UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
BL AUG 3 1 2004
Michael N. Milby, Clerk of Court

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 Plaintiffs, - v.- ENRON CORP., et al., Defendants.	§	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases)

MOTION FOR A LIMITED STAY OF THE DEPOSITION OF JAMES FALLON

On August 19, 2004, James Fallon, a former employee of Enron Broadband Services, was served with a deposition subpoena (copy attached as Exhibit 1) compelling him to appear for a deposition in this case on September 28, 29, 30 and October 1, 2004 – just one business day before the trial in U.S. v. Rice, et al., is set to begin. Mr. Fallon has been identified by the United States as a witness the prosecution expects to call at the Rice trial. By this motion, Mr. Fallon seeks a limited stay of his deposition until after he testifies at the Rice trial, pursuant to the conditions set by the Court in its August 25, 2004 Order granting a limited stay of the depositions of Ed Smida, Stan Hanks and David Campbell (copy attached as Exhibit 2).

Previously, the United States moved to stay the deposition of Mr. Fallon and five others until after the completion of criminal trials in the Rice matter and another criminal case, United States v. Jeffrey Skilling, et al., Cr. No. H-04-25. In its June 10, 2004 Motion, the United States

2372

stated that Mr. Fallon "will" testify at both trials. See United States' Motion for a Limited Stay of Selected Depositions, June 14, 2004, at 2 (copy attached as Exhibit 3). The United States asserted that the taking of Mr. Fallon's deposition will disrupt the criminal prosecutions and could allow sensitive information from the ongoing grand jury investigation to be disclosed. Furthermore, Mr. Fallon's deposition would allow the criminal defendants (who are defendants in this Action) to circumvent the rules governing criminal discovery, thereby granting improper access to discovery materials and witness statements.

The Court denied the United States' motion on July 12, 2004, citing concerns about (1) the number of individual depositions (six) the United States sought to stay, and (2) the uncertain length of the stay, due to the fact that the Skilling matter has not been set for trial (copy attached as Exhibit 4). The Court's Order noted that the United States "implies that once the Rice case has been tried the stay *could* be dissolved." June 1, 2004, Order at 4 (emphasis added). If the requested stay was for a limited number of witnesses and was dissolved "once the Rice case has been tried," the Court said it "might be inclined to grant the stay in the spirit of co-operation." Id.

In its August 25, 2004 Order, the Court granted a limited stay of the Smida, Hanks, and Campbell depositions until after they testified in the Rice trial, with some conditions. The Court Order stayed the depositions:

> until the earlier of the date on which each witness completes his testimony for the prosecution in U.S. v. Kenneth Rice, et al., if the trial of U.S. v. Kenneth Rice, et al., begins as it is currently scheduled on October 4, 2004. If the trial of U.S. v. Kenneth Rice, et al., is continued, the civil litigants may take the depositions without further order of the Court.

The Court also stated that "in no event will this stay extend beyond January 1, 2005," and that the parties are free to schedule the depositions as long as they do not begin until after the time periods described in the Order.

Mr. Fallon is in exactly the same position as Messrs. Smida, Hanks and Campbell. His deposition will occur just one business day prior to the beginning of the Rice trial, at which the United States has stated he will be a trial witness. By this motion, Mr. Fallon seeks a limited stay of his deposition until after he testifies in the Rice trial, subject to the conditions set forth in the Court's August 25, 2004 Order. There is no good reason to treat Mr. Fallon differently than Messrs. Smida, Hanks, and Campbell. A limited stay is therefore necessary because (1) it will vindicate the public's interests in law enforcement, (2) it will promote judicial economy and efficiency, (3) it will protect Mr. Fallon from undue burden and expense, and (4) the parties are not prejudiced by such a limited delay.

Argument

It is well settled that the Court is empowered to modify a deposition subpoena "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," to promote judicial economy or efficiency, or where the interests of justice require it. Fed. R. Civ. P. 45(c); Fed. R. Civ. P. 26(c); see also 9 James Wm. Moore et al., Moore's Federal Practice ¶ 45.04 (3rd ed. 2004) ("A nonparty's motion to quash a subpoena is, in essence, the same as a motion for a protective order"). A limited stay of Mr. Fallon's deposition vindicates each of these factors and will not prejudice the parties seeking to depose him. See Court's Order of Feb. 11, 2004, Securities and Exchange Commission v. Howard, et al., No. H-03-0905 (Harmon, J.) ("where a stay of discovery would not be of 'infinite scope or duration,' but only until the criminal proceedings are terminated, a court would be more willing to grant the stay") (citing

Board of Governors of the Federal Reserve System v. Pharaon, 140 F.R.D. 634, 636-37 (S.D.N.Y. 1991)).

1. In its July 12, 2004 motion, the United States argued that a stay of Mr. Fallon's deposition was necessary because:

> 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 use in his criminal suit." *** Such discovery could seriously impede, impair, and prejudice the criminal prosecution and related investigation....The public interest in the effective enforcement of the criminal laws therefore warrants that the requested stay [of Mr. Fallon's deposition] be granted.

United States' Motion For A Limited Stay of Selected Depositions, June 14, 2004, at 6 (citations omitted). The United States also asserted that the subject matter of Mr. Fallon's expected trial testimony "encompasses virtually all of [his] expected deposition testimony," and that much of Fallon's testimony "bears on the subject matter of an ongoing grand jury investigation." In short, with respect to Mr. Fallon, "there is no prospective line of inquiry that avoids the risk of intruding into 'the areas of [Mr. Fallon's] anticipated testimony at a criminal trial.'" Id. at p. 8.

Moreover, a limited stay of Mr. Fallon's deposition, consistent with the Court's August 25, 2004 Order, precludes any attempt by the civil litigants to circumvent that Order by deposing Mr. Fallon on issues related to the trial testimony of Messrs. Smida, Hanks, and Campbell. A deposition one day before the commencement of the Rice trial could give the criminal defendants, who are civil defendants here, a windfall by giving them an improper preview of the prosecution's case and enabling them to question Mr. Fallon about the subjects of Messrs. Smida, Hanks and Campbell's, as well as other potential witness', trial testimony.

In sum, a limited stay of Fallon's deposition is in the public interest.

2. The interests of judicial economy and efficiency would be served by a limited stay of Mr. Fallon's deposition. See Jones v. City of Indianapolis, 216 F.R.D. 440, 452 (S.D. Ind. 2003) ("Permitting certain discovery to proceed, such as depositions of the individual Defendants, would be an inefficient use of resources."). If Mr. Fallon's deposition is stayed until after he testifies at trial, the parties will have the benefit of a great deal of information, including: extensive trial testimony and cross examination; any exhibits used during his testimony; any relevant grand jury testimony disclosed in the criminal proceeding; and other documents disclosed at trial. See Securities and Exchange Commission v. Mutuals.com, No. Civ.A.3:03-CV-2912-D, 2004 WL 1629929, at *4 (N.D. Tex. July 20, 2004) ("In fact, the stay may only marginally impede their ability to gather the facts because the government will provide them with the documents relating to the conduct alleged in the criminal complaint pursuant to Fed. R. Crim. P. 16. Witness statements and impeachment materials will likewise be provided to defendants at the time of the criminal trial.").

This tremendous amount of information will streamline the deposition, reduce the number of deposition days needed to depose Mr. Fallon, and greatly aid the civil litigants. See Court's Order of May 5, 2004, Securities and Exchange Commission v. Skilling et al., H-04-0284 (Harmon, J.) (granting stay of civil proceedings pending outcome of the criminal case) ("the resolution of the criminal case and the evidence presented therein may serve to streamline the civil enforcement action once the stay has been lifted"). As the Court noted in its order granting a stay in the SEC's parallel enforcement action, "the criminal prosecution would narrow the issues for civil litigation, because . . . there is an overlap of facts and issues." See Court's Order of Feb. 11, 2004, Securities and Exchange Commission v. Howard, et al, No. H-03-0905

(Harmon, J.). "[T]he criminal trial will address the same issues through the same witnesses and much the same evidence, and defendants will receive voluminous discovery." Id. Thus, a limited stay would promote judicial economy and efficiency, and help to streamline the discovery in this Action.

3. Requiring Mr. Fallon to attend a deposition just one business day before the beginning of the Rice trial—where he will testify on the same subjects he would be asked about in a deposition—is unduly burdensome, expensive, and creates an annoyance that can be alleviated with a reasonable and brief stay. A limited stay would enable the civil litigants in this Action to benefit from Mr. Fallon's trial testimony and other information garnered from the Rice trial, thereby streamlining the deposition and reducing the time needed. Mr. Fallon is employed by another company in Ohio. A streamlined, more efficient deposition would reduce the disruption and time away from his new job.

