supports any argument

that Petitioners are abusing the courts or the class action process. The pleading standards have served their purpose in this respect. These standards will fail their purpose, however, if they are used to discard Petitioners as inconveniences, and prevent them from offering the best statement of their Claim using evidence proffered to, but ignored by, both lower courts. Justice requires under the circumstances of this case that the district court consider Petitioners' Second Amended Complaint.

### C. Dismissal Under These Circumstances Is a Manifest Injustice

The allegations of Petitioners' proposed Second Amended Complaint state a claim against Respondents for the very kinds of conduct Congress prohibits through Section 10(b) of the 1934 Act. Nevertheless, the courts below have somehow abused the judicial process. Petitioners respectfully submit that this Court must grant their petition and review this case in order to make the important statement that our laws and our courts exist for the cause of justice.

> *Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.*
>
> THE FEDERALIST NO. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961)

The history of this case warrants the attention requested of this Court. The district court stagnated

Petitioners' litigation and then cited delay to effectively dismiss Petitioners' pursuit of justice. Petitioners implore the Court to reflect upon this history:

- Thirteen (13) years of litigation;
- Denial of Respondents' initial motion to dismiss;
- Completion of both fact and expert discovery;
- Followed by an involuntary four-and-a-half (4.5) year litigation stay;
- Followed by Petitioners' one and only request for leave to file an amended complaint;
- Followed by the district court's denial of leave to amend based solely on delay in another case;
- Followed by the district court's refusal to issue deadlines and timely rule upon motions;
- Followed five (5) years later by the district court granting the ten-year-old FED. R. CIV. P. 12(b)(6) motion to dismiss, without consideration of the proposed amendment; and
- Followed by the appellate court's affirmation of the dismissal framed in a failure of briefing, but without considering the brief as a whole and its record citations.

Does the specific history and circumstances of this case not call into question the fairness, integrity, and reputation of the judicial process overseen by this Court? An irony exists in that Enron misstated its public financial appearance by elevating form over

substance. In the same way here, the courts below have elevated form over substance, thereby defeating the very purpose of the process.

It is one thing for the courts below to have reviewed the proposed Second Amended Complaint to find that, despite Petitioners' admittedly best effort, they failed to state a viable 1934 Act Claim. But it is quite another thing for the courts below to have in their possession the one and only proposed amended complaint for which Petitioners sought leave to file, to refuse to consider its contents and substance, and to coldly dismiss Petitioners in their 13th year of pursuing justice as though their claims are speculative, frivolous, and abusive.

Denial of leave to amend, and the resulting dismissal, solely because Petitioners complied with the district court's stay order and because of the district court's subsequent unwillingness to timely rule on motions, is a manifest injustice. Affirming the district court's dismissal, the Fifth Circuit refused to comment on this specific point of appeal. Instead, both controlling law and the credible evidence in the record were disregarded. The district court's Dickensian outcome, then, was affirmed by silence. Justice now demands this Court grant certiorari to enforce and protect the usual course of judicial proceedings. In a just system, claims would not be court-ordered to languish for over a decade, only then to be dismissed with the unfair and unlawful justification that the case has become too old.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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