

U.S. District Courts
Southern District of Texas

OCT 15 2002

Michael N. Miloy, Clerk

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.

PAMELA M. TITTLE, on Behalf of Herself and
a Class of Persons Similarly Situated,

§ Civil Action No. H-01-3913
§ (Consolidated)

Plaintiffs,

vs.

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

Defendants.

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

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I. Preliminary Statement

On September 26, 2002, Lead Counsel in *Newby* and *Tittle* filed plaintiffs' joint motion to establish the document depository, which detailed the various efforts to obtain an agreement of all the parties, and which followed the September 20 posting of Draft No. 26 to the Web site, accompanied by the notice attached as Ex. A. As detailed in the attached Declaration of Jerrilyn Hardaway, Mr. Harrison's objections to the proposed depository Order are dilatory in every respect. Despite his participation in the negotiations, he never made the seriousness of his concerns known until filing his motion. More importantly, even had he done so his objection would remain. **First**, the folder field is not essential to identify documents that should be reviewed or to reasonably use them. **Second**, the cost and delay caused by the mandatory insertion of the folder field are unjustifiably high because there is a much less costly, faster and more reasonable alternative to getting source information. **Third**, the case law he cites does not address the circumstances of this case, particularly in light of the schedule the Court has set for discovery and the enormous costs associated with identifying documents with the detail that Mr. Harrison seeks.

II. Argument

A. The Proposed Order Is Not Severely Flawed

Mr. Harrison contends that the proposed Order is seriously flawed because the parties will not be able to determine which documents need to be reviewed. But the details Mr. Harrison seeks through a "folder field," information he refers to as the "lowest level of identifiable source of the document," would not only fail to segregate the most important information, but from a practical point of view is far too detailed to require.

While Mr. Harrison is concerned that the document production will be unstructured or scrambled, the proposed Order requires each Producing Party (as that term is defined in the proposed Order) to prepare a very detailed index containing the following fields:

- Beginning Bates/Document Number
- Ending Bates/Document Number
- Document Date (if appearing on the face of the document)
- Folder, if any**
- Type of document, *i.e.*, "correspondence" or "contract"
- Author(s) and Recipient(s), including "cc's" (if appearing on the face of the document)

Date Produced to the Depository*
Producing Party*
Location in Physical Depository (*i.e.*, Box Number)*
CD or DVD volume number*
Whether image withheld for privilege (Y/N) (for documents imaged prior to this Order)

*These fields will be added to the index by the Depository Administrator.

**This field is entirely optional and any Producing Party may decide, in its complete discretion, to leave this field blank for any portion of, or for the entirety of, that Producing Party's production. To the extent that a Producing Party determines to leave this field blank, the Depository Administrator will be informed of that fact and will not attempt to complete this field with respect to documents produced by such Producing Party. To the extent a Producing Party wishes to provide information about a document in the "folder" field, this field should be completed to reflect the information, if any, from the label on the folder, if any, that contains that document.

Proposed Order at 5-6.

To support his contention that this very detailed indexing is "useless," Mr. Harrison provides examples: "Being able to identify every document authored by Ken Lay has limited utility. Being able to identify which documents are from Ken Lay's files is imperative."¹ But that is not what Mr. Harrison actually seeks. Instead, he wants a much more detailed, rigorous review of the "folders" that were in Mr. Lay's possession, custody, and control and a catalogue of the same. While plaintiffs agree that identifying Lay's files is a good idea, we understand from defendants, including Enron, that given the state and volume of documents in this case, the benefit of identifying "folders" is outweighed by the cost and delay inherent in generating them. Moreover, the proposed index already makes Enron's production searchable for "Ken Lay." And a simple interrogatory that asks all documents from Mr. Lay's office to be generally indexed by bates number would insure that all documents associated with Mr. Lay would be sufficiently identified.

