

United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

In re ENRON CORPORATION
SECURITIES DERIVATIVE &
"ERISA" LITIGATION

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MDL Docket No. 1446

MARK NEWBY, et al.,
Plaintiffs,

vs.

ENRON CORPORATION, et al.,

Defendants.

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Civil Action No. H-01-3624
And Consolidated Cases

PAMELA M. TITTLE, on behalf of herself
and a class of persons similarly situated, et al.,
Plaintiffs

vs.

ENRON CORPORATION, an Oregon
Corporation, et al.,

Defendants.

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Civil Action No. H-01-3913
And Consolidated Cases

ADDITIONAL MEMORANDUM OF CERTAIN FINANCIAL INSTITUTIONS
REGARDING EXAMINER TRANSCRIPTS

1994

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The Financial Institutions¹ respectfully submit this memorandum in further opposition to Lead Plaintiff's Motion to Compel the Banks to Produce the Sworn Statements and Deposition Transcripts of Their Employees (the "Motion") and in response to the memoranda that have been filed recently by various parties in support of the Motion.²

Preliminary Statement

The core issue presented by the Motion has already been decided by Judge Gonzalez. After notice, full briefing, and oral argument, Judge Gonzalez determined that the Financial Institutions were entitled to a protective order with respect to the Regents' attempt to compel the production in the *Newby* case of the transcripts of the sworn statements taken by the Enron Examiner. In effect, the Regents -- now with the support of others who chose not to appear before Judge Gonzalez and who have filed no motion of their own -- ask this Court to overrule Judge Gonzalez on an issue he has already decided and which he found to be important to his Court and to the integrity of the Examiner process. It must be emphasized, as Judge Gonzalez recognized in his ruling, that these statements are entirely the creation of the

¹ For purposes of this memorandum, "Financial Institutions" refers to Bank of America Corporation, Bank of America Securities LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated. In addition, although Lead Plaintiff's Motion was not directed at them and they are covered by the stay of discovery under the Private Securities Litigation Reform Act (15 U.S.C. § 78u-4(b)(3)(B)), and without waiving any rights with respect to that stay, Deutsche Bank AG and certain of its affiliates ("DB"), The Royal Bank of Scotland Group plc and its affiliate defendants ("RBSG"), Royal Bank of Canada and its affiliate defendants ("RBC") and Toronto-Dominion Bank and its affiliate defendants ("TD"), as parties to the bankruptcy proceeding who are covered by Judge Gonzalez's Protective Order, also join in this memorandum in order to avoid subsequent, duplicative motions to the extent that the stay is ever lifted as to all or any of them.

² Outside Directors' Memorandum Concerning Discovery of Examiner Transcripts, dated 2/2/04 ("Dirs. Mem."); Supplement to Outside Directors' Memorandum Concerning Discovery of Examiner Transcripts, dated 2/6/04; Defendant Kenneth L. Lay's Memorandum Concerning Discovery of Examiner Transcripts, dated 2/5/04; Certain Private Action Plaintiffs' Corrected Joinder in Support of Lead Plaintiffs' Motion and Outside Directors' Memorandum Concerning Discovery of Examiner Statements and Transcripts, dated 2/6/04.

Bankruptcy Court's orders -- it is Judge Gonzalez who appointed the Examiner in the first place and set the guidelines to be followed in that process. It is the Bankruptcy Court that must be concerned with the impact on future voluntary cooperation with any examiner, and the speed with which any such examiner can complete his or her report(s) to the Bankruptcy Court, if that process can so easily be converted into fruits of civil litigation, notwithstanding the very different standards that govern an examiner's inquiries.

In their various memoranda here, the joining parties do not even mention -- let alone contest -- the rationale Judge Gonzalez provided in making his ruling. After considering extensive written and oral argument from counsel for the Regents, Judge Gonzalez ruled that the sworn statements were not discoverable for use in the Regents' litigation because those who had given the sworn statements to the Examiner had relied upon the Examiner procedures that had been established by the Bankruptcy Court. Those procedures established that the sworn statements would remain confidential and would not be disclosed to, or used by, adversaries like the Regents in the various civil lawsuits. According to Judge Gonzalez, reneging on the confidentiality provisions would undermine "the integrity of the process" and "the integrity of these confidentiality orders" and erode "the confidence that these orders will be interpreted and complied with in the context of the bankruptcy court and the examiner". (12/4/03 Bankruptcy Court Transcript ("Tr.") at 40-41 (see Dirs. Mem., Ex. B).)

Rather than address the rationale provided by Judge Gonzalez, certain of the joining parties mischaracterize the issue as one of mere "confidentiality" -- akin to protecting from public disclosure a litigant's pre-existing medical records, personal financial information or trade secrets. (Dirs. Mem. at 12.) Such analogies miss the mark. The issue is not merely the ability of a court to protect sensitive data from widespread public disclosure. The issue is one of

reliance on Bankruptcy Court procedures, orders and agreements that promised confidentiality as to adversaries in the civil litigations as the quid pro quo for the voluntary creation of the statements. Judge Gonzalez determined that if his procedures and orders and these agreements can be so easily circumvented, the guarantee of confidentiality is a hollow one -- impairing the ability of future bankruptcy examiners to proceed with the cooperation they need.

The problem of chilling future bankruptcy examiners is now compounded by the fact that the joining parties now ask (without making a formal motion) that this Court order that *all* parties are to have access to *all* transcripts of sworn statements taken by the Enron Examiners. We note that some of those who would be affected by such a ruling are not even before this Court. We respectfully submit that the unprecedented, wholesale abrogation of the orders and confidentiality protections afforded by the Bankruptcy Court should not be undertaken without involving Judge Gonzalez and without formal motions, with notice to all potentially affected parties and the opportunity for everyone to be heard.

The Financial Institutions submit that the ruling on this issue made by Judge Gonzalez is the correct one. The ruling fosters important bankruptcy policies that, as found by Judge Gonzalez, implicate the very integrity of the examiner process. Judge Gonzalez' ruling has not set the stage for the parade of horrors suggested in the memoranda filed by the joining parties -- violations of "fundamental fairness" or "basic due process", "stacked deck" discovery, "trials by ambush" or the like. Indeed, the Regents made similar arguments to Judge Gonzalez and he found that any fairness issues were outweighed by the broader policy issues and by the wealth of information otherwise available from the Examiner's public reports.

Finally, the Financial Institutions take issue with the suggestion made by the joining parties that the sworn statements constitute critical, "highly relevant" evidence that may

be used at trial by those who now possess them. This issue has never been addressed by Judge Gonzalez or by this Court, and we respectfully submit that now is not the time to consider the question. When the time comes, and if the issue is again raised, the Financial Institutions intend to demonstrate why these transcripts -- taken, as they were, during an investigation process that courts have likened to a fishing expedition -- are not admissible in the manner suggested by the joining parties, either against the parties who were present during the Examiner interviews or against the many parties who were not.

Background

The testimony now sought by the Regents (and those now joining the Motion) was obtained by the Enron Examiner in accordance with Orders of the Bankruptcy Court, exclusively to aid in certain investigations relating to the Enron bankruptcy. Under Bankruptcy Rule 2004, the Enron Examiner sought documents and sworn statements from a variety of persons and entities, including the Financial Institutions and their current and former employees, to assist in the Examiner's investigation of Enron's acts, conduct, liabilities and financial condition. The Examiner also sought testimony and documents from Enron, its former officers and employees, its outside directors, its outside accountants, its principal outside law firm, its consultants, and numerous other financial institutions.

The Bankruptcy Court entered a number of Orders designed to facilitate the Examiner's inquiry, to ensure that the information provided to the Examiner would be used only for limited purposes related to the bankruptcy, and to secure the cooperation of witnesses by assuring them that confidential information would be protected. Thus, the Bankruptcy Court entered a number of Orders governing the production and use of confidential material among the Examiner, the Creditors Committee, the Debtor and non-parties. The Bankruptcy Court also

entered Orders governing the sharing of Rule 2004 materials by the Examiner and the Creditors Committee, which set forth specific conditions under which third parties might obtain access to the material, including limiting any such access exclusively to use in the bankruptcy proceedings.

In reliance on the Orders of the Bankruptcy Court (which obviated the need for Rule 2004 subpoenas), the Financial Institutions and numerous other entities (only some of which are parties before this Court) granted the Examiner's request for sworn private statements from certain employees. Because the Financial Institutions were defendants in pending civil lawsuits such as the *Newby* case, they were concerned that civil plaintiffs might try to obtain and use in the civil cases the sworn statements given to the Examiner, notwithstanding the very different legal standards that govern examiner proceedings as compared to civil litigation. Each Financial Institution therefore reached agreements with the Examiner regarding the conditions under which the sworn statements or testimony might be given.

In general, these agreements provided that the Financial Institutions would produce designated employees for questioning under oath by the Examiner's attorneys. The agreements also provided that the transcribed statements of these witnesses and any documents used during the questioning would be subject to the Bankruptcy Court's Orders governing the production and use of confidential material. The Financial Institutions explicitly insisted upon the exclusion of third parties from the examinations.³ The Financial Institutions had no right to prohibit improper, immaterial or irrelevant questions and no right to demand that the issues or subjects of inquiry be defined in advance of the interviews. As recognized in the case law,

³ The Orders entered by Judge Gonzalez as to the conduct of the Examiner's investigation allowed representatives of the Creditors' Committee and/or the Enron estate to attend certain of the sworn statement examinations.

