

MAY 12 2004

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Michael N. Milby, Clerk

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IN RE ENRON CORPORATION	:	
SECURITIES LITIGATION	:	MDL 1446
-----	:	
This Document Relates To:	:	
	:	
MARK NEWBY, et al., Individually and	:	
On Behalf of All Others Similarly Situated,	:	
	:	
Plaintiffs,	:	Civil Action No.: H-01-CV-3624
v.	:	Consolidated Cases
ENRON CORP., et al.,	:	
	:	
Defendants.	:	
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**BANK DEFENDANTS' RESPONSE TO ENRON'S APRIL 22, 2004 MOTION TO SET
PROTOCOL FOR HANDLING "PRESUMPTIVELY CONFIDENTIAL" DOCUMENTS**

The undersigned Defendants¹ (collectively, the "Bank Defendants") respectfully submit this Response to the April 22, 2004 Motion of Enron Corp. ("Enron") For Handling "Presumptively Confidential" Documents ("Motion" or "April 22 Motion").

Preliminary Statement

Enron wrongly asserts that its April 22 Motion has been necessitated by an unreasonable demand purportedly made by the Bank Defendants that Enron spend millions of

¹ This submission is made on behalf of J.P. Morgan Chase & Co., J.P. Morgan Securities, Inc., JPMorgan Chase Bank, Citigroup Inc., Citibank N.A., Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney, Inc.), Salomon Brothers International Limited, Bank of America Corporation, Banc of America Securities LLC, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA) Inc., Pershing LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Holdings Inc., Lehman Brothers Inc., Deutsche Bank AG, Deutsche Bank Securities, Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (formerly known as CIBC Oppenheimer Corp.), and CIBC World Markets plc.

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dollars and several years screening its documents for confidentiality. That is not the case. The Bank Defendants have never made any such request. Upon receiving notice that Enron had created a *130,000-page log* of documents that it had unilaterally decided to deem “presumptively confidential”, counsel for the JPMorgan Chase Defendants notified Enron that this designation did not comport with this Court’s earlier rulings on Enron’s previous motion for confidentiality, which rejected Enron’s request for wholesale confidentiality designations and placed the burden on parties seeking confidential treatment for specific documents to demonstrate the need for confidentiality. March 28, 2003 Order (MDL 1446 Docket Entry No. 83). The Bank Defendants and other parties have adhered to the procedures established by the March 28, 2003 Order seeking confidential treatment of documents in their own productions.

Enron’s entire approach to the designation of confidential documents is remarkably reminiscent of its prior decision to cease compliance with the Court’s August 16, 2002 Order (Newby Docket Entry No. 1008) compelling production of documents that Enron has produced to the government. Having been ordered in August 2002 to produce to the Newby depository all documents produced to governmental entities, Enron ceased compliance with the Court’s order in May 2003 without informing any party, other than the Lead Plaintiffs, or the Court until some four months later. *See* Enron’s September 30, 2003 “Unopposed” Motion for Relief from August 2002 Discovery Order. Enron only resumed compliance with the Court’s August 2002 Order in December 2003 at the insistence of the Bank Defendants. The delays associated with the production of Enron’s documents are the primary reason why depositions in this case could not start in January 2004 as scheduled. Moreover, contrary to the impression created by Enron’s Motion, many of the documents Enron was ordered to produce back in August 2002 are only now starting to become available to the parties, and millions of Enron

documents remain unavailable today, with the commencement of depositions less than one month away.

The point is a simple one. Enron is required to comply with this Court's Orders, just as all other parties are, and cannot take it upon itself to determine when such compliance has become too burdensome or expensive. Enron's "presumptively confidential" designations, which Enron's Motion indicates it would have applied to one-third of its overall production, violate the March 28, 2003 Order. Consequently, if Enron wants relief from that Order, it is incumbent upon Enron to seek such relief from the Court, as it now belatedly has, instead of offering up its 130,000 page log to the parties and attempting to shift to those parties the burden of distinguishing between confidential and non-confidential documents. Enron inexplicably seeks to blame the Bank Defendants for the need to seek modification of the Court's prior Order. The Bank Defendants have no objection to reasonable confidentiality designations by Enron. Nonetheless, the approach advocated by Enron – creation of massive logs of "presumptively confidential" materials through unspecified search terms – seems arbitrary at best and will place unwarranted burdens on the Bank Defendants.

Background

In an Order entered on March 28, 2003, this Court rejected Enron's motion for a broad protective order for Enron documents and required Enron to "produce a privilege log identifying those documents that it seeks to keep confidential, with supporting affidavits setting forth particular and specific facts that establish good cause (specific prejudice or harm from distribution to third parties) for the issuance of a protective order as to each document." Instead, on February 25, 2004, some eleven months after this Court's denial of its motion for protective order, Enron filed a "Notice Regarding Enron Corp.'s Presumptively Confidential Documents", stating that a list of Enron's presumptively confidential documents was now available. (Ex. A,

February 25, 2004 Notice).² When they obtained the list, the Bank Defendants were surprised to learn that *Enron's list itself is 130,000 pages long*, and it asserts that *1,836,442 Enron documents are presumptively confidential*.³ The list was unaccompanied by any affidavit setting forth good cause for the issuance of a protective order, and contained only bare descriptive details of the documents. (*See Ex. B, Excerpt comprising the first ten pages of Enron's list.*) Such a mammoth designation of presumptively confidential documents, without any explanation or justification for the designations, is entirely inconsistent with this Court's March 28, 2003 Order.

In subsequent correspondence, counsel for the JPMorgan Chase Defendants pointed out these deficiencies, indicating their view that the list appeared to be excessively overbroad on its face. In response, Enron claimed that it was in compliance with this Court's prior orders, but gave no explanation how it had created its "presumptively confidential" list. (*See Exs. C, D & E, Correspondence between counsel for Enron and counsel for the JPMorgan Chase Defendants.*)

Now, in its Motion, Enron has for the first time revealed that it generated this list through computerized searches for words and phrases that supposedly are only found in documents that are confidential. However, Enron has not explained, either to the Bank Defendants or to this Court, exactly how it is able to identify confidential documents using computer searches, and why the proportion of Enron documents designated as presumptively

² References to "Ex. ___" are to the exhibits attached to the accompanying affidavit of Alan C. Turner.

³ As Enron now states in its Motion, this list is only partially complete, resulting from searches of approximately six million of the estimated sixteen million documents in Enron's production. At this rate, Enron seems destined to designate roughly 5 million of its documents as "presumptively confidential", and its list will be over 350,000 pages long.

confidential is so overwhelmingly large. Instead, Enron seeks to justify its unilateral decision to proceed with a search process and the designation of confidential documents in a manner that is entirely inconsistent with this Court's March 28, 2003 Order, without first seeking the Court's approval of that process, or even, at a minimum, sharing its plans with the litigants. Now, with its searches half-complete, Enron is seemingly asking the Court to retroactively bless a flawed process that is being presented as a *fait accompli*.

Argument

Enron's Motion complains that the Bank Defendants have acted unreasonably by pointing out to Enron that its "presumptively confidential" log did not comply with the Court's prior rulings. Motion at 4. As noted above, there is nothing unreasonable about expecting Enron to adhere to Court Orders or, if seeking relief from such Orders, to file an application with the Court. Enron undeniably acted contrary to the Court's March 28, 2003 Order in designating almost one-third of its documents as presumptively confidential, and in failing to provide any facts, let alone affidavit support, establishing the need for confidential treatment of the designated documents. In pointing out these deficiencies, the Bank Defendants cannot be accused of acting unreasonably.

Enron's "presumptively confidential" list clearly seems to include a significant proportion of non-confidential documents. According to its April 22 Motion, Enron has searched roughly 6 million documents⁴, and has designated roughly 1.8 million of those documents as presumptively confidential. It seems unrealistic for Enron to have this Court and the litigants believe that almost one-third of its documents should be considered confidential.

⁴ Enron says it has electronically searched approximately 30 million pages to date, and estimates a page to document ratio of 5:1. April 22 Motion at 7.

Other producing parties, including the Bank Defendants, have designated minimal quantities of documents as confidential, in keeping with the guidelines in this Court's March 28, 2003 Order. The over-inclusiveness of Enron's designations can be confirmed by checking any randomly-selected pages of Enron's "presumptively confidential" list. For example, pages 776-777 of Enron's list contain the following selection of obviously non-confidential documents:⁵

E000233739-233758	Enron quarterly SEC filings, 2000 and 2001
E000233759-233763	Press releases by Enron, October and November, 2001
E000233764-233767	Minutes of Special Meetings of Enron's Board of Directors, November 2001
E000233819-233866	Reports by the Financial Accounting Standards Board on various accounting principles
E000233878-233909	Memo from Ken Lay to all Enron employees, with an accompanying booklet concerning the "Conduct of Business Affairs" at Enron

Enron's list is replete with other examples of obviously non-confidential documents including deal approval sheets for various Enron transactions, financial documents and analyses, draft and final agreements for various transactions, meeting minutes and news articles, not to mention a plethora of routine, non-confidential business and non-business office emails including distributions to "All-Enron", all of which serve to cast further doubt on the designation process Enron has employed.⁶

⁵ See Ex. F, pages 776-777 of Enron's presumptively confidential log.

⁶ When the Bank Defendants pointed out the apparent non-confidential status of certain documents on the first page of Enron's list, Enron responded by de-designating the documents. However, this avoids the real issue, since exactly the same exercise could be conducted on almost any page in Enron's presumptively confidential list.

Enron complains that the Bank Defendants' objection to their "presumptively confidential" document list is somehow premature or hypothetical because no party has yet indicated that they wish to publish any particular document on the list. But with such overbroad designations, Enron is effectively seeking to reverse the burden for designation of confidential documents. It is not the Bank Defendants' task to pick through millions of Enron documents and identify which documents they consider are not confidential—it is Enron's task, as ordered by this Court, to designate the documents it believes in good faith are confidential and to provide the Court with sworn justification for its claims. Enron's position is especially unreasonable because now Enron is a plaintiff in a bankruptcy adversary proceeding against certain of the financial institutions, claiming billions of dollars in damages and other relief, and the documents Enron is producing here will be used in depositions taken jointly in the adversary proceeding as well as in *Newby* and the related cases.

Furthermore, there are significant practical problems with Enron's approach to designation of confidential documents, not least of which is the fact that Enron has not stamped its presumptively confidential documents with a "Confidential" stamp on their face. Instead, Enron has instructed parties to search Enron's 130,000-page list before using any document in any court filing or in any other public way.⁷ Moreover, Enron's proposed protocol would require a party seeking to use an Enron document in a court filing to provide 10-days' prior written notice of that intent. This is an unworkable and unnecessary burden on a party that may be unable or unwilling to specify each document it intends to file in support or opposition to a motion 10 days before the filing is due. The delay and burden associated with identifying

⁷ See Ex. A, Enron's February 25, 2004 Notice Regarding Presumptively Confidential Documents.

whether a document is on Enron's list or not, then seeking and obtaining Enron's consent, or litigating Enron's refusal to give consent, will add an unnecessary layer of complication to an already complicated litigation—a complication that will be compounded if one-third of Enron's documents are designated as presumptively confidential. To make matters even more difficult, it seems certain that Enron's presumptively confidential log will frequently change as requests are directed to Enron to "de-designate" certain documents. Keeping track of the list will be a nightmare.

