United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	
	§	

LEAD PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM DEFENDANT CITIGROUP, INC.

1980

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I. INTRODUCTION

Since the filing of the Consolidated Complaint, several supplemental investigations have corroborated plaintiffs' allegations against Citigroup. New York District Attorney Robert M. Morgenthau, who conducted an 18-month examination of Citigroup's role in Enron's prepaid commodities transactions, found Citigroup "***knowingly*** structured the prepaid transactions with Enron in a way that allowed Enron to engage in fraudulent accounting and to make its financial statements less transparent." *See* Ex. 1 at 8.[1] The SEC disclosed Citigroup "consented" to a decree ordering it to cease and desist from violating the federal securities laws and agreed to pay a $101 million fine for its unlawful conduct related to Enron. *See* Ex. 2. And Enron's Bankruptcy Examiner concluded Citigroup's $2.4 billion in bankruptcy claims should be equitably subordinated because the Bank designed and implemented Enron's deceptive transactions, which Citigroup ***knew*** were used to falsify Enron's reported financial statements.

These findings, and Citigroup's consent to the entry of judgment, stand in sharp contrast to Citigroup's claim that plaintiffs have pleaded a "patent[ly] irrational[]" scheme and the claim plaintiffs intend to prove their case "only in the media." Citigroup has gone so far as to call this case a "misuse of the judicial process." Citigroup's Motion to Dismiss at 5-7 (Docket No. 630).

The ***real*** abuse of process is Citigroup's failure to comply with its discovery obligations under the Federal Rules. Citigroup refuses even to search for, let alone produce, documents highly relevant to its conduct in the Enron fraud. For example:

- Citigroup refuses to search for or produce documents created after December 2, 2001, though documents created after Enron's bankruptcy are highly relevant to the litigation. Citigroup admits it has ***not*** reviewed these documents, but nevertheless has ***assumed*** that "virtually all documents" created after Enron's bankruptcy are

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[1] Unless noted otherwise, all emphasis is added and all citations and footnotes are omitted. Also, all Exhibits are attached hereto.

privileged. (Citigroup subsequently agreed to produce post-bankruptcy documents from 28 employees that Citigroup selected, but will only search for and produce documents created on or before April 8, 2002, the date Citigroup was named as a defendant, and only for these 28 individuals.)

- Citigroup has identified a group of several hundred persons who had "significant involvement" in its relationship with Enron. Citigroup refuses to search for or produce all documents from these persons purportedly because it is too burdensome (excepting the 28 employees selected by Citigroup).

- Citigroup refuses to restore and search e-mails stored on backup tapes or similar archival media purportedly because it is too burdensome, yet e-mail has been ***critical*** to proving Citigroup's knowledge of and intended participation in the Enron fraud (excepting the 28 employees selected by Citigroup).

- Citigroup refuses to produce documents in the possession of Delta Energy Corporation, an SPE created, controlled and funded by Citigroup to accomplish $2.4 billion in bogus prepays with Enron. Citigroup maintains Delta is an independent third party and thus Citigroup cannot produce documents on its behalf. This "third party" fiction has been exposed by Congress and by the Enron Bankruptcy Examiner, who concluded Citigroup controls Delta.

Any burden Citigroup may suffer in responding to plaintiffs' document production requests is directly proportional to its ***extensive*** involvement in the Enron fraud. After deceiving Enron's investors for years, resulting in catastrophic losses to the investing public, Citigroup's carping about discovery burden or costs is especially disingenuous. If Citigroup believes its documents are privileged, it should say so in a privilege log, allowing plaintiffs and, if necessary, the Court, to determine whether Citigroup's assertion has any legal basis. Instead, Citigroup assumes a privilege exists and makes blanket claims of privilege. Citigroup should be compelled to produce all the documents plaintiffs have requested.

II. THE ORDER LEAD PLAINTIFF SEEKS

Lead Plaintiff respectfully requests the Court order the Citigroup defendants, including Citigroup, Citibank, Salomon Smith Barney, Salomon Brothers International, and all other Citigroup subsidiaries and divisions, to undertake the following actions:

1. search for and produce all responsive non-privileged documents and communications created after December 2, 2001;

2. restore, search and produce all responsive non-privileged e-mails stored on backup tapes or other archival media, costs to be borne by Citigroup;

3. produce all non-privileged documents in response to document production Request Nos. 2(g) and 74 which concern investigative documents and communications;

4. gather and produce all responsive non-privileged documents and communications concerning Delta Energy Corporation;

5. gather and produce all responsive non-privileged documents and communications, including e-mails stored on backup tape and post-bankruptcy documents, from all individuals Citigroup has identified as having "significant involvement" in the Enron relationship;

6. gather and produce all responsive non-privileged expense-related documents from those individuals Citigroup has identified as having "significant involvement" in the Enron relationship; and

7. excepting documents created by Citigroup's counsel in anticipation of the *Newby* litigation, if Citigroup withholds any documents from production, they shall be described in detail on Citigroup's privilege log.

III. STATEMENT OF CONFERENCE

In accordance with Rule 26(c) and the Court's Procedures Manual, §IV.D., counsel for Lead Plaintiff conferred with counsel for defendant Citigroup in an attempt to resolve the dispute. On July 2, 2002, Citigroup was served with plaintiffs' First Request for the Production of Documents (Ex. 3); Citigroup filed its Objections and Responses on January 21, 2003 (Ex. 4). On June 11, 2003, counsel for Lead Plaintiff met and conferred with Robyn F. Tarnofsky, counsel for defendant Citigroup, concerning Lead Plaintiff's Requests. These sessions were continued on November 10, 2003, November 17, 2003, January 30, 2004 and February 2, 2004. Correspondence regarding these discussions is attached hereto as Exhibits 5-10, 23, 24. Counsel were unable to reach agreement concerning the subject matter of this Motion.

IV. STANDARD

The scope of discovery under the Federal Rules is extremely broad. Under Rule 26(b)(1), parties may "obtain discovery regarding ***any*** matter, not privileged, that is relevant to the claim or defense of any party." This includes the "existence, description, nature, custody, condition, and

location of ***any*** books, documents, or other tangible things. *Id.* Relevant information "need ***not*** be admissible" at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

Discovery is permitted on "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[2] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). It has long been the case in the Fifth Circuit that plaintiffs are permitted to "'obtain the ***fullest*** possible knowledge of the issues and facts before trial.'" *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977). *Accord Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (discovery must "adhere to the liberal spirit of the Rules"). The discovery rules are accorded a broad and liberal treatment so they may fulfill their purpose of adequately informing litigants in civil trials. *Hebert v. Lando*, 441 U.S. 153, 176 (1979).

V. ARGUMENT

Citigroup's refusal to search for, let alone produce, all documents sought herein necessitates an order compelling Citigroup to produce them. Because Citigroup cannot credibly dispute the relevancy of the requested documents, Citigroup has instead interposed boilerplate burdensome and privilege objections and now is withholding production on these bases.

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[2] The 2000 amendments to Rule 26 do not affect judicial interpretations of relevance formulated prior to the amendments. "The minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26(b)(1)." *Anderson v. Hale*, No. 00 C 2021, 2001 U.S. Dist. LEXIS 6127, at *8 (N.D. Ill. May 10, 2001). *See Medtronic Sofamor Danek, Inc. v. Sofamor Danek Holding, Inc.*, No. 01-2373-M1V, 2003 U.S. Dist. LEXIS 8587, at *6 (W.D. Tenn. May 13, 2003) (citing Rule 26(b)(1) as amended and finding materials discoverable if it "'appears reasonably calculated to lead to the discovery of admissible evidence'").

Citigroup has interposed a blanket privilege objection to producing documents created after Enron's bankruptcy, but Citigroup has ***not even reviewed*** these documents to determine whether the privilege applies or whether non-privileged documents can be produced. *See* §IV.A., *infra*. Citigroup's "[b]road-based, non-specific objections are almost impossible to assess on their merits, and fall ***woefully short*** of the burden that must be borne by a party making an objection to an interrogatory or document request." *Harding v. Dana Transport*, 914 F. Supp. 1084, 1102 (D.N.J. 1996). *See St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-12 (N.D. Iowa 2000) (mere statement by a party that discovery is ""'overly broad, burdensome, oppressive and irrelevant'"" is inadequate). Notably, Citigroup itself has demanded in document production requests that plaintiffs produce documents created after Enron's bankruptcy.

Citigroup also refuses to restore and search e-mails stored on backup tapes and archives, claiming it is too burdensome and costly. Nonsense. Citigroup, one of the largest financial conglomerates in the world, has the resources to restore and search e-mail. And the limited scope of e-mails produced by Citigroup so far confirms its electronic communications are highly relevant and must be produced.

Lead Plaintiff also seeks an order compelling the production of documents from all persons Citigroup has identified as having "significant involvement" in the Enron relationship, documents in the possession of Delta Energy Corporation, documents, testimony and communications provided to investigators like the SEC, and expense-related documents from Citigroup employees who were involved with Enron.

The Court should compel Citigroup to produce the following documents, or, if Citigroup believes they are privileged, the documents should be identified on a privilege log. Citigroup should be ordered to complete its review and production of documents and privilege log within 30 days.

A. Citigroup Should Be Ordered to Collect and Produce Documents Created After December 2, 2001

Acting as its own discovery referee, Citigroup impermissibly limits the time period applicable to relevant documents by refusing to search for or produce documents created after December 2, 2001.[3] In plaintiffs' First Request for the Production of Documents, plaintiffs sought documents created from January 1, 1997 to the present. Citigroup objected "on the ground that it is not limited to a reasonable time period" and, without consulting plaintiffs, Citigroup unilaterally imposed a time period from January 1, 1997 to November 27, 2001 (which was then extended five days to December 2, 2001). Ex. 4 at 5; Ex. 5 at 1.

Citigroup refuses to search for or produce any post-Enron bankruptcy documents, even if they concern or reflect on Class Period events, purportedly because:

> [V]irtually all documents that post-date the Enron bankruptcy are protected from production because they are subject to either the attorney-client privilege or the work product doctrine. Moreover, we believe that the majority of these documents would not be relevant to the issues in this lawsuit. Accordingly, ***reviewing all post-petition documents for production*** – or even all post-petition documents reflecting internal Citigroup meetings about Enron – and creating a privilege log of such documents would be ***unduly burdensome***.

Ex. 6 at 3. Citigroup's response concedes its boilerplate objection was made ***without*** having reviewed the post-bankruptcy documents to make a determination concerning their relevancy or applicable privilege. Citigroup refuses to identify these documents on a privilege log so that plaintiffs, and the Court if necessary, can independently determine whether the documents are privileged, or whether non-privileged documents can be produced.[4]

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[3] After objecting to producing any post-bankruptcy documents, Citigroup subsequently agreed to search for and produce documents created from December 2, 2001 through April 8, 2002 for 28 individuals. There is no reasonable basis for Citigroup's isolated scope of production here.

[4] Notably, Citigroup refused Lead Plaintiff's offer to exclude from Citigroup's privilege log the documents and communications created by Citigroup's outside litigation counsel prepared in anticipation of the *Newby* securities litigation.

What's more, Citigroup ***itself*** recognizes post-bankruptcy documents are relevant. Citigroup's document production requests served on class members demanded:

> Unless otherwise specified, all requests herein refer to the period from January 1, 1997 ***to the present*** (the "***Relevant*** Time Period") and include all documents and information that relate to that period, even though prepared or published outside of that period.

See Ex. 11 at 7. Citigroup's muddled burdensome/privilege objections fail.

1. Documents Generated by Citigroup After Enron's Bankruptcy are Relevant and Must be Produced

"[T]here is no *per se* rule barring discovery regarding events which occur after an action is filed." *Southwest Hide Co. v. Goldston,* 127 F.R.D. 481, 484 (N.D. Tex. 1989). Citigroup asserts, without verification or support, a "majority" of its post-bankruptcy Enron documents are not relevant. But Citigroup has ***not*** reviewed the documents to assess relevancy.

Citigroup's assumption about the documents' relevancy is mistaken. Post-bankruptcy communications concerning the Enron fraud, Citigroup's financial exposure to Enron, meeting minutes, and similar documents about Enron's implosion are highly relevant, especially from individuals Citigroup has identified as having "significant involvement" with Enron. *See* §IV.E., *infra*. Enron's Bankruptcy Examiner has cited myriad class period communications among Citigroup employees that show Citigroup knew Enron was a fraud and knew its transactions with Enron were being used to falsify Enron's financials. *See generally* the Bankruptcy Examiner's Second Report, Appendix D, on file with the Court. Documents created or communications after December 2, 2001 that concern Enron will contain highly relevant evidence that bear on scienter, intent and knowledge. Courts have ordered such documents be produced in security class actions:

> [T]he class period ... does not determine the period of relevancy for discovery purposes. ***There are numerous instances in securities fraud litigation where post-offering statements, documents, or conduct have been treated as admissible evidence on the issue of scienter, intent, and knowledge....*** Although [defendant] relies on the certified class period as the relevant time frame, there is no rule fixing discovery in class-action litigation to the class period.

In re Control Data Corp. Sec. Litig., No. 3-85-1341, 1987 U.S. Dist. LEXIS 16829, at *7-*8 (D. Minn. Dec. 10, 1987), *aff'd*, 1988 U.S. Dist. LEXIS 18603 (D. Minn. Feb. 22, 1988).

Like Citigroup, the defendants in another securities class action, *Seagate*, sought to limit discovery of documents to just weeks before and after the class period. *In re Seagate Tech. II Sec. Litig.*, No. C-89-2493(A)-VRW, 1993 U.S. Dist. LEXIS 18065, at *1, *4 (N.D. Cal. June 10, 1993). The *Seagate* court denied the defendants' request: "Although plaintiffs' subpoenas request documents beyond the actual class period," the court observed, "courts have ***routinely*** cautioned against erecting ***artificial and arbitrary restrictions*** on discovery." *Id.* at *3.

Similarly, in *King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 7 (D.D.C. 1987), the defendant stockbrokers in a securities fraud case objected to discovery requests because they sought discovery of post-complaint events. The *King* court rejected defendants' objection because "documents which bear a date after the filing of a complaint" may concern prior events. *Id.* And "[s]ubsequent documents may reflect on events and statements ... which would bear on the intent of the defendant-stockbrokers ... and the alleged falsity of their representations." *Id.* The *King* court further reasoned, "[t]he continuation of a course of conduct, involving false representations or other culpable wrongdoing after a complaint, may have evidentiary significance." *Id.* at 7.

In meet and confers, Citigroup has argued post-bankruptcy documents are irrelevant because plaintiffs' claims concern the class period and thus only documents created during the class period need be produced. *See* Ex. 6 at 3. First, artificial time limitations, as shown above, are flatly rejected by numerous courts. Second, Citigroup's analysis is incomplete, for Rule 26(b)(1) states discovery is relevant if it concerns the claim or "***defense***" of any party. Here, Citigroup has asserted 36 affirmative defenses and also has expressly adopted ***all*** other defenses by ***all*** other defendants in this case to the extent the defense is "available" to Citigroup. *See* Ex. 12. Among other things, these myriad defenses assert Citigroup:

- did not act with scienter;
- "acted at ***all*** times in good faith";
- did not create a misrepresentation on which plaintiffs relied;
- did not employ "***any***" device, scheme or artifice to defraud and did not engage in "***any***" act or practice that operated as a fraud or deceit; and
- had "***no*** knowledge, and was not reckless in not knowing" that alleged statements or omissions were false or misleading.

Plaintiffs are entitled to ***all*** relevant documents on each of Citigroup's sweeping, categorical defenses. If post-bankruptcy documents show Citigroup acted at "***any***" time in bad faith, the documents are relevant and must be produced. If post-bankruptcy documents show Citigroup possessed knowledge that "***any***" alleged statements were false or misleading, or the documents concern Citigroup's scienter, they are relevant and must be produced. "'[I]t is not too strong to say that a request for discovery should be considered relevant if there is ***any possibility*** that the information sought may be relevant to the subject matter of the action.'" *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095-D, 2003 WL 22768675, at *4 (N.D. Tex. Mar. 10, 2003). *Accord B & H Mfg., Inc. v. Owens-Illinois Glass Container, Inc.*, No. F-89-252 REC, 1989 U.S. Dist. LEXIS 17538, at *2-*3 (E.D. Cal. Dec. 7, 1989) ("The clear policy of the rules is toward full disclosure.... [I]t is ***rare*** that ... a particular item of requested information is not 'relevant' under the broad definition given that word in Rule 26.") (citing Hon. Irving R. Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 119 (1961)).

2. Citigroup's Blanket Assertion of Burden and Privilege Fails

The mere fact producing post-bankruptcy documents is burdensome is not a valid reason to withhold production.

> Every lawsuit is burdensome and expensive to the party litigants, but where it is found necessary to bring about a fair, impartial and thorough administration of justice, ***all*** sources of information ***must*** be made available ***regardless*** of expense or inconvenience resulting therefrom.

Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., No. 88-9752, 1991 U.S. Dist. LEXIS 8304, at *7 (E.D. Pa. June 17, 1991). A "mere showing of some ... annoyance or expense" is insufficient. *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985).

Nor is Citigroup's blanket ***assumption*** of privilege a valid reason to refuse production. The attorney-client privilege is both narrow and fact-specific. The privilege only protects disclosure of confidential communications between the client and the attorney; it does not protect the disclosure of "underlying facts." *Elec. Data Sys. Corp. v. Steingraber*, No. 4:02 CV225, 2003 U.S. Dist. LEXIS 11818, at *6-*7 (N.D. Tex. July, 9, 2003) (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981)). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where ***necessary*** to achieve its purpose." *Fisher v. United States,* 425 U.S. 391, 403 (1976). Whether documents are protected by the privilege is a "***highly fact-specific***" inquiry – an inquiry that Citigroup, by its own admissions, has ***refused*** to undertake. *Elec. Data*, 2003 U.S. Dist. LEXIS 11818, at *6.

The work product doctrine is similarly narrow, shielding from discovery only those materials prepared by or for an attorney in preparation of litigation. *Hickman,* 329 U.S. 495. "[T]he Doctrine is ***not an umbrella*** that shades all materials prepared by a lawyer, or agent of the client. It focuses only on materials assembled and brought into being in anticipation of litigation." *Piatkowski v. Abdon Callais Offshore L.L.C.,* No. 99-3759, 2000 U.S. Dist. LEXIS 12067, at *5 (E.D. La. Aug. 11, 2000). "Excluded from the work product materials are 'materials ***assembled in the ordinary course of business***.'" *United States v. El Paso Co.,* 682 F.2d 530, 542 (5th Cir. 1982). Yet, by assuming ***all*** post-bankruptcy documents are protected, Citigroup has invoked the umbrella-type protection courts reject. *See Piatkowski*, 2000 U.S. Dist. LEXIS 12067, at *2.

Here, post-bankruptcy documents were made in the ordinary course of Citigroup's business. Because of Enron's massive bankruptcy, Citigroup would have undertaken an internal review

regardless of whether litigation was anticipated. *See, e.g., In re Kidder Peabody*, 168 F.R.D. 459, 465 (S.D.N.Y. 1996) (a defendant like Citigroup "would have hired outside counsel to perform such an inquiry ***even if no litigation had been threatened at the time***.... [I]t is painfully evident that the [] scandal presented [Citigroup] not only with a serious legal problem, ***but with a major business crisis***," and that hiring outside counsel was designed to handle the business crisis.). At a ***minimum***, the post-bankruptcy documents that purportedly are privileged must be placed on a privilege log so plaintiffs can independently assess the claims of privilege.

Further, Citigroup has engaged in a concerted public relations campaign to minimize the public perception of its wrongdoing. Citigroup, its chairman and its senior executives publicly proclaimed they know of no wrongdoing and trumpeted the Bank's reformed business practices to assuage the public and to explain away its conduct in the Enron scandal. In so doing, Citigroup has waived any privilege as to these post-bankruptcy documents. *See, e.g., In re Grand Jury Proceedings,* 219 F.3d 175, 184 (2d Cir. 2000) ("where a corporation has disseminated information to the public that reveals parts of ... privileged reports, courts have found the privilege waived").

3. Creation of a Privilege Log for Documents Created After December 2, 2001 Is Not Unduly Burdensome

Lead Plaintiff has already proffered to Citigroup its agreement to exclude from Citigroup's privilege log the documents generated by Citigroup's outside litigation counsel in the *Newby* securities class actions so long as the documents were prepared in anticipation of this litigation. Otherwise, all other responsive post-bankruptcy documents must be produced or, if Citigroup believes they are privileged, included in a privilege log.

B. Citigroup Should Be Compelled to Restore and Produce Electronic E-mail Stored on Backup Tapes and Similar Archival Media

1. Citigroup Refuses to Restore and Produce Archived E-mail in Violation of the Discovery Rules

Plaintiffs have repeatedly requested Citigroup search for and produce e-mails stored on backup tapes or archives. *See, e.g.*, Ex. 5 at 2. Citigroup refuses to do so, claiming the task too burdensome, the costs too great. *See* Ex. 6 at 3 ("we did not search e-mail 'back-up' tapes or archives ... on the ground of undue burden"); Ex. 8. First, under Rule 26, the size and complexity of this case justifies the production plaintiffs seek. Second, this is hardly a burden for Citigroup.[5]

Excepting 28 employees that Citigroup selected, Citigroup even refuses to restore and produce all e-mail communications for those Citigroup employees it has identified as having "significant involvement" in the Enron relationship:

> [Citigroup] indicated that we were ***not*** willing to extend our offer to include a search of e-mail archives for the hundreds of other individuals who had ***significant involvement*** in the Enron relationship from whom we collected documents on the ground that it would be ***unduly burdensome***.

See Ex. 8 at 3. And Citigroup refuses to search for electronically archived copies of destroyed personnel materials "on the grounds of undue burden and relevance." *See* Ex. 7 at 2 ("Citigroup refuses to search its archive or backup electronic media ... [for] copies of personnel records that were destroyed."); Ex. 8 at 2 ("We declined to search Citigroup's electronic archives for copies, if any, of personnel materials that were destroyed ... on grounds of undue burden and relevance.").

Citigroup must produce all responsive e-mails and similar electronic documents contained on backup tapes or similar archival media. "[T]oday, it is ***black letter law*** that computerized data is discoverable if relevant." *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM) (AJP),

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[5] Citigroup's objection to restoring archived e-mail based on costs is particularly specious. For the nine months ended September 30, 2003, Citigroup had net income of $13 billion and as of February 2004 has a market capitalization of $253 billion. *See* Exs. 13 & 14.

1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995). Federal Rule of Civil Procedure 34(a) authorizes plaintiffs to demand electronic communications data be produced, including "***data compilations*** from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." According to the 1970 Advisory Committee Notes, "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to ***electronic*** data compilations ...." Fed. R. Civ. P. 34. Thus, "'electronic documents are no less subject to disclosure than paper records.'" *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003). *See In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1995 U.S. Dist. LEXIS 8281, at *2 (N.D. Ill. June 15, 1995) ("computer-stored information is discoverable under the same rules that pertain to tangible, written materials").

These principles apply not only to "electronic documents that are currently in use, but also of documents that may have been deleted and ***now reside only on backup disks***." *Zubulake*, 217 F.R.D. at 317. In *Zubulake*, for example, where e-mail was a "substantial means of communication" at investment bank UBS Warburg (as it is at Citigroup), the plaintiff was entitled to the requested e-mails. *Id.*

In a case similar to *Enron*, the lead plaintiff in *Rasner v. Sturm*, No. 00-K-1376, Order (D. Colo. May 14, 2003) ("*Firstworld*") (Ex. 15) sued several investment banks for fraudulent underwriting practices concerning Firstworld, a bankrupt Internet company. *See* Order at 3. The lead plaintiff in *Firstworld* moved to compel the production of stored e-mails. *Id.* at 11. Like Citigroup, the investment banks objected to restoring e-mails from backup tapes on the bases of burdensomeness and cost. *Id.* The Special Master in *Firstworld* squarely rejected the banks' objection:

> A failure to search for and preserve relevant e-mail communications may constitute a sanctionable breach of a party's discovery duties, *see Proctor & Gamble Co. v.*

> *Haugen*, 179 F.R.D. 622, 632 (D. Utah 1998), *aff'd in part, rev'd on other grounds* 222 F.3d 1262 (10th Cir. 2000), and warrant a court instructing a jury that such failure permits the inference that the undisclosed files would contain information detrimental to the non-responding party. *McPeek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001).

Id. at 12. Further, "the fact that discovery may be burdensome and expensive" was ***not*** a valid basis to refuse production. *Id.* at 13. As the Special Master explained:

> The Underwriters are substantial firms engaged in conducting business in the nations' capital markets. The potential relevancy of information contained in the e-mails is ***beyond cavil***. Considering 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 ... the Special Master concludes that the potential benefits of the discovery outweigh the costs and other burdens of production.

Id. at 19. These factors apply with even greater force to Citigroup's unlawful conduct related to Enron.

2. Citigroup's E-mail Is Highly Relevant

It cannot be seriously disputed Citigroup's e-mails, including those stored on backup tapes, are highly relevant. Though Citigroup has yet to restore any e-mail from backup tapes, Enron's Bankruptcy Examiner relies on scores of internal Citigroup e-mails that were produced from current storage media to demonstrate Citigroup's knowledge. For example:

- Following the resignation of Jeff Skilling, a Citigroup employee states in an e-mail: "'also want to get your [Caplan's] confirmation that (apart from the fact ***we put deals together for Enron which we knew confused the ratings agencies***) there is no ***skellington*** in the closet.'" Ex. 16 at 78 & n.291.

- Concerning Citigroup's involvement in the sham Bacchus transaction, an employee e-mail states: "'Sounds like we made ***a lot*** of exceptions to our standard policies. I am sure we have gone out of our way to let them know we are bending over backwards for them ... let's remember to ***collect this iou when it really counts***.'" *Id.* at 124 & n.520.

- Warning colleagues in January 1999 that Citigroup will not approve a new cash management facility for Enron, Citigroup's primary relationship manager for Enron wrote in an e-mail: "'***our exposure predicament is legend***.'" *Id.* at 25 & n.81.

- In an e-mail discussing Citigroup's sham prepay transactions: "'[I]t is critical that any transactions of this type, no matter how "plain vanilla", are viewed in the context

of the overall funding strategy of the company (*i.e.*, including interest rate profile, currency profile, liquidity preference, ratings agency considerations etc. etc.) ***we are intricately involved in this process for key clients, indeed we are charged with providing the analytical framework***.'" *Id.* at 77 & n.289.

- "'Enron generates substantial GCIB revenue ($50mm in 2000); any decision to limit/reduce credit availability will significantly reduce revenues going forward both at CIT and [Salomon] and ***permanently impair the relationship***.'" *Id.* at 20 & n.64.

- "'We still have the existing $250mm prepaid to deal with for which [Enron] ***still "owe[s]" us one*** for having provided the $250mm originally. Joint call on Glisan/Fastow appropriate.'" *Id.* at 21 & n.66.

- A Citigroup employee relayed via e-mail that Fastow sent to Citigroup a "'strong message ... that Enron would like to see some ***progress*** in our ***equity research*** view of Enron before the relationship with [Salomon] can really progress.'" *Id.* at 31 & n.104 & 30 n.101.

- "'The ***paperwork cannot reflect*** [Enron's] agreement to repay the $190MM as it would ***unfavorably alter the accounting***; to compensate for that, we will amend the syndications letter to read that syndication will commence on 10/1 ....'" *Id.* at 58 & n.211.

- Citigroup's bogus prepay transactions will "'***give some oomph to [Enron's] revenues***.'" *Id.* at 70 & n.260.

- "'[T]here is ***no underlying*** commodity ***exposure*** at all.'" *Id.* at 47 n.176.

- In an e-mail discussing Citigroup's exclusion from a sham transaction called Popeye: "'[W]e were told that it was a result of our rejection of a 15mm participation in the brazos production-payment financing.... I believe it is too late to save popeye, but could we reconsider brazos in an attempt to get back into the ABS [asset-backed securities] hunt?'" *Id.* at 21 & n.67.

- "'As a part of Citi's broader relationship with Enron, we have been asked to support this transaction. Given the importance of this relationship to GEM [Global Energy and Mining], ***it is difficult if not impossible to deny this request***.'" *Id.* at 21 & n.68.

- "'Two points: one can we technically structure a default swap from the trust that eliminates our exposure and two there is a question of appropriateness: presumably we will be representing to investors that we are putting up half the equity and then with or without disclosure (?) we are doing a default swap with the trust; ***sound questionable***.'" *Id.* at 26 n.89.

These e-mails remove any doubt that Citigroup's internal e-mail communications, including those that are stored only on backup tapes, are highly relevant. *See Zubulake*, 217 F.R.D. at 317; *Firstworld*, Order at 19; *Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at *1. *See also Sattar v.*

Motorola, Inc., 138 F.3d 1164 (7th Cir. 1998) (affirming lower court's order that producing party defendants must produce 210,000 pages of e-mail in some combination of downloading information to conventional computer disks, loaning requesting party the software necessary to read the tapes or allowing on-site access to its own systems); *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999) (noting the liberality of the discovery rules, stating "information stored in computer format is discoverable," and ordering the production of e-mail and ordering access to defendants' hard drive to make mirror image of all information contained therein); *In re Triton Energy Ltd.*, No. 5:98cv256, 2002 U.S. Dist. LEXIS 4326 (E.D. Tex. Mar. 7, 2002) ("[T]he Court will appoint a special master to review the information retrieved from the computer storage systems" and further appointed a forensic specialist to determine if electronic documents were deleted.).

3. Plaintiffs' Request Is Reasonable and Necessary

Plaintiffs' request is reasonable because, by law, Citigroup was ***required*** to preserve electronic evidence, including e-mails, for a minimum of three years. *See* 17 C.F.R. §240.17a-4 ("SEC Rule 17a-4"). SEC Rule 17a-4 requires the retention of "[o]riginals of all communications received and copies of all communications sent ... by [Citigroup] (including inter-office memoranda and communications) relating to its business as such." In 1997, "aware of the rising concern over the application of Rule 17a-4(b)(4) to e-mail communications, the SEC attempted to provide guidance on the issue in Release No. 34-38245 (Feb. 5, 1997)."[6] In the 1997 release, the SEC states underwriters like Citigroup are required to retain "***e-mail and Internet communications*** (including inter-office communications) which relate to the broker-dealer's 'business as such.'" *See* Reporting

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[6] *See* Jayant W. Tambe and Jonathan M. Redgrave, "Electronic Discovery Emerges As Key Corporate Compliance Issue," The Metropolitan Corporate Counsel, Oct. 2002, at 2 (Ex. 17).

Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934, Release No. 34-38245, 1997 SEC LEXIS 266, at *17 (Feb. 5, 1997).

Plaintiffs' request also is necessary because just one year ago, Citigroup's Salomon Smith Barney unit was one of several underwriters who paid a $1.65 million fine for its failure to retain e-mail communications as required by SEC Rule 17a-4. *In the Matter of Deutsche Bank Sec. Inc.*, Release No. 46937, Order Instituting Proceedings at 4 (Dec. 3, 2002) (Citigroup "***willfully*** violated Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder by ***failing*** to preserve electronic mail communications for three years") (Ex. 18). *See generally In the Matter of Edward J. Mawod & Co.*, Release No. 13512, 1977 SEC LEXIS 1811, at *16 (May 6, 1977) (recordkeeping rules are the "keystone of the surveillance of brokers and dealers by [SEC] staff and by the security industry's self-regulatory bodies").[7]

In consenting to the SEC's Order, Citigroup agreed to "review its procedures regarding the preservation of electronic mail communications" and, within 90 days, inform the SEC in writing that Citigroup "established systems and procedures reasonably designed to achieve compliance." Ex. 18 at 4. Citigroup has had ample time to remedy any deficiencies in its ability to retain and restore internal e-mails – and in fact promised the SEC it would do precisely that. Citigroup cannot now complain about the burden of restoring and producing its stored electronic communications. *See Firstworld*, Order at 15 (the SEC rules require e-mails be stored in "non-rewritable, non-erasable format, serializing and time-dating the storage units, and having the capacity to ***readily*** download indices and records preserved. 17 C.F.R. §240.17a-4(f)(2)(ii)(A), (C) and (D)."). Plaintiffs are

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[7] *See In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002) (according to study, "'93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper.'").

entitled to these records, which should have been preserved as part of Citigroup's ordinary course of business.

4. Citigroup Should Bear Costs of Producing Archived E-mail

Citigroup bears the burden of paying all costs associated with restoring and producing responsive, archived e-mails. In *Zubulake*, the Southern District of New York held electronic evidence is no less discoverable than paper evidence, and thus courts must respect the "presumption" that the responding party bear costs, and this is especially true where, as here, "private parties are engaged in litigation with large corporations." 217 F.R.D. at 317 In fact, "[e]lectronic evidence is frequently cheaper and easier to produce than paper" because it can be searched automatically and made available in electronic form. *Id.* at 318.

Similarly, in *Firstworld*, the Special Master ordered the Underwriters to restore and produce e-mails at their expense. Order at 19. Other district courts have also held defendants should bear such costs. *See, e.g., Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at *6-*7 (responding defendants ordered to bear entire cost of compiling, formatting, searching and retrieving responsive e-mail from 30 million pages of e-mail data stored on backup tapes).

Citigroup should be compelled to produce all relevant e-mail stored on its backup or archival media and should bear all costs associated with the e-mail restoration and review. And Citigroup ***must*** "utilize the method which would yield the most complete and accurate results." *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 112 (D. Colo. 1996).

C. Documents and Communications Concerning Enron-Related Investigations and Proceedings

Among other deficiencies, Citigroup has not produced transcripts and related documents from deposition testimony that Citigroup employees provided in investigations or legal proceedings, including testimony provided to the SEC as part of the Commission's investigation into Enron's collapse and Citigroup's participation in the Enron fraud. *See* Ex. 5 at 3 ("Citigroup does not have

any transcripts of depositions taken by the SEC ...."). Nor has Citigroup produced all communications with the SEC. Such documents are responsive to Request No. 74, which directs Citigroup to produce:

> All documents and all communications concerning any interview, meeting, deposition, testimony, or transcripts or recordings in which Citigroup participated, concerning any anticipated or actual civil, criminal, regulatory, legislative, investigative, or arbitration inquiry or investigation, or any legal proceeding or lawsuit, concerning Enron or any of the SPEs, Trusts, or LJM Partnerships.

Ex. 3 at 38. The documents also are responsive to plaintiffs' Request No. 2(g), which seeks all Enron-related communications,

> between Citigroup and the SEC, OCC, FRB, New York State Department of Banking, DOJ, FBI any Congressional committee or subcommittee, or any other federal or state governmental agency or regulatory body.

Id. at 3.

By this motion, Lead Plaintiff seeks an order compelling production of all relevant documents responsive to these Requests. The documents plaintiffs seek are highly relevant. For example, the transcripts, "which set forth testimony of the defendants regarding the very facts and occurrences at issue in this lawsuit," are unquestionably relevant. *Baxter v. A.R. Baron & Co.,* No. 94 Civ. 3913 (JGK)(THK), 1996 U.S. Dist. LEXIS 18242, at *4, *10 (S.D.N.Y. Dec. 10, 1996); *accord In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. 167, 168 (N.D. Cal. 2001); *Herbst v. Able*, 63 F.R.D. 135, 137 (S.D.N.Y. 1972). Although Citigroup claims to have requested copies of the deposition transcripts from the SEC, Citigroup is not actively seeking to procure the transcripts. *See* Ex. 5; Ex. 6 at 6 ("we do not have any transcripts of any SEC interviews of Citigroup personnel"). Citigroup's failure to secure and produce relevant documents within its control breaches its obligations under Rule 34(a) of the Federal Rules of Civil Procedure.

Citigroup maintains "control" over the deposition testimony Citigroup and its employees provided to the SEC. "A party need ***not*** have actual possession of the documents to be deemed in

control of them. 'The test is whether the party has a legal right to control them.'" *In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354, 356 (N.D. Ga. 1992).

Citigroup witnesses deposed by the SEC have the right to request copies of their deposition transcripts. 17 C.F.R. §203.6; *Carley Capital Group v. Deloitte & Touche, LLP*, No. 1:97-CV-3183-TWT, 1999 U.S. Dist. LEXIS 11595, at *2 (N.D. Ga. June 30, 1999) ("'A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees ....'"). Plaintiffs, on the other hand, cannot request these transcripts. *See Herbst*, 63 F.R.D. at 137. Because Citigroup "has a legal right to endeavor to obtain the transcript[s]," it "has 'control' of [them] for purposes of discovery." *In re Woolworth Corp. Sec. Class Action Litig.*, 166 F.R.D. 311, 313 (S.D.N.Y. 1996); *see also Legato*, 204 F.R.D. at 169.[8]

Numerous courts, "faced with this identical issue," have required defendants like Citigroup "to produce copies of SEC investigation documents in their possession or to cooperate in obtaining such documents from the SEC." *Preservation Prods. v. Nutraceutical Clinical Labs Int'l, Inc.*, 214 F.R.D. 494, 495 (N.D. Ill. 2003). *See Legato*, 204 F.R.D. at 169-70; *Woolworth*, 166 F.R.D. at 313; *Herbst*, 63 F.R.D. at 138; *Carley Capital*, 1999 U.S. Dist. LEXIS 11595, at *2-*3; *Baxter*, 1996 U.S. Dist. LEXIS 18242, at *10.

In *Preservation Prods.*, the court granted an order compelling the defendant to provide a written consent authorizing the plaintiff to obtain from the SEC a sworn statement from the defendant. The *Preservation Prods.* court emphasized the fact the defendant did "not currently have

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[8] Citigroup's counsel have notified plaintiffs that they represent not only Citigroup's current employees, but also its former employees. *See* Ex. 25.

copies [of the transcripts] in his possession is not significant because he has 'control' of those documents by signing the necessary request form." 214 F.R.D. at 496.

In *Legato*, the court ordered the defendant to obtain and produce a transcript of his testimony before the SEC. The *Legato* court rejected as overly "restrictive" the defendants' contention "that a witness has control of documents only when he 'has an absolute, exclusive and unconditional right to obtain the documents upon demand.'" 204 F.R.D. at 169. Similarly, the court in *Woolworth* directed a former controller of the defendant, and non-party, to obtain a copy of her SEC testimony and turn it over to the plaintiffs. 166 F.R.D. at 313. The court reasoned the company controller had "control" of the transcript through her ability to order it from the SEC. *Id.*

The Federal Rules require Citigroup to produce transcripts of testimony it provided to the SEC as well as transcripts of depositions given by current and former employees under its control. *See, e.g.*, *Herbst*, 63 F.R.D. at 138; *Carley Capital*, 1999 U.S. Dist. LEXIS 11595, at *3; *Baxter*, 1996 U.S. Dist. LEXIS 18242, at *10; *see also In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 531 (S.D.N.Y. 1996) (reaching same result in antitrust context); *Domestic Air*, 142 F.R.D. at 357-58 (same). In *Herbst*, the court ordered the defendant "to have its non-defendant employees procure copies of their private testimony before the SEC so that [the defendant] may give same to plaintiffs." 63 F.R.D. at 138. The *Herbst* court explained, "[p]lainly [the defendants'] employees are persons within its control." *Id.* Similarly, the court in *Carley Capital* ordered auditor Deloitte to obtain and then produce the deposition transcripts of Deloitte employees taken by the SEC, which were taken in connection with a securities fraud investigation. 1999 U.S. Dist. LEXIS 11595, at *3. "This Court is not persuaded that there are strong legal or public policy arguments that dictate a different resolution of this issue," held Judge Thrash. *Id.*

Citigroup's documents and communications with the SEC concerning contemplated charges also are highly relevant. Citigroup denies it has made an Enron-related Wells submission to the

SEC.[9] *See* Ex. 9. The SEC acknowledges, however, it communicated with Citigroup concerning the contemplated charges, resulting in a $101 million penalty and disgorgement and resulting in the SEC ordering Citigroup to "cease and desist" from violating §10(b) and Rule 10b-5.

> In determining to accept the Offer, the Commission also considered that Citigroup cooperated with the Commission's investigation in a timely and comprehensive manner, including production of witnesses and documents without delay, responsiveness to other requests for information, and timely efforts to resolve this matter.

See Ex. 19 at 17.

When an enforcement target like Citigroup cooperates with the SEC, documents and communications exchanged between the target and the SEC are both relevant and discoverable. "Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation." *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993). Such incentives exist "regardless of whether private party third litigants [like Regents] have access to attorney work product disclosed to the SEC." *Id.*

In *Steinhardt*, a plaintiff class of investors moved to compel production of defendants' legal memoranda submitted to the SEC that concerned "issues" and legal theories about the case. *Id.* at 231. The *Steinhardt* defendants refused to produce the memoranda with the SEC on grounds of privilege. *Id.* The Second Circuit rejected defendants' privilege claim and ordered the document be produced since the defendants' "***voluntary*** submission of the memorandum to the Enforcement

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[9] Since 1973, the SEC has permitted targets of its investigations to file "Wells submissions" to respond to contemplated charges. A Wells submission is a written statement made to the SEC detailing "all the facts and circumstances concerning the matter to be investigated." 15 U.S.C. §78u(a)(1). *See also* 15 U.S.C. §77t(a). On January 30, 2004, counsel for Lead Plaintiff inquired whether "Enron-related documents or communications sent to or received from the SEC have not been produced or have been withheld from plaintiffs." Ex. 10. To date, plaintiffs have received no response to this inquiry.

Division ***waived***" privilege. *Id.* at 236. The Second Circuit further held exchanged documents and communications were discoverable by "***subsequent civil litigants***" like The Regents and other Enron investors. *Id.*

> "When a corporation elects to participate in a voluntary disclosure program like the SEC's, it necessarily decides that the benefits of participation outweigh the benefits of confidentiality.... ***It forgoes some of the traditional protections of the adversary system*** in order to avoid some of the traditional burdens that accompany adversary resolution of disputes, especially disputes with such formidable adversaries as the SEC."

Id.[10]

Similarly, in *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991), a third-party litigant demanded a defendant company "produce the documents that it had made available to the SEC and to the DOJ." *Id.* at 1420. The target company was investigated by the SEC and the DOJ for violating the federal "securities laws by making illegal payments to obtain [a] contract." *Id.* at 1418. The defendant company refused to produce the materials it provided to the SEC, claiming privilege and work product. *Id.* at 1420.

The Third Circuit disagreed. The *Westinghouse* court held the targeted defendant company "waived the attorney-client privilege and the work-product doctrine when it disclosed otherwise protected documents to the SEC and to the DOJ. Therefore, the district did not commit clear error in ordering [target company] to produce the disputed material" to a private party litigant. *Id.* at 1431. This is because, in the final analysis, "[t]he ability to prepare one's case in confidence, which is the chief reason articulated in *Hickman* for the work product protections, has ***little*** to do with talking to the Government." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289,

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[10] "An allegation that a party [like Citigroup] facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine." *Steinhardt*, 9 F.3d at 236.

306 (6th Cir. 2002). *See also In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984) ("no question" that target of SEC investigation was SEC's adversary and thus documents were discoverable because privileges were waived); *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2004 WL 60290, at *2-*3, *5 (S.D.N.Y. Jan. 12, 2004) ("*IPO*") (where underwriter defendants claimed their communications with the SEC were non-discoverable "settlement materials," Judge Scheindlin held there was "***no*** serious doubt" the communications were discoverable, even if the materials contained "offers of settlement").

The SEC's charges of fraud against Citigroup mirror Lead Plaintiff's allegations. As in *IPO*, Citigroup's communications with the SEC are relevant because they "precisely ... address, and rebut, the same charges." *Id.* at *5. The SEC initiated proceedings against Citigroup because of its numerous fraudulent Enron transactions, including bogus prepay transactions through the Cayman Island shell entity Delta Energy Corp., as well as Yosemite, Bacchus, and Nahanni. Citigroup settled the SEC's enforcement proceeding for $101 million. *See* Ex. 19.

The SEC's administrative proceeding states Citigroup engaged in more than 10 bogus prepay transactions with Enron. "In all of these transactions, Citigroup was aware that Enron's primary motive was to receive cash financings," yet falsely characterize the cash proceeds as cash flow from operations instead of financing. Ex. 19 at 9. "Delta was a nominally capitalized SPE established by Citigroup, whose sole purpose in these transactions was to ***facilitate Enron's accounting treatment***." *Id.* at 11. The SEC's allegations parallel Lead Plaintiff's allegations. *Compare* Ex. 19 at 9-11 *with* ¶¶45, 684 ("Citigroup lent Enron $2.4 billion in a series of manipulative devices and transactions – prepaid swaps conducted via Citigroup's Cayman Island subsidiary called Delta.").[11]

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[11] Citations to Lead Plaintiff's First Consolidated Amended Complaint are designated as "¶__."

Project Yosemite furthered Citigroup's and Enron's goals. According to the SEC, Yosemite allowed Citigroup and Enron to use "proceeds of sales of privately placed notes to fund blind pool trusts that either funded prepay transactions or served as security for Citigroup's funding of prepay transactions." Ex. 19 at 12. Citigroup and Enron ultimately raised $2.3 billion using Yosemite. *Compare* Ex. 19 at 12-13 *with* ¶¶48, 101(c), 473-473, 641.7-.16, 641.10 ("It was via this [Yosemite] Offering that Citigroup transferred the credit risk of the bogus Delta transaction debt to the purchasers of these Yosemite notes."), 641.43-44, 678.

Concerning Project Nahanni, the SEC alleges "Citigroup knew" Nahanni was designed to generate approximately $500 million in bogus cash flow from operations. *See* Ex. 19 at 2. The SEC charges, "At a September 1999 meeting between Enron and Citigroup, Enron explained that it projected a year-end shortfall in its cash flow from operating activities .... Citigroup developed Project Nahanni and presented it to Enron as a ***financial statement solution*** to that operating cash flow shortfall." *Id.* at 6. "Enron informed Citigroup that it would use this $500 million to decrease its reported debt by that amount." *Id.* at 3. *Compare* Ex. 19 at 2, 5-8 *with* ¶101(b) (Nahanni and other Citigroup transactions were "minority interest financings by which Citigroup secretly funneled approximately $1.75 billion in loans to Enron such that the loans did not appear on Enron's balance sheet as debt").

The SEC's administrative order confirms Citigroup voluntarily cooperated with the SEC, including providing relevant documents and communications. *See* Ex. 19 at 17. Accordingly, plaintiffs request the Court to order Citigroup to produce ***all*** documents responsive to Request Nos. 2(g) and 74.

D. Citigroup Should Be Ordered to Produce All Responsive Documents Concerning Delta

Citigroup refuses to produce any documents from Delta Energy Corporation ("Delta") because Citigroup "could not produce documents in the possession, custody or control of third parties, including Delta Energy Corp." *See* Ex. 6 at 3. But Delta is ***not*** a third party.[12]

The publicly disclosed facts, obtained in Congressional and other investigations of Citigroup's fraud, remove any doubt concerning Citigroup's creation of and control over Delta. According to Robert Roach, Chief Investigator of the Permanent Subcommittee on Investigations, "Although Delta appears, technically, to be a legally separate entity from Citigroup ... the ***facts surrounding its creation, operation and control prove otherwise***. Delta is a nonsubstantive entity established for the benefit of Citigroup." *See* Ex. 20 at D-6. Among other things, Congressional investigators found:

- Delta was established by Citigroup.
- There is no indication that Delta has a physical office or staff, or that it has the personnel or physical facilities to engage in oil and gas trading.
- Delta only participated in prepay transactions that also included Citigroup.
- Delta was capitalized with only $1,000. It could not have participated in trading activity of the size of the Yosemite deals without receiving financing from Citigroup or Yosemite Securities Trust.

Id. Moreover, Congress found ample evidence Citigroup controls Delta:

- When third parties needed to communicate or negotiate with Delta, they directed all inquiries through Citigroup.

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[12] Through Delta, Citigroup lent Enron $2.4 billion in a series of bogus "pre-paid" swaps. ¶45. To achieve the phony accounting required by Citigroup, Delta was established as an offshore entity in the Cayman Islands. Delta's status as a Cayman-based Citigroup SPE is not determinative to Citigroup's control over the documents or the Court's authority to order their production. *In Re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947) ("The fact that a corporation's records and documents are physically located beyond the confines of the United States does not excuse it from producing them .... The test is control – ***not*** location of the records.").

- Delta's outside attorneys seek authorizations from Citigroup instead of from Delta directly.
- Delta's expenses associated with prepay transactions were reimbursed by Citigroup.
- Delta's Citigroup bank account is controlled by Citicorp.
- Delta's Administrator is Schroder Cayman Bank and Trust Company, Ltd, a subsidiary of Citigroup since January, 2000.

Id. at D-7.

Bolstering this evidence are the findings and supporting evidence from Enron's Bankruptcy Examiner. A "Citibank bank account for Delta show Delta's address as '***c/o Citicorp North America, Inc.***,' describe the account as an '***internal account***' to be '***controlled' by Citibank***, and list ***three Citibank employees as authorized signatories on the account***." *See* Ex. 21. Further, "Citibank employees bluntly referred to Delta as a '***shell corporation***/SPV,'" and "Citibank paid the administrative costs – including registration fees – relating to Delta, its attorneys' fees ... and Delta's transaction fees." *Id.*

Further, in sworn testimony before Congress, Richard Caplan, representing Citigroup, stated Citibank formed Delta for the purpose of acting as a shell for Citibank prepay transactions and that Citibank "put in place" certain "control mechanisms" to prevent Delta from "go[ing] off and do[ing] business with other parties." *See* Ex. 22 at 105-10. This evidence destroys Citigroup's assertion it "could not produce documents" from Delta because it is an independent third-party. *See* Ex. 6.

The overwhelming and uncontroverted evidence, including Citigroup employees' sworn testimony, establishes Delta is a shell corporation controlled by Citigroup. Citigroup should be ordered to produce documents from Delta. *See Advance Labor Serv., Inc. v. Hartford Accident & Indem. Co.*, 60 F.R.D. 632 (N.D. Ill. 1973) (defendant corporation ordered to produce documents from company that "technically" was a separate corporation, but in reality the nonparty company's primary function was to provide services to defendant corporation and nonparty company had same

directors and shareholders as defendant corporation); *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 99 F.R.D. 309, 313 (N.D. Ga. 1983) (where two corporations "acted 'as one' in the transaction at issue," U.S.-based corporation "cannot now assert that it does not 'control' the documents relevant to that transaction" and cannot use "corporate boundaries" to "circumvent the development of the facts necessary for a fair trial of this case"); *Gen. Envtl. Sci. Corp. v. Horsfall*, 136 F.R.D. 130, 134 (N.D. Ohio 1991) ("Defendants undoubtedly exercise control over the documents requested, and must provide them to the Plaintiff."). *Cf. Omni Exploration, Inc. v. Graham Engineering Corp.*, 562 F. Supp. 449, 454 (E.D. Pa. 1983) ("Thus where a subsidiary acts merely as a 'shell' or 'front' for the parent corporation a court may deem the actions of the subsidiary the actions of the parent.").

Delta was a key player in the Enron fraud. Citigroup not only established and controlled Delta, it also handled all inquiries for Delta, provided all the financing for Delta, and Delta only participated in prepay transactions that included Citigroup. "To treat [Citigroup and Delta] as unrelated entities would ***defy reality***." *Perini America, Inc. v. Paper Converting Machine Co.*, 559 F. Supp. 552, 553 (E.D. Wis. 1983) (ordering documents from sister corporation be produced).

E. Citigroup Should Be Ordered to Produce All Documents from All Employees with Significant Involvement

In meet and confers and in its confirmatory letters, Citigroup claims it would be unduly burdensome to contact all of its employees worldwide to gather responsive documents. *See* Ex. 6. Instead, Citigroup claims it contacted individuals and businesses who Citigroup has identified as having "'***significant involvement*** in the Enron relationship'" and has taken "other necessary steps, to preserve and, as appropriate, gather, materials responsive to plaintiffs' requests." *Id.* at 4.[13]

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[13] Plaintiffs understand this group totals, at most, several hundred people. *See* Ex. 10. Citigroup has not informed plaintiffs of the exact number of persons, or their names and titles, in this group.

Although Citigroup claims to have "preserved" and "gathered" these documents, Citigroup has ***not*** produced all their documents, nor has Citigroup restored e-mails on backup tape for all these persons.

In a good-faith effort to compromise with Citigroup, instead of seeking documents from Citigroup's universe of employees, during the meet and confer process plaintiffs requested Citigroup produce all responsive documents from all individuals and entities that Citigroup ***itself*** identified as having "significant involvement" in the Enron relationship. But Citigroup refuses to produce all documents even from this markedly reduced universe of persons, and to date refuses to produce all responsive documents from Citigroup personnel who had "significant involvement" with Enron. *See* Ex. 5 at 1 ("Citigroup objects to plaintiffs' request of production as burdensome"); Ex. 10 at 2 ("For the remaining individuals who had significant involvement ... Citigroup ... has not produced those documents.").

Citigroup cannot dispute the relevancy of these documents. Instead, in the meet-and-confer, Citigroup maintains it would be too ***burdensome*** to collect and produce all documents from this limited subset of persons. *See* Ex. 6 at 3 (Citigroup will produce documents, but only those that are not "subject to" its burdensomeness and other objection).[14] Citigroup's claims of undue burden ring hollow. Citigroup's counsel confirm they have already "contacted [these] individuals" to "preserve and, as appropriate, gather, materials responsive to plaintiffs' requests." *See* Ex. 6 at 4. Contrary to Citigroup's claim, it is not unduly burdensome for Citigroup to now produce those responsive

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[14] Citigroup's responses have been equivocal. Citigroup's November 17, 2003 letter states Citigroup has agreed to search for and produce "all" non-privileged, responsive documents from person having significant involvement, but such agreement is "subject to our other responses and objections," including burdensomeness and time period. Ex. 6. And this equivocal agreement to produce ***excludes*** e-mails stored on backup tapes. Accordingly, Citigroup has refused to produce all responsive documents from all Citigroup persons that had significant involvement in the Enron relationship.

documents it has already "preserved" and "gathered," including post-bankruptcy documents or e-mails on backup tape.

Citigroup's claim of undue burden, in any event, is not a valid basis on which to refuse production of these documents. *See Rhone-Poulenc*, 1991 U.S. Dist. LEXIS 8304, at *7 (even if discovery is burdensome, all sources of information must be made available); *Dollar*, 561 F.2d at 616 (plaintiffs are permitted to "'obtain the fullest possible knowledge'"). *Coughlin*, 946 F.2d at 1159. Nor should Citigroup be permitted to limit its production based on a self-serving burden claim.

In *Baine v. General Motors Corp.*, 141 F.R.D. 328, 330 (M.D. Ala. 1991), defendant General Motors, like Citigroup here, unilaterally circumscribed its response to plaintiffs' document production requests based on what General Motors thought was relevant to plaintiffs' design-defect case. "This court cannot allow [defendant] to ***define the parameters and content*** of discovery in this case," responded the *Baine* court. *Id.*

Like Citigroup, General Motors's objection to broader discovery was "phrased in terms of burden and expense." *Id.* But the "mere fact that producing documents would be burdensome and expensive and would interfere with party's normal operations" was not a reason to refuse production of the documents. *Id.* at 331. "Nor can the lack of an adequate filing system insulate a party from discovery." *Id. Accord Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) ("To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.").

Citigroup's refusal to produce all documents from those with "significant involvement" in the Enron relationship because of its assertion of undue burden is not an adequate basis to withhold

production. The Court should order ***all*** non-privileged documents from ***all*** person having significant involvement be produced.

F. Citigroup Should Be Ordered to Produce Documents Concerning Employee Expenses

Plaintiffs' document production Request No. 49 seeks the following:

> Provide all documents and communications concerning all entertainment expenses related to Enron, including, but not limited to, restaurants, airfare, sporting or theater events, or corporate jet use.

Ex. 3 at 31.

Plaintiffs seek these expense-related documents from those who had significant involvement in the Enron relationship because they will provide direct evidence of the dates, times, and persons who attended meetings between Citigroup and Enron. The expense documents also will provide direct evidence of when and how frequently Citigroup's research analysts, who purportedly were kept separate from Citigroup's investment banking business, traveled with or otherwise participated in gatherings or meetings with Citigroup's investment bankers.[15] Citigroup's corporate jet manifests will show who from Citigroup was traveling and when and where, providing additional relevant information.

During the discovery meet and confer process, Citigroup claimed it cannot produce expense-related information because it does not have an adequate system to track employee expenses. *See* Ex. 7. Citigroup also agreed that individual employees determined the manner in which expenses

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[15] These documents (among others) are particularly important to the parties' claims and defenses. Plaintiffs allege Citigroup's analysts were conflicted and the purported Chinese Wall is a sham. *See, e.g.*, ¶¶643, 645, 676 ("There was no so-called 'Chinese Wall' to seal off the Citigroup securities analysts from the information which Citigroup obtained in rendering commercial and investment banking services to Enron."). Citigroup not only denies these allegations but asserts various affirmative defenses disclaiming any knowledge of or liability for any alleged false statement alleged in the Complaint, including Citigroup's alleged false statements. *See* Ex. 12.

were recorded.[16] *Id.* Citigroup's purported failure to adequately track employee expense-related information does not square with Citigroup's public statements to its shareholders.

Citigroup's other objection is Citigroup would have to search through "countless" files to retrieve responsive expense documents. *See* Ex. 8. This response also does not square with Citigroup's public statements. Even if true, Citigroup's burden claim is fundamentally flawed. Citigroup's "haphazard manner of retaining its files" or "disorganization is ***not*** an excuse for non-production of relevant documents." *Avillan v. Digital Equip. Corp.*, No. 91 Civ. 8594 (LBS), 1994 U.S. Dist. LEXIS 6454, at *15 (S.D.N.Y. May 17, 1994). *See Caliper Techs. Corp. v. Molecular Devices Corp.*, 213 F.R.D. 555, 562 (N.D. Cal. 2003) ("The mere failure of a party to maintain records does not excuse it from producing relevant information."); *Kozlowski*, 73 F.R.D. at 76 ("The defendant may not excuse itself from compliance with [Rule 34] by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them ...."). Even if some burden is involved, Citigroup must produce these expense-related documents. *See Baxter Travenol Labs, Inc. v. Le May*, 93 F.R.D. 379, 383 (S.D. Ohio 1981) (requiring production of documents despite the fact that record search of 2.8 million invoices would require hundreds of hours).

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[16] Citigroup disputes these statements were made during the meet and confer. *See* Ex. 8 at 4. Citigroup now claims it merely said, "Citigroup does not have a master system to track expenses by client" and thus in order to find the requested documents, "Citigroup would have sort through countless files to retrieve responsive documents." *Id.* Plaintiffs dispute Citigroup's characterization of the discussion, but even if true, Citigroup's assertion is legally insufficient and does not even attempt to explain why Citigroup cannot retrieve expense information by employee (instead of by client). Nor does this explain Citigroup's refusal to produce expense records for individuals such as investment bankers, research analysts, and others who Citigroup has identified as having "significant involvement" in the Enron relationship (other than the 28 employees Citigroup identifies in Interrogatory Response No. 4).

VI. CONCLUSION

Citigroup's refusal to produce the requested documents violates the letter and spirit of the Federal Rules. The Court should order Citigroup to immediately begin to collect and produce the documents requested herein. Production should be completed within 30 days.

DATED: February 11, 2004

Respectfully submitted,

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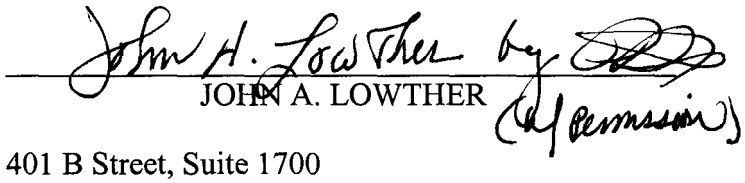

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM DEFENDANT CITIGROUP, INC. document has been served by sending a copy via electronic mail to serve@ESL3624.com on this February 11, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM DEFENDANT CITIGROUP, INC. document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this February 11, 2004.

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Mo Maloney

Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk