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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION
SECURITIES LITIGATION

MDL-1446

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

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

Plaintiffs,

- v. -

ENRON CORP., et al.,

Defendants.

**UNITED STATES' REVISED MOTION
FOR A LIMITED STAY OF SELECTED DEPOSITIONS**

INTRODUCTION

The United States of America submits this Revised Motion for a Limited Stay of Selected Depositions seeking a temporary stay of the depositions of John Bloomer, Bill Collins and Arild Holm in this case (the "Class Action"). The United States hereby incorporates by reference its previous Motion for and Memorandum of Law in Support of Its Request to Intervene and For a Limited Stay of Selected Depositions, filed on May 28, 2004, and its Motion for A Limited Stay of Selected Depositions, filed on June 10, 2004.

The United States respectfully seeks a temporary stay of the depositions of John Bloomer, Bill Collins and Arild Holm in the Class Action until January 1, 2005, or, if necessary, pending the

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conclusion of trials in a number of criminal cases related to the United States' investigation of 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 John Bloomer, Bill Collins and Arild Holm 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 trial of United States v. Kenneth Rice, et. al. Cr. H-03-93 ("Rice case"). All of these witnesses have met extensively with the government and two have testified in the Enron Grand Jury. The testimony of all three 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 grand jury investigation. It would also accord the defendants in the Criminal Cases – particularly those in the Rice case – many of whom are also defendants in the Class Action, improper access to

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 During the previous deposition cycle the Government informed the parties that it is no longer seeking to stay the deposition of Gary Peng or Margaret Ceconi. In the present deposition cycle the government has ceded to the parties' request regarding another proposed deponent, Bryan Begley, and will not seek to delay the Begley deposition.

discovery materials and witness statements which they are not entitled to receive under the law and procedures governing criminal matters.³

As with the prior motion seeking a limited stay of certain depositions, the instant motion does not seek a blanket stay of all discovery in the Class Action. Rather, the United States has narrowly focused its request to just 3 of the 26 nominees for the August deposition cycle. In this instance, the United States is seeking to temporarily delay only those individuals who are certain to be witnesses in the upcoming Rice case. The United States seeks to obtain the temporary stay of these selected depositions until these specific witnesses have concluded their testimony in the Criminal Cases.⁴ 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

³ 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.

⁴ Once these individuals have completed their testimony in the Rice matter, which the government anticipates will conclude in the fall of 2004, it is unlikely that the United States will seek to further stay their depositions in this case.

access to an extensive record of testimony and prior statements. Thus, the United States' motion should be granted.

STATEMENT OF FACTS

The United States hereby incorporates by reference the Statement of Facts contained in its previously filed Motions. As the Court well knows, 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, John Bloomer, Bill Collins, and Arild Holm are examples of this overlap. All three witnesses figure prominently in the Rice trial involving Enron's broadband business unit. The knowledge and testimony of these witnesses is confined nearly exclusively to this subject matter. The Rice trial is scheduled to begin on October 4, 2004, and the United States anticipates it will finish before the end of the year.

John Bloomer and Bill Collins were employed exclusively by Enron's Broadband business unit and can testify solely about the circumstances surrounding this unit's failed development. They never worked for any other Enron business unit, and both left the company within approximately one year of arriving. In addition, Arild Holm, a financial analyst employed by the California Board of Regents, analyzed Enron as a prospective investment – including its then-emerging broadband venture. These individuals – particularly Bloomer and Collins – are uniquely situated in that their testimony will be exclusively focused on Enron's broadband business. The government seeks a

limited stay with respect to these depositions precisely to avoid prejudicing its position in the upcoming Rice case where all 3 are expected to testify.

The government's limited and focused request in this instance is consistent with its approach thus far in this process. To date, of the nearly 50 nominees put forward by the civil parties, the Government has sought to temporarily delay a total of 6 of these depositions. In each instance the depositions which the Government has sought to temporarily delay involve individuals who have been, or will be, witnesses in the Enron Grand Jury or the Criminal Cases. Moreover, with respect to some witnesses, the government and the civil parties have endeavored to reach – and have reached – agreement. To date the government has withdrawn its objection to two nominees including one of the prospective deponents from the instant deposition cycle. The Government has been and will continue to be willing to narrowly tailor its requests for stays with respect to selected depositions.

ARGUMENT

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.

The public interest in preserving the integrity of and prioritizing the criminal prosecution is served by a stay in these selected depositions. Campbell v. Eastland, 307 F.2d 478, 486 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1980) (Administrative policy gives priority to the public interest in law enforcement.). If the depositions that are the subject of this Motion are permitted to take place it will undermine the Government's position in the Criminal Cases in general and in the Rice case in particular. 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 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.⁵

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 – indeed, the Rice case is a mere three months away – 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. Contrary to the parties’ assertions that the government is seeking a delay of “infinite duration,” there will be ample opportunity for the parties to take the depositions of the individuals at issue after their trial testimony is completed. In the meantime, the parties will be able to move forward with the deposition of other persons.⁶ 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

⁵ Similarly, as noted above, the interests of judicial economy would also be served by a stay. The witnesses that are the subject of this motion will be witnesses in the Rice case. 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.

⁶ The parties contend that the Government’s proposed stay “would delay a broad and undefined group of depositions” (Certain Insured Defendants Opposition at 8). This argument is without merit. To the contrary, the Government to date has sought a limited stay in a small number of proposed depositions and has done so only with respect to those individuals who will be or have been witnesses either before the Enron Grand Jury or in the Criminal Cases.

prejudice to the Class Action litigants from postponing the depositions at issue until the witnesses have testified at the trials of the Criminal Cases.⁷

The parties urge that the Court's June 1 Order provides sufficient protection to the Government's interest and that of the public in a criminal prosecution that is not disadvantaged. The parties contend that the Government has misread the Court's Order and the source of that protection. (Bank Defendant's Opposition at 7; Certain Insured Defendants Opposition at 6, footnote 6). The apparent confusion in the parties' interpretation of the Court's Order is instructive in understanding the potential prejudice confronting the government if these particular depositions are permitted to move forward at this time. The parties argue that the Order precludes inquiry into only "what [the deponents] said to the Government and the Government said to them" (Bank Defendant's Opposition at 7). They further take issue with the government's "interpretation" that the Order precludes inquiry into "areas [of deponents'] anticipated testimony at a criminal trial." This distinction – if there is

⁷ The parties contend that the concerns which normally merit a stay namely the dangers of manufactured evidence, perjured testimony and witness intimidation are not present here. While the government does not contend that such actions have taken place, the danger of such activities is never removed from a criminal matter such as this where the defendants, if convicted, stand to receive significant periods of incarceration and to incur substantial financial penalties. This concern can never be dismissed from any balancing of competing interests and is one of the essential reasons, as the Campbell court noted, 307 F.2d at 487, that the public's interest in the enforcement of the criminal law takes precedence. See also, SEC v. Mersky, No. Civ. A. 93-5200, 1994 WL 22305 at *4 (E.D. Pa. Jan. 25, 1994) ("contrary to [defendant's] assertions, the proper focus is not upon the discovering party's intent in seeking discovery, but rather upon the effect of his obtaining such discovery.")(citation omitted); Integrated Genetics v. Bowen, 678 F.Supp. 1004, 1009 (E.D.N.Y. 1988)("the decision of whether or not to stay this lawsuit pending the outcome of the grand jury proceeding does not depend solely on whether this Court finds some wrongful intent. . . to circumvent the criminal discovery rules"); accord In re Ivan F. Boesky Securities Litigation, 128 F.R.D. 47, 51 (S.D.N.Y. 1989) ("although no such risks [of perjury or manufactured evidence] have been articulated here, there continue to be the possible dangers that underlie the basis on which courts authorize deferral of full access to discovery, particularly where only 3500 material and private investigative agency proceedings are the subject of what is being withheld.").

one at all – is of no moment. If the Court’s Order is as narrow as the parties suggest the government is provided minimal if any protection. Conversely, if the Order provides a broader protection for the criminal prosecution as the government contends, taking these particular depositions at this time would be a time-consuming and ultimately duplicative exercise.

As indicated above, Messrs. Bloomer, Collins and Holm will be called to testify as trial witnesses in the Rice case. It is anticipated that the subject matter of that testimony will encompass virtually all of their expected deposition testimony. John Bloomer worked solely for Enron Broadband Services (“EBS”), the division which is the subject of the Rice criminal prosecution. While he was with the company, Bloomer oversaw much of EBS’s product development efforts. These are key issues at the heart of the Rice criminal matter. Similarly, Bill Collins was also employed exclusively at Enron Communications and EBS. Collins’ experiences at EBS bear on important issues in the Rice prosecution including the viability of EBS’ software and hardware products and services. Arild Holm was a financial analyst for the California Board of Regents who, among other things, analyzed Enron as a prospective investment and assisted in the decision to purchase Enron stock based, in part, on its burgeoning broadband business.⁸ In short, to take the depositions of these specific individuals at this time – so close to their trial testimony in a criminal case – runs the very real risk that the civil discovery, appropriate as it may be in this case, will “do violence” to the interests of the criminal prosecution. Campbell, 307 F.2d at 487 (“Judicial

⁸ It is anticipated that the various parties will argue that, since Holm is a former employee of the lead plaintiff, it is unfair or inappropriate that his deposition be temporarily delayed until he completes his trial testimony. This complaint is overblown. As with the other depositions, the government only seeks a limited delay of Holm’s deposition until after he testifies in the Rice trial. In addition, the government is not seeking the depositions of other current and former employees of the Board of Regents, such as Jeffrey Heil, and those depositions can move forward.

discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.”). 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 where as here the proposed deponents are witnesses in an upcoming criminal case and the potential prejudice of a delay to the parties seeking to take those depositions is minimal. See, e.g., First Merchants Enterprise, 1989 WL 25214 at *2.

Even assuming arguendo that aspects of Bloomer’s, Collins’ and Holm’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 principle of judicial economy. Such limited inquiry guarantees that these witnesses would have to be recalled after their subsequent trial testimony. To proceed with these depositions now would generate a lengthy and likely 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 the Rice 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.

Finally, the Bank Defendants contend that the government’s request for a limited stay to selected depositions will disrupt the entirety of the civil discovery process in this case and grind the Class Action to a halt. This argument is without merit. The government is mindful of the interests of the civil parties in an expeditious discovery process. Accordingly, the government has been narrowly focused in its request for temporary delays of certain selected depositions. Indeed, of the

six depositions which the government has sought to delay only one of those individuals, Wanda Curry, is a potential witness in the Skilling case and therefore could conceivably be subject to further stay motions.

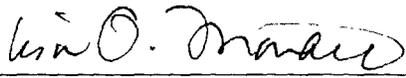
The Court's June 1 Order lays out a procedure to balance the procedural interests of the parties to this Case and those of the government and the public in a coherent criminal prosecution. This is precisely the balance envisioned in Campbell v. Eastland. The United States respectfully requests that the Court exercise its discretion to harmonize the competing interests at issue and grant its Motion to stay specific depositions pending their testimony 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,

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Certificate of Service

I, hereby certify that on June 30, 2004, I served a copy of the United States' Motion to Withdraw Its Motion For a Limited Stay of Selected Depositions and for Leave to File a Revised Motion for a Limited Stay of Selected Depositions, via electronic mail on Kathy Patrick, counsel for selected Directors and Officers of Enron Corporation, and electronically pursuant to the Court's order governing service in this matter.

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