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

United States Courts
Southern District of Texas
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IN RE ENRON CORPORATION SECURITIES AND DERIVATIVE & ERISA LITIGATION This Document Relates to: MARK NEWBY, *et al.*, Plaintiffs, v. ENRON CORPORATION, *et al.*, Defendants.	MDL 1446 Civil Action No. H-01-3624 (Consolidated)

CERTAIN ENRON OFFICERS' OPPOSITION TO ENRON TASK FORCE'S MOTION AND MEMORANDUM OF LAW FOR A LIMITED STAY OF SELECTED DEPOSITIONS

Certain Enron Officer Defendants Richard B. Buy, Richard A. Causey, Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Jeffrey K. Skilling, and Lawrence Greg Whalley[1] file this opposition to the Enron Task Force's Motion and Memorandum of Law for a Limited Stay of Selected Depositions.

PRELIMINARY STATEMENT

On October 22, 2001, the first of more than a hundred civil securities fraud class actions was filed in this Court. After years of work by the Court and the parties, all of those actions, along with dozens filed in other United States District courts or state courts around the country, were eventually consolidated into the vast multidistrict litigation over which this Court now

[1] As a result of the holiday weekend and the Court's request to have a copy of this pleading faxed to chambers today, we have not had an opportunity to confer with counsel for all Enron Officer Defendants to determine whether they might wish to join in this pleading. We will confer with other Enron Officer Defendants tomorrow and inform the Court by close of business on June 1, 2004 whether additional parties will be joining in this filing.

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presides. The magnitude of the Enron bankruptcy, the number of cases that have been filed, and the broad array of allegations that have been levied have resulted in this action proceeding more slowly than the Court or the parties may have anticipated or preferred.

Under the previously entered scheduling order, fact depositions were originally set to commence in December 2003. That month, the parties jointly moved the Court for an adjournment of that schedule to allow time for attempting to negotiate a protocol for proceeding with depositions that would be acceptable to all parties. Thereafter, all of the parties designated representatives to a deposition protocol drafting committee. That committee worked tirelessly for several months—expending thousands of attorney hours—and finally reached agreement on a Proposed Deposition Protocol Order ("Deposition Protocol"). Ultimately, that Deposition Protocol was entered on March 11, 2004. (*See* Deposition Protocol Order, Docket No. 208, MDL-1446, March 11, 2004.) Notwithstanding the fact that the Court held a hearing in advance of entering the Deposition Protocol, the Enron Task Force raised no objection to its terms or entry.

The terms of the Deposition Protocol make it clear that "60 days before the beginning of each deposition cycle ... each committee will serve notice on the other of those persons they propose to depose during that cycle and the length of time anticipated for each witness." (*See id.* at ¶ VI.) As a result, on April 7, 2004, the parties exchanged names of 16 potential deponents for the month of June 2004. Similarly, on May 7, 2004, the parties noticed another 25 depositions for July 2004.

Now nearly two months after the first depositions were noticed, and ***two business days before the first depositions are to commence***, the Enron Task Force files a motion seeking a partial stay of discovery and to quash eight of those depositions—***including one that is set to***

commence on June 3. Specifically, the Task Force has requested that certain depositions be stayed "until December 1, 2004 or, if necessary, pending the conclusion of trials in a number of criminal cases related to the United States' investigation into the collapse of Enron Corporation." (U.S. Mot. and Mem. of L. in Supp. of Its Request To Intervene and For a Ltd. Stay at 1 ("Task Force Br.").) Significantly, however, trial dates have not even been set in some of the criminal cases.

The Task Force had numerous opportunities to come forward and raise its concerns before thousands of attorney hours had been expended negotiating a workable schedule and preparing for these fact depositions. Yet, it opted not to do so. Now, the Task Force seeks, at the eleventh hour, to stay one-third of those depositions, and to essentially eviscerate the detailed procedures established by the Deposition Protocol four months after the Court held a hearing on it and nearly three months after the Court entered the Deposition Protocol.

The Task Force's motion shows complete disregard for this litigation, the efforts that the parties have expended in coordinating these depositions, as well as the enormous effort expended by this Court. As this Court noted, just recently, "[t]his case simply must stay on schedule.... A great deal of time, energy, talent, and effort have been devoted to the schedule we have." (Order on Bank Defendants' Mot. and Mem. of L. for Modification of the Scheduling Order, May 28, 2004 at 3.)

