UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
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MICHAEL N. MILBY, CLERK OF COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON COPRORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 (Consolidated)
	§	CLASS ACTION
This Document Relates To		
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,		
vs.		
ENRON CORPORATION., *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.		

MOTION TO INTERVENE OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS

TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Dow Jones & Company, Inc., the New York Times Company, the Washington Post, USA Today, the Houston Chronicle, and The Reporters' Committee for Freedom of the Press (collectively "Media Intervenors") file this Motion to Intervene for the limited purpose of being heard on Plaintiff's Motion to Preclude the Filing or Production of Documents Subject to a

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Protective Order and on Defendants' Proposed Protective Orders, and in support respectfully show the following:

I. Media parties seeking to intervene

The following parties are the Media Intervenors:

Dow Jones & Company, Inc. is the publisher, *inter alia*, of *The Wall Street Journal*, a national newspaper published each business day; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; WSJ.com, the largest subscription news site on the world wide web with more than 650,000 subscribers; and, through its Ottaway Newspaper, Inc. subsidiary, 13 daily and 13 weekly newspapers in 10 states.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and throughout the world. Its weekday circulation is the third highest at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The New York Times Company has no affiliates or subsidiaries that are publicly owned.

The Washington Post is a daily newspaper published in Washington, D.C. and distributed nationwide, with a daily circulation of more than 800,000 and a Sunday circulation of more than a million. The *Post* covers local, national, and international news.

USA TODAY is the nation's largest-selling daily newspaper, with a circulation of approximately 2.3 million. Its website, USA TODAY.com, is one of the top newspaper sites on the Internet.

The Houston Chronicle is Houston's daily newspaper, published for more than a century. It is the larges daily newspaper in Houston and one of the 10 largest in the country.

The Reporters' Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Media Intervenors seek to intervene for the limited purpose of being heard on Plaintiff's Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, Defendants' opposition to this motion, and the protective orders proposed by the Defendants. The Media Intervenors also request permission to file a brief on this issue by Friday, October 25, 2002. The Media Intervenors have only recently received the Defendants' briefing and need additional time to review the parties' pleadingts and draft their brief.

II. Intervention as of Right

Under Federal Rule of Civil Procedure 24, a party is permitted to intervene as of right if: (1) the application is timely made; (2) the applicant has an interest relating to the property or transaction that is the subject of the action; (3) the applicant's situation is such that the action's disposition may, as a practical matter, impair the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately protected by the parties. *Ford v. City of Huntsville*, 242 F.3d 235, 239 (5th Cir. 2001) (reversing trial court's denial of newspaper's motion to intervene). The Media Intervenors can establish each element of their right to intervene for this limited purpose.

A. The Media Intervenors' Motion is Timely

Four factors are involved in the timeliness determination: the date when the applicant learned or reasonably should have learned that he had a stake in the litigation; any prejudice to

the parties from not intervening at that time; any prejudice to the applicant may suffer if its motion to intervene is denied; and any unusual circumstances. *Doe v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001) (reversing trial court's denial of intervention). In contrast, factors such as how far the litigation has progressed and the amount of time that has passed since suit was filed play no role. *Id.* at 375.

The Media Intervenors are filing this motion less than a month after the Plaintiffs' motion opposing a protective order, and mere days after becoming aware of the scope of Enron's position advocating widespread secrecy. The Plaintiffs filed their Motion to Preclude the Filing or Production of Documents Subject to a Protective Order on September 24. The filing date on Enron's response is October 15 – just four days before the filing of this Motion. Other Defendants filed responses around the same time. The responses make clear Defendants' desire to shield information from the public, and bring into focus the Media Intervenors' interest in the case and necessity for intervention. Before Plaintiffs' motion and (especially) Defendants' responses were filed, the Media Intervenors had no specific reason to intervene. Thus, the Media Intervenors' interest in the case did not ripen until this motion and proposed protective orders were filed. *See Ford v. City of Huntsville*, 242 F.3d at 239 (a newspaper's interest in litigation did not arise until the entry of a confidentiality order). *See also Doe*, 256 F.3d at 378 (distinguishing between an intervenor's awareness of the litigation and its awareness of its stake in the litigation).

Although it has cautioned that there are no absolutes, the Fifth Circuit has repeatedly held that motions to intervene filed within a month of an applicant's discovery of its stake in the litigation were timely. *Doe*, 256 F.3d at 375, 377; *Ford*, 242 F.3d at 239 (twenty-three days after confidentiality order); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266-67 (5th Cir. 1977).

Similarly, that an applicant files its a motion to intervene before judgment is entered argues in favor of timeliness. *Doe*, 256 F.3d at 377.

Further, the Fifth Circuit has stated that "[c]ourts should discourage premature intervention." *Doe*, 256 F.3d at 376 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994)). Thus, the Media Intervenors should not be penalized for not moving to intervene before a protective order became an issue.

The parties will suffer no prejudice from the timing of the intervention. The prejudice inquiry only asks whether prejudice will result from any delay in seeking to intervene; whether or not the parties will be prejudiced from intervention itself is not a factor in this determination. *Ford*, 242 F.3d at 240. The slight delay sought by the Media Intervenors to file their brief by October 25 (still less than two weeks after Enron's pleading seeking protective orders) will not prejudice either the Plaintiffs or the Defendants. In contrast, the Media Intervenors will be prejudiced if their motion to intervene is not granted.

B. <u>The Media Intervenors have an interest</u>

The Media Intervenors have an interest in challenging orders that require confidentiality. Generally, members of the news media have both an interest in challenging confidentiality orders and standing to challenge those orders. *Ford*, 242 F.3d at 240. *See also Davis v. East Baton Rouge Parish Sch. Board*, 78 F.3d 920 (5th Cir. 1996) (news agencies had standing to challenge a court's confidentiality order that prohibited disclosure of draft desegregation plans) (citing cases). At the intervention stage, the issue is not whether the Media Intervenors will prevail on the merits of their brief; rather, the question is whether an order would potentially act as an obstacle to the media's access. *Ford*, 242 F.3d at 240. A confidentiality order in this case –

involving millions of dollars in public and private funds invested in Enron, the collapse of which has deservedly received intense public scrutiny – plainly will have this effect.

In *Ford*, the Fifth Circuit held that a newspaper's legal interest justified its intervention as of right to challenge an order that made the terms of a settlement confidential. *Ford*, 242 F.3d at 241. In so holding, the Court emphasized that "[s]tanding to challenge [a] confidentiality order demonstrates the interest required to intervene under Rule 24(a)(2)." *Id.* at 240. Because Fifth Circuit caselaw establishes that the Media Intervenors have this standing, they have a legal interest under Rule 24(a).

C. The Media Intervenors' interest may be impaired

If the court enters a protective order such as the one that Enron has proposed (where all documents would be presumptively confidential), the Media Intervenors' interest in access to documents would certainly be impaired. In fact, any protective order or confidentiality order has the potential to impair the media's interest. As in *Ford*, where the Fifth Circuit determined that a confidentiality order would impede access to a settlement, a protective order here could impair the Media Intervenors' rights of access to documents.[1]

The Court also should consider the unique nature of this case, in which members of the public numbering in the thousands and thousands are absent class members. In addition to the legitimate interest all Enron investors hold in these proceedings, the public at large has a substantial stake in monitoring the details of this monumental corporate collapse. The Media Intervenors serve a special role as conduits of information to those who have a justifiable interest in keeping abreast of this lawsuit – an interest that clearly would be impaired by the entry of broad protective orders.

[1] Although *Ford* involved a confidentiality agreement that was subject to the Texas Public Information Act, the Media Intervenors do not believe that the Act determined whether intervention was appropriate.

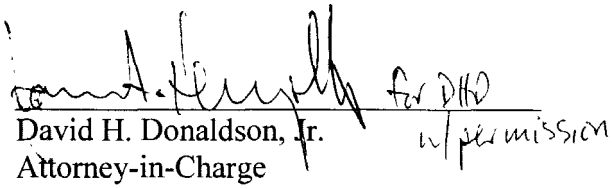
D. The Media Intervenors' interest will not be adequately represented by the parties

An applicant must only show that the parties' representation of its interest may be inadequate, a burden that is "minimal." *Doe*, 256 F.3d at 380. Although the Plaintiffs have moved for entry of an order that none of the documents to be produced are confidential, the Plaintiffs' interest and the media's interest are not identical. The Media Intervenors' interest is very particular: the Media Intervenors are concerned with protecting their access to the contents of those documents and ensuring that the public is informed of the important events in this lawsuit. While the Plaintiffs also oppose the broad secrecy sought by Enron and others, the Media Intervenors seek to protect the First Amendment access rights held by the media and the public – rights potentially broader than those represented by Plaintiffs.

III. Conclusion

For these reasons, the Media Intervenors ask this Court to grant their Motion to Intervene and to grant them permission to file a brief in support of their position by Friday, October 25, 2002.

Respectfully Submitted,



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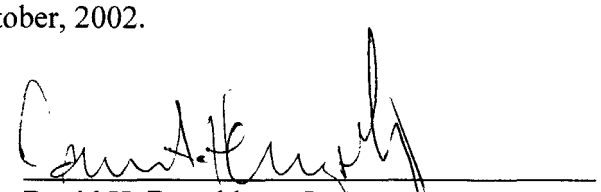
COUNSEL FOR MEDIA INTERVENORS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO INTERVENE OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS has been served by sending a copy via electronic mail to serve@esl3624.com on the 18th day of October, 2002.



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