

ORIGINAL

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

United States Courts
Southern District of Texas
FILED

MAR 04 2003

BC

Michael N. Milby, Clerk

MARK NEWBY, ET AL.,

Plaintiffs,

v.

ENRON CORPORATION, ET AL.,

Defendants.

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**CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES**

**CERTAIN OFFICER DEFENDANTS' MOTION FOR PROTECTION
FROM BANKRUPTCY RULE 2004 SUBPOENAS**

Richard A. Causey, Kenneth Rice, Richard Buy, Mark Frevert, Jeffrey McMahon, Steven Kean and Joseph Sutton ("Officer Defendants") move to quash Bankruptcy Rule 2004 subpoenas issued to them by Enron's Bankruptcy Examiner, Neal Batson (the "Examiner"). The Examiner's subpoenas are *virtually identical* to the Creditors' Committee's subpoenas that this Court already quashed. In addition to disregarding this Court's prior order, the subpoenas violate this Court's stay of discovery and the Private Securities Litigation Reform Act, Title 15 U.S.C. Sec. 78u-4(b)(3)(B) (the "PSLRA").¹ In support of this motion to quash, the Officer Defendants show the following:

INTRODUCTION

The Rule 2004 subpoenas served on the Officer Defendants by the Examiner call for the production of 239 broad categories of documents, including documents containing attorney-client communications. By order entered December 13, 2002, this Court already quashed the Rule 2004 subpoenas served on Enron's outside directors and Kenneth Rice by Enron's Official Committee of Unsecured Creditors (the "Creditors' Committee") (12/13/02 Order, Ex. B). The Court ruled that

¹ The subpoenas served on each of the Officer Defendants are attached as Exhibit "A."

1264

the discovery must be obtained through the Federal Rules of Civil Procedure rather than Bankruptcy Rule 2004 because the Creditors' Committee had filed a civil lawsuit against certain former officers of Enron. The Court further found that even individuals that were not parties to the Creditors' Committee case, but were otherwise parties to *Newby*, were "affected by" the litigation. The Court then reiterated that discovery was currently stayed under the PSLRA.²

The Creditors' Committee is now attempting an end-run around this Court's order by having the Examiner subpoena the same documents. The Creditors' Committee's lawsuit, which is now pending before this Court, was brought under authority granted to the Examiner by the Bankruptcy Court. (08/29/02 Order, Ex. C). The Examiner assigned the authority to bring the lawsuit to the Creditors' Committee (*Id.*), and was then ordered to share the discovery he obtains using Rule 2004 with the Creditors' Committee. (*Id.*; 09/12/02 Order, Ex. D). Because the Creditors' Committee is acting under the Examiner's authority, shares a common interest with the Examiner to act on behalf of the bankruptcy estate and must share discovery materials with the Creditors' Committee to further its lawsuit, this Court's December 13, 2002 order quashing the Creditors' Committee's Rule 2004 subpoenas applies equally to the Examiner's Rule 2004 subpoenas and should be quashed by the Court. To permit this discovery to proceed outside the supervision of this Court is also at odds with the determination by the Judicial Panel on Multidistrict Litigation that this Court – and not the Bankruptcy Court – should supervise and coordinate all discovery in federal actions arising out of Enron's collapse.

² The Officer Defendants adopt and incorporate by reference the Outside Directors' Motion for Protection from Bankruptcy Rule 2004 subpoenas that was filed on October 16, 2002. The arguments made by the Outside Directors apply equally to the Examiner's subpoenas directed to the Officer Defendants.

BACKGROUND FACTS

On April 8, 2002, the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge for the Southern District of New York, entered an order directing the appointment of an examiner for Enron Corporation and certain of its affiliates (collectively, the “Debtors”). The Examiner Order provides, among other things, that the Examiner shall inquire into all transactions involving special purposes entities or vehicles created or structured by the Debtors or at the behest of the Debtors.

On August 29, 2002, the Bankruptcy Court granted the Examiner authority to prosecute any and all claims arising on or before December 2, 2001, against present and former officers and directors of the Debtors. (8/29/02 Order, Ex. C). The Bankruptcy Court further authorized the Examiner to assign such claims. The Examiner did assign the authority to bring such claims to the Creditors’ Committee. (*Id.*, ¶¶ 1-2).

