

FILED
03/13/02

MICHAEL N. MILBY, CLERK
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COURTROOM MINUTES

JUDGE MELINDA HARMON PRESIDING Numbers 4128 & 134
COURTROOM CLERK Helen Tippen
COURT REPORTER Gayle Dye
LAW CLERK: Nancy Benjamin
MORNING 11:15 AFTERNOON _____
SESSION 12:10 SESSION _____ DATE: March 13 2002

CIVIL ACTION NO: H-01-3624

APPEARANCES:

MARK NEWBY, *et al.* Helen Hodges, Paul Howes,
Roger Greenberg

vs.

ENRON CORPORATION, *et al.*
Arthur Andersen Rusty Hardin

Nancy Temple, non-party Mark Hansen

CIVIL ACTION NO: H-01-3913

APPEARANCES:

PAMELA TITTLE, *et al.* Justin Campbell, Clyde Platt

vs.

ENRON CORPORATION, *et al.*

Nancy Temple, non-party Mark Hansen

DOCKET ENTRY

(MH) TELEPHONE CONFERENCE (Rptr- G. Dye)

Telephone Conference held on faxed memorandum of non-party Nancy A. Temple in Opposition to Plaintiffs' Ex Parte Motion to Compel Appearance For deposition in Houston on March 14, 2002. The Court Orders Ms. Temple to appear at the March 14, 2002 deposition, as stated on the record.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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March 13, 2002

Via Facsimile

Honorable Melinda Harmon
United States District Court
Southern District of Texas
515 Rusk Avenue
Houston, Texas 77002

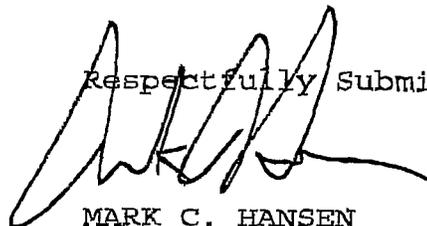
Re: Mark Newby, et. al. v. Enron Corp., et. al.,
C.A. No. H-01-3624
Pamela Tittle, et. al. v. Enron Corp. et. al.,
C.A. No. H-01-3913

Dear Judge Harmon:

Per the telephone conference conducted yesterday in this matter and the instructions of your chambers, please find attached our Memorandum of Non-Party Nancy A. Temple in Opposition to Plaintiffs' Ex Parte Motion to Compel Appearance for Deposition in Houston on March 14, 2002.

Per the instructions of your chambers, I have notified lead counsel for the Plaintiffs, G. Paul Howes and Helen Hodges, Roger Greenberg for the Newby plaintiffs, and Clyde Platt for the Tittle plaintiffs to be available at 11 a.m. (Central Standard Time) for a tentative teleconference with your Honor. I will appear on behalf of Nancy Temple.

Respectfully Submitted,



MARK C. HANSEN

cc: G. Paul Howes
Helen Hodges
Roger Greenberg
Clyde Platt

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036-3206

FACSIMILE TRANSMISSION**TO:** Hon. Melinda Harmon**FAX NO.:** 713-250-5431**FROM:** Mark C. Hansen**CLIENT NO.:** 02505**PHONE:** 202-326-7904**DATE:** March 13, 2002**RE:** Re: Mark Newby, et al. v. Enron Corp., et al., C.A. No. H-01-3624
Pamela Tittle, et al. v. Enron Corp., et al., C.A. No. H-01-3913**TOTAL NUMBER OF PAGES:** 20 (INCLUDING THIS SHEET)

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OR CONTACT OUR COPY SERVICE CENTER.**

PHONE NO: (202) 326-7949**FAX NO:** (202) 326-7999

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

_____)	
MARK NEWBY, et al., Individually and On))
Behalf of All Others Similarly Situated,))
Plaintiffs,)	Civil Action No. H-01-
)	3624 (Consolidated)
))
v.)	<u>CLASS ACTION</u>
))
ENRON CORP., et al.,))
))
Defendants.))
_____))

MEMORANDUM OF NON-PARTY NANCY A. TEMPLE IN OPPOSITION TO
PLAINTIFFS' EX PARTE MOTION TO COMPEL APPEARANCE FOR DEPOSITION
IN HOUSTON ON MARCH 14, 2002

I. Summary of Argument

Counsel for plaintiffs seek an Order of this Court compelling non-party Nancy A. Temple, a resident of Chicago, Illinois, to appear for a deposition in Houston on March 14. But the Court has no power to enter such an order because (1) Ms. Temple has not been properly served with a valid subpoena compelling her appearance in Houston, or anyplace else; (2) under Federal Rule of Civil Procedure 45, only the United States District Court for the Northern District of Illinois has jurisdiction to order Ms. Temple to appear for a deposition - as counsel for plaintiffs correctly recognized when they faxed - but failed properly to serve - a subpoena from that court to Ms. Temple's counsel; and (3) in the absence of a valid subpoena

from the proper court, properly served, there is simply no legal basis for ordering a non-party to appear for deposition in Houston, let alone one who is more than 100 miles from this Court. Plaintiffs' counsel thus ask the Court to act unlawfully, and to issue an order that can have no effect, all in a needless effort to harass this nonparty witness.

II. Background

On January 29, 2002, Helen J. Hodges, of Milberg Weiss Bershad Hynes & Lerach LLP, faxed counsel for Nancy A. Temple a subpoena issued by the United States District Court for the Northern District of Illinois. See Subpoena of Nancy A. Temple (Jan. 29, 2002), attached to accompanying Declaration of Mark C. Hansen ("Hansen Declaration") as Exhibit A. The subpoena compelled Ms. Temple to attend a deposition that had been scheduled for February 25, 2002 at the Four Seasons Hotel in Chicago, Illinois. See *id.* Counsel for Ms. Temple did not accept service on Ms. Temple's behalf. See Hansen Declaration ¶ 5. Since the February 25, 2002 fax, Ms. Temple has not been served with any other deposition subpoena. See *id.* ¶ 4.

III. Argument

As a matter of black-letter law, this Court lacks the power to compel Ms. Temple to appear in Houston, Texas (or anyplace else) for a deposition on March 14, 2002 (or at any other time). First, as a nonparty, Ms. Temple may only be compelled to attend

a deposition pursuant to a subpoena validly issued and served under Federal Rule 45. The January 29 subpoena does not satisfy the requirements of Rule 45 because it says nothing about a deposition on March 14, 2002 in Houston and, in any event, was not served on Ms. Temple in accordance with the Rule. Even if it had been properly served, this Court would lack power to enforce the January 29 subpoena, which was issued by the Northern District of Illinois. Second, because Ms. Temple is beyond the subpoena power of this Court, any subpoena issued by this Court compelling Ms. Temple to attend a deposition in Houston or anywhere else would be invalid. Third, private discussions between counsel for Ms. Temple and counsel for plaintiffs do not eliminate the need for a validly issued and served subpoena if plaintiffs wish to *compel* Ms. Temple to attend a deposition. Finally, even if this Court disregards all of the above and orders Ms. Temple to attend a deposition, it should stay its decision in order to permit Ms. Temple to appeal.

A. Ms. Temple Cannot Be Compelled to Attend a Deposition Because She Has Not Been So Ordered by a Validly Issued and Properly Served Subpoena

"[A] subpoena is necessary to compel someone who is not a party to appear for the taking of a deposition." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2452, at 18 (2d ed. 1995). In this case, no subpoena compels Ms. Temple to attend a deposition in Houston, Texas on March 14,

2002. The only subpoena of which counsel for Ms. Temple is aware is a subpoena issued by the Northern District of Illinois and faxed to counsel for Ms. Temple on January 29, 2002. That document, however, purports to compel Ms. Temple to attend a deposition on "02/25/02 at 9 a.m." at the "Four Seasons Hotel" located at "120 East Delaware Place, Chicago, IL 60611." Hansen Declaration, Exhibit A. Accordingly, it cannot even arguably be construed as ordering Ms. Temple to attend a deposition on March 14 in Houston.

In any event, the January 29 subpoena was not properly served. The issuance and service of such a subpoena is governed by Rule 45. *Cf. In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984) ("[District courts] have no power to issue a deposition subpoena unless expressly or impliedly so authorized by [the Federal Rules of Civil Procedure]"). Rule 45 requires, among other things, that a subpoena be served "upon a person named therein . . . by delivering a copy thereof to such person." Fed. R. Civ. P. 45(b)(1). This provision has been interpreted as requiring personal service of subpoenas. Without such personal service, a subpoena is void. *See Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968); *Ghandi v. Police Dep't of City of Detroit*, 74 F.R.D. 115, 121 (E.D. Mich. 1977); *In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973); *Gillam v. A. Shyman, Inc.*, 22 F.R.D. 475, 479 (D. Alaska 1958); *see also* 9A Wright & Miller,

supra, § 2454, at 24. Moreover, the Fifth Circuit has specifically held that a subpoena served on counsel for the person named in the subpoena is "a nullity." See *Harrison*, 404 F.2d at 273; see 9A Wright & Miller, *supra*, § 2454, at 24 ("[U]nlike service of most papers after the summons and complaint, service [of a subpoena] on a person's lawyer will not suffice."). Because the January 29 subpoena was served on counsel - who did not agree to accept it - it is "a nullity" and without any effect.

Had the January 29 subpoena been properly served, this Court would still lack the authority to enforce a subpoena issued by the Northern District of Illinois. See *In re Sealed Case*, 141 F.3d 337, 342 (D.C. Cir. 1998) ("[T]he rules vest power to compel discovery from a nonparty, and to impose contempt sanctions for non-compliance, in the subpoena-issuing court." (emphasis added)). If plaintiffs wish to enforce the January 29 subpoena - the only process that conceivably could compel Ms. Temple to appear for deposition - they must go to the court that issued it.

B. This Court May Not Issue a Subpoena to Compel Ms. Temple to Attend a Deposition in Houston or Anywhere Else

The Court similarly has no power to rectify plaintiffs' failure to properly serve Ms. Temple with a subpoena by simply issuing its own subpoena to command her appearance. The deposition of a nonparty may only be taken within "100 miles from the place where that person resides, is employed or regularly

transacts business in person." Fed. R. Civ. P. 45(c)(3)(A)(ii). Because Ms. Temple does not "reside[]," is not "employed," and does not "regularly transact[] business in person" within 100 miles of Houston, Texas, she may not be ordered to attend a deposition there. *Id.*; see also Fed. R. Civ. P. 45(e) ("An adequate cause for failure to obey [a subpoena served upon a person] exists when a subpoena purports to require a non-party to attend or produce at a place not within the [territorial] limits provided by [Fed. R. Civ. P. 45(c)(3)(A)(ii)].").

Because any deposition of Ms. Temple must occur in Chicago, this Court cannot issue an order compelling her to appear there either. "[T]he rules governing subpoenas and nonparty discovery have a clearly territorial focus." *In re Sealed Cases*, 141 F.3d at 341. Subpoenas ordering attendance at a deposition must be issued by the court for the district *in which the deposition is to be taken*. See *id.*; Fed. R. Civ. P. 45(a)(2) ("A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken."); see also *In re Corrugated Container Anti-trust Litig.*, 620 F.2d 1086, 1090 (5th Cir. 1980) (holding, under a prior - though substantially similar - version of the Federal Rules that a non-party witness is, for the purposes of compelling the witness's presence at a deposition, only subject to the jurisdiction of the court where

the deposition is to be held); *In re Guthrie*, 733 F.2d at 638 (same). This Court is therefore without the power to issue to Ms. Temple a valid subpoena ordering her presence at a deposition, in Houston or anywhere else.

C. Private Discussions Between Counsel for Plaintiffs and Counsel for Ms. Temple Did Not Eliminate the Need for Plaintiffs to Obtain and Serve a Subpoena if They Wish to Compel Ms. Temple To Attend a Deposition

Whatever private agreement for Ms. Temple's voluntary appearance was reached, it cannot and does not supplant the requirement for a subpoena. If plaintiffs wish to employ the power of the federal courts to force Ms. Temple to attend a deposition, they must obtain a valid subpoena and properly serve it on her.

The law is clear that a nonparty cannot be compelled to attend a deposition without having been served with a subpoena. See 9A Wright & Miller, *supra*, § 2452, at 18. And a purely voluntary agreement to attend a deposition does nothing to alter that general rule. In *Bueker v. Atchison, Topeka & Santa Fe Railway Co.*, 175 F.R.D. 291 (N.D. Ill. 1997), for example, the court was confronted with a nonparty physician who had voluntarily appeared for a deposition and begun answering questions before suddenly walking out in the middle of the deposition and refusing to continue. See *id.* at 292-93. When the defendant sought an order from the trial court compelling the physician to continue with the deposition, the trial court

refused, noting that it lacked the power to issue such an order. "[E]ven though [the nonparty's] conduct during the deposition was, to say the least, dismaying," the district court observed, "it is apparent that he was under no legal obligation to continue with his deposition once he withdrew his consent. . . . Absent [a subpoena], the court is without means to compel his deposition in any locale." *Id.* at 292. Ms. Temple thus cannot be compelled by the Court to attend a deposition on the basis of an informal agreement to a date.¹ If plaintiffs wish to invoke the power of the Court to compel Ms. Temple to attend a deposition, they must first properly serve her with a valid subpoena. In the absence of such a subpoena, a private agreement does nothing to confer power on a court in Houston, Texas to command a nonparty witness in Chicago, Illinois to travel to Houston for deposition. The Federal Rules flatly prohibit such an order.

D. If the Court Orders Ms. Temple to Attend a Deposition in

¹Plaintiffs of course argue that Ms. Temple's counsel is "playing games" and being unreasonable. But the facts are that only a single date was ever agreed to by Ms. Temple's counsel, and the requested postponement is perfectly reasonable. If anyone is playing games, it is plaintiffs' counsel with their false and malicious leaks to the press - to wit, that Ms. Temple is in plea discussions with the government, their lack of any reasonable ground for compelling Ms. Temple to appear, and their failure to articulate any good reason why the deposition cannot be postponed for a reasonable period of time. Plaintiffs have made, and can make, no showing of any urgent need to take Ms. Temple's deposition this week. Because the Court lacks power to issue the requested order, however, there is no need to consider or resolve these issues.

Houston, It Should Stay Its Own Order To Give Ms. Temple an Opportunity to Seek Appellate Review

Even if the Court rules in favor of plaintiffs' unlawful request, it should stay its decision in order to give Ms. Temple an opportunity to seek appellate review. The Federal Rules display great solicitude for the geographical inconvenience imposed by discovery requests on non-parties. See *In re Sealed Case*, 141 F.3d at 341 ("Congress in the Rules has clearly been ready to sacrifice some efficiency in return for territorial protection for nonparties."). Moreover, Rule 45(e) specifically exempts from potential contempt sanctions a person who fails to obey a subpoena compelling attendance at a deposition issued in derogation of the geographic limits imposed by Rule 45(c)(3)(A)(ii).

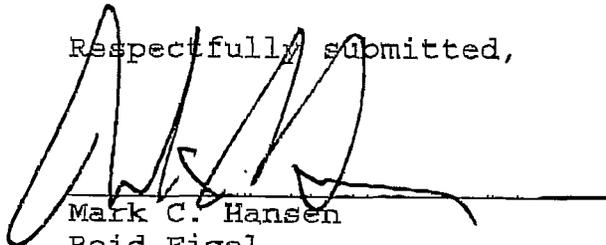
Given the evident concern in the Federal Rules for the inconvenience imposed upon nonparties by requiring them to attend far-flung depositions, this Court should give Ms. Temple an opportunity to press her arguments on appeal before forcing her to choose between attending the deposition and insisting on the protections afforded her under Rule 45, thereby risking the possible imposition of contempt sanctions. In *In re Sealed Case*, the D.C. Circuit issued a writ of mandamus prohibiting the district court from transferring a nonparty discovery dispute to the out-of-state trial court in order to prevent the nonparty from being forced to undergo, without the benefit of appeal, the

very geographical inconvenience Rule 45 is designed to prevent. See 141 F.3d at 340. For the same reasons, this Court should stay any decision in favor of plaintiffs' request in order to give Ms. Temple an opportunity to avail herself of her right to an appeal.

There is no harm in granting such a stay. Plaintiffs can demonstrate no urgent need to take Ms. Temple's deposition this week. It can and should fairly await an appeal of the fundamental issue: whether in these circumstances this Court has the power to command a non-party to attend a deposition in Houston.

Dated: March 13, 2002

Respectfully submitted,



Mark C. Hansen
Reid Figel
Silvija Strikis
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Attachment A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

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

Plaintiffs,)

ENRON CORP., et al.,)

Defendants.)

Civil Action No.
H-01-3624
(Consolidated)

CLASS ACTION

DECLARATION OF MARK C. HANSEN

I, Mark C. Hansen, depose and state as follows:

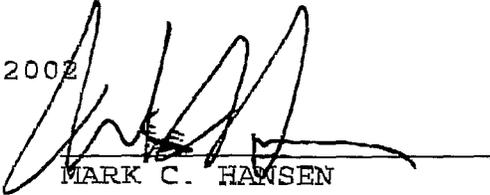
1. I am over 21 years of age and competent to make this Declaration. I know the information set forth in this affidavit to be correct as a matter of my personal knowledge.
2. I am a partner of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., located at 1615 M Street, N.W., Washington, D.C. 200036. I represent Nancy A. Temple, a resident of Chicago, Illinois.
3. On January 29, 2002, I received by telecopier a subpoena to Ms. Temple issued by the United States District Court for the Northern District of Illinois in the case of Mark Newby, et.al. v. Enron Corp., et. al., Case Number H-01-3624 (S.D. Tex.). The subpoena stated that a deposition had been scheduled for February 25, 2002 at The Four Seasons Hotel, 120 East Delaware Place, Chicago, Illinois. A true and accurate copy of the subpoena is attached as Exhibit A.
4. I did not agree to accept service of this or any other subpoena for Ms. Temple by counsel in Newby or any related cases. To the best of my knowledge, Ms.

Temple has not been served with any subpoena in these cases.

5. After learning of counsel's interest in taking Ms. Temple's deposition, I spoke on one or two occasions by telephone with Paul Howes. Mr. Howes did not ask me to accept service of any subpoena, but we did agree to schedule Ms. Temple's voluntary appearance for deposition in Houston on March 14. This was the first and only date scheduled with counsel for Ms. Temple (though counsel for Arthur Andersen, who do not represent Ms. Temple, had apparently proposed earlier dates).
6. Further affiant sayeth not.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on March 13, 2002



MARK C. HANSEN

Exhibit A

JAN-30-2002 01:55 PM KHTE

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P.01

Milberg Weiss Bershad Hynes & Lerach LLP

401 B Street, Suite 1700, San Diego, CA 92101-4297
(619) 231-1058 Fax: (619) 231-7423

www.milberg.com

New York
San Francisco
Los Angeles
Boca Raton
Seattle

January 29, 2002

VIA UPS OVERNIGHT

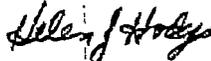
Mark Hansen
KELLOGG HUBER HANSEN
TODD & EVANS PLLC
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Enron Securities Litigation

Dear Mr. Hansen:

Enclosed is the subpoena for Nancy Temple. Please let me know the date or dates that your client is available for a deposition within the deadline set by the court. Please note that the subpoena calls for the appearance of Ms. Temple in Chicago, where I understand she resides. My deposition notice mistakenly set the deposition location in Houston.

Very truly yours,



HELEN J. HODGES

HJH:dsg

cc: G. Paul Howes
James Jaquette
Frank Karam
Jeffrey Kaiser
Jeffrey Konis
Rusty Hardin, Jr.

Enclosure

N:\msy\lsh\1471\Enron\DEB80367.12



JAN-20-2002 01:35 PM KHHTE

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P. 02

AO 88 (Rev. 1/84) Subpoena in a Civil Case - SDNY WES 4/89

Issued by the
UNITED STATES DISTRICT COURT

Northern DISTRICT OF Illinois

Mark Newby, et al.

SUBPOENA IN A CIVIL CASE

V.

Enron Corp., et al.

CASE NUMBER: 1 H-01-3624 (S.D. Tex.)

TO: Nancy Temple
c/o Mark Hansen, KELLOGG HUBER HANSEN TODD & EVANS FULC
1815 M Street, N.W., Suite 400
Washington, D.C. 20036

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 The Four Seasons Hotel, 120 East Delaware Place, Chicago, IL 60611	DATE AND TIME 02/25/02 at 9:00 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'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Helen J. Hodges</i> Attorney for Plaintiff Amalgamated Bank	DATE 01/29/02
--	------------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Helen J. Hodges, MILBERG WEISS BERSHAD HYNES & LERACH LLP, 401 E St., Suite 1700 San Diego, CA 92101; telephone 619/231-1058

(See Rule 45, Federal Rules of Civil Procedure, Parts G & H on Returns)

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

JAN-30-2002 01:35 PM KHTE

2023267999

P. 03

AO 88 (Rev. 1/84) Subpoena in a Civil Case - SDNY WEB 4/80

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 46, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance,
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly conducts business in person, except that

subject to the provisions of clause (c)(3)(B)(ii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.