

United States Courts
Southern District of Texas
FILED

MAY 07 2003

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION §
SECURITIES LITIGATION §
_____ §

This Document Relates To: §

MARK NEWBY, et al., §

Plaintiffs, §

vs. §

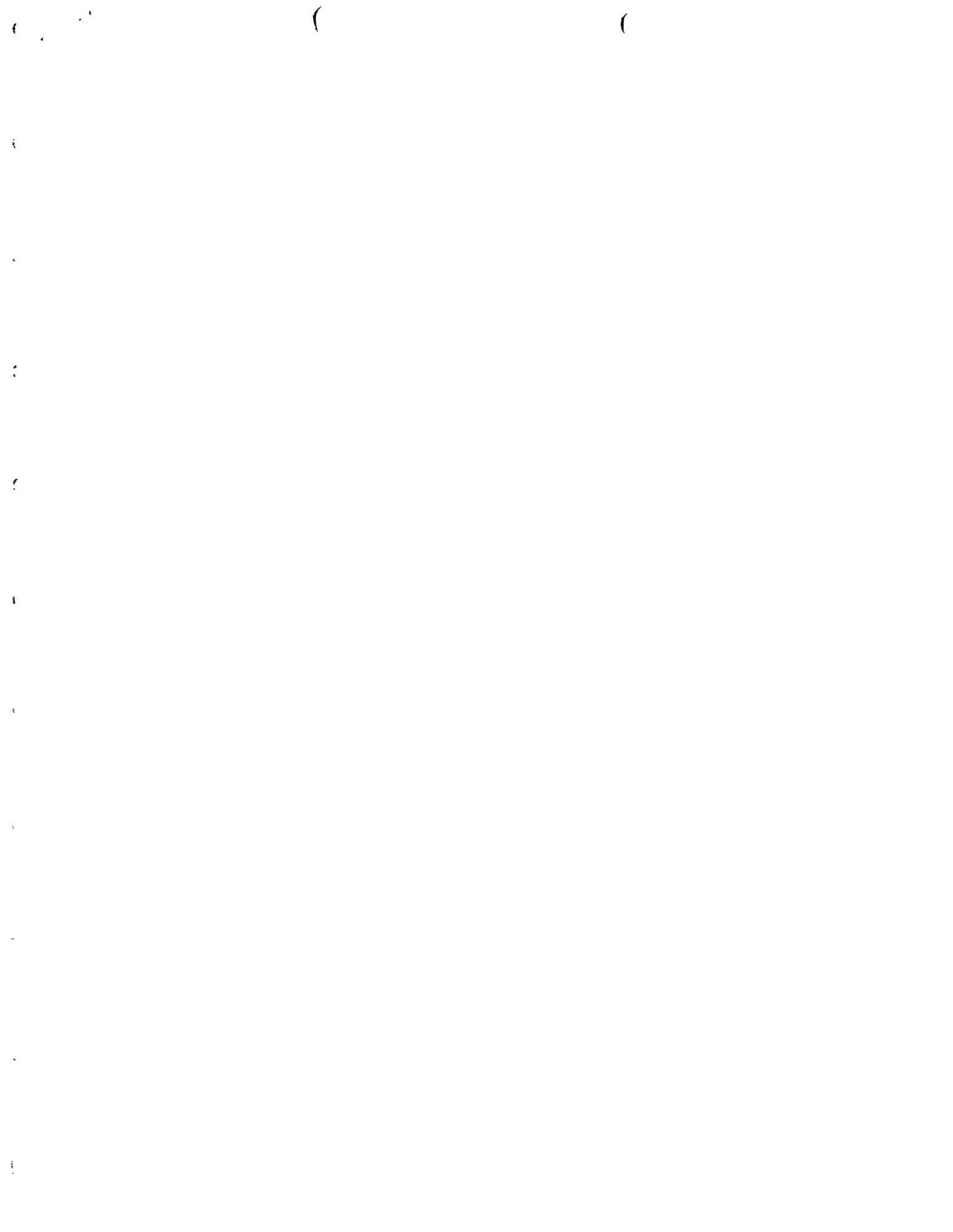
ENRON CORP., et al., §

Defendants. §
_____ §

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

DECLARATIONS AND AFFIDAVIT IN SUPPORT OF BARCLAYS PLC'S
MOTION FOR SUMMARY JUDGMENT

1377



5. Barclays PLC is a holding company, which owns, directly or indirectly, the shares of numerous subsidiary companies. These subsidiaries provide commercial banking, investment banking and asset management services to individual, institutional and governmental clients. Barclays PLC does not itself provide such services.

6. Although the boards of directors of Barclays PLC and Barclays Bank PLC are the same and have common meetings, they separately record and maintain the minutes of their meetings.

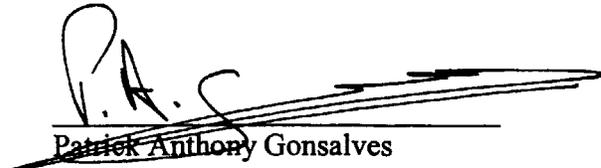
7. Barclays PLC has its own books and records, bank accounts, accounts receivable, lines of credit, and other assets.

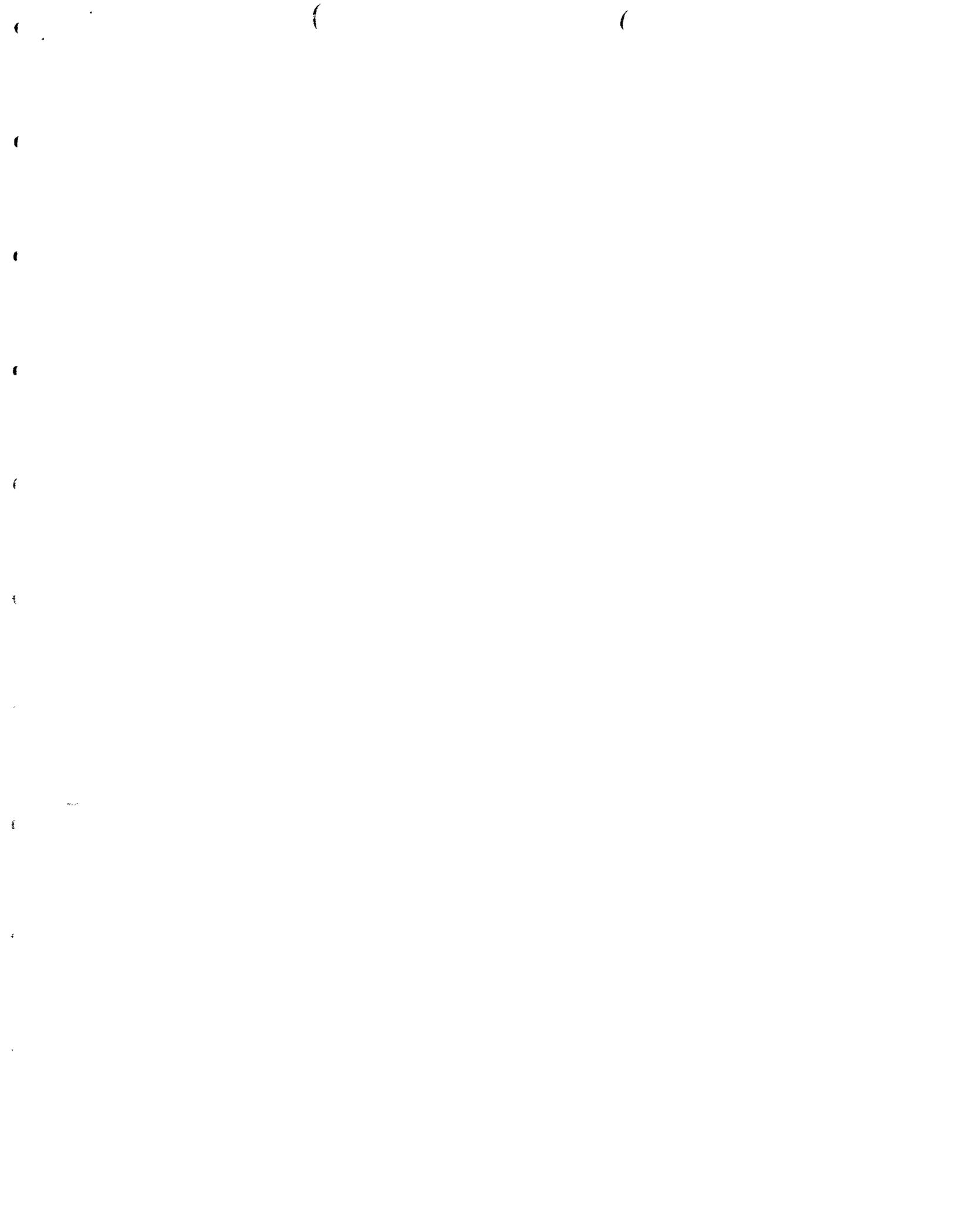
8. Barclays PLC did not engage in any transactions with Enron.

9. Barclays PLC did not engage in any of the activities alleged against it in the Consolidated Complaint (the "Complaint") in the above-captioned action. The allegations in the Complaint that refer to "Barclays PLC" or "Barclays" concern transactions and events in which Barclays PLC was not involved. On information and belief, certain subsidiaries of Barclays PLC (but not Barclays PLC itself) were involved in some of the transactions and events alleged.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in London, England, on 2nd day of May 2003.


Patrick Anthony Gonsalves



6. The board of directors of Barclays Capital Inc. conducts board meetings independent of those of Barclays PLC and all other affiliated entities, separately recording and maintaining the minutes thereof. The directors of Barclays Capital Inc. do not serve on the board of Barclays PLC.
7. Barclays Capital Inc. has its own books and records, bank accounts, accounts receivable, lines of credit, and other assets.
8. Barclays Capital Inc. is independently operated from Barclays PLC, and its day-to-day activities are conducted and managed by employees of Barclays Capital Inc., not employees of Barclays PLC.
9. Barclays Capital Inc. was one of five financial institutions that severally agreed to purchase certain Zero Coupon Convertible Senior Notes from Enron in February 2001 for resale to Qualified Institutional Buyers in a non-public offering. However, I have been advised that neither Barclays Capital Inc. nor any subsidiary or affiliate actually purchased, sold or resold any such notes.

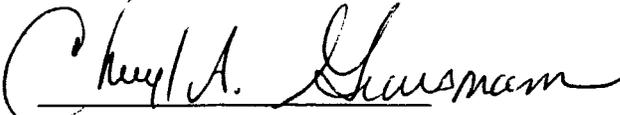
I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 6, 2003



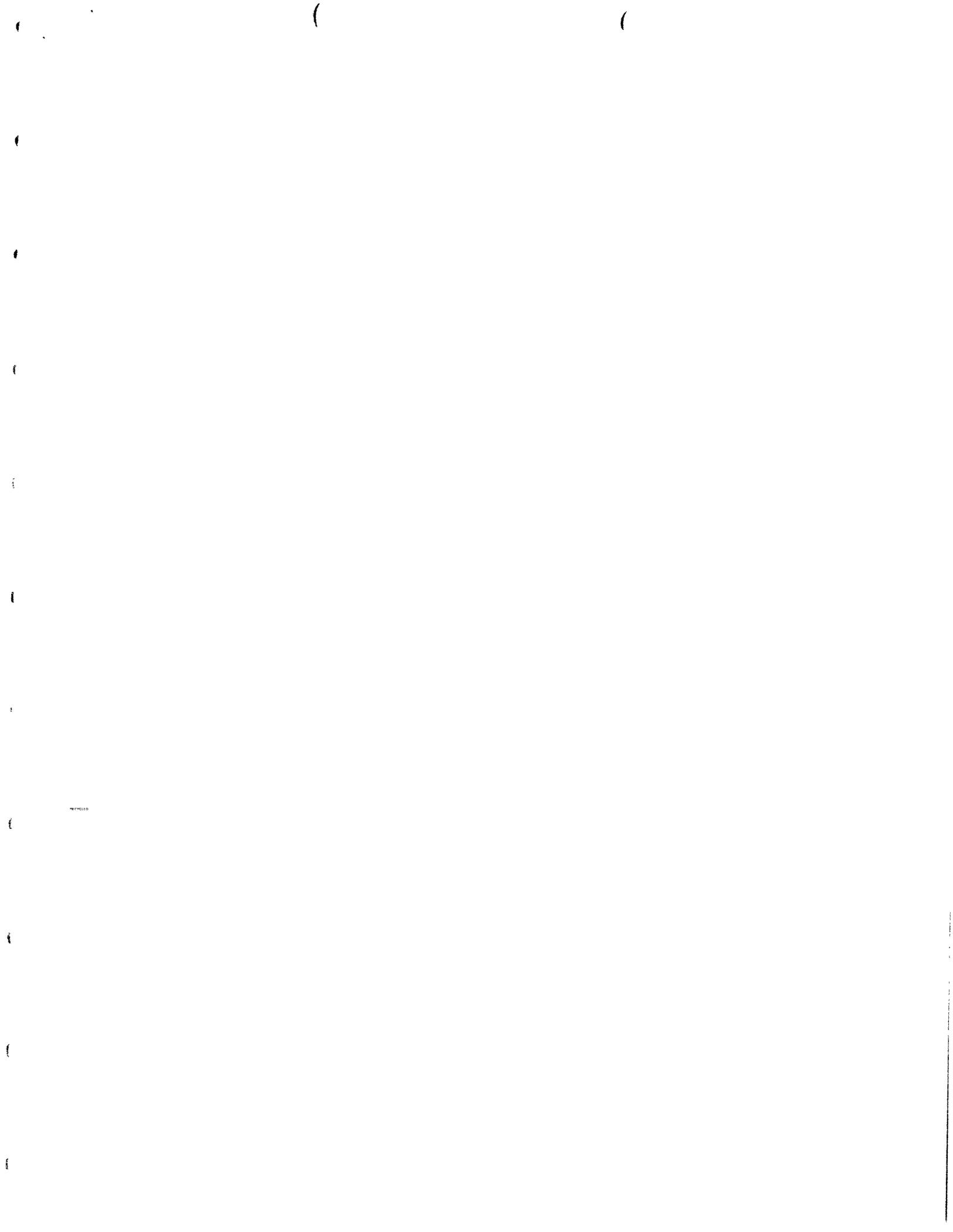
Julie Grossman

Subscribed and sworn to me
this 6th day of May, 2003, to
certify which witness my hand
and official seal.



Notary Public

CHERYL A. GRASSMANN
Notary Public, State of New York
No 01GR5037184
Qualified in New York County
Commission Expires December 19, 2006



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

In re ENRON CORPORATION §
SECURITIES LITIGATION §

This Document Relates To: §

MARK NEWBY, et al., §
Plaintiffs, §

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

vs. §

ENRON CORP., et al., §
Defendants. §

**DECLARATION OF DEIRDRE ANN PARRY IN SUPPORT OF
DEFENDANT BARCLAYS PLC'S MOTION FOR SUMMARY JUDGMENT**

I, Deirdre Ann Parry, being duly sworn, state as follows:

1. I am over twenty-one years of age and am fully competent to make this Declaration. I have personal knowledge of the facts set forth in this Declaration.
2. I am Assistant Secretary of Barclays Bank PLC.
3. Barclays Bank PLC is a public limited liability company incorporated in England and Wales in August 1925. In 1985, the company was re-registered as a public limited company and the name was changed to Barclays Bank PLC. The principal offices of Barclays Bank PLC are located in London.
4. Barclays Bank PLC is a legal entity separate from defendant Barclays PLC (which wholly owns Barclays Bank PLC).
5. All the issued ordinary share capital of Barclays Bank PLC is owned by Barclays PLC.

6. Although the boards of directors of Barclays Bank PLC and Barclays PLC are the same and have common meetings, they separately record and maintain the minutes of their meetings.

7. Barclays Bank PLC has its own books and records, bank accounts, accounts receivable, lines of credit and other assets.

8. Since 1985, Barclays Bank PLC has been the principal operating subsidiary of Barclays PLC, with responsibility for both the United Kingdom and overseas banking operations. Barclays Bank PLC provides commercial banking, investment banking and asset management services to individual, institutional and government clients.

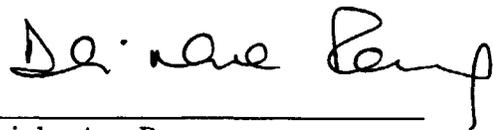
9. Barclays Bank PLC is, and has always been, adequately capitalized in relation to its business activities.

10. Barclays Bank PLC is an independently operated business enterprise, and its day-to-day activities are conducted and managed by employees of Barclays Bank PLC.

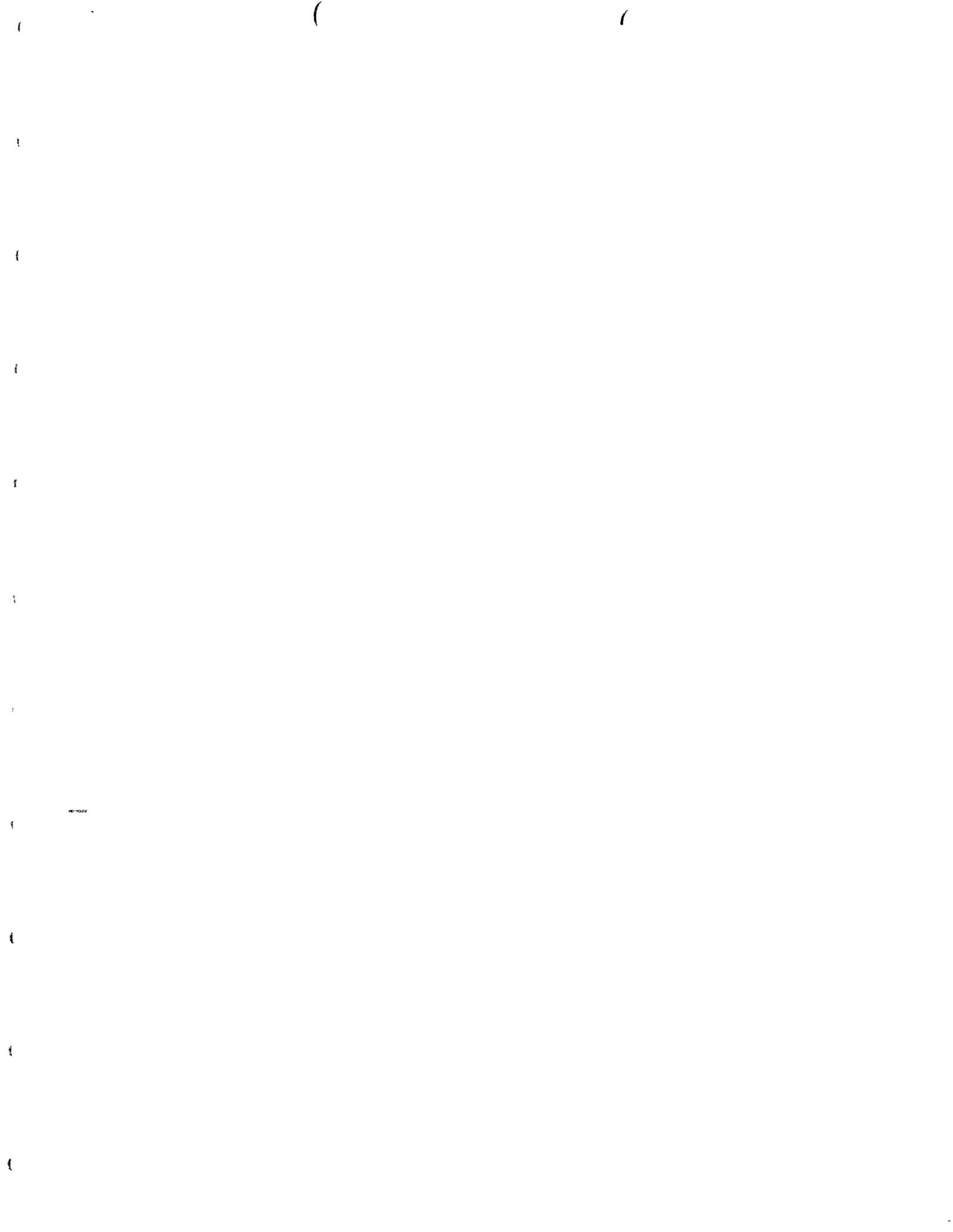
11. Barclays Bank PLC provided, from time to time, banking services to Enron and its affiliates and related entities. For example, in 1997, Barclays Bank PLC loaned approximately \$240 million to Chewco which Enron guaranteed, and Barclays Bank PLC loaned approximately \$11.4 million to entities investing in Chewco. In addition, Barclays Bank PLC participated in the non-public offering of £200,000,000 of 8.75% Enron Linked Obligations issued by Yosemite Securities Company Ltd. in February 2000.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in London, England, on 2nd day of May 2003.



Deirdre Ann Parry



INTRODUCTION

4. I was born on 5 December 1959 in London, England. I was educated at St Paul's School, London and Corpus Christi College in the University of Cambridge. I was called to the Bar of England and Wales by the Honourable Society of Middle Temple in November 1983; and, having completed my training as a pupil barrister, I have been in continuous practice as a barrister since early 1985. I specialise in chancery litigation of a commercial nature, an area of practice which encompasses business disputes raising legal issues relating in particular to companies, insolvency, securities, property, equitable remedies and trusts. In April 2002, I was appointed Queen's Counsel.
5. I am a member of the Honourable Society of Middle Temple, and a member of the Chancery Bar Association and of the Commercial Bar Association.

PURPOSE OF THIS DECLARATION

6. The purpose of this declaration is to give a brief answer to the questions whether, under English law, a holding company may be held answerable for the acts or liabilities of a subsidiary company incorporated under English law, and if so under what circumstances.
7. I understand that, for the purposes of the above-captioned case, those questions may arise in the context of a class action in which Plaintiffs may seek to say that Defendant Barclays PLC should be held answerable for alleged liabilities of Barclays Bank PLC, which is one of its subsidiaries and a

company limited by shares¹. Beyond that, I answer the questions posed in paragraph 6 above without reference to, or knowledge of, the facts of the case.

8. The discussion set out in paragraphs 9 following below:

- (1) concerns companies incorporated under English law with a share capital, and having the liability of their members limited by the memorandum of association to the amount, if any, unpaid on the shares held by the members²; and
- (2) assumes, subject to the discussion at paragraphs 15 following below, that there is no involvement by the holding company in the alleged wrongs by reason of which liability is said to arise³.

ANSWER

9. The general rule under English law is that a holding company is *not* answerable for the acts or liabilities of its subsidiary.
10. The basic principle⁴ is that a company is a separate legal person distinct from its shareholders; and that its shareholders are *not* (beyond the amount which

¹ See paragraph 8(1) of this declaration and footnote 2 below.

² Usually described as “companies limited by shares” (s. 1(2)(a) Companies Act 1985). Limitation of liability by shares is not the only form of limitation; and companies can be formed without any limit on the liability of their members.

³ In circumstances where there is such involvement, one is concerned not so much with making the holding company answerable for the acts or liabilities of its subsidiary as with making the holding company answerable for its own acts.

⁴ Usually regarded as having been established by the well-known case of *Salomon v Salomon & Co.* [1897] AC 22.

they have agreed to pay on their shares) answerable for the acts or liabilities of the company. That principle applies with equal force to subsidiaries of a holding company as it does to a single company whose shareholders are individuals. There is no general principle either:

- (1) that a holding company is vicariously liable for the acts of a subsidiary; or
- (2) that all companies in a group are to be regarded as a single entity or otherwise as one and the same.

On the contrary, the fundamental rule is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities⁵.

11. To that general rule there are qualifications (sometimes described as exceptions). The central ones are:

- (1) Where some statutory, contractual or other provision makes irrelevant, or requires or permits to be ignored, the separate personalities of the holding company and its subsidiary.
- (2) Where the corporate structure is a façade or a sham, or is being used as an instrument to perpetrate a fraud or some other wrongdoing or to avoid or conceal liability for a fraud or other wrongdoing.

⁵ See Lord Justice Slade in the leading case of *Adams v Cape Industries* [1990] Ch 433 at 532D, quoting Lord Justice Roskill in *The Albazero* [1977] AC 774 at 807.

- (3) Where the subsidiary can be regarded as being the agent for, or nominee of, the holding company.

A brief discussion of each of those categories is set out below.

Statutory, contractual or other provision

12. These types of situations are, as I understand it, unlikely to be in issue in the above-captioned case. I do not therefore discuss this category at any length.

Examples of statutory intervention include:

- (1) specific provisions which for accounting purposes treat a group as a single entity and require a holding company to prepare consolidated accounting records for the group, notwithstanding the separate personalities of the holding company and its subsidiaries;
- (2) taxation provisions which adopt a group treatment of a holding company and its subsidiaries;
- (3) provisions relating to UK merger control, which tend to look at the business enterprise being conducted irrespective of the corporate structure involved; and
- (4) European Community competition law provisions, which have the force of law in England and which are capable of treating holding companies and their subsidiaries as a single economic unit for competition purposes.

These have impact only in their specific contexts, and do not lead to any broader imposition of liability upon a holding company for the acts or liabilities of a subsidiary.

Where the subsidiary is a façade or a sham or used as an instrument of wrongdoing

13. This category encompasses a disparate group of cases which have as their characteristic that a company is being used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability of the person or persons behind the company⁶. Examples where the Court has disregarded the presence of the company and fixed those behind it with liability include:

- (1) Where an individual agreed to sell some land and, before completion of the sale, transferred the land to a creature company under his complete control in order to attempt to defeat the purchaser's claim for specific performance. Specific performance was ordered against the individual and the company⁷.
- (2) Where an ex-employee attempted to avoid a covenant imposed by his former employer restricting his ability to supply competing services by incorporating a company through which he provided the services. An injunction was granted against the ex-employee and his company, which was regarded as a "mere cloak" for his activities⁸.

⁶ See *Trustor v Smallbone* [2001] 1WLR 1177 at paragraph 23.

⁷ *Jones v Lipman* [1962] 1WLR 832.

⁸ *Gilford Motor Company v Horne* [1933] Ch 935.

(3) Where a defendant in breach of duty to a company transferred substantial sums to a offshore company; the offshore company had nominee directors and was controlled by a Liechtenstein Anstalt of which the defendant was a beneficiary. The court found that the recipient offshore company acted on the defendant's instructions, had no independent business, directors, shareholders or creditors; and that the company was simply used as a vehicle for the receipt by the defendant of the money he had wrongly caused to be paid away. The Court treated the receipt of the money by the offshore company as receipt by the Defendant⁹.

14. It is important, however, to note two general points in relation to this qualification/exception:

(1) English law does not consider it permissible to ignore the separate corporate personalities of companies in a group just because the corporate structure has been set up so as to ensure that any legal liability for any particular activity (or activities) of the group, and therefore the risk of any enforcement in respect of any such liability, will fall on one or more members of the group to the exclusion of one or more of the other members of the group. That is regarded as an inherent feature of limited liability under English company law¹⁰.

(2) The Court will *not* impose liability on a holding company by reason of the fact that the subsidiary was involved in some impropriety (even if it be fraudulent activity) unless the impropriety in question was linked to the

⁹ *Trustor v Smallbone* [2001] 1WLR 1177.

¹⁰ *Adams v Cape* [1990] Ch 433, at 544D to G.

use of the corporate structure for the purpose of avoiding or concealing liability for (or perhaps rendering recovery more difficult in respect of) that impropriety¹¹.

Agency or nominee ship

15. This qualification/exception covers cases where, notwithstanding the separate personalities of the holding company and its subsidiary (or any company and its shareholder(s)) it is found on the facts that the subsidiary (or other company) acted as agent or nominee for its parent (or other shareholder(s)) as principal, and liability rests with the parent company (or other shareholder(s)) accordingly.
16. In general, the relationship of principal and agent can only be established by the consent of the principal and the agent, who will be held to have consented if they have agreed to what in law amounts to such a relationship, whether or not they themselves recognized it. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. That principle applies as much to “one-man companies” as to wholly owned subsidiaries¹².

¹¹ *Trustor v Smallbone* [2001] 1WLR 1177 at paragraph 22. See also *Yukong Line v Rensburg* [1998] 2 BCLC 485: in that case the controller and sole beneficial owner (“Y”) of a company caused it to repudiate a charterparty, and then immediately caused money to be paid out of the company to another company of which Y was also the controller and sole beneficial owner. The transfer was for the purpose of putting assets beyond the reach of the other party to the charterparty in the event of litigation. The conduct of Y in so transferring assets away did not justify treating him as a party to the charterparty and personally liable in damages for its repudiatory breach. It was also unsuccessfully argued that the chartering company should be treated as the agent of Y in entering into the charterparty, as to which see paragraphs 15 following of this declaration.

¹² See *Yukong Line v Rensburg* [1998] 2 BCLC 485 at 494 g to i, quoting Lord Pearson in *Garnac Grain v Faure & Fairclough* [1968] AC 1130 at 1137.

17. Whilst the task is to find on the specific facts of the case the necessary consensual creation of the relationship of agency (or nomineeehip), the following points can be made:

- (1) There is no implied or presumed agency relationship arising between a parent and its subsidiary or between any other controlling shareholder and a company¹³.
- (2) The crucial point on which the House of Lords overruled the Court of Appeal in *Salomon's case* was precisely the rejection by the House of Lords of the doctrine that agency between a corporation and its members can be inferred from the control exercisable by the members over the corporation or from the fact that the sole objective of the corporation is to benefit the members. Whether the corporation acts directly on the instructions of the members as directors, or merely indirectly by reason of the overriding control which the members can exercise in general meeting, makes no difference¹⁴.
- (3) Thus neither agency nor nomineeehip (nor for that matter sham or façade) is to be inferred simply because a subsidiary company has a small paid-up capital and has a board of directors all, or most, of whom are also directors or senior executives of its holding company¹⁵.

¹³ *Salomon v Salomon & Co.* [1897] AC 22; *Kodak v Clark* [1903] 1KB 505.

¹⁴ See Lord Justice Kerr in *JH Rayner v DTI* [1989] Ch 72 at 188; approved by Lord Oliver in the House of Lords [1990] AC 418 at 515.

¹⁵ *Polly Peck* [1996] 2 AllER 433 at 445e.

(4) Similarly, the fact that a subsidiary company has been formed or purchased to operate with the parent's funds and on the parent's directions, but so as not to expose the parent to liability, does not create or justify the finding of the relationship of agency between parent and subsidiary¹⁶.

18. It may be concluded therefore that a relationship of agency or nominee-ship between member and company, if not express, will not easily be implied. An illustration of that point is supplied by the *Polly Peck* case¹⁷. There a holding company ("PPI") set up a wholly-owned subsidiary ("PPIF") specially for the purpose of raising finance for the group's activities by means of bond issues. Under the arrangements, PPIF's repayment obligations were guaranteed by PPI and all money raised by PPIF was lent-on by it to PPI. Having joined in the issue of the bonds, PPIF's practical involvement in the issue was minimal: it had no bank account and all fees were paid by PPI. On the insolvency of PPI and PPIF, the question arose whether (a) PPIF could prove in the insolvency of PPI at the same time as, and in competition with, the bondholders, or (b) could not do so, because PPIF was only acting as the agent or nominee of PPI with the result that there was in truth only a single debt owed by PPI to the bondholders. The principal factors in support of the argument that agency should be inferred were that¹⁸:

(1) PPIF was incorporated solely for the purpose of the bond issues.

¹⁶ *The Coral Rose (No.1)* [1991] 4 AllER 769 at 779.

¹⁷ [1996] 2 AllER 433.

¹⁸ See page 445 at f to h.

- (2) It had no separate independent management.
- (3) It had a very small paid-up capital.
- (4) It did not pay the costs of the transactions and could not have done so.
- (5) It had no normal bank account and no separate financial records.
- (6) The terms of the on-loan to PPI were not separately negotiated, did not serve any commercial purpose, were never finally agreed and the $\frac{1}{4}\%$ turn to PPIF was never paid except as a paper transaction.
- (7) No lender could or would have relied on PPIF's covenant to repay as opposed to PPI's.
- (8) PPIF only had a nominal role in the arrangements.
- (9) Accordingly, as a matter of substance PPI should be recognised as having borrowed direct from the bondholders.

The argument was rejected, and PPIF's agency was not inferred. An argument that PPIF was a cipher or façade for PPI was also rejected.

Some final observations

19. Whilst commentators have discussed the question whether there might exist a limited but free-standing case-based (as opposed to statutory) qualification or exception based upon a single economic unit theory, such a theory was

effectively rejected in *Adams v Cape*¹⁹. And *Polly Peck*²⁰ rejected the more limited proposition that an exception should be recognized “where a rule of law founded in public policy would be frustrated by ignoring the economic reality of the single group”.

20. The *Trustor* case rejected the broad proposition that the Court can and should “pierce the corporate veil” whenever the interests of justice might be thought so to require²¹.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in London, England, on Friday 2 May 2003.

Paul Girolami

Paul Girolami Q.C.

¹⁹ [1990] Ch 433 especially at 532-537.

²⁰ *Polly Peck* [1996] 2 AllER 433 at 447h to 448g.

²¹ See the discussion in *Trustor v Smallbone* [2001] 1WLR 1177 at paragraphs 14 and 20 to 23, following *Adams v Cape* [1990] Ch 433 and *Ord v Bellhaven Pubs* [1998] BCC 607 in preference to *Re a Company* [1985] BCLC 333.