

9 OCT 4 2002

Michael N. Milby, Clerk

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

MARK NEWBY, *et al.*

Plaintiffs,

v.

ENRON CORP., an Oregon corporation,
et al.,

Defendants.

CIVIL ACTION NO. H 01-3624 ✓
AND CONSOLIDATED CASES

PAMELA M. TITTLE, on behalf of herself
and a class of persons similarly situated, *et al.*,

Plaintiffs,

v.

ENRON CORP., an Oregon corporation,
et al.,

Defendants.

CIVIL ACTION NO. H 01-3913
AND CONSOLIDATED CASES

DEFENDANT KEN L. HARRISON'S OBJECTIONS TO PLAINTIFFS' JOINT
MOTION TO ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY

DEFENDANT KEN L. HARRISON'S OBJECTIONS TO PLAINTIFFS' JOINT MOTION TO
ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY - 1

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I. INTRODUCTION

1. Defendant Ken L. Harrison respectfully requests one of two results from this Court: 1) denial of Plaintiffs' Joint Motion to Enter Order Establishing Document Depository and, instead, entry of the form of Document Depository Order attached hereto as Ex. A¹, or 2) entry of the Order attached to the Plaintiffs' Joint Motion but alter it by making the following changes by interlineation: Section IV.A.1. (Depositing Documents and Preparing Indices; Required Format; Hard Copy/Paper Documents), delete ",if any" after "Folder" in the list of required fields and replace footnote 2 in its entirety with the sentence, " 'Folder' is the lowest level of identifiable source of the document, e.g. John Doe's Correspondence File", and in Section IV.C.1.(Depositing Documents and Preparing Indices; Privilege Logs; General Privilege Log Requirements), add to the list of required index information after "Document Date", "Folder", and add footnote definition "'Folder' is the lowest level of identifiable source of the document, e.g. John Doe's correspondence file." The proposed changes by interlineations are depicted on the attached Ex. B.

II. DISCUSSION

2. Since shortly after the entry of the Court's February 27, 2002, Scheduling Order, the parties have worked diligently to come to agreement on an order establishing the document depository. Counsel for Mr. Harrison was a participant in those discussions. We believe that the Proposed Order submitted by Plaintiffs is seriously flawed in one critical respect – it allows parties to produce millions of documents in such a way that no organizational structure to the document production will be apparent and thus renders the production essentially unmanageable because the documents will have been effectively scrambled. The Proposed Order fails to

¹ The attached Ex. A is identical to Plaintiffs' Proposed Order except that the interlineations set forth herein have been incorporated.

require the minimum care needed to establish an indexing system that will allow receiving parties to determine which documents need to be reviewed.

A. The Flaw In The Proposed Order And The Suggested Remedy.

3. There is much that is unprecedented about this litigation, not the least of which is the document production. Although the precise volume of overall production cannot be known, all parties agree that tens of millions of pages of documents will be produced to the depository. Extraordinary resources will be expended by producing and receiving parties in dealing with the onslaught.²

4. We cannot - and do not intend to - review every document that is produced in this case. We doubt that any party can or ever will review all these millions of pages. Recognizing the immensity of the task ahead, the parties have attempted to compose an order to deal with it. Under Plaintiffs' Proposed Order, all produced documents – hard copy and electronic – will be "imaged," *i.e.* converted into a computer file, and Bates-stamped during the imaging process. Each producing party will also provide an index to the imaged documents that sets out beginning and ending Bates numbers, document date, document type (*e.g.*, "correspondence" or "contract"), author and recipient(s), and other facts concerning production. The parties refer to this indexed information as "basic coding." The purpose of basic coding is to allow the parties to sort and search the coded fields to find relevant documents so that those selected documents can be reviewed. There is undoubtedly much chaff among the wheat, and the parties should make every reasonable effort to efficiently separate the two.

5. What is lost in the conversion from a physical production of boxes and file folders filled with paper to a computerized production of document images is the organizational

² Although Mr. Harrison will not be a significant producing party, he will, like every other party, face the challenge of reviewing the produced documents.

structure of the documents - that is, what files exist and which documents are in which of those files. That problem is created in Plaintiffs' Proposed Order because absent from the basic coding proposal is any requirement on the producing party to state where any document came from. In cases involving far fewer documents, that would not be a problem because it is a common practice for attorneys to review original documents and compare them with the copies. This way, the internal organization of the documents is clearly apparent and can be noted on the copies.³ It simply is not practical for the original documents to be reviewed in this case. Thus, greater care must be taken to capture the organizational structure (what files were produced and which documents were in which files) of the documents, rather than conceal that structure in the "imaging" process.

6. We believe that the basic coding must include a description of the lowest level of identifiable source of the document, such as "John Doe's correspondence file" or "Enron North America's centralized file on Raptor I." As proposed in Plaintiffs' Order, no amount of searching the images of the produced documents themselves or the index will reveal the source of the documents.

