

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

In re ENRON CORPORATION SECURITIES
LITIGATION

----- X
MARK NEWBY, et al., Individually and On Behalf of :
All Others Similarly Situated, :
 :
 :
Plaintiff, :
 :
-against- :
ENRON CORP., et al., :
 :
 :
Defendants. :
----- X

Civ. No. H-01-3624
(Consolidated)
CLASS ACTION

THE REGENTS OF THE UNIVERSITY OF :
CALIFORNIA, et al., Individually and On Behalf of :
All Others Similarly Situated, :
 :
 :
Plaintiff, :
 :
-against- :
KENNETH L. LAY, et al., :
 :
 :
Defendants. :
----- X

**DEFENDANT CITIGROUP INC.'S MEMORANDUM OF LAW IN
OPPOSITION TO LEAD PLAINTIFF'S MOTION TO COMPEL**

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2011

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Defendant Citigroup Inc. (“Citigroup”) respectfully submits this Memorandum of Law in Opposition to Lead Plaintiff’s Motion to Compel Production of Documents from Citigroup (“motion to compel”).

PRELIMINARY STATEMENT

Far from seeking to conceal relevant evidence, Citigroup welcomes discovery in this litigation. Citigroup firmly believes that the evidence will show that Citigroup’s employees at all times acted with the utmost good faith in their dealings with Enron; that Citigroup was wholly unaware of any fraud committed by Enron; and that no one at Citigroup ever had any intention of aiding Enron to deceive the investing public. To the contrary: the evidence will show that a central purpose of the deceptive accounting practices committed by Enron and its insiders was to deceive Enron’s lenders, including Citigroup, and that Citigroup, which lost hundreds of millions of dollars when Enron went bankrupt, was itself a victim of Enron’s fraud.

Consistent with these beliefs, beginning in early 2002, Citigroup engaged in a comprehensive effort to preserve and collect documents relevant to its dealings with Enron, devoting tens of thousands of hours and many millions of dollars to this undertaking. On its motion to compel, plaintiff misleadingly suggests that Citigroup has grudgingly produced to it only a smattering of documents from a handful of employees. The truth is quite the opposite: Citigroup has, without objection, already produced 1.5 million pages of documents, including over 600,000 pages of e-mail messages, from the files of approximately 400 Citigroup employees and 27 separate business units.

The documents Citigroup has produced comprise the non-privileged responsive documents relating to Enron that are in the possession of the Citigroup employees and business units that had substantive contact with Enron or responsibility for Enron-related transactions from before the beginning of the class period until the date of Enron’s bankruptcy. Among other

categories, Citigroup has already produced to plaintiff the following documents that are at the heart of plaintiff's claims and Citigroup's defenses in this case:

- Internal memoranda reflecting Citigroup's review and approval of all Enron-related transactions;
- Memoranda concerning Citigroup's evaluations of Enron's financial status and creditworthiness;
- E-mail files through the date of Enron's bankruptcy for the Citigroup employees who were involved in the Enron relationship or who worked on Enron-related transactions;
- Memoranda and reports concerning the extension of financing to Enron;
- Presentations made by Citigroup to Enron and by Enron to Citigroup;
- Correspondence between Citigroup and Enron; and
- Contracts for Enron-related transactions, and drafts of such contracts.

Citigroup's production to plaintiff includes the entirety of its production to the various regulators and investigators that have exhaustively examined Citigroup's relationship with Enron, including the Securities and Exchange Commission ("SEC"), the Senate Permanent Subcommittee on Investigation ("PSI"), and Enron's bankruptcy examiner, as well as many additional documents sought only by plaintiff. Citigroup has also produced to plaintiff all documents that it has produced to other civil litigants in Enron-related litigations. None of the regulators or investigators complained that Citigroup's production was deficient; indeed, the SEC specifically commended Citigroup for its cooperation.

Plaintiff's rhetorical charge that Citigroup is refusing to produce additional documents in an effort to hide damaging evidence is unsupported and false. With respect to the issues raised by plaintiff in its motion to compel, Citigroup has objected to production only where (i) the burdens and costs of collection would vastly outweigh the likelihood of finding non-duplicative discoverable material; (ii) the documents sought are not reasonably likely to lead

to the discovery of admissible evidence, or are inadmissible pursuant to Federal Rule of Evidence 408; or (iii) the documents sought are not in Citigroup's possession, custody or control. Moreover, in an effort to address the concerns voiced by plaintiff about Citigroup's document production, Citigroup has agreed during the meet-and-confer process to collect, review and produce—at the cost of additional millions of dollars—further documents from the Citigroup employees who had principal responsibility for its dealings with Enron, including, in particular, documents created *after* Enron declared bankruptcy, and e-mails restored from archived backup tapes. Citigroup has repeatedly invited plaintiff to review its production to identify any substantive deficiencies or any specific areas in which plaintiff believed additional discovery was warranted.

Neither in its motion papers nor in any of the meet-and-confer sessions has plaintiff identified any such specific gaps or deficiencies in Citigroup's document production. Instead, as it does in this motion, plaintiff has consistently made sweeping demands for wholesale categories of documents, with no showing that such documents are reasonably likely to contain any material, relevant information, or that the likelihood that they will do so is not vastly outweighed by the enormous cost—in money and delay—that such production would entail. Plaintiff's utter inflexibility in this regard strongly suggests that its true purpose in filing this motion to compel is not to obtain any relevant information, but only to impose onerous and unnecessary litigation costs on Citigroup.

Nor would the costs of granting plaintiff's motion be borne by Citigroup alone. To the contrary, numerous other defendants in this litigation have asserted objections similar to those at issue here. Thus, granting plaintiff's motion may well have the effect of imposing substantial additional costs on at least some of those defendants as well. Moreover, with the commencement of depositions now rapidly approaching, requiring Citigroup and possibly other

defendants to collect, review and produce potentially enormous volumes of (marginally relevant and largely duplicative) additional documents will threaten to impede the progress of this litigation.

As a matter of both law and fairness, plaintiff is not entitled to the additional discovery it seeks—and, with respect to two of the categories of discovery covered by plaintiff's motion, the motion is moot.

First, plaintiff's demand that Citigroup restore all archived e-mail and retrieve all emergency e-mail backup tapes for approximately 400 Citigroup employees who worked on Enron-related matters is grossly overbroad, would impose exorbitant costs on Citigroup—almost \$600,000 for the restoration alone—and would take at least 10 months to complete, excluding attorney review time. The issue here is not whether employee e-mails are relevant or discoverable: as noted, Citigroup has already produced the e-mail files from the entire class period of the approximately 400 employees who worked on Enron-related matters, and has agreed further to restore and produce archived e-mails from backup tapes for the 28 employees who had the most significant involvement in Enron-related transactions. Citigroup has also offered to consider any reasonable request to restore archived e-mails for a limited number of additional employees selected by plaintiff. Rather, the issue is whether retrieving and producing archived e-mails of hundreds of additional Citigroup employees is reasonably likely to produce any appreciable, non-duplicative evidence beyond the hundreds of thousands of pages of e-mails Citigroup has already produced. Plaintiff offers no evidence to support its assertion that such an effort would be worth undertaking, much less that the effort would be worth the staggering cost in both money and time.

Plaintiff's categorical demand for *all* archived e-mail and *all* e-mail available from emergency backup tapes for *every* individual from whom Citigroup has produced

documents is unsupported by the case law. We are aware of no court that has ever compelled a party to restore *all* archived e-mail from hundreds of employees, much less at the producing party's expense. Courts have required, at most, that parties restore e-mail only for limited numbers of individuals over tightly focused time frames, and generally have shifted the cost of this discovery onto the requesting party.

Second, plaintiff's categorical demand for all of Citigroup's Enron-related documents without regard to when they were created, including documents created through the present, also is unreasonable. As noted, Citigroup has produced Enron-related documents from the files of approximately 400 employees from before the beginning of the class period until the date of Enron's bankruptcy—the relevant period for this litigation. Citigroup has also agreed to collect and produce any non-privileged responsive documents (including, as noted, archived e-mails) from the files of the 28 employees with the most significant involvement in Enron-related transactions through the date on which Citigroup was named a defendant in this lawsuit (April 8, 2002). Finally, Citigroup is prepared to produce non-privileged responsive documents from the files of its remaining employees from whom it has collected documents, to the extent that it has already collected those documents for purposes of this and related litigations.

Plaintiff's demand that Citigroup engage in a massive, enormously costly effort to collect additional documents from hundreds of employees—and, apparently, to repeat that collection effort endlessly throughout this litigation—is patently unreasonable. In a litigation as large and complex as this one, the parties cannot be required to engage in an endless cycle of updating their document collection, or repeatedly gathering and producing documents created months and years after the events at issue.

Third, plaintiff demands that Citigroup produce transcripts of SEC testimony given by its employees and settlement communications between Citigroup's counsel and the

SEC. As we advised plaintiff before it made this motion, however, while Citigroup is willing to produce any SEC transcripts it obtains, and has requested those transcripts from the SEC, it has not received them. Accordingly, there is nothing for Citigroup to produce. As for Citigroup's settlement communications with the SEC, as a matter of well-settled case law, those communications are protected from disclosure because they are neither reasonably likely to lead to the discovery of admissible evidence, nor admissible under Federal Rule of Evidence 408.

Fourth, plaintiff insists that Citigroup produce documents relating to Enron in the possession of Delta Energy Corporation ("Delta"), a special purpose entity that is neither owned by, nor an agent of, Citigroup. Citigroup has contacted Delta on plaintiff's behalf to request the production of all non-privileged documents from Delta's files relating to Enron, and Delta has agreed to produce those documents. As Delta's cooperation has now been obtained, plaintiff's motion in relation to Delta documents is moot.

Fifth, plaintiff's motion seeks Citigroup employee expense reports and corporate jet manifests. Although producing these marginally relevant materials will impose significant unnecessary costs, Citigroup is prepared to produce these documents. Accordingly, that portion of plaintiff's motion is likewise moot.

Finally, in the last section of its brief in support of its motion to compel, plaintiff demands that Citigroup produce all responsive documents from everyone from whom Citigroup has collected documents. This portion of plaintiff's motion is mystifying. Plaintiff never explains what additional documents it seeks or what objections by Citigroup it asks the Court to overrule, other than the five categories of documents addressed above. Nor does plaintiff identify any specific gaps in Citigroup's production. Accordingly, it is impossible to respond to this portion of plaintiff's motion. To the extent plaintiff identifies any additional significant

documents or categories of documents that it seeks to compel, Citigroup will respond appropriately.

STATEMENT OF FACTS

I. Citigroup's Document Collection and Production

In January 2002, shortly after Enron declared bankruptcy, Citigroup began an extraordinarily comprehensive and wide-ranging effort to preserve and collect documents relating to its relationship with Enron. (Declaration of Robyn F. Tarnofsky, dated March 2, 2004 (“Tarnofsky Decl.”) ¶ 2.) A team of approximately 17 attorneys and paralegals from Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”), Citigroup’s outside counsel, contacted all Citigroup employees who might have had any contact with Enron, collecting documents from approximately 400 current and former employees identified as having Enron-related documents. (These approximately 400 individuals were described in Citigroup’s discovery responses as individuals having “substantial involvement” with Enron.) The files of each of these approximately 400 employees were diligently searched for Enron-related material. (*Id.* ¶¶ 3-5.)

Citigroup also collected Enron-related documents from numerous sources in addition to those approximately 400 employees, including records in possession of the law firms that acted as Citigroup’s outside counsel in Enron-related transactions and the files of 27 Citigroup business units that did business with Enron. (*Id.* ¶¶ 6,7.)

Citigroup’s collection of documents from these various sources was wide-ranging and comprehensive. Citigroup collected all Enron-related material—including correspondence, contracts, drafts, calendars, memoranda, paper copies of e-mails, presentations and handwritten or printed notes—from these sources.

In addition, Paul, Weiss attorneys worked closely with Citigroup’s information technology department to download e-mails from the electronic mailboxes and personal folders

of employees and former employees. (*Id.* ¶ 9.) This effort enabled Citigroup to retrieve all e-mail messages—both Enron-related and non-Enron related—in the employees’ current e-mailboxes and personal folders at the time, including all e-mails created before the collection date that the employee had not affirmatively deleted. (Declaration of John W. Marshall, dated March 2, 2004. (“Marshall Decl.”) ¶ 9.)¹ Paul, Weiss attorneys also coordinated with Citigroup’s information technology department to collect from Citigroup’s computers additional Enron-related electronic files, such as Excel, Word, PowerPoint and other text documents. (Tarnofsky Decl. ¶ 10.) Paul, Weiss attorneys and paralegals spent the better part of a year collecting these documents, although the bulk were collected during the first quarter of 2002. (*Id.* ¶ 11.) Citigroup’s counsel subsequently reviewed these documents for responsiveness and privilege, a project that required over 13,000 hours of attorney time, at substantial cost to Citigroup. (*Id.* ¶ 12.)

To date, Citigroup has produced about 1.5 million pages of documents in connection with this litigation, or the equivalent of approximately 500 boxes—including more than 600,000 pages of e-mails generated over a period of more than three years. (*Id.* ¶ 13.)

Citigroup’s production includes all of the documents at the heart of the disputed issues in this case as they relate to Citigroup. Among other categories, Citigroup has produced, without objection, memoranda in which employees described and discussed, and Citigroup approved, Enron-related transactions; memoranda concerning Citigroup’s evaluation of Enron’s

¹ The snapshots also captured all e-mails that had been deleted in the previous 7 days. As Mr. Marshall’s declaration explains, unlike many e-mail systems that automatically delete e-mails after a certain period of time if the e-mails have not affirmatively been saved by the user, the e-mail system for Citigroup’s corporate and investment bank retains on its servers all e-mails that are not affirmatively deleted by the user. (Marshall Decl. ¶ 8.)

financial status and creditworthiness; contracts for Enron-related transactions (including drafts); memoranda and reports concerning Citigroup's extension of financing to Enron; presentations made by Citigroup to Enron and by Enron to Citigroup; correspondence between Citigroup and Enron; and approximately 600,000 pages of e-mail messages by or to Citigroup employees who were involved in the Enron relationship or who worked on Enron-related transactions. Citigroup has produced to plaintiff all documents that it has produced to the SEC, PSI, the Enron bankruptcy examiner, and all other government regulators and investigators as well as civil litigants. None of the regulators and investigators to whom Citigroup has produced documents has expressed dissatisfaction with the completeness of Citigroup's production; indeed, in the order instituting a public administrative proceeding and imposing a cease and desist order on Citigroup, the SEC commended Citigroup for its cooperation with the SEC's investigation. (*Id.* ¶ 15.)

With respect to the issues raised by plaintiff's motion to compel, Citigroup is producing all non-privileged responsive documents it has collected, except for certain documents reflecting communications with the SEC (all created after Enron's bankruptcy filing). (*Id.* ¶ 16.)

II. The Meet-and-Confer Process

Plaintiff and Citigroup did not complete their meet-and-confer sessions prior to plaintiff's filing of this motion to compel. Indeed, at the time plaintiff filed this motion, the parties were still in the process of negotiating several of the issues that are the subject of this motion.

In particular, the parties were still in discussions over the extent to which Citigroup would produce documents created after December 2, 2001, the day that Enron filed its Chapter 11 bankruptcy petition. (Pl. Br., Ex. 6 at 3.) Citigroup had already agreed during the meet-and-confer process to collect and produce non-privileged responsive post-petition

documents through April 8, 2002 (the date that Citigroup was first sued in this matter), and to retrieve archived e-mails from backup tapes, for its 28 employees with the most significant involvement in Enron-related transactions. (Tarnofsky Decl. ¶¶ 20, 22.) Citigroup also expressed a willingness to consider retrieving backup e-mails and collecting post-petition documents for a limited number of additional employees whom plaintiff might identify. (Tarnofsky Decl. ¶¶ 21, 23.) And plaintiff and Citigroup were in the midst of discussing the feasibility of producing employee expense reports stored in Citigroup's central filing system and corporate jet manifests reflecting Enron-related travel. (*Id.* ¶ 18.)

Citigroup repeatedly urged plaintiff during the meet-and-confer process to identify any perceived deficiencies in Citigroup's production or specific areas where plaintiff believed the production was inadequate. Plaintiff never did so. (*Id.* ¶ 19.)

ARGUMENT

I. Plaintiff's Demand for all Archived E-mails and Emergency E-mail Backup Tapes Is Grossly Overbroad and Would Impose an Undue Burden on Citigroup; At The Very Least, the Cost of Retrieving and Producing Those E-mails Should Be Borne By Plaintiff.

A. Citigroup Should Not be Required to Retrieve and Produce Archived E-mails Other Than Those It Has Already Agreed To Produce.

Plaintiff's insistence that Citigroup restore and review *all* archived e-mails and *all* emergency backup tapes from every one of approximately 400 Citigroup employees is unprecedented and staggeringly overbroad. Plaintiff's brief avoids the real issue at hand—the exorbitant cost of retrieving and producing these e-mails, and the limited likelihood that they will generate additional meaningful discovery—and instead argues at length that e-mails are generally discoverable. This argument is a classic red herring. As noted, Citigroup has not refused to produce e-mails—to the contrary, it has produced hundreds of thousands of pages of

e-mails, and it has further agreed to retrieve archived e-mails for the 28 employees principally involved in its transactions with Enron.

Plaintiff's attempt to elide the distinction between the routine practice of producing responsive electronic data and the far more onerous task of producing archived electronic material (let alone from hundreds of employees) is disingenuous. Courts have consistently held that parties are not entitled to unlimited access to archived e-mails and emergency backup tapes—and certainly have not imposed on the producing party (here, Citigroup) the expense of retrieving such e-mails.²

Every court in this Circuit to have considered the discoverability of archived electronic data has recognized the need to balance the prohibitive costs of retrieving and producing such material against the likelihood of obtaining significant evidence. *See, e.g., In re Triton Energy Ltd, Sec. Litig.*, Civ. No. 98-256, 2002 WL 32114464, at *7 (E.D. Tex. Mar. 7, 2002) (imposing costs of retrieving such data on the requesting party); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ. A 99-3564, 2002 WL 246439, *3-4 (E.D. La. Feb. 19, 2002); *see also Cognex Corp. v. Electro Scientific Indus.*, No. Civ. A 01CV10287 RCL, 2002 WL 32309413, at *4-5 (D. Mass. July 2, 2002) (denying plaintiff's request for discovery of e-mail backup tapes even in the context of an offer by plaintiff to share costs). *See generally* Fed. R. Civ. P. 26(b)(2)(iii) (“the frequency or extent of use of the discovery methods otherwise permitted . . . shall be limited by the Court if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit”).

² Moreover, at least four other defendants in this action have also objected in their responses and objections to plaintiff's document requests to the production of archived e-mails and e-mails restored from emergency backup tapes.

Applying this balancing test, courts that have ordered the production of archived electronic materials almost uniformly have limited the scope of production to a handful of correspondents or in some other fashion. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (ordering production of e-mails from only five of 94 backup tapes); *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001) (requiring production of archived e-mails only of specific individuals alleged to have retaliated against plaintiff).

Here, balancing the substantial cost against the likely yield of significant evidence weighs strongly against plaintiff's request.

The cost of complying with plaintiff's demand for restoration and review of all archived e-mail and all emergency e-mail backup tapes through the present would be substantial. As set forth by Mr. Marshall, Director of the Citigroup Technology Infrastructure, restoring all of the material plaintiff seeks (from Zantaz and the emergency backup tapes) would cost nearly \$600,000 and would take 10 months to complete. (Marshall Decl. ¶¶ 34, 48.) In stark contrast to this substantial burden and delay, the yield to plaintiff in the form of responsive material is likely to be minimal, at best. As discussed below, *see infra* p. 16, the archival e-mails and e-mails on backup tapes will include, of course, many e-mails that have already been produced in this action. (*Id.* ¶ 44.) Indeed, it is unclear that restoration of the archives and emergency backup tapes will yield *any* non-duplicative e-mails.

As set forth in Mr. Marshall's declaration, Citigroup has two sources of archival e-mail: "Zantaz," and "Exchange server disaster recovery tapes" (otherwise known as emergency backup tapes). Zantaz is an outside vendor that captures Citigroup's external e-mails—that is, e-mails that pass through Citigroup's internet gateways on their way to or from non-Citigroup persons or entities. (*Id.* ¶ 13.) Zantaz maintains archives of external e-mail for employees of Citigroup's corporate and investment bank for the periods September 1997 through

September 1998; January 1, 2001 to mid-August 2001; and October 2001 to the present. (*Id.* ¶ 23.) (The two gaps in coverage result from of the destruction of backup media stored in 7 World Trade Center on September 11, 2001, and Citigroup’s inability to perform normal backup operations during its disaster recovery efforts in the immediate aftermath of that disaster. (*Id.* ¶ 22.))

In Citigroup’s experience with Zantaz, retrieving one year’s worth of e-mails for one e-mail address on average costs about \$600 (although the actual cost for any particular search can be more or less). Absent economies of scale, Zantaz can perform ten retrievals—with a retrieval capturing one year’s worth of e-mails for one e-mail address—in a 48-hour period. Anticipating certain economies of scale, however, Citigroup estimates that retrieving all the e-mails available through Zantaz for the approximately 400 employees from whom Citigroup has collected documents—most of whom are likely to have had multiple e-mail addresses over the course of that period³—would take 100 days to complete at a cost of nearly \$250,000. (*Id.* ¶ 34.) This estimate does not include the significant time and cost of subsequent attorney review.

And that is only the Zantaz system. Citigroup also has a separate backup system for its Exchange e-mail servers that stores internal as well as external e-mails. This backup system operates by taking “snapshots” of employees’ current e-mailboxes and personal folders on a regular basis. Before April 2002, Citigroup used this backup system solely as an emergency system, and therefore did not retain the stored e-mails for more than two weeks. Weekly backup

³ Employees’ e-mail addresses changed due to restructurings of Citigroup’s business and due to name changes by employees (Marshall Decl. ¶ 25.)

tapes have been retained since that time. Thus, the earliest existing emergency backup tapes were created in early 2002. (Marshall Decl. ¶ 36.)

Retrieving data from the emergency backup tapes is more complicated than retrieving e-mail from Zantaz. The emergency backup tapes are stored in a format that must be processed before it can be used. Citigroup has obtained a bid from an outside vendor to process the Exchange server backup tapes for the April 2002 through February 2003 period so that they are in a format similar to the Zantaz tapes. The vendor estimates that this project would take 26 weeks. This project involves only restructuring the backup tapes, and so the 26-week timeframe for completing the project does not include the time it would take to retrieve e-mails.

(*Id.* ¶¶ 45-47.)

The time and cost of retrieving e-mails from the emergency backup tapes for the employees who performed substantive Enron-related work would be comparable to the time and cost associated with retrieving e-mails for those individuals from Zantaz, assuming no economies of scale. Thus, Mr. Marshall conservatively estimates that it would cost Citigroup \$240,000 and take approximately 4 months to retrieve the e-mails for approximately 400 employees for the 11 months that the emergency backup tapes are available. (*Id.* ¶ 48.)⁴ And these estimates do not include the significant time and cost of attorney review. Given the significant amount of time it would take to complete the restoration, review, and production of these materials, compelling their production would threaten to impede the progress of this litigation significantly.

⁴ This project would require 400 separate retrievals—one for each employee for the 11 months for which these tapes are available. At \$600 per retrieval, the cost would be \$240,000. This project would take approximately 4 months (400 retrievals ÷ 5 retrievals per day = 80 days). (Marshall Decl. ¶ 49.)

