

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

United States Courts
Southern District of Texas
F11 FD

MAY 07 2004

Michael N. Milby, Clerk

In re ENRON CORPORATION	§	
SECURITIES, DERIVATIVE	§	
& "ERISA" LITIGATION	§	
 	§	
MARK NEWBY, ET AL.,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	
	§	
ENRON CORPORATION, ET AL.,	§	
	§	
<i>Defendants.</i>	§	
	§	

**MDL 1446
and Consolidated, Related
and Coordinated Cases**

**Civil Action no: H-01-3624
and Consolidated, Related Cases
and Coordinated Cases**

**MOTION OF CERTAIN OFFICER DEFENDANTS
TO COMPEL THIRD-PARTY BLOCKBUSTER, INC. TO RESPOND
TO SUBPOENA DUCES TECUM**

Defendants Richard B. Buy, Steven J. Kean, Jeffrey McMahon, Mark A. Frevert, Mark E. Koenig, Cindy Olson, and Lawrence G. Whalley, (collectively "Officer Defendants") respectfully submit this Motion to Compel Third Party Blockbuster, Inc. to Respond to a Subpoena Duces Tecum. In further support of this Motion, the Officer Defendants respectfully show the Court the following:

I. Introduction

This motion concerns a third-party subpoena served in the Enron Securities Litigation (the "Litigation"). Several of the individual defendants in this case are former officers of Enron Broadband Services, Inc. ("EBS"), a subsidiary of Enron Corporation. On or about December 19,

2128

2003, the Officer Defendants served the Custodian of Records of Blockbuster, Inc., who is not a party to the Litigation, with a subpoena duces tecum pursuant to Rule 45 of the Federal Rules of Civil Procedure. Generally, the subpoena sought documents related to EBS's and Blockbuster's former contractual relationship involving the creation and marketing of a service known as "Video-on-Demand." *See* Subpoena to Blockbuster, attached as Ex. A. As set forth below, allegations related to this contractual relationship are central to the litigation. The subpoena commanded that documents be produced on or before January 17, 2003. Soon after service of the subpoena, counsel for the Officer Defendants and counsel for Blockbuster entered discussions regarding the scope and timing of Blockbuster's response to the subpoena.¹ Blockbuster requested additional time to gather responsive documents, and asked the Officer Defendants to narrow the scope of the documents requested. The Officer Defendants agreed to grant Blockbuster additional time, ultimately setting a final response deadline of April 28, 2004, and agreed to limit the scope of Blockbuster's initial response to only four of the twenty categories of documents requested in the subpoena, reserving the right to seek additional documents if the initial response was inadequate.

On May 6, 2004, Blockbuster delivered a woefully inadequate response, even considering the narrowed scope of the subpoena, as set forth in more detail below. With depositions in this matter scheduled to start June 2, 2004, the Officer Defendants have no choice but to request that this Court compel Blockbuster to produce all documents responsive to the subpoena.

¹ On January 16, 2004, Blockbuster filed a Motion to Quash Third-Party Subpoena Duces Tecum in the Northern District of Texas, the court from which the subpoena had issued. The Officer Defendants did not respond to the Motion to Quash as the parties were already engaged in discussions and expected to quickly reach an agreement regarding the timing and scope of Blockbuster's response to the subpoena. On April 5, 2004, Blockbuster's counsel notified the Court that it was withdrawing its Motion to Quash without prejudice, subject to the parties' expected agreement on a scope of and procedure for production.

II. Argument

Rule 45 of the Federal Rules of Civil Procedure provides that a party to litigation may serve a subpoena on a non-party commanding that person to produce and/or permit inspection of documents. Fed. R. Civ. P. 45(a)(1)(C). The permissible scope of a Rule 45 subpoena is the same as the scope of discovery under Rule 26(b)(1):

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1); *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998). The documents requested by the Officer Defendants in the subpoena to Blockbuster fall well within the permissible scope of discovery. Plaintiffs in this extremely complex, multi-district litigation, have alleged, among many other things, that EBS, as well as its former officers, made fraudulent or misleading statements to investors regarding the viability of Video-on-Demand and EBS's related business and profit potential. Blockbuster's documents regarding Blockbuster's and EBS's joint efforts to develop Video-on-Demand service and their relationship under the Video-On-Demand agreement are essential to rebutting Plaintiffs' allegations regarding EBS. Accordingly, the Officer Defendants are clearly entitled to the documents requested in the subpoena.

Blockbuster's minimal response, nearly four months after the original return date on the subpoena, is woefully inadequate. Blockbuster produced a mere 650 pages, over 200 pages of which consists of outside telecommunication industry reports not directly related to the relationship between Blockbuster and EBS. Many of the documents produced by Blockbuster are PowerPoint presentations and other reports that were jointly prepared by EBS and Blockbuster. Entirely absent from the production are *any* internal documents regarding Blockbuster's perspective on its

relationship with EBS and the viability of Video-on-Demand— no email communications, internal memoranda, handwritten notes, internal meeting agendas, or other similar internal documents have been produced. Blockbuster failed to produce correspondence between Blockbuster officers and employees and EBS officers and employees during the course of the contractual relationship. Although Blockbuster did produce the Video-on Demand Agreement between Blockbuster and EBS and the Amendment to that agreement, it failed to produce any drafts of either the agreement or the amendment, or any correspondence, internal or with EBS, regarding the negotiation of the terms of the agreement or the amendment. Similarly, Blockbuster did not produce any documents related to agreements with Regional Bell Operating Companies (“RBOCs”), last-mile providers or other broadband distributors. These companies streamed content provided by Blockbuster as part of the Video-on-Demand trials jointly undertaken by Blockbuster and EBS. The success or failure of these trials is of course essential to a determination of the viability of Video-on-Demand. In sum, Blockbuster failed to produce even a reasonable portion of the documents commanded to be produced under the subpoena.

“Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.” Fed. R. Civ. P. 45(e).² Although Blockbuster agreed to abide by an April 28, 2004 deadline for production, it has continually dragged its feet and produced only a few documents over a week past that deadline. The Officer Defendants agreed that Blockbuster’s initial response could be limited to only four of the

² Although Rule 45(e) provides that the court from which the subpoena issued must enforce it, several cases have held that, in multi-district litigation, under 28 U.S.C. §1407, the judge appointed to preside over the MDL should hear such motions. See *United States v. Diabetes Treatment Ctrs.*, 238 F. Supp. 2d 270, 275 (D. D.C. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 586 (E. D.Pa. 1989).

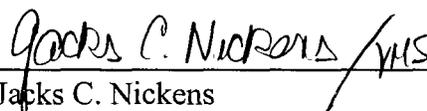
twenty categories of documents listed in the subpoena, fully expecting to review that initial production much earlier than May 6th and to be able to seek further discovery if necessary. The documents produced by Blockbuster on May 6th are not even fully responsive to those four categories. Blockbuster's production is too little too late. Over the past four months, the Officer Defendants have attempted to compromise and work with Blockbuster to obtain their needed discovery in a way that limited the burden on this third party. At this late date, however, the Officer Defendants must demand that Blockbuster fully comply with the subpoena as the law requires.

Blockbuster has no reasonable excuse for its failure to comply with the subpoena. Blockbuster's continual delays have caused great prejudice to the Officer Defendants, whose counsel needs to review the Blockbuster documents in preparation for an intensive deposition schedule beginning June 2, 2004. Accordingly, the Officer Defendants ask this Court to enter an order compelling Blockbuster to produce all documents responsive to the subpoena without further delay, no later than May 21, 2004. Should Blockbuster continue to delay even after this Court compels production, the Officer Defendants would ask the Court to hold Blockbuster in contempt, in accordance with Rule 45(e). *See Painewebber, Inc. v. Acstar Ins. Co.*, 211 F.R.D. 247, 249 (S.D.N.Y. 2002).

III. Conclusion

For the above reasons, the Officer Defendants respectfully request that the Court enter an order compelling Blockbuster, Inc. to comply with and respond to the subpoena without further delay, no later than May 21, 2004.

Respectfully submitted,



Jacks C. Nickens
State Bar No. 15013800
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191 (phone)
(713) 571-9652 (fax)

ATTORNEY IN CHARGE FOR
OFFICER DEFENDANTS

OF COUNSEL:

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FARRELL & FLACK, L.L.P.

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(713) 571-9652 (fax)

CERTIFICATE OF CONFERENCE

The undersigned certifies that counsel for the movants has conferred with Blockbuster, Inc. regarding the subject matter of this motion and that counsel cannot agree about the disposition of the motion.


Virginia Mixon Swindell

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of May, 2004, a true and correct copy of the foregoing document was served by mail on counsel for Blockbuster, Inc., and on all counsel of record in the Enron Securities Litigation by posting said document in .PDF format to the <http://www.es13624.com> website.


Virginia Mixon Swindell

**UNITED STATES DISTRICT COURT
Northern District of Texas
Dallas Division**

**In re ENRON CORPORATION SECURITIES
LITIGATION**

Pending in the United States District Court for the Southern
District of Texas Houston Division
CIVIL ACTION NUMBER: H-01-3624
(Consolidated)

This Document Relates to All Actions

**SUBPOENA DUCES TECUM
IN A CIVIL CASE**

TO: Custodian of Records, Blockbuster, Inc., 1201 Elm Street, Dallas, TX 75270

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
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YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

SEE ATTACHMENT A

PLACE: Nickens Keeton Lawless Farrell & Flack LLP 600 Travis Street, Suite 7500 Houston, TX 77002	DATE AND TIME by January 17, 2003 9 a.m.
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify Federal Rules of Civil Procedure 30(b)(6)

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Virginia M. Swindell</i> Attorney for Officer Defendants Buy, Causey, Kean, McMahon, Frevert, Hannon, Hirko, Koenig, Olson and Whalley	DATE December 19, 2003
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ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Virginia Swindell, Texas Bar No. 00794711 Nickens Keeton Lawless Farrell & Flack LLP 600 Travis Street, Suite 7500 Houston, TX 77002 Telephone: (713) 353-6687	
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PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct

Executed on _____ DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance,
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearances or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

I. INSTRUCTIONS

1. This subpoena requires that you produce to the parties all documents described herein at the time and place specified.

2. Documents to be produced include all documents in your possession, custody or control, wherever located. Without limitation on the term "control" a document is deemed to be in your control if you have the right to secure that document or a copy thereof from another person.

3. All documents that respond, in whole or in part, to any part or clause or any paragraph of this subpoena shall be produced in their entirety, including all attachments to documents called for by this subpoena shall be produced, even if they are not otherwise responsive to this subpoena. Documents shall be produced in the order and in the file folders in which they appear in your files and shall not be shuffled or otherwise rearranged. Documents that in their original condition were stapled, clipped or otherwise fastened together shall be produced in such form.

4. Any document demanded by the subpoena that is withheld on a claim of privilege must be preserved. If the document contains privileged material, the entire document shall be produced with the privileged portion deleted. For any document or any portion of a document withheld under a claim of privilege, a privilege log shall be submitted in which you identify the document by author(s), addressee(s), date, number of pages, current location, and subject matter; the nature and basis of the claimed privilege and the paragraph of this subpoena to which the document is responsive shall be specified; and each person to whom the document or its contents, or any part thereof, was disclosed shall be specified.

5. If any of the requested documents have been destroyed in any manner, identify each document by its author, date, recipients and subject mater, and provide a date and description of the manner in which it was destroyed.

6. These requests are continuing in nature, and supplementation of responses is requested for any new documents found, recovered, developed or coming into your actual or constructive possession, custody or control from the date of the request until the end of trial.

7. No agreement purporting to modify, limit or otherwise vary this subpoena shall be valid or binding unless confirmed or acknowledged in writing.

II. DEFINITIONS

1. "And" and "or" as used herein are terms of inclusion and not of exclusion, and shall

be construed either disjunctively or conjunctively as necessary to bring within the scope of this schedule any document or information that might otherwise be construed to be outside its scope.

2. "Document" means any written, recorded or graphic material of any kind that is in your possession, custody or control. The term includes, but is not limited to: contracts; agreements; letters; telegrams; interoffice communications; memoranda; notes; reports; analyses; notebooks; surveys; lists; outlines; schedules; pamphlets; newsletters; flyers; charts; tabulations; compilations; studies; books; records; telephone books or messages; visitor books; calendar or diary entries; desk or appointment calendars; drafts; business cards; minutes or meetings or conferences; notes or memos or other records of telephone or other conversations or communications; electronic mail transmissions; ledgers; financial statements; bills or invoices; purchase orders; receipts; photostats; microfilm; microfiche; audio and video tapes or disc recordings; and computer printouts. It also includes electronically stored data from which information can be obtained either directly or by translation through detection devices or readers. Any such document is to be produced in reasonably usable form, along with instructions for reading the data. The term "document" includes the original (or a copy thereof if the original is not available) and all copies that differ in any respect from the original or that bear any notation, marking or information not on the original.

3. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute or other business or legal entity, and includes any affiliate, parent or subsidiary.

4. "Company," "Corporation," and "Entity" include any corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute or other business or legal entity, and includes any affiliate, parent or subsidiary. "Your company" includes but is not limited to any other business entities related by common ownership, common management, common directors, common officers or by other means.

5. "Relating to" means constituting, analyzing, describing, discussing, reporting on, commenting on, inquiring about, setting forth, explaining, considering, pertaining to, mentioning, regarding, alluding to or concerning, in whole or in part.

6. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun, and vice versa.

7. "EBS" refers to Enron Broadband Services and its predecessor, Enron Communications, Inc.

8. "BBI" and "Blockbuster" refer to Blockbuster, Inc.

III. DOCUMENTS TO BE PRODUCED

Any and all documents that describe, refer to or relate to the following matters, for the period January 1, 1997 to the present:

1. All documents relating to the negotiation, due diligence, execution, performance, assignment, modification or termination of any proposed or actual agreements, contracts and/or marketing arrangements between BBI and EBS to provide Video-on-Demand ("VOD") service to customers of Regional Bell Operating Companies and their affiliates ("RBOCS"), including but not limited to the agreement signed on April 20, 2000 (hereafter "VOD Agreement").

2. All documents relating to BBI's evaluation of the capabilities and/or potential applications of EBS's hardware, software or network capabilities for streaming VOD to customers, including, but not limited to, all demonstrations of or representations about EBS's technology and capabilities to stream VOD.

3. All presentations, technical documents, white papers or other documents that were presented or exchanged at any meetings between representatives of Blockbuster and EBS.

4. All documents relating to the negotiation and execution of the modification of the VOD Agreement in December of 2000.

5. All documents relating to the negotiation, due diligence, execution, performance, assignment, modification or termination of any proposed or actual agreements, contracts and/or marketing arrangements for rights to film content sought or obtained by BBI relevant to the VOD Agreement.

6. All publicity, promotional, marketing or other documents that relate to or describe the VOD Agreement, any other agreements between Blockbuster and EBS, or any agreements for digital rights to film content sought or obtained by Blockbuster, including all drafts of such press releases and any information provided by EBS relating to such press releases. This request includes, but is not limited to:

7. The joint press release issued on or about July 19, 2000;

8. Any publicity documents relating to the modification of the VOD Agreement;

9. Any publicity documents relating to the termination of the VOD Agreement;

10. All press releases issued by Blockbuster that mention EBS.

11. All documents relating to the BBI's participation in efforts to negotiate agreements with RBOCs and EBS to provide VOD services to customers of RBOCS and their affiliates.

12. All documents relating to the negotiation, due diligence, execution, performance, assignment, modification or termination of any proposed or actual agreements, contracts and/or marketing arrangements between and among BBI and SBC (Southwestern Bell) or EBS and SBC, relevant to the VOD Agreement, including, but not limited to, the agreement described in

the July 19, 2000 joint press release.

13. All documents relating to the negotiation, due diligence, execution, performance, assignment, modification or termination of any proposed or actual agreements, contracts and/or marketing arrangements between and among BBI and Covad, Inc., or EBS and Covad, Inc., relevant to the VOD Agreement, including, but not limited to, the agreements described in the July 19, 2000 joint press release.

14. All documents relating to the potential or actual demonstration of the VOD technology to any potential or actual customers, vendors or other third parties, including, but not limited to:

a) the Airswitch "friends and family" demonstration scheduled to launch on or about November 6, 2000, in America Fork, Utah;

b) the Airswitch market trial scheduled to launch on or about December 15, 2000, in America Fork, Utah;

c) the demonstration of streaming VOD to the Airswitch customer site in America Fork, Utah, on or about September 22, 2000;

d) Any demonstration of streaming VOD involving SBC, Verizon or any other RBOC or RBOC affiliate.

15. All documents relating to the termination of the VOD Agreement in February and March of 2001, including, but not limited to:

a) Any contacts with EBS prior to termination relating to extension or modification of the VOD Agreement;

b) Letter of Kenneth D. Rice dated February 26, 2001, terminating the BBI/EBS Agreement;

c) Letter of John Antiocos dated March 8, 2001, responding to the Rice letter of termination.

16. All documents relating to any litigation, arbitration or mediation relating to the termination of the VOD Agreement.

17. All e-mails, memoranda, correspondence, calendar entries, expense reports or other records relating to or reflecting any meetings or contacts between EBS or EBS representatives and any current or former BBI officers or employees, including, but not limited to the following:

John Antiocos

Mark Gilman

18. All e-mails, memoranda, correspondence, calendar entries and expense reports relating to EBS or meetings between EBS and BBI located in the files of those current or former BBI employees who were principally responsible for developing or maintaining the relationship between BBI and EBS.

19. All e-mails, memoranda, correspondence, calendar entries, expense reports or other records relating to or reflecting any meetings or contacts between any current or former BBI employees and any of the following current or former EBS employees:

Jeff Skilling

Kenneth Rice

Kevin Hannon

Joseph Hirko

Rich DiMichele

David Cox

Ed Smida

Frank Bay

Barry Pierce

Jim Fallon

John Howard

April Hodgson

Gil Melman

Rex Rogers

Mark Hensel

20. All documents produced by BBI to any private plaintiff, state or federal governmental entity or any other party pursuant to any actual or contemplated legal proceeding relating to EBS.