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Hearing Date: February 20, 2002
10:00 a.m.

UNITED STATES BANKRUPUTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	§	CHAPTER 11
ENRON CORP., et al.,	§	CASE NO. 01-16034 (AJG)
Debtors.	§	Jointly Administered

APPLICATION OF VARIOUS TRADING CREDITORS IN SUPPORT OF MOTION FOR ORDER, PURSUANT TO 11 U.S.C. §§ 105 AND 1104, (I) DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE, EXAMINER WITH EXPANDED POWERS OR OTHER SUCH FIDUCIARY FOR THE ESTATE OF ENRON NORTH AMERICA CORP.; (II) DIRECTING ENRON NORTH AMERICA CORP. TO SECURE AND PRESERVE ALL OF ITS BOOKS, RECORDS AND FILES PENDING SUCH APPOINTMENT; (III) DIRECTING ENRON NORTH AMERICA CORP. TO SEQUESTER AND HOLD IN ESCROW ALL OF ITS CASH AND OTHER MONETARY RECEIPTS PENDING SUCH APPOINTMENT; (IV) DIRECTING ENRON NORTH AMERICA CORP. TO TURN OVER CUSTODY OF ALL OF ITS BOOKS, RECORDS, FILES AND CASH AND OTHER MONETARY RECEIPTS TO THE APPOINTED FIDUCIARY; (V) DIRECTING ENRON NORTH AMERICA CORP. TO COOPERATE WITH THE APPOINTED FIDUCIARY AND (VI) VESTING THE APPOINTED FIDUCIARY WITH THE POWERS NECESSARY TO CARRY OUT SPECIFIED FUNCTIONS

The Wiser Oil Company, Nuevo Energy Company, BreitBurn Energy Company, LLC, Denbury Resources, Inc., EnerVest Energy, L.P., EnerVest Management Partners, Ltd., Vernon E. Faulconer and Vernon E. Faulconer, Inc., and Yuma Production & Exploration, Inc.

(collectively, the "Trading Creditors"), by and through Reed Smith LLP, hereby submit this application in support of their motion (the "Motion") for the entry of an order, pursuant to 11 U.S.C. §§ 105 and 1104, (i) directing the appointment of a chapter 11 trustee, examiner with expanded powers or other such fiduciary (the "Responsible Fiduciary") for the estate of Enron North America Corp. and all of its direct and indirect subsidiaries ("Enron N.A."); (ii) directing Enron N.A. to secure and preserve all of its books, records and files pending such appointment; (iii) directing Enron N.A. to sequester and hold in escrow all of its cash and other monetary receipts pending such appointment; (iv) directing Enron N.A. to turn over custody of all of its books, records, files and cash and other monetary receipts to the Responsible Fiduciary upon such appointment; (v) directing Enron N.A. and its officers, directors and other employees to cooperate with the Responsible Fiduciary; and (vi) vesting the Responsible Fiduciary with the power necessary to carry out specified functions, and, in support thereof, respectfully represent and allege as follows:

I. FACTUAL BACKGROUND

A. The Commencement of the Bankruptcy Cases.

1. On or about December 2, 2001 (the "Petition Date"), Enron Corp. ("Enron"), Enron N.A. and certain of their subsidiaries and affiliates (collectively, and together with Enron and Enron N.A., the "Debtors"), each filed a voluntary petition (collectively, the "Petitions", and each, a "Petition") for relief under chapter 11, Title 11 of the United States Code, 11 U.S.C. § 101, et seq. (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Court").

2. The Debtors did not file their statements and schedules of assets and liabilities pursuant to Section 521 of the Bankruptcy Code with the Petitions, and pursuant to Order of the Court dated December 3, 2002, they are not required to do so until June 18, 2002.

3. Pursuant to an Order of this Court entered on or about December 3, 2001, the Debtors' bankruptcy cases were consolidated for administrative purposes and are being jointly administered. Since December 3, 2001, certain other affiliates or subsidiaries of Enron have filed with this Court voluntary petitions for relief under the Bankruptcy Code. The bankruptcy cases of such affiliates or subsidiaries have been administratively consolidated with those of the Debtors, and such affiliates or subsidiaries shall be included within the definition of "Debtors" contained in paragraph 1 hereof.

4. The Debtors have been continued in the possession and control of their assets and businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. According to its Petition, Enron is engaged in business as a "holding company of subsidiaries engaged in wholesale merchant and commodity market businesses, the management of end-use retail customer energy services, the operation of gas transmission systems and the worldwide management of energy related assets and broadband services." See, Petition filed by Enron, p. 4, ¶ 3. Enron owns, either directly or indirectly, one hundred percent (100%) of the stock of Enron N.A. See, Petition filed by Enron N.A., p. 4, ¶ 4.

6. According to its Petition, Enron N.A. principally is engaged in the business of "offer[ing] a broad range of price, risk management and financing services including forward contracts, swap agreements and other contractual commitments." See, Petition filed by Enron N.A., p. 4, ¶ 3.

7. From a review of the Petition filed by Enron N.A., it appears that Enron N.A. is solvent on a book value basis. Specifically, Enron N.A.'s Petition states that Enron N.A. has assets totaling $13,743,023,203 and debts of only $8,840,215,034. See, Petition filed by Enron N.A., p.2, ¶2. Thus, it appears that Enron N.A.'s total assets exceed its liabilities by

approximately $4.9 billion. Significantly, however, in a footnote, Enron N.A. states that the amount of its debts as listed on its Petition does not include "off-balance sheet and contingent obligations." Id., at fn. 1. Debtors' counsel has represented that these "off-balance sheet and contingent obligations" referred to by Enron N.A. include the liabilities owed under hedge, swap, collar and other forward agreements similar to those entered into between the respective Trading Creditors and Enron N.A., as described below. Such agreements, it is believed, constitute a significant, if not the major, portion of Enron N.A.'s business.

8. Enron N.A.'s Petition states that Enron N.A. "estimates that, after any exempt property is excluded and administrative expenses are paid, there will be no funds available for distribution to unsecured creditors." See, Petition filed by Enron N.A., p.1. This statement is seemingly inconsistent with the amount of Enron N.A.'s debts and liabilities, as listed on its Petition. At the December 18, 2001 hearing on Wiser's motion for an order authorizing Wiser to obtain discovery pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure, Debtors' counsel advised that Enron N.A.'s Petition is inaccurate to the extent it states that Enron N.A. estimates that there will be no funds available for distribution to its unsecured creditors.

9. Based on the Debtors' oral representations at various Court hearings and meetings, and the papers submitted by the Debtors in support of their motion to continue to use their pre-petition cash management system (the "Cash Management Motion"),[1] it is the Trading Creditors' understanding that each subsidiary or affiliate of Enron, including Enron N.A., passes all of its revenue upon receipt to Enron. It is the trading creditors' further understanding that, although Enron may in some way keep track of which subsidiary or affiliate passes up how much

[1] The Cash Management Motion was granted by order of the Court dated December 3, 2001 (the "cash management order").

money, all such monies are lumped together and commingled by Enron, and are then passed back down to the subsidiaries or affiliates on an "as needed" basis, without regard for whether the needy subsidiary or affiliate passed up any money at all. Thus, the revenue generated by one subsidiary or affiliate may be, and indeed is, used to pay the debts of other subsidiaries or affiliates. Specifically, since the Debtors have represented on numerous occasions that Enron N.A. (or the Debtors' trading operations which are conducted largely by Enron N.A.) historically has generated the "lion's share" of all of the Debtors' revenue, it is believed that the revenue generated by Enron N.A. has been and continues to be plundered to pay the debts of other, less profitable Enron entities, to the detriment of creditors of Enron N.A.

10. The Trading Creditors are creditors of Enron N.A. pursuant to their respective hedge, forward or similar contracts, as more fully described hereinafter. To the extent Enron guaranteed Enron N.A.'s obligations to the Trading Creditors, the Trading Creditors also are creditors of Enron. Although neither Enron N.A. nor Enron has formally quantified the extent, timing and range of Enron N.A.'s off-balance sheet or contingent assets and liabilities represented by hedging or other forward contracts having future expirations and potential recoveries and liabilities, counsel for the Debtors has represented that such off-balance sheet liabilities total approximately $5 billion.

11. Prior to the Petition Date, Enron reported having sought a merger, other stabilizing combination, cash infusion or business venture with, among others, Dynegy, Inc. ("Dynegy"). Being involved in many of the same lines of business, Dynegy was and is considered a competitor of Enron N.A. In fact, the media reported that Dynegy initially and primarily sought to acquire Enron N.A.'s oil and gas trading operations as a complement to its own.

12. At the hearings held in these cases on December 3, 2001 (the "First Day Hearings"), counsel for the Debtors noted that the Debtors had in excess of $500 million in cash and that their "book of business" recently decreased from approximately $12 billion before the negotiations with Dynegy broke down to a range of $6-7 billion around the Petition Date. That "book of business" referred to by the Debtors includes financial hedging and other forward agreements such as those between the Objectors and Enron N.A. Since Enron is a holding company, the vast majority, if not substantially all, of its business is owned by subsidiaries such as Enron N.A. Based upon reports issued during the negotiations between Enron and Dynegy, and statements made by the Debtors' counsel at the Organizational Meeting (as defined below), Enron N.A. is the "jewel" of Enron's subsidiaries. Thus, presumably, a significant portion of Enron's reported book of business and cash balances were generated by Enron N.A. and should be preserved and protected, along with the proceeds thereof, for the benefit of Enron N.A.'s creditors, and used to pay the creditors of Enron N.A.

B. <u>The Formation of the Creditors Committee and the DIP Facility</u>.

13. The Organizational Meeting for the formation of official committee(s) was held in these cases on Wednesday, December 12, 2001 (the "Organizational Meeting"). Prior to the Organizational Meeting, certain of the Objectors and, upon information and belief, certain additional similarly situated creditors of Enron N.A., requested the formation of a separate committee to represent the interests of the unsecured creditors of Enron N.A. The reasons cited for the formation of a separate committee to represent the creditors of Enron N.A. were numerous, and include the fact that, historically, Enron N.A. has generated a large portion of the cash flow for all of the Debtor entities (upon information and belief, Enron N.A. generated approximately 90% of over $100 billion of the Debtors' collective revenue last year) and the

proponents of a separate committee were concerned that the monies generated by Enron N.A. have been and will continue to be used to fund or pay the expenses of Debtors other than Enron N.A. Moreover, as confirmed by the Debtors at the Organizational Meeting, the assets of Enron N.A. were not encumbered by any liens as of the Petition Date, however, the Debtors' propose to pledge the assets of Enron N.A. to secure the repayment of all of the Debtors' post-petition borrowing, regardless of whether any of the proceeds of such post-petition borrowing are received by Enron N.A. Thus, the Trading Creditors are justly concerned that, absent the formation of a separate committee of creditors in the Enron N.A. case, Enron N.A.'s assets, which were not encumbered by any liens as of the Petition Date, will be dissipated to pay obligations of other Debtors to the detriment of the Objectors and other creditors of Enron N.A.

14. Despite the requests to form a separate committee to represent the creditors of Enron N.A., only one committee was formed in these cases (the "Creditors Committee"). The Trading Creditors have concerns regarding the composition of the Creditors Committee, since six (6) or seven (7) of the fifteen (15) members are institutional lenders whose interests likely will conflict with the interests of many of the Debtors' unsecured creditors, at least with respect to the Debtors' post petition borrowing, which is a significant issue. Also troubling is the inclusion of JPMorgan Chase Bank ("JPMorgan") and Citicorp USA, Inc. ("Citicorp") as members of the Creditors Committee since these entities allegedly are pre-petition secured creditors of some of the Debtors and are the Debtors' post-petition lenders. On the other hand, there are only two (2) or three (3) members of the Creditors Committee who are trading creditors, such as the Trading Creditors. Such creditors constitute the majority, if not all, of the creditors of Enron N.A. Accordingly, the Trading Creditors submit that the interests of Enron N.A. creditors are not and cannot be adequately protected by the Creditors Committee as formed.

15. Specifically, the Debtors have sought authority from this Court to obtain debtor-in-possession financing (the "DIP Facility") from JPMorgan and Citibank, and an interim order granting such relief was signed on December 3, 2001, one day after the Petition Date. Under the proposed DIP Facility, among other things, JPMorgan and Citibank are granted a blanket lien and security interest against and in all of Enron N.A.'s assets, which were unencumbered prior to the Petition Date.[2] Because the application seeking approval of the DIP Facility has been granted on an interim basis (the "Interim DIP Facility"), JPMorgan and Citicorp are likely to assert liens against the proceeds of the sale of the Debtors' Wholesale Trading Business, including most, or at least a substantial portion, of Enron N.A.'s assets. This could be the case regardless of whether Enron N.A. receives any proceeds from the Interim DIP Facility or the DIP Facility, or whether such proceeds have been disbursed to Debtors other than Enron N.A.[3] Thus, the structure of the DIP Facility is consistent with the Debtors' cash management system, in which the revenue generated by the respective Enron entities is swept up to Enron, commingled, and then passed back down to the various Enron subsidiaries and affiliates on an "as needed" basis without regard to whether the entity receiving the money generated such money, or any money at all.

16. Thus, although the hearing to consider final approval of the DIP Facility is not scheduled to occur until January 30, 2002 (having been adjourned by the Debtors from January 7, 2002), the sale, or more accurately the licensing, of the Debtors' Wholesale Trading Business, and thus a substantial portion of Enron N.A.'s assets (as discussed below), which occurred

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[2] Wiser and other Trading Creditors intend to object to the Debtors' motion for final approval of the DIP Facility because it would encumber Enron N.A.'s previously unencumbered assets, and on other bases.

[3] It is the Trading Creditors' understanding that Enron N.A. has not, in fact, received any funds from the Interim DIP Facility.

January 10, 2002 and was approved by the Court on January 18, 2002, now brings to the forefront certain of the Trading Creditors' concerns and objections regarding the DIP Facility and the Debtors' cash management system.

C. The Sale of the Wholesale Trading Business.

17. On January 10, 2002, the Debtors conducted a sale (the "Asset Sale") of a portion of their wholesale trading business (the "Wholesale Trading Business") pursuant to the Debtors' motion (the "Sale Motion") seeking Court approval of such sale, pursuant to Section 363 of the Bankruptcy Code. Ultimately, the Asset Sale took the form of an agreement whereby the Debtors would license their Wholesale Trading Business to UBS Warburg in exchange for royalty payments.

18. As set forth in the Sale Motion, the Wholesale Trading Business encompasses marketing of, and making of markets for, (a) energy commodities and related risk management, and (b) financial services including, "swaps, caps, floors, collars, futures contracts, forward contracts, options and other derivative instruments, contracts or arrangements based on … energy commodities." At the hearing held on December 19, 2001 to consider the Debtors' proposed bidding procedures relating to the Asset Sale, the Debtors stated that the Wholesale Trading Business can be broken down into three categories: (x) the people, represented by employment contracts, (y) the hard assets, such as furniture, hardware and software, and (z) the book of business or actual trading contracts (the "Trading Book of Business"). See Sale Motion, p. 5 at ¶13. According to the Sale Motion, the assets to be sold include certain "equipment and fixed assets, hardware and software, information, records, intellectual property, permits, third party claims, and real property" that relate to the Wholesale Trading Business. See id., p. 6 at ¶16. Also to be included in the Asset Sale are certain executory contracts relating to the

Wholesale Trading Business, including, employment contracts. See ibid. Under the proposed sale terms, the consideration to be received by the Debtors for the Wholesale Trading Business would include cash, as well as a 49% equity interest in a new entity called The New Energy Trading Company ("NETCO"), which would continue the Wholesale Trading Business. See id., p. 7 at ¶17. Ultimately, the consideration was modified to take the form of a stream of royalty payments to be made to the Debtors in exchange for the exclusive right to use the Wholesale Trading Business.

19. Wiser and other creditors and interested parties filed objections to the Sale Motion and Asset Sale on the following on a variety of bases, including that

a) the terms of the Asset Sale did not include (i) a Debtor by Debtor and asset by asset description of the Wholesale Trading Business being sold, (ii) each Debtor's internal and book values for the assets being sold, (iii) an itemization of which Debtor(s) owned the assets being sold, (iv) a specific description of which Debtor(s) will own what portion of the forty-nine percent (49%) interest in NETCO, the proposed purchaser of the Wholesale Trading Business, (v) a reconciliation of how the allocated ownership interest compares to the value of each such Debtor's conveyed assets, and (vi) an allocation by the bidder of the purchase price to each category of assets on a Debtor by Debtor basis;

b) because of the lack of allocation of assets and purchase price, the Asset Sale, alone and in combination with the Interim DIP Facility, constitute a de facto consolidation of the Debtors' respective chapter 11 estates;

c) the Asset Sale is objectionable to the extent proceeds would be subject to liens under the Interim DIP Facility; and

d) the Debtors have made no provision for the preservation and management of the Enron N.A. Book of Business following the Asset Sale.

20. Notably, although certain creditors sought admission to the Asset Sale, the Debtors, without authority, barred creditors from attending the Asset Sale.

21. On January 11, 2002, a hearing on the Sale Motion was held, but was adjourned to January 18, 2002. Prior to the January 18th hearing, the Debtors disclosed that the terms of the Asset Sale had been changed to take the form of a licensing of the Debtors' Wholesale Trading Business to UBS Warburg, in exchange for a stream of royalty payments to the Debtors. However, the same allocation issues remained as under the original proposed terms of the Asset Sale. Specifically, there was no provision for allocation on a Debtor by Debtor basis of the assets being licensed, or the royalties generated therefrom. Nevertheless, on January 18, 2002, the Court approved the sale/licensing of the Debtors' Wholesale Trading Business to UBS Warburg. The Court specifically stated that the allocation issues can be addressed at a later time pursuant to other hearings, including the hearing on the DIP Motion.

22. Significantly, pursuant to the Asset Sale, the contracts of practically all of the employees of Enron N.A. are to be transferred to UBS Warburg, and the Trading Book of Business is not included in the Asset Sale. Thus, the Trading Creditors are extremely concerned that there will be insufficient manpower and management left at Enron N.A. to administer the Trading Book of Business and exercise appropriate fiduciary duties with respect to Enron N.A.'s creditors.

D. The Civil and Criminal Investigations of the Debtors.

23. It has been widely and prominently reported that the rapid financial collapse of the Debtors' multi billion dollar conglomerate, the tragic and enormous consequences of such collapse, and the Debtors' bankruptcy filings, have prompted civil and criminal investigations into the Debtors and their management by the Securities and Exchange Commission (the "SEC"), the United States Department of Labor, Congress and the Department of Justice. See, Affidavit of Charles N. Panzer, **Exhibit A**.

24. Specifically, the media have reported that (a) the SEC has been investigating Enron since October, 2002 for possible violations of securities laws and is continuing its investigation; (b) the United Stated Department of Labor has commenced an investigation into the Debtors as a result of, among other things, the massive, widespread losses under 401k and other retirement plans; (c) the Debtors are being investigated by the House Energy and Commerce Committee and the House Oversight and Investigations Committee, which have requested that the SEC turn over reviews and records of the Debtors' accounting practices and filings since 1997; (d) the Senate Government Affairs Committee is looking into possible fraud, obstruction of justice and insider trading by Enron executives; (e) the United States Justice Department has formed a special task force to pursue criminal investigations of Enron Corp., which are expected to center on possible accounting fraud and obstruction of justice; and (e) the President of the United States also has called for investigation into the Debtors' collapse. See id., **Exhibits A and B**.

25. Particularly disturbing are reports that employees of the Debtors have been destroying Enron documents since the federal government began investigating their collapse, and that Arthur Andersen LLP, the Debtors' accountants and auditors, have acknowledged that a

significant number of financial documents and electronic records related to Arthur Andersen's auditing of the Debtors have been destroyed or deleted. See id., **Exhibit B**. The prospect that a large number of the Debtors' financial records, and/or documents and records relating thereto, may have been destroyed or deleted is even more troubling in light of the fact that, currently, the Debtors are not required to file their statements and schedules of assets and liabilities pursuant to Section 521 of the Bankruptcy Code until June 18, 2002, and are not required to file their first monthly operating reports pursuant to Section 704 of the Bankruptcy Code until mid-February. Indeed, it can be speculated that the destruction of Enron documents, and the resulting deficiency of information, could explain why the Debtors have not yet provided certain financial information, such as their statements of assets and liabilities pursuant to Section 521 of the Bankruptcy Code. It may be that such financial information no longer exists, due to destruction by the Debtors and/or Arthur Andersen, LLP.

26. Also, it is reported that Sherron S. Watkins, a Vice President of Enron, sent a letter to Enron Chairman, Kenneth Lay, after the departure of Enron's Chief Executive and months before Enron laid off over 4,000 employees, expressing detailed concerns about the potential implosion of Enron, accounting oddities and irregularities, and a "veil of secrecy" surrounding various transactions. See id., **Exhibit A.**

27. Perhaps the most disturbing reports are that a number of high-level Enron executives sold off approximately $1.1 billion in Enron securities just before the Enron collapse, while general Enron employees were precluded from selling the Enron securities in their retirement portfolios. As has been reported, those retirement portfolios have been decimated. See id., **Exhibit A**.

II. JURISDICTION

28. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2).

III. RELIEF REQUESTED

29. By this application, the Trading Creditors seek the entry of an order, pursuant to 11 U.S.C. §§ 105 and 1104 and not withstanding the Cash Management Order: (i) directing the appointment of a chapter 11 trustee, examiner with expanded powers or other such fiduciary for the estate of Enron N.A. (i.e., the Responsible Fiduciary); (ii) directing Enron N.A. to secure and preserve all of its books, records and files pending such appointment; (iii) directing Enron N.A. to sequester and hold in escrow all of its cash and other monetary receipts pending such appointment; (iv) directing Enron N.A. to turn over custody of all of its books, records, files and cash and other monetary receipts to the Responsible Fiduciary upon such appointment; (v) directing Enron N.A. and its officers, directors and other employees to cooperate with the Responsible Fiduciary; and (vi) vesting the Responsible Fiduciary with the power necessary to carry out her functions.

IV. LEGAL ARGUMENT

A Responsible Fiduciary Must Be Appointed to Take Control of, and to Preserve and Protect the Assets of Enron North America.

30. Section 1104(a) of the Bankruptcy Code provides that, after the commencement of the bankruptcy case, on request of a party in interest, the bankruptcy court may appoint a trustee "(1) for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management….", or "(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." See, e.g., In re American

Preferred Prescription, Inc., 250 B.R. 11, 15-18 (E.D.N.Y. 2000) (explaining when a trustee may be appointed under Section 1104(a) of the Bankruptcy Code); In re Anchorage Boat Sales, Inc., 4 B.R. 635, 644 (Bankr. E.D.N.Y. 1980) (same); In Re L.S. Good & Co, 8 B.R. 312, 314 (Bankr. N.D.W.Va. 1980) (same). Whether there are sufficient grounds for appointment of a trustee under Bankruptcy Code Section 1104(a) is a matter for the court's discretion. In re American Preferred Prescription, Inc., supra, 250 B.R. at 17.

31. In addition, Section 1104(c) of the Bankruptcy Code provides that, after commencement of the bankruptcy case, on request of a party in interest, and where the court does not order the appointment of a trustee, the court *shall* appoint an examiner, to investigate the debtor, as appropriate, where "(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate;" or "(2) a corporation's fixed, liquidated unsecured debts, other than for goods, services or taxes, or owing to an insider, exceed $5,000,000." (emphasis supplied). In Re Revco D.S., Inc., 898 F.2d 498 (6th Cir. 1990) ("[Section 1104(c)] plainly means that the bankruptcy court "'shall'" order the appointment of an examiner when the total fixed, liquidated, unsecured debt exceeds $5 million); In re Sletteland, 260 B.R. 657, 671 (Bankr. S.D.N.Y. 2000) (holding that, because the movants did not allege that the debtor's fixed, liquidated unsecured debts exceeded $5,000,000, movants were required to demonstrate "cause" for appointment of an examiner or trustee, or that such appointment was in the interests of creditors and other interested parties). Thus, under Section 1104(c), the court is *required* to appoint an examiner if it does not appoint a trustee under Section 1104(a), and the debtor's fixed, liquidated unsecured debts, other than for goods, services or taxes, or owing to an insider, exceed $5 million. The Trading Creditors recognize that typically an examiner is charged with the responsibility of preparing a historical report and accounting of a debtor. In

this case, as a consequence of the many reported, ongoing investigations into the Debtors' prepetition conduct, the Trading Creditors submit that a traditional examiner and examiner's report is unnecessary in this case, and the creditors of Enron N.A. should not be forced to bear the expense of a historical report when it appears that more than one such report will be prepared by one or more governmental agencies. Instead, the Trading Creditors submit that, to the extent the Court appoints an examiner rather than a trustee, the examiner should be vested with special powers sufficient to enable her to take control of, preserve and protect the assets of Enron N.A. for the benefits of its creditors, as set forth herein.

32. In addition, Section 105 of the Bankruptcy Code provides, subject to certain conditions, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

33. In the case of Enron N.A., there is clearly sufficient "cause" pursuant to Section 1104(a) of the Bankruptcy Code to warrant the appointment of a trustee for the specific purposes set forth in this Motion. Moreover, due to the amount and value of the claims against Enron N.A.'s estate, the Court must appoint an examiner, pursuant to Section 1104(c) of the Bankruptcy Code. The Trading Creditors submit that appointing a trustee, examiner with expanded powers, administrator or other such fiduciary, for the specific purposes set forth herein, is both necessary and appropriate to carry out the provisions of the Bankruptcy Code. Accordingly, the Court should order such appointment pursuant to Sections 1104 and 105 of the Bankruptcy Code.

34. The disturbing facts surrounding the Debtors' collapse, the suggestion of serious civil and criminal violations by the various investigations into the Debtors and their executives, including allegations of fraud, insider trading and obstruction of justice, the reported destruction

of Enron documents by Enron employees, the acknowledgement by the Debtors' accountants that they destroyed financial documents and records of the Debtors, the complete lack of financial disclosure by the Debtors to date, the complete lack of a Debtor-by-Debtor accounting and allocation of assets and sale proceeds to date in connection with the Asset Sale, the Debtors' cash management system in which it appears assets of various Enron entities are pooled and then redistributed on an "as needed" basis, the effect of the Interim DIP Facility to create liens on the previously unencumbered assets of Enron N.A. (including the future royalties generated by the Asset Sale), the fact that Enron N.A. is the financial "jewel" of the Debtors, and the lack of disclosure by the Debtors concerning the current or future allocation of the DIP Facility proceeds, respectively and collectively, compel the immediate appointment of a Responsible Fiduciary to safeguard Enron N.A.'s assets, including its books and records, and to ensure that the value of such assets is preserved and maximized.

35. The Debtors not only are in managerial and financial crises, they also are the subject of intense and far-reaching civil and criminal investigations by various branches and agencies of the United States government. Because these investigations center on alleged fraudulent and criminal conduct by the Debtors, and because the Debtors and their accountants reportedly have destroyed financial documents and records of the Debtors, a fiduciary should be appointed to (i) take control of the books and records of Enron N.A., (ii) prepare immediate and monthly accountings of Enron N.A.'s cash receipts and disbursements since the Petition Date (including any proceeds of the Asset Sale), and (iii) implement a cash management system for Enron N.A. that will, among other things, account for any and all receipts and disbursements of Enron N.A. and retain all of Enron N.A.'s assets for the exclusive benefit of the Enron N.A. estate and Enron N.A's creditors, in order to avoid or minimize the Debtors' potential plundering

of Enron N.A.'s assets. This is a particularly urgent matter, in light of the Court's approval of the Asset Sale, pursuant to which a large portion of Enron N.A.'s assets were licensed to UBS Warburg in exchange for royalty payments, the complete lack of a Debtor by Debtor accounting and allocation of assets licensed and royalties realized from the Asset Sale, the Interim DIP Facility's grant of liens to the DIP Lenders on the proceeds of the Asset Sale and the Debtors' existing cash management system providing for the pooling of the respective Debtors' cash receipts and other assets.

36. The Trading Creditors fear that, unless a Responsible Fiduciary as described herein is appointed by the Court and granted exclusive control over Enron N.A.'s books, records, cash receipts and cash management in general, the security of those items will be compromised to the irreparable detriment of Enron N.A.'s creditors. Specifically, additional books and records may be destroyed, and cash and other assets of Enron N.A. may be used to pay the creditors of Debtors other than Enron N.A., and those Debtors may be administratively insolvent or otherwise incapable of repaying Enron N.A.

37. Further, the Trading Creditors submit that the Responsible Fiduciary also must be authorized and empowered to administer and manage the Trading Book of Business, which was not included in the Asset Sale, although substantially all of Enron N.A.'s employment agreements with its traders were transferred to UBS Warburg. It is imperative that a Responsible Fiduciary be appointed immediately to manage Enron N.A.'s Trading Book of Business. Until recently, the Trading Book of Business constituted Enron N.A.'s (and apparently all of the Debtors') most valuable asset. The Trading Book of Business also likely will give rise to the largest number of creditors and amount of claims against Enron N.A. and perhaps against all of the Debtors. Almost all of the traders who created the once invaluable Trading Book of Business

have been "sold" in connection with the Asset Sale, and will not be available to assist Enron N.A. in administering the Trading Book of Business. In order to maximize the value of the Trading Book of Business and minimize the value and amount of claims arising therefrom, it is imperative that a Responsible Fiduciary be appointed to manage the Trading Book of Business.

38. Based on the foregoing, the Trading Creditors submit that this Court should appoint a Responsible Fiduciary as described herein in order to prevent further disaster being visited upon the estate of Enron N.A. and its creditors. The Trading Creditors submit that the powers afforded such fiduciary should include, among other things, (a) the power to compel production of and to assemble all books and records of Enron N.A., (b) the power to subpoena officers, directors and employees of the Debtors, and others, and conduct examinations regarding the location, contents, custody, maintenance, control, compilation, generation and/or destruction of Enron N.A.'s books and records, (c) the power to take complete and exclusive control of Enron N.A.'s books and records, (d) the power to implement and exclusively control a new cash management system for Enron N.A. to ensure that revenue generated by Enron N.A. is not distributed to other Debtors or their creditors, (e) the power to administer and manage the Trading Book of Business, and (f) the power to retain employees and professionals (subject to approval by the Court) necessary to enable said fiduciary to perform her functions. The Trading Creditors further submit that the responsibilities of such Responsible Fiduciary should include, among other things, the immediate preparation, filing with the Court and service upon all interested parties in the Debtors' bankruptcy cases of an accounting of all cash and other disbursements and receipts of Enron N.A. upon the Petition Date, and thereafter, the preparation, filing and service of monthly reports as to any and all such disbursements and receipts by Enron

N.A., as well as the assumption of all accounting functions of Enron N.A. and administration and management of the Trading Book of Business.

39. The Trading Creditors further submit that, in conjunction with such appointment, and in order to enable the appointed Responsible Fiduciary to carry out its duties, the Court should direct the Debtors in general, and Enron N.A. in particular, to assemble and turn over to the Responsible Fiduciary all of Enron N.A.'s books and records, to yield exclusive control thereof to the Responsible Fiduciary, to immediately cease disbursing any assets of Enron N.A., and to sequester and secure any and all cash and other assets of Enron N.A., and subsequently yield exclusive control over same to the Responsible Fiduciary.

CONCLUSION

40. No prior request for relief sought herein has been made to this or any other Court.[4]

41. Since this Motion includes references to legal authority supporting the requested relief, the Trading Creditors respectfully request that the requirement contained in Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York. be waived under the circumstances and that the Trading Creditors not be required to file a separate brief or memorandum of law in support of this Motion.

WHEREFORE, for all of the foregoing reasons, the Trading Creditors respectfully request the entry of an Order, pursuant to 11 U.S.C. §§ 105 and 1104, granting the Motion in all respects, and granting such other and further relief as the Court deems just and appropriate.

Dated: January 22, 2002
Newark, New Jersey

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[4] On December 10, 2001, Wiser filed a motion seeking, among other things, the appointment of a chapter 11 trustee or examiner for the Debtors' estates, but withdrew such motion, without prejudice, on January 11, 2002 as a consequence of, among other things, changes in the relevant facts and circumstances relating to these bankruptcy cases.