examiner proceedings are judicially sanctioned “fishing expeditions”, unfettered by such basic civil litigation concepts as relevance.⁴

In October 2003, counsel for the Regents sent letters to the Financial Institutions, demanding that they produce in *Newby* copies of all transcripts of sworn statements given to the Enron Examiner. Because the Financial Institutions believed that the Bankruptcy Court was the appropriate forum for the Financial Institutions to seek a protective order, the Financial Institutions filed such a motion in the Bankruptcy Court on October 28, 2003, providing notice via the Bankruptcy Court’s Independent Website. (A courtesy copy of the motion was also provided to this Court.) Responsive papers were filed by the Regents, the Debtor and the Creditors’ Committee, and Judge Gonzalez held a hearing on December 4, 2003.⁵

At the December 4 hearing before Judge Gonzalez, counsel for the Regents made essentially all of the arguments that the Regents and the joining parties are now making before this Court. None of the joining parties chose to appear before Judge Gonzalez. The Regents argued to Judge Gonzalez that Enron and the Creditors’ Committee had access to the sworn statements but the Regents did not (Tr. at 22 (“Only the *Newby* plaintiffs . . . could not have that information”), 27, 29); that the Regents had requested production of the sworn statements pursuant to requests made in the *Newby* case and not pursuant to requests through the

⁴ E.g., *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (“courts have recognized that Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions”).

⁵ On October 31, 2003, in response to the motion filed in Bankruptcy Court by the Financial Institutions, counsel for the Regents filed the Motion to Compel in this Court, attaching as Exhibit A the motion previously filed before Judge Gonzalez by the Financial Institutions. Thus, all parties in *Newby*, including the Outside Directors, knew that a motion for protective order relating to the Examiner Transcripts was pending before Judge Gonzalez. In addition, in its opposition to the Regents’ Motion in this Court, which was posted to the *Newby* website on November 20, 2003, the Financial Institutions gave notice to all participants in this litigation that “[t]he motion pending before Judge Gonzalez is scheduled to be heard on December 4, 2003”. (Opposition of Financial Institutions to Lead Plaintiff’s Motion to Compel, dated 11/20/03, at 2.)

Bankruptcy Court or upon the Enron Examiner (Tr. at 21-22); that the Financial Institutions had refused to produce the sworn statements in *Newby* and therefore the dispute was a mere “discovery issue in the class action” (Tr. at 20-21, 26, 32, 39); that the Bankruptcy Court policy issues were illusory (Tr. at 31 (production would not “hurt this bankruptcy case one iota”)); that production of the sworn statements would “streamline” the discovery in *Newby* (Tr. at 28, 30-32); and thus “all parties should have access to the same information” (Tr. at 28).

After hearing from counsel for the Regents, Judge Gonzalez determined that notwithstanding the Regents’ arguments, the Financial Institutions were entitled to a protective order preventing the disclosure of the Examiner transcripts to the Regents. The Bankruptcy Court reasoned as follows:

“But I do think that the issues and the concerns raised by the financial institutions with respect to the general integrity of the process of the examination and the reliance upon confidentiality orders, et cetera, and the assurance that future examiners will be able to enter into these orders with the counterparties’ having the confidence that they will be enforced and will be enforced by the Court that enters them, as is provided for under the order, that overall that lack of efficiency that would be attendant in granting this motion coupled with the additional cost I think is just something that is going to be borne in these circumstances, because I do think it is more important to protect the integrity of these confidentiality orders here and to give the parties that are involved in this and that may be involved in examinations in the future, the confidence that these orders will be interpreted and complied with in the context of the bankruptcy court and the examiner. So generally for the reasons set forth by the movants, I will grant the request for the protective order and in so doing overrule the objection of the moving plaintiffs.” (Tr. at 40-41 (emphasis added).)

Following the December 4 hearing before Judge Gonzalez, counsel for the Regents submitted a proposed order to the Bankruptcy Court. (See 12/5/03 Letter from Mr. Rieders to Judge Gonzalez enclosing Proposed Order.) The Regents, who at the time had a pending motion to compel before this Court, proposed that Judge Gonzalez order that the

Regents “may not, in this [Bankruptcy] Court, obtain the sworn statements or interviews deemed confidential which were provided to the Examiners”. (Id., Proposed Order at 1 (emphasis added).) Judge Gonzalez found the order proposed by the Regents to be “inconsistent with the relief ordered by the Court” at the December 4 hearing. (12/8/03 Order at 1 (see Dirs. Mem., Ex. A).) Instead, Judge Gonzalez ruled that “all transcripts of depositions, sworn private statements or other interviews provided to the Examiners . . . are protected from disclosure in the consolidated private securities litigation” known as *Newby*. (Id. at 2.)

Argument

I. THE RULING OF THE BANKRUPTCY COURT IS ENTITLED TO DEFERENCE

It is an understatement to say that this Court has worked closely with the Bankruptcy Court in the administration of the Enron bankruptcy and the associated litigation. Most recently, on January 22, 2004, this Court and the Bankruptcy Court held a joint hearing regarding the coordinated efforts of the parties in the development of an agreed Deposition Protocol. The Deposition Protocol effort -- which, unlike the creation of the sworn statements during the process utilized by the Enron Examiner, eventually will result in sworn testimony that will be useable by the parties -- is but one example of how this Court and the Bankruptcy Court have worked together on the many issues that have arisen since the collapse of Enron.

Judge Gonzalez has clearly ruled on the issue presented by the Regents’ Motion. The Financial Institutions respectfully submit that his ruling -- based, as it is, on policy considerations of particular concern to the Bankruptcy Court, the Examiner process and the fair administration of Judge Gonzalez’ docket -- is entitled to great deference. Indeed, it appears from the transcript of the December 4 hearing that Judge Gonzalez consulted with this Court prior to making his ruling. (Tr. at 39.) We respectfully submit that the Court should not in effect

overrule Judge Gonzalez on such an issue, at least not without involving the Bankruptcy Court in the process and providing notice to all entities potentially affected by any reconsideration of Judge Gonzalez's ruling.

The Financial Institutions also submit that deference to Judge Gonzalez is critical here because, unlike the Regents, the joining parties appear to ask that this Court rule that all parties in this litigation should have access to all Examiner transcripts. (See, e.g., Dirs. Mem. at 4, 16.) Thus, the policy issue considered by Judge Gonzalez -- whether compelled production of the sworn statements in civil litigation might impair the Examiner process and/or chill the ability of future Examiners to obtain the voluntary cooperation of necessary witnesses -- is greatly magnified. The Financial Institutions were not the only parties that provided sworn statements pursuant to confidentiality agreements reached with the Enron Examiner -- Vinson & Elkins, Arthur Andersen and many other entities (many of which are not before this Court) struck similar arrangements with the Examiner and presumably would also object if this Court abrogated the protections reached in the Bankruptcy Court process.⁶

Indeed, although one might not be able to tell from their memorandum on the issue, counsel for the Outside Directors also possess sworn statements. These sworn statements of the Outside Directors were not provided to the *Newby* depository and are not available to the Financial Institutions, presumably for the same reason -- the sworn statements of the Directors were given to the Examiner pursuant to confidentiality agreements upon which counsel for the Directors have relied in refusing to produce the transcripts.

⁶ One of the joining parties -- defendant Kenneth L. Lay -- appeared for a one-day interview with the Examiner that was not conducted under oath, but has apparently refused to provide any sworn, transcribed testimony in connection with any examination of Enron.

In their memorandum, the Outside Directors suggest that Judge Gonzalez reached his ruling without proper jurisdiction or fair notice. (Dirs. Mem. at 7-8 & n.8.) This argument is untenable. The sworn statements at issue were all created under the auspices of the bankruptcy proceedings and pursuant to rules of the road that emanated from Judge Gonzalez. Since the sworn statements only exist as a result of the Examiner process created and overseen by the Bankruptcy Court, and since Judge Gonzalez was in the best position to determine whether allowing discovery of the sworn statements might hobble future Examiners, it was entirely appropriate for Judge Gonzalez to issue a ruling on the question and, we submit, his ruling should be protected from collateral attack in these proceedings. We respectfully submit that Judge Gonzalez therefore correctly rejected the argument (then being made by the Regents) that compelling production of the sworn statements was only “a discovery issue in *Newby*”. (Tr. at 39.)

As for the notice issue, it is clear that all parties in *Newby* had notice that the motion by the Financial Institutions was going to be heard by Judge Gonzalez on December 4. (See supra note 5.) Thus, it is simply untrue that the Outside Directors were “unable to appear and advise” Judge Gonzalez (Dirs. Mem. at 7); rather, they chose not to appear in the Bankruptcy Court (just as they chose to wait until February 2004 to file papers regarding the Regents’ October 2003 Motion in this Court). When it has been important to the Outside Directors to have a voice in the Bankruptcy Court, they have spoken.⁷ Here, they chose not to

⁷ E.g., Kathy D. Patrick Motion for Admission to Practice *Pro Hac Vice*, dated 2/26/02; Outside Directors’ Notice of Limited Appearance and Notice of Agreement with Respect to Committee 2004 Motion, dated 9/9/02; Outside Directors’ Notice of Limited Appearance and Notice of Agreement with Respect to Examiner Motion, dated 8/26/02; Motion of Certain Present and Former Directors of the Enron Corporation for Relief from the Automatic Stay, dated 3/21/02; Statement of Certain Present and Former Directors of Enron Corp. in Support of Motion of Debtors, dated 2/25/02.

speak, and they now ask this Court to undo a Bankruptcy Court ruling that they apparently only recently decided has caused them supposed “prejudice” (even though their own behavior with their own sworn statements has been entirely consistent with Judge Gonzalez’ ruling).

Finally, the Directors try to make it appear as if Judge Gonzalez was unaware of the arguments being made by the Directors in their recent memorandum. That is not true. The Regents presented to Judge Gonzalez all of the arguments the Directors are now presenting to this Court. Judge Gonzalez determined that such arguments were outweighed by the larger, more important policy considerations that are of special importance to the Bankruptcy Court. Such a ruling is, we respectfully submit, entitled to great deference.⁸

II. THE AUTHORITY CITED IN SUPPORT OF THE MOTION IS INAPPOSITE

There is not a wealth of case law regarding the precise issue presented by the Regents’ Motion. The decision most directly on point is the one by Judge Gonzalez. There are at least two other cases that have reached a similar conclusion. See In re Ionosphere Clubs, Inc., 156 B.R. 414, 431-36 (S.D.N.Y. 1993); In re Baldwin United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985). Both cases were cited in the Financial Institutions’ response to the Regents’ Motion. Neither was addressed by the Outside Directors in their recent memorandum.

The Outside Directors do cite and discuss cases relating to the protection of sensitive information like trade secrets, patient medical records, social security numbers and the like. (Dirs. Mem. at 12-13.) Such case law addresses the relatively non-controversial point that,

⁸ See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995) (Bankruptcy Court rulings entitled to respect; collateral challenge of Bankruptcy Court order in Texas federal courts was improper; “This they cannot be permitted to do without seriously undercutting the orderly process of the law.”); In re DaimlerChrysler Corp., 294 F.3d 697, 700 (5th Cir. 2002) (federal court “is bound by the proper orders of another federal court”); In re Grand Jury Subpoena Duces Tecum, 945 F.2d 1221, 1225-26 (2d Cir. 1991) (better course is to challenge bankruptcy court protective order by motion directed to the bankruptcy court; that court “is obviously best situated to evaluate the original need for the order and the ramifications of changing it”).

when important to the litigation, even pre-existing sensitive data can be compelled during discovery because the courts can use protective orders to guard against dissemination of the data to the general public. This case law is irrelevant. The Financial Institutions are not contending that these sworn statements are non-discoverable simply because they are “confidential”. Instead, we are contending that the statements should not be discoverable by civil litigation adversaries because the only reason they were created is that they were voluntarily given pursuant to and in reliance upon orders and agreements whereby the statements would not be used in the way that the Regents and others now want to use them. Absent those orders and agreements, each witness could have -- and would have -- insisted on the full panoply of protections under the Federal Rules of Civil Procedure, essentially bringing the Examiner’s inquiry to a standstill while all participants in the bankruptcy negotiated and then proceeded under the equivalent of the Deposition Protocol recently submitted to this Court and Judge Gonzalez.

In contending that the sworn statements are just like a pre-existing medical record, the Outside Directors ignore entirely the element of reliance (and, thus, the basis for Judge Gonzalez’ ruling). The same mistake was made by the Regents when they argued the point before Judge Gonzalez. The Regents argued to the Bankruptcy Court that they had a right in this Court to seek “confidential” documents and “these witnesses’ statements are the same thing”. (Tr. at 25.) Judge Gonzalez rightly expressed skepticism about that claim: “That is a question that just arose, as you started to reference it. Are they the same thing? You still can go to Judge Harmon with respect to a document marked as ‘confidential’ and argue whether it should be turned over, but these [sworn statements] were not in existence at the time. These

documents were created as a result of the examiner's pursuit under confidentiality orders." (Tr. at 25-26.)

The Directors also claim that the confidentiality agreements between the Financial Institutions and the Examiner cannot preclude discovery of the sworn statements "any more than an agreement by two parties to keep a contract confidential means that it cannot be produced in a subsequent suit on the contract". (Dirs. Mem. at 2.) That argument also is untenable. The argument once again ignores the critical point that these sworn statements were created after the events in question and expressly in reliance on Court orders protecting the statements from disclosure to litigants like the Regents and the Directors. The Directors' argument also is a false analogy because *Newby* is not a suit "on" the sworn statements. Of course a court can order a confidential contract produced when the contract is the very basis for the lawsuit. That is simply not the case with these sworn statements.

The Directors also cite Fed. R. Civ. P. 26(b)(3). (Dirs. Mem. at 2, 10.) That rule is inapplicable here. It provides that a party may obtain a statement about the action when the statement was "previously made by that party". Here, the Directors are not seeking access to their own sworn statements (they have these and to date have not produced them to anyone). Instead, the Directors are seeking access to the sworn statements given by others. Thus, Rule 26(b)(3) is inapplicable.

Finally, the Directors cite seven cases that arose in the context of a party seeking to restrict a bankruptcy examiner's discovery pursuant to Rule 2004. (Dirs. Mem. at 15-16.) Those cases do not support the Directors' position. The general holding of the cases is that a party cannot prevent or restrict the broad latitude given an examiner pursuant to Rule 2004 by asserting *a fear* of discovery by civil litigation adversaries. They do not address the fundamental

question presented by the Regents' motion -- i.e., whether a District Court can compel the production of sworn statements given in reliance upon confidentiality protections and a judicial protective order secured in the context of a bankruptcy examiner's investigation precisely so that the examiner could conduct a broad inquiry. We are not aware of any case compelling the production of sworn statements under such circumstances, and the Directors do not cite one.⁹

III. THE POTENTIAL PREJUDICE IS NON-EXISTENT OR EXAGGERATED

The bulk of the memoranda submitted by the joining parties is devoted to a specious "fairness" argument: that *Newby* allegedly "cannot be fairly prepared and tried" unless all parties have access to all examiner transcripts. (Dirs. Mem. at 17.) This argument was made to -- and rejected by -- Judge Gonzalez. The argument should also be rejected here.

First, the joining parties greatly overstate the "uneven playing field" argument. In particular, a large portion of the memorandum submitted by the Outside Directors is an attempt to create the misleading impression that *only* the Outside Directors will be without access to the

⁹ The Certain Private Action Plaintiffs cite a single case -- In re Continental Airlines, 150 B.R. 334 (D. Del. 1993). This case is also not on point. It did not involve an examiner such as the one appointed by Judge Gonzalez in this case. Instead, the case involved a fee reviewer who had filed a report on whether \$68 million in fees charged by the debtor's professionals were appropriate; the fee applicants had filed responses to the report. The bankruptcy court had ordered the court filings sealed and had allowed access under a confidentiality agreement only to the U.S. Trustee, the debtor and the creditors' committee. On appeal, the district court ruled that the bankruptcy court's actions were inconsistent with, among other things, the First Amendment and Section 107 of the Bankruptcy Code (all papers "filed in a [bankruptcy] case" are "public records"): "The Bankruptcy Court abused its discretion in limiting party and public access to these court filings." In re Continental Airlines, 150 B.R. at 343 (emphasis added). Regrettably, when the Certain Private Action Plaintiffs quoted from In re Continental, they decided to stop the quotation right before the sentence quoted above, which would have made it clear to this Court that In re Continental is very different and did not involve the confidential transcripts of sworn statements given to a bankruptcy examiner and never filed in any court.

Defendant Lay's citation of United States v. AT&T Co., 461 F. Supp. 1314 (D.D.C. 1978), is equally misleading. That case involved the government's request that the defendant produce a subset of documents that had previously been selected for copying from a universe of millions of pages. The case had nothing to do with a motion to compel the production of sworn statements taken by a bankruptcy examiner. Accordingly, defendant Lay's insertion of bracketed language in the middle of the quotation -- "[and the process of obtaining sworn statements]" -- is inappropriate and misleading.

Examiner transcripts (i.e., discovery in *Newby* will be a “stacked deck” against them). (Dirs. Mem. at 3-4.) In fact, the Outside Directors, the various Financial Institutions, Arthur Andersen, Vinson & Elkins, and others are in exactly the same position: each party has its own sworn statements, but nothing more.¹⁰ That result is exactly the result that was intended by the Examiner process. The Outside Directors knew that at the time they were giving their own sworn statements, and they know it now. That the Outside Directors are now “willing to waive” the judicial protections they previously secured (Dirs. Mem. at 11 n.12) is no basis to compel all others to do the same.

Second, in large part the Directors’ “fairness” argument depends on a number of “what if” scenarios -- e.g., “what if” all parties in *Tittle* are granted access to all transcripts, “what if” all parties in the Creditors’ Committee action are granted access, “what if” Enron and the Creditors’ Committee are allowed to use the sworn statements for any and all purposes in cases other than *Newby*. (Dirs. Mem. at 3-4 & n.4.) None of those scenarios has occurred. If and when the questions are in fact presented, the relevant issues can be briefed by those with an interest in those actions. Speculation about what might happen in the discovery and trial of other cases is no basis to overrule Judge Gonzalez and thereby compel every party in *Newby* to put every Examiner transcript in the *Newby* depository.¹¹

Third, the argument that the sworn statements “cannot be replicated by the parties” is simply not true. (Dirs. Mem. at 6.) We note that not even the Regents made this

¹⁰ Each financial institution possesses *only* the transcripts of its own witnesses. The Financial Institutions have not exchanged witness statements with each other.

