AFFIDAVIT

SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS

I, C. Deanne Simpson, being duly sworn, do hereby depose and say as follows:

1. I am employed as a Special Agent of the Federal Bureau of Investigation ("FBI") and have been so employed for more than six years. Since January 2002, I have been assigned to the Department of Justice and FBI Enron Task Force, which is investigating criminal activity associated with the financial collapse of Enron Corporation ("Enron").

2. I have investigated numerous cases involving "white-collar" crime, including wire fraud and other financial crimes, during the course of my employment with the FBI.

3. During this investigation, I and other FBI agents have reviewed documents, including partnership documents, bank records, hotel records, telephone records, wire transfer records, handwritten notes, transcripts of tape recorded statements, emails, and other materials that set forth certain of the events described herein.

4. During this investigation, I and other FBI agents have interviewed witnesses with first-hand knowledge of certain events described herein.

5. The following facts are based upon information derived during the course of the FBI's investigation, including the review of relevant documents and interviews.[1]

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[1] This affidavit contains facts necessary to demonstrate probable cause that a crime has been committed as well as certain background facts which aid in a better understanding of the transactions at issue. It does not include all facts uncovered during the FBI's investigation, but only summarizes certain pertinent portions of interviews conducted and documents reviewed as part of the ongoing investigation.

Relevant Corporations and Partnerships

6. Enron was an Oregon corporation with its principal place of business in Houston, Texas. Enron was primarily in the energy business, but it also invested in other businesses, including in an internet venture called Rhythms NetConnections, Inc. ("Rhythms Net"). In March or April1999, Rhythms Net conducted an initial public offering (an "IPO") of its shares. Enron owned approximately 5.4 million pre-IPO shares of Rhythms Net. After the IPO, those shares were trading well above the amount Enron had invested. However, under the terms of its ownership, Enron was restricted from selling those shares before approximately October 1999.

7. In or about June 1999, Enron's Board of Directors passed a resolution which gave Enron's Chief Financial Officer ("CFO") a limited waiver of Enron's conflict-of-interest rules so that he could also act as general partner of a newly formed partnership called LJM Cayman, L.P. ("LJM Cayman").[2] Enron's Board of Directors was told that LJM Cayman was being established to hedge Enron's risk in its Rhythms Net investment. For that hedging purpose, LJM Cayman and Enron engaged in transactions in which LJM Cayman received approximately 3.4 million shares of restricted Enron stock. In exchange, LJM Cayman issued Enron promissory notes for approximately $64 million and created a subsidiary that wrote Enron a series of derivative options. The derivative options included a "put," giving Enron the right to sell its Rhythms Net shares to the LJM Cayman subsidiary Swap Sub for $56.125 each on certain dates. LJM Cayman

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[2] In or about June 1999, LJM Cayman created a subsidiary called LJM Swap Sub, L.P. ("Swap Sub"). The general partner of Swap Sub was an entity named LJM SwapCo., of which the Enron CFO was the general partner.

used approximately 1.6 million of its Enron shares and approximately $3.75 million to capitalize Swap Sub.

8. National Westminster Bank Plc ("Nat West") was a bank with offices in Houston, Texas and London, England. Greenwich Nat West ("GNW") was a division of Nat West with offices in Greenwich, Connecticut and London, England. Nat West's GNW division had a structured finance group.

9. LJM Cayman had two limited partners, Campsie Limited ("Campsie") and ERNB, each of which had equal limited partner interests. Credit Suisse First Boston ("CSFB") established ERNB -- an acronym for Enron's Rhythms Net Bet -- in the Cayman Islands as a vehicle to invest in LJM Cayman. Nat West established Campsie in the Cayman Islands as a vehicle to invest in LJM Cayman.

<u>Participants</u>

10. During the relevant period, Andrew Fastow ("Fastow") was the CFO of Enron and acted as the general partner of LJM Cayman. Also, during the relevant period, Michael Kopper was Managing Director at Enron who helped Fastow run LJM Cayman.

11. During the relevant period, GARY STEVEN MULGREW was a managing director at Nat West's GNW division and the head of the structured finance group. GILES ROBERT HUGH DARBY also was a managing director at Nat West's GNW division who specialized in transactions in the energy industry and reported to MULGREW. DAVID JOHN BERMINGHAM also was a Nat West employee in the GNW division whose title was Head of the Structuring Group. BERMINGHAM reported to both MULGREW and DARBY. Individuals in the structured finance group at Nat West, including MULGREW, DARBY and

BERMINGHAM, negotiated Nat West's investments in and other transactions with Enron and LJM Cayman on behalf of Nat West.

Scheme to Defraud

12. Between approximately November 1999 and August 2000, while still employed at Nat West's GNW division, and while negotiating on behalf of Nat West, MULGREW, DARBY and BERMINGHAM, with the assistance of persons associated with Enron and LJM Cayman, devised and executed a scheme to defraud Nat West by causing Nat West to sell its interest in Campsie for approximately $1 million at a time when MULGREW, DARBY and BERMINGHAM knew that Nat West's interest in Campsie was worth many times that amount. At the same time, MULGREW, DARBY and BERMINGHAM obtained for themselves a portion of Nat West's interest in the same partnership for only $250,000, then liquidated that interest just weeks later for $7.3 million in personal profit.

Nat West's Investments in LJM Cayman and Swap Sub

13. In or about June or July 1999, LJM Cayman was capitalized with approximately $16 million. Fastow represented to Enron's Board of Directors that he was investing $1 million and the limited partners, Campsie and ERNB, each invested $7.5 million.

14. When Nat West made its initial investment in LJM Cayman, Nat West realized that, due to the value of the Enron shares still held in LJM Cayman, Nat West's investment of $7.5 million had a paper value well in excess of that amount. Nat West also had an interest in Swap Sub, which also held Enron shares, but it valued that interest at zero because of the potential liability on the Rhythms Net put. Since LJM Cayman's only liability was the promissory notes to Enron,

Nat West and CSFB entered into a series of transactions which had the following effects: (i) the promissory notes were paid off; (ii) Enron shares held by LJM Cayman were delivered to Nat West and CSFB; and (iii) Nat West and CSFB each realized over $20 million in profits through derivatives transactions using the Enron shares.

The Nat West Takeover

15. In or about September or October 1999, the Bank of Scotland launched a hostile takeover bid for Nat West. Shortly thereafter, Royal Bank of Scotland ("RBS") also made a competing bid to takeover Nat West. As part of its defense to a hostile takeover, Nat West made efforts to increase its capital, including shopping its GNW division to potential buyers and offering early bonuses to its employees for deals closed during the first quarter of 2000. In addition, each of Nat West's suitors indicated that it would sell all or part of the GNW division if successful in a takeover of Nat West. Thus, by the end of 1999, it appeared likely that the GNW division would be sold regardless of the outcome of the takeover battle. On or about March 6, 2000, RBS won the hostile takeover battle and Nat West began transitioning to ownership by RBS.

16. In early 2000, Swap Sub's main asset — the Enron shares — increased in value and its only liability — the Rhythms Net put — decreased in value. During this period, MULGREW, DARBY and BERMINGHAM pursued efforts to crystallize the value of Nat West's investment in Swap Sub before the takeover of Nat West and the sale of Nat West's GNW division, and they discussed those efforts among themselves. At the same time, MULGREW, DARBY and BIRMINGHAM pursued and discussed efforts to enrich themselves from the liquidation of Nat West's interest in Swap Sub. Relevant communications regarding these efforts included, but

were not limited to, the following:

a. On or about January 29, 2000, BERMINGHAM told DARBY in an email that, with the price of Enron shares exceeding $60, he believed that Nat West's interest in Swap Sub had significant value. BERMINGHAM stated to DARBY that he "ran the numbers last night and I would say there is quite some value there now. The trick will be in capturing it. I have a couple of ideas but it may be good if I don't share them with anyone until we know our fate!!!" At this time, I believe that BERMINGHAM, DARBY and MULGREW were contemplating their futures in light of the takeover process and ways that they could capture the value of Nat West's interest in Swap Sub for themselves.

b. On or about February 19, 2000, BERMINGHAM emailed MULGREW and DARBY about an upcoming presentation to Fastow concerning a proposal to restructure Swap Sub. BERMINGHAM stated, "the story looks compelling, and even Andy would have trouble arguing that the benefit split is anything other than equitable. For your info, our minimum profit per these slides would be $8m, rising to $17m for the middle bit, and then finally up to around $30m. Everybody wins . . . Even the LPs don't end up looking too shabby." I believe that, as used in this email, "Andy" refers to Fastow, "our" refers to BERMINGHAM , MULGREW and DARBY, "slides" refers to the slides in the presentation to Fastow, and "LPs" refers to the limited partners, Campsie and ERNB.

c. In a series of email exchanges on or about February 20, 2000, BERMINGHAM acknowledged to MULGREW that the proposal he drafted did not guarantee Fastow a $25 million profit, stating, "If I knew there was a realistic way to 'lock in' the $40m and give him $25m, we would also jump all over it I guess, since it would give us $15m . . . I will be the first to be delighted if he has found a way to lock it in and steal a large portion himself," and "We should be able to appeal to his greed." In response to BERMINGHAM'S February 20, 2000 email, MULGREW replied, "why can't you squeeze the LPs a bit more." The pronouns "him" and "he" in these emails appear to refer to Fastow; "we" and "us" appear to refer to BERMINGHAM, MULGREW and DARBY; and "the LPs" appears to refer to Campsie and ERNB.

d. On or about February 21, 2000, BERMINGHAM forwarded a message to MULGREW and DARBY that he had already sent to another Nat West employee in GNW's structured finance group. BERMINGHAM included the following comments in his message forwarding the email to MULGREW and DARBY: "This in an attempt to head the obvious off at the pass and keep the lid on the thing. Large numbers of people are asking what we are up to. I hate lies." In addition, the message that BERMINGHAM sent to the other Nat West employee stated that DARBY and MULGREW were going to Houston to do a deal and that their boss was "in the loop," but that the other employee should "not speak to anyone" and should "just act dumb please."

e. On or about February 22, 2000, MULGREW, DARBY and BERMINGHAM traveled to Houston, Texas to make a presentation to Fastow and Kopper. Nat West's Enron relationship manager in Houston did not attend this meeting even though it was his job to arrange and attend such meetings. DARBY told the relationship manager not to attend but also not to worry because they were "going to get rich."

f. The presentation that BERMINGHAM, MULGREW and DARBY prepared for Fastow on or about February 22, 2000 discussed various alternatives which appear to be detrimental to Nat West's interest as a limited partner in LJM Cayman. For example, one of the possible alternatives listed in the presentation was to sell the Enron stock held by Swap Sub for cash and then buy it back a few days later. This appears to have been an attempt to convert that stock from partnership property, which Fastow was contractually prohibited from using for profit, to substitute property, which Fastow could profit from. However, the presentation went on to note that the "Problem is that it is too obvious (to both Enron and LPs) what is happening (ie, robbery of LPs), so probably not attractive. Also no certainty of making money . . . . . "

g. On or about February 26, 2000, BERMINGHAM and MULGREW exchanged a series of emails in which BERMINGHAM, addressing the potential tax consequences of the proposed transactions, wrote, "we know the minimum profit of CayCo will be $7m" and "$7m minimum profit" and "for pretty much any share price scenario . . . $7.5m (NewCo)." As set forth below, "CayCo" appears to be a reference to Southampton K Co., which was the vehicle used by Kopper to facilitate MULGREW, DARBY, and BERMINGHAM's effort to obtain the majority of Nat West's interest in Swap Sub. In response to BERMINGHAM's email, MULGREW wrote: "I understand (its so much easier to focus when its your own dough)."

<u>CSFB Liquidates Its Interest in LJM Cayman</u>

17. In or about January or February 2000, a CSFB managing director contacted Fastow about unwinding Enron's Rhythms Net transactions with LJM Cayman by dissolving the LJM Cayman subsidiary Swap Sub and distributing Swap Sub's assets. The managing director told Fastow that the recent increase in the price of Enron shares combined with a spike in the price of

Rhythms Net's shares presented a good opportunity to unwind the transaction in a way that would be profitable for Fastow, the limited partners, and Enron. He also noted that the Rhythms Net shares were extremely volatile and could decrease again, thereby increasing Swap Sub's liability on the put options granted to Enron. Fastow responded that Enron was not interested in unwinding the transaction.

18. Not satisfied with Fastow's response, the CSFB managing director attempted to enlist Nat West's help in his effort to convince Fastow to unwind the deal and he attempted to contact DARBY. Shortly thereafter, Fastow contacted the CSFB managing director and told him that Enron now wanted to unwind the transaction and pay CSFB $10 million for ERNB's interest in Swap Sub and that CSFB would receive more money than Nat West because it was CSFB's idea to unwind the deal.

<u>MULGREW, DARBY, and BERMINGHAM Execute Their Scheme to Defraud</u>

19. Between approximately March 2000 and July 2000, MULGREW, DARBY, and BERMINGHAM executed a scheme to purchase, and then profit hugely from, the lion's share of what should have been Nat West's beneficial interest in Swap Sub, held by the Campsie limited partnership. Pursuant to that scheme, the following events, among others, occurred on the following dates:

a. <u>On or about March 4, 2000</u>: While Fastow, BERMINGHAM and others were having dinner in the Cayman Islands, Fastow told BERMINGHAM, in substance, that he had to "move quickly."

b. <u>In or about early March 2000</u>: Kopper wrote in his work notebook, "Gary Mulgrew – spoke to AF, everything moving as planned." I believe that AF refers to Fastow.

c. <u>In or about late February or early March 2000</u>: Although MULGREW was authorized to approve transactions of such size on his own, MULGREW informed his boss at Nat West that Enron was offering to buy-out Nat West's interest in Swap Sub for $1 million and that the interest was worth about that much. MULGREW's boss told him to sell it.

d. On or about March 1, 2000: BERMINGHAM informed MULGREW and DARBY in an email that another Nat West employee was "in the loop" on the Nat West deal with Enron but that "He does NOT know anything about NewCo or our personal aspirations, just so you know." "NewCo" appears to be a reference to a new company that was used to help MULGREW, DARBY, and BERMINGHAM obtain an interest in Swap Sub for themselves.

e. On or about March 3, 2000: The Board of Directors of Campsie met in the Cayman Islands to consider a presentation by DARBY, on behalf of Campsie's owner Nat West, regarding a proposal that Campsie sell its interest in Swap Sub for $1 million. BERMINGHAM was a Campsie Board member who attended this meeting and voted to authorize DARBY to negotiate the transaction for Campsie.

f. March 7, 2000: Kopper sent a letter to DARBY formalizing the offer to purchase Campsie's interest in Swap Sub for $1 million. On the same day, DARBY drafted a memo advising MULGREW to accept the offer and representing, "There is clearly no way we can generate any profit (if any exists) from this subsidiary until 2004." As used in this memo, "this subsidiary" refers to the LJM Cayman subsidiary Swap Sub and "we" refers to Nat West. MULGREW approved the sale the same day.

g. On or about March 10, 2000: DARBY sent a letter to Kopper indicating that Campsie would sell its interest in Swap Sub to a company controlled by Kopper called "NewCo."

h. On or about March 14, 2000: BERMINGHAM flew to New York for meetings with Kopper and two other Enron/LJM Cayman employees. While in New York, BERMINGHAM drafted a form option agreement from Kopper to MULGREW, DARBY, and BERMINGHAM for an option to purchase Southampton K Co. (i.e., "CayCo"), one of the limited partners of Southampton, L.P. Southampton, L.P. was controlled by Kopper.

i. On or about March 16, 2000: At a meeting in the Cayman Islands, the Campsie Board of Directors approved a Purchase Agreement, presented by DARBY on behalf of Nat West, to sell Campsie's interest in Swap Sub for $1 million. On the same date, DARBY forwarded an email and attachments from an LJM Cayman attorney to Nat West's relationship manager for the Enron account in Houston with a note that "You need to sign this . . . ." The attachments to this email included a Consent and Amendment to the LJM Cayman limited partnership agreement allowing Fastow to make a distribution to the limited partners of their interests in Swap Sub. The Nat West relationship manager was on the Campsie Board of Directors and had been authorized to execute documents to effect this transaction. However, the Nat West relationship manager was not aware that MULGREW, DARBY, and BERMINGHAM were negotiating their own purchase of an interest in Swap Sub, via Southampton K Co., and that they would personally profit from this transaction at the expense of Nat West.

j. <u>On or about March 17, 2000</u>: Campsie entered into a Purchase Agreement whereby Campsie's interest in Swap Sub was sold for $1 million to Southampton, L.P. At or about the same time, ERNB entered into an agreement whereby ERNB's (and therefore CSFB's) interest in Swap Sub was sold to Southampton, L.P. for $10 million.

k. <u>On or about March 19, 2000</u>: BERMINGHAM tendered to MULGREW four weeks notice of resignation from Nat West.

l. <u>On or about March 20, 2000</u>: Kopper, MULGREW, DARBY, and BERMINGHAM signed the final version of the option agreement drafted by BERMINGHAM one week earlier in New York. This agreement gave MULGREW, DARBY, and BERMINGHAM the right, until May 31, 2000, to purchase jointly all of the issued and outstanding equity of Southampton K Co. for $250,000, plus interest.

m. <u>On or about March 22, 2000</u>: Enron and Swap Sub entered agreements to terminate the Rhythms Net put option, effective April 28, 2000.

n. <u>On or about March 27, 2000</u>: BERMINGHAM resigned from the Board of Directors of Campsie.

o. <u>On or about April 17, 2000</u>: DARBY sent an email to a group of Nat West employees indicating that he was resigning from Nat West. Darby's resignation became effective on July 31, 2000.

p. <u>April 20, 2000</u>: BERMINGHAM's last day on the Nat West payroll.

q. <u>On or about April 21, 2000</u>: BERMINGHAM, DARBY, and MULGREW notified Kopper that they were exercising their rights under their option agreement to purchase Southampton K Co.

r. <u>On or about April 24, 2000</u>: BERMINGHAM received an email from Kopper's attorney instructing him to wire transfer the purchase price for Southampton K

Co. to an account at Chase Bank of Texas in Houston, Texas in the name of Chewco Investments ("Chewco").

s. On or about April 24, 2000: BERMINGHAM directed that a wire transfer of funds be made to Chewco on April 27, 2000.

t. On or about April 25, 2000: MULGREW transferred approximately 160,000 British Pounds Sterling (approximately $250,000) from his bank account to BERMINGHAM's account at Nat West in order to fund BERMINGHAM, DARBY, and MULGREW's purchase of Southampton K Co.

u. On or about April 27, 2000: BERMINGHAM and Kopper executed a Share Purchase Agreement whereby Kopper sold all of the shares of Southampton K Co. to BERMINGHAM for $250,000 plus interest. On the same date, BERMINGHAM caused a wire transfer of $251,993 from BERMINGHAM's account at Nat West in Moorgate, England to a Chewco account at Chase Bank of Texas in Houston, Texas, as payment to Kopper. On the same date, BERMINGHAM also granted an option to MULGREW and DARBY to purchase one-third interests in Southampton K Co. until August 31, 2000.

v. On or about April 28, 2000: Enron and Swap Sub terminated their Rhythms Net agreements.

w. On or about April 28, 2000: Fastow called MULGREW, who was in Toronto, and told him, in substance, that MULGREW, DARBY, and BERMINGHAM had just made $7 million.

x. On or about May 1, 2000: Southampton K Co., which was now controlled by MULGREW, DARBY, and BERMINGHAM, received a wire transfer of approximately $7,352,626 into an account at the Bank of Bermuda (Cayman) Limited ("Bank of Bermuda").

y. On or about June 27, 2000: MULGREW resigned from Nat West.

z. On or about July 31, 2000: BERMINGHAM directed the Bank of Bermuda to transfer 1,522,072 British Pounds Sterling (approximately $2.38 million) from the Southampton K Co. account to an account controlled by DARBY. DARBY's resignation from Nat West became effective on the same date.

aa. On or about August 1, 2000: BERMINGHAM directed the Bank of Bermuda to transfer 250,000 British Pounds Sterling (approximately $390,000) from the Southampton K Co. account to BERMINGHAM's account at National Westminster Bank in London, England.

bb. On or about August 8, 2000: BERMINGHAM directed the Bank of Bermuda to transfer 1,522,072 British Pounds Sterling (approximately $2.38 million) from the Southampton K Co. account to an account controlled by MULGREW.

cc. On or about July 17, 2001: BERMINGHAM directed the Bank of Bermuda to transfer the remaining funds in the Southampton K Co. account to his solicitor's account in the United Kingdom.

Absence of Reporting And Approval

20. Nat West had a "Personal Account Dealing" policy ("PAD") that made clear that any partnership interests or other investments associated with Nat West employees must be reported to the Legal and Compliance Departments. In addition to the PAD policy, the GNW division had an extensive on-line compliance manual and an Ethical Standards and Conflict-of-Interest Policy in effect during the period relevant to this matter. These policies made it clear that Nat West employees in the GNW division were to avoid all actual conflicts, and the appearance of conflicts, between their personal interests and the interests of GNW and its clients. In addition, the policies prohibited use of confidential information about GNW and Nat West for any purpose – including personal investments – other than carrying out the business of the bank.

21. On or about March 10, 2000, BERMINGHAM sent an email notification to GNW's Compliance department in which he generically described a limited partnership investment in a film and "other projects" he might invest in, including by way of option. In response, BERMINGHAM received an email from a GNW compliance officer which confirmed that the proposed investments referenced by BERMINGHAM were covered by GNW's PAD Policy, that BERMINGHAM's email notification was sufficient notice of the film investment, and that "[t]his confirmation is based on the understanding that the subject investments will not give rise to any conflicts of interest involving GNW." These emails do not mention that

BERMINGHAM, MULGREW, and DARBY were contemplating purchasing an interest in Swap Sub while simultaneously recommending that Nat West sell its interest for a fraction of its actual value.

22. MULGREW, DARBY, and BERMINGHAM's personal investments in the Swap Sub transactions were not disclosed to Nat West officials and would not have been approved by Nat West officials.

Conclusion

23. The $7.3 million received by MULGREW, DARBY, and BERMINGHAM from the Southampton, L.P. transaction rightfully belonged to Nat West and would have gone to Nat West if Campsie had not sold its interest in Swap Sub for only $1 million pursuant to MULGREW's and DARBY's recommendation.

24. Based on the foregoing, I submit that there is probable cause to believe that GARY STEVEN MULGREW, GILES ROBERT HUGH DARBY, and DAVID JOHN BERMINGHAM did knowingly execute a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, transmitted and caused to be transmitted by means of wire communications in interstate and foreign commerce, writings, signs, signals, and sounds, including: (i) the March 16, 2000 email from DARBY in London, England to the Nat West relationship manager in Houston, Texas, as referenced in paragraph 19.i. above; (ii) the April 21, 2000 fax from Bermingham, Mulgrew and Darby to Kopper in Houston, Texas concerning the exercise of the Option Agreement, as referenced in paragraph 19.q. above; and (iii) the April 27, 2000, wire transfer of $251,993 from BERMINGHAM's account at Nat West

in Moorgate, England to the account of Chewco Investments, LP at Chase Bank of Texas in Houston, Texas, referenced in paragraph 19.u. above, in violation of Title 18, United States Code, Sections 1343 and 2.

C. Deanne Simpson
Special Agent
Federal Bureau of Investigation

Sworn to and subscribed before
me on , 2002.

United States Magistrate Judge
Southern District of Texas