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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**:**	**Chapter 11**
	:	**Case No. 11-38111 (CGM)**
DYNEGY HOLDINGS, LLC, et al.,[1]	**:**	**Jointly Administered**
	:	
Debtors.	**:**	

MOTION OF EXAMINER, PURSUANT TO 11 U.S.C. §§ 105(a), 1104, AND 1106 AND FED. R. CIV. P. 45(c), TO QUASH SUBPOENA PROPOUNDED ON EXAMINER BY CLAREN ROAD ASSET MANAGEMENT LLC

[1] The Debtors, together with the last four digits of each Debtor's federal tax identification number, are Dynegy Holdings, LLC (8415); Dynegy Northeast Generation, Inc. (6760); Hudson Power, L.L.C. (NONE); Dynegy Danskammer, L.L.C. (9301); and Dynegy Roseton, L.L.C. (9299). The location of the Debtors' corporate headquarters and the service address for Dynegy Holdings, LLC, Dynegy Northeast Generation, Inc. and Hudson Power, L.L.C. is 1000 Louisiana Street, Suite 5800, Houston, Texas 77002. The location of the service address for Dynegy Roseton, L.L.C. is 992 River Road, Newburgh, New York 12550. The location of the service address for Dynegy Danskammer, L.L.C. is 994 River Road, Newburgh, New York 12550.

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Susheel Kirpalani, Examiner (the "**Examiner**") respectfully submits this Motion, Pursuant To 11 U.S.C. § 105(a), 1104, And 1106 And Fed. R. Civ. P. 45(c)[2] To Quash Subpoena For Production Of Documents Propounded By Claren Road Asset Management, LLC ("**Claren Road**") on April 5, 2012 (the "**Subpoena**").

I. PRELIMINARY STATEMENT

1. Claren Road has subpoenaed the Examiner for "[a]ny and all Documents and Communications relied on by [the Examiner] for, or that are cited in, or that are otherwise relevant to, the Examiner's Report ... including handwritten notes of meetings and transcripts of interviews or depositions." (Subpoena at 5.) The Examiner moves to quash the Subpoena because responding to the requested discovery is inconsistent with the purpose of the Examiner's appointment, will compromise the integrity of the investigative process, and will violate various Court Orders prohibiting the Examiner from disclosing the requested documents to any party except the Court.

2. Bankruptcy examiners act at the behest of, and answer solely to the Bankruptcy Court. The Court asked the Examiner to conduct an investigation of various pre-petition transactions and issues identified in the Examiner Approval Order and present his findings and conclusions in a report within 60 days. To ensure a robust investigation, the Court's Orders made clear that materials produced to the Examiner would not lose any confidentiality or privilege protections by virtue of their production to the Examiner. Respondents to the Examiner's discovery demands produced materials in reliance on the Orders' protective provisions, and those productions contributed not only to the report's timeliness, but also to the thoroughness of its findings and conclusions.

[2] Fed. R. Civ. P. 45(c) is applicable to this matter pursuant to Fed. R. Bankr. P. 9016.

3. The integrity of the investigative process will be compromised if the Examiner is compelled, like a litigant in these cases, to produce his materials for the purpose of aiding the litigation positions of third parties. Instead, for any examiner's investigation to be productive and, as directed by the Examiner Approval Order, "unfettered," an examiner must be free from the threat that information gathered pursuant to the investigation will be subject to discovery by litigants.[3] Nor should the Examiner be forced to act as a discovery "clearing house" in these cases, where parties seek documents from the Examiner in lieu of propounding direct requests on the producing parties. Neither Congress nor the Court envisioned these roles for the Examiner.

4. Policy considerations aside, the Examiner cannot, as a practical matter, comply with the Subpoena without violating the Examiner Approval Order and the Rule 2004 Order and certain protective orders. They require that the Examiner maintain third-party materials and information confidentially and only disclose those materials to the Court.

5. Lastly, the Subpoena promises to unduly burden the Examiner. Nearly all the documents and information in his possession were provided by third parties. The Examiner does not possess any primary source documents that were not created or originated by third parties. It is unreasonable to ask the Examiner to determine which of the 170,000 documents produced by third parties is entitled to confidentiality or privilege protections when the producing parties that created those documents can make those determinations as part of their production (if any) to Claren Road. To that end, any subpoena for documents is properly directed to the party, entity, or individual that produced these documents—not the Examiner. The balance of any documents possessed by the Examiner are subject to attorney-client and work product protections and are

[3] The Examiner Approval Order also contemplated that the Examiner himself would be free from examination, prohibiting, among other things, any party from calling the Examiner to testify (save the Court).

clearly protected from disclosure. No purpose could be served by requiring the Examiner to simply record his own documents on a privilege log.

6. Claren Road's path to pursue documents lies either in seeking the documents directly from the parties that produced them or seeking relief from the Court's Orders governing their confidentiality. Accordingly, the Subpoena should be quashed.

II. FACTUAL BACKGROUND

A. ORDER APPROVING EXAMINER APPOINTMENT PROTECTS PRIVILEGED & CONFIDENTIAL MATERIALS

7. Dynegy Holdings LLC and certain of its indirect subsidiaries (collectively, "**Dynegy**" or the "**Debtors**") filed for bankruptcy protection on November 7, 2011 (the "**Petition Date**") in the Bankruptcy Court in Poughkeepsie, New York. On November 11, 2011, U.S. Bank National Association filed a motion requesting the appointment of an examiner to investigate and report on certain aspects of the bankruptcy process and the entities and individuals involved (the "**Examiner Motion**"). The Bankruptcy Court granted the Examiner Motion pursuant to the Examiner Approval Order.[4] Among other things, the Examiner Approval Order:

- directs that the Examiner will conduct "an ***unfettered*** investigation" and report to the Bankruptcy Court with respect to "(i) the conduct of the Debtors in connection with the prepetition 2011 restructuring and reorganization of the Debtors and their non-Debtor affiliates (including, without limitation, pre-petition transactions; (ii) any possible fraudulent conveyances; and (iii) whether DH is capable of confirming a chapter 11 plan"; and

[4] Order Granting Motion Of U.S. Bank National Association, As Indenture Trustee, For Appointment Of Examiner Pursuant To Section 1104(c) Of Bankruptcy Code, entered December 29, 2011 (the "**Examiner Approval Order**").

- provides that, pursuant to section 1106(a)(4) of the Bankruptcy Code, the Examiner must file a written report of his investigation within 60 days of the order approving the appointment of the Examiner (that is, March 12, 2012).

8. To facilitate the investigation, the Examiner Approval Order contained provisions directing the Debtors to cooperate with the Examiner.[5] In addition, the Examiner Approval Order directed that the Debtors (or their directors, officers, employees, and professionals) could not seek to withhold information on the grounds of attorney-client privilege.[6]

9. With respect to privileged materials produced by any party, however, the Examiner Approval Order provided specifically that documents would not lose their confidentiality or privilege protections simply because they are produced to the Examiner:

> **ORDERED** that in accordance with Rule 502(d) of the Federal Rules of Evidence, all privileges, protections, confidentiality and immunities (including, without limitation, the attorney-client privilege and the work product doctrine), ***shall remain in full force and effect as to any information provided to the examiner***, and shall not be waived or in any way impaired in connection with these chapter 11 cases (including in connection with any current or subsequent adversary proceeding or contested matter in these chapter 11 cases) or in any other Federal, State or other proceeding outside these chapter 11 cases by disclosure or production to the examiner of any materials protected by such privileges, protections, confidentiality and immunities, or compliance with any other aspect of this Order[.]

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5 *See* Examiner Approval Order at 2 (directing the Debtors to "cooperate fully and to (i) cause their respective present directors, officers, employees and professionals, and (ii) utilize reasonable best efforts to cause their respective former directors, officers, employees and professionals, to cooperate fully with the examiner and to provide unfettered access to the examiner in conjunction with the performance of any of the examiner's duties and investigation and to promptly turn over, and otherwise promptly make available, to the examiner all information (including witness interviews) requested by the examiner ....").

6 *See* Examiner Approval Order at 6 (providing that "if the examiner seeks the disclosure of documents or information (whether written or oral) as to which DH or any of the other Debtors asserts a claim of privilege or other protection from disclosure, including, without limitation, the attorney-client privilege and/or the work product doctrine, or documents or information (whether written or oral) that are confidential (including pursuant to any confidentiality agreement), (i) the Debtors shall not claim or assert, (ii) the Debtors shall cause their respective directors, officers, employees and professionals not to claim or assert, that any privilege, protection, confidentiality or immunity belonging to or assertable by DH or any of the other Debtors precludes the production or disclosure of documents or information (whether written or oral, including witness interviews) requested by the examiner ....").

Examiner Approval Order at 4-5 (emphasis added). The Examiner Approval Order provides that the Examiner must maintain confidentially any documents and materials he receives that are designated as such and cannot disclose them to third parties.[7] The Examiner Approval Order specifically limits disclosure of confidential or privileged information to the Court:

> **ORDERED** . . . ***To the extent that the examiner must include confidential or privileged material in any report submitted to the Court, the complete report shall be made only to the Court, under seal, with a copy to the party claiming privilege or confidentiality, and such report shall be redacted or otherwise protected prior to the examiner's transmission of it to other parties.***

Examiner Approval Order at 3 (emphasis in original).

10. Shortly after his appointment, the Examiner requested the power to issue subpoenas for the production of documents and the examination of persons pursuant to the Examiner Rule 2004 Motion.[8] On January 27, 2012, the Court entered an order granting the Examiner's motion and authorizing subpoenas for documents and testimony (the "**Rule 2004 Order**"). The Examiner's Rule 2004 Motion specifically requested that non-debtor affiliates and their professionals produce to the Examiner all privileged materials, including any materials that were the subject of a joint representation of the Debtor. To that end, the Rule 2004 Order provides that non-debtor representatives cannot withhold documents, information, materials, or advice that relate to Restructuring Matters and that were created between January 1, 2011 and November 7, 2011 on the basis of any privilege or other protection.[9] It also contains the very

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7 *See* Examiner Approval Order at 6 ("ORDERED ... The Debtors (or any of them) may designate any information as 'privileged', 'work product' or 'confidential', in which case the examiner shall treat such information as designated, unless otherwise ordered by this court ....").

8 *See* Mot. of Examiner, Pursuant to 11 U.S.C. §§ 105(a), 1106(a)(3) & (4), 1106(b), and 1109(b), and Fed. R. Bankr. P. 2004, for Entry of an Order Granting Authority to Issue Subpoenas for the Prod. of Documents and Authorizing the Examination of Persons and Entities and Establishing Procedures for Responding to Those Subpoenas (Jan. 16, 2012) (Docket No. 326) ("**Examiner Rule 2004 Motion")**.

9 *See* Rule 2004 Order at 2-3 ("ORDERED that, to the extent that any subpoena issued pursuant to this Order against the Non-Debtor Affiliates or any entity that has jointly represented the Non-Debtor Affiliates and

same protections with respect to the production of purportedly privileged or confidential information contained in the Examiner Approval Order:

> [T]he production or disclosure of any documents, information, materials, or advice by a Non-Debtor Affiliate or Third-Party Representative in response to a subpoena issued under this Order ***shall not constitute a waiver of any applicable privilege, protection, confidentiality, or immunity*** (including, without limitation, the attorney-client privilege or the work product doctrine) pursuant to Rule 502(d) of the Federal Rules of Evidence.

Rule 2004 Order at 3 (emphasis added).[10]

11. Lastly, the Examiner Approval Order provides that while "the examiner shall have the standing of a party in interest with respect to matters that are within the scope of his or her investigation," it made clear that "***the examiner may not be called to testify except by this Court.***" (Examiner Approval Order at 5) (emphasis added). Similarly, the Examiner Approval Order provided that the Creditors' Committee "cannot 'tag along' in the examiner's investigation." (*Id.* at 2).

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any of the Debtors ("Third-Party Representatives") requires disclosure of documents, information, materials, or advice … relating to Restructuring Matters (as defined below) created or given between January 1, 2011 and November 7, 2011 (collectively, 'Restructuring Materials') as to which such Non-Debtor Affiliate or Third-Party Representative asserts a claim of privilege or other protection from disclosure, including, without limitation, the attorney-client privilege and/or the work product doctrine … (i) such Non-Debtor Affiliate or Third-Party Representative shall not claim or assert, (ii) such Non-Debtor Affiliate shall cause their respective … professionals not to claim or assert, and (iii) such Non-Debtor Affiliate shall utilize reasonable best efforts to cause its respective former … professionals not to claim or assert, that any privilege, protection, confidentiality, or immunity belonging to or assertable by it precludes the production or disclosure of Restructuring Materials to the Examiner;" "for purposes of this Order, "Restructuring Matters" means matters relating to (a) the Prepetition Restructuring, (b) the Chapter 11 Cases, (c) the Restructuring Litigations, (d) the Restructuring Support Agreement, and (e) the Plan, as such terms are defined in the Examiner's First Request For Production of Documents, dated January 17, 2012").

[10] Additionally, two separate additional protective orders were entered with respect to third-party banks that restrict the Examiner from sharing protected materials absent a Court order or permission from the designating parties (the "**Third-Party Protective Orders**"). *See* Stipulated Protective Order with Credit Suisse Securities (USA) LLC and Goldman Sachs Lending Partners LLC (dated February 17, 2012; so ordered March 26, 2012) (Docket No. 550); Stipulated Protective Order with Barclays Capital Inc. (dated March 9, 2012; so ordered March 26, 2012) (Docket No. 551).

B. RESPONDENTS PRODUCED DOCUMENTS IN RELIANCE ON ORDERS' PRIVILEGE & CONFIDENTIALITY PROTECTIONS

12. In the course of his investigation, the Examiner served 23 separate document and deposition subpoenas. He received from third parties and reviewed approximately 170,000 documents consisting of over 1.3 million pages and deposed and interviewed more than 30 parties. Virtually all these materials and depositions were designated "privileged" and/or "confidential" by the producing parties and deponents.

13. On March 9, 2012, the Examiner filed his Report (the "**Examiner's Report**") (Docket No. 490) in a redacted form consistent with the instructions in the Examiner Approval Order.

14. On April 5, 2012, Claren Road filed a motion for entry of an order granting public access to the Examiner's Report based on the crime-fraud exception to, and waiver of, attorney-client privilege and attorney work product doctrine (the "**Motion to Unredact**"). On the same day, Claren Road sent the Subpoena to the Examiner's counsel.[11]

III. JURISDICTION

15. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (L) and (O). Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

[11] Through meet and confer discussions, the Examiner's counsel worked to resolve disputes with Claren Road, requesting that Claren Road withdraw the Subpoena for many of the reasons set forth in this Motion. In the absence of an agreement, the Examiner filed the instant Motion.

IV. BASIS FOR RELIEF

16. The statutory predicates for the relief requested herein are sections 105(a), 1104, and 1106 of the Bankruptcy Code and Federal Rule of Civil Procedure 45, made applicable to this matter pursuant to Rule 9016 of the Federal Rules of Bankruptcy Procedure.

17. Section 105(a) of the Bankruptcy Code provides that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 1104(c) of the Bankruptcy Code authorizes the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate ...." 11 U.S.C. § 1104(c). Section 1106 of the Bankruptcy Code authorizes an examiner to, among other things, "investigate the acts, conduct, assets, liability, and financial condition of the debtor, the operation of the debtor's business ... [and] any other matter relevant to the case or the formulation of a plan;" "except to the extent that the court orders otherwise, [to perform] any other duties of the trustee that the court orders the debtor in possession not to perform;" and to "file a statement of any investigation conducted ...." 11 U.S.C. § 1106.

18. The Federal Rules of Civil Procedure require this Court to quash a subpoena that demands disclosure of privileged or other protected materials or that subjects a person to undue burden. Specifically, Rule 45(c)(3)(A) provides: "On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it . . . (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or (iv) subjects a person to undue burden." Fed.R.Civ.P. 45(c)(3)(A).[12]

[12] *See* Fed. R. Bankr. P. 9016 ("Rule 45 F.R.Civ.P. applies in cases under the Code").

A. SUBJECTING EXAMINER TO DISCOVERY IS INCONSISTENT WITH EXAMINER'S INVESTIGATIVE ROLE AND COMPROMISES INTEGRITY OF INVESTIGATIVE PROCESS

19. "A bankruptcy examiner is clothed by statute with judicial powers; he acts at the behest of the federal bankruptcy court … [answering] solely to the court …. The role of a bankruptcy examiner has been likened to that of a civil grand jury." *Vietnam Veterans Foundation v. Erdman (In re Vietnam Veterans Foundation*), 1987 WL 9033, at *2 (D.D.C. Mar. 19, 1987) (citations omitted).

