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

United States Courts
Southern District of Texas
FILED
JUN 29 2004
Michael N. Milby, Clerk

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| IN RE ENRON CORPORATION SECURITIES, DERIVATIVE, & "ERISA" LITIGATION | § | MDL-1446 |

UN-SEALED PER 2235

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| MARK NEWBY, et al., *Plaintiffs*, | § | |
| v. | § | CIVIL ACTION NO: H-01-3624 AND CONSOLIDATED CASES |
| ENRON CORP., an Oregon Corporation, et al., *Defendants.* | § | |

Sealed
Public and unofficial staff access to this instrument are prohibited by court order.

**FORMER OUTSIDE DIRECTORS' RESPONSE TO THIRD MOTION TO QUASH FILED BY THE ENRON TASK FORCE**

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2232

TO THE HONORABLE MELINDA HARMON:[1]

The most recent motion to quash filed by the Enron Task Force makes clear that the court should anticipate Task Force objections to the depositions of: a) every current or former Enron employee; b) every member of the Arthur Andersen engagement team[2] that certified that Enron's financial statements were fairly presented; c) every investment analyst; d) every grand jury witness; and, e) even the plaintiffs themselves. Although in this motion the Task Force asks the Court to put on ice, indefinitely, the three witnesses currently at issue--Messrs. Fallon and Griebling, and Ms. Curry--it does so on the basis of an argument that it has the right to a stay as to any or all "individuals who will be or have been witnesses before either the Enron Grand Jury or in the Criminal Cases." Task Force June 28 Motion to Quash at note 6. The stay the Task Force seeks is far from temporary; it is of indefinite duration, and it will persist--if the Task Force's motion is granted--until the trials in all of the Enron-related criminal cases have concluded, including the trial of cases that have not yet even been indicted.

Discovery in this case simply cannot be managed--or finished--if the people who worked at Enron, the people who audited its financial statements, and the plaintiffs who allegedly relied on their representations are cannot be deposed in a timely way. Accordingly, for the reasons stated by

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[1]The Court and all parties are advised that, although this response was posted to the www.esl3624.com website on the evening of June 28, we were unable to file it with the District Clerk's office by the time that office closed. We apologize for any confusion this has created and respectfully request that the Court consider this response as if it had been timely filed.

[2]Though not currently the subject of a motion by the Task Force, counsel for the Task Force has indicated that they may well seek to preclude depositions of many of the Arthur Andersen partners charged with responsibility for the audit of Enron's financial statements.

others who have opposed the Task Force's motions, and those stated below, the Outside Directors respectfully submit that:

1. The Task Force's pending motions to quash should be denied; and,
2. The Court should schedule a prompt hearing, at which the Task Force should be ordered to appear, to discuss with all parties how discovery can be conducted in light of the Task Force's broad assertion of a right to preclude discovery from any "individuals who have been or will be witnesses either before the Enron Grand Jury or in the Criminal Cases."[3]

In opposition to the Task Force's motion, the Outside Directors argue as follows:

**What Does the Task Force Seek?**

Since the first motion it filed in May of 2004, the Enron Task Force has objected to or sought to quash the following depositions:

Enron Employees:

Jim Fallon (formerly employed in Enron Broadband Services)

Margaret Ceconi (formerly employed in Enron Energy Services)[4]

Wanda Curry (formerly employed in Enron Energy Services)

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[3]We note that the Task Force's assertion of this right is particularly problematic for those parties, such as the Outside Directors, who are not involved in the ongoing criminal investigation. Because grand jury proceedings are secret, we literally have no way to know whether a person we seek to depose is a grand jury witness until after the deposition has been noticed. Under the existing deposition protocol order, the identification of witnesses occurs sixty days in advance and the Task Force then has an automatic veto right to force a further, thirty day postponement. Accordingly, every time the Task Force raises an objection, the parties fall further and further behind in discovery.

[4]No motion to quash was ultimately filed as to Margaret Ceconi, because she currently resides in Australia.

John Griebling (formerly employed in Enron Broadband Services)

Gary Peng (formerly employed in Enron's accounting department)

Claudia Johnson (formerly employed in Enron Broadband Services)

John Bloomer (formerly employed in Enron Broadband Services)

Bill Collins (formerly employed in Enron Broadband Services)

Andersen Employees:

Roger Willard (member of Andersen Enron engagement team)

Plaintiffs

Arild Holm (investment analyst for Lead Plaintiff Regents)

McKinsey & Co.