In addition, where there are folder labels, they will be scanned and indexed as separate documents as a matter of routine. Lex Solutio captures much of that information as scanning takes place unless the administrator receives specific contrary instructions. Though there is not yet a requirement to do so, the Enron production previously forwarded for review in the *Titlle* case

¹Mr. Lay and Ms. Mordaunt were chosen as examples by Mr. Harrison. Plaintiffs' response is also by way of example.

contained scanned file folders (where a folder existed) and the production contained an index (though not in the exact format required in the proposed Order).

Finally, the purpose of the index is not intended to capture every detail, but to organize the documents for their reasonable use, nothing more. There will no doubt be much chaff among the wheat, but the attorneys will necessarily have to review the documents to distinguish the two.

B. Mr. Harrison's Request Is Impractical and Burdensome

Mr. Harrison's original suggestion was impractical for a majority of defendants because it would have required them to either re-scan millions of pages of documents or to manually match original documents to scanned documents for the purposes of creating a single folder field within the index. Thus, it would have meant that most of the work done on the Related Documents to date had to begin again. And even though some defendants favored including the field at the outset, the majority came to agree that the cost involved, as well as the inevitable delay in production, was simply not worth any advantage that the added folder field would provide.²

For example, Enron has already produced millions of pages to numerous requesting parties. This additional field would require it to either begin again, or hire someone to manually determine the folder field – one page at a time. A much more reasonable alternative is simply to allow Enron to respond to an interrogatory asking for a general identification by bates number of the general source, by personnel and department, of those documents. The parties will then be able to insert this information in the indices if they desire, along with any other identifying information they deem necessary upon reviewing the documents.

Allowing Mr. Harrison's objection to dictate a change in the proposed Order would make it the proverbial tail that wagged the dog. The magnitude of production in this case is unprecedented, perhaps as much as 25 million documents. Mr. Harrison's description of himself as not "a significant producing party" is an understatement. Of those millions of produced pages, he is expected to contribute *fewer than 1,000* – not even half of a banker's box. His counsel would impose on all other defendants an indexing scheme that will indeed make production unimaginably expensive –

²Cost estimates for inclusion of the folder field are provided on Ex. B.

but not for Mr. Harrison. Under the terms of the proposed Order, he will not be required to bear any of the expenses incurred as a result of *his* insistence on the additional index field.

C. Mr. Harrison's Case Law Is Distinguishable

Mr. Harrison would require a heightened level of detail so that he might determine which documents merit his attention. To support his request, he cites eight cases, but none of them dictate endorsing his objection in this case.

Ironically, he first cites a ruling on a motion for sanctions against one of several defense counsel for conduct "vexatiously and unnecessarily multiplying the proceedings in the case at bar."³ He cites *Bonilla* for the proposition that "[t]he 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."⁴ But much more germane is the preceding paragraph: "[defendant] has produced over 100 boxes of documents with information concerning all types of makes, models and years mixed together. The issue is whether Plaintiff *can compel [defendant] to produce its index and to produce said documents in an orderly fashion*."⁵ Because the index already existed, the *Bonilla* court was deciding whether to compel its production. Likewise, Mr. Harrison cites a case where the producing party directed the requesting party to 146,832 documents with no index provided. In a third case, defendants produced no documents, no index – nothing – and two of them claimed that the other was in possession of the documents.⁶ His arguments are misplaced. In short, the producing parties in *Newby* and *Tittle* have already agreed to produce a detailed index and these cases have no bearing on where or how the documents will be organized and indexed.

Mr. Harrison's citation of *Taube* is misleading, where the court stated: "It simply is not feasible to expect Plaintiff to wade through a mass of documents in a vain attempt to locate relevant

³*Bonilla v. Trebol Motors Corp.*, No. 92-1795 (JP), 1997 U.S. Dist. LEXIS 4370, at *1 (D.P.R. Mar. 27, 1997).

⁴*Id.* at *219.

⁵*Id.* (emphasis added).

⁶*Wagner v. Dryvit Sys.*, 208 F.R.D. 606 (D. Neb. 2001).

information."⁷ But the court was referring to Fed. R. Civ. P. 33(c) and the issue was the producing parties' *refusal to answer interrogatories*, choosing instead to refer the requesting party to "an undifferentiated mass of records."⁸ Nothing in the proposed depository Order refers to interrogatories. Mr. Harrison also attempts to apply the three-prong test typically reserved for Rule 33 cases to a document production issue. Again, his reliance on *Taube* is misplaced.⁹

Mr. Harrison's reliance on another Rule 33 case,¹⁰ which again refers to responses to interrogatories and only vaguely to a problem with discovery responses – the producing party refused to answer interrogatories, insisting that the answers were available from the documents previously produced – has no bearing on *Newby* or *Tittle*.

Simply stated, in most of Mr. Harrison's cases there exists some egregious circumstance for which plaintiffs sought relief or sanctions: In *Bonilla*, documents were produced in Swedish with no translations; in *Wagner and Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp.*, No. 85 Civ. 5399-CSH, 1987 U.S. Dist. LEXIS 868 (S.D.N.Y Feb. 9, 1987), there was no index at all; and in *Taube*, the producing party refused to organize the documents in any way. In the other cases, the facts are so far removed from *Newby* and *Tittle* that their comparison makes no sense; in *Admiral Heating*, the very existence of the documents sought was inculpatory – document organization was secondary to their production; and *White* is a Rule 33 case, distinguishable because the producing party refused to answer interrogatories.

III. Conclusion

The document depository is needed now. The administrator is in place. The parties are already experiencing delays that could easily result in increased cost of litigation for all parties. Mr. Harrison's indexing requirement will slow production of documents to the point that the Court's February 27 Scheduling Order cannot be met. That one minor player should be allowed to force

⁷*T.N. Taube Corp. v. Marine Midland Mortg. Corp.*, 136 F.R.D. 449, 455 (W.D.N.C. 1991).

⁸*Id.* (citation omitted).

⁹Objection at 9.

¹⁰*White v. U.S. Catholic Conf.*, No. 97-1253 (TAF/JMF), 1998 U.S. Dist. LEXIS 11872 (D.D.C. July 10, 1998).

upon all other parties a requirement that even plaintiffs agree is onerous has no justification. Moreover, his eleventh-hour attempt to derail more than seven months of negotiations – in which his counsel actively participated – is irresponsible. Mr. Harrison was not ignored. His suggestion, in its original form, was simply unacceptable to those parties whose document production in this matter is exponentially more voluminous, and thus far more expensive, than seeking general source information through an interrogatory to the producing parties.

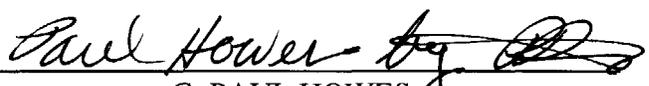
Consequently, Lead Plaintiffs in *Newby* and *Tittle* request that the Court overrule Mr. Harrison's objection. Lead Plaintiffs in *Newby* and *Tittle* also reurge their Joint Motion to Enter Order Establishing Depository Order filed on September 26, 2002, which proposed Order was approved by the following defendants: Arthur Andersen, L.L.P., Enron, The Northern Trust Company, Kirkland & Ellis, Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick, III, Bank of America, Merrill Lynch & Co., Deutsche Bank AG, Credit Suisse First Boston Corporation, Citigroup, Inc., Salomon Smith Barney, Inc., Lehman Brothers Holding, Inc., Barclays Bank PLC, Canadian Imperial Bank of Commerce, J.P. Morgan Chase & Co., Jeffrey Skilling, Philip J. Bazelides, Mary K. Joyce, James S. Prentice, Rebecca Mark-Jusbasche, Kenneth Lay, James V. Derrick, Jr., Robert A. Belfer, Norman, P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Charles A. LeMaistre, Wendy L. Gramm, Robert K. Jaedicke, Charls E. Walker, John Wakeham, John Mendelsohn, Paulo V. Ferraz Pereira, Frank Savage, Herbert S. Winokur, Jr., Jerome J. Meyer, John A. Urquhart, William D. Gathmann, Andrew Fastow, Lou L. Pai, Joseph Sutton, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Stanley C. Horton, Kevin

