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Michael H. Milby, Clerk

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

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 IN RE ENRON CORPORATION :
 SECURITIES LITIGATION :
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 This Document Relates To: :
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 MARK NEWBY, et al., Individually and : Consolidated Civil Action
 On Behalf of All Others Similarly Situated, : Case No.: H-01-CV-3624
 :
 Plaintiffs, :
 v. :
 ENRON CORP., et al., :
 :
 Defendants. :
 :
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BANK DEFENDANTS' SUBMISSION INFORMING THE COURT OF THE OUTCOME OF THEIR MEET-AND-CONFER DISCUSSIONS WITH ENRON, PURSUANT TO THE AGREED MOTION OF ENRON AND BANK DEFENDANTS FOR A TEMPORARY STAY OF AUGUST 2002 DISCOVERY ORDER

Pursuant to Your Honor's November 1, 2003 Order (the "November 1 Order") granting the Agreed Motion of Enron Corp. ("Enron") and Bank Defendants for a Temporary Stay of August 2002 Discovery Order (the "Agreed Motion"), the undersigned Defendants¹ (collectively, the "Bank Defendants") respectfully submit this report on the status of the "meet-and-confer" discussions between the Bank Defendants and Enron concerning the issues raised by Enron's September 30, 2003 Motion For Relief From August 2002 Discovery Order ("Enron's

¹ This submission is made on behalf of J.P. Morgan Chase & Co., J.P. Morgan Securities Inc, JPMorgan Chase Bank, Citigroup Inc., Citibank N.A., Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.), Salomon Brothers Limited, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Pershing LLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (formerly known as CIBC Oppenheimer Corp.), Bank of America Corporation, Banc of America Securities LLC, Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Inc., and Lehman Brothers Holdings Inc.

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Motion”). Unfortunately, the parties have not been able to reach a consensual resolution of those issues.

As the Court will recall, its August 16, 2002 Discovery Order (the “August 2002 Order”) directed Enron to produce to the *Newby* Depository any materials produced by Enron “in connection with any inquiry or investigation into the Company’s business affairs that were provided to any legislative branch committee, [or] the executive branch, including the Department of Justice and the Securities and Exchange Commission. . . .”. August 2002 Order at 1. In Enron’s Motion, Enron sought permission to halt any further production to the *Newby* Depository of documents it has produced to the various governmental entities referred to in the August 2002 Order, complaining that its compliance with the August 2002 Order had become unduly burdensome and costly, because, *inter alia*, of the “never-contemplated extent of the government production” caused by continuing governmental requests. Enron’s September 30 Motion, at 5.

As is summarized below, however, and will be addressed in more detail in the supplemental briefing called for by the November 1 Order², it is apparent that large volumes of unquestionably relevant Enron documents that were provided to the government long ago, including productions made prior to the entry of the August 2002 Order, have yet to be produced to the Depository. In fact, an index recently delivered by Enron suggests that as much as 45% of the governmental productions made by Enron have not been produced to the *Newby* Depository. Needless to say, it is important to ensure that the parties to a case about Enron’s fraud actually have all relevant Enron documents.

² In accordance with the November 1 Order, the Bank Defendants and Enron will each submit, by December 5, 2003, supplemental briefs on Enron’s September 30 Motion, and replies to these supplemental briefs on December 12, 2003.

Enron has not met its burden of demonstrating that the unproduced materials subject to the August 2002 Order are irrelevant to this action and, thus, should be exempted from the August 2002 Order – indeed the withheld documents appear to be plainly relevant.

Moreover, Enron has yet to explain on what basis some materials were selected for production to the Depository, while others, including documents produced to the Securities and Exchange Commission, the FBI and other governmental entities almost two years ago, have not. As a result, the Bank Defendants' meet and confer efforts with Enron have raised more questions and concerns about Enron's compliance with the August 2002 Order than they have answered.

Background

On September 30, 2003, Enron submitted to Your Honor a motion styled as an "Unopposed Motion of Enron Corp. For Relief From August 2002 Discovery Order." Enron's Motion came as a surprise to the Bank Defendants, which were operating on the reasonable assumption that Enron was complying with the August 2002 Order. A fundamental assumption underlying the Bank Defendants' negotiation of and agreement to the Court's July 11, 2003 Scheduling Order was that production of the relevant Enron documents – materials that are unquestionably at the heart of this litigation – would be substantially completed by the early Fall of 2003, so that they could be largely synthesized and organized before the commencement of depositions on January 10, 2004. Indeed, the August 2002 Order, entered some fifteen months ago, required Enron to produce to the *Newby* document Depository all documents that it produced to governmental entities.

In its September 30 motion, Enron disclosed that several months earlier, on May 27, 2003, it had been "instructed" by counsel for the Lead Plaintiff to cease production to the Depository of documents "which it provided to the government after the August 16, 2002

Order.” Letter from Paul Howes, Exhibit B to Enron Motion. Enron asked the Court to relieve it from compliance with the August 2002 Order, because, it alleged, many of the documents that were subject to the Order were not relevant to the present litigation and would be extremely expensive to produce to the Depository. Enron gave as an example “8 terabytes”, representing some 800 million images, of trading records that had been produced to the Federal Energy Regulatory Commission (“FERC”).

The Bank Defendants responded to Enron’s Motion on October 10, 2003, indicating that they were amenable to reasonable modifications to Enron’s obligations under the August 2002 Order for categories of documents that Enron was able to demonstrate were clearly immaterial to the issues in this litigation. The Bank Defendants indicated that in order to make an informed judgment in this regard they would need Enron to provide “additional information sufficient to enable them to determine the source and subject matter of the documents subject to the August 2002 Order and to identify which of those documents have not yet been produced to the Depository.” Bank Defendants’ Response to Enron Motion, October 10, 2003, at 6. To date, Enron has simply been unable to provide that additional information.

On October 20, the Court entered an Order denying Enron’s Motion and directing Enron to provide the Bank Defendants with an index detailing which portions of Enron’s governmental productions had and had not been produced to the Depository. In a good faith effort to reach a solution to some of the cost and burden concerns raised by Enron, the Bank Defendants joined Enron in filing the Agreed Motion on October 21, 2003, which was granted by the Court on November 1, 2003, and which resulted in a stay of the August 2002 Order until November 25, 2003, at which time the parties were to notify the Court whether they had resolved the dispute. In the absence of any consensual resolution, the parties agreed to submit further

briefing in support of their respective positions by December 5, 2003, with each party's reply due by December 12, 2003.

The Results of the Meet-and-Confer Discussions

After the October 21 filing of the Agreed Motion, counsel for Enron and counsel for representatives of some of the Bank Defendants had several meetings. In the course of those meetings, it became apparent that the problems with Enron's document productions go much further than we first thought. Not only have vast quantities of potentially relevant documents covered by the August 2002 Order been withheld from the Depository, but Enron appears unable to provide a full and accurate accounting of exactly what has and has not been produced to date. Due to the expedited nature of some of its government productions, Enron purports not to have retained an accurate record of all its document productions and, even in cases where outside law firms were responsible for completing a production, Enron claims not to have a good record of what documents were produced in response to which requests.

This confusion was manifested in Enron's effort to provide an index of documents subject to the August 2002 Order, which this Court's October 20, 2003 Order directed it to do. On November 10, 2003 Enron delivered to the Bank Defendants a 944-page index relating to its government productions, but advised the Bank Defendants a few days later that the index contained "many inaccuracies." Subsequently, on November 19, 2003, Enron delivered a 569-page "corrected" version of the index. It is not yet clear how the 944-page initial version of the index shrunk to 569 pages in the corrected version. And, critically, for many of Enron's document productions, the index contains wholly insufficient information on which to base any determination as to the relevance of the documents. For example, in many instances the index merely describes the documents as produced "Pursuant to Request," or employs the equally

murky description, “Potentially relevant.” There is no explanation in the index – and Enron has provided none – as to why documents indicated as having been withheld from the *Newby* Depository have been withheld. Nor has there been any explanation as to why they should not be produced now.

The index does make clear, however, that a significant number of relevant documents produced by Enron to government entities have not been produced to the *Newby* Depository. For example, Enron’s index reflects that the following categories of documents that were the subject of productions to the SEC, DOJ and other governmental entities in early 2002 have yet to be provided to the *Newby* Depository:

- Documents containing details of all Enron-related special purpose entities (“SPE’s”);
- Copies of Deal Approval Sheets (DASH) completed at Enron in connection with various structured transactions;
- Fairness opinions issued by Enron’s accountants; and
- Lists of people who had access to certain key Enron press releases prior to their dissemination.

As part of subsequent governmental productions, Enron has also produced, among other things, organizational charts, documents “reflecting the schedules and activities” of certain key Enron executives, “all documents concerning LJM1, LJM2, Chewco and JEDI”, and financial documents that, according to Enron’s index, have not been sent to the Depository. Of the 16,507 entries in Enron’s index, fully 7,544 of those entries – or 45.7% – state that the production has **not** been delivered to the *Newby* Depository.³

³ Furthermore, based on the Bank Defendants’ review of Enron documents produced to date, it appears that numerous documents cited by the Enron Bankruptcy Examiner in his reports on Enron’s SPE transactions have not been produced to the *Newby* Depository.

Enron's Motion suggests that the exemption it seeks relates primarily to government productions post-dating the August 2002 Order, that the costs and burdens imposed by the August 2002 Order were not anticipated and that the documents as to which it seeks an exemption are not relevant to this case. See Enron's Motion at 1-2 (referring to the "volume of documents subsequently sought by government sources" and Enron's inability to comply with the August 2002 Order because of the "ongoing nature of the government productions.")). Indeed, the May 27, 2003 letter from Lead Plaintiff's counsel instructed Enron to cease production to the *Newby* Depository of government productions made *after* entry of the August 2002 Order. Of course, an August 2002 cut-off would itself be highly arbitrary, since it bears no relationship to the substance of the documents that would or would not be produced. In any event, as noted above, it appears that many of the government productions as to which Enron now seeks relief *pre-date* the Court's August 2002 Order. Furthermore, the argument in Enron's September 30 motion about the cost of producing to the Depository certain trading databases produced to FERC does not seem to apply to the bulk of the documents on Enron's index, which appear to be in formats that could be produced to the *Newby* Depository relatively easily and at no greater cost than any of the other productions Enron has turned over to the Depository already.⁴

In short, there is no apparent rhyme or reason as to which of the government productions have been delivered to the *Newby* Depository. Contrary to the picture painted by

⁴ Enron's arguments as to the "overwhelming" and "shockingly high" cost of producing its governmental productions to the *Newby* Depository should be taken with a grain of salt, in view of the enormous costs Enron has expended to date on lawyers and consultants in the bankruptcy proceeding. See Enron's Disclosure Statement for Second Amended Joint Plan of Affiliated Debtors Pursuant to Ch. 11 of the U.S. Bankruptcy Code, November 13, 2003, Appendix G-3 at 9, indicating professional fees of approximately \$502 million for the period December 2, 2001 through June 30, 2003.

Enron's Motion, this does not appear to be a case of Enron reacting to the burden of delivering to the Depository increasingly voluminous government-requested documents. Rather, it appears that Enron has selectively withheld certain government productions, or parts of productions, without explaining why those documents were withheld and others were not. In all events, Enron has made no effort to particularize which documents or categories of documents within particular government productions would not be relevant to this litigation.

In the course of discussions with Enron, other troubling issues concerning Enron's document productions have come to light. For example, many of the productions to date in response to the August 2002 Order were not actually made by Enron. Instead, Enron sent its documents to Gibbs & Bruns, counsel for certain individual defendants, who then made productions to the Depository on behalf of Enron. The Bank Defendants have asked Enron to confirm that there was no screening of documents done as part of this process. The practical effect of this arrangement was to give counsel for one group of defendants access to Enron's documents much earlier than other parties obtained such access. There is a significant time lag of several weeks or, in some instances, months, between the date that a production is submitted for processing to the Depository administrator, Lex Solutio, and the date on which the production becomes available for all parties to review.

Similarly, the Bank Defendants have learned that after Enron and Lead Plaintiff's counsel agreed that Enron would cease compliance with the Court's August 2002 Order, Enron provided Lead Plaintiff's counsel with "courtesy copies" of certain highly relevant document productions, namely: (i) Enron Board of Director meeting minutes and Board Committee meeting minutes; (ii) Enron shareholder meeting minutes; (iii) Enron's monthly financial statements, including journal entries; and (iv) investor relations presentations. While Enron has

represented that these documents were “scattered throughout the Depository” and thus were technically available to other parties, the selective production of pre-packaged compilations of relevant documents provides an obvious advantage to the receiving party.⁵

Moreover, while it was initially hoped that Enron’s government productions would encompass the lion’s share of relevant materials to be produced by Enron in this litigation, the Bank Defendants have learned that a large number of potentially relevant documents exist that may not currently be covered by the Court’s August 2002 Order. For example, Enron is in the process of restoring several categories of electronic data, including emails of relevant Enron employees, that may not have been produced to the government and that clearly have not been provided to the Depository.

As the Court is aware, depositions in this case are scheduled to begin on January 10, 2004. The Bank Defendants respectfully submit that Enron’s non-compliance with the August 2002 Order jeopardizes the current discovery schedule. Given the significant time lag between the production of documents to the Depository and their availability to the parties, and the significant volume of materials subject to the August 2002 Order that have yet to be produced by Enron, it will not be possible for the Bank Defendants or other parties to receive and digest these materials before depositions are currently scheduled to begin.

Conclusion

The Bank Defendants remain willing to consider exemptions from the August 2002 Order with respect to governmental productions that are truly irrelevant to the *Newby* proceedings. However, the information provided by Enron to date does not demonstrate which, if any, of its governmental productions are irrelevant to this proceeding, much less what the costs

⁵ Upon discovering the existence of these “courtesy” sets, the Bank Defendants requested

are of producing various categories of documents. To the contrary, the information provided by Enron so far tends to suggest that a significant number of highly relevant documents covered by the August 2002 Order have not yet been produced, but should be produced, and can be produced without the excessive costs that Enron complained about in its September 30 Motion.

and were given copies of them as well.

Dated: November 25, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served upon all counsel of record via the www.esl3624.com website, on this 25th day of November 2003.


Richard W. Mithoff