

BC JUN 28 2004

Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES LITIGATION
This Document Relates To:
MARK NEWBY, <i>et al.</i> , Individually and On Behalf of All Others Similarly Situated,
Plaintiffs,
-v.-
ENRON CORP., <i>et al.</i> ,
Defendants.

MDL-1446

UN-SEALED PER 2235

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

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**BANK DEFENDANTS' RESPONSE TO THE UNITED STATES' MOTION FOR
A STAY OF THE DEPOSITIONS OF JOHN BLOOMER, BILL COLLINS AND
ARILD HOLM**

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

¹ 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 John Bloomer, Bill Collins and Arild Holm (hereinafter “Government’s Motion” or “Motion”), filed June 23, 2004.²

The Bank Defendants file this response (1) to state that a grant of the Government’s motion (and similar motions the Government has already filed and 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 again correct the Government’s continued misreading of the scope of this Court’s June 1, 2004 Order.³

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.

² The Bank Defendants hereby incorporate by reference their previous Response to the United States’ Motion to Intervene and for a Limited Stay of Selected Depositions, filed June 1, 2004, their Response to the United States’ Motion for a Stay of the Depositions of Jim Fallon, Wanda Curry and John Griebing, filed June 15, 2004, and their Supplemental Response to the United States’ Motion for a Stay of the Depositions of Jim Fallon, Wanda Curry and John Griebing, filed June 18, 2004.

³ 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”).

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 responses to the Government's prior motions. While the Government once again portrays its Motion as seeking only limited relief, the deponents who are the 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 motions, the Government's Motion again 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. Taking into account the other depositions that the Government has already sought to stay, and future depositions as to which the Government is likely to object, any decision to grant the Government's Motion would likely substantially skew the deposition schedule, an outcome which is inconsistent with the Deposition Protocol Order and which the Government's Motion fails to recognize. The Defendants would be prevented from

pursuing discovery of many critical Enron witnesses, while the plaintiffs could continue to take depositions of Bank Defendant personnel.

The witnesses subject to the Government's present Motion (John Bloomer, Bill Collins and Arild Holm), 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 Messrs Bloomer, Collins and Holm in the trial of the Enron officers who orchestrated the spectacular failure of the Enron Broadband Services division while publicly proclaiming that it comprised as much as \$21 billion of Enron's total value. As indicated in the Government's Motion, Messrs. Bloomer and Collins worked at EBS, and have detailed insider knowledge of the strategic, management and product-development problems that beset EBS, and the actions taken by Enron officers to hide those shortcomings. Significantly, and as has already been partially confirmed through the June 3-4 deposition of Ronald Hulme⁴ and the June 22 deposition of Claudia Johnson (depositions 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

⁴ 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.

no longer hide its failure in the spring and summer of 2001, Enron stock sank. It is no coincidence that the Government's criminal 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.

As outlined in the Government's Motion, Mr. Holm is a financial analyst who was employed by the Regents of the University of California—the Lead Plaintiff in *Newby*—and was involved in the Regents' decision to invest in Enron. Mr. Holm's testimony concerning the Lead Plaintiff's investment decisions is obviously a critical area of inquiry for the defendants in this case. The Government goes much too far in seeking to block the defendants in a multi-billion dollar civil litigation from deposing one of the key representatives of the plaintiffs, even if only for part of the deposition period. It is not meaningful for the Government to offer that the defendants are free to depose other employees of the Lead Plaintiff. Motion at 9, n.8. As the Government surely recognizes, the defendants noticed Mr. Holm's deposition because of his particular factual knowledge; he is not fungible.

Notably, the Government does not suggest any particular scheduling difficulties associated with fitting these depositions around the likely dates of the deponents' trial testimony or preparation, nor does it suggest any other practical reason that would prevent these depositions proceeding now. Yet, if the depositions are delayed, 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. Defendants simply cannot be asked to conduct discovery on perhaps the most significant areas of this case in a several month (or less) timeframe.

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, while the Enron EBS officers' criminal trial is currently scheduled to begin October 4, 2004, there is no guarantee that the date will hold, given the prior adjournments of supposedly firm trial dates in that case, and the fact that the Government just last week added two more counts to the indictments for that trial, raising the possibility of further delays. Moreover, the trial date for Mr. Skilling has not even been set.

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 responses to the Government's prior motions, 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 Government continues to maintain its 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. Bloomer, Collins and Holm 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 8-10. The Government wrongly states that there is little or no distinction between, on the one hand, a deponent being questioned about what they said to the Government and what the Government said to them (as to which the Bank Defendants agree the June 1 Order precludes any inquiry), and, on the other hand, a deponent being questioned about the subject areas as to which they are knowledgeable—what they did, said and heard, well before they ever spoke to the Government. Obviously some of these same subjects might come up at a future criminal trial. But the Government's suggestion that the parties in

this case are precluded from making any inquiry into such subject areas is inconsistent with the terms of the Court's June 1 Order.⁵

* * *

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.

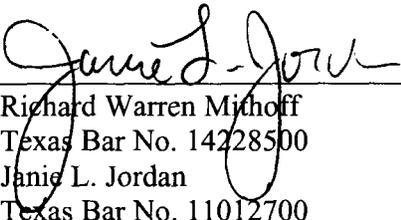
The Bank Defendants again seek to highlight to the Court the certain need to make time in the case schedule for the defendants to take the depositions of the witnesses subject to the Government's Motion, and the numerous other similarly situated witnesses that are implicated by the Government's Motion. If all of these depositions are

⁵ Moreover, if one accepted the Government's faulty reasoning that the June 1 Order already precludes any inquiry into the same subject areas as these deponents may testify to at trial, the Government's present Motion would presumably be unnecessary.

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 28, 2004

Respectfully submitted,

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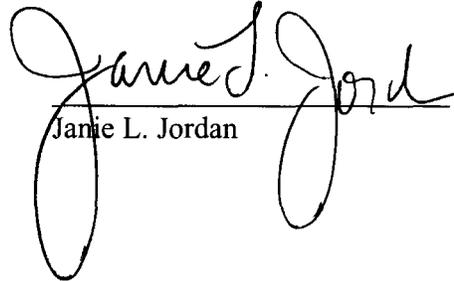
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CERTIFICATE OF SERVICE

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 28th day of June, 2004.


Janie L. Jordan