On September 12, 2002, the Bankruptcy Court issued a further order instructing the Examiner to share all Rule 2004 discovery material with the Creditors’ Committee, including documents, deposition transcripts, deposition exhibits, and deposition videotapes. (09/12/02 Order, Ex. D). The Order provides:

All discovery material produced to the Debtors, Committee or the Examiner under Rule 2004 . . . shall be deemed to be produced to all of the Debtors, the Committee and the Examiner and shall be shared, in the form produced or in a manner otherwise agreed by the Debtors, Committee and the Examiner, between the Debtors, the Committee and the Examiner.

(*Id.*, ¶ 11). The Order further provides:

The Committee, Examiner and Debtors shall coordinate, to the fullest extent practicable, the date and timing of the oral examinations authorized herein in order to avoid unnecessary duplication of oral examinations of a Subpoenaed Party. . . . [T]he Committee, Examiner and Debtors all shall be permitted to be present at each oral examination authorized herein and to interrogate each witness. The

Committee, Examiner and Debtors shall confer to attempt to establish as to each oral examination authorized herein a lead interrogator. . . . If the Court decides that the Examiner should take a Rule 2004 oral examination without the Debtors and/or the Committee present, the Examiner will provide a transcript of the Rule 2004 oral examination to either or both unless otherwise ordered by the court.

(*Id.*, ¶¶ 7-9).

On October 1, 2002, the Creditors' Committee filed a lawsuit against Officer Defendants Richard Causey, Richard Buy, and other former officers and employees of Enron styled the *Official Committee of Unsecured Creditors of Enron Corp. v. Andrew S. Fastow, et al.*, Case No. 02-10-06531-CV, in the 9th Judicial District Court of Montgomery County, Texas (the "Creditors' Committee Lawsuit"). A copy of the Lawsuit Petition is attached as Exhibit H. In its Petition, the Creditors' Committee asserts claims against defendants for breaches of their fiduciary duties, aiding and abetting breaches of fiduciary duties, fraud, civil conspiracy, gross negligence, money had and received, accounting, imposition of a constructive trust, and breaches of the duty of care. (Petition, ¶ 2). In particular, the Creditors' Committee alleged that, among other things, Defendants Causey and Buy, (1) abdicated their oversight responsibilities mandated by the Board to ensure the fairness to Enron of self-dealing transactions (Petition, ¶ 6, 36), and (2) misrepresented the nature and effectiveness of controls to ensure the fairness of transactions between Enron and LJM involving a number of SPEs, including, but not limited to, RADR, Chewco, JEDI, Rhythms, Southampton and the Raptors.

On October 16, 2002, the Creditors' Committee Lawsuit was removed to the United States District Court for the Southern District of Texas and subsequently transferred to the docket of this Court.

Prior to filing its lawsuit, the Creditors' Committee served Bankruptcy Rule 2004 subpoenas on current and former Outside Directors of Enron and at least one former officer, Kenneth Rice. The subpoenas issued by the Creditors' Committee are virtually identical to those now issued by the Examiner. The Outside Directors and Kenneth Rice moved to quash the Bankruptcy Rule 2004 subpoenas on October 16, 2002. After an oral hearing, the Court quashed the subpoenas by order dated December 13, 2002.

The Court ruled that the discovery sought must be obtained through the Federal Rules of Civil Procedure rather than Bankruptcy Rule 2004. Bankruptcy Rule 2004 was designed to aid in the discovery of claims and is not an appropriate tool once a lawsuit has been filed. The Court found that the prohibition against Rule 2004 discovery extended beyond those who were named in the Creditors' Committee Lawsuit because individuals that were parties to *Newby*, but not parties to the Creditors' Committee case, were still "affected by" the litigation.

The Examiner and the Creditors' Committee then entered into a stipulation designed to attempt an end-run around this Court's order (the "Discovery Sharing Stipulation").³ This Stipulation provides:

1. This Stipulation shall govern the use of all documents, deposition testimony, and other material which has been produced or provided or will in the future be produced or provided (collectively, the "Materials") to the Examiner by former officers and directors of Enron named as defendants in the [Creditors' Committee] Lawsuit who have been served with a Rule 2004 subpoena

* * * *

³ The Discovery Sharing Stipulation was styled the Stipulation and Consent Order Modifying the October 10, 2002 Order Governing the Production and Use of Confidential Material Among the Examiner and the Official Committee of Unsecured Creditors, the Debtors and Non-Parties. The Discovery Sharing Stipulation is attached as Exhibit E to this motion.

3. The Parties agree that Paragraph 4(g) of the October 10, 2002 Order is amended as follows. The Examiner shall not share any Materials produced or provided to the Examiner by any Defendant Non-Party Producers, pursuant to Bankruptcy Rule 2004, with the Committee or the Debtors unless directed by further order of the Court.

4. This Stipulation may be amended, modified, supplemented or terminated only by the written consent of the Parties hereto or their counsel, or further order of the Court.

(Discovery Sharing Stipulation, Ex. E, pp. 3-5).

The Discovery Sharing Stipulation only applies to defendants in the Creditors' Committee Lawsuit. It does not even attempt to modify the Examiner's Sharing Order obligation to share discovery received from other parties "affected by" the Creditors' Committee Lawsuit, even though the Court had previously quashed subpoenas to such parties. Accordingly, the Discovery Sharing Stipulation offers no protection to Officer Defendants McMahon, Frevert, Kean, Rice and Sutton because they are not parties to the Creditors' Committee Lawsuit. The Discovery Sharing Stipulation purports to cover Officer Defendants Causey and Buy. But it provides them no real protection because, by its own terms, it can be modified or terminated at any time, without notice. The Examiner and the Creditors' Committee could simply decide on their own to amend their stipulation and share the documents.

The Examiner served his Rule 2004 subpoenas on the Officer Defendants on February 14, 2003. The subpoenas request that the Officer Defendants appear and testify at a Rule 2004 examination on March 21, 2003 and produce a wide range of documents – including personal and privileged documents – responsive to 239 requests, by March 12, 2003. The subpoenas are extremely broad and seek documents dating back eight years to January 1, 1995. Although the subpoenas are virtually identical to those already quashed by this Court and they now purport to be

issued by the Examiner, production to the Examiner will be “deemed” production to the Creditors’ Committee and must be shared with the Creditors’ Committee.

The Examiner’s intent to share the 2004 discovery with the Creditors Committee is demonstrated by his most recent motion (Fourth Motion of Neal Batson, The Examiner, Pursuant to Federal Rule of Bankruptcy Procedure 2004 for an Order Directing Production of Documents and Oral Examinations (the “Fourth Rule 2004 Motion”), filed in the New York Bankruptcy Court on February 28, 2002).⁴ In his motion, the Examiner seeks permission to serve the *same subpoenas* against the same Officer Defendants as those at issue here. In that motion, the Examiner asks the Bankruptcy Court to enter an Order that would effectively terminate the Discovery Sharing Stipulation and require that “all discovery material produced by Respondents to the Examiner shall be deemed to be produced to all of the Debtors, the [Creditors’] Committee and the examiner and shall be shared between the Debtors, the Committee and the Examiner, in the form produced . . . ” (the “Proposed Rule 2004 Order”).⁵ This proposed order would eliminate any restriction on the Creditors’ Committee’s ability to obtain through the Examiner the very documents it requested in the subpoenas this Court quashed.

Because the Creditors’ Committee stands in the Examiner’s shoes, because both have the same duty with respect to the bankruptcy estate, because members of the Creditors’ Committee are parties to the *Newby, Tittle* and other Enron related litigation pending before this Court, because the Creditors’ Committee itself has now filed suit and engaged in litigation against certain former

⁴ A copy of the Fourth Rule 2004 Motion is attached as Exhibit F.

⁵ The proposed order, titled Order, Under 11 U.S.C. § 1103(c) and Fed. R. Bankr. P. 2004, Authorizing and Directing Neal Batson, the Examiner, to Issue Subpoenas for Rule 2004 examinations and Production of Documents, is attached as Exhibit G.

officers of Enron, and because the Examiner must share discovered information with the Creditors' Committee, the Examiner must conduct any and all discovery related to those lawsuits in accordance with the Federal Rules of Civil Procedure – and under the supervision of this Court, where the Creditors' Committee's action is now pending.⁶

ARGUMENTS AND AUTHORITIES

A. The Examiner Must Use the Federal Rules of Civil Procedure Rather Than Bankruptcy Rule 2004 to Obtain Discovery From Those Affected By Litigation Brought On Behalf Of Enron's Bankruptcy Estate.

Because the Examiner's discovery benefits and must be shared with the Creditors' Committee, any discovery sought by the Examiner from persons affected by that lawsuit must be obtained in accordance with the Federal Rules of Civil Procedure. The Examiner may not utilize the more expansive Bankruptcy Rule 2004 to circumvent the limitations and protections afforded by the Federal Rules of Civil Procedure and the PSLRA.

1. The Examiner Represents The Same Bankruptcy Estate Interests As The Creditors' Committee With Whom It Must Share Information.

By the use of Rule 2004, the Examiner seeks to discover information that will be shared with and utilized by the Creditors' Committee to prosecute its claims against Causey, Buy and other defendants. The Creditors' Committee, the Examiner and the Debtor share a common duty to act in the interest of and for the benefit of the Enron bankruptcy estate. Initially, the Examiner had the authority by court order to pursue the claims alleged in the Creditors' Committee's Lawsuit. The Bankruptcy Court allowed the Examiner to assign the right to bring the Lawsuit to the Creditors'

⁶ None of the Officer Defendants are parties to the Enron bankruptcy proceeding, and do not have pending proofs of claim on file in the bankruptcy.

Committee, but the Examiner was directed to assist the Creditors' Committee in pursuit of its alleged claims though the sharing of discovery. (09/12/02 Order, Ex. D; 12/11/02 Order, Ex. E).

Even though the Examiner hoped to avoid the PSLRA stay through a modification of the Sharing Order, the Discovery Sharing Stipulation provides no protection to the Officer Defendants. The Sharing Order (which requires documents and information to be shared), not the Discovery Sharing Stipulation (which purports to restrict the sharing of documents and information), applies to Officer Defendants McMahon, Frevert, Kean, Rice and Sutton. And while the stipulation restricting the sharing of discovery does purport to apply to Officer Defendants Causey and Buy, they are not parties to that stipulation and it can be modified or terminated at any time, without notice to or agreement by the Officer Defendants, simply by written agreement between the various bankruptcy estate entities. Indeed, termination is already being sought by the Examiner through the Proposed Rule 2004 Order, and it is likely that the Discovery Sharing Stipulation will be terminated to allow the Creditors' Committee access to Causey's and Buy's production and testimony before the PSLRA stay is lifted.⁷

Even if no formal "sharing" of information occurred, the Creditors' Committee would still have access to the Examiner's reports which will include information discovered from the Officer Defendants. As such, the Discovery Sharing Stipulation does nothing to prevent the sharing of the fruits of Rule 2004 discovery prior to the PSLRA stay being lifted. The only thing that can insure the protection of the PSLRA stay is for this Court to quash the subpoenas, subject to their being

⁷The Examiner, the Creditors' Committee and the Debtors have repeatedly stipulated to their common interest and duty to help each other. See Discovery Sharing Stipulation at page 3: "WHEREAS, the Parties together wish to cooperate with each other to avoid any impediments to the fulfillment of their duties."

reissued after the PSLRA stay is terminated. Otherwise, the Bankruptcy Examiner would be entitled to avoid the statutory PSLRA stay in an effort to assist the adversary proceeding. The Examiner's use of a Rule 2004 examination for this purpose is improper.

2. The Examiner May Not Conduct Rule 2004 Discovery On Issues Related to the Creditors' Committee Lawsuit.

“Once an actual adversary proceeding has been initiated, ‘the discovery devices provided for in Rules 7026-7037 . . . apply and Rule 2004 should not be used.’ *In re Kipp*, 86 B.R. 490, 491 (W.D. Tex. 1988). The “pending litigation” limitation prevents Bankruptcy Rule 2004 subpoenas from being used to avoid the procedural safeguards and limitations on discovery given under the Federal Rules of Civil Procedure. *See In re Symington*, 209 B.R. 678, 683-84 (Bankr. D. Md. 1997) (stating that a Rule 2004 exam is undertaken before the filing of a lawsuit or motion whereas discovery under the Federal Rules of Civil Procedure occurs thereafter); *In re Bennett*, 203 B.R. at 28 (Bank. N.D.N.Y. 1996) (“[O]nce an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the FED. R. BANKR. P. 7026, *et seq.*, rather than by a FED. R. BANKR. P. 2004 examination.”); *Sweetland, III v. Szadkowski (In re Szadowski)*, 198 B.R. 140, 141 (Bankr. D. Md. 1996) (“Once an adversary proceeding has commenced . . . discovery may be had only pursuant to the discovery provisions of the Federal Rules of Civil Procedure.”); *Snyder v. Society Bank*, 181 Br. 40, 41-42 (S.D. Tex. 1994), *aff'd*, 52 F.3d 1067 (5th Cir. 1995) (examiner's proposed use of Bankruptcy Rule 2004 examination to further his state court case constituted an abuse of that rule) *In re French*, 145 B.R. 991, 992 (Bankr. D.S.D. 1992) (“If a contested matter or adversary proceeding is pending, Rule 2004 should not be used, but, rather, the various discovery provisions of the Federal Rules of Civil Procedure should apply.”).

The Federal Rules must be applied (1) if the party from whom discovery is sought is involved in or affected by a pending contested matter or adversary proceeding (*i.e.*, collateral proceeding); or (2) when the discovery sought is on an issue that is the subject of a pending adversary proceeding. *See 2435 Plainfield Ave., Inc. v. Township of Scotch Plains (In re 2435 Plainfield Ave., Inc.)*, 223 B.R. 440, 455 (Bankr. D.N.J. 1998) (observing that “the majority of courts that have addressed this issue have prohibited a Rule 2004 exam of parties involved in or affected by an adversary proceeding while it is pending.”); *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 29 (Bank. N.D.N.Y. 1996) (finding that the “[d]iscovery of evidence related to [a] pending proceeding must be accomplished in accord with [the] more restrictive provisions of [the] Federal Rules of Civil Procedure rather than Bankruptcy Rule 2004.”).

The reason for this rule is because discovery under Rule 2004 is much broader than discovery under the federal rules and deprives litigants of certain rights and protections that are necessary in an adversarial situation. As one court explained:

Bankruptcy Rule 2004 is designed to be a quick “fishing expedition” into general matters and issues regarding the administration of the bankruptcy case and, as such, does not offer the procedural safeguards available under Rule 26 of the Federal Rules of Civil Procedure. For example, a Rule 2004 examination does not afford the witness the right to be represented by counsel at the examination, and the right to object to improper and unfair questions in the course of the examination has usually been denied. Although these two parallel discovery procedures, as with identical twins, seem to resemble each other, they are much different.

French v. Pike, 145 B.R. 991, 992-93 (D.S.D. 1992) (citations and quotations omitted). Those differences are critical here, where Rule 2004 discovery is sought from Officer Defendants who are actively defending themselves and their conduct in numerous consolidated cases pending in this Court.

Causey and Buy are parties to the Creditor's Committee Lawsuit and the other Officer Defendants are certainly "affected by" those proceedings as the Court recognized in its December 13, 2002 Order quashing the Creditors' Committee subpoenas. The "pending litigation" limitation should apply here because the Examiner's subpoenas improperly seek discovery both as to parties involved in or affected by the pending litigation and as to issues addressed in that litigation. The Examiner's subpoenas should be quashed in order to prevent him from using Bankruptcy Rule 2004 to assist the Creditors' Committee in circumventing the safeguards and limitations on discovery afforded to the Officer Defendants under the Federal Rules of Civil Procedure and the PSLRA.⁸

3. The Discovery Sought by the Examiner Is Directly Related to Matters Raised in Pending Litigation.

The discovery that the Examiner has been ordered to share with the Creditors' Committee relates to matters raised in the Creditors' Committee's Lawsuit. Among other things, the subpoenas request the production of documents related to over 130 of Enron's special purpose entities ("SPEs") partnerships or transactions, including Chewco, LJM, RADR, Rhythms, Southampton and the Raptors. The subpoenas further seek documents (1) reflecting the compensation received by the Officer Defendants from Enron; (2) demonstrating the Officer Defendants' financial interests and trading of Enron stock; (3) relating to various individuals, some of whom are defendants in the Creditors' Committee case, and (4) relating to each Officer Defendants' duties at Enron and the performance of those duties. Each of those requests directly relate to allegations raised in the

⁸ As the Court is aware, certain members of the Creditors' Committee, including J.P. Morgan and Silvercreek Management, are individual parties to the Enron-related litigation before this Court.

Creditors' Committee Lawsuit. Finally, the subpoenas seek to compel oral examinations of the Officer Defendants, presumably to testify on the same topics covered by the document requests.

This Court has already determined that the Creditors' Committee's Lawsuit is based largely on the same issues (*i.e.*, the purportedly improper creation of SPEs by former officers and employees of Enron) as *Newby*. The Creditors' Committee alleged the creation by defendants of what is described as an intricate and complex web of SPEs used to hide debt from Enron's balance sheet in order to inflate Enron's earnings and to enrich defendants at the company's expense. The Creditors' Committee further alleged that Causey, Buy and other officers of Enron abdicated their oversight responsibilities to the company by, among other things, (1) structuring and approving transactions between Enron and the SPEs that were unfair to Enron and improperly disclosed; (2) failing to implement a procedure to identify and scrutinize the self-dealing transactions between Enron and the SPEs; (3) failing to conduct a proper investigation into the actions of the other defendants in connection with the SPE transactions; and (4) incorrectly advising Enron's Board of Directors that many of the transactions in question were proper. (Petition, ¶ 83). The information obtained from the Examiner's subpoenas and Bankruptcy Rule 2004 examination of the Officer Defendants is clearly related to the subject matter covered by the Creditors' Committee Lawsuit. In short, the use of a Rule 2004 examination would unavoidably create a back door through which the Creditors' Committee in the guise of the Examiner could circumvent the limitations imposed on discovery by the PSLRA and the Federal Rules of Civil Procedure. Accordingly, the subpoenas should be quashed because the information elicited by the subpoenas relates to issues raised in the Creditors' Committee's Lawsuit.

4. The Examiner's Subpoenas Impermissibly Seek to Obtain Discovery from a Party Involved in and Others Affected by the Pending Litigation.

Rule 2004 examinations of parties *affected* by a lawsuit are not appropriate, even if the person is not a party to the lawsuit. *See In re 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455 (Bankr. D.N.J. 1998) (“The majority of courts that have addressed this issue have prohibited a Rule 2004 exam of parties involved in or *affected by an adversary proceeding* while it is pending.”) (emphasis added); *In re the Bennett Funding Group, Inc.*, 203 B.R. 24, 29 (N.D.N.Y. 1996) (concluding that after an adversary proceeding is commenced, a trustee must look to Bankruptcy Rule 7026, rather than Rule 2004, “for discovery as to both *entities affected by the proceeding* and issues addressed in the proceeding”) (emphasis added).

Causey and Buy are named defendants in the Creditors’ Committee Lawsuit. The other Officer Defendants are parties to *Newby* and *Tittle*, as well as numerous cases transferred to this Court through the MDL process. As this Court recognized when it quashed the Creditors’ Committee’s subpoenas, parties in the litigation before the Court are affected by the Creditors’ Committee Lawsuit. The *Newby* and *Tittle* complaints attempt to piece together securities fraud, ERISA and RICO claims against the Officer Defendants based on the very same transactions and entities that the Creditors’ Committee raises in its complaint. Thus, the same transactions and entities are the subject of both suits, and the Creditors’ Committee’s Lawsuit will have an affect on the Officer Defendants. Any discovery obtained by the Examiner is germane to the Creditors’ Committee’s Lawsuit. Since the Examiner has been ordered by the Bankruptcy Court to coordinate, share, and even allow the Creditors’ Committee to participate in the Examiner’s Bankruptcy Rule 2004 Examination of the Officer Defendants, and because the Examiner’s discovery can or will be

used by the Creditors' Committee in preparation of its pending litigation against the Officer Defendants, the Examiner should be required to give the Officer Defendants the protections afforded by the Federal Rules of Civil Procedure. Accordingly, the subpoenas should be quashed to prevent the Examiner from using the broad powers of Bankruptcy Rule 2004 to impermissibly obtain discovery from the Officer Defendants, who are parties to or affected by pending litigation.

B. The Examiner's Attempted Use of Bankruptcy Rule 2004 Discovery Violates the Discovery Stay Ordered by This Court.

The discovery sought by the Examiner – which will be shared with the Creditors' Committee – will disrupt and interfere with the discovery stay now in place in the consolidated *Newby* litigation. The Examiner (and by extension the Creditors' Committee) is using the subpoenas to pursue documents and other discovery that are foreclosed to members of the Creditors' Committee (such as J.P. Morgan) who are litigants before this Court in the consolidated *Newby* and *Tittle* Litigation.

⁹ To allow the Examiner to succeed would violate the PSLRA stay on all lawsuit discovery in this case pending the Court's resolution of the motions to dismiss. The Court has repeatedly informed litigants to this action – and even the Creditors' Committee itself – that “all discovery is STAYED . . . until the Court has ruled on the pending motions to dismiss.” (08/07/02 Order, Ex. I at 4; 12/13/02 Order, Ex. B at 3-4). Notwithstanding this Court's orders, the Examiner has demanded discovery from the Officer Defendants which, if produced, would inure to the benefit of J.P. Morgan, a member of the Creditors' Committee and a litigant in this case, and to the benefit of the Creditors'

⁹ While hoping to gain the benefit of discovery through the Examiner's Rule 2004 subpoenas, J.P. Morgan fervently asserted the PSLRA stay to prevent its own production until after the stay is lifted. See, J.P. Morgan Chase & Co.'s Objections and Responses to Plaintiffs' First Request for the Production of Documents, General Objection and Response No. 1, p. 2, filed January 21, 2003.

Committee itself, which would use the information to further the prosecution of its claims against the Officer Defendants in the Creditors' Committee's Lawsuit.

Neither the Creditors' Committee nor its members should be permitted, through their relationship with the Examiner, to secure premature discovery and circumvent the discovery protections that this Court plainly envisioned and intended in its orders staying discovery. If the Creditors' Committee or its members (such as J.P. Morgan) are allowed to proceed with discovery while other parties to the *Newby* litigation are ordered to postpone discovery pending the Court's resolution of the motions to dismiss, the Court's efforts to achieve efficiency and economy in coordinating all the consolidated actions and to avoid multiple rounds of discovery will be undermined. Accordingly, the Officer Defendants request that the Court quash the subpoenas to prevent the Examiner (and by extension the Creditors' Committee) from exploiting this opportunity to make an end-run around the discovery stay imposed by this Court under the guise of Bankruptcy Rule 2004.¹⁰

C. The Officer Defendants Also Object to the Subpoenas On Additional Grounds.

Because it is not proper for the Examiner to conduct discovery related to and for the aid of the Creditors' Committee's lawsuit, the Examiner's subpoena should be quashed in its entirety. The Officer Defendants also object to the subpoenas on additional grounds. For example, each Officer Defendant objects to the subpoenas on the grounds that certain documents they seek are protected

¹⁰ Notably, the All Writs Act also authorizes this Court to prohibit the Examiner from pursuing discovery from the Officer Defendants, when necessary in aid of this Court's jurisdiction or to protect its orders and processes. 28 U.S.C. § 1651. This is particularly true where, as here, the Examiner's pursuit of discovery will be shared with the Creditors' Committee and presumably used by it in collateral proceedings which threaten to frustrate this cause and disrupt the orderly progress and resolution of the consolidated *Newby* Litigation.

by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving the arguments presented in this motion, each Officer Defendant provided the Examiner with his written responses and objections to each subpoena pursuant to Federal Rule of Civil Procedure 45. Those response and objections are incorporated herein in their entirety.¹¹ Each Officer Defendant is entitled to a protective order on these grounds as well.

CONCLUSION

For these reasons, the Officer Defendants respectfully request that the Court grant this motion for protective order and quash the subpoenas appended to this motion.

Respectfully submitted,



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¹¹ Copies of each Officer Defendant's Responses and Objections to the Examiner's subpoenas, except for those served by Joseph Sutton, are attached hereto as Exhibit J.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the pleading was served on all counsel of record on the Service List on March 4, 2003 via posting to www.esl3624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website. A true and correct copy of this pleading was also served on the following counsel for the Enron's Bankruptcy Examiner Neal Batson via Federal Express.

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Bradley W. Hoover

The Exhibit(s) May
Be Viewed in the
Office of the Clerk

The Service List

May be Viewed in

the Office of the Clerk