United States Courts
Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORP. SECURITIES DERIVATIVE, & "ERISA" LITIGATION	MDL-1446
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. ENRON CORP., et al., Defendants.	C.A. No. H-01-3624 AND CONSOLIDATED CASES

ARTHUR ANDERSEN LLP'S AND ARTHUR ANDERSEN INDIVIDUALS' MOTION FOR PROTECTION FROM BANKRUPTCY RULE 2004 SUBPOENAS

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Arthur Andersen LLP ("Andersen") and John Stewart, Benjamin Neuhausen, Carl Bass, Debra Cash, and Patricia Grutzmacher (the "Andersen Individuals") seek an order quashing or for protection from Bankruptcy Rule 2004 subpoenas (the "Subpoenas") issued to them by the Bankruptcy Examiner for the Enron Corporation bankruptcy estate (the "Examiner").

I. INTRODUCTION

The Examiner seeks Rule 2004 examinations of five Andersen Individuals -- including three defendants in the *Newby* Litigation (the "Individual Andersen Defendants") and two other Andersen individuals who worked on the Enron engagement -- and two Rule 30(b)(6) examinations of Andersen. As shown below, these examinations are improper, and relief should be granted for four fundamental reasons. First, the Examiner cannot make the necessary threshold showing of need to take these examinations, in order to determine whether the Enron estate has unasserted legal claims, because his own reports demonstrate that he already has sufficient information to make this determination. *See In re GHR Energy Corp.*, 35 B.R. 534, 538 (Bankr. D. Mass. 1983). Second, the Examiner's proposed examinations of Andersen and the Andersen Individuals relate directly to pending litigation that "affects" Andersen and the Andersen Individuals. Therefore, the Subpoenas should be quashed because Andersen and the Andersen Individuals are entitled to the protections of the Federal Rules of Civil Procedure. *See In re Bennett Funding Group, Inc.,* 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996). Third, the Subpoenas should be quashed because the minimal benefit to the Enron estate of these examinations is far outweighed by the burden the examinations would impose on Andersen and the Andersen Individuals. *See In re Express One Intern., Inc.*, 217 B.R. 215, 217 (Bankr. E.D. Tex. 1998). Finally, if the examinations are permitted to proceed, they should be coordinated with depositions in the *Newby* Litigation to avoid duplicative discovery and the attendant burdens and costs of such duplication. *See In re Taxable Mun. Bonds Litig.*, 1992 U.S. Dist. LEXIS 12207, at *8, *12 (E.D. La. Aug. 12, 1992).

First, Rule 2004 discovery is available only to provide the Examiner with sufficient information to determine whether the estate has valid claims to assert. Here, the Examiner has

more than sufficient information to make that determination, rendering improper his continued use of Rule 2004 discovery directed at Andersen and the Andersen Individuals. The Examiner has already spent thousands of attorney hours and over $50 million of the Enron estate's assets taking discovery, reviewing documents, and preparing voluminous reports reaching conclusions regarding Enron's accounting and transactions. In late January, the Examiner issued his second report (over 2,000 pages) detailing more than one hundred Enron transactions, drawing conclusions as to the propriety of the accounting for those transactions, and, in many instances, criticizing Andersen's advice regarding them. These transactions -- on which the Examiner has already made detailed findings and reached accounting conclusions -- are the same transactions about which he now seeks to examine the Andersen Individuals.

Given the extraordinary discovery that has already taken place and the Examiner's detailed findings regarding Enron's transactions and accounting exhibited in his reports, the Examiner simply cannot claim to need additional 2004 examinations of Andersen and the Andersen Individuals in order to determine whether the estate has unasserted legal claims against Andersen or others -- especially since the Official Committee of Unsecured Creditors ("Creditors Committee") and dozens of civil plaintiffs have already filed suit against a wide range of parties relating to Enron's collapse. Indeed, when asked by Andersen's counsel why these examinations were necessary, the Examiner could not articulate any pressing need for them, or any need to take the examinations before depositions begin in the *Newby* Litigation.

Second, as this Court has already held in connection with a Motion for Protection by Enron's Outside Directors, the pendency of adversary proceedings that "affect" the witnesses provides an independent basis for quashing Rule 2004 Subpoenas. The Creditors Committee filed suit against Andersen and is already seeking the depositions of two of the witnesses subpoenaed by the Examiner. The Creditors Committee, under authority assigned to it by the Examiner, also brought suit, now pending in this Court, against various former Enron officers asserting that the officers participated in fraudulent accounting -- precisely the issue on which the Examiner seeks to examine the Andersen Individuals. Under Bankruptcy Court procedures, the

discovery regarding those proceedings is limited to that authorized by the Federal Rules of Civil Procedure, with the attendant protections offered thereunder. As this Court recognized in its earlier ruling on this issue, Rule 2004 discovery (which is much broader and lacking in procedural protections to the witnesses) of persons "affected by" the existing adversary proceedings is impermissible because it deprives the "affected" witnesses of the protection of the Federal Rules of Civil Procedure. *See* Order on Outside Directors' Motion for Protection from Bankruptcy Rule 2004 Subpoenas at 3 (dated Dec. 13, 2002).

Third, the Subpoenas should be quashed because the burden on Andersen and the Andersen Individuals far outweighs the benefit of the examinations to the Enron estate. As noted above, any need the Examiner has for additional examinations, given his detailed report on Enron's accounting and the vast amount of information he already has regarding Andersen's work for Enron, is minimal. On the other hand, the burden imposed on Andersen and the Andersen Individuals of multiple and duplicative depositions relating to pending litigation, including litigation in which Andersen and the Individual Andersen Defendants are named defendants, and without the benefit of the protections of the Federal Rules of Civil Procedure, is immense. Because the burden the examinations would impose on Andersen and the Andersen Individuals far outweighs any possible benefit to the Enron estate, the Subpoenas should be quashed.

Finally, even if the Rule 2004 discovery were not improper in principle, the examinations should be coordinated with depositions in the *Newby* Litigation, as Judge Gonzalez himself ordered in allowing the Examiner to seek discovery under Rule 2004 last summer. Not only are the Andersen Individuals being sought for examinations by the Examiner, two of them have been sought for depositions by the Creditors Committee, and all of them have been interviewed by the Department of Justice and/or the Securities and Exchange Commission, are certain to be deposed in *Newby*, and are potentially subject to deposition in any or all of dozens of cases pending around the country in state court. Such uncoordinated and duplicative discovery is unfair and burdensome to the witnesses. Moreover, duplicative discovery imposes excessive costs on the

litigants and, in this case, wastes Andersen's resources. Furthermore, uncoordinated discovery in the bankruptcy proceeding and in the state court proceedings threatens to interfere with and undermine this Court's effort to effectively and efficiently manage discovery in the complex litigation before it. This Court should, therefore, at a minimum order the Examiner's discovery coordinated with the *Newby* Litigation.

II. BACKGROUND

A. The Enron Bankruptcy Examiner

Enron filed for bankruptcy on December 2, 2001. On April 8, 2002, the Honorable Arthur J. Gonzalez, Bankruptcy Judge for the Southern District of New York, ordered the appointment of an examiner for the Enron estate and provided the Examiner with the power and authority to inquire into various Enron transactions. *See* April 8 Order (attached as Ex. 1). Mr. Batson was appointed as Examiner by the Bankruptcy Court shortly thereafter. The Examiner's mission is to investigate and determine whether the estate has unasserted claims against any parties in order to maximize the assets of the estate. *See* 11 U.S.C. § 1106(a)(3-4) and (b).

On September 12, 2002, the Bankruptcy Court issued an order at the Examiner's request authorizing the Examiner to conduct Bankruptcy Rule 2004 discovery. *See* Sept. 12 Order (attached hereto as Ex. 2). In its September 12 Order, the Bankruptcy Court expressly directed the Examiner to coordinate discovery with the *Newby* Litigation:

> With respect to those parties or entities that are parties in the consolidated civil action before Judge Harmon in the [*Newby* Litigation], the Committee, **Examiner** and Debtors are **directed to coordinate, to the extent practicable, the discovery authorized herein with any discovery in the consolidated class action** in the event the PSLRA stay is lifted.

Id., ¶ 18 (emphasis added). As this Court recently lifted the PSLRA stay, by order of the Bankruptcy Court, the Examiner is required to coordinate discovery with *Newby*.

B. The Examiner's Extensive Investigation, Including Analysis of and Conclusions on the Transactions That Would Be the Subject of the Examinations.

Pursuant to the September 12 Order, the Examiner, his counsel (Alston & Bird), and the various experts hired by him, have engaged in a massive investigation, the extraordinary scope of which is apparent from the thousands of hours spent and tens of millions in fees and expenses incurred -- all of which (if approved) will ultimately be paid from the bankruptcy estate:

- The attorneys and para-professionals of Alston & Bird[1] have incurred $44 million in fees and expenses through March 31, 2003.[2]
- The Examiner himself has incurred another $1 million in fees and expenses.[3]
- The Examiner has also hired a number of accountants and experts to assist him in his fact finding including Plante & Moran PLLC (over $5 million in fees and expenses), Al Hartgraves, PhD (over $400,000 in fees and expenses)

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[1] Sixty-four partners of Alston & Bird had logged time to representation of the Examiner -- several partners billing in excess of 800-1000 hours -- between September 1 and December 31, 2002. In addition, ninety-three associates, ten contract attorneys, and fifty paralegals had logged time to the investigation by year-end. In sum, 217 individuals from Alston & Bird logged 63,992 hours to this matter by the end of 2002. *See* Ex. 3, Summary Sheet, pp. 1-8. Since then, the investigation has continued at an intensified pace: in March 2003 alone, Alston & Bird submitted a request for payment for over twenty-four thousand hours of services rendered to the Examiner, resulting in a charge of $6,211,556.33. *See* Ex. 4, p. 3.

[2] *See* Fee Applications of Alston & Bird for Second Interim Period, Summary Sheet, p. 2 (attached hereto as Ex. 3); Statement of Fees and Expenses for the Period of January 1, 2003 through January 31, 2003, p. 3 (attached hereto as Ex. 5); Statement of Fees and Expenses for the Period of February 1, 2003 through February 28, 2003, p. 3 (attached hereto as Ex. 6); Statement of Fees and Expenses for the Period of March 1, 2003 through March 31, 2003, p. 3 (attached hereto as Ex. 4).

[3] *See* Fee Applications of Examiner Neal Batson for Second Interim Period, Summary Sheet, p. 2 (attached hereto as Ex. 7); Statement of Fees and Expenses for the Period of January 1, 2003 through January 31, 2003 (attached hereto as Ex. 8); Statement of Fees and Expenses and Amended Statement for the Period of February 1, 2003 through February 28, 2003 (attached hereto as Ex. 9); Statement of Fees and Expenses for the Period of March 1, 2003 through March 31, 2003, p. 3 (attached hereto as Ex. 10).

and George J. Benston, PhD (over $370,000 in fees and expenses). *See* Experts' Fee Applications (attached hereto as Ex. 11).

In total, the Examiner, his counsel and his experts have incurred over $50 million to date in fees and expenses in their extensive investigation.

As a result of the extensive investigation undertaken, the Examiner has issued two reports, a 150-page preliminary report in September 2002 and a Second Interim Report dated January 2003 and made public in February 2003. The Second Interim Report consists of over 2,000 pages detailing the Examiner's analysis of more than 100 Enron transactions, Enron's accounting, and the Examiner's conclusions as to the propriety of Enron's accounting. The reports evidence that the Examiner has reached conclusions about the very same accounting issues that he is now pursuing through his inherently duplicative discovery. Specifically, the Examiner's reports show that he already has sufficient information to reach conclusions as to the following topics: Prepay Transactions, Share Trust Transactions, Minority Interest Transactions, Tax Transactions, Related Party Transactions, FAS 140 Transactions, Non-Economic Hedge Transactions, and Enron's use of, and disclosures relating to, SPEs. *See* Excerpts from Examiner's Second Interim Report and Appendices (attached hereto as Exs. 12-19).

The reports further reach conclusions as to Andersen's work on a number of transactions, including, for example:

- Andersen's work regarding the "Blockbuster Transaction" between EBS and Blockbuster. *See* Examiner's Second Interim Report, pp. 30-31 (attached hereto as Ex. 12).
- Andersen's work regarding the Marlin, Whitewing and Firefly transactions. *See* Appendix B to Examiner's Second Interim Report, pp. 23-24 (attached hereto as Ex. 13).
- Andersen's work regarding application of the 3% Equity Test equity to Enron SPEs such as LJM1 and LJM2. *Id.*, p. 33.

- Andersen's work regarding the prepay transactions. *See* Appendix E to the Examiner's Second Interim Report, pp. 28-29 (attached hereto as Ex. 14).
- Andersen's analysis as to whether certain entities were SPEs (Appendix E to Examiner's Second Interim Report, p. 34 (attached hereto as Ex. 14) and Appendix K to Examiner's Second Interim Report, pp. 29-30 (attached hereto as Ex. 15)); Andersen's reasoning for not requiring consolidation of Rawhide (Appendix I to Examiner's Second Interim Report, p. 63 (attached hereto as Ex. 16)); the "appropriateness" of recognizing a $61 million gain Enron reported in 1997 (Appendix O to Examiner's Second Interim Report, p. 15 (attached hereto as Ex. 17)).

It is thus apparent that the Examiner has already concluded, based on public information and other discovery taken, that he has sufficient information to make detailed findings both as to Enron's accounting and Andersen's role in it. As the litigation arising from the bankruptcy proceeding described below further confirms, the Examiner's discovery is plainly *not* necessary for the Examiner to determine whether the estate has unasserted legal claims to bring.

C. Litigation Arising from the Bankruptcy Court

Based on his investigation, the Examiner has shared discovery and worked with the Creditors Committee to bring litigation on behalf of the estate against various persons and entities for contributing to Enron's collapse.

On August 29, 2002, the Examiner sought (and received) an Order granting him authority to "bring any and all claims . . . against present and former officers and directors of Enron Corp. and its affiliates." *See* Aug. 29, 2002 Order, p. 2, ¶ 1 (attached hereto as Ex. 20). The Order then assigned the Examiner's right to the Creditors Committee. *Id.* The Creditors Committee thereafter filed two separate lawsuits.

The first suit was filed in the Southern District of New York against Andersen. *See Official Committee of Unsecured Creditors v. Arthur Andersen LLP*, Case No. 02-03119 (Bankr. S.D. N.Y. 2002) (the "Preference Action") (Amended Complaint attached hereto as Ex. 21).

This suit alleges that Enron improperly made preferential payments to Andersen shortly before Enron declared bankruptcy. That matter is currently in active discovery, and the Creditors Committee has asked for depositions of a number of former Andersen partners and employees, including two individuals who have been served with 2004 subpoenas by the Examiner. *See* Letter from Edward Stelzer to Sharon Katz dated April 7, 2003 (attached hereto as Ex. 22).

The second lawsuit was filed on October 1, 2002 by the Creditors Committee against certain current and present officers and employees of Enron. *See Official Committee of Unsecured Creditors of Enron Corp. v. Andrew Fastow, et al.* (S.D. Tex. 2002) (the "Fastow Litigation") (Complaint attached hereto as Ex. 23). Although this suit was initially filed in state court, it was subsequently removed to this Court on October 16, 2002.

In the Fastow Litigation, the Creditors Committee[4] alleges that certain Enron officers and employees "wrongfully participated in a series of transactions between Enron and special purpose entities ("SPEs") to enrich themselves at Enron's expense." *Id.*, ¶ 3. The Fastow Complaint further alleges that the Enron defendants used "aggressive accounting methods . . . to achieve these ends, even if such accounting methods distorted the true nature and effect of the underlying transactions." *Id.*, ¶ 61. The Complaint also makes numerous allegations regarding violations of generally accepted accounting principles in regard to the transactions at issue. *See Id.*, ¶¶ 29-31. Thus, the focus of the Fastow Litigation is squarely on the accounting for certain Enron transactions -- the same transactions on which Andersen is attacked in the *Newby*

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[4] Although discovery by the Creditors Committee in those adversary proceedings must comply with the Federal Rules of Civil Procedure, *see* Fed. R. Bankr. P. 7026-7037, the Creditors Committee stands to benefit in litigating these pending matters from the much broader Rule 2004 sought by the Examiner because the Bankruptcy Court ordered the Examiner to share any Rule 2004 discovery he takes with the Creditors Committee. *See* Ex. 2, ¶ 11; *infra* at p. 4. Moreover, as this Court recognized in ruling on the Outside Directors' Motion for Protection, the Examiner's broad 2004 discovery "would also inure to the benefit of J.P. Morgan Chase & Company, a litigant in the *Newby* case and a member of the Creditors Committee." *See* Ex. 24, p. 3 & n.2.

Litigation and, almost certainly, the same transactions about which the Examiner seeks to examine the Andersen Individuals.[5]

The litigation arising from the bankruptcy proceeding confirms both (*i*) that the facts are sufficiently developed without any additional discovery for the Examiner to determine what claims should be brought on behalf of the estate, and (*ii*) that the Examiner has supported litigation that relates to and affects Andersen and the Andersen Individuals. As demonstrated below, these facts preclude the Examiner's Rule 2004 discovery of Andersen and the Andersen Individuals.

D. <u>Andersen's Provision of Extensive Discovery to the Examiner</u>

The Examiner already has been afforded substantial discovery relating to Andersen's audit work. Prior to the issuance of the Examiner's Second Interim Report, Andersen provided the Examiner (and/or the Creditors Committee with the authority to share with the Examiner) with (*i*) access to its workpapers, including months of access to the physical workpapers and, ultimately, copies of over 100,000 pages of the workpapers; (*ii*) an informal interview with the managing partner of Andersen's Houston office; and (*iii*) documents (over 200,000 pages) relating to several specific individuals. *See* Declaration of Catherine E. Palmer ("Palmer Decl."), ¶ 7, filed herewith. More recently, Andersen provided the Examiner with over seventeen

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[5] The Examiner's counsel has indicated that the examinations would cover all of the transactions (except for the tax transactions) covered in Appendix Q to the Examiner's March 2003 report, and would include certain other transactions as well, such as Blockbuster. *See* Palmer Decl., ¶ 5. The examinations would thus cover nearly every material transaction that has received public attention, including almost every material transaction discussed in the *Newby* Complaint. Palmer Decl., ¶ 6. In addition, the Examiner's requests for documents to the Andersen Individuals expose the close connection between the Examiner's discovery, the Fastow Litigation, and the *Newby* Litigation. *Compare* Examiner's 2004 Subpoenas, Exs. 25-32, Examiner's Req. 31 (JEDI), Req. 36 (LJM1), Req. 37 (LJM2), Reqs. 51-54 (Raptors) (attached hereto as Exs. 25-32); *with* Fastow Compl., Ex. 23, ¶¶ 37-44 (LJM partnerships), ¶ 45 (Raptors); and *Newby* Compl. ¶¶ 948-950 (Andersen's involvement in accounting for LJM1/LJM2), ¶¶ 951-954 (Andersen's involvement in accounting for Raptors). Therefore, it cannot be denied that the Examiner's Rule 2004 examinations will expose the Andersen Individuals to testifying about issues directly relevant to the Fastow Litigation and the *Newby* Litigation without the procedural protections offered by the Federal Rules of Civil Procedure.

thousand pages of documents relating to Enron tax transactions and agreed to provide the Examiner with interviews of four Andersen accountants regarding Enron tax issues. *See* Palmer Decl., ¶ 7; *infra* at n. 6. Moreover, Andersen has offered to provide the Examiner access to documents that will ultimately be produced in the *Newby* Litigation -- a collection of documents exceeding twelve million pages -- *see* Andersen's Responses and Objections to Examiner's Bankruptcy Rule 2004 Subpoena at 2 (attached hereto as Ex. 33) -- and offered to allow the Examiner to participate in the *Newby* depositions of Andersen witnesses. *See* Palmer Decl., ¶ 7.

In addition to the materials and information provided by Andersen, the Examiner has access to a substantial amount of publicly available information regarding Andersen's work for Enron, including testimony of Andersen partners before Congressional committees, the Powers Committee report, and the criminal trial held before this Court. Thus, as his extensive reports reflect, the Examiner already has received a wealth of information about Andersen's work for Enron.

E. <u>The Examiner's 2004 Subpoenas Served on Andersen and the Andersen Individuals</u>

On May 8, 2003, Andersen and the Andersen Individuals accepted service of seven subpoenas from the Examiner. The five subpoenas directed at the Andersen Individuals demand Rule 2004 examinations in late-May and early-June, in addition to production of documents relating to 78 Enron transactions as well as other categories of documents. *See* Exs. 27-32. The other two subpoenas, which seek documents and Rule 30(b)(6) testimony, are directed at Andersen. *See* Exs. 25-26. Although the Examiner's requests for documents are overly broad and seemingly unnecessary, Andersen and the Andersen Individuals have, consistent with Andersen's offer to make its entire *Newby* production available to the Examiner, agreed to produce the requested documents. *See* Palmer Decl., ¶ 7. With respect to the examinations, however, Andersen, through counsel, contacted the Examiner in order to negotiate their scope and timing. *See* Palmer Decl., ¶ 4.[6] The Examiner initially informed Andersen that the scope of

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[6] Shortly before the Examiner informed Andersen that he intended to serve the Subpoenas, Andersen and the Examiner negotiated an arrangement regarding other discovery and

the examinations would be all work those individuals performed regarding Enron. *Id.* The Examiner refused Andersen's request that the examinations be limited to information that the Examiner truly needed. *Id.* Later, the Examiner clarified that the topics would be any and all transactions, except those that are tax-related, that are covered in Appendix Q[7] to the Second Interim Report and any and all SPE transactions including, but not limited to, Blockbuster, Nigerian Barge, LE Huston, and minority interest transactions such as Nighthawk and Nahani. *Id.*, ¶ 5. Thus, the topics include almost every material transaction at issue in the *Newby* Litigation. *Id.*, ¶ 6. The Examiner refused to discuss or consider any further limitation as to topic. *Id.*, ¶ 4.[8]

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examinations the Examiner requested. In that instance, the Examiner agreed to accept interviews of certain witnesses and limit the discussion to tax transactions that are not the subject of the Fastow Litigation or the *Newby* Litigation. On that basis, Andersen and the Andersen witnesses agreed to provide the Examiner with the discovery he requested. *See* Palmer Decl., ¶ 2. Here, the Examiner has refused to discuss any limitations on the scope of the testimony to prevent prejudice to Andersen and the Andersen Individuals. *See* Palmer Decl., ¶ 3. Given the extraordinary breadth of the topics on which the Examiner insists he needs testimony, Andersen and the Andersen Individuals are aware of no reasonable accommodation they can make to provide the Examiner with the discovery he seeks while avoiding the prejudice inherent in subjecting themselves to 2004 examinations regarding transactions at the heart of the pending litigation.

[7] Appendix Q references broad categories of transactions along with examples of those types of transactions: FAS 140 Transactions (Hawaii, Cerberus, Bacchus, ETOL, Avici, Backbone); Non-Economic Hedges (Raptors); Share Trust Transactions (Marlin, Whitewing); Minority Interest Transactions (Rawhide, Zephyrus, Choctaw); and Prepay Transactions. *See* Ex. 18. Each of these categories of transactions are in turn discussed at length in the Examiner's Second Interim Report. *See* Ex. 12.

[8] The document requests are equally broad. The Examiner demands that the deponents produce a wide assortment of documents responsive to 96 individually numbered requests, including:

- "All documents" concerning each of 78 individual transactions;
- "All Documents, including work papers, *concerning* Enron";
- All correspondence and communications between and among employees of Andersen "concerning Enron or its officers, directors, partners, members, or employees"; and
- All correspondence and communications between any employees of Andersen and employees of Enron "concerning Enron or its officers, directors, partners, members, or employees."

See Exs. 25-32 (emphasis added).

The stated topics for the examinations are noteworthy in that, not only do they involve an immense number of transactions, but the identified transactions are precisely the transactions about which the Examiner has already investigated and on which the Examiner has already issued detailed findings and reached conclusions regarding Andersen's work. For example, the minority interest transactions, including Nighthawk and Nahani, are the subject of the 136-page Appendix I to the Examiner's Second Interim Report. *See* Ex. 16. In that section, the Examiner makes explicit findings regarding Andersen's advice:

> In connection with LJM2's acquisition of Hoss, Rawhide, upon Andersen's recommendation, paid down the principal amount of the Rawhide Loan by $10 million to maintain nonconsolidation treatment. Enron and Andersen concluded that LJM2's interest would not be considered independent only to the extent of Fastow's ownership of LJM2 and only that portion of LJM2's investment should be disqualified in the 3% Equity Test. Accordingly, by reducing the loan amount, the 3% Equity Test could be met even if Fastow's proportion of the investment was disallowed.

The Examiner disagrees.

Id., p. 63 (emphasis added); *see also* Annex 4 of Appendix L to the Second Interim Report, p. 54 (attached hereto as Ex. 19). The Examiner himself notes that the Second Interim Report states his "views on the role of the SPEs in the collapse of Enron, and . . . how the SPEs were used to engineer its reported financial position." *See* Ex. 12 at 12. The Examiner concludes that his report addresses "*substantially all of Enron's material SPE transactions* identified to date." *Id.* at 12 (emphasis added). Given the Examiner's detailed conclusions already reported regarding these transactions, and the Examiner's apparent ability to reach these conclusions without consulting Andersen personnel, counsel for Andersen inquired as to the necessity for examining Andersen witnesses on these same topics. The Examiner provided no meaningful answer. *See* Palmer Decl., ¶ 4.

Compliance with these broad Subpoenas would necessarily require Andersen and the Andersen Individuals to devote substantial time, effort, and expense to that task, diverting resources from Andersen's efforts to begin discovery in the *Newby* Litigation. Accordingly, for the convenience of the witnesses and parties and to avoid unnecessary expense, Andersen

requested that the Examiner coordinate the examinations with the anticipated depositions in *Newby*. Palmer Decl., ¶ 4. Despite Judge Gonzalez's Order requiring the Examiner to coordinate discovery with *Newby*, *see* Ex. 2, ¶ 18, and the lifting of the discovery stay in *Newby*, the Examiner refused to consider Andersen's proposal. Palmer Decl., ¶¶ 4, 7.

III. ARGUMENT

A. The Examiner Does Not Need Rule 2004 Discovery to Determine Whether the Estate Has Unasserted Claims[9]

The Examiner's use of Rule 2004 discovery directed at Andersen and the Andersen Individuals is inappropriate because Rule 2004 discovery is a limited-use tool unavailable when the facts have been sufficiently developed to permit the Examiner to determine whether and against whom the estate has unasserted claims. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) ("[Rule 2004] is properly used as a pre-litigation device to determine whether there are grounds to bring an action"); Cook, Bankruptcy Litigation, Manual § 4.04 (1995-96 ed.) ("A Rule 2004 examination is a useful device for persons . . . who need additional information before filing an adversary proceeding"). Although 2004 discovery is

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[9] The Examiner has previously argued in response to a similar motion filed by certain Enron officers that this Court lacked the authority to grant the relief requested here and that such a motion could only be addressed to the courts issuing the subpoenas -- here, the Bankruptcy Courts for the Southern District of Texas and the Northern District of Illinois. *See* Ex. 34. That argument is incorrect. Over similar objections by the Creditors Committee, this Court quashed Rule 2004 subpoenas directed at Enron's outside directors, implicitly rejecting the Examiner's contention. *See* Ex. 24. This Court's authority stems from several bases. First, this Court has authority under the All Writs Act to issue writs in aid of its jurisdiction, *see* 28 U.S.C. § 1651, and here that authority would be directed at an inferior federal court. Courts assigned to manage large, complex litigation as is the case here have regularly used that authority to issue orders to enjoin actions or orders that interfere with the courts' management of complex litigation. *See, e.g., Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996); *In re Consolidated Welfare Fund ERISA Litig.*, 798 F. Supp. 125, 127-28 (S.D.N.Y. 1992); *In re Inter Op Hip Prosthesis Prod. Liab. Litig.*, 174 F. Supp. 2d 648, 655 (N.D. Ohio 2001); *see also In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334 (5th Cir. 1981). Second, this Court also has jurisdiction to protect assets necessary to pay any successful claimants in the *Newby* Litigation. *See Consolidated Welfare*, 798 F. Supp. at 127-28; *Inter Op Hip Prosthesis*, 174 F. Supp. 2d at 654; *infra* at 16. Finally, this Court has appellate jurisdiction over the Bankruptcy Court for this district. *See* 19 Moore's Federal Practice § 204.05 (3rd ed.).

broad in scope, its purpose is limited to establishing the "extent and whereabouts" of the estate, or determining proper parties and facts sufficient to commence a legal claim. *See Cameron v. United States*, 231 U.S. 710, 717 (1914); *In re Handy Andy Home Improvement Ctrs., Inc.*, 199 B.R. 376, 380 (Bankr. N.D. Ill. 1996) ("Rule 2004 is substantially a *prelitigation* device for assessing *whether grounds exist to commence an action*") (emphasis added).

Once sufficient information is learned as to whether the estate has unasserted claims and against whom, use of 2004 discovery is no longer permissible. *See* 9 Collier on Bankruptcy, § 7026.03, pp. 2026-8 (15th Ed. 1991) ("[i]f an adversary proceeding or contested matter is pending or *is likely*, it is improper for one of the parties to use a Rule 2004 examination as a substitute for . . . discovery pursuant to Rule 26 et seq. of the Civil Rules") (emphasis added); *In re Hammond*, 131 B.R. 78, 82-83 (Bankr. S.D. Ohio 1991) ("Good cause [for 2004 discovery] ordinarily may be shown if the examination and requested documents are *necessary to establish the claim* of the party seeking the examination") (emphasis added); *see also In re Symington*, 209 B.R. 678, 687-88 (Bankr. D. Md. 1997) ("[W]hile [Rule 2004] does not contain an explicit requirement of 'good cause' for the granting of a motion to conduct an investigation, such a requirement is implicit and can be enforced by a protective order . . . *where the information purportedly sought is either already well-known or within the would-be examiner's possession*") (emphasis added).

This limitation on Rule 2004 results from the vast breadth of the rule's scope and the lack of procedural safeguards provided to the subjects of such discovery. *See In re Bennett Funding*, 203 B.R. at 28 ("courts are wary of attempts to utilize Fed. R. Bankr. P. 2004 to avoid the restrictions of the Fed. R. Civ. P."); *In re Szadowski*, 198 B.R. 140, 141 (Bankr. D. Md. 1996) ("Court will not allow litigants to utilize Rule 2004 as a substitute for discovery under the Federal Rules of Civil Procedure, especially where to do so would compromise the rights of parties subject to discovery requests"); *In re Valley Forge Plaza Assocs.*, 109 B.R. 669, 675 (Bankr. E.D. Pa. 1990); *In re Kipp*, 86 B.R. 490, 491 (Bankr. W.D. Tex. 1988) ("Rule 2004 may not be used to circumvent the protections offered under the discovery rules); John G. Stevenson,

Jr., Discovery Under the Federal Rules of Bankruptcy Procedure, 9 Bank. Dev. J. 643, 662-63 (1993) ("the case law . . . echoes this distaste for efforts to gain advantage by bypassing the procedural protections set out in Bankruptcy Rule 7026"). Without limitations on the use of Rule 2004, parties in bankruptcy proceedings would be encouraged to take discovery under Rule 2004 to support their as-yet unfiled adversary proceedings in an effort to circumvent the procedural protections provided witnesses by the Federal Rules of Civil Procedure which would otherwise apply. *See In re GHR Energy Corp.*, 35 B.R. 534, 538 (Bankr. D. Mass. 1983). In refusing a request for Rule 2004 discovery, the *GHR* court explained:

> From the evidence . . . it seems that the debtors are now in a position to file an action . . . if they so choose. It appears the debtors are attempting to use Rule 2004 to circumvent the procedural safeguards provided a litigant by the Federal Rules of Civil Procedure.

Id; see also In the Matter of Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) ("The proper mode of discovery which ordinarily must be utilized against a third party who may be liable to the bankruptcy estate . . . is contained in the Federal Rules of Civil Procedure, which provide numerous safeguards against unfairness to the party from which discovery is sought").

Here, the Examiner cannot contest that there is sufficient information to determine whether the estate has unasserted legal claims against any parties. Indeed, the Examiner's 2,000 page report, concluding on the very transactions about which he insists on examining the Andersen Individuals, alone precludes any finding that the examinations at issue are necessary to determine whether the estate has unasserted claims it should pursue. *Supra* at 6-9; *see In re GHR*, 56 B.R. at 538. Moreover, the actions of other parties demonstrate that there is ample information already available to make the necessary determination. The Creditors Committee has already brought suit against Enron insiders and Andersen. *Supra* at 6-9. With the publicly available information from the Andersen trial, public hearings and reports regarding Enron's accounting and Andersen's role in it, the countless civil complaints already filed, and the millions of pages of Andersen documents that Andersen has offered to provide to the Examiner, there is simply no basis -- and the Examiner has provided none -- for the Examiner's implicit

contention that he must examine Andersen and the Andersen Individuals in order to decide whether the estate should "commence an action." *In re Handy Andy*, 199 B.R. at 380. The Examiner, therefore, cannot satisfy his burden to show that the 2004 discovery sought here is warranted. *See In the Matter of Wilcher*, 56 B.R. at 434-35 (once objection to 2004 discovery is made, the party seeking the discovery bears the burden to show it is warranted).

B. The Examiner May Not Conduct Rule 2004 Discovery on Issues Related to the Preference Action and Fastow Litigation

1. Andersen and the Andersen Individuals Are "Affected By" Pending Litigation on the Same Subject As the Examiner's Discovery

Even if the Examiner could demonstrate a need to take the examinations here, the fact that the examinations seek discovery on issues that are the subject of pending litigation that "affects" Andersen and the Andersen Individuals presents an independent basis for quashing the Subpoenas. This Court has already recognized that, once adversary proceedings have commenced, Rule 2004 subpoenas are no longer permissible and the protections of the Federal Rules of Civil Procedure apply. *See* Ex. 24, p. 3; *see also In re Blinder,* 127 B.R. at 275 ("[I]f an adversary proceeding or contested matter is pending, the discovery devices provided for in Rules 7026-7037, which adopt various discovery provisions of the Federal Rules of Civil Procedure, apply and Rule 2004 should not be used"); *accord In re Kipp*, 86 B.R. 490, 491 (W.D. Tex. 1988); *In re Bennett Funding*, 203 B.R. at 28 ("[O]nce an adversary proceeding or contested matter has commenced . . . discovery is made [Rule 7026)] rather than by [Rule 2004] an examination"); *In re Szadkowski*, 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").

Prior to filing the Fastow Litigation, the Creditors Committee served Bankruptcy Rule 2004 subpoenas on the Outside Directors of Enron similar to those at issue here. After the Fastow Litigation was filed, the Outside Directors sought protection from this Court, arguing they were "affected by" the Fastow Litigation and, therefore, broad Rule 2004 discovery should not be permitted. This Court agreed, stating:

> If, in the context of a Rule 2004 context, the phrase 'affected by' has anything close to a dictionary definition meaning, it is hard to imagine how the outside directors would not be 'affected by' the creditors committee's lawsuit, despite their non-party status in that case.
>
> The Court finds that the outside directors are affected by the creditors committee lawsuit. The creditors committee is, therefore, precluded from utilizing Rule 2004 subpoenas against the outside directors. The creditors committee is relegated to the use of the Federal Rules of Civil Procedure for obtaining discovery.

Ex. 24, p. 3.

As this Court held, once adversary proceedings are filed, the only relevant question is whether the parties from whom the subpoenas are sought are "affected by" such litigation. *See* Ex. 24, p. 2 ("Bankruptcy Rule 2004 subpoenas could not be used to obtain discovery from parties 'affected by' the litigation"); *Snyder v. Society Bank*, 181 B.R. 40 (S.D. Tex. 1994); *In re Bennett Funding*, 203 B.R. at 29 (concluding that after an adversary proceeding is commenced, 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). Once again, the reason for this rule is the need to afford persons "affected" by pending litigation the full protection of the Federal Rules of Civil Procedure. *See In re Blinder,* 127 B.R. at 275. The protections of the Federal Rules of Civil Procedure not granted by Rule 2004 are not merely incidental -- as explained by the court in *In re French*: "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." 145 B.R. 991, 992 (Bankr. D. S.D. 1992).

Like the Outside Directors, Andersen and the Individual Andersen Defendants are defendants in the *Newby* Litigation. They, like the Outside Directors, stand accused of approving the allegedly fraudulent transactions that are the basis of the Fastow Litigation. *See, e.g., Newby* Consolidated Complaint, ¶ 910 (Andersen "approved . . . egregious transactions"), ¶¶ 941-954 (allegations re: Andersen's knowledge of and involvement in the formation of Chewco, JEDI, and LJM transactions). Without question, the Examiner's 2004 Subpoenas seek

discovery relevant to the Fastow Litigation. The Examiner requests documents and testimony relating to Enron's SPEs. *See* Exs. 25-32; Palmer Decl., ¶ 5. That discovery goes directly to the heart of the matters at issue in the Fastow Litigation:

> The litany of greed and corruption that gives rise to this action began in 1997. At that time, the transactions in which Enron engaged had become increasingly complex . . . . [The defendant officers] **wrongfully participated in a series of transactions between Enron and special purpose entities ("SPEs")** to enrich themselves at Enron's expense.

See Ex. 23, ¶ 3 (emphasis added). Although Andersen and the Andersen Individuals are not parties to the Fastow litigation,[10] as Enron's auditor Andersen and the Andersen Individuals audited the transactions upon which the Fastow Litigation is based. *See id.,* ¶¶ 27-36 (Chewco transaction), ¶¶ 37-42 (LJM transactions), ¶¶ 43-44 (Rhythms), ¶¶ 45-48 (Raptors). Accordingly, Andersen and the Andersen Individuals are, like the Outside Directors, "affected by" the existing litigation and face similar risk to that of the Outside Directors in exposure to broad Rule 2004 discovery without the protections of the Federal Rules of Civil Procedure.

Furthermore, Andersen and the Individual Andersen Defendants are named defendants in the *Newby* Litigation. As this Court recognized in quashing Rule 2004 subpoenas directed at the Outside Directors, the status of the subpoenaed parties as defendants in the *Newby* Litigation is an additional basis for requiring that any discovery that relates to the *Newby* Litigation be brought under the Federal Rules of Civil Procedure. *See* Ex. 24, p. 3. Any Rule 2004 examinations of the Individual Andersen Defendants taken by the Examiner are subject to being used against them in the *Newby* Litigation and will provide the parties there a preview of the Individual Andersen Defendants' testimony prior to depositions in *Newby.* Because members of

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[10] It is well recognized that a party need not be a party to litigation to be "affected by" it. *See* Ex. 24, p. 3 ("[I]f the phrase 'affected by' has anything close to a dictionary definition meaning, it is hard to imagine how the Outside Directors would not be 'affected by' [the Fastow Litigation], *despite their non-party status* . . . ") (emphasis added); *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 <u>or</u> *affected by an adversary proceeding while it is pending*") (emphasis added); *In re Bennett Funding*, 203 B.R. at 29.

the Creditors Committee with whom the Examiner is required to share discovery are parties to the *Newby* Litigation, the Rule 2004 discovery sought by the Examiner will almost certainly inure to the benefit of parties adverse to the Individual Andersen Defendants in *Newby*. *See supra* at 7 & n.4.

Finally, as discussed above, the Creditors Committee has initiated the Preference Action against Andersen. Andersen and its former partners and employees are "affected by" that litigation.[11] Indeed, two of the Andersen Individuals have already been asked to submit to depositions therein. *Supra* at 7.

In short, the discovery sought by the Examiner pertains directly to the Preference Action, the Fastow Litigation, and the *Newby* Litigation. Based on the anticipated topics of questioning, there is no question that the examinations would delve into issues central to the existing proceedings. As such, Andersen and the Andersen Individuals are entitled to the protections of the Federal Rules of Civil Procedure.

2. The Fact That the Examiner Did Not Initiate the Adversary Proceedings Is Irrelevant

In his Opposition to the Certain Enron Officers' Motion for Protection from Rule 2004 discovery, the Examiner argued that the rule precluding Rule 2004 discovery of parties "affected by" existing adversary proceedings should not apply to him because he did not bring the adversary proceedings here and does not "share a common interest" with the Creditors Committee, which brought the litigation. *See* Examiner's Opposition to Certain Officer Defendants' Motion for Protection (attached hereto as Ex. 34). That argument fails for two reasons.

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[11] Discovery in the Preference Action already overlaps in some respects with the Rule 2004 discovery. For example, the Preference Action alleges that "[o]n or within ninety (90) days preceding the Petition Date, Enron made transfers to Andersen in the aggregate amount of at least $9.5 million, *see* Ex. 21, ¶ 10, and that such "were transfers for or on account of antecedent debt owed by Enron to Andersen before such transfers were made." *Id.*, at ¶ 16. The Examiner seeks "[a]ll documents concerning the fees or compensation received by you concerning Enron." *See* Exs. 25-32, ¶ 90. Thus, information provided to the Examiner pursuant to the Subpoenas is relevant to the Preference Action.

First, the Examiner does share a common interest with the Creditors Committee. The Creditors Committee's authority to bring the Fastow Litigation was assigned to it directly from the Examiner, and both are plainly interested in maximizing the value of the Enron bankruptcy estate. *See* Ex. 20, ¶ 1; 11 U.S.C. § 1106. In addition, the Examiner and Creditors Committee are subject to a discovery "sharing order" which *requires* the Examiner to share information garnered through Rule 2004 discovery with the Creditors Committee:

> All discovery material produced to the Debtors, Committee or the Examiner under Rule 2004 . . . shall be deemed to be produced to all the Debtors, the Committee and the Examiner and shall be shared . . . .

See Ex. 2, ¶ 11.

> [T]he Committee, Examiner and Debtors all shall be permitted to be present at each oral examination authorized herein and to interrogate each witness . . . . 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.

See Ex. 2, ¶ 8-9. Even more troubling, individual members of the Creditors Committee, which are parties to the *Newby* Litigation, will also gain access to the Rule 2004 discovery to use against Andersen and the Individual Andersen Defendants in the *Newby* Litigation. *See supra* at n. 4. Thus, the procedural safeguard barring Rule 2004 subpoenas to "affected" persons once proceedings are initiated is imperative here because the Creditors Committee and its members are positioned to benefit directly in their adversary proceedings and other litigation from the broad Rule 2004 discovery the Examiner is seeking.

Second, it is irrelevant that the Examiner did not bring the adversary proceedings here. The import of the rule is to protect defendants and witnesses subject to or potentially subject to suit from being taken advantage of unfairly. *See, e.g., In re Blinder*, 127 B.R. at 275; *In re French*, 145 B.R. at 992-93. ("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"). Accordingly, the

limitation on Rule 2004 discovery properly applies to protect the *witnesses* from unfairness without regard of the identity of the party who is seeking the discovery at issue.

C. The Subpoenas Should Be Quashed Because the Burden on Andersen and the Andersen Individuals Far Outweighs the Benefit to the Enron Estate

In addition to the foregoing reasons, this Court should quash the Subpoenas because the benefit to the Examiner and the Enron estate is far outweighed by the costs to Andersen and the Andersen Individuals. *See In re Express One Intern., Inc.*, 217 B.R. 215, 217 (Bankr. E.D. Tex. 1998) ("if the cost and disruption to an examinee attendant to a requested examination outweigh the benefits to the examiner, the request should be denied"); 9 Collier on Bankruptcy, § 2004.02[2] (Rule 2004 discovery should be limited where it is oppressive, burdensome or results in excessive cost). As shown above, the Examiner has no need for the Rule 2004 discovery he seeks, which appears to be sought for the sole purpose of generating additional fees. Thus, the Enron estate stands only to incur increased costs with little, if any, benefit from the discovery. *See* Bankruptcy Rules at p. 120 (Collier Pamphlet Ed. 2003) (Rule 2004 discovery cannot be used to waste assets of the estate); *In re Texaco*, 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987).

Not only is the Examiner's sought-after discovery unnecessary, it will almost certainly prove duplicative and wasteful. First, the Examiner himself has not brought litigation in the bankruptcy proceeding (*see* Exs. 20 (assignment of Examiner's rights to prosecute suit to Creditor's Committee)), and is unlikely to bring future litigation on behalf of the estate. Thus, whoever is assigned the right to bring future litigation -- whether the Creditors Committee, the debtor, or yet some other party -- will surely seek to re-take depositions of Andersen and the Andersen Individuals in the context of any adversary proceeding they bring. *See In re Lang,* 107 B.R. 130, 132 (Bankr. N.D. Ohio 1989) (Rule 2004 examination does not preclude subsequent deposition in any adversary proceeding). Second, the Examiner has not yet received the twelve million pages of documents to which Andersen has offered him access. Once the Examiner has reviewed those documents, the Examiner may well seek additional examinations of these same

witnesses. Any examinations should wait until *after* the parties have had an opportunity to review all the relevant documents.

On the other hand, Andersen and the Andersen Individuals are unreasonably burdened by the Rule 2004 examinations. Andersen and the Individual Andersen Defendants face substantial claims and liabilities as defendants in numerous pending cases, and are thus defendants particularly in need of the protections of the Federal Rules of Civil Procedure. *See In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 275 (D. Colo. 1991). Moreover, the Examiner's excessive and unnecessary discovery also wastes Andersen's resources. *See In re Inter Op Hip Prosthesis Prod. Liab. Litig.*, 174 F. Supp. 2d at 654 (in enjoining parallel litigation: "A substantial portion of the money available to pay successful plaintiffs will come from wasting insurance policies, which means that expenditures on duplicative and possibly unnecessary discovery defense costs will proportionately and materially reduce the total funds available to pay [successful claims]"); *In re Consolidated Welfare Fund*, 798 F. Supp. at 128. The burden on Andersen and the Andersen Individuals as well as unnecessary and excessive cost to Andersen far outweigh any possible benefit to the Examiner who has already concluded on the transactions at issue. Thus, the balance of harm provides a further basis to quash these Subpoenas. *See In re Lufkin*, 255 B.R. 204, 209 (Bankr. E.D. Tenn. 2000) ("[W]hile the scope of Rule 2004 is broad, the rule cannot be used to harass, abuse, or inquire into irrelevant matters, and *examinations should not be overly disruptive or costly*") (emphasis added); *accord In re Fearn*, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989).

D. <u>The Examiner's Discovery Should Be Coordinated With *Newby*</u>

Even if this Court were to determine, notwithstanding the foregoing, that the Examiner's discovery under Rule 2004 should be permitted to proceed in principle, the Court should order the Rule 2004 discovery to be coordinated with that in the *Newby* Litigation. The Multidistrict Litigation Panel assigned the consolidated Enron-related action to this Court "for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. "The purpose for consolidating cases under the Multidistrict

Litigation statute is to decrease the duplicity and redundancy by having coordinated discovery for cases 'involving one or more common questions of fact pending in different district.' 28 U.S.C. § 1407(a)." *Bellorin v. Bridgestone/Firestone, Inc.*, 236 F. Supp. 2d 670, 676 (W.D. Tex. 2001); *see also In re Holiday Magic Securities and Antitrust Litig.*, 384 F. Supp. 1403, 1404 (Jud. Pan. Mult. Lit. 1974) ("[C]oordinated or consolidated pretrial proceedings will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation"); *In re Koratron*, 302 F. Supp. 239, 242 (Jud. Pan. Mult. Lit. 1969) (holding "common questions of fact require that this case be included for consolidated or coordinated pretrial purposes"); Manual for Complex Litigation, § 21.423 (3d ed. 1995) ("If related cases are pending in more than one court, common discovery should be coordinated to avoid duplication and conflicts").

Indeed, this Court has itself repeatedly noted the need to coordinate discovery. *See, e.g., In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 438 (S.D. Tex. 2002) ("The Court finds that consolidation, at least pretrial, serves to promote an orderly progression of this very complex litigation, especially since discovery necessarily involves overlapping Defendants and a common core of facts and legal issues that all relate to a purported scheme and course of conduct"). Judge Gonzalez has gone even further, ordering the Examiner to coordinate his discovery with that in *Newby,* an order with which the Examiner has refused to comply. Ex. 2, ¶ 18 ("[T]he Committee, Examiner and Debtors are directed to coordinate, to the extent practicable, the discovery authorized herein with any discovery in the consolidated class action in the event the PSLRA stay is lifted").

In addition to violating Judge Gonzalez's express order, the Examiner's refusal to coordinate his discovery with that in *Newby* threatens to undermine the Court's efforts to manage the complex litigation before it and unnecessarily burdens Andersen and the Andersen Individuals. First, competing discovery obligations from the Examiner and the Creditors Committee in the Enron bankruptcy proceeding and state court litigants in unconsolidated proceedings will interfere with and undermine this Court's scheduling orders designed to ensure

that discovery is taken in an orderly and efficient manner. *See In re Inter Op Hip Prosthesis,* 174 F. Supp. 2d. at 654 ("it appears likely impossible for defendants to respond both to discovery obligations mandated by this Court and the innumerable . . . deposition requests [in other matters]"); *In re Taxable Mun. Bonds Litig.*, 1992 U.S. Dist. LEXIS 12207, at *8, *12 (E.D. La. Aug. 12, 1992) (ordering state court discovery coordinated with MDL litigation where "necessary" to prevent duplication and waste); *Arthur-Magna, Inc. v. Del-Vac Financial Corp.*, 1991 WL 13725, at *1 (D.N.J. Feb. 1, 1991) ("if separate discovery were to go forward, much work would be duplicated"); *Three J Farms, Inc. v. Alton Box Bd. Co.,* 1978 WL 1459, at *3 (D. S.C. Nov. 29, 1978) (holding that a separate action should not be maintained where a duplication of discovery efforts would not "justify the cost, waste of judicial time and other complications attendant to discovery proceedings [separate from those being conducted under the Multidistrict Litigation]"); *cf. Newby v. Enron Corp.*, 2002 WL 1001056, at *2 (S.D. Tex. May 1, 2002) ("If . . . state court actions proceed independent of the Newby Litigation, any coordinated efforts to resolve this litigation prior to a trial on the merits of these claims will fruitless").

Second, unchecked and uncoordinated 2004 examinations unduly burden the litigants. Already some of the Andersen Individuals have been sought for depositions by the Creditors Committee and have been requested for interviews and/or depositions by various governmental agencies. With the looming prospects of discovery in *Newby*, as well as depositions in the numerous outstanding unconsolidated proceedings, the Andersen Individuals face the burdensome prospect of repeated and duplicative depositions. *See Gross Metal Products, Inc. v. Falls Mfg. Co.*, 1996 WL 36899, at *2 (E.D. Pa. Jan. 31, 1996) (transferring one of two parallel suits where "allowing both suits to proceed would burden the parties and witnesses with duplicative depositions and travel"); *S.E.C. v. Saul*, 133 F.R.D. 115, 116-17 (N.D. Ill. 1990) (precluding SEC from initiating duplicative depositions in an effort to "spare the defendants from undue burden and expense"). Because the Examiner has no compelling need to take these examinations now, and the burden the examinations would impose on Andersen and the

Andersen Individuals without coordination is so high, the balance of equities clear ways in favor of coordination.

In order to avoid these burdens to witnesses, and to reap the benefits of coordination, district courts supervising complex, multidistrict litigation have regularly enforced coordination or stayed conflicting discovery. *See In re Taxable Mun. Bonds*, 1992 U.S. Dist. LEXIS 12207, at *8, *12 (ordering coordinated discovery); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 535 (S.D. Ind. 2002) (ordering coordinated deposition between federal court and state court plaintiffs and other defendants); *In re Diet Drugs Prods. Liab. Litig.*, 2001 U.S. Dist. LEXIS 5927 (N.D. Pa. May 9, 2001) (ordering coordination of discovery between related proceedings); *see also In re Bankamerica Corp. Sec. Litig.*, 263 F.3d 795, 802-04 (8th Cir. 2001) (staying state court discovery); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 1989 U.S. Dist. LEXIS 3878, at *5 (E.D. Ill. Apr. 10, 1989); *In re Inter Op Hip Prosthesis*, 174 F. Supp. 2d at 653-54 (staying uncoordinated state court discovery); *see also Newby v. Enron Corp.*, 2002 WL 1001056, at *2 (staying state court discovery during PSLRA stay). In the event this Court does not quash the Subpoenas in their entirety, it should enforce Judge Gonzalez's order requiring coordination and require that the Examiner's discovery be coordinated with the *Newby* Litigation, as counsel for Andersen and the Andersen Individuals have offered. Palmer Decl., ¶ 7.

IV. CONCLUSION

At bottom, the Examiner cannot satisfy the legal requirements to obtain the Rule 2004 examinations that he seeks. First, the Examiner cannot demonstrate that he has a genuine need for the discovery in order to determine whether the estate has unasserted legal claims that it should assert. Second, even if the Examiner could meet that threshold burden, the Subpoenas should be quashed because Andersen and the Andersen Individuals are "affected" by pending litigation that is closely related to the discovery sought. Third, any need for the Rule 2004 examinations is far outweighed by the palpable burden the examinations would impose on

Andersen and the Andersen Individuals. Finally, if the Examiner's discovery were permitted to go forward, it should be coordinated with discovery in the *Newby* Litigation.

For the these reasons, this Court should grant this motion and quash the Examiner's Subpoenas. In the alternative, this Court should order that the examinations requested by the Examiner be coordinated with depositions in the *Newby* Litigation.

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Respectfully submitted,

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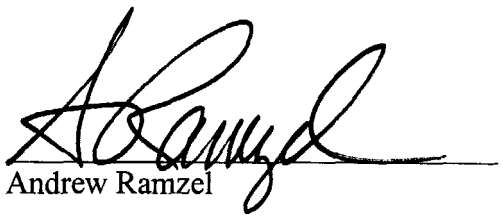
CERTIFICATE OF SERVICE

I certify that on this 14th day of May, 2003, a true and correct copy of the foregoing pleading was served on all counsel pursuant to the Court's service orders.



Andrew Ramzel