

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

In re ENRON CORPORATION
SECURITIES LITIGATION

Civil Action No. H-01-3624
(Consolidated)

CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,
Plaintiffs,

vs.

ENRON CORP., et al.,
Defendants.

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

vs.

KENNETH LAY, et al.,
Defendants.

United States Courts
Southern District of Texas
FILED

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MAY 28 2004

Michael N. Milby, Clerk

OUTSIDE DIRECTOR DEFENDANTS' RESPONSE TO
GOVERNMENT'S MOTION FOR A "LIMITED" STAY OF SELECTED
DEPOSITIONS

TO THE HONORABLE MELINDA HARMON:

The United States has filed a motion seeking an indefinite stay of the depositions of two witnesses scheduled for June—Ronald Hulme, whose deposition is set to begin on June 3, 2004, and

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Claudia Johnson, whose deposition is set to begin June 22, 2004.¹ The government further seeks to stay the depositions of as many as six additional witnesses designated for July, but not yet noticed: Roger Willard, Margaret Ceconi, Wanda Curry, Jim Fallon, John Griebing, and Gary Peng.² Of these six witnesses, four (Johnson, Curry, Peng and Willard) are designated as “extended time witnesses.” These are witnesses for whom week-long blocks in the deposition schedule have already been set aside. If these depositions are postponed at this late date, it will eliminate the opportunity to make them up—or will displace slots for other major witnesses—because there are only 56 available slots for the depositions of major witnesses in a scheduling order whose deadlines the Court has emphasized are “firm.” *See* Scheduling Order at 1 (March 11, 2004). This creates obvious management issues for the Court, and it is imperative that the Court address those at the earliest possible opportunity, because the scheduling of depositions in this case is difficult, complex and critically time-sensitive.

It is important to be clear what is not at issue in this response: The Outside Directors do not dispute that the government has the right to seek to stay depositions it believes may interfere with its ongoing effort to prosecute those accused of criminal wrongdoing at Enron. The relevant standard may well have been met for some or all of the witnesses whose depositions the government seeks to prevent. We do not, in any way, suggest that the government has acted improperly in

¹Hulme was a McKinsey consultant to Enron. Johnson was an Enron Broadband Services press relations employee.

² Willard was an Arthur Andersen partner on the Enron engagement; Ceconi was an Enron Energy Services employee who is alleged to have written the August 2001 letter to Ken Lay; Fallon and Griebing were Enron Broadband Services executives; Peng was an Enron employee involved in Enron's financial reporting.

seeking to invoke certain rights nor are we in any way suggesting that the Court should prevent the government from doing so.

What is at issue, however, is this: This Court, and the scores of parties to this case (and the more than one hundred coordinated cases), have to continue to manage discovery in the face of what are likely to become serial motions to postpone or quash depositions. There are only 1200 deposition days available in a broad ranging action against 35 individuals (including 16 former independent directors), an accounting firm, three law firms, and over 40 financial institutions. There are only fifty-six weeks in which “extended time witnesses”—witnesses whose depositions are expected to exceed three days—may be deposed and only one extended time witness may be deposed in each week.

Under the Deposition Protocol Order, witness names must be exchanged sixty days in advance of each five week deposition cycle and notices issued (following extensive negotiation) by a committee “as soon as scheduled” – which for June witnesses was to be no later than May 4, 2004. Deposition Protocol Order Part VI. As a result, and following considerable negotiations, the extended time slots for June and for July have already been filled. It is too late (under the Order) to substitute witnesses for those weeks, just as it is too late to substitute more limited witnesses for those whose depositions may now be stayed. If the government’s motion is granted, therefore, the parties will require some back-end relief to permit them to make up for the lost access to the major witnesses whose depositions may now be postponed or quashed entirely. If the depositions of Mesdames Curry and Johnson and Messrs. Willard and Peng are each stayed, then the discovery period should be extended for thirty days. This will permit the parties to make up for the four lost “extended time witness” weeks that will result if the government’s motion is granted.

The government seeks two forms of relief. First, they have asked for a postponement of the depositions of Messrs. Willard and Hulme, and Ms. Johnson, until December 1, 2004, “or, if necessary, pending the conclusion of the trials in a number of criminal cases related to the United States' investigation of the collapse of Enron.”³ If granted in its entirety, this request will impose an enormous burden on the parties to the civil case, all of whom will lose a full six month period in which discovery of these highly relevant witnesses could occur – and perhaps longer, if the criminal trials are not concluded. Second, the government proposes that the Court afford it the right to prevent the scheduling of other witnesses, in the government's discretion, until December 1, 2004 or “until the criminal trials are concluded.” As the government acknowledges, one such trial – that of Messrs. Skilling and Causey is not yet set. Other charges, the government indicates, are not even yet pending. This is not, therefore, likely to be a limited postponement, and it will impinge significantly on the orderly process of discovery in this case.⁴

