

TO THE HONORABLE MELINDA HARMON:

The Outside Directors file this short reply brief to address certain points, and to correct certain errors, that appear in the responsive briefs filed by the Financial Institutions and Vinson & Elkins, LLP (V&E). In the hope that the Court will appreciate brevity, we address each specific point below:

- **The issue before this Court does not concern the rights of non-parties.**

As was made clear at the status conference on January 22, all parties agreed that the first and only issue to be addressed at this time was whether parties to this action could avoid producing relevant testimony their employees provided to the Examiner. That is the only relief sought in the Regents' Motion, because they seek an order compelling the Financial Institutions to produce their own transcripts. This is also the only relief sought by the Outside Directors in their Memorandum in Support. No pending motion raises or concerns the rights of non-parties. Accordingly, the Court need not decide that issue now.

- **Respondents' Arguments That They "Relied" on Confidentiality Orders Rendering Their Transcripts Confidential Is Belied By Those Orders.**

Both Respondents suggest that an order granting discovery of the Examiner transcripts will upset settled expectations engendered by "confidentiality orders" they assert were issued by the Bankruptcy Court. *See* Financial Institutions' Brief at 2 (suggesting that "those who had given the sworn statements to the Examiner had relied upon the Examiner procedures that had been established by the Bankruptcy Court") and V&E Brief at 3 ("V&E relied on the confidentiality orders to assure the confidential treatment of the information provided to the Examiner."). Amazingly, however, they neither cite to, quote from nor attach any of these "Examiner procedures" or "confidentiality orders."

That omission is striking and raises the question: If this is so clear, why aren't the orders and procedures attached? They are not, we submit, because they are inconsistent with Respondents' argument. Far from prohibiting the use of the transcripts, those procedures and orders (at least until the recently issued Order) had specified the circumstances in which those transcripts could be discovered and used by persons other than the Examiner and the Creditors' Committee. It was never otherwise until long after the depositions had been taken.

March 15, 2002 Order

In this Order, which is attached as Exhibit "A," the Bankruptcy Court specified the procedures by which persons other than the Creditors' Committee could gain access to the transcripts of Rule 2004 materials (including deposition transcripts). "Requesting Parties" may gain access to 2004 material, including transcripts, by making a request and then allowing specified time periods for notice and objections to expire. *See* March 15 Order at ¶12. Requesting Parties were required to certify that "the Rule 2004 Material is sought and shall be used by the Requesting Party in connection with the investigation of claims that relate to the acts, conduct or property or to the liabilities and financial condition of the Debtors, or to any matter which may affect the administration of the Debtors' estate." *Id.* at ¶4. Litigation claims belonging to the Debtor, such as those asserted in the *Enron Adversary* and *Creditors' Committee* actions, are property of the Debtors' estates. *See* 11 U.S.C. §541. Although the order contemplated that unspecified material might be treated as confidential under a further "confidentiality agreement or protective order," *see*

¹No such protective order is attached to either of the Respondents' briefs and, as we discuss below, the confidentiality agreement attached to V&E's brief specifically contemplates that it may be used in litigation filed by or on behalf of Enron.

March 15 Order at ¶6(a) and Ex. “B,” in the absence of such an agreement or order, the material could be released to the Requesting Party. *Id.* at ¶6(c).

In sum, nothing in the March Order stated (or created an impression) that transcripts created under Rule 2004 could not be used later in the prosecution of the Debtors’ claims.

October 10, 2002 Order

As the Examiner’s investigation got underway, a second order “Governing the Production and Use of Confidential Material Among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties.” *See* Ex. “B,” attached. It described the circumstances under which the Requesting Parties discussed above could gain access to testimony “designated as Confidential Information hereunder.” *Id.* at ¶1. Critically, however, “Confidential Information” is specifically defined as:

any Materials² that are (i) deemed a trade secret or other confidential research, development or commercial information as those terms are used in Federal Rule of Bankruptcy Procedure 7026(c)(7) or under any law, rule or regulation of any jurisdiction having or claiming to have jurisdiction over the Non-Party Producer³ or confidential under the laws of a jurisdiction whose laws apply to the Non-Party Producer or personal information; or (ii) as to the producing law firms only, deemed an attorney client privileged communication; or (iii) as to producing law firms only, deemed work product as defined under Federal Rule of Bankruptcy Procedure 7026(b)(3) or under applicable law or (iv) unrelated to the Requesting Parties’ Investigation. The Non-Party Producer may designate as “Highly Confidential” any Confidential Information containing particularly confidential technology or other trade secrets whose disclosure to persons in the same industry would put it at a severe competitive disadvantage or that is otherwise particularly sensitive personal information.

²“Materials” was the term used to describe “documents, testimony or other information” produced to the Examiner. *Id.*

³Respondents here are “Non-Party Producers” under this Order.

Id. at ¶2. Critically, nothing in this Order states that transcripts may not be produced to Requesting Parties in compliance with the March Order. Indeed, the Order again contemplates that--Confidential Information (as defined) aside--the Examiner may reveal this material to the public at large in his reports, *id.* at 4(g), and that the transcripts may likewise be provided to Requesting Parties under the terms of the March 15, 2002 Order. *Id.* at 4(h).

So, absent a trade secret, an issue of attorney client privilege or an issue of attorney work product, no expectation was created under this Order that entire transcripts would be forever sealed or rendered undiscoverable. Quite the contrary, in fact, because the Order specifies the circumstances in which even this “Confidential Information” may be revealed to others.

October 25, 2002 Order

In this Order, the bankruptcy court again established a procedure by which information generated by the Examiner could be shared among the Debtors, the Unsecured Creditors’ Committee and the Examiner. *See* Amended Stipulation and Consent Order Among the Debtors, the Creditors’ Committee and the Examiner Regarding the Sharing of Confidential Information, attached as Ex. “C.” Under this Order, the Examiner had the express right to share “with the Debtors and/or Committee” documents and legal opinions (“Shared Material”) created or obtained in the course of his investigation. *Id.* at ¶1. The Order goes even further and says that “Nothing herein shall prohibit, restrict or limit any Party⁴ from providing or disclosing to any other person or entity, without notice and at the sole discretion of each, the Shared Material or information contained in Shared Material that they have provided to another Party.” *Id.* at ¶6. The parties receiving this Shared Material,

⁴Enron, the Creditors’ Committee and the Examiner are each a “Party” under this Order.

moreover, had “no obligation to resist” a request for shared material if it is made by any person-- including parties litigant in this court. *Id.* at ¶7.

This Order, which expands further the circumstances under which the Examiner’s materials may be revealed or shared to include sharing them with “any other person or entity, without notice” is not fairly characterized as an Order that provided an assurance of confidentiality to those who cooperated with the Examiner.

December 11, 2002 Order

Other than the post-hoc order prohibiting use of the transcripts in *Newby*, we have located only one other order that addresses the use of the Examiner transcripts. This order was issued on December 11, 2002 in response to this court’s order quashing the Rule 2004 subpoenas the Creditors’ Committee had issued to the Outside Directors. *See* Ex. “D.” As a result of that Order, the bankruptcy court amended the October 10, 2002 Order to provide that “the Examiner shall not share any Materials produced or provided to the Examiner by any Defendant Non-Party Producers,⁵ pursuant to Bankruptcy Rule 2004, with the Committee or the Debtors unless directed by further order of the Court.”

This Order, which was addressed solely to information provided by Enron’s former officers and directors, certainly could not have engendered an expectation of confidentiality among other parties so as to induce them to “cooperate” with the Examiner.

⁵The “Defendant Non-Party Producers” are defined as “former officers and directors of Enron named as defendants in the Lawsuit who have been served with a Rule 2004 subpoena.” Although the directors were not named as defendants in that lawsuit, they were “affected by” it, so the subpoena issued to them was quashed. It appears that the intent of this order was to give effect to this Court’s Order precluding the Committee from using Rule 2004 discovery after it had filed suit.

These orders--which are the only orders we can locate that existed at the time the depositions were taken--rebut respondents' argument that they testified in reliance on a claimed understanding that their transcripts could not be used later in other lawsuits. Nothing in these orders sealed those transcripts. Nothing in these orders prohibited their use to prosecute claims by or on behalf of the Debtors. All of the orders (save the one addressing the former officers and directors of Enron) specifically contemplated and specified the circumstances in which a further disclosure of the transcripts could be made. While it is possible that we may have missed an order somewhere, the complete absence of any citation to a specific order sealing the transcripts certainly suggests that no such order exists. This history demonstrates that, until the recently issued Order prohibiting use of the transcripts in the *Newby* action, there simply was no order that prohibited the use of the transcripts, rendered them undiscoverable or prohibited their use in any proceeding. That is something that occurred after the fact and it in no way induced any reliance on the part of Respondents.

- **Neither *Ionosphere Clubs* nor *Baldwin United* resolves the question raised here, because neither the orders described above nor the confidentiality stipulation described below prohibited a further use of the transcripts.**

Having wrapped themselves in the claim that they relied on (non-existent) assurances of complete confidentiality, Respondents next try to buttress their argument by citing their two favorite cases: *In re Ionosphere Clubs* and *In re Baldwin United*. A careful analysis of the facts of each demonstrates that neither resolves the question before this court.

In *Ionosphere Clubs*, the question was whether the court would enforce a protective order that:

by its terms precludes all parties to the Examiner's investigation from using any of the materials in the Examiner's Record [and that] explicitly provides that the material provided by the parties for the examination shall be confidential and will not be used or referred to by any party...in any way, manner or otherwise.⁶

156 B.R. 414, 433 (S.D.N.Y. 1993). In *Ionosphere Clubs*, in simple terms, all parties were operating under an order prohibiting anyone from using the Examiner materials for any purpose. See *Ionosphere Clubs*, 156 B.R. at 433.

That is vastly different from the Bankruptcy Court order here. Far from prohibiting all parties from using the Examiner's materials, Judge Gonzalez's March and October Orders permitted many contemplated uses of the Examiner Transcripts before the depositions were taken. Even after they were taken, Judge Gonzalez' most recent order continues to permit the Examiner Transcripts to be used in the *Enron Adversary*, *Creditors' Committee* and *Tittle* lawsuits.⁷ *Ionosphere Clubs*, which focused on the parties' expectations, thus argues in favor of releasing these transcripts--because there was never any justified expectation that the transcripts could not be used in other proceedings.

The October Order, of course, contemplated that certain materials might be designated as confidential. Vinson & Elkins has submitted to the Court, as Exhibit "B" to its brief, a further

⁶ Ellipsis in original.

⁷ Enron itself is a plaintiff in the *Enron Adversary*. The *Creditors' Committee* lawsuit is expressly brought "on behalf of" Enron. The stay has been lifted, moreover, to allow the plaintiffs in *Tittle* to proceed against Enron, which is a litigating defendant in that action.

Confidentiality Stipulation that addresses the use of its transcripts.⁸ This stipulation states that the V&E sworn statements⁹ may be used for the purpose of:

- (i) investigation by the Examiner, the Debtors, and/or the [Creditors'] Committee with regard to acts, conduct, or property, or to the liabilities and financial condition, of the Debtors and to determine whether to assert claims against third parties, including V&E; and, (ii) should claims be asserted by the Examiner, the Debtor, and/or the Committee against third parties, including V&E, the prosecution of claims.

See Ex. "B" to V&E Brief at ¶10. Claims by the Committee and Enron have, indisputably, been filed. Under the express terms of this stipulation, therefore, the Examiner Transcripts may now be used to prosecute those claims.¹⁰ Because these transcripts can and will be used in those lawsuits, the parties to those cases (which include many, but not all, of the parties to *Newby*) will have access to them.

We recognize that the V&E stipulation goes on to specify that "information disclosed during the sworn statement (including the transcript and any exhibits) shall not be used in connection with any other litigation or proceeding." *Id.* The Court will have to consider whether it wishes to uphold this stipulation. That two law firms have agreed not to produce a transcript does not mean that it is

⁸No similar stipulation has been provided by the Financial Institutions, so their transcripts are apparently governed solely by Orders themselves.

⁹ The term "V&E Confidential Information" includes the sworn statements of its employees. See Ex. "B" to V&E Brief at ¶ 7.

¹⁰ Respondents' suggestions that the question of "When and how Enron or the Creditors' Committee may use the transcripts has yet to be decided," see V&E Brief at 12, are at odds with the plain language of this stipulation. For the same reason, the Financial Institutions mis-speak when they suggest that the "what if scenarios ... [of] 'what if' Enron and the Creditors' Committee are allowed to use the sworn statements for any and all purposes in cases other than *Newby*," has not occurred. See Financial Institutions' Brief at 15. With respect, under the terms of at least the V&E stipulation, those transcripts may be used, right now, to prosecute the claims already filed by Enron and the Creditors' Committee. The question is therefore called: Are only *some* parties, but not others, to have access to this information?

not subject to discovery, if the criteria of the Federal Rules are otherwise satisfied. To permit counsel to create a preferred class of litigants with access to a select set of highly relevant and otherwise discoverable transcripts is fundamentally unfair. At a minimum, the multiple uses of information contemplated by this stipulation demonstrate that there was no blanket assurance (or expectation of) confidentiality that respondents' now claim they relied on. *Compare Ionosphere Clubs* 156 B.R. at 414 (stating that examiner materials shall "not be used or referred to by any party...in any way, manner or otherwise.") with Ex. "B" to V&E Brief (stating that sworn statements may be used to prosecute claims "asserted by the Examiner, the Debtor, and/or the Committee against third parties, including V&E").

In re Baldwin United, 46 B.R. 314 (S.D. Ohio 1985), is similarly unavailing. To be sure, the *Baldwin* court said that it "never contemplated, nor in our opinion does the Bankruptcy Code contemplate, that the Examiner act as a conduit of information to fuel the fires of third party litigation." *Id.* at 316. Nevertheless, the *Baldwin United* court went on to note that "The issue of disclosure of the Examiner's investigative materials is not presently before this Court, and may never be before this Court." Accordingly, the *Baldwin* decision did not hold that materials discovered in the course of a bankruptcy examination could never be discovered in collateral civil litigation.¹¹ To the contrary, that bankruptcy judge noted that, "We suspect that the District Court will have the thoroughly unenviable task of deciding this issue as the [collateral litigation] case progresses." Pending the District Court's decision on whether to grant access, the bankruptcy judge ordered the

¹¹ Such a result would be inconsistent, moreover, with the many cases holding that the mere existence of collateral litigation in which Rule 2004 discovery may be used is no basis upon which to deny a Debtor the right to proceed with an examination under Rule 2004. *See Outside Directors' Memorandum* at 15-16.

Examiner “to maintain and preserve all documents or other materials received or generated by him during his investigation,” so as to “insure that the decision-making processes of the District Court are not compromised.” *Id.* at 316-317.

The “unenviable task of deciding this issue,” *id.*, has now fallen to this Court. The Court is confronted not with a uniform order prohibiting use of all examiner materials but, rather, with a patchwork quilt of confidentiality agreements and orders that specify how and under what circumstances the transcripts may be used. None of these, importantly, effected a permanent sealing of the transcripts and none of them justifies a conclusion by this court that only some, but not all, parties to the *Newby* case should have access to this highly relevant material.

- **The Examiner contends, and Judge Gilmore apparently concurs, that these materials may be sought from the parties’ whose testimony is at issue.**

Both the Financial Institutions and Vinson & Elkins make much of Judge Gilmore’s decision to quash a subpoena served on the Examiner by one of the criminal defendants. *See* V&E Brief at 12 (“Judge Gilmore quashed the subpoena, citing the protective orders issued by Judge Gonzalez governing access to the Examiner’s Rule 2004 materials.”); Financial Institutions’ Brief at pg. 15, n. 11 (“In fact, at the hearing on February 9, Judge Gilmore quashed the criminal defendant’s subpoena that sought the sworn statement from the Examiner.”). This subpoena, all agree, sought to obtain from the Examiner copies of at least some of the transcripts he had obtained. There is no question the subpoena was quashed; the question is why.

A review of the hearing transcript, demonstrates the important point that respondents’ missed (or fail to mention) in each of their briefs: The subpoenas were quashed because the Examiner had been subpoenaed, not because the Court ruled that the transcripts were inherently undiscoverable.

In fact, during this hearing, both the Examiner and Judge Gilmore recognized that these transcripts were available from and could be subpoenaed from the parties who gave the testimony. The Examiner began by observing that although he could not be compelled to produce the transcripts himself,

All of this material is available in the first instance through the producing parties themselves, not the examiner who collected this material from the production parties. Sworn statements fall into the same bucket. Assuming they are discoverable at all under Rule 17(c),¹² they can be gotten from the folks who gave them. They have copies of them.

See February 9, 2004 Transcript of Hearing before the Honorable Vanessa Gilmore at 24 (Exhibit “E” hereto) (statement of James Grant, counsel to Enron’s Examiner).¹³ The Examiner’s statement makes clear that the Bankruptcy Order that prevents him from being subpoenaed is no impediment to an order that compels the parties who gave testimony to produce their own transcripts. “They can,” to quote the Examiner, “be gotten from the folks who gave them.”

Having considered the Examiner’s argument, Judge Gilmore concluded that the materials indeed could not be subpoenaed from the Examiner. *Id.*

Because the protective order [by Judge Gonzalez] was entered to facilitate the performance of an investigation by the examiner, the Court, the bankruptcy judge, ordered that the Examiner not disclose certain things. And in looking at other similar cases to this one in which a bankruptcy examiner was subpoenaed to give

¹² This statement was made at a hearing on whether the Examiner could be compelled to produce witness statement pursuant to a subpoena under Fed. R. Crim. P. 17(c). We address this in greater detail below, but for now note that the Examiner apparently does not believe there is any impediment to a subpoena requesting that the parties who gave the statements produce them.

¹³ Unless otherwise noted, all emphasis herein is added.

information in a criminal case, the only other case I found on point,¹⁴ in weighing and balancing, particularly in the other case that I looked at, the information was completely unavailable from any other source except for the bankruptcy examiner. And even in that context, the court held that the disclosures of that information should be protected.

Id. at 37-38. In the very next breath, however, Judge Gilmore indicated that the transcripts could be obtained from other parties, such as those who gave the testimony to begin with:

In this instance, I believe that much of the information at issue is available from other entities, that the defendant did not present to the Court sufficient information indicating that the information was not available from other entities. But more importantly, I don't think that I received specific information that indicated to the Court that the subpoena was narrowly tailored to get specific information that was relevant, admissible and not available through other means, and that the subpoena was not done just to see what might fall out of the trees if they were shaken hard enough.

Judge Gilmore Hearing Transcript at 38. The transcripts thus make clear that, far from holding that the transcripts “should not be produced”¹⁵ by anyone, Judge Gilmore ruled only that they could not be obtained from the Examiner himself.¹⁶ *Id.* There is no other fair reading of Judge Gilmore's

¹⁴ Judge Gilmore indicated that the case to which she referred as “the only other case that I found on point,” was *In re Lazar*. See Transcript at 39. A copy of the *Lazar* decision, 1993 WL 513037 (Bankr. C.D. Cal. Sept. 30, 1993) is attached hereto as Exhibit “F.” It was entered on September 30, 1993 and was reversed a mere two weeks later by the United States District Court. See *In re Grand Jury Subpoena Duces Tecum Issued July 28, 1993 by the Dye Grand Jury*, 1993 WL 566341 (C.D. Cal. Oct. 14, 1993) at *1 (noting that it is addressing an order of the bankruptcy court dated September 30, 1993) (Exhibit “G” hereto). When it reversed the *Lazar* decision, the District Court in fact ordered the Examiner to comply with the subpoenas issued to him. *Id.* at *2. We do not seek such a result here, but thought the Court should be aware that *Lazar* was reversed and so cannot be relied upon as a basis to deny the parties access to the Examiner transcripts.

¹⁵ Compare V&E Brief at 6.

¹⁶ Of course, no one here has subpoenaed the Examiner. The question before this Court is whether the other parties from whom the material “is available,” and “can be gotten,” Judge Gilmore Hearing Transcript at 24, can nevertheless conceal it and withhold it from discovery.

repeated observations that she believed “that much of the information at issue is available from other parties.” *Id.* (emphasis added).

- **The fact that this testimony was provided in the course of a bankruptcy examination does not make it inadmissible, much less undiscoverable.**

Both the Financial Institutions and V&E suggest that the nature of the Examiner’s inquiry renders the sworn testimony provided to him unusable at trial or in discovery. The law is to the contrary.

First, the rule making former testimony admissible against the party who gave it does not turn on the nature of the proceeding in which the testimony was provided. *See* Fed. R. Evid. 801(d)(1). Former testimony may be offered to impeach when it was given “under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” *Id.* Under the plain language of Rule 801, the fact that these depositions were taken during a bankruptcy examination renders them admissible to impeach a witness testifying at trial, because they were: a) under oath; b) subject to the penalty of perjury; and, c) were taken in a “proceeding or in a deposition.” The rule is clear: These transcripts are (or should be) admissible as impeachment evidence at trial.

Second, the question before this Court today is not whether to admit these at trial. The question is whether it should prohibit parties from obtaining discovery of concededly relevant, former testimony of witnesses with knowledge of the events that occurred at Enron. To be sure, the Outside Directors argued that these transcripts could be admitted as impeachment at trial, but we did so solely to illustrate the discovery point. Because these transcripts plainly would be admissible for this purpose at trial, *see* Fed. R. Civ. P. 801, there was no argument that they were not discoverable under Rule 26. By definition, the production of these transcripts is reasonably calculated to lead to

the discovery of admissible evidence, *see* Fed. R. Civ. P. 26, because the transcripts themselves are admissible at trial.

Third, there is no question that these are relevant materials. The Financial Institutions attempted to punt on this question, asserting that they would demonstrate “when the time comes ... 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.” *See* Financial Institutions’ Brief at 4. If the Financial Institutions had an argument as to why these transcripts were not relevant, the time to make it was in their response. Prevaricating about how they might argue relevance later serves no purpose other than to demonstrate that they have no relevance argument now. Having failed to make this argument in their response, the Financial Institutions have waived their right to argue relevance at some later date of their choosing. *Cf. Lucky Stevens v. Omega Protein, Inc.*, U.S. Dist. LEXIS 9657 (E.D. La. May 15, 2002) (“Although the relevance of the requested information is tangential, plaintiff has waived all objections by failing timely to assert them.”); *accord In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989) (“We readily agree with the district court that as a general rule, when a party fails to object timely to interrogatories, requests for production or other discovery efforts, objections thereto are waived.”).

- **This motion does not concern the potential for interference with the Enron Examiner.**

The Enron Examiner’s investigation is complete. He has already made his final report, so the production of these transcripts will neither interfere with nor affect the shape of an ongoing investigation.

Respondents’ suggestion that their willingness to cooperate with these Examinations would have differed in the absence of assurances of confidentiality ignores both reality and the orders in

existence at the time they gave their testimony. At the time they prevailed on the Examiner to grant them confidentiality agreements, the Examiner had already filed a request with the Bankruptcy Court for authority to issue Rule 2004 subpoenas.¹⁷ Presumably, none of the respondents is suggesting that they would have been free to ignore Rule 2004 subpoenas had they been issued, so there is no reason to conclude that the testimony provided in the voluntary sworn interviews – that were negotiated in lieu of Rule 2004 depositions – was somehow different from the testimony that would have been given under Rule 2004.¹⁸

- **The Bankruptcy Court’s August 2002 Order does not dispose of this issue.**

Both the Financial Institutions and V&E cite the earlier order by Judge Gonzalez denying the Regents the right to obtain access to certain documents produced in the bankruptcy by Arthur Andersen, Vinson & Elkins and McKinsey. Two points demonstrate why this order is irrelevant here. At the time this order was entered, the Regents were stayed from taking any discovery by

¹⁷ See Motion of Neal Batson, the Examiner, Pursuant to Federal Rule of Bankruptcy Procedure 2004 for an Order Directing the Production of Documents, In re Enron Corp, et al., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y.) Instrument No. 5522, filed August 1, 2002.

¹⁸ We note that both respondents make much of the Outside Directors’ limited appearances in the Enron Bankruptcy proceedings. Ms. Patrick did file an initial pro hac vice application, so that she could sign pleadings for the Outside Directors should the need to do so arise. Thereafter, we filed limited appearances to (1) notify the Bankruptcy Court of a discovery agreement between the Outside Directors and the Examiner; and (2) to clarify that, under the Unsecured Creditors’ Rule 2004 Motion, our clients retained their right under Fed. R. Civ. P. 45 to challenge the Creditors’ Committee’s Rule 2004 subpoena in this court. Importantly, when the subpoena was challenged, it was challenged in this Court – where the Outside Directors are parties – and not in the bankruptcy court, where they are not.

Finally, respondents’ note cryptically that the Outside Directors have filed two pleadings “for relief from the automatic stay” or “in support of motion of debtors,” but neglect to tell the court what those motions involved. Each motion concerned an identical request by the directors’ insurance carriers for an order to lift the stay in order to authorize them to pay defense costs under the insurance policies that cover the claims at issue in *Newby* and other cases.

operation of law, as provided in the Private Securities Litigation Reform Act, 15 U.S.C. §78u-4 et. seq. *See In re Enron Corp.* 281 B.R. 836, 837 (Bankr. S.D.N.Y. 2002) (noting “all discovery is stayed in the *Newby* action pending a judicial determination on motions to dismiss that have been filed in that case.”). The Court concluded that “the Regents – despite their statements to the contrary – are seeking to use Rule 2004 for discovery in the *Newby* action.... The Regents have not alleged, much less substantiated, that the Rule 2004 Material sought from the Objectants are properly discoverable in the context of a Bankruptcy Rule 2004 examination.” *Id.* at 841. Thus, this Order reflects nothing other than the conclusion that as “Requesting Parties” under the March 2002 Order, the Regents had failed to establish that they sought access to this information to further the investigation of the Debtors’ claims. *Id.*, 281 B.R. at 838 and 842; *see also* Ex. “A,” March Order at ¶ 4.

Whatever may have been the case then, things are very different now. None of the parties in this case is stayed from taking discovery. Both Enron and the Creditors’ Committee have filed their lawsuits. The Outside Directors have also demonstrated “why the material sought...is properly discoverable” in the context of the *Newby* action.¹⁹ These transcripts can, and will, be used to prosecute claims asserted by Enron and the Creditors’ Committee. *See* V&E Stipulation at ¶10. There was no “expectation of confidentiality” that they would not be discoverable in those cases at the time this testimony was given, and there is none now. Thus, the real question to be resolved by

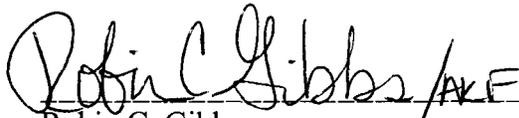
¹⁹ The suggestion that the Outside Directors must prove “a compelling reason to allow discovery,” V&E Brief at 10, is entirely at odds with the Rules of Civil Procedure. The Rules of Civil Procedure do not require a compelling reason, or even good cause, to order the discovery of these transcripts. Instead, these transcripts are presumed to be discoverable so long as they are “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26. As we have demonstrated above, and in our earlier memorandum, these transcripts are discoverable.

this Court is: Should parties to the *Newby* case be permitted to suppress relevant transcripts in their possession, which are already accessible to Enron and the Creditors' Committee who (along with their opponents that are also parties in *Newby*) unquestionably will be able to use them in those cases? The Outside Directors respectfully submit that the answer is "no."

Dated: February 25, 2004

Respectfully submitted,

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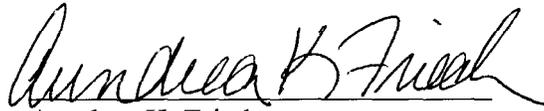
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record on this the 25th day of February, 2004, via posting to www.esl3624.com.



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The Exhibit(s) May
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