Finally, the Task Force's list of witnesses whose depositions it seeks to stay makes clear that, if the Task Force has its way, it will permit deposition testimony in this case from precious few witnesses who possess relevant information concerning the events that occurred within Enron. Such a request is particularly perplexing in light of the fact that most of the witnesses whose depositions the Enron Task Force seeks to stay ***have already testified*** or provided

statements to either the

Powers Committee, the Enron Examiner, the Securities and Exchange Commission, congressional committees, the Department of Labor, and/or testified at the Arthur Andersen criminal trial.

Should the Court grant the Task Force's motion, the inevitable result will be to delay this civil action, perhaps for years. This is an outcome that is not acceptable; not for plaintiffs, not for defendants, and certainly not for this Court.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS DISCRETION AND DENY THE ENRON TASK FORCE'S UNTIMELY REQUEST FOR A STAY

"District court[s] have a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice. Nevertheless, stay orders will be reversed when they are found to be immoderate or of an indefinite duration." *McKnight, v. C. H. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982); *Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971); *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970). Courts have rejected requests for indefinite and broad stays like that sought by the Enron Task Force here. *United States v. Gieger Transfer Service, Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997).

Moreover, as one Circuit Court recognized, one of the functions of a deposition is to preserve testimony while it is still fresh. *See McSurely*, 426 F.2d at 195. Recognizing the length of time that it might take to complete a criminal proceeding and its related appeals, the court held, there, that an indefinite stay of deposition testimony should not be compelled unless no alternative was available. *See id.*; *see also Gieger Transfer Serv., Inc.* 174 F.RD. at 385 (citing *McSurely*).

That same reasoning applies with even greater force here. It has been nearly three years

since Enron filed for bankruptcy and more than five years since many of the events at issue in the civil litigation transpired. The longer the Enron Task Force delays deposition of these witnesses, the greater the likelihood that their memory will fade and their testimony will be less accurate. Enough time has passed. This Court should exercise its reasonable discretion and deny the Enron Task Force's request to stay these depositions any longer.

II. THE STAY REQUESTED BY THE ENRON TASK FORCE'S WOULD DELAY THIS CASE FOR YEARS

The Enron Task Force's Motion for a Limited Stay claims that:

> 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 the next year and a half, so there will be ample opportunity for the parties to take the depositions of the individuals at issue.

(Task Force Br. at 6-7.)

As demonstrated below, the Task Force's characterization of the impact of its Motion for a Limited Stay on the disposition of this litigation ignores the realities of this complex litigation. The list of witnesses whose depositions the Task Force seeks to stay makes clear that they will prevent all but a few of the witnesses with knowledge of the events that transpired at Enron from testifying. Consequently, the parties and this Court must expect that the total number of depositions the Task Force will seek to stay will be significant. There simply is no way that the Task Force can continue to seek to stay one-third of each month's depositions and expect that discovery in this case, and, as a result, disposition of this case, will not be significantly delayed.

A. It Is Clear That The Enron Task Force Will Undoubtedly Seek To Stay Depositions Of All But A Few Of The Witnesses Who Have Relevant Testimony Concerning The Events That Occurred Within Enron

The Task Force's motion contends that:

> 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.... 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.

(Task Force Br. at 3.)

Notwithstanding the Task Force's contention, their motion makes clear that they will seek to stay the depositions of all but a few of the numerous witnesses who have relevant testimony concerning the events that occurred within Enron. Although, the Enron Task Force contends that "19 other depositions already scheduled are unaffected by this motion," (Task Force Br. at 3), they have sought a stay of virtually every ***Enron witness*** whose deposition has been noticed. The parties noticed eight Enron witnesses and the Task Force has sought to stay six of them.[2] (*See id.* at 1-2.)

Moreover, the Task Force also seeks to stay the depositions of Enron's consultants—Ron Hulme of McKinsey—and accountants—Roger Willard of Arthur Andersen. (*See* Task Force Br. at 1-2.) In light of the breadth of the depositions that the Task Force has already sought to stay, one can only conclude that the Task Force will seek to stay countless other Enron employees, as well as Enron's accountants (notwithstanding the fact that many of these witnesses ***have already testified*** in the Arthur Andersen criminal trial),[3] attorneys, and consultants. In fact,

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[2] The only Enron witnesses that the Enron Task Force has ***not*** yet sought to stay are Stuart Zisman and a Federal Rule of Civil Procedure 30(b)(6) deposition seeking the current Enron employee most knowledgeable about Enron's Risk Assessment and Control Group.

