

# “E-Discovery”

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## SYLLABUS

### A. **Basic Concepts – Discovery in the Digital Age**

1. Word processed documents and databases
2. E-mail
3. Instant messaging
4. Voice messaging
5. Considering the costs of e-discovery

### B. **Types of Data – Hard copy, paper-like images – TIF or PDF, reasonably usable format – load file or access database, native format, hosted data, web pages, and inactive data**

### C. **The Spoliation Challenge – How Data is Changed Or Lost When Handled**

1. Imbedded macros and auto date function
2. Different fonts can change pagination and appearance
3. Review created data changes
4. E-mail created data changes

### D. **Remedial Actions**

1. Require log of original system metadata
2. Limiting acquisition costs (native data may be prohibitively expensive to acquire)
3. Redaction of privileged information

### E. **Amendments To The FRCP Regarding Electronic Discovery – An Overview**

1. The Meet and Confer Obligation
2. Retention and Destruction; Rule 37(f)
3. The Two-Tier System; Rule 26(b)(2)(B) – Accessibility

4. The Production of Privileged Documents Whether Inadvertent or Intentional (see also item F where the primary discussion of the privileges is located - and specifically item F. 4.)
5. Relevance, accessibility and costs
6. Interrogatories, Requests for Production and Subpoenas Involving ESI

## **F. The Evidentiary Privileges in Bankruptcy Cases**

1. Overview of the evidentiary privileges and related privacy rights available to litigants.  
*Focus: The factual elements. Does state or federal law govern?*
2. Who holds the privileges and related privacy rights to avoid the production of probative evidence and who can waive them?  
*Focus: Distinguish between the Debtor entity, its directors, officers, managers and other employees and successors to them.*
3. Waivers of the Evidentiary Privileges.  
*Focus: Intentional and unintentional waivers, who has the ability to waive and the use of an employers computers, network servers and e-mail service and the like.*
4. The evidentiary privileges and related privacy rights in the age of electronically stored data.  
*Focus: Identify some of the problems created by electronically stored data in relation to the evidentiary privileges and related privacy rights, including the volume of such data and waiver due to third party access to such data.*
5. The new FRCP Rules relating to electronically stored data, focusing especially on new proposed Rule 502.  
*Focus: How do the new FRCP Rules operate to address the evidentiary privileges; identify problems the Rules try to resolve and where the Rules appear to succeed and where they seem to be lacking.*

## **G. Conclusions.**

## **H. Q & A.**

## HYPOTHETICAL

(Syllabus cross references in red)

The Farengi Fund aggressively participated in the run up of oil and natural gas prices in 2005 and early 2006, making millions of dollars on numerous trades. Much like Amaranth, Farengi aggressively bet on a continued rise in fuel prices. Alas, in the third quarter of calendar year 2006, Farengi's heretofore brilliant hedging strategy turned to ashes, resulting in losses exceeding \$6 billion.

On October 10, 2006, Farengi filed its voluntary Chapter 11 petition in the United States Bankruptcy Court for Southern District of Never Neverland. Farengi immediately moved to retain Zimmer & Hodges, LLP, as counsel, and Chu, Chu & Coleman, LLP, as restructuring consultants. Shortly thereafter, a Committee of Unsecured Creditors was appointed in the Chapter 11 case, and the Committee began investigating Farengi's business affairs, among other things, asking Farengi to voluntarily produce myriad documents. **A.1., 2., 3., 4., 5.** Farengi, by counsel agreed to deliver many of the documents, all of which were reviewed by Chu, Chu & Coleman, LLP, before delivery to Committee counsel. **B.**

On October 20, 2006, counsel for the Committee discovered that Howard Shemp, Farengi's CFO, completed numerous unauthorized trades using Farengi's accounts. The effect of the trades was to shift \$25,000,000.00 of losses to Farengi, leaving Shemp with a \$20,000,000.00 gain. Shemp, realizing that he "has a problem," retained civil and criminal defense counsel to represent him personally, as well as a forensic accounting firm possessing expertise in the area of commodities trading and derivatives. Shemp shared certain e-mails germane to Farengi's business affairs with his counsel and accountants to aide in the preparation of his personal defense. **C.** He also corresponded with his counsel and accountants using Farengi's e-mail system regarding his legal problems arising from his activities at Farengi. **E.4.**

On October 31, 2006, the Committee, by its counsel, commenced an Adversary Proceeding against Shemp to recover all of the money that allegedly rightfully belonged to Farengi, together with compensatory and punitive damages. **F.1.** Also, on October 31, 2006, Shemp resigned as Farengi's CFO. The principle claims set forth in the Committee's Complaint are common law fraud and conversion. **F.1.** On November 1, 2006, the Committee served a

Summons and Complaint on Shemp, together with a notice to take his deposition and for the production of documents pursuant to the applicable F. R. Bankr. P. E.1.-6. The document request included all Farengi's paper documents and all electronically stored information, e-mails, voice messages, and instant messages (collectively, "ESI") relating to Shemp's activities as Farengi's CFO and all trading records. D.1.,2.,3.

After receipt of the document production requests, Shemp consulted with Farengi's director of IT, who then audited Farengi's computer system and discovered that Farengi's trading records consisted of more than five million documents, including e-mails, voice recordings and instant messages. B., C.1.-4. and D.1.-3. The results of the audit were provided to counsel for Farengi and Shemp's personal counsel in the Adversary Proceeding. Later that afternoon, counsel for Farengi contacted Committee counsel to advise that Farengi could not afford to comply with the document demand. E.1.-6.

The case was converted to Chapter 7 on November 23, 2006, and Rob Grabbit was appointed Chapter 7 Trustee. Shortly thereafter, Grabbit retained counsel and accountants to investigate Farengi's financial affairs and review its books and records to determine if facts existed to support litigation claims to be asserted on behalf of the estate. Grabbit instructed his accountants to focus on transactions involving Howard Moe, F. Larry and Howard Curley, former officers and directors of Farengi, all of whom also traded for Farengi before its collapse.

When the case was converted to Chapter 7, Moe, Larry and Curley were out of town, but they contacted Grabbit and asked him how to proceed. After consulting with his accountants, Grabbit told Moe, Larry and Curley to have an employee lock up Farengi's premises, leave all of Farengi's property, including its laptops, PDA's, desktop computers, electronic media, books and records and financial information, in place and send the keys to Grabbit's office. A.1.-5., B., C.1.-4. None of Moe, Larry, nor Curley returned to Farengi's premises after conversion of the case, however, they contacted Gripeline.com., a third party vendor of secure communications, to terminate the services Gripeline provided to Farengi, including the maintenance of Farengi's telephone service and of a website made available to individuals for the purpose of contacting Farengi with complaints regarding Farengi's corporate conduct and governance. Soon thereafter, Grabbit's accountants took possession of all of Farengi's hard copy books and records and its entire computer network, including individual PCs, laptops, PDA's, network servers and backup

tapes that had been stored “off site” and which were being maintained by a third party vendor. E.1, 2, 3.4., F.2., 3.

On December 12, 2006, Grabbit’s attorney served an Order pursuant to F.R. Banks P. 2004 for the examination of each of Moe, Larry and Curley and for the production of documents, including all ESI relating to Farengi’s assets, liabilities and financial affairs. The Order directed that all ESI should be produced in “native” form and all Metadata and embedded data should be fully preserved. B. On December 15, 2006, counsel for Grabbit sent counsel for Moe, Larry and Curly a letter seeking a meeting of counsel to discuss discovery issues, including issues related to the production of ESI. E.1.-4. Additionally, on the same date, counsel for Grabbit sent counsel for Shemp a letter seeking a meeting of counsel for Shemp in the Adversary Proceeding a letter seeking a meeting of counsel to discuss similar. E.1.-4.

In November 2006, counsel for Moe, Larry and Curley learned that certain ESI and print copy documents containing allegedly privileged communications were left behind at Farengi’s premises. F.3.4. Counsel for Moe, Larry and Curley and counsel for Shemp then asked counsel for Grabbit to segregate such ESI and hard copy documents and treat them as being subject to the evidentiary privileges and certain other ill defined privacy rights. F.3.4.

Moe, Larry nor Curley has complied with the discovery demands served by Grabbit’s counsel. Shemp has not complied with the discovery served in the Adversary Proceeding. Moe, Larry, Curley and Shemp each contend that certain documents, including ESI, sought by Grabbit as Trustee, and by Grabbit as Trustee and successor Plaintiff in the Adversary Proceeding, are covered by the attorney-client, work product and joint defense privileges. F.1.2.3.4. On January 2, 2007, Moe, Larry and Curley provided the Trustee with a privilege log covering the ESI and print documents. In lieu of a formal privilege log Shemp has claimed that any documents he may possess or control responsive to the document demand are protected by the evidentiary privileges. F.2., 3., 4.

The Trustee has moved to compel production asserting, first, the documents requested are not subject to any evidentiary privilege nor to any other right that would allow Moe, Larry Curley and Shemp not to produce the documents requested, and, second, Moe, Larry, Curley and Shemp waived the privileges, if any existed, since the documents were stored on Farengi’s computer network or in Farengi’s offices. F.1., 2., 3., 4. On the other hand, Moe, Larry, Curley

and Shemp assert, first, the privileges and related privacy rights absolve them from producing the documents sought, and, second, they never waived such privileges, although the records sought by the Trustee were all stored on Farengi's computer network and hardcopies all were left in Farengi's offices when possession of Farengi's assets were turned over to the Trustee. F.1., 2., 3., 4.

During his ongoing investigation, Grabbit became aware that the Farengi computer system maintained detailed, "computer audit logs" of business activities on all transactions with the associated and related threads of electronic communications, including e-mails, instant messages and video conference sessions, etc. These items were all capable of being systematically stored and indexed so they readily could be searched by authorized individuals if necessary. At all times relevant, Moe, Larry, Curly and Shemp were aware that Farengi's IT Department could avail itself of such search and review capability. F.3., 4.

Oh yes, on January 2, 2007, the United States Attorney for the District of Never Neverland commenced her investigation regarding the collapse of Farengi and the respective roles of various parties regarding such collapse. On January 7, 2007, the Office of the U.S. Attorney issued document subpoenas seeking copies of all Farengi documents, including all ESI relating to Farengi's trading activities. E.4., F.5

## MODEL QUESTIONS IMPLICATED BY THE HYPOTHETICAL

1. Does the Debtor have a document retention policy in place (document destruction protocol)? How does the Chapter 11 filing affect that policy? What is the extent of counsel's obligations to prevent the destruction of ESI (the so called "preservation" letter)? What are the Debtor's duties under the Bankruptcy Code, if any, concerning the preservation of ESI?
2. Does a consultant's review of the documents affect the viability of the evidentiary privileges?
3. Does sharing corporate documents with an individual's counsel affect the viability of the evidentiary privileges? Who holds the privileges?
4. Does it matter that Shemp used Farengi's e-mail system to correspond with his personal counsel? How will that affect his personal defense?
5. Does federal common law or state law govern the assertion of privileges in the adversary proceeding by the defendant?
6. What is ESI? What types of data is stored by most business? What is "reasonably usable format"? What is "native format"? What is "hosted data" format? How is ESI cost or changed when handled? How can ESI be preserved?
7. Does cost shifting, as contemplated by Rule 26, work in the bankruptcy context?
8. How do the Amended Rules apply in the bankruptcy context?
  - ◆ Retention and destruction: Rule 37(f)
  - ◆ Accessibility: Rule 26(b)(2)(B) – the two tiered system
9. Why were phone calls made by counsel (the meet and confer obligation)? Is there a bankruptcy analog to Rule 26(f)? Should there be?
10. What information will accountants and financial advisors typically seek from a Debtor and "insiders" in terms of data?
11. How are the privileges affected by an entity's methods of using and storing ESI, including the use of third party providers?
12. How will ESI be addressed in the context of Bankruptcy Rule 2004?



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Mr. Herman is a past Chair of the Committee on Bankruptcy Law for the Business Law Section, current Chair for the Bankruptcy and Debtor and Creditor Law CLE Programs, and member of the New York State Bar Association. He is a member of the New York City Bar Association, a member of the Steering Committee for the NYC Bankruptcy Assistance Project, and a member of the Bankruptcy Administration Committee and Real Estate Committee of the American Bankruptcy Institute. He is admitted to practice in the Second Circuit of the U.S. Court of Appeals, and the U.S. District Courts for the Southern, Eastern, Western, and Northern Districts of New York.

Mr. Herman has been the Chair, Moderator, and Speaker of several conferences for the New York State Bar Association, New York County Lawyers' Association, American Bankruptcy Institute, American Conference Institute, and many others. He is an Adjunct Professor at St. John's School of Law in the Bankruptcy LL.M. program, and on the Board at Westchester Hebrew High School.

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## SPECIAL KUDOS

Special kudos to Jack Seward for providing his incites on the topics covered by this program and these materials. Without his advice and expertise, none of this would have been possible.

Mr. Seward is a digital forensic accounting technologist in New York and provides litigation support, including e-Discovery and computer forensics for bankruptcy, insolvency, and other commercial matters. He co-chairs the ABI's Commercial Fraud Task Force Committee, and is a contributing editor of *Norton Bankruptcy Law & Practice, 2d* and the *ABI Journal*. His *Straight and Narrow* and *Beyond the Quill* columns for the *ABI Journal* cover various topics relating to ethics, bankruptcy litigation, and technology, including electronically stored information, e-Discovery, computer forensics, and case administration.

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# **Record Retention, Preservation, and Production of ESI Under the Amended Federal Rules As Applied in the Bankruptcy Context**

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## Some Historical Consequences of Failing to Preserve ESI

- *Zubulake v. UBS Warburg, LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (Zubulake V); 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV)
- *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. 15<sup>th</sup> Cir. March 1, 2005)
- *Mosaid Technologies, Inc. v. Samsung Electronics Co., Ltd.*, 348 F. Supp. 2d 332 (D.N.J. 2004)
- *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003)
- *United States of America v. Philip Morris USA INC. f/k/a Philip Morris Inc.*, 327 F.Supp.2d 21 (S.D.C. 2004)
- *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002)

## Changes to Fed. R. Civ. P. to Address Challenges Presented by Discovery of ESI

- Distinction between ESI and documents
- The form of production
- Information preservation
- Privilege waiver

## **Production and Preservation Obligations**

- **Discussion of issues relating to producing discoverable information as part of Rule 26(f) conference**
- **Issues related to disclosure or discovery of ESI in Rule 16 discovery plan**
- **Discussion of issues relating to preserving discoverable information**
- **Form of electronic production included in discovery plan**

## The e-Discovery Standard

“A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is **not reasonably accessible** because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

## Changes to Rule 34 (Production Rule)

- **Change in the title of the rule**
- **Scope: ESI, sound recordings, images, data ... stored in any medium**
- **Intended to be broad enough to cover all types of computer-based information, including technological advances in the future**
- **Amendments allow for testing and sampling**

## Additional Changes to Rule 34 (Production Rule)

- **Requesting party can specify form of discovery**
- **If not specified or responding party objects, must state form in which electronic data will be produced; must produce in form or forms in which it is ordinarily kept or in a form “reasonably usable”**
- **“Searchable form”**
- **Production in native format not necessarily required**
- **Metadata must be preserved and maintained**

## Overview of Changes to Rules 33 and 45

- **Rule 33: Interrogatories**
  - ▶ May point to ESI in response to interrogatory
  - ▶ May require direct access to data or technical assistance
- **Rule 45: Subpoenas**
  - ▶ May obtain ESI from third party
  - ▶ Same scope on limitations as Rules 34 and 26(b)(2)

## Rule 37 “Safe Harbor”

“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine, good faith operations of the party’s electronic information systems.”

- No court-imposed preservation order in effect
- Responding party takes reasonable steps to preserve information
- Failure resulted from routine operation of electronic information system

## Inadvertent Production of Privileged Material – Rule 26(b)(5)(B)

“If information is produced during discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.”

## **Proposed Amendment to Fed. R. Evid. 502**

“ \*\*\*

**(b) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).**

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## Proposed Amendment to Fed. R. Evid. 502 (cont'd)

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**(d) Controlling effect of court orders. A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.**

**(e) Controlling effect of party agreements. An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order. \*\*\*”**

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## Litigation Hold

- Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents  
**Zubulake IV, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)**
- The party must retain all relevant documents in existence at the time the duty to preserve attaches, and any relevant documents created thereafter
- The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (September 2004 Public Comment Draft)  
[www.thesedonaconference.org/publications](http://www.thesedonaconference.org/publications)
- ALAS (Attorney Liability Assurance Society, Inc.) recommendations

## Recent Cases Involving ESI and the Amended Rules

- ***Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006)** (outside counsel grossly negligent in production failure)
- ***Analog Devices, Inc. v. Michalski*, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006)** (analyzes the various approaches to managing discovery of ESI)
- ***In re NTL, Inc. Securities Litigation*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)** (spoliation)
- ***Ameriwood Industries, Inc. v. Liberman*, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007)** (burden-shifting analysis in compelling production of ESI)
- ***Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., et al.*, 2007 WL 684001 (D. Colo. March 2, 2007)** (preservation obligations and litigation holds)
- ***Capitano v. Ford Motor Co.*, 831 N.Y.S.2d 687 (N.Y. Sup. 2007)** (litigation hold letters/memoranda are attorney/client communications)

## Application of the Amended Federal Rules to Bankruptcy Cases

- Federal Rules apply pursuant to the applicable Bankruptcy Rules
- Local Bankruptcy Rules may apply
- The meet and confer obligation – Federal Rule 26(f):  
Is there a chapter 11 analog?

## **Document Retention Policies and the Effect of Bankruptcy**

- **The “litigation freeze” – counsel’s ethical obligations**
- **Preservation issues unique to bankruptcy**
  - ▶ **Asset sales**
  - ▶ **Multi-party disputes**
  - ▶ **Post-confirmation issues**

## ESI and Bankruptcy: Additional Issues

- ESI and the Broad Scope of Bankruptcy Rule 2004
- Bankruptcy and the Evidentiary Privileges
  - ▶ Identifying the client
  - ▶ Does State or Federal law govern?





**Glossary of  
Common Electronic Discovery  
Terms and Concepts**

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## Electronic Discovery Glossary

**Active Data:** Data that can be readily accessed directly from a computer or storage device.

**Application:** A software program, such as Word or Excel or Adobe Acrobat, that enables a user to access, view, modify, store, or extract information from files or databases.

**Archive [Electronic]:** As with paper archives, Electronic Archives store electronic records for the long term. Electronic archives preserve the content, prevent or track alterations and control access to electronic records.

**Attachment:** A record or file associated with another record, most commonly in electronic mail. An attachment is linked to a “parent” record, and is known as the parent’s “child.” Multiple attachments can be associated with a parent, and an attachment can have additional attachments, thereby creating multiple levels of records, called a “family” or “attachment group.” Attachments groups are typically categorized as a single unit. In the context of document review the parent and its attachments are generally produced together, though in some cases they can be disassociated. See also *Family Relationship*.

**ASCII (American Standard Code for Information Exchange):** Format for storing data that facilitates the exchange of data across systems. ASCII is system that represents characters in format understood by most computer systems.

**Author:** The author of a document is the person or entity that created an electronic record. In email, the author is who the email is from. In some cases, other software applications such as Word and Excel capture the author’s identity in the application’s properties.

**Backup Data:** Information that is maintained as a copy for data retention, backup, or disaster recovery purposes. Backup data is generally not readily accessible from common computer or storage devices, as the data is written to specialized media (such as magnetic tapes) that are optimized for high capacity.

**Backup Tape:** Magnetic media used to store backup data. Backup tapes store large amounts of data and are typically used within an archive of multiple tapes, the contents of which are inventoried in an index.

**Backup Tape Recycling:** The re-utilization of tapes in a backup system whereby data is overwritten on a schedule. This recycling causes the loss of data stored within the backup archive over time.

## Electronic Discovery Glossary

**Bandwidth:** The amount of information or data that can be sent over a network in a given period of time. Bandwidth is commonly measured in kilobits per second (kbps), or megabits per second (mbps). A basic home DSL typically provides speeds from 300 kbps to 3,000 kbps. A typical office connects to the internet at speeds such as 3 mbps or higher.

**Bates Number [Electronic]:** A tracking number assigned to each page in a set of documents produced in discovery. The concept is the same as with traditional Bates numbers, except that the number is applied automatically by the database system, embedding the number into an electronic image. When files are produced in native form, different methods are available for associating a Bates number with native files.

**Binary:** The underlying computational mechanism used by today's computers. The binary system represents numeric values using two symbols, using digits "1" and "0". This is also known as a base 2 number system.

**Bit:** The smallest measurement of digital information. A bit is either the "1" or "0" component of the binary code. Eight bits constitute a byte.

**Blog:** Web publication that consists of short articles, links, and comments (also known as web logs). In the beginning blogs represented the voice of individuals, but are increasingly being adopted in a commercial context.

**Byte:** The basic unit of measure for most electronic data. Most data volumes today are expressed in megabytes or gigabytes, based on the nearest multiples of a byte:

- 1 bit = smallest unit
- 1 byte = 8 bits
- 1 kilobyte (KB) = 1,024 bytes
- 1 megabyte (MB) = 1,024 KB
- 1 gigabyte (GB) = 1,024 MB
- 1 terabyte (TB) = 1,024 GB
- 1 petabyte (PB) = 1,024 TB
- 1 exabyte (EB) = 1,024 PB

**Cache:** Computer memory that temporarily stores frequently used information for faster retrieval and performance.

**CD-ROM:** Data storage medium that uses compact discs to store various types of data, including software, images, documents, audio, or video files. A CD-ROM can store approximately 15,000 pages of document pages in image format.

## Electronic Discovery Glossary

**Coding:** Document coding is the process of capturing information that describes a document (such as the author, date, recipient, etc.) so that it can be used in a database to enable a user to search and categorize documents.

**Compressed File:** A file saved in a format that reduces its size without otherwise altering it. Files are commonly compressed to reduce the amount of space they require on storage devices, or to facilitate their transfer by email or across a network. Winzip is a popular multi-purpose compression format. Some specialized compression formats have become the industry standard for specific file types, such as TIFF for electronic images, and MP3 for audio files.

**Computer Forensics:** The processes, tools and techniques used to assess, recover, and interpret electronic evidence. Examples of forensics work include the recovery of deleted data, extraction and analysis of user access logs, and the preservation of evidence stored on computers.

**Cookie:** A file written to a user's hard drive when they access a web site. These files are generally benign, storing information that identifies users (such as user preferences and login information).

**Custodian:** The owner or person responsible for the care of business records. The custodian is typically the best person to identify the relevance and location of ESI. Data collection efforts focus on custodians as the primary source for limiting the information that will be collected and exchanged in a matter.

**DAT (Digital Audio Tape):** Used as a storage medium in some backup systems.

**Data:** The general designation for information stored on the computer or storage device and used by applications to create documents, sounds, or images. Equivalent to ESI (“Electronically Stored Information”).

**De-Duplication:** The removal of duplicate records through the comparison of the records’ unique characteristics. These characteristics are expressed as a “hash” value, a numeric value that uniquely identifies the record, and can easily be compared to other records.

**Deleted Data:** Data tagged for removal from storage by a computer system or end-user action. Deleted data remains on storage media in whole or in part until it is overwritten by ongoing usage or “wiped” with a software program specifically designed to remove deleted data. When new data is written to the designated space, the original data is rendered inaccessible except using special data recovery tools. Even after the data itself

## Electronic Discovery Glossary

has been wiped, directory entries, pointers, or other metadata relating to the deleted data may remain on the computer.

**Desktop:** An individual's fixed, office personal computer.

**Digital:** Storing information in a binary format. See *Binary*, above.

**Disc (disk):** It may be a floppy disk, or it may be a hard disk. Either way, it is a magnetic storage medium on which data is digitally stored. A disc may also refer to a CD-ROM.

**Document.** Refers to e-mail, attachments, database records, word processed documents, spreadsheets, graphic files, and also a set of images that make up a document. The term is interchangeable with a "record" or "file." As defined in Fed. R. Civ. P. 34(a), documents include "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations."

**Document Attribute:** See *Embedded Object*, below.

**Document Retention:** The preservation of documents and data, including hard copy and electronic documents, databases and e-mails, that are created, sent and received in an organization's ordinary course of business.

**Document Retention Policy:** A systematic plan for reviewing, maintaining and destroying documents and data, including hard copy and electronic documents, databases and e-mails, that are created, sent and received in an organization's ordinary course of business.

**Electronic Discovery:** The process of collecting (also called "harvesting"), preparing, reviewing, and producing electronic documents in the context of the legal discovery process.

**Electronic Image:** An electronic or digital picture of a document; the most common image formats used in the legal area are TIFF and PDF.

**Electronic Mail Message:** Commonly referred to as "e-mail", an electronic mail message is a document created or received via an electronic mail system, including brief notes, formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, which may be transmitted with the message.

**Electronic Record:** Information recorded in a form that requires a computer or other machine to process it and that otherwise satisfies the definition of a record.

## Electronic Discovery Glossary

**E-mail String/Thread:** A series of e-mails related to each other as elements of a conversation with replies and/or forwarded messages.

**Embedded Object:** A form of metadata that is not readily apparent in an electronic document when viewed through normal means, but that expands, reduces, or qualifies the document's content. Document attributes and embedded data can significantly alter the meaning or import of a document when viewed in its totality. In Word, for example, track changes and versions show previous drafts; in PowerPoint, speaker notes reveal the author's perspective; in Excel, hidden rows and columns and formulas provide additional clues to use of the data.

**Encryption:** The process of protecting data by rendering it unreadable by anyone not authorized to read it.

**Extranet:** An extension of a corporate intranet site providing access to third parties for joint ventures and vendor relationships.

**Family (Attachment Relationship):** See *Attachment*, above.

**File Attribute:** Information about a data file that is maintained by the operating system, such as storage location, size, and date/time created.

**File extension:** The suffix of a file name that consists of a period followed by three or four letters. The extension provides a clue to the data file's format or the application used to create the file. However, file extensions can easily be modified to conceal data, and are not a reliable source of file type.

**File server:** A computer designated to serve as the main storage location for other computers on a network

**File sharing:** One of the key benefits of a network is the ability to share files stored on the server among several users.

**Firewall:** Hardware devices and/or software that protect a network and its users from intrusions by unauthorized users or programs.

**Floppy Disk:** A near-obsolete storage medium used to copy and port relatively small amounts of data (1.44 MB).

**Fragmented Data:** Fragmented data is live data that has been broken up and stored in various locations on a single hard drive or disk.

## Electronic Discovery Glossary

**FTP (File Transfer Protocol):** An Internet protocol that enables you to transfer files between computers on the Internet. SFTP, a secure variant of FTP, protects data in transit by encrypting it before sending.

**GIF (Graphic interchange format):** A computer compression format for pictures.

**Hard Drive:** The primary storage unit on PCs, consisting of one or more magnetic media platters on which digital data can be written and erased magnetically.

**Harvesting:** The collection of electronic documents and data including e-mail, Web pages, word processing files, computer databases, and virtually anything that is stored on a computer. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

**Hash Value:** A number that uniquely identifies a document for purpose of identification or de-duplication.

**HTML (Hypertext Markup Language):** The tag-based ASCII language used to create pages on the Web.

**Instant Messaging (“IM”):** Text based electronic communication between two or more users who are all online simultaneously. Many public IM systems include an option to maintain logs of these conversations or the users’ PC or on the IM server.

**Intranet:** A network of interconnecting smaller private networks that are isolated from the public Internet.

**IP address:** A unique identifier of a computer or network device connected to a private or public network.

**ISP (Internet Service Provider):** A service provider for internet access.

**JPEG (Joint Photographic Experts Group):** An image compression standard for photographs.

**Keyword search:** A search for documents containing one or more words that are specified by a user.

**LAN (Local area network):** Usually refers to a network of computers in a single building or other discrete location.

## Electronic Discovery Glossary

**Latency:** The time taken by a packet of data to travel from one application to another. Latency is as important as bandwidth when judging the speed of a site accessed through a network. Whereas bandwidth measures how much data can travel in a unit of time, latency measures how quickly each packet can reach its destination over the network.

**Legacy Data:** Data that is highly relevant to an organization, but which remains in an inefficient or obsolete system.

**Legal Hold:** A communication that suspends the normal disposition or processing of records due to a pending or anticipated litigation, audit, government investigation or other legal matter.

**Metadata:** Data included in an electronic document that describes key information such as when it was authored, exchanged, accessed and modified. Some metadata are readily apparent on the document, and others are hidden from view (see *Embedded Objects*, above).

**Migrated Data:** Information that has been moved from one database or format to another, usually as a result of a change from one hardware or software technology to another.

**Mirror Image:** Used in computer forensic investigations and some electronic discovery investigations, a mirror image is a bit-by-bit copy of a computer hard drive that ensures the operating system is not altered during the forensic examination. This is also referred to as “disc imaging,” or making a “forensic copy.”

**MIS:** Management information systems.

**Native Format:** Electronic documents depend on a format defined by the application that created it. This is known as the “native format” of the document. Because viewing or searching documents in the native format may require the original application (i.e., viewing a Microsoft Word document may require the Microsoft Word application), documents are often converted to a standard file format (i.e., tiff) as part of electronic document processing.

**Nesting:** When one document is inserted within another document (i.e., an attachment is nested within an email; graphics files are nested within a Microsoft Word document).

**Network:** A group of computers or devices connected together for the exchange of data and sharing of resources.

## Electronic Discovery Glossary

**Node:** Any device connected to network. PCs, servers, and printers are all nodes on the network.

**OCR (Optical Character Recognition):** A technology that converts an electronic image into searchable and editable text data.

**Offline:** A device that is not connected to a network.

**Off-line data:** The storage of electronic data outside the network in daily use (i.e., on backup tapes) that is only accessible through the off-line storage system, not the network.

**Online:** Connected (to a network).

**Operating system (OS):** The software on a computer that runs the hardware. On most PCs this is Windows 2000, XP or the Macintosh OS. Unix and Linux are other operating systems often found in scientific and technical environments.

**OST File (Offline Storage File):** The format (.ost extension) for the storage of Outlook data when not connected to the network. The OST file contains copies of the email stored in the Exchange server, and is synchronized whenever the Outlook mailbox is online.

**PDA (Personal Digital Assistant):** Handheld electronic device or organizer.

**PDF (Portable Document Format):** An Adobe format that enables documents to be viewed and printed using the free and ubiquitous Adobe Acrobat reader. A PDF can embed the text of the document, in which case its contents can be searched by keyword.

**Pointer:** An index entry in the directory of a disk (or other storage medium) that identifies the space on the disc in which an electronic document or piece of electronic data resides, thereby preventing that space from being overwritten by other data. In most cases, when an electronic document is “deleted,” the pointer is deleted, which allows the document to be overwritten, but the document is not actually erased.

**Portal:** An online system that enables multiple parties to collaborate by sharing calendars, document collections, work product and other information such as contact lists.

**Preservation Notice, Preservation Order:** See *Legal Hold*, above.

## Electronic Discovery Glossary

**PST (Personal Storage File):** The format (.pst extension) for the storage of Outlook data outside of the Exchange Server. A PST file is created when an mail account is configured, and to back up or archive Outlook messages.

**RAM (Random Access Memory):** Solid state memory in a computer into which operating system, application program, and document information can be loaded and executed for fast response.

**Record:** Information, regardless of medium or format, that is recorded by an organization. The term is used to describe both documents and electronically stored information.

**Records Management:** The planning, controlling, directing, organizing, training, promoting and other managerial activities involving the lifecycle of information, including creation, Records Retention Period, Retention Period: The length of time a given records series must be kept, expressed as either a time period (i.e., four years), an event or action (i.e., audit), or a combination (i.e., six months after audit).

**Records Retention Schedule:** A plan for the management of records, listing types of records and how long they should be kept; the purpose is to provide continuing authority to dispose of or transfer records to historical archives.

**Electronic Record Repository:** An online database created to store electronic records where they can be accessed, organized, and searched concurrently a group of users.

**Restore:** To transfer data from a backup medium (such as tapes) to an on-line system, often for the purpose of recovery from a problem, failure, or disaster. Restoration of archival media is the transfer of data from an archival store to an on-line system for the purposes of processing (such as query, analysis, extraction or disposition of that data). Archival restoration of systems may require not only data restoration but also replication of the original hardware and software operating environment. Restoration of systems is often called “recovery”.

**Router:** A piece of hardware that routes data from a local area network (LAN) to a phone line.

**Scanning:** The conversion of hard copy paper to digital image for use in a computer system. See also *OCR*, above.

**Sibling:** A sibling is a document that shares a common parent with the document in question (such as two attachments with the same parent email).

## Electronic Discovery Glossary

**Spoliation:** The destruction of records which may be relevant to ongoing or anticipated litigation, government investigation or audit.

**System administrator:** The person responsible for and knowledgeable about the database systems used in an organization.

**Thumb Drive:** A small portable device used to store data, typically via a USB connection.

**TIFF (Tagged Image File Format):** One of the most widely supported file formats for storing electronic images. It is a flexible format that can store single or multiple pages and support compression. Files in TIFF format generally end with a .tiff or .tif extension.

**TCP/IP:** A collection of protocols that define the basic workings of the features of the Internet (acronym for Transmission Control Protocol/Internet Protocol).

**VPN (Virtual Private Network):** A communication channel that enables private communications over a public network.



**FORM ORDER AUTHORIZING AND ESTABLISHING PROCEDURES FOR  
DISCOVERY PURSUANT TO BANKRUPTCY RULE 2004**

**SUBMITTED BY:**

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**FILED**

OCT 01 1999

TIMOTHY R. WALBRIDGE, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLAHOMA

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLAHOMA**

<b>IN RE:</b>	)	
	)	
<b>COMMERCIAL FINANCIAL SERVICES, INC., and</b>	)	<b>Case No. 98-05162-R</b>
	)	
<b>CF/SPC NGU, INC.,</b>	)	<b>Case No. 98-05166-R</b>
	)	<b>Chapter 11 Jointly</b>
	)	<b>Administered</b>
<b>Debtors and Debtors-in-Possession</b>	)	<b>with Case No. 98-05162-R</b>

**ORDER AUTHORIZING AND ESTABLISHING PROCEDURES  
FOR DISCOVERY PURSUANT TO BANKRUPTCY RULE 2004**

On January 11, 1999, the Official Committee of Asset Backed Security Holders (the "ABS Committee") filed its Motion for an Order Directing Examinations and Document Productions Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "ABS Committee's Motion") (Docket # 184). On January 26, 1999, CFS filed CFS Response to ABS Committee's Motion for an Order Directing Examinations and Document Productions Pursuant to Rule 2004 (Docket # 314). Thereafter, in connection with the ABS Committee's Motion the following pleadings were filed: (1) the Supplemental Statement in Support of the ABS Committee's Motion, filed by the ABS Committee, filed on February 1, 1999 (Docket # 337); (2) an application to join the ABS Committee's Motion filed by Alliance Capital Management, L.P. on September 15, 1999 (Docket # 1258); and the Supplement to Motion of Official Committee of Asset-Backed Security Holders for an Order Directing Examination and Document Productions Pursuant to Rule 2004 . . . filed on September 16, 1997 (Docket # 1275).

The ABS Committee's Motion was originally set for February 2, 1999 (Docket # 205), and was continued to February 9, 1999, in order for the parties to attempt to negotiate a mutually agreeable global order governing Rule 2004 examinations in this case (Docket # 359M). The hearing was continued at the request of the ABS Committee numerous times (Docket # 374, 381, 394M, 422, 436, 505, 509, 615, 620, 670, 679, 701M, 824, 825, 839M, 932, 940, and 964M).

On July 23, 1999, Bank Of America, N.A. filed its Motion for Order Authorizing Examinations Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure ("BOA's Motion"). BOA's Motion was set for August 5, 1999. Joinders in BOA's Motion were filed by (i) Bankers Trust Company As Indenture Trustee for SMART 1997-5 and SMART 1997-6, Series Indenture Trustee and Master Trustee for GREAT Series 1998-A and GREAT Series 1998-B ("BT as Trustee") (Docket # 1063); (ii) Norwest Bank Minnesota, National Association, As Trustee for SMART 1996-2, 1996-4, 1997-2 and 1997-3 Securitization Trusts (Docket # 1073) ("Norwest as

ENRASURECFSNORDEKSOmnibus Rule 2004 Discovery Order  
September 27, 1999 (6:31PM)

**DOCKETED** 10-1-99  
Clerk, U.S. Bankruptcy Court  
Northern District of Oklahoma

Case No. 98-05162-R

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Trustee" and, collectively with BT as Trustee, the "Trustees"); and (iii) Hartford Financial Services Group, Inc., Hartford Investment Management Company and Hartford Investment Services, Inc., as agent and attorney in fact for Hartford Fire Insurance Company, Hartford Life and Accident Insurance Company, Hartford Life and Annuity Insurance Company, Hartford Insurance Company of Illinois and Heritage Reinsurance Co. Ltd. (collectively "Hartford")(Docket # 1081). On August 3, 1999, the Official Committee of Unsecured Creditors (the "Creditors' Committee") and CFS filed objections to BOA's Motion (Docket # 1076, 1078). On August 4, 1999, AEGON USA Investment Management, Inc., BlackRock Financial Management, Inc., Hartford Investment Services, Inc. and ING Investment Management LLC filed their Response in Support of Motion of Bank of America, N.A. for Order Authorizing Examinations Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (Docket # 1080); and Charles Welsh, a party sought to be examined, filed his objection to BOA's Motion (Docket # 1092).

A hearing on BOA's Motion was held on August 5, 1999, whereupon the Court required CFS to issue document subpoenas as requested by BOA, and the remainder of BOA's Motion was continued to August 24, 1999 (Docket # 1102M, 1106), again for the purpose of allowing interested parties, including BOA and the ABS Committee, to prepare a proposed discovery order governing Rule 2004 discovery in this case. CFS offered to take the lead in coordinating the preparation of such a proposal. On August 24, 1999, a hearing was held on BOA's Motion and the ABS Committee's Motion, wherein the parties requested additional time to confer about the terms of the proposed discovery order; the hearing on both motions was continued to September 9, 1999 (Docket # 1189M), and then to September 16, 1999 (Docket # 1237M).

On September 15, 1999, CFS submitted to the Court a proposed Order Authorizing and Establishing Procedures for Discovery Pursuant to Bankruptcy Rule 2004. Comments upon and objections to the proposed order were filed by the Creditors' Committee (Docket # 1259); Norwest as Trustee (Docket # 1268); and the ABS Committee (Docket # 1275).

At the hearing on September 16, 1999, CFS submitted a revised Order Authorizing and Establishing Procedures for Discovery Pursuant to Bankruptcy Rule 2004 (the "Proposed Order") and the Court entertained argument of counsel concerning certain disputed matters. Counsel were permitted to file additional comments to the Proposed Order on or before September 17, 1999. On September 17, 1999, additional comments and objections were filed by Norwest as Trustee (Docket # 1286); William and Kathryn Bartmann as Equity Security Holders (the "Bartmanns") (Docket # 1287); and BT as Trustee (Docket # 1288).

On September 20, 1999, Hartford Investment Management Co. and Hartford Financial Services Group, Inc. filed a withdrawal of their joinder in BOA's Motion (Docket # 1297). Also on September 20, 1999, the Court entered an Order Granting Application Of Alliance Capital Management L.P. for Leave to Join in the Motion by the ABS Committee for an Order Directing Examinations and Document Production Pursuant to Rule 2004 (Docket # 1296).

Upon consideration of the Proposed Discovery Order, the above-recited pleadings, the arguments of counsel and the applicable law,

**THE COURT HEREBY FINDS THAT:**

1. This Court has jurisdiction to consider the ABS Committee's Motion and BOA's Motion (collectively the "Motions") and responses thereto and to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A) and (O). Venue is proper in this Court pursuant to 11 U.S.C. §§ 1408 and 1409.

2. Commercial Financial Services, Inc. ("CFS") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on December 11, 1998 (the "CFS Petition Date"). CF/SPC NGU, Inc. ("NGU" and, collectively with CFS, the "Debtors") filed a voluntary petition for relief under Chapter 11 on December 14, 1998.

3. The Debtors continue to function as Debtors-in-Possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. On January 5, 1999, the Court entered an order consolidating the Debtors' Chapter 11 cases for administrative purposes only.

5. By virtue of the Motions, joinders, objections and comments, certain parties in interest have expressed a desire to participate in discovery pursuant to Bankruptcy Rule 2004 in order to investigate the acts, conduct and property, and the liabilities and financial condition, of the Debtors and their affiliates, and other matters which may affect the administration of the Debtors' estates, and the sources of money or property that may be acquired by the Debtors for purposes of formulating and consummating a plan of orderly liquidation. Other parties in interest under Section 1109 of the Bankruptcy Code ("Parties in Interest") may desire to participate in Rule 2004 discovery. For the purposes of this Order, the Debtors, the ABS Committee, the Creditors' Committee, BOA, the Trustees, parties joining in the Motions, and all Parties in Interest who file a Request by Party in Interest for Notices Under Rule 2004 Discovery Order as set forth in ¶ Q(iv) of this Order shall be referred to herein as "Interested Parties."

6. The Court has determined that discovery by Interested Parties should be permitted pursuant to Bankruptcy Rule 2004, pursuant to a discovery plan based on the following principles:

a. The plan should be designed to accommodate and accomplish coordinated, cost-efficient discovery.

b. The plan should be designed to minimize the unnecessary burden and expense of redundant discovery requests upon recipients of Bankruptcy Rule 2004 discovery (the "Rule 2004 Discovery"), Interested Parties, and the Court.

c. The objective of this Order (among others) that recipients of Rule 2004 Discovery requests, including Interested Parties, be relieved of redundant discovery can be accomplished only if Interested Parties can be reasonably confident that all responsive documents either are produced or are specifically identified as withheld pursuant to a legitimate claim of privilege or other protection against disclosure. Upon learning that there are additional responsive documents in its possession or under its control which have not

been produced or identified as withheld under a claim of privilege, a recipient of a Rule 2004 Discovery request is under an obligation promptly to make known the existence of the documents (including the reason for the failure to produce or identify the documents as withheld under a claim of privilege) and submit the documents to the document depository or, if withheld under a claim of privilege or protection, provide a meaningful identification of the documents.

d. Discovery should be conducted on the assumption that there may be litigation relating to the Debtors before this Court, the United States District Court for the Northern District of Oklahoma, and other federal and state courts.

e. Through the use of one or more document depositories, all Interested Parties should have reasonable and cost-effective access to, and the ability to retrieve, (i) all existing and future examination transcripts, interrogatory answers, responses to requests for admissions, responses to requests for documents, hearing and trial transcripts in text-readable form and searchable computer files, and (ii) all documents produced by Debtors and recipients of Rule 2004 Discovery, in whatever form, that are likely to be used during examinations, hearings or trials.

f. Videotaped examinations (which are also stenographically recorded) may be taken for potential use as trial testimony of all persons and entities whose testimony will likely be needed in litigation, thereby enabling trials to be conducted in different courts simultaneously without complications arising from the unavailability of witnesses and to minimize the burden on such persons and entities.

g. Documents produced by recipients of Rule 2004 Discovery requests, including Interested Parties, should be indexed and maintained in one or more document depositories and, where appropriate, imaged in order to make the documents more easily accessible to a larger number of persons and entities.

h. The costs of copying and imaging documents, and maintaining one or more document depositories, should not be borne exclusively by the Debtors' estates, but rather should be borne by those Interested Parties who request such imaging and utilize such document depositories.

7. This Order is not intended to establish a set of inflexible rules for the conduct of Rule 2004 Discovery, but rather is intended to create a flexible framework in which to encourage cooperative and coordinated discovery by and among a multitude of Interested Parties with overlapping, parallel and/or divergent interests. As such, this Order is without prejudice to the right of any Interested Party to seek to modify or amend its terms, upon appropriate motion, notice and opportunity for a hearing, in the event that the terms of this Order do not foster the principles contained in ¶ 6, or in the event that circumstances change so that the terms of this Order are no longer appropriate.

8. The Debtors' books and records (including electronic data) constitute property of the Debtors' estates over which this Court has exclusive jurisdiction. See 28 U.S.C. § 1334(e); 11 U.S.C. § 541.

**THEREFORE, THE COURT HEREBY ORDERS THAT:**

A. Adequacy of Notice. Notice of the Motions was adequate under the circumstances, and all further notice of the relief granted in this Order is waived.

B. Disposition of Motions. The relief requested in the Motions is granted as, and to the extent, provided herein.<sup>1</sup> Interested Parties are authorized generally to issue discovery requests pursuant to Bankruptcy Rule 2004 subject to, and in accordance with, the terms of this Order (including the attachments to this Order). Except as otherwise provided herein, this Order is without prejudice to the right of any Interested Party or other recipient of a Rule 2004 Discovery request to move to quash, seek a protective order, or otherwise object to any such request, or to seek to modify this Order as set forth in ¶ 7 above.

C. Discovery Requests and Responses; Disputes. Only Interested Parties (as defined in ¶ 5 above) may commence and conduct Rule 2004 Discovery. Except for Rule 2004 discovery previously authorized by the Court, all Rule 2004 Discovery shall be conducted in accordance with this Order. Discovery requests and responses will not be filed with the Court, except when specifically ordered by the Court or to the extent offered in connection with a motion. Any motion relating to discovery shall contain a certification that the parties to the dispute (or others, as appropriate) have conferred by telephone and have made a good faith effort to resolve the dispute without the need for Court intervention.

D. Discovery Timing and Scope. All Rule 2004 Discovery shall be conducted according to the schedule attached hereto as Attachment No. 1 and shall be completed by September 30, 2000. The Court may grant relief from or otherwise extend this discovery cutoff date for good cause shown. To the extent that individuals and entities with knowledge of relevant facts in addition to those individuals and entities listed on Exhibits A-C of Attachment 1 are discovered during the course of the Rule 2004 Discovery, Interested Parties may seek an extension of time to obtain additional discovery from such individuals and entities. Counsel for Interested Parties shall cooperate in the scheduling of such additional Rule 2004 Discovery.

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<sup>1</sup>CFS, parties who responded to the Motions, and others, have consulted regarding the terms of a proposed order and CFS has provided the initial draft of the Proposed Order. The Court appreciates the efforts of the parties in crafting an orderly and feasible framework for Rule 2004 Discovery in this case. Notwithstanding their participation, each participating party voiced objections to certain portions of the Proposed Order, and the Court has revised, added to or deleted provisions of the Proposed Order. Thus this Order should not be considered a consent order.

E. Documents.

(i) Scope.

(a) "Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or disks, books, journals, calendars, day-timers, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, telegram messages, telephone bills and logs, resumes, summaries, compilations, computations, and other formal and informal writings or tangible preservations of information.

(b) This Order pertains only to documents containing information relevant to, or that may lead to the discovery of information relevant to, the acts, conduct and property, and the liabilities and financial condition, of the Debtors and their affiliates, and other matters which may affect the administration of the Debtors' estates, and the sources of money or property that may be acquired by the Debtors for purposes of formulating and consummating a plan of orderly liquidation.

(c) All documents deposited in the IKON Depository (as defined in ¶ F(ii) below) shall be maintained and preserved in the IKON Depository during the pendency of these cases, and for 120 days after entry of a final order closing these cases. Subject to further order of the Court, each Interested Party that receives notice of this Order shall be responsible for preserving and maintaining, at its own cost and expense, all documents (in whatever form) relevant to, or that may lead to the discovery of information relevant to, the subject matter of the Rule 2004 Discovery; provided, however, that the Debtors shall be permitted to transfer documents as part of Court-authorized sales of property of their estates; and provided, further, however, that nothing in this Order shall limit the obligations of Interested Parties and others who do not receive notice of this Order to preserve and maintain documents under other applicable law.

(ii) Numbering System. Debtors' counsel shall develop and implement a system for identifying, by a unique number, symbol or other designation, each of the Debtors' documents of which other Interested Parties request copies during the course of the Rule 2004 Discovery. IKON Document Services ("IKON"), through its designated representative, currently Troy Gentry, at 15 West 6<sup>th</sup> Street, Suite 2710, Tulsa, Oklahoma 74119, (918) 585-9000, shall develop and implement a system for identifying, by a unique prefix identifying the producing party and by number, each document produced by other Interested Parties and others during the course of the Rule 2004 Discovery.

F. Document Depositories.

(i) Establishment of CFS Depository. CFS shall establish an initial document depository (the "CFS Depository") for documents of the Debtors and their affiliates at CFS's offices in Tulsa, Oklahoma. If space limitations or other circumstances reasonably require that all or some portion of the documents be stored elsewhere, then CFS shall be entitled to make appropriate arrangements for off-site storage consistent with this Order.

(ii) Establishment of IKON Depository. A document depository (the "IKON Depository") for all documents produced by Interested Parties (other than the Debtors and their affiliates) and others during the course of the Rule 2004 Discovery shall be established and maintained at IKON's offices, 15 W. 6<sup>th</sup> Street, Suite 2710, Tulsa, Oklahoma 74119, or such other location established by IKON. CFS is authorized to enter into the Document Services Agreement attached to the Addendum to Supplement to Motion of Official Committee of Asset-Backed Securityholders for an Order Directing Examination and Document Productions Pursuant to Rule 2004 . . . filed October 1, 1999.

(iii) Imaging. Documents of the Debtors and their affiliates of which Interested Parties request copies may be "imaged" by IKON and then made available to requesting parties on CD-ROM disks or other suitable media. Documents produced by Interested Parties (other than the Debtors and their affiliates) and others in response to Rule 2004 Discovery requests may be "imaged" by IKON and then made available to requesting parties on CD-ROM disks or other suitable media. The cost of imaging documents shall be borne initially by the Interested Party(ies) that request(s) such imaging; provided, however, that IKON shall cooperate with such Interested Party(ies) to develop and implement a procedure for allocating the cost of imaging in an equitable fashion and reimbursing such Interested Party(ies) on a *pro rata* basis in the event that other Interested Parties or others subsequently request copies of the CD-ROM disks or other media. Notwithstanding anything to the contrary contained herein, each of CFS, the ABS Committee and the Creditors' Committee shall be entitled to one copy of any CD-ROM disk, or other suitable formatted copy, produced by IKON, but for cost allocation purposes, those three entities shall constitute one Interested Party.

(iv) Filing System. Documents produced by Interested Parties (other than the Debtors and their affiliates) and others pursuant to formal or informal Rule 2004 Discovery requests, as well as copies of interrogatories (and responses), deposition transcripts, trial transcripts and hearing transcripts, shall be deposited in the IKON Depository (after IKON or the producing party has numbered the documents in sequential order or otherwise identified the documents) and thereafter shall be maintained by IKON. Documents shall be organized in groups in accordance with document identification prefixes.

(v) Access, Copying, Log (CFS Depository). Counsel and other representatives of Interested Parties shall have reasonable access during business hours, on not less than 2 business days' advance written notice to CFS to inspect documents in the CFS Depository. Such notice may be delivered to a CFS designated representative by facsimile. Such inspection may be monitored by CFS. Counsel for Interested Parties may request from CFS

copies of documents from the CFS Depository, which copies shall be made by IKON and forwarded directly to the requesting Interested Party(ies); provided, however, that in responding to inspection and copying requests, CFS shall be responsible for balancing the competing interests of providing timely copies of, and preserving equal access to, the documents in the CFS Depository. Each Interested Party shall be responsible for paying for the cost of copies requested by such party, and for making adequate payment arrangements with IKON. CFS shall maintain a log of all persons who enter and leave the CFS Depository. Other than the delivery by CFS of documents to IKON for copying, only duplicate copies of documents may be removed from the CFS Depository, except by leave of Court.

(vi) Access, Copying, Log (IKON Depository). Counsel and other representatives of Interested Parties shall have access to inspect documents in the IKON Depository in accordance with ¶ F(viii) below. Advance notice to inspect documents in the IKON Depository shall be required only if such inspection is to occur before or after business hours or on weekends. Such inspection shall be monitored by IKON. Counsel for Interested Parties may request from IKON copies of documents from the IKON Depository, which copies shall be made by IKON and forwarded directly to the requesting Interested Party(ies). Each Interested Party shall be responsible for paying for the cost of copies requested by such party, and for making adequate payment arrangements with IKON. IKON shall maintain a log of all persons who enter and leave the IKON Depository. Only duplicate copies of documents may be removed from the IKON Depository, except by leave of Court.

(vii) CFS Viewing Room. CFS shall maintain a viewing room where representatives of Interested Parties may review the documents in the CFS Depository (the "CFS Viewing Room"). The CFS Viewing Room shall contain sufficient seating and table capacity for 10 people; no more than 10 people shall be permitted in the Viewing Room at any one time. No more than 2 representatives of an Interested Party may utilize the Viewing Room at any one time, unless there is excess capacity. In the event that more than 10 people seek to use the Viewing Room on any given day, the Debtors shall provide access on a first-come, first-served basis, and those who are denied access on that day shall have priority of access on the next available business day. The Viewing Room shall contain at least 1 computer workstation from which electronic files and data may be accessed, and at least 2 phones. The Viewing Room shall not contain a photocopier.

(viii) IKON Viewing Room. IKON shall maintain a viewing room where representatives of Interested Parties may review the documents in the IKON Depository (the "IKON Viewing Room") (a) at no charge between 8:00 a.m. and 5:00 p.m. on Monday - Friday, (b) at a charge of \$15.00 per hour between 5:00 p.m. and 8:00 p.m. on Monday - Friday, and (c) at a charge of \$25.00 per hour at all other times. The IKON Viewing Room shall contain sufficient seating and table capacity for 10 people; no more than 10 people shall be permitted in the IKON Viewing Room at any one time. No more than 2 representatives of any Interested Party may utilize the IKON Viewing Room at any one time, unless there is excess capacity. In the event that more than 10 people seek to use the IKON Viewing Room on any given day, IKON shall provide access on a first-come, first-served basis, and those who are denied access on that day shall have priority of access after normal business

hours (at their own cost and expense) or on the next available business day. The IKON Viewing Room shall contain at least at least 1 computer workstation from which electronic files and data may be accessed, and at least 2 phones. The IKON Viewing Room shall not contain a photocopier.

(ix) **Index Of CFS Depository.** To the extent feasible, CFS shall provide an initial index of categories of documents maintained in the CFS Depository upon request by an Interested Party. Thereafter, to the extent feasible, CFS periodically shall provide an updated category index to all Interested Parties who previously have requested an index as (a) CFS catalogues additional documents, and (b) additional documents are added to the CFS Depository.

(x) **Index of IKON Depository.** IKON shall create and maintain indices of (a) those parties who utilize the IKON Depository, (b) documents deposited in the IKON Depository (which index shall be updated as additional documents are added to the IKON Depository), (c) bates ranges per box of documents in the IKON Depository, and (d) the identity of parties who request copies of documents.

(xi) **Allocation of Costs of CFS Depository.** Pursuant to Fed. R. Civ. P. 26(b)(2) and (c), each Interested Party (other than the Debtors and their affiliates, the ABS Committee and the Creditors' Committee) that obtains copies of documents maintained in the CFS Depository shall bear its allocable share of the cost of establishing and maintaining the CFS Depository by paying to CFS a one-time lump sum of \$5,000. The imposition of this fee on Interested Parties is intended to reimburse CFS for the costs of establishing and maintaining the CFS Depository, including the cost of rent, personnel and other overhead, and is not intended to make the CFS Depository a "profit-center."

G. **Avoidance of Multiple Document Requests or Requests for Admission.** Counsel for Interested Parties shall, to the extent possible, coordinate and consolidate their requests for production and examination of documents and requests for admissions to any other Interested Party or other examinee into a single set of requests in order to eliminate duplicative requests. To this end, any Interested Party that intends to issue document requests or requests for admissions shall, at least 7 business days prior to issuing such requests, circulate by facsimile copies of its proposed requests to counsel for (i) the Debtors, (ii) the Creditors' Committee, (iii) the ABS Committee, (vi) the Trustees, and (v) to Interested Parties on the Rule 2004 Discovery Service List (defined below). Within such 7 business day period, other Interested Parties may supplement the proposed requests with additional requests to the intended recipient by serving such proposed requests by facsimile upon the Interested Party that originated the document requests or requests for admission. At the end of the 7-day period, the requests (as supplemented) may be issued.

H. **Avoidance of Multiple Sets of Interrogatories.** Counsel for Interested Parties shall, to the extent possible, coordinate and consolidate their interrogatories to any other Interested Party or other examinee into a single set of questions in order to eliminate duplicative interrogatories. To this end, any Interested Party that intends to issue interrogatories shall, at least 7 business days prior to issuing such interrogatories, circulate by facsimile copies of its proposed interrogatories to counsel for (i) the Debtors, (ii) the Creditors' Committee, (iii) the ABS Committee, (vi) the Trustees, and

(v) to Interested Parties on the Rule 2004 Discovery Service List (defined below). Within such 7 business day period, other Interested Parties may supplement the proposed interrogatories with additional interrogatories to the intended recipient by serving such proposed requests by facsimile upon the Interested Party that originated the interrogatories. At the end of the 7-day period, the interrogatories (as supplemented) may be issued.

I. Examinations. See Attachment No. 2.

J. Special Agreements.

(i) All Interested Parties shall be under a continuing duty to make prompt disclosure to the Court (and, unless excused by the Court for good cause shown, to those parties listed on the then-current Master Service List) of the existence and terms of all agreements and understandings (formal or informal, absolute or conditional) that purport to settle, transfer or limit their liabilities to, or claims against, the Debtors' estates. This obligation includes not only settlements, but also such matters as insurance, indemnification, contribution and damage-sharing arrangements.

(ii) Each Interested Party who ceases being a Party in Interest under Section 1109 of the Bankruptcy Code shall immediately file with the Court a Withdrawal Of Request By Interested Party For Notices Under Rule 2004 Discovery Order, and shall serve a copy of such withdrawal upon those Interested Parties reflected on the then-current Rule 2004 Discovery Service List. If the party filing and serving a Withdrawal Of Request By Interested Party For Notices Under Rule 2004 Discovery Order has transferred its claim to a third party, the withdrawal shall contain the name and address of the transferee of such claim, including the name and telephone number of the contact person with such transferee.

K. Creditors' Committee's Counsel. Counsel for the Creditors' Committee shall be generally responsible for coordinating the activities of creditors holding unsecured claims against the Debtors (excluding unsecured claims held by ABS Holders and the Trustees, if any) (the "Unsecured Creditors") during the Rule 2004 Discovery process and shall:

(i) determine (after consultation with members of the Creditors' Committee) and present (in briefs, oral argument, or such other fashion as may be appropriate) to the Court and other Interested Parties the position of the Creditors' Committee on all matters arising during the Rule 2004 Discovery;

(ii) coordinate the initiation and conduct of discovery on behalf of the Creditors' Committee consistent with the requirements of Bankruptcy Rule 2004, including the preparation of interrogatories, requests for admissions and requests for production of documents, and the examination of witnesses;

(iii) delegate specific tasks to Unsecured Creditors' counsel in a manner to ensure that Rule 2004 Discovery is conducted effectively, efficiently and economically;

(iv) enter into stipulations with counsel for other Interested Parties necessary for the conduct of the Rule 2004 Discovery;

(v) monitor the activities of the Rule 2004 Discovery in an effort to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and

(vi) perform such other duties as may be incidental to proper coordination of the Rule 2004 Discovery or as authorized by further order of the Court.

L. ABS Committee's Counsel. Counsel for the ABS Committee shall be generally responsible for coordinating the activities of ABS Holders during the Rule 2004 Discovery process and shall:

(i) determine (after consultation with members of the ABS Committee and ABS Holders as may be appropriate) and present (in briefs, oral argument, or such other fashion as may be appropriate) to the Court and other Interested Parties the position of ABS Holders on all matters arising during the Rule 2004 Discovery;

(ii) coordinate the initiation and conduct of discovery on behalf of ABS Holders consistent with the requirements of Bankruptcy Rule 2004, including the preparation of joint interrogatories, requests for admissions and requests for production of documents, and the examination of witnesses;

(iii) delegate specific tasks to other ABS Holders' counsel in a manner to ensure that Rule 2004 Discovery is conducted effectively, efficiently and economically, including, but not limited to, delegating to other ABS Holders' counsel all or a portion of the examination time allocated to the ABS Committee pursuant to Attachment No. 2 to this Order;

(iv) enter into stipulations with counsel for other Interested Parties necessary for the conduct of the Rule 2004 Discovery;

(v) monitor the activities of the Rule 2004 Discovery in an effort to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and

(vi) perform such other duties as may be incidental to proper coordination of the Rule 2004 Discovery or as authorized by further order of the Court.

M. Trustees. The Trustees may present written and oral arguments, conduct examinations, and otherwise act separately as appropriate, provided that in doing so they use their best efforts to coordinate their arguments, questions and actions with the ABS Committee.

N. Individual Unsecured Creditors, ABS Holders. Subject to the terms of this Order, ABS Holders and Unsecured Creditors who disagree with the conduct or positions of their respective committee, or who have individual or divergent positions, may make written and oral arguments to the Court, conduct examinations, and otherwise act separately as appropriate, provided, however,

that in doing so they shall not repeat the arguments, questions, or actions of their respective committee.

O. Use of Rule 2004 Discovery in Court. All Rule 2004 Discovery taken pursuant to this Order shall be deemed taken, conducted and useable in accordance with Fed. R. Civ. P. 26-37, made applicable to bankruptcy cases by Bankruptcy Rules 7026-7037, and Bankruptcy Rule 9014, for purposes of use at hearings and trials.

P. Effect of Order. This Order is without prejudice to (a) the right of any Interested Party to seek or conduct discovery in any contested matter and/or adversary proceeding in these cases, or in litigation outside of these cases, (b) the right of any Interested Party to seek Rule 2004 Discovery from persons or entities other than those set forth in the Exhibits to Attachment 1 hereto by motion to amend or supplement this Order, notice and an opportunity for a hearing; and (c) the right of any recipient of Rule 2004 Discovery requests to seek a protective order or other relief based on, among other things, the fact that it has previously responded to such Rule 2004 Discovery.

Q. Service of Order.

(i) Within 5 business days after the entry of this Order, CFS shall serve copies of this Order on the then-current Master Service List, and shall serve notice of the entry of this Order (in the form attached hereto as Attachment No. 4) on all Parties in Interest, including all known creditors of the Debtors, except that the Trustees shall serve copies of the Order on ABS Holders of record.

(ii) Any Interested Party that issues a Rule 2004 Discovery request pursuant to this Order shall serve a copy of this Order on the recipient of such request.

(iii) Within 5 business days after the entry of this Order, the Trustees shall serve copies of this Order on all ABS Holders of record.

(iv) All Parties in Interest that desire to be served with notice of all Rule 2004 Discovery taken pursuant to this Order shall file with the Court, and serve on CFS's counsel, a Request By Party in Interest For Notices Under Rule 2004 Discovery Order ("Request for Notices") in a form substantially similar to Attachment No. 3 attached hereto. Upon filing such a Request for Notices, a Party in Interest shall become an "Interested Party" and thus be entitled to seek and conduct Rule 2004 Discovery and be subject to all duties and obligations of this Order. CFS shall maintain a current list of Interested Parties (the "Rule 2004 Discovery Service List"), which shall be consecutively numbered and filed with the Court on Friday of each week (but only if there has been a change to the Rule 2004 Discovery Service List since the filing of the previous list), and shall serve a copy of the Rule 2004 Discovery Service List on those Interested Parties included on the Rule 2004 Discovery Service List.

R. Notice.

(i) For purposes of this Order, notice to a Party in Interest shall be deemed sufficient if sent by overnight delivery service, facsimile or United States first-class mail to such Party

in Interest at the address shown on the then-current Master Service List or, if a Party in Interest is not included on the Master Service List, then at the address shown for such party in the Debtors' bankruptcy schedules. Notice shall be deemed received (a) upon receipt, if sent by overnight delivery service or facsimile, and (b) 3 business days after mailing, if sent by United States first-class mail.

(ii) Interested Parties may elect to receive service of Rule 2004 Discovery requests by United States first-class mail or facsimile by indicating such election on the Request for Notices. An Interested Party may elect to receive Rule 2004 Discovery requests by e-mail *instead of or in addition to* other methods of service by so indicating on the Request for Notices.

S. The Court reserves jurisdiction to reallocate the costs of Rule 2004 Discovery or to order additional cost assessments if required in the interests of justice.

SO ORDERED this 1<sup>st</sup> day of October, 1999.

  
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DANA L. RASURE,  
UNITED STATES BANKRUPTCY JUDGE

**Attachment No. 1 -- Discovery Schedule**

Discovery shall be conducted according to the following schedule:

<u>Discovery</u>	<u>Date</u>
Interrogatories by all Interested Parties to ascertain identity and location of witnesses and documents, including computerized records	11/30/99
Document requests to those listed on Exhibit A	11/15/99
Document requests to those listed on Exhibit B	12/15/99
Document requests to those listed on Exhibit C	01/15/00
Witness examinations of those listed on Exhibit A	05/31/00
Witness examinations of those listed on Exhibit B	06/15/00
Witness examinations of those listed on Exhibit C	07/31/00
Supplemental examinations (if any)	08/31/00

**EXHIBIT "A"**

1. William Bartmann
2. Kathryn Bartmann
3. Jay Jones
4. Michael Temple
5. Gertrude Brady
6. James D. Sill
7. Bruce Hadden
8. Charlie Welsh
9. Mitchell Vernick
10. Fred Caruso
11. Peter Wachtell
12. Esther Vanna
13. Ram Ramakrishnan
14. Kevin Highland
15. Chris Horrocks
16. Jeff O'Hare
17. Wayne Learned
18. Alan Colberg
19. Richard Langstaff
20. Caroline Benediktson
21. Thomas Crotty
22. Chase Manhattan Bank
23. Chase Securities, Inc.
24. BT Alex Brown
25. Banc One Capital Corporation
26. Arthur Andersen
27. PricewaterhouseCoopers
28. Mayer Brown & Platt
29. Goldman Sachs
30. Dimat Corporation
31. Bankers Trust Company
32. Norwest Bank, N.A.
33. Duff and Phelps
34. Standard & Poor's
35. Moody's
36. Fitch & Co.
37. NationsBank Montgomery Securities

**EXHIBIT "B"**

1. Gary Betow
2. Bank One, Oklahoma, N.A.
3. Fleet Bank
4. The Fuji Bank, Limited
5. Long Term Credit Bank
6. NATEXIS Banque
7. Union Bank of California
8. Abbey National Treasury Services, PLC
9. AEGON USA Investment Management, Inc.
10. Alliance Capital Management L.P.
11. Miller, Anderson & Sherred, LLP
12. Pacific Life Insurance Company
13. Structured Finance Advisors
14. Blackrock Financial Management, Inc.
15. CGA Investment Management
16. Capital Reinsurance Co.
17. ING Investment Management, LLC
18. Hartford Investment Management Co.
19. Unsecured Noteholders (18)
20. Jenner & Block
21. Bank of America, N.A., f/k/a NationsBank

**EXHIBIT "C"**

1. Cadle & Co.
2. Bank of Oklahoma
3. Stephen Money
4. Tom Allison
5. Cynthia Andrews
6. Tonya Gates
7. David Gates
8. Bonita Konop
9. Dale Rudolph
10. James Woolsey
11. Brad Sharp

**Attachment No. 2 -- Examination Guidelines**

Examinations shall be conducted in accordance with the following rules:

1. **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and examinees.

2. **Scheduling.** Absent extraordinary circumstances, counsel shall consult in advance with counsel for other Interested Parties, counsel for proposed examinees and unrepresented proposed examinees in an effort to schedule examinations at mutually convenient times. That some counsel (other than examinee's counsel) may be unavailable shall not, however, in view of the number of attorneys involved in these cases, be grounds for deferring or postponing an examination. In any event, no examinee shall be subpoenaed or noticed for examination until at least 30 days after (a) documents produced in response to a document request to such examinee have been deposited in the IKON Depository, or (b) the examinee has certified that he or she has no documents that are responsive to such request. No simultaneous depositions shall be scheduled.

3. **Location; Costs.**

(a) **Location.** Unless otherwise agreed unanimously by all participating individuals (including the examinee), all examinations shall occur either in Chicago, Illinois, at the offices of Jenner & Block, or in Tulsa, Oklahoma, at a location designated by Debtors. If the examinee will not agree and cannot be compelled to attend an examination in Chicago or Tulsa, then the examination shall occur at a location to which the examinee can be compelled to attend pursuant to Bankruptcy Rules 2004(c) and 9016, or at such other place as may be agreed upon by the examinee and counsel for Interested Parties.

(b) **Costs.** Any mileage and witness fees required to be paid under Bankruptcy Rule 2004(e) shall be paid by the Interested Party that noticed the examination. If the examination is conducted more than 100 miles from the place where the examinee resides, is employed or regularly transacts business in person, then the Interested Party that noticed the examination shall be responsible for reimbursing the examinee for any reasonable travel and lodging costs (if any) that the examinee incurs. CFS is hereby authorized to reimburse examinees from funds of the estate for examinations that it notices, if any.

4. Attendance.

(a) **Who May Be Present.** Unless otherwise ordered by the Court, examinations may be attended by Interested Parties and their counsel, testifying and/or consulting experts retained by Interested Parties, and counsel for the examinee; provided, however, that while an examinee is being examined about any document or information that is Confidential Information under the Agreed Protective Order entered by the Court on February 2, 1999, persons who have not executed the Agreed Protective Order and the Release (as defined in the Agreed Protective Order) shall be excluded from the examination. In order to facilitate the making of necessary arrangements for attending counsel, any counsel intending to attend the examination shall so notify the Interested Party that noticed the examination not less than 3 business days prior to the commencement date of the examination of the number of attorneys who will be attending the examination.

(b) **Unnecessary Attendance.** Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court. Counsel who have only a marginal interest in a proposed examination or who expect their clients' interests to be adequately represented by other counsel may elect not to attend and may conduct, pursuant to ¶ 11 below, supplemental interrogation of the examinee should a review of the examination transcript or videotape reveal the need for such examination.

5. Conduct of Examinations. Except as otherwise provided in this Order, Fed. R. Civ. P. 30(d), made applicable to bankruptcy proceedings by Bankruptcy Rule 7030, shall apply to all Rule 2004 examinations in this case.

(a) **Examination.** The ABS Committee, the Trustees, the Creditors' Committee and the Debtors shall designate one attorney each to conduct the principal examination of the examinee, and examination by other attorneys should be limited to matters not previously covered by the designated attorneys.

(b) **Recording of Examinations.** Examinations shall be recorded stenographically (with a computer disk in text-readable form also being obtained) and, subject to ¶ 8 below, may also be recorded on videotape. The Interested Party that notices the examination shall be responsible for arranging for a court reporter to attend and record the examination, and for paying for the original transcript of the examination (unless the Interested Party that noticed the examination elects not to order a transcript of the examination).

(c) **Objections and Directions Not to Answer.** It is rarely necessary to object to questions during an examination. Most objections can, and should, be made at hearing or trial when the examination is offered. Any objections that are made during an examination shall be stated concisely and in a non-argumentative and non-

suggestive manner, such as would be appropriate if the examination were being conducted before a judicial officer. The objection of one counsel to a question need not be repeated by another counsel in order to preserve that objection on behalf of such other counsel. An examinee may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence imposed by the Court, or to present a motion under Fed. R. Civ. P. 30(d)(3). When a privilege is claimed, the examinee should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

(d) **Length and Timing of Examinations.** Except as provided in ¶ 5(e) below or as agreed unanimously by all participating individuals (including the examinee) or as authorized by the Court for good cause shown upon motion, notice and an opportunity for hearing, no single examination may take more than 21 hours of actual examination time, excluding breaks. Each examination shall begin promptly at 9:00 a.m. and conclude no later than 6:00 p.m., with a one hour lunch break commencing between noon and 1:00 p.m. When necessary to avoid continuing the examination on a subsequent day, an examinee will have the unilateral right to extend the examination for up to 1 hour (until 7:00 p.m.).

(e) **Extended Duration Examinations.** Notwithstanding ¶ 5(d) above, and except as otherwise agreed unanimously by all participating individuals (including the examinee) or as authorized by the Court for good cause shown upon motion, notice and an opportunity for hearing, the examinations of William Bartmann, Jay L. Jones, Gertrude Brady, Mike Temple and Caroline B. Benediktson shall not take more than 35 hours of actual examination time, excluding breaks. Each examination shall begin promptly at 9:00 a.m. and conclude no later than 6:00 p.m., with a one hour lunch break commencing between noon and 1:00 p.m. When necessary to avoid continuing the examination on a subsequent day, an examinee will have the unilateral right to extend the examination for up to 1 hour (until 7:00 p.m.).

(f) **Private Consultation.** Private conferences between examinees and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments, but should not be used to "coach" the examinee.

(g) **Continuation of Examination.** If an examination is not concluded on a business day other than a Friday, then it shall be continued on the next day (assuming the next day is not a holiday) unless otherwise agreed unanimously by all participating individuals (including the examinee). If an examination is not concluded on a business day that is followed by a holiday or a Friday, then the

examination shall be continued on the next business day, subject to the availability of the examinee. If the examinee is unavailable, then the examination will resume on the next available date for the examinee. At the conclusion of the initial examination, the examinee shall be advised of the opportunity of non-attending Interested Parties to request a resumption of such examination, subject to the right of the examinee to seek a protective order.

(h) **Holidays.** No examinations shall be scheduled on the dates of Court hearings or on national or religious holidays. For purposes of this Order, such holidays are: Rosh Hashanah (2 days); Yom Kippur; Columbus Day; Veterans Day; Thanksgiving (Thursday and Friday); Martin Luther King's Birthday; President's Day; Good Friday; Passover (2 days); Memorial Day; Independence Day (2 days if it falls on a Tuesday or Thursday); Labor Day; Christmas (December 24-26); and New Year's Day (December 31-January 2).

(i) **Allocation of Examination Time.** The Court encourages the Interested Parties to allocate examination time in accordance with the importance of each examinee to the Interested Parties. Except as otherwise agreed by the Interested Parties participating in the examination, or unless a different allocation is authorized by the Court for good cause shown, the Debtors collectively, the Creditors' Committee, and the ABS Committee (subject to ¶ L(iii) of this Order) shall each be entitled to use 25% of the total examination time (up to a maximum of 5.25 hours each (and 8.75 hours each for the extended duration examinations)). If after the Debtors and Committees have exhausted their allotted time or otherwise concluded their examinations without fully exhausting their allotted time, other Interested Parties desiring to examine the examinee (including but not limited to equity security holders, the Trustees, individual ABS Holders, and individual Unsecured Creditors) shall be afforded a pro rata share of the remaining total examination time. Any portion of the time allocated to but not used by the other Interested Parties shall be reallocated to the Debtors and committees pro rata. Counsel for the examinee shall have an opportunity to examine the examinee for the purpose of clarification or rehabilitation without limitation on time.

6. Documents.

(a) **Copies.** Extra copies of documents about which counsel expect to examine the examinee shall be provided to other counsel and the examinee no later than at the commencement of the examination, and earlier if possible. Examinees should be shown a document before being examined about it, except when counsel seeks to impeach or test the examinee's recollection.

(b) **Marking of Examination Exhibits.** Documents used during examinations initially shall be referred to by the Bates-stamp number or other identifying mark assigned by the IKON Depository or the CFS Depository. Thereafter, such

documents shall be assigned sequential numbers preceded by the examinee's last name and "2004", e.g., Bartmann 2004 Exhibit 1.

7. Examinations of Witnesses Who Have No Knowledge of the Facts. An officer, director, or managing agent of a corporation or a governmental official served with a notice of an examination or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party, a reasonable time before the date noticed, an affidavit so stating and identifying a person within the corporation or governmental entity believed to have such knowledge, if any. In such case, such other identified person shall appear for the examination unless, notwithstanding such affidavit, the noticing party insists on proceeding with the examination of the person initially identified, subject to the right of such person to seek a protective order.

8. Videotaped Examinations.

(a) Videotaped Examinations Permitted. By so indicating in its notice of an examination, a party may record the examination by videotape. Fed. R. Civ. P. 30(b)(2) and (3), and 30(c), made applicable in bankruptcy cases by Bankruptcy Rule 7030, shall apply to all Rule 2004 Discovery in this case.

(b) Rules for Videotaped Reporting.

(i) Video Operator. The operator(s) of the videotape recording equipment shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, and shall not be financially interested in this case. At the commencement of the examination, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

(ii) Attendance. Each examinee, attorney and other person attending the examination shall be identified on camera at the commencement of the examination. Thereafter, only the examinee (and demonstrative materials used during the examination) will be videotaped.

(iii) Standards. The examination shall be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the examinee shall be seated at a table or in a witness box, except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the examination shall be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting and field of view shall be changed only as necessary to record accurately the natural body movements of the examinee or to portray exhibits and materials used during the

examination. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the examinee. Eating and smoking by examinees or counsel during the examination shall not be permitted; beverages shall be permitted and made available.

(iv) **Interruptions.** The videotape shall run continuously throughout the active conduct of the examination. Videotape recording will be suspended during all "off the record" discussions.

(v) **Index.** The videotape operator shall use a counter on the recording equipment and, after completion of the examination, shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.

(vi) **Filing.** The original of the videotape recording, together with the operator's log index and a certificate of the operator attesting to the accuracy of the videotape, shall be deposited and maintained in the IKON Depository. No part of a videotaped examination shall be released or made available to any member of the public unless authorized by the Court.

(vii) **Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped examination shall be accompanied by appropriate pages of the written transcript. If needed for an informed ruling, a copy of the videotape and equipment for viewing the tape shall also be provided to the appropriate court by the party requesting the ruling.

(viii) **Use at Trial; Purged Tapes.** An individual or entity desiring to offer all or part of a videotape examination at any hearing or trial shall be responsible for having available appropriate playback equipment and a competent operator. After the designation by all individuals and entities of the portions of a videotape to be used at any hearing or trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), shall be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other individuals and entities at least 5 business days before it is sought to be used at any hearing or trial, and the unedited original of the videotape shall also be available at the hearing or trial.

9. **Telephonic Examinations.** Interested Parties and their counsel, and testifying and/or consulting experts retained by Interested Parties, may participate in examinations

telephonically at their own cost and expense; provided, however, that no examination shall be delayed or postponed due to technical issues arising from such telephonic participation. By indicating in its notice of an examination that it wishes to conduct the examination by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(7), made applicable in bankruptcy cases by Bankruptcy Rule 7030. Unless an objection is filed and served within 7 days after such notice is received, the motion shall be deemed to have been granted. In such case, other parties may examine the examinee telephonically or in person. However, all persons present with the examinee shall be identified in the examination and shall not by word, sign, or otherwise coach or suggest answers to the examinee.

10. Waiver of Transcription and Filing. The Interested Parties and examinees are authorized to waive transcription and filing in the IKON Depository of examinations that prove to be of little or no usefulness, or to agree to defer transcription and filing until the need for using the examination arises.

11. Use; Supplemental Examinations.

(a) Use. Rule 32(a)(1)-(4) of the Federal Rules of Civil Procedure and the Federal Rules of Evidence shall apply to the use of any or all of an examination taken under this Order.

(b) Supplemental Examinations. Each Interested Party not present or represented at an examination may, within 30 days after the filing of the examination transcript in the IKON Depository (or, if later, within 60 days after becoming a party in any adversary proceeding or contested matter in these cases), request permission of the examinee or seek an order from the Court to conduct a supplemental examination of the examinee, including the right to take such examination telephonically. If permitted, the examination shall be treated as the resumption of the examination originally noticed. Such supplemental examination shall not be repetitive of the prior examination.

12. Immediate Presentation to Court of Disputed Issues. During examinations, disputes arising that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the examination, may be presented by telephone to the Court. Facilities shall be provided at all examinations so that, in the event a telephonic ruling is sought from the Court, all counsel can hear and participate in the hearing. The presentation of the issue and the Court's ruling shall be recorded as part of the examination. If the Court is unavailable during the period while the examination is being conducted, the examination shall continue as to matters not in dispute.

**Attachment No. 3**

**Form of Request By Party in Interest For  
Notices Under Rule 2004 Discovery Order**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLAHOMA**

<b>IN RE:</b>	)	
	)	
<b>COMMERCIAL FINANCIAL SERVICES, INC., and</b>	)	<b>Case No. 98-05162-R</b>
	)	<b>Chapter 11</b>
	)	
<b>CF/SPC NGU, INC.,</b>	)	<b>Case No. 98-05166-R</b>
	)	<b>Chapter 11 Jointly Administered</b>
<b>Debtors.</b>	)	<b>with Case No. 98-05162-R</b>

**REQUEST BY PARTY IN INTEREST FOR  
NOTICES UNDER RULE 2004 DISCOVERY ORDER**

[Claimant], by its attorney of record [individual and firm name], pursuant to the Order Authorizing and Establishing Procedures for Discovery Pursuant to Bankruptcy Rule 2004 (the "Rule 2004 Discovery Order") entered by the Court on September \_\_\_\_\_, 1999, hereby requests notice of all discovery pursuant to the Rule 2004 Discovery Order.

[Claimant] elects to receive notice of all Bankruptcy Rule 2004 discovery requests and pleadings related to Rule 2004 Discovery in these jointly administered cases by the following method:

- First-class mail to the address reflected below, or
- Facsimile
- E-mail instead of other method of service
- E-mail in addition to other method of service

**DATED** this \_\_ day of \_\_\_\_\_, \_\_\_\_\_.

---

Name  
Firm Name  
Address  
Telephone Number  
Fax Number  
E-mail address  
Attorney for [Claimant]

**CERTIFICATE OF SERVICE**

I do hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, a true, correct and exact copy of the above and foregoing document was served upon those Interested Parties reflected on Rule 2004 Discovery Order Service List No. \_\_\_\_\_, by either placing the same in the United States mail, with proper postage thereon duly prepaid, or by faxing the same to the Interested Parties listed below:

**Attachment No. 4**  
**Notice of Entry of Bankruptcy Rule 2004 Discovery Order**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLAHOMA**

IN RE:	)	
	)	
COMMERCIAL FINANCIAL SERVICES, INC., and	)	Case No. 98-05162-R
	)	Chapter 11
	)	
CF/SPC NGU, INC.,	)	Case No. 98-05166-R
	)	Chapter 11 Jointly Administered
Debtors.	)	with Case No. 98-05162-R

**NOTICE OF ENTRY OF BANKRUPTCY RULE 2004 DISCOVERY ORDER**

The United States Bankruptcy Court for the Northern District of Oklahoma (the "Court") entered an order on September \_\_, 1999, establishing procedures for the conduct of Bankruptcy Rule 2004 discovery in the Chapter 11 cases of Commercial Financial Services, Inc. ("CFS") and CF/SPC NGU, Inc. ("NGU" and, together with CFS, the "Debtors"). **Creditors and other parties in interest under Section 1109 of the Bankruptcy Code who desire to receive notice of, and have an opportunity to participate in, such Bankruptcy Rule 2004 discovery must file with the Clerk of the United States Bankruptcy Court for the Northern District of Oklahoma, 224 South Boulder Avenue, Room 105, Tulsa, Oklahoma 74103 (telephone (918) 581-7181 ext. 398) and serve on counsel for the Debtors, a *Request By Party in Interest For Notices Under Rule 2004 Discovery Order* in the form contained on the reverse side of this notice. If a creditor or other party in interest fails to file and serve such a request, such party shall not receive any further mailings of notices of, and shall not be permitted to participate in Bankruptcy Rule 2004 discovery in the Debtors' Chapter 11 cases.**

Commercial Financial Services, Inc.

By: \_\_\_\_\_  
One of its Attorneys