¹¹ One “what if” scenario cited by the Directors is Judge Gilmore’s “hearing on February 9, 2004 to consider whether the Examiner Transcripts must be produced in that criminal action”; according to the Directors, “[i]f those who are criminally charged have access to this highly relevant evidence, but those who are not, do not, the unfairness is simply compounded”. (Dirs. Mem. at 11.) In fact, at the hearing on February 9, Judge Gilmore quashed the criminal defendant's subpoena that sought the sworn statements from the Examiner.

argument to Judge Gonzalez. (See Tr. at 31-32 (“We are going to get the information one way or the other.”).) As an initial matter, the documents cited by the Examiner in his reports (excluding the sworn statements), as well as the Examiner’s reports themselves, are available to the Regents and the joining parties (or will be made available under the document agreement currently being negotiated among the parties). In addition, the parties just spent considerable time and effort developing an agreed Deposition Protocol that will allow for the taking of 1200 deposition days over the course of 18 months. Unlike the sworn statements, the depositions that occur pursuant to the Deposition Protocol will truly be useable by the parties -- they will be taken pursuant to the Federal Rules and all interested parties will have the opportunity to be present, to object, and to cross-examine. Mere speculation that a witness here or there might be unavailable or might have forgotten a few things (Dirs. Mem. at 6) is not a valid basis for a wholesale reversal of the Bankruptcy Court on important policy questions.

Fourth, there is no basis for the Directors’ contention that some parties may be able to use (or admit) all of the Examiner transcripts at trial. The Directors cite no authority for this argument. Again, aside from the hearsay issue, the process that led to the creation of these sworn statements has been likened in numerous judicial decisions to a fishing expedition unfettered by the Federal Rules. Although this issue is not currently before the Court, it is clear that if this Court agrees with Judge Gonzalez, such a decision would create no possibility of there being “a skewed presentation of the evidence” or a “trial by ambush” in *Newby*. (Dirs. Mem. at 3, 9-10.)

Finally, the appeals to “basic due process” and “fundamental fairness” are hollow. (Dirs. Mem. at 4, 16.) There is no due process or fairness right of a civil litigant to access the transcripts of confidential sworn statements given to a bankruptcy examiner in connection with

an investigation of a debtor's affairs. If such a "right" existed, bankruptcy examiners could never secure the prompt, voluntary cooperation of witnesses, since every witness would insist on the full panoply of rights and protections under the Federal Rules, and every participant in the bankruptcy would have to appear and participate in the questioning or run the risk of foregoing the opportunity to examine the witness subsequently. Recognition of such a "right" would guarantee the very chilling effect on examiner proceedings that Judge Gonzalez wanted to avoid.

The idea that the Regents, the Directors or others are somehow "behind the 8-ball" as a result of the Bankruptcy Court's ruling is pure fiction. As Judge Gonzalez noted at the December 4 hearing, the Regents and everyone else involved with these lawsuits have received the benefits of the information provided in thousands of pages of the Examiner's public reports. (Tr. at 29.) Thus, the litigants already have a "leg up" compared to the usual securities case, where there are no Examiner reports. Having been given a potential "road map" for free, it is absurd for the Directors to suggest that it is "unfair" to deny them access to what they speculate might be even more detailed driving directions. Agreeing with Judge Gonzalez on this issue would not "strike at the very heart" (Dirs. Mem. at 16) of our justice system; but ignoring the valid reliance of the bankruptcy participants on the judicial orders and proceedings of the Bankruptcy Court would.

Conclusion

The Financial Institutions respectfully ask this Court to deny the Regents' Motion to Compel. In the alternative, the Financial Institutions respectfully ask this Court to schedule a

joint hearing with Judge Gonzalez to address the policy issues raised by this motion, with notice to all persons and entities implicated by the joining parties' request for expanded relief.

Respectfully submitted,

Lawrence D. Finder

Lawrence D. Finder *w/p Ken Blatter*
Southern Dist. Id. No. 602 *00797364*
Texas Bar No. 07007200

HAYNES AND BOONE, LLP

1000 Louisiana Street, Suite 4300

Houston, TX 77002-5012

Telephone: (713) 547-2000

Telecopier: (713) 547-2600

OF COUNSEL:

Richard W. Clary

Julie A. North

Darin P. McAtee

CRAVATH, SWAINE & MOORE LLP

Worldwide Plaza

825 Eighth Avenue

New York, NY 10019-7475

Telephone: (212) 474-1000

Telecopier: (212) 474-3700

George W. Bramblett, Jr.

Southern Dist. Id No. 10132

Texas Bar No. 02867000

Noel M.B. Hensley

Southern Dist. Id. No. 10125

Texas Bar No. 09491400

HAYNES AND BOONE, LLP

901 Main Street, Suite 3100

Dallas, TX 75202-3789

Telephone: (214) 651-5000

Telecopier: (214) 651-5940

Odean L. Volker
Southern Dist. Id. No. 12685
Texas Bar No. 20607715
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

**ATTORNEYS FOR DEFENDANTS CREDIT SUISSE FIRST BOSTON LLC (f/k/a/
CREDIT SUISSE FIRST BOSTON CORPORATION), CREDIT SUISSE FIRST
BOSTON (USA), INC. AND PERSHING LLC**

Hugh R. Whiting

Hugh R. Whiting *w/Robert M. Latta*

Texas Bar No. 21373500

Southern Dist. Id. No. 30188

JONES DAY

717 Texas Avenue, Suite 3300

Houston, Texas 77002-3008

Telephone: (832) 239-3939

Telecopier: (832) 239-3600

OF COUNSEL:

David L. Carden

Robert C. Micheletto

(not admitted in New York)

JONES DAY

222 East 41st Street

New York, New York 10017-6702

Telephone: (212) 326-3939

Telecopier: (212) 755-7306

**ATTORNEYS FOR DEFENDANTS LEHMAN BROTHERS HOLDINGS INC.
AND LEHMAN BROTHERS INC.**

Mark D. Manela

Mark D. Manela *W/P Kullbutter*
State Bar No. 12894500
S.D. Texas I.D. No. 1821
MAYER, BROWN ROWE & MAW LLP
700 Louisiana, Suite 3600
Houston, Texas 77002
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

OF COUNSEL:

William H. Knull, III
State Bar No. 11636900
S.D. Texas I.D. No. 7701
MAYER, BROWN ROWE & MAW LLP
700 Louisiana Street, Suite 3600
Houston, Texas 77002-3600
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

Alan N. Salpeter
Michael L. Odorizzi
T. Mark McLaughlin
MAYER, BROWN ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
Telephone: (312) 782-0600
Telecopier: (312) 701-7711

B. J. Rothbaum
HARTZOG CONGER CASON & NEVILLE
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000

**ATTORNEYS FOR DEFENDANTS CANADIAN IMPERIAL BANK OF COMMERCE,
CIBC WORLD MARKETS CORP. (F/K/A CIBC OPPENHEIMER CORP.) AND CIBC
WORLD MARKETS plc**

Barry Abrams

Barry Abrams *w/P Ken Kletter*

Texas Bar No. 00822700

S.D. ID. 2138

ABRAMS, SCOTT & BICKLEY, LLP

700 Louisiana, Suite 1800

Houston, Texas 77002

Telephone: (713) 228-6601

Telecopier: (713) 228-6605

OF COUNSEL:

David H. Braff

Michael T. Tomaino, Jr.

Jeffrey T. Scott

SULLIVAN & CROMWELL LLP

125 Broad Street

New York, New York 10004-2498

Telephone: (212) 558-4000

Telecopier: (212) 558-3588

**ATTORNEYS FOR DEFENDANTS BARCLAYS PLC, BARCLAYS BANK PLC AND
BARCLAYS CAPITAL INC.**

Taylor M. Hicks

Taylor M. Hicks *W.P. Kennerly*

Texas Bar No. 09585000

Southern Dist. Id. No.. 3079

HICKS THOMAS & LILIENSTERN, LLP

700 Louisiana, Suite 1700

Houston, Texas 77002

Telephone: (713) 547-9100

Telecopier: (713) 547-9150

OF COUNSEL:

Herbert S. Washer

James D. Miller

Ignatius A. Grande

CLIFFORD CHANCE US LLP

200 Park Avenue

New York, New York 10166

Telephone: (212) 878-8000

Telecopier: (212) 878-8375

Robert F. Serio

Mitchell A. Karlan

Marshall R. King

GIBSON, DUNN & CRUTCHER LLP

200 Park Avenue

New York, New York 10166

Telephone: (212) 351-4000

Telecopier: (212) 351-4035

**ATTORNEYS FOR DEFENDANT MERRILL LYNCH & CO., INC. AND
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED**

Charles G. King

Charles G. King *w/p Kimberly*

Texas Bar No. 11470000

Southern Dist. Id. No.1344

KING & PENNINGTON LLP

1110 Louisiana Street

Suite 5050

Houston, Texas 77002

Telephone: (713) 225-8404

Telecopier: (713) 244-8408

OF COUNSEL:

Gregory A. Markel

Ronit Setton

Greg Ballard

Nancy I. Ruskin

CADWALADER WICKERSHAM & TAFT LLP

100 Maiden Lane

New York, New York 10038

Telephone: (212) 504-6000

Telecopier: (212) 504-6666

**ATTORNEYS FOR DEFENDANTS BANK OF AMERICA CORPORATION AND BANC
OF AMERICA SECURITIES LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through esl3624.com in accordance with the Court's order regarding website service on the 20th day of February, 2004.

Odean L. Volker w/p Kenneth

Odean L. Volker