United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

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

MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO. H-01-3624
	§	(CONSOLIDATED)
vs.	§	
	§	
ENRON CORP., ET AL.,	§	
	§	
Defendants.	§	

ENRON CORP.'S OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

Plaintiffs seek unprecedented and extraordinary relief: a ruling from this Court that none of the millions of documents that are to be produced in this litigation may be kept confidential, regardless of the competitively sensitive nature of those documents, Plaintiffs seek the authority, at their sole discretion, to act as the arbiter of what documents are published, many of which were originally produced to governmental agencies in response to the most heavily scrutinized criminal and civil investigations in a generation. Plaintiffs do so despite the common practice, and vast authority, for precisely the opposite approach: the use of umbrella-style protective orders at the commencement of pre-trial discovery. Courts routinely enter these orders, especially where they are necessary to the orderly and expedient flow of pretrial discovery.

Enron Corp. ("Enron") has produced millions of pages of documents to various governmental agencies, all of which this Court has ordered to be produced into the document depository in this case. The agencies which are conducting investigations not only of Enron but a multitude of individuals and other companies include Congress, several states including California

1076

and Oregon, and a panoply of executive branch agencies, including the FERC, the CFTC, the IRS, the SEC, and the DOJ. These bodies are investigating a broad spectrum of conduct, including securities and commodities trading, rate proceedings, and potential criminal and civil violations unrelated to any claim asserted by the plaintiffs in these cases. As is demonstrated below and by the attached affidavit, these broad inquiries have caused Enron to produce millions of pages of documents, many containing confidential and competitively sensitive information, that have no relevance to the claims made by the plaintiffs in this or the *Tittle* case.

In order to cooperate and timely comply with all governmental requests, Enron produced a multitude of material – literally millions of pages of documents – to the government in their entirety, without specific review for the confidentiality or competitively sensitive nature of the documents being produced. Enron was able to produce these documents in this manner to the governmental agencies because the documents were produced subject to confidentiality agreements and/or statutory provisions requiring the confidential treatment of such information. Given this Court's timetable for the prosecution of this and the *Tittle* case, Enron cannot possibly review these documents for confidentiality and then produce them in a timely manner.

Plaintiffs assert that this is a unique case that requires plaintiffs to ensure that the public, through this litigation, learns the lessons of what happened at Enron. Plaintiffs are correct about the uniqueness of the case, but not about their role or the need for it. Congress, the agencies of the Federal Government, and the governments of the various states are already fulfilling that role. They, along with the press, have spent the better part of a year tutoring the public in what occurred at Enron. In fact, plaintiffs rely heavily on the governmental investigations and press reports in making their claims. The protection of Enron's confidential information in these lawsuits will in no way prevent the public education that plaintiffs profess to desire.

The issue before the Court is not plaintiffs' desire to try its case through the public by selective disclosure of documents, but rather what procedural guidelines will best serve the Court's goal of efficiently and expeditiously trying plaintiffs' claims in these cases. Enron thus proposes that the Court enter a protection order that treats all documents as confidential for purposes of the pretrial discovery phase of these cases, and prohibits the use of these documents for any other purpose, or the publication of these documents to the world at large. Enron's proposed protective order, attached to this brief as Exhibit B, gives plaintiffs the right to seek to publish any documents that plaintiffs, in good faith, believe are relevant to their claims in this case. The producing party would then have time to review those documents and object to any that it believes requires protection under Rule 26(c) of the Federal Rules of Civil Procedure. The burden of proof would remain with the producing party.

Absent the entrance of a protective order along these lines, Enron simply cannot comply with the ambitious deadlines set for these cases. This brief outlines (1) why the Court has the authority to enter a protective order, (2) why the court should enter a protective order, and (3) why the protective order entered should be an umbrella order as outlined above.

A. A Protective Order Is A Common Tool of Litigation That This Court Is Fully Empowered to Adopt

A collection of other defendants in this case have filed a global response to plaintiffs' motion with a case by case refutation of plaintiffs' broad and erroneous assertions of the public's right to review all documents produced in the discovery phase of civil litigation, which Enron adopts and to which Enron refers this Court. In this section of its brief Enron will simply make the following three points about the Court's authority to issue a protective order: (1) it has that authority; (2) first

amendment concerns are not applicable; and (3) any common law right of access by the public does not apply to pretrial discovery.

1. The Federal Rules Grant Protective Order Authority

Despite their extensive quotations regarding the rights of the public, plaintiffs admit, as they must, that this Court has broad discretion to enter a protective order.

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . .
>
> (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

Fed. R. Civ. P. 26(c). While Enron in its opposition is most concerned with documents of a proprietary and commercially sensitive nature, it should be noted that Rule 26(c) is not limited to these category of documents but explicitly allows the Court to consider protecting any category of documents "for good cause shown." *See, e.g., Cipollone v. Ligget Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986); *Phillips v. General Motors.*, 289 F.3d 1117 (9th Cir. 2002).

Where the issue is trade secrets and competitively sensitive information, the Supreme Court has indicated that "courts have refused to permit their files to serve as ... sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Communications*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312 (1978). The presence of trade secrets in court records, much less in pretrial discovery that has not been filed with the Court, weighs against any public right of access. *See, e.g., Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 166 (3rd Cir. 1993).

2. The First Amendment Is Not a Concern

In support of their extraordinary request, plaintiffs offer two slender arguments for their contention that all documents be made public. Neither are at issue in this matter and plaintiffs motion should be denied. First, plaintiffs argue that the First Amendment requires disclosure. First Amendment concerns, however, are not implicated with regard to general discovery as opposed to documents that the Court may have relied on in making decisions on the merits of the case. The Supreme Court has held that a protective order entered into pursuant to the requirements of the rules of civil procedure (Rule 26(c)) "does not offend the First Amendment." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S. Ct. 2199, 2209-10 (1984). As one circuit Court has noted, the holding by the Court in *Seattle Times* was peremptory: it leaves no room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) protective orders. *See Cipollone*, 785 F.2d at 1119.

The discovery process is a statutorily created forum not traditionally open to the public. *Seattle Times*, 467 U.S. at 32, 104 S. Ct. at 2208; *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987). As explained more fully below, Congress and the press have shown maximum interest in the events at Enron, and can fully protect the public interest while this Court and the parties before it can focus on the expeditious examination of the claims and defenses in these cases.

3. The Common Law Right of Access Does Not Apply to Pretrial Discovery

Secondly, Plaintiffs assert that the federal common law rights of access to court records should prevent this Court from entering a protective order. This common law right of access, however, applies only to court records, not all documents produced in pretrial discovery regardless of whether used in the case. *See, e.g., Seattle Times*, 467 U.S. at 27, 104 S. Ct. at 2207-08 (pretrial

discovery are not public components of a civil trial, and were not open to the public at common law); *In re Alexander Grant*, 820 F.2d at 352 (private documents collected during discovery are not judicial records); *In re The Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1335-36 (D.C. Cir. 1985) (Scalia, J.) (exhaustive review of the historical record indicates no public right of access to pre-judgment records in private civil cases). *See also Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980).

While there is some debate in the Courts as to what precisely constitutes a judicial record subject to a public right of access, that debate is not presently before this Court. The issue raised by the plaintiffs is their desire to publish every document (or, better stated, every document that they deem worthy of publication) that is produced in these cases. Enron's proposed protective order will allow any party to propose publication of documents upon which they seek to rely, and which might be relied upon by the Court in any ruling on the merits. Plaintiffs simply have no support for their assertion that the public has a common law right of access that prevents this Court from issuing a protective order.

B. The Court Should Enter An Order Protecting The Parties' Confidential and Competitively Sensitive Information

A protective order is necessary to ensure efficient and expedient procedures in this case. Enron, pursuant to this Court's orders, will soon be producing into the document depository millions of pages of documents, much of it without relevance to any issue raised by the plaintiffs. These pages contain proprietary and commercially sensitive information that deserves protection. Moreover, plaintiffs fail to enunciate any legitimate reason why there is a need for them to be the arbiter of what the public learns about what happened at Enron. In this unique case, the government has fulfilled that role and continues to do so.

1. Enron's Proprietary and Commercially Sensitive Information Needs Protection

Attached as Exhibit A to this brief is the Affidavit of Robert C. Williams, a Managing Director at Enron. The affidavit sets forth the history of the production of documents to various governmental agencies, and details four categories of documents that Enron believes contain proprietary or commercially sensitive information, or other information the release of which would harm Enron and the estate. Williams Aff. at ¶ 10. Because the Court has ordered production in these cases of all documents produced to governmental agencies by Enron, a protective order is necessary.

The requests that Enron received from various governmental agencies were extremely broad in nature, requiring broad production by Enron to the government in order to timely respond. Williams Aff. at ¶¶ 5-6. In doing so, Enron produced all sorts of proprietary and commercially sensitive information, information that, if released to the public, could harm Enron, the Estate, and potentially third parties.

First, competitors or trading partners of Enron could use Enron's proprietary information to Enron's disadvantage. Enron and its largest assets continue to operate as going business concerns under the bankruptcy laws. Williams Aff. ¶ 11. Enron has produced proprietary information including contractual term and rate information, database information detailing transactional data for all of Enron's natural gas, energy, and other commodity trades, information as to how Enron analyzes markets, including price curves and daily position reports, and Enron trading and risk management strategies. *Id.*

Plaintiffs assert that Enron has no need to protect its business secrets because it will become a different company then it was before bankruptcy. Plaintiffs miss the point. Not only does Enron itself continue trading positions and use of proprietary information, Enron continues to have an

interest in its former trading business (now operated by UBS AG), through a 33% interest in the pre-tax profits of that business. Williams Aff. ¶ 12. Enron would be financially harmed if UBS is harmed through the release of proprietary information regarding its trading, much of which was produced to the government.

Second, Enron is currently in the process of determining what bids it can accept for its largest assets. If proprietary information regarding those assets is released to the public, the value of those assets to the Estate could be reduced. Williams Aff. ¶¶ 14-15.

An example is Portland General. Its proprietary negotiating positions and market analyses have been produced to the government. The value of Portland Electric as a going concern would be reduced if this information was made public. Williams Aff. ¶ 15.

Third, Enron is party to hundreds of contracts with third parties that require Enron to keep the details of those contracts, and any transactions conducted under them, confidential. Enron has produced to the government these contracts, and information about the transactions conducted under them. Williams Aff. ¶ 16. Enron would be in breach of its obligations under these contracts if it were to allow the public dissemination of this information.

Fourth, Enron is involved in various ongoing disputes. Enron has produced confidential information to the government regarding these disputes to which the opposing parties do not have a right. Disclosure of these documents could adversely affect Enron in these disputes. Williams Aff. ¶ 17.

An example is Enron's dispute with Pacific Gas & Electric, where Enron is seeking hundreds of millions of dollars in underpayments that Enron is entitled to collect under the regulatory scheme of California. Enron has produced to the government legal analyses of this dispute, to which Pacific Gas & Electric is not entitled. *Id.* Absent a protective order, Enron will not be able to prevent

plaintiffs from posting these memoranda on their web site where Pacific Gas & Electric will have ample opportunity to read them.

The Williams Affidavit demonstrates that Enron has significant confidential, proprietary information that requires protection. Plaintiffs' surmise to the contrary is wrong.

2. Plaintiffs Have Not Demonstrated A Countervailing Need

Plaintiffs assert that through this litigation they need to serve the public interest by being the arbiter of what information is released to the public about the events at Enron. Plaintiffs are simply not needed in this capacity. In short, Congressional and other governmental investigations surrounding Enron have provided ample public disclosure of the events that are the basis of plaintiffs' lawsuit. Plaintiffs' complaint is largely based on the findings and public disclosures made by these investigations.

Moreover, the initial production of documents by Enron in these cases will not be made pursuant to specific requests by the plaintiffs, but rather will be the documents produced to the government. This production is in the millions of pages. It is beyond argument that the government has been diligent, indeed zealous, in its investigation of Enron, and that the public can get its information through those investigations. *See, e.g., In re Consumer Power Company Sec. Lit.*, 109 F.R.D. 45, 54 (E.D. Mich. 1985). Plaintiffs seek to fulfil a role that has already been taken by the government. Their participation is not necessary.

This litigation should focus on the claims and defenses of the parties, not plaintiffs' perceived need to defend the public interest. Plaintiffs' proposed class is represented by competent counsel and named representatives. Plaintiffs have failed to articulate why the prosecution of their claims will suffer in any respect if they are not allowed to publish the entirety of pretrial discovery in this case.

C. The Court Should Enter An "Umbrella" Protective Order

The question remains, what type of protective order should the Court enter? Enron submits that in this highly complex litigation, with dozens of parties and millions of documents, an aggressive scheduling order, and facing complicated pretrial discovery,[1] the Court should govern discovery through an "umbrella" protective order that covers all of the pretrial discovery produced in the case, but allows plaintiffs the right to submit to the producing party relevant documents that they seek to publish. The producing party would have the right to submit argument to the Court for any document that it believes should remain under the protective order.

Furthermore, because of the nature in which Enron produced documents to the government, the umbrella order should deem all documents produced in the litigation confidential, and maintain that confidentiality absent plaintiffs going through the procedures to lift the protective order on specific documents contained in the protective order.

1. Courts Routinely Use Umbrella Protective Orders In Complex Litigation

> When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication.

Manual For Complex Litigation, Third § 21.432 (Federal Judicial Center 1995). Courts have cited the Manual in support of entering umbrella protective orders. *See, e.g., In re Alexander Grant*, 820 F.2d at 356; *Cipollone*, 785 F.2d at 1122 (commenting on how the Manual makes clear that the umbrella approach has several advantages over the document-by-document approach); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981).

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[1]Assuming, of course, that the plaintiffs' claims survive the pending motions to dismiss.