Against this substantial cost, burden, and delay, the likelihood that restoring the emergency backup tapes will yield meaningful evidence is slight. As noted, Citigroup has already produced a vast quantity of e-mails—90,000 e-mail messages (covering more than 600,000 pages), or more than 100 e-mail messages a day for each business day during the class period. Moreover, it is highly likely that any responsive e-mails found on the emergency backup tapes would be duplicative of e-mails that already have been produced in this litigation. This is because the “snapshots” of employees’ current e-mailboxes and personal folders, which were taken at the direction of counsel primarily during the first quarter of 2002 and from which the significant quantities of e-mails that already were produced were taken, captured the very same e-mails as those captured on emergency backup tapes that were created around the same time. The emergency backup tapes would not contain any e-mails older than those captured by document collection in connection with this litigation to the extent that the document collection was carried out prior to the creation of the first available backup tapes (Marshall Decl. ¶ 35)—which in very large measure it was (Tarnofsky Decl. ¶ 11).⁵

Despite this vast disparity between cost to Citigroup and likely yield of meaningful evidence to plaintiff, Citigroup, in an effort to accommodate plaintiff’s demands, agreed during the meet-and-confer process to produce e-mails available from Zantaz through April 8, 2002 (the date that Citigroup was named a defendant in this case) for each of the 28 employees identified by Citigroup (in its responses to interrogatories propounded by plaintiff) as

⁵ It is true that emergency backup tapes created after Citigroup’s initial collection of electronic documents could contain Enron-related materials created after the initial collection. However, as set forth more fully below, *see infra*. pp. 18, 19, these materials are unlikely to contain non-privileged Enron-related information.

having the most significant involvement in the Citigroup-Enron relationship. (Tarnofsky Decl. ¶ 20)—notwithstanding the substantial costs of restoration and attorney review. In addition, Citigroup proposed that if plaintiff identified a reasonable number of additional employees, Citigroup would produce e-mails available through Zantaz for those employees. Plaintiff did not take Citigroup up on this offer. (*Id.* ¶ 21.)

In light of the substantial cost—in time and money—of requiring Citigroup to retrieve archived e-mails and to restore emergency backup tapes for more than these 28 key employees, and the limited likelihood that retrieving these additional e-mails would yield significant non-duplicative discoverable material, we respectfully request the Court to deny plaintiff’s motion.

B. If Citigroup Is Required To Retrieve any Archived E-Mail, the Cost of Retrieval Should Be Borne by Plaintiff

If, contrary to settled law, the Court requires Citigroup to restore all archived e-mails and all emergency backup tapes, as plaintiff requests, plaintiff—not Citigroup—should bear the cost of retrieving those e-mails.

While the party responding to a discovery request generally bears the cost of compliance, a court may protect the responding party from “undue burden or expense” by shifting some or all of the costs of production to the requesting party. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (internal quotation marks omitted). The courts have applied this principle to shift the costs of extraordinary production of electronic documents, as plaintiff seeks here. *In re Triton Energy*, 2002 WL 32114464, at *7 (imposing costs of retrieving electronic data on requesting party); *see also Rowe Enter., Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002), *aff’d*, No. 98 Civ. 8272, 2002 WL 975713, *2 (S.D.N.Y. May 9, 2002) (general rule imposing cost allocation on the responding party “does not translate

well into the realm of electronic data”). Indeed, the *Manual for Complex Litigation* appears to anticipate such an outcome in the class action context. See MANUAL FOR COMPLEX LITIGATION SECOND § 21.446 (1993) (“parties obtaining information from another’s computerized data typically are required to bear any special expense incident to this form of production”).

Courts in this Circuit have generally adopted a balancing test to determine when cost-shifting is appropriate. See, e.g. *Murphy Oil*, 2002 WL 246439, at *3-5. Among the factors to be considered are “the specificity of the discovery request, the likelihood of discovering critical information, the availability of such information from other sources, the purposes for which the responding party maintains the requested data, the relative benefit to the parties of obtaining the information, the total cost associated with production, the relative ability of each party to control costs and its incentive to do so, and the resources available to each party.” *Id.*; see also *Medtronic Sofamor Danek v. Michelson*, No. 01-2373-MIV, 2003 WL 21468573, *2-3 (W.D. Tenn. May 13, 2003).

In this case, application of these factors supports shifting to plaintiff the cost of the burdensome search it proposes. For one thing, plaintiff has refused to narrow its sweeping request, which militates in favor of cost shifting. See, e.g., *Rowe*, 205 F.R.D. at 429-30. The likelihood of discovering “critical” information from these archived sources is slight in light of the hundreds of thousands of pages of responsive e-mails that have already been produced in this action, the secondary roles of the employees at issue, and the fact that the material available through Zantaz and on the emergency backup tapes is likely to be duplicative or cumulative of materials already produced. Citigroup does not maintain the archived material and tapes for any current business purpose and will not accrue any benefit from their retrieval—another factor

supporting cost shifting.⁶ *See, e.g., Murphy Oil*, 2002 WL 246439, at *5-6; *Rowe*, 205 F.R.D. at 429-30. Finally, the total cost of retrieving these e-mails far exceeds the typical costs of discovery in even a major litigation.

In sum, the substantial cost of restoring all archived e-mails and retrieving all emergency backup tapes, as compared to the marginal utility to plaintiff, make it fundamentally unfair to impose these costs on Citigroup. *See McPeck*, 202 F.R.D. at 34; *Byers v. Illinois State Police*, No. 99 C 8105, 2002 WL 1264004, *10-12 (N.D. Ill. June 3, 2002). To the extent the Court orders restoration and retrieval of any of these documents, plaintiff should bear the cost of production.

II. Plaintiff's Open-Ended Demand for Production of all Responsive Non-Privileged Documents Post-Dating Enron's Bankruptcy Is Patently Unreasonable, Is Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence, and Would Impose Undue Burdens on Citigroup.

Plaintiff's demand that Citigroup collect and produce documents without any cutoff date is patently unreasonable. Citigroup's initial agreement to produce documents created up to Enron's bankruptcy—shortly after the end of the class period—is eminently reasonable,

⁶ Plaintiff's argument that Citigroup maintains its e-mails for a current business purpose on the grounds that SEC regulations require the retention of electronic evidence is without merit. *See* 17 C.F.R. §240.17 a-4 (b)(4) (2003) (requiring NASD member firms to retain electronic evidence of broker-dealer activity for three years). First, the regulations require only that Citigroup *retain* electronic evidence, not that it routinely search archived e-mails as part of its current business practice (much less that it retrieve the e-mails of hundreds of employees over a period of years). Second, SEC regulations do not require the retention of *all* e-mail communications, but rather only those relating to the broker-dealer's "business as such." Materials excluded from the record-keeping requirement include telephone messages, drafts of deal documents, and notes made by brokers and traders. *See* Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934, 66 Fed. Reg. 55,818 (S.E.C. Nov. 2, 2001). Plaintiff's request here goes far beyond the limited categories of documents covered by the SEC document retention policy. Finally, at least a third of the documents that plaintiff seeks are more than three years old and not within the scope of the regulations.

and consistent with the position taken by at least 15 other defendants in this litigation in their objections and responses to plaintiff's document requests. By contrast, plaintiff's contention that Citigroup (and presumably other defendants) should be bound by a continuing obligation to collect and produce documents relating to Enron months and years after Enron's bankruptcy, is entirely unmanageable, and would require defendants to engage in an endless cycle of updating their document collection. Given the substantial number of defendants in the case, the vast number of likely custodians of Enron-related documents, and the pendency of the ongoing Enron bankruptcy proceeding and the multiple Enron-related litigations, compliance with plaintiff's demand would cause this litigation to grind to a halt.

As discussed above, Citigroup carried out the bulk of its document collection efforts in the first quarter of 2002. Citigroup did not as a general matter circle back to collect documents created after the initial collection effort. Collecting such subsequently created documents would essentially require Citigroup to redo from scratch its entire document collection effort. (Tarnofsky Decl. ¶28.)

Such a project would not merely require Citigroup to re-contact the approximately 400 employees from whom it initially collected documents to collect newly created documents. (*Id.*) In addition, personnel from Citigroup's information technology department would have to take a new snapshot of each employee's current e-mailbox and personal folders. That project would place a significant burden on Citigroup's information technology department: we estimate that the project would take thousands of hours to complete and would cost several million dollars for the collection effort alone. This estimate does not factor in the substantial time and cost of subsequent attorney review. (*Id.*)

Moreover, the enormous burden of this additional collection effort would dwarf any benefit to plaintiff. The results of this wholesale recollection effort would be almost entirely

duplicative of Citigroup's initial document collection effort. The new snapshots would include all Enron-related e-mails that were captured in the snapshots previously taken during the initial collection effort in the first quarter of 2002, since employees were instructed to preserve all Enron-related material.⁷ Furthermore, because these snapshots would capture all of the e-mails in the employee e-mailboxes and personal folders (Marshall Decl. ¶ 38.)—whether or not they relate to Enron—the new snapshots, like the initial ones, would contain an enormous amount of material having nothing whatsoever to do with Enron.

The enormous burden of this additional collection effort would dwarf any likely benefit to plaintiff. Documents created after Enron's collapse—and thus after the conduct alleged in the complaint—are far less likely than contemporaneous documents to be relevant to the allegations of fraud that form the basis of this suit, or to Citigroup's affirmative defenses, which likewise relate to Citigroup employees' actions and state of mind during the class period. The likelihood of discovering any relevant documents decreases dramatically as one moves further away from the dates of the allegedly improper conduct. It is also likely that most relevant documents created after Enron's bankruptcy were prepared in anticipation of bankruptcy litigation and that most relevant documents created after Citigroup was named as a defendant in this lawsuit were prepared in anticipation of, or in connection with, this suit; these documents are thus likely to be protected from production under the work product doctrine.

In an attempt to respond to the concerns expressed by plaintiff during the meet-and-confer process, Citigroup agreed to collect, review, and produce documents (including

⁷ Indeed, the first available emergency backup tapes were created around the same time as Citigroup's initial document collection effort, so that the overlap will be almost complete.

e-mails) created through the date that Citigroup was named as a defendant in this lawsuit (April 8, 2002) from the files of the 28 Citigroup employees who had principal responsibilities with respect to Enron transactions. In addition, Citigroup is prepared to produce all non-privileged responsive post-petition documents it has already collected from the approximately 400 Citigroup employees from whom it collected documents (and to log any documents withheld from production based on the attorney-client privilege and the work product doctrine). These documents were created between December 2, 2001 and various dates in 2002, depending on when Citigroup collected the documents from its respective employees. (Tarnofsky Decl. ¶ 28.) Producing these documents, of course, will impose a substantial burden on Citigroup: we estimate that reviewing these documents for responsiveness and privilege will consume thousands of hours of attorney time, at significant cost to Citigroup. (*Id.*)

Plaintiff's further demand that Citigroup resume a wholesale collection of newly created documents for each of the approximately 400 employees from whom Citigroup has already collected documents—and, apparently, that it continue to do so *ad infinitum*—is unduly burdensome. Discovery has “ultimate and necessary boundaries.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quotation marks omitted); *Medtronic*, 2003 WL 21468573, at *1. Where, as here, the burden of production on one party so substantially outweighs the likely benefit to its adversary, courts routinely exercise their discretion to curtail the scope of discovery. *See Garcel, Inc. v. Hibernia Nat'l Bank*, No. Civ. A 01-0772, 2002 WL 100605, at *3 (E.D. La. Jan. 24, 2002) (plaintiff's open-ended request for discovery of individual defendants' bank records denied as “overly-broad” in fraud context); *Fitzpatrick v. MCI Tel. Corp.*, No. Civ. A 95-1864, 1997 WL 576391, at *3 (E.D. La. Sept. 15, 1997) (affirming magistrate judge's ruling that plaintiff's request for production over an unlimited time frame was “overbroad” and fixing appropriate discovery time frame as the time during which the competing

products were available on the market); *see also Coker v. Duke & Co., Inc.*, 177 F.R.D. 682, 685-86 (M.D. Ala. 1998) (requiring plaintiff to make a specific showing why continuous, open-ended production was “necessary” in the securities fraud context); *King v. E.F. Hutton & Co.*, 117 F.R.D. 1, 9-10 (D.D.C. 1987) (denying certain requests for open-ended discovery on the grounds that plaintiff’s request was “too broad” and not reasonably calculated to gather relevant and responsive documents). Indeed, courts have a “duty to pare down overbroad discovery requests under Rule 26(b)(2).” *Rowlin v. Alabama Dep’t of Public Safety*, 200 F.R.D. 459, 461 (M.D. Ala. 2001).

Accordingly, we respectfully submit that the Court should deny plaintiff’s unreasonable demand for open-ended discovery that will yield (at most) marginally relevant material, at exorbitant cost. To the extent that the Court does order production of these materials, Citigroup respectfully submits that plaintiff should be required to bear the costs of this extraordinary discovery. *See cases cited supra pp. 18, 19.*

III. Plaintiff Is Not Entitled to an Order Compelling Production of SEC Materials

Plaintiff’s position regarding Citigroup’s alleged failure to produce materials relating to the SEC’s investigation of Citigroup is both disingenuous and contrary to well-settled law.

The documents covered by plaintiff’s motion fall into three general categories: (1) correspondence between Citigroup and the SEC about the SEC’s discovery requests to Citigroup; (2) transcripts of SEC depositions of Citigroup employees; and (3) drafts of settlement agreements and other settlement communications with the SEC. As plaintiff would have learned if it had been willing to complete the meet-and-confer process, Citigroup is prepared to produce documents falling into the first category. (Declaration of Mark F. Pomerantz (“Pomerantz Decl.”) ¶ __.) Accordingly, this aspect of plaintiff’s motion is moot.

Likewise, Citigroup has not objected to producing SEC deposition transcripts to the extent they are in its possession, custody or control. As we advised plaintiff during the meet-and-confer process, Citigroup does not currently have possession of these transcripts, but, in a good faith effort to comply with plaintiff's discovery demands, it has asked the SEC for copies of the transcripts (which Citigroup will then produce to plaintiff). (Tarnofsky Decl. Exs. A-H.) To date, the SEC has not furnished those transcripts to Citigroup. (Tarnofsky Decl. ¶ 31.) Contrary to plaintiff's snide insinuation that Citigroup "is not actively seeking to procure the transcripts" (Pl. Br. at 19), Citigroup has done precisely what it is required to do under applicable law. See *In re Domestic Air Trans. Antitrust Litig.*, 142 F.R.D. 354, 357 (N.D. Ga. 1992); see also *Preservation Prods. v. Nutraceutical Clinical Labs Int'l, Inc.*, 214 F.R.D. 494, 496 (N.D. Ill. 2003) (requiring only that defendants provide plaintiff with a signed consent form for the transcripts); *In re Woolworth Corp. Sec. Class Action Litig.*, 166 F.R.D. 311, 313 (S.D.N.Y. 1996) (requiring that defendant's ex-employee request transcript from SEC, and produce it if provided; "if the SEC refuses to grant her request for a copy of the transcript . . . plaintiffs will have to forego this avenue of discovery").⁸

As for the third category of documents, plaintiff contends that Citigroup has failed to produce responsive, non-privileged materials relating to its negotiations with the SEC over the terms of the SEC's Order Instituting a Public Proceeding against, and Settlement with, Citigroup.

⁸ Under applicable SEC regulations, the SEC has discretion for good cause to deny a request by a deponent for a deposition transcript. "A person who has submitted . . . testimony. . . shall be entitled, upon written request, to procure . . . a transcript of his testimony on payment of the appropriate fees: Provided, however, that in a non-public formal investigative proceeding the Commission may for good cause deny such request." 17 C.F.R. § 203.6 (2003); see also *LaMorte v. Mansfield*, 438 F.2d 448, 450 (2d Cir. 1971) (noting the SEC's discretion to maintain the confidentiality of deposition testimony).

(Pl. Br. at 22.) Citigroup and the SEC engaged in settlement discussions that led to settlement of certain Enron-related issues on July 28, 2003. Citigroup and the SEC each intended these settlement communications to be kept confidential, and expected that they would remain confidential. Indeed, the SEC placed a legend demanding confidential treatment on all documents it provided to Citigroup in connection with these settlement negotiations. (Pomerantz Decl. ¶ 6.) In these circumstances, the Court should decline to compel the production of Citigroup's settlement communications with the SEC.

It is well-settled that discovery of settlement negotiations is disfavored, because such discovery tends to undermine “the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions.” *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982). Indeed, at least one Court of Appeals has recognized a “settlement privilege” precluding discovery of settlement negotiations. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981-83 (6th Cir. 2003); *see also Allen County, Ohio v. Reilly Indus.*, 197 F.R.D. 352, 354 (N.D. Ohio 2000) (recognizing settlement negotiations as privileged communications); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 553 (E.D. Cal. 1990) (“settlement discussion are protected by the right to privacy”); *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 236 (S.D. Fla. 1989) (recognizing existence of settlement privilege).

Moreover, numerous courts that have not yet recognized the existence of a settlement privilege *per se* require “a particularized showing of relevance” before permitting even limited discovery as to the terms of a settlement agreement. *See, e.g., Matsushita Elecs. Corp. v. Loral Corp.*, No. 92 Civ. 5461, 1995 WL 527640, at *4 (S.D.N.Y. Sept.7, 1995) (denying discovery as to settlement materials/communications, where settling parties had agreed to confidentiality and where party seeking discovery had failed to articulate a compelling reason

for the discovery sought); *Riddell Sports, Inc. v. Brooks*, 1995 WL 20260, at *1 (S.D.N.Y. Jan. 19, 1995) (“absent a particularized showing of their relation to admissible evidence, documents concerning settlement are presumed irrelevant and need not be produced.”) (quotation marks omitted); *Bottaro*, 96 F.R.D. at 160 (“The question in the case . . . is whether an inquisitor should get discovery into the terms of the agreement itself based solely on the hope that it will somehow lead to admissible evidence on the question of damages. Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.”); *SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 552719, at *1 (S.D.N.Y. Sept. 18, 1995) (noting that courts have been quite consistent in imposing a requirement that “the discovering party, as the price for obtaining such potentially disruptive disclosure, make a fairly compelling showing of need for the information”); *Fidelity Federal Sav. & Loan Assoc. v. Felicetti*, 148 F.R.D. 532, 534 (E.D.Penn. 1993) (“In keeping with the strong Congressional policy behind Rule 408 as well as the liberal discovery rules, we will follow along the lines of the New York district courts and place the onus on the plaintiffs to show that the documents relating to the settlement negotiations are relevant and likely to lead to the discovery of admissible evidence.”).

Even if, contrary to the Sixth Circuit’s decision in *Goodyear Tire*, settlement communications are discoverable at all, plaintiff’s repeated claims that these settlement communications are “highly relevant” do not even remotely satisfy its burden of making a “particularized showing of relevance” required to obtain such discovery. Not even the publicly

available final settlement agreement, let alone the drafts plaintiff now seeks, would be admissible at trial. Fed. R. Evid. 408.⁹ Nor can plaintiff establish that the details of Citigroup's negotiations with the SEC over the contents of their settlement agreement are reasonably likely to lead to the discovery of admissible evidence. See *Shipes v. BIC Corp.*, 154 F.R.D. 301, 309 (N.D. Ga. 1994) (concluding that it is "unlikely that information about prior settlements will lead to the discovery of admissible evidence"); *Bottaro*, 96 F.R.D. at 160 (E.D.N.Y. 1982) ("the terms of settlement do not appear to be reasonably calculated to lead to discovery of admissible evidence"). Plaintiff is in no way disadvantaged if it does not have access to this settlement material, because, as noted, Citigroup has produced to plaintiff the very same underlying documents that it produced to the SEC, and the same witnesses that the SEC deposed are available for deposition in this case.

Furthermore, plaintiff's argument that "documents and communications with the SEC concerning contemplated charges" are discoverable because voluntary provision of such documents to the SEC waives any applicable privilege (Pl. Br. at 22) entirely misses the point. The strong public policy favoring settlement applies with equal force in the context of settlement negotiations with the SEC. In this regard, a number of courts have recognized that disclosure of otherwise privileged documents to the SEC will not waive applicable privileges with respect to

⁹ Fed. R. Evid. 408 provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

third parties, particularly where as here, the materials were exchanged with the agency pursuant to an express confidentiality agreement.¹⁰

Accordingly, plaintiff's request for the production of protected settlement materials should be denied.

IV. Plaintiff's Request that Citigroup Be Ordered To Produce (i) Responsive Documents From Delta and (ii) Employee Expense Reports and Corporate Jet Manifests Reflecting Enron-Related Travel Is Moot

Plaintiff's demand that Citigroup produce documents from Delta, a legally independent entity that is neither directly nor indirectly owned by Citigroup, is without justification. Nevertheless, Citigroup has obtained a commitment from Delta to produce all non-privileged Enron-related documents to plaintiff. (Tarnofsky Decl. ¶ 33.) Accordingly, this aspect of plaintiff's motion is moot.

Plaintiff's demand that Citigroup produce all Enron-related expense reports from all employees from whom Citigroup collected documents, as well as corporate jet manifests reflecting Enron-related travel, while overbroad, is also moot. Citigroup will produce these materials, notwithstanding the significant burden of doing so. (*Id.* ¶ 34.)

¹⁰ See *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984) (no waiver of work product protection by disclosure of materials to government agencies where the disclosing party can demonstrate the fairness of selective disclosure, an expectation of confidentiality, and that disclosure does not conflict with the policy underlying the work product doctrine); *Mauruzen Co. v. HSBC USA, Inc.*, No. 00 Civ. 1079, 2002 WL 1628782, *1-2 (S.D.N.Y. July 23, 2002) (no waiver of work product protection where producing party provided evidence of an oral confidentiality agreement with the government agency). See also WEINSTEIN'S FEDERAL EVIDENCE § 511.04[5] n.6 (2d ed. 2000) (citing majority rule finding that "an express agreement preserving confidentiality" undermines claim of waiver).

V. Citigroup Has Made a Complete and Appropriate Production

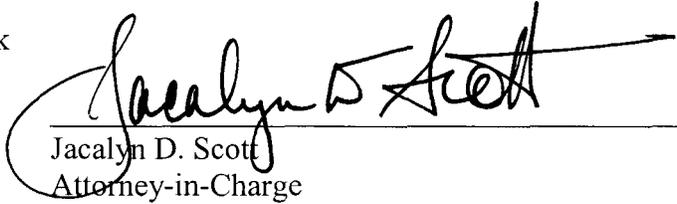
In the final section of its brief, plaintiff demands that Citigroup produce all non-privileged responsive documents from all Citigroup personnel from whom Citigroup collected documents. However, plaintiff never identifies any purported deficiencies in Citigroup's production or articulates what additional documents it claims Citigroup is not producing (beyond the five categories of documents discussed above). With respect to the issues raised in plaintiff's motion, Citigroup represents that it is not withholding from production any non-privileged documents that it has collected, except certain communications with the SEC, discussed above. (*Id.* ¶ 26.)

To the extent that, in this portion of its motion, plaintiff seeks to challenge all of Citigroup's general and specific objections not addressed elsewhere in the motion, we note that this is a grossly improper means of bringing a discovery dispute before the Court. Plaintiff never discussed with Citigroup the majority of Citigroup's objections to production and never completed its discussions with Citigroup on a number of other issues. (*See* Pl. Br. Exs. 6, 8, 23; Tarnofsky Decl. Ex. __.) And plaintiff's motion papers make no attempt to address any of Citigroup's objections (other than those addressed above). The only response we can make to this portion of plaintiff's motion is to repeat that Citigroup has made a complete and appropriate production in response to plaintiff's sweeping document demands.

CONCLUSION

For the foregoing reasons, plaintiff's motion to compel production of documents from Citigroup should be denied in its entirety.

Dated: New York, New York
March 2, 2004



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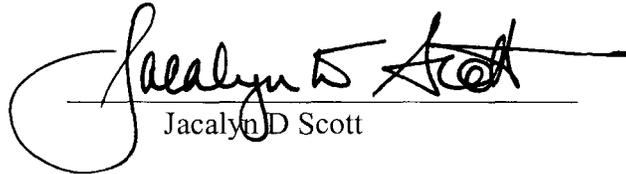
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Memorandum of Law in Support of Defendant's Opposition to Lead Plaintiff's Motion to Compel Documents from Defendant Citigroup Inc. was served to all counsel of record via the www.esl.3624.com <<http://www.esl.3624.com>> web site, pursuant to the Court's Orders of June 5, 2002, and August 7, 2002; on this the 2nd day of March 2004.



Jacalyn D Scott

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