4. The civil litigants are not prejudiced by this limited stay. Quite the contrary, the litigants will benefit from the information gained by waiting until the end of the Rice trial. Moreover, a limited stay until after Mr. Fallon testifies in the Rice trial will only delay his deposition by about two months.[1] Simply put, there is no prejudice to the litigants from a short delay of Mr. Fallon's deposition—in fact, there will be a sizeable benefit if the limited stay is granted due to the tremendous amount of information the litigants will gain from the Rice trial. See Jones v. City of Indianapolis, 216 F.R.D. 440, 451 (S.D. Ind. 2003) (stating that plaintiff's interest in proceeding expeditiously is not irreparably harmed or prejudiced by a limited stay where plaintiff "may continue to proceed with discovery, including additional depositions").

[1] The Rice trial is scheduled to last for eight weeks. Judge Gilmore has denied several of the Defendants' motions for continuance, most recently by written order on June 10, 2004.

The parties seeking to take Mr. Fallon's deposition may argue that the Rice trial is not certain to start on October 4, 2004.[2] This argument is speculative, but is easily met by Mr. Fallon's agreement to abide by the conditions set forth in the Court's August 25, 2004 Order. Simply put, there is no good reason to treat Mr. Fallon differently than Messrs. Smida, Hanks, and Campbell—or any subsequent deponents scheduled to testify at the Rice trial, who presumably will be treated in a manner consistent with the August 25, 2004 Order. Moreover, Mr. Fallon is willing to agree now to firm deposition dates, consistent with the Court's August 25, 2004 Order. The parties currently are scheduling depositions for cycle 5, which is October 18 to November 19. Mr. Fallon is willing to agree now to dates in cycle 6, which should begin after the Rice trial. Specifically, Mr. Fallon is available for deposition the weeks of November 22 or December 6, 2004, or the week of January 10, 2005. We also are willing to discuss such other reasonable dates as the litigants may propose consistent with the August 25, 2004 Order.

The parties likely will argue that Mr. Fallon's deposition should not be stayed because it already has been scheduled. But this is a problem of their own making. Mr. Fallon's offers to schedule his deposition for a time after the Rice trial have been rejected. Instead, the civil litigants, some of whom are criminal defendants, apparently seek to take his deposition prior to the Rice trial – presumably so they can benefit from the liberal civil discovery in crafting their criminal defense or cross-examining Mr. Fallon at the criminal trial. The Court should not sanction the civil litigants' efforts to create prejudice where none existed, by their refusal to agree to deposition dates after the Rice trial.

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[2] O'Melveny & Myers, counsel to Jeffrey Skilling, issued the subpoena for Mr. Fallon's deposition, on behalf of former Enron officers and directors, including some that are defendants in the Rice trial.

In sum, the August 25, 2004 Order provides a reasonable, balanced procedure for scheduling the depositions of individuals expected to testify at the Rice trial. There is no good reason to treat Mr. Fallon differently than Messrs. Smida, Hanks, and Campbell, or other witnesses at the Rice trial. Accordingly, a limited stay of Mr. Fallon's deposition is warranted.

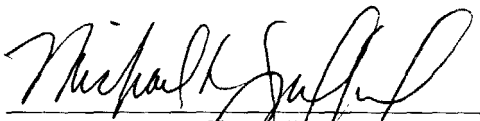
Conclusion

For the foregoing reasons, Mr. Fallon respectfully requests that his motion for a limited stay, pursuant to the conditions of the Court's August 25, 2004 Order, of his deposition in the Class Action should be granted.

Dated: August 30, 2004

Respectfully submitted,

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

By: 

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Attorneys for James Fallon

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 Plaintiffs, - v.- ENRON CORP., et al., Defendants.	§	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases)

ORDER

Upon consideration of the motion of James Fallon for a Limited Stay of the Deposition of James Fallon and any opposition thereto,

IT IS HEREBY ORDERED that James Fallon shall not be deposed until the earlier of the date on which he completes his testimony for the prosecution in U.S. v. Kenneth Rice, et al., if the trial of U.S. v. Kenneth Rice, et al. begins as it is currently scheduled on October 4, 2004. If the trial of U.S. v. Kenneth Rice, et al. is continued, the civil litigants may take the deposition without further order of the Court.

In no event will this stay extend beyond January 1, 2005. Mr. Fallon may be deposed any time after January 1, 2005, regardless of whether they have testified in U.S. v. Kenneth Rice, et al.

The parties are free to notice the deposition and begin the process of scheduling the deposition at any time as long as Mr. Fallon is not deposed until after the time described above.

Dated: _____, 2004
Houston, Texas

_____
Hon. Melinda Harmon
United States District Judge
Southern District of Texas

Certificate of Service

I hereby certify that on August 30, 2004, I served a copy of James Fallon's Motion for a Limited Stay of the Deposition of James Fallon, via electronic email on Joanna Hamrick, counsel for selected Directors and Officers of Enron Corporation, who in turn served the document electronically pursuant to the Court's order governing service in this matter.

Todd A. Ellis

Issued by the
UNITED STATES DISTRICT COURT

Southern DISTRICT OF Texas

Mark Newby, et al. v. Enron Corp., et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] H-01-3624

TO: James B. Fallon
2425 Pine Valley Court
Houston, TX 77019

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Enron Houston Deposition Center 1111 Bagby, Houston, Texas 77002	September 28, 2004 – 9 a.m. September 29, 2004 – 9 a.m. September 30, 2004 – 9 a.m. October 1, 2004 – 9 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
M Stern Attorney for Defendant Jeffrey K. Skilling	8/19/2004

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Robert M. Stern, O'Melveny & Myers LLP, 1625 Eye Street, N.W., Washington, D.C. 20006, (202) 383-5328

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

[1] If action is pending in district other than district of issuance, state district under case number.

United States Courts
Southern District of Texas
ENTERED
AUG 2 5 2004
Michael N. Milby, Clerk of Court

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

MARK NEWBY,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.H-01-3624
	)	(Consolidated)
ENRON CORP., et al.,	)	
	)	
Defendants,	)	

ORDER

Upon consideration of the motion of the United States for a Limited Stay of Selected Depositions and the opposition thereto,

IT IS HEREBY ORDERED that Ed Smida, Stan Hanks, and David Campbell shall not be deposed until the earlier of the date on which each witness completes his testimony for the prosecution in U.S. v. Kenneth Rice et al., if the trial of U.S. v. Kenneth Rice et al. begins as it is currently scheduled on October 4, 2004. If the trial of U.S. v. Kenneth Rice et al. is continued, the civil litigants may take the depositions without further order of this Court.

In no event will this stay extend beyond January 1, 2005. The witnesses may be deposed any time after January 1, 2005, regardless of whether they have testified in U.S. v. Kenneth Rice et al.

The parties are free to notice the depositions and begin the process of scheduling the depositions at any time as long as each of the witnesses is not deposed until after the time described above.

Dated: August 25th, 2004
Houston, Texas

Melinda Harmon

Hon. Melinda Harmon
United States District Judge
Southern District of Texas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
JUN 1 0 2004
Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES LITIGATION	§	MDL-1446
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)

UNITED STATES' MOTION
FOR A LIMITED STAY OF SELECTED DEPOSITIONS

INTRODUCTION

The United States of America submits this Motion for a Limited Stay of Selected Depositions seeking a temporary stay of the depositions of Jim Fallon, Wanda Curry, and John Griebling 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.

The United States respectfully seeks a temporary stay of the depositions of Jim Fallon, Wanda Curry and John Griebling in the Class Action 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 ("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 Wanda Curry, Jim Fallon and John Griebling 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 trials in the Criminal Cases. All of these witnesses have met extensively with the government and testified in the Enron Grand Jury. Jim Fallon and John Griebling will be witnesses in the Rice matter, while Curry and Fallon will testify in the Skilling trial.[3] In addition, their testimony 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 ongoing grand jury investigation. It would also accord the defendants in the Criminal Cases, who are also defendants in the Class Action, improper access to discovery materials and witness statements which they are not entitled to receive under the law and procedures governing criminal matters.

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[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] The Government is not seeking to stay the deposition of Gary Peng or Margaret Ceconi.

[3] Curry may also be called as a Rule 404(b) witness in the Rice matter.

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.

Significantly, in this case the United States is not seeking a blanket stay of all discovery in the Class Action. Instead, the United States has narrowly focused its request to obtain the temporary stay of the selected depositions until specific witnesses have concluded their testimony in the Criminal Cases. 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 access to an extensive record of testimony and prior statements. Thus, the United States' motion should be granted.

STATEMENT OF FACTS

The Department of Justice, through the Enron Task Force, is investigating all criminal matters associated with the demise of Enron. On March 27, 2002, a special grand jury was empaneled in the Southern District of Texas as part of the Government's investigation into the collapse of Enron (the "Enron Grand Jury"). As part of that investigation, the Enron Grand Jury has returned the Bayly, Rice, and Skilling indictments. The Bayly matter, which was indicted in September 2003, is scheduled for trial on August 16, 2004, while the Rice case, which was indicted in May 2003, is expected to start trial on October 4, 2004.[4] The United States also expects that the Skilling case, which was indicted in February 2004, will proceed to trial early in 2005 although no trial date has yet been set. In addition to these pending matters, the grand jury has also returned indictments in United States v. David Bermingham, et al., H-02-0597 and in United States v. Andrew Fastow, et al., H-02-665. All together, over twenty persons have been charged.

These indictments span a wide spectrum of criminal activity at Enron and involve charges of securities fraud, insider trading, money laundering and false statements. The defendants in the Criminal Cases include former Enron employees and executives as well as employees of various banks and financial institutions. The Enron Grand Jury's investigation is ongoing and its term was recently extended to September 27, 2004.[5]

The Class Action was filed on October 22, 2001. Given the vast impact of the collapse of Enron, the Class Action was designated a multi-district litigation and several separate lawsuits

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[4] Judge Gilmore recently denied the Defendants' Motion for Continuance by written Order on June 10, 2004.

[5] Pursuant to Fed. R. Crim. P. 6(e), the government cannot comment in this public filing about matters occurring before the grand jury.

concerning the same subject matter were consolidated before this Court. 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, Wanda Curry, Jim Fallon and John Griebling are examples of this overlap. All three witnesses have testified before the Enron Grand Jury and all three are anticipated witnesses in the Criminal Cases. The United States expects to call both Jim Fallon and John Griebling to testify in the Rice matter. Wanda Curry and Jim Fallon are also likely to be called as witnesses in the Skilling trial once it is scheduled.[6]

ARGUMENT

The Government hereby incorporates by reference its Memorandum of Law in Support of Its Request to Intervene and For a Limited Stay of Selected Depositions which was filed with the Court on May 28, 2004. 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.

If these depositions are permitted to take place it will undermine the Government's position in the Criminal Cases and the criminal discovery process in those matters. 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

[6] See Affirmation In Support of Government's Motion to Intervene and for Limited Stay of Selected Depositions, Benton J. Campbell.

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.

Similarly, the interests of judicial economy would also be served by a stay. The witnesses that are the subject of this motion are expected to testify in the Criminal Cases and have testified before the Enron Grand Jury. 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.

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, pending re-evaluation, 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, so there will be ample opportunity for the parties to take the depositions of the individuals at issue. In the meantime, the parties will be able to move forward with the deposition of other persons. 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 prejudice to the Class Action litigants from postponing the depositions at issue until the witnesses have testified at the trials of the Criminal Cases.

It is anticipated that the parties seeking to take the Fallon, Griebling and Curry depositions may argue that the Court's order of June 1, 2004, which prevents discovery of, among other things, "the areas of [a witness'] anticipated testimony at a criminal trial," June 1, 2004, Order at 4, protects

the government's interests with sufficient force that the depositions should be allowed to take place. This argument is unpersuasive. As indicated above, these witnesses will be called to testify as trial witnesses, and the subject matter of that testimony encompasses virtually all of their expected deposition testimony. John Griebling spent his entire tenure with Enron at Enron Broadband Services ("EBS"), the division which is the subject of the Rice criminal prosecution. While he was with the company, Griebling oversaw much of EBS's network development efforts. These are key issues at the heart of the Rice criminal matter. There is nothing, not even Griebling's professional background, which falls outside the "areas of his . . . anticipated trial testimony." Similarly, Jim Fallon spent a year and a half at EBS, eventually becoming the CEO of the unit in the summer of 2001. Fallon's experiences at EBS bear on important issues in the Rice and Skilling prosecutions including EBS' commercial and business performance and the viability of its software and hardware products and services. Similarly, Fallon's prior experience at Enron Capital and Trade, where he was involved in Enron's power trading operations, is also within the purview of his anticipated trial testimony, particularly because it is where he first encountered several of the criminal defendants. Likewise, Curry's employment at Enron, including her tenure at Enron Energy Services, is tied directly to issues at the core of the Skilling indictment. In short, with respect to these specific proposed deponents there is no prospective line of inquiry that avoids the risk of intruding into "the areas of [the deponent's] anticipated testimony at a criminal trial." Furthermore, much of Fallon's and Curry's testimony bears on the subject matter of an ongoing grand jury investigation. 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 when the potential prejudice of a

delay to the parties seeking to take those depositions is nonexistent. See, e.g. First Merchants Enterprise, 1989 WL 25214 at *2.

Even assuming arguendo that aspects of Fallon's and Curry'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 principal of judicial economy. Such limited inquiry guarantees that both witnesses would have to be recalled after their subsequent trial testimony. To proceed with these depositions now would generate a lengthy and ultimately 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 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.

Accordingly, the Government respectfully requests that the Court exercise its authority to grant its Motion to stay specific depositions pending the testimony of these witnesses 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,

ANDREW WEISSMANN
Director, Enron Task Force

By: _____
Benton J. Campbell
Sean Berkowitz
Lisa Monaco
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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 Plaintiffs, - v. - ENRON CORP., et al., Defendants.	§	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases)

ORDER

Upon consideration of the motion of the United States' for a Limited Stay of Selected Depositions and any opposition thereto,

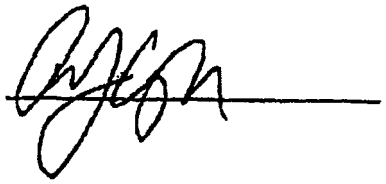
IT IS HEREBY ORDERED that the depositions of Wanda Curry, Jim Fallon and John Griebling are stayed until January 1, 2005;

Dated: _____, 2004
Houston, Texas

_____
Hon. Melinda Harmon
United States District Judge
Southern District of Texas

Certificate of Service

I, hereby certify that on June 10, 2004, I served a copy of the United States' Motion For a Limited Stay of Selected Depositions, via electronic mail on Kathy Patrick, counsel for selected Directors and Officers of Enron Corporation, who in turn served the document electronically pursuant to the Court's order governing service in this matter.



United States Courts
Southern District of Texas
ENTERED
JUL 12 2004
Michael N. Milby, Clerk of Co

IN THE UNITED STATES DISTRICT COURT
FOR THE 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	}	
VS.	}	
ENRON CORP., et al.,	}	
Defendants	}	

ORDER ON UNITED STATES' MOTIONS FOR LIMITED STAYS OF SELECTED DEPOSITIONS

Pending before the Court are two motions filed by the United States' Enron Task Force, the group in charge of the criminal prosecutions arising out of the fall of Enron Corporation. These motions were filed after the Court's Order of June 1, 2005 (Instrument No. 2181), ruling on the United States' first motion for a limited stay of selected depositions.

The first motion, filed June 10, 2004 (Instrument No. 2193), seeks to stay 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. . . ." Instrument No. 2193 at 1-2. The motion states that Fallon and Griebling will be witnesses in the case of *United States v. Kenneth Rice, et al.*, Cr. H-03-93 and that Curry will possibly be a Rule 404(b) witness in that case and, along with Fallon, will testify in the case of *United States v. Skilling*, et al., Cr. No. H-04-25. *Id* at 2. The *Rice* case is currently set for trial October 4, 2004. The *Skilling* case has not yet been set for trial.

2268

The second motion, originally filed June 23, 2004 and revised and filed June 30, 2004 (Instrument No. 2245), seeks to stay the depositions of John Bloomer, Bill Collins and Arild Holm also "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. . . ." Instrument No. 2245 at 1-2. All three of these defendants are expected to testify in the *Rice* criminal trial.

The United States argues that it is seeking to stay the deposition of only six witnesses and implies that once the *Rice* case has been tried the stay could be dissolved. If this were the circumstance the Court might be inclined to grant the stay in the spirit of co-operation. Reading between the lines of the motions, however, the Court gleans that some or all of these six witnesses would be needed for future criminal cases and that the United States does not intend in the future to limit its requests for stays to these six witnesses. The United States has presented no new or compelling reasons, beyond those presented in its May 28, 2004 motion, for deposition stays. The Court has nothing to add to the reasoning of its Order of June 1, 2004 denying that motion for stay. The Court is sympathetic to the plight of the United States, but, on balance, given the peculiar circumstances of the discovery in this multi-district litigation, cannot justify granting the stays the United States requests. Accordingly,

It is hereby ORDERED that the United States' Motion for a Limited Stay of Selected Depositions (Instrument No. 2193) is DENIED. It is further

ORDERED that the United States' Revised Motion for a Limited Stay of Selected Depositions (Instrument No. 2245) is DENIED.

Signed at Houston, Texas this 12th day of July, 2004.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE