

JUL 27 2004

TL

Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ MDL Docket No. 1446

This Document Relates To:

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

MARK NEWBY, et al., Individually and On
Behalf 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.

[Caption continued on next page]

**BANK DEFENDANTS' REPLY CONCERNING THEIR MOTION TO CLARIFY THE
MARCH 11, 2004 SCHEDULING ORDER, WITH RESPECT TO THIRD-PARTY
COMPLAINTS AND CROSS CLAIMS IN ACTIONS NOT PROCEEDING UNDER THE
CONSOLIDATED NEWBY AND TITTLE COMPLAINTS**

2298

PAMELA M. TITTLE, *et al.*,

Plaintiffs,

vs.

ENRON CORP., *et al.*,

Defendants.

Civil Action No. H-01-3913

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF ENRON CORP.,

Plaintiffs,

vs.

ANDREW S. FASTOW, MICHAEL J. KOPPER,
BEN GLISAN, JR., RICHARD B. BUY,
RICHARD A. CAUSEY, JEFFREY K.
SKILLING, KENNETH L. LAY, JEFFREY
McMAHON, JAMES V. DERRICK, JR.,
KRISTINA M. MORDAUNT, KATHY LYNN,
ANNE YAEGER-PATEL, ARTHUR
ANDERSEN, LLP, AND CARL FASTOW, AS
ADMINISTRATOR OF THE FASTOW FAMILY
FOUNDATION,

Defendants.

Civil Action No. H-04-0091

[Caption continued on next page]

**BANK DEFENDANTS’ REPLY CONCERNING THEIR MOTION TO CLARIFY THE
MARCH 11, 2004 SCHEDULING ORDER, WITH RESPECT TO THIRD-PARTY
COMPLAINTS AND CROSS CLAIMS IN ACTIONS NOT PROCEEDING UNDER THE
CONSOLIDATED *NEWBY* AND *TITTLE* COMPLAINTS**

The undersigned defendants (collectively the “Bank Defendants”)¹ respectfully submit this Reply concerning their Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints (“Motion”).

The Bank Defendants’ Motion, which is unopposed by the Lead Plaintiff, does not seek to delay discovery or otherwise upset the schedule the Court has set. Rather, the Motion seeks to clarify and resolve in a practical and sensible way a procedural uncertainty that has arisen, not surprisingly, in this procedurally complicated litigation.

¹ This motion is made on behalf of defendants Citigroup Inc., Citibank, N.A., Citigroup Global Markets Inc. (formerly Salomon Smith Barney Inc.) and Citigroup Global Markets Ltd. (formerly known as Salomon Brothers International Limited), J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, J.P. Morgan Securities, Inc., Bank of America Corp., Banc of America Securities LLC, Bank of America, N.A., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Merrill, Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC Inc., Toronto Dominion Bank, Toronto Dominion Holdings (USA), Inc., TD Securities, Inc., TD Securities (USA) Inc., Toronto Dominion (Texas) Inc., Royal Bank of Canada, RBC Dominion Securities Inc., RBC Dominion Securities Ltd., RBC Holdings (USA) Inc., RBC Dominion Securities Corp., Royal Bank Holding Inc., Royal Bank DS Holding, Inc., Royal Bank of Canada Europe Ltd., Deutsche Bank AG, Deutsche Bank Securities Inc., DB Alex. Brown LLC, Deutsche Bank Trust Company Americas, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Lehman Brothers Commercial Paper Inc., The Royal Bank Of Scotland Group plc, The Royal Bank of Scotland plc, National Westminster Bank Plc, Greenwich Natwest Structured Finance, Inc., and Greenwich Natwest Ltd., Campsie Ltd. Certain of the bank defendants who join in this motion—namely, Royal Bank of Scotland, Royal Bank of Canada, and Toronto Dominion Bank, and their respective affiliates—are covered by the stay of discovery under the Private Securities Litigation Reform Act (15 U.S.C. Sec. 78u-4(b)(3)(B)), and they join here without waiving any rights with respect to that stay. Royal Bank of Scotland, Royal Bank of Canada and Deutsche Bank will also file separate statements addressing issues unique to their circumstances.

As the Bank Defendants set forth in their Motion, the Court has stayed the filing of any further pleadings in certain private actions that are not currently proceeding under the *Newby* and *Tittle* complaints (“private actions”), pending resolution of class certification issues. The stay serves the very sensible function of deferring numerous potentially unnecessary pleadings and motions until after the Lead Plaintiff’s motion for class certification is resolved, following which some or all of the private action plaintiffs may choose not to proceed with their complaints. Thus, while the March 11, 2004 Order fixed an August 2, 2004 deadline for filing third-party claims and cross-claims, the Court expressly reaffirmed that the “ruling in Part I of the July 11, 2003 Scheduling Order [staying further pleadings pending class certification] will [continue to] govern the schedule for those [private action] cases.” March 11, 2004 Order at 2. Because of the stay, the Bank Defendants have not been required to file answers in most of the private actions. It would be a procedural anomaly—not to mention a significant and unnecessary burden on the parties and this Court—if the defendants were nonetheless required to file cross-claims and third-party claims, with all associated motion practice, prior to even filing an answer (or a motion to dismiss, in advance of any answer) in those actions. Against that background, the Bank Defendants have sought clarification and confirmation that the March 11, 2004 Order—which expressly reaffirms the July 11, 2003 Order’s stay of further pleadings in the private actions—does not require a party to file cross-claims and third-party claims by August 2, 2004 in private actions governed by the stay, unless that party has already filed an answer. Both Arthur Andersen LLP and “Certain Defendants” have subsequently joined the Bank Defendants’ Motion. (See Docket Nos. 2288 & 2291, respectively). No Defendant has opposed the motion.

Significantly, the Lead Plaintiff does not oppose the Bank Defendants' Motion.² Although it has submitted an alternative proposed order, the Lead Plaintiff has not in its one-sentence brief in support offered any explanation as to why its order is preferable to the one submitted by the Bank Defendants.³ Accordingly, the Bank Defendants request that their proposed order be adopted.

The only complete opposition to the Bank Defendants' Motion was filed by Certain Private Action Plaintiffs.⁴ Oddly, this objection is based on a fundamental and unexplained misreading of the relief sought in the Bank Defendants' Motion. The Bank Defendants do not, as the objection states, seek to move the deadline for asserting cross-claims and third-party claims to **November 1, 2004** or 30 days after filing answer. To the contrary, the clear terms of the Bank Defendants' Motion and Proposed Order propose a deadline of **August 2, 2004** or 30 days after filing answer. The objection's focus on a perceived minimum 90-day delay is therefore completely misplaced and irrelevant.

Placing aside this significant discrepancy, the main concern raised by the Certain Private Action Plaintiffs is that newly-joined parties to the private actions may be prejudiced if

² Lead Plaintiff's Response to Bank Defendants' Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints, and [Proposed] Order, filed July 23, 2004.

³ Except to the limited extent addressed in the separate statements seeking clarification by Royal Bank of Scotland, Royal Bank of Canada and Deutsche Bank, and their respective affiliates, the Bank Defendants do not in this Motion and Proposed Order seek any clarification as to the August 2, 2004 deadline for joining new parties or filing cross-claims and third-party complaints in *Newby*.

⁴ Certain Private Action Plaintiffs' Memorandum of Law in Opposition to Bank Defendants' Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints, filed July 23, 2004 (Docket No. 2290).

they are late-arrivers on the fact discovery scene. However, by the time all potential new parties have been added to the *Newby* and *Tittle* cases on August 2, 2004, it seems very unlikely as a practical matter that there will be any truly new parties—parties not already participating in discovery pursuant to the coordinated deposition schedule—that could be joined into any of the private action cases.⁵ Nonetheless, a minor modification to the relief sought by Bank Defendants completely resolves this concern. Submitted with this reply is an alternative Proposed Order that requires that all *truly new parties*—i.e. individuals or entities that are not already participating in discovery as a party in *Newby*, *Tittle* or at least one of the Enron consolidated, coordinated or related cases that is pending before this Court or before the Southern District of New York Bankruptcy Court—be added by August 2, 2004.⁶ Except to the extent a *truly new party* is added, which under the alternative Proposed Order would have to be done by August 2, 2004, further pleadings, cross-claims and third-party complaints would remain stayed in the private actions.

The only other response to the Bank Defendants' Motion was submitted by American National and Westboro, plaintiffs in several of the private actions. The American National and Westboro Plaintiffs implicitly agree in their brief that defendants in the private actions should not be required to file cross-claims or third-party claims prior to filing their answer, but propose that such defendants be required to file cross-claims and third-party complaints on the later of August 2, 2004 or the same day the party files its answer (rather than

⁵ Moreover, the March 11, 2004 Order already contemplates that this situation may arise, since new parties may be added in the *Newby* and *Tittle* cases long after the commencement of fact discovery.

⁶ Joinder of a truly new party in any one such case by August 2, 2004 would suffice.

30 days after the party files its Answer, as initially proposed by the Bank Defendants).⁷ While the Bank Defendants are certainly cognizant of the need to bring cross-claims and third-party complaints promptly after answering, it makes sense to allow a short period of time between a party's deadline for answering and its deadline for filing cross-claims and third-party claims, to allow defendants to take into consideration the answers of co-defendants. Accordingly, consistent with Rule 14 of the Federal Rules of Civil Procedure, the alternative Proposed Order submitted with this reply suggests a 10-day period between the filing of a party's answer and its deadline for filing cross-claims and third-party claims.⁸

Recognizing the concerns raised by the parties that have responded to the present Motion, the Bank Defendants respectfully request that the Court grant the Motion and enter the attached Proposed Order which, in the Bank Defendants' view, meets the recently raised concerns and is consistent with the Court's prior Scheduling Orders.

⁷ American National and Westboro Plaintiffs' Opposition to the Banks' Motion to Modify Scheduling Order, filed July 22, 2004.

⁸ Fed. R. Civ. P. 14, which governs third party practice, provides that a third-party complaint may be filed without the Court's leave, if filed within 10 days after a party serves its answer, and thereafter only with the Court's leave. See Fed. R. Civ. P. 14(a).

Dated: July 27, 2004

Respectfully submitted,

By: Richard Warren Mithoff * by permission
KLR

Richard Warren Mithoff
Texas Bar No. 14228500
Janie L. Jordan
Texas Bar No. 11012700
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Telephone: (713) 654-1122
Facsimile: (713) 739-8085

OF COUNSEL:

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

Charles A. Gall
Texas Bar No. 07281500
James W. Bowen
Texas Bar No. 02723305
JENKENS & GILCHRIST,
A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Facsimile: (214) 855-4300

ATTORNEYS FOR J.P. MORGAN CHASE & CO.,
JPMORGAN CHASE BANK, J.P.MORGAN
SECURITIES, INC.

* indicates signature by permission

BY: Jacalyn D. Scott*

Jacalyn D. Scott
Texas Bar No. 17899900
WILSHIRE SCOTT & DYER P.C.
3000 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 651-1221
(713) 651-0020 (Facsimile)

OF COUNSEL:

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

ATTORNEYS FOR DEFENDANTS CITIGROUP
INC., CITIBANK INC., CITIBANK N.A.,
CITIGROUP GLOBAL MARKETS INC. (F/K/A
SALOMON SMITH BARNEY INC.),
CITIGROUP GLOBAL MARKETS LTD. (F/K/A
SALOMON BROTHERS INTERNATIONAL
LIMITED)

By: Barry Abrams

Barry Abrams
Texas Bar No. 00822700
ABRAMS SCOTT & BICKLEY, LLP
700 Louisiana, Suite 1800
Houston, Texas 77002
Telephone: (713) 228-6601
Facsimile: (713) 228-6605

OF COUNSEL:

David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
Steven J. Purcell
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
(212) 558-3588 (Facsimile)

ATTORNEYS FOR DEFENDANTS BARCLAYS
PLC, BARCLAYS BANK PLC, BARCLAYS
CAPITAL INC.

By: Charles G. King[†]

Charles G. King
Texas Bar No. 11470000
KING & PENNINGTON LLP
1100 Louisiana Street
Suite 5055
Houston, Texas 77002
Telephone: (713) 225-8404
Facsimile: (713) 224-8488

OF COUNSEL:

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

ATTORNEYS FOR BANK OF AMERICA
CORP., BANK OF AMERICA, N.A., BANC
OF AMERICA SECURITIES LLC

By Mark D. Manela*

Mark D. Manela
Texas Bar No. 12894500
S.D. Texas I.D. No. 01821
MAYER, BROWN ROWE & MAW LLP
700 Louisiana, Suite 3600
Houston, Texas 77002
(713) 547-9630
(713) 632-1848 (Facsimile)

OF COUNSEL:

Alan N. Salpeter
Michele Odorizzi
T. Mark McLaughlin
MAYER, BROWN ROWE & MAW LLP

190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
(312) 701-7711 (Facsimile)

Drew Neville, Jr.
B.J. Rothbaum
Charles E. Geister III
HARTZOG CONGER CASON &
NEVILLE
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000
Facsimile: (405) 996-3403

ATTORNEYS FOR CANADIAN IMPERIAL
BANK OF COMMERCE, CIBC INC., CIBC
WORLD MARKETS CORP.

By: Lawrence D. Finder*

Lawrence D. Finder
Texas Bar No. 07007200
Odean L. Volker
Texas Bar No. 20607715
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Facsimile: (713) 547-2600

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

George W. Bramblett, Jr.
Texas Bar No. 02867000
Noel M.B. Hensley
Texas Bar No. 09491400
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

ATTORNEYS FOR CREDIT SUISSE FIRST
BOSTON (USA) INC., CREDIT SUISSE
FIRST BOSTON LLC (F/K/A CREDIT
SUISSE FIRST BOSTON CORP.), PERSHING
LLC (F/K/A DONALDSON, LUFKIN &
JENRETTE SECURITIES CORPORATION)

By:

Joel M. Androphy*

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

OF COUNSEL:

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

ATTORNEYS FOR DEFENDANT DEUTSCHE
BANK AG, DEUTSCHE BANK SECURITIES INC.,
DB ALEX. BROWN LLC, DEUTSCHE BANK
TRUST COMPANY AMERICAS

By: Robert J. Sussman*

Robert J. Sussman
Texas Bar No. 19523500
Federal Bar No. 2822
HINTON, SUSSMAN, BAILEY &
DAVIDSON, LLP
5300 Memorial Drive, Suite 1000
Houston, Texas 77007
Telephone: (713) 864-4477
Facsimile: (713) 864-8738

OF COUNSEL:

Robert Plotkin
MCGUIRE WOODS LLP
1050 Connecticut Ave., N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 857-1750
Facsimile: (202) 857-1737

ATTORNEYS FOR DEFENDANTS THE
TORONTO-DOMINION BANK,
TORONTO-DOMINION HOLDINGS
(U.S.A.), TD SECURITIES, INC., TD
SECURITIES (USA) INC., TORONTO-
DOMINION (TEXAS), INC.

By: Taylor M. Hicks*

Taylor M. Hicks
Texas Bar No. 09585000
Southern District I.D. No. 3079
Stephen M. Loftin
Texas Bar No. 12489510
Southern District I.D. No. 12676
HICKS THOMAS & LILIENSTERN, LLP
700 Louisiana, Suite 1700
Houston, Texas 77002
Telephone: (713) 547-9100
Facsimile: (713) 547-9150

OF COUNSEL:

Herbert S. Washer
James D. Miller
Ignatius A. Grande
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, NY 10019
Telephone: (212) 878-8000
Facsimile: (212) 878-8375

Robert F. Serio
Marshall R. King
James L. Hallowell
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

COUNSEL FOR DEFENDANTS
MERRILL LYNCH & CO., INC.,
MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED

By: David E. Miller*

David E. Miller
Laurie DeBrie Thanheiser
JONES DAY
717 Texas, Suite 3300
Houston, Texas 77002
Tel: 832-239-3939
Fax: 832-239-3600

OF COUNSEL:

John M. Newman, Jr.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44144
Telephone: (216) 586-7207
Facsimile: (216) 579-0212

ATTORNEYS FOR THE ROYAL BANK
OF SCOTLAND GROUP PLC, THE
ROYAL BANK OF SCOTLAND PLC,
NATIONAL WESTMINSTER BANK PLC,
GREENWICH NATWEST STRUCTURED
FINANCE, INC., GREENWICH
NATWEST LTD., CAMPSIE LTD.

By: Hugh R. Whiting*

Hugh R. Whiting

Texas Bar No. 21373500

S.D. Admission No. 30188

JONES DAY

717 Texas Avenue, Suite 3300

Houston, TX 77002-2712

Telephone: (832) 239-3939

Facsimile: (832) 239-3600

OF COUNSEL:

David L. Carden

Robert C. Micheletto

JONES DAY

222 E. 41 Street

New York, NY 10017-6702

Telephone: (212) 326-3939

Facsimile: (212) 755-7306

ATTORNEYS FOR DEFENDANTS
LEHMAN BROTHERS HOLDINGS INC.,
LEHMAN BROTHERS INC., LEHMAN
BROTHERS COMMERCIAL
PAPER INC.

ELAINE L. CHAO, SECRETARY OF THE
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

vs.

ENRON CORP., et al.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. H-03-2257
(Consolidated with H-01-3913)

**[PROPOSED] ORDER CLARIFYING THE MARCH 11, 2004 SCHEDULING ORDER
WITH RESPECT TO THIRD-PARTY COMPLAINTS AND CROSS CLAIMS IN
ACTIONS NOT PROCEEDING UNDER THE CONSOLIDATED *NEWBY* AND *TITTLE*
COMPLAINTS**

Upon the Bank Defendants' Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints ("Motion"), it is hereby:

ORDERED that the Motion is **GRANTED**; and it is

FURTHER ORDERED that this Court's March 11, 2004 Scheduling Order is clarified as follows:

Deadline to join any new party that is not already a party in <i>Newby</i> , <i>Tittle</i> or at least one of the Enron consolidated, coordinated or related cases that is pending before this Court or before the Southern District of New York Bankruptcy Court	Monday, August 2, 2004
---	------------------------

Deadline to otherwise join parties or to file a third-party complaint or cross-complaint/claims	In each action, the later of Monday, August 2, 2004 or 10 days after the party files its Answer
---	---

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

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 27th day of July, 2004.

Alan C. Turner *
Alan C. Turner