

the collapse of Enron Corporation (“Enron”).¹ Those cases include United States v. Daniel Bayly, et al., Cr. No. H-03-363, assigned to the Hon. Ewing Werlein, Jr., United States v. Kenneth Rice, et al., Cr. H-03-93, and United States v. Jeffrey Skilling, et al., Cr. No. H-04-25, assigned to the Hon. Sim Lake (hereafter, the “Criminal Cases”).

Pursuant to the procedure established in the Court’s Deposition Protocol Order, the United States has been notified by the parties that Wanda Curry, Jim Fallon and John Griebing are among the proposed deponents in the Class Action’s upcoming deposition cycle.² 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. All of these witnesses have met extensively with the government and testified in the Enron Grand Jury. Jim Fallon and John Griebing will be witnesses in the Rice matter, while Curry and Fallon will testify in the Skilling trial.³ In addition, 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 and witness statements which they are not entitled to receive under the law and procedures governing criminal matters.

¹ The United States will file an additional motion prior to January 1, 2005, if it is necessary to seek a continued delay of these depositions.

² The Government is not seeking to stay the deposition of Gary Peng or Margaret Ceconi.

³ Curry may also be called as a Rule 404(b) witness in the Rice matter.

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 specific witnesses have concluded their testimony in the Criminal Cases. 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 August 16, 2004, while the Rice case, which was indicted in May 2003, is expected to start trial on October 4, 2004.⁴ 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. 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, 2004.⁵

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

⁴ Judge Gilmore recently denied the Defendants' Motion for Continuance by written Order on June 10, 2004.

⁵Pursuant to Fed. R. Crim. P. 6(e), the government cannot comment in this public filing about matters occurring before the grand jury.

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, Wanda Curry, Jim Fallon and John Griebing are examples of this overlap. All three witnesses have testified before the Enron Grand Jury and all three are anticipated witnesses in the Criminal Cases. The United States expects to call both Jim Fallon and John Griebing to testify in the Rice matter. Wanda Curry and Jim Fallon are also likely to be called as witnesses in the Skilling trial once it is scheduled.⁶

ARGUMENT

The Government hereby incorporates by reference its Memorandum of Law in Support of Its Request to Intervene and For a Limited Stay of Selected Depositions which was filed with the Court on May 28, 2004. The Government believes that the interests of the public, the parties to the Class Action, the Government, and the Court are all served by a stay of the depositions at issue.

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 criminal defendants will be able to obtain witness statements and discovery of their expected testimony, something they cannot do under the criminal discovery rules. This problem is exacerbated because this same information would also become available to other persons, many of

⁶ See Affirmation In Support of Government's Motion to Intervene and for Limited Stay of Selected Depositions, Benton J. Campbell.

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. "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 suit. Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert.denied, 371 U.S. 955 (1980); Securities and Exchange Commission v. Downe, No. 92 Civ 4092 (PKL), 1993 U.S. Dist. LEXIS 753 at *46 (S.D.N.Y. Jan. 26, 1993). ("The Court recognizes that a stay of discovery is often necessary where liberal discovery rules will allow a litigant to undermine, or gain an unfair advantage in, a potential criminal prosecution which parallels the subject matter of the civil action."). Such discovery could seriously impede, impair, and prejudice the criminal prosecution and related investigation. "If the government would be prejudiced by [the witness] giving deposition testimony and producing documents, it should not be required to take its chances that no testimony will be given or production made in the absence of a stay." First Merchants Enterprise, Inc. v. Shannon, No. 88 Civ 8254 (CSH), 1989 WL 25214 at *2 (S.D.N.Y. March 16, 1989). The public interest in the effective enforcement of the criminal laws therefore warrants that the requested stay be granted.

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 and have testified before the Enron Grand Jury. If they are allowed to testify at trial 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 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.

It is anticipated that the parties seeking to take the Fallon, Griebing and Curry depositions may argue that the Court's order of June 1, 2004, which prevents discovery of, among other things, "the areas of [a witness'] anticipated testimony at a criminal trial," June 1, 2004, Order at 4, protects

the government's interests with sufficient force that the depositions should be allowed to take place. This argument is unpersuasive. As indicated above, these witnesses will be called to testify as trial witnesses, and the subject matter of that testimony encompasses virtually all of their expected deposition testimony. John Griebing spent his entire tenure with Enron at Enron Broadband Services ("EBS"), the division which is the subject of the Rice criminal prosecution. While he was with the company, Griebing oversaw much of EBS's network development efforts. These are key issues at the heart of the Rice criminal matter. There is nothing, not even Griebing's professional background, which falls outside the "areas of his . . . anticipated trial testimony." Similarly, Jim Fallon spent a year and a half at EBS, eventually becoming the CEO of the unit in the summer of 2001. Fallon's experiences at EBS bear on important issues in the Rice and Skilling prosecutions including EBS' commercial and business performance and the viability of its software and hardware products and services. Similarly, Fallon's prior experience at Enron Capital and Trade, where he was involved in Enron's power trading operations, is also within the purview of his anticipated trial testimony, particularly because it is where he first encountered several of the criminal defendants. Likewise, Curry's employment at Enron, including her tenure at Enron Energy Services, is tied directly to issues at the core of the Skilling indictment. In short, with respect to these specific proposed deponents there is no prospective line of inquiry that avoids the risk of intruding into "the areas of [the deponent's] anticipated testimony at a criminal trial." Furthermore, much of Fallon's and Curry's testimony bears on the subject matter of an ongoing grand jury investigation. Under such circumstances, the authorities make clear that the government should not have to "take its chances" that no important aspect of its criminal case is prematurely disclosed during depositions of its trial witnesses in this parallel civil litigation, particularly when the potential prejudice of a

delay to the parties seeking to take those depositions is nonexistent. See, e.g., First Merchants Enterprise, 1989 WL 25214 at *2.

Even assuming arguendo that aspects of Fallon's and Curry's testimony could be "carved out" of the subjects of their trial testimony with sufficient clarity to permit inquiry during a deposition, such a practice would fly in the face of the principal of judicial economy. Such limited inquiry guarantees that both witnesses would have to be recalled after their subsequent trial testimony. To proceed with these depositions now would generate a lengthy and ultimately fruitless record involving attorneys repeatedly engaging in the difficult and time consuming exercise of parsing out permissible lines of inquiry. By contrast, delaying these depositions until after trial will provide the parties with a lengthy record of prior testimony, substantially narrow the range of disputed issues and dramatically increase the efficiency of the proceedings.

Accordingly, the Government respectfully requests that the Court exercise its authority to grant its Motion to stay specific depositions pending the testimony of these witnesses in the criminal cases. United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983)(As the Fifth Circuit has stated, "Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding."); 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).

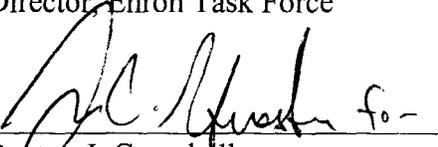
CONCLUSION

For the foregoing reasons, the United States' motion 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
Lisa Monaco
Special Attorneys, Enron Task Force

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION	§	
SECURITIES LITIGATION	§	MDL-1446
	§	
	§	
	§	
	§	
MARK NEWBY, et al., Individually and	§	Civil Action No. H-01-3624
On Behalf of All Others Similarly Situated	§	(Consolidated, Coordinated
	§	and Related Cases)
Plaintiffs,	§	
	§	
- v. -	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
	§	

ORDER

Upon consideration of the motion of the United States' for a Limited Stay of Selected Depositions and any opposition thereto,

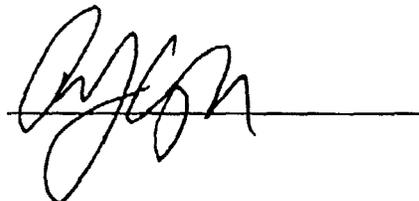
IT IS HEREBY ORDERED that the depositions of Wanda Curry, Jim Fallon and John Griebing are stayed until January 1, 2005;

Dated: _____, 2004
Houston, Texas

Hon. Melinda Harmon
United States District Judge
Southern District of Texas

Certificate of Service

I, hereby certify that on June 10, 2004, I served a copy of the United States' Motion For a Limited Stay of Selected Depositions, via electronic mail on Kathy Patrick, counsel for selected Directors and Officers of Enron Corporation, who in turn served the document electronically pursuant to the Court's order governing service in this matter.

A handwritten signature in black ink, appearing to read "Clyde", is written over a horizontal line.