Courts
of Texas
JAN 28 2002 LF
Michael N. Milby, Clerk

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

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

**DEFENDANT KENNETH L. LAY'S
EMERGENCY MOTION TO ENJOIN CERTAIN PLAINTIFFS
AND COUNSEL FROM PROSECUTING STATE COURT ACTION
IN DEROGATION OF THIS COURT'S JURISDICTION AND SUPPORTING BRIEF**

TO THE HONORABLE MELINDA HARMON:

Defendant Kenneth L. Lay requests that the Court enjoin certain plaintiffs and their counsel before it in these consolidated proceedings from proceeding with a state court action designed to circumvent this Court's rulings and to undermine its ability to control these consolidated proceedings, and respectfully shows the Court the following:

Introduction

One day after this Court entered its Order Prohibiting the Destruction of Evidence, Granting Limited Discovery, and Providing Other Relief Regarding Arthur Andersen ("the Evidence Order"), plaintiffs in one of the consolidated *Newby* cases before this Court, Hal Moorman & Milton Tate, Co-Trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan & Trust ("Moorman & Tate"), and their counsel, Fleming & Associates, L.L.P., secured an *ex parte* Temporary Restraining Order from a state district court in Washington County, Texas, addressing precisely the same issues as this Court's Order but expanding the Order to restrain Mr. Lay as well as Arthur Andersen. The

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Washington County court has scheduled a temporary injunction hearing for January 31, 2002. At this time, this Court is considering a briefing schedule on whether Mr. Lay's deposition should be taken in connection with the evidence preservation issues addressed by the Evidence Order. By obtaining the *ex parte* Temporary Restraining Order in state court and attempting to proceed with the temporary injunction hearing, Moorman & Tate and their counsel are deliberately circumventing this Court's power to address and resolve these serious issues. Unless they are stopped now, this Court will be deprived of the ability to resolve not only the evidence preservation issues, but other important pre-trial issues. Moreover, if these plaintiffs and their counsel are free to leave these consolidated federal proceedings and strike out in state court when they want additional or different relief, then other plaintiffs and their counsel will surely follow. As discussed more fully below, this Court has the power under the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, to stop these forays designed to undermine its jurisdiction. It should not hesitate to exercise that power immediately.

Factual Background

On November 7, 2001, the law firm of Fleming & Associates ("Fleming") filed the first of three Enron-related lawsuits it has filed to date. The first lawsuit was filed in state court in Harris County, Texas, by plaintiffs Fred A. Rosen and Marian Rosen, derivatively on behalf of Enron, against various Enron officers and directors including Mr. Lay, and asserting causes of action for breach of fiduciary duty of loyalty and breach of fiduciary duty of due care (the "*Rosen* Litigation").

Six days later, on November 13, 2001, Fleming filed its second Enron lawsuit, *John & Peggy Odam, et al. v. Enron Corp., et al.* (the "*Odam* Litigation"), in the United States District Court for the Southern District of Texas, Houston Division. Fleming filed the suit on behalf of six plaintiffs

who allegedly owned a total of 2,000 shares of Enron stock, including Moorman & Tate, who owned 200 shares of Enron. The plaintiffs asserted federal securities fraud claims against Enron, various Enron officers and directors, including Mr. Lay, and Arthur Andersen ("Andersen").

On December 2, 2001, Enron filed a petition in bankruptcy. Two days later, on December 4, 2001, Fleming filed a voluntary non-suit of all the defendants except Andersen in the *Odam* Litigation and non-suited Enron in the *Rosen* Litigation.

On December 12, 2001, The Honorable Judge Lee H. Rosenthal entered an order consolidating the *Odam* Litigation with 45 other Enron-related federal court actions in the Southern District of Texas under the caption *Newby v. Enron Corp., et al.* (the "*Newby* Litigation"). In the consolidation order, Judge Rosenthal explained that *Odam* and the other Enron-related actions "all arise from a common core of operative facts." Judge Rosenthal concluded that consolidation would "ensure the orderly progress of these lawsuits" and "avoid unwarranted duplication of discovery and motion practice."

On December 21, 2001, the Florida State Board of Administration filed a motion for appointment as lead plaintiff in the *Newby* Litigation, claiming it purchased 9,107,558 shares of Enron stock and suffered a loss of approximately $325 million. The same day, Fleming filed an objection to the consolidation on behalf of the *Odam* plaintiffs. In support of their objection, the *Odam* plaintiffs claimed they would be "burdened" by the consolidation because they asserted claims against only Andersen and not the remaining defendants. They also urged that their efforts to protect their interests would be "impaired" by having to wait for lead counsel to be appointed for the securities class actions.

On January 11, 2002, Amalgamated Bank filed its *Ex Parte* Application For Particularized Expedited Discovery From Defendant Arthur Andersen LLP To Preserve Evidence (the "Amalgamated Bank Motion") in the *Newby* matter, asking the Court to enter an order preventing Andersen from destroying documents relating to Enron.

On January 16, 2002, Fleming filed a First Amended Petition on behalf of the plaintiffs in the *Rosen* state court litigation, transforming the derivative action into a state court securities fraud lawsuit. In the process, Fleming named twenty-one new defendants, including Andersen and some of its partners. The *Rosen* plaintiffs included in their First Amended Petition a request for a temporary restraining order ("TRO") against Andersen to prevent it, its employees, and its agents from destroying documents relating to Enron.

Two days later, on January 18, 2002, the state court entered a TRO against Andersen in the *Rosen* matter. On the same day, however, Andersen removed the case to federal court.

On January 22, 2002, the Amalgamated Bank Motion was amended to include a request for expedited discovery from Mr. Lay and other Enron executives. The same day, the Court held a hearing on the relief sought by Amalgamated Bank against Andersen. During the hearing, there was a discussion about entering a briefing schedule relating to Amalgamated Bank's request to depose Mr. Lay. Counsel with the Fleming & Associates law firm appeared at the hearing.

The next day, January 23, 2002, this Court entered its Evidence Order requiring Andersen to segregate, preserve, and protect all writings and other materials relating to Enron and any Enron-related entities. The Court also ordered depositions of Andersen related individuals on topics relating to document and data retention and destruction. The Evidence Order did not address Amalgamated Bank's request to depose Mr. Lay and other Enron executives.

The next day, January 24, 2002, at 3:00 p.m., Fleming filed its third Enron-related lawsuit in state court in Washington County, Texas (the "*Bullock* Litigation"), seeking among other things, a TRO against Andersen and Mr. Lay. A copy of Plaintiffs' Original Petition, Application for Temporary Restraining Order and Temporary Injunction filed in the *Bullock* Litigation is attached as Exhibit No. 1. The *Bullock* Litigation was filed on behalf of eleven plaintiffs, including Moorman & Tate. Moorman & Tate who are also plaintiffs in *Odam*, the federal lawsuit filed by Fleming which was consolidated into *Newby*. The petition Fleming filed in the *Bullock* Litigation is essentially identical to the complaint filed in the *Odam* federal court litigation, except that state law causes of action are alleged.

At 3:20 p.m. on the same day the suit was filed, the state court entered an *ex parte* TRO against Andersen, granting relief that is virtually identical to the Evidence Order entered by this Court one day earlier. The state court, however, also granted similar relief against Mr. Lay. The state court scheduled a temporary injunction hearing to be held on January 31, 2002. A copy of the Temporary Restraining Order and Order Setting Hearing For Preliminary Injunction in the *Bullock* Litigation is attached as Exhibit No. 2.

Fleming filed the *Bullock* lawsuit and obtained a TRO against Mr. Lay without giving notice to Mr. Lay's counsel. It was not until 3:50 p.m., after the TRO had been entered by the state court, that Fleming placed a telephone call to Mr. Lay's counsel.

Argument and Authorities

Federal courts have broad authority to issue an injunction when "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line Railroad*

Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970); *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332, 1334 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982) (same); *see also* All Writs Act, 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); Anti-Injunction Act, 28 U.S.C. § 2283 (permitting a federal court to issue an injunction to stay a state court proceeding "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments").

Both the All Writs Act and the Anti-Injunction Act provide that a federal court may grant an injunction restraining a state court proceeding where "necessary in aid of its jurisdiction." *See* 28 U.S.C. §§ 1651, 2283. The Supreme Court has found that this gives a federal court the power "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone*, 434 U.S. 159, 173 (1977). The Fifth Circuit and other circuit courts have therefore approved issuance of injunctions to prevent disruption of complex litigation where, as here, a parallel state action threatened to frustrate proceedings and disrupt the orderly resolution of the federal litigation. *See In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332, 1334-35 (5th Cir. 1981); *see also Carlough v. American Products, Inc.*, 10 F.3d 189, 197 (3d Cir. 1993); *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985). Where the state plaintiffs' success in a parallel state court "would make a nullity of the district court's ruling, and render ineffective its efforts to effectively manage the complex litigation at hand, injunctive relief is proper." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1997). In *Winkler v. Eli Lilly & Co.*, the court

emphasized: "Litigants who engage in forum-shopping, or otherwise take advantage of our dual court system for the specific purpose of evading the authority of a federal court, have the potential 'to seriously impair the federal court's flexibility and authority to decide that case.'" *Id.* at 1203 (*quoting Atlantic Coast Line RR,* 398 U.S. at 295, 90 S. Ct. at 1747).

