

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

UNITED STATES COURTS  
 SOUTHERN DISTRICT OF TEXAS  
 FILED

BL AUG 10 2004

Michael N. Milby, Clerk of Court

MARK NEWBY, )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 ENRON CORP., et al., )  
 )  
 Defendants, )

CIVIL ACTION NO.H-01-3624  
 (Consolidated)

2004 AUG 10 PM 3:41

**Officer and Director Defendants' Response To  
 Task Force's Fourth Motion For A Limited Stay Of Selected Depositions**

Certain former officers and outside directors of Enron ("Officer and Director Defendants")<sup>1</sup> file this response to the Enron Task Force's latest motion for a stay filed August 4, 2004 ("Fourth Motion to Stay").

**I. Preliminary Statement**

In its fourth motion the Task Force seeks to stay the depositions of Stan Hanks, Ed Smida, and David Campbell "until November 1, 2004, or until the completion of their trial testimony [in the EBS criminal case], whichever is later." (Fourth Motion to Stay at 2). The Task Force notes that the trial in the EBS case is scheduled for October 4, 2004, and that "Judge Gilmore has previously denied the defendants' motions to continue this trial date." (Fourth Motion to Stay at 2). The

---

<sup>1</sup> The Defendants joining in this opposition include: Richard B. Buy, Richard A. Causey, Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Jeffrey K. Skilling, Joseph Sutton, Lawrence Greg Whalley, Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. Lemaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charls E. Walker, and Herbert S. Winokur.

Officer and Director Defendants do not oppose the Task Force's request as long as the EBS case goes to trial on its current schedule. The Officer and Director Defendants oppose the indefinite stay that could result if the EBS case is continued.

## **II. Factual Background**

On July 9, 2004, the parties in the civil case notified the Task Force that the three depositions at issue here were going to be scheduled in September. On July 15, 2004, the Task Force responded that it objected to the depositions.<sup>2</sup> Upon receiving that objection, the parties removed the witnesses from the scheduling process for September. On July 22, 2004, the Officer and Director Defendants told the Task Force that there would be opposition to the Task Force's anticipated motion to stay the depositions and that the Officer and Director Defendants would likely seek expedited consideration of any such motion. While this Court's June 1, 2004 Order provided that the Task Force would have "ten days to file its motion to stay or quash," and the Task Force knew that the Officer and Director Defendants were anxious to have this issue resolved so they could get the deponents at issue on the schedule, the Task Force did not file its motion to stay until August 4, 2004, 26 days after it was notified of the proposed depositions and 20 days after it lodged its objection to them.

## **III. The Prejudice to the Civil Litigants is Real.**

As demonstrated by the Officer and Director Defendants' notice to the Task Force that it would seek expedited consideration, the Officer and Director Defendants are anxious to depose the three witnesses at issue here. As this Court knows from prior briefing on this issue, scheduling

---

<sup>2</sup>The Task Force wrote that it objected to the depositions at issue here and to the deposition of David Fleischer, but the Task Force has not moved to stay Mr. Fleischer's deposition.

depositions in this large and complicated case requires a lot of lead time and, as this Court also knows from prior briefing, deposition of certain witnesses must be taken early in the discovery process because their testimony will provide the jumping off point for a series of sequenced discovery that will follow up on, amplify, and explore what these witnesses say about critical issues.

The Task Force's motion repeatedly emphasizes that the prejudice to the parties in this civil case is "minimal," because "[t]rial in this criminal matter is only two months away." (Task Force's Fourth Motion at 7). The Task Force claims that its "request for a temporary stay of these depositions is reasonable in light of [*inter alia*] the rapidly approaching trial date for the EBS case" (Task Force's Fourth Motion at 6), and that the "depositions of these specific individuals at this time – so close to their trial testimony in the 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." (Task Force's Fourth Motion at 7). The Task Force claims that it is "not seeking a delay of undefined duration" (Task Force's Fourth Motion at 7), but the stay it seeks could become just such an indefinite stay if the EBS case does not go to trial on October 4, 2004, as it is currently set.

The Task Force's objection has already delayed the depositions by one month and its untimely motion for stay seeks to delay them still further. The prejudice to the civil litigants in delaying these key depositions is not "minimal." It is only in the spirit of cooperation that this Court has encouraged that the Officer and Director Defendants are willing to accept the delay, but they cannot accept it should the stay become indefinite.

#### **IV. The Prejudice to the Task Force is, at Best, Imagined.**

While the civil litigants suffer obvious prejudice from delaying the depositions, the Task Force has not been able to identify any prejudice that it would suffer if its motion were denied. The Task Force claims that the depositions of Ronald Hulme, Claudia Johnson, and Roger Willard show that “the government’s previous assertions of prejudice were not hollow claims.” (Task Force’s Motion at 4). The only evidence of any prejudice the Task Force points to is that the witnesses testified about EBS. (Task Force’s Motion at 4). But the civil litigants never claimed that they would not question the witnesses about EBS. Quite the contrary, everyone involved knew that the witnesses would testify about EBS. When the Task Force moved to stay the depositions, no one ever disputed the Task Force’s claim that there was a substantial overlap between the criminal cases and this case or that “Ron Hulme, Claudia Johnson and Roger Willard, are examples of this overlap.” (Task Force’s First Motion<sup>3</sup> at 5). Claudia Johnson’s only connection to Enron was her employment by EBS. In opposing the Task Force’s Third Motion To Stay, the Officer Defendants argued extensively that the testimony of Mr. Hulme and Ms. Johnson had been so favorable to the defendants *on EBS issues* that it was unlikely that either of them would be called in any criminal trial. (Certain Officer Defendants’ Revised Opposition To Enron Task Force’s Revised Motion for a Limited Stay of Selected Depositions at 8-12).

The Task Force has not hinted at any prejudice of the kind present in the cases it relies upon. There has been no witness intimidation, manufactured evidence, or unfair surprise to the prosecution.

---

<sup>3</sup>United States’ Motion and Memorandum of Law in Support of Its Request to Intervene and for a Limited Stay of Selected Depositions.

The Task Force has not identified any way in which the testimony of any deponent thus far has caused the Task Force any unfair prejudice.<sup>4</sup> The Task Force also has not shown how any of the proposed depositions at issue could cause it any unfair prejudice.

The Task Force's latest motion again repeats its claim that the discovery in the civil case is being used as an end-run around the limitations on discovery in criminal cases, but it offers no explanation of how discovery of facts could be unfair to anyone. In any event, the Officer and Director Defendants' willingness to postpone this discovery until *after* the criminal trial in October should put to rest any claim that they seek the discovery for use in the criminal trial.

**V. In the Spirit of Compromise Fostered by this Court, the Officer and Director Defendants are Willing to Agree to a Defined Stay of the Depositions at Issue.**

Despite the lack of any showing of prejudice, the Officer and Director Defendants are willing to postpone these depositions until after the witnesses testify in the EBS case, so long as that case is tried beginning October 4, 2004, as it is currently scheduled. However, the Officer and Director Defendants are concerned that the delay the Task Force seeks could become indefinite (or at least intolerable in light of the tight schedule in this case), if the EBS trial is again continued. The EBS

---

<sup>4</sup>The Task Force notes that "[c]ounsel for Mr. Willard raised a standing objection that the entirety of this questioning occurred in violation of this Court's June 1, 004 [sic] order prohibiting questioning on the subject of the criminal cases." (Task Force's Fourth Motion at 5 n.5). This Court's Order did not prohibit the parties from asking the witness about matters about which they might also have testified before the Grand Jury--and for good reason. The parties to the civil case have no way to know what subjects are being explored in confidential grand jury proceedings; we know only what is relevant to the Newby case. The Court's Order was intended to prevent the parties from asking witnesses about their grand jury testimony (*e.g.* questions such as, "What did you tell the grand jury about this?"). No witness was ever asked any such prohibited question. The witnesses were questioned only about facts relevant to the Newby claims.

case was first set for trial in June, 2003. Since that time there has been a series of continuances, and a motion for continuance is currently pending before Judge Gilmore. The Task Force's proposed order would prohibit the deposition of the witnesses until after their testimony in the EBS case, even if it is continued indefinitely. In short, the Task Force's proposed order provides just the sort of "delay of undefined duration" that the Task Force claims it does not seek. (Task Force's Fourth Motion at 7).

#### **VI. Conclusion**

The Officer and Director Defendants respectfully request that the Court deny the Task Force's motion to the extent it seeks an indefinite stay. The Officer and Director Defendants instead suggest that the Court enter an order providing that the depositions will be stayed only if the EBS trial begins on October 4, 2004, as it is currently scheduled, and that the Court's order provide that in no event will the stay extend beyond January 1, 2005. A proposed order providing that relief is attached.

Respectfully submitted,

  
\_\_\_\_\_

Jacks C. Nickens  
State Bar No. 15013800  
NICKENS KEETON LAWLESS FARRELL & FLACK LLP  
600 Travis, Suite 7500  
Houston, Texas 77002  
(713) 571-9191  
(713) 571-9652 (fax)

Attorney-in-Charge for Defendants Richard B. Buy,  
Richard A. Causey, Mark A. Frevert, Steven J. Kean,  
Mark E. Koenig, Jeffrey McMahan, Cindy K. Olson,  
and Lawrence Greg Whalley

OF COUNSEL:

Paul D. Flack  
Joanna V. Hamrick  
State Bar No. 00786930  
NICKENS KEETON LAWLESS FARRELL & FLACK LLP  
600 Travis, Suite 7500  
Houston, Texas 77002  
(713) 571-9191  
(713) 571-9652 (fax)

  
\_\_\_\_\_

Robin C. Gibbs  
State Bar No. 07853000  
GIBBS & BRUNS, L.L.P.  
1100 Louisiana Street, Suite 5300  
Houston, Texas 77002  
Telephone: (713) 650-8805  
Facsimile: (713) 750-0903

Attorneys in charge for Defendants  
Robert A. Belfer, Norman P. Blake, Ronnie C. Chan,  
John H. Duncan, Joe H. Foy, Wendy L. Gramm,  
Robert K. Jaedicke, Charles A. LeMaistre,  
John Mendelsohn, Jerome J. Meyer, Frank Savage,  
John Wakeham, Charls E. Walker, and  
Herbert S. Winokur, Jr.

OF COUNSEL:

GIBBS & BRUNS, L.L.P.  
Kathy D. Patrick  
State Bar No. 15581400  
Jean C. Frizzell  
State Bar No. 07484650  
Aundrea K. Frieden  
State Bar No. 24034468  
1100 Louisiana Street, Suite 5300  
Houston, Texas 77002  
Telephone: (713) 650-8805  
Facsimile: (713) 650-0903

  
\_\_\_\_\_  
Jack O'Neill  
State Bar No. 15288500  
Federal ID No. 3696  
CLEMENTS, O'NEILL, PIERCE, WILSON &  
FULKERSON, LLP  
Wells Fargo Plaza  
1000 Louisiana, Suite 1800  
Houston, Texas 77002  
(713) 654-7607  
(713) 654-7690 (fax)

Attorney in charge for Defendant  
Joseph W. Sutton

OF COUNSEL:

Jason C. Norwood  
State Bar No. 24027579  
CLEMENTS, O'NEILL, PIERCE,  
WILSON & FULKERSON, LLP  
1000 Louisiana, Suite 1800  
Houston, Texas 77002-5009  
(713) 654-7664  
(713) 654-7690 (fax)



Ronald G. Woods  
RONALD G. WOODS, ATTORNEY AT LAW  
5300 Memorial, Suite 1000  
Houston, Texas 77007  
(713) 862-9600

Attorneys for Defendant Jeffrey K. Skilling

OF COUNSEL:

Bruce A. Hiler  
Jeffrey W. Kilduff  
Robert M. Stern  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D. C. 20006  
(202) 383-5300  
(202) 383-5414

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing instrument was served by electronic posting to www.ESL3624.com on August 10, 2004.



Paul D. Flack