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DATED: October 15, 2002

Respectfully submitted,

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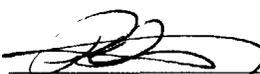

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Exhibit "A"

After months of negotiation and multiple drafts, which have circulated among the Plaintiffs, the Banks and Law Firms, Enron, Andersen and the Enron Insureds, we have finally come to an understanding on nearly every aspect of the Depository Order. At the moment, only Andersen has stated that they are unable to agree to the terms of this Order. While we cannot yet represent that each individual within a reviewing group has agreed, we can say that we believe this Order to be as close to a consensus of the parties as we will be able to accomplish. For those of you not affiliated with one of reviewing groups that would like to be added as a proponent of the Order, please contact either Jerri Hardaway, Milberg Weiss or Joanna Hamrick, Nickens Keeton. We anticipate that this document will be filed with the Court late Monday afternoon, September 23rd. Please call if you have any questions.

Jerri Hardaway
713-228-2044

Joanna Hamrick
713-353-6671

EXHIBIT A

EXHIBIT "B"

Document Estimate	Document Prep \$ 0.15 per page	Adding One Field to Existing Index and Capturing Beginning and Ending Document No \$ 22 per document*	Branding Image with Unique Number \$ 01 per page	Data Input \$40.00**	Burning CD/Roms of resorted tiff files \$15.00 each	Man Hours To Produce Index
Arthur Andersen database	195000	572000	130000	1040000	16250	26000
Arthur Andersen scanned 97-01 workpapers	2070	6072	1380	11040	172.5	276
Arthur Andersen 97-01 workpapers to be scanned	Will be incurred under proposed Order	30448	Will be incurred under proposed Order	Will be incurred under proposed Order	Will be incurred under proposed Order	Will be incurred under proposed Order
Arthur Andersen 95 and 96 to be scanned	Will be incurred under proposed Order	15400	Will be incurred under proposed Order	Will be incurred under proposed Order	Will be incurred under proposed Order	Will be incurred under proposed Order
Enron	75000	220000	50000	400000	6250	10000
Nine Banks (Conservative Estimate)	300000	880000	200000	1600000	25000	40000
	272,070	1,723,920	181,380	1,451,040	22,673	36276
TOTAL MAN HOURS REQUIRED ASSUMING 16 HOUR DAYS AND 60 CODERS WORKING AT ALL TIMES						112552
ADDITIONAL COSTS / TIME INCURRED SOLELY TO PROVIDE MR. HARRISON'S "FOLDERS" FIELD	3,651,083					3.91
*Assuming an average of five pages per document and 100 pages per folder, average						(MONTHS)
**Estimating that one coder/scanner can produce 500 pages per hour						

These costs are IN ADDITION to any costs already incurred by the parties. They do not include transportation of the file boxes to Lex Solutio or the transportation of a Lex Solutio scanning team to the location of the documents. Further, these costs do NOT INCLUDE costs already budgeted for the project. All that is shown here is the ADDITIONAL costs attributable to the "Folders" field.

DECLARATION OF SERVICE BY WEBSITE AND 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 October 15, 2002, declarant served the PLAINTIFFS' JOINT RESPONSE TO DEFENDANT KEN L. HARRISON'S OBJECTIONS TO PLAINTIFFS' JOINT MOTION TO ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY by posting to the website or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 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 15th day of October, 2002, at San Diego, California.



Mo Maloney

The Service List

May be Viewed in

the Office of the Clerk