

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

United States Courts
Southern District of Texas
ENTERED

APR 29 2003

Michael R. Milby, Clerk of Court

In Re Enron Corporation §
Securities, Derivative & § MDL-1446
"ERISA Litigation §

THIS DOCUMENT RELATES TO: §

All Cases §

MARK NEWBY, ET AL., §

Plaintiffs §

VS. §

CIVIL ACTION NO. H-01-3624 ✓
CONSOLIDATED CASES

ENRON CORPORATION, ET AL., §

Defendants §

THE REGENTS OF THE UNIVERSITY §
OF CALIFORNIA, et al., §
Individually and on Behalf of §
All Others Similarly Situated, §

Plaintiffs, §

vs. §

KENNETH L. LAY, ET AL., §

Defendants. §

ORDER

Pending before the Court is Defendant Andrew Fastow's opposed motion to postpone answer (instrument #1322) until the conclusion of the criminal proceedings against him.

For the same reasons that the Court in its discretion found that the clear and substantial overlap of issues in the *Tittle* action¹ and Fastow's criminal indictment warranted a stay

¹ In the order, the Court indicated that once the stay under the PSLRA was lifted in *Newby*, the same conflict would exist in that action as in *Tittle*. Instrument #1298 at 5 n.2.

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in discovery so that Fastow would not have to choose between invoking his Fifth Amendment privilege and risking severe prejudice in the civil action by responding to discovery requests (instrument #1298 in *Newby*, #570 in *Tittle*), the Court finds that requiring Fastow to file an answer in *Newby*, now that his motion to dismiss has been denied, would have the same effect. To avoid having Lead Plaintiff's allegations against him deemed to be admissions, as required by Fed. R. of Civ. P. 8(d), Fastow would either have to file an answer to defend himself in the civil action or assert his Fifth Amendment rights. Lead Plaintiff cites *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987), *cert. denied*, 486 U.S. 1007 (4th Cir. 1987), for the proposition that Fastow must "properly" invoke, i.e., make a specific claim for protection pursuant to, his Fifth Amendment privilege and concurrently answer those allegations where the privilege does not apply and where he is able to respond, in order to provide the Court with a basis for determining with particularity whether the privilege applies. Not only would Fastow be faced with what he characterizes as a "Hobson's choice," but the virtually identical allegations in the criminal indictment and civil action complaint make the applicability of the privilege obvious on their face. Following the holding of the Fourth Circuit in *North River* would not only be inconsistent with this Court's ruling on Fastow's motion to stay discovery under *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979) and its earlier decision in *Kmart Corp. v. Aronds et al.*, Civ. No. H-

96-1212 (S.D. Tex. Dec. 11, 1996) (refusing to require civil and criminal defendants to choose between asserting Fifth Amendment privilege or possible self-incrimination), but forcing Fastow to provide a specific foundation for the privilege under the parallel claims and charges at issue is unnecessary. Accordingly, the Court

ORDERS that Fastow's motion to postpone answer is GRANTED.

SIGNED at Houston, Texas, this 28th day of April, 2003.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE