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Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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.

**MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO PROHIBIT
OBJECTIONS AND COACHING OF WITNESSES DURING DEPOSITIONS**

2263

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I. Introduction

Since depositions began in June, the parties have, for the most part, abided by the letter of the Federal Rules of Civil Procedure, as well as the spirit of the Court's March 11, 2004 Deposition Protocol Order (the "Order"). The former prohibits an attorney from coaching a witness through speaking objections, while the latter limits objections to "Form" and "Responsiveness" and was designed to expedite the deposition process. The conduct of some lawyers during recent depositions makes it apparent that they either do not understand the letter and spirit of the Order or refuse to abide by it. Consequently, Lead Plaintiff, joined by counsel for Enron Corp. (plaintiff in the *Enron Adversary* action), requests clarification of the Order as it relates to the conduct of counsel, and further that the Court admonish the parties that it will enforce the Order in the future and sanction conduct that violates it.

II. Argument

This Court is vested with broad discretion to control the conduct of depositions. *See* Fed. R. Civ. P. 16, 26(f), 30. The Order governs all oral depositions of fact witnesses. *See* Order at 1. Nevertheless, some counsel have interposed speaking objections – with the effect of coaching witnesses – on grounds other than "Form" or "Responsiveness," and have repeatedly echoed the objections of others. These violations of the Order and the Federal Rules of Civil Procedure interfere with the depositions and waste precious time allocated to each party for questioning the witness.

For example, Mr. Angiolillo, representing JP Morgan Chase, in the deposition of Marc Shapiro, raised approximately 70 speaking objections, which had the effect of coaching the witness.

Similarly, the same type of improper speaking objections and witness coaching took place during the deposition of Mr. Berardino. Like that for Mr. Shapiro, the record of Mr. Berardino's

deposition equally demonstrates that counsels' behavior has improperly interfered with both the efficient and effective prosecution of this case.

A. Coaching Witnesses Violates Federal Rules of Civil Procedure 30(d)(1), the Order and Applicable Case Law

Federal Rule of Civil Procedure 30(d)(1) provides that, “[a]ny objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.” It is elementary that speaking objections that coach a witness frustrate the underlying purpose of a deposition, which is to find out what a witness saw, heard or did – *what the witness thinks*. A deposition is meant to be a question–and–answer conversation between the deposing lawyer and the witness. There is no need for the witness’s lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. *The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record.* *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). Sanctions, including costs and attorneys’ fees, may be awarded for conduct that the Court finds has “frustrated the fair examination of the deponent.” Fed. R. Civ. P. 30(d)(3). Dovetailing the Federal Rules of Civil Procedure and case law, the Order here specifically addresses the conduct of counsel during depositions:

[A]ll counsel shall refrain from making speaking objections, which are designed to suggest an answer to the witness or delay the deposition.... The only objections permitted during the depositions will be to the form of a question or to the responsiveness of an answer Objections shall be stated precisely. “Objection, Form” or “Objection, Responsiveness” will be sufficient.

Order, §X.C. at 12.

For the most part, when reminded of the Order during the June depositions, parties who strayed outside the letter and spirit of §X.C. of the Order immediately conformed their conduct to comply. *See, e.g.*, Bishko Tr., 6/11/04, at 394; Meyer Tr., 6/15/04, at 265; Kronthal Tr., 6/16/04, at 194 (Tr. excerpts attached hereto as Exs. A-E). But there are some egregious instances where

lawyers, although reminded of the Order's provisions governing conduct at the Enron depositions, have refused to comply.

During the depositions of Marc Shapiro in Houston and Joseph Berardino in New York, the lawyers for the deponents – Berardino, the former Andersen Worldwide CEO, had four lawyers present – improperly objected to questions by either suggesting an answer to the witness or testifying themselves. For example, during the deposition of Mr. Berardino, the following occurred:

Q. I know that, I'm not going to ask you chapter and verse, but do you disagree with the idea that part of independence implies that the auditor adopt a state of mind, so to speak of judicial impartiality with regard to the work they do?

MS. NADLER: [1st defense counsel] Objection to form.

MS. PALMER: [2nd defense counsel] Objection to form.

MS. NADLER: Are you asking about a specific SAS?

MS. PATRICK: Let me tell you something. *There is an order on speaking objections.*

MS. NADLER: *I understand that. There is a preceding statement, counsel on the record that seemed like a predicate to the question. I'm happy to have him answer any question you ask.*

MS. PATRICK: Thank you.

MS. NADLER: I just want it to be clear.

MS. PATRICK: *If my questions aren't clear it's on my head. There is an order on speaking objections.*

MS. NADLER: *That wasn't a speaking objection.*

MS. PATRICK: *Well, I don't need any comment on the quality of my questions either, I would like to examine the witness and not you, if you don't mind.* Could you read back my question without the commentary, please.

(Requested portion of record read.)

MS. NADLER: Same objection. I would ask for clarification as to whether that is predicated on the first part of what you asked him before you asked that question. *Are you referring to an SAS or are you asking him a stand-alone question? Just tell me and he can answer.*

Q. Mr. Berardino, you can answer my question.

Berardino Tr., 6/22/04 at 86-87.¹ The form objections were so numerous and consistent the court reporter made no effort to stop the *unison* violations. And Mr. Berardino's counsel continued to violate the Order and federal rules as demonstrated by this passage:

Q. Did you ever ask anyone who was assisting you in preparing your testimony to have such a discussion with the Professional Standards Group to determine whether you were accurate in saying that the transaction fell below the scope of your audit?

MS. PALMER: Objection to form. Counsel, and I would like a clarification, and for you to tell us on the record where the reclassification of shareholders' equity shows up in the Tr. that you just quoted with respect to Mr. Neuhausen. They are two completely different issues, counsel.

MS. PATRICK: That's your view. If you would like to testify, we can swear you in.

Berardino Tr., 6/22/04 at 194:16-195:6.

Q. Is the board entitled to rely on that opinion?

MS. NADLER: Objection to form.

MS. PALMER: Objection to form; *calling for a legal conclusion*.

A. *Are you asking me for a legal opinion, I'm not a lawyer?*

Berardino Tr., 6/24/04 at 35:12-35:18.

During the deposition of Marc Shapiro, Mr. Angiolillo repeatedly interrupted his client's answers on significant matters related to Chase's prepays, and after the interruptions Mr. Shapiro responded with answers reflecting counsel's coaching.

Q. (BY MR. JACONETTE) Would you please look at the third page of the document –

A. (Witness complies.)

Q. – where it states, "Examples of loans documented as derivatives."

A. Uh-huh.

¹ Here, as elsewhere, all emphasis is added and citations are omitted unless otherwise noted.

Q. Did you know before today that Chase referred to loans in the context of calling them loans documented as derivatives?

MR. ANGIOLILLO: Can you lay a foundation for that -- that -- that representation?

* * *

A. If you're asking me --

MR. ANGIOLILLO: I'm sorry. *You haven't established with this witness what this page is, where it came from, who the author is. So you're now making a representation to the witness that this is a Chase -- this is -- this is Chase speaking.* And I'd just like you to lay the foundation for that because the witness has told you he's never seen this document before.

A. *I'd just like to clarify. This is terminology used by one person. I don't -- I don't -- I wouldn't think this purports to be what, quote, Chase, end quote, believes.*

Shapiro Tr., 6/15/04, at 227:16-25, 228:1-12. See also Shapiro Tr., Ex. 30103.

Mr. Angiolillo also coached his client to talk about the differences between loans and prepaids in his client's answers. In one such instance he went so far as to cut off his client's answer to direct the testimony he wanted:

Q. What did you tell him?

A. I asked him what he thought about it.

Q. And what did he say?

A. He said that he had received the document, that he didn't agree with it, that he had asked for a further review by our accountants, and that they had agreed with him.

Q. Did he tell you why he didn't agree with it?

A. Yes.

Q. What did he say?

A. Well, it's a long answer. I'd like to go into what the difference -- the significant differences between a loan and a prepaid commodity contract.

Q. Did he talk to you about how prepaid forwards, if they were classified this way, would affect Chase's business?

A. The way they're --

MR. ANGIOLILLO: Excuse me. I object to – to the – to the question since you asked a previous question, the witness began to answer the question, and then you effectively cut him off by asking a different question.

Would you like an answer to your previous question, or are you withdrawing that question, so the record's clear?

MR. JACONETTE: I'll withdraw the question.

MR. ANGIOLILLO: Okay. So you don't want to know the difference between a prepay forward transaction and a loan?

MR. JACONETTE: Bruce –

MR. ANGIOLILLO: Just – just so the record's clear.

MR. JACONETTE: – [D]o you really need to insert all of this nonsense into the record?

MR. ANGIOLILLO: It's not nonsense.

MR. JACONETTE: *It's, objection, form. We don't need your advocacy right now.*

MR. ANGIOLILLO: *That's what I get paid for.*

Shapiro Tr., 6/15/04, at 224:2-25, 225:1-15.

The conduct of counsel at the Berardino and Shapiro depositions was improper, as demonstrated by the forgoing testimony. “Coaching the witness is not appropriate deposition conduct and such behavior by [counsel] is even more egregious in light of the court’s [Deposition Protocol Order].” *Resolution Trust Corp. v. Int’l Ins. Co.*, No. 89-4020, 1993 U.S. Dist. LEXIS 4357, at *4 (E.D. La. Mar. 25, 1993).

Consequently, “disputatious grandstanding” by counsel should be eliminated as objections that are nothing more than “thinly veiled instructions to the witness,” who then incorporates counsel’s “language into [the] answer.” *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 180-81 (S.D. Iowa 1993). “By virtue of his counsel’s ‘objections’” Mr. Shapiro and Mr. Berardino were denied the opportunity to respond of their own accord, and “what plaintiff’s counsel has effectively ‘discovered’ is the opinion and concomitant testimony of the defendants’ attorney.”

Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 59 (E.D. Pa. 1993). Such grandstanding – in unison – continued during the Berardino deposition:

Q. The second bullet point says “we noted that the after-tax materiality of these proposed adjustments to a more ‘normalized’ income level of 642, adjusted to remove the effect of the large and unusual charges discussed above, was approximated,” approximately I think it means, “7.6 percent.” Is that an appropriate level at which one ought to start to consider materiality?

MS. PALMER: Objection to form

MS. NADLER: Objection to the form of the question. *The witness hasn't even testified that he's ever seen this document. And you're asking him to interpret a memorandum that he never saw. It's inappropriate.*

MS. PATRICK: Ms. Nadler?

MS. NADLER: Yes.

MS. PATRICK: *Objection; form, is what's authorized under the order.*

MS. NADLER: That's what I did.

MS. PATRICK: *If we continue to have speaking objections, we are going to have to take it up with the judge.*

MS. NADLER: *If we continue to have questions that lack foundation, maybe we will.*

Berardino Tr., at 343:13-14.

Similarly, Mr. Shapiro's counsel failed to follow the Order. When Mr. Angiolillo did not like the form of his client's answer he interrupted the deposition to ask the client questions on the record.

MR. ANGIOLILLO: When you say company, which company are you referring to?

THE WITNESS: Chase Manhattan – well, in this case, J.P. Morgan Chase or its subsidiaries.

MR. ANGIOLILLO: Okay. Thank you.

Shapiro Tr., 6/15/04, at 207:3-7.

In the context of his speaking objections, Mr. Angiolillo offered “lacks foundation” nearly 20 times during Mr. Shapiro’s deposition.² For example:

... And I guess the issue here was did we have a full understanding of the range of all those off-balance sheet SPVs and how they would affect our company.

Q. Can you tell me more specifically why a study was being done?

A. I can't tell you why a study was initiated at that point in time.

Q. Why was there a concern about the range of S – SPVs that the company was using?

MR. ANGIOLILLO: Object to the form of the question, *use of the word "concern."* *It lacks foundation.*

Id. at 168:1-12. Similarly:

Q. And you understand the transaction that I'm talking about, correct?

A. Generally speaking, I do understand the transaction.

MR. ANGIOLILLO: Object to the form of the question.

Q. (BY MR. JACONETTE) And you understand that transaction had three – had a number of components, and three of them are described here; is that correct?

MR. ANGIOLILLO: I object to the form of the question, and *it lacks foundation.* *And you – you haven't established that this witness has personal knowledge of what the details of that particular transaction were.*

Shapiro Tr., 6/16/04, at 338:8-20.

While questions were pending Mr. Angiolillo also emphasized to his client characteristics of documents about which Mr. Shapiro was being asked. For example:

Q. (BY MR. JACONETTE) Okay. Have you had any conversations with Mr. Dellapina about this discussion that's reflected in the Tr. of taped telephone call in front of you?

² See Shapiro Tr., 6/15/04, at 168:10, 169:13, 177:18, 179:23, 181:17, 197:16, 243:21, 244:5, 245:6; Shapiro Tr., 6/16/04, at 296:23, 310:20, 333:10, 333:24, 334:11, 338:18; Shapiro Tr., 6/17/04, at 428:10, 446:14, 527:24, 549:22.

MR. ANGIOLILLO: Object to the form of the question. *Also note that this is a Tr. prepared by someone working apparently for the U.S. Senate Permanent Subcommittee on Investigations.*

A. I've not had a conversation with Mr. Dellapina *about this Tr.*

Q. (BY MR. JACONETTE) Have you had any conversations with Mr. Dellapina about a conversation he had with Messrs. Traband and Ballentine, wherein Mr. Traband used the term "circular deal"?

MR. ANGIOLILLO: May I have the question read back please?

(Requested text read.)

MR. ANGIOLILLO: Object to the form of the question, *and it lacks foundation.*

A. I don't recall any such conversations.

Id. at 310:6-9.

During day two of the Shapiro deposition, counsel for Lead Plaintiff requested a hearing with the Court to enforce the Order. During a recess, Lead Plaintiff's counsel met with Mr. Angiolillo and reiterated warnings that his conduct was improper and the Court's intervention would be sought. Mr. Angiolillo acknowledged the warnings and that the Court was prepared to hear Lead Plaintiff's motion. Lead Plaintiff's counsel cancelled the hearing, but Mr. Angiolillo continued to violate Federal Rules of Civil Procedure 30(d)(1) and the Order, and made at least another 20 speaking objections before the deposition concluded. For example:

Q. [BY MS. SAMMONS] Back when you did the review of the accounting for the prepay structures back in 1999, as part of that review, did you analyze whether or not the prepay transaction was a loan?

MR. ANGIOLILLO: Object to the form of the question, and I – and it lacks foundation about him doing a review.

MS. SAMMONS: *And if you continue to make speaking objections that tell the witness what answers you want the witness to give, I will, in fact, call the Court, and we will have a hearing on this.*

MR. ANGIOLILLO: Counselor, I don't mean to – I really would like –

MS. SAMMONS: Let's go ahead –

MR. ANGIOLILLO: Counselor, I would really like to get through this, but you can't – you can't – in a professional way, you can't just make up what he testified to earlier. All right. You just can't.

Shapiro Tr., 6/17/04, at 446:9-47:1. Even in the face of a warning by Ms. Sammons on behalf of the Debtor Enron, Mr. Angiolillo's speaking objections continued. *See* Shapiro Tr., 6/16/04, at 353-54, 376, 379, 381; Shapiro Tr., 6/17/04, at 440-41, 442-45.

Speaking objections, such as those cited, not only coach a witness and frustrate the purpose of the deposition, but decrease the time allotted to each party for questioning. Section X.C. of the Order specifies that "all counsel shall refrain from making speaking objections, which are designed to suggest an answer to the witness *or delay the deposition.*" Many hours of negotiations have been devoted to fairly allocating among all parties the time allotted to depose each witness. Because speaking objections violate Federal Rules of Civil Procedure 30(d)(1) and the Order, Lead Plaintiff asks the Court to order the parties to refrain from making speaking objections and limit all future objections to "Form" and "Responsiveness."

B. Objections Other than "Form," "Responsiveness" and Privilege Are Impermissible Pursuant to the Order

The Order provides:

The only objections permitted during the depositions will be to the form of a question or to the responsiveness of an answer Objections shall be stated precisely. "Objection, Form" or "Objection, Responsiveness" will be sufficient.... Counsel shall not instruct witnesses not to answer questions, except on the ground of privilege.

Order, §X.C. at 12. Nevertheless, during day one of the Berardino deposition, his lawyers interposed a number of impermissible objections, including the following:

- Asked and answered (Berardino Tr., at 38, 53, 81, 197, 255, 331, 357)
- Misstates testimony (*id.* at 73, 357, 358)
- Misstates the record (*id.* at 208, 287)
- Same objection (*id.* at 80)

- Lack of foundation (*id.* at 129, 208, 219, 341, 342, 345, 349, 352)
- Calls for a legal conclusion (*id.* at 141)
- Assumes facts not in evidence (*Id.* at 222, 285)
- Relevance (*id.* at 285)
- Deponent is not an expert witness (*id.* at 312)
- Question is incomprehensible (*id.* at 330)

And throughout the deposition of Marc Shapiro speaking objections included the following, among others:

- “That’s a hypothetical question calling for speculation,” “asking him to answer what is a hypothetical question” (Shapiro Tr., 6/15/04, at 142:19, 205:2-3, 240:18).
- “[H]e’s already answered that question” (*id.* at 48:23, 52:09, 207:12; Shapiro Tr., 6/16/04, at 274:05, 357:14, 379:01, 379:13; Shapiro Tr., 6/17/04, at 425:20, 444:12, 444:19, 503:12).
- “[P]rior testimony speaks for itself” (Shapiro Tr., 6/16/04, at 357:15).
- “It lacks foundation” (Shapiro Tr., 6/15/04, at 66:12, 168:10, 169:12, 177:17, 181:16, 197:15, 243:20, 244:05; Shapiro Tr., 6/16/04, at 245:05, 296:22, 310:19, 312:10, 333:09, 333:23, 338:17; Shapiro Tr., 6/17/04, at 428:10, 446:13, 527:23, 549:22). *See also supra* n.2.
- “I would request that you establish a time period when the witness became aware of this, if he did” (Shapiro Tr., 6/15/04, at 77:22).
- “[N]ot what he testified to,” “inconsistent with his testimony,” “considerable variance with what the witness previously testified” (Shapiro Tr., 6/15/04, at 108:24; Shapiro Tr., 6/17/04, at 441:21, 602:05).
- “He’s not the author,” “he’s never seen this document,” “not clear who the author was” (Shapiro Tr., 6/15/04, at 173:01, 228:08-09, 232:11-12; Shapiro Tr., 6/16/04, at 284:10-11).
- “It’s not a report, as you indicated when you introduced this document into the record. It’s the testimony of an individual” (Shapiro Tr., 6/15/04, 175:4-6)
- “[A]rgumentative” (*id.* at 178:11, 180:24, 198:07)
- “[T]he witness doesn’t recall the meeting” (*id.* at 187:02; Shapiro Tr., 6/16/04, at 373:20, 380:11-12).

- “[T]he question is independent of this meeting. You’re not asking for his recollection of what was discussed at the meeting,” “[A]re we now again at the meeting or are we asking for a different question” (Shapiro Tr., 6/17/04, at 415:20-21, 416:17).
- “Are you asking whether the words appear on the page” (*id.* at 440:04-05).

Lead Plaintiff requests that the Court order that objections other than “Form” or “Responsiveness” are not permitted and that the Court will enforce the Deposition Protocol Order as to future violations.

C. The Deposition Protocol Order Does Not Permit Repeated Duplicative Form Objections

The Order also provides:

The objection of one counsel to a question shall not be repeated by another counsel to preserve that objection on behalf of such other counsel. ***Any objection to the form of a question shall be deemed to have been made (a) on behalf of all other parties, and (b) on all grounds for a form objection.***

Order, §X.C. at 12. Despite this language, which prohibits repeated form objections, some lawyers refuse to comply. For example, on approximately 167 occasions during day one of Mr. Berardino’s deposition, his multiple counsel interposed duplicative form objections.³ Multiple objections to form, like speaking objections – beyond the tiresome repetition and unnecessary distraction – prejudice the party taking the deposition by decreasing valuable time allocated to each party for questioning. Lead Plaintiff respectfully requests the Court admonish the parties that such behavior is improper.

³ See Berardino Tr., at 27, 34-35, 37-38, 43, 46-47, 50, 53-54, 56-58, 63-64, 71-73, 76, 79-81, 86, 89-94, 97-99, 106-09, 120, 122-24, 128-29, 131, 133, 135-37, 139, 141, 143-44, 148, 150, 153, 155, 157-58, 161, 170, 181, 191-93, 196-97, 200, 204-08, 210, 214-23, 230, 234-36, 244-46, 249, 256, 259, 262-65, 267-69, 274, 276-77, 281, 284-90, 299, 303, 307, 309-18, 321, 327-28, 330, 340-43, 345, 347, 349, 351-52, 354, 356-58.

III. Conclusion

The Court knows how long the parties negotiated the Deposition Protocol Order. There is no place in the Order or the federal rules for speaking objections or for delay tactics. Thus, Lead Plaintiff requests clarification of the Order as it relates to the conduct of counsel, and that the Court admonish the parties that it will enforce the Order as to all future depositions and sanction conduct that violates the Order.

DATED: July 8, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO PROHIBIT OBJECTIONS AND COACHING OF WITNESSES DURING DEPOSITIONS document has been served by sending a copy via electronic mail to serve@ESL3624.com on this July 8, 2004.

I further certify that a copy of the foregoing MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO PROHIBIT OBJECTIONS AND COACHING OF WITNESSES DURING DEPOSITIONS document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this July 8, 2004.

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United States Trustee, Region 2
33 Whitehall Street, 21st Floor
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Mo Maloney

In The Matter Of:

***In re ENRON CORPORATION SECURITIES LITIGATION v.
MALIK BELLAMY, "COMMUNITY COORDINATOR***

JENNIFER BISHKO

June 11, 2004

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BISHKO, JENNIFER - Vol. II



1 JENNIFER BISHKO - CONFIDENTIAL

2 recollection, you should give a recollection.

3 THE WITNESS: Okay, thank you.

4 A. I don't recall.

5 Q. You can approximate, so go ahead
6 and approximate what you believe your bonus
7 would have been at the time.

8 MR. MC KETTA: I need to remind
9 counsel not to instruct anything to a witness
10 about answering, according to Judge Harmon's
11 order, and even if a witness were to use the
12 word "guess", that's subject at best to a
13 subsequent effort by counsel.

14 So may I ask that we take care to
15 follow the special rule Judge Harmon has given
16 us for this deposition?

17 MS. BOX: Thank you.

18 BY MS. BOX:

19 Q. Go ahead and answer the question.

20 A. If I had to guess, sitting here
21 today, not remembering that long ago, less than
22 50,000.

23 Q. If your annual salary is 80,000 and
24 you received a bonus somewhere, say, 30 to
25 50,000 for the year 19977, that's fairly

In The Matter Of:

In re: ENRON CORPORATION SECURITIES LITIGATION v.

JEFFREY KRONTHAL

June 16, 2004

CONFIDENTIAL
LEGALINK MANHATTAN
420 Lexington Avenue - Suite 2108
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KRONTHAL, JEFFREY - 30(b)(6)



LEGALINK

A WORKWAVE COMPANY

1 JEFFREY KRONTHAL - CONFIDENTIAL

2 17 million right then in 1999?

3 MR. WASHER: Objection to form.

4 A I don't believe so.

5 BY MR. HAYS:

6 Q Now, at the time the STRC met, you knew
7 when the 17 million was going to come in, correct?

8 A I believe at that time we knew when it was
9 going to come in, yes.

10 Q But there was an expectation that Merrill
11 Lynch would receive 17 million in present value from
12 engaging in this transaction?

13 MR. WASHER: Objection to form. I mean,
14 17 million relates to the options premium. It
15 doesn't speak to what other cash flows might have
16 occurred as a result of the action.

17 MR. HAYS: I believe objection to form was
18 a proper objection. Everything after that would be
19 inappropriate under the deposition protocol and you
20 are testifying.

21 MR. WASHER: I understand. I'm trying not
22 to do that today, but I also don't want you and the
23 witness talking past each other, and I thought that
24 might be helpful.

25 MR. HAYS: No, thank you.

JEFFREY KRONTHAL - CONFIDENTIAL

C E R T I F I C A T E

THE STATE OF NEW YORK)
COUNTY OF NEW YORK)

I, Jodi Harmon, Registered Merit Reporter, Certified Realtime Reporter and Notary Public, State of New York at Large, do hereby certify that the aforementioned witness was by me first duly sworn to testify the whole truth; that I was authorized to and did report said deposition in stenotype; and that the foregoing pages are a true and correct transcription of my shorthand notes of said deposition.

I further certify that said deposition was taken at the time and place hereinabove set forth and that the taking of said deposition was commenced and completed as hereinabove set out.

I further certify that I am not attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 2004.

JODI HARMON, RMR, CRR
Notary Public - State of New York
Commission #01HA6100640
Expires: October 20, 2007

In The Matter Of:

In re ENRON CORPORATION SECURITIES LITIGATION v.

JOHN MEYER

June 15, 2004

CONFIDENTIAL

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PH: 212-557-7400 / FAX: 212-692-9171

MEYER, JOHN - Vol. 1



LEGALINK

A WORDSWORTH COMPANY

1 JOHN MEYER

2 practical purposes no exposure is anticipated
3 and therefore it could be argued no swap limit
4 should be marked." Correct?

5 A. That's what it says.

6 Q. That is what you meant to say your
7 98 million was quite conservative; wasn't it,
8 Mr. Meyer?

9 A. Yes, it was.

10 Q. Because you're saying here you
11 could mark nothing against the risk?

12 MR. BRAFF: Objection. That is
13 not what it says. Mischaracterization of the
14 document.

15 MR. GODFREY: Let's go by the
16 deposition protocol, please.

17 MR. BRAFF: As long as you don't
18 mischaracterize the document.

19 MR. GODFREY: Let's go by the
20 protocol.

21 MR. BRAFF: As long as you don't
22 mischaracterize the document we will go by the
23 protocol.

24 MR. GODFREY: There is no coaching
25 of witnesses.

C E R T I F I C A T E

STATE OF NEW YORK)

: SS.

COUNTY OF NEW YORK)

I, TAMMEY M. PASTOR, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOHN MEYER, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of _____, 2004.

TAMMEY M. PASTOR, RPR

In The Matter Of:

In re: ENRON CORPORATION SECURITIES LITIGATION v.

JOSEPH BERARDINO

June 22, 2004

CONTAINS CONFIDENTIAL PORTION

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PH: 212-557-7400 / FAX: 212-692-9171

BERARDINO, JOSEPH - Vol. 1



LEGALINK

A WORDWARE COMPANY

1 JOSEPH F. BERARDINO

2 Mr. Berardino, is the board entitled to rely on
3 the opinion of the public auditors that is given
4 to them concerning the fair presentation of the
5 company's financial condition?

6 MS. PALMER: Objection to form.

7 MS. NADLER: Objection to form.

8 A. As I suggested earlier, the
9 auditors are an extremely important part of the
10 process a board should go through in assessing
11 the adequacy of the financial statements.

12 Q. Is the board entitled to rely on
13 that opinion?

14 MS. NADLER: Objection to form.

15 MS. PALMER: Objection to form;
16 calling for a legal conclusion.

17 A. You are asking me for a legal
18 opinion, I'm not a lawyer.

19 Q. No, I'm asking you for an opinion
20 as an auditor, sir, and as somebody who has
21 advised public companies and audit committees.

22 Did you believe, when you were
23 providing advice to an Audit Committee, that
24 they should not rely on your opinion?

25 MS. PALMER: Objection to form.

1 JOSEPH F. BERARDINO

2 Board of Directors of Enron Corp.?

3 A. You know, I don't know legally what
4 the protocol is. When you asked the question
5 before I said either the board or the
6 shareholders, I'm not sure which. But in my --
7 to my knowledge, the shareholders ultimately are
8 the owners, and the board stands in the shoes of
9 the shareholders.

10 Q. And this opinion we can see for
11 Enron was addressed to both the shareholders and
12 the Board of Directors; is that right?

13 A. Yes.

14 Q. Do you have any reason to doubt
15 that the Audit Committee and Board of Directors
16 of Enron were entitled to rely on this opinion?

17 MS. NADLER: Objection to form.

18 MS. PALMER: Objection to form;
19 asked and answered.

20 A. You know, I don't have much more to
21 say than I've said already to some of the
22 questions.

23 Q. How much was Andersen -- strike
24 that.

25 You said that you were required to

1 JOSEPH F. BERARDINO

2 understanding, we can continue.

3 A. My experience, the best atmosphere
4 for an auditor is one in which the management
5 and the board and the auditors, I always looked
6 at this as a team sport, and I don't want to
7 trivialize the concept, but it's a three-way
8 conversation. And obviously the best
9 conversations are ones that are open, candid and
10 searching on all parties.

11 Q. So then you would agree, if the
12 Audit Committee -- if an Audit Committee for
13 whom you were providing -- strike that.

14 Do you agree then that if the Audit
15 Committee asks a question of Andersen concerning
16 its discussions with management, the Audit
17 Committee is entitled to a candid answer?

18 MS. PALMER: Objection; asked and
19 answered.

20 MS. NADLER: Objection to form.

21 A. I don't have anything else to add.
22 It's a conversation.

23 Q. And it has to be a truthful one;
24 true?

25 MS. NADLER: Objection to form.

1 JOSEPH F. BERARDINO

2 Q. They were the best and the
3 brightest minds on those subjects in Andersen's
4 view?

5 MS. PALMER: Objection to form.

6 A. They were the best and brightest on
7 technical matters, yes.

8 Q. Can you think of any reason why it
9 is that the engagement team would have the
10 ability to overrule what the best and brightest
11 technical minds concluded were the relevant
12 accounting principles to be applied?

13 MS. NADLER: Objection to form.

14 MR. NAFTALIS: Objection to form.

15 MS. PALMER: Objection to form.

16 MS. NADLER: Misstates his
17 testimony.

18 A. The difficulty I have in answering
19 your question is that judgments are often made
20 about which rules or even whether rules
21 specifically govern a given transaction. And
22 there could be areas where people were trying to
23 find anomalous situations that one may or may
24 not agree with as to whether that was
25 appropriate in this circumstance, which is why

1 JOSEPH F. BERARDINO

2 the question and the complete answer.

3 MS. PALMER: Same objection.

4 A. And the question is, do I remember
5 saying this?

6 Q. Yes.

7 A. Yes.

8 Q. Does that refresh your recollection
9 about whether it was at least your understanding
10 at the time that one of the things Andersen did
11 was to consult on the front end of transactions
12 concerning whether they would, as you put it,
13 pass the rules?

14 MS. PALMER: Objection to form.

15 MS. NADLER: Objection to form.

16 A. I have problems trying to
17 communicate with you on two words. One is
18 consult, and the other is front end.

19 Q. Can you agree with me that the
20 phrase giving advice on whether they would pass
21 the rules is future tense?

22 MS. PALMER: Objection to form.

23 MS. NADLER: It's actually not.

24 But objection to form.

25 A. Again, I have no firsthand

1 JOSEPH F. BERARDINO

2 knowledge of what was going on. It is not
3 uncommon for a client to come to us with a
4 transaction, and knowing that we were going to
5 audit it, say here is our conclusion, do you
6 agree or disagree. That to me is not giving
7 advice, that is doing an audit.

8 Q. When you said we were very much
9 involved as the company was setting up these
10 transactions, what did you mean?

11 A. I had been told that there was lots
12 of conversation between the client and our
13 engagement team on issues as they came up.

14 Q. Including as the company was
15 setting up transactions, as you put it in your
16 testimony?

17 MS. PALMER: Objection to form;
18 asked and answered.

19 MS. NADLER: Objection to form.

20 A. The client asks us questions, we
21 answered their questions when they came up.
22 These transactions were not always completed
23 transactions, they were transactions that were
24 being contemplated.

25 Q. And the testimony you gave the

1 JOSEPH F. BERARDINO

2 auditing processes and standards that should be
3 followed.

4 Q. I know that, I'm not going to ask
5 you chapter and verse, but do you disagree with
6 the idea that part of independence implies that
7 the auditor adopt a state of mind, so to speak,
8 of judicial impartiality with regard to the work
9 they do?

10 MS. NADLER: Objection to form.

11 MS. PALMER: Objection to form.

12 MS. NADLER: Are you asking about a
13 specific SAS?

14 MS. PATRICK: Let me tell you
15 something. There is an order on speaking
16 objections.

17 MS. NADLER: I understand that.
18 There is a preceding statement, counsel, on the
19 record that seemed like a predicate to that
20 question. I'm happy to have him answer any
21 question you ask.

22 MS. PATRICK: Thank you.

23 MS. NADLER: I just want it to be
24 clear.

25 MS. PATRICK: If my questions

1 JOSEPH F. BERARDINO

2 aren't clear, it's on my head. There is an
3 order on speaking objections.

4 MS. NADLER: That wasn't a speaking
5 objection.

6 MS. PATRICK: Well, I don't need
7 any comment on the quality of my questions
8 either, I would like to examine the witness and
9 not you, if you don't mind.

10 Could you read back my question,
11 without the commentary, please.

12 (Requested portion of record read.)

13 MS. NADLER: Same objection. I
14 would ask for clarification as to whether that
15 is predicated on the first part of what you
16 asked him before you asked that question. Are
17 you referring to an SAS or are you asking him a
18 stand-alone question? Just tell me which it is
19 and then he can answer.

20 Q. Mr. Berardino, you can answer my
21 question.

22 MS. NADLER: Objection to form.

23 A. I've never thought of the concept
24 of judicial impartiality. So I don't know how
25 to answer your question.

1 JOSEPH F. BERARDINO

2 Q. Based on what Andersen's practices
3 required?

4 MS. NADLER: Objection to form.

5 MS. PALMER: Objection to form, and
6 lack of foundation.

7 A. I think I already answered your
8 question.

9 Q. You did.

10 Did it also happen in 2000, sir?

11 MS. PALMER: Objection to form.

12 A. I don't know.

13 (Deposition Exhibit 20173 for
14 identification, SMART Tool, production numbers
15 AASDTEX 000367165 through AASDTEX 000367200.)

16 Q. I'm going to show you Exhibit
17 20173. Can you read the Bates number at the
18 bottom of that document for me, sir?

19 A. What's the Bates number?

20 Q. The number AA something.

21 A. AASDTEX 000367165.

22 Q. This is a SMART Tool that bears a
23 date at the bottom May 18, 2000; is that right?

24 A. Yes.

25 Q. If you will look internally at page

1 JOSEPH F. BERARDINO

2 A. I don't exactly remember what I
3 might have said. I will say, however, that it
4 certainly passed the weight test. There were
5 lots of notes. And that was the extent of my
6 knowledge at the time or now.

7 Q. Lots of notes meaning lots of
8 disclosure?

9 A. Yes.

10 MS. NADLER: Objection to form.

11 MS. PALMER: Objection to form.

12 A. Yes.

13 Q. Should Andersen have affixed a
14 clean opinion to financial statements that it
15 believed did not tell the whole story?

16 MS. NADLER: Objection to form.

17 MS. PALMER: Objection to form;
18 calls for a conclusion.

19 A. I have to keep coming back to
20 professional standards. And we are not engaged
21 to tell a story or not tell a story. We are
22 engaged to give an opinion of financial
23 statements.

24 Q. And fair presentation involves --
25 well, let's talk about it this way: What does

1 JOSEPH F. BERARDINO

2 Q. At page 949. Do you see at line 1
3 Mr. Neuhausen testified "at the end of year
4 2000, fourth quarter 2000, the Raptor entities
5 actually did enter into a
6 cross-collateralization agreement of that
7 nature.

8 "Question: And thus satisfy what
9 the PSG was saying?

10 "Answer: And thus satisfy what we
11 were saying."

12 Did you ever discuss with
13 Mr. Neuhausen whether the PSG had given advice
14 on that transaction in late 2000?

15 A. No.

16 Q. Did you ever ask anyone who was
17 assisting you in preparing your testimony to
18 have such a discussion with the Professional
19 Standards Group to determine whether you were
20 accurate in saying that the transaction fell
21 below the scope of your audit?

22 MS. PALMER: Objection to form.
23 Counsel, and I would like a clarification, and
24 for you to tell us on the record where the
25 reclassification of shareholders' equity shows

1 JOSEPH F. BERARDINO

2 up in the transcript that you just quoted with
3 respect to Mr. Neuhausen. They are two
4 completely different issues, counsel.

5 MS. PATRICK: That's your view. If
6 you would like to testify, we can swear you in.

7 Can you read back my question,
8 please.

9 (Requested portion of record read.)

10 MS. NADLER: Objection to form.

11 A. The --

12 Q. Mr. Berardino, let me rephrase the
13 question.

14 When you gave your testimony to
15 Congress and asked your partners to help you
16 prepare it, did you expect them to get the best
17 information they could so that you could be
18 accurate in what you told the Congress?

19 A. Yes.

20 Q. And did you expect them to do what
21 was necessary to determine whether the factual
22 statements you made to the Congress were
23 accurate?

24 A. Yes.

25 Q. And so as a part of that, would you

1 JOSEPH F. BERARDINO

2 that right?

3 MS. PALMER: Objection to form.

4 A. Again, I wasn't making distinctions
5 as to who was doing what to whom at that point
6 in time.

7 Q. Mr. Berardino, that wasn't my
8 question. Did you believe that the Professional
9 Standards Group was closer to the facts on the
10 Enron engagement than were you?

11 MS. PALMER: Objection to form.

12 A. I knew the PSG was consulted from
13 time to time by the Enron team. So by
14 definition they would know more than I would.

15 Q. Is that one of the sources that you
16 expected your partners to tap to determine what
17 the facts were in order to bring them forward?

18 MS. NADLER: Objection to form;
19 asked and answered.

20 MS. PALMER: Objection to form.

21 A. I did not give specific directions
22 to the team as to who they ought to speak to or
23 not speak to. I asked them to give me the
24 testimony they ended up giving me, which set out
25 some of the basic issues. And our knowledge as

1 JOSEPH F. BERARDINO

2 utterly lacks foundation.

3 MS. PALMER: Objection to form,
4 misstates the record.

5 A. I don't know what's going on here.
6 You've given me some testimony to read. It's
7 obviously important testimony. I don't know
8 what the other points of view around the firm
9 were. So I don't know what was going through
10 the minds of our engagement people in taking
11 whatever advice they were getting and
12 communicating with the client.

13 Q. Are you surprised by this, sir?

14 MS. PALMER: Objection to form.

15 A. I have no reaction to this because
16 I'm learning more every day.

17 Q. Do you know, sir, whether Andersen
18 reviewed the impact of the Raptor transactions
19 when it did its first quarterly report review on
20 the 10-Q in March of 2001?

21 MS. PALMER: Objection to form.

22 A. I don't know what we did or did not
23 do in that first quarter.

24 (Deposition Exhibit 20179 for
25 identification, document headed "Related Party

1 JOSEPH F. BERARDINO

2 transactions?

3 A. Yes.

4 Q. Where did you first hear it, sir?

5 A. I don't know. Probably in the
6 press.

7 Q. Do you remember hearing that it was
8 a related party transaction?

9 MS. PALMER: Objection to form.

10 A. No.

11 Q. No.

12 Do you know whether Andersen was
13 involved in providing continuous audit services
14 with regard to the Raptor transactions?

15 MS. PALMER: Objection to form.

16 A. I know we were providing continuous
17 audit services. But that relates to a lot of
18 things we might have been looking at.

19 Q. Did it ever come to your attention
20 that Andersen had written no fewer than fourteen
21 memos concerning the Raptor transactions?

22 MS. PALMER: Objection to form.

23 MS. NADLER: Objection to form;
24 lacks foundation.

25 A. I have no idea how many memos we

1 JOSEPH F. BERARDINO

2 Q. Never came up with Tim Russert or
3 anybody else?

4 A. I don't remember specifically
5 discussing the Raptor transactions.

6 Q. To your knowledge, was Andersen
7 aware of the errors on the shareholders' equity
8 reclassification when it gave its clean audit
9 opinion to Enron in the 2000 financials?

10 MS. PALMER: Objection to form.

11 A. I don't know what we knew at that
12 point in time.

13 Q. Do you agree that if Andersen was
14 aware of a material error with regard to
15 shareholder equity, it should not have given a
16 clean opinion?

17 MS. NADLER: Objection to form;
18 assumes facts not in evidence.

19 MS. PALMER: Objection to form.

20 A. We are back to the materiality
21 discussion we had earlier. Materiality is not a
22 line by line concept, it's looking at the total
23 fairness of the total financial statements.

24 Q. There is no question, however, that
25 if, in your mind, if Andersen was aware that

1 JOSEPH F. BERARDINO

2 A. We didn't have a discussion about
3 comfort or lack of comfort.

4 Q. So they didn't indicate to you in
5 any way that they were not comfortable that the
6 judgments they were making were correct?

7 MS. PALMER: Objection to form;
8 asked and answered.

9 A. I didn't hear anything that would
10 lead me to believe that people were making
11 judgment calls they were uncomfortable with.

12 Q. Look at the next page, please,
13 Mr. Berardino. There are a series of take-away
14 to dos there. The first one was to inquire as
15 to whether Andy Fastow or LJM would be viewed as
16 an affiliate from an SEC perspective. Was there
17 any discussion of that in your presence?

18 A. No.

19 Q. Did you meet Mr. Fastow while you
20 were at Enron?

21 A. No.

22 Q. You know who he is?

23 A. Sure do.

24 Q. He's the chief financial officer of
25 Enron, at the time.

1 JOSEPH F. BERARDINO

2 MS. PALMER: Objection to form and
3 relevance.

4 MS. NADLER: Objection to form.

5 A. I, you know, never had to do that.
6 But I would tell the truth. And if that's
7 relevant to -- or if I thought it were relevant
8 to the other party, I would make the disclosure.

9 Q. And there is, you know, from
10 working around boards throughout your career,
11 management owes a duty of candor to the board;
12 don't they?

13 MS. PALMER: Objection to form.

14 A. Going back to my three-legged stool
15 from before. And I do think the best corporate
16 governance is where there is appropriate,
17 straightforward conversations among the board --
18 I'm sorry, among management, management first
19 and then the auditors and the directors.

20 Q. And in this case, can you explain
21 why Mr. Bauer would not have disclosed to the
22 Audit Committee that he knew that Mr. Kopper was
23 an investor in this transaction?

24 MS. PALMER: Objection to form;
25 assumes facts not in evidence, counsel.

1 JOSEPH F. BERARDINO

2 Chewco," in the second to last paragraph of that
3 transaction, Mr. Bauer told the Congress "the
4 transaction documents and Enron board minutes I
5 reviewed relating to Chewco corroborated the
6 representations I had received from Mr. Glisan
7 and Enron. The documents described an \$11.4
8 million independent equity infusion into Chewco,
9 which represented 3 percent of Chewco's
10 capitalization. Also, the documents described
11 and represented that Chewco was not affiliated
12 with Enron."

13 Do you see that?

14 A. Yes.

15 Q. So it appears, at least according
16 to Mr. Bauer's testimony, that back in 1997, he
17 knew that Enron's Executive Committee had been
18 told that Chewco was not affiliated with Enron?

19 MS. PALMER: Objection to form;
20 misstates the record.

21 MS. NADLER: Objection to form.

22 A. Well, I'm not going to put myself
23 in Tom Bauer's mind. If he read those minutes,
24 he would have, he would have reached the
25 conclusion they were not affiliated. I don't

1 JOSEPH F. BERARDINO

2 Q. That is a management
3 representation; is that right, Mr. Berardino?

4 A. Correct.

5 Q. And as it pertains to the financial
6 accounting standards, when management makes a
7 representation, according to FAS 57, about the
8 terms of related party transactions, that is an
9 auditable statement; is that right?

10 MS. PALMER: Objection to form.

11 MS. NADLER: Objection to form.

12 MS. PALMER: The witness is not
13 here as an expert witness.

14 A. Management makes -- yeah, these are
15 management's financial statements, they do make
16 assertions. You know, I'm not an expert in
17 terms of related party transactions. But any
18 statements -- any notes in the financial
19 statements, you know, we would have to read and
20 be confident that they can be supported.

21 Q. And specifically as it pertained to
22 related party transactions, Mr. Berardino, FAS
23 57 required Andersen to undertake whatever
24 procedures it deemed necessary to substantiate
25 that assertion; is that right?

1 JOSEPH F. BERARDINO

2 management, and that would be the end of it?

3 MS. NADLER: Objection to form.

4 MR. NAFTALIS: Form.

5 MS. PALMER: Objection to form.

6 MS. NADLER: Incomprehensible.

7 A. There are constant conversations as
8 I suggested earlier between the auditor and the
9 management. There are required discussions with
10 the Audit Committee, as we've discussed today.
11 Which include the quality of the financial
12 disclosures.

13 So it's hard for me to answer in
14 the abstract as to what thought processes and
15 judgment an auditor might make as to what they
16 discussed with management versus the Audit
17 Committee.

18 Q. And you have no view as you sit
19 here about whether transactions that have
20 increased from \$1 billion to \$2-1/2 billion
21 within a year are the sort of transactions,
22 specifically with regard to these prepaids, as
23 they are described here, that should have been
24 raised with the Audit Committee, including the
25 potential -- strike that.

1 JOSEPH F. BERARDINO

2 Do you have a view, sir, as you sit
3 here, about whether an increase of -- in prepay
4 transactions, from a billion dollars to \$2-1/2
5 billion, is something that the audit committee
6 should have been told about and considered
7 disclosing?

8 MS. NADLER: Objection to form.

9 MS. PALMER: Objection to form;
10 asked and answered.

11 A. I told you in the area of prepays,
12 I have no clue what this statement is. So how I
13 can form a conclusion as to its significance,
14 I'm just not capable of doing that.

15 MS. PATRICK: You can switch the
16 tape.

17 THE VIDEO OPERATOR: Going off the
18 record, 5:12. This will mark the end of tape
19 No. 4.

20 (Discussion off the record.)

21 THE VIDEO OPERATOR: Returning to
22 the record at 5:16, and this marks the beginning
23 of tape No. 5.

24 BY MS. PATRICK:

25 Q. Mr. Berardino, I want to turn now

1 JOSEPH F. BERARDINO

2 MS. PALMER: Objection to form and
3 lacks foundation.

4 A. Again, I would have to look at this
5 in context. The context being our firm's
6 structure at the time and reporting
7 relationships. And also the expanded
8 consultation process. I don't think -- I don't
9 remember if that was in place at this time.

10 MS. NADLER: What is the time, by
11 the way, I don't see a date on this memo?

12 THE WITNESS: It's the 1997
13 financial -- some point presumably in 1998.

14 Q. A couple of questions. It recites
15 here that, in the first bullet point, "we noted
16 that the after-tax total of these adjustments
17 were 47 percent of 1997 net income of \$105
18 million."

19 Do you see that?

20 A. Yes.

21 Q. "We concluded, however, that
22 measuring materiality against unadjusted net
23 income was not the most appropriate measure in
24 this instance because the company reported two
25 extremely large charges against earnings in

1 JOSEPH F. BERARDINO

2 1997."

3 Do you see that?

4 A. Yes.

5 Q. That's one of those judgment calls
6 that auditors make; right?

7 MS. NADLER: Objection to form.

8 MS. PALMER: Objection to form.

9 And lack of foundation with respect to whether
10 this witness has ever seen this document.

11 A. This is, you know, passing
12 adjustments is one of many judgements an auditor
13 makes in signing off on the financial
14 statements.

15 Q. Is one of the judgments that in
16 your experience -- is one of the judgments in
17 your experience that auditors can make is
18 against what to measure the passed adjustment?
19 That is, normalized income or extraordinary
20 income.

21 MS. PALMER: Objection to form.

22 MS. NADLER: Objection to form.

23 A. The reason I made that little
24 history lesson for you before is because this
25 was always a debate. And in fact, as I recall,

1 JOSEPH F. BERARDINO

2 and I don't remember exactly when, but probably
3 around 1999, the SEC actually came out with
4 their views on this issue. So I'm just -- I
5 don't remember exactly what happened when. But
6 this has always been an area that there have
7 been varying approaches.

8 Q. And a lot of judgment involved?

9 MS. PALMER: Objection to form.

10 A. There is judgment involved
11 throughout the audit, and this would be one
12 area.

13 Q. The second bullet point says "we
14 noted that the after-tax materiality of these
15 proposed adjustments to a more 'normalized'
16 income level of 642, adjusted to remove the
17 effect of the large and unusual charges
18 discussed above, was approximated,"
19 approximately I think it means, "7.6 percent."

20 Is that an appropriate level at
21 which one ought to start to consider
22 materiality?

23 MS. PALMER: Objection to form.

24 MS. NADLER: Objection to the form
25 of the question. The witness hasn't even

1 JOSEPH F. BERARDINO
2 testified that he's ever seen this document.
3 And you're asking him to interpret a memorandum
4 that he never saw. It's inappropriate.

5 MS. PATRICK: Ms. Nadler?

6 MS. NADLER: Yes.

7 MS. PATRICK: Objection; form, is
8 what's authorized under the order.

9 MS. NADLER: That's what I did.

10 MS. PATRICK: If we continue to
11 have speaking objections, we are going to have
12 to take it up with the judge.

13 MS. NADLER: If we continue to have
14 questions that lack foundation, maybe we will.

15 Q. Mr. Berardino, you did become
16 familiar in preparing for your testimony with
17 the fact that Enron had passed adjustments;
18 right? You've told me that.

19 MS. PALMER: Objection to form.

20 A. First of all, Enron didn't have
21 passed adjustments, Andersen did in connection
22 with its audit of Enron.

23 Q. Okay.

24 A. And I was aware, yes, there were
25 passed adjustments.

1 JOSEPH F. BERARDINO

2 Q. Do you remember being told what the
3 size of the passed adjustments in each year was?

4 A. No, I don't.

5 Q. Do you have any reason to doubt
6 that the judgments passing those adjustments
7 were reasonable and appropriate judgments at the
8 time they were made?

9 MS. PALMER: Objection to form.

10 A. I didn't do the audit, I didn't
11 have the benefit of all the things the audit
12 team might have considered at that time.

13 Q. Without regard to that, sir, do you
14 have any reason to doubt the judgment of an
15 Andersen engagement partner, engagement team,
16 that it's appropriate to pass an adjustment?

17 MS. PALMER: Objection to form.

18 Q. As it pertains to Enron?

19 MS. PALMER: Objection to form,
20 lacks foundation.

21 MS. NADLER: Objection to form.

22 A. Engagement partners are assigned by
23 the firm, as we talked earlier, based on our
24 confidence in their ability to make judgments.
25 And I find it very difficult to second guess any

1 JOSEPH F. BERARDINO

2 Exhibit 20190. Which is AA-EX00096644. Which
3 is entitled "LJM transactions," and has a list
4 of 19 LJM transactions, the date closed, date
5 funded, AA partner/manager. Do you see that?

6 A. Yes.

7 Q. Description, and then above that
8 LJM capital, and then a heading that says
9 disclosed, with some years, and then status.

10 Do you see that?

11 A. Yes, I do.

12 Q. Do you know whether this is a list
13 of the transactions on which Andersen partners
14 or managers consulted at the time they were
15 booked with regard to the LJM relationship?

16 MS. NADLER: Objection to form.

17 MS. PALMER: Objection to form;
18 lack of foundation.

19 MS. PATRICK: I can only find out
20 if he knows if I ask.

21 A. I have never seen this document, I
22 have no idea what it is. So I can't answer your
23 question.

24 Q. You did know, Mr. Berardino,
25 without regard to this list of transactions,

1 JOSEPH F. BERARDINO

2 MS. NADLER: Objection to form;
3 lack of foundation.

4 MS. PALMER: Objection to form;
5 lack of foundation.

6 A. I have no knowledge either way
7 about what they might have been talking. So I
8 couldn't dispute that they had taken place if
9 they had taken place.

10 Q. Mr. Berardino, have you ever heard
11 of something called a FAS 125 transaction, or
12 FAS 125?

13 A. I don't remember what FAS 125 is.

14 Q. Do you know what a securitized
15 transaction is?

16 A. Very generally.

17 Q. Do you know from preparing to
18 testify before the Congress whether some of the
19 complex transactions in which Enron engaged
20 involves securitized transactions?

21 MS. PALMER: Objection to form.

22 A. I don't remember. I don't remember
23 having those discussions.

24 Q. Harking back to your dinner with
25 your partners in preparation for your meeting

1 JOSEPH F. BERARDINO

2 triaging process to flag clients that needed
3 further work?

4 MS. PALMER: Objection to form.

5 MS. NADLER: Objection to form;
6 asked and answered.

7 A. As I said earlier, it was an
8 attempt to see if there was a quantifiable
9 methodology we could come up with that would
10 indicate a higher risk of fraud in company A
11 versus company B.

12 Q. Did you ultimately conclude that
13 the tool you had developed would not work or was
14 not a good tool?

15 MS. NADLER: Objection to form.

16 MS. PALMER: Objection to form;
17 misstates his testimony.

18 A. When I was involved in the
19 discussions, it was in the experimental phase,
20 and I don't ever remember getting to the point
21 where we thought we had a tool that worked.

22 Q. That worked?

23 A. That we would use as part of our
24 audit methodology.

25 Q. Fair to say then that FIDO, and

1 JOSEPH F. BERARDINO

2 that tool, was not incorporated into the audit
3 methodology at Arthur Andersen as of 2001?

4 MS. PALMER: Objection to form.

5 A. I don't remember ever agreeing that
6 this would be part of our tool set, no.

7 Q. Therefore, it was not something in
8 your view that was, if it kicked out something,
9 required to be raised either with a client or
10 its Audit Committee?

11 MS. NADLER: Objection to form.

12 MS. PALMER: Objection to form;
13 misstates his testimony.

14 MS. NADLER: Lack of foundation.

15 A. I really can't add to what I've
16 already said, which is I was apprised we were
17 working on something. It was, to my knowledge,
18 never finalized as a working tool of the firm.

19 Q. Why not, if you know?

20 MS. PALMER: Objection to form.

21 A. You know, there is always, you
22 know, we are dealing with very significant
23 issues here, in terms of identifying fraud or
24 accusing people of fraud, et cetera. And it's
25 hard to just do that with numbers. So we were

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

In Re: ENRON CORPORATION * MDL Docket No. 1446
SECURITIES LITIGATION *
* Civil Action No. H-01-3624
MARK NEWBY, ET AL., * (Consolidated)
INDIVIDUALLY AND ON BEHALF *
OF ALL OTHERS SIMILARLY * CLASS ACTION
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.

VIDEOTAPED ORAL DEPOSITION
OF MARC J. SHAPIRO
VOLUME 1
JUNE 15, 2004

1 survival and how that might be affected by Dynegy and how
2 that might play out against our financial statements.

3 Q. J.P. Morgan Chase & Company thought it was
4 favorable for Dynegy to acquire Enron, correct?

5 MR. ANGIOLILLO: Object to the form of
6 the question.

7 A. There was a point in time when we believed
8 that it would be the best course of Enron -- for Enron to
9 merge with Dynegy.

10 Q. (BY MR. JACONETTE) And that was discussed at
11 board of directors meetings?

12 A. I don't know whether it was discussed at board
13 of directors meetings.

14 Q. Was it discussed at executive committee
15 meetings?

16 A. I don't know whether it was.

17 Q. If you wanted to find out today if it was
18 discussed, what would you do?

19 MR. ANGIOLILLO: That's a hypothetical
20 question calling for speculation.

21 MR. JACONETTE: Objection. Form. That's
22 the objection, Bruce.

23 A. I suppose --

24 MR. ANGIOLILLO: You heard my objection.
25 You may answer, if you can.

1 exactly how many people it goes to.

2 Q. As a member of the executive committee, did
3 you read those articles?

4 A. I got a copy of the circulation. I don't
5 know -- on any day, I might read them, or I might not read
6 them.

7 Q. Which news publications did you regularly read
8 in 2001 and 2002?

9 A. You mean as a part of that clipping service or
10 as -- or separately?

11 Q. Just period.

12 A. Well, the New York Times, The Wall Street
13 Journal, The Financial Times would be probably the primary
14 three.

15 Q. And when you read those publications, did you
16 specifically look for articles concerning J.P. Morgan or top
17 clients of J.P. Morgan?

18 A. Sometimes.

19 Q. But if you -- if you did come across an
20 article concerning J.P. Morgan or a top client of
21 J.P. Morgan, you would have read it, correct?

22 A. Some --

23 MR. ANGIOLILLO: Objection. I'm sorry.
24 You -- he's already answered that question.

25 A. Yeah, sometimes. Depends on how much time I

1 go about doing that?

2 A. You would go to the corporate secretary's
3 office and ask that question.

4 Q. That's a matter of -- of record in the
5 corporate secretary's office?

6 A. I don't know if it's a matter of record, but
7 he would have all of the data.

8 Q. So the information could be gathered?

9 MR. ANGIOLILLO: Objection. You've got
10 his answer. Now you're just asking him to speculate.

11 Q. (BY MR. JACONETTE) Is that correct?

12 A. I presume it could.

13 Q. At Page 3 of your questionnaire --

14 A. Uh-huh.

15 Q. -- you indicated that you have been a
16 consultant for J.P. Morgan Chase & Company since January of
17 this year?

18 A. Yes.

19 Q. Do you see that?

20 A. Yes.

21 Q. What were the circumstances surrounding your
22 departure from the vice chairman position at J.P. Morgan
23 Chase & Company?

24 A. I wanted to return back to Houston, and my
25 wife wanted to return back to Houston. So we decided when we

1 choreographed trading."

2 A. Uh-huh.

3 Q. And there it says, "People familiar with
4 Mahonia." Do you -- does that refresh your recollection as
5 to whether or not anybody at Chase provided background
6 information with respect to Mahonia and the management of tax
7 liabilities?

8 A. No.

9 Q. Have you discussed the topic of who provided
10 information not for attribution in this particular article
11 with anybody?

12 MR. ANGIOLILLO: Objection. It lacks
13 foundation, and it's inconsistent with his prior testimony,
14 where he -- where he's testified he doesn't have a
15 recollection one way or the other as to whether anybody
16 provided background information for this article. So how can
17 you ask that question?

18 MR. JACONETTE: Bruce, you don't have
19 many words left in your speaking objections before I call the
20 judge. The objection is, objection, form.

21 MR. ANGIOLILLO: Jim, the phone is yours.
22 Anytime you want to call the judge, be my guest. But just
23 don't ask this witness a question that you know and I know is
24 entirely inconsistent with what he just testified to.

25 MR. JACONETTE: It's objection, form,

1 Mahonia?

2 A. Yes.

3 Q. Who owns it?

4 A. I don't have a recollection right today.

5 There's a letter that we sent to the Senate investigation
6 committee that detailed specifically who owns Mahonia, and if
7 you could -- want me to access that letter, I'd be happy to
8 give you --

9 Q. Do you recall generally --

10 MR. ANGIOLILLO: Let him finish, please.

11 Q. (BY MR. JACONETTE) I'm sorry. Go ahead.

12 A. I said, if you want me to access that letter,
13 I can tell you specifically the name of who owns Mahonia.

14 MR. ANGIOLILLO: Jim, I don't mean to
15 interrupt, but you may want to ask the witness, with respect
16 to these questions that you're asking about Mahonia, as to
17 the time when he learned about Mahonia and the details of his
18 knowledge.

19 MR. FLYNN: Counsel, we can't hear you.
20 Could you please speak up?

21 MR. ANGIOLILLO: Sure. I was just
22 suggesting to Jim that he may want to ask the witness to
23 identify the time period when he learned about the existence
24 of Mahonia and the information that he just conveyed.

25 MR. FLYNN: Thank you.

1 article?

2 A. Is it in the article?

3 Q. Yes, it is.

4 A. I'm sure if it's in the article, I would have
5 noted it.

6 Q. Do you recall inquiring about that
7 investigation when you read the article?

8 A. I don't recall it specifically, but I probably
9 would have.

10 Q. In the third column of the article, on the
11 first page, it's the second full paragraph down, the article
12 states, "J.P. Morgan would pay Enron between 150 million and
13 250 million for the future delivery of natural gas or crude
14 oil."

15 A. I'm sorry. Where are you reading?

16 Q. That's the second full paragraph down, third
17 column, first page.

18 A. Oh, okay.

19 Q. Is that generally consistent with your
20 understanding of Mahonia transactions with J.P. Morgan and
21 Enron?

22 MR. ANGIOLILLO: Object to the form.
23 Again, I would request that you establish a time period when
24 the witness became aware of this, if he did.

25 A. I'm sorry. What is your question?

1 A. I don't know. I mean, I don't know
2 specifically. You might -- you might prod my memory with one
3 or two names, but I can't think of them.

4 Q. Rich Kinder?

5 A. Rich Kinder (pronunciation).

6 Q. Kinder.

7 A. Rich Kinder didn't subsequently go to work for
8 Chase, but I know Rich Kinder.

9 Q. Who did he work for?

10 A. Who does he work for now?

11 Q. Well, has he ever worked for a Chase entity?

12 A. Not to my knowledge.

13 Q. Okay. How long have you known Rich Kinder?

14 A. Again, you know, approximately 10 years.

15 Q. Who is Bill Macamer?

16 A. Bill --

17 Q. Macamer.

18 A. I don't know.

19 Q. Okay. Previously, I think you testified that
20 when you were with Texas Commerce Bank, the bank did
21 transactions with Mr. Skilling or consulted with Mr. Skilling
22 on transactions. Was that correct?

23 MR. ANGIOLILLO: Object to the form of
24 the question, and it's not what he testified to.

25 A. No. What I said was that we hired McKinsey as

1 between. And I guess the issue here was did we have a full
2 understanding of the range of all those off-balance sheet
3 SPVs and how they would affect our company.

4 Q. Can you tell me more specifically why a study
5 was being done?

6 A. I can't tell you why a study was initiated at
7 that point in time.

8 Q. Why was there a concern about the range of
9 S -- SPVs that the company was using?

10 MR. ANGIOLILLO: Object to the form of
11 the question, use of the word "concern." It lacks
12 foundation.

13 A. I think there's always an issue of control and
14 who is setting up these SPVs, who has authority to set up the
15 SPVs, do we have the full range of accounting controls and
16 reporting, is it plugged into all of our systems for -- for
17 our reporting. And, so, I think that's the issues that
18 legitimately could be studied.

19 Q. And were those issues being studied at this
20 time?

21 A. I don't know. This -- this -- that's what
22 this memo says, but I don't recall specifically.

23 Q. Now, Chase's prepay transactions with Enron
24 used an off-balance sheet SPV, correct?

25 A. They did. I didn't know that at this time,

1 but that's correct.

2 Q. And at this time, if the study was looking
3 into the extent of control of SPVs, it would have tried -- it
4 would have explored to some extent the control over the
5 off-balance sheet SPV in the Mahonia transactions --

6 MR. ANGIOLILLO: May I have the question
7 read --

8 Q. (BY MR. JACONETTE) -- is that correct?

9 MR. ANGIOLILLO: Excuse me. May I have
10 the question read back, please?

11 (Requested text read.)

12 MR. ANGIOLILLO: I object to the form of
13 the question. It lacks foundation. And I don't think you
14 mean to mix things up, but the witness has been talking about
15 J.P. Morgan Chase's use of SPVs.

16 A. Yeah. I would say it's a hypothetical
17 question. I don't know what the study was intended to do,
18 and I don't know what its range of what it covered would have
19 been. So I don't know how I can answer your question.

20 (Deposition Exhibit 30091 was marked.)

21 MR. JACONETTE: What exhibit number is
22 this?

23 THE REPORTER: Ninety-one.

24 Q. (BY MR. JACONETTE) The court reporter has
25 handed you Exhibit Number 91.

1 He's not the author.

2 A. I don't know, but I presume it refers to
3 Chase.

4 Q. (BY MR. JACONETTE) That was your
5 understanding?

6 A. Yes.

7 Q. There's a -- a reference to a document,
8 calling SPVs managed SPVs?

9 A. Yes.

10 Q. What did the document call managed SPVs?

11 A. I don't know. I'd have to review the
12 document.

13 Q. Do you recall at all what SPVs Mr. Layton was
14 referring to here?

15 A. No. I'd have to -- I'd have to review the
16 document.

17 MR. JACONETTE: I'll mark those as a core
18 exhibit.

19 Q. (BY MR. JACONETTE) Mr. Layton [sic], the
20 court reporter has handed to you Core Exhibit Number 1. Do
21 you recognize that document?

22 A. No.

23 Q. Would you please take a moment to review it?
24 You can flip through it.

25 MR. CARROLL: What is it?

1 Q. Did you discuss this report with anybody at
2 J.P. Morgan Chase & Company?

3 MR. ANGIOLILLO: Object to the form of
4 the question. It's not a report, as you indicated when you
5 introduced this document into the record. It's the testimony
6 of an individual.

7 MR. JACONETTE: I -- I apologize.

8 Q. (BY MR. JACONETTE) Mr. Shapiro, have you
9 discussed this testimony of Robert Roach with anybody at
10 J.P. Morgan Chase & Company?

11 A. I've probably discussed it with our general
12 counsel.

13 Q. Anybody else?

14 A. I don't know.

15 Q. And do you recall when you discussed it with
16 your general counsel?

17 A. Most likely, it would have been shortly after
18 it was issued.

19 Q. And the report says -- or the testimony
20 says -- I apologize -- at C00009939, it's Page C-5, which is
21 an appendix entitled "J.P. Morgan Chase Case History," quote,
22 in 1986 --

23 MR. ANGIOLILLO: I'm sorry. Where --
24 where are you?

25 MR. JACONETTE: Page C00009939.

1 A. We usually called it Mourant.

2 MR. ANGIOLILLO: I would -- I would
3 caution the witness with respect to these questions, since
4 you've already testified that you learned about Mahonia
5 subsequent to the events, that -- I want you to be very
6 careful not to give testimony to the extent that you are just
7 relating information that was provided to you by counsel.

8 MR. GENACK: Well, and he's just reading
9 the documents.

10 Q. (BY MR. JACONETTE) Mr. Shapiro, do you deny
11 that an application letter to the commercial relations
12 officer for Island of Jersey from Mourant at Page 2, and
13 dated April 24, 1986, stated that the special purpose
14 vehicle, Mahonia, would be, quote, controlled by Chase, but
15 for accounting and other requirements, not be wholly owned by
16 Chase?

17 MR. ANGIOLILLO: I object to the form of
18 the question. It lacks foundation. I'm going to ask you to
19 establish with this witness before he answers whether he has
20 personal knowledge.

21 I'll also state for the record that the
22 quote that is in this document relates to something that
23 never actually happened. So I don't wish to interfere with
24 your interrogation, but you're proceeding from a false
25 premise. And I'd be happy to -- at a break to go into it

1 with you.

2 Q. (BY MR. JACONETTE) You can answer.

3 A. I have no knowledge of this other than what I
4 learned from counsel.

5 Q. Mr. Shapiro, do you deny that Chase wanted to
6 use the charitable trust referenced here on Page 39 of
7 Core Exhibit Number 1 to assist clients who wished to raise
8 finance, not by way of borrowing, but by way of a related
9 transaction?

10 MR. ANGIOLILLO: I'm sorry. It's -- I
11 object. It's argumentative. And, again, the witness has
12 just testified he doesn't have knowledge other than what he
13 received through counsel subsequent to the events.

14 A. Yes. I have no knowledge of -- of this -- of
15 the items that are subject to your question other than what I
16 learned from counsel subsequent to the initiation of
17 litigation.

18 Q. (BY MR. JACONETTE) Do you deny this?

19 MR. ANGIOLILLO: I'm sorry. He's given
20 you the answer, and -- and, you know, you -- we both know
21 that that's unfair, and it's just purely argumentative. I
22 would ask you to -- to move on.

23 Q. (BY MR. JACONETTE) Would you please look at
24 the second paragraph -- or I apologize.

25 A. Second paragraph of what page?

1 Q. Or the last sentence of the first paragraph.

2 A. I'm sorry. What page are we on?

3 Q. Page 39 still.

4 A. Okay.

5 Q. Okay. There it says, "Mourant served as
6 trustee for Eastmoss." Is that consistent with your
7 understanding?

8 A. Everything --

9 MR. ANGIOLILLO: I'm sorry. Go ahead.

10 A. Everything I know about the ownership of
11 Mahonia and its -- the way it operated I learned from counsel
12 subsequent to the initiation of litigation.

13 Q. (BY MR. JACONETTE) The purpose of Mahonia was
14 to issue notes and to finance transactions arranged by Chase
15 Bank, was it not?

16 A. Again, everything I've learned about Mahonia I
17 learned subsequent to the initiation of litigation from
18 general counsel.

19 Q. Prior to this litigation, were you aware that
20 the documents indicate that over 25 Jersey-registered
21 companies owned by the trustees of Eastmoss Trust were
22 created on Chase's behalf?

23 MR. ANGIOLILLO: Lacks foundation.

24 A. I can't say that I was aware of that either
25 before or after initiation of litigation. I have no

1 knowledge of that.

2 Q. (BY MR. JACONETTE) Were you aware that
3 trustees of the Eastmoss Trust were creating
4 Jersey-registered companies on Chase's behalf?

5 A. I don't know if that's a factual statement
6 or not.

7 MR. ANGIOLILLO: Same objection.

8 Q. (BY MR. JACONETTE) Were you --

9 A. A bunch of what's in this document is not
10 factual, so I have no -- no way to know that it would be
11 factual.

12 Q. Prior to this litigation, were you aware that
13 one of the companies that Eastmoss Trust created on Chase's
14 behalf was Mahonia Limited?

15 A. No. I was not aware of anything related to
16 Mahonia prior to the litigation.

17 Q. In the last paragraph, Mr. Roach's testimony
18 states, quote, in reality, Mahonia could not have functioned
19 as an independent trading party because it had only 10,000
20 pounds of capitalization, no employees and Mourant attorneys
21 who served as directors. Do you deny that?

22 A. Again --

23 MR. ANGIOLILLO: I object to the form of
24 the question. It's argumentative, and it's kind of -- you
25 know, frankly, it's -- you're just harassing him now since

1 he's told you he -- he's without knowledge at the time of the
2 events in question. And the only information he has on the
3 subject is information that he learned from counsel
4 subsequent to the commencement of the litigation. So I'm not
5 sure what the point is, unless you just want to browbeat the
6 witness.

7 Q. (BY MR. JACONETTE) You can answer the
8 question.

9 A. What was the question again?

10 (Requested text read.)

11 A. Again, I have no knowledge of the activities
12 of Mahonia other than what I learned from general counsel
13 after the initiation of litigation.

14 Q. (BY MR. JACONETTE) How long have you known
15 that Maurant -- the law firm Maurant worked for Chase?

16 MR. ANGIOLILLO: Object to the form of
17 the question. It lacks foundation.

18 A. I've known that only as I learned it from
19 general counsel's -- after the initiation of litigation.

20 Q. (BY MR. JACONETTE) And which litigation was
21 that?

22 A. The surety litigation.

23 MR. JACONETTE: Ninety-two?

24 THE REPORTER: Ninety-two.

25 (Deposition Exhibit 30092 was marked.)

1 Q. Do you have a general recollection as to why?

2 MR. ANGIOLILLO: I'm sorry. The witness
3 has just told you he doesn't recall one way or the other, so
4 I'm not sure the follow-on question is a fair one.

5 Q. (BY MR. JACONETTE) What was happening at that
6 time, in August '99, with respect to prepaid transactions as
7 they concerned Chase's business in general?

8 A. I'm not sure I understand, what was happening.

9 Q. What was happening at this point in 1999
10 concerning Chase's prepay transactions with Enron?

11 MR. ANGIOLILLO: I object to the form of
12 the question.

13 A. I didn't know at the time what was happening.
14 I guess later we can go back and look at the records as to
15 when we did transactions with them.

16 Q. (BY MR. JACONETTE) Were there any significant
17 transactions at Enron or with Enron at this time that you
18 recall?

19 A. Not at the time, but I can go back and look at
20 the record of when we did the transactions.

21 Q. How would you do that?

22 A. How would I do that?

23 Q. Yeah.

24 A. I would ask our lawyers to look it up for me.

25 Q. What sort of records do you believe

1 document. Presumably, there had been a committee that had
2 been studying how we could control better SPVs, and this was
3 the product of that committee's work.

4 Q. (BY MR. JACONETTE) And do you recall
5 generally why the committee was reviewing this?

6 A. Well, I think we discussed before that we felt
7 there was a need to make sure that we had full control of all
8 the SPVs. There would have been a proliferation of them
9 because of the fact that they were fairly easy to set up and
10 used in many, many trading businesses, and that we needed to
11 make sure that we had better control of them.

12 Q. Were you concerned about the amount of prepays
13 that Chase had with Enron at this point in time, late October
14 2001?

15 MR. ANGIOLILLO: Object to the form of
16 the question. It lacks foundation.

17 A. Well, it's unrelated to this issue, but as a
18 matter of fact, I wasn't particularly concerned about them
19 because I thought they were all insured.

20 Q. (BY MR. JACONETTE) There was a -- in October
21 of 2001, there were some significant negative disclosures
22 made by Enron, correct?

23 A. That's true, but I thought that our exposure
24 to Enron, at least with regard to prepays, was fully insured.

25 Q. And --

1 A. Or virtually fully insured.

2 Q. And you cannot recall why, at all, Chase was
3 preparing to issue a policy on special purpose vehicles at
4 this point in time; is that correct?

5 A. Well, I think --

6 MR. ANGIOLILLO: Object to -- I'm sorry.
7 It's argumentative. And you've just heard the witness tell
8 you about the context in which this came about, so I can't
9 see how you can ask that question.

10 Q. (BY MR. JACONETTE) Go ahead.

11 A. The question is: Why do I think we did it at
12 this time? Is that the question?

13 Q. You -- you can't -- I'm asking if you have any
14 recollection after looking at this document and responding to
15 my questions.

16 A. My recollection is that we, going back to the
17 previous summer, had had some concerns about whether we had
18 adequate controls over SPVs. I think it's also likely that
19 the publicity about Enron's SPVs would have given some
20 additional urgency to the task; however, it's clear that the
21 committee was at work well before that -- those issues were
22 publicized.

23 In any event, it would be unrelated to
24 the Mahonia situation. I didn't know of Mahonia at that
25 time, and what I knew about the prepays was not a matter of

1 MR. ANGIOLILLO: I'm going to object to
2 the form of the question and -- and asking him to answer what
3 is a hypothetical question.

4 A. It would appear to me that it would qualify as
5 a J.P. Morgan Chase-established SPV.

6 (Deposition Exhibit 30098 was marked.)

7 Q. (BY MR. JACONETTE) Mr. Shapiro, the court
8 reporter handed you Exhibit Number 30098.

9 MR. JACONETTE: This is a one-page
10 document dated 11/20/2001, and it bears Bates Number
11 JPMNBY 100059035.

12 Q. (BY MR. JACONETTE) Mr. Shapiro, do you
13 recognize this document?

14 A. Yes, I do.

15 Q. What is it?

16 A. It's an e-mail from me to John Yarmick.

17 Q. Why did you send him this e-mail?

18 A. I sent him this to make sure that we had a
19 study ongoing that would be reported to the risk management
20 committee on whether any of our off-balance sheet vehicles or
21 special purpose vehicles had any kind of hook or obligation
22 back to the company itself similar to what some of the Enron
23 SPVs undertook.

24 Q. Could you please read the second sentence of
25 that e-mail?

1 that our SPVs were truly off-balance sheet, truly not --
2 could not have any impact on the company itself.

3 MR. ANGIOLILLO: When you say company,
4 which company are you referring to?

5 THE WITNESS: Chase Manhattan -- well, in
6 this case, J.P. Morgan Chase or its subsidiaries.

7 MR. ANGIOLILLO: Okay. Thank you.

8 Q. (BY MR. JACONETTE) At this time, did you ask
9 for any analysis, or -- or did you look into any matters
10 relating to Enron to ensure that Chase SPVs were truly
11 off-balance sheet?

12 MR. ANGIOLILLO: Object to the form of
13 the question. You just got the answer to that question
14 several times.

15 A. Let me rephrase the question. It wasn't a
16 matter of relating to Enron. It was relating to the types of
17 risk that Enron undertook, as described in the newspapers.
18 And the -- the answer is that we wanted to make sure that we
19 didn't have those types of risks. The study was undertaken
20 and determined that we did not have those types of risks.

21 Q. (BY MR. JACONETTE) Did the study include SPVs
22 involved in Enron transactions?

23 A. The study included all SPVs, but those
24 wouldn't have been the ones that were -- were relevant to
25 this question.

1 in the litigation.

2 Q. What did you tell him?

3 A. I asked him what he thought about it.

4 Q. And what did he say?

5 A. He said that he had received the document,
6 that he didn't agree with it, that he had asked for a further
7 review by our accountants, and that they had agreed with him.

8 Q. Did he tell you why he didn't agree with it?

9 A. Yes.

10 Q. What did he say?

11 A. Well, it's a long answer. I'd like to go into
12 what the difference -- the significant differences between a
13 loan and a prepaid commodity contract.

14 Q. Did he talk to you about how prepaid forwards,
15 if they were classified this way, would affect Chase's
16 business?

17 A. The way they're --

18 MR. ANGIOLILLO: Excuse me. I object
19 to -- to the -- to the question since you asked a previous
20 question, the witness began to answer the question, and then
21 you effectively cut him off by asking a different question.
22 Would you like an answer to your previous question, or are
23 you withdrawing that question, so the record's clear?

24 MR. JACONETTE: I'll withdraw the
25 question.

1 MR. ANGIOLILLO: Okay. So you don't want
2 to know the difference between a prepay forward transaction
3 and a loan?

4 MR. JACONETTE: Bruce --

5 MR. ANGIOLILLO: Just -- just so the
6 record's clear.

7 MR. JACONETTE: -- do you really need to
8 insert all of this nonsense into the record?

9 MR. ANGIOLILLO: It's not nonsense.

10 MR. JACONETTE: It's, objection, form.
11 We don't need your advocacy right now.

12 MR. ANGIOLILLO: That's what I get paid
13 for.

14 MR. JACONETTE: Would you please restate
15 for the witness my last question?

16 (Requested text read.)

17 A. The answer to that is no. He was not
18 concerned with how it would affect our business. He was
19 concerned with the proper accounting on our books.

20 Q. (BY MR. JACONETTE) Did you talk with anybody
21 about that topic?

22 A. About what topic?

23 Q. Ever, about how the reclassification of
24 prepaid forwards, if it was done according to this memo,
25 would affect Chase's operations.

1 Q. Mr. Shapiro, isn't it true that Chase
2 executives arranged to report prepaid forwards as loans
3 effective as of August 31, 1996 and did so by way of
4 documentation during this time period?

5 A. I have no idea.

6 MR. ANGIOLILLO: Object to the form of
7 the question.

8 A. I have no idea. I wasn't -- I wasn't at the
9 company until September of '97. I know that at some point
10 subsequent to this, there was a thorough review of the
11 subject with the controller of the company and our external
12 auditors, and the conclusion was they should be reported as
13 mark-to-market instruments in -- in our trading books. But
14 when that was done, what was done in the interim, I wasn't
15 there, and I can't tell you.

16 Q. (BY MR. JACONETTE) Would you please look at
17 the third page of the document --

18 A. (Witness complies.)

19 Q. -- where it states, "Examples of loans
20 documented as derivatives."

21 A. Uh-huh.

22 Q. Did you know before today that Chase referred
23 to loans in the context of calling them loans documented as
24 derivatives?

25 MR. ANGIOLILLO: Can you lay a foundation

1 for that -- that -- that representation?

2 A. If you're asking me --

3 MR. ANGIOLILLO: I'm sorry. You haven't
4 established with this witness what this page is, where it
5 came from, who the author is. So you're now making a
6 representation to the witness that this is a Chase -- this
7 is -- this is Chase speaking. And I'd just like you to lay
8 the foundation for that because the witness has told you he's
9 never seen this document before.

10 A. I'd just like to clarify. This is terminology
11 used by one person. I don't -- I don't -- I wouldn't think
12 this purports to be what, quote, Chase, end quote, believes.

13 Q. (BY MR. JACONETTE) Believes at this time?

14 A. Again, this is written by one person.

15 Q. Okay. Were you aware of -- before today, were
16 you aware of Chase documentation giving examples of loans
17 documented as derivatives?

18 A. Before today, I may have seen this memo in
19 the -- in the surety litigation. I may also be aware that
20 other people within Chase may sometimes refer to these as
21 loans. That doesn't make them loans, and it certainly
22 doesn't make it Chase's view that these are loans.

23 Q. Are you aware of whether people at Chase refer
24 to prepay transactions as loans documented as derivatives?

25 A. I'm aware that a lot of times people refer to

1 A. As far as I can tell.

2 Q. -- where it says, "Please review the attached
3 draft of the interim accounting policy, guidance on loans,
4 borrowings documented as derivatives. I want to discuss this
5 draft with you --

6 A. Right.

7 Q. -- before I leave for a long vacation. Can we
8 meet Thursday afternoon or Friday morning, Bill"?

9 A. Right.

10 MR. ANGIOLILLO: Right. What it appears
11 is that Bill was forwarding the attachment. It's not clear
12 who the author was. It would be speculating.

13 A. In any event, I think there are lots of
14 mistakes in this document, and I'd be happy to talk about the
15 differences between loans and derivatives.

16 MR. WHITING: I'm sorry. Could you read
17 his answer back? I couldn't hear him.

18 A. I said, in any event, I think there are lots
19 of mistakes in this document, and I'd be happy to talk about
20 the differences between loans and prepaid commodity
21 contracts.

22 MR. JACONETTE: Was there a question
23 pending?

24 THE REPORTER: No.

25 MR. JACONETTE: Move to strike. 103?

1 be given confidential treatment.

2 Q. (BY MR. JACONETTE) Would you please look at
3 the bottom of the first page, where Dinsa Mehta wrote to
4 George Brash, "This is for Unocal, will be for an aggregate
5 of \$175 million with a term structure that pays down between
6 January '99 and November '99, six-month average maturity."

7 Do you see that?

8 A. I'm sorry. Where is that?

9 Q. That's at the bottom of the first page.

10 A. Bottom of the first page. Okay. Yes, I do
11 see that.

12 Q. Okay. What does that refer to?

13 A. Presumably, it refers to some type of prepaid
14 commodity swap that we entered into with Unocal.

15 Q. As you read this, do you understand Anne Marie
16 Sullivan to be stating that while this transaction is in the
17 form of a prepay, it is really an unsecured loan?

18 MR. ANGIOLILLO: Object to the form of
19 the question. You're just asking him to speculate.

20 Q. (BY MR. JACONETTE) I'll direct you to the
21 first paragraph.

22 A. Right. I'm not sure what your question is.

23 Q. Does it look like she's saying there, while
24 this transaction is in the form of a prepay, it is -- and
25 I'll quote -- quote, really, an unsecured loan.

1 THE WITNESS: Which -- which clients they
2 were.

3 (Deposition Exhibit 30107 was marked.)

4 Q. (BY MR. JACONETTE) Mr. Shapiro, the court
5 reporter handed you Exhibit Number 107, which was marked as
6 Wilson 1 in the Liberty Mutual litigation.

7 MR. JACONETTE: The Bates range is
8 JPMC 153977 through 78, and JPMCBKR 0020568 through 569,
9 also -- I think that's it. I'm getting confused by the Bates
10 numbers on this. It's a 5/24/99 e-mail at the top of the
11 page.

12 Q. (BY MR. JACONETTE) Have you seen this
13 document before?

14 A. I haven't seen this document. I've seen
15 the -- the document that's being forwarded from Don Layton on
16 many occasions.

17 Q. Before you first saw this document, were you
18 aware that Don Layton referred to prepay transactions as
19 disguised loans?

20 MR. ANGIOLILLO: Object to the form of
21 the question. It lacks foundation.

22 A. Before I first saw this document --

23 MR. JACONETTE: Let me -- let me withdraw
24 the question.

25 THE WITNESS: Okay.

1 Q. (BY MR. JACONETTE) Before you first saw
2 the -- the e-mail by Don Layton in this document, were you
3 aware that Mr. Layton referred to prepay transactions at
4 Chase as disguised loans?

5 MR. ANGIOLILLO: Same objections. Lacks
6 foundation. Object to the form.

7 A. I -- I don't recall whether he did or not
8 before I saw it in writing.

9 Q. (BY MR. JACONETTE) Before you first saw the
10 e-mail that Mr. Layton sent in this document, were you aware
11 that a new phrase was used at Chase to refer to disguised
12 loans, and that new phrase was "derivatives-based fundings"?

13 MR. ANGIOLILLO: Object to the form of
14 the question.

15 A. I had conversations with Mr. Layton about this
16 subject in general. As indicated before, we were both
17 concerned that we were having extensions of credit in many
18 different forms and wanted to be certain that those
19 extensions of credit were all subject to the same controls
20 and the same disciplines with regard to returns and
21 distribution.

22 So I don't know that I'm aware of the
23 specific terminology, but I was aware of the general subject,
24 which is that we wanted to be certain that extensions of
25 credit that were being done in the trading departments were

1 covered by certain controls, reporting and risk disciplines.

2 Q. (BY MR. JACONETTE) Were you aware that
3 changes in terminology were made with respect to how prepays
4 were identified or referred to?

5 MR. ANGIOLILLO: I -- I object to the
6 form of the question. Lacks foundation. And could you tell
7 me where "prepays" is in this document? James, could you
8 point that out to us since you're referring to it?

9 Q. (BY MR. JACONETTE) Let me ask you this. Are
10 you aware that Don Layton has referred to prepay transactions
11 as disguised loans?

12 A. I'm aware that both Don and I have a concern
13 about all extensions of credit, and particularly those that
14 were done on the trading books, and that we wanted to be
15 certain that they were subject to the same disciplines as
16 loans.

17 (Deposition Exhibit 30108 was marked.)

18 MR. JACONETTE: 108?

19 THE REPORTER: Uh-huh.

20 Q. (BY MR. JACONETTE) The court reporter handed
21 you Exhibit Number 108.

22 MR. JACONETTE: That is a document that
23 was previously marked as Shapiro 5 in the Liberty Mutual
24 litigation, and it is identified by Bates range
25 JPMCBKR 0017776 through 77 and JPMNBY 300064301 through 02.

1 STATE OF TEXAS X

2 COUNTY OF DALLAS X

3 I, LISA M. DURHAM, Certified Shorthand Reporter duly
4 commissioned and qualified in and for the State of Texas, do
5 hereby certify that there came before me on the 15th day of
6 June, 2004, at the offices of the Houston Deposition Center,
7 located at 1111 Bagby, Suite 2100, in the City of Houston,
8 County of Harris, State of Texas, the following named person,
9 to-wit: MARC J. SHAPIRO, Volume 1, who was duly sworn to
10 testify the truth, the whole truth and nothing but the truth
11 of his knowledge touching and concerning the matters in
12 controversy in this cause; that he was thereupon examined
13 upon his oath and his examination reduced to typewriting
14 under my supervision; that the deposition is a true record of
15 the testimony given by the witness, and signature of the
16 witness is to be before any Notary Public.

17 I further certify that I am neither attorney
18 for, nor related to or employed by, any of the parties to the
19 action in which this deposition is taken, and further that I
20 am not a relative or employee of any attorney or counsel
21 employed by the parties hereto, or financially interested in
22 the action.

23

24

25

1 That the amount of time used by each party at the
2 deposition is as follows:

3
4 MR. JACONETTE: 6 hours, 6 minutes

5 Given under my hand and seal of office on this the
6 22nd day of June, A.D., 2004.

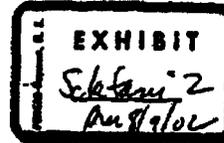
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My certification expires 12/31/05

Author: Bill Macomber at GB-NEWYORK-45
Date: 8/27/96 9:51 AM
Priority: Normal
TO: Henry Cheever at GB-NEWYORK-04
TO: Richard J Poworosnek at CCMAIL_HUBPO
TO: John Cotter at CCMAIL_HUBPO
CC: Jeffrey SaterstaineChase at CCMAIL_HUBPO
CC: Edwin Jenkins
TO: Maggie Serravalli at GB-NEWYORK-13
TO: Martin Mussen
TO: Peter Biessard at GB-NEWYORK-05
TO: Patrick O'Brien at GB-NEWYORK-43
TO: John Costello at GB-NEWYORK-03
Subject: Prepaid Forwards -- Loans Vs Derivatives



----- Forwarded w/Changes -----
Author: Diane Butterfield at ccmail_hubpo 8/23/96 5:55 PM
TO: Bill Macomber at GB-NEWYORK-45
CC: Edwin Jenkins at GB-NEWYORK-45
CC: Ana Barrio Lopez @ CEC NOTES at ccmail_hubpo
CC: Jody A. Blumanfeld @ CEC NOTES at ccmail_hubpo
CC: Jeffrey Saterstaine @ CHASE at ccmail_hubpo
Subject: Prepaid Forwards -- Loans Vs Derivatives
----- Message Contents -----

John,

Please arrange to report the prepaid forwards as loans effective as of August 31, 1996. Also, please coordinate the reporting of these balances as loans in GES. Thank..

Bill

Forward Header

Subject: Prepaid Forwards -- Loans Vs Derivatives
Author: Diane Butterfield at ccmail_hubpo
Date: 8/23/96 5:55 PM

At our meeting with Joe and Mark on Monday, 8/19, it was decided that some interim guidance should be issued to Controllers relative indicators that they should look for in determining whether transactions should be recorded as loans or derivatives. Joe wanted to have this guidance go out as soon as possible so that people could focus on this issue. In addition to the list of indicators to be included in the guidance, the guidance should include examples of what we have seen to date and the reason we believe it is either a loan or a derivative. Another item to be included is that these items are not to be booked in Other Assets.

In our phone conversation subsequent to the meeting, you agreed to do an initial draft by 8/30 when you leave on vacation. You agreed to pass the initial draft onto us so that we can make changes to it while you are on vacation and then issue it upon your return.

Regards,
Diane
Display\$SWType: All other attachments - No conversion needed
\$SWType: PCDATA



JPMC116489

CONFIDENTIAL

JPMCBKR0012489

JPMNBY300062655

Author: Bill Macomber at GS-NEWYORK-43
Date: 8/28/96 12:14 PM
Priority: Normal
TO: Diana Butterfield at CCMAIL_HUBPO
TO: Ana Sarric Lopes at CCMAIL_HUBPO
TO: Jeffrey Saterstaine@Chase at CCMAIL_HUBPO
TO: John Cotter at CCMAIL_HUBPO
TO: Edwin Jenkins
CC: Mark Staines at GS-NEWYORK-20
CC: Patrick O'Brien at GS-NEWYORK-43
Subject: Loans/Deposits Documented as Derivatives

----- Message Contents -----

Please review the attached draft of an interim accounting policy guidance on Loans/Borrowings Documented as Derivatives. I want to discuss this draft with you before I leave for a long vacation. Can we meet Thursday afternoon or Friday morning?

Bill

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JPMCBKR0012490

JPMNBY300062656

Derivatives are not only the most complex instruments that controllers monitor, they are also the most variable in economic substance. While the ability to tailor the terms of a derivative transaction to satisfy a customer's request can enhance the Bank's revenues, sometimes a proposed derivative transaction causes significant accounting issues as well as "suitability" issues. In this context, Global Bank and Corporate Controllers recently became aware that timing of cash flows has occasionally been crafted in a way that a transaction is economically equivalent to lending by the Bank. Those transactions are in the process of being reclassified to loans. Upon reviewing a few other transactions, the outstanding balances are being reclassified as borrowings because that is their economic substance.

This memo provides you with interim accounting policy guidance to be applied to new transactions. Until we have an adequate sample of the transactions that are possibly at issue, the guidelines can only be fairly general and provide a few examples. You must exercise cautionary judgment whenever you apply this guidance. If you have doubt or concerns regarding the financial reporting for a transaction, you must consult with Global Bank Controller's Financial Advisory unit and your senior Business Unit Controller who will coordinate a response with Corporate Accounting Policy. Concerns regarding a possible "suitability" issue should be referred to the Legal Department (which is in the process of issuing guidelines???) and your senior Business Unit Controller.

INTERIM ACCOUNTING POLICY GUIDANCE

A transaction that is economically equivalent primarily to a loan should be reported as a loan, and one that is economically equivalent primarily to a borrowing should be reported as a borrowing. The principle factor determining whether a transaction is a loan (or a deposit) is a "time lag" between cash flows, excluding those that are inherently a market practice (such as semiannual or quarterly floating rate payment on an interest rate swap against an annual fixed rate payment.) Additional factors indicative of a lending transaction are (a) absence of market risk to the Bank, although interest rate sensitivity to the Bank's NII is incurred; (b) a strike price for a purchased option that makes it almost inevitable that the option will be exercised and produces a large premium payment by the Bank; or (c) an interest rate swap that has a very far off market rate and produces a large upfront payment by the Bank.

EXAMPLES OF LOANS DOCUMENTED AS DERIVATIVES

Transaction One, which is documented as a prepaid commodity swap with no market risk: A clear example of a loan that could be documented as a derivative is a transaction that requires the Bank to make a \$10 million cash payment today and requires the customer to deliver in 30 days a quantity of a commodity to be determined based on the commodity price at the delivery date. When the quantity is determined, the related market value of the commodity to be delivered will be equal to a \$10 million loan plus interest for 30 days. (Need to address whether the Bank has a commitment to purchase the commodity at a future date which should be included in schedule RCL of the Call Report.)

Transaction Two, which is documented as a prepaid commodity swap with market risks: Even if Transaction One is modified so that at the inception of the transaction a known quantity of the commodity is to be delivered, the transaction is primarily a loan due to the time lag between the Bank's payment and the subsequent receipt of the commodity. (Need to address reporting the impact of market risk on SOC, I&E and RAC/Call Report.)

Transaction Three, which is documented as an off current market rate FX option having market risks: If the Bank purchases an FX option to buy Sterling 10 million for US Dollars 10 million, exercise of the option would be almost inevitable. Because the option is deep in the money (strike price of 1 Pound to 1 USD compared to a market price of say 1 Pound to USD 1.54), the Bank would be required to make a

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large upfront payment. Although this transaction has market risk, it is primarily a loan. (Need to address reporting the impact of market risk on SOC, I&E and RAC/ Call Report.)

Transaction Four, which is documented as an interest rate swap having no market risk: The cash flows of a swap can be structured to be a set of fixed cash inflows and outflows occurring at different dates. This transaction is similar to Transaction One because it has no market risk, albeit having funding/reinvestment risk that would impact NII. The "notional" amounts of this transaction, if any, should not be included in any Risk Adjusted Capital or Call Report disclosure.

Transaction Five, which is documented as an interest rate swap having market risk: If under a USD interest rate swap the Bank is to receive a fixed rate of say 1000 basis points over current market, a related upfront payment by the Bank is primarily a loan. (Need to address the impact of market risk on SOC, I&E and RAC/Call Report)

OFF CURRENT MARKET RATE DERIVATIVES TO BE REPORTED AS TRADING

An off current market rate derivative should be reported as a trading position when the customer's purpose is to exactly offset an existing risk position and the cash paid or received by the Bank is not significant to the transaction. To ensure that cautionary judgment is applied to the reporting of such transactions, you need to refer to Global Bank Controller's Advisory unit and your senior Business Unit Controller each such transaction that results in a cash flow exceeding \$5 million having a "time lag" as the term is used under the Interim Accounting policy Guidance above.

For this purpose, the absolute sum of cash flow for (a) any series of similar transactions and/or (b) payments or receipts from one transaction. For an off current market rate option, the cash flow is limited to the amount of the premium attributable to a strike price over or under the current market rate.

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JPMCBKR0012492

JPMNBY300062658

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION
4 In Re: ENRON CORPORATION * MDL Docket No. 1446
5 SECURITIES LITIGATION *
6 * Civil Action No. H-01-3624
7 MARK NEWBY, ET AL., * (Consolidated)
8 INDIVIDUALLY AND ON BEHALF *
9 OF ALL OTHERS SIMILARLY * CLASS ACTION
10 SITUATED, *
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VIDEOTAPED ORAL DEPOSITION
OF MARC J. SHAPIRO
VOLUME 2
JUNE 16, 2004

1 A. My answer is that I don't recall the exact
2 terminology that we used in our discussion.

3 Q. Do you have any doubt that he expressed this
4 viewpoint that we've been discussing?

5 MR. ANGIOLILLO: Object to the form of
6 the question. He's already answered your question. Now
7 you're just arguing with him.

8 A. I have no doubt that this is his e-mail.

9 Q. (BY MR. JACONETTE) And in 1999, did
10 Mr. Layton express to you his viewpoint that he had a
11 question as to -- strike that, and I'll withdraw the
12 question.

13 In 1999, did Mr. Layton express to you
14 the question whether or not pricing was right on what he was
15 calling disguised loans versus the loan market, or if the
16 pricing was underpriced versus the loan market?

17 MR. ANGIOLILLO: Object to the form.

18 A. There was -- there were several issues that we
19 discussed relative to these types of trading transactions
20 where money was advanced, in particular whether we were
21 getting the same returns as we would get on other types of
22 advances, including loans, whether they were subject to the
23 same approval processes, whether we were allocating capital
24 in a consistent way and whether we were reporting our
25 exposures in a consistent way. So all of those were issues

1 disguised as derivatives to the term, quote,
2 derivatives-based funding?

3 MR. ANGIOLILLO: Object -- object to the
4 form of the question. I also would ask counsel if he'd
5 permit the witness to read this five-page memo.

6 Q. (BY MR. JACONETTE) Would you please answer
7 the question. Then if you would like to review more of the
8 document, you're welcome to.

9 MR. ANGIOLILLO: I object to that
10 procedure since the witness has already testified he's never
11 seen document before. Now you're asking him to offer a view
12 about -- about a portion of the document. Why don't you let
13 him read the document?

14 MR. JACONETTE: I'll do better than that.

15 Q. (BY MR. JACONETTE) We're going to break right
16 now, and, Mr. Shapiro, you can go ahead and review that
17 document during the break.

18 A. Okay.

19 THE VIDEOGRAPHER: We're off record. The
20 time is 9:43.

21 (A recess was taken.)

22 THE VIDEOGRAPHER: We are back on record.
23 The time is 9:50.

24 MR. JACONETTE: We've placed a phone call
25 to Judge Harmon's chambers for the purpose of setting up a

1 DBFs"?

2 A. Yes, I do.

3 Q. Would you please read the second paragraph?

4 A. I'm reading from a draft, for discussion
5 purposes only, of a discussion of accounting issues. I'm
6 sorry. Which paragraph would you like me to read?

7 Q. The second paragraph, under "Differentiation
8 of DBFs."

9 A. "Upfront payment equal to notional amount. In
10 these structures, the upfront amount is analogous to loan of
11 a principal amount, and the amounts received over time are
12 the return of principal and interest. Examples of such
13 transactions are prepaid forwards and monetized collars.
14 Proposal: Report as -- report as debt and equity
15 instruments."

16 Q. Having reviewed and read this, do you recall
17 that in 1999, Chase internally differentiated
18 derivatives-based funding transactions, and one such
19 transaction was described internally by Chase as a pre --
20 prepaid forward transaction, as set forth in this example
21 that you've just read?

22 MR. ANGIOLILLO: I object to the form
23 because it lacks foundation.

24 A. No. I don't believe I've seen this document
25 before -- before today.

1 A. Okay.

2 Q. (BY MR. JACONETTE) Okay. Have you had any
3 conversations with Mr. Dellapina about this discussion that's
4 reflected in the transcript of taped telephone call in front
5 of you?

6 MR. ANGIOLILLO: Object to the form of
7 the question. Also note that this is a transcript prepared
8 by someone working apparently for the U.S. Senate Permanent
9 Subcommittee on Investigations.

10 A. I've not had a conversation with Mr. Dellapina
11 about this transcript.

12 Q. (BY MR. JACONETTE) Have you had any
13 conversations with Mr. Dellapina about a conversation he had
14 with Messrs Traband and Ballentine, wherein Mr. Traband used
15 the term "circular deal"?

16 MR. ANGIOLILLO: May I have the question
17 read back, please?

18 (Requested text read.)

19 MR. ANGIOLILLO: Object to the form of
20 the question, and it lacks foundation.

21 A. I don't recall any such conversations.

22 Q. (BY MR. JACONETTE) Have you had any
23 conversations with Mr. Traband about that?

24 A. I don't --

25 MR. ANGIOLILLO: Same -- same objections.

1 MR. ANGIOLILLO: Same objection.

2 A. No, I have not.

3 Q. (BY MR. JACONETTE) Have you spoken with
4 anyone, other than counsel, to -- concerning efforts to
5 retrieve e-mails that might have been deleted by Chase
6 employees and which concerned Chase's business with Enron?

7 MR. ANGIOLILLO: May I have the question
8 read back?

9 (Requested text read.)

10 MR. ANGIOLILLO: Object to the form of
11 the question, and I would respectfully ask you to rephrase it
12 because it suggests facts that you haven't laid a foundation
13 for.

14 A. I've had no discussions, and I'm not aware of
15 any such efforts.

16 MR. JACONETTE: Let's take a 10-minute
17 break. We'll go back on, and then we'll take lunch at noon.

18 THE VIDEOGRAPHER: We're off record. The
19 time is 11:26.

20 (A recess was taken.)

21 BEGINNING OF TAPE NUMBER 2:

22 THE VIDEOGRAPHER: We're back on record.
23 The time is 11:40. This is the beginning of Tape 2.

24 Q. (BY MR. JACONETTE) Mr. Shapiro, what is
25 Chemical Investments, Inc.?

1 to discuss possible ways of refinancing prepays, along with
2 certain other transactions, in a manner that would shift
3 Chase's credit exposure to other parties?

4 A. I don't know.

5 Q. Has anybody other than counsel informed you of
6 a meeting in December 1998 between Chase and Enron's
7 treasurer and other Enron officials to discuss possible ways
8 of refinancing prepays?

9 MR. ANGIOLILLO: Object to the form of
10 the question. It lacks foundation.

11 A. No. No one has informed me of such a meeting.

12 Q. (BY MR. JACONETTE) Have you previously been
13 made aware -- this is through information other than through
14 counsel -- that there was a concern expressed in Chase that
15 through certain ways of refinancing prepays, along with other
16 transactions in a manner that would shift Chase's credit
17 exposure to other parties, there might be a -- a danger that
18 credit rating agencies would gain knowledge of existing
19 prepays?

20 MR. ANGIOLILLO: May I have it read back,
21 please?

22 (Requested text read.)

23 MR. ANGIOLILLO: Object to the form of
24 the question. It lacks foundation.

25 A. The answer to the question is, no.

1 Q. (BY MR. JACONETTE) Would you please look at
2 Paragraph 35 on this page, Mr. Shapiro?

3 A. Okay.

4 Q. There's a November 13, 2000 memorandum
5 referenced there. Have you seen that memorandum before?

6 A. Not that I recall.

7 Q. Has anybody discussed that memorandum with
8 you, other than counsel?

9 MR. ANGIOLILLO: Object to the form.

10 A. No.

11 MR. ANGIOLILLO: It lacks foundation.

12 A. No.

13 Q. (BY MR. JACONETTE) Do you see the
14 September 13, 2001 audiotaped phone call referenced in
15 Paragraph 36 on this same page --

16 A. Yes, I do.

17 Q. -- Mr. Shapiro? Have you heard a tape of this
18 phone call before?

19 A. No, I have not.

20 Q. Have you seen a transcript of this phone call
21 before?

22 A. I don't recall that I have.

23 (Deposition Exhibit 30126 was marked.)

24 Q. (BY MR. JACONETTE) Mr. Shapiro, the court
25 reporter has handed you Exhibit Number 30126.

1 it better.

2 A. Okay. I believe there were a series of swaps
3 between Chase and Enron, and I believe there were ultimately
4 physical sales between Chase and Enron.

5 Q. And you understand --

6 A. I'm not sure whether that was all
7 contractually agreed to or not.

8 Q. And you understand the transaction that I'm
9 talking about, correct?

10 A. Generally speaking, I do understand the
11 transaction.

12 MR. ANGIOLILLO: Object to the form of
13 the question.

14 Q. (BY MR. JACONETTE) And you understand that
15 transaction had three -- had a number of components, and
16 three of them are described here; is that correct?

17 MR. ANGIOLILLO: I object to the form of
18 the question, and it lacks foundation. And you -- you
19 haven't established that this witness has personal knowledge
20 of what the details of that particular transaction were.

21 A. My understanding is that these elements were
22 part of the overall arrangements --

23 Q. (BY MR. JACONETTE) And they were --

24 A. -- but I don't think it accurately is
25 described as a complete circle.

1 going to talk about finance and risk management, but you can
2 take finance separately, if you want to talk about that.

3 A. Well, I'm sorry. I had other responsibilities
4 besides finance and risk management, so I was trying to
5 clarify.

6 Q. Yes. I'm only going to focus on finance and
7 risk management.

8 A. Okay. That -- that structure was similar to
9 that. I'm sure that there were various changes along the way
10 in terms of -- of the exact reporting and who reported to who
11 and who did what function and -- and who the people were.
12 But the -- but the relative constants in it were Ms. Dublon
13 and Mr. Sclafani.

14 Q. I want to talk a little bit about an issue
15 that you wanted to talk about a lot yesterday, which are the
16 prepays, and I want to get your understanding of prepays over
17 various points in times. And I want to distinguish, if you
18 will, with me what you knew when.

19 A. Okay. Best I can.

20 Q. Okay. Can you tell me when you first became
21 aware that -- and I'm going to use J.P. Morgan Chase to mean
22 J.P. Morgan or Chase, whichever one you worked for at the
23 time, from the time you began with TCB, up through and
24 including the merger.

25 When did you first become aware that

1 J.P. Morgan Chase was engaging in prepay transactions such as
2 the prepay transactions that are the subject of this lawsuit?

3 MR. ANGIOLILLO: I object to the form of
4 the question. Move to strike everything prior to "when did
5 you become aware" as not a question.

6 Q. (BY MS. SAMMONS) You can answer.

7 A. The answer is, in 1999.

8 Q. Okay. How did you become aware?

9 A. I became aware because I had been looking at a
10 daily income statement that we received -- or that I received
11 related to our -- relating to our trading activities, and
12 there was a sizable income item relating to one particular
13 unit.

14 And, so, I inquired about the origin of
15 that income, and when I was told that it was a -- a commodity
16 swap, prepaid commodity transaction, and I believe it was a
17 gold transaction, I inquired if -- if I could have a better
18 understanding of what the transaction was and what the risks
19 involved were.

20 I asked that of David Pflug, who was the
21 credit officer generally responsible for our trading
22 activities. So David arranged a meeting for me with some of
23 the people in that unit to explain the use of prepaid
24 commodity transactions.

25 Q. So as I recall -- as -- as I understand your

1 reference to any of the documents, that's what your memory
2 is, correct?

3 MR. ANGIOLILLO: Object to the form of
4 the question.

5 A. As best I can recall, when you say I learned
6 about it, I asked questions about it previous to that time,
7 so I would have had some discussion with somebody. But the
8 first full discussion, to the best of my recollection, absent
9 these memorandum, was in August of 1999.

10 Q. (BY MS. SAMMONS) And the discussion that you
11 had in August of 1999 was simply to get an understanding of
12 the prepay activity that J.P. Morgan Chase was engaging in,
13 correct?

14 MR. ANGIOLILLO: I object to the form of
15 the question. His prior testimony speaks for itself.

16 A. Yes. That was the purpose of it.

17 Q. (BY MS. SAMMONS) Okay. After -- did you do
18 more than attend the meeting in August 1999 to get an
19 understanding of those products?

20 A. If I did more to get an understanding? I
21 don't recall that I did any more to get an understanding of
22 them. I -- I raised questions that came out of that meeting
23 about the way the bank was handling the transactions from an
24 accounting and reporting point of view. But I don't recall
25 that I did anything additionally to get a better

1 out to five years, and the real -- and the question I was
2 raising was how much of the revenue should be deferred and
3 recognized over that extended time period, not whether it was
4 in June or July. I think this is apparently a different
5 issue, and I'm not sure I really got into this issue at all.

6 Q. The -- did you really get into at all the
7 issue of whether or not mark-to-market treatment of the
8 transactions was appropriate?

9 A. Yes.

10 MR. ANGIOLILLO: Object to the form.

11 A. I mean, yes, that's an issue I -- I raised.

12 Q. (BY MS. SAMMONS) Okay. And this memo
13 indicates that at the meeting, Joe Sclafani was supportive of
14 the mark-to-market treatment of the transactions, as was
15 Lesley. Do you know what the debate was surrounding whether
16 or not mark-to-market treatment of the transactions was
17 appropriate?

18 MR. ANGIOLILLO: Object to the form. Do
19 you mean independent of this -- this meeting? My problem
20 with the question is, is the witness doesn't recall this
21 meeting, so --

22 MS. SAMMONS: Let me -- let me rephrase.

23 MR. ANGIOLILLO: Thank you.

24 Q. (BY MS. SAMMONS) And I am -- I am using this
25 document because I understand you don't recall the meeting,

1 mark-to-market treatment of the prepays was appropriate back
2 in this time period, correct?

3 A. That's what this memo seems to indicate, but I
4 don't have an independent recollection of it.

5 Q. Okay. And that's because that isn't what you
6 were primarily focused on. What you do have an independent
7 recollection of is whether, given a mark-to-market
8 accounting, at what point you recognize the revenue, correct?

9 MR. ANGIOLILLO: Objection to the form.
10 It's inappropriate to put words in the witness's mouth.

11 A. Yeah. I think the issue for me was were we
12 accounting for it appropriately. That's -- that's a pretty
13 open-ended question. And what I asked was had everybody
14 reviewed these transactions to make sure that we were
15 accounting for them appropriately.

16 Q. (BY MS. SAMMONS) Okay.

17 THE VIDEOGRAPHER: Excuse me, Counsel.
18 We need to change tapes in less than five minutes.

19 MS. SAMMONS: Okay.

20 MR. ANGIOLILLO: Why don't we just make a
21 quick tape change and stay -- stay in place.

22 MS. SAMMONS: Sure, sure.

23 THE VIDEOGRAPHER: We're off record. The
24 time is 2:22. This is the end of Tape 2.

25 (A recess was taken.)

1 MR. ANGIOLILLO: Object to the form.

2 Asked and answered.

3 A. Well, that's one of the things I was focused
4 on. I was also focusing on our control systems and our
5 reporting systems.

6 Q. (BY MS. SAMMONS) Okay. And I was just
7 focusing on the accounting --

8 A. On accounting.

9 Q. -- issue there. So is it fair to say that
10 from an accounting standpoint, what you recall your focus as
11 being in 1999 was the revenue recognition under a
12 mark-to-market accounting treatment?

13 MR. ANGIOLILLO: Objection to the form of
14 the question and to your effort to recast his testimony.
15 He's given you his answers.

16 A. My -- my questions were about the accounting,
17 were we accounting for it appropriately. When I got
18 responses about how we were accounting for it, I further
19 inquired about are we certain about the timing of the
20 recognition. And I believe I satisfied myself that we were
21 doing it appropriately.

22 Q. (BY MS. SAMMONS) Okay. This -- I'll ask you
23 to look back at 30110, which is written by Ms. Caruso after
24 the meeting that apparently took place on July 8, 1999. Near
25 the end of the first paragraph, it says, the --

1 A. I don't have an independent recollection of
2 the meeting.

3 Q. (BY MS. SAMMONS) So you're not going to
4 answer the question?

5 MR. ANGIOLILLO: I'm sorry. That's -- I
6 move to strike. That's -- that's -- that's not fair.

7 Q. (BY MS. SAMMONS) If you have an independent
8 recollection that differs from this, I want to know about it.

9 A. I don't --

10 Q. Do you have an independent recollection that
11 is different from what is expressed in Exhibit 30110?

12 A. I don't have --

13 MR. ANGIOLILLO: And I object to the
14 raising of the voice. The witness has testified that he does
15 not recall the meeting.

16 A. I don't have an independent recollection that
17 would either confirm or deny what he said.

18 Q. (BY MS. SAMMONS) Do you have an independent
19 recollection of doing anything after the meeting in July 8th,
20 1999, to make sure you were comfortable with the accounting
21 treatment and market risk's assessment of the trade?

22 MR. ANGIOLILLO: Same objection.

23 A. Well, this is a -- as I indicated, there were
24 a number of studies that went on throughout the fall. This
25 related to one particular trade. But on the general subject,

1 STATE OF TEXAS X

2 COUNTY OF DALLAS X

3 I, LISA M. DURHAM, Certified Shorthand Reporter duly
4 commissioned and qualified in and for the State of Texas, do
5 hereby certify that there came before me on the 16th day of
6 June, 2004, at the offices of the Houston Deposition Center,
7 located at 1111 Bagby, Suite 2100, in the City of Houston,
8 County of Harris, State of Texas, the following named person,
9 to-wit: MARC J. SHAPIRO, Volume 2, who was duly sworn to
10 testify the truth, the whole truth and nothing but the truth
11 of his knowledge touching and concerning the matters in
12 controversy in this cause; that he was thereupon examined
13 upon his oath and his examination reduced to typewriting
14 under my supervision; that the deposition is a true record of
15 the testimony given by the witness, and signature of the
16 witness is to be before any Notary Public.

17 I further certify that I am neither attorney
18 for, nor related to or employed by, any of the parties to the
19 action in which this deposition is taken, and further that I
20 am not a relative or employee of any attorney or counsel
21 employed by the parties hereto, or financially interested in
22 the action.

23

24

25

1 That the amount of time used by each party at the
2 deposition is as follows:

3
 MR. JACONETTE: 2 hours, 10 minutes

4 MS. SAMMONS: 1 hour, 6 minutes

5 Given under my hand and seal of office on this the
6 23rd day of June, A.D., 2004.

7
8
9

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My certification expires 12/31/05

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

In Re: ENRON CORPORATION * MDL Docket No. 1446
SECURITIES LITIGATION *

MARK NEWBY, ET AL., * Civil Action No. H-01-3624
INDIVIDUALLY AND ON BEHALF * (Consolidated)

OF ALL OTHERS SIMILARLY *
SITUATED, * CLASS ACTION
*

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. *

VIDEOTAPED ORAL DEPOSITION
OF MARC J. SHAPIRO
VOLUME 3
JUNE 17, 2004

1 don't -- we don't talk about our client -- our other client
2 relationships, though. But I -- I mean, I recall one or two
3 names.

4 Q. Can you tell me what those names are, please?

5 A. I'd -- I'd have to ask my attorney if that's
6 privileged or not privileged. Is that an appropriate
7 question to ask?

8 Q. We are under a confidentiality order, and it
9 won't be used outside this litigation.

10 MR. ANGIOLILLO: Well -- well, I would --
11 I would ask, then, for the question to be clarified. Katie,
12 are you asking about what was discussed at the meeting, or
13 are you asking for the former vice chairman of the bank's
14 recollection as to clients that did business with the bank at
15 that time in a certain area?

16 MS. SAMMONS: I'm asking him for his
17 recollection of the other larger clients at J.P. Morgan Chase
18 who were doing prepays in the time period August 1999.

19 MR. ANGIOLILLO: Well, I -- I object to
20 the form of the question. And as I understand it now, the
21 question is independent of this meeting. You're not asking
22 for his recollection of what was discussed at the meeting
23 now? Because I think the record needs to be clear on this.

24 MS. SAMMONS: Well, I'll ask it both
25 ways, then, so the record is clear.

1 MR. ANGIOLILLO: Okay.

2 Q. (BY MS. SAMMONS) First of all, can you tell
3 me your recollection from the meeting of what larger clients
4 who used -- who used prepays as a product from -- of
5 J.P. Morgan Chase back in the August 1999 time frame were?

6 THE WITNESS: And let me just ask again,
7 of counsel that's --

8 MR. ANGIOLILLO: You're permitted to
9 answer the question.

10 THE WITNESS: Okay.

11 A. The ones I remember from the meeting were
12 Occidental Petroleum and Barrick Gold.

13 Q. (BY MS. SAMMONS) And Barrick --

14 A. Barrick Gold.

15 Q. -- Gold. Did either of those clients use
16 prepays that included gas or oil as a commodity?

17 MR. ANGIOLILLO: I object to the form of
18 the question. Are we now, again, at the meeting, or are we
19 asking a different question?

20 MS. SAMMONS: I'm asking a different
21 question.

22 A. You're asking me whether I know now?

23 Q. (BY MS. SAMMONS) Yes.

24 A. Occidental did.

25 Q. They used --

1 don't recall whether or not you were involved in a
2 conclusion -- in making a conclusion that the classification
3 was correct based on the premise that the assets are really
4 derivatives?

5 MR. ANGIOLILLO: Object to the form.

6 A. That's correct. I don't recall, other than
7 what I've told you.

8 Q. (BY MS. SAMMONS) Yesterday I asked you for a
9 list of your independent recollection, that is, your
10 recollection apart from anything that you've learned in the
11 course of this litigation, about the analysis that was
12 performed at J.P. Morgan Chase into the accounting of
13 prepays.

14 And you've listed for me some things that
15 you remembered, one of which was the August 1999 meeting.
16 You also said you recalled that studies were initiated and
17 handled. Do you have any specific recollection about, first,
18 who was handling those studies that you referred to
19 yesterday?

20 MR. ANGIOLILLO: Object to the form of
21 the question. I believe he asked and he answered that
22 question yesterday, but --

23 Q. (BY MS. SAMMONS) Go ahead and answer.

24 A. We reviewed some memos that indicated that the
25 studies were done and -- and who some of the people were who

1 months.

2 Q. And do you recall -- did the -- did the issue
3 of how J.P. Morgan Chase was accounting for prepays sort of
4 remain open during that entire period, the -- let me say that
5 again.

6 Did the issue of whether or not
7 J.P. Morgan Chase was properly accounting for prepays remain
8 an open issue throughout that several-month period that you
9 were talking with Mr. Layton?

10 MR. ANGIOLILLO: Lacks foundation.
11 Object to the form.

12 A. I'm not sure I'd say it was an open issue.
13 We -- we had a discussion -- I didn't really discuss with
14 Mr. Layton the accounting. That would have been a discussion
15 with Ms. Dublon and Joe Sclafani.

16 The finding, essentially, was that we
17 were accounting for it correctly. So it's hard for me to say
18 exactly whether it was an open issue or not.

19 Q. (BY MS. SAMMONS) Well, I guess my question
20 is: When was that decision that you were accounting for it
21 correctly made, to the best of your recollection?

22 MR. ANGIOLILLO: Same objections.

23 A. I don't have a specific date that I can
24 recall.

25 Q. (BY MS. SAMMONS) Do you have a general

1 accurate that whoever wrote the e-mail to Mr. Pflug, they
2 described it as an amortizing oil loan, correct?

3 MR. ANGIOLILLO: Object to the form of
4 the question. Are you asking whether the words appear on the
5 page?

6 MS. SAMMONS: Yes, I am.

7 MR. ANGIOLILLO: Well, I can confirm that
8 the words appear on the page.

9 MS. SAMMONS: I'm asking the witness to.

10 THE WITNESS: I think --

11 MR. ANGIOLILLO: It's -- it's a pointless
12 question.

13 THE WITNESS: I think --

14 MR. ANGIOLILLO: I object and ask if you
15 would rephrase it.

16 Q. (BY MS. SAMMONS) Go ahead and answer.

17 A. I think this person characterized it as an oil
18 loan booked in global markets as a trading asset.

19 Q. Okay. I want to talk to you a little bit more
20 generally, then, about prepays for a few minutes. As you
21 understand it, the prepays in which J.P. Morgan Chase engaged
22 with Enron, they were a form of financing, correct?

23 A. There's no question they were a form of
24 financing.

25 Q. Okay. And is it correct that there are

1 numerous forms of financing, one of which is a loan?

2 A. That is a correct statement. There are
3 numerous forms of financing, one of which is a loan.

4 Q. Okay. It is, I understand, your position,
5 sitting here today, that a prepay is not a loan, correct?

6 A. There's no question that a prepay standing by
7 itself is not a loan.

8 Q. It is also, as I understand it, your position,
9 sitting here today, that the Enron prepays in which
10 J.P. Morgan Chase participated were not loans, correct?

11 MR. ANGIOLILLO: Object to the form of
12 the question.

13 A. The Enron prepays in which J.P. Morgan Chase
14 participated were not loans.

15 Q. (BY MS. SAMMONS) Okay. Sitting here today,
16 that's your position, correct?

17 A. Absolutely.

18 Q. And I believe that you testified earlier that
19 you formed that position subsequent to the surety litigation
20 being filed, correct?

21 MR. ANGIOLILLO: Object to the form of
22 the question. It's inconsistent with his testimony.

23 A. Well, as I indicated, I had a review of
24 accounting issues regarding the general subject of prepays in
25 1999 and satisfied myself that they were correctly classified

1 as trading assets.

2 With regard to the Enron transactions, at
3 that time, in 1999, I did not have a detailed review of the
4 specifics of each transaction. Subsequently, I have done a
5 detailed review of the specifics of each transaction, and I
6 have concluded that they were properly accounted for as
7 trading assets --

8 Q. Okay.

9 A. -- and liabilities.

10 Q. Okay. The detailed review that you have done
11 of the Enron prepays was subsequent, though, to litigation
12 being filed against J.P. Morgan Chase, correct?

13 MR. ANGIOLILLO: Object to the form of
14 the question. Are you talking about his personal review?

15 Q. (BY MS. SAMMONS) Go ahead and answer.

16 MR. ANGIOLILLO: No. Could we just have
17 it clarified on the record so the question is clear?

18 MS. SAMMONS: If he needs it clarified,
19 he can ask.

20 MR. ANGIOLILLO: I'm asking you
21 respectfully, Counselor, rather than ask an ambiguous
22 question, would you just clarify that you're asking about the
23 individual's personal review.

24 Q. (BY MS. SAMMONS) If you have a -- if you have
25 a question about my question, it's unclear to you, go -- we

1 have an agreement that you'll go ahead and tell me that,
2 right?

3 A. Yes.

4 Q. Okay.

5 A. My review started in very early December of
6 19 -- of 2001, which was a few days prior to our bringing
7 suit against the surety company.

8 Q. Okay. So back in the time period when you --
9 in the 1999 time period, when you did the analysis, you did
10 not have a detailed understanding of how the Enron prepays
11 worked, correct?

12 MR. ANGIOLILLO: Object. Repetitive.

13 A. I did not have a -- a detailed review of the
14 specific mechanics of the Enron prepays in 1999.

15 Q. (BY MS. SAMMONS) The structure of the --

16 MR. ANGIOLILLO: May you allow the
17 witness to finish without interrupting him?

18 Q. (BY MS. SAMMONS) The structures of the
19 prepays, you did not --

20 MR. ANGIOLILLO: Could we have that
21 agreement, Counselor?

22 Q. (BY MS. SAMMONS) -- you didn't understand the
23 structures --

24 MR. ANGIOLILLO: Counselor, could we have
25 that agreement that we would allow the witness to answer?

1 MS. SAMMONS: If you will -- if we can
2 have an agreement that you will stop interrupting me and you
3 will stop interrupting this deposition.

4 MR. ANGIOLILLO: Respectfully, Counselor,
5 if you interrupt the witness when he's answering the
6 question, it's -- it's just not going to make a clear record.
7 So I would just ask that you allow the witness to answer.

8 Q. (BY MS. SAMMONS) Let's go back to my
9 question. Okay. Back in the 1999 time period, you did not
10 have an understanding of the structure of the Enron prepays,
11 correct?

12 MR. ANGIOLILLO: Asked and answered
13 several times.

14 A. I did not do an independent review of the
15 specifics of the Enron transactions in 1999.

16 Q. (BY MS. SAMMONS) And that wasn't my question.
17 My question is: Did you, in 1999, have an understanding of
18 the structure of the Enron prepay transactions?

19 MR. ANGIOLILLO: Asked and answered, and
20 you're now arguing.

21 A. I did not do an independent review of the
22 specifics of the Enron transaction in 1999.

23 Q. (BY MS. SAMMONS) And because you didn't do an
24 independent review, you did not have an understanding of the
25 structure, correct?

1 MR. ANGIOLILLO: Object to the form of
2 the question.

3 A. I did not do a detailed review of the Enron
4 transaction in 1999.

5 Q. (BY MS. SAMMONS) Did you have a -- a -- even
6 if you didn't do a detailed review, did somebody else tell
7 you what the structure was back in 1999?

8 A. I don't recall whether someone told me the
9 specifics of the structure back in 1999.

10 Q. So sitting here today, you can't say you had
11 any understanding of the structure of the Enron prepays back
12 in 1999, correct?

13 MR. ANGIOLILLO: Object to the form of
14 the question, and you're now misstating his last answer.

15 A. I did not do a specific review of the specific
16 Enron transactions in 1999.

17 MS. SAMMONS: Could you read back my last
18 question, please?

19 (Requested text read.)

20 MR. ANGIOLILLO: Objection stands.

21 Q. (BY MS. SAMMONS) Can you answer that? Could
22 you answer that question, please?

23 MR. ANGIOLILLO: I -- I believe the
24 witness already answered it.

25 A. Well, I think any understanding is a pretty

1 broad question. I certainly had some understanding, but I
2 did not do a specific detailed review of the Enron
3 transactions.

4 Q. (BY MS. SAMMONS) What was your understanding
5 of the structure of Enron prepay transactions back in 1999?

6 A. My understanding was that we advanced them
7 money, and they promised to pay us back in -- in a commodity
8 of oil and gas.

9 Q. Back when you did the review of the accounting
10 for the prepay structures back in 1999, as part of that
11 review, did you analyze whether or not the prepay transaction
12 was a loan?

13 MR. ANGIOLILLO: Object to the form of
14 the question, and I -- and it lacks foundation about him
15 doing a review.

16 MS. SAMMONS: And if you continue to make
17 speaking objections that tell the witness what answers you
18 want the witness to give, I will, in fact, call the Court,
19 and we will have a hearing on this.

20 MR. ANGIOLILLO: Counselor, I don't mean
21 to -- I really would like --

22 MS. SAMMONS: Let's go ahead --

23 MR. ANGIOLILLO: Counselor, I would
24 really like to get through this, but you can't -- you
25 can't -- in a professional way, you can't just make up what

1 he testified to earlier. All right. You just can't.

2 MS. SAMMONS: Would you read my question
3 back, please?

4 (Requested text read.)

5 A. I reviewed the general issue of whether
6 prepaid commodity transactions should be classified as a loan
7 or a trading asset on our books, and I concluded that they
8 should be classified as a trading asset.

9 Q. (BY MS. SAMMONS) Can you tell me all of the
10 reasons why you concluded, in 1999 -- and I don't want to
11 know the reasons that you've come up with since the surety
12 litigation was filed. But can you tell me the reasons that
13 you personally concluded back in 1999 that the Enron prepays
14 were not loans?

15 MR. ANGIOLILLO: Object to the form.

16 A. There were two reasons. One was that the
17 amount of the obligation from the counterparty to us
18 fluctuated with the price of the commodity, and, therefore,
19 there would have been no way to capture that fluctuation
20 under conventional loan accounting.

21 The second reason was that the accounting
22 policy people in the bank, the chief accountant in the bank
23 and our external auditors advised me that their opinion was
24 that that was the correct accounting.

25 Q. (BY MS. SAMMONS) And the chief accounting

1 individuals to make sure that the global exposure system was
2 reporting accurately the exposures the bank had. And the
3 responsibility from that -- for that was delegated to those
4 people. How they went about doing their job and how they
5 made sure that happened was something that -- that I do not
6 have familiarity with.

7 Q. (BY MR. SIEV) Okay. I understand you don't
8 have actual familiarity with it. I'm asking if your
9 anticipation is that in making that determination, those
10 individuals would have an understanding of all of the
11 material aspect of the particular transaction.

12 MR. ANGIOLILLO: Object to the form.
13 Asked and answered a couple times.

14 A. My belief, in looking at reports from the
15 global exposure system, was that it was the responsibility of
16 people who monitored that system to make sure that it was
17 reporting accurately.

18 Q. (BY MR. SIEV) In connection with the --
19 withdrawn. What did J.P. Morgan Chase do with the
20 information that it gathered on particular borrowers --
21 borrowers under the global exposure system?

22 A. Well, we used it as a basis for determining
23 whether we could do additional transactions with that client
24 and for aggregating how much exposure we had so we could
25 determine what approval level was necessary for additional

1 commitment that would be, in effect, a second lien on those
2 pipelines with an equity -- with a provision that would
3 benefit from any increase in the value of Enron stock.

4 Q. (BY MR. SIEV) Okay. And I believe you had
5 testified about both of those in earlier testimony, so we
6 won't go back through that. Were there other credit
7 facilities or extensions of credit that were being discussed
8 in that time frame?

9 A. I'm sure there were other ideas considered,
10 but I can't recall exactly what they were.

11 Q. Was J.P. Morgan Chase willing to commit
12 additional funds to Enron under new facilities on an
13 unsecured basis at that point in time, which was late
14 October 2001?

15 A. I don't believe we were.

16 Q. Why is that?

17 A. Because I think we had a level of unsecured
18 exposure that was already very high relative to our allowable
19 concentrations and because of the condition of the company.

20 Q. Other than Dynegy, which we'll discuss in a --
21 in a minute, were there other merger candidates or proposals
22 discussed in the October 2001 time frame?

23 MR. ANGIOLILLO: Object to the form. It
24 lacks foundation.

25 A. Yes. We discussed what other companies might

1 MR. ANGIOLILLO: Before -- before the
2 witness answers the question, I have conferred with -- with
3 my client. To answer that question, in my judgment, would
4 reveal an attorney/client communication. Notwithstanding,
5 I'll allow him to answer the question if I have the express
6 understanding that by answering the question, we have not in
7 any way waived -- any way waived the attorney/client
8 privilege with respect to the subject matter.

9 MR. SIEV: Okay. We will not use the
10 fact that you allowed the witness to answer this as any
11 argument in favor of any waiver of the attorney/client
12 privilege.

13 MR. ANGIOLILLO: Okay. You may answer
14 the question.

15 A. The answer is that I was advised by our
16 attorneys that, absent a settlement, J.P. Morgan Chase would
17 not be indicted by the district attorney's office.

18 Q. (BY MR. SIEV) In your discussions with
19 representatives of the district attorney's office, were you
20 advised which individuals at J.P. Morgan Chase might face
21 indictment absent a settlement?

22 MR. ANGIOLILLO: That lacks foundation,
23 and I'd also like to have the question read back.

24 (Requested text read.)

25 A. As I indicated, I do not recall specifically

1 is that correct?

2 MR. OWENS: Objection. Form.

3 MR. ANGIOLILLO: I object. That's -- I
4 object to the form of the question. That is -- that -- that
5 is at considerable variance with what the witness previously
6 testified.

7 THE REPORTER: Who objected over here?

8 MR. ANGIOLILLO: From Mr. Owens.

9 THE REPORTER: Okay. Thanks.

10 A. I believe the question that was asked to me
11 was how could it have been clearer, and I responded with some
12 of those comments as to ways it could have been clearer. I
13 think that was the question that was asked of me.

14 Q. (BY MR. HAIL) And were Enron's disclosures of
15 its prepay obligations adequate?

16 MR. ANGIOLILLO: Object to the form of
17 the question.

18 MR. ROSENTHAL: Object.

19 MR. ANGIOLILLO: And it sounds to me like
20 it calls for a legal conclusion as well.

21 Q. (BY MR. HAIL) You may answer.

22 A. If the question is, were there disclosures in
23 accordance with GAAP, as I understand it, the answer is, yes.

24 Q. Were they misleading?

25 MR. ANGIOLILLO: Object to the form of

1 STATE OF TEXAS X

2 COUNTY OF DALLAS X

3 I, LISA M. DURHAM, Certified Shorthand Reporter duly
4 commissioned and qualified in and for the State of Texas, do
5 hereby certify that there came before me on the 17th day of
6 June, 2004, at the offices of the Houston Deposition Center,
7 located at 1111 Bagby, Suite 2100, in the City of Houston,
8 County of Harris, State of Texas, the following named person,
9 to-wit: MARC J. SHAPIRO, Volume 3, who was duly sworn to
10 testify the truth, the whole truth and nothing but the truth
11 of his knowledge touching and concerning the matters in
12 controversy in this cause; that he was thereupon examined
13 upon his oath and his examination reduced to typewriting
14 under my supervision; that the deposition is a true record of
15 the testimony given by the witness, and signature of the
16 witness is to be before any Notary Public.

17 I further certify that I am neither attorney
18 for, nor related to or employed by, any of the parties to the
19 action in which this deposition is taken, and further that I
20 am not a relative or employee of any attorney or counsel
21 employed by the parties hereto, or financially interested in
22 the action.

23

24

25

2011-03-11 10:00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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.

**ORDER GRANTING MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO
PROHIBIT OBJECTIONS AND COACHING OF WITNESSES DURING
DEPOSITIONS**

Having reviewed Lead Plaintiff's Motion to Clarify the Deposition Protocol Order, and pursuant to and consistent with the Federal Rules of Civil Procedure and the Deposition Protocol Order dated March 11, 2004, the Court hereby orders that objections during depositions in this matter be limited to only "Objection Form" or "Objection Responsiveness." Moreover, the Court cautions all parties that it will not tolerate violations of this Order or the Deposition Protocol Order.

IT IS SO ORDERED.

DATED: _____

HON. MELINDA HARMON
U.S. DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER GRANTING MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO PROHIBIT OBJECTIONS AND COACHING OF WITNESSES DURING DEPOSITIONS document has been served by sending a copy via electronic mail to serve@ESL3624.com on this July 8, 2004.

I further certify that a copy of the foregoing ORDER GRANTING MOTION TO CLARIFY DEPOSITION PROTOCOL ORDER TO PROHIBIT OBJECTIONS AND COACHING OF WITNESSES DURING DEPOSITIONS document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this July 8, 2004.

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



Mo Maloney