

JUN 25 2002

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Michael N. Milby, Clerk

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

In re ENRON CORPORATION SECURITIES  
LITIGATION

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

This Document Relates To:

CLASS ACTION

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

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF THE REGENTS  
OF THE UNIVERSITY OF CALIFORNIA'S MOTION FOR A  
LIMITED PRODUCTION OF ENRON DOCUMENTS**

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In an attempt to avoid turning over documents Enron has already located, organized and produced to others, defendants argue the discovery stay provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") protect them from having to provide these indisputably relevant documents to Lead Plaintiff. But as this Court noted in its February 27 Scheduling Order, "[t]he automatic stay of discovery mandated by the PSLRA was designed to prevent fishing expeditions in frivolous securities lawsuits." Order at 3-4. Here, contrary to defendants' histrionics about "giving an inch and taking a mile" and "slippery slope[s],"<sup>1</sup> no terrible result would occur if Enron were required, in accordance with Judge Gonzalez's May 22 Order, to turn over documents already provided to Congress and other government agencies.

This Court recognized the PSLRA's discovery stay "was not designed to keep secret from counsel in securities cases documents that have become available for review by means other than discovery in the securities case." Feb. 27 Order at 4. Under this reasoning, the Court lifted the stay as to certain ERISA-related materials and made them available to the *Newby* plaintiffs. What Lead Plaintiff seeks here is simply an extension of this Order to include documents already provided to government agencies, Congress and others.

The documents requested by plaintiffs pose no threat of the abusive litigation addressed by the PSLRA. Defendants therefore should not be allowed to hide behind the statute.

Plaintiffs do not dispute that the PSLRA's discovery stay was, among other things, "intended to prevent unnecessary imposition of discovery costs on defendants." *SG Cowen Sec. Corp. v. United States Dist. Court*, 189 F.3d 909, 911 (9th Cir. 1999) (quoting H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 731).<sup>2</sup> Here, the burden would be minimal as

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<sup>1</sup>Memorandum of Investment Bank and Law Firm Defendants in Opposition to Lead Plaintiff's Motion for Production of Enron Documents ("Bank Opp.") at 2, 8; Enron Corp.'s Opposition to the Regents of the University of California's Motion for a Limited Production of Enron Documents ("Enron Opp.") at 3.

<sup>2</sup>Defendants' cases miss the point. First, in *In re CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d 1260, 1264 (N.D. Okla. 2001), one of the reasons the court denied the discovery sought by plaintiffs was that the defendant would "have to review a mountain of documents ... and then ... will have to review the mountain again" when other motions were filed. Here there is no danger of duplicative discovery – the documents have already been reviewed. In *Mishkin v. Ageloff*, 220 B.R. 784, 793 (S.D.N.Y. 1998), the court reversed the bankruptcy court's order lifting the discovery stay because the trustee sought an "open-ended, boundless universe of discovery." By contrast, Lead

Enron has already located, reviewed and organized the documents. Indeed, a recent submission in litigation between Enron and Dynegey Inc. related to scheduling matters, indicates that Enron is ready and able to produce the very documents Lead Plaintiff seeks:

[Enron] expects to produce an enormous number of additional documents soon, including documents related to the merger that were seized by the Federal Bureau of Investigation, emails from the electronic files of the Enron employees who worked on the transaction, *some eleven hundred boxes of documents produced to the government in the course of the numerous investigations of Enron's collapse* and an unknown number of documents concerning Enron's recent Form 8-K filing, in which it disclosed the need for downward adjustments to risk management assets and asset write downs totaling \$22-24 billion.

*Enron v. Dynegey*, No. 02-1528, Defendants' Submission of Proposed Scheduling Order for Consideration at June 13 Hearing and Memorandum in Support at 2-3 (S.D. Tex. June 10, 2002) (attached hereto as Ex. A).

"The PSLRA is a shield intended to protect security-fraud defendants from costly discovery requirements ... not ... a sword." *In re Flir Sys., Inc. Sec. Litig.*, No. 00-360-HA, 2000 U.S. Dist. LEXIS 19391, at \*8-\*9 (D. Or. Dec. 13, 2000) (citation omitted). The documents sought by Lead Plaintiff would pose no burden on defendants. This Court, in line with its earlier ruling which

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Plaintiff here seeks a discreet and readily identifiable set of documents. The dangers present in *Mishkin* are simply not extant here. Finally, defendants rely on *Faulkner v. Verizon Communs., Inc.*, 156 F. Supp. 2d 384 (S.D.N.Y. 2001). In *Faulkner*, the court recognized other courts often lift the stay in part because "the limited discovery request would not impose additional discovery costs on the defendants." *Id.* at 405. But the *Faulkner* court found plaintiffs could have sought the materials from defendants, but instead opted to seek the documents through a third party. Thus, the court found, it would be unfair to force the third party to expend time and money. *Id.*

partially lifted the stay in relation to ERISA-related documents, should order the production of the discreet set of documents requested by Lead Plaintiff.

DATED: June 25, 2002

Respectfully submitted,

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United States Court  
Southern District of Texas  
FILED

JUN 10 2002

Michael J. Kirby, Clerk

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS**

**ENRON CORP., et al.,**

**Plaintiffs,**

v.

**DYNEGY INC. AND DYNEGY  
HOLDINGS, INC.,**

**Defendants.**

02-CV-1528

**ORIGINAL**

**DEFENDANTS' SUBMISSION OF PROPOSED SCHEDULING ORDER  
FOR CONSIDERATION AT JUNE 13 HEARING AND  
MEMORANDUM IN SUPPORT**

**MAY IT PLEASE THE COURT:**

Defendants Dynegy Inc. and Dynegy Holdings, Inc. ("Dynegy") submit the proposed scheduling order attached and incorporated as Exhibit A and, in the particulars that follow, file this memorandum in support of the proposed order:

From the outset, Plaintiffs and Defendants have agreed on the need to move this case quickly and to prepare it for trial as soon as possible. We have met repeatedly in person and telephonically, and Plaintiffs and Defendants have worked to negotiate an aggressive schedule. The Parties have reached agreement on several issues. As reflected in the attached proposed scheduling order, the Parties agreed to expanded initial disclosures, with each side committing to identify and turn over all relevant documents, without waiting for formal discovery requests, by today. Plaintiffs and Defendants have agreed to a double-track deposition schedule, each committing to taking depositions seven hours each day, five days a week during the deposition period.

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As reflected in the proposed order, the Parties have negotiated several stipulations to facilitate expedited discovery.

The Parties have already made progress on early discovery, though much remains to be done. The Parties exchanged initial disclosures on May 28, 2002. To focus the document production, the Parties exchanged correspondence concerning documents and issues that each side deems important, as well as objections to the various categories of information sought by the other side.

With the exception of trading documents, discussed below, Dynegy expects substantially to complete production of the documents it deems relevant today. Dynegy's production includes approximately 100,000 pages of documents related to the failed Enron-Dynegy merger at issue in this suit. Dynegy has collected, reviewed and produced all the hard-copy documents in Dynegy's files regarding the transaction and has retrieved electronically thousands of pages of emails from the Dynegy personnel involved in the transaction.

As of this filing, Enron has produced approximately fifteen boxes of documents relating to the merger transaction and three CDs related to transactions involving Mahonia Ltd. Enron has represented that it expects to produce an enormous number of additional documents soon, including documents related to the merger that were seized by the Federal Bureau of Investigation, emails from the electronic files of the Enron employees who worked on the transaction, some eleven hundred boxes of documents produced to the government in the course of the numerous investigations of Enron's collapse, and an unknown number of documents concerning Enron's recent Form

8-K filing, in which it disclosed the need for downward adjustments to risk management assets and asset write downs totaling \$22-24 billion.

The Parties have made little progress on documents relevant to Enron's trading operations. Access to these documents is critical to begin taking depositions. Dynegy has agreed to produce information concerning its trading with Enron and has made specific proposals about the form that production might take. Enron has not responded to those proposals. Nor has Enron's counsel been able to provide information about what trading data and documents Enron will ultimately produce, although counsel has advised us that efforts are underway to determine what information is available for production. At this time, we cannot estimate the volume of materials to be produced regarding trading. Dynegy's proposed scheduling order extends the document production period two weeks to give Enron time to resolve these issues.

Despite ongoing negotiations, substantial areas of disagreement remain. First, the Parties do not agree about the date that depositions should commence. Although both sides initially agreed to commence depositions in June, Dynegy has proposed extending the start date to July 24, 2002, which Plaintiffs oppose. Dynegy's proposal is clearly justified. Given the current state of Enron production and uncertainties about when critical documents will be produced, depositions cannot realistically begin in June.

Dynegy also asked, as a matter of professional courtesy, to postpone commencement of depositions for a short period to allow Dynegy executives to devote their full attention to managing some of the complex issues confronting the company in

the short term.<sup>1</sup> As a compromise, Dynegy offered to consider Enron's scheduling certain third party depositions before July 24 provided that counsel could confirm that they had turned over Enron's documents relevant to such depositions. Plaintiffs have not responded to that offer. Dynegy's proposed scheduling order therefore provides for depositions to begin on July 24 and ties other deadlines to that date.

Dynegy proposed, as a starting point for discovery in addition to document production, that the Parties exchange requests for admissions and interrogatories before depositions begin in order to narrow the issues and authenticate documents. To stay on the aggressive schedule that Dynegy wants and Enron professes it wants, Dynegy suggested that each side agree to respond to this written discovery within twenty days of service. To date, Enron has not responded to Dynegy's proposal. Nevertheless, Dynegy has now served requests for admissions and interrogatories and intends to serve more this week. The proposed scheduling order contemplates an expanded number of interrogatories for each party and an abbreviated response time for requests for admission and interrogatories.

Despite ongoing negotiations, the Parties have not reached complete agreement on a confidentiality agreement to govern discovery in this case.

Finally, Dynegy has suggested repeatedly that discovery in this case should begin in an orderly fashion, focusing first on issues most likely to lead to early summary judgment. Enron has refused to engage with us in a dialog about what evidence it contends supports its claim that Dynegy somehow engineered Enron's downfall.

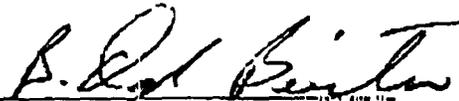
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<sup>1</sup> Dynegy, like every company in the sector, has come under scrutiny and has experienced business set backs as a result of the Enron implosion. As has been widely reported, Dynegy is currently working very hard to respond to government inquiries.

Dynegy therefore filed a motion on June 7, 2002, attached as Exhibit B to this memorandum, to have the Court conduct a hearing to determine the course, order and timing of discovery. As reflected in Dynegy's proposed scheduling order, we believe that the hearing should take place in June so that the Parties will know the order in which discovery is to proceed as they schedule and prepare for depositions.

For the foregoing reasons, Dynegy respectfully requests entry of the attached scheduling order.

Respectfully submitted,



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ATTORNEYS FOR DYNEGY INC. AND  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been provided to the following counsel of record on this 10th day of June 2002:

Mr. John Strasburger  
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B. Daryl Bristow

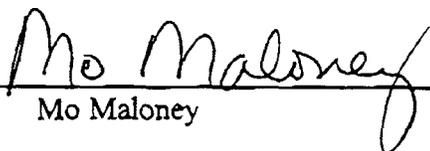
DECLARATION OF SERVICE BY E-MAIL, FACSIMILE OR UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on June 25, 2002, declarant served the foregoing document by sending via e-mail, facsimile or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of June at San Diego, California.

  
Mo Maloney

The Service List  
Attached  
to this document  
may be viewed at  
the  
Clerk's Office