UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MAY 28 2002

Michael N. Milby, Clerk

In Re ENRON CORP. SECURITIES LITIGATION	Consolidated Lead Case No. H-01-3624
RALPH A. WILT, JR., Plaintiff, v. ANDREW S. FASTOW, et al., Defendants.	Civil Action No. H-02-0576

THE WILT PLAINTIFFS' RESPONSE AND MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF DEFENDANTS ANDREWS, BASKIN, BERARDINO, JONAS, KUTSENDA, SAMEK, STEWART, AND TEMPLE TO DISMISS THE *WILT* FIRST AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION;

DECLARATION OF JAMES F. MARSHALL

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MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION OF DEFENDANTS
ANDREWS, BASKIN, BERARDINO, JONAS,
KUTSENDA, SAMEK, STEWART, AND TEMPLE
TO DISMISS THE *WILT* FIRST AMENDED COMPLAINT
FOR LACK OF PERSONAL JURISDICTION

1. SUMMARY OF RESPONSE.

Plaintiffs Ralph A. Wilt, Jr., Kieran J. Mahoney, and David I. Levine ("Wilt Plaintiffs") hereby oppose the motion of Defendants Andrews, Baskin, Berardino, Jonas, Kutsenda, Samek, Stewart, and Temple ("Moving Defendants") to dismiss the *Wilt* First Amended Complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) (the "Motion").

The Wilt Plaintiffs oppose the Motion on the grounds that the Court has specific jurisdiction over the moving defendants, and each of them, under the conspiracy theory of jurisdiction and because they intentionally directed tortious acts into the State of Texas.

Alternatively, the Wilt Plaintiffs request a fair opportunity to conduct jurisdictional discovery, including depositions of Moving Defendants and related document productions.

2. KEY ALLEGATIONS OF FIRST AMENDED COMPLAINT.

A. The Standard for Reviewing Plaintiffs' Allegations.

The Moving Defendants appear to assume that the Motion will benefit from the stringent pleading requirements to be applied in evaluating contemporaneous motions to dismiss federal securities fraud claims. However, a motion to dismiss for lack of personal jurisdiction does not

implicate the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). A very different, much more relaxed standard applies. In *Guidry v. United States Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999), the Fifth Circuit restated the rule for evaluating allegations relevant to personal jurisdiction:

> Procedurally, the party invoking the jurisdiction of a federal court bears the burden of establishing minimum contacts justifying the court's jurisdiction over a nonresident defendant. When a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, as in the present case, however, ***the nonmoving party need only make a prima facie showing, and the court must accept as true the nonmover's allegations and resolve all factual disputes in its favor.***

Id. at 625 (citations omitted; emphasis added).

B. The Organizational "AA" Defendants.

The First Amended Complaint names three related organizational defendants, Andersen, Andersen Worldwide, and Arthur Andersen LLP, collectively called "AA." First Amended Complaint ("FAC"), ¶¶ 43-45. The FAC makes the following common allegations about AA:

> On information and belief, Defendant Andersen is either a partnership or other type of unincorporated association consisting of member firms within "the Andersen global client service network." On information and belief, Andersen describes and promotes itself as a single, integrated, full-service, professional business enterprise comprising "one firm" with "one voice" and a "shared heritage and common values and vision." On information and belief, ***Anderson does business and is found in Houston, Texas***, and is one of the most sophisticated international accounting, auditing, and management consulting firms in the United States and the world, with expertise in all areas of Enron's business. Before the recent bankruptcy of Enron, Andersen enjoyed an excellent reputation; Andersen's involvement with auditing, SEC filings, and securities offerings bestowed the imprimatur of legitimacy, confidence, and stability on its many clients, including Enron. Andersen is sued as a direct participant, aider and abettor, and co-conspirator in the fraudulent acts, omissions, and scheme set forth below. Plaintiffs will seek leave of court to amend this pleading to name constituent

> members of Andersen after discovery into the exact nature of Andersen, members, alter ego issues, and sham transaction issues.

FAC ¶ 43 (emphasis added). The same allegations are made with respect to Andersen Worldwide and Arthur Andersen LLP, including the Houston presence. FAC ¶¶ 44-45.

AA's organizational complicity in the Enron scandal is described, in part, as follows:

> On information and belief, on dates and/or during a period that is currently not precisely known, AA has made strategic business decisions to transform itself from a traditional, independent, and objective accounting and auditing firm with acknowledged responsibilities to the public, into a very aggressive, pro-active, pro-client, advisory firm committed to promoting client success through value creation. On information and belief, the AA model of client success through value creation was described at length by three AA partners, on behalf of AA, in Cracking the Value Code: How Successful Businesses Are Creating Wealth in the New Economy (2000), and summarized as follows:
>
> > Value creation – that is, future value captured in the form of increased market capitalization – is how successful businesses are creating value in the New Economy....
> >
> > In the pages that follow, you will find a new set of tools that we have developed to help you create value in the New Economy [i.e. increased market capitalization]. It is called Value Dynamics, and it is based, in part, on an intensive three-year, 10,000-company research project by professionals at Arthur Andersen.
>
> On information and belief, on or about January 10, 2001, AA appointed Joseph F. Berardino to be its new chief executive officer. In a press release announcing Mr. Berardino's new appointment, AA described its collective "Cracking the Value Code" vision as follows:
>
> > Arthur Andersen's vision is to be the partner for success in the new economy. The firm helps clients find new ways to create, manage and measure value in the rapidly changing global economy. With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing and a focus on client success.
>
> On information and belief, the fraudulent acts, omissions, and scheme set forth below was substantially the result of AA's very aggressive, pro-active, pro-client business strategy and management-consulting philosophy of fostering "inventiveness" and promoting

> client success through value creation as measured by increased market capitalization. On information and belief, if AA had performed the more traditional roles of independent and objective accountant and auditor, then the fraudulent acts, omissions, and scheme below would not have occurred or would have been exposed much earlier.

FAC ¶¶ 48-50.

The FAC states with particularity the factual predicates for imposing liability on AA under Texas state law claims and a civil conspiracy theory. FAC ¶¶ 73-78, 80-81, 91, 105-06, 108-09, 112, 114, 116-28, 130, 132-33, 135-41, 143-48, 150-55, 157-61, 163-69, 171-72, 174-77, 179-81, 183-93, 195-200, 202-07, 209-13, 215-16, 218-21, 226-47, 249, 251-52, 254-58, 260-63, 265, 267-69, 271, 277-83, 285, 287, 289-94, 298, 304, 306-10, 314, 316-20, 324. It is unnecessary to belabor these facts herein because the Motion seeks dismissal based on lack of personal jurisdiction, not on any failure to plead fraud with particularity. As discussed above, the Wilt Plaintiffs need only make a *prima facie* showing; the Court is required to accept their allegations as true and to resolve all factual disputes in their favor. *Guidry*, 188 F.3d at 625.

The Moving Defendants concede that this Court has personal jurisdiction over the AA organizational defendants and individual accountant defendants who are domiciled in Texas and work, or have worked, in AA's Houston office. Rather, the Moving Defendants are contending that their own individual connections to the case are insufficient for personal jurisdiction.

C. Defendants Samek, Jonas, Kutsenda, and Stewart.

The FAC contains the following allegations about key events occurring in January and February, 2001, demonstrating the culpability of the accountant defendants in the Enron fraud:

> On information and belief, the Accountant Defendants undertook to audit Enron's financial statements for the fiscal year ended December 31, 2000 (the "2000 Financials"). On information and

belief, during this audit and before February 5, 2001, the Accountant Defendants had grave concerns and second thoughts about continuing to represent Enron in light of its use of SPE's for sham transactions, understatement of liabilities, overstatement of income or assets, and similar accounting, auditing, legal, management, and liability issues, as well as the exposure of the Accountant Defendants as direct participants, aiders and abetters, and co-conspirators in the SCHEME. On information and belief, these concerns and second thoughts were raised with the highest levels of the Accountant Defendants' management.

On information and belief, the Accountant Defendants' senior management had meetings and conferred in Houston, Texas, Chicago, Illinois, and/or other locations, on various dates currently unknown, to discuss *inter alia* (a) the Enron account; (b) the management and financial problems at Enron; (c) the Accounting Defendants' knowledge of, involvement in, and responsibility and liability for those problems; (d) whether the Accounting Defendants had an actual conflict of interest with Enron; (e) whether the Accounting Defendants should terminate their relationships with Enron; (f) whether the Accounting Defendants should withdraw their prior unqualified audit reports or otherwise blow the whistle or raise a red flag for the SEC or other regulators; and/or (g) whether the Accounting Defendants would instead continue to participate in the SCHEME, as they had been doing for years, and continue to profit from their lucrative relationships with Enron.

On information and belief, the Accountant Defendants held a large meeting and conference call in Houston, Texas, on or about February 5, 2001, to consider whether to keep Enron as a client. On information and believe, the Accountant Defendants who attended in person or participated by conference call were aware of, discussed, and intentionally, wilfully, or recklessly decided to do nothing about the ongoing fraud of the Director and Officer Defendants, involving the use of SPE's for sham transactions, understatement of liabilities, and overstatement of assets or income. Instead, the Accounting Defendants intentionally, wilfully, or recklessly decided to keep Enron as a client and continue as knowing participants, aiders and abetters, and co-conspirators in furtherance of the SCHEME to preserve lucrative relationships with Enron.

On information and belief, on or about February 6, 2001, Jones wrote a memo to D. Duncan and Bauer about the 2/5/01 meeting conducted by the Accountant Defendants, admitting *inter alia* that the Accounting Defendants knew that Enron was using SPE's for sham transactions, materially understating its liabilities, and materially overstating its income or assets (the "5/6/01 Memo"). The 5/6/01 Memo admits that most Accountant Defendants had directly participated in the meeting; that they had discussed "the fact that Enron often is creating industries and markets and transactions for which there are no specific rules which requires significant judgement and that Enron is aggressive in its transaction structuring"; and that certain earnings figures were nothing but "intelligent gambling."

> Despite serious concerns and second thoughts about the propriety of Enron's business and accounting practices, the Accountant Defendants failed to resign, blow the whistle, or raise a red flag, completed the audit of Enron's financial statements for the fiscal year ended December 31, 2000 (the "2000 Financials"), and issued an unqualified audit report dated February 23, 2001, attesting to their accuracy and reliability (the "2000 Audit Report").

FAC ¶¶ 230-34.

AA published and authenticated the 2/6/2001 memo on its web site. Marshall Dec. ¶ 2, Exh. "A." The 2/6/2001 memo confirms that Defendants Samek, Jonas, Kutsenda, and Stewart directly participated in the events in the foregoing paragraphs of the FAC. This memo confirms that Defendants Samek, Jonas, Kutsenda, and Stewart dealt and worked directly with AA's most culpable partners in Houston, discussed the major problems with the Enron account, and agreed to continue lending AA's good name and services to the ongoing fraud. These facts, confirmed by documentary evidence available on the AA web site, demonstrate that Defendants Samek, Jonas, Kutsenda, and Stewart – the ten other participants in the meeting and conference call with AA's Houston office – were direct participants and co-conspirators in the fraud.

Mr. Samek's participation in the meeting and conference call is telling. As an author of Cracking the Value Code, FAC ¶ 60, he was an architect of AA's conversion from a traditional accounting and auditing firm into an aggressive, pro-active, pro-client advisory and consulting firm committed to fostering "inventiveness" and promoting client success through value creation as measured by increased market capitalization. These are the hallmarks of the Enron fraud.

D. Defendant Berardino.

The press release announcing Mr. Berardino's appointment (quoted *supra*) demonstrates that he was elevated to lead AA's very aggressive, pro-active, pro-client business strategy and management-consulting philosophy of fostering "inventiveness" and promoting client success

through value creation as measured by increased market capitalization. As such, Mr. Berardino was the point man for the strategy and philosophy that was the hallmark of the Enron fraud.

The FAC names Mr. Berardino on a conspiracy theory:

> On information and belief, Defendant Joseph F. Berardino ("Berardino") is a resident of Chicago, Illinois, and the Chief Executive Office of AA. On information and belief, at relevant times Berardino acted as a direct participant, aider and abetter, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below, and/or *inter alia* knew of, condoned, authorized, directed, furthered, and/or attempted to conceal the true extent of AA's involvement in the fraudulent acts, omissions, and scheme set forth below. On information and belief, Berardino intentionally, wilfully, and/or recklessly did so with full knowledge that administrative, civil, and criminal investigations and litigation to which such evidentiary matter was highly relevant had already been commenced and/or were imminent. Berardino is sued herein as a direct participant, aider and abettor, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below.

FAC ¶ 70 (emphasis added).