Enron would have this Court believe that there is simply no other way to ensure protection from disclosure of confidential information. Enron says that computerized searches are the only reasonable way to identify its confidential documents, and that the Bank Defendants are being unreasonable in rejecting that approach. As an initial matter, it is quite misleading for Enron to claim that the Bank Defendants have somehow rejected Enron's computerized search process and "simply refuse to accept anything less" than a manual review of millions of documents that would take Enron staff "42 person-years" to complete. Prior to filing its Motion, Enron did not inform the Bank Defendants that it had followed a computer search-term approach in amassing its presumptively confidential list—the Bank Defendants only knew that the list was very, very long, and seemed over-inclusive. Only in filing its Motion did Enron reveal that it had foregone a manual review in favor of a computerized search process. Yet, while Enron's Motion explains in numerous different ways how many person-years it would take to review its documents for confidentiality, Enron is remarkably brief when it comes to explaining the methodology of the computer-based system it has instead adopted. The affidavit of Ms. White vaguely refers to a process by which Enron constructed a "list of words and phrases that, if present in a document, would indicate that the document contained confidential information."

White Affidavit, ¶ 10. However, it is not clear to the Bank Defendants how a computerized word-search would enable Enron to identify confidential documents with any degree of accuracy. It is difficult to imagine what kinds of words or phrases will only appear in confidential documents, but not in non-confidential documents. Moreover, Enron admits in its Motion that it has not even conducted a manual review of the documents that were identified by the computer search (or even a sample thereof), to provide any kind of reality check on the accuracy of the searches. The flaws in this process are apparent from the overbroad and over-inclusive nature of the “presumptively confidential” list itself.

In any event, contrary to Enron’s assertions, the Bank Defendants have no interest in *how* Enron selects documents for which it seeks confidential treatment. The Bank Defendants are only interested in ensuring that Enron’s confidentiality designations are reasonable, and that the Bank Defendants are able to (1) freely use Enron’s documents in depositions, (2) show Enron’s documents to potential deponents, potential trial witnesses, experts and consultants, and (3) use Enron’s documents in motion practice, including, *e.g.*, summary judgment motions, and in public court proceedings, without any undue burden.⁸ However, the starting point must be for Enron to follow this Court’s prior rulings, and to seek protective status for only those documents

⁸ Enron seems to acknowledge this need, in whole or in part, by indicating in its Motion that “such documents can be shown to deponent witnesses.” Motion at 4, n. 5. While this indication is helpful, any order that is entered with respect to Enron’s confidential or “presumptively confidential” documents must formally and expressly allow the parties to disclose Enron documents (regardless of any confidential or “presumptively confidential” designation) to counsel of record in Enron-related cases, their employees, employees of parties in Enron-related cases for the purposes of assisting or consulting with counsel or in preparation for or during their depositions or trial testimony, nonparty witnesses during or in preparation for their deposition or trial testimony, experts retained by parties and the court-appointed mediator.

it can legitimately argue would cause specific harm or prejudice to Enron if distributed to third parties.

Conclusion

For the reasons set forth above, the Bank Defendants respectfully request that Enron's April 22 Motion be denied.

Dated: May 12, 2004

Respectfully submitted,

/s/ Richard W. Mithoff

Richard Warren Mithoff
Attorney-in-Charge
Texas Bar No. 14228500
S.D. Texas I.D. No. 2102
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Telephone: (713) 654-1122
Telecopier: (713) 739-8085

OF COUNSEL:

Charles A. Gall
Texas Bar No. 07281500
S.D. Texas Bar No. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. Texas I.D. No. 16337
JENKENS & GILCHRIST, P.C.
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Telecopier: (214) 855-4300

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Jonathan K. Youngwood
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Telecopier: (212) 455-2502

***Attorneys for J.P. Morgan Chase & Co., J.P.
Morgan Securities Inc. and JPMorgan Chase
Bank***

/s/ Jacalyn D. Scott

Jacalyn D. Scott
Attorney-in-Charge
Texas Bar No. 17899900
Eugene B. Wilshire
WILSHIRE, SCOTT & DYER
3000 Houston Center, 1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Telecopier: (713) 651-0020

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Telecopier: (212) 757-3990

*Attorneys for Citigroup, Inc., Citibank
N.A., Citigroup Global Markets Inc. (f/k/a
Salomon Smith Barney, Inc.) and Salomon
Brothers International Limited*

/s/ Gregory A. Markel

Gregory A. Markel (pro hac vice)
(Attorney-in-Charge)
Ronit Setton (pro hac vice)
Gregory Ballard (pro hac vice)
CADWALADER, WICKERSHAM & TAFT
LLP
100 Maiden Lane
New York, New York 10038
Telephone: (212) 504-6000
Facsimile: (212) 504-6666

Charles G. King
Texas Bar No. 11470000
KING & PENNINGTON LLP
1100 Louisiana Street
Suite 5055
Houston, Texas 77002-5220
Telephone: 713) 225-8404
Facsimile: (713) 225-8488

*Attorneys for Bank of America Corporation and
Banc of America Securities LLC*

/s/ Lawrence D. Finder

Lawrence D. Finder
Attorney-in-Charge
Texas Bar No. 07007200
S.D. Texas I.D. No. 602
Odean L. Volker
Texas Bar No. 20607715
S.D. Texas I.D. No. 12685
HAYNES and BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 0019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

*Attorneys for Credit Suisse First Boston LLC
(formerly known as Credit Suisse First Boston
Corporation), Credit Suisse First Boston (USA)
Inc., and Pershing LLC*

/s/ David H. Braff
David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
Daniel H.R. Laguardia
Steven J. Purcell
Julian C. Swarengin
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Barry Abrams
(Attorney-in-Charge)
State Bar No. 00822700
Southern District I.D. No. 2138
ABRAMS SCOTT & BICKLEY, LLP
Chase Tower, 600 Travis, Suite 6601
Houston, Texas 77002
Telephone: (713) 228-6601
Facsimile: (713) 228-6605

***Attorneys for Defendants Barclays PLC,
Barclays Bank PLC and Barclays Capital
Inc.***

/s/ Hugh R. Whiting

Hugh R. Whiting

Attorney-in-Charge

Texas Bar No. 21373500

S.D. Texas I.D. No. 30188

JONES DAY

717 Texas Ave, Suite 3300

Houston, Texas 77002

Telephone: (832) 239-3939

Telecopier: (832) 239-3600

David L. Carden

Robert C. Micheletto

JONES DAY

222 East 41st Street

New York, New York 10017-6702

Telephone: (212) 326-3939

Telecopier: (212) 755-7306

***Attorneys for Lehman Brothers Holdings Inc.
and Lehman Brothers Inc.***

/s/ Joel M. Androphy

Joel M. Androphy
State Bar No. 01254700
Federal ID No. 1410
Thomas C. Graham
State Bar No. 24036666
Federal ID No. 35394
BERG & ANDROPHY
3704 Travis Street
Houston, Texas 77002-9550
(713) 529-5622 – Telephone
(713) 529-3785 – Facsimile

OF COUNSEL:

Lawrence Byrne
Owen C. Pell
Lance Croffoot-Suede
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200 – Telephone
(212) 354-8113 – Facsimile

***Attorneys for Defendants Deutsche Bank AG
and Deutsche Bank Securities, Inc.***

/s/ Mark D. Manela

Mark D. Manela
Texas Bar No. 12894500
S.D. Texas Bar No. 1821
MAYER, BROWN, ROWE & MAW
700 Louisiana Street, Suite 3600
Houston, Texas 77002-2730
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

OF COUNSEL:

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

B.J. Rothbaum
HARTZOG CONGER CASON & NEVILLE
201 Robert S. Kerr Avenue,
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Telecopier: (405) 235-7329

*Attorneys for Canadian Imperial Bank of
Commerce, CIBC World Markets Corp. (f/k/a
CIBC Oppenheimer Corp.), and CIBC World
Markets plc*

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served upon all counsel of record via the www.esl3624.com website, on this 12th day of May, 2004.

/s/ Alan C. Turner
Alan C. Turner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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IN RE ENRON CORPORATION :
SECURITIES LITIGATION :
----- :
This Document Relates To: :
MARK NEWBY, et al., Individually and : Consolidated Civil Action
On Behalf of All Others Similarly Situated, : Case No.: H-01-CV-3624
 :
Plaintiffs, :
v. :
ENRON CORP., et al., :
 :
Defendants. :
----- X

[PROPOSED] ORDER

Having considering the April 22, 2004 Motion of Enron Corp. (“Enron”) For Handling “Presumptively Confidential” Documents, it is hereby:

ORDERED that the motion of Enron Corp. is **DENIED**.

SIGNED at Houston, Texas, this ____ day of _____, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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IN RE ENRON CORPORATION	:	
SECURITIES LITIGATION	:	
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This Document Relates To:	:	
	:	
MARK NEWBY, et al., Individually and	:	Consolidated Civil Action
On Behalf of All Others Similarly Situated,	:	Case No.: H-01-CV-3624
	:	
Plaintiffs,	:	
	:	
v.	:	
ENRON CORP., et al.,	:	
	:	
Defendants.	:	
-----	:	
	X	

**AFFIDAVIT OF ALAN C. TURNER IN SUPPORT OF THE BANK DEFENDANTS’
RESPONSE TO ENRON’S APRIL 22, 2004 MOTION TO SET PROTOCOL FOR
HANDLING “PRESUMPTIVELY CONFIDENTIAL” DOCUMENTS**

STATE OF NEW YORK)
 ss:
COUNTY OF NEW YORK)

Alan C. Turner, being duly sworn, deposes and says:

1. My name is Alan C. Turner. I am over the age of 18 years, and I am competent to make this affidavit.

2. I am an associate of the firm of Simpson Thacher & Bartlett LLP, counsel for J.P. Morgan Chase & Co., J.P. Morgan Securities, Inc. and JPMorgan Chase Bank (the “JPMorgan Chase Defendants”) in this proceeding. I submit this affidavit in support of the Bank Defendants’ Response to Enron’s April 22, 2004 Motion To Set Protocol For Handling “Presumptively Confidential” Documents.

3. Attached hereto are true and correct copies of the following documents:
- a. February 25, 2004 Notice Regarding Enron Corp.’s Presumptively Confidential Documents (attached hereto as Exhibit A);
 - b. Excerpt comprising the first ten pages of Enron’s Presumptively Confidential Document Log (attached hereto as Exhibit B);
 - c. March 16, 2004 Letter from Simpson Thacher & Bartlett LLP, counsel for the JPMorgan Chase Defendants, to Weil, Gotshal & Manges LLP, counsel for Enron Corp. (attached hereto as Exhibit C);
 - d. March 24, 2004 Letter from Weil Gotshal & Manges LLP to Simpson Thacher & Bartlett LLP (attached hereto as Exhibit D);
 - e. April 6, 2004 letter from Simpson Thacher & Bartlett LLP to Weil Gotshal & Manges LLP (attached hereto as Exhibit E);
 - f. Excerpt comprising pages 776-777 of Enron’s Presumptively Confidential Document Log (attached hereto as Exhibit F).

Alan Turner

Alan C. Turner

Sworn to before me this

11 day of May, 2004

Sharril A. Wilner

Notary Public

SHARRI A. WILNER
NOTARY PUBLIC, State of New York
No. 31-5044670
Qualified in New York County
Commission Expires Oct. 22, 2005

The Exhibit(s) May

Be Viewed in the

Office of the Clerk