UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	MDL 1446
This Document Relates To:	§	Civil Action No. H-01-3624 (Consolidated)
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	
ENRON CORP., et al.,	§	
Defendants.	§	
WASHINGTON STATE INVESTMENT BOARD and EMPLOYER-TEAMSTERS LOCAL NOS. 175 and 505 PENSION TRUST FUND, On Behalf of Themselves and All Others Similarly Situated,	§	Civil Action No. H-02-3401
	§	CLASS ACTION
Plaintiffs,	§	
v.	§	
KENNETH L. LAY, JEFFREY K. SKILLING, ANDREW S. FASTOW, RICHARD A. CAUSEY, MARK A. FREVERT, STANLEY C. HORTON, KENNETH D. RICE, RICHARD B. BUY, LOU L. PAI, JOSEPH M. HIRKO, KEN L. HARRISON, STEVEN J. KEAN, JEFFREY MCMAHON, CINDY K. OLSON, JOSEPH W. SUTTON, MARK E. KOENIG, KEVIN P. HANNON, LAWRENCE GREG WHALLEY, ROBERT A. BELFER, NORMAN P. BLAKE, JR., RONNIE C. CHAN, JOHN H. DUNCAN, WENDY L. GRAMM, ROBERT K. JAEDICKE, A. LEMAISTRE, JOE H. FO, JEROME J. MEYER, JOHN A. URQUHART, JOHN	§	

United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

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WAKEHAM, CHARLES E. WALKER, HERBERT S. WINOKUR, JR., DAVID B. DUNCAN, DEBRA A, CASH, DAVID STEPHEN GODDARD, JR., GARY B. GOOLSBY, MICHAEL M. LOWTHIER, ARTHUR ANDERSEN LLP, ANDERSEN WORLDWIDE, S.C., ANDERSEN CO. (INDIA), ARTHUR ANDERSEN-BRAZIL, ARTHUR ANDERSEN (UNITED KINGDOM), VINSON & ELKINS, LLP, JP MORGAN CHASE & CO., JP MORGAN CHASE BANK, JP MORGAN SECURITIES INC., CITIGROUP, INC., CITIBANK, N.A., SALOMON SMITH BARNEY, INC., BARCLAYS PLC, BARCLAYS BANK PLC, DEUTSCHE BANK AG, DEUTSCHE BANK TRUST COMPANY AMERICAS, LEHMAN BROTHERS HOLDING, INC., and LEHMAN BROTHERS INC.	§	DEMAND FOR JURY TRIAL

DEFENDANTS RICE'S AND HANNON'S
MOTION TO POSTPONE DISCOVERY AND TO STAY ANSWER
DURING PENDENCY OF CRIMINAL PROCEEDINGS

Defendants Kenneth D. Rice ("Rice") and Kevin P. Hannon ("Hannon") have moved to dismiss Plaintiffs' First Amended Complaint[1]. They now move to stay discovery against them and the filing of their answers in this case to protect their constitutional rights pending the conclusion of criminal proceedings against them. This Court has already granted Rice and Hannon similar relief in *Newby*. Because this motion to stay will be moot if the motion to dismiss is granted, they make this motion to stay subject to their motions to dismiss.

I. INTRODUCTION

Mr. Rice was a Chief Executive Officer of Enron Broadband Services ("EBS"). Mr. Hannon was the Chief Operating Officer of EBS from sometime in 2000 to August 2001. The

[1] *See* Motion to Dismiss Plaintiffs' First Amended Complaint of Officer Defendants Buy, Frevert, Kean, Koenig, McMahon, Olson, Rice, Whalley, Hannon, Kirko and Causey (Exhibit 1).

collapse of Enron gave rise to a myriad of civil lawsuits as well as a federal criminal investigation. All of these proceedings cover the same subject matter. Mr. Rice and Mr. Hannon are defendants in numerous civil cases, including *Newby v. Enron Corp.* and the captioned case, as well as some of the other cases transferred to this Court pursuant to MDL No. 1446. Mr. Rice and Mr. Hannon have also been indicted on matters central to the civil litigation. *See United States v. Kenneth Rice, Joseph Hirko, Kevin Hannon, et al;* H-03-93-01, filed April 29, 2003, which was superceded by *United States v. Kenneth Rice, Joseph Hirko, Kevin Hannon, et al;* H-03-93-02, filed September 15, 2003.[2] The indictments reference many of the same press releases, analyst conferences, EBS transactions and stock trades that form the basis of the allegations against Mr. Rice and Mr. Hannon in *Newby* and the Washington State Investment Board's First Amended Complaint for Violations of the Securities Laws ("Complaint"). There is clear overlap between the civil cases before this Court and the criminal cases against Messrs. Rice and Hannon. Accordingly, Rice and Hannon seek the same relief from filing an answer and from discovery that this Court recently granted to these same defendants in *Newby*.[3]

Granting Messrs. Rice and Hannon's motion to postpone answer and stay discovery in *Newby*[4], this Court referenced another such order, which held that a stay is necessary for an indicted defendant when "the clear overlap of issues in the criminal and civil cases [make] the

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[2] The Superseding Indictment against Kenneth Rice, Joseph Hirko, Kevin Hannon, Kevin Howard, Scott Yeager, Rex Shelby and Michael Krautz is attached as Exhibit 2, and the Second Superseding Indictment against these same defendants is attached as Exhibit 3.

[3] See Order Re: Rice's and Hannon's motion to postpone discovery and to stay answer entered June 6, 2003 (DE 1468) attached as Exhibit 4.

[4] Rice and Hannon incorporate by reference "Kenneth Rice's and Kevin P. Hannon's Motion To Postpone Discovery And To Stay Answer During Pendency of Criminal Proceedings" filed in *Newby*, which was granted by this Court and is attached as Exhibit 5 (DE 1456).

potential for self-incrimination more likely."[5] (Exhibit 6, p. 22). Staying Mr. Fastow's (and later Mr. Rice's and Mr. Hannon's) obligation to file an answer, the Court held that "requiring Fastow to file an answer in *Newby*, now that his motion to dismiss has been denied, would have the . . . effect" of unnecessarily forcing him "to choose between invoking his Fifth Amendment privilege and risking severe prejudice in the civil action." (Exhibit 6, p. 2). As this Court recognized, the same Fifth Amendment considerations support a stay of Mr. Rice's and Mr. Hannon's obligation to answer and to respond to discovery in this case, just as this Court found it did in *Newby*. Answering the Complaint paragraph by paragraph and responding to discovery would force Mr. Rice and Mr. Hannon to a "Hobson's choice" of asserting their Fifth Amendment privilege or defending the civil case. Therefore, Mr. Rice and Mr. Hannon request that this Court postpone discovery from each of them and stay their obligation to answer the Complaint (and any amended complaints) in *Washington State Investment Board v. Lay* until the criminal proceedings against them are concluded.

II. DISCUSSION

A. Mr. Rice and Mr. Hannon Are Confronted With A Constitutional Predicament.

Plaintiffs in the Complaint seek responsive pleadings and may seek discovery from Mr. Rice and Mr. Hannon regarding their roles at Enron and related matters. The United States government has indicted Mr. Rice and Mr. Hannon over the same issues. If Mr. Rice and Mr. Hannon answer the complaints and respond to the civil discovery, they jeopardize their Fifth Amendment privilege against self-incrimination by creating the possibility their answers will aid in the prosecution of them. If Mr. Rice and Mr. Hannon invoke their Fifth Amendment privilege,

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[5]See Memorandum and Order Re: Motions Filed by Enron Insider Defendant Andrew S. Fastow, entered March 25, 2003 (DE 1298) attached as Exhibit 6; Order staying Fastow's obligation to answer entered April 29, 2003 (DE 1353) attached as Exhibit 7.

they risk severe prejudice in this civil action that could amount to a forfeiture of their due process right to defend the case. Mr. Rice and Mr. Hannon thus face an impossible choice, a so-called *Hobson's* choice, where selection of either alternative will damage a constitutional right.

B. The Civil Case Allegations Against Mr. Rice and Mr. Hannon Primarily Relate to Enron Broadband Services.

Plaintiffs' allegations against Mr. Rice and Mr. Hannon in the Complaint as well as in *Newby* and *Tittle* primarily relate to their tenure with EBS. *See, e.g.*, ; *Washington State Investment Board*, Complaint, ¶¶ 91, 111, 141, 143, 156, 158, 315; *Newby,* First Amended Consolidated Complaint, ¶¶ 83, 84, 88, 173, 214(h)-(l), 276, 300 (h)-(o), 309, 317, 339(h)-(o), 992; 993; *Tittle,* First Amended Complaint, ¶¶ 73, 657, 667. The factual allegations as to Mr. Rice and Mr. Hannon, to the extent there are any factual allegations against them, are the same in this case as in *Newby*. Washington State Investment Board alleges that Mr. Rice, Mr. Hannon and other defendants used EBS as part of a fraudulent scheme to deceive Plaintiffs and to enrich themselves. *See, e.g., id.*

C. The Criminal Allegations Against Mr. Rice and Mr. Hannon Mirror The Civil Allegations.

The criminal allegations against Mr. Rice and Mr. Hannon focus on the same activities and allegations as in this case, *Newby, Tittle,* and related MDL No. 1446 civil actions–Mr. Rice's and Mr. Hannon's alleged "scheme to defraud" in connection with EBS:

> ....defendants Kenneth Rice [and]....Kevin Hannon, together with others, engaged in conduct and made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS.

United States v. Kenneth Rice, Joseph Hirko, et al; (S.D.Tx. 2003) Cr. No. H-03-93-01 at ¶ 11.

Due to the overlap between the criminal and civil cases, Mr. Rice and Mr. Hannon cannot respond to discovery in the consolidated civil actions without providing information to the government for use in its criminal investigation. To avoid providing direct assistance to the criminal investigation, Mr. Rice and Mr. Hannon would have to invoke their Fifth Amendment privileges in response to civil discovery. However, even if Mr. Rice and Mr. Hannon were to exercise their Fifth Amendment privileges in response to discovery, their invocation of the privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of them, and they would face the possibility of a negative inference being drawn in the civil case from that invocation of the Fifth Amendment.

D. Fifth Circuit Law Requires Postponement Of Discovery To Protect The Constitutional Rights Of Litigants Subject To Criminal Proceedings.

When confronted with a party facing a *Hobson's* choice, both this Court and the Fifth Circuit have fashioned a remedy that balances the interests of litigants in pursuing their civil damages claim while still protecting the rights of an individual subject to criminal investigation. *See Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088-89 (5th Cir. 1979); *Kmart Corp. v. Aronds et al.*, Civ. No. H-96-1212, p. 4-6 (S.D. Tex. Dec. 11, 1996). That remedy postpones responsive pleadings, discovery (and, if necessary, trial) until after conclusion of all criminal proceedings. Both Mr. Rice and Mr. Hannon seek that remedy, and this Court has already granted them that remedy in *Newby*.

III. CONCLUSION

This Court acknowledged the same constitutional dilemma confronting Mr. Rice and Mr. Hannon in its orders staying the *Newby* and *Tittle* cases against these same defendants. The Court's reasoning supports a similar stay of the civil proceedings in this case against Mr. Rice

and Mr. Hannon until the resolution of their criminal actions. To protect the same constitutional rights that this Court sought to protect by staying their obligations to answer and respond to discovery in the *Newby* and *Tittle* cases, the Court should stay both discovery from Mr. Rice and Mr. Hannon and their duty to answer or otherwise respond to the Complaint (and any amendments) in *Washington State Investment Board v. Lay* pending the outcome of their criminal trials. The legal and factual bases for a postponement will be the same in each case and therefore need not be brought to the Court's attention each time an answer date draws near in a consolidated case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served by sending a copy via electronic mail to serve@ESL3624.com on this the 3rd day of December, 2003.

I further certify that a copy of the foregoing document has been served via Certified Mail/Return Receipt Requested on the following parties, who do not accept service by electronic mail on this the ____ day of December, 2003.

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United States Trustee, Region 2
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New York, NY 10004
Telephone: (212) 510-0500
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Joanna V. Hamrick

The Exhibit(s) May

Be Viewed in the

Office of the Clerk