

United States Courts  
Southern District of Texas  
FILED  
VH OCT 31 2003  
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

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

§  
§  
§ CLASS ACTION

-----  
This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

-----  
THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

-----  
**LEAD PLAINTIFF'S MOTION TO COMPEL THE BANKS TO  
PRODUCE THE SWORN STATEMENTS AND DEPOSITION TRANSCRIPTS  
OF THEIR EMPLOYEES**

1803

Lead Plaintiff requests that the Court order Bank of America, Barclays, CIBC, Credit Suisse First Boston, Lehman Brothers, and Merrill Lynch and their subsidiaries (collectively, the “Banks”) to produce the sworn statements given to the Enron Examiner and transcripts of Bank employees’ depositions taken by the Enron Examiner. The Banks have recently filed a motion for a protective order before Judge Gonzalez (attached as Ex. A) in an attempt to keep these statements and deposition transcripts hidden from Lead Plaintiff and the securities class plaintiffs it represents. Lead Plaintiff has requested that the Banks turn over those statements/transcripts in the litigation before this Court. Since each of the Banks is a defendant in this litigation, this Court is the appropriate forum for ruling on Lead Plaintiff’s motion to compel.<sup>1</sup>

Months ago, Lead Plaintiff requested that Enron Examiner Neal Batson afford Lead Plaintiff access to the statements/transcripts referenced in his reports. His counsel advised that Lead Plaintiff should obtain the information from the Banks. Lead Counsel followed up on the request for production of statements/transcripts, which we served in 2002, directed to the Banks. *See Ex. B.* The Banks have refused to produce them to us.

Lead Counsel plan to start taking depositions in January 2004. Lead Counsel will depose many of the same individuals from whom the Examiner has taken testimony. Repeating questions previously asked by the Examiner would be a waste of time for all parties involved. We are making every effort to be efficient to prepare this case for trial in accordance with the Court’s Scheduling Order.

The Banks are bent on hiding the testimony of their witnesses behind the cloak of the Bankruptcy Examiner. Lead Plaintiff is not impeding the Examiner’s investigation in any way.

---

<sup>1</sup> Fed. R. Civ. P. 37 provides “An application for an order to a party shall be made to the court in which the action is pending.”

Lead Plaintiff simply requests the prior sworn statements of witnesses that it will depose. If this motion to compel is denied, then only the Banks and the Enron estate will have access to those transcripts.

The Banks assert that the information should be kept from the securities class plaintiffs so that the Enron Examiner and future examiners are not hobbled. The Banks seem to say that their employees told the Examiner the truth in a wide-ranging inquiry *only* because the Examiner promised to keep the information confidential. Lead Plaintiff seriously doubts that Mr. Batson or other examiners will be hampered from their efforts if the statements at issue here are produced.<sup>2</sup>

Notably, the Enron Examiner has issued three reports referencing bank documents and bank witness statements supporting his conclusions that most of the Banks are wrongdoers and several are *knowing* wrongdoers. The securities class plaintiffs are entitled to “the rest of the story,” that is, not just the Examiner’s conclusions based on the testimony. There is no need to ask the same witnesses the same questions again. With this information we can streamline the depositions that we take. Finally, if we do not obtain the statements now and we get inconsistent testimony, surely at trial we can obtain and have admitted the prior inconsistent testimony to impeach these witnesses.

The Banks also assert that the statements of their witnesses should not be produced because the plaintiffs here may make “improper use” of testimony that was given “without all of the

---

<sup>2</sup> The Banks cite two cases in support of hiding their employees’ sworn statements. The Bank assert that the “assurance of confidentiality often is essential” for the examiner to secure evidence, citing *In re Ionosphere Club*, 156 B.R. 414 (S.D.N.Y 1993). Motion at 11. In *Ionosphere*, the court denied a motion to unseal the entire record of evidence gathered by the examiner. Likewise, in *In re Baldwin United Corp.*, 46 B.R. 314 (Bankr. S.D. Ohio 1985), the question was whether the entire examiner’s record should be preserved for the benefit of shareholders. The bankruptcy court noted that the *district court* would likely have to decide whether the examiner’s investigative materials would be disclosed. Here, Lead Plaintiff is seeking nothing from the Enron Examiner. Lead Plaintiff seeks only the sworn statements and deposition transcripts of Bank employees from the Banks.

protections established in the Federal Rules of Civil Procedure.” Motion at 3. The Banks do not define what “protections” are referred to, but one could speculate that the Banks would argue that the testimony is not relevant and try to block us from getting it in our case. However, the sworn statements taken by the Enron Examiner are plainly relevant to this case. The Enron Examiner was authorized to investigate all transactions “(i) involving special purpose vehicles or entities created or structured by the Debtors ... that are (ii) not reflected on the Enron Corp. balance sheets, or that (iii) involve hedging using the Enron Corp. stock, or (iv) as to which the Enron 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.” Order Pursuant to 11 U.S.C. §§1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner at 2 (April 8, 2002). The Enron Examiner has gathered evidence and reported on many of the transactions Lead Plaintiff identified in the Consolidated Complaint filed on April 8, 2002.

The Banks want to hide the evidence pursuant to a confidentiality order entered by Judge Gonzalez. However, to the extent that there is any difference between a confidentiality order entered by Judge Gonzalez and this Court’s orders, this Court’s orders should govern evidence produced by the parties in this action, especially given the fact that Judge Gonzalez has consistently taken the approach that discovery issues as they related to the Class Action should be governed by this Court.

In the motion for protective order, the Banks point to an order Judge Gonzalez entered denying Lead Plaintiff access to certain documents on the 2004 Web site. The 2004 Web site was established for the use by parties in the bankruptcy. Judge Gonzalez denied Lead Plaintiff access over one year ago reasoning that it was not entitled to the information for purposes in the bankruptcy and that Lead Plaintiff was trying to make an end run around the PSLRA stay then in effect in this case. “The Court finds that the Regents are attempting to employ Rule 2004 for discovery in the Newby Action and not for the purpose of asserting their rights as a party in interest in this

bankruptcy case.” *In re Enron Corp.*, 281 B.R. 836, 844 (Bankr. S.D.N.Y. 2002). He noted that the PSLRA stay was in effect in this case. *Id.* at 837-38. While we acknowledge that ruling, circumstances have changed. The PSLRA stay is no longer in effect and Lead Plaintiff is seeking discovery for the prosecution of its case from defendants who are before this Court.

After Judge Gonzalez lifted the bankruptcy stay at Lead Plaintiff’s request, this Court granted Lead Plaintiff’s request for documents that Enron had provided to government entities, including the SEC. Order dated Aug. 16, 2002 (“Order”). This Court ordered Enron to produce “all transcripts of witness interviews or depositions related to those inquiries.” Order at 1. The Banks have recently filed an opposition to Enron’s Agreed Order regarding compliance with the Order. The Banks want the benefit of obtaining *Enron* witness statements taken by the government, but they do not want to produce their own witness statements.

Lead Plaintiff respectfully requests that the Court grant this motion to compel and order the Banks to produce the sworn statements and deposition transcripts of their witnesses. The Banks’ refusal to produce is simply a roadblock to Lead Plaintiff’s ability to get at the truth. The production

of these statements and transcripts is certain to facilitate discovery in this action and likely to speed its resolution.

DATED: October 31, 2003

Respectfully submitted,

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
WILLIAM S. LERACH  
DARREN J. ROBBINS  
HELEN J. HODGES  
BYRON S. GEORGIU  
JAMES I. JACONETTE  
MICHELLE M. CICCARELLI  
JAMES R. HAIL  
ANNE L. BOX  
JOHN A. LOWTHER  
ALEXANDRA S. BERNAY  
MATTHEW P. SIBEN  
ROBERT R. HENSSLER, JR.

  
HELEN J. HODGES (w/ permission)

401 B Street, Suite 1700  
San Diego, CA 92101  
Telephone: 619/231-1058

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
G. PAUL HOWES  
JERRILYN HARDAWAY  
Texas Bar No. 00788770  
Federal I.D. No. 30964  
1111 Bagby, Suite 4850  
Houston, TX 77002  
Telephone: 713/571-0911

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
STEVEN G. SCHULMAN  
One Pennsylvania Plaza  
New York, NY 10119  
Telephone: 212/594-5300

**Lead Counsel for Plaintiffs**

SCHWARTZ, JUNELL, GREENBERG  
& OATHOUT, LLP  
ROGER B. GREENBERG  
State Bar No. 08390000  
Federal I.D. No. 3932

  
\_\_\_\_\_  
ROGER B. GREENBERG

Two Houston Center  
909 Fannin, Suite 2000  
Houston, TX 77010  
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP  
THOMAS E. BILEK  
Federal Bar No. 9338  
State Bar No. 02313525  
440 Louisiana, Suite 720  
Houston, TX 77002  
Telephone: 713/227-7720

**Attorneys in Charge**

BERGER & MONTAGUE, P.C.  
SHERRIE R. SAVETT  
1622 Locust Street  
Philadelphia, PA 19103  
Telephone: 215/875-3000

**Attorneys for Staro Asset Management**

WOLF POPPER LLP  
ROBERT C. FINKEL  
845 Third Avenue  
New York, NY 10022  
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP  
THOMAS G. SHAPIRO  
75 State Street  
Boston, MA 02109  
Telephone: 617/439-3939

**Attorneys for Nathaniel Pulsifer**

SCOTT + SCOTT, LLC  
DAVID R. SCOTT  
NEIL ROTHSTEIN  
S. EDWARD SARSKAS  
108 Norwich Avenue  
Colchester, CT 06415  
Telephone: 860/537-3818

**Attorneys for the Archdiocese of Milwaukee  
Supporting Fund, Inc.**

LAW OFFICES OF JONATHAN D. McCUE  
JONATHAN D. McCUE  
4299 Avati Drive  
San Diego, CA 92117  
Telephone: 858/272-0454

**Attorneys for Imperial County Board of  
Retirement**

CUNEO WALDMAN & GILBERT, LLP  
JONATHAN W. CUNEO  
MICHAEL G. LENETT  
317 Massachusetts Avenue, N.E.  
Suite 300  
Washington, D.C. 20002  
Telephone: 202/789-3960

**Washington Counsel**

S:\PleadingsSD\Enron\mntn00003028 doc



Hearing Date and Time: December 4, 2003 10:00 a.m.  
Objection Deadline: December 1, 2003 5:00 p.m.

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re : Chapter 11  
ENRON CORP, et al., :  
Debtors. : Jointly Administered  
-----X

**MOTION OF FINANCIAL INSTITUTIONS FOR PROTECTIVE ORDER  
REGARDING TRANSCRIPTS OF PRIVATE EXAMINATIONS  
CONDUCTED BY THE BANKRUPTCY EXAMINER**

TO THE HONORABLE ARTHUR J. GONZALEZ  
UNITED STATES BANKRUPTCY JUDGE:

**Jurisdiction**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

**Introduction**

2. The Movants are a group of financial institutions (the "Financial Institutions")<sup>1</sup> who are defendants in the consolidated private securities litigation known as *Newby v. Enron*

---

<sup>1</sup> Attorneys for Bank of America Corporation and Bank of America Securities LLC, Barclays Bank PLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Incorporated.

*Corp.*, No. H-01-3624 (S.D. Tex.) (Harmon, J).<sup>2</sup> Certain current and former employees of some of the Financial Institutions provided sworn private statements, in the form of transcribed questions and answers, to the examiners appointed in these cases (the "Examiner").<sup>3</sup> They provided those private statements in reliance upon the protections of confidentiality orders entered by this Court and pursuant to discussions with Counsel for the Examiner. In order to facilitate the Examiner's investigation, the Financial Institutions agreed to permit the Examiner to conduct wide-ranging, unrestricted examinations (in the nature of examinations pursuant to Federal Rule of Bankruptcy Procedure 2004 ("Rule 2004")) with respect to matters that might concern the administration of the bankruptcy estate, but only under circumstances that precluded third parties with an interest in other civil litigation from attending the "depositions" or otherwise having access to the statements.<sup>4</sup>

3. Despite this Court's prior orders denying civil litigants access to Rule 2004 discovery, the Lead Plaintiffs in the *Newby* case, the Regents of the University of California (the "*Newby* Plaintiffs"), have demanded that the Financial Institutions produce any transcripts they may possess of depositions or sworn statements given by their employees to the Examiner. For the reasons set forth below, the Financial Institutions ask this Court to enter an order protecting all such transcripts from disclosure to the *Newby* Plaintiffs. The Financial Institutions gave

---

<sup>2</sup> As Lead Plaintiff in *Newby*, the Regents of the University of California is a creditor in these proceedings and has sought relief from this Court on numerous occasions.

<sup>3</sup> The term "Examiner" encompasses Neal Batson and Harrison Goldin. Pursuant to the "Order Expanding the Duties of Harrison J. Goldin, the Court-Appointed Examiner in the Enron North America Corp. Bankruptcy Proceeding, to Include the Investigation of Certain Entities Involved in Transactions Pertaining to Special Purpose Entities," dated June 2, 2003, Mr. Goldin was given the responsibility of investigating certain Financial Institutions because Mr. Batson's law firm possessed conflicts of interest. Thus, in certain instances in this Motion, the reference to the Examiner will be limited to Mr. Batson and in other instances it will be limited to Mr. Goldin.

<sup>4</sup> For convenience, we have used the term "depositions" to refer to the transcribed question-and-answer sessions conducted by the Examiner. Our use of that term does not imply that the sessions were "depositions" within the meaning of the Federal Rules of Civil Procedure, and the answers provided by the witnesses often have been referred to by the Examiner simply as "statements" or "sworn statements."

sworn statements to the Examiner for the limited purpose of assisting the Examiner in his inquiries into matters that may affect administration of the bankruptcy estate. The Examiner's inquiries were open-ended explorations. They were not limited by the relevance considerations that apply in depositions taken in adversary proceedings, nor was their scope limited by reference to issues raised in a particular set of pleadings, which would be the case in a deposition taken in a civil lawsuit. Moreover, there was no requirement that the Examiner conduct the depositions with all of the protections and procedural safeguards that pertain to depositions conducted under the Federal Rules of Civil Procedure.

4. To the extent that the Financial Institutions possess copies of transcripts of private sworn statements given to the Examiner, the Financial Institutions ask this Court to protect such transcripts from disclosure to the *Newby* Plaintiffs. Protection of the transcripts is necessary:

- To ensure that the Court-appointed Examiner in this bankruptcy, and examiners in future proceedings, are not hobbled in their efforts to obtain the cooperation of witnesses, and to preserve the ability of this Examiner and future examiners to assure witnesses that Rule 2004 statements will not be used against them in civil lawsuits outside the bankruptcy proceeding.
- To prevent plaintiffs in a civil lawsuit outside of the bankruptcy proceedings from making improper use of testimony given to the Examiner testimony that in many cases was given without all of the protections established in the Federal Rules of Civil Procedure.
- To maintain the efficacy of this Court's orders governing the production and use of confidential material.
- To avoid an escalating series of demands for documents and testimony generated by the Examiner's investigation. For example, if the *Newby* Plaintiffs are allowed to receive the transcripts of statements provided by employees of the Financial Institutions, a strong argument will arise in favor of compelling the production of transcripts of testimony provided to the Examiner by other persons and entities for example,

Enron's officers, Arthur Andersen personnel, Vinson & Elkins lawyers, personnel from other Financial Institutions, and presumably others. Such materials would have to be disclosed to provide all parties to the various civil lawsuits a complete, accurate picture of the information obtained by the Examiner, creating in essence a parallel track to normal civil discovery.

**Relief Requested**

5. The Movants respectfully request that this Court enter the attached proposed Protective Order barring the *Newby* Plaintiffs from obtaining the transcripts of sworn private statements provided to the Examiner by the Financial Institutions' current and former employees.

**The Nature of the Private Statements At Issue**

6. During the week of October 5, 2003, counsel for the *Newby* Plaintiffs sent letters to the Financial Institutions demanding that they produce "transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any Enron-related investigation or legal proceeding by ... the bankruptcy examiners ..." See Exhibit A (Correspondence from the *Newby* Plaintiffs to the Financial Institutions).

7. The testimony sought by the *Newby* Plaintiffs was obtained by the Examiner, in accordance with orders of this Court, exclusively to aid in certain investigations related to the bankruptcy. The Examiner sought documents and sworn statements from a variety of persons and entities, including the Financial Institutions and their employees, to assist in his investigation of Enron's acts, conduct, liabilities and financial condition. The Examiner also sought testimony and documents from Enron, its officers and employees, its outside accountants, its principal outside law firm, its consultants, and numerous other Financial Institutions.

8. The Court entered a number of orders designed to facilitate the Examiner's inquiry, to ensure that information provided to the Examiner would be used only for limited purposes related to the bankruptcy, and to secure the cooperation of witnesses by assuring them

that confidential information would be protected. Specifically, this Court entered a number of orders governing the production and use of confidential material among the Examiner, the Official Committee of Unsecured Creditors, the debtor and non-parties.<sup>5</sup> This Court also entered orders governing the sharing of Rule 2004 materials by the Examiner and the Official Committee of Unsecured Creditors (the "Sharing Orders").<sup>6</sup> The Sharing Orders set forth specific conditions under which third parties might obtain access to Rule 2004 material, including limiting any such access to use in the bankruptcy proceedings.

9. In reliance on the Court's orders, the Financial Institutions granted the Examiner's request for sworn private statements from certain employees of the Financial Institutions. However, because the Financial Institutions were defendants in pending civil lawsuits such as the *Newby* case, they were concerned that civil plaintiffs might try to obtain and use in the civil cases the sworn statements given to the Examiner by employees of the Financial Institutions. Each Financial Institution therefore reached agreements with the Examiner governing the conditions under which sworn statements or testimony would be given.

10. In general, the agreements provided that the Financial Institutions would produce designated employees for questioning under oath by the Examiner's attorneys. The agreements

---

<sup>5</sup> See generally June 2, 2003, First Amended Order Governing the Production and Use of Confidential Material Among the Enron Corp. Examiner, the Enron North America Corp. Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties [Docket Entry No. 10994]; April 17, 2003, Amended Stipulation and Consent Order Modifying the October 10, 2002 Order Governing the Production and Use of Confidential Material Among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties [Docket Entry No. 10268]; December 11, 2002, Stipulation and Consent Order Modifying the October 10, 2002 Order Governing the Production and Use of Confidential Material Among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties [Docket Entry No. 8339]; October 10, 2002, Order Governing the Production and Use of Confidential Material Among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties [Docket Entry No. 7122]; September 5, 2002, Stipulation and Proposed Consent Order Governing the Production and Use of Confidential Material Among the Examiner, and Non Parties Arthur Andersen LLP, Vinson & Elkins LLP, and PricewaterhouseCoopers LLP [Docket Entry No. 6268].

<sup>6</sup> April 10, 2003, Order Clarifying Second Amended Rule 2004 Sharing Order [Docket Entry No. 10148]; December 18, 2002, Second Amended Rule 2004 Sharing Order [Docket Entry No. 8416].

also provided that the transcribed statements of these witnesses and any documents used during the questioning would be subject to the Court's orders governing the production and use of confidential material. The Financial Institutions explicitly insisted upon the exclusion of third parties (such as the *Newby* Plaintiffs) from the examinations. The depositions were *not* conducted under Rule 2004 – which would have allowed purportedly “interested” parties such as the *Newby* Plaintiffs to seek the opportunity to be present during the examination.<sup>7</sup> However, the depositions were conducted with the same broad latitude that applies during Rule 2004 examinations. The Financial Institutions had no right to prohibit improper or immaterial questions and no right to demand that the issues or subjects of inquiry be defined beforehand. The transcripts of the private statements are being treated by the Examiner as Rule 2004 Materials in terms of the protections and confidentiality that apply to them under this Court's orders. In addition, many of the documents discussed in the depositions were produced under conditions of confidentiality and in reliance on the protections established by this Court.

**This Court Has Denied the *Newby* Plaintiffs'  
Prior Attempts to Obtain the Examiner's Discovery**

11. This is not the first time that the *Newby* Plaintiffs have attempted to appropriate the Examiner's efforts and make use of them in civil litigation taking place in another court. Last year, the *Newby* Plaintiffs tried unsuccessfully to obtain documents that had been produced to the Examiner under Rule 2004 by Arthur Andersen LLP, Vinson & Elkins LLP, and McKinsey & Company.

12. In denying the *Newby* Plaintiffs' request for documents, this Court addressed the purposes of examinations conducted under Rule 2004. This Court observed that the broad,

---

<sup>7</sup> See, e.g., ¶¶ 9-11, December 18, 2002, Second Amended Rule 2004 Sharing Order [Docket Entry No. 8416].

unrestricted nature of Rule 2004 examinations is designed to facilitate the prompt gathering of information that might be relevant to the administration of the bankruptcy estate. However, the wide scope and unfettered manner of conducting such examinations are inconsistent with the protections that the Federal Rules of Civil Procedure confer upon persons who are deposed in adversary proceedings. It is instructive here to review the analysis set forth in this Court's Memorandum Decision and Order dated August 15, 2002. *In re Enron Corp.*, 281 B.R. 836 (Bankr. S.D.N.Y. 2002) (the "August 2002 Order").

13. In its August 2002 Order, this Court warned of the dangers of permitting civil litigants to use discovery (such as deposition testimony) obtained under Rule 2004 in private litigation. This Court began by observing that Rule 2004 inquiries are broad and unrestricted in order to maximize the information-gathering purpose of such inquiries:

"As a general proposition, Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate . . . and for 'discovering assets, examining transactions, and determining whether wrongdoing has occurred' . . . In this regard, courts have recognized that Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions."

281 B.R. at 840 (*citations omitted*).

14. The unfettered nature of Rule 2004 examinations, although useful in gathering information, is inconsistent with the stricter procedural safeguards that must be observed in the context of adversary proceedings:

"Courts have imposed limits on the use of Rule 2004 examinations. . . under the well recognized rule that once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004."

*Id.* (*citations omitted*).

15. This Court listed some of the procedural safeguards that are absent in a Rule 2004 Examination – safeguards that are essential to ensuring that the answers and information elicited during the course of the examination cannot be used improperly or twisted unfairly because of the witness' inability to object to the subject matter, nature or form of questions:

“The basis for this. . . proscription ‘lies in the distinction between the broad. . . nature of the Rule 2004 exam and the more restrictive nature of discovery under [the Federal Rules of Civil Procedure]’. . . For example, under Rule 2004: ‘the witness has no right to be represented by counsel except at the discretion of the court; there is only a limited right to object to immaterial or improper questions; there is no general right to cross-examine witnesses; and no right to have issues defined beforehand.’”

*Id.* at 840-41 (*citations omitted*).

16. This Court concluded, consistent with a long line of authority, that it would be improper to allow the *Newby* Plaintiffs to use Rule 2004 materials to build their civil case:

Based on Rule 2004's substantive differences, courts have expressed concern that Rule 2004 not be used as a tactic to circumvent the safeguards of the Federal Rules of Civil Procedure.

\* \* \*

[T]he Court agrees with this line of authority and finds this reasoning applicable where, as here, the Regents—despite their statements to the contrary—are seeking to use Rule 2004 for discovery in the *Newby* Action. The Regents' motions are devoid of any invocation of what matters it seeks under Rule 2004(b) and the nexus of those materials to the Regents as a party in interest in this bankruptcy case.

*Id.* at 841-42 (*citations omitted*).

**Recent Efforts by The *Newby* Plaintiffs to Obtain Rule 2004 Material**

17. More recently, the *Newby* Plaintiffs asked the Examiner to produce copies of documents referenced in the footnotes to the Examiner's Reports, and to grant the *Newby* Plaintiffs access to the Rule 2004 depositions being conducted by the Examiner. By letter dated

May 27, 2003 to Judge Harmon, the Examiner stated his position "that he believes bankruptcy examiners are not subject to discovery and therefore should not voluntarily provide the materials referenced in his Interim Report." (A copy of the Examiner's letter dated May 27, 2003 is attached as Exhibit B.) The Examiner also informed Judge Harmon that the documents sought by the *Newby* Plaintiffs "are covered by a Confidentiality Order and/or private confidentiality agreements with certain producing parties, as well as a complicated order entered by Judge Gonzalez governing third-party access to discovery obtained through Bankruptcy Rule 2004 . . . ". Finally, with respect to the transcripts of Rule 2004 depositions taken by the Examiner, the Examiner told Judge Harmon that "third-party access to those transcripts is also governed by the Confidentiality Order entered by Judge Gonzalez and the Order governing third-party access to Rule 2004 materials."