7. The producing parties will no doubt contend that the receiving parties could target their searches and review of the documents by reliance on the substantive coded fields that the producing parties have agreed to provide: document date; document type (*e.g.* correspondence or contract); and author and/or recipients.⁴ But this assertion is wrong. Being able to identify

³ The problem of the lack of a source identifier for the documents is exacerbated by another provision of the order concerning original documents. Paragraph IV.B. provides that, if a party chooses, it may deliver original documents without Bates numbers to the Administrator, who will image the documents and return the originals to the producing party. Thus, the depository will not contain a complete set of original documents. Even if a receiving party wanted to review original documents to discern organizational structure so that he could make decisions about which documents to review, he would not be able to.

⁴ These are the only substantive fields in the Required Format that will have any utility in baseline document review. The other fields in the proposed order are beginning and ending document number, date produced, producing party, location in the physical depository, CD or

every document authored by Ken Lay has limited utility. Being able to identify which documents are from Ken Lay's files is imperative. Being able to identify every document received by Kristina Mordaunt has limited utility. Being able to identify and review her Southhampton Place file is essential. There may well be documents in that file that do not bear Ms. Mordaunt's name either as author or recipient. Hence, without requiring the producing party to identify the name of each of her files and the Bates range of all documents contained therein, it will simply not be possible to identify and review her entire Southhampton Place file. Only the producing parties have the information necessary to identify the source of the produced documents.

8. Plaintiffs may even argue that the Proposed Order is sufficient because it requires producing parties to image the folder labels and therefore the index will indicate how the documents are segregated from one another in the files of the producing party. This argument is also wrong. First, there is no indication that every file folder or other organizational document has been or will be imaged. There is certainly no requirement in the proposed Order that that happen. Second, even if file folder labels were imaged, coded and indexed, the file folder labels probably will not reveal the source of the documents. For example, it is likely that Mr. Lay's correspondence file is simply labeled "correspondence," not "Mr. Lay's correspondence." Without identification of the source of the documents, the requesting parties will have very little ability to efficiently search the records for relevant documents.

B. Case law and common sense support the imposition of an obligation on the producing party to identify the source of the document.

9. The sheer number of documents in this case requires additional measures to ensure that the documents can be reviewed in an efficient manner, consistent with the purposes

DVD number and whether the image has been withheld for privilege. Plaintiffs' Proposed Order, paragraph IV.A.1.

of the Federal Rules. "The case law * * * makes it clear that discovery must be produced in a manner to facilitate the mandates of Rule 1, Fed. R. Civ. P., regarding the just, speedy and efficient resolution of disputes." *Bonilla v. Trebol Motors Corp.*, 1997 U.S. Dist. LEXIS 4370 *220 (D. P.R. 1997), *rev'd in part on other grounds*, 150 F.3d 88 (1st Cir. 1998). "Even if [the producing party] is producing the documents as they are kept in the normal course of business, which [the requesting parties] dispute, [the requesting parties] are entitled to ask that they be produced in an orderly fashion consistent with the goals of the Federal Rules to determine all relevant facts quickly and efficiently." *Id.* at *222-23.

10. It is not uncommon for federal courts to order the producing party to take additional steps to identify relevant documents when, otherwise, the party would be producing a mass of documents that would be difficult if not impossible for the requesting party to review effectively. "[P]roducing large amounts of documents in no apparent order does not comply with a party's obligation under Rule 34." *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, *610, *613 (D. Neb. 2001) (ordering producing party to either supply an index system and paralegal or other staff person to assist the requesting party's counsel in reviewing 146,832 documents housed in a court-ordered repository, or to produce all responsive documents organized and labeled by request number, at the requesting party's choice). "This method of conducting discovery does not conform to the letter, spirit, or purposes of the Federal Rules, 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at *611 (quoting FRCP 1). "[W]here as here the state of the corporation's records would make it unreasonably burdensome for the discovering party to search for the sought-after documents, the burden falls on the discoveree to organize the documents so that the discoverer may make 'reasonable use' of them." *Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp.*, 1987 U.S. Dist. LEXIS 868 (S.D.N.Y. 1987); *see also T.N. Taube Corp. v. Marine Midland Mortg. Corp.*, 136 F.R.D. 449, 455-56 (W.D.N.C. 1991) (stating that it "simply is not feasible to expect [the requesting party] to wade through a

mass of documents in a vain attempt to locate relevant information" and ordering the producing party to organize the documents in order to satisfy "the purposes of discovery, and basic considerations of fairness"); *Board of Educ. Of Evanston Township High School Dist. No. 202 v. Admiral Heating & Ventilating, Inc.*, 104 F.R.D. 23, 36 (N.D. Ill. 1984) (requiring producing party to segregate certain key documents from its production; "In this case the burden to a stranger of rummaging through what may be massive job files to find the 'smoking gun,' coupled with the inculpatory nature of the documents covered by the request, justifies placing the burden on the discovered rather than discovery party."); cf. *White v. U.S. Catholic Conference*, 1998 U.S. Dist. LEXIS 11872 *6 (D.D.C. 1998) (stating, in context of interrogatory response, "The case law convinces me that the federal courts have always found wanting discovery responses, like [the producing party's], which are so unspecific that they require the other party to wade through an undifferentiated mass of materials to find the answer.").

11. The Texas Court of Appeals has also approved of the trial court ordering a producing party to take additional organization steps when necessary to make the documents reasonably useable by the requesting party. See *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 456 (Tex. App. 1991) (affirming trial court's order that producing party, who had already provided documents as kept in the usual course, provide "a more responsive answer" and quoting approvingly from 8 C. Wright & A. Miller, Fed. Prac. and Pro. (West Supp. 1991) that Rule 34(b) "should not be read as giving the party from whom discovery is sought an absolute option to produce records as kept in the usual course of business. He should be required to produce them in a form that will make reasonable use of them possible.").

12. In this case, the parties have already agreed that the producing party must image its documents and provide basic coding. Requiring source location identifiers in the basic coding information is the key to allowing Mr. Harrison and the other receiving parties to make reasonable use of the tens of millions of electronic images that will be produced.

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13. Difficulty and expense of production have routinely been rejected by the courts as excuses for non-production. In a case in which the producing party argued that it would require a "herculean effort" to locate the responsive documents, the court concluded that "[t]he defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules." *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) (plaintiff requested defendant produce records of similar complaints). The cases show that Rule 34 imposes a duty to produce documents in a manner in which they can reasonably be used by the opponent.

14. It is not unusual at all for a producing party to be required to go to great lengths to make its computer-stored material useable by the requesting party. For example, parties have been ordered to use their computers to translate data into readable form and have been ordered to make their computer personnel available to the opponent to explain their programs. *See* 8 C. Wright & A. Miller, § 2218 and cases cited therein. It would be a bizarre outcome in this case to obligate, for example, Arthur Andersen to provide the receiving parties the software necessary to extract the embedded formulas in its spreadsheets but to deprive them of knowing whose files the spreadsheet came from.

15. This situation – where documents are being proposed to be produced without a system for identifying from whence they came - is similar to that situation where the party on whom interrogatories are served simply points in the direction of a mountain of documents and tells the inquiring party, "have at it". In that circumstance, the Court would evaluate three factors: cost; the nature of the records; and the responding party's familiarity with its own

documents. *T.N. Taube*, *supra*, 136 F.R.D. at 455-56. This case illustrates the importance of the third factor - the producing parties' familiarity with their own documents. It can't seriously be disputed that this work must be done – the parties must be able to know the source of the documents. This is not information that is equally accessible to the parties, and the only question is which party should bear the burden of extracting it. This information is only available to the producing parties and they should be obliged to provide it to the requesting parties. The cost to the group, as a whole, will be much lower if the Court places this burden on the party most familiar with the documents.

III. CONCLUSION

16. Our proposed Order, attached as Ex. A, differs from Plaintiffs' Proposed Order in only one respect: It obligates the producing party to state, if the information is available, the lowest level of identifiable source of the document. For the reasons stated herein, defendant Ken L. Harrison respectfully requests that this Court DENY Plaintiffs' Joint Motion to Enter Order Establishing Document Depository and instead enter the form of Document Depository Order attached hereto as Ex. A. In the alternative, Mr. Harrison requests that this Court enter the Order attached to the Plaintiffs' Joint Motion after making the following changes by interlineations (as depicted on Exhibit B): Section IV.A.1. (Depositing Documents and Preparing Indices; Required Format; Hard Copy/Paper Documents), delete ",if any" after "Folder" in the list of required fields and replace footnote 2 in its entirety with the sentence, " 'Folder' is the lowest level of identifiable source of the document, e.g. John Doe's Correspondence File" and Section IV.C.1.(Depositing Documents and Preparing Indices; Privilege Logs; General Privilege Log

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Requirements), add to the list of required index information after "Document Date", "Folder" and add footnote definition "'Folder' is the lowest level of identifiable source of the document, e.g. John Doe's correspondence file."

Respectfully submitted,

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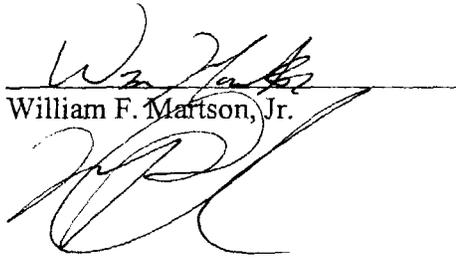
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CERTIFICATE OF SERVICE

I certify that on the 4th day of October 2002, a true and correct copy of
**DEFENDANT KEN L. HARRISON'S OBJECTIONS TO PLAINTIFFS' JOINT
MOTION TO ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY** was
served by posting the same to the website pursuant to the Order entered by United States District
Judge Melinda Harmon, Southern District of Texas, Houston Division, in Civil Action No. H-01-
3624 (Consolidated Cases) (Instrument No. 819).


William F. Martson, Jr.

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**DEFENDANT KEN L. HARRISON'S OBJECTIONS TO PLAINTIFFS' JOINT MOTION TO
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The Exhibit(s) May
Be Viewed in the
Office of the Clerk

The Service List

May be Viewed in

the Office of the Clerk