CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
12/08/04
MICHAEL N. MILBY, CLERK
BY DEPUTY H. Zipper

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

United States Courts
Southern District of Texas
ENTERED
DEC 09 2004
Michael N. Milby, Clerk of Court

IN RE ENRON CORPORATION	§	
SECURITIES, DERIVATIVE, &	§	MDL-1446
"ERISA" LITIGATION	§	
	§	
	§	
This Document Relates to	§	
MARK NEWBY, ET AL.,	§	
PLAINTIFFS,	§	
	§	CIVIL ACTION NO. H-01-3624
VS.	§	AND CONSOLIDATED CASES
	§	
ENRON CORPORATION, ET AL.,	§	
DEFENDANTS.	§	
	§	

PRELIMINARY INJUNCTION

Pending before the Court are two requests for Preliminary Injunction. The first, filed pursuant to 28 U.S.C. §§1335 and 2361 and Rules 22 and 65 of the Federal Rules of Civil Procedure, is requested by Greenwich Insurance Company, certain underwriters at Lloyds London subscribing to insurance certificate no. 901/LK9802531, St. Paul Mercury Insurance Co., Federal Insurance Co., Royal Insurance Co. of America, Ace Bermuda Insurance, Ltd., Associated Gas & Electric Insurance Services, Ltd., Energy Insurance Mutual, Limited, and Kemper Indemnity Insurance Company (collectively, the "Excess Insurers"), with respect to the policies which are subject of the Excess Insurers' action in Interpleader, and has been joined

M & H

by Third-Party Plaintiffs/Counterclaim Defendants Robert A. Belfer, Norman P. Blake, Jr., 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 A. Urquhart, John Wakeham, Charls E. Walker, Herbert S. Winokur, Jr., and Rebecca Mark-Jusbasche (collectively, "the Settling Parties"). This injunction seeks the entry of an order enjoining all Third-Party Counterclaim Defendants[1] to the Excess Insurers' Interpleader Action – including but not limited to Third-Party Counterclaim Defendants Ken L. Harrison, Michael Krautz, Scott

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[1] The Third-Party Counterclaim Defendants are Robert A. Belfer; Norman P. Blake, Jr.; 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 A. Urquhart; John Wakeham; Charles E. Walker; Herbert S. Winokur, Jr.; Rebecca Mark-Jasbasche; Jeffrey Ader; Daniel Allegretti; Thomas Alonso; Sheil Armsworth; John Arnold; Harpreet S. Arora; Berney C. Aucoin; Robert Badeer; James G. Barnhart; Eric P. Bass; J. Clifford Baxter; Diane Bazelides; Philip Bazelides; Sally W. Beck; Timothy N. Belden; Robert Benson; Brian Bierbach; Donald W. Black; Kelly Boots; James Bouillion; Dan O. Boyle; William S. Bradford; Sandra F. Brawner; Craig A. Breslau; Aaron Brown; Michael Lynn Brown; Robert Butts; Richard Buy; Christopher F. Calger; Michelle H. Cash; Richard A. Causey; Paul Choi; Lawrence Clayton, Jr.; Douglas Clifford; Wesley Colwell; Mary Ellen Coombe; Sean R. Crandall; Keith Crane; Martin L. Cuilla; Michael J. Curry; Ken Daniels; Steve Daniels; Mark Davis; Joseph Deffner; David W. Delainey; James V. Derrick, Jr.; Tim Despain; Timothy J. Detmering; Frank J. Ermis; Rodney Faldyn; James B. Fallon Andrew S. Fastow; Mark S. Fischer; Christopher Foster; Mark A. Frevert; Robert Scott Gahn; Christopher Gaskill; William D. Gathmann; Dana R. Gibbs; Douglas Gilbert-Smith; John Gillis; Ben F. Glisan, Jr.; Eric Gonzales; Michael D. Grigsby; William Gulyassy; Guatam Gupta; Daniel Haas; Mark E. Haedicke; Kevin P. Hannon; Claibourne L. Harris; Kenneth L. Harrison; Rod Hayslett; Timothy Heizenrader; Robert J. Hermann; Rogers Herndon; Joseph Hirko; Keith A. Holst; Stanley C. Horton; Kevin A. Howard; David R. Hultsman; Robert W. Jones; Mary K. Joyce; Sheila Kahanek; Wincenty J. Kaminsky; Steven J. Kean; Jeff King; Sheila Knudsen; Mark E. Koenig; Michael J. Kopper; Michael W. Krautz; Lawrence Lawyer; Kenneth L. Lay; Linda Lay; Andrew Lewis; Tod A. Lindholm; John Llodra; Laura L. Luce; David Lund; Richard Lydecker; Kathy Lynn; Lori L. Maddox; Michael J. Maggi; Thomas A. Martin; R. Davis Maxey; Lawrence J. May; Gay Mayeux; Michael S. McConnell; Kevin McConville; Sandra McDonald; Bradley T. McKay; Jonathan McKay; Jeffrey McMahon; Peggy B. Menchaca; Mark J. Metts; Todd Migliore; Narsimha Misra; Steven Montovanno; Kristina Mordaunt; Matthew H. Motley; Mark S. Muller; Theodore Murphy, II; Julia Heintz Murray; Scott Neal; Jesse Neyman; James Noles; Cindy K. Olson; Lou L. Pai; Michael K. Patrick; Alfred F. Pennisi; Paulo Ferraz Pereira; James S. Prentice; Kevin M. Presto; Paul H. Racicot, Jr.; Marian E. Ragland; Susan C. Ralph; Michael Ranz; Mikie Rath; Anthony Ravosa, Jr.; Brian L. Redmond; Kenneth D. Rice; Jeffrey Ricter; Paula Rieker; Rex Rogers; Stewart Rosman; Jeanette M. Rub; Kevin Ruscitti; Molly M. Sample; James E. Schweiger; Rex T. Shelby; John Sherriff; David Shields; Hunter Shively; Jeffrey K. Skilling; Stuart W. Staley; Robert Stalford; Geoffrey C. Storey; Fletcher J. Sturm; John D. Suarez; Colleen Sullivan-Shaklovitz; Joseph W. Sutton; Michael J. Swerzbin; Mark E. Taylor; Jane M. Tholt; Jacob S. Thomas; Barry L. Tycholiz; Frank W. Vickers; Robert C. Vote; Rickey L. Waddell; Steve H. Wang; Terry Ward; Greg Lawrence Whalley; Thomas White; Lloyd J. Will; Bruce Willison; Scott Yeager; Ann Yeager-Patel; Richard G. DiMichelle; Patrick Mallory; David J. Ryan; and Marlin Stokely.

Yeager, and Kevin Howard — and anyone claiming an interest in the proceeds of certain excess directors and officers insurance policies issued by the Excess Insurers to Enron (the "D&O Insurance") with actual notice of this order from prosecuting or initiating any lawsuits or arbitration proceedings (including but not limited to the Harrison and EBS Criminal Defendants' actions in the Southern District of New York) relating to the D&O Insurance, the Excess Insurers, or the *Newby* and *Official Creditors' Committee* settlements until further order of this Court.

Separately, and pursuant to the first-filed action relating to this issue, the Settling Parties seek a preliminary injunction enjoining the Excess Insurers from disbursing any funds from their policies until the Court determines whether the proposed Settlements of the claims in *Newby* and *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow, et al.*, No. H-04-0091 should be funded by the proceeds of the D&O Insurance. This injunction is sought in order to preserve sufficient D&O Insurance proceeds against erosion while the Court considers whether these two settlements should be funded. After considering the applications for temporary restraining orders and preliminary injunctions, briefs in support and in opposition, as well as the pleadings, affidavits, and other evidence, the Court concludes that both applications have merit and therefore finds and orders as follows:

Subject Matter Jurisdiction

This Court has subject matter jurisdiction over both applications under both 28 U.S.C. § 1335 and 28 U.S.C. § 1367(a). The statutory interpleader action filed by the Excess Insurers is within the original jurisdiction of the Court pursuant to 28 U.S.C. §1335. There are two or more

claimants to the Enron D&O Insurance that are of diverse citizenship. *See id.* at §1335(a)(1). The Settling Parties include citizens of Connecticut, Montana, Maryland, and various foreign countries, and none are residents of Washington, where Harrison, an adverse claimant to the policy proceeds, resides. The amount in controversy requirement is met, because at issue in the interpleader are Excess Insurance policies with a collective limit of liability of $200 million. *Id.* The Excess Insurers sought and obtained, on December 2, 2004, the entry of an order lifting the stay in Enron's bankruptcy to permit them to fund the interpleader. Enron and the Creditors Committee withdrew their objection to the Excess Insurers' motion to lift the stay filed in the United States Bankruptcy Court for the Southern District of New York. The Excess Insurers have unconditionally tendered the full amount of their policy limits, to be paid as directed by the Court. *See* Excess Insurers' Interpleader Action at ¶221. The Court has jurisdiction and the authority under 28 U.S.C. §1335 and 28 U.S.C. § 2361 to control the interpleaded policy proceeds, so that the various claims to funding from the D&O Insurance may be resolved in one court, in a manner that eliminates the risk of inconsistent determinations concerning which of the insureds is entitled to receive what portion of the policy proceeds, and for what purpose.

This Court also has supplemental jurisdiction under 28 U.S.C. § 1367 over the Settling Parties' Third-Party Claims, the Insurers' Interpleader Action, and the Settling Parties' Counterclaims asserted in response to the Insurers' Interpleader Action, because the claims in those actions are so related to the claims in *Newby* and the *Official Creditors' Committee* cases that they form part of the same case or controversy under Article III of the United States Constitution. Claims for indemnity are within the ancillary jurisdiction of the federal courts. *See* 28 U.S.C. §1367 ("supplemental jurisdiction shall include claims that involve the joinder or

intervention of additional parties"); *see also W.R Grace & Co. v. Continental Casualty Co.,* 896 F.2d 865, 870 (5th Cir. 1990) ("clearly proper" use of ancillary jurisdiction to bring insurers into a case during settlement negotiations); *Zurn Indus. Inc. v. Acton Const. Co.*, 847 F.2d 234, 238 (5th Cir. 1999) (multiple insurers and indemnitors brought into the case through ancillary jurisdiction); *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970)("action for indemnity...would not exist without the threat of liability arising out of the original claim"); *Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 436-37 (2d Cir. 2000)("It is well-settled that a third party action for indemnification comes within a court's ancillary jurisdiction."). Federal supplemental jurisdiction is therefore present pursuant to 28 U.S.C. §1367.

In addition, the Excess Insurers have invoked their right to interplead the policy proceeds pursuant to Fed. R. Civ. P. 22 and have requested entry of an injunction to protect them against vexatious litigation pursuant to Fed. R. Civ. P. 65. The Excess Insurers' request for a preliminary injunction on these grounds has been joined by the Settling Parties. By virtue of the supplemental jurisdiction present pursuant to §1367, the Court has jurisdiction of the Rule 22 interpleader action. It therefore has jurisdiction to enter an injunction to protect the interpleaded insurance policies against collateral litigation instituted in other courts or forums by parties to the proceedings now pending in this Court. *See New Jersey Sports Productions, Inc. v. Don King Enterprises, Inc.*, 15 F. Supp.2d 534, 545 (D.N.J. 1998).

Neither the policies' arbitration clauses nor the forum selection clause would deprive this Court of subject matter jurisdiction to control the proceeds of the D&O Insurance while it

determines which of the various claimants is entitled to receive them. *See Aetna Cas. & Surety Co. v. Ahrens*, 414 F.Supp. 1235, 1242 (S.D. Tex. 1976)(noting that court had provisional jurisdiction to issue an interpleader injunction while it determined other, preliminary issues such as whether the parties were of diverse citizenship).

Injunction Against the Filing of Other Suits

On October 12, 2004, the Settling Parties as Third-Party Plaintiffs filed an action in this Court concerning the D&O Insurance Policies. On October 18, 2004, following notice and a hearing, this Court issued a temporary restraining order preventing Third-Party Defendant Greenwich Insurance Company from disbursing any funds under its excess policy.

On October 20, 2004, Defendant Harrison filed an action in the Southern District of New York, seeking declaratory and injunctive relief related to the D&O Insurance Policies. On October 22, 2004, a second action was filed in the Southern District of New York by Michael Krautz, Scott Yeager, and Kevin Howard ("the EBS Defendants"). The EBS Defendants' suit mirrors many of the allegations made in the Harrison suit, and likewise seeks declaratory and injunctive relief related to the policies.

Actions relating to the D&O Insurance and its proceeds, such as the suits by Harrison and the EBS Defendants in the Southern District of New York, seek to affect the subject matter of the interpleader action before this Court. As such, they interfere with this Court's jurisdiction, and violate the policies and purposes of the interpleader statute. They also interfere with the earlier filed Third-Party Action, as well as this Court's October 18, 2004 Temporary Restraining Order

and with the Court's preliminary injunction regarding preservation of the policy proceeds, which is set forth below.

A balance of harm analysis is not required for the entry of an injunction pursuant to 28 U.S.C. § 2361. *See Holland America Ins. Co. v. Succession of Shepherd J. Roy*, 777 F.2d 992, 997 (5th Cir. 1985)(distinguishing injunction under §2361 from standards required to issue injunction under Fed. R. Civ. P. 65). Instead, an interpleader injunction may issue so long as the proceeding sought to be enjoined "affect[s] the property, instrument or obligation involved in the interpleader action." 28 U.S.C. §2361. The reach of the interpleader injunction statute is broad, in that it authorizes a court "in any civil action of interpleader" to "issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property ...involved in the interpleader action." *Id. See also Aetna Cas. & Surety Co. v. Ahrens*, 414 F.Supp.1235, 1242 (S.D. Tex. 1976)(noting that the interpleader statute vests "extraordinary authority" in a district court "in order to permit orderly determination of the appropriate distribution of proceeds from [the interpleaded] fund and to avoid multiple, vexatious litigation as to the fund").

The Court finds that the entry of a preliminary injunction preventing the institution or prosecution of suits affecting the D&O Insurance policies would in no way harm anyone claiming a right to the D&O Insurance proceeds. Any such claims can be considered and resolved by this Court in the context of the interpleader, and sufficient funds necessary to satisfy such claims (should the Court find that they must be satisfied) will be preserved while the interpleader is pending. Thus, this Court finds that no bond should be required.

Independently of its authority under 28 U.S.C. § 2361, the Court also finds that the requested preliminary injunction on litigation affecting the D&O Insurance is warranted under Rules 22 and 65 of the Federal Rules of Civil Procedure. Under the traditional standard, an applicant for a preliminary injunction must establish: (1) a substantial likelihood of success on the merits of its claim; (2) a substantial threat of irreparable injury or harm for which there is no adequate remedy at law; (3) the threatened injury to applicant outweighs any harm that the injunction might cause to defendants; and (4) the injunction will not disserve the public interest. *DSC Communications Corp. v. DGI Techs., Inc.,* 81 F.3d 597, 600 (5th Cir.1996); *Cherokee Pump & Equip., Inc. v. Aurora Pump,* 38 F.3d 246, 249 (5th Cir.1994); *Canal Auth. of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir.1974).

In this case, all four criteria support entry of the requested preliminary injunction on litigation or any other proceedings involving the D&O Insurance. First, having tendered the limits of their respective policies to the Court based on their conclusion that the proceeds are subject to conflicting and mutually exclusive demands among the insureds, the Excess Insurers are likely to prevail on their request for a discharge from all further obligations under or relating to the policies. *See Metro. Life Ins. Co v. Barretto*, 178 F. Supp. 2d 745, 747-51 (S.D. Tex. 2001). Moreover, in this case, the underlying claims against the various insureds clearly contain claims that, in the aggregate, far exceed the available remaining limits of liability provided by the Excess Insurers' D&O Insurance Policies.

Second, the Excess Insurers face a substantial threat of irreparable injury and harm if the conflicting demands for the policy proceeds by the insureds are not coordinated in a single

proceeding to adjudicate the insureds' respective rights to the remaining limits of the policies. In this regard, the Excess Insurers face a substantial threat of the entry of inconsistent orders or judgments against them by different courts or tribunals concerning the use or distribution of the proceeds of the D&O Insurance. To date, the Excess Insurers have been named as defendants in three suits filed in two jurisdictions in connection with the D&O Insurance. The problems of multiple and vexatious litigation against the Excess Insurers are present in this case.

Third, the threatened injury to the Excess Insurers created by such threat of inconsistent orders and judgments outweighs any harm that the injunction might cause to defendants. While injury to the Excess Insurers arising from multiple and vexatious litigation and the possibility of inconsistent orders would be severe, the insureds retain their rights to assert their claims to the proceeds of the D&O Insurance in the context of the interpleader.

Finally, an injunction on litigation involving the D&O Insurance in other forums will serve the public interest by facilitating the prompt and efficient resolution of the competing claims to the proceeds of the D&O Insurance in a single forum.

For these reasons, and pursuant to 28 U.S.C. § 2361 and Rules 22 and 65 of the Federal Rules of Civil Procedure, the Court ORDERS that all Third-Party Counterclaim Defendants to the Excess Insurers' Interpleader – including but not limited to Third-Party Counterclaim Defendants Ken L. Harrison, Michael Krautz, Scott Yeager, and Kevin Howard — and anyone claiming an interest in the proceeds of the D&O Insurance Policies issued by the Excess Insurers with actual notice of this order are restrained from prosecuting or initiating any actions or arbitration proceedings (including but not limited to the Harrison and EBS Defendants' actions

in the Southern District of New York) relating to the D&O Policies issued by the Excess Insurers to Enron Corporation, the Excess Insurers, and/or the *Newby* and *Official Creditors' Committee* settlements until further order of this Court; provided, however, that all parties enjoined may make their claims to the proceeds of the D&O Insurance in the context of the interpleader action pending before this Court.

Injunction Regarding Preservation of Policy Proceeds

The Settling Parties also seek a preliminary injunction enjoining the Excess Insurers from disbursing any funds from their respective layers of insurance – other than payments directed by the Court in connection with the pending Excess Insurers' Interpleader Action – until the Court determines whether the proposed Settlements of the claims in *Newby* and *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow, et al.*, No. H-04-0091 must be funded from the D&O Insurance. After considering the Settling Parties' applications for temporary restraining orders and preliminary injunctions, the parties' briefs, pleadings, affidavits and other evidence, the Court finds as follows.

The Settling Parties have shown that they have a substantial likelihood of success on the merits. The Settling Parties have reached settlements with the plaintiffs in *Newby* and in *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow, et al.*, No. H-04-0091. Taken together, these settlements require funding by at least $200 million of proceeds from the Excess Insurance and, as of the entry of this Order, there remain sufficient proceeds in the Excess Insurance to fund these settlements because the TRO entered by this Court prevented payment of invoices submitted prior to the presentation of the settlement demands. Claims for such matters

can be presented and resolved in the Interpleader. The D&O Insurance Policies are indemnity policies whose limits may well be exhausted by the settlements. The Excess Insurers agree that their policies have been fully impaired as a result of the settlements that have been presented to them, and have agreed to tender their limits and pay them in accordance with the direction of the court. The non-settling insureds under the D&O Insurance policies, however, had claims prior to such settlements and have continued to incur and make demands for the payment of defense costs despite the pendency of these settlements. Some of the non-settling insureds have filed, or have threatened to file, actions in other jurisdictions or in arbitration, that seek to compel the Excess Insurers to continue to fund defense costs even if doing so will deplete the policy proceeds necessary to fund the settlements. Without further action by this Court, there is an imminent risk that the Excess Insurers may be subjected to conflicting demands and orders while this court is evaluating whether payment of the *Newby* and *Official Creditors' Committee* settlement amounts should be made from the interpleaded policies. Such orders compelling payment would imperil, and perhaps extinguish entirely, the Settling Parties' Settlements. Moreover, the defense cost invoices presented after the original Third-Party complaint was filed, and the filing of collateral litigation against the Excess Insurers, creates an imminent risk of inconsistent adjudications concerning the right to use the policy proceeds to fund the *Newby* and *Official Creditors' Committee* settlements.

The Settling Parties also have shown that there is a substantial, imminent threat that they will suffer irreparable injury if the injunction is denied. Under the insurance policy, the Excess Insurers and the Insureds are required to "cooperate in the investigation, settlement, and defense of" claims. While the Excess Insurers, by filing their action in interpleader, have taken steps to

protect the policy proceeds, they cannot protect the Settling Parties against collateral litigation that seeks to compel them to disburse to others the insurance proceeds they have interpleaded in this Court. The obligation of cooperation with respect to settlements would be meaningless if the Excess Insurers were forced to deplete the policy proceeds by paying defense costs or other demands that were submitted to them after these settlements. Settling Parties' ability to settle might be extinguished as a result of further erosion of the remaining policy proceeds due to the payment of defense costs, or by the entry of inconsistent orders in the pending lawsuits filed by Defendant Harrison and the EBS Defendants.

Erosion of the limits provided by any of the Excess Insurers' policies would irreparably injure the Settling Parties because if the insurance proceeds is not available to fund the settlements, the settlements may be terminated. This would irreparably injure the Settling Parties because, if the settlements fail, the Settling Parties would be left exposed to massive excess potential liability that they would have avoided if they had been able to consummate their settlements; would be forced to continue to litigate claims as to which they could have otherwise bought peace; and would have little hope of fully recovering the policy proceeds paid out as defense costs or in other settlements or otherwise obtaining a satisfactory recovery of such lost funds through litigation.

This injury is imminent, in that the policy proceeds are being depleted at a rapid rate, the Twin City layer underlying the Greenwich layer has been or imminently will be exhausted, and claims for defense costs have accumulated both before and after the *Newby* and *Official Creditors' Committee* settlements were submitted that seek funding from the Greenwich layer.

Thus, in the absence of an injunction, the insurance proceeds necessary to fund the might be exhausted by the payment of defense costs, before the Court can determine whether these settlements should be approved and paid.

The Settling Parties have shown that this threatened injury outweighs any damage that the injunction might cause the Excess Insurers or other insureds under the Policies. The Excess Insurers will suffer no harm from the entry of an order restraining them from making payments under their D&O policies other than payments required or in connection with the pending Interpleader Action. While there may be some delay in payment, that brief delay will not harm the non-settling insureds, and any perceived harm is outweighed by the significant and irreparable harm that will be inflicted on the Settling Parties if the policy proceeds are depleted before this Court can determine whether the settlements should proceed.

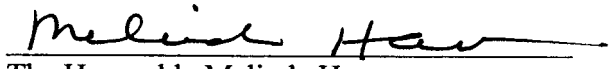
The Settling Parties have shown that the injunction serves the public interest. It will encourage settlement, as well as provide time for the Court to consider whether the settlements should be funded by the policy proceeds, as has been requested in the Insurers' action in interpleader. The Court further finds that, in the exercise of its discretion, no bond will be required.

The court finds that the D & O Insurers' unconditional tender of the D & O Proceeds, and their request for direction concerning where those proceeds should be deposited, satisfies the deposit requirement of the federal interpleader statute, 28 U.S.C. Section 1335. The Parties are ordered to submit a designated depository, and an appropriate form of escrow agreement

specifying the accounts to receive the interpleaded funds, within ten days of the entry of this Order in accordance with Fed. R. Civ. P. 67 and 28 U.S.C. Section 2041.

For these reasons, the Court ORDERS that the Excess Insurers, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are restrained from disbursing any funds under the D&O Insurance Policies issued to Enron other than payments as directed by the Court in connection with the Excess Insurers' Interpleader Action until further order of this Court.

Signed on December 8th, 2004, at 1:50 p.m.



The Honorable Melinda Harmon
U.S. District Judge