18. Thus, in the wake of the Examiner's refusal to produce copies of documents and deposition transcripts generated by the Examiner's Rule 2004 inquiry, the *Newby* Plaintiffs are attempting to circumvent the Court's prior orders by demanding those materials directly from the Financial Institutions themselves. They have done so pursuant to requests for the production of documents issued in the context of the *Newby* case.

**Reasons for Seeking a Protective Order from This Court**

19. The Financial Institutions respectfully submit that this Court, rather than the *Newby* court, is the appropriate forum for the Financial Institutions to seek a protective order with respect to the transcripts requested by the *Newby* Plaintiffs.<sup>8</sup> This Court not only entered the orders appointing the Examiner and allowing for Rule 2004 examinations, but also entered the confidentiality orders that are placed at issue by the *Newby* Plaintiffs' demand for copies of

---

<sup>8</sup> A courtesy copy of this Motion is being provided simultaneously to Judge Harmon.

the transcripts. The agreements upon which the Financial Institutions relied in giving the Examiner access to their personnel were agreements made with the Examiner appointed by this Court. This Court is in the best position to consider the effect on future bankruptcy examiners – and the degree to which persons will be willing to cooperate with such examiners – if Rule 2004 materials become available for use by civil adversaries.

20. Moreover, the requested transcripts are only one subset of the testimony obtained by the Examiner during his investigation. To the extent that the *Newby* Plaintiffs are able to obtain any such transcripts from the Financial Institutions and make use of them in civil litigation, this Court will be compelled to field demands for testimony provided to the Examiner by other persons and entities. If the *Newby* Plaintiffs are given access to a subset of the testimony provided to the Examiner, then the Financial Institutions and other parties to the myriad civil lawsuits generated by the Enron collapse may properly insist that they have a right to complete the record by obtaining testimony provided to the Examiner by other entities and persons, including the debtor. If the Financial Institutions are compelled to give to the *Newby* Plaintiffs any transcripts they may have of the Examiner's depositions of their personnel, then the Financial Institutions will have every right to demand that Enron, Enron's officers and directors, Andersen, Vinson & Elkins, McKinsey and others turn over any transcripts of depositions of their personnel conducted by the Examiner.

21. Finally, this Court has an institutional interest in promoting the cooperation of witnesses from whom testimony may be sought by a court-appointed Examiner. Allowing the *Newby* Plaintiffs unfettered access to the transcripts is likely to chill future voluntary provision of testimony to this Examiner and future examiners. The expectation of confidentiality – and the expectation that testimony provided to the Examiner will be used *only* in the context of the

Examiner's investigation – promotes voluntary cooperation among persons and entities who may have information that is relevant to the bankruptcy proceeding. Compelling the Financial Institutions to produce their transcripts will eliminate any such expectation, undermining the ability of any court-appointed examiner to obtain cooperation from witnesses. This chilling effect will hinder not only the Examiner's efforts in this proceeding, but also the efforts of court-appointed examiners in future proceedings. Other courts have recognized that the assurance of confidentiality often is essential in securing the cooperation of witnesses and the voluntary production of evidence to a bankruptcy examiner. For example, in *In re Ionosphere Clubs, Inc.* 156 B.R. 414 (S.D.N.Y. 1993) (Sweet, J.), the court determined that it was appropriate for the Bankruptcy Court to deny motions to unseal records of an examiner's investigation. The court stated that the "justifications for the [Bankruptcy Court's] Protective Orders [were] immediately apparent" where the companies under investigation informed the examiner that they would not voluntarily produce witnesses or evidence without assurance of confidentiality; without the protective orders, the examiner's investigation would have been delayed. *Id.* at 435.

22 Similarly, in *In re Baldwin United Corp.*, 46 B.R. 314 (Bankr. S.D. Ohio 1985), the court addressed the impropriety of allowing civil litigants to use material gathered by the bankruptcy examiner to build their cases, especially where the examiner had obtained that material through assurances of confidentiality. The court observed that the Bankruptcy Code does not contemplate "that the examiner act as a conduit of information to fuel the litigation fires of third-party litigants," and it noted further that the "prospect of an examiner being required to indiscriminately produce investigative materials obtained through promises of confidentiality and reliance upon this Court's orders raises grave concerns touching both the integrity of the

Bankruptcy Court's processes, as well as the integrity of the statutory position of the examiner." *Id.* at 316; *see also id.* at 317.

**The Newby Plaintiffs Do Not Need the Transcripts They Seek**

23. The *Newby* Plaintiffs cannot claim that they do not have access to relevant information that may have been provided during the Examiner's depositions of Financial Institution personnel. The *Newby* Plaintiffs can issue, in the context of the *Newby* case, notices for the depositions of employees of the Financial Institutions. (Indeed, counsel for the *Newby* Plaintiffs have suggested they plan to take approximately 500 fact depositions in that litigation.) Any such depositions unlike the private statements taken by the Examiner would be governed by the Federal Rules of Civil Procedure and limited to matters appropriately relevant to the issues set forth in the *Newby* pleadings. The *Newby* Plaintiffs should not be allowed however, to obtain the transcripts of examinations conducted by the Examiner because there were no limitations assuring that the examinations would be limited to issues relevant to the *Newby* litigation.

24. Judge Harmon has recognized that allowing parties to obtain access to the wide range of Rule 2004 Material for use in the *Newby* case would improperly allow those parties to circumvent the safeguards and limitations that apply to discovery conducted in a civil lawsuit. On December 13, 2002, Judge Harmon granted the motion of Enron's outside directors to quash the Rule 2004 subpoena served on them by the creditors' committee, stating that "Rule 2004 subpoenas would allow the creditors' committee to obtain far-reaching discovery from those subject to the subpoena without the procedural safeguards of the discovery rules of the Federal Rules of Civil Procedure." *Newby v. Enron Corp.*, No. H-01-3624, slip op. at 2 (S.D. Tex. Dec. 13, 2002) (Attached hereto as Exhibit C). The *Newby* Plaintiffs should not be entitled to

circumvent the Federal Rules of Civil Procedure and obtain the transcripts of private examinations that were conducted solely for the purposes of assisting the Examiner in his investigation. Nor should the *Newby* Plaintiffs be allowed to end-run the various orders of this Court governing the Examiner's Rule 2004 investigation. Discovery in the *Newby* case should be conducted under the Federal Rules of Civil Procedure.

