



United States v. Jeffrey Skilling, et al., Cr. No. H-04-25, assigned to the Hon. Sim Lake (hereafter, the "Criminal Cases"). The United States also requests that the depositions of Jim Fallon, Wanda Curry, John Griebing, Margaret Ceconi and Gary Peng, which have yet to be finalized, not be scheduled.<sup>1</sup> The Government further seeks an order requesting that the parties to the Class Action provide it with a list of pending and potential depositions so that it may identify other prospective trial and grand jury witnesses which, in turn, would also be temporarily stayed until December 1, 2004. The United States also proposes to provide the Court and the Class Action parties with an update by December 1, 2004 as to whether the temporary stays of these depositions, or others subsequently identified, are still necessary.

This motion is necessary because these Class Action deponents are expected to testify as witnesses for the government in the upcoming trials in the Criminal Cases or before the Enron Grand Jury. Their testimony is directly related to the subject matter of the Criminal Cases and the ongoing criminal investigation concerning other participants in the criminal conduct charged in the Criminal Cases. The taking of these depositions at this time unduly risks disrupting the Government's criminal prosecutions and raises the danger of disclosing sensitive information from the ongoing grand jury investigation. It would also accord the defendants in the Criminal Cases, who are also defendants in the Class Action, improper access to discovery materials which they are not entitled to receive under the law and procedures governing criminal matters.

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<sup>1</sup>As of the date of this motion, those depositions had not been formally scheduled although the parties were seeking to finalize dates and times for the witness' appearance. To the extent that any of those depositions are scheduled between now and the resolution of this motion, the United States would respectfully request that they be incorporated in any stay order.

The government has been informed by counsel for the California Board of Regents, one of the lead plaintiffs in the Class Action, who in turn has discussed this matter with the Discovery Steering Committee, that there is no consensus among the parties in the Class Action. Accordingly, the parties have requested that the United States file this motion.

Orders granting stays of all litigation and discovery have already been entered in civil enforcement cases filed by the Securities and Exchange Commission (“SEC”) that parallel the Criminal Cases brought during the United States’ investigation. See SEC v. Fastow, Civ. No. H-02-3666, November 21, 2002 (Hoyt, J.) ; SEC v. Merrill Lynch & Co. et al., Civ. No. H-03-0946 (Hoyt, J.); SEC v. Kevin Howard, et al., Civ. No. H-03-0905 (Harmon, J.); SEC v. Jeffrey Skilling, et al., Civ. No. H-04-0284 (Harmon, J.). Two of those cases, SEC v. Howard and SEC v. Skilling, are pending before this Court.

Significantly, in this case the United States is not seeking a blanket stay of all discovery in the Class Action. Instead, the United States has narrowly focused its request to obtain the temporary stay of the selected depositions until the witnesses have concluded their testimony in the Criminal Cases. Indeed, 19 other depositions already scheduled are unaffected by this motion. The government’s limited request minimizes the risk of disruption or prejudice to the Class Action litigants and allows other depositions and discovery procedures to proceed. Equally important, the United States’ motion also protects the interests of the government by preventing defendants in the Criminal Cases from unfairly using the more expansive rules of civil discovery that apply in the Class Action to obtain information they are not entitled to receive in a criminal prosecution. In addition, the United States’ limited stay request also maximizes judicial economy. By the time these depositions take place, the deponents will have testified in the Criminal Cases and the parties in the

Class action will have access to an extensive record of testimony and prior statements. Thus, the United States' motion should be granted.

### STATEMENT OF FACTS

The Department of Justice, through the Enron Task Force, is investigating all criminal matters associated with the demise of Enron. On March 27, 2002, a special grand jury was empaneled in the Southern District of Texas as part of the Government's investigation into the collapse of Enron (the "Enron Grand Jury"). As part of that investigation, the Enron Grand Jury has returned the Bayly, Rice, and Skilling indictments. The Bayly matter, which was indicted in September 2003, is scheduled for trial on June 7, 2004, while the Rice case, which was indicted in May 2003, is expected to start trial on October 4, 2004. The United States also expects that the Skilling case, which was indicted in February 2004, will proceed to trial early in 2005 although no trial date has yet been set.<sup>2</sup> In addition to these pending matters, the grand jury has also returned indictments in United States v. David Bermingham, et al., H-02-0597 and in United States v. Andrew Fastow, et al., H-02-665. All together, over twenty persons have been charged.

These indictments span a wide spectrum of criminal activity at Enron and involve charges of securities fraud, insider trading, money laundering and false statements. The defendants in the Criminal Cases include former Enron employees and executives as well as employees of various banks and financial institutions. The Enron Grand Jury's investigation is ongoing and its term was recently extended to September 27, 2004.<sup>3</sup>

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<sup>2</sup>The Government expects that Judge Lake will soon set a trial date in this matter.

<sup>3</sup>Pursuant to Fed. R. Crim. P. 6(e), the government cannot comment in this public filing about matters occurring before the grand jury.

The Class Action was filed on October 22, 2001. Given the vast impact of the collapse of Enron, the Class Action was designated a multi-district litigation and several separate lawsuits concerning the same subject matter were consolidated before this Court. The allegations of the Class Action concern the same pattern of conduct charged in the Criminal Cases and the underlying factual allegations are substantially similar. As a result, many of the witnesses and documents the United States intends to present in the Criminal Cases also support the Class Action and will be subject to discovery and deposition in this case. The deponents identified in this motion, Ron Hulme, Claudia Johnson and Roger Willard, are examples of this overlap. All three witnesses have testified before the Enron Grand Jury. The United States expects to call all three to testify in the Rice matter and at least one, if not more, to testify at the Skilling trial once it is scheduled. Similarly, Jim Fallon, Wanda Curry and John Griebing have all testified before the Enron Grand Jury and are expected to be called as witnesses in the Rice and, with the exception of Griebing, the Skilling trials. Margaret Ceconi and Gary Peng have also been interviewed by the government and are being considered for testimony before the Enron Grand Jury in connection with its ongoing investigation.

If these depositions are permitted to take place it will undermine the Government's position in the Criminal Cases and the criminal discovery process in those matters. Through these depositions the witnesses will be questioned regarding their expected testimony in the Criminal Cases and about meetings with the government and their testimony before the Enron Grand Jury, information the criminal defendants cannot obtain through the criminal discovery rules. This problem is exacerbated because this same information would also become available to other persons, many of whom are also defendants in the Class Action, who are subjects or targets of the grand jury's investigation but have not yet been charged. As noted above, the Enron Grand Jury's

investigation is ongoing and is examining other acts and individuals. The details of that investigation are protected by Federal Rule of Criminal Procedure 6(e) and cannot be publicly disclosed. Such discovery would permit the criminal defendants and other targets and subjects not yet charged, to obtain information that is unavailable to them in the Criminal Cases, thereby significantly expanding the reach of criminal discovery beyond the limits of Rule 16 of the Federal Rules of Criminal Procedure. Such discovery could seriously impede, impair, and prejudice the criminal prosecution and related investigation. The public interest in the effective enforcement of the criminal laws therefore warrants that the requested stay be granted.<sup>4</sup>

Similarly, the interests of judicial economy would also be served by a stay. The witnesses that are the subject of this motion are expected to testify in the Criminal Cases or before the Enron Grand Jury. If they are allowed to testify in those matters before appearing for depositions in the Class Action, the parties will have the benefit of their extensive trial testimony under cross examination, any exhibits used during their testimony, plus access to prior grand jury testimony and reports and documents relating to their trial appearances. This significant wealth of information is virtually certain to streamline the depositions and may help to narrow, if not resolve, areas of factual dispute in this case.

Equally importantly, the litigants in the Class Action are not prejudiced by any delay. The United States is only asking for these depositions to be postponed for a comparatively short period of time, pending re-evaluation, and is not requesting that the Class Action parties be precluded from ever speaking with these witnesses. Depositions in the Class Action are expected to take place over

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<sup>4</sup>Moreover, some of the witnesses, who have entered into cooperation agreements, still retain their Fifth Amendment privilege.

the next year and a half, so there will be ample opportunity for the parties to take the depositions of the individuals at issue. In the meantime, the parties will be able to move forward with the deposition of other persons. Moreover, if these depositions are rescheduled to a later date, the parties will have the benefit of their prior trial and grand jury testimony and exhibits, as well as copies of reports summarizing their meetings with the government and documents bearing on the subjects of their testimony. In short, there is no prejudice to the Class Action litigants from postponing the depositions at issue until the witnesses have testified at the trials of the Criminal Cases.<sup>5</sup>

## ARGUMENT

### I. THE COURT SHOULD GRANT THE GOVERNMENT'S MOTION TO INTERVENE

The Court should allow the Government to intervene in this action for the limited purpose of moving for a stay of selected depositions pending until the witnesses have testified in the Criminal Cases. Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that anyone may intervene as of right in an action when the applicant timely “claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest . . . .” See generally Sierra Club v. Espy, 18 F.3d 1201, 1204-05 (5<sup>th</sup> Cir. 1994). In addition, Rule 24(b)(2) provides for permissive intervention, upon a timely application, “when an applicant's claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b)(2).

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<sup>5</sup>Through this motion, the Government also seeks to establish a procedure to minimize the need for further litigation by requesting that the parties provide it with a list of upcoming depositions and, if any of those depositions involve prospective trial or grand jury witnesses, that those depositions be temporarily stayed until December 1, 2004. At that time, the Government proposes to file a report with the Court and the parties outlining the status of the stayed witnesses or the need for any further deposition delay.

Rule 24(b)(2) further provides that a district court exercising discretion over whether or not to permit intervention should “consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Id.

When government prosecutors have advised courts that they are conducting criminal prosecutions or investigations of individuals involved in a pending civil action, the courts have regularly permitted the government to intervene in order to request a stay, or partial stay, of proceedings in the civil case. See, e.g., SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988); SEC v. Doody, 186 F. Supp.2d 379, 381 (S.D.N.Y. 2002); Thornhill v. Otto Candies, Inc., Civ. A. No. 94-1479, 1994 WL 382655 at \*1 (E.D. La. July 19, 1994); SEC v. Mersky, No. Civ. A. 93-5200, 1994 WL 22305 at \*1 (E.D. Pa. Jan. 25, 1994); SEC v. Downe, No. 92 Civ. 4092(PKL), 1993 WL 22126 at \*11 (S.D.N.Y. Jan. 26, 1993). Twenty First Century Corp. v. LaBianca, 801 F. Supp. 1007, 1009 (E.D.N.Y. 1992). Allowing the Government to intervene in this case under Rule 24 is clearly appropriate.

Intervention is warranted as a matter of right under Rule 24(a)(2) in light of the strong interest of the government and the public in the enforcement of criminal laws. See, e.g., Cascade Natural Gas v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967) (permitting intervention as of right by State in antitrust proceedings because of public interest in effective competition); SEC v. Realty & Improvement Co., 310 U.S. 434, 458-60 (1940) (SEC should have been permitted to intervene in bankruptcy proceeding because resolution of that proceeding might “defeat the public interests which [the SEC] was designated to represent”). That interest may be substantially impaired if these depositions were to take place in this matter before the witnesses testify in the Criminal Cases or before the grand jury, as we explain further in Point II below. Indeed, courts have

specifically recognized that the government “has a discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter.” Chestman, 861 F.2d at 50; see Morris v. Amer. Fed. of State, County and Municipal Employees, No. 99 Civ. 5125(SWK), 2001 WL 123886 at \*1 (S.D.N.Y. Feb. 9, 2001) (permitting District Attorney to intervene in civil action to request stay of discovery); Board of Governors of the Federal Reserve System v. Pharaon, 140 F.R.D. 634, 638 (S.D.N.Y. 1991) (same); First Merchants Enterprise, Inc. v. Shannon, No. 88 Civ. 8254(CSH), 1989 WL 25214 at \*2-\*3 (S.D.N.Y. Mar. 16, 1989) (allowing United States Attorney to intervene in a civil action).

Intervention is additionally warranted as an exercise of this Court’s discretionary authority because there is substantial overlap in the core factual allegations underlying this action and the factual questions that likely will be resolved in the Criminal Cases -- namely, whether the defendants charged in the Criminal Cases, and who are also named in the Class Action, schemed to violate the securities laws and defraud the investing public and others. The motion is also timely and is being filed before any Class Action depositions have taken place. In addition, the Government is proceeding expeditiously with its criminal prosecutions and investigation, and any delay caused by staying these depositions so as not to interfere with the parallel Criminal Cases would not be undue. Moreover, the depositions of other witnesses, of which there are many, will continue. Finally, the Government’s intervention for the limited purpose of seeking a stay of selected depositions will not prejudice any party’s rights. The Government seeks only a temporary stay of specific depositions, and its intervention will not alter the parties’ respective positions or prevent them from proceeding with other witnesses in the interim. In fact, the criminal prosecution may benefit the civil parties by providing them with a wealth of prior testimony and information before these witnesses are

eventually deposed and by bringing out facts relevant to the Class Action in the Criminal Cases. The same justification for intervention that existed in the SEC enforcement actions and in cases like Chestman, Doody, Mersky, and others discussed above exists here. Accordingly, this Court should permit the Government to intervene.

II. THE COURT SHOULD GRANT THE GOVERNMENT'S MOTION TO STAY SPECIFIC DEPOSITIONS PENDING THE TESTIMONY OF THE WITNESSES IN THE CRIMINAL CASES

The Government believes that a proper analysis of the interests of the public, the parties, the Government, and the Court warrants a stay of the depositions at issue. Accordingly, the Government's request for a stay should be granted.

1. The Court has the authority to stay the depositions pending resolution of the criminal matter.

The Court's authority to grant the requested stay is clear. As the Fifth Circuit has stated, "Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding." United States v. Little Al, 712 F.2d 133, 136 (5<sup>th</sup> Cir. 1983); see United States v. Kordel, 397 U.S. 12, n.27 (1970); Heller Healthcare Finance, Inc. v. Boyes, No. Civ. A. 300CV1335D, 2002 WL 1558337 at \*2 (N.D. Tex. July 15, 2002). Indeed, Courts have commonly stayed civil cases, and all discovery within those cases, when a parallel criminal proceeding is anticipated or already underway. In Degen v. United States, the Supreme Court noted:

[T]he District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Fed. R. Civ. Proc. 26(c). Decisions in the Court of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases.

517 U.S. 820, 826 (1996) (citing In Re Ramu Corp., 903 F.2d 312, 316-17 (5<sup>th</sup> Cir. 1990)); see SEC v. First Financial Group of Texas, Inc., 659 F.2d 660, 668 (5<sup>th</sup> Cir. 1981); Campbell v. Eastland, 307

F.2d 478, 487 (5<sup>th</sup> Cir. 1962); see also In Re Ivan F. Boesky Securities Litigation, 128 F.R.D. 47, 49 (S.D.N.Y. 1989).

2. A proper analysis of the interests of the public, the parties, the Government, and the Court warrants a stay of the depositions.

“In deciding whether a stay of discovery in a civil proceeding is appropriate, the Court must balance the competing interests at stake.” SEC v. Downe, 1993 WL 22126, at \*12 (citing Landis v. North American Co., 299 U.S. 248, 255 (1936)). Courts consider the following factors to weigh those competing interests:

- (1) the private interest of the plaintiff in proceeding expeditiously with the civil suit as balanced against the prejudice to the plaintiff from a delay; (2) the burden on the defendants; (3) the convenience of the courts; (4) the interest of persons not parties to the civil litigation; and (5) the public interest. Mersky, 1994 WL 22305 at \*2-3.

In In re WorldCom, Inc. Securities Litigation, the district court in the Southern District of New York described modified factors, adding “the extent to which issues in the criminal case overlap with those presented in the civil case,” and “the status of the case, including whether the defendants have been indicted.” In re WorldCom, Inc. Securities Litigation, 2003 WL 31729501, at \*4 (S.D.N.Y. 2002).

A. A stay would serve the public interest in law enforcement.

It is well-settled that a pending criminal prosecution ordinarily takes precedence over related civil litigation. Thus, courts have often repeated that “a trial judge should give substantial weight to [the public interest in law enforcement] in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.” Campbell v. Eastland 307 F.2d at 487; see also Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996); In re Ivan F. Boesky Securities Litigation, 128 F.R.D. at 48. Indeed, one court has observed that “where both civil and criminal proceedings arise out of the same or related transactions, the government is ordinarily

entitled to a stay of all discovery in the civil action until disposition of the criminal matter.” United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352, 353 (S.D.N.Y. 1966); see also Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975) (“it has long been the practice to ‘freeze’ civil proceedings when a criminal prosecution involving the same facts is warming up or under way”).

Stays of discovery in civil actions reflect a recognition of the vital interests at stake in a criminal prosecution. See, e.g., United States v. Kordel, 397 U.S. at 12 n. 27 (“Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution”). Indeed, stays have been granted to halt civil litigation that threatened to impede criminal investigations which had yet to yield an indictment. For example, stays have been granted to avoid interference in investigations relating to tax fraud, see, e.g., Campbell v. Eastland, 307 F.2d at 480; insider trading, see, e.g., SEC v. Chestman, 861 F.2d at 50; SEC v. Downe, 1993 WL 22126 at \*1; insurance fraud, see, e.g., Raphael v. Aetna Casualty and Surety Co., 744 F. Supp. 71, 73 (S.D.N.Y. 1990); bank fraud, see, e.g., Board of Governors v. Pharaon, 140 F.R.D. at 639; customs violations, see, e.g., R.J.F. Fabrics, Inc. v. United States, 651 F. Supp. 1437 (U.S. Ct. Int’l Trade 1986), and immigration fraud, see, e.g., Souza v. Shiltgen, No. C-95-3997 MHP, 1996 WL 241824 at \*1 (N.D.Cal. May 6, 1986).

The limited stay of selected depositions that the United States is requesting is especially appropriate here where the Enron Grand Jury has already returned indictments against over twenty persons in the Criminal Cases for the same activities that are the subject of the Class Action. The prosecution in these cases will vindicate substantially the same public interest as the underlying Class Action, namely preventing corporate securities fraud. See, e.g., Volmar Distributors, Inc. v.

New York Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (criminal prosecution would serve to advance public interest in preserving integrity of competitive markets). Indeed, unlike in many cases, the civil and criminal charges here arise from many of the same remedial statutes, making vindication of the same public interest especially likely. See, e.g., In re Par Pharmaceutical, Inc. Securities Litigation, 133 F.R.D. 12, 14 (S.D.N.Y. 1990).

This logic is even more compelling here where the United States seeks a limited-term stay, subject to re-evaluation, and narrowly focuses its request on witnesses who are expected to testify at upcoming trials or before the grand jury. This literally is exactly the situation that the caselaw contemplates, namely criminal defendants seeking to use the broader rules of civil discovery in a parallel civil proceeding to obtain access to information, including witnesses, which they cannot obtain under the more limited disclosure rules that apply to a criminal prosecution. Under such circumstances, the public's interest in the adequate enforcement of the criminal law is compelling. Campbell, 687 F.2d at 487.

B. The interest of the Class Action parties.

The interest of the Class Action plaintiffs is not harmed by the limited stay of selected depositions that the United States seeks. As the courts have recognized in the analogous context of securities enforcement actions initiated by the Securities and Exchange Commission, parallel civil and criminal proceedings are often undertaken and serve distinct yet complimentary interests. "Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously." SEC v. Dresser Indus., Inc., 628 F.3d 1368, 1377 (D.C. Cir. 1980). The Fifth Circuit has recognized that "[t]he simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the

different interests promoted by different regulatory provisions,” and hence “[t]his principle is fully applicable when the SEC and Justice Department each seek to enforce the federal securities laws through separate civil and criminal actions.” First Financial, 659 F.2d at 667. Here, the interests of the United States in the enforcement of the criminal laws and in seeking retribution for the victims of criminal activity parallels the interests of the Class Action plaintiffs in seeking a recovery of financial losses.

In this context, the prejudice to the Class Action parties is minimal or nonexistent. The United States is not seeking to stay all discovery or preclude any of the identified witnesses from ever being deposed. Rather, the United States is requesting that the selected depositions be postponed for at least six months at which time the government will submit a further update to the Court and the parties regarding the need for any further delays.<sup>6</sup> At the most, the United States’ request would necessitate a delay in selected depositions until the conclusion of the trials in the Criminal Cases. Even this worst case scenario would have little or no impact on the interests of the parties in the Class Action as the Criminal Cases will almost certainly resolve many, if not all, of the same issues pending in the Class Action. As the Mersky court noted in assessing the similar issues raised by parallel SEC proceedings, any “potential prejudice to the SEC and the public is diminished by the possibility that the resolution of the criminal proceeding will narrow the issues to be litigated in the present [civil] case.” Mersky, 1994 WL 22305 at \*3. Such logic applies with compelling force here.

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<sup>6</sup>The United States also requests that the parties provide the United States with a schedule of upcoming depositions so that it can identify potential trial or grand jury witnesses and temporarily stay those depositions until December 1, 2004. In the alternative, the United States requests permission to file further motions, such as this, as necessary, if it believes that additional stays are necessary.

C. A stay will prevent unfair prejudice to the United States.

A stay also is appropriate to prevent criminal defendants from taking unfair advantage of the broad civil discovery rules that apply in the Class Action to the detriment of the Government and its witnesses. The courts, particularly including the Fifth Circuit, have recognized that:

[a] litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal trial. “[J]udicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.”

Board of Governors v. Pharaon, 140 F.R.D. at 639 (quoting Campbell v. Eastland, 307 F.2d at 487); see Campbell v. Eastland, 307 F.2d at 487.

The vastly different rules that apply to discovery in civil and criminal cases are important reasons for staying civil discovery in cases where there are parallel criminal proceedings. See Campbell v. Eastland, 307 F.2d at 487; see, e.g., Afro-Lecon Inc. v. United States, 820 F.2d 1198, 1203 (Fed. Cir. 1987); United States v. Hugo Key and Son, Inc., 672 F. Supp. 656, 657-59 (D.R.I. 1987). Criminal defendants ordinarily are not entitled to depose prosecution witnesses, much less engage in the type of far-ranging inquiry permitted by civil discovery rules. See Fed. R. Crim. Proc. 15(a). Nor are they able to obtain documents reflecting prior statements of witnesses before trial. See 18 U.S.C. § 3500. Likewise, the criminal discovery rules require production only of those documents which the Government intends to offer at trial, or which are material to the defense. See Fed. R. Crim. Proc. 16(1)(C).

Discovery in criminal cases is narrowly circumscribed for important reasons entirely independent of any generalized policy of restricting the flow of information to defendants. Three major reasons regularly identified by the courts in justifying narrow criminal discovery are that:

(1) the broad disclosure of the essentials of the prosecution's case may lead to perjury and manufactured evidence; (2) the revelation of the identity of prospective witnesses may create the opportunity for intimidation; and (3) the criminal defendants may unfairly surprise the prosecution at trial with information developed through discovery, while the self-incrimination privilege would effectively block any attempts by the Government to discover relevant evidence from the defendants.

Nakash v. United States Department of Justice, 708 F. Supp. 1354, 1366 (S.D.N.Y. 1988); see Campbell v. Eastland, 307 F.2d at 487 n.12; Raphael v. Aetna Casualty and Surety Co., 744 F. Supp. at 75.<sup>7</sup>

Each of these dangers is present in this case. Unlike many cases, there is no need to speculate about the threat of criminal defendants using the broader rules of civil discovery to obtain circumvent the restrictions of the Federal Rules of Criminal Procedure – that is precisely what is happening here. Affording criminal defendants the opportunity to depose trial witnesses such as Hulme, Johnson, Willard, Griebing, Fallon and Curry, and prospective grand jury witnesses such as Peng or Ceconi, in the Class Action flies in the face of the rules enacted expressly to minimize the dangers posed by extensive discovery in criminal prosecutions and is directly contrary to well-established precedent. The interests of the United States in assuring the integrity of the Criminal Cases and the grand jury's investigation mandates the limited stay that it seeks here.

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<sup>7</sup>There is yet another danger to allowing civil discovery to proceed during the pendency of the criminal matter. Many potential Government witnesses retain their Fifth Amendment privilege against self-incrimination. This includes witnesses who have entered into cooperation agreements with the Government, as well as many other Government witnesses who may have already given statements to Government investigators or testified before the grand jury. It would be unfair to the United States to permit a party to the civil litigation to manufacture impeachment material by allowing civil depositions to be conducted where Government witnesses may be forced to assert their Fifth Amendment rights. See Mitchell v. United States, 526 U.S. 314, 323-24 (1999) (even defendants who have pled guilty retain Fifth Amendment rights prior to sentencing); SEC v. Malden, No. 89 Civ. 0572 (JFK), 1991 WL 270116 at \*3-\*4 (S.D.N.Y. Dec. 9, 1991) (noting that a cooperating individual faces the possibility of criminal charges from other law enforcement authorities and for other criminal activity related to his cooperation).

D. A stay will benefit both judicial economy and the civil parties.

A stay of civil discovery is particularly appropriate where, as here, resolution of a parallel criminal prosecution may narrow or eliminate factual issues in the civil litigation. “[T]he availability of transcripts and other evidence from the criminal trial may eliminate altogether the need for certain depositions.” Volmar Distributors, Inc. v. New York Post Co., 152 F.R.D. at 39. Moreover, a stay “may streamline later discovery since transcripts from the criminal case will be available to the civil parties.” Twenty First Century Corp. v. LaBianca, 801 F. Supp at 1011; see, e.g., In re Grand Jury Proceedings, 995 F.2d 1013, 1018 n.11 (11<sup>th</sup> Cir. 1993) (“Although stays delay civil proceedings, they may prove useful as the criminal process may determine and narrow the remaining civil issues.”); United States v. Mellon Bank, 545 F.2d 869, 872 (3<sup>rd</sup> Cir. 1976) (affirming a stay of discovery and stating: “it might well have been that resolution of the criminal case would moot, clarify, or otherwise affect various contentions in the civil case.”); Bureerong v. Uvawas, 167 F. Supp. at 87 (“[S]ome common factual questions may be conclusively determined in the criminal action. This would pare down the issues to be determined in the civil case, and serve the interests of judicial economy by narrowing the focus of the action to the benefit of the litigants. Thus, a stay of civil discovery is clearly appropriate.”); Brock v. Tolkow, 109 F.R.D. 116, 119-20 (E.D.N.Y. 1985) (in granting a stay, noting that “the resolution of the criminal case might reduce the scope of discovery in the civil case or otherwise simplify the issues.”).

The pending Criminal Cases will almost certainly result in a substantial narrowing of the issues and scope of discovery in the Class Action. The testimony, witness statements, and exhibits that will become publicly available at any criminal trial will represent a wealth of discovery material for the civil parties on the same issues that are implicated in this lawsuit. Furthermore, “resolution

of the criminal case may increase the possibility of settlement of the civil case due to the high standard of proof required in a criminal prosecution.” Trustees of the Plumbers v. Transworld Mechanical, Inc., 886 F. Supp. 1134, 1140 (S.D.N.Y. 1995); see also Brock v. Tolkow, 109 F.R.D. at 120.

As noted previously, the limited nature of the United States’ request, which entails a temporary stay of selected depositions, drastically limits the danger of any prejudice to the parties in the Class Action. The United States is not requesting that all discovery come to a halt, nor is it seeking to prevent the parties from ever deposing the witnesses at issue. Indeed, 19 scheduled depositions are unaffected by this motion. Instead, the United States requests a temporary six-month stay of these depositions until December 1, 2004 at which time it will submit a report to the Court and the parties outlining whether any further stays would be necessary. In any event, the longest stay of any deposition would only be until the witness completed his or her testimony in the Criminal Cases, at which point the parties would have access to a wealth of additional information including trial testimony and prior statements. The results of the Criminal Cases would also contribute significantly to narrowing the issues in the Class Action, adding to the possibility of settlement or resolution, a factor which unquestionably serves the interest of the Court in conserving judicial resources.

In sum, the interests of the public, the United States, the parties, and the Court strongly weigh in favor of the granting of this stay motion.

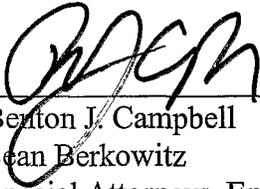
CONCLUSION

For the foregoing reasons, the United States' motion to intervene and for a limited stay of selected depositions in the Class Action should be granted.

Respectfully submitted,

ANDREW WEISSMANN  
Director, Enron Task Force

By: \_\_\_\_\_

  
Benton J. Campbell  
Sean Berkowitz  
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**Certificate of Service**

I, hereby certify that on May 28, 2004, I served a copy of the United States' Motion and Memorandum of Law in Support of Its Request to Intervene and for a Limited Stay of Selected Depositions, and of the Affirmation of Benton J. Campbell, via electronic mail and fax on G. Paul Howes, counsel for the California Board of Regents who, in turn, served the documents pursuant to the Court's order governing service in this matter.

A handwritten signature in black ink, appearing to be "G. Paul Howes", is written over a horizontal line. The signature is cursive and stylized.