

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

FILED  
OCT 15 2002  
Michael N. Bilby, Clerk

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In re ENRON CORPORATION :  
SECURITIES LITIGATION :  
: :  
: :  
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This Document Relates To: :  
: :  
MARK NEWBY, et al., Individually and On :  
Behalf of All Others Similarly Situated, :  
: :  
Plaintiffs, :  
: :  
vs. :  
: :  
ENRON CORPORATION, et al., :  
: :  
Defendants. :  
: :  
----- X

Civil Action No. H-01-3624 ✓  
(Consolidated)

PAMELA M. TITTLE, on behalf of herself and :  
a class of persons similarly situated, :  
: :  
Plaintiffs, :  
: :  
vs. :  
: :  
ENRON CORPORATION, et al., :  
: :  
Defendants. :  
: :  
----- X

Civil Action No. H-01-3913  
(Consolidated)

**THE BANKS' JOINDER IN PLAINTIFFS' JOINT MOTION  
TO ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY**

1077

Defendants Bank of America, Barclays PLC, Canadian Imperial Bank of Commerce, Citigroup Inc., Credit Suisse First Boston Corporation, Deutsche Bank AG, J.P. Morgan Chase & Co., Lehman Brothers Holding, Inc., Merrill Lynch & Co., and Salomon Smith Barney Inc. (collectively, the “Banks”) respectfully file this joinder in Plaintiffs’ Joint Motion to Enter Order Establishing Document Depository (“Plaintiffs’ Motion”). For the reasons set forth below, the Banks respectfully urge the Court to enter the Proposed Order Establishing Document Depository (the “Proposed Order”) and to overrule Defendant Ken L. Harrison’s Objections to Plaintiffs’ Joint Motion to Enter Order Establishing Document Depository (the “Objection”).

The Proposed Order represents the product of several months of negotiations by the parties in an effort to reach a consensus on the protocol that should govern document production in these consolidated cases. During these negotiations, the parties attempted to balance numerous competing objectives, including (1) avoiding the imposition of undue cost or burden on either the producing or reviewing parties; (2) making the documents reasonably accessible to all reviewing parties; and (3) ensuring that document production can be conducted in a timely manner in accordance with this Court’s scheduling order. After considerable discussion and compromise, the vast majority of the parties in these consolidated cases believes that the Proposed Order strikes the appropriate balance. Indeed, virtually all constituencies – including the plaintiffs, the law firm defendants, Arthur Andersen, the bank defendants, and most of the individual defendants – support the Proposed Order. The only objection thus far comes from Mr. Harrison. Given that all parties, save one, apparently believe that the Proposed Order should appropriately govern document production in this case, the Banks respectfully urge this Court to enter the Proposed Order.

But even putting aside the fact of this negotiated consensus, Mr. Harrison's Objection still should be rejected for several independent reasons. First, the modification to the Proposed Order that Mr. Harrison proposes is inconsistent with the objective coding regime envisioned by the Proposed Order. Second, Mr. Harrison's proposal would drastically increase the cost, burden and time required to complete the coding process. Third, his proposal would penalize those parties that have proceeded in good faith to begin, over the last several months, to review and code documents in reliance on the objective coding criteria reflected in the draft order.

A very early draft of the depository order circulated by plaintiffs in mid-April 2002, included a requirement that the producing party image, and provide certain objective coding relating to, each document produced. The objective coding required was limited to specific information appearing on the face of the document, including the date of the document, the type of document and the author(s) and recipient(s) of the document.

Objective coding was a contentious issue. Initially, many defendants (particularly those likely to have voluminous productions) vigorously opposed objective coding since it is extremely costly and far exceeds a producing party's obligations under the Federal Rules of Civil Procedure. Not surprisingly, plaintiffs and a number of the individual defendants likely to face minimal production obligations strongly supported objective coding. To bridge their differences, the parties agreed to objective coding subject to certain cost-sharing mechanisms. Throughout the negotiations, however, it was understood that the objective coding required by the Proposed Order would be limited to information appearing on the face of a document. This condition was necessary to permit the parties to outsource the coding function to the document depository administrator (or similar document management firm), thereby facilitating the economical and expeditious coding and production of documents. Indeed, this condition also was crucial to the

negotiated cost-sharing mechanism, since the cost of coding as reflected in the price list of the depository administrator acts as a cap on the costs available for reimbursement.

In his objection, Mr. Harrison proposes to mandate an additional coding field for “Folder” – a field requiring information reflecting “the lowest level of identifiable source of the document.” But this information is simply not apparent on the face of a document, and thus coding for that field could not be outsourced to the depository administrator (or other document management firm). Instead, Mr. Harrison’s proposal, if accepted, would require each party, or its counsel, to provide source information for every piece of paper to be produced. Not only would this requirement impose substantial additional expense, but it would also drastically slow the production process. What is more, Mr. Harrison’s proposal would substantially undermine the carefully calibrated cost-sharing mechanisms negotiated by the parties, which could not accommodate this category of information since the costs of the document depository administrator in coding information visible on the face of a document would bear no relation to – and could not serve as a proxy for – the costs incurred by a party in providing this type of “source” information.

Beyond its burdens and impracticality, Mr. Harrison’s proposal also would work a severe hardship on the several parties that already have begun to review and code documents in reliance on the parties’ negotiations. The proposed objective coding fields in the draft orders that have been circulated among the parties over the past several months have not included any field resembling Mr. Harrison’s “Folder” concept. Many parties, facing document requests from plaintiffs and mindful of the schedule set by this Court and the vast quantity of documents to be reviewed and produced, have begun to code their responsive documents with an eye to the coding fields reflected in the draft orders.

As far as the Banks are aware, the “Folder” concept was not advanced by Mr. Harrison until September 4, 2002, at least four-and-a-half months after plaintiffs first circulated a draft of the Proposed Order. As noted, this new concept was entirely inconsistent with the parties’ prior discussions and would have frustrated the stated goal of permitting the parties to outsource the coding function to a low-cost and efficient vendor. For this reason, Mr. Harrison’s “Folder” concept immediately met with strong opposition from all other parties to the negotiation and, within days, was soundly rejected as a mandatory field. If the balance struck over the past several months by the vast majority of the parties were now disregarded, and Mr. Harrison’s lone dissent accepted, those parties that in good faith relied on the negotiations to begin to review and code documents would be forced, at great expense, to restart their efforts from scratch. We respectfully submit that such an outcome would be both unfair and unwarranted.

Finally, we respectfully note that Mr. Harrison does not cite a single authority – and we are not aware of any – to support his argument that producing parties should be required to provide detailed source information concerning each document produced. Indeed, none of Mr. Harrison’s cases even deals with the concept of objective coding. Instead, Mr. Harrison relies on cases that (a) stand for the unexceptional proposition that a producing party must separate responsive documents from non-responsive documents,<sup>1</sup> or (b) discuss a party’s obligation in

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<sup>1</sup> See *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 609-11 (D. Neb. 2001) (producing party could not simply direct requesting party to unindexed depository for another case, which depository contained many documents not responsive to requesting party’s requests); *Standard Dyeing and Finishing Co. v. Arma Textile Printers Corp.*, No. 85 Civ. 5399 (CSH), 1987 U.S. Dist. LEXIS 868 at \*3-\*4 (S.D.N.Y. Feb. 10, 1987) (producing party must identify and make available responsive documents rather than simply telling requesting party that all of producing party’s documents are kept at a given location); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76-77 (D. Mass. 1976) (producing party could not refuse to identify responsive documents and simply invite requesting party to look at all potentially responsive records).

responding to an interrogatory request,<sup>2</sup> or (c) direct a producing party to indicate which documents are responsive to which request.<sup>3</sup>

Perhaps aware that no authority supports his position, Mr. Harrison attacks the Proposed Order by claiming that documents produced in accordance with its terms “will have been effectively scrambled.” (Objection ¶ 2). But this position is specious. Nothing in the Proposed Order relieves the parties from complying with their obligations under Fed. R. Civ. P. 34 to produce responsive documents either as they are kept in the regular course or organized to respond to the specific categories in the request. The Proposed Order requires the producing parties to go far beyond the requirements of the Federal Rules.<sup>4</sup> Far from diminishing the parties’ discovery obligations, the Proposed Order strengthens them.

