

MINUTES OF PROCEEDINGS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Date: **September 4, 2008** :

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In re: :

Enron Creditors Recovery Corp., et. al., :

Reorganized Debtors. :

Chapter 11
Case No. 01-16034 (AJG)
(Jointly Administered)

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Enron Creditors Recovery Corp., et. al., :

Plaintiff, :

v. :

Mass Mutual Life Insurance Co. et al., :

Defendants. :

Adversary Proceeding
No. 03-92682

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Present: Hon. Arthur J. Gonzalez
Bankruptcy Judge

Courtroom Deputy

ECRO
Court Reporter

Appearances:

<u>Name</u>	<u>Firm</u>	<u>Representing</u>
Howard P. Magaliff, Esq.	Togut, Segal & Segal, LLP One Penn Plaza, Suite 3335 New York, NY 10119	Enron Creditors Recovery Corp.
Karel S. Karpe, Esq.	White & Williams, LP One Penn Plaza, Suite 1801 New York, NY 10119	Veritas Software Investment Corp.
	-and-	
Michael E. Klingler, Esq.	Bialson, Bergen & Schwab 2600 El Camino Real, Suite 300 Palo Alto, CA 94306	Veritas Software Investment Corp.

Proceeding: Motion for an Order for Filing of Joinder

Order: For the reasons set forth in Exhibit "A" attached hereto, the Motion is denied.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez
United States Bankruptcy Judge

09/04/2008
Date

Jacqueline De Pierola
Courtroom Deputy

EXHIBIT "A"

Veritas Software Investment Corporation (referred to as "Veritas") has filed a Motion for Filing of Joinder (the "Veritas Motion"), seeking an order that the document captioned "Defendant Veritas Software Investment Corporation's Joinder to (1) the Mass Mutual Defendants' Motion for Summary Judgment, (2) With Exceptions, That Portion of Defendant Goldman Sachs & Co.'s Motion for Summary Judgment Related to § 546(e), and (3) That Portion of Kelly Properties, Inc.'s Motion for Summary Judgment Relating to Earmarking and Collapsing Defenses" (the "Veritas Joinder") be deemed timely filed.

Veritas is a defendant in the *Enron v. Mass Mutual Life Insurance Company* adversary proceeding, number 03-92682 (the "Adversary Proceeding"). By prior order the Court set a deadline of April 29, 2008 for the filing of dispositive motions in the Adversary Proceeding. Notwithstanding that order, the Veritas Motion admits that the Veritas Joinder was not filed with the court until, at the earliest, June 26, 2008, when it was delivered via Federal Express. The Veritas Joinder was not entered on the docket in the Adversary Proceeding until it was appended as Exhibit A to the Veritas Motion under docket number 838 on July 29, 2008, and was not separately docketed until August 27, 2008, when it was assigned docket number 870.

The Veritas Motion asserts that Veritas's failure to properly file the joinder at the time of service was due to excusable neglect under the Supreme Court's rationale in *Pioneer Investment Services Company v. Brunswick*. Veritas cites the retirement of its then local counsel, for the failure to file.

However, as Enron Creditor Recovery Corporation ("Enron") correctly notes in its Opposition to Veritas Software Investment Corporations Motion for Filing of Joinder

(the "Opposition"), the focus of the Veritas Motion misses the point. What the Veritas Motion completely fails to address is the nearly two-month period that elapsed between the dispositive motion deadline and the filing and service of the Veritas Joinder.

The principal case addressing untimely filing, cited by both Veritas and Enron is the Supreme Court's ruling in *Pioneer*. In *Pioneer*, the Supreme Court enumerated the following factors to determine whether a late filing would be permitted for excusable neglect under Bankruptcy Rule 9006(b)(1): "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 507 U.S. at 395.

Applying the *Pioneer* factors to the Veritas Joinder, it is apparent that the danger to Enron is high. Enron's deadline to file its response to the summary judgment motions was only one day after the filing of the Veritas Joinder, and Enron did not have time to adequately respond to the Veritas Joinder, particularly because the Veritas Joinder was not merely a "me-too" joinder, but adopted various elements of several summary judgment motions and referenced various deposition citations not previously addressed by Enron and now would have to be addressed if the Veritas Motion were granted.

The length of the delay was significant, nearly sixty days. The Court is forced to speculate as to the reason for the delay, as Veritas simply did not address its significant delay in filing the Joinder; however, the Court notes the fact that many other defendants were able to file joinders on the April 29, 2008 deadline for filing dispositive motions strongly suggests that Veritas's delay was unnecessary. There is no dispute that Veritas's

counsel was served with the summary judgment motions, so it is apparent that the delay was wholly within Veritas's control.

Although Veritas contends that some time was necessary to assimilate the various grounds asserted for summary judgment and determine which applied to Veritas's circumstances, the fact that many other defendants were able to file joinders undermines that argument. Further, if Veritas needed an extension of time to file the Joinder, it could have and should have sought an extension of time rather than merely delaying its filing.

The last element under *Pioneer* is whether the movant acted in good faith. There is no evidence that Veritas did not act in good faith.

Considering all of the *Pioneer* factors, the Court determines that Veritas has not demonstrated that its delay in filing the Veritas Joinder was due to "excusable neglect." Accordingly, relief is denied.

The Veritas Motion is denied without prejudice to file a summary judgment motion following the rulings on the pending summary judgment motions.