Ronald Hulme

Goldman Sachs

David Fleischer (investment analyst who followed Enron for Goldman Sachs)[5]

The Task Force asserts that it seeks only a "temporary stay" of these depositions--but the duration is more accurately described as "indefinite." *See* Order on United States' Motion for a Limited Stay of Selected Depositions, entered June 1, 2004 at 1 ("Although at first blush the motion seeks a limited stay, in actuality, the stay sought by the Task Force would seem to be one of indefinite duration."). Why is the delay indefinite? The Task Force's request for relief makes it clear:

[5]We anticipate that a motion to quash the deposition of David Fleischer will be filed next month, because his deposition was postponed to the next cycle due to a scheduling conflict.

- "The United States respectfully seeks a temporary stay of the depositions of Jim Fallon, Wanda Curry and John Griebling until January 1, 2005, or, if necessary, pending the conclusion of trials in a number of criminal cases related to the United States' investigation of the collapse of Enron Corporation. Those cases include *United States v. Daniel Bayly, ...United States v. Kenneth Rice, ...* and *United States v. Jeffrey Skilling, et. al.*" Task Force June 10 Motion to Quash at 1-2 (emphasis added).
- "Curry and Fallon will testify in the Skilling trial." *Id.* at 4.
- The Skilling case is not yet set for trial. *Id.* at 4.
- The grand jury has returned other indictments, e.g. *United States v. David Bermingham*, *id.* at 4., which involve defendants that have yet even to be extradited from other jurisdictions and so, likewise, have not been set for trial.
- The "Enron Grand Jury's investigation is ongoing and is examining other acts and individuals..." *Id.* at 6.
- "Many of the witnesses and documents the United States intends to present in the Criminal Cases also support the [*Newby*] Class Action and will be subject to discovery and deposition in this case.... If these depositions are permitted to take place it will undermine the Government's position in the Criminal Cases." *Id.* at 5.

It is now clear that the Task Force takes the position that any witnesses common to the criminal and civil cases should not be deposed until the criminal cases (including cases not yet even filed) are concluded. This prohibition, if granted, would extend to virtually every knowledgeable Enron employee, Andersen employee and plaintiff until after the criminal trials (including trials in

cases that are not yet filed) have concluded. As we explain below, this means that those witnesses cannot possibly be deposed before the November 30, 2005 discovery cut-off. That, alone, justifies denying the Task Force's motion because such a long delay would plainly, and irretrievably, prejudice the parties in the civil case.

**Why Would It Prejudice the Outside Directors if The Task Force's Motion is Granted?**

The Task Force seeks to shield not only witnesses in its existing criminal cases, but those who may testify against others "not yet charged." Task Force Motion at 6. The Task Force ignores the fact that this will, inevitably, mean a delay of a year, *if not more*, in the depositions of many of these witnesses. There are at least three reasons why this is true.

First, since *United States v. Arthur Andersen*, not a single Enron-related criminal case has gone to trial on its first scheduled trial date. The so-called Enron Broadband case, *United States v. Howard et. al.*, was originally indicted against two defendants on March 26, 2003. It was superseded to add additional defendants, including Ken Rice and Joe Hirko (defendants in the *Newby* case), on April 29, 2003. The indictment was superseded a second time in November 2003. Trial in that case is, according to the Task Force, set to commence on October 4, 2004--**nineteen months** after the indictment was originally handed up. According to media reports, trial of the Broadband Case is expected to exceed a month in length.

The indictment in the so-called "Nigerian Barge" case, *United States v. Bayly et al.*, was returned on September 16, 2003. The trial of that case has been continued at least once, and a hearing is scheduled for August 17 to determine whether the issuance of a superseding indictment will result in a further delay of the trial of that case. Even if trial proceeds shortly after August 17, **nearly a year will have elapsed** between the indictment of the Nigerian Barge case and the date on

which trial will commence. That trial, too, is expected to exceed a month in length. In short, there is no reason for the court to conclude that *any* Enron case will proceed to trial in less than a year's time from indictment, and there is *every* reason for the court to expect that even those cases that have already been indicted will suffer significant trial delays as a result of continuances or superseding indictments. Delaying civil depositions until the conclusion of the criminal trials, therefore, will build in a massive scheduling delay entirely beyond the control of this Court or the parties to this case.

Second, the *Skilling* criminal case is not even set for trial. Even if trial occurs in "early 2005," as the Task Force suggests, Task Force Motion at 6, it will not occur soon enough to prevent significant prejudice to the other, unindicted parties if depositions are delayed until after the *Skilling* trial concludes.[6] Assume for the sake of argument that the *Skilling* trial begins in March of 2005 and concludes within two months (assumptions that are doubtful, at best), an Order granting the Task Force's motion would mean that no discovery of grand jury witnesses could occur until **at the very earliest** June of 2005--only six months before the November discovery cut-off. The parties to the *Newby* case cannot possibly depose every Enron employee with relevant knowledge, every member of the Andersen Engagement Team, every plaintiff and every investment analyst in the six month time period that will remain if the *Skilling* trial has concluded by June of 2005.

Matters are worse than they appear in the Task Force's motion, however, because the extradition of the defendants in *United States v. Bermingham* has only just been ordered by a court in the United Kingdom. Given that no Enron-related case has been tried in less than a year, there

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[6]This, morevoer, assumes that the *Skilling* matter actually goes to trial in early 2005--an assumption at odds with the history of every other Enron-related criminal case to date.

is no reason to expect that the trial in *Bermingham* will commence anytime before July of 2005--and it may occur many, many years from now, after appeals of the extradition order are exhausted. Must the parties in *Newby* wait to take discovery until a foreign appeal is decided and a criminal matter is concluded here before they can take the depositions of key witnesses? For the Task Force, the answer is "yes," but the prejudice to the parties and to the interests of justice dictates that the answer to this question should be "no."

Third, the Task Force is quite open about the fact that it has sought and obtained an extension of the Enron Grand Jury's term through September 27, 2004. Task Force Motion at 4. The Task Force acknowledges that "the Grand Jury's investigation is ongoing and is examining other acts and individuals." *Id.* The media is replete with reports that the Task Force is contemplating a request for additional, very significant indictments against one or more persons who have not previously been indicted. Even if indictments were handed up tomorrow, the Task Force would no doubt suggest that discovery should await the conclusion of that trial (or trials) too. If even a year were to elapse between an indictment handed up on July 1 and a subsequent criminal trial, an order granting the Task Force's motion would condemn the parties to take the depositions of ten, and perhaps all (given the breadth of the Task Force's argument) of the most critical Enron, Andersen and plaintiffs' witnesses.[7] This is not a parade of horribles concerning what might happen; instead, this analysis takes only to its logical endpoint the Task Force's assertion that it seeks to preclude discovery from

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[7]If a new defendant were indicted on July 1, 2004, history suggests that the case would not be set for trial before a year's time and would be continued at least once. Even if the case were tried within one year, and the trial were two months in length, an order granting the Task Force's motion would mean that the depositions of relevant witnesses could not even begin until September 1, 2005. A backlog of literally scores of witnesses would have built up by then, and the parties would have no way to complete those depositions before the discovery cut-off in November.

"grand jury witnesses" until after every, Enron-related criminal trial is concluded. That endpoint, as this analysis demonstrates, is years and years away.

**What is At Stake?**
**At Stake is the Schedule and Fundamental Fairness**

The Task Force's motion uses reasonable words to achieve an unreasonable result. It has sought a "temporary" stay that is really of indefinite duration. The Task Force sought to quash the depositions of a half-dozen witnesses in its first motion, tried to preclude another handful of witnesses in its second motion--but it has done so, in each instance, on the basis of a rationale that would preclude the depositions of the most knowledgeable Enron witnesses, the members of the Andersen Engagement team,[8] critical investment analysts and now even the plaintiffs themselves. Like the mouse that eats the cheese, but does so bite by bite, the Task Force's motion will inevitably devour, in its entirety, the carefully negotiated schedule that governs discovery in this case. If the Task Force's motion is granted, there simply will be no opportunity for the parties to complete the timely depositions of these critical witnesses before fact discovery ends.

We wish to make clear that the Outside Directors do not doubt the Task Force's claim to be acting in the public interest--but the Task Force considers that question only from its own vantage point. While there is no question that there is a public interest in law enforcement, there is an equally compelling public interest in timely civil justice. This is one of the most complex civil cases in history and the schedule for discovery in it is extremely tight. This court observed, early in this case, that the eyes of the nation were on this case to determine whether the wheels of justice could

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[8]Counsel for the Task Force have indicated to us that they might well seek orders quashing the depositions of most of the senior Arthur Andersen partners who advised Enron's Board concerning the truthfulness of Enron's financial statements.

grind with other than Dickensian slowness. *See* February 28, 2002 Order at 2. While much has happened since then, the observation remains true today. Timely civil justice is a very important public interest. There will not be *timely* civil justice for the parties in *Newby* if the Task Force is granted an indefinite stay of discovery as to all grand jury and criminal trial witnesses until after all possible criminal trials (including the trials of cases that have not yet been indicted) have been concluded.