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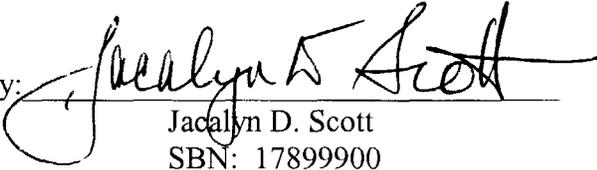
<sup>2</sup> See *White v. United States Catholic Conference*, No. 97-1253 (TAF/JMF), 1998 U.S. Dist. LEXIS 11872, at \*5-\*6 (D.D.C. July 10, 1998) (interrogatory response directing opposing party to all documents previously produced inadequate); *T.N. Taube Corp. v. Marine Midland Mortgage Corp.*, 136 F.R.D. 449, 453-55 (W.D.N.C. 1991) (discussing interrogatory obligations under predecessor to current Rule 33(d)).

<sup>3</sup> See *T.N. Taube*, 136 F.R.D. at 456 (ordering identification of documents responsive to request where it appeared that documents had not been produced as kept in the ordinary course of business); *Board of Educ. v. Admiral Heating & Ventilating, Inc.*, 104 F.R.D. 23, 36 (N.D. Ill. 1984) (requiring identification of documents responsive to one of at least eighteen requests where risk of deliberate concealment of critical documents was acute); *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 457-58 (Tex. App. 1991) (citing *Admiral Heating* as aid in interpreting analogous Texas rule; identification ordered where documents were not produced as kept in the ordinary course of business). Mr. Harrison also cites to *Bonilla v. Trebol Motors Corp.*, No. 92-1795 (JP), 1997 U.S. Dist. LEXIS 4370, at Part 2 \*220, \*222-\*223 (D. P.R. Mar. 27, 1997), *reversed in part, vacated in part*, 150 F.3d 88 (1st Cir. 1998). But the pages to which Mr. Harrison cites do not constitute the opinion of the court. Rather, those pages are part of the submissions of one of the parties; the court appended the submissions of all parties to its decision. *Id.* at Part 1 \*18-\*19 & n.3, Part 1 \*115-\*170, Part 2 \*1-\*245.

<sup>4</sup> Plaintiffs filed a brief in opposition to Mr. Harrison’s objection and in support of the Proposed Order in which they argue that Mr. Harrison’s “Folder” requirement is unnecessary because, plaintiffs claim, parties may obtain the very same information by propounding interrogatories. While the Banks agree that interrogatories may appropriately be used to obtain source information about discrete documents, they do not believe that a party may be required to provide source information for its entire production (or even for large portions

For the reasons set forth herein, the Banks respectfully request that the Court overrule the Objection and enter the Proposed Order.

Respectfully submitted,

By: 

Jacalyn D. Scott  
SBN: 17899900  
3000 One Houston Center  
1221 McKinney  
Houston, Texas 77010  
(713) 651-1221  
(713) 651-0020 (Facsimile)

Attorney-in-Charge for Defendants Citigroup Inc.  
and Salomon Smith Barney Inc.

Of counsel:

Brad S. Karp

Mark F. Pomerantz

Richard A. Rosen

Michael E. Gertzman

Claudia L. Hammerman

Jonathan H. Hurwitz

PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON

1285 Avenue of the Americas

New York, New York 10019-6064

Telephone: (212) 373-3000

Telecopier: (212) 757-3990

ATTORNEYS FOR CITIGROUP, INC.

