

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

United States Courts
Southern District of Texas
ENTERED

NOV 22 2005

Michael N. Milby, Clerk of Court

In re ENRON CORPORATION SECURITIES,
DERIVATIVE, and "ERISA" LITIGATION

MDL 1446

MARK NEWBY, et al.,

Plaintiffs,

Civil Action No. H-01-3624
and consolidated cases

VS.

ENRON CORP., et al.,

Defendants.

DK ACQUISITION PARTNERS, L.P., et al.,

Plaintiffs,

Civil Action No. H-03-3393

VS.

J.P. MORGAN CHASE & CO., et al.,

Defendants.

UNICREDITO ITALIANO SPA, et al.

Plaintiffs,

Civil Action No. H-04-0324

VS.

J.P. MORGAN CHASE BANK, et al.,

Defendants.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
OF OHIO, et al.,

Civil Action No. H-02-4788

VS.

ANDREW S. FASTOW, et al.,

Defendants.

ORDER ON MOTION TO COMPEL THIRD-PARTIES MOODY'S INVESTORS SERVICE, INC. AND STANDARD & POOR'S TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENAS AND FOR EXPEDITED CONSIDERATION (INSTRUMENT NO. 3933)

Pending before the Court is the motion of JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities Inc. (collectively referred to as "JPMC") to compel from the non-parties Moody's Investors Service, Inc. ("Moody's") and Standard & Poor's, a division of The McGraw-Hill Companies, Inc. ("S&P"), production of documents evidencing their evaluation, analysis, and treatment of prepaid forward commodity transactions ("Prepaid Forward Transactions") by thirteen companies that are not involved with the Enron related lawsuits. JPMC maintains in its motion that it seeks this discovery so that it can defend itself against allegations made by many of the plaintiffs in the Enron related lawsuits that S&P and Moody's were unaware of the specifics of the Prepaid Forward Transactions engaged in by Enron with JPMC. The allegations conclude by the assertion that had the ratings given to Enron by these agencies been fully known and understood, the agencies would have given Enron lower ratings.

In JPMC's motion it maintains that, in order to defend itself from these allegations, it must be able to show that

Prepaid Forward Transactions like the ones JPMC engaged in with Enron were well-known and commonplace among energy and trading companies, and numerous companies that received investment-grade ratings from S&P and Moody's prior to Enron's December 2, 2001 bankruptcy engaged in Prepaid Forward Transactions that were substantively indistinguishable from the JPMC Prepaid Forward Transactions. Prior to Enron's bankruptcy, S&P and Moody's did not criticize such Prepaid Forward Transactions in their published reports on these investment-grade companies or suggest in any way that the Transactions were improper.

Instrument No. 3933, at 2.

In addition JPMC wishes to ascertain how both Moody's and S&P treated Prepaid Forward Transactions, whether as debt or otherwise, in analyzing JPMC's Prepaid Forward Transactions with Enron and Prepaid Forward Transactions utilized by thirteen other companies that received investment-grade ratings. *Id.*

Moody's and S&P's responses to the motion to compel are in vigorous opposition, based upon three premises. First they argue that there has been no threshold showing of potential relevance, as required under Rule 26 of the Federal Rules of Civil Procedure. Second, they argue that any relevance is "negligible and speculative, and outweighed by burdensomeness, invasiveness, and precedential dangers involved." (Instrument No. 4019 at 2). Third they seek the protection of journalistic privilege.¹

The Court agrees with Moody's and S&P that delving into the ratings of these thirteen uninvolved companies in order to determine whether Moody's and S&P were consistent in their analysis of Prepaid Forward Transactions engaged in by Enron on the one hand and by the thirteen companies on the other would seem to be an exercise in speculative word and number crunching. The extensive briefing of both Moody's and S&P (Instrument No. 4019 and Instrument No. 3954) make the case that a generic Prepaid Forward Transaction, or "prepay," can be very different in form, structure, and complexity from one engaged in by a particular company. The instant case is concerned with particular Prepaid Forward Transactions engaged in by Enron, and there is no indication that the thirteen companies engaged in Prepaid Forward Transactions of the nature and consequence of Enron's. JPMC is interested in whether Prepaid Forward Transactions are treated as debt by Moody's or S&P, but this factor is only one question in the inquiry. It may be of importance,

¹ The Court does not reach this third premise because the motion can be decided on the first two.

but it cannot be raised to the level of the only important consideration. Moody's and S&P both indicate that a company's ratings are committee judgment calls based on the details of the specific Prepaid Forward Transactions at issue as well many other factors, such as, *inter alia*, creditworthiness, the amounts of the transactions, and the company's balance sheet. JPMC 's briefing suggests that it intends to build a ratings model from the treatment of Prepaid Forward Transactions engaged in by the thirteen companies. To the extent JPMC does intend to implement such a plan, the resulting model would be the product of a great deal of speculation. It would be impossible for JPMC accurately to determine how Moody's or S&P "would" have rated Enron by focusing on an analysis of Enron's Prepaid Forward Transactions as compared to an analysis of how the rating agencies viewed the Prepaid Forward Transactions of the thirteen companies.

Moreover, although JPMC attempts to downplay the burden of producing documents for thirteen uninvolved companies, it cannot be gainsaid that on its face this burden of production is formidable. When the relevance of these documents and the inevitable speculative use that will be made of them are balanced against the burden of producing the documents, it is clear that in this case the burden far outweighs the relevance.

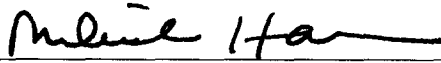
JPMC argues that to reach the conclusion that the Enron Prepaid Forward Transactions may have had an impact on Enron's ratings with Moody's and S&P, the Moody's and S&P witnesses presented for deposition engage in speculation. This fact, JPMC asserts, results in the need for JPMC to engage in an in-depth analysis as to what the Enron ratings would have been had Moody's and S&P been fully aware of the details of the Prepaid Forward Transactions. This argument does not answer the argument of Moody's and S&P that such an analysis would itself be speculation, given, first, the nature of determining any company's ratings and, second, the fact that JPMC wishes to analyze the data of thirteen other, non-party, companies who engaged in Prepaid Forward Transactions. JPMC's

argues, “If, however, Plaintiffs are going to be permitted to pursue claims against JPMC based on allegations that the rating agencies would have downgraded Enron had they known more about the JPMC Prepaid Forward Transactions, JPMC must be given an opportunity to refute these allegations.” (Instrument No. 3935, at 7). Of course, but the question remains, is an in depth analysis of how committees made up of various rating analysts at Moody’s and S&P, engaged in rating thirteen other companies who engaged in Prepaid Forward Transactions, relevant to a refutation of those allegations? The Court finds that JPMC’s proposed analysis is too speculative to be relevant under Rule 26. Whatever relevance there might be is far outweighed by the substantial burden faced by Moody’s and S&P in producing the documents JPMC seeks to compel. Accordingly, it is hereby

ORDERED that JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities Inc.’s Motion to Compel Third-Parties Moody’s Investors Service, Inc. and Standard & Poor’s to Produce Documents Responsive to Subpoenas (Instrument No. 3933) is DENIED. It is further

DECLARED that JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities Inc.’s Motion for Expedited Consideration is MOOT.

Signed at Houston, Texas, this 22nd day of November, 2005.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE