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Defendants.

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, STATE TEACHERS' RETIREMENT SYSTEM OF OHIO, SCHOOL EMPLOYEES' RETIREMENT SYSTEM OF OHIO and OHIO STATE HIGHWAY PATROL RETIREMENT SYSTEM,

Plaintiffs,

v.

KENNETH L. LAY., et al.,

CIVIL ACTION NO. H-02-7488

RICHARD C. PETERSEN; JOHN E. §
STEWART; MICHAEL L. BENNETT; §
WILLIAM E. SWANSON; ROGER D. §
WILLARD; MICHAEL D. JONES; §
GREGORY W. HALE; JOHN E. SORRELS; §
DANNY B. RUDLOFF; PHILIP A. §
RANDALL; ROMAN W. McALINDON; and §
C.E. ANDREWS, §
§
§
Defendants. §
§

SILVERCREEK MANAGEMENT INC.;
SILVERCREEK LIMITED PARTNERSHIP;
SILVERCREEK II LIMITED; OIP LIMITED;
and PEBBLE LIMITED PARTNERSHIP,

Plaintiffs,

v.

CIVIL ACTION NO. H-03-0185

CITIGROUP, INC.; BANK OF AMERICA
CORPORATION; J.P. MORGAN
SECURITIES, INC.; J.P. MORGAN CHASE &
COMPANY; CREDIT SUISSE FIRST
BOSTON; DEUTSCHE BANK ALEX
BROWN, INC.; DEUTSCHE BANK AG;
BARCLAY'S CAPITAL INC., BARCLAY'S
PLC; MERRILL LYNCH & CO.; ANDERSEN
WORLDWIDE S.C.; ANDERSEN CO.;
ARTHUR ANDERSEN-PUERTO RICO;
ANDERSEN LLP; ARTHUR ANDERSEN-
BRAZIL; ARTHUR ANDERSEN; JOSEPH F.
BERARDINO; THOMAS H. BAUER; DEBRA
A. CASH; DONALD DREYFUSS; JAMES A.
FRIEDLIEB; DAVID STEPHEN GODDARD,
JR.; GARY B. GOOLSBY; MICHAEL M.
LOWTHER; BENJAMIN S. NEUHAUSEN;
DAVID MICHAEL C. ODOM; RICHARD R.
PETERSEN; JOHN E. STEWART; MICHAEL
L. BENNETT; WILLIAM E. SWANSON;
ROGER D. WILLARD; MICHAEL D. JONES;
GREGORY W. HALE; JOHN E. SORRELLS;
DANNY D. RUDLOFF; PHILLIP A.
RANDALL; ROMAN W. McALINDON; C.E.
ANDREWS; VINSON & ELKINS L.L.P.;
KIRKLAND & ELLIS; KENNETH LAY;
JEFFREY K. SKILLING; ANDREW S.
FASTOW; ROBERT A. BELFER; NORMAN
P. BLAKE; RONNIE C. CHAN; JOHN H.
DUNCAN; JOE H. FOY; WENDY L.
GRAMM; KENNETH L. HARRISON;
ROBERT K. JAEDICKE; CHARLES A.
LeMAISTRE; REBECCA MARK-
JUSBASCHE; JOHN MENDELSON;
JEROME J. MEYER; PAULO V. FERRAZ
PERIERA; FRANK SAVAGE; JOHN A.

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DAVID B. DUNCAN, DEBRA A. CASH, §
 DAVID STEPHEN GODDARD, JR., GARY §
 B. GOOLSBY, MICHAEL M. LOWTHER, §
 BENJAMIN S. NEUHAUSEN, MICHAEL C. §
 ODOM, JOHN E. STEWART, MICHAEL L. §
 BENNETT, WILLIAM E. SWANSON, §
 ROGER D. WILLARD, GREGORY W. HALE, §
 JOHN E. SORRELLS, DANNY D. RUDLOFF, §
 VINSON & ELKINS, LLP, KIRKLAND & §
 ELLIS, ANDREWS & KURTH, L.L.P., §
 MILBANK, TWEED, HADLEY & MCCLOY §
 LLP, J. P. MORGAN CHASE & CO., J. P. §
 MORGAN SECURITIES, INC., J. P. §
 MORGAN CHASE BANK, CITIGROUP, §
 INC., CITIGROUP GLOBAL MARKETS §
 REALTY CORP. (F/K/A SALOMON SMITH §
 BARNEY, INC.), CITIBANK, N.A., §
 CITIGROUP GLOBAL MARKETS, LTD. §
 (F/K/A SALOMON BROTHERS §
 INTERNATIONAL LIMITED), MERRILL §
 LYNCH & CO., MERRILL LYNCH, PIERCE, §
 FENNER & SMITH, INC., BARCLAYS §
 CAPITAL, INC., BARCLAYS BANK, PLC, §
 CREDIT SUISSE FIRST BOSTON (USA), §
 INC., CREDIT SUISSE FIRST BOSTON LLC, §
 DONALDSON, LUFKIN & JENRETTE §
 SECURITIES CORP., PERSHING, LLC, §
 CANADIAN IMPERIAL BANK OF §
 COMMERCE, CIBC, INC., CIBC WORLD §
 MARKETS CORP., CIBC WORLD §
 MARKETS PLC, CIBC CAPITAL §
 CORP., BANK OF AMERICA CORP., BANK §
 OF AMERICA SECURITIES LLC, §
 DEUTSCHE BANK AG, DEUTSCHE BANK §
 SECURITIES INC., DEUTSCHE BANK §
 TRUST COMPANY AMERICAS, §
 TORONTO-DOMINION BANK, TORONTO- §
 DOMINION HOLDINGS (U.S.A.), INC., TD §
 SECURITIES, INC., TD SECURITIES (USA), §
 INC., TORONTO-DOMINION §
 INVESTMENTS, INC., TORONTO §
 SECURITIES LTD., TORONTO DOMINION §
 (TEXAS), INC., THE ROYAL BANK OF §
 SCOTLAND GROUP PLC, THE ROYAL §
 BANK OF SCOTLAND PLC, NATIONAL §
 WESTMINSTER BANK PLC, GREENWICH §

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AND SALOMON SMITH BARNEY, INC.,

Defendants.

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Plaintiffs in the above-styled actions (collectively, the “Plaintiffs”) hereby respectfully oppose the Motion and Memorandum for Modification of the Scheduling Order dated March 11, 2004 filed on behalf of various bank defendants (collectively, the “Bank Defendants”).

PRELIMINARY STATEMENT

The Scheduling Order dated March 11, 2004 (the “Scheduling Order”), sets forth the discovery schedule that applies in this action. Pursuant to the Scheduling Order, these dates are “firm” and “are not subject to change without sufficient reason.” The Deposition Protocol Order, entered by this Court on March 11, 2004 (the “Deposition Protocol Order”), governs all oral depositions of fact witnesses, except as specifically provided therein, and states that unless there is agreement between the deposition scheduling committees, once a deposition is scheduled it shall not be postponed without “good cause.”

Under both the Scheduling Order and the Deposition Protocol Order, depositions are to begin by June 2, 2004 and end by November 30, 2005. As acknowledged by the Bank Defendants, both the Scheduling and Deposition Protocol Orders were the result of months of hard work and substantial compromises by all parties. (Defts’ Mem at 4.)¹ As the Bank Defendants are well aware, the parties have already scheduled June depositions and July deponents have been chosen and the time allocated to each witness has been negotiated. However, on the eve of the commencement of depositions, the Bank Defendants are now attempting to modify the Scheduling Order in order to substantially delay the commencement of depositions.

¹ The Bank Defendants’ Memorandum is referenced to herein as “Defts’ Mem At ____”.