The actions taken by the *Bullock* plaintiffs and counsel clearly demonstrate that their purpose was to evade the authority of this Court by seeking a more expansive ruling in state court through an *ex parte* TRO that extended to both Andersen and Mr. Lay. If such actions are allowed to continue in state court, the plaintiffs will undoubtably continue to pursue the same tactics, making a nullity of this Court's pre-trial rulings and rendering "ineffective its efforts to effectively manage the complex litigation at hand." *Id.* at 1202.

Under similar circumstances, in *BankAmerica Corporation Securities Litigation,* 263 F.3d 795 (8th Cir. 2001), the Eighth Circuit recently determined that a federal district court had authority to enjoin proceedings in a parallel state court securities action. The circuit court found that the "federal right of control by the greatest stakeholder [under the Private Securities Litigation Reform Act ("PSLRA")] could not 'be given its intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, [could] . . . threaten the orderly conduct of the federal case. . . .'" *Id.* at 799-800 (*quoting In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044, 1049 (E.D. Mo. 2000)).

In that case, over twenty-four securities class actions were filed in various federal courts as a result of the merger of BankAmerica and NationsBank. At the same time, several state actions were filed against the same defendants based on the same allegations of misconduct. *In re BankAmerica*, 95 F. Supp. 2d at 1045. As the court noted, "When it became clear that the [Milberg

Weiss] firm's clients lacked the financial stake to become lead plaintiffs in the [consolidated] federal case, and thereby select Milberg Weiss as lead counsel, Milberg Weiss dismissed [its] federal case to focus on the California [state] cases where no financial stake rules govern the selection of lead plaintiffs and lead counsel." *Id.* The federal district court determined that these actions were:

> a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court. . . . Clearly the [state court action] is nothing more than a thinly-veiled attempt to circumvent federal law. The [state court] plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proved themselves to be wholly inadequate to control the conduct of this suit. . . . Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiff's rights under the PSLRA.

In re BankAmerica, 95 F. Supp. 2d at 1050.

The plaintiffs in the *Bullock* action are clearly not the greatest financial stakeholders in the consolidated *Newby* cases.[1] They nevertheless seek to control this litigation through their actions in state court. Without an injunction against pursuit of the state court proceedings, this Court's appointment of a lead plaintiff will effectively be a nullity.

This district court has previously recognized that Federal Rule of Civil Procedure 16(c)(12) authorizes judges to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems" early in the litigation. *In re Lease Oil Antitrust Litigation,* 48 F. Supp. 2d 699, 703 (S.D. Tex. 1998) (Jack, J.). In that case, the court found that "notwithstanding the limitations of the Anti-Injunction Act, the district court could have entered an injunction against the parties over whom it

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[1] Although the *Bullock* plaintiffs have failed to plead their aggregate number of Enron shares, they undoubtedly purchased far fewer shares than the Florida State Board of Administration, which allegedly purchased 9,107,558 shares of Enron stock.

had personal jurisdiction, even before the federal court had entered an order which required protection from the potential interference of a state court [action]." *Lease Oil* at 705; *see also In re General Motors Corporation Pick-Up Truck Fuel Tank Liability Litigation*, 134 F.3d 133, 141 n.2 (3d Cir. 1998) ("[I]t is conceivable that we could direct the district court to enjoin those 200 plaintiffs [over whom the district court had personal jurisdiction] from pursing their state damage remedies in Louisiana [state court]"); *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (The district court "undoubtedly had the authority under the All Writs Act to enjoin parties before it from pursuing conflicting litigation in the state court. . . ."). Accordingly, without regard to the terms of the Anti-Injunction Act, this Court can and should act expeditiously to enjoin these Plaintiffs and their counsel from going forward in the Washington County proceeding, including the pending injunction proceedings.[2]

WHEREFORE, Defendant Kenneth L. Lay requests that the Court immediately set this motion for hearing and, upon hearing, enjoin Hal Moorman & Milton Tate, Co-Trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan & Trust, and Fleming & Associates, L.L.P., from taking any further action in prosecution of the state court action styled *Jane Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 32716, pending in the District Court of Washington County, Texas, 21st Judicial District.

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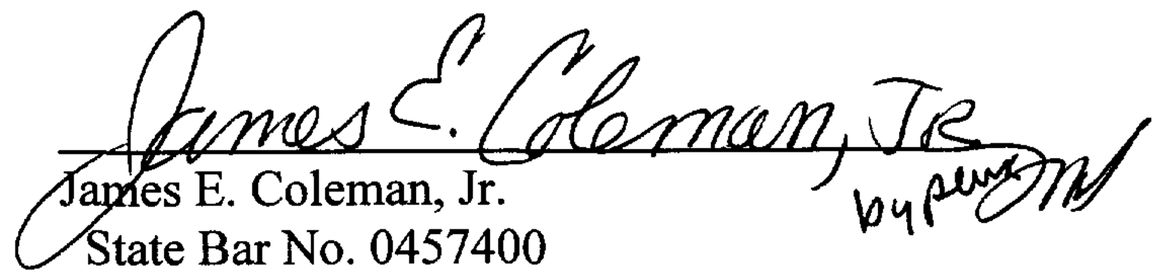
[2] This court has the authority to enjoin not only the plaintiffs in these proceedings, but their counsel also. *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8th Cir. 2001) (enjoining all named plaintiffs and "all persons, agents, representatives, or employees acting in concert with them or on their behalf"); *Carlough v. Admiral Insurance Company*, 10 F.3d 189 (3d Cir. 1993) (specifically enjoining the attorneys in the action); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985) (same); *Treeby v. Aymond*, No. 00-1377, 2000 WL 869502 (E.D. La. June 28, 2000) (same).

Respectfully submitted,



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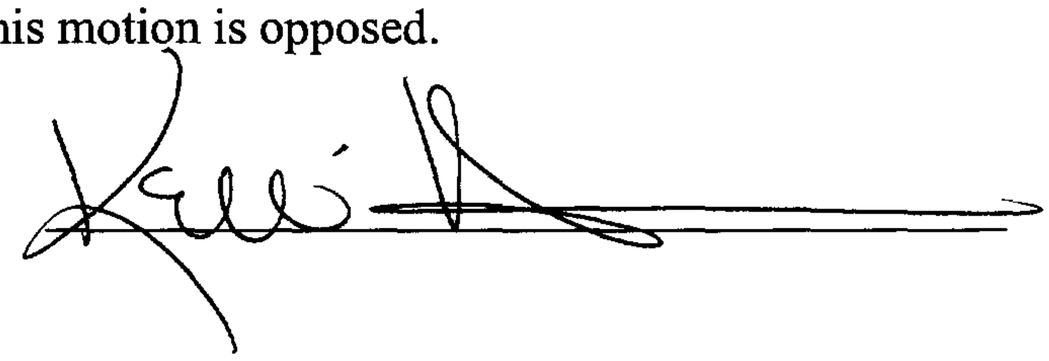
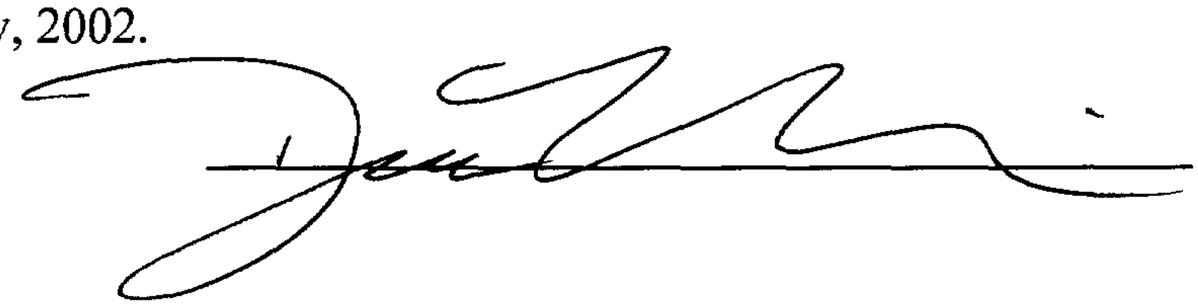
Certificate of Conference

On Jan 28, 2002, the undersigned counsel for Defendant Lay telephoned counsel for Plaintiffs in the State Court Action in an attempt to confer on the merits of the foregoing motion, but was unable to reach counsel; therefore, it is assumed this motion is opposed.



Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 28th day of January, 2002.



Cause No. 32716

JANE BULLOCK; JOHN BARNHILL; DON REILAND; SCOTT BORCHART; MICHAEL MIES; VIRGINIA ACOSTA; JIM HEVELY; MIKE BAUBY; ROBERT MORAN; JACK & MARILYN TURNER; and HAL MOORMAN & MILTON TATE, CO-TRUSTEES FOR MOORMAN, TATE, MOORMAN & URQUHART MONEY PURCHASE PLAN AND TRUST,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	WASHINGTON COUNTY, TEXAS
v.	§	
ARTHUR ANDERSEN, L.L.P.; D. STEPHEN GODDARD, JR.; DAVID B. DUNCAN; DEBRA A. CASH; ROGER WILLARD; THOMAS H. BAUER; ANDREW S. FASTOW; KENNETH L. LAY; and JEFFREY J. SKILLING,	§	
Defendants.	§	21st JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION, APPLICATION
FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

COME NOW Plaintiffs Jane Bullock, John Barnhill; Don Reiland; Scott Borchart; Michael Mies; Virginia Acosta; Jim Hevely; Mike Bauby; Robert Moran; Jack & Marilyn Turner; and Hal Moorman and Milton Tate, co-trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan and Trust, with this their Original Petition, Application for Temporary Restraining Order and Temporary Injunction, complaining of Defendants Arthur Andersen, L.L.P.; D. Stephen Goddard, Jr.; David B. Duncan; Debra Cash; Roger Willard; Thomas H. Bauer; Andrew S. Fastow; Kenneth L. Lay; and Jeffrey J. Skilling. In support thereof, they would show the following:

FILED
AT 3:00 O'CLOCK p M
JAN 2 4 2002
District Clerk, Washington County
By _____ Deputy

EXHIBIT
1

I. Discovery

1. Discovery is intended to be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

II. Parties

2. Plaintiffs are citizens of the State of Texas who own Enron common stock.

3. Defendant **Andrew S. Fastow** ("Fastow") was Enron's former Executive Vice President and Chief Financial Officer. Defendant Fastow may be served with citation at 1831 Wroxton, Houston, Texas 77005.

4. Defendant **Kenneth L. Lay** ("Lay") has been an Enron director since 1985. Lay has been Chairman of the Board of Enron since 1986. From 1986 until February 2001, Mr. Lay was also the Chief Executive Officer of Enron. On August 14, 2001, Lay became President and CEO of Enron upon the surprise resignation of defendant Skilling, as further described below. Mr. Lay is also a director of Eli Lilly and Company, Compaq Computer Corporation, EOTT Energy Corp. (the general partner of EOTT Energy Partners, L.L.P.), i2 Technologies, Inc. and NewPower Holdings, Inc. Defendant Lay may be served with citation at his principal place of business, 1400 Smith Street, Houston, Texas 77002.

5. Defendant **Jeffrey K. Skilling** ("Skilling") has been an Enron director at all times relevant to this lawsuit. Mr. Skilling served as President and Chief Executive Officer of Enron from February 2001 through August 14, 2001, when he announced his unexpected resignation from the offices of both President and CEO. It was also announced on that date that Skilling would remain on the Board of Directors, and that he would serve as a consultant to the Company through the year 2005. Mr. Skilling served as President and Chief Operating Officer of Enron from January 1997 through February 2001. From August 1990 until December 1996, he served

as Chairman and Chief Executive Officer of Enron North America Corp. and its predecessor companies. Mr. Skilling is also a director of the Houston Branch of the Federal Reserve Bank of Dallas. Defendant Skilling may be served with citation at 10 Briarwood Court, Houston, Texas 77019-5802.

6. **Defendant D. Stephen Goddard, Jr.** ("Goddard") is the office managing partner of the Houston, Texas office of Arthur Andersen, L.L.P. that conducted the external and internal audits and accounting of Enron's records, books, financial statements, annual and quarterly SEC filings. Goddard is an individual residing in Houston, Harris County, Texas who may be served with process at his home office and regular place of business, 711 Louisiana Street, Houston, Texas 77002.

7. Defendant **David B. Duncan** ("Duncan") is a partner of the Houston, Texas office of Arthur Andersen, L.L.P. who was in charge of the Enron account in which he and others conducted the external and internal audits and accounting of Enron's records, books, financial statements, annual and quarterly SEC filings. Duncan is an individual residing in Houston, Harris County, Texas who may be served with process at his home office and regular place of business, 711 Louisiana Street, Houston, Texas 77002.

8. Defendant **Debra A. Cash** ("Cash") is a partner of the Houston, Texas office of Arthur Andersen, L.L.P. who was in charge of the Enron account in which he and others conducted the external and internal audits and accounting of Enron's records, books, financial statements, annual and quarterly SEC filings. Duncan is an individual residing in Sour Lake, Hardin County, Texas who may be served with process at Hwy. 326 N, Sour Lake, Texas 77659.

9. Defendant **Roger Willard** ("Willard") is a partner of the Houston, Texas office of Arthur Andersen, L.L.P. who was in charge of the Enron account in which he and others

conducted the external and internal audits and accounting of Enron's records, books, financial statements, annual and quarterly SEC filings. Duncan is an individual residing in Houston, Harris County, Texas who may be served with process at 3723 Maroneal St., Houston, Texas 77025-1219.

10. Defendant **Thomas H. Bauer** ("Bauer") is a partner of the Houston, Texas office of Arthur Andersen, L.L.P. who was in charge of the Enron account in which he and others conducted the external and internal audits and accounting of Enron's records, books, financial statements, annual and quarterly SEC filings. Duncan is an individual residing in Houston, Harris County, Texas who may be served with process at 1515 Pebble Chase Dr., Katy, TX 77450-4358.

11. Defendant **Arthur Andersen, L.L.P.** ("AALLP") is a limited liability partnership, whose business address is 901 Main Street, Suite 5600, Dallas, Texas 75202. Defendant Arthur Andersen may be served with process by mailing its registered agent, by certified mail, return receipt requested, a copy of the citation and a copy of the petition attached thereto, to P. Scott Ozanus, 901 Main Street, Suite 5600, Dallas, Texas 75202. Arthur Anderson was the independent and an internal auditor for Enron during the relevant portions complained of herein.

III. Introduction

12. As a result of the actions of Defendants in this case, Plaintiffs available retirement funds and/or investments have been reduced, and Plaintiffs will be unable to collect retirement benefits and/or returns in the future in the amounts anticipated.

13. Collectively, the Defendants identified in paragraphs 3-5 are referred to as the "Enron Defendants." The Enron Defendants, through their positions as directors and/or senior officers of Enron, had responsibility for the management of Enron's business and operations.

14. Collectively, the Defendants identified in paragraphs 6-11 are referred to as the "Andersen Defendants."

15. It is appropriate to treat the Enron Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in Enron's public filings, press releases and other publications as alleged herein are the collective actions of the narrowly defined group of Defendants identified above. Each of the above officers and directors of Enron, by virtue of their high-level positions with Enron, directly participated in the management of Enron, was directly involved in the day-to-day operations of Enron at the highest levels and was privy to confidential proprietary information concerning Enron and its business, operations, products, growth, financial statements, and financial condition, as alleged herein. Said Defendants were involved in drafting, producing, reviewing and/or disseminating the false and misleading statements and information alleged herein, were aware, or recklessly disregarded, that the false and misleading statements were being issued regarding Enron, and approved or ratified these statements.

16. As officers and controlling persons of a publicly-held company whose common stock was, and is, registered with the SEC pursuant to the Exchange Act, and was traded on the New York Stock Exchange ("NYSE"), and governed by the provisions of the federal securities laws, the Individual Defendants each had a duty to disseminate promptly, accurate and truthful information with respect to Enron's financial condition and performance, growth, operations, financial statements, business, products, markets, management, earnings and present and future

business prospects, and to correct any previously-issued statements that had become materially misleading or untrue, so that the market price of Enron's publicly-traded securities would be based upon truthful and accurate information. The Enron Defendants' misrepresentations and omissions violated these specific requirements and obligations.

17. The Enron Defendants participated in the drafting, preparation, and/or approval of the various public and shareholder and investor reports and other communications complained of herein and were aware of, or recklessly disregarded, the misstatements contained therein and omissions therefrom, and were aware of their materially false and misleading nature. Because of their Board membership and/or executive and managerial positions with Enron, each of the Enron Defendants had access to adverse undisclosed information about Enron's business prospects and financial condition and performance as particularized herein and knew (or recklessly disregarded) that these adverse facts rendered the positive representations made by or about Enron and its business issued or adopted by Enron materially false and misleading.

18. The Enron Defendants, because of their positions of control and authority as officers and/or directors of Enron, were able to and did control the content of the various SEC filings, press releases and other public statements pertaining to Enron. Each Enron Defendant was provided with copies of the documents alleged herein to be misleading prior to or shortly after their issuance and/or had the ability and/or opportunity to prevent their issuance or cause them to be corrected. Accordingly, each of the Enron Defendants is responsible for the accuracy of the public reports and releases detailed herein, and is therefore primarily liable for the representations contained therein.

19. Defendant AALLP was hired by Enron with the approval of its directors to provide the accounting data necessary for compliance with Texas state securities statutes and

requirements of the New York Stock Exchange. Defendant AALLP's relationship with Enron included being paid to provide both outside audits of Enron's financial statements as well as internal audits, a clear conflict of interest. As a result AALLP owed a duty of full and complete disclosure to shareholders in Enron and its employees, as well as regulatory authorities, the stock exchange and state law. AALLP breached that duty by failing to fully and adequately disclose Enron's debt positions by overstating Enron's net income for each year beginning in 1997 and by failing to fully and adequately disclose Enron's involvement with private investment limited partnerships formed by Enron executives.

20. Defendant AALLP was also hired by Enron with the approval of its directors to provide their opinion that Enron's system of internal controls was adequate. This opinion was false and misleading in view of the many material errors and omissions in the financial statements.

21. Each of the Defendants is liable as a participant in a fraudulent scheme and course of business that operated as a fraud or deceit on Plaintiffs by disseminating materially false and misleading statements as well as internal audits and significant consulting services a clear conflict of interest and/or concealing material adverse facts. The scheme: (i) deceived the Plaintiffs and the investing public regarding Enron's business, its finances and the intrinsic value of Enron's common stock; and (ii) caused Plaintiffs to continue their ownership of Enron stock in their private investing devices and/or their 401k plans.

IV. Jurisdiction and Venue

22. This Court has jurisdiction over each Defendant because Defendant has committed a tort in whole or in part in Washington County, Texas, by mailing reports, audits and representations to Plaintiffs herein at their homes in Washington County. Plaintiffs relied on

those reports done at the behest of the Defendants Lay, Skilling & Fastow and prepared by AALLP through the other Defendants herein. This Court also has jurisdiction over the controversy because the damages are above the minimum jurisdictional limits.

23. Venue is proper in Washington County, Texas. Specifically, venue is proper in Washington County, Texas because it is the county in which all or a substantial part of representations were received and acted upon by the Plaintiffs to their detriment. These representations included annual reports, auditing documents, 10K's, 10Q's, and other reports prepared by AALLP and its partners and auditors such as David Duncan, Debra A. Cash, Roger Willard and Thomas H. Bauer as well as others as of yet unknown to Plaintiffs. Plaintiffs' losses all occurred in Washington County, Texas, giving this Court jurisdiction of this suit.

24. The Defendant Lay traveled to Brenham, Washington County, to represent to the Plaintiffs herein and to all others that would listen just what a great investment Enron Corp. was. The Plaintiffs believed this representation made in Washington County and relied upon it to their detriment in either purchasing shares in Enron or in not selling the shares that they had already purchased.

V. Just the Facts

25. In 1999, Defendant Fastow formed two investment partnerships, LJM Cayman LP ("LJM") and LJM2 Co-Investment LP ("LJM2"). LJM and LJM2 are private investment companies that, according to Enron's public filings, engage in acquiring and/or investing in primarily energy-related investments. Fastow was the managing member of the general partner of each of the two partnerships.

26. Mr. Fastow's role as chief financial officer made him privy to internal asset analyses at Enron. An offering memorandum for the LJM2 Co-Investment, L.P. ("LJM2")

partnership said that this dual role "should result in a steady flow of opportunities. . . to make investments at attractive prices."

27. Incredibly, the document reportedly goes so far as to expressly acknowledge the glaring conflict of interest that existed under this agreement and the multi-million dollar incentive for Fastow to engage in self-dealing to the detriment, and at the expense of, Enron and its stockholders to whom he and the Director Defendants owned a fiduciary duty and states that this dual role "should result in a steady flow of opportunities. . . to make investments at attractive prices and that *Mr. Fastow would find his interests "aligned" with investors because the "economics of the partnership would have significant impact on the general partner's [Mr. Fastow] wealth.*" (Emphasis added).

28. Defendants clearly breached their duties by expressly approving the agreement with Mr. Fastow which created a situation of irreconcilable conflict and placed Enron's CFO in the middle of that conflict by putting Fastow, who is responsible for overseeing the financial interests of the company, in charge of partnerships that routinely purchased assets from Enron and was involved in self dealing.

29. Remarkably, Defendant Lay reportedly denied the existence of any conflict of interest arising out of the LJM arrangement. Such related-party transactions, involving top managers or directors, aren't unusual, he said. "Almost all big companies have related-party transactions."

30. Enron has publicly stated that the partnership deals were aimed to help it hedge against fluctuating values for its growing portfolio of assets. In the past decade, Enron has seen its asset base rocket to more than $100 billion. As a result of this rapid growth, Enron has at

times been strapped for capital and has sought ways to bring in outside investors to help bolster its balance sheet.

31. Despite statements designed to make the partnership deals seem innocuous, the positions Fastow held with the partnerships (and Enron) allowed Fastow to benefit from the illicit use of confidential, non-public information. An egregious example of this occurred in connection with a $30 million LJM2 investment in a project known as "Raptor III" in September 2000. This transaction involved writing put options committing LJM2 to buy Enron stock at a set price for six months. Writers of put options benefit from higher prices of the underlying stock, and are hurt by declining prices. As reported in the *Wall Street Journal* on October 19, 2001: "Only four months into this six month deal, LJM2 approached Enron to settle the investment early, causing LJM2 to receive its $30 million capital invested, plus $10.5 million in profit." The information quoted came from an internal report produced by Defendant Fastow for the partnership investors, but withheld from the public. The article further reported that: "The renegotiation was before a decline in Enron's stock price, which could have forced LJM2 to buy Enron shares at a loss of as much as $8 each." Thus, Fastow and LJM2 took advantage of inside information to recap illicit insider trading profits, in the millions of dollars in this transaction alone.

32. Finally, the fallout from the revelations about the partnership wrongdoing has had negative financial repercussions for Enron. These include a steep decline in its stock price, loss of investor and Wall Street confidence, and increased costs of attracting and retaining employees. The cover up of the Fastow agreement and other related transactions by the directors and auditors has subjected Enron to strong criticism from investors and analysts alike.

33. On October 23, 2001, the Associated Press reported that various partnership transactions purportedly resulted in a gain of $16 million (pretax) in 1999, and a loss of $36 million in 2000. The same article quoted a top analyst as sharply criticizing the directors and officers' concealment of the partnership deals. "What you are hearing from many is that the company's credibility is being questioned and there is a need for disclosure," said David Fleischer of Goldman, Sachs & Co. "That is exactly what I think needs to happen. There is an appearance that you are hiding something . . . I for one find the disclosure is not complete enough for me to understand." To add fuel to the fire, the Company also acknowledged that the SEC had begun an investigation into AALLP's auditing practices with regard to the partnerships and whether the audits were done according to GAAP

34. On the basis of the foregoing, the Director Defendants breached their duties that each of them owed to its stockholders by expressly approving of a number of agreements that placed Enron's Chief Financial Officer in a position where he was permitted to capitalize on his knowledge of Enron's proprietary financial information for the benefit of numerous partnerships of which he served as a general partner.

35. Significantly, officers and directors of Enron had financial interests in all or some of these partnerships. As such, by approving the agreements that enabled Mr. Fastow to act in dual capacities, Defendants effectively engaged in self-dealing and placed Mr. Fastow in a position where he was capable of misappropriating Enron's confidential financial information for the purpose of enriching the partnerships he served as a general partner of, as well as furthering the financial interests of other investors in the partnerships—all to the detriment of Enron. In so doing, the Defendants breached the duties that each of them owed to Enron's stockholders and

caused Enron to incur losses in the amount of at least $35 million and the stock value to drop drastically.

36. According to published reports, the general partner of the two investment partnerships was paid management fees as much as 2% annually of the total amounts invested in the partnerships. Additionally, the general partner was eligible for profit participation that could produce tens of millions of dollars more if the partnership met its performance goals over its projected 10-year life. Inasmuch as the partnerships were formed with the intention of managing over $200 million in assets, Defendant Fastow's potential profits from managing the partnership exceeded $4 million a year.

37. Since their formation, LJM and LJM2 have engaged in billions of dollars of complex hedging transactions with Enron – in which Enron's interests were adverse to these entities. By their very nature, Enron's transactions with these two investment partnerships, if successful, would result in losses to Enron and a lowering of Plaintiffs' stock value.

38. Because Defendant Fastow was on both sides of the transactions between Enron and the investment partnerships, the terms of those transactions were not at arm's-length and there was no reasonable method to ensure that the terms of those transactions were equivalent to transactions that could have been engaged in with third parties. AALLP failed to include these transactions on a consolidated balance sheet as required by GAAP.

39. For example, Enron entered into a series of complex transactions in 1999 involving LJM and a third-party, pursuant to which (i) Enron and the third-party amended certain forward contracts to purchase shares of Enron common stock, resulting in Enron having forward contracts to purchase Enron common shares at the market price on the day of the agreement, (ii) LJM received about 6.8 million shares of Enron common stock, and (iii) Enron received a note

receivable and certain financial instruments from LJM hedging an investment held by Enron. These transactions should have appeared on the consolidated accounts of Enron in accordance with GAAP.

40. During the fourth quarter of 1999, LJM2 acquired approximately $360 million of merchant assets and investments from Enron. Further, in December, 1999, LJM2 entered into agreements to acquire certain of Enron's interest and assets for about $45 million. This was not on a consolidated balance sheet.

41. In 2000, Enron again entered into transactions with LJM, LJM2, and entities related to LJM and LJM2, to hedge certain merchant investments and other assets. Enron contributed about $1.2 billion of assets, including notes payable and restricted shares of outstanding Enron common stock and warrants, to LJM-related entities. Additionally, Enron entered into derivative transactions with a combined amount of about $2.1 billion with LJM-related entities to hedge certain assets. These transactions put Enron at risk in amounts exceeding $1 billion, yet were not included on Enron's consolidated balance sheet or properly reported to investors by Enron's independent auditor, AALLP.

42. In all, between June 1999 and September 2001, Enron and Enron-affiliated entities did 24 deals with LJM1 or LJM2 or both, ranging from buying and selling hard assets, purchasing debt or equity interests, and selling the rights to buy or sell shares of stock at certain preset prices. These were not included on reports prepared by AALLP and relied upon by Plaintiffs.

43. In fact, the LJM2 offering document, which was prepared under the direction of Defendant Fastow, admitted that the responsibilities of Mr. Fastow and other partnership

officials to Enron could "from time to time conflict with fiduciary responsibilities owed to the Partnership and its partners."

44. As reported in TheStreet.com on July 12, 2001, Enron was questioned in a conference call that day about the Company's transactions with LJM and LJM2. Defendant Skilling falsely represented the true state of affairs by representing that LJM and LJM2 had done "a couple of real minor things." The Defendants either knew or should have known that these representations were false, yet they did nothing to inform the Plaintiffs of the true facts and liabilities of these transactions.

45. In July 2001, Fastow terminated his interests in the partnerships, and Enron unwound its financial relationship with the partnerships, yet Plaintiffs were kept in the dark concerning the effect of these transactions on the value of Plaintiffs' shares.

VI. Additional Materially False and Misleading Statements

46. On January 18, 2000, Enron issued a press release approved by its officers and directors announcing its financial results for the fourth quarter of 1999 and fiscal year 1999. The Company reported that for fiscal 1999 it earned $957 million and had revenues of $40 billion. Defendant Lay commented on the results, stating in pertinent part as follows:

> Our strong results in both the fourth quarter and full year 1999 reflect excellent performance in all of our operating businesses. . . . In addition, Enron continues to develop innovative, high-growth new businesses that capitalized on our core skills, as demonstrated by the early success of our new broadband services businesses. Overall, a great year – one in which our shareholders received a total return of 58 percent.

47. On January 20, 2000, Enron issued a press release announcing that the Company had hosted its annual analyst conference in Houston that same day. With respect to the broadband services division, the press release stated in pertinent part as follows:

> The new name of Enron's communications business, Enron Broadband Services, reflects its role in the very fast growing market for premium broadband services. Enron is

> deploying an open flexible global broadband network controlled by software intelligence, which precludes the need to invest in a traditional point-to-point fiber network.

The Defendants either knew or should have known that this was false and misleading.

48. On April 12, 2000, Enron issued a press release announcing its financial results for the first quarter of 2000, the period ending March 31, 2000. The Company reported net income of $338 million, or $0.40 per share, and revenues of $13.1 billion. Defendant Lay highlighted the Company's broadband business, stating in pertinent part as follows:

> In our newest business, we significantly advanced deployment of our broadband network and saw strong response to our bandwidth intermediation and content delivery products.

The press release further described the developments in the broadband business as follows:

> Enron is replicating its unique business model and skills to deploy a global network for the delivery of comprehensive bandwidth solutions and high bandwidth applications.
>
> During the first quarter, Enron significantly advanced its network development. New agreements have been signed with over 20 broadband distribution partners.

The Defendants either knew or should have known that this was false and misleading.

49. On July 24, 2000, Enron issued a press release announcing its financial results for the second quarter of 2000, the period ending June 30, 2000. The Company reported net income of $289 million, or $0.34 per share, and revenues of $16.9 billion for the second quarter. Defendant Lay described the results as "another excellent quarter" and highlighted that Enron Broadband Services had recently executed "an exclusive, 20-year, first-of-its-kind contract with Blockbuster to stream on-demand movies." The press release further reported that Enron Broadband Services had executed $19 million of new contracts. The directors, officers and auditors should have known that this was false and misleading.

50. On October 17, 2000, Enron issued a press release announcing its financial results for the third quarter of 2000, the period ending September 30, 2000. The Company reported net

income of $292 million, or $0.34 per share, and revenues of $30 billion. Defendant Lay commented on the results stating in pertinent part as follows:

> Enron delivered very strong earnings growth again this quarter, further demonstrating the leading market positions in each of our major businesses . . .. We operate in some of the largest and fastest growing markets in the world and we are very optimistic about the continued strong outlook for our company.

With respect to Enron Broadband Services, the press release reported among other things, that "Enron delivered 1,399 DS-3 months equivalents of broadband capacity, which was a 42 percent increase over the previous quarter." The directors, officers and auditors should have known that this was false and misleading.

51. On January 22, 2001, Enron issued a press release announcing its financial results for the fourth quarter of 2000 and fiscal year 2000, the period ending December 31, 2000. The Company reported earnings of $0.41 per share for the fourth quarter of 2000. Defendant Lay commented on the results stating in pertinent part as follows:

> Our strong results reflect breakout performances in all of our operations, ... Our wholesale services, retail energy and broadband businesses further expanded their leading market positions, as reflected in record levels of physical deliveries, contract originations and profitability. Our shareholders had another excellent year in 2000, as Enron's stock returned 89 percent, significantly in excess of any major investment index.

With respect to Enron Broadband Services, the press release stated:

> In addition, Enron Broadband Services reported a $32 million IBIT loss. These results include costs associated with building this new business, partially offset by the monetization of a portion of Enron's broadband delivery platform.
>
> * Enron Broadband Services delivered 2,393 DS-3 month equivalents of capacity, representing a 71 percent increase over the third quarter of 2000. In addition, transaction levels also significantly increased to 236 transactions in the fourth quarter, compared to 59 transactions in the third quarter of 2000.

This was false and misleading and should not have been allowed by the directors, officers and auditors.

52. On January 30, 2001, Enron issued a press release announcing that it had priced an offering of 20-year zero coupon convertible senior debt securities, raising $1.25 billion.

53. On April 17, 2001, Enron issued a press release announcing its financial results for the first quarter of 2001, the period ending March 30, 2001. The Company reported earnings of $0.47 per share. Defendant Skilling commented on the results, stating in pertinent part as follows:

> Enron's wholesale business continues to generate outstanding results. Transaction and volume growth are translating into increased profitability . . . . In addition, our retail energy services and broadband intermediation activities are rapidly accelerating.

With respect to Enron Broadband Services, the press release stated, among other things, as follows:

> Enron's global broadband platform is substantially complete, and 25 pooling points are operating in North America, Europe and Japan. Enron's broadband intermediation activity increased significantly, with over 580 transactions executed during the quarter – more than in all of 2000. Enron also added 70 new broadband customers this quarter for a total of 120 customers.

The directors approved this press release, causing a false impression to Plaintiffs of the value of Enron shares.

54. On July 12, 2001, Enron issued a press release announcing its financial results for the second quarter of 2001, the period ending June 30, 2001. The Company reported diluted earnings of $0.45 per share. Defendant Skilling downplayed any concerns investors might have about Enron Broadband Services, stating in pertinent part as follows:

> In contrast to our extremely strong energy results, this was a difficult quarter in our broadband business. However, our asset-light approach will allow us to adjust quickly to weak broadband industry conditions. We are significantly reducing our broadband cost structure to match the reduced revenue opportunities currently available.

None of the directors or other officers who were aware of the falsity of this statement made any attempt to correct this misstatement of the facts.

55. On July 25, 2001, Bloomberg Business News reported that at a meeting with analysts, Defendant Skilling stated that Enron will meet or beat its profit projections. The article stated in pertinent part:

> "We will hit those numbers, and we will beat those numbers," Skilling told a meeting of analysts and investors in New York . . . .
>
> Analysts have also cited concern about unpaid power bills by Enron customers in California and India, and losses by Enron's broadband trading unit, which may hurt Enron's profits.
>
> "All of these are bunk," Skilling said. "These are not issues for this stock."

56. On August 14, 2001, Enron issued a press release announcing that Defendant Skilling had resigned his positions at the Company. This announcement surprised investors and the price of Enron common stock dropped in response. According to a report carried by Bloomberg Business News, on August 17, 2001, after the announcement of Defendant Skilling's resignation, Defendant Lay met with investors and analysts "to calm fears that the Company may be hiding dire financial news . . .." The article quoted an analyst from UBS Warburg as stating: "Ken met with us to reassure us that there is nothing wrong with the company . . .. There is no other shoe to fall, and no charges to be taken." Plaintiffs believed Lay's statement to their detriment.

57. Then, on August 29, 2001, Defendant Lay provided an interview to Bloomberg Business News which was carried on the newswires. Defendant Lay portrayed the broadband services division in highly positive terms. The following question/answer is illustrative:

> Johnson: There has been a lot of concern by investors recently over the company's broadband trading unit, which trades space on fiber optic networks. Where does Enron stand with fiber optic trading now? Have you – do you still remain hopeful in that sector? Or what's the outlook now?

Lay: Why, no, that continues to grow, quarter-to-quarter, at a very good rate, so we're continuing to develop liquidity in the marketplace. I mean, the biggest single problem has been the shortage of creditworthy counter parties to do longer term transactions. But certainly, quarter-to-quarter, we continue to increase the number of trades rather significantly.

58. The Defendant Lay sent an e-mail to employees after he knew that the stock value had declined appreciably indicating that the stock was still a good value. This representation was false, misleading and fraudulent and resulted in damages to the Plaintiffs herein.

59. The statements referenced above, were each materially false and misleading when made as they misrepresented and/or omitted the following adverse facts which then existed and disclosure of which was necessary to make the statements made not false and/or misleading, including:

(a) that Enron Broadband Services was experiencing declining demand for bandwidth and the Company's efforts to create a trading market for bandwidth were not meeting with success as many of the market participants were not creditworthy;

(b) that the Company's operating results were materially overstated as a result of the Company failing to timely write-down the value of its investments with LJM Cayman LP and LJM2 Co-Investment LP;

(c) that Enron was failing to write-down impaired assets on a timely basis in accordance with GAAP; and

(d) as a result of the foregoing, Defendants' earnings projections and statements about the Company's prospects and outlook were lacking in a reasonable basis at all times. The Plaintiffs either invested based on these statements or did not sell their shares based on these false and misleading statements.

VII. The Results

60. On October 16, 2001, Enron surprised the market by announcing that the Company was taking non-recurring charges of $1.01 billion after-tax, or ($1.11) loss per diluted share, in the third quarter of 2001, the period ending September 30, 2001. Defendant Lay commented on the substantial charge, stating:

> After a thorough review of our businesses, we have decided to take these charges to clear away issues that have clouded our performance and earnings potential of our core energy businesses.

The press release further detailed the charge as follows: $287 million related to asset impairments recorded by Azurix Corp.; $180 million associated with the restructuring of the Company's Broadb. l Services division; $544 million related to losses with certain investments and early termination during the third quarter of certain structured finance arrangements with a previously disclosed entity.

61. An article in The Wall Street Journal, on October 17, 2001, further explained the nature of the "structured finance arrangements with a previously disclosed entity," which was mentioned in the Company's earnings release. According to the article, the structured finance arrangements involved limited partnerships that were managed by Enron's Chief Financial Officer, Defendant Fastow. The article stated in pertinent part as follows:

> The two partnerships, LJM Cayman LP and the much larger LJM2 Co-Investment LP, have engaged in billions of dollars of complex hedging transactions with Enron involving company assets and millions of shares of Enron stock. It isn't clear from Enron filings with the Securities and Exchange Commission what Enron received in return for providing these assets and shares. In a number of transactions, notes receivable were p ided by partnership-related entities.

62. According to The Wall Street Journal, in a news report on October 17, 2001, the cryptic reference in the press release was to the "pair of limited partnerships that until recently were run by Enron's chief financial officer." According to The Wall Street Journal, Enron

privately acknowledged (initially) that its transactions with those partnerships resulted in write-downs of $35 million.

63. The next day, on October 18, 2001, The Wall Street Journal further reported on the nature of Defendant Fastow's financial arrangements with the Company. The article reported that "Enron had shrank its shareholder equity by $1.2 billion as the Company had decided to repurchase 55 million of its shares that it had issued as part of a series of complex transactions with an investment vehicle" connected to Defendant Fastow. The article stated in pertinent part as follows:

> According to Rick Causey, Enron's chief accounting officer, these shares were contributed to a "structured finance vehicle" set up about two years ago in which Enron and LJM2 were the only investors. In exchange for the stock, the entity provided Enron with a note. The aim of the transaction was to provide hedges against fluctuating values in some of Enron's broadband telecommunications and other technology investments.

64. Defendants did not acknowledge, however, until October 17, 2001, that the $1.2 billion writedown was attributable to Enron's transactions with Fastow's investment partnerships. On October 18, 2001, The Wall Street Journal reported that in a conference call on October 17, 2001, Defendant Lay stated that 55 million shares had been repurchased by Enron, as the Company "unwound" its participation in the transactions with the limited partnerships.

65. Defendants failed to disclose this huge reduction in assets and shareholder's equity attributable to Enron's transactions with the investment partnerships, either in the October 16, 2001 press release or on the October 16, 2001 conference call, in an apparent admission of guilt of their wrongful conduct.

66. The price of Enron common stock fell sharply on these disclosures. On October 17, 2001, the price declined approximately 5% to a closing price of $32.20 per share on volume of more than 5 million shares. On October 18, 2001, the price dropped approximately 10% to

close at $29 per share with over 9 million shares trading. According to Reuters news service, "Enron Corp. stock fell sharply on [October 18] as investors digested news of a $1.2 billion reduction in the energy giant's shareholder equity that attracted little attention when it was first disclosed earlier this week."

67. Enron's October 16, 2001 announcement and the continual "un-weaving" of Enron's business dealings prompted further concerns for investors regarding Enron's financial status. On November 6, 2001 Fitch Inc. downgraded Enron's senior unsecured debt to triple-B-minus from triple-B-plus, just a notch above junk bond or high-yield status. The prior week, Standard & Poor's Corp. lowered its credit rating on Enron to triple-B while Moody's Investors Service lowered its rating to Baa2.

68. On November 8, 2001, Enron announced it was restating its finances as far back as 1997 to account for losses related to a number of complex partnerships resulting in a $586 million reduction in net income, an additional $2.5 billion in debt and 77-cent reduction in earning per share. This news prompted John Olson, an analyst with Sanders Morris Harris to state: "At the end of the day these details give support to the fear that Enron was a financial house of cards." In trading, Enron's stock closed at $8.63 on November 9, 2001.

69. On Friday evening, November 9, 2001, Enron's rival in the energy trading business, Dynegy announced it would acquire Enron. Dynegy agreed to purchase Enron stock for an estimated $8.9 billion and assume $12.8 billion in Enron debt. Shareholders would have received 0.2685 share of Dynegy stock per Enron stock, an estimated $10.41 per Enron share.

70. As alleged herein, Defendants acted recklessly in that Defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; the Defendants knew that such statements or documents would

be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents which they knew were false and misleading. As set forth elsewhere herein in detail, Defendants, by virtue of their receipt of information reflecting the true facts regarding Enron, their control over, and/or receipt and/or modification of Enron's allegedly materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Enron, participated in the fraudulent scheme alleged herein.

71. Defendants' reckless conduct is further evidenced by the insider selling of certain of the Enron Defendants and other Enron Insiders. This trading was unusual and suspicious given its timing and amount as follows:

> Defendant Lay: sold 84,714 shares from Jan. 2 to Jan 31 for $68.28 to $82 each, or more than $5.78 million; sold 80,680 shares from Dec. 1 to Dec. 29 for $67.19 to $84.06 each, or more than $5.42 million. The sales total $11.2 million. Plaintiffs seek a disgorgement of Lay's ill-gotten gains made at the expense of Plaintiffs.
>
> Defendant Skilling: sold 50,000 shares from Jan. 3 to Jan. 31 for $68.94 to $80.28 each, or more than $3.45 million; sold 20,000 shares from Dec. 20 to Dec. 27 for $79.03 to $83 each, or more than $1.58 million, and 20,000 shares from Dec. 6 to Dec. 13 for $68.91 to $77.06, or $1.38 million. The sales total $6.41 million. Plaintiffs seek a disgorgement of Skilling's ill-gotten gains.

72. At all relevant times, the market for Enron's securities was an efficient market for the following reasons, among others:

(a) Enron's stock met the requirements for listing, and was listed and actively traded on the NYSE, a highly efficient and automated market;

(b) As a regulated issuer, Enron filed periodic public reports with the SEC and the NYSE;

(c) Enron regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press

releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and

(d) Enron was followed by several securities analysts employed by major brokerage firms who wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

73. As a result of the foregoing, the market for Enron's securities promptly digested current information regarding Enron from all publicly available sources and reflected such information in Enron's stock price. Under these circumstances, Plaintiffs suffered injury through their purchase of Enron's securities at artificially inflated prices and a presumption of reliance applies.

74. Defendants wholly failed to issue true and complete financial statements regarding Enron, and the Andersen Defendants, as Enron's independent auditor, miserably failed investors in performing its obligations. AALLP provided accounting services to Enron for a number of years and has performed independent audits of Enron's financial statements for at least the period of 1997 through 2000. In so doing, AALLP falsely certified that the year-end financial statements contained in their reports fairly presented Enron's financial position, results of operations and changes of financial position. AALLP falsely certified that these financial statements had been examined in accordance with Generally Accepted Accounting Practices ("GAAP") and Generally Accepted Auditing Standards ("GAAS").

75. As part of the services rendered to Enron, AALLP's personnel were present at Enron's corporate headquarters, financial offices and other operations throughout the period in

question and had continual access to, and knowledge of, Enron's private and confidential corporate financial and business information. including internal monthly financial statements, board minutes and internal memoranda. Further, the Andersen Defendants received substantial compensation for these services, and in addition, AALLP-related companies received equivalent, if not greater, compensation for related services. The Andersen Defendants, thus, knew or recklessly disregarded Enron's actual financial condition and business problems, which were concealed from the investing public. AALLP, however, issued unqualified, misleading and false reports regarding Enron's finances for the periods of 1997, 1998, 1999 and 2000.

VIII. Causes of Action

COUNT I – Fraud

76. Plaintiffs incorporate by reference and re-allege each of the foregoing allegations.

77. The Defendants, individually and in concert, engaged in a plan, scheme, and course of conduct, pursuant to which they knowingly and/or recklessly engaged in acts, transactions, practices, and courses of business which operated as a fraud upon Plaintiffs and made various untrue and deceptive statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to Plaintiffs as set forth above. The purpose and effect of this scheme was to induce Plaintiffs to purchase and/or retain Enron common stock at artificially inflated prices.

78. Defendants, pursuant to their plan, scheme and unlawful course of conduct, knowingly and/or recklessly issued, or caused to be issued statements to the investing public as described above.

79. Defendants knew and/or recklessly disregarded the falsity of the foregoing statements. As senior officers and/or directors of the Company and internal and outside auditors, the Defendants had access to the non-public information detailed above.

80. Each of the Defendants knew or recklessly disregarded the fact that the above acts and practices, misleading statements, and omissions would adversely affect the integrity of the market in Enron stock. Had the adverse facts Defendants concealed been properly disclosed, Enron's shares would not have sold at the artificially inflated prices they did.

81. As a result of the foregoing, the market price of Enron stock was artificially inflated. In ignorance of the false and misleading nature of the representations, Plaintiffs relied, to their detriment, on the integrity of the market as to the price of Enron stock and purchased and/or retained their Enron stock.

82. Had Plaintiffs and the marketplace known of the true operating and financial results of Enron, which, due to the actions or inactions of Defendants were not disclosed, Plaintiffs would not have purchased or otherwise acquired their Enron common stock or, if they had acquired Enron common stock in the past, they would have divested their holdings of Enron stock before its tumultuous decline.

83. Plaintiffs were injured because the risks that materialized were risks of which they were unaware as a result of Defendants' misrepresentations, omissions and other fraudulent conduct alleged herein. The decline in the price of Enron's sock was caused by the public dissemination of the true facts, which were previously concealed or hidden. Absent said Defendants' wrongful conduct, Plaintiffs would not have been injured.

84. The price of Enron common stock declined materially upon public disclosure of the true facts which had been misrepresented or concealed, as alleged in this petition. Plaintiffs

have suffered substantial damages as a result of the wrongs alleged herein, yet many defendants knowing the true value of the shares disposed of them before the directors and auditors made the true facts known about the stock value.

85. Plaintiffs further allege that because Defendants knew that the representations described above were false at the time they were made, the representations were fraudulent and malicious and constitute conduct for which the law allows the imposition of exemplary damages. In the connection, Plaintiffs will show they incurred significant expenses, including attorneys' fees, in the investigation and prosecution of this action. Accordingly, Plaintiffs request that exemplary damages be awarded against the Defendants in a sum within the jurisdictional limits of this Court.

COUNT II – Negligence of Andersen Defendants

86. Plaintiffs incorporate by reference and re-allege each of the foregoing allegations.

87. The accounting firm of Arthur Andersen, L.L.P. ("AALLP") was hired by Enron with the approval of its directors to provide the audit data necessary for compliance with state statutes and requirements of the N.Y.S.E. As a result AALLP owed a duty of full and complete disclosure to shareholders in Enron, as well as regulatory authorities. AALLP breached that duty by failing to fully and adequately disclosed Enron's debt positions by overstating Enron's net income for each year beginning in 1997 and by failing to fully and adequately disclose Enron's involvement with private investment limited partnerships formed by Enron executives. All of these actions or inactions violated general principles of accounting.

88. For instance, based on information and belief, the Defendant Fastow formed L-JM Cayman, L.P. (LJM1) and LJM2 Co. – Investment, L.P. (LJM2), private investment limited partnerships which affected the equity of shareholders such as Plaintiffs through its transactions

with Enron. These transactions were not adequately reflected in the filings done or overseen by AALLP and were not reported by AALLP in accordance with standard accounting practices.

89. The financial activities of Chewco Investments, L.P. ("Chewco"), an investor in Joint Energy Development Investments Limited Partnership ("JEDI") should have been consolidated with Enron beginning in 1997. The failure to consolidate Chewco caused a false financial picture to be given to shareholders such as Plaintiffs. The Plaintiffs relied to their detriment on the financial statements prepared by AALLP in either purchasing their shares or retaining them.

90. The financial activities of JEDI should have been consolidated into Enron's financial statement epared by AALLP beginning in 1997 causing a false financial picture to be given of Enron to its investors such as Plaintiffs. Such failure amounted to a violation of standard accounting practices by AALLP and resulted in damages to Plaintiffs.

91. The financial activities of LJM1 which engaged in derivative transactions with Enron to permit Enron to hedge market risks also should have been consolidated into Enron's financial statements beginning in 1999. The failure to do so amounted to negligence on the part of AALLP and resulted in losses to Plaintiffs. Such failure by AALLP was also a violation of standard accounting practices.

92. Four SPE's known as Raptor I-IV (collectively "Raptor") were created in 2000 permitting Enron to hedge market risk in certain of its investments. Under generally accepted accounting principles, the note receivable from Raptor should have been included as a reduction to shareholders equity. The net effect of this accounting entry done by AALLP was to overstate both notes receivable and shareholders' equity by approximately $172,000,000.00.

93. In connection with the work it performed for Enron, the Andersen Defendants also:

(a) obtained, or recklessly disregarded, certain evidentiary matters which provided it with information revealing adverse facts about Enron's business and finances, and improperly failed to require, or to make, disclosure of such facts. As a result of its investigations and audit work, the Andersen Defendants knew, or recklessly disregarded, that Enron's publicly-disseminated reports and financial statements were materially false and misleading and/or failed to disclose material facts.

(b) knew or recklessly disregarded facts which indicated that it should have qualified its opinion on Enron's financial statements for Fiscal Years 1997 through 00, the failure to make such a qualification was a violation of GAAS, including the Fourth Standard of Reporting, the first, second and third standards of fieldwork.

(c) failed to cause Enron to disclose material facts and allowed Enron to make material misrepresentations regarding Enron to Enron's security holders and the investing public generally during the period in question, and also took steps in furtherance of the conspiracy which aided and abetted the wrongdoing complained of herein.

(d) knew or recklessly disregarded that Enron's publicly-reported revenues and earnings throughout the period in question were materially overstated because Enron employed improper asset and loss recognition techniques.

(e) knew or recklessly disregarded that employees and officers of Enron had interests in and control over Special Purpose Entities ("SPE's") which would have caused such SPE's to be reported in consolidated financial reports of Enron.

(f) knew or recklessly disregarded that employees and officers of Enron had close ties to the SPE's, which themselves had huge liabilities that AALLP knew did not show up on consolidated financial reports of Enron; and

(g) knew or recklessly disregarded that Enron had a note receivable received in exchange for stock issued in 2000.

94. AALLP did not qualify its opinion on Enron's financial statements and system of internal control for fiscal years 1997 through 2001 and the failure to make such a qualification was a violation of GAAS, including the fourth standard of reporting and attestation standards established by the AICPA.

95. These failures on the part of AALLP each constituted negligence and were a proximate cause of the precipitous drop in the value of Plaintiffs' shares in Enron. All of the above transactions and the failure of AALLP to properly record and document them constituted a violation of standard accounting practices.

COUNT III – Civil Conspiracy

96. Plaintiffs incorporate by reference and re-allege each of the foregoing allegations.

97. The Defendants conspired together to commit fraud. In particular, the Defendants made certain representations to Plaintiffs regarding financial condition of Enron that they knew were not true. The Defendants filed annual and quarterly reports with the SEC which they knew had false and misleading information concerning the finances of Enron and which were done illegally or through illegal means. Defendants reviewed, certified and/or audited the financial statements of Enron indicating Enron was reaping profits greater than the actual profits that would have been shown had the reports been done in a legally required manner following generally accepted accounting practices.

98. Plaintiffs relied on the Defendants statements, whether written or oral, and their positions at Enron and purchased and/or retained Enron stock, unaware that the finances of the Enron were being inflated and no what had been represented, and each has suffered damages as a result. Defendants continued to make representations which were false, and which they knew were false and not in the best interest of the Plaintiffs in order to deceive the Plaintiffs and maximize their own profits. The Defendants directly benefited by way of reaping large profits by selling of their own Enron stock at artificially inflated prices and/or collecting millions of dollars in auditing fees that would not have been realized absent the misrepresentations.

99. In addition, the Audit and Compliance Committee ("Committee") of the Enron Board of Directors serves as the overseer of Enron's financial reporting, internal controls and compliance processes. Every year during the relevant time period, the Committee met with the Andersen Defendants, as well as Enron officers and employees responsible for legal, financial and accounting matters. These Enron officers and employees necessarily included Lay, Skilling, Fastow, Causey and Buy. In addition to recommending the appointment of independent auditors, like the Andersen Defendants, to the Board of Directors, the Committee reviewed the scope of and fees related to the audit, the accounting policies and reporting practices, contract and internal auditing and internal controls. In relevant years, the Committee was comprised of Jaedicke, Chan, Foy, Wakeham, Gramm, Willison, Mendelsohn and Pereira. These Directors wholly failed in their duties to oversee the auditing process and acted in concert with the Andersen Defendants in misrepresenting the true financial picture of Enron.

100. In the course of rendering services to Enron, the Andersen Defendants either obtained knowledge of or recklessly regarded the true financial picture of Enron. The Andersen Defendants pursued a conspiracy and common course of conduct with the Director Defendants

and aided and abetted in the making of the false and misleading statements complained of herein. The Andersen Defendants were direct, necessary and substantial participants in the conspiracy and common course of conduct complained of herein. The Andersen Defendants and the Director Defendants were the agents of each other and were, at all times relevant herein, acting within the course and scope of said agency. AALLP has admitted to being both an internal auditor of Enron and its independent auditor and that it received compensation for non-audit services. AALLP has admitted to Congress that it knew of the course of conduct that resulted in the inaccurate financial condition of Enron and failed to disclose such conduct to anyone. AALLP's Chief Executive Officer Joe Berardino testified before the U. S. House of Representatives Committee on Financial Services on December 12, 2001 that, with respect to 20% of the underreported special purpose entity consolidated losses, "our team made an error in judgment." Against this background, AALLP has recently announced global net revenues of $9.3 billion for the fiscal year end for August 31, 2001, $47.5 million of which came from services related to Enron, $3.2 million of which was related to services for review of financial controls. Despite this amount of billings to Enron and clear "error in judgment", the Andersen Defendants maintain their independence and continue to request the public's confidence.

Spoliation of Evidence

101. Plaintiffs would show that the Defendant, AALLP, undertook a concerted effort to destroy documents concerning its audit of Enron beginning in September 2001, when it began to appear that the prior Enron audits, reports and filings done by AALLP would be determined to be false, misleading and illegal. These documents were destroyed at the behest of counsel for AALLP according to information and belief and reports of the news media. The Court should rule that based on the deliberate destruction of evidence by this Defendant that the jury should be

instructed that those documents must be presumed to be harmful to the position of AALLP, its agents, employees and partners. Documents have also been destroyed by employees of Enron Corp. acting under the direction of their CEO, the Defendant Lay.

REQUEST FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

102. It has been revealed by AALLP, the news media and various committees of the U.S. House and Senate that an attorney for AALLP, believed to be Nancy Temple, di that papers relating to AALLP's audit of Enron be destroyed. This has created an emergency requiring Plaintiffs to seek a temporary restraining order without notice enjoining AALLP, its agents, employees and attorneys from further destroying records. Further, after notice and hearing, the Defendant, AALLP, should be temporarily enjoined from destroying any records without notice to this Court and a hearing at which the Plaintiffs would have the opportunity to contest any such destruction.

103. Plaintiffs would show further that as AALLP is a limited liability partnership, any distributions to its partners would decrease its value and the amount Plaintiffs could collect for Defendants' fraud, gross negligence and malfeasance. AALLP, its agents, officers, and employees should be enjoined from making any distributions or salary payments to its partners or employees outside the normal course of business or greater than the salaries or distributions to those partners or employees that were paid in 2001. To allow greater distributions to occur will prevent the Plaintiffs and others similarly situated from collecting on any potential judgment to the full extent of their loss. Such an injunction would preserve the status quo and prevent this suit from becoming "an exercise in futility" should AALLP elect to dissipate its assets prior to trial.

104. As late as January 21, 2002, it was acknowledged by spokesmen for Defendants Lay, Fastow and Skilling that documents were being shredded at the place of Lay's employment at Enron Corporation. The document shredding was made public by Maureen Castaneda, a former Enron executive acting under the Defendant Lay.

105. Plaintiffs request a preferential trial setting in accordance with the Texas Rules of Civil Procedure and that a low bond be set pendente lite.

106. Plaintiffs also ask this Court to set its application for TRO and request for temporary injunction for hearing on the issues in Plaintiffs' application. And after the hearing issue, a permanent injunction against Defendants AALLP and Lay.

IX. Damages

107. As a result of Defendants' wrongful conduct, actions and omissions, Plaintiffs have suffered substantial actual and special damages, far in excess of the minimal jurisdictional limits of this Court, to Plaintiffs' detriment.

108. Plaintiffs has suffered actual damages and losses to their detriment, including the greater of the difference between the amount or consideration paid for the Enron securities and:

(a) the true fair market value of such securities at the time of purchase (*i.e.*, had there been no misrepresentation); or

(b) the net amount received upon their sale.

109. In addition, or in the alternative, Plaintiffs have suffered actual damages and losses, to their detriment, in the following respects:

(a) Loss or diminution of principal invested;

(b) Loss of investment opportunity;

(c) Loss of earnings (including lawful interest); and

(d) Commissions or fees incurred by way of investment in Enron securities.

110. In addition to their actual damages, the common law of Texas allows recovery of punitive damages. Each of the Defendants' conduct was done fraudulently, knowingly, with actual awareness, malice and intent, and/or with such an entire want of care as to indicate that the acts and omissions in question were the result of conscious indifference to the rights, welfare or safety of the persons affected by them, including Plaintiffs, such that an award of exemplary or punitive damages to be determined by the jury commensurate with the facts of this case is warranted.

X. Jury Demand

111. Plaintiffs request and demand a jury trial.

WHEREFORE, Plaintiffs pray for judgment as follows:

(a) Awarding Plaintiffs compensatory damages, together with appropriate prejudgment interest at the maximum rate allowable by law;

(b) Awarding Plaintiffs exemplary damages;

(c) Awarding Plaintiffs their costs and expenses for this litigation including reasonable attorneys' fees and other disbursements; and

(d) A temporary restraining order, as well as a temporary injunction pendente lite, restraining AALLP and Lay, their agents, employees and attorneys from destroying more documents relating to Enron and from making distributions to AALLP's employees or other partners other than those done in the ordinary course of business and at the set notes of salary and distribution currently in force until final judgment herein. Further Plaintiffs seek to enjoin the Defendant Lay form destroying any personal or corporate records relating to his sales of Enron Corp shares, his knowledge of insider trades by

himself or others at Enron or its subsidiaries and any records relating to the audits and public reports done by AALLP.

(e) Granting such other and further relief as this Court deems to be just and proper, including a prompt trial setting as required by the Texas Rules of Civil Procedure.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.
G. Sean Jez
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George M. Fleming
State Bar No. 07123000
1330 Post Oak Boulevard, Suite 3030
Houston, Texas 77056-3019
Telephone (713) 621-7944
Fax (713) 621-9638

By: _____
G. Sean Jez

ATTORNEYS FOR PLAINTIFFS

160391.1

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

On this day, Milton Tate appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read the PLAINTIFFS' ORIGINAL PETITION, APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION and the facts stated in it are within his personal knowledge and are true and correct or are in the public domain through media reports, news interviews, and newspaper articles.

/s/
MILTON TATE, Co-Trustee for Moorman,
Tate, Moorman & Urquhart Money Purchase Plan
and Trust

SWORN TO and SUBSCRIBED before me by Milton Tate on January 24, 2002.

/s/
Notary Public In and For the State of Texas

Cause No. _____

JANE BULLOCK; JOHN BARNHILL; DON REILAND; SCOTT BORCHART; MICHAEL MIES; VIRGINIA ACOSTA; JIM HEVELY; MIKE BAUBY; ROBERT MORAN; JACK & MARILYN TURNER; and HAL MOORMAN & MILTON TATE, CO-TRUSTEES FOR MOORMAN, TATE, MOORMAN & URQUHART MONEY PURCHASE PLAN AND TRUST,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	WASHINGTON COUNTY, TEXAS
v.	§	
ARTHUR ANDERSEN, L.L.P.; D. STEPHEN GODDARD, JR.; DAVID B. DUNCAN; DEBRA A. CASH; ROGER WILLARD; THOMAS H. BAUER; ANDREW S. FASTOW; KENNETH L. LAY; and JEFFREY J. SKILLING,	§	
Defendants.	§	21st JUDICIAL DISTRICT

TEMPORARY RESTRAINING ORDER AND
ORDER SETTING HEARING FOR PRELIMINARY INJUNCTION

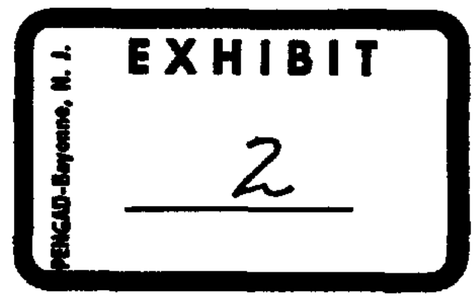
On January 24, 2002, this Court heard Plaintiffs' Application for Temporary Restraining Order.

This Court, after examining the pleadings and hearing the argument of all counsel, and the briefing of the parties, finds that

1. this Court has jurisdiction of this case;

2. there is evidence that:

   a. Plaintiffs are likely to recover from Defendants, ..thur Andersen, L.L.P. and Kenneth Lay;



b. Harm is imminent, and if this Court does not issue the temporary restraining order, Plaintiffs will be irreparably injured because the documents they seek may be destroyed;

Therefore, this Court:

a. Immediately RESTRAINS Defendants Arthur Andersen, L.L.P. and Kenneth Lay, their agents, employees, partners, and others acting on their behalf, from further destroying, altering, or deleting any records concerning Enron Corporation, its related partnerships or subsidiaries, in connection with Arthur Andersen's audit, reports to the Securities and Exchange Commission, and financial statements of Enron Corporation, its affiliated partnerships, and subsidiaries;

b. ORDERS that Arthur Andersen and Kenneth Lay shall segregate, preserve and protect all writings, recordings, and electronically stored material (FRE 1001) in their possession, custody or control concerning Enron Corporation, including but not limited to, documents, correspondence, e-mails or other communications or evidence related to audit examinations, quarterly reviews, tax-related entities. Enron-related entities shall include Special Purpose Entities and any affiliates, subsidiaries, partnerships, or joint ventures in which, to Arthur Andersen's knowledge, Enron Corporation or any Enron-related entity participated (hereinafter collectively "Enron-related entities") (all such materials and evidence collectively to be referred to as "Enron-related Materials"). Arthur Andersen and Kenneth Lay shall also preserve and protect all writings, recordings and electronically stored material relating to Arthur Andersen's or Enron's destruction or deletion of Enron-related materials, to Arthur Andersen's investigation of the destruction or deletion of Enron-related materials by or at the discretion of Arthur Andersen's employees or agents, and to Arthur Andersen's or Kenneth Lay's efforts to

recover or reconstruct Enron-related materials which had been previously destroyed, discarded or deleted.

c. The rights of all parties to seek additional information are preserved.

d. Arthur Andersen shall distribute a copy of this Order to all Arthur Andersen partners and employees promptly upon its entry.

e. ORDERS the clerk to issue notice to Defendants, Arthur Andersen, L.L.P. and Kenneth Lay that the hearing on Plaintiffs' Application for Temporary Injunction is set for January 31, 2002, at 1:30 ~~a.m.~~/pm. The purpose of the hearing shall be to determine whether this temporary restraining order should be made a temporary injunction pending a full trial on the merits; and

d. Sets a bond at $ 100.00.

This Order expires on _____, 2002.

SIGNED on 1/24/02, 2002, at 3:20 ~~a.m.~~/p.m.

/s/ H. R. Toosley
HONORABLE
JUDGE PRESIDING

APPROVED & ENTRY REQUESTED:

_____
G. Sean Jez
Fleming & Associates, L.L.P.