

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
(HOUSTON DIVISION)

United States Court  
Southern District of Texas  
FILED

JUN 14 2004



Michael H. Newby, Clerk

In re ENRON CORPORATION SECURITIES  
LITIGATION

MDL-1446

This Document Relates To:

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

Plaintiffs,

-v.-

ENRON CORP., *et al.*,

Defendants.

Civil Action No. H-01-3624  
(Consolidated, Coordinated and  
Related Cases)

**BANK DEFENDANTS' RESPONSE TO THE UNITED STATES' MOTION FOR  
A STAY OF THE DEPOSITIONS OF JIM FALLON, WANDA CURRY AND  
JOHN GRIEBLING**

The undersigned defendants (collectively the "Bank Defendants")<sup>1</sup> hereby  
submit this response to the United States' Motion For a Limited Stay of Selected

<sup>1</sup> This response is made on behalf of defendants Citigroup Inc., Citibank, N.A., Citigroup Global Markets Inc. (formerly Salomon Smith Barney Inc.) and Citigroup Global Markets Ltd. (formerly known as Salomon Brothers International Limited), J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, J.P. Morgan Securities, Inc., Bank of America Corp, Banc of America Securities LLC, Bank of America, N.A., Barclays PLC, Barclays Bank PLC, Barclays Capital, Inc., Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Merrill, Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC Inc., Toronto Dominion Bank, Toronto Dominion Holdings (USA), Inc., TD Securities, Inc., TD Securities (USA) Inc., Toronto Dominion (Texas) Inc., Royal Bank of Canada, RBC Dominion Securities Inc., RBC Dominion Securities Ltd., RBC Holdings (USA) Inc., RBC

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Depositions, specifically the depositions of Jim Fallon, Wanda Curry and John Griebing (hereinafter “Government’s Motion” or “Motion”), filed June 10, 2004.

The Bank Defendants file this response (1) to state that a grant of the Government’s motion (and similar motions we expect the Government to file in future months concerning witnesses with similar factual knowledge) would effectively bring to a halt the depositions of entire categories of similarly situated witnesses and would substantially skew the deposition schedule, and (2) to correct the Government’s misreading of the scope of this Court’s June 1, 2004 Order.<sup>2</sup>

**A. A Grant of The Government’s Motion Will Effectively Halt Numerous Depositions and Will Substantially Skew the Deposition Schedule**

The Government’s Motion implicates the very same issues that the Bank Defendants laid out in their response to the Government’s May 28, 2004 Motion. *See* Bank Defendants’ Response to United States’ Motion to Intervene and For a Limited Stay of Selected Depositions, May 31, 2004 (Docket No. 2176). While the Government once again portrays its Motion as seeking only limited relief, the deponents who are the

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Dominion Securities Corp., Royal Bank Holding Inc., Royal Bank DS Holding, Inc., Royal Bank of Canada Europe Ltd., Deutsche Bank AG, Deutsche Bank Securities Inc., DB Alex. Brown LLC, Deutsche Bank Trust Company Americas, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Lehman Brothers Commercial Paper Inc., The Royal Bank Of Scotland Group plc, The Royal Bank of Scotland plc, National Westminster Bank Plc, Greenwich Natwest Structured Finance, Inc., and Greenwich Natwest Ltd., Campsie Ltd. Certain of the bank defendants who join in this motion—namely, Royal Bank of Scotland, Royal Bank of Canada, and Toronto Dominion Bank, and their respective affiliates—are covered by the stay of discovery under the Private Securities Litigation Reform Act (15 U.S.C. Sec. 78u-4(b)(3)(B)), and join here without waiving any rights with respect to that stay.

<sup>2</sup> Order On United States’ Motion And Memorandum Of Law In Support Of Its Request To Intervene And For A Limited Stay Of Selected Depositions, June 1, 2004 (Docket No. 2181) (hereinafter “June 1 Order”).

subject of the Government's Motion are similarly situated to numerous other potential witnesses involved in subject matter areas, including the failure of Enron's various business units such as Enron Broadband Services ("EBS") and Enron Energy Services ("EES"), that are key to the Bank Defendants' defense. Accordingly, a decision to grant the Government's Motion could effectively bring to a halt entire categories of depositions, not just the three depositions that are the subject of the Government's Motion.

As was the case with its prior motion, the Government's Motion seeks a stay only with respect to witnesses noticed for deposition by the defendants. None of the plaintiffs' proposed deponents are subject to the Government's Motion. That pattern seems unlikely to change, because, to date, only the defendants have noticed depositions of witnesses in the categories the Government seeks to block—employees of Enron's failed businesses, including EBS and EES—while the plaintiffs have, to date, almost exclusively focused on depositions of Bank Defendant personnel. For example, of the twelve deponents the defendants have identified for the August calendar, four relate (at least in part) to Enron Broadband Services (John Bloomer, Bill Collins, Everett Plante, all formerly of EBS, and Bryan Begley of McKinsey, which served as a consultant to EBS), and one relates to Enron Energy Services (Jeff Gray). Conversely, of the thirteen deponents the plaintiffs have noticed for August, *all* are current or former Bank Defendant employees. While the time has not yet run on the Government's opportunity to object to the August witnesses, it appears likely that any requests for stays will again likely fall entirely on the defendants' nominees. Any decision to grant the Government's Motion would likely substantially skew the deposition schedule, blocking the defendants'

ability to pursue discovery of many critical Enron witnesses, while allowing the plaintiffs to continue to take depositions of Bank Defendant personnel.

The witnesses who are subject to the present Government's Motion (Jim Fallon, John Griebing and Wanda Curry), as well as numerous other Enron witnesses who are likely to be deposed in this litigation and are implicated by the Government's Motion, are important players in this case. The testimony of these and other witnesses is central to the Bank Defendants' defense that Enron's collapse was due to Enron's involvement in transactions and businesses largely or entirely unrelated to the Bank Defendants' interactions with Enron. It is not surprising that the Government plans to offer testimony from these witnesses in criminal trials alleging fraudulent conduct by senior Enron officers who oversaw Enron's collapse.

As indicated in the Government's Motion, Messrs. Fallon and Griebing worked at Enron Broadband Services, and are likely to offer testimony supporting the Government's indictment against the Enron officers who orchestrated the spectacular failure of the EBS business unit while publicly proclaiming that it comprised as much as \$21 billion of Enron's total value. Significantly, and as has already been partially confirmed through the June 3-4 deposition of Ronald Hulme<sup>3</sup> (a deposition this Court allowed to go forward over the Government's objection), after hyping EBS at its January 20, 2000 analyst conference, Enron's stock skyrocketed. When EBS fell apart and could no longer hide its failure in the spring and summer of 2001, Enron stock sank. It is no

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<sup>3</sup> Mr. Hulme and McKinsey were hired by Enron in 1999 to analyze the growing broadband business, help orchestrate a strategy and prepare Enron for the January 2000 analyst conference, which featured broadband. McKinsey also authored reports in 2001 that chronicled the demise of EBS.

coincidence that the Government's prosecution of Enron's EBS officers is running on a parallel path to the Bank Defendants' discovery efforts in the civil litigation. Both the Government and the Bank Defendants recognize the overwhelming role EBS played in Enron's demise. Similarly, as outlined in the Government's Motion, Ms. Curry is likely to offer testimony concerning allegedly fraudulent conduct and mismanagement relating to Enron Energy Services—again, conduct totally unrelated to the Lead Plaintiffs' allegations against the Bank Defendants—which contributed to the failure of the EES business unit and dragged down Enron's stock in the same way as did the failure of EBS.

It is unrealistic for the Government to suggest that there will be plenty of time to fit these witnesses into the deposition schedule some time later next year. Given the number of witnesses likely to be affected by the reach of the Government's criminal cases, they cannot all be deferred until the end of the discovery period, when there will almost certainly be insufficient time to complete the depositions of these individuals, much less any follow-up discovery that may become necessary after the depositions of these witnesses are taken. It is similarly unhelpful for the Government to suggest that it will be to the civil litigants' advantage to defer these depositions and have the benefit of the witnesses' trial testimony in the criminal cases. The Bank Defendants need to begin taking the depositions of these important witnesses now, rather than waiting until some time later next year, when it will quite simply be impossible to complete all the discovery that is required. Indeed, given that the trial date for Mr. Skilling has not even been set, there is seemingly no end to the Government's request for a stay.

Allowing the depositions of Bank Defendant employees to go forward while deferring the depositions of the witnesses identified by the Government would

compound the prejudice the Bank Defendants already face because of the Fifth Amendment-related stays presently in place in favor of the senior Enron executives who orchestrated Enron's rise and fall. Indeed, given the fact that millions of pages of Enron and Arthur Andersen documents are still unavailable for review, any restrictions on which witnesses are subject to deposition makes it all the more difficult for the defendants to identify and nominate suitable deponents.

Moreover, as the Bank Defendants expressed in their response to the Government's prior motion, it is patently unfair to the Bank Defendants to have the bulk of the deposition schedule devoted to other parties' examination of the Bank Defendants' witnesses, while the Bank Defendants, through no fault of their own, are precluded from conducting discovery that is critical to their defense. The deposition protocol to which the Bank Defendants agreed was founded on the principle of a shared schedule giving similar amounts of time to witnesses chosen by both plaintiffs and defendants.

**B. This Court's June 1 Order Permits Questioning Regarding Enron's Allegedly Fraudulent Activities And Poor Business Decisions**

The Bank Defendants are compelled to correct the Government's mistaken interpretation of the Court's June 1, 2004 Order denying the Government's May 28, 2004 Motion. In its Motion, the Government argues that even if the depositions of Messrs. Fallon and Griebeling, and Ms. Curry, are allowed to proceed, the Court's June 1 Order would preclude any questioning of those witnesses concerning the same *subject areas* as the testimony the Government contemplates offering in the criminal cases. Government's Motion at 7-8. In other words, regardless of the present motion, according to the Government the Court's June 1 Order would preclude any questioning of Mr. Fallon about EBS, since he will offer testimony about EBS in the criminal cases. In fact,

the Government's Motion even goes so far as to suggest that the Court's June 1 Order prevents the civil litigants from questioning witnesses about their professional background. *Id.* Such an interpretation of the Court's June 1 Order would amount to a de-facto granting of the Government's May 28, 2004 Motion, a motion this Court denied. While the parties are prohibited by the June 1 Order from asking witnesses specifically about their interviews with the Government, what they said to the grand jury, and what they expect to be asked in the criminal trials—in other words, what they said to the Government and the Government said to them—the Bank Defendants (and other parties) must be able to ask these witnesses questions concerning the subject areas about which they are knowledgeable—what they did, said and heard at Enron, well before they ever spoke to the Government. Obviously some of these same subjects might come up at a future criminal trial. The Bank Defendants believe that this is the approach that the Court's June 1 Order prescribed. Indeed, it was the approach followed by all parties, without objection, at the deposition on June 3 and 4 of Ronald Hulme, the McKinsey consultant hired by EBS to help construct a broadband strategy and to help prepare Enron for the January 2000 analyst conference.

\* \* \*

The Government's moving papers suggest that certain criminal defendants might benefit unfairly through exposure to the civil discovery sought through the noticed depositions. While not unsympathetic to this concern, the Bank Defendants seek depositions of individuals involved in Enron's businesses because this testimony will likely be an important part of their defense of the pending civil litigations. The Bank Defendants respectfully submit that they have already been prejudiced by the

commencement of depositions without access to millions of pages of relevant Enron and Arthur Andersen documents. The Bank Defendants also continue to be prejudiced by the stays granted to certain individual defendants based on Fifth Amendment concerns.

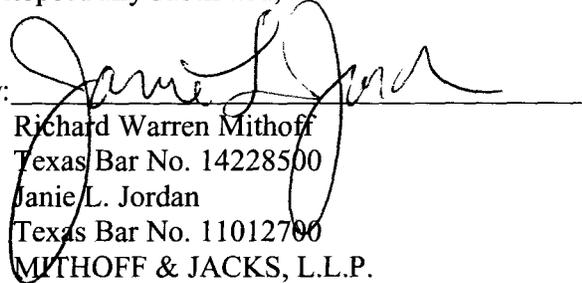
Under the Deposition Protocol Order, the Bank Defendants are compelled to produce their witnesses for deposition now. If granted, the Government's motion would mean that very few other defense track depositions would go forward.

The Bank Defendants again seek to highlight to the Court the certain need to make time in the case schedule for the defendants to take the depositions of the witnesses subject to the Government's Motion, and the numerous other similarly situated witnesses that are implicated by the Government's Motion. If all of these depositions are put off until after the criminal trials are concluded, there simply will not be time in the 18-month fact discovery schedule to catch up. A multi-month extension of the schedule will unquestionably be needed. Discovery in this case cannot be completed until those most directly involved in and responsible for the collapse of Enron—Enron's own executives and senior managers—and other Enron employees who are most knowledgeable about their conduct, testify concerning the alleged fraudulent behavior.

Dated: June 15, 2004

Respectfully submitted,

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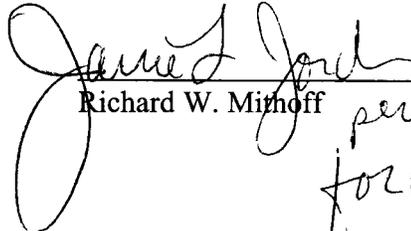
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 15th day of June, 2004.

  
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