³ This is not a “one time” problem. The witnesses whose depositions the government seeks to postpone are relevant not only to the so-called “Broadband Trial,” which is set to begin on October 4, 2004 before Judge Gilmore (and which the defendants in that matter have recently filed a Joint Motion to Continue Trial Setting), they are relevant to other cases as well. Several of the designated witnesses (e.g. Peng and Curry, among others), and witnesses who have not yet been designated, may have evidence relevant to other business units and knowledge that may be relevant to the pending prosecutions of Jeff Skilling and Richard Causey (and as the government indicates, possibly prosecutions not yet pending as well). As the government admits, those cases are not even set for trial, and the government has offered no suggestion as to how the Court should deal with the indefinite postponement of these depositions.

⁴The government is concerned that the depositions of witnesses may involve inquiry into grand jury testimony or anticipated trial testimony, and therefore asserts that they should be postponed, perhaps indefinitely. We suggest a simpler approach: This Court has the power, under Fed. R. Civ. P. 26, to enter an order that “the discovery not be had,” if good cause is shown. It would seem, therefore, that the government's investigative concern in this regard could be protected simply by the entry of an order precluding any party in the civil case from inquiring into grand jury testimony, the areas of anticipated testimony at the criminal trials or the content of meetings with agents of the Federal Bureau of Investigations or the Enron Task Force.

The government suggests that this delay will be beneficial to the parties in the civil case because, upon the conclusion of the criminal trials (whenever that may be) the grand jury and trial testimony will be available to the parties in the civil case. While that may be true of the trial testimony, it is not at all clear that this would be true of the grand jury testimony. That testimony, presumably, would be disclosed only to the defendant – and since the vast majority of parties in the civil case are not criminal defendants, it is unclear how that testimony could or would be made available to the *Newby* parties.

While the Court may find some interim relief is appropriate, we also believe the Court needs to put in place a process to deal with these issues over the long term. These are quite likely to be just the first of many such motions to postpone or quash. The depositions of critical witnesses cannot be postponed indefinitely. Nor should the Court, the parties, or the government be placed in the position of scrambling at the last minute, every month, to try to schedule—and then replace—witnesses whose depositions have been (or may be) quashed. In order to ensure that the scheduling of civil discovery can proceed smoothly, even as the government moves forward with its cases, we believe it would be appropriate for the Court to modify the Deposition Protocol Order by inserting the following language:

Objections and Motions to Stay or Quash by the United States

The Deposition Scheduling Committee, upon receiving nominations of witnesses from the parties to the litigation, shall (within three business days) assemble a list of potential witnesses by name and affiliation and forward it to the designated representative of the United States Government. The United States shall designate a representative to receive that list of witnesses. Within five business days of receiving that list, the United States shall notify the Deposition Scheduling Committee of the identities of particular witnesses whose depositions it plans to move to quash or postpone. Upon such notice, the depositions of the witnesses at issue shall be postponed, automatically, to the next deposition cycle. During that one

time postponement, the government shall have ten days to file its motion to stay or quash; the members of the DSC shall have five days to file a response, and the Court will then rule on whether the deposition shall be postponed and, if so, for how long.

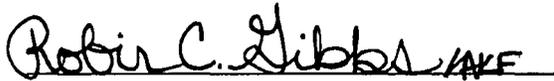
Inclusion of this paragraph will ensure that the government's motions to postpone or quash are not filed so late as to cripple the discovery process. This procedure also assures the government that witnesses whom it believes are critical to its efforts are not deposed without an opportunity for it to invoke its rights and be heard. Finally, the inclusion of the one-time postponement and expedited briefing schedule will ensure that issues such as these do not linger for so long as to make the whole process utterly unmanageable.

There may be other procedures, or different deadlines, that would be more workable. What will not work, however, is for the government to request serial postponements only days before depositions are scheduled to commence. Even if they have merit, late-filed postponements will invariably cause all parties to lose deposition days critical to the efficient preparation of this case. We request, therefore, that the Court modify the scheduling order to:

1. Include the advance notice procedure described above; and,
2. Extend the discovery period for thirty days, if the motions to stay or quash are granted, so as to permit the parties to replace the deposition weeks that will be lost as a result.

Respectfully submitted,

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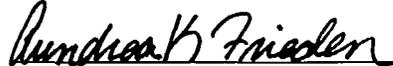
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OUTSIDE DIRECTOR DEFENDANTS' RESPONSE TO GOVERNMENT'S MOTION FOR A LIMITED STAY OF SELECTED DEPOSITIONS** has been served by sending a copy via posting to www.ESL3624.com on this the 28th day of May, 2004.


Aundrea K. Frieden