**Notice**

25. Notice of this Motion has been given in accordance with the Court's Second Amended Case Management Order Establishing, Among Other Things, Noticing, Electronic Procedures, Hearing Dates, Independent Website and Alternative Methods of Participation at Hearings, Dated December 17, 2002. The Movants submit that no other notice need be given.

26. Pursuant to Local Bankruptcy Rule for the Southern District of New York 9013-1(b), because there are no novel issues of law presented herein, the Movants respectfully request that the Court waive the requirement that the Movants file a memorandum of law in support of this Motion.

27. Except as noted above, no previous motion for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Movants respectfully request that this Court enter the Order granting the relief requested herein and such other and further relief as may be just.

Dated: New York, New York

October 28, 2003

[SIGNATURE PAGE FOLLOWS]

By: John S. Mairo  
Scott D. Talmadge (ST 2399)  
John S. Mairo (JM 0670)  
CLIFFORD CHANCE US LLP  
200 Park Avenue  
New York, New York 10166  
Telephone: (212) 878-8000  
Facsimile: (212) 878-8375

*Attorneys for Bank of America Corporation  
and Bank of America Securities LLC.*

By: Jonathan M. Landers  
Jonathan M. Landers  
Robert F. Serio  
Marshall King  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, NY 10166-0193  
Telephone: (212) 351-4000  
Facsimile: (212) 351-4035  
Email: [enronlitigation@gibsondunn.com](mailto:enronlitigation@gibsondunn.com)

*Attorneys for Defendants Merrill Lynch &  
Co., Inc. and Merrill Lynch, Pierce, Fenner  
& Smith, Incorporated*

By: David L. Carden  
David L. Carden  
Robert C. Micheletto (not admitted in NY)  
JONES DAY  
222 E. 41st Street  
New York, NY 10017  
Telephone: (212) 326-3939  
Facsimile: (212) 755-7306

*Attorneys for Defendants Lehman Brothers  
Holdings Inc. and Lehman Brothers Inc.*

By: Robert J. Ward  
Robert J. Ward (RW 0149)  
Andrew D. Shaffer (AS 7129)  
MAYER, BROWN, ROWE & MAW LLP  
1675 Broadway  
New York, New York 10019-5820  
Telephone: (212) 506-2500  
Facsimile: (212) 262-1910

*Attorneys for Canadian Imperial Bank of  
Commerce, CIBC World Markets Corp., and  
CIBC World Markets plc*

By: Ken Coleman  
Ken Coleman (KC 9750)  
Hugh McDonald (HM 2667)  
ALLEN & OVERY  
1221 Avenue of the Americas  
New York, New York 10020  
Telephone: (212) 610-6300  
Facsimile: (212) 610-6399

David H. Braff (DB 0761)  
Michael T. Tomaino (MT 6200)  
Jeffrey T. Scott (JS 5014)  
Adam R. Brebner (AB 0914)  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004  
Telephone: (212) 558-4000  
Facsimile: (212) 558-3588

*Attorneys for Barclays Bank PLC*  
By: Richard W. Clary  
Richard W. Clary  
Julie A. North  
CRAVATH, SWAINE & MOORE LLP  
Worldwide Plaza  
825 Eighth Avenue  
NY, NY 10019  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700  
*Attorneys for Credit Suisse First Boston LLC*

**Milberg Weiss Bershad Hynes & Lerach LLP**

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1068 Fax: (619) 231-7423

[www.mwlb.org.com](http://www.mwlb.org.com)

James R. Earl

New York  
San Francisco  
Los Angeles  
Wash. D.C.  
Cairo

October 7, 2003

**VIA FACSIMILE**

Robert M. Fredrick  
**MAYER, BROWN, ROWE & MAW**  
190 South La Salle Street  
Chicago, IL 60603

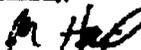
Re: *In re Enron Securities Litigation*

Dear Jordan:

I write to confirm the scope of Canadian Imperial Bank of Commerce's response to the production of documents in Request No. 74 of Plaintiff's First Request for Production of Documents. That Request asks CIBC to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which CIBC participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." CIBC has responded it will produce responsive, non-privileged documents.

Please inform me whether CIBC has produced all transcripts of testimony and interviews, written statements, reports, disclosures, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy trustees, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If CIBC has any of these documents in its possession, custody or control, but has not produced them, please let me know whether CIBC will produce such documents and when. Please respond by this Friday.

Sincerely,

  
JAMES R. EARL

JRH:vjr

S:\Case 03P\enron\enron\CIBC\enron74.doc

EXHIBIT A

# ALSTON & BIRD LLP

One Alston Center  
1201 West End Street  
Atlanta, Georgia 30309-2404

404-525-4000  
Fax: 404-525-4999  
www.alston.com

James C. Grant

Overseas 404-525-4000

Atlanta 404-525-4000

May 27, 2003

VIA TELEFAX

The Honorable Melinda Harmon  
The United States District Court  
Southern District of Texas  
5300 Federal Building  
513 Frank Avenue  
Houston, Texas 77002

Re: In re Enron Corp. Securities Litigation and ERISA Litigation NDL 1446  
& Civil Action No. H-03-3824

Dear Judge Harmon:

The undersigned represents Neal Eshen, the Enron Corp. Chairman. Over the Memorial Day holiday weekend I received Melinda Hodges' affidavit which letter to you addressing various issues in Newby, including, among other things, a list of topics to be covered at the upcoming status conference scheduled for tomorrow at 2:00 pm CDT. I will be participating in the status conference from Judge Gonzalez' courtroom.

One of the requests Mr. Hodges puts before your Honor is a request that the Enronian provide access to her office to the documents subpoenaed in the discovery to the Enronian's first and second interim reports. She claims that the Enronian has responded to that request with a statement that the documents requested are covered by a Confidentiality Order. While the Enronian has informed Mr. Hodges in the past that certain of the documents referenced in the discovery to the first and second interim reports are covered by a Confidentiality Order and/or private confidentiality agreements with certain producing parties, as well as a confidential order entered by Judge Gonzalez governing third-party access to discovery obtained through Rule 6064, the Enronian has also told her that he believes third-party witnesses are not subject to discovery and therefore should not voluntarily provide the materials referenced in his interim reports. Instead, the Enronian has suggested that the Newby plaintiffs seek discovery from the producers of those materials or from the Debitors who also have

Bank of America  
100 North Main Street, Suite 2000  
Columbus, OH 43215-3000  
Tel: 614-444-3111  
Fax: 614-444-3111

St Paul Office  
170 York Street  
St Paul, MN 55102  
Tel: 612-222-4444  
Fax: 612-222-4444

200 Riverside Plaza, Suite 2000  
Atlanta, GA 30303-1400  
Tel: 404-525-4000  
Fax: 404-525-4000

200 Peachtree Street, N.W.  
Atlanta, Georgia 30303  
Tel: 404-525-4000  
Fax: 404-525-4000

EXHIBIT B

The Honorable Melinda Harman  
May 27, 2003  
Page 2

copies of the majority<sup>1</sup> of the materials referred to in the footnote to the Honorable's interim reports.

Ms. Harman also asks that the *Newly* Plaintiffs be provided access to the Discovery Rule 2004 documents the Honorable is taking. Third-party access to these transcripts is also governed by the confidentiality order entered by Judge Gonzalez and the order preventing third-party access to Rule 2004 materials.

There are a few cases addressing the viability of discovery directed toward biographic materials. The most often cited case is *In re Subsis United Corp.*, 46 B.R. 314 (S.D. Cal. 1983) (holding that biographic materials is not subject to the discovery of civil litigation/agency materials). If the *Newly* Plaintiffs insist on receiving materials from the Honorable beyond what the Honorable discloses publicly in his reports, the Honorable believes the appropriate process in this case is to serve the Honorable with a subpoena so the Honorable can respond in the more traditional manner of objecting and moving to quash and as that appropriate briefing on the facts can be had before any ruling is made.

Thank you for your consideration.

Respectfully,



James C. Grant

JCG:ps

cc: The Honorable Arthur J. Gonzalez  
All Counsel Via Filing to 200304 Website  
Helen J. Hodges

ATTN:14444721

<sup>1</sup> In certain instances, the Honorable could not share with the Plaintiff the materials in the footnote to his reports. For example, the Honorable has received documents from the Committee and Heritage Commission and the House Subcommittee on Permanent Investigations on the condition that to not share these documents with anyone else.



(Montgomery County lawsuit) against certain officers and inside directors of Enron Corporation. That lawsuit was removed to the Federal District Court, Southern District of Texas and transferred to the docket of the undersigned judge.

The Rule 2004 subpoenas would allow the creditors committee to obtain far-reaching discovery from those subject to the subpoena without the procedural safeguards of the discovery rules of the Federal Rules of Civil Procedure. Although there were a number of issues raised in the motions, responses, and reply filed and in the arguments of counsel at the hearing held on the motion, December 5, 2002, it is not necessary to treat these other issues because, at core, the dispute involves a single issue. At the hearing, the parties agreed that Bankruptcy Rule 2004 subpoenas could not be used to obtain discovery from parties "affected by" the litigation. *Snyder v. Society Bank*, 191 B. R. 40 (S. D. Tex. 1994); *In re Stadkowski v. Sweetland*, 198 B. R. 140 (Bankr. D. Md. 1996); *In re the Bennett Funding Group*, 203 B. R. 24 (N.D.N.Y. 1996); *In re 2435 Plainfield Ave.*, 223 B. R. 440 (Bankr. D.N.J. 1998). The parties did not agree that the outside directors were parties "affected by" the litigation, and the resolution of the motion turns upon the determination of the meaning of the phrase.

The creditors committee argues that the outside directors are not affected by the litigation because they have not been sued in the Montgomery County lawsuit. The creditors committee concedes that being a party to a lawsuit is not absolutely essential to the "affected by" status, but the examples given by counsel for the committee did not range far from party status. Counsel for the outside directors argued that the face of the Montgomery County lawsuit itself, when compared to the matters sought by the Rule 2004 subpoenas, establishes that the creditors committee

subpoenas seek discovery focused on Euron's use of its special purposes entities, which is also the focus of the committee's lawsuit.

Euron's use of the special purpose entities also makes up a large portion of the *Newby* and *Tithe* complaints that allege securities fraud, ERISA, and RICO claims against, *inter alia*, the outside directors. The discovery sought by the Rule 2004 subpoenas 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.<sup>2</sup> 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. *In re Blinder, Robinson & Co.*, 127 B.R. 267, 275 (Bankr. Colo. 1991). The creditors committee is relegated to the use of the Federal Rule of Civil Procedure for obtaining discovery. This is, of course, a problem for the creditors committee because there is currently a statutory stay on all lawsuit discovery pending a resolution of the motions to dismiss filed in the *Newby* case. *Cf.* Private Securities Litigation Reform Act, Title 15 U.S.C. Sec. 78u-4(b)(3)(B). Be that as it may, the filing of the lawsuit has precluded the use of Rule 2004 discovery and subjected the creditors committee to the stay. Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED that the Outside Directors' Motion for Protection from Bankruptcy Rule 2004 subpoenas is GRANTED. The creditors committee is

<sup>2</sup>J. P. Morgan Chase & Company maintains that it was not they who served the subpoenas, but the creditors committee of which, J. P. Morgan Chase & Company concedes, it is a member.

1 1

prohibited from seeking further discovery from the Outside Directors without permission of this Court.

Signed at Houston, Texas, this 12<sup>th</sup> day of December, 2002.

  
MELINDA HARMON  
UNITED STATES DISTRICT JUDGE



# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Karin A. DeMasi  
CRAVATH, SWAINE & MOORE LLP  
825 Eighth Avenue  
New York, NY 10019

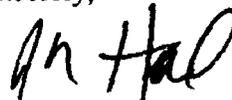
Re: *In re Enron Securities Litigation*

Dear Karin:

I write to confirm the scope of Credit Suisse First Boston's response to the production of documents in Request No. 73 of Plaintiffs' First Request for Production of Documents. That Request asks CSFB to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which CS First Boston participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts or LJM Partnerships." CSFB has responded it will produce responsive, non-privileged documents.

Please inform me whether CSFB has produced all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If CSFB has any of these documents in its possession, custody or control, but has not produced them, please let me know whether CSFB will produce such documents and when. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr



# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Jordan M. Rudnick  
MAYER, BROWN, ROWE & MAW  
190 South La Salle Street  
Chicago, IL 60603

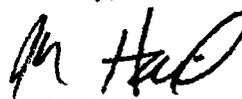
Re: *In re Enron Securities Litigation*

Dear Jordan:

I write to confirm the scope of Canadian Imperial Bank of Commerce's response to the production of documents in Request No. 74 of Plaintiffs' First Request for Production of Documents. That Request asks CIBC to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which CIBC participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." CIBC has responded it will produce responsive, non-privileged documents.

Please inform me whether CIBC has produced all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If CIBC has any of these documents in its possession, custody or control, but has not produced them, please let me know whether CIBC will produce such documents and when. Please respond by this Friday.

Sincerely,

  
JAMES R. HAIL

JRH:vjr

S:\CaseInfoSD\Enron\Corres\banks\CIBC discovery ltr.doc



# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Michael T. Tomaino  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004-2498

Re: *In re Enron Securities Litigation*

Dear Michael:

I write to confirm the scope of Barclays's response to the production of documents in Request for Production No. 72 of Plaintiffs' First Request for Production of Documents. That Request asks Barclays to produce "All documents and communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Barclays participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." Barclays has responded it will produce responsive, non-privileged documents insofar as they can be located upon a reasonable search of its records.

Please inform me whether Barclays has produced all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If Barclays has any of these documents in its possession, custody or control, but has not produced them, please let me know whether Barclays will produce such documents and when. Please respond by this Friday.

Sincerely,

  
JAMES R. HAIL

JRH:vjr



# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Ronit Setton  
CADWALADER, WICKERSHAM & TAFT LLP  
100 Maiden Lane  
New York, NY 10038

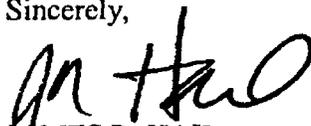
Re: *In re Enron Securities Litigation*

Dear Ronit:

I write to confirm the scope of Bank of America's response to the production of documents in Request No. 73 of Plaintiffs' First Request for Production of Documents. That Request asks Bank of America to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Bank of America participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." Bank of America has responded it will produce responsive, non-privileged documents related to the allegations sustained against it.

Please inform me whether Bank of America has produced all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If Bank of America has any of these documents in its possession, custody or control, but has not produced them, please let me know whether Bank of America will produce such documents and when. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr

S:\CaseInfoSD\Enron\Corres\banks\bofa discovery ltr.doc



# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Marla S.K. Bergman  
JONES DAY  
222 East 41st Street  
New York, NY 10017-6702

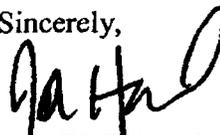
Re: *In re Enron Securities Litigation*

Dear Marla:

I write to confirm the scope of Lehman Brothers Holdings Inc.'s response to the production of documents in Request No. 72 of Plaintiffs' First Request for Production of Documents. That Request asks Lehman Brothers Holdings Inc. to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Lehman Brothers participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." Lehman Brothers has responded it will produce responsive, non-privileged documents so long as they pertain to the sustained allegations and were generated after March 11, 2000.

Please inform me whether Lehman Brothers intends to withhold all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships that were generated after March 11, 2000. If Lehman Brothers has any of these documents in its possession, custody or control, but has not produced them, please let me know whether Lehman Brothers will produce such documents and when. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr

S:\CaseInfoSD\Enron\Corres\banks\Lehman discovery ltr.doc



1

Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

2

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 7, 2003

VIA FACSIMILE

Herbert S. Washer  
CLIFFORD CHANCE ROGERS & WELLS  
200 Park Avenue, Suite 5200  
New York, NY 10166

Re: *In re Enron Securities Litigation*

Dear Herbert:

I write to confirm the scope of Merrill Lynch's response to the production of documents in Request No. 77 of Plaintiffs' First Request for Production of Documents. That Request asks Merrill Lynch to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Merrill Lynch participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." Merrill Lynch has objected to this Request in full.

Please inform me whether Merrill Lynch stands on its objections. If Merrill Lynch has in its possession, custody or control any transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships, and intends to produce them, please let me know when production will occur. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr

# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

James R. Hail

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

October 8, 2003

VIA FACSIMILE

David J. Woll  
SIMPSON THACHER & BARTLETT  
425 Lexington Avenue  
New York, NY 10017

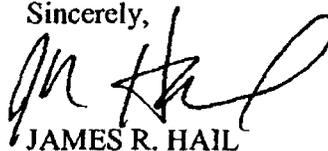
Re: *In re Enron Securities Litigation*

Dear David:

I write to confirm the scope of J.P. Morgan Chase & Co.'s response to the production of documents in Request No. 82 of Plaintiffs' First Request for Production of Documents. That Request asks JP Morgan to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which J.P. Morgan Chase participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." JP Morgan has objected to this Request in full.

Please inform me whether JP Morgan stands on its objections. If JP Morgan has in its possession, custody or control any transcripts of testimony or interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships and intends to produce them, please let me know when production will occur. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr

# Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297  
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

New York  
San Francisco  
Los Angeles  
Boca Raton  
Seattle

James R. Hail

October 7, 2003

VIA FACSIMILE

Robyn F. Tarnofsky  
PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON, LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064

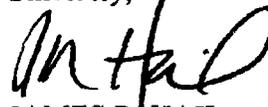
Re: *In re Enron Securities Litigation*

Dear Robyn:

I write to confirm the scope of Citigroup's response to the production of documents in Request No. 74 of Plaintiffs' First Request for Production of Documents. That Request asks Citigroup to produce "All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Citigroup participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships." Citigroup has responded it will produce responsive, non-privileged documents concerning any interview, meeting, transcript or recording in which Citigroup participated.

Please inform me whether Citigroup has produced all transcripts of testimony and interviews, written statements, reports, declarations, or affidavits given in connection with any investigation or legal proceeding by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, Congressional investigators, the bankruptcy examiners, the New York Attorney General's office, or the New York District Attorney's office concerning Enron or any of the SPEs, Trusts or LJM Partnerships. If Citigroup has any of these documents in its possession, custody or control, but has not produced them, please let me know whether Citigroup will produce such documents and when. Please respond by this Friday.

Sincerely,



JAMES R. HAIL

JRH:vjr