E. Defendants Andrews and Baskin.

Mr. Andrews and Mr. Baskin were positioned at the heart of AA's fraudulent practices. The FAC names Mr. Andrews and Mr. Baskin on a conspiracy theory:

> On information and belief, Defendant C.E. Andrews ("Andrews") is a resident of Chicago, Illinois, an AA partner, and ***the managing partner of AA's global auditing practice***. On information and belief, at relevant times Andrews acted as a direct participant, aider and abetter, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below, and/or *inter alia* knew of, condoned, authorized, directed, participated in, furthered, and/or attempted to conceal the true extent of AA's involvement in the fraudulent acts, omissions, and scheme set forth below. On information and belief, Andrews intentionally, wilfully, and/or recklessly did so with full knowledge that civil, administrative, and criminal investigations and litigation to which such evidentiary matter was highly relevant had already been commenced and/or were imminent. Andrews is sued

> herein as a direct participant, aider and abettor, and ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below.
>
> On information and belief, Defendant Dorsey L. Baskin, Jr. ("Baskin") is a resident of Chicago, Illinois, an AA partner, and at relevant times ***the managing director of AA's professional standards group***. On information and belief, at relevant times Baskin acted as a direct participant, aider and abetter, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below, and/or *inter alia* knew of, condoned, authorized, directed, participated in, furthered, and/or attempted to conceal the true extent of AA's involvement in the fraudulent acts, omissions, and scheme set forth below. On information and belief, Baskin intentionally, wilfully, and/or recklessly did so with full knowledge that administrative, civil, and criminal investigations and litigation to which such evidentiary matter was highly relevant had already been commenced and/or were imminent. Baskin is sued herein as a direct participant, aider and abettor, and ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below.

FAC ¶¶ 69, 68 (emphasis added).

F. Defendant Temple.

This Court has already held a hearing and found personal jurisdiction over Ms. Temple. PACER Nos. 382 and 383. Accordingly, the Motion should be summarily denied as to Ms. Temple. Furthermore, as explained below, personal jurisdiction over Ms. Temple results in conspiracy jurisdiction over all co-conspirators, including *inter alia* all Moving Defendants.

The FAC names Ms. Temple on a conspiracy theory:

> On information and belief, Defendant Nancy A. Temple ("Temple") is a resident of Chicago, Illinois, a former partner in the prestigious corporate law firm of Sidley & Austin, and a high-level corporate attorney employed by AA. On information and belief, at relevant times Temple acted as a direct participant, aider and abetter, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below, and/or *inter alia* knew of, condoned, authorized, directed, participated in, furthered, and/or attempted to conceal the true extent of AA's involvement in the fraudulent acts, omissions, and scheme set forth below. On information and belief, as set forth more fully below, ***Temple inter alia wrote a clever email and caused it be sent to AA's Houston office to encourage and incite***

> ***the shredding, destruction, and spoliation of records. On information and belief, Temple intentionally, wilfully, and/or recklessly did so with full knowledge that administrative, civil, and criminal investigations and litigation to which such evidentiary matter was highly relevant had already been commenced and/or were imminent.*** Temple is sued herein as a direct participant, aider and abettor, and/or ***co-conspirator*** in the fraudulent acts, omissions, and scheme set forth below.

FAC ¶ 67 (emphasis added).

The FAC elaborate on Ms. Temple's participation in the conspiracy:

> On information and belief, on a date or dates currently unknown but no later than February 5, 2001, AA's senior management came to understand that AA and several Accountant Defendants were exposed to major civil and criminal liability as participants, aiders and abetters, and co-conspirators in the SCHEME. On information and belief, as a result of determining that Enron's fraudulent accounting practices were about to explode in a major accounting scandal, AA on or about October 9, 2001, hired outside counsel, Davis Polk & Wardwell ("Davis Polk"), and intensified its litigation preparation. On information and belief, Temple participated in the retention of Davis Polk and knew of AA's litigation preparation at all relevant times.
>
> On information and belief, on or about October 12, 2001, Temple sent an email to Odom in Houston, who forwarded it to B. Duncan in Houston, stating "It might be useful to consider reminding the engagement team of our documentation and retention policy. ***It will be helpful to make sure that we have complied with the policy.*** Let me know if you have any questions" (emphasis added) (the "10/12/01 Email"). On information and belief, when Temple sent the 10/12/01 Email, she knew that AA's documentation and retention policy called for the destruction of certain documents, and she intended to and did refer to that destruction policy.
>
> On information and belief, during several telephone conference calls in October 2001, concurrently with other litigation preparation, Temple made a point of specifically asking whether the Accountant Defendants who were located in the Houston office were in compliance with AA's documentation and retention policy.
>
> On information and belief, the 10/12/01 Email and the telephone inquiries about compliance with AA's documentation and retention policy were clever attempts by Temple, a very sophisticated lawyer, to encourage and incite the shredding, destruction, and spoliation of AA's records relating to Enron in the face or actual and imminent administrative, civil, and criminal investigations, litigation, and prosecutions, while maintaining

deniability on her part, in an attempt to destroy the full record of AA's active complicity in furthering the SCHEME.

On information and belief, Odom, B.Duncan, and all the other AA partners in Houston construed the 10/12/01 Email and Temple's telephone inquiries about compliance with AA's documentation and retention policy to have the meaning intended by Temple, to wit, as a directive to shred, destroy, and spoliate evidence that would be damning to AA in litigation; at no time did any AA partners in Houston doubt that intended meaning or seek clarification.

On information and belief, on a date or dates currently unknown but no later than the receipt of the 10/12/01 Email in Houston, AA undertook a massive campaign to shred, destroy, and spoliate huge quantities of records and documents relating to the Enron account and/or evidencing AA's role in furthering the SCHEME. On information and belief, this evidence-destruction campaign was conducted and/or condoned by at least 8 partners in the Houston office, at least four of whom had management authority and duties, together with scores of secretaries, staff accountants, office assistants, and other AA employees. On information and belief, the evidence-destruction campaign was so extensive, interrupted normal operations so much, and was so frenetic in its conduct, that no AA personnel in management in the Houston office could have been unaware that it was occurring.

...

On information and belief, on or about October 16, 2001, Temple sent an email to B.Duncan asking him to alter one or more documents to delete her name and references to legal advice in news releases relating to Enron's financial position. On information and belief, Temple made this request with the intent to minimize the appearance of her involvement and to create the false impression that the massive evidence-destruction campaign in Houston was unauthorized.

...

On information and belief, on a date currently unknown but no later than October 17, 2001, the SEC made its first inquiry of AA relating to Enron. On information and belief, on dates currently unknown but promptly after the SEC's first inquiry, the Accountant Defendants all knew or recklessly failed to learn of that inquiry. On information and belief, notwithstanding knowledge or reckless failure to learn of the SEC's inquiry, the evidence-destruction campaign continued, and the Accountant Defendants made no effort to stop it or to preserve documents.

...

On information and belief, on a date currently unknown but no later than October 22, 2001, Enron publicly disclosed that the SEC was investigating Enron. On information and belief, any of the

> Accountant Defendants who may not have learned of the SEC investigation from the first inquiry to AA on or about October 17, 2001, learned of it from Enron's disclosure no later than October 22, 2001. On information and belief, notwithstanding knowledge of the SEC investigation, the evidence-destruction campaign continued, and the Accountant Defendants made no effort to stop it or to preserve documents.
>
> On information and belief, on a date currently unknown but no later than October 31, 2001, the SEC opened a formal inquiry into Enron. On information and belief, the Accountant Defendants immediately learned of this formal inquiry. On information and belief, notwithstanding knowledge of the SEC's formal inquiry, the evidence-destruction campaign continued, and the Accountant Defendants made no effort to stop it or to preserve documents.
>
> ...
>
> On information and belief, on a date currently unknown but no later than November 8, 2001, the SEC served a subpena on AA for Enron records. On information and belief, the Accountant Defendants promptly learned of this subpena. On information and belief, notwithstanding knowledge of the subpena, the evidence-destruction campaign continued, and the Accountant Defendants initially made no effort to stop it or to preserve documents.
>
> On information and belief, on a date currently unknown but no later than November 9, 2001, a secretary in AA's Houston office sent an email to others in the Houston office directing them to "stop the shredding" (the "11/9/01 Email"). On information and belief, the evidence-destruction campaign continued for an unknown period after the 11/9/01 Email. On information and belief, at no time prior to November 9, 2001, did Temple or other Accountant Defendants attempt to stop the ongoing evidence-destruction campaign.
>
> On information and belief, the Accountant Defendants tried to conceal the widespread evidence-destruction campaign for almost two months after the 11/9/01 Email. On information and belief, the Accountant Defendants did not admit that massive quantities of evidence had been destroyed until January 4, 2002, and then only because they realized that they could not possibly succeed in concealing such extensive spoliation involving so many people.

FAC ¶¶ 278-83, 285, 287, 289-90, 292-94 (emphasis added).

The Wilt Plaintiffs allege ample facts to demonstrate a massive corporate conspiracy that implicates all Accountant Defendants, including the subset of Moving Defendants. The 2/6/01 Memo proves that several Moving Defendants were intimately involved with the details of the conspiracy and working closely with the worst bad actors in AA's Houston office.

3. LEGAL ARGUMENT AND ANALYSIS.

THIS COURT HAS SPECIFIC JURISDICTION OVER MOVING DEFENDANTS

1. The Conspiracy Theory of Personal Jurisdiction.

The Wilt Plaintiffs agree in principle with the general discussion in the moving papers. However, the Moving Defendants ignore the conspiracy theory of jurisdiction, pursuant to which all co-conspirators are subject to personal jurisdiction if any co-conspirator is.

In *Textor v. Board of Regents*, 711 F.2d 1387 (7th Cir. 1983), the Seventh Circuit stated the classic rationale for the conspiracy theory of jurisdiction:

> There does not seem to be any question that if plaintiff's complaint alleges an actionable conspiracy then the minimum contacts test has been met. ***The "conspiracy theory" of personal jurisdiction is based on the "time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.*** To plead successfully facts supporting application of the conspiracy theory of jurisdiction a plaintiff must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state.

Id. at 1392-93 (emphasis added; citations omitted).

The Fifth Circuit has never rejected *Textor*. However, the conspiracy theory of personal jurisdiction was qualified in *Hawkins v. The Upjohn Co.*, 890 F. Supp. 601 (E.D. Texas 1994), where the Court held that the co-conspirator's intentional actions must have been purposefully directed toward Texas with knowledge that the brunt of the injury would be felt in Texas. *Id.* at 608, *following Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

Even as qualified in *Hawkins*, the Wilt Plaintiffs allege enough to establish personal jurisdiction. As set forth above, the 2/6/2001 memo shows that Defendants Samek, Jonas, Kutsenda, and Stewart participated directly in the fraudulent acts committed in Texas by Accountant Defendants in AA's Houston office. This memo proves that those defendants dealt and worked directly with the most culpable Andersen partners in Houston, discussed the major problems with the Enron account, and agreed to continue lending Andersen's good name and services to the ongoing fraud. These facts establish that Defendants Samek, Jonas, Kutsenda, and Stewart – and ten other participants in the meeting and conference call with AA's Houston office – were direct participants and co-conspirators in fraud. For her part, Defendant Temple initiated the document shredding campaign in Texas and participated directly in the concealment of the fraud, shredding, and obstruction of the SEC investigation. Other Moving Defendants are likewise implicated as co-conspirators in these wrongful actions that were intentionally directed into Texas with intentional, injurious effects in Texas. Therefore, even as modified in *Hawkins*, the Wilt Plaintiffs allege enough to show personal jurisdiction over the co-conspirators.

2. Tortious Acts Directed into the State of Texas.

In the Fifth Circuit, it is settled that "specific jurisdiction ... exists when a nonresident defendant has 'purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities.'" *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 868 (5th Cir. 2000), *quoting Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S.Ct. 2174 (1985). *See also Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988) ("Even a single purposeful contact may in a proper case be sufficient to meet the requirement of minimum contacts when the cause of action arises from the contact"). For the reasons discussed in the preceding section, the Wilt Plaintiffs allege sufficient wrongful contacts by Defendants Samek, Jonas, Kutsenda, Stewart, and Temple. The rest of the Moving Defendants are adequately implicated by the allegations of conspiracy and their collective participation therein.

3. Harmful Effects Caused in the State of Texas.

In the Fifth Circuit, it is settled that "a tortious act occurring outside the forum state, that has effects inside the state, may be sufficient to confer specific jurisdiction." *Hawkins*, 890 F. Supp. at 608, *following Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), and *Keeton v. Hustler*, 465 U.S. 770, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984). See also *Guidry*, 188 F.3d at 629 ("a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an intentional or physically harmful tort done elsewhere, with respect to any claim arising from these effects").

The Wilt Plaintiffs allege ample facts to show that Defendants Samek, Jonas, Kutsenda, Stewart, Temple, and their co-conspirators engaged in fraudulent acts that had effects in Texas, i.e. perpetration of the massive securities fraud in Texas and the related concealment, document shredding, and SEC obstruction in Texas. These effects proximately caused billions of dollars of damages in Texas. These contacts are sufficient for jurisdiction under the effects test.

4. Fair Play and Substantial Justice.

In the Fifth Circuit, it is settled that "to exercise specific jurisdiction, the court must examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends ***traditional notions of fair play and substantial justice***." *Southmark*, 851 F.2d at 772 (emphasis added), *following Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir.1986), *cert. denied*, 481 U.S. 1015, 107 S. Ct.1892, 95 L. Ed. 2d 499 (1987). It is fair and just to find jurisdiction over Defendants Samek, Jonas, Kutsenda, Stewart, Temple, and co-conspirators in Texas based on their direct personal participation in the fraud in Texas and the related concealment, document shredding, and SEC obstruction in Texas.

The Motion makes no showing of cognizable unfairness or substantial injustice in forcing the Moving Defendants to appear in Texas after directing so many wrongful acts into Texas.

5. Fair Opportunity for Jurisdictional Discovery.

The Motion raises questions of fact relating to the the Moving Defendants' contacts with Texas, their participation in the conspiracy among the Accountant Defendants, and the direction of tortious acts and harmful effect into the State of Texas . In such a scenario, the Fifth Circuit mandates that plaintiffs be allowed to conduct appropriate jurisdictional and general discovery. For example, in *Wyatt v. Kaplan*, 686 F.2d 276 (5th Cir. 1982), the Court stated:

> Discovery under the Federal Rules of Civil Procedure is broad in scope. Courts do not generally grant protective orders without a strong showing of "good cause." Orders prohibiting discovery by deposition are particularly disfavored. ***When a defendant challenges personal jurisdiction, courts generally permit depositions confined to the issues raised in the motion to dismiss. In an appropriate case, we will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery***. When, as in this case, the jurisdictional question intertwines with the merits of this case, some discovery on the merits may be necessary, and general discovery may be permitted.

Id. at 283.

See also Kelly v. Syria Shell Petro. Dev. B.V., 213 F.3d 841, 856 (5th Cir. 2000) ("A district court is not required to defer ruling on a jurisdictional motion until all discovery contemplated by the plaintiff has been accomplished; instead, an *opportunity* for discovery is required") (emphasis added), *following Patterson v. Dietze, Inc.*, 764 F.2d 1145 (5th Cir. 1985).

The Wilt Defendants are not seeking wide-open discovery in derogation of the Court's consolidation and scheduling orders. In their Response to Motion for Preliminary Scheduling

Order in Non-Class Actions, filed separately, the Wilt Plaintiffs are requesting leave to pursue discovery calculated to identify and names Doe corrupt officials who have not been sued by any other plaintiffs. But for the instant motion challenging personal jurisdiction, the Wilt Plaintiffs would not be requesting specific leave to conduct the additional discovery sought herein.

4. CONCLUSION.

The Motion should be denied in its entirety. Alternatively, a ruling on the Motion should be deferred until after the Wilt Plaintiffs are permitted an opportunity to take the depositions of, and to obtain document production from, each of the Accountant Defendants.

Dated: May 23, 2002

Respectfully Submitted,

JUDICIAL WATCH, INC.

By: _____

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DECLARATION OF JAMES F. MARSHALL

I, James F. Marshall, declare as follows:

1. I am a member in good standing of the California, Washington State, District of Columbia, and U.S. Supreme Court Bars, and am employed by Judicial Watch, Inc., counsel of record to the Wilt Plaintiffs in this action. I have personal, first-hand knowledge of all facts set forth below and, if called as a witness, I could and would testify competently hereto.

2. In preparing the First Amended Complaint, I used the information set forth in the memorandum dated 02/06/2001, a true and correct copy of which is attached hereto as Exhibit "A," which I had obtained from the Andersen web site at http://www.andersen.com. On May 21, 2002, I went to that web site again and downloaded another copy of the memorandum.

I declare under penalty of perjury under the laws of the United States of America and the State of Texas that the foregoing is true and correct.

Executed on May 23, 2002, at San Marino, California.

JAMES F. MARSHALL

Arthur Andersen
E&P and IPP's

To: David B. Duncan@ANDERSEN WO, Thomas H. Bauer@ANDERSEN WO
cc:
Date: 02/06/2001 08:24 AM
From: Michael D. Jones, Houston , 2541
Subject: Enron retention meeting

Dave, I was not sure whether you were planning on documenting the meeting yesterday. My significant notes were as follows (these were not very detailed, but I was not sure how detailed you wanted to get, assuming that you were going to document the meeting). Let me know if you want me to take a stab at it first (if so we should probably get together for a few minutes to discuss your documentation ideas.:

Attendees:
By Phone: Samek, Swanson, Jeneaux, Jonas, Kutsenda, Stewart
In Houston: Bennett, Goddard, Goolsby, Odom, Lowther, Duncan, Bauer, Jones

Significant discussion was held regarding the related party transactions with LJM including the materiality of such amounts to Enron's income statement and the amount retained "off balance sheet". The discussion focused on Fastow's conflicts of interest in his capacity as CFO and the LJM fund manager, the amount of earnings that Fastow receives for his services and participation in LJM, the disclosures of the transactions in the financial footnotes, Enron's BOD's views regarding the transactions and our and management's communication of such transactions to the BOD and our testing of such transactions to ensure that we fully understand the economics and substance of the transactions.

The question was raised as whether the BOD gets any competing bids when the company executes transactions with LJM. DBD replied that he did not believe so, but explained thier transaction approval process generally and specifically related to LJM transactions.

A significant discussion was also held regarding Enron's MTM earnings and the fact that it was "intelligent gambling". We discussed Enron's risk management activities including authority limits, valuation and position monitoring.

We discussed Enron's reliance on its current credit rating to maintain itself as a high credit rated transaction party.

We discussed Enron's dependence on transaction execution to meet financial objectives, the fact that Enron often is creating industries and markets and transactions for which there are no specific rules which requires significant judgement and that Enron is aggressive in its tranaction structuring. We discussed consultation among the engagement team, with Houston management, practice management and the PSG to ensure that we are not making decisions in isolation.

Ultimately the conclusion was reached to retain Enron as a client citing that it appeared that we had the appropriate people and processes in place to serve Enron and manage our engagement risks. We discussed whether there would be a perceived independence issue solely considering our level of fees. We discussed that the concerns should not be on the magnitude of fees but on the nature of fees. We arbitrarily discussed that it would not be unforseeable that fees could reach a $100 million per year amount considering the multi-disciplinary services being provided. Such amount did not trouble the

EXHIBIT "A"

participants as long as the nature of the services was not an issue.

In addition to the above discussions were held to varying degrees on each page of the presentation materials.

Take away To Do's:
Inquire as to whether Andy Fastow and / or LJM would be viewed as an "affiliate" from an SEC perspective which would require looking through the transactions and treating them as within the consolidated group.
Suggest that a special committee of the BOD be established to review the fairness of LJM transactions (or alternative comfort that the transactions are fair to Enron, e.g., competitive bidding)
Why did Andy not select AA as auditors, including when PWC was replaced with KPMG. Discussions concluded that we would likely not want to be LJM's financial advisors given potential conflicts of interest with Enron.
Focus on Enron preparing thier own documentation and conclusions to issues and transactions.
AA to focus on timely documentation of final transaction structures to ensure consensus is reached on the final structure.

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David B. Duncan

CERTIFICATE OF SERVICE

In re ENRON Corp. Securities Litigation
Consolidated Lead Case No. H-01-3624

Wilt v. Fastow,
Case No. H-02-0576

I certify that on May 23, 2002, I served a true and correct copy of the foregoing document by e-mail on the following attorneys of record at the e-mail address indicated:

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James F. Marshall, Esq.

I certify that on May 23, 2002, I served a true and correct copy of the foregoing document by fax on the following person at the fax number indicated:

Carolyn S. Schwartz United States Trustee, Region 2	Fax Number: (212) 668-2255

I further certify that on May 23, 2002, I served a true and correct copy of the foregoing document, by first class mail, on the following person at the address indicated:

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Linden Collins Associates
1226 West Broadway
P.O. Box 114
Hewlett, New York 11557

Doreen MacQueen

Doreen MacQueen