Courts routinely adopt or approve umbrella-style protective orders. *See, e.g., In re Agent Orange*, 96 F.R.D. 582 (E.D.N.Y. 1983); *Chambers v. Browning Ferris*, 104 F.R.D. 133 (W.D. Pa. 1985); *Leucadia*, 998 F.2d at 166; *In re Korean Air Lines Disaster of September 1*, 597 F. Supp. 621 (D. D.C. 1984); *In re Reporters Comm.*, 773 F.2d 1325. In *In re Consumers Power Company Sec. Lit.*, 109 F.R.D. 45 (E.D. Mich. 1985), the Court outlined its reasoning why at the start of complex litigation of great public interest, umbrella orders are necessary to the smooth functioning of the case:

> The evolution of a case in litigation involves increasing degrees of public visibility. In its final chapter with the full trial, the relevant facts have been marshaled for public review and resolution in a court. . . . The present order covers information exchanges at the earliest phase of the litigation. It restricts disclosure of documents or their contents only to those persons involved in the litigation. It permits future use of such documents in more public chapters of the litigation.

Id. at 54-55.

This is even more the case where much of the documents to be produced will be irrelevant to the case. As the Williams Affidavit makes clear, Enron has produced documents to the government on a vast scale on issues that have nothing to do with this litigation. Williams Aff. ¶¶ 5-8. Where, as here, documents produced in pretrial discovery are likely to be irrelevant and inadmissable at the trial of the case, an umbrella order is particularly relevant. *See, e.g., In re Alexander Grant*, 820 F.2d at 355-56. That Court went on to discuss the overall efficacy of umbrella orders:

> The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular government. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large number of

> documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be "filed" for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial. Judicial review will then be limited to those materials relevant to the legal issues raised. History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery.

Id. at 356-57. These concerns are precisely the concerns that justify the adoption of an umbrella order in this case.

2. The Court Should Adopt Enron's Proposed Protective Order

Enron's proposed protective order, attached as Exhibit B, deems all documents produced to the document depository to be used solely for purposes of these cases, and would prevent any party from automatically publishing any document. Instead, a party would have the right to seek permission from the Court to publish a document so long as that party believed in good faith that the document was relevant to its claims or defenses in these cases, and the producing party would be able to challenge the lifting of the protective order as to any document. The producing party would still carry the burden of proving good cause for a protective order to remain effective over a particular document.

The difference in Enron's protective order from that proposed by other defendants is that all documents would be treated as confidential unless challenged. The particular, unique circumstances of production in this case demonstrates that good cause exists for the Court to adopt Enron's proposal.

As detailed in the Williams Affidavit, Enron was forced by the governmental demands for timely production to produce millions of pages of documents without a document-by-document review. Williams Aff. ¶ 8. Thus Enron is unable to identify where in the production to the government confidential material may exist.

This Court has set an ambitious pretrial schedule for the parties to follow, as well as an aggressive trial date. Enron is unable to conduct a document-by-document review of the millions of pages produced to the government and still produce those documents into the document depository in a timely manner. Williams Aff. ¶ 9.

There is precedent for the Court proceeding in the manner proposed by Enron. In the *Agent Orange* case, all documents were treated as confidential at the onset of the litigation. As the Court noted, "the special master indicated that he based his determination that good cause exists for the order on the 'complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date.'" *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983). The Court went on to note that such a protective order was justified by the fact that the broad discovery encouraged by the Federal rules of necessity results if the production of many documents that will not be used at trial. *Id.* at 584. As discussed above, the circumstances of Enron's production to the government will result in the production of a staggering amount of irrelevant documents.

Other courts have allowed the parties to similarly produce all or the vast majority of their documents as confidential. *See, e.g., Zenith Radio Corp.*, 529 F. Supp. at 875. In that case, the Court recognized the propriety of issuing an umbrella protective order which resulted in all or almost all documents protected in the initial stages of complex litigation:

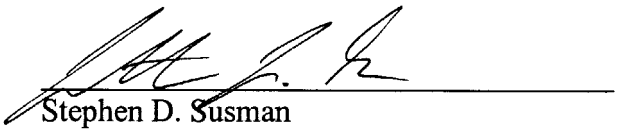
> The propriety and desirability of protective orders securing the confidentiality of documents containing sensitive commercial information that are the subject of discovery in complex cases is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order similar to PTO 35 has not been agreed to by the parties and approved by the Court.

Id. at 889.

Enron's proposed protective order achieves the Court's desire to expeditiously commence discovery in this case. It allows the plaintiffs to assert that certain relevant documents should be made public. Enron respectfully requests that the Court deny plaintiffs' motion and enter Enron's proposed protective order.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: 

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CERTIFICATE OF SERVICE

I, Jonathan J. Ross, hereby certify that on the 14th day of October, 2002, the foregoing was served by e-mail or facsimile on the attached service list.

Jonathan J. Ross

The Service List

May be Viewed in

the Office of the Clerk

The Exhibit(s) May

Be Viewed in the

Office of the Clerk