**The Task Force Provides No Basis Upon Which To Deny Discovery to the Outside Directors**

The court aptly noted that the discovery schedule in this case "was not negotiated in order to provide an end-run around criminal procedure rules," Order Denying Task Force Motion at 3. The Outside Directors have not been indicted. They are witnesses who have cooperated with every single government agency that has sought to interview them--including the members of the Enron Task Force. The Outside Directors, quite understandably, need to take (and have a right to take) the depositions of the Andersen and Enron employees on whom they relied in making their decisions as board members. Indeed, the Outside Directors' primary defense to the Section 11 claim against them (which is the only claim that remains against them) turns on whether they were reasonable in relying on Arthur Andersen's opinion certifying to them, and to the investing public, that Enron's financial statements were presented fairly in accordance with generally accepted accounting principles. There are few witnesses more critical to the Outside Directors's defense than the Andersen accountants, but the Task Force would apparently have the Outside Directors wait years to take those depositions--and then condemn them to take them in a mad rush, at the end of discovery, with no opportunity to follow up with other witnesses.

The Task Force acknowledges that the test that must be met in order to obtain an order quashing these depositions expressly requires the court to consider, among other things, "the burden on the defendants" if a stay is granted. *See SEC v. Mersky*, 1994 WL 22305 at *2-3, cited in Task Force's First Motion to Quash at 11. It is somewhat surprising, therefore, that most of the arguments made by the Task Force wholly ignore the plight of unindicted parties like the Outside Directors.

The Task Force simply does not explain, likely because it cannot explain, why the Outside Directors are *not* severely burdened by an order prohibiting them, indefinitely, from taking discovery from the Enron employees and the Andersen accountants on whom they relied in discharging their duties as Enron's directors. The Task Force seems to suggest a successful prosecution may help the plaintiffs in the pursuit of their claims against the indicted parties, Task Force First Motion at 12, but that is hardly a substitute for *the Outside Directors' right* to timely take the depositions of the *witnesses relevant to their defense*. Because it has failed to address the prejudice to unindicted defendants, like the Outside Directors, the Task Force has failed to meet its burden to demonstrate that it is entitled to an indefinite stay of depositions for all of its trial and grand jury witnesses.

Finally, the Task Force's arguments about prejudice to the government either do not relate to the Outside Directors at all, or can be dealt with by measures much less drastic than a wholesale and indefinite stay of discovery. *See generally* Task Force Original Motion at 16 incorporated in its Second Motion at 1. There is no risk of perjury or manufactured evidence here. What the Outside Directors seek is the right to cross-examine witnesses. For generations, American courts have recognized that cross-examination is the time honored engine of the truth. There also is no risk, at all, of witness intimidation. As the Officers' Response aptly notes, none of the parties to the civil case is charged with a violent crime and none is alleged to be a mobster. The Task Force is also

concerned that it might be surprised by the testimony of witnesses at the criminal trial if they have been deposed in the civil case. Though it is difficult to see how the Task Force, with a grand jury at its disposal, could *ever* be surprised by evidence--any claimed surprise can be dealt with simply by giving the Task Force copies of the civil deposition transcripts.

**Conclusion**

At bottom, the Task Force seems to believe that these depositions are being sought by and for the benefit of criminal defendants. The Outside Directors have sought these depositions, as have the Financial Institutions and the Plaintiffs, and none of them is a criminal defendant. What the Task Force misses, fundamentally, is that there are unindicted parties in the *Newby* case whose right to defend themselves will be severely prejudiced if they are forced to wait years to take critical depositions even as memories fade, witnesses die or, as has already occurred in the case of Ms. Ceconi, witnesses move to Australia or other jurisdictions where they cannot feasibly be deposed. The rights of the unindicted parties cannot be vindicated, and the public interest in timely civil justice cannot be met, if the discovery of the most relevant and critical witnesses is put on ice until after the criminal cases conclude--whenever that might happen to be. The Task Force has not met and cannot meet its burden to obtain the relief it seeks. Accordingly, for the reasons stated above, and those stated in the responses filed by Certain Enron Officer Defendants and the response filed by the Financial Institutions, the Task Force's Motion for Stay should be denied. In addition, we suggest that it might be helpful to all concerned if the court were to schedule an early status conference with all parties, and counsel for the Task Force, to guide the management of discovery in light of the broad, and long-lasting, relief sought by the Task Force.

Respectfully submitted,

**GIBBS & BRUNS, L.L.P.**

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**ATTORNEYS FOR CERTAIN FORMER OUTSIDE DIRECTORS OF ENRON CORPORATION**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by electronic posting to www.ESL3624.com on this 28th day of June, 2004.

Aundrea K. Frieden