The Bank Defendants assert that the entire deposition schedule should be delayed ninety days because they have not yet received and reviewed a number of Enron Corp (“Enron”) and Arthur Andersen (“Andersen”) documents. Specifically, the Bank Defendants want to postpone depositions that are scheduled to begin in June as well as the entire discovery and deposition schedule because: (i) they have not received documents that have already been produced by Enron due to processing delays at Lex Solutio, which manages the document depository; (ii) Andersen has not completed the production of documents in response to a January 22, 2004, document request, and the Bank Defendants have not received documents that were produced in response to a November 26, 2003, document request; and (iii) the Bank Defendants have learned that Enron directors and officers are in the process of producing to the document depository documents that they received in discovery from the government in related criminal proceedings.

Contrary to the Bank Defendants’ assertions, sufficient reason does not exist to modify the Scheduling Order to postpone the start of depositions by ninety days and good cause does not exist to postpone each of the depositions that have already been scheduled for June.

A. The Bank Defendants Knew That Document Productions Would Not Be Completed By The Commencement Of Depositions At The Time The Bank Defendants Agreed To The Terms Of The Scheduling And Deposition Protocol Orders

When the Bank Defendants agreed to the current discovery schedule and the terms of the Deposition Protocol Order, they were aware that many parties and non-party witnesses had not completed document production, that every production would not be completed before the commencement of depositions in June, and that Lex Solutio was experiencing processing backlogs causing Lex Solutio to be periodically delayed in delivering large quantities of documents as parties and non-parties responded to outstanding discovery requests. Notwithstanding this knowledge, the Bank Defendants agreed to the terms of the Scheduling

Order and did not make their compliance with the Scheduling Order or Deposition Protocol Order contingent upon a resolution of these matters prior to the commencement of depositions. An important element of Plaintiffs' willingness to compromise on various issues surrounding the Scheduling and Deposition Protocol Orders involved the Bank Defendants' agreement to commence depositions in a timely manner and not postpone scheduled depositions. Accordingly, the Bank Defendants should not be able to retroactively and unilaterally re-negotiate the terms of the Scheduling and Deposition Protocol Orders, push back the entire deposition and discovery schedule, and needlessly postpone the depositions of the sixteen Category One Witness depositions that have already been scheduled and are due to commence on June 2, 2004.²

B. The Bank Defendants Have Already Demonstrated That They Have Access To Enough Documents To Schedule And Take Depositions

The Bank Defendants do not assert that Enron has not complied with the Document Production Agreement and withheld documents from Lex Solutio. Rather, the Bank Defendants acknowledge that Enron has produced approximately 84 million pages of documents to the depository and that the Bank Defendants have already received approximately 58 million pages of documents. (Defts' Mem at 9.) Thus, the Bank Defendants have already received a significant number of Enron documents in order for them to prepare for depositions.

Although the Bank Defendants assert that they need to review more documents before they are ready for depositions, they have already demonstrated that they are prepared to proceed with depositions. With access to approximately 58 million pages of Enron documents, the Bank Defendants have already scheduled depositions for June and designated deponents for July

² Importantly, granting the Bank Defendants' motion would not only postpone depositions, but it would also postpone the entire discovery schedule, including the trial date, by ninety days.

without the benefit of the outstanding documents. Thus, enough documents have already been produced to enable the Bank Defendants to commence depositions.

The Bank Defendants point out that Enron and Andersen witnesses have been scheduled for June and July. However, they omit to state that it was the Bank Defendants themselves who designated a substantial portion of those witnesses, including all of the Enron witnesses. Plaintiffs did not designate any Enron or Andersen employees for depositions in June and did not designate any Enron employees for July. In stark contrast, the Bank Defendants designated the only Enron and Andersen employees for June, and all seven Enron employees for July, as well as an Andersen employee. The Bank Defendants were not forced to designate these Enron and Andersen witnesses, but chose to do so. They should not be allowed to use their own scheduling decisions as “good cause” or “sufficient reason” to delay the entire discovery process.

**C. The Outstanding Documents Do Not Warrant
A Postponement Of The Entire Deposition Schedule**

The Bank Defendants propose that all depositions should be delayed until they have received the outstanding Enron and Andersen documents, irrespective of whether a witness was an Enron or Andersen employee. This extreme remedy is unwarranted and non-Enron and non-Andersen depositions surely should not be prevented from proceeding as scheduled.

Instead of forcing the entire deposition schedule to be pushed back, causing delays that would require depositions to be pushed back to February 2006, it would be in the interests of judicial efficiency to proceed with the current schedule. If the Bank Defendants believe that more time is warranted for certain as-yet unscheduled deponents, they can refrain from noticing those witnesses immediately. There are so many witnesses that need to be deposed that the Bank Defendants can simply proceed with depositions of witnesses whose examinations will not be impacted by outstanding document productions. As an example, the Bank Defendants have

already designated a J.P. Morgan Chase employee for a July deposition and they could schedule additional depositions from other non-Enron or non-Andersen witnesses. Once the Bank Defendants receive the additional productions they can schedule witnesses that are impacted by the outstanding productions.

Anticipating that suggestion, the Bank Defendants assert that they cannot simply wait to designate Enron and Andersen witnesses due to the “limited time for depositions.” (Defts’ Mem at 15). However, depositions are scheduled to occur over an 18-month period, so the banks have ample time to conduct the depositions they believe they will need.

Furthermore, instead of delaying the entire schedule unnecessarily, the Bank Defendants could request that plaintiffs hold off on designating certain deponents immediately, and if crucial documents have been produced after depositions have taken place, under the Deposition Protocol Order, the Bank Defendants could move to reopen those depositions. (*See* Deposition Protocol Order; Sec. VII B.) The Bank Defendants’ concerns do not warrant the extreme remedy of pushing back the entire deposition schedule when they were aware of the issues they now raise at the time they agreed to the current deposition schedule, and their concerns can adequately be addressed on a witness-by-witness basis.

D. Plaintiffs Are Prepared To Commence Depositions Without The Outstanding Documents

Plaintiffs are in the same position as the Bank Defendants in that they have not received the Enron and Andersen documents described herein. However, delaying the entire schedule every time documents are delayed or unexpectedly appear could wreck havoc on the entire

discovery process and litigation schedule and Plaintiffs believe that it is much better to work out issues like these within the confines of the established schedule.³

Finally, it is difficult to know with any reasonable certainty how long it will take before the parties will receive and review the documents currently being processed by Lex Solutio. For example, although the Bank Defendants have been assured that Andersen would be producing the remaining documents to the depository on a rolling basis as “quickly as possible,” there is no way to precisely know how long this process will actually take, or how long it will take Lex Solutio to make the documents available. (Hurwitz Aff., ¶9.) Moreover, there could be additional unforeseen delays at any step along this process, which could once again cause the Bank Defendants to request more time before commencing depositions. Accordingly, a balancing of interests weighs in favor of moving forward as scheduled. Defendants have not shown “sufficient reason” to postpone the start of depositions by ninety days.⁴

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Banks Defendants’ Motion for Modification of the Scheduling Order dated March 11, 2004.

Dated: May 25, 2004

Respectfully Submitted,

By: 
W. Kelly Puls
Brant Martin

³ Witnesses have already cleared their calendars for June depositions and would be unnecessarily burdened if they had to do the same thing again three months from now. Additionally, parties to this action have spent time, money, and effort preparing to take and defend June depositions and those efforts would go stale if the Bank Defendants’ motion is granted.

⁴ In the event the Court grants the Bank Defendants’ motion, Plaintiffs request that the Court order the Bank Defendants to pay for the costs of the Houston and New York Deposition centers during the period that they are not in use as a result of the Bank Defendants’ motion.

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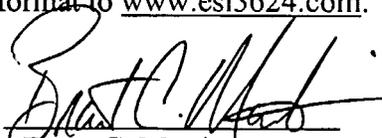
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2004, a copy of the forgoing document was served on all counsel of record by posting in PDF format to www.esl3624.com.

By:



Brant C. Martin