UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

MAR 2 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	MDL-1446 Consolidated Civil Action No. H-01-3624
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants.	

RESPONSE OF J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK AND J.P. MORGAN SECURITIES INC. TO LEAD PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM DEFENDANT CITIGROUP, INC.

Defendants J.P. Morgan Chase & Co., JPMorgan Chase Bank, and J.P. Morgan Securities Inc. (collectively, "JPMorgan Chase") respectfully submit this Memorandum of Law along with the accompanying affidavit of David J. Woll, Esq. (the "Woll Aff.") in response to

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the Lead Plaintiff's Motion to Compel Production of Documents from Defendant Citigroup, Inc. (the "Motion to Compel").

PRELIMINARY STATEMENT

Lead Plaintiff's Motion to Compel is not directed at JPMorgan Chase and the comprehensive and extensive production of documents that JPMorgan Chase has made to date. The Motion to Compel does, however, raise two issues that may also potentially impact JPMorgan Chase, namely: (i) Lead Plaintiff's demand for settlement communications with the Securities and Exchange Commissions ("SEC") (*see* Motion to Compel at 21-25); and (ii) Lead Plaintiff's insistence that Defendants be required to search for and produce documents that were created at any time ***up to the present*** (*see* Motion to Compel at 6-11), including documents created after the end of the proposed class period and after the December 2, 2001 filing of Enron's bankruptcy petition ("Post-Bankruptcy Documents") and which, by definition, clearly post-date the events relevant to this litigation.[1] Accordingly, we respectfully request that the Court consider this submission in ruling on the Motion to Compel.

Lead Plaintiff's request for settlement communications with the SEC flies in the face of the strong public policy favoring settlement discussions and protecting such communications from use in litigation. The settlement discussions between JPMorgan Chase and the SEC, which resulted in the settlement and consent decree that was entered on July 30, 2003, were undertaken by both sides under the express agreement that the discussions and documents exchanged in connection therewith would be kept in strict confidence and not disclosed to third parties. That agreement should be honored. Subjecting settlement discussions to routine discovery would have a severe chilling effect on such discussions and would defeat the

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[1] By focusing on these two categories, JPMorgan Chase does not mean to suggest that it agrees with Lead Plaintiff's position in other respects.

purpose of Rule 408 of the Federal Rules of Evidence, by creating tremendous impediments to frank discussions and consensual resolutions. That is why courts have held that disclosure of settlement communications will only be permitted, if at all, where the requesting party demonstrates a compelling need for disclosure. Lead Plaintiff cannot make any such showing.

JPMorgan Chase has, to date, produced over 3.8 million pages of documents relating to the events and transactions identified in Lead Plaintiff's 600-page First Amended Consolidated Complaint (the "Complaint"). Lead Plaintiff's legitimate interest in discovery concerning JPMorgan Chase's role in those events and transactions can be satisfied by reviewing that voluminous production. JPMorgan Chase's settlement discussions with the SEC would add nothing on that score and would clearly not be admissible under Rule 408. Thus, Lead Plaintiff cannot demonstrate any need, much less a compelling one, for disclosure of these settlement communications.

Similarly, Lead Plaintiff's demand for Post-Bankruptcy Documents seeks materials having little, if any, relevance, to the matters in dispute. That demand, however, would impose an unreasonable and unwarranted additional burden on JPMorgan Chase; a party that has already gone to extraordinary lengths to make a comprehensive, good faith document production in response to the eighty-nine separate requests in Lead Plaintiff's Document Request. JPMorgan Chase has communicated with tens of thousands of employees world-wide in an effort to identify potentially responsive documents. Its outside counsel has conducted detailed "document" interviews with over 1,500 individuals to determine the existence of responsive materials and have also independently reviewed millions of pages of electronic data stored in over 170 individual email boxes. This effort cost millions of dollars and took more than a year. These collection and production efforts were, understandably, focused on documents created

during the proposed class period, which ended on November 27, 2001 and which also pre-dated Enron's bankruptcy filing. Thus, while JPMorgan Chase has agreed to locate and produce some specified categories of Post-Bankruptcy Documents, it has not done a wholesale search for "Enron-related" documents created in the 2-plus years since Enron's December 2, 2001 bankruptcy filing. The vast majority of such Post-Bankruptcy Documents is subject to either the attorney-client or work-product privileges and would not have any bearing on Plaintiffs' fraud claims, because they do not reflect the contemporaneous knowledge or intentions of JPMorgan Chase employees during the relevant time period. Thus, requiring JPMorgan Chase to go through the burdensome and extremely expensive exercise of reviewing and logging these Post-Bankruptcy Documents would be of little or no use to Lead Plaintiff. A far better approach would be to have Lead Plaintiff's counsel make targeted requests for specific categories of Post-Bankruptcy Documents that it believes are relevant to the case.

ARGUMENT

I. SETTLEMENT COMMUNICATIONS WITH THE SEC SHOULD NOT BE SUBJECT TO DISCOVERY

Beginning in January, 2002, JPMorgan Chase had a series of communications with the SEC relating to Enron. Many of these communications pertained to SEC requests for information and JPMorgan Chase's responses thereto. JPMorgan has agreed to produce documents relating to these communications. *See* Woll Aff. ¶ 2.

Certain of the communications between JPMorgan Chase and the SEC, however, were in the nature of settlement discussions. As has been publicly announced, the SEC and JPMorgan Chase reached a settlement in connection with certain Enron-related matters, as a result of which, *inter alia*, a Complaint by the SEC and Consent Decree, dated July 24, 2003 were filed with this Court. Prior to that date, JPMorgan Chase and the SEC had numerous

discussions and communications relating to a potential resolution of the issues ultimately raised by the SEC Complaint. JPMorgan Chase expressly requested that these settlement discussions be kept confidential. Woll Aff. ¶ 3. JPMorgan Chase's settlement communications contained attorney work product, designed principally to reflect comments on various elements of a possible settlement, including suggested changes and revisions to draft settlement-related documents. The SEC, for its part, also designated its settlement communications confidential and expressly requested that the communications not be disclosed to third parties. *Id.* ¶ 4.

In its Motion to Compel, Lead Plaintiff argues 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. *See* Motion to Compel at 21. This argument, however, ignores the strong public policy concerns weighing in favor of protecting settlement communications with the SEC, especially where, as here, there has been no showing of compelling need.

First, several courts have recognized that a party providing otherwise privileged or work product documents to the SEC does not waive applicable privileges with respect to any other parties. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (*en banc*) ("As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred."); *In re LTV Securities Litig.*, 89 F.R.D. 595, 620-21 (N.D. Tex. 1981) ("The class' final argument is that Wozencraft can assert no privilege on behalf of LTV because any privilege is waived by disclosure to the SEC. . . . [E]ven were the analysis solely in terms of the attorney-client privilege, the voluntary disclosure of information to an agency, as part of an agency enforcement proceeding, often is viewed as only a partial waiver of the attorney-client privilege."). *But see In re Steinhardt*

Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) ("An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.").

Moreover, even under the authorities relied upon by the Lead Plaintiff, any waiver argument should be defeated by the understanding between the SEC and JPMorgan Chase that their settlement communications would be kept confidential. Lead Plaintiff relies primarily on the decision of the Second Circuit in *In re Steinhardt Partners, L.P.*,[2] *see* Motion at 22-23, a case in which the court held that there was a waiver of work product protection through communication to the SEC. In that case, however, the Second Circuit "decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection." *Steinhardt*, 9 F.3d at 236. Among the situations where the *Steinhardt* court recognized that a waiver may ***not occur*** are those "in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." *Id.* This principle was subsequently applied in *Maruzen Co., Ltd. v. HSBC USA, Inc.*, No. 00 CIV. 1079, 2002 WL 1628782 (S.D.N.Y. July 23, 2002). In that case, the court held that the defendants' voluntary disclosure to authorities did not waive any privilege and the documents

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2 Lead Plaintiff also relies upon *In re Initial Public Offering Securities Litigation*, No. 21 MC 92, 2004 WL 60290 (Jan. 12, 2004) ("*In re IPO Litigation*") to argue that SEC communications are discoverable. However, the only issue considered by *In re IPO Litigation* was whether Wells submissions are discoverable. *See In re Initial Pub. Offering Sec. Litig*, 2004 WL 60290, at *1 ("The question addressed here . . . is whether Wells submissions to the Securities and Exchange Commission are discoverable in subsequent litigation."). JPMorgan Chase did not make a Wells submission to the SEC. Thus, the holding of *In re IPO Litigation* does not apply insofar as JPMorgan Chase is concerned. Furthermore, the court in *In re IPO Litigation* relied upon the logic of *Steinhardt* in finding the waiver of the attorney work-product privilege. Because there was an agreement to maintain the confidentiality of the settlement communications between JPMorgan Chase and the SEC, the analysis of *In re IPO Litigation* is inapposite. *See infra.*

were not discoverable in a subsequent civil action. There, the plaintiffs sought production of documents that HSBC had provided to the U.S. Attorney's Office. HSBC submitted a declaration from counsel stating that HSBC had an ***oral*** confidentiality agreement with the U.S. Attorney's Office. The court found this sufficient to maintain the confidence of the communications and to deny disclosure of them. *Maruzen*, 2002 WL, at *1.

Here, both JPMorgan Chase and the SEC have acknowledged the confidential nature of their settlement discussions and have expressed the desire and understanding that those discussions not be made available to third parties. This understanding is fully consistent with the strong public policy favoring settlements. Pursuant to this well-recognized public policy, communications in furtherance of settlement should be immune from disclosure to third parties such as Lead Plaintiff. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003) ("The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statement made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery."); *Allen County, Ohio v. Reilly Indus.*, 197 F.R.D. 352, 354 (N.D. Ohio 2000) (adopting the rationale in *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548 (E.D. Cal. 1990), in finding settlement negotiations were privileged communications); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 553 (E.D. Cal. 1990) (*overruled on other grounds by Jaffe v. Redmond*, 518 U.S. 1 (1996)) ("As for the defendant's assertions that such settlement discussions are protected by the right to privacy, the court agrees."); *BankAtlantic v. Blyth Eastman PaineWebber, Inc.*, 127 F.R.D. 224, 236 (S.D. Fla. 1989) (recognizing the existence of the settlement privilege); *Gannett Co., Inc. v. Register Publ'g Co.*, 428 F. Supp. 818, 835 (D.

Conn. 1977) (recognizing the settlement privilege to the extent that the information sought was not with respect to malfeasance in the settlement proceedings themselves).

As the court in *Goodyear* explained, the privilege protecting settlement communications is necessary to give teeth to the public policy favoring settlement:

> There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. . . . They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

332 F.3d at 980. Allowing discovery of settlement negotiations would inevitably have a chilling effect on parties' willingness to engage in such negotiations.

Even in the absence of an absolute privilege for settlement communications, many courts have nevertheless found that the party seeking discovery must make a "compelling" or "particularized" showing of its need for discovery of the settlement communications. *See SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 552719, at *1 (S.D.N.Y. Sept. 18, 1995) ("Under these circumstances it is reasonable to require that the discovering party, as the price for obtaining such potentially disruptive disclosure, make a fairly compelling showing of need for the information."); *Matsushita Elec. Corp. v. Loral Corp.*, No. 92 Civ. 5461, 1995 WL 527640, at *3-4 (S.D.N.Y. Sept. 7, 1995) ("Settlement discussions are typically undertaken with the understanding that they will remain confidential . . . . Under these circumstances it is reasonable to require that the discovering party, as the price for obtaining such potentially disruptive disclosure, make a fairly compelling showing that it needs the information."); *Fidelity Fed. 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"); *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) ("The question in this 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."). Lead Plaintiff has failed to make any such showing here.

Lead Plaintiff merely asserts repeatedly that the documents sought are "highly relevant" and "relevant and discoverable." Motion at 21, 22. But Lead Plaintiff has made *no* attempt to particularize what information it needs from documents provided to the SEC that is not already available to it in the millions of pages of contemporaneous documents that JPMorgan Chase has already produced or in the responses to subpoenas and requests for information from the SEC that JPMorgan Chase has agreed to produce. In fact, any documents related to settlement discussions with the SEC would be of no use because they would be inadmissible under Federal Rule of Evidence 408 ("Evidence 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 is likewise not admissible."). *See also Goodyear*,

332 F.3d at 980 ("Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence,' by some future third party.") Thus, Lead Plaintiff has offered no argument – let alone a compelling argument – that it needs production of the SEC communications.

