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United States Court  
Southern District of Texas  
FILED

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

DEC 05 2003

**Michael H. Milby, Clerk**

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. §  
\_\_\_\_\_ §

**ENRON'S MOTION FOR LIMITED MODIFICATION  
OF THE COURT'S DEPOSITORY ORDER AND OF THE COURT'S  
AUGUST 2002 DISCOVERY ORDER**

TO THE HONORABLE MELINDA HARMON:

Enron Corp. ("Enron") files this Motion for Limited Modification of the Court's Depository Order and of the Court's August 2002 Discovery Order (the "Motion"). In support of its Motion, Enron respectfully shows as follows:

**I. INTRODUCTION**

Enron, a Chapter 11 debtor in bankruptcy, is not a party to the *Newby* case. Nevertheless, pursuant to the Court's August 16, 2002 order granting the Regents of the University of California's motion for a limited document production (*Newby* Docket Entry No. 1008) (the "August Order"), and according to the terms of the Order Establishing Document Depository (*Newby* Docket Entry No. 1116) (the "Depository Order"), Enron estimates it has produced over 23 million pages of documents – approximately three times the volume of

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documents any other party in the referenced action has produced. Under the terms of the Depository Order Enron is responsible for half the cost associated with this massive production, even though Enron is not a party to *Newby*. Notwithstanding Enron's vast production of documents over the past year, Enron estimates that over 77 million pages of documents subject to the August Order, not including trading databases produced to the Federal Energy Regulatory Commission ("FERC") ("the Trading Databases") that equate to hundreds of millions of pages of data, have not yet been produced to the Depository. Cost estimates to complete production of the outstanding documents, without taking into account the massive data contained in the Trading Databases,<sup>1</sup> approach \$11 million.

Enron respectfully requests the Depository Order be modified to clarify that Enron is a "Third Party" with respect to *Newby* under the Depository Order, and that the August Order be modified to reflect that Enron is not required to produce to the Depository the Trading Databases because (1) a tremendous amount of the debtors' financial resources needlessly will be drained by its continued productions to the *Newby* Depository under the current Depository Order, (2) Enron is in fact a third party to *Newby*, and (3) none of the parties to *Newby* have demonstrated any legitimate need or desire for the Trading Databases.

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<sup>1</sup> Enron estimates the volume of the Trading Databases produced to FERC exceeds 8 terabytes of data, or the equivalent of 800 million pages. See Affidavit of Bonnie J. White in Support of Motion for Limited Modification of Depository Order and of August 2002 Discovery Order ("Affidavit of Bonnie J. White"), attached hereto as Exhibit "1," at ¶ 6.

## II. FACTUAL BACKGROUND

### A. Procedural Background to this Court's Entry of the August Order and the Depository Order

The Plaintiff in *Newby* moved to lift the automatic statutory bankruptcy stay in an attempt to pursue its claims against Enron, but the Bankruptcy Court denied the request.<sup>2</sup> Judge Gonzalez modified the stay, however, to allow the *Newby* Plaintiff to obtain a limited amount of documents from Enron during the pendency of the Private Securities Litigation Reform Act ("PSLRA") stay.<sup>3</sup> In its motion in the Bankruptcy Court, the *Newby* Plaintiff suggested that because Enron was required to produce to the *Tittle*<sup>4</sup> Plaintiffs similar types of documents, the Bankruptcy Court should modify the automatic stay to permit production of the same types of documents in the *Newby* case.<sup>5</sup> Because the Bankruptcy Court had authorized similar documents to be produced by Enron in *Tittle*, the Bankruptcy Court modified the automatic stay upon the *Newby* Plaintiff's request. As the discovery process progressed, however, the productions could not have been more dissimilar. The scope of the document productions authorized by the Bankruptcy Court in its order on the *Tittle* Plaintiffs' motion was limited to those documents Enron produced in connection with any investigation into its handling of the "*ERISA-governed pension plans*."<sup>6</sup> In contrast, the *Newby* Plaintiff did not request any such limitation on the

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<sup>2</sup> See Bankruptcy Court Order entered on March 18, 2003 denying the *Newby* Plaintiff's request for order lifting the automatic stay, attached as Exhibit "2."

<sup>3</sup> See Bankruptcy Court Order Regarding Motion of the Regents of the University of California for a Limited Modification of the Automatic Stay, entered on May 22, 2002, attached as Exhibit "3."

<sup>4</sup> Hereinafter *Tittle* refers to the case pending in this court captioned *Tittle, et al. v. Enron Corp., et al.*, No. H-01-3913 (S.D. Tex.).

<sup>5</sup> See Motion of the Regents of the University of California for a Limited Modification of the Automatic Stay (the "Bankruptcy Motion"), attached hereto as Exhibit "4." Of course, the argument was somewhat misleading because the volume of documents Enron would be required to produce in *Newby* would far outweigh the amount of documents Enron was required to produce in *Tittle*.

<sup>6</sup> See Bankruptcy Court Order of February 25, 2002, attached as Exhibit "5" (emphasis added).

scope of document productions Enron would be required to make in *Newby*, and neither the Bankruptcy Court's order nor this Court's August Order imposed any restriction on the scope of documents Enron would be required to produce in *Newby*. Without any limitation on the scope of documents subject to the August Order, the production demands on Enron have mounted exponentially. At the time the stay was modified, no one anticipated how voluminous the productions would become.<sup>7</sup> Certainly, no one considered the fact that under the August Order Enron would have to produce the equivalent of hundreds of millions of pages of data in the Trading Databases. These circumstances and the mounting costs for not only Enron, but also for the "Requesting Parties," as defined by the Depository Order, led the *Newby* Plaintiff to withdraw its discovery request to avoid incurring its portion of the ever-growing discovery costs.<sup>8</sup>

**B. Enron is a Third Party to *Newby***

As a Chapter 11 debtor, by operation of the statutory automatic stay, Enron is not a party to *Newby*.<sup>9</sup> As mentioned above, the Plaintiff in *Newby* moved to lift the automatic stay in an attempt to pursue its claims against Enron, but the Bankruptcy Court denied the request.<sup>10</sup> Although the Bankruptcy Court modified the stay to allow the *Newby* Plaintiff to obtain a limited

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<sup>7</sup> During the bankruptcy hearing on the motion for a limited modification of the stay, and based upon the information then known, Enron estimated it would need only a couple of months to produce the approximately one million estimated documents that had, at that time, been produced. See Transcript from April 4, 2002 Hearing before Judge Gonzalez, attached as Exhibit "6."

<sup>8</sup> See Letter from G. Paul Howes to John Strasburger, dated May 27, 2003, attached hereto as Exhibit 7.

<sup>9</sup> See 11 U.S.C. § 362(a)(1).

<sup>10</sup> See Bankruptcy Court Order entered on March 18, 2003, attached as Exhibit "2."

amount of documents from Enron during the pendency of the PSLRA stay, the Bankruptcy Court has not modified the stay as it applies to *Newby* for any other purpose.<sup>11</sup>

**C. Under The August Order Enron Is Required To Produce 800 Million Pages of FERC Documents That Have No Relevance To Any Legitimate Issue In *Newby***

By way of background, the Plaintiff in *Newby* requested this Court to enter an order requiring Enron to produce “all documents and materials produced by the Debtor related to any inquiry or investigation by any legislative branch committee, [or] the executive branch, including the Department of Justice and the Securities and Exchange Commission, . . . .”<sup>12</sup> The Court granted the *Newby* Plaintiff’s Motion for Limited Production over strong opposition not only from Enron, but also from the Bank Defendants.<sup>13</sup> Ironically, the Bank Defendants objected to the August Order at the time because the Plaintiff was not seeking any “particular documents, or even documents on a particular topic, but . . . all documents previously produced in the course of the numerous and extensive federal investigations regarding Enron, obviously an enormous number of documents.”<sup>14</sup> Enron estimates that it has produced well over 8 terabytes of information, or the equivalent of 800 million pages of documents, to FERC in the form of the Trading Databases, and Enron believes that the vast majority of information contained in this FERC production has no relevance to any legitimate issue in *Newby* or the related cases. No party has indicated to Enron that it seeks the Trading Databases produced to FERC, and the

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<sup>11</sup> See Bankruptcy Court Order, Exhibit 3 (ordering that “[t]he automatic stay is hereby continued, except as provided below”).

<sup>12</sup> See Motion of the Regents of the University of California for a Limited Production of Enron Documents (“Motion for Limited Production”) (*Newby* Docket Entry No. 802); see also August Order.

<sup>13</sup> The “Bank Defendants” are listed in the first paragraph of the Bank Defendants’ Response to the Motion of Enron Corp. for Relief from August 2002 Discovery Order (*Newby* Docket Entry No. 1741).

<sup>14</sup> See Memorandum of Investment Bank and Law Firm Defendants in Opposition to Lead Plaintiff’s Motion for Production of Enron Documents (*Newby* Docket Entry No. 882) (“Opposition to Discovery Order”) (emphasis added).

estimated cost to produce this data to the Depository is in excess of \$100 million because of its sheer volume.<sup>15</sup> Accordingly, Enron respectfully requests the August Order be modified to expressly relieve Enron of the burden to produce the Trading Databases.

**D. The Estimated Cost of Complying With The August Order Under The Terms of The Depository Order, Excluding the Trading Databases, is Approximately \$11 Million**

According to the Depository Order, both hard copy and electronic documents produced in the captioned matter must be uploaded in a specific format, regardless of the format in which the documents were maintained and, significantly, regardless of the format in which the documents subject to the August Order were originally produced by Enron to the government. Specifically, the Depository Order (Docket Entry No. 1116) entered in October 2002 requires that documents be produced to the Depository in a "Group IV .tiff" format.<sup>16</sup> The Requesting Party and the Producing Party are to split the cost of document production into the Depository.<sup>17</sup> The Depository Order also states that the cost of formatting and processing the documents for production is set forth in the Pricing Schedule of the Document Administrator.<sup>18</sup>

According to Enron's document production index and the Depository Administrator's Pricing Schedule, Enron estimates the cost to complete production of the documents referenced on the index pursuant to the Depository Order is nearly \$11 million.

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<sup>15</sup> The cost of producing electronic documents in native format pursuant to the Depository Order is set forth in the Depository Administrator's Pricing Schedule, attached as Exhibit "C" to the Affidavit of Bonnie J. White. Processing the electronic documents in native format costs approximately \$.11 per image in addition to \$.05 per document for capturing metadata and indexing. On average, there are five pages per document. After the documents are processed and indexed, they are downloaded to CDs at a cost of \$15 per CD. *See* Affidavit of Bonnie J. White at ¶¶ 10, 12-13.

<sup>16</sup> Depository Order at § IV.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.* at VIII(b); *see also* Pricing Schedule, attached as Exhibit "C" to the Affidavit of Bonnie J. White

**1. Over 77 Million Pages of Documents, Excluding the Trading Databases, Have Yet to be Produced to the *Newby* Depository**

To date Enron estimates it has produced over 23 million pages of documents into the *Newby* Depository, but this volume represents less than one quarter of what is required to be produced to the *Newby* Depository under the August Order, not including the Trading Databases. According to Enron's document production index, over 77 million pages of documents have been produced to the specified government investigators but have not yet been produced to the *Newby* Depository:<sup>19</sup>

<b>Media Source Type</b>	<b>Units</b>	<b>Average Data Storage Capacity per Media Source</b>	<b>Estimated Capacity Used</b>	<b>Estimated Total Page Volume</b>
Compact Disk	626	.7 Gig/70,000 pages	36%	15,775,200
Digital Video Disk	21	4 Gigs/400,000 pages	50%	4,200,000
Hard Drive	22	120 Gigs/12,000,000 pages	20%	52,800,000
Individual Line Items of Documents	N/A	N/A	N/A	5,009,746
		<b>TOTAL PAGES</b>		<b>77,784,946</b>

The estimated 77 million outstanding pages have not been "withheld" from production as the Bank Defendants imply, but rather are in line for production to the *Newby* Depository. When the August Order was first issued, Enron faced a backlog of over eight months worth of document productions previously made to the government, and while Enron worked to clear the initial backlog, more and more productions to the government were being made. Moreover, as explained above, the *Newby* Plaintiff sent Enron a letter demanding that Enron cease production of documents produced to the government after August 16, 2002.<sup>20</sup>

<sup>19</sup> See Affidavit of Bonnie J. White at ¶¶ 5-10; see also Enron's Document Production Index, Exhibit "A" to the Affidavit of Bonnie J. White; see also Index of Media Sources Enron Produced to Government, attached as Exhibit "B" to the Affidavit of Bonnie J. White.

<sup>20</sup> See Exhibit 7.

Enron continued to produce documents to the depository, however, through late August 2003, but began discussions with various *Newby* parties to resolve the issues raised by the *Newby* Plaintiff's letter and the growing burdens of production. The Depository Administrator is continuing to process the Enron documents for upload to the depository, and Enron continues to collect and prepare the remaining documents for production. Although it has not been able to complete the productions, Enron has not "withheld" any documents from production under the August Order.<sup>21</sup> Because the government continues to seek documents from Enron, there is no telling when this document production will end, or what its eventual scope will be.

**2. It Will Cost Approximately \$9 Million to Produce the Outstanding Electronic Documents that are in Native Format<sup>22</sup>**

The Depository Order requires that electronic images, produced in their native format, be converted by the Depository Administrator to .tiff images, branded with a Bates number, and indexed.<sup>23</sup> Assuming 90% of Enron's 77 million pages of documents are in native electronic format,<sup>24</sup> approximately 69 million pages must be converted to .tiff. The images must then be downloaded to portable media sources for Bates labeling and uploading onto the Depository Administrator's main server. Metadata from the imaged data is then captured by the server to generate an index according to the specified fields outlined in the Depository Order.<sup>25</sup> Once the required fields are indexed, the images can be distributed to the parties, and production

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<sup>21</sup> See Affidavit of Bonnie J. White at ¶ 14.

<sup>22</sup> Again, this discussion of Enron's electronic productions does not include the Trading Databases produced to FERC.

"Native format" refers to documents as they exist in their original electronic form. Unlike portable document format, documents in "native" form are not read-only.

<sup>23</sup> Depository Order at IV(A)(2).

<sup>24</sup> See Affidavit of Bonnie J. White at ¶ 11.

<sup>25</sup> See Depository Order at IV(A)(1)-(2) (listing required fields for mandatory Depository index).

notices are posted on the ESL website. According to the Pricing Schedule of the Depository Administrator, the production of Enron's 69 million pages of electronic documents would cost nearly \$9 million.<sup>26</sup>

<b>Process Description</b>	<b>Price</b>	<b>Estimated Volume</b>	<b>Estimated Cost</b>
Converting to .tiff	10 cents per image	69 million images	\$6.9 million
Bates Numbering	1 cent per image	69 million images	\$690,000
Capturing metadata and indexing	5 cents per document	14 million documents <sup>27</sup>	\$700,000
Download to portable media source like compact disks	\$15 per compact disk	125 compact disks	\$1,725.00
		<b>TOTAL ESTIMATED COST</b>	<b>\$8,993,450</b>

Although the electronic documents are not particularly difficult to process for production, the cost is steep because of the volume of documents to be produced.

### **3. It Will Cost Approximately \$2 Million to Produce the Outstanding Hard Copy and .pdf Documents**

Like the electronic documents, the Depository Order requires that documents produced in their original format, both hard copy and documents previously produced in Portable Document Format (".pdf"), be converted by the Depository Administrator to .tiff images, branded with a Bates number, and indexed. Many of the documents Enron has produced to government investigators – approximately 8 million pages of the outstanding documents – were produced in .pdf, and now, under the August Order, they are being produced to the Depository in the same format.<sup>28</sup>

<sup>26</sup> See Affidavit of Bonnie J. White at ¶ 12.

<sup>27</sup> See Affidavit of Bonnie J. White at ¶ 10.

<sup>28</sup> Because .pdf preserves the fonts, images, and layout of source documents, regardless of the application used to create the document, it is widely used by the government, as well as private sector organizations, for secure distribution of electronic documents.

The estimated cost to produce the hard copy and .pdf formatted documents, pursuant to the requirements of the depository order, is nearly \$2 million:<sup>29</sup>

<b>Process Description</b>	<b>Price</b>	<b>Approximate Volume</b>	<b>Cost</b>
Converting to .tiff	3 cents per page	8 million pages	\$240,000
Download to portable media source like compact disks	\$15 per compact disk	13 compact disks	\$195.00
Quality Control .pdf to .tiff	1.5 cents per page	8 million pages	\$120,000
Coding for Index	98 cents per document <sup>30</sup>	1.6 million documents	\$1,568,000
		<b>TOTAL COST</b>	<b>\$1,928,195</b>

The total cost to produce the 77 million pages of documents outstanding to date is just under \$11 million, and, although as a “Producing Party” Enron presumably would be taxed with half of the total cost of production – over \$5 million, this figure excludes outside professional fees and significant internal costs incurred by Enron as a result of the massive production effort.<sup>31</sup>

### **III. ARGUMENT AND ANALYSIS**

#### **A. Enron Requests a Limited Modification of the Depository Order to Clarify Enron’s Status as a Third Party to the *Newby* Depository**

The Depository Order defines Enron as a “Designated Party,” and thus requires Enron to pay Depository production costs each time it produces documents to the *Newby* Depository.<sup>32</sup> As the Court is aware, however, Lead Plaintiff in the *Newby* litigation moved unsuccessfully in the Bankruptcy Court for relief from the automatic stay.<sup>33</sup> Because the

<sup>29</sup> See Affidavit of Bonnie J. White at ¶ 13.

<sup>30</sup> According to the pricing schedule, the Depository Administrator charges \$.14 per coded field in a single document, and according to invoices from the Depository Administrator to Enron, the Depository Administrator codes seven different fields per document. See Affidavit of Bonnie J. White at ¶ 13.

<sup>31</sup> See Depository Order at VIII(B)(2).

<sup>32</sup> See Depository Order at 1 (defining “Designated Party”).

<sup>33</sup> See Bankruptcy Court Order entered on March 18, 2003, attached as Exhibit “2.” Section 362 of the Bankruptcy Code most commonly results in the imposition of an automatic stay of all efforts to assert pre-petition claims

Bankruptcy Court denied Lead Plaintiff's motion for relief from the automatic stay, Lead Plaintiff has been precluded from serving Enron with process in *Newby*, and Enron is therefore not a party to *Newby*. The automatic stay has been lifted only to allow Enron to participate in *Newby* as a third party to the discovery process. Therefore, Enron should not fall within the definition of "Designated Party" as that term is defined in the Depository Order. Instead, Enron requests that the Court acknowledge Enron is a third party to *Newby* and clarify that, with respect to *Newby*, Enron is a "Third Party" within the meaning of the Depository Order.

The Depository Order reflects the well-established law requiring parties to a case to pay for discovery sought from third parties. Under Federal Rule of Civil Procedure 34(c), "[a] person not a party to the action may be compelled to produce documents and things . . . as provided in Rule 45." Under Rule 45, the party seeking discovery from a third party must bear enough of the costs associated therewith to render the costs to the third party "non-significant." *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001); *see also* FED. R. CIV. P. 45(c)(1). The *Linder* court explained that under Rule 45 "the questions before the district court are whether the subpoena imposes expenses on the non-party, and whether those expenses are 'significant.' If they are, the court must protect the non-party by requiring the party seeking discovery to bear at least enough of the expense to render the remainder 'non-significant.' The rule is susceptible of no other interpretation." *Linder*, 251 F.3d at 182.

Designating Enron as a "Third Party" under the Depository Order with respect to *Newby* would recognize Enron's actual status as a third party to *Newby* and relieve Enron of its

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against a Chapter 11 debtor's property outside of the Bankruptcy Court. 11 U.S.C. § 362(a)(1); *see, e.g., In re Ionosphere Clubs, Inc.*, 124 B.R. 635, 638 (S.D.N.Y. 1991) ("The automatic stay is one of the fundamental protections provided by the bankruptcy laws. . . . It stops all collection efforts, all harassment, and all foreclosure actions.")

obligation to pay the cost of producing documents to the *Newby* Depository.<sup>34</sup> Enron would thus receive under the Depository Order the same treatment as any third party from whom discovery is sought. Enron would, however, still be responsible for its own substantial internal costs associated with locating and reviewing the documents prior to their production. Enron is aware that depending upon the facts of a particular case, third parties may be required to pay some of the costs associated with discovery. *In re Propulsid Products Liability Litigation*, 2003 WL 22174137 at \*2 (E.D. La. 2003). Because Enron is Chapter 11 debtor, requiring Enron to pay the substantial internal costs associated with locating and reviewing documents before transferring them to the *Newby* Depository, while requiring the Requesting Party to pay the Depository costs, would render a much more efficient, fair and equitable discovery process.

The purpose of a cost-sharing or cost-shifting order, such as the Depository Order, should be to make the discovery process fair, equitable, and efficient. “[C]ost-sharing orders . . . almost always constitute a way of fueling an array of hand-crafted procedural devices designed to sort and resolve myriad claims in an equitable, efficient, comparatively inexpensive manner.” *In re Two Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 994 F.2d 956, 966 (1st Cir. 1993). Placing the cost of document production on a third party, for example, provides no incentive to the requesting party to pursue efficient and useful discovery strategies from the third party. On the other hand, placing the costs of discovery on the parties to the litigation forces them to seek from the third party only those documents they actually need.<sup>35</sup>

This economic reality is demonstrated by this case. Classifying Enron – a Chapter 11 debtor – as a Designated Party with respect to *Newby* has created a situation where

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<sup>34</sup> See Depository Order at VIII(D).

<sup>35</sup> See generally *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) (applying economic analysis to cost-sharing among parties).

tens, if not hundreds, of millions of documents are scheduled to be produced, without regard to their relevance or usefulness, at a cost of nearly \$14 million—the approximately \$3 million already spent by Enron<sup>36</sup> and the estimated additional \$11 million to complete the production, exclusive of the Trading Databases. As government investigators continue to request documents from Enron, one cannot even estimate additional future costs. No party can argue that this is optimal, desirable, or even the lesser of any comparable burdens. Going forward under the status quo will not bring the parties any closer to the facts of this case, much less to a timely trial. It cannot be that the Court intended such a result. Where equity and justice so require, courts can and should entertain motions to modify orders allocating costs. *In re Two Appeals*, 994 F.2d at 965-66.

As Enron has always tried to make clear to the Court and the parties, Enron does not desire to withhold any non-privileged documents that the parties believe are relevant. However, Enron is entitled to occupy its proper place as a third party to the *Newby* case and carry out its discovery obligations accordingly without undue burden.

## **2. The Burden of Producing the Trading Databases under the August Order Exceeds Any Demonstrated Benefit**

Under Federal Rule of Civil Procedure 26(b)(2)(iii), a court may limit discovery otherwise permitted if it determines that “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.” *Coleman v. American Red Cross*, 23 F.3d 1091, 1098 (6th Cir. 1994) (finding no abuse of discretion when district court denied discovery request

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<sup>36</sup> See Affidavit of Bonnie J. White in Support of the Unopposed Motion of Enron Corp. for Relief from the August 2002 Discovery Order, Exhibit A to *Newby* Docket Entry No. 1723 at ¶ 5.

that would have required defendants to search every file in existence at its national headquarters for any documents that might be relevant to any matter in the case).

Putting aside for the moment that Enron is not a party to *Newby*, the August Order should be modified to relieve Enron of the obligation to produce the Trading Databases because their production imposes an unreasonably large burden and expense without providing any proportionate benefit to the parties. The August Order simply requires that Enron produce to the Depository all documents being produced to the government, regardless of what the government requests (or which department or agency within the government makes the request), including the data equivalent of the 800 million pages of Trading Databases.<sup>37</sup>

As explained above, the Trading Databases include information relevant to energy marketing and trading practices, not the securities fraud allegations made in *Newby*. Because no party to *Newby* has expressed any specific interest in the Trading Databases, the expense of producing the Trading Databases would clearly outweigh any benefits associated with producing them. While Enron appreciates that these cases are of national importance and that the amount in controversy is potentially staggering, Enron also understands that production of the Trading Databases in this case could actually impede fact finding. The sheer volume of the Trading Databases and the extraordinary amount of time and expense it will take to produce them, not to mention the time it will take for the parties to review and digest them, strongly suggests that the August Order should be modified to exclude the Trading Databases.

#### IV. CONCLUSION

The continued operation of the Depository Order, in conjunction with the burdens of the August Order, will create an unnecessary and tremendous hardship on Enron, as well as

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<sup>37</sup> As explained above, by virtue of its request that Enron stop producing documents to the *Newby* Depository, the *Newby* plaintiff recognized that the current document production regime is overly burdensome and expensive without providing a corresponding benefit. See Exhibit 7.

the *Newby* parties. Enron's hardship will ultimately become the problem of its creditors. Enron in no way intends to deny the parties access to relevant information, but Enron needs relief from the tremendous costs associated with document production under the Depository Order, especially when these costs provide little benefit to any party. For the reasons set forth in this Motion for a Limited Modification of the Court's Depository Order and of the Court's August 2002 Discovery Order, Enron respectfully asks the Court to modify the Depository Order to clarify that Enron is a Third Party to the *Newby* Depository and requests that the August Order be modified to relieve Enron of the obligation to produce documents from the Trading Databases.

Dated: December 5, 2003

Respectfully submitted,

By: Scott D. Lassetter w/permission PB

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(1) (1)

**CERTIFICATE OF CONFERENCE**

I hereby certify that Enron and representatives of the Bank Defendants have conferred about the substance of this Motion on numerous occasions, and we have been unable to reach agreement.

*John B. Strasburger w/permission PSB*  
\_\_\_\_\_  
John B. Strasburger

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon all known counsel of record by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com), pursuant to the Court's Order dated August 7, 2002 (Docket No. 984), on this 5th day of December 2003.

*John B. Strasburger w/permission PSB*  
\_\_\_\_\_  
John B. Strasburger

The Exhibit(s) May  
Be Viewed in the  
Office of the Clerk