20. Courts have identified straightforward and sensible reasons for preventing parties from accessing the files of bankruptcy examiners through discovery demands, finding that subjecting examiners to that production would raise "grave concerns." *In re Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) (requiring examiner to preserve non-privileged documents, but ordering examiner not to disclose any document without court approval). As *Baldwin United* explained:

> [C]ertainly the Examiner's file drawers offer a most enticing alternative to the long and bloody battles which plaintiffs' counsel often face in the discovery phase of securities litigation. However, while we have always hoped that the Examiner's report and chronology would provide a useful tool for all parties in the many proceedings pending against the Debtors, ***we never contemplated, nor in our opinion does the Bankruptcy Code contemplate, that the Examiner act as a conduit of information to fuel the litigation fires of third-party litigants***. The prospect of an Examiner being required to indiscriminately produce investigative materials obtained through promises of confidentiality and reliance upon this Court's orders ***raises grave concerns touching both the integrity of the Bankruptcy Court's processes, as well as the integrity of the statutory position of the Examiner***.

Baldwin, 46 B.R. at 314 (emphasis added). *See also Vietnam Veterans Foundation*, 1987 WL 9033 at *2 ("A contrary rule would allow parties to use the bankruptcy examiner as a discovery short-cut and would only invite further demands on such officers, potentially leading to substantial encroachments on judicial integrity and efficiency.").

21. Claren Road's single, yet expansive request seeks all documents relied on by the Examiner for, cited in, or otherwise relevant to the Examiner's Report. While the Court tasked the Examiner to conduct a neutral, independent investigation, Claren Road's subpoena treats the Examiner as an adversary or, at a minimum, as a "clearing house" for discovery. But the Court did not appoint the Examiner so his discovery efforts could later be made available to parties in furtherance of their litigation positions. Instead, it appointed the Examiner to prepare a timely report with respect to various pre-petition transactions, which the Examiner submitted on March 9, 2012.[13]

22. The integrity of the Examiner's investigation demands that the Examiner remain removed from litigation and act as an independent investigator. That neutrality, and the ability to receive privileged and confidential information free from fear that it later will be subject to discovery, are essential to a robust investigation and a helpful and comprehensive report. *See Baldwin*, 46 B.R. at 316-17 (noting the "unique nature of the position itself[:] An Examiner's legal status is unlike that of any other court-appointed officer which comes to mind. He is first and foremost disinterested and non-adversarial. The benefits of his investigative efforts flow solely to the debtor and to its creditors and shareholders, but he answers solely to the Court;" and (ii) "[i]f examiners in other cases are to perform [their] functions effectively, and if their non-adversarial role is to be maintained, they and the subjects of their investigation must be unhampered by the threat that any information which comes into the Examiner's hands will be fair game ....").

[13] While the Examiner also has been acting as a mediator in these cases, the Subpoena does not request documents relating to the mediation. If it did, the Examiner would object to that discovery for the same, if not additional reasons.

23. For these reasons, courts have prohibited third-party discovery of examiners and their underlying materials and records. *See id.* at 317; *see also Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chi. (In re Ionosphere Clubs),* 156 B.R. 414, 435 (S.D.N.Y. 1993) (upholding bankruptcy court's denial of request by union for access to the record supporting the examiner's report and stating that the "public interest is in the Report and the Examiner's conclusions, not in the Record upon [sic] the conclusions are based"); *Vietnam Veterans Foundation,* 1987 WL 9033, at *2 ("The integrity of the judicial process is directly threatened when litigators are allowed to question directly a court officer about the reasoning behind his official actions, thus courts have prohibited such examination;" finding examiner could not testify as to findings and conclusions in report: "[he] owes a continuing fiduciary responsibility to the bankruptcy court for which he served and that the fruits of his investigation … are amenable to no other purpose or interested party. [He] obtained testimony, documents, and other information through his court-appointed powers, and thus it cannot serve as the basis for his proffered testimony") (citations omitted).

24. Indeed, courts in similar situations specifically have relieved the examiner from any duty to respond, object, or move for a protective order in response to any discovery demands. That prohibition only carved out limited situations, that is, when the requesting party can demonstrate that materials demanded cannot be obtained from any other source or the request arises in criminal or fee-related proceedings.[14]

[14] *See In re: Tribune Co.*, Case No. 08-13141 (KJC) (Bankr. D. Del. Aug. 26, 2010), Docket No. 5541, Order Approving Motion Of Court-Appointed Examiner, Kenneth N. Klee, Esq., For Order (I) Discharging Examiner; (II) Granting Relief From Third-Party Discovery; (III) Approving The Disposition Of Certain Documents and Information; and (IV) Granting Certain Ancillary Relief, ¶ 7 ("Except as otherwise provided herein, the Examiner and his Professionals are relieved from any duty to respond, object or move for a protective order in response to any formal or informal discovery process, except that this prohibition shall not apply to (i) requests for documents, materials or information that the requesting party has demonstrated to this Court, upon notice to and an opportunity to object by the Examiner, and cannot be

25. Lastly, the Examiner Approval Order contemplated that the Examiner would conduct his investigation free from the threat of discovery from parties in these cases. *First*, it specifically ordered an "unfettered" investigation. That directive would be lost if parties could, after the fact, subject the Examiner to discovery. *Second*, the Order prohibits any party except the Court from calling the Examiner as a witness to testify, reflecting an intent that the Examiner would be free from examination himself apart from Court inquiries. *Third*, the Order contemplates that the Examiner will not act as a "clearing house" or otherwise be tasked with conducting discovery in aid of a particular party's litigation position as reflected in the prohibition against the Creditors' Committee conducting a "tag along" investigation.

B. RESPONDING TO SUBPOENA WILL VIOLATE COURT ORDERS

26. The Examiner Approval Order, the Rule 2004 Order, and the Third-Party Protective Orders require the Examiner to maintain documents and materials produced to him confidentially. Respondents produced a wide range of documents and information in reliance on the protections in those orders against waivers of privilege and confidentiality. *See In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 434 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994)

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reasonably obtained from any other source, (ii) production required in response to an order of a federal district court presiding over a criminal proceeding in which a party in interest is a defendant, which finds that the Examiner or his Professionals are obligated to produce documents or other materials to said defendants under the principals of *Brady v. Maryland* … as embodied in subsequent case law and the Federal Rules of Criminal Procedure, and (iii) discovery of information related to compensation applications filed by the Examiner or his professionals"). *See also In re Lehman Brothers Holdings Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y. July 13, 2010), Docket No. 10169, Order Discharging Examiner And Granting Related Relief, ¶ 3 (same); *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y. Feb. 19, 2004), Docket No. 16382, Order Granting Motion of Neal Batson, the Enron Corp. Examiner, with Respect to Certain Procedural Issues in Connection with Termination of Examination, ¶ 2 (same); *In re New Century TRS Holdings, Inc.*, No. 07-10416 (KJC) (Bankr. D. Del. May 1, 2009), Docket No. 9623, Order Discharging Michael J. Missal as Examiner, ¶¶ 6-7 (permitting transfer of third-party documents to liquidating trustee, but otherwise relieving examiner from responding to discovery requests, including subpoenas); *In re Refco Inc.*, No. 05-60006 (RDD) (Bankr. S.D.N.Y. Aug. 16, 2007), Docket No. 5748, Order Discharging Examiner and Establishing Related Procedures, ¶ 9 (permitting transfer of third-party documents to litigation trustee, but otherwise prohibiting issuance of discovery requests on examiner with limited exceptions).

(noting "the mere fact that the information was disclosed pursuant to a protective order suggests that reliance can be presumed[;] we see no reason on the record before not to presume, as we have in the past, that a witness relied on it.") (citation omitted).

27. Indeed, nearly all documents produced were marked "confidential" or "privileged" as part of an expedited discovery process designed to enable the Examiner to file his report within the 60-day deadline imposed under the Examiner Approval Order. Additionally, all deposition transcripts were marked "privileged and confidential" in their entirety.

28. At bottom, the Examiner cannot respond to the Subpoena without violating various Court Orders. The Second Circuit has protected from disclosure materials possessed by an examiner—even in the face of a grand jury subpoena—under nearly identical facts. *See In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221, 1222 (2d Cir. 1991) (noting (i) parties advised examiner "that they would not voluntarily produce documents or witnesses unless the information obtained would be kept confidential and used only in the bankruptcy proceeding;" (ii) parties "were in a bitter dispute over the pre-petition transactions . . . the examiner's investigation would have been seriously delayed had the bankruptcy court not approved the assurance of confidentiality;" (iii) "time was of the essence . . . [the] examiner was under enormous pressure to expedite his investigation;" and (iv) parties "signed a stipulation to keep confidential the information obtained during the depositions taken by the examiner."). In overruling a district court order directing the examiner to produce documents in response to the grand jury subpoena, the Second Circuit found that the government would have to show the protective orders were "improvidently granted" or otherwise show "exceptional circumstances or compelling need" to override an existing protective orders. *Grand Jury*, 945 F.2d at 1224 (citation omitted).

C. SUBPOENA UNDULY BURDENS EXAMINER; ORDERS WERE NOT ENTERED IMPROVIDENTLY, AND NEITHER EXCEPTIONAL CIRCUMSTANCES NOR COMPELLING NEED CAN BE SHOWN

29. Virtually all the materials in the Examiner's possession were produced by third parties in response to the Examiner's subpoenas and under the auspices of the Examiner Approval and Rule 2004 Orders. But the Examiner does not hold any privilege or confidentiality protections with respect to the demanded materials, that is, the 170,000 produced documents. He is unable to waive any such protections. Indeed, the Subpoena clearly is intended to solicit documents originally prepared or possessed by parties ***other than the Examiner***. It instructs that any refusal to produce due to any privilege be accompanied by a written statement that, among other things, "specifies the date on which the Document was prepared or received by Debtors." Subpoena at 5. The Subpoena requests documents and information that were produced by other parties, but those respondents, not the Examiner, are the proper target of Claren Road's discovery. Claren Road remains perfectly capable of pursuing those documents directly from the third parties that produced them.

30. The balance of the documents in the Examiner's position are privileged, either as attorney-client communications or attorney work product. This includes communications between the Examiner and his counsel (Quinn Emanuel) and financial advisors (Zolfo Cooper).[15] Materials prepared by the Examiner, his counsel, or his financial advisors in connection with the

[15] This privilege extends to third parties that assist in interpretations and analyses undertaken by attorneys, such as, here, Zolfo Cooper. *See, e.g., U.S. v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *In re Tri-State Outdoor Media Group, Inc.*, 283 B.R. 358, 364 (Bankr. M. D. Ga. 2002).

investigation are protected as either an attorney-client communication or as reflecting attorney work product.[16]

31. It would be time-consuming and costly to catalogue, as commanded by the Subpoena, everything encompassed in the expansive request for "[a]ny and all Documents and Communications relied on by you for, or that are cited in, or that are otherwise relevant to [the Report]." Nor is it clear what relevance the Examiner's documents would have to any issues pertinent to Claren Road, as the Examiner's Report made no findings specific to Claren Road. It is not in the interests of justice or efficiency to force the Examiner to produce a lengthy privilege log to merely confirm that any materials in his possession not produced to him by outside parties are protected.

32. Lastly, Claren Road cannot use the Subpoena as an alternative procedural vehicle to secure the relief it requests in the Motion To Unredact the Examiner's Report. To the extent the Subpoena seeks the source materials for the Examiner's Report as an alternative to the Motion To Unredact, the Subpoena should be quashed, and Claren Road should be directed to pursue the information it seeks through the Motion To Unredact.

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[16] *See, e.g.*, *In re County of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (noting attorney-client privilege is one of the oldest recognized privileges for confidential communications and rules that would result in its waiver "should be formulated with caution."); *In re Supreme Specialties, Inc.*, 2007 WL 1964852, at *3 (Bankr. S.D.N.Y. July 2, 2007) (citing United States v. Adlman, 1134 F.3d 1194 (2d Cir. 1998)) (noting a document is protected from disclosure by the work product privilege if "in light of the nature of the document and the factual situation of the particular case, [it] can be fairly said to have been prepared or obtained because of the prospect of litigation."); *In re Tri-State Outdoor Media Group, Inc.*, 283 B.R. at 364 (concluding bankruptcy cases constitute an adversarial process that qualifies as "litigation" for work product purposes, despite semantic differences: "While bankruptcy is certainly not litigation, it is an adversarial proceeding, particularly when considering the rights of the debtor versus the rights of the unsecured creditors. Thus the documents in question were created in anticipation of Bankruptcy and 'in anticipation of litigation.'").

V. NOTICE

33. No previous request for the relief sought herein has been made to this or any other Court. This Motion includes citations to the applicable authorities and does not raise any novel issues of law. The Examiner reserves any and all rights to file a reply in further support of this Motion or in response to any objection to this Motion.

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VI. CONCLUSION

For the foregoing reasons, the Examiner requests the entry of an order (a) quashing the Subpoena and (b) awarding such other relief as the Court deems just and appropriate.

DATED: New York, New York
April 11, 2012

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ James C. Tecce

James C. Tecce
Rex Lee
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(212) 849-7000

Counsel to the Examiner, Susheel Kirpalani

Hearing Date: May 2, 2012 at 10 a.m. (Prevailing Eastern Time)
Objection Deadline: April 18, 2012 at 12 p.m. (Prevailing Eastern Time)

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Rex Lee
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(212) 849-7000

Counsel to the Examiner, Susheel Kirpalani

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
DYNEGY HOLDINGS, LLC, *et al.*,[1]	**Case No. 11-38111 (CGM)**
Debtors.	**(Jointly Administered)**

NOTICE OF MOTION OF EXAMINER, PURSUANT TO 11 U.S.C. §§ 105(a), 1104, AND 1106 AND FED. R. CIV. P. 45(c), TO QUASH SUBPOENA PROPOUNDED ON EXAMINER BY CLAREN ROAD ASSET MANAGEMENT LLC

PLEASE TAKE NOTICE that a hearing on the annexed motion, dated April 11, 2012 (the "Motion"), of the Examiner, Susheel Kirpalani (the "Examiner"), for entry of an order to quash the subpoena served on him by Claren Road Asset Management LLC, before the Honorable Judge Cecelia G. Morris, Chief Judge of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") 355 Main Street Poughkeepsie, New York

[1] The Debtors, together with the last four digits of each Debtor's federal tax identification number, are Dynegy Holdings, LLC (8415); Dynegy Northeast Generation, Inc. (6760); Hudson Power, L.L.C. (NONE); Dynegy Danskammer, L.L.C. (9301); and Dynegy Roseton, L.L.C. (9299). The location of the Debtors' corporate headquarters and the service address for Dynegy Holdings, LLC, Dynegy Northeast Generation, Inc. and Hudson Power, L.L.C. is 1000 Louisiana Street, Suite 5800, Houston, Texas 77002. The location of the service address for Dynegy Roseton, L.L.C. is 992 River Road, Newburgh, New York 12550. The location of the service address for Dynegy Danskammer, L.L.C. is 994 River Road, Newburgh, New York 12550.

12601 ("Chambers"), on **May 2, 2012 at 10:00 a.m**. (Prevailing Eastern Time), or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the application must: (a) be made in writing; (b) conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York and the Administrative Order Establishing Case Management Procedures [Docket No. 35] (the "Case Management Procedures"); (c) state with particularity the legal and factual basis for the objection; and (d) be filed with the Court (with a copy to Chambers) in accordance with General Order M-399, and served upon (i) counsel to the Debtors, Sidley Austin LLP, 787 Seventh Avenue, New York, New York 10019, Attn: Brian J. Lohan and Sophia P. Mullen; (ii) the Office of the United States Trustee, 74 Chapel Street, Suite 200, Albany, New York 12207, Attn: Lisa Penpraze; (iii) counsel to the Official Committee of Unsecured Creditors, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, NY 10036, Attn: Ira S. Dizengoff; (iv) Examiner's counsel Quinn Emanuel Urquhart & Sullivan LLP, 51 Madison Avenue, 22nd Floor, New York, New York 10010, Attn: James C. Tecce; and (iv) all parties identified on the Special Service List and the General Service/2002 List maintained in these cases pursuant to the Case Management Procedures, in each case so as to be received no later than **April 18, 2012 at 12:00 p.m.** (Prevailing Eastern Time) (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if an objection to the application is not received by the Objection Deadline, the relief requested shall be deemed unopposed, and the Bankruptcy Court may enter an order granting the relief sought without a hearing.

Dated: April 11, 2012

Respectfully submitted,

By: */s/ James C. Tecce*
James C. Tecce

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