---

thereof) in response to an interrogatory. Any such interrogatory would be wildly overbroad and overly burdensome, and the Banks reserve the right to object to any such interrogatories.

*Lawrence D. Finder*

Lawrence D. Finder  
Attorney-in-Charge

Texas Bar No. 07007200

S.D. Texas Bar No. 602

HAYNES AND BOONE, LLP

1000 Louisiana Street, Suite 4300

Houston, Texas 77002-5012

Telephone: (713) 547-2000

Telecopier: (713) 547-2600

*signed by  
permission  
by MS*

Of counsel:

Richard W. Clary

Julie A. North

CRAVATH, SWAINE & MOORE

Worldwide Plaza

825 Eighth Avenue

New York, New York 10019-7475

Telephone: (212) 474-1000

Telecopier: (212) 474-3700

ATTORNEYS FOR CREDIT SUISSE FIRST  
BOSTON CORP.

Joel M. Androphy

Joel M. Androphy  
Attorney-in-Charge  
Texas Bar No. 01254700  
B. Elizabeth Klein  
Texas Bar No. 24032515  
Texas Bar No. 00787725  
BERG & ANDROPHY  
3704 Travis  
Houston, Texas 77002  
Telephone: (713) 529-5622  
Telecopier: (713) 529-3785

*signed by permission  
by JMS*

Of counsel:

Lawrence Byrne  
Owen C. Pell  
Lance Croffoot-Suede  
WHITE & CASE, LLP  
1155 Avenue of the Americas  
New York, New York 10036-2787  
Telephone: (212) 819-8200  
Telecopier: (212) 354-8113

ATTORNEYS FOR DEUTSCHE BANK AG

*Taylor M. Hicks*

Taylor M. Hicks  
Attorney-in-Charge  
Texas Bar. No. 09585000  
S.D. Texas Bar No. 3079

*signed by permission  
by JTB*

HICKS THOMAS & LILIENSTERN, LLP  
700 Louisiana, Suite 1700  
Houston, Texas 77002  
Telephone: (713) 547-9100  
Telecopier: (713) 547-9150

Of counsel:

Herbert S. Washer  
James D. Miller  
Ignatius A. Grande  
CLIFFORD CHANCE US LLP  
200 Park Avenue  
New York, New York 10166  
Telephone: (212) 878-8000  
Telecopier: (212) 878-8375

Robert F. Serio  
Mitchell A. Karlan  
Marshall R. King  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, New York 10166  
Telephone: (212) 351-4000  
Telecopier: (212) 351-4035

ATTORNEYS FOR MERRILL LYNCH & CO.,  
INC.

  
Richard Warren Mithoff  
Attorney-in-Charge *signed by permission*  
Texas Bar No. 14228500 *by JLB*  
S.D. Texas. Bar No. 2102  
Janie L. Jordan  
Texas Bar No. 11012700  
S.D. Texas. Bar No. 17407  
MITHOFF & JACKS, L.L.P.  
One Allen Center, Penthouse  
500 Dallas Street, Suite 3450  
Houston, Texas 77002  
Telephone: (713) 654-1122  
Telecopier: (713) 739-8085

Of counsel:

Charles A. Gall  
Texas Bar No. 07281500  
S.D. Texas Bar No. 11017  
Texas Bar. No. 02723305  
S.D. Texas Bar No. 16337  
JENKENS & GILCHRIST, A  
PROFESSIONAL CORPORATION  
1455 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
Telephone: (214) 855-4500  
Telecopier: (214) 855-4300

Bruce D. Angiolillo  
Thomas C. Rice  
David J. Woll  
James W. Bowen  
SIMPSON THACHER & BARTLETT  
425 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 455-2000  
Telecopier: (212) 455-2502

ATTORNEYS FOR J.P. MORGAN CHASE & CO.

*Barry Abrams*

Barry Abrams

Attorney-in-Charge

Texas Bar No. 00822700

S.D. Texas Bar No. 2138

ABRAMS, SCOTT & BICKLEY, LLP

Chase Tower, 600 Travis, Suite 6601

Houston, Texas 77002

Telephone: (713) 228-6601

Telecopier: (713) 228-6605

*Signed by permission  
by JMB*

Of counsel:

David Braff

Anthony M. Candido

Adam R. Brebner

SULLIVAN & CROMWELL

125 Broad Street

New York, New York 10004-2498

Telephone: (212) 558-4000

Telecopier: (212) 558-3588

ATTORNEYS FOR BARCLAYS PLC

*Hugh R. Whiting*

Hugh R. Whiting  
Attorney-in-Charge  
Texas Bar No. 21373500  
S.D. Texas Bar. No. 30188

*signed by permission  
by JDB*

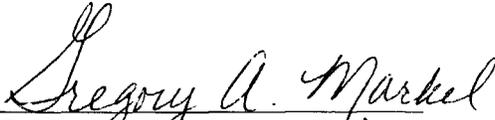
David E. Miller  
Texas Bar No. 14067150  
S.D. Texas Bar No. 27647  
JONES, DAY, REAVIS & POGUE  
600 Travis Street, Suite 6500  
Houston, Texas 77002-3008  
Telephone: (832) 239-3939  
Telecopier: (832) 239-3600

Of counsel:

David L. Carden  
JONES, DAY, REAVIS & POGUE  
221 East 41<sup>st</sup> Street  
New York, New York 10017-6702  
Telephone: (212) 326-3939  
Telecopier: (212) 755-7306

Robert D. Micheletto  
JONES, DAY, REAVIS & POGUE  
77 West Wacker Drive, Suite 3500  
Chicago, Illinois 60601-1692  
Telephone: (312) 269-3939  
Telecopier: (312) 782-8585

ATTORNEYS FOR LEHMAN BROTHERS  
HOLDINGS, INC.

  
Gregory A. Markel  
Attorney-in-Charge  
Ronit Setton  
Nancy I. Ruskin  
CADWALADER WICKERSHAM & TAFT  
100 Maiden Lane  
New York, New York 10038  
Telephone: (212) 504-6112  
Telecopier: (212) 504-6666

*Signed by permission  
by JRS*

Of counsel:

Charles G. King  
Texas Bar. No. 11470000  
S.D. Texas Bar No. 1344  
KING & PENNINGTON LLP  
711 Louisiana Street, Suite 3100  
Houston, Texas 77002  
Telephone: (713) 225-8404  
Telecopier: (713) 224-8488

ATTORNEYS FOR BANK OF AMERICA CORP.

*William H. Knull, III*

William H. Knull, III

Attorney-in-Charge

Texas Bar No. 11636900

S.D. Texas Bar. No. 7701

MAYER, BROWN, ROWE & MAW

700 Louisiana Street, Suite 3600

Houston, Texas 77002-2730

Telephone: (713) 221-1651

Telecopier: (713) 224-6410

*signed by permission  
by J.B.*

Of counsel:

Alan N. Salpeter

Michele Odorizzi

T. Mark McLaughlin

MAYER, BROWN, ROWE & MAW

190 South LaSalle Street

Chicago, Illinois 60603

Telephone: (312) 782-0600

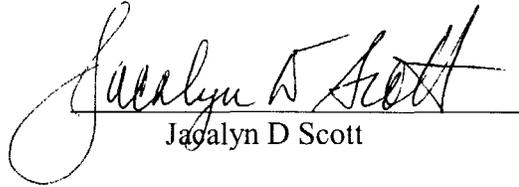
Telecopier: (312) 701-7711

ATTORNEYS FOR CANADIAN IMPERIAL  
BANK OF COMMERCE

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served on October 15, 2002 pursuant to the Court's orders regarding service in this matter.

*Please See Attached Service List*

  
Jagalyn D Scott

# The Service List

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