

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Court
Southern District of Texas
FILED
JUL 07 2004
Michael H. Kirby, Clerk

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)

§
§ CLASS ACTION
§

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD PLAINTIFF'S OPPOSITION TO THE MOTION TO COMPEL LEAD
PLAINTIFF TO PROVIDE COMPLETE AND SPECIFIC ANSWERS TO CREDIT
SUISSE FIRST BOSTON LLC'S FIRST SET OF INTERROGATORIES AND REQUEST
FOR EXPEDITED CONSIDERATION (DOCKET NO. 2213)**

2260

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I. INTRODUCTION

Credit Suisse First Boston LLC (“CSFB”) claims that Lead Plaintiff has failed to respond to interrogatories. In fact, Lead Plaintiff has provided a list of witnesses in response to the interrogatories and many of those witnesses have been deposed or are on the July and August deposition schedule. CSFB insists not that they receive a list of persons with knowledge of the Complaint’s allegations, but that Lead Plaintiff identifies each witness and *link* the witness to a specific paragraph in the Complaint. Defendants’ motion is not supported by the law.

CSFB’s motion is not what it seems. CSFB purports to seek answers to interrogatories “to test the veracity of Lead Plaintiff’s serious allegations through discovery.” Motion at 3. But CSFB’s interrogatories are calculated *not* to address Lead Plaintiff’s factual allegations. For instance, CSFB asks not for the facts showing that CSFB knew Enron’s financial results were false, but that plaintiffs identify a specific person who said so, a person who plaintiffs quote in the Complaint as a source for that proposition.¹ Forcing plaintiffs to answer such interrogatories will necessarily disclose Lead Counsel’s work product, and will also needlessly reveal the names of confidential witnesses who spoke to Lead Counsel and subject these persons to retribution for their honest efforts to reveal wrongdoing.

II. ARGUMENT

A. Plaintiffs Need Not Provide Answers to Interrogatories Seeking Attorney Work Product

In accordance with their obligations, plaintiffs have fully responded to CSFB’s First Set of Interrogatories, providing a discrete list of fact witnesses in response to CSFB’s interrogatories. *See*

¹ *See, e.g.*, Interrogatory No. 8. (Ex. A to Motion) (“Identify the ‘Enron insider’ quoted in ¶709 of the Complaint as saying: “There’s no question that senior people at CSFB knew what was going on and that it was a house of cards”).

Ex. A to Plaintiffs' Responses to CSFB's Interrogatories (Ex. A to Motion). Plaintiffs are not required to specifically link allegations in the Complaint with specific persons whom plaintiffs' counsel interviewed to support the factual allegations. It is "established law ... that there is work product in the identity of witnesses interviewed or otherwise relied upon by plaintiffs" in drafting their Complaint. *In re MTI Tech. Corp. Sec. Litig. II*, No. SACV 00-0745 DOC (ANx), 2002 U.S. Dist. LEXIS 13015, at *10 (C.D. Cal. June 13, 2002). That CSFB seeks the identity of confidential witnesses who are *sources* for Lead Plaintiff's allegations, and not relevant *facts*, is clear. CSFB characterizes its own interrogatories as "requesting essential information about who made the allegedly quoted statements and what was Lead Plaintiff's *source for the particular information*" in the Complaint. Motion at 3.² The "source for the particular information" is opinion work product and need not be disclosed via an interrogatory where an answer would reveal work product.³

In addition to those interrogatories explicitly seeking the *source* of an allegation, CSFB posits interrogatories requiring Lead Plaintiff to identify by name who made a particular statement or heard a particular statement, which would also likely reveal Lead Plaintiff's source for that allegation. For example, CSFB poses Interrogatory No. 8:

Identify the "Enron insider" quoted in ¶709 of the Complaint as saying: "There's no question that senior people at CSFB knew what was going on and that it was a house of cards," and state the time, place, and circumstances in which the statement was made.

² That CSFB merely seeks to determine the sources for plaintiffs' allegations, and not the facts surrounding those allegations, is also self-evident in Interrogatory No. 18, which requests that Lead Plaintiff "identify all individuals who are the *source* of the factual information." Emphasis is added and citations and footnotes are omitted unless otherwise noted.

³ Moreover, as shown below, interrogatories seeking the sources of plaintiffs' allegations improperly infringe upon the protections afforded whistle-blowers and smack of an improper Rule 11 inquiry without good cause for such an investigation.

This interrogatory, like each interrogatory posed by CSFB, does not seek to discover the *facts* relevant to determining if Lead Plaintiff's allegations that CSFB knew Enron was a house of cards is sufficiently pleaded, it merely seeks to determine the *source* for plaintiffs' factual allegation. As such, the interrogatories are improper.⁴

When confronted with the exact issue pending before this Court, Judge Leonard Davis of the Eastern District of Texas denied, as the attorney's opinion work product, the defendant's motion to compel responses to interrogatories that sought the disclosure of confidential sources of allegations:

The Court finds that revealing the identity of witnesses interviewed would permit opposing counsel to infer which witnesses counsel considers important, thus, revealing mental impressions and trial strategy.... Such evaluations and strategies are at the heart of the work product rule.

Elec. Data Sys. Corp. v. Steingraber, No. 4:02 CV 225, 2003 U.S. Dist. LEXIS 11816, at *7-*8 (E.D. Tex. June 27, 2003) (“*EDS*”). Judge Davis followed the holdings in *In re Ashworth Sec. Litig.*, 213 F.R.D. 385 (S.D. Cal. 2002) and *MTI*, 2002 U.S. Dist. LEXIS 13015, at *10. As set forth by the *MTI* court, in the context of complex litigation concerning violations of the federal securities laws, the “identification of individuals that are linked to the very special factual contentions in the [complaint] ... would necessarily reveal counsel's opinions regarding the relative importance of these witnesses, the highlights of their testimony/factual knowledge, and would link any future factual statements by the witnesses with Plaintiff's counsel's legal theories and conclusions as outlined in the complaint.” 2002 U.S. Dist. LEXIS 13015, at *12. Judge Davis's analysis and conclusion are both well-supported and well-reasoned, and Lead Plaintiff respectfully contends that this Court should concur in his conclusions on this issue.

⁴ Because CSFB really seeks the discovery of sources, not facts, the cases it cites at p. 4 of its Motion are distinguishable.

CSFB's limited attempt to distinguish *EDS*, Motion at 6 n.2, rings hollow because it heavily relies upon the very same authorities that Judge Davis considered in *EDS* but declined to follow. The out-of-circuit opinions that CSFB relies on, which were rejected by *EDS*, are *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 1999 U.S. Dist. LEXIS 8038 (E.D. Pa. May 26, 1999), and *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 631 (N.D. Ga. 2002). See Motion at 5-6. In determining that plaintiffs need not link their confidential sources to specific allegations in the complaint, Judge Davis did not distinguish the facts of *Aetna* or *Theragenics*, but simply found these opinions unpersuasive. *EDS*, 2003 U.S. Dist. LEXIS 11816, at *6.

CSFB's reliance upon *Aetna* and *Theragenics* is misplaced. In *Aetna*, unlike the present case, plaintiffs tried to hide the identities of important fact witnesses by burying their names in a list of 750 persons that was so long it prohibited any attempt to depose or interview the important persons who might have knowledge of the issues being litigated. See *Aetna*, 1999 U.S. Dist. LEXIS 8038, at *11-*12. Here, plaintiffs' list of 39 persons "likely to have discoverable information Lead Plaintiff may use to support its claims" (Ex. A to Plaintiffs' Responses) is much more reasonable and is not calculated to prevent defendants from obtaining relevant discovery over the next 16 months.

Aetna is also unpersuasive because it is based upon a misplaced reading of *United States v. Amerada Hess Corp.*, 619 F.2d 980 (3d Cir. 1980). See *Aetna*, 1999 U.S. Dist. LEXIS 8038, at *7-*8. After deciding *Amerada Hess*, the Third Circuit in the same year clarified that the identity of witnesses interviewed by a party is work product. See *Appeal of Hughes*, 633 F.2d 282, 289 (3d Cir. 1980) (specifically clarifying *Amerada Hess* that "the list of persons interviewed ... fall[s] within the definition of work product"). Similarly unconvincing is *Theragenics*, because "the court in *Theragenics* relied specifically, and clearly based its holding, on the *Aetna* court's rationale in determining whether the information was protected as work product." *Ashworth*, 213 F.R.D. at 389. Moreover, CSFB's accusation that Lead Plaintiff is using the work-product doctrine as both a sword

and a shield is unfounded. For instance, CSFB cites *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F. Supp. 2d 1084 (D. Nev. 2003), where that court determined the “parties should not be able to selectively disclose privileged communications they consider helpful while claiming privilege on damaging communications relating to the same subject.” *Id.* at 1093. Plaintiffs here are *not* selectively disclosing some work product while withholding other. Nor are plaintiffs here, unlike defendants in *Aspex*, “waiv[ing] the privilege by asserting the advice of counsel defense.” *Id.* at 1092. Accordingly, as did Judge Davis when faced with a similar choice, this Court should reject defendants’ motion to compel further responses because it would disclose plaintiffs’ work product.

B. Confidential Whistle-Blowers Need Not Be Prematurely or Unnecessarily Identified and Linked to Specific Allegations in the Complaint

Securities-fraud prosecutions depend upon whistle-blowers. Even the most blatant of frauds requires some insider’s knowledge to crack the case, and these honest individuals do so at great risk to their livelihoods and future employment. It is vitally important that the courts not compel the disclosure of such persons’ names, particularly in the instance where much of the information initially provided by a whistle-blower can be proven at trial by other means.

The retaliation meted out upon whistle-blowers is well-recognized. This is particularly true with respect to securities-fraud suits:

[T]here are important public policy concerns implicated by disclosure of former employees acting as informants. Although the whistle-blower privilege is not available in this private suit, that does not lessen the need to consider the practical results of an order requiring disclosure of the employees’ identities. *The Fifth Circuit generally recognized that former employees acting as informers could face serious consequences if their identities were revealed by plaintiff’s counsel.*

MTI, 2002 U.S. Dist. LEXIS 13015, at *17-*18 (citing *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972)).⁵ This Court and the Fifth Circuit have specifically acknowledged the importance of protecting confidential witnesses used by plaintiffs to satisfy the PSLRA'S heightened pleading standards. *See, e.g., ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 352-53 (5th Cir. 2002) (compelled disclosure of sources “could deter informants from providing critical information to investigators in meritorious cases or invite retaliation against them”); *In re Enron Sec. Litig.*, 235 F. Supp. 2d 549, 570-71 (S.D. Tex. 2002) (refusing to require disclosure of confidential sources).

Given the Fifth Circuit's stated desire to protect confidential informants from retribution for their honesty, at least at the pleading stage, there is no reason to force plaintiffs to disclose their confidential sources now that plaintiffs have survived dismissal motions. Indeed, the Fifth Circuit has recognized that, simply because a complaint's allegations are based upon facts provided by a confidential informant, defendants are not entitled to learn the informant's identity. The Fifth Circuit has recognized that under certain circumstances “[i]t is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court.” *Wirtz v. Cont'l Fin. & Loan Co.*, 326 F.2d 561, 563 (5th Cir. 1964) (denying defendants' motion to compel interrogatories requesting names of employee informants). That is, if a party's case could be proven without the testimony of a confidential informant, forcing that party to identify the informant prematurely would

⁵ *See also Mgmt. Info. Techs. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478, 481 (D.D.C. 1993); *cf. McCray v. Illinois*, 386 U.S. 300, 305-14 (1967); *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973); *Mitchell v. Roma*, 265 F.2d 633, 636 (3d Cir. 1959); *Reich v. Midpoint Registry*, No. 92-5058, 1993 U.S. Dist. LEXIS 15426, at *1-*4 (D.N.J. June 1, 1993).

serve no legitimate purpose: “[Under] such circumstances the only conceivable need for the names of the informers would be the desire of the employer to know who had informed on it.” *Id.*⁶

In a civil suit not involving the government, one court allowed plaintiffs to take an even more extreme position in protecting the identities of confidential witnesses than that taken by plaintiffs here. *Mgmt. Info. Techs.*, 151 F.R.D. 478. Specifically, the plaintiff “refused to reveal the names of the sources within Alyeska who allegedly provided him with company documents. He has also refused to turn over copies of any documents received from confidential sources within Alyeska that may betray the identities of his confidential informants.” *Id.* at 481. The *Alyeska* court recognized that the retribution potential upon these whistle-blowers was extreme: “To their detractors, whistleblowers are viewed as ‘snitches,’ ‘stool pigeons,’ or ‘industrial spys’ who are willing to publicly embarrass their co-workers and their companies in order to satisfy their political, ethical, moral, or personal agendas.” *Id.* at 482. In ruling that plaintiff did not have to disclose either the names of the confidential witnesses or documents provided to the plaintiff that served as the basis for his allegations, the *Alyeska* court noted that “the identities of the confidential informants do not go to the heart of the case and are at best marginally relevant to the issues at stake in this litigation.” *Id.* at 482-83. Because the same is true here, the Court should follow the *Alyeska* analysis and precedent. Moreover, in this action there is even less of a need to force further answers to CSFB’s interrogatories, as plaintiffs have identified in Ex. A those persons known to plaintiffs who may know pertinent information concerning matters that will be raised at trial.

⁶ In reaching this conclusion, the Fifth Circuit was careful to note that it did not have to consider the government’s privilege argument. Whereas the privilege argument would have required a “type of weighing of conveniences,” the Fifth Circuit stated “we think we need not indulge in weighing the conveniences” because it “is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court.” 326 F.2d at 563. Accordingly, *Wirtz* is authoritative regardless of whether the “informer’s privilege” is applicable, which it is.

Plaintiffs drafted their Complaint in reliance, in part, upon information provided by confidential informants. Plaintiffs have refused to answer defendants' interrogatories on the grounds that, among other things, it would violate the privacy rights of the individual confidential informants. *See* Plaintiffs' Responses, General Objections, ¶4 (Ex. A to Motion). Certain witnesses have specifically informed Lead Counsel that disclosure of their identities would result in retribution by their employer. *See* Declaration of G. Paul Howes, ¶2. Accordingly, Lead Counsel will take all appropriate measures to maintain the confidentiality of the identities of certain witnesses and the specifics of what they told Lead Counsel. *Id.*, ¶3. ***In sum***, forcing plaintiffs to answer defendants' interrogatories with greater specificity will either exploit counsel's work product, and explicitly reveal the names of plaintiffs' confidential sources, and inform defendants of the exact facts provided by the confidential witness, or defendants will be provided with ample information for figuring out the confidential witnesses' identities. In either event, Lead Counsel has every reason to believe that the candid individuals who spoke out to help reveal this massive deception would be unjustly harmed if Lead Counsel is forced to reveal their identities.

C. CSFB's Focus Upon the Sources of Plaintiffs' Allegations, Rather than the Facts, Is an Improper End-Run Around Rule 11

CSFB argues that answers to its interrogatories are "necessary to enable CSFB to confront its accusers and challenge the accusations that are the basis of Lead Plaintiff's claims against CSFB." Motion at 3. What CSFB leaves unsaid is as important as what it says. The interrogatories are ***not*** calculated to confront those persons who will act as CSFB's accusers in court, but to attack the confidential sources for plaintiffs' allegations in the Complaint. Similarly, CSFB does not seek to "challenge the ***accusations*** that are the basis of Lead Plaintiff's claims," but rather seeks to challenge the ***sources*** that ***were*** the basis of Lead Plaintiff's Complaint. These are crucial distinctions.

It is improper for CSFB to ask interrogatories merely to challenge the support for, and the particularity of, the Complaint's allegations, especially if those interrogatories are not relevant to the plaintiffs' trial case. Plaintiffs' allegations were well-founded and continue to prove to be true with every subsequent revelation of defendants' conduct. Discovery of Lead Counsel's basis for every allegation in the Complaint is an improper fishing expedition to bring a Rule 11 motion.

[F]ocusing on the nature of the homework plaintiffs and their counsel did before filing the complaint, would be appropriate not under normal discovery rules, but only under Rule 11. It seems to this court that it would be unwise and unwarranted to permit Rule 11 discovery (*i.e.*, discovery into the quality and scope of the investigation that preceded the filing of a claim) until after the party seeking the Rule 11 discovery has shown, through traditional discovery, that there is more than a speculative basis for believing that its opponent may have violated the norms set forth in Rule 11. The interests potentially invaded by Rule 11 interrogatories are considerable; a party seeking to invade those interests should be required to present a substantial justification.

In re Convergent Techs. Sec. Litig., 108 F.R.D. 328, 346 (N.D. Cal. 1985). If defendants wish to file a Rule 11 motion then they should do so, otherwise it is time to prepare for trial and discovery should be aimed at that purpose and no other.

D. Plaintiffs Have Sufficiently Answered CSFB's Interrogatory Nos. 1 Through 14

CSFB incorrectly seeks to set Interrogatory Nos. 1 through 14 apart from its other interrogatories. Motion at 7-9. But these interrogatories are calculated to reveal the confidential sources for plaintiffs' allegations. The interrogatories seek to determine which persons provided Lead Counsel or investigative journalists with information demonstrating CSFB's knowledge of the Enron fraud. For example, Interrogatory No. 13 requests that plaintiffs identify the individuals referenced in the June 2001 meeting referred to in ¶¶56, 622, 710-711. That meeting included an Enron manager and two CSFB managing directors. To answer this interrogatory would likely result in harm to a confidential informant relied upon by plaintiffs. Interrogatory Nos. 1 through 14

include many similar requests.⁷ And, as stated above, plaintiffs need not rely upon the testimony of these individuals (or contents of the specific meetings they attended, which are described in the Complaint) to prove plaintiffs' case against CSFB. Because the interrogatories focus upon plaintiffs' *sources* for specific allegations – rather than establishing what CSFB knew and when – they are improper and do not further the ultimate resolution at trial.

CSFB's motion to compel further answers to Interrogatory Nos. 1 through 14 is also improper in that plaintiffs have provided sufficient answers at this early stage of discovery and the relevant information is already known to defendants. Given that defendants have equal if not better access to the answers they seek, it appears that CSFB's interrogatories are merely intended to harass. For instance, CSFB seeks the names of the "10 bankers from CS First Boston who had joined CS First Boston from Donaldson Lufkin & Jenrette in 98." *See* Interrogatory No. 1. CSFB has the best access to such information, thus seeking this discovery serves no legitimate purpose.

Similarly, CSFB moves to compel further information concerning the "date, time, place, subject and attendees (and their employer, title and responsibilities)" of meetings between CSFB and Enron employees in June and July 2001 as discussed in the Complaint. Motion at 8. While Lead Plaintiff answered interrogatories calling for such information, CSFB argues that Lead Plaintiff's "partial answers are insufficient." *Id.* at 9. Lead Plaintiff did not attend these meetings, but CSFB's employees did. The information is available to CSFB, and there is no reasonable basis for requiring plaintiffs to further respond to such interrogatories. CSFB's insistence that Lead Plaintiff continue to supply additional particularity for allegations in the Complaint, even though the Court has already

⁷ *See, e.g.*, Interrogatory Nos. 2 and 3 (Ex. A to Motion) ("Identify the individual quoted in ¶708"); 4 and 5 (identify persons who spoke with Larry Nath); 6 ("Identify the 'knowledgeable banker' quoted in ¶709").

determined that Lead Plaintiff's allegations are sufficiently particularized, serves no legitimate purpose and works a burden on Lead Counsel and the Court.

Similarly, CSFB seeks considerable additional who-what-and-when detail about certain allegations in the Complaint referencing communications between CSFB and Enron employees. Motion at 8. As discovery is in its early stages, plaintiffs have properly referred CSFB to Ex. A's discreet list of fact witnesses and an article by Joshua Chaffin and Stephen Fidler, "Enron's Alchemy Turns to Lead for Bankers," *Financial Times*, Feb. 28, 2002. Plaintiffs' responses are sufficient given the facts: (i) depositions have just begun; (ii) plaintiffs need not rely on these specific communications to prove their case at trial; (iii) answering the interrogatories would reveal confidential sources; and (iv) that CSFB has equal access to these facts via its own discovery.

Moreover, CSFB mischaracterizes the position taken by Lead Plaintiff during the parties' meet-and-confer. Motion at 8 ("During our meet and confer, counsel for Lead Plaintiff indicated that they knew additional information beyond that which was disclosed in the article and in the list, and is intentionally withholding that information from CSFB. It is unclear on what basis Lead Plaintiff is doing so; the underlying factual information is clearly discoverable and not protected work product."). But in response, the only additional information being withheld is the names of some confidential informants who spoke with Lead Counsel who fear retribution.

E. CSFB Has No Substantial Need for the Discovery it Poses

CSFB poses no argument as to why its purported need for the requested discovery outweighs concerns for Lead Counsel's attorney work product or the Fifth Circuit's desire to protect whistleblowers from retribution. The names of most witnesses identified by Lead Plaintiff (and many, many more) are not new to defendants – they have testified before Congress, given statements to the Bankruptcy Examiner, or were already identified in the voluminous documents produced in discovery. Defendants have had access to these materials for many months, if not years. Defendants

simply cannot show substantial need or undue hardship demanding that plaintiffs perform defendants' work for them. Defendants should be required to do their own work and interview, and depose the witnesses as they see fit, rather than by asking plaintiffs to reveal who the best witnesses are. *See Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (noting that it is in the best interest of the adversary system "that each side relies on its own witnesses in preparing their respective cases").

III. CONCLUSION

Because defendants cannot demonstrate an overwhelming need to know the identity of each confidential witness, as it pertains to each allegation in the Complaint, and because such disclosure will invade counsel's work product and violate the witnesses' privacy rights and likely cause them

substantial harm, Lead Plaintiff's responses and objections to CSFB's interrogatories should be ruled sufficient and CSFB's Motion to Compel should be denied.

DATED: July 7, 2004

Respectfully submitted,

LERACH COUGHLIN STOIA
& ROBBINS LLP
G. PAUL HOWES
JERRILYN HARDAWAY
Texas Bar No. 00788770
Federal I.D. No. 30964



G. PAUL HOWES (w/ permission)

1111 Bagby, Suite 4850
Houston, TX 77002
Telephone: 713/571-0911

LERACH COUGHLIN STOIA
& ROBBINS LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIU
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
ANNE L. BOX
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

LERACH COUGHLIN STOIA
& ROBBINS LLP
REGINA M. AMES
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007
213/617-9185 (fax)

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932



ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

BERGER & MONTAGUE, P.C.
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Staro Asset Management

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

Attorneys for Nathaniel Pulsifer

SCOTT + SCOTT, LLC
DAVID R. SCOTT
NEIL ROTHSTEIN
S. EDWARD SARSKAS
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

**Attorneys for the Archdiocese of Milwaukee
Supporting Fund, Inc.**

LAW OFFICES OF JONATHAN D. McCUE
JONATHAN D. McCUE
4299 Avati Drive
San Diego, CA 92117
Telephone: 858/272-0454

**Attorneys for Imperial County Board of
Retirement**

CUNEO WALDMAN & GILBERT, LLP
JONATHAN W. CUNEO
MICHAEL G. LENETT
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Washington Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO THE MOTION TO COMPEL LEAD PLAINTIFF TO PROVIDE COMPLETE AND SPECIFIC ANSWERS TO CREDIT SUISSE FIRST BOSTON LLC'S FIRST SET OF INTERROGATORIES AND REQUEST FOR EXPEDITED CONSIDERATION (DOCKET NO. 2213) has been served by sending a copy via electronic mail to serve@ESL3624.com on this 7th day of July, 2004.

I further certify that a copy of the foregoing document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 7th day of July, 2004.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004

Deborah S. Granger

DEBORAH S. GRANGER