II. THE DEFENDANTS SHOULD NOT BE REQUIRED TO PRODUCE DOCUMENTS CREATED AFTER ENRON'S BANKRUPTCY FILING

Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). The relevancy requirement in the rules is not toothless. This Court has the ability to set limits on the time period for responsive documents so that responding parties will only have to search for documents that will reasonably be relevant to the claims and defenses at issue in this action. *See* Fed. R. Civ. P. 26(b)(2) ("The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit . . . ."); *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1252 n.7 (7th Cir. 1990) ("It was entirely proper for the district court to deny [plaintiff's] discovery requests in light of the limited relevance of the evidence that such discovery would produce."); *In re Sassalos*, 160 B.R. 646, 651 (D. Or. 1993) ("It is within the discretion of a judge to limit discovery as appropriate under Fed.R.Civ.P. 26(b)(1).").

The claims and defenses in *Newby* focus, *inter alia*, on Lead Plaintiff's allegations that Defendants fraudulently engaged in conduct during the proposed class period with the purpose and intent of allowing Enron to misrepresent its financial condition to the investing public, in violation of GAAP and other pertinent rules and regulations. By its own terms, the

Complaint in this action defines the relevant period during which investors were allegedly affected by the defendants' conduct – *i.e.*, the class period – which ended on November 27, 2001. Accordingly, the potentially relevant documents are those that were created during that period when the defendants' involvement with Enron allegedly affected the plaintiffs.

JPMorgan Chase undertook a massive effort to collect, restore, and review potentially responsive documents relating to its dealings with Enron during the proposed class period. As a result, it has produced more than 3,800,000 pages of responsive documents. Furthermore, JPMorgan Chase has agreed to produce documents generated over the course of a five year period from January 1997 through December 2001. This extended period is in stark contrast to the narrowly tailored periods in the cases relied upon by the Lead Plaintiff. *Cf. In re Seagate Tech. II Sec. Litig.*, No. C-89-2493, 1993 U.S. Dist. LEXIS 18065, at *3 (N.D. Cal. June 10, 1993) (granting plaintiffs' request for discovery of documents in a time period of only 16 months, which "appear[ed] narrowly crafted to avoid undue burden on the subpoenaed parties"); *In re Control Data Corp. Sec. Litig.*, No. 3-85-1341, 1987 U.S. Dist. LEXIS 16829 (D. Minn. Dec. 10, 1987) (granting discovery beyond class period when period was only 7 months long).

Lead Plaintiff, however, asserts the extreme position that production in this case should include documents created *to the present*. It has made no showing, however, that such documents are relevant or would lead to the discovery of relevant evidence. *See In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 111 (2d Cir. 1998) (affirming denial of discovery for documents created after class period); *Fitzpatrick v. MCI Telecomm. Corp.*, No. Civ.A. 95-1864, 1997 WL 576391, at *3 (Sept. 15, 1997 E.D.La) (denying plaintiff's motion to compel in part in response to defendant's objection that "the discovery was over broad for lack of a time frame"). The request here for documents *to the present* calls for production of documents created not only

after the end of the class period and after Enron's bankruptcy petition, but even after Lead Plaintiff's claims against JPMorgan Chase and the other financial institution defendants were filed on April 8, 2002. Such a limitless discovery period is clearly unwarranted. *See, e.g.*, *Daly v. Sprague*, 675 F.2d 716, 724 (5th Cir. 1982) (affirming refusal to allow discovery of events after the filing of plaintiff's action); *U. S. ex rel. Stewart v. Louisiana Clinic*, No. Civ.A. 99-1767, 2003 WL 21283944, at *10 (E.D. La., June 4, 2003) ("The time period ending as of the time of the filing of relators' complaint is clearly appropriate and consistent with the district judge's intent to control discovery pursuant to Fed.R.Evid. 26(b)(2) . . . .").[3] This "time period" is, in fact, an unlimited time period that would require massive re-collections of documents on a rolling basis throughout the litigation.

Furthermore, the vast majority of otherwise responsive documents created after December 2, 2001 will be privileged. JPMorgan Chase's in-house and outside attorneys have been involved in litigation-related issues pertaining to Enron's bankruptcy since at least December, 2001. Lead Plaintiff's proposal that defendants can exclude from their privilege log documents "created" by outside counsel in anticipation of the *Newby* securities litigation, *see* Motion at 6 n.4, provides little relief from the immense burden Lead Plaintiff seeks to place on Defendants. Requiring JPMorgan Chase to create a voluminous log of indisputably privileged Post-Bankruptcy Documents that have little or no relevance to any matter in dispute would be a

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[3] Lead Plaintiff's reliance on *Southwest Hide Co. v. Goldston*, 127 F.R.D. 481 (N.D. Tex. 1989) and *King v. E. F. Hutton & Co.*, 117 F.R.D. 2 (D.D.C. 1987) is misplaced. In those cases, the courts allowed discovery of events beyond the date of the filing of a complaint based on the provision in the civil RICO statute "provid[ing] the pattern of activity may take place within a ten (10) year period." *Goldston*, 127 F.R.D at 482; *see also King*, 117 F.R.D. at 7 (allowing discovery because of "pattern" requirement of civil RICO statute and continuation of a course of conduct). Such cases are particularly inapposite here because any alleged course of conduct in dealing with Enron certainly ceased by the date

wasteful and pointless exercise. There are certainly enough relevant documents and issues to occupy the parties to this enormous litigation without the need to create additional burdens that, on their face, will be of no utility.

Lead Plaintiff's attempt to require production of Post-Bankruptcy Documents is especially inappropriate when viewed in the context of JPMorgan Chase's extensive and good faith discovery efforts to date. As noted above, JPMorgan Chase has gone to great effort and expense to collect Enron-related materials and review those materials for documents responsive to Lead Plaintiff's requests. E-mail requests were sent to tens of thousands of individuals across the globe who worked in areas of JPMorgan Chase that were reasonably likely to have Enron-related materials, asking them to notify attorneys working at the law firms assisting JPMorgan Chase in this preservation and collection effort if they did, in fact, have such materials. Woll Aff. ¶ 5. All individuals who responded that they possessed Enron-related materials were contacted and those materials were collected. In addition, counsel contacted other individuals identified as potentially having Enron-related materials. *Id.* ¶ 6. As a result, JPMorgan Chase and its counsel interviewed over 1,500 present and former employees of JPMorgan Chase and its affiliates. Woll Aff. ¶ 7.

In addition, JPMorgan Chase separately recovered and reviewed emails for more than 170 individuals, in search of responsive Enron-related materials. *Id.* ¶ 8. At present, JPMorgan Chase has produced to the document depository administrators in this case more than 3,800,000 pages of documents. *Id.* ¶ 9. The review and production of these documents required the work of scores of attorneys and paralegals for nearly a year and cost several millions of dollars. *Id.* ¶ 10.

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of Enron's bankruptcy filing and, in any event, conduct after the bankruptcy filing had no

In addition to the exhaustive review and production of documents created prior to the filing of the bankruptcy petition, JPMorgan Chase has also produced several categories of documents created after December 2, 2001. For example, JPMorgan Chase has produced all deposition transcripts of JPMorgan Chase witnesses from its Enron-related litigation against certain sureties. *Id.* ¶ 11. In addition, it has produced the transcripts of all depositions of JPMorgan Chase witnesses taken by the SEC as well as responses to document requests from the SEC. *Id.* ¶ 12. JPMorgan has also agreed to produce all documents that it provided to Enron's Bankruptcy Examiner, including certain specified categories of documents created after December 2, 2001 that were requested by the Examiner. *Id.* ¶ 13.

Moreover, counsel for JPMorgan Chase has indicated that it is willing to consider additional requests for specific categories of Post-Bankruptcy Documents. The extraordinary, additional burden, however, of undertaking a plenary review of all documents created after December 2, 2001 *to the present* is plainly not warranted and should not be required.

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bearing on the investment decisions made during the proposed class period.

CONCLUSION

For the foregoing reasons, JPMorgan Chase respectfully requests that the Court deny Lead Plaintiff's Motion to Compel insofar as it relates to SEC settlement communications and Post-Bankruptcy Documents.

Dated: March 2, 2004

MITHOFF & JACKS, L.L.P.

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Certificate of Service

A true and correct copy of the foregoing Response to Lead Plaintiff's Motion to Compel Production of Documents from Defendant Citigroup, Inc., filed by J.P. Morgan Chase & Co., JPMorgan Chase Bank, and J.P. Morgan Securities Inc., along with the Affidavit of David J. Woll, Esq., have been served upon all known counsel of record by electronic mail to the ESL Website on the 2nd day of March 2004.

/s/ Richard Warren Mithoff

RICHARD WARREN MITHOFF