[3] Moreover, the Enron Task Force's request for a limited stay is particularly baseless with respect to witnesses Wanda Curry, Roger Willard, Jim Fallon and Gary Peng. (Task Force Br. at 1-2.) Each of these witnesses have already testified before the Examiner appointed by the United States Bankruptcy Court and/or the Securities and Exchange Commission. The transcripts of these witnesses' Examiner depositions have been produced in this litigation by Arthur Andersen or Enron, have been deposited into the document depository and are available to all parties.

the only depositions that the Task Force has permitted to go forward in any meaningful respect are depositions of witnesses from Enron's investment bankers and plaintiffs. Thus, the Task Force's request for a limited stay of discovery is actually tantamount to a blanket stay of all depositions, except those of the financial institutions and the plaintiffs.

B. The Number Of Witnesses The Enron Task Force Seeks To Stay Will Require Substantial Modification Of The Court's Current Scheduling Order

As noted above, the Enron Task Force has requested that certain depositions be stayed "until December 1, 2004 or, if necessary, pending the conclusion of" three criminal cases related to the United States' investigation into the collapse of Enron Corporation." In light of the status of at least two of these three cases, the Task Force's claim that the stay would only remain in effect until December 1, 2004 is disingenuous at best. First, the *United States v. Kenneth Rice, et al*, Cr. H-03-93, case is not set to begin trial until October 2004, at the earliest. Even if it goes forward as currently scheduled, the complexity of the case, as well as the holiday schedule, means that trial would likely continue well into 2005.

Moreover, *United States v. Jeffrey Skilling, et al*, Cr. No. H-04-25, ***has not yet even been set for trial***. The Task Force itself concedes that the ***earliest*** this case could go to trial is early 2005—***two months after they claim their requested "temporary" stay would be lifted.*** Consequently, the Task Force's own pleading proves that the alleged six-month stay could easily result in as much as a two-year moratorium on the testimony of crucial witnesses. In fact, the Task Force has admitted as much, stating that in light of the circumstances, the Task Force will almost certainly have to ask this Court to readdress this issue when it "provide[s] 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." (Task Force Br. at 2.)

Even if by some chance the temporary stay were to be lifted by December 1, 2004, such a

delay would nevertheless wreak havoc on the current Scheduling Order, as well as the exhaustively negotiated Deposition Protocol Order and the scheduling mechanism contained therein. The Deposition Protocol that was presented to this Court for approval and signed by almost every party in the entire case provided for five depositions per day for eighteen months. (*See* Deposition Protocol at ¶ IV.) The Task Force's requested elimination of what is currently an unknown number witnesses[4] from consideration during the first six months of this schedule could result in an untenable compression of an already aggressive agenda. For example, during the first two months of the depositions, the Task Force has asked to stay over 30% of the witnesses noticed. Certainly, such percentages will only increase when the parties begin noticing higher profile witnesses such as David Duncan, Andrew Fastow, Michael Kopper, and Ben Glisan. To still provide for approximately 1200 depositions days (the number ultimately agreed to by the parties), the number of deposition tracks per day would have to be dramatically increased. Given that several parties only reluctantly agreed to permit as many as five depositions to go forward each day, this option is simply untenable. The simple fact is that should the Court grant the Task Force's motion the inevitable result will be to delay this civil action perhaps for years, and increase litigation costs for all concerned.

III. THE ENRON TASK FORCE IS SEEKING TO MODIFY, IF NOT OUTRIGHT EVISCERATE, THE DEPOSITION PROTOCOL MONTHS AFTER ITS ENTRY

In December of 2003, the parties to this action set about to negotiate a protocol for proceeding with depositions that would be acceptable to all parties. Thereafter, all of the parties designated representatives to a deposition protocol drafting committee. That committee worked

[4] According to the Task Force's papers, the criterion for determining which depositions it will seek to stay is whether the witness has testified before the grand jury. (*See* Task Force Br. at 5.) If that remains the criterion employed by the Task Force, it will apply with equal force to hundreds of witnesses who have testified before the Enron Grand Jury that have been empanelled for more than two years. This serves to illustrate the breadth of relief that the Enron Task Force is likely to ultimately seek.

tirelessly for several months—expending thousands of attorney hours—and finally reached agreement on Deposition Protocol. Ultimately, that Deposition Protocol was entered on March 11, 2004. (*See* Deposition Protocol Order, Docket No. 208, MDL-1446, March 11, 2004.)

Notwithstanding the fact that Court held a hearing in advance of entering the Deposition Protocol, the Enron Task Force raised no objection to its terms or entry. Now, the Task Force, through its untimely motion, seeks to modify that Deposition Protocol to provide themselves with time to review the proposed deponents and object "to any prospective depositions because the individuals are expected to be trial or grand jury witnesses." (Enron Task Force Proposed Order at 2, filed May 28, 2004.) The Task Force had more than adequate opportunity to seek to have their concerns included in the Deposition Protocol. Yet they did nothing. After months of extensive negotiation among all the parties, they now seek to unravel the entire Deposition Protocol by disrupting the carefully-crafted scheduling process months after the Court heard argument and entered the Deposition Protocol without objection.

As a practical matter, there simply is not enough time built into the current Deposition Protocol to permit the Enron Task Force this window to raise objections without disrupting the entire scheduling process and/or wasting significant effort each month. Under the terms of the Deposition Protocol, by the time a deposition is "noticed" within the meaning of Federal Rules of Civil Procedure, representatives from the various parties have expended at least a month's worth of time and effort scheduling the depositions, negotiating the allocation of time among the respective parties and resolving competing demands. (*See* Deposition Protocol ¶ 6.) Moreover, the Task Force's objection to particular depositions at that late date prevents the parties from substituting additional witnesses to fill any gaps. Consequently, in the event that this Court is inclined to grant the Enron Task Force any relief, it should require the Task Force to come

forward with a list, in the next five days, of all potential witnesses whose depositions it would seek to stay. That way, the Court can evaluate the extent and impact of the Task Force's involvement in this case, the parties can raise any objections they may have on a witness-by-witness basis and the parties can attempt to truly schedule around "objectionable depositions" without wasting time and effort trying to guess which depositions the Enron Task Force might choose to stay.

IV. DEPOSITION OF THESE WITNESSES WILL NOT INTERFERE WITH THE CRIMINAL INVESTIGATION AS SOME HAVE ALREADY TESTIFIED BEFORE THE POWERS COMMITTEE, THE ENRON EXAMINER, THE DEPARTMENT OF LABOR AND/OR THE SECURITIES AND EXCHANGE COMMISSION

The Enron Task Force's motion papers contend that permitting these depositions to go forward could "seriously impede, impair, and prejudice the criminal prosecution and related investigation."[5] (Aff. in Supp. of Task Force Br. at ¶ 9.) Yet, when the Powers Committee conducted a thorough inquiry at Enron with access to all current and former employees, the Enron Task Force did not interfere with any of their interviews. When the Securities and Exchange Commission subpoenaed more than 135 witnesses for testimony, the Enron Task Force did nothing. When the Enron Examiner conducted a forensic investigation into Enron's accounting practices and financial statements--deposing more than 250 witnesses including former officers and directors of Enron, as well Enron's accountants, attorneys, consultants and bankers--the Enron Task Force permitted those depositions to go forward. Finally, when the Department of Labor and multiple congressional committees conducted governmental investigations, the Enron Task Force said nothing. Now, after nearly three years of litigation and

[5] The Task Force's professed concern about the civil discovery intruding on the secrecy of grand jury proceedings is a red herring. Grand jury testimony is confidential, and ongoing civil discovery does not override that confidentiality. But lest there be any doubt or question on that score, these Certain Enron Officers commit not to ask any witnesses any questions about what they were asked, or what their testimony was, before the Enron Grand Jury.

a tremendous amount of work by this Court and the civil parties, the Enron Task Force seeks to prevent discovery in the civil action from going forward. In light of the foregoing, the Task Force's justification for the stay rings hollow.

CONCLUSION

This case is too complicated, and too many parties and this Court have already expended too much time and too many resources, to now hand over management of this case to the Enron Task Force. Accordingly, the Task Force's Motion for a Limited Stay of Selected Depositions should be denied.

Dated: May 31, 2004

By: _____

Jacks C. Nickens
Paul D. Flack
Joanna V. Hamrick
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191
(713) 571-9652
Attorneys for Defendants Richard B. Buy, Richard A. Causey, Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, and Lawrence Greg Whalley

By: _____

Bruce A. Hiler
Jeffrey W. Kilduff
Robert M. Stern
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
(202) 383-5414
Attorneys for Defendant Jeffrey K. Skilling

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 1st day of June, 2004.

Joanna V. Hamrick