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

United States Courts
Southern District of Texas
FILED
MAY 20 2003
Michael N. Milby, Clerk

MARK NEWBY, ET AL.,	}	
	}	
Plaintiffs,	}	
	}	CIVIL ACTION NO. H-01-3624
v.	}	AND CONSOLIDATED CASES
	}	
ENRON CORP., ET AL.,	}	
	}	
Defendants.	}	

RESPONSE OF NEAL BATSON, THE ENRON CORP. EXAMINER, TO ARTHUR ANDERSEN LLP'S AND ARTHUR ANDERSEN INDIVIDUALS' MOTION FOR PROTECTION FROM BANKRUPTCY RULE 2004 SUBPOENAS

I. INTRODUCTION

Neal Batson, the Examiner (the "Examiner") appointed in the Enron Corp. ("Enron") bankruptcy case pending in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), pursuant to the Order entered by the Honorable Arthur J. Gonzalez on April 8, 2002 (the "April 8 Order" [Docket No. 2838]) (attached hereto as Exhibit ("Ex.") 1), by his undersigned counsel, respectfully submits this memorandum in opposition to the Motion for Protection from Rule 2004 Examination ("Motion for Protection") filed by Arthur Andersen LLP ("Andersen") and John Stewart, Benjamin Neuhausen, Carl Bass, Debra Cash, and Patricia Grutzmacher (the "Andersen Individuals") (Andersen and the Andersen Individuals are sometimes collectively referred to as "the Witnesses").[1] The Motion for Protection is in response to

[1] The Witnesses provided responses and objections to the Subpoenas for Rule 2004 Examinations on Monday, May 19, 2003, rather than serving them contemporaneously on the Examiner along with the Motion for Protection delivered on May 15, 2003. The Examiner notes that his Response to the Motion for

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subpoenas for Rule 2004 Examinations scheduled to take place during the period, May 26, 2003, to June 4, 2003. The Witnesses' assertions, like those made by others that have (unsuccessfully) filed motions to quash in this Court, run contrary to the purpose of a Rule 2004 Examination and misconstrue the nature and scope of the appointment of an Examiner pursuant to the April 8 Order and to 11 U.S.C. § 1104(c). The Witnesses played integral roles in the matters that are the subject of this Examination. *See* Affidavit of William T. Plybon (the "Plybon Affidavit"), at ¶ 3 (attached hereto as Ex. 2). Evidence indicates that they assisted Enron in designing and implementing its numerous SPE transactions. Accordingly, their testimony is central to the Examiner's investigation. As the Second Circuit has recognized, "[O]ne of the purposes for conferring upon the trustee [or an examiner] in reorganization broad investigatory powers" is "the exposure of corporate abuses . . . ." *Austrian v. Williams*, 198 F.2d 697, 702 (2d Cir. 1952); *see also Weissman v. Hassett*, 47 B.R. 462, 467 (S.D.N.Y. 1985) (citing *Austrian* and noting that "[t]he courts recognize that dissemination of a judicial opinion or report may serve an important public purpose"); *cf.* 11 U.S.C. § 107 (providing for public access to papers filed in bankruptcy proceedings). The testimony of these Witnesses will greatly aid this important purpose and should proceed.

This Court has twice addressed and rejected the same issues now raised by the Witnesses. *See* Order on Motion for Protection from Bankruptcy Rule 2004 Subpoenas dated March 12, 2003 (the "March 12 Order") (attached hereto as Ex. 3), and Order on Motions to Quash Subpoenas for Rule 2004 Examination dated May 15, 2003 (the "May

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Protection addresses only those contentions made by the Witnesses in the Motion for Protection, not those contained in the responses and objections to the subpoenas. The Examiner reserves the right to respond to these latter pleadings at another time.

15 Order") (attached hereto as Ex. 4). Accordingly, the Examiner respectfully asks this Court to deny the Motion for Protection.

II. BACKGROUND

On December 2, 2001 and on certain dates thereafter, Enron and certain of its affiliates (collectively, and together with the later-filing entities, the "Debtors") filed voluntarily petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtors have continued to operate their businesses and manage their affairs as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. On April 8, 2002, the Bankruptcy Court entered the April 8 Order authorizing and directing the appointment of an Examiner pursuant to 11 U.S.C. § 1104(c) to inquire into, *inter alia*, all transactions (as well as all entities, as defined in the Bankruptcy Code, and pre-petition professionals involved therein): (i) involving special purpose vehicles or entities created or structured by the Debtors or at the behest of the Debtors, that are (ii) not reflected on Enron's balance sheets, or that (iii) involve hedging using Enron stock, or (iv) as to which the Examiner has the reasonable belief are reflected, reported or omitted in the relevant entity's financial statements not in accordance with generally accepted accounting principles, or that (v) involve potential avoidance actions against any pre-petition insider or professional of the Debtors. April 8 Order, at 2. In addition, 11 U.S.C. §1106 (a)(4)(A) requires the Examiner to report on "fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate." On May 22, 2002, the United States Trustee for the Southern District of New York appointed Neal Batson as the Examiner. The United States Trustee's appointment of

Neal Batson as Examiner was approved by the Bankruptcy Court by Order dated May 24, 2002.

In order to fulfill his Court-ordered and statutory duties, the Examiner determined it was necessary and appropriate to seek the production of documents and to conduct oral examinations. By a motion filed in the Bankruptcy Court, the Examiner sought and obtained permission to issue Bankruptcy Rule 2004 subpoenas for the production of documents upon numerous entities and individuals. *See* Bankruptcy Court Order dated September 12, 2002 ("September 12 Order") [Docket No. 6449] (attached hereto as Ex. 5). The Examiner subsequently sought the Bankruptcy Court's authority to obtain oral testimony from certain individuals, including these Witnesses. *See* Third Motion of Neal Batson, the Examiner, Pursuant to Federal Rule of Bankruptcy Procedure 2004 for an Order Directing Production of Documents and Oral Examinations [Docket No. 9128] (attached hereto as Ex. 6). By Order dated February 27, 2003, the Motion was Granted [Docket No. 9439] (attached hereto as Ex. 7).

At present, the Examiner is required to submit his Third Interim Report by June 30, 2003. The scope and subjects upon which the Examiner now seeks the testimony of the Witnesses are germane to the ongoing investigation and are *not* duplicative of any efforts and/or material previously obtained throughout the course of this Examination.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Both Andersen and the Andersen Individuals Have Unique Knowledge of Matters Within the Scope of the April 8 Order and Are Therefore a Proper Subject of Rule 2004 Examination

The Witnesses contend that "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 . . . ." Motion

for Protection, at 2. To the contrary, the testimony of these Witnesses is necessary to investigate thoroughly and analyze issues relative to the Examination and, in particular, to locate assets and uncover possible causes of action (and defenses to same), not only against Andersen but a variety of other entities. Rule 2004 is the proper vehicle through which to conduct this investigation.

It is well established that "discovery under Rule 2004 extends beyond the debtor to persons associated with him as well as to those persons who may have had business dealings with the debtor." *Deloitte & Touche v. Hassett*, 123 B.R. 488, 490 (S.D.N.Y. 1991). Under Rule 2004, which is the "basic discovery device" used in bankruptcy cases, an examination of *any* party is permitted, even without a pending adversary proceeding or contested matter. *In re Symington*, 209 B.R. 678 (Bankr. D.Md. 1997) (internal citations omitted). Such examinations are intended to aid in discovery of assets of the estate and to expose fraudulent conduct. *Id.* To that end, third parties having knowledge of the debtor's affairs, as well as the debtor itself, are subject to examination. *Id.*

The Examiner has good cause to seek the Rule 2004 testimony of each of these Witnesses. The Examiner is charged with investigating and reporting on Enron's SPE transactions and also on whether potential claims may lie against third parties. Given the evidence adduced to date suggesting the central role of the Witnesses in Enron's affairs, the investigation would not be complete without their testimony. As the court in *In re GHR Energy Corp.*, 35 B.R. 534, 537 (Bankr. D. Mass. 1983), stated: "[I]t is evident that [a Rule 2004] examination may be had only of those persons possessing knowledge of a debtor's acts, conduct or financial affairs so far as this relates to a debtor's proceeding in bankruptcy." The Examiner has a valid basis to believe that these Witnesses possess

substantial knowledge regarding Enron's use of SPEs and its accounting. *See* Plybon Affidavit, at ¶¶ 3-4.

The Witnesses' citation in their Motion for Protection to *In re GHR* is incomplete at best. The court there denied the debtor's request for use of a Rule 2004 examination because the witnesses sought to be examined did not possess "*any* information properly discoverable by the debtors in the context of a Rule 2004 examination." *In re GHR*, 35 B.R. at 538 (emphasis added). Here, to the contrary, both Andersen and the Andersen Individuals do possess information that is directly relevant to the Examination and which the Examiner believes will have a substantial bearing on the claims that the Estate may eventually assert against outside third parties. *See* Plybon Affidavit, at ¶ 3.

The Witnesses also argue that because the Examiner has already reported on various transactions in which Enron engaged, the requested examinations of Andersen and the Andersen Individuals are not necessary to determine whether the Estate has unasserted claims that may be pursued. Motion for Protection, at 15. This argument ignores the fact that the Examiner is conducting an investigation not just to identify claims, but also to carry out the broad mandate of the April 8 Order. Moreover, the Examiner's two prior reports were based entirely on documentary and other material evidence that was available to the Examiner *at the time the reports were issued.*

As the Second Interim Report indicates, issues such as possible claims against third parties remain to be investigated. Second Interim Report of Neal Batson, Court-Appointed Examiner, dated January 21, 2003, at 13 (a copy of the relevant portion of the Report is attached hereto as Ex. 8). The information, both testimonial and documentary, that the Examiner seeks from Andersen and the Andersen Individuals constitutes

evidence that the Examiner has not yet had an opportunity to review or analyze. The Examiner has not yet spoken with any of the Witnesses. As is acknowledged in the Witnesses' own pleadings, they have not even produced all of the documents requested in and relevant to the investigation. Motion for Protection, at 10. It strains credulity to accept the Witnesses' position that the Examiner should be denied new evidence to determine whether the Estate may assert claims against various third parties when it is that very evidence that the Examiner needs in order to make the determination in the first place.

The Examiner's Third Interim Report will describe additional aspects of Enron's SPE transactions and will also identify and discuss the viability of certain third party claims that the Estate may assert. Necessarily, an investigation of all of these issues must include the Witnesses, who possess unique knowledge and understanding of Enron's SPE transactions.[2]

B. The Examiner is not a Party to the *Newby* Litigation or the Fastow Litigation, and Therefore May Continue to Conduct Rule 2004 Discovery on the Witnesses

Both the *Newby* Litigation and the Fastow Litigation are proceedings that involve claims brought by the Official Committee of Unsecured Creditors (the "Creditors' Committee") against various officers and directors of the Debtors and third parties associated with the Debtors. The Examiner is not affiliated with the either proceeding, nor is he a party to those proceedings. As a result, consistent with this Court's prior

[2] The Andersen Individuals are listed on numerous documents as having participated directly or indirectly in various Enron transactions. However, what remains to be determined is the *extent* to which the Individuals participated in the transactions and what role they played in them. As a result, the Examiner needs Rule 2004 evidence from these individuals and from Andersen itself in order to fully understand the scope of the Witnesses' participation in Enron's affairs throughout the period specified in the April 8 Order. *See* Plybon Affidavit, at ¶ 3.

rulings, he is free to use Rule 2004 to obtain discovery from the Witnessess, even though some or all of the Witnesses may be associated with the *Newby* or Fastow proceedings.

The Witnesses assert that once adversary proceedings have commenced, the use of Rule 2004 subpoenas will no longer be permitted and the protections afforded by the Federal Rules of Civil Procedure will apply. They cite *In re Blinder*, 127 B.R. 267 (D. Colo. 1991) in support of this proposition. What their argument overlooks, however, is the procedural posture inherent in that case. There, it was the same individual (the trustee) who sought to initiate the adversary proceeding and press forward simultaneously with a 2004 examination in the bankruptcy. *In re Blinder*, 127 B.R. at 273.

This misconstruction of the applicable law is also apparent in the Witnesses' recitation of this Court's ruling on the Outside Directors' Motion for Protection from Bankruptcy Rule 2004 Subpoenas in connection with the *Newby* Litigation on December 12, 2002 (attached hereto as Ex. 9). There, it was the *Creditors' Committee* who sought to use Rule 2004 subpoenas after already having commenced adversary proceedings, avoiding the strictures of the Federal Rules of Civil Procedure. Thus, this Court prohibited the Creditors' Committee from pursuing its Rule 2004 Examinations. In contrast, the Examiner, unlike the Creditors' Committee in the *Newby* Litigation and the Trustee in *In re Blinder*, is not a party to the underlying adversary proceeding. Thus, discovery under Rule 2004 is appropriate for the Examiner, both from parties that are defendants in any litigation and from parties related to those involved in litigation. *See also 2435 Plainfield Ave., Inc. v. Township of Scotch Plains (In re 2435 Plainfield Ave., Inc.)*, 223 B.R. 440, 455-56 (Bankr. D.N.J. 1998); *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 29-30 (Bankr. N.D.N.Y. 1996).

The Witnesses also assert that the Examiner "share[s] a common interest" with the Creditors' Committee, and suggest that the Examiner's discovery efforts under Rule 2004 should be treated in the same fashion as the Creditors' Committee's discovery under Rule 2004. *See* Motion for Protection, at 20. This contention is incorrect. While the Creditors' Committee owes a fiduciary duty to the creditors it represents, *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 513 (S.D.N.Y. 1994), "[e]xaminers . . . play a chiefly information-seeking role and, like the court itself, must remain a neutral party in the bankruptcy process." *Kovalesky v. Carpenter*, 1997 WL 630144 at *3 (S.D.N.Y. Oct. 9, 1997). Accordingly, the Examiner's Rule 2004 Subpoenas issued to the Witnesses were issued in furtherance of the Examiner's duties to the Bankruptcy Court: to investigate Enron's structured finance vehicles and the persons and entities involved with them, and to file reports. *See In re Big Rivers Elec. Corp.*, 213 B.R. 962, 977 (Bankr. W.D. Ky. 1997) (recognizing the examiner as "a party who is not an adversary but rather an independent third-party and officer of the Court."); *see also In re Interco, Inc.*, 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("[T]he Examiner's role is by its nature disinterested and non-adversarial. There is no doubt that the Examiner is a neutral party in a bankruptcy case."); *In re Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) ("[The Examiner] is first and foremost disinterested and nonadversarial. . . . [H]e answers solely to the Court.").

Once the Examiner receives materials from the Witnesses and takes testimony from them, he will then be able to report on their role in Enron's pre-petition financial affairs in his reports to the Bankruptcy Court. The Examiner is under an obligation to report his findings impartially, whether it benefits Enron's bankruptcy estate or impairs it.

See Leonard L. Gumport, *The Bankruptcy Examiner*, 20 Cal. Bankr. J. 71, 101 (1992) (comparing the duties of a trustee and an examiner, and noting that "the trustee may be more adversarial in its investigation and report than an examiner would be, because the trustee . . . will have a stake in pursuing any causes of action identified in the investigation. Even a totally impartial and fair trustee may be reluctant to file a report which discloses in detail possible weaknesses in causes of action which the trustee plans to prosecute"). Judge Gonzalez recently recognized that the Examiner's role was to report on his facts and findings, regardless of whether Enron or a particular defendant will benefit from them:

> Let me also add something because I think it's probably an appropriate time. And I have viewed this process in terms of duties of the Examiner. There's really a, what I consider two different standards that are contained within the Examiner order. One is the duty to the Court as a fact-finder, and there the Examiner's role is to do his report and whether the findings are in the best interest of the estate, the findings should be made in accordance with what the Examiner believes the facts and circumstances require.
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> . . .
>
> I have no doubt at all that the Examiner is fully aware of the fact-finding and conclusion and, et cetera, that *the standard is the duty to the Court and not any particular constituency, including the estate.*

(*In re Enron Corp.*, Transcript of Hearing of Feb. 27, 2003, at 18-19 (Bankr. S.D.N.Y. Case No. 01-16034) (emphasis added) (a copy of the relevant transcript excerpts is attached hereto as Ex. 10)).

Thus, unlike the Creditors' Committee, the Examiner has been and will remain impartial, and will not use discovery to prove one case or disprove another. Indeed, certain of Enron's former outside directors have voluntarily agreed to be interviewed and to provide sworn testimony to the Examiner because of, among other reasons, his independent investigatory role. Despite this cooperative approach by similarly situated

parties, the Witnesses persist in their efforts to thwart the Examiner, and incorrectly argue the Examiner and the Creditors' Committee have the same interests and constituencies. As the cases noted above illustrate, however, the Examiner's role is different, and the reasons used to preclude Bankruptcy Rule 2004 discovery in certain circumstances by the Creditors' Committee should not apply here.

Moreover, as mentioned previously, the Examiner is also different from the Creditors' Committee in that he is not a litigant, in this case or any other. The Bankruptcy Court's Order appointing the Examiner provided him with no authority to file lawsuits. While the August 29, 2002, Order of Judge Gonzalez granted the Examiner authority to sue certain officers and directors, it simultaneously effected an assignment of that authority to the Creditors' Committee. *See* Bankruptcy Court Order dated August 29, 2002 [Docket Number 6189] (attached hereto as Ex. 11). Accordingly, unlike the Creditors' Committee or any of the other parties before this Court, the Examiner is not in a position to resort to discovery under Federal Rule 7026 *et seq.* and may only use Rule 2004. Indeed, given that the Examiner has no power to sue, Bankruptcy Rule 2004 is the only discovery tool available to him. The Motion for Protection not only ignores the Examiner's unique role in the Enron investigation, but, if granted, would eliminate the Examiner's *only method* to compel parties to respond to his inquiries. Accordingly, because the Motion for Protection incorrectly identifies the Examiner's role and seeks to curtail the Examiner's fact-finding mission with respect to Andersen and the Andersen Individuals, it should be denied.

The Witnesses also assert that evidence procured by the Examiner during a Rule 2004 examination of the Andersen Individuals will be "used against them by the

Creditors' Committee in the Newby Litigation" by virtue of the Sharing Order entered on September 12, 2002. Motion for Protection, at 18, 20; *see also* September 12 Order, at ¶ 11.[3] However, this issue has already been addressed by this Court in ruling on the Motion for Protection from Bankruptcy Rule 2004 Subpoenas, on March 12, 2003. Counsel for Richard A. Causey, Richard Buy, Kenneth Rice, Mark Frevert, Jeffrey McMahon, Steven Kean and Joseph Sutton ("Officer Defendants") objected to the use of Bankruptcy Rule 2004 on Officer Defendants contending that the Examiner had an obligation to share discovery material with the Creditors' Committee. The Examiner demonstrated his willingness to enter into a revised Discovery Sharing Stipulation, pursuant to which the Examiner, the Creditors' Committee and the Debtors would agree that the Examiner would not share documents, deposition testimony or other material he received from any defendant in the Creditors' Committee's suit.

This Court denied the Officer Defendants' Motion, stating that:

> In light of the "Discovery Sharing Stipulation" prohibiting sharing of the discovery obtained from Richard Buy and Richard A. Causey with the Creditors' Committee and other entities, the Examiner's willingness to expand that stipulation to protect the remainder of the Officer Defendants from the Creditors' Committee's use of the Bankruptcy Rule 2004 to obtain discovery . . . the Court finds the discovery sought by the Examiner should be allowed to go forward.

March 12 Order, at 2.[4]

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[3] The Witnesses reference the case of *Official Committee of Unsecured Creditors v. Arthur Andersen LLP*, Case No. 02-03119 (Bankr. S.D.N.Y. 2002). Motion for Protection, at 7. As this Court is aware, however, that case is a statutory preference action only. As a result, any overlap in document production or testimony would be de minimis. In addition, the Examiner to date has not reported on any payments made to Andersen that would fall within the purview of a preference action.

[4] Similarly, at the hearing on the Examiner's first Bankruptcy Rule 2004 Motion held on August 29, 2002, counsel for the Bank of New York and certain other plaintiffs in the Marlin Adversary Proceeding raised objections to using Bankruptcy Rule 2004 to obtain discovery in that action, and to the Examiner's sharing such discovery with the Committee and Enron, both litigants in the Marlin Adversary Proceeding. (*In re Enron Corp.*, Transcript of Hearing of Aug. 29, 2002, at 66-68, 117-18 (Bankr. S.D.N.Y. Case No. 01-

In keeping with its prior ruling, this Court should allow the Examiner to obtain Rule 2004 discovery from the Witnesses subject to an order that any discovery material produced in response to the Examiner's subpoenas will not be shared, unless permitted by further order.[5] The Examiner has no objection to modifying the Discovery Sharing Stipulation so as to allay any confidentiality concerns the Witnesses may have.

C. This Court has Previously Rejected the Argument that the Burden Associated with a Court-Authorized Rule 2004 Examination Outweighs the Benefit of Obtaining Relevant and Discoverable Evidence from that Examination

The Witnesses assert that because the Examiner has no need for the Rule 2004 discovery he seeks in connection with this matter, any benefit achieved through use of the Rule 2004 discovery would not outweigh the burden and expense incurred by the Witnesses in having to comply with the Rule 2004 subpoenas. Motion for Protection, at 21. As the Examiner has shown, Rule 2004 discovery from these Witnesses is, in fact, necessary in order to complete a thorough examination of the Debtors' affairs and ensure that any and all claims the Estate may have are properly delineated and substantiated in sufficient detail.

In addition, this Court has already addressed and rejected a similar argument in ruling on R. Davis Maxey's Emergency Objection and Motion to Quash Subpoena for

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16034) (a copy of the relevant transcript excerpts is attached hereto as Ex. 12)). Judge Gonzalez resolved these objections in the September 12 Order by ruling that any party having documents and deposition testimony:

> relating to the Marlin transactions, the Marlin Water Trust, Bristol Water Trust or the Atlantic Water Trust (collectively, the "Marlin Subject Matter") shall produce such Rule 2004 Material to the Examiner, who shall not, unless permitted by further order of the Court . . . share such information with the Committee, the Debtors or any other entity.

(September 12 Order, at ¶ 12).

[5] As noted above, the Creditors' Committee has already agreed to such a procedure once, via the Discovery Sharing Stipulation.

Rule 2004 Examination, on May 15, 2003. There, Mr. Maxey argued that "a second examination would be of a marginal benefit to the Examiner" and would involve "a substantial cost to Mr. Maxey in time, money and inconvenience." R. Davis Maxey's Emergency Objection and Motion to Quash Subpoena for Rule 2004 Examination, at 8 (attached hereto as Ex. 13). In denying the motion, this Court observed that the Examiner is not "intending to duplicate previous information gathering sessions held with each witness, nor . . . attempting to harass or burden the witness. The Court is convinced that there is a probability that *each witness has information germane to the Examiner's investigation that the Examiner has yet to obtain.*" May 15 Order, at 2 (emphasis added). The Examiner requests a Rule 2004 Examination from the Witnesses because they each have information that is germane to his investigation, and the Examiner has not yet spoken with any of them.

Additionally, whether the Creditors' Committee or its eventual designee chooses to bring an adversary proceeding against the Witnesses and subject them to multiple depositions is irrelevant for purposes of the Examiner's present request to conduct Rule 2004 Examinations for three reasons. First, as mentioned, the Examiner and the Creditors' Committee are separate and distinct entities, each with its own responsibilities. Second, the Witnesses must acknowledge that they would be subject to additional depositions regardless of who the eventual plaintiff would be in the adversary proceeding. That plaintiff would be free to conduct depositions in accordance with the Federal Rules of Civil Procedure and would not be restricted or limited in any fashion by what transpired throughout the course of the current Examination. Finally, as the Witnesses cannot dispute, they played a key role in one of the largest corporate failures in

history. Requiring their testimony, even if it were more than once, is not, in the context of the impact of this case on so many lives, very burdensome.

D. Coordination with the Creditors' Committee in Connection with the *Newby* Litigation Would not be Practicable Vis-à-vis the Witnesses

The Witnesses accuse the Examiner of "violating Judge Gonzalez's express order" and refusing to "coordinate his discovery with that in Newby . . . ." Motion for Protection, at 23. This argument demonstrates the Witnesses' capacity to ignore plain facts while making inflammatory assertions.

As this Court is aware, little if any discovery has occurred to date in *Newby*. Accordingly, as has been the case in the past, coordination with the *Newby* plaintiffs is not practicable. On Monday, May 19, 2003, the Examiner contacted the *Newby* plaintiffs to inquire as to discovery of Andersen. As was the case previously, the Examiner was informed that the *Newby* plaintiffs had not received any Andersen documents and were not prepared to proceed with depositions.[6] Plybon Affidavit, at ¶ 6.

Judge Gonzalez's mandate that the Examiner coordinate his efforts with the *Newby* parties is based on the condition that those efforts be accomplished only "to the extent practicable." *See* September 12 Order, at ¶ 18. The Examiner believes that it would not be "practicable" to wait until the *Newby* plaintiffs are fully prepared and ready to proceed with depositions and other discovery in connection with the examination of the current Witnesses, given the relevant and crucial information that these Witnesses possess. Any delay in obtaining the information from these Witnesses will substantially

[6] Amazingly, the Witnesses urge this Court to defer to discovery in *Newby* despite admitting that in *Newby* they had yet to produce *12 million* pages of documents. *See* Motion for Protection, at 10. Arguing that the Examiner must wait for Andersen to produce those documents is directly contrary to the very purpose of this Examination and to the well-settled law described above.

impede the Examiner's efforts to fully and adequately report on the Debtors' affairs and dealings with third parties, and will prevent him from adhering to the 120-day schedule for filing his Third Interim Report as required by the April 8 Order.

IV. CONCLUSION

For the foregoing reasons, the Examiner requests that the Motion for Protection be denied. Further, the Examiner notes that the Witnesses raise arguments that have been twice rejected by this Court in this proceeding. Particularly in light of the obvious relevance of any testimony from the Witnesses, and that the Examiner has been required, yet again, to expend resources responding to these arguments, the Court may find it appropriate to consider sanctions.

Respectfully submitted, this 19th day of May, 2003.

James C. Grant (by WTPlybon w/ express permission)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the pleading was sent to Jerri Hardaway of Milberg, Weiss, Bershad Hynes & Lerach, LLP on May 19, 2003 for service on all counsel of record on the Service List via posting to www.es13624.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 served on the following counsel for Andersen and the Andersen Individuals via overnight delivery (with exhibits) on May 19, 